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

June 2, 2021

UNITED STATES OF AMERICA, Complainant, v. FACEBOOK, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2021B00007

ORDER DENYING MOTION TO DISMISS

I. INTRODUCTION AND PROCEDURAL HISTORY

On December 3, 2020, Complainant, the United States, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Facebook, Inc. (Facebook), violated 8 U.S.C. § 1324b by discriminating against "U.S. workers" in its hiring and recruiting practices related to positions it earmarked for the permanent labor certification (PERM) process between January 1, 2018 and September 18, 2019.[1]

On December 28, 2020, Respondent requested an extension to file an answer and a motion to dismiss. The Court granted this extension request on January 4, 2021. Pursuant to the request for an extension, the Court also provided Complainant until March 30, 2021 to file its response to the motion to dismiss.

On February 18, 2021, Respondent filed a Notice of Respondent Facebook, Inc.'s Motion to Dismiss the Complaint with a corresponding Memorandum of Law in Support of the aforementioned motion.[2]

On March 30, 2021, Complainant filed United States' Opposition to Facebook's Motion to Dismiss (Opposition).

[1] Complainant relies upon both 8 U.S.C. § 1324b(a)(3) and 20 C.F.R. § 656.3 to define "U.S. workers." Compl. 3, 5.

[2] Citations to Motion to Dismiss are made with reference to the Memorandum of Law in Support of Respondent Facebook, Inc.'s Motion to Dismiss the Complaint.

On April 9, 2021, Respondent filed a Reply Memorandum of Law in Further Support of Respondent Facebook, Inc.'s Motion to Dismiss the Complaint (Reply).[3]

On April 19, 2021, Complainant filed United States' Sur-Reply in Opposition to Facebook's Motion to Dismiss (Sur-Reply).[4]

The matter is now ripe for resolution.

II. PARTIES' POSITIONS

A. Motion to Dismiss

Respondent argues this case should be dismissed based on two theories: lack of subject matter jurisdiction and failure to state a claim. Mot. Dismiss 1–2.

Respondent notes the PERM process is administered by the Department of Labor (DOL) which "has exclusive authority to enforce, interpret, or modify the PERM regulations." *Id.* at 1. Therefore, Respondent asserts that this Court lacks subject matter jurisdiction over the claims. *Id.* at 7–9.

Alternatively, Respondent argues that the Complaint failed to state a claim upon which relief can be granted because "the DOJ's claim that an employer's good-faith PERM recruitment process must closely resemble its normal recruitment process is baseless." *Id.* at 9. Respondent's contends that there is no legal requirement that the PERM recruitment process be similar to their normal recruitment process and thus "the Complaint fails to present any competent evidence adequate to show that Facebook, in violation of 8 U.S.C. § 1324b, regularly and purposefully treated U.S. workers less favorably than temporary foreign workers as a standard operating procedure." *Id.* at 11.

Specific to Count II (Pattern or Practice of Failing to Consider U.S. Workers), Respondent argues that the PERM regulations do not require an employer "to consider U.S. workers for employment, but only to perform a test of the labor market to determine whether there are available, able, and willing U.S. applicants who are minimally qualified for the PERM position." *Id.* at 15. Similarly, Respondent claims Count III (Pattern or Practice of Failing to Hire U.S. Workers) should be dismissed because "the PERM regulations contain no requirement that . . . U.S. workers actually be hired" after inspecting the U.S. labor market. *Id.* at 16.

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[3] Pursuant to 28 C.F.R. § 68.11(b), the Court granted Respondent leave to file its Reply Brief In Further Support of its Motion to Dismiss on April 5, 2021.

[4] Pursuant to 28 C.F.R. § 68.11(b), the Court granted Complainant leave to file its Sur-Reply in Opposition to Facebook's Motion to Dismiss on April 13, 2021.

B. Opposition

In its Opposition, Complainant rejects Respondent's assertion that the Complaint is an attempt to litigate the PERM process or create additional duties and obligations within the PERM process. Opp'n 1. Instead, Complainant asserts the Court "has exclusive jurisdiction over the United States' claims, as 8 U.S.C. § 1324b is the sole basis for liability in the Complaint." *Id.* Complainant characterizes the PERM statute, 8 U.S.C. § 1182(a)(5)(A), and PERM regulations, 20 C.F.R. § 656, as a "part of the factual backdrop" of the litigation; "this Court need not adjudicate Facebook's compliance with the requirements of the PERM rules to determine whether Facebook violated § 1324b while navigating the perm process." Opp'n 12, 14. Complainant cites a prior OCAHO case in which an administrative law judge (ALJ) "found that the respondent violated § 1324b when it preselected a candidate for a position in connection with a permanent labor certification application and failed. [sic] to consider or hire qualified U.S. workers." Opp'n 11 (citing *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 694–95 (1997)).[5]

Complainant asserts that it meets the "minimal pleading requirements," and that it has stated a claim upon which relief can be granted. *Id.* at 1. Complainant explains that "[t]his case is about [Respondent's] intentional discrimination against workers based on their citizenship or immigration status when recruiting for and filling certain positions." *Id.* at 2. Complainant defends the contents of its Complaint as sufficient, noting it has identified a protected class of individuals (U.S. workers), who were treated differently because of their citizenship or immigration" status. *Id.* at 16–17. Complainant concludes it pled sufficient facts to raise an inference of discrimination. *Id.* at 15.

C. Reply

In its Reply following Complainant's Opposition, Respondent notes that:

> Congress delegated to the DOL matters relating to the protections of American labor, including specifically authorizing the DOL to protect "American labor against an influx of aliens entering the United States for the purposes of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter the country." H.R. Rep. No. 1365, 82d Cong. Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1705."

Reply 1.

[5] 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.

Respondent distinguishes *Iron Workers* from the instant case because in *Iron Workers*, the employer hired an undocumented worker and filed a PERM application that was ultimately rejected. Reply 4. Moreover, Respondent argues that the ALJ in *Iron Workers* gave "substantial weight" to the DOL's findings adverse to the employer. Reply 8. Additionally, Respondent cites *Hassanali v. Attorney General*, 599 F. Supp 189, 195–96 (D.D.C. 1984), as an instance in which an agency, the Immigration and Naturalization Service (INS), "overstepped its bounds and purported to act in an area which lies exclusively with the Secretary of Labor." Reply 5.

Respondent also claims that Complainant failed to demonstrate in its filings that one federal agency can "overrule the decision of another agency on a question that Congress expressly delegated to the latter agency." Reply 5. Finally, Respondent argues that, as to its assertion of failure to state a claim upon which relief can be granted, Complainant has not raised an inference of discrimination, noting that the hiring practices are distinguishable from those in the cases upon which Complainant relied. Reply 6. Respondent notes its hiring practices are not "secretive and subjective[;]" rather their hiring and recruiting practices were in conformity with DOL's PERM regulations. Reply p. 6–7.

D. Sur-Reply

In its Sur-Reply following Respondent's Reply, Complainant argues that "[c]ontrary to Facebook's assertions, determining whether [Respondent's] recruitment and hiring pursuant to the PERM process violate § 1324b does not require the Court to review, much less overrule, the [DOL's] approval of Facebook's PERM applications." Sur-Reply 1–2.

Complainant distinguishes the cases Respondent utilized in its Reply pertaining to the INA, noting those cases relate to admissibility and not anti-discrimination. Sur-Reply 3–4. Complainant recognizes the limits of the then-INS with respect to rendering determinations on labor certifications; however, Complainant asserts it "makes no such attempt to invalidate Facebook's approved PERM applications." Sur-Reply 4.

Finally, Complainant contests Respondent's interpretation of *Iron Workers*. Sur-Reply 5. Complainant clarified that the ALJ in *Iron Workers* determined it had "subject-matter jurisdiction over hiring and recruiting discrimination claims that occur in the context of a permanent labor certification process, and DOL's prior decision regarding the validity of the permanent labor certification did not affect that jurisdiction." Sur-Reply 6. In addition, Complainant cites another instance in which an OCAHO ALJ properly exercised jurisdiction within the context of a different labor certification process. *Id.* (citing *United States v. Estopy Farms*, 11 OCAHO no. 1252 (2015)).

III. LEGAL STANDARDS

A. Subject Matter Jurisdiction

"OCAHO is a forum of limited jurisdiction[,]" and thus can only hear cases within the jurisdiction that Congress had prescribed. *Patel v. USCIS Boston*, 14 OCAHO no. 1353, 3 (2020) (quoting *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO no. 919, 1167, 1173 (1997)). Subject matter jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case[.]" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)).

"The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, contain no specific provision authorizing motions to dismiss for lack of subject-matter jurisdiction." *Wong-Opasi v. Sundquist*, 8 OCAHO no. 1054, 830, 833 (2000). Nevertheless, the regulations permit the Court to utilize the Federal Rules of Civil Procedure as a general guideline. *Id.* (citing 28 C.F.R. § 68.1). According to Federal Rule of Civil Procedure 12(h)(3), "if the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."

B. Failure to State a Claim Upon Which Relief Can Be Granted

Pursuant to 28 C.F.R. § 68.10(b), the ALJ "may dismiss the complaint, based on a motion by the respondent or without a motion from the respondent, if the [ALJ] determines that the complaint has failed to state a claim upon which relief can be granted."

The bar for pleadings in this forum is low. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8–10 (2012). OCAHO's rules do not "require that a complainant plead a prima facie case to pursue a claim under 8 U.S.C. § 1324b." *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016) (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002)). A complainant need only plead "sufficient minimal allegations to satisfy [28 C.F.R.] § 68.7(b)(3) [that] give rise to an inference of discrimination." *Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379, 5 (2020) (citing *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016)).

A complaint "must plead facts that reasonably suggest a nexus between" the decision not to hire the complainant and the complainant's protected status. *Montalvo v. Kering America Inc.*, 14 OCAHO no. 1350, 5 (2020) (citing *Kelly Legal Services*, 12 OCAHO no. 1282 at 9). A complaint wherein a respondent declined to hire the complainant because of his citizenship status (U.S. citizen), "due to its preference for hiring foreign workers who have H-1B visas" was sufficient to survive a motion to dismiss, especially in light of the forum's "liberal pleading standards[.]" *Montalvo*, 14 OCAHO no. 1350 at 5.

When examining a motion to dismiss under this theory, the Court should view the complaint in the light most favorable to the complainant. *Brown*, 14 OCAHO no. 1379 at 2 (citing *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990)). "The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor." *Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 4 (2017) (citing *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994)).

IV. DISCUSSION AND ANALYSIS

A. The Court Has Subject Matter Jurisdiction Over the Allegations in the Complaint

"[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *United States v. Cotton,* 535 U.S. 625, 630 (2002)). Indeed, "courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction[.]" *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (citing *Arbaugh*, 546 U.S. at 514).

OCAHO is a forum of limited jurisdiction, and an analysis of subject matter jurisdiction must necessarily begin with the text and construction of the statute, which sets forth what Congress has directed this Court to adjudicate, and conversely and what is outside the scope of this Court's jurisdictional ambit.[6] *See Ogunrinu v. Law Resources*, 13 OCAHO no. 1332g, 4 (2020) (quoting *Wilson*, 6 OCAHO no. 919 at 1173). In assessing jurisdictional arguments, the Supreme Court has explained that "Congress, of course, need not use magic words in order to speak clearly on [the point of jurisdiction]. 'Context is . . . relevant.'" *Henderson*, 562 U.S. at 435 (quoting *Reed Elsevier, Inc.*, 559 U.S. at 168). Courts can look to the location of information within a statute to divine context and intent. *See Henderson*, 562 U.S. at 439–40.[7]

Section 1324b proscribes "unfair immigration-related employment practices." Congress specified that "[i]t is an unfair immigration-related employment practice for a[n] entity to discriminate against any [protected] individual . . . with respect to the hiring or recruitment of the individual for employment . . . because of such individual's citizenship status." §1324b(a)(1)(B).

After explaining the covered employment actions, Congress immediately provided additional guidance to the Court by way of "exceptions" in the very next subsection. § 1324b(a)(2). First, Congress excluded small businesses with "three or fewer employees."[8] § 1324b(a)(2)(A). Next, Congress excluded a subset of discrimination complaints which could be pursued under section

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[6] *See also* Jonathan T. Molot, *Re-examining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1251–52 (2002). "The legitimacy of judicial power over statutory interpretation has long been thought to flow from [the] assumption that judges would implement Congress' decisions."

[7] In concluding that a timeliness requirement within the Veterans' Judicial Review Act (VJRA) was non-jurisdictional, the Supreme Court noted that Congress placed the timeliness requirement in a section entitled "Procedure" and not in a section entitled "Organization and Jurisdiction[.]" *Henderson*, 562 U.S. at 439. Further, the Supreme Court noted language in VJRA that provided guidance on the "scope" of what before the Veterans Court (an Article I tribunal) is jurisdictional. *Id.*

[8] This numerical limit is distinct from the statutory structure of Title VII as analyzed in *Arbaugh* because, in Title VII, the employee "numerosity" requirement appears in a separate definition section. 546 U.S. at 515. The Supreme Court noted that the placement of requirements within a statute is probative of Congressional intent. *Henderson*, 562 U.S. at 440.

703 of the Civil Rights Act of 1964. § 1324b(a)(2)(B). Finally, Congress excluded citizenship discrimination claims when the action at issue is "required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government."[9] § 1324b(a)(2)(C).

The exceptions at § 1324b(a)(2) are substantive in nature as they provide the contours of the statute's reach. *See Reed Elsevier, Inc*., 559 U.S. at 166 (citations omitted) ("[T]he jurisdictional analysis must focus on the 'legal character of the requirement,' . . . which we discerned by looking to the condition's text, context, and relevant historical treatment.").[10]

The exceptions at § 1324b(a)(2) are jurisdictional as they limit the scope of cases properly before an OCAHO ALJ. *See Henderson*, 562 U.S. at 435 (warning against labeling a rule as jurisdictional "unless it governs a court's adjudicatory capacity"). *See generally Arbaugh*, 546 U.S. at 516 ("When Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). [11]

Prior OCAHO ALJs have also considered the exceptions at § 1324b(a)(2) as jurisdictional. *See Hammoudah v Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1015, 254, 258 (1998) (citations omitted); *Parkin-Forrest v. Veterans Admin.*, 3 OCAHO no. 516, 1115, 1118–19

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[9] Notably, Respondent does not raise this exception as an argument for dismissing the Complaint. As Complainant indicates, "Facebook could not escape § 1324b liability by demonstrating that PERM rules permit its conduct because § 1324b excuses discrimination that is required by law, not permitted." Opp'n 22. Exempted from the prohibition of unfair immigration-related discrimination is "discrimination because of citizenship status which is otherwise *required* in order to comply with law, regulation, or executive order[.]" § 1324b(a)(2)(3) (emphasis added). The PERM process is not required by law, rather it is an elective process.

[10] The Supreme Court differentiates "claim-processing rules" from jurisdictional conditions. *Henderson*, 562 U.S. at 435; *see also Bowles v. Russell*, 551 U.S. 205, 210 (2011). Claim-processing requirements, such as timeliness, "are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 428. "A statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Reed Elsevier, Inc.*, 559 U.S. at 166 (quoting *Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 395 (1982)). The exceptions listed in § 1324b(a)(2) are neither claim-processing rules nor conditions precedent.

[11] For example, in *Arbaugh*, the issue presented was whether employee numerosity concerns subject-matter jurisdiction or the merits of the claim. 645 U.S. at 510. The Supreme Court held that employee numerosity, which Congress placed in the definition section of the statute, was not jurisdictional in nature. *Id.* at 516. The Supreme Court also noted the "Americans with Disabilities Act of 1990's employee-numerosity requirement, 42 U.S.C. § 12111(5)(A), resembling Title VII's requirement, is not jurisdictional." *Id* at 510.

(1993) (citations omitted); *United States v. Marcel Watch Corp.*, 1 OCAHO no. 143, 988, 999 (1990); *Mikhailine v. Web SCI Techs., Inc.*, 8 OCAHO no. 1033, 513, 514 (1999) (citations omitted); *Adame v. Dunkin Donuts*, 4 OCAHO no. 691, 904, 906–07 (1994).

Satisfied that this is precisely the location in the statute at which Congress would provide clear instructions to the Court as to what is beyond its jurisdiction, the Court notes that there is no fourth exception involving the Department of Labor or the permanent labor certification process in 8 U.S.C. § 1324b(a)(2).

As Respondent itself notes, "it is clear that Congress includes requirements when 'it considers it appropriate to do so' and that the 'omission of . . . such requirements' is deliberate." Mot. Dismiss 17 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993)); *see Russello v. United States*, 464 U.S. 16, 23 (1983). The Court is not inclined to presume such an exception into existence, as judicially practiced statutory interpretation "should respect legislative supremacy[.]" Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 Loy. U. Chi. L.J. 639, 692 (2000) (citing Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 Case W. Res. L. Rev. 1129, 1132 (1992)); *see* John F. Manning, *Without Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2413, 2425 (2017); *see also* Valerie C. Brannon, Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends 54 (2d ed. 2018) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)) (defining casus omissus as "[a] matter not covered by a statute should be treated as intentionally omitted[.]").

To the extent Respondent has framed the issue at hand as a referendum on its DOL PERM process and whether the PERM process imposes certain obligations on employers, the Court will defer to the Department of Labor.[12] To the extent Complainant seeks to demonstrate that Respondent has engaged in an unfair immigration-related employment practices as proscribed in 8 U.S.C. § 1324b, the Court has and will exercise exclusive subject matter jurisdiction. *Hsieh v. PMC – Sierra, Inc.*, 9 OCAHO no. 1083, 3 (2002).

For the reasons outlined above, the Court has subject matter jurisdiction over the Complaint.

B. The Complaint Meets the Low Pleading Standard in this Forum

As noted above, the Complaint has identified a protected group, "U.S. workers," that allegedly experienced disparate treatment in the recruiting and hiring practices of Respondent based on their citizenship or immigration status. Compl. 2. The Complaint asserts this disparate treatment

[12] Respondent is correct in its assertion that adjudicating compliance or lack thereof with a DOL process is outside the scope of this forum. While the PERM process and adherence to DOL regulations may prove relevant in this forum, compliance with DOL regulations does not, in and of itself, eliminate the possibility of an employer acting in a discriminatory manner in violation of § 1324b. *Cf. Smiley v. City of Philadelphia*, 7 OCAHO no. 925, 15, 35 (1997) (noting that obligations imposed by the Internal Revenue Commission are independent of obligations imposed under § 1324b). Conversely, failing to follow DOL regulations does not create a per se presumption of citizenship discrimination.

was intentional and to the detriment of the protected individuals. *Id.* The Complaint describes a scheme of set-asides of certain positions for only temporary visa holders and ineffective methods of recruitment designed to solicit minimal, if any, response from individuals outside the targeted group of temporary visa holders. Compl. 2–3; Opp'n 2. The Complaint also alleges that to the extent U.S. workers could be in contention for these positions, they are "not considered" because of their citizenship status. Compl. 2; Opp'n 6.

In totality, the Complaint raises an inference of discrimination as the Complaint contains facts which "reasonably suggest a nexus between Respondent's decision[s]" related to divergent recruitment tactics and the citizenship status of affected U.S. workers. *Montalvo*, 14 OCAHO no. 1350 at 5 (2020) (citing *Kelly Legal Services*, 12 OCAHO no. 1282 at 9). As the Court has previously held, allegations of manipulating the hiring practice to disqualify individuals based on citizenship, meet the legal standard in this forum for stating a claim upon which relief can be granted. *See Montalvo*, 14 OCAHO no. 1350 at 5.

For the reasons outlined above, the Court finds the Complaint states a claim upon which relief can be granted.

V. CONCLUSION

Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Dated and entered on June 2, 2021.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge