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

April 16, 2009

JOSE R. LIMA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 08B00044
NEW YORK CITY DEPT. OF EDUCATION, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which Jose Lima, a citizen and national of the Dominican Republic, is the complainant and the New York City Department of Education (DOE or the Department) is the respondent. Lima filed a complaint with this office in which he alleged that DOE discriminated against him based on his citizenship status and national origin by firing him from his job as a teacher of mathematics, refusing to hire him for other jobs, rejecting documents he tendered to establish his eligibility for employment in the United States, and excluding him from a Job Fair conducted by the Department. Lima's complaint also asserted that his exclusion from the Job Fair was motivated by retaliation for his filing a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

DOE filed a verified answer denying the material allegations of the complaint and raising various affirmative defenses; it also filed a Motion to Dismiss based on some, but not all, of the same denials and defenses. The answer and motion were accompanied by exhibits. Lima filed a response to the answer, accompanied by another copy of the complaint, and by attachments and exhibits. Because materials outside the record were tendered, I issued an order notifying the parties that DOE's motion would be converted to one for summary decision, and offering Lima the opportunity to file additional evidence in opposition. *See Kopec v. Coughlin*, 922 F.2d 152, 154-55 (2d Cir. 1991) (stating that a court must either rule on a motion to dismiss without

considering matters extraneous to the pleadings or convert the motion to one for summary judgment); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 592 (2d Cir. 1993).

Lima refiled the same response, together with more copies of the same exhibits, as well as his own declaration and the declaration of his attorney authenticating the exhibits. DOE replied by a four page letter accompanied by fourteen pages of materials identified collectively as Exhibit A. Lima responded by letter accompanied by his Second Declaration, together with approximately 100 pages of telephone records.

The motion is ripe for decision.

II. BACKGROUND INFORMATION

Although an attachment to Lima's complaint asserts that he became a conditional permanent resident on August 17, 2006, with a pending request for removal of the condition, his immigration status has varied during the period to be examined here.[1] Lima holds a Bachelor's Degree in Electromechanical Engineering, conferred in 2000 by the Universidad Autonoma de Santo Domingo. He had an Employment Authorization Document (EAD) that was valid from August 21, 2002 until February 20, 2003, which he obtained as the beneficiary of a petition filed by his United States citizen wife, and a pending application for adjustment of status. He subsequently obtained another EAD that purported to authorize him to work from March 3, 2003 until August 2, 2004, but because Lima and his first wife were divorced on July 14, 2003, he was no longer eligible to pursue adjustment of status based on her petition, as he was no longer the spouse of a United States citizen.

DOE describes itself as the largest school system in the nation, serving around 1.1 million students in New York city's five boroughs: Brooklyn, Manhattan, Queens, Staten Island, and the Bronx. The system consists of 1198 public schools, and employs approximately 80,000 teachers, with a total staff (including the teachers) of about 140,000 employees. In 2003, DOE began sponsoring international teachers in certain shortage subject matter areas, including mathematics, for temporary full time employment.

DOE hired Lima as a full time temporary math teacher on April 14, 2003, and on his behalf filed both a labor condition application with the Department of Labor (Form ETA-9035E), seeking certification to employ him through the H-1B program, and a Petition for Nonimmigrant Worker (Form I-129) with the Immigration and Naturalization Service (INS). On the Form I-129 Petition, boxes were checked indicating that the action requested of INS was to "[c]hange the person(s) status and extend their stay since they are all now in the U.S. in another status (see

[1] The record reflects that on May 23, 2008, Lima's conditional resident status was extended for one year.

instructions for limitations)." Another box was checked on the form indicating that Lima was at that time in exclusion or deportation proceedings, although he also had a family adjustment of status pending.[2]

DOE's petition was approved in August 2003 for a period of three years, and Lima was issued an H-1B nonimmigrant visa for the period. As a participant in the international teacher program, Lima was required to qualify for an Exchange Certificate and meet the requirements for state teacher certification by August 1, 2005, as well as to maintain INS-approved visa status. As an approved participant in DOE's international teacher program, Lima taught math in one of DOE's middle schools for more than three years. But DOE evaluated Lima for his initial state teaching certification requirements in November of 2004, and found that he lacked many of the required qualifications to be a math teacher, including, inter alia, passing his New York State Teacher Certification Examinations.

