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

September 12, 1996

JACK N. TOUSSAINT, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 96B00040
TEKWOOD ASSOCIATES, INC., Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Procedural History*

On April 26, 1996, the Complainant Jack N. Toussaint (hereinafter Complainant or Toussaint), acting *pro se*, filed a complaint against Tekwood Data Processing Consulting (hereinafter Respondent or Tekwood).[1] The complaint and a notice of hearing were served by the Office of the Chief Administrative Hearing Officer on April 30, 1996.

[1] The following abbreviations will be used throughout this Order:

C. Mot. to Strike	—	Toussaint's July 12, 1996 motion to strike Tekwood's answer to the complaint
R. Mot. to Dismiss	—	Tekwood's July 19, 1996 cross-motion to dismiss the complaint and for attorney's fees
R.R. Mot. to Strike	—	Tekwood's August 1, 1996 letter reply to Toussaint's motion to strike
C.R. Aff. Def.	—	Toussaint's August 5, 1996 reply to Tekwood's affirmative defenses
C.R. Mot. to Dismiss	—	Toussaint's August 23, 1996 reply to Tekwood's motion to dismiss
OCAHO	—	Office of the Chief Administrative Hearing Officer
CAHO	—	Chief Administrative Hearing Officer
OSC	—	Office of Special Counsel for Immigration-Related Unfair Employment Practices
IRCA	—	Immigration Reform and Control Act of 1986
EEOC	—	Equal Employment Opportunity Commission

In the complaint, Mr. Toussaint states that he is a United States citizen and alleges that he has been discriminated against by Tekwood on the bases of his national origin and citizenship status. Complaint ¶¶2–3, 8–9, 13. Specifically, he alleges that on August 18, 1994, he applied for the position of programmer/consultant to maintain and develop computer software programs for Tekwood, and he was not hired because he was unable to provide a Social Security number. Complaint ¶¶10–13. He further asserts that he was qualified for the job, the employer was looking for workers, that after he was not hired the job remained open, and the employer continued taking applications from other people with his qualifications. Complaint ¶13(c)–(d). He also alleges that Tekwood refused to accept the documents that he presented to show that he can work in the United States; namely a Statement of Citizenship. Complaint ¶16. Toussaint further contends that Tekwood asked for too many or wrong documents than required to show that he is authorized to work in the United States;[2] specifically, he states that Tekwood asked him for either an IRS form W–9, an employment application showing a Social Security number, or assurance that he was applying for such a number, or an IRS opinion that endorses his position and directs Tekwood not to withhold state and federal taxes from his paychecks. Complaint ¶17.

Complainant further states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on November 15, 1995, and that OSC informed him that he could file a complaint with the Office of the Chief Administrative Hearing Officer. As relief for Tekwood's alleged discrimination, he states that he wants to be hired and requests back pay from August 29, 1994. Complaint ¶¶13(e), 20–21.

Tekwood filed its answer with OCAHO on June 5, 1996. In its answer, Tekwood admitted some of the allegations but as to most of the complaint paragraphs it either denied them or stated that it did not have sufficient information to admit or deny the allegations.[3] Tekwood admitted that on or about August 22, 1994, it made an offer

[2] While the statute states that it is unlawful for an employer to request "more or different documents," 8 U.S.C. ¶1324b(a)(6), the complaint alleges that Tekwood requested "too many or wrong documents." Although the language of the complaint does not track the language of the statute, keeping in mind that the complaint is a form document, and that Complainant is *pro se*, I will liberally construe the allegation as meaning that Tekwood requested "more or different documents." *See Aguirre v. KDI American Products, Inc.,* 6 OCAHO 882, at 12 n. 9 (1996)

[3] A statement of lack of information shall have the effect of a denial. 28 C.F.R. §68.9(c)(1).

of employ ment to Toussaint upon the condition that Complainant complete Respondent's hiring procedures. Answer ¶11. Tekwood also admitted that it withdrew the conditional offer because Toussaint was unable to provide a social security number, which prevented the successful completion of the hiring process. Answer ¶13 (b). Tekwood further admitted that it requested the documents listed by Complainant in paragraph 17(a) of the complaint. Answer ¶17. Tekwood also admitted that Toussaint appeared reasonably qualified for the job and that after Toussaint was not hired, it continued taking applications from other individuals who were qualified. Answer ¶13(c) and (d). Tekwood also asserted twenty-one affirmative defenses, each of which was supported by a statement of facts. Some of the defenses included are that Complainant's claims are barred, either in whole or in part, by the applicable statutes of limitation; that there is lack of subject matter jurisdiction; and that the complaint fails to state a claim upon which relief may be granted.

On July 12, 1996, Complainant filed a motion to strike Respondent's answer, and brief in support thereof, and a notice of violation of Rule 11, and on July 15, 1996, filed an amendment to his brief in support of the motion to strike the answer, and a motion for sanctions. On July 19, 1996, Tekwood filed a cross-motion to dismiss the complaint and for attorney's fees, and a brief in support thereof. On July 25, 1996, Toussaint filed a notice of violation of 28 C.F.R. §68.6. On August 1, 1996, Tekwood filed a letter response merely stating that Complainant's motion to strike was frivolous and warrants the imposition of sanctions and an award of attorneys' fees in favor of Respondent.

On August 5, 1996, Toussaint filed a reply to Tekwood's affirmative defenses.[4] Also on August 5, 1996, Toussaint requested and was given an extension of time until August 23, 1996, to file his response to Tekwood's motion to dismiss. On August 23, 1996, Toussaint filed his reply to Respondent's motion to dismiss.

On August 12, 1996, Respondent filed a notice of motion to correct the caption. On August 26, 1996, I granted Respondent's unopposed motion, correcting the caption to identify Respondent as "Tekwood Associates, Inc." rather than "Tekwood Data Processing Consulting."

[4] The Rules of Practice permit a complainant to file a reply responding to each affirmative defense asserted. 28 C.F.R. §68.9(d).

On August 6, 1996, I issued an Order Staying Proceeding which served to stay discovery and the filing of any motions and other pleadings, except any pending response to existing motions, until the motion to dismiss and the other pending motions are ruled upon.

II. *Toussaint's Motion to Strike Answer Denied*

Toussaint's July 12, 1996, motion to strike Tekwood's answer and notice of violation of Rule 11 of Federal Rule of Civil Procedures asserts that Tekwood's answer should be stricken:

> in that [the] Answer of June 4, 1996, contains unsubstantiated statements that are not well grounded in fact and are not warranted by existing law; in that the claims, defenses and other legal contentions are not warranted by existing law; in that the allegations and other factual contentions do not have evidentiary support; and in that the denials of factual contentions are not warranted on the evidence or reasonably based on a lack of information or belief.

C. Mot. to Strike at 1.

On August 1, 1996, Tekwood filed a letter in opposition to Toussaint's motion to strike. Tekwood thereby asserts that the motion to strike was frivolous and warrants the imposition of Rule 11 sanctions.

The Rules of Practice and Procedure at 28 C.F.R. §68.9(c) provide that an answer to a complaint shall include:

> (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted; and
>
> (2) A statement of the facts supporting each affirmative defense.

Tekwood's answer complies with this Rule in that it includes a statement either admitting, denying or asserting lack of sufficient information to admit or deny each allegation in the complaint, as well as a statement of fact in support of each asserted affirmative defense.

Toussaint's motion to strike asserts that Tekwood's answer should be stricken due to its factual and legal inaccuracies, as well as the argument that the answer is "filled with insufficient defenses, redundant and immaterial content and scandalous matters. . . ." Brief in Support of C. Mot. to Strike at 1. OCAHO Rules of Practice and Procedure do not address motions to strike answers to complaints.

However, the Rules do indicate that the Federal Rules of Civil Procedure may be used as a general guideline in situations not covered by OCAHO's Rules. *See* 28 C.F.R. §68.1. Rule 12(f) of the Federal Rules of Civil Procedure states that:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 12(f) provides for striking a pleading upon a motion of a party served within 20 days after the service of the pleading on the party. Fed. R. Civ. P. 12(f). Tekwood's answer was served on June 4, 1996. OCAHO Rules of Practice provide that service of all pleadings other than complaints is deemed effective at the time of mailing. 28C.F.R. §68.8(c)(1). The Rules also provide that whenever a party has the right to take some action within a prescribed period after service of a pleading by regular mail, five days shall be added to that period of time. 28 C.F.R. §68.8(c)(2). Therefore, Toussaint had to serve his motion to strike within 25 days after June 4, 1996, or on or before June 29, 1996. Toussaint did not serve his motion to strike until July 11, 1996. Therefore, pursuant to Rule 12(f) and 28 C.F.R. §§68.8(c)(1) and (2), Toussaint's motion to strike Tekwood's answer was not timely filed and is denied.

In addition, motions to strike are generally disfavored because they require the court to evaluate legal issues before the factual background of a case has been developed through discovery. *F.D.I.C. v. White*, 828 F. Supp. 304, 307 (D.N.J. 1993) *citing Cippolone v. Liggett Group, Inc.,* 789 F.2d 181, 188 (3d Cir. 1986). I find that Toussaint's motion to strike Tekwood's answer is not well founded in that such answer is not shown to contain redundant, immaterial, impertinent, or scandalous matter, and Toussaint has failed to demonstrate that any of the affirmative defenses raised in the answer are insufficient. Therefore, Toussaint's motion to strike Tekwood's answer is also denied for the above-stated reasons.

III. *Standards for Dismissal/Summary Decision*

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. *Bent v. Brotman Medical Ctr. Pulse Health Serv.,* 5 OCAHO 764, at 3 (1995), *citing Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *Zarazinski v.*

Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the complainant the benefit of all inferences that can be derived from the alleged facts. *Kowal v. MCI Communications Corp.,* 16 F.3d 1271 (D.C. Cir. 1994). The motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987). The motion to dismiss should not be granted unless the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Martin Marietta Corp. v. International Telecommu nications Satellite Organization,* 991 F.2d 94, 97 (4th Cir. 1993); *Bent v. Brotman Medical Center Pulse Health Service*, 5 OCAHO 764, at 3 (1995); *Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638, at 9 (1994). However, the motion to dismiss may be granted if, even assuming that the complainant's factual assertions are true, the complaint fails to state a cognizable claim. *See Carter v. Burch,* 34 F.3d 257, 261 (4th Cir. 1994).

A motion to dismiss is treated as a motion for summary decision if matters outside the pleadings are presented to and not excluded by the court. *See* Fed. R. Civ. P. 12(c); *United States v. Italy Department Store,* 6 OCAHO 847, at 2–3 (1996). Tekwood's motion to dismiss shall be treated as a motion for summary decision because it has included and relied on extraneous documents as support for its motion.[5] If matters outside the pleadings are presented and not excluded by the court, a motion to dismiss shall be treated as one for summary decision. *Flores v. Logan Foods,* 6 OCAHO 874, at 4 (1996); *Ortallano v. Wordperfect Company,* 4 OCAHO 716, at 2 (1994), *quoting* Fed. R. Civ. P. 12(c).

OCAHO Rules of Practice and Procedure authorize the ALJ to "enter 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). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). In demonstrating that there

[5] The extraneous documents relied on in support of the motion to dismiss include a certification by Tekwood's president Thomas Wood, a certification by Tekwood's attorney Kirsten Scheurer, and Toussaint's EEOC charge and the subsequent EEOC denial of the charge and right to sue letter.

is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* Failure to meet this burden invites summary decision in the moving party's favor.

IV. *Applicable Statutory and Regulatory Authority*

Toussaint's complaint alleges various violations of 8 U.S.C. §1324b, including national origin discrimination, citizenship status discrimination and document abuse. The statutory provisions for these types of unfair immigration-related employment practices provide at 8 U.S.C. §1324b:

> (a) Prohibition of discrimination based on national origin or citizenship status
>
> (1) General rule
>
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment —
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status. . . .
>
> (6) Treatment of certain documentary practices as employment practices
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

Section 1324b provides, in addition, that in certain circumstances the general rule regarding discrimination quoted in 8 U.S.C. §1324b(a)(1) above does not apply. Specifically, Section 1324b provides:

> (2) Exceptions
>
> Paragraph (1) shall not apply to —
>
> (A) a person or other entity that employs three or fewer employees,
>
> (B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e–2 of Title 42, or
>
> (C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

Section 1324b also provides that there will be no overlap between complaints filed at OCAHO and those filed at the Equal Employment Opportunity Commission. Specifically, Section 1324b(b)(2) provides:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e et seq.], unless the charge is dismissed as being outside the scope of such title.

As to the issue of the timeliness of the filing of a complaint with OCAHO or a charge with OSC, 8 U.S.C. §1324b(d)(3) provides, in pertinent part, that:

> 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 the charge with the Special Counsel.

In addition, the regulation regarding the timeliness of filing a charge with OSC at 28 C.F.R. §44.300(b) provides, in pertinent part, that:

> Charges shall be filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice.

As to the timeliness of a charge and a complaint, OCAHO Rules of Practice and Procedure at 28 C.F.R. §68.4 provide, in pertinent part, that:

(a) **Generally.** An individual must file a charge with the Special Counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice.

(b) The Special Counsel shall, within one hundred and twenty (120) days of the date of receipt of the charge:

(1) Determine whether there is reasonable cause to believe the charge is true and whether to bring a complaint respecting the charge with the Chief Administrative Hearing Officer within the 120-day period; or,

(2) Notify the party within the 120-day period that the Special Counsel will not file a complaint with the Chief Administrative Hearing Officer within the 120-day period.

(c) The charging individual may file a complaint directly with the Chief Administrative Hearing Officer within ninety (90) days after the date of receipt of notice that the Special Counsel will not be filing a complaint within the 120-day period.

V. *Issues*

Tekwood has moved to dismiss this action on the bases that: (A) Toussaint's OSC charge was untimely filed pursuant to 8 U.S.C. §1324b(d)(3) and 28 C.F.R. §§44.300(b) and 68.4; (B) OCAHO lacks subject matter jurisdiction over Toussaint's claim of national origin discrimination; and (C) Toussaint's entire complaint fails to state a claim upon which relief can be granted under 8 U.S.C. §1324b. In determining whether Toussaint's complaint has stated a claim upon which relief can be granted, it is necessary to determine whether he has alleged facts under which it may be shown that Tekwood has committed an unfair immigration-relation related employment practice as defined in 8 U.S.C. §1324b.[6]

VI. *Findings and Conclusions*

A. *Timeliness*

Respondent contends that the complaint should be dismissed because, pursuant to 8 U.S.C. §1324b(d)(3) and 28 C.F.R. §§44.300(b) and 68.4, an individual must file a charge with OSC within 180 days

[6] Toussaint's assertions, that the tax laws do not require a United States citizen to apply for a Social Security number, or subject a citizen to the requirements of the Social Security Act, or that the United States code or regulations do not require citizens to have taxes withheld, are irrelevant to the issue in this case, which is whether the employer engaged in an unfair immigration-related employment practice.

of the date of the last alleged unfair immigration-related employment practice. Section 1324b(d)(3) provides in pertinent part 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." *See United States v. Hyatt Regency Lake Tahoe,* 6 OCAHO 879 (1996). The timely filing of a charge with OSC is a prerequisite for filing a private action with OCAHO. *See Bozoghlanian v. Hughes Radar Systems Group*, 5 OCAHO 741, at 7 (1995).

The record shows that Toussaint filed his charge with the OSC on November 21, 1995. *See* Respondent's Certification of Kirsten Scheurer, Exhibits G and H. According to Toussaint's own recitation of the facts contained in the timeline filed with his motion to strike, Respondent had made requests for certain documentation from August 22 to 29, 1994 and withdrew the offer of employment on September 1, 1994, when the information was not provided. C. Mot. to Strike, Ex. A.

It is axiomatic that the limitations period begins to run at the time of the alleged discriminatory act, provided that act is sufficiently clear to put Complainant on notice. Thus, an unequivocal notification of termination or rejection of employment delineates the commencement of the limitations period. *Chardon v. Fernandez*, 454 U.S. 6, 7 (1981); *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980); *Lewis v. McDonald's Corporation*, 2 OCAHO 383, at 4 (1991). Thus, the 180 day limitations period begins to run from the time the applicant is informed of the rejection of his application, which in this case was September 1, 1994.

Tekwood's withdrawal of employment on September 1, 1994, was unequivocal and constituted the last alleged discriminatory practice. Thus, to be timely, a charge filed with OSC would have to have been filed not later than February 28, 1995. In fact, it was not filed with OSC until November 21, 1995, which was over a year after the last alleged discriminatory act.[7]

[7] The charge filed with OSC is dated November 15, 1995, but the charge is not deemed filed until it is received by OSC, which occurred on November 21, 1995. *See* Certification of Kirsten Scheurer, Ex. H. However, even if November 15 were considered the effective file date, the charge was not timely.

However, the 180 day filing deadline is subject to equitable modification. 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 employer lulled the applicant into inaction during the filing period by misconduct or otherwise; or (3) the charging party timely filed his charge in the wrong forum. *Bozoghlanian v. Hughes Radar Systems Group, supra* at 8. In this case there is no allegation or evidence of the first two. As to the third item, Toussaint did file a charge with the Equal Employment Opportunity Commission. Although he initially contacted the EEOC on September 15, 1994, he did not actually file a charge with EEOC until March 31, 1995. *See* C. Mot. to Strike, Ex. A2 and Ex. C12–13. Since the charge filed with the EEOC was not filed by February 28, 1995, the 180 day period already had expired.

Moreover, on April 20, 1995, EEOC dismissed his charge on the ground that it failed to state a viable claim. C. Mot. to Strike, Ex. C14. Therefore, even assuming that the statute of limitations was tolled during the time it was pending before the EEOC, the 180 day period recommenced on April 20, 1995, and that time period expired on October 17, 1995. Since Complainant did not file his charge with OSC until November 21, 1995, his charge was untimely, and the complaint must be dismissed.

In addition, a Memorandum of Understanding (MOU) between EEOC and OSC does not render Toussaint's charge timely. The MOU states in relevant part:

> The [EEOC], under Title VII of the Civil Rights Act of 1964, as amended (hereinafter, "Title VII"), has jurisdiction to process certain charges of employment discrimination on the basis of national origin. The [OSC] of the Department of Justice, under section 102 of the Immigration Reform and Control Act of 1986, has jurisdiction to process certain other charges of employment discrimination on the bases of national origin or citizenship status. The purpose of this Memorandum of Understanding between the EEOC and the Special Counsel is to prevent any overlap in the filing of charges of discrimination under these statutes and to promote efficiency in their administration and enforcement. . . .
>
> By this Memorandum of Understanding, the agencies hereby appoint each other to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits. To ensure that filing deadlines are satisfied, each agency will accurately record the date of receipt of charges and notify the other agency of the date of receipt when referring a charge.

See MOU, 54 Fed. Reg. 32499, 32500 (1989).

Toussaint has alleged three different types of discrimination in his complaint; namely national origin discrimination, citizenship status discrimination and document abuse. Tekwood argues that Toussaint's EEOC charge only alleged national origin discrimination, and accordingly cannot be utilized to render the subsequent OSC charge timely as to the citizenship status discrimination and the document abuse allegations. R. Mot. to Dismiss at 11–12, n. 4. Toussaint asserts that Tekwood did not consider the EEOC charge as a whole, which asserts discrimination based on national origin, but indicates "U.S. Citizen" beside such assertion, and which implicates Tekwood's requirement that Toussaint produce his Social Security number as the reason for the withdrawal of the offer of employment. C.R. Mot. to Dismiss at 12–13.

As to the allegation of document abuse, the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline. In fact, the MOU was signed and became effective in 1989, while the document abuse provision of Section 1324b did not become part of the IRCA until the Immigration Act of 1990. As the MOU predates the document abuse provision, and only mentions national origin and citizenship status discrimination, the MOU cannot be used to render Toussaint's document abuse charge timely. *See United States v. Hyatt Regency Lake Tahoe,* 6 OCAHO 879, at 11 (1996).

As Toussaint is *pro se*, and as his EEOC charge did mention "U.S. Citizen" in the space for identifying his national origin, I will treat his filing with EEOC as indicating both national origin and citizenship status discrimination. However, a filing with EEOC still must be within 180 days of the alleged discrimination to be considered timely filed with OSC pursuant to the MOU. *See Walker, et al v. United Air Lines, Inc.,* 4 OCAHO 686, at 29 (1994). Here, as previously discussed, Toussaint's EEOC charge was not filed until March 31, 1995, well after the 180 day filing deadline. The MOU does not alter the 180 day filing deadline. A charge is timely filed under IRCA if it is filed with OSC, or an agency with which OSC has an MOU, at the most, 180 days after the alleged discriminatory event. *Id.* at 29 *citing* 8 U.S.C. §1324b(d)(3); *Reyes v. Pilgrim Psychiatric Center*, 3 OCAHO 529, at 2 (1993). Therefore, the MOU does not render a timely filed EEOC charge that was filed outside of the 180 days

timely under IRCA.[8] *Id.* at 29. In addition, the MOU indicates that its purpose is to ameliorate uncertainty as to the correct forum resulting from the separate jurisdictions of EEOC and OSC. *United States v. Auburn University*, 4 OCAHO 617, at 12 (1994); *Yefremov v. Dep't of Transportation,* 3 OCAHO 466, at 3 (1992). EEOC did not treat the charge as one filed in the incorrect forum. The MOU dictates that charges regarding national origin and/or citizenship status discrimination incorrectly filed at EEOC should be referred to OSC when certain conditions are met. *See* MOU, 54 Fed. Reg. 32499, 32500. Here, EEOC *did not refer* the charge to OSC. Rather, EEOC issued a determination that Toussaint's charge failed to state a claim upon which relief can be granted, including notice of Toussaint's right to sue within ninety days of receipt. As EEOC did not refer the charge to OSC and exercised jurisdiction over the charge, and as Toussaint filed a subsequent charge with OSC and did not attempt to treat the EEOC filing as a subsequent filing with OSC, the MOU was not invoked and is not applicable to satisfy the 180 day statute of limitations.

Toussaint argues that OSC's acceptance of his charge and failure to dismiss it on the basis of lack of timeliness renders such charge timely. Specifically, Toussaint states:

> Complainant has diligently pursued all known legal remedies in this case in a continuing effort to secure his rights under the Constitution and applicable federal law. If Complainant's complaint was not filed within the applicable statute of limitations, then OSC would not have accepted the complaint. The complaint was clearly filed within the applicable statute of limitations as evidenced by OSC's acceptance of the complaint. As 28 C.F.R. §44.300 prohibits any overlap between charges filed with OSC and EEOC complaints, as OSC accepted Complainant's charge and did not dismiss it pursuant to 28 C.F.R. §44.301(d)(1), the Complainant's charge was made within the 180 day limitation.

C.R. Mot. to Dismiss at 12.

Complainant is mistaken as to the effect of OSC's acceptance of his charge. While 28 C.F.R. §44.301(d)(1) does provide that "[i]f the

[8] IRCA and Title VII have different statutes of limitations. A charge filed with OSC must be filed within 180 days of the alleged discriminatory event. Under Title VII, a charge of discrimination generally must be filed with the EEOC within 180 days of the alleged discrimination, except that a charge filed in a state where the state has created an agency to hear employment discrimination claims (a "deferral state") can be filed up to 300 days after the alleged discrimination. *See Walker,* 4 OCAHO 686, at 29–30 *citing* 42 U.S.C. §2000e–5 (1992).

Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice," OSC's failure to properly dismiss an untimely charge is not determinative on the issue of timeliness. In fact, OSC has actually filed cases on behalf of charging parties where the case was dismissed due to the lack of timeliness in the filing of the initial charge. *See, e.g., United States v. Hyatt Regency Lake Tahoe,* 6 OCAHO 879, at 8–11 (1996). Pursuant to 8 U.S.C. §1324b(c)(2), OSC is responsible for investigating charges and issuing complaints under Section 1324b and in prosecuting such complaints before OCAHO Administrative Law Judges. Accordingly, OSC's function is an investigatory and prosecutorial one, not a judicial one. Therefore, OSC's acceptance of an untimely charge does not effect the ability of an Administrative Law Judge to rule on the timeliness of such charge.[9]

Since, pursuant to 8 U.S.C. §1324b(d)(3) and 28 C.F.R.§§44.300(b) and 68.4 the charge was untimely, this proceeding is barred by the statute of limitations.

B. *National Origin Discrimination*

OCAHO has limited subject matter jurisdiction over claims based on national origin under IRCA, since it is statutorily limited to claims against employers employing not less than four and not more than fourteen individuals. *See* 8 U.S.C. §§1324b(a)(1)(A); 1324b(a)(2)(A); and 1324b(a)(2)(B); *Valencio v. VASP Brazilian Airlines*, 5 OCAHO 740, at 2 (1995); *Yohan v. Central State Hospital*, 4 OCAHO 593, at 5 (1994); *Tal v. Energia,* 4 OCAHO 705, at 15 (1994). Specifically, Sections 1324b(a)(2)(A) and (B) provide that the general prohibition against national origin discrimination shall not apply to an employer with three or fewer employees, or where the EEOC has jurisdiction under Section 2000e–2 of Title 42. *See* 8 U.S.C. §§1324b(a)(2)(A) and (B). For purposes of determining EEOC jurisdiction over a claim of national origin discrimination against a particular employer under 42 U.S.C. §2000e–2, the term "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of

[9] The Administrative Law Judge is not required to give deference to OSC's interpretation of the statute or regulation. *See Cruz v. Able Service Contractors, Inc*., 6 OCAHO 837, at 7–8 (1996); *Mir v. Federal Bureau of Prisons*, 3 OCAHO 510, at 10 (1993).

twenty or more calendar weeks in the current or preceding calendar year. . . . " 42 U.S.C. §2000e(b).

Respondent asserts that OCAHO lacks jurisdiction over Complainant's national origin discrimination claim because it employs now, and employed during the relevant time period in August and September 1994, more than fourteen employees. Tekwood contends that it had 28 employees during the time period from August 1, 1994 until September 30, 1994, which encompasses the time frame during which Touissant alleges that the alleged unfair immigration-related employment discrimination practices occurred. Tekwood states that it now has 42 employees. Since Tekwood employed more than 14 employees at the time of the alleged violation and still employs more than 14, it asserts that Touissant's national original claim should be dismissed. In support of its assertion, Tekwood has attached a "Certification" by its president Thomas Wood (hereinafter "Wood Certification") which supports this contention.[10]

EEOC jurisdiction over national origin discrimination claims exists when an employer has fifteen or more employees work each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e(b). In determining the number of employees for each working day, courts generally do not count part time employees who did not work each day of the working week. *EEOC v. Garden & Associates*, 956 F.2d 842 (8th Cir. 1992); *Zimmerman v. North American Signal Company*, 704 F.2d 347, 354 (7th Cir. 1983). Courts also generally do not count independent contractors as employees for jurisdictional purposes. *Garrett v. Phillips Mills, Inc.,* 721 F.2d 979, 982 (4th Cir. 1983); *United States v. Robles,* 2 OCAHO 309, at 8 (1991). In addition, Title VII case law differentiates between "employers" and "employees" for jurisdictional purposes. A company president and supervisory personnel are not considered employees for jurisdictional purposes. *Paroline v. Unisys Corp.,* 879 F.2d 100, 104 (4th Cir. 1989).

Tekwood has not provided any specific information as to the 28 employees it allegedly employed in August and September 1994. In particular, it is not clear whether these include part time employees or supervisors. Moreover, Tekwood has not provided any information as to the number of full time, nonsupervisory employees it em-

[10] The certification is not under oath and is not an affidavit.

ployed during the twenty or more calendar weeks in 1994 or the preceding year.

As previously stated, Tekwood, as the moving party, has the initial burden of showing that there is no genuine issue as to any material fact before summary decision may be granted. Tekwood's submission regarding its number of employees is insufficient to show that there is no genuine issue of material fact regarding the number of employees for each day of the twenty weeks preceding the alleged discriminatory act. The Wood Certification only refers to the number of employees at the present time and from August 1, 1994 to September 30, 1994. Moreover, Tekwood has not shown that these numbers included only full time, non-supervisory employees.

Consequently, Tekwood has not shown that it had greater than fourteen full time non-supervisory employees for *each day* for twenty consecutive weeks. It is particularly fatal to Respondent's motion that it failed to show the number of employees for each working day during the twenty consecutive weeks. In addition, Tekwood failed to provide information regarding the status (full time, supervisory etc.) of the individuals. *See Flores v. Logan Foods Co.*, 6 OCAHO 874, at 7 (1996).

Since as the movant Tekwood has the burden of proof and all facts must be examined in the light most favorable to Complainant as the non-moving party, I find that there is a genuine issue of material fact as to the number of employees working for Respondent during the twenty weeks prior to the alleged discriminatory conduct.

However, aside from whether OCAHO has subject matter jurisdiction of Toussaint's national origin discrimination allegation, the question is whether prior EEOC exercise of jurisdiction affects OCAHO's jurisdiction over Complainant's Section 1324b complaint. In this respect, Section 1324b provides in pertinent part that:

> [n]o charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under Title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title.

See 8 U.S.C. §1324b(b)(2); *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 3 (1995). Here, Toussaint filed an EEOC charge alleging national origin discrimination based on the same set of facts as those alleged in his present complaint. EEOC dismissed that

charge as failing to state a claim, not that it lacked jurisdiction. Therefore, pursuant to Section 1324b(b)(2), since EEOC asserted jurisdiction over the national origin claim, OCAHO does not have jurisdiction over Toussaint's national origin claim. *See Adame v. Dunkin Donuts*, 5 OCAHO 772, at 3–5 (1995).

Even if I had jurisdiction over Toussaint's national origin discrimination claim, I would still grant Respondent's motion to dismiss as this claim substantively fails to state a claim upon which relief can be granted. Specifically, Toussaint has not pled information related to what his national origin is. Rather he continuously refers to his national origin as being that of a United States citizen. United States citizens are protected from citizenship status discrimination under 8 U.S.C. §1324b(a)(1)(B). In his complaint, Toussaint asserted that he was discriminated against based on his national origin. Complaint ¶8. Following Respondent's denial of this claim in its answer, Toussaint asserted that he was discriminated against based on his national origin because of Respondent's request for specific documents and because Toussaint is a protected individual under 8 U.S.C. §1324b(a)(3)(A). C. Mot. to Strike at 4. However, these arguments only relate to Complainant's document abuse and citizenship status discrimination claims. In addition, Toussaint specifically states, "Complainant's charges are not frivolous as Complainant is only seeking the protection of his rights under the law as a United States Citizen." C.R. Mot. to Dismiss at 2. In fact, Toussaint acknowledges that his national origin and his citizenship status discrimination claims are indistinguishable, stating that:

> there is considerable legal difficulty in distinguishing between his national origin and citizenship status. To say that Complainant's national origin is French, rather than American, because some unknown persons, generations ago, lived in France and begat a line of descendants ultimately manifesting itself in Complainant's birth in New Jersey, is to stretch the point beyond reason. There is no way to distinguish between Complainant's national origin and his citizenship status.

C.R. Mot. to Dismiss at 14. As Toussaint's arguments are solely based on his status as a United States citizen, his claim is properly one for citizenship status discrimination and his national origin discrimination must be dismissed for failure to state a claim upon which relief can be granted.

C. *Citizenship Status Discrimination*

Toussaint asserts that Tekwood's withdrawal of its offer of employment constitutes discrimination based on his status as a United

States citizen. Complaint ¶13(a). Toussaint stated that the reason he was not hired was because of his "inability to provide [a] Social Security number." Complaint ¶13(b). Toussaint further alleges that he was qualified for the job with Tekwood and that after he was not hired the job remained open and Tekwood continued taking applications from other people with his qualifications. Complaint ¶¶13(c) and (d). Toussaint alleges Respondent's refusal to hire him was based on citizenship status discrimination. Toussaint, a United States citizen, is a "protected individual" under 8 U.S.C. §1324b(a)(3), who may therefore bring such a claim.

The principles for the order and allocation of proof which have been applied to Title VII claims of disparate treatment because of race, color, religion, gender or national origin are also applicable to disparate treatment claims of national origin or citizenship status discrimination brought pursuant to 8 U.S.C. §1324b. *See, e.g., Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638 (1994); *Alvarez v. Interstate Highway Construction,* 2 OCAHO 430 (1991).

Toussaint has the burden of proof to prove discrimination on the basis of citizenship status. *United States v. Mesa Airlines*, 1 OCAHO 462, 500 (Ref. No. 74) (1989). In a Section 1324b case a complainant must establish discriminatory treatment by proof that the plaintiff was treated less favorably than others because of his protected status, i.e. his national origin or citizenship status. *See, e.g., Westendorf v. Brown and Root, Inc.,* 3 OCAHO 477 (1992). The employee must establish discriminatory intent on the part of the employer. In the case at bar, Toussaint must establish discriminatory treatment by proof that he was treated less favorably than others because of his U.S. citizenship. To meet this burden in a case involving failure to hire, a complainant must show, by a preponderance of the evidence, that: (1) he is a member of a class entitled to the protection of IRCA, (2) that he applied for and was qualified for the job for which the employer was seeking applicants, (3) that despite his qualifications, he was rejected, and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of Complainant's qualifications. *Zarazinski,* 4 OCAHO 638, at 16 *citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800 (1973). Once the complainant makes a prima facie showing of the above-listed elements, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *Id. citing St. Mary's Honor Center v. Hicks,* 509 U.S 502, 507 (1993). If the employer is successful, the burden shifts a

third and final time to the Complainant who must show that the reason proffered by the employer was a mere pretext for illegal discrimination, and that the prohibited basis was the true reason for the adverse employment action. *Id.*

Notwithstanding the shifts in burdens of production, the ultimate burden of persuasion always remains with the complainant to prove discriminatory intent. Once the employer produces evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus, the complainant bears the ultimate burden of proving that the proffered reason was not the true reason for the employment decision and that he has been the victim of intentional discrimination. *Dhuria v. Trustees of the University of the District of Columbia,* 827 F. Supp. 818, 826 (D.D.C. 1993) *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In applying the four part test to determine if Toussaint can establish a prima facie case of employment discrimination, and taking into account that in ruling on a motion to dismiss all facts alleged must be taken in the light most favorable to the Complainant, Toussaint has, for purposes of this motion, alleged sufficient facts to make out such a prima facie case. Specifically, as a United States citizen, Toussaint is a member of a class protected by Section 1324b from citizenship status discrimination.[11] Toussaint appeared to be qualified for the position he applied for since he was initially offered the job.[12] Tekwood admitted in its answer that after Toussaint was rejected it continued to accept applications for the job from other individuals who were qualified for the job. Answer ¶13(d). Taking these facts in the light most favorable to Toussaint, he has plead a prima facie case of citizenship status discrimination. Therefore, the burden shifts to Tekwood to state legitimate, non-discriminatory reason for its decision not to hire Toussaint.

Tekwood asserted that on August 22, 1994, it made an offer of em-ployment to Toussaint, conditioned upon his completion of Tekwood's normal hiring procedures. R. Mot. to Dismiss at 4.

[11] With respect to citizenship status discrimination, 8 U.S.C. §1324b(a)(1)(B) provides that "protected individuals," as defined in 8 U.S.C. §1324b(a)(3), are protected under IRCA. United States citizens are identified as "protected individuals."

[12] I do not credit Tekwood's assertion that Toussaint was not qualified for the job because he could not provide Tekwood with a Social Security number. Answer ¶13(c).

Tekwood further asserts that its normal hiring procedures include obtaining an individual's Social Security number for purposes of withholding taxes and that Toussaint stated that he could not provide Tekwood with such a number and that taxes had not been withheld from his pay for several years. R. Mot. to Dismiss at 4. Tekwood states that it withdrew the offer of employment to Toussaint because he could not provide a Social Security number in completing Tekwood's standard hiring practices or an IRS opinion letter endorsing his contention that Tekwood does not have to withhold taxes from his paychecks. R. Mot. to Dismiss at 4–5. This proffered reason for not hiring Toussaint is a legitimate, non-discriminatory reason under 8 U.S.C. §1324b. OCAHO case law correctly holds that nothing in the logic, text or legislative history of the Immigration Reform and Control Act limits an employer's ability to require a Social Security number as a pre-condition of employment. *Lewis v. McDonald's Corporation,* 2 OCAHO 383, at 4 (1991). As Tekwood has stated a legitimate, non-discriminatory reason for its failure to hire, the burden shifts to Toussaint to produce evidence that the proffered reason is merely pretext.

Toussaint has repeatedly stated that his claim for citizenship status discrimination is based on Tekwood's request for his Social Security number. Complaint ¶13(b); C. Mot. to Strike at 9. Toussaint further asserts that:

> Respondent incorrectly states that 'its failure to hire' the Complainant was because of 'his refusal to provide a Social Security number.' Complainant never refused to provide a Social Security number but, rather, was lawfully unable to provide a number, pursuant to his rights as a U.S. Citizen.

C.R. Mot. to Dismiss at 2. It is undisputed that Tekwood withdrew its offer of employment because Toussaint did not provide it with a Social Security number. Toussaint asserts that no law requires him to have a Social Security number. However, that contention is irrelevant to this matter. As previously stated, nothing in IRCA limits an employer's ability to require a Social Security number as a precondition of employment. As the facts regarding the request are not in dispute, and as Toussaint has not presented any evidence in the form of an affidavit to show that Tekwood applied this requirement in a discriminatory manner, (i.e. requiring only United States citizens to provide a Social Security number), he has failed to state a claim upon which relief can be granted because he has provided no evidence that Tekwood's asserted legitimate, non-discriminatory reason for its failure to hire was a pretext for discrimination.

Therefore, with respect to his claim of citizenship status discrimination, Toussaint has failed to state a claim upon which relief may be granted.

D. *Document Abuse*

Section 1324b(a)(6) provides in pertinent part that it is an unfair immigration-related employment practice for a person or entity to request, for purposes of satisfying the requirements of section 1324a(b), more or different documents than are required under that section of IRCA. Moreover, IRCA prohibits a potential employer from demanding any particular document to satisfy the employment eligibility verification requirements of 8 U.S.C. §1324a. *Lewis v. McDonald's Corpora tion, supra* at 5; *Jones v. DeWitt Nursing Home*, 1 OCAHO 189 (1990). The choice of documents which a job applicant may present to an employer in order to establish identity, work eligibility, or both, is exclusively that of the job applicant and not that of the employer. At the risk of engaging in an unfair immigration-related employment practice, the employer may not insist on a particular document in order to establish employment eligibility under IRCA. *United States v. A.J. Bart, Inc.,* 3 OCAHO 538 (1993); *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO 414 (1992).

However, in this case Tekwood did not ask Toussaint to produce a Social Security card or a Social Security number for the purpose of verifying his authorization to work under IRCA. In fact, while Toussaint had been conditionally offered employment, he had not actually been employed, and there is no evidence that the IRCA verification process had even begun.

As was stated rather aptly in the earlier case of *Lewis v. McDonald's Corporation, supra* at 5:

> The public policy against immigration-related discriminatory practices is strengthened by prohibiting a prospective employer from demanding any particular document to satisfy employment eligibility verification requirements, *e.g.* a Social Security card. That policy is not enhanced, however, by prohibiting an employer from demanding a Social Security number. *Nothing in the logic, text or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment.*

(Emphasis added).

IRCA does not create a blanket prohibition on an employer's request for documents. Rather, Section 1324b(a)(6) renders unlawful an employer's request for more or different documents "for purposes of satisfying the requirements of section 1324a(b)," which references the employment verification system. IRCA does not render unlawful an employer's request for documents which are not related to the employment eligibility verification procedures provided in IRCA. In this case there is no evidence or suggestion that Tekwood requested a Social Security card for the purpose of satisfying the employment eligibility requirements of IRCA. Rather, Tekwood's request was made to satisfy what it considered to be tax law requirements. Indeed, this is shown by Toussaint's own allegations in the complaint. Specifically, Toussaint states that Tekwood requested either:

> 1) IRS form W–9 or employment application showing Social Security number or
>
> 2) 'your assurance that you are applying for a Social Security number' or
>
> 3) 'an IRS opinion letter that endorses your position and directs Tekwood to not withhold State and Federal taxes from your future paychecks'

See Complaint ¶17(a). These documents, as identified in Toussaint's complaint, are not documents accepted to show an employee's identity or employment eligibility pursuant to 8 U.S.C. §1324a.[13] While the documents requested include references to Toussaint's Social Security number, Tekwood did not require Toussaint's actual Social Security card. In completing the I–9 verification process, an employer must examine the documents provided by the employee as proof of identity and employment eligibility. Therefore, while a Social Security card is a List C document, an acceptable document for proving employment eligibility, none of the three documents that Toussaint identified in his complaint as the specific documents requested by Tekwood was the actual Social Security card, or any other List A, B or C document. Thus, it is clear

[13] The employment verification process mandated in 8 U.S.C. §1324a requires that an employer, in completing Section 2 of the employment eligibility verification (I–9 form) for each employee, examine documents which prove an employee's identity and employment eligibility. An employer is required to examine and document either a List A document, *or* a List B *and* a List C document. List A documents, for example a U.S. Passport, show both identity and employment eligibility. List B documents, for example a driver's license or state issued I.D. card, establish identiy. List C documents, for example a Social Security card, establish employment eligibility.

that Tekwood was not requesting more or different documents for verifying identity or employment eligibility.

Toussaint also alleged that Tekwood refused to accept documents that he presented to show that he is eligible to work in the United States. Complaint ¶16. Specifically, Toussaint alleged that Tekwood refused to accept a "Statement of Citizenship" that he provided. Complaint ¶16(a). Tekwood asserts that Toussaint's document abuse charge fails to state a claim upon which relief can be granted because Toussaint does not allege that Tekwood, in connection with I–9 verification, demanded that he produce his Social Security card or refused to accept other documents establishing his authorization and identity. R. Mot. to Dismiss at 20.

Toussaint responded by asserting that the portion of 8 U.S.C. §1324b(a)(6) relating to refusing to honor documents is not limited by the requirement that such documents be offered for completing the employment verification process. Toussaint specifically asserts:

> While the "request" portion of the statute is specifically limited to requests made "for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section," the "refusing to honor" portion of the statute involves no such limitation, in fact the only limitation on "refusing to honor" is that the documents tendered "on their face reasonably appear to be genuine." Grammatically speaking, the use of the disjunctive conjunction "or" in "required under such section *or* refusing to honor," specifically limits application of the preceding phrase "for purposes of satisfying the requirements of section 1324a(b) of this title" to the "request" portion of the statute.

C.R. Mot. to Dismiss at 8–9. Toussaint then discusses rules for statutory interpretation, including the premise that it is a court's duty to refrain from reading a phrase into a statute when Congress has left it out. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rusello v. United States, 464 U.S. 16, 23 (1983).*

While Complainant is correct that a court generally should not read language into a part of statute where it is not included from another part where such language is included, he is not correct in his interpretation of 8 U.S.C. §1324b(a)(6). The document abuse provision at 8 U.S.C. §1324b(a)(6) provides:

> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The phrase "for purposes of satisfying the requirements of section 1324a(b) of this title" is set out in 8 U.S.C. §1324b(a)(6) by commas which indicates that it limits both an employer's request for more or different documents or an employer's refusal to honor documents which reasonably appear to be genuine. Complainant asks that I read the portion of 8 U.S.C. §1324b(a)(6) regarding the refusal to accept documents to be limited only by the requirement that the documents reasonably appear to be genuine, meaning that an employer's refusal to accept any document in the hiring process which reasonably appears to be genuine on its face constitutes an unfair immigration-related employment practice. This construction of the statute is nonsensical, in that it would expand the coverage of the Immigration Reform and Control Act well beyond the bounds of its intent and its inherent limitations to national origin discrimination, citizenship status discrimination, retaliation and document abuse in the employment eligibility verification process.

As I have found that all the document abuse provisions in 8 U.S.C. §1324b(a)(6) require that the questionable documentary practices must involve the employment eligibility verification system, it is necessary to address whether, examining the facts in the light most favorable to the Complainant, Toussaint has sufficiently stated a claim of document abuse in his complaint.

Toussaint alleges that Tekwood refused to accept his "Statement of Citizenship" which reasonably appeared to be genuine. However, Toussaint has not alleged in any of his many pleadings that Tekwood's nonacceptance of this document was made in the process of completing his employment eligibility verification. In fact, the alleged document, a "Statement of Citizenship," is not an acceptable document in either List A, B or C for purposes of showing employment eligibility or identity. Therefore, the document could not have been accepted for such purposes, and Tekwood's refusal to accept the document does not constitute document abuse.

Toussaint has failed to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C.

§1324b(a)(6). Therefore, Tekwood's motion to dismiss is granted as to those allegations in the complaint at ¶¶16–17, as related to the document abuse claims.

VII. *Requests for Costs and Attorney's Fees*

In several pleadings Toussaint has requested the award of expenses and attorney's fees pursuant to Rule 11 of the Federal Rules of Civil Procedure.[14] Tekwood also has requested attorney's fees pursuant to Rule 11. R. Mot. to Dismiss at 24.

Neither party cites any OCAHO case law which would support its request for attorney's fees pursuant to Rule 11 and in fact the relevant case law clearly provides that the requested relief cannot be awarded. The Chief Administrative Hearing Officer (CAHO) previously has ruled that neither the CAHO nor an Administrative Law Judge is empowered by the Rules of Practice to impose a monetary sanction on a party or attorney for misconduct. *See United States v. Nu Look Cleaners of Pembroke Pines, Inc.,* 1 OCAHO 1771, 1780 (Ref. No. 274) (1990). Therefore, Toussaint's and Tekwood's motions for attorney's fees pursuant to Rule 11 are denied.

However, pursuant to 8 U.S.C. §1324b(h) and 28 C.F.R. §68.52(c)(2), once the case has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact. Toussaint is not represented by counsel in this proceeding but Tekwood is so represented and has requested attorney's fees pursuant to the above statute and regulation. Tekwood states in its brief that, upon a grant of attorney's fees, it will submit a certification of services detailing the fees and costs incurred in connection with this action. R. Mot. to Dismiss at 23.

At this time I am reserving judgment on the issue of whether Tekwood is entitled to receive attorney's fees and, if so, in what amount. If Tekwood wishes to have its request for costs and attorney's fees granted, it will have to submit further briefing to support its request. Initially, since the statute only refers to the award of an "attorney's fee" and not costs, Tekwood will have to show that an awarding of costs, as well as an attorney's fee, is authorized.

[14] Toussaint is not represented by counsel and has not shown why attorney's fees should be awarded when he is not being represented by an attorney in this action.

Tekwood bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting *pro se*. Therefore, Tekwood is ordered to file, not later than September 26, 1996, a certification of services detailing the fees and costs incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate, as well as an itemized list of costs. It is Tekwood's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Tekwood will support its request with a legal brief or memorandum showing why Toussaint's arguments are "without reasonable foundation in law and fact" and discussing (not just citing) the pertinent OCAHO case law, such as *Banuelos v. Transportation Leasing Co., et al.,* 1 OCAHO 1636 (Ref. No. 255) (1990), *Becker v. Alarm Device Mfg. Co. and District 65 Union,* 1 OCAHO 719, 723 (Ref. No. 107) (1989), as well as more recent cases such as *Wije v. Barton Springs/Edwards Aquifer Conservation District,* 5 OCAHO 785 (1995); *Chu v. Fujitsu*, 5 OCAHO 778 (1995); *Bozoghlanian v. Lockheed-Advanced Dev. Co.,* 4 OCAHO 711 (1994); and *Huesca v. Rojas Bakery,* 4 OCAHO 654 (1994). Tekwood also shall discuss the leading Title VII case law with respect to awards of attorney's fees such as *Christiansburg Garment Co. v. EECO,* 434 U.S. 412 (1978) and *Miller v. Los Angeles County Board of Education*, 827 F.2d 617 (9th Cir. 1987).[15] Following Tekwood's filing, Toussaint shall have until October 15, 1996, to file its response to Tekwood's submission.[16]

VIII. *Conclusion*

For the above stated reasons Tekwood's motion to dismiss the complaint is hereby granted. I retain jurisdiction to determine whether attorney's fees are appropriate in this case and, if so, in what amount. Any motions and arguments not expressly addressed, except for Tekwood's motion for attorney's fees, are hereby denied.

ROBERT L. BARTON, JR.
Administrative Law Judge