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

MAHMOUD M. HAMMOUDAH, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) Case No. 98B00072
RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, Respondent.	) MARVIN H. MORSE) Administrative Law Judge

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(March 29, 2000)

I. *INTRODUCTION*

On December 11, 1997,[1] Dr. Mahmoud M. Hammoudah (Complainant or Hammoudah), a naturalized citizen of the United States, filed a Charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleging that Rush-Presbyterian-St. Luke's Medical Center (Respondent or Rush) discriminated against him based on national origin and citizenship status. His cause of action specifies July 22, 1997, as the date he learned definitively that he was not selected to work as a Therapeutic Radiological Physicist in a position for which he had applied.

Hammoudah received a rejection letter [Final Rejection Letter] dated July 22, 1997 with respect to the position advertised in February 1997. The letter, on Rush letterhead, is signed by Dr.

[1] The Charge is dated November 29, 1997. OSC's letter of April 16, 1998 advised Hammoudah that it was not filing a complaint on his behalf, and that he might file a private action. On May 19, 1998, Hammoudah timely filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. § 1324b(d).

James Chu (Chu), department head of medical physics in Rush University College of Health Sciences [graduate college faculty position], and section head of medical physics within the Rush Medical College Department of Radiation Oncology [medical college faculty position/hospital clinic service director].

Because December 11, 1997 is within 180 days after the alleged specific discriminatory "event," i.e., the failure to hire evidenced by the Final Rejection Letter, Complainant's charge is timely filed. 8 U.S.C. § 1324b(b)(3).

The Charge states that Respondent discriminated against Hammoudah when it failed to hire him, but instead hired Dr. X. Allen Li (Li or Dr. Li), a Canadian citizen of Chinese origin who "is less qualified than [Hammoudah] and has no citizenship status." Hammoudah also alleges that Chu, a United States citizen of Chinese origin, smuggled Li into the United States "by using and twisting the NAFTA agreement." In addition, the Charge asserts that, in 1996, Dr. Chu "hired another Chinese candidate."

The Charge, therefore, identifies Rush as the Respondent and Chu as the primary decision maker in the hiring process at issue. Further, it identifies core elements of the Complaint, namely, that the Respondent had open positions during 1996–1997 for which Complainant applied at least once, that Respondent was aware of and, "considered" Complainant at least once, and that Complainant was not selected during the hiring process for reasons he alleges were unlawfully discriminatory in nature, reasons which the Respondent alleges were legitimate and non-discriminatory.

The OCAHO Complaint was filed on May 19, 1998.

Respondent's Answer to the Complaint, filed July 1, 1998 admits "that it sought applicants for the *position* of Therapeutic Radiology Physicist in February 1996 and in March 1997, but denies that Complainant was qualified or best qualified for the *position*. Respondent admits that the position was filled by other *candidates*." Part I. 5. [Emphases added.]

Complainant's filings of October 1998, November 2, 1998, and February 16, 1999, provide further clarification of the background and ambiguities of his dispute.

Hammoudah's October 1998, filing indicates that he submitted three separate applications for positions of Therapeutic Radiological Physicist: February 1992 [February 92 position], February 1996 and March, 1997 [February 96–97 position]. Hammoudah asserts that he submitted several other applications between 1989 and 1997, presumably for professional employment at Rush.

Complainant's November 2, 1998 filing alleges that Chu "did not allow American students to have [certain] opportunities and also denied other qualified candidates such as the Complainant to be hired in the Medical Physics position." Complainant's Pleadings in Response to Respondent's October 20, 1998 Response, Para. 1. The filing discusses other hirings by Chu, and asserts, "The respondent prefers and has a pattern and practice of hiring, other non US citizens instead of US citizens." In support, he says that "The Respondent retained the 1996 application of Li to be used for consideration again in March, 1997." *Id.*, para. 2.

Complainant's February 16, 1999 Letter Pleading included, as Exhibit 33, Respondent's February 2, 1999 answer to an amended complaint in *Hammoudah v. Rush-Presbyterian-St Luke's Medical Center*, Case. No. 98 C 5050 (N.D. Ill. 2000) (U.S. District Court decision dated Feb. 17, 2000, referenced in Order, 8 OCAHO 1047 (2000)). That answer recites, "By letter dated July 22, 2997 (sic), the Chairman of defendant's Department of Medical Physics, James D.H. Chu ('Chu') informed plaintiff that the Department had selected another candidate. **Chu was the individual who had similarly informed plaintiff that he was not being hired in 1992 and 1996. Answer:** 9. Defendant admits." [Emphasis added].

In 1992, subsequent to Hammoudah's application for and Rush's decision regarding the 1992 vacancy, Complainant began working in a senior level medical physics position in Saudi Arabia. In 1994, Complainant suffered an illness that rendered him temporarily unable to manage the stress of his chosen profession, at which point he returned to the United States. Between 1992 and 1994, I find as fact that there is no continuity of contact between the Complainant and Respondent. I also find that the February 1992 vacancy was filled by a qualified individual and remained filled by that individual through the date of the Final Rejection Letter.

I conclude, therefore, that Complainant's allegations that he was unlawfully discriminated against implicates only events and decisions during the period 1995 through July 1997. Disputes as to occurrences prior to 1995 are outside the scope of this Order. Factual issues will be examined where continuity of contact is alleged by the Complainant, i.e., from 1995 (when Complainant asserts he frequently encountered Chu at a gas station where Hammoudah was employed and orally "applied" for jobs[2]) until the July 1997 Final Rejection Letter.

Through Chu's deposition, Respondent acknowledges at least three distinct employment decisions during 1996–97 with respect to staffing therapeutic radiological physicist functions in the clinical setting: (1) the decision to hire Weimin Chen internally in the spring of 1996 after advertising externally, (2) the decision to invite Chui-Tsao to apply for a position[3] in December of 1996 (and subsequently to offer her a position which she then declined), and, (3) the decision to hire Li externally after advertising externally in the spring of 1997. It is undisputed that during each of these decision-making processes, Complainant was actively pursuing a position by formal and informal means. It is also undisputed that during each of these decision-making processes, Chu did not invite Hammoudah for an interview, albeit not always for the same reason.

The discussion and analysis in section IV will address the Motion for Summary Decision with specific reference to each hiring decision as a separate factual scenario. If Complainant were able to meet the burden of establishing the *prima facie* elements of discrimination in hiring for any one of the three situations, and then to rebut Respondent's arguments that it rejected Complainant for legitimate reasons, the motion could not be granted.

Complainant, acting *pro se*, demonstrates his perseverance and focus in presenting the nuances and historical context which puts the considerable factual complexity of this case into perspective.

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[2] *See* Hammoudah Deposition, p. 41–44.

[3] "I approached her, because I know the position is opening up, so I told her, We are going to have a position open up. Are you interested. And she said, Yes. Would you give me a copy of the CV, which she did. She was sort of handled separate from the regular pool of people, because if she were to accept our offer, we wouldn't have proceeded with any other interviews. [. . .] I think she's American, but [. . .] she's Taiwanese." Chu Deposition, September 17, 1999, p. 63–4. "Q: Did you offer her the job? Chu: Yes. Q: Did she take it? Chu.: No. Q: Do you know why? Chu: We cannot come up with enough money." *Id*., p. 77.

Nonetheless, for the reasons discussed below, I conclude on the basis of the pleadings and evidentiary materials submitted on motion practice that Complainant is unable to establish all four *prima facie* elements for the first two of the scenarios, and as to the third, Complainant fails to rebut Respondent's assertion that failure to select him in 1997 was based on reasons other than that Complainant is a United States citizen.[4]

II. *SELECTED PROCEDURAL HISTORY*

A. *The Complaint*

Complainant's OCAHO Complaint alleges both national origin and citizenship status discrimination. In addition to the allegations as in the OSC Charge, Complainant states that Chu hired "others from Chinese origin" who were all "less qualified than me[,]" listing six individuals by name. No dates for those hires are noted, nor is it indicated whether those hires were for positions for which Hammoudah had applied.

Utilizing the standard OCAHO complaint format for filing a private action, Complainant responded "YES" to the question whether (a) he was qualified for the job, and that (b) the business/employer was looking for workers.

B. *The Answer*

The Answer was filed July 1, 1998. Respondent admits, *inter alia*, that Chu is the Chair of the Department of Medical Physics and a United States citizen, and that Respondent hired Li, Ph.D., a Canadian citizen, for the position of Therapeutic Radiology Physicist in 1997.

Respondent also admits that it sought applicants for the position of Therapeutic Radiology Physicist in February 1996 and in March 1997, but denies that Complainant was qualified or best qualified

[4] In the Seventh Circuit, an employer's erroneous, inconsistent, and even dishonest statements or practices are not per se pretexts for discrimination. "If the employer presents multiple reasons for terminating a plaintiff, and the plaintiff successfully knocks down some of the reasons, the employer may still prevail on summary judgment provided that at least one pin is standing." *Paul Mollica, Employment Discrimination Cases in the 7th Circuit*, 1 Employee Rts. & Empl. Policy J. 63, 82–84 (1997) (citing *Wolf v. Buss (America) Inc.*, 77 F.3rd 914 (7th Cir. 1996), *cert. denied*, 519 U.S. 866 (1996) (granting summary judgment to employer even though employee successfully challenged four of employer's six reasons justifying his termination)).

for the position. Respondent admits that the position was filled by other candidates.

Respondent asserts as its First Additional Defense that: "There is no jurisdiction to consider Complainant's failure to be hired in 1996 because he did not file a charge alleging discrimination within 180 days after he was informed he was not being hired."

C. *Complainant's Pleadings of July 28, 1998*

On July 28, 1998, Complainant filed a "Countermove Respondent Answer"[5] and "Countermove Partial Summary Decision" (Complainant's Motion). Complainant repeats and expands on allegations in the OSC Charge and OCAHO Complaint. Additionally, he requests access to personnel files for Radiation Physicists, stating that "these candidates were hired at the same time the complainant applied for the Rush jobs since 1992. . . . the candidates applied, selected and hired are necessary to establish the action of discrimination."

D. *Order Dismissing National Origin Discrimination Claim*

By Order Dismissing National Origin Discrimination Claim, Denying Complainant's Motion and Inquiring Further dated September 28, 1998, I dismissed Complainant's national origin discrimination claim,[6] and retained jurisdiction over the citizenship status discrimination claim. 8 OCAHO 1015 (1998), *available in* 1998 WL 1085948 (O.C.A.H.O.).

E. *Complainant's Pleadings of October 1998*

Complainant's October 1998 filing further clarifies his allegations, and provides names of non-U.S. citizen staff within the department.

(1) Two individuals he believes were hired in the Therapeutic Radiological Physicist positions for which he was not hired—Ramasamy Virudachalam (Viru), in 1992, and Weimin Chen, in 1996.

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[5] Complainant's filing is considered a reply to Respondent's Answer. 28 C.F.R. § 68.9(d).

[6] The Rush payroll exceeds the number of employees as to whom the administrative law judge (as distinct from the Equal Employment Opportunity Commission) has jurisdiction. 8 U.S.C. § 1324b(a)(2).

(2) Two others he asserts were non-citizens when they started at Rush, and were hired without advertisement in the American Association of Physicists in Medicine (AAPM) Placement Bulletin. "After that, they might be hired in post doctoral or Therapeutic Radiological Physicist positions." P. 19, para. 6. In other words, these are individuals working for "Respondent" doing relevant professional work within the institution.

F. *Respondent's Letter Pleading of 10/20/98*

Respondent's pleading of October 20, 1998 states, regarding the 1996 and 1997 positions, that "on or about February 12, 1996, Complainant applied for the Therapeutic Radiological Physicist position in response to the advertisement. The position was eventually filled by an internal candidate and, on May 9, 1996, Complainant was informed in writing that he had not been selected. The individual who obtained the position [Weimin Chen, Ph.D. a postdoctoral fellow already working in the Department of Radiation Oncology, a Chinese citizen] resigned in February 1997, creating another vacancy in the same job classification." P. 1–2, para. 2–3.

"In February 1997, Respondent sought applicants for that vacancy and published a new job advertisement. Respondent reconsidered the persons who had applied for the prior vacancy as well as new applicants who had responded to the 1997 advertisement. The position was filled in June 1997 by an external candidate." P. 2, para. 3.

G. *Complainant's Pleading of 12/12/98*

Complainant's filing of December 18, 1998 states, "The precise basis for the Complainant's claim was that James Chu, Ph.D. prefers, has and had a pattern and practice of selecting, other non-U.S. citizens instead of U.S. citizens since 1990. The Complainant was **excluded from being interviewed and being considered for hire** because James Chu selected non-U.S. citizens and the Respondent hired them." P. 2, para. 7, 8, 9. [Emphasis added]. The position was filled by an external candidate, Li, Ph.D., on June 1997. Respondent scheduled an interview for David Mellenberg, Ph.D. on November 10, 1997, and Li, Ph.D. was one of David Mellenberg's interviewers. "This means that there were two positions available, one position Chu, Ph.D. advertised for it and the other was filled without an ad." P. 3, para.10. "James

Chu, Ph.D. offered the positions to all the candidates but he orchestrated conditions to make it difficult for qualified candidates to accept his offer, such as salaries below the average national guidelines and specific conditions for research." *Id.*

H. *Other Filings by the Parties*

(1) Respondent's Motion to Stay filed March 11, 1999, acknowledges that "The Complaint [filed May 18, 1998] alleges that the Complainant was not hired by the Respondent in 1996 and 1997 for the position of Therapeutic Radiological Physicist because he is a U.S. citizen." Para. 1. Respondent concedes that Complainant's issue with the 1996 decision(s) were raised in the initial complaint.

(2) Complainant made further filings, mostly dealing with discovery issues, which each imply, or explicitly state, requests that the court accept modified or "perfected" allegations so as to in effect "amend" the claim of citizenship status discrimination to more accurately reflect his understanding of the circumstances he seeks to redress. I have done so, in the spirit of liberal construction of the complaints of pro se complainants.

I. *Order Granting Respondent's Motion for Partial Summary Decision*

The Order dated July 16, 1999, 8 OCAHO 1031 (1999), barred Complainant from obtaining specific relief for a claim based on the 1996 failure to hire. Granting partial summary decision, it affirmed in spirit the assertion by Respondent that the original Complaint had not **timely** requested relief for failure to hire except for the position implicated by the July 1997 Final Rejection Letter regarding the opening advertised in March, 1997. The Order explicitly contemplated and allowed for Complainant's arguments that there was continuity in decision- making, and employment-related actions between 1996 and 1997. While no liability for failure to hire in 1996 remains at issue, Hammoudah was not precluded from proffering pre–1997 conduct in order to prove his allegations as to failure to hire in the 1996–1997 time frame.

III. *CURRENT POSTURE OF THE PROCEEDING*

A. *Complainant's Standing to Bring a Citizenship Status Discrimination Claim*

To have standing to bring a claim of citizenship status discrimination in violation of IRCA, the claimant must be a "protected individual," statutorily defined as a United States citizen or national, an alien who is lawfully admitted for permanent or temporary residence, a refugee, or an individual granted asylum. 8 U.S.C. § 1324b(a)(3). Rush is an employer with more than three employees, and is, therefore, subject to the 8 U.S.C. § 1324b prohibition against citizenship status discrimination.

Complainant, as a "protected individual," has standing to file the complaint in this case.

B. *Motion for Summary Decision and Associated Pleadings*

Respondent's Motion for Summary Decision [Motion], filed October 18, 1999, re-asserts that any claim related to Respondent's rejection of Complainant in May 1996 (evidenced in the May 1996 letter informing Hammoudah he had not been selected [1996 Rejection Letter]) is barred because it is untimely and not like or reasonably related to Complainant's underlying OSC charge. Respondent's reply to Complainant's response,[7] timely filed on January 14, 2000, addresses the relevance of the 1996 decision: "Complainant's suggestion that the [1996 decision is] part of a continuing violation fails because hiring and promotion decisions are 'discrete, isolated, and completed acts which must be regarded as individual violations.'" Respondent's Reply, p.2 (citing *Enright v. Illinois State Police*, 19 F. Supp. 2d 884, 887 (N.D. Ill. 1998) (quoting *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992))).

Stating that Rush rejected Complainant in July 1997 because it determined that other candidates were better qualified,[8] Re-

[7] Complainant's Response was filed December 13, 1999.

[8] Stated criteria for Chu's rating Hammoudah in 1997 as a least desirable candidate, upon review of his resume, are that: (1) Complainant had no regular employment in the medical physics field since June 1994; (2) Complainant changed jobs nine times since 1980; (3) Complainant had no teaching experience since 1988, and Chu saw no evidence of clinical teaching experience; (4) Chu did not consider Complainant's prior employers to be prestigious; and, (5) Chu did not see a specific list of publications. However, Chu's deposition raises doubts about whether Hammoudah was rated at

Continued on next page—

spondent's Memorandum in support of its Motion argues that the 1997 decision was based **solely** on paper submissions (i.e., resumes and cover letters). In contrast, however, the accompanying statement of undisputed facts concedes that "At the time he received Complainant's resume, Chu knew also that Complainant had recently worked as a gas station attendant. Chu **did not** consider that employment to be indicative of **demonstrable** competence as a Therapeutic Radiological Physicist." R. Statement of Undisputed Facts, p. 5, para. 24. [Emphasis added].

The advertised Therapeutic Radiological Physicist position "also included a faculty appointment to Rush Medical College, [and therefore] Complainant's lack of teaching experience since 1988 [was] another strike against him." R. Memo, p. 5.

Complainant's December 13, 1999, Response to Respondent's Statement of Undisputed Material Facts disputes a number of "undisputed" facts. He states that this "is not an individual case, but it arises out of an employer's multi-year decisional process to **resolve a continuing employment application** which comprises a continuing pattern of discrimination." Para. 53. [Emphasis added]. In this context, he argues, "It does not matter who the Respondent rejected, what matters is who the Respondent hired and whether there was discrimination based on citizenship status or not." Id.

Complainant also filed a "sur-reply" to Respondent's reply, which asked for reconsideration of the July 16, 1999, partial summary decision with respect to claims predating 1997, on the basis that additional submissions bolster his claim of "a continuous pattern of discrimination that supports Complainant OSC charges."

Complainant's sur-reply identifies graduate students and post-doctoral fellows from China and Taiwan under Chu's supervision who over the years were assigned, among other responsibilities, the professional duties of Therapeutic Radiological Physicists. Com-

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all in 1997, or whether the rating/rejection was "ongoing" from the receipt of Hammoudah's 1996 application. Chu says he always rated an applicant upon receipt of a resume, and placed the numerical rating on either a cover letter or a corner of the resume. Although Chu sent Hammoudah a letter in the spring of 1997 acknowledging receipt of Hammoudah's resume, Respondent could only produce a 1996 Hammoudah cover letter bearing Chu's rating of 5. No rated 1997 document for Hammoudah was forthcoming, despite Respondent's assertion that a chart it produced containing 1997 candidate ratings was constructed from Chu's **1997** notes on applicant submissions.

plainant argues that if the qualifications of these "student" job candidates are compared to his own, a fact-finder could see from the Chu hiring policy "that there is a continuous pattern of discrimination against the Complainant who is a US citizen and a highly educated experienced Medical Scientist in contrast to [student] candidates." P. 6. Complainant also asserts that all of his previous employers, in contrast to Rush, "hired qualified, certified Therapeutic Radiological Physicists to do the job, not graduate students to experiment on patients." P. 10.

The parties' perspectives on the significance of the Final Rejection Letter are:

(1) Respondent's Perspective: The 1997 rejection was a discrete employment hiring action, by Chu as agent for Rush, subsequent to a published position notice. Complainant, a member of a protected class, applied for and was rejected for that position, which was then filled by someone not a member of the protected class of U.S. citizens. The hiring process and rejection of Complainant in 1996 is similarly characterized. Complainant was not qualified for the position(s), thus failing to establish a critical element of his *prima facie* case. In the alternative, Hammoudah was rejected for clearly articulated non-discriminatory reasons.

(2) Complainant's Perspective: The 1997 rejection was the most recent of a series of rejections in an ongoing discriminatory hiring process. **The hiring process itself was pretextual,** in that Chu's personal selection choices rather than institutional hiring policies dictated who filled positions or accomplished the work under Chu's supervision. For the two advertised positions (spring 1996, spring 1997, ostensibly the same position re-vacated and re-advertised), the advertisements themselves were pretext, and Chu made his personnel selection choices **before** posting the ads. Two intersecting processes were ongoing: (1) Hammoudah's repeated efforts to obtain a position (from 1995 through 1997), in contrast to, (2) Chu's continuous staff-building and staff-maintenance actions with an end to accomplish the professional work tasks of the Medical Center within the undisputed salary constraints.

Because this 8 U.S.C. § 1324b dispute arises in Illinois, any judicial review of this final decision and order lies with the United States Court of Appeals for the Seventh Circuit. 8 U.S.C. § 1324b(i)(1). I am in accord with the Seventh Circuit in liberally construing the pleadings of *pro se* litigants. *Cable v. Ivy Tech*

State College, 200 F.3d 467, 477 (7th Cir. 1999); *Del Raine v. Williford*, 32 F.3d 1024, 1050 (7th Cir. 1994) ("'. . . the allegations of the pro se complaint, . . . we hold to less stringent standards than formal pleadings drafted by lawyers. . .'" (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972))). See also *Woods v. Thieret*, 903 F.2d 1080, 1082 (7th Cir. 1990) ("We liberally construe the complaints of pro se litigants . . . although [Complainant] did not use the [legal] "buzz words," the nature of the claim is apparent.").

Respondent characterizes Complainant's pre-1997 discussion as an attempt "to litigate other unsuccessful applications for employment." I do not agree. I accept evidence as to the 1996 application and hiring processes as evidentiary support to rebut Respondent's contention that Complainant was not qualified for the jobs available, as well as to assess the credibility of Respondent's versions of how job functions were filled under Chu's supervision. See Order, 8 OCAHO 1031 (1999).

C. *Summary Decision Generally*

This case is ripe for adjudication of the motion for summary decision on Hammoudah's citizenship status discrimination Complaint.

Title 28 C.F.R. § 68.38(c)[9] authorizes the administrative law judge (ALJ) to dispose of cases, as appropriate, upon motions for summary decision. Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no **genuine issue as to any material fact** and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1997) [emphasis added]. OCAHO jurisprudence is generally consistent with Article III case law;[10] both define a fact as material if it might affect the outcome of the case. *See e.g., United states v. Patrol & Guard Enterprises, Inc.*, 8 OCAHO 1040,

[9] Rules of Practice And Procedure For Administrative Hearings Before Administrative Law Judges In Cases Involving Allegations Of Unlawful Employment Of Aliens And Unfair Immigration-Related Employment Practices, 28 C.F.R. Part 68 (1999) (Rules), implementing 8 U.S.C. § 1324b, enacted as Section 102, Immigration Reform and Control Act (IRCA) of 1996, amending the Immigration and Nationality Act (INA), adding Section 274B.

[10] The Federal Rules of Civil Procedure are available to the ALJ "as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1.

at 9[11] (2000), (Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision); *United States v. Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO 1013, at 3 (1998), available in 1998 WL 1085946 at *3 (O.C.A.H.O.) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "As to materiality, the substantive law will identify which facts are material." *Anderson*, 477 U.S. at 248.

The law of the United States Court of Appeals for the Seventh Circuit is to the same effect. *See Tarpley v. Keistler*, 188 F.3d 788, 791 (7th Cir. 1999) ("Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c)."); *Sanchez v. Henderson*, 188 F.3d 740, 743 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1201 (2000) ("In order for a party 'to avoid summary judgment, that party must supply evidence sufficient to allow a jury to render a verdict in his favor.'" (quoting *Williams v. Ramos*, 71 F.3d 1246, 1248 (7th Cir. 1995))). In determining whether a genuine factual issue exists, courts must resolve ambiguities and draw all reasonable and justifiable inferences in favor of the non-moving party. *See Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 731 (7th Cir. 1999).

Notwithstanding the presumption favoring the non-movant, summary judgment is available to further the interests of judicial economy and fairness. "Courts need not be reluctant to grant summary judgment in appropriate cases." *CL-Alexanders Laing & Cruickshank v. Goldfield*, 739 F. Supp. 158, 161 (S.D.N.Y. 1990). As recently held in *Ipina v. Michigan Jobs Commission*, 8 OCAHO 1036, at 7 (1999):

> While all reasonable inferences are to be drawn in favor of the nonmoving party, summary judgment will 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, 157 (1970). Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment

[11] Citations to OCAHO precedent refer to volume and consecutive reprint number assigned to decisions and orders. Pinpoint citations to precedents in Volumes 1 and 2, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, and Volumes 3 through 7, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS, UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES AND CIVIL PENALTY DOCUMENT FRAUD LAW OF THE UNITED STATES are to specific pages, seriatim of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume VII are to pages within the original issuances.

is appropriate. *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

The pertinent OCAHO Rule, 28 C.F.R. § 68.38(c), assigns the relative burdens of production on a motion for summary decision. The moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 932 (1994), *available in* 1994 WL 721954, at *6 (O.C.A.H.O.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1985)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. *Id.* The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. That showing may be made by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. *Celotex*, 477 U.S. at 324.

The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and judicially-noticed matters. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). However, "[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for an evidentiary hearing." 28 C.F.R. § 68.38(e); *United States v. Valenca Bar & Liquors*, 7 OCAHO 995, at 1104 (1998), *available in* 1998 WL 746012, at *1 (O.C.A.H.O.). As summarized in *Valenca Bar & Liquors*, on assessing the existence of genuine issues of material fact, all reasonable inferences should be drawn in favor of the non-moving party and if a genuine issue of material fact is gleaned from this analysis, summary decision is not appropriate. *Id.* This standard of analysis "is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 918–19 (7th Cir. 1996) (quoting *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993)).

D. *Citizenship Status Discrimination*

To withstand the motion for summary decision, Complainant as the non-moving party is obliged to produce some evidence, direct or inferential, respecting every element essential to his case on which he would have the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. at 322. In an analysis of a discrimination claim, the

complainant must first provide some evidence of each element of a *prima facie* case of the discrimination alleged. This *prima facie* burden "is a useful barrier that serves to screen out unsubstantiated discrimination charges." *Jayasinghe v. Bethlehem Steel Corporation*, 760 F.2d 132, 134 (7th Cir. 1985). Unnecessary litigation is to be avoided in cases where a complainant "fails to distinguish his case from the ordinary, legitimate kind of adverse personnel decision, i.e., where [the complainant . . .] has not applied for or is not qualified for the job, or where the desired position is not available or open." *Id.*

In general, for a claim to constitute discrimination "[t]he employer [must] . . . treat some people less favorably than others" because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). In this forum, Complainant can only claim disparate treatment because of citizenship status. "Where citizenship status is the forbidden criterion, there must . . . be some claim . . . that the individual is being treated less favorably than others **because of** his citizenship status." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 901–2 (1996), *available in* 1996 WL 780148, at *8 (O.C.A.H.O.). [Emphasis added]. *See also, United States v. Marcel Watch Corporation*, 1 OCAHO 143 at 1001 (1990), *available in* 1990 WL 512157 at *11 (O.C.A.H.O.) ("Disparate treatment exists when an employer intentionally treats some people less favorable (sic) than others because of their group status . . . [and] . . . is precisely what the anti-discrimination provisions of IRCA sought to remedy provided that a *prima facie* case is established on behalf of the aggrieved individual."); *United States v. Mesa Airlines*, 1 OCAHO 74, at 467 (1989), *available in* 1989 WL 433896 at *6 (O.C.A.H.O.); *appeal dismissed, Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991) (IRCA "**established disparate treatment but not disparate impact causes of action**.") [emphasis added].[12]

[12] Upon enactment of IRCA, President Ronald Reagan's signing statement expressed the policy that the new anti-discrimination prohibition requires proof of discriminatory intent, i.e., evidence of knowing and intentional discrimination. The new law was to be understood to prohibit only that discrimination which could be proven to be disparate treatment, not disparate impact. *See* Statement of President Reagan upon signing S.1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986); Supplementary Information to 28 C.F.R. § 44, 52 F.R. 37403 (1987) (Attorney General statement that intent to discriminate is an essential element of a charge). Title VII **disparate treatment** jurisprudence provides the starting point for analysis of a Section 102 (§ 1324b) complaint. *See Marcel Watch*, 1 OCAHO at 1001–1003.

Complainant must meet the burden, which rests with him at all times, to first establish the *prima facie* elements of his citizenship status discrimination in the hiring process, and, secondly, to offer some evidence rebutting substantiated arguments by the employer that its reasons for the adverse employment action were non-discriminatory. *See Winkler v. Timlin,* 6 OCAHO 912, at 1058 (1997), available in 1997 WL 148820, at *7 (O.C.A.H.O.); *Toussaint v. Tekwood,* 6 OCAHO 892, at 801 (1996), *available in* 1996 WL 670179, at *12 (O.C.A.H.O.); *United States v. Mesa Airlines,* 1 OCAHO at 500, *available in* 1989 WL at *32.

Complainant submits attachments to his pleadings to support his allegation that in violation of 8 U.S.C. § 1324(a)(1)(B)[13] Rush discriminated against him, as a U.S. citizen, by preferring individuals in its hiring pool who are not U.S. citizens or nationals. Complainant contends that Rush accomplishes this discrimination via short-term or long term mechanisms[14] which establish a "hiring pool" that in practice implicitly excludes U.S. citizens.

I understand Complainant's version of the hiring pool scenario as reflecting Chu's and Rush's personal and academic institutional preferences which influence a variety of academic and administrative decisions. Complainant describes Chu's preferential treatment in student recruitment in an academic setting/teaching hospital clinic, and preferences of graduate students and post-graduates for technical and laboratory responsibilities in lieu of more senior professionals.[15] However, that conduct is not necessarily an indicia

[13] **8 U.S.C. § 1324(a)(1)(B).** It is an unfair immigration-related employment practice for a person or other entity to discriminate against [a protected individual (as defined in paragraph (3)—such definition to include U.S. citizens or nationals, as well as lawful permanent residents who applied for naturalization within six months after becoming eligible to do so)] with respect to the hiring [. . .] of the individual for employment [. . .] (B) [. . .] because of such individual's citizenship status.

[14] Alleged "preselection" mechanisms include discrete invitations to favored candidates, preparation of current favored students for the therapeutic radiology physicist positions, arbitrary and subjective rating criteria of potential candidates which are altered for different audiences asking to see them, arbitrary and shifting specifications of job requirements so as to exclude or include particular candidates, non-competitive salary levels, circumvention by Chu of established Rush hiring policies, and de facto selection of candidates prior to the posting of position availability.

[15] As an example, Hammoudah refers to a letter from Dr. Ramasamy Virudachalam to the Associate Dean of Rush Medical College (May 8, 1997), at page 2: "When a member of the physics group leaves, Dr. Chu decides to transfer the responsibilities to a person whom he likes rather than to the most appropriate individual to do the job. About a year ago, a senior faculty member left. He maintained some of the software. Dr. Chu decided one of the postdoctoral fellows should assume that responsi-

of a *prima facie* case of citizenship status discrimination in specific hiring decisions. That Chu uses professional contacts and personal networking in recruitment efforts to staff underpaid academic professional positions [16] does not implicate citizenship status discrimination. Indeed, in his own efforts at obtaining employment, Hammoudah engaged in "networking" behavior as evidenced by his numerous informal inquiries to Chu.

An academic/medical employer's "method of hiring" may be haphazard, less than fair, an exercise of bad business judgment, or may even put patients' health at risk. Such conduct does not *per se* make such a method unlawful under 8 U.S.C. § 1324b. To meet the burden of showing citizenship status discrimination, the specific elements of the *prima facie* case must be evident.

1. *Prima Facie Case of Citizenship Status Discrimination*

To state a *prima facie* case of citizenship discrimination, Complainant's pleadings "must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory." *Lee v. Airtouch Communications,* 6 OCAHO 901, at 901 (1996), *available in* 1996 WL 780148, at *8 (O.C.A.H.O.) (citing *L.R.L. Properties v. Portage Metro. Hous. Auth.,* 55 F.3d 1097, 1103 (6th Cir. 1995)). In assessing whether a *prima facie* case has been pleaded, well-stated allegations of fact are taken as true. Legal conclusions and unsupported inferences, however, "obtain no deference." *Cholerton v. Robert M. Hadley Co.,* 7 OCAHO 934, at 233 (1997), *available in* 1997 WL 1051435, at *7 (O.C.A.H.O.). "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Hensel v. University of Oklahoma Health Sciences Center,* 3 OCAHO 532, at 1329 (1993), *available in* 1993 WL 403085, at *6 (O.C.A.H.O.) (quoting *Celotex v. Catrett,* 477 U.S. at 323).

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bility. The most appropriate person should have been the computer manager or another physics faculty."

[16] Complainant's references to the low salaries paid to the clinical physicists echoes a May 9, 1991 memo from Chu to the Dean of Rush Medical College: "We have lost one physicist and are about to lose a second one due to the pay scale problem. The low pay scale makes it difficult to recruit qualified candidates. [. . .] I believe we should be able to identify resources to correct deficiencies in our program." The problem persisted into 1999. Agreeing with the suggestion that he could not "compete with salaries being offered at other institutions," Chu said that, "We are trying to get Rush to correct that. We are having constant problems now. Even now they're being lured to other institutions." Chu Deposition, p. 109–10.

A brief restatement of the elements of a *prima facie* case of citizenship status discrimination with respect to hiring is instructive in resolving whether this case presents genuine disputes of material facts sufficient to defeat a summary judgment motion.

A *prima facie* case of citizenship status discrimination in hiring, adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and elaborated in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

(1) he is a member of a protected class;

(2) he applied for a job for which the employer was seeking applicants;

(3) despite being qualified, he was rejected; and

(4) after the applicant was rejected, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. *See Yefremov v. NYC Dept. of Transportation,* 3 OCAHO 562 at 1583 (1993), 1993 WL 502295 at *18 (O.C.A.H.O.)(citing *McDonnell Douglas,* 411 U.S. at 802). *Cf. Winkler v. Timlin,* 6 OCAHO 912, at 1059 (1997), *available in* 1997 WL 148820 at *7–8 (O.C.A.H.O.) (citing *Lee v. Airtouch,* 6 OCAHO 901, at 11, which specified the fourth element as follows: "(4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship"). The Sixth Prehearing Conference Report and Order (August 19, 1999) stated this equivalent: Proof of a *prima facie* case of citizenship status discrimination [17] includes demonstrating that:

(1) Complainant applied for a position and was rejected from consideration for that position; and

[17] *See also McNier v. San Francisco State Univ.,* 7 OCAHO 947, at 425 (1997), *available in* 1997 WL 1051448, at *7 (O.C.A.H.O.) (setting forth that a *prima facie* case of 8 U.S.C. § 1324b citizenship status discrimination is established when the applicant for employment demonstrates: (1) he is a member of a protected class; (2) the employer had an open position for which he applied; (3) he was qualified for the position; (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.).

(2) The employer hired a non-U.S. citizen for the position in question with the intent to discriminate against Complainant because Complainant is a U.S. citizen.

