UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 11, 2018

VIERI VERDESI, Complainant, v. ARK RUSTIC INN, LLC D/B/A RUSTIC INN, CRABHOUSE, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00096

AMENDED FINAL ORDER AND DISMISSAL

A Final Decision and Order was initially issued in the above-captioned case on May 4, 2018. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Order and Dismissal amends the order issued on May 4, 2018, and corrects solely clerical and typographical errors.

Appearances: Nnamdi S. Jackson for the Complainant

Susan C. Rodriguez for the Respondent

Before: Judge Thomas P. McCarthy

I. STATEMENT OF THE CASE

This is an action arising under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). The case is before me on a Motion to Dismiss filed by the Respondent.

Complainant, Vieri Verdesi, alleges that Respondent, Ark Rustic Inn, LLC d/b/a Rustic Inn, Crabhouse, unlawfully terminated him on March 10, 2017 based on citizenship status under 8 U.S.C. § 1324b(a)(1). OCAHO Compl. at Section 8. Complainant further alleges that Respondent engaged in unlawful document abuse practices under 8 U.S.C. § 1324b(a)(6) by rejecting or refusing to accept documents regarding naturalization that Complainant presented to

prove identity and show authorization to work in the United States. *Id.* Specifically, Complainant alleges that Respondent asked for more or different documents than required for the employment eligibility process to show that Complainant was eligible to work in the United States because Respondent requested multiple written updates on Complainant's citizenship status from Complainant's immigration attorney so that Respondent's Human Resource office could avoid an audit. *Id.*

As discussed herein, 8 U.S.C. § 1324b requires that an individual asserting citizenship status discrimination under 8 U.S.C. § 1324b(a)(1), and document abuse claims under 8 U.S.C. § 1324b(a)(6) must be a statutorily-defined "protected individual." *United States v. Mar-Jac Poultry, Inc.,* 12 OCAHO no. 1298, 30 (2017); *Angulo v. Securitas Sec. Servs. USA, Inc.* ., 11 OCAHO no. 1261, 7 (2014); *see also Rainwater v. Doctor's Hospice of Georgia, Inc.*, 12 OCAHO no. 1300, 20 (2017). By statute, "an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible" is not a "protected individual." 8 U.S.C. § 1324b(a)(3). Complainant Verdesi first became eligible to apply for naturalization on the date of his 18th birthday, November 9, 2013. Complainant did not apply for naturalization until May 2016. Since Complainant did not apply for naturalization within six months of first becoming eligible on November 9, 2013, Complainant is not a "protected individual" under the statute. Accordingly, the complaint alleging citizenship status discrimination and unfair documentary abuses must be **DISMISSED.**

II. FACTUAL AND PROCEDURAL BACKGROUND

Complainant Verdesi is an Italian national. OCAHO Compl. at Section 3a. His driver's license and original charge indicates that he was born on November 9, 1995. On March 10, 2006, he became a legal permanent resident (LPR) of the United States. OCAHO Compl. at Section 3a. Complainant became 18 years old on November 9, 2013.

Complainant was hired by Respondent on October 27, 2015. Respondent's Motion at 2; Complainant's Resp. at 1. There is a dispute about what documentation Complainant presented to Respondent to verify his employment eligibility at the time of hire.[1] Complainant claims that he provided his driver's license, restricted social security card, and a Permanent Resident Card. Complainant Resp. at 1. Respondent claims that Complainant presented a driver's license and restricted social security card. Respondent's Answer at ¶ 10 and Motion to Dismiss at 2. On the Form I-9, Section 1, Complainant attests that he is a lawful permanent resident and that his work authorization expired on March 10, 2016. On the Form I-9, Section 2, Respondent's office manager attests that Complainant presented his Florida driver's license as a List B identity

[1] It is not necessary to resolve this dispute because I find that Complainant was not a protected individual at the time of the alleged discrimination.

document, and his DHS restricted social security card as a List C employment authorization document.

As noted, Complainant's work authorization expired on March 10, 2016. Form I-9, Section 1. Complainant alleges that he applied for naturalization in May 2016. OCAHO Compl. at Section 4a. This was more than six months after Complainant first became eligible to apply for naturalization on November 9, 2013. Respondent terminated Complainant's employment on March 10, 2017. OCAHO Compl. at Section 8; Answer at ¶ 8.

On March 28, 2017, the Complainant filed a charge with the U.S. Department of Justice, Immigrant and Employee Rights Section (IER), alleging that Respondent discriminated against him on the basis of his citizenship status and improperly requested documentation about his naturalization, ignoring responses of his immigration attorney. OCAHO Compl. at 17, IER Charge Form at 2. By letter dated July 26, 2017, IER informed Complainant that IER had not yet determined whether there was cause to believe that discrimination had occurred, and that Complainant had the right to file a complaint with OCAHO. *See* IER Letter of Determination (Jul. 26, 2017) (citing 8 U.S.C. § 1324b(d)(2); 28 C.F.R. § 44.303(c)).

On August 14, 2017, Complainant filed the instant complaint against Respondent with OCAHO. The complaint alleges that Complainant was terminated by Respondent on March 10, 2017 because of citizenship status in violation of 8 U.S.C. § 1324 b(a)(1), and was intimidated, threatened, coerced or retaliated against for exercising his rights under 8 U.S.C. § 1324b. Complainant does not seek reinstatement, but requests back pay from the date of his discharge, and expungement of any false performance review or false warning document in his personnel file. The complaint further alleges that Respondent violated 8 U.S.C. § 1324b(a)(6) by rejecting or refusing to accept documentation regarding Complainant's process of naturalization to prove his identity and/or show that he was authorized to work in the United States, and by asking for more or different documents than required for the employment eligibility process to show that Complainant was eligible to work in the United States. More specifically, the complaint alleges that Respondent requested multiple written updates on Complainant's citizenship status from Complainant's immigration attorney because Respondent's Human Resource office needed them to avoid an audit. The complaint specifically denies that Complainant was discriminated against because of his national origin.

On September 13, 2017, Respondent filed its Answer and a Motion to Dismiss. Respondent's Answer denies that Complainant was fired based on citizenship status or retaliated against because of such status, and admits, consistent with Section 9 of the complaint that this case does not involve any alleged conduct related to intimidation, threats, coercion or retaliation in violation of 8 U.S.C. § 1324b(a)(5). Respondent's Answer further denies rejecting or refusing to accept documents provided by Complainant that were presented to prove identity or work authorization. Rather, Respondent's Answer claims that Complainant only provided a driver's license and a *restricted* Social Security card (marked valid for work only with DHS

authorization) at the time of hire in order to complete the Form 1-9. Respondent attaches a copy of supporting documentation as Exhibit A. Respondent's Answer further notes that the Form 1-9 rules state that a restricted Social Security card is not a proper List C document to show work authorization, but rather only an unrestricted Social Security card is acceptable. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, EMPLOYMENT ELIGIBILITY VERIFICATION FORM I-9 (2017), https//www.uscis.gov/i-9 (Page 4 of the Form 1-9, List of Acceptable Documents); *see also* Respondent's. Motion, Ex. A (Complainant completed a 2013 version of the Form I-9, however, the attached exhibit does not provide page 4, which outlines the list of acceptable documents.). Respondent alleges that it discovered this deficiency and asked Complainant to provide any documentation that would satisfy the Form 1-9 requirements with ample time to remedy the issue. Respondent further alleges that Complainant did not produce any further documentation to remedy this deficiency. Rather, Complainant's attorney sent a letter stating that Complainant applied for citizenship, but Respondent asserts that a mere letter from an attorney is not acceptable for the Form I-9 document requirements under List A or List B and List C. Respondent avers that Complainant never supplied any other documents, such as a Lawful Permanent Resident Card, unrestricted Social Security card, or any other documents from the List of Acceptable Documents for the Form 1-9.

Respondent's answer denies that Complainant is entitled to any relief and asserts certain affirmative defenses. Specifically, Respondent argues that Complainant fails to state a claim upon which relief may be granted; that Complainant fails to establish that he is a protected individual under 8 U.S.C. § 1324b(a)(3) and therefore entitled to maintain claims of either citizenship-based discrimination related to termination, or citizenship-status-based document abuse; that Respondent was acting in good faith in compliance with federal law and regulations by attempting to obtain any documents from Complainant that would satisfy the Form 1-9 requirements; and that Respondent had legitimate, non-discriminatory reasons for terminating Complainant's employment.

On September 13, 2017, Respondent also filed a Motion to Dismiss, which reiterated the affirmative defenses set forth in its Answer. Respondent's motion argues that based on admissions in the Complaint, Verdesi became a permanent resident in 2006 and was eligible to apply for naturalization in 2011. In order to qualify as a statutorily-protected individual, Verdesi would have been required to apply for naturalization within six months of becoming eligible for naturalization in 2011. Complainant did not apply for naturalization until May 2016. Therefore, because Complainant failed to apply for naturalization within the first six months of becoming eligible as required by statute, Respondent argues that the Complaint must be dismissed because Verdesi is not a statutorily-defined protected individual entitled to pursue his allegations.

Respondent's Motion to Dismiss also argues that Complainant fails to state a claim upon which relief may be granted because Respondent was acting in compliance with federal law and regulations. Respondent asserts that as a matter of law, Respondent is required to obtain documents from its employees to satisfy the Form I-9 rules. Respondent further asserts that

Verdesi failed to submit any documentation sufficient to satisfy the Form I-9 requirements. Instead, Verdesi only submitted a *restricted* Social Security card bearing the marking "VALID FOR WORK ONLY WITH DHS AUTHORIZATION" along with a driver's license for the Form I-9. Thus, Respondent argues that it was required to follow-up with Verdesi to obtain documents that would satisfy the Form I-9 requirements.

On September 25, 2017, Complainant filed his Response to the Motion to Dismiss. The Response narrowly asserts that suit was filed against Respondent based on Respondent's violation of 8 U.S.C. § 1324b(a)(6) ("Paragraph (6)" or "the document abuse provision"). The Response asserts that at the time of hiring on October 27, 2015, Complainant completed a Form I-9 and provided Respondent with his driver's license, restricted Social Security card, and a Permanent Resident Card. Complainant's Response asserts that his Permanent Resident Card did not expire until March 2016. Complainant argues that Respondent engaged in document abuse by spending approximately a year requesting more documentation as to Complainant's ability to legally work in the United States and then terminating his employment on March 10, 2017 in violation of 8 U.S.C. § 1324b. Contrary to Respondent, Complainant argues that 8 U.S.C. § 1324b does not require Complainant to be a "protected individual," as defined in 8 U.S.C. § l 324b(a)(3) ("Paragraph (3)"), to bring claims of document abuse on the basis of citizenship status. Complainant argues that the legislative history makes clear that Congress intended only to require that an employer have discriminatory intent on the basis of citizenship status or national origin, and Respondent's contrary interpretation is fundamentally inconsistent with the purpose of the document abuse provision. Accordingly, Complainant argues that he has stated a claim upon which relief can be granted.

On December 26, 2017, my office issued an Order for Prehearing Statements. On March 6, 2018, after a review of the pleadings, the Motion to Dismiss and Complainant's Opposition, my office convened a pre-hearing telephonic conference call pursuant to 28 C.F.R. § 68.13 (2017). Counsel for both parties were present. During the conference, I gave both parties a full opportunity to address the merits of Respondent's pending motion to dismiss and show cause why the complaint should or should not be dismissed pursuant to 28 C.F.R. § 68.13(a)(2)(ix). *See also* 28 C.F.R. § 68.10(b) (ALJ may dismiss the complaint for failure to state a claim upon which relief can be granted on motion of Respondent, but may not do so in the prehearing stage *on his own motion* without affording complainant an opportunity to show cause why the complaint should not be dismissed). After exhausting the parties' respective positions, I ruled that Respondent's Motion to Dismiss was granted because Complainant was not a protected individual for the reasons set forth in Respondent's motion and *United States v. Mar-Jac Poultry Inc.*, 12 OCAHO no. 1298 (2017),[2] which I found dispositive. The undersigned indicated that a written order memorializing my oral ruling would be issued shortly. *See* 28 C.F.R. § 68.13(c).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages,

After my definitive ruling, counsel for Complainant asked if he could amend the complaint. I denied this request as too late and untimely because I had already granted the motion to dismiss. Accordingly, there was nothing to amend.

An OCAHO Administrative Law Judge (ALJ) may grant a motion to dismiss a complaint for failure to state a claim upon which relief may be granted. 28 C.F.R. § 68.10; *United States v. Spectrum Technical Staffing Servs., Inc., and Personnel Plus, Inc.*, 12 OCAHO no. 1291, 8 (2016). For the reasons set forth herein, I reaffirm my ruling that 8 U.S.C. § 1324b requires that an individual who alleges citizenship status discrimination and unfair documentary abuses based on citizenship must be a protected individual. Accordingly, the complaint must be **DISMISSED** because Complainant is not a protected individual under the statute.

III. DISCUSSION AND ANALYSIS

A. Citizenship status discrimination under 8 U.S.C. § 1324b(a)(1)

8 U.S.C. § 1324b provides for unfair immigration-related employment practices, as follows:

> **§ 1324b. Unfair immigration-related employment practices**
> **(a) Prohibition of discrimination based on national origin or citizenship status**
> **(1) General rule**
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
> (A) because of such individual's national origin, or
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

Paragraph (3) provides as follows:

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seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

> **(3) ‘‘Protected individual’’ defined**
> As used in paragraph (1), the term ‘‘protected individual’’ means an individual who—
> (A) is a citizen or national of the United States, or
> (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 . . .

Thus, citizenship status discrimination under 8 U.S.C. § 1324b(a)(1) covers a protected individual under 1324b(a)(3). An alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) is not a protected individual. 8 U.S.C. 1324b(a)(3)(B)(i). Federal regulations require, among other things, that to be eligible for naturalization, an alien must establish that he or she is at least 18 years of age. 8 C.F.R. § 316.2(a)(1). Complainant first became eligible to apply for naturalization on the date of his 18th birthday, November 9, 2013. Complainant alleges that he did not apply for naturalization until May 2016. Since Complainant did not apply for naturalization by May 9, 2014, i.e., within six months of first becoming eligible on November 9, 2013, Complainant is not a "protected individual" who can maintain a citizenship status discrimination claim under 8 U.S.C. § 1324b(a)(1). *See Bienvenido Antonio Thompson v. Sanchez Auto Services, LLC,* 12 OCAHO no. 1302, 7 (2017) (dismissing citizenship-based claims because complainant was not a protected individual after failing to apply within six months of being eligible for naturalization) (citing *Santos v. USPS,* 9 OCAHO no. 1105, 5 (2004) and *Omoyosi v. Lebanon Corr. Inst.,* 9 OCAHO no. 1119, 4-5 (2005)).

For the same reason, I conclude that Complainant was a non-protected individual who may not maintain a viable document abuse claim based on citizenship status under 8 U.S.C. § 1324b(a)(6). 8 U.S.C. § 1324b(a)(6) provides as follows:

> **(6) Treatment of certain documentary practices as employment practices**
> A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

In *Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298 at 29-33, ALJ James R. McHenry III gave a thorough and thoughtful analysis of the relevant statutory language and prior OCAHO precedent under § 1324b(a)(6). Judge McHenry concluded, consistent with ALJ Robert L. Barton, Jr.'s decision in *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 16 (2002), that "cognizable claims under 8 U.S.C. § 1324b(a)(6) include only allegations that an employer committed document abuse against a statutorily-defined protected individual because of the individual's citizenship status." 12 OCAHO no. 1298, at 30.

I agree with Judge McHenry's analysis in *Mar-Jac* that the statutory language is circuitous, but clear and unambiguous. *Id.* at 31. As Judge McHenry persuasively found, the document abuse provision in 8 U.S.C. § 1324b(a)(6) is expressly limited to cases involving a purpose or intent "of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)]." *Id.* 8 U.S.C. § 1324b(a)(1)(B) expressly limits claims of citizenship-status discrimination to protected individuals defined in 8 U.S.C. § 1324b(a)(3). *Id.* The reading of § 1324b(a)(6) proposed by Complainant here would essentially read the opening clause of 8 U.S.C. § 1324b(a)(1)(B) out of the statute, despite the express reference to 8 U.S.C. § 1324b(a)(1) in 8 U.S.C. § 1324b(a)(6). The only construction that gives effect to the cross-reference to 8 U.S.C. § 1324b(a)(1) contained in 8 U.S.C. § 1324b(a)(6) and gives effect to each word contained in the cross-referenced subsection, including 8 U.S.C. § 1324b(a)(1)(B), is the construction found by Judge McHenry in *Mar-Jac* and Judge Barton in *Ondina-Mendez*, which concludes that document abuse with the intent to discriminate based on citizenship status is limited to protected individuals. In short, the undersigned must give effect to the clear statutory language where only one construction gives effect to all parts of the statute. *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute"' (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

The undersigned is also persuaded by Judge McHenry's observation in *Mar-Jac* that the Department of Justice "explicitly declined to add regulatory language extending the scope of 8 U.S.C. § 1324b(a)(6) to cover all work-authorized individuals . . ." *See* 12 OCAHO no. 1298, at 33, (citing 81 Fed. Reg. 91768-01, 91778 (Dec. 19, 2016) (revising 28 C.F.R. part 44 effective Jan. 18, 2017)). Rather, the Department's position was that the revised rule incorporates the amended statutory language set forth in 8 U.S.C. § 1324b(a)(6), thus supporting my conclusion that to the extent 8 U.S.C. § 1324b(a)(6) involves a claim of intent to discriminate based on citizenship status, as opposed to intent to discriminate on the basis of national origin, such a claim may only be raised by protected individuals defined in 8 U.S.C. § 1324b(a)(3). *See* 12 OCAHO no. 1298, at 33.

In sum, the undersigned finds the reading of 8 U.S.C. § 1324b(a)(6) in *Mar-Jac* and *Ondina-Mendez* to be persuasive and consonant with statutory text as a whole. Complainant's claims under 8 U.S.C. § 1324b(a)(6) based on citizenship status only apply to protected

individuals as defined in 8 U.S.C. § 1324b(a)(3). Since Complainant is not a protected individual, his claim under 8 U.S.C. § 1324b(a)(6) must also be dismissed.

As noted, during the March 6, 2018 conference call, Complainant attempted to avoid dismissal of his claims by generically asking to amend his complaint after my definitive ruling dismissing his claims, as set forth above. I denied Complainant's belated and non-specific request to amend his complaint as untimely because I had already granted Respondent's motion to dismiss. Accordingly, there was nothing to amend.

I reaffirm that ruling here. OCAHO Rule § 68.9(e) allows for "appropriate amendments to complaints and other pleadings at any time *prior* to the issuance of the Administrative Law Judge's final order based on the complaint." 28 C.F.R. § 68.9(e) (emphasis added). The operative word is that amendment must occur *prior* to issuance of a final order dismissing the case. Complainant offered his motion too late, after I ruled that Respondent's Motion to Dismiss was granted, consistent with *Mar-Jac*. Furthermore, Complainant's motion contained no substantive or factual basis. An Administrative Law Judge has discretion to allow amendment "[i]f a determination of a controversy on the merits will be facilitated thereby . . . ." 28 C.F.R. § 68.9(e); *see United States v. Alexander's Inc.*, 3 OCAHO no. 504, 1037 (1993) (the rule "confers broad discretion on the judge"). In the exercise of my discretion, I find that Complainant failed to seek to amend his complaint in a timely fashion. I further find that allowing the amendment would not facilitate a timely and just resolution of the case. As a non-protected individual, Complainant cannot state a claim upon which relief can be granted, particularly since Complainant expressly disavowed national origin discrimination in his complaint. *See Jablonski*, 12 OCAHO no. 1272, 8 (2016) (finding that the liberality granted for complaint amendments "does not extend to a proposed amendment that would not survive a motion to dismiss, the usual test for determining whether or not a proposed amendment is futile"). Accordingly, Complainant's motion to amend is **DENIED** and Respondent's Motion to Dismiss is **GRANTED.**

SO ORDERED.

Dated and entered on May 11, 2018.

Thomas P. McCarthy
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.