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

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| ADOLFO CRUZ DEGUZMAN, | ) | |
| Complainant, | ) | |
| | ) | |
| and | ) | 8 U.S.C. §1324b Proceeding |
| | ) | Case No. 93B00099 |
| FIRST AMERICAN BANK | ) | |
| CORPORATION, | ) | |
| Respondent. | ) | |
| | ) | |

FINAL DECISION AND ORDER
(December 13, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Adolfo C. DeGuzman, Complainant, pro se.
David O. Jones, for Respondent.

I. *Procedural Background*

This is a proceeding pursuant to section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. On February 17, 1993, Adolfo C. DeGuzman (DeGuzman or Complainant) filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). DeGuzman alleged national origin discrimination against First American Bank Corporation (First American or Respondent). On March 18, 1993, OSC issued a determination letter stating that OSC "does not have jurisdiction of your charge under the law because of the number of individuals employed by this employer." That letter advised Complainant that OSC would not be filing a complaint with an administrative law judge and that OSC had referred the charge to the Equal Employment Opportunity Commission (EEOC), for further consideration. DeGuzman was advised that he could file his complaint directly in the Office of the Chief Administrative Hearing Officer (OCAHO).

A charge on behalf of DeGuzman was filed with EEOC on April 22, 1993.

On May 10, 1993, DeGuzman filed a complaint in OCAHO. Complainant, born in the Philippines, is a permanent resident authorized to work in the United States. He claims that First American discriminated against him on the basis of national origin and citizenship status. In Item #7 on the preprinted OCAHO complaint form he indicates that he was discriminated against because of national origin. Item #8 is blank as to discrimination based on citizenship status. However, item #13 claims that Complainant was fired because of his citizenship status and national origin.

An individual cannot maintain an IRCA national origin discrimination claim if a national origin claim arising out of the same circumstances is filed with EEOC, unless the EEOC charge is dismissed as being outside the scope of Title VII. 8 U.S.C. §1324b(b)(2). Such a Title VII claim appears to be pending at EEOC.

Even absent an EEOC filing, an individual cannot maintain an IRCA national origin claim if there are more than fourteen employees on the employer's payroll. 8 U.S.C. §1324b(a)(2)(B).

In view of the prohibition against overlap with EEOC jurisdiction and the uncertainty of the basis for a citizenship status discrimination claim, by Order of Inquiry issued November 2, 1993, I directed the parties to file responses to certain questions set out in the order.

Complainant was to:

> Explain his understanding of the basis for his claim of national original discrimination;
> Explain his understanding of the basis for being fired because of citizenship status discrimination, and Describe the status of his EEOC charge.

Respondent was to:

> State the number of employees who worked for Respondent during the period of Complainant's employment, April 21, 1989 to January 2, 1993, and to provide the minimum number of employees on any date during that period.

Responses were to be sworn to as by affidavit, to include as attachments copies of documents in support, and to be the statements of individuals with personal knowledge of the facts stated. The order

provided that replies would be considered if filed not later than November 22, 1993.

On November 15, 1993, in response to the November 2 order, Respondent's senior vice president and secretary, David O. Jones (Jones), filed a letter-pleading dated November 8, 1993. Complainant has failed to make a filing or other response to the November 2 order.

Respondent's filing contains two enclosures:

(1) A July 28, 1993 letter to DeGuzman from the EEOC Chicago District Office advising that for internal management reasons, his charge against First American, EEOC No. 210931897, had been transferred to the EEOC San Francisco office. Respondent's November 8 transmittal undertakes that the EEOC July 28, 1993 letter is the most recent correspondence reflecting DeGuzman's EEOC claim against First American.

(2) A November 8, 1993 affidavit by Jones as to the number of employees during the period of Complainant's employment, April 21, 1989 to January 2, 1993:

> The number of full time, trainees, part time and seasonal employees on April 21, 1989 was 381. During the intervening period the respondent hired 516 individuals for a total number of employees of 897 who worked during the period in question. Our records further indicate the minimum number of employees at any given month end was 377 on April 30, 1989.

## II. *Discussion*

### A. National Origin Discrimination Claim Dismissed

I have no reason to doubt that the Jones affidavit accurately reflects the magnitude of First American's payroll during the relevant time period. Accordingly, I find that Respondent is not amenable to administrative law judge jurisdiction over a national origin discrimination claim. It is well established that First American employs more than fourteen individuals. National origin discrimination jurisdiction is limited under 8 U.S.C. §1324b. As has been held in a number of cases:

> jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees.

Holguin v. Dona Ana Fashions, OCAHO Case No. 93B00005 (12/1/93) (Order) at 3-4; Zolotarevsky v. U.S. Nuclear Regulatory Commission, OCAHO Case No. 93B00078 (9/24/93) at 4; Cortes v. Seminole County School Board, OCAHO Case No. 93B00038 (6/23/93); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 526 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4, quoting U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) at 11.

See also U.S. v. Huang, 1 OCAHO 288 (4/4/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Pioterek v. Scott Worldwide Food Service, OCAHO Case No. 92B00261 (6/9/93); Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

B. Citizenship Status Discrimination Claim Dismissed

Unlike the national origin discrimination claim, I clearly have jurisdiction over the citizenship status discrimination for which it is only necessary that the employer employ at least three individuals, with no ceiling as to the size of the payroll. However, Complainant's failure to respond to the November 2 order disables me from adjudicating his claim on the merits. Lack of a response to the judge's inquiry is a breach of the solemn responsibility which every litigant owes to the forum. Failure to adhere to judicial command frustrates the pursuit of justice.

Lack of response by a complainant to a judicial inquiry must be understood as an abandonment of the complaint. OCAHO rules of practice and procedure, copies of which accompanied the OCAHO notice of hearing addressed to the parties, so provide:

> (b) Dismissal--Abandonment by party. A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if:
>
> > (1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge;

28 C.F.R. §68.37(b)(1).

Compassion for Complainant's pro se status in the circumstances described must give way to the need for orderly and informed participation by the parties to an administrative adjudication. Failure to respond to the judge as directed is at odds with that participation.

Failure to adhere to explicit orders by the judge invites dismissal of the complaint, as having been abandoned. 28 C.F.R. §68.37(b)(1). Brooks v. Watts Window World, 3 OCAHO 570 (11/1/93); Castillo v. Hotel Casa Marina (Mariott), 3 OCAHO 508 (4/12/93); Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/92); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92).

III. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, and supporting documents filed by the parties. All motions and other requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that:

1. The national origin discrimination claim is dismissed as being outside the jurisdiction of OCAHO.

2. The citizenship status discrimination claim is dismissed as having been abandoned.

3. I find and conclude that Respondent has not engaged and is not engaging with respect to Complainant in the unfair immigration related employment practices alleged and within the jurisdiction of this Office, i.e., citizenship status discrimination. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. §-1324b(i).

**SO ORDERED**.

Dated and entered this 13th day of December, 1993.

MARVIN M. MORSE
Administrative Law Judge