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

DALILA KAMAL-GRIFFIN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00068
CURTIS, MALLET-PREVOST, COLT & MOSLE, Respondent.	)	

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DENYING COMPLAINANT'S C ROSS-MOTION FOR SUMMARY DECISION

(August 16, 1993)

Appearances:

For the Complainant
Dalila Kamal-Griffin, Pro Se

For the Respondent
Joseph D. Pizzurro
Nancy E. Delaney
Curtis, Mallet-Prevost, Colt & Mosle

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

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I. *Statutory Background*

This case arises under section 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. § 1324b, which prohibit as an "unfair immigration-related employment practice," discrimination based on national origin or citizenship status "with respect to hiring, recruitment, referral for a fee, of [an] individual for employment or the discharging of the individual from employment." 8 U.S.C. § 1324b(a)(1)(A) and (B). IRCA prohibits citizenship status discrimination by employers of more than three employees, 8 U.S.C. § 1324b(a)(2)(A), and prohibits national origin discrimination by employers of between four and fourteen employees.[1] 8 U.S.C. § 1324b(a)(2)(A) and (B); § 1324b(b)(2). The statute prohibits national origin discrimination against any individual, other than an unauthorized alien, and prohibits citizenship status discrimination against a "protected individual," statutorily defined as a United States citizen or national, an alien, subject to certain exclusions who is lawfully admitted for permanent or temporary residence, or an individual admitted as a refugee or granted asylum. 8 U.S.C. § 1324b(a)(3).

Under § 101 of IRCA, 8 U.S.C. § 1324a, employers are subject to sanctions for, among other things, hiring aliens who are not authorized to work in the United States. IRCA imposes sanctions on employers who knowingly hire, recruit, refer for a fee, or continue to employ unauthorized workers without verifying their eligibility to work in this country. See 8 U.S.C. § 1324a(a)(1) and (2). IRCA also imposes sanctions on employers who fail to comply with the statute's employment verification system, found at 8 U.S.C. § 1324a(b). The statute also considers certain documentary practices relating to an employer's compliance with § 1324a to be prohibited by IRCA's antidiscrimination provisions. More specifically, IRCA treats as an "unfair immigration-related employment practice" relating to the hiring of individuals (and thus a violation of § 1324b(a)(1)) an employer's "request, for purposes of satisfying the requirements of section 1324a(b) . . ., for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine." 8 U.S.C. § 1324b(a)(6).

[1] IRCA's coverage of national origin discrimination claims supplements the coverage of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000 et seq., which prohibits national origin discrimination by employers of fifteen or more employees.

Congress enacted IRCA's antidiscrimination provisions out of concern that the employer sanctions program might lead to employment discrimination against those who appear or sound "foreign," including those who, although not citizens of the United States, are lawfully present in the country. "Joint Explanatory Statement the Committee of Conference," H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87-88 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5653. See generally United States v. General Dynamics Corp., OCAHO Case No. 91200044, at 1-2 (May 6, 1993), appeal docketed, No. 93-70581 (9th Cir. July 8, 1993). IRCA filled a gap in discrimination law left by the Supreme Court's decision in Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), in which the Court held that Title VII does not prohibit discrimination based on citizenship status or alienage. Id. at 95.

In Espinoza, a lawfully admitted resident alien who was a Mexican citizen, was denied employment as a seamstress because of the prospective employer's long-standing company policy to hire only U.S. citizens. Thus, plaintiff had been discriminated against because of her citizenship status. The Court construed the term "national origin" as used in Title VII to refer "to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Id. at 88. Based upon this definition, the Court held that national origin discrimination does not encompass discrimination solely based on an individual's citizenship status. Id. at 95; see Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (a treaty-sanctioned preference for Japanese citizens was not actionable under Title VII as national origin discrimination); Longnecker v. Ore Sorters (North America), Inc., 634 F.Supp. 1077 (N.D.Ga. 1986) (Title VII national origin claim dismissed because it was based on alleged discrimination arising from contractual arrangements linked to citizenship); Vicedomini v. Alitalia Airlines, 33 Empl. Prac. Dec. (CCH) para. 34,119 (S.D.N.Y. 1983) (plaintiff's allegation of discrimination based on his American citizenship did not state a cause of action under Title VII); Novak v. World Bank, 20 Empl. Prac. Dec. (CCH) para. 30,021 (D.D.C. 1979) (plaintiff's allegation of discrimination based on his U.S. citizenship posed a "reverse Espinoza" problem and was barred under Title VII because "'national origin' does not include mere citizenship"). The Court used the term "alienage" interchangeably with "citizenship." Espinoza, 414 U.S. at 90, 92.

In Espinoza, the Court recognized that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin." 414 U.S. at 92. For instance, "a citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other

cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination." Id. The Court concluded that Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." Id. Thus, while national origin discrimination and citizenship status discrimination may at times overlap, Espinoza clarified that the two are "distinct phenomena." EEOC v. Switching Systems Division of Rockwell International Corp., 783 F.Supp. 369, 373 n. 4 (N.D. Ill. 1992) (quoting MacNamara v. Korean Air Lines, 863 F.2d 1135, 1146 (3d Cir. 1988), cert. denied, 493 U.S. 944 (1989)).

IRCA's legislative history makes clear that Congress intended the term "citizenship status" to refer both to alienage and to non-citizen status. The House of Representatives Committee on the Judiciary ("Committee"), recognizing the importance of an authorized individual's right to work, stated its rationale for prohibiting employment discrimination based on citizenship status:

> The Committee does not believe barriers should be placed in the path of permanent residents and other aliens who are authorized to work and who are seeking employment particularly when such aliens have evidenced an intent to become U.S. citizens. It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status. Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

H.R. Rep. No. 682, Part 1, 99th Cong., 2d Sess. 70 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5674. While IRCA's purpose was to combat discrimination based on a person's "immigration (non-citizen) status," H.R. Rep. No. 682, Part 2, 99th Cong., 2d Sess., 13 (1986), "[t]he bill also makes clear that U.S. citizens can challenge discriminatory hiring practices based on citizen or non-citizen status.[2] H.R. Rep. No. 682, Part 1 at 70.

Individuals alleging discriminatory treatment on the basis of national origin or citizenship status must file a charge with the United States Department of Justice, Office of the Special Counsel for

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[2] See also Jones v. DeWitt Nursing Home, 1 OCAHO 189, at 8 (June 29, 1990) (recognizing a U.S. citizen's standing to sue under section 102 of IRCA); United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 9 (July 2, 1991) (ALJ stated that IRCA protects native born American citizens despite that fact that they were not the Act's primary target for protection).

Immigration-Related Unfair Employment Practices ("OSC"). OSC is authorized to file complaints on behalf of such individuals before administrative law judges designated by the Attorney General. 8 U.S.C. § 1324b(d)(1), (e)(2). The Special Counsel investigates each charge and within 120 days of receiving it determines whether "there is reasonable cause to believe that the charge is true and whether . . . to bring a complaint with respect to the charge before an administrative law judge." 8 U.S.C. § 1324b(d)(1). If the Special Counsel decides not to file a complaint based on the charge before an administrative law judge within the 120-day period, the Special Counsel notifies the charging party of such determination and the charging party, subject to the time limitations of 8 U.S.C. § 1324b(d)(3), may file a complaint directly before an administrative law judge within 90 days of receipt of the Special Counsel's determination letter. 8 U.S.C. § 1324b(d)(2).

II. *Procedural History*

Before me are Respondent's motion and Complainant's cross-motion for summary decision, filed pursuant to 28 C.F.R. § 68.38.[3] On March 25, 1992, Complainant, Dalila Kamal-Griffin ("Kamal- Griffin" or "Complainant"), filed a complaint against the law firm of Curtis, Mallet-Prevost, Colt & Mosle ("Curtis, Mallet" or "Respondent"), alleging that the firm's decision not to hire her as an associate attorney was discriminatory because it was based on her status as a non-U.S. citizen and a permanent resident of the United

[3] References to "28 C.F.R. § 68" are to the Rules of Practice and Procedure for Administrative Hearings, as amended by the final rule, published in the Federal Register at 57 Fed. Reg. 57669 (1992) (to be codified at 28 C.F.R. Part 68).

States.[1] I have jurisdiction over this matter pursuant to 8 U.S.C. § 1324b and 28 C.F.R. § 68.28.

This lawsuit arises from Curtis, Mallet's nonselection of Complainant for an associate attorney position. In March of 1991, Complainant mailed a letter and resume to the New York office of Curtis, Mallet, seeking employment as an associate attorney. Complainant's resume indicated that she had passed the New York bar exam and was awaiting admission and that she had received her primary law degree from the University of Paris-Sorbonne in France and had obtained an LL.M. degree in comparative law from the University of San Diego School of Law ("USD Law School"). Complainant's resume further indicated her status as a French citizen and permanent resident of the United States. In October of 1991, approximately seven months after receiving her letter and resume, Respondent sent Complainant a rejection letter, stating that the firm is "able to hire only one or two

[1] Also on March 25, 1992, Complainant filed a complaint against the law firm of Cahill, Gordon & Reindel in which she made the same allegation. See Kamal-Griffin v. Cahill, Gordon & Reindel, OCAHO Case No. 92B00067 (currently pending before me on Respondent's Motion for Summary Decision and Complainant's Cross-Motion). The parties have also stipulated that on or about April 17, 1992, Kamal-Griffin filed a lawsuit in the United States District Court for the Central District of California against Curtis, Mallet and three other law firms (Cahill, Gordon & Reindel; Hughes, Hubbard & Reed; and Chadbourne & Park), as well as several individuals, each a partner or employee of one of the named firms. Joint Stipulation of Facts, filed July 8, 1993. In that lawsuit, Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, et. al., CV-92-2343, Complainant alleges employment discrimination, numerous civil rights violations, and conspiracy, and seeks four million dollars in money damages based on the law firms' separate refusals to hire her. Joint Stipulation of Facts,Ex. A. The parties also stipulated that on or about August 13, 1992, Complainant filed a First Amended Complaint in that action, naming additional defendants. See Id. at Ex. B. The parties further stipulated that on October 19, 1992, Complainant filed a Notice of Voluntary Dismissal, in order to separately sue the defendants. Id. at 2 and Ex. D. In addition, the parties stipulated that "[o]n or about October 26, 1992," Complainant filed an action in the United States District Court for the Central District of California, Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, Bernadette Miles, Joseph Pizzuro (sic), Turner P. Smith, John F. Egan, Peter Kalat and Does 1-200, CV-92-6385, alleging employment discrimination, civil rights violation and conspiracy. See id. at 3 and Ex. F. The parties stipulated that the action was dismissed on April 23, 1993, pursuant to a Stipulation and Order. See id., at Ex. G (the parties stipulated that the dismissal would be without prejudice to the refiling of the action after, but within 60 days of the entry of the final judgment in the instant case). The parties also stipulated that on or about November 4, 1991, Complainant filed a charge of sex discrimination with the EEOC against another law firm, Joint Stipulation of Facts, at 3 and Ex. L, and that "[o]n August 25, 1992, the [EEOC] issued a Determination, [see id. at Ex. M,] that the evidence obtained during its investigation does not establish a violation of [Title VII of the Civil Rights Act of 1964], whereupon Complainant's charge was dismissed." See id. at 3-4.

foreign lawyers each year and [had] already made [its] commitments for [the following] year." Pizzurro Aff., Ex. B; Kamal-Griffin Aff.1, Ex. 4. After she was admitted to the New York bar, Complainant telephoned Respondent's recruiting coordinator to reiterate her interest in the firm. After Complainant stated her qualifications and that she had been admitted to practice law in New York, the recruiting coordinator told Complainant that Respondent would still consider her a "foreign lawyer" and as such, it would be quite difficult for her to obtain an associate position with Curtis, Mallet. The recruiting coordinator also stated that the firm did not anticipate an opening for a "French lawyer" in the coming year.

On November 19, 1991, Complainant initiated the proceedings in this case by filing a written charge with OSC, in which she alleged that Curtis, Mallet's rejection of her application was discriminatory because it was based on her citizenship status. In a letter dated February 19, 1992, OSC notified Complainant that after conducting an investigation, it had determined that there was "no reasonable cause to believe the charge to be true." OSC thus informed Complainant that it would not file a complaint before an administrative law judge based on the aforesaid charge. Pursuing her right to bring a private action under 8 U.S.C. § 1324b(d)(2), Ms. Kamal-Griffin, proceeding pro se, filed the complaint in this case on March 25, 1992, in which she alleges that Curtis, Mallet knowingly and intentionally refused to hire her for an associate attorney position based on her citizenship status, in violation of 8 U.S.C. § 1324b.[2] Complainant seeks (1) to be hired by Respondent as an associate attorney with back pay from March 25, 1989; (2) an order directing Respondent to cease and desist from discriminating based on citizenship status; and (3) reasonable attorney's fees.

Respondent moved for summary decision arguing that (1) Complainant has failed to establish a prima facie case of employment discrimination because she did not present any evidence that she was qualified for an associate attorney position with Respondent and (2) even if Complainant has established a prima facie case, she has failed to show that Respondent deliberately discriminated against her based on citi-

[2] In her complaint, Complainant asserts that she applied for an associate attorney position with Respondent on "March 25, 1992." Based on Complainant's statement in her charge that the alleged discriminatory act occurred on March 25, 1991 and her later statement in a letter-pleading which she filed on April 15, 1993, in Complainant stated that she had requested in her complaint that Respondent hire her with two years back pay, I view the date of Complainant's application to Respondent as written in her complaint to be a typographical error and find that Complainant applied for an attorney position with Respondent on March 25, 1991.

zenship status. Respondent requests that the complaint be dismissed and/or judgment be entered in favor of the Respondent and that reasonable attorneys fees be assessed against the Complainant.

Opposing Respondent's motion for summary decision, Complainant argues that she has presented direct evidence of Respondent's discrim-inatory intent and therefore need not make a prima facie case; in the alternative, she argues that she has established a prima facie case of discrimination and has presented proof that Respondent intentionally discriminated against her based on citizenship status. Complainant further argues in opposition to Respondent's motion that a genuine tri-able issue exists as to the interpretation of 8 U.S.C. § 1324b(a)(6), which considers certain documentary practices to be unfair immigration-related employment practices in violation of IRCA's prohibition of discrimination. In addition, Complainant has cross-moved for sum-mary decision, arguing that (1) there is direct evidence in this case that Respondent intentionally discriminated against Complainant based on her citizenship status; and (2) in the alternative, Complainant has established a prima facie case and has shown that Respondent intentionally discriminated against her based on her citizenship status.

In support of its summary decision motion, Respondent has submitted an affidavit of Joseph D. Pizzurro, a member of Curtis, Mallet's Personnel Committee since 1987 and chairman of the committee since January 1992, with exhibits ("Pizzurro Aff."), a memorandum of law ("R's Legal Mem."), the reply affidavit of Curtis, Mallet associate Nancy E. Delaney with exhibits ("Delaney Aff.") and a reply memorandum of law ("R's Reply Mem."). Respondent has also submitted responses to two sets of interrogatories which I issued ("R's Resp. to ALJ's Interrogs.")

In opposition to Respondent's motion for summary decision and in support of her cross-motion, Complainant has submitted a brief in op-position to Respon-dent's motion for summary decision ("C's Brief"), a 53-page memorandum of law[3] ("C's Legal Mem.") an affidavit of Kamal-Griffin with exhibits[4] ("Kamal-Griffin Aff.1") and a second

[3] Complainant's Memorandum of Law was originally filed on December 30, 1992. A corrected copy was filed on January 7, 1993 and a second corrected copy was filed on March 31, 1993.

[4] The affidavit of Kamal-Griffin with exhibits was originally filed on August 24, 1992. A duplicate was filed on December 30, 1992.

affidavit of Kamal-Griffin with exhibits[5] ("Kamal-Griffin Aff.2"). Complainant has also submitted responses to interrogatories which I issued ("C's Resp. to ALJ's Interrogs.").[6] In addition, at Complainant's request, a letter was submitted to this office on July 6, 1993 at Complainant's request from Assistant Dean and Director of the Master of Comparative Law Program at USD Law School, Carrie R. Wilson ("Wilson Letter").

I have considered all of these submissions.[7] For the reasons set forth below, Respondent's motion for summary decision will be granted and Complainant's cross-motion for summary decision will be denied.

III. *Facts*

Complainant, Dalila Kamal-Griffin ("Kamal-Griffin"), is a native of Morocco, a French citizen, and a permanent resident of the United States. She entered the United States in 1986, on a tourist visa, following her engagement to a United States citizen and became a conditional permanent resident of the United States in July of 1988. In February of 1991, she was granted permanent resident status.

Curtis, Mallet is a law firm based in New York, with additional offices in Washington, D.C.; London, England; Paris, France; Frankfurt, Germany ; and Mexico. The firm's practice is divided into the following departments: international/corporate; litigation; tax; trusts and estates; real estate; ERISA and employee benefits. As of October

[5] The second affidavit was filed on December 30, 1992.

[6] I have had the arduous task of sorting through the pleadings and assorted documents Complainant has filed in this case. She has submitted pleadings which she later corrected in part, at times where the original was to be maintained in part. She has submitted duplicates of pleadings months after the original was filed; failed to submit exhibits to which she refers in her pleadings; incorrectly cited to several cases; cited state cases, which this agency does not follow; inaccurately quoted cases; mistakenly referred to the facts of a companion case, Kamal-Griffin v. Cahill, Gordon & Reindel, OCAHO Case No. 92B00067, when she intended to refer to the facts of this case; and she has been inconsistent in her assertions as to the dates of particular events and documents. Furthermore, the lack of organization of Complainant's memorandum of law combined with the fact that some of her assertions are unclear have made her arguments somewhat difficult to discern.

[7] I have also considered additional exhibits submitted by Complainant which I have given little or no weight because they are irrelevant, immaterial or not probative.

25, 1991, Curtis, Mallet had 259 employees worldwide, with 229 in its New York office.[8]

On or about March 28, 1991, Complainant mailed an unsolicited letter and resume to Curtis, Mallet, seeking employment as an associate attorney.[9] Pizzurro Aff. at para. 3 and Ex. A. In her cover letter, Complainant described herself as "a French speaking, French educated lawyer," see id. at Ex. A, and in her resume indicated her status as a French citizen and permanent resident of the United States. Complainant's resume also indicated that she received a law degree from the University of Paris-Sorbonne, France, in 1983; a Diploma of Chinese Law Studies from the University of Beijing, Peking, in 1987; and an LL.M. in comparative law from the USD Law School in 1988. Complainant's resume showed that her experience included a seven- month internship from 1983-84 assisting in business planning and tax research for Price Waterhouse in Casablanca, Morocco; a seven-month associate position with Clifford Chance in 1985 in Paris where she dealt with corporate and aviation law;[10] a five-month internship in environmental law in 1988 with a professor at USD Law School; a nine- month clerkship in general civil law with a law office in Los Angeles from 1988-89; and a one-year associate position with a law office in Los Angeles from 1989-90.[11] Complainant's resume also indicated that she had passed the New York bar exam in July of 1990 and was awaiting admission. In addition, Complainant's resume indicated that she was fluent in French, English and Arabic. In July of 1991, subsequent to the date Complainant applied for an attorney position with Respondent but prior to Respondent's rejection of her application, Complainant passed the New York bar exam. Complainant did not notify Respondent prior to

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[8] This decision focuses on the hiring practices of Respondent's New York office only.

[9] Complainant has been inconsistent throughout this proceeding regarding the date she applied for an attorney position with Respondent. See, e.g., Compl. at para. 4, filed March 25, 1992 ("March 25, 1992" application date); C's Resp. to ALJ's Interrogs. at 1, filed July 7, 1993 ("May 31, 1991" application date). I consider these inadvertent errors as in her first affidavit, Complainant gave the "March 28, 1991" date, see Kamal-Griffin Aff.1 at para. 4, and Complainant's own exhibit is a copy of the letter, dated March 28, 1991. See id. at Ex. 2a.

[10] Complainant did not indicate in her resume that Clifford Chance was a law firm.

[11] Complainant's positions with the two Los Angeles law offices "were poorly paid, if paid at all . . . ." C's Brief at 6.

its rejection of her application that she was admitted to practice in New York.

Respondent asserts that according to its practice, Kamal-Griffin's submissions were reviewed by various members of the firm's personnel committee, Pizzurro Aff. at para. 4, and the committee determined that "the firm was not in need of someone with [her] qualifications." R's Legal Mem. at 2. In a letter dated October 25, 1991, approximately seven months after Respondent received Complainant's cover letter and resume, Respondent informed Complainant that it was not in a position to offer her employment, stating: "We are able to hire only one or two foreign lawyers each year and have already made our commitments for next year."[12] Pizzurro Aff., Ex. B; Kamal-Griffin Aff.1, Ex. 4.

On November 6, 1991, Complainant telephoned Bernadette Miles, Respondent's recruiting coordinator, to reiterate her interest in working for Curtis, Mallet.[13] Kamal-Griffin Aff.1 at para. 9; C's Legal Mem. at p. 7. Complainant summarized her qualifications, including her recent admission to the New York bar and stated that she was seeking a position with Respondent. Kamal-Griffin Aff.1 at para. 11. Complainant mentioned that she had already been rejected by Respon-dent on the ground that she was a "foreign lawyer." Id. Respondent does not deny that "Ms. Miles told Complainant that as far as the law firm was concerned, [she] was a 'foreign lawyer', and that as such, it would be extremely difficult to be considered for a position with Respondent" id. at para. 12, "unless there was a need for a French lawyer . . . and that she did not anticipate an opening for a French lawyer in the coming year." Id. at para. 15.

IV. *Discussion, Findings of Fact and Conclusions of Law*

A. Legal Standards for Summary Decision

[12] Although Complainant has stated that Respondent rejected her by a letter dated June 21, 1991, see C's Resp. to ALJ's Interrogs. at 1, I find this to be an inadvertent error as Complainant's own exhibit contains the rejection letter, dated October 25, 1991. See Kamal-Griffin Aff.1, Ex. 4.

[13] I find Complainant's reference to Margaret Saling as Respondent's recruiting coordi-nator, see C's Resp. to ALJ's Interrogs. at p.1, to be an inadvertent error as Ms. Saling is the name of the recruiting coordinator at another law firm against which Complainant has filed a claim of citizenship status discrimination. See Kamal-Griffin v. Cahill, Gordon & Reindel, OCAHO Case No. 92B00067.

A summary decision is appropriate when "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. See Fed.R.Civ.P. 56(c). Only facts which bear on the outcome of a suit under the applicable law are material. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). The purpose of a summary decision is to avoid "protracted, expensive and harassing [litigation]." Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir.), cert. denied, 474 U.S. 829 (1985).

In considering a motion for summary decision, I need not resolve disputed issues of fact, but, viewing the evidence in the light most favorable to the nonmoving party, need only determine whether a hearing is warranted to decide a genuine issue of material fact. See Arledge v. Stratmar Systems, Inc., 948 F.2d 845, 847 (2d Cir. 1991); Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991). The moving party has the initial burden of identifying those portions of the materials on file that the movant believes demonstrate the absence of a genuine issue as to any material fact. Celotex, 477 U.S. 317, 323 (1985). If the moving party has made a sufficient showing, "[t]he mere existence of a scintilla of evidence in support of the [nonmoving party's] position," is insufficient to show a genuine issue of material fact, Liberty Lobby, 477 U.S. at 252. Nor are conclusory allegations of discrimination sufficient. See Bryant v. Maffucci, 923 F.2d 979, 985 (2d Cir.), cert. denied, 112 S.Ct. 152 (1991) (neither conjecture nor surmise will raise a genuine issue of material fact).

The nonmoving party must present evidence, in the form of affidavits, depositions or otherwise, Celotex, 577 U.S. at 317, on which a jury could reasonably find for the nonmoving party. Liberty Lobby, 477 U.S. at 252; Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. This standard also applies to cross- motions for summary decision in that "each movant has the burden of presenting evidence to support its motion that would allow [a] court, if appropriate, to direct a verdict in its favor." Barhold v. Rodriguez, 863 F.2d 233, 236 (2d Cir. 1988).

B. Threshold Issues

1. Complainant Has Standing to Bring a Citizenship Claim

In order to have standing to bring a claim of citizenship status discrimination in violation of IRCA, the claimant must be a "protected individual," statutorily defined as a United States citizen or national, an alien who is lawfully admitted for permanent or temporary residence, a refugee, or an individual granted asylum. 8 U.S.C. § 1324b(a)(3). The statute, however, provides two exclusions to this classification:

> (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

8 U.S.C. § 1324b(a)(3)(i) and (ii).

Complainant has the burden of showing that she does not fit within either of IRCA's two exclusions to protection against citizenship status discrimination. Dhillon v. Regents of the University of California, 3 OCAHO 497, at 12 (March 10, 1993). The naturalization laws provide that a permanent resident may file for naturalization only if he or she has resided in the United States for at least five years after being admitted as a lawful permanent resident. 8 U.S.C. § 1427(a). This time period is shortened to three years for permanent residents who have resided continuously in the United States for three years and during those three years have been living in marital union with their citizen spouse, subject to certain conditions. 8 U.S.C. § 1430(a). As Complainant first became a permanent resident in February of 1991, regardless of whether Complainant has been living in marital union with her citizen spouse, she was not yet eligible to apply for naturalization at the time Respondent rejected her application. Thus, the first exclusion does not apply. As Complainant had not applied for naturalization by the time Respondent rejected her application, nor does the second exclusion apply. Therefore, Complainant, as a "protected individual," has standing to file the complaint in this case.

2. Respondent is Subject to IRCA's Prohibition Against Citizenship Status Discrimination

Section 102 of IRCA provides for causes of action based on citizenship status discrimination against employers of more than three employees. See 8 U.S.C. § 1324b(a)(1)(B), (a)(2)(A); see also Westendorf v. Brown & Root, 3 OCAHO 477, at 12 (Dec. 2, 1992). As Respondent employed over 200 employees on the date of the alleged discriminatory act,

Respondent is subject to IRCA's prohibition against this type of discrimination.

C. The Alleged Unfair Immigration-Related Employment Practices

1. Disparate Treatment Theory

IRCA prohibits as an unfair immigration-related employment prac-tice, knowing and intentional discrimination with respect to the hiring of a protected individual for employment, because of such individual's citizenship status. 8 U.S.C. § 1324b(a)(1), (3); 28 C.F.R. § 44.200(a)(2). See United States v. Lasa Marketing Firms, 1 OCAHO 141, at 11 (March 14, 1990). Claims of unfair immigration-related practices brought under IRCA must be proven by a "disparate treatment" theory of discrimination.[14] See Statement of President Reagan upon signing S.1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986) (construing IRCA's antidiscrimination provisions to require a showing of deliberate discriminatory intent); Supplementary Information to 28 C.F.R. § 44, 52 Fed. Reg. 37403 (October 6, 1987) (statement by the Attorney General that the intent to discriminate under this provision is an essential element of the charge). In view of the common language and common purpose of Title VII and IRCA, the analysis developed under Title VII for proving intentional discrimination has been applied to cases arising under IRCA. See, e.g., Dhillon, 3 OCAHO 497; Alvarez v.Interstate Highway Construction, 3 OCAHO 430 (June 1, 1992); Huang v. Queens Motel, 2 OCAHO 364 (Aug. 9, 1991); United States v. Harris Ranch Beef Co., 2 OCAHO 335 (May 31, 1991); United States v. Lasa Marketing Firms, 1 OCAHO 106 (Nov. 27, 1989); United States v. Mesa Airlines, 1 OCAHO 74, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991).

Under Title VII case law, "disparate treatment" or discrimination is when an "employer simply treats some people less favorably than

[14] In contrast, an individual bringing a claim under Title VII may proceed under either the "disparate treatment" or "disparate impact" standard of proof. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Title VII proscribes "not only overt discrimination but also practices that are fair in form but discriminatory in practice."). "'Disparate impact' . . . results from the use of 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on [a protected group] and cannot be justified by business necessity.'" Geller v. Markham, 635 F.2d 1027, 1031 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)). Under the disparate impact theory, actual intent to discriminate is not necessary for a finding of illegal discrimination. See, e.g., Griggs, 401 U.S. at 431.

others because of their race, color, religion, sex or national origin." Teamsters, 431 U.S. at 334 n.15. Accord, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). IRCA added to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1).

It was recognized two decades ago that "although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable than men." Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974) (female applicants for associate positions with a law firm prevailed where the court found the selection process to be tainted by the assumption that females were less acceptable as professionals than men). Nor, since the passage of IRCA in 1986, has a law firm been free to discriminate based upon citizenship status in its selection process. In contrast to Title VII, however, which allows an employer "discretion to choose among equally qualified candidates, provided the decision is not based upon [a protected characteristic]," Burdine, 450 U.S. at 259, IRCA permits an employer to prefer to hire a U.S. citizen or national over an alien if the two applicants are "equally qualified."[15] 8 U.S.C. §1324b(a)(4). In order to use the "equally qualified" exception, the employer must have compared the qualifications of the complainant to the selected citizen as a result of which the selected citizen was found to have qualifications not less than equal to the non-selected complainant. Mesa Airlines, 1 OCAHO 74.

2. Case Analysis

a. Complainant Has Not Presented Direct Evidence of Discrim-ination

"Direct evidence is evidence which, if believed, proves discrimination without inference or presumption" Brown v. East Mississippi Electric Power Assoc., 989 F.2d 858, 861 (5th Cir. 1993) as the evidence "in and of itself, shows a discriminatory animus." Jackson v. Harvard University, 900 F.2d 464, 467 (1st Cir.), cert. denied, 498 U.S. 848 (1990). "Only the most blatant remarks whose intent could be nothing

[15] An employer who does so, however, may still be liable for violating Title VII's prohibition against national origin discrimination. Klasko, Frye & Pivec, Employers' Immigration Compliance Guide, § 4.05[2] at 4-17 (1993).

other than to discriminate constitute direct evidence." Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

Direct documentary evidence or an oral admission of employment discrimination is rarely available. See Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (An employer is not likely to leave a "smoking gun" in the form of direct evidence to establish discriminatory intent). But see, e.g., EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990) (general manager's remark that "if it was his company he wouldn't hire any black people," constituted direct evidence of discriminatory motive in failing to promote a black employee where the general manager was responsible for promotion decisions at issue); Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541, 546 (8th Cir. 1984) (oral statement that "Court will never run well so long as there are women in charge" constituted direct evidence of discriminatory intent); Nation v. Bank of Cal., 649 F.2d 691, 698 (9th Cir. 1981) (comment that plaintiff was "over the hill" constituted direct evidence of discriminatory motive).

In a case where direct evidence of discrimination is presented, the McDonnell Douglas test does not apply. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 80-81 (2d Cir. 1983).[16] In Thurston, the employer had a policy whereby vacant positions were created for airline pilots under age 60 who were forced to stop flying, but not for pilots forced into retirement at age 60.[17] The Court found that this facially discriminatory policy constituted direct evidence of discrimination and held that although in such a case, McDonnell Douglas's shifting burdens do not apply, the employer is permitted to prove an affirmative defense to its discriminatory practice. Thurston, 469 U.S. at 122.

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[16] The parties differ as to the appropriate analysis for a disparate treatment claim where direct evidence of discrimination has been presented. Complainant argues that the McDonnell Douglas test is inapplicable. C's Legal Mem. at 9 citing Thurston. Re-spondent, citing Mesa Airlines, 1 OCAHO 74, asserts that "[e]ven if Ms. Kamal-Griffin was able to prove direct evidence of intentional discrimination, which she cannot, she would still be subject to the McDonnell Douglas/Burdine analysis. I agree with Complainant.

[17] The plaintiffs in Thurston sued under the Age Discrimination in Employment Act ("ADEA"). With reference to the ADEA and Title VII, the Supreme Court has ruled that interpretations of one apply with equal force to the other. Thurston, 469 U.S. at 121. The ADEA has provided guidance to cases interpreting § 1324b of IRCA. See General Dynamics, OCAHO Case No. 91200044, at 27 (citations omitted).

Complainant asserts that the rejection letter which Respondent sent her, in which Respondent stated that it is "able to hire only one or two foreign lawyers each year and [had] already made [its] commitments for the following year," Kamal-Griffin Aff.1 at Ex. 4, and Respondent's telephonic reference to her as a "French lawyer," C's Legal Mem. at 15, constitute direct evidence of citizenship status discrimination. She contends that given (1) the definition of the term "foreign lawyer," (2) the general rules of interpretation, (3) Respondent's "incoherent and diversified use of the term 'foreign lawyer,'" and (4) discovery, "the only true and lawful interpretation of the term 'foreign lawyer' as applied to Complainant by Respondent refers to her lack of U.S. citizenship."[18] C's Legal Mem. at 17.

I will now examine Complainant's arguments regarding the term "foreign lawyer" and that which she refers to as "rules of interpretation." Complainant contends that "[t]he definition of 'foreign', 'lawyer' and of the term 'foreign lawyer' speaks for itself, with [r]espect to Complainant." C's Legal Mem. at 9.[19] She further contends that "[t]he general rules of interpretation warrant a finding that in Complainant's case, the words 'foreign lawyer' mean, on their face, lawyer who is not

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[18] Complainant presents several arguments claiming that she has submitted direct evidence of discrimination. See C's Legal Mem. at 8-29. Because I find that some of them do not belong in a discussion of direct evidence, I will consider them in later sections of this decision.

[19] On June 6, 1993, per Complainant's request and pursuant to 28C.F.R. § 68.41, I took official notice of the legal definitions of the term "Attorney at law" and the words "foreign," and "lawyer" as found in Black's Law Dictionary (6th Ed. 1990) (hereinafter "Black's"):

> Attorney at law. A person admitted to practice law in his respective state and authorized to perform both civil and criminal functions for clients, including drafting of legal documents, giving of legal advice, and representing such before courts, administrative agencies, boards, etc. . . .
>
> Foreign. Belonging to another nation or country; belonging or attached to another jurisdiction; made, done, or rendered in another state or jurisdiction; subject to another jurisdiction; operating or solvable in another territory; extrinsic; outside; extraordinary. Non-resident person, corporation, executor, etc. . .
>
> Lawyer. A person learned in the law; as an attorney, counsel, or solicitor; a person licensed to practice law. Any person who prosecutes or defends causes in courts of) record or other judicial tribunals of the United States or any of the States, or whose business is to give legal advice or assistance in relation to any cause or matter whatever.

Black's at 888; 128; 646.

a citizen of the United States." Id. at 12. In addition to her reliance on the officially noticed definition of "foreign," Complainant relies on an early Supreme Court case for the proposition that "the term foreign . . . applies to any person or thing belonging to another nation or country." The Cherokee Nation v. The State of Georgia, 30 U.S. 1, 55 (1831). Thus, Complainant asserts that she is not a "foreign lawyer" in that (1) she is a permanent resident of the United States and (2) "she belongs to the New York State Jurisdiction as an attorney in good standing with all the rights and privileges deemed by the Supreme Court of the state of New York." C's Legal Mem. at 10. Complainant asserts that she "belongs to another country," however, "in the sense that she is a citizen of France, and not of the United States." Id.

Complainant contends that because she is licensed to practice law only in New York, "[t]here is no ambiguity possible" with regard to Respondent's references to her as a "foreign lawyer" or a "French lawyer," as Respondent's use of the words "foreign" and "French" must refer to her citizenship status.[20] C's Legal Mem. at 15. Complainant, relying on state cases, then argues that if any ambiguity does exist, it "is to be most strongly construed against the party who causes such an uncertainty to exist." Id. at 15.[21] If any ambiguity exists, however, the evidence is not direct evidence of discrimination.

Because I find Respondent's use of these terms to be ambiguous, Complainant's contention that she has presented direct evidence of citizenship status discrimination is without merit. I agree with Complainant's assertion that "[i]f Respondent had intended to refer to Complainant's [primary legal training] rather than [her] lack of U.S. citizenship, [Respondent] could have referred to her as a foreign law graduate, or as a lawyer principally trained outside the United States." C's Legal Mem. at 11. I find, however that Respondent's references to Complainant as a "foreign lawyer" and a "French lawyer" do not constitute direct evidence of citizenship status discrimination because the former could refer to Complainant's national origin and both terms could refer to Complainant's primary legal training. As the

[20] As Complainant had not informed Respondent prior to its written rejection of her application that she had been admitted to the New York bar, I view this argument as relating to the references made by Respondent's recruiting coordinator during the telephone conversation in which Complainant informed her that she had been admitted to the New York bar.

[21] This agency, however, follows federal, not state court decisions.

meaning of each reference to Complainant is ambiguous and does not indicate citizenship status without inference or presumption, I find that neither constitutes direct evidence of citizenship status discrimination.[22] Compare Mesa Airlines, 1 OCAHO 74, at 47 (written admissions by employer's president and general counsel of a company policy of hiring only U.S. citizen pilots, when available, constituted direct evidence of discriminatory conduct); Barbano v. Madison County, 922 F.2d 139, 141 (2d Cir. 1990) (statement by interviewer that he would not consider "some woman" for the position constituted direct evidence of sex discrimination).

b. Complainant Has Made a Prima Facie Case of Discrimination

Direct evidence of intentional discrimination, however, is not required to prove a disparate treatment claim. Thurston, 469 U.S. at 121; Aikens, 460 U.S. at 715-17 (1983). In order to provide the plaintiff her "day in court," despite the absence of direct evidence, Thurston, 469 U.S. at 121 (1985), the Supreme Court, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established the allocation of burdens and the order for the presentation of proof to establish discriminatory intent by circumstantial evidence in Title VII cases. "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). A plaintiff may establish a prima facie case of discriminatory failure to hire by showing that: (1) she is a member of a protected class; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, she was rejected; and (4) after the plaintiff was rejected, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802. The plaintiff's "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Burdine, 450 U.S. at 254.

"The nature of the plaintiff's burden of proof at the prima facie stage is de minimus." Dister, 859 F.2d at 1114 (2d Cir. 1988); Melnyk v. Adria Laboratories, 799 F.Supp. 301, 313 (W.D.N.Y. 1992). The Supreme Court has explained that this proof creates a prima facie showing of illegal motive because "it eliminates the most common

[22] Respondent did not say that it is able to hire only one or two non-citizens each year. Nor did Respondent refer to Kamal- Griffin as a permanent resident or a non-citizen.

nondiscriminatory reasons for the plaintiff's rejection." Burdine, 450 U.S. at 254. This prima facie showing raises:

> an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). See also Burdine, 450 U.S. at 254. As the Court has explained, "[I]t is a [Title VII] plaintiff's task to demonstrate that similarly situated employees were not treated equally." Burdine, 450 U.S. at 258; Martin v. Citibank, 762 F.2d 212, 216 (2d Cir. 1985).

"The method suggested in McDonnell Douglas for pursuing [the dis-parate treatment] inquiry . . . was never intended to be rigid, mechanized, or ritualistic." Furnco, 438 U.S. at 577. A Title VII plaintiff therefore can establish a prima facie case of individualized disparate treatment other than through a showing under the McDonnell Douglas paradigm by 'offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII].'" Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.), cert. denied, 112 S.Ct. 228 (1991) (quoting Teamsters, 431 U.S. at 336 (1977)).

As I have stated previously, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." United States v. General Dynamics, OCAHO Case No. 91200044, at 43 (quoting Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977)). Furthermore, the Second Circuit has stated that statistical proof alone ordinarily cannot establish a prima facie case of individualized disparate treatment, Martin v. Citibank, 762 F.2d at 218, while implicitly recognizing that a sufficiently probative statistical disparity can do so. Id; Lopez, 930 F.2d at 161 n.2. In hiring claims, "the raw numbers, taken alone, mean relatively little" and "must be compared with the applicable availability pools, i.e., the percentage of [members of the protected class at issue] in the work force who are qualified and available to fill the positions in question." Coser v. Moore, 587 F.Supp. 572, 584 (E.D.N.Y. 1983). Generally, however, statistics must be combined with anecdotal evidence further implicating the presence of an unlawful motive in hiring, so that "the cold numbers [are brought] convincingly to life." Teamsters, 431 U.S. at 339.

Complainant asserts that "[t]he statistics derived from Respondent's own pool of applicant[s] establish a prima facie case of discrimination." C's Legal Mem. at 31. Complainant has stated that of the approximately 166 non-citizens who applied between January 1, 1990 and October 25, 1991 for an associate attorney position with Respondent, only four held J.D. degrees from law schools accredited by the American Bar Association ("A.B.A.") and the others who each received a "foreign lawyer" rejection letter from Respondent like the one Complainant received allegedly were rejected outright; she has also stated that only ten of the "thousands" of U.S. citizens who applied to Respondent for an attorney position during that time received their primary legal education at a foreign law school, C's Legal Mem. at 20-21, and thus allegedly were rejected outright by Respondent.[23] Complainant has also submitted statistics relating to the high percentage of U.S. citizens enrolled in the J.D. programs at various law schools accredited by the A.B.A. and the high percentage of non-citizens enrolled in the LL.M. programs at those schools. See Statement of Hugh Chan, filed January 1, 15, 1993. Complainant's statistics relate solely to the relative percentages of U.S. citizens and non-citizens attending these U.S. law schools and her evidence relates solely to the relative percentages of U.S. citizen and non-citizen foreign primary law degree holder applicants for attorney positions with Curtis, Mallet.

"[W]here special qualifications are necessary [to perform a job, however], the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) citing Hazelwood, 433 U.S. at 308. The proper statistical evaluation in this case therefore would compare the percentage of qualified non-citizen applicants hired by Respondent to

[23] In my Order of September 9, 1992, I directed Respondent to produce the resumes it had received and was able to locate of all the U.S. citizens who held a foreign law degree and had applied for a position with Respondent during the period from January 1, 1990 to October 25, 1991, which I deemed the relevant time period in which to examine Respondent's hiring practices. I further directed Respondent to state, if known, whether any applicants for attorney positions during the relevant time period were non-U.S. citizens, and if so, whether any were hired by Respondent.

the percentage of qualified citizen applicants hired by Respondent.[24] See Coser, 587 F.Supp. at 584 (to evaluate plaintiffs' claim of discrimination against women in university's faculty hiring, court found it necessary to compare the male/female ratio of hirings with the male/female ratio in the relevant labor force). Complainant, however, has failed to establish such a statistical disparity. Cf. Coopersmith v. Roudebush, 10 Empl. Prac. Cas. (CCH) para. 10,354 (D.C. 1975) (disparate impact case in which female attorney job applicant failed to show that the Board of Veteran Affairs' preference for applicants who had recent legal experience had a disproportionate impact on women applicants). Therefore, I conclude that Complainant's numerical evidence does not make a prima facie case of discrimination.

I find, however, that Complainant has provided sufficient circumstantial evidence to establish a prima facie case of discrimination based on citizenship status. Complainant has presented evidence that (1) Respondent sent her a rejection letter which stated that Curtis, Mallet is "able to hire only one or two foreign lawyers each year and [had] already made [its] commitment for next year," Kamal-Griffin Aff.1, Ex. 4., in response to Complainant's resume, which indicated that she received her primary legal education in France, had an LL.M. from an A.B.A. accredited law school, had passed the New York bar exam and was a French citizen and a permanent resident of the United States; and (2) after informing Respondent's recruiting coordinator by telephone that she had been admitted to the New York bar and setting out her other credentials, the recruiting coordinator responded that (a) the firm still considered Complainant a "foreign lawyer"; and (b) the firm had no need for a "French lawyer." I find this evidence sufficient to establish an inference that Curtis, Mallet restricts the number of non-U.S. citizens it hires and that the firm rejected Complainant for an associate attorney position based upon her citizenship status.

c. Respondent's Legitimate Nondiscriminatory Reason

"[I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Burdine, 450 U.S. at 252-53

[24] The numbers from which to ascertain the appropriate statistics are not in the record. While the record indicates that one of the 166 non-citizen applicants was hired by Respondent as a permanent associate, Delaney Aff., Ex. HHHHH, no evidence was presented regarding how many of the "thousands" of citizen applicants were hired by Respondent.

(internal quotation marks omitted). If the defendant carries its burden,"the presumption raised by the prima facie case is rebutted," Id. at 255, and "drops from the case." Id. at 255, n.10. "'[T]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782, 4783 (U.S. June 25, 1993) (quoting Burdine, 450 U.S. at 254-55 and n.8). "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254. "By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [an employer sustains its] burden of production, and thus [places itself] in a "better position than if [it] had remained silent." St. Mary's, 61 U.S.L.W. at 4784. If the defendant remains silent or "fail[s] to introduce evidence, which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action," "the court must award judgment to the plaintiff as a matter of law." Id. Because Complainant has established a prima facie case of citizenship status discrimination, the burden shifts to Respondent to assert a legitimate nondiscriminatory reason for not selecting Complainant as an associate attorney.

Respondent states that it rejected Complainant for an associate position because she "lacked the legal qualifications and professional experience necessary to obtain employment at Curtis, Mallet." It is undisputed that Respondent's hiring criteria for law students, as indicated in its National Association for Law Placement ("NALP") law firm questionnaire for the 1991-92 academic year includes "excellent academic achievement (top 25% of the class), extra curricular activities, journal work and moot court highly regarded." R's Reply Mem. at 5; see C's Legal Mem. at 38; Kamal-Griffin Aff.1, Ex. 3. Respondent asserts that its hiring criteria for lateral applicants is either "excellent academic achievement or outstanding professional experience." R's Reply Mem. at 1. Respondent's stated reason for concluding that Kamal- Griffin was not qualified for a position with Curtis, Mallet is four-fold: (1) Complainant "did not receive a J.D. from an American law school and never attended a full course of legal studies in the United States"; (2) she obtained her only American legal education, an LL.M. in comparative law, from a school "which is not one of the law schools from which Curtis, Mallet regularly recruits law students for positions as attorneys; (3) she failed to include any grades; and (4) although she had graduated from law school in 1983, she appeared to have no legal experience. R's Legal Mem. at 13.

Because Respondent's asserted reasons for not selecting Kamal- Griffin, when taken together, are legitimate and nondiscriminatory, the presumption of discrimination drops from the case. Cf. Frausto v. Legal Aid Society of San Diego, Inc., 563 F.2d 1324 (9th Cir. 1977) (lack of criminal law experience, lack of assurance of long-term commitment and questions regarding attorney's professional reputation and ability to get along with people were legitimate nondiscriminatory reasons for rejecting attorney's application).

d. Complainant Has Failed to Prove Discriminatory Intent on the Part of Respondent

"Once the defendant 'responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide . . . 'whether the rejection was discriminatory . . . .'" St. Mary's, 61 U.S.L.W. at 4786-87 (quoting Aikens, 460 U.S. at 714-15). Thus, at this point, the plaintiff must sustain its ultimate burden of proving '"the ultimate factual issue in the case,' which is 'whether the defendant intentionally discriminated against the plaintiff."[25] St. Mary's, 61 U.S.L.W. at 4787 (quoting Aikens, 460 U.S. 711, 715 (brack-ets and internal quotation marks omitted)). "[T]he ultimate question [is] discrimination vel non." St. Mary's, supra, at 4786 (quoting Aikens, supra, at 714).

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." St. Mary's at 4784. Therefore, "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. Such rejection, however, does not compel judgment for the plaintiff. Id. Furthermore, "[e]ven though . . . rejection of the defendant's proferred reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." Id. at n.4.

[25] In so stating, the Court called inadvertent the dictum in Burdine, 450 U.S. at 256, describing as an indirect method of proving intentional discrimination a plaintiff's "showing that the employer's proffered explanation is unworthy of credence." St. Mary's at 4786. The Court stated that a finding of pretext does not mandate a finding of illegal discrimination because the plaintiff must show that the employer's asserted legitimate reasons were "a pretext for discrimination" which entails showing "both that the reason was false, and that discrimination was the real reason." Id. Thus, the Court stated that "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." Id.

In order to prove that Respondent intentionally discriminated against Complainant on the basis of her citizenship status, Complainant has set forth several theories, none of which establishes discriminatory intent on the part of Respondent.

i. Respondent Uses the Term "Foreign Lawyer" To Refer to the Non-U.S. Situs of an Applicant's Primary Legal Education or Professional Experience

Complainant concedes that it was legitimate for Respondent to classify her as a "foreign lawyer" prior to her admission to practice law in the United States. C's Legal Mem. at 5. Her argument, apparently, is that once she was admitted to the bar, Respondent's designation of her as a "foreign lawyer" or a "French lawyer" ignored the fact that she is licensed to practice law in New York. Thus, she concludes that "foreign" or "French" cannot be references to her legal education as she is educated in the legal systems of both France and the United States and licensed only to practice in New York. Therefore, Kamal-Griffin asserts that these references must refer to her citizenship status.

Complainant contends that an evaluation of the criteria Respondent uses to label individuals as "foreign lawyers" indicates that Respondent's reference to her as a "foreign lawyer" was based on her citizenship status. Complainant asserts that Curtis, Mallet labels as "foreign lawyers" all "applicants who show some alienage characteristics," in the form of dual citizenship, residency in a foreign country, "a native fluency in foreign languages" or a foreign legal education. C's Legal Mem. at 14. Respondent, however, has consistently asserted that its use of the term "foreign lawyer" "refers only to the training and professional background of an applicant; neither national origin nor citizenship status has any bearing upon it." R's Legal Mem. at 2. See id. Ex. C. at 2 [Respondent's Letter to the Office of Special Counsel] ("The reference to 'foreign lawyers' in the letter relates only to her training and professional background. Neither Ms. Kamal-Griffin's national origin nor her citizenship status had any bearing whatsoever on our decision not to pursue her query regarding possible employment."); Pizzurro Aff. at para. 7 ("In the case of Ms. Kamal-Griffin, the determination was made that the firm was not in need of someone with her credentials and qualifications. That decision was based entirely upon her educational background and professional experience and the needs of the firm at that time.").

Complainant asserts that dual citizenship is a basis for Respondent's classification of individuals as "foreign lawyers." C's Legal Mem. at 14

citing Delaney Aff., Ex's. VVVV, WWWW, XXXX, YYYY,[26] ZZZZ, AAAA, BBBB, DDDD [eight resumes, seven of which indicate dual citizenship]. The evidence, however, indicates that all seven of the dual citizens to whom Complainant refers received their primary law degree outside the United States. Furthermore, two of the nine U.S. citizen applicants who received a "'foreign lawyer' rejection letter" in the relevant period were not dual citizens. See Delaney Aff., Ex. UUUU [U.S. citizen by birth who was attending law school in England]; Ex. CCCCC [U.S. citizen who obtained his J.D. from an A.B.A. accredited law school in the United States and was working in Luxembourg]. I thus find Complainant's assertion to be without merit and find Respondent's characterization of these individuals as "foreign lawyers" to be consistent with Respondent's explanation that it uses such term to refer to the "training and/or professional background of an applicant." R's Legal Mem. at 2. I find that citizenship status had no bearing upon Respondent's designation of these individuals as "foreign lawyers."

Complainant also contends that residency in a foreign country is a basis for Respondent's classification of individuals as "foreign lawyers." C's Legal Mem. at 14. While Respondent did reject as a "foreign lawyer" an individual who was residing in a foreign country, see Delaney Aff., Ex. CCCCC, that individual, a U.S. citizen who had a J.D. degree from a U.S. law school, was also working abroad. I therefore conclude that Respondent characterized him as a "foreign lawyer" because of his professional background, not his place of residence, and that such reference clearly was not based on citizenship status.

Complainant further contends that Respondent's classification of individuals with "a native fluency in foreign languages" as "foreign lawyers" is based on citizenship status. C's Legal Mem. at 14. This characteristic, however, is clearly a pseudonym for national origin and thus does not implicate citizenship status or alienage. Complainant, several times throughout her pleadings, has characterized factors as based on alienage when they are actually grounded in national origin. For example, Complainant asserts that:

> the common thread between [the applicants rejected on the basis that they are "foreign lawyers"] is the fact that they have a strong element of foreignness that Respondent disfavor (sic) profoundly for reasons as trivial and discriminatory as the fact that

[26] This exhibit does not indicate dual citizenship.

> english is not, or might not be, those applicants (sic) native language, and they speak, or might speak english, with a foreign accent.

C's Legal Mem. at 13 (bold and cites omitted).

Complainant refers to four of the five sets of interview notes taken by members of the firm upon interviewing a non-U.S. citizen, Ivan Chiang, hired by Curtis, Mallet as a permanent associate on September 4, 1991 to begin employment in the fall of 1992, after his graduation from Columbia University School of Law. See Kamal-Griffin Aff.1, Ex. C-6(c)(1) through (3) and (c)(5). Complainant contends that these notes indicate that Respondent hired Mr. Chiang "with one reservation: that english is his second language and that he speaks with an accent." C's Legal Mem. at 13; see Kamal- Griffin Aff.1, Ex's. C-6(a), 6(c)(1)-(3) and (c)(5). Complainant apparently is unaware that an individual's accent implicates his or her national origin. See Fragrante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990); Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980 (6th Cir. 1980) (per curiam); Mejia v. New York Sheraton Hotel, 459 F.Supp. 375 (S.D.N.Y. 1978). See also 29 C.F.R. § 1606.1 (Equal Employment Opportunity Commission's Guidelines on Discrimination Because of National Origin, defining national origin discrimination as including "linguistic characteristics of a national origin group").

Furthermore, Title VII cases addressing claims of national origin discrimination have held that "an adverse employment decision may be predicated upon an individual's accent when--but only when--it interferes materially with job performance." Fragrante, 888 F.2d at 596; see Carino, 750 F.2d at 819 (employer unlawfully denied plaintiff the position of supervisor of a dental laboratory where plaintiff's "noticeable" Filipino accent did not interfere with his ability to perform supervisory tasks); Mejia, 459 F.Supp. at 377 (Dominican chambermaid was lawfully denied promotion to front desk because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"). Because accent and ability to communicate do not implicate an individual's citizenship status, and Complainant has submitted no evidence indicating that Respondent discriminates based on these factors related to national origin for the purpose of discriminating based on citizenship status, I find that Respondent's concern about the accent and communication ability of its prospective attorney hire does not support a finding of discriminatory intent based on citizenship status.

In addition, Complainant contends that Respondent's classification of individuals who have obtained their primary law degree outside the United States as "foreign lawyers" implicates citizenship status. The record, however, indicates otherwise as Curtis, Mallet classifies U.S. citizen as well as non-citizen applicants as "foreign lawyers." See Delaney Aff., Ex's. UUUU - BBBB, DDDDD -FFFFF [eleven resumes of applicants who are U.S. citizens who received their primary legal education from schools located outside the United States, and the "foreign lawyer" rejection letters like the one at issue, sent to each of them by Respondent]. I therefore find that Respondent's categorization of individuals who received their primary law degree outside the United States as "foreign lawyers" does not implicate citizenship status. Thus, Complainant's evidence as to Respondent's general use of the term "foreign lawyer" does not support a finding that Respondent knowingly and intentionally discriminated against her based on citizenship status.

ii. Respondent Does Not Require An American J.D. Degree of its Permanent Associate Attorneys

Complainant contends that Respondent requires its attorneys to have an American J.D. degree and that Respondent has imposed this requirement for the purpose of discriminating based on citizenship status. C's Legal Mem. at 26. Respondent, on the other hand, contends that it has no such requirement. R's Reply Mem. at 3, 5.[27] Complainant asserts that because U.S. law schools "are populated almost exclusively with United States citizens at the J.D. degree level," Respondent's requirement of an American J.D. degree "is an almost sure bet that it will not hire non-U.S. citizen attorneys." C's Legal Mem. at 22. Complainant argues that the disparate impact of Respondent's alleged requirement of an American J.D. degree is so

[27] It is undisputed that Respondent considers and hires holders of foreign law degrees for temporary attorney positions, called "foreign trainees." Respondent has defined "foreign trainees" as "foreign lawyers who maintain permanent residence abroad, who accept[] employment with [Curtis, Mallet] for a limited period of time and with the expectation that they will return to practice law in their countries of origin." R's Legal Mem. at 5 n.4; Delaney Aff., Ex. GGGGG at 2. During the relevant time period, January 1, 1990 through October 25, 1991, Respondent hired six foreign trainees. Delaney Aff., Ex. GGGGG at 2-3. Respondent contends that such hiring of "holders of foreign law degrees for attorney positions" indicates that Respondent does not require an American J.D. degree for attorney positions. R's Reply Mem. at 5-6. That argument is unpersuasive as it is undisputed that Complainant applied for an associate attorney position, not a foreign trainee position and I find Respondent's hiring of foreign-trained attorneys for temporary positions irrelevant to the issue of Respondent's hiring policies for permanent associate positions.

great that Respondent's discriminatory motive must be inferred. As discussed above, however, Complainant's evidence is insufficient to establish a probative statistical disparity. See discussion supra at section IV.C.2.b.

Based on the fact that Curtis, Mallet checked a box on its NALP questionnaire which indicated that it would not accept applications from foreign law students for its 1992 summer program, I find that Respondent requires an American J.D. from law student applicants. See Kamal-Griffin Aff.1, Ex. 3. The record indicates, however, that Respondent does not require its associate attorneys to have an American J.D. degree. See R's Response to ALJ's Second Set of Interrogatories [indicating that Respondent hired two individuals who received their primary law degrees from schools located outside the United States and are currently employed by Respondent: in 1981, Respondent hired an associate attorney who received her primary legal education from the University of Costa Rica and in 1988 hired an associate attorney who received her J.D. equivalent from Catholic University in Peru and her LL.M from Yale University.][28]

iii. Respondent Gives More Weight to a J.D. Degree from an A.B.A. Accredited Law School than to a Foreign Primary Legal Education & an LL.M. Degree in Comparative Law From an A.B.A. Accredited Law School

Complainant contends that the words of the rejection letter indicate that once Respondent classifies an applicant as a "foreign lawyer," Respondent rejects the applicant "outright," C's Legal Mem. at 19, and that such outright rejection of individuals who are licensed to practice in the United States based on the fact that they have a foreign law degree is not legitimate as it discriminates based on citizenship.

[28] Although not persuasive evidence regarding Respondent's intent prior to the filing of the instant complaint, Respondent hired two permanent associates in 1993 who received their primary legal education at a foreign law school. R's Second Set of Responses to ALJ's Interrogatories at 2-3. One received his LL.B. from West England Law School and his LL.M. from Fordham University School of Law and the other received his law school education at the University of Monterrey, Mexico. Furthermore, in 1992, Respondent awarded partnership to three individuals who received their primary law degree outside the United States. One attended the University of Paris for her primary legal education and obtained her LL.M. from the University of Pennsylvania. Another received his primary law degree from the University of Monterrey in Mexico and his LL.M. from New York University. The third received his law school education from the Universidad Nacionale Autonoma de Mexico.

Respondent has stated that part of the reason Curtis, Mallet did not offer Kamal-Griffin a position was that she "did not receive a J.D. from an American law school and never attended a full course of legal studies in the United States." R's Legal Mem. at 13. Respondent has further stated that "it is manifest that an LL.M. in comparative law coupled with a civil law degree, simply does not provide one with the same training and approach as three years of study of U.S. law at an accredited U.S. law school." R's Legal Mem. at 11.

Complainant concedes that Respondent has considered holders of foreign primary law degrees for permanent associate positions during the relevant period. C's Legal Mem. at 32 citing Kamal-Griffin Aff.2, Ex. 3(2) at p. 32 [Respondent's denial of Complainant's request for an admission that it "excludes systematically from permanent employment considerations members of the New York State Bar who hold their J.D. degree from a foreign school of law regardless of those applicants' grades, awards, experience, school ranking, and legal training."]; Ex. 11 at pp. 134-40 [resume of a U.S. citizen who received his primary legal education outside the United States and was studying for his LL.M. in corporate law at New York University; his name on the interview schedule for September, 1990 for position in Curtis, Mallet's bankruptcy department; the post-interview letter he sent to Respondent; and the rejection letter Respondent sent him, dated November 13, 1990]. Furthermore, as discussed above, Curtis, Mallet has hired holders of foreign primary law degrees for permanent associate positions. See supra section VI.C.2.d.ii.

Because Respondent has considered and hired holders of foreign law degrees, I find that Respondent does not reject outright individuals who received their primary law degree from a non-U.S. school; rather, I find that Respondent gives more weight to a degree from an A.B.A. accredited U.S. law school than it gives to a degree from a foreign law school, even when combined with an LL.M. degree in comparative law from an A.B.A. accredited law school. I further find that such weighting is legitimate and does not implicate citizenship status.

iv. Respondent Does Not Restrict the Types of Attorney Positions for Which a Foreign Primary Law Degree Holder is Eligible

Complainant contends that Respondent does not consider applicants who are licensed to practice law in the United States for an associate attorney position if the applicant is a holder of a foreign primary law degree and the position is not specifically related to the laws of the country in which the applicant obtained his or her education. See C's

Legal Mem. at 36, 46 ("It appears that 'foreign lawyers' are considered for employment by Respondent when Respondent (sic) firm has a need connected with a particular country or area in the world."). Complainant asserts that this alleged practice of the firm discriminates based on citizenship status.

Respondent has stated that "[t]he circumstances under which Curtis, Mallet hires any lawyer, including a foreign lawyer . . . depends (sic) upon the needs of the firm at the time," and that at the time of Complainant's application, "the need was for one or two foreign attorneys." R's Resp. to ALJ's Interrogs. at 2. One could infer from this statement that Respondent considers applicants whom it classifies as "foreign lawyers" only for positions which require expertise in the jurisprudence of the country in which the applicant received his or her primary legal education. This inference is supported by Respondent's failure to deny that its recruiting coordinator told Complainant that "it would be extremely difficult [for her] to be considered for a position with Respondent," C's Brief at para. 12, "unless there was a need for a French lawyer." Id. at para. 15.

As discussed above, Respondent has considered an applicant who held a foreign primary law degree for a permanent associate position in Respondent's bankruptcy department. See supra section IV.C.2.d.iii. Because Respondent's bankruptcy department is apparently part of Respondent's international/corporate department, it is unclear whether or not the position for which Respondent interviewed the applicant required expertise in the jurisprudence of a foreign country. Thus, I conclude that Complainant has presented insufficient evidence to prove that Respondent has a practice of excluding holders of foreign primary law degrees for permanent associate positions which do not require an expertise in the law of a foreign country. Rather, I find that Respondent considers holders of foreign primary law degrees for such positions, but that the applicant would need to have exceptional qualifications, e.g., outstanding professional experience, in order to overcome the lesser weight Respondent would give to the foreign legal education than it would give to a degree from an A.B.A. accredited law school. Therefore, I find that Respondent does not limit the type of associate attorney positions for which an applicant designated as a "foreign lawyer" is eligible.

v. Complainant's Credentials Were Not as Strong as Those of a Selected Candidate

In order to prove Respondent's discriminatory intent, Complainant has attempted to show that she was more qualified than Christopher Goebel, a U.S. citizen who sent Respondent an unsolicited letter and resume expressing interest in an associate position. C's Brief at 8. Respondent offered Mr. Goebel an associate attorney position on May 29, 1992, approximately six months after Complainant's telephone conversation with Curtis, Mallet's recruiting coordinator, in which Complainant was told that Respondent had no need for a "French lawyer" and did not anticipate such a need in the coming year. Id. Complainant asserts:

> If I had not been so discouraged by Ms. Miles and if I had not been so deterred by Respondent's proclivities toward non-citizens who reside permanently in the United States, I would have continued to pursue employment possibilities with Respondent which would have allowed me to be considered for the position offered later to Mr. Goebel or to any other applicant similarly situated.

C's Brief at 9.

As I find this to be a legitimate reason for Complainant's failure to resubmit her resume, a comparison of Complainant's credentials to those of Mr. Goebel is probative of whether Respondent's decision to not hire Complainant was discriminatory. Mr. Goebel, a first year associate at Curtis, Mallet, graduated from Cornell University in 1988 with a B.A. degree and the honors of magna cum laude with distinction in all subjects, Phi Beta Kappa, and College Scholar (combining French, international economics and physics). He graduated from Harvard Law School in 1991 after serving as Editor of the Harvard International Law Journal. Mr. Goebel was fluent in French and had spent a summer as a clerk for a French law firm. He had spent almost a year in the Netherlands doing a fellowship and had a pending offer to work for a law firm in Paris. See Delaney Aff., Ex. C.

The record indicates that Complainant graduated with a B- average from the University of Paris-Sorbonne, Ex's. 17A at A7 and 17C,[29] which placed her in the top 40% of her class. See Wilson Letter [indicating USD Law School's Comparative Law Program only accepts candidates in the top 40% of their class]. Complainant's grades at the LL.M. program at USD Law School ranged from fair to good. See R's Legal Mem. at 13 n.10. Complainant contends that she was at least as qualified as Mr. Goebel (1) because she has academic and profes-

[29] It is unclear whether these exhibits, filed January 15, 1993, are an addendum to the exhibits attached to Kamal-Griffin Aff.1 or Kamal-Griffin Aff.2.

sional training in both the French and American legal systems, whereas Mr. Goebel has only clerked for a summer in a French law firm and his training did not indicate that he was as well versed in French law as in American Law; and (2) because she was admitted to the New York Bar, while Mr. Goebel had not yet taken the bar examination at the time he was hired. C's Brief at 9. As discussed above at section IV.C.1, 8 U.S.C. § 1324b(a)(4) permits an employer to prefer a U.S. citizen or national over an "equally qualified" alien if the employer compared qualifications as a result of which the selected citizen or national was found to have qualifications not less than equal to the non-selected complainant. Thus, Complainant's burden was to show either (1) that she was as qualified as the selected citizen and Respondent had a policy of not considering the qualifications of non-citizens or (2) that she was more qualified than the selected citizen. Complainant has failed to establish either one, however, as Mr. Goebel's credentials are clearly superior to her's. Thus, Complainant's evidence of her comparative qualifications does not support a finding that Respondent discriminated against her based on her citizenship status.

vi. Complainant Was Not More Entitled Than a Non-"Protected Individual" to a Position With Respondent

Complainant asserts that because she is a "protected individual" under IRCA, 8 U.S.C. § 1324b(a)(3), she was more entitled than a non- "protected individual" to an associate attorney position with Respondent.[30] See C's Brief at 10-13; C's Legal Mem. at 21. Complainant thus contends that Respondent's offer of an associate attorney position to Ivan Chiang, who was not a "protected individual,"[31] on September 4, 1991, discriminated against her as a permanent resident of the United States. Id. A "protected individual" is still covered by § 1324b when the individuals allegedly preferred are non-protected individuals. See Nguyen v. ADT Engineering, Inc., 3 OCAHO 489 (Feb. 18, 1993) (complainant's claim of employer's preference for H-1 visa holders was within section 1324b's prohibition of citizenship-based discrimination). While § 1324b(a)(4) permits an employer to prefer a U.S. citizen or national over an "equally qualified" alien, the statute does not require an employer to prefer a citizen over a non-citizen

[30] See supra section III.B.2 for definition of "protected individual."

[31] Mr. Chiang, a Taiwanese citizen, is in the United States on an "unexpired foreign passport with [employment authorization] attached." Delaney Aff., Ex. GGGGG. He holds a J-1 visa. K-amal-Griffin Aff.1, Ex. 6(d).

authorized for employment in the United States. Likewise, as I previously held, IRCA does not require an employer to hire a protected individual instead of a qualified non-protected individual who is authorized to be employed in the United States. General Dynamics, OCAHO Case No. 91200044, at 57. If Curtis, Mallet had a preference for non-protected non-citizens over protected non-citizens, evidence of such a policy would likely have appeared in the notes taken by Respondent's personnel upon interviewing Mr. Chiang. There was no such evidence. See Kamal-Griffin Aff.1, Ex. C-6(c)(1) through (5).

Furthermore, Complainant was not as qualified for an associate attorney position as Mr. Chiang. Mr. Chiang, who received his under-graduate education in Taiwan, then completed a masters degree in political science at Columbia University where he was honored as a Presidential Scholar in 1987-88 while working on his Ph.D. He received his J.D. degree from Columbia University School of Law in 1992 where he was a member of the Columbia Journal of Transnational Law and Editor of the Journal of Chinese Law. His grades were excellent. See Delaney Aff., Ex. B. Because I find that Mr. Chiang's credentials are superior to Complainant's and because there is no evidence that Respondent has a policy of preferring non-protected individuals over protected individuals, Respondent's selection of Mr. Chiang does not support a finding of discriminatory intent on the part of Respondent.

e. Section 1324b(a)(6) Does Not Apply to this Case

Complainant asserts that by classifying her as a "foreign lawyer," and thus allegedly rejecting her application outright, Respondent refused to honor her license to practice law in the State of New York and that such refusal violates another of IRCA's antidiscrimination provisions, 8 U.S.C. § 1324b(a)(6). C's Legal Mem. at 50. That section considers an employer's "request, for purposes of satisfying the requirements of [IRCA's employment verification system,] section 1324a(b) . . ., for more or different documents than are required . . . or refusing to honor documents that on their face appear to be genuine" to be "an unfair immigration-related employment practice relating to the hiring of individuals." Although Complainant contends that a genuine triable issue of fact exists as to whether a license to practice law is included in the term "documents" as used in § 1324b(a)(6), statutory interpretation is not an issue of fact, but one of law. Thus, Complainant's argument is inappropriate to oppose Respondent's Motion for Summary Decision. Furthermore, as a legal argument, it does not apply to this case.

Section 101 of IRCA, 8 U.S.C. § 1324a, addresses "the requirements and procedures persons or entities must comply with when hiring, or when recruiting or referring for a fee, or when continuing to employ individuals in the United States." 8 C.F.R.§ 274a.2(a). IRCA's employ-ment verification requirements, 8 U.S.C. § 1324a(b), apply only to "[a] person or entity that hires or recruits or refers for a fee an individual for employment." 8 C.F.R. § 274a.2(b)(1). "Hire" is defined as "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. 274a.1(c). Complainant was not interviewed nor hired for a position with Respondent, so she clearly did not commence employment with Respondent. Moreover, even if she had commenced employ-ment, a license to practice a profession is not in the list of documents acceptable to establish identity or employment authorization. See 8 C.F.R. § 2-74a.2(b)(v)(A), (B) and (C). Complainant's novel theory of the scope of § 1324b(a)(6) is therefore misplaced.[32]

3. Conclusion

Complainant has not come forward with evidence from which a reasonable factfinder could conclude that Curtis, Mallet intentionally discriminated against her based upon her citizenship status either as a non-citizen or as a permanent resident. Nor has she established that Respondent's hiring policies discriminate against non-citizens. Rather, the record indicates that in addition to Ivan Chiang, a non-U.S. citizen hired as a permanent associate on September 4, 1991, Delaney Aff., Ex. GGGGG, three mid- to senior level associates of the firm are non-U.S. citizens. Delaney Aff., Ex. HHHHH at 3-4. Moreover, three non-U.S. citizens, after being employed by Respondent for five years or more since 1980, have been granted partnership in the firm. Id. at 2-3. Two of the three remain non-U.S. citizens while one has been a U.S. citizen as of approximately 1990, but at the time was a French citizen and permanent resident of the United States. Id. at 3. Complainant also has failed to establish that Respondent's hiring policies discriminate against permanent residents. Furthermore, Complainant has not shown that Respondent's asserted reason for not selecting her for an attorney position was untrue, illegitimate or a guise for discrimination.

Complainant argues that Curtis, Mallet's application of the term "foreign lawyer" to attorneys with a background similar to her's is

[32] The record is devoid of any evidence that Curtis, Mallet ever asked Complainant to produce any documentation showing that she is permitted to work in the United States.

"disparaging because it implies that those lawyers are not qualified to practice law in their jurisdiction of admission." C's Legal Mem. at 16. Yet Complainant has referred to herself as a "French lawyer" and as part of "a group of foreign lawyers." Complainant's Affidavit in Support of Her Request for Judicial Notice, filed December 30, 1992 [seventeen copies of the form letter which Complainant sent to seventeen A.B.A. accredited law schools inquiring into the number and percentage of permanent residents, international student visa holders and citizens enrolled in the school's J.D. program and the number and percentage of U.S. citizen foreign primary law degree holders enrolled in the school's LL.M. program]. Furthermore, even if the term "foreign lawyer" has negative connotations, I find that Curtis, Mallet's use of such term did not establish knowing and intentional discrimination based on citizenship status. See General Dynamics, OCAHO Case No. 91200044, at 59 ("It is not my role to second-guess an employer's business decision, but to look at evidence of discrimination.").

Because at a hearing, Complainant would bear the ultimate burden of persuasion, her burden at this stage was to present sufficient evidence to sustain a finding, by a preponderance of the evidence, that Respondent's failure to hire her was based on her citizenship status. As Complainant failed to carry that burden, there are no genuine issues of material fact and Respondent is entitled to a decision in its favor as a matter of law. See Smith v. American Express Co., 853 F.2d 151, 154-55 (2d Cir. 1988) (while summary judgment is ordinarily inappropriate where a plaintiff makes a prima facie showing of discrimination, it is appropriate where a plaintiff cannot sustain his burden of demonstrating that the employer's proffered explanation is pretextual). See also Dhillon, 3 OCAHO 497 (granting summary decision where complainant made prima facie case, but did not submit any evidence of citizenship status discrimination).

Accordingly, Respondent's motion for summary decision is granted, Complainant's cross-motion for summary decision is denied and the complaint in this case is dismissed.

D. Attorney's Fees

Respondent requests an award of attorneys' fees incurred in defending this proceeding. Section § 1324b(h) of Title 8 of the United States Code provides:

> In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other

> than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

See also 28 C.F.R. § 68.52(c)(2)(v). Thus, if I were to find that (1) Respondent is the "prevailing party" and (2) Complainant's arguments were without reasonable foundation in law and fact, I would have discretion to award Respondent attorneys' fees. If I decided to award such fees, Respondent's counsel would need to submit an itemized list of "actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. § 68.52(c)(2)(v). Because I find that both of the requisite factors were not present in this case, no inquiry into such expenses is necessary.

1. Respondent is the Prevailing Party

Respondent is clearly the prevailing party within the meaning of 8 U.S.C. § 1324b(h). See Banuelos v. Transportation Leasing Co., 1 OCAHO 255, at 17 (Oct. 24, 1990), appeal docketed, No. 90-567 (9th Cir. Dec. 21, 1990) (threshold requirement is that there is "a clearly identifiable 'prevailing party' and 'losing party'").

2. Kamal-Griffin's Claim Was Not Without Reasonable Foundation in Law and Fact

Several OCAHO cases have addressed the issue of whether to grant a prevailing Respondent attorney fees. See, e.g., Banuelos, 1 OCAHO 255, at 15-20 (in which I granted a Respondent attorney fees in a § 1324b case); Nguyen, 4 OCAHO 489, at 17-20 (ALJ denied such fees); Salazar-Castro, 3 OCAHO 406, at 11-14 (Feb. 26, 1991) (same). Title VII case law is also relevant to the issue of whether Kamal-Griffin's arguments were without reasonable foundation in law and fact because it applies a similar standard for determining attorneys' fees requests by prevailing Respondents. See 42 U.S.C. § 2000e-5(k). In Christiansburg, 434 U.S. 412 (1978), the Supreme Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Id. at 421.

The Second Circuit has acknowledged the Supreme Court's "double standard" with regard to fee awards in civil rights cases, which makes it "easier for plaintiffs than for defendants to recover fees to enable plaintiffs with meager resources to hire a lawyer to vindicate their rights" while at the same time "'protect[ing] defendants from burdensome litigation having no legal or factual basis.'" Greenberg v. Hilton

International Co., 870 F.2d 926, 939 (2d Cir. 1989) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978)). The Supreme Court has cautioned district courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. at 421. The Court has further stated that "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 421-22.

The rationale for awarding attorneys' fees to a prevailing plaintiff is that "[t]he prevailing plaintiff vindicates federal law and policy and any award made is against a violator of federal law." Sobel v. Yeshiva University, 619 F.Supp. 839, 843 (S.D.N.Y. 1985). This rationale does not apply to prevailing defendants. Christiansburg, 434 U.S. at 418-19. Attorney fees must be awarded to prevailing defendants in a circumspect manner to avoid "a chilling effect upon the prosecution of legitimate civil rights lawsuits" which are less than airtight. Sassower v. Field, 973 F.2d 75, 79 (2d Cir. 1992), cert. denied, 113 S.Ct. 1879 (1993).

I find that an award of attorney fees to Respondent is not warranted in the case at bar. The rejection letter which Respondent sent Com-plainant was suggestive of discrimination in violation of IRCA as it was subject to the implication that Complainant was not considered for an associate attorney position because of her citizenship status. Based on IRCA and Title VII case law, I cannot conclude that Complainant's claim was without foundation in law and fact. Accordingly, I deny Respondent's request for attorney fees.

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). Not later than 60 days after entry, Complainant may appeal this Decision and Order int 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. 8 U.S.C. § 1324b(i)(1).

SO ORDERED this 16th day of August, 1993 in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge