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

JIA XIAN PAN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding CASE NO. 94B00029
JUDE ENGINEERING, INC., A CALIFORNIA CORPORATION dba CHRISTIAN ENGINEERING, Respondent.	)	

FINAL DECISION AND ORDER DISMISSING THE NATIONAL ORIGIN PORTION OF THE COMPLAINT FOR LACK OF JURISDICTION AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AS TO THE OTHER ALLEGATIONS IN THE COMPLAINT

(June 15, 1994)

Appearances:

For the Pro Se Complainant
Jia Xian Pan

For the Respondent
John P. Christian, Esquire

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *Statutory & Regulatory Background*

This case arises under § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b, as amended.[1] Congress enacted IRCA in an effort to control illegal immigration into the United States by eliminating job opportunities for "unauthorized aliens."[2] H.R. Rep. No. 682, Part I, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5649-50. Section 101 of IRCA, 8 U.S.C. § 1324a, thus authorizes civil and criminal penalties against employers who employ unauthorized aliens in the United States and authorizes civil penalties against employers who fail to comply with the statute's employment verification and record-keeping requirements.

Congress, out of concern that IRCA's employer sanctions program might cause employers to refuse to hire individuals who look or sound foreign, including those who, although not citizens of the United States, are lawfully present in the country, included anti-discrimination provisions within the statute. "Joint Explanatory Statement of the Committee of Conference," H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87-88 (1986), reprinted in U.S. Code Cong. & Admin. News at 5653. See generally United States v. General Dynamics Corp., 3 OCAHO 517, at 1-2 (May 6, 1993), appeal docketed, No. 93-70581 (9th Cir. July 8, 1993). These provisions, enacted at section 102 of IRCA, 8 U.S.C. § 1324b, prohibit as an "unfair immigration-related employment practice," discrimination based on national origin or citizenship status "with respect to hiring, recruitment, referral for a fee, of [an] individual for employment or the discharging of the individual from employment." 8 U.S.C. § 1324b(a)(1)(A) and (B).

IRCA prohibits national origin discrimination against any individual, other than an unauthorized alien, and prohibits citizenship status discrimination against a "protected individual," statutorily defined as a United States citizen or national, an alien, subject to certain exclusions who is lawfully admitted for permanent or temporary residence, or an individual admitted as a refugee or granted asylum. 8 U.S.C. § 1324b(a)(3). The statute prohibits national origin

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[1] IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952, was amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[2] An "unauthorized alien" is an alien who, with respect to employment at a particular time, is either (1) not lawfully admitted for permanent residence or (2) not authorized to be so employed by the Immigration and Nationality Act or by the Attorney General. 8 C.F.R. § 274a.1.

discrimination by employers of between four and fourteen employees, 8 U.S.C. § 1324b(a)(2)(A) and (B), thus supplementing the coverage of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., which prohibits national origin discrimination by employers of fifteen or more employees. IRCA prohibits citizenship status discrimination by employers of more than three employees. 8 U.S.C.§ 1324b(a)(2)(A).

Individuals alleging discriminatory treatment on the basis of national origin or citizenship status must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). OSC is authorized to file complaints with the Chief Administrative Hearing Officer ("CAHO"). 28 C.F.R. § 68.4(b)(1). IRCA permits private actions in the event that OSC does not file a complaint before the CAHO within 120 days of receiving it. 8 U.S.C. § 1324b(d)(2); 28 C.F.R § 68.4(c). The charging party may file a complaint directly with the CAHO within 90 days of receipt of notice from OSC that it will not prosecute the case. Id.

II. *Introduction*

A. Procedural History

On May 5, 1993, William R. Tamayo of the Asian Law Caucus, Inc. in San Francisco sent to OSC "by certified mail, return receipt requested" a letter with an attached OSC charge form on behalf of Jia Xian Pan ("Complainant" or "Pan"), alleging that Jude Engineering Inc. dba Christian Engineering Company ("Respondent" or "Christian Engineering") discriminated against Pan by unlawfully terminating his employment on November 18, 1992 based on his "immigration status (asylee)/national origin." See Compl.'s Resp., Ex. A [Letter from William R. Tamayo to OSC]; Charge (Form OSC-1) ¶ 9.[3] Pan asserts in his charge that he was granted permanent resident status on June 17, 1992 and that Respondent employs more than fifteen employees. Attached to Pan's charge form are an addendum, an application for employment and a notice to employee as to change in relationship.

