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

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| HADDON SPEAKMAN,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. 1324b Proceeding |
| | ) | Case No. 92B00186 |
| THE REHABILITATION<br>HOSPITAL OF SOUTH TEXAS,<br>Respondent. | ) | |

ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION
AND
ORDER GRANTING COMPLAINANT EXTENSION OF TIME TO RESPOND TO RESPONDENT'S MOTION TO DISMISS

I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted Section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States, and mandated civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. § 1324b, these anti-discrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin and/or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual. If, however, the OSC does not file such a charge within one hundred twenty (120) days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

The aims of IRCA are thus dual in nature. The intent is to prevent employers from hiring unauthorized workers, but at the same time to prevent these same employers from being overly cautious or zealous in their hiring practices by avoiding certain classes of employees or, alternatively, treating them in a discriminatory fashion.

With its enactment, the IRCA legislation expanded the national policy on discriminatory hiring practices found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Claims under Title VII did not raise a distinction between national origin and alienage discrimination. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). Further, Title VII provided for claims solely against employers of fifteen (15) or more employees.

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three (3) but less than fifteen (15) employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three (3) employees.

## II. *Procedural History*

Complainant filed a Complaint against Respondent, on August 17, 1992, alleging violation of Section 274B of the Immigration and Nationality Act. On September 14, 1992, in its Notice of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices, the Office of Chief Administrative Hearing Office advised the parties of the filing of the Complaint and of Respondent's right to file an Answer to the Complaint within thirty (30) days of the

Complaint's receipt. The parties were also notified that should Respondent not file a timely Answer, the Administrative Law Judge might hold that Respondent had waived its right to appear and contest the allegations of the Complaint and might enter a judgment by default along with any and all appropriate relief.

Proper service of the Complaint and the Notice of Hearing in this case is evidenced by a copy of the United States Postal Service's return receipt for certified mail, signed by an individual at Respondent's address. Respondent filed its timely Answer on October 11, 1992.

On October 15, 1992, Respondent filed its Motion to Dismiss For Failure To State A Cause Of Action Under 8 U.S.C. 1324b and a Memorandum in Support of its Motion To Dismiss. Under the pertinent regulations, whenever a motion is filed with this court by a party, the other party, or parties, must be given a reasonable opportunity to respond. See 28 C.F.R. 68.9(a). In this case, Complainant's response was due to be filed with this Court within ten days (fifteen days if mailed) of service on the Complainant. See 28 C.F.R. 68. 68.9(b); 28 C.F.R. 68.7(c)(2). However, on October 27, 1992, Respondent notified this Court that it had served Complainant with its Answer and its Motion To Dismiss at the address indicated on Complainant's Charge Of Discrimination. As that is not Complainant's current address, Respondent reserved Complainant at his correct address on October 27, 1992.

III. *Discussion*

A. Complainant's Status As A Protected Individual

A review of the file reveals that Complainant may not be a protected individual as defined by Section 274B(a)(3)(B) of the Act, which states:

> the term "protected individual" means an individual who-...
>
> B. is an alien who is lawfully admitted for permanent residence, is granted the status of alien lawfully admitted for temporary residence under section 210(a), 210A or 245A, is admitted as a refugee under section 207, or is granted asylum under section 208...

Complainant has indicated in his Charge Form and in his Complaint that he had an H-1 visa at the time of the alleged discriminatory act(s), that he now has a J-1 visa, and that he also has the status of "alien lawfully admitted for temporary residence under 8 U.S.C. 1255a(a)(1)." An individual who, at the time of the alleged discriminatory act, has been admitted to the United States on the basis of an H-1 visa, does not appear to fall under the definition of a protected

individual in the Act. Further, non-immigrant status under an H-1 visa seems to conflict with status under 8 U.S.C. 1255a(a)(1) which applies to non-immigrants who have lived continuously and unlawfully in the United States since January 1, 1982 and who may become lawful permanent residents under certain additional conditions. The Court further notes that the Office of Special Counsel for Immigration-Related Unfair Employment Practices stated, in its letter of July 30, 1992 addressed to Mr. Shawn Smith at Respondent's counsel's office, that it had determined that the Complainant was not within the definition of "protected individual" as set out in the statute.

It is a basic premise of law that this Court may not act outside of its jurisdiction. A threshold determination that must be made in this case to determine whether this Court has jurisdiction over Complainant's claim is whether Complainant is a protected individual as defined in 8 U.S.C. 1324b(a)(3)(B), Section 274B(a)(3)(B).

It is Complainant's burden to establish this fact. See, e.g., Prado-Rosales v. Montogomery Donuts, 3 OCAHO 438 (6/26/92). As such, Complainant is directed to file with this Court, on or before the close of business on November 25, 1992, sufficient documentation that establishes his status as a protected individual. Should Complainant not be able to establish that he is a protected individual under the Act, this Court will not have jurisdiction to hear this case as a matter of law and it will be dismissed for lack of jurisdiction. Should Complainant establish that he is protected, the Court will proceed as appropriate.

B. Extension Of Time To File Complainant's Response

Regarding the reservice of Respondent's Answer and Motion To Dismiss, I hereby grant Complainant, sua sponte, until November 25, 1992 in which to respond to this motion based on the following: the file reveals several addresses for Complainant, there is no indication that Respondent intentionally misserved Complainant, Complainant is pro se, and, I find no prejudice to either party by allowing Complainant an extension of time to respond to Respondent's motion.

**IT IS SO ORDERED** this 6th day of November, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge