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

JOSE E. BRICENO-BRICENO, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 93B00129
FARMCO FARMS, Respondent.	)	

FINAL DECISION AND ORDER DISMISSING THE CITIZENSHIP STATUS PORTION OF THE COMPLAINT FOR LACK OF STANDING AND DISMISSING THE NATIONAL ORIGIN PORTION OF THE COMPLAINT FOR LACK OF TIMELINESS

(April 28, 1994)

Appearances:

For the Pro Se Complainant
Jose E. Briceno

For the Pro Se Respondent
Vernon Schulz and Joyce Schulz

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 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 national origin

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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.

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. § 2000e et seq., which prohibits national origin discrimination by employers of fifteen or more employees. The statute also prohibits citizenship status discrimination by employers of more than three employees. 8 U.S.C. § 1324b(a)(2)(A).

Individuals alleging discriminatory treatment on the basis of national origin or citizenship status must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). OSC is authorized to file complaints before administrative law judges ("ALJs") designated by the Attorney General. 8 U.S.C. § 1324b(e)(2). IRCA permits private actions in the event that OSC does not file a complaint before an ALJ within 120 days of receiving the charge. The charging party may file a complaint directly before an ALJ within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. § 1324b(d)(2).

II. *Procedural History*

On July 13, 1992, the charge in this case was filed by Jose Elias Briceno-Briceno aka Jose E. Birisno, aka Jose Briseno aka Jose E. Brisinio aka Jose Elias Brisino Brisino ("Complainant" or "Briceno")[3] a native and citizen of Mexico and a permanent resident alien of the United States, acting pro se, filed a charge with OSC on July 10, 1992, along with "many others," alleging that "Franklin McCabe and companies that favor him and ranchers" unlawfully discriminated against "all the Tribal Members and Mexicans" based on both national origin and citizenship status, in violation of 8 U.S.C. § 1324b.[4] Briceno states that another name that has been used by the injured party is "FarmCo. Farms." See Complaint, Ex. 1 [Charge] at para. 1.

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[3] In response to an interrogatory I issued, Briceno stated late in these proceedings that his correct name is Jose Elias Briceno-Briceno. See Complainant's Answers to ALJ's Interrogatories, filed March 7, 1994, at para. 1. I therefore amended the case caption in this final decision and order in part to reflect that information.

[4] IRCA provides that "any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf) . . . may file a charge . . . with the Special Counsel." 8 U.S.C. § 1324b(b)(1) (emphasis added). If the Special Counsel decides not to prosecute that charge, "the person making the charge" is then permitted to bring a private action by filing a complaint before an ALJ. 8 U.S.C. § 1324b(d)(2).

Complainant states that the alleged discrimination has been going on for about three years. See id. at para. 6. He also states that the discrimination took place or is taking place in all of the companies and ranches. See id. at para. 7. In describing the alleged unfair immigration-related employment practice, Briceno asserts:

> We go ask for work one day and they tell us that when we return they have another contractor sent by Franklin McCabe (Director) they tell all the companies not to give [work?] Mr. Franklin McCabe already has the companies fixed lets go with Mr. Franklin (sic) McCabe (the director) and he says that our bids are closed bit (sic) not for the other contractors.
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> In this town, Parker/Poston there is a lot of discrimination ont (sic) he (sic) part of the contractors and Franklin McCabe people with [citizenship] papers and correct papers and then they are fired and people without papers or fake ones go for work and are hired. The boys from school can't work for their clothes because they are hiring people without papers and don't hire them.
>
> The contractors are: Martha Trevino, Ermila Mejia Urena, Israel Elizondo.

See id. at para. 8.[5]

Complainant further states that he filed a charge based on this set of facts with the Wage & Hour Division of the Equal Employment Opportunity Commission in Phoenix, Arizona 16 months prior to filing his OSC charge. See id. at para. 9.

In a letter dated February 12, 1993, OSC informed Briceno that it had not made a determination as to his allegations of unfair immigration-related employment practices against Farmco Farms and would continue its investigation. OSC also informed Briceno that he could file his own complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") within 90 days of receipt of OSC's letter.

On June 18, 1993, Briceno filed a complaint with OCAHO, alleging that Vernon Shlutz (sic)/Farmco Farms ("Respondent" or "Farmco") discriminated against him.[6] See Complaint, para. 9. Briceno indicates, however, that Farmco did not discriminate against him based on either

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[5] This is a translation of Briceno's charge, which is written in Spanish. The Department of Justice translated the charge into English on July 13, 1992. That translation is part of the record.

[6] Briceno filed an OCAHO form complaint for § 1324b cases, which sets forth various allegations under § 1324b and provides blank spaces for the complaining party to check or fill in the allegations pertinent to its complaint.

his national origin or citizenship status. See id. at paras. 7, 8. He states that on June 5, 1992, he worked for Farmco in the job of chopping cotton and weeding and that he was knowingly and intentionally fired on June 11, 1992 "so we would be replaced by Illegal Aliens." See Complaint paras. 11, 13(b) and (c). Briceno states that he was qualified for the job but was fired anyway and that he does not want to be rehired by Respondent. See id. at para. 16(d) and (f). Briceno seeks backpay from June 11, 1992. See id. at para. 19.

On July 26, 1993, Farmco, also proceeding pro se, filed its answer to the complaint in the form of a letter from Vernon Schulz, on behalf of Respondent, denying all allegations of discrimination alleged in the complaint. Attached to the complaint is a letter dated March 26, 1992 from Franklin J. McCabe, Jr., Director of the Tribal Employment Rights Office ("TERO") of the Colorado River Indian Tribes, Colorado River Indian Reservation in Parker, Arizona addressed "To Whom It May Concern." See Answer, Ex. 1 [TERO Letter].

On August 19, 1993, I issued an Order Directing Both Parties to Answer Administrative Law Judge's Interrogatories ("Order of Aug. 19, 1993"). On August 30, 1993, Complainant filed his answers to those interrogatories ("Compl.'s Answers to ALJ's Interrogs.1") and on September 7, 1993, Respondent filed its answers ("Resp.'s Answers to ALJ's Interrogs.1"), along with the written statement of Joyce Schulz, a partner in Farmco Farms ("Joyce Schulz Stmt.").

On October 26, 1993, F. Thomas Bartlett, telephoned this office to announce that he would be representing Briceno on a pro bono basis. On November 15, 1993, Mr. Bartlett again telephoned this office to state that he could not represent Briceno. On November 18, 1993, Mr. Bartlett filed a letter, requesting that he be allowed to withdraw from this case because he had been appointed as a judge for the Colorado River Indian Tribal Court and this case appeared to him to involve tribal law. On November 19, 1994, for good cause shown, I granted Mr. Bartlett's request to withdraw from representation of Briceno. I also granted Briceno 15 days to retain a new attorney.

On December 6, 1993, Briceno's son telephoned this office to state that Briceno had not been able to retain an attorney. In response, Briceno's son was told that Briceno must move forward with the case. I then issued an order on December 6, 1993 ("Order of December 6, 1993"), directing Complainant to file a letter with this office by December 10, 1993, stating whether he intended to prosecute this case.

On December 7, 1993, Briceno filed a letter stating that he intended to proceed with this case, pro se.

Briceno's son telephoned this office again in December, asking the date of his father's hearing. My office staff informed him that this case likely would be decided without an evidentiary hearing, and that Briceno should complete discovery.

On December 10, 1993, Briceno filed supplemental answers to his earlier answers to interrogatories I had issued ("Compl.'s Answers to ALJ's Interrogs.2"), along with several exhibits, including (1) Article 1 of the Tribal Employment Rights Labor Code; (2) an OSC charge filed by Briceno around December 8, 1993, alleging retaliation against him by Farmco Farms; (3) the business license of Thurlow F. Stanley and Jose E. Briseno with the Colorado River Indian Tribes, a letter from Farmco Farms; (4) a report that Briceno passed his English and citizenship examination; and (5) an identified document from State Fund Workers Compensation Insurance, titled "Employer's Premium Report" with the signature "Jose Briseno."

On December 28, 1993, Briceno filed a letter, ("Compl.'s Letter.1") in which he asserts, among other things, that twenty or more Indian tribes people were discriminated against by Martha Trevino and Farmco Farms so that Trevino could hire illegal aliens. Attached to that letter as Exhibit 1 is a letter from an individual named Samuel Bautista, who from the contents of the letter appears to be an unauthorized alien.

On February 14, 1994, I issued an order directing the parties to answer interrogatories ("Order of Feb. 14, 1994"). Briceno filed a timely response ("Compl.'s Answers to ALJ's Interrogs.3"), along with an exhibit (indicating that Briceno passed an English and citizenship examination, approved by the Immigration & Naturalization Service ("INS")) and Respondent filed a timely response ("Resp.'s Answers to ALJ's Interrogs.2") as well.

On March 22, 1994, a letter was filed with this office, which states at the top, "Partnership: Thurlow Stanley" ("Compl.'s Letter.2"). It lists the names of 24 Indians on the reservation (tribal members) who allegedly were discriminated against. Below the 24 names, is written "Please verify the following names for employment on the Colo. Riv. Ind. Res. Your truly, Gilbert Weivas." To the right of the 24 names, it states in what appears to be Briceno's handwriting:

> The same lady that discriminated (Martha Trevino, Labor T & M) has a lot of people right now with illegal papers (greencard). Send someone to investigate so you can see for yourself that I am not lying (sic). The tribal members want them to be paid for time lost.

On April 26, 1994, Respondent filed a letter ("Resp.'s Letter") indicating the number of employees Farmco Farms employed at all times relevant to this case.

II. *FACTS*

A. Undisputed Facts

1. Briceno

Briceno is a a native and citizen of Mexico and a permanent resident alien of the United States[7]. He obtained his permanent residence status on February 27, 1963, at which time he was married to the former Aurora Vindiola Kallol, a U.S. citizen. Briceno has remained continuously in the United States since that time. See Compl.'s Answers to ALJ's Interrogs.3 at para. 5(a). Upon becoming a permanent resident, he lived in marital union with his spouse. See id. at para. 5(c).

Although Complainant took and passed the English and citizenship test for naturalization ("ETS Standardized Section 312 Test") on October 9, 1993, he has never applied for U.S. citizenship. See Compl.'s Answers to ALJ's Interrogs.1 para. 1; Order of Aug. 19, 1994, at 3; Compl.'s Answers to ALJ's Interrogs.3, Ex. 1 [Report indicating that Complainant passed the test].[8]

Briceno is both a contractor of farm labor services and a farm laborer. See Compl.'s Answers to ALJ's Interrogs.3, at para. 3.

2. Custom Farms

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[7] Briceno asserts in his charge that he is a U.S. citizen or national. He later contradicts this, asserting that he is a permanent resident alien. The record conforms with the latter assertion.

[8] Section 312 of the Immigration and Nationality Act, 8 U.S.C. § 1423(1) and (2), provides that no person shall be naturalized who cannot demonstrate "an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language . . . and [can demonstrate] knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States."

In June of 1992, Briceno was in partnership with Thurlow F. Stanley as a contractor of farm labor services.[9] The partnership, called Custom Farms Labor Contractors ("Custom Farms"), was licensed through the Colorado River Indian Tribes. See Compl.'s Answers to ALJ's Interrogs.2 at para. 2, Ex. 3 [the business license]. As such, the partnership was subject to the Colorado River Tribes Labor Code Ordinance No. 86-5 in connection with any work done on the Colorado River Indian Reservation. See Answer, Ex. 1; Resp.'s Answers to ALJ's Interrogs. at para. 1.

3. Farmco Farms

Respondent, Farmco Farms, is a partnership of husband and wife, Vernon and Joyce Schulz. See Resp.'s Answers to ALJ's Interrogs.1 at 1-2. Farmco is located on the Colorado River Indian Reservation (see Compl.'s Answers to Interrogs.1 para. 4) and is tribal-lands leased, with assigned lease number 7134 (see Compl.'s Answers to ALJ's Interrogs.2. at para. 4, Ex. 4). Daniel Hyde is the farm foreman. See Resp.'s Answers to ALJ's Interrogs.1. at para. 3. At all times relevant to this case, Farmco employed between 8 and 14 employees. See Resp.'s Letter.

4. The Dealings Between Farmco Farms & Custom Farms

On June 5, 1992, Respondent asked either Max Briceno (see Answer; Compl.'s Answers to ALJ's Interrogs, Ex. 4) or Jose Briceno (see Compl.'s Answers to ALJ's Interrogs.2 at para. 5) to provide Farmco Farms with 100 workers[10] to weed cotton by chopping weeds out of the

[9] Mr. Stanley is now deceased.

[10] Briceno has submitted conflicting statements. In his answer to interrogatories I issued, he disputes that Respondent asked for 100 workers, but later in his supplemental response, he concedes that Schulz asked for 100 workers. Compare Compl.'s Answers to ALJ's Interrogs.1 at para. 5 with Compl.'s Answers to ALJ's Interrogs.2 at para. 5.

cotton fields.[11] The parties reached an oral agreement.[12] The oral contract was for approximately $6.00 an hour and Farmco paid Briceno after Briceno gave Farmco the total hours worked. See Resp.'s Answers to ALJ's Interrogs.2 at para. 1.

On the first day that Custom Farms performed work for Farmco Farms, there were 12 workers and on the remaining days there were between 30 and 40 workers. See Answer; Compl.'s Answers to ALJ's Interrogs.1 at para. 5; Compl.'s Answers to ALJ's Interrogs.2 at para. 5.

B. Disputed Facts

1. Briceno's Version of the Facts

Briceno asserts that he told Schulz that it would take several days to gather 100 people, as it would be difficult to find many available as it was melon-packing season. Compl.'s Answers to ALJ's Interrogs.2 at para. 5, Ex. 4. Briceno further asserts that there were no complaints made to him that weeds had not been cut or that workers had been observed "idling." See Compl.'s Answers to ALJ's Interrogs.1 at 1. He maintains that "Mr. Veron (sic) Schultz (sic) came to the field only once the first day and actually came into the field and accompanied us and observed the density of the weed and then told us to proceed as we were." See Compls.'s Answers to ALJ's Interrogs.2 at 1. Briceno states that "[i]n the weeding of the cotton the meditod (sic) of extract in the morning Glory had to be pulled by hand and therefore the Labor to get up over and pull each root by hand. They do have to stretch at sometime while their (sic) in the field." See id.

Briceno further states that on Thursday of the first week that Custom Farms workers were weeding the cotton fields at Farmco Farms, a representative of Farmco called Briceno into his office and told him that he and his workers should stop working for three days. See id. When Briceno asked for the reason, the representative would not say.

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[11] While it appears from a letter filed with this office by "Jose Briseno" and "Max Briseno" on December 7, 1994 that these are two separate individuals, Jose Briceno has not clarified his relationship to Max Briseno, nor explained why some evidence in the record indicates that Thurlow Stanley was the partner of Max Briseno and other evidence indicates that Thurlow Stanley was the partner of Jose Briceno.

[12] Vernon Schulz, on behalf of Respondent, has stated that such verbal agreements are common "in this area" and asserts that he "personally [doesn't] know of a written contract on cotton chopping." Resp.'s Answers to ALJ's Interrogs.2.

See Compl.'s Answers to ALJ's Interrogs.1 at 1. Briceno asserts that two days later, he went back to Farmco Farms and saw employees of T & M Contractors in the field weeding and recognized most of them as undocumented aliens.[13] See Compl.'s Answers to ALJ's Interrogs.1, Compl.'s Answers to ALJ's Interrogs.2.

Briceno argues that Schulz knew that by hiring T & M Contractors, he was hiring illegal aliens. See id. Briceno further states that the border patrol came by one day and arrested several of Trevino's workers and that Daniel Hyde saw what had occurred. See id. Briceno maintains that Trevino hid some of her workers in a canal until the border patrol left. Briceno further claims that he "[has] three of these workers as witnesses ready to testify and bring their pay stubs showing they were being paid $4.00 an hour." Id. One individual, Samuel Bautista, states that he worked for Martha Trevino beginning on June 10th and that he and two of his cousins were working "when Martha Trevino (contractor) came to pick us up (red truck), we asked her where she was taking us and she said that she was going to hide us because the Immigration was coming so she took us and hid us in a drain ditch." Compl.'s Letter, Ex. 1 [Bautista Letter] at 1.

2. Respondent's Version of the Facts

Vernon Schulz asserts that "[he] personally asked [Thurlow Stanley and Max Briseno] if they could get 100 workers to chop [cotton] and [he] was assured that [Farmco] would have them within two days." See Answer; Compl.'s Answers to ALJ's Interrogs, Ex. 4 [letter dated June 17, 1992 from Vernon Schulz "To Whom It May Concern" regarding its version of the pertinent facts of this case]. Respondent states that it observed some of Briceno's workers in the field "stand and talk, then chop a few feet and stop and talk more." Answer; see Joyce Shultz Stmt. at 1 ("when [Briceno's] crew was chopping weeds on our farm[,] my husband and I watched the choppers, and some of them were chopping and some were leaning on their hoes talking."); Compl.'s Answers to ALJ's Interrogs.2, Ex. 4. Joyce Schulz asserts that "[her] husband told Daniel Hyde, farm foreman, to tell Mr. Briseno they were not getting enough work done and he had not furnished the number of people he had promised to. If he could not perform the job we would have to get someone else." Schulz Stmt. at 1.

[13] Complainant does not state how he knew that any of these workers were undocumented.

Respondent further asserts that several times during the week, it told the contractor that (1) the workers were not completing enough acres so they needed to work faster and (2) the workers were leaving weeds. See Answer. Respondent states that it terminated the agreement with Briceno on June 11, 1992 because these problems were not resolved and "[i]t was not economically feasible to keep these people in [Farmco's] employment." Compl.'s Answers to ALJ's Interrogs, Ex. 4; see Answer; Joyce Schulz Stmt. at 1 (stating that a couple of days after Briceno had started work at Farmco Farms, "[she] overheard Vernon talking to Daniel on the telephone about [Briceno]. Vernon said if they still aren't doing the job we need to let them go and get someone else, we have to get the weeds chopped.").

After Farmco terminated its agreement with Custom Farms, Briceno told Daniel Hyde, the farm foreman that "[they] could not let him go and he would sue [them]." Answer. Briceno provided Respondent with a letter from Franklin McCabe which discusses Chapter 3 of the Colorado River Indian Tribal Labor Code.[14] See Answer, Ex. 1 ["TERO Letter"]. Schulz called McCabe, told him what had happened and asked if he had done anything wrong. See Answer. McCabe said that Schulz had the right to let the contractor go if he was not doing his job. See id. Schulz then asked McCabe for the names of other contractors "registered with the tribe," and was given several names, including T & M Contractors or Martha Trevino. See id.

Respondent hired T & M Contractors or Martha Trevino on the same terms as its arrangement with Briceno; thus, Respondent asserts that he pays Trevino $6.00 an hour after Trevino gives Farmco the total hours worked. See Resp.'s Answers to ALJ's Interrogs.2 at paras. 1-4. Respondent states that T & M Contractors are doing a good job, although Farmco still needs more workers to weed cotton. See id. at Ex. 4; Answer.

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[14] The TERO Letter discusses the Colorado River Indian Tribal Labor Code, Chapter 3, Section 1-301, which provides that "all covered employers operating on the Colorado River Indian Reservation shall give preference in accordance with the priorities set forth in Section 1-302 to Indians in hiring, promotion, training, subcontracting and in all aspects of employment." See Answer, Ex. 1 [TERO Letter]; Compl.'s Answers to ALJ's Interrogs., Ex. 2. The Tribal Labor Code gives preferential treatment to the Native American Indians who are enrolled with the Colorado River Indian Tribes in employment and services offered by Thurlow Stanley, as a Farm Labor Contractor in partnership with Max Briseno. See Answer, Ex. 1. "Any federally recognized Tribe of an enrolled Tribal Member can utilize the provisions of the Tribal Labor Code to their advance if it can be established the bid submitted is competive (sic) and can provide the quality of service needed." Answer, Ex. 1.

Respondent asserts that "T & M Contractors are not illegal (sic) aliens, it is a labor contractor." Answer. Respondent also claims that as far as it knew, Trevino's employees were all authorized for employment in the United States. See Answer. Respondent further states that one of the reasons it hire contractors for labor is because it is the contractors' responsibility to document workers and pay state compensation and withholding taxes. Furthermore, Respondent states that "the border patrol came shortly after T & M Contractors were hired and I was told that all workers were documented." Answer.

C. Factual Finding as to Why Briceno is the Only Complainant in this Case

Because Briceno filed the OSC charge on behalf of other individuals but in the complaint indicates that Farmco discriminated against him by firing him, the basis of his allegations was unclear.[15] In order to clarify Briceno's allegations, I directed him to respond to interrogatories which asked him whether he is alleging that he personally was discriminated against as a labor contractor and/or whether he is attempting to bring this complaint on behalf of American Indian tribesmen who he believes were discriminated against by Farmco's termination of its contract with Custom Farms and subsequent contract with another contractor to supply farm laborers who Briceno alleges were unauthorized aliens. See Order of February 14, 1994, paras. 2, 4.

Briceno makes clear that he is attempting to bring this complaint on behalf of American Indian tribesmen who he feels were discriminated against by Farmco Farms' agreement with another contractor to supply farm laborers whom Briceno alleges were unauthorized aliens.[16] See Compl.'s Answers to ALJ's Interrogs.3, at para. 4 (responding "Yes" to Order of February 14, 1994, at para. 4); Compl.'s Letter.1 (in which Briceno claims that Respondent discriminated against 20 American Indian tribe members who were not hired when instead Respondent hired Trevino's employees who were illegal aliens); Compl.'s Letter.2 (in which Briceno names 24 American Indian tribe members who were not hired when instead Respondent hired Trevino's employees who were

[15] To add to the confusion, Briceno asserts that while Farmco discriminated against him, he was not discriminated against based on national origin or citizenship status.

[16] It is not clear whether these 24 individuals to whom Briceno refers were employed by Custom Farms to weed the cotton fields at Farmco or whether these were 24 Indians who were not in any way connected with the oral contract between Custom Farms and Farmco Farms but under the Colorado River Indian Tribal Labor Code should have received preferential treatment in hiring by Martha Trevino and/or Farmco.

illegal aliens); Briceno asserts that "The same lady that discriminated (Martha Trevino, Labor T & M) has a lot of people right now with illegal papers (greencard). Send someone to investigate so you can see for yourself that I am not lying (sic). The tribal members want them to be paid for time lost.").

With regard to whether he is alleging that he personally was discriminated against, Briceno states: "An oral contract existed, and Farmco Farms dismissed me and my laborers and brought in another contractor using illegal aliens." Compl.'s Answers to ALJ's Interrogs.3, at para. 2. In view of the fact that none of the 24 Native American Indians whom Briceno purports to represent has filed any written pleading indicating an intention to join this case or indicating permission that Briceno represent his or her interest in this case, I construe the complaint in this case as alleging that Farmco discriminated against Briceno by terminating its contract with Custom Farms.

III. *Discussion*

A. Jurisdiction

1. I Have Jurisdiction Over the National Origin Portion of Briceno's Claim

The jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers employing between four and fourteen employees. Dhillon v. Regents of the University of California, 3 OCAHO 497, at 11 n.8 (March 10, 1993); Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 8 (Dec. 2, 1992); see 8 U.S.C. § 1324b(a)(2)(A) and (B). As Respondent employed between eight and fourteen employees at all times relevant to the allegations in the complaint, I have jurisdiction over the national origin portion of Complainant's claim.

2. I Have Jurisdiction Over the Citizenship Status Portion of the Claims

The jurisdiction of administrative law judges over claims of citizenship status discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers employing more than three employees. Westendorf v. Brown & Root, OCAHO 477, at 12 (Dec. 2, 1992); see 8 U.S.C. § 1324b(a)(1)(B),

(a)(2)(A). As Respondent employed more than three employees at all times relevant to the allegations in the complaint, I have jurisdiction over the citizenship status portion of Complainant's claim.

B. The Citizenship Status Portion of the Allegations

1. The Citizenship Status Portion of Briceno's Claim Must Be Dismissed Because He is Not a "Protected Individual"

In order to be eligible to bring a claim of citizenship status discrimination under IRCA, a complainant must be a "protected individual" as defined at 8 U.S.C. § 1324b(a)(3). 8 U.S.C. § 1324b(a)(1)(B). The group of individuals protected by the prohibition against citizenship status discrimination includes United States citizens and nationals and aliens with the immigration status of permanent resident, temporary resident, asylee or refugee,[17] subject to the following exclusions:

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

8 U.S.C. § 1324b(a)(3)(B).

A complainant has the burden of showing that he or she does not fit within either of the two exclusions to protection against citizenship status discrimination. Dhillon v. Regents of the University of

[17] As originally enacted in 1986, 8 U.S.C. § 1324b protected only U.S. citizens, nationals, and "intending citizens" from employment discrimination based on citizenship status. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 102, 100 Stat. 3374. "Intending citizens" were defined in the law as permanent residents, temporary residents, asylees and refugees who evidenced an intention to become citizens of the United States. 100 Stat. at 3375. Under the law as it existed at that time, an individual's intent to become a citizen was a prerequisite to protection under IRCA. See United States v. Mesa Airlines, 1 OCAHO 74, at 10-12 (July 24, 1989), appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991).

California, 3 OCAHO 497, at 12 (March 10, 1993). The naturalization laws provide that a permanent resident may file for naturalization only if he or she has resided in the United States for at least five years after being admitted as a lawful permanent resident. 8 U.S.C. § 1427(a). This time period is shortened to three years for permanent residents who have resided continuously in the United States for three years and during those three years have been living in marital union with their citizen spouse, subject to certain conditions. 8 U.S.C. § 1430(a).[18]

Briceno obtained his permanent resident status on February 27, 1963. At the time, he was married to a U.S. citizen with whom he has lived in marital union. Briceno has never applied for naturalization. Therefore, he is not protected by IRCA's prohibition against citizenship status discrimination. As he lacks standing to bring such a claim, that portion of his claim must be dismissed under 8 U.S.C. § 1324b(a)(3)(B).

C. The National Origin Portions of Briceno's Claim Must Be Dismissed For Lack of Timeliness

This case presents the interesting issues of whether 8 U.S.C. § 1324b covers the claim of Briceno, a labor contractor, against Farmco, a user of contract labor. I need not reach this issue, however, because, as discussed below, the complaint in this case was not timely and therefore the national origin portion of Briceno's complaint must be dismissed.

In a letter dated February 12, 1993, OSC informed Briceno that it had not made a determination as to his allegations of unfair immigration-related employment practices against Farmco Farms and would continue its investigation. OSC also informed Briceno that he

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[18] This section provides that:

> Any person whose spouse is a citizen of the United States may be naturalized upon compliance with all the requirements of this subchapter except the provisions of paragraph (1) of section 1427(a) of this title if such person immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his application has been living in the marital union with the citizen spouse, who has been a United States citizen during all of such period, and has been physically present in the United States for periods totaling at least half of that time and has resided within the State or the district of the Service in the United States in which the applicant filed his application for at least three months.

could file his own complaint with OCAHO within 90 days of receipt of OSC's letter. Not until 126 days after the date of OSC's letter did Briceno file the complaint in this case.

IRCA provides in pertinent part that:

> If the Special Counsel after receiving . . . a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an [ALJ] with respect to such charge within [120 days of receipt of the charge], the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to [§ 1324b(d)(3)]) file a complaint directly before a judge within 90 days after the date of receipt of the notice. . . ..

8 U.S.C. § 1324b(d)(2).

The 90-day requirement for filing a § 1324b complaint with OCAHO following receipt of OSC's determination letter, however, is not jurisdictional. Rather, it is more like a statute of limitations, subject to waiver, estoppel and equitable tolling. See Valenzuela v. Kraft, Inc., 801 F.2d 1170, 1173 (9th Cir. 1986), amended by, 815 F.2d 570 (9th Cir. 1987) (addressing parallel 90-day requirement for filing suit after receipt of an EEOC right-to-sue notice). See also Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392, 102 S.Ct. 1127, 1131, 71 L.Ed.2d 234 (1982) (addressing time period for filing an EEOC charge).

Briceno has provided no explanation as to why he did not comply with the 90-day statutory period and thus has provided no basis for equitably tolling the statute, waiving the 90-day requirement or for applying the theory of estoppel. See generally Halim v. Accu-Labs Research, Inc., 3 OCAHO 474, at 12-15 (Nov. 16, 1992); United States v. Mesa Airlines, 1 OCAHO 74, at 22-27 (July 24, 1989), appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991). I therefore conclude that the national origin portion of his complaint must be dismissed for lack of timeliness under 8 U.S.C. § 1324b(d)(2).

IV. *Conclusion*

Based on the above, the citizenship status portion of the complaint is dismissed based on lack of standing and the national origin portion of the complaint is dismissed for lack of timeliness.

V. *Appeal Process*

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). Not later than 60 days after entry, Complainant may appeal this Decision and Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. 8 U.S.C. § 1324b(i)(1).

IT IS SO ORDERED this 28th day of April, 1994 in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge