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

JOSE JASSO, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	CASE NO. 92B00036
DANBURY HILTON & TOWERS, Respondent.	)	

FINAL DECISION AND ORDER
(May 14, 1993)

Appearances:

For the Complainant
MR. JOSE JASSO
Pro Se

For the Respondent
CHRISTOPHER G. WINANS, ESQ.
PINNEY, PAYNE, Van LENTEN,
BURRELL, WOLFE AND DILLMAN, P.C.

Before:
E. MILTON FROSBURG
ADMINISTRATIVE LAW JUDGE

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I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted Section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States, and mandated civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status in hiring, firing or referral for a fee. Found at 8

U.S.C. § 1324b, these antidiscrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). After a determination investigation, OSC may then file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

The aims of IRCA are, thus, dual in nature. The intent is to prevent employers from hiring unauthorized workers, and, at the same time, to prevent these same employers from being overly cautious or zealous in their hiring practices and avoiding certain classes of employees or, alternatively, treating them in a discriminatory fashion.

With its enactment, the IRCA legislation expanded the national policy on discriminatory hiring practices found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Claims under Title VII did not raise a distinction between national origin and alienage discrimination. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). Further, Title VII provided for claims solely against employers of fifteen (15) or more employees.

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three (3), but fewer than fifteen (15) employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three (3) employees.

II. *Procedural History*

On February 28, 1991, the Complainant in this case, Mr. Jose Natalo Jasso, a legal permanent resident and native of Mexico, contacted the Danbury Equal Rights and Opportunities Office (EROO) in Danbury, Connecticut, in order to file a claim of discriminatory discharge. Acting as an agent for the State of Connecticut Commission of Human Rights and Opportunities (CCHRO), the EROO helped Mr. Jasso complete his paperwork on April 17, 1991 and forwarded it to CCHRO for filing on April 22, 1991. This filing was timely forwarded and accepted by the United States Equal Employment Opportunity Commission (EEOC). Then, in accordance with a Memorandum of Understanding (MOU) between EEOC and OSC, on August 14, 1991, Complainant's charge alleging national origin discrimination by Respondent in violation of 8 U.S.C. § 1324b was accepted by OSC.

On December 9, 1991, OSC notified Mr. Jasso that it would not be filing a complaint as it had determined that there was no reasonable cause to believe that his charge was true. Mr. Jasso was informed by OSC that he had the right to file his own complaint directly with OCAHO within ninety (90) days of receipt of their notice of nonfiling. Therefore, on February 14, 1992, Mr. Jasso, acting pro se, filed his Complaint with OCAHO alleging national origin discrimination based on his statement that he was fired on January 2, 1991 from his position with Respondent as dishwasher due to his Mexican nationality.

The Complaint was served on Respondent on February 24, 1992 along with the Notice of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices, dated February 19, 1992. The Notice of Hearing informed Respondent of the necessity of filing a timely Answer to avoid the possibility of a default judgment being entered against it. Respondent was again notified of the necessity of a timely Answer in my Notice of Acknowledgment dated February 24, 1992. On March 23, 1992, Respondent, acting pro se, filed its timely Answer along with documentation to support each of its responses.

On April 6, 1992, at a prehearing telephonic conference with the parties and Mr. Julio Lopez, the Director of the Equal Rights and Opportunity office as interpreter, I discussed the possibility that both parties might retain legal representation.

Although at that time, Mr. Jasso indicated that he would have legal representation, he remained in pro se status throughout this proceeding while availing himself of Mr. Lopez's skills. On or about April 10,

1992, Respondent's counsel, Christopher Winans, Esquire, filed his Notice of Appearance.

On May 19, 1992, I held the second prehearing telephonic conference. At that time, I dismissed Mr. Jasso's national origin claim for lack of jurisdiction under the statute based on the undisputed fact that Respondent employed more than fourteen (14) employees. 8 U.S.C. 1324b; Suchta v. U.S. Postal Service, 2 OCAHO 327 (5/16/91). However, by following the reasoning in Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/91), I considered the Complaint to include a citizenship discrimination claim over which I did have jurisdiction.

In addition, although I encouraged the parties to continue their negotiations, based on the parties' desire to proceed to hearing, I notified my staff to make the arrangements. Respondent, at that time, indicated that it did not intend to conduct discovery.

On July 1, 1992, I held the third prehearing telephonic conference with the parties. During the conference, I again explained to Respondent that I did not have jurisdiction under the Act to hear any arguments based on national origin discrimination, and that I would only entertain argument regarding citizenship discrimination; however the record, at that point, did not support such a claim. Thus, I advised Complainant that it was his burden to prove that Respondent discriminated against him based on his citizenship status and, barring that proof, this Court would be powerless to grant Complainant any relief.

On July 2, 1992, Respondent filed a Motion For Summary Decision. Respondent's argument was based on the fact that Mr. Jasso's charge regarding employment-related discrimination, which by statute was required to be filed within 180 days of the discrimination, was allegedly filed on August 14, 1991, more than one hundred eighty (180) days from the termination date of January 2, 1991.

On July 14, 1992, I granted Respondent's motion for a continuance of the hearing, tentatively scheduled for July 22, 1992, based on the unavailability of its material witnesses. On July 17, 1992 and July 15, 1992, respectively, Complainant and Respondent submitted their witness lists. After a review of Complainant's witness list, Respondent moved, on July 21, 1992, for permission to depose the unfamiliar witnesses. Respondent's motion was granted on July 29, 1992.

On August 24, 1992, I issued an Order directing that Respondent file a proposed discovery schedule and a written status report on or before

September 8, 1992, so that a new hearing date could be reset. Said status report and proposed discovery schedule were filed on September 8, 1992. On September 11, 1992, Respondent filed a Motion To Compel as Complainant had not responded to its interrogatories or requests for production dated August 4, 1992.

On September 21, 1992, I held a prehearing telephonic conference to discuss the status of the case, Respondent's proposed discovery schedule, Respondent's pending Motion For Summary Decision, Respondent's pending Motion To Compel and Complainant's discovery plans. With the agreement of the parties, the discovery cutoff was set for October 30, 1992 and a hearing date of November 17-19, 1992 was set. Respondent's two (2) pending motions were discussed, but I did not rule on them, as Complainant represented that the discovery responses were ready for mailing and the documentation from CCHRO regarding the timeliness of the original filing was due to be received by the Court.

On September 24, 1992, Complainant filed its discovery responses. Respondent requested further discovery on October 20, 1992, which was responded to on November 9, 1992.

On October 28, 1992, due to a change in the Court's calendar, the hearing date was changed to December 8-9, 1992 and the last prehearing telephonic conference in this case was held on November 24, 1992. At that time, Complainant stated that he would submit an affidavit setting forth the proof that he was a protected individual under the statute. Further, he stated that he would present six (6) witnesses; Respondent intended to present seven (7). My Order Acknowledging Hearing Arrangements was served on November 30, 1992. The hearing took place as scheduled. No post hearing briefs were filed; the record was closed on January 22, 1993.

III. *Facts and Hearing Testimony*

Complainant, Mr. Jose Natalo Jasso, a native of Mexico and a legal permanent resident in the United States since July 12, 1988 under the Special Agricultural Workers Program, Section 245A of the Immigration and Naturalization Act, and who is eligible for naturalization on July 12, 1993, filed a Complaint against Respondent alleging employment-related discrimination in violation of 8 U.S.C. 1324b, i.e., he alleged that he was fired by Respondent on January 2, 1991 due to his national origin. (Tr. 6-7). Although the charge and Complaint alleged national origin discrimination, I have previously dismissed that charge for lack of jurisdiction and, in my discretion and based on prior case

law, I have found that Complainant's charge also incorporated a charge of citizenship discrimination. See Order of May 20, 1992; Ryba v. Tempel Steel, 1 OCAHO 289 (1/23/91). At the time he was fired, Mr. Jasso was employed by Respondent as a kitchen dishwasher along with seven (7) other Hispanic dishwashers whose citizenship status was unknown to Mr. Jasso. (Tr. 10-11, 19, 22-23, 38).

Respondent, Danbury Hilton & Towers, is a private franchised hotel, owned and operated by Hospitality Equity Investors, a group of private citizens not affiliated with the Hilton Hotel chain. (Tr. 70). Respondent employs approximately two hundred (200) employees in its Danbury, Connecticut hotel. See Order of May 20, 1992. Respondent alleges that it fired Mr. Jasso for legitimate business reasons, in that he violated known corporate policy by repeatedly arriving late and not calling when absent. (Tr. 91-92; Ex. R-1 at 26-33).

On February 28, 1991, Mr. Jasso began his paperwork for filing his complaint of discrimination with Mr. Lopez at the Connecticut Human Rights Commission and on April 17, 1991 completed the forms. (Tr. 38; Answer filed March 16, 1992).

Mr. Jasso was employed as a dishwasher by Respondent two (2) different times, the first time was from March 1, 1989 until July 7, 1989 when he quit, and the second time was from March 16, 1990 until January 2, 1991, when he was fired. (Tr. 9, 11, 14, 23, 72, 92; Ex. R-1 at 1, 7). His supervisor was the executive chef, Mr. Patrick Butler. (Tr. 117).

Mr. Jasso testified that he quit Respondent's employ in July, 1989 because he believed that he was being discriminated against and harassed by Mr. Casazza and Mr. Williams, other employees whom he believed to be his supervisors, in that they allegedly called him an "illegal". (Tr. 9, 10, 13). The evidence revealed that Mr. Jasso did not file, and has not filed any charges regarding that alleged discrimination. (Tr. 23, 72; Ex. R-1).

Respondent testified, on the other hand, that Mr. Jasso did not quit his job in July 1989, due to harassment or discriminatory treatment, but instead did not return to work after a previously scheduled family visit. (Tr. 72-73). As evidence, Respondent testified that Mr. Jasso had requested a leave of absence, in writing, on May 22, 1989, in order to return to Mexico to visit his family from July 15, 1989 until August 20, 1989. (Tr. 72-73; Ex. R-1 at 5,6).

Complainant testified that in March 1990, Respondent's executive chef, Mr. Butler, requested his return to work. (Tr. 11, 23). Mr. Jasso testified that he returned to Respondent's employment but again felt that the same individuals were harassing him and discriminating against him by calling him names, such as "lazy", "stupid" and "asshole" despite his request that this behavior stop.[1] (Tr. 10, 11, 12, 13, 14, 23, 43, 44). The record shows that no written complaints to his supervisor or to the management about this behavior were made by Mr. Jasso. (Tr. 41, 131, 142; Ex. R-1).

At the hearing, as evidence of the alleged harassing treatment he was receiving, Mr. Jasso described an undated incident wherein he was pushing a "hot box", a unit used to keep food warm, and was allegedly told by Mr. Williams that he was not pushing it fast enough and then was called "lazy" and an "asshole". (Tr. 20, 42-44). Subsequently, Mr. Williams allegedly pushed the hot box, causing Mr. Jasso to fall. (Tr. 20, 43). The record reveals that no written or oral complaints about this incident were made by Mr. Jasso to his supervisor or to the management. (Tr. 41, 80, 126, 128-9, 131, 142; Ex. R-1).

Mr. Jasso also testified that from June 14, 1990 through July 9, 1990, he was required to be absent from work due to intestinal surgery. (Tr. 24). After Mr. Jasso returned to work, the discrimination and harassment allegedly continued in the form of name calling, unfair schedule changes, unauthorized tampering with his time card and a refusal to assign him to light duty. (Tr. 12, 17, 50, 137-142). The record reveals that no written or oral complaints to his supervisor or to the management were made by Mr. Jasso about this behavior. (Tr. 41, 126; Ex. R-1).

In response, Respondent testified that, as required by Respondent's policy on returning to work after a medical absence, Mr. Jasso presented doctors' notes stating that he could work again. (Tr. 28, 78-80; Ex. R-1 at 21-24). The record contains these various notes which state:

1. Mr. Jasso could return to work full time on July 9, 1990; signed by Dr. Kovacs, dated June 14, 1990;

[1] It is unclear from the record whether Mr. Jasso is alleging that this discriminatory behavior began as soon as he returned to work or whether he is alleging that it began after his return from surgery in the summer of 1990. (Tr. 12, 13, 26, 23). However, I find that the actual date is not material.

2. Mr. Jasso could return to work without restrictions on July 9, 1990, signed by a physician whose signature is illegible;

3. Mr. Jasso could return to light duty work on August 2, 1990, signed by Dr. Goodman, dated August 1, 1990;

4. Mr. Jasso could return to full time work on August 7, 1990, signed by Dr. Goodman, dated August 7, 1990.

(Tr. 28, 78-80; Ex. R-1 at 21-24).

Respondent testified, and Mr. Jasso did not refute, that as requested, Mr. Jasso was assigned to light duty in the cafeteria for the one week period from August 2, 1990 until August 7, 1990 and then, as his medical notes indicated was appropriate and proper, he was reassigned to his full time work duties. (Tr. 107, 130; Ex. R-1 at 23).

The testimony revealed that for some unstated time between September, 1990, and January 2, 1991, Mr. Jasso worked a second job with Stop & Shop in Newton, Connecticut. (Tr. 32-33, 34, 123). Due to scheduling conflicts and transportation difficulties between the two (2) jobs, Mr. Jasso was sometimes late, or absent, from work at Respondent's location. (Tr. 31-34, 123-4; Ex. R-1 at 31). As such, on August 26, 1990 and September 30, 1990, Mr. Jasso was given, and signed for, the first two of four warnings for violating corporate policy by coming to work late, or not showing up, without calling. (Tr. 31; Ex. R-1 at 26-29). On October 12, 1990, he was counseled about his behavior and its consequences by his supervisor, Mr. Butler. (Ex. R-1 at 31). On November 5, 1990, he received his third warning. (Tr. 31, 33, 82-89, 132; Ex. R.1 at 31). On January 1, 1991, on a heavy work load day, Mr. Jasso again did not call or show. (Tr. 132).

Mr. Jasso testified that on January 2, 1991, he was fired allegedly because of a business slow down; however, to his knowledge, he was the only individual fired from the kitchen. (Tr. 14, 18, 20). On cross-exam, though, he admitted that he was the only worker who was warned four (4) times about being late for work. (Tr. 38-39).

On January 7, 1991, Mr. Jasso filed for unemployment insurance; he collected approximately nine hundred dollars ($900) until March, 1991, when his medical problems, which included stomach problems, back problems, an injured hand which has been operated on three (3) times and an injured foot, made him ineligible for continued benefits. (Tr. 34-36, 94; Ex. R-1 at 35).

Due to his medical disabilities, Mr. Jasso applied for Social Security disability, but no determination on that claim had been made by the time of the hearing. (Tr. 37). At this time, Mr. Jasso alleges that he is unable to work. (Tr. 36).

A. Complainant's Case

Complainant presented two (2) witnesses in addition to his own testimony described previously; Sylvia Oyola, a friend and former co-worker was his first witness. (Tr. 45-46). She testified that she worked at the Hilton between February and March, 1990 as a waitress, but, on cross-examination when confronted with her employment application, admitted that she had begun work on September 21, 1990 and stayed until October 7, 1990 when she quit and filed for unemployment (Tr. 46, 52-54).

Ms. Oyola testified that during her employment with Respondent, she had spoken with Mr. Jasso about the postsurgical pain he was having and he told her that although he had complained to an unidentified supervisor about it, he was told to work anyway. (Tr. 48). She also testified that on three (3) occasions, she had seen Mr. Jasso holding his side and that Mr. Williams was yelling at him to get to work. (Tr. 48-49). Ms. Oyola testified further that she heard Mr. Jasso called "stupid", "you lazy bum", and "asshole", just as she had heard other kitchen workers called derogatory names; she did not identify the name-caller(s). (Tr. 49). She did testify, though, that she never heard any derogatory remarks made to Mr. Jasso with regard to his Hispanic heritage and that she never heard Mr. Butler, his supervisor, make any derogatory comments at all to Mr. Jasso. (Tr. 49, 56). Ms. Oyola testified that Complainant told her that he did not complain about his treatment for fear of losing his job. (Tr. 50). She also testified that on two (2) occasions, when Mr. Jasso should have been ready to leave work, his time card had been apparently clocked out and reclocked in, to her belief, without Mr. Jasso's knowledge or permission. (Tr. 50).

Mr. Jasso next presented Mr. Francisco Taveras, a former employee of the Hilton's. (Tr. 57). Mr. Taveras testified that he worked for the Hilton as a dishwasher for approximately three (3) months in 1990; however, upon cross-examination, he admitted that he was employed for only approximately two (2) weeks, from April 30, 1990 until May 15, 1990, leaving the Hilton's employ after he had a verbal fight with Mr. Williams and his brother-in-law, who got involved in the altercation, physically attacked Mr. Williams. (Tr. 58, 59, 62).

Mr. Taveras testified that he did not see any acts of discrimination towards Mr. Jasso, although Mr. Jasso spoke of them daily, and that he, himself, was subjected to discriminatory treatment. (Tr. 59-60, 61-2, 64). Mr. Taveras testified that Mr. Jasso stated that only the Hispanics were mistreated; never the American citizens. (Tr. 60). He also testified that Mr. Jasso complained that he was harassed if he spoke in Spanish, even to other Hispanics, and that Mr. Jasso stated that he was called a "wetback" and other derogatory names by Mr. Williams and several employees. (Tr. 61, 62).

B. Respondent's Case

At the end of Mr. Taveras's testimony, Respondent moved to dismiss the case based on Complainant's failure to make a prima facie case. (Tr. 66-68). I denied the motion, pending the completion of the hearing. (Tr. 68).

Respondent presented six (6) witnesses; the first being Laura Davis, director of Respondent's Human Resources Department, which runs the administration of the hotel, and controls all personnel files. (Tr. 69). Ms. Davis' personnel duties include interviewing and administering orientation to new hirees, dealing with and monitoring issues of employee performance, and dealing with all claims and investigations of discrimination. (Tr. 70).

Ms. Davis testified that Respondent has a policy of nondiscrimination based on age, race, religion, gender, national origin, and alienage. (Tr. 71). She also testified that upon Mr. Jasso's reemployment in March, 1990, the initial hiring procedure was performed again, including the readministration of orientation. (Tr. 73, 76). This procedure included receiving a Hilton handbook called "Conditions of Employment" which contains an explanation of Hilton's "no call, no show" policy, wherein an employee scheduled to work who does not appear and does not call to notify the Hotel will be reprimanded, suspended and/or terminated. (Tr. 72; Ex. R-1 at 10-13). After reading this handbook, all employees are required to sign that they have done so. (Tr. 75). Mr. Jasso received his handbook in Spanish and submitted the required signature. (Tr. 72, 75; Ex. R-1 at 13).

Ms. Davis testified that although Mr. Jasso's performance appraisal in June 1990 showed that he was judged to be an average employee, after that time, he began to exhibit absence, tardiness and "no call, no show" behavior. (Tr. 76-77; Ex. R-1 at 17). "No call, no show" behavior is considered serious as it causes a disruption in the work schedule and other employees' work loads. (Tr. 83, 88).

Ms. Davis verified Mr. Jasso's testimony that he was absent from work from June 14, 1990 to July 9, 1990 due to intestinal surgery and that he was required to present a doctor's note upon his return stating that it was appropriate for him to return to work. (Tr. 78-80). She testified to receipt of the four medical notes Mr. Jasso submitted and that after receiving the last one, which stated that Mr. Jasso could return to work full time as of August 7, 1990, no other notes or communication from Mr. Jasso's doctors were submitted. (Tr. 78-80; Ex. R-1 at 21-24). Further, although one note did request one week's light work duty, Ms. Davis testified that there was no other written communication from Mr. Jasso or his supervisor requesting lighter work duty. (Tr. 80-81; Ex. R-1 at 23). Ms. Davis confirmed that no workman's compensation claim was filed for any injury resulting from the hot box incident and that no medical issue in connection with Mr. Jasso, other than this surgery, came to her attention. (Tr. 42, 92).

In support of its production of its legitimate business reason for Mr. Jasso's termination, Ms. Davis testified that Mr. Jasso had received several written warnings, dated August 26, 1990, September 30, 1990, and November 5, 1990, that his continued behavior of not calling in and not showing up for work was a violation of the employee standards. (Tr. 82-83, 87, 89, 90; Ex. R-1 at 26, 28, 31, 33). With each written warning, Mr. Jasso met with his manager to review the problem and the reasons for it; after discussing solutions, they both would sign off on it. (Tr. 82-85; Ex. R-1 at 31).

After the first two meetings to discuss the written warnings, on October 12, 1990, Mr. Jasso was counseled by Mr. Butler for several reasons, including the need for more productivity, more initiative on the job, more follow through and less fraternization on the job. (Tr. 89; Ex. R-1 at 30).

On January 1, 1990, on a very heavy workload day, Mr. Jasso did not call and did not show for the fourth time. (Tr. 91, 132-133; Ex. R-1 at 33). At that time, Mr. Butler, Ms. Mongrain, an executive committee member, and Ms. Davis determined that Mr. Jasso should be fired. (Tr. 91, 134). Ms. Davis testified that no consideration of Mr. Jasso's national origin, citizenship, race, English speaking ability, Hispanic name, or the like, was discussed or given consideration when making this decision and that the sole criteria for his termination was Mr. Jasso's performance record. (Tr. 91, 92, 134).

At the time of his termination on January 2, 1992, Mr. Jasso, Mr. Butler, Mr. Cordero, a translator, and Mr. Casazza, an employee

witness, were present. (Tr. 93). At that time, Mr. Jasso refused to sign his performance appraisal. (Tr. 94; Ex. R-1 at 40).

Ms. Davis testified that after his termination, Mr. Jasso lodged a complaint with the State of Connecticut stating that he had not been paid his overtime. (Tr. 94-95). This complaint was found to be without merit. (Tr. 95). She also testified that Mr. Jasso filed a complaint with the CCHRO alleging that he was terminated because business was slow, but that he was the only Hispanic in the kitchen terminated for that reason. (Tr. 95) This complaint was also determined to be unfounded. (Tr. 96). Ms. Davis testified that Mr. Jasso was not terminated due to a business slowdown; his termination was due solely to his attendance and punctuality record. (Tr. 95, 96, 133, 134).

With regard to the makeup of the kitchen staff, Ms. Davis testified that of the eight (8) dishwashers in the kitchen area, seven (7) had Hispanic surnames. (Tr. 98). She testified that she was not aware of any of those individual's citizenship status as it was of no concern to the Respondent and was not a matter raised in connection with termi-nation or other personnel considerations. (Tr. 98, 102, 103). In fact, she stated that she is the only one who might be aware of an employee's citizenship status and that information is never divulged. (Tr. 103).

Ms. Davis testified that a new dishwasher was hired on February 14, 1991 to replace Mr. Jasso and that individual was Hispanic; his citizenship status was not an issue in the hiring decision. (Tr. 99, 100; Ex. R-2).

Ms. Davis testified that Mr. Williams, who Mr. Jasso alleged called him names and pushed him, monitored the kitchen and supervised its operation, but had no supervisory authority over the staff. (Tr. 105-106). However, she did state that an employee such as Mr. Jasso could believe that Mr. Williams had authority over him. (Tr. 106).

With regard to Mr. Jasso's allegation that Respondent did not adjust his work load after his surgery, Ms. Davis testified that there was only a one week period where Mr. Jasso requested light duty and that his request was granted. (Tr. 107).

Respondent next presented Mr. Patrick Butler, the executive chef for the Respondent, who was responsible for the total operation of the kitchen including the hiring, firing and performance appraisals of approximately twenty-two (22) employees including the eight (8) utility employees. (Tr. 115-116, 118). Mr. Butler testified that all

eight (8) of the utility employees were Hispanic and that approximately three-quarters of the other kitchen employees were also Hispanic. (Tr. 118). All utility workers, a category which includes dishwashers, report to him. (Tr. 24, 117, 127). Mr. Butler testified that Mr. Jasso's position as a dishwasher, whose duties include washing dishes, flatware, cups, glassware, mopping and sweeping the floor, wiping down equipment and general total kitchen sanitation, was a noncareer position typified by varying weekly work schedules and monthly turnovers in staff. (Tr. 125, 127, 131).

Mr. Butler testified further that he does not review personnel files and does not consider alienage or citizenship status as a basis for hiring employees or determining how the employees are treated. (Tr. 118-120). Further, he testified that prior to this lawsuit, he had not been aware of Mr. Jasso's citizenship status. (Tr. 120).

Mr. Butler testified that he had never heard any complaint regarding Mr. Jasso's treatment, whether discriminatory, abusive, or otherwise. (Tr. 131). In addition, Mr. Butler testified that he had not, and as far as he knew neither had Mr. Williams or Mr. Casazza, called Mr. Jasso "wetback", "stupid", "lazy" "asshole" or any other derogatory name. (Tr. 142). Mr. Butler did acknowledge that it was possible that, unknown to him, something might have occurred among the staff, but he reiterated that Mr. Jasso had not brought any complaint about his alleged maltreatment to his attention. (Tr. 128-129, 131, 135, 136).

Mr. Butler also testified that Mr. Williams' position as supervisor over food production was very limited and did not involve any authority to hire, fire, discipline, review an employee's personnel file, or to contact Ms. Davis in Human Relations regarding employees; that authority rested solely with him. (Tr. 122). He also testified that Skip Casazza worked in accounting and was never Mr. Jasso's supervisor or in a position where he would have authority over personnel; he confirmed that Mr. Taveras had had a fight with Mr. Williams. (Tr. 128, 129).

With regard to Mr. Jasso's allegation that he was harassed for speak-ing Spanish, Mr. Butler acknowledged that the Hispanic employees spoke Spanish to each other at work, but testified that this was not a problem for the management. (Tr. 132).

When asked about Mr. Jasso's job performance, Mr. Butler stated that there were several times when Mr. Jasso would come in late or not show up at work because of his schedule at his second job; this caused disruption in the kitchen and in service to the hotel's patrons.

(Tr. 123-125; Ex. R-1 at 26, 29, 30, 33). He acknowledged that, in an effort to remedy the situation informally without putting documentation into Mr. Jasso's file, he had met and spoken with Mr. Jasso about his lateness and "no call, no shows". (Tr. 133-134). Mr. Butler testified that this approach did not work. (Tr. 133).

In order to terminate Mr. Jasso, Mr. Butler worked with Ms. Mongrain and Ms. Davis; the termination was approved by Mr. Moore, the general manager. (Tr. 134). Mr. Butler testified that he again met with Mr. Jasso after the fourth written warning and had explained to him why he was being fired, i.e., he did not call or show on a very busy day after receiving prior warnings; Mr. Jasso's citizenship status had no bearing on his termination. (Tr. 132-3, 134, 137; Ex. R-1 at 30).

In response to Mr. Jasso's allegation that his schedule was discriminatorily arranged, Mr. Butler testified that he scheduled the kitchen employee's shifts one week in advance and that they varied weekly. (Tr. 125). A varying work schedule typified Mr. Jasso's job position and had been explained to him prior to his accepting the job; Mr. Jasso was not singled out for varying time shifts. (Tr. 125, 136). In fact, Mr. Butler testified that he tried to accommodate employee scheduling requests whenever possible. (Tr. 126, 139).

As to Mr. Jasso's allegation of unauthorized tampering with his time card, Mr. Butler testified that he knew nothing about it, although when work was slow, an employee was sent home early. (Tr. 125-126, 128, 140; Ex. R-1 at 45-47, 49).

With regard to Mr. Jasso's allegation that his request for light work went unheeded, Mr. Butler remembered that Mr. Jasso had requested, and was given, light work, on the basis of a doctor's note, for a one week time period. (Tr. 130). When the doctor's note indicated that Mr. Jasso could return to full time work, he was reassigned. (Tr. 130-131).

Respondent also presented Mr. Wesley Williams, a kitchen employee of Respondent's, as a witness. (Tr. 144). Mr. Williams testified that his supervisor was Mr. Butler and that he, Mr. Williams, has never directly been Mr. Jasso's boss or had direct contact with him. (Tr. 144, 145, 148). He testified further that he did not make up Mr. Jasso's schedule, handle any of Mr. Jasso's personnel matters or have any contact with Mr. Jasso's time card. (Tr. 145-146, 150).

Mr. Williams testified that he is a legal permanent resident and that he assumed from the way Mr. Jasso spoke, that he had the same

status; he had no problem with Mr. Jasso's noncitizenship status. (Tr. 146).

Mr. Williams testified that he had never called, and did not know of anyone else who had called, Mr. Jasso "lazy", "stupid' or a "wetback" and that he had never heard the term "wetback" before and did not know what it meant. (Tr. 145, 147, 148, 151). In addition, he denied the alleged incident wherein Mr. Jasso stated that he had jerked a hot box out of Mr. Jasso's hands causing him to fall. (Tr. 147).

Respondent then presented Mr. Manuel Cachimuel, a dishwasher who has been employed by Respondent for four (4) years. (Tr. 152). Mr. Cachimuel testified that even though he only had work authorization, he had not had any difficulties with the management or with other employees regarding his citizenship status. (Tr. 153-4). He also testified that he had heard a rumor that Mr. Jasso had told another individual that he would win one hundred fifty thousand dollars ($150,000) from this case. (Tr. 154).

Respondent then presented Mr. Juan Cordero, a lead line cook for Respondent. (Tr. 155). Mr. Cordero testified that he is a U.S. citizen, worked the same shift as Mr. Jasso, did most of the translations for other employees, and often spoke with Mr. Jasso. (Tr. 156). Mr. Cordero stated that the kitchen employees got along well, helped each other and did not make disparaging, racist or denigrating comments to, or about, Mr. Jasso. (Tr. 157). Further, he was not aware of anyone ever calling Mr. Jasso "stupid", tampering with his time card, or discriminatorily adjusting his schedule. (Tr. 157, 160). He testified that Mr. Jasso, as well as the other employees, was open about his nationality and citizenship status and spoke about it with the other employees. (Tr. 156-157). In fact, most were noncitizens. (Tr. 157).

Mr. Cordero further testified that he was present at each warning given to Mr. Jasso, as well as at the termination meeting, since he was the only one who could translate from Spanish to English. (Tr. 158). At each of the meetings, Mr. Butler and Mr. Cordero explained the reason that Mr. Jasso was being warned and what he needed to do to correct the situation. (Tr. 158; Ex. R-1 at 30).

Mr. Cordero testified that he was not aware of any complaints that Mr. Jasso had made to management about his treatment while he was employed, that he did not recall any issue of citizenship status being mentioned as a reason for Mr. Jasso's termination, and that he did not recall any other incident or denigrating remarks that would reflect discrimination towards Mr. Jasso. (Tr. 159-160).

As Respondent's last witness, it presented Mr. Harvey Moore, Re-spondent's general manager. (Tr. 161). Mr. Moore reaffirmed that Respondent had a nondiscrimination policy that all employees were made aware of during orientation and for which they sign their acknowledgement. (Tr. 162). He testified further that Respondent employs a large number of Hispanic individuals and that citizenship status is not a condition of employment. (Tr. 162-163). As evidence of its nondiscriminatory atmosphere towards its Hispanic employees, Mr. Moore testified that the Hilton offered Spanish classes for management personnel in an effort to make employee relations better. (Tr. 162-163).

When questioned regarding Mr. Jasso's termination, Mr. Moore stated that Mr. Jasso was terminated according to company policy for repeated "no call, no shows" and that to his knowledge, there were no discussions or considerations regarding Mr. Jasso's citizenship or alienage when considering his termination. (Tr. 164, 165). He testified that these considerations were not part of Respon-dent's hiring or firing policy. (Tr. 165).

IV. *Timeliness of the Filing of the Complaint*

A. Issue

An issue which has been pending in this case, as alleged in Respondent's Motion For Summary Decision filed on July 2, 1992, is whether the filing of Complain-ant's charge with OSC on August 14, 1991 was timely.

B. Analysis

The statute does not permit the filing of any complaint respecting any unfair immigration-related employment practice which occurred more than 180 days prior to the date of the filing of the charge with Special Counsel. 8 U.S.C. 1324b(d)(3). The facts in this case show that Mr. Jasso was fired by Respondent on January 2, 1991 and that he contacted the Danbury Equal Rights & Opportuni-ties Office in Danbury, Connecticut on February 28, 1991. On April 17, 1991, Mr. Jasso completed his paperwork regarding the charge of discrimination. It was then mailed to the Bridgeport, Connecticut office of the Connecticut Commission of Human Rights Office (CCHRO) on April 22, 1991. (Ex. C-2). In turn CCHRO referred Mr. Jasso's complaint to EEOC.

As EEOC has an MOU with OSC which designates these agencies as each other's agent for the purpose of filing charges and/or complaints, this Court has previously found that when a complainant files with EEOC there is a constructive simultaneous filing with OSC, so that a timely filing with EEOC cures the tardiness of a late filing with OSC. Vefremov v. NYC Department of Transportation, 3 OCAHO 466 (10/23/92); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459 (9/24/92). (9/24/92).

After a review of the law, the MOU and its purpose, i.e., to ameliorate the uncertainty as to the correct filing forum, to prevent unfairness, and to provide an efficient procedure for individuals to receive redress for their injuries under the state and federal law, I have determined that it is appropriate and correct, and in the interests of fairness and justice, to consider Mr. Jasso's timely filing with CCHRO to be a constructive timely filing with EEOC and, in turn, a timely filing with OSC. In reaching this finding, I have also taken into consideration that an MOU between CCHRO and EEOC went into effect on October 1, 1991, again evidencing that an individual should not be penalized by filing a timely employment-based discrimination claim in the wrong forum. (Ex. C-3). Therefore, I denied Respondent's motion. (Tr. 5-6). It should be noted that at hearing, Respondent had no objection to this holding. (Tr. 6).

V. *Complainant's Standing as a Protected Individual Under 8 U.S.C. 1324b to Bring This Complaint*

In order to proceed with a claim of citizenship discrimination, the Complainant must first establish the threshold requirement that he is a "protected individual" as defined by 8 U.S.C. 1324b(a)(3). Should Complainant not be able to meet this requirement, I must dismiss the case for lack of jurisdiction. See, e.g., Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/92).

In this case, the relevant definitional language is found in Section 274B(a)(3)(B) of the Act which states:

> the term "protected individual" means an individual who-. . .
> B. is an alien who is lawfully admitted for permaent residence, is granted the status of alien lawfully admitted for temporary residence under section 210(a), 210A or 245A, is admitted as a refugee under section 207, or is granted asylum under section 208....

At hearing, Complainant entered into evidence a notarized statement indicating that he became a resident alien on July 12, 1988 under the Special Agricultural Workers Program, Section 245A of the Immigra-

tion & Nationality Act, and that he will be eligible for naturalization on July 12, 1993. (Tr. 6-7, C; Ex. #2). As Respondent offered no contradictory evidence and expressed no opposition, I found Complainant to be a protected individual as defined by 8 U.S.C. 1324b(a)(3). Therefore, Mr. Jasso has standing to bring this case. See e.g., Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92).

VI. *Applicable Standards of Law*

An allegation of discrimination may be proven by a showing of deliberate discriminatory intent on the part of an employer, regardless of the employer's motive. See 52 Fed. Reg. 37404. Discrimination or disparate treatment (as opposed to disparate impact) is found when "the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). The Immigration Reform and Control Act of 1986 (IRCA) added an individual's citizenship status to the above list of protected classifications. 8 U.S.C. § 1324b(a)(1). Thus, less favorable treatment based on citizenship status qualifies as discrimination.

The majority of IRCA discrimination cases previously decided have relied upon the body of law pertaining to Title VII discrimination cases. It should be noted at this point that I agree with the reasoning in United States v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) that "(t)itle VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases."

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established the order and allocation of proof to be used in Title VII and other discrimination cases where direct discrimination is not evident. First, the claimant must establish a prima facie case of discrimination or disparate treatment by showing that: (i) he belongs to a minority or suspect class; (ii) he applied and was qualified for employment by the employer; (iii) he was rejected for employment despite his qualifications; and (iv) after being rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants. After the claimant has established its prima facie case, the burden of production shifts to the employer who must show a legitimate, nondiscriminatory reason for its refusal to hire the claimant. Upon this production, the claimant is then given the opportunity to prove, by a preponderance of the evidence, that the reason offered by the employer for the nonhire was a pretext used to cover an illegal motive.

This analysis was followed again by the Supreme Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In that case, the Court expanded upon its ruling in McDonnell Douglas by explaining that an employer bears only the burden of explaining the nondiscriminatory reasons for its actions and need not prove, by a preponderance of the evidence, that its reasons for rejecting the claimant were legitimate. Burdine, U.S. 450 at 254. The employer must only meet and contradict the prima facie case with evidence of a nondiscriminatory explanation for its actions. Id; Marcel, 1 OCAHO 143 (3/22/90) at 14. Since the burden of persuasion remains at all times with the claimant, he then must show by a preponderance of the evidence that the employer's reason for the nonhire was pretextual. Burdine, U.S. 450 at 253.

Although the elements required to make out a prima facie case of employment discrimination set forth in McDonnell Douglas focus on the "refusal to hire" scenario, wrongful termination of employment, which is also encompassed in 8 U.S.C. § 1324b(a)(1), follows the same shifting burden of proof test. See U.S. v. Sargetis, 3 OCAHO 407 (3/5/92); Prieto v. News World Communications, Inc., 1 OCAHO Case 178 (5/24/90); Fayyaz v. The Sheraton Corp., 1 OCAHO Case No. 152 (4/10/90).

The standard for establishing a prima facie case which was applied in prior OCAHO cases, and that applied by the Second Circuit where this case is located, are quite similar. In Bethishou v. Ohmite Mft. Co., 1 OCAHO 77 (8/2/89), the Court considered:

1. whether the claimant was a member of a protected group;

2. whether the claimant was discharged from his position; and

3. whether there was disparate treatment from which the court may infer a causal connection between the claimant's protected status and the discharge.

The Second Circuit has applied the following test for establishing a prima facie case:

1. whether Complainant is a member of a protected class;

2. whether Complainant satisfactorily performed the duties required by the position;

3. whether Complainant was discharged under circumstances suggesting that the discrimination was based on the statute's prescribed improper basis; and,

4. whether the employer hired or sought other applicants for the position.

Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1045 (2nd Cir. 1992) citing to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; Lopez v. Metropolitan Life Insurance Co., 930 F.2d 157, 161 (2nd Cir.), cert. denied, __ U.S. __, 112 S.Ct. 228 (1991); Meiri v. Dacon, 759 F.2d 989, 995 (2nd Cir.), cert. denied, 474 U.S. 829 (1985).

The Second Circuit has also applied the following test:

1. whether the Complainant is a member of a protected class;
2. whether the Complainant is qualified for the job in question;
3. whether the employer rejected or discharged the Complainant despite the qualifications, and;
4. whether the employer sought other applicants for the Complainant's position.

Sorlucco v. New York City Police Dept., 888 F.2d 4 (2nd. Cir. 1989) citing to Mc Donnell Douglas, 411 U.S. at 802.

In a case of citizenship discrimination under 8 U.S.C.§ 1324b, as this case is, once the claimant makes out a prima facie case of discrimination, just as in a case of discriminatory hiring or failure to promote, the burden of production shifts to the employer who must explain the legitimate reasons his action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Sorlucco v. New York City Police Dept., 888 F.2d 4 (2nd. Cir. 1989) citing to Mc Donnell Douglas, 411 U.S. at 802; Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1045 (2nd Cir. 1992); Munoz v. Pastel Furniture Mfg. Co., 3 OCAHO 457 (9/21/92). After the employer does so, in order to prove his case, the claimant must show that the reasons offered by the employer are pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); U.S. v. Sargetis, 3 OCAHO 407 (3/5/92).

In the age discrimination case of Trans World Airlines, Inc., v. Thurston, 469 U.S. 111 (1985), the Court stated that in cases where direct evidence of discrimination is shown, the McDonnell Douglas test does not apply. The Court reasoned that the shifting burden test was necessary to provide a plaintiff a day in court despite the unavailability of direct evidence. In Thurston, the Court found that TWA's policy was discriminatory on its face; therefore, direct evidence was shown. See Tovar v. United States Postal Service, 1 OCAHO 269 (11/19/90), appeal pending, Docket No. 90200006, (9th Cir.) (policy of U.S. Postal Service which excluded all aliens but permanent residents from employment found to be discriminatory on its face, but found to be an exception within the parameters of 8 U.S.C. § 1324b(a)(2); therefore,

the claimant did not prevail). Thus, it appears that to bypass the McDonnell Douglas test, the direct evidence must show that the contested employment practice is discriminatory on its face. Thurston, 469 U.S. at 121. When the direct evidence excludes the McDonnell Douglas scheme, Thurston permits the employer to attempt to prove an affirmative defense to its discriminatory practice. Id. at 122.

VII. *Analysis*

In this case, although the testimony has revealed that Mr. Jasso alleged discriminatory conduct during both periods of employment with Respondent, I will only be considering the discrimination alleged by the instant Complaint. (Tr. 9-12). Complainant should be aware that his allegations of discriminatory treatment during his first period of employment do not fall within my jurisdiction as (1) no timely complaint was filed, and (2) there was no discrimination related to his hiring or firing by Respondent. However, I do find that Mr. Jasso, during his first period of employment with Respondent, did request, in writing, a leave of absence from July 15, 1989 to August 20, 1989 in order to return to Mexico for a family visit. I find further that this time frame coincides with the time frame when Mr. Jasso testified that he quit Respondent's employ, allegedly for discriminatory treatment. (Tr. 10-11; Ex. R-1 at 5).

A. The Claimant Must Establish a Prima Facie Case of Discrimination

Discrimination may be proven by direct or indirect evidence. U.S. v. Weld County School District, 2 OCAHO 326 (5/14/91); see U.S. v. Sargetis, 3 OCAHO 407 (3/5/92). In this case, there has been no evidence of direct discrimination that would allow me to avoid the McDonnell/Burdine analysis. Although Complainant presented hearsay testimony that he was called a "wetback" by other employees and that he was criticized for speaking Spanish on the job, he has not been able to produce any corroborating or credible evidence, either through knowledgeable witnesses or documentation, which would allow me to make such a finding of direct discrimination. (Tr. 61, 62).

In this case, as Complainant is pro se and appears to have a poor command of the English language, I have considered all three (3) standards, previously set out, for establishing a prima facie case in order to give Mr. Jasso every opportunity to establish his prima facie case.

At the hearing on December 8, 1992, at the end of Complainant's case-in-chief, pending completion of the hearing, I denied Respondent's Motion To Dismiss which was based on the argument that Complainant failed to establish a prima facie case. Thus, Respondent was allowed the opportunity to present its case, i.e., that it had legitimate business reasons for Mr. Jasso's termination, and Mr. Jasso was given the opportunity to prove, by a preponderance of the evidence, that Respondent's reasons were pretextual.

At the close of the hearing, Respondent renewed its Motion To Dismiss and I made a preemptive finding that Complainant had made out a prima facie case. That finding was subject to my final ruling in this Decision and Order on whether Complainant had established his prima facie case. That decision would be made after I had the opportunity to digest and study all the documentary evidence submitted at the hearing, as well as the hearing transcript.

My determination at the hearing that Mr. Jasso had established a prima facie case was based on the following:

1. Mr. Jasso is a protected individual under the Act, 8 U.S.C. 1324b(a)(3), and, thus, is a member of a protected class; (Tr. 5-6);

2. Mr. Jasso was qualified for his position at the time he was hired in March, 1990, as evidenced both by Respondent's request that he return to work and by his performance appraisal dated June, 1990; (Tr. 11, 23; Ex. R-1 at 17);

3. Mr. Jasso was fired by Respondent on January 2, 1991; (Tr. 32); and,

4. Mr. Jasso was fired after allegedly being called derogatory names including "wetback" and being harassed for speaking Spanish on the job. (Tr. 61, 62).

These findings satisfied the OCAHO test for a prima facie case, although they did not satisfy the Second Circuit tests since Mr. Jasso did not allege, or establish, that Respondent had hired another individual for his position or that the position was kept open and another individual was being sought.

However, at this time, I have had the opportunity to carefully examine the record, the hearing transcript, and the documentary evidence. Although I still find that Mr. Jasso is a member of a protected class, that he was fired by Respondent on January 2, 1991, and that Mr. Jasso was qualified for his position at the time he was originally employed in March, 1990, I must give serious weight and consideration to his testimony that he was not qualified to perform his job at the time he was fired. (Tr. 14-15).

I have also reconsidered Mr. Jasso's allegation that he was called a "wetback". Upon review of the facts in this case, I find that although there has been corroboration that Mr. Jasso was called derogatory names, "wetback" is not one that was confirmed. In addition, I find that this term, which is defined by Webster's Third New International Unabridged Dictionary as "a Mexican who enters the United States illegally (as by wading or swimming the Rio Grande)," does not refer to Mr. Jasso's citizenship status, but instead refers to his national origin status. As previously ordered, the national origin claim was dismissed for lack of jurisdiction.

Therefore, upon reconsideration, I now must find that, when applying the OCAHO standard, Mr. Jasso has not met his burden of establishing a prima facie case. Obviously, he still does not meet the Second Circuit standards.

B. Legitimate Business Reason Analysis and Pretext

For Complainant's benefit, I wish to add that even if I had found a prima facie case, I find that Respondent has met its burden of production by providing a legitimate business reason for Complainant's termination, i.e., his continuing "no call, no show" in violation of corporate policy despite Respondent's several warnings and Complainant's awareness of the consequences. (Ex. R-1 at 26-33; Ex. R-1 at 10-13).

Further, based on the record, I can not find that Mr. Jasso had proven, by a preponderance of the evidence, that Respondent's reason for his termination was pretextual. Complainant's witnesses were not credible as they gave conflicting statements in their testimony. (Tr. 53-4, 46, 52, 58, 59, 62). Since none of Mr. Jasso's witnesses saw or heard anything that could be inferred to relate to Mr. Jasso's citizenship status, their testimony would not allow me to infer disparate treatment towards Mr. Jasso. (Tr. 49, 56, 59-60, 61, 62, 49). As a matter of fact, although I find it conceivable that Complainant may have been called derogatory names at various times by various individuals, even Complainant himself did not provide any evidence or testimony which related these incidents to citizenship discrimination by Respondent.

In addition to the fact that I have found nothing related to citi-zenship discrimination, I also have concerns about (1) why Mr. Jasso did not file a Workman's Compensation Claim for his alleged injuries sustained when Mr. Williams allegedly pushed the "hot box", (2) why Mr. Jasso did not file any written complaints about his alleged

discriminatory treatment, (3) why Mr. Jasso did not change his behavior after Respondent's oral and written warnings, and, (4) why Mr. Jasso alleges that he had quit Respondent's employ in reaction to discriminatory treatment when his personnel file shows that he took a trip to visit his family.

VIII. *Ultimate Findings of Fact and Conclusions of Law and Order*

Based on all the evidence of record, the testimony, the pleadings, the motions and the relevant law, I make the following findings of fact and conclusions of law:

1. I find that Mr. Jasso, a native of Mexico, is a legal permanent resident since July 12, 1988 under the Special Agricultural Workers Program, Section 245A of the Immigration and Naturalization Act and will be eligible for naturalization on July 12, 1993.

2. I find that Mr. Jasso is a protected individual under 8 U.S.C. § 1324b.

3. I find that Mr. Jasso filed a timely charge with OSC by virtue of a constructive simultaneous filing with CCHRO, EEOC and OSC, on or about April 22, 1991.

4. I find that Mr. Jasso's charge of national origin discrimination must be dismissed for lack of jurisdiction as Respondent employs more than 14 employees. 8 U.S.C. 1324b.

5. I find that Mr. Jasso's charge and complaint incorporated a claim of citizenship discrimination, in violation of 8 U.S.C. 1324b, over which I have jurisdiction.

6. I find that Respondent is a private franchised hotel with approximately two hundred employees.

7. I find that Mr. Jasso was employed by Respondent as a dishwasher from March 16, 1990 until January 2, 1991, when he was fired.

8. I find that Mr. Jasso was qualified for his position as a dishwasher when he was hired on March 16, 1990.

9. I find that Mr. Patrick Butler was Mr. Jasso's supervisor.

10. I find that Respondent provided Mr. Jasso with a handbook of employment conditions, in Spanish, upon his hiring, which he acknowledged receiving and reading.

11. I find that Mr. Jasso was given written warnings with regard to his violation of corporate policies related to attendance and punctuality, i.e., "no call, no show", on three occasions, August 26, 1990, September 30, 1990 and November 5, 1990, prior to his firing on January 2, 1991.

12. I find that Mr. Jasso was counseled at least one time formally by Mr. Butler, on October 12, 1990, with regard to his attendance and punctuality behavior, prior to his termination.

13. I find that Mr. Jasso continued to not show up at Respondent's location for his scheduled work, and did not call to advise Respondent that he would not be showing up, after receiving both oral and written warnings of the consequences of this behavior which was disruptive to Respondent and its patrons;

14. I find that Mr. Jasso was aware of Respondent's policy regarding "no call, no show" by virtue of the handbook of employment conditions, Respondent's warnings and counseling.

15. I find that Mr. Jasso did not submit any written complaints to Respondent regarding alleged discriminatory behavior, name-calling, discriminatory schedule changes, unauthorized tampering with his time card, or inappropriate physical contact by other employees.

16. I find that Mr. Jasso was absent from work from June 14, 1990 through July 9, 1990 due to surgery and that, in accordance with Respondent's policy, filed doctor's notes stating that he was able to return to work on or about July 9, 1990.

17. I find that Mr. Jasso requested, by way of a doctor's note, light duty work for one week, from August 2, 1990 until August 7, 1990.

18. I find that Respondent complied with Mr. Jasso's request for light duty for the one week period from August 2, 1990 until August 7, 1990.

19. I find that Mr. Jasso did not request light duty for any other period of time and that it was appropriate for Respondent to assign him to his regular job after August 7, 1990, in conformity with the submitted medical notes.

20. I find that Mr. Jasso was not qualified for his position as dishwasher on January 2, 1991.

21. I find that Respondent hired an Hispanic individual to replace Mr. Jasso as a dishwasher.

22. I find that Mr. Jasso did not show that Respondent hired another individual of different citizenship status to replace him in his former position.

23. I find that Mr. Jasso did not establish his prima facie case under either OCAHO or Second Circuit tests.

24. I find that Mr. Jasso was terminated for good cause after his fourth "no call, no show" and that this is a legitimate business reason.

25. I find Complainant's witnesses not credible.

26. I find that Respondent employed many individuals in the kitchen who were not U.S. citizens.

27. I find that the term "wetback" refers to a person's national origin and not his/her citizenship status.

28. I find that Respondent did not consider citizenship status in its determination to terminate Mr. Jasso.

29. I find that Mr. Jasso has not proven by a preponderance of the evidence that Respondent's explanation of his termination was a pretext for discriminatory actions.

Based on my findings, I find that Respondent did not engage in immigration-related employment discrimination against Complainant in violation of 8 U.S.C. 1324b. Thus, any outstanding motions are denied and this case is dismissed.

This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 14th day of May , 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge