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

ALAN JOSEPH RUSK, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00209
NORTHROP CORPORATION AND DEPARTMENT OF DEFENSE, Respondents.	)	

FINAL DECISION AND ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION

(February 4, 1994)

Appearances:

For the Complainant
Alan Joseph Rusk, 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

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.[1] Congress enacted IRCA in an effort to control illegal immigration into the United States by eliminating job opportunities for "unauthorized aliens."[2] 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 anti-discrimination 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 discrimination by

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[1] 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).

[2] 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).

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.[3]

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 Employment Practices ("OSC"). OSC is authorized to file complaints

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[3] 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).

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*

This case arises under § 102 of IRCA, 8 U.S.C. § 1324b. Before me are two motions for summary decision, one filed by each Respondent pursuant to 28 C.F.R. § 68.38 (1993).[4] On May 21, 1992, Alan Joseph Rusk ("Complainant" or "Rusk") filed a charge with OSC, alleging that Northrop Corporation ("Northrop") and the United States Department of Defense ("DOD"), Respondents herein, discriminated against him based on his national origin, in violation of IRCA, by Northrop's failure to hire him for a computer systems analyst position in June 1987 because he did not meet DOD requirements concerning security clearance.[5]

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[4] 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.

[5] Complainant asserts that a March 31, 1992 article in the "New York Times" prompted him to file a charge with OSC, alleging that Northrop and DOD had discriminated against him in violation of IRCA. That article was issued by DOD, pursuant to a "Settlement Stipulation in Huynh v. Cheney, No. 87-3436 (D.D.C. Dec. 31, 1991) in which DOD agreed to publish to the public the court's decision, Huynh v. Cheney, No. 87-3436, slip op. (D.D.C. March 14, 1991), declaring unconstitutional 32 C.F.R. § 154.16(c), which had been a provision of paragraph 3-402, DOD 5200.2-R, "DOD Personnel Security" (January 1987), and paragraph 20b, DOD Manual 5220.22-M, Industrial Security Manual for Safeguarding Classified Information" (September 1987).

The former regulation denied security clearance to naturalized U.S. citizens whose "country of origin ha[d] been determined to have interests adverse to the United States . . . or who ha[d] resided in such countries for a significant period of their life." 32 C.F.R. § 154.16(c). Pursuant to the former regulation, DOD had promulgated a list of 29 countries and areas at 32 C.F.R. § 154, Appendix G. Section 154.16(c)(1) specified that (continued...)

In a letter dated September 16, 1992, OSC notified Complainant that it had investigated his charge and had determined that because it was not timely filed, OSC would not file a complaint before an administrative law judge ("ALJ") on his behalf. Pursuing his right to bring a private action under 8 U.S.C. § 1324b(d)(2), on October 1, 1992, Rusk, proceeding pro se, filed the complaint in this case with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer ("OCAHO"), alleging that Northrop's failure to hire him in June 1987 for a job as a computer systems analyst constitutes discrimination by both Northrop and DOD based on national origin and citizenship status.[6]

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[5](...continued)
naturalized citizens from any of these countries or areas were precluded from obtaining security clearance unless they had (i) been a U.S. citizen for five years or longer or, (ii) if a citizen for less than five years, must have resided in the U.S. for the past ten years. This regulation, called the "5/10 year rule," was challenged in Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988), by DOD employees who were naturalized U.S. citizens originally from Vietnam, a "designated" country.

After the regulation was declared unconstitutional in Huynh v. Cheney, No. 87-3436, slip op. at 3 (D.D.C. March 14, 1991), DOD and the plaintiffs in Huynh v. Carlucci on December 31, 1991 entered into a Settlement Stipulation, under which DOD agreed to post notices publicizing the settlement and permitting individuals adversely affected by the regulation to file charges of discrimination under with OSC. The formal notice was to explain that the Settlement Stipulation applied to individuals who had been denied security clearance because they are "Naturalized Citizens From, Or Who Have Resided For A Significant Period Of Time In, The Following Countries." As part of the settlement, DOD agreed to waive the affirmative defense of untimely filing as to those claims, if filed within 180 days of the claimant's receipt of notice that the regulation may have been applied to him or within twelve months after the last date of publication of the notice. Huynh v. Cheney, No. 87-3436 at 5-6 (D.D.C. Dec. 31, 1991).

Complainant states that he believed the 5/10 year rule was the controlling factor in Northrop's refusal to hire him in June 1987 because (l) his country of origin was on the list, (2) he applied for employment with Northrop, a DOD contractor, in June 1987, when the regulation was being enforced, (3) the job required security clearance, and (4) his interview at Northrop focused entirely on the fact that he was a former citizen of the USSR. Complainant's Response to ALJ's Interrogatories, at 2; Complaint, para. 12(b).

[6] Rusk has not formally alleged citizenship status discrimination as a basis for his complaint. See Complaint, para. 8 (the form complaint which Rusk filed with OCAHO, in which he checked off the response "NO" after the statement "I have been discriminated against because of my citizenship status."); id. at para. 12(a) (Rusk checked off "national origin" to complete the phrase "I was not hired because of my: ", leaving blank "citizenship status" and "citizenship status AND national origin."). The allegations in the complaint, however, clearly allege both citizenship status and national origin discrimination. See text infra quoting Complaint, para. 12(b). As complaints filed by pro (continued...)

In his complaint, Rusk asserts the basis for his allegations of discrimination:

> I believe I was not hired because [Northrop] acted pursuant to the DOD regulation which denied security clearance to naturalized U.S. citizens from communist countries. That regulation was enforced by the DOD and DOD contractors from January 2, 1987 to February 12, 1988. The United States District Court for the District of Columbia has declared the regulation unconstitutional and permanently enjoined the DOD from enforcing it. Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991).
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> I believe I was adversely affected by the enforcement of this regulation, as I am a naturalized U.S. citizen who had been born in a communist country (USSR); the job required security clearance; and I applied for the job in June of 1987 when the regulation was actively enforced. I was otherwise qualified for the job as evidenced by the fact that after reviewing my resume, the company had invited me to come, at their expense, from New Jersey to interview at their headquarters in California.
>
> Following their investigation, the Office of Special Counsel has informed me that the company claims the reason they had not hired me was because my wife was not a U.S. citizen at that time. This explanation seems rather implausible, since the question of my wife's citizenship had never been brought up during the interview, it was not stipulated as a requirement (unlike the citizenship of the applicant, which the company inquired about prior to the interview), and was not mentioned as a reason in the rejection letter.

Complaint, para. 12(b).

On November 2, 1992, Northrop filed its answer in which it denies that it discriminated against Complainant, asserting that it did not offer Rusk employment because he was not qualified for the position as "[s]pecial access to a [Special Access Required] program was required and Complainant was unable to obtain access from the DOD." Answer, para. 10. Northrop also raises several affirmative defenses, asserting that: (1) the complaint fails to state a claim upon which relief can be granted; (2) the complaint is time-barred because it was not filed within 180 days of the alleged discriminatory act; (3) the complaint is barred by the exception set forth in 8 U.S.C. § 1324b(a)(2)(c) (which permits citizenship status discrimination required by government contract or regulation) in that special access was a requirement of the DOD contract to which Complainant was applying for employment; (4) the allegations in the complaint are vague and ambiguous; and (5)

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[6](...continued)
se parties are to be liberally construed, Hughes v. Rowe, 449 U.S. 5,9 (1980) (per curiam), I construe the complaint to allege discrimination based on both citizenship status and national origin.

Northrop is not a proper party to the complaint because Northrop does not establish special access criteria or grant or deny access.

On November 16, 1992, DOD filed its answer to the complaint, in which it essentially adopts Northrop's answer but asserts that it is not a proper party to the complaint because it was not a "business/ employer" who discriminated against Complainant. In addition, DOD asserts that special access to the B-2 program was required and DOD found that Complainant was not qualified for access because his wife was not a U.S. citizen. DOD raises several affirmative defenses, asserting that: (1) OCAHO does not have jurisdiction over this complaint; (2) the complaint fails to state a claim upon which relief can be granted;[7] (3) the complaint is barred by the exception to liability set forth in 8 U.S.C. § 1324b(a)(2)(C);[8] and (4) the complaint was not timely because it was not filed within 180 days of the alleged discriminatory conduct.

Northrop argues in its motion for summary decision that the complaint against it should be dismissed because (1) it was not timely filed and (2) because the discrimination fits into the exception set forth at 8 U.S.C. § 1324b(a)(2)(C). Northrop also argues in its motion for summary decision that because Complainant could not meet the program access criteria for access to a program requiring special access, he was not qualified for the position for which he applied. In support of its motion, Northrop has submitted the affidavit of Northrop's Personnel Security Manager of the B-2 Division, Prestell F. Askia ("Askia Aff.") with exhibits and the affidavit of Northrop's Technical Employment Manager of the B-2 Division, Richard J. Navarro ("Navarro Aff.").

DOD argues in its motion for summary decision that I lack jurisdiction to hear the complaint against it because "Complainant has not established that this matter comes within the limited waiver of sove-

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[7] DOD appears to argue that the complaint fails to state a claim upon which relief can be granted because it has not waived immunity from suit under the doctrine of sovereign immunity. ALJ Morse has held that federal agencies and executive departments may not rely on the doctrine of sovereign immunity in discrimination suits filed against them under 8 U.S.C. § 1324b. Roginsky v. Department of Defense, 3 OCAHO 426, at 6 (May 5, 1992); Mir v. Federal Bureau of Prisons, 3 OCAHO 510, at 10-11 (April 20, 1993). I need not determine that issue in this case, however, because DOD is not a proper Respondent.

[8] This section lists as an exception to liability "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."

reign immunity agreed to in the Settlement Stipulation in Huynh v. Cheney, 679 F. Supp. 61 (D.D.C. 1988). DOD asserts that "the authority of OCAHO to consider IRCA cases involving the United States is derived from the Settlement Stipulation, in which DOD agreed to OCAHO jurisdiction in cases involving the withdrawal or denial of security clearance because the individual came within the coverage of the former 5/10 year rule." DOD's Motion for Summary Decision at 2.

DOD argues that Rusk has not established jurisdiction nor stated a cause of action because of the following:

> a. Mr. Rusk does not and cannot factually allege that his security clearance was denied because of the 5/10 year rule. His allegations actually pertain to a denial of access to the B-2 Special Access Program at Northrop Corporation. Based on information provided by Mr. Rusk and as augmented by the record, Mr. Rusk was denied access to the Special Access Program in 1987 because his wife was a citizen of a foreign country, the Philippines--which is not even on the list of designated countries as used in applying the 5/10 year rule. The record further shows that no request for security clearance for Mr. Rusk was made on Mr. Rusk's behalf. Therefore there is no way in which the 5/10 year rule could have been applied to him. The beliefs expressed in the narrative in the Complaint are based on misguided assumptions, not based on fact, and are simply incorrect.
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> b. Since Mr. Rusk was not denied security clearance and the 5/10 year rule was not involved, the Huynh Settlement Stipulation is inapplicable. Mr. Rusk's Complaint is, therefore not within the limited waiver of sovereign immunity agreed to as part of the Settlement Stipulation. Therefore, OCAHO lacks jurisdiction over the subject matter of the Complaint.
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> c. Because the liability of Respondent Northrop Corporation, if any, is derived from its contractual relationship with DOD, Mr. Rusk's failure to establish jurisdiction or establish that the 5/10 year rule was applied in his case should be considered as to both Respondents.

Id.

DOD further argues that Complainant's allegation of citizenship status discrimination must be dismissed because Rusk, as a U.S. citizen

at the time of the alleged discrimination, was not protected from citizenship status discrimination under IRCA.

For the reasons stated below, Respondents' motions for summary decision will be granted.

III. *Facts*

1. Complainant

Rusk was born in Odessa, Ukraine, a republic of the former Soviet Union (USSR) and immigrated to the United States on June 25, 1979 as a stateless refugee. He became a naturalized citizen on January 15, 1985. His wife is a citizen of the Phillippines.

2. Northrop's Contract with DoD

Northrop is a large corporation, which at all times material to the allegations of the complaint, employed in excess of fourteen employees. Northrop provides a variety of services and products to the United States Air Force ("Air Force"), 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 November of 1981, Northrop entered into a full-scale development ("FSD") contract with the Air Force to develop the advanced technology bomber, known as the "B-2." That contract established the B-2 program as a classified, Special Access Required ("SAR") program, subject to special access criteria established by the Air Force. These special access criteria required that both individuals and their spouses be U.S. citizens.[9] On November 19, 1987, Northrop and the Air Force entered

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[9] These criteria implement Director of Central Intelligence Directive ("DCID") No. 1/14, sections 5(b)(1) and (2). Section 5(b)(1) provides that "[b]oth the individual and members of his immediate family shall be U.S. citizens. For these purposes, 'immediate family' includes the individual's spouse, parents, brothers, sisters, and children." Section 5(b)(2) provides that "[t]he members of the individual's immediate family and persons to whom he or she is bound by affection or obligation should [not] be subject to physical, mental, or other forms of duress by a foreign power . . . ."

That DCID requirement is derived from DOD Directive 5200.2-R, Chapter II, Policies, Section 1, Standards for Access to Classified Information or assignment to Sensitive Duties, and Section 2, Criteria for Application of Security Standards, 2-200(k) which states as a factor determining ineligibility for special access:

(continued...)

into a low rate initial production ("LRIP") contract for the B-2 bomber. Both the FSD and LRIP contracts contain the same SAR requirements established by the Air Force. Askia Aff. at 2.

In Northrop's role as contractor for the B-2 program, it agreed to the terms and conditions established for special access by the Air Force. In turn, Northrop developed and submitted for approval to the Air Force its own contractor security plan, detailing the steps it would take to satisfy the Air Force's SAR requirements. In addition, Northrop was required to comply with the terms of the DOD Industrial Security Manual.

During June 1987, employment at the B-2 Division necessarily required that an individual be accessed to the program to work in the facility, as well as obtain a U.S. government security clearance (generally secret or above). That special program access required, among other things, that individuals and members of their immediate family be citizens of the United States, and that individuals with relatives in designated countries obtain special approval to access. Askia Aff., Ex. A at 1 ["Program Access Criteria"].

In accordance with the requirements of Northrop's customer, the Air Force, all applicants for employment at Northrop's B-2 Division must submit to a security interview and screening procedure during which applicants are evaluated against the program access criteria. Askia Aff. at 2. If an applicant does not satisfy the program access criteria, Northrop does not make an offer of employment. Id. Because at the time of Rusk's application, the B-2 program was the only project in the Advanced Systems Division, all positions in the division were subject to B-2 program access as a job requirement. Navarro Aff. at 2. Because the B-2 is a classified program, all employees who work in the facility must be cleared and accessed to the program as each could potentially come in contact with classified material. Askia Aff. at 2. Thus, at the time of Complainant's application, regardless of the position applied for, access to the B-2 program was a job prerequisite. Id.

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[9](...continued)
Vulnerability to coercion, influence, or pressure that may cause conduct contrary to the national interest. This may be (1) the presence of immediate family members or other persons to who[m], the Applicant is bonded by affection or obligation resides in a nation (or areas under its domination) whose interests may be inimicable to those of the United States . . . .

3. The Alleged Discriminatory Conduct

On May 6, 1987, Complainant applied for the position of computer system analyst with Northrop's Advanced Systems Division, which is now the B-2 Division. Askia Aff. at 2. After reviewing his resume, Northrop invited Complainant at Northrop's expense for an interview at its headquarters in Pico Rivera, California. On June 5, 1987, Rusk went to Pico Rivera for his interview and completed a 16-point questionnaire, in which he indicated, among other things, that he was born in the Ukraine, a former republic of the U.S.S.R., that he was a naturalized U.S. citizen and that his wife was a citizen of the Philippines. See DOD's Brief in Support of Its Answer, Enclosure 5, at 3-4. Complainant was then interviewed by a Northrop security officer. Complainant told the security officer that he was born in the U.S.S.R. but had been a naturalized citizen for over two years. After that, according to Complainant, all questions directed to him dealt with his activities when he resided in the U.S.S.R. and those of his relatives. Northrop asserts that Rusk stated at his interview that he still corresponded with relatives in the U.S.S.R., a then "designated country." Askia Aff. at 2 (citing Exhibit A). According to Complainant, a subsequent interview with the project manager on the same day was a mere formality lasting no more than fifteen minutes.

Shortly after these interviews were completed, and on the same day, Complainant was denied employment by Northrop. While Complainant asserts that he received a letter of rejection, there is no evidence in the record that Complainant was told either orally or in writing why he was not offered the position for which he had applied. Northrop asserts that due to the application of the program access criteria set forth by the Air Force, which includes the requirement that applicants and their spouses are U.S. citizens, Complainant was denied employment because his wife was not a U.S. citizen. See DOD's Brief in Support of Its Answer, Enclosure 5 [Letter, dated July 15, 1992, from Gail Vendeland, Northrop's Senior Staff Counsel to Jillane Hinds, Director for Industrial Security Clearance Review, Department of Defense in Arlington, Virginia, sent in response to an OSC notification letter to Northrop, requesting information regarding Complainant's allegations of discrimination]; see also Askia Aff. at 2 ("Based on the application of access criteria, [Rusk] was deemed ineligible and therefore was not made an offer of employment."); Navarro Aff. at 2 ("Subsequent to the security interview and his submission of additional requested documentation, it was determined that Complainant did not meet the access criteria requirements.").

In accordance with Northrop's standard procedure, Rusk was not informed that his ineligibility for special access was the reason for his denial of employment. Navarro Aff. at 2. Because he was not selected on the basis of failure to meet access criteria, Rusk was never required to apply for a security clearance in connection with his application for employment at Northrop. Id.

IV. *Discussion*

A. Legal Standards for Deciding a 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 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 nonmoving 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).

B. Case Analysis

1. Rusk Applied for a Position Within the B-2 Program & Was Rejected Because He Was Ineligible Under Special Access Requirements

Rusk disputes Northrop's assertion that he applied for a position in the B-2 program which had special access requirements, stating that

"[n]o proof was presented to support Northrop's contention . . . ." Complainant's Response to Northrop's Motion For Summary Decision, at 1. In response, DOD notes that Rusk does not substantiate his allegation that the position was not in the B-2 program or did not require special access.

> [Rusk] does not provide any information or documentation that refutes the information provided by Northrop, as contained in Enclosure 5 to the Brief in Support of DOD's Answer to Complaint. In addition, even if his allegation that the advertisements he answered and the interviewers he met at Northrop did not specify that the position was within the B-2 program, even if correct, does not refute the information provided by Northrop. It is not unrea-sonable to assume that mention of the Special Access Program nature of a position may not occur before a tentative decision is made.

Rebuttal to Complainant's Answer to Motion for Summary Decision by Department of Defense, at 2.

The letter contained in Enclosure 5 to the Brief in Support of DOD's Answer to Complaint is from Northrop's Senior Staff Counsel to Jillane Hinds, Director for Industrial Security Clearance Review at DOD. That letter indicates that:

> Mr. Rusk was denied employment because of his inability to obtain access to the B-2 program, which requires special access. . . Due to the application of program access criteria set forth by the DOD customer (see enclosed) which included the requirement that applicants and their spouses must be U.S. citizens, he was denied access and therefore was not made an offer employment. Mr. Rusk never applied for a security clearance in connection with his application for employment at Northrop.

Complainant has provided no documentation to support his assertion that the job at issue was not within the B-2 program or that the job did not require special access. Nor has Complainant asserted that statements were made to him indicating the same. Thus, although there is a dispute, the evidence is so one-sided, that this case can be resolved without an evidentiary hearing. As Complainant has failed to contradict Northrop's evidence, I find that he applied for a position within the B-2 program, but was neither told that the position was within the B-2 program nor that the program required special access. I further find that Complainant was not offered the position for which he applied because based on the fact that his wife was a citizen of the Phillippines, he failed to meet the special access requirements established by the Air Force.

2. DoD Is Not a Proper Respondent

The complaint in this case alleges that DOD and Northrop committed an unfair immigration-related employment practice against Complain-

ant with respect to Northrop's failure to hire him for the position of computer system analyst. DOD argues that neither DOD nor the Air Force (an agency of DOD) was the "employer" who refused to hire Complainant and therefore the complaint against DOD should be dismissed.

More specifically, DOD asserts that its relationship with individuals hired by Northrop to work on the B-2 program bears none of the indicia of an employer/employee relationship as that term is generally understood in the context of employment and contract law. DOD contends that since Complainant did not apply for a position with DOD or the Air Force and Northrop is not an employee of DOD or the Air Force, there is no legal basis for viewing Complainant as a prospective "employee" of DOD or the Air Force, either directly or indirectly. I agree with DOD that it would not have been Complainant's employer had he been hired, and thus the complaint against DOD cannot stand.

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 regulations implementing § 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.1(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 the Air Force to manufacture the B-2 bomber. 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 could not have discriminated against Complainant with respect to "hir[ing] him for employment" under 8 U.S.C. § 1324b(a)(1). As DOD was not Complainant's employer, it was improperly joined in the complaint as a respondent. The complaint against DOD therefore is dismissed.[10]

3. 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). As Northrop employed more than fourteen individuals on the date that Northrop informed Complainant of its decision not to offer him employment, I do not have jurisdiction over Rusk's allegation of national origin discrimination. Accordingly, the national origin portion of Complainant's claim 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 status portion of the complaint. Id. (citing several cases). As stated above, Complainant alleges that he was unlawfully discharged by Northrop because of his citizenship status.[11] IRCA's antidiscrimination provisions cover discrimination against U.S. citizens. See supra n.3. The statute

[10] Thus, I need not address DOD's other arguments as to why the complaint against it should be dismissed.

[11] I interpret Complainant's argument that he was not hired because of his citizenship status to suggest that Northrop did not offer him a job 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.

however, limits my jurisdiction over allegations of citizenship status 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 Rusk's allegation of citizenship status discrimination.

b. Northrop is a Proper Party to the Complaint

Northrop argues that it is not a proper party to the complaint because it does not establish special access criteria or grant or deny access. As discussed supra at section IV(B)(2), because Northrop employs its workers in the B-2 division, it is clearly an employer within the meaning of § 1324b. Thus, Northrop is the proper Respondent in this case.

c. Rusk's Complaint Was Not Timely Filed

IRCA 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). The allegedly discriminatory act in this case occurred on June 5, 1987, the date Northrop informed Complainant of its decision not to hire him. As Rusk filed his charge with OSC on May 21, 1992, approximately four and a half years beyond the 180 days required by IRCA, the complaint in this case was not timely filed.[12]

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, l992).

i. 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 com-

[12] 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 ("MO."), 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).

plaint within 180 days of receiving notice of a March 31, 1992 article in the "New York Times" issued by DOD pursuant to a "Settlement Stipulation in Huynh v. Carlucci, 679 F. Supp. 61, 63 (D.D.C. 1988), in which DOD had agreed to publish to the public the court's decision, Huynh v. Cheney, No. 87-3436, slip op. (D.D.C. March 14, l991), declaring 32 C.F.R. § 154.16(c) unconstitutional.

As discussed supra at note 5, former DOD regulation, 32 C.F.R. § 154.16(c)(1) specified that naturalized citizens from explicitly proscribed countries including the Soviet Union were precluded from obtaining security clearance unless they had been a U.S. citizen for five years or longer or, if a citizen for less than five years, must have resided in the U.S. for the past ten years. In the Settlement Stipulation, DOD agreed to waive the affirmative defense of untimely filing as to cases involving the withdrawal or denial of security clearance resulting from implementation of former 32 C.F.R. § 154.16(c). Huynh v. Cheney, No. 87-3436, Settlement Stipulation at 5-6 (D.D.C. Dec. 31, 1991).[13] 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).

Complainant states that he believed that the 5/10 year rule was the controlling factor in Northrop's refusal to hire him in June l987 because (l) his country of origin was on the list, (2) he applied for employment with Northrop, a DOD contractor, in June 1987, when the regulation was being enforced, (3) the job required security clearance, and (4) his interview at Northrop focused entirely on the fact that he was a former

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[13] DOD specifically consented to have charges of discrimination under IRCA based on DOD's enforcement of the 5/10 year rule considered, 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. 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).

citizen of the USSR. See Complainant's Response to ALJ's Interrogatories, at 2; Complaint, para. 12(b).

The waiver provisions of the Huynh Settlement Stipulation, however, are not applicable to this case based on the following. 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 Huynh Settlement Stipulation, the waiver would not apply to this case because the 5/10 year rule applied only to the granting or denial of security clearance and the record clearly shows that no such clearance was applied for on Rusk's behalf in connection with the position at Northrop. See, e.g., Defense Investigative Service letter, dated October 21, l992 (confirming that there is no record of any request for security clearance for Rusk, and consequently, no adverse action based upon the 5/10 rule could have been taken). Furthermore, the record shows that Northrop's decision not to offer Rusk employment was based on his ineligibility for special access. See DOD's Brief in Support of Its Answer, Enclosure 5 [Letter, dated July 15, 1992, from Gail Vendeland, Northrop's Senior Staff Counsel to Jillane Hinds, Director for Industrial Security Clearance Review, Department of Defense in Arlington, Virginia, sent in response to an OSC notification letter to Northrop, requesting information regarding Complainant's allegations of discrimination]; see also Askia Aff. at 2 ("Based on the application of access criteria, [Rusk] was deemed ineligible and therefore was not made an offer of employment."); Navarro Aff. at 2 ("Subsequent to the security interview and his submission of additional requested documentation, it was determined that Complainant did not meet the access criteria requirements.").

Based on the above, I conclude that the 180-day limitations period in this case was not waived.

ii. The Doctrine of Equitable Tolling Does Not Apply

In determining whether to apply the doctrine of equitable tolling to the limitations period for filing a charge of discrimination under IRCA, administrative law judges have followed federal court precedent regarding analogous filing limitations periods under Title VII and the Age Discrimination in Employment Act of l967, 29 U.S.C. § 621 et seq. See, e.g., Halim, 3 OCAHO 474, at 12-13; Anthony F. Lundy v. OOCL (USA), Inc., 1 OCAHO 215, at 8-11 (August 8, l990) (citing numerous federal decisions). As I stated in Halim, the Supreme Court in Baldwin County

Welcome Center v. Brown,466 U.S. 147 (1984), set forth the following factors to consider:

> (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.[14]

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. l978); 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. l983) (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: "I did not realize I had a case of discrimination until the settlement stipulation in Huyhn was reached and publicized, as I could not otherwise have known of the existence of the

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[14] 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)).

aforementioned DOD regulation." Rusk's Response to ALJ's Interrogatories, at 2. These circumstances, however, do not establish sufficient grounds to equitably toll the 180-day rule. There was nothing to prevent Complainant within 180 days from the date of learning that Northrop decided not to hire him to discover his legal rights. In addition, there is no evidence in the record that Complainant was misled by Northrop or DOD about his legal right to file a charge with OSC or the EEOC.

3. Conclusion

As Northrop has not waived the timeliness requirement and there is no basis in the record for equitably tolling the limitations period for filing a charge, 8 U.S.C. § 1324b(d)(3) requires that the complaint in this case be dismissed.

C. Conclusion

For the reasons state above, Respondents' motions for summary decision are hereby GRANTED.[15]

IV. *Attorneys 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:

> 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.

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[15] Northrop has argued that the complaint is barred by 8 U.S.C. § 1324b(a)(2)(C), which provides as an exception to IRCA's prohibition of unfair immigration-related employment practices:

> 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.

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 Rusk's complaint was not timely filed, I need not reach this issue.

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 decided not to hire him were never conveyed to him, I find that Rusk's filing of the complaint in this case was not without reasonable foundation in law and fact. Northrop's request for attorney fees therefore is denied.

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 4th day of February, l994 at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge