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. 92B00067
CAHILL GORDON &	)	
REINDEL	)	
Respondent.	)	
_____	)	

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

(October 19, 1993)

Appearances:

For the Complainant
Dalila Kamal-Griffin, Pro Se

For the Respondent
Charles A. Gilman
Silda Palerm
Cahill Gordon & Reindel

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

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I. *Statutory Background*

The Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, was enacted by Congress as amendment to the Immigration and Nationality Act of 1952, in an effort to control illegal immigration by eliminating job opportunities for illegal immigrants in the United States. H.R. Rep. No. 682, Part I, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5649-50. 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 8 U.S.C. § 1324a(b), the statute's employment verification system. The statute provides for civil and criminal penalties as well as injunctions. See 8 U.S.C. § 1324a(e)(4) and (5) (civil monetary penalties) and 8 U.S.C. § 1324a(f)(1) and (2) (criminal penalties and injunctions for pattern or practice violations).

Based on concern that the employer sanctions program might cause employers to refuse to hire individuals who look or sound foreign, including those who, although not citizens of the United States, are lawfully present in the country, Congress included antidiscrimination provisions within IRCA. "Joint Explanatory Statement of the Committee of Conference," H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87-88 (1986), reprinted in U.S. Code Cong. & Admin. News at 5653. See generally United States v. General Dynamics Corp., 3 OCAHO 517, at 1-2 (May 6, 1993), appeal docketed, No. 93-70581 (9th Cir. July 8, 1993). These provisions, enacted at section 102 of IRCA, 8 U.S.C. § 1324b, prohibit as an "unfair immigration-related employment prac-tice," 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). 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).

IRCA 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 exclu-sions who is lawfully admitted for permanent or temporary residence, or an individual admitted as a refugee or granted asylum. 8 U.S.C. §1324(a)(3). The statute 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, 8 U.S.C. §1324(a)(2)(B), thus supplementing 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.

Section 102 of 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 citi-zen, was denied employment as a seamstress because of the prospective employer's long-standing company policy to hire only U.S. citizens. The record in that case indicated that 96% of the employees at the division of the company in which the plaintiff applied were U.S. citizens of Mexican ancestry, as were 97% of the seamstresses in that division. Thus, the Court found that the defendant employer did not discriminate against individuals of Mexican national origin with regard to employment as seamstresses; Rather, the plaintiff had been discriminated against based on her citizenship status. Espinoza, 414 U.S. at 93.

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) (a 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) ¶ 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) ¶ 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"). In the decision, the Court used the term "alienage" interchangeably with "citizenship." Espinoza, 414 U.S. at 90, 92.

In the decision, 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." Id. 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." Equal Employment Opportunity Commission 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. H.R. Rep. No. 682, Part 1 at 70.[1]

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 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 for 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*

This case arises under §102 of IRCA, 8 U.S.C. §1324b. Before me are Respondent's motion and Complainant's crossmotion for summary decision, filed pursuant to 28 C.F.R. §68.38 (1993).[2] On March 25, 1992, Dalila Kamal-Griffin ("Kamal-Griffin" or "Complainant"), filed a complaint against the law firm of Cahill Gordon & Reindel ("Cahill Gordon" or "Respondent"), alleging that the firm's decision not to hire

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[1] 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) (stating that IRCA protects native born American citizens despite that fact that they were not the Act's primary target for protection.

[2] References to "28 C.F.R. §68" are to the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices, revised as of July 1, 1993.

her as an associate attorney was discriminatory because it was based on her citizenship status.[3] Complainant's Brief at 2. I have jurisdiction over this matter pursuant to 8 U.S.C. §1324b and 28 C.F.R. §68.28.

The factual highlights of this case are as follows: Kamal-Griffin sent an unsolicited letter expressing her interest in a position with Respondent and attached her resume, which 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 in addition to an LL.M. degree in comparative law from the University of San Diego School of Law ("USD Law School"). Kamal-Griffin's resume further indicated her status as a French citizen and permanent resident of the United States. A few weeks later, Respondent sent Complainant a rejection letter, dated June 21, 1991, stating that: "[a]lthough [Respondent] has in the past hired

[3] Also on March 25, 1992, Complainant filed a complaint against the law firm of Curtis, Mallet-Prevost, Colt and Mosle in which she made the same allegation. See Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, OCAHO Case No. 92B00068 (Final Decision and Order Granting Respondent's Motion For Summary Decision and Denying Complainant's Cross-Motion for Summary Decision; issued August 16, 1993). 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 Cahill Gordon and three other law firms (Curtis, Mallet-Prevost, Colt & Mosle; 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 on a temporary basis, there are no such positions available at this time." Kamal-Griffin Aff.1, Ex. 2C; Greene Aff., Ex. 4. After she was admitted to the New York bar, Complainant telephoned Respon-dent's Hiring Coordinator, Margaret Saling, and a conversation took place regarding Respondent's classification of Complainant as a "foreign lawyer" and the firm's hiring practices regarding individuals it classifies as such.

On November 13, 1991, Complainant initiated the proceedings in this case by filing a written charge with OSC, in which she alleged that Cahill Gordon'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 her 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 Cahill Gordon 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. 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 has moved for summary decision arguing that Kamal- Griffin's claim that Cahill knowingly and intentionally refused to hire Complainant because of her citizenship status has no basis in fact. Respondent argues that (1) Complainant cannot establish a prima facie case of employment discrimination because (a) she is not qualified for an associate attorney position with Respondent (Respondent's Supp. Brief at 29-30) and (b) she "applied for a position that was not available and indeed did not and does not exist at the Firm" (Respondent's Motion for Summary Decision at 6; Respondent's Supp. Brief at 30-31); and (2) even if Complainant has established a prima facie case, there is no evidence in the record to support the charge that Cahill Gordon engaged in citizenship-based discrimination as (a) the undisputed record shows that Cahill Gordon hires non-U.S. citizens and (b) Cahill Gordon's use of the term "foreign lawyer" is not a reference to citizenship status. Respondent further asserts that Kamal-Griffin has failed to "identify a single material issue of fact requiring a hearing." Respondent's Reply Brief at 2. 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 discriminatory intent and therefore need not make a prima facie case of discrimination; in the alternative, she argues that she has established a prima facie case and, apparently, that she has shown that "Respondent has intentionally and knowingly engaged in unfair

immigration-related employment practices with respect to Complainant, and to numerous other applicants who are similarly situated." Complainant's Supp. Brief at 2. Complainant further argues in opposition to Respondent's motion that a genuine triable 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 summary decision.

In support of its motion for summary decision, Respondent has submitted Respondent's Brief in Further Support of its Motion For Summary Decision ("Respondent's Brief") and an affidavit with exhibits of Cahill Gordon partner Charles A. Gilman ("Gilman Aff.1"). Respondent has also submitted a supplemental brief in further support of its summary decision motion and in opposition to Complainant's cross-motion ("Respondent's Supp. Brief"), and an appendix of affidavits in support thereof, including a second affidavit with exhibits of Charles A. Gilman ("Gilman Aff.2"), an affidavit with exhibits of Cahill Gordon partner Stephen A. Greene ("Greene Aff."), an affidavit of Cahill Gordon's Hiring Coordinator, Margaret B. Saling ("Saling Aff."), affidavits of Cahill Gordon associate attorneys Philippe Benedict ("Benedict Aff."), Jonathan R. Donnellan ("Donnellan Aff."), Charles L. Gildehaus ("Gildehaus Aff."), Jeffrey Goldman ("Goldman Aff."), Anne W. Salisbury ("Salisbury Aff."), Sahir C. Surmeli ("Surmeli Aff."), and affidavit of former associate Caroline Rule ("Rule Aff."), an affidavit with exhibits of Cahill Gordon's Hiring Coordinator, Margaret Saling ("Saling Aff."), an affidavit with exhibits of Cahill Gordon's Assistant Hiring Coordinator Joyce A. Hilly ("Hilly Aff."), and an affidavit with exhibits of Director of the New York University School of Law Placement Office Irene H. Dorzback ("Dorzback Aff."). Respondent has also submitted responses to interrogatories which I issued ("Respondent's Resp. to ALJ's Interrogatories.").

In opposition to Respondent's Motion For Summary Decision and in support of her cross-motion, Complainant has submitted a response to Respondent's Motion For Summary Decision ("Complainant's Brief"),

a 65-page brief in support of her cross-motion for summary decision ("Complainant's Supp. Brief"), a reply to Respondent's opposition to Complainant's cross-motion ("Complainant's Reply Brief") an affidavit of Kamal-Griffin with exhibits ("Kamal-Griffin Aff.1") and a second affidavit of Kamal-Griffin with exhibits ("Kamal-Griffin Aff.2") submitted in support of Complainant's Request For Judicial Notice and a statement of Hugh Chan, an accountant with a degree in economics ("Statement of Hugh Chan")also submitted in support of Complainant's Request For Judicial Notice. Complainant has also submitted responses to interrogatories which I issued ("Complainant's Resp. to ALJ's Interrogs.").[4]

In addition, at Complainant's request, a letter was submitted to this office on July 6, 1993 from Assistant Dean and Director of the Master of Comparative Law Program at USD Law School, Carrie R. Wilson ("Wilson Letter"). Having considered all of these submissions, 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.[5]

III. *Facts*

Complainant, Dalila Kamal-Griffin, is a native of Morocco, a French citizen, and a permanent resident of the United States. Complainant's Supp. Brief at 3; Kamal-Griffin Aff. ¶ 2. 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. Respondent's Brief at 3. In February of 1991, she was granted permanent resident status. Id.

[4] The disjointed nature of Complainant's Briefs combined with the fact that some of her assertions are unclear have made her arguments somewhat difficult to discern. In addition, throughout Complainant's pleadings, she has been inconsistent in her assertions as to the dates particular events occurred. Furthermore, Complainant has provided numerous incorrect or incomplete citations to cases, cited state cases, which this agency does not follow and inaccurately quoted cases. Moreover, she has submitted unmarked exhibits as well as exhibits that are out of order.

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

Cahill Gordon is a law firm based in New York, with additional offices in Washington, D.C. and Paris, France.[6] The firm's practice is divided into the following departments: litigation, corporate, antitrust and trade regulation, real estate and tax. Cahill Gordon has 59 partners and employs 134 associate attorneys and counsel. Greene Aff. ¶ 2. Respondent's hiring criteria for associates includes "'proven academic ability and recognized analytic and writing skills, as reflected in law review participation or other comparable activities.'" Complainant's Supp. Brief at 46 (quoting Respondent's Response to Interrogatories Number 5 of Complainant's First Set of Interrogatories). Respondent does "[l]ateral hiring . . . through legal recruiters and from judicial clerkships" and also "interviews candidates who write applying for a position with the firm ("write-ins") and whose academic credentials and performance meet the firm's standards . . .." Respondent's Resp. to Interrog. 7 of Complainant's First Set of Interrogatories., Doc. 9.

Kamal-Griffin sent an unsolicited letter to Respondent, dated May 31, 1991, in which she described herself as "a French speaking French educated lawyer" who was "confident that [her] natural worldliness and top-ranked European education [would] contribute positively to [Cahill Gordon], especially to [the firms'] expanding International Law department." Kamal-Griffin Aff., Ex. 2A; Gilman Aff.1, Ex. 1; Greene Aff. ¶ 21 and Ex. 3. Complainant further stated that she had dedicated herself to "a career in International Law," discussed her "superior educational background [which she] received from the University of Paris-Sorbonne," noted her knowledge "of international social etiquette," and expressed her "desire to be part of the international law community." Id. In her attached resume, Complainant indicated her status as a French citizen and permanent resident of the United States. Kamal-Griffin Aff., Ex. 2B; Gilman Aff.1, Ex. 1; Greene Aff., Ex. 3. 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 USD Law School in 1988. Kamal-Griffin Aff., Ex. 2B. 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

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

where she dealt with corporate and aviation law;[7] 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.[8] 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 its rejection of her written application that she was licensed to practice law in New York.

Cahill Gordon did not interview Kamal-Griffin. The firm sent Com-plainant a rejection letter, dated June 21, 1991, written by the firm's Hiring Coordinator, Margaret Saling, in which she stated that: "[a]lthough [Cahill Gordon] has in the past hired foreign lawyers on a temporary basis, there are no such positions available at this time." Kamal-Griffin Aff. 1, Ex. 2C; Gilman Aff.1, Ex. 2. On November 6, 1991, Complainant telephoned Saling, inter alia, to inquire as to the meaning of that statement. Complainant contends that her purpose was to reiterate her interest in a position with the firm, Kamal-Griffin Aff. ¶ 9, and that during the telephone conversation, the following occurred:

> Complainant summarized her qualifications . . .. [She] did not indicate . . . a desire to work in any particular department or to specialize in any filed (sic) of law. She merely stated that she was seeking a position as an associate with Respondent.
>
> Complainant was told by Ms. Saling the firm had no need for a French Lawyer at that time and that the firm had no need for someone who had a native fluency in French and who was proficient in French Law. Ms. Saling added that Complainant did not qualify for a position as an associate attorney with Respondent's firm because she was a "foreign lawyer". When Complainant asked that Ms. Saling define the term "foreign lawyer", Ms. Saling stated to plaintiff (sic) that "the firm hires occasionally foreigners who seek a training in an American Law firm before going back to their countries of

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

[8] Complainant asserts that since her graduation from USD Law School, she "[has] been seeking a position . . . anywhere in the United States: and "[a]ll [she] could obtain where (sic) unpaid, temporary clerkship positions with local Lost Angeles area law offices." Kamal-Griffin Aff. ¶ 5. Respondent points to inconsistencies in Complainant's assertions as to the length of time she worked for these two offices and whether either position was paid. See Respondent's Supp. Brief at 21 n.5. I conclude, however, that these inconsistencies are not material.

> origin." "These foreign lawyers are", added Ms. Saling, "only eligible for a temporary position with the firm." Ms. Saling also stated that no temporary position was available at the time of Complainant's employment application. Complainant told Ms. Saling that she was not looking for a temporary position, that she had no plans to leave the country in the foreseeable future, and that, being admitted to practice in New York, she did not consider herself a "foreign lawyer" except for the fact that she is not a citizen of the United States. Ms. Saling stated then that as far as the firm is concerned, Complainant is a "foreign lawyer" who would be eligible for a temporary position as a "foreign lawyer" at the most. Ms. Saling indicated also that, a foreign legal education is cause for systematic disqualification from permanent employment consideration by Respondent, regardless of the applicant's individual merits, achievements, U.S. residency and admission to practice in New York. Ms. Saling stated also that the firm had no plans to change its policy of excluding "foreign lawyers" from employment consideration.

Complainant's Supp. Brief at 7-8; Kamal-Griffin Aff.1 ¶¶ 9-13. See also Complainant's Brief at 3 (Complainant asserts that "Margaret Saling [stated that 'Cahill Gordon has] a strict policy not to hire foreign lawyers.'").

Ms. Saling admits that on or about November 6, 1991 she spoke "with someone who telephoned [the] office and identified herself as Dalila Kamal-Griffin." Saling Aff. ¶ 7. She asserts, however:

> I have never had any such conversation as described by Kamal-Griffin in my life. My conversation with Kamal-Griffin was as follows: She telephoned me and in a very agitated tone of voice referred to my letter to her and accused me of discriminating against her because of her non-U.S. citizenship. I told her that her citizenship was not even considered when we declined to interview her. I told her that my letter was not meant to be discriminatory and that the reference to her as a "foreign lawyer" pertained to her non-U.S. primary legal education. [Kamal-Griffin] did not appear to care what I said, and in fact seemed hysterical. She ended the conversation by saying she would sue the firm. The conversation ended. I have never made to anyone the statements attributed to me by Kamal-Griffin in paragraphs 6-13 of her affidavit. Her affidavit to the contrary is a lie.

Id.

Respondent asserts that Kamal-Griffin's failure to refer to this alleged conversation in her charge form filed with OSC, see Gilman Aff.2., Ex. 5, or "in any of [her] federal complaints" supports Respon-dent's contention that Complainant's version of the telephone conversation is false. Respondent's Supp. Brief at 31 n.10. Kamal-Griffin asserts that "[s]omething more substantial than what [Saling] recounts must have been said during [their] telephone conversation which lasted approximately ten minutes." Complainant's Reply Brief at 4 (citing Ex. 1 [Complainant's telephone bill]).[9]

[9] The disputed contents of the telephone conversation will be resolved in my findings.

Around the time of Respondent's written rejection of Kamal-Griffin's application and the above telephone conversation, Cahill Gordon hired several individuals as associates "[m]ost of [whom] . . . were hired out of law school and had not [yet] sat for
the bar examination." Complainant's Supp. Brief at 56.

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

A. Legal Standards for Summary Decision

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 resi-dence, 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. Westendorf v. Brown & Root, 3 OCAHO 477, at 12 (Dec. 2, 1992); see 8 U.S.C. § 1324b(a)(1)(B), (a)(2)(A). Based on Respondent's statement in its firm brochure, written in March of 1991, that its lawyers "number over 260," and the affidavit of Stephen A. Greene, in which he stated that "[a]s of April 15, 1993, Cahill Gordon ha[d] 59 partners and employ[ed] 134 associate attorneys and counsel," Greene Aff., ¶ 2, I find that on June 21, 1991, the date of the alleged discriminatory act, Respondent employed over three employees. Greene Aff., Ex. 2. Thus, Cahill Gordon is subject to IRCA's prohibition against citizenship status discrimination.

C. The Alleged Unfair Immigration-Related Employment Practice

1. Disparate Treatment Theory

Claims of discrimination brought under IRCA must be proven by a"disparate treatment" theory.[10] 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);[11] Supplemen-

[10] 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 fail 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, 421 U.S. 324, 335-36 n.15 (1977)). Under 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.

[11] "Although a Presidential signing statement fails outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment." Williamson v. Aurorama, 1 OCAHO 174, at 6 (May 16, 1990); accord United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (Presidential signing statements are significant in illuminating congressional intent where the Executive Branch has

(continued...)

tary 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 order to prevail on an IRCA claim, a complainant must establish "knowing and intentional discrimination" on the part of the employer. 8 U.S.C. § 1324b(a)(1), (3); 28 C.F.R. § 44.200(a)(2). See General Dynamics, 3 OCAHO 517, at 39; cf. United States Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.'") (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).[12]

In view of the common language and common purpose of Title VII and IRCA, the analysis developed under Title VII for proving intentional discrimination is applied to cases arising under IRCA. See, e.g., General Dynamics, 3 OCAHO 517; 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. Mesa Airlines, 1 OCAHO 74, appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991). Similarly, the Age Discrimination in Employment Act ("ADEA") has provided guidance to cases interpreting§ 1324b of IRCA. General Dynamics, 3 OCAHO 517, at 27 (citations omitted). See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (with reference to the ADEA and Title VII, the Supreme Court has ruled that interpretations of one apply with equal force to the other).

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

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[11](...continued)

participated in negotiating the compromise legislation).

[12] The regulations implementing 8 U.S.C. § 1324b state in pertinent part:

It is an unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or engage in a pattern of [sic] practice of knowing and intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring. . .of the individuals for employment. . . because of such individual's citizenship status.

28 C.F.R. § 44.200(a)(2).

to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1). As I have stated previously:

> At issue is whether the discriminatory act is deliberate, not whether the violation of the law is deliberate or the result of an employer's invidious purpose or hostile motive. A complaining party, however, will not prevail on a disparate treatment claim where the evidence shows the employer was aware that a given policy would lead to adverse consequences for a given group, if there is insufficient evidence of discriminatory intent.

General Dynamics, 3 OCAHO 517, at 39-40 (citations omitted).

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 on a Title VII claim 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."[13] 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.

The framework for allocating the burdens and order of presentation of proof in a Title VII disparate treatment case in the absence of direct evidence was established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), refined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), and recently clarified in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). In order to establish a disparate treatment claim through indirect evidence, the plaintiff first has the burden of proving a prima facie

[13] 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).

case of discrimination by the preponderance of the evidence. Hicks, 113 S.Ct. at 2746-47; Burdine, 450 U.S. 248, 252-53. 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 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 plaintiff's establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the plaintiff, and shifts to the defendant the burden "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254; Hicks, 113 S.Ct. at 2747. Once the defendant offers such evidence, the presumption of discrimination drops from the case and the plaintiff has the ultimate burden of proving that the defendant's asserted reasons were a pretext for intentional discrimination. Hicks, 113 S.Ct. at 2747-48.

The plaintiff may carry this burden "`either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (quoting Burdine, 450 U.S. at 256). The Court in Hicks, however, clarified that the district court's rejection of the defendant's asserted reasons permits, but does not compel a finding of intentional discrimination. 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. Hicks, 113 S.Ct. at 2749. See Saulpaugh v. Monroe Community Hospital, __ F.3d __, 1993 WL 328805, *5 (2d Cir. Aug. 27, 1993) ("[A] Title VII plaintiff does not necessarily meet its burden of persuasion by convincing the fact finder that the employer's non-discriminatory reason is not credible; rather, the trier of fact must find that the plaintiff has proven its explanation of discriminatory intent by a fair preponderance of the evidence.").

The Supreme Court has explained that proof of the four requirements set forth in McDonnell Douglas creates a prima facie showing of illegal motive because "it eliminates the most common

nondiscriminatory reasons for the plaintiff's rejection." Burdine, 450 U.S. at 254. The Court has stated that the 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.

"The method suggested in McDonnell Douglas for pursuing [the disparate 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)). Accord Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1980), cert. denied, 452 U.S. 940.

For example, a broad-based policy of employment discrimination may establish a prima facie case of individual discrimination. Teamsters, 431 U.S. at 359; cf. General Dynamics, 3 OCAHO 517, at 43 ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.") (quoting Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977)). The plaintiff must show that there was a pattern or practice of disparate treatment and that it was based on the discriminatory factor alleged. General Dynamics, 3 OCAHO 517 at 43 (citing Teamsters, 431 U.S. at 334. The plaintiff has to establish by a preponderance of the evidence that the alleged discrimination "was the company's standard operating procedure -- the regular rather that the unusual practice." Bazemore v. Friday, 478 U.S. 385, 396 (1986) quoting Teamsters, 431 U.S. at 336. A policy or a "pattern or practice" cannot be inferred from isolated or sporadic discriminatory acts. Teamsters, 431 U.S. at 336.

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 (2d Cir. 1985) while implicitly recognizing that a sufficiently probative statistical disparity can do so. Lopez, 930 F.2d at 161 n.2. In hiring cases, "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 case who are] 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. Where there are reasonable grounds to infer that an individual hiring decision was made in accordance with a discriminatory policy, the employer must come forward with evidence dispelling that inference." Teamsters, 431 U.S. at 359. Where a discriminatory policy has been established, the employer is entitled to prove that the plaintiff was not injured because he or she would not have been hired in any event. Id. at 369 n.53; cf. Mt. Healthy School Dist. Board of Education v. Doyle, 429 U.S. 274, 285-87 (1977).

2. Case Analysis

a. Complainant Has Failed to Establish a Prima Facie Case

Complainant has attempted to make a prima facie case of discrimination by establishing that Respondent has a hiring criterion that discriminates based on citizenship status. Kamal-Griffin asserts that Respondent made its decision not to hire her pursuant to the firm's alleged policy of excluding from consideration for permanent associate positions individuals who obtained their primary legal education outside the United States, or, in the alternative, individuals who obtained their primary legal education in a non-common law country. Complainant objects to Respondent's hiring policy, asserting that once an individual is licensed to practice law in New York, he or she should be considered on an equal footing with individuals who have received their J.D. degree in the United States. She further asserts that she was more qualified than several of the selected candidates.

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

Complainant contends that the disparate impact on non-citizens of Respondent's alleged American J.D. degree requirement for associate attorneysestablishesaprima case of discrimination. Complainant's Supp. Brief at 37.[14] In support, Complainant has submitted a survey

[14] Complainant has relied in part, inappropriately, on several constitutional law cases in which the Supreme Court struck down state ordinances as discriminatory under the

(continued...)

she conducted of the percentages of U.S. citizens and non-citizens in the population of American Bar Association ("ABA") accredited law schools. Complainant asserts that she sent surveys to 50 such schools throughout the United States, Complainant's Supp. Brief at 16, seeking the number of permanent residents, "international students (i.e., non-citizens who are enrolled in [the school's J.D.] program while holding an international student visa)" as well as the total number of students enrolled in the school's J.D. program. Kamal-Griffin Aff.2, Ex. a-p [Copies of the answered surveys returned to Complainant by the sixteen schools which responded]. Kamal-Griffin also asked how many LL.M. programs the school offers and the number of individuals enrolled in any of the LL.M. programs who received their primary legal training outside the United States. Id. In addition, Complainant asked the number of U.S. citizens who received their primary legal training outside the United States who were currently enrolled in the school's J.D. or LL.M. program. Id.

Respondent contends that Kamal-Griffin's argument is misplaced in view of the "clearly stated position of the Department of Justice ("the Department") that IRCA does not apply to facially neutral policies or practices which are alleged to have a disparate impact on non-citizens. 52 Fed. Reg. 37402, 37403 (1987)." Respondent's Brief at 4. Respon-dent further contends that "Complainant is asserting a disparate- impact theory that is simply not authorized by IRCA." Id. It is Respondent's arguments, however, which are misplaced. Respondent is correct that IRCA "prohibits intentional discrimination rather than neutral conduct with an unintended disparate impact." 52 Fed. Reg. 37402-01. The Department, however, in supplemental information to its rules and regulations regarding unfair immigration related employment practices, has indicated that "facially neutral policies, such as 'English-only' rules, lengthy residence requirements, or a hierarchy of preferred documents for employee verification can be challenged under the disparate treatment standard of proof as well as the disparate impact standard. Id. The Department stated that "[t]he intent standard makes illegal facially neutral policies which are intended to discriminate on prohibited bases and have that effect." Id. The Department further stated that "a facially neutral policy neutrally

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[14](...continued)

Fourteenth Amendment to the United States Constitution to support her argument that "when the disparate impact is so dramatic as it is in the case at hand, discriminatory intent is established by the mere disparate impact of a policy, ordinance or statute upon a specific class of impact of a policy, ordinance or statute upon a specific class of persons." Complainant's Supp. Brief at 18-19; see Id. At 20-25.

applied, but adopted for the purpose of discriminating on a prohibited basis and having that effect, is similarly prohibited." Id.[15]

The supplemental information provides an example:

> [i]f an employer who has been in business for several years and has unsuccessfully obtained satisfactory employees without the use of an "English-only" rule, adopts such a rule after November 6, 1986, . . . and if the adoption of that rule falls with disproportionate impact on a particular citizenship status group or national origin group, the Special Counsel is well justified under the intent standard in pursuing an investigation to seek an explanation for the adoption of such a rule.

52 Fed. Reg. 37402-01.

Kamal-Griffin has submitted a statement of Hugh Chan, an accoun-tant with a degree in economics, who expressed his opinions of Com-plainant's survey. Chan asserts that Complainant represented to him that she randomly selected 50 ABA approved law schools out of the 177 ABA approved law schools in the United States, for a total of 28%; that she mailed the survey to those 50 schools; and that she received answers from 16 of them, representing 9% of the total number of ABA approved law schools. Statement of Hugh Chan at 1-2. Chan asserts that based on Complainant's representations and the law schools' responses, he concludes that (1) the average percentage of the resident aliens in J.D. programs is 0.87% and therefore, greater than 99% of the students in the J.D. programs are U.S. citizens; (2) the average percentage of international students is 1.01% and therefore almost 99% of the students in the J.D. programs are not international students; (3) an average of 94% of all LL.M. students are international students; and (4) 99.91% of all U.S. citizens in the J.D. and LL.M. programs do not hold a foreign primary law degree. Id.

Even assuming, arguendo, that Complainant's survey and Chan's opinion regarding it are worthy of credence and that the sixteen schools which responded to the survey are representative of the 177

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[15] Complainant incorrectly asserts that a showing of the employer's mere knowledge of or disregard for the consequences of its actions is sufficient to establish an IRCA violation. See Complainant's Brief at 5-6; Complainant's Supp. Brief at 18, 25-26, 56-57, 63. Complainant relies on Transworld Airlines, Inc. V. Thurston, 469 U.S. 111 (1985), for the proposition that "a violation of the [ADEA] would be `willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Id. At 126 (internal quotation marks and ellipsis omitted). The Supreme Court came to this conclusion, however, based on its analysis of § 7(b) of the ADEA, which provides for liquidated damages in the case of a "willful" violation. As section 102 of IRCA, 8 U.S.C. § 1324b contains no similar provision, Complainant's reliance on Thurston is misplaced.

ABA approved law schools, I would agree with Complainant's contentions that her survey "shows that over 99% of the students pursuing J.D. degrees in [ABA approved law schools] are United States citizens," and that over 90% of the students enrolled in [ABA approved] LL.M. programs are not citizens of the United States. Complainant's Supp. Brief at 16. I would not agree with Complainant's contentions that her survey indicates that "almost every single foreign law graduate is either a foreigner (non-U.S.) or a naturalized citizen" and that "the percentage of United States citizens who have received their J.D. degree abroad is infinitesimal." Id. I find, however, that Complainant's survey results are not relevant to her case as Cahill Gordon does not exclude from consideration for associate positions applicants who did not obtain their primary law degree from an ABA approved law school.[16]

It is apparent that Kamal-Griffin based her argument that Respondent requires its attorneys to have a J.D. degree from a U.S. law school on Margaret Saling's explanation to Kamal-Griffin that "the reference [in the rejection letter] to [Complainant] as a 'foreign lawyer' pertained to her non-U.S. primary legal education," Saling Aff. ¶ 7. Complainant's argument, however, has no basis in fact as Cahill Gordon in recent years has hired six individuals whose primary legal education was obtained outside the United States as permanent associates:

[16] Even if Complainant had established that Cahill Gordon had a requirement of an American J.D. degree, she failed to provide the ratio of citizens to non-citizens hired by the firm as permanent associates. See Coser, 587 F.Supp. at 584 (to evaluate plaintiff's 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 ration in the relevant labor force; cf. Coopersmith v. Roudebush, 10 Empl. Prac. Cas. (CCH) para. 10,354 (D.C.Cir. 1975) (disparate impact case in which female attorney job applicants who had recent legal experience had a disproportionate impact on women applicants).

Name	Situs of Legal Education	Employment at Cahill Gordon
Sandra Kinet	Univ. of Nottingham, Eng.	1977-1981
Richard A. Mahfood	London University, Eng.	1979-1990
Andrew I. Koven	Dalhousie, Canada	1986-1991
William M. Levine	Manitoba, Canada	1989-1991
Silda Palerm	Univ. of Puerto Rico, P.R.FN	1989-present

Greene Aff. ¶ 17.[17] I therefore find, based on the record, that Respondent does not require its associate attorneys to have an American J.D. degree.

ii. Respondent's Requirement For Permanent Associate Posi-tions of a Primary Legal Education in a Common Law System of Jurisprudence Does Not Discriminate Based on Citizenship Status

A. Respondent Has an Unwritten RequirementFor its Permanent Associate Attorneys to Have a Primary Legal Education in a Common Law System of Jurisprudence

1. Respondent Uses the Term "Foreign Lawyer" to Refer to an Individual Whose Primary Legal Education is in a Non-Commonlaw System of Jurisprudence

Respondent asserts that "[t]he reference in Ms. Saling's letter to 'foreign lawyers' was not a reference to Ms. Kamal-Griffin's national origin or citizenship status, but rather to the situs of her principal legal education." Respondent's Supp. Brief at 36 (citing Green Aff. at ¶ 25); Saling Aff. at ¶ 6. More specifically, Cahill Gordon asserts that "[a]s used by Respondent, the phrase 'foreign lawyer' is intended to signify an individual whose principal legal education and training has

[17] The University of Puerto Rico School of Law is one of the 177 law schools accredited by the American Bar Association. See "A Review of Legal Education in the United States: Fall 1992" (American Bar Association: 1993) (hereinafter "ABA Review") at pp. 1, 53.

taken place outside of the United States, generally in a non-Anglo-American common law system of jurisprudence." Respondent's Resp. to ALJ's Interrogatory No. 5 (citing Greene Aff. ¶ 25; Saling Aff. ¶ 6); see Respondent's Supp. Brief at 39 (quoting Gilman Aff.2, Ex. 15 [statement that Cahill Gordon uses the term "foreign lawyer" to describe the same group of individuals for whom the University of Michigan School of Law exclusively designed the Master's in Comparative Law degree.]).

On August 13, 1993, per Complainant's request and pursuant to 28 C.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.

Relying on the officially noticed definitions, as well as 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), 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."Complainant's Supp. Brief at 10. Complainant further 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. at 11. Complainant contends that if Respondent had intended by its use of

the term "foreign lawyer" to refer to her academic background, 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." Complainant's Supp. Brief at 11. She thus asserts that the "logical conclusion" is that Respondent's use of the term "foreign lawyer" to describe Complainant "refer[s] only to her lack of United States citizenship." Id.; see Complainant's Brief at 7-8 (Complainant asserts that Respondent's reference to her as a "foreign lawyer" "can only refer to her citizenship status since Complainant had passed the New York State Bar examination, thereby committing to a career in New York."); Complainant's Supp. Brief at 15 (Complainant contends that "the only true and lawful interpretation of the term 'foreign lawyer' as this term was used by Respondent in its letter of rejection, is: 'lawyer who is not a citizen of the United States', with respect to Complainant.").

Complainant next argues that "[f]aced with so much uncertainty as to what Respondent meant by 'foreign lawyer' with respect to Com-plainant," certain "rules of interpretation have to apply with full force." Complainant's Supp. Brief at 11-12. She contends that "[t]he general rules of interpretation warrant a finding that in Complainant's case, the term 'foreign lawyer' mean (sic), on its face, lawyer who is not a citizen of the United States." Id. at 11. Kamal-Griffin cites several state cases for the proposition that where language is unambiguous, a party's intent must be gathered from that language alone. She further asserts 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 these terms must refer to her citizenship status. Complainant's Supp. Brief at 12. Complainant, again 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 13.

Nothing in the officially noticed definition of "foreign" specifically refers to citizenship. Complainant is foreign-born, foreign-educated and a citizen of a foreign country. As the term "foreign lawyer" is ambiguous, Complainant's argument that "the only true and lawful interpretation of the term . . . as . . . used by Respondent in its letter of rejection [to Complainant] . . . is: 'lawyer who is not a citizen of the United States' . . .", Complainant's Supp. Brief at 15, is misplaced. Furthermore, Complainant's reliance on state cases is inappropriate as this agency follows federal, not state court decisions. Complainant's arguments are also misplaced in that an employer is not liable for unlawful discrimination merely because it has made a statement which could be interpreted as discriminatory. I agree with

Complainant 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." Complainant's Supp. Brief at 11. (emphasis omitted). Complainant's even admits, however, that there is "much uncertainty as to what Respondent meant by 'foreign lawyer' with respect to Complainant," Complainant's Supp. Brief at 11-12. I therefore find that Complainant has failed to establish that Respondent's reference to Complainant as a "foreign lawyer' with respect to Complainant," Complainant's Supp. Brief at 11-12. I therefore find that Complainant has failed to establish that Respondent's reference to Complainant as a "foreign lawyer" are credible, I find that Cahill Gordon uses the term "foreign lawyer" to refer to an individual whose primary legal education is in a non-common law system of jurisprudence. I thus find that Respondent referred to Kamal-Griffin as a "foreign lawyer" based on the fact that she obtained her primary law degree in French law, which is based on the civil law system of jurisprudence.

2. Respondent Requires its Permanent Associates to Have a Primary Legal Education in a Common Law System of Jurisprudence

The rejection letter at issue stated that "[a]l though [Cahill Gordon] has in the past hired foreign lawyers on a temporary basis, there are no such positions available at this time." Kamal-Griffin Aff.1, Ex. 2C; Gilman Aff., Ex. 2. Respondent asserts that the firm had "no need for anyone with Complainant's qualifications, training and interest." Respondent's Brief at 4-5 (footnote omitted). Yet the rejection letter implies that which Complainant has asserted from the beginning of these proceedings -- that individuals whom Respondent characterizes as "foreign lawyers" are not eligible for full-time associate positions with Cahill Gordon, regardless of their qualifications and interest. See, e.g. Complainant's Brief at 3 (Kamal-Griffin asserts that "Margaret Saling [stated that 'Cahill Gordon has] a strict policy not to hire foreign layers.'"); id. At 15 (Complainant asserts that "Respondent. . .reject[s] as `foreign lawyers' non-United States citizens who are admitted to practice in New York, hold their initial law degrees from their countries of origin and have committed to put their extraordinary skills at the service of the United States"); Complainant's Supp. Brief at 39 (Complainant asserts that "Respondent stated in plain english the reason for its rejection of Complainant[; her] fate was determined from the outset and without

regards to her personal achievements, or other neutral considerations.").

Respondent has not admitted that it requires its permanent asso-ciates to have a primary legal education in a common law system of jurisprudence, although Respondent has asserted that "the core of [Kamal-Griffin's] legal education, training and intellectual focus is in legal systems other than that of the United States..." Respondent's Supp. Brief at 13. In a brief filed approximately fourteen months after the complaint in this case was filed, Respondent for the first time asserted that "Kamal-Griffin's emphasis on her foreign and interna-tional background and experience strongly suggested that she was seeking a position in a foreign lawyer internship program practicing International Law." Respondent's Supp. Brief at 30 citing Dorzback Aff. ¶¶ 4-6; cf. Kamal-Griffin v. Curtis, Mallet at 26 n.30 (the law firm hired for temporary attorney positions holders of foreign law degrees "who maintain permanent residence abroad, who accept [] employment with [the firm] for a limited period of time and with the expectation that they will return to practice law in their countries of origin."). The affidavit on which Respondent relies for support is that of Irene Dorzback, Director of the New York University School of Law Placement Office. I find Respondent's reliance misplaced as Ms. Dorzback merely stated that in her opinion, "it was entirely reasonable for Cahill Gordon & Reindel to understand that Kamal-Griffin's interest was in a position practicing international. . ." Dorzback Aff. ¶ 4. As Complainant had passed the New York bar examination, was not licensed to practice law in France and had not mentioned interest in returning to France to practice, I do not find Respondent's assertions credible. Respondent has not come forward with any credible evidence to refute the implication that the firm requires its permanent associates to have a primary legal education in a common law system of jurisprudence; Respondent's Hiring Coordinator merely asserted that "[she has] never made to anyone the statements attributed to [her] by Kamal-Griffin in paragraphs 6-13 of her affidavit." Saling Aff. ¶ 7. I therefore find that Complainant has established by a preponderance of the evidence that Respondent has such a requirement.

B. Cahill Gordon's Requirement of a Primary Legal Education in a Common Law Legal System Does Not Discriminate Based On Citizenship Status

If Complainant can show that Respondent's requirement of primary legal training in a common law system of jurisprudence was intended to discriminate based on citizenship status, e.g., was not neutrally applied, and has that effect or was neutrally

applied, but was adopted for the purpose of discriminating based on citizenship status and has that effect, she will have established that this requirement discriminates based on citizenship status. See 52 Fed. Reg. 37,402.

1. The Requirement is Neutrally Applied

Complainant asserts that in contrast to Respondent's treatment of individuals whom it categorizes as "foreign lawyers," Cahill Gordon "invariably . . . will consider U.S. citizen applicants, based on neutral and fair criteria." Complainant's Supp. Brief at 22; see Complainant's Reply Brief at 7 (Kamal-Griffin asserts that Cahill Gordon "has a policy where a class of people is rejected outright while the U.S. citizen applicants are considered on their individual merits.") Respondent asserts, however, that its use of the term "foreign lawyer" is not intended to be a reference to citizenship status and would apply to any American citizen who had received the same legal education and training as . . . Kamal-Griffin." Respondent's Resp. to ALJ's Interrogatories No. 5 (citation omitted). As Complainant has failed to provide any factual basis for her assertion that the firm applies a different standard to non-citizens that to citizens, I find that Cahill Gordon's requirement of a primary law degree in a common law system of jurisprudence is neutrally applied.

2. Respondent Neither Intends For the Requirement to Discriminate Based On Citizenship Status Nor Adopted It For That Purpose

a. Respondent's Incorrect Use of the Term "Foreign Lawyer" Does Not Establish Discriminatory Intent

Respondent applies its requirement of a primary legal education in a common law system of jurisprudence regardless of whether the applicant obtained a masters degree in law from an ABA approved law school and is a member of the New York bar. Complainant asserts that "[she] realized and accepted the fact that as long as she was not admitted to practice in the United States, ... she would legitimately be considered a 'foreign lawyer'." Complainant's Supp. Brief at 5. She contends, however, that because she is licensed to practice law in New York, "[she] is not a foreign lawyer." Complainant's Supp. Brief at 3. I find, based on the officially noticed definitions of the words "foreign", "lawyer", and "attorney" that characterization of an individual as a "foreign lawyer" should refer to the jurisdiction in which the individual is licensed to practice law. Complainant, who was not licensed to

practice law at the time she received the rejection letter at issue and who was licensed to practice law only in New York at the time of her telephone conversation with Respondent's Hiring Coordinator was not a "foreign lawyer" as that term is legally defined. Thus, Respondent's reference to her as such was incorrect.[18] Respondent's incorrect use of the term "foreign lawyer," however, does not indicate that Respondent's decision not to hire Kamal-Griffin was based on her citizenship status.

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[18] Respondent contends that "[w]ithin the legal community, courts, educators and regulators commonly use the term 'foreign lawyer' to refer to persons whose primary legal education was obtained outside the United States, regardless of that person's nationality or citizenship." Respondent's Supp. Brief at 36 citing Dorzback Aff. ¶ 6 (assertion of the Director of the New York University School of Law's Placement Office that in her experience, "the terms 'foreign lawyer" and 'foreign attorney' are commonly used by law schools, law students and law firms to refer to attorneys whose legal education was obtained outside the United States regardless of the person's citizenship."). Among the examples Respondent has provided are some state court decisions which use the term "foreign lawyer" with differing definitions, an article in a legal publication regarding foreign-trained lawyers with the headline "Bar Exam Rules Tightened for Foreign Attorneys" (Respondent's Supp. Brief at 37 (citing Gilman Aff., Ex. 13) ["New York Law Journal" article; January 25, 1990]; and the Associate Dean of Columbia University School of Law's interchangeable use of the term "foreign-trained lawyers" with the term "foreign LL.M. candidates" in a letter (Gilman Aff., Ex. 14) In addition, Respondent notes that even Kamal-Griffin has used the term "foreign lawyer" to describe herself. See Respondent's Supp. Brief at 38. Subsequent to her admission to the New York bar, she referred to herself as a "foreign lawyer" and asked for information regarding "foreign lawyers." See Kamal-Griffin Aff.2, Ex. a-p (in the introduction to her survey, Complainant stated that she is "a French lawyer admitted to practice in New York" and asserted that "[w]e (a group of foreign lawyers are in the process of creating as association of foreign lawyers in America.")

As Complainant has noted, "neither the New York State Bar Association, nor the Supreme Court of the State of New York use, or have condoned the use of such a term to refer to attorneys with a background similar to Complainant (sic)." Complainant's Supp. Brief at 13; see Kamal-Griffin Aff.1, Ex. 3A-B. Furthermore, in response to Complainant's survey, dated September 15, 1992, which she sent to several law schools requesting information regarding enrollment in their J.D. and LL.M. programs, almost all of the law schools used a term other than "foreign lawyers" to characterized individuals who received their primary legal education outside the United States. The terms used included "individuals with foreign law degrees" (University of Connecticut School of Law), "graduates of foreign degrees from foreign countries" (Northwestern University School of Law). One school (Cornell University School of Law), however, did use the term "foreign lawyers". I thus find that the term "foreign lawyer" is not commonly used in the legal community to describe the situs of an individual's legal education or, as Respondent used it, to describe the type of legal system in which an individual obtained his or her primary legal education.

b. Citizenship Status Does Not Determine the Type of Legal System in Which an Individual Chooses to Obtain A Legal Education

Complainant asserts that "it is only because [she] was born a French citizen, and not a U.S. citizen, that she was schooled in her country of citizenship." Complainant's Supp. Brief at 16. For support, Kamal-Griffin relies on League of United Latin American Citizens v. Pasadena Independent School District, 662 F.Supp. 443 (1987). In that case, the school district, on February 18, 1987, terminated four female custodial workers who were undocumented aliens for the sole reason that each had put an invalid social security number on her job application form. IRCA, enacted three months prior, provided that undocumented aliens who could demonstrate that they had lived in the United States since prior to January 1, 1982, were protected under IRCA and were eligible for citizenship by proceeding through a multi-step legalization process under § 245A of IRCA. Individuals could not apply for legalization, however, until May 5, 1987 and "the mechanism for qualified undocumented aliens to obtain valid social security numbers ha[d] yet to be established." Pasadena, 662 F.Supp 443, 446. The Grandfather Clause of IRCA, § 101 (a)(3), permitted continued employment of the individual plaintiffs. Id. at 445.

The Pasadena court stated that:

> the proposed application for legalization requires that candidates list inter alia their aliases, social security numbers used and employers. It seems only logician that the Immigration and Naturalization Service will seek to verify this information with the employers of undocumented workers. Such verification will inform employers of falsifications that these workers have made, and, in the case of [the Pasadena Independent School District], the result will be that the workers will be automatically terminated. Such revelations will in many cases lead to termination. Clearly, Congress did not intend to force qualified aliens to make the choice between exercising this right and risking termination of their employment.

Id. at 448 (internal citation omitted)."

In order to give IRCA force and effect, the court held that the indivi-dual plaintiffs were entitled to relief. Id. at 451. Kamal-Griffin asserts "the District Court stressed that it was only because of their citizenship status that plaintiffs had not been able to secure valid social security numbers; as a result, their dismissal was caused by their lack of U.S. citizenship." Id. The instant case is clearly distinguishable as the type of legal system in which an individual has obtained his or her primary legal education is a choice unrelated to

citizenship status, unlike an individual's eligibility for a social security card, which is determined by immigration status. See 20 C.F.R. § 422.107 ("An applicant for an original Social Security number card must submit documentary evidence which the Secretary of Health and Human Services regards as convincing evidence of age, U.S. citizenship or alien status and true identity.")[19]

c. Respondent's Failure to Include Citizenship Status in its Firm Brochure, Listing the Types of Discrimination It Prohibits Does Not Establish Discriminatory Motive

Complainant contends that Respondent's failure to include "citizenship" in its Employment Policies Guidelines (Revised 8/90) as a protected characteristic under federal antidiscrimination laws proves that Cahill Gordon intentionally discriminated against her. Com-plainant's Brief at 13; see id., Ex 9 at 1 [Respondent's Employment Policies Guidelines, which state that "[t]he Firm is committed to a policy of equal employment opportunity and, in conformity with federal, state and local law, prohibits discrimination on account of race, color, sex, religion, national origin or sexual orientation with respect to any and all terms and conditions of employment]. I do not

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[19] The code of Federal Regulations provides that Social Security numbers are assigned to:

> (a) Persons with evidence of age, identity, and U.S. citizenship or alien status. A Social Security number may be assigned to an applicant who meets the evidence requirements in § 422.107, if the applicant is:
>
> (1) a U.S. citizen;
>
> (2) an alien lawfully admitted to the United States for permanent residence or under other authority of law permitting him or her to work in the United States (see § 422.105 regarding the presumption of authority of nonimmigrant alien to work; or
>
> (3) An alien who is legally in the United States but not under authority of law permitting him or her to engage in employment, but only for a nonwork purpose (see § 422.107(e)(1) and (2)).
>
> (b) Persons with other evidence of alien status. . .

20 C.F.R. § 422.104.

find Respondent's failure to publish a commitment to a workplace free of citizenship status discrimination to indicate discriminatory motive; rather, as IRCA had been in effect since 1986, I find that Respondent was remiss in its failure to add this ground for discrimination to its brochure.

d. That Respondent Hires Non-Citizens Whose Primary Legal Education is in A Common Law System But Does Not Hire Non-Citizens Whose Primary Legal Education is Not in a Common Law System Does Not Establish Citizenship Status Discrimination

It is undisputed that Respondent hires non-citizens for permanent associate positions. Between 1977 and the time Complainant filed her charge with OSC in November, 1991, Cahill Gordon hired five non-U.S. citizens as permanent associates and one as a summer associate who was later hired as a permanent associate. Greene Aff. ¶ 18. Two were British citizens at the time of their employment, and one each was a citizen of Jamaica, Zimbabwe, Switzerland, and Turkey. Id. Two of the six are currently employed in Cahill Gordon's New York office: (1) Philippe Benedict, a Swiss citizen and permanent resident of the United States, hired in 1990, who has a B.S. degree from Adelphi University and a J.D. degree from New York University School of Law (Benedict Aff. ¶¶ 1-3); and (2) Sahir C. Surmeli, a Turkish citizen at the time he was hired, who has a B.A. from Johns Hopkins University, a J.D. from the University of Chicago School of Law and an M.B.A. from the University of Chicago School of Business. Surmeli Aff. ¶¶ 1-4. [20] She asserts, however, that Respondent's policy of hiring permanent residents "entirely schooled in the United States, while excluding those who were educated in their countries of citizenship [who] have brought their foreign background with them"

[20] Since 1992, Respondent has hired two non-citizens as summer associates. One will return to Cahill Gordon as a permanent associate after completion of a judicial clerkship; the other has an outstanding offer to return upon completion of her judicial clerkship. Greene Aff. ¶ 18. Since these two individuals were hired subsequent to the initiation of the proceedings in this case, that Respondent hired them is not probative of its hiring of non-citizens.

discriminates based on citizenship status. Complainant's Reply Brief at 7.[21]

Complainant contends that:

> To conclude that Respondent does not discriminate on the basis of citizenship status because it has hired a protected individual who was entirely schooled in the United States and who has lost as much of his foreign appearance as possible, is tantamount to saying that Respondent could never be found to have discriminated against African-Americans because it intentionally chose to hire exceptionally unusual African-American (sic) who are white, who have Caucasian features and who do not look like African-American (sic), while discriminating against those who are more representative of their group. In other words, the deliberate hiring of immigrants who 'look American', speak english with an American accent, have American mannerism (sic), were entirely educated in the United States and have other American characteristics is just as invidious and violative of IRCA as the calculated and admitted refusal to hire an individual because of his citizenship status

Complainant's Supp. Brief at 17.

Complainant's argument is misplaced as appearance, mannerism and accent have been legally defined as characteristics of national origin, not citizenship status. See 29 C.F.R. § 1606.1 (1988). (The EEOC's guidelines limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physician, cultural or linguistics characteristics of a national origin group.") 29 C.F.R. § 1606.1 (1988); Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, OCAHO Case No. 92B00068, at 25 (in which I stated that "an individual's accent implicates his or her national origin, " not citizenship status).

e. It is Not an ALJ's Role to Second-Guess an Employer's Business Decision

Kamal-Griffin does not assert that her license to practice law in the State of New York entitles her to an associate attorney position with Cahill Gordon. See Salazar-Castro v. Cincinnati Public Schools, at (ALJ held that "[a] diploma and a license, without more, "did not mean that the complainant automatically qualified for the teaching position

[21] Kamal-Griffin contends that non-citizens who have been entirely educated in the United States "represent [a very small percentage] of the non-U.S. citizens applicants." Complainant's Reply Brief at 8. She has varied in her assertions as to the percentage of non-citizens who have received all of their education in the United States, ranging from "no more than 1% of the class of applicants to which Complainant belongs," Complainant's Supp. Brief at 62, to "perhaps no more than 3%. Id. Complainant, however, provides no support for her assertions.

at issue as "certification requirements service as a qualifications floor, rather that a qualifications ceiling."). Rather, she argues that her membership in the New York State bar entitles her to be considered for the position.

Complainant contends that Cahill Gordon's policy of not considering individuals who received their primary legal education in a non-com-mon law country is illogical, Complainant's Supp. Brief at 21, as an individuals' education in a different legal system does not imply that he or she does not meet Respondent's stated hiring criteria of "proven academic ability and recognized analytic and writing skills, as reflected in law review participation or other comparable activities.'" Complainant's Supp. Brief at 46 (quoting Respondent's Response to Interrogatory No. 5 of Complainant's First Set of Interrogatories). Complainant asserts that the fact that:

> lawyers like her "are well-versed in two systems of law . . . does not mean that their ability to practice American law is lessened by their double qualifications! Respon-dent's argument that the training cannot be the same because the law in the United States is not the same as a foreign country's law is extremely weak in view of the fact that one's admission to practice, upon passing a Bar exam, testifies to the fact that he/she had received an equivalent training; also, not prejudicial speculation on a foreign educated professional's ability to perform is permissible when the applicant had met the State's admission to practice requirements.

Complainant's Supp. Brief at 24; see id. at 45-46.[22]

Complainant asserts that "[n]othing better attests of (sic the excellency of an application's training that (sic) his passing successfully a foreign bar examination, on an equal footing with, and under the same conditions as other domestic law graduates." Complainant's Supp. Brief at 52; see Complainant's Reply Brief at 2. She contends that:

> [o]nce a highly skilled immigrant has been licensed to practice his profession, and once the state has recognized that the immigrant's foreign credentials are equivalent to credentials obtained in a U.S. institution, the immigrant should be considered on the same criteria as an American graduate: school ranking, grades, extra curricular (sic) activities personal achievements and other criteria should be the true measure of one's ability.

Complainant's Supp. Brief at 55; see id. at 55; Complainant's Reply Brief at 2.

[22] The state of New York permits individuals with a primary law degree from a non-common law country and a postgraduate degree from an ABA approved U.S. law school, to take the New York bar examination. "ABA Review" at 37.

Complainant asserts that Respondent's attitude demonstrates an improper motive, stating that "Respondent has turned Complainant (sic) unique training and talents into reasons why Complainant should no (sic) be hired. Clearly, only an improper motive could explain Respondent's attitude." Complainant's Brief at 10; see Complainant Suppo. Brief at 47 (Complainant asserts that "[i]t appears that Respondent had turned into a handicap what is an advantage to both the firm and the clients that the firm serves."). Kamal-Griffin asserts that she and other similarly situated attorneys "have qualifications that are vital in today's world, regardless of whether the clients to be served are involved in international business or not." Complainant's Supp. Brief at 43. She asserts that "[a]ny law firm of any size and any location will find it impossible to help its most important clients without being prepared to serve them in the international market place." Id. (quoting Kamal-Griffin Aff.1, Ex. 5["(New York] State Bar News," March 1993 at p.11 (internal quotation marks omitted)].

Complainant's arguments are not persuasive that Respondent's requirement discriminates based on citizenship status.[23] Compare Mesa Airlines, 1 OCAHO 74 (company policy of hiring only U.S. citizen pilots when available, constituted a "pattern or practice" of citizenship discrimination in violation of § 1324b). Cahill Gordon's decision to require its associate attorneys to have primary legal training in a common law system of jurisprudence indicates that Respondent had made a business decision that an individual who has primary legal training in a non-common law system of jurisprudence and and LL.M. degree from an ABA approved law school (which "usually involves a one-year program," "ABA Review" at 2,) cannot be as qualified for an associate attorney position with the firm as an individual who has a primary law degree which is generally a three-year degree) in the common law system of jurisprudence. It is not my prerogative to decide what best serves the interests of Cahill Gordon's clientele, but to look for evidence of citizenship status discrimination. See General Dymanics, 3 OCAHO 517, at 59 ("It is not my role to second-guess an employer's business decision, but to look at evidence of discrimi-nation."). As Complainant has failed to establish that Respondent's requirement for an associate attorney position of a primary legal education in a common law system of jurisprudence (1) was intended to discriminate based on citizenship and has that effect or (2) was

[23] Respondent's hiring policy, however, may have a disparate impact based on national origin. As I do not have jurisdiction over any claim of national origin discrimination in this case, see 8 U.S.C. §§ 1324b(a)(2)(A) and (B), 1324b(b)(2), however, it is for a district court to decide whether Respondent has unlawfully discriminated against Complainant based on her national origin.

adopted for that purpose and has that effect, she has failed to establish a prima facie case of discrimination. [24]

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

Complainant asserts that by classifying her as a "foreign lawyer," and thus rejecting her application outright, Respondent refused to honor (1) her license to practice law in the State of New York, and thus did not honor the "findings of the State of New York that Complainant is fit to practice law in that state (Complainant's Brief at 15; Complainant's Supp. Brief at 58); (2) her LL.M. degree from USD Law School, a degree which she asserts "evidences that Complainant possesses the requisite American legal training to practice law in New York," (Complainant's Brief at 15); and (3) her foreign credentials, which she asserts "almost invariable show the foreignness or alienage of an applicant." Complainant Supp. Brief at 58. Complainant asserts that Respondent's refusal to honor her license to practice law and/or her foreign credentials "may render [her] eligibility to reside in the United States, as it is embodied in a a 'green card', completely worthless." Complainant's Supp. Brief at 59. She thus asserts that "[a]s a result, refusing to honor one document amounts to refusing to honor the other." Id. Complainant thus contends that Respondent's refusal to honor these documents violates another of IRCA's antidiscrimination provisions, 8 U.S.C. § 1324b (a)(6). Complainant's Brief at 14-15; Complainant's Supp. Brief at 57-60. 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."

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

[24] Even assuming, arguendo, that I had found that Respondent's policy of not considering the applications of individuals who received their primary legal education in non-common law countries was discriminatory based on citizenship status, Respondent would be entitled to prove that Complainant had not been injured because she would not have been hired in any event. See, e.g., Teamsters, 431 U.S. at 369 n. 53; cf. Mt. Healthy, 429 U.:S. At 285-87. Respondent would have succeeded in doing so as I would have found Kamal-Griffin's credentials, including a lackluster academic record (e.g., a "C" average in the LL.M. program at USD Law School (Greene Aff. ¶ 23,, Gilman Aff, ¶ 2)) inferior to those of the selected associates. Compare Benedict Aff. ¶¶ 1-5; Donnellan Aff. ¶¶ 2-6; Gildehaus Aff. ¶¶ 2-7; Goldman Aff. ¶¶ 2-6; Salisbury Aff. ¶¶ Surmeli Aff. ¶¶ 1-5.

individuals in the United States." 8 C.F.R. § 274a.2(a). IRCA's employment verification requirements, 8 C.F.R. § 274a.2(b)(1). "Hire" is defined as "the actual commencement of employment of an employee for wages or other renumeration." 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 employment, neither a license to practice a profession nor an educational degree are included in the list of documents acceptable to establish identity or employment authoriza-tion See 8 C.F.R. § 274a.2(b)(v)(A), (B) and (C). Therefore, Com-plainant's theory of the scope of § 1324b(a)(6) is misplaced. Kamal-Griffin v. Curtis, Mallet, OCAHO Case No. 92B00068 at 32-33.[25]

c. Conclusion

Complainant has failed to establish that Cahill Gordon's hiring criteria for associate attorney positions of a primary legal education in a common law system of jurisprudence discriminates based on citizen-ship status. In addition, because she obtained her primary legal education in the civil law system, Complainant is unable to establish that she is qualified for an associate attorney position with Respon-dent. Complainant thus has failed to establish a prima facie case. 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 Respon-dent's decision not 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.

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 defen-ding this proceeding. Section §1324b(h) of Title 8 of the United States Code provides:

[25] Furthermore, the record is devoid of any evidence that Cahill Gordon ever asked Complainant to produce any documentation showing that she is permitted to work in the United States.

> In any complaint respecting an unfair immigration related employment practice, and 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 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.

i. Cahill Gordon 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) (threshold requirement is that there is "a clearly identifiable 'prevailing party' and 'losing party'"), aff'd in unpublished decision, Banuelos v. United States Dep't of Justice, No. 91-70005, (9th Cir. Aug. 3, 1993); reh'g denied (9th Cir. Oct. 4. 1993).

ii Kamal-Griffin's Claim Was Not Without Reasonable Founda-tion 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 burden-

some 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 understand-able 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).

Respondent contends that:

> Complainant's frivolous charges against Cahill, and perhaps other law firms, are apparently the result of Complainant's frustration at having unsuccessfully applied to over one thousand law firms and corporations the United States. Rather than recognizing that it is her undifferentiated form letter and her resume which generated her inability to obtain an offer of employment in a highly competitive market, Ms. Kamal-Griffin charges a nationwide conspiracy against her. Complainant's lack of success in market place does not provide any legal basis for her complaint.

Respondent's Brief at 2.

Respondent further contends that "[t]his proceeding has been abusive and without any reasonable foundation in law or fact." Respondent asserts that my decision in Banuelos "is particularly on point." Respondent's Supp. Brief at 49. In that case, after granting the respondent's Motion for Summary Decision, I determined that the respondent was "entitled to attorneys' fees in order to achieve one of two purposes of section 1324b(h) -- to deter meritless civil rights suits and to protect defendants from burdensome litigation having no factual or legal basis." Id. at 42-43. This case is distinguishable, however, as in Banuelos, the complainant had attempted to bring the same claim repeatedly even though other courts and administrative tribunals found that it lacked merit. In contrast, this is the only

decision that has been rendered by any court or administrative tribunal regarding Complainant's claim of discrimination in Cahill Gordon's failure to select her for an associate position. See supra footnote 4. Furthermore, this is the only forum in which Complainant could bring a claim of citizenship status discrimination.

In the instant case, Respondent has failed to show that Kamal-Griffin's claim was frivolous, intended to harass or without a basis in fact and law. I find that Complainant's claim has basis in fact and law and in view of (1) the fact that Respondent's rejection letter to Complainant in effect stated that because of her status as a "foreign lawyer" she was not qualified for a permanent associate position, (2) the ambiguous nature of the term "foreign lawyer," (3) Respondent's incorrect use of such term to describe Complainant, and (4) the fact that the rejection letter was subject to the interpretation that Kamal- Griffin's citizenship status motivated Respondent's decision not to hire her. See Nguyen, 3 OCAHO 489, at 20 (ALJ denied the respondent's motion for attorney fees despite the complainant's failure to have established a prima facie case). Furthermore, in view of the suspect nature of the change in Respondent's version of the class of people it defines as "foreign lawyers" (from those whose primary legal education was obtained outside the United States to those who primary legal education was in a non-common law system of jurisprudence), and Respondent's failure to directly address whether the firm requires a primary legal education in a common law system of jurisprudence, I find that Respondent was justified in pursuing her claim. Thus, based on IRCA and Title VII case law, I find that an award of attorney fees to Respondent is not warranted in the case at bar. Accordingly, Respondent's request for attorney fees is denied.

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 in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. 8 U.S.C. § 1324b(i)(1).

SO ORDERED this 19th day of October, 1993 in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge