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

RAMNIK M. TRIVEDI, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00205
NORTHROP CORPORATION AND DEPARTMENT OF DEFENSE, Respondents.	)	

ERRATA

In Trivedi v. Northrop, OCAHO Case No. 92B00205 (Amended Final Decision and Order Granting Respondents' Motions For Summary Decision; January 25, 1994), the following changes shall be made:

1. At page 14, line 5, "n.3" shall be amended to state "n.4."

2. At page 15, the second paragraph, the last sentence:

"The regulation was declared unconstitutional. Id. at 66-67." shall be amended to state "The regulation was then declared unconstitutional. Huynh v. Cheney, No. 87-3436, slip. op. (D.D.C. March 14, 1991)."

3. At page 15, note 16, the last sentence, beginning "One ALJ . . . " shall be deleted and replaced with

> An ALJ, prior and subsequent to publication of that memorandum, held that a federal agency cannot rely on the doctrine of sovereign immunity to preclude liability under § 1324b. See Roginsky v. Department of Defense, 3 OCAHO 426, at 6 (May 5, 1992)

(holding that DOD waived the sovereign immunity defense where application of the 5/10 year rule has adversely affected security clearance); Mir. v. Federal Bureau of Prisons, 3 OCAHO 510, at 10-11 (holding that the Federal Bureau of Prisons waived the sovereign immunity defense against complainant's claim that its refusal to hire him as a correctional officer was based on his citizenship status).

4. At page 19, the first full paragraph, line 8, the word "complaint" shall be changed to the work "charge."

5. At page 19, the first full paragraph, the last line, "P," shall be amended to read "P."

6. At page 19, third full paragraph, "CDFEF" shall be amended to read "CDFEH."

7. At page 19, third full paragraph, third line, "complaint" which appears twice shall be amended to read "charge."

8. At page 20, from the second line, stating:

Since IRCA requires that complaints alleging immigration-related employment practice be filed within 180 days of the occurrence of the alleged discrimination in July 1990, Trivedi's complaint was not timely filed. Since neither equitable estoppel nor waiver is applicable to the facts of this case, the complaint must be dismissed for Complainant's failure to file a timely complaint.

shall be amended to read

As IRCA required Trivedi's charged to be filed with OSC within 180 days of July 27, 1990, the date of occurrence of the alleged discrimination, Trivedi's charge was not timely filed. As neither equitable tolling nor waiver apply to the facts of this case, 8 U.S.C. § 1324b(d)(3) requires that the complaint be dismissed for Complainant's failure to file a timely charge.

SO ORDERED this 3rd day of February, 1994 at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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RAMNIK M. TRIVEDI, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00205
NORTHROP CORPORATION AND DEPARTMENT OF DEFENSE, Respondents.	)	

AMENDED FINAL DECISION AND ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION[1]

(January 25, 1994)

Appearances:

For the Complainant
Ramnik M. Trivedi, Pro Se

For the Respondents
Gail A. Vendeland, Esq.
Northrop Corporation

Pat Koepp, Esq.
Barry Sax, Esq.
U.S. Department of Defense

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

[1] This decision supersedes the Final Order & Decision Granting Respondent's Motion For Summary Decision, issued December 7, 1993.

I. *Statutory Background*

This case arises under § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b, as amended.[2] Congress enacted IRCA in an effort to control illegal immigration into the United States by eliminating job opportunities for "unauthorized aliens."[3] 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. Section 101 of IRCA, 8 U.S.C. § 1324a, thus authorizes civil and criminal penalties against employers who employ unauthorized aliens in the United States and authorizes civil penalties against employers who fail to comply with the statute's employment verification and record-keeping requirements.

Congress, out of concern that IRCA's 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, included antidiscrimination provisions within the statute. "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 practice," discrimination based on national origin or citizenship status "with respect to hiring, recruitment, referral for a fee, of [an] individual for employment or the discharging of the individual from employment." 8 U.S.C. § 1324b(a)(1)(A) and (B).

IRCA prohibits national origin discrimination against any individual, other than an unauthorized alien, and prohibits citizenship status discrimination against a "protected individual,"statutorily defined as a United States citizen or national, an alien, subject to certain exclusions who is lawfully admitted for permanent or temporary residence, or an individual admitted as a refugee or granted asylum. 8 U.S.C. § 1324b(a)(3). The statute prohibits citizenship status

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[2] IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952, was amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[3] An "unauthorized alien" is an alien who, with respect to employment at a particular time, is either (1) not lawfully admitted for permanent residence or (2) not authorized to be so employed by the Immigration and Nationality Act or by the Attorney General. 8 C.F.R. § 274a.1 (1993).

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. § 1324b(a)(2)(A) and (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. 414 U.S. at 95. 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); 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"). The Court, however, 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.

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.[4]

Individuals alleging discriminatory treatment on the basis of national origin or citizenship status must file a charge with the U.S. Department of Justice, Office of the Special Counsel for Immigration-Related Unfair

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[4] See General Dynamics, 3 OCAHO 517, at 20 (asserting that the individuals against whom the respondent allegedly discriminated, as U.S. citizens, were protected against citizenship status discrimination); United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 9 (July 2, 1991) (stating that IRCA protects native-born American citizens despite the fact that they were not the Act's primary target for protection); 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).

