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

SALAZAR-CASTRO,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 90200373
CINCINNATI PUBLIC SCHOOLS,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(February 26, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Boris G. Salazar-Castro, Complainant.
John P. Concannon, Esq., for Respondent

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration and Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or a discharge from employment because of that individual's national origin or citizenship status. . . ." The statute covers a "protected individual," defined at Section 1324b (a) (3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are

lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. §1324b(d)(2).

II. *Procedural Summary*

Complainant, Boris G. Salazar-Castro (Salazar), filed a discrimination charge with the Office of Special Counsel (OSC) on June 1, 1990. OSC advised in a letter dated November 2, 1990 that "there is not a reasonable basis on which to conclude that Cincinnati Public Schools, discriminated against you in violation of Section 102 of the Immigration Reform and Control Act." OSC notified Complainant that he could file a complaint directly before an administrative law judge no later than December 31, 1990. 28 C.F.R. §44.303(c)(3). Complainant did in fact file such a complaint before the indicated deadline.

On December 26, 1990, Salazar filed a pro se Complaint in holographic letter format, dated December 20, 1990 with the Office of the Chief Administrative Hearing Officer (OCAHO). In the Complaint, Salazar states inter alia that, "I have never been called for an interview related to any Spanish Position, Full-time, Part-Time, or Substitute, in any High School around the CPS area. . . . Also, I do not understand 'If I were not qualified for teaching Spanish 7-12 grades, as CPS stated, Why The Ohio Board of Education - Department of Education of the State of Ohio, send to me a new Certification Valid until 1994 for Teaching my own language."

On February 6, 1991, Complainant filed an Amended Complaint, dated January 29, 1991. It alleges both national origin and citizenship-based discrimination against Respondent Cincinnati Public Schools (CPS) in violation of 8 U.S.C. §1324b.

Following issuance by OCAHO of a notice of hearing transmitting the Complaint to Respondent, an Answer was filed on April 22, 1991. Subsequent to the notice, Complainant filed two voluminous documents with attachments, containing lengthy recitations of Respondent's alleged discrimination. During the three telephonic prehearing conferences of May 14, 1991, June 26, 1991 and August 8, 1991 no basis for settlement was found. During the course of the conferences the bench informed Complainant that his filings were not in evidence.

Pursuant to the schedule agreed to during the last conference, an evidentiary hearing was held on October 21, 1991 in Cincinnati, Ohio. Respondent filed its post-hearing brief on December 31, 1991. Complainant filed his post-hearing brief on January 2, 1992.

III. *Statement of Facts*

Complainant is a citizen of Venezuela. Complainant states that, "From May 8, 1987 I received from INS 'employment authorization' . . . , this means that I was elegible [sic] to work as a Spanish Teacher 7-12 since May, 1987." Exh. 1. Salazar received temporary residency status in March, 1988. Despite Complainant's statement, Respondent, per its Proposed Findings of Facts, assumes that Complainant has been authorized to work in the United States since Complainant first applied for CPS employment on October 6, 1986. Resp. Brief at 1.

Salazar received a letter from CPS, dated October 16, 1986, acknowledging receipt of his employment application and outlining the CPS application procedure. Contrary to the assertion in the Complaint, CPS scheduled two interviews for Salazar. His first interview was on November 1, 1986, with Nelida Mietta-Fontana, the CPS Supervisor for Secondary Languages. The second interview was on November 12, 1986, with Michael E. Dantley, then Associate Director of Certificated Personnel. On January 23, 1989, Salazar also had an impromptu interview with Bertha Jones, then Associate Director of Certificated Personnel for the Secondary Level succeeding Dantley. In March, 1989, Complainant had a casual talk with Edward H. Jung, Associate Director of Certificated Personnel for the Elementary Level.

Salazar testified that he was interviewed. "Now, in 1986 I receive [sic] an interview from Cincinnati Public School. This interview was done by Dr. Dantley and Mrs. Fontana." Tr. 27; Complainant also acknowledged the CPS interviews during his questioning of witnesses and in his post-hearing brief. Tr. 81, 87, 99, at 156; Exhs. I, N and O; Compl. Brief at 4.

I find that upon receipt of his application, CPS promptly scheduled interviews with Salazar. In addition to the two formal interviews, CPS provided Complainant one impromptu interview. It is informative also that the CPS Application for Employment expressly states, "Participation in the interview does not assure employment." Exh. B.

Besides Salazar's transferral of Spanish speech patterns into English and his Hispanic mannerisms, data regarding his education in Venezuela and submitted reference letters confirm his South American origin. During the interview, Mietta-Fontana was aware that, like herself, Salazar had a Hispanic background. Mietta-Fontana's inter-view evaluation of Salazar was negative. The Interview Report Form, dated October 1, 1986, was filled out by Mietta-Fontana shortly after the interview. It makes no mention of work authorization. The possible overall ratings a CPS interviewee can obtain are outstanding, very good, satisfactory, marginal and unsatisfactory. Mietta-Fontana gave Salazar a marginal rating. Her stated reasons for recommending against the hire of Salazar were that although he knew how to speak Spanish, he did not "have enough knowledge on how to teach foreign languages to high school students." She tied her perception that he would falter in the classroom to the assessments that:

(1) Salazar favored a traditional grammatical teaching technique over a contemporary communication-oriented technique and

(2) Salazar lacked a cohesive approach to classroom management and discipline.

Exh. N; Tr. at 88.

Dantley gave Salazar an overall rating of satisfactory. Dantley noted on the Interview Report Form, dated November 11, 1986, that Salazar "may have some difficulty disciplining" and "may need help working in an urban school system." In contrast to Mietta-Fontana, he noted Salazar's immigration status, writing, "Would need VISA." Exh. O.

Between November, 1986 and March, 1988, Salazar sporadically checked with CPS on the status of his application. Although CPS never extended a job offer or even the hope of a job offer to Complainant during that time, neither did it explicitly reject his application. In March, 1988, which coincidentally was the time that Complainant received his temporary residency status, he renewed his correspondence with CPS, sending two letters dated March 15, 1988 to different

CPS officials. Among other things, these letters volunteered information regarding Salazar's immigration status and work authorization. There is no indication that CPS in any way required or even requested this information. Exhs. D and E. According to Complainant, he initiated all focus on his immigration status. Tr. 48; see also Tr. 65.

Salazar's December 6, 1988 correspondence with CPS again contained unsolicited statements regarding his immigration status and work authorization. Tr. 54. Upon receipt of this letter, Jones made handwritten notations on the letter. Inter alia these notations recite, "What Visa does he have? II-1 [or H-1]? . . . F-1? . . . Exp. 1990 of temporary Resident Status. . . ." Tr. 143.; Exh. F. On December 15, 1988 Jones initiated a telephone conversation with Salazar, presumably in response to his 1988 correspondence. Complainant alleges that during this phone call, Jones asked him "for visa in [his] passport." Jones does not recall making this request. Tr. 143. Salazar followed up this sequence of events with letters to CPS, dated December 19, 1988 and December 27, 1988. Both contained information regarding his eligibility to work in the United States and copies of pertinent documents. Complainant hand-delivered the December 19 letter.

According to Salazar, Jones' January 23, 1989 interview of Salazar was acrimonious. The discussion culminated in a refusal by Jones to put in writing to Salazar CPS' rejection of his application. Jones' Record of Conference, dated January 23, 1989, states, ". . . He was told no spanish [sic] vacancies exist at this time; that we have reservations about his [Salazar's] success as a teacher for CPS. . . ." Exh. I. Jones' Record does not mention the applicant's nationality, citizenship or any unpleasantness.

Salazar followed up with another letter, dated February 27, 1990, delineating his immigration status and work eligibility. Salazar persistently telephoned and visited the CPS' office until March 1989. In March, he had an informal visit with Edward Jung. According to Complainant, Jung told Salazar that he had "TEMPORARY VISA. . ." status. Tr. 28. At that point Salazar began to seek legal remedies to the inequities he felt he had suffered vis a vis CPS.

IV. *Discussion*

A. Threshold Issues

1) Lack of Jurisdiction Over the National Origin Charge

Complainant alleges that Respondent discriminated against him on the basis of both national origin and citizenship by not hiring him for a teaching position in one of the CPS secondary schools. It has become commonplace that

> jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since Respondent employs more than fourteen (14) employees, U.S.C. §1324b(a)(2)(B), it is excluded from IRCA coverage with regard to the national origin discrimination claims.

Williamson v. Autorama, OCAHO Case No. 89200540, May 16, 1990.

See also U.S. v. Huang, 1 OCAHO 288 (1/11/91), aff'd, Ching-Hua Huang v. United States Dept. of Justice, No. 91-4079 (2d Cir. Feb. 6, 1992); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

CPS employs more than fourteen employees. Accordingly, I dismiss the national origin portion of the claim for want of jurisdiction under IRCA.

2) Complainant Has Standing to Bring Citizenship Discrimination Claim

Only a "protected individual" has standing to maintain an IRCA discrimination claim. 8 U.S.C. §1324b(a)(3). Consequently, the threshold question on the citizenship discrimination claim is whether Complainant meets the statutory definition of "protected individual."

Combing the record, it is not clear that Salazar was authorized to work at the time of his initial CPS application. Despite this uncertainty, Respondent concedes that Complainant was at all pertinent times eligible to work in the United States and his initial work eligibility is not in dispute. Resp. Brief at 1. According to the record, Complainant acquired temporary residency status in March, 1988, while his employment application was still pending.

The issue of Complainant's standing can be analogized to the timeliness issue in U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, No. 89-9552 (10th Cir. Dec. 17, 1991). Both the case at bar and Mesa arose from circumstances implicating pending employment applications. In Mesa I held that the discriminatory act continued throughout the pendency of the application. Consequently a timeliness determination was not limited to the commencement of

the discriminatory act, i.e. the time at which the application was first remitted. I held, rather, that the cause of action accrued repeatedly throughout the entire period of continuing discrimination, and therefore the timeliness determination had to be made in reference to that entire time period. Due to the continuing nature of the discrimination, I held the Mesa charge to have been timely filed. In effect, where an act of discrimination is continuous, a Complainant's filing eligibility is not limited by the date of the initiation of the discrimination. The Complainant is eligible to file charges at any time relevant to the continuance of that discrimination.

I apply the Mesa doctrine to the case at bar. Taking into account the silence of the record and Respondent's position on this issue, I reach no decision regarding Salazar's work eligibility at the time of his initial CPS application. Since he was patently eligible to work during a substantial portion of the continuing allegedly discriminatory non-hire, I conclude that Salazar is a protected individual under 8 U.S.C. §1324b. As such, he has standing to pursue the citizenship based discrimination portion of his Complaint.

B. Complainant Has Not Met his Burden of Persuasion

1) Title VII Disparate Treatment Analysis: The McDonnell Douglas/Burdine Test

As first applied in U.S. v. Mesa Airlines, 1 OCAHO 74 at 41, the disparate treatment analysis of Title VII of the Civil Rights Act, 42 U.S.C. § 2 0 0 0e-5(k)(1964) underpins IRCA §102 discrimination analysis. In order to prevail on a disparate treatment issue an IRCA complainant, just as a Title VII complainant, must show deliberate discriminatory intent on the part of an employer. Statement of President Ronald Reagan upon signing S.1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986).

In two landmark cases, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 792 (1973), the Supreme Court allocated the proper burden of proof between parties in disparate treatment/discrimination cases. In employment discrimination actions the burden of persuasion remains at all times with the complainant/applicant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 792. The Burdine court summarized the basic allocation of burdens and orders of presentation of proof as originally set out in McDonnell Douglas.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [McDonnell Douglas Corp. v. Green, 411 U.S.] at 802. . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id., at 804.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 248.

The McDonnell Douglas Court enumerated the elements of Complainant's first probative hurdle. To meet the initial burden of establishing a prima facie case, a complainant must show:

> (i) that he belongs to a protected class, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . .

McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

The remaining prongs of the McDonnell Douglas/Burdine test have not been construed with as much particularity. If the Complainant meets all the elements of the initial prima facie burden, a limited burden of production passes to the employer or prospective employer. The employer can satisfy its burden by articulating legitimate, non-discriminatory reasons for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 257; Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977). If the Respondent meets his burden of production, the burden of persuasion passes back to the Complainant to prove that Respondent's articulated reasons, for the action at issue, are pretextual.

