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

June 15, 2023

RAVI SHARMA, Complainant, v. LATTICE SEMICONDUCTOR, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00048

Appearances: Ravi Sharma, pro se Complainant
Ulrico S. Rosales and Aleksandr Katsnelson, Esq., for Respondent

ORDER ON COMPLAINANT'S MOTION TO AMEND, RESPONDENT'S MOTION FOR SUMMARY DECISION, AND COMPLAINANT'S MOTIONS FOR PERJURY CHARGES

I. INTRODUCTION AND PROCEDURAL HISTORY

This matter arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Complainant Ravi Sharma filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 12, 2019, alleging that Respondent Lattice Semiconductor refused to hire him based on his citizenship status in violation of 8 U.S.C. § 1324b(a)(1). Respondent filed an answer on September 19, 2019.

On July 29, 2020, Respondent filed a Motion for Summary Decision. Complainant filed a response on August 18, 2020.

On December 10, 2021, Complainant filed a Request to Stay Ruling on Summary Decision pending resolution of an age discrimination lawsuit against Respondent in the Superior Court of the State of California, Santa Clara County. Respondent filed an opposition on December 28, 2021. On August 31, 2022, Complainant submitted a letter informing the Court that the lawsuit

in the Superior Court had concluded, and asking the Court to issue a decision on the Motion for Summary Decision.[1]

On December 28, 2022, the Court issued an Order for Supplemental Briefing, directing the parties to submit briefing addressing: (1) whether the Court should construe the Complaint as amended to include a claim for citizenship discrimination based on failure to hire Complainant instead of A.K. for a second opening, which was not raised in the Complaint, and (2) if the parties contend that the Complaint has been amended to include such a claim, to submit evidence regarding this position, specifically "evidence relating to the job description and/or qualifications for the position." *R.S. v. Lattice Semiconductor*, 14 OCAHO no. 1362c, 3 (2022).[2] On January 17, 2023, Complainant filed a Motion for Leave of Court to Amend his Complaint. The parties filed their supplemental briefing on January 30, 2023 (Respondent) and February 28, 2023 (Complainant).

On February 28 and March 9, 2023, Complainant filed Motions for Perjury Charges against several of Respondent's employees and Respondent's attorney.

For the foregoing reasons, Complainant's Motion to Amend is granted, and Complainant's Motions for Perjury Charges are denied. Respondent established that there is no genuine issue of material fact for trial as to the first position, but because the Court is not in a position to issue a final order, the case is stayed as to the first position. The Court will defer adjudication as to the second position to allow for further proceedings.

II. FACTS NOT IN DISPUTE[3]

[1] As Respondent's August 31, 2022, filing appears to constitute a withdrawal of the request for a stay, this Court will not address the request.

[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 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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] The undisputed facts are drawn from both parties' statement of facts, *see* R's Mem. of Points & Auths. 2–9; C's Opp'n 4; 28 C.F.R. § 68.38, to the extent they are supported by citations to the record, *see* Fed. R. Civ. P. 56(c)(1), as well as the evidence in the record to the extent that it would be admissible during the hearing, *see Brown et al. v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379a, 2–3 (2022) (citing 28 C.F.R. § 68.38(b), (c), and then citing Fed. R. Civ. P. 56(c)(4)).

A. Complainant's Background and Experience

Complainant, Ravi Sharma, is a United States citizen and a computer engineer. *See* Leigh Decl. Ex. A, at 3–4; C's Opp'n 4. According to his resume, Complainant received a B.Tech in Electronics Engineering and an M.S. in Computer Engineering, and has "[o]ver 15 years experience in ASIC and FPGA design." Leigh Decl. Ex. A, at 3–4.

B. First Position

On November 13, 2018, Respondent, Lattice Semiconductor Corporation, posted a job opening for an Applications Engineer position. *Id.* Ex. C (listing the position title as "Applications Eng R62" and "APPLI01064"). Under "Accountabilities," the posting indicated: "Our Applications team is seeking an outstanding team member who can give dedicated engineering supports to provide state-of-art FPGA development software solutions to our field engineers and end customers. This position also requires to be a conduit between the software developers and end users by representing our customers and their needs." *Id.* Under "Description," the posting listed:

- Expertise in FPGA design flows . . .
- Experience in Lattice FPGA design software tools is a plus.
- Good understanding of FPGA architecture and applications is required.
- Hands-on FPGA development experience, including verification is required . . .
- Outstanding English communication skills, both written and verbal is required.
- Must be able to work independently and also in a team environment.

Id.

1. Complainant's Application and Phone Screening

Complainant applied for this position on November 16, 2018. Leigh Decl. 1. Kyoho Lee, Senior Applications Engineer Manager at Lattice, was the "hiring manager responsible for filling the vacant Applications Engineer position," and he reviewed the resumes they had received, and selected five candidates with FPGA experience, sending this information along to Aimee Romeo, a member of Respondent's HR department, and Bertrand Leigh, the Director of Applications Engineering, for a phone screening. *Id.*; Lee Decl. 1, 3; *Id.* Ex. A, at 2. Mr. Leigh responded to this email noting that: "I think [Ms. Romeo] will check whether they also have legal status to

work in [the] U.S. May be challenging to get legal working status for this position." Leigh Decl. Ex. F, at 1.

Ms. Romeo sent back information about the four candidates she was able to screen: Complainant, A.K., A.G., and S.K. Lee Decl. Ex. A. For Complainant, Ms. Romeo wrote that he had "[s]trong FPGA exp[erience]" and had a "strong knowledge of FPGA design." *Id.* at 3. However, she also wrote that he was "[n]ot currently working," and that she "could not get a direct answer as to why." *Id.* She did not ask him about visa sponsorship. *Id.* For A.K., she wrote that he was "[c]urrently [an] intern at a start up" with two years of FPGA experience, and that he had "excellent communication skills and sounded very energetic and passionate about what he does." *Id.* She wrote that she "[a]ssum[ed] he needs H 1 sponsorship." *Id.* For S.K., she wrote that he was working on a design of convolutional neural network prototype for FPGA" and working for "Scalable." *Id.* He was on an F-1 visa and "would need H 1 sponsorship." *Id.* Because the fourth candidate would need relocation support, Mr. Romeo recommended that Mr. Lee do a phone screen with Complainant, A.K., and S.K. *Id.* at 1.

Mr. Lee conducted Complainant's phone screening. *Id.* Ex. B, at 1. In his summary from the screening, he wrote that he was not currently in a job and had worked as a contractor for the past ten years. *Id.* at 2. In terms of FPGA experiences, he wrote that Complainant had "[v]ery good FPGA SW and HW experiences," but that "15 years of experiences a bit overqualified for the position." *Id.* For interpersonal skills, Mr. Lee wrote that Complainant was "slightly lacking enthusiasm" and did not have much direct customer communication experience, but had "no problem" and "[l]ooks okay." *Id.* His verbal English was "good," but without "much outgoing style with convincing voices." *Id.* Overall, Mr. Lee wrote that Complainant was "[a] potential good candidate" with "[v]ery good skills and experiences" but noted a "concern of being too long out of FT," and that he was "[m]aybe not a very active outgoing personality unlike [A.K.]." *Id.* In an email to Mr. Leigh, Mr. Lee noted that his two concerns were (1) that Complainant had been out of full-time work for too long, and (2) his personality "may be a bit less active and outgoing for the role," suggesting that they bring in him for a face-to-face interview to see if he could qualify for either this position or another senior position. *Id.* at 1.

