Published 3/16/17 12 OCAHO no. 1298

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

March 3, 2017

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 11B00111
MAR-JAC POULTRY, INC., Respondent.	)	

FINAL DECISION FINDING LIABILITY AND SCHEDULE FOR SUPPLEMENTAL FILINGS

I. INTRODUCTION

This is an action arising under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). The Office of Special Counsel for Immigration-Related Unfair Employment Practices (Complainant, OSC, or the government)[1] filed a two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Mar-Jac Poultry, Inc. (Mar-Jac, Respondent, or the company). OSC alleges that Mar Jac committed document abuse in violation of 8 U.S.C. § 1324b(a)(6) against certain individuals and that Mar-Jac engaged in a pattern or practice of document abuse. After discovery was completed, both parties filed

[1] On January 18, 2017, while this matter was pending but after the instant decision was drafted, OSC changed its name to the Immigrant and Employee Rights Section (IERS). *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-01 (Dec. 19, 2016). To avoid confusion—and because most documents filed in this case refer to the OSC before its name change—the undersigned will continue to use OSC in the instant decision to refer to what is now named IERS. *See* 28 C.F.R. § 0.53. Any future orders or decisions from the undersigned, however, will refer to IERS. Similarly, OSC also replaced the term "document abuse" with the term "unfair documentary practices" as a description of a violation of 8 U.S.C. § 1324b(a)(6); nevertheless, the undersigned will continue to use the term "document abuse" for purposes of this decision.

motions for summary decision and responses to the other party's motion. Both parties also requested leave to file a reply to the other party's response, accompanied by their own replies.[2] For the reasons discussed in detail below, OSC's motion for summary decision will be granted in part and denied in part; Mar-Jac's motion will also be granted in part and denied in part.

II. PROCEDURAL HISTORY

On December 13, 2010, OSC accepted as complete a charge form filed by Edwin Morales,[3] who was authorized to work in the United States as a recipient of Temporary Protected Status (TPS), alleging that Mar-Jac committed document abuse against him on July 14, 2010.[4] In a letter dated February 16, 2011, OSC informed Mar-Jac that OSC was expanding its investigation "to include a possible pattern or practice of document abuse against non-U.S. citizens." *See* Complaint, Attachment B. OSC informed Mr. Morales on April 12, 2011, that OSC was still continuing its investigation and that he could now file his own complaint with OCAHO. Mr. Morales did not do so, and on July 14, 2011, OSC filed a complaint with OCAHO.

Count I of the complaint contends that Mar-Jac committed document abuse against Mr. Morales and "Other Similarly Situated Persons," and Count II contends that Mar-Jac carried out a "Pattern or Practice of Discrimination in the Hiring and Employment Eligibility Verification Process."[5] Complaint at 5-6. The complaint also requests that the Administrative Law Judge

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[2] Leave to file the reply briefs is granted to each party.

[3] On October 5, 2015, Michelle Mendez, Esq., of the Catholic Legal Immigration Network, Inc. located in Silver Spring, MD, informed this tribunal that Mr. Morales passed away on August 31, 2015. According to her filing, Ms. Mendez was Mr. Morales's attorney. Mr. Morales's death is unfortunate, but it does not preclude OSC's ability to maintain the instant cause of action because "OSC represents the public interest in an OCAHO case, not the charging party or other individuals." *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 7 n.6 (2012).

[4] Mr. Morales initiated his charge form on August 4, 2010. *See* Complaint, Attachment A.

[5] Although this header includes "discrimination in the Hiring . . . Process," which could be its own cause of action, *see* 8 U.S.C. § 1324b(a)(1) ("It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, . . . of the individual"), Count II in fact alleges only a pattern or practice of document abuse. *See* Complaint at 7 ("Respondent's hiring policies and practices described above constitute a pattern or practice of document abuse in violation of 8 U.S.C. § 1324b(a)(6),

(ALJ) order Mar-Jac to cease and desist from the alleged discriminatory practices, that Mar-Jac "provide full remedial relief to work authorized non-U.S. citizens" who were not hired but had sufficient employment eligibility verification documents, and that Mar-Jac pay a $1100 civil penalty for each violation of 8 U.S.C. § 1324b(a)(6). The complaint further seeks "other appropriate measures to overcome the effects of the discrimination." *Id.* at 7.

On August 16, 2011, Mar-Jac filed an answer denying the material allegations of the complaint and raising several affirmative defenses. These defenses included: (1) OSC failed to state a claim upon which relief may be granted, (2) the alleged discriminatory acts fall outside the statute of limitations, (3) section 1324b(a)(6) only prohibits actions carried out for purposes of completing the Employment Eligibility Verification Form I-9, not E-Verify, and (4) OSC lacks jurisdiction to file a complaint on Mr. Morales's behalf because he is not a "protected individual" as defined under 8 U.S.C. § 1324b(a)(3).

A. Motion to Dismiss

The same day, Mar-Jac filed a motion to dismiss, to which OSC responded. Sur-replies were also filed. Mar-Jac reasserted that OSC lacked jurisdiction to maintain the charge in Count I because the language of 8 U.S.C. § 1324b(a)(6) only prohibits document abuse if made with the purpose of or intent to discriminate against an individual in violation of § 1324b(a)(1), which in turn references a "protected individual" as defined under § 1324b(a)(3). Therefore, because Mr. Morales was a TPS recipient, which does not constitute a "protected individual," OSC could not bring a claim of document abuse on his behalf. Mar-Jac also argued that the complaint failed to state a claim upon which relief could be granted because OSC did not identify any specific individual who is a protected individual or who was denied employment or suffered an adverse employment action based on citizenship.

In response, OSC argued that OCAHO has jurisdiction because document abuse does not require that the charging party be a protected individual and that the statutory scheme and legislative history support the proposition that all work authorized individuals are protected from document abuse based on citizenship status. The government also stated that it sufficiently pleaded that Mar-Jac engaged in a pattern or practice of document abuse because economic injury is not required. Relying on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977), OSC also contended that even if economic injury were required, it did not have to demonstrate adverse employment actions at the initial liability stage.

On March 15, 2012, ALJ Ellen K. Thomas, who initially presided over this case, denied Mar-

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depriving non-U.S. citizens of their right to equal employment opportunities without discrimination based on citizenship status.").

Jac's motion to dismiss. Because "it is not necessary to find that every failure of a litigant to establish some threshold fact equates to an ouster of jurisdiction" and because OSC brought the charges pursuant to its authority to conduct investigations upon its own initiative, Judge Thomas found that Mr. Morales's status as a non-protected individual did not have any bearing on the issue of jurisdiction. *Mar-Jac Poultry, Inc. v. United States*, 10 OCAHO no. 1148, 7-8 (2012).[6] In addition, Judge Thomas held that OSC's complaint satisfied OCAHO's pleading standards under 28 C.F.R. § 68.7(b).[7] *Id.* at 10-12.

B. Motions for Summary Decision, Responses, and Replies

On February 21, 2014, OSC filed a Motion for Summary Decision (OSC's Motion). On March 14, 2014, Mar-Jac filed its Motion for Summary Decision (Mar-Jac's Motion). The following submissions were subsequently filed: (1) Mar-Jac's Response to OSC's Motion for Summary Decision, (2) OSC's Consolidated Response in Opposition to Mar-Jac's Motion for Summary Decision and Reply to Mar-Jac's Response in Opposition to OSC's Motion for Summary Decision, (3) Mar-Jac's Unopposed Motion for Leave to File Reply to OSC's Opposition to Mar-Jac's Motion for Summary Decision with Mar-Jac's Reply in Support of its Motion for Summary Decision, and (4) OSC's Sur-Reply to Mar-Jac's Reply in Support of its Motion for Summary Decision.

On August 26, 2015, OSC filed a Motion for Status Conference Regarding Supplemental Briefing. Specifically, OSC requested a status conference to address the impact of *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227 (2014). Mar-Jac opposed the motion. On December 18, 2015, ALJ Stacy S. Paddack, who was presiding over the case at the time, ordered both parties to file briefs addressing the relevance of *Life Generations* to the instant cause of action and denied the request for a status conference.

On February 3, 2016, OSC filed its supplemental brief and Mar-Jac filed its respective brief on

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[7] *See* OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2017).

February 24, 2016. The case was subsequently reassigned to another ALJ in June 2016 before being reassigned to the undersigned on November 15, 2016. The parties' motions and the issue of liability are now fully ripe for a decision.

III. EVIDENCE CONSIDERED

A. OSC's Evidence

OSC's Motion included the following exhibits: Ex. C-1) Excerpts from OSC's 2011 Investigatory Interview of Marta Guzman; Ex. C-2) Mar-Jac's Second Amended Responses to OSC's Second Set of Interrogatories; Ex. C-3) Excerpts from Marta Guzman's deposition, June 18, 2012; Ex. C-4) Excerpts from Harry Don Bull's deposition, June 19, 2012; Ex. C-5) Excerpts from Maria Salazar's deposition, August 7, 2012; Ex. C-6) Excerpts from Ana Zuares's deposition, June 22, 2012; Ex. C-7) Mar-Jac's Response to OSC's Second Request for Admissions; Ex. C-8) Excerpts from Sandra Wood's deposition, June 20, 2012; Ex. C-9) Declaration of Ryan Thompson, OSC Senior Paralegal; Ex. C-10) Memorandum from Mar-Jac management to Mar-Jac personnel; Ex. C-11) Form I-9 with copies of the provided Lists B and C documents and of E-Verify printout for Mar-Jac employee, Vanessa Ramirez; Ex. C-12) Form I-9 for Mar-Jac employee, Luis Hernandez Mayo, and note from Mar-Jac explaining why he was terminated; Ex. C-13) Mar-Jac's Response to OSC's First Request for Admissions; Ex. C-14) Mar-Jac's *Hiring Policy/Procedures/Practices*; Ex. C-15) Copies of Mar-Jac's E-Verify posters; Ex. C-16) Mar-Jac's Response to OSC's Second Requests for Production; Ex. C-17) E-Verify Program For Employment Verification, Memorandum of Understanding; Ex. C-18) Mar-Jac's Response to OSC's Third Set of Interrogatories; Ex. C-19) Copies of E-Verify Query Screen Shots; Ex. C-20) Declaration, Forms I-9, copy of lawful permanent resident (LPR) card, and E-Verify printout pertaining to Alejandro Amante and Mar-Jac Applicant Flow Log; Ex. C-21) Mar-Jac Applicant Flow Log; Ex. C-22) Declaration, Form I-9, and copies of Social Security card and LPR card pertaining to Hrang Thang and Mar-Jac's response to his application for employment; Ex. C-23) Declaration, Form I-9, copies of LPR card and Social Security card, and E-Verify printout pertaining to Gerardo Marban; Ex. C-24) Declaration, Forms I-9, copies of LPR card and Social Security card, and E-Verify printout pertaining to Juana Hernandez; Ex. C-25) Declaration, Form I-9, copies of LPR and employment authorization card, E-Verify printout, and USCIS Notice of Action regarding Application for Employment Authorization pertaining to Edwin Morales, and Extension of the Designation of Honduras for TPS and Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries, 75 Fed. Reg. 86 (May 5, 2010); Ex. C-26) Watt Poultry USA, *2012 Top Poultry Companies* (Mar. 2012); Ex. C-27) Excerpt of Joel Williams's deposition, August 9, 2012; Ex. C-28) Declaration, Form I-9, copies of Social Security and Georgia driver's license, and E-Verify printout pertaining to Gerardo Hernandez; Ex. C-29) Form I-9, copies of Social Security card, Georgia driver's license,

I-551 stamp, and LPR card, and E-Verify printout pertaining to Miguel Vera, and Mar-Jac Applicant Flow Log; Ex. C-30) Forms I-9 and attachments pertaining to Azucena Gonzalez, Natividad Velasquez, Patricia Lopez, Jesus Garcia, Yovanny Castro Melendez, Manuel Aquino Chacon, Jose Castillo Huezo, Max Cruz, Marco Martinez, and Manuel Quinteros; Ex. C-31) Excerpts from USCIS, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* (M-274) (1991, 2007, 2009, and 2011 versions); Ex. C-32) Forms I-9 pertaining to four Mar-Jac employees; and C-33) Form I-9 and copies of Social Security card and LPR card pertaining to Arnulfo Ibarra.[8]

OSC included the following exhibits to its Consolidated Response in Opposition to Mar-Jac's Motion for Summary Decision and Reply to Mar-Jac's Response in Opposition to OSC's Motion for Summary Decision: Ex. Cc-1) Forms I-9 and E-Verify printouts pertaining to Ray Clark, Sandie Gearn, Matthew Hall, Donald Maddox, and John Whitmire; Ex. Cc-2) Excerpts from Marta Guzman's deposition; Ex. Cc-3) Excerpts from Sandra Wood's deposition; Ex. Cc-4) Excerpts from Maria Salazar's deposition; Ex. Cc-5) Excerpts from Rosa Torres's deposition, August 6, 2012; Ex. Cc-6) Excerpts from Mr. Morales's deposition, August 23, 2012; Ex. Cc-7) Mar-Jac's First Amended Response to OSC's Third Requests for Production; Ex. Cc-8) Forms I-9 with attached documents (List A or Lists B and C) and E-Verify printouts for eleven Mar-Jac employees; Ex. Cc-9) Excerpts from Marta Guzman's interview; Ex. Cc-10) Ryan Thompson's declaration with attached logs of information pertaining to Mar-Jac employees, their citizenship or immigration status, and whether a List A document was identified on their respective Forms I-9 and/or E-Verify; Ex. Cc-11) Mar-Jac's response to OSC's inquiries in response to Mr. Morales's OSC charge form; Ex. Cc-12) Mar-Jac's Response to OSC's Second Set of Interrogatories; Ex. Cc-13) Mar-Jac's Response to OSC's Third Set of Interrogatories; Ex. Cc-14) Excerpts from Mr. Bull's deposition; Ex. Cc-15) Excerpts from Ana Zuares's deposition; Ex. Cc-16) William Yates, Acting Assoc. Dir., Bureau of Citizenship and Immigration Services, Memorandum, *The Meaning of 8 CFR 274a.12(a) as it Relates to Refugee and Asylee Authorization for Employment* (Mar. 10, 2003); Ex. Cc-17) Affidavit of Bernard Siskin, Ph.D.; and Ex. Cc-18) Excerpts from Dr. Siskin's deposition, September 19, 2012.[9]

B. Mar-Jac's Evidence

Mar-Jac attached the following exhibits to its motion: Ex. R-1) Excerpts from Rosa Torres's

[8] For purposes of clarity, the undersigned has enumerated OSC's exhibits by adding a "C" before the respective exhibit number. Similarly, Mar-Jac's exhibits will be numbered including an "R."

[9] For purposes of clarity, the undersigned has identified the exhibits supporting OSC's response as "Cc" to distinguish them from the exhibits included in OSC's Motion; the exhibits attached to Mar-Jac's response are similarly enumerated as "Rr."

deposition; Ex. R-2) Declaration of Marta Guzman; Ex. R-3) Excerpts from Terri Middlebrooks's deposition, August 10, 2012; Ex. R-4) Excerpts from Maria Salazar's deposition; Ex. R-5) Excerpts from Dr. Siskin's deposition; Ex. R-6) Excerpts from Edwin Morales's deposition; Ex. R-7) Mr. Morales's application for employment with Mar-Jac; Ex. R-8) Excerpts from Marta Guzman's deposition; Ex. R-9) Excerpts from Ana Zuares's deposition; Ex. R-10) Blank copy of Form I-9; Ex. R-11) Blank screenshot of information requested by E-Verify; Ex. R-12) Excerpts from Mr. Bull's deposition; Ex. R-13) Excerpts from Phillip Turner's deposition, August 9, 2012; Ex. R-14) Equal Employment Opportunity, *2011 Employer Information Report*, Mar-Jac Processing, Inc.; Ex. R-15) Dr. Siskin's affidavit; Ex. R-16) Andorra Bruno, Cong. Research Serv., R40002, Immigration-Related Worksite Enforcement: Performance Measures (2012); Ex. R-17) DHS, *Fact Sheet: Worksite Enforcement Strategy* (Apr. 30, 2009); Ex. R-18) ICE, *331 Arrested by ICE Agents During Search of South Carolina Poultry Processing Plant*, News Releases (Oct. 9, 2008); Ex. R-19) ICE, *ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for Their Hiring Practices*, News Release (Nov. 19, 2009); Ex. R-20) ICE, *Fact Sheet: Worksite Enforcement* (Apr. 1, 2013); Ex. R-21) Excerpts from Sandra Wood's deposition; Ex. R-22) exhibit not provided;[10] Ex. R-23) Copy of Luis Mayo Hernandez's Form I-9 and note from Mar-Jac explaining why he was terminated; Ex. R-24) Declaration of Christopher Adams, paralegal with law firm of Mar-Jac's counsel; Ex. R-25) Mar-Jac's applicant flow log; Ex. R-26) Mar-Jac's employee information with respect to Mr. Morales; Ex. R-27) Mr. Morales's statement; Ex. R-28) Mr. Morales's Form I-9; Ex. R-29) E-Verify sheet with respect to Mr. Morales; Ex. R-30) E-Verify sheet with respect to Mr. Morales; Ex. R-31) Georgia Dep't of Labor, Separation Notice with respect to Mr. Morales; Ex. R-32) Tennessee Dep't of Labor and Workforce Development, Time Sensitive Request for Separation Information; Ex. R-33) Tennessee Dep't of Labor, Agency Decision with respect to Mr. Morales's claim for unemployment benefits; Ex. R-34) Declaration of unidentified former Mar-Jac employee; Ex. R-35) Gerardo Marban's declaration; Ex. R-36) Form I-9, copies of LPR card and Social Security card, and E-Verify printout pertaining to Gerardo Marban; Ex. R-37) Alejandro Amante's declaration; Ex. R-38) Mr. Amante's Mar-Jac employment history record; Ex. R-39) Mr. Amante's Form I-9; Ex. R-40) Mr. Amante's Form I-9; Ex. R-41) Mr. Amante's Form I-9; Ex. R-42) Mr. Amante's Form I-9; Ex. R-43) Form I-9, copy of LPR card, and E-Verify printout pertaining to Mr. Amante; Ex. R-44) Juana Hernandez's declaration; Ex. R-45) Ms. Hernandez's Mar-Jac employment history record; Ex. R-46) Forms I-9, copies of LPR card, and E-Verify printout for Ms. Hernandez; Ex. R-47) Gerardo Hernandez's declaration; Ex. R-48) Form I-9, copies of Social Security card and Georgia driver's license, and E-Verify printout pertaining to Gerardo Hernandez; Ex. R-49) Hrang Thang's declaration; Ex. R-50) Mr. Thang's application for employment with Mar-Jac; Ex. R-51) Employment interview questionnaire with respect to Mr. Thang; Ex. R-52) Mar-Jac

[10] According to Mar-Jac, Ex. R-22 was composed of "40,000 pages of documents, and more than 5,500 Form I-9 files," from July 2005 through January 2012. Mar-Jac's Motion at 85.

employee record with respect to Mr. Thang; Ex. R-53) Form I-9, copies of employment authorization document (EAD) and Social Security card, and E-Verify printout pertaining to Mr. Thang; Ex. R-54) Letter from OSC to Eileen M.G. Scofield, Esq. of Alston & Bird; Ex. R-55) Form I-9 Instructions; Ex. R-56) USCIS, Notice of Action with respect to Mr. Thang's LPR application; Ex. R-57) Mar-Jac's Leave of Absence with respect to Mr. Thang; Ex. R-58) Mr. Thang's employee attendance record; Ex. R-59) Georgia Dep't of Labor, Separation Notice with respect to Mr. Thang; Ex. R-60) Mar-Jac's report, "All E-Verify Users in Georgia"; Ex. R-61) Mar-Jac's report, "All E-Verify Users in Southeast"; Ex. R-62) U.S. Census Bureau, Sex by Age by Citizenship Status, Hall County, Georgia (2006-2010); and Ex. R-63) Excerpts from Joel William's deposition.

Mar-Jac attached the following exhibits to its Response to OSC's Motion for Summary Decision: Ex. Rr-1) Second declaration of Christopher Adams; Ex. Rr-2) Excerpts from OSC's interview of Marta Guzman; Ex. Rr-3) Excerpts from Mar-Jac's applicant flow logs, 2010; and Ex. Rr-4) Mar-Jac's applicant flow log, March 2010.

The company also attached to its Reply in Support of its Motion for Summary Decision the following exhibits: Ex. R2-1) Mr. Morales's statement; and Ex. R2-2) Bernard Siskin & Joseph Trippi, *Ch. 5: Statistical Issues in Litigation*, in Employment Discrimination Litigation, Behavioral, Quantitative, and Legal Perspectives 132 (2005).

The undersigned has thoroughly reviewed the record and has considered the pleadings, the exhibits accompanying the various motions, and all other materials of record for the purposes of the instant decision.

IV. FACTS ESTABLISHED BY THE RECORD

Each party argues that there are no genuine issues of material fact, and indeed, many of the relevant facts appear to be either undisputed or not meaningfully challenged by the evidence of record.

Mar-Jac is a poultry-processing plant located in Gainesville, Georgia. In 2012, the company had approximately 1300 employees. Harry Bull, Rosa Torres, Maria Salazar, Anna Zuares, Sandra Wood, and Terri Middlebrooks worked in Mar-Jac's human resources personnel department and have knowledge of Mar-Jac's hiring process. Between August 1998 and March 31, 2012, Mr. Bull served as the manager of personnel. Ms. Middlebrooks assumed Mr. Bull's position when he retired in 2012. All of the aforementioned human resources personnel testified through depositions about Mar-Jac's hiring process, including the steps involved in completing the Form

I-9 process.[11]

A. Ms. Guzman

OSC first interviewed Ms. Guzman telephonically in February 2011, and she was deposed on June 18, 2012. As of that date, Ms. Guzman had been employed in Mar-Jac's human resources department for approximately twelve years. She explained that previously, an individual had to present photograph identification and a Social Security card to obtain an application for employment at Mar-Jac. Mar-Jac had this policy to ensure that the prospective employee "would be eligible for hire." *See* OSC's Motion, Ex. C-3 at 83.

During her telephonic interview, Ms. Guzman stated that she filled out Section 1 of the Form I-9 on behalf of a new hire "very few times" because Respondent preferred that the individual employee complete Section 1 on his or her own. *See id.*, Ex. C-1 at 61. She further stated that if a non-U.S. citizen provided Lists B and C documents for purposes of completing the Form I-9 and had checked the box in Section 1 indicating that he or she was an alien authorized to work or an LPR, Ms. Guzman would ask to see "that card to make sure that it's valid, that it's real and that it's them." *Id.* at 62.[12] She would then make a copy of the document that the individual provided to her. Ms. Guzman reaffirmed that if a new hire presented Lists B and C documents for completion of the Form I-9 and attested to being a non-U.S. citizen in Section 1, she "want[ed] to see that card," meaning the corresponding LPR card or EAD *Id.* at 62-63. "If they check that they have a lawful permanent resident, I want to see that card. If they check that they're an alien authorized to work, I want to see that card." *Id.* at 62-63. Ms. Guzman also explained that when a non-U.S. citizen individual presented his or her LPR card, she would not identify that document under List A of Section 2 because "that is not what [the employee] presented" to her. *Id.* at 63. If a non-U.S. citizen could not provide an LPR card, for example, he or she could not work at Mar-Jac because "on this I-9, it states that the documents that they are presenting are good, eligible, they're not fraud and it's them, and I can't see that. I can't sign off on that, something that I'm not looking at." *Id.* at 64.

During her deposition, Ms. Guzman testified that this was her practice since 2008 when Mar-Jac joined E-Verify[13] and that she was "mistaken" in believing E-Verify required that she ask non-

[11] Phillip Turner also testified generally about the composition of Mar-Jac's workforce. *See* Mar-Jac's Motion, Ex. R-13.

[12] Ms. Guzman further stated, "I want to see the document that they've checked on there." *See* OSC's Motion, Ex. C-1 at 62. It appears that she was referring to the corresponding LPR card or EAD.

[13] Mar-Jac joined E-Verify on October 20, 2008. *See* OSC's Motion, Ex. C-17.

U.S. citizens to present their LPR card or EAD. *Id.*, Ex. C-3 at 131-32. She also acknowledged that she was mistaken in believing that E-Verify would not "run" a non-U.S. citizen with List B and C documents. *Id.* at 188. Moreover, she stated that she did not ask U.S. citizens or U.S. nationals to present any particular document. *Id.* at 132-33. She further testified that her coworkers also had a similar misunderstanding about asking non-U.S. citizens for certain documents, including Ms. Torres, Mr. Bull, Ms. Salazar, and Ms. Zuares. *Id.* at 144. Ms. Guzman stated that it was also a mistake to reverify an LPR card holder in Section 3 of the Form I-9. *Id.* at 210.

Ms. Guzman further testified that she would ask individuals who were recipients of TPS whose work authorization was going to expire for "receipts" from USCIS demonstrating that they were renewing their work authorization because "the Federal Register states that I need to ask for a receipt, where they have applied for TPS." OSC's Motion, Ex. C-1 at 93-94. If a TPS recipient could not provide his or her receipt, Ms. Guzman could no longer employ them but she indicated that she could not recall a situation where an individual could not present the receipt. *Id.* at 95.

Mar-Jac also acknowledged in its answer that Ms. Guzman "mention[ed]" that she would ask a non-citizen to provide a copy of his or her LPR card or EAD "if not already presented by the employee for the Form I-9" because she mistakenly believed it was necessary to make a copy of these documents to complete E-Verify on the individual's behalf. *See* Mar-Jac's Answer at 5.

B. Mr. Bull

Mr. Bull was deposed in June 2012. He was a personnel manager at Mar-Jac and retired in March of that year. OSC's Motion, Ex. C-4 at 27, 29. He stated that Mar-Jac used to require a prospective hire to present photograph identification and a Social Security card to obtain an employment application to ensure that an individual was work authorized. *Id.* at 115. He believes that Mar-Jac changed its policy to now only require presentation of a photograph ID because of OSC's current suit.

Mr. Bull also testified that he was mistaken when he had previously stated during an OSC interview that he and other human resources personnel had a misunderstanding about non-U.S. citizens having to present a List A document to complete a Form I-9. OSC's Consolidated Response, Ex. Cc-14 at 290. During his deposition he stated that he had answered truthfully to the question but that he had meant to say "E-Verify" instead of I-9 process. *Id.* at 291. He affirmed that they mistakenly believed a List A document was necessary for E-Verify. *Id.* He attributed this mistaken belief to Ms. Guzman. *Id.*

C. Ms. Torres

Ms. Torres was deposed in August 2012 and at that time, she had been employed by Mar-Jac for approximately ten years. She worked the day shift in the human resources department. OSC's Consolidated Response, Ex. Cc-5 at 15. She stated that "a few years back," Mar-Jac used to require a prospective employee to present photograph identification and a Social Security card to obtain an employment application. Mar-Jac's Motion, Ex. R-1 at 42. In addition, before the drug screening of a new hire, Ms. Torres would ask the new hire for his or her work authorization documents. OSC's Consolidated Response, Ex. Cc-5 at 124-25. Ms. Torres explained that before, her practice was to fill out for the Form I-9 before the new hire returned for orientation based on the copies of the individual's work authorization documents that were presented for an application. She would not complete the citizenship attestation of Section 1. Mar-Jac's Motion, Ex. R-1 at 135. Now, she completes the Form I-9 when the employee is present. *Id.* at 130.

D. Ms. Salazar

Ms. Salazar was deposed in August 2012 and worked the night-shift at Mar-Jac's human resources department. She testified that she used the copies of documents that the day shift had made to complete a new hire's Form I-9. Before 2011, if the day shift had made copies of a prospective employee's driver's license and Social Security card, she would ask to see the individual's LPR card if he or she had checked LPR status in Section 1. OSC's Motion, Ex. C-5 at 116. She stated that she "was told to do" this. *Id.* Similarly, if the individual had attested to being an alien authorized to work in Section 1 and had presented a driver's license and a Social Security card, Ms. Salazar would ask to see his or her EAD. *Id.* at 117. She believes that Ms. Guzman, Ms. Torres, or Ms. Zuares instructed her to ask a lawful permanent resident for his or her LPR card. *Id.* at 121. Ms. Salazar could not recall a time when a non-U.S. citizen was unable to present his or her LPR card. *Id.* In addition, she recalled situations where she had observed Ms. Zuares asking a lawful permanent resident or alien authorized to work to present an LPR card or EAD when completing the Form I-9. *Id.*

Ms. Salazar also stated that during the period when the day shift would make photocopies of the documents provided by the prospective employee, there were few instances where a non-U.S. citizen did not have his or her LPR card or EAD, even if the day shift had copied the individual's driver's license and Social Security card. *Id.* at 118. If the non-U.S. citizen had to leave and retrieve his or her LPR card, Ms. Salazar would create a new Form I-9 for the individual identifying the LPR card in Section 2 and would discard the previous Form I-9 as well as the copies of the driver's license and Social Security card. *Id.* at 119.

Ms. Salazar stated that now, when completing the Form I-9, when a lawful permanent resident provides a driver's license and a Social Security card, she does not request to see his or her LPR card. *See* Mar-Jac's Motion, Ex. R-4 at 130.

E. Ms. Zuares

OSC deposed Ms. Zuares in June 2012; at that time, she had been employed with Mar-Jac's human resources department for approximately eleven years, working the night shift. She explained that her responsibilities include reviewing employment applications. According to Ms. Zuares, before February 2011, the night shift's employment application process involved requiring that an individual who was requesting an employment application to present a photograph ID and Social Security card. Mar-Jac's Motion, Ex. R-9 at 117. The individual would then be interviewed by a member of human resources. If there was a position available, human resources would then proceed with a drug test, during which time Ms. Zuares would ask the individual for the documents he or she had presented to obtain an application. *Id.* at 118. The new hire would then be instructed when to return for orientation and what to bring. Normally, he or she would be required to come the next evening, during which time human resources would complete the individual's employee information sheet, tax documents, and Form I-9. *Id.* Before February 2011, human resources would complete as much information required in Section 1 of the Form I-9 before the individual returned based on the information provided in the employment application. *Id.* at 129. Ms. Zuares indicated that Mar-Jac made copies of the Social Security card for the Form I-9. OSC's Motion, Ex. C-6 at 145.

Ms. Zuares testified that when completing the Form I-9, if an individual provided a driver's license and Social Security card and attested to lawful permanent resident status, she would ask to see his or her LPR card. *Id.* at 158; Mar-Jac's Motion, Ex. R-9 at 139. If the new hire was an alien authorized to work, she would ask to see the EAD. Mar-Jac's Motion, Ex. R-9 at 139. She would ask to see the card to ensure that the person had written the correct A number in Section 1 and she would then proceed to complete Section 2. OSC's Motion, Ex. C-6 at 140. Normally, the new hire would write his or her A number and she would not have to. Mar-Jac's Motion, Ex. R-9 at 136. She believed she was required to see the LPR card or EAD "based on what [she] saw the day shift forms, how they were filled out." *Id.* She expressed that she had this understanding about having to request certain documents since she began working at Mar-Jac. *Id.* at 159. Ms. Zuares also stated that Ms. Salazar had this belief as well when she first started. Ms. Zuares also indicated that a majority of the time, non-U.S. citizens presented their LPR card or EAD when they first asked for an employment application and that when completing the Form I-9, they would also present either document and human resources would verify the A number and expiration date, if any. Mar-Jac's Motion, Ex. R-9 at 243-44.

Ms. Zuares further testified that the human resources staff was informed "a few months back" that they could no longer specify which documents they would accept. OSC's Motion, Ex. C-6 at 159. She could not recall ever requesting a U.S. citizen to present his or her passport or birth certificate. *Id.* at 160. If an individual now checks lawful permanent resident status in Section 1 and presents a driver's license and a Social Security card, she does not request to see an LPR

card. *Id.* at 157. This is the same practice for an alien authorized to work. *Id.* at 157-58.

F. Ms. Wood

At the time of her deposition in June 2012, Ms. Wood had been employed by Mar-Jac for approximately forty-nine and a half years. She is a receptionist/personnel clerk. She confirmed that before February 2011, an individual seeking employment would need to present a photograph ID and a Social Security card to obtain an application. Mar-Jac's Motion, Ex. R-21 at 37. The company no longer asks a prospective employee to present both these documents when seeking an application, only a photograph ID. *Id.* at 40.

Ms. Wood testified that she used to fill out the Forms I-9 in the 1980s when the company first began using the form until approximately six months prior to her deposition. OSC's Motion, Ex. C-8 at 27, 81. Ms. Wood confirmed that Mar-Jac's policy, at least before February 2011, was to ask an individual who checked lawful permanent resident status in Section 1 for his or her LPR card and to ask an individual who checked alien authorized to work in Section 1 for his or her EAD. *Id.* at 77. Ms. Wood believed that this policy had existed since at least 2008 when Mar-Jac joined E-Verify. *Id.* at 78. In addition, before the company joined E-Verify, Ms. Wood stated that Mar-Jac would ask individuals who checked lawful permanent resident status to present an LPR card but human resources did not normally make a copy of the card. *Id.* The individual would then write the A number on his or her Form I-9.

In addition, Ms. Wood stated that since the 1980s, the human resources personnel completed Section 1 for the employee, with the exception of the citizenship or immigration status attestation and signature. *Id.* at 81. This was the policy for all employees, regardless of citizenship or immigration status. *Id.* at 82. She also affirmed that since the 1980s, it was company policy to ask to see an LPR card or an EAD if the individual marked lawful permanent resident status or alien authorized to work. *Id.* at 83. According to Ms. Wood, she never asked a U.S. citizen to present a passport or a birth certificate. *Id.* at 149.

Ms. Wood testified on redirect that non-U.S. citizens would normally present an LPR card or an EAD when requesting an employment application and it was their choice to present these documents. Mar-Jac's Motion, Ex. R-21 at 163. During redirect, she also stated that she misunderstood OSC's question, which is why she had previously replied that she learned in training that non-U.S. citizens had to present their LPR cards. *Id.* She explained that she misunderstood the question because "I thought she was asking me one thing and she was asking me something else, I think." *Id.* at 165. Ms. Wood then testified that she had not received any training that non-U.S. citizens had to present certain documents. *Id.* In addition, on redirect, Ms. Wood testified, in response to a question about her previous testimony that a non-U.S. citizen had to present an LPR card or an EAD, that Mar-Jac does not ask for a specific document but

that it might request to see the document to verify that the A number written on the I-9 is correct. *Id.* at 166. She also indicated during redirect that human resources accepted the Lists B and C documents that a non-U.S. citizen would present. *Id.* at 167. Ms. Wood was not involved in the E-Verify process. *Id.*

Ms. Guzman, Ms. Salazar, Ms. Torres, Ms. Wood, and Ms. Zuares completed Section 2 of 97.27% of Mar-Jac's Forms I-9 from October 21, 2008, to February 9, 2011. OSC's Motion, Ex. R-9; Mar-Jac's Motion at 9.

Mar-Jac acknowledged that its human resources personnel "ask[ed]" a lawful permanent resident or an alien authorized to work to see the respective LPR card or EAD "to ensure the new employee checked the correct box and inserted the correct alien number and expiration date, if applicable." OSC's Motion, Ex. C-2, Interrog. 16, 17. Mar-Jac also indicated that this practice, "[w]hile not known specifically ... would have started when Respondent began completing Section 1 on behalf of all new hires." *Id.*, Interrog. 17.

G. Ms. Middlebrooks

Ms. Middlebrooks testified that she reviews all the Form I-9s and also runs new hires through E-Verify. Mar-Jac's Motion, Ex. R-3 at 64. She noted that when she first began working at Mar-Jac, the majority of employees were Vietnamese and then the workforce transitioned to one with a majority of Hispanic employees. *Id.* at 84-85.

H. Dr. Siskin

Dr. Siskin, who is currently the director of a specialty consulting firm, was retained by OSC "to statistically study the frequency with which non-U.S. citizens submitted List A documentation" for employment eligibility verification at Mar-Jac. OSC's Consolidated Response, Ex. Cc-17 at 2. Part of his analysis included reviewing an Excel spreadsheet that contained information relating to 1975 individuals hired by Mar-Jac between October 20, 2008, and May 4, 2011. *Id.* at 3. According to his analysis, non-U.S. citizens presented List A documents at a much greater numerical rate (99.5%) than U.S. citizens (3.6%). *Id.* at 7. Dr. Siskin indicated that the likelihood that such disparities occurred by chance is extremely small. *Id.* at 7-8. He further stated in his affidavit that the "data is consistent with the hypothesis that Mar-Jac specifically requested non-U.S. citizens to submit a List A document." *Id.* at 12.

Dr. Siskin was deposed in September 2012 and he testified that he is not an expert on Form I-9 issues. OSC's Consolidated Response, Ex. Cc-18 at 126. He also testified that "an overall pattern favorable to the protective class may be probative in assessing whether discrimination has occurred" collectively and that it could also assist in assessing discrimination in an individual

case, but is not dispositive in the latter. Mar-Jac's Motion, Ex. R-5 at 28.

I. Mr. Morales

Mr. Morales was deposed in August 2012. He recalled that he applied for employment with Mar-Jac on or around June 23, 2010. OSC's Consolidated Response, Ex. Cc-6 at 37. On his employment application, he indicated he was available to begin work on June 28, 2010, because he wanted to start work on a Monday to receive a full week's pay. Mar-Jac's Motion, Ex. R- 6 at 34. Mr. Morales further confirmed that when he requested an application, Mar-Jac asked him to present a photograph ID and Social Security card, so he provided his EAD and restricted Social Security card, which he had with him. *Id.* at 41-42, 93. He further indicated that he normally only carried his Social Security card with him when seeking employment but that Ms. Guzman asked him to present "all those documents." *Id.* He also indicated that he "always" presented his EAD and Social Security card. *Id.* at 97. According to Mr. Morales, Ms. Guzman asked if he had a driver's license and if he was from Honduras; when he replied, "yes," she asked if he had "letters of receipt of TPS from immigration." *Id.* at 42. He did and presented them to Ms. Guzman who made copies of the receipt.

Mr. Morales recalled that after he began employment with Mar-Jac, he was asked to verify some personal information on the computer. Mar-Jac's Motion, Ex. R-6 at 55. He stated that he was not under the impression that Mar-Jac was trying to prevent him from being employed at the company. *Id.* at 56.

V. POSITIONS OF THE PARTIES

A. OSC's Motion

OSC contends that the evidence of record demonstrates that Mar-Jac engaged in a pattern or practice of document abuse because (1) Mar-Jac implemented its discriminatory documentary practices to comply with the employment verification requirements of 8 U.S.C. § 1324a(b); (2) Mar-Jac requested more, different, or specific documents than are required under § 1324a(b); (3) Mar-Jac made requests for documents with the purpose or intent to discriminate against an individual on the basis of his or her citizenship status; and (4) Mar-Jac's discriminatory practices were its standard operating procedures. OSC's Motion at 23.

Specifically, OSC argues that it is undisputed, based on the testimony of the human resources personnel and Mar-Jac's responses to OSC's Interrogatories, that Mar-Jac's requests were made to satisfy the employment eligibility verification requirements. OSC states that the testimony of the human resources personnel and employee declarations show that Mar-Jac personnel

requested that non-U.S. citizens present a DHS-issued document to establish employment eligibility, even if the employee had already presented other Form I-9 documentation. OSC contends that Mar-Jac's specific requests for documents constitutes the statutory request "for more or different documents" because these specific requests curtailed the employee's right to choose which documents to present. *Id.* at 25 (citing 8 C.F.R. § 274a.2(b)(1)(v)). In addition, OSC stated that "'the vast majority of OCAHO rulings have held that requests for specific documents, such as INS documents, constitute document abuse violations.'" *Id.* (citing *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 507 (1999)).[14]

OSC argues that it demonstrated that Mar-Jac subjected non-U.S. citizens to its documentary practices because of their citizenship status, thus satisfying § 1324b(a)(6)'s intent element. Relying on U.S. Supreme Court precedent, the government states that discriminatory intent does not require animus or ill-will. *Id.* at 27 (citing *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 1203-04 (1991)). OSC further contends that Mar-Jac's own admissions demonstrate that Mar-Jac treated non-U.S. citizens differently because of their citizenship status. For example, in its response to OSC's interrogatories, the company stated:

> [I]t was Respondent's policy to complete Section 1 of the Form I-9 on behalf of each new employee. This was done to ensure accuracy and consistency. In each case, Respondent's personnel staff completed the preparer/translator portion of Section 1 . . . In the cases where the new employee would check Permanent Resident or Alien Authorized to work in Section 1, Respondent's personnel staff would ask to see the new employee's alien card. This was done to ensure that the new employee checked the correct box and inserted the correct alien number and expiration date, if applicable.

Id. at 28 (citing Ex. C-2, Interrog. No. 16).

Thus, Mar-Jac admitted that it "was only concerned with verifying whether non-U.S. citizens accurately noted their citizenship status," but neither asked U.S. citizens to provide any specific documents nor verified that they checked the correct box. *Id.* OSC argues that "if you were a non-U.S. citizen employee, Mar-Jac had you present a List A document for no other reason than because you were a non-U.S. citizen; if you were a U.S. citizen, you could choose the document(s) you wished to present because you were a U.S. citizen." *Id.* at 28.

OSC also asserts that it demonstrated that Mar-Jac's operating procedure was to require List A

[14] As of March 1, 2003, the functions of the former Immigration and Naturalization Service (INS) were transferred to DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002).

documents from non-U.S. citizens. Based on a review by OSC's paralegal, the government indicates that "[a]ll but two of the 784 non-U.S. citizens hired during the relevant period (October 21, 2008 to February 9, 2011) showed a List A document." *Id.* at 30 (citing Ex. C-9 ¶ 17). At the liability stage, the government further contends, its burden is to only demonstrate that the discriminatory policy or practice existed and not "'to offer evidence for each person for whom relief would be sought.'" *Id.* (quoting *Mar-Jac*, 10 OCAHO no. 1148 at 11).

In addition, OSC avers that Mar-Jac failed to raise any legitimate, non-discriminatory reason for its actions. Mar-Jac's argument that it asked non-U.S. citizens to see their corresponding List A document to verify they checked the correct box and provided the correct A number in Section 1 is not a legitimate, non-discriminatory reason, but rather demonstrates that Mar-Jac "targeted its documentary requests only at non-U.S. citizens due to their citizenship status." OSC's Motion at 31. Even assuming that this reason supports the company's contention that it did not act because of any malice or ill-will, OSC reasserts this is irrelevant because malice or ill-will is not necessary to establish discriminatory intent. *Id.*

Moreover, Mar-Jac's argument that it required non-U.S. citizens to present a List A document because of a mistaken belief that E-Verify required it to do so fails to rebut the showing of discriminatory intent, according to OSC. *Id.* at 33. First, the government states that OCAHO case law has held that "documentary requests made in the E-Verify context cannot escape OCAHO scrutiny and may violate 8 U.S.C. § 1324b." *Id.* (citing *Mar-Jac*, 10 OCAHO no. 1148 at 11). In addition, OSC contends that Mar-Jac's mistaken belief is undermined by the fact that the company ran a non-U.S. citizen's Lists B and C documents through E-Verify soon after the company joined in 2008. *Id.* (citing Ex. C-33). OSC presented a blank E-Verify screen shot to demonstrate that Lists B and C documents are the first options presented in E-Verify, including for non-U.S. citizens. *Id.* (citing Ex. C-19). OSC also points to Respondent's admission that its requirements for non-U.S. citizens to present List A documents began when the company started to complete Section 1 on behalf of all new hires, predating when it joined E-Verify. *Id.*

Finally, OSC reasserts that the company is liable for committing document abuse against all work authorized individuals and not just those who fall within the statutory definition of "protected individual." *Id.* at 35 (citing cases).

1. Impact of *Life Generations* decision

OSC asserts that the decision in *Life Generations*, which followed the standards laid out in *International Brotherhood of Teamsters* clarified that the requisite intent standard for a document abuse claim does not require ill will or animus against a protected class. *Life Generations*, 11 OCAHO no. 1227 at 23. An intent to discriminate, according to *Life Generations*, means that a person "would have acted differently but for the protected characteristic." *Id.* at 22. According

to OSC, therefore, "Mar-Jac's numerous admissions are direct evidence of intentional discrimination." OSC's Supplemental Briefing at 4. In addition, OSC states that Mar-Jac's contention that it hires large numbers of non-U.S. citizens and does not harbor any ill will or animus towards this group is irrelevant under *Life Generations* because discriminatory intent does not require any "'malevolent motive.'" *Id.* at 5 (citing *Life Generations*, 11 OCAHO no. 1227 at 22). OSC states:

> Respondent's admitted standard operating procedure of requiring only non-U.S. citizens to produce List A documents to ensure that they "checked the correct box" on the Form I-9, while not requiring U.S. citizens to produce specific documents to ensure that they too "checked the correct box," is sufficient direct evidence to merit a summary decision finding a pattern or practice of document abuse in violation of § 1324b(a)(6).

Id. at 6. OSC further avers that it is entitled to summary decision because there is no affirmative defense to document abuse and Mar-Jac failed to controvert its admissions that it only asked non-citizens for documents to verify the accuracy of its Form I-9 selections.

OSC also argues that assuming for the sake of argument that Mar-Jac's admissions do not constitute direct evidence, but rather, circumstantial evidence of discrimination, OSC still demonstrated that Mar-Jac's documentary practices were discriminatory. According to OSC, *Life Generations* involved circumstantial evidence and therefore appropriately relied on the *Teamsters* framework. Notably, OSC contends that *Life Generations* properly considered statistical data, which showed that the respondent had a standard operating procedure of requiring DHS-issued documents based on its workers' citizenship status. *Id.* at 9. OSC states that the statistical data it presented in the instant matter is very similar to the "100% List A production rate" in *Life Generations*. The government states that between October 2008 and February 2011, 782 of the 784 non-U.S. citizens (99.74%) that Mar-Jac hired presented DHS-issued documents. In addition, like the statistical data in *Life Generations*, here, once the period of alleged discrimination ended, the Lists B and C document rate for non-U.S. citizens increased from 0% to 19%. *Id.* at 10. OSC also relied on the testimony of Dr. Siskin to proffer that the likelihood of a nearly 100% non-U.S. citizen List A document presentation rate occurring by chance was very slim. *Id.* at 11 (citing Ex. C-17).

OSC further states that Mar-Jac proffered "a series of shifting, illegitimate, and discriminatory justifications to defend its practices." *Id.* at 14. First, Mar-Jac's argument that it needed to request certain documents to ensure that an individual checked the correct box in Section 1 is neither legitimate nor non-discriminatory because Mar-Jac did not request to see certain documents from U.S. citizens to ensure they checked the correct box. *Id.* at 15. In addition, OSC states that Mar-Jac's claim that because it hires large numbers of immigrants, it cannot be

liable for discriminatory practices against them is similar to the respondent's argument in *Life Generations* that "'some common cultural characteristic unique to Filipino employees' caused them to present DHS-issued documents," which the Administrative Law Judge found was "'inconsistent with the weight of the evidence.'" *Id.* (quoting *Life Generations*, 12 OCAHO no. 1277 at 21).

B. Mar-Jac's Position

Mar-Jac argues that with respect to Count I, OSC has failed to establish a *prima facie* case of discriminatory document abuse. First, Mar-Jac states that a "mere request for a specific document" is not document abuse under 8 U.S.C. § 1324b(a)(6) because the statute requires an intent to discriminate, citing *United States v. Diversified Technology and Services of Virginia, Inc.*, 9 OCAHO no. 1095 (2003). Mar-Jac also cites to precedent from the U.S. Supreme Court and the Court of Appeals for the Eleventh Circuit (Eleventh Circuit)[15] for the legal standards in employment discrimination lawsuits, specifically the burden shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Mar-Jac's Motion at 53-55.

In accordance with *McDonnell Douglas*, Mar-Jac contends that OSC was required to demonstrate that the victims of the alleged document abuse suffered an adverse employment action. *Id.* Mr. Morales and the 571 non-U.S. citizens asserted in the complaint were all hired. The company also argues that 8 U.S.C. § 1324b(a)(6) only prohibits certain documentary practices when made in connection with satisfying the Form I-9 requirements and does not apply to other purposes, such as "the application or interview stage," drug testing, Social Security and tax withholding, and "requests for documents at the E-Verify stage." *Id.* at 63.

Mar-Jac next contends that OSC is not entitled to summary decision because OSC cannot show that all of the non-U.S. citizens included in the complaint were protected individuals. Mar-Jac cites to the statutory language of § 1324b(a)(6) and its reference to § 1324b(a)(1) for the proposition that claims of document abuse on the basis of citizenship status require that the victim of discrimination be a protected individual, and that claims of document abuse on account of national origin apply to all work authorized individuals. *Id.* at 64. A "protected individual," in turn, does not include all work authorized individuals, such as TPS recipients and, therefore, Count I must be dismissed.

Moreover, Mar-Jac explains that it had legitimate, non-discriminatory reasons "for requesting specific documents" when completing the Forms I-9. As the company completed Section 1 of

[15] The alleged discriminatory acts occurred in the State of Georgia. Therefore, the reviewing United States Court of Appeals for this case is the Eleventh Circuit, should the final decision in this case be appealed. *See* 28 C.F.R. § 68.57.

the form for all new employees, the human resources personnel "necessarily . . . had to look at the documents of both U.S. citizens and non-U.S. citizens in order to attest, under penalty of perjury . . . " that Sections 1 and 2 of the form were completed accurately and properly. Mar-Jac's Motion at 72. In addition, because the Form I-9 and E-Verify require that non-U.S. citizens provide their A number, human resources had "a legal duty to verify the information on Form I-9." *Id.* at 73. Mar-Jac posits that it completes Section 1 for all employees in an effort to avoid noncompliance with the employment verification system of 8 U.S.C. § 1324a(b) and attendant civil money penalties. The company also states that it could be subject to criminal liability for perjury if human resources "did not look at the documents necessary to complete Section 1 to assure that the information recorded in Section 1 is true and correct." *Id.* (referencing, among others, 18 U.S.C. § 1546(a), (b)(3)). Mar-Jac identifies several federal circuit court cases where individuals were convicted of violating federal fraud statutes. *Id.*

The company continues to aver that any requests it made during the hiring process "was designed 'to assist the applicant in satisfying the requirements of the Form I-9.'" *Id.* at 78 (citing *Diversified Tech. and Servs.*, 9 OCAHO no. 1095 at 29). As further support for its position that it did not act with any discriminatory intent, Mar-Jac underscores its hiring of non-U.S. citizens, which it asserts has significantly increased in number and percentage. *Id.* at 79. Mar-Jac contends that OSC's own expert, Dr. Siskin, undermined OSC's theory that Mar-Jac acted with an intent to discriminate. *Id.* (citing Exs. R-5, R-15).

> Finally, Mar-Jac contends that the complaint is barred by the statute of limitations. As to Count I, Mar-Jac references 8 U.S.C. § 1324b(d)(3) to argue that because OSC investigated Mr. Morales's charge, any events relating to Mr. Morales's claim that occurred before June 16, 2010, cannot be the subject of the complaint. Section 1324b(d)(3), in relevant part, provides, "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel."

In addition, Respondent recognizes that OSC has the authority to investigate unfair immigration-related employment practices on its own initiative and cites to OSC's regulation, 28 C.F.R. § 44.304(b), in support of its argument that OSC cannot pursue claims of unfair immigration-related employment practices that occurred more than 180 days prior to the filing of the complaint. According to § 44.304(b):

> The Special Counsel may file a complaint with OCAHO when there is reasonable cause to believe that an unfair immigration-related employment practice has occurred no more than 180 days prior to the date on which the Special Counsel opened an investigation of that practice.

Mar-Jac states that because there is "no charge with respect to the expanded investigation and because [Mr.] Morales's charge did not reflect that others were the subject of discrimination," the complaint improperly alleges discriminatory acts that occurred more than 180 days prior to its filing. Mar-Jac's Motion at 89. Therefore, OSC cannot pursue claims of alleged unfair immigration-related employment practices that occurred before January 15, 2011.

1. Impact of *Life Generations*

Mar-Jac contends that *Life Generations* did not address the significance of the requirements imposed on the preparer of Section 1 of the Form I-9, which Mar-Jac prepared for all new hires, and is therefore not pertinent to the instant suit. Mar-Jac's Supplemental Briefing at 4. Mar-Jac reiterates that this practice necessarily required its personnel to look at the documents of both U.S. citizens and non-U.S. citizens, because the company could be held liable for civil and criminal sanctions if the information provided in the Form I-9 was not true and correct. Relatedly, the company states that pursuant to 8 U.S.C. § 1324b(a)(2)(C), its actions do not constitute citizenship discrimination because they were following the requirements of § 1324a(b).

The company also contends that because a non-U.S. citizen must provide an A number on the Form I-9 and in E-Verify, its personnel had to see the document containing this information. *Id.* at 7-10. Mar-Jac reiterates its arguments that OSC failed to demonstrate any discriminatory intent. Moreover, Mar-Jac contends that *Life Generations* is not applicable because it did not explicitly or implicitly reject the position that only protected individuals can be the subject of document abuse and because it did not address the statute of limitations issue.

VI. DISCUSSION & ANALYSIS

A. Legal Standards

1. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c) establishes that 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." Relying on Supreme Court precedent, OCAHO case law has held, "An issue of material fact is genuine only if it has a real basis in the record. 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)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* Fed. R. Civ. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." Moreover, "the court must view all facts and all reasonable inferences to be drawn from them 'in the light most favorable to the non-moving party.'" *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 3 (2000) (quoting *Matsushita*, 475 U.S. at 587).

2. Frameworks for Evaluating Claims of Discrimination under 8 U.S.C. § 1324b

The parties dispute the applicable framework for assessing the claims raised in the complaint, and some discussion of the general principles guiding analysis of discrimination claims under 8 U.S.C. § 1324b is necessary before turning to the substance of the claims at issue in the instant case.

As an initial point, claims of discrimination in violation of 8 U.S.C. § 1324b may encompass both individual claims and "pattern or practice" claims. 8 U.S.C. § 1324b(d)(2); *United States v. Mesa Airlines*, 1 OCAHO no. 74, 461, 463-64 (1989). Furthermore, discriminatory intent for each type of claim may be established through direct evidence or circumstantial evidence. *See Life Generations*, 11 OCAHO no. 1227 at 23.[16] Direct evidence "proves the fact at issue without the need to draw any inferences." *Diversified Tech.*, 9 OCAHO no. 1095 at 13 (referencing *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11-12, 16-17 (2003)); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) ("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'") (quotation omitted). The Eleventh Circuit defines "direct evidence of discrimination as 'evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" *Wilson*, 376 F.3d at 1086 (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999)). OCAHO's definition is not

[16] At least one ALJ has posited that discriminatory intent "may be established by direct or circumstantial evidence, or it may be inferred from statistical evidence." *Life Generations*, 11 OCAHO no. 1227 at 23. Inferential evidence is intrinsically circumstantial, however. Thus, notwithstanding this somewhat loose formulation, statistical evidence appears to constitute a subset of circumstantial evidence, rather than a discrete, separate category for proving a discrimination claim under 8 U.S.C. § 1324b. *See id.* (discussing the probative value of statistical evidence in claims arising under 8 U.S.C. § 1324b(a)(6)).

dissimilar. *See Diversified Tech.*, 9 OCAHO no. 1095 at 21 ("Direct evidence [of intentional discrimination] . . . ordinarily means there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision.") (citations omitted).

Once a showing of putative discrimination is established by direct evidence, the "defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached absent the presence of that factor." *Lee v. Russell Cnty. Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982) (citing *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989); *Diversified Tech.*, 9 OCAHO no. 1095 at 14. "The defendant's burden when refuting direct evidence of discrimination is one of persuasion and 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)). Unlike circumstantial evidence of discrimination, discussed below, direct evidence of discrimination does not call for use of any particular established framework. *See generally Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 622 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'") (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)); *see also Lee*, 684 F.2d at 774 ("Where a case of discrimination is made out by direct evidence, reliance on the. . . test developed for circumstantial evidence is obviously unnecessary."). Indeed, as noted, once direct evidence of discrimination is established, a respondent can prevail *only* by showing, by a preponderance of the evidence and bearing the burden of persuasion, that the same action would have been taken in the absence of the pertinent discriminatory factor.

Circumstantial evidence "suggests, but does not prove, a discriminatory motive." *Wilson*, 376 F.3d at 1086. For claims involving circumstantial evidence, two well-established, paradigmatic frameworks exist, depending on whether the claim at issue is an individual claim or a pattern or practice claim.[17] First, for individual claims of discrimination, 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). *See 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). Under the *McDonnell Douglas* framework, the complainant must first establish a *prima facie* case; second, the respondent must articulate some legitimate, nondiscriminatory

[17] These frameworks are not necessarily the only ones utilized to address claims of discrimination. *See Lee*, 684 F.2d at 773 (identifying others). Nevertheless, "[t]he Department [of Justice] has consistently relied on such frameworks when litigating cases before OCAHO" and "OCAHO has analyzed cases under [8 U.S.C. § 1324b] using these traditional frameworks." 81 Fed. Reg. 91768, 91774.

reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the *prima facie* case disappears unless the complainant establishes that the proffered reason is pretextual. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015). Once the employer satisfies its burden of production by setting forth a facially valid reason for the employment decision, the burden reverts to the employee to show that the employer's reason is pretextual. *Id*. The employer will generally be entitled to summary decision unless the complainant can demonstrate that there is a genuine issue of fact regarding pretext. *Id*. In other words, under *McDonnell Douglas*, a plaintiff must initially establish a *prima facie* case of discrimination and the burden then shifts to the employer to rebut the presumption of discrimination "by producing evidence that its actions was taken for some legitimate, non-discriminatory reason." *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)). If the employer meets its burden of rebutting the presumption of discrimination, the plaintiff "must show that the proffered reason really is a pretext for unlawful discrimination." *Id.* at 1273 (citing *Burdine*, 450 U.S. 248 at 255-56). The employer's burden is one of production, not persuasion, and the complainant retains the ultimate burden of persuasion throughout the analysis. *Odongo*, 11 OCAHO no. 1236 at 6; *accord Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 5 (2017); *Diversified Tech.*, 9 OCAHO no. 1095 at 14.

For a pattern or practice claim under 8 U.S.C. § 1324b, a similar burden-shifting framework is set forth in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See Life Generations*, 11 OCAHO no. 1227 at 18; *see also* H.R. Rep. No. 99-682, pt. I, at 59 (1986) (report of the House Judiciary Committee on IRCA emphasizing that it intended to follow the *Teamsters* decision in authorizing pattern or practice claims under 8 U.S.C. § 1324b). Under the *Teamsters* framework, the plaintiff also has the initial burden of establishing a *prima facie* case of liability by "presenting evidence adequate to show that the employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure, not just an unusual practice." *Life Generations*, 11 OCAHO no. 1227 at 18 (citing *Teamsters*, 431 U.S. at 335-36). "If the initial burden is satisfied, the burden of production then shifts to the employer to defeat the prima facie showing of a pattern or practice," which may be done by showing that the employee's proof is either inaccurate or insignificant or by providing a nondiscriminatory reason for its actions. *Id.* (citing *Teamsters*, 431 U.S. at 360-62, 360 n.46). 36).

In short, for individual claims of discrimination based on circumstantial evidence, *McDonnell Douglas* generally provides the applicable framework. Similarly, for pattern or practice claims of discrimination based on circumstantial evidence, *Teamsters* provides the applicable framework. For either individual or pattern-or-practice claims based on direct evidence of discrimination, however, no framework necessarily applies, and an employer can rebut the direct evidence of discrimination only by proving by a preponderance of the evidence that the same decision would

have been reached absent the presence of the discriminatory factor. *Lee*, 684 F.2d at 774.

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 Sec. Servs. 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. *Progressive Roofing*, 12 OCAHO no. 1295 at 4. "These two elements, an act and an intent, are essential to a claim of document abuse." *Id*.

Document abuse is prohibited if made "in connection with the employment verification process required by 8 U.S.C. § 1324a(b)," meaning "for the purpose of verifying the identity and work-eligibility of the individual" and including participation in the E-Verify program. *United States v. Swift & Co.*, 9 OCAHO no. 1068, 10 (2001); *see, e.g.*, *Mar-Jac*, 10 OCAHO no. 1148 at 11 ("[Mar-Jac] is mistaken in its assertion that document requests made at the interview stage or for purposes of E-Verify can escape scrutiny in OCAHO proceedings.").

Generally, in satisfying the requirements of 8 U.S.C. § 1324a(b), an employer may not specify the type of documents it will accept in order to complete the Form I-9.[18] 8 U.S.C. § 1324b(a)(6); *see also Townsend Culinary*, 8 OCAHO no. 1032 at 507 (collecting cases and noting that "[t]he choice of documents is that of the individual and employers may not specify those documents which are to be produced" and that "the vast majority of OCAHO rulings have held that requests

[18] Very limited circumstances exist in which an employer may specify the types of documents it will accept; however, those circumstances are not present in the instant case. *See, e.g.*, *Progressive Roofing*, 12 OCAHO no. 1295 at 6-10 (finding that an employer enrolled in the E-Verify program may, in certain circumstances, require an employee to provide a List B document with a photograph in order to comply with 8 U.S.C. § 1324a(b)).

for specific documents . . . constitute document abuse violations") (internal citations omitted)).[19] Doing so with the intent to discriminate against an individual in violation of 8 U.S.C. § 1324b(a)(1)—*i.e.* based on that individual's national origin or citizenship status—is a prohibited unfair immigration-related employment practice. 8 U.S.C. § 1324b(a)(6).

a. Intent to Discriminate

In 1996 Congress amended 8 U.S.C. § 1324b(a)(6) to require discriminatory intent, such that document abuse is no longer treated as a strict liability offense. *Progressive Roofing*, 12 OCAHO no. 1295 at 5; *Mar-Jac*, 10 OCAHO no. 1148 at 3-4; *see also Diversified Tech. & Servs.*, 9 OCAHO no. 1095 at 18 (finding that the post-amendment statutory language of 8 U.S.C. § 1324b(a)(6) is "crystal clear" that "document abuse can no longer be treated as a strict liability offense").

[19] Respondent relies on the decision in *United States v. Zabala Vineyards*, 6 OCAHO no. 830 (1995), to assert that requests for specific documents do not constitute document abuse for purposes of 8 U.S.C. § 1324b(a)(6). Respondent's Motion at 62. The actual holding in *Zabala Vineyards* is not a model of clarity as it alternatively posits—without apparent reconciliation—that a violation of 8 U.S.C. § 1324b(a)(6) occurs if aliens but not other new hires are asked to present specific documents, that a violation of 8 U.S.C. § 1324b(a)(6) occurs if an adverse employment action is taken in response to an employee's failure to present specified documents, but that a request for specific documents in general is not a violation of 8 U.S.C. § 1324b(a)(6). *Zabala Vineyards*, 6 OCAHO no. 830 at 85-88. Subsequent cases, however, have interpreted *Zabala Vineyards* to hold that requests for specific documents are not a violation of 8 U.S.C. § 1324b(a)(6) unless non-U.S. citizens are treated differently. *Townsend Culinary*, 8 OCAHO no. 1032 at 507. As that view of *Zabala Vineyards* is a reasonable interpretation of its somewhat convoluted conclusions and as it does not aid Respondent's arguments because the evidence shows that it did treat non-U.S. citizens differently, I have no further need to attempt to parse the decision in *Zabala Vineyards* or to determine whether it was correctly decided.

The parties disagree as to the level of intent required to establish discrimination under 8 U.S.C. § 1324b(a)(6), and a proper understanding of that issue has somewhat bedeviled OCAHO jurisprudence since the statute was amended in 1996.[20] Before addressing what intent is required,

[20] OSC recently promulgated regulations, *inter alia*, purporting to define the term "discriminate" for purposes of 8 U.S.C. § 1324b(a) and the phrase "[a]n act done 'for the purpose or with the intent of discriminating against an individual in violation of [1324(a)(1)]'" for purposes of 8 U.S.C. § 1324b(a)(6). *See* 81 Fed. Reg. 91768-01 (Dec. 19, 2016) (significantly revising 28 C.F.R. part 44 effective January 18, 2017). Although OSC explicitly noted that its promulgated regulatory definitions did not alter the relevant frameworks for assessing claims of discrimination under 8 U.S.C. § 1324b, *see id*. at 91774 ("The definition of 'discriminate' in the proposed rule does not alter the parties' respective burdens in a pattern or practice claim or individual claim, and the *McDonnell Douglas* and *Teamsters* frameworks set forth by the Supreme Court in interpreting Title VII continue to apply."), its new definitions nevertheless include confusing language—*i.e.* "regardless of the explanation for the differential treatment"—which appears to be in tension with step two of both the *McDonnell Douglas* and *Teamsters* frameworks. At first glance, and despite the confusing language, however, the new regulations do not appear to alter the law regarding the well-established *McDonnell Douglas* and *Teamsters* frameworks for circumstantial-evidence claims, each of which allows an employer to put forth a legitimate nondiscriminatory reason for its action. At most, these new regulations appear merely conclusory or tautological, rather than indicative of a significant change in the applicable law. OSC has also not advanced any further or broader interpretation of the new regulations, though the undersigned also notes, parenthetically, that although valid prospective regulations are binding in this forum, OSC's interpretations and arguments regarding the meaning of those regulations or any other applicable law are not. *See, e.g., Simon v. Ingram Micro, Inc.*, 9 OCAHO no. 1088, 18 (2003); *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 152-53 (1996); *accord Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 797 n.9 (1996) ("The Administrative Law Judge is not required to give deference to OSC's interpretation of the statute or regulation."). In any event, these new regulations are not applicable to Respondent's case. No relevant statute authorizes OSC to promulgate regulations with retroactive effect; thus, OSC's new definitional regulations in 2017 cannot be applied retroactively to evaluate Respondent's conduct at issue in this case, which occurred, in pertinent part, in 2010. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). Consequently, OSC's new definitional regulations do not apply to Respondent's case *per se*, and the instant case does not provide a vehicle for any further interpretation of the scope or meaning of those regulations. Nevertheless, the undersigned does note that OSC's comments during the rulemaking process for the new regulations may be probative regarding other issues, as discussed *infra*.

it is important to note first what it does *not* entail. For instance, a discriminatory intent does not require malice, ill will, or a malevolent motive. *Life Generations*, 11 OCAHO no. 1227 at 22; *accord EEOC v. Joe's Stone Crabs, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000). Indeed, subjective ill-will, malice, or any similar kind of animus toward the protected group is simply not required. *Joe's Stone Crabs*, 220 F.3d at 1284.

Conversely, the intent requirement is also not so diluted as to be tantamount to strict liability, and an employer's explanation for alleged disparate treatment is not meaningless or irrelevant, particularly in a case involving circumstantial evidence. *Progressive Roofing*, 12 OCAHO no. 1295 at 5. Indeed, such a reading of the intent requirement would vitiate the application of either the *McDonnell Douglas* framework (for individual claims) or the *Teamsters* framework (for pattern or practice claims), both of which allow an employer to proffer an explanation at step two after a *prima facie* case has been advanced based on circumstantial evidence. Moreover, even in direct-evidence cases which do not implicate the *McDonnell Douglas* or *Teamsters* frameworks, the intent required by 8 U.S.C. § 1324b(a)(6) does not collapse into strict liability, for a respondent can still rebut the direct evidence by proving by a preponderance of the evidence that the same decision would have been reached absent the presence of the discriminatory factor.

In short, the intent to discriminate required by 8 U.S.C. § 1324b(a)(6) neither requires a showing of animus nor is reducible to strict liability. Instead, as the statute commands, there must be an intent to discriminate against an individual on account of that person's citizenship status or national origin in order to establish a violation. In the instant context, that means "that a person has the intent to discriminate if he or she would have acted differently but for the protected characteristic," and for purposes of 8 U.S.C. § 1324b(a)(6), those characteristics are national origin or citizenship status.[21] *Life Generations*, 11 OCAHO no. 1227 at 22 (citing *Shelley v. Geren*, 666 F.3d 599, 607-08 (9th Cir. 2012)). Accordingly, to find discrimination under 8 U.S.C. § 1324b(a)(6), there must be a showing that an employer acted based on an individual's national origin or citizenship status and that its action would not have occurred but for one or both of those characteristics.

b. Economic Harm or Injury is Not Required to Establish Document Abuse Under 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." *Progressive Roofing*, 12 OCAHO no. 1295 at 4 (citing

[21] This formulation of the intent requirement also explains why even direct evidence of discrimination may be rebutted if a respondent can prove by a preponderance of the evidence that the same action would have been taken absent the presence of the discriminatory factor.

Mar-Jac, 10 OCAHO no. 1148 at 11); *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)). "Rather, the document abuse itself is the injury as it is inherently an unfair immigration-related employment practice, similar to other such practices prohibited by 8 U.S.C. § 1324b—*i.e*. discrimination with respect to hiring, recruitment or referral for a fee, or discharging an individual for employment because of the individual's national origin or citizenship status and discrimination through intimidation, threats, coercion, or retaliation against an individual for exercising rights under the statute." *Id.* at 5 (citing 8 U.S.C. §§ 1324b(a)(1), (5), (6)). Thus, an adverse employment action is not required to establish a claim of document abuse under 8 U.S.C. § 1324b(a)(6).[22]

c. Citizenship Status-Based Document Abuse Encompasses Claims Made Only by Protected Individuals

As ALJ Thomas previously noted in the instant case, there is a conflict in OCAHO case law regarding the scope of 8 U.S.C. § 1324b(a)(6) and, for cases alleging an underlying intent to discriminate based on citizenship status, whether it covers all work-authorized individuals or only "protected individuals" as defined in 8 U.S.C. § 1324b(a)(3). *See Mar-Jac*, 10 OCAHO no. 1148 at 5.

As discussed above, 8 U.S.C. § 1324b(a)(6) was amended to include an intent element, such that it now reads:

> A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

Prior to 2002, OCAHO case law generally held that all work-authorized individuals were covered by 8 U.S.C. § 1324b(a)(6). In *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 16 (2002), however, ALJ Robert L. Barton, Jr. found that the cross-reference in the amended statute to § 1324b(a)(1) affirms that the kinds of discrimination prohibited are (1) citizenship

[22] Although an adverse employment action is not necessary to establish a violation of 8 U.S.C. § 1324b(a)(6), the presence or absence of such an action may inform or bear upon the appropriateness of certain remedies available for such a violation. *See* 8 U.S.C. § 1324b(g)(2)(B).

status discrimination against protected individuals, and (2) national origin discrimination by employers with four or more employees not covered by Title VII. Under § 1324b(a)(3), a protected individual refers to a United States citizen or national, a recent lawful permanent resident,[23] a refugee, and an asylee. Accordingly, under § 1324b(a)(6) as interpreted in *Ondina-Mendez*, an OCAHO ALJ may consider claims alleging that (1) an employer committed document abuse against a statutorily-defined protected individual because of the individual's citizenship status and/or (2) an employer, who is not covered by Title VII, committed document abuse against any work authorized individual because of the individual's national origin.

ALJ Thomas did not necessarily agree with ALJ Barton's conclusion—and, thus, *Ondina-Mendez* has rarely been cited in subsequent OCAHO case law—and the conflict in OCAHO case law remains unresolved.[24] *See Mar-Jac*, 10 OCAHO no. 1148 at 5. As the issue is salient and unavoidable in the instant case, however, I must resolve the conflict, and after a thorough consideration of the relevant statutory language, prior OCAHO case law, and the spirited arguments of both parties, I find that *Ondina-Mendez* presents the most persuasive reading of the extent and scope of coverage of 8 U.S.C. § 1324b(a)(6). Consequently, I also find that cognizable claims under 8 U.S.C. § 1324b(a)(6) include only allegations that an employer committed document abuse against a statutorily-defined protected individual because of the individual's citizenship status and/or allegations that an employer, who has four or more employees and is not covered by Title VII, committed document abuse against any work authorized individual because of the individual's national origin.

This view of the scope of 8 U.S.C. § 1324b(a)(6) flows clearly from the statute itself and both its

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[23] The definition excludes lawful permanent residents who have failed to apply for naturalization or have failed to naturalize within a specified time period.

[24] Judge Thomas' decisions frequently note that no subsequent OCAHO decision has followed *Ondina-Mendez* and that the weight of OCAHO case law prior to 2002 asserts that any work-authorized individual, and not just a statutorily-defined protected person, can maintain a citizenship-status claim of document abuse under 8 U.S.C. § 1324b(a)(6). *See, e.g.*, *Ariz. Family Health P'ship*, 11 OCAHO no. 1254 at 7 n.5. Judge Thomas's observation is correct but is also somewhat acontextual. Judge Barton's last published OCAHO decision was in December 2004, and until 2016, Judge Thomas was frequently the lone OCAHO ALJ for significant periods of time. Other ALJs who briefly passed through OCAHO between 2004 and 2016 do not appear to have addressed the issue. Thus, as Judge Thomas appears to have tacitly disagreed with Judge Barton's decision and as she also appears to have been the lone ALJ to confront this issue directly since 2004, the lack of other OCAHO decisions following *Ondina-Mendez* is neither surprising nor dispositive.

interplay with 8 U.S.C. § 1324b(a)(1) and that statute's further reference to 8 U.S.C. § 1324b(a)(3). Because subsection (a)(6) of 8 U.S.C. § 1324b cross-references subsection (a)(1) which, in turn, cross-references subsection (a)(3), the statutes must be read *in pari materia*; nevertheless, the language of all three is clear that claims of document abuse with an intent or purpose of discriminating against an individual based on citizenship status is limited to claims against statutorily-defined protected individuals.

The statutory language is circuitous but not unclear. The document abuse provision in 8 U.S.C. § 1324b(a)(6) is expressly limited to situations involving a purpose or intent "of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)]." In turn, 8 U.S.C. § 1324b(a)(1)(B) expressly limits claims of citizenship-status discrimination to protected individuals defined in 8 U.S.C. § 1324b(a)(3). The reading of 8 U.S.C. § 1324b(a)(6) proposed by OSC and often utilized by OCAHO prior to *Ondina-Mendez* would essentially read the opening clause of 8 U.S.C. § 1324b(a)(1)(B) out of the statute, notwithstanding the explicit reference to 8 U.S.C. § 1324b(a)(1) in 8 U.S.C. § 1324b(a)(6). Conversely, the only construction that gives effect to the cross-reference to 8 U.S.C. § 1324b(a)(1) contained in 8 U.S.C. § 1324b(a)(6) and gives effect to every word contained in that cross-referenced subsection, including 8 U.S.C. § 1324b(a)(1)(B), is the one noted in *Ondina-Mendez* finding that document abuse with the intent to discriminate based on citizenship status is limited to protected individuals. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (noting the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'" (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). In short, the language of the three statutes is clear, and the undersigned must give effect to that clear language, particularly when there is only one construction that gives effect to all parts of the statutes at issue.

An inquiry into statutory interpretation "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion). Furthermore, when statutory language is sufficiently clear, there is no reason to examine additional considerations of policy. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Indeed, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id*. Thus, although OSC's policy-based arguments regarding a broad reading of 8 U.S.C. § 1324b(a)(6) are perhaps laudable, they cannot overcome the clear statutory text. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (noting that a "statute's remedial purpose cannot compensate for the lack of a statutory basis"); *see also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (holding that it is error to simply and necessarily interpret remedial statutes liberally "as a substitute for a conclusion grounded in the statute's text and structure").

Moreover, the undersigned is aware that the construction of 8 U.S.C. § 1324b(a)(6) in *Ondina-Mendez*, and followed in the instant decision, necessarily limits the scope of coverage of that

statute and may diverge from past practice by OSC and other agencies.[25] Nevertheless, the undersigned must "give effect to [the] plain command [of the statute] even if doing that will reverse the longstanding practice under the statute." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (internal citations omitted); *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("'[A]ge is no antidote to clear inconsistency with a statute.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 122 (1994)).

Furthermore, a contrary reading that citizenship-status based document abuse claims may be maintained by any work-authorized individual would produce anomalous results for non-protected individuals. For instance, it is undisputed that a non-protected individual cannot maintain a citizenship status discrimination claim under 8 U.S.C. § 1324b(a)(1). Thus, if 8 U.S.C. § 1324b(a)(6) applied to all work-authorized individuals, an employer otherwise prohibited from engaging in document abuse based on citizenship status would nevertheless remain free to either hire or discharge non-protected individuals based on citizenship status, thereby substantially eroding the salutary value of prohibiting document abuse in the first instance. Indeed, an employer could accept a non-protected individual's work authorization and identity documents and then immediately refuse to hire or fire that individual based on citizenship status without running afoul of 8 U.S.C. § 1324b. Moreover, the statute is clear that although document abuse is an unfair immigration-related employment practice, it is not necessarily of the same order of seriousness as other such practices, including hiring, discharging, and retaliation based on discrimination. *See* 8 U.S.C. § 1324b(g)(2)(B) (imposing higher civil penalties and enhancements for repeat violators for violations of 8 U.S.C. §§ 1324b(a)(1) and (5) but not for violations of 8 U.S.C. § 1324b(a)(6)). Under OSC's reading, however, employers would be prohibited from engaging in document abuse against a non-protected individual based on citizenship status but would remain free to engage in the relatively more serious discriminatory acts of hiring and firing such an individual. Such incongruities also caution against adopting OSC's interpretation of the scope of 8 U.S.C § 1324b(a)(6).

[25] For example, U.S. Citizenship and Immigration Services (USCIS), a division within the U.S. Department of Homeland Security (DHS) that neither enforces nor administers the provisions of 8 U.S.C. § 1324b, has opined that "[a]ll work-authorized individuals are protected from unfair documentary practices" under 8 U.S.C. § 1324b(a)(6). *See* USCIS, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* (M-274) (Jan. 22, 2017), available at https://www.uscis.gov/sites/default/files/files/form/m-274.pdf. Just as guidelines from U.S. Immigration and Customs Enforcement (ICE), a fellow division of USCIS within the DHS, are not binding in this forum, *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011), neither are the opinions of USCIS, particularly when they conflict with the clear language of the statute.

Finally, the undersigned notes that OSC's position in this case regarding the scope of 8 U.S.C. § 1324b(a)(6) is not fully consistent with its more recent position as expressed by the Department of Justice (the Department). On December 19, 2016, the Department promulgated significant revisions to the regulations governing OSC. *See* 81 Fed. Reg. 91768-01 (Dec. 19, 2016) (revising 28 C.F.R. part 44 effective January 18, 2017). In doing so, the Department explicitly declined to add regulatory language extending the scope of 8 U.S.C. § 1324b(a)(6) to cover all work-authorized individuals despite a direct request to do so:

> *Issue:* One commenter requests that the Department add a definition to the rule to "clarify that [section 1324b of] the INA protects all work authorized individuals from unfair documentary practices." This commenter believes the proposed rule "does not adequately guard all work-authorized individuals from unfair documentary practices." The commenter states that while there is a conflict in the case law on this issue, it believes that "the more persuasive cases hold that the prohibition on document abuse, 8 U.S.C. 1324b(a)(6), extends to all work-authorized individuals." *Response:* The Department declines to add regulatory language addressing this issue. The Department notes that the revised rule incorporates the amended statutory language found in 8 U.S.C. § 1324b(a)(6).

See id. at 91778. Tellingly, the Department neither asserted that 8 U.S.C. 1324b(a)(6) already applies to all work-authorized individuals nor altered the regulations to clarify that it does; thus, the only possible conclusion from the Department's position, which necessarily is also OSC's position, is that 8 U.S.C. 1324b(a)(6) does not apply to all work-authorized individuals.

In short, the statutory language of 8 U.S.C. § 1324b(a)(6) referring to 8 U.S.C. § 1324b(a)(1) is clear and unambiguous. Document abuse covers acts with an intent to discriminate based on national origin or citizenship status, but to the extent it involves a claim of an intent to discriminate based on citizenship status, that claim may be raised only by protected individuals as defined in 8 U.S.C. § 1324b(a)(3). This conclusion ineluctably follows from the statutory text of 8 U.S.C. § 1324b and is notably consistent with the Department's recent express declination to assert a contrary position. Consequently, the undersigned finds the reading of 8 U.S.C. § 1324b(a)(6) in *Ondina-Mendez* to be the most persuasive and most consonant with the relevant statutory text as a whole. Accordingly, the undersigned finds that the provisions of 8 U.S.C. § 1324b(a)(6) involving claims based on citizenship status only apply to protected individuals as defined in 8 U.S.C. § 1324b(a)(3).[26]

[26] The undersigned's analysis is confined, of course, to interpreting the statutory text, and I offer no opinion regarding the wisdom or appropriateness of the specific language or phrasing in 8 U.S.C. § 1324b(a)(6). *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress").

With all of the aforementioned principles in mind, the undersigned turns to the merits of the liability issue in the instant case.

B. Application

1. Count I

Count I must be dismissed as to Mr. Morales and to anyone else similarly situated. It is undisputed that Mr. Morales was a TPS recipient at the time of the alleged document abuse. *See* Complaint at 3; Mar-Jac's Motion, Ex. R-6 at 42. It is further undisputed that a TPS recipient is not a protected individual. *See* 8 U.S.C. § 1324b(a)(3). Count I of the complaint charged Mar-Jac with "document abuse discrimination against [Mr. Morales] and other similarly situated individuals on the basis of their citizenship status." *See* Complaint at 6. As discussed, *supra*, OSC can only maintain a document abuse cause of action premised on citizenship status where the victim was a protected individual, *see Ondina-Mendez*, 9 OCAHO no. 1085 at 16, which does not include a TPS recipient. 8 U.S.C. § 1324b(a)(3); *see also Mar-Jac*, 10 OCAHO no. 1148 at 3. Moreover, individuals who were "similarly situated" to Mr. Morales would necessarily include other TPS recipients who are also not protected individuals. Accordingly, OSC will be denied summary decision as to Count I, Mar-Jac will be granted summary decision as to Count I, and Count I will be dismissed in its entirety.

2. Count II

a. Direct Evidence of a Policy of Discriminatory Document Abuse

OSC demonstrated there is no genuine issue of material fact with respect to Mar-Jac's liability for carrying out a pattern or practice of document abuse against protected individuals on account of their citizenship status. Specifically, OSC demonstrated that Mar-Jac's human resources personnel asked non-U.S. citizens to present a DHS-issued document, either an LPR card or an EAD, when completing the employment verification process because of these individuals'

Indeed, my "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute," [for o]nce the meaning of an enactment is discerned. . .the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194 (1978). As I am neither "a committee of review" nor "vested with the power of veto," my sole function is interpreting the meaning of 8 U.S.C. § 1324b(a)(6), and not passing judgment on any underlying policy concerns. *Id*. at 194-95.

citizenship status. Ms. Guzman, Ms. Salazar, Ms. Zuares, and Ms. Wood[27] each testified that they asked new hires who were non-U.S. citizens to present an LPR card or an EAD because they had attested to being a lawful permanent resident or an alien authorized to work in Section 1 of their Form I-9 and the company itself admitted to making these specific requests.[28] The testimony of these personnel serves as direct evidence of discriminatory intent, unequivocally demonstrating that the citizenship status of these lawful permanent residents and aliens authorized to work was the reason, the motivating factor behind the requests to see a DHS-issued document. Ms. Guzman testified that this was her practice since 2008, even if the new hire had provided a Lists B and C documents to complete Section 2 of the Form I-9. *See* OSC's Motion, Ex. C-1 at 61-62 ("[I]f they have presented to me, a B and C document, and when they are going to fill out their I-9, where they will check off whichever one they are, if they check off that they're an alien authorized or a permanent resident alien, I then ask to see that card, to make sure that it's valid . . . ."); *id.*, C-3 at 131-32 (responding "I was just mistaken" when asked why she thought that E-Verify required her to ask to see an LPR card if an individual checked that he/she was a lawful permanent resident and responding "No," when asked if there was ever a particular document she asked to see when a new hire checked off U.S. citizen or national). Mar-Jac conceded that Ms. Guzman effectuated this policy because of a "mistaken belief" with respect to completing E-Verify. *See* Mar-Jac's Answer at 5. Ms. Wood stated that "[p]robably since '08," when Mar-Jac joined E-Verify, until February 2011, when Ms. Guzman was first interviewed by OSC, a non-U.S. citizen had to present his/her respective LPR card or EAD. OSC's Motion, Ex. C-8 at 77-78. Ms. Wood continued, and when asked if it was Mar-Jac policy since the 1980s, when Mar-Jac began using the Form I-9, to ask a lawful permanent resident or alien authorized to work for his/her respective LPR card or EAD, she provided an affirmative answer. *Id.* at 83.

In similar fashion, Ms. Salazar and Ms. Zuares testified that they asked new hires who were lawful permanent residents or aliens authorized to work to present a corresponding DHS

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[27] Ms. Wood's testimony on redirect, which was both cursory and suggestive of *post hoc* rationalization, that she was "mistaken" when she previously testified during the deposition that she had learned in training that non-U.S. citizens had to present an LPR card is both insufficient and unpersuasive to rebut the direct evidence of document abuse discrimination in this case. Moreover, this somewhat superficial assertion by Ms. Wood that she was "mistaken" does not materially or significantly undermine OSC's evidence that the company had a policy of requesting LPR cards or EADs from non-U.S. citizens.

[28] Even granting Mr. Bull's changed testimony that human resources was mistaken in believing that E-Verify, *not* the Form I-9, required non-U.S. citizens to present a List A document full evidentiary weight, Mar-Jac would still be liable for document abuse because its practices were made for completing E-Verify, which § 1324b(a)(6) encompasses. *Swift*, 9 OCAHO no. 1068 at 10; *Mar-Jac*, 10 OCAHO no. 1148 at 11.

document, even when the non-U.S. citizen had presented Lists B and C documents to establish their identity and work eligibility. *See* 8 U.S.C. § 1324a(b)(1)(C)-(D); OSC's Motion, Ex. C-5 at 116 (Ms. Salazar explaining that she would ask to see the LPR card or EAD if an individual had attested to being a lawful permanent resident or alien authorized to work, respectively, on the Form I-9, even if she had copies of the individual's driver's license and Social Security card); *id.*, Ex. C-6 (Ms. Zuares explaining that when a new hire presented a driver's license and Social Security card but checked the lawful permanent resident box on the Form I-9, she thought she "had to" ask to see the LPR card to complete the Form I-9). Mar-Jac also admitted that Ms. Zuares believed that non-U.S. citizens were required to present a DHS-issued document, such as an LPR card or EAD, for Mar-Jac to hire the individual. *See* OSC's Motion, Ex. C-7 (response to request for admission no. 50). In these proceedings, it has further acknowledged that it requested specific documents from non-U.S. citizens and has essentially admitted that it engaged in a practice of specifying documents to be presented for completion of the Form I-9. *See* Respondent's Motion at 72 ("Mar-Jac Had Legitimate, Non-Discriminatory Reasons for Requesting Specific Documents For Purposes of Completing Form I-9 and E-Verify").

The company engaged in prohibited documentary practices by virtue of both specifying the kind of document that a new hire had to present, here an LPR card or an EAD, and requesting an additional document when a new hire sufficiently presented Lists B and C documents. Moreover, Mar-Jac's documentary practices were carried out for purposes of satisfying the employment verification requirements of 8 U.S.C. § 1324a(b). The deposition testimony of Ms. Guzman, Ms. Salazar, Ms. Zuares, and Ms. Wood persuasively demonstrates that they asked to see an LPR card or an EAD based on the new hire's attestation in Section 1 of the Form I-9. The company itself has admitted that its human resources personnel made such requests "to complete Form I-9 and E-Verify procedures," and it is undisputed that these requests were made to lawful permanent residents or aliens authorized to work. *See* Mar-Jac's Motion at 72; *see also* Mar-Jac's Answer at 5; Mar-Jac's Motion at 16 ("After joining E-Verify . . . some personnel staff had the belief that it was necessary to ask a non-U.S. citizen to present a List A document, such as [LPR card] or . . . EAD to complete the Form I-9 or E-Verify Process. . . . The personnel staff believed that as the preparer of Section 1, it was incumbent on them to ensure that the information provided by the employee was true and correct.") (citing Ex. R-8); OSC's Motion, Ex. C-2, Response to Interrog. No. 16 ("[I]t was Respondent's policy to complete Section 1 of the Form I-9 on behalf of each new employee. . . . In the cases where the new employee would check Permanent Resident or Alien Authorized to work in Section 1, Respondent's personnel staff would ask to see the new employee's alien card."), 17. Although the company avers its practices required that its staff "look at the documents of both U.S. citizens and non-U.S. citizens," *id.*, the testimony of Mar-Jac human resources personnel belies this assertion, as Ms. Guzman, Ms. Zuares, and Ms. Wood all testified that they did not ask U.S. citizens or nationals to present certain documents based on their I-9 attestation. OSC's Motion, Exs. C-3 at 132; C-6 at 160; C-8 at 149. The record conclusively shows that Mar-Jac personnel only made these

requests to non-U.S. citizens. *See also* OSC's Motion, Ex. C-2, Response to Interrog. No. 17 ("Respondent's personnel staff, specifically Marta Guzman, Anna Zuares, and Maria Salazar, would ask to see a non-citizen employee's permanent resident card or employment authorization document during the completion of the Form I-9. They did so to ensure that Section 1 was completed properly . . . .").

Overall, there is ample direct evidence in the form of deposition testimony of Respondent's human resources personnel to show that Respondent engaged in document abuse and that its practice was standard operating procedure for non-U.S. citizens. Indeed, the record reflects that Mar-Jac had a *de facto* discriminatory policy regarding the specification of documents for non-U.S. citizens completing the Form I-9, and the deposition testimony of its human resources personnel unambiguously demonstrates that determinations regarding the presentation of documents for the Form I-9 were made based on an individual's citizenship status. *See Diversified Tech.*, 9 OCAHO no. 1095 at 21 ("Direct evidence [of intentional discrimination] . . . ordinarily means there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision.") (citations omitted). In sum, the record establishes that Mar-Jac implemented its discriminatory documentary practices to comply with the employment verification requirements of 8 U.S.C. § 1324a(b), it requested more, different, or specific documents than are required under § 1324a(b), it made requests for documents with the purpose or intent to discriminate against an individual on the basis of his or her citizenship status, and such practices were essentially its standard operating procedures. Accordingly, the record contains sufficient direct evidence of document abuse for OSC to meet its burden of proof for Count II.

b. Mar-Jac Did Not Rebut the Direct Evidence of Discriminatory Document Abuse

Furthermore, because OSC met its burden of proof by presenting direct evidence of discrimination, it is unnecessary to consider statistical evidence or to resort to the burden shifting frameworks of *McDonnell Douglas* or *Teamsters*.[29] *See generally Thurston*, 469 U.S. 111 at

[29] In *Life Generations*, ALJ Thomas found that statistical data and anecdotal evidence established that the company was liable for a pattern or practice of document abuse. 11 OCAHO no. 1227 at 19. In the instant matter, the testimony of the human resources personnel who were responsible for executing the company's hiring and Form I-9 process directly proves that a discriminatory policy existed. Thus, as there is direct evidence of Respondent's practice, there is no need to resort to circumstantial evidence, such as statistical data, to resolve the claim. Nevertheless, the undersigned notes parenthetically that the statistical evidence amplifies and is fully consistent with the direct evidence of discrimination in violation of 8 U.S.C. § 1324b(a)(6).

622; *Lee*, 684 F.2d at 773-74 (citations omitted). Moreover, because the direct evidence of discrimination is sufficient to meet Complainant's burden of proof for Count II, the burden of persuasion shifts to the Respondent to show that it would have taken the same action regarding its employees even in the absence of the protected characteristic, *i.e.* an individual's citizenship status. *Lee*, 684 F.2d at 774; *Diversified*, 9 OCAHO no. 1095 at 14.

Although Respondent has proffered several putatively non-discriminatory reasons for requesting specific documents from non-U.S. citizen employees, those reasons do not rebut the direct evidence of document abuse discussed above. Moreover, these assertions proceed from a false premise, as a burden-shifting framework is not applicable in the face of direct evidence of discrimination. *See Thurston*, 469 U.S. at 622 ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'") (citation omitted); *see also Lee*, 684 F.2d at 774 ("Where a case of discrimination is made out by direct evidence, reliance on the. . . test developed for circumstantial evidence is obviously unnecessary.") (citations omitted). Nevertheless, even if Respondent's putative non-discriminatory reasons for requesting specific documents for non-U.S. citizen employees had a role in the applicable framework for direct-evidence discrimination cases, those reasons would nevertheless be unavailing because they neither rebut that evidence nor show that Mar-Jac would have engaged in the same action even in the absence of the protected characteristic, *i.e.* an individual's citizenship status.

For instance, Mar-Jac has asserted that because it completed Section 1 of the Form I-9 as a preparer/translator for many of its employees, it was required to review an EAD or LPR card for a non-U.S. citizen in order to avoid criminal liability for a false attestation regarding the alien number or citizenship status of a non-U.S. citizen employee that is required in Section 1. Mar-Jac's Motion at 72-74. The reach of this argument far exceeds its supportable or persuasive grasp. Although the preparer/translator attestation in Section 1 requires an attestation that the information contained therein is true and correct to the best of the preparer/translator's knowledge, that standard does not require absolute metaphysical certainty—or even actual knowledge—regarding the information from the preparer/translator and in no way requires an employer to ask to see a document to verify the information; indeed, Section 1 does not require review of any documentation at all. In contrast to the attestation by the actual employee in Section 1 which is unequivocal, the attestation to the best of the preparer/translator's knowledge is somewhat exhortatory and does not require absolute certainty of verification.[30] *Cf. In re*

[30] Mar-Jac has not asserted that facial discrepancies existed between information provided by an employee in Section 1 and the actual documentation provided for review in Section 2. Thus, the undersigned has no cause to consider whether an employer's request for specific or different documentation in that situation would constitute document abuse under 8 U.S.C. § 1324b(a)(6).

Tropicana Casino and Resort, 9 OCAHO no. 1060, 6-7 (2000) (noting that "an assertion 'to the best of my knowledge' cannot be viewed as conclusive").

Moreover, the federal cases to which Mar-Jac cited in support of this argument are all easily distinguishable, as they involved false statements, attestations, or fraud by the principals, and do not demonstrate convictions for false attestations to the best of the knowledge of a preparer or translator. *See* Mar-Jac's Motion at 74. Respondent has provided no evidence that requiring presentation of an EAD or LPR card for a non-U.S. citizen in order to sign the preparer/translator attestation is necessary to avoid criminal liability, and its argument on this point is unavailing. Similarly, Mar-Jac's argument that its unlawful documentary practices are subject to the exception provided in 8 U.S.C. § 1324b(a)(2)(C) also fails as a matter of law. There is no "law, regulation, or executive order" or "Federal, State, or local government contract . . ." requirement that mandates a lawful permanent resident or an alien authorized to work must present a List A, List B, *and* List C document to establish his or her identity and work authorization. 8 U.S.C. § 1324b(a)(2)(C).[31]

The company's understanding of its responsibilities as the preparer/translator of the Form I-9's Section 1 was misguided, and its understanding of what E-Verify required was admittedly mistaken. *See* OSC's Motion, Ex. C-3 at 131. These misconceptions about the employment verification scheme led human resources to believe that lawful permanent residents and aliens authorized to work *had* to present their corresponding DHS-issued documents, such that human resources carried out its documentary practice because of an individual's citizenship status. Misconceptions or misapprehensions of the applicable law, however, cannot overcome direct evidence of document abuse discrimination.

Rather, to overcome direct evidence of discrimination, Mar-Jac had the burden of proving it would have made the same decision even in the absence of the protected characteristic. *Lee*, 684 F.2d at 774; *Diversified*, 9 OCAHO no. 1095 at 14. That the company asked non-U.S. citizens to present an LPR card or an EAD in order to complete the Form I-9 does not rebut direct evidence of discrimination; to the contrary, it confirms that Mar-Jac treated these employees differently on account of their citizenship status. Moreover, subjective animosity towards the protected group is not necessary to demonstrate discriminatory intent. Thus, Mar-Jac's putatively benign motive in requesting specific documents from only non-U.S. citizens does not refute the direct evidence of document abuse. In short, Mar-Jac's acknowledgment that it made such requests to assist non-U.S. citizens not only fails to meet its burden of rebuttal but further confirms that it took these

[31] Mar-Jac's attempted analogy between a notary public, who has statutorily-defined duties that require confirmation of an individual's identity, and a translator/preparer, who assists in filling out the Form I-9 and is not required or mandated by statute to verify any information, is both exceptionally strained and markedly unpersuasive. *See* Mar-Jac's Motion at 74.

actions because of the individuals' citizenship status as non-U.S. citizens.

In addition, Mar-Jac is liable for these unlawful documentary practices irrespective of whether the victims were hired by the company. *See* Mar-Jac's Motion at 81-82. Indeed, Mar-Jac's hiring statistics with respect to Hispanics and other non-U.S. citizen groups and its alleged outreach activities to non-U.S. citizens are not material to this point of law. As explained above, 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). In other words, an intent to deny employment is not required to establish a pattern or practice of document abuse, only an intent to act differently based on a protected characteristic. Consequently, Mar-Jac's assertion that it nevertheless hired non-U.S. citizens notwithstanding its specification of certain documents to be presented for purposes of completing the Form I-9 is ultimately immaterial to the issue of liability, though it may bear on any appropriate remedies. Indeed, OSC alleged that the company engaged in a pattern or practice of document abuse, not that the company failed to hire or terminated protected individuals because of their citizenship status, which are separate unfair immigration-related employment practices under 8 U.S.C. § 1324b(a)(1). As discussed, *supra*, a separate adverse employment action is simply not required to make out a claim for document abuse under 8 U.S.C. § 1324b(a)(6).

In sum, the direct evidence is clear that Mar-Jac requested different documents from non-U.S. citizens in completing the Form I-9, and none of its proffered reasons rebuts that direct evidence of citizenship-status discrimination. OSC has demonstrated that there is no disputed issue of material fact and that it is entitled to decision as a matter of law on these points. Accordingly, the record contains ample evidence to establish that Mar-Jac engaged in a pattern or practice of document abuse in violation of 8 U.S.C. § 1324b(a)(6), and Count II will be sustained, subject to two limitations noted below.

c. Statute of Limitations

Pursuant to 8 U.S.C. § 1324b(d), OSC has the authority to investigate charges filed with it and to conduct investigations "on [its] own initiative" respecting unfair immigration-related employment practices. Section 1324b(d)(3) provides the time limitation on when OSC must file a complaint with OCAHO based on a charge filed by an individual:

> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the *charge* with the Special Counsel. This subparagraph shall not prevent the subsequent amendment of a charge or complaint under subsection (e)(1) of this section. (emphasis added).

OSC's charge of a pattern and practice of document abuse was based on Mr. Morales's charge. Although the pattern and practice claim was not filed on behalf of Mr. Morales, as previously noted, "OSC's expanded investigation was initially triggered by Morales' charge." *Mar-Jac*, 10 OCAHO no. 1148 at 7-8. In fact, OSC wrote in its February 16, 2011 letter to Mar-Jac, "OSC is investigating a charge of discrimination brought by Edwin Morales ("Charging Party") . . . alleging document abuse . . . . I am writing to inform you that OSC is expanding this investigation to include a possible pattern or practice of document abuse against non-U.S. citizens." *See* Complaint, Attachment B at 1. The operative word is "expanded," which indicates that OSC's investigation was based on Mr. Morales's charge, rather than on its own initiative. Thus, although OSC's pattern or practice claim was not filed on behalf of Mr. Morales *per se*, the overall complaint was unquestionably triggered by and predicated on Mr. Morales's initial charge. Moreover, Judge Thomas's prior finding that OSC's investigation was triggered by Mr. Morales's charge, *Mar-Jac*, 10 OCAHO no. 1148 at 7-8, is the law of the case, and I find no basis to deviate from that finding. Therefore, because OSC's complaint was based on Mr. Morales's charge, even though the pattern or practice count was not necessarily filed on his behalf, 8 U.S.C. § 1324b(d)(3) provides the controlling limitations period. *See also United States v. Fairfield Jersey, Inc.*, 9 OCAHO no. 1069, 6 (2001) ("The statutory time bar for a pattern and practice case based on a charge is the same for an individual case, that contained in § 1324b(d)(3); at least one unlawful practice must have occurred within 180 days prior to the filing of the charge.").

Here, Mr. Morales's charge was deemed complete on December 13, 2010. Therefore, Mar-Jac will be held liable for unlawful documentary practices that occurred on or after June 16, 2010. It is undisputed that since at least 2008, when Mar-Jac joined E-Verify, until February 2011, when Ms. Guzman was telephonically interviewed by OSC, human resources personnel asked non-U.S. citizens to present their corresponding LPR card or EAD.

Accordingly, OSC will be granted summary decision as to Count II, only with respect to a pattern or practice of document abuse against protected individuals that occurred within the applicable statute of limitations. Mar-Jac will be granted summary decision as to Count I. Mar-Jac will also be granted summary decision as to Count II with respect to instances of document abuse against non-protected individuals or any instances that occurred outside of the applicable statute of limitations.

VII. CONCLUSION

OSC failed to meet its burden of proof with respect to Count I because Edwin Morales and other similarly-situated persons were not "protected individuals" when subjected to Mar-Jac's

unlawful documentary practices.

Summary decision will be granted to OSC in part as to Count II because OSC established that Mar-Jac engaged in a pattern or practice of document abuse based on citizenship status by specifying that lawful permanent residents and aliens authorized to work present a specific document issued by the DHS. Because Count II will be sustained for the instances of document abuse that occurred only against protected individuals and only within the 180-day period prior to the filing of Mr. Morales's charge, summary decision will also be granted to Mar-Jac in part regarding any instances against non-protected individuals or outside the applicable statute of limitations.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Mar-Jac Poultry, Inc. is a poultry processing plant located in Gainesville, Georgia.

2. Harry Bull, Rosa Torres, Maria Salazar, Anna Zuares, Sandra Wood, and Terri Middlebrooks worked in Mar-Jac's human resources personnel department and have knowledge of Mar-Jac's hiring process.

3. Between August 1998 and March 31, 2012, Harry Bull served as the manager of personnel. Ms. Middlebrooks assumed Mr. Bull's position when he retired in 2012.

4. Harry Bull, Rosa Torres, Maria Salazar, Anna Zuares, Sandra Wood, and Terri Middlebrooks testified about Mar-Jac's hiring process, including the steps involved in completing the Employment Eligibility Verification Form I-9 and E-Verify.

5. Edwin Morales applied for employment with Mar-Jac on or around June 23, 2010.

6. Edwin Morales was a recipient of Temporary Protected Status (TPS) at the time he sought employment with Mar-Jac.

7. Mr. Morales's charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices was deemed complete on December 13, 2010.

8. Mar-Jac joined E-Verify on October 20, 2008.

9. When completing the Form I-9, Ms. Guzman, Ms. Zuares, and Ms. Salazar requested to see a

lawful permanent resident card or an employment authorization document when a new hire had attested to being a lawful permanent resident or alien authorized to work in Section 1 of the Form I-9. This practice occurred since at least October 2008, when Mar-Jac joined E-Verify, until February 2011, when Ms. Guzman was telephonically interviewed by OSC.

10. Mar-Jac's human resources personnel did not ask United States citizens or nationals to present any specific document based on their citizenship attestation in Section 1 of the Form I-9.

B. Conclusions of Law

1. Mar-Jac Poultry, Inc. is a person or entity within the meaning of 8 U.S.C. § 1324b(a)(6).

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

3. OCAHO regulation 28 C.F.R. § 68.38(c) establishes that 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."

4. OCAHO case law has held, "An issue of material fact is genuine only if it has a real basis in the record. 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)).

5. Discriminatory intent for an individual or "pattern or practice" discrimination claim under 8 U.S.C. § 1324b may be established through direct evidence or circumstantial evidence. *See United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 23 (2014).

6. Direct evidence "proves the fact at issue without the need to draw any inferences." *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (referencing *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11-12, 16-17 (2003)); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) ("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'") (quotation omitted). The Eleventh Circuit defines "direct evidence of discrimination as 'evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" *Wilson*, 376 F.3d at 1086 (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999)).

7. Once a showing of putative discrimination is established by direct evidence, the "defendant

can rebut only by proving by a preponderance of the evidence that the same decision would have been reached absent the presence of that factor." *Lee v. Russell Cnty. Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982) (citing *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989); *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 14 (2003).

8. Circumstantial evidence "suggests, but does not prove, a discriminatory motive." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). For claims involving circumstantial evidence, two well-established, paradigmatic frameworks exist, depending on whether the claim at issue is an individual claim or a pattern or practice claim. For individual claims of discrimination, 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). *See 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). Under the *McDonnell Douglas* framework, the complainant must first establish a *prima facie* case; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the *prima facie* case disappears unless the complainant establishes that the proffered reason is pretextual. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015).

9. For a pattern or practice claim under 8 U.S.C. § 1324b, a similar burden-shifting framework is set forth in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 18 (2014). Under the *Teamsters* framework, the plaintiff also has the initial burden of establishing a *prima facie* case of liability by "presenting evidence adequate to show that the employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure, not just an unusual practice." *Life Generations*, 11 OCAHO no. 1227 at 18 (citing *Teamsters*, 431 U.S. at 335-36). "If the initial burden is satisfied, the burden of production then shifts to the employer to defeat the prima facie showing of a pattern or practice," which may be done by showing that the employee's proof is either inaccurate or insignificant or by providing a nondiscriminatory reason for its actions. *Id.* (citing *Teamsters*, 431 U.S. at 360-62, 360 n.46).

10. "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 Sec. Servs. 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. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017).

11. A discriminatory intent does not require malice, ill will, or a malevolent motive. *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 22 (2014); *accord EEOC v. Joe's Stone Crabs, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000).

12. To find discrimination under 8 U.S.C. § 1324b(a)(6), there must be a showing that an employer acted based on an individual's national origin or citizenship status and that its action would not have occurred but for one or both of those characteristics.

13. "A finding of economic harm or of a separate, discrete, or tangible injury is not required to establish a claim of document abuse." *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017) (citing *United States v. Mar-Jac*, 10 OCAHO no. 1148, 11 (2012); *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)).

14. The statutory language of 8 U.S.C. § 1324b(a)(6) referring to 8 U.S.C. § 1324b(a)(1) is clear and unambiguous. Document abuse covers acts with an intent to discriminate based on national origin or citizenship status, but to the extent it involves a claim of an intent to discriminate based on citizenship status, that claim may be raised only by protected individuals as defined in 8 U.S.C. § 1324b(a)(3). *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 16 (2002).

15. Title 8 U.S.C. § 1324b(d)(3) provides that no complaint respecting any unfair immigration-related employment practice may be filed occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel.

16. Mr. Morales and other similarly situated persons were not protected individuals within the meaning of 8 U.S.C. § 1324b(a)(3) at the time of the alleged document abuse and therefore cannot be the subject of a document abuse claim.

17. The testimony of Mar-Jac's human resources personnel and Mar-Jac's own admissions in its pleadings constitute direct evidence of a discriminatory policy.

18. Through direct evidence, the government demonstrated that Mar-Jac engaged in document abuse by virtue of both specifying the kind of document that a new hire had to present, here an

LPR card or an EAD, and requesting an additional document when a new hire sufficiently presented Lists B and C documents. Moreover, Mar-Jac's documentary practices were carried out for purposes of satisfying the employment verification requirements of 8 U.S.C. § 1324a(b).

19. Mar-Jac did not meet its burden of rebutting the direct evidence of discrimination, as it admitted it requested non-U.S. citizens to present a corresponding LPR card or EAD. Mar-Jac's explanation that it made such requests to assist non-U.S. citizens in completing the Form I-9 further confirms that the company carried out the prohibited actions because of an individual's citizenship status as a non-U.S. citizen.

20. Mar-Jac Poultry, Inc. will be liable for document abuse that occurred within the 180-day period before the filing of Mr. Morales's charge with OSC.

ORDERS

Summary decision is granted as to Mar-Jac, and denied as to OSC, with respect to Count I, and Count I is dismissed. With respect to Count II, OSC established that Mar-Jac engaged in a pattern or practice of document abuse based on citizenship status by specifying that lawful permanent residents and aliens authorized to work present a specific document issued by the DHS. However, Count II is sustained only with respect to a pattern or practice of document abuse that occurred against protected individuals and within the 180-day period prior to the filing of Mr. Morales's charge. Thus, Count II is sustained only to the extent discussed above, and summary decision is accordingly granted to both parties in part as to that Count.

When a person or entity is found to have engaged in an unfair immigration-related employment practice, an order must be issued requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A). Other remedies, however, are discretionary. 8 U.S.C. § 1324b(g)(2)(B).

The parties are directed to confer on or before March 31, 2017, to make reasonable efforts to reach agreement as to what discretionary remedies are appropriate in this case, and to file a report on or before April 28, 2017, advising this office 1) whether and to what extent they have reached agreement, 2) what issues remain to be resolved, 3) whether they can stipulate to any of the underlying facts regarding remedies, and 4) whether there are genuine issues of material fact remaining regarding remedies and, if so, what those issues are.

Should the parties reach an agreement on the appropriate discretionary remedies, they shall file a joint motion with this office as soon as practicable. Otherwise, this office will schedule a prehearing conference with the parties after April 28, 2017, to address any outstanding issues and

to direct the furtherance of this case.

SO ORDERED.

Dated and entered on March 3, 2017.

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James R. McHenry III
Administrative Law Judge