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

ROBERT HEATH, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00072
ASTA CRS, INC., Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTIONS TO APPROVE SUBPOENAS

I. PROCEDURAL HISTORY

On May 16, 2021, Complainant Robert Heath filed four motions to approve subpoenas to four different entities, Anthem, Capital One, Fannie Mae, and Merck, that he claims are clients of Respondent, ASTA CRS, Inc. Heath seeks responses to interrogatories and requests for production of documents that he propounds within the subpoenas.

On July 8, 2021, the Court issued an Order to Show Cause Regarding Subpoenas (OTSC) directing Complainant to "show cause as to why the requested subpoenas are relevant and not overbroad." OTSC 3. The Court explained its concerns with the potential overbreadth of the requested subpoenas:

> Complainant's subpoenas appear to demand information well beyond the scope of the complaint. As a foundational matter, it is also unclear whether the employers named in the subpoenas have any relation to the job vacancy at issue in this litigation. Moreover, Complainant's demand for documents pertaining to "the technical requirements for [Respondent's] consultants that will work at any [of the subpoenaed entity's] facility for the years 2019 and 2020" appears to not only cover positions that predated Complainant's application, but also positions that arose after his application. It is also unclear how the LCAs[1] relate to Complainant's allegations of nonselection due to his national origin and citizenship status.

[1] As Complainant described it in his previous submission to the Court, a Labor Condition Application, or LCA, is a document filed with the U.S. Department of Labor by prospective employers related to the temporary hiring of a foreign worker on a non-immigrant basis. Complainant Mot. to Approve Subpoena to Anthem, Client of ASTA CRS 6.

Id.

On July 18, 2021, Complainant filed his Response to the Order to Show Cause (Complainant's Response to OTSC). On August 13, 2021, Respondent filed Respondent's Opposition to Complaint's Response to Order to Show Cause (Opposition).

II. LEGAL STANDARDS

"[S]ince granting the issuance of a requested subpoena is discretionary, [the administrative law judge should] make an appropriate decision after reviewing the requesting party's showing of general relevance and reasonable scope of the evidence sought." United States v. Creation and Innovation, Inc., 3 OCAHO no. 491, 941, 941 (1993) (citation omitted); *see also* § 68.25(a).[2] In order for an administrative subpoena to be enforceable, the following three elements must be met: "the investigation is within the statutory authority of the agency; the subpoena is not too indefinite; and the information sought is reasonably relevant to the charge under investigation." In re Investigation of Space Exploration Tehcs. Corp., 14 OCAHO no. 1378, 2 (2020) (citations omitted). In the context of an administratively issued subpoena, relevance means "virtually any material that might cast light on the allegations against the employer." In re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO no. 751, 238, 243 (1995) (citations omitted); *e.g.,* Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 68–69 (1984). Discovery, including the subpoena process, "must be relevant to the claim of discrimination, and cannot be a fishing expedition for any other potential wrongdoing." Ogunrinu v. Law Resources, 13 OCAHO no. 1332a, 2 (2019) (citing United States v. Kellogg Brown & Root Servs., Inc., 284 F.R.D. 22, 34–35 (D.D.C. 2012)). The person seeking the discovery beards the burden to establish relevancy. United States v. Volvo Trucks N. Am., 7 OCAHO no. 994, 1088, 1092 (1998).

III. ANALYSIS

It was at the outset not clear how the subpoenaed information was relevant to the claims and defenses in this matter. The Court therefore provided Complainant an opportunity to explain

[2] 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.

the need for the information in Complainant's response to the Order to Show Cause. Complainant however did not met his burden of demonstrating the relevance of information to his citizenship status and national origin discrimination claims. Complainant simply did not address the issues outlined in the Order to Show Cause. The Court is therefore in the same position it was when the order was issued: unsure that the "employers named in the subpoenas have any relation to the job vacancy at issue in this litigation[,]" dubious of the Complainant's request for correspondence pertaining to positions predating and postdating Complainant's application, and "unclear how the LCAs relate to Complainant's allegations of nonselection due to his national origin and citizenship status." OTSC 3.

Complainant's arguments in support of the subpoena appear to be mere reiterations of the initial requests for the subpoenaed information. *See* Complainant's Resp. MTC 4. For example, in discussing the request for the LCAs in its response to the Order to Show Cause, Complainant states that "this evidence is also cited above in section C.1.a and is required to be on public display in either the Respondent location or on the premises of the subpoenaed party. Retention of those records are required by regulation and is cited above in section C.2." Id. This same argument is present in the motion to approve the subpoena. *See* Complainant Mot. to Approve Subpoena to Anthem, Client of ASTA CRS 6 ("Pursuant to 20 C.F.R. 655.760(a), employers who participate in the H-1B program are required to make a filed labor condition application . . . available for public examination at the employer's principal place of business . . . or at the place of employment . . . . Please produce those documents."). Assuming *arguendo* that the LCAs are required to be publicly available as Complainant describes, Complainant's statement in both the initial motion and the response to the OTSC does not enlighten the Court about the significance of the LCAs in the context of Complainant's case.

Complainant has therefore failed to meet his burden of demonstrating that the sought after information is relevant to the claims and defenses in this matter, and Complainant's four motions to approve subpoenas are accordingly DENIED.

IT IS SO ORDERED.

Dated and entered on September 28, 2021.

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Honorable John A. Henderson
Administrative Law Judge

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ERRATA ON ORDER DENYING COMPLAINANT'S
MOTIONS TO APPROVE SUBPOENAS

The Order Denying Complainant's Motions to Approve Subpoenas issued on September 28, 2021, is hereby amended to correct the following errors:

1. On page 2, the last sentence of section II is corrected to read, "The person seeking the discovery bears the burden to establish relevancy. United States v. Volvo Trucks N. Am., 7 OCAHO no. 994, 1088, 1092 (1998)."

2. On page 2, the third sentence of section III is corrected to read, "Complainant however did not meet his burden of demonstrating the relevance of information to his citizenship status and national origin discrimination claims."

3. On page 2, the fourth sentence of section III is corrected to read, "Complainant simply did not address the issues outlined in the Order to Show Cause."

IT IS SO ORDERED.

Dated and entered on October 6, 2021.

Honorable John A. Henderson
Administrative Law Judge