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

June 17, 2010

MID-ATLANTIC REGIONAL ORGANIZING COALITION, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Charging Party,	)	
CRUZ HERNANDEZ, ORGANIZER, MID-ATLANTIC REGIONAL ORGANIZING COALITION, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Injured Party,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 10B00022
HERITAGE LANDSCAPE SERVICES, LLC, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006) as amended, in which Cruz Hernandez filed a complaint alleging that he applied for work as a landscape laborer at Heritage Landscape Services, LLC (HLS or Heritage Landscape) but was not hired because of his citizenship status. His regional union filed a separate complaint making similar allegations with respect to other union representatives. Accompanying the complaints was a copy of the charge the union filed on Hernandez' behalf with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). HLS filed a timely answer denying the material allegations of both complaints and raising ten affirmative defenses.

The answer was followed shortly by Respondent's Motion to Dismiss and/or Motion for Summary Decision. The complainants filed a response to the motion, and the respondents filed a reply to the response. The complainants filed an opposition to the reply, and the respondents filed a sur-reply by letter asking for oral argument either at a live hearing or by telephone

conference. The complainants, also by letter, opposed oral argument. HLS also filed Respondent's Motion to Strike and for Reasonable Costs and Fees addressed to the declarations and exhibits accompanying the complainants' response to the motion to dismiss, and the complainants filed a timely memorandum in opposition.

Both the respondent's motion to dismiss and/or motion for summary decision and respondent's motion to strike and for costs and fees are fully briefed and ready for decision. The request for oral argument will be denied. For the reasons more fully set out herein, Heritage's motion for summary decision will be granted, and its motion to strike will be denied as moot. Heritage's request for an award of the costs and fees incurred in filing the motion to strike will be denied without prejudice to Heritage's right to file a petition for attorney's fees pursuant to 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(d)(6)[1] within the next 30 days.

II. THE MOTION FOR SUMMARY DECISION

A. Evidence Submitted

Heritage's motion to dismiss and/or for summary decision was accompanied by Exh. 1, the declaration of William Cullen, Vice President of Operations (7 pages), appended to which are exhibits A) an employee manual (25 pages); B) a letter dated January 13, 2009 from United States Citizenship and Immigration Services (CIS) to HLS; C) Department of Labor Form ETA-750, Application for Alien Employment Certification (2 pages); D) a list of applicants from November 2, 2008 to February 28, 2009 (3 pages); E) a letter dated October 27, 2008 from Mas to LIUNA; F) a Washington Times advertisement; G) a letter dated November 3, 2008 from the Virginia Employment Commission to Mas, with an attached list of applicants referred (2 pages); H) a letter dated April 28, 2009 from OSC to HLS with attached charge (7 pages); and I) a letter dated November 19, 2009 from OSC to respondent's counsel; and Exh. 2, the declaration of Elizabeth Whitley Fulton, appended to which are exhibits A) a letter dated October 27, 2008 from Mas to LIUNA (a duplicate of Cullen's Exhibit E); B) a Washington Times advertisement (a duplicate of Cullen's Exhibit F); and C) a letter dated November 3, 2008 from the Virginia Employment Commission to Mas, with an attached list of applicants referred (a duplicate of Cullen's Exhibit G) (2 pages).

MAROC's response to the motion was accompanied by the declarations of Cruz Hernandez (3 pages) and Raymin Diaz (2 pages), and exhibits A) a letter dated October 27, 2008 from Mas to LIUNA (a duplicate of Cullen's exhibit E and Fulton's exhibit A); B) a computer printout dated March 29, 2010 from the Virginia State Corporation Commission; C) a webpage screenshot for KT Enterprises; D) a computer printout dated March 29, 2010 from the Virginia State

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Part 68 (2010).

Corporation Commission; E) a webpage screenshot for Heritage Landscape; F) a picture of a sign in Spanish.

Respondent's Reply Memorandum was not accompanied by attachments or exhibits. The complainants' Opposition to Respondent's Reply Memorandum was accompanied by the supplemental declaration of Raymin Diaz (2 pages), and exhibit G) a document captioned Test Application Program for H-2B Visa Landscape Applicants.

B. Background information

The Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America (MAROC) is a labor organization that oversees seven district councils which operate hiring halls and seek to place union members in construction and manual labor jobs with various employers in the mid-Atlantic states. It is a regional branch of the Laborers' International Union of North America (LIUNA). Cruz Hernandez is a labor organizer who works at MAROC's office in Reston, Virginia. The respondent Heritage Landscape Services, LLC (HLS) is a Virginia-based company that provides landscaping services to corporate clients and homeowners' associations at multiple locations in Fairfax, Louden, and Prince William counties in Virginia. Its corporate headquarters office is located at 23725 Overland Drive, Sterling, Virginia 20166. Mid-Atlantic Solutions, Inc. (Mas) is a full service firm specializing in the H-2B process.[2] The firm handles the entire process on behalf of employers, including completing all the necessary forms and reports, and that in that capacity, Mas handled the H-2B process for HLS during the period 2006-2009.

