

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

March 14, 2023

ZAJI OBATALA ZAJRADHARA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2022B00036
)	
E-SUPPLY ENTERPRISES,)	
Respondent.)	
_____)	

Appearances: Zaji Obatala Zajradhara, pro se Complainant
Tiberius D. Mocanu, Esq., for Respondent

ORDER ON MOTIONS AND ISSUING STAY OF PROCEEDINGS

I. PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 132b. Complainant, Zaji Obatala Zajradhara, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 25, 2022. Complainant alleges that Respondent, E-Supply Enterprises, refused to hire him in July 2021, on account of his national origin and citizenship status. Compl. 6–7, *see also id.* at 19–20. This order addresses Complainant’s most recent series of motions, filed on January 25, 2023, and Respondent’s Motion to Dismiss, filed on July 25, 2022.

This case has a lengthy procedural history, summarized as of November 10, 2022 in *Zajradhara v. E-Supply Enters.*, 16 OCAHO no. 1438b, 1 (2022).¹

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 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

The relevant history to this Order is summarized as follows:

On July 25, 2022, Respondent filed a Motion and Memorandum in Support of Motion to Dismiss Complaint (Motion to Dismiss). Complainant filed an opposition to that motion on August 9, 2022, a filing that also included a number of motions that were repeated in similar form in several subsequent filings, primarily motions relating to discovery.

On November 10, 2022, the Court responded to these discovery motions and updated the case schedule. *E-Supply Enters.*, 16 OCAHO no. 1438b, at 1. The Court also addressed the Motion to Dismiss, determining that Respondent had raised a factual attack on the Court’s subject matter jurisdiction. *Id.* at 4. The Court stated that while “Complainant plead sufficient facts to establish jurisdiction . . . [h]e must come forward with evidence outside his pleadings to support his jurisdictional allegation.” *Id.* To ensure that Complainant had a reasonable opportunity to present relevant evidence, the Court allowed Complainant to serve five discovery requests limited to how many employees Respondent employed during the relevant period of 2020 and 2021, and stayed all other discovery. *See id.* at 4–5. The Court permitted Complainant to supplement his opposition to the Motion to Dismiss by January 19, 2023, stating that the supplement must be accompanied by relevant evidence. *See id.* at 7. The Court permitted Respondent to file a reply to any filings by Complainant related to jurisdiction by February 2, 2023. *Id.*

On December 12, 2022, Respondent filed a “Response to Order on Motions and Updated Case Schedule” (Reply).

On December 14, 2022, Complainant filed a “Response to Order on Motions and Updated Case Schedule Rule 0 [sic] & Rule 37: Failure to Make Disclosures or to Co-Operate in Discovery 28 CFR 68.23 Rule(s) 30 B.6, Rule 31 A-4.”² Complainant’s December 14, 2022, filing also included a section entitled “Motion to Dismiss / Jurisdiction / Response” (hereinafter Supp. Opp’n Mot. Dismiss).

On January 18, 2023, the Court issued an Order that denied Complainant’s December 14, 2022 motion relating to discovery as Complainant had, despite previous orders clearly setting forth relevant requirements, not met OCAHO’s procedural requirements, nor presented the dispute in such a way that the Court could resolve it. *Zajradhara v. E-Supply Enters.*, 16 OCAHO no. 1438d, 1 (2023). Moreover, the discovery Complainant appeared to seek was not limited to jurisdiction.

database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

² This case is not enrolled in OCAHO’s voluntary electronic filing pilot program (e-filing). Nonetheless, the Court exercised discretion to accept this filing and consider its contents. *Zajradhara v. E-Supply Enters.*, 16 OCAHO no. 1438d, 1, n.2 (2023).

The Court stated that it considered the “Motion to Dismiss / Jurisdiction / Response” as supplementing Complainant’s Opposition to the Motion to Dismiss. *Id.* at 2, n.3.

On January 25, 2023, Complainant filed a “Motion for to Submit Additional Evidence and Motion to Be Able to Submit E-Filing Due to Extreme Poverty” (hereinafter Complainant’s Motion for Discovery and E-Filing).³ Respondent did not file an opposition to Complainant’s Motions for Discovery and E-Filing. Accordingly, Complainant’s January 25, 2023 motions and the July 25, 2022 Motion to Dismiss are ripe for adjudication.