2) The McDonnell Douglas/Burdine Test Applied to the Case at Bar

The McDonnell Douglas/Burdine Title VII analysis applies to IRCA discrimination cases. Akinwande v Erol's, Inc., 1 OCAHO 144 (3/23/90); In re Rosita Martinez, U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90); U.S. v. Mesa Airlines, 1 OCAHO at 74.

a) The First Prong of the McDonnell Douglas/Burdine Test -- Complainant's Prima Facie Burden

Complainant has shown that, at the very least, he became a member of the protected class during the pendency of his application, thus

satisfying the first prima facie element. However, he has not adequately addressed the other prima facie elements.

Complainant established that he applied for a CPS teaching position, but he has failed to show that he was qualified for that position. Admittedly, Complainant complied with state-mandated academic and licensing requirements for teachers, but Complainant misperceives the significance of this compliance. Salazar testified,

> Mrs. Jones . . . told me that I don't have the credentials in order to teach in Cincinnati Public School. In other words, I wasn't qualified to teach at Cincinnati Public School. I told her that I don't understand why, if I have at least the minimum requirements for State Board of Education when the State Board of Education gave me the teacher's certification, and she insist that this is not for Cincinnati Public School, this does not mean I am qualified to teach at Cincinnati Public School.

Tr. 29 - 30.

A diploma and a license, without more, do not mean that Complainant automatically qualifies as a CPS teacher. Ohio's certification requirements serve as a qualifications floor, rather than a qualifications ceiling. Therefore, although the employer school district is precluded from utilizing hiring requirements less rigorous than the state's, it does have discretion to impose more rigorous hiring requirements. CPS, in fact, requires more. Among CPS' additional criteria are:

(1) a demonstrated ability to cope with inner-city adolescents in a classroom setting and

(2) a working knowledge of current classroom strategies specific to that teacher's area of specialization.

CPS hiring personnel Nietta-Melda, Dantley and Jones concluded that Salazar did not meet CPS standards. None recommended hire.

There is no evidence that Mietta-Fontana had any awareness of or interest in Complainant's work authorization. Rather, the record shows that she recommended against Salazar's hire due to his lack of professional qualifications. Accordingly, I find that without knowledge regarding Complainant's work authorization, Mietta-Fontana's decision to recommend against hire was driven exclusively by consideration of the applicant's lack of qualifications.

Dantley's Interview Report Form, Exh. O, bears a notation regarding Salazar's visa. Apparently, he had some intimation regarding Complainant's immigration status. However, Complainant has provided no basis for concluding that such information infected Dantley's evaluation of the candidate. Standing alone Dantley's visa reference does not establish discriminatory non-hire. Accordingly, I am not persuaded that Dantley's negative evaluation was based on any fact other than his conclusion as to Salazar's lack of professional qualifications.

By December, 1988 when Jones interviewed Salazar, Jones was aware of Salazar's immigration status. Notably, Jones' awareness did not flow from any improper CPS inquiries. Complainant had volunteered information regarding his immigration status on numerous occasions. As Respondent's brief correctly asserts and Complainant's brief concedes, "Any discussion as to residency/citizenship was initiated by Mr. Salazar." Resp. Brief at 12; Compl Brief at 2.

Complainant, in effect, disregards the significance of the fact that he himself provided CPS with information regarding his immigration status. He asserts that CPS' refusal to hire him was discriminatory simply because they engaged in a dialogue regarding his immigration status. However, where Complainant has virtually barraged Respondent with information regarding his immigration status, I am unable to conclude that it is improper for Respondent's agent to engage in a dialogue with the Complainant regarding that status. That dialogue does not undermine the fact that, Respondent rejected Complainant for employment due to his lack of qualifications. As described by Salazar, Jones' behavior may have been discourteous, but it did not rise to the level of illegality. Cf. Bruno v. City of Crown Point, No. 90-3164 (7th Cir. Nov. 27, 1991) (in a sex discrimination case the complainant must not only prove that the prospective employer initiated an illegal dialogue, but also that it refused hire on the basis of the "stereotypes implicit" in the dialogue.)

