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

WARTAN BOZOGHLANIAN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 94B00073
LOCKHEED-ADVANCED DEVELOPMENT COMPANY, SUCCESSOR-IN-INTEREST TO LOCKHEED-CALIFORNIA COMPANY Respondent.	)	

FINAL DECISION AND ORDER GRANTING MOTION TO DISMISS

(November 23, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Wartan Bozoghlanian, Pro se
James E. Ingram, Jr., Esq.
for Respondent

I. *Procedural History and Facts*

By a charge dated September 9, 1993, Wartan Bozoghlanian (Complainant or Bozoghlanian) alleged that Lockheed-California Company, now known as Lockheed-Advanced Development Company (Respondent or Lockheed), discriminated against him based on his citizenship status and national origin, practices prohibited by section 102 of the

Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(1)(B). Bozoghlanian filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Bozoghlanian alleged that in November of 1987 he applied for employment with Respondent and that during an interview was informed by a representative of Lockheed that he was not eligible because the position for which he applied required a security clearance. In order to be eligible for that clearance, an individual born in one or another of certain designated countries was required to have been a citizen for a period of five (5) years, or a resident for ten (10) years (i.e., he must satisfy the "5/10 rule"). The 5/10 rule, promulgated by the United States Department of Defense (DOD), has since been repealed. See Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988) and former 32 C.F.R. § 154.16 (1987). Bozoghlanian argued that Respondent's actions are tantamount to his having been denied employment by Lockheed in violation of the prohibitions of § 1324b against citizenship status and national origin discrimination. Bozoghlanian's charge also named DOD as a respondent.

By a determination letter dated March 17, 1994, OSC advised Bozoghlanian that it elected not to file a complaint before an administrative law judge for two reasons: First, there was no 5/10 rule discrimination within the meaning of the settlement in Huynh and accordingly the charge (as to Lockheed's predecessor) was out of time. Secondly, as to DOD, the "Department of Justice has determined that the Office of Special Counsel lacks jurisdiction to pursue such claims against federal agencies, including DOD." OSC, however, informed Bozoghlanian that he could pursue a private cause of action directly with an administrative law judge in the Office of the Chief Administrative Hearing Officer (OCAHO).

On April 8, 1994, Bozoghlanian filed an OCAHO complaint. Complainant reasserted his claim that Respondent had denied him employment on the basis of his citizenship status and national origin. He did not include DOD in his complaint although he filed a subsequent motion to amend his complaint to include DOD as a respondent. See Complainant's Motion for Amending the Following Complaints, July 1, 1994.

On April 12, 1994, OCAHO issued its Notice of Hearing (NOH), which transmitted to Respondent a copy of Bozoghlanian's complaint.

On May 25, 1994, Respondent timely filed an answer, including affirmative defenses. Denying discrimination against Complainant, Lockheed asserts, inter alia, that Complainant's claims are time-barred because IRCA discrimination claims must be filed within 180 days of the alleged practice; Complainant, however, did not file his claim with OSC until more than five years after the event. In addition, Respondent contends that DOD has investigated Complainant's case and concluded that no citizenship status discrimination "occurred as a result of the '5/10 year rule' pursuant to the settlement in Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991) . . ." and that this decision is binding. Respondent's Answer at 3.[1]

Respondent also argues that all of its employment interviewers are trained to avoid questions relating to "an applicant's lineage, ancestry, national origin, descent, place of birth, or mother tongue, or about the national origin of applicant's parents or spouse." Id. Presumably, Respondent asserts that because of this special training, no interviewer would have engaged in a conversation with Complainant such as the one forming the basis for this complaint.

On May 25, 1994, Respondent filed a motion to dismiss which reiterated its defense of timeliness. The motion also included the defense that Complainant has failed to state a claim on which relief can be granted.

Complainant filed a motion to represent himself on July 1, 1994. On July 14, 1994, Respondent filed a motion for a prehearing telephonic conference.

In response to Respondent's Motion to Dismiss, on July 21, 1994, Bozoghlanian filed a Motion to Show Cause Why Respondent's Motion to Dismiss his Complaint Should Not Be Granted (Complainant's Motion to Show Cause). The motion addresses Respondent's arguments for summary judgment. In addition, Complainant augments his arguments in a memorandum filed on July 22, 1994 [hereinafter Complainant's Document Augmenting the Record].

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[1] It should be noted that (and Complainant correctly points this out in his Motion to Show Cause at 6) Respondent is incorrect in its supposition regarding DOD. For purposes of §1324b, DOD did not investigate Complainant's charge. It was OSC which determined that Complainant did not appear to be the subject of citizenship status discrimination as a result of the 5/10 rule. OSC's determination is not, however, binding on the adjudicator and, therefore, is not an effective defense.

II. *Discussion*

Because of the similarity of this case to Bozoghlanian v. Unisys, a complaint previously filed by Complainant with OCAHO, the analysis in Unisys, with minor variations, is reiterated.[2]

OCAHO rules of practice and procedure authorize the administrative law judge to dispose of cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief can be granted, 28 C.F.R. § 68.10 (1994), and motions for summary decision, 28 C.F.R. §68.38(c). The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1. These Rules as well as fairness and judicial efficiency require that Respondent's motion to dismiss be treated as tantamount to a motion for summary decision. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). It is a condition precedent to summary decision that there is "no genuine issue as to any material fact." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

Keeping in mind that any uncertainty as to a material fact must be considered in a light most favorable to the non-moving party,[3] i.e., Complainant, the threshold issue is whether or not Bozoghlanian satisfied IRCA's 180-day statute of limitations. 8 U.S.C. § 1324b(d)(3).

A. *Application of Huynh v. Carlucci to IRCA's Statute of Limitations*

Title 8 U.S.C. 1324b(d)(3) provides that "no complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." It is undisputed that the alleged discrimination occurred on November 16, 1987. The OSC charge was not filed until September 9, 1993, more than five years later. Obviously, unless Complainant is entitled to a waiver of the limitations requirement, his discrimination complaint would be time-barred under IRCA.

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[2] See Bozoghlanian v. Unisys Corporation, OCAHO Case No. 94B00067 (November 18, 1994).

[3] See Matsushita v. Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

Complainant, however, makes two arguments as to why he is entitled to avoid the 180 day requirement. The first argument relies on Huynh v. Carlucci, 679 F. Supp. 61. In Huynh, the court invalidated DOD's 5/10 rule on the basis that it was in violation of the U.S. Constitution. The rule required naturalized citizens from a designated list of countries thought to be hostile to the United States (1) to have been a U.S. citizen for five (5) years, or (2) to have resided in the U.S. for the past ten (10) years in order to be issued a security clearance required of employees involved in certain DOD contracts. See former 32 C.F.R. § 154.16(c)(1).

By the settlement between the parties and approved by the Huynh court, DOD agreed to waive the IRCA limitations requirement, thereby allowing victims of the 5/10 rule to litigate their discrimination claims without regard to the 180 day time frame. See Huynh v. Cheney, 87-3436 TFH (D.D.C. Dec. 24, 1991).[4] Complainant seeks benefit of the waiver on the basis that he was allegedly told by a representative of Respondent that he could not be hired due to the fact that the 5/10 rule barred him from obtaining a security clearance. See Complainant's Motion to Show Cause at 3.

1. Lebanon is not on the List of Countries Designated as Hostile

The Huynh settlement waives limitations only with regard to charges against DOD, and not against other employers.[5] However, even assuming that Respondent is bound by the Huynh decision, I conclude that Complainant is not entitled to a waiver of limitations. This is so because the 5/10 rule on its face applies only to individuals whose countries of origin are among those designated by DOD. Bozoghlanian's country of origin, Lebanon, was not included among the

[4] While it may appear that there are two Huynh cases, Huynh v. Cheney and Huynh v. Carlucci, they are the same case. Huynh v. Carlucci is the district court decision which held that the 5/10 rule was unconstitutional. Huynh v. Cheney is the subsequent settlement agreement to which DOD assented, requiring public notification of the Huynh decision.

[5] See Trivedi v. Northrop Corp. and Department of Defense, 4 OCAHO 600 (1994), appeal filed, No. 94-70098 (9th Cir. Mar. 8, 1994) (holding that only DOD is bound by the Huynh decision; other entities, including private contractors like Respondent, are not bound).

countries designated by DOD as hostile.[6] Complainant asserts that this fact is not dispositive because DOD should be understood as in effect having secretly included Lebanon in its list of countries to which the 5/10 rule was applied. According to Complainant, this is true because the geographic "**area**" in which Lebanon is located has generally been considered to be hostile to the United States. See Complainant's Motion to Show Cause at 13.

In addition, Complainant relies on dictum in Huynh which states that "[a]lthough the People's Republic of China does not appear on [the] . . . list, defendant DOD has been secretly applying the Regulation to naturalized United States citizens from that nation." Huynh, 679 F. Supp. at 63. Continuing, the Huynh court stated that:

> Defendant [DOD] has not offered sufficient evidence justifying the Regulations' designation of nations with interests adverse to the United States, which at least ostensibly omits such obviously hostile nations as the People's Republic of China and Lebanon. . . .

Id.

Arguing from the quoted statements in Huynh, Complainant claims that there are other countries (besides China) to which DOD secretly applied the 5/10 rule, but which were not on the designated list. Complainant suggests I treat Lebanon as a designated hostile country, triggering a waiver of the 180-day limitations period.

There is no basis on which to conclude that Lebanon was, like China, understood to be on DOD's list. With the exception that in Huynh DOD acknowledged that China was treated as if included, the list is conclusive of the determination by DOD of those countries deemed sufficiently hostile to warrant inclusion in the 5/10 rule. It may be supposed that for reasons of national policy, DOD failed to list China while secretly treating Chinese born as if from a listed country. As

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[6] Appendix G of former 32 C.F.R. § 154.16 listed the following countries as having interests adverse to the United States:

> Afghanistan, Albania, Angola, Berlin (Soviet Sector), Bulgaria, Cambodia (Kampuchea), Cuba, Czechoslovakia, Estonia, Ethiopia, German Democratic Republic (East Germany), Hungarian People's Republic (Hungary), Iran, Iraq, Democratic People's Republic of Korea (North Korea), Laos, Latvia, Libyan Arab Republic, Mongolian People's Republic (Outer Mongolia), Nicaragua, Poland, Rumania, Southern Yemen, Syria, Union of Soviet Socialist Republics, Democratic Republic of Vietnam (North Vietnam), South Vietnam, Yugoslavia, Kurile Islands and South Sakhalin (Karafuto).

discussed below, I am unpersuaded of any reason to extend that regulation to Lebanon.

Huynh is not authority for including Lebanon in a secret version of the 5/10 list. Rather, Huynh speculates that Lebanon is an arguably hostile nation not on DOD's list of such countries and, because of that omission, must be compared with China and "allied nations that have recently spied on the United States," none of which are on the list. Huynh, 679 F. Supp. at 65. Huynh, however, is authority for the vulnerability of the 5/10 rule to attack on equal protection of law grounds. In that context, the court obviously deemed it material to speculate as to which countries were on the 5/10 list and which were not. Without specifying what countries belong to the hostile "allied countries," the court nevertheless cites Lebanon to stress the equal protection denial inherent in singling out some but not all naturalized citizens as ineligible for security clearance. That China was the only country to which DOD admitted having secretly applied the 5/10 rule confirms that Lebanon was not so treated. There is no reason for DOD not to have been as forthcoming with respect to other secretly "designated countries" as it was with respect to China.

Furthermore, Complainant's enumeration of reasons the United States ought to deem Lebanon a hostile nation is unavailing. See Complainant's Motion to Show Cause at 14. If every country which had engaged in activities considered "anti-American" were included on a list of hostile countries, the list would be seemingly endless and the reason for having it pointless.

By asking this court to assume that the DOD secretly applied the 5/10 rule to countries other than China but refused to reveal this fact in Huynh, Complainant is essentially asking this court to second-guess DOD. A judgment for Complainant would be equivalent to stating, without any proof, that DOD was violating its own regulations. This I am unwilling to do.

2. Inapplicability of 5/10 Rule

As with summary judgments generally, Complainant's contentions are viewed in a light most favorable to him in order to determine whether there are any material facts at issue. The ultimate issue is whether Respondent imposed the 5/10 rule, an inquiry which is moot if it is concluded that the rule was inapplicable ab initio. Assuming arguendo, that DOD secretly applied the 5/10 rule to Lebanon, Complainant still does not qualify for a waiver of the statute of limitations because the

5/10 rule is inapplicable to him. Former 32 C.F.R. § 154.16(c)(1), is satisfied if the potential employee

(i) had been a U.S. citizen for five years or longer, or
(ii) if a citizen for less than five years, had resided in the U.S. for 10 years prior to the alleged discriminatory violation (emphasis added).

At the time of the alleged discriminatory conduct, Bozoghlanian had only been a U.S. citizen for approximately two years. The first prong of the 5/10 year rule is therefore inapplicable to him and the second prong becomes the critical consideration.

Complainant contends that he obtained permanent resident status in July of 1977. The alleged discrimination occurred on November 16, 1987, more than 10 years after he had obtained permanent resident status.

Simply stated, the 5/10 rule is inapplicable to Bozoghlanian if he is found to have resided in the United States for ten or more years at the time he applied for employment. Complainant argues that he cannot be held to have resided in the U.S. for 10 or more years because he returned to Lebanon for approximately two years and did not reenter the United States until April 14, 1979. Therefore, Complainant maintains that, for purposes of the 5/10 rule, he was a resident for less than nine years. See Complainant's Motion to Show Cause at 11. Respondent argues that Complainant's "interruption" in residency is immaterial because the 10-year requirement was not meant to be continuous.

This is essentially a question of statutory/regulatory interpretation. Unfortunately, however, no definition of the word "reside" appears in the 5/10 rule. "Where the language of a . . . statute is unclear or ambiguous, we ordinarily look to . . . [the drafters'] intent for direction in determining the correct interpretation." Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 9-10 (1976).

As stated in former § 154.16(a)(2) of 32 C.F.R., DOD's intent in writing the 5/10 rule was to protect classified information in order to ensure national security interests.[7] Although the regulation does not

[7] Former 32 C.F.R. § 154.16(a)(2) stated:

(continued...)

specify examples of national security interests, it is more than likely that the 5/10 year rule was intended to ensure loyalty to the United States and at the same time prevent acts of espionage and terrorism.

Nowhere in § 154.16 does it state that an alien must continuously reside for ten years in the United States in order to satisfy the 5/10 rule. It is significant, however, that other statutes dealing with immigration status do define the term "reside." For example, § 245A of the Immigration and Nationality Act (INA) states in pertinent part that an alien must establish that he or she "has been continuously and physically present in the United States since the date of the enactment of this section." 8 U.S.C. 1255a(a)(3)(emphasis added). Furthermore, "[a]n alien shall not be considered to have failed to maintain continuous physical presence . . . by virtue of brief, casual, and innocent absences from the United States." Id.

Another example where the term "reside" has been thoroughly defined is in section 101(a)(33) of the INA which states "[t]he term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Id.

The drafters of the 5/10 rule would logically look to statutes such as the INA for guidance when writing a regulation on aliens, a subject outside DOD's particular area of expertise. Had DOD intended to limit the 5/10 rule only to aliens who resided continuously and without absence in the U.S., it would have used more specific language in defining the term "reside." The absence of a specific definition of "reside" in § 154.16 is consistent with the effort taken by DOD elsewhere in the regulation to retain flexibility in applying the regulation.[8] Having resided in the U.S. for over 10 years, whether or

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[7](...continued)

Military, DoD civilian, and contractor personnel who are employed by or serving in a consultant capacity to the DoD, may be considered for access to classified information only when such access is required in connection with official duties. Such individuals may be granted either a final or interim personnel security clearance provided the investigative requirements set forth below are complied with, and provided further that all available information has been adjudicated and a finding made that such clearance would be clearly consistent with the interests of national security (emphasis added).

[8] For example, former § 154.16 provided the following exception to the 5/10 rule:

In the event a naturalized U.S. citizen from one of the countries listed in Appendix G (continued...)

not without interruption, Complainant is not eligible for waiver of IRCA's 180-day filing limit because the 5/10 rule was inapplicable to him.

3. The Timeliness of Bozoghlanian's Filing of a Discrimination Charge under Huynh

Upon adjudicating a civil rights claim, the U.S. Supreme Court stated that "because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity." Felder v. Casey, 487 U.S. 131, 140 (1988). This axiom can be applied generally to any case involving a statute of limitations. Therefore, even if Complainant were to qualify under the 5/10 rule for a waiver of IRCA's 180-day limitation, his complaint still was not timely filed for the following reason. IRCA's statute of limitations, although tolled by Huynh, began to run again as soon as Bozoghlanian knew or "should have become aware of facts which would support a charge of citizenship status discrimination under IRCA. . . ." U.S. v. Mesa Airlines, 1 OCAHO 74 (1989) at 19, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991). DOD in fact made this an explicit part of their settlement stipulation in Huynh.[9]

The complaint asserts that he filed his charge with OSC on April 15, 1993. His charge is actually dated September 9, 1993 and OSC "accepted as complete . . . [his] discrimination charge against Lockheed/Department of Defense (DOD) . . ." on September 15, 1993. Whether Bozoghlanian filed his charge in April or September of 1993 is, however, immaterial as to whether the statute of limitations has

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[8](...continued)
does not meet either of the criteria in § 154.16(c)(1)(ii) and (ii) and a compelling need exists, he or she may be considered for issuance of a limited access authorization (as an exception to policy) in accordance with the provisions of paragraph (d) of this section. The scope of the background investigation shall be confined to the period of residence in the United States (emphasis added).

[9] The settlement stated:

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 based upon application of the regulation.

Huynh v. Cheney, 87-3436 TFH (D.D.C. Dec. 24, 1991) at 6 (emphasis added).

run; the pertinent issue is when Complainant knew or should have known that he had a claim of discrimination prior to the time he filed or allegedly filed his OSC charge.

Complainant states that he "first saw the advertisement [notifying victims of the 5/10 rule of their rights under Huynh] in a newspaper or a magazine during the beginning of March of 1993. Then almost simultaneously [he] . . . saw the same advertisement on a bulletin board at my workplace (I work for the Federal Government)." Complainant's Document Augmenting the Record at 2. Pursuant to the Huynh settlement, however, DOD was required to publish a notice of the settlement within forty days of the court's order i.e., in late January, 1992. In addition, DOD was required, within 70 days (or around March, 1992) of the order, to publish the notice in 90 publications for various periods of time. See Huynh v. Cheney, 87-3436 TFH (Dec. 24, 1991) (Order) at 1 and 3. By Complainant's own account, he did not see the notice at his place of employment until nearly one year after it was posted and published. This is true despite the fact that he worked for the government which was required to post the notice "on or before 40 days after the date of . . . [the Huynh] Order. . . ." Id. at 2. Complainant also states that he saw the notice in a newspaper or magazine. It may be supposed that these were outdated newspapers or magazines because DOD's publishing schedule would have long been complete at the point at which Complainant alleges he saw the notice for the first time.[10]

"Precedents make clear that courts undertake factual inquiry to determine whether, in applying limitations, charging parties acted with a prudent regard for their rights in respect of their employers' conduct." Mesa, 1 OCAHO 74, at 17. It is an employee's duty to keep abreast of employer policies and notices. Although an employee may not read a

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[10] The Huynh Settlement Stipulation states:

> 6. The DoD shall, within 70 days of the date of this Order, make arrangements to contract with the publishers of the publications listed in Exhibit 2 to this Order, to publish the notice in each of these publications at the earliest possible publication date.
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> 7. The schedule of publication shall be as follows:
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> -Daily publications - Once a week during the last week of one month a once a week during the first week of the following month, and on at least one Sunday in each publication with a Sunday edition;
> -Weekly publications - Two consecutive publications;
> -All other publications - One publication.

notice put up by his or her employer immediately, he or she does not usually ignore notices for a year. By waiting over a year to act on the notice of the Huynh settlement, Complainant failed to act in a prudent manner with regard to his rights. I conclude that Bozoghlanian should have known of the opportunity to file his OSC charge in early 1992, more than 180 days before actually filing his charge.

B. Equitable Tolling

Complainant makes a second argument for waiving the § 1324b limitations period. Complainant states that his case qualifies for equitable tolling of the time limit. United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89). Under this doctrine, a party is entitled to a tolling of the statute of limitations if "(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." Bozoghlanian v. Magnavox Advanced Prod. & Sys. Co., 4 OCAHO 653 (1994) (Order Granting Respondent's Motion for Dismissal) [hereinafter Magnavox] (citing United States v. Weld County School Dist., 2 OCAHO 326, at 17 (1991).

In the case at hand, Complainant argues that he was lulled into inaction by Respondent because Respondent's representative told him he would keep Complainant's resume for consideration. Complainant's Motion to Show Cause at 8. Complainant writes, "Respondent never informed me to the effect that if after so many months or years you do not hear from us, then we will stop considering you for employment. . . ." Id. at 9. However, by Complainant's own admissions, he realized that he would not receive an employment position with Respondent because the same representative told him he would not be able to work for Respondent without a security clearance. Furthermore, in a similar case brought by Complainant, he admits that retaining applications is a common practice with employers;[11] it does not, however, imply that an applicant will definitively receive a job. Such a remark would not lead a reasonable man, and should not have led Complainant, to believe that he was still being considered for the position some five or six years later. As stated in Magnavox:

[11] Bozoghlanian v. Unisys Corp., OCAHO Case No. 94B00067 (11/18 /94). Complainant writes, "It is not uncommon for companies to call back and hire past applicants even after several years of their employment application date." Id. (Complainant's Motion to Show Cause at 5).

"[Respondent's actions] should be regarded as nothing more than common courtesy on [R]espondent's part." Magnavox, supra at 7. Complainant cannot have it both ways, claiming he was on notice of a security clearance impasse, while also believing his application continued to be alive.

C. Respondent's Request for Attorney's Fees Denied

Respondent requests that I grant it attorney's fees, as I am authorized to do in favor of the prevailing party upon a finding that the "losing party's argument is without legal foundation in law and fact." 8 U.S.C. § 1324b(h). Rarely in the emerging jurisprudence under § 1324 has there been a complaint so lacking in evidentiary credibility as this one. Without a doubt, Respondent is the prevailing party and Complainant's allegations are without reasonable foundation in law and fact. Absent a scheme for, and reasonable assurance of, public distribution of OCAHO decisions with consequent public appreciation of litigating risks inherent in filing § 1324b complaints of dubious validity, there is no generalized public intent favoring fee shifting. Accordingly, in the exercise of my discretion as explicitly authorized by § 1324b(h) and keeping in mind the relative posture of the parties, I withhold fee shifting.

III. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Bozoghlanian, the answer and motion filed by Lockheed, and other requests and supporting documents filed by each party. All motions and other requests not specifically ruled upon are denied.

Complainant can only benefit from the Huynh case and thereby obtain a waiver of the statute of limitations, upon proof that (1) his country of origin was listed or conceded to have been treated by DOD as hostile and (2) that he had been a citizen for less than five years or a resident for less than ten years. Complainant has failed on both counts.

In addition, there is absolutely no glimmer of a basis on which to conclude that the 5/10 rule was a relevant factor in Complainant's failure to obtain employment by Respondent. Having failed to qualify for a waiver of IRCA's statute of limitations under either Huynh or the equitable tolling doctrine, the complaint is untimely. Without a timely filing or a waiver, OCAHO lacks jurisdiction over the instant complaint. For these reasons, I find and conclude that:

1. Respondent's Motion for Summary Judgment is granted;

2. Complainant's Motion to Show Cause is denied;

3. Respondent has not engaged in unfair immigration-related employment practices as alleged within the jurisdiction of this Office.

4. The complaint is dismissed for lack of jurisdiction.

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

SO ORDERED.

Dated and entered this 23d day of October, 1994

MARVIN H. MORSE
Administrative Law Judge