Hernandez' OCAHO form complaint alleges that he applied to HLS for work as a landscape laborer at HLS on October 22, 2008 and November 12, 2008, but was not hired because of his citizenship status. Attachments to his complaint included a copy of the OSC charge MAROC filed on Hernandez' behalf, together with MAROC's own complaint which makes additional allegations with respect to four other organizers not named in the OSC charge.

Hernandez' complaint identifies him as a lawful permanent resident of the United States, but is silent as to his actual citizenship status which nowhere appears in the record. The OSC charge stated that Hernandez went to Heritage Landscape's office in Sterling, Virginia on October 22,

[2] The term "H-2B process" refers to the multi-step procedure that must be followed in order for an employer to obtain permission from various government agencies to employ aliens for nonagricultural labor of a temporary or seasonal nature in the United States. The term is derived from the statutory provision found at 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Nonimmigrant aliens temporarily admitted to the United States to perform such work are colloquially referred to as "H-2B workers."

2008[3] to apply for a job that had been advertised pursuant to the requirements of the H-2B visa program, and was told that Heritage was not accepting applications. MAROC's self-styled complaint states more specifically that Hernandez is an organizer at MAROC, that MAROC dispatched him to Heritage's Sterling, Virginia office in response to an ad announcing that Heritage was seeking labor certification for the H-2B visa program, but that when he arrived at the office Hernandez found a sign on the door in Spanish stating that the company was not hiring at the time. It says further that when he entered the respondent's office, Hernandez was told by Douglas Sevachko, Operations Manager, that applications would not be accepted until February.

MAROC's complaint says further that on October 27, 2008 the union received a letter from Mas stating that Heritage was seeking certification for 88 H-2B workers to begin in February, 2009. The document goes on to assert that on various dates in November and December 2009 MAROC sent four other agents, Hugo Carballo, Ricardo Gallardo, Miguel Carballo, and Raymin Diaz, "back to the Heritage offices in Chantilly" to apply for landscaping jobs, and that they were not hired or considered. The complaint concludes that these four agents as well as Hernandez were all refused employment because of their (unidentified) citizenship status and seeks various forms of relief in addition to attorney's fees.

1. The Cullen Declaration

The declaration of William Cullen, HLS' Vice President of Operations (exh. 1 in support of HLS' motion) states that the majority of the workforce at Heritage is comprised of field laborers whose duties include mowing, mulch installation, planting, general clean-up, and other landscape services, and that foremen supervise teams of three to six laborers. It says HLS' season runs from February 15 to December 15, with the peak being February through June and September through October, and that job openings rarely occur in the fall. The declaration says further that 124 workers were employed on October 1, 2008, but by mid-December of that year there were only 47, and that the company typically begins its hiring in February of each year.

The declaration explains further that a construction boom in the area in 2005-2008 made recruiting landscape workers in sufficient numbers very difficult, so beginning in 2005 HLS started using the H-2B program to supplement its workforce. Cullen says that HLS preferred to hire domestic workers because of the costs associated with participating in the H-2B program, but it nevertheless retained Mid-Atlantic Solutions, Inc. to assist in its recruitment during that period. The declaration says further that in 2006, HLS had 56 domestic workers and 31 H-2B workers; for 2007, those numbers were 58 domestic and 60 H-2B workers; and in 2008 there were 74 domestic workers and 82 H-2B's; but for 2009 no H-2B landscape laborers were hired. A downturn in the economy and in construction created a larger pool of available domestic

[3] Although Hernandez' form complaint asserts that he applied on October 28, 2008 and November 12, 2008, the OSC charge reflects only the former date.

workers and, although HLS did obtain certification from the DOL to hire H-2B workers in February of 2009, permission was denied by Citizenship and Immigration Services (CIS) in January because the cap for such workers had already been reached for 2009 (Cullen exhibit B).

The declaration states further that HLS has not operated any offices in Chantilly, Virginia since October 2007, and that HLS has no record or recollection of Hernandez or any of the other four individuals named in MAROC's complaint ever attempting to apply for employment at HLS. Cullen's exhibit D is a list of persons HLS hired between November 2, 2008 and February 28, 2009 and contains also the names of others who applied but were not hired, together with the reason each individual wasn't hired.

2. The Fulton Declaration

Elizabeth Whitley Fulton is the president of Mas. The Fulton declaration (exh. 2 in support of HLS' motion) states that as part of the H-2B process, the declarant sent a letter to MAROC on October 27, 2008 (Fulton exhibit A) inquiring whether the union had seasonal workers available for employment as landscape laborers from February 13, 2009 to December 13, 2009. The letter identified Heritage as the employer and described the hours and pay rates. The letter explained that 88 workers were needed, and provided a phone number for the union to call if it had any workers wishing to apply for the positions. MAROC never responded to the letter.

The Fulton declaration said further that the same 88 jobs were also advertised in the Washington Times October 26-28, 2008 (Fulton exhibit B). The ad described the duties and pay rates and identified the employer as Heritage Landscape Services. The instructions directed interested applicants to "Contact the Virginia Employment Commission Office at 5520 Cherokee Ave., Alexandria, VA w/ Job Order # 117960 for referral." No one from MAROC contacted the state Employment Commission to respond to this ad. One inquiry was received in response; it was not from one of MAROC's agents or members.

3. The Hernandez and Diaz Declarations

The declarations of Cruz Hernandez and Raymin Diaz were offered in opposition to the motion. HLS has moved to strike various portions of these declarations as hearsay, because they do not state facts on personal knowledge, or because they draw legal conclusions rather than stating facts. HLS moved as well to strike the accompanying exhibits as unauthenticated. MAROC responded by arguing that the motion was based on "technicalities" and that the respondent filed the motion to delay the proceedings or "to inflict additional costs on MAROC." It argues that the exhibits are authentic and are "capable of being converted into admissible evidence."

There is, however, an even more fundamental problem with the Hernandez and Diaz declarations: each is made "to the best of my information, knowledge, and belief." Testimony "to the best of my knowledge and belief" is opinion; it has no evidentiary value and is properly

disregarded. *Stubbs v. The DeSoto Hilton Hotel*, 8 OCAHO no. 1005, 148, 154 (1998) (citing *Automatic Radio Mfg. Co v. Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950)). Strictly speaking the Hernandez and Diaz declarations should not be considered at all. Nothing in 28 C.F.R. § 68.38(b) authorizes the application of one standard to the moving party's evidence and another standard to that of the nonmoving party. *See Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 5-6 (2002) (explaining that there is no qualitative double standard for evidence in support of, or opposition to, a motion for summary decision).

Our case law has nevertheless in practice sometimes applied a more lenient standard to the nonmoving party, most frequently when the nonmoving party was proceeding pro se. *Id.* To the extent that these declarations actually state specific facts likely to be within the personal knowledge of the declarant they will be considered. To the extent they set forth unsupported conclusions and speculation, they will not. While hearsay is acceptable in OCAHO proceedings and a witness may therefore testify about statements made to him by a third party, bald conclusions based on undisclosed conversations with unnamed persons do not constitute "such facts as would be admissible in evidence," and are not given any evidentiary weight. *See Stubbs*, 8 OCAHO no. 1005 at 156.

The declaration of Cruz Hernandez describes his visit to Heritage on October 22, 2008 and says that Douglas Sevechko told him that day that HLS was not accepting applications until February, and that he should come back then. Hernandez' declaration represents that he and Hugo Carballo, Ricardo Gallardo, Miguel Carballo, and Raymin Diaz are all either lawful permanent residents or citizens of the United States, and that they also made subsequent attempts to apply for work at HLS. Hernandez said he made a "follow-up visit" himself on November 12, 2008, and said that his supervisor at MAROC told him to go as well to the offices of KT Enterprises, because it "was related to Heritage Landscaping and the two offices were very close together." Hernandez thought the offices were in Chantilly. Hernandez made reference to an "overlap" between the two companies and said neither he nor the other organizers were allowed to apply at Heritage or at KT Enterprises.

The declaration of Raymin Diaz identifies the declarant as an organizer for MAROC, and says that on January 5, 2009 he went to two separate offices. At the KT Enterprises office a woman refused to accept a job application from him, and directed him to Heritage's office, which was nearby. He thought they were both in Chantilly. When he arrived at the Heritage office it was closed and no one was there to accept his application. The Supplemental Declaration states further that Diaz and his colleagues were given a schedule (Diaz exhibit G) to visit various targeted landscape companies to apply for work and that they tried to follow the schedule. It says further that he and his colleagues were "briefed" and provided with materials about the companies, so they "knew that both Heritage and KT Enterprises were closely affiliated.

C. Applicable Law

1. Summary Decision

OCAHO rules provide that summary decision as to all or part of a complaint may issue 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 the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[4] A party seeking a summary disposition bears the initial burden of demonstrating an absence of a material factual issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When the burden of establishing the issue at trial would be on the nonmovant, however, 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 on 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).

2. Discrimination in Hiring or Recruitment

A prima facie case of discrimination in hiring is shown when a complainant demonstrates that he belongs to a protected class, he applied and was qualified for a job for which the employer was seeking applicants, despite his qualifications he was rejected, and after his rejection the position remained open and the employer continued to seek applicants with similar qualifications. *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001). Alternatively, the individual must show that he is a member of a protected group, that he applied and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination. *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998).

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

It is well established in OCAHO jurisprudence that discrimination in hiring encompasses not only a failure to hire, but also to a failure to consider for hire. *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 681 (1997). The governing statute specifically applies to recruitment for employment as well as to hiring, and OCAHO cases have long held that it is the entire selection process, and not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment. *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999).

D. Positions of the Parties

1. Heritage Landscaping

HLS contends, citing *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000), that all MAROC's agents were "testers" who were not qualified for the jobs in question and never intended to accept them, so they have no standing to bring this action because they were not adversely affected by any act of HLS. It argues further that because no charge was ever filed with OSC respecting the claims of persons other than Cruz Hernandez, any purported claims involving Hugo Carballo, Ricardo Gallardo, Miguel Carballo, and Raymin Diaz are barred for failure to timely exhaust administrative remedies. Similarly, HLS argues that because KT Enterprises was never named in an OSC charge and was never provided with any notice of MAROC's claims, KT may not be joined at this late date either.

HLS notes that before applying to Citizenship and Immigration Services for permission to obtain H-2B visas for any seasonal or temporary foreign workers, it is first necessary to apply to the Department of Labor (DOL) for certification that qualified domestic workers are not available and that the employment of H-2B workers will not adversely affect the wages or working conditions of similarly employed domestic workers. As part of the certification process, the employer must exhaust recruitment efforts for domestic workers through the appropriate State Workforce Agency (SWA) by placing a job order there, and by advertising in a publication likely to bring responses from domestic workers. Only after the completion of the recruitment process will DOL determine whether to issue the certification, after which it is necessary to obtain the permission of CIS as well. Although HLS followed this process in each year from 2005 to 2008, it hired no temporary foreign workers for the 2009 season and says the complaints in this matter must necessarily fail for this reason.

HLS urges further that the complainants cannot make out a prima facie case because they allege no instance of disparate treatment: they do not contend either that H-2B workers were hired in 2009 or that HLS accepted applications from H-2B workers during the period at issue.

2. MAROC

MAROC responded to the motion by urging that it must be denied because the complainants

made out a prima facie case, because there are significant disputes as to material facts, and because Heritage is not entitled to judgment as a matter of law.

MAROC denied that its agents were "testers" and asserted that they had standing to complain because they had an interest in taking jobs in the landscaping industry in order to organize the other workers, a procedure known as "salting." It urged that the claims of the four organizers other than Hernandez are sufficiently "like and related" to the issues raised in Hernandez' OSC charge to provide notice, citing *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 7 (2003). MAROC says there is a material issue of fact as to whether the scope of the OSC investigation reasonably growing out of Hernandez' charge put Heritage on notice of the other claims as well, and that discovery is needed as to the scope of the OSC investigation in order to resolve this question.

MAROC and Hernandez argue that "it was the entire hiring and recruitment process" which led to the discrimination, and that HLS "did not even consider their applications because they did not have H-2B status." It contends that the only reason HLS didn't hire any H-2B workers for the 2009 season is that it was prohibited from doing so by CIS in a letter dated January 13, 2009 (Cullen exhibit B).

MAROC also contends that "there are numerous issues of material fact in dispute" and that summary decision is therefore inappropriate "at this time." MAROC cites as examples that there are factual disputes "over the subsequent visits" of its agents, and as to "whether Heritage and KT Enterprises are the same company for purposes of this case."

E. Discussion and Analysis

As in any employment discrimination case, the complainants bear the burden of establishing a prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Hernandez' and MAROC's claims of discrimination in hiring falter at the threshold because neither is able to meet the minimum showing required for a prima facie case.

It is undisputed that Heritage did not hire any H-2B workers at all in 2009, and that all of the landscape laborers it did hire for the 2009 season were domestic workers whose citizenship status, like Hernandez,' has not been specifically identified. There is no evidence to support an inference that Hernandez was discriminated against on the basis of his citizenship status where, as here, that status is still undisclosed and Hernandez points to no way in which HLS could even have learned what that status was.[5] *Cf. Alamprese v. MNSH, Inc.*, 9 OCAHO no 1094, 8-9

[5] Neither Hernandez nor MAROC makes any argument that HLS had any way of knowing his citizenship status, and there is nothing in the record that discloses that status even now.

(2003) (noting impossibility of finding discrimination based on a characteristic unknown to the employer). While Hernandez asserts that he and his colleagues were all either citizens or lawful permanent residents of the United States, he made no showing that the persons Heritage hired for the 2009 season were not also citizens or lawful permanent residents of the United States.

Discrimination suits require some evidence of discrimination. *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 25 (2005) (citation omitted). This means that there must be at minimum a sufficient factual basis to permit an inference that a protected characteristic actually played a role in the employment decision in question, and that it had a determinative influence on the outcome. *Id.* There is no such evidence here. The complainants have identified no similarly situated individual of any citizenship status who was permitted to apply for one of those 88 jobs at HLS by walking into Heritage's Sterling office at a time of his own choosing months in advance of the time that landscape workers were needed, and months before HLS typically started its hiring for the season. They do not even allege that any persons of some other citizenship status were permitted to apply in that manner.

The Cullen declaration said that HLS rarely had job openings in the fall and that it typically began hiring seasonal workers in February of each year. MAROC cited no authority for the proposition that a job applicant has the prerogative to dictate the time, place, and manner in which a particular employer should accept applications or begin hiring. It is the employer's prerogative, not the prospective employee's, to decide when, where, and how applications will be received. While MAROC says that HLS refused to let its agents apply, the fact is that neither Hernandez nor any other representative or member of MAROC ever made any attempt to apply for the jobs in any of the ways in which HLS actually sought applicants.

The complainants thus cannot establish that they applied and were rejected. An individual who fails to apply cannot establish a prima facie case of discrimination in hiring. *Brown v. McLean*, 159 F.3d at 903. Unlike the plaintiff in *Sears Roebuck*, who "diligently applied" for the job at issue, 243 F.3d at 851, neither Hernandez nor any of MAROC's agents ever applied for work as a landscape laborer at HLS at the time or in the manner in which HLS actually did its hiring for the season. HLS had 88 landscape laborer jobs which were set to begin February 13, 2009, and there were three ways in which Hernandez could have applied for one of these jobs. First, he could have returned to the office in February when HLS was actually hiring, as Douglas Sevechko expressly told him to do. Second, he could have answered the newspaper advertisement by calling the Virginia State Employment Commission and making reference to the Job Number specified in the ad. Third, he could have been referred by MAROC in response to the letter Mas sent to the union on October 27, 2008.

That the office was closed when he went there is insufficient to show that Diaz was "refused the opportunity" to apply for work at HLS. The assertion that his seeking to apply at the office of KT Enterprises is somehow the same as seeking to apply to HLS based on the bald conclusion that the two companies "are the same company for purposes of this case" is also insufficient to

survive a motion for summary decision. MAROC cited no authority for the proposition that a prospective job applicant has the prerogative to determine by fiat that he applied to one company by attempting to apply to a different company. There is no evidence whatsoever, and no allegation, that KT Enterprises was seeking employees, either on its own behalf or on behalf of HLS, in the fall of 2009. There is no evidence and no allegation that KT Enterprises accepted walk-in employment applications from anyone of a different citizenship status, either on its own behalf or on behalf of HLS, and there is no evidence or allegation that someone else having a different citizenship status was permitted to apply for a job at HLS by walking into the offices of KT Enterprises.

It is undisputed that Hernandez never returned to Heritage in February, as Sevechko had expressly told him to do. It is similarly undisputed that no other agent of MAROC went to Heritage's office in February either. It is undisputed that neither Hernandez nor any other MAROC representative or member sought to apply for work as a landscape laborer at Heritage by contacting the Virginia Employment Commission Office with reference to the job number specified in the newspaper ad, and that MAROC itself simply never responded to the letter Fulton sent to the union on October 27, 2008 to indicate any interest in those jobs.

In short, neither Hernandez nor any of the union representatives can make a prima facie case with respect to hiring discrimination because none applied in the manner set out by the employer, none can demonstrate that HLS even knew his still undisclosed citizenship status, and none can show that a person having a citizenship status different from his own was permitted to apply in the time, place, and manner he sought to apply. No rational factfinder could conclude on the basis of this record that HLS refused to accept Hernandez' or anyone else's application because of his citizenship status.

Case law sets out an exception to the requirement of an application for employment where the complainant can demonstrate that a formal application would be a "futile gesture." As explained in *Fox v. Baltimore City Police Department*, 201 F.3d 526, 534-36 (4th Cir. 2000), the doctrine derives from *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368 (1977), where minority bus drivers did not apply for more favorable positions because the employer maintained seniority and promotion policies that rendered such application futile. *See also Williams v. Giant Food Inc.*, 370 F.3d 423, 433 (4th Cir. 2004). Because § 1324b expressly prohibits discrimination in recruitment as well as in hiring, OCAHO case law finds it appropriate to examine the whole hiring process, including any nullification or substantial impairment of employment opportunities, even in the absence of a final rejection, *United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990) (observing that active discouragement, based on citizenship, of complainant's attempt to apply for a position can substantially impair employment opportunity), without the necessity of a "futile gesture" doctrine.

But this is not a case like *United States v. Gregory*, 871 F.2d 1239, 1241-42 (4th Cir. 1989) in which the female plaintiff did not formally apply for a deputy position because the employer

explicitly said he did not hire women deputies. Neither is it a case like *Holsey v. Armour & Co.*, 743 F.2d 199, 208-09 (4th Cir. 1984) in which the court found that a formal application was futile and unnecessary where the employer had no black employees in sales jobs and actively discouraged blacks from applying for sales jobs. *Cf. Pinchback v. Armistad Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) (plaintiff not required to make futile offer on property when real estate agent told her blacks were not permitted to live in that neighborhood). There is no suggestion here that members of Hernandez' protected group were under represented in HLS' workforce. HLS did nothing to discourage Hernandez from applying, moreover, or to suggest to him that he would be rejected if he did apply. Instead, Sevechko expressly told him to come back in February when the hiring would be done.

MAROC says that the gravamen of its claims is "that Mr. Hernandez and the other applicants were refused the opportunity to even apply for positions for which Heritage was actively recruiting (and ultimately intending to hire) H-2B visa holders," and argues that HLS' act of discrimination was not its failure to hire Hernandez and the other organizers, but its failure to consider them at all "when it was admittedly seeking to hire H-2B applicants."

Assuming arguendo that a claim of discrimination that is evidently based on immigration status, rather than on citizenship status as set out in the statutory language, would satisfy § 1324b(a)(1), MAROC's conclusion is insufficient to establish a prima facie case because it is made up of no more than speculation coupled with the unsupported inferences set out in its complaint. The complaint concludes that when Sevechko told Hernandez to come back in February, "this meant that Mr. Hernandez' application would only be considered after H-2B visa holders were given preference and hired." The factual basis for this conclusion is unelaborated, and the conclusion does not follow from the premise. MAROC further asserts that the October 27 letter from Mas asking whether any of its members were interested in applying for one of 88 jobs at Heritage "confirmed that Mr. Hernandez' application would only be considered by Heritage after H-2B visa holders were given preference and hired." Again, the factual basis for this conclusion is unelaborated and the conclusion does not follow from the premise. Conclusory allegations about an employer's state of mind do not constitute facts, and naked speculation, without more, will not assist in creating a prima facie case. *See Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 847 (4th Cir. 1988).

Contrary to MAROCs reasoning, filing a petition with DOL does not mean that H-2B workers will be hired first. As is evident in this case, filing a petition with DOL does not necessarily even mean that temporary alien workers will end up being hired at all. The alien labor certification process requires a petitioning employer to seek domestic workers first through recruitment and advertising. Filing a petition with the DOL at least 45 days (but not more than 120 days) in advance of an anticipated need for workers is only the first step in a lengthy proceeding.

Approval for the employment of temporary or seasonal alien workers is governed and regulated

by a complex system of interrelated laws administered by the Departments of Labor, State, and Homeland Security. *See generally Sanchez et al. v. Ocanas*, 9 OCAHO no. 1115, 3-4 (2005) (outlining the multi-step process under the analogous provision for employing temporary or seasonal agricultural workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(a)). Only after DOL approves a certification application may the employer file a Petition for Nonimmigrant Worker, Form I-129, to seek a determination as to whether a visa petition should be granted. 8 C.F.R. § 214.2(h)(2)(i)(A), 214.2(h)(6)(i)(A); *see also* § 214.2(h)(1)(i) and 214.2(h)(1)(ii)(D). It is the approval of the second petition which permits the issuance of an H-2B visa. *See* 8 C.F.R. § 214.2(h)(6)(iii). Visas permitting individuals to enter the United States for employment are not actually issued by the Department of State until the end of the process. *Id.; see also United States v. Sourovova*, 8 OCAHO no. 1020, 283, 290 (1998) (noting that in order to obtain employment-related visa, an individual must be the beneficiary of both an labor certification and an approved visa petition). Where, as here, the numbers available for a particular category in a given year have been exhausted, CIS will not approve any additional visa petitions for that category.