In a letter dated September 22, 1993, OSC informed Pan (1) that it had not made a determination as to his allegations of discrimination

[3] Pan alleged in both his charge and complaint that "Christian Engineering" discriminated against him. Respondent's subsequent pleadings and Complainant's response to Respondent's motion to dismiss, filed on Pan's behalf by Chinese for Affirmative Action, clarified Respondent's proper name.

and was continuing its investigation; and (2) that because the 120-day investigatory and exclusive complaint-filing period specified in 8 U.S.C. § 1324b had ended, he could file his own complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") within 90 days of receipt of OSC's letter.

In a letter dated November 2, 1993, OSC advised Pan that it would not file a complaint on his behalf before an administrative law judge. In a letter dated November 10, 1993, OSC advised Christian Engineering that after investigating Pan's charge, it had determined that "there is insufficient evidence of reasonable cause to believe the charging party was discriminated against" and therefore had decided not to file a complaint regarding the matter.

On November 16, 1993, Pan filed a complaint of discrimination with the California State Department of Fair Employment and Housing ("DFEH") and the Equal Employment Opportunity Commission ("EEOC"). On December 23, 1993, in response to OSC's letter of September 22, 1993 giving Pan notice of a 90-day period in which he could file his own complaint with OCAHO, Pan wrote a 2 1/2-page letter to OCAHO which begins:

> Dear Sir/Madam:
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> I received a letter from Office of Special Counsel on 09-28-93. That letter's result was I complained (sic) Christian Engineering Company. But because I can't write on this paper in English. So I only use my native language (Chinese) to tell you about a case below.

Compl.'s Resp., Ex. F; see Comp.'s Resp. at 3. The rest of the letter is in Chinese, other than the phrase "employment authorization," proper names and a "Merry Christmas" greeting at the end.

In a letter dated January 7, 1994, B. Jack Rivers, Counsel to the CAHO, informed Pan that OCAHO had "received [his] request for guidance in filing a complaint." Compl.'s Resp., Ex. G, at 1. OCAHO received Pan's letter on January 6, 1994.[4] Mr. Rivers told Pan that OCAHO's rules of practice and procedure for proceedings before an Administrative Law Judge require that "[a]ll documents presented by a party in a proceeding must be in the English language, or if in a foreign language accompanied by a certified translation." See 28 C.F.R.

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[4] As the date OCAHO received this letter was not in the record, I requested that information from Mr. Rivers and received his response by electronic mail on June 10, 1994.

§ 68.7(e). Along with the letter, Mr. Rivers enclosed a copy of the OCAHO form complaint/questionnaire, which he stated "must be completed if [Pan] wish[ed] to file a complaint with this office." Mr. Rivers further stated: "Please remember that if you wish to file a complaint with this Office, it is very important that you file the complaint within 90 days from the date you received the letter of determination from the Office of Special Counsel."

On February 17, 1994, Pan filed the complaint in this case, in which he alleges that: (1) he is an alien authorized to be employed in the United States; (2) he is a native and citizen of China; (3) he obtained his permanent residence status in the United States on June 17, 1992; (4) Christian Engineering hired him on May 27, 1992 to work as a fabricator whose job responsibilities included welding and cutting metal; (5) Christian Engineering knowingly and intentionally "laid-off" Pan on November 18, 1992 because of his national origin and citizenship status in violation of 8 U.S.C. § 1324b; (6) "[t]here was no reason given on the 'laid-off' notice, however Tom Chang told [Pan] verbally that there was not enough work"; and (7) Respondent asked Pan for too many documents, including a green card, social security card and driver's license and refused to accept Pan's work authorization card to show that he was authorized to work in the United States, in violation of 8 U.S.C. § 1324b. Complainant seeks backpay from August 11, 1992.

Accompanying Pan's complaint was a letter dated February 8, 1994 from Isabel Huie, a Civil Rights Officer of Chinese for Affirmative Action, a non-profit, membership-supported civil rights advocacy organization in San Francisco. Ms. Huie stated that Pan had recently contacted her organization, requesting assistance in completing the OCAHO form complaint/questionnaire because of his limited English.

On March 30, 1994, Respondent filed its answer, denying that it knowingly and intentionally fired Complainant because of his citizenship status and national origin and raising eight affirmative defenses, including (1) that the complaint failed to state facts sufficient to constitute a claim for relief against the Respondent, and (2) that the complaint is barred by the applicable statutes of limitations, including 8 U.S.C. § 1324b(d)(2) and (3).

Also on March 30, 1994, Respondent filed a motion to dismiss the complaint on the grounds that the complaint is barred because both the charge and the complaint were not timely filed. In support of that motion, Respondent filed a memorandum of points and authorities

("Resp.'s Mem."), a declaration of the president of Christian Engineering, Robert F. Christian ("R. Christian Decl."), along with exhibits and a declaration of Respondent's counsel, John P. Christian, Esq. ("J. Christian Decl.").

On April 4, 1994, I issued an order (1) directing Complainant to file a response to Respondent's motion to dismiss on or before April 22, 1994;[5] and (2) directing Respondent to file a reply to Complainant's response on or before May 2, 1994.

On April 21, 1994, Isabel Huie, a Civil Rights Officer of Chinese for Affirmative Action, a non-profit, membership-supported civil rights advocacy organization responded to Respondent's motion to dismiss on Pan's behalf, filing a response ("Compl.'s Response"), along with several exhibits.

B. Facts

Pan was born May 5, 1952 in the Canton region of China. He graduated from the Engineering College of Guangzhous, China in 1981. At some point in 1990, Pan was granted political asylum in the United States. He obtained status as a permanent resident on June 17, 1992.

Jude Engineering, a California corporation doing business as Christian Engineering, is a small, closely-held corporation engaged in the design and manufacture of custom machinery, located in San Francisco, California. On or about February 22, 1991, Pan applied for a job as a fabricator with Christian Engineering. On May 27, 1992, Christian Engineering hired Pan at the rate of $8.00 per hour to work as a fabricator whose job responsibilities included welding and cutting metal. Compl. ¶ 11; R. Christian Decl., Ex. 1 at 1. Pan was paid $12.00 for overtime and worked 40-50 hours per week.

Complainant asserts that on May 28, 1992, Respondent asked him to fill out several forms. Pan further asserts that he did not possess an alien registration card, although his application for adjustment of status had already been approved. Complainant states that he

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[5] Based on Complainant's pro se status, I directed him to carefully review the motion filed by Respondent, the facts alleged therein as well as the decisions in Halim v. Accu-Labs Research, 4 OCAHO 474 (11/16/92), Salcido v. New-Way Pork, 4 OCAHO 425 (4/28/92), and Lundy v. OOCL (USA) Inc., 2 OCAHO 215 (8/8/90), which this office provided to him. I further directed Complainant to respond to all the facts stated in Respondent's motion and to provide any additional factual information which he believed would be relevant or helpful in resolving Respondent's motion.

presented a valid work authorization card with an August 18, 1992 expiration date to Tom Chang, a member of Respondent's management team. Pan asserts that Chang stated to him, "When you get your green card you better show it to me or else I'll think that you're tricking me." Pan states that he received his alien registration card on June 17, 1992, and soon after presented it to Chang. Pan asserts that throughout his employment, Chang questioned the authenticity of Pan's alien registration card in front of fellow employees, at least twice in the presence of Complainant and that other times, Cantonese employees reported to Pan that Chang had done so.

Pan asserts that Chang, who is Taiwanese, asked Complainant why after being in the United States for two years, he did not have a greencard. Pan claims that he stated that it was a personal matter and that Chang responded, "You can't hide it. You must explain your immigration status." Pan further asserts that Chang told the other employees between May 29 and June 21 that Pan had applied for political asylum. According to Complainant, after Chang revealed Pan's immigration status, the Shanghainese employees mocked Pan on September 3, 1992 by stating that they could go back to China, but that Pan could not.

Pan further asserts that:

> On or about June 21, 1992 I attempted to buy a car from a Cantonese man in the sunset district. Zhou, a Shanghainese and a fellow employee wanted the same car. The seller refused to bargain with Zhou and wanted to sell the car to me. The following day at work, none of the Shanghainese employees would talk to me. Between 9-11 AM that day, Tom Chang stopped me 3 times and told me to give up the car to Zhou. Zhou was a more senior employee and brought his complaint about the car seller preferring me over him to another senior employee. Apparently, that senior employee relayed Zhou's complaint to Chang. On the 3rd occasion (sic), Chang confronted me about the car, threatened me and stated that it would be very difficult for me to work there and to keep my job. I was apparently the highest skilled Cantonese employee.
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> On or about August 3, 1992, at 5 PM, a coworker dropped a steel pole on my left foot. As a result of the injury, I took August 4-5 off from work. On August 6, the doctor recommended that I take that day off. I showed the doctor's letter to the manager. Chang, however, stated to me that I had to work that day. I then worked because Chang ordered me to and stated that it was in my best interest to work that day.
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> On or about September 3, 1992, Chang sent me into the sawing room (table saw). Zhou tried to pass through the room and picked a narrow path through it although the room was wide open. Zhou pushed me in the back while I was hunched over the saw while the saw was on. Zhou passed through the room. When he returned back, Zhou pushed me again. Thereupon, I asked him, "Why are you pushing me?" Zhou stated that if they had a fight, Zhou can always go back to China but I can't. (The saw blade is a 1/2 meter in diameter; 6" of the blade were exposed on the surface.) Another employee, Mr. Fung, witnessed this incident.

> On or about September 4, 1992, at a workers meeting, Zhou took out his wrench from this (sic) backpocket and said "you can't even bump some people . . . if he doesn't treat me well, he better watch out." He was referring to me.
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> A few days after the saw incident with Zhou, I went to the Equal Employment Opportunity Commission in San Francisco where I was interviewed by an employee. I complained about the work conditions and the treatment by Zhou. The counselor told me that I should quit my job and seek work elsewhere through the help of Chinese social service agencies since the conditions and the atmosphere of the workplace were becoming increasingly hostile. The counselor also stated that my statement would be kept on record and that if I was ever terminated permanently from the job I should return to EEOC to file a complaint.
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> On or about September 8, 1992, I told Chang that Zhou threatened me at the meeting, and that Zhou pushed me into the saw. Chang stated that he already heard about the incident and mentioned that if the incident was true that he better fire Zhou. However, Zhou was never fired or disciplined.
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> Some time toward the end of October, I was using a gas burner to cut some material. A Shangahinese employee reported that I bumped a light with a lift and almost killed somebody. Chang asked him about the alleged incident. I stated that I did not remember any such incident, and that I was using a hammer (to break the material which was cut cleanly) and not operating a lift at about the time of the alleged accident (4:50 PM). Chang warned me that I better be honest or else I would be fired.
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> On at least ten occasions (sic), Chang singled me out and stated that if I ever hurt anybody at work or did anything wrong, I would be arrested and sent to jail, and that all my efforts to enter the United States illegally and get lawful permanent residency would have been wasted.
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> Sometime in early November 1992, Chang talked to Zhou and others who had abused me. He asked which employees should be laidoff (sic) now that there is little work to do.

Addendum to Charge, at 2-3.

On November 18, 1992, Christian Engineering laid-off Pan and three other employees, telling them that there was not enough work to keep them on the payroll. See R. Christian Decl., Ex. 1 at 1. The other laid-off employees were (1) Tang, hired late September 1992; (2) Chan, hired early September; and (3) Li, hired early September. Pan had more seniority than some of the employees who were retained, e.g., Lao, who performed a similar job and had been employed by Respondent for 2.5 months. Furthermore, none of the Shanghainese were terminated or laid off. At the time of the layoff, Respondent employed 28 individuals.[6] Christian Decl. ¶ 4 and Ex. K.

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[6] One year later, Respondent employed only 14 employees (Christian Decl., Ex. 1(L) due to the recession. Christian Decl. ¶ 4.

The complaint states that Pan filed his charge with OSC on April 9, 1993. See Complaint ¶ 18. In contrast, the letter dated May 5, 1993 from William R. Tamayo of the Asian Law Caucus, Inc. in San Francisco to OSC, states that ALC had assisted Pan in assembling his charge and that ALC enclosed that charge and other items with its letter pursuant to Pan's request. See Compl.'s Response, Ex. A. OSC received Pan's charge on May 19, 1993. R. Christian Decl., Ex. 1(C) [OSC's letter of May 24, 1993 to Tom Chang of Christian Engineering regarding Pan's charge].

In a letter dated September 22, 1993, OSC informed Pan that it had not made a determination as to his allegations of discrimination and was continuing its investigation. OSC also informed Pan that because the 120-day investigatory and exclusive complaint filing period specified in 8 U.S.C. § 1324b had ended, he could file his own complaint with OCAHO within 90 days of receipt of that letter. Pan received OSC's right-to-sue letter on September 28, 1993. See Compl.'s Resp., Ex. F, at 1.

In a letter dated November 2, 1993, OSC advised Pan that it would not file a complaint on his behalf before an administrative law judge. On February 17, 1994, Pan filed the complaint in this case.

III. *Discussion*

A. National Origin Portion of the Complaint Dismissed For Lack of Jurisdiction

Complainant alleges that Respondent terminated his employment based on his "Cantonese" national origin. The jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is limited to claims against employers employing between four and fourteen employees, 8 U.S.C. § 1324b(a)(2)(A) and (B), thus supplementing Title VII's coverage of national origin discrimination by employers of fifteen or more employees. See, e.g., Trivedi v. Northrop Corp. and Department of Defense, 4 OCAHO 600, at 13 (Jan. 25, 1994); Rusk v. Northrop Corp. and Department of Defense, 4 OCAHO 607, at 15-16 (February 4, 1994); Dhillon v. Regents of the University of California, 3 OCAHO 497, at 11 n.8 (March 10, 1993); Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 8 (Dec. 2, 1992).

As it is undisputed from the record in this case that Christian Engineering employed more than fourteen employees at all times

relevant to the alleged acts of discrimination, I do not have jurisdiction to determine Complainant's allegation of national origin discrimination.[7] Complainant's allegation of national origin discrimination is therefore dismissed.

B. Citizenship Status Claim and Claim that Respondent Asked for Too Many Documents Dismissed for Lack of a Timely Complaint

1. Allegation of Citizenship Status Discrimination

a. Complainant Has Standing to File a Citizenship Claim

Pan also alleges that Respondent terminated his employment based on his immigration status as a political asylee, thus violating IRCA's prohibition against citizenship status discrimination. In order to have standing to bring a claim of citizenship status discrimination under IRCA, the claimant must be a "protected individual," 8 U.S.C. § 1324b(a)(B), statutorily defined as a United States citizen or national, an alien who is lawfully admitted for permanent or temporary residence, a refugee, or an individual granted asylum. 8 U.S.C. § 1324b(a)(3).

The statute, however, provides two exclusions to this classification:

> (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

8 U.S.C. § 1324b(a)(3)(i) and (ii).

As Respondent does not dispute that Complainant is a "protected individual," I conclude that based on his status as a permanent resident, Complainant is a "protected individual," who therefore has standing to file the complaint in this case.

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[7] As I lack jurisdiction over the national origin portion of Pan's claim, I need not reach the issue of whether discrimination based on Cantonese origin (versus Chinese origin) constitutes national origin discrimination (versus discrimination based on race or ethnicity).

b. Respondent is Subject to IRCA's Prohibition Against Citizenship Status Discrimination

Section 102 of IRCA provides for causes of action based on citizenship status discrimination against employers of more than three employees. See 8 U.S.C. § 1324b(a)(1)(B), (a)(2)(A); see also Westendorf v. Brown & Root, 3 OCAHO 477, at 12 (Dec. 2, 1992). As Respondent employed 28 individuals on the date of the alleged discriminatory act, Respondent is subject to IRCA's prohibition against this type of discrimination.

2. Legal Standard for Summary Decision

Under the rules of practice and procedure governing these proceedings, an administrative law judge "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "When a party fails to comply with the procedural filing requirements of the forum, there is no genuine issue of material fact to be decided, and the complaint may be dismissed on that basis alone." Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 3 (Feb. 13, 1991) (quoted in Salcido v. New-Way Pork Co., 3 OCAHO 425, at 3 (April 28, 1992)). Where as here, I look outside the pleadings to determine a motion to dismiss, that motion should be construed as a motion for summary decision. Id.

3. The Charge Was Timely Filed

Respondent asserts that Pan did not file his charge of discrimination with OSC until May 19, 1993, 182 days after the alleged discriminatory act, and therefore, Complainant failed to timely comply with the statute and regulations which require complainants to file their OSC charges within 180 days of the date of the alleged unfair employment practice. Resp.'s Mem. at 2 (citing 8 U.S.C. § 1324b(d)(3) and 28 C.F.R. § 68.4(a)). Respondent argues that because Complainant failed to timely file his OSC charge, the complaint should be dismissed.

IRCA provides that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. 8 U.S.C. § 1324b(d)(3). Similarly, OSC's regulations and this agency's rules of practice and procedure provide that charges of discrimination in violation of IRCA must be filed within 180 days of the

alleged unfair immigration-related employment practice. 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4.

It is undisputed that the alleged unfair immigration-related employment practice occurred on November 18, 1992 and that in order to be timely, Pan's charge must have been filed within 180 days of that alleged discriminatory practice. Respondent, however, misconstrues the law, arguing that the date OSC received the charge is the date of filing. OSC, however, has established that "[f]or purposes of determining when a charge is timely under [8 U.S.C. § 1324b], a charge mailed to the Special Counsel, shall be deemed filed on the date of its post-mark." 28 C.F.R. § 44.300(b). Therefore, Pan's charge must have been post-marked by May 17, 1993 in order to be timely filed.

Although the complaint states that Pan filed his charge with OSC on April 9, 1993 (see Complaint ¶ 18), the record is clear that the charge was mailed later as the letter accompanying the charge form was dated May 5, 1993. See Compl.'s Response, Ex. A. Although it is unlikely that a letter sent by certified mail from San Francisco (see Compl.'s Response at 2) would take 12 days to get to Washington, D.C, the record is undisputed that the OSC charge form was sent by certified mail to OSC on May 5, 1993. I therefore conclude that Pan's charge was post-marked on May 5 and thus was timely filed.

4. The Complaint is Time-Barred

Respondent argues that because the complaint was not timely filed, it should be dismissed. Resp.'s Mem. at 2-3 (citing 28 C.F.R. § 68.8(c)(2) and 8 U.S.C. § 1324b(d)(2)). IRCA provides in relevant part that:

> If the Special Counsel, after receiving . . . a charge respecting an unfair immigration-related employment practice . . . has not filed a complaint before an administrative law judge with respect to such charge within [120 days of the date OSC received the charge], the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to [8 U.S.C. § 1324b(d)(3)]) file a complaint directly before such a judge within 90 days after the date of receipt of the notice.

8 U.S.C. § 1324b(d)(2).[8] See also 28 C.F.R. §§ 44.303(c) and 68.4(2)(c).

[8] Section 1324b(d)(3) provides that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel."

The statute and regulations therefore required Pan to file his complaint within 90 days after receipt of notice from OSC that the 120-day investigatory and exclusive complaint-filing period had elapsed. Pan was notified by a letter dated September 22, 1993 from OSC that he had 90 days from receipt of that letter to file a complaint before an administrative law judge. Pan received OSC's right-to-sue notice on September 28, 1993. See Compl.'s Resp., Ex. F, at 1. He therefore had until December 27, 1993 to file a complaint with the CAHO.

In response to OSC's right-to-sue letter, on December 23, 1993, Pan filed a letter mostly in Chinese which he argues constitutes a complaint. See Compl.'s Resp. at 3. OCAHO's rules of practice and procedure for proceedings before an Administrative Law Judge provide that a § 1324b complaint must contain:

> (1) A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated;
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> (2) The names and addresses of the respondents, agents and/or their representatives who have been alleged to have committed the violation;
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> (3) The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred;
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> (4) A short statement containing the remedies and/or sanctions sought to be imposed against the respondent; and
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> (5) Be accompanied by a statement identifying the party or parties to be served by [OCAHO] with notice of the complaint pursuant to § 68.3 of this part.

28 C.F.R. § 68.7(b).

Pan's letter may have sufficed as a complaint if it had been written in English or accompanied by a certified translation. See 28 C.F.R. § 68.7(e) (requiring all documents presented by a party in a proceeding to be in English or, if in a foreign language, accompanied by a certified translation). As a certified translation did not accompany Pan's letter, the letter was not a valid pleading.

In contrast to an OSC charge, deemed filed the date of the postmark, a complaint is deemed filed the date it is received by OCAHO. 28

C.F.R. § 68.8(b); see Grodzki v. OOCL (USA), Inc., 2 OCAHO 295, at 8 (Feb. 13, 1991). It therefore was not until February 17, 1994, the date OCAHO received Pan's form complaint that his complaint was filed. As Pan filed the complaint 142 days after receiving notice from OSC, he was 52 days late.[9]

In Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), the Supreme Court set forth the following factors for a court to examine in determining whether the 90-day filing period under Title VII may be equitably tolled: (1) when a claimant has received inadequate notice; (2) where a motion for appointment of counsel is pending; (3) where the court has misled the plaintiff to believe that he or she complied with the court's requirements; or (4) where affirmative misconduct on the part of the defendant lulled the plaintiff into inaction.

Complainant admits that on September 28, 1993, he received notice from OSC that the complaint must be filed within 90 days. He has not asserted that he was misled by OCAHO, OSC or Respondent as to the date his complaint had to be filed. Nor has Pan alleged any misconduct on the part of Christian Engineering that prevented him from timely filing. Furthermore, no motion for appointment of counsel is pending. Complainant's response to Respondent's motion to dismiss merely states that "Pan did try to be timely." Compl.'s Resp. at 3.

Based on the fact that Complainant wrote a letter to OCAHO on December 23, 1993, I agree that he attempted to file a timely complaint. Pan's attempt at timeliness, however, does not warrant equitably tolling the statute of limitations in this case. See Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 9 (Feb. 13, 1991) (ALJ denied equitable relief from the 90-day filing requirement where pro se complainant was one day late). I therefore conclude that the complaint must be dismissed for lack of timeliness.[10]

See, e.g., Halim v. Accu-Labs Research, 4 OCAHO 474 (Nov. 16, 1992); Salcido v. New-Way Pork, 4 OCAHO 425 (April 28, 19/92); Grodzki v.

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[9] Even if Pan's handwritten letter of December 23, 1993 constituted a valid complaint, it was not received until January 6, 1994 and therefore, would have been filed 14 days late.

[10] In the interests of justice, OSC may wish to consider clarifying the law for pro se complainants by inserting in their determination letters to such individuals (1) that compliance with IRCA's 90-day private complaint-filing period requires that OCAHO receive the complaint within 90 days, and (2) that complaints must be written in English in order to be valid.

OOCL (USA) Inc., 2 OCAHO 295 (Aug. 8, 1990). Accordingly, Respondent's motion for summary decision is granted as to Complainant's citizenship status claim and the claim that Respondent asked for too many documents.

This Decision and Order dismissing the national origin portion of the complaint for lack of jurisdiction and granting Respondent's motion for summary decision as to the other allegations in the complaint is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). Not later than 60 days after entry, Complainant may appeal this Decision and 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. 8 U.S.C. § 1324b(i)(1).

SO ORDERED on this 15th day of June, 1994 in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge