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

October 1, 2020

LI ZU, Complainant, v. AVALON VALLEY REHABILITATION CENTER Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00078

ORDER ON MOTION TO DISMISS AND CROSS-MOTIONS FOR SUMMARY DECISION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. § 1324b. Complainant, Li Zu, filed a pro se complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 24, 2015, alleging that Respondent, Avalon Rehabilitation Center, discriminated and retaliated against her in violation of § 1324b.

I. BACKGROUND

In June 2012, Complainant, Li Zu, was a registered nurse at a nursing facility operated by Respondent, Avalon Valley Rehabilitation Center. *Li Zu v. Avalon Health Care, Inc.*, No. 18-4153 (10th Cir. 2020). Complainant had an employment authorization document (EAD) that expired in November 2013. Complainant informed Respondent that she would not be able to renew her EAD prior to the expiration and voluntarily terminated her employment. *Id.* at 4. In December 2013, after she renewed her EAD, Complainant applied for two positions with Respondent. Respondent did not hire her for those positions. *Id.* In August 2014 and September 2014, Complainant applied for additional positions with Respondent. Respondent did not hire her for those positions. Complainant's Response to Mot. Summ. Dec., Ex. 1 at 11.

In March 2014, Complainant filed a charge of discrimination with the Utah Antidiscrimination and Labor Division of the Utah Labor Commission. *Id.* at 6. Complainant later filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). She then filed a complaint in federal district court alleging, among other claims, national origin discrimination and retaliation under Title VII of the Civil Rights Act of 1964. On September 24,

2015, Complainant filed an OCAHO complaint alleging that Respondent discriminated against her based on her national origin and citizenship status when it refused to rehire her, and engaged in retaliation in violation of § 1324b. Respondent filed an answer, and the parties filed prehearing statements. After convening a prehearing conference, the Administrative Law Judge (ALJ) issued an order on March 14, 2016, staying proceedings due to the filing of a discrimination claim before the EEOC based on the same set of facts presented in the complaint filed with OCAHO. The ALJ noted that the case was pending before the United States District Court for the District of Utah (District Court). *Li Zu v. Avalon Health Care, Inc.*, 2:15-cv-00845 (D. Utah). The case was later reassigned to the undersigned.

On March 27, 2020, the undersigned issued an order lifting the stay and requesting a case status update. The undersigned noted that, on March 23, 2020, the United States Court of Appeals for the Tenth Circuit issued a decision in Complainant's case affirming the District Court's grant of summary judgment for Respondent on all claims. The undersigned asked the parties to provide case status updates, and specifically, asked whether Complainant intended to proceed with her OCAHO complaint, and what, if any, factual issues remain unresolved.

On May 6, 2020, each party provided a case status update. Complainant stated that she wished to proceed with her OCAHO complaint, and there are unresolved factual issues for two of the positions to which she applied. She also stated that either she can present direct evidence of citizenship status discrimination, or that she intends to request further discovery.

In its status update, Respondent argued that OCAHO lacks subject matter jurisdiction over Complainant's national origin-based discrimination claim because it employs more than fifteen employees and Complainant already litigated her national origin-based discrimination claim in District Court. Respondent also argued that collateral estoppel (issue preclusion) bars Complainant's citizenship status-based discrimination and retaliation claims.

On May 22, 2020, the undersigned issued a Notice of Intent to Convert. The undersigned construed Respondent's status report as a motion to dismiss. Additionally, the undersigned found that Respondent supported its collateral estoppel argument with documents outside the pleadings and converted the motion to dismiss to a motion for summary decision regarding the collateral estoppel issue. She provided Complainant an opportunity to respond to the motions.

On June 22, 2020, Complainant filed an Opposition to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision. On July 7, 2020, Respondent filed an opposition to Complainant's cross-motion and a motion for leave to file a reply to its converted motion for summary decision and attached the reply brief. On July 14, 2020, Complainant filed a motion for leave to file a reply brief to her cross-motion for summary decision and attached the reply brief. Due to the procedural posture of this case, the parties' respective motions for leave to file reply briefs are GRANTED. 28 C.F.R. § 68.11(b).

II. STANDARDS

A. Motion to Dismiss

When considering a motion to dismiss, the Court must "liberally construe the complaint and view it 'in the light most favorable to the [complainant].'" *United States v. Spectrum Tech. Staffing*, 12 OCAHO no. 1291, 8 (2016) (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)).[1] "OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted." *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 2 (2020) (quoting *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291 at 8 (2016)). Generally, when "considering 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). "When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision." *Barone v. Superior Wash & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013). If the Court converts a motion to dismiss to a motion for summary decision, "the parties must be given appropriate notice so that they have a reasonable opportunity to present relevant materials." *Id.*

Respondent seeks dismissal of Complainant's national origin-based discrimination claims for lack of subject matter jurisdiction. "The OCAHO Rules of Practice and Procedure do not contain a specific provision regarding dismissal of actions for lack of subject-matter jurisdiction but the Federal Rules of Civil Procedure 'may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.'" *Ugochi v. North Dakota Department of Human Servs.*, 12 OCAHO no. 1304, 4 (2017) (quoting 28 C.F.R. § 68.1).

B. Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). Section 68.38(c) is similar to and based on Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

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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.

"An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The party seeking summary decision assumes the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997). In determining whether the moving party has met its burden of proof, all evidence and reasonable inferences are drawn in favor of the nonmoving party. *Id.* Once the moving party has met its burden, the opposing party must come forward with specific facts showing there is a genuine issue of material fact. *Id.*; *see* 28 C.F.R. § 68.38(b) ("a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial.").

When both parties move for summary judgment, the Court must analyze each motion individually and on its own merits. *See Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979) (explaining that cross-motions for summary judgment are to be treated separately); *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

III. DISCUSSION

A. Motion to Dismiss

In its motion to dismiss. Respondent argues that OCAHO lacks subject matter jurisdiction to hear Complainant's national origin discrimination claim. Specifically, Respondent asserts that it employs more than fourteen employees. Respondent also asserts that under § 1324b(b)(2), since Complainant filed a national origin-based discrimination charge with the EEOC under Title VII and the District Court adjudicated the claim on the merits, OCAHO cannot hear the claim.

In the Notice of Intent to Convert Motion, the undersigned explained that OCAHO's jurisdiction to hear national origin discrimination claims under § 1324b is limited. First, OCAHO only has jurisdiction to hear national origin discrimination claims against employers who employ between four and fourteen employees. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020). Respondent asserts that it has more than fourteen employees. In her Complaint, Complainant did not indicate how many employees Respondent employed, but Complainant attached to her complaint the charge form filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices,[2] in which she indicated that Respondent employs more than fifteen individuals. Charge Form at 3.

[2] On January 18, 2017, the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section. *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-92 (Dec. 19, 2016); 28 C.F.R. § 0.53 (2017).

In the Notice of Intent to Convert Motion, the undersigned provided Complainant the opportunity to respond to Respondent's motion to dismiss for lack of subject matter jurisdiction, explaining that Complainant has the burden to establish that OCAHO has subject matter jurisdiction to hear her claims. *Miller v. United States Postal Serv.*, 12 OCAHO no. 1284, 5 (2016). Complainant's response to the Motion for Summary Decision does not address her national origin claim at all, and does not assert that Respondent employs the requisite number of employees.

Furthermore, § 1324b(b)(2) specifically bars OCAHO from hearing discrimination claims based on national origin when the EEOC has exercised jurisdiction over the claim. § 1324b(b)(2); *Guth v. Kaiser Permanente Haw Ah*, 10 OCAHO no. 1190, 3 (2013). In 2016, Complainant filed a national origin discrimination claim under Title VII against Respondent in the District Court. The District Court found, and the Tenth Circuit affirmed, that Complainant did not establish a national origin discrimination claim and granted Respondent's motion for summary decision on Complainant's national origin claims. Resp't Status Report, Exs. 2, 3. Thus, even if Complainant alleged that Respondent employed the requisite number of employees, OCAHO lacks jurisdiction to hear Complainant's national origin discrimination claim because Complainant previously filed a charge with the EEOC alleging national origin discrimination under Title VII based on the same set of facts. § 1324b(b)(2).

Complainant did not establish that OCAHO has subject matter jurisdiction to hear her national origin discrimination claim. As such, Complainant's national origin discrimination claim is DISMISSED.

B. Complainant's Cross-Motion for Summary Decision

In her Cross-Motion for Summary Decision, Complainant asserts that she can establish that Respondent discriminated against her based on her citizenship status. Complainant contends that she can present direct evidence of discrimination based on her citizenship status and relies on a brief statement made in the deposition of Respondent's employee, Byron Kirton. Complainant also contends that the District Court found that Respondent provided four legitimate, nondiscriminatory reasons for its decision not to rehire Complainant, but Complainant asserts that those reasons are pretextual. She asks the undersigned to grant summary judgment in her favor on her citizenship status-based discrimination claim.

Respondent argues that Complainant's cross-motion should be denied. Specifically, Respondent argues that Kirton's statement is taken out of context and additional context shows that Kirton was discussing Respondent's legitimate, nondiscriminatory reasons for not rehiring her, including a lack of attention to detail which was evidenced by the lapse in her employment authorization. Thus, Respondent argues that Complainant's cross-motion is not supported by evidence that would compel a reasonable factfinder to reject all of Respondent's legitimate, nondiscriminatory reasons or defenses.

1. Protected Individual

Section 1324b(a)(1)(B) prohibits a person or other entity from discriminating against a "protected individual" with respect to hiring for employment or discharge from employment based on the individual's citizenship status. *See MacKinnon v. The Financial Times*, 13 OCAHO no. 1316, 2 (2019). According to § 1324b(a)(3), a "protected individual,"

> (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 . . . or is granted asylum[.]

To maintain a citizenship status discrimination claim, Complainant has the burden of establishing she is a protected individual. *MacKinnon*, 13 OCAHO no. 1316 at 3; s*ee, e.g.*, *Omoyosi v. Lebanon Correctional Inst.*, 9 OCAHO no. 1119, 4 (2005). "Section 1324b(a)(3) provides a clear definition of 'protected individual'; the Court lacks the authority to override the clear statutory text." *MacKinnon v. The Financial Times*, 13 OCAHO no. 1316a, 3 (2019) (citing *Mar-Jac Poultry*, 12 OCAHO no. 1298 at 31; *see M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305a, 9 n.11 (2018) ("Flexibility to ignore the statute is not within the [Administrative Law Judge's] discretion.")).

Further, a complainant must establish that she was a "protected individual" *at the time of* the alleged discrimination. *Rainwater v. Doctor's Hospice*, 12 OCAHO no. 1300, 20 (2017); *McNier v. San Francisco State Univ.*, 7 OCAHO no. 947, 411, 417 n. 3 (1997) (noting that the critical date for assessing the relevance of an individual's status under § 1324b is the date of the alleged discrimination and that subsequent status changes are irrelevant); *Pioterek v. Anderson Cleaning Sys., Inc.*, 3 OCAHO no. 590, 1919, 1922–23 (1993) (dismissing a claim for citizenship status discrimination where an individual was not a protected individual at the time of the alleged discrimination but subsequently became a protected individual).