MAROC's presumption that potential H-2B workers would be hired first simply because a petition was filed with DOL is thus totally unwarranted. Any presumption, moreover, is to the contrary. As explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 596 (1982), the whole purpose of the labor certification process was to protect, not to disadvantage, domestic workers:

> The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers . . . . First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers.

That the process is sometimes abused, or that its purpose is not always accomplished, does not mean, as MAROC evidently assumes, that the process is a device designed to favor foreign workers. There is not a scintilla of evidence that HLS ever abused the process or used it to avoid employing domestic workers. Nothing in MAROC's filings rebuts the Cullen declaration that HLS' preference was for hiring domestic workers, and that HLS' eventual use of the H-2B process in 2005-08 was a supplement to, not a substitute for, hiring domestic workers.

That there may be factual disputes between the parties does not preclude summary decision where the disputes are not material. An issue of fact is material only if it might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and only if it must inevitably be decided, William W. Schwartzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1983, 1984). Factual

disputes the resolution of which is unnecessary to the decision are therefore not sufficient to avert a summary decision.

It is unnecessary to resolve the factual questions MAROC identified because there is no evidence that Hernandez or any of MAROC's representatives made any effort whatsoever to apply for employment in any of the ways the prospective employer directed. Even were I to find that HLS and KT Enterprises were "the same company for purposes of this case," the result would not differ. Similarly, were I to find that the allegations regarding MAROC's four other organizers are "like and related" to Hernandez' claim and that OSC's investigation encompassed them, the result would not differ. MAROC's opaque contention in response to the Cullen declaration that HLS has not operated any offices in Chantilly since October 2007, that "the truth about Heritage's offices and the relocation of those offices is more nuanced than Heritage's motion portends" is not sufficient to rebut the Cullen declaration. Vague expressions of skepticism do not create a factual issue where one would not otherwise exist. *Cf. Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007) (observing that when a fact is established by sworn testimony, it takes more than an unsworn denial to create a factual issue).

F. Conclusion

MAROC's theory appears to encompass at least two underlying but unarticulated hypotheses: 1) that Hernandez and others ought to have been permitted to apply in the time, place, and manner they chose rather than in the time, place, and manner selected by the employer, and 2) that filing a petition for labor certification is conclusive evidence that Heritage would have hired H-2B workers first had they been permitted to do so, without any consideration being given to domestic workers. Both hypotheses are unsupported in law or fact.

Neither Hernandez nor any of the union representatives can make a prima facie case of discrimination because none applied for work as a landscape laborer at the time HLS was actually hiring or in the manner HLS selected, none can demonstrate that HLS even knew his still undisclosed citizenship status, none can show that a person having a citizenship status different from his own was permitted to apply in the time, place, and manner he sought to apply, and none can show that the individuals hired had a citizenship status different from his own. Unless the mere act of filing a certification petition with DOL in advance of an anticipated need for workers is itself an act of discrimination, as MAROC appears to suggest, its claims of discrimination must fail. Even were I to assume, moreover, that Hernandez and/or MAROC presented a prima facie case, there is not a scintilla of evidence that HLS' explanation of how it went about hiring its landscape laborers for the 2009 season in a nondiscriminatory manner is pretextual.

III. THE MOTION TO STRIKE AND FOR COSTS AND FEES

Heritage's motion to strike will be denied as moot. The request for an award of the costs and fees incurred in filing the motion will also be denied. This fee request is predicated entirely upon Rule 56(g) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and cites to no case arising under OCAHO rules in which costs and fees were awarded to a prevailing party for success in bringing an interlocutory motion. In *United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1778-80 (1990), moreover, the Chief Administrative Hearing Officer (CAHO) vacated an ALJ's award of attorney's fees purportedly made pursuant to federal rules 11 and 37, noting that the federal rules are used to fill in gaps in OCAHO's rules, not to grant additional substantive powers to ALJs.[6] Similarly, in *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1091, 6-7 (2003), the ALJ refused to apply 28 U.S.C. § 1927, which provides for sanctions for unreasonable and vexatious conduct in cases in "courts of the United States," observing that this forum is not such a court and that ALJs do not wield the inherent powers possessed by federal judges.