I hold that three CPS hiring employees independently declined to hire Salazar despite the fact that he held an assortment of university degrees and an Ohio teaching certificate, because in their judgment he did not qualify for a CPS teaching position. Consequently, Complainant has not met the prima facie burden mandated by the first prong of the McDonnell Douglas/Burdine test and has failed to establish "knowing and intentional discrimination" by the preponderance of the evidence. 8 U.S.C. §1324b(d)(2). Where the Complainant/Applicant himself

raises the issue of immigration status, he cannot, without more evidence, successfully turn around and accuse the Respondent/ Employer of discrimination for discussing that status with him.

Having failed to show by a preponderance of the evidence that he was qualified for the job, it is obviously impossible for Complainant to satisfy the remaining two factors of the McDonnell Douglas/Burdine prima facie test, i.e. that he was rejected despite his qualifications and that the position remained open subsequent to his unjust rejection. Where a disparate treatment IRCA Complainant fails to make a prima facie case, he loses and further inquiry is unnecessary. Adatsi v. Citizens & Southern National of Georgia, 1 OCAHO 203 (8/23/90); Akinwande v. Erol's, 1 OCAHO 144 (3/23/90).

b) The Other Prongs of the McDonnell Douglas/Burdine Test

Because the Complainant did not make a prima facie case, the burden of production never shifted to the Respondent, per the second prong of McDonnell Douglas/Burdine. In any event, Respondent has met its burden of production. Respondent has amply demonstrated that its non-hire decision was based on legitimate, non-discriminatory reasons. Additionally, Respondent's hiring policy, as articulated during the pleading stage and in the evidentiary hearing, affirmatively promotes ethnic and racial diversity among its staff. Such a policy distinguishes CPS from respondents against whom liability for citizenship discrimination has been found. See e.g., U.S. v. Mesa, 1 OCAHO 74 at 34 and 35.

Complainant cannot prevail under the third prong. By failing to show that he was qualified for the position in question, he failed the second prong of the McDonnell Douglas/Burdine test. It is impossible for Complainant to show by the preponderance of the evidence that Respondent's proffered reasons for non-hire were pretextual. Complainant has clearly failed to sustain its burden of proof and has not shown that he suffered citizenship discrimination at CPS.

C. Attorney's Fees

Respondent has requested recovery of reasonable attorney's fees against Complainant. Title 8 U.S.C. 1324b(h) authorizes fee shifting within the discretion of the administrative law judge. As applied in this case, fee shifting pursuant to subsection (h) requires findings in favor of Respondent on both of the following factors:

(1) that CPS is the "prevailing party" in this litigation and

(2) that the "losing party's [Salazar's] argument is without reasonable foundation in law and fact."

8 U.S.C. 1324b(h).

A finding in favor of Respondent on both of those factors would necessitate inquiry into attorney's time expended and related fee and expense data. 28 C.F.R. §68.52 (c)(2)(v). However, no further inquiry is required because only one of the two factors is found in Respondent's favor.

1) CPS is the Prevailing Party

CPS is a prevailing party within the meaning of subsection (h). In a seminal case applying an analogous prevailing party factor under the Voting Rights Act, the Court of Appeals for the D.C. Circuit has ruled that a party prevails if it has:

[1] substantially received the relief it sought and . . .

[2] the law suit itself . . . [is] a catalytic, necessary or substantial factor in attaining the relief.

Commissioner Court of Medina County, Texas v. United States, 683 F.2d 435, 440 (D.C. Cir. 1982).

The courts have applied the Medina standards to cases arising under both the Voting Rights Act and the Equal Access to Justice Act (EAJA). Andrew v. Bowen, 837 F.2d 875, 877 (9th Cir. 1988). (". . . the party seeking to establish 'prevailing party' status must demonstrate that: (1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiff's claim."); Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986); Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (a prevailing party must prevail on the central issue). CPS is the prevailing party because it has received all the relief it sought, thereby satisfying the first strand of Medina.

The second strand of Medina requires a strong causal link between a parties' receipt of relief and the role of that litigation victory in attaining the relief. CPS' successful defense relieves it from any legal

obligation toward the Complainant, thus fulfilling the causal link requirement.

CPS has met the prevailing party standard. Accordingly, I hold that Respondent is properly characterized as the prevailing party for the purpose of determining the collateral issue of attorney's fees.

2) Complainant's Arguments Were Not Without Reasonable Foundation in Law and Fact

a) Relevant EAJA and Title VII Jurisprudence

The finding that a party has prevailed does not necessarily entitle that party to an award. For example, under EAJA, the Court of Appeals for the First Circuit has held that the losing party "is not liable merely because it lost." United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985).

Under 8 U.S.C. §1324b(h) the prevailing party obtains the benefit of fee shifting only upon a finding that the arguments of the opposing party were without reasonable foundation in law and fact. 8 U.S.C. §1324b(h); Jones v. DeWitt Nursing Home, 1 OCAHO 189, (6/29/90) at 25-29. An objective standard is used to determine the legitimacy of the arguments made by the losing party.

Parameters for IRCA's reasonable foundation standard are informed by EAJA case law, even though the IRCA terminology "without reasonable foundation" does not appear in EAJA. The EAJA formulation of the parallel test is "substantial justification"; at least twelve circuits have construed that formulation to be a reasonableness test. United States v. Yoffe, 775 F.2d at 449. The EAJA standard, as applied by the courts, approximates IRCA's subsection 1324(h) reasonableness standard.

EAJA jurisprudence has developed a middle of the road framework for assessing attorney's fees. Fees are neither awarded automatically to every prevailing party, nor are they awarded only when the losing party's position is frivolous. United States v. Yoffe, 775 F.2d at 450. Fee shifting was granted against the party deemed to have prosecuted a case "wholly without merit." Andrew v. Bowen, 837 F.2d at 875. Fee shifting was denied where a party failed to anticipate the weakness of its case, because inter alia it misjudged the credibility of a key witness. Temp. Tech. Industries, Inc. v. N.L.R.B., 756 F.2d 586 (7th Cir. 1985).

Title VII of the Civil Rights Act also illuminates the reasonableness test for fee shifting. Under Title VII, the Supreme Court has held that

> . . . a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978).

See also Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989); Marshall v. Nelson Electric, A Unit of General Signal, 766 F. Supp. 1018, 1042 (N.D. Okla. 1991) (attorney's fees not shifted where the action was not frivolous, unreasonable or without foundation.)

Title VII case law is instructive,

> [a] finding that an action is frivolous, unreasonable, or without foundation cannot result solely because the plaintiff did not prevail on the action. [cite omitted.] Since the results of many lawsuits are not predictable, plaintiffs are not to be discouraged from bringing an action just because it is less than airtight.

E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1385 (W.D.N.C. 1991).

b) Complaint Was Not Unreasonable

In the case at bar, Respondent does not allege that Salazar acted in bad faith. It fails to show that the case was frivolous or unreasonable. Cf. Jones v. DeWitt Nursing Home, 1 OCAHO 189 at 28 (awarding attorney's fees where the party requesting them had prevailed and because the party opposing them had made arguments held to be "without foundation in law and fact.") Even though Salazar did not make out a prima facie case and, therefore, has not prevailed in any portion of this case, legitimate issues were ventilated throughout the pleading stage and during the evidentiary hearing. Applying the relevant IRCA, and cognate EAJA and Title VII case law, I am unable to conclude that Complainant's arguments lacked a reasonable foundation in fact and law. Accordingly, I deny Respondent's motion for attorney's fees.

V. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, testimony, evidence, memoranda, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that Complainant has failed to prove discrimination based on his citizenship status.

Upon the basis of the whole record, consisting of the evidentiary record and the pleadings filed by the parties, I am unable to conclude that a state of facts has been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. §1324b(g)(2)(A). I find and conclude that Respondent has not engaged and is not engaging in the unfair immigration-related employment practice alleged and within the jurisdiction of this Office, i.e, citizenship based discrimination. Accordingly, the Complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Entered this 26th day of February 1992.

MARVIN H. MORSE
Administrative Law Judge