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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 90200363
MCDONNELL DOUGLAS CORPORATION, Respondent.	)	

FINAL ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION REGARDING MR. KIM BUMBICO

I. *Procedural History*

This decision addresses the claim of the last of the twenty three charging parties in this case. The procedural history of this case has been set down in prior Decisions and Orders. At this point, I have before me Respondent's Motion For Summary Decision with regard to Mr. Kim Bumbico's charges.

In its Motion for Summary Decision, Respondent presented the following arguments: that Mr. Bumbico's charge, allegedly filed with the Office of Special Counsel on August 16, 1990, was untimely; that Mr. Bumbico has not prosecuted his case and has abandoned his claim as evidenced by his not showing up for his deposition or notifying Respondent, prior to the appointed time that he would not appear and that Mr. Bumbico's charge does not state a claim upon which relief may be granted, i.e., that he has alleged that he was not offered comparable wages of the British workers and that he was not allowed to work on days or at hours when British workers were allowed to work.

In support of its motion, Respondent filed the following documents:

1. a copy of an unsigned charge form allegedly from Mr. Bumbico, date stamped by OSC on August 16, 1990;

2. a copy of OSC's questionnaire to Mr. Bumbico date stamped on August 16, 1990;

3. a copy of an envelope addressed to OSC with an illegible postmark date;

4. a copy of a Blocking Tag date stamped by OSC on July 2, 1990;

5. a preprinted, check-off affidavit from Mr. Bumbico, date stamped by OSC on July 2, 1990 in which Mr. Bumbico states that he had applied for a position as a Jig and Fixture Builder with Respondent within the last three years, that he has not been offered a direct hire position by Respondent, that he had been told that there was a hiring freeze, that for six months he had been denied or unable to work days or hours when British temporary workers were allowed to work and that American workers were being laid off after being displaced by temporary foreign workers;

6. a copy of an envelope postmarked June 29, 1990 and addressed to Carol Mackela, Esq., of the Office of Special Counsel;

7. Kim Bumbico's declaration dated August 22, 1991, stating that, for employment purposes, he was temporarily residing in Mt. Clemens, Michigan and would be there through the end of the year; further, he did not believe his new employer would allow him time off nor could he afford to fly to Los Angeles for a deposition scheduled by Respondent for October, 1991;

8. a handwritten statement by Mr. Bumbico which appears to be a response to a request for production of documents from Respondent;

9. a copy of a U.S. Postal Service signed certified return receipt, dated April 3, 1992 indicating that a letter was received by Mr. Bumbico in Michigan;

10. Reporter's Transcript of Proceedings, dated August 27, 1992, certifying that Mr. Bumbico did not appear for his deposition on August 27, 1992; notice sent to Mr. Bumbico on August 4, 1992 did not result in any response.

On February 18, 1994, I issued an Order to Show Cause requiring that Mr. Bumbico file with this court, within 15 days of receipt of said Order, a statement as to whether he had decided not to prosecute his claim. If he intended to proceed with this action, he was required to file, in the same time period, a statement of the alleged discriminatory acts directed at him by Respondent, his theory of the case, his plan of proof of the alleged citizenship discrimination, a list of his prospective witnesses, and their proposed testimony and its relevance, and a list of any other evidence that he will bring forth to prove his case.

Mr. Bumbico was cautioned that should he not file this information, I might infer that he had decided to abandon his claim and I would rule on Respondent's motion without benefit of his input.

On March 7, 1994, Mr. Bumbico filed a letter pleading in which he stated that he intended to continue to prosecute his claim. Mr. Bumbico admitted not showing up for his deposition but disputed the fact that Respondent was not notified. Mr. Bumbico stated, further, that he had no "physical evidence" to present to prove his claim. He also stated that the only witness he knew of with "good knowledge" of this case, had died. In his words, Mr. Bumbico stated: "So, if its (sic) evidence I need to make a solid case and to receive any kind of settlement in my favor well then I can only say tough luck for me....". Mr. Bumbico continued by stating that he could present his original complaint and that he felt, personally, that he was discriminated against in violation of 8 U.S.C. § 1324b because he was not hired despite two trips to Respondent's employment office while Respondent was hiring individuals with H-2B visas.

II. *Discussion*

A. Dismal-Summary Decision

Under 28 C.F.R. 68.38(c), I 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.

The Supreme Court has interpreted the burdens of proof required to succeed on summary decision. The Court has established that the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970). The party may do so by demonstrating to the court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden at trial. Celotex Corp. v. Catrett, 477 U.S. U.S. 317, 323 (1986). The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial" and must "do more than simply show that there is some metaphysical doubt as to the material facts." Fed. R. Civ. P. 56(e); Matushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Further, speculation, conclusory allegations and mere denials are not enough to raise a genuine issue of fact. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

Returning to the facts and issues in this case, under 28 C.F.R. 68.23, if a party fails to comply with an order, I may, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party and/or rule that, for the purposes of the proceeding, the matter or matters concerning which the order was issued are established adversely to the non-complying party and/or rule that the non-complying party may not introduce into evidence, or otherwise, rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense and/or rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents or other evidence would have shown.

While Mr. Bumbico responded to my Order to Show Cause and indicated that he would like to continue with his case, his theory was that he wasn't hired although H-2B workers were. He admitted that he had no evidence or witnesses to produce who could support his case.

In order to prove a citizenship discrimination case, the Supreme Court has set forth guidelines. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993). Once an individual alleging discrimination establishes a prima facie case, the burden of production shifts to the employer to assert legitimate nondiscriminatory reasons for its employment

decision. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-255 (1981).

Applying this analysis to this case, I find that Mr. Bumbico can set forth a prima facie case. See McDonnell Douglas, supra; Burdine, supra. The court held that an individual alleging discrimination in employment must first establish a prima facie case by showing: (1) that he is a member of a protected class; (2) that he was qualified for a position with Respondent as a jig and fixture worker; (3) he was not hired for the position, and (4) another individual with a different citizenship status was hired.

Under the McDonnell Douglas/Burdine analysis, the burden shifts to Respondent to show, not prove, a legitimate business reason for its actions. At this point, based on a review of the file, I can infer and find that Respondent has a legitimate business reason for hiring H-2B workers. I base this finding on the evidence of record and testimony of the Department of Labor (DOL) Specialist who testified under oath to the requirements of obtaining H-2B visas and the fact that Respondent fully complied with the DOL's mandates.

Now based on the McDonnell Douglas/Burdine/St. Mary's analysis, the burden of persuasion shifts back to Complainant, Mr. Bumbico, for proof of the discrimination. In Mr. Bumbico's own words, he cannot do so. His bold allegations are not sufficient. Therefore, I must find that no citizenship discrimination occurred.

As such, I find that there is no genuine issue of material fact. Respondent's Motion for Summary Judgment is granted.

This Decision and Order is the final Decision and Order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

SO ORDERED this 15th day of August, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge