

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

August 31, 2022

ROBERT PAUL HEATH,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 2021B00060
I-SERVICES, INC.,	)	
Respondent.	)	
_____	)	

Appearances: Robert Heath, pro se Complainant  
Murali Ghanta, on behalf of I-Services, Inc., pro se Respondent

ORDER DENYING MOTION TO DISMISS  
AND NOTICE OF APPARENT DEATH

I. PROCEDURAL HISTORY

This case arises under the employment discrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, Robert Heath, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 22, 2021. Complainant alleges that Respondent, I-Services, Inc., discriminated against him on account of his citizenship status and national origin, and engaged in unfair documentary practices, in violation of § 1324b.

On February 14, 2022, Respondent filed an answer and a response to the Court's December 3, 2021, Order to Show Cause. On February 22, 2022, the Court denied Complainant's Motion for Default Judgment, filed on February 16, 2022, accepted Respondent's answer, and discharged the Order to Show Cause. *Heath v. I-Services, Inc.*, 15 OCAHO no. 1413, 1–4 (2022).<sup>1</sup> On February

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<sup>1</sup> 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

22, 2022, the Court issued an Order for Prehearing Statements. On March 25, 2022, Complainant filed his prehearing statement.

On May 9, 2022, the Court issued an Order Issuing Stay of Proceedings. *See Heath v. I-Services, Inc.*, 15 OCAHO no. 1413a, 1–3 (2022). On July 13, 2022, the Court issued an Order for Status Report. *See Heath v. I-Services, Inc.*, 15 OCAHO no. 1314b, 1–2 (2022). The Court’s July 13, 2022, Order required the parties to submit a joint status report. *Id.* at 2. If the parties were unable to ‘meet and confer,’ the Court ordered each party to file a separate status report. *Id.* The Administrative Law Judge (ALJ) cautioned that “failure to file a status report may result in a finding that Complainant abandoned his complaint or a default order against Respondent.” *Id.*

On August 3, 2022, Respondent filed a “Response to Notice for Status Report and Motion to Dismiss the Complaint” (Mot. Dismiss). Respondent represents that it “tr[ie]d to reach the Complainant unsuccessfully on phone” following the Court’s May 9, 2022, Order. Mot. Dismiss. Respondent also moves the Court to dismiss the Complaint “[b]ased on the reasons mentioned in our [February 1, 2022 submission]” and because the Complaint is “baseless and frivolous.”<sup>2</sup> *Id.*

To date, the Court has not received a status report from Complainant or opposition to Respondent’s August 3, 2022, filing. The Motion to Dismiss is now ripe for adjudication.

## II. MOTION TO DISMISS

The OCAHO Rules of Practice and Procedure<sup>3</sup> permit a respondent to move for dismissal if “the complainant has failed to state a claim upon which relief may be granted.” 28 C.F.R. § 68.10. To survive a motion to dismiss, a § 1324b complaint must sufficiently state facts for each alleged violation, such that the complaint may give rise to an inference of discrimination. *See* § 68.7(b)(3); *Heath v. Tringapps, Inc.*, 15 OCAHO no. 1410, 4–5 (2022) (citations omitted).

“When considering a motion to dismiss, the Court will accept the facts alleged in the complaint as true and construe the facts in the light most favorable to the complainant.” *Montalvo v. Kering Americas, Inc.*, 14 OCAHO no. 1350, 3 (2020) (citing *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990)). While the ALJ’s review is limited to the facts alleged in the complaint, the complaint includes any written attachments or exhibits, and any statements or documents

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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>.

<sup>2</sup> The undersigned notes that Respondent previously described the Complaint as “baseless and frivolous” in its February 1, 2022 submission, and requested dismissal on that ground. *See I-Services, Inc.*, 15 OCAHO no. 1314, at 2, 3 n.6. While the February 1, 2022 submission included a one sentence dismissal request, the Court found that this did not transform that filing into a motion to dismiss and declined to opine on the merits. *See id.* at 3 n.6.

<sup>3</sup> 28 C.F.R. pt. 68 (2022).

incorporated therein by reference. *Werline v. Pub. Serv. Elec. & Gas Co.*, 7 OCAHO no. 935, 239, 246 n.5 (1997) (citation omitted).

A. Discrimination in Hiring, 8 U.S.C. § 1324b(a)(1)

For an 8 U.S.C. § 1324b(a)(1) discrimination claim, a complainant must allege that the individual was treated less favorably than others by an employer on account of a protected characteristic. *See United States v. Life Generations, LLC*, 11 OCAHO no. 1227, 19 (2014) (citations omitted). The statute recognizes that discrimination can be on account of national origin, or, in the case of a protected individual under § 1324b(a)(3), on account of citizenship status. §§ 1324b(a)(1). “Where citizenship status is the forbidden criterion, there must . . . be some claim . . . that the individual is being treated less favorably than others *because* of his citizenship status.” *Lee v. Airtouch Comm.*, 6 OCAHO no. 901, 891, 901–02 (1996) (emphasis in original).

Complainant states that he was a citizen of the United States at the time of the alleged discrimination. Compl. 2. Complainant asserts that on November 14, 2020, Respondent discriminated against him *because* of his national origin and citizenship status. *Id.* at 6. Complainant then alleges that Respondent refused to hire him because “H1B transfers are unavailable for citizens of the United States.” *Id.* at 6–7.

Respondent contends in its February 1 submission (the Answer) that Complainant did not “[present] himself as a candidate with a resume for our job,” and accordingly, could not determine his suitability for a position. *See* Answer 2. Respondent states that its records did not contain Complainant’s resume or bio-data. *See id.* at 2. Respondent also argues that the language in its announcement encourages a wider pool of candidates.<sup>4</sup> *Id.* Respondent points out a number of discrepancies with the job posting and concludes that the Respondent either intentionally mislead the court or the posting was a result of a system error in the website. *Id.* at 1–2.

The issue is whether, taking the allegations in the Complaint as true, and reading them in the light most favorable to Complainant, the Complaint states a claim. A motion to dismiss is not the vehicle for the Court to resolve factual disputes, which Respondent primarily calls for the Court to do.<sup>5</sup> Here, the job announcement attached to the Complaint supports that Respondent was “hiring” or “recruiting for a fee” within the meaning of § 1324b. Compl. at 21–23. The announcement features the header “H1B transfer, EB3/EB2 filing right away. Fulltime . . . I-Services, Inc.[,] Remote or Boston, MA[,], 2 weeks ago[.]” *Id.* at 21. The announcement states that Respondent is “seeking to interview candidates for our direct client,” and identifies sought skills. *Id.* The announcement also instructs candidates to “call after sending the resume.” *Id.* Further, Complainant represents that he applied for and was qualified for the job, and that Respondent was looking for workers at the time of his application. *Id.* Complainant also attached

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<sup>4</sup> “For select candidates, we consider sponsoring for H1 as well as [t]hose authorized to work in the United States without sponsorship are encouraged to apply.” Compl. 21.

<sup>5</sup> In a summary decision motion, by contrast, the movant sets forth facts showing that there is no genuine issue of material facts such that judgment should enter on the party’s behalf, and is generally supported by evidence of the facts, such as affidavits, material obtained in discovery or otherwise. *See* 28 C.F.R. § 68.38.

a printout dated November 14, 2020 with the text “Your application is on its way . . . for the position of H1B transfer, EB3/EB2 filing right away. Fulltime with I-Services, Inc. through Dice”<sup>6</sup> to support the allegation. *Id.* at 19–20.

While the advertisement does appear to include a statement encouraging all non-sponsored persons to apply, it is ambiguous at best, and the header and title of the announcement only references visa terms “H1B transfer” and “EB3/EB2.” While aspects of the posting appear nonsensical or unusual,<sup>7</sup> whether the advertisement attached to the Complaint was the result of a system error or was otherwise manipulated is a fact that must be proven either in a motion for summary decision or a hearing. So, too, is the assertion by Respondent that it did not receive Complainant’s application.

Accordingly, Complainant stated sufficient facts to permit an inference of discrimination; that is, manipulation of hiring practices to disqualify him because of his citizenship status. *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5, 9 (2021). Thus, Respondent’s Motion to Dismiss as to the discrimination in hiring claim is DENIED.

#### B. Unfair Immigration-Related Documentary Practices, 8 U.S.C. § 1324b(a)(6)

For an unfair immigration-related documentary practices claim, a complainant must allege: (1) an employer requested more or different documents than those required, or rejected otherwise acceptable documents, in connection to the employment eligibility verification process required by 8 U.S.C. § 1324a(b), and (2) the practice was “undertaken for the purpose or with the intent” of discrimination on account of national origin or citizenship status. *Mbitaze v. City of Greenbelt*, 13 OCAHO no. 1345a, 9–10 (2020) (citations omitted).

The Complaint includes an allegation that Respondent rejected or refused to accept Complainant’s documents to provide his identity or show his U.S. work authorization. *See* Compl. 10. However, Respondent’s dismissal arguments appear to derive from the job announcement and application, not conduct pertaining to unfair documentary practices. The Court thus concludes that Respondent has not moved it to take any action for the allegation arising under § 1324b(a)(6).

### III. NOTICE OF APPARENT DEATH

On June 27, 2022, this tribunal received a copy of a “Certification of Death,” which names the decedent as Robert Heath. *See Heath v. Ancile, Inc.*, 15 OCAHO no. 1411a, 1 (2022). The certificate lists the date of death as May 18, 2022, and the date of registration of death as June 1, 2022. *Id.* The Bureau of Vital Statistics for the State of Florida issued this certification on June 24, 2022. *Id.*

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<sup>6</sup> The Court observes that the “Dice ID” and “Position ID” in the November 14, 2020 printout matches that in the job announcement.

<sup>7</sup> Respondent argues that the “10+ lines of text under the heading ‘Skills’ without any details of the actual job or work” would support a finding that, on its face, this was not an actual job posting. *Id.* So to the line, “Originally Posted: 1 decade ago” text, and according to Respondent, the job announcement is printed directly from Complainant’s hard drive. *Id.* at 1.

The OCAHO Rules allow ALJs in the forum to take “official notice” of “any material fact, not appearing in the evidence in the record, which is among the traditional matters of judicial notice.” 28 C.F.R. § 68.41. When providing such notice, the ALJ shall give both parties adequate time to respond and “opportunity to show the contrary.” *Id.*

This Order provides the parties in this matter with notice of the “Certification of Death” for the decedent named Robert Heath (the “apparent death”). The parties shall be heard on this matter through responses within thirty (30) days of the date of this Order. The responses may address the propriety of judicial notice, applicable law on the substitution of parties, propriety of finding a claim abandoned in the absence of a response by Complainant or any putative successor party, or any other matter related to the apparent death it deems appropriate.

#### IV. CONCLUSION

For the foregoing reasons, the court DENIES Respondent’s August 3, 2022, Motion to Dismiss.

The Court affords the parties the opportunity to be heard on the apparent death within thirty (30) days of the date of this Order.

Further, the Court ORDERS Complainant to advise on intent to advance this litigation within thirty (30) days of the date of this Order. *See Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388g, 4 (2022) (“[C]oncerns of judicial economy and preservation of parties’ resources all but compel the Court to require [Complainant] file a submission clarifying [intentions to pursue the case].”). Failure to submit the previously ordered status report or respond to the instant order may be construed as abandonment of the Complaint pursuant to 28 C.F.R. § 68.37(b)(1).

SO ORDERED.

Date: August 31, 2022

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Jean C. King  
Chief Administrative Law Judge