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

April 2, 2020

ALEX J. MONTALVO, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00008
KERING AMERICAS, INC., Respondent.	)	

ORDER ON MOTION TO DISMISS

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(1)(B) (2017). Alex J. Montalvo (Complainant) filed a complaint, *pro se*, with the Office of the Chief Administrative Hearing Officer (OCAHO) on October 24, 2019, alleging that Kering Americas, Inc. (Respondent or KAI) violated § 1324b by discriminating and/or retaliating against him based on his citizenship status or national origin. Complainant also alleges that Respondent committed visa fraud. Compl. at 9. Respondent argues that the complaint should be dismissed because it fails to state a claim upon which relief can be granted. Mot. Dismiss at 1. Respondent also asserts that the claim should be dismissed because the matter has already been summarily disposed of by the United States Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER). *Id.* For the reasons set forth herein, Respondent's Motion is GRANTED as to the retaliation and visa fraud claims and DENIED as to the employment discrimination claims.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant is a United States citizen who applied for a contract position with KAI's Information Technology department through KAI's staffing firm, Zen3. *Id.* at 4-6, 8-9, 11. Complainant was ultimately not hired for the position. *Id.* at 8.

On April 3, 2019, Complainant filed a charge against Respondent with IER for discriminating against him based on his citizenship status and his national origin. *Id.* at 1. Complainant also

alleges in his complaint that Respondent was committing visa fraud. *Id*. at 9. On July 25, 2019, IER sent Complainant a letter of determination informing him that IER had not yet determined whether a violation of 8 U.S.C. § 1324 had occurred. Letter of Determination at 2. The letter also stated that Complainant could nevertheless present his claims by filing a complaint with OCAHO. *Id*.

On October 24, 2019, Complainant filed his complaint with OCAHO. Complainant asserts in his complaint that he applied for a position at KAI as a Senior Developer. IER Charge Form at 2. He states that he was qualified for this position, and was scheduled for an interview with the "IT Director and HR" following a successful technical screening. Compl. at 8, 11. Complainant claims that, when he went to interview for the position, the individual who was interviewing him —Alfredo— was not the hiring manager; rather, he was an assistant or "an HR coordinator." *Id*. at 11. According to Complainant, the person with whom he was originally supposed to meet could not attend the meeting and asked Complainant to come back the following day. *Id*. Due to the short notice, Complainant said that they would need to set a later date, when he would be available, because he was working for another employer at the time and could not take off work the following day. *Id*. Three weeks after the interview, Complainant was informed that the employer had hired someone else. *Id*. Complainant asserts that the job posting remained active and he was still receiving calls from other recruiters. *Id*. Complainant further asserts that KAI and their recruiting agency—Zen3—were "involved in committing Visa Fraud by not moving forward with [his] candidacy . . . [a]s [he] was an American Citizen over the age of 40." *Id*. at 9.

In Complainant's IER Charge Form, which is attached to the OCAHO complaint, he alleges that "[t]he entire recruitment process was manipulated by Harish G." IER Charge Form at 2. Complainant alleges that "Harish G," an employee of Zen3, was in contact with Complainant regarding the position at KAI. *Id*. According to Complainant, Zen3 is "a known recruitment agency based out of Washington State and India whose sole purpose is to hire H1B guest workers." *Id*. Three weeks after Complainant's interview, "Harish G" emailed Complainant letting him know that Respondent had hired someone else. *Id*. at 3. Complainant states that he "kn[ew] this was conceived to disqualify [him] from consideration for another H1B." *Id*.

Respondent timely filed an Answer and Affirmative Defenses on December 26, 2019. On January 14, 2020, OCAHO issued an Order for Prehearing Statements requiring Complainant to file his prehearing statement no later than February 14, 2020, and Respondent to file no later than March 16, 2020. Complainant has not submitted a prehearing statement. Respondent filed the current Motion to Dismiss on January 16, 2020. On March 13, 2020, the undersigned issued a Notice and Order to Show Cause regarding Complainant's prehearing statement.

III. STANDARDS

The Administrative Law Judge (ALJ) may dismiss the complaint, based on a motion by the respondent, if the ALJ determines that the complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. § 68.10(b). "OCAHO's rules require only that the complainant set out facts 'for each violation alleged to have occurred.'" *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016) (quoting *United States v. Split Rail Fence Co.*, 10 OCAHO no.

1181, 5 (2013) (order by the CAHO)). The complainant is not required to plead a prima facie case to overcome a motion to dismiss for failure to state a claim upon which relief can be granted. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002); *Kelly Legal Servs.*, 12 OCAHO no. 1282 at 10. When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990).[1] Additionally, complaints of pro se complainants "must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel." *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 777 (1992).

Additionally, on a motion to dismiss, "the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The court may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113-14. Additionally, "a copy of a document attached to a pleading is a part of the pleading for all purposes." [2] *Id.* (citing FED. R. CIV. P. 10(c)).

IV. DISCUSSION

A. Visa Fraud Claim

Embedded in Complainant's complaint is a bare assertion that Respondent had committed visa fraud by not moving forward with his application ". . . as [he] was an American [c]itizen over the age of 40." Compl. at 9. Respondent advances several arguments to challenge this assertion. First, Respondent argues that there is no private right of action for visa fraud. Mot. Dismiss at 3. Second, Respondent argues that the claim of visa fraud is not appropriately stated as a discrimination claim. *Id*. Third, Respondent argues that, even if the claim of visa fraud is appropriately stated as a discrimination claim, Complainant fails to state a claim upon which relief can be granted. *Id*. Fourth, Respondent argues that OCAHO lacks subject-matter jurisdiction to hear a claim of visa fraud. *Id*. at 4.

While OCAHO has subject-matter jurisdiction to hear a claim of visa fraud, such a claim must be brought by the Government. Section 1324c(a) prohibits any person or entity from knowingly making any fraudulent document for the purpose of obtaining an immigration benefit. 8 U.S.C.

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[1] 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, 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 OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[2] Respondent attached a number of documents to this motion. Complainant did not reference the documents in his complaint. Thus, these documents will not be considered in this motion.

§ 1324c(a). This section provides OCAHO the authority to adjudicate cases of document fraud, which may include visa fraud. § 1324c(d)(2). Thus, OCAHO has subject-matter jurisdiction to adjudicate claims of visa fraud.

However, the Department of Homeland Security (DHS) has the exclusive authority to bring forth an action against an individual or entity for engaging in document fraud under § 1324c. 8 C.F.R. § 270.2; *see* § 1324c(d). Section 1324c provides the procedure for enforcement proceedings before OCAHO regarding document fraud. *See McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 867, 486 (1996). Enforcement proceedings for violations of 8 U.S.C. § 1324c involving allegations of document fraud are commenced by submitting a written complaint to the DHS office "having jurisdiction over the business or residence of the potential violator or the location where the violation occurred." 8 C.F.R. § 270.2(a). After DHS investigates the allegation of document fraud, it may commence a proceeding by issuing a Notice of Intent to Fine (NIF). § 270.2(a). A respondent contesting the NIF may then file a request for hearing before an administrative law judge. *Id*. There is no language in the statute or in the regulations which suggests that there is a private right of action to bring a document fraud claim under § 1324c; such cases must be brought by the U.S. Government. To the extent that Complainant alleged a claim for document fraud, that claim is DISMISSED.

B. Discrimination Claim Based on National Origin and Citizenship Status

Complainant alleges in his complaint that Respondent discriminated against him by declining to hire him based on his national origin and his citizenship status. Under section 1324b, an employer is prohibited from discriminating against an individual with respect to hiring or termination based on the individual's national origin, or a protected individual's citizenship status. 8 U.S.C. § 1324b(a)(1). While there is no requirement in a case pursuant to § 1324b that a complainant plead a prima facie case, a § 1324b complaint must nevertheless contain sufficient minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and give rise to an inference of discrimination. *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 5 (2016). To assess a complaint's facial validity, the Court will accept a well-pleaded factual allegation as true, but will not accept a legal conclusion couched as a factual allegation as true. *Id*. (citation omitted).

As an initial matter, a U.S. citizen is a "protected individual" under section 1324b(a)(3)(A). Neither party disputes that Complainant is a United States citizen and is, therefore, a protected individual under § 1324b. With respect to his national origin, Complainant only listed himself as a U.S. national on his complaint. Compl. at 4-5.

Complainant must allege sufficient facts that he was qualified for the position. *Reed v. Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321a, 4 (2019). Complainant asserts he was qualified for the position at issue. In the box asking for a position description, he listed four qualifications: (1) Experienced in IBM RPG AS400 technology; (2) should also be trained to handle development and support activities; (3) should have a good competency with AS400; (4) must have efficient mailing and communication skills. Compl. at 8.

Respondent argues that Complainant was not qualified for the position because it sought someone with JDA experience. Respondent states that the four job qualifications Complainant

listed on the complaint as a job description were copied and pasted from the email Complainant received from Respondent's recruiting agency, Zen3. *Id*. at 5. However, Respondent states that Complainant omitted the key qualification for the position: "Experienced in IBM AS400 Technology (JDA Preferred)." *Id*.

The Court finds that Complainant has adequately alleged that he was qualified for the position. As stated above, when considering a motion to dismiss, the Court must accept the facts alleged in the complaint as true and construe the facts in the light most favorable to the complainant. *Osorno*, 1 OCAHO no. 275 at 1786. The Court will not consider the attachments submitted by Respondent as Complainant did not include or specifically reference any particular document regarding the job qualifications. *See* n.2. Moreover, complaints of *pro se* complainants "must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel." *Halim*, 3 OCAHO no. 474, at 765, 777. The issue of whether Complainant was qualified for the position is an issue of material fact that may be considered on a motion for summary decision, but not on a motion to dismiss.

Complainant must also allege that he has suffered an adverse employment decision. There is no dispute that Complainant suffered an adverse employment action when Respondent did not hire him for the job position. *See Reed,* 13 OCAHO no. 1321a at 4.

Finally, to support his claim that he was not hired because of his citizenship status and national origin, Complainant alleges several facts. First, Complainant stated that Respondent and its third party recruiter were involved in committing visa fraud by not moving forward with his candidacy, as he was an American citizen. Compl. at 9. In his IER Charge form, Complainant alleged that the recruiter's "sole purpose was to hire" H-IB visa holders, IER Charge Form at 1. Second, Complainant stated that he interviewed for the open position, but he was not interviewed by a hiring manager, and was not given a second interview. *Id*. at 11. Third, Complainant was told, weeks after his interview, that Respondent had hired someone else, even though the job posting was still active. *Id*. In his IER Charge form, Complainant alleges that he "kn[ew] this was conceived to disqualify [him] from consideration for another H-1B." IER Charge Form at 2.

Complainant must plead facts that reasonably suggest a nexus between Respondent's decision not to hire Complainant and Complainant's status as a U.S. Citizen. *See Jablonski v. Kelly Legal Services*, 12 OCAHO no. 1282, 9 (2016). The Court finds that Complainant's allegation that the hiring process was manipulated to disqualify him from consideration for another H-1B candidate is sufficient to survive this motion to dismiss, given the liberal pleading standards and that Complainant is *pro se*. The allegations are sufficient to raise an inference that the Respondent had declined to hire Complainant because he is a U.S. Citizen, due to its preference for hiring foreign workers who have H-1B visas.[3]

In a footnote, Respondent argues that it should not be held liable for any allegations of discrimination on the part of Zen3. Respondent asserts that Zen3 did not provide the citizenship,

[3] It is unclear the extent to which Complainant is asserting a national origin claim. As Respondent did not specifically address this claim in its motion, however, the Court will not address it at this time.

national origin, or visa status to Respondent when it recommended candidates for the position. Mot. Dismiss at 6. According to Respondent, Zen3 is the ultimate employer for these contract positions and does not pass on such information to Respondent until after the person is hired for the job. *Id*. Thus, Respondent asserts that it was unaware of Complainant's citizenship, national origin, or visa status when Zen3 considered him. *Id*. Whether Respondent knew of Complainant's citizenship status or national origin or whether Zen3 was the ultimate employer for this position are issues of fact not appropriate for resolution on a motion to dismiss. Respondent further asserts, in a footnote, that even if the successful candidate for the position Complainant applied for was a foreign worker and/or one who required an H-1B Visa sponsorship, hiring a qualified foreign worker over a U.S. citizen who lacks the minimum requirements for the job does not constitute discrimination. Mot. Dismiss at 6. This argument also involves an issue of fact that is not appropriate for resolution on a motion to dismiss. Finally, Respondent argues that the complaint should be dismissed because "the matter has already been summarily disposed of by IER." *See* Mot. Dismiss at 1. Even if IER dismisses a charge of discrimination and declines to file a complaint with OCAHO, the party who filed the initial charge with IER is still entitled to bring forth the claim with OCAHO. § 1324b(d)(2); § 68.4; § 44.303. Neither the IRCA nor the regulations require OCAHOs ALJs to give any deference to IER's determination. *Lardy v. United Airlines*, 4 OCAHO no. 595, 31, 70 (1994). As such, the Court finds Complainant has stated a discriminatory hiring claim under § 1324b. Respondent's motion to dismiss as it relates to Complainant's discrimination claim is DENIED.

C. Retaliation Claim

Complainant argues that Respondent retaliated against him for engaging in a protected activity under 8 U.S.C. § 1324b. Section 1324b(a)(5) prohibits an employer from intimidating, threatening, coercing, or retaliating against an individual for the purpose of interfering with a right or privilege under § 1324b or because the individual intended to file a charge, complaint, testify, assist, or participated in an investigation or proceeding under § 1324b. The only identifiable adverse employment actions evident in the complaint are Respondent's refusal to hire Complainant or to schedule him for a second interview. Complainant subsequently filed the IER charge and the Complaint. Complainant has not alleged any facts that show that Respondent's alleged act of retaliation was in response to him asserting his legal rights against unfair immigration-related employment practices. The Court finds that Complainant has failed to state a claim for retaliation upon which relief can be granted. As such, Complainant's retaliation claim is DISMISSED.

V. CONCLUSION

The Court finds that, with respect to Complainant's claims of visa fraud and retaliation, Complainant has failed to state a claim upon which relief may be granted. The Court also finds that Complainant has sufficiently alleged a claim of employment discrimination. As such, the Court finds that Respondent's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART. Respondent's Motion to Dismiss related to Complainant's discriminatory hiring claim is DENIED. Respondent's Motion to Dismiss related to Complainant's visa fraud and retaliation

claims is GRANTED. Complainant's claims regarding visa fraud and retaliation are DISMISSED.

SO ORDERED.

Dated and entered on April 2, 2020.

Jean C. King
Chief Administrative Law Judge