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 such a complaint 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*

On April 20, 1992, Ramnik M. Trivedi, pro se Complainant, filed a charge with OSC alleging that Northrop Corporation ("Northrop") and the Department of Defense ("DOD"), Respondents herein, had discriminated against him based on his national origin and citizenship status, in violation of IRCA, 8 U.S.C. § 1324b. More specifically, Complainant asserts in his charge:

> I have been discriminated by the Northrop and U.S. Air Force because of my national origin and having a relative in India. For this reason I lost my job, seniority, retirement benefits, family life and virtually lost everything.
>
> Northrop:
>
> The reason lack of work given by the Northrop for my termination was not true because there was not lack of work in my former department at that time. In fact (sic) my fellow engineers were working overtime for the same job I was appointed, then terminated[.]
>
> U.S. Air Force:
>
> The U.S. Air Force stated that my access was denied because my relatives were residing in India. I think that this reason is not properly justified because in my department engineers working on this program are naturalized citizens as I am. They have relatives residing in the non democratic countries. Still the Air Force have granted their access and they are working on this program.

Trivedi's Charge Form (attached to Complaint), para. 9.

On July 23, 1992, OSC sent Complainant a letter advising him that it had completed its investigation of his charge and had determined that it would not file a complaint on his behalf because (1) his

allegations of discrimination were not timely filed with their office and (2) the discrimination fits into an exception under 8 U.S.C. § 1324b(a)(2)(C), where citizenship status discrimination is required by government contract or regulation. Because each of the Respondents employed more than 14 employees, OSC referred Trivedi's charge to the Equal Employment Opportunity Commission ("EEOC"). OSC also advised Trivedi of his right to file a complaint with an administrative law judge.

On September 21, 1992, Trivedi filed the complaint in this case with the Office of the Chief Administrative Hearing Officer ("OCAHO"), alleging that both Northrop and DOD discriminated against him based on his national origin, in violation of 8 U.S.C. § 1324b(d)(2). Complainant asserts "[b]ecause of my national origins (sic), Dept. of Defense (sic) denied my access clearance. Northrop has terminated me." In his complaint, Trivedi reiterates the assertions made in his charge, although he fails to allege citizenship status discrimination in his complaint as he has in his charge. Nonetheless, it is clear from subsequent pleadings that Complainant intended to allege citizenship status discrimination in his complaint. See Complainant's Response to Government's Response to Applicant's Pleading and Renewed Motion for Summary Decision at para. 4 (asserting that this cause of action is based on "discrimination against naturalized citizen"); Affidavit of Ramnik Trivedi ("Trivedi Affidavit") at para. 3 ("I state that my complain (sic) is for national origin and naturalized citizenship discrimination."). Complaints filed by pro se parties are to be liberally construed. Halim v. Accu-Labs Research, Inc., 3 OCAHO 474, at 10 (Nov. 16, 1992) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); Tovar v. A.P. Esteve Sales, Inc., 3 OCAHO 458, at 4 (Sept. 21, 1992)). I therefore construe the complaint to allege citizenship status discrimination as well as national origin discrimination.[5] Complainant also alleges in subsequent pleadings that his constitutional rights to due process of law have been violated.

A letter dated October 14, 1992 from Northrop's counsel to the office of Administrative Law Judge ("ALJ") Joseph E. McGuire, who was originally assigned this case, discussed the failure of the Chief Administrative Hearing Officer to perfect service on the proper parties

[5] More specifically, I construe the complaint to allege that DOD's special access criteria are invalid because they unlawfully discriminate based on citizenship status and national origin and that Northrop's discharge of Complainant was based on national origin and citizenship status discrimination.

to the complaint. Specifically, Northrop received a copy of a Notice of Hearing on the complaint and the complaint itself, but no Notice of Acknowledgment. In addition, there was not proper service on DOD.

On or about October 20, 1992, ALJ McGuire directed Northrop to file its answer within thirty days after service of the complaint. On October 30, 1992, Northrop filed its answer and a motion for summary decision. In its answer, Northrop denies that it discriminated against Complainant and states that only DOD may grant security clearances and special access to designated programs. Northrop admits that it hired Complainant on July 2, 1984 as an engineering specialist. Northrop asserts that because DOD would not grant Complainant clearance to a Special Access Required program, Complainant was laid off because of a lack of work on July 27, 1990. Northrop raises several affirmative defenses, including that: (1) the complaint fails to state a claim upon which relief can be granted; (2) the complaint is time-barred since the charge on which it is based was not filed within 180 days of the alleged discriminatory act; (3) each and every allegation contained in the complaint is barred by the exception set forth in 8 U.S.C. § 1324b(a)(2)(C), in that special access was a requirement of the DOD contract on which Complainant worked; (4) each and every allegation in the complaint is vague and ambiguous; and (5) Northrop is not a proper party to the charge in that it does not establish special access criteria or grant or deny access.

On November 6, 1992, DOD filed its answer to the complaint, in which it denies that it unlawfully discriminated against Complainant because of his national origin or, more specifically, that it refused him security clearance based on his national origin.[6] DOD asserts that Complainant's security clearance was withdrawn in July 1990 because in view of his termination by Northrop, it was no longer necessary. DOD also raises several affirmative defenses, including that: (1) OCAHO does not have jurisdiction over this matter; (2) the complaint fails to state a claim upon which relief can be granted; (3) the complaint "is barred by the exception to liability set forth in 8 U.S.C. § 1324b(a)(2)(C), in that the facts, as alleged by Complainant, do not indicate any action by DOD against Complainant's security clearance but, rather, ineligibility under specific program access criteria required by the DOD contract"; and (4) the complaint was not timely filed since

[6] Complainant, however, alleges that both DOD and Northrop discriminated against him based on his national origin by denying him special access clearance, not security clearance.

the underlying charge on which the complaint is based was not filed within 180 days of the alleged discriminatory conduct.

On November 9, 1992, DOD filed a motion for summary decision. On November 20, 1992, this case was reassigned to me pursuant to 8 U.S.C. § 1103(a) and 28 C.F.R. § 68.29. After reviewing the Respondents' motions for summary decision, I requested and obtained additional factual information from all the parties through interrogatories.

III. *Facts*

Trivedi was born in Rajkot, India and entered the United States on June 27, 1969 as a permanent resident alien. He became a naturalized U.S. citizen on August 5, 1977. He was granted a secret level clearance by the Defense Industrial Security Clearance Office ("DISCO") in Columbus, Ohio in 1979. Northrop hired Trivedi on July 2, 1984 as an engineering specialist in Northrop's Aircraft Division ("NAD") at El Segunda, California.

Northrop is a large corporation employing in excess of fourteen employees. Northrop provides a variety of services and products to the United States Air Force ("USAF"), an agency of DOD, pursuant to contracts governed by the Armed Forces Procurement Act of 1947, 10 U.S.C. §§ 2301-2314, as implemented by the Federal Acquisition Regulations. In April 1986, the U.S. Government, on behalf of the U.S. Army, Navy and Air Force, entered into a contract on the Tri-Service Standoff Attack Missile ("TSSAM") with Northrop. The TSSAM program was established by DOD as a Special Access Required program and continues to be classified as such.[7]

One of the criteria for access to a Special Access Required program is that the individual and members of his or her immediate family, including spouse and siblings, are U.S. citizens. Northrop's Response to ALJ's Interrogatories, filed May 28, 1993, Ex. A at 1, para. 1 ["Personnel Security Criteria" at 131, para. 1]. Furthermore, an application to access an individual who has an immediate family

[7] "Special Access Programs are characterized by and adjudicated against more restrictive standards than the normal clearance standards of a Secret or Top Secret security clearance." Letter, dated June 5, 1990, from USAF Lt. Col. Richard Gammon to Sen. Pete Wilson attached to Government's Response to Applicant's Pleading and Renewed Motion for Summary Decision, filed April 6, 1993 ("Gammon Letter").

member who is not a U.S. citizen, or who resides or has resided in a foreign country must be accompanied by a letter of compelling need explaining in detail why an exception to the criteria is required. Id. In its role as prime contractor for TSSAM, Northrop agreed to the terms and conditions established by DOD for special access.

In February 1988, Northrop's Security Operations Manager, Branson Tate, sought to obtain program access for Complainant to the TSSAM program at NAD. Northrop made numerous efforts over a two-year period to obtain special access for Trivedi, submitting several letters of compelling need to DOD. Each time such a request was made, however, DOD advised Northrop that Trivedi was ineligible for access to TSSAM because he had foreign relatives presently living in India and/or his wife and mother were not U.S. citizens.[8] During this two-year period, Northrop supplied Trivedi with unclassified engineering work.

The U.S. Air Force considered the justification for a waiver of security standards and determined that the justification was not sufficiently strong to constitute a compelling need. As any doubt about whether an application for access should be approved must be resolved in favor of national security, Trivedi was denied access. Gammon Letter.

From January 15, 1990 to March 9, 1990, Complainant had contact with the DOD's Defense Investigative Service ("DIS") to determine why he was denied clearance, but DIS would not release any information to him. During this time, Complainant contacted Northrop's Industrial Relations Office and Northrop's Personnel Department at Northrop's Pico Rivera plant about transferring to another job. Trivedi's secret level clearance was voluntarily terminated on July 18, 1990. Northrop terminated Trivedi from his job in Hawthorne, California on July 27,

[8] Northrop originally sought TSSAM program access for Trivedi in early 1988 while he was employed at Northrop's Newbury Park site. Trivedi was denied access. He then became an employee of NAD and his DOD clearance was upgraded in March 1989. Another attempt to obtain access was submitted in May 1989 and again Trivedi was denied access. Northrop submitted another letter of compelling need on Trivedi's behalf in October 1989 and submitted additional information regarding his siblings and spouse in November 1989. The DOD again denied him access. One last attempt was made in December 1989 for access but this request was also denied. See Branson Tate Affidavit and attached exhibits.

1990. Northrop's Answer, para. 11.[9] Complainant was not offered any other job.[10] Northrop asserts that because the work remaining in Trivedi's organization had become classified and Trivedi had been deemed ineligible for program access by DOD, Northrop laid off Trivedi for lack of work because he was ineligible to perform the classified work his organization was assigned. See Affidavit of Nelson W. Gabert.[11]

IV. *Discussion*

A. Guidelines for Deciding Motion for Summary Decision

The rules of practice and procedure for administrative hearings in cases involving allegations of unfair immigration-related employment practices provide for the entry of summary decision "if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact." 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules

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[9] While Trivedi asserts that he was fired on "20/7/90" in the blank in the section 1324b form complaint in which the complainant is to indicate the "day/month/year" on which he was fired, see Compl. para. 13(c), I consider this to be a typographical error as Trivedi indicated in paragraph 20 of the Complaint that he wants back pay from "2/27/90" which I interpret as another typographical error where the intent was to write 7/27/90. Furthermore, in a "Chronology of Events" filed by Complainant on January 25, 1993, at para. 16, he states that on July 27, 1990, "Northrop terminated me."

[10] On March 23, 1990, Complainant wrote a letter to then-U.S. Senator Pete Wilson, requesting assistance in resolving his problems with DOD and Northrop. On June 5, 1990, Complainant received a reply from Wilson's office, stating that Trivedi's special access clearance had been denied because he had relatives in a foreign country. Attached to the letter from Wilson's office was a copy of the Gammon Letter, stating that "Mr. Trivedi was seeking access to a 'Special Access Program'" and that "the denial of access does not affect Mr. Trivedi's security clearance." The letter further states that "the Air Force has not made a judgment concerning Mr. Trivedi's honesty, loyalty, integrity or fitness to hold a security clearance." In addition, the letter specifies that "one of the access criteria is that all members of his family must be U.S. citizens."

[11] During the period from December 1990 to March 1991, Complainant contacted several lawyers about filing a lawsuit against Respondents, but decided it was too costly. In July 1991, Trivedi contacted the State of California's Department of Fair Employment and Housing ("CDFEH") concerning his termination and received a response around July 22, 1991, which provided Complainant with information about his right to file a private lawsuit and information about several federal agencies that might be able to provide him with further assistance. In early August 1991, Complainant contacted his Congressman and requested assistance in obtaining special access clearance and reinstatement of his job with Northrop. On November 12, 1991, Complainant received a negative reply from his Congressman's office. See Trivedi Affidavit, dated May 18, 1993, and his chronology of events, dated January 23, 1993.

of Civil Procedure, which provides for the entry of summary judgment in federal district court cases. Consequently, federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and the standards for determining whether summary decision under § 68.38 is appropriate in proceedings before this agency. Egal v. Sears Roebuck and Co., 3 OCAHO 442, at 9 (July 23, 1992); Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (June 1, 1992).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587. Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The only material facts in dispute in this case are the reasons Northrop fired Complainant. As the record overwhelmingly supports Northrop's explanation as to why it fired Complainant, this case can be resolved without an evidentiary hearing.

B. Case Analysis

Each Respondent argues in its motion for summary decision that the complaint against it should be dismissed because Trivedi's charge of national origin discrimination was not timely filed with OSC and because the discrimination fits into the 8 U.S.C. § 1324b(a)(2)(c) exception to discrimination prohibited by IRCA. DOD also argues that the complaint should be dismissed because it was not the "employer" ("person or entity") who discharged Complainant and it has not waived immunity from suit under the doctrine of sovereign immunity.[12] Moreover, DOD argues that OCAHO does not have jurisdiction over national origin claims against an employer who employs in excess of fourteen employees on the date of the alleged act of discrimination and argues that both Northrop and DOD employed in excess of fourteen employees on the date Complainant was discharged. For the reasons

[12] Although an ALJ has held that federal agencies are not covered by the doctrine of sovereign immunity against discrimination suits filed under 8 U.S.C. § 1324b, see Roginsky v. Department of Defense, 3 OCAHO 426 (May 5, 1992), I need not determine that issue in this case because DOD is not a proper party Respondent.

stated herein, Respondents' motions for summary decision will be granted.

1. DoD is Not a Proper Respondent

The complaint in this case alleges that both DOD and Northrop committed an unfair immigration-related employment practice with respect to Complainant's discharge. DOD, however, argues that IRCA's antidiscrimination provisions apply only to an employer that discharges an employee, not to the federal agency that contracts with the employer to manufacture a product that requires its employees to obtain "Special Access". DOD further argues that since it was not Complainant's employer and did not discharge Complainant, it cannot be charged with violating IRCA. I agree.

IRCA's prohibition of discrimination based on national origin or citizenship status states in pertinent part that:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in § 1324a(h)(3) of this section) with respect to the hiring . . . or discharging of the individual from employment--
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(l)(A) and (B).

The term "employer" is not defined in 8 U.S.C. § 1324b or the regulations promulgated to implement that section. The regulations promulgated to implement § 1324a, however, define "employer" as

> a person or entity, including anyone acting directly or indirectly in the interest thereof, who engages the services of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor and not the person or entity using the contract labor.

8 C.F.R. § 274a.1(g)

The implementing regulations for § 1324a define "independent contractor" as "includ[ing] individuals or entities who carry on independent businesses, contract to do a piece of work according to their own means and methods, and are subject to control only as to

results." 8 C.F.R. § 274a.l(j). This regulation states that whether a person or entity is an independent contractor is to be determined on a case-by-case basis, and depends on whether the person or entity:

> supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.

The facts of this case clearly show that Northrop was an independent contractor acting under a specific contract with DOD to manufacture the TSSAM. Northrop, as an independent contractor, is clearly the employer of its contract workers for purposes of § 1324a. DOD is clearly the user of contract labor and thus has no obligation to comply with § 1324a with regard to its use of contract workers, like Complainant.

With regard to coverage under IRCA's antidiscrimination provisions, however, I have previously held that a user of contract labor is covered by the prohibitions of § 1324b where it is a "joint employer" of the charging party. See General Dynamics Corp., 3 OCAHO 517 at 24-30. Under the "joint employer" theory, the "totality of the circumstances" are analyzed, with the "greatest emphasis on 'the hiring party's right to control the manner and means by which the work is accomplished.'" Frankel v. Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993) (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989)). In General Dynamics, the respondent:

> (1) selected its contract labor workers supplied pursuant to contracts with technical service firms; (2) controlled the work hours of its contract laborers by assigning them to shifts, (3) exclusively supervised their work and (4) retained authority to terminate them if their work was unsatisfactory and to request a replacement from the technical service firm.

General Dynamics, 3 OCAHO 517, at 30.

I therefore held that "[b]ased on Respondent's exclusive control over the means and manner of performance of its jig and fixture contract labor workers," General Dynamics, along with the technical service firms that employed those workers, was their joint employer. Id. Thus, General Dynamics' selection of its jig and fixture contract labor workers constituted "hiring . . . for employment" under § 1324b. In the instant case, however, the record contains no evidence indicating that DOD was a joint employer of Complainant. Thus, DOD did not discharge Complainant from employment under 8 U.S.C. § 1324b(a)(1).

As DOD was not Complainant's employer, it was not properly joined in the complaint as a respondent. The complaint against DOD therefore is dismissed.[13]

2. I Lack Jurisdiction Over Complainant's National Origin Allegation

The jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is limited to claims against employers employing between four and fourteen employees, 8 U.S.C. § 1324b(a)(2)(A) and (B), thus supplementing Title VII's coverage of national origin discrimination by employers of fifteen or more employees. See Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (April 30, 1993) at 3-4 (and additional precedent cited therein). Since it is undisputed from the record that Northrop employed more than fourteen individuals on the date that Complainant was discharged, I do not have jurisdiction over Trivedi's allegation of national origin discrimination. Accordingly, the national origin portion of Complainant's claim for is dismissed.

3. Complainant's Citizenship Discrimination Allegation

a. Jurisdiction

Dismissal of Complainant's national origin allegations does not affect "the vitality of a citizenship discrimination claim." Mir v. Federal Bureau of Prisons, 3 OCAHO 510, at 12 (April 20, 1993). In mixed claim cases in which the employer employs over 14 employees, even though the ALJ lacks jurisdiction over the national origin allegation, the ALJ retains jurisdiction over the citizenship portion of the

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[13] Complainant, in his pleading, filed May 11, 1993, argues, among other things, that DOD "terminated or denied [his] clearance and provoked Northrop to fire [him] without any valid reason." Complainant's letter to Sen. Wilson is attached to this pleading and states that "[a]s an American citizen, I feel that I have been deprived of my constitutional rights in this matter."

Although I am sympathetic to Complainant's inability to obtain special access and the consequential loss of his job, even if DOD were a proper Respondent, I would not have jurisdiction to determine the constitutionality of the special access criteria at issue in this case. See Westendorf v. Brown & Root, 3 OCAHO 477 (December 2, 1992) (I held that I lacked jurisdiction to determine whether Complainant's constitutional due process rights or civil right to work had been violated). If Complainant believes that DOD's decision to deny him special access deprived him of his constitutional right to due process of law, or that the special access criteria are unconstitutional, he will have to resolve these issues before the appropriate United States district court.

complaint. Id. (citing several cases). As stated above, Complainant alleges that he was unlawfully discharged by Northrop because of his citizenship status.[14] IRCA's antidiscrimination provisions cover discrimination against U.S. citizens. See supra n.3. The statute however, limits my jurisdiction over allegations of citizenship discrimination to employers who employ in excess of three employees. 8 U.S.C. § 1324b(a)(2)(A). As Northrop employed over three employees at the time of the allegedly discriminatory conduct, I have jurisdiction over Complainant's allegation of citizenship status discrimination.

b. Trivedi's Complaint Was Not Timely Filed

IRCA also requires an aggrieved party to file his charge with OSC within 180 days after the unfair immigration-related employment practice occurs. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b). It is undisputed that the allegedly discriminatory act occurred on July 20, 1990, the date that Northrop discharged Complainant. Trivedi filed his complaint with OSC on April 20, 1992, sixteen months after the alleged act of unfair immigration-related employment practice. Complainant clearly failed to file his complaint with OSC within 180 days of the alleged act of discrimination.[15]

Complainant's failure to comply with the 180-day limitations period for filing his charge, however, is not dispositive of his citizenship status discrimination allegation. Although the statute requires the filing to be made within 180 days of the alleged discriminatory conduct, the filing period, akin to a statute of limitations, is subject to waiver, estoppel and equitable tolling. See Halim, 3 OCAHO 474, at 12-13; Ortiz v. Moll-Tex Brocasting Company, 3 OCAHO 440 at 4 (October 6, 1992).

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[14] I interpret Complainant's argument that he was discharged because of his citizenship status to suggest that Northrop discharged him because he was a naturalized citizen as opposed to a native-born citizen and that DOD's special access criteria are invalid because they unlawfully discriminate based on citizenship status.

[15] Complainant did not file a charge with the EEOC. If he had timely filed a charge with the EEOC, it would have cured the tardiness of a subsequent OSC filing because OSC and EEOC have adopted a Memorandum of Understanding ("MOU"), 54 Fed. Reg. 32499 (August 8, 1989), under which a filing with EEOC is understood to be a constructive simultaneous filing with OSC and vice versa. Yefremov v. New York City Dep't of Transportation, 3 OCAHO 466, at 3 (October 23, 1992).

1. Northrop Has Not Waived the Timeliness Requirement

I infer from Complainant's pleadings that he argues that Northrop has waived the timeliness requirement. Complainant filed his complaint within 180 days of receiving notice of a March 1992 article in "The Los Angeles Times" that discussed a settlement in Huynh v. Cheney, Civil Action No. 87-3436 (D.D.C. 12/31/91) ("Settlement Stipulation"), in which DOD agreed to submit to OCAHO jurisdiction in cases involving the withdrawal or denial of security clearance resulting from implementation of a DOD regulation, formerly codified at 32 C.F.R. § 154.16(c). That regulation denied "security clearance to naturalized United States citizens whose country of origin has been determined to have interests adverse to the United States . . . or who have resided in such countries for a significant period of their life." Huynh v. Carlucci, 679 F. Supp. 61, 63 (D.D.C. 1988).

At 32 C.F.R. § 154, Appendix G, DOD published a list of 29 countries and areas, specifying at § 154.16(c)(1) that naturalized citizens from these countries were precluded from obtaining security clearance unless they had (l) been a U.S. citizen for five years or longer, or (2) if a citizen for less than five years, must have resided in the United States for the past ten years. Roginsky v. Department of Defense, 3 OCAHO 426, at 5 (May 5, 1992). The regulation, called "the 5/10 Rule," was challenged by DOD employees who were naturalized citizens originally from Vietnam, a "designated" country. Huynh v. Carlucci, 679 F. Supp. 61. The regulation was declared unconstitutional. Id. at 66-67.

On December 31, 1991, DOD and the plaintiffs in Huynh v. Carlucci entered into a Settlement Stipulation, under which DOD agreed to post notices publicizing the settlement and agreed to permit individuals adversely affected by the regulation to file charges under IRCA with OSC. In the Settlement Stipulation, DOD agreed to waive the affirmative defense of untimely filing as to those claims. Huynh v.

Cheney, No. 87-3436, Settlement Stipulation at 5-6.[16] More specifically, the waiver notice states that:

> as to any IRCA claim filed within 180 days of the claimant receiving notice that the regulation may have been applied to them, or within twelve months after the last date of publication of the notice, whichever is sooner, the DOD waives any defense based upon timeliness of filing of a claim of discrimination upon application of the regulation.

Id. at 6, para. (c).

The waiver provisions of the Huynh Settlement Stipulation, however, are not applicable to this case for a number of reasons. First, that part of the Huynh Settlement Stipulation which waives the 180-day filing period under IRCA is between the plaintiffs in Huynh and DOD, and did not involve Northrop. Second, even if Northrop were bound by the Settlement Stipulation in Huynh, the waiver would not apply to this case because it is undisputed that Complainant was discharged because he failed to obtain "special access," not because he failed to obtain "security clearance."

Although the complaint is not detailed as to the conduct which Trivedi alleges violates IRCA's antidiscrimination provisions, the information provided clearly indicates that he has not alleged discriminatory denial or loss of security clearance; rather, Trivedi alleges denial of access to a Special Access Required program at Northrop. In his complaint, Trivedi expresses his belief that he was discriminated against by the statement of "the Air Force . . . that [his] access was denied because of [his] relatives [who] were residing in India."

The record, too, supports the fact that special access, not security clearance, is at issue in this case. By letter dated October 21, 1992, DIS confirmed that no adverse action had been taken by DOD against Trivedi's security clearance, but rather, that his secret level clearance was voluntarily terminated on July 18, 1990. In addition, Northrop states that it discharged Trivedi in July 1990 due to lack of work after "Northrop made a number of applications over an extended period of

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[16] In addition, DOD specifically consented to have discrimination charges based on DOD's enforcement of the 5/10 Rule considered pursuant to IRCA statutory provisions, although the Settlement Stipulation also specifies that DOD did not otherwise waive sovereign immunity under IRCA. On August 17, 1992, the Justice Department's Office of Legal Counsel issued a memorandum arguing that OSC lacks jurisdiction to handle such discrimination complaints against federal agencies. One ALJ subsequently held that he has jurisdiction over cases where application of the 5/10 rule has adversely affected security clearance. See Roginsky (ALJ Morse held that DOD waived the sovereign immunity defense).

time to obtain special access for him but was unsuccessful." (See Letter to Directorate for Industrial Security Clearance Review, dated May 26, 1992). Furthermore, a letter from OSC to DOD confirms that failure to obtain special access, not security clearance was the basis for Trivedi's claim. See OSC Letter to DOD, dated May 6, 1992 (stating that "[s]pecifically, . . . Trivedi alleged that he was discriminated against because of his national origin and because he had relatives in India who were not U.S. citizens. He was terminated by Northrop in Hawthorne, California on July 27, 1990 as a result of being unable to obtain a special access clearance in 1989.").

Thus, the record establishes that Trivedi was ineligible for special access and that the allegedly discriminatory conduct was based not on the 5/10 Rule but, rather, on the requirements of DOD's contract with Northrop relating to the Special Access Required program. Although Trivedi was denied access to a Special Access Required program in 1989, he remained with Northrop and retained his secret level security clearance until he was laid off in July, 1990, at which time security clearance was voluntarily withdrawn because it was no longer needed.[17] In conclusion, the record indicates no connection between the 5/10 Rule and Trivedi's discharge by Northrop.[18] Therefore, the 180-day limitations period in this case was not waived.

2. The Doctrine of Equitable Tolling Does Not Apply

OCAHO decisions have followed federal court precedent regarding analogous filing limitations periods under Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 621 et seq., to determine whether to apply the doctrine of equitable tolling to the limitations period for filing a charge of discrimination under IRCA. Halim, 3 OCAHO 474, at 12-13; Anthony F. Lindsay v. OOCL (USA), Inc., 1 OCAHO 215, at 8-11 (August 8, 1990) (citing numerous federal decisions). As I stated in Halim, the Supreme Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), sets forth the following factors to consider:

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[17] Although Trivedi was discharged on July 27, 1990, nine days after his security clearance was withdrawn, the record establishes that his loss of security clearance was connected to his discharge by Northrop.

[18] Furthermore, the list of designated countries at former 32 C.F.R. § 154, Appendix G, contains the names of countries that currently are or formerly were under communist control or that are or were considered by the Government to be adverse to the interests of the United States. As India is not on the list of designated countries, even if the 5/10 Rule applied to Special Access Required programs, the rule would not apply to Trivedi.

> (1) when a claimant has received inadequate notice; (2) where a motion for appointment of counsel is pending; (3) where the court has misled the plaintiff to believe that he or she complied with the court's requirements; or (4) where affirmative misconduct on the part of the defendant lulled the plaintiff into inaction. Furthermore, the absence of prejudice to a defendant may be considered in determining whether tolling should apply once a factor that might justify tolling is identified, but it is not an independent basis for invoking the doctrine.

466 U.S. at 151.

I have adopted these guidelines to determine whether the 180-day filing period under IRCA may be equitably modified.[19]

A complainant "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Brown, 446 U.S. at 151. Furthermore, mere ignorance of filing requirements does not justify equitable tolling. Quina v. Owens-Corning Fiberglass Corp., 575 F.2d 1115, 1118 (5th Cir. 1978); Tillet v. Carlin, 637 F. Supp. 245, 249 (D. Conn. 1985). Even coupled with pro se status, lack of knowledge of proper filing procedures does not entitle a complainant to an extension of time. See Cruz v. Triangle Affiliates, Inc., 571 F. Supp. 1218 (E.D.N.Y. 1983) (neither pro se status nor the fact that English was a second language was sufficient to automatically invoke equitable tolling of the EEOC limitation period); see also Williams v. Deloitte and Touche, 1 OCAHO 258 (November 1, 1990) (ALJ refused to equitably toll a pro se Complainant's filing of complaint four days after the expiration of the 90-day filing period). Even where a pro se Complainant is just one day late in complying with IRCA's filing period, the ALJ need not grant equitable tolling. See Grodzki v. OOCL (USA), 1 OCAHO 295 (February 2, 1991) (ALJ did not extend the limitations period one day in the absence of a recognized equitable consideration).

Complainant asserts that he was late in filing his complaint because: (l) he thought the Gammon Letter informed Sen. Wilson that Trivedi was a threat to national security and this scared Trivedi and his family and affected his ability to file a timely complaint because he did not know what to do or whom to contact; (2) he could not afford to hire an attorney; (3) he contacted the State of California Department of Fair

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[19] Other OCAHO ALJ decisions have stated that the 180-day filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the application into inaction during the filing period by misconduct or otherwise. See Gimein v. Department of Defense and Grumman Aerospace Corp., 3 OCAHO 503, at 8 (March 3, 1993) (citing United States v. Weld County School District, 2 OCAHO 326, at 17 (May 14, 1991)).

Employment and Housing ("CDFEH") about his discharge and did not receive a response; (3) he contacted his congressman's office for help and received a negative reply; and (4) he did not know that naturalized U.S. citizens were protected against discrimination until he read an article in "The Los Angeles Times" stating that he should contact the OSC.

I conclude that none of Complainant's arguments are equitable grounds for tolling the 180-day filing period because there was nothing to prevent Complainant within 180 days from the date of his discharge to discover his legal rights from the lawyers whom he contacted or the federal agencies charged with the enforcement of IRCA and Title VII. In addition, there is no evidence in the record that Complainant was mislead by Northrop or DOD about his legal rights to file a complaint with OSC or the EEOC. Moreover, Complainant's inability to hire an attorney to provide him legal advice on IRCA's filing requirements is not grounds for equitable relief, because IRCA complainants are not entitled to an attorney, in the event that they cannot afford one. Compare Fed. R. Crim. P, Rule 44 .

Although Complainant asserts that he did not receive a response from CDFEH concerning his allegation of discriminatory discharge, the record indicates otherwise. Trivedi has submitted documents in this case which show that on or about July 22, 1991, he received a written reply, dated December 19, 1990, from CDFEH which advised him, inter alia, that the agency would not file a complaint on his behalf, but that he could file his own complaint. More importantly, CDFEH's letter stated that Trivedi could contact the EEOC regarding his charge of employment discrimination and provided Complainant with the addresses and telephone numbers of the six EEOC offices in California. The letter also advised Trivedi that he could contact the Department of Housing and Urban Development ("HUD") which handles housing discrimination and provided him with the addresses and telephone numbers of the two HUD offices in California. See Complainant's pleading filed January 15, 1993, and attached notice from CDFEH.

Although the 180-day filing period in this case had lapsed when Trivedi received his letter from CDFEF, he chose not to file a complaint with EEOC. If he had filed a complaint with EEOC, he would have a stronger argument for equitable relief in this case. Based upon the record, I do not find any equitable grounds to toll the 180-day filing period.

3. Conclusion

The discrimination alleged by Trivedi, even if otherwise covered by IRCA, occurred on July 20, 1990, the date he was discharged. Trivedi first filed charges with the OSC by letter dated April 28, 1992 some twenty-one months after he was laid off by Northrop and twenty-seven months after he was denied access to the Special Access Program. Since the Huynh settlement is not controlling, the time waiver under which DOD agreed to accept the Notice required by the Settlement Stipulation as the starting date for the filing period does not apply. Since IRCA requires that complaints alleging immigration-related employment practice be filed within 180 days of the occurrence of the alleged discrimination in July 1990, Trivedi's complaint was not timely filed. Since neither equitable estoppel nor waiver is applicable to the facts of this case, the complaint must be dismissed for Complainant's failure to file a timely complaint.[20]

4. Conclusion

For the foregoing reasons, Respondents' motions for summary decision in this case are GRANTED.

5. Attorney Fees

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

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[20] Northrop has argued as an affirmative defense that Complainant has failed to state a claim upon which relief can be granted. The basis for this defense may be that the discrimination alleged in this case falls within an exception to the statute's prohibition of discrimination, which allows

> discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State or local government.

8 U.S.C. § 1324b(2)(C).

It is not clear, however, whether this exception would cover Complainant's allegation of citizenship status discrimination as in this case, Complainant was denied special access--and subsequently terminated by Northrop--not because of his own citizenship status, but because of the citizenship status of his wife and mother. As Trivedi's complaint was not timely filed, I need not reach this issue.

> 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. Because I find that both of the requisite factors were not present in this case, no inquiry into such expenses is necessary.

Northrop is clearly a 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).

The Supreme Court has a "double standard" with regard to fee awards in civil rights cases, which makes it "easier for plaintiffs than for defendants to recover fees to enable plaintiffs with meager resources to hire a lawyer to vindicate their rights" while at the same time "'protect[ing] defendants from burdensome litigation having no legal or factual basis.'" Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978). The Supreme Court has cautioned district courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. at 421. The Court has further stated that "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 421-22. Attorney fees therefore 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).

In view of the fact that Complainant is pro se and the record clearly shows that the specific reasons why Northrop fired him were never conveyed to Complainant, I find that Trivedi's arguments for filing the complaint in this case were not without reasonable foundation in law and fact. I therefore DENY Northrop's request for attorney fees.

IV. *Notice of Appeal Rights*

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

SO ORDERED this 25th day of January, 1994 at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge