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

July 25, 2024

RAVI SHARMA, Complainant, v. LATTICE SEMICONDUCTOR, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00048

Appearances: Ravi Sharma, pro se Complainant
Ulrico S. Rosales, Esq. and Aleksandr Katsnelson, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This matter arises 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. Complainant, Ravi Sharma, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 12, 2019, alleging that Respondent, Lattice Semiconductor, refused to hire him based on his citizenship status in violation of 8 U.S.C. § 1324b(a)(1). Respondent filed an answer on September 19, 2019.

On July 29, 2020, Respondent filed a Motion for Summary Decision, to which Complainant filed a response on August 18, 2020. On December 28, 2022, the Court issued an Order for Supplemental Briefing, directing the parties to address whether the Court should construe the Complaint as amended to include a claim for citizenship discrimination based on failure to hire Complainant for a second position, which was not raised in the Complaint but was addressed by both parties in their briefing on summary decision. *R.S. v. Lattice Semiconductor*, 14 OCAHO no. 1362c, 3 (2022).[1] On January 17, 2023, Complainant filed a Motion for Leave of Court to Amend his Complaint to include a claim of discrimination based on the second position.

[1] Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where

On June 15, 2023, the Court granted Complainant's motion to amend his complaint to include a discrimination claim based on the second position, and found that there was no genuine issue of material fact remaining for a hearing as to Complainant's discrimination claim based on failure to hire him for the first position, but issued a stay of proceedings as to this claim. *See generally Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362d (2023). The Court deferred adjudication of the motion for summary decision as to Complainant's discrimination claim based on the second position pending further discovery. *Id*. at 22. The Court directed Complainant to file an amended complaint limited to allegations regarding the second position. *Id*. at 24.

On July 10, 2023, Complainant filed a First Amended Complaint (FAC). Complainant included allegations related to discrimination in hiring on the basis of citizenship status regarding the second position. By order dated August 23, 2023, this Court struck an additional allegation included by Complainant regarding retaliation, which was beyond the scope of the Court's leave to amend. *Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362e, 5 (2023).

The Court subsequently held a status conference on September 20, 2023, and set a case schedule, including deadlines for discovery and motions for summary decision. Both parties filed discovery motions as well as a number of other motions, which were resolved by this Court on January 18, 2024. *See generally Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362g (2023).

On February 8, 2024, Respondent filed a Motion for Summary Decision. Complainant filed the following submissions in response: (1) Complainant's Motion to Strike Declarations of Respondent's Interviewers from the Court's Records on February 9, 2024; (2) Complainant's Response to Respondent's Motion for Summary Decision on March 7, 2024; and (3) Complainant's Motion for Leave of Court to Submit Additional Evidence in His Response To Respondent's Motion for Summary Decision on March 18, 2024. Also pending is Complainant's Motion for Leave of Court to File Motion for Reconsideration of the Court's 6/15/2023 Order Related to the First Position, filed on October 5, 2023, as well as Respondent's opposition thereto.

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the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, 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 through the Westlaw database "FIM OCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice's website: https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

For the reasons that follow, Respondent's February 8, 2024, Motion for Summary Decision is granted.

II. PENDING MATTERS

Before turning to the Motion for Summary decision, the Court will address the other pending matters.

A. Stay of Proceedings

In its June 15, 2023, decision, the Court analyzed Complainant's discrimination claim involving the first position under the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *Sharma*, 14 OCAHO no. 1362d, at 9. Under this framework, the Court found that Complainant had met his burden to establish a prima facie case of discrimination, but that Respondent articulated a legitimate, non-discriminatory reason for its failure to hire Complainant for the first position, and Complainant did not establish that Respondent's failure to hire him was false or pretextual. *Id*. at 17-22.

Nonetheless, because the Court "[found] itself in a position wherein it is unable to execute a case disposition," it issued a stay of proceedings as to the first position in lieu of dismissal. *Id.* at 22 (citing, among others, *A.S. v. Amazon Web Servs., Inc.,* 14 OCAHO no. 1381h, 2 n.4 (2021)).

On October 12, 2023, the Department of Justice published an interim final rule providing for review by the Attorney General of OCAHO Administrative Law Judge (ALJ) final orders in cases arising under 8 U.S.C. § 1324b. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68). The regulation resolved the issue identified in *A.S. v. Amazon Web Servs., Inc*. that led to the stay. As a result of this change to the regulation, this Court may proceed to a final case disposition in this matter. Accordingly, the stay is lifted, and the Respondent's Motion for Summary Decision is granted as to the first position for the reasons stated in the June 15, 2023, decision.[2]

B. Motion to Strike

In his February 9, 2024, Motion to Strike Declarations, Complainant argues that the declarations from Masashi Tayama, Michael Chan, and Vincent Hsia are dated December 14, 2023, after the close of discovery. Mot. Strike 1. OCAHO's Rules of Practice and Procedure do not contain

[2] Complainant's Motion for Leave of Court to File Motion for Reconsideration of the Court's 6/15/2023 Order Related to the First Position, filed on October 5, 2023—which requests a reconsideration of the Court's decision to issue a stay—is accordingly moot.

provisions governing motions to strike. *See United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 2 (2009). Therefore, it is appropriate for the Court to consider Federal Rule of Civil Procedure 12(f), as well as Ninth Circuit case law. *See* 28 C.F.R. §§ 68.1, 68.57. Rule 12(f) provides that courts "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" either on its own or upon motion by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

The Court does not find that Complainant has shown that these declarations are "redundant, immaterial, impertinent, or scandalous." All of the declarations Respondent submitted along with and in support of the motion for summary decision are dated July 27, 2020, and were previously submitted by Respondent in support of its prior motion for summary decision. Respondent did submit three declarations dated December 14, 2023, as exhibits to Respondent's Opposition to Complainant's Motion to Compel. As these affidavits were submitted in support of a prior motion, there is no basis to strike them from the record at this time. In any event, the affidavits merely refer to and repeat information from the previous declarations. Accordingly, the Motion to Strike is denied.

C. Motion for Leave of Court to Submit Additional Evidence

In the Motion for Leave of Court to Submit Additional Evidence in his Response to Respondent's Motion for Summary Decision filed on March 18, 2024, Complainant, rather than seeking to submit additional evidence, makes an additional argument related to one of Respondent's declarants. "OCAHO's Rules of Practice and Procedure for Administrative Hearings do not allow parties to file replies or sur-replies unless the Court provides otherwise." *United States v. Space Expl. Techs. Corp.*, 18 OCAHO no. 1499a, 4 (2023) (citing 28 C.F.R. § 68.11(b)). "A party must seek leave of Court before filing a reply . . . and the decision whether to allow a reply or sur-reply 'is solely within the judge's discretion.'" *Id.* (citing *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1093, 7 (2003), and then citing *Diaz v. Pac. Mar. Assoc.*, 9 OCAHO no. 1108, 3 (2004)). The reason for the reluctance to accept additional briefing is to guard against "an endless volley of briefs." *Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379, 3 (2020) (citing *Byrom v. Delta Family Care-Disability & Survivorship Plan*, 343 F. Supp. 23 1163, 1188 (N.D. Ga. 2004)). Here, Complainant sought leave to submit these additional arguments, he filed his motion shortly after his original response, and Respondent has not objected. Accordingly, the Court will grant the motion and consider the argument raised in the motion.

III. MOTION FOR SUMMARY DECISION – SECOND POSITION

A. Findings of Fact[3]

As discussed in more detail below, the evidence the parties submit to address the present Motion for Summary Decision is largely the same as the evidence previously submitted to address the first Motion for Summary Decision; therefore, for efficiency, the Court incorporates the "Facts Not in Dispute" from its June 15, 2023, Order into this section. *Sharma*, 14 OCAHO no. 1362d, at 2-7. Together these constitute the findings of fact. *See* 28 C.F.R. § 68.38(d) (requiring that any final order entered as a summary decision shall include a "statement of . . . [f]indings of fact and conclusions of law, and the reasons therefor, on all issues presented").

In summary, Complainant, Ravi Sharma, is a United States citizen and a computer engineer. *See* Leigh Decl. Ex. A, at 3–4 (containing Complainant's resume); C's Opp'n 1. According to his resume, Complainant received a B.Tech in Electronics Engineering and an M.S. in Computer Engineering, and has "[o]ver 15 years experience in ASIC and FPGA design." Leigh Decl. Ex. A, at 3-4. On November 13, 2018, Respondent, Lattice Semiconductor Corporation, posted a job opening for an Applications Engineer position (APPLI01064). *Id.* Ex. C. The posting's description indicated that the team was seeking expertise in FPGA design flows; that experience in Lattice FPGA design software tools was a "plus," and that a good understanding of FPGA architecture and applications, hands-on FPGA development experience, including verification, outstanding English communication skills, both written and verbal, and the ability to work independently and in a team environment, were required. *Id.*

Complainant applied for this position on November 16, 2018. Leigh Decl. 1. Kyoho Lee, Senior Applications Engineer Manager at Lattice, was the hiring manager, and he reviewed the resumes they had received, and selected five candidates, sending this information along to Aimee Romeo, a member of Respondent's HR department, and Bertrand Leigh, the Director of Applications Engineering, for a phone screening. *Id*. at 1-2; Lee Decl. 1, 3; *id.* Ex. A, at 2. After an initial screening by Ms. Romeo, Mr. Lee conducted an initial interview with three candidates: A.K., S.K.,[4] and Complainant. Lee Decl. Ex. B. Both A.K. and S.K. were non-citizens who needed H-

[3] The facts are drawn from both parties' statement of facts, *see* R's Mem. of Points & Auths. 2-10; C's Opp'n 2-4; 28 C.F.R. § 68.38, to the extent they are supported by citations to the record, *see* Fed. R. Civ. P. 56(c)(1), as well as the evidence in the record to the extent that it would be admissible during the hearing, *see Brown et al. v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379a, 2-3 (2022) (citing 28 C.F.R. § 68.38(b), (c), and then citing Fed. R. Civ. P. 56(c)(4)). When citing declarations, the Court is referencing the declarations attached to Respondent's February 8, 2024, Motion for Summary Decision unless otherwise noted.

[4] The Court will refer to the other candidates by their initials.

1B visa sponsorship from Respondent. *See* C's Add. Exs. 33-42 (H-1B Visa petitions for S.K. and A.K.).

All three candidates were brought to the offices for in-person interviews by a different combination of interviewers who completed an interview evaluation form, which asked the interviewer to rate the candidate on a Scale of 1-5, with 1 being the worst and 5 the best, in the areas of interpersonal skills, communication skills, teamwork skills, understanding of overall FPGA design flows, HDL language skills, experiences of FPGA designs with software, how well the candidate's skills match the job requirements, and overall impression. *See, e.g.*, Leigh Decl. Ex. B, at 2. The form also asks the interviewer whether they recommend moving forward with the candidate. *Id.* Complainant scored lower than A.K. on average in the categories of interpersonal skills, communication skills, teamwork skills, overall impression, and how well the candidate's skills match the job description, and higher on average in the categories of FPGA designs with software, HDL language skills, and understanding of overall FPGA design flows. *See* Lee Decl. Ex. C, at 34, 35; Khong Decl. Ex. A, at 1, 2; Hsia Decl. Ex. A, at 2, 3; Hsia Dec. 14, 2023 Decl. 1-2; Chan Decl. Ex. A, at 4, 6; Chan Dec. 14, 2023 Decl. 1-2; Wang Decl. Ex. A, at 2; Leigh Decl. 4, 6; Tayama Decl. Ex. A, at 4, 6; Tayama Dec. 14, 2023 Decl. 1-2; Liu Decl. Ex. A, at 3. Four of Complainant's interviewers did not recommend moving forward with him. Chan Decl. Ex. A, at 7; Leigh Decl. 4; Tayama Decl. Ex. A, at 6; Hsia Decl. Ex. A, at 3. One of A.K.'s interviewers recommended against hiring him. Khong. Decl. Ex. A, at 2; Leigh Decl. 3.

Ultimately, Mr. Lee and Mr. Leigh chose S.K. for the first position. *See* Leigh Decl. 2; *id.* Ex. D, at 1.

According to Mr. Lee, around a month after they selected S.K. for the first opening, Mr. Leigh and Mr. Lee "turned to hiring for a second job vacancy." Lee Decl. 2. Although Mr. Leigh and Mr. Lee originally contemplated that this second vacancy would be a more senior role, because they did not identify any candidates who possessed the requisite qualifications at the more senior level, they did not conduct on-site-interviews, but instead "converted the open position to a more junior role." *Id.*

The record contains a Job Requisition Request Form dated October 30, 2018, describing the qualifications for the more senior position, Senior Staff Applications Engineer, prior to its conversion to a more junior role. *See* R's Opp. to C's Mot. Perjury Charges 11-14. According to Mr. Leigh, "communication and interpersonal skills were key requirements for both Open Positions, because a very substantial portion of the job responsibilities for these positions involved advising and interacting with Lattice's customers and field engineers." Leigh Decl. 4. The record contains H-1B Visa petitions for S.K. and A.K. with the Job Title "Applications Engineer" for both, and the same position description, including providing "engineering support and state-of-art FPGA development solutions to field engineers and end customers." C's Add'l Exs. 33-42.

On January 16, 2019, Mr. Lee emailed Complainant asking whether he would "still be interested in the other senior position that we are going to fill after this position," and noting that the "senior position has much higher expectation [sic] in both technical and interpersonal aspects." Lee Decl. Ex. I, at 2. Complainant responded asking for an update on the status of his interview and the other position, and that he believed his "skill set fits the other position as well." *Id.* Mr. Lee responded that Complainant was "currently listed for the other position that we also decided to fill with more time with more candidates," and that his "experiences and skills [were] partially qualified for the position." *Id.* at 1.

Mr. Lee and Mr. Leigh ultimately decided to hire A.K. for the Second Position, finding that he "was the next-best qualified candidate (after [S.K.]) for that position following the on-site interviews for the First Opening." Lee Decl. 5.

Mr. Lee emailed Mr. Leigh on Feb. 20, 2019, writing that A.K. was "very interested in (desperately) getting this job." Leigh Dec. Ex. E, at 2. Mr. Lee recounted telling A.K. that they were concerned that he was technically shallow, but A.K. "expressed a strong intention to overcome any kind [of barriers] by diligent self learning and quick catching up attitudes." *Id.* Mr. Leigh responded by inquiring: "Any sense of H1B status and when the filing has to be done?" *Id.*

B. Respondent's arguments

Respondent argues that Complainant's discrimination claim relating to the second position fails for the same reason that the claim failed for the first position: that Respondent established a legitimate, non-discriminatory reason for not hiring Complainant, and Complainant has not proffered any evidence demonstrating that Respondent's reasons for not hiring him are pretextual. R's Mem. of Points & Auths. 2. Specifically, Respondent argues that Complainant was assessed by the decisionmakers, Mr. Lee and Mr. Leigh, as well as each of the interviewers using the same objective metrics, and based on these metrics Respondent concluded that A.K. was better qualified than Complainant. *Id.* at 3-4. A.K. received a higher rating than Complainant in the categories of overall impression, whether the candidates' overall skills matched the position's requirements, communication, interpersonal, and teamwork skills. *Id.* at 4-5. Further, only three of Complainant's interviewers recommended hiring him whereas four of the others recommended against hiring him, and all but one of A.K.'s interviewers recommended hiring him. *Id.* Lastly, several interviewers expressed concerns about Complainant's work history. *Id.* at 5-7. Respondent denies that the decision was based on Complainant's citizenship, stating that if anything, it was a plus. *Id*. at 8.

In support of the motion, Respondent resubmitted the eight declarations from the individuals who made the selections and conducted the interviews for both positions, the evaluation forms

and email communication about the interviews.[5] Respondent also submitted an updated declaration from Respondent's attorney with the same documents as previously submitted, but added one additional document obtained through recent discovery (Ex. L).[6]

C. Complainant's arguments

Complainant argues that Respondent hired a non-immigrant worker over him, a United States citizen, for the second position, even though Complainant is better qualified for the job than the candidate hired (A.K.). C's Opp'n 1. Complainant first argues that there are disputed issues of fact, and that contrary to Respondent's arguments, the five common interviewers rated him higher in overall skills and overall impression than they rated A.K. *Id.* He also argues that Respondent's argument that he inflated his actual work experience based on comparison to his LinkedIn profile is not true as no one asked about his LinkedIn profile at the time, that he has rebutted the declarations, and that other arguments made by Respondent are belied by the record. *Id*. at 3-4.

Complainant next argues that he established a prima facie case of discrimination and Respondent's reasons for not hiring him are pretextual. *Id.* at 4, 13-18. He argues that A.K. "did not meet the basic requirements for the position" and was rated lower. *Id.* at 8. He states that Respondent's claim that he was not qualified for the position is false as he was the only one of the three final applicants that met the technical qualifications, and that Respondent made contradictory claims about his qualifications. *Id.* at 13-15. He argues that the proffered reason for non-selection of lack of communication skills is a pretext, as is the concern about long-term employment, and that the interviewers' recommendations contradicted their own complimentary ratings. *Id.* at 15-17. Complainant also argues that there is direct evidence of discrimination, *id.* at 5-7, and there is statistical evidence that Respondent intended to hire non-immigrant workers, *id.* at 18-19.

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[5] Vincent Hsia, Masashi Tayama, Michael Chan, Kames Khon, Kevin Wang, Skip Liu, Bertrand Leigh, and Kyoho Leigh.

[6] Notice of Charge and Charge of Discrimination received from U.S. Equal Employment Opportunity Commission (Ex. A), Complainant's response to Respondent's First Set of Written Interrogatories (Ex. B), Excerpt from June 1, 2020 deposition of Complainant (Ex. C), Exhibit from deposition of Complainant (Ex. D), LinkedIn Profile of Respondent from deposition (Ex. E), Complainant's resume (Ex. F), Supplemental Responses to Respondent's Requests for Production and Interrogatories (Ex. G), Technical Assistance Letters from the Department of Justice's Immigrant and Employee Rights Section, formerly the Office of Special Counsel (Ex. H and I), Respondent's First set of Written Interrogatories and Production of Documents to Complainant (Ex. J and K), and Complainant's Supplemental Responses in Compliance with this Court's order on discovery (Ex. L).

D. Legal Standards

1. Summary Decision

Per OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of material 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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 284 (1986)). "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014) (citation omitted).

"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)). "[T]he 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." *United States v. 3689 Com. Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

2. Discrimination in Hiring, Recruitment, or Referral for a Fee

Complainant alleges that Respondent refused to hire him based on his citizenship status as a United States citizen, in violation of 8 U.S.C. § 1324b(a)(1). Under 8 U.S.C. § 1324b(a)(1), "[i]t is an unfair immigration-related employment practice for a person or entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee . . . because of such individual's national origin, or in the case of a protected individual . . . because of such individual's citizenship status." A United States citizen is a "protected individual" under 8 U.S.C. § 1324b(a)(3)(A).

A complainant may use direct or circumstantial evidence to prove a § 1324b discrimination case. *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). Direct

evidence is evidence that, on its face, establishes discriminatory intent. *Id*. "If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence." *Id*. However, only on rare occasions can the complainant present direct evidence. *Id*. at 14 (citing *Nguyen v. ADT Eng'g, Inc.*, 3 OCAHO no. 489, 915, 922 (1993) ("It is rare that the victim can prove that the employer conceded discrimination, e.g. 'I don't want any permanent resident aliens working here.'")).

A complainant may also rely on circumstantial evidence to establish an employment discrimination claim. *Id*. If the complainant relies on circumstantial evidence, OCAHO applies the familiar burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny. *See Reed v. Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321a, 3 (2019). First, the complainant must establish a prima facie case of discrimination; second, the respondent must articulate some legitimate, non-discriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the prima facie case disappears, and the complainant must then prove by a preponderance of the evidence that Respondent's articulated reason is false and that the respondent intentionally discriminated against the complainant. *Id*.; *see generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

When the inference of discrimination is rebutted, "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. The complainant retains the burden of persuasion. *See id.* "This burden now merges with the ultimate burden of persuading the court that []he has been the victim of intentional discrimination." *Id.* at 256. At this point, the complainant must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*

E. Analysis

1. Direct Evidence

Complainant argues that there is direct evidence of discrimination, stating that only the technical skills and experience listed in the job description are valid to the hiring decision (as opposed to interpersonal skills), and, in looking only at the five interviewers who interviewed both candidates, Complainant scored higher in those technical elements. C's Opp'n 7.

As noted above, direct evidence is some evidence that proves discriminatory intent. *Nguyen*, 3 OCAHO no. 489, at 922. Complainant has not cited any statement or concession made by Respondent that he was not hired due to his citizenship status. Based on its review of the record, the Court sees no such direct evidence of discriminatory intent, such as a statement by any

interviewer conceding discrimination, *see id.* Complainant's arguments regarding the propriety of consideration of different interview components in the hiring decision are relevant to whether the Respondent's reasons for not hiring him were pretextual, but not direct evidence of discrimination.

2. Prima Facie Case

Respondent does not contest that Complainant asserted a prima facie case of discriminatory failure to hire, and this Court previously found that Complainant made a prima facie case as to the first position. R's Mem. of Points & Auths. 13; *Sharma*, 14 OCAHO no. 1362g, at 17. This Court previously found Respondent hired two non-U.S. citizens for positions that the parties concede Complainant, a citizen, applied for and was qualified for, and the record reflects that the decision-makers in the hiring process were aware of the citizenship status of the candidates. *See* Lee Decl. Ex. B, at 5 (email from Mr. Lee to Mr. Leigh noting that S.K. "needs an H1-B sponsorship"); *id.* at 8 (email from Mr. Lee to Mr. Leigh indicating that A.K. was in F1 status and looking for H1-B sponsorship). For these reasons, the Court finds that Complainant has met his burden of showing a prima facie case of citizenship status discrimination based on failure to hire for the second position as well. *See Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005) ("To make out a prima facie case under *McDonnell Douglas*, a plaintiff must show that (1) she belongs to a protected class; (2) she applied for and was qualified for the position she was denied; (3) she was rejected despite her qualifications; and (4) the employer filled the position with an employee not of plaintiff's class . . . .").

3. Legitimate, Non-Discriminatory Reason

Respondent asserts that as with the first position, it has "clearly satisfied its burden of advancing a legitimate, non-discriminatory reason for not hiring Complainant, thereby eliminating any inference of discrimination which would be raised by Complainant's *prima facie* case." R's Mem. of Points & Auths. 12-13. Respondent argues that it based the decision not to hire Complainant for the second position, and instead to hire A.K., on both candidate's interview scores and interviewer impressions. The Court agrees that Respondent has shown a legitimate, non-discriminatory reason for its non-selection of Complainant for the second position based on interview scores and interviewer impressions.

First, as to interview scores, the record reflects that Complainant scored lower than A.K. on average in five of the eight interview categories: interpersonal skills, communication skills, teamwork skills, overall impression, and how well the candidate's skills match the job requirements.[7]

[7] Complainant averaged a 3.57, 3.29, 4.00, 3.43, and 3.50 in these categories, respectively. *See* Lee Decl. Ex. C, at 34; Khong Decl. Ex. A, at 1; Hsia Decl. Ex. A, at 2; Chan Decl. Ex. A, at 7; Wang Decl. Ex. A, at 2; Leigh Decl. 4; Tayama Decl. Ex. A, at 6.

Second, as to interviewer impressions, "[t]hree out of six of Complainant's interviewers did not recommend moving forward with him, whereas only one of [A.K.'s] interviewers recommended against hiring him." *Sharma*, 14 OCAHO no. 1362d, at 5.[8] In addition, a number of interviewers expressed concerns about Complainant's work history, which included concerns about the substantial length of time (five years) since Complainant had last held full-time employment as well as the short duration of the positions he listed. Hsia Decl. Ex. A, at 2 (noting that his main concern with Complainant was "stability, since all of his past work experience was all less than 2-year in one position/company"); Hsia Decl. 2 (attesting that he advised against hiring Complainant because his resume reflected he "frequently changed jobs, and that the length of time he held the positions he listed was relatively short"); Lee Decl. Ex. B, at 1 (note from Mr. Lee regarding Complainant's phone screen, expressing concern that Complainant had been "out of full time for too long"); Tayama Decl., Ex. A, at 6 ("Didn't feel that he has [a] 15+ years' experience").

In contrast, A.K. averaged a 4.33, 3.86, 4.60, 3.57, and 3.57 in these categories, respectively. *See* Hsia Decl. Ex. A, at 3 (noting he was "[f]riendly, ambitious, eager to learn," and while he had "shallow" knowledge and "limited FGPA experience" and needed more training, he showed a "strong interest to learn"); Tayama Decl. Ex. A, at 4; Khong Decl. Ex. A, at 2; Chan Decl. Ex. A, at 4 (remarking that A.K. did not seems to have a "thorough grasp of the video subsystem he worked on" but had "potential for the position"); Lee Decl. Ex. C, at 35 (remarking that A.K. had a good personality and promising interpersonal skills, but would need technical training); Liu Decl. Ex. A, at 3; Leigh Decl. Ex. B, at 6 (noting that A.K. was "very energetic and good with people" but would need some time to develop).

[8] *See* Lee Decl. Ex. C, at 1 (Ms. Romeo's evaluation of Complainant, noting that she had a "bit of a challenge getting things out of him," that he was "[a]t times difficult to understand"); Khong Decl. Ex. A, at 1 (Mr. Khong's evaluation identifying Complainant's weaknesses as customer interface and communications); Hsia Decl. Ex. A, at 2 (Mr. Hsia evaluation noting that Complainant was "easy to communicate and interact with," but also that he was "unsure if [Complainant could] manage external communication"); Chan Decl. Ex. A, at 7 (Mr. Chan interview evaluation noting that he did not recommend moving forward with Complainant, and he "didn't feel like his communication skills are sufficient to effectively communicate with the software group needed for the position."); Wang Decl. Ex. A, at 2 (recommending moving forward with Complainant, but noting that he was worried about his communication skills); Leigh Decl. 4 (Mr. Leigh declaration attesting that while he did not complete an evaluation, he interviewed him and "verbally communicated [his] assessment of his qualifications to Mr. Lee," including recommending against hiring him"); Tayama Decl. Ex. A, at 6.

Specifically, as to the second position, Leigh and Lee attest that they "selected [A.K.] because they determined that he, and not Complainant, was the next best-qualified candidate." R's Mem. of Points & Auths. 7 (citing Lee Decl. ¶ 12; Leigh Decl. ¶ 12). "In reaching this determination, Mr. Lee was particularly influenced by the fact that Masashi Tayama and Michael Chan – the two most senior-level engineers on the Applications Engineering team, whose input he assigned particular weight among the interviewers because of their depth of knowledge and experience – both interviewed and advised against hiring him." *Id.* (citing Lee Decl. ¶ 12; Leigh Decl. ¶ 12; Tayama Decl. Ex. A; Chan Decl. Ex. A). "Mr. Lee did not feel it would be appropriate to hire a candidate who both Mr. Tayama and Mr. Chan determined was not a suitable candidate for the team . . . Furthermore, Mr. Leigh, who personally interviewed Complainant, did not approve of hiring him." *Id.* (citing Lee Decl. ¶ 12; Leigh Decl. ¶ 12).

As noted in the prior decision, lower interview scores may be a legitimate and non-discriminatory reason for failure to hire someone. *See, e.g.*, *Sorrell v. Wilkie*, No. 17-cv-1573, 2018 WL 6601742 at *5, 2018 U.S. Dist. LEXIS 212122, at *14 (S.D. Cal. Dec. 14, 2018) ("Defendant has advanced a legitimate and non-discriminatory reason for Plaintiff's non-selection. Plaintiff's scores based on her written application, interview, and writing exercises were lower than those who were hired.").[9]

In response to these lower interview scores and interviewer impressions, Complainant argues that the Court should only consider the ratings of the candidates in technical areas, and only the scores of the overlapping interviewers.

However, it is clear from the record that interpersonal, communication, and teamwork skills were important to the second position—not just technical skills. The record contains a Job Requisition Request Form dated October 30, 2018, describing the qualifications for the more senior position, Senior Staff Applications Engineer, prior to its conversion to a more junior role. *See* R's Opp. to C's Mot. Perjury Charges 11-14. According to Mr. Leigh, "communication and interpersonal skills were key requirements for both Open Positions, because a very substantial portion of the job responsibilities for these positions involved advising and interacting with Lattice's customers and field engineers." Leigh Decl. 4.[10] Moreover, categories of overall impression and how well

[9] Since the allegations at issue in this case occurred in California, the Court may look to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57. "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." *Chellouf v. Inter Am. Univ. of P.R.*, 12 OCAHO no. 1269, 5 (2016).

[10] *See also* C's Add. Exs. 33-42 (H-1B Visa petitions for S.K. and A.K. with the Job Title "Applications Engineer" for both, and the same position description, including providing

the candidate's skills match the job requirements capture technical skills as well, not only "soft" skills.

As to whether the Court should disregard the ratings of non-overlapping interviewers, the Court sees no basis for this argument. The interviewers each had the same criteria and scoring range, and each of their scores and perspectives were used by the decision makers. Even if the Court were to disregard these ratings (Wang, Romeo, Leigh, and Liu), Complainant still scores lower in the categories of interpersonal skills, communication skills, and teamwork skills, based only on the ratings of Hsia, Tayama, Khong, Chan, and Lee.[11] Further, of the five, three recommended against hiring him (Hsia, Tayama and Chan).

Here, given that Complainant had more categories with lower average scores than A.K., particularly in the areas of interpersonal, communication, and teamwork skills, the fact that several interviewers recommended against hiring him, and the negative comments from reviewers, the Court finds that Respondent has established a legitimate, non-discriminatory reason for failing to hire Complainant.

4. Rebuttal

Complainant argues that Respondent's proffered legitimate, non-discriminatory reason for his non-selection was false and pretextual.

Again, a Complainant may show pretext "indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or . . . directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220-22 (9th Cir. 1998)). "To show pretext using circumstantial evidence, a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives." *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 642 (9th Cir. 2003), *as amended* (Jan. 2, 2004).

"engineering support and state-of-art FPGA development solutions to field engineers and end customers").

[11] Based on the ratings of these five interviewers, Complainant averaged a 3.80 (interpersonal skills), 3.40 (communication skills), 4.00 (teamwork skills), 3.60 (how well skills match job requirements), and 3.40 (overall impression), respectively. A.K. averaged a 4.40, 3.60, 4.33, 3.20, and 3.20 in these categories, respectively.

Complainant does not offer, and the Court does not find in the record, any direct evidence of pretext. "Direct evidence of discriminatory intent consists of 'evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption,'" and includes such evidence as discriminatory remarks. *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280-81 (9th Cir. 2017); *see also Chuang*, 225 F.3d at 1128-29 (considering racist remarks as "direct evidence" of pretext). Complainant has pointed to no such statements in the record, nor does the Court locate any. To the contrary, the evidence in the record reflects direct evidence of Respondent's preference for hiring a U.S. citizen, by way of remarks reflecting on the expense and difficulty associated with sponsoring an employee's H-1B visa. *See* Leigh Decl. Ex. D, at 1 ("Please note that [S.K.] is asking for [] H-1B sponsorship that requires additional spending from Lattice."); *id*. Ex. F, at 1 ("I think [Ms. Romeo] will check whether they also have legal status to work in [the] U.S. May be challenging to get legal working status for this position.").

Rather than direct evidence, Complainant's arguments center on indirect evidence of pretext, i.e., evidence that Respondent's proffered reasons for his non-selection are not believable.

First and foremost, Complainant points to the comparative qualifications of himself and A.K. for the second position. Complainant argues that A.K. "did not meet the basic requirements for the position," citing his lack of prior experience with FPGA development work, lack of FPGA classes or training, lower ratings in the technical qualifications categories, and his interviewer's concerns about his qualifications in their comments on his interview sheets. C's Opp'n 8-12.

It is undisputed that the record reflects that Complainant had a longer work history than A.K.; Complainant's resume shows prior work experience, including as an FPGA Design/Development Engineer, extending back to 2005, *see* Leigh Decl. Ex. A, at 3, though that experience is punctuated by extended gaps in employment. A.K.'s resume reflects that he graduated with his Master of Science in 2018, and worked as an FPGA Design Engineer as an intern beginning in 2018, Add. Exs. 1; *see also* Leigh Decl. Ex. A, at 9 (remarking that A.K. had around two years of FPGA experience). It is also undisputed that Complainant scored higher on average in the technical requirements at his interviews, and that several of A.K.'s interviewers expressed a concern regarding his lack of prior experience.[12]

[12] Complainant averaged a 4.33 in experiences of FPGA designs with software, a 4.5 in HDL language skills, and a 4.17 in understanding of overall FPGA design flows. *See* Lee Decl. Ex. C, at 34; Khong Decl. Ex. A, at 1; Hsia Decl. Ex. A, at 2; Chan Decl. Ex. A, at 7; Wang Decl. Ex. A, at 2; Leigh Decl. 4; Tayama Decl. Ex. A, at 6.

In contrast, A.K. averaged a 3.29 in experiences of FPGA designs with software, a 4 in HDL language skills, and a 3.14 in understanding of overall FPGA design flows. *See* Hsia Decl. Ex. A, at 3; Tayama Decl. Ex. A, at 4; Khong Decl. Ex. A, at 2; Chan Decl. Ex. A, at 4; Lee Decl. Ex. C, at 35; Liu Decl. Ex. A, at 3; Leigh Decl. Ex. B, at 6.

"In a disparate treatment action, the fact that an employer hired a far less qualified person than the plaintiff naturally gives rise to an inference that the non-discriminatory explanation offered by the employer is pretextual; it is logical to expect that an employer wants to hire the most qualified person for the position." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003), *opinion amended on denial of reh'g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003); *see also Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1282-83 (9th Cir. 2017) ("Evidence that an employer replaced a plaintiff with a less qualified person outside the protected class can be evidence of pretext.") (citing *Perez v. Curcio*, 841 F.2d 255, 258 (9th Cir. 1988) (reversing a grant of summary judgment on an age discrimination claim where plaintiff presented evidence that a younger, less qualified person was chosen to replace her)). "Evidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext." *Shelley v. Geren*, 666 F.3d 599, 610 (9th Cir. 2012) (citation omitted) (finding that a comparison of two candidates' resumes gave rise to a factual dispute as to whether the plaintiff was better qualified for the position, because the plaintiff had "significantly more years of work experience related to contracting, and more experience employed in the Corps").

But the qualifications of the complainant must be "clearly superior." *Peters v. Shamrock Foods Co.*, 262 F. App'x 30, 33 (9th Cir. 2007) ("Qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are 'clearly superior' to those of the selected job applicant.") (citing *Raad*, 323 F.3d at 1194). Where "relative suitability for the job is debateable," or when faced with "subjective personal judgments of [] competence," courts in the Ninth Circuit have not found a question of material fact for a fact-finder. *Id.*; *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1289 (9th Cir. 2000) (noting that where the plaintiff does not "attack the selection criteria as having a disparate impact on the protected class" courts will "not second guess the selection criteria used by an employer").

On this record, the Court does not find that Complainant's longer work history and higher scores in technical areas create a question of material fact for a hearing, for the following reasons.

First, Respondent has shown (as discussed above) that communication and teamwork skills were important for the second position, and that A.K. scored higher (and received better comments from interviewers) on these subjects than Complainant. Complainant has not identified any evidence in the record suggesting that communication and teamwork skills were not important for the job—the Court is not in a position to second guess Respondent's hiring criteria, and hiring decisions do not need to be wise or fair. *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993) ("The court must not substitute its own judgment about whether the employment decisions were wise, or even fair, for that of the employer."). Complainant argues that the requirement for good communication skills is a "pretext," because the H-1B application for A.K. did not mention this. But the H-1B application serves a different purpose. C's Add'l Exs. 39-41. The job posting for the original position is quite clear that communication and teamwork skills are requirements of the job, stating, "[o]utstanding English communication

skills, both written and verbal is required," and "[m]ust be able to work independently and also in a team environment." *See* Leigh Decl. Ex. C. Complainant also points to a negative comment regarding his communication skills in Chan's declaration, and compares that negative comment to his score in the communication skills category which matched that of A.K. C's Opp'n 15. Mr. Chan did not include any comments to explain his score regarding communication for A.K. but did for Complainant. Chan Decl. Ex. A, at 4, 7 ("No. I didn't feel like his communication skills are sufficient to effectively communicate with the software group needed for the position."). It is unclear why Mr. Chan remarked upon Complainant's communications skills and not A.K.'s, but rated them the same. However, this was only one of seven scores from Mr. Chan, most of which were lower. Further, Complainant does not address the other two areas where A.K. scored significantly higher: interpersonal skills and teamwork skills, including several scores of five, the highest possible. Mr. Chan did not give Complainant any scores of five.

Second, while Complainant scored higher on technical requirements, the record reflects that A.K. was generally qualified for the second position and showed potential to grow in the role. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000) ("But '[t]he question is not whether [the applicant] in the abstract had better qualifications than the other candidates. The question is whether the other candidates are more qualified with respect to the criteria that [the employer] actually employs.'") (quoting *Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9th Cir. 1987)). In his declaration, Mr. Leigh indicated that A.K. had relevant experience, "including good work experience with verification of FPGA and other basic key functions required for the role." Leigh Decl. 4. In the screening interview, Mr. Leigh noted that A.K. had around two years of FPGA experience, including FPGA design experience, which appeared to meet the basic qualifications to be selected for an interview. Leigh Decl. Ex. A, at 9. After the interview, he stated that A.K. had "a good understanding of FPGAs and should be able to learn on the job for what he needs" but also noted that his experience was in verification. *Id.* Ex. B, at 6. And, again, A.K. possessed strong communication and teamwork skills.

Third, the record reflects that the two most senior-level engineers on the Applications Engineering Team (Tayama and Chan) both advised against hiring Complainant. *See* Leigh Decl. 5. Chan was concerned about his communication skills and work history, while Tayama was concerned that based on his interview responses, Complainant did not appear to possess the abilities and experiences Tayama would have expected to see from someone with his work history, and he did not believe he would be able to develop those skills and abilities. Tayama Decl. at 2; Chan Decl. Ex. 5 (answering "No" to whether he would recommend Complainant because "I didn't feel like his communication skills are sufficient to effectively communicate with the software group needed for the position").[13]

[13] The only interviewer that recommended against hiring A.K. was Khong. But, Mr. Leigh and Mr. Lee both discounted Mr. Khong's assessment by noting that the software-related qualifications were not relevant to the second applications engineering position, and that this

In sum, "[t]o show pretext using circumstantial evidence, a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives," *Vasquez*, 349 F.3d at 642, and a court must look at the cumulative evidence in making a pretext determination, *Chuang*, 225 F.3d at 1127 (9th Cir. 2000). Here, while the evidence reflects that A.K. had less work experience and scored lower on technical skills, it also reflects that Complainant's interviewers were concerned with his communication and teamwork skills which were important to the role, and that Respondent was concerned with the expense associated with hiring an H-1B visa holder. Against this backdrop, the Court finds that Complainant has simply not offered sufficient evidence to create a question of material fact that his non-selection was actually motivated by discrimination against United States citizens. *See Opara v. Yellen*, 57 F.4th 709, 726 (9th Cir. 2023) (remarking that although "very little[ ] evidence is necessary to raise a genuine issue of fact regarding an employer's motive," because the plaintiff "created only a weak issue" as to whether the employer's proffered reasons were untrue "against a backdrop of 'abundant and uncontroverted independent evidence that no discrimination has occurred,"' she had not carried her burden of persuasion, and affirming district court's grant of summary judgment) (internal quotations and citations omitted); *Black v. Grant Cnty. Pub. Util. Dist.*, 820 F. App'x 547, 550 (9th Cir. 2020) (affirming grant of summary judgment where promotion-related discrimination claims relied on "weak circumstantial evidence, amounting to little more than his membership in a protected class, his rejection for positions for which he had basic qualifications, and the offering of the positions to employees outside the protected class," and "the remaining evidence in the record undercuts any inference of discrimination").

Complainant raises three additional points requiring the Court's attention.

First, Complainant points out that A.K. received some mixed comments from his interviewers: (1) "It didn't seem like he had a thorough grasp of the video subsystem he worked on, but I think he has potential," Chan Decl. Ex. A, at 4; (2) "Does not have a thorough understanding [of FPGA design flows]. Showed some potential . . . Mainly verification oriented language skills. Should be easily accommodate design skills . . . [c]urrent skill sets do not satisfy the job requirements, but showed good potential," Lee Decl. Ex. C, at 34; and (3) A.K. had "basic FPGA design understanding and practice," and ultimately his "[k]nowledge is shallow but shows strong interest to learn," Hsia Decl. Ex. A, at 3. Hsia concluded that he would consider A.K. for a junior position because he is willing to learn and be trained, and Mr. Khong ultimately recommended against hiring Complainant over A.K. based on his assessment of their technical software abilities and experience, and gave A.K. low scores in these areas. Khong Decl. at 2.

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position did not involve significant interaction with Mr. Khong's applications engineering group. *Id.*; Leigh Decl. 3.

But these remarks—taken in the context of the whole record—do not create a question of material fact. As discussed above, while Lee noted that his skill set did not satisfy the current job requirements and Hsia recommended a more junior role, the second position was converted to a more junior role prior to A.K.'s selection. Lee Decl. 2. Moreover, both interviewers emphasized A.K.'s strong desire to learn and his potential. As to Khong's sole recommendation against hiring A.K., "his input was less relevant to the Second Opening . . . Mr. Khong, a member of Lattice's Software Engineering group (not its Applications Engineering group), served as a 'guest' interviewer for the First Opening because that position involved significant contact with Mr. Khong's group, which was not the case for the Second Opening." Leigh Decl. 3 n.1.

Second, Complainant argues that three interviewers' recommendations not to hire Complainant contradicted their own complimentary ratings about his skills. C's Opp'n 17. He highlights Mr. Tayama whose average score was the same for both, but he gave A.K. the benefit of the doubt, while recommending against hiring Complainant. In his declaration, Mr. Tayama explained that he was concerned that Complainant had misrepresented his skills, that someone with his years of experience should have had skills and abilities but in the interview, Complainant did not demonstrate these skills. Tayama Decl. 2. Further, Mr. Tayama was concerned that Complainant would not be able to acquire the appropriate skills and adjust to the company's standards and practice. *Id.* Mr. Tayama did not express the same concerns about A.K.

Complainant also cited Mr. Hsia's positive comments about him versus the negative comments about A.K. Complainant selectively quoted from Mr. Hsia's comments: he did agree that Complainant "understood FPGA design flow and operation" and would fit the position, but was very concerned with Complainant's work history, expressed concern in his declaration that his knowledge level was not what it should have been given his claimed work history, and his communications ability. Hsia Decl. Ex. A, at 2. In contrast, his overall impression of A.K. was good, he scored slightly better overall, although he did agree that his knowledge level was shallow. *Id.* Ex. A, at 3. While he had some concerns about both candidates, when weighing the deficiencies, he found the issues with Complainant were more detrimental as a candidate than those of A.K.

In his motion to submit additional evidence, Complainant states that Mr. Leigh stated that he hired S.K. because he had worked for the company's competitor, but Complainant had also worked for the competitor and A.K. had not. Mr. Leigh cited a number of reasons for hiring S.K., including overall higher ratings, and in particular because he had strong communication and interpersonal skills. Leigh Decl. 2-3. He noted that Complainant also had strong skills in particular areas, but was, when asked about those areas, inflexible and would not "interact effectively with Lattice's customers." *Id.* at 4.[14]

[14] Complainant also argues that Respondent claimed he was not qualified for the position in the case before the EEOC, whereas here Respondent claims he was overqualified, thus Respondent

In conclusion, Respondent has shown that there were multiple requirements for the position, and although Complainant had more experience in the technical aspects, the interviewers indicated both that they had doubts about that experience, and Complainant was not as qualified in regards to communication, teamwork, and interpersonal skills which ultimately swayed the final suitability rating. Ultimately, Complainant has not met the burden of persuasion, and has not supplied any evidence to show that his citizenship status was the true reason.

IV. CONCLUSION AND ORDERS

For the reasons set forth in this order, IT IS ORDERED that the stay of proceedings as to Complainant's citizenship status discrimination claim based on his non-selection for the first position is LIFTED, Respondent's July 29, 2020 Motion for Summary Decision is GRANTED, and this claim is DISMISSED.

IT IS FURTHER ORDERED that Respondent's February 8, 2024 Motion for Summary Decision is GRANTED, and Complainant's citizenship status discrimination claim based on his non-selection for the second position is DISMISSED.

V. CONCLUSIONS OF LAW

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gave inconsistent reasons for not hiring him, one of the ways to show pretext. Opp'n 13-15. However, in his position statement before the EEOC, Respondent wrote only that the two other persons hired for the position were better qualified, not that Complainant was unqualified. Opp'n Ex. A. This is not inconsistent with Respondent's assertion in its prehearing statement that "[d]uring the interview process of Complainant for the Open Position, Kyoho Lee communicated to Complainant that he believed Complainant was overqualified for the Open Position, in terms of his technical skills." Preh'g Statement 3.

Complainant also argues that statistical evidence shows pretext, because thirty-three individuals applied for the open position, and Lattice did not choose any protected individuals, arguing that the Respondent assumed that Complainant would also need H-1B sponsorship because of his resume showing prior education in India. "Statistical evidence may support a plaintiff's showing of pretext in a disparate treatment claim." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1172 (9th Cir. 2007) (citation omitted). But Complainant has not indicated whether there were any other United States citizens in the pool and whether they were qualified—therefore, this statistical evidence is not probative of pretext.

1. Complainant, Ravi Sharma, is a United States citizen, and therefore a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

2. Respondent, Lattice Semiconductor, is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. Complainant met his burden of showing a prima facie case of citizenship status discrimination based on failure to hire for the first position and the second positions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005).

4. Respondent established a legitimate, non-discriminatory reason for not hiring Complainant for the first and the second positions—namely, relying on interview scores and interviewer impressions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005).

5. Complainant did not offer sufficient evidence to create a question of material fact that Respondent's legitimate, non-discriminatory reason for his non-selection for the first and second positions was pretext, and that Respondent was actually motivated by discrimination against United States citizens. *See Opara v. Yellen*, 57 F.4th 709, 726 (9th Cir. 2023)

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

SO ORDERED.

Dated and entered July 25, 2024.

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Honorable Jean C. King
Chief Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the Chief Administrative Hearing Officer to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.