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

April 15, 2003

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 01B00059
DIVERSIFIED TECHNOLOGY & SERVICES OF VIRGINIA, INC. Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This case arises under the nondiscrimination provisions of the Immigration and Nationality Act (INA or the Act), as amended, 8 U.S.C. § 1324b (2001). The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC or Special Counsel) filed a complaint in four counts against Diversified Technology & Services of Virginia, Inc. (Diversified or DTSV): Counts I and II allege that the company engaged in certain acts of document abuse and citizenship status discrimination against Ahmed Binouf Osman, a refugee; Counts III and IV allege that it also engaged in a pattern and practice of document abuse and citizenship status discrimination against other noncitizen applicants for employment.

DTSV filed an answer to the complaint denying the material allegations and raising twelve affirmative defenses.[1] After discovery was completed the parties filed cross motions for summary decision, and each filed a response to the other's motion. OSC sought leave to file a reply brief as well,[2] addressed solely to the issue of remedies. I denied that motion without prejudice as being premature where the instant motions already raise substantial novel questions, some of first impression, with respect to the predicate issue of liability. Both motions for summary decision are thus fully briefed only as to the latter issue, and only that issue is addressed here.

STATUTORY AND REGULATORY BACKGROUND

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986), amended the INA to establish for the first time in our history a national system designed to control the employment of unauthorized aliens by requiring employers to verify the eligibility of each new employee, and by penalizing employers who fail to do so. 8 U.S.C. § 1324a. In order to ensure that the verification system did not itself have the unintended consequence of causing employers to avoid the issue by not considering applicants who looked or sounded "foreign," Congress also enacted a complementary provision prohibiting discrimination on the basis of citizenship status or national origin. 8 U.S.C. § 1324b. Early OCAHO case law examined the interaction between the employment eligibility verification system and the nondiscrimination provision, and established the general principle that an employer's claimed good faith effort to comply with the requirements of § 1324a is not a sufficient reason to exempt the employer from liability for violations of § 1324b. *United States v. Marcel Watch Corp.*, 1 OCAHO no. 143, 988, 1006-07 (1990); *United States v. Lasa Mktg. Firms*, 1 OCAHO no. 141, 950, 968-72 (1990).[3]

Because the issues presented in this case involve the interaction among and potential conflicts between the statute and the subsequent amendments and regulatory provisions flowing from it, the particular

---

[1] A motion to strike eleven of those defenses is presently pending.

[2] Rules applicable to this proceeding, 28 C.F.R. Pt. 68 (2001), do not provide for a reply or counter-response as of right. 28 C.F.R. § 68.11(b).

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

provisions involved will be set out in some detail.

A. The Employment Eligibility Verification System

1. The Statutory Provision - Section 1324a

IRCA's employment eligibility verification system requires employers to examine specific documents in order to verify each new employee's identity and work eligibility. Presentation of a document containing a picture identification of the prospective employee is one of the requisites of the verification system. The statute itself sets out specific documents which are sufficient to show a person's employment authorization and/or identity: Document List A, § 1324a(b)(1)(B), identifies documents which simultaneously show both employment authorization and identity; Document List C, § 1324a(b)(1)(C), designates those showing employment authorization only; and Document List B, § 1324a(b)(1)(D), designates those showing identity only. An employer is obligated to examine either a List A document, or a List B and a List C document for each new employee. 8 U.S.C. § 1324a(b)(1). The List A documents specifically designated in the statute are three: a United States passport, a resident alien card, and an alien registration card.[4]

In addition Congress explicitly authorized the Attorney General to designate other documents by regulation, but only within certain parameters:

> A document designated by the Attorney General for both purposes (List A) may be included if it, inter alia, "contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for the purposes of this subsection." 8 U.S.C. § 1324a(b)(1)(B)(ii)(I) (emphasis added).[5]

The other statutory constraints on the Attorney General's authority to designate additional List A documents include the requirements that the document is also evidence of employment authorization and that it contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

---

[4] The statute provides further that an unrestricted social security card suffices as evidence of employment eligibility (List C) and that a driver's license or state identification card with a photograph serves as evidence of identity (List B).

[5] A document establishing identity only (List B) may similarly be designated by regulation if it, inter alia, "contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section." 8 U.S.C. § 1324a(b)(1)(D)(i) (emphasis added).

8 U.S.C. § 1324a(b)(1)(B)(ii)(III). With certain exceptions not pertinent here, the Commissioner of the Immigration and Naturalization Service (INS or the Service) was at all relevant times the authority to which enforcement of the INA was committed. 8 U.S.C. § 1103(a)-(c); 8 C.F.R. § 2.1. Because INS was the agency which, on behalf of the Attorney General and the Commissioner, promulgated and enforced regulations pursuant to a statute it was entrusted to administer, its interpretation of those regulations is the only agency interpretation currently entitled to deference in the event of a conflict of interpretation between agencies.[6] INS regulations have the force of law not only as regards the regulated public, but also as to other agencies of government. *See generally* Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 39 n.20 (1991).

The power of an agency or department to issue rules and regulations extends only to the power to promulgate those which are in harmony with the statute. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155, 1162 (2002). It is thus axiomatic that regulations must be consistent with the statutes under which they are promulgated if they are to be valid. *Moore v. Harris*, 623 F.2d 908, 919 (4th Cir. 1980). The parties in this case dispute whether the Service exceeded the scope of its authority under 8 U.S.C. § 1324a(b)(1)(B)(ii)(I) in promulgating regulations.

2. Regulations Governing Verification of Employment Eligibility

Pursuant to the Attorney General's authorization, the INS from time to time issued regulations designating additional documents to be acceptable for verification purposes and establishing procedures to be followed. 8 C.F.R. §1.1 et sequitur. INS Form I-9, the Employment Eligibility Verification Form, has been prescribed by the Service as the form to be used in complying with the verification system. 8 C.F.R. § 274a.2. Generally speaking, employers must attest under the penalty of perjury on Form I-9 that they have physically examined documents to establish the identity and employment eligibility of a prospective employee, and that the documents appear to be genuine and to relate to that individual. 8 C.F.R. § 274a.2(b)(1)(ii)((A) and (B). The process, including examination of a document containing a photograph of the applicant, is to be completed within three business days of the individual's hire. 8 C.F.R. § 274a.2(b)(1)(ii). To assist employers in meeting these requirements, INS

---

[6] The Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (codified in scattered titles and sections of the U.S. Code), abolished the INS and transferred its functions to a new Department of Homeland Security (DHS). Pursuant to the President's Homeland Security Reorganization Plan of November 25, 2002, as modified January 30, 2003, those functions were transferred as of March 1, 2003. With the exception of two small amendments not relevant here, the INA was not altered, so that references to the Attorney General, the Commissioner, and INS remain in place as of this date. Pursuant to the savings provision at HSA § 1512, codified at 6 U.S.C. § 552, existing INS regulations continue in effect until modified or revoked.

promulgated a Handbook for Employers, Instructions for Completing Form I-9 (Employment Eligibility Verification Form) (Publication M-274, revised 11/21/91). In 1996 Congress directed the INS to reduce the number of acceptable work verification documents in order to minimize confusion. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 142 Cong. Rec. S4401-01, S4411 (1996). Although INS thereafter promulgated an interim rule, that rule has never been made final, and it in fact enlarged rather than reduced the list of documents. In recognition of the problems the interim rule created, the notice announcing the rule also advised the public that INS would exercise its prosecutorial discretion and refrain from seeking civil money penalties for violations based on the interim rule. Interim Designation of Acceptable Documents for Employment Verification, 62 Fed. Reg. 51001 (Sept. 30, 1997). Employers were advised to "continue to use the current version of the Form I-9 (edition 11/21/91) to complete the employment verification process until the form I-9 is revised." *Id*. at 51002.[7]

In a subsequent update INS reiterated that it would not prosecute violations based on the interim rule until after the effective date of a new final rule with a revised I-9 Form:

> As with the September 30, 1997 interim rule, the Service will withhold enforcement of civil money penalties for violations associated with the changes made by the interim rule committed before the effective date of a final rule containing the revised Form I-9. Interim Designation of Acceptable Receipts for Employment Eligibility Verification, 64 Fed. Reg. 6187, 6188 (Feb. 9, 1999).

Because no final rule has yet been published, employers continue to rely on the old I-9 Form and the Handbook for Employers, which have not been revised since 1991. The Handbook for Employers includes as a List A Document, inter alia, an:

> [u]nexpired foreign passport which . . . has attached to it a Form I-94 bearing the same name as the passport and containing an employment authorization stamp, so long as the period of endorsement has not yet expired, and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

Form I-94 is an Arrival/Departure Record that is ordinarily stapled to a page in the individual's passport. The departure portion must be surrendered when the individual leaves the United States.

---

[7] A proposed rule, Reduction in the Number of Acceptable Documents and Other Changes to Employment Verification Requirements, 63 Fed. Reg. 5287 (Feb. 2, 1998) was subsequently published but never finalized.

The so-called "receipt rule," 8 C.F.R. § 274a.2(b)(1)(vi),[8] provides that an alien can under some circumstances show a "receipt" instead of a required document to satisfy the employment verification procedures. As amended, the rule provides that for refugees, the departure section of Form I-94 with an unexpired refugee admission stamp is designated as a "receipt" for a Form I-766, a Form I-688B,[9] or a social security card with no employment restrictions. 8 C.F.R. § 274a.2(b)(1)(vi)(C)(1).

Among the problems sought to be addressed by the amended receipt rule is that although certain individuals, including refugees admitted under 8 U.S.C. § 1157 and persons granted asylum under 8 U.S.C. § 1158, are by definition authorized to work incident to their status, they may not necessarily be in immediate possession of adequate documentation to satisfy the statutory and regulatory verification requirements. 62 Fed. Reg. 51001. *See generally Getahun v. Office of the Chief Admin. Hearing Officer*, 124 F.3d 591 (3d Cir. 1997). Because of the regulatory requirement that an employer examine specific documents within three days after an employee starts work, a refugee or asylee could be deprived of employment during the period he or she is waiting for the issuance of an employment authorization document. The regulation was therefore amended to permit such persons to start work immediately, pending the issuance of employment authorization documents by INS. 8 C.F.R. § 274a.2(b)(1)(vi)(C)(2). However, INS Form I-9 and the accompanying Handbook for Employers have never been updated or amended to reflect the amendment of the receipt rule.

Section 309 of The Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002), codified as 8 U.S.C. § 1738, now requires that an employment authorization document containing a fingerprint and photograph be issued to a refugee upon admission to the United States and to an asylee immediately upon the grant of asylum. Thus refugees and asylees will no longer need to rely on Form I-94 as a "receipt" for an authorization document. For refugees admitted earlier however, the receipt rule still allows Form I-94 to serve temporarily as a List A document in the interim, notwithstanding the fact that it does not contain a photograph of the individual.[10] Diversified contends that the rule is pro tanto invalid as manifestly contrary to the statute

---

[8] The receipt rule as amended now applies in three circumstances: (1) presenting an application for a replacement document, § 274a.2(b)(1)(vi)(A); (2) presenting a Form I-94 as temporary evidence of permanent resident status, § 274a.2(b)(1)(vi)(B); and (3) presenting a Form I-94 indicating refugee status, § 274a.2(b)(1)(vi)(C). Only the third is at issue here.

[9] Form I-766 and Form I-688B are Employment Authorization Documents which serve to show both employment eligibility and identity. 8 C.F.R. § 274a.2(b)(1)(v)(A)(4). Each of those forms contains a photograph of the individual.

[10] Although the question is not raised by DTSV, Form I-94 also may not contain the security

(continued...)

and beyond the authority of the Service to promulgate. OSC defends the validity of the rule.

B. The Nondiscrimination Provisions - Section 1324b of the Statute

The 1986 Act also added to the INA a general rule which prohibits employers from discriminating against any protected individual "with respect to the hiring, or recruitment or referral for a fee, of the individual for employment . . . because of such individual's citizenship status." 8 U.S.C. § 1324b(a)(1). In addition to back pay and injunctive remedies, civil money penalties for violation of this section may be assessed against a first offender ranging from $275 to $2,200 for each individual discriminated against. 28 C.F.R. § 68.52(d)(1)(viii).

As amended by the Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978 (1990), the statute also prohibits certain documentary practices, colloquially known as "document abuse." 8 U.S.C. § 1324b(a)(6). Civil money penalties for a first offender under this latter section, in contrast to those for violations of § 1324b(a)(1), range only from $110 to $1,100 for each violation. 28 C.F.R. § 68.52(d)(1)(xii).

As originally enacted the document abuse section provided that:

> [a] person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) [employment eligibility verification], for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

Because an intent to discriminate was not explicitly spelled out as an element in this section, much of the case law following its enactment treated document abuse as a strict liability offense. *See, e.g., United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO no. 414, 181, 187-88 (1992). Thus if it was shown that an employer either made a request for more or different documents than necessary or refused to honor documents that reasonably appeared genuine, such request or refusal was usually found to be a per se violation, without inquiry into the reason for the employer's conduct, *United States v. A.J. Bart, Inc.*, 3 OCAHO no. 538, 1374, 1387 (1993), and without regard to whether any individual was actually denied employment, *United States v. Robison Fruit Ranch*, 6 OCAHO no.

---

[10](...continued)
features necessary to make it resistant to tampering, counterfeiting, or fraudulent use as is also required by 8 U.S.C. § 1324a(b)(1)(B)(ii)(III). *See United States v. Dominguez*, 6 OCAHO no. 876, 560, 561-62 (1996) (respondent charged with forgery of 103 I-94 Forms).

855, 285, 320-23 (1996), *petition for review granted*, 147 F.3d 798 (9th Cir. 1998). A new clause inserting an element of intent was added to the section by IIRIRA § 421, 110 Stat. at 3009-760 (codified as 8 U.S.C. § 1324b(a)(6), effective September 30, 1996), so that the law now provides that such a refusal or request violates the section only "if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)" (emphasis added). The parties here dispute vigorously the meaning and effect of the 1996 amendment. The only circuit yet to examine the question held that the amendment merely clarified what the law had meant since its inception: "We hold that Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment." *Robison*, 147 F.3d at 801.

OSC is the agency to which investigations and enforcement under the nondiscrimination provisions is committed. 8 U.S.C. § 1324b(d).[11]

III. EVIDENCE CONSIDERED

OSC's motion was accompanied by complainant's exhibits (CXs) numbered as follows: 1) Diversified's responses to OSC's first request for admissions; 2) INS Alien Status Report -- a fax transmission to Doris Winston from the INS Vermont Service Center dated January 25, 2001, with 5 pages of attachments consisting of an INS Central Index System (CIS) record for Ahmed Binouf Osman; 3) an INS Alien Status Report-CIS records for Allison Nkpigi consisting of 4 pages; 4) an INS Alien Status Report-CIS records for Glory Kara[12] consisting of 4 pages; 5) an INS Alien Status Report-CIS record for DeKumba Kennedy consisting of 4 pages; 6) the deposition of Ella Baker; 7) the deposition of Mireya Juarez; 8) the deposition of Calvin Wilson; 9) the deposition of Douglas S. Daisey; 10) a letter from DTSV to OSC dated December 13, 2000; 11) Ahmed Osman's I-9 Form and I-94; 12) Osman's Virginia state ID, driver's license and social security card; 13) Allison Nkpigi's I-9 Form with I-94 and Virginia state ID; 14) a payroll record from The Mark Winkler Co. for Allison Nkpigi; 15) Glory Kara's I-9 Form with Employment Authorization Document (EAD), I-94 and social security card; 16) a letter addressed to DeKumba Kennedy from Calvin Wilson dated June 20, 2000; 17) DeKumba Kennedy's I-94 Form; 18) DeKumba Kennedy's Virginia state ID, social security card, EAD and driver's license; 19) 438 I-9 Forms; 20) a spreadsheet summarizing I-9 information; 21) a comparison table summarizing I-9 information; 22) the affidavit of Kathleen A. Roso; 23) the declaration of Dr. John J. Miller; 24) the deposition of Ahmed Osman; 25) the deposition of Allison Nkpigi; 26) the deposition of Glori Kara; 27) the deposition of Mireille Kalaki; 28) the deposition of Ponleiy Le; 29) the declaration of Seada Mohammed; 30) the declaration of Kim Thu Thi Mai; 31) the

---

[11] Individuals are permitted under certain circumstances to file their own complaints as well. *Id.*

[12] Some of the documents refer to this individual as Glori Kara. *See, e.g.*, CX 26.

declaration of Isidore Etok Mulamba; 32) the declaration of Aster A. Kassahun; 33) the declaration of Sode Nnabie; and 34) an IRS interest rate table.

DTSV's motion was accompanied by respondent's exhibits (RXs) identified as follows: A) the Declaration of Calvin J. Wilson; B) excerpts from the deposition of Mireya Juarez; C) portions of the supplemental answers to respondent's first set of interrogatories and request for production of documents with attachment A; D) the second supplemental answers to respondent's first set of interrogatories and requests for production of documents; E) the Declaration of Mireya Juarez; and F) portions of the answers to respondent's second set of interrogatories, requests for admission, and requests for production of documents.

OSC's response to Diversified's motion did not include additional documentary evidence. However Diversified's response to OSC's motion was also accompanied by exhibits which, like the exhibits accompanying its own motion, were identified alphabetically as A through L. In order to distinguish the exhibits in response to OSC's motion from the exhibits A through F which accompanied its initial motion, I have referred to DTSV's second set of exhibits numbered A-F as exhibits A2, B2, etc., through F-2. Thus the exhibits in response to OSC's motion are: A2) a portion of the deposition of Tariku Dagnew; B2) a portion of the deposition of Aster Kassahun; C2) a portion of the deposition of Ponleiy Le; D2) a portion of the deposition of Seada Mohammed; E2) a portion of the deposition of Isadore Etok Mulamba; F2) a portion of the deposition of Mulushewa Mussie; G) a portion of the deposition of Chau Bech Ngu; H) a portion of the deposition of Kim Thu Tang; I) a letter to OSC dated December 13, 2000 from DTSV; J) portions of the answers to respondent's second set of interrogatories, requests for admission, and requests for production of documents; K) a letter dated July 10, 2002, from OSC to DTSV's counsel; and L) the Declaration of Douglas Daisey.

In addition to these materials I have considered the pleadings, exhibits accompanying other motions, and all other materials of record for the purposes of ruling on the instant motions.

IV. FACTS ESTABLISHED BY THE RECORD

Each party contends that there are no genuine issues of material fact, and it appears from the materials submitted that many of the operative facts respecting this action are either undisputed or have not been specifically challenged by affidavit or other probative evidence. Diversified, which has its headquarters in Newport News, Virginia, has a contract with the United States Patent and Trademark Office (PTO) pursuant to which its employees perform certain records maintenance functions at the PTO facility in Arlington, Virginia. Calvin J. Wilson has been the project manager for the PTO contract since February 1999. In this capacity, he is the person who supervises the employment eligibility verification process for Diversified.

Mireya Juarez has been employed at the Arlington facility since January 30, 1997, and since October 1999, has been an administrative services supervisor. In that capacity, she reports to Calvin Wilson. Juarez was, during much of the relevant period, the principal person who, on behalf of the company, collected and examined the majority of the documents presented by prospective employees in order to verify their eligibility to work in the United States. She filled out the employer's section of the I-9 but did not sign the forms. This task was assigned to various people at different times. Douglas Daisey was employed as the Arlington facility's human resources manager from September 25, 2000 to at least November 28, 2001, reporting to Calvin Wilson. His duties included reviewing and completing I-9 Forms, including obtaining supporting documentation. Ella Baker was employed as operations manager from October 4, 1999 to June 14, 2000, and also reviewed and signed I-9 Forms from time to time.

Ahmed Binouf Osman, a refugee, was hired by DTSV and went through orientation on September 26, 2000. When Juarez asked Osman to show documents verifying his employment eligibility, he presented the departure portion of his Form I-94. Osman did not start work then because Diversified's personnel believed the I-94 form he presented had to be accompanied by an unexpired foreign passport. The list of documents set out on the back of INS Form I-9 and in the INS Employers' Handbook so state. The I-9 Instructions provide that among the documents acceptable under list A is an "[u]nexpired foreign passport with . . . attached INS Form I-94." Calvin Wilson, Diversified's project manager, attested that prior to September 25, 2000, it was the company's policy that a refugee's I-94 could be accepted only if it was attached to an unexpired foreign passport because this is what the INS instructions said.

Shortly thereafter, OSC called Diversified and told them that under the "receipt rule," Form I-94 was an acceptable document by itself to show both Osman's identity and his employment eligibility. It is uncontested that until it was so advised by OSC, Diversified was unaware of the receipt rule. Osman started working for DTSV on October 11, 2000. He filed a charge with OSC seeking backpay starting from the date he would have begun working had his I-94 been accepted.

Diversified identified three other refugee applicants it also rejected based on their presentation of the departure portion of an INS Form I-94 without an unexpired foreign passport: Allison Nkpigi, Glory Kara, and DeKumba Kennedy. Nkpigi and Kara were subsequently hired on October 17, 2000. DTSV had sent Kennedy an offer letter on June 20, 2000 (CX 16), and it offered him employment again in October 2000 and on February 26, 2001. Kennedy was scheduled for an orientation session on March 6, 2001, but did not accept the job.[13]

---

[13] OSC's brief states at footnote 7 that Osman presented his I-94 and a Virginia ID and could have presented other documents, but Juarez did not give him the opportunity. Footnote 8 says that (continued...)

Juarez said that to the best of her knowledge, other than the four applicants who presented Form I-94, no noncitizen applicant was refused employment based on employment eligibility verification issues. She said applicants were usually required to present only the documents they had brought with them to orientation or on the first day of work. While OSC's response to DTSV's motion challenged the credibility of this assertion, no specific evidence to the contrary was identified or presented.

Juarez also said that if a noncitizen applicant did not volunteer an INS-issued document, her practice was to request such a document in order to verify that the alien number the applicant had entered in Section 1 of the I-9 form was accurate, but the applicant was not refused employment if he or she did not have the document. Juarez estimated that she requested an INS-issued document from approximately half the noncitizen applicants with whom she dealt, and the other half presented an INS-issued document spontaneously without being requested to do so. Juarez said she believed that it was permissible to request an INS-issued document to verify the alien number. However the question and answer section of the INS Handbook for Employers contains the following language at page 13:

> Q. If an employee writes down an Alien Number or Admission Number when completing Section 1 of the I-9, can I ask to see a document with that number?
>
> A. No. Although it is your responsibility as an employer to ensure that your employees fully complete Section 1 at the time employment begins, there is no requirement that employees present **any** document to complete this section.
>
> When you complete Section 2, you may not ask to see a document with the employee's Alien Number or Admission Number or otherwise specify which document(s) an employee may present.

Juarez also said noncitizens had to present INS-issued documents for reverification purposes or be put on unpaid leave, and that permanent resident aliens had to reverify their alien registration cards.

---

[13](...continued)
Nkpigi presented an I-94, a state ID, and a social security card, but Juarez insisted on a passport or an INS-issued work authorization card. Footnote 9 says that Kara presented her I-94 and a social security card, but Juarez asked for a green card or a work authorization card. Footnote 10 says that at the time his I-94 was rejected, Kennedy had been issued a Virginia ID and a driver's license. Neither party has identified the question of whether any of the refugees actually presented other documents as raising an issue of material fact. OSC's response to DTSV's motion argues at footnote 6 that Osman's and Kara's failure to spontaneously volunteer other documents does not defeat their claim.

However, no individual was identified who was actually put on unpaid leave or whose employment was otherwise affected by these mistaken beliefs. Ella Baker said that she would not sign an I-9 Form for a noncitizen if the person did not have a green card or work permit, and that she did not think a noncitizen could be hired with just a driver's license and social security card, but no individual was identified whose employment was actually affected by these errors.

In the course of discovery Diversified provided its I-9 Forms to OSC, and OSC prepared an analysis and summaries of those forms (CX 20-23) which demonstrate that from October 27, 1999 to December 19, 2000,[14] a statistically significant percentage of noncitizens presented INS-issued documents. OSC said it identified 96 noncitizen employees out of 102 (94% of the noncitizen applicants during the period) who presented INS-issued documents. That period was then compared with two other periods: January 14, 1999 to October 26, 1999, and December 20, 2000 to August 2, 2001, during which substantially lower percentages of INS-issued documents were presented.

OSC's analysis does not disclose which of the employees in the middle period produced such documents spontaneously and which did so in response to a specific request for an INS document. All were evidently hired without any delay. However several employees in addition to Osman, Nkpigi and Kara testified that they had been asked for particular documents: Seada Mohammed, (CX 29); Ponleiy Ye, (CX 28); Mireille Kalaki, (CX 27); Kim Thu Thi Mai, (CX 30); Isidore Etok Mulamba, (CX 31); Aster A. Kassahun, (CX 32); and Sode Nnabie, (CX 33) made such statements. Some of the same individuals also testified either that DTSV did not discriminate against them or that they had no idea why that allegation was made. Tariku Dagnew (RXA2), Aster Kassahun (RXB2), Ponleiy Ye (RXC2), Seada Mohammed (RXD2), Isidore Etok Mulamba (RXE2), Mulushewa Mussie (RXF2), Chau Bech Ngu (RXG), and Kim Thu Tang (RXH) made such statements.

On March 2, 2001, OSC issued a letter stating it had found cause to believe Osman's allegations were true and that it was continuing its investigation for another 90 days to explore the question of settlement. DTSV raised as an affirmative defense that notwithstanding that representation it was never contacted about settlement, but it has not pursued this assertion in response to OSC's motion.

V. STANDARDS APPLICABLE TO THE MOTIONS

A. Standards for Summary Decision

---

[14] This period begins when Juarez became Administrative Services Supervisor in October 1999, and ends with the date Sode Nnabie was asked to present an Employment Authorization card.

OCAHO rules provide that summary decision on all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to a summary decision. 28 C.F.R. § 68.38(c). Only facts that might affect the outcome of the proceedings are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), a summary decision may nevertheless issue where there are no specific facts shown which raise a contested material factual issue. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970).

Where cross motions for summary decision each assert that there is no factual issue and that the party is entitled to judgment as a matter of law, that does not necessarily mean that if one motion is rejected the other one will prevail. *Reading & Bates Corp. v. United States*, 40 Fed. Cl. 737, 748 (1998). Each party's motion must be considered on its own merit. Neither does the fact that both parties say there is no issue of fact necessarily mean that trial is unnecessary. *Podberesky v. Kirwan*, 38 F.3d 147, 156 (4th Cir. 1994).

B. Relative Burdens of Production and Proof

The party seeking a summary disposition bears the initial burden of demonstrating the absence of a material factual issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, when the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1077, 5 (2001). OCAHO case law is in accord that a failure of proof on any element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000), *petition for review denied*, 2001 WL 114717 (7th Cir. 2001), *cert. denied*, 534 U.S. 836 (2001). Because the inquiry necessarily implicates the standard of proof that would apply at a hearing or trial, the evidence on summary judgment must be viewed "through the prism of the substantive evidentiary burden" in the particular case. *Anderson*, 477 U.S. at 254.

As in any civil case, a plaintiff may prove a case of employment discrimination by direct or circumstantial evidence. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). As explained in *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11-12, 16-17 (2003), direct evidence is evidence which proves the fact at issue without the need to draw any inferences. *Cf. Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). To satisfy this standard, the evidence must on its face show discriminatory intent. *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1138 n.2 (4th Cir. 1988). If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence. *Kamal-Griffin v. Curtis, Mallet-Prevost,*

Colt & Mosle, 3 OCAHO no. 550, 1454, 1470-74 (1993), *appeal denied*, 29 F.3d 621 (2d Cir. 1994). When plaintiffs are able to present sufficiently direct evidence of discrimination, they may qualify for a more advantageous standard of proof which requires the defendant to show that the same decision would have been made even in the absence of discrimination, *Fuller*, 67 F.3d at 1141-42, or to establish some other affirmative defense. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985). Direct evidence is seldom available in an employment discrimination case because an employer's state of mind is not usually susceptible to such evidence. *Ipina v. Michigan Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999); *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.'"). *But see United States v. Southwest Marine Corp.*, 3 OCAHO no. 429, 336, 351 (1992) ("[N]o noncitizen employee will be allowed to work aboard naval vessels.").

Because direct evidence is rare, the customary mode of proof of discrimination is by circumstantial evidence. The familiar burden shifting analysis in a circumstantial case is that initially established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently elaborated by its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *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).

Absent direct evidence, the initial burden of establishing a prima facie circumstantial case of hiring discrimination in the Fourth Circuit generally calls for a showing that the plaintiff 1) belongs to a protected class; 2) applied and was qualified for a job for which the employer was seeking applicants; 3) despite his qualifications was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applicants. *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001). There are variations of this basic framework, depending on the nature of the claim and on the particular statute involved. *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

Prior to the amendment of § 1324b(a)(6), document abuse was conclusively established by a showing that the employer requested a work-authorized individual to produce documents for the purpose of satisfying the requirements of § 1324a(b), coupled with a showing either that 1) the request was for more or different documents than the section requires; or 2) the employer refused to honor documents tendered that reasonably appear to be genuine and to relate to the individual. 8 U.S.C. § 1324b(a)(6). *See United States v. Acosta*, 7 OCAHO no. 961, 573, 600 (1997), *aff'd*, 159 F.3d 1356 (5th Cir.

1998) (Table); *A.J. Bart*, 3 OCAHO at 1387. Now such a showing may suffice to state a prima facie case, but it can no longer prove a violation absent a showing of a purpose or intent to discriminate.

VI. OSC'S MOTION

OSC's motion seeks summary decision as to two sets of allegations, first that DTSV refused to accept valid I-94 forms from Osman and three other refugees and that in so doing, the company violated both the document abuse provision, 8 U.S.C. § 1324b(a)(6) (Count I), and the prohibition against discrimination in hiring, 8 U.S.C. § 1324b(1) (Count II). Second, OSC asserts that the evidence shows DTSV regularly engaged in a pattern and practice of rejecting valid documents and requesting citizens of countries other than the United States to produce INS-issued documents for employment eligibility verification and reverification purposes, and that in so doing, the company also violated both statutory provisions (Counts III and IV).

Diversified responded to this motion by saying that OSC made no showing of any intent to discriminate against Osman and the other refugees because the evidence shows they were not rejected based on their citizenship status, but based on the fact that they presented Form I-94 without an accompanying passport. Diversified contends that OSC's reading of the amended § 1324b(a)(6) intent standard is wrong, and further that the very same documentary practices alleged as violations of subsection (a)(6) cannot also be held, without more, to violate the general provision of subsection (a)(1), citing *United States v. Swift & Co.*, 9 OCAHO no. 1068, 12-15 (2001). As to the 96 employees[15] whose I-9 forms show they presented INS-issued documents, DTSV says no prima facie hiring case can be made because those individuals were summarily hired and thus there was no adverse employment action, citing *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 622 (2000) and *Swift*.

VII. DIVERSIFIED'S MOTION

Diversified's motion also seeks summary decision as to all counts of OSC's complaint. As to the claims of document abuse under § 1324b(a)(6) (Counts I and III), DTSV contends that OSC's evidence makes no showing of any purpose or intent to discriminate against any individual as is required by the 1996 amendment. Diversified contends further that OSC's interpretation of the amended language of § 1324b(a)(6) is wrong, and that it is still seeking to apply a strict liability standard to document abuse. Finally, Diversified contends that the receipt rule itself is manifestly contrary to the statutory requirement that a List A document must contain a photograph, citing to the principle that

---

[15] The record reflects some question as to whether there are 95 or 96 such individuals. Ninety-five persons were named by OSC in its Supplementary Answers to Respondent's First Set of Interrogatories and Requests for Production (RXC). OSC's statistical analysis (CX 20-23) shows 96.

where an administrative regulation is in conflict with a statute, it is the statute which necessarily controls. *Dalton v. United States,* 816 F.2d 971, 974 (4th Cir. 1987).

DTSV urges also that OSC made no prima facie case of hiring discrimination under § 1324b(a)(1) (Counts II and IV). As to Count II, it says that it initially failed to hire the four refugees based only on the fact that they presented Form I-94 without a passport, not based on their citizenship status. As to Count IV, DTSV asserts that there was no adverse employment decision affecting the ninety-six individuals identified by OSC as discriminatees where it hired all those individuals without any delay or impediment. It argues further that in any event the complaint alleges only document abuse, and the self-same acts cannot be penalized under both § (a)(1) and § (a)(6), citing *Swift*.

OSC responded to Diversified's motion by asserting that it does not need to present a prima facie case as to Counts I and II because DTSV's rejection of Form I-94 constitutes direct evidence of discrimination, and that DTSV can claim no defense based on a good faith desire to comply with the employment eligibility verification system, citing *Marcel Watch*. It contends further that DTSV is mistaken as to the intent standard, and that the only defense available to it would be a showing of constructive knowledge or reasonable suspicion that the applicants were unauthorized, citing *Tadesse v. United States Postal Serv*., 7 OCAHO no. 979, 936 (1997). Finally, it argues that the receipt rule is valid.

With respect to Count IV, OSC says no adverse employment decision is necessary to show discrimination in hiring because barriers to employment are actionable whether or not the person is hired. OSC also contends that Juarez' affidavit is not credible in stating that noncitizens were hired without INS-issued documents.

VIII. DISCUSSION

Because OSC is the party bearing the burden of proof, its motion will be considered first, with all facts viewed in the light most favorable to DTSV and all reasonable inferences drawn in its favor. *Primera*, 4 OCAHO at 261.

A. Whether OSC is Entitled to Partial Summary Decision

1. Count I - Document Abuse Against Osman, Nkpigi, Kara and Kennedy

As OSC acknowledges, it bears the burden under the amended document abuse provision to prove not only that Diversified requested more or different documents or rejected documents that reasonably appeared to be genuine, but also that the company acted for the purpose or with the intent of discriminating on a prohibited basis. The parties are in agreement that the company did, in fact, request documents for the purpose of satisfying the requirements of §1324a(b); that it did, in fact, explicitly reject the I-94's proferred by Osman, Nkpigi, Kara, and Kennedy; and that it followed a policy of not accepting Form I-94 as sufficient to show both identity and employment eligibility unless the form was attached to an unexpired foreign passport. Diversified has not raised any question as to whether the documents presented by the refugees appeared to be genuine and to relate to the individuals who tendered them. Thus the parties dispute only the purpose and intent with which DTSV acted, and the proper standards to be applied in making that determination. Critical to the resolution of the latter inquiry is the question of what constitutes proof of intent for purposes of establishing a post-amendment violation of § 1324b(a)(6).

(a) The Meaning and Effect of the Amendment to § 1324b(a)(6)

The impact of the 1996 amendment has not yet been fully explored in OCAHO jurisprudence, and the cases are not wholly consistent. In OSC's view, the intent standard must be narrowly construed in light of its legislative history, so that unless an employer has constructive knowledge or reasonable suspicion that an applicant is unauthorized for employment, it is still impermissible for an employer to refuse proffered documents or demand others because of unreasonable concerns regarding the validity of the documents. OSC contends that therefore "an employer's request for additional employment eligibility documents without any valid reason to suspect the applicant is unauthorized to work, or an employer's rejection of such documents based on unreasonable concern regarding the document's validity would constitute intentional document abuse."

But it is not intentional document abuse which the statute now prohibits; it is intentional discrimination. The amended statute, moreover, says nothing at all about unreasonable concerns respecting the validity of documents or suspicions about an applicant's lack of authorization. It says that a refusal of tendered documents or a request for more or different documents is a violation of the law only if it is made "for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)." The question presented is one of statutory interpretation: does the amendment mean what it seems to say, or should it be construed to mean something different based on an interpretation gleaned from its legislative history?

The starting point in a case involving the construction of a statute is the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

The circuit is in accord. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 228 (4th Cir. 2002) ("We begin our analysis with the text of the statute."). If the statutory language at issue has a plain, unambiguous meaning, the inquiry is over: the first canon is also the last. *Barnhart*, 534 U.S. at 462.

OSC points to no ambiguity in the statutory language; indeed it has not even suggested that there is any. Because no ambiguity has been identified and it appears that there is none, I must decline to resort to the legislative history in order to blunt what appears to be the plain meaning of the language Congress used. "When a statute is unambiguous, canons of construction prevent us from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do." *In re Equipment Servs., Inc.*, 290 F.3d 739, 745 (4th Cir. 2002) (citing cases). I note at the outset in approaching this question that Congress cannot have been unaware when it enacted this particular language that there are decades of Title VII jurisprudence, as well as cases arising under other nondiscrimination legislation, construing and explicating the meaning of the term intentional discrimination. The nondiscrimination provision in § 1324b(a)(1) was expressly modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2001), *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990), and case law under the latter statute has therefore long been held to be persuasive in interpreting § 1324b. *See, e.g., Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO no. 624, 308, 322 (1994), *aff'd*, 53 F.3d 328 (4th Cir. 1995) (Table). Apart from selected portions of its legislative history, there has been no showing in this case of any persuasive reason to believe that the words of the amendment mean something different in § 1324b(a)(6) than they mean in any other nondiscrimination law, and I decline to so hypothesize.

If there is one thing that is crystal clear from the amending language, it is that document abuse can no longer be treated as a strict liability offense. While pre-amendment cases may have held that a showing of discrimination is not required in order to establish liability for document abuse, this principle no longer applies. I conclude, therefore, that the facts in a document abuse case must now be examined in the same manner and with the same approach as is taken in any other intentional discrimination case. That is to say, where a case rests on direct evidence, the employer may overcome that evidence only by establishing an affirmative defense. *Tovar v. United States Postal Service*, 1 OCAHO no. 269, 1720, 1726 (1990), *aff'd in part & rev'd in part*, 3 F.3d 1271 (9th Cir. 1993). Where a case rests on circumstantial evidence however, the employer must be afforded the opportunity to respond to a prima facie showing by proffering a legitimate nondiscriminatory reason for the employment practice complained of. Whether a request for or rejection of documents can be found to discriminate will thus ordinarily depend upon the reason the request is made.

Because I find no reason to examine the legislative history of the amendment, I also cannot endorse the hypothesis put forward in *Patrol & Guard*, 8 OCAHO at 627-28, and *Tadesse*, 7 OCAHO at 944-45, that a new affirmative defense of good faith can or should be distilled from remarks made by Senators Simpson and McCain during the floor debates on the amendment. The words Congress chose to enact simply do not bear the meaning suggested in those cases. As explained in *Shannon v. United States*, 512 U.S. 573, 583 (1994), "We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." If Congress intended by amending § 1324b(a)(6) to create an affirmative defense, it chose language singularly ill suited to that purpose.

In declining to give dispositive weight to the floor debates, I am influenced by the *Barnhart* court's assessment of the weight to be given to the floor statements of Senators Wallop and Rockefeller, sponsors of the Coal Act, as to the meaning of the language in that Act. While the Commissioner had argued that as sponsors of the Act their views were entitled to special weight, the court emphatically disagreed, noting that the remarks could not have a determinative effect on the interpretation of a statute:

> Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

534 U.S. at 457. In the face of this unequivocal language, the remarks of Senators Simpson and McCain cannot be afforded the defining role suggested in *Patrol & Guard* and *Tadesse*.

Characterizing an employer's explanation of its document request or rejection as an affirmative defense, moreover, does violence both to the statutory scheme and to the weight of the case law respecting the allocation of proof in an employment discrimination case. If an employer's explanation were to be treated as a matter of affirmative defense even in the absence of direct evidence, this would have the effect of shifting the burden of proof on the issue of intent in every document abuse case from the complainant to the employer, because the party asserting an affirmative defense bears the burden of proof on that issue. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1164 (1998). But we know on the highest authority from *Reeves-Hicks-Burdine* that the burden of proof on the ultimate question of whether a protected trait actually motivated the employer's decision remains at all times on the complaining party. The employer's burden of production in proffering a legitimate nondiscriminatory reason for a questioned employment decision is precisely that: a burden of production only. *Causey v. Balog*, 162 F.3d 795, 800 (4th Cir. 1998).

Nothing in the amendatory language remotely suggests a legislative intention to reallocate the burden of proof for cases alleging document abuse so that the complainant is relieved of the burden of showing discriminatory intent.

Lack of intent to discriminate is not an affirmative defense in a case arising under § 1324b because the element of intent is part of the complainant's case, upon which the complainant at all times bears the burden of proof. A true avoidance or affirmative defense, unlike an employer's proffer of a nondiscriminatory reason, is either a pleading that admits the allegations of the complaint but suggests some other reason why there is no right of recovery, or one that introduces allegations outside the plaintiff's prima facie case which therefore cannot be raised by a simple denial in the answer.[16] 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §1271 (Supp. 2001). Where a purported "affirmative defense" does not really set forth an avoidance or defense, but merely denies liability or asserts that the plaintiff cannot establish all the elements of its case, the matters raised are already in issue by virtue of the allegations in the complaint and answer. *A&A Maint. Enters., Inc.*, 6 OCAHO no. 852, 265, 271 (1996); *cf. Renalds v. S.R.G. Rest. Group*, 119 F. Supp. 2d 800, 804 (N.D. Ill. 2000) (stating that good faith is not an affirmative defense which must be pleaded by defendants in a Title VII case); *Clark v. Milam*, 152 F.R.D. 66, 73 (S.D.W.Va. 1993).

As previously noted, the respective burdens of proof and production in a post-amendment document abuse case must now be allocated in the same manner as they are in cases arising under § 1324b(a)(1), because document abuse is no longer a per se violation. This means that absent direct evidence, a prima facie document abuse case may serve to raise an inference of discrimination, but once the employer responds by proffering a nondiscriminatory reason, any inference of discrimination is dissipated, and the complainant must show, as in any other disparate treatment case, that the employer's reasons are unworthy of credence or are otherwise a pretext for discrimination. *See generally Dugan v. Albemarle County Sch. Bd.*, 293 F.3d 716, 721 (4th Cir. 2002). This is the standard I will apply to the facts in this case.

Whether § 1324b(a)(6) as amended now provides, as a matter of public policy, a sufficiently rigorous standard to motivate employers to learn what their responsibilities are under the employment eligibility verification program and to conform their conduct to those responsibilities is a question best addressed in the first instance to the United States Congress. My task is to apply the law as enacted, not to determine what the law should be.

(b) Whether OSC Demonstrated Intentional Discrimination Against the

[16] For example, DTSV's eighth affirmative defense, the invalidity of the "receipt rule," is in the nature of a true affirmative defense. It does not merely deny the allegations of the complaint; instead it introduces new allegations of its own, extrinsic to the complaint.

OSC says that intentional discrimination does not require proof that the employer subjectively harbored some special animus, hostility, or malice toward the protected group, only that the employment decision was premised upon the protected characteristic. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987). OSC contends that the requisite intent to discriminate has been demonstrated here because:

> . . . the four refugees presented I-94 documents issued to them by INS and identifying them as refugees. They possessed these documents because of their status. As refugees, they could not stop and obtain passports when fleeing their countries. Thus, Respondent's rejection of the refugees' INS Forms I-94 was based on their status as refugees, and was not accidental.

OSC supports this conclusion by citation to *Marcel Watch* and *DeWitt*, and says that rejection of an I-94 form is direct evidence demonstrating an intent to discriminate without the necessity of any *McDonnell Douglas* showing. It says that refugees would by definition be unable to produce a passport because of their status, and draws an analogy to the Puerto Rican born complainant in *Marcel Watch* who could not produce a green card because she was a United States citizen.

But OSC has not explained what is "direct" about any evidence in this case. Direct evidence is that which proves the fact in issue without the benefit of any inference or presumption. *Fuller*, 67 F.3d at 1142. This ordinarily means there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision. *See, e.g., Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) ("He stated . . . he was never going to send a female to the Academy."); *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433-34 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (noting supervisor's admission to belief that "older people tend to become complacent whereas younger people generally have more drive and ambition"). While OSC says that intentional discrimination does not necessarily require a showing of some special animus toward a protected group, direct evidence, in contrast, usually does require such evidence of animus. That is what the term direct evidence means in the context of an employment discrimination case.

As the Fourth Circuit, in which this case arises, explained, direct evidence is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Taylor*, 193 F.3d at 232.

Such evidence has two characteristics: 1) it clearly indicates a discriminatory attitude, and 2) it illustrates a nexus between the negative attitude and the employment action. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999). OSC has identified no evidence which satisfies either element of this standard.

Instead it argues, with notable circularity of reasoning, that refugees have I-94s and no passports because of their status as refugees, and therefore rejection of their I-94s is rejection because of their status. But this is not evidence at all, much less direct evidence; it is a tautology which takes no account of the facts or the evidence as to what actually happened,[17] and assumes away the very question to be decided. According to OSC's rationale, aliens have INS-issued documents only because of their "status"; therefore whenever an employer rejects or requests any INS-issued document, the rejection or request would automatically by definition be based on the person's "status," foreclosing any inquiry into the actual facts or the employer's real reason for rejecting or requesting the document.

OSC does not explain how its formulaic recitation has any probative value as to Cascade's intent, and I cannot agree that the record reflects direct evidence of an intent to discriminate on the basis of citizenship status. Unless the I-9 Instructions and the Handbook for Employers are themselves direct evidence of intent to discriminate on the basis of citizenship, or more accurately, became direct evidence of such discriminatory intent when the receipt regulation was amended to include a refugee's Form I-94 as a "receipt" for Form I-766 or I-688B, it is difficult to understand how a policy based on these sources could be so characterized. OSC has identified no evidence of any discriminatory attitude; indeed it says it doesn't even have to make such a showing, but this assertion is inconsistent with the claim that there is direct evidence.

While OSC argues that the legislative history of the amendment shows it was not intended to overrule *Marcel Watch* and *DeWitt*, a snippet of legislative history, for the reasons previously stated, cannot be read to elevate every sentence in those cases to binding precedent. *Marcel Watch* is not controlling as to the meaning of the term "direct evidence" and I do not find it particularly persuasive on that point either, because it relied on *Thurston* (which clearly did involve a facially discriminatory policy restricting the transfer rights of pilots over the age of 60) without explanation of what was direct about the evidence before it, and without analysis of the structural differences between the ADEA and Title VII. While *Marcel Watch* and *DeWitt* may have reached the right result based on their own facts,[18] this

---

[17] For example, contrary to OSC's recitation that refugees have no passports, the record reflects that Osman arrived in the United States with a valid passport from the Republic of Sudan (CX 24, p. 22).

[18] While the result in *Marcel Watch* appears to be correct, this is not necessarily because the (continued...)

does not mean that the mode of analysis there is necessarily applicable to every document abuse case. The approach to direct evidence taken in such cases as *United States v. General Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1164 (1993), *petition for review denied*, 49 F.3d 1384 (9th Cir. 1995), *Kamal-Griffin*, and *Lasa* appears to be more consistent in any event with mainstream jurisprudence, as well as with the views of the circuit in which this case arises.

Neither does OSC's conclusion that DTSV's rejection of the I-94 Forms was "based on" citizenship status find support in the record. Acceptance of the proposition that refugees have I-94s because of their status, and therefore rejecting I-94s is based on their status, requires an inference or presumption that presentation of an I-94 Form is a proxy for the presenter's citizenship. That inference is not warranted for two reasons. First, for purposes of considering OSC's motion, all the inferences must be drawn in favor of DTSV as the nonmoving party. Second, and more importantly, drawing such an inference would conflict with the teaching of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-09 (1993), which holds that prohibited disparate treatment must be based on the actual protected characteristic, not on some other analytically distinct factor, even though the other factor may be empirically correlated with the protected characteristic.

Correlation should not be confused with causation. Thus notwithstanding the fact that there may be an empirical correlation between refugee status and presentation of Form I-94 (although persons other than refugees could also present a Form I-94, *see* 8 C.F.R. § 274a.2(b)(vi)(B), and refugees could present documents other than Form I-94), or between status as a refugee and lack of United States citizenship (although obviously not all noncitizens are refugees), these correlations cannot substitute for a showing that citizenship status itself was actually a factor which influenced the employment decision. As observed in *Contreras*, 9 OCAHO at 19,

> The phrase "because of" or "based on," as applied to a protected characteristic, ordinarily requires that the employee is obligated to prove not only that an adverse employment decision occurred, but also that the cause of that decision can be specifically traced to the protected characteristic itself, not to some other characteristic standing in as a proxy for the protected characteristic. That is, the adverse decision must be shown to actually have been made by reason of, or on account of, the protected characteristic itself.

While the simple fact of rejection of, or inappropriate requests for, documents coupled with

---

[18](...continued)
evidence there was "direct" but because the employer's attempted explanation was ultimately not sufficient to explain the particular employment decision in question.

membership in a protected group was regarded as sufficient to establish a violation under the former strict liability document abuse standard, there must now be something more: a causal link or nexus must actually be established between those two factors. That is, the adverse decision must be shown to have actually been made by reason of, on account of, or on the basis of the protected characteristic. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995). There must be an intent or purpose to discriminate. This means at minimum that there must be a factual basis upon which a rational fact-finder could infer a causal connection; the nexus cannot be established just by a formulaic assertion that the protected characteristic was the reason.

A decision is not "based on" a protected characteristic when the facts demonstrate the decision was made for some other, different reason. Notwithstanding OSC's use of the term "thus," Diversified's rejection of the I-94s has not been shown to have a causal relationship to the particular citizenship status of the four individuals proffering the I-94s, or to their lack of United States citizenship status either.[19]

Assuming, however, that OSC's evidence made out a prima facie case of document abuse as to Osman, Nkpigi, Kara, and Kennedy under a traditional *McDonnell Douglas*-type analysis, Diversified proffered a nondiscriminatory explanation for its conduct: it said it rejected the refugees' I-94 Forms because the INS Handbook for Employers and the instructions on the back of the I-9 Form said that the I-94 had to be attached to an unexpired foreign passport, and in each case it wasn't. The presentation of this explanation would dispel any inference of discrimination arising from the prima facie case.

OSC argues, however, that DTSV can have no valid defense based on a good faith effort to avoid hiring undocumented workers absent constructive knowledge or reasonable suspicion that an employee or applicant is undocumented, citing again to *Marcel Watch* and to the legislative history of the 1996 amendment. But OSC is setting up a straw man when it characterizes DTSV's reason for rejecting the I-94s as being a claim of "good faith effort to avoid hiring undocumented workers." Such a generalized statement is indeed an inadequate explanation for an employment decision, but it is not the explanation DTSV gave for rejecting the I-94 forms.

Vague and conclusive averments of good faith have never been sufficient to satisfy an employer's obligation to provide a nondiscriminatory reason for an employment action. *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 680 (1997); *Lasa*, 1 OCAHO at 968. This is not because of the amendment to § 1324b(a)(6) or its legislative history, but because once an

[19] While neither party mentioned the refugees' actual citizenship status, documentary evidence shows that Osman is a citizen of Sudan (CX 11, p. 2); Nkpigi and Kara are citizens of Nigeria (CX 13, p. 2) (CX 15, p. 2); and Kennedy is a citizen of Angola (CX 17).

employer comes forward to explain an employment decision, the factual inquiry proceeds to a new level of specificity. *Aikens*, 460 U.S. at 714-15; *Burdine*, 450 U.S. at 255. In order to qualify as a nondiscriminatory reason, the employer's explanation must present a specific reason and "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255-56. A generalized claim of good faith will seldom meet these requirements because the reason must be clear and specific. This has long been the law. *See, e.g.*, *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985) (emphasizing that vague and conclusory averments of good faith do not satisfy employer's burden of production; otherwise employees seeking to show pretext would be unfairly handicapped).

What DTSV actually said, in contrast to OSC's characterization, was that it rejected the I-94 documents because the back of the I-9 Form and the INS Handbook for Employers said that Form I-94 had to be attached to an unexpired foreign passport in order to be used as a List A document, and the company was unaware of the existence of the receipt rule until informed of it by OSC.[20] This is not a generalized claim of "good faith effort to avoid hiring undocumented workers"; it is a specific, albeit mistaken, nondiscriminatory reason why Cascade's personnel rejected the I-94s. It is evidently undisputed that the instructions on form I-9 and the Handbook were both promulgated by INS for the guidance of employers and have not been revised since 1991; those rules simply do not recognize the later amendment to the receipt regulation permitting use of Form I-94 as a List A document. INS expressly told employers to continue to use the 1991 version of the I-9 form, 62 Fed. Reg. at 51001-02, and this is what Diversified did.

Not all mistakes employers make in the verification process give rise to penalties under 1324a: the Service itself has declined to seek civil money penalties for violations of § 1324a associated with changes made by the interim rule, at least until it revises the I-9 form and promulgates a final rule. 62 Fed. Reg. at 51001-02; 64 Fed. Reg. at 6187-88. INS thereby created a safe harbor for employers "who continue to act in reliance upon and in compliance with existing employment verification forms, guidance, and procedures." 62 Fed. Reg. at 51001-02. It is reasonably clear as well that Congress did not intend that all mistakes in the verification process should give rise to penalties under 1324b either: by amending § 1324b(a)(6) in the manner it did, Congress has specifically instructed us that errors in carrying out documentary inquiries for purposes of § 1324a compliance can now be penalized under § 1324b only where there is a showing that there actually was a discriminatory intent. I simply cannot find such an intent manifested in the evidence presented here.

---

[20] Although DTSV also set out its reliance on the I-9 instructions and the Handbook as the third of its twelve affirmative defenses, I conclude that this was an excess of caution: what purports to be DTSV's third affirmative defense is in fact no more than a statement of the company's proffered explanation for the employment decision; its assertion as an affirmative defense is redundant.

OSC's reliance on *Louis Padnos* is misplaced, first because *Louis Padnos* was decided under the pre-amendment per se strict liability standard which required no showing of intent, and second because the facts in *Louis Padnos* were quite different. The respondent in *Louis Padnos* said it requested an INS-issued document for reverification in reliance on the Handbook and on a telephone conversation with a Border Patrol agent. *Louis Padnos* could not actually have relied on the Handbook, however, because a fair reading of the Handbook did not support his "ill-advised" interpretation of it, 3 OCAHO at 186, and the oral advice of a government agent has never been entitled to reliance. *Id.* at 187-88, citing *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984). *See also Acosta,* 7 OCAHO at 608; *cf. Getahun,* 124 F.3d at 595-96 (finding that employer's purported reliance on an INS legal memorandum was unavailing where the employer misinterpreted the memorandum).

Because Diversified set forth a nondiscriminatory reason, its explanation dissipated any inference of discrimination arising from OSC's prima facie case, and put the evidentiary ball back in OSC's court. There the ball remains for purposes of this motion because OSC presented no evidence to suggest either that DTSV's explanation is unworthy of belief or that it was a cover-up for discrimination against refugees. OSC did not suggest that DTSV's personnel lied about its policy or the reasons for the policy, and did not identify any evidence which would undermine DTSV's unrebutted evidence of the reason why it mistakenly rejected the proffered I-94s. OSC's motion for summary decision must accordingly be denied as to this count, because OSC has failed to make a showing of discriminatory intent, one of the essential elements of its case.

> 2. Count II- Citizenship Status Discrimination Against Osman and other Refugees

OSC argues similarly that DTSV's rejection of the refugees' I-94 forms also constitutes knowing and intentional discrimination in hiring. It says,

> Respondent's conduct also constitutes citizenship status discrimination against the four refugees, based on direct evidence, that is, the admissions of Respondent in rejecting the refugees' INS Forms I-94 and refusing to hire them, based on their citizenship status.

But there is no direct evidence, and DTSV has made no "admission" that it rejected the refugees' I-94s and refused to hire them "based on their citizenship status." Quite to the contrary, the company vigorously denied making any decision based on anyone's citizenship status, and says instead that its rejection of the I-94s was based on specific INS instructions.

OSC's assertion that rejection of the I-94s was based on citizenship status rests again on acceptance of the assumption that presentation of Form I-94 is the legal equivalent of the presenter's citizenship status, a proposition at odds with *Hazen Paper*. For the reasons previously stated, I cannot agree that either the policy itself, or the INS Handbook for Employers and I-9 instructions on which the policy was premised, constitute direct evidence of discrimination or of intent to discriminate on a prohibited basis. It is nevertheless undisputed that Osman, Nkpigi, Kara, and Kennedy belong to a protected class, that they applied and were qualified for jobs at DTSV, and that they were initially rejected while DTSV continued seeking applicants. Although a prima facie hiring case was thus made out under *Sears Roebuck* as to the four refugees, DTSV proffered a nondiscriminatory reason for rejecting their I-94 forms; that is, specific, though outdated, INS instructions said that Form I-94 was acceptable only if attached to an unexpired foreign passport. Any inference of discrimination arising from OSC's prima facie case was thereby dissipated. In the absence of any evidence or suggestion of pretext, OSC has failed to establish an essential element of its case, and summary decision must be denied it as to this count as well.

3. Count III - Pattern and Practice of Document Abuse as to 96 Noncitizens

OSC next contends that its evidence demonstrates that from October 27, 1999 to December 19, 2000, DTSV engaged in a pattern and practice of document abuse by requiring 96 noncitizens to produce INS-issued documents both for verification and for reverification, with the purpose or intent of discriminating against them on the basis of their citizenship. It says that the company's standard operating procedure established barriers to employment because the choice of which documents to present should be the employee's choice, not the employer's.

What was nevertheless not shown was that any individual other than the four refugees was actually obstructed by any document requests: it is essentially undisputed that all of the other individuals OSC identified as discriminatees were hired without any delay attributable to employment eligibility documentation issues. Although OSC questioned the credibility of Juarez' testimony on this point, it was evidently unable to identify any specific applicant, apart from the four refugees, who was not immediately hired by DTSV. OSC says, however, that because noncitizens were required to present more or different documents than the statute requires, and because economic harm is not an element of document abuse, it is not necessary that any damages be shown.

In OSC's view, a request for specific documents "immediately eliminates an individual's right to produce any other documents" and is therefore a violation. OCAHO case law is not consistent, however, as to whether a request for a specific document, as opposed to the statutory "more or different documents," is a practice prohibited by the section.

See United States v. Zabala Vineyards, 6 OCAHO no. 830, 72, 85-88 (1995) (finding that request for specific document was not encompassed in § 1324b(a)(6) and discussing apparent conflict with *United States v. Strano Farms*, 5 OCAHO no. 748, 206, 224-25 (1995), *aff'd sub nom. Strano v. Department of Justice*, 98 F.3d 1353 (11th Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997), and *A.J. Bart*). *See also Robison Fruit Ranch*, 147 F.3d at 801-02. *Zabala* held that, at least in a case where there was no showing that anyone was denied employment, "the statutory prohibition against an employer's request 'for more or different documents' or 'for refusing to honor documents tendered that on their face appear to be genuine' does not per se prohibit a request for specific documents, at least where those documents are in fact routinely presented in anticipation of such a request or on demand." 6 OCAHO at 88.

While it is impossible to tell from the 96 I-9 forms themselves whether a particular alien's INS-issued document was presented spontaneously by the applicant or whether it was produced in response to a specific request, several individuals in addition to the refugees did testify that they were asked for specific documents. Seada Mohammed said Mireya Juarez asked her for a "resident card, social security and license," so she presented them (CX 29); Ponleiy Ye said that Juarez requested her driver's license, social security card and alien registration card, and she presented them (CX 28); Mireille Kalaki said when she was told on the phone to bring her green card, she said she didn't have one, but that she did have a work permit. She was then told to bring the work permit, so she did, along with her ID and social security card (CX 27); Kim Thu Thi Mai said Juarez asked for her driver's license and work permit so she presented them (CX 30); Isidore Etok Mulamba said he was told to bring his social security card and permanent resident card to orientation. When he filled out the I-9 Form, he showed his permanent resident card, and he was asked to show a work permit and social security card as well (CX 31); Aster A. Kassahun said Ella Baker asked her for a work permit, ID and social security card (CX 32); and Sode Nnabie said Douglas Daisey asked him to bring an Employment Authorization card but he didn't have one, so he brought his I-94, drivers's license, and social security card instead (CX 33).

The facts here are similar to those described in *Robison* where all the workers who were asked for specific documents were hired, and no applicant was shown to be particularly burdened by the request. 147 F.3d at 802. The *Robison* court noted that no authorized alien had difficulty complying with the requests there, and characterized the documents as those which "virtually all applicants had in their possession and in fact commonly used to fill out other required employment forms." *Id.* at 799. For many newly-arrived aliens, the only documents they will have are INS-issued documents. Certificates of alien registration and alien registration receipt cards are, moreover, documents which aliens are already obligated by law to carry and have in their possession at all times. 8 U.S.C. § 1304(e). The employer in *Robison* was thus requesting documents the aliens were already using to fill out the top of Form I-9 and Form W-4, which requires a social security number.

Far from suggesting intent to discriminate, the court in *Robison* said the employer there was actually "attempting to assist the applicant in satisfying the requirements of Form I-9."

Similarly, the requests in *Zabala*, like those here as well, were also for specific documents that are "routinely presented" during the employment process, and there was no showing anyone was denied the opportunity for employment. 6 OCAHO at 88. None of the employees other than the four refugees said that producing the requested documents caused them any hardship or delay, or for that matter that Diversified rejected any other documents which they had proffered. Both Kalaki (CX27) and Nnabie (CX33) said that when they told DTSV they didn't have the particular documents that had been requested, DTSV accepted other documents that they did have. This evidence suggests that DTSV was seeking to hire these individuals as expeditiously as they could, not to delay or impede their employment. As explained in *Zabala*,

> This case stands for the proposition that (a)(6) does not intrude on hiring practices for purposes unrelated to overcoming discrimination in the workplace. Eliminating discrimination is what § 1324b, including subsection (a)(6), is all about. Section 1324b is an expression of national policy which addresses the evil of exclusionary hiring practices. No one was excluded here. To find liability on this record would not serve that national policy.

Id. OSC nevertheless says that in this case "discriminatory intent is evidenced by Respondent's admissions of Ms. Juarez and Ms. Baker, the deposition testimony and declarations of the employee witnesses and the summary of Respondent's I-9 forms." OSC's statistical analysis of Diversified's I-9 Forms shows that the percentage of aliens who presented INS-issued documents during the period identified differed in a statistically significant way from the percentages in the preceding or following periods. OSC's expert concluded that the underlying process which generated production of those documents in that period differed from the process in the other two periods. I credit this evidence, and credit as well the low probability that the result could have happened by chance, but I cannot find that the statistical analysis has any probative value either way as to the issue of intent to discriminate.

Neither do I find evidence of intent in the deposition testimony or the statements of the employee witnesses. The employees simply described the specific requests that were made to each of them for documents. The testimony of Juarez and Baker displayed lamentable ignorance of some of the requirements of the employment eligibility verification system, but ignorance is not evidence of an intent to discriminate.[21] A "purpose" or "intent" to discriminate is the operative language here; as I

---

[21] With respect to the element of intent, OSC says it is proven because noncitizens were treated differently and the law "merely requires a showing that individuals are treated differently on the

(continued...)

understand those terms they mean something different from ineptitude or ignorant error.

It is certainly true that employers have an affirmative statutory obligation to make reasonable efforts to ascertain what the law requires and to conform their conduct to it. DTSV didn't do this very well, at least to the extent of ensuring that Juarez and Baker were adequately trained. However even if we were to charge DTSV with the knowledge that they should have had, knowledge is still not the same as intent. As Judge Easterbrook explained in *Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992),

> [D]iscrimination is an intentional wrong. An empty head means no discrimination. There is no "constructive intent," and constructive knowledge does not show actual intent. Ignorance may be reprehensible, but not because it is . . . discrimination. A supervisor who does not find out what is going on in the workplace should be sacked as incompetent, not lumped with bigots.

This is not to imply any approval of DTSV's documentary practices. It is clear that those practices left much to be desired. OSC's statistical and anecdotal evidence supports a finding that inappropriate document requests were sometimes made by Diversified's employees. Statements made by Juarez and Baker reflect a lack of understanding of some of the basic principles of the employment eligibility verification system, and might well have had adverse consequences for employment applicants.[22] Except for the four refugees, however, they evidently did not.

The kinds of errors Diversified's personnel made would doubtless have been held in a pre-amendment case to constitute per se document abuse; the question presented here is whether those same errors can, now that document abuse is no longer a strict liability offense, be characterized as intentional discrimination under § 1324b(a)(6) as amended, particularly where there has been no showing that any

---

[21](...continued)
basis of national origin or citizenship status." It is the phrase "on the basis of," however, that provides the sticking point: in order to find an intent to discriminate "on the basis of" a protected characteristic, the element of actual causation must be established; that is, the protected characteristic, here citizenship status, must be shown to be the actual basis or reason for the employment practice in issue. *Hazen Paper*, 507 U.S. at 610.

[22] DTSV's contention that it is not responsible for errors of low-level employees had there been violations is simply wrong: an employer cannot avoid responsibility for violations simply by delegating the hiring process to low-level employees. *United States v. Y.E.S. Industries, Inc.*, 1 OCAHO no. 198, 1306, 1318-19 (1990) (principal chargeable for act of agent within scope of agent's authority).

specific applicant was actually affected by the erroneous beliefs. I am not persuaded that after the amendment to the document abuse provision every mistake an employer makes in carrying out its responsibilities under § 1324a, or every erroneous belief held by an employee about the requirements of the verification process, can be equated without more to a violation of § 1324b.

Case law has noted in other contexts that sometimes an employer can make errors too obvious to be unintentional, *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 117 (2002), so that the errors themselves bolster an inference of pretext. *Accord Fischbach v. District of Columbia Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996). It thus may be that under some circumstances an employer's claim of ignorance is too implausible to be credited. But I do not find the errors here susceptible to such characterization; the document requests made here may have been wrong, but there is no indication that they were intended to impede any individual, or that they did so. Accordingly, I find that OSC has not carried its burden of proof with respect to the issue of intent in Count III, and its motion for summary decision on this count must be denied.

4. Count IV Pattern and Practice of Citizenship Status Discrimination in Hiring

OSC urges that notwithstanding the fact that all the alleged discriminatees other than the four refugees were hired, a pattern and practice of hiring discrimination is nevertheless established by its evidence that DTSV created obstacles for noncitizens, because they were required to produce INS-issued documents as a condition of employment, while United States citizens could produce any acceptable combination of documents from the back of Form I-9.

A prima facie case of hiring discrimination under 8 U.S.C. §1324b(a)(1), however, ordinarily follows the classic showing that the individual belongs to a protected class, applied and was qualified for an open position but was rejected, and that the employer continued to seek applicants. *Henson*, 61 F.3d at 275. The paradigmatic case of pattern and practice case of hiring discrimination is thus not ordinarily a case brought on behalf of existing employees; it is usually the applicants who are denied employment who are the discriminatees, not the ones who were hired without difficulty or delay. Here however, no applicant flow data was presented and there has been no showing that any applicant for employment, other than the four refugees, was affected by errors in Diversified's documentary practices. If there was any such applicant, that person has not been identified.

OSC argues that it is the whole hiring process, not just a failure to hire, which is encompassed in § 1324b(a)(1). That may well be. It does not necessarily follow, however, that a prima facie hiring discrimination claim can be shown in the absence of any tangible adverse employment action. As explained in *Von Gunten v. Maryland*, 243 F.3d 858, 863 n.1 (4th Cir. 2001), proof of an "adverse employment action" is a sine qua non of a discrimination claim.

There must be some injury at a "threshold level of substantiality" to state a cognizable claim. *Id.* at 864 (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)). *Accord Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (action must have some "significant detrimental effect" in order to provide basis for discrimination claim). Only under extremely limited circumstances can a discrimination case be maintained in the absence of a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998). According to the Court,

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Id. at 761 (citing cases).

Absent any prima facie showing that unnecessary barriers were created which actually affected, even temporarily, the employment of noncitizens, OSC is not entitled to a summary decision as to Count IV.

B. Whether DTSV is Entitled to Summary Decision

1. Counts I and II - Document Abuse and Hiring Discrimination Against Osman, Nkpigi, Kara and Kennedy

For purposes of considering Diversified's motion, I draw every reasonable inference from the same facts in OSC's favor. As previously observed, OSC made out a prima facie case both as to document abuse and as to hiring discrimination with respect to each of the four refugees. DTSV's explanation then returned the burden of proof to OSC, which has not really addressed at all the principal question that needs to be answered at this stage: whether Diversified's explanation is unworthy of belief or is otherwise a pretext for discrimination. Even considering the facts in the light most favorable to OSC, I find that no factual issue has been presented regarding pretext.

It is the complainant's burden at this stage to demonstrate some evidence that the employer's proffered reason is pretextual and that the real reason for the employer's actions was discrimination. In order for OSC to survive DTSV's motion, OSC would have to point to evidence which 1) raises an inference that the reason is false because it has no basis in fact, or 2) shows that the reason is inconsistent with or contradicted by other evidence, or 3) suggests that the reason was made up after the fact and thus did not actually motivate the actions complained of, or 4) otherwise shows that the reason lacks credibility and is unworthy of belief. *Sears Roebuck*, 243 F.3d at 852-54. OSC did not, however, tender any evidence suggesting that Diversified's explanation of the reasons for its initial refusal to accept the refugees' I-94s is unworthy of belief or that the policy masks a discriminatory purpose.

The facts underlying Diversified's explanation of why it rejected the I-94s and delayed hiring the refugees are essentially unrefuted.

DTSV's motion for summary decision on these two counts must be granted in the absence of any evidence or suggestion that its explanation is pretextual. When a nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary disposition is appropriate. *Celotex*, 477 U.S. at 322. Absent a genuine factual issue as to the element of intent to discriminate, DTSV's motion for summary decision will be granted as to Counts I and II.

In view of the fact that DTSV's nondiscriminatory reason for refusing the I-94s proffered by Osman, Nkpigi, Kara, and Kennedy is unrebutted, I do not reach the question of whether the receipt rule is inconsistent with 8 U.S.C. § 1324a,[23] or whether the INS regulations preclude OSC from seeking penalties for violations that may be associated with changes made by the INS Interim Rule.

2. Counts III and IV - Pattern and Practice of Discrimination

With respect to the allegations of a pattern and practice of document abuse and hiring discrimination, OSC made an initial showing that Juarez made inappropriate document requests, that she and Baker were misinformed about some of the basics of the employment eligibility verification process, that DTSV had requested specific documents from several noncitizen employees, and that a statistically significant number of aliens presented INS-issued documents for I-9 purposes during the period at issue. OSC's evidence did not, however, show either that during that period any applicant for employment other than the four refugees was delayed or burdened by the requests complained of, or that Diversified made such requests for the purpose or with the intent of discriminating against any individual in violation of § 1324b(a)(1).

Because OSC bears the burden of proof on the issue of intent, Diversified can prevail simply by pointing out the absence of sufficient evidence to create a genuine issue of material fact as to that element of OSC's case. There being no such factual issue presented, Diversified's motion will be granted as to Counts III and IV asserting a pattern and practice of discrimination.

IX. Findings and Conclusions

[23] It is not entirely clear whether an administrative tribunal within the Department of Justice may entertain a challenge to the validity of regulations promulgated by the Attorney General. *See United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 16-18 (2000). Neither of the parties elected to address this issue.

I have considered the pleadings, motions and supporting documents filed by the parties as well as the remainder of the record. All motions and other requests not previously disposed of are denied. On the basis of the record I make the following findings and conclusions:

A. Findings of Fact

1. Diversified Technology & Services of Virginia, Inc. is a corporation which has its headquarters in Newport News, Virginia.

2. Diversified Technology & Services of Virginia, Inc. has a contract with the United States Patent and Trademark Office (PTO) pursuant to which its employees perform certain records maintenance functions at the PTO facility in Arlington, Virginia.

3. Diversified has 426 employees, 334 of whom work at the Arlington facility.

4. At all times relevant to this proceeding, Diversified Technology & Services of Virginia, Inc. employed more than three employees.

5. Calvin Wilson has been employed as DTSV's Project Manager at the Arlington facility since February 22, 1999.

6. Calvin Wilson's responsibilities as Project Manager include supervision of the employment eligibility verification processes.

7. Mireya Juarez has been employed by DTSV since January 30, 1997, and has been its Administrative Services Supervisor since October 1999, reporting to Calvin Wilson.

8. During the period October 27, 1999 to December 19, 2000, Mireya Juarez frequently asked noncitizen applicants and employees to present INS-issued documents for I-9 verification and reverification, and also asked permanent residents to reverify their alien registration cards.

9. Ella Baker was DTSV's Operations Manager from October 4, 1999 to June 14, 2000.

10. Ella Baker reviewed and signed I-9 Forms from time to time between October 4, 1999 and June 14, 2000.

11. Ella Baker testified that she believed a noncitizen applicant had to present an INS-issued document for employment eligibility verification purposes, so she wouldn't sign an I-9 without such a document.

12. Douglas Daisey was DTSV's Human Resources Manager from September 25, 2000, until at least November 28, 2001, reporting to Calvin Wilson.

13. Douglas Daisey reviewed and completed I-9 Forms and obtained supporting documentation for employment eligibility verification purposes.

14. Ahmed Binouf Osman, a citizen of Sudan, was admitted to the United States as a refugee on September 8, 1999.

15. Allison Nkpigi, a citizen of Nigeria, was admitted to the United States as a refugee on September 20, 1999.

16. Glory Kara, a citizen of Nigeria, was admitted to the United States as a refugee on February 11, 1999.

17. De Kumba Kennedy, a citizen of Angola, was admitted to the United States as a refugee on December 14, 1999.

18. Ahmed Binouf Osman presented his INS Form I-94 to Diversified on September 25, 2000, in order to verify his identity and employment eligibility.

19. Diversified did not accept Osman's I-94 as sufficient evidence of identity and employment eligibility because it was not accompanied by an unexpired foreign passport.

20. Until approximately September 25, 2000, Calvin Wilson had a policy on behalf of DTSV of accepting Form I-94 only if the form was attached to an unexpired foreign passport.

21. INS' Handbook for Employers and the Instructions accompanying INS Form I-9, instruct employers that Form I-94 is acceptable as a List A document only if attached to an unexpired foreign passport.

22. DTSV was notified by OSC on or about September 25, 2000, that the "receipt rule" permitted a refugee to use Form I-94 alone as a "receipt" for a document showing identity and employment eligibility.

23. Ahmed Binouf Osman was subsequently hired by Diversified as a File Clerk I on October 11, 2000.

24. Had Diversified accepted Osman's I-94 when he originally presented it, Osman would have started work on September 26, 2000.

25. Allison Nkpigi presented his INS Form I-94 to Diversified on August 7, 2000, in order to verify his identity and employment eligibility.

26. Diversified did not accept Allison Nkpigi's I-94 as sufficient evidence of identity and employment eligibility because it was not accompanied by an unexpired foreign passport as directed in INS' Handbook for Employers and the Instructions accompanying INS Form I-9.

27. Allison Nkpigi was subsequently hired as a File Clerk I by Diversified on October 17, 2000.

28. Had Diversified accepted Nkpigi's I-94 when he presented it, Nkpigi would have started work on August 8, 2000.

29. Glory Kara presented her INS Form I-94 to Diversified on or about August 10, 2000, in order to verify her identity and employment eligibility.

30. Diversified did not accept Glory Kara's I-94 as sufficient evidence of identity and employment eligibility because it was not accompanied by an unexpired foreign passport as directed in INS' Handbook for Employers and the Instructions accompanying INS Form I-9.

31. Glory Kara was subsequently hired by Diversified on October 17, 2000.

32. Had Diversified accepted Kara's I-94 when she presented it, she would have started work on August 15, 2000.

33. De Kumba Kennedy presented his INS Form I-94 to Diversified on or about June 23, 2000, in order to verify his identity and employment eligibility.

34. Diversified did not accept De Kumba Kennedy's I-94 as sufficient evidence of identity and employment eligibility because it was not accompanied by an unexpired foreign passport as directed in INS' Handbook for Employers and the Instructions accompanying INS Form I-9.

35. De Kumba Kennedy was subsequently offered employment by Diversified in October 2000 and again February 26, 2001.

36. Had Kennedy's I-94 been accepted when he presented it, he would have started work on June 27, 2000.

37. A File Clerk I at Diversified is paid at the starting rate of $10.55 an hour.

38. INS instructed employers to "continue to use the current version of the Form I-9 (edition 11/21/91) to complete the employment verification process until the Form I-9 is revised." 62 Fed. Reg. at 51001-02.

39. From October 27, 1999 to December 19, 2000, 96 out of 102 noncitizen employees (94.12%) produced INS-issued documents for employment eligibility verification purposes.

40. Between October 27, 1999 and December 19, 2000, 47 out of 168 United States citizen employees (27.98%) produced documents showing their citizenship status for employment eligibility verification purposes.

41. Between October 27, 1999 and December 19, 2000, Diversified conducted four noncitizen employee reverifications; all four produced INS-issued documents.

42. Between October 27, 1999 and December 19, 2000, DTSV requested Seada Mohammed, Ponleiy Ye, Mireille Kalaki, Kim Thu Thi Mai, Isidore Etok Mulamba, Aster Kassahun and Sode Nnabie to present specific documents for purposes of verifying their identity and employment eligibility.

43. Seada Mohammed, Ponleiy Ye, Mireille Kalaki, Kim Thu Thi Mai, Isidore Etok Mulamba, Aster Kassahun and Sode Nnabie either presented the specific documents requested or presented alternative documents sufficient to prove their identity and employment eligibility.

44. DTSV personnel reviewed and changed their employment eligibility verification procedures around mid-January 2001.

45. There was no showing that DTSV intended to discriminate against any applicant for employment on the basis of the applicant's citizenship status.

46. On or about October 30, 2000, Osman filed a charge with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices alleging that he was denied employment because he could not produce the documents DTSV requested to verify his identity and employment eligibility.

47. On or about May 1, 2001, OSC filed the instant complaint with the Office of the Chief Administrative Hearing Officer.

B. Conclusions of Law

1. Diversified Technology & Services of Virginia, Inc. is an entity within the meaning of 8 U.S.C. § 1324b(a).

2. Refugees are protected individuals within the meaning of 8 U.S.C. § 1324b(a)(3)(B).

3. All conditions precedent to the institution of this action have been satisfied.

4. Refugees are individuals authorized to work in the United States incident to their status. 8 U.S.C. § 1157, 8 C.F.R. § 274a.12(a)(3).

5. The receipt rule authorizes refugees to use INS Form I-94 as a receipt for a List A document. 8 C.F.R. § 274a.2(b)(1)(vi)(C); 64 Fed. Reg. 6187, 6188 (1999).

6. OSC did not carry its burden to show that DTSV intended to discriminate against Osman, Nkpigi, Kara, and Kennedy on the basis of their citizenship status.

7. No showing was made that DTSV's initial refusal to accept INS Form I-94 from Osman, Nkpigi, Kara, and Kennedy for employment eligibility verification was because of any purpose or intent to discriminate against those individuals on the basis of their citizenship status within the meaning of 8 U.S.C. § 1324b.

8. No showing was made that DTSV engaged in a pattern and practice of requesting more or different documents than are required from employment applicants with the purpose or intent of discriminating against any individual on the basis of citizenship status within the meaning of 8 U.S.C. § 1324b(a)(1) or (a)(6).

9. No showing was made that DTSV engaged in a pattern and practice of refusing documents proffered by employment applicants that reasonably appear genuine and to relate to the individual with the purpose or intent of discriminating against any individual within the meaning of 8 U.S.C. § 1324b(a)(1) or (a)(6).

10. There is no genuine issue of material fact and DTSV is entitled to judgment as a matter of law.

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

ORDER

OSC's complaint must be, and it hereby is, dismissed.

SO ORDERED.

Dated and entered this 15th day of April, 2003.

_____

Ellen K. Thomas
Administrative Law Judge