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

October 9, 1997

LEONOR GARCIA,	)
Complainant,	)
	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 97B00094
TIA MARIA'S CANTINA &	)
MEXICAN RESTAURANTE,	)
Respondent.	)
	)

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Leonor Garcia*, *pro se*.
Darah Headley, Esq., for Respondent.

I. *Procedural Background*

On April 26, 1996, Leonor Garcia (Garcia or Complainant) filed a charge alleging discrimination by Tia Maria Cantina & Mexican Restaurante (Respondent) with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). On January 8, 1997, she supplied additional information to OSC, making the charge complete. Garcia claims she was fired and replaced by an unauthorized employee after an altercation.

By letter dated February 7, 1997, OSC informed Complainant that it lacked jurisdiction because Complainant did not satisfy the statutory definition of a protected individual. OSC also advised Complainant that she could file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

On April 15, 1997, Garcia filed a timely *pro se* Complaint against Respondent. Paragraph #5 of the Complaint states that Garcia applied for naturalization on August 26, 1996; paragraph #7 states that she obtained her permanent resident status on July 20, 1987, although her March 26, 1996, application for naturalization recites April 25, 1989, as the date she became a permanent resident alien.[1]

Complainant checked paragraph #8 of the OCAHO Complaint format, responding in effect that she had not "been discriminated against because of my national origin." In contrast, at paragraph #9, she stated that "I have been discriminated against because of my citizenship status." At paragraph #14 (a), Complainant stated that she was "fired" because of her "citizenship status AND national origin."

On April 23, 1997, OCAHO issued a Notice of Hearing (NOH) which transmitted the Complaint to Respondent, and assigned the case to me as the presiding Administrative Law Judge (ALJ). The NOH cautioned the parties that all proceedings and appearances would be conducted in accordance with the OCAHO Rules of Practice and Procedure, 28 C.F.R. Part 68 (1996), a copy of which was enclosed with each party's copy of the NOH.

On May 28,1997, Respondent filed its Answer which agreed with Complainant that she was not discriminated against because of her national origin (as she stated at paragraph #8) and denied that Complainant was discriminated against because of her citizenship status (as alleged at paragraph #9 of the Complaint). Respondent also denied that Complainant was fired because of her citizenship status and national origin (as alleged in paragraph #14 of the Complaint) and asserted that Complainant was fired because she got into an altercation with another employee after she had previously been warned that such conduct would cause her to be terminated. Respondent further denied that the employee who was allegedly retained in lieu of Complainant was not, to its knowledge, an

[1]Complainant's "Alien Registration Receipt Card," Form I–551, shows this date as her temporary resident adjustment date. She is, therefore, in error in citing the 1987 date for her adjustment to permanent resident status. Instead, she adjusted to that status in 1989, as correctly stated in her naturalization application. Such "amnesty aliens," on their way to becoming United States citizens, who satisfied the statutory eligibility criteria first became "temporary resident aliens." 8 U.S.C. §1255a(a). Then, after satisfying the requirements outlined in 8 U.S.C. §1255a(b), they became "permanent resident aliens," eligible for naturalization and citizenship as is any permanent resident alien. *See California Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, n.3 (9th Cir. 1990).

unauthorized person. That person presented what appeared to be genuine documents sufficient to establish identity and authorization to work. Respondent contended that the other employee was not terminated as a result of the altercation because she had not been warned that such conduct would lead to termination, and because she had not previously engaged in such conduct.

II. *Discussion and Findings*

A. *Lack of Subject Matter Jurisdiction*

Title 28 C.F.R. §68.38(c) provides that "the Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact that a party is entitled to summary decision."

"A forum's first duty is to determine subject matter jurisdiction because 'lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed.'" *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 4 (1997), (citing *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 376, *reh'g denied,* 309 U.S. 695 (1940)).

The United States Court of Appeals for the Fifth Circuit in *Sarmiento v. Texas Bd. of Veterinary Med. Examiners*, 939 F.2d 1242, 1245 (5th Cir. 1991), instructs:

> It is a fundamental principle of federal jurisprudence, too basic to require citation of authority, that the federal courts are courts of limited jurisdiction. They are empowered to hear only those cases that are within the constitutional grant of judicial power, and that have been entrusted to them by a jurisdictional grant enacted by Congress.

The Federal Rules of Civil Procedure are available as a guideline for cases before ALJs. 28 C.F.R. §68.1. Specifically, "whenever it appears by suggestion of the parties, or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). *See Avitts v. AMOCO Prod. Co.*, 53 F.3d 690 (5th Cir. 1995); *MCG, Inc. v. Great Western Energy Corp.,* 896 F.2d 170 (5th Cir. 1990); *Giannakos v. M/V Bravo Trader,* 762 F.2d 1295 (5th Cir. 1985).

It is well established that a district court may enter summary judgment *sua sponte* upon proper notice to the adverse party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986); *Washington v. Resolution Trust Corp.,* 68 F.3d 935 (5th Cir. 1995); *Nowlin v. Resolution Trust Corp.,* 33 F.3d 498, n.9 (5th Cir. 1994).

ALJs may grant summary decision in favor of the moving party provided adequate notice is given to the party against whom it is sought. *See Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638 (1994). On August 15, 1997, I issued an Order of Inquiry which placed the parties on notice that information there requested would be relevant in assisting the judge in determining jurisdiction, *i.e.*, whether Complainant is entitled to maintain this action.

B. *National Origin Discrimination Jurisdiction*

Title 8 U.S.C. §1324b national origin discrimination jurisdiction is limited to claims against employers who employ between four and fourteen employees. The national origin discrimination prohibition protects all individuals, other than unauthorized aliens, from national origin discrimination in the workplace. 8 U.S.C. §1324b(a)(1)(A). *See Hernandez v. City of Santa Ana,* 4 OCAHO 674 (1994); *Pioterek v. Anderson Cleaning Systems, Inc.,* 3 OCAHO 590 (1993); *Monjaras v. Blue Ribbon Cleaners,* 3 OCAHO 526 (1993) (citing *Williamson v. Autorama,* 1 OCAHO 174, at 4 (1990)) (citing *United States v. Marcel Watch Co.,* 1 OCAHO 143, at 11 (1990)).

Respondent's response to the Order of Inquiry submits a listing of the number of individuals employed at all times pertinent to this litigation, *i.e.*, during the period January 1, 1996, to January 31, 1997. Based on Respondent's payroll records, the sworn statement depicts Respondent as an employer of between 26 and 35 individuals for each week during that period.

As it is undisputed from the record that Respondent employed more than fourteen employees at all times relevant to the alleged acts of discrimination, I do not have jurisdiction over Complainant's allegations of national origin discrimination. Complainant's allegation of national origin discrimination is, therefore, dismissed.

C. *Citizenship Status Discrimination*

In order to maintain a citizenship status discrimination claim, an individual must be a "protected individual." 8 U.S.C. §1324b(a)(1)(B).

An alien lawfully admitted for permanent residency is a protected individual unless that individual fails to apply for naturalization within six months of the date he or she first becomes eligible to apply for naturalization. 8 U.S.C. §1324b(3)(B)(i). *See Aguinaldo v. McDonnell Douglas Corp.,* 4 OCAHO 707 (1994). Generally, that eligibility attaches five years after an adjustment of status to permanent legal resident. 8 U.S.C. §1427(a).

Absence from the United States during the period of continuous residence may break the continuity of residence, delaying the date on which the alien is eligible to apply for naturalization. 8 U.S.C. §1427(b). Garcia's absences from the United States were occasional, none for more than two weeks, and, therefore, have no affect on continuity of residency. *Prado-Rosales v. Montgomery Donuts,* 3 OCAHO 438 (1992); *Dhillon v. Regents of the Univ. of California*, 3 OCAHO 497 (1993).

Complainant's response to the Order of Inquiry makes it clear that she is not within the class of individuals protected against citizenship status discrimination. This is so because in her "Application for Naturalization," Form N–400, Complainant attests that she became a permanent resident on April 25, 1989. She did not apply for naturalization until August 26, 1996, which is more than five years and six months after April 1989. It follows that Complainant is not a protected individual under the scope of 8 U.S.C. §1324b(a). Complainant's allegation of citizenship status discrimination is, therefore, dismissed.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings and supporting documents filed by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as more fully explained above, the Complaint is dismissed.

IV. *Appeal*

This Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a

United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated and entered this 9th day of October, 1997.

MARVIN H. MORSE
Administrative Law Judge