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

March 14, 1995

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| WARTAN BOZOGHLANIAN,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. 1324b Proceeding<br>OCAHO Case No. 94B00074 |
| HUGHES RADAR SYSTEMS GROUP,<br>Respondent. | ) | |

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On September 15, 1993, Wartan Bozoghlanian (complainant) filed a discrimination charge with the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). In that charge, he alleged that Hughes Radar Systems Group (Hughes Radar or respondent) discriminated against him because of his citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978 (1990).

Complainant alleged that on October 27, 1987, he attended an on-campus recruitment interview at California State University, Los Angeles, and at the conclusion of that interview, Ed Smith, respondent's employment specialist, asked complainant when he had become a naturalized United States citizen. Complainant replied that he became a naturalized citizen in late 1985, prompting Mr. Smith to respond that the position for which complainant was applying required a security clearance. Complainant also alleged that Mr. Smith told him that in order to be eligible for that clearance an individual was required to have been a United States citizen for a period of five (5) to ten (10) years. Complainant concluded that those statements by Mr. Smith

resulted in his having been denied employment with Hughes Radar solely because of his citizenship status.

On January 11, 1994, OSC notified complainant by certified mail that it had not finished its investigation of his charge, and advised complainant that he could file his complaint directly with the Office of the Chief Administrative Officer (OCAHO), if he did so within 90 days of his receipt of that letter.

On or around March 21, 1994, after having completed its investigation of complainant's charge, OSC informed him by letter that it had determined that there was no reason to believe that citizenship status discrimination had occurred as a result of the so-called "5/10 year rule," at issue in Huynh v. Cheney, 87-3436 TFH (D.D.C.). In addition, OSC advised complainant that he had failed to file his citizenship status discrimination charge in a timely manner.

For those two (2) reasons, OSC advised complainant that it would not file a complaint with this Office on his behalf and once again informed him that he was entitled to file a private action directly with an administrative law judge assigned to this Office.

On April 8, 1994, complainant filed the Complaint at issue, alleging therein that on October 27, 1987, respondent refused to hire him for a position for which he was qualified and for which respondent was looking for workers, and did so based upon his citizenship status and his Lebanese national origin.

When asked to state the reason he had not been hired, complainant again alleged that on October 27, 1987, during an interview at California State University, Los Angeles, respondent's company representative told him that in order to obtain employment with respondent, it would be necessary to obtain a security clearance, which would require that complainant must then have been a United States citizen for at least five (5) years.

On May 18, 1994, respondent filed its Answer, in which it denied that it had discriminated against complainant because of his national origin and citizenship status. Respondent also denied making any statements regarding the qualifications necessary for obtaining a security clearance.

Also in that Answer, respondent asserted the following seven (7) affirmative defenses:

1) Complainant has failed to state a claim for which relief can be granted; (2) Complainant is time-barred from raising his claim whether by laches or by statute of limitations; (3) Complainant is estopped from and/or has waived his claims by his acts or omissions; (4) Complainant is not a qualified "protected individual" under 8 U.S.C. § 1324b et seq.; (5) Complainant was not affected by the Department of Defense's so called "five/ten year rule" (previously codified at 32 C.F.R. 154.16(c)) in that he was not a former citizen of a country covered by that regulation; (6) Complainant was not affected by the Department of Defense's so called "five/ten year rule" (previously codified at 32 C.F.R. 154.16(c)) because, at the time that the alleged discrimination occurred, the Complainant already had been resident in the United States for over ten years and thus did not fall within the purview of that regulation; and (7) Complainant has suffered no damages.

Respondent's Answer concluded with a request that complainant's case be dismissed with prejudice and that it be awarded attorneys' fees pursuant to 28 C.F.R. Section 68.52 and 5 U.S.C. Section 504.

On June 30, 1994, complainant filed a pleading captioned Motion for Amending the Following Complaints, which requested that this Complaint, as well as seven (7) additional complaints then pending, be amended to add the Department of Defense (DoD) as a party respondent. Complainant asserted that at the time he filed his Complaint against respondent he was unaware that he could also have filed a complaint against DoD, and he subsequently learned that he could have done so, and that the inclusion of DoD was "an integral part of the whole issue." Motion for Amending, at 2.

Complainant also contended in that June 30, 1994 motion, that if he was unable to amend his Complaint to add DoD as a respondent in this matter, the foundations of his Complaint would be so weakened as to make it impossible for complainant "to obtain a complete, just and fair hearing." Id.

On July 7, 1994, complainant's Motion for Amending the Following Complaints was denied, without prejudice, and complainant was instructed to file separate pleadings for each of his eight (8) OCAHO cases then pending. Complainant was given until July 22, 1994 in which to refile his motion to amend this Complaint.

Accordingly, because complainant has not refiled his motion to add DoD as a respondent in this proceeding, that motion is hereby denied with prejudice to refiling.

On July 18, 1994, complainant filed a pleading captioned Motion Showing Cause Why My Complaint Should Not Be Dismissed, in response to respondent's May 18, 1994 Answer. Complainant argued

that his Complaint should not be dismissed as having been untimely filed because equitable modification of the 180-day filing deadline was justified in this case. See Complainant's Motion, at 5-6.

Complainant asserted that the 180-day filing period is regularly extended for periods during which: an employer held out hope of employment or the applicant was not informed that he was no longer being considered for the position or, the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. Complainant contends that he was justified in not giving up hope for employment since he was never notified that he was no longer being considered for the position. Id. at 5.

Complainant additionally asserted that although Lebanon, his country of origin, did not appear on the "List of Designated Countries," (a list that enumerated the countries of origin to whose natives the "5/10 year rule" pertained and whose interests were determined by DoD to be hostile to the United States, 32 C.F.R. Section 154, Appendix G (1987)), Lebanon had in fact been hostile to the United States. Complainant attributes his having been denied employment by respondent upon that hostility.

On July 22, 1994, complainant filed an additional responsive pleading captioned "For Augmenting the Record. More Facts Concerning My Assertion That I Did Not File My Charges Late With The Office Of Special Counsel."

Complainant maintained in that motion that his charge was timely filed in response to a posting from OSC notifying individuals potentially adversely affected by the "5/10 year rule," which posting was, according to complainant, in effect at the time that he filed his OSC charge.

On September 2, 1994, respondent filed a pleading captioned Respondent Hughes Radar System Group's Response To Complainant's Motion Showing Cause Why His Complaint Should Not Be Dismissed And Cross Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted Or, In The Alternative, Motion For Summary Decision. In support of its motion, respondent offered the following reasons:

1. Complainant alleges that he was discriminated against on the basis of his national origin. Because HRSG employs more than 15 employees, the exclusive remedy for Complainant's claim of national origin discrimination is provided by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., enforced by the

Equal Employment Opportunity Commission ("EEOC"). Accordingly, Complainant's national origin discrimination claims may not be brought before this Court under the Immigration Reform and Control Act ("IRCA").

2. Complainant has failed to state a claim under 8 U.S.C. § 1324b(a)(1)(B) because, his country of origin, Lebanon, is not on the list of countries whose citizens were targeted for application of the Department of Defense's ("DoD") so called "5/10 year rule." Thus, even if Hughes had reviewed Complainant's application for employment in light of the 5/10 year rule, the Company would not have discriminated against Complainant. As a result, Complainant would not have been adversely affected by any such discrimination.

3. Complainant has failed to state a claim upon which relief can be granted because all of the claims contained in his Complaint are barred by the applicable statute of limitation for IRCA-related claims. 8 U.S.C.§ 1324b(d)(3).

4. Complainant has failed to state a claim under 8 U.S.C. § 1324b(a)(1)(B) because the waiver of timeliness as an affirmative defense to claims based upon the 5/10 year rule agreed to by the Department of Defense ("DoD") in the Settlement Stipulation in Huynh v. Cheney, Civil Action No. 87-3436 TFH (D.D.C. Dec. 31, 1991) does not apply in this case. This waiver is only binding on the DoD and not on HRSG who was not a party to the settlement. Further, even if the waiver was binding on HRSG, the 180-day statute of limitation began to run once the Complainant knew, or should have known, of the facts giving rise to the alleged violation.

5. In light of the Supreme Court's decision in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), as well as the OCAHO's decisions in Rusk v. Northrop Corp. and Dep't of Defense, 4 OCAHO 607 (February 4, 1994) and Trivedi v. Northrop Corp. and the Dep't of Defense, 4 OCAHO 600 (January 25, 1994), Complainant cannot establish the existence of factors allowing equitable tolling of the statute of limitations. In the absence of such factors, equitable tolling should not be allowed. Therefore, Complainant's claims should be dismissed as being untimely filed and the entire Complaint dismissed as a matter of law.

6. The facts in evidence fail to support Complainant's claims and further, fail to refute Respondent's claims that it did not hire Complainant for other than non-discriminatory reasons. Therefore, summary decision in HRSG's favor is appropriate.

## Discussion

The pertinent procedural rule governing motions to dismiss in unfair immigration-related employment practice cases provides that:

> The respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint.

28 C.F.R § 68.10.

A motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. Section 68.10 is similar to and based upon Rule 12(b)(6) of the Federal Rule of Civil Procedure, which provides for the dismissal of cases in Federal court. See Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994). In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the complainant. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim unless the complainant can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Complainant has alleged that respondent committed two (2) unfair immigration-related employment practices namely, respondent's alleged wrongful failure to hire him based upon his Lebanese national origin and its failure to hire him because of its citizenship status.

Administrative law judges assigned to this Office have limited subject matter jurisdiction over claims based upon national origin under IRCA since it is statutorily limited to claims against employers employing between four (4) and 14 individuals. See 8 U.S.C. §§ 1324b(a)(1)(A); 1324b(a)(2)(A); 1324b(a)(2)(B). Consequently, an individual cannot maintain an IRCA national origin claim against an employer if that employer employs less than 4 or more than 14 employees. See, e.g., Tal v. Energia, 4 OCAHO 705, at 15 (1994).

It is undisputed that Respondent, Hughes Radar Systems Group, employs more than 14 employees. Complainant acknowledged that respondent business has fifteen (15) or more employees, see Complainant's Charge Form, dated September 9, 1993, at 2, and respondent concurred with complainant that it employs more than fifteen (15) persons. See Respondent's September 2, 1994 Motion to Dismiss, at 1.

Therefore, because respondent employs more than 14 individuals, this Office lacks subject matter jurisdiction over complainant's claim of discrimination based upon his Lebanese national origin. See 8 U.S.C. § 1324b(a)(2)(B). Accordingly, that portion of complainant's April 8, 1994 Complaint alleging discrimination based upon national origin must be dismissed as being outside the jurisdiction of OCAHO. See Tal, 4 OCAHO 705, at 15; Holguin v. Dona Ana Fashions, 3 OCAHO 582, at 3 (1993); Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 5-6 (1992).

Having dismissed complainant's first cause of action, we now review his remaining claim, that respondent discriminated against him based upon his citizenship status.

The filing of a timely charge with OSC is a prerequisite for filing a private action with this Office. See 8 U.S.C. § 1324b(d). Under IRCA and the pertinent regulations, a charge must be filed with OSC within 180 days after the occurrence of the alleged unlawful act on which the charge is based. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a). In pertinent part, IRCA provides:

> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of a charge with the Special Counsel.

8 U.S.C. § 1324b(d)(3).

Complainant alleged in his charge and in the resulting Complaint that respondent's alleged unfair immigration-related employment practice of failing to hire him because of his citizenship status occurred on October 27, 1987. The record in this case clearly discloses that OSC did not accept complainant's charge as complete until September 15, 1993, or almost six (6) years later, and thus well beyond the 180-day statute of limitations provided for in IRCA. See 8 U.S.C. 1324b(d)(3).

Complainant asserted in his Complaint that he filed his charge with OSC on April 15, 1993. Complainant specifically alleged that he filed one (1) charge with OSC on April 15, 1993 for all eight (8) of his claims, and that August 4, 1993 OSC notified him that he needed to file a separate charge for each claim. As discussed earlier, in considering a motion to dismiss, a court must liberally construe a complaint in the light most favorable to the complainant. However, even accepting complainant's assertion in the Complaint that he filed his charge with OSC on April 15, 1993, as opposed to September 15, 1993, that charge would still have been filed some five (5) years, or 1818 days, after the 180-day filing deadline of April 24, 1988.

Complainant's failure to comply with this 180-day filing deadline is not per se dispositive, because the deadline is subject to equitable modification on a case-by-case basis. United States v. Mesa Airlines, 1 OCAHO 74, at 26 (1989). The filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period by

misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (1991). For reasons to be discussed momentarily, complainant is not entitled to an equitable modification of the 180-day filing deadline under these facts.

In his July 18, 1994 "Motion Showing Cause Why My Complaint Should Not Be Dismissed," complainant argued that the 180-day filing deadline should be extended from October 27, 1987 to September 15, 1993, the date upon which he filed his charge with OSC. In support of his position, complainant alleged that respondent's representative had not informed him that he was no longer being considered for the position and also that respondent had failed to advise him of the results of his job interview. For those reasons, complainant contended that he justifiably held out hope of employment and was lulled into inaction by respondent's silence during that six (6) year period.

As the undersigned stated in Bozoghlanian v. Magnavox Advanced Products and Systems Co., 4 OCAHO 653, at 7 (1994), "[c]omplainant's contention is weak at best since it is simply not reasonable for a job applicant to believe that he is still being considered for a position almost six (6) years after [applying and interviewing for a position]."

Complainant has further alleged facts implicating the "5/10 year rule," and the explicit waiver of timeliness as an affirmative defense to causes of action under IRCA, 8 U.S.C. § 1324b, resulting therefrom under the Settlement Stipulation in Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991), which was subsequently approved by the United States District Court for the District of Columbia on December 31, 1991.

The "5/10 year rule" denied security clearances to naturalized citizens whose countries of origin were determined to have interests adverse to the United States. Huynh v. Cheney, 679 F. Supp. 61, 63 (D.D.C. 1988). Pursuant to the "5/10 year rule," DoD published a list of twenty-nine (29) countries and areas determined to have those hostile interests. See 32 C.F.R. § 154, Appendix G (1987).

Interestingly, complainant's country of origin, Lebanon, did not appear on that "List of Designated Countries" prepared by DoD. Regardless of complainant's contention that Lebanon had interests that were hostile to the United States, the fact remains that Lebanon was not on that list and thus the "5/10 year rule" was not involved in respondent's refusal to hire, or even to interview, complainant.

Accordingly, complainant's case does not come under the scope of the settlement stipulation in Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991), and as such, complainant's untimely filed Complaint is not entitled to the Huynh waiver of timeliness.

Based upon that determination, coupled with complainant's demonstrated failure to have timely filed his IRCA charge with OSC within the required 180-day filing period, complainant's request for administrative review must be denied.

## Order

In view of the foregoing, respondent's September 2, 1994 Motion to Dismiss is granted and complainant's April 8, 1994 Complaint is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

## Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this 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, and does so no later than 60 days after the entry of this Order.