Mr. Lee also conducted a phone screening interview with S.K. *Id.* at 5–6. In his screening summary, he wrote that S.K. had recently changed from an intern to full-time, had "[s]ome, not a lot" of FPGA experience, although his "understanding and skills [were] excellent," and similarly, although he did not have experience with many tools, he "demonstrated very good understanding[.]" *Id.* at 6. His design experience was "[v]ery good," although he had "[a]lmost no experience" with VHDL coding. *Id.* His interpersonal, teamwork, and interaction with people skills were "excellent," although he had "[s]ome but not much" customer support experience. *Id.* His verbal communication skills were very good, he had "[s]everal experiences" writing documents, and had presentations skills from a "few internal training[s]." *Id.* Overall, Mr. Lee wrote that S.K. was an "[e]xcellent candidate for the position." *Id.* In an email to Mr. Leigh, Mr. Lee again wrote that S.K. was an excellent candidate, and wrote: "He also needs an

H1B sponsorship even though he is currently working as a FT employee. His F-1 OPT ends on July 5th, 2020." *Id.* at 5.

Finally, Mr. Lee conducted a phone screening interview with A.K. *Id.* at 8–9. In the summary, Mr. Lee wrote that A.K. was a good candidate to bring in for an official interview. *Id.* at 9. Under tool and design experiences, he wrote that A.K. had a "[g]ood level of understanding," but that he would "need to check actual skill levels in the interview." *Id.* Mr. Lee wrote that A.K.'s interpersonal skills were "very good," that he had no problem with teamwork skills as he had "many experiences working in teams," no issue interacting with people, and a lot of customer support experiences. *Id.* Finally, he wrote that A.K. had very good communication skills, although he was "a little too energetic in some cases." *Id.* In an email to Mr. Leigh and Ms. Romeo, Mr. Lee wrote that he felt A.K. was a good candidate for the position, and that A.K. "looks to have quite good skills and knowledge," but that they would need to verify his skills in an interview. *Id.* at 8. He also wrote that he confirmed that A.K. was in F-1 status and looking for H-1B sponsorship: "His internship is being terminated, and he looked a little desperate too." *Id.*

2. On-Site Interviews and Evaluations

Complainant, S.K., and A.K. were each interviewed on site by a different combination of interviewers. Interviewers were asked to complete an interview evaluation form, which asked the interviewer to rate the candidate on a Scale of 1–5, with 1 being the worst and 5 the best, in the areas of interpersonal skills, communication skills, teamwork skills, understanding of overall FPGA design flows, HDL language skills, experiences of FPGA designs with software, how well the candidate's skills match the job requirements, and overall impression. *See, e.g.*, Leigh Decl. Ex. B, at 2. The form also asks the interviewer whether they recommend moving forward with the candidate. *Id.*

Complainant scored, on average, lower than both other candidates in the categories of interpersonal skills, communications skills, teamwork skills, overall impression, and how well the candidate's skills match the job requirements, and lower than S.K. in understanding of overall FPGA design flows. *See generally* Lee Decl. Ex. C; Khong Decl. Ex. A; Hsia Decl. Ex. A; Chan Decl. Ex. A; Wang Decl. Ex. A; Tayama Decl. Ex. A; Leigh Decl. Ex. B; Liu Decl. Ex. A. Complainant scored higher, on average, than both other candidates in experiences of FPGA designs with software and HDL Language skills, and higher than A.K. in understanding of overall FPGA design flows. *See generally id.* Three out of six of Complainant's interviewers did not recommend moving forward with him, whereas each of S.K.'s interviewers recommended moving forward with him, and only one of A.K.'s interviewers recommended against hiring him. *See generally id.* During his interview, Mr. Lee asked Complainant whether he would need visa sponsorship, and Complainant answered that he was a U.S. citizen. C's Ex. C, at 6–9.

3. Hiring Decision

Following the on-site interviews, Mr. Lee and Mr. Leigh decided to hire S.K. for the position (APPLI01064). *See* Leigh Decl. 2; *id.* Ex. D, at 1. Mr. Leigh attests that they selected S.K. because (1) he received a higher average rating than Complainant in whether his skills matched the position's job requirements, (2) each of his interviewers recommended hiring him, (3) only three of Complainant's interviewers recommended hiring him, and (4) Complainant received a lower rating in communication and interpersonal skills. *Id.* at 3–4. Of the three interviewers that recommended hiring Complainant, one (Mr. Wang) was the team's most junior employee at the time, and one (Mr. Khong) was a "guest interviewer" from the Software Engineering, not Applications Engineering, group. *Id.*

In an email, Mr. Lee recounted to Ms. Romeo that he and Mr. Leigh had decided: "1. [S.K.] is the primary candidate that we want to give a job offer. 2. If [S.K.] does not take the offer, we may give an offer to [A.K.]. 3. Ravi does not fit the position but we can still keep him for the other opening (APPL01065)." *Id.* Ex. D, at 1. He further wrote: "Please note that [S.K.] is asking for [] H-1B sponsorship that requires additional spending from Lattice." *Id.*

A. Second Position

According to Mr. Lee, around a month after they selected S.K. for the first opening, Mr. Leigh and Mr. Lee "turned to hiring for a second job vacancy." Lee Decl. 2. Although Mr. Leigh and Mr. Lee originally contemplated that this second vacancy would be a more senior role, because they did not identify any candidates who possessed the requisite qualifications at the more senior level, they did not conduct on-site-interviews, but instead "converted the open position to a more junior role." *Id.*

The record contains a Job Requisition Request Form dated October 30, 2018, describing the qualifications for the more senior position, Senior Staff Applications Engineer, prior to its conversion to a more junior role. *See* R's Opp. to C's Mot. Perjury Charges 11–14. It is unclear which portions of the Senior Staff Applications Engineer job description were to be included in the junior role, but according to Mr. Leigh, "communication and interpersonal skills were key requirements for both Open Positions, because a very substantial portion of the job responsibilities for these positions involved advising and interacting with Lattice's customers and field engineers." Leigh Decl. 4.[4]

[4] *See also* C's Add. Exs. 33–42 (H-1B Visa petitions for S.K. and A.K. with the Job Title "Applications Engineer" for both, and the same position description, including providing "engineering support and state-of-art FPGA development solutions to field engineers and end customers").

On January 16, 2019, Mr. Lee emailed Complainant asking whether he would "still be interested in the other senior position that we are going to fill after this position," and noting that the "senior position has much higher expectation [sic] in both technical and interpersonal aspects." Lee Decl. Ex. I, at 2. Complainant responded asking for an update on the status of his interview and the other position, and that he believed his "skill set fits the other position as well." *Id.* Mr. Lee responded that Complainant was "currently listed for the other position that we also decided to fill with more time with more candidates," and that his "experiences and skills [were] partially qualified for the position." *Id.* at 1.

Mr. Lee and Mr. Leigh ultimately decided to hire A.K. for the Second Position, finding that he "was the next-best qualified candidate (after [S.K.]) for that position following the on-site interviews for the First Opening." Lee Decl. 5.

Mr. Lee emailed Mr. Leigh on Feb. 20, 2019, writing that A.K. was "very interested in (desperately) getting this job." Leigh Dec. Ex. E, at 2. Mr. Lee recounted telling A.K. that they were concerned that he was technically shallow, but A.K. "expressed a strong intention to overcome any kind [of barriers] by diligent self learning and quick catching up attitudes." *Id.* Mr. Leigh responded by inquiring: "Any sense of H1B status and when the filing has to be done?" *Id.*

III. LEGAL STANDARDS

A. Motion to Amend

OCAHO's rules permit amendment of a complaint, as relevant: (1) "[if] a determination of a controversy on the merits will be facilitated thereby" and "upon such conditions as are necessary to avoid prejudicing the public interests and the rights of the parties," and (2) "[w]hen issues not raised in the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties," in which case they "shall be treated in all respects as if they had been raised in the pleadings," and "may be made as necessary to make the pleading conform to the evidence." 28 C.F.R. §§ 68.9(e).

28 C.F.R. § 68.9(e) is "analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure," which is permissive guidance in OCAHO proceedings. *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998); *see* 28 C.F.R. § 68.1.

Federal Rule 15(a)(1) provides that: "a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Federal Rule 15(a)(2) further provides that

"[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." As Respondent filed an answer more than twenty-one days prior to Complainant's Motion for Leave to Amend Complaint, Rule 15(a)(2) applies. Because this case arises in California, the Court may also look to case law from the United States Court of Appeals for the Ninth Circuit. *See* 28 C.F.R. § 68.56. In the Ninth Circuit, courts look to several factors when considering a motion to amend pursuant to Rule 15(a)(2): (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006).

Federal Rule 15(b)(2) provides that: "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." A party may move at any time to amend the pleadings to "conform them to the evidence and to raise an unpleaded issue."

1. Summary Decision

Per 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 of material fact and that the party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of material 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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 284 (1986)). "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1213, 6 (2014).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing." *United States v. 3689 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 249, 261 (1994) (citations omitted).

2. Discrimination in Hiring, Recruitment, or Referral for a Fee

Complainant alleges that Respondent refused to hire him based on his citizenship status as a United States citizen, in violation of 8 U.S.C. § 1324b(a)(1). Under 8 U.S.C. § 1324b(a)(1), "[i]t is an unfair immigration-related employment practice for a person or entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee . . . because of such individual's national origin, or in the case of a protected individual . . . because of such individual's citizenship status." A United States citizen is a "protected individual" under 8 U.S.C. § 1324b(a)(3)(A).

Complainant may use direct or circumstantial evidence to prove a § 1324b discrimination case. *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (citing *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711 n.3 (1983)). Direct evidence is evidence that, on its face, establishes discriminatory intent. *Id*. "If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence." *Id*. However, only on rare occasions can the complainant present direct evidence. *Id*. at 14 (citing *Nguyen v. ADT Eng'g, Inc.*, 3 OCAHO no. 489, 915, 922 (1993) ("It is rare that the victim can prove that the employer conceded discrimination, e.g. 'I don't want any permanent resident aliens working here.'")).

Complainant may also rely on circumstantial evidence to establish an employment discrimination claim. *Id*. If Complainant relies on circumstantial evidence, OCAHO applies the familiar burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), and its progeny. *See Reed v. Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321a, 3 (2019). First, Complainant must establish a prima facie case of discrimination; second, Respondent must articulate some legitimate, non-discriminatory reason for the challenged employment action; and third, if Respondent does so, the inference of discrimination raised by the prima facie case disappears, and Complainant must then prove by a preponderance of the evidence that Respondent's articulated reason is false and that Respondent intentionally discriminated against Complainant. *Id*.; *see generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

"A prima facie case of discrimination in hiring is shown when a complainant demonstrates that he belongs to a protected class, he applied and was qualified for a job for which the employer was seeking applicants, despite his qualifications he was rejected, and after his rejection the position remained open and the employer continued to seek applicants with similar qualifications." *Mid-Atlantic Reg'l Org. Coal., Laborers' Int'l Union of N. Am. v. Heritage Landscape Servs., LLC*, 10 OCAHO no. 1134, 7 (2010) (citation omitted); *see also Millsaps v. Pinal Cnty. Superior Ct.*, 494 F. App'x 821, 823 (9th Cir. 2012) (summary decision) (same). "Alternatively, the individual must show that he is a member of a protected group, that he applied and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination." *Mid-Atlantic*, 10 OCAHO no. 1134, at 7 (citation

omitted); *see also, e.g.*, *Guerrero v. Ca. Dep't of Corrections & Rehab.*, 11 OCAHO no. 1264 (2015) (same).

IV. MOTION TO AMEND

A. Position of the Parties

1. Complainant

As detailed in the Court's Order for Supplemental Briefing, Complainant alleges in the Complaint that Respondent discriminated against him based on his citizenship status when it hired S.K. for the Application Engineer position he applied to on November 28, 2018. Although Respondent moves for summary decision as to a discrimination claim based on both this "First Position" as well as for the hiring of A.K. for the "Second Position," Complainant does not allege discrimination based on the Second Position in his Complaint.

Complainant moves the Court to allow him to amend his Complaint to include a claim for citizenship discrimination based on Respondent's decision not to hire him, and instead to hire A.K., for the Second Position. *See* C's Mot. to Amend. 1. Complainant asserts that when he filed the Complaint, he was not aware that Respondent had hired A.K. for the Second Position, and only discovered this during the discovery process. *Id.* Complainant also asserts that as a pro se litigant, he did not "know about the legal requirement of amending the complaint" until he received the Court's December 28, 2022 Order for Supplemental Briefing. *Id.* at 2. Finally, Complainant argues that the First Position and the Second Position were only one position—APPLI01064—for which he, S.K., and A.K. applied, and therefore the hiring of A.K. "for the same open position of application engineer has been raised in all the pleadings and it cannot be delinked now from this case." C's Supp. Br. 2–7.

Complainant also requests that the Court allow him to amend his Complaint to answer "No" to the question "Do you want to be rehired?" C's Mot. to Amend 2.

2. Respondent

Respondent argues that the Court should not construe the Complaint as amended to include a claim for citizenship discrimination based on its decision to hire A.K. for the Second Position. R's Supp. Br. 1.

Respondent asserts that Complainant's request to amend his Complaint is "both inappropriate and untimely." *Id.* at 2. Respondent notes that Complainant filed his original action on August 12, 2019, raising a claim of discrimination "based solely upon Respondent's decision to hire S.K. instead of Complainant" for the First Position. *Id.* Respondent asserts that Complainant should

have become aware that it hired A.K. for a "second, separate Application Engineer position that later became available" when it informed Complainant of this information in its discovery responses in April 2020, but Complainant's Motion to Amend follows these discovery responses by almost three years. *Id.* at 2–4. Moreover, Respondent notes that the discovery and dispositive motions deadlines in this matter closed around 2.5 years ago. *Id.* at 4–5. Given this delay, Respondent asserts that Complainant's request to amend his Complaint would result in prejudice by "requiring Respondent to litigate an entirely separate hiring decision involving a distinct job vacancy that was not the subject of the Complaint, nearly four years after that hiring decision was made, and after discovery has closed . . ." *Id.* at 6.

B. Analysis

1. Consent: 28 C.F.R. § 68.9(e) and Fed. R. Civ. P. 15(b)(2)

Both parties briefed Respondent's Motion for Summary Decision addressing a discrimination claim involving the Second Position as if it had been raised in the Complaint, including submitting evidence related to such a claim, and the parties conducted discovery related to such a claim, all without objection by Respondent. At first blush, it would appear as though 28 C.F.R. § 68.9(e)'s provision regarding issues tried by consent applies.[5]

[5] There is a question as to whether this provision applies to pre-trial motions, i.e., the summary decision stage. This provision is "modeled after Federal Rule of Civil Procedure 15(b)(2), and both provisions notably speak in terms of issues being tried, i.e., determined through a trial." *United States v. El Paso Paper Box Inc.*, 17 OCAHO no. 1451b, 7 n.5 (2023) (CAHO order) (noting that "no OCAHO case so far has determined the scope of applicability of 28 C.F.R. § 68.9(e)") (citing *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 327 n.7 (3d Cir. 2012) (collecting cases)). Ninth Circuit case law supports that application of Rule 15(b) to new claims raised in motions for summary judgment may sometimes be proper. *See, e.g.*, *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (finding that a district court erred by not considering a plaintiff's unpled constitutional vagueness challenge in ruling on the parties' cross-motions for summary judgment, noting that "when issues are raised in opposition to a motion to summary judgment that are outside the scope of the complaint, '[t]he district court should have construed [the matter raised] as a request pursuant to rule 15(b) of the Federal Rules of Civil Procedure to amend the pleadings out of time.'" (quoting *Apache Survival Coal. v. United States*, 21 F.3d 895, 910 (9th Cir. 1994))); *but see Perez v. Vitas Healthcare Corp.*, 739 F. App'x 405, 407–08 (9th Cir. 2018) (finding a district court did not err by refusing to consider new claim raised in opposition to summary judgment); *Ray v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-55989, 2021 WL 4902357, at *1, 2021 U.S. Dist. LEXIS 31707, at *3–4 (9th Cir. 2021). The undersigned need not reach this issue, however, because of lack of consent.

Respondent has objected to amendment, however. Courts may sometimes find implied consent when the parties both brief an unpled claim on summary decision. *See, e.g.*, *Galassini v. Town of Fountain Hills*, No. 11-cv-02097, 2013 WL 5445483, at *5 n.1, 2013 U.S. Dist. LEXIS 142122, at *11 n.1 (D. Ariz. Sept. 30, 2013) ("Defendants did not object to Plaintiff moving for summary judgment on claims that were not in her complaint. Accordingly, Defendants have impliedly consented to constructive amendment of Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 15(b)(2)."); *Curtis v. Illumination Arts, Inc.*, No. 12-cv-0991, 2013 WL 6173799, at *11 n.8, 2013 U.S. Dist. LEXIS 167456, at *35 n.8 (W.D. Wash. Nov. 21, 2013) ("The Ninth Circuit has interpreted Rule 15(b)(2) to apply when the parties fully argue the merits of an unpleaded claim on summary judgment with no objection from defendants.")

While both parties briefed Respondent's Motion for Summary Decision addressing a discrimination claim involving the Second Position, including submitting declarations and rebuttal statements to those declarations addressing the Second Position in their supplemental briefing, Respondent expressly denies consenting to trial of such a claim. *See generally* R's Supp. Br.; *see also Negrete v. Allianz Life Ins. Co. of N. Am.*, Nos. 05-cv-6838, 05-cv-8908, 2011 WL 2909246, *4, 2011 U.S. Dist. LEXIS 80999, at *13 (C.D. Cal. July 18, 2011) (concluding that amendment was not appropriate under Rule 15(b)(2) where defendant "expressly objected" to trial of a claim not pled in the operative complaint). The evidence sought, produced, and provided to the Court related to the Second Position appears to be also relevant to the claim involving the First Position, for which A.K. was also interviewed. Courts have found that "[w]here 'evidence . . . allege[d] to have shown implied consent was also relevant to the other issues at trial[,] [it] cannot be used to imply consent to try the [unpled] issue.'" *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) (citing, inter alia, *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987) ("The introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case")); *El Paso Paper Box Inc.*, 17 OCAHO no. 1451b, at 7 & n.5 (declining to review whether a "failure to prepare" charge could be conformed to the evidence into an unpled "failure to timely prepare" charge pursuant to 28 C.F.R. § 68.9(e)/Rule 15(b)(2) in part because "Respondent clearly did not consent to consideration of" such a claim).

2. Leave to Amend: 28 C.F.R. § 68.9(e) and Fed. R. Civ. P. 15(a)(2)

However, the Court finds that Complainant has met the standard for leave to amend pursuant to 28 C.F.R. § 68.9(e)'s provision regarding facilitation of determination of a controversy on the merits, which is modeled after Fed. R. Civ. P. 15(a)(2).[6]

[6] Respondent argues that the Court should deny Complainant's motion to amend for failure to meet the standard for motions in 28 C.F.R. § 68.11(a) and for lack of good cause, as the Court did in its March 25, 2021 Order Denying Complainant's Motion for Leave of Court to File a Supplemental Response to Respondent's Motion for Summary Decision. *See* R's Supp. Br. 5. However, the Court finds that Complainant's motion meets the standard in § 68.11(a), by setting

The Ninth Circuit instructs that "Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so requires.'" *AmerisourceBergen Corp.*, 465 F.3d at 951 (quoting *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999)). However, the Ninth Circuit instructs courts to also consider the factors set out in *Foman v. Davis*, 371 U.S. 178, 182 (1962), which include prejudice to the opposing party, undue delay, bad faith, and the futility of the opposed amendment. *See Wood v. Santa Barbara Chamber of Com., Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1983); *Hydrick v. Wilson*, 711 F. App'x 813, 814–15 (9th Cir. 2017).

Here, as a threshold matter, the Court does not find Complainant's argument that the position A.K. was hired for was the same as the First Position alleged in the Complaint persuasive. Were this true, there would be no need to amend the complaint as Respondent hired two people for the position. However, the evidence in the record reflects that these were two separate positions—APPLI01064 and APPLI01065. *See, e.g.*, Lee Decl. Ex. F (email from Lee describing the decision as to APPLI01064 that Complainant "does not fit the position but we can still keep him for the other opening (APPL01065)"); Ex. I (email from Lee indicating that Complainant was "listed for the other position that we also decided to fill with more time with more candidates").

Considering the *Foman* factors, the Ninth Circuit has held that an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable. *AmerisourceBergen Corp.*, 465 F.3d at 953 (citing *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991)). Moreover, the Ninth Circuit has found undue prejudice related to a lengthy delay in moving to amend where the amendment would require additional discovery because it "advance[s] different legal theories and require[s] proof of different facts." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387–88 (9th Cir. 1990); *see also Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *Texaco, Inc.,* 939 F.2d at 799 (denying leave to amend where "Texaco waited until after discovery was over, just four and a half months before the trial date, before moving to amend its complaint" and defendant "would have been unreasonably prejudiced by the addition of numerous new claims so close to trial"); *Loza v. Am. Heritage Life Ins. Co.*, No. 09-cv-1118, 2009 WL 4824756, at *3, 2009 U.S. Dist. LEXIS 121124, at *9–11 (D. Ariz. Dec. 9, 2009).

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forth the relief sought (amendment of the complaint) and the grounds therefor with particularity (that Complainant learned of the hiring of A.K. during the discovery phase and did not know of the legal requirement of amending the complaint, and that he addressed A.K.'s hiring in his opposition to Respondent's Motion for Summary Decision). *See generally* C's Mot. to Amend. Moreover, as to the "good cause" standard cited by Respondent and in the Court's prior order, while it applies to motions for supplemental pleadings, it does not apply to motions to amend pursuant to § 68.9(e).

Here, Complainant asserts that he did not know that A.K. was hired for the Second Position when he filed the Complaint. *See* C's Mot. to Amend. 1. But he was provided with this information through discovery, which has been closed since April 27, 2020. *See generally* Order Summarizing Case Mgmt. Conf. Complainant's pro se status and unfamiliarity with court procedure does not excuse his untimely motion. *See Holguin v. Dona Ana Fashions*, 4 OCAHO no. 605, 142, 146 (1994) ("Compassion for Complainant's pro se status . . . must give way to the need for orderly and informed participation by the parties to an administrative adjudication.").

Nonetheless, the Court finds that the interests of justice would be served by allowing amendment here. The Respondent considered the same applicant pool, and the same interview results for two separate positions. *See, e.g.*, Lee Decl. 5. It would appear, further, that the Respondent adjusted the second position in light of the applicant pool. *See id.* at 2. The requirements for the second position are not developed on this record, and therefore the Court is making no comment on the ultimate disposition of this claim, but any claim to discrimination based on the position would seem to apply equally, if not more, to the second.

As to prejudice, while clearly there is some given the passage of time and the potential need for additional discovery, it does not overcome the interests at stake. The proposed amendment is closely tied to the allegations in the Complaint and does not amount to "an entirely new lawsuit following the proposed amendment," *cf. Hydrick*, 711 F. App'x at 814–15; no new parties will be added, the Second Opening was with the same company, the candidate hired for the position applied for the First Position as well, and Respondent appears to have relied on those interviews in hiring for the Second Position, evidence of which is already in the record.

Respondent asserts that considering the Complaint as amended "could cause additional litigation, requests for additional discovery, and the filing of a new motion for summary decision." R's Supp. Br. 2, 6 n.8. But Respondent has been litigating this issue along with Complainant throughout the pendency of this case; as detailed in the Order for Supplemental Briefing, in its Motion for Summary Decision, Respondent asserts that Complainant "alleges [Respondent] discriminated against him on the basis of his United States citizenship when he applied for a vacant Application Engineer position (the 'First Opening') in November 2018, *as well as a second Application Engineer position that subsequently became available (the 'Second Opening'*) at Lattice (together, the 'Open Positions')," and moves for summary decision for failure to hire for both positions. R's Mem. MSD 1 (emphasis added). Respondent appears to have assumed that this second position was already part of the litigation. Some discovery has already been produced related to the Second Opening, *see* R's Supp. Br. 2–3 & nn.3–5 (noting that Respondent produced discovery and interrogatory responses regarding the Second Position in March and April 2020); if additional discovery is needed, it would be limited.[7]

[7] The Court acknowledges Respondent's argument that Complainant issued voluminous interrogatories and document requests during the discovery process, *see* R's Supp. Br. 9, suggesting that re-opening discovery may be especially time-consuming. *See McCaffrey v. LSI*

Moreover, as to the remaining *Foman* factors, the Court does not find that the record reflects Complainant is moving to amend in bad faith or with a dilatory motive; he filed his Motion in response to the Court's Order for Supplemental Briefing, which asked the parties for their position on whether to consider the Complaint amended, and this is Complainant's first motion to amend.

As to the factor of futility, "a court may deny as futile a motion to amend a complaint when the proposed complaint would not survive a motion to dismiss." *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 3 (2019) (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)); *see also United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 6 (2012). In considering a motion to dismiss, OCAHO rules merely require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 5 (2013) (quoting 28 C.F.R. § 68.7(b)(3)). Moreover, the evidentiary standards set forth in *McDonell Douglas Corp.* generally do not apply to a motion to dismiss. *Heath v. Tringapps, Inc.*, 15 OCAHO no. 1410, 5 (2022). In his Motion to Amend, Complainant writes: "I want to amend the complaint filed on August 8, 2019 to include the claim for citizenship discrimination based on respondent's failure to hire me and instead to hire A.K. for the open position of application engineer (second opening according to respondent)," and that his "complaint should include both the nonimmigrant workers hired for the open position of application engineer." Mot. Amend 1–2. The Court finds these proposed allegations would be sufficient, at the motion to dismiss stage, to give rise to an inference of citizenship discrimination: Complainant was not hired for the position of application engineer, and a "nonimmigrant worker" was hired instead. *See, e.g.*, *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016) (noting that in order to "give rise to an inference of discrimination," complaints must include information that links the complainant's protected class and the employment action in question); *Ba v. Wal-Mart Store 1199*, 10 OCAHO no. 1163, 3 (2012) (stating that "[t]here must be some [alleged] facts, not just legal conclusions that 'connect[] his United States citizenship status to his termination.'" (citation omitted)).

Considering each of these factors—recognizing the lengthy delay as well as the prejudice that may result to Respondent if Complainant is allowed to amend his Complaint, but mindful of the liberal amendment policy, and the fact that the proposed amendment appears neither futile nor brought in bad faith—the Court GRANTS Complainant's Motion to Amend.

Logic Corp., 6 OCAHO no. 867, 481, 489–90 (1996) (finding prejudice would result by allowing amendments to the complaint where that case's "progress in discovery ha[d] been characterized by multiple disputes, requests for protective orders, inability to reach factual stipulations, and various novel or unconventional approaches to litigation"). The Court will place tight limits if additional discovery is sought.

V. MOTION FOR SUMMARY DECISION

A. Position of the Parties

1. Respondent

Respondent argues that Complainant has not presented facts sufficient to show that there is an issue of material fact for trial. R's Mem. Points & Auths. 11.

First, Respondent argues that Complainant has not established a prima facie case of citizenship discrimination. *Id.* at 12–14. Respondent notes that it is undisputed that Complainant is a member of a protected class, and that Respondent had open positions for which Complainant applied, and stipulates for the purpose of its motion that Complainant was qualified for both positions. *Id.* at 12 n.11. However, Respondent asserts that Complainant has failed to satisfy his burden of demonstrating that Respondent selected other candidates under circumstances giving rise to an inference of unlawful discrimination based on citizenship, because Complainant has not presented evidence from which one may infer that its actions were "based on a discriminatory motive." *Id.* at 13. Respondent argues that Complainant's allegations amount to "mere suspicion or belief of animus," which is "not sufficient to sustain a finding that an employer's action is actually motivated by animus." *Id.* at 14 (first citing *Boyd v. AutoZone, Inc.*, No. C-11-00776, 2012 WL 4466538, at *6–7, 2012 U.S. Dist. LEXIS 138552, at *23–24 (N.D. Cal. Sept. 26, 2012), and then citing *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001)). Respondent further argues that the "mere fact that the individuals that [it] hired for the Open Positions were not U.S. citizens does not by itself constitute substantial evidence of . . . discriminatory motive." *Id.* at 16.

Second, Respondent argues that even assuming Complainant has established a prima facie case of citizenship discrimination, Respondent "has clearly satisfied its burden of advancing a legitimate, non-discriminatory reason for not hiring Complainant." *Id.* at 15. Respondent then argues that Complainant has not established that Respondent's proffered legitimate reasons were pretextual; Respondent asserts that the fact that the individuals who were not selected for the positions were citizens does not constitute substantial evidence of pretext, nor does Complainant's belief that he was better qualified than the other applicants, as it is the perception of the decision-makers that is relevant. *Id.* at 16–17 (citing, inter alia, *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980); *Tx. Dep't of Cmty. Affairs v. Burdein*, 450 U.S. 248, 259–60 (1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011–12 (1st Cir. 1979)). Respondent notes that an "employer has broad discretion in defining expectations for and assessing candidates" which cannot be "second-guessed without actual evidence calling the employer's exercise of discretion into question," which Complainant has not presented. *Id.* at 18–19.

2. Complainant

Complainant disputes many of Respondent's arguments, principally as to whether its proffered reasons for hiring other candidates were pretextual.

First, Complainant asserts that S.K. and A.K. were not more qualified than he was for the open positions; Complainant references S.K. and A.K.'s resumes, noting that their skills, experience, and education did not contain the FPGA design experience that Complainant possessed, as well as negative interview evaluations regarding A.K.'s technical skills and positive interview evaluations regarding his own technical experience. C's Opp'n 6–9. Complainant argues that he "clearly [has] better qualifications, skills and experience than [S.K.]." *Id.* at 7.

Second, Complainant contests Respondent's characterization of his communication skills; he argues that "Respondent has not provided any evidence that [his] communication skills and interpersonal skills were inferior to the two candidates Respondent hired," and that "[c]ommunication skills and interpersonal skills . . . are subjective, and therefore easy for an employer to claim as a reason," that Respondent's claim that these criteria were among the top for the job is "not consistent with the job announcement," and that Respondent has not elaborated specific concerns about his communication and interpersonal skills. *Id.* at 10.

Third, Complainant takes issue with the fact that Ms. Romeo interviewed him but did not interview the other two candidates, and could not have assessed his technical skills, because her qualifications were not in the technical field. *Id.* at 12. Complainant also notes that he, unlike A.K., was not given an opportunity to address the interviewer's concerns regarding the second position, and that A.K. was also not employed at the time of the interviews. *Id.* at 16–17.

Complainant concludes that Respondent "has not presented any legitimate, nondiscriminatory reason for failure to hire Complainant in that their proffered reason has no factual basis in the job description," no "evidence has been provided that [the other candidates] had better technical skills, interpersonal skills and communication skills than Complainant," and "Respondent's reasons for failing to hire Complainant are inconsistent, contradictory and pretextual." *Id.* at 17–18.

B. Analysis

1. Prima Facie Case

As Respondent concedes that the first three elements of a prima facie case of discriminatory failure to hire are met here, *see* R's Mem. Points & Auths. 12 n.11, and as to the fourth element, neither party argues that Respondent "continued to seek applicants" after Complainant's rejection, the question is whether Complainant has satisfied the fourth element by showing that he was rejected "under circumstances giving rise to an inference of unlawful discrimination based on citizenship." *See Mid-Atlantic*, 10 OCAHO no. 1134, at 7.

Respondent argues: "Complainant cannot establish a *prima facie* case because he has failed to satisfy his burden of demonstrating that Lattice's decisions to select candidates other than him for the Open Positions were made under circumstances giving rise to an inference of unlawful discrimination," because to meet this burden, Complainant "must present evidence of actions taken by Lattice from which one can infer . . . that such actions were based on discriminatory motive." R's Mem. Points & Auths. 13.
But here, the evidence establishes that Respondent hired two non-U.S. citizens for positions that the parties concede Complainant, a citizen, applied for and was qualified for, and the record reflects that the decision-makers in the hiring process were aware of the citizenship status of the candidates. *See* Lee Decl. Ex. B, at 5 (email from Mr. Lee to Mr. Leigh noting that S.K. "needs an H1-B sponsorship"); *id.* at 8 (email from Mr. Lee to Mr. Leigh indicating that A.K. was in F1 status and looking for H1-B sponsorship).

OCAHO and Ninth Circuit case law suggest that evidence of someone outside of the complainant's protected class being hired for the position instead of the complainant may be sufficient evidence for an inference of discrimination for purposes of the fourth factor of a prima facie case, without independent evidence of a "discriminatory motive." *See, e.g.*, *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 12 (2004) (finding the complainant satisfied the fourth factor "albeit marginally" when he presented evidence that the respondent chose not to hire him—a naturalized U.S. citizen—but hired the rest of his classmates who were all native-born citizens); *Mid-Atlantic*, 10 OCAHO no. 1134 (noting that "[d]iscrimination suits require some evidence of discrimination . . . there must be at minimum a sufficient factual basis to permit an inference that a protected characteristic actually played a role in the employment decision in question, and that it had a determinative influence on the outcome," and finding no evidence in that case because the complainants had identified no similarly-situated individual who was treated differently, nor that "any persons of some other citizenship status were permitted to apply in that manner"); *Shipley v. Haw. Dep't of Educ.*, No. 05-00145, 2007 WL 188029, at *8, 2007 U.S. Dist. LEXIS 4548, at *25 (D. Haw. Jan. 22, 2007) (finding the plaintiff made a prima facie case for gender discrimination when she was a member of a protected class, qualified for a transfer, and not selected, and a man was hired).

The Court does not find the cases cited by Respondent are persuasive authority to find the fourth element of a prima facie failure-to-hire claim was not established on this record. For example, in *Lee v. Airtouch Communications*, while this Court found that the complainant had not made a prima facie case of discrimination, this was based on the fact that the complainant had supplied no information about who was hired instead of him, and the respondent denied that workers of other nationalities or citizenship were hired. *See* 6 OCAHO no. 901, 891, 892, 896, 902 (1996). In *Shortt v. Dick Clark's AB Theatre*, Respondent cites to a section discussing a retaliation claim, and this Court dismissed a failure-to-hire claim because it was "undisputed that Shortt never sought or applied for a job . . . and that he was never rejected for a job in the kitchen *in favor of a similarly situated individual of another citizenship status*." *See* 10 OCAHO no. 1130, 7 (2009)

(emphasis added). Similarly, in *Boyd*, the Northern District of California noted that the plaintiff had "not presented *any* evidence that similarly situated individuals outside his protected class were treated more favorably." *See* 2012 WL 4466538, at *7, 2012 U.S. Dist. LEXIS 138552, at *23–24. Finally, *Carmen* deals with a retaliation, not discrimination, claim. *See* 237 F.3d 1026, at 1028.

Thus, the Court finds that Complainant has met his burden of showing a prima facie case of citizenship status discrimination based on failure to hire for the First Position.

2. Legitimate, Non-Discriminatory Reason

However, the Court finds that Respondent has established a legitimate, non-discriminatory reason for its decision to hire S.K. for the First Position.

Respondent asserts that even if Complainant has established a prima facie case of citizenship discrimination, Respondent has "clearly satisfied its burden of advancing a legitimate, non-discriminatory reason for not hiring Complainant, thereby eliminating any inference of discrimination which would be raised by Complainant's *prima facie* case." R's Mem. of Points & Auths. 15. Respondent notes that Lattice employees who interviewed S.K. and A.K. found "each of them to be more qualified than Complainant in a number of key areas, and expressed concerns about Complainant's skills and work history," and "overall (and on average), Complainant received lower ratings from interviewers than the other two candidates." *Id.* at 17 n.13, 18. Therefore, "Mr. Lee and Mr. Leigh—in accordance with the assessments of that majority—determined that S.K. and A.K. were better candidates." *Id.* at 18. Moreover, Respondent notes that there was concern about Complainant's work history, including many short, contracting positions. *Id.* at 16–17 & n.12.

Indeed, the evidence reflects higher interview scores for S.K. than Complainant in most categories which were integral to the position based on the posted job description.[8] As noted in *supra* Section II.B., the job posting sought an "outstanding team member" who would "be a conduit between the software developers and end users by representing our customers and their needs." *See* Leigh Decl. Ex. C. Under 'Description," the posting listed "[o]utstanding English communication skills, both written and verbal" as "required." *Id.* Mr. Leigh emphasized that communication and interpersonal skills were key requirements because a substantial portion of the job responsibilities involved advising and interacting with Respondent's customers and field engineers. *Id.* at 4.

In his on-site interview evaluation forms from Mr. Hsia, Mr. Tayama, Mr. Wang, Mr. Khong, Mr. Chen, Ms. Romeo, and Mr. Lee, Complainant received average interview scores of 3.57,

[8] The only two categories in which Complainant received a higher score were experiences with FPGA designs with software and HDL language skills.

3.29, and 4 in interpersonal skills, communication skills, and teamwork skills, respectively. *See* Lee Decl. Ex. C, at 1 (Ms. Romeo's evaluation of Complainant, noting that she had a "bit of a challenge getting things out of him," that he was "[a]t times difficult to understand");[9] Khong Decl. Ex. A, at 1 (Mr. Khong's evaluation identifying Complainant's weaknesses as customer interface and communications); Hsia Decl. Ex. A, at 2 (Mr. Hsia evaluation noting that Complainant was "easy to communicate and interact with," but also that he was "unsure if [Complainant could] manage external communication[10]"); Chan Decl. Ex. A, at 7 (Mr. Chan interview evaluation noting that he did not recommend moving forward with Complainant, and he "didn't feel like his communication skills are sufficient to effectively communicate with the software group needed for the position."); Wang Decl. Ex. A, at 2 (recommending moving forward with Complainant, but noting that he was worried about his communication skills); Leigh Decl. 4 (Mr. Leigh declaration attesting that while he did not complete an evaluation, he interviewed him and "verbally communicated [his] assessment of his qualifications to Mr. Lee," including recommending against hiring him"); Tayama Decl. Ex. A, at 6. In contrast, S.K. averaged 4.8, 4.8, and 4.4 in these areas in his interview evaluation forms from Mr. Hsia, Mr. Tayama, Mr. Wang, Mr. Chan, and Mr. Lee. *See* Hsia Decl. Ex. A, at 1; Chan Decl. Ex. A, at 8; Wang Decl. Ex. A, at 1, 3 (noting that S.K.'s communication skills were "very good" and that "his communication skills outsh[one Complainant] significantly"); Tayama Decl. Ex. A, at 9; Lee Decl. Ex. C, at 33.

Complainant averaged a 4.17, 3.5, and 3.43 in understanding of overall FPGA design flows, how well the candidate's skills match the job requirements, and overall impression, whereas S.K. averaged a 4.8, 4.6, and 4.8 in these categories. Lee Decl. Ex. C, at 1; Khong Decl. Ex. A, at 1; Hsia Decl. Ex. A, at 1, 2; Chan Decl. Ex. A, at 7, 8; Wang Decl. Ex. A, at 1, 2, 3; Leigh Decl. 4; Tayama Decl. Ex. A, at 6, 9.

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[9] As to Complainant's argument that Ms. Romeo only interviewed him but did not interview the other two candidates, and could not have assessed his technical skills, because her qualifications were not in the technical field, *see* C's Opp'n 12, each candidate was interviewed by a different panel of evaluators, and Ms. Romeo did not assign Complainant a numeric rating on his technical skills, *see* Lee Decl. Ex. C, at 2.

[10] Complainant argues that Mr. Hsia's evaluation and declaration are "inadmissible," disputing, inter alia, Mr. Hsia's job title and the fact that Mr. Hsia did not ask him any technical or in-depth questions. C's Rebuttal Hsia. Specially, Complainant points out that in his interview notes, Mr. Hsia indicates that A.K.'s knowledge is shallow, he had limited FPGA experience and would need more training, yet stated in the declaration that he did not have any "concerns about the adequacy of his abilities or qualifications". Hsia Decl. 3, Ex. A, at 3. However, Mr. Hsia indicated that A.K. was his second choice, so any discrepancy is not relevant to the First Position.

Complainant scored higher on average than S.K. in two categories; Complainant averaged a 4.33 in experiences of FPGA designs with software and a 4.5 in HDL language skills, whereas S.K. averaged a 4 and 4.25 in these categories. *See id.*

However, four interviewers (Mr. Hsia, Mr. Tayama, Mr. Chan, and Mr. Leigh) recommended against hiring Complainant and one was unsure (Ms. Romeo), and only two recommended hiring him (Mr. Wang and Mr. Khong); in contrast, each of his interviewers recommended hiring S.K.. *See id.*

Lower interview scores may be a legitimate and non-discriminatory reason for failure to hire someone. *See, e.g.*, *Sorrell v. Wilkie*, No. 17-cv-1573, 2018 WL 6601742 at *5, 2018 U.S. Dist. LEXIS 212122, at *14 (S.D. Cal. Dec. 14, 2018) ("Defendant has advanced a legitimate and nondiscriminatory reason for Plaintiff's non-selection. Plaintiff's scores based on her written application, interview, and writing exercises were lower than those who were hired.").

Here, given that Complainant's interview scores were mostly lower on average than S.K.'s, particularly in the areas of interpersonal, communication, and teamwork skills, the fact that several interviewers recommended against hiring him, and the negative comments from reviewers, the Court finds that Respondent has established a legitimate, non-discriminatory reason for failing to hire Complainant.[11]

3. Rebuttal

Complainant asserts that Respondent's proffered reasons for failing to hire him were false and pretextual. Complainant argues that he "clearly [has] better qualifications, skills and experience than [S.K.]," pointing to the length and breadth of his past experiences. C's Opp'n 7. Complainant also argues that Respondent's focus on communication skills is vague, subjective, and not consistent with the job requirements. *Id.* at 10.

It is true that the record reflects that Complainant had more years of experience, and more experience with certain relevant areas, than S.K. S.K.'s resume indicates that he graduated with his master of science in Electrical Engineering in May 2017, and post-Master's work experience of only being an ASIC Design Intern and then an ASIC Design Engineering for Scalable Systems Research Labs, beginning in November 2017, Add. Exs. 4, whereas Complainant's resume shows work experience, including as an FPGA Design/Development Engineer, extending

[11] Although Leigh attests that he was among the interviewers who assessed S.K., *see* Leigh Decl. 3, no completed interview evaluation form appears in the record. However, the Court does not find that the missing notes for this one interviewer create a question of material fact when the remaining interview evaluations in the record support Respondent's proffered reasons for failing to hire Complainant. Even if Leigh's assessment was negative in all respects, it would not have been enough to tip the balance.

back to 2005, Add. Ex. 2. However, Complainant has not proffered evidence demonstrating that Respondent's assessment of his communication and interpersonal skills was *false*, as opposed to subjective. And as to whether this proffered reason is pretextual, the job description for the first position indicated that "[o]utstanding English communication skills, both written and verbal is required," and "[m]ust be able to work independently and also in a team environment," reflecting that communication and teamwork skills were important to the position, in addition to technical experience. *See* Leigh Decl. Ex. C. As Respondent notes, a longer work history is not sufficient evidence that the reasons given for failing to hire a complainant were pretextual. *See* R's Mem. of Points & Auths. 18 (citing *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1065 (2001)).

Moreover, email correspondence reflects that the hiring managers were concerned about the fact that S.K. and A.K. would need sponsorship for their work authorization, undercutting Complainant's assertion that the decision not to hire him based on his interview results was pretextual. *See* Leigh Decl. Ex. D, at 1.

Complainant's subjective and conclusory assertions are unsupported by specific, concrete evidence, and therefore do not create a genuine factual issue. *See Hajiani,* 10 OCAHO no. 1212, at 6.
As such, the Court does not find a genuine issue of material fact as to whether Complainant has demonstrated by a preponderance of the evidence that Respondent's articulated reason is false and that Respondent intentionally discriminated against him when it hired S.K. for the First Position.

Because the Court finds itself in a position wherein it is unable to execute a case disposition, however, it now issues a stay of proceedings as to Complainant's discrimination claim based on Respondent's failure to hire him for the first position. *See A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, 2 n.4 (2021); *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381o, 2–3 (2022); *Ravines de Schur v. Easter Seals Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388g, 2 (2022); *Rodriguez Garcia v. Farm Stores*, 17 OCAHO no. 1449, 2–3 (2022).[12]

During the stay of proceedings, the Court will not consider or adjudicate submissions filed by the parties relating to Complainant's citizenship status discrimination claim relating to the First Position. The parties are not precluded from contacting the Court and requesting a status update; however, parties should bear in mind that the Court will timely inform the parties in writing when the stay is lifted.

The Court defers adjudication of the motion for summary decision pending any further discovery as to the second position.

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

VI. COMPLAINANT'S MOTION FOR PERJURY CHARGES

On February 28 and March 9, 2023, Complainant filed: (1) Complainant, Ravi Sharma's Motion for Perjury Charges Against Kyoho Lee and Bertrand Leigh of Semiconductor Corporation; and (2) Complainant, Ravi Sharma's Motion for Perjury Charges Against Therese Kemble of Lattice Semiconductor Corporation and Aleksandr Katsnelson, Attorney Representing Lattice Semiconductor Corporation. Respondent filed an opposition to these motions on March 13, 2023.

Complainant moves for the Court to "punish" Ms. Kemble, Mr. Katnelson, Mr. Lee, and Mr. Leigh for "lying under oath" in their interrogatory responses and declarations by "sentencing [them] to five years in prison and imposing fines" or to "refer the charge based on this motion with the record evidence to the United States Attorney for perjury charges." Mot. Perjury Charges Against Lee & Leigh 2 (citing 18 U.S.C. § 1621); Mot. Perjury Charges Against Kemble & Katnelson 3 (same).

Complainant's motions are DENIED. Insofar as Complainant requests that this Court issue perjury charges pursuant to 18 U.S.C. § 1621, this Court does not have the authority to do so. OCAHO Administrative Law Judges (ALJs) are "appointed pursuant to 5 U.S.C. [§] 3105" to hear cases arising under 8 U.S.C. §§ 1324a–1324c, and "may not perform duties inconsistent with their duties and responsibilities as administrative law judges." *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450h (2023) (citing 28 C.F.R. §§ 68.1, 68.2, and then citing 5 U.S.C. § 3105). "The enforcement of criminal statutes is committed to entities other than the complainant[] . . . or this forum." *Iron Workers Loc. 455, et al. v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964 (1997).

Further, the Court does not find that Complainant has demonstrated that Respondent engaged in misconduct. Complainant's motions center on his contention that each of the individuals at issue lied under oath by stating that the First Position and Second Position were two separate positions. However, as discussed above, the record reflects that the First Position and Second Position were in fact two separate positions. *See, e.g.*, Lee Decl. Ex. F (email from Lee indicating that Complainant "does not fit the position but we can still keep him for the other opening (APPLI01065)"); Ex. I (email from Lee indicating that Complainant was "listed for the other position that we also decided to fill with more time with more candidates").

VII. Conclusion

Complainant is ordered to file an amended complaint by July 6, 2023. The amendment is limited to allegations regarding the second position. The amended complaint (First Amended Complaint) will supersede the original Complaint.

Respondent may file an amended answer by July 27, 2023.

The parties are furthered ordered to file separate status reports by August 10, 2023, informing the Court if each party will be seeking additional discovery and if so, the substance and form of the discovery.

SO ORDERED.

Dated and entered June 15, 2023.

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Honorable Jean C. King
Chief Administrative Law Judge