When Lima applied for an extension of his H-1B visa in January of 2006, DOE's office of International Recruitment notified him that the Department could not proceed with the visa renewal process for him until he satisfied the New York state certification requirements. DOE sent Lima a Notice of Uncompleted Requirements for Certification on May 5, 2006, including, inter alia, requirements that he pass the liberal arts and science test (LAST), the assessment of teaching skills - written test (ATS-W), and a content specialty test (CST) in mathematics. Shortly thereafter, on May 16, 2006, DOE sent Lima a letter stating that his employment as an international teacher was based on meeting state certification requirements, and that DOE's sponsorship of his H-1B employment visa would cease unless those requirements were met. The letter stated that Lima had been expected to have met the certification requirements, and that he was then teaching without certification. DOE terminated Lima on July 1, 2006, and simultaneously revoked its sponsorship of his H-1B visa. DOE then "placed a flag in its human resources systems" and put Lima on a list of persons ineligible to be employed by the Department (the "ineligible list").[3]

Meanwhile, Lima had married another U.S. citizen in February of 2006, and, pursuant to a second petition, once again became eligible to apply for adjustment of status as the spouse of a United States citizen. Lima then acquired a new EAD authorizing him to work in the United

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[2] It is unclear exactly when Lima entered the United States. The H-1B petition says he arrived on January 7, 2003, but since he had an EAD in August of 2002, this appears to be incorrect.

[3] In a letter to OSC dated April 6, 2007, Lima's counsel says that DOE's usual practice is to renew an international teacher's H-1B visa for a second three year period, then, after the teacher has worked for five years, apply for his or her permanent resident status. The implication is evidently that had Lima qualified as a math teacher, the usual process would have been followed.

States from May 25, 2006 until May 24, 2007, and he evidently notified the human resources department about this in June of 2006. He was offered a job by a DOE Region 10 summer school supervisor, and began working as a summer school teacher at Mirabel Sisters Intermediate School in July of 2006. On August 17, 2006, Lima obtained conditional permanent resident status, and around the same time he applied for a substitute teaching license, but DOE later told him that it could not issue him a substitute teaching license because there was an immigration code in his file.

Lima didn't get a paycheck for his summer school teaching in August of 2006, so he spoke to DOE's payroll secretary, who informed him that she could not process his check because of "issues with [his] immigration status." When he discussed the situation with the Director of the Office of Recruitment, he was told that his file contained a code indicating that he had been terminated because of his immigration status.[4] He requested that the code be corrected.

Lima meanwhile obtained a New York State Public School Teacher Certificate as a "school attendance teacher" on September 1, 2006, but a computer printout from October 6, 2006 still showed the notation "DIM TERM/IMMIGRA." Lima requested and obtained a letter from DOE dated November 1, 2006 reflecting that his separation was a resignation. He also had a letter from DOE's Division of Human Resources dated October 17, 2006 which said his name had been removed from the "ineligible list." Lima then applied for school attendance teacher jobs in DOE's Regions 9 and 10, and a supervisor in one of the Regions, Nancy Miller, told him that she would have hired him in November as an attendance teacher but for the immigration code in his file. Still looking for work, Lima applied in January of 2007 for a job at Danay's Enterprises, a travel agency, but his application was rejected after a reference check because DOE had informed the agency that Lima had been terminated due to immigration problems. Lima filed his OSC charge shortly thereafter, on February 8, 2007.

DOE did not finally remove the "flag" in his file or take Lima off the ineligible list until April of 2007, nine months after he first requested that his record be corrected, an error the Department attributed to administrative oversight. Lima finally obtained his substitute teaching license in July of 2007, but was nevertheless escorted out of a DOE job fair by a staff member on July 12, 2007. The parties provided conflicting statements and evidence as to how many times after that Lima rejected opportunities offered to him to work as a substitute teacher, but it is evident that at least on some occasions he was offered and did accept those opportunities, and that he did work from time to time in 2008 as a substitute teacher for the Department. Although Lima's Declaration states that he continued to apply for jobs as an attendance teacher, no specific attendance teacher jobs or applications were identified after the November, 2006 rejection of his application for a Region 10 position.

[4] Lima's union eventually negotiated a settlement for this paycheck in September of 2007.

Lima's charge alleged that DOE discriminated against him on the basis of his Dominican national origin and engaged in document abuse. OSC conducted an investigation and sent Lima a letter on August 7, 2007, informing him that he had ninety (90) days after receiving the letter in which to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Lima filed his complaint more than a year later, on August 18, 2008.

III. EVIDENCE CONSIDERED

Because each of the parties identified each set of its exhibits alphabetically, the letter "R" will be used to precede the alphabetical designations of the respondent's exhibits, and the letter "C" will be used to precede the alphabetical designations of the complainant's exhibits in order to distinguish between them. The record contains multiple copies of the same exhibits filed with different letter designations, resulting in considerable redundancy and confusion. The confusion is further compounded by the fact that Lima filed three different sets of exhibits, each of which contained alphabetical designations. The first set accompanied his complaint. The second set was filed in response to the motion to dismiss, and the third after the conversion of the motion. No one set of exhibits corresponds exactly to the others and none corresponds exactly with the Declaration of Lima's counsel purporting to describe them. They will be identified in a manner consistent with the actual labeling of the exhibits in the most recent filing.

A. DOE'S EXHIBITS

DOE's answer and motion were accompanied by two sets of the same exhibits. They include: RA) a letter from DOE signed by Lima and Janet Petrosini dated August 11, 2003; RB) a Notice of Appearance as Attorney or Representative and an INS Petition for Nonimmigrant Worker, Form I-129, filed on Lima's behalf, dated May 21, 2003 (7 pages); RC) a letter from Deputy Superintendent of DOE to the INS in support of H-1B petition on behalf of Lima dated May 19, 2003, together with a copy of a Labor Condition Application, Form ETA- 9035E (9 pages); RD) Notice of Approval of Lima's H-1B petition, dated August 12, 2003; RE) Evaluation of Lima's completion of requirements for teaching license for Adolescent 7-12 education, math, dated November 15, 2004 (3 pages); RF) DOE H-1B Extension Checklist, dated January 3, 2006 (5 pages); RG) email from Samuel Cheung to Lima dated February 15, 2006; RH) Notice of Uncompleted Requirements for Certification sent to Lima, dated May 5, 2006 (2 pages); RI) Notice: Expiration of New York State Certificate Reminder sent to Lima, dated May 16, 2006; RJ) letter to Lima from DOE Office of Recruitment dated May 18, 2006; RK) copy of Lima's Employment Authorization Document with notation "no original;" RL) copy of Lima's provisional Public School Teacher Certificate as an Attendance Teacher, effective September 1, 2006 - August 31, 2011; RM) New York State Requirements for a specific Certificate Title and Type, from DOE website (3 pages); RN) Candidate Profile for Lima (5 pages); RO) Letter from DOE to Lima dated October 17, 2006 signed by Lawrence Becker; RP) H.R.S. Service History Inquiry Screen 01 (2 pages); RQ) letter from DOE to Lima dated July 11, 2007 signed by Peter Ianiello; RR) page 2 of Lima's OCAHO complaint. In its additional reply after Lima's response,

DOE attached one more exhibit, which it also identified as exhibit A, NYDOE Subcentral Detail Report of call history from DOE to Lima, dated December 31, 2008 (14 pages). In order to distinguish it from respondent's original exhibit A, it will be referred to as R2A.

B. LIMA'S EXHIBITS

Lima's second response to DOE's motion was accompanied by his own sworn declaration and the sworn declaration of his attorney authenticating the exhibits. The declaration asserts that Exhibit A "contains true copies of all submissions by Mr. Lima in the present matter." Exhibit CA, however, appears to consist of six pages of documents in English and in Spanish. Other exhibits include CB) copies of three employment authorization cards and a permanent resident card dated August 17, 2008; (CC) Labor Condition Application for H-1B Nonimmigrants (3 pages); CD) Approval Notice for H-1B Petition dated August 12, 2003 and valid until August 3, 2006 (duplicate of RD); CE) Public School Teacher Certificate as School Attendance Teacher effective September 1, 2006 (duplicate of RL); CF) a letter dated October 17, 2006 from DOE HR to Lima (duplicate of RO); CG) a letter to Lima dated November 1, 2006 from Genevieve M. Aloia, Administrator, Office of Salary Services; CH) a computer printout dated October 6, 2006 containing the notation "DIM TERM/IMMIGR; CI) a letter to Lima dated January 25, 2007 from Genevieve M. Aloia, Administrator, Office of Salary Services, followed by an undifferentiated mass of 22 pages of documents, some in Spanish, and a different set of documents labeled as exhibits A-L, consisting mostly of duplicates.

In addition to the submissions of the parties, I have also considered the record as a whole, including all the pleadings and attachments thereto.

IV. STANDARDS TO BE APPLIED

A. STANDARDS GOVERNING SUMMARY DECISION

OCAHO rules[5] set forth the relative burdens of production for ruling on a motion for summary decision, 28 C.F.R. § 68.38(b), and OCAHO cases applying those rules are guided by federal case law, *United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[6] Accordingly,

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[5] Rules of Practice and Procedure, 28 C.F.R. Part 68 (2008).

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

summary decision may be entered in favor of either party if the pleadings, affidavits, or other evidence show that there is no genuine issue of material fact, and that a party is entitled to judgment as a matter of law. § 68.38(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party seeking summary decision has the initial burden of demonstrating the absence of a genuine issue of material fact. *Id.* If this burden is met, the nonmoving party's opposition must "set forth specific facts showing that there is a genuine issue of fact for the hearing" rather than resting on mere allegations or denials. § 68.38(b). An issue of fact is "genuine" only if it has a real basis in the record, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), and "material" only if it might affect the outcome of the suit, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1077, 5 (2001). OCAHO case law is in accord that a failure of proof of any element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).

B. SUBSTANTIVE BURDENS OF PROOF

1. Discrimination Based on National Origin or Citizenship

It is an unfair immigration-related employment practice for a person or entity to discriminate against an individual because of the individual's national origin or citizenship status when recruiting, hiring, or discharging employees. 8 U.S.C. 1324b(a)(1). In the absence of direct evidence, a complainant may show a prima facie case by using the paradigmatic framework first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As recently described, that framework requires the employee to show that: 1) he is a member of a protected class, 2) he was qualified for the position, 3) he suffered an adverse employment action, and 4) the events occurred under circumstances that could give rise to an inference of intentional discrimination. *See, e.g., Yefremov v. N.Y. City Dep't of Transportation*, 3 OCAHO no. 562, 1556, 1583 (1993).

If the complainant successfully makes a prima facie case using the *McDonnell Douglas* burden-shifting framework, the burden of production shifts to the employer to proffer a nondiscriminatory reason for the employment decision at issue. *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999). If the employer does so, the burden shifts back to the employee to show that the employer's reason is pretextual. *Id.* This means that once an employer has put forth a nondiscriminatory reason, the employer will ordinarily be entitled to

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database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

summary resolution unless the complainant can point to evidence that could reasonably support a finding of discrimination. *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000).

2. Document Abuse

Section 1324b(a)(6) provides that an employer's request for more or different documents than are required to demonstrate employment eligibility, or a refusal to honor facially valid documents, is treated as an unfair employment practice if the request or refusal is made for the purpose of or with the intent of discriminating against an individual on the basis of citizenship status or national origin. The respective burdens of proof and production for document abuse are allocated in the same manner as in any other discrimination case. *See United States v. Diversified Tech. & Servs. of Va.*, 9 OCAHO no. 1095, 20 (2003).

3. Retaliation

It is unlawful for a person or entity to retaliate against any individual by interfering with a right or privilege secured by § 1324b, or because the individual files or intends to file a charge or complaint under that section. In order to establish a prima facie case, the employee must show that: 1) his or her conduct is specifically protected by § 1324b, 2) the employer was aware of the protected conduct, 3) the employee suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse employment action. *Ipina*, 8 OCAHO no. 1036 at 568. To satisfy the fourth prong, the complainant must present evidence sufficient to raise an inference that the protected activity is the likely reason for the adverse action. *See id.* at 577.

V. THRESHOLD ISSUES POSED BY AFFIRMATIVE DEFENSES

A. LIMA'S ALLEGATIONS OF DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN

Section 1324b(a)(2)(B) provides that the INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (Title VII). Title VII covers most claims of national origin discrimination against employers who employ more than fourteen (14) employees, which means that claims of national origin discrimination against such employers are not within the scope of § 1324b, and must be directed to the EEOC. *Sodhi v. Maricopa County Special Health Care Dist.*, 9 OCAHO 1124, 6 n. 2 (2007) (*Sodhi I*).

Lima acknowledged in his OSC charge that DOE has fifteen or more employees;[7] other materials in the record reflect that the number is approximately 140,000. Lima does not contend otherwise, and his claim of national origin based discrimination must accordingly be dismissed. Although DOE raised this issue as a question of subject matter jurisdiction over Lima's claim of national origin based discrimination, the number of a respondent's employees is an element of a claim for relief rather than a jurisdictional matter. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-16 (2006). Accordingly, DOE's "jurisdictional" defense is treated instead as a failure to state a claim upon which relief may be granted in light of Lima's inability to satisfy one of the elements of a claim of national origin discrimination under § 1324b.

B. LIMITATIONS

Although DOE raised an affirmative defense based on limitations, the issue was not addressed in its motion or memorandum, thus was not briefed by either party. There are nevertheless limitations problems with respect to both the complaint and the charge which affect the appropriate scope of this case.

1. Limitations on the Filing of a Complaint

Lima filed the instant complaint more than a year after OSC issued him the letter advising him that he had ninety days from his receipt of that letter to file it. Included in the record is a series of self-styled "tolling agreements" between the parties and OSC, each of which purports to extend the filing period yet again for the ostensible purpose of "further investigation" and settlement discussions.

The governing statute expressly provides OSC with a period of 120 days from the filing of a charge in which to investigate the charge and decide whether or not it wants to file a complaint. 8 U.S.C. § 1324b(d)(1). If, upon the expiration of the 120-day period, OSC has not filed a complaint, it must so notify the charging party, and inform the party that he or she has 90 days in which to file a private complaint with OCAHO. *See* § 1324b(d)(2); § 68.4(c). OSC retains the option within the ensuing 90-day period to continue its investigation and to file its own complaint. The mandatory notification to the charging party at the end of the 120 day period is ordinarily accomplished by a certified mail letter sent to the charging party advising that the complaint must be filed within 90 days after the charging party's receipt of the letter. *See id.*; *Seaver v. BAE Sys.*, 9 OCAHO no. 1111, 6 (2004). There is no provision, either statutory or regulatory, authorizing either the nullification of the notification letter once it has been issued, or the alteration of the nondiscretionary timetable.

[7] The English translation of Lima's charge inexplicably says DOE has "15 or less employees." The Spanish version correctly states "15 o mas." It is unclear who provided the translation, but Lima signed the Spanish version.

It is therefore nowhere evident that the statutory deadline can be susceptible to abrogation by a series of agreements between OSC and the parties. The issue has not previously been addressed in OCAHO jurisprudence and is not elaborated by the parties. I am aware of no authority which permits alteration of the statutory filing deadline by consent, and no such authority has been cited. In *Szymonik v. TyMetrix, Inc.*, 2006 WL 3246848 (USDOL SAROX) (March 8, 2006), the stipulated consensual tolling of a similar 90 day filing period for complaints under the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A (SOX), for the purpose of "settlement discussions," was sua sponte held by the administrative law judge to be a nullity, noting that "[t]o allow private parties to contract at will out of the 90-day limitation would effectively thwart the explicit legislative intent of Congress regarding the applicable statute of limitations." If it is not permissible for private parties to "opt out" of the statutory filing period, it does not appear that a government agency would have the authority to modify or manipulate that deadline to permit them to do so either.

I am nevertheless reluctant to decide the issue without the benefit of briefing, and in the interest of a prompt resolution of this case am disinclined to order briefing at this late date. Future litigants whose cases raise similar issues will be expected to address the issue directly and to justify any purported tolling of the statutory filing period.

2. Limitations on the Filing of a Charge

The statute governing this proceeding provides that no complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with the Office of Special Counsel. 8 U.S.C. § 1324b(d)(3); *see also* 28 C.F.R. § 68.4(a) (2008). Filing a timely OSC charge is thus a condition precedent to the filing of a private action with OCAHO. *Aguirre v. KDI Am. Prods., Inc.*, 6 OCAHO no. 882, 632, 644 (1996); *Bozoghlanian v. Raytheon Co. Electromagnetic Sys. Div.*, 4 OCAHO no. 660, 602, 609 (1994). In the instant case, Lima's charge was filed on February 8, 2007; that means events occurring prior to August 12, 2006 are not properly within the scope of his complaint.

Lima's complaint alleges a series of discriminatory adverse employment actions, starting with his discharge and DOE's simultaneous entry of an immigration code in his file, and continuing with the ongoing refusal to correct the record or to accept his valid documents, the delay of his paychecks in July of 2006, the denial of a job as an attendance teacher in November of 2006, the delay in issuing him a substitute teacher license until January, 2007, the negative reference DOE gave to a private employer in January of 2007, and the exclusion from a job fair on July 12, 2007.

It is evident, however, that with the one exception of Lima's allegation of retaliation for filing the OSC charge, all the adverse actions Lima complains of are the direct result and consequence of the initial allegedly discriminatory acts of firing him, placing the immigration "flag" in his file, and putting him on the ineligible list, events which took place on July 1, 2006, more than

180 days prior to his filing of the charge. For purposes of calculating the limitations period, "the proper focus is on the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

In *Alleyne v. American Airlines, Inc.*, 548 F.3d 219 (2d Cir. 2008), for example, the plaintiff filed a timely charge complaining about the loss of his job in a layoff in June of 2003. But because his loss of occupational seniority in 2002 was the proximate cause of the job loss, the claim was held untimely because termination was only a delayed consequence of the actual discriminatory act, the loss of seniority. *Id*. at 220-221. Like the denial of tenure in *Ricks* and the loss of seniority in *Alleyne*, it was the immigration code in Lima's computer file and the entry of his name on the list of ineligibles that was the actual cause of his loss of employment and licensing opportunities in the ensuing months. The general rule is that "the present effects of a past act are as a matter of law not sufficient to revive a past time-barred event." *Sodhi I*, 9 OCAHO no. 1124 at 9-10.

A respondent's failure or refusal to undo or remedy a prior discriminatory act, moreover, is not ordinarily treated as a new discrete act of discrimination. *Berlanga v. Butterball Co.*, 4 OCAHO no. 669, 705, 710 (1994). In *Berlanga*, the complainant brought a charge of citizenship status discrimination based on the respondent's failure to rehire him for a job he was terminated from over five months earlier. *Id.* Although the failure to rehire him occurred within the 180-day period, the initial termination did not. *Id.* The charge was held to be untimely filed because the underlying act of discrimination was the original termination, and the failure to rehire Berlanga could not revive the untimely claim for discharge because a rule allowing revival "would nullify statutes of limitation." *Id.* at 710.

Because DOE raised the affirmative defense of limitations in its answer, but neither addressed this issue in its motion nor raised any objection to the consideration of the untimely claims, the defense will be treated as having been waived.

VI. DISCUSSION AND ANALYSIS

A. CITIZENSHIP STATUS DISCRIMINATION

A complainant bears the burden of proof with respect to each element of his case. While Lima contends that he is a protected individual, it is not clear that this was the case on the date of the original alleged discriminatory act. The term "protected individual" includes an alien lawfully admitted for permanent residence, or for temporary residence under sections 1160(a) or 1255(a)(1), a refugee under section 1157, or an asylee under section 1158. Lima's permanent resident card is dated August 17, 2008 and indicates that he has been a resident since August 17, 2006. Although he had an valid employment authorization card as of May 25, 2006, it is not

clear what his immigration status was on July 1, 2006, or what type of visa, if any, he had after the revocation of his H-1B visa. The I-129 petition for nonimmigrant worker reflects that at the time it was filed, Lima was in exclusion or deportation proceedings, but the record is silent as to any resolution of those proceedings.

Assuming arguendo for purposes of this motion that Lima could make a timely prima facie case with respect to his termination, DOE contends in response that the reason Lima was terminated was that he was expected to have met state certification requirements as a teacher of mathematics by August 1, 2005, and that he failed to do so. This is apparently undisputed, and Lima appears to acknowledge that he was not actually eligible to be employed as a teacher of mathematics in 2006. He offered no evidence and made no claim that DOE's explanation for firing him from that job is pretextual.

Lima next points to the entry and maintenance of a "stigmatizing" code in his file. The code itself is opaque; it is not entirely clear that Lima didn't have a problem with his immigration status after the revocation of his H-1B visa.[8] Lima's termination, however, was actually based on his failure to qualify as a math teacher, not on his visa revocation, which was the consequence, not the cause, of his termination. To this extent, the code is clearly incorrect. While Lima points to DOE's failure to correct the code as another act of discrimination, DOE attributed the delay in correcting it to administrative error. Lima contends that the reason given is not credible, and asserts that there is direct evidence of discrimination because he was told upon revocation of his H-1B status that he had to return to his home country and that DOE would not pay for his ticket. He urges that DOE's "words and actions give rise to an inference of discrimination," but the usual expectation would be that any foreign worker would have to return to his home country once his H-1B nonimmigrant visa is revoked, and Lima suggests no nexus between these events and his Dominican citizenship.

In order to provide that nexus, Lima's response to the motion asserts that citizens of the Dominican Republic are no longer considered by DOE for H-1B employment, while citizens of other countries are considered. A letter to OSC dated April 6, 2007 asserts that DOE stopped recruiting teachers from the Dominican Republic to participate in the H-1B program, and that Lima believes the decision stems from hostility to Dominicans. No evidence was offered in support of this proposition. DOE's supplemental submission contends, on the other hand, that the assertion is patently false, and that while the Department no longer travels to different countries to recruit teachers, it still accepts applications from any teacher eligible for conditional certification. DOE says that it most recently hired a teacher from the Dominican Republic in September of 2008, for a total of 19 teachers recruited from the Dominican Republic.

[8] Although Lima obtained another EAD as of May 25, 2006, his visa status at that point is unclear.

Unsupported factual allegations in a brief or memorandum are not evidence and cannot themselves provide a sufficient basis for summary decision. *Cf. United States v. IBP, Inc.*, 8 OCAHO no. 1021, 295, 302 (1999). Neither Lima's assertions about recruitment of Dominicans nor DOE's counterargument rests on any evidence whatsoever. Accordingly, no findings are made with respect to the assertion. Absent any facts from which it may be inferred that DOE intended to discriminate against Lima based on his Dominican citizenship, there is no genuine issue of material fact with respect to pretext.

Lima suggests that the pretextual nature of DOE's explanation is evident, but bureaucratic error, standing alone, is not evidence of discrimination. DOE personnel evidently told Lima they would make the correction, and then either failed to follow through or failed to follow up. The people who made the promises are not necessarily the same individuals who are responsible for carrying them out. As anyone who has ever tried to correct an electronic billing error with a cable or computer service provider can attest, delay and frustration are regrettably frequent, particularly when dealing with an institution of the size of DOE. This does not excuse the cavalier treatment Lima received. But it doesn't render it discriminatory either.

B. DOCUMENT ABUSE

Lima alleges that DOE did not reject his documents "to my face," but nonetheless refused on several occasions to accept valid documents he presented as evidence of his employment eligibility. As a specific example, he alleged that in November, 2006, Nancy Miller "dismissed" his valid green card and refused to hire him as an attendance teacher in Region 10. But it is clear that Miller actually wanted to hire Lima; she was prevented from doing so by the code or "flag" in his computer file, not because she had any problem with his employment authorization document as such.

Lima contends that per se document abuse is established where DOE's notation erroneously says he was terminated because of an immigration issue, and it is undisputed that he was denied jobs because of the erroneous notation. But in order to find a violation of § 1324b, it is necessary not only to find that Lima's valid documents were rejected, but also to find that they were rejected with the intent or for the purpose of discriminating against him on the basis of his Dominican citizenship. There is not a scintilla of evidence that Nancy Miller had such an intent or purpose, or, for that matter, that "DOE" did either.[9] What happened to Lima was unfortunate, but there is no evidence that it had any nexus to his Dominican citizenship.

[9] Like any other artificial person, DOE can act, have intent, or make decisions only through its authorized agents. *Bendig*, 9 OCAHO no. 1077 at 16. *Cf. United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991); *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 99 (2d Cir. 1983) (noting that a corporation has no independent state of mind).

C. RETALIATION

Lima alleges that DOE's refusal to allow him to attend a job fair on July 12, 2007 was not only discriminatory, but also was done in retaliation for his filing of the OSC charge. A letter dated July 11, 2007, in response to an in-person inquiry by Lima, explains that DOE Teacher Career Fairs are by invitation only, are for new or excessed teachers certified in specific subject matter areas (shortage areas), and are dictated by the needs of the schools. The letter goes on to explain that because attendance teachers are not a high need area, they are not included in career fairs. DOE says further that the staff member who excluded Lima from the fair was unaware of his OSC charge, and excluded him because he did not qualify for any of the featured shortage area jobs.

Assuming arguendo that Lima made a prima facie case of retaliation, DOE proffered a nondiscriminatory reason, and Lima provided no evidence suggesting that this reason was a pretext for an underlying retaliatory motive. *See Sodhi v. Maricopa County Special Health Dist.*, 10 OCAHO no. 1127, 8-9 (2008) (*Sodhi II*). He does not suggest that other attendance teachers were permitted to attend, or were recruited at, job fairs, nor does he suggest that he was treated differently from any other applicant for an attendance teacher position once the offending code was removed from his record. There are no facts from which an inference may be drawn that excluding Lima from the fair was either discriminatory or retaliatory.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. Jose Lima is a citizen and national of the Dominican Republic who became a permanent resident of the United States on August 17, 2006.

2. Lima had an Employment Authorization Document (EAD) authorizing him to work from March 3, 2003 until August 2, 2004, which he obtained as the beneficiary of a petition filed by his United States citizen spouse, pursuant to which he filed an application for adjustment of status.

3. On July 14, 2003, Lima and his first wife divorced, so he was no longer eligible to pursue adjustment of status as the spouse of a United States citizen.

4. The New York City Department of Education (DOE) is a large metropolitan public school system with approximately 140,000 employees in about 1200 schools located in the five boroughs of New York City.

5. In 2003, DOE began sponsoring international teachers in certain shortage subject matter

areas, including mathematics, for temporary full time employment.

6. Participants in DOE's international teacher program had to qualify for an Exchange Certificate, meet the requirements for state teacher certification by August 1, 2005, and obtain INS-approved visa status.

7. DOE hired Lima on April 14, 2003 as a full time temporary math teacher pursuant to its international teacher program.

8. DOE filed a labor condition application with the Department of Labor (Form ETA-9035E) on Lima's behalf, seeking certification to employ him through the H-1B program, as well as a Petition for Nonimmigrant Worker (Form I-129) with the Immigration and Naturalization Service (INS).

9. With a letter of support from DOE, Lima applied for an H-1B nonimmigrant visa, and the application was approved on August 12, 2003.

10. In January of 2006, Lima applied for an extension of his H-1B visa, but DOE informed him that the Department would not proceed as his sponsor for visa renewal because he had not passed the New York State Teaching Certification Examinations.

11. Lima remarried in February, 2006 and again became eligible to pursue adjustment of status as the spouse of another United States citizen; he acquired a new EAD that was valid from May 25, 2006 until May 24, 2007.

12. On July 1, 2006, DOE terminated Lima and simultaneously revoked its sponsorship of Lima's H-1B visa because he failed to meet state certification requirements for teachers of mathematics.

13. On July 1, 2006, DOE placed a "flag" in its human resources system indicating that Lima had a problem with "immigration" and put him on its "ineligible" list.

14. In July of 2006, Lima began working as a summer school teacher at a DOE school.

15. In August of 2006, Lima applied for a substitute teaching license, but was later told DOE could not issue him such a license because of the immigration code in his file.

16. In August of 2006, Lima was informed that he could not receive a paycheck for his summer school teaching services because of the immigration code in his file.

17. A union negotiated a settlement for Lima's 2006 summer school pay in September of 2007.

18. On September 1, 2006, Lima received a New York State Public School Teacher Certificate in the area of "school attendance teacher."

19. In October of 2006, DOE informed Lima that he had been removed from the "ineligible" list.

20. Lima was rejected for an attendance teacher position in November of 2006 because of the immigration code in his file.

21. In January of 2007, Lima applied for a position with Danay's Enterprises, a travel agency, but was rejected because DOE informed the travel agency that Lima had been terminated due to immigration problems.

22. DOE's delay in issuing a check for Lima's summer pay and in granting him a substitute teaching license, its failure to hire him as an attendance teacher, and its giving a negative reference to Danay's Enterprises for him were all based on the immigration code in his file.

23. On February 8, 2007, Lima filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

24. In April of 2007, DOE finally removed Lima from the "ineligible" list and/or removed the immigration "flag" from his electronic file.

25. On July 12, 2007, Lima was escorted out of a DOE job fair.

26. The job fair was by invitation only, and Lima was not invited because he did not have the required certification for any of the positions available there.

27. In July of 2007, Lima was granted a substitute teaching license.

28. Lima was offered opportunities to substitute teach in 2008 and accepted some of those opportunities.

29. On August 7, 2007, OSC sent Lima a letter informing him that he had ninety (90) days after receiving it in which to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

30. Lima filed the instant complaint on August 18, 2008.

31. At the time of Lima's employment and at all relevant times, DOE had fifteen or more employees.

B. CONCLUSIONS OF LAW

1. Lima has been a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) since August 17, 2006.

2. There is no evidence that Lima was a protected individual on July 1, 2006.

3. The New York City Department of Education is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

4. An exception to 8 U.S.C. § 1324b(a)(1) exists for claims based on national origin where an entity is covered under the Civil Rights Act of 1964, 42 U.S.C. § 2000-e2 (Title VII). 8 U.S.C. § 1324b(a)(2)(B) (2008).

5. Most claims of national origin discrimination are covered under Title VII if the employer has fifteen (15) or more employees for twenty or more weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b).

6. Lima's claim of national origin discrimination is covered under Title VII and accordingly is not covered by § 1324b.

7. No complaint may be filed respecting practices that occur more than one hundred and eighty (180) days prior to the filing of a charge with OSC. 8 U.S.C. § 1324b(d)(3).

8. For purposes of calculating a limitations period, "the proper focus is on the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

9. A respondent's failure to undo or remedy a prior discriminatory act is not a new discrete act of discrimination. *Berlanga v. Butterball Co.*, 4 OCAHO no. 669, 705, 710 (1994).

10. Under the paradigmatic framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a prima facie case is made when an employee shows that: 1) he is a member of a protected class, 2) he was qualified for the position, 3) he suffered an adverse employment action, and 4) the events occurred under circumstances that could give rise to an inference of intentional discrimination. *See, e.g., Yefremov v. N.Y. City Dep't of Transportation*, 3 OCAHO no. 562, 1556, 1583 (1993).

11. If the complainant successfully makes a prima facie case using the *McDonnell Douglas* burden-shifting framework, the burden of production shifts to the employer to proffer a nondiscriminatory reason for the employment decision at issue. *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999). If the employer does so, the burden shifts back to the

employee to show that the employer's reason is pretextual. *Id*.

12. Once an employer has put forth a nondiscriminatory reason, the employer will be entitled to summary resolution unless the complainant can point to evidence that could reasonably support a finding of discrimination. *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000).

13. Assuming arguendo that Lima made a prima facie case as to each of his claims of discrimination, DOE proffered nondiscriminatory reasons for its actions.

14. Assuming arguendo that Lima made a prima facie case as to retaliation, DOE proffered a nonretaliatory reason for excluding him from the job fair.

15. Lima failed to demonstrate specific facts raising a genuine issue of material fact with respect to the issue of pretext, as to either his claims of discrimination or his claim of retaliation.

16. The complaint must be dismissed.

To the extent that any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 16th day of April, 2009.

_____

Ellen K. Thomas
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 timely review of that 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 such Order.