II. COMPLAINANT’S MOTIONS FOR DISCOVERY AND E-FILING

Through his January 25, 2023, submission, Complainant moves the Court to: (1) allow him to electronically file (e-file) this pleading, and any future submissions; (2) “accept additional evidence as proof of the Respondent’s ‘pattern and practice’” of §1324b discrimination; and (3) “grant discovery” for the same information requested in his August 9, 2022, filing. Complainant’s motions are GRANTED IN PART and DENIED IN PART.

The Court’s decision to accept a filing electronically is discretionary, and parties, absent exigency, are expected to file according to OCAHO’s rules. *See* 28 C.F.R. § 68.6(a).⁴ Here, Complainant contemporaneously served his filing on all parties of record, via email. Given the contents of the motion (leave to e-file due to indigency) and parties’ notice of its contents, the Court exercises discretion to ACCEPT the January 25, 2023, filing.

However, the Court will not go so far as to permit e-filing for *all* future filings by Complainant. Complainant shall seek leave of the Court each time he seeks to e-file in this case, with certification of service on all parties.

Next, the Complainant asks the Court to “accept additional evidence” which includes a May 23, 2022 email excerpt, addressed in part to an E-Supply email address, stating that he applied for a position with E-Supply in 2022. Mot. Disc. E-Filing 2–3. The additional evidence also includes the Job Vacancy Announcement (JVA) 22-05-94916, with an opening date of May 11, 2022 and listing E-Supply as an employer for a secretarial job. *Id.* at 3–8. Complainant argues that this evidence supports a “pattern or practice” violation, based on JVA and visa fraud. *See id.* at 3.

³ On January 4, 2023, and February 15, 2023, the Court issued Disclosures of Ex Parte Communication. *Zajradhara v. E-Supply Enters.*, 16 OCAHO no. 1438c, 1 (2023); *Zajradhara v. E-Supply Enters.*, 16 OCAHO no. 1438e, 1 (2023). On January 19, 2023, Respondent’s counsel, Tiberius Mocanu, filed a Notice of Appearance.

⁴ OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

The only issue before the Court at this juncture is whether it has jurisdiction over the case. The Court has not set a date for a hearing, nor is there a pending motion for summary decision. The additional evidence is therefore not responsive to the matter currently pending. Complainant alleged that Respondent failed to hire him in July 2021, for the “administrative support” position (JVA 21-06-91973), on account of his citizenship status and national origin. Compl. 6–7. Complainant has not sought to add a 2022 job application to the allegations. *See also Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450e, 2 (2023) (“[A]n unsolicited evidentiary submission runs afoul of the Court’s obligation to ensure a clear record[.]”).

Lastly, the Court’s January 18, 2023, Order stated that the Court would not consider further discovery motions. *E-Supply Enters.*, 16 OCAHO no. 1438d, at 3. The Court will not consider the discovery requests for relief raised in Complainant’s January 25, 2023, filing.

III. RESPONDENT’S MOTION TO DISMISS

As the deadlines for limited jurisdictional discovery and related filings have passed, the Respondent’s Motion to Dismiss is ripe for resolution.

A. Position of the Parties

1. Respondent

Respondent argues that the Court does not have subject matter jurisdiction over Complainant’s § 1324b claims. *See generally* Mot. Dismiss. Respondent states that it was established in March 2021. Reply 1. Respondent asserts that it employed one person in Q2 2021 (April, May, June). *Id.* at 8, 17. Respondent contends that in July 2021, when Complainant applied for the administrative support position (JVA 21-06-91973), E-Supply only had three employees. Mot. Dismiss 2–3; *see* Reply 1, 11–12, 20 (showing three employees for Q3 2021 (July, August, September)). Respondent concludes that “§ 1324b(a)(2)(A) claims of discrimination do not apply to a person or other entity which employs three or fewer employees,” so the Complaint should be dismissed with prejudice. Mot. Dismiss 2. Respondent admits that it employed seven workers in Q4 2021, *see* Reply 1, 14, 23, and that it employed fifty-four workers in July 2022, *see* Mot. Dismiss 2, but argues that the number of employees in Q4 2021 and July 2022 is irrelevant in determining whether the Court has jurisdiction over Complainant’s § 1324b claims in this case.

Respondent offers the following evidence in support of its Motion to Dismiss and Reply: CNMI Business License for E-Supply Enterprise, issued March 17, 2021; CNMI Monthly Business Gross Revenue Tax Returns for July and August 2021; CNMI Department of Revenue Employer Quarterly Withholding Tax Return for Q2, Q3, and Q4 2021; IRS Quarterly Federal Tax Returns for Q2, Q3, and Q4 2021 (with earning statements attached to Q4); and a declaration from Respondent’s General Manager, dated July 15, 2022.

2. Complainant

Complainant argues that the Court has subject matter jurisdiction to hear his § 1324b claims. Supp. Opp’n Mot. 2. According to Complainant:

The Respondent candidly admits that it has #51 employees, only #-3 of which are American; that leaves another (9) positions open – via the JVA 21-06-91973 - #9, positions in which The Respondent denied an otherwise qualified American worker-; that in the Complainant’s beliefs should have been employed . . . the matter before the Court has nothing to do with the positions currently held by the “American workers”; but by the offer of employment to #9-non-citizens.

Id. To support his (Supplemented) Opposition, Complainant includes citations to “8 CFR 101, 208.209 et al, 28 CFR 105.24 et al, 29 CFR 2.16/2.17 et al.” Opp’n Mot. Dismiss 2. Complainant also offers the following as evidence: JVA 21-06-91973; a blank CW-1 Application for Temporary Employment Certification (DOL Form ETA-9142C – Appendix C); and a printout of the interim final rule Implementation of the Northern Marianas Islands U.S. Workforce Act of 2018, 28 Fed. Reg. 29,264 (May 14, 2020).

B. Legal Standards

1. 8 U.S.C. § 1324b(a) Jurisdiction – Number of Employees

As a forum of limited jurisdiction, OCAHO only hears cases within the jurisdiction prescribed by Congress. *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5–8 (2021) (citations omitted). OCAHO has subject matter jurisdiction over § 1324b citizenship status claims if the employer employs more than three employees. *Zajradhara v. HDH Co., LTD*, 16 OCAHO no. 1417, 2 (2022) (citations omitted). OCAHO’s subject matter jurisdiction for hearing § 1324b national origin allegations is narrower, limited to cases in which an employer employs between four and fourteen employees. *Id.* (citations omitted). Complainant has the burden to demonstrate that OCAHO has jurisdiction over allegations plead in the Complaint. *See Zajradhara v. Misamis Constr. (Saipan) LTD.*, 15 OCAHO no. 1396a, 2 (2022).

The date jurisdiction attaches depends on whether a § 1324b(a) claim is based on national origin or citizenship status. “Under EEOC’s governing statute [Title VII], jurisdiction attaches over employers with fifteen or more employees for each working day in each of twenty or more calendar weeks preceding the year the alleged discriminatory act occurred.” *E-Supply Enters.*, 16 OCAHO no. 1438b, at 5 n.8 (citations omitted). In contrast, the count of employees for a citizenship status discrimination claim arising under § 1324b(a) “is to be made as of the date the alleged discrimination occurred and that all who are employed on that date, whether full-time or part-time and whether permanent or seasonal, are to be counted.” *See Sanchez v. Ocanas*, 9 OCAHO no.

1115, 2–3, 7–11 (2005) (citations omitted) (affording deference to legacy Office of the Special Counsel’s date-of-discrimination counting rule).

2. 8 U.S.C. § 1324b(a) Jurisdiction – Factual Motion to Dismiss⁵

OCAHO’s rules do not specifically address a motion to dismiss for lack of jurisdiction. However, the OCAHO administrative law judge (ALJ) may consult the Federal Rules of Civil Procedure as general guidance, along with Circuit precedent applying relevant Federal Rules.⁶ *See* 28 C.F.R. §§ 68.1, 68.57. The Ninth Circuit provides that when a trial court reviews a factual attack on jurisdiction (e.g., a motion to dismiss), it may “weigh the evidence and satisfy itself as to the existence of its power to hear the case,” including other material in the record, such as evidence and affidavits. *E-Supply Enters.*, 16 OCAHO no. 1438b, at 4 (citations omitted). Evidence on jurisdiction must be both reliable and probative to be considered. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 9–10 (2023) (citations omitted) (noting indicia of reliability, and that probative value bears on how likely the evidence is to prove a material fact); *see also* 28 C.F.R. § 68.40(b). The party submitting evidence as to jurisdiction must “provide some foundation from which its identity, relevance, and provenance may be established.” *See United States v. Carpio-Lingan*, 6 OCAHO no. 914, 5 (1997).

C. Discussion

1. Parties’ Evidence

The Court finds that Respondent submitted probative, reliable evidence regarding its number of employees. The business license, issued by the CNMI government, is sufficient to establish that E-Supply began operations in March 2021; consequently, this is the earliest time from which the Court can consider the number of employees. *See* Reply 3. The signed CNMI and IRS tax returns, covering Q2, Q3, and Q4 2021, report the number of employees employed by Respondent for each fiscal quarter. *See id.* at 4–28; *see also* Mot. Dismiss 5–6. Respondent’s General Manager provided a signed, sworn declaration in which she states the same number of employees for Q3

⁵ The Court previously determined that Respondent’s Motion to Dismiss is factual in nature. *E-Supply Enters.*, 16 OCAHO no. 1438b, at 4. A factual motion to dismiss “alleges an incurable jurisdictional defect that deprives the court of any authority to adjudicate the dispute.” *Id.* at 4 n.4 (quoting *Ruan v. United States Navy*, 8 OCAHO no. 1046, 1046, 717 (2000)).

⁶ As the parties are located in the CNMI, the Court may consult caselaw arising from the United States Court of Appeals for the Ninth Circuit. Prior OCAHO ALJs have consulted Rule 12(b)(1) and 12(h)(3) in resolving motions to dismiss for lack of subject matter jurisdiction. *See Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 4 (2004) (citations omitted) (collecting cases).

2021 as the tax returns. Mot. Dismiss 3–4; *see id.* at 5–6 (CNMI tax return doe Q3 2021 showing three employees); *see also* Reply 20 (IRS tax return for Q3 2021 showing three employees).

Complainant’s evidence has limited relevance as to the number of employees, and hence jurisdiction. The blank CW-1 application form and interim final rule on the implementation of the “Workforce Act” shed no light on the number of workers Respondent employed in 2020 and 2021, which the Court identified to Complainant as the relevant time period. Supp. Opp’n Mot. Dismiss 6–64; *see E-Supply Enters.*, 16 OCAHO no. 1438b, at 5. Even so, the Court finds that the JVA 21-06-91973 evidence has some relevance as to the number of employees. *See* Opp’n Mot. Dismiss at 5–9. The “number of openings currently available,” in this JVA, ten, is not necessarily indicative of the number of workers employed by a company *at the time of the job announcement*. *Id.* at 6. However, the JVA does show an intended start date of employment of October 1, 2021, which is relevant to when the jurisdictional period ended (*see below*). *Id.* at 8. Lastly, unsupported statements about the number of employees, or citations to inapplicable statutes, are not evidence. Opp’n Mot. Dismiss 2; *see United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 32 (2022) (citation omitted) (“[A]rgument is not evidence.”).

Based on the record before it, the Court finds that Respondent employed the following number of employees in 2021:

Q2 2021, April 2021 to June 2021: 1 employee
 Q3 2021, July 2021 to September 2021: 3 employees
 Q4 2021, October 2021 to December 2021: 7 employees

2. Date of the Alleged Discrimination

Having discussed the number of employees, the next issue is the date of the alleged discriminatory act. As set forth in the Complaint, the alleged discriminatory act is the non-selection of Complainant for the administrative support position, on account of his citizenship status and national origin. Compl. 6–7.

Complainant left the date he applied for the position blank on the Complaint. *Id.* at 7. On the Immigrant and Employee Rights (IER) charge form, Complainant states: that he applied for the position on July 8, 2021; that an Elizabeth Santos sent him an email asking for which position he applied for on July 20, 2021; and that he replied to Santos’s email to clarify the applied-for position on July 21, 2021. *Id.* at 13. The Complaint also shows Complainant seeks back pay from July 20, 2021 on. *Id.* at 11.

Respondent does not indicate when it made the decision to not hire Complainant for the administrative support position. Instead, it references Complainant applying for the position in July 2021. *See* Mot. Dismiss 3; Reply 1. Respondent admits that it received Complainant’s resume on July 20, 2021, “which we reviewed,” and that the intended start date was October 1, 2021.

Answer 5, 40; *see also* Opp’n Mot. Dismiss 5–8 (JVA for the administrative support position showing an intended starting date of employment as October 1, 2021).

The record supports that the alleged discriminatory act, non-selection, occurred on or after July 20, 2021, when Respondent received Complainant’s resume, and before October 1, 2021, the intended start date for the “administrative support” position.

3. Jurisdiction Over National Origin Discrimination Claim

As noted in ¶ B.1. *supra*, in determining jurisdiction over national origin claims, the count of employees may be made by looking at the number of employees employed in the twenty calendar weeks preceding the year the alleged discriminatory act occurred. *See E-Supply Enters.*, 16 OCAHO no. 1438b, at 5 n.8 (same). Here, E-Supply did not commence operations until March 2021. Accordingly, the relevant period for jurisdiction over the national origin discrimination claim is March 2021 to July 2021. During that period, the most employees Respondent employed was three. *See* Reply 3–37. OCAHO’s subject matter jurisdiction for hearing § 1324b national origin allegations is limited to cases in which an employer employs between four and fourteen employees.

4. Jurisdiction Over Citizenship Status Discrimination Claim

In determining jurisdiction over citizenship status claims, the count of employees is made at the time of the alleged discrimination. *Sanchez*, 9 OCAHO no. 1115, at 2–3, 7–11. The Court has determined that time as between July 20, 2021 and October 1, 2021. *Supra* ¶ C.2. In Q3 2021 (July, August, September), Respondent employed three workers. Jurisdiction does not attach until an employer employs more than three workers. *See* 8 U.S.C. § 1324b(a).

IV. STAY OF PROCEEDINGS

Based on the evidence before it, it appears that this tribunal does not have jurisdiction over Complainant’s claims. However, because the Court finds itself in a position wherein it is unable to execute a final case disposition, it now issues a stay of these proceedings.⁷ *A.S. v. Amazon Web Servs.*, 14 OCAHO no. 1381h, 2 n.4 (2021); *see, e.g., Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388g, 2 (2022); *Rodriguez Garcia v. Farm Stores*, 17 OCAHO no. 1449, 2–3 (2022); *Zajarahara v. Li Yong Hong Corp.*, 17 OCAHO no. 1472, 2–3 (2023). The Court therefore will not make a final determination regarding jurisdiction.

⁷ A stay of proceedings is generally defined as “a ruling by a court to stop or suspend a proceeding . . . temporarily or indefinitely. A court may later lift the stay and continue the proceeding.” *Heath v. I-Services, Inc.*, 15 OCAHO no. 1413a, 2 n.4 (2022) (citations omitted).

During the stay of proceedings for *Zajradhara v. E-Supply Enterprises* (OCAHO Case No. 2022B00036), the Court will not consider or adjudicate submissions filed by the parties. Parties should bear in mind that the Court will timely inform the parties in writing when the stay is lifted. When the stay is lifted, the Court will make a final determination regarding jurisdiction.

Complainant is reminded of the Court's admonishment regarding ex parte communication; specifically, that he may not call the office to discuss anything substantive in this case, and further such communications will result in appropriate sanctions.

E-Supply Enters., 16 OCAHO no. 1438e, at 3; *see* 28 C.F.R. § 68.36(b).

SO ORDERED.

Dated and entered on March 14, 2023.

Honorable Jean C. King
Chief Administrative Law Judge