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

CORNELIU CURUTA, Complainant	)	
v.	)	8 U.S.C. §1324b Proceeding OCAHO Case No. 92B00142
U.S. WATER CONSERVATION LAB, (U.S. Department of Agriculture) Respondent.	)	

FINAL DECISION AND ORDER
(September 24, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Cornelieu Curuta, Complainant, pro se.
Thomas R. Fox, Esq., for Respondent.

I. *Statutory and Regulatory Background*

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

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

lawfully present in this country.[1] Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

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

The legislative history of IRCA makes clear that the new prohibitions against national origin and citizenship status discrimination were enacted because Title VII remedies were considered insufficient "to protect individuals from the potential act[s] of discrimination that may uniquely arise from the imposition of sanctions." H.R. REP. NO. 99-682(II), 99th Cong., 2d Sess. 12, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5757, 5761. IRCA's national origin jurisdiction in particular was intended to complement, not overtake, Title VII. The IRCA remedy is available only to the extent that Title VII is not available. H.R. REP. NO. 99-682(I) at 70, 1986 U.S. CODE CONG. & ADMIN. NEWS 5674 ("Specifically exempted from coverage are: . . . (2) those covered under Title VII for national origin discrimination (i.e., employers of fifteen or more) . . .")

Title 8 U.S.C. §1324b(a)(2)(B) excepts from coverage

> a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity is covered under section 703 of the Civil Rights Act of 1964

Title VII, codified at 42 U.S.C. §2000e et seq., covers national origin discrimination on the part of employers of fifteen or more individuals, conferring enforcement jurisdiction on EEOC and the courts.

Consistent with congressional intent that IRCA and Title VII comple-ment each other, IRCA prohibits overlap of IRCA and Title VII causes
of action. An EEO national origin discrimination charge may not be filed if a charge respecting an identical unfair immigration-related

[1] "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. REP. NO. 99-1000, 99th Cong., 2d Sess. 87 (1986).

employment practice has been filed under IRCA, and vice versa. 8 U.S.C. §1324b(b)(2).

II. *Procedural History*

A. Background

By a charge form dated April 10, 1992, Corneliu Curuta (Curuta or Complainant) filed a charge with OSC alleging an unfair immigration-related employment practice by the U.S. Water Conservation Lab (Lab or Respondent). Curuta alleged that he suffered an unfair immigration-related employment practice on March 17, 1992, when he was rejected for employment by the Lab in Phoenix, Arizona.

Section 4 of the charge explicitly invites the injured party to state whether he or she claims both national origin and citizenship status discrimination or only one of them. Curuta entered an X in the box on the national origin discrimination line, but made no entry in the box on the citizenship status discrimination line. As appears from his entry at section 5, as amplified by additional remarks at section 9, Curuta is a naturalized U.S. citizen of Romanian national origin.

At section 9, Complainant alleged that the March 17 rejection was but the last of many. Among the attachments to his charge are a rejection notification dated August 14, 1990 by the Animal and Plant Health Inspection Service, U.S. Department of Agriculture (USDA) and another dated January 31, 1991 by the Agricultural Research Service (ARS), USDA. Curuta wrote, "I'm sure that I was and I am discriminated (sic) because of my National Origin."

By a determination letter dated June 4, 1992, OSC advised Curuta that (1) it had investigated his charge and determined "that there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. §1324b on the basis of your citizenship status"; (2) it lacked jurisdiction over his national origin discrimination charge "because of the number of individuals employed by this employer," and (3) he was entitled to file his own complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of his receipt of the OSC letter.

On June 22, 1992, Curuta filed a timely complaint on a form provided by OCAHO. At section 11 of the OCAHO form, he identified the job he did not obtain as a "Post-Doctoral Associate Agricultural Engineer." At section 10, he noted that he had applied for the job on

March 17, 1992, the date he had stated on his OSC charge that he had been rejected.

Section 7 of the OCAHO complaint, consistent with section 4 of the OSC charge, does not require an election between national origin and citizenship status discrimination claims. Nevertheless, he claimed only national origin discrimination on his OCAHO complaint. To the same effect, adopting the preprinted text at section 12 that he was "knowingly and intentionally not hired," Complainant filled out subsection 12a as follows:

CHECK ONLY ONE

a) I was not hired because of my:

_____ citizenship status

__X__ national origin

_____ citizenship status AND national origin

By notice of hearing dated July 1, 1992, the parties were advised that the case was assigned to me and that Respondent's answer must be filed within 30 days of its receipt of the notice with copy of the complaint attached. On July 10, Complainant filed a July 7 letter which acknowledged receipt of the notice of hearing. He enclosed Respondent's March 17, 1992 letter advising Curuta that he had not been selected for the post-doctoral position. (A copy of this letter had also accompanied his OSC charge.) He also enclosed a letter from the Southern Plains Area Grassland, Soil and Water Research Laboratory, ARS, Temple Texas, dated June 8, 1992, advising that ARS had decided not to fill a research hydrologic engineer position.

On July 27, 1992, an entry of appearance was filed on behalf of Respondent by counsel, Thomas R. Fox, USDA Office of the General Counsel (OGC). He submitted that the Lab is "an organizational unit of the Agricultural Research Service, United States Department of Agriculture, an Executive Department of the United States."

Concurrently, Respondent filed a motion to dismiss for lack of subject matter jurisdiction. The motion contended that Curuta's complaint alleged only national origin and not citizenship status discrimination. On the basis that Curuta exclusively alleged national origin discrimination and the size of its workforce, Respondent contends that the national origin claim is cognizable under section 717 of the Civil

Rights Act of 1964 (Title VII), 42 U.S.C. §2000e-16(a). Respondent relies on the IRCA exception to national origin discrimination coverage. 8 U.S.C. §1324b(a)(2)(B). This subsection excepts from IRCA jurisdiction those national origin claims which are covered by 42 U.S.C. §2000e-2. Respondent argues, in effect, that the complaint must be dismissed because USDA is the proper venue for Curuta's national origin claim, citing 42 U.S.C. §2000e-16(c) and 29 C.F.R. Part 1613.

On August 7, 1992, a pleading was filed on Complainant's behalf by an attorney who had not previously appeared in the case and who has not participated subsequently. That pleading, captioned Objection to Motion to Dismiss, stated that while Respondent's motion had claimed that Curuta "may" file a Title VII complaint "his efforts to do so have to date been unsuccessful," (attaching two letters from the Equal Employment Opportunity Commission (EEOC) as exhibits). Curuta's Objection noted that thirty days had "long passed even before he was aware of the requirement that a Title VII claim involving a federal agency must be initiated by consulting with an EEO counselor at the employing agency within thirty days of the alleged discrimination. The Objection recited that Curuta "has unsuccessfully attempted to contact Agency EEO officials to seek a waiver of the time constraints." The Objection contended that

> "[U]ntil such time as it becomes clear that EEOC will not reject Mr. Curuta (sic) complaint or claim that it too has no jurisdiction, this court should not rule it has no jurisdiction leaving Mr. Curuta possibly with no forum at all, which was clearly not the intent of Congress.

Objection at 2.

On August 10, 1992, Complainant filed a letter dated August 7 which transmitted a copy of the Objection.

On August 14, 1992, Respondent filed its answer, inter alia reiterating its claim that the administrative law judge "lacks subject matter jurisdiction over this Complaint." Complainant responded to the answer by letter dated August 25, filed August 28. He expressed concern with the denial in Respondent's answer that he was entitled to any relief. By order dated August 26, 1992, a telephonic prehearing conference was scheduled for September 15.

At the September 15 prehearing conference, Complainant participated pro se. Respondent was represented by USDA OGC per Mr. Fox. Upon inquiry by the bench, Complainant reiterated that he

claimed only national origin, and not citizenship status discrimination. Mr. Fox expanded on Lab's jurisdictional claim. He asserted that as an organizational unit of ARS and USDA, Respondent employs more than fourteen individuals. Therefore, Respondent argued, Complainant's national origin claim is cognizable only under Title VII, and not under IRCA.

II. *Discussion*

A. The Complaint Sounds Only in National Origin

The distinction between national origin and citizenship status discrimination may at times be unclear. Indeed, until Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), it was not necessarily understood that Title VII was inapplicable to alienage, i.e., citizenship status claims. Early adjudications under Section 102 rejected the suggestion that conceptually the two causes of action are mutually exclusive. Romo v. Todd Corp., 1 OCAHO 25 (8/19/92) at 7-10, aff'd, U.S. v. Todd Corp., 900 F.2d 164 (9th Cir. 1990); U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90); amended 1 OCAHO 169 (5/10/90); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92). The conclusion that a complaint sounds only in national origin and not also citizenship status discrimination is not made lightly.

The entries on Curuta's complaint form demonstrate a clear selection of only those entries which implicate a national origin claim. Respondent's Motion to Dismiss argues that the complaint claims only national origin discrimination. Complainant's Objection to Motion to Dismiss filed by counsel on his behalf focuses exclusively on implications of national origin jurisdiction. In short, the pleadings of both parties are unmistakably consistent. In the present case, national origin alone is at issue. Discussion during the prehearing conference was to the same effect and in no way impeached that exclusivity. I conclude that there is no glimmer of a citizenship status discrimination claim in this proceeding.

B. IRCA National Origin Jurisdiction Is Limited To Employers of Between Four and Fourteen Individuals

It has become commonplace that

> jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since Respondent

> employs more than fourteen (14) employees, U.S.C.§1324b(a)(2) (b), it is excluded from IRCA coverage with regard to the national origin discrimination claims.

Marcel Watch Corp., 1 OCAHO 143 at 11.

See also Huang v. U.S. Postal Service, 1 OCAHO 288 (1/11/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Brown v. Baltimore City Schools, OCAHO Case No. 91200231 (6/4/92); Palancz, 3 OCAHO 443 at 3; Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92); Williamson v. Autorama, 1 OCAHO 174 (5/16/90), May 16, 1990; Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Lab is identified by Complainant as the putative employer and Respondent. I accept Respondent's unrebutted assertion and find that Lab is an organizational component of ARS and, in turn, of USDA. USDA, therefore, is the real party in interest even though it is not so designated in the pleadings. I take official notice that USDA is, and at all relevant times has been, an employer of more than fourteen individuals.

The national origin statutory scheme prohibits the application of Title VII and IRCA to an identical employment practice. As explained in Huang,

> The logic of the exception is plain. IRCA empowered administrative law judges to adjudicate claims arising out of the newly established citizenship venue, or the enlarged national origin jurisdiction, i.e., of employers with more than three employees and fewer than fifteen. Jurisdiction over national origin discrimination claims established before enactment of IRCA on November 6, 1986 was not to be disturbed. Case law under IRCA has clearly so understood. (Citations omitted).

Huang, 1 OCAHO 288 at 4.

I agree with Respondent's statement that

> [t]he legislative history to the IRCA demonstrates that Congress intended the unfair immigration-related employment practices procedures and remedies provided by 8 U.S.C. §1324b to fill in the gaps in Title VII coverage, but not to overlap with Title VII.

Motion To Dismiss at 3.

C. The Limit on IRCA National Origin Jurisdiction Applies Also to Federal Employment

Section 703 of the Civil Rights Act of 1964 is codified as 42 U.S.C. §2000e-2. Subsection 2000e-2 is the generic Title VII definition of prohibited discrimination, as augmented at 42 U.S.C. §2000-3 as to retaliation and other prohibited conduct. As originally enacted, Title VII omitted any reference to coverage of federal employment. Title VII coverage was explicitly expanded to include employees of the federal executive branch by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §717, 86 Stat. 211, 42 U.S.C. §2000e-16. Enactment of 42 U.S.C. §2000e-16 made clear the intention that federal employees, no less than private sector employees, were entitled to protection from forbidden discrimination.

Caselaw confirms that standards of nondiscriminatory conduct with respect to private sector employment under 42 U.S.C. §2000e-2 et seq, apply also to federal employment under 42 U.S.C. §2000e-16. See Ayon v. Sampson, 547 F.2d 446, 449-450 (9th Cir. 1976) (§2000e-16 held to incorporate the general provisions of §2000e-3). See also Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975) ("Congress has extended the reach of Title VII to public employers, including the Federal Government," citing 42 U.S.C. §2000e-16). The purpose of the Civil Rights Act of 1964, as amended, was to establish a single coextensive venue for federal as well as private sector discrimination claims within Title VII coverage. This purpose would be unjustifiably frustrated if the exception to IRCA national origin coverage were to apply to private sector but not to federal employment. Accordingly, I apply the exception of 8 U.S.C. §1324b(a)(2)(B) to federal employment.

This is not the first case finding lack of administrative law judge jurisdiction to adjudicate national origin claims where more than fourteen individuals are on a federal agency payroll. See Huang, 1 OCAHO 288. On appeal, the Second Circuit Court of Appeals affirmed dismissal of a national origin complaint against the Postal Service without addressing the distinction between federal and private sector employment. Huang, 962 F.2d at 1. However, the court's discussion is instructive:

> . . . the ALJ concluded that it was "manifest beyond question that her Complaint is premised on allegations of national origin, not citizenship, discrimination." This is a factual finding made on the basis of an administrative record, and it will be affirmed if supported by substantial evidence. See Mester Mfg. Co. v. INS, 879 F.2d 561, 565 (9th Cir. 1989). Upon our review of the record, we conclude that this finding is amply supported and we will not disturb it.
>
> Thereafter, the ALJ analyzed 8 U.S.C. § 1324b(a)(2)(B) to determine whether the statute vested jurisdiction in OCAHO to adjudicate national origin claims against employers who employed more than 15 (sic) people. (The ALJ took notice of the fact

> that the U.S. Postal service employs over 15 (sic) people.) He concluded that it did not, and that pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the Equal Employment Opportunity Commission (EEOC) had jurisdiction over such claims. While we review an agency's construction of a statute de novo, "we will give a certain amount of deference to an agency's reasonable construction of a statute it is charged with administering." Mester Mfg. Co., 879 F.2d at 565. Since the statute's plain language makes clear that the ALJ's interpretation was "reasonable, and consistent with congressional intent," we affirm his construction of § 1324b(a)(2)(B). Id. Thus, the EEOC, not OCAHO, had subject matter jurisdiction to hear Huang's claim, and her OCAHO complaint was properly dismissed.

Id. at 1-2, slip op.

So far as I am aware, the Curuta case is the first adjudication to discuss the interplay between Title VII and 8 U.S.C. §1324b(a)(2)(b) with respect to federal employment. Neither the administrative law judge nor the court of appeals discussed the federal employment aspect in Huang, even though the employer was the U.S. Postal Service. On the appeal, the brief for the government made the point that although IRCA referred only to the general definition, i.e., section 703 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, "Congress plainly intended to preclude coverage of all claims cognizable under Title VII," viz, those involving federal employment covered by 42 U.S.C. §2000e-16. Brief for Respondent at 12, Huang, 962 F.2d at 1 (No. 91-4079). Interestingly, the court was silent as to the distinction between federal and private sector employment. The court's silence as to the distinction, in the face of the government's having drawn attention to it, is consistent with the conclusion that the exception to IRCA jurisdiction applies without regard to the identity of the employer.

D. The Complaint Is Not Barred by the IRCA/Title VII Overlap Provision

Respondent's motion also raises the IRCA overlap provision as a basis for dismissing the complaint. 8 U.S.C. §1324b(b)(2). On the basis of the pleadings and accompanying documentary materials and the prehearing conference discussion, I reject this claim.

It does not appear that Curuta has a pending Title VII national origin charge. To the contrary, EEOC has rebuffed efforts at such a filing. According to its June 4, 1992 determination letter, OSC had forwarded Curuta's national origin claim to EEOC. Procedures for processing EEO claims before the Commission differ in federal employment cases from those implicating other employers. In the federal sector, the first step is to bring the discrimination to the

attention of an EEO counselor in the agency involved in the disputed action within 30 days.

It may be speculated that when OSC referred Curuta's charge to the EEOC, OSC had overlooked that Lab is a federal employer. Neither OSC nor Curuta appear to have complied with the procedures for initiating a discrimination charge under Title VII. By substantially identical letters dated July 7, 1992, filed with Curuta's Objection to Motion to Dismiss, an EEOC administrative judge separately advised OSC and Curuta that such cases must be initiated with an EEO counselor at the federal employing agency, not with EEOC. During the prehearing conference, I requested that Respondent's counsel provide Curuta with the precise name and address of the appropriate EEO counselor to whom the initial submission must be made. By letter dated September 16, 1992, Mr. Fox provided the requested information.

E. Complainant's IRCA Filing May Toll EEO Filing Time Limits

Curuta's lawyer correctly noted in the Objection that the 30 day requirement for timely filing is long past. The September 16 USDA letter advises that 29 C.F.R. §1613.214(a)(4) provides that an agency "shall extend" such time limit in certain described circumstances. Moreover, OSC and EEOC have adopted a Memorandum of Understanding (MOU) by which each appointed the other as its agent to accept charges, thereby tolling the time limits for filing charges. The effect of the MOU is that a filing with OSC is understood to be a constructive simultaneous filing with EEOC and vice versa. Therefore, a timely filing with OSC can cure the tardiness of a subsequent EEOC filing. The purpose of the MOU is to ameliorate "uncertainty as to the correct forum resulting from separate jurisdiction (EEOC on the one hand, and IRCA administrative law judges on the other). . . ." Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90) at 18. See also U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) at 29.

In Huang, concluding that "EEOC, not OCAHO" had subject matter jurisdiction over the national origin claim, the court addressed the confusing situation parties may face in pursuing such a claim in the appropriate venue:

> . . . we are not unmoved by plaintiff's plight in seeking to have her discrimination claim heard. The record of correspondence between Huang and the various offices of the Justice Department reveals to us that Huang, then a pro se complainant who barely spoke English, was diligently pursuing her claim but was lost in a confusing maze of legal subtleties. For over one and a half years, she repeatedly sought guidance from

> various governmental agencies. While these offices might have had the best of intentions, it is now evident that they were unsuccessful in assisting Huang as she sought to pursue her claim.
>
> As the ALJ noted in his opinion, the alleged discrimination in this case may have begun as early as May 1989. Now, over two and one half years later, Huang is understandably concerned that she will be barred by the statute of limitations from pursuing her claim before the EEOC. Given the diligence with which Huang has sought relief, albeit misguided, we think that it would be unjust to deny her the opportunity to be heard and that no purpose behind the statute of limitations would be served thereby. While we are not now in a position to order that the EEOC apply the doctrine of equitable tolling to its statute of limitations, we believe that equitable tolling would be proper here in order to allow Huang to prosecute her claim, should she choose to do so.

Huang at 2, slip op.

Whether or not Curuta's diligence can be analogized to Huang's, clearly he should have the opportunity to effect a filing under Title VII that is not time barred.

IV. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, including letters and documents filed, memoranda and arguments submitted. All motions and requests not previously resolved are denied.

By his complaint and other pleadings including the filing by counsel, and by statements during the telephonic prehearing conference, Complainant has made clear that he has alleged and urged only a national origin discrimination claim and not a citizenship status discrimination claim. Accordingly, Respondent's motion to dismiss the complaint is granted.

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

SO ORDERED.

Dated and entered this 24th day of September, 1992.

MARVIN H. MORSE
Administrative law Judge