Complainant states that when Respondent hired her in 2013, she was authorized to work in the United States under Optional Practice Training. Complainant's Decl. at 3. She states that she had to terminate her employment with Respondent when her EAD expired and she expected Respondent to rehire her when she obtained her new EAD. *Id.* Complainant further contends that she got married on September 12, 2013, and immediately applied for her EAD when she was eligible, and received her new EAD on December 17, 2013. *Id.* Complainant attached a copy of her EAD for the time period she sought to be rehired. Complainant's Mot. Summ. Dec., Ex. 4. The EAD was valid from December 9, 2013 through December 8, 2014. *Id.* The document states that it is not evidence of U.S. citizenship or permanent residence, and the person identified is authorized to work in the United States for the duration of the card. *Id.*

Complainant claims that Respondent refused to rehire her on four separate occasions based on her citizenship status. She applied for a Registered Nurse position and a Resident Assessment Coordinator (RAC) position on December 26, 2013. She also alleges that she applied for Registered Nurse positions in August 2014 and September 2014. Complainant's Mot. Summ. Dec., Ex. 3. As stated above, Complainant provided evidence of an EAD that was valid from December 2013 to December 2014. The EAD does not show that Complainant was a protected

individual at the time she applied for the two positions on December 26, 2013. *Id*. at Ex. 4. Rather, it shows that she was an applicant for adjustment of status. *Id.*; *see* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, EMPLOYMENT AUTHORIZATION DOCUMENT CODES (Oct. 2018), https://save.uscis.gov/web/media/resourcesContents/EAD_Code_Table.pdf.; *Fakunmoju v. Claims Administration Corp.*, 4 OCAHO no. 624, 308, 320–21 (1994) (an applicant for adjustment of status is not a protected individual).

Further, in her Complaint, Complainant alleges that she was a lawful permanent resident beginning in April 2014. Compl. at 2. However, she did not provide any evidence that she was a lawful permanent resident, or otherwise a protected individual under § 1324b(a)(1)(B), at the time she applied for the August 2014 and September 2014 Registered Nurse positions. The EAD provided only shows that she was an applicant for adjustment of status. As such, Complainant has not shown that she is entitled to summary decision on her citizenship status discrimination claims.

2. Direct Evidence

In an abundance of caution, the Court will, in the alternative, address Complainant's motion. Complainant asserts that she provided direct evidence of discrimination. "Direct evidence requires proof of an existing policy which itself constitutes discrimination or oral or written statements on the part of a defendant showing a discriminatory motivation." *Cuenca v. Univ. of Kansas*, 101 Fed.Appx. 782, 788 (10th Cir. 2004) (internal citations and quotations omitted). "Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1154 (10th Cir. 2008) (quoting *Hall v. U.S. Dept. of Labor*, 476 F.3d 847, 854 (10th Cir. 2007)). Thus, "[d]irect evidence demonstrates on its face that the employment decision was reached for discriminatory reasons." *Danville v. Reg'l Lab Corp*., 292 F.3d 1246, 1249 (10th Cir. 2002). "A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and thus, does not constitute direct evidence." *Vaughn*, 537 F.3d at 1154 (quoting *Hall*, 476 F.3d at 855); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013); *Contreras v. Cascade Fruit, Co.*, 9 OCAHO no. 1090, 11 (2003). The complainant must show that the employer actually relied on the protected characteristic in making its decision. *Tabor*, 703 F.3d at 1216.

"The classic example of direct evidence of discrimination comes from *Trans World Airlines, Inc.* [*v. Thurston*, 469 U.S. 111, 121 (1985)], where the Supreme Court held that an explicit, mandatory age requirement was direct evidence of age discrimination." *Tabor*, 703 F.3d at 1216; *see also Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (an example of direct evidence would be a management memorandum saying, "Fire [plaintiff]–he is too old.") (internal quotation marks and citation omitted).

a. Kirton's Testimony

Complainant cites several lines of deposition testimony given by Respondent's Vice President of Human Resources, Byron Kirton, and argues the cited testimony constitutes direct evidence of discrimination based on citizenship status. Respondent argues that the evidence on which Complainant relies is not direct evidence; it is a few isolated lines from a deposition, and Complainant did not explain the context of the testimony.

The testimony cited by Complainant is as follows:

> Q: I didn't pay attention to detail can be one reason for you for denying my employment opportunity?
>
> A: It was one of four reasons.
> . . . .
>
> Q: You certainly understand that U.S. citizens never have this kind of problem don't you?
> . . . .
>
> A: Citizens don't have to struggle with maintaining a work visa.

Complainant's Mot. Summ. Dec., Ex. 5 at 73–74.

> Q: What is other one?
>
> A: The other one is that there was no lapse in Freeman's ability to work.
>
> Q: For me, I have lapse?
>
> A: Yes.
>
> Q: That's the reason I wasn't to be rehired? Right?
>
> . . . .
>
> A: Again, one of four reasons. Many of those reasons, as I have specified, are far more weighted than this one.

Cross-Mot. Summ. Dec., Ex. 5 at 89–90.

Respondent argues that, when considered in the full context of the deposition, Kirton was discussing one of Respondent's legitimate, nondiscriminatory reasons for its hiring decision—lack of attention to important details. The lapse in Complainant's employment authorization indicated to Respondent that she did not pay attention to important details.

The testimony above does not meet the rigorous direct evidence standard because it requires the Court to draw an inference. Kirton does not state that Respondent did not rehire Complainant because of her citizenship status. Kirton states that Respondent did not hire Complainant because of a lack of attention to detail, as evidenced by the lapse in Complainant's employment authorization. Further, the lack of attention to important details was one of four reasons for not rehiring Complainant, and was weighted less than the other reasons. *Id.* at 90. A review of the full portions of the deposition demonstrates that Kirton was consistent in this explanation. Cross-Mot. Summ. Dec., Ex. 5 at 73, 89–90. Thus, the Court must draw an inference between Respondent's concern about the lack of attention to detail and a citizenship status-based discriminatory motive for not hiring.

Kirton's quoted testimony is also open to multiple interpretations, both discriminatory and benign. Complainant claims that the testimony shows that her citizenship status played "a necessary and undisguisable role" in the decision to not rehire her. Cross-Mot. Summ. Dec. at 8. As Complainant argues, Kirton's testimony could be interpreted as discriminatory in that the lapse in employment authorization would only arise for a non-citizen employee and therefore it was her status that was the true reason. However, Respondent reiterates a benign interpretation: that the lapse in the employment authorization *itself* was not one of its reasons for not rehiring Complainant. Rather, Respondent determined that Complainant did not pay close attention to detail because Respondent thought that the lapse was caused by Complainant's own delay in renewing her employment authorization. Opp. Cross-Mot. Summ. Dec. at 6.

Complainant does not quote the remainder of the testimony on page 74 of Exhibit 5; however, as a *pro se* party, the Court will liberally construe her motion and consider other portions of the testimony attached to her motion. *See Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362, 3 (2020) ("courts generally liberally construe a pro se party's pleadings"). After Complainant asked Kirton if he knew whether U.S. citizens have the problem of obtaining new employment authorization documents, Kirton responded "[i]t's not relevant to a hiring decision." *Id.* at 73. Complainant pressed the issue, and Kirton eventually agreed that when referring to citizens, they "don't have to struggle with maintaining a work visa." *Id.* at 74. Complainant asked whether it was Kirton's opinion that no matter what reason she had, if she couldn't keep her visa active that means she did not pay attention to important things. Ex. 5 at 74. Kirton responded, "I'm saying that was one of the conclusions that we had drawn as a company, Avalon Valley, that played a part in us hiring other candidates." *Id.* Further, when Complainant asked Kirton if he would state that Respondent refused to hire her because she was not authorized to work in the United States, Kirton responded, "no." Cross-Mot. Summ. Dec., Ex. 5 at 89.

This exchange indicates that Complainant's ability to maintain her employment authorization status played a role in the decision not to hire her, but it still requires the Court to draw an inference. Kirton consistently stated that her status was not relevant in and of itself to a hiring decision, but that it was relevant only as an example of Complainant's attention to detail.

b. Kirtons' Email to Complainant

In the Title VII case, the Tenth Circuit also considered an email exchange between Complainant and Kirton in February 2014. In the exchange, Complainant accused Respondent of discrimination in hiring. Kirton responded by email stating:

> [H]e had reviewed Plaintiff's performance appraisal documenting her average performance and communications difficulties, and he concluded that "there is no discrimination occurring but rather as Avalon . . . makes new hire decisions they are selecting applicants that have stronger communication skills and a better ability to collaborate with coworkers." Kirton added that "as a company we were not impressed that you waited so long to renew your visa," which did "not preclude . . . rehire" but raised concern about Plaintiff's "attention to detail in the important matters and did put the facility in a tough spot with the need to replace [her] in the schedule [on] short notice."

Resp't Status Report, Ex. 3 at 5–6.

Statements made on behalf of the company can constitute direct evidence of discrimination. *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1137 (10th Cir. 2000). However, direct evidence involves statements on behalf of the company that reflect a policy of discrimination. *See id.* at 136–37. Kirton's statement in the email that "as a company we were not impressed that you waited so long to renew your visa[,]" but it did "not preclude . . . rehire[,]" does not establish a policy of refusing to hire non-U.S. citizens or otherwise discriminating against potential employees based on citizenship status. Resp't Status Report, Ex. 3 at 5–6. Instead, it shows that Respondent was concerned about the perceived delay in renewing her visa, but that her citizenship status was not a reason to refuse to hire her. *Id.* Thus, at best, the email is also circumstantial evidence of citizenship status discrimination.

The evidence in this case is distinguishable from cases where courts have found the employee presented direct evidence of discrimination. In *Tabor*, the Tenth Circuit considered evidence presented in support of a gender discrimination claim. *Tabor*, 703 F.3d at 1213–15. During an employee's interview, the employer's district manager made multiple comments about her gender, particularly in relation to the position. *Id.* at 1217. Statements included, "it would take more work for [the plaintiff], as a woman, to learn the tools well enough to demonstrate them for customers or she would be 'chewed up and spit out[.]'" *Id.* at 1213. The district manager "also suggested that as a woman, the plaintiff might have some 'advantages' in getting men to talk to her even if they were reluctant to talk to a salesman." *Id*. The court held that the manager's explicitly stated view that women possessed an inferior knowledge of tools and inferior ability to sell tools constituted direct evidence of discrimination. *Id.* at 1217. The court reasoned that the manager expressed discriminatory beliefs about whether members of the plaintiff's protected class were capable of doing the job, the "statements spoke directly to central requirements of the job," and the manager "made them during a discussion about [the plaintiff's] fitness for the position." *Id.*; *see also Cox v. U.S.D. 255*, 428 F.Supp.2d 1171, 1176–77 (D. Kan. 2006) (finding a decision-maker's statement that employee was old and not getting his work done was direct evidence as it was made prior to the employer's decision not to renew the employee's employment).

Unlike in *Tabor*, Complainant's ability to do her job as a non-U.S. citizen was not discussed. Instead, Kirton only discussed the lapse in employment authorization and Respondent's concerns about the lapse in the context of how late Complainant waited to resolve the issue, and the difficulty the company was placed in because of it. While Complainant is correct that a lapse in authorization would only arise in the case of a non-U.S. citizen, a lack of attention to detail that results in harm to the company can arise in any context and is not discriminatory.

In summary, viewing the evidence in the light most favorable to Respondent, the nonmoving party, the evidence presented does not constitute direct evidence of citizenship status discrimination. The statements in Kirton's email do not reflect a policy of refusing to hire non-U.S. citizens. Kirton's testimony requires the Court to infer that Respondent did not rehire Complainant based on her citizenship status, and the testimony also reflects benign reasons for the consideration of Complainant's employment authorization in the hiring decision. Therefore,

Complainant's evidence must be evaluated using the *McDonnell-Douglas* burden-shifting standard. Finally, as discussed above, Complainant has not established that she was a protected individual under § 1324b. As such, Complainant's Cross-Motion for Summary Decision is DENIED.

C. Respondent's Motion for Summary Decision

The Court previously construed Respondent's May 2020 status report as a motion to dismiss, and converted the motion to a motion for summary decision on the citizenship status discrimination and retaliation claims because Respondent relied on evidence outside the pleadings. Respondent argues that the Court should dismiss Complainant's citizenship status discrimination and retaliation claims because they are barred by the doctrine of collateral estoppel. Specifically, Respondent argues that in the Title VII case, the District Court decided the issue of whether Respondent's reasons for not rehiring Complainant were pretextual. Further, Respondent contends that the District Court in the Title VII case also decided the issue of whether Complainant established a prima facie case of retaliation. Respondent argues that collateral estoppel bars a complainant from litigating the same issues that have already been decided in a different forum, and the District Court and Tenth Circuit have already decided the issues related to her retaliation and citizenship status discrimination claims.

Complainant does not mention her retaliation claims in her response. Complainant argues that collateral estoppel does not bar her citizenship status discrimination claim because the issues decided in the Title VII case are different than the issues in this case. Complainant also argues that there has not been a final adjudication on the merits in the Title VII case and she did not get an opportunity to fully litigate her citizenship status discrimination claim in the Title VII case.

"The doctrine of collateral estoppel (issue preclusion) bars a complainant from litigating an issue that has already been decided in a former proceeding." *United States v. Split Rail Fencing*, 11 OCAHO no. 1216, 4 (2014) (citing *Diarrassouba v. Medallion Fin. Corp*., 9 OCAHO no. 1076, 9 (2001)). For collateral estoppel to foreclose an issue in this case, Respondent must show: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits in the prior action; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior action. *Id.* at 5; *Mackentire v. Ricoh Corp.*, 5 OCAHO no. 746, 191, 196 (1995); *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009).

1. Citizenship Status Discrimination

a. Issue Previously Decided

Collateral estoppel applies only where the same issue is involved in the prior and present proceeding. *Mackentire*, 5 OCAHO no. 746 at 196. Respondent argues that in order to establish a citizenship status-based discrimination claim, Complainant must prove that Respondent's reasons for not rehiring her were a pretext for a discriminatory motive. Respondent contends that the District Court found, and the Tenth Circuit affirmed, that Complainant failed to establish

that Respondent's reasons for not rehiring Complainant were pretextual. Further, Respondent contends that even if Complainant could present direct evidence of citizenship status-based discrimination, the District Court and the Tenth Circuit have already found the "judicially established fact that Avalon Valley had honest, *nonpretextual* concerns about—among other things—Zu's documented communication problems, her refusal to mentor nursing students, and her professionalism." Reply at 6. Thus, the reasons for not rehiring Complainant were legitimate, business-related reasons.

Complainant argues that the issues decided in the District Court action were not the same as this action because her District Court case relied on circumstantial evidence, and the District Court found that she could not show that Respondent's legitimate, nondiscriminatory reasons for not rehiring her were pretextual. Nonetheless, Complainant alleges that she can provide direct evidence of citizenship status-based discrimination in this case, so the ALJ will not analyze her claims using the *McDonnell Douglas* burden-shifting standard. Therefore, she contends pretext is not an issue in this case and, thus, the issues decided in the Title VII case are not applicable.

As found above, Complainant's evidence does not constitute direct evidence of citizenship status discrimination; rather, it is circumstantial evidence. *Supra* Part B.2. Therefore, Complainant's citizenship status discrimination claim must be analyzed under the *McDonnell-Douglas* burden-shifting standard. *Id.* Under the *McDonnell-Douglas* framework, the complainant must first establish a prima facie case of discrimination; if the complainant can establish a prima facie case, the burden shifts to the respondent to provide a legitimate, nondiscriminatory reason for the adverse employment action; if the respondent does so, the inference of discrimination raised by the prima facie case disappears unless the complainant establishes that the proffered reason is pretextual. *Mar-Jac Poultry*, 12 OCAHO no. 1298 at 23–24.

Since Complainant's OCAHO claim relies on circumstantial evidence, this case is similar to *Mackentire*, 5 OCAHO no. 746. In *Mackentire*, the complainant filed a charge with the EEOC alleging national origin discrimination and brought a case in federal court under Title VII. *Mackentire*, 5 OCAHO no. 746 at 191. The complainant relied on circumstantial evidence, and the District Court found that the respondent had legitimate, nondiscriminatory reasons for terminating the complainant. *Id.* at 191–92. While the District Court case was ongoing, Complainant also brought a citizenship status discrimination claim with OCAHO. *Id.* at 192. The respondent filed a motion for summary decision arguing that the complainant's OCAHO claims were barred by collateral estoppel. *Id.* at 193. The ALJ found that the issues in the District Court case and the OCAHO case were identical. *Id.* at 198. Despite the differences between national origin and citizenship status causes of action, the complainant relied on circumstantial evidence to establish national origin discrimination in District Court and citizenship status discrimination before OCAHO. *Id.* at 197. The ALJ explained that the District Court found that the respondent articulated a valid non-discriminatory reason for terminating the complainant, and that the complainant failed to establish the fourth element of a prima facie case. *Id.* at 198. Thus, the complainant's citizenship status discrimination claim was barred by collateral estoppel. *Id.* at 199.

Here, Complainant relied on circumstantial evidence to establish her national origin discrimination claim in the Title VII action. The District Court found, and the Tenth Circuit

affirmed, that Respondent articulated several legitimate, nondiscriminatory reasons for not rehiring Complainant. Status Report, Ex. 2 at 3–10. Specifically, the District Court found that Respondent articulated four legitimate, nondiscriminatory reasons: Complainant had communication difficulties, she refused to mentor students, her qualifications and lack of professionalism. *Id.*; Status Report, Ex. 3 at 9–23. Additionally, the District Court found that Complainant did not present sufficient evidence to prove that Respondent "did not genuinely believe its proffered reasons for not hiring Ms. Zu." Status Report. Ex. 2 at 3; *see* Status Report, Ex. 3 at 9–23. Thus, the issues related to Respondent's reasons for not rehiring Complainant and pretext were conclusively decided in the Title VII action.

Complainant's OCAHO claims are based on the same facts as her Title VII claim. Respondent asserts the same reasons for not rehiring Complainant in both the Title VII and OCAHO cases. *See* Status Report at 9–10. Similar to *Mackentire*, even though her OCAHO citizenship status discrimination claim is not identical to her Title VII national origin discrimination claim, the District Court already found that Respondent presented legitimate, nondiscriminatory reasons for not rehiring Complainant and found that Complainant did not prove that Respondent's reasons were pretextual. Because the Court would analyze Complainant's citizenship status discrimination claim under the same framework as her Title VII case, the same issues are central to the decision in this action. As such, the issues related to Respondent's nondiscriminatory reasons and pretext in the OCAHO case are identical to the issues decided in the Title VII case.

b. Final Adjudication on the Merits

Respondent argues that the District Court's decision granting summary judgment in favor of Respondent on Complainant's national origin claim is a final adjudication on the merits. Furthermore, the Tenth Circuit affirmed the District Court's decision and denied Complainant's petition for panel rehearing or rehearing *en banc*. Resp't Reply to Mot. Summ. Dec., Ex. 1. Complainant contends that there has not been a final adjudication on the merits because she plans to file a petition for writ of certiorari with the Supreme Court, so she is still appealing the District Court's decision.

Federal courts have found that the pendency of an appeal does not deprive a final judgment of preclusive effect. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013); *Fid. Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) (per curium); *Wilson v. Fullwood*, 772 F.Supp.2d 246, 262 (D. D.C. 2011); *Joseph v. Linehaul Logistics, Inc.*, 291 F.R.D. 511, 514–15 (D. Mont. 2013); *see also* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4427 (3d ed. 2020) ("Once a trial court has entered judgment at the close of its own proceedings, failure to take an available appeal does not defeat res judicata.").

The District Court granted summary judgment on all of Complainant's claims on September 20, 2018. Resp't Status Report, Ex. 2 at 13–14. On appeal, the Tenth Circuit affirmed the District Court's decision on March 23, 2020. Resp't Status Report, Ex. 3. Complainant then filed a petition for panel rehearing and rehearing *en banc*. Resp't Reply, Ex. 1. The Tenth Circuit denied the petitions for rehearing on June 23, 2020. *Id.* While Complainant claims that she

intends to file a petition for writ of certiorari with the Supreme Court, the undersigned finds that based on the procedural history of the Title VII case, there is a final adjudication on the merits.

c. Privity of Parties

The party against whom collateral estoppel is asserted must be the same party or in privity with a party to the prior adjudication. *Mackentire*, 5 OCAHO no. 746 at 198. Respondent asserts collateral estoppel against Complainant and Complainant was the plaintiff in the District Court action. As such, Complainant was a party to the prior action.

d. Full and Fair Opportunity to Litigate

Respondent argues that Complainant had a full and fair opportunity to litigate her claims in District Court as she chose the forum and had all of the tools of discovery provided in the Federal Rules of Civil Procedure. Respondent contends that in the District Court case, Complainant propounded many discovery requests, conducted several depositions, and filed over a dozen discovery motions.

Complainant argues that she did not have a full and fair opportunity to litigate the issues regarding her citizenship status-based discrimination claim because she did not get full discovery for her citizenship status discrimination claims in the prior case. Nonetheless, Complainant argues she has direct evidence of citizenship status discrimination, relying on statements made in a deposition she took in the previous case. She has not identified what other discovery she would seek. As such, Complainant did not show that she lacked a full and fair opportunity to litigate her claims at the District Court

The Court finds that the issues in this case are identical to the issues decided in the Title VII case, the parties are identical to the parties in the Title VII case, Complainant had a full and fair opportunity to litigate her claims in the Title VII case, and there has been a final adjudication on the merits in the Title VII case. Thus, Respondent established that collateral estoppel bars Complainant's citizenship status discrimination claim. As such, Respondent's Motion for Summary Decision on the citizenship status discrimination claim is GRANTED and Complainant's citizenship status claim is DISMISSED.

2. Retaliation

Respondent also contends that Complainant's retaliation claim is barred by collateral estoppel. Respondent alleges that Complainant asserted a retaliation claim under Title VII based on the same set of facts as her OCAHO retaliation claim. Respondent asserts that the District Court found, and the Tenth Circuit affirmed, that Complainant did not establish a prima facie case or show that Respondent's legitimate, nondiscriminatory reasons were pretextual. In her response, Complainant did not address her OCAHO retaliation claim.

In her OCAHO complaint, Complainant alleges that Respondent retaliated against her because she filed a discrimination complaint by providing her potential employers with unfavorable job references or by refusing to provide a reference. Compl. at 6. In her District Court complaint,

Complainant alleged that Respondent refused to provide a reference or provided an unfavorable job reference to employers because she engaged in activities protected by Title VII. Resp't Status Report, Ex. 1 at 11. The Magistrate Judge's Report and Recommendation denied Respondent's summary judgment motion on the retaliation claim. Resp't Status Report, Ex. 2 at 1. The District Court reviewed the Magistrate Judge's Report and Recommendation, rejected the Magistrate Judge's recommendation to deny summary judgment on the retaliation claim, and found that Complainant did not make a prima facie case of retaliation or show that Respondent's reasons were pretextual. *Id.* at 10–11.

To establish a prima facie claim for retaliation, a complainant must provide evidence: "(1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 998 (10th Cir. 2011) (quoting *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008)); *see Crespo v. Famsa, Inc.*, 13 OCAHO no. 1337, 4 (2019). The District Court found that Complainant did not show that a reasonable employee would have found the challenged action materially adverse. Resp't Status Report at 11–13. To establish a prima facie claim of retaliation before OCAHO, Complainant must establish the same element. *Twigg*, 659 F,3d at 998; *Crespo*, 13 OCAHO no. 1337 at 4. Since the District Court already found that she did not establish that element of her prima facie case and, therefore, did not establish a retaliation claim, that issue has already been decided. As discussed above, the four other elements of collateral estoppel are met and the District Court has already found that Complainant did not establish a reasonable employee would have found the challenged action materially adverse. Therefore, Complainant's retaliation claim under § 1324b is barred by collateral estoppel. As such, Complainant's retaliation claim is DISMISSED.

IV. CONCLUSION

Respondent's Motion for Leave to file a Reply to its Motion for Summary Decision is GRANTED. Complainant's Motion for Leave to File a Reply in Support of her Cross-Motion for Summary Decision is GRANTED. The Court finds that OCAHO lacks subject matter jurisdiction to hear Complainant's national origin discrimination claim because Complainant did not establish that Respondent has less than fourteen employees and Complainant previously filed a charge with the EEOC alleging national origin discrimination under Title VII based on the same set of facts. Respondent's Motion to Dismiss regarding Complainant's national origin discrimination claim is GRANTED and Complainant's national origin discrimination claim is DISMISSED.

Complainant did not establish that she was a protected individual under § 1324b at the time of the alleged discrimination. Additionally, the evidence Complainant presented did not constitute direct evidence, and instead was circumstantial evidence. Thus, Complainant's Motion for Summary Decision on her citizenship status claim is DENIED. Collateral estoppel bars Complainant's citizenship status discrimination and retaliation claims because the issues related to Respondent's reasons for not rehiring Complainant and pretext were already conclusively decided in Complainant's Title VII action. Thus, Respondent's Motion for Summary Decision

related to citizenship status discrimination and retaliation is GRANTED and Complainant's claims are DISMISSED. As such, the Complaint is DISMISSED.

V. FINDINGS OF FACT AND CONLUSIONS OF LAW

A. Findings of Fact

1. Avalon Valley Rehabilitation Center hired Li Zu in 2013.

2. At the time Avalon Valley Rehabilitation Center hired Li Zu in 2013, she was authorized to work in the United States under Optional Practice Training.

3. Avalon Valley Rehabilitation Center employs more than 14 individuals.

4. Li Zu voluntarily terminated her employment with Avalon Valley Rehabilitation Center in November 2013 when her employment authorization expired.

5. Li Zu obtained a new employment authorization document, which authorized her to work in the United States from December 9, 2013 to December 8, 2014.

6. On December 26, 2013, Li Zu applied for a Registered Nurse position and a Resident Assessment Coordinator position with Avalon Valley Rehabilitation Center.

7. Li Zu was an applicant for lawful permanent residence when she applied for the Registered Nurse position and Resident Assessment Coordinator position in December 2013.

8. Complainant previously filed a charge with the Equal Employment Opportunity Commission alleging national origin discrimination under Title VII based on the same set of facts, and the U.S. District Court for the District of Utah and the Tenth Circuit Court of Appeals found that Complainant could not establish a claim for national origin discrimination against Avalon Valley Rehabilitation Center.

9. The U.S. District Court for the District Court of Utah found, and the Tenth Circuit Court of Appeals affirmed, that Avalon Valley Rehabilitation Center articulated several legitimate, nondiscriminatory reasons for not rehiring Li Zu.

10. The U.S. District Court for the District Court of Utah found, and the Tenth Circuit Court of Appeals affirmed, that Li Zu did not establish that Avalon Valley Rehabilitation Center's articulated reasons were pretextual.

11. The issues regarding Avalon Valley Rehabilitation Center's legitimate, nondiscriminantory reasons for not rehiring Li Zu and whether those reasons were pretextual for discrimination are identical to the issues decided in her Title VII case.

12. The parties in this action were parties in the Title VII action.

13. The District Court found that Li Zu did not establish a prima facie case of retaliation because Li Zu did not show that a reasonable employee would have found the challenged action materially adverse.

B. Conclusions of Law

1. "OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted." *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 2 (2020) (quoting *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016)).

2. Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).

3. The party seeking summary decision assumes the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997). In determining whether the moving party has met its burden of proof, all evidence and reasonable inferences are drawn in favor of the nonmoving party. *United States v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997).

4. When both parties move for summary judgment, the Court must analyze each motion individually and on its own merits. *See Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979).

5. Because OCAHO only has jurisdiction to hear national origin discrimination claims against employers who employ between four and fourteen employees, OCAHO does not have jurisdiction over Complainant's national origin discrimination claim. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020).

6. Because OCAHO is barred from hearing discrimination claims based on national origin when the Equal Employment Opportunity Commission has exercised jurisdiction over the claim, OCAHO does not have jurisdiction over Complainant's national origin discrimination claim. 8 U.S.C. § 1324b(b)(2); *Guth v. Kaiser Permanente Haw Ah*, 10 OCAHO no. 1190, 3 (2013).

7. A person or entity is prohibited from discriminating against a "protected individual" with respect to hiring for employment or discharge from employment based on the individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B); *see MacKinnon v. The Financial Times*, 13 OCAHO no. 1316, 2 (2019).

8. As a "protected individual" is defined as a United States citizen or national, a lawful permanent resident, an alien lawfully admitted for temporary residence under 8 U.S.C. §§ 1160(a) or 1255a(a)(1), a refugee, or an asylee. 8 U.S.C. § 1324b(a)(3), Respondent was not a "protected individual" when she applied for the positions in December 2013, and she did not establish that she was a "protected individual" when she applied for the positions in 2014.

9. Direct evidence of discrimination "requires proof of an existing policy which itself constitutes discrimination or oral or written statements on the part of a defendant showing a discriminatory motivation." *Cuenca v. Univ. of Kansas*, 101 Fed.Appx. 782, 788 (10th Cir. 2004).

10. "Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1154 (10th Cir. 2008) (quoting *Hall v. U.S. Dept. of Labor*, 476 F.3d 847, 854 (10th Cir. 2007)).

11. "A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and thus, does not constitute direct evidence." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1154 (10th Cir. 2008).

12. The deposition testimony of Byron Kirton does not meet the direct evidence standard because it requires the Court to draw an inference and it is open to multiple interpretations. *See Vaughn v. Epworth Villa*, 537 F.3d 1147, 1154 (10th Cir. 2008).

13. Byron Kirton's statements made in an email to Complainant do not constitute direct evidence of citizenship status discrimination because the statements do not reflect a policy of refusing to hire non-U.S. citizens. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1137 (10th Cir. 2000).

14. Li Zu did not present direct evidence of citizenship status discrimination. Rather, her evidence constituted circumstantial evidence, which would be analyzed using the *McDonnell-Douglas* burden-shifting standard. *See United States v. Mar-Jac Poultry*, 12 OCAHO no. 1298, 23 (2017).

15. To establish a discrimination claim based on circumstantial evidence, under the *McDonnell Douglas* framework, the complainant must first establish a prima facie case of discrimination; if the complainant can establish a prima facie case, the burden shifts to the respondent to provide a legitimate, nondiscriminatory reason for the adverse employment action; if the respondent does so, the inference of discrimination raised by the prima facie case disappears unless the complainant establishes that the proffered reason is pretextual. *United States v. Mar-Jac Poultry*, 12 OCAHO no. 1298, 23–24 (2017).

16. "The doctrine of collateral estoppel (issue preclusion) bars a complainant from litigating an issue that has already been decided in a former proceeding." *United States v. Split Rail Fencing*, 11 OCAHO no. 1216, 4 (2014) (citing *Diarrassouba v. Medallion Fin. Corp*., 9 OCAHO no. 1076, 9 (2001)).

17. For collateral estoppel to foreclose an issue, the party asserting collateral estoppel must show: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits in the prior action; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior action. *United States v. Split Rail Fencing*, 11 OCAHO no. 1216, 4 (2014).

18. The Tenth Circuit's affirmance of the District Court's grant of summary judgment for Avalon Valley Rehabilitation Center, as well as the Tenth Circuit's denial of petitions for rehearing, constitute a final decision on the merits. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013); *Fid. Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) (per curium); *Wilson v. Fullwood*, 772 F.Supp.2d 246, 262 (D. D.C. 2011); *Joseph v. Linehaul Logistics, Inc.*, 291 F.R.D. 511, 514–15 (D. Mont. 2013).

19. Collateral estoppel bars Li Zu's citizenship status claim under 8 U.S.C. § 1324b.

20. Collateral estoppel bars Li Zu's retaliation claim under 8 U.S.C. § 1324b(a)(5).

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

SO ORDERED.

Dated and entered on October 1, 2020.

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Jean C. King
Chief 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.