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

September 27, 1994

WARTAN BOZOGHLANIAN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00069
RAYTHEON CO., ELECTROMAGNETIC SYSTEMS DIVISION, Respondent.	)	

ORDER GRANTING MOTION TO DISMISS

On September 15, 1993, Wartan Bozoghlanian (complainant) commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), in which he alleged that Raytheon Company, Electromagnetic Systems Division (Raytheon or respondent) had engaged in immigration-related employment discrimination against him based upon his citizenship status, a practice prohibited under the pertinent provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(1)(B).

Complainant alleged specifically that on Monday, November 2, 1987, he attended an on-campus recruitment interview arranged by respondent at California State University, Los Angeles (CSULA). He also asserted that at the conclusion of that interview, respondent's representative asked him to provide his naturalization date. Complainant replied that he had become a naturalized citizen in late 1985. Complainant contends that respondent's representative then advised him that the position for which he had applied required a security clearance, and that in order to be eligible for that clearance an individual

was required to have been a citizen for a period of five (5) to 10 years. Complainant argued that this statement by respondent's representative was tantamount to his having been denied employment with Raytheon solely because of his citizenship status.

OSC reviewed complainant's charge, and by letter dated March 16, 1994, informed complainant that it had determined that there was no reason to believe that his alleged citizenship status discrimination had occurred as a result of the so-called "5/10 year rule", a provision involved in the ruling styled Huynh v. Cheney, 87-3436 TFH (D.D.C.).

OSC further advised complainant that he had failed to timely file his charge alleging citizenship status discrimination.

For those reasons, OSC informed complainant that it would not file a complaint with this Office on his behalf, and also advised him that he was entitled to file a private action directly with an Administrative Law Judge assigned to this Office.

On April 8, 1994, complainant did so by filing the Complaint at issue.

In that Complaint, complainant realleged that on November 2, 1987, respondent had refused to hire him for a position for which he was qualified and for which respondent was then seeking applicants, and did so solely because of his naturalized citizenship status. In addition to that claim, complainant added an allegation that respondent also refused to hire him because of his Lebanese national origin.

On May 9, 1994, respondent filed its Answer, in which it denied that it had discriminated against complainant because of his citizenship status and national origin and also denied that it had failed or refused to offer complainant a job for the reason that its representative did not meet with or interview complainant on the date alleged, November 2, 1987, nor at any other time.

Respondent also asserted these five (5) affirmative defenses in its responsive pleading.

Respondent asserted as a first affirmative defense that complainant has failed to state a claim for which relief may be granted.

Respondent's second affirmative defense urged that complainant is time-barred from raising his claim, whether by laches or by the applicable statute of limitations.

For its third affirmative defense, respondent maintained that complainant is estopped from and/or has waived his claim by his acts or omissions.

In its fourth affirmative defense, respondent argued that complainant is not a qualified "protected individual" as that term is defined in 8 U.S.C. § 1324b.

As a fifth affirmative defense, respondent asserted that complainant has suffered no damages.

On May 9, 1994, also, respondent filed a Motion to Dismiss for Failure to State a Claim, arguing therein that complainant has failed to establish a prima facie case of disparate treatment discrimination. Respondent premised that argument on its assertion that complainant had never met with, nor had he been interviewed by, respondent's representative for employment purposes.

In that motion, respondent also asserted as a separate ground for dismissal that complainant's claim is time-barred on its face.

Complainant had 15 days from the date of service of respondent's motion to respond, 28 C.F.R. §§ 68.8(c), 68.11(b), but failed to do so.

On June 30, 1994, after having fully considered complainant's motion, the undersigned issued an Order to Show Cause Why Motion to Dismiss Should Not Be Granted.

In that order, it was determined that respondent had presented evidence indicating that complainant did not interview for a position with respondent either on the date alleged in the charge and the Complaint at issue, November 2, 1987, or at any other date, a fact essential to complainant's claim, and proof of which complainant would bear the burden at hearing. Because complainant did not respond to respondent's motion, it was found that complainant had failed to come forward with specific facts showing that there was a genuine issue for trial.

In addition, it was determined that respondent had shown that complainant had failed to file his charge within the period provided for under IRCA, and had failed to offer an explanation justifying or excusing his failure to comply with the statutory limits for filing his charge.

For these reasons, complainant was ordered to show cause why his claim should not be dismissed as having been untimely filed, and to have done so within 15 days of his receipt of the June 30, 1994 Order.

On July 1, 1994, complainant filed a pleading captioned Motion For Amending this Complaint, requesting that the Complaint be amended to name the Department of Defense (DoD) as a respondent in this matter.

In support of that motion, complainant asserted that he did not realize at the time he filed the Complaint that he was able to file a complaint against DoD, but has since learned that he can do so and that the inclusion of DoD is "an integral part of the whole issue." Motion for Amending, at 2.

Complainant further asserted in that pleading that if he is unable to amend his Complaint to name DoD as a respondent in this matter, the foundations of his Complaint would be so weakened as to make it impossible for complainant "to obtain a complete, just and fair hearing." Id.

The procedural regulation governing amendments and supplemental pleadings provides that the Administrative Law Judge may allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the final order based on the complaint. 28 C.F.R. § 68.9(e).

However, filing a charge with OSC alleging that a person or entity has committed or is committing an unfair immigration-related employment practice is a prerequisite to filing a private action with this Office. See George v. Bridgeport Jai-Alai, 3 OCAHO 537, at 6 (7/12/93). Accordingly, a complainant cannot amend a private action to assert claims against individuals who were not named in a charge filed previously with OSC. See Wije v. Barton Springs/Edwards Aquifer C.D., OCAHO Case No. 94B00046 (Order Denying Complainant's Motions for Supplementary Complaint of Retaliation by Mr. William Couch, General Manager of the Respondent District and for Supplementary Complaint of Retaliation by Members of the Board of Directors of the Respondent District), at 5 (7/21/94).

Complainant asserted in his Motion for Amending that "DoD is an integral part of this whole issue." Motion for Amending, at 2. This assertion notwithstanding, complainant failed to name DoD as a respondent in the charge that he filed earlier with OSC, and has failed

throughout these proceedings to assert any facts which implicate DoD as a potential respondent in this matter.

Because complainant failed to name or implicate DoD as a respondent or potential respondent in the earlier OSC charge, his request that the Complaint be amended to name DoD as a respondent in this matter is improper and therefore must be denied.

On July 8, 1994, in response to the June 30, 1994 Order to Show Cause, complainant filed a pleading captioned Motion to Show Cause Why Respondent's Motion to Dismiss My Complaint as Having Failed to State a Claim Should Not Be Granted.

In that pleading, complainant submitted a form titled "On-Campus Recruitment, California State University Los Angeles, Student's Schedule, Fall 1987", which indicated, according to complainant, that he was scheduled for an interview with respondent at 10:45 on November 2, 1987. Complainant contended that he would not and had not canceled that interview, and asserted that respondent has failed to establish that complainant had, in fact, canceled that interview.

Complainant also attached an exhibit titled "On-Campus Recruitment, California State University Los Angeles, Student's Schedule, Winter 1988", for the purpose of demonstrating that he was on the waiting list for an interview with respondent's representative, one which he had scheduled but did not occur. Complainant contended that respondent has failed to produce any evidence, as it did for the November 2, 1987 interview, to explain why that interview did not occur.

In his "motion", complainant also asserts that his Complaint should not be dismissed as having been untimely filed, contending that equitable modification of the filing period is appropriate in this case.

In particular, complainant alleged that after his alleged interview with respondent on November 2, 1987, complainant received no reply from respondent that he was being considered, and therefore had reasonably considered his application for employment to have been pending from that point until, presumably, the date upon which that he filed his OSC charge.

In response to the rebuttable determination in the Order to Show Cause that complainant was not adversely affected by the so-called "5/10 year rule" because complainant had resided in the United States

for more than 10 years at the time of the alleged interview with respondent, complainant asserts that, although he became a permanent resident in July 1977, he had resided in the United States for only eight years and seven months on November 2, 1987, the date of the alleged violation.

To explain the discrepancy between the date he obtained permanent resident status and the date he actually began to reside in the United States, complainant states that after he became a permanent resident alien, he went to Lebanon, where he remained until he returned to the United States on April 14, 1979. In support of this assertion, complainant attached copies of pertinent pages of his Lebanese passport and United States Reentry permit, and a Clearance Certificate dated February 4, 1979 from his Lebanese employer, Middle East Airlines (MEA), showing that he was to be employed by MEA until March 31, 1979.

Finally, complainant asserts that although his country of origin, Lebanon, did not appear on the "List of Designated Countries", 32 C.F.R. section 154, appendix G (1987), which enumerates the countries of origin to whose natives the "5/10 year rule" pertained, and whose interests were determined by DoD to be hostile to the United States, Lebanon was in fact hostile to the United States on the date he alleged he had been denied employment by respondent, and resulted from that fact.

On July 22, 1994, complainant filed an additional responsive pleading captioned "For Augmenting the Record. More Facts Concerning My Assertion That I Did Not File My Charges Late With The Office Of Special Counsel."

In that pleading, complainant maintains that his charge was timely filed in response to a posting from OSC notifying individuals potentially adversely affected by the "5/10 year rule", which posting was, according to complainant, in effect at the time that he filed his OSC charge.

On August 5, 1994, respondent filed its Reply to Complainant's "Motion to Show Cause Why Respondent's Motion to Dismiss My Complaint as Having Failed to State A Claim Should Not Be Granted", in which it asserts that complainant's "Motion" proves that complainant has not met the procedural requirements for filing his Complaint, and also demonstrates convincingly that complainant lacks standing to assert his claim.

Particularly, respondent asserts that by complainant's own admission, he could not have been adversely affected by the "5/10 year rule." In support of this assertion, respondent notes that in his "Motion", complainant stated the following:

> Fact One. In November 1987, I had resided in the U.S. since April 14 1979. That is eight (8) years and seven (7) months. Not ten (10) years or over. Fact Two. In November 1987, I had been a citizen for only two (2) years. I became a naturalized U.S. citizen on 21 November, 1985....

Raytheon's Reply, at 2.

Respondent asserts that the undersigned must take judicial notice of these statements, which establish that complainant "is not entitled to the benefit of the 5/10 year rule." Id. Therefore, respondent concludes, complainant lacks standing to pursue this or any other claim.

Finally, respondent argues that it has offered credible evidence establishing the fact that it did not meet with complainant on the date which complainant asserts he was denied employment by respondent, November 2, 1987, a fact upon which, respondent contends, complainant bears the burden of proof.

Discussion

This matter can be adjudicated on either of two grounds.

Initially, a ruling may be predicated upon respondent's contention that summary decision is in order since it has offered evidence demonstrating that complainant has failed to state a claim upon which relief can be granted. In particular, respondent asserts that it has shown, and complainant has failed to rebut, that complainant did not apply for a position with respondent, a necessary element of complainant's claim and for which complainant would bear the burden of proof at hearing.

The second ground for decision is respondent's argumentation that the Complaint should be dismissed because the charge upon which that Complaint was based was untimely filed. Each of these contentions will be considered in turn.

Failure to State a Claim

The procedural regulations governing these proceedings provide that a respondent may move for dismissal on the ground that the complainant has failed to state a claim upon which relief can be granted. See 28 C.F.R. § 68.10. If the Administrative Law Judge determines that complainant has failed to state a claim, the Administrative Law Judge may dismiss the complaint on that ground. Id.

As noted in the Order to Show Cause, this procedural regulation is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, which has accordingly been used as a guidepost by the Administrative Law Judges in this Office in issuing orders pursuant to motions to dismiss under section 68.10 of the pertinent procedural rules.

Rule 12 of the Federal Rules of Civil Procedure provides that if, on a motion to dismiss for failure of the pleading to state a claim under Rule 12(b)(6), matters outside the pleading are presented to and not excluded by the court, the motion is to be considered as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

In its Motion to Dismiss, respondent submitted several outside documents not contained in the Complaint. For this reason, respondent's Motion to Dismiss for Failure to State a Claim was considered in the Order to Show Cause as a motion for summary decision under 28 C.F.R. section 68.38, a regulation analogous to Rule 56 of the Federal Rules of Civil Procedure. See Udala v. New York State Dep't of Educ., OCAHO Case No. 94B00020 (Order Granting Motion to Dismiss Complaint), at 6 (5/4/94); Grodzki v. OOCL (USA), 1 OCAHO 295, at 3 (2/13/91).

Section 68.38 of the procedural regulations governing these proceedings provides 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 material fact, and that a party is entitled to summary decision.

Because the decisional standard in section 68.38(c) of the procedural regulations is analogous to that contained in Rule 56(c) of the Federal Rules of Civil Procedure, Federal precedent interpreting Rule 56(c) has been used in determining whether summary decision is appropriate in proceedings under IRCA, 8 U.S.C. § 1324b.

An issue of material fact is genuine if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532, at 7 (6/25/93). As to materiality, only disputes over facts that under the governing law might affect the outcome of the suit will properly preclude the entry of summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Hensel, 3 OCAHO 532, at 7.

In determining whether there is a genuine issue of material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Sepahpour v. Unisys, Inc., 3 OCAHO 500, at 3 (3/23/93); U.S. v. Lamont St. Grill, 3 OCAHO 441, at 3 (7/21/92); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

Regardless of which party would have the burden of persuasion at trial, the party moving for summary decision assumes the initial responsibility of informing the court of the basis of its motion and of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

After this responsibility is met, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Anderson, 477 U.S. at 250, 106 S. Ct. at 2511; Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Hensel, 3 OCAHO 532, at 8; Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524, at 4 (6/10/93); Sepahpour, 3 OCAHO 500, at 3.

A complainant may prove that he or she has been subjected to immigration-related employment discrimination in violation of IRCA in one of two ways. First, the complainant may offer direct evidence of discrimination. See Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1984); Hensel, 3 OCAHO 532, at 11 (6/25/93).

Alternatively, a complainant may follow the framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 192 (1973), and adduce indirect, or circumstantial proof of such discrimination, and thus establish a prima facie case of disparate treat-

ment, which, if unrebutted by the respondent, entitles the complainant to decision.

In order to establish a prima facie case of disparate treatment in hiring, complainant must show:

1. That he belongs to a protected class;
2. That he applied and was qualified for a job for which respondent was seeking applicants;
3. That, despite his qualifications, he was rejected; and
4. That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802; Hensel, 3 OCAHO 532, at 12.

In his charge, complainant contended that his claim was established by direct evidence of discrimination. In particular, complainant asserted that in the course of an interview with a representative of respondent on November 2, 1987, complainant was told that he was not eligible for, and was therefore denied, a position with respondent because of his citizenship status.

Complainant filed his Complaint on a form provided by this Office. Following the format of that form, complainant asserted his claim in accordance with the framework established by the Supreme Court in McDonnell Douglas. In particular, complainant asserted that he interviewed for a position with respondent for which he was qualified, that he was not hired because of his citizenship status and national origin, and that the position remained open and respondent continued to accept applications from other individuals with complainant's qualifications.

Summary decision is mandated:

> "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. (emphasis added)

Celotex, 477 U.S. at 322-323, 106 S. Ct. at 2552 (quoting Anderson, 477 U.S. at 242, 106 S. Ct. at 2511). Accord Lujan v. National Wildlife Fed'n, 479 U.S. 871, 110 S.Ct. 3177, 3186 (1990).

Regardless of whether complainant proceeds by offering direct evidence of discrimination, or chooses to adduce indirect, or circumstantial, evidence of discrimination under the McDonnell Douglas framework, the fact that complainant actually met with a representative of the respondent firm is obviously an essential element of complainant's cause of action which he must prove in order to prevail.

In its Motion to Dismiss, respondent offered evidence to establish that its representatives did not meet with complainant on the date asserted in the charge and resulting Complaint, November 2, 1987, nor on any other date.

In particular, respondent submitted a copy of complainant's schedule of interviews, which indicates that complainant had been scheduled for an interview with respondent at 10:45 on November 2, 1987. However, over that date and time appears the inscription "Canceled," made by a representative of CSULA.

Respondent further asserted in that motion that it had interviewed the Human Resources representative who conducted the interviews at CSULA for respondent on November 2, 1987, and that that individual asserted that respondent did not interview complainant either on that date or at any other time.

In response, complainant alleged that he attempted to obtain documents from the CSULA placement office showing that he did, in fact, interview with respondent on November 2, 1987, but that he was unable to contact the individual who had custody of those documents. Accordingly, complainant has simply asserted, without offering any supporting evidence, that he interviewed with respondent on that date.

As previously noted, the party seeking summary decision assumes the initial duty of identifying evidence which demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323 106 S. Ct. at 2553. Respondent has produced evidence which indicates that it did not interview complainant on the date alleged in the Complaint, November 2, 1987, nor on any other date, a fact critical to complainant's cause of action.

The burden at this stage is therefore upon complainant to demonstrate through the production of probative evidence that there remains a genuine issue of fact to be tried. Id.; Glacier Optical, Inc. v. Optique Du Monde, Ltd., 816 F. Supp. 646, 650 (D. Or. 1993); Somavia v. Las Vegas Metro. Police Dept., 816 F. Supp. 638, 640 (D. Nev. 1993).

To create a genuine issue of fact, complainant must do more than present some evidence on the issue that he asserts is disputed. Avia Group Int'l, Inc. v. L.A. Gear California, 853 F.2d 1557, 1560 (Fed. Cir. 1988). As the Court has held, "(w)hen the moving party has carried its burden..., its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356.

Complainant's bare assertion that he interviewed with respondent's representative at CSULA on November 2, 1987 is insufficient to demonstrate that there is a genuine issue of material fact on this question, in light of the fact that respondent has produced unrebutted documentary evidence to the contrary.

The fact that complainant interviewed with respondent, either on the date alleged in the Complaint or on another date, is indisputably essential to complainant's case, and because respondent has demonstrated that there is no genuine issue as to the fact that complainant did not interview with respondent firm, the latter is entitled to summary decision on that fact alone. As the Court held, "the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. Complainant has clearly failed to make such a showing under these facts.

Even in the event that summary decision were not granted in respondent's favor on this issue, complainant cannot prevail because it has been shown with equal certitude that the Complaint at issue was untimely filed and must be dismissed.

As noted in the June 30, 1994 Order to Show Cause, the filing of a timely charge with OSC is a prerequisite for filing a private action with this Office. See 8 U.S.C. §§ 1324b(d)(1) and (2).

Under the applicable law, a charge must be filed with OSC within 180 days after the occurrence of the alleged unlawful act on which the charge is based. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a). See Lundy v. OOCL (USA) Inc., 1 OCAHO 215, at 8 (8/8/90).

In complainant's OSC charge, as in his Complaint, he has alleged that the unfair immigration-related employment practice on which he bases his claim, that of respondent's alleged wrongful failure to hire him because of his citizenship status and his national origin, had occurred on November 2, 1987. Accordingly, complainant's OSC charge must have been filed within 180 days of that date, or by April 30, 1988.

It is clear that OSC did not accept complainant's charge as complete until September 15, 1993, or more than five years, 10 months and 13 days later, and thus well in excess of the 180-day statute of limitations provided for in IRCA. Even accepting complainant's assertion that he filed his charge with OSC on April 15, 1993, as opposed to September 15, 1993, that charge would still have been filed some 1811 days after the 180-day filing deadline of April 30, 1988.

However, as noted in the June 30, 1994 Order, complainant's failure to comply with this 180-day filing deadline is not necessarily dispositive of the Complaint, because the 180-day deadline is subject to equitable modification on a case-by-case basis. See United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89).

In general, that filing period is 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 applicant into inaction during the filing period by misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91). However, the charging party bears the burden of demonstrating that equitable modification would be appropriate. Becker v. Greenwood Police Dep't, OCAHO Case No. 92B00228 (Order Granting Respondent's Motion for Dismissal) (4/19/93).

In his response to the Order to Show Cause, complainant asserted that the 180-day filing period should be extended from November 2, 1987 to September 15, 1993, the date upon which he filed his charge with OSC, because he had not been informed by respondent that he was not being considered, and therefore, complainant had held out hope during that period that he would be selected by respondent.

That contention, however, is directly contradicted by complainant's statements in his OSC charge, as well as in his OCAHO complaint. In both of those pleadings, respondent asserted that he was told at the end of his purported November 2, 1987, interview with respondent's agent that in order to be considered for the position he sought, he

would be required to obtain a security clearance, which he would be unable to do because of his period of residence. Those alleged statements should certainly have placed respondent on notice on the alleged interview date that he was not being considered for the position.

Complainant further asserts that the 180-day filing deadline should be extended in this instance in accordance with the waiver of timeliness as an affirmative defense to causes of action under IRCA, 8 U.S.C. § 1324b, in cases involving application of the so-called "5/10 year rule" under the Settlement Stipulation in Huynh v. Cheney, 87-3436 (D.D.C. March 14, 1991).

Under the 5/10 year rule, formerly codified at 32 C.F.R. § 154.16(c)(1) (1987), security clearances were denied to naturalized United States citizens whose countries of origin were determined to have interests adverse to the United States. Huynh v. Cheney, 679 F. Supp. 61, 63 (D.D.C. 1988). Pursuant to that regulation, DoD published a list of 29 countries and areas at 32 C.F.R. § 154, Appendix G.

Complainant's nation of origin, Lebanon, does not appear on that list. See id. Complainant contended in his response to the Order to Show Cause that the rule was applied to him despite that fact, asserting that during the period in question, the interests of that nation were, in reality, adverse to the interests of the United States.

Furthermore, and in response to a rebuttable determination made by the undersigned in the Order to Show Cause, respondent asserts that at the time of the alleged discrimination he was within the class of individuals proscribed under the "5/10 year rule."

In his Complaint, complainant asserted that he obtained his permanent resident status in July 1977. In the Order to Show Cause, the undersigned noted therefore that on November 2, 1987, complainant had been a resident of the United States for more than 10 years, and therefore eligible for a security clearance under the pertinent regulation. See 32 C.F.R. § 154.16(c)(1)(ii)(1987).

In his response, complainant asserted that although he had been in permanent resident status since July 1977, he had resided in the United States only since April 14, 1979, eight years and seven months before the alleged discriminatory act, and only became a naturalized citizen on November 21, 1985, less than two years before the alleged occurrence.

The term "reside" as it applies to the "5/10 year rule" is not defined in the applicable regulations. See 32 C.F.R. § 154.1 et sec. However, it is apparent from reviewing those regulations that the term applies to actual physical residence in the United States, and not to any period in which one remains in permanent resident status while residing outside the United States.

In view of the foregoing, and in accordance with the findings in the undersigned's June 30, 1994 Order to Show Cause in this proceeding, respondent's May 6, 1994 Motion to Dismiss is granted and complainant's April 8, 1994 Complaint is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this 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, and does so no later than 60 days after the entry of this Order.