

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

September 11, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 11B00136
)	
LIFE GENERATIONS HEALTHCARE, LLC)	
D/B/A GENERATIONS HEALTHCARE)	
Respondent.)	
_____)	

FINAL DECISION FINDING LIABILITY AND SCHEDULE FOR
SUPPLEMENTAL FILINGS

Appearances of Counsel:

Phil Telfeyan and Ronald Lee
for the Office of Special Counsel,

Rocío Avila
for Carmen Chavez

Maria Z. Stearns and George Gorman
for Life Generations Healthcare LLC

Kyle Schriener
for Ruthmarie Banda

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012), in which the Office of Special Counsel for Immigration-Related Unfair

Employment Practices (OSC or the government) is the complainant and Life Generations Healthcare, LLC d/b/a Generations Healthcare (Generations, GHC, or the company) is the respondent. OSC filed a three-count complaint in which it alleged that Generations discriminated against Carmen Chavez and other foreign-born, work-authorized individuals based on their citizenship status and/or national origin by requiring them to produce more or different documents to establish their identity and work authorization, or by refusing to honor documents tendered that on their face reasonably appeared to be genuine (Count I). OSC also alleged that the company engaged in a pattern or practice of document abuse against foreign-born, work-authorized individuals since at least January 1, 2008 by requesting specific documents (Count II), or by requesting more or different documents than are required under the employment eligibility verification system (Count III). Generations filed an answer denying the material allegations of the complaint and prehearing procedures were completed.

Pursuant to an agreement between the parties, proceedings in this matter were bifurcated. A hearing on the issue of liability was conducted in San Francisco, California, commencing on December 2, 2013 and concluding on December 6, 2013. Witnesses were sworn, evidence was received, and a record was compiled consisting of 1336 pages exclusive of exhibits.¹ In addition to the evidence presented at the hearing, the parties entered certain joint stipulations and those stipulations are also part of the evidence considered. After the hearing, the parties filed post-trial briefs as well as proposed findings of fact and conclusions of law. OSC also filed two offers of proof and Generations filed memoranda in opposition to both. The post-hearing submissions are complete, the record is hereby closed, and the matter is ripe for resolution as to both offers of proof as well as to the issue of liability.

II. BACKGROUND INFORMATION

Generations manages and operates a group of eighteen assisted living and skilled nursing facilities at various locations throughout the State of California. At the time of the events in question, GHC had between 2400-3000 employees company-wide. The company maintains a corporate support center in Newport Beach that provides support services to all its facilities, including risk management and human resources services. Teresa Green is the director of risk management for GHC and Mary Rogers is the director of the human resources department (HR). Among the facilities owned and operated by GHC is a skilled nursing facility located in Daly City, California, known as St. Francis Convalescent Pavilion (St. Francis or Pavilion). Maggie

¹ After the hearing concluded and the transcript of proceedings was filed, the parties were notified and provided the opportunity to propose corrections to the transcript. They reported that any errors were not sufficiently substantial to affect the clarity of the record and no changes to the transcript were necessary.

Parreno is the facility administrator at Pavilion. GHC acquired St. Francis Pavilion at midnight on September 1, 2007, at which time the facility had about 200-300 employees.

As a result of the acquisition, the employees already working at Pavilion became new employees of GHC and the company completed new-hire documentation for them, including new I-9 forms. During the acquisition process, Teresa Green and her assistant, Leanne Hanson, traveled to Daly City and took responsibility for completing new I-9 forms for the existing employees there. In mid-September 2007, however, those I-9 preparation duties were reassigned to employees at St. Francis itself. Lani Pulmano and/or Regina Czerwinski, directors of staff development (DSDs), continued to perform these duties through at least July 9, 2010. Pulmano was in charge and Czerwinski was her assistant. Teresa Green or members of GHC's human resources team provided training to employees responsible for reviewing employment applications and making hiring decisions at each of GHC's facilities. Green or HR staff members also provided Form I-9 verification training to those GHC employees responsible for completing I-9s at each of GHC's facilities. From time to time, Green or others provided I-9 verification training to both Pulmano and Czerwinski.

Carmen Chavez is now a lawful permanent resident of the United States, but at the time of the events in question Chavez was a work-authorized alien and a former employee of St. Francis. Chavez reapplied for work as a certified nurse assistant (CNA) at St. Francis on two occasions after GHC acquired St. Francis, and in neither instance was she hired. Chavez thereafter filed a charge with OSC on or about May 25, 2010, alleging that Generations discriminated against her by refusing to accept a valid work authorization document. On November 3, 2010, Chavez received notice by certified mail from OSC that OSC was continuing its investigation of her charge and that she had the right to file her own complaint. Chavez did not file an individual complaint, but OSC continued its investigation and, after a series of extensions agreed to by GHC, ultimately filed the instant complaint on September 30, 2011. Chavez subsequently became a party and is separately represented. All conditions precedent to the institution of this proceeding have been satisfied.

During the prehearing stage of this litigation it became known that at some point after May 2011, Regina Czerwinski had shredded an unknown number of unsuccessful employment applications. Czerwinski said she was unaware of the fact that GHC's in-house counsel had orally instructed Lani Pulmano to preserve these applications. A motion for sanctions was granted based on GHC's spoliation of these applications and an adverse inference was adopted that during the period between August 1, 2009 and May 1, 2010, GHC's human resources officers asked certain employment applicants whether they had lawful permanent resident cards, and requested at least some of those applicants, including Carmen Chavez, to present employment authorization documents, which Generations' employees photocopied and stapled to the individuals' applications. The company was precluded from challenging testimony to this effect, or from

introducing evidence to the contrary at the liability stage.

III. SUMMARY OF EVIDENCE PRESENTED AT THE HEARING

A. Complainants' Evidence

The complainants presented statistical, anecdotal, and comparative evidence. Witnesses testifying on their behalf included two unsuccessful applicants for employment, Carmen Chavez and Dora Martinez; an OSC employee, Joann Sazama; complainants' expert witness, statistician and demographer Dr. Jeanne Gobalet; and a number of current or former GHC employees.

1. Unsuccessful Applicants for Employment as Certified Nurse Assistants

Carmen Chavez testified about two employment applications she filed with St. Francis after the acquisition. The first of these was on August 25, 2009. Chavez said that when she handed her application to Lani Pulmano that day, Pulmano asked her if she had a green card. Chavez said she told Pulmano she did not, but she showed Pulmano her work permit. Chavez testified that some former coworkers told her St. Francis was asking for green cards now. She said she never heard anything further about this application, so she filled out another on February 23, 2010. This time she gave the application to Regina Czerwinski, who asked for her documents. Chavez said she showed Czerwinski her work permit and social security card and Czerwinski copied them. Chavez testified further that after Czerwinski returned her documents, she asked Chavez whether she had a green card and an ID. Czerwinski also told Chavez that Lani Pulmano said Chavez' employment authorization card was a problem because it had an expiration date, and when it expired Chavez would have to stop working and Pavilion would have to find someone to replace her. Czerwinski also said she would speak with the administrator about the issue, but called Chavez the next day and said she that had done so, and that Chavez could not return to work at St. Francis.

Dora Martinez testified that she applied for a CNA job at Pavilion in December 2009, but the receptionist did not accept her application and asked her to provide her driver's license, social security card, and residency card. Martinez said there was another woman present at the same time who was also trying to apply for a job, and she too was told she had to show her work authorization documents. Martinez said she had her driver's license and social security card with her, but not her residency card, so she went home and got the card that same day. When she returned to Pavilion the receptionist took her application, copied her documents, and returned the documents to her, but the facility never called or hired Martinez.

2. Statistical Evidence and Expert Testimony

Joann Sazama identified herself as an equal opportunity specialist (EOS) employed by OSC. She testified as to the methodology she used to prepare the spreadsheets and summaries that Dr. Jeanne Gobalet, OSC's expert witness, analyzed. Sazama said she reviewed 552 I-9 forms produced by GHC, together with photocopies of the attached documents. She prepared an Excel spreadsheet using only the information that could be derived from examining the forms and any attached documentation. First, she examined section 1 of the I-9 form for each employee to ascertain which of the three boxes the particular employee checked to indicate status as a United States citizen, a lawful permanent resident, or an alien authorized to work. Sazama then examined section 2 to see which documents each employee had presented, and, if copies of the documents were attached, she considered the information on the documents. Based on all the information, Sazama grouped the employees into four categories: United States citizens (USCs), United States citizens whose documents reflected foreign birth (USC-Fs), lawful permanent residents (LPRs), and aliens authorized to work (AAWs).

Sazama concluded that there were sixty U.S. citizens whose documents did not reflect foreign birth, fifty-five U.S. citizens whose documents did reflect foreign birth, 120 lawful permanent residents, and five aliens authorized to work. She then examined the I-9 forms and determined that five U.S. citizens had presented List A documents, fifty-four had presented List B and C documents, and six were overdocumented, that is, six presented more documents than were required for purposes of the employment eligibility verification process. Of the fifty-five USC-Fs, however, all presented List A documents and all were overdocumented, i.e., each presented more documents than required for the verification process. Of 120 LPRs, all presented List A documents and all were overdocumented. Five AAWs all presented List A documents, and all presented more documents than were required.

Sazama characterized her results as a snapshot of what the written records actually showed. Thus even if it were subsequently shown that there were some citizens of the United States whose foreign birth was not reflected in their documents, this would not call for any change in the result because that information was not disclosed in the documents themselves. Sazama also prepared a similar spreadsheet tabulating the comparable results for Seton Medical Center during the period from September 18, 2007 to July 9, 2010. Seton is a nearby facility located less than 2000 feet from Pavilion. Sazama identified exhibit C-15 as the spreadsheet for Seton and C-16 as the spreadsheet for Generations. Seton hired 229 employees during the period and Pavilion hired 240.

Dr. Gobalet authored a written report, and also testified as to the statistical significance of the numbers reflected in Sazama's spread sheet and summaries. Gobalet's report addressed three specific issues: the difference in Pavilion's overdocumentation rates based on citizenship status,

the difference in the facility's List A submission rates based on citizenship status, and the hiring rates for aliens authorized to work. Gobalet explained that probability tools could be used to assess the statistical significance of different rates in terms of normal distributions, that is, the familiar bell-shaped curve, the middle of which represents the mean. Most cases fall within plus or minus one standard deviation from the middle of the bell curve. When you get to plus or minus two or more standard deviations from the mean, the results become statistically significant. Probability levels decline the further out you get in terms of standard deviations.

Gobalet's report and testimony observed that the rate of overdocumentation for individuals whose documents reflected foreign birth was 100%, while the rate for native-born was ten percent. She hypothesized a series of probability rates ranging from ten percent to 97.6% and said that even if the "true" rate of overdocumentation were 97.6%, this result would still be more than two standard deviations away from GHC's rate. Using the Fisher's Exact test, Dr. Gobalet concluded that it was virtually impossible that the disparity in overdocumentation between the foreign-born workers and native-born U.S. citizens could have happened by chance, and that there must be some explanation specific to Generations that would account for these differences. Her written report said the likelihood that the disparity in overdocumentation occurred by chance was smaller than the probability of locating a particular grain of sand by chance on all the beaches in the world, and that the disparity was "an extreme statistical aberration." One explanation that would be consistent with the results reflected is that the foreign-born employees were specifically asked to present excessive documents.

Gobalet performed a similar analysis of the rates at which the two groups presented List A documents. The rate for noncitizens was 100%, while the rate for citizens was 8.3%. Gobalet's report says that the Fisher's Exact test shows the probability of this result is even less likely to have occurred by chance than the probability associated with the overdocumentation rates. The probability that this difference appeared by chance "is so small that the number of equivalent standard deviations approaches infinity." Again, assuming a variety of baseline "true" rates ranging from 8.3% to 96.8%, the results were still statistically significant even at the 96.8% rate. Whatever baseline was used for comparison, Gobalet said there was practically no chance GHC's result could have happened randomly and one needs to look for some explanation specific to Generations.

Finally, Gobalet made some comparisons between the hiring rates for AAWs at Pavilion and at Seton Medical Center. Her report concluded that there were less than four chances out of 10,000 that the pattern would have occurred by random chance.

Generations did not present countervailing statistical evidence of its own, but sought to refute Dr. Gobalet's conclusions in a variety of ways on cross-examination. GHC pointed out that several employees were naturalized United States citizens whose foreign birth was not reflected in

Sazama's charts. These were individuals whose I-9 paperwork and supporting documents did not disclose the individuals' foreign birth. The company accordingly questioned the accuracy of the underlying data on which Gobalet's expert report was based, and created its own revised alternative version of the table Dr. Gobalet relied on in her report. GHC's version of the table incorporated the additional information about these individuals, and thereby altered the numbers and percentages shown. Dr. Gobalet testified on cross-examination that she would need to recalculate the math to reach firm conclusions as to specific numbers, but even with the revisions on GHC's revised report, the results were still statistically significant.

GHC also challenged the significance of OSC's statistical evidence, contending that Seton Medical Center was not an appropriate comparator because Seton is a hospital, not a skilled nursing facility. The company also contends that without knowing the proper baseline for comparison, that is, the real rate of document presentation in the outside world, it is impossible to know what the appropriate pattern should have been.

3. Pavilion Employees and Former Employees

A number of employees and former employees testified about their respective experiences in obtaining employment at St. Francis and about requests for documentation that were made to them during the hiring process. Pastor Dayao testified in pertinent part that he was referred by a friend, and applied for work at St. Francis in August 2008. He said he walked into the facility, and Maggie Parreno, the administrator, interviewed him right away. He was told after that to go to Lani Pulmano's office to schedule a physical, and Pulmano gave him a paper listing the documents to bring. The next day he brought the documents checked on the paper. He brought his green card, his social security card, his passport, and his state ID. Someone copied only the state ID, the social security, and the green card. The only one of these documents Dayao would ordinarily have had with him would be his state ID.

Mary Jane Bautista, a lawful permanent resident and a charge nurse, said she worked for St. Francis Pavilion for only one day. She said that in July 2008, someone in HR asked her during the hiring process to bring her permanent resident card, her driver's license, and her social security card. She initially said she didn't remember the name of the person, but when asked if it was Lani Pulmano, she said that it was. Bautista said she only left St. Francis because she had a better offer from another hospital. Rudianto Tunggalwidjaja is a CNA at St. Francis who began working there on June 22, 2009. He said that when he applied, Lani Pulmano interviewed him and told him he would be called for the follow up. She asked him at the interview what country he was from, and told him prior to orientation to bring everything he had; his green card, ID or driver's license, social security card, and passport. He brought all his original documents, and Regina Czerwinski made copies of his green card, social security card, and driver's license. He would not have brought all those documents had he not been told to do so.

Evangelina Aragona, a CNA and a lawful permanent resident, testified that she has worked at St. Francis since 1988. When Generations took over, all the employees were asked to complete new I-9 forms, and Lani Pulmano asked Aragona for her ID, social security card, and permanent resident card. Johnson Apolinar, a lawful permanent resident, said he started work as a dietary aide on November 23, 2009. He said that when he first filled out the application, Lani Pulmano told him to bring his permanent resident card and social security card to orientation, and that she made copies of those documents. Ronaliza Belen, a naturalized U.S. citizen, started working at GHC in April 2010. She said Lani Pulmano told her to bring her passport, nursing license, social security card, and California ID to orientation. Belen said her sister, who was hired in 2012, had a copy of the List of Acceptable Documents, but that she herself had no recollection of ever seeing that document when she was hired in 2010. Shirly Orsonal, a CNA, was a green card holder at the time she first applied for work at St. Francis in 2008. Orsonal testified that after she filed her application, Elvira Dacayanan, a DSD assistant, telephoned her and told her to bring her green card, social security card, and California ID to orientation. Dacayanan and Lani Pulmano were both present at the orientation, and Pulmano copied her documents. Orsonal said she always carries her California ID with her, but not the other documents.

Donna Cathleen Mallari, a licensed vocational nurse (LVN) and a lawful permanent resident at the time she started at Pavilion on August 3, 2009, said Lani Pulmano told her in advance to bring her permanent resident card, LVN license, driver's license, and social security card to orientation. Mallari was present when Pulmano made copies of her documents. Lirio Manalaysay, a CNA and a lawful permanent resident when she started at Pavilion on December 1, 2009, said she went to the facility and filled out an application, and after a few months Lani Pulmano called her for an interview. At the interview both Pulmano and Regina Czerwinski were present. Pulmano asked for a green card, social security card, driver's license ID, and CNA certificate. Manalaysay said she presented all those documents at orientation. Pulmano copied her documents and told Manalaysay she would have to provide a new green card after the one she presented expired. The only one of those documents Manalaysay ordinarily carries with her is her driver's license.

Martin Ortiz started work as a CNA at St. Francis in August 2008, at which time he was a lawful permanent resident. He filled out an application and Lani Pulmano and Regina Czerwinski interviewed him. He was called a couple of months later and told to bring his social security card, green card, and California ID. He said he always carries his driver's license, but not the other documents. Ortiz was less than persuasive and contradicted himself on cross-examination, answering "I don't remember" to questions he had just answered affirmatively on direct. Ruthmarie Banda, a naturalized U.S. citizen and an activity assistant at St. Francis, started work there on April 7, 2008. She said Maggie Parreno interviewed her. Banda appeared extremely nervous and on the verge of tears. She was clearly a reluctant witness and appeared to contradict

herself on some particulars. Banda said that she had to leave orientation during a break to go home for her file because she did not have the documents Pavilion needed, other than her driver's license. She said Regina Czerwinski asked her to bring her social security card, ID, and passport, but no one asked her to bring her certificate of naturalization.

Elwyn Mallari is a registered nurse who applied for work at Pavilion in 2009. He said when he filled out an application at the facility, he was asked whether he had a green card or was a citizen. When he said he was a citizen, he was asked for his passport and social security card. He did not have those documents with him, so he went home to retrieve them because he lives close to the facility. When he came back that same day, he presented his passport, social security card, and driver's license. He already had the driver's license with him, but not the other documents, which he usually keeps in a safe at home. Mallari said he did not stay long at St. Francis because he got another job he likes better. OSC's offer of proof said that five additional subpoenaed witnesses, Arcelie Santiago, Edwin Licudine, Matilde Baliwag, Oscar Oca, and Mario Esteban, would testify to similar requests for specific and excessive documents. The offer is accepted for what it is worth.

Several of these employee witnesses also testified that they signed prepared statements in May 2012 that asserted they were not asked for documents and/or presented their documents without being asked, but that those statements were untrue. Pastor Dayao said Sanje Oriaes called him to come to a meeting on May 14, 2012 by the department of staffing and development that about twenty employees attended. He said Teresa Green was on the telephone and explained to the group that the one-page statement they had been given was needed to verify that they could work, and that each employee should check to see that his or her name and position were accurate before signing it. Dayao said he signed the already-prepared statement, but did not read it carefully.

Rudiano Tunggalwidjaja said Regina Czerwinski provided him such a statement during his shift and asked him to sign it, so he did. He said he did not take time to read the statement and that the facts stated in it are untrue. Shirley Orsonal said she signed the statement on May 15, 2012 while she was working and did not have time to read it. She also said the statement is not true. Martin Ortiz said he was about to get off work on May 25, 2012, when Mr. Moses called him from the DSD office to come and sign the statement. He was in a hurry to get off work when he signed the statement. He said the facts asserted in the statement are not true. OSC's offer of proof says three additional witnesses, Arcelie Santiago, Edwin Licudine, and Matilde Baliwag, would testify that they signed the declaration without reading it carefully, and that the facts asserted in it are not true. An additional witness, Mario Esteban, would testify that he signed the statement but the facts asserted in it are not true.

B. Generations' Evidence

Testifying for Life Generations were management witnesses Teresa Green, Regina Czerwinski, and Lani Pulmano, as well as a number of employee witnesses.

1. Management Witnesses

Teresa Green

Teresa Green said that since 2000 she has been the director of risk management for GHC's support center in Newport Beach, California. Green said she was the lead person for the acquisition process of Pavilion, and that she and Leanne Hanson, her assistant, went to Daly City at the outset and remained there until mid-September. Both completed I-9s for the newly-acquired employees, and provided training to Lani Pulmano on how to complete I-9 forms. After Green and Hanson returned to Newport Beach, Pulmano and Czerwinski² were responsible for the I-9 forms.

In describing the hiring process at St. Francis, Green said the receptionist provides a copy of the application to a candidate, and after the application is complete the receptionist notifies the particular department to which the candidate is applying. Sometimes an interview is conducted immediately and sometimes the application is reviewed before scheduling an interview. Certain background checks are required, after which an offer can be made. The candidate is then called in to complete a health questionnaire and physical exam, and is provided at that time with the List of Acceptable Documents advising of the need to bring original documents to orientation.

New-employee orientation for CNAs lasts for sixteen hours, and for other employees it lasts eight hours. During orientation, employees attend mandatory trainings and complete a lot of new-hire paperwork, including a personnel action form (PAF) and an I-9 form. GHC also requires a copy of the individual's social security card for payroll purposes, tax-related documents such as a W-4, and other documentation. The PAF and I-9 form are among the documents that are sent to the corporate support center once they are completed. These documents are supposed to be reviewed by the HR department for accuracy, but Green said that the department didn't always pay enough attention to the details of the documents prior to OSC's investigation. The main goal was to get the employees entered into GHC's database. Green

² Teresa Green testified that in early September 2007, she also provided training to Czerwinski, who was part of the staff development office at that time. Czerwinski testified, however, that she was a licensed vocational charge nurse until May 2008, which is when she went to the staff development office and started preparing I-9 forms.

thought HR was just checking to see that all the needed items were actually received. She said she was surprised to find out around July 2010 that the I-9s were not being reviewed as they should have been. After OSC's investigation, that changed. Now HR looks at the I-9s in detail and addresses any issues or concerns immediately.

Green said the orientation at St. Francis Convalescent Pavilion is done in the DSD office, and both the List of Acceptable Documents and the training schedule are posted outside the door. The HR team now does the I-9 training. These meetings generally last all day and occur quarterly. Written training materials are provided as well. Green explained that the instruction in one of the training memos stating that the candidates' I-9 documents are their "ticket to orientation" was intended to let people know the importance of bringing their original documents on the first day of orientation. Green said if someone showed up without the proper documentation, that individual would be allowed to go get it on a break or to present it within seventy-two hours. Green also said she was aware that OSC had reviewed six of GHC's facilities, including St. Francis Heights, which is right next door to St. Francis Pavilion and uses the same parking lot, and that her impression was that there were no issues at the other five facilities.

Green appeared visibly upset when discussing the I-9 forms from Pavilion, which she characterized as "sloppily done." Green said that Lani Pulmano completed most of those forms. Green said she was surprised, disappointed, and frustrated because she and her associate, as well as other team members, had spent time with Pulmano, who evidently just did not pay attention to the details of her job. Green said Pulmano was a gentle and kind person, but not careful with documentation. Pulmano was ultimately moved from the position because she did not have the right skill set and was not the right person for the job.

Green testified that she was surprised by the testimony of the employees who repudiated their declarations about document requests. She said she was involved in preparing the declaration form and helped write it. Green could not go to Pavilion on the day the employees reviewed the declarations, but said she called on the phone and talked to the employees. The declarations and I-9 forms were available on two separate desks. Green thought the employees were comfortable with and understood the declaration because there was a discussion as well as an opportunity for questions. She was surprised by employees' statements that they did not have time to review the declaration because she made sure the employees' patients were covered, and made sure the employees knew that. Green said all the employees she interacted with said they had not experienced any discrimination, but she had no recollection of which employees she had conversations with. The other person involved with obtaining the declarations was Moises, whose last name Green did not recall. He is a licensed nurse, but was acting as a DSD.

Green testified further that a DSD meeting took place on August 11, 2009, and the agenda included a half-hour presentation by Michelle Green and Lauren Davis on the topic of the I-9 employment eligibility and termination process. Teresa Green was present at that session, as were Lani Pulmano and Regina Czerwinski. Written materials were provided to the attendees and sent to the directors of nursing and other administrators who couldn't make it to the meeting. Another session was held at which Mary Rogers and Lauren Davis spoke about the I-9 process. Green, Pulmano, and Czerwinski were present at various trainings. Green pointed to and discussed various written materials as well as other training events.

Green testified that Generations keeps its I-9s in a separate I-9 binder, together with copies of the supporting documents. Company policy is to copy the documents and retain them with the I-9s in a separate binder in a secure location, which at St. Francis was the DSD office. Green identified exhibit C-42 as an email she sent to the DSDs on December 17, 2010 with the top ten dos and don'ts for maintaining I-9s, which stated that the I-9 and supporting documentation should be kept in a separate binder or file. She also identified exhibit C-43 as a sworn statement she made on September 28, 2012 reflecting a somewhat inconsistent policy. Green said in her declaration that if an audit of the I-9 binder shows more documents than necessary, the additional documents are removed and placed in the employee's personnel file, and that no record is kept of whether documents now in the personnel file were previously in the I-9 binder.

On cross examination, Green initially denied any recollection of documents being moved from the I-9 binder to the employee's personnel files. She was questioned at length about inconsistent versions of specific employee documents that were produced in discovery, and the written revisions and strike-throughs that were made on the face of the I-9 forms for a number of individuals. Green said initially that she was not sure how it came about that revisions were made on the forms. She thought the handwriting on the I-9 forms looked like Lani Pulmano's, and that it was possible that Pulmano had removed documents from the binder because the DSD office is locked and Pulmano and Czerwinski were the only ones who had access to it.

Green's memory was markedly improved after lunch, and she recalled on redirect that corrections were made to the I-9s at which time extra documentation was removed from the I-9 binder and transferred to the employees' personnel files. Green said she told the DSDs to take this action if they found an error on the I-9. She said later that at some point during the litigation it was HR's decision to audit the binders and move documents from the I-9 binder to the individual's personnel file. Green instructed the DSDs to make the corrections on the I-9 forms and remove the excessive documents. After lunch, she was able to discuss in detail on redirect the changes to the specific forms she had previously been unable to explain on cross-examination.

In a discussion about the company's second production of documents, Green said she did not remember exactly when it happened, but she subsequently instructed Pulmano and Czerwinski to

go back through the I-9s and, where the forms had strike-throughs, to retrieve and provide copies of the additional documentation from the personnel files in response to the government's production request. She thought that the request related to the second production of documents had come through the attorneys. Green attributed her previous lack of recollection about these events to nerves. Green asserted that employers are entitled to make corrections to an I-9 form when they find an error.

OSC made an offer of proof regarding the company's incomplete I-9 production and GHC filed a memorandum in opposition. Having considered the parties' arguments, I accept the offer of proof with respect to the production of documents.

Regina Czerwinski

Regina Czerwinski identified herself as a licensed vocational nurse (LVN). From September 2007 until May 2008, Czerwinski was an LVN charge nurse. Then she went to the DSD office in May 2008, and received her certification as a DSD in August 2008. Czerwinski was Lani Pulmano's assistant until around May 2011. Czerwinski said she worked in the DSD office until March 2012, and continued after that to help out there through September 2013. Part of her responsibility as a DSD was to assist with the new-hire process, including the preparation of I-9 forms.

Czerwinski said she was familiar with the List of Acceptable Documents, which would be given to a prospective employee before the physical. Hiring was contingent upon passing the physical, after which the candidate would be called for orientation. Czerwinski's responsibilities at orientation included asking the employee what documents he or she had brought. She would look at the documents, make sure there were no expiration dates and that the documents were on the list, then copy them. Czerwinski did not recall any time an employee did not have enough documents or had to go home and get one. Czerwinski testified that she followed Lani Pulmano's instructions and accepted all the documents the employees presented. She did the I-9s the same way Pulmano did.

Czerwinski said she had training but did not recall any specifics. She recognized Carmen Chavez and said she had one conversation with her but did not recall any specifics about that either. She did not recall reviewing any applications for Chavez and said she would not have seen her documents because documents are not presented until the person is hired. Czerwinski said further that she was unaware of any policy that would permit a DSD to remove attachments from an I-9, and that she never moved copies of documents accompanying an I-9 to an employee's personnel file.

Czerwinski testified on cross-examination that she knows today not to accept List A, B, and C documents from a single individual but does not recall when she learned that. She does not recall being told not to require a List A document or excessive documents. She said she was not involved in getting signatures on the declarations. Czerwinski responded to questions about specific I-9 forms from which documents had been removed, and said she would not have removed them and was not aware of any Generations policy that would permit a DSD to do this. She said she never moved documents from a personnel file to an I-9 either. Czerwinski estimated that fifty percent of new hires presented a List A document, and that one in every four or five showed excessive documentation. She acknowledged that these numbers are inconsistent with the numbers on the chart showing 100% List A documents and 100% overdocumentation for foreign-born employees.

Lani Pulmano

Lani Pulmano identified herself as a charge nurse and a citizen of the United States. As a DSD from September 2007 until July 2010, Pulmano said she was responsible for preparing I-9s for new hires. She said her practice was to give the individuals the List of Acceptable Documents before they went for their physicals so they would know what documents they could present at orientation. Pulmano said at orientation she copied whatever documents an individual presented, and did not ask the individual for specific documents. She copied both sides of whatever documents the new employee presented. Pulmano testified that she could not recall when she had training or what the content of the training was.

Pulmano said she knew Carmen Chavez and had in fact hired Chavez at St. Francis before GHC's acquisition of the facility, but Chavez' employment ended when her work authorization expired. Pulmano could not recall any subsequent conversation with Chavez, and denied seeing her since 2007 or reviewing any applications Chavez filed in 2009 or 2010. Pulmano denied telling Czerwinski that the expiration date on Chavez' EAD was a problem. Pulmano first testified that she did not train Regina Czerwinski, but when reminded that she said in her deposition that she did train her, Pulmano corrected herself and said she did. Later in her testimony, however, Pulmano said she could not remember whether or not she trained Czerwinski.

Pulmano said further that she was aware that copies of an employee's documents must be kept with the I-9 in the I-9 binder, and she denied unequivocally that she ever moved copies of the documents from the I-9 binder to an employee's personnel file. She said she never received an instruction from Teresa Green to remove attachments from the I-9s and no one at the support center ever told her to do this. She never did it and was not aware of Czerwinski ever doing it either.

Pulmano acknowledged an email exchange she had in 2009 with Lauren Davis from the corporate support center about notifying six permanent residents who had expiring permanent resident cards. Lauren Davis told her to immediately put all the employees with expired resident alien cards on thirty days' leave, and said several of the employees were extremely out of compliance. The I-9s for some of those individuals showed that they had also presented valid driver's licenses and social security cards. Pulmano nevertheless notified each of the employees that their permanent resident cards were expiring. She said she did not know in 2009 that Davis' advice was wrong. She does know that now. Pulmano could not remember whether or not she placed the employees on personal leave as instructed.

Pulmano did not recall when she started passing out the List of Acceptable Documents. She said she knows that she was doing it by the time she stopped being a DSD in January 2011, but could not remember if she was doing it in January 2010, January 2009, or January 2008. She said she never received a single question from anyone about the list, and she never had to ask for a document because the employees always brought enough documents, including their social security cards. Pulmano thinks that in Filipino culture it is more common to bring everything when applying for work. She testified consistently with her deposition testimony that about ninety percent of Filipinos brought excessive documents and about seventy-five percent of non-Filipinos brought excessive documents.

Pulmano's testimony was sometimes opaque and she contradicted herself on a number of topics and wavered on others. She was quite insistent, however, that she never removed employee documents from the I-9 binder and that doing so would be against policy. Pulmano testified on cross-examination that if an employee indicates in section 1 of the I-9 that the individual is a permanent resident or an alien authorized to work, the employee must present a permanent resident card and should already have it in his or her possession. At first she said she still believes this today, but when prompted, she readily changed her testimony on redirect. She also said that from September 2007 until July 2010 she did not understand that a worker could just present a List A document. Then she said she did know this and understood it all along.

Pulmano also said she knew at all times as a DSD that the employer could not require an employee to present specific documents. After being reminded of her deposition testimony, she also said she maybe became aware of this in 2009. She said she certainly knew after receiving notice of the OSC investigation in 2010 that an employer could not request specific documents and she never requested specific documents after that. Pulmano was once again reminded that she had previously testified in her deposition that she first knew this in 2007, then 2009, and had finally said, "I cannot remember."

2. Current GHC employees

Five U.S citizens and five lawful permanent residents testified that they were not asked to bring or present specific or excessive documents. Cuiling Zhao, a U.S.citizen, said she started work as a dietary manager on September 2, 2008. She said she presented her driver's license, passport, and social security card, and that no one asked her for those documents. Zhao said Lani Pulmano called her and told her before her first day of work to bring two forms of ID, but she already planned to do that before Pulmano called. Zhao did not remember ever seeing the List of Acceptable Documents. Alicia Encarnacion works as a dietary aide and is a lawful permanent resident. Cuiling Zhao is her supervisor. Encarnacion said that when completing her I-9 at orientation, she showed what she referred to as "my permanent visa," as well as a social security card and California ID. She said no one asked her to bring these particular documents and she always brings them with her when applying for a job. She contradicted herself on cross-examination, however, and said that Lani Pulmano did ask for her permanent resident card and California ID. On redirect, she said it was after the orientation that Pulmano asked for the permanent resident card. When asked directly whether Pulmano actually said the words "permanent resident card," she first answered yes, and immediately thereafter answered no.

Annabelle Apante, a nurse's assistant, testified that she is now a citizen of the United States, but at the time she started work at St. Francis Pavilion on February 23, 2009 she was a lawful permanent resident. She said that on her first day of employment she presented her social security card, green card, and driver's license. She said no one told her to bring these documents, and she always has them in her purse. When asked whether she had her social security card with her now, she said her purse was in her car and her social security card was at home. Apante testified on cross-examination that she had previously told an attorney from the Department of Justice on the telephone that Lani Pulmano asked her for those three documents, but on redirect said that Pulmano never used the words permanent resident card, driver's license, or social security card. She also said that during the telephone calls with Department of Justice attorneys, they never asked her if Lani Pulmano asked her for documents.

Remedios Bamba, a citizen of the United States, testified that she is currently the director of associate services, but when she first started working at Pavilion on February 4, 2008 she was a social service assistant. Bamba said she presented her passport and social security card on her first day, and that no one asked her for those documents. She knows that proof of authorization to work is needed and always brings those documents automatically when she applies for a job, and on the first day of work. She said she is close friends with Maggie Parreno, and is familiar with the List of Acceptable Documents. Because she is in a supervisory position, Bamba has explained the list to new hires. She might have seen the list on her first day of work.

Mercedes Saballa is a citizen of the United States who has worked in medical records since February 2010. She said she presented her driver's license, social security card, and certificate of naturalization to Pulmano on her first day at St. Francis, and that no one asked her for these specific documents or told her to bring them. She said it's commonsense, and that she has copies of her documents with her whenever she applies for a job. She keeps all her documents at home in a binder, and brought the whole binder with her on the first day. Saballa did not believe she ever saw the List of Acceptable Documents.

Ric Valencia is a lawful permanent resident who started work as a CNA at St. Francis on April 13, 2010. He said that on his first day, he presented his California ID, social security card, and permanent resident card to Lani Pulmano, and that no one asked him to bring or show those documents on his first day of work. He said he always carries his permanent resident card because it is needed to cross state lines. Valencia said he was contacted by lawyers from the Department of Justice and felt harassed by them. He testified that when he became a permanent resident in 2008, he got a letter and a pamphlet that came with his permanent resident card. The letter told him he could use the card when applying for a job and that he had the right to vote in the United States. Valencia identified himself as a friend of Maggie Parreno, and said he has been to her house and also has a friendly relationship with Parreno's niece. Valencia said he recognized the List of Acceptable Documents because he saw it in previous employment, but said neither Pulmano nor Czerwinski gave it to him.

Edmond Sajo is a registered nurse and a lawful permanent resident of the United States. Sajo testified that at one time he was the p.m. shift supervisor, then became a.m. supervisor, but now is an MDS coordinator. MDS stands for minimum data summary. Sajo said he started at St. Francis on January 21, 2008, and brought his California ID, registered nursing license card, CPR card, social security card, and permanent resident card with him. No one at Pavilion asked him for any of these documents. He asked his dad what to bring because he himself didn't know. Sajo said he gave them copies of his documents but he showed the originals he had with him. He made the copies beforehand.

Mark Rodriguez testified that he is the assistant director of nursing at Pavilion, and a lawful permanent resident of the United States. Rodriguez said he started work at St. Francis on May 27, 2008, at which time he presented his permanent resident card, driver's license, and social security card to Lani Pulmano. No one asked him to bring or present those particular documents. Rodriguez said he quit his job in 2008 to study for the exam to get his registered nurse license, and that after he obtained that license he again was hired at St. Francis. He presented the same documents the second time he was hired. He was promoted to his current position about four months previously. On cross-examination his memory was less certain and he answered a number of questions saying he did not remember, including some of the same questions he had just answered affirmatively on direct examination.

Jonalyn Joseph, a CNA and lawful permanent resident, said her first day at St. Francis was June 23, 2008, and that she presented her green card, ID, and social security card to Lani Pulmano that day. No one asked her to bring or present those specific documents. Her mom told her what documents to take to orientation. On cross examination, however, Joseph said it was possible that Pulmano told her what documents to bring in. Elvira Magap is a United States citizen who started at Pavilion on April 12, 2010. She presented her passport, driver's license, and social security card to Pulmano. No one told her to bring or present those particular documents. Every time she looks for a job she brings her documents. Magap did not recognize the List of Acceptable Documents.

The parties stipulated that forty-three United States citizens, Resurreccion Anderson, Vihelm-Mace Basco, Edelmira Estrada, Eleanor M. Fabro, Ofelia Frijas, Katrina Gascon, Jun Jimenez, Melissa Marilla, Estrella Ng, Aida Pangan, Wilfredo Pangan, Jason Parreno, Maria Sylvester, Diana Valino, Norma Zarate, Lynna Zozobrado, Rechelle Abaoag, Raemin Ang, Herman Bowman, Jr., Teresa Cheng, Christine Cole, Geraldine Cruz, Jim Feng, Liezl Fernandez, Carmela de Guzman, Yahannia Jerez, Ron Lawas, Michael Lopez, Amanda Jo Madayag, Joseph Marilla, Kristal Morales, Rachel Muhammad, Jeremiah Munoz, Erica Padilla, Josephine Paras, Andrew Pete, Jessica Phan, Elaine Plamondon, Rose Reyes, Luisa Six, Rizza Stevens, Jennifer Thomas, and Tomo Tom would each testify that they were not asked or required to provide specific or excessive documentation.

IV. STANDARDS APPLIED

The paradigmatic evidentiary framework for a pattern or practice case of disparate treatment is that set out in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977) pursuant to which the plaintiff (or in this case the complainants) at the liability stage must establish a prima facie case. This is accomplished by presenting evidence adequate to show that the employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure, not just an unusual practice. *Id.*

If the initial burden is satisfied, the burden of production then shifts to the employer to defeat the prima facie showing of a pattern or practice. The employer may defeat a prima facie showing by demonstrating that the complainant's proof is either inaccurate or insignificant, *id.* at 360-62, or by providing a nondiscriminatory reason for its actions, *id.* at 360 n.46. As explained in *EEOC v. General Telephone Company of NW, Inc.*, 885 F.2d 575, 579-81 (9th Cir. 1989), to make a proper defense, an employer must do more than raise theoretical objections. To overcome an inference of discrimination based on statistical evidence, the opponent must do more than point

to flaws in the statistics; it must show in addition by credible evidence that had the flaws been adequately accounted for, the disparities would be eliminated. *Id.* at 582-83.

V. DISCUSSION AND ANALYSIS

Discrimination in violation of § 1324b(a)(1) consists of disparate treatment. Disparate treatment occurs when an employer is shown to treat some people less favorably than others because of a prohibited factor. *See Teamsters*, 431 U.S. at 335 n.15 (1977); *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 510 (1999).³ Just as Title VII forbids an employer to limit, segregate, or classify employees or employment applicants on a prohibited basis, so too does § 1324b prohibit an employer from adopting one rule for citizen employment applicants, and a different, harsher rule for noncitizen employment applicants.

The government's initial burden in this bifurcated pattern or practice case is to demonstrate that Generations engaged in a systemic pattern or practice of document abuse. Statistical and anecdotal evidence amply demonstrates that during the period when Lani Pulmano and Regina Czerwinski were in charge of I-9 completion at St. Francis Pavilion, their standard operating procedure was to require noncitizens and perceived foreign-born individuals to present List A documents, as well as to present more and different documents than necessary for the purpose of satisfying the employment eligibility verification system. Dr. Gobalet's testimony was both powerful and persuasive as to the statistical significance of the disparities reflected in her reports, and anecdotal evidence presented by the testimony of a number of employee witnesses provides additional corroboration that specific and excessive documents were routinely required from USC-F, LPR, and AAW employees and applicants.

That is to say, Pulmano and Czerwinski regularly and purposefully applied more rigorous requirements to persons they perceived to be foreign-born than they applied to citizens of the

³ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

United States whose documents did not reflect foreign birth. These latter individuals were generally permitted to present whatever documents they chose. While Generations suggests that any requests for specific or excessive documents were isolated, sporadic, or accidental, this assertion is belied by the bottom line: U.S. citizens were generally hired without having to present List A documents or excessive documents, but no noncitizen was hired without presenting both a List A document and more documents than required to satisfy the requirements of the employment eligibility verification system.

The stark differences in the patterns before mid-September 2007, when Pulmano initially took over the I-9 responsibility, and after July 9, 2010, when those duties were principally assigned to others, paint a clear picture of what Dr. Gobalet characterized as “an extreme statistical aberration” requiring some explanation peculiar to GHC. As reflected in exhibit C-7, when I-9 forms were prepared by Green and Hanson during the acquisition period, only 3.85% of the USC-F employees were overdocumented, 6.52% of the LPRs were overdocumented, and no AAW was overdocumented. Thus 96.15% of the USC-F employees were correctly documented, 93.48% of the LPRs were correctly documented, and 100% of the AAWs were correctly documented when Green and Hanson prepared the forms.

Once Lani Pulmano and Regina Czerwinski started preparing the I-9 forms, those figures changed dramatically. While many U.S. citizens were hired without List A documents or excessive documents, no USC-F, LPR, or AAW employee was hired without a List A document or without excessive documentation. When Lani Pulmano and Regina Czerwinski stopped preparing I-9 forms, the pattern again changed markedly. During the period starting July 10, 2010 until July 31, 2011, only five percent of foreign-born employees were overdocumented and no U.S. citizens were.

Except as previously indicated, most of the employee witnesses on both sides, with one exception,⁴ were reasonably credible although a few appeared to have shaky memories. I credit that most of the U.S. citizens were not asked to present either List A documents or excessive documents, and that there were at least some noncitizen employees who spontaneously presented both List A documents and excessive documents. What I do not credit is that anywhere near 100% of the USC-F, LPR, and AAW employees did that. Rather, the preponderance of the evidence supports the conclusion that Lani Pulmano and Regina Czerwinski themselves routinely instructed these employees to bring and present excessive documents, including List A documents, as a condition of employment at St. Francis Convalescent Pavilion.

The company sought to provide a nondiscriminatory alternative explanation for the acknowledged statistical disparities based on the hypothesis that all the foreign-born employees

⁴ I have discounted the testimony of Ric Valencia as wholly lacking in credibility.

brought and presented excessive documents not because Pulmano or Czerwinski instructed them to bring or present those documents, but because some cultural characteristic common to people from the Philippines caused all the new employees to bring all their documents when applying or being interviewed for employment. GHC argues that Pulmano and Czerwinski erred only by copying and recording all the documents the new employees presented.

But GHC's theory that some common cultural characteristic unique to Filipino employees disposed them to spontaneously present all their documents is both implausible and inconsistent with the weight of the evidence. To begin with, it cannot simply be assumed that all of Pavilion's foreign-born employees were even from the Philippines. They were not. Cuiling Zhao, for example, is from China, while Mangala Araem is from India. Carmen Chavez is not from the Philippines either. Second, the hypothesis is inconsistent with the testimony of Lani Pulmano that an estimated ninety percent of Filipinos and seventy-five percent of non-Filipinos bring excessive documents, and the testimony of Regina Czerwinski that about half of new hires present List A documents and one in every four or five presents excessive documentation.

As a general rule, statistical disparities over two or three standard deviations have been held to support an inference of discrimination, *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), and the disparities in this case significantly exceed that measure. *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 464 (9th Cir. 1987) identifies three ways in which a respondent may rebut statistical evidence, and Generations sought to utilize the first two. First, GHC sought to show that the complainants' statistics were flawed by interpolating information not available from the documents that were examined. Second, the company sought to argue that the remaining disparities were not statistically significant. Generations did not utilize the third method of presenting contravening statistical evidence of its own, and implicitly acknowledged that it could not do so. The company was unable either to rebut the complainants' statistical evidence, or to provide a legitimate nondiscriminatory explanation for the acknowledged disparities in the rates of overdocumentation and presentation of List A documents between foreign-born workers and native-born U.S. citizens at St. Francis Convalescent Pavilion.

While I credit that the hiring process Teresa Green described is probably the current hiring process at St. Francis Pavilion and that the List of Acceptable Documents is now posted and provided to new employees, the evidence does not show that this was the process in place at Pavilion during the period at issue in this case or that the List of Acceptable Documents was provided to new employees during that period. To begin with, it is apparent that Green had no idea what Pulmano and Czerwinski's hiring practices were during the period at issue; her own testimony was that she was shocked, disappointed, and frustrated when she belatedly learned how inattentive Pulmano and Czerwinski were to their responsibilities. It is evident that Green had no personal knowledge of what was going on at St. Francis Pavilion during the relevant period.

Neither do I credit Lani Pulmano's testimony that she routinely provided new hires with the List of Acceptable Documents throughout the period in issue. Even GHC's own employee witnesses testified for the most part that they had never seen the List of Acceptable Documents. Pulmano's testimony, moreover, was inconsistent, lacking in credibility, and constantly shifting as it went along. Pulmano said she couldn't remember when she actually started providing the List of Acceptable Documents to new employees. That Czerwinski destroyed employment applications and that someone at GHC made clumsy attempts to alter the I-9s retroactively and remove supporting documents from the I-9 binder while this litigation was in progress does not inspire confidence in the company's accounts of what actually transpired at Pavilion during the period at issue either.⁵

GHC contends that it had no general corporate-wide policy of requesting specific or excessive documents and that it made good faith efforts to train employees on the I-9 procedures, albeit the company made some mistakes in doing that. Notwithstanding GHC's document destruction and attempts to alter Pavilion's I-9s, this assertion is probably even true. It does not mean, however, that Lani Pulmano and Regina Czerwinski did not engage in a pattern or practice of document abuse at Pavilion during the entire period at issue in this case, or that GHC is not responsible for their actions.

The law provides that an employer's request for more or different documents than are required to satisfy the verification system of 8 U.S.C. § 1324a(b) is treated as an unfair immigration-related employment practice if made for the purpose or intent of discriminating against an individual in violation of § 1324b(a)(1). 8 U.S.C. § 1324b(a)(6). Both Pulmano and Czerwinski testified that they bore no hostile motives toward foreign-born employees, and had no subjective discriminatory intent. I believe their testimony on this point. But the law provides that a person has the intent to discriminate if he or she would have acted differently but for the protected characteristic. See *Shelley v. Geren*, 666 F.3d 599, 607-08 (9th Cir. 2012) (stating that the burden [under ADEA] is satisfied by a showing of "but-for" causation). Professor Strauss refers to the critical inquiry as the "reversing the groups" test; it asks the question whether the outcome would have been different if the groups had been reversed. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 956-60 (1989). It is not required that

⁵ While GHC's response to the government's offer of proof points out that the answer to question 33 in the *Handbook for Employers* specifically permits employers to make corrections to their I-9s, the company omits the accompanying instruction that such corrections are to be initialed and dated. Neither does the response acknowledge that nothing in the *Handbook* authorizes an employer to remove the accompanying documents from an I-9 form. If GHC's employees were instructed by counsel to correct the forms, moreover, it is surprising that counsel would not also have instructed them to date and initial the so-called corrections.

malice or ill will be shown, and the absence of a malevolent motive does not alter the character of a discriminatory policy. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). It is evident here that had the groups been reversed, the outcome would have differed.

Discriminatory intent may be established by direct or circumstantial evidence, or it may be inferred from statistical evidence, *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 319 (N.D. Cal. 1992), and gross statistical disparities may themselves provide prima facie proof of a pattern or practice of discrimination, see *Coral Constr. Co. v. King County*, 941 F.2d 910, 918 (9th Cir. 1991). A discriminatory pattern is itself probative with respect to motive, and can create an inference of intent. See *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005) (citing *Diaz v. AT&T*, 752 F.2d 1356, 1363 (9th Cir. 1985)). Statistics too may also be helpful in showing that an employer's reason is pretextual. *Id.* at 694.

It is long established in Title VII jurisprudence that discrimination can occur at any point in the hiring process. Cf. *Muntin v. Cal. Parks and Recreation Dep't*, 671 F.2d 360, 362-63 (9th Cir. 1982); *Shiple v. Dugan*, 874 F. Supp. 933, 937 (S.D. Ind. 1995) (nondiscrimination statutes are offended by discrimination at any point in the selection process). Significant evidence was also presented that Pulmano and Czerwinski, as well as an otherwise unidentified receptionist, made similar requests for documents at the application stage, before any hiring decisions were even made. OCAHO jurisprudence holds that such "prescreening" of employment applicants based on their documentation is impermissible. See *Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 429-430, 432 (1991) (discussing the practice of "prescreening" job applicants); *McNier v. S.F. State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999) (the entire selection process, not just the hiring decision alone, must be considered); *United States v. Lasa Mktg. Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990). Carmen Chavez and Dora Martinez were subject to such premature and excessive requests for documents during the application process. Because Generations destroyed the employment applications of the unsuccessful candidates, it cannot be ascertained how many other unknown applicants were similarly treated.

VI. CONCLUSION

The complainants carried their burden of proof with respect to Count I by showing that Carmen Chavez and Dora Martinez were subject to prescreening document abuse based on their citizenship status, but the evidence is insufficient to show a pattern or practice for this count.

With respect to Counts II and III, the complainants demonstrated by a preponderance of the evidence that GHC engaged in a pattern and practice of document abuse based on citizenship status against foreign-born work-authorized individuals by requesting List A documents, and by

requesting more or different documents than are required to satisfy the requirements of the employment eligibility verification system.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Life Generations Healthcare, LLC manages and operates a group of skilled nursing and assisted living facilities at various locations in California.
2. Life Generations Healthcare, LLC has a corporate support center in Newport Beach, California.
3. At midnight on September 1, 2007, Life Generations Healthcare, LLC acquired a skilled nursing facility in Daly City, California known as St. Francis Convalescent Pavilion.
4. Between September 1, 2007 and July 2010, Life Generations Healthcare, LLC employed between 2400 and 3000 employees company-wide.
5. Between September 1, 2007 and July 2010, Life Generations Healthcare, LLC employed between 200 and 300 employees at St. Francis Convalescent Pavilion.
6. When Life Generations Healthcare, LLC acquired St. Francis Convalescent Pavilion, employees who were already working at the St. Francis facility became employees of Life Generations Healthcare, LLC, and completed Life Generations Healthcare, LLC's new-hire documentation, including, inter alia, I-9 forms.
7. Teresa Green has been employed at the corporate support center for Life Generations Healthcare, LLC as the director of risk management since 2000.
8. Teresa Green and Leanne (Kersley) Hanson traveled to Daly City to facilitate the acquisition process for St. Francis Convalescent Pavilion and remained there until mid-September 2007.
9. On or about September 18, 2007, Lani Pulmano took over responsibility for the preparation of I-9 forms at St. Francis Convalescent Pavilion.
10. Between September 1, 2007 and July 2010, Lani Pulmano was a director of staff development at St. Francis Convalescent Pavilion.

11. Between August 2008 and July 2010, Regina Czerwinski was an assistant director of staff development at St. Francis Convalescent Pavilion.
12. Between September 18, 2007 and July 9, 2010, Lani Pulmano and/or Regina Czerwinski were responsible for the preparation of I-9 forms at St. Francis Convalescent Pavilion.
13. From time to time during the period from September 18, 2007 and July 9, 2010, Teresa Green or members of GHC's human resources team provided training to employees responsible for reviewing employment applications and making hiring decisions at each of GHC's facilities; Green or HR also provided Form I-9 verification training to those GHC employees responsible for completing I-9 forms at each of GHC's facilities.
14. From time to time during the period from September 18, 2007 and July 9, 2010, Teresa Green or members of GHC's human resources team provided I-9 verification training to both Lani Pulmano and Regina Czerwinski.
15. From September 18, 2007 through July 9, 2010, a total of 240 I-9 forms were completed for new employees at St. Francis Convalescent Pavilion.
16. I-9 forms prepared by Teresa Green and Leanne (Kersley) Hanson during the acquisition period from September 1, 2007 to approximately September 17, 2007 reflect that 3.85% of USC-F employees were overdocumented, 6.52% of LPRs were overdocumented, and no AAWs were overdocumented.
17. From about September 18, 2007 through July 9, 2010, a total of sixty I-9 forms were processed for new hires at St. Francis Convalescent Pavilion who checked the box for citizen of the United States in section 1 of the form, and whose documentation did not show evidence of a foreign birth. Five out of those sixty, or 8.33%, provided a List A document and six of them, or ten percent, were overdocumented.
18. From about September 18, 2007 through July 9, 2010, a total of fifty-five I-9 forms were processed for new hires at St. Francis Convalescent Pavilion who checked the box for citizen of the United States in section 1 of the form, and whose documentation did show evidence of foreign birth. Fifty-five of these, or 100%, provided a List A document and fifty-five, or 100%, were overdocumented.
19. From about September 18, 2007 through July 9, 2010, a total of 120 I-9 forms were processed for new hires at St. Francis Convalescent Pavilion who checked the box for lawful permanent resident in section 1 of the form. Of these, 120, or 100%, provided a List A document

and all 120 were overdocumented.

20. From about September 18, 2007 through July 9, 2010, five I-9 forms were processed for new hires at St. Francis Convalescent Pavilion who checked the box for alien authorized to work in section 1 of the form. Of these, five, or 100%, provided a List A document and all five were overdocumented.

21. Life Generations Healthcare, LLC received notice of OSC's investigation on July 9, 2010.

22. From about September 18, 2007 through July 9, 2010, 100% of USC-F workers, LPRs, and AAWs at St. Francis Convalescent Pavilion presented a List A document, while the rate for U.S. citizens was 8.33%.

23. From about September 18, 2007 through July 9, 2010, 100% of USC-F workers, LPRs, and AAWs at St. Francis Convalescent Pavilion were overdocumented while only ten percent of U.S. citizens were.

24. From July 10, 2010 to July 31, 2011, five percent of foreign-born employees at St. Francis Convalescent Pavilion were overdocumented, and no U.S. citizens were.

25. Lawful permanent residents Pastor Dayao, Mary Jane Bautista, Rudianto Tunggalwidjaja, Evangelina Aragona, Johnson Apolar, Shirly Orsonal, Donna Mallari, Lirio Manalaysay, and Martin Ortiz, and U.S. citizens Ronaliza Belen, Ruthmarie Banda, and Elwyn Mallari testified that Lani Pulmano and/or Regina Czerwinski requested them to present both List A documents and excessive documents for the purpose of satisfying the requirements of the employment eligibility verification system. Lawful permanent residents Edwin Licudine, Matilde Baliwag, Oscar Oca, Mario Esteban, and Arcelie Santiago would have so testified as well.

26. Lawful permanent residents Alicia Encarnacion, Ric Valencia, Edmond Sajo, Mark Rodriguez, and Jonalyn Joseph, and U.S. citizens Cuiling Zhao, Annabelle Apante,⁶ Remedios Bamba, Mercedes Saballa, and Elvira Magap testified that Lani Pulmano and/or Regina Czerwinski did not request them to bring or present specific or excessive documents for the purpose of satisfying the requirements of the employment eligibility verification system.

27. Forty-three additional citizens of the United States, Resurreccion Anderson, Vihelm-Mace Basco, Edelmira Estrada, Eleanor M. Fabro, Ofelia Frijas, Katrina Gascon, Jun Jimenez, Melissa Marilla, Estrella Ng, Aida Pangan, Wilfredo Pangan, Jason Parreno, Maria Sylvester, Diana

⁶ Apante was a lawful permanent resident at the time she started working at St. Francis Convalescent Pavilion.

Valino, Norma Zarate, Lynna Zozobrado, Rechelle Abaoag, Raemin Ang, Herman Bowman, Jr., Teresa Cheng, Christine Cole, Geraldine Cruz, Jim Feng, Liezl Fernandez, Carmela de Guzman, Yahannia Jerez, Ron Lawas, Michael Lopez, Amanda Jo Madayag, Joseph Marilla, Kristal Morales, Rachel Muhammad, Jeremiah Munoz, Erica Padilla, Josephine Paras, Andrew Pete, Jessica Phan, Elaine Plamondon, Rose Reyes, Luisa Six, Rizza Stevens, Jennifer Thomas, and Tomo Tom, were employees or former employees at St. Francis Convalescent Pavilion, and would have testified that Life Generations Healthcare, LLC did not ask or require them to provide more or different documents that are required under 8 U.S.C. § 1324a to establish their identity and work authorization; refuse to honor documents tendered by the individual; or ask or require the individual to produce a "List A" document.

28. On August 25, 2009, Carmen Chavez, a former employee, filed an application for a position at St. Francis Convalescent Pavilion as a full-time certified nurse assistant.

29. On February 23, 2010, Carmen Chavez, a former employee, filed an application for a position at St. Francis Convalescent Pavilion as a full-time certified nurse assistant.

30. On August 25, 2009 and February 23, 2010, Carmen Chavez had an Employment Authorization Card reflecting that it was valid from June 23, 2009 until June 22, 2010.

31. On August 25, 2009, Lani Pulmano asked Carmen Chavez whether she had a green card and Carmen Chavez showed Lani Pulmano her Employment Authorization Document.

32. On February 23, 2010, Regina Czerwinski asked Carmen Chavez for her documents and Carmen Chavez showed Regina Czerwinski her Employment Authorization Document and social security card, which Regina Czerwinski copied both sides of.

33. On February 23, 2010, Regina Czerwinski returned Carmen Chavez' documents and asked her if she had a green card and ID; Czerwinski told Chavez her Employment Authorization Document was going to be a problem because of its expiration date.

34. On February 24, 2010, Regina Czerwinski told Carmen Chavez that she could not be hired.

35. Life Generations Healthcare, LLC did not hire Carmen Chavez after she submitted applications on August 25, 2009 and February 23, 2010.

36. On or about May 25, 2010, Carmen Chavez filed a charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices

37. On or about June 25, 2010, the Office of Special Counsel for Immigration-Related Unfair

Employment Practices accepted Carmen Chavez' charge as complete and began an investigation.

38. On or about July 9, 2010, Life Generations Healthcare, LLC received notice that the Office of Special Counsel for Immigration-Related Unfair Employment Practices would conduct an investigation.

39. Dora Martinez applied for work as a certified nurse assistant at St. Francis Convalescent Pavilion in December 2009 and was asked by the receptionist to present a permanent resident card, driver's license, and social security card.

40. Because Dora Martinez did not have her permanent resident card with her on the day she applied for work at St. Francis Convalescent Pavilion, she went home and got it; when she returned she presented her permanent resident card, driver's license, and social security card, and the receptionist copied those documents.

41. When Dora Martinez was applying for employment at St. Francis Convalescent Pavilion in December 2009, she observed another woman trying to apply for work there who was also told she needed to show her documents.

42. Life Generations Healthcare, LLC did not hire Dora Martinez after she applied in December 2009.

43. During the period between August 1, 2009 and May 1, 2010, human resources officers at St. Francis Convalescent Pavilion asked certain applicants for employment whether they had lawful permanent resident cards, and requested at least some applicants, including Carmen Chavez, to present an employment authorization document, which Pavilion employees photocopied and stapled to the individual's application.

44. No evidence was presented as to why Carmen Chavez was not hired as a certified nurse assistant at St. Francis Convalescent Pavilion in 2009 or 2010.

45. No evidence was presented as to why Dora Martinez was not hired as a certified nurse assistant at St. Francis Convalescent Pavilion in 2009 or 2010.

46. At some time after May 2011, Regina Czerwinski shredded the unsuccessful applications of an unknown number of individuals who had applied for work at St. Francis Convalescent Pavilion.

47. At an unknown time during the course of this litigation, representatives of Life Generations Healthcare, LLC made handwritten alterations to the I-9 forms for employees at St. Francis

Convalescent Pavilion and removed documents from the facility's I-9 binder.

48. From about September 18, 2007 through July 9, 2010, Lani Pulmano and Regina Czerwinski regularly requested List A documents and excessive documents from foreign-born individuals who did not themselves spontaneously present List A documents and excessive documents. Such requests occurred at the application stage, during the interview stage, at the orientation stage, and at various points in between.

49. From about September 18, 2007 through July 9, 2010, Lani Pulmano and Regina Czerwinski systematically, regularly, and purposefully applied more rigorous documentary requirements to persons they perceived to be foreign-born than they applied to citizens of the United States whose documents did not reflect foreign birth.

50. Statistician and demographer Dr. Jeanne Gobalet used the Fisher's Exact test and concluded that the disparities in overdocumentation and presentation of List A documents between foreign-born workers and native-born U.S. citizens could not have happened by chance and that there must be some explanation specific to Life Generations Healthcare, LLC to account for those disparities.

B. Conclusions of Law

1. Carmen Chavez is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).
2. Dora Martinez is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).
3. Life Generations Healthcare, LLC is a person or entity within the meaning of 8 U.S.C. § 1324b(a)(6).
4. All conditions precedent to the institution of this proceeding have been satisfied.
5. Intentional discrimination is shown when an employer treats some people less favorably than others because of a prohibited factor. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 510 (1999).
6. A person has the intent to discriminate if he or she would have acted differently but for the protected characteristic. *See Shelley v. Geren*, 666 F.3d 599, 607-08 (9th Cir. 2012).
7. It is not required that malice or ill will be shown to establish discrimination, and the absence of a malevolent motive does not alter the character of a discriminatory policy. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

8. A prima facie pattern or practice discrimination case is established by evidence that that an employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure, not just an unusual practice. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

9. Discriminatory intent may be established by direct or circumstantial evidence, or may be inferred from statistical evidence. *See Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 319 (N.D. Cal. 1992).

10. From September 18, 2007 through July 9, 2010, Lani Pulmano and Regina Czerwinski engaged in a pattern and practice of making discriminatory document requests from new hires at St. Francis Convalescent Pavilion whom they perceived to be noncitizens of the United States.

11. To overcome an inference of discrimination based on statistical evidence, the opponent must do more than point to flaws in the statistics; it must show in addition by credible evidence that had the flaws been adequately accounted for, the disparities would be eliminated. *EEOC v. Gen. Tel. Co. of NW, Inc.*, 885 F.2d 575, 582-83 (9th Cir. 1989).

12. Life Generations Healthcare, LLC was unable to rebut the complainant's statistical evidence or to provide a legitimate nondiscriminatory explanation for the disparities in overdocumentation and presentation of List A documents between foreign-born workers and native-born U.S. citizens at St. Francis Convalescent Pavilion.

13. When an employer fails to retain required records, the employee is entitled to an inference that the missing documents would have supported the employee's case. *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 318 (N.D. Cal. 1992).

14. OCAHO jurisprudence holds that prescreening of employment applicants based on their documentation is impermissible. *Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 429-430, 432 (1991); *McNier v. S.F. State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999); *United States v. Lasa Mktg. Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990).

15. Life Generations Healthcare, LLC is liable for the document requests made by Lani Pulmano and Regina Czerwinski at the application stage in the hiring process at St. Francis Convalescent Pavilion during the period from September 18, 2007 through July 9, 2010.

16. Carmen Chavez and Dora Martinez were subject to prescreening document abuse based on their citizenship status, but the evidence is insufficient to show a pattern or practice with respect to prescreening.

17. The complainants demonstrated by a preponderance of the evidence that GHC engaged in a pattern and practice of document abuse based on citizenship status against foreign-born work authorized individuals by requesting that they present List A documents, and by requesting that they present more or different documents than are required to satisfy the requirements of the employment eligibility verification system.

ORDER

When a person or entity is found to have engaged in an unfair immigration-related employment practice, the law provides that an order must issue requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A). Other remedies, however, are discretionary. 8 U.S.C. § 1324b(g)(2)(B).

The parties are directed to confer on or before October 17, 2014 and make reasonable efforts to reach agreement as to what discretionary remedies are appropriate in this case, and to file a report on or before November 7, 2014 advising this office 1) whether and to what extent they have reached agreement, 2) what issues remain to be resolved, 3) whether they can stipulate to any of the underlying facts, 4) whether there are genuine issues of material fact remaining that require another hearing, and, if so, what those issues are. In the event the parties conclude that another hearing is necessary, they are to file their preliminary witness and exhibit lists on or before December 1, 2014, and each party is to provide an estimate of the length of time needed to present its evidence with respect to remedies.

SO ORDERED.

Dated and entered this 11th day of September, 2014.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than sixty (60) days after the entry of such Order.

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

October 7, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 11B00136
)	
LIFE GENERATIONS HEALTHCARE, LLC)	
D/B/A GENERATIONS HEALTHCARE)	
Respondent.)	
_____)	

ERRATUM

In the Final Decision Finding Liability and Schedule for Supplemental Findings issued on September 11, 2014, the text at the end of the decision setting out the procedure for appeal is hereby stricken. Because the decision does not constitute a final order within the meaning of 8 U.S.C. § 1324b(i), it is not appealable at this time.

SO ORDERED.

Dated and entered this 7th day of October, 2014.

Ellen K. Thomas
Administrative Law Judge