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

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| DANIELA D. TIPLEA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. §1324b Proceeding |
| | ) | CASE NO. 92B00265 |
| REYNOLDS ELECTRICAL<br>& ENGINEERING<br>COMPANY, INC.,<br>Respondent. | ) | |

ORDER DIRECTING FILING OF MEMORANDA CONCERNING TIMELINESS, THE "FIVE/TEN YEAR RULE" AND JURISDICTION OVER THE NATIONAL ORIGIN CLAIM

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. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Immigration and Nationality Act (Act), prohibited discrimination by employers on the basis of national origin or citizenship status. 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. 8 U.S.C. 1324b.

Under 8 U.S.C. 1324b, the protected individuals who meet the statutory definition may file charges of national origin and/or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC may then file a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) if it determines that there is reasonable cause to believe that the filed charge is true. 8 U.S.C. 1324b(d)(1). If, however, OSC does not file a Complaint within one hundred twenty (120) days of receipt of the charge, the protected individual is authorized to file a Complaint directly with OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

## II. *Procedural History*

On or about April 13, 1992, Complainant, Daniela Tiplea, an alleged United States naturalized citizen born in Romania, filed a charge with OSC alleging national origin discrimination. On September 1, 1992, OSC notified Complainant that it would not be filing a complaint as her case was not covered by the "5/10 year rule" since the discrimination needed to occur "at the very latest by 1989". Thus, on November 30, 1992, Complainant filed the instant Complaint alleging both citizenship and national origin discrimination in violation of 8 U.S.C. 1324b.

On January 6, 1993, a Notice of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices was issued by OCAHO, advising the parties of Complainant's filing of the Complaint and Respondent's obligation to file a timely Answer in order to avoid the possible issuance of a default judgment. On January 21, 1993, as is my normal practice, I issued a Notice of Acknowledgment in which Respondent was again cautioned that a timely Answer to the complaint was due in order to forestall the issuance of a default judgment.

Respondent filed, on February 8, 1993, its timely Answer and affirmative defenses and on February 9, 1993, it filed its Motion to Dismiss. On February 23, 1993, Complainant filed its response in opposition.

## III. *Discussion*

Respondent's motion to dismiss was based on three arguments. The first argument presented was that the filed charge was untimely; it was filed approximately eleven months after the alleged discrimina-

tory act. The second argument was that Complainant failed to state a claim in that as she was a naturalized citizen, she could not claim discrimination based on national origin.

Complainant agreed in response that she filed her charge only ten days after seeing OSC's notice in the newspaper that she might have a claim. She alleged further that although she was told she was qualified for the position with Respondent, i.e., she was a U.S. citizen and had excellent qualifications, there would be difficulty getting her approved for security clearance because she was born in Romania.

The record reveals that Respondent's argument has merit as Complainant's charge was filed approximately one year after the alleged discriminatory act. However, equitable tolling may be applied in employer discrimination cases to avoid dismissal for late filing. Halim v. Accu-Labs Research, Inc., OCAHO Case No. 92B00037 (11/10/92) citing to Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); U.S. v. Weld County School District, 2 OCAHO 326 (5/14/91); Mendez v. Daniels, 2 OCAHO 374 (9/19/91); U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89). Additionally, the record revealed that this case might be considered under a "5/10 year rule" analysis. See Office of Special Counsel's Determination Letter of September 1, 1992.

Therefore, in the interests of justice and in consideration of Complainant's pro se status, I am directing the parties to file, with the Court, on or before the close of business on September 6, 1993, the following documents:

1. Complainant is to file any statements and/or evidence which she has that will support the application of equitable tolling[1] in her case;

[1] Complainant should be aware that equitable tolling is not readily granted by courts and that it has been found not to apply in some cases of mistaken belief, ignorance regarding filing deadlines, and illiteracy. See e.g., Barrow v. New Orleans S.S. Ass'n., 932 F.2d 473 (5th Cir. 1991); Burkley v. Martin's Super Markets, Inc., 741 F.Supp. 161 (N.D. Ind. 1990)(ignorance of filing requirements was not sufficient for application of equitable tolling where employer had posted notice of requirements in an area that filing party had access to); Lundy v. OOCL, 1 OCAHO 215 (8/8/90). However, fraudulent concealment of employee's rights by the employer, employer acts which lulled employee into inaction, employee's timely filing in the wrong forum, inadequate notice of the right to sue, court action which has misled the filing party into believing that it has complied with the court's requirements, and facts which amount to "extraordinary circumstances" have all been found to be a basis for equitable tolling. Brown; Weld County; Halim citing to Miller v. International Telephone & Telegraph Corp., 755 F.2d 20, 24 (2nd Cir. 1985), cert. denied, 474 U.S. 851 (1985)

2. Respondent is to file a memorandum addressing the following issues:

a. equitable tolling as applied to Complainant;

b. whether Respondent had a contract with Department of Defense which required a security clearance for the job to which Complainant had applied;

c. whether it is bound by the Settlement Stipulation in Huynh v. Cheney, Civ. Act. No. 87-3436 TFH (12/24/91); specifically, whether it is bound by Department of Defense's waiver of the timeliness affirmative defense.

d. whether it was bound by contract or agency law to be Department of Defenses agent, i.e., did it "step into the government's shoes" during the hiring process to which Complainant was involved, thus, becoming bound by the Stipulation in Huynh v. Cheney, Civ. Act. No. 87-3436 TFH (12/24/91);

e. the number of employees it had at the time of the alleged discriminatory act;

Upon receipt of these filings, I will consider Respondent's pending motion.

**IT IS SO ORDERED** this 4th day of August, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge