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

August 30, 2019

UNITED STATES OF AMERICA, Complainant, v. CHANCERY STAFFING SOLUTIONS, LLC AKA TRANSPERFECT STAFFING SOLUTIONS AKA TRANSPERFECT LEGAL SOLUTIONS, INDIVIDUALLY AND AS SUCCESSOR TO TRANSPERFECT STAFFING SOLUTIONS. LLC AKA TRANSPERFECT LEGAL SOLUTIONS, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00023

ORDER DENYING MOTION TO DISMISS

I. INTRODUCTION

This case arises under the antidiscrimination 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(a)(1)(B) (2017). The United States of America, through the Department of Justice's Immigrant and Employee Rights Section (IER) (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 9, 2019, alleging that Chancery Staffing Solutions (Respondent) discriminated against two individuals based on their citizenship status and engaged in a pattern or practice of citizenship status discrimination in violation of 8 U.S.C. § 1324b. Respondent's Motion to Dismiss is now pending. Respondent argues that IER failed to comply with relevant time limitations and the Complaint fails to state a claim upon which relief can be granted. For reasons set forth herein, Respondent's Motion is DENIED.

II. BACKGROUND AND PROCEDURAL HISTORY

Respondent, formerly TransPerfect Staffing Solutions, is a corporation that, among other services, hires temporary employees to perform work for third-party clients. Respondent recruits individuals, screens them using their clients' criteria, and nominates candidates for the clients to

select. After the clients select the candidates, Respondent hires the candidates as temporary employees to work on the client's projects. Compl. at 5.

The Complaint asserts that Respondent (as Transperfect) engaged in a pattern or practice of citizenship status discrimination when it refused to consider for selection on a document review project any worker who was not a United States citizen, and, additionally, any worker who was a United States citizen holding dual citizenship.

It is undisputed that on March 29, 2017, the client requested resumes of English-speaking attorneys admitted to practice law in the District of Columbia for a temporary document review project (the Project). On April 4, the client indicated that proof of United States citizenship was required. Answer at 5. The Complaint asserts that thereafter, the Respondent only considered United States citizens for the Project until the Project ended on July 7, 2017. This requirement was expanded to bar any candidates who were dual citizens of the United States and another country on May 12, 2017. Compl. at 5–6.

The Complaint asserts that the charging party, Marc Philippe Cicchini, was hired for the Project, but on May 8, 2017, was removed from the Project because he was a dual citizen. On May 12, 2017, Respondent sent a blast email advertising the Project, but Respondent did not send it to the charging party. Compl. at 7.

On May 9, 2017, the charging party filed a charge under 8 U.S.C. § 1324b with IER. On May 17, 2017, IER notified the Respondent that IER had initiated an investigation into the charge, as well as an investigation into whether Respondent engaged in a pattern or practice of unfair immigration-related employment practices.

On September 6, 2017, IER transmitted a written notice to the charging party stating that it had not yet determined whether there was reasonable cause to believe a violation of 8 U.S.C. § 1324b had occurred and whether it would file a complaint, and the investigation would continue. The notice informed the charging party that he now had a right to file a complaint with OCAHO, which he must do within 90 days.

On April 19, 2018, IER notified Respondent that it had concluded its investigation and found reasonable cause to believe that Respondent had engaged in a pattern or practice of unfair immigration-related employment practices. As noted above, IER filed the Complaint with OCAHO on May 9, 2019. IER alleges four counts in the Complaint. In Count I, IER alleges Respondent engaged in a pattern or practice of citizenship status discrimination against protected individuals under § 1324b. In Count II, IER alleges that Respondent engaged in a pattern or practice of citizenship status discrimination against U.S. citizens who hold dual citizenship. In Count III, IER alleges that Respondent discriminated against the charging party based on his citizenship status, and in Count IV, IER alleges Respondent discriminated against Garth Hall based on his status as a U.S. citizen with dual citizenship.

Respondent filed a motion to dismiss the Complaint and memorandum in support of the motion, as well as an answer to the Complaint. IER filed a response to the motion to dismiss.

III. POSITIONS OF THE PARTIES

Respondent argues that the Court should dismiss the Complaint for several reasons. First, Respondent argues that Complainant did not make a reasonable cause determination within 120 days of the filing of the charge, nor did it file the Complaint within the 90-day period following the 120-day period as required by 8 U.S.C. § 1324b. Respondent argues that the timing provisions should be treated as statutes of limitations. Respondent contends that to the extent that the regulations are contradictory, they should be determined to be invalid as they conflict with the statute. Further, even if the Court does not treat the timing provisions as statutes of limitations, dismissal is still warranted as Respondent suffered prejudice resulting from the delay in filing the Complaint.

Complainant responds that § 1324b poses no time limit on IER's authority to file a complaint with OCAHO when based upon a timely charge, that the regulations reinforce this rule, and that the Administrative Law Judge (ALJ) is bound to follow regulations promulgated by the Attorney General.

Second, Respondent asserts that Complainant fails to allege a pattern or practice of discrimination because the Complaint does not allege that Respondent's standard operating procedure was to engage in citizenship discrimination—it alleges only one isolated incident. In addition, Respondent asserts that Counts I and II should be dismissed because the Complaint fails to allege that Respondent knew its client was engaging in unlawful discrimination. Respondent asserts that its client directed it to impose the citizenship requirement, Respondent believed that the firm was in full compliance with its legal obligations, and that it believed the law required the imposition of the citizenship requirement.

Complainant responds that to state a pattern or practice discrimination claim, it either has to plead a policy of discrimination, or that a sufficient number of acts occurred. Complainant asserts that in this case, Respondent had a facially discriminatory policy. Complainant further argues that it stated a claim because it alleges that the discriminatory policy broadly affected hiring on the Project. As to the knowing element, Complainant responds that it pled sufficient facts to infer intent, and a good faith defense is unavailable to employers who violate the INA's anti-discrimination provision.

Respondent next argues that Counts I and II, the pattern or practice claims, should be dismissed because IER fails to identify any citizens who were not recruited, nominated, referred or hired. Instead, Respondent contends that Complainant's allegations are merely conclusory, tracking the language of the statute, and therefore fail to state a claim. Further, Complainant's

allegation that Respondent failed to consider or hire otherwise qualified non-US citizen candidates is false as Respondent hired both Cicchini and Hall.

Next, Respondent argues that the Complaint fails to allege that Respondent discriminated against the named individuals with respect to referrals, that an obvious alternative explanation exists for not sending the individuals back to the Project from which they had been dismissed, and that Complainant failed to show Respondent acted with intent as such a placement would be futile. Respondent contends that the appropriate remedy here was to place the individuals with a different client, not to send the individuals back to the same company. Respondent argues that the individuals were offered a different placement.

Complainant argues that consideration of an alternative explanation is improper at this stage, that it sufficiently pled individual discrimination claims under § 1324b, and that the ALJ cannot be a factfinder in a motion to dismiss.

Lastly, Respondent argues that the Complaint should be dismissed if appointments clause deficiencies exist. Complainant attached the undersigned's appointment order by the Attorney General.

IV. STANDARDS

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10. Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)).[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 database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

There is no requirement in a case pursuant to § 1324b that a complainant plead a prima facie case; however, "a § 1324b complaint must contain sufficient minimal factual allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination." *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016) (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002)). "In assessing the facial validity of a complaint, well-pleaded factual allegations are taken as true, but a legal conclusion couched as a factual allegation need not be accepted." *Id*. (citing *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006)). Reasonable inferences are drawn in the complainant's favor. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115 (2d Cir. 2008).

V. DISCUSSION

A. Time limitation

Respondent first asserts that IER's claim is time barred. Respondent points to the statutory provision titled "Investigation of charges", which provides in relevant part:

> **(1) By Special Counsel** The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge . . . .
>
> **(2) Private actions** If the Special Counsel, after receiving such a charge . . . has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge within 90 days after the date of receipt of the notice. The Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period.

8 U.S.C. § 1324b(d).[2]

[2] On January 18, 2017, the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section. *See* Standards & P. for the Enforcement of the INA, 81 Fed. Reg. 91768-01, 91787 (Dec. 19, 2016). Section 1324b and the regulations still refer to IER as Special Counsel.

In 2016, the Department of Justice promulgated regulations regarding the timeframes:

> (b) If the Special Counsel determines not to file a complaint with respect to such charge by the end of the 120-day period, or decides to continue the investigation of the charge beyond the 120-day period, the Special Counsel shall, by the end of the 120-day period, issue letters to the charging party and respondent by certified mail notifying both parties of the Special Counsel's determination.
> . . . .
> (d) The Special Counsel's failure to file a complaint with respect to such charge with OCAHO within the 120-day period shall not affect the right of the Special Counsel to continue to investigate the charge or later to bring a complaint before OCAHO.

28 C.F.R. § 44.303 (2017).

The Attorney General published supplemental information with the proposed regulation explaining the intent of the regulation. "Paragraph (d) would be revised to clarify that the Special Counsel is not bound by the 90-day statutory time limit on filing a complaint that is applicable to individuals filing private actions." Standards & P. for the Enforcement of the INA, 81 Fed. Reg. 53,965, 53,969 (August 15, 2016). The supplemental information explains that § 1324b(d)(3) is the only statutory time limit on IER's authority to file a complaint based on a charge. *Id.* Section 1324b(d)(3) states, "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." The supplemental information explains that the 90-day statutory time limit provision makes clear that the Special Counsel has a right to "investigate the charge or to bring a complaint . . . during such 90-day period." 81 Fed. Reg. 53,965, 53,969. "Nothing in the statute explicitly states that the Special Counsel is subject to that 90-day limit, however, or prohibits the Special Counsel's office from continuing to investigate a charge or from filing its own complaint based on a charge even after the 90-day period for a charging party to file a private complaint has run." *Id.*[3]

Section 44.303 is on point and resolves the Respondent's arguments. Respondent concedes that the regulation exists, but urges the Court to find that the regulation is in clear conflict with the statute and should be declared invalid.

Congress granted the Attorney General the authority to promulgate regulations to effectuate and enforce IRCA's antidiscrimination provisions. *See* 8 U.S.C. § 1103(a) ("The Attorney General shall establish such regulations… as the Attorney General determines to be necessary for carrying out this section"). The Supreme Court has long recognized that a federal agency is

[3] The Attorney General received several comments expressing concern with the provision, but the Attorney General moved forward with the regulation without change. Standards & P. for Enforcement of the INA, 81 Fed. Reg. 91768, 91781 (Dec. 19, 2016).

obliged to abide by the regulations it promulgates. *See Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

While it is not clear that this Court has the authority to declare its own regulations ultra vires, it would decline in any event. When Congress delegates authority to an agency to fill in gaps in a statute, the agency's permissible regulation is not ultra vires. *United States v. Occupational Res.Mgmt. Staffing, Inc.*, 10 OCAHO no. 1166 (2013) (citing *United States v. Dang*, 488 F.3d 1135, 1140–41 (9th Cir. 2007)). Here, the statute does not impose a deadline upon IER to file a complaint. Instead, the statute provides that IER must make a determination regarding the *investigation* of the charges within 120 days. Once the 120 days have elapsed, the charging party has 90 days to file the claim. The statute clearly contemplated that IER might not file a charge within the first 120 days, as § 1324b(d)(2) mentions filing by IER during the subsequent 90-day period. The 90-day period can reasonably be read to address the rights of private parties to file a complaint, and does not impose requirements for IER. The last sentence in § 1324b(d)(2) merely says that IER's rights are not affected by the failure to file a complaint within the first 120 days. While the statute specifically references the 90-day period, the reference is reasonably interpreted to apply only to the non-exclusive nature of the private party's rights during those 90 days.

Both parties cite to *United States v. Agripac, Inc.*, 8 OCAHO no. 1028, 309, 404 (1999), which found that § 1324b "does not set out in terms any particular time within which the Special Counsel must file a complaint before an administrative law judge." *See also United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1156 (1993) ("The statute contains no time limitations on the Special Counsel's authority to conduct independent investigations or to subsequently file complaints based on such investigations."); *but see United States v. Workrite Unif. Co., Inc.*, 5 OCAHO no. 736, 107, 111–15 (1995). *Agripac* ultimately left open the possibility, however, that a showing of prejudice could lead to a different result.[4] In any event, *Agripac* and *Workrite* were published before the regulation was promulgated and are no longer persuasive authority.

The Court finds that § 1324b and the regulations do not impose a time limitation within which IER must file a complaint with OCAHO. As such, Complainant's claims are not time barred.

B. Sufficiency of pleadings: Counts I and II

Respondent argues that the alleged instance of discrimination occurred in one contract for a document review project that lasted no more than 100 days, and Complainant claims that the alleged discrimination only impacted two people. Respondent argues that this one alleged

[4] *See also EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014) (holding that the employer was entitled to attorney's fees due to the EEOC's unreasonable filing of complaint where the EEOC waited six and a half years to file complaint and, due to office closure, the remedy under Title VII was unavailable at the time the complaint was filed.).

instance is not a standard operating procedure as is required to establish a pattern or practice claim, but is an isolated incident. Memo. Supp. Mot. Dismiss at 15–18.
Complainant argues that to establish a pattern or practice claim, it can show either that the employer had a policy of disparate treatment, or that a sufficient number of acts occurred, and the Complaint asserted the former, citing to *International Brotherhood of Teamsters v. United States* for this legal principle. 431 U.S. 324, 336 (1977). Resp. Mot. Dismiss at 18.
While *International Brotherhood of Teamsters* does not clearly lay out the legal proposition that a complainant can either show a facially discriminatory policy or a sufficient number of instances to establish a pattern and practice claim, precedent provides support for this assertion. In a "pattern or practice" case, "'discrimination [is] the company's standard operating procedure—the regular rather than the unusual practice.'" *Schuler v. PricewaterhouseCoopers*, LLP, 514 F.3d 1365, 1370 (D.C. Cir. 2008) (quoting *Teamsters*, 431 U.S. at 336).

Direct evidence of a facially discriminatory policy can establish a pattern or practice of discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also Krish v. Conn. Ear, Nose & Throat, Sinus & Allergy Specialists, P.C.*, 607 F. Supp. 2d 324, 331 (D. Conn. 2009); *United States v. Bd. of Educ. for Sch. Dist.*, 911 F.2d 882, 892–93 (3d. Cir. 1990) (finding that an admitted discriminatory policy is sufficient to establish a pattern or practice); *Freeman v. Lewis*, No. 76-1587, 1983 U.S. Dist. LEXIS 16915, at *22 (D. D.C. May 16, 1983) (citing *Teamsters*, 431 U.S. at 359) (explaining that a broad-based policy can be used to establish a prima facie case of discrimination).

The cases Respondent relies upon primarily relate to specific individuals' discrimination claims which were insufficient to establish a practice or pattern of discrimination. In those cases, there was no assertion that a facially discriminatory policy existed. *See* Memo. Supp. Mot. Dismiss at 16–17; *Townsend v. United States*, 236 F.Supp. 3d 280, 306 (D.D.C. 2017); *Champlin v. Experis US, Inc.*, 4:16-CV-421, 2017 WL 635563 (S.D. Tex. Feb. 16, 2017).

Respondent relies on *Champlin*, for the proposition that a job posting with discriminatory language is not enough to assert a pattern or practice claim against a staffing agency that posted the job on behalf of its client. In *Champlin*, the plaintiff alleged that the defendant staffing agency engaged in a consistently enforced policy of discrimination in that no fewer than six job postings included age discriminatory remarks for Software Engineer positions and in the email from the client to the defendant there were six job postings with age discriminatory language, which defendant promised to send out. The court found that the six job postings were not separate posting, but instead the single job posting referred to six positions available for the Software Engineer position, and the email stated that the client was "not looking for . . . candidates with more than 10-12 years of experience," the client's employees were "young" and "eager," and a candidate with "1-5 years experience is the best fit." *Id.* at *4, n.7. The court explained that while the language in the emails "may be described as discriminatory, it is a far cry from the sign reading 'whites only'" as discussed in *Teamsters*. *Id.* at n.7. (citing *Teamsters*, 431 U.S. at 365) (explaining that if an employer had a "Whites Only" sign on the office door, the victims of the discrimination include both the job applicants and those potential candidates who

did not apply based on the sign)). Thus, the *Champlin* court found that it was "not sure that a single job posting, coupled with vague allegations of additional postings, would be enough to allege a pattern or practice of discriminatory action by the client," let alone by the staffing agency. *Champlin*, 2017 WL 635563 at *4.

Here, Complainant's allegations are more comparable to the "whites only" sign in *Teamsters*, than the language in the *Champlin* email. Complainant pled both a facially discriminatory policy, and that it potentially impacted a large number of persons. Complainant alleges that Respondent sought document reviewers for its client's project over the course of several months, sending emails to approximately 900 people. From April 4, 2017, to the end of the Project, Respondent allegedly only considered, nominated, referred, and hired U.S. citizens to work on the Project and, on April 19, 2017, Respondent sent a blast email advertising the Project and stating that the candidates "must be able to demonstrate U.S. citizenship." Compl. at 6. Respondent then asked all qualified candidates about their U.S. citizenship status and required proof of that status, and allegedly disqualified any candidate who was not a U.S. citizen or could not prove their U.S. citizenship status. On May 12, 2017, Complainant alleges that Respondent asked each otherwise qualified candidate whether they were a U.S. citizen who could prove citizenship status and whether they were a dual citizen. Thereafter, Complainant alleges that Respondent also disqualified any candidate who was a dual citizen. Complainant alleges that Respondent recruited, nominated, and referred over forty candidates for the Project. As such, Complainant has sufficiently asserted a claim for pattern or practice of discrimination based on citizenship status. Respondent's Motion to Dismiss related to Counts I and II is DENIED.

C. Intent

Respondent next alleges that Complainant failed to plead facts to "plausibly suggest" that Respondent knowingly engaged in unlawful discrimination. Specifically, it argues that there are no allegations in the Complaint that Respondent knew the citizenship requirement imposed by its client amounted to unlawful discrimination. Respondent contends that it imposed the requirement not because of an intent to discriminate, but because its client directed Respondent to do so. Further, Respondent asserts that it believed it was acting in good faith and § 1324b(a)(2) provides an exception to the prohibition on citizenship status discrimination when the law requires citizenship requirements. Respondent's client was a law firm. Respondent's contract with its client involved the International Traffic in Arms Regulations (ITAR), and Respondent relied on the client/law firm's representation that the ITAR required sole citizenship for anyone touching the work. Respondent appears to concede that the client's representation about ITAR's requirements is an error.

OCAHO does not demand the "plausibility" standard required in federal courts as outlined by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8–10 (2012). OCAHO's rules of practice and procedure merely require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred."

28 C.F.R. § 68.7(b)(3). Thus, "[t]he only question to be addressed in considering a motion to dismiss for failure to state a claim is whether the complaint is facially sufficient to permit the case to proceed further." *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 10. OCAHO does not require complainants "to present evidence at the pleading stage; the task here is not to assess evidence and predict at the outset what [IER] will be able to prove." *Id.*

Intent is generally a factual inquiry that is inappropriate to resolve at a motion to dismiss stage. Respondent relies on cases decided at the summary judgment stage, after discovery and submission of evidence. *See United States v. Diversified Tech. & Servs. of Va.*, 9 OCAHO no. 1095, 25–26 (2003) (denying the complainant's motion for summary decision related to its intentional discrimination claim because the complainant failed to establish discriminatory intent under the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) analysis); *McCauley v. Tate & Kirlin Assocs., Inc.*, 347 Fed.Appx. 860, 861 (3d. Cir. 2009) (denying petition to review an OCAHO ALJ's order granting summary decision because the complainant failed to provide any evidence that the respondent acted with an intent to discriminate based on citizenship status).

In Counts I and II, Complainant alleges that Respondent knowingly and intentionally engaged in a pattern or practice of citizenship status discrimination when it failed to consider or hire qualified U.S. citizens who were dual citizens, based on their citizenship status, and failed to consider or hire qualified non-U.S. citizen candidates for placement on the Project, based on their citizenship status. Complainant alleges that from May 12, 2017 through the end of the Project, Respondent asked otherwise qualified candidates whether they were a U.S. citizen who could prove citizenship status and whether they were dual citizens. Complainant alleges Respondent disqualified from consideration any candidate who was a dual citizen, non-U.S. citizen, and any U.S. citizens who could not prove their citizenship status. Complainant has alleged facts to state claims for intentional pattern or practice of discrimination based on citizenship status.[5]

The Court finds that Respondent's Motion to Dismiss Counts I and II because Complainant failed to allege Respondent intended to discriminate is DENIED.

D. Sufficiency of pleadings: III and IV

Respondent argues that Counts III and IV allege discriminatory actions in failing to seek to refer the two individuals named in the Complaint, that these are implausible claims, and that after the charging party and Hall were removed from the Project, an alternative explanation exists for not referring them back to the Project; namely, that it would have been futile.

[5] *See also Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 770 (2000) ("Complainant needs to show only that the discriminatory act was deliberate, not that the violation of the law was deliberate or that the act was the result of the [r]espondent's invidious purpose or hostile motive."); *Yefremov v. NYC Department of Transportation*, 3 OCAHO no. 562, 1156, 1580 (1993); *United States v. Fairfield Jersey Inc.*, 9 OCAHO no. 1072, 7 (2001); *Nguyen v. ADT Engineering*, 3 OCAHO No. 489, 915, 922 (1993).

Section 1324b(a)(1)(B) prohibits discrimination against a protected individual "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" based on the individual's citizenship status. Complainant alleges individual citizenship status-based discrimination claims. Counts III and IV incorporate by reference all the claims from Counts I and II, which assert that both the charging party and Hall were removed from the Project due to their dual citizenship status, and Respondent did not consider them for rehire on the project because of their status, while others who were United States citizens and not dual citizens were considered. The counts broadly assert discrimination, and are not limited to the failure to be rehired on the Project. In addition, the Court must construe the complaint "in the light most favorable to the plaintiff." *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)). Additionally, given that the Complaint does not set forth facts to establish an alternative explanation, the Court will not entertain those arguments at this time.

The Court finds that Complainant has stated claims for citizenship status-based discrimination in Counts III and IV.

E. Appointments Clause

Lastly, the undersigned was appointed by the Attorney General of the United States, and therefore no appointments clause issues exist. *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018).

VI. CONCLUSION

Construing the Complaint liberally and viewing it in the light most favorable to Complainant, the Court finds Complainant has alleged sufficient facts to state claims of pattern or practice of citizenship status-based discrimination in Counts I and II. The Court also finds that Complainant has alleged facts to state individual citizenship status-based discrimination claims in Counts III and IV and dismissal at this early stage is inappropriate. This decision is made without any comment or judgment as to the ultimate disposition of the claim. As such, Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Dated and entered on August 30, 2019.

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Jean C. King
Chief Administrative Law Judge