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

Ironsi C. Ndusorouwa, Complainant v. Prepared Foods, Inc., Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200191.

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(July 3, 1990)

SYLLABUS

1. Whether or not a Declaration of Intending Citizen, Form I-772, has been completed pursuant to 8 U.S.C. § 1324b(a)(3)(B)(ii), an alien who does not fit within one of the categories defined as intending citizens, 8 U.S.C. § 1324b(a)(3)(B)(i), cannot qualify as an individual covered by the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment discrimination.

2. An alien who no longer resides in the United States and who conditions participation in the oral phase of the hearing process on payment by the United States of his transportation and lodging costs has waived the opportunity for such oral hearing.

MARVIN H. MORSE, Administrative Law Judge:

Appearances: **IRONSI C. NDUSOROUWA**, pro se, Complainant.
JOHN G. MUNDIE, Esq., for Respondent.

Statutory and Regulatory Background

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at section 102, by amending the Immigration and Nationality Act of 1952 (INA § 274B), codified at 8 U.S.C. §§ 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that ``[I]t is an unfair immigration-related employment practice to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. . . .'' (Emphasis added). Discrimination arising either out of an individual's national origin or citizenship status is thus prohibited. Section 274B protection from citizenship status discrimination extends

to an individual who is a United States citizen or qualifies as an intending citizen as defined by 8 U.S.C. § 1324b(a)(3).

Congress established new causes of action out of concern that the employer sanctions program enacted at INA § 274A, 8 U.S.C. § 1324a, might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens of the United States, are lawfully in the United States. See ``Joint Explanatory Statement of the Committee of Conference,'' Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842. Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not file a charge of national origin or citizenship status discrimination before an administrative law judge within 120 days after receiving a complaint, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

Procedural Summary

Mr. Ironsi C. Ndusorouwa (Ndusorouwa or Complainant) charges Prepared Foods, Inc. (Prepared Foods or Respondent) with knowing and intentional citizenship discrimination for his dismissal as an industrial engineer on or about April 1, 1988, in violation of 8 U.S.C. § 1324b.

Ndusorouwa is a citizen of Nigeria. As a holder of an expired F-1 Visa, he was not a permanent resident alien at the time of the alleged discrimination in April 1988. On June 7, 1988 Complainant filed a timely charge with the Office of Special Counsel (OSC). (A charge of national origin discrimination was also filed with the Equal Employment Opportunity Commission, El Paso, Texas office on April 4, 1988).

Upon investigation of his charge, OSC concluded that Complainant was ``not an intending citizen as defined by section 102 of IRCA . . . at the time of the alleged discrimination;'' OSC's undated letter advised also that ``[S]ince you do not meet the statutory defi-

nition of intending citizen, this Office has no jurisdiction over your citizenship status discrimination charge.''

Ndusorouwa filed a timely private action in this Office on April 17, 1989. I was assigned the case on July 14, 1989.

Respondent's Answer filed August 14, 1989 denies any discrimination and asserts that Complainant was an ``Industrial Engineer Trainee'' during his employ at Prepared Foods, and not an ``Industrial Engineer,'' as Complainant described his position. Respondent also claims that Complainant is authorized to be employed in the United States.* Documents accompanying Complainant's original filing with this Office indicate that Prepared Foods had applied for and received labor certification for the Complainant as of August 28, 1987.

My Order of August 28, 1989, stipulated procedures for a prehearing conference. As Complainant resides in Nigeria the dates suggested for a prehearing conference were tentative. I received no response from Complainant. My Order of October 24, 1989 requested Complainant to advise me immediately as to his whereabouts; to provide telephone numbers and state his availability on specified dates so that a telephonic prehearing conference could be held and this case move forward.

Respondent filed a Motion to Dismiss dated November 15, 1989, filed November 21, 1989, alleging Complainant had failed to prosecute his case. Respondent's Motion crossed in the mail with Complainant's response to my Order of October 24, 1989 which I received on November 20, 1989, advising me of his address, telephone number and times he would be available for a prehearing conference. With the cooperation of Respondent's counsel, my office attempted unsuccessfully to arrange a prehearing conference on a date agreed to by Complainant, i.e., November 22, 1989. As the result, I issued an Order of Inquiry to the Parties on December 19, 1989 stating that I was unable to reach him at the telephone number provided in his letter of November 20th.

The December 19, 1989 Order cautioned Complainant that ``he cannot invoke the jurisdiction of an administrative law judge pursuant to 8 U.S.C. § 1324b and then, with impunity, be unavailable for reasonable prompt dispatch of the proceeding he initiated.'' I directed Complainant to advise me of his availability in the United States for an evidentiary hearing so that the case might proceed.

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* Having been hired before November 7, 1986, i.e., in September 1986, Complainant was a `'grandfathered'' employee of Respondent under the Employer Sanction provisions of IRCA; as the result, Respondent would not have been liable for a sanctions violation. IRCA, supra, at Section 101(a)(3), 100 Stat. 3360, 3372, 8 U.S.C. § 1324a note.

The Order included questions for each party which I deemed relevant to resolution of this case.

On December 26, 1989 Respondent answered my Order of Inquiry, noting that Prepared Foods, Inc. employed 355 persons on the date of the alleged discrimination. This fact, as discussed below, eliminates IRCA jurisdiction over the national origin portion of Complainant's claim. 8 U.S.C. § 1324b(a)(1)(A). Respondent also reported its intention to file an amended Motion to Dismiss.

By letter dated January 19, 1990, filed January 29, 1990, Complainant responded to the Order of Inquiry. Complainant stated that ``[I]f my presence in the United States is required for an evidentiary hearing . . . as distinct from disposition of my complaint upon a paper record, I am available and willing to appear anytime; however this can be made possible if I am provided with a round trip plane tickets and lodging expenses to the United States in view of my present financial constraints.'' (Emphasis added.)

Respondent filed a renewed Motion to Dismiss for Failure to Show Standing, dated February 26, 1990, filed March 13, 1990. Prepared Foods maintains that Complainant, despite his response to my Order of Inquiry of December 19, 1989, still fails to demonstrate standing under 8 U.S.C. § 1324b. By Order to Show Cause dated April 19, 1990, I advised Complainant that since I had no authority to ``provide for his attendance at a hearing in the United States at government expense'' and ``by conditioning his willingness to participate in a hearing on the judge's determination whether a hearing is necessary, and on public funding for his costs of attendance, I understand his response to be a waiver of the right to an oral evidentiary hearing.'' I further advised Complainant that I could dispose of this matter based on Respondent's Motion.

Complainant responded to the Order to Show Cause by letter pleading dated March [sic May] 11th, 1990, filed May 22, 1990. He requests that I not dismiss this case, explaining that the materials enclosed with his letter should clarify his standing and ``the circumstantial evidences [sic] thereof.'' Based on the information provided in that last filing, considered particularly in light of his letter of January 19 and recitations in the Show Cause Order of April 19, 1990, this Final Decision and Order adjudicates the complaint based on the paper record.

Discussion

Complainant alleges that Respondent discriminated against him on the basis of both national origin and citizenship by discharging him on April 1, 1988 from his position as an Industrial Engineer. It has become commonplace that ``jurisdiction of administrative law

judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since respondent employs more than fourteen (14) employees, 8 U.S.C. § 1324b(a)(2)(B), it is excluded from IRCA coverage with regard to the national origin discrimination claims.'' Williamson v. Autorama, OCAHO Case No. 89200540, May 16, 1990; See also Bethishou v. Ohmite Mfg. Co., OCAHO Case No. 89200175, August 12, 1989, at 4; Empl. Prac. Guide ♀5244. Accordingly, I dismiss the national origin portion of the claim for want of jurisdiction under IRCA.

Only an alien who satisfies the statutory definition of an intending citizen, 8 U.S.C. § 1324b(a)(3), can maintain an IRCA discrimination claim. Accordingly, the threshold question on the citizenship discrimination claim, i.e., whether Complainant meets the statutory definition of ``intending citizen,'' must be resolved in order to determine whether he can maintain this action. Set forth below is a chronology derived from Complainant's filings which explains his immigration status.

1. Complainant, a Nigerian citizen, arrived in the United States in 1977 with a Foreign Student Visa (F-1), to attend Alabama A & M. University. He remained in this country as a student, receiving his Bachelor of Science in Industrial Engineering degree from the University of Texas at El Paso (UTEP) in December 1981. He continued his education at UTEP, working on a Master's degree which he expected to receive in December 1986. In March 1984 INS granted Complainant a waiver of off-campus work prohibition for the duration of his F-1 status. 8 C.F.R. § 214.2(f)(5)(iii). The waiver authorized part-time employment.

2. From March 1984 until March 1986 Complainant was employed as an ``Industrial Engineer/Production Planner'' at Beatrice Meats, Inc. in El Paso, Texas. In May 1985 Complainant filed a Form I-140, Petition for Prospective Immigrant Employee (Preference Status), with INS at El Paso. The petition for Third Preference was rejected as deficient in July 1985 for lack of a labor certification.

3. After working on his Master's thesis, Complainant was hired by Prepared Foods, Inc. in September 1986 as a trainee industrial engineer. Such practical training for pay is permitted for holders of F-1 Visas. 8 C.F.R. § 214.2(f)(10). Respondent promptly began the process of sponsoring Complainant for permanent resident status by applying for a labor certification for the job of industrial engineer, the job for which Complainant was hired as a trainee. In an October 24, 1986 letter to the New Mexico Employment Security Department, William L. Mundie, Prepared Foods Vice President for Operations, supported Complainant's labor certification petition, stating that ``[I]t is our intention to offer him [a] full-time position as industrial engineer upon his graduation from UTEP in December 1986 if he is granted an alien employment certificate.'' The labor certification was granted on August 28, 1987.

4. On September 17, 1987 Complainant filed a new Form I-140 and requested an adjustment of status to permanent resident. At the time of the alleged discrimination he had still not been granted any change of status.

> 5. Complainant's immigration status is less certain for the period between award of his Master's Degree in December 1986 and his dismissal from Prepared Foods on April 1, 1988. No longer a student, he was not entitled indefinitely to F-1 Visa status because, as provided in INS regulations then in effect, even where a holder of an F-1 Visa has been granted permission to engage in a practical training period, and that period is extended, the F-1 Visa only remained valid for a maximum renewal of 12 months after the date that the practical training began following the educational period. 8 C.F.R. § 214.2(F)(10)(iii) [1986].

As Complainant received his Master's degree in December of 1986, his F-1 status could only have remained in effect through December 1987. He remained an employee of Prepared Foods for another year after February 1987. Although the labor certification was issued in August 1987, it would be sheer speculation to suppose that Complainant had been granted a change in immigration status to temporary non-resident status or that he had obtained an H-1 visa. 8 C.F.R. § 214.2 (h)(2)(i).

Most importantly, the labor certification did not confer legal immigrant status but only the prospect that a job was available for him when and if he achieved an adjustment of immigration status or approval of a Visa petition. It is clear that Complainant still awaited permanent resident status at the time of his discharge by Respondent.

Complainant's filings before me are not consistent with a change of status. For purposes of this case, however, it is not necessary to speculate whether Complainant had overstayed his F-1 status and thus in the absence of a change in status became unauthorized to work in the United States. Rather, I conclude that nothing in Complainant's own submissions supports a finding that he was at the time of the alleged discrimination a permanent resident alien, a refugee, an asylee or a legalization (amnesty) applicant ``granted the status of an alien lawfully admitted for temporary residence . . .'' as required by 8 U.S.C. § 1324b(a)(3)(B) in order to qualify for Section 102 relief.

Prepared Foods sponsored Complainant and supported a labor certification on behalf of his employment. It is plain that Respondent was aware of Complainant's immigration status at the time of the alleged discrimination. Complainant in response to my Order of Inquiry of April 19, 1990 says as much. ``Knowing fully well the complainant's NATIONAL ORIGIN AND CITIZENSHIP STATUS and that his immigration status depended on continued employment at Prepared Foods Inc. can the Respondent, . . . explain its action on April 1, 1988.''

Respondent obviously was aware for a considerable time prior to April 1988 that Complainant was not a citizen of the United States. Indeed, Complainant in a March 31, 1988 memorandum to Bill

Mundie, stated that when he had first been offered employment, Prepared Foods had made a pledge to sponsor his ``United States residency status adjustment . . .'' The employer's assistance in positioning Complainant for authorized employment and permanent resident status is not consistent with an unlawfully discriminatory discharge. This situation is not unique. In Prieto v. Noticias del Mundo/News World Communications, OCAHO Case No. 88200164, (May 23, 1990) a case alleging citizenship based discrimination, the complainant was an illegal alien. The employer, having knowledge of his status, continued to employ him in increasingly responsible positions. The employer helped him prepare his legalization application. I held, inter alia, that Prieto was not fired because he was an alien but because he had embarrassed the employer in other respects, Id. at 6.

Unlike Prieto, Complainant, as already noted, does not qualify under IRCA as an intending citizen as defined at 8 U.S.C. § 1324b(a)(3)(B). Complainant acknowledges in his letter of May 11, 1990 that he was refused temporary residence status because INS determined him ineligible for amnesty under IRCA. See 8 C.F.R. § 245a.2 (12). Accordingly, because he lacks standing under Section 102 I do not reach the merits of his discharge. Romo v. Tood, OCAHO Case No. 87200001 (Aug. 19, 1988), aff'd United States v. Todd Corp._____ F.2d_____ (9th Cir. 1990).

Ndusorouwa is not entitled to relief under IRCA because he did not quality as an intending citizen status, 8 U.S.C. § 1324b(a)(3)(B)(i), although his January 19, 1990 response to my order of December 19, 1989 included an undated Form I-772, Declaration of Intending Citizen. Completion of such declaration does not, however, confer IRCA coverage on an alien who does not otherwise fit one of the four categories identified at subsection (a)(3)(B)(i), supra. Complainant cannot make a prima facie case. Therefore, I dismiss this action.

Respondent's amended motion to dismiss is granted for the reason that Complainant, being found not to have qualified as an intending citizen, is unable to maintain an action under 8 U.S.C. § 1324b. The motion is granted under authority of Federal Rule of Civil Procedure (FRCP) Rule 12(b)(6) which authorizes dismissal of an action for failure to state a claim. See 28 C.F.R. § 68.1. Where, as here, Complainant has failed to recite a claim within the jurisdiction of an administrative law judge, it is necessary and just to apply FRCP 12(b)(6). Williamson v. Autorama, supra, at 5.

Respondent is the prevailing party in this action. Since Respondent has not required an award of attorneys' fees, I do not reach any decision on such award.

Ultimate Findings of Fact and Conclusions of Law:

In addition to the findings and conclusions already stated, based on the foregoing, considering the pleadings, including their attachments, I find and conclude as follows:

1. That I am without jurisdiction to hear a claim of national origin discrimination where, as here, the employer has more than fourteen (14) employees.

2. That Complainant lacks standing to maintain a claim of citizenship status discrimination because he has been unable to establish standing as an intending citizen. 8 U.S.C. § 1324b(a)(3)(B)(i)

3. That by offering to participate in an oral hearing in the United States only upon payment by the United States of his transportation and related travel costs, and expressing his willingness to have the case decided by the judge on a paper record, Complainant waived his opportunity for the oral evidentiary phase of the hearing process.

4. That the entire record on which this Final Decision and Order is based consists of the pleadings, including their attachments, filed with me.

5. That for the reasons stated above, the Complaint is dismissed. 28 C.F.R. § 68.36.

6. That all motions and all requests not previously disposed of are denied.

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

SO ORDERED.
Dated this 3rd day of July 1990.

MARVIN H. MORSE
Administrative Law Judge