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

November 19, 2020

MARTINE MBITAZE, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00005
CITY OF GREENBELT, Respondent.	)	

AMENDED ORDER ON MOTION FOR SUMMARY DECISION

An Order on Summary Decision was initially issued in the above-captioned case on October 1, 2020. Pursuant to 28 C.F.R. § 68.52(f), this Amended Order on Motion for Summary Decision amends the order issued on October 1, 2020, and corrects solely for clerical errors.

On October 11, 2019, Complainant, Martine Mbitaze, filed a complaint against Respondent, Greenbelt Police Department, with the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint alleges that Respondent refused to hire her based on her national origin and citizenship status and engaged in document abuse in violation of 8 U.S.C. § 1324b. Respondent filed an answer and a motion to dismiss on November 8, 2019. Complainant did not file a response to the motion to dismiss and the undersigned denied the motion on January 15, 2020, and substituted the City of Greenbelt (the City) for the Greenbelt Police Department as the named Respondent. On July 17, 2020, Respondent filed a motion for summary decision and on August 11, 2020, Complainant filed a memorandum opposing Respondent's motion for summary judgment.

I. BACKGROUND

The following facts are not in dispute. In February 2019, Complainant, who is a United States citizen, began the application process for a law enforcement officer with the City of Greenbelt, Greenbelt Police Department, by submitting an application and then taking, and passing, a physical agility test and a written test. Mot. Summ. Dec., Ex. 1 at ⁋ 3. In March 2019, the complainant was interviewed, and, based upon the interview, was moved to the next step in the

process. *Id.* Thereafter, she submitted her Personal History Statement (PHS), and Michelle Moo-Young, the Training Coordinator for the Police Department, met with Complainant to review her PHS and related documentation. Mot. Summ. Dec., Ex. 2, ¶ 4. During the meeting, Complainant provided an unexpired United States passport as proof of citizenship. *Id.* Ms. Moo-Young asked for additional paperwork regarding Complainant's "naturalization status." After Complainant completed the PHS and provided supporting documentation, which did not include the additional evidence of citizenship, Ms. Moo-Young sent the PHS to Captain Gordon Pracht who then assigned an investigator, Corporal Michael Apgar, to conduct her background investigation. *Id.* at ¶ 5. Ms. Moo-Young also scheduled Complainant for a polygraph examination, which she took, and a psychological examination, which was canceled. *Id.* at ¶¶ 6-7. In June, Corporal Apgar sent an email asking about, among other things, the status of "Naturalization paperwork." Mot. Summ. Dec., Ex. 10.

On June 5, 2019, Corporal Apgar recommended to Captain Pracht in an email that Complainant not be considered for employment with the City, which he followed with a formal memorandum on June 12, 2019. Mot. Summ. Dec., Ex. 1, ¶ 7. The memorandum cited to three incidents: one involving campus security at Montgomery College, one at the Montgomery County Police Headquarters, and an email exchange with Corporal Apgar. Corporal Apgar concluded that these incidents are an indication of how Complainant responds when challenged, how she handles conflict, and that these demonstrate qualities that are not what that the Corporal believes a police officer should possess. Mot. Summ. Dec., Ex. 11. Complainant was not hired for the position. *Id.* at 7.

II. THE PARTIES' POSITIONS

A. Respondent's Motion

Respondent contends that it is entitled to summary decision because Complainant cannot establish a prima facie claim for discrimination as she cannot establish that she was qualified for the position. Mot. Summ. Dec. at 9. Respondent argues that in performing the background check, the City discovered events in which Complainant displayed an inability to deal with conflict. As regards the document abuse claim, Respondent argues that Complainant cannot establish intentional discrimination. Respondent argues that it did not determine that the PHS was incomplete without the naturalization paperwork; instead, Complainant continued to be moved through the application process. Ms. Moo-Young forwarded the PHS to Captain Pracht to begin the background investigation, and she scheduled Respondent for a polygraph and psychological examination.

Respondent submitted eleven exhibits in support of the motion: affidavits from Captain Gordon Pracht, Michelle Moo-Young, and Corporal Michael Apgar. Also included are Respondent's answers to Complainant's interrogatories; email exchanges between Complainant and Ms. Moo-

Young dated May 9, and June 6, 2019; an email from Dr. Jack Leeb; an incident Report from Montgomery College; email exchanges involving Captain Pracht, Corporal Apgar, and Ms. Moo-Young dated June 3-4, 2019; and email exchanges involving the above, as well as with Complainant dated June 5-6, 2019.

B. Complainant's Response

Complainant argues in her Memorandum in Opposition (Opp.) that certain facts are untrue: Ms. Moo-Young wrongly claimed that Complainant supplied an expired U.S. Passport; Complainant did not provide contradictory information on her naturalization papers. Opp. Complainant also argues that the Montgomery County Police Headquarters incident was inaccurately reported by Corporal Apgar and, contrary to the Corporal Apgar's recommendation letter, Complainant did disclose this incident. Complainant also disagrees with the assessment of her inability to handle conflict both in her tone in her email and in handling this litigation. Opp.

Complainant submitted twenty-two exhibits, comprised of the following: three interview worksheets; Complainant's Maryland State Application; documents regarding her Naturalization Application; her PHS Part II; Complainant's oath of allegiance ceremony notice; Complainant's U.S. Passport; email exchanges between Ms. Moo-Young and Ms. Vickie Murphy; Complainant's adoption ruling; Montgomery County Police Confidential Questionnaire; as well as exhibits produced by Respondent.

III. LEGAL STANDARDS

A. Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[1] Section 68.38(c) is similar to and based on 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).

"An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith*

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

Radio Corp., 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2] However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. A party opposing a motion for summary decision may not demand a trial simply based on a speculative possibility that a material issue might turn up at trial. *See generally United States v. Manos & Assocs., Inc.*, 1 OCAHO no. 130, 877, 884 (1989).

"While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 8 (2015). Furthermore, "[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." *Id.* at 9 (relying on *Catrett*, 477 U.S. 317 at 322–23).

B. The Burdens of Proof

As in any civil case, a plaintiff may prove a case of employment discrimination by direct or circumstantial evidence. *United States. v. Diversified Tech. & Servs of Va.*, 9 OCAHO no. 1095, 13 (2003) (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). As explained in *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11-12, 16-17 (2003), direct evidence is evidence which proves the fact at issue without the need to draw any inferences. *Cf. Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). To satisfy this standard, the evidence must on its face show discriminatory intent. *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1138 n.2 (4th Cir. 1988). If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence. *Diversified Tech.*, 9 OCAHO no. 1095 at 13 (citing *Kamal-Griffin v. Curtis, Mallet-Prevost*, 14 *Colt & Mosle*, 3 OCAHO no. 550, 1454, 1470-74 (1993), *appeal denied*, 29 F.3d 621 (2d Cir. 1994)). When plaintiffs are able to present sufficiently direct evidence of discrimination, they may qualify for a more advantageous standard of proof which requires the defendant to show that the same decision would have been made even in the absence of discrimination, *Fuller*, 67 F.3d at 1141-42, or to establish some other affirmative defense. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985). "The defendant's burden when refuting direct evidence of discrimination is one of persuasion and

[2] 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 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 in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

not merely production." *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1104 (11th Cir. 2001) (citing *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1539 (11th Cir. 1988)).

Where there is no direct evidence, the mode of proof of discrimination is by circumstantial evidence. The familiar burden shifting analysis in a circumstantial case is that initially established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently elaborated by its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Absent direct evidence, the initial burden of establishing a prima facie circumstantial case of hiring discrimination in the Fourth Circuit generally calls for a showing that the plaintiff: 1) belongs to a protected class; 2) applied and was qualified for a job for which the employer was seeking applicants; 3) despite her qualifications was rejected; and 4) after her rejection, the position remained open and the employer continued to seek applicants. *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001).

IV. DISCUSSION AND ANALYSIS.

1. Discrimination

Complainant, who was born in the Republic of Cameroon, asserted a nationality discrimination claim. An Administrative Law Judge (ALJ) may always examine the complaint *sua sponte* for subject matter jurisdiction and should dismiss the complaint if none is found. *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 119 (1997); *see also Rauch v. Day and Night Mfrg. Corp.*, 576 F.2d 697, 699 (6th Cir.1977) ("[i]t is of course proper, and indeed mandatory for a court to inquire into its subject-matter jurisdiction"). The parties may not confer upon a court subject matter jurisdiction which in fact does not exist. *Jarvis*, 7 OCAHO no. 930 at 119.

Section 1324b(a)(1)(A) prohibits discrimination against any individual with respect to hiring or firing based on that individual's national origin. OCAHO only has jurisdiction to hear national origin-based discrimination claims against employers with between four and fourteen employees. *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 13 (2002). Section 1324b states that it does not apply to persons covered under Title VII; in other words, § 1324b does not apply to employers who employ more than fifteen persons. § 1324b(a)(2); *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020). Complainant has the burden to

establish that OCAHO has subject matter jurisdiction to hear her claims. *Miller v. United States Postal Serv.*, 12 OCAHO no. 1284, 5 (2016).

In her Complaint, Complainant did not indicate how many employees Respondent employed. However, Complainant attached to her complaint the charge form filed with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice, in which she indicated that Respondent employs more than fifteen individuals. Charge Form at 3. Accordingly, Complainant has not demonstrated that OCAHO has jurisdiction over her national origin discrimination claim. The Respondent's motion for summary judgment is GRANTED as to Complainant's nationality discrimination claim.

2. Citizenship Status discrimination

Section 1324b(a)(1)(B) prohibits discrimination against any individual with respect to hiring or firing based on that individual's citizenship status. The statute, however, excepts discrimination when it is "otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government." 8 U.S.C. § 1324b(a)(2)(C).

Complainant appears to assert that she is subject to discrimination because she is a derived citizen. Complainant states that she obtained her citizenship through adoption pursuant to the Child Citizenship Act of 2000, Pub. L. 106–395.

OCAHO precedent has found that citizenship status discrimination includes when an employer treats naturalized U.S. citizens differently from other U.S. citizens. *See Nickman v. Mesa Air Group*, 9 OCAHO no. 1113, 8 (2004); *Roginsky v. Department of Defense*, 3 OCAHO 278, 280 (1992); *Naginsky v. Dep't of Defense*, 6 OCAHO 748, 752 (1996). As noted *infra*, the City of Greenbelt has a regulation that requires that all police officers must be United States citizens. The City may, therefore, discriminate against non-citizens because United States citizenship is a requirement for the position, but it may not discriminate among citizens based upon their status, i.e. how they obtained citizenship. Complainant's assertion that she is subject to discrimination based upon the fact that she derived citizenship through her adoption is consistent with the above cases, and is cognizable as citizenship status discrimination.

Respondent argues that Complainant cannot make a prima facie showing of discrimination because she was deemed unqualified for the job. The Code of Maryland Regulations sets forth requirements for the position of police officer. MD. CODE REGS. 12.04.01 et seq. The initial requirements are that the applicant must "(1) [b]e a United States citizen; and (2) [s]ubmit documents supporting a claim of citizenship to the hiring law enforcement agency," be 21 years old at the time of certification, have a high school diploma or a GED, and possess or be able to possess a valid driver's license. MD. CODE REGS. 12.04.01.04. The hiring process is set forth in

the regulations, including the requirement of a background check of all applicants in part to determine if the applicant, "[d]isplays the behavior necessary to perform the duties of a police officer." MD. CODE REGS. 12.04.01.05(A)(1). An "agency head shall use the background investigation to determine whether information concerning the applicant's citizenship, mental and emotional fitness, and other information is valid and the applicant is otherwise capable of performing law enforcement duties." MD. CODE REGS. 12.04.01.05(A)(3).

Before determining whether the Complainant made a prima facie case, the Court must determine whether Complainant provided direct evidence that she was not selected based upon her citizenship. The most relevant evidence is Respondent's request through Ms. Moo-Young and Corporal Apgar, that Complainant provide "naturalization paperwork" in addition to her passport, allegedly because Complainant provided conflicting evidence of her naturalization status and "passports expire." Mot. Summ. Dec., Ex. 2 ⁋ 4; Ex. 9. In her Complaint, Complainant indicated that Ms. Moo-Young said she could not be hired without the paperwork, a statement Ms. Moo-Young denies. Compl.; Mot. Summ. Dec., Ex. 2 ⁋ 4. Complainant has not supported the motion with a sworn affidavit, and therefore, the allegation in the Complaint is not evidence. *See Cormia v. Home Care Giver Servs.*, 10 OCAHO no. 1160, 5 (2012). In any event, the statement and the requests do not provide direct evidence of a discriminatory intent in the determination not to hire Complainant because she is a derivative citizen. Direct evidence must 1) clearly indicate a discriminatory attitude, and 2) illustrate a nexus between the negative attitude and the employment action. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999). The position required that Complainant demonstrate and support her claim to United States citizenship, and the statement could be interpreted as an attempt by Ms. Moo-Young to satisfy that requirement. Further Respondent indicated that it did not hire Complainant due to her unfitness, not because of the paperwork. Accordingly, Complainant's evidence is circumstantial and must be analyzed using the *McDonnell-Douglas* burden-shifting standard. Thus, Complainant must establish a prima facie case of discrimination.

It is indisputable that Complainant satisfied the preliminary requirements for the position—citizenship, age, and education. Because the determination regarding Complainant's fitness to be a police officer is made at an advanced stage of the process, and whether Complainant demonstrated fitness to be an officer is a subjective determination, this Court will assume without finding that Complainant established a prima facie case of discrimination. Accordingly, this Court will analyze whether the City provided a legitimate, non-discriminatory reason for not hiring Complainant.

Captain Gordon Pracht indicates that the decision not to proceed with the Complainant's application was made based upon the recommendation of Corporal Apgar due to incidents he uncovered during the background investigation. Mot. Summ. Dec., Ex. 1 at ⁋ 6-7. Corporal Apgar stated in an affidavit that he identified two incidents in Complainant's background that caused him concerns regarding her character and ability to serve as a police officer: the first involved an incident when she was escorted from the library at Montgomery College by campus

security, and the second involved an incident where Complainant attempted to enter the Montgomery Police Headquarters with a pocket knife. Mot. Summ. Dec., Ex. 4, ⁋ 4. According to Corporal Apgar, in the latter incident Complainant was stopped by a security officer about the knife in her belongings. She denied having the knife, but when a knife was found among her belongings, she became belligerent and argumentative. *Id.* Corporal Apgar's memorandum indicates that he spoke with a Sergeant at the Montgomery County Police force who reported the incident. Mot. Summ. Dec., Ex. 20. Lastly, Corporal Apgar sent an email to Complainant about references, her psychological examination and about the status of her naturalization paperwork. *Id.* at ⁋ 6. Complainant responded with a lengthy email, and Corporal Apgar stated that he found the tone of Complainant's response unacceptable and unprofessional. *Id.* at ⁋ 7. The record contains an email from Mr. Apgar to Ms. Moo Young on June 5 in which he indicates to Ms. Moo Young that he is going to disqualify the Complainant because of the email exchange, as well as a failure to disclose everything and incident reports which reflect an attitude that he did not find appropriate. Mot. Summ. Dec. Ex., 10. He states that he knows nothing about the naturalization paperwork, but "I'm not going to be talked to like that. Period." *Id.* On June 5, 2019, Corporal Apgar sent an email to Captain Pracht stating that he did not believe Complainant was a qualified applicant, stating that the decision was based upon her unprofessional response, and due to incidents that she did not identify that came up in her background investigation. *Id.* at ⁋ 8. He submitted a formal memorandum on June 12, 2019. Corporal Apgar stated that the lack of naturalization papers did not factor into his decision in any way. *Id.*

The Court finds that the City articulated legitimate, non-discriminatory reasons for not hiring the Complainant. Complainant must establish that these reasons were pretextual, that the true reason she was not hired was due to her citizenship status. Complainant argues that the incident at the Montgomery County Police Headquarters did not happen the way Corporal Apgar stated it did, that she had the knife in her purse, she was allowed to keep the knife until she exited the building when she was asked to dispose of it, whereupon she did dispose of it. Opp. at IV.C. She states that she was not argumentative and belligerent. Complainant also argues that contrary to the recommendation letter, she disclosed the incident on her PHS.

While reviewing the employer's articulated reasons for not hiring an employee, "we must keep in mind that Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 298–99 (4th Cir. 1998) (citation and quotation marks omitted). The Court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination[.]" *Id.* (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997) (quotations and citations omitted)); *see also EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir.1992). The issue is solely whether the failure to hire was based on a discriminatory intent. "Thus, when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *Giannopoulos*, 109 F.3d at 411.

Complainant states that Corporal Apgar was incorrect in his opinion of the tone of her email, and the facts surrounding the incident at the Montgomery County police station. However, "'[i]t is the perception of the decision maker which is relevant,' not the self-assessment of the plaintiff." *DeJarnette*, 133 F.3d at 299 (quoting *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960–61 (4th Cir.1996)). Here, Respondent provided contemporaneous emails and an incident report from the Montgomery County library to show the reasons why Complainant was not hired. Complainant has not provided any evidence to show that Corporal Apgar did not believe what he was writing and that he was motivated by Complainant's citizenship status in making his recommendation. On the contrary, Corporal Apgar indicated that he knew nothing about her citizenship status. While this Court may not have reacted in the same way to the tone of Complainant's email to Corporal Apgar, his reaction is clear in the emails. Lastly, Complainant's dispute about what actually happened at Montgomery County Police Headquarters does not establish a genuine issue of material fact. Regardless of whether the reports by the Sergeant to Corporal Apgar about the incident were accurate, Complainant has not demonstrated that he knew they were inaccurate and misreported the incident to his superiors for a discriminatory reason. Contrary to Complainant's arguments, Corporal Apgar's recommendation letter indicates that Complainant did not disclose the library incident; it notes specifically that she made the admission as to the knife incident in her "PHQ", but that she disclosed the facts differently than reported by the Sergeant. Mot. Summ. Dec. at 11.

Lastly, Respondent persuasively demonstrated that it was moving Complainant through the hiring process even though it had not received her "naturalization paperwork." Indeed, she was scheduled for her psychological examination until the Corporal received the negative information. Accordingly, the Court finds that Respondent articulated legitimate, non-discriminatory reasons for not hiring Complainant, and Complainant has not established that those reasons were pretextual, and that she was not hired due to her citizenship status. Respondent demonstrated that there is no genuine issue of material fact, and Respondent's motion for summary decision based upon citizenship status is GRANTED.

3. Document abuse

"Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo v. Securitas Security Services USA Inc.*, 11 OCAHO no. 1259, 5-6 (2015). Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's

national origin or citizenship status. These two elements, an act and an intent, are essential to a claim of document abuse. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017). For individual claims of document abuse, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Johnson*, 12 OCAHO no. 1295 at 5; *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015).

It is undisputed that even though Complainant provided a current, facially valid, United States passport, Respondent requested more documents. The only mention in the evidence of which document was requested appeared in an email from Vickie Murphy, who indicated that there were some "background issues (such as nationalization certificate)." Mot. Summ. Dec., Ex. 9. Complainant was attempting to secure a certificate, sometimes referring to it as a naturalization or citizenship certificate. Opp., Exs. 5-6, 8, 14-16, 19. A current United States Passport is a valid document to establish identity and employment eligibility. 8 C.F.R. § 274a.2(b)(1)(v)(A). To ask for more documents is document abuse.

The City has not argued that the request for more paperwork was not made, at least in part, for the employment verification process. In *United States v. Mar-Jac Poultry*, the ALJ stated that document requests made at the interview stage will be scrutinized as OCAHO cases "have long held that it is the entire selection process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment." *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012) (citing *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999); *United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990)); *but see Gonzalez-Hernandez v. Arizona Family Health Partnership*, 11 OCAHO no. 1254 (2015) (finding that the requirement to produce an Arizona driver's license at the application phase was not for the purpose of verifying his identity for his I-9, but to satisfy the requirement that individual's driving for work had an Arizona driver's license). Thus, document abuse can occur at any point in the hiring process because, if it were only limited to the Form I-9 employment eligibility verification, "an employer would be free to use preliminary document requests as an impermissible screening device." *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 11.

Respondent argues that an intent to discriminate cannot be shown in this case. Document abuse is inherently an unfair immigration-related employment practice, and liability for this unlawful practice does not hinge on a showing of an additional adverse employment action. *See* 8 U.S.C. § 1324b(a)(6). "A finding of economic harm or of a separate, discrete, or tangible injury is not required to establish a claim of document abuse." *United States v. Mar-Jac Poultry*, 12 OCAHO no. 1298, 28–29 (2017) (citing *Johnson*, 12 OCAHO no. 1295 at 4; *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 625 (2000) (finding that an individual need not show that he experienced an injury in order to establish liability against an employer for document abuse in violation of 8 U.S.C. § 1324b(a)(6)).

In other words, an intent to deny employment is not required to establish a claim of document abuse, only an intent to act differently based on a protected characteristic. *Id.* at 31. As Complainant has made a prima facie case, we are left to determine whether Respondent intended to treat Complainant differently, i.e. asked her for different documents, because of a protected characteristic. In this, Respondent's explanation is important. Ms. Moo-Young indicated that she requested the documents because passports expire, and Complainant provided inconsistent responses about her naturalization. These reasons are not reasonable: while passports expire and an employee is required to provide an unexpired passport, it is indisputable that Complainant's passport had not expired. Opp., Ex. 9. Nor is it clear how this fact bears on citizenship, which does not expire when a passport expires. Likewise, it is unclear what Ms. Moo-Young found inconsistent about Complainant's explanation of the basis for her citizenship. A derivative citizen derives citizenship based upon a parent's status (or adoption) and is entirely different from obtaining citizenship based upon naturalization, which is an affirmative process. Evidence of citizenship for a derivative citizen is either a passport or a certificate of citizenship. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL, ch.. 4, https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-4. Not having been through the naturalization process, a derivative citizen will not have a naturalization certificate.

The Court considers the exhortation of the ALJ in *Diversified Tech. Servs. of Va., Inc.*, 9 OCAHO no. 1095 at 30, "ignorance is not evidence of an intent to discriminate. A 'purpose' or 'intent' to discriminate is the operative language here; as I understand those terms they mean something different from ineptitude or ignorant error." *Id.* (citing *Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992) ("[D]iscrimination is an intentional wrong. An empty head means no discrimination.")). Given, however, that Complainant attempted to explain, at some length, how she obtained citizenship, that a United States passport is adequate evidence of status, this Court finds that the reasons supplied by Ms. Moo-Young were not legitimate. "Case law has noted in other contexts that sometimes an employer can make errors too obvious to be unintentional, *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 117 (2002), so that the errors themselves bolster an inference of pretext." *Id.* at 31; *accord Fischbach v. District of Columbia Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

As Respondent's explanations for seeking additional documents are not reasonable, the burden shifting analysis dissolves. The Court finds that Respondent asked for, and insisted upon, more documents than required because the Complainant is a derivative citizen. Respondent did not persuasively establish nor even assert that the passport was invalid on its face and Respondent never explained what was inconsistent about Complainant's explanation. Thus, Respondent did not show that it is entitled to summary decision as a matter of law on the document abuse claim. *See* FED. R. CIV. P. 56(a). Thus, Respondent's motion for summary judgment as to the claim for a document abuse violation is DENIED.

Since Respondent's motion for summary decision regarding Complainant's document abuse claim is denied, the parties must provide briefing on the remedies for the document abuse claim on or before October 15, 2020. The parties may file responses to briefing on the remedies and those responses are due on or before October 30, 2020. If a hearing is necessary, it will be reset following the briefing on the remedies.

V. CONCLUSION

OCAHO lacks subject matter jurisdiction to hear Complainant's national origin discrimination claims because Respondent employs more than fourteen employees. As such, Respondent's motion for summary decision regarding the national origin discrimination claim is GRANTED. Complainant's national origin discrimination claim is DISMISSED.

Complainant did not provide direct evidence of citizenship status discrimination. Assuming she established a prima facie claim for citizenship status discrimination, Respondent articulated legitimate, nondiscriminatory reasons for not hiring Complainant, and Complainant did not show that Respondent's articulated reasons were pretextual. Thus, Respondent's motion for summary decision regarding the citizenship status discrimination claim is GRANTED. Complainant's citizenship status discrimination claim is DISMISSED.

Complainant alleged a prima facie case of document abuse and Respondent did not allege any legitimate, nondiscriminatory reasons for requesting more documents than required from Complainant. Therefore, Respondent failed to establish that it is entitled to summary decision on the document abuse claim. Respondent's motion for summary decision regarding the document abuse claim is DENIED.

Finally, the parties must provide briefing on the remedies for the document abuse claim on or before October 15, 2020. The parties may file responses to briefing on the remedies and those responses are due on or before October 30, 2020. If a hearing is necessary, it will be reset following the briefing on the remedies.

VI. FINDINGS AND CONCLUSIONS

A. Findings of Fact

1. Martine Mbitaze is a citizen of the United States.

2. Martine Mbitaze derived citizenship through adoption pursuant to the Child Citizenship Act of 2000, Pub. L. 106–395.

3. Martine Mbitaze alleged that the City of Greenbelt employs more than fourteen employees.

4. In February 2019, Martine Mbitaze began the application process for a law enforcement officer with the City of Greenbelt by submitting an application and then taking, and passing, a physical agility test and written test.

5. In March 2019, the City of Greenbelt interviewed Martine Mbitaze, and, based upon the interview, it moved her to the next step in the progress.

6. Martine Mbitaze submitted a Personal History Statement (PHS).

7. Michelle Moo-Young, the Training Coordinator for the Police Department, met with the Martine Mbitaze to review her PHS and related documentation.

8. The position of law enforcement officer requires proof of United States citizenship.

9. Martine Mbitaze provided a current United States passport as proof of citizenship.

10. Michelle Moo-Young asked for additional naturalization paperwork regarding Martine Mbitaze's citizenship status.

11. Michelle Moo-Young's stated reasons for requesting the additional paperwork was because "passports expire" and Martine Mbitaze gave conflicting information about her naturalization.

12. Upon completion of the PHS and supporting documentation, which did not include the requested naturalization paperwork, Michelle Moo-Young sent the PHS to Captain Gordon Pracht who then assigned an investigator, Corporal Michael Apgar, to conduct the background investigation.

13. Michelle Moo-Young also scheduled Martine Mbitaze for a polygraph examination, which she took, and a psychological examination, which was canceled.

14. In June 2020, Corporal Apgar sent an email asking about, among other things, the status of "Naturalization paperwork."

15. On June 5, 2019, Corporal Apgar recommended to Captain Pracht in an email that Martine Mbitaze not be considered for employment with the city.

16. On June 12, 2019, Corporal Apgar sent a formal memorandum recommending that Martine Mbitaze not be considered for employment with the city, citing to three incidents that were an indication of how Martine Mbitaze responds when challenged, and how she handles conflict, that

these demonstrate qualities that are not what that the Corporal believes a police officer should possess.

B. Conclusions of Law

1. Martine Mbitaze is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(B).

2. The City of Greenbelt is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

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

4. An administrative law judge may always examine the complaint *sua sponte* for subject matter jurisdiction and should dismiss the complaint if none is found. *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 119 (1997); *see also Rauch v. Day and Night Mfrg. Corp.*, 576 F.2d 697, 699 (6th Cir. 1977).

5. OCAHO only has jurisdiction to hear national origin-based discrimination claims against employers with between four and fourteen employees. 8 U.S.C. §1324b(a)(2); *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 13 (2002); *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020).

6. The City of Greenbelt is entitled to summary decision as to discrimination based upon nationality because Martine Mbitaze alleged that the City of Greenbelt has more than fourteen employees.

7. An Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).

8. "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

9. Absent direct evidence, the initial burden of establishing a prima facie circumstantial case of hiring discrimination in the Fourth Circuit generally calls for a showing that the plaintiff: 1) belongs to a protected class; 2) applied and was qualified for a job for which the employer was seeking applicants; 3) despite his qualifications was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applicants. *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001).

10. The City of Greenbelt is entitled to summary judgment on the claim to discrimination based upon citizenship because, assuming arguendo that Martine Mbitaze established a prima facie case of discrimination, the City of Greenbelt provided a legitimate, nondiscriminatory reason for its refusal to hire Martine Mbitaze and she did not produce or point to any evidence to create a factual issue regarding the legitimacy of the explanation for the basis of its decision not to rehire her.

11. To establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017).

12. For individual claims of document abuse, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 5 (2017); *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F.App'x 440 (5th Cir. 2015).

13. There is no genuine issue of material fact where the established facts show by a preponderance of the evidence a prima facie case of document abuse violation, and the City of Greenbelt did not establish a legitimate, non-discriminatory reason for rejecting Martine Mbitaze's facially valid United States passport.

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 as such.

SO ORDERED.

Dated and entered on November 19, 2020.

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Jean C. King
Chief Administrative Law Judge