As the prevailing party in this matter however, respondent Heritage will be given 30 days in which to file a petition for attorney's fees in accordance with the provisions of 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(d)(6), which provide that attorney's fees may be awarded in connection with a final order if the losing party's argument is without reasonable foundation in law and fact. OCAHO cases follow the "double standard" set out by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978). *See, e.g., Rusk v. Northrop Corp.*, 4 OCAHO 607, 153, 174 (1994). Under that standard, a prevailing plaintiff is ordinarily entitled to attorney's fees in all but "special circumstances," *Christiansburg Garment Co.*, 434 U.S. at 416-17, but a prevailing defendant may be awarded attorney's fees only when the plaintiff's lawsuit is "unfounded, meritless, frivolous, or vexatiously brought." *Id.* at 421; *Ojeda-Ojeda v. Booth Farms, L.P.*, 9 OCAHO no. 1121, 3 (2006). The petitioning party bears the burden of proof under that standard.

In addition to the itemized statement required by 28 C.F.R. § 68.52(d)(6), the petitioner should also provide evidence of the prevailing market rate in the appropriate geographical area for lawyers of reasonably comparable skill, experience, and reputation. *See Shortt v. Dick Clark's AB Theatre, Inc.*, 10 OCAHO no. 1130, 18 (2009). It is also the fee applicant's burden to produce satisfactory evidence supporting the hours worked and the rate claimed. *Id*; *see also Blum v. Stenson*, 465 U.S. 886, 896 (1984). Information sufficiently specific to permit the ALJ to assess the reasonableness of the request is required. *See Austin v. Jitney Jungle Stores of Am., Inc.*, 7 OCAHO no. 969, 763, 769 (1997).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

[6] OCAHO rules provide that the federal rules may be used as a guideline in situations not provided for in our own rules. 28 C.F.R. § 68.1 (emphasis supplied).

1. The Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America is a labor organization that oversees seven district councils which operate hiring halls and seek to place union members in construction and manual labor jobs with various employers in the mid-Atlantic states.

2. Cruz Hernandez is a labor organizer who works at MAROC's office in Reston, Virginia.

3. Cruz Hernandez is a lawful permanent resident of the United States whose citizenship status is not apparent from the record.

4. Heritage Landscape Services, LLC (HLS) is a Virginia-based company that provides landscaping services to corporate clients and homeowners' associations at multiple locations in Fairfax, Louden, and Prince William counties in Virginia.

5. Heritage Landscape Services, LLC has its corporate headquarters office at 23725 Overland Drive, Sterling, Virginia 20166.

6. Heritage Landscape Services, LLC has not operated any offices in Chantilly, Virginia since October, 2007.

7. Mid-Atlantic Solutions, Inc. (Mas) is a full service firm specializing in the H-2B process. The firm handles the entire process on behalf of employers, including completing all the necessary forms and reports.

8. Mid-Atlantic Solutions, Inc. (Mas) handled the H-2B process for HLS during the period 2006-2009.

9. Cruz Hernandez filed a complaint with the Office of the Chief Administrative Hearing Officer on November 16, 2009 alleging that he applied for work as a landscape laborer at Heritage Landscape Services, LLC (HLS) but was not hired because of his citizenship status.

10. The Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America filed a separate complaint on November 16, 2009.

11. On or about April 20, 2009, the Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America (MAROC) filed a charge of employment discrimination with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on behalf of Cruz Hernandez.

12. On August 18, 2009, the Office of Special Counsel for Unfair Immigration-Related Employment Practices sent a letter to the Mid-Atlantic Regional Organizing Coalition saying that the union had the right to file a complaint based on the charge filed with the Office of the

Chief Administrative Hearing Officer within 90 days of its receipt of the letter.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.

2. Cruz Hernandez is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) (2006).

3. Heritage Landscape Services, LLC is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

4. Cruz Hernandez failed to establish a prima facie case of discrimination in hiring or recruitment based on citizenship status.

5. The Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America failed to establish a prima facie case of discrimination in hiring or recruitment based on citizenship status.

6. Cruz Hernandez failed to demonstrate specific facts raising a genuine contested issue of material fact with respect to his claims.

7. The Mid-Atlantic Regional Organizing Coalition, Laborers' International Union of North America failed to demonstrate specific facts raising a genuine contested issue of material fact with respect to its claims.

8. Assuming arguendo that a prima facie case was presented, there is no evidence that the respondent's nondiscriminatory explanation was a pretext for discrimination on the basis of citizenship.

9. The complaints in this matter must be dismissed.

To the extent 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 as such.

ORDER

Heritage's request for oral argument is denied. Heritage's motion for summary decision is granted, and its motion to strike is denied as moot. Heritage's request for an award of the costs and fees incurred in filing the motion to strike is denied. Heritage has until July 16, 2010 to file a petition for attorney's fees pursuant to 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(d)(6). MAROC will have until August 16, 2010 to file a response.

SO ORDERED.

Dated and entered this 17th day of June, 2010.

_____
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 files a timely petition for 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.