Proving the *prima facie* elements is not meant to be a rule of law imposed on a complainant in a rigid, mechanistic fashion. Rather, the elements provide guidance for establishing a case, and are to be adapted with respect to the varying factual situations. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("The prima facie case method established in McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,'" quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 3 (1973) ("The facts necessarily will vary . . . and the specification above of the prima facie proof required is not necessarily applicable in every respect to differing factual situations.").[18]

The elements discussed in the case law establish the parameters of an individual's cause of action; they do not contemplate lawsuits on behalf of others. If Complainant is not a member of a protected class, for instance, but applied for and was rejected from consideration along with numerous members of a protected class, he has no basis for a claim. Alternatively, if he did not apply for a particular opening, because he had been rejected in earlier years and "knew" he would be rejected again, but was aware of others of the same protected group who did apply and were rejected, he would have no basis for a claim.

Here, it is undisputed that Complainant, as an applicant for employment by Respondent, was a member of the protected class of United States citizens. 8 U.S.C. § 1324(a)(1)(B). Element (1) therefore, needs no further discussion. Section IV, infra, will discuss the factual issues concerning the elements (2) through (4) regarding Chu's hiring processes during 1996 and 1997.

[18] *See also Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO 550 at 1475 1993) ("A Title VII plaintiff therefore can establish a *prima facie* case of individualized disparate treatment other than through a showing under the *McDonnell Douglas* paradigm by 'offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII].' *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 228 (1991) (quoting *Teamsters*, 431 U.S. at 336 (1977))").

2. *Discriminatory Intent*

In proving disparate treatment, discriminatory intent must be proved with respect to the allegations of the *prima facie* case, once each element of the *prima facie* case is shown. *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335–6 n.15 (1977) ("**Proof of discriminatory motive is critical,** although it can in some situations be inferred from the mere fact of differences in treatment.") [emphasis added]; *Regner v. City of Chicago,* 789 F.2d 534, 537 (7th Cir. 1986) (distinguishing standards for success for disparate impact and disparate treatment cases). OCAHO case law holds similarly: "Discrimination or disparate treatment exists where an employer treats certain individuals less favorably than others **because of** their race, color, religion, sex, national origin or citizenship status. *United States v. Sargetis,* 3 OCAHO 407, at 25 (3/25/92)." *Hensel,* 3 OCAHO at 1330, *available in* 1993 WL 403085, at *7 (O.C.A.H.O.). [Emphasis added]. *See also, Marcel Watch,* 1 OCAHO at 1001; *Mesa Airlines,* 1 OCAHO at 467; *Kamal-Griffin v. Cahill, Gordon & Reindel,* 3 OCAHO 568, at 1659 (1993), *available in* 1993 WL 557798, at *11–12 (O.C.A.H.O.).

As stated in *Marcel Watch,* Title VII disparate treatment jurisprudence provides the analytical point of departure for 8 U.S.C. § 1324b cases. Liability under § 1324b is proven by a showing of deliberate discriminatory intent on the part of an employer. The Complainant must establish intentional discrimination by a preponderance of the evidence, i.e., "knowing and intentional discrimination." 8 U.S.C. § 1324b(d)(2)). *See Marcel Watch,* 1 OCAHO at 1001; see also *Yefremov,* 3 OCAHO at 1580, *available in* 1993 WL 502295, at *16–17.

Complainant needs to show only that the discriminatory act was deliberate, not that the violation of the law was deliberate or that the act was the result of the Respondent's invidious purpose or hostile motive. *See, e.g., Nguyen v. ADT Engineering,* 3 OCAHO 489, at 922 (1993) ("The discriminatee must only prove that the violative conduct occurred. A complainant does not need to prove that the conduct was intended to violate the proscription against discrimination").

Complainant offers no *direct* evidence of the employer's intent, i.e., there are no admissions that Complainant was rejected because of his U.S. citizenship status, and no admissions that Re-

spondent preferred non-U.S. citizens in Therapeutic Radiological Physicist positions. Because "direct evidence of discriminatory intent exists mostly in plaintiff's dreams," courts look to circumstantial evidence for proof of intent. *Santos v. Rush-Presbyterian-St. Luke's Medical Center,* 641 F. Supp. 353, 358 (N.D. Ill. 1986) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). It is Complainant's burden to produce such circumstantial evidence; if he carries that burden, the employer must then rebut the presumption of discrimination. The employer's rebuttal may either dispute the plaintiff's facts or articulate nondiscriminatory reasons for the disparity of treatment. *Hensel,* 3 OCAHO at 1330, *available in* 1993 WL 403085 at *7.

3. *Distinguishing a Discriminatory "Pattern or Practice" in Hiring Claim*

Complainant argues that he has been a victim of Chu's pattern and practice of discrimination based on citizenship status.

Drawing on 8 U.S.C. § 1324b(d)(2), 28 C.F.R. § 44.200(a)(1) instructs that "It is an unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or to **engage in a pattern or practice of knowing and intentional discrimination** against any individual [. . .] because of such individual's citizenship status." [Emphasis added]. Title 8 U.S.C. § 1324b(d)(2) establishes the procedure for a private individual to bring a charge of either "knowing and intentional discriminatory activity or a pattern and practice of discriminatory activity."

The judicial construction of the term "pattern or practice" is set forth in *United States v. Mayton,* 335 F.2d 153 (1964), *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977), and *United States v. Int'l Assoc. of Ironworkers Local No. 1,* 438 F.2d 679 (1971). The term "pattern or practice" has its generic meaning and applies to regular, repeated, and intentional activities, and does not include sporadic acts. Germaine concepts in this construction are "regularity" (suggesting applicability to procedures) and "activities" (in contrast to thoughts or motives). *See, e.g.,* as to 8 U.S.C. § 1324b claims, *United States v. Zabala Vineyards,* 6 OCAHO 830, at 4 n. 3 (1995); *United States v. Mesa Airlines,* 1 OCAHO 74, 508 (1989), *available in* 1989 WL 433896, at *11 (O.C.A.H.O.), *appeal dismissed,* 951 F.2d 1186 (10th Cir. 1991).

In *Teamsters*, the Supreme Court set forth the method of proving a pattern or practice claim of disparate treatment. The plaintiff ultimately has to establish by a preponderance of the evidence that the alleged discrimination "was **the company's standard operating procedure--the regular [. . .] practice."** *Bazemore v. Friday*, 478 U.S. 385, 396 (1986) (quoting *Teamsters*, 431 U.S. at 336). [Emphasis added]. A pattern or practice cannot be inferred from isolated or sporadic discriminatory acts. *Teamsters*, 431 U.S. at 336. *See also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (two discriminatory acts over four-year period not enough to establish pattern or practice).

The term "pattern or practice," therefore, has applicability only to situations involving systematic behavioral practices which can be evaluated as reflective of a pattern, not to situations involving various and sporadic actions resulting from a particular way of thinking. Here, there is no suggestion of evidence of a pattern or practice such as to invoke 8 U.S.C. § 1324b(d)(2). Rather, Complainant's assertions of "pattern and practice" are understood to be arguments, and nothing more, in support of his claim that Respondent knowingly and intentionally discriminated against him because of his citizenship status.

4. *Applicability of the Continuing Violation Exception*

OCAHO caselaw specifically recognizes the theory of a "continuing violation" of IRCA's § 1324b, which has enabled complainant to offer proof that respondent had engaged in uninterrupted conduct over a period of time, provided at least one (1) violation had occurred within the 180-day statutory limitation period. *See United States of America v. Robison Fruit Ranch, Inc.*, 6 OCAHO 855, *available in* 1996 WL 454995 at *36, *37 (regarding discussion of penalties); *Walker v. United Air Lines, Inc.*, 4 OCAHO 686, at 25 (1994) (in a detailed discussion of the continuing violation doctrine, stating "[t]o establish a continuing violation, a complainant 'must allege that a discriminatory act occurred or that a discriminatory policy existed within the period prescribed by the statute.'" (citing *Johnson v. General Elec.*, 840 F.2d 132, 137 (1st Cir.1988))); *United States v. Weld County Sch. Dist.*, 2 OCAHO 326, at 18 (1991); see also *United States v. Zabala Vineyards*, 6 OCAHO 830, at 4 n. 3 (1995) ("OCAHO caselaw makes clear that § 1324b(a)(6) pattern or practice cases involve continuing violations, overcoming the § 1324b(d)(3) requirement that the cause of

action be limited to conduct within 180-days prior to filing an OSC charge.").

Respondent incorrectly relies on *Enright v. Illinois State Police*, 19 F. Supp. 2d 884, 887 (N.D. Ill. 1998) (quoting *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992)) for the proposition that "hiring and promotion decisions are 'discrete, isolated, and completed acts which must be regarded as individual violations,'" not acts comprising a continuing violation. Rather, *Enright* reiterates the three factors which the *Selan* court established as those to be considered in deciding whether an employer's conduct (in that case, promotion decisions) is or is not part of a continuing violation: "(1) the subject matter, (2) the frequency, and (3) the degree of permanence." *Enright*, 19 F. Supp. at 887.

"Subject matter" refers to the alleged discriminatory acts. In *Enright*, the subject matter was promotions in rank. Plaintiff, a policewoman, was denied promotion in each round of promotions (meeting *both* the similarity in subject matter and the frequency requirement).

The subject matter of Hammoudah's complaint is "selection for a short-list[19] for hiring." Respondent did not hire Complainant because it rated him too low to be invited for an interview as one of the short-listed candidates. Complainant proffers evidence of other alleged discriminatory acts to support his claim that the discrimination he suffered was a consequence of a multi-year decision-making process. However, alleged earlier actions not representative of hiring decisions based on short-listing candidates rated and ranked according to Chu's selection criteria are of little probative value in establishing this particular continuing violation claim.

The other *Selan* factors are frequency and degree of permanence. The Seventh Circuit provides some guidance regarding the frequency factor. *See Filipovic v. K & R Express Systems*, 176 F.3d 390, 397 (1999) ("Three incidents occurring over a nine year period 'cannot reasonably be linked together into a single chain, a single course of conduct, to defeat the statute of limitations.'" (quoting *Galloway v. General Motors Serv. Parts Operation*, 78 F.3d 1164,

[19] Short-listing is understood to be the customary practice in hiring academics (and other professionals) to establish a smaller, more manageable pool of candidates than the pool of all applicants who respond to a vacancy announcement. *See Senner v. North Central Technical College*, 113 F.3d 750, 755–56 (7th Cir. 1997).

1166 (7th Cir. 1996))). Complainant would need to establish that Chu failed to short-list (or to rate "1" or "2") U.S. citizens with some frequency to meet this requirement.

Enright turned on whether the "alleged acts of discrimination had the degree of permanence which should trigger an employee's awareness of and duty to assert her rights." *Enright*, 19 F. Supp. at 887. The crucial factors the Selan court analyzed, and on which the plaintiff's arguments failed in that case, were both the frequency and the degree of permanence factors.

In considering the degree of permanence factor, the focus is on ascertaining whether earlier actions directly affecting the complainant were of enough permanence that complainant should have known of the discrimination. The 1996 decision not to hire Hammoudah was made very clear in a May 1996 letter of rejection. The continuing violation exception is only available to a complainant who, due to the nature of the discrimination, was either not in a position to realize it was in fact discriminatory, or alternatively, was insufficiently distressed by the first of a series of incidents in the workplace (e.g., sexual harassment) to respond with legal action.[20]

Complainant offers legal authority on point, stating that, "There are three scenarios in which the continuing violations doctrine is applicable:

> (1) [where] the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred;
>
> (2) [where] the employer has an express, openly espoused policy that is alleged to be discriminatory; and
>
> (3) [where] 'the Complainant charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy.' *Stewart v. CPC International, Inc.*, 679 F.2d 117, 120 (7th Cir. 1982)." Hammoudah Sur-reply, p 16.

Complainant argues that as "serial violations," his case in effect fits the third *Stewart* scenario. As just discussed, however, Complainant does not establish that Chu's rating and short- listing actions occurred with a frequency and constancy to warrant description as a "serial violation." Applying *Selan* analysis, I can

[20] *See Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344 (7th Cir. 1999), *cert. denied*, 120 S. Ct.. 178 (1999); *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996).

not find that Respondent's alleged hiring actions with respect to Complainant constitute a systematic discriminatory pattern of hiring procedures or behavior, either covert or overt, eliminating the last two *Stewart* scenarios.

The first *Stewart* scenario is the most pertinent to Chu's decision-making process, involving factual dispute as to when, how, and why hiring decisions were made and hiring actions taken during 1996–1997.

"Finding a continuing violation is a question of fact." *Santos v. Rush-Presbyterian-St. Luke's Medical Center,* 641 F. Supp. 353, 360 (N.D. Ill. 1986) (denying a motion to dismiss, stating, "We do not want to dismiss based on a factual picture which may be incomplete."). The Santos court additionally states that "Pinpointing the discriminatory event is [an] elusive exercise, partly because of factual ambiguities—plaintiffs often allege multiple events occurring at different times which in their minds together compose the alleged discrimination—and partly because there are policy considerations—encouraging plaintiffs to assert their rights and protecting defendants from stale claims—which intersect the factual disputes." *Id.*, at 357. Further, a plaintiff "can establish a violation which includes the earlier act if he or she can prove the later decision was the result of a continuing discrimination having earlier origins and motivating the earlier decision as well." *Id.* at 358.

Clearly there is a dispute as to the details of Chu's consideration, if any, of Hammoudah's application in 1997. Complainant suggests that Chu never evaluated the 1997 application but rested his decision on the 1996 rating of "5" which was also not a real evaluation. In contrast, Respondent contends that Chu evaluated Hammoudah in 1997 and found him wanting. However, resolving the question of fact as to whether a continuing violation exists is unnecessary to dispose of the question whether Complainant can adequately rebut Respondent's stated reasons for rejecting his 1997 application. Considering the 1996 application in order to better resolve whether there was citizenship status discrimination in 1997 can be done equally under a continuing violation theory or within a discussion of whether Complainant persuades that Respondent's stated reasons for failure to hire are pretext.

In the Seventh Circuit, providing some evidence of continuity of discriminatory actions over time appears to be critical for a

plaintiff to overcome a summary judgment motion, even where there is no issue of limitations.[21] "[C]laims of discrimination are hard to prove one case at time. An employer can offer some proper explanation for almost any decision. A pattern of treating older (or black, or female) [applicants] worse than others speaks more loudly. The law of large numbers smooths over the quirks and turns of fate that make finding 'the' cause of a particular [employment decision] so hard." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148 (7th Cir. 1993). Seventh Circuit decisions "emphasize the need to get beyond a few comparison cases, and we cannot stress this point enough." *Kuhl v. Ball State Univ.*, 78 F.3d 330, 332 (7th Cir. 1996).

The following section analyzes whether Complainant meets his burden of establishing each element of his *prima facie* case, irrespective of when critical hiring decisions and actions occurred.

IV. *DISCUSSION AND ANALYSIS*

I am obliged to draw all reasonable inferences from the entire record on motion for summary decision in the light most favorable to Hammoudah as the non-moving party. *Senner*, 113 F.3d at 754. The facts which are relevant are those with respect to the availability and filling of the Therapeutic Radiological Physicist position in the Therapeutic Radiological Physics Section [TR Clinic] at Rush advertised once in 1996 and once again in March 1997 (96–97 TRP position). The 96–97 TRP Position refers to the employment "bundle of functions" embodied in a full time professional employee whose qualifying profile ranges from a junior post-doctoral fellow to a senior experienced faculty member, and whose functions were ultimately carried out by Weimin Chen and then by Li.

[21] *See, e.g., EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 151 (7th Cir. 1996) (complainant can assert comparative evidence to rebut employer's arguments only if that evidence shows "**systematically more favorable treatment** toward similarly situated employees not sharing the protected characteristic." (quoting *Loyd v. Phillips Bros. Inc.*, 25 F.3d 518, 522 (7th Cir. 1994))). [Emphasis added].

A. *Element (2) of the Prima Facie Case: Respondent Had An Open Position, For Which Complainant Applied*

1. A job offer letter (signed by Dr. V. Amod Saxena,[22] June 17, 1997) to a candidate identifies the position as that of clinical physicist, and includes appointments as assistant professor in Rush Medical College (which provides clinical teaching, such as dosimetry training) and Rush College of Health Sciences (which provides academic teaching, in the medical physics department, with associated graduate level research activities). The Rush Medical College budget funds the clinical physicist position. "A person who is hired usually serves in all three areas." Saxena Deposition, p. 23.

2. Rush Medical College faculty allocation agreements, signed by Saxena but not Chu, include the following allocation of effort for base compensation for the position:

(a) 5% for Department Administration
(b) 20% for Supervision of House Staff (in clinical teaching settings)
(c) 75% for Direct Patient Care
(d) 0% for University Instruction (includes clinical instruction of students)[23]
(e) 0% for Research and Research Administration.

3. Respondent advertised an open position, which included a faculty appointment, in both February of 1996 and March of 1997. Additionally, the position "became available for filling" at other times, including December of 1996 when Chu contacted a professional colleague about her availability. The precise periods during which the advertised position, including the faculty appointment, remained open is undefined. (For the 1997 advertised position, Dr. Saxena signed a recommendation for faculty appointment let-

[22] It is Saxena who makes the hiring decision, subject to approval by the Medical College Dean. "Dr. Chu doesn't hire people. Dr. Chu recommends." Saxena Deposition, September 28, 1999, p. 64–5.

[23] May 8, 1997 correspondence from Viru, Assistant Professor (Therapeutic Radiological Physicist): "According to my contract the percentage of time allotted for instructional service is 0% and I am forced to do more than my share of teaching." *But see Report of the Department Advisory Committee of the Radiation Oncology Department on the Grievance filed by Dr. Ramasamy Virudachalam against Drs. Saxena and Chu* (October 28, 1997): "[F]aculty members [understand] that the contract allocations of effort may not accurately reflect their duties. There is a presumption [for instance] that the Ph.D. degree itself [and a professional position which requires it] implies a commitment to publication of original research."

ter,[24] to the Dean of Rush Medical College on behalf of Dr. Li, on September 15, 1997).

4. The position is not unique--there is more than one therapeutic radiological physicist in the TR Clinic.

5. The position is neither separate (incumbent works as a team member) nor apart from other positions in terms of job responsibilities--if necessary, staff filling other positions either senior or directly subordinate to incumbent, such as an assistant clinical physicist or a post-doctoral fellow, can carry out job tasks. The TR Clinic employs as professionals, staff members, and graduate student "workers:" one Director, two or three Therapeutic Radiological Physicists, Assistant Physicists, Post-Doctoral Fellows, Clinical Assistants, Research Assistants, Dosimetrists, M.S. Candidates, and Ph.D. Candidates. During 1995–1997, roughly half of those working in the TR Clinic were U.S. citizens.

6. Assistant clinical physicists and post-doctoral fellows can be, and have been, promoted from within, into the therapeutic radiological physicist position. As an example, after the 1996 advertisement of the position, following receipt of applications, Chu decided not to fill the faculty/clinical position, but instead promoted a post-doctoral fellow, Weimin Chen, who did not receive a faculty appointment.

7. Staffing the professional physicists' positions in the clinic was an ongoing concern of Chu's, because of the important health care function of the clinic, the shortage of such physicists, and the low salary scale at Rush. When Chu received applications for the position advertised in 1996, he retained a number of them for later consideration.

8. Chu made initial "employment decisions" about each candidate intermittently over the period 1996–1997. As he received each application (in the form of a resume with a cover letter), he would review and "rate" it when received, writing a number from one to five, five being the least desirable, on the prospective candidate's cover letter or resume.

[24] The Faculty Appointment Recommendation form/memo was addressed to: (a) Dean, Rush Medical College (granting primary appointment) (b) Dean, Graduate College/College of Health Sciences (conjoint app't).

9. In at least three decision-making junctures with respect to staffing the position, Chu rejected Hammoudah in favor of others: (1) In early 1996, highly rating and recommending for hire Weimin Chen, a U.S. permanent resident, and Chinese citizen of Chinese national origin; (2) On or about December 1996, highly rating (as a "1") and offering employment to Sou-Tung Chiu- Tsao, of unidentified citizenship status [25] (who Chu believed to be an American citizen of Taiwanese national origin); and (3) In spring of 1997, highly rating and recommending for hire Li, Canadian citizen of Chinese national origin.

10. Hammoudah engaged in ongoing application for the position, including formal applications when Rush formally advertised the position, and numerous phone calls and inquiries to Chu. Chu rated, and rejected, Hammoudah at some point in spring of 1996. This 1996 rating may have remained "attached" to Hammoudah during subsequent contacts during 1996 and 1997.

I infer that the open position for which Hammoudah applied was available in an intermittent, ongoing fashion during 1996–1997. Likewise Hammoudah's application was of a continuous nature.

The job requirements (both initial qualifications and subsequent faculty and non-faculty responsibilities) and time-lines for hiring decisions are obviously variable, a not uncommon practice in scientific/academic environments. As a result, there are open factual questions regarding causal connections between Complainant's individual application actions and Respondent's discrete hiring actions. These need not be resolved in order to rule on the Motion. Respondent's actions during 1996–1997 are viewed in the aggregate, and Complainant is viewed as engaging in one prolonged application process. Neither the basic job requirements nor Hammoudah's qualifications changed between 1996 and 1997; the only change was the passage of time. This simplified profile of the case provides structure and organization to the analysis without prejudicing either party, and assists in avoiding unnecessary discussion of disputed facts immaterial to the outcome.

[25] Chu stated that when he "invited Chiu-Tsao to interview for the position Chen would be vacating, I did not **know** Chiu-Tsao's citizenship status." Chu Affidavit, p. 2. *But see supra* note 3.

B. *Element (3) of the Prima Facie Case: Hammoudah Was Qualified for the Position*

1. As submitted to Rush, Hammoudah's qualifications for the position include:

Education: Ph.D. Biophysics; M.S. Medical Physics; 2 Diplomas in Radiation Physics, B.S. Physics and Chemistry; **Certifications:** Several, including American Board of Medical Physics, and American Board of Radiology; **Years of Experience:** Over 30 years of responsible professional experience in radiological physics, including senior managerial positions and faculty appointments; **Technical:** Extensive, including safety management, equipping clinics, and all tasks of clinical radiation therapy physics in diverse settings; **Research:** Primary standard Fricke dosimeter; improvement of accuracy of localization; fusion process in liposomes; **Academic:** Instructor; clinical training and education for professional staff; M.S. thesis advisor; **Managerial:** Senior management at Oncology Center in Saudi Arabia; prior medical physicists positions.

2. The qualifications for the Therapeutic Radiological Physicist position in the Therapeutic Radiological Physics Section at the Medical Center as published in the February 1996 and March 1997 advertisements are: **Education:** Doctoral degree and "appropriate" professional certification; **Years of Experience:** "Appropriate" (2/96); senior level preferred (3/97); **Technical Skills:** Clinical physics support in all aspects of radiation oncology; **Research:** Potential to develop research interests (2/96) and projects (3/97), including collaborative research within the Medical Physics Program; **Academic:** Participate in M.S. and Ph.D. Medical Physics graduate programs (faculty appointment according to qualifications) with Rush University; **Managerial:** None indicated.

3. The Rush Personnel Office job description supplements the above, listing the clinical responsibilities of the incumbent Professional Clinical Physicist as follows: (1) Radiation therapy quality assurance; (2) Treatment planning consultation; (3) Radiation safety, and assurance of safe operations and regulatory compliance; (4) Data acquisition and management of dosimetry data; (5) Research and development, including publication of high quality research; and, (6) Training/instruction of staff and graduate students.

4. The American College of Radiology (a Non-Profit Professional Society) suggests the following standards[26] for competency: **Education:** Certification and continuing education in Therapeutic Radiological Physics; **Managerial:** Supervision and direction of medical dosimetrists, therapy equipment service engineers, and other support staff; **Research:** Remain current through readings and conferences; **Academic and training:** Supervise trainees (physicists and support staff); **Technical:** Specification, selection and acceptance of equipment; comprehensive quality management program related to radiation therapy protocols, documentation of procedures; machine calibrations; implementation of a documented safety program; consultation on imaging, treatment planning, and dose delivery.

On the basis of the foregoing, I find that Hammoudah was qualified for the Therapeutic Radiological Physicist position as advertised by Rush.[27]

C. *Element (4) of the Prima Facie Case: Complainant Was Rejected For the Position He Applied For, and the Position Remained Open for Other Applicants with Complainant's Qualifications*[28]

1. *Scenario One: The "rejection" in spring, 1996*

Chu advertised the position, which was to include a faculty appointment. Hammoudah submitted his resume and a cover letter. Chu rated Hammoudah as a "5" candidate—the least desirable, noting the number 5 on Hammoudah's cover letter, which was retained into 1997. Hammoudah called Chu to inquire about the status of his application. The position became unavailable for others of similar qualifications to fill when Chu decided not to fill

[26] These standards, presented by Hammoudah, are consistent with Rush's published advertisement, its internal job description, and Chu and Saxena's general judgments of what makes a qualified candidate.

[27] Chu Deposition, p. 124: "Q: As we already talked about, Dr. Hammoudah appears to meet the qualifications at least as they're described in your advertisement; is that correct? Chu: Yes, but we also have some other concerns."

[28] Alternatives of this fourth element describe narrower "circumstances" which may suggest an inference of discrimination, e.g., the position not only remained open but was specifically filled by an individual who was not a member of the protected group—in this case other than a U.S. citizen. *Cf. Carson v. Bethlehem Steel Corp.,* 82 F.3d 157 (7th Cir. 1996) (per curiam), where the Seventh Circuit held that even if the position is subsequently filled by a member of the protected group, a complainant may still be able to state a *prima facie* case.

it as advertised. No short-list of highly rated candidates was created for Saxena to review; no one was selected to be interviewed. A Chinese citizen of Chinese national origin was promoted from within to carry out the clinical responsibilities of a therapeutic radiological physicist, but without the faculty appointment. Chu sent Hammoudah a letter telling him Rush had chosen someone else for the position.

2. *Scenario Two: The "rejection" in or around December of 1996*

Chu became aware he would need to fill the position again, when the incumbent informed him he would be leaving Rush. Chu was in possession of some retained resumes from the applicants from the spring of 1996, including Hammoudah's resume and cover letter. However, Chu contacted none of those for whom he retained resumes; instead, he contacted a professional acquaintance (Chui-Tsao), who he would rate "1" on his scale, and who he believed to be a U.S. resident or citizen and of Taiwanese national origin, to offer her the position. She ultimately declined due to the low salary. Chu did not select Hammoudah for an interview, nor "offer the job" to Hammoudah, nor anyone else. Instead, he chose to formally re-advertise the position, which implicitly invited applications from citizens and non-citizens.

3. *Scenario Three: The "rejection" in spring, 1997*

Hammoudah formally re-submitted his resume, which contained no new information related to his experience and qualifications for the job. Chu did not modify his "5" rating of Hammoudah. The rating was either carried forward from 1996 (consistent with Complainant's assertion that Chu did not read his resume), or the rating was re-assigned by Chu in 1997 upon receipt of Hammoudah's resume. Hammoudah called Chu to inquire about the status of his application. Chu sent Hammoudah a letter acknowledging receipt of his resume. Chu arranged for interviews of Dr. Li, a Canadian citizen of Chinese national origin, and at least one other candidate, from whom he received resumes. Saxena subsequently offered Dr. Li the job, as advertised to include a faculty appointment. Chu sent Hammoudah his Final Rejection Letter in July, 1997.

Regarding each of the scenarios above, respectively, I find the following:

a. Element (4) of a *prima facie* case as to scenario one (spring 1996) is **not** satisfied in that Chu decided **not** to hold the position open to others of Hammoudah's qualifications from outside Rush, but rather to hire a post-doctoral fellow from within whom he had already personally trained, and with whose work he was familiar.

b. Element (4) of a *prima facie* case as to scenario two (December 1996) is **not** satisfied in that Hammoudah could not be rejected absent a pending application. There is no evidence Hammoudah directly applied for the job in the latter part of 1996, either formally or informally. It does not appear that he knew, or could have known, that the job again had become available. In the context of Chu's practices, there is no basis for an inference that he treated Hammoudah's persistent interest in a job as an ongoing application for employment, irrespective of Hammoudah's desires. Further, there is no evidence Chu reviewed his set of retained "pending" resumes and on that basis rejected Hammoudah while selecting others to consider.

c. Element (4) of a *prima facie* case **is** satisfied as to scenario three (spring 1997). Hammoudah did apply for the position advertised; Chu rejected him in an initial "cut" regarding the applicants for that position (which included the faculty appointment). Chu's failure to short-list Hammoudah took place at the time of receipt of Hammoudah's resume; and the position remained open for other applicants of Hammoudah's qualifications. Dr. Li, a Canadian citizen of Chinese national origin, was subsequently hired in the advertised position and received a faculty appointment.

D. *Employer's Proffered "Non-discriminatory" Reasons for Failure to Select Hammoudah for an Interview*

1. *Chu's Actions and Decisions, and Legitimate Reasons for Them*

Chu, as the initial and primary decision maker, took a number of actions with respect to staffing his clinic in 1996 and 1997 using his managerial "business judgment" and using the staffing mechanisms available to him. The purportedly non-discriminatory reason for each decision is that it "made business sense" to Chu, as outlined below:

Chu advertised in 1996, to attract candidates.

Chu received applications, including Hammoudah's--whom he ranked 5. Chu offered among other reasons for the ranking, that: "Dr. Hammoudah, around this time [when] there's a very significant shortage of medical physicists, still cannot get a stable job, doesn't give me a lot of confidence on his ability, either his ability to sell himself or he's not a really qualified candidate." Chu Deposition, p. 108. Respondent's response to interrogatories states that Hammoudah "was rejected during the initial screening for . . . reasons [including that] Dr. Chu knew that Complainant had been working at a gas station and did not consider that employment to be indicative of demonstrable competence as a Medical Physicist; and, according to his resume, Complainant had no regular employment [in Medical Physics] since 1994. Responses to Complainant's Third Set of Interrogatories, June 18, 1999.

Chu's unwillingness to rate Hammoudah higher than a five, despite Hammoudah's qualifications, appears to be based on personal and subjective conclusions reached about Hammoudah.

Following receipt of applications, Chu elected not to fill the position in the spring of 1996, and to instead promote a post-doctoral fellow. The record does not tell us why Chu made this election. This decision reflects the flexibility Chu exercised in matching his workplace needs to available employees, and in tailoring the expectations of the incumbent to meet the needs and constraints.[29] While such decision-making freedom in the hiring process in an academic setting gives opportunity for discriminatory actions, here there is no evidence that this election was based on anything other than Chu's business judgment.

Chu sent Hammoudah a rejection letter in May 1996, but retained his resume along with a partial set of the resumes of other 1996 candidates. Nothing tells us why some resumes were retained and others discarded.

Chu contacted a professional colleague in 1996, and offered her the position.[30] The record establishes, and Complainant does not dispute, that she was very qualified for the job. The record also

[29] The promoted fellow did not receive a faculty appointment.

[30] Chu Affidavit: "Chiu-Tsao interviewed at Rush on or about December 3, 1996, with me, Dr. Saxena and three faculty members. All five interviewers were U.S. citizens. . . . Based on feedback from the interviewers and my own impressions, I, with Dr. Saxena's concurrence, decided to and did offer the job to Chiu-Tsao but she declined it."

establishes that while Chu did not know, he believed her to be an American citizen, thus rebutting any inference that Chu treated non-U.S. citizens more favorably than citizens as desirable candidates for the job.

Chu advertised the position in early spring, 1997, which invited all who believed they were eligible, citizens and non-citizens alike, to apply for the job. The neutrality of the advertisement, in its terms, is not disputed.[31]

Chu received and rated applications, including Hammoudah's, and included in his selection pool resumes from the previous year as well. Hammoudah's rating for 1997 was a "5"—the same as in 1996. Chu's perceptions of Hammoudah do not appear to have changed, and ostensibly the reasons for the "5" rating in 1996 and 1997 were the same.

Chu selected Dr. Li, a non-U.S. citizen, to be interviewed for the job, and Rush subsequently hired him. Chu sent Hammoudah a rejection letter in July 1997 (the Final Rejection Letter), which evidences that he had indeed "applied."

There are factual disputes concerning this hiring scenario. The parties agree the position was available, that Complainant applied, and was rejected--in the form of a "5" rating (a rejection of which he was not aware until July, 1997), that the position remained open for someone else to fill, and that it was filled by a non-U.S. citizen. The factual disputes concern each party's evidence comprising non-discriminatory explanations for details of the hiring process on Respondent's part, and evidence of pretext offered by Complainant.[32]

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[31] The advertisement includes the text, "Rush-Presbyterian-St. Luke's Medical Center is an affirmative action, equal opportunity employer."

[32] A fundamental dispute exists regarding the legitimacy of the short-listing and subsequent interviewing stage of hiring (the step of the process at which Complainant was eliminated). One disagreement concerns how many candidates were on the short-list. Respondent states, "The Respondent interviewed [**three** candidates] Sou-Tung Chiu-Tsao, Rulon Mayer, and X. Allen Li for the 1997 position. Chiu-Tsao was interviewed 12/3/96 [for the 1997 position]. Mayer was interviewed 5/12/97 [after notice of the internal grievance by Viru.]. Li was interviewed 5/19/97." Interrogatory 7, R. Responses to Outstanding Interrogatories, Sept. 15, 1999. Chu's Affidavit presents a slightly different version: "I invited **two** of the applicants to interview for the position. They were Rulon Mayer, Ph.D. and X. Allen Li, Ph.d., who I rated 2 and 2.5, respectively. From their resumes, I knew that Dr. Mayer was a United States citizen and I knew Dr. Li was a Canadian citizen. . . . I rejected the remaining applicants.

Continued on next page—

Rush argues that Complainant was not qualified; I have already stated that Complainant has successfully established his qualification for the job. In the alternative Rush argues it had legitimate, non-discriminatory reasons for not short-listing Hammoudah, as well as having legitimate non-discriminatory reasons for its ultimate choice of Li for the position. In proving this latter point, Respondent outlines its view of the sequence and dates of the various hiring decisions resulting in Li's ultimate hire. In the context of that sequence, Respondent also outlines the factors which influenced each decision along the hiring process path.

Complainant challenges Respondent's explanations and disputes the assertions regarding the sequence and dates of various hiring decisions. As was stated earlier, however, the fact that the employer is less than accurate regarding facts surrounding hiring is not per se evidence of discriminatory intent.[33]

The factual dispute to be analyzed here is that regarding the Respondent's proffered business reasons for not selecting Hammoudah for an interview.

It is not the function of the administrative law judge to second-guess business decisions or to question how a business chooses to achieve its legitimate goals. *See Burdine,* 450 U.S. at 259 ("The fact that a court may think that the employer misjudged the quali-

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I did not know the citizenship of any of the rejected applicants unless that information was listed on their paper submissions. Among the rejected applicants [was] Jen-San Tsai, [who] according to her resume was a Canadian citizen. . . . I did not know Dr. Hammoudah's citizenship when I eliminated him from consideration for the Therapeutic Radiological Physicist position."

Chu continues, "Dr. Mayer interviewed at Rush on about May 12, 1997 with me, Dr. Saxena and five other Rush faculty members. Dr. Li interviewed at Rush on or about May 19, 1997 with me, Dr. Saxena and four other Rush faculty members. Based on feedback from the other interviewers and my own impression, I, with Dr. Saxena's concurrence, decided to and did offer the job to Dr. Mayer, but he declined it. After Dr. Mayer declined the job, I, with Dr. Saxena's concurrence offered Li the job and he accepted it. Dr. Hammoudah was told in a form letter dated July 22, 1997 that he was not selected." Chu Affidavit, Para. 33–37.

Hammoudah suggests there never was a short list, and that any and all explanations of how Rush evaluated candidates in order to interview the best qualified are pretext. He references H–1B Visa and salary documents in Li's personnel file, dated April 28, 1997 and May 8, 1997 respectively, to support the claim that Chu intended to hire Li **before** he interviewed him on May 19, 1997 in response to the vacancy advertisement. If so, the vacancy advertisement may have been a vehicle to hire whomever Chu desired to hire, and, therefore, a sham, but it does not inform at all concerning citizenship status preference, if any.

[33] *See supra* note 4.

fications of the applicants does not in itself expose him to Title VII liability. . ..''). *See also Yefremov*, 3 OCAHO at 1584, *available in* 1993 WL 502295 (quoting *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988))("Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons.'').

2. *Respondent's Hiring Criteria in the Context of the Rush Employment Environment*

In examining Respondent's reasons, both explicitly and implicitly articulated, for not selecting Hammoudah for either an interview or for the position itself, we need to consider each area of responsibility implicated by the position vacancy: (1) the therapeutic clinical position; (2) the faculty appointment in the Medical College with which the clinic is linked, and under Saxena's supervision; and (3) the faculty appointment in the College of Medical Sciences under Chu's chairmanship. The net of the Chu and Saxena depositions, not rebutted by Hammoudah, yields the following portrayal of Rush's expectations of the incumbent and the desirable characteristics best qualifying someone as a Therapeutic Radiological Physicist.

Of the three areas of responsibility, the therapeutic clinical area is the most inflexible in its requirements, and the one with ongoing daily demands for safety and patient care. Skills are obviously a priority, as is the more subjective factor of likelihood of longevity in the job.[34] Rush considers recent experience with state-of-the-art machines and equipment, including equipment it contemplates acquiring, to be a critical factor in a desirable candidate. In Hammoudah's professional judgment, skills with quality assurance and clinical safety management are equally important, and Rush's job description affirms this as one of five key skill areas. Lacking these qualifications, a candidate is undesirable.

[34] *Report of the Department Advisory Committee of the Radiation Oncology Department on the Grievance filed by Dr. Ramasamy Virudachalam against Drs. Saxena and Chu* (October 28, 1997), page 3: "Over the past 18 months, four faculty members (including one elevated to that status in September 1997), one postdoc, one highly experienced dosimetrist, and one graduate student who had completed all course work have left the Medical Physics section. All of these individuals provided some clinical physics services. In addition, one associate professor of Medical Physics has been reduced from full time to a 60% appointment. Dr. Viru's presence would assure competence and **continuity in patient care**." [Emphasis added].

Exceptional qualifications in this area may allow a candidate to avoid responsibility[35] in the other areas. According to Saxena, "A person can **just be** a medical physicist serving within—as a service to the patient—in the hospital . . . I don't recall if there is anybody over the years that fits that criteria . . ." Saxena Deposition, p. 23.

While not a requirement, there is a presumption that a candidate for the position must be qualified as a faculty member as well. The job title is as a faculty member in the Medical College (per the H–1B petition for Dr. Li, the spring 1997 hiree), the Medical College funds the position,[36] and the position is identified as a full-time, permanent position. Ideal qualifications for the faculty appointments are subjectively and variously defined. While the final hiring decision (authorizing the salary) for the Medical College faculty appointment is made by the Dean of Rush Medical College, it is Saxena and Chu who subjectively determine factors defining an ideal candidate at a particular time. "The criteria we use that led to Weimin Chen's ultimate selection might be different criteria we use for the particular candidate which ultimately replaced Weimin Chen, because the situation is different and the quality of applicants we get at the time were different." Chu Deposition, p. 40.

The Rush Medical College faculty position is under Saxena's supervision, and Saxena's faculty expectations[37] are: (a) Board certified or eligible to be certified; (b) Most likely holding a Ph.D.; (c) Meet minimum requirements for a faculty appointment, with

[35] An extremely qualified candidate can use an "escape clause" to avoid the duties of one or both of the faculty appointments. Saxena Deposition, p. 21.

[36] Chu Deposition, p.18. "The budget [for the position] is coming from radiation oncology [in the Medical College]." The salary is based on degree(s) earned, area of specialization, previous work experience, publications, and requirements from funding sources when applicable.

[37] The deposition question was asked, "Was there any requirement that a candidate participate in recent research?" Saxena responded: "See, when you use the word 'requirement,' in any academic center you look at the person. There is an expectation—'strong expectation' is the word I want to use. Requirement has never been a strict requirement. If you are very good in certain areas and you don't do certain other things, you look at the person. So it's the value to the department that is more important." Saxena Deposition, p. 32. Another question was posed, "If the candidate had been out of a clinical setting for 3 or 4 years, would you consider that candidate not qualified for the position?" Response: "I would consider the candidate in relation to the applicants. You have to, again, go back to that you have five candidates and you look at each and everybody's experience and select the best that you have." Saxena Deposition, p. 36.

clinical teaching experience; (d) Clinical expertise (with modern technology); (e) Research skills; (f) Of "value to the department." Criteria (a) through (e) do not implicate citizenship status discrimination in any way. Criteria (f) is open to interpretation.

The College of Health Sciences faculty/research appointment is under Chu's chairmanship. Since this appointment provides both a source of research opportunities and support (cadre of graduate students), Chu holds strong expectations of productive (ending in high quality publications) research and graduate teaching/training which helps retain graduate students. He holds a presumption not uncommon among academics that prior experience with "prestigious" medical centers, an impressive publications list, and recency in teaching and research experience are excellent predictors of successful research and graduate program development.

Chu expressed a preference for a candidate with a research interest in "Monte Carlo techniques," a principal criteria for his selection of Li for the position in 1997. Other than his statement, no evidence was offered, such as research proposals, current research projects, research interests of graduate students, or benefits to the patient care clinic, to substantiate this criteria. Complainant argues the criteria is pretext, and was not specified in the advertisement for the appointment. He suggests such an interest is poor academic judgment on Chu's part. However, a business decision "need not be good or even wise. It simply has to be nondiscriminatory." *Graefenhain v. Pabst Brewing Co.,* 827 F.2d 13, 20 (7th Cir. 1987) (overruled with respect to standard for determining liquidated damages only). Thus, Chu's reasons for preferring Li need not be well-advised, but merely truthful. *See Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 559 (7th Cir.) (Title VII), *cert. denied*, 484 U.S. 977 (1987). To show pretext, Complainant must show the interest in "Monte Carlo techniques" was not genuine. Complainant's professional opinion about Li's research qualifications are immaterial; more importantly, they are insufficient to defeat summary decision. *Flores v. Preferred Technical Group,* 182 F.3d 512, 514–15 (7th Cir. 1999).

It appears that Chu's decision-making and staffing goals included the following more general academic business goals: (a) Build a team of stable, committed professionals, consistent with his management style, and willing to cooperate with current research plans; (b) Negotiate the obstacle of low salaries; and (c) Get "the Work" done in the clinical setting. Chu's actions to achieve these

goals included: (a) Develop a student "apprentice" pool; (b) Develop professional network contacts; (c) Formal hiring, of one of the following:

i. Junior Professional (e.g., Weimin Chen in 1996),
ii. Managerial Professional (e.g., Viru in 1992),
iii. Academic/Faculty Professional (e.g., Dr. Li in 1997).

E. *Complainant's Rebuttal of Respondent's Asserted Reasons for Failure to Hire*

Complainant challenges numerous factual assertions by Respondent with respect to Rush goals and business-related actions. However, a case is "amenable to summary judgment when there is no genuine dispute of material fact or there is insufficient evidence of the alleged motive to discriminate." *Benjamin v. Katten, Muchin, & Zavis*, 1999 WL 1212565, at *5 (N.D. Ill. 1999) (granting summary judgment) (citing *Cliff v. Board of School Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994)). "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

1. *Complainant's Discriminatory Policies Theory*

One prong of Complainant's arguments assumes a selection process did in fact occur, but that it was a process directly rooted in discriminatory policy. Complainant alludes to two allegedly discriminatory covert "policies" on the part of Respondent: (1) the "recruit and then promote from within pre-selected non-U.S. citizen students" policy; and, (2) the "make it difficult for qualified U.S. citizen professionals to apply" policy. One or the other or both of these policies, he alleges, is the real reason behind the failure to hire him in 1997, and the 1997 failure to hire was simply a continuation of Respondent's failure to hire him based on the same reasons in earlier years. His argument lacks factual support.

(a) Recruitment of students is not an employment decision-making process. Even if it were, there is nothing to suggest that student recruitment policies at Rush are designed to discriminate against U.S. citizens. Chu's recruitment methods neither supersede nor replace institutional policy. If Chu utilizes a student recruitment agenda as Complainant alleges which favors candidates of

Chinese origin, there is no indication that such bias turns on citizenship as distinct from national origin considerations.

As a teaching institution, the Rush preference for candidates from within the institution, including drawing from a graduate student pool, is an overt, not covert, policy.[38] Existence of this policy establishes a legitimate non-discriminatory business reason (i.e., training, combined with a less costly labor pool) for preference of an internal candidate over an external one. Interestingly, more than half of the Therapeutic Radiology Clinic's personnel are U.S. citizens.

(b) Complainant contends that Chu has a covert policy of making it difficult for qualified citizen professionals to apply for the Therapeutic Radiological Physicist position. Hammoudah points to relatively low professional salaries and asserts that Rush through Chu places undesirable constraints on research work. I reject as unrealistic the suggestion that these characteristics are driven by a discriminatory motive. It would be surreal and unrealistic to conclude that salary constraints and research demands, e.g. for certain research topics (such as "Monte Carlo techniques") and policies regarding the publication of research results (imposing himself as an author), are intended to or have the effect of preferring non-citizen employees.

Because employers rarely announce their discriminatory policies, discriminatory intent behind a policy is usually proven indirectly through the introduction of statistical and anecdotal evidence. *See, e.g., Teamsters*, 431 U.S. at 334–40. Relevant statistical comparisons in a refusal to hire case include comparisons between groups of individuals in the appropriate labor pool. *See Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.1982), *cert. denied*, 459 U.S. 1038 (1982). Here, such a comparison would be between citizens vs. non-citizens applying for the therapeutic radiological physicist position and their different rates of hire. "Where gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307–08 (1977). A plaintiff may establish a *prima facie* case "by show [ing] a disparity in the relative position or treatment of the minority group and [eliminating] 'the most common nondiscriminatory reasons' for the

[38] Rush Human Resources Policy and Procedures. Section 3.02. When possible and where qualified, current employees of the Medical Center expressing interest should be given consideration for promotion to available positions over non-employees.

observed disparity." *Segar v. Smith*, 738 F.2d 1249, 1273 (D.C.Cir.1984) (quoting *Burdine*, 450 U.S. at 253–54). The most common nondiscriminatory reason is "a lack of qualifications among the minority group members." *Segar*, 738 F.2d at 1274.

Hammoudah fails to substantiate allegations of statistically significant occurrences of discrimination based on citizenship status. Instead, despite extensive discovery initiatives, he offers only scattered anecdotal bits and pieces. That evidence consists essentially of references to hire of persons claimed to have inferior qualifications, to be unauthorized for employment and to be largely of Chinese ethnicity, and to recruitment of Ph.D. students of Chinese ethnicity in earlier years to "prep" them for employment several years later. Nothing in these allegations provides statistically-based proof of a policy of discrimination against U.S. citizens. Indeed, even assuming Chu's preferences are consistent over time and as alleged, Chu could equally prefer U.S. citizens of Chinese origin as non-U.S. citizens.

2. *Complainant's "Everything Is Pretext" Theory*

Complainant asserts at various points that the reasons Rush offers for failure to hire him, as well as Rush's portrayal of the whole hiring process as a reasonable and legitimate academic business endeavor, is all pretext. Specifically he asserts that placement of the advertisements in both 1996 and 1997 were pretext; that the comparative rating chart of 40 or so candidates which generated the short list in 1997 was fabricated for legal and investigative forums; that identifying a short list of candidates to consider fairly in 1997 was pretext, that it never happened; that the non-selected candidate (U.S. citizen Rulon Mayer) interviewed in May, 1997 was a setup meant to show Rush considered citizen candidates, and that the interview was a sham. He asserts that the positive opinion of Dr. Li, the selected candidate's "Monte Carlo technique" research was pretext, hiding the real reason for his selection; that the reasons for judging both Chen in 1996 and Li in 1997 as much better qualified than Hammoudah were without basis in truth, and were offered to hide the real basis for those preferences. Perhaps most critical to Complainant's case, he asserts that Chu's rating Hammoudah a five, based on a review of his resume and cover letter, was pretext—that Chu never even looked at his resume.

In the Seventh Circuit, if the employer offers several reasons for not hiring a candidate, and even one stands muster, the complainant will fail in his task of establishing pretext on the part of the employer. *See Gnosh v. Indiana Dept. of Envtl. Management*, 192 F.3d 1087, 1091–2 (7th Cir. 1999) ("When the defendant offers multiple reasons for its employment decision, the plaintiff must show that all of the proffered reasons are pretextual in order to reverse the district court's grant of summary judgment"); *Wolf v. Buss (America) Inc.*, 77 F.3rd 914 (7th Cir. 1996) (summary judgment granted to the employer even though the employee successfully challenged four of six reasons proffered by the employer to justify his termination). Such is the case here. Complainant begins but fails to successfully conclude his pretext arguments to rebut each and every reason Rush proffers for its failure to hire him.

V. *CONCLUSION*

Complainant established his *prima facie* case. Respondent proffered legitimate, non-discriminatory reasons for not hiring Complainant, some but not all of which Respondent itself contradicts.[39] The burden was then on Complainant to rebut the arguments which Respondent offers for its failure to hire decision. If he were to meet this burden, an issue would exist for a hearing on the merits to establish whether Rush discriminated against Hammoudah in the hiring process **because of** his citizenship status. Specifically, Hammoudah would need to show at hearing that because of his citizenship, he was not short-listed, and at a minimum, interviewed, and that because of his citizenship, he was not hired. The Seventh Circuit "has exacted a strict adherence to this burden of proof." *Santos v. Rush-Presbyterian-St. Luke's Medical Center*, 49 Fair Empl. Prac. Cas. (BNA) 685 (N.D. Ill. 1989), *available in* 1989 WL 27441, at *13 (citing *Grohs v. Gold*

[39] Rush has a personnel hiring policy which inter alia is designed to help insure a fair hiring process. Jobs are to be posted through personnel, and all candidates "channeled" through the personnel office. Chu's hiring practices, however, do not exactly conform to policy. His hiring policy in this regard appears to be akin to his authoring policy (as reflected in the Viru grievance documents, automatic authorship accorded to faculty on graduate student work, absent contribution) which also was contrary to formal Rush policy. Hammoudah suggests other "deviations" of Chu's decisions from Rush's policies and interests: **Motion to Compel Response to Discovery; Sanctions.** p. 10. "Careful examination of Li, X., Allen resume indicated that he has no experience whatsoever with Radiation Safety which was a requirement by Rush for hiring Clinical Radiation Therapy Physicists. Chu, James, Ph.D. selected Li X. Allen although he had no experience in Radiation Safety."

Bond Building Products, 859 F.2d 1283 (7th Cir. 1988)). It would not be necessary that Hammoudah prove that citizenship status was the only factor in the failure to hire decision, rather that it was a significant contributing factor.

The "because of" analysis is not required of Complainant in order to survive summary judgment, however. Respondent overreaches in its statement on brief that, in order to survive its Motion, "Complainant must show that one of the real reasons Chu rejected him was because of his citizenship status." In the Seventh Circuit, to defeat summary decision, Complainant need only establish his *prima facie* case and produce evidence from which "a rational fact-finder could infer that [Rush's] proffered reasons were pretextual." *Senner,* 113 F.3d at 755 (citing *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994)). The Seventh Circuit does not require that he go further and provide pretext-plus argument.[40]

In any event, Hammoudah has not met his substantial burden of showing that all of Chu's reasons for rejecting him were false, phony or unbelievable. Respondent has articulated legitimate, non-discriminatory reasons for how it determined Li met its qualifications and why Li was selected to fill the position. Similarly it articulated reasons why it did not select Hammoudah. I find Chu's reluctance to hire Hammoudah to be for at least some of the reasons he explains on deposition and by affidavit. He did not want to hire a Therapeutic Radiological Physicist who within recent years had been unemployed due to clinical depression, and in recent years been employed at a gas station used by Chu. There may have been additional reasons beyond Chu's preferring other eligibles on their merits but they do not reflect citizenship considerations. That the judge might not have made the same judgment as did Chu is not determinative. Chu's reluctance to hire Hammoudah rings true, and could not be causally linked by a reasonable fact-finder to citizenship status discrimination. While it may never be absolutely certain where the true roots

[40] *See Mollica, supra* note 4, at 105: "The Seventh Circuit has rejected the pretext-plus model of proof [and does] not require a plaintiff on summary judgment to present evidence beyond proof of the *prima facie* case and rebuttal of the employer's proffered justification for the adverse job action." Straight pretext cases can be submitted to the fact-finder in all instances, because for "summary judgment purposes, the non-moving party has a lesser burden" of establishing a triable issue of fact than pretext-plus requires. *Id.,* at 106 (quoting *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1123–24 (7th Cir. 1994)).

of the hire/no interview decisions lie, it is Respondent's version that Chu did not know Hammoudah's citizenship status at the time of the decision, and Hammoudah is in no position to discredit that claim.

The Seventh Circuit's *Senner* discussion and conclusion is so apt it is a wonder it was not bought to our attention by either party. Senner, a disappointed applicant for appointment as a college psychology professor claimed age and gender discrimination when he was not short-listed and a younger female candidate was selected. For the court, Judge Ilana Diamond Rovner noted that the plaintiff's theory that the employer's "putatively neutral screening process was a sham used to hide the college's practice of intentionally eliminating or discounting applications" from candidates of plaintiff's characteristics "so that it could hire a younger woman, even though she was less qualified . . . is a disparate treatment theory, not a disparate impact theory." Accordingly, the court held plaintiff "to the standards of disparate treatment analysis," concluding that he "has not provided evidence from which a rational jury could conclude that discriminatory intent **probably motivated**" the employer. *Senner*, 113 F.3d at 756–57. [Emphasis supplied.]. I hold Hammoudah to the same standard.

Hammoudah relies almost exclusively as the gravamen of the discrimination claim on conclusory statements about what Chu must have been thinking, rather than on direct or circumstantial evidence that Dr. Chu's reasons for rejecting him were a pretext for citizenship status discrimination. *See Ost v. West Suburban Travelers Limosine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996) ("Without evidence casting a doubt on [the employer's] proffered nondiscriminatory reason for not hiring [the Complainant], [his] claim cannot survive summary judgment"), the consequential lack of any discernible meritorious § 1324b claim forecasts that he would be unable to carry an ultimate burden of proof in a full evidentiary hearing. Here there are disputes of fact, turning on whether Chu accurately recalls never having seen Hammoudah's publications list, whether he truly believed that Hammoudah had an unstable employment record and truly believed that Hammoudah had no teaching experience since 1988, and no clinical teaching experience at all. Far from pretextual they are the essence of any selection process. As to 8 U.S.C. § 1324b, however, absent an overarching citizenship status concern, these disputes are immaterial, and their resolution would not inform this record in any meaningful way, nor affect the outcome of this case.

To survive summary decision in the Seventh Circuit, Complainant must show that Chu did not honestly believe any of the conclusions reached about him. *See Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997) (plaintiff does not win if employer honestly believed in the nondiscriminatory reasons it offered); *Richter v. HookSupeRx, Inc.*, 142 F.3d 1024, 1029–30 (7th Cir. 1998) (plaintiff must show that employer's proffered reasons for failure to hire were "a lie [or] a phony reason").

Beyond mere allegation, there is no evidence that the 1997 advertisement was a sham, nor that Li and Mayer were not bona fide candidates for the 1997 vacancy. If the process from the outset was designed to favor a particular potential hire, there is no suggestion such an artifice was designed on the basis of citizenship considerations. There is also no evidence proving that the subjective judgments of Chu and Saxena that Li and Mayer were sufficiently qualified be invited for interviews, and to be offered the position, were lies or phony reasons. None of the Chu's goals, and the means to achieve them, implicate citizenship status discrimination. Finally, there is no evidence showing that Chu in his heart believed **none** of the reasons he stated for rejecting Hammoudah. In sum, nowhere among the extensive filings do I find a scintilla of evidence to suggest that Chu's conclusions about Hammoudah were linked to his U.S. citizenship, or to the citizenship status of those hired in his stead.

As Judge Rovner stated for the court in *Senner,* "The problem is that [plaintiff's arguments, even when construed most favorably toward [plaintiff], only show that [the employer] did not give his credentials the emphasis they may have deserved." *Senner,* 113 F.3d at 756. "Moreover," said the court, "employers may have subjective preferences . . . as long as they do not express forbidden references. [Plaintiff] has shown at best, that [the employer's] evaluation criteria require a subjective judgment; they do not suggest that discriminatory intent affected that judgment." *Id.* The court continued:

> The ratings which [the employer] gave its pool of nine candidates are 'subject to too many alternative explanations to discrimination . . . to be considered any better than makeweight evidence of discrimination.' Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1398 (7th Cir. 1997). Consequently, [plaintiff] has failed to present evidence that [the employer's] reasons for not hiring him were a pretext for age or gender discrimination, sufficient to preclude summary judgment.

Id.

One of Hammoudah's claims is that others were preselected and that advertising the positions was a sham. The very articulation of that underlying premise defeats the claim that his citizenship was at issue. There is no semblance of such concerns on the part of Rush. It is the rare case where an employment decision turns on citizenship as distinct from race, religion, national origin, gender, age and physical disability. Whatever may have driven Chu's and Saxena's preferences does not implicate citizenship status. Hammoudah may appropriately feel wronged that Rush sought out a candidate who required an H-IB Visa, and rejected him for reasons unrelated to his qualifications. However, I find and conclude that there is no basis on which this case should go forward because there is no genuine issue of material fact to warrant a confrontational evidentiary hearing.

Even though Hammoudah establishes a *prima facie* case of citizenship status discrimination, Rush articulates at least some legitimate, nondiscriminatory reasons for its hiring decisions. I am unable to second-guess Chu's and Saxena's exercise of their discretionary judgment to select for short listing and employment the individuals best qualified according to criteria unrelated to citizenship status of candidates. Hammoudah's pleadings, exhibits and arguments, understood in a light most favorable to him, provide no basis for concluding that there is any genuine dispute of material fact to support Hammoudah's claim of citizenship status discrimination.

VI. *ULTIMATE FINDINGS, CONCLUSION, AND ORDER*

A. I have considered the pleadings, testimony, evidence, briefs, arguments and memoranda submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, in addition to the findings and conclusions already stated, I find and conclude that:

1. The national origin discrimination claim is dismissed for lack of jurisdiction because Respondent employs more than 14 individuals. 8 OCAHO 1015 (1998).

2. There is no genuine issue of material fact that supports Hammoudah's claim of citizenship status discrimination as

to warrant a confrontational evidentiary hearing on the claim of citizenship status discrimination.

3. Upon the basis of the whole record, consisting of the pleadings of the parties, and accompanying exhibits, a state of facts has not been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. § 1324b(g)(2)(A). I find and conclude that Respondent has not engaged and is not engaging in the unfair immigration-related employment practice alleged, and within the jurisdiction of the administrative law judge. Accordingly, the complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

4. Respondent's Motion for Summary Decision is granted.

5. To the extent that Complainant recites a motion for summary decision in his response to Respondent's statement of undisputed material facts, that motion is denied.

B. The Complaint is dismissed.

VII. *APPEAL PROCESS*

This Final decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to the United States Court of Appeals for the Seventh Circuit in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.
Dated and entered this 29th day of March, 2000.

Marvin H. Morse
Administrative Law Judge