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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 91200044
GENERAL DYNAMICS CORPORATION, Respondent.	)	

FINAL DECISION AND ORDER
(May 6, 1993)

Appearances:

For the Complainant

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For the Respondent

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General Dynamics Corp.

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

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I. *Introduction*

This case involves an allegation of a "pattern or practice" of citizenship status discrimination in violation of § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1324b, in the preference of General Dynamics Corporation ("General Dynamics") to hire as contract labor workers 25 British citizen workers whom it understood to be in the United States on temporary work visas over "U.S. workers" (U.S. citizens and certain classes of aliens) from March to September of 1990 for the highly specialized position of jig and fixture builder. The contract labor services of these 25 British workers were offered to General Dynamics by Falcon International, a technical service firm. The United States Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Complainant") filed a citizenship status discrimination complaint with the United States Department of Justice, Office of the Chief Administrative Hearing Officer ("OCAHO") against General Dynamics, seeking monetary and injunctive relief.

The following, in accordance with 28 C.F.R. § 68.52(b), as amended by the Final Rule of December 7, 1992, 57 Fed. Reg. 57669 (to be codified at 28 C.F.R. Part 68) (hereinafter "28 C.F.R. § 68"), shall constitute my final decision and order, including findings of fact and conclusions of law. This decision and the findings herein were made after a full hearing on the issue of liability, which took place on December 16-19, 1991 and April 14-15, 1992 in San Diego, California. Fifteen witnesses were examined, 78 exhibits were received, and a trial transcript of 1093 pages was compiled. For the reasons set forth below, I find that OSC failed to prove that General Dynamics had engaged or was engaging in a pattern or practice of citizenship status discrimination. Novel issues of law presented include whether § 1324b applies to the selection of contract labor workers, whether the joint employer theory applies to § 1324b, and whether an employer's preference to hire individuals on temporary work visas over individuals considered "protected individuals" under § 1324b, constitutes a violation of IRCA's antidiscrimination provisions.

II. *Statutory and Regulatory Background*

Congress, in an effort to control the escalating rate of illegal im-migration into the United States in the 1980's, enacted § 101 of IRCA,

as amended, 8 U.S.C. § 1324a (1992).[1] IRCA established a national employment verification system, requiring that all employers verify the employment eligibility of their employees in order to control the employment of "unauthorized aliens."[2] Congress subjected employers to civil penalties for the violation of IRCA's prohibitions against unlawful employment of undocumented aliens (8 U.S.C. § 1324a(a)(1)(A); § 1324a(a)(2)) and/or for failure to comply with IRCA's record keeping and verification ("paperwork") requirements, 8 U.S.C. § 1324a(b). 8 U.S.C. § 1324a(e)(5)(1). See also 8 C.F.R. § 274a.10(b). Congress also authorized criminal penalties for "pattern or practice" violations of IRCA's prohibitions against unlawful employment. 8 U.S.C. § 1324a(f)(1). See also 8 C.F.R. 274a.10(a).

Out of concern that employers' attempts to comply with the employer sanctions provisions might lead to discrimination against those who appear or sound "foreign," including those who, although not citizens of the United States, are lawfully present in this country, Congress included antidiscrimination provisions.[3] "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. REP. NO. 99-1000, 99th Cong., 2d Sess. 87-88 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842. Actions brought under 8 U.S.C. § 1324b, however, are not restricted to employer behavior instigated by employer sanctions. United States v. Mesa Airlines, 1 OCAHO 74, at 6 (July 24, 1989), appeal dismissed, No. 89-9552 (10th Cir. 1991).

Section 1324b fills a gap in antidiscrimination legislation. Id. at 6; United States v. Marcel Watch Corp., 1 OCAHO 143, at 2 (March 22, 1990), amended, 1 OCAHO 169 (May 10, 1990). Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.,prohibits, inter alia, national origin discrimination against United States citizens as well as non-citizens. This prohibition, however, does not apply to employers of fewer than fifteen employees. Nor does Title VII prohibit discrimination on the basis of citizenship status. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). IRCA fills this gap by prohibiting

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[1] IRCA amended the Immigration and Nationality Act of 1952 ("INA").

[2] The regulations promulgated to effectuate 8 U.S.C. §1324a provide that an "unauthorized alien" is an alien who, with respect to employment at a particular time, is not at that time either: (1) lawfully admitted for permanent residence or (2) authorized to be so employed by the INA or by the Attorney General. 8 C.F.R. §274a.1(a) (1992).

[3] These antidiscrimination provisions, § 102 of IRCA, amended the INA by adding a new § 274B, codified at 8 U.S.C.

citizenship status discrimination by employers of four or more employees and national origin discrimination by employers of between four and fourteen employees. 8 U.S.C. §§ 1324b(a)(1)(A) and (B), 1324b(2)(A).

This case arises under § 102 of IRCA, 8 U.S.C. § 1324b(a)(1), which provides that "[i]t is an unfair immigration-related employment prac-tice" to discriminate against any individual other than an unauthorized alien "with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment" because of that individual's national origin or citizenship status. The statute covers citizenship status discrimination against a "protected individual," defined at § 1324b(a)(3) as a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee or granted asylum.[4]

In order for an individual to bring a claim of citizenship status discrimination, he or she must initially file a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC").[5] The Special Counsel is authorized to prosecute charges before administrative law judges designated by the Attorney General. 8 U.S.C. § 1324b(e)(2). In the event that OSC does not file a complaint before an administrative law judge ("ALJ") within 120 days of receiving the charge, IRCA permits private actions. 28 C.F.R. § 44.303(c)(1). The individual making the charge may file a complaint directly before an ALJ within 90 days of receipt of notice from OSC that it will not prosecute the case. Id. 8 U.S.C. § 1324b(d)(2).

The Special Counsel, on his or her own initiative, may "conduct investigations respecting unfair immigration-related employment practices" when there is reason to believe that a person or entity has engaged or is engaging in such practices "and, based on such investigations and subject to [time limitations may] file a complaint before [an ALJ]." 8 U.S.C. § 1324b(d)(1); 28 C.F.R. § 44.304(a) (1991). The

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[4] Section 533 of the Immigration Act of 1990 ("the Act"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) eliminated the requirement that a protected individual, who is not a citizen, file a declaration as an intending citizen in order to bring a citizenship status discrimination complaint. See 56 Fed. Reg. 11272 (March 15, 1991) (retroactive effect given to charges otherwise deemed incomplete as of November 29, 1990).

[5] OSC, an office in the U.S. Department of Justice, was created to investigate and prosecute charges of discrimination stemming from unlawful immigration-related employment practices.

Special Counsel may file a complaint with OCAHO "where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint." 28 C.F.R. § 44.304(b).

III. *Procedural History*

On March 18, 1991, OSC filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against General Dynamics Corporation ("GD" or "Respondent"), pursuant to 8 U.S.C. § 1324b(c)(2) and (d)(1). OSC alleges in its complaint that GD engaged in a pattern or practice of citizenship status discrimination from March to November of 1990 with respect to the selection of contract workers for the position of jig and fixture builder at Respondent's Convair Division in San Diego, California. More specifically, OSC alleges that GD preferred unauthorized aliens for these positions "based solely on [their] citizenship status [and] regardless of their qualifications," while at the same time regularly rejecting qualified "U.S. workers" (U.S. citizens and other individuals protected against citizenship status discrimination under IRCA), in violation of § 102 of IRCA, 8 U.S.C. § 1324b(a)(1)(B).[6] OSC requests (1) that I issue an order enjoining GD from engaging in discriminatory employment policies and practices against U.S. workers; (2) in order to vindicate the public interest, that I order Respondent to pay a civil penalty of $1,000 for each individual illegally discriminated against; and (3) that I order sufficient relief to make whole all qualified U.S. citizens and protected individuals who were victims of the alleged discrimination.

On April 19, 1991, GD filed its answer to the complaint, admitting some allegations, denying others and asserting, inter alia, that "the citizenship of the [Falcon/GK] employees to be supplied was not a material term of the contract . . . ." (Answer, at 2, para. 8.) In its answer, GD requests (1) that I dismiss the complaint with prejudice; that (2) I grant none of the relief Complainant has requested; (3) that Complainant reimburse Respondent for all costs and attorneys' fees incurred in defense of this matter and (4) that I grant other and additional relief as justice may require. (Id. at 4-5.)

On November 18, 1991, the parties filed a joint motion to bifurcate the hearing, proposing that the initial proceeding focus on the sole

[6] OSC, after hearing, modifies this argument to allege that GD preferred unauthorized individuals whom GD understood to be British workers on temporary work visas over U.S. workers. See, e.g., OSC Reply Brief at 15.

issue of liability and should liability be found, a second hearing would focus on the issue of remedy.[7] On November 20, 1992, I granted this motion.

On December 3, 1991, each of the parties filed a prehearing statement. On December 13, 1991, the parties filed a set of 25 stipulated facts which they supplemented on April 8, 1992, with two additional stipulated facts.

An evidentiary hearing was held December 16-18, 1991 and April 14-15, 1992 on the issue of liability.

On July 21, 1992, Complainant filed a 54-page post-hearing brief ("OSC Br."). On September 4, 1992, Respondent filed a 69-page post-hearing brief ("GD Br."). On October 16, 1992, Complainant filed a 27-page reply to Respondent's post-hearing brief ("OSC Reply Br."). On October 22, 1992, Respondent filed a motion for leave to file an amended answer along with an amended answer. On November 5, 1992, Complainant filed a response to Respondent's motion. On November 17, 1992, I issued an order granting Respondent's motion to amend its answer.

IV. *Statement of Facts*

A. Background

General Dynamics Corporation ("GD"), a Delaware corporation with its principal place of business in St. Louis, Missouri (Answer, para. 5), is a governmental and commercial contractor specializing in the manufacture of products for the aerospace industry. In 1990, when the events relevant to this action took place, GD employed approximately 17,000 to 18,000 employees in San Diego, California. (Exhibit ("Exh.") C-20, Stipulated Fact ("SF") 1; Sullivan, Tr. 890-91.) GD's Convair Division, based in San Diego, California, had approximately 8,000 to 9,000 employees. (Id.; Answer, para. 5.)

[7] The second hearing would focus on: (a) which of the qualified protected individuals were victims of the discriminatory policy and/or practice of unlawful discrimination found to exist; (b) who, if anyone, should receive equitable relief; and (c) what form that equitable relief should take.

In 1989 and early 1990, GD's Convair Division was seeking the services of jig and fixture builders to build, repair and refurbish jigs and fixtures, primarily for its MD-11 aircraft production line.[8]

In 1990, GD's Convair Division had direct employees ("direct hires") who were jig and fixture builders and also used the services of contract labor ("job shopper") jig and fixture builders. GD's company policy and its collective bargaining agreement with the International Association of Machinist and Aerospace Workers ("IAMAW" or "union") dictated that GD fill its need for jig and fixture builders through the recruitment of direct hires and that GD use job shoppers only when its Human Resources Department was unable to recruit enough direct hires to fulfill the company's manpower needs. (Sullivan, Tr. 877-78; Anyon, Tr. 930 [company policy to hire direct where possible]; Robinson, Tr. 241-42 and Exh. R-25 [agreement with union].)

Throughout 1989, GD's Human Resources Department made substantial efforts to recruit direct hire jig and fixture builders by, among other things, attending numerous job fairs and placing advertisements in newspapers in the western United States. These efforts, however, yielded very poor results. (Robinson, Tr. 211-217 and Exhs. R-4 and R-44; Sullivan, Tr. 864-65.)

From some time in 1989 to November of 1990, GD had contracts with two technical service firms, B&M Associates ("B&M") and International Technical Services ("ITS"), for the supply of an indefinite number of contract laborers, as needed, in various fields, including the building of jigs and fixtures. (Wilson, Tr. 454-55; 588; 591-92. See also Exh. R-50 [GD's Contract With B&M].) Both B&M and ITS were known to GD as dependable sources of qualified jig and fixture workers. During 1989, GD routinely selected contract jig and fixture builders from B&M and ITS.

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[8] Jig and fixture builders are "highly skilled individuals with engineering degrees, or the equivalent, who build, maintain and repair jigs and fixtures to exacting standards." General Dynamics Corporation v. Falcon International, et. al., Civil No. 910998 GT (S.D. Ca. July 22, 1991) at 7, para. 16. Jigs and fixtures are "extremely complex 'tools' which are used in the assembly and subassembly of airplanes, missiles and other aerospace products." Id. These tools "ensure that different parts of the assemblies and subassemblies are aligned precisely, sometimes within one ten thousandth (1/10,000) of an inch." Id.

B. Falcon/GK's Proposal to GD's Human Resources Department

In July 1989, GD was contacted by Donald Yuhas, President of GK Industries ("GK"), which claimed to be a technical service firm.[9]

Mr. Yuhas, on behalf of Falcon/GK, offered GD's Human Resources Department the opportunity to obtain the services of several qualified jig and fixture builders who were represented to be familiar with MD-11 jigs and fixtures as they were currently working in Long Beach, California at McDonnell Douglas Corporation, GD's MD-11 customer. (Appendix B [Single Source Justification].)

On August 2, 1989, Donald Yuhas and Richard ("Rick") Turner, represented throughout his dealings with GD as General Manager of Falcon International, presented a proposal on behalf of Falcon/GK to George Robinson and Wes Maczka, employees in GD's Human Resources Department, offering to supply GD with the services of British citizen jig and fixture builders employed by Falcon/GK. (Exh. C-20, SF 2.) The written terms of the proposal are embodied in a document entitled: "FALCON INTERNATIONAL'S PROPOSAL to supply international labor for GENERAL DYNAMIC'S (sic) CONVAIR DIVISION" ("Proposal"). (Exh. C-20, SF 3; see Appendix A [Proposal].)

The Proposal discusses the difficulty U.S. companies in the aerospace industry encounter in finding skilled manufacturing/ production workers, including jig and fixture builders. The Proposal acknowledges that these companies have a "tremendous need for a large number of skilled [p]roduction workers for a finite period of time." It then notes that some companies have hired workers from the United Kingdom who are highly coveted because (a) "[t]hey are well-trained . . . and have excellent educational backgrounds"; (b) "[a] substantial number can be effectively recruited in a short period of time"; and (c) [t]hey are basically indentured to the company(s) sponsoring their employment tenure."

The Proposal then highlights the difficulties that U.S. companies encounter in hiring British workers as direct employees: (1) "Ameri-

[9] GK is a company that is, in essence, a fiction of Falcon Search, Inc., also known as Falcon International ("Falcon"). Falcon is a management consulting firm that assists management in personnel-related problems. GK was created using financial information from Falcon's accountant, and was devised in large part of Falcon's assets. It is undisputed that the relationship between the companies was so intertwined that their separate entities should be disregarded. For purposes of this Final Order and Decision, "Falcon/GK" will be used to identify dealings with the other.

can companies looking to hire British citizens" must obtain approval from the Immigration and Naturalization Service ("INS") for visas which are "difficult to acquire, . . . carry tedious time limitations and companies find themselves at the mercy and whims of the INS, an autocratic government beauracracy [sic]"; (2) "the period these people can work in the United States is finite"; and (3) "the INS can revoke these Visas at any time."

The Proposal then states: "So, even though British Labor is a valuable resource, there is no reason to spend time and money to utilize these workers. Wrong." The Proposal goes on to outline how Falcon/ GK can supply Respondent with as many workers as needed for an indefinite period of time within INS guidelines as contractors and then transfer them to Respondent's direct payroll. The Proposal further states that as direct employees of GD, the Falcon/GK workers could still stay indefinitely within INS guidelines.

The Proposal states that Falcon/GK is a British-based company with a U.S. subsidiary, and as such, "can bring British employees to the United States to work" without being restricted by INS guidelines which do not affect such a company "bringing British citizens" to the United States to work for the subsidiary. It then states that Falcon/GK brings workers into the United States under its "auspices and in turn contract[s] them to clients for a specific period of time and/or indefinitely." The Proposal further states that [t]his methodology is currently being utilized with 150 British workers actively employed in the United States for the last three years at various locations.

The Proposal also has a section called "Visas," in which it says "H-1 vs. E-2 vs. B-1," without further explanation. The Proposal then describes Rick Turner as the General Manager of Falcon International, an individual "uniquely qualifi[ed] to carry out this effort" as he is (1) "a qualified Production Engineer [who] has effectively run and managed his own engineering company"; and (2) "a registered Barrister in the United Kingdom, specializing in Immigration Law."

The Proposal states in conclusion that Falcon/GK "can . . .deliver as many workers as needed for an indefinite period of time" and "can . . . shoulder the burden of all personal, work-related, relocation and recruiting problems." The Proposal further states that "these workers will work at the current Union scale," and that Falcon/GK "offer[s] continuity in the workforce." Finally, the Proposal promises that the

workers can be delivered within 3-4 weeks after the contract is negoti ated.[10]

C. Presentation Recap & Recap Benefits

On July 22, 1991, GD filed a civil suit, Civil No. 910998 GT, in the United States District Court in the Southern District of California against Falcon/GK for, inter alia, fraud and deceit for misrepresenting material facts through correspondence, telephone calls, and meetings from August 1989 to November 1990. That case is still pending.

On August 8, 1989, GD prepared a summary of Falcon/GK's presentation, called "CONTRACT LABOR FALCON INTERNATIONAL PRESENTATION RECAP" ("Recap"), which states:

> NEED: MACHINE SHOP AND TOOLING REQUIRE APPROXIMATELY 70 HEADS-ASAP
>
> FALCON INTERNATIONAL MADE A PRESENTATION TO [GD] ON A SYSTEM FOR RECRUITING UNITED KINGDOM WORKERS INTO OUR LABOR FORCE
>
> THEIR TIME SPAN WITH [GD] CAN RANGE FROM 90 DAYS TO 3 YEARS

(Exh. C-14. See also Robinson, Tr. 149).

On the same day, GD prepared a summary of the benefits of the Falcon/GD presentation ("Recap Benefits"), which states the following:

> IMMEDIATE HIRE OF EXPERIENCED AND TRAINED PERSONNEL
>
> THESE CONTRACT LABORERS ARE NOT PART OF GD WORK-FORCE UNTIL 1 YEAR OF EMPLOYMENT AT WHICH TIME WE MAY TRANSFER FROM FALCON TO CONVAIR IF NEED IS STILL PRESENT
>
> FALCON INTERNATIONAL HANDLES ALL PAPERWORK, VISAS, WORK PERMITS, PAYROLL, BENEFITS AND ALL NON-WORK RELATED ISSUES
>
> COST TO THE COMPANY IS 36% OF THE ACTUAL ANNUALIZED HOURLY RATE

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[10] It is undisputed that the Proposal contains numerous misrepresentations regarding, inter alia, Falcon's status as an international corporation, Falcon's legal authorization to bring foreign workers into the United States, Falcon's prior successful use of the methodology described in the Proposal, the status of the British jig and fixture builders as legally authorized by the immigration laws of the United States to be employed in the United States by Falcon/GK or by GD on temporary work visas. (See generally, Yuhas, Tr. 319-333 and Exh. R-2.)

THIS COST AND SYSTEM TO BE USED FOR RECRUITING ARE SUBJECT TO NEGOTIATION

Exh. R-3; see also Robinson, Tr. 153-54.

D. GD's Second Look at the Falcon/GK Proposal

GD initially rejected the Proposal because the company did not want to hire job shoppers. (Robinson, Tr. 168; Sullivan, Tr. 878-79.) However, as GD's need for jig and fixture builders continued to grow and the Human Resources Department was unable to provide a sufficient number of direct hires, GD decided to reconsider the Proposal. (Robinson, Tr. 168, 170-72; Maczka, Tr. 369.) Therefore, in January of 1990, GD contracted Falcon/GK to discuss the Proposal. (Id.) On January 23, 1990, Rick Turner and Gary Tingstad, who represented that he was Falcon International's Vice President of Operations, met with George Robinson, Wes Maczka, and others at General Dynamics' Convair Division to discuss the Proposal.[11]

At the meeting, the Proposal and the services which Falcon/GK could provide Respondent were discussed. Falcon/GK offered GD contract jig and fixture builders from the United Kingdom who were interested in working in the United States because the British aerospace industry had had a downturn. (Maczka, Tr. 373-74.) Falcon/GK represented that the contract labor workers were legally authorized to be employed by Falcon/GK and contracted to GD, and that Falcon/GK would handle all necessary immigration paperwork on behalf of the contractors, to allow them to lawfully be hired directly by GD. (Appendix A [Proposal], Appendix B [Single Source Justification]; Maczka, Tr. 381; Sullivan, Tr. 881-82; Robinson, Tr. 178; Henetz, Tr. 1005.) Falcon/GK further represented that the contractors to be provided to GD wanted to become direct hires of GD. (Robinson, Tr. 232-33; Sullivan, Tr. 879-881, 899-900; Henetz, Tr. 999, 1005; Anyon, Tr. 945; Wilson, Tr. 601-02.) Falcon/GK also represented that the workers lacked the proper paper-work to work directly for a U.S. corporation, but that Falcon/GK would seek authorization for them to work directly for GD. (Henetz, Tr. 1005.)

[11] Mr. Tingstad was never actually employed by Falcon/GK. (Exh. C-20, SF 4.)

It is undisputed that Falcon/GK represented that it was seeking E-2 visas for the workers.[12]

E. *Processing of the Falcon/GK Contract*

1. Procurement Authorization

Immediately after this meeting, Bob Henetz, who was in charge of tool manufacturing, including the building of jigs and fixtures at Convair Division (and who worked directly under both Bob Anyon, Manager of Production Engineering, and Norm Pearl, Director of Fabrication) began the process of obtaining the Contract. (Henetz, Tr. 996-97; see also Exh. C-20, SF 19.) On or about January 24, 1990, Henetz prepared a Procurement Authorization for 25 jig and fixture 22 C.F.R. builders "specifically for Falcon Industries," which was

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[12] An E-2 "treaty investor" visa is available to an alien:

> entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, . . . solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing a substantial amount of capital.

8 U.S.C. § 1101(a)(15)(E)(ii). The United Kingdom has such a commerce and navigation treaty with the United States.

The E-2 investor himself must have invested or be actively in the process of investing in a bona fide enterprise in the United States, and the investment must be substantial. 22 C.F.R. § 41.51(b). An alien employee of a treaty investor may be classified E-2 if the employee is or will be engaged in executive or supervisory duties, or if the employee's qualifications are essential to the efficient operation of the enterprise. 22 C.F.R. § 41.51(c). When determining if an employee's skills are "essential," the consular official considers such factors as (1) the degree of proven expertise of the alien in the area of specialization, the uniqueness of the specific skills and the length of experience and training. 9 Foreign Affairs Manual, 22 C.F.R. § 41.51 N3.4-3(a), U.S. Dep't of State (1988). The consular official must also assess whether competent U.S. workers are available to provide the skills needed by the treaty firm. Id. at N3.4-3(e). To issue E-2 visas, the consular official must be satisfied that no U.S. workers are available in the skill areas concerned. Statements from such sources as labor organizations, industry trade sources or state employment services may be requested to make this determination. Id.

No petition is required to be filed with the INS for an E-2 visa. Rather, applications are made directly to the appropriate U.S. consulate. The consular official then determines whether the investor or the employees have met the statutory criteria. E-2 visas are generally issued for periods of up to one year and may be extended in increments of one year. D. Crosland, Business Immigration Law Today § VIII-3 (1990).

reviewed and approved by both Anyon and Pearl. (Exh. R-10 [C-1/257]; Robinson, Tr. 184-85; 238-239.) From this point on, Henetz was actively involved in the logistics of getting the British workers on board and making sure the Contract was finalized as quickly as possible. (Henetz, Tr. 997.)

2. Single Source Justification

Since the Falcon/GK Procurement Authorization was a request that GD "go off contract" (procure contractors from a contract labor firm other than those with which GD had an annual contract), Mark Wilson of the Procurement Department requested that George Robinson of the Human Resources Department provide Wilson with a letter providing the justification for using a single source. (Robinson, Tr. 187-88, 243; Wilson, Tr. 498.)[13] Robinson complied. (Robinson, Tr. 187-88.)

The Single Source Justification letter states that:

> Convair has an opportunity to acquire additional tooling work. The work involves MD-11 and tasks from Space Systems. The work requirements call for qualified Jig & Fixture Builders. We have been unable to acquire a sufficient number of direct hires. Falcon International is a company that deals with highly qualified workers and has supplied these workers to McDonnell Douglas our MD-11 customer. These workers know the MD-11 requirements having worked them prior to this Convair opportunity. We are also able to benefit from a rate that is the same as our regular direct rate and Falcon supplies a complete benefit package. At the end of the 6-month contract Convair may choose to "direct hire" these Job Shoppers based on our requirements at that time.
>
> Aside from the talent, and financial benefits, all immigration coordination is handled by Falcon International. We will be able to use this cadre of "Tooling Workers" to train our in house people thereby lessening our reliance on a parade of Job Shoppers with no real allegiance to Convair.
>
> In conclusion, it was determined that Falcon International helps meet the needs of the Division so as to respond effectively to Management's request for a more qualified direct hire labor base.

Appendix B; Exh. R-13 [C-1/170].

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[13] GD requires a "single source justification" when a department requests that the Procurement Department depart from its normal procedure of using the services of the technical service firms GD had on contract. Such a request was very unusual at GD's Convair Division. (Wilson, Tr. 499-500.) The purpose of the single source justification was to set forth all the business reasons for using Falcon/GK for the desired procurement instead of the contract labor firms GD already had under contract (e.g., B&M and ITS). (Wilson, Tr. 496-97; Robinson, Tr. 187-88; 243.)

3. GD Approves of the Falcon/GK Workers

On February 6, 1990, shortly after the January 23, 1990 presentation meeting, Bob Henetz sent George Eggert, the general supervisor of the jig and fixture builders, who worked directly under Henetz, to Long Beach, California to interview approximately 14-16 jig and fixture builders whom Falcon/GK proposed to supply to Respondent.[14] (Exh. C-20, SFs 19, 21.) About a week prior to the interviews, Eggert had received a package of approximately 20-25 resumes from Falcon/GK, which he reviewed with William Gifford, a first line supervisor of the jig and fixture builders. (Eggert, Tr. 832-33.) All the resumes were of British workers. (Id. at 833.)

The interviews were conducted in Long Beach, California. Eggert interviewed approximately sixteen workers in two groups rather than individually because they were late getting off their shifts at McDonnell Douglas. (Eggert, Tr. 834-35.)

4. Badging of the British Workers

Before starting work at GD, jig and fixture job shoppers are required to obtain an identification badge which they must wear for security reasons while on site. (Wilson, Tr. 468.) Mark Wilson completes the badge request form and then sends it to security. (Wilson, Tr. 469) One part of the badge request form completed by Wilson asks for the job shopper's name and citizenship status. (Wilson, Tr. 470; see C-1 at 238, 245.)

On February 23, 1990, Wilson received a response from Gary Miller of GD's security office to an inquiry from Wilson about whether the non-U.S. citizen English jig and fixture workers could be on site unescorted at the facility in which their work would be performed. (Wilson, Tr. 514-516.) Miller notified Wilson that this was problematic because unescorted access was limited to U.S. citizens or individuals who qualify as intending citizens under the Immigration Reform & Control Act of 1986. (Exh. C-1 at 141; see Wilson, Tr. 514-516.) Wilson was told by the security office that each of the Falcon/GK job

[14] Mr. Henetz reported directly to Bob Anyon, the Manager of Production Engineering for Convair Division, whose responsibilities included the supervision of the jig and fixture builders. (Exh. C-20, SFs 17, 18.) Mr. Anyon reported directly to Norman Pearl, the Director of Fabrication and Production Engineering for Convair Direction, who oversaw tooling and production at Convair Division. (Id. at SFs 16, 17.) Mr. Pearl reported directly to Ken Lake, the Vice President of Operations. (Id. at SF 15.)

shoppers needed to complete an INS Declaration of Intending Citizen ("I-772") Form in order to have access to the facility. (Wilson, Tr. 485.)

Wilson therefore required as a condition of proceeding with the con-tract that Falcon/GK submit to GD an I-772 form for each of the jig and fixture builder workers Falcon/GK was to provide. Falcon/GK subsequently complied with this requirement. (Exh. C-20, SF 11; Wilson, Tr. 639-41.) The forms, however, were incomplete as they did not contain alien registration numbers. (Exh.C-20, SF 12, 13; see R-42 [Forms I-772].)[15]

Wilson completed a badge request form for each of the jig and fixture job shoppers provided by Falcon/GK. (Wilson, Tr. 472; see Exh. C-1 at 238-51.) On each form, Wilson wrote that the citizenship status of the worker was either "British" or "English." (Wilson, Tr. 474; see Exh. C-1 at 238-51.) Jan Eldridge, a purchasing agent and a supervisor of Wilson's during the period of the Contract, signed off for procurement on each form. (Wilson, Tr. 474-75.) After Wilson and Eldridge signed off on the badges, the badges were sent to GD's security personnel. (Wilson, Tr. 484.)

5. Bid List Approval

On February 26, 1990, shortly after receiving the Single Source Justification, Mark Wilson prepared a bid list approval, which was a general description of the procurement to be issued for the Contract. (Wilson, Tr. 532.) The bid list approval states that "this [Request for Quotation ("RFQ")] is being issued to obtain the services of . . . twen-ty-five (25) English jig and fixture builders."[16] (Exh. R-19 [RFQ].) Rick Krampe, one of Wilson's supervisors, Jan Eldridge, Wilson's purchasing agent, and numerous other management personnel signed or initialed the bid list approval.

6. Request for Quotation

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[15] Furthermore, the I-772 forms were falsified in that they appeared to have been accepted and filed by the INS, but were in fact neither accepted nor filed. (Exh. C-20, SFs 12, 13.)

[16] Wilson testified that he had learned as early as January 24, 1990, that the workers would be English pursuant to conversations he had with Bob Anyon, Bob Henetz, and George Robinson.

On March 1, 1990, Wilson received a memorandum from Bob Henetz, stating that "Rick Turner from [Falcon/GK] is putting pressure on us to act on our [ProcurementAuthorization] or we may lose the British jig and fixture builders." Henetz asked that Wilson "do whatever is possible to expedite this task so we may bring the initial 6 aboard." That same day, Wilson prepared an RFQ, which described the procure-ment GD was seeking as one for "25 JFBs" for "6 months" at "$15.97/ hour" and a "$70/week per diem for non-residents."

7. Affidavit of Permanent Residence

Under the Contract, in order for the workers to be paid a "per diem" of $70.00 per week, they each had to fill out an Affidavit of Permanent Residence. (Exh. C-20, SF 24.) Each of the Falcon/GK workers pro-vided Wilson with an Affidavit of Permanent Residence, in which each affirmed under penalty of perjury that his permanent residence was outside San Diego County, California and that he intended to remain a permanent resident of the United Kingdom. (Exh. C-20, SF 24; see, e.g., Exh. C-1 at 195).[17]

8. GD Dispensed With Company Policy to Expedite Procurement

In order to expedite the processing of the procurement, GD, through authorization of its Division Vice President of Procurement, dispensed with the company's policy of issuing a "Notice of Intent to Solicit a Foreign Source."

9. The Purchase Order for 25 English JFBs

On March 9, 1990, Mark Wilson prepared the purchase order which would become the contract between GD and Falcon/GK. In the pur-chase order, Wilson described the contract specifically as a contract for "ENGLISH JIG AND FIXTURE BUILDERS." This purchase order/ contract was approved by many GD employees, including the Vice President of Procurement, the Technical Buyer, the Offset Manager, the Purchasing Agent, the Small Business Administrator, the Price/ Cost Analyst, Material Contracts, and the Manager of Procurement.

In mid-March of 1990, GD and Falcon/GK entered into a 6- month "single source" contract ("Contract"), effective March 19, 1990, in which Falcon/GK agreed to supply GD on an "as needed basis" with 25

[17] These statements directly contradicted the statements the Falcon/GK workers had made in the I-772 forms submitted to Wilson.

jig and fixture builders. (Exh. C-20, SF 5; See Appendix C [written contract]; Ex. R-23 [same].) Employees of GD had authority pursuant to the Contract to approve of jig and fixture builders provided by Falcon/GK and, as necessary to conduct Respondent's business, its employees assigned them to shifts, supervised their activities and retained discretion to terminate them. (Answer at 3, para. 10.)

F. GD's Selection of Contract JFBs From January to November, 1990

1. The Falcon/GK Workers

From March through June, 1990, GD brought on all 25 of the jig and fixture builders for whom it had contracted with Falcon/GK. They be-gan work for Respondent in the following sequence: seven on March 19, 1990, ten on April 16, 1990 and eight on June 18, 1990. (Exh. C-20, SF 6.) Of the 25 provided, two were dismissed; one on July 15, 1990, and one on August 12, 1990. (Id. at SF 7.) They were replaced on July 16, 1990 and August 13, 1990, respectively, by workers provided by Falcon/GK. (Id.)[18]

2. The B&M and ITS Workers

a. Procedure by Which GD Reviewed Resumes From B&M and ITS

From January to November of 1990, GD at various times selected contract labor jig and fixture builders from resumes submitted by B&M and ITS, the two technical service firms with which it had contracts. (Gifford, Tr. 756; Eggert, Tr. 826- 27.) Eggert and Gifford received these resumes through company mail and kept them in desk drawers in their office. (Eggert, Tr. 828-29; Gifford, Tr. 758-59.) During this time, there was never a shortage of current resumes from the two firms. (Eggert, Tr. 829-30; Gifford, Tr. 761.) Whenever Gifford's drawer of resumes became too full, he threw out the oldest resumes, which were on the bottom of the stack. (Gifford, Tr. 794.)

[18] Falcon/GK represented that all 27 workers were authorized to be employed in the United States by GD. However, with the exception of two of the Falcon/GK workers, who married U.S. citizens immediately prior to beginning work at GD, there was no proof that any were authorized to be employed in the United States by GD. (Exhs. C-4, C-5, C-22, C-24, C-26, R-51.) INS records show that: (1) approximately ten of the workers entered the United States on H2-B visas specific to McDonnell Douglas (authorizing them to work in the United States only for McDonnell Douglas); and (2) some entered on B-2 (visitor) visas by which they were not authorized to work. (Tr. 973-92.) The INS had no records for approximately ten of the workers. (Id.)

When Eggert selected a contract worker from B&M or ITS, he would send the name of the worker through his secretary to Mark Wilson of Procurement, who then contacted the technical service firm that em-ployed the worker. (Eggert, Tr. 827; McKim, Tr. 61.) When the con-tract jig and fixture builders reported for work, William Gifford, the first line supervisor (Exh. C-20, SF 20), screened them in order to place them at appropriate assignments and shifts. (Gifford, Tr. 754-55, 757.) Gifford also directly supervised both the direct and contract jig and fixture builders. (Gifford, Tr. 754-55.)

From January to September 1990, B&M and ITS, pursuant to their long-term contracts with GD, submitted a total of 538 resumes of U.S. Citizen contract jig and fixture builders to GD.[19] (McKim, Tr. 78; Katz, Tr. 136-38; Exhs. C-6, C-7, C- 21.) GD, through Gifford, has identified 28 of the 344 individuals he finds qualified based on their resumes, which were submitted between January and September, 1990. (Exh. C- 20, SF 25; see also Exhs. C-6, C-7 [letters from B&M and ITS with names of available contract jig and fixture workers].) GD, through Gifford, has also identified 24 additional individuals who were qualified as contract jig and fixture builders but whom Gifford maintains would not have been selected "because they were currently employed" or because the resume appeared altered in some way. (Exhs. C-25 [portions of Gifford's deposition identified at Tr. 770-72]; C-9 [the resumes of qualified individuals].)

In January and February of 1990, Respondent selected nine contract jig and fixture builders from resumes submitted by B&M and ITS. (Exh. C-13.) During the period of the Contract, B&M and ITS continued to send resumes to GD. These resumes were forwarded by Mark Wilson of Procurement to Bill Gifford, an Operations Supervisor. (Gifford, Tr. 793.) Gifford, who was covering three jobs and working two shifts, quickly glanced at the resumes when he had time to do so. (Id. at 791-94.) He would only look at a few and put the stack of resumes in his desk drawer. (Id. at 794.) He did not have time to review every resume in the stack. (Id. at 795-96.) In addition, for a time Gifford rejected anyone he did not know personally and he claims that he routinely rejected anyone whose resume showed current employment. (Id. at 797-98; 806-07.)

During the months of March, April, and May, 1990, while Respondent brought on 17 jig and fixture builders from Falcon/GK, none were

[19] Due to multiple submissions of some individuals' resumes throughout the period, the number of individual applicants totaled 344.

selected from either B&M or ITS. (Exhs. C-10, C-13.) During the course of the Falcon/GK contract, GD had on board jig and fixture builders obtained from both B&M and ITS in accordance with the terms of its contracts with those contract labor firms. From March through May of 1990, U.S. workers who had been supplied by B&M were terminated at a rate of two per month, for a total of six, and not replaced. (Exhs. C-10, C-13.) In June, 1990, when the last eight of the initial 25 non-U.S. workers from Falcon/GK began their duty at GD, Respondent selected two U.S. workers from B&M. (Id.)

On August 10, 1990, prior to the date on which the last Falcon/GK contractor reported to work, GD General Foreman George Eggert requested that GD's Procurement Department bring in 20 named contractors, each of whom was from B&M or ITS. (Comparison of Exh. R-43, pp. 2-5 with names on Exh. C-10 and list at OSC Br. at 18-19.)

G. Falcon/GK States It Does Not Place Americans

On or about August 14, 1990, Gaylene Slocum, the wife of a U.S. citizen jig and fixture builder, telephoned Rick Turner of Falcon/GK to inquire about job prospects for her husband. Mr. Turner told her: "We do not place Americans, only British." (Slocum, Tr. 357).

H. The Contract Extension

At the end of the summer of 1989, when the Contract was due to expire, a meeting was held to discuss extending it. (Wilson, Tr. 550-51). Present at the meeting were Rick Turner, Gary Tingstad and Ann Yuhas for Falcon/GK and Mark Wilson, George Robinson, Bob Henetz, and Wes Mazcka for GD. (Wilson, Tr. 550- 51). At the meeting, it was made clear that if the Contract was to be extended, "[GD] would need to get the paperwork started." (Wilson, Tr. 551-52) Rick Turner claimed that he was working on "expedit[ing] the paperwork that was required for the [jig and fixture builders] to become direct hire[s]." (Anyon, Tr. 955) Bob Anyon, speaking for Convair's operations division, informed Falcon/GK that GD, under increasing pressure from its program office to reduce the number of people it had working on the MD-11 program, could not guarantee that it "would have work for any extended period of time" for the Falcon/GK jig and fixture workers. (Anyon, Tr. 955).

On September 19, 1990, Wilson, with the approval of his supervisor, drafted a memorandum requesting permission to extend the Contract, which he again described as "THE CONTRACT WITH GK INDUS-

TRIES, FOR 25 ENGLISH JIG AND FIXTURE BUILDERS." (Wilson, Tr. 555-56; Exh. C-1 at 22).

On or about September 21, 1990, Wilson prepared a purchase order transmittal regarding the extension of the Contract. The subject mat-ter of the transmittal is stated as the "SIX MONTH EXTENSION OF ENGLISH JIG AND FIXTURE BUILDERS" (Wilson, Tr. 554; Exh. C-1 at 6). Wilson completed new forms for badge requests for the Falcon/GK workers for the subsequent extension of the contract. (Wilson, Tr. 483-84).

The contract was extended on September 19, 1990 for an additional six-month period, effective September 20, 1990. The final order which extended the Contract until March 22, 1991 contains the description "ENGLISH JIG AND FIXTURE BUILDERS." (Exh. C-1 at 259; C-20, SF 5).

On November 2, 1990, OSC informed GD that the jig and fixture builders provided by Falcon/GK were not authorized to work for GD. (See Exh. 20, SF 8).

I. Termination of the Falcon/GK Contract

On November 6, 1990, Wilson informed Falcon/GK regarding the Contract that "no additional work will be completed after end of shift November 7, 1990." (Exh. C-20, SF 9; see Exh. C-1 at 10). On November 7, 1990, as a result of manpower cutbacks growing out of budgetary constraints, some direct hire jig and fixture builders and all jig and fixture builder contract workers, including those from Falcon/GK and other contract labor firms, were dismissed. (Exhs. R-32, R-38, R-39, R-40; Anyon, Tr. 934, 938-45; Wilson, Tr. 712.)

J. Falcon/GK Worker Became GD Direct Hire

On May 31, 1991, Richard Summers, one of the contract jig and fixture workers which Falcon/GK had provided GD, returned to GD as a direct hire jig and fixture builder.[20] (Exh. C-20, SF 10.) None of the other Falcon/GK workers were hired as direct employees of GD. Id.

V. *Discussion, Findings of Fact, Conclusions of Law*

[20] Mr. Summers resigned from this position on September 18, 1991 for an increased salary in a position with another company. (Exh. C-20, SF 10.)

This case presents the following issues:

1. whether OSC has standing to file this complaint;

2. whether § 1324b applies in the context of contract labor and whether the joint employer theory applies to § 1324b;

3. whether the complaint really alleges national origin discrimination, rather than citizenship status discrimination;

4. whether the complaint was timely filed;

5. whether GD denied U.S. workers jobs as contract jig and fixture builders because of their citizenship status; and

6. whether Respondent's actions constitute a pattern or practice of citizenship status discrimination.

A. Jurisdiction

1. OSC Has Standing to File this Complaint

a. The Workers Against Whom Respondent Allegedly Discriminated are Protected Individuals Under IRCA

IRCA protects U.S. citizens, nationals and certain classes of aliens against citizenship status discrimination. 8 U.S.C. § 1324b(a)(3). The individuals against whom GD allegedly discriminated are contract labor jig and fixture builders from B&M and ITS whose resumes were on file with GD and who were not hired during the period of the alleged pattern or practice of discrimination. It is undisputed that these individuals are U.S. citizens, who, as such, are protected against citizenship status discrimination. Jones v. De Witt Nursing Home, 1 OCAHO 189 (June 29, 1990); see also United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 9 (July 2, 1991) (ALJ stated that IRCA protects native born American citizens despite the fact that they were not the Act's primary target for protection.).

b. OSC Has Authority to File § 1324b Complaints

IRCA expressly provides for the appointment of a Special Counsel for Immigration-Related Unfair Employment Practices who is responsible for the investigation of charges and the filing of complaints alleging discrimination under § 102 of IRCA, 8 U.S.C. § 1324b. 8 U.S.C. § 1324b(c)(1) and (2). The statute specifically provides that "[t]he

Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation . . . , file a complaint before an [administrative law judge ('ALJ')]." 8 U.S.C. § 1324b(d)(1). As such, the Special Counsel has standing to file a complaint alleging discrimination in violation of IRCA.

c. OSC May Prosecute Pattern or Practice Claims

The only reference in § 1324b to claims of a pattern or practice of discrimination is in the provision addressing private actions. See 8 U.S.C. § 1324b(d)(2). While Congress arguably placed this reference under the subheading "Private actions," with the intent to prohibit the Special Counsel from filing pattern or practice claims, I conclude that this was not Congress's intent. As discussed in Mesa, 1 OCAHO 74, at 13-16, a case in which OSC prevailed on a pattern or practice claim alleging citizenship status discrimination, IRCA's legislative history and principles of statutory construction support the view that the Special Counsel is authorized to file pattern or practice complaints. To conclude otherwise would severely detract from the effectiveness of the Special Counsel as "pattern or practice jurisdiction implicates causes of action initiated by or prosecuted to vindicate the public interest in eliminating ongoing discriminatory practices." Id. at 15 citing EEOC v. United Parcel Service, 860 F.2d 372 (10th Cir. 1988).

2. GD Employed Its Contract Labor Jig & Fixture Workers

a. The Prohibitions of § 1324b Apply to GD

My jurisdiction over claims of citizenship status discrimination ex-tends to employers of four or more employees. 8 U.S.C. § 1324b(a)(2)(A). It is undisputed that at the time of the alleged discriminatory conduct, GD employed and continues to employ more than four employees. (See Exh. C-20, SF 1.) Therefore, IRCA prohibits Respondent from discriminating against "any individual (other than an unauthorized alien . . .) with respect to the hiring . . . of the individual for employment" because of such individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B).

The parties are in dispute, however, as to whether IRCA's anti-discrimination provisions apply to GD's selection of contract labor for jig and fixture work. OSC, relying on Title VII case law and National Labor Relations Board cases, argues that Respondent, as a "joint em-ployer" of its contract labor is liable for GD's alleged discrimination under § 1324b. Respondent contends, however, that § 1324b's prohi-

bition against employment discrimination does not apply to the use of contract labor, and I therefore lack jurisdiction over OSC's allegations. More specifically, Respondent argues that § 1324b does not apply to its selection of contract labor because: (1) the regulations implementing § 1324a (IRCA's employer sanctions provisions) exclude from the definition of "employer" persons or companies who use the services of contract labor; and thus, GD's allegedly discriminatory acts are outside the reach of the statute as a matter of law; and (2) no authority exists for applying the "joint employer" theory under § 1324b.

Whether § 1324b applies to the selection of contract labor and whether the "joint employer" theory applies to § 1324b are matters of first impression.

b. § 1324b May Apply to the Selection of Contract Labor Workers

Whether the alleged discrimination in this case is prohibited by IRCA turns on whether by the terms of § 1324b(a)(1), GD's selection of its contract jig and fixture builders constitutes "hiring . . . for employment." Respondent contends that § 1324b does not apply to any user of contract labor because Congress intended for IRCA's antidiscrimination provisions to be limited to direct employment situations.

Respondent asserts that § 1324a is limited to direct employment situations. Respondent argues that although the term "employment" is not defined in § 1324b, its legislative history, or its implementing regulations, that since there is a direct relationship between § 1324a and § 1324b, Congress intended that § 1324b also be limited to direct employment situations. I find Respondent's arguments to be without merit, based on the following.

The premise supporting Respondent's argument is incorrect as § 1324a is not limited to direct employment situations. Respondent re-lies on a regulation implementing § 1324a which provides that "[i]n the case of . . . contract labor . . . , the term 'employer' shall mean the . . . contractor and not the person or entity using the contract labor." 8 C.F.R. § 274a.1(g) (1992). While users of contract labor are excluded from the definition of "employer" under § 1324a, Congress made clear in enacting IRCA's employer sanctions provisions that a person or business that uses contract labor to circumvent the law against knowingly hiring unauthorized aliens, will be considered to

have"hire[d]" the alien "for employment," in violation of § 1324a(a)(1)(A). 8 U.S.C. § 1324a(a)(4). See 8 C.F.R. § 274a.5 (1992).[21]

It is clear that the regulation on which Respondent relies, 8 C.F.R. § 274a.1, merely clarifies that the contractor, not the person or company using the contract labor service, is responsible for complying with IRCA's employment eligibility and verification requirements, 8 U.S.C. § 1324a(a)(1)(B). While a user of contract labor is not considered an "employer" under § 1324a, Congress specifically delineated circumstances under which the user of contract labor is considered to have "hired [an] alien for employment," in violation of section 1324b(a)(1)(A).[22] It is therefore clear that IRCA's employer sanctions provisions are not limited to direct employment situations.

In addition, Respondent argues that § 1324b complaints must be based on behavior relating to § 1324a. This argument is misplaced. While IRCA's legislative history indicates that the adoption of § 1324b was based primarily on protecting individuals from discrimination based on employers' fear of sanctions for violating § 1324a, see, e.g., Marcel Watch Corp., 1 OCAHO 143, at 2, the alleged discriminatory practice need not relate to IRCA's verification and sanctions provisions in order to violate § 1324b. United States v. Southwest Marine Corp., 3 OCAHO 429, at 20 (May 15, 1992); Mesa, 1 OCAHO 74, at 6.

Next, Respondent argues that because "employment" is not defined in § 1324b, its legislative history, or its implementing regulations, one must look to how Congress defined "employment" in § 1324a to discover its intent regarding § 1324b. While each section of a statute should be construed in relation with every other section so as to produce a harmonious whole, Richards v. United States, 369 U.S. 1

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[21] Section 1324a(a)(4) provides:

> For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of [§ 1324a(a)(1)(A)].

The implementing regulation, 8 C.F.R. § 274a.5, contains similar language.

[22] Congress enacted § 1324a(a)(4) to avoid the creation of a loophole which would have enabled a person or business to use subcontractors or create "independent contractor" relationships with workers to avoid liability for employer sanctions. H.R. Rep. No. 99-682, Part 1, 99th Cong., 2d Sess. 62 (1986).

(1962); Stanford v. Commissioner of Internal Revenue, 297 F.2d 298 (9th Cir. 1961), in my view, the regulations implementing one section do not necessarily apply to another. The regulations implementing § 1324a explicitly apply to the "Control of Employment of Aliens," see 8 C.F.R. Part 274a, whereas the regulations implementing § 1324b, found at 28 C.F.R. Part 44 (1991), apply to "Unfair Immigration-Related Employment Practices." Furthermore, different entities were authorized to promulgate the regulations implementing IRCA's sanctions and discrimination provisions. The Attorney General, pursuant to 8 U.S.C. § 1103(a), has authorized INS to promulgate the implementing regulations for § 1324a and has authorized OSC to promulgate the implementing regulations for § 1324b.

Furthermore, in enacting § 1324b, Congress delineated specific exceptions to the antidiscrimination provisions.[23] Congress did not provide a specific exception to § 1324b for "a person or other entity using contract labor services." The lack of such an exception is consistent with the standard applied to employers under the sanctions provisions. Moreover, the Supreme Court has stated that when Congress explicitly enumerates certain exceptions to a statutory scheme, additional exceptions may not be implied without evidence of legislative intent to do so. Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980). Without such a provision, I am unwilling to conclude that the selection of contract labor personnel is necessarily excluded from "hiring . . . for employment" under § 1324b or, in other words, that contract laborers are denied the protections of § 1324b. I cannot do so in view of the specific exceptions, directed toward coverage of all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded.

I therefore conclude that 8 C.F.R. § 274a.1 does not apply to § 1324b to create an exception to IRCA's antidiscrimination provisions for individuals or companies using contract labor. I also hold that "hiring . . . for employment" under § 1324b may include the selection of con-

[23] These include: (1) a person or other entity that employs three or fewer employees; (2) national origin discrimination covered under § 703 of Title VII; (3) discrimination because of citizenship status otherwise (a) required to comply with law, regulation or executive order, (b) required by Federal, State or local government contract, or (c) which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State or local government. 8 U.S.C. § 1324b(a)(2).

tract labor personnel for the purpose of the jurisdictional requirement.[24] Whether a particular person or entity is covered by IRCA in its selection of contract laborers, however, must be determined on a case-by- case basis.

c. Common Law Principles Govern Whether A Relationship Constitutes "Employment" Under § 1324b

i. The Joint Employer Theory Applies to § 1324b

Respondent argues that because an employer/employee relationship did not exist nor was contemplated between GD and the contract labor applicants, GD's selection of its contract labor workers is not covered by § 1324b. Complainant's theory of jurisdiction, however, is that al-though Respondent did not directly employ the British workers supplied by Falcon/GK, nor would it have directly employed the U.S. contract worker applicants denied positions because of the Falcon/GK contract, GD is liable for the unfair immigration-related employment practice alleged in this case because it is a "joint employer" of its contract labor jig and fixture workers.

Federal courts recognize the "joint employer" theory for the purposes of jurisdiction and liability under the labor laws. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473 (1964); McCune v. Oregon Senior Services Division, 894 F.2d 1107, 1111 (9th Cir. 1990); Sheetmetal Workers Union v. Public Service Co. of Indiana, Inc., 771 F.2d 1071, 1074 (7th Cir. 1985).[25]

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[24] If the selection of contract labor personnel could not be covered by § 1324b, there would be a loophole in the law which would allow a person or business to use subcontractors or create "independent contractor" relationships with workers to avoid liability for discrimination that violates IRCA.

[25] The traditional test to determine whether separate entities are joint employers is whether the entities jointly exercise control over the employee's employment. See Boire, 376 U.S. at at 481; Oakes v. City of Fairhope, Alabama, 515 F. Supp. 1004, 1035 (S.D. Ala. 1981). It has long been established that under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq, separate corporate entities may be treated as a single or joint employer for jurisdiction purposes in Title VII cases. Courts considering Title VII claims have adopted the liberal rules used in National Labor Relations Act cases to determine whether two or more separate business entities are so related as to be "joint employers" to enable the court to assert subject matter jurisdiction over each entity. See e.g., Equal Employment Opportunity Comm'n v. Wooster Brush Co. Employees' Relief Assoc., 727 F.2d 566, 571 (6th Cir. 1984); Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983); Mas Marques v. Digital Equipment Corp., 637 F.2d 24, 24 (1st Cir. 1980); Baker . Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977). To determine the (continued...)

Because GD and the technical service firms were not so interrelated as to constitute a consolidated or integrated enterprise, they are not "joint employers" under IRCA in the strict sense of that term. See Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391-92 (8th Cir. 1977). The "joint employer" theory, however, also has been applied in a dif-ferent light where the test is whether an entity exercises such control over the terms and conditions of another entity's employees as to also be considered an employer of the employees. Equal Employment Op-portunity Comm'n v. Wooster, 523 F. Supp. 1256, 1261 (N.D. Ohio 1981); see also NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 1266-67 (7th Cir. 1987) (joint employer status existed where Western sent temporary workers, had power over the identity of the temporary workers and exclusive control over their daily activities). OSC's use of the term "joint employer' is understood to have this latter application.

This application of the theory is often used in Title VII cases "to obtain jurisdiction over a company which is unrelated to the employ-er-in-fact but exercises sufficient day-to-day control over a charging party employed by the employer-in-fact so as to become a co-employer of the charging party." B. Schlei & P. Grossman, Employment Discri-mination Law, 1001 (2d. ed. 1983)(hereinafter "Employment Discrimination Law"). See, e.g., Equal Employment Opportunity Comm'n v. Sage Realty Corp., 87 F.R.D. 365, 22 Fair Emp. Prac. Cas. 1660 (S.D.N.Y. 1980) (cleaning contractor, who paid plaintiff, and building management company were joint employers where latter hired, trained, and supervised plaintiff, and ordered her fired when she refused to wear a revealing costume).

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[25](...continued)
existence of a joint employer relationship, these courts adopted the single or joint To determine the existence of a joint employer relationship, these courts adopted the single or joint employer standard of the National Labor Relations Board ("NLRB"), consisting of four factors used to determine whether consolidation of separate entities is proper: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. To assert a joint employer claim under this theory, a plaintiff must show either that two entities operated as an "integrated enterprise" or that one entity acted as the other's agent theory, with regard to employment practices. Nation v. Winn-Dixie Stores, Inc., 567 F. Supp. 997, 1010 (N.D. Ga. 1983). Under either the integrated enterprise or agency the primary inquiry is who made the final decision regarding employment matters related to the plaintiff. Trevino, 701 F.2d at 404.

Factors which have resulted in a finding that a company is a "joint employer" include control over the hiring, discipline, or discharge of employees of the employer-in-fact; and control over the work schedules and work assignments of such employees. See generally Employment Discrimination Law 1001. For example, in Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344 (S.D.N.Y. 1984), the plaintiff was allowed to proceed on a Title VII discriminatory discharge claim where the temporary agency paid her salary, but defendant controlled her work hours, work place, and work assignments; hired, trained, and supervised plaintiff; and ultimately discharged her. That plaintiff was paid directly by the temporary agency was not conclusive that she was solely its employee. Id. at 348. That she was subject to the direction of Merrill Lynch in her work assignments, hours of service, and other usual aspects of an employee-employer relationship permitted an inference that she was an employee of both the temporary agency and Merrill Lynch. Id.

ii. Title VII Principles of Law Are Generally Applied to § 1324b Cases

Respondent argues that Complainant's reliance on Title VII case law is misplaced because Title VII's scope is not limited to direct employment situations as nothing in its text or legislative history suggests that its prohibitions were intend ed to be so limited. As discussed supra at part V.A.2.b, IRCA's scope is not limited to direct employment situations. Furthermore, Title VII principles of law are generally applied to IRCA discrimination cases. See United States v. Sargetis, 3 OCAHO 407, at 26 (March 5, 1992) ("The majority of IRCA discrimination cases previously decided have relied upon the body of law per- taining to Title VII discrimination cases"); Jones v. DeWitt Nursing Home, 1 OCAHO 189, at 27 (June 29, 1990) (Title VII jurisprudence "provides an essential starting point for a discussion of attorneys' fees under Section 102"); Marcel Watch Corp., 1 OCAHO 143, at 13 ("Title VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases"); United States v. Lasa Marketing Firms, 1 OCAHO 141, at 9 (March 14, 1990), amending 1 OCAHO 106 (November 27, 1989) (ALJs look at "traditional employment discrimination law for suggested approaches to resolving complaints of unfair immigration-related employment practices brought under IRCA"); Mesa, 1 OCAHO 74, at 22, 26 (applying Title VII principles of equitable tolling).

iii. ADEA Case Law Provides Guidance to § 1324b Cases

In addition to relying on Title VII case law, many IRCA discrimination cases look to the Age Discrimination in Employment Act ("ADEA") for guidance in interpreting IRCA's provisions. See, e.g., United States v. Northwest Airlines, 2 OCAHO 452, at 9 (September 10, 1992) (noting that the federal courts have recognized a de facto attorney-client privilege under the ADEA); Lardy v. United States, 2 OCAHO 450, at 9 (Sept. 3, 1992) (discussing the factors which determine extraterritoriality under the ADEA); Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 9 (February 13, 1991) (citing an ADEA case which denied equitable tolling of the time period for filing a charge); Lundy v. OOCL (USA), Inc., 1 OCAHO 215 (August 8, 1990) (relying on ADEA and Title VII case law for holding that equitable tolling of the filing period is available under IRCA); Mesa, 1 OCAHO 74, at 27 (same).

Neither the statutory language of IRCA nor the regulations implementing § 1324b indicate whether the selection of contract labor constitutes "hiring . . . for employment" under section 1324b(a)(1).[26] A recent ADEA case provides guidance as it notes the three different tests courts have developed in various contexts to analyze whether an individual is an employee or an independent contractor: (1) the common law agency test, which focuses on the hiring party's right to control the manner and means by which the product is accomplished; (2) the "economic realities" test, under which individuals are considered employees if as a matter of economic reality they are dependent upon the business to which they render service; and (3) the "hybrid test," which combines the other two tests, by looking at the economic realities of the situation, but considers as the most important factor,

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[26] The regulations governing § 1324a define an "employee" as "an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section . . .."

8 C.F.R. § 274a.1(f). Section 274a.1(j) provides that:

[t]he term "independent contractor" includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done . . . .

"the extent of the employer's right to control the 'means and manner' of the worker's performance." Frankel v. Bally, Inc., 1993 WL 38541, *2-*3, 61 U.S.L.W. 2522 (2nd Cir. Feb. 17, 1993).

The Frankel court found itself bound by a recent Supreme Court case which provides guidance on the appropriate test to apply. In Nationwide Mutual Insurance Co. v. Darden, 112 S.Ct. 1344 (1992), the Court, in determining the definition of the term "employee" as used in the Employee Retirement Income Security Act of 1974 (ERISA), held that where a statute containing that term does not helpfully define it, it is presumed that Congress intends an agency law definition unless the statute clearly indicates otherwise. Id. at 1348. See, e.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).

The Court in Darden applied the well established principle that:

> [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . .. In the past, when Congress has used the term "employee" without defining it, [the Supreme Court has] concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Darden, 112 S.Ct. at 1348 (1992) quoting Reid, 490 U.S. at 739 (cites omitted).

In so holding, the Court rejected its earlier reasoning that a more liberal construction of the term would better effectuate the remedial purpose of the legislation. See United States v. Silk, 331 U.S. 704, 713 (1947) (the definition of "employee" should be construed "in the light of the mischief to be corrected and at the end to be attained") quoting NLRB v. Hearst Publication, Inc., 332 U.S. 111, 124 (1944).

In Darden, the Court excepted from application of the common law agency test the Fair Labor Standard Act ("FLSA") based on that statute's broad definition of the term "employ" to mean "suffer or permit to work." Darden, 112 S.Ct. at 1350. Based on this exception, the Frankel court held that since the ADEA does not contain the FLSA's broad definition of the term "employ," Darden requires the question of whether an individual is an "employee" or an "independent contractor" within the meaning of the ADEA to be determined by the common law agency test. Frankel, 1993 WL 38541 at *4. Similarly, because IRCA does not contain the FLSA's broad definition of the term "employ," I find that Darden mandates the application of the common law agency test. I therefore hold that the question of whether the

selection of contract labor workers is covered by § 1324b, must be determined in accordance with common law agency principles.

The common law agency test places its greatest emphasis on "the hiring party's right to control the manner and means by which the work is accomplished and considers a non-exhaustive list of factors as part of a flexible analysis of the 'totality of the circumstances.'" Frankel, 1993 WL 38541 at *4.[27] As the common law test has "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Id. at 1348 (citation omitted). As the joint employer theory is based on common law agency principles, I hold that it applies to § 1324b.

d. Analysis

It is clear from the pleadings, affidavits and testimony at the hearing that Respondent (1) selected its contract labor workers supplied pur-suant to contracts with technical service firms; (2) controlled the work hours of its contract laborers by assigning them to shifts, (3) exclusively supervised their work and (4) retained authority to terminate them if their work was unsatisfactory and to request a replacement from the technical service firm. The technical service firms, on the other hand, provided only administrative support. Based on Respondent's exclusive control over the means and manner of performance of its jig and fixture contract labor workers, I find that under the joint employer theory, founded in common law principles, Respondent, along with the appropriate technical service firm, was a joint employer of its jig and fixture workers. Therefore, Respondent's selection of jig and fixture contract labor workers constitutes "hiring . . . for employ-

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[27] In Darden, the Court stated that:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 112 S.Ct. at 1348 quoting Reid, 490 U.S. at 751-52 (footnotes omitted).

ment" under § 1324b, giving me subject matter jurisdiction over Complainant's claim.

3. The Complaint Does Not Allege National Origin Discrimination

Respondent argues that the complaint really alleges national origin discrimination because even if the Falcon/GK contract were for "English" or "British" workers as OSC contends, such terms would refer only to national origin, not citizenship status. Respondent argues that therefore I lack jurisdiction over this case. GD Br. at 30-31.[28] Respondent contends that the distinction between national origin and citizenship status "is critical because nationality does not necessarily determine citizenship status." Id. at 31. Respondent asserts that the facts of this case demonstrate the distinction as:

> Each of the [Falcon/GK] contractors in this case filled out an INS Form I-772, "Declaration of Intending Citizen" document. Although we now know that these documents were fraudulent, if they were genuine as [GD] believed they were, these declarations would show that all of these "English jig and fixture builders" were protected individuals under section 1324b.

Id. at 31.

Respondent's argument lacks merit for the following reasons. While the terms "English" and "British," as used by GD in various descriptions of the Falcon/GK workers may be construed to refer to their national origin and not their citizenship status, GD's intent in hiring the workers to the exclusion of U.S. workers, may have been based only on citizenship status and not national origin, or a combination of both. A particular action can violate both the prohibition against national origin discrimination and the prohibition against citizenship status discrimination. Marcel Watch, 1 OCAHO 143, at 12. Even if a Title VII national origin claim has been filed based on the same set of facts asserted in this case, I still have jurisdiction over the citizenship status portion of the claim. See Id. at 11-12 (noting that IRCA's prohibition against an overlap of claims filed with the Equal Employment Opportunity Commission ("EEOC") and OCAHO refers only to claims of national origin discrimination).

[28] Under IRCA, my jurisdiction over claims of national origin discrimination extends to complaints against employers who employ between four and fourteen individuals. 8 U.S.C. § 1324b(a)(2)(A) and (B).

For example, in Roginsky v. Department of Defense, 3 OCAHO 415 (March 8, 1991), a naturalized U.S. citizen from the former Soviet Union alleged that the Department of Defense ("DOD") interfered with his employment opportunity by denying him a security clearance based on his being from a "hostile country" and the number of years he had been a U.S. citizen. DOD argued that the court lacked jurisdiction because the case was really a national origin case. The Administrative Law Judge viewed the alleged discrimination as essentially based on and implicating the complainant's citizenship status and not his national origin. Id. at 1.

Similarly, in the instant case, I find that GD's alleged discrimination is based on citizenship status and not national origin. More specifically, OSC alleges that GD preferred the Falcon/GK workers who were temporary visa holders over "U.S. workers" -- a group consisting of U.S. citizens and certain classes of aliens. National origin is clearly not implicated by the complaint; however, even if it were, I would still have jurisdiction over the citizenship status portion of the claim. Roginsky at 1.

B. Timeliness of the Complaint

Respondent claims that its selection of the British jig and fixture workers hired pursuant to the Falcon/GK contract is immune from challenge under IRCA because the complaint in this case was not timely filed. OSC maintains, however, that the complaint was timely filed under the Special Counsel's independent powers as authorized by statute.

IRCA provides in pertinent part that:

> [t]he Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation and subject to [§ 1324b(d)(3)],[29] file a complaint before [an ALJ].

8 U.S.C. § 1324b(d)(1).

The statute contains no time limitations on the Special Counsel's authority to conduct independent investigations or to subsequently file complaints based on such investigations. While the statute provides

[29] Section 1324b(d)(3), which sets forth the time frame for a charge brought by a private party, provides in pertinent part that "[n]o 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."

a time limitation on complaints filed with OCAHO by a private party after such party has filed a charge with OSC, see 8 U.S.C. § 1324b(d)(3), no private party complaint was filed in this case. Rather, the Special Counsel filed the complaint in this case based on information obtained from an investigation of General Dynamics which he had . That investigation was prompted by information which OSC received from
authorized an individual who had failed to complete his charge and from other information collected during an investigation of possible unfair immigration-related employment practices at McDonnell Douglas Corporation ("McDonnell Douglas"), in Long Beach, California.[30] (Exh. C-20, SF 23.)

OSC is authorized by the Attorney General to promulgate regulations to implement and enforce IRCA's antidiscrimination provisions. 8 U.S.C. § 1103(a). The regulations which OSC has promulgated, set forth in 28 C.F.R. Part 44, inter alia, prescribe the circumstances under which the Special Counsel may proceed under 8 U.S.C. § 1324b:

> (a) The Special Counsel may, on his or her own initiative, conduct investigations respecting unfair immigration-related unfair employment practices when there is reason to believe that a person or entity has engaged or is engaging in such practices.
>
> (b) The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint.

28 C.F.R. § 44.304.

Respondent does not challenge the independent powers of the Special Counsel. Respondent argues, however, that the Special Counsel failed to comply with the "strict time limits on [his] right to file a complaint," as prescribed by 28 C.F.R. § 44.304(b), thus depriving me of jurisdiction to hear and decide this case. GD Br. at 26. Respondent suggests that the issue with regard to timeliness is whether the alleged discriminatory act occurred within the 180-day period preceding the filing of the complaint. The appropriate question, however, is whether there was "reasonable cause" to believe that an unfair immigration-related employment practice occurred within the 180 day period. 28 C.F.R. § 44.304(b). OSC filed the complaint in this case on

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[30] On December 17, 1990, OSC filed a complaint against McDonnell Douglas, alleging a pattern or practice of employment discrimination by the company in its hiring of jig and fixture builders for a contract with the United States Air Force to construct an aircraft called the "C-17." See United States v. McDonnell Douglas Corp., OCAHO Case No. 90200363. That case is still pending.

March 18, 1991. I therefore must determine whether it was reasonable for the Special Counsel to believe that GD had engaged in a pattern or practice of discrimination based on citizenship status in its hiring of jig and fixture workers at any point from September 18, 1990 to March 18, 1991.

Respondent argues that "no matter how one analyzes the Government's case, it is obvious that there is no evidence of any discriminatory acts occurring in the critical time period." GD Br. at 26-27. Respondent contends that all of the relevant events in this case occurred more than 180 days before the complaint was filed: (1) Falcon/GK's initial proposal to GD was made on August 2, 1989; (2) GD and Falcon/GK entered into the contract on March 9, 1990; (3) the jig and fixture builders provided by Falcon/GK pursuant to the contract began work at GD in March, April and June of 1990; (4) two of these workers who "left" their positions at GD were replaced, one on July 16, 1990 and the other on August 13, 1990; and (5) the statistics which OSC offers in support of its case are based on a comparison of the sources of the jig and fixture contract workers selected by GD from March through June of 1990. GD Br. at 27-28. Respondent, however, ignores the fact that the Contract was renewed on September 20, 1990, within 180 days of the date the complaint was filed.

In addition, Respondent contends that not a single resume of any "U.S. worker" whom GD allegedly "rejected" for a jig and fixture con-tract labor position was submitted within the 180-day period. GD Br. at 27. Respondent argues that therefore, even if each rejection is considered a part of a "pattern or practice," OSC has not identified even one qualified individual who was rejected during the 180-day period. Respondent erroneously equates the date of submission of an application or resume with the date of rejection, apparently arguing that the individuals who were qualified but were not hired during the 180-day period, would have had to reapply during the 180-day period in order to be "rejected." I find, however, that based on GD's contracts with B&M and ITS for jig and fixture job shoppers on an "as needed" basis, the applicants need not have reapplied within the 180-day period in order for GD to have rejected them.

Complainant, however, asserts (1) that OSC substantially complied with the regulation at issue, 28 C.F.R. § 44.304(b); (2) that by failing to raise the issue earlier, Respondent has waived any statute of

limitations challenge or defense to the non-jurisdictional regulation;[31] and (3) that evidence at the hearing established a continuing violation of IRCA.

1. OSC Substantially Complied With 28 C.F.R. § 44.304(b)

Complainant contends that it substantially complied with 28 C.F.R. § 44.304(b). OSC argues that the complaint, filed March 18, 1991, was timely as it was filed within 180 days of September 20, 1990, the date on which the Falcon/GK contract extension became effective. Complainant asserts that based on the extension of the GK contract, "the Special Counsel had every reason to conclude that an unfair employment practice had occurred, was occurring, and would continue to occur." OSC argues that in renewing or extending the contract, GD effectively rehired the 25 British citizens who were then working as jig and fixture contract labor under the original contract; and that "a discriminatory group quota policy system was once again by contract affixed in place." OSC Reply Br. at 7.

I agree with OSC's contention that to interpret a contract extension or renewal as a hiring is consistent with the interpretation of such actions as codified in IRCA's sanctions provisions.[32] Therefore, based on the multitude of GD's internal documents that referred to the Contract as one for "British" or "English" workers, the credible testimony of Gaylene Slocum that Rick Turner told her that Falcon/GK "[did] not place Americans, only British," my finding that the Contract was exclusively for British citizen jig and fixture builders from the United Kingdom, and the fact that GD renewed the Contract on September 20, 1990, I find that the Special Counsel had "reasonable cause to believe that an unfair immigration-related employment practice had occurred within 180 days from the date of the filing of the complaint," on March 18, 1991. Thus, the Special Counsel substan-

[31] Subsequent to Complainant's filing of its post-hearing briefs, Respondent filed a motion to amend its answer to include the affirmative defense of lack of timeliness of the complaint, in violation of 28 C.F.R. § 44.304(a) and (b). I granted the motion, thus mooting Complainant's argument.

[32] IRCA's sanctions provisions state that "a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended . . . to obtain the labor of an alien . . . shall be considered to have hired the alien." 8 U.S.C. § 1324a(a)(4) (emphasis added).

tially complied with 28 C.F.R. § 44.304(b).[33] The complaint was therefore timely.[34]

V. *The Alleged Unfair Immigration-Related Employment Practice*

OSC's theory of discrimination is that from March to September of 1990, GD maintained a policy of knowingly and intentionally preferring to hire individuals whom GD understood to be British workers on temporary work visas[35] as contract jig and fixture builders, while re-

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[33] Even if I had not concluded that OSC substantially complied with this regulation, I would have found meritless Respondent's argument that Complainant's lack of compliance with the regulation deprives me of jurisdiction. Courts have consistently held that this kind of procedural regulation is not jurisdictional and should be construed to advance the ends of justice and achieve the legislative purpose. For example, in Onslow County v. United States Dept. of Labor, 774 F.2d 607, 611 (4th Cir. 1985), the court, following applicable Supreme Court precedent, stated that "[i]n the absence of a statutory limitation, the federal government normally is not bound by any condition or limitations period in asserting its rights." Id. at 611, citing Guaranty Trust Co. v. United States, 304 U.S. 126, 132-133 (1938). The court further stated that "[a]gencies are free to relax procedural rules . . . when the ends of justice require it." Id. citing American Farm Lines v. Black Ball Freight Service, 397 U.S. 253, 266 (1986) (holding that the Secretary of Labor's failure to make a determination within a statutorily mandated 120-day period did not "divest the Secretary of jurisdiction to act after that time"). See also United States v. Irvine, 699 F.2d 43, 46 (1st Cir. 1983); EEOC v. General Electric Co., 532 F.2d 359, 368-71 (4th Cir. 1976).

[34] I need not reach Complainant's "continuing violation" argument.

[35] GD relied on representations made by Falcon/GK that the workers which were being offered pursuant to the Contract would be authorized to work in the United States for GD. (See, e.g., Proposal for Falcon's representations). It is undisputed, however, that a majority of the 27 workers supplied by Falcon/GK to Respondent were not authorized to be employed by GD in the United States as they had been on H2-B visas which authorized them to work only for McDonnell Douglas in the United States or they were on tourist visas which did not authorize them to work in the United States. See dis-cussion supra n.18. Falcon/GK had unsuccessfully applied to the U.S. Department of State for E-2 treaty investor status. Since Falcon/GK apparently made no other effort to obtain legal status for the British workers, with the exception of two who married U.S. citizens and became permanent residents prior to starting work at GD, and approximately ten more for whom there has been no proof submitted of authorization to work in the United States, none of the other Falcon/GK workers were authorized to be employed in the United States by GD, as confirmed by INS documentation.

GD relied on a representation made by Falcon/GK that all of these workers, even the two who married U.S. citizens, were temporary visa holders who did not yet have green cards. Whether GD reasonably relied on Falcon/GK's assertions that the were authorized to be employed in the United States by GD would be relevant to a complaint alleging a

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jecting qualified U.S. workers.[36] (OSC's Reply Br. at 15.) OSC contends that the contract for 25 English jig and fixture builders, "represents at least 25 instances of discrimination" because "[a]s each English jig and fixture builder was hired, and a U.S. worker not hired, the discriminatory act was repeated, thereby becoming the regular and systematic practice of the using department." OSC Br. at 35. OSC further contends that the Contract constitutes a discriminatory policy because "there was enough thought or . . . action, that it can be presumed by circumstantial . . . or found by direct evidence that authoritative and responsible persons were behind . . . the Contract." Id. at 43. The ultimate factual issue is whether GD engaged in a pattern or practice of disparate treatment based on citizenship status.

1. The Legal Framework

a. Disparate Treatment Generally

The burden of proof analysis applicable to IRCA discrimination cases is based on Title VII case law. See, e.g., United States v. Weld County School Dist., 2 OCAHO 326, at 5-7 (May 14, 1991); Marcel Watch, 1 OCAHO 143, at 13. Under Title VII jurisprudence, discrimination or "disparate treatment" is when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[37]

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[35](...continued)
violation of section 101 of IRCA , 8 U.S.C. § 1324a(a)(1)(A), which prohibits the knowing hire of unauthorized aliens. See also 8 U.S.C. § 1324a(a)(4). No such complaint, however, is before me.

[36] "U.S. workers" are individuals protected against citizenship status under IRCA. The statute includes within the group of "protected individuals" United States citizens, nationals and certain classes of aliens. See 8 U.S.C. § 1324b(a)(3)(A) and (B).

[37] Disparate treatment is the only theory of liability on which an IRCA discrimination claim may be based. In signing IRCA into law, President Reagan construed its antidiscrimination provisions to require a showing of deliberate discriminatory intent. Statement by President Ronald Reagan upon signing S. 1200, reprinted in Interpreter Releases, Vol. 63, No. 44, November 10, 1986, p. 1037. He expressly rejected Title VII's disparate impact doctrine, which does not require a showing of discriminatory intent, indicating that in order to state a cause of action under § 274B of the Immigration & Nationality Act, the complainant must prove that the employer intended to discriminate against the complainant because of his or her national origin or citizenship status. Id. The Attorney General has also stated that the intent to discriminate under this provision is an essential element of the charge. See 52 Fed. Reg. 37403 (Oct. 6, 1987).

Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 334 n.15 (1977). See also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Furnco Construction Corp. v.Waters, 438 U.S. 567, 577 (1978); Gay v. Waiters and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982). IRCA added to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1).

The Supreme Court established the order and allocation of proof to be used in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, the plaintiff must establish by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff does so, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Id. at 802. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason is a pretext for discrimination. Id. at 804.

In order to show a prima facie case of discrimination, "a plaintiff must offer evidence that 'give[s] rise to an inference of unlawful discrimination.'" Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), as amended, 784 F.2d 1407 (1986) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). The plaintiff may establish a prima facie case of discriminatory failure to hire by showing that: (1) he is a member of a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, he was rejected; and (4) after the plaintiff was rejected, the position remained open and the employer continued to seek applications from people with comparable qualifications. McDonnell Douglas, 411 U.S. at 802.

This formula is flexible, however, so as to conform to the facts of each case. Id. at 802 n.13. The plaintiff must produce either direct or circumstantial evidence in order to create a prima facie case. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc). The amount of evidence necessary to do so is "very little." Lowe, 775 F.2d at 1009.

Despite the shifting of the burden of production to the employer, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. Burdine, 450 U.S. at 253 (1981); Smith v. Barton, 914 F.2d 1330, 1340 (9th Cir. 1990). The plaintiff can carry its

ultimate burden either directly, by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, at 256.

An IRCA complainant must establish "knowing and intentional discrimination" on the part of the employer. Lasa Marketing Firms, 1 OCAHO 141, at 11 (March 14, 1990); Marcel Watch, 1 OCAHO 143, at 13. The regulations implementing 8 U.S.C. § 1324b state in pertinent part:

> It is an unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or engage in a pattern of [sic] practice of knowing and intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring . . . of the individual for employment . . . because of such individual's citizenship status.

28 C.F.R. § 44.200(a)(2).

An employer knowingly and intentionally discriminates on a pro-hibited basis if it deliberately treats a job applicant differently on the basis of the applicant's citizenship status regardless of the employer's motivation for the discrimination. United States v. San Diego Semiconductors, 2 OCAHO 314, at 6 (April 14, 1991); Marcel Watch, 1 OCAHO 143 at 13. See also Carney v. Martin Luther Home, Inc., 824 F.2d 643, 649 (8th Cir. 1987) (under the Pregnancy Discrimination Act, "an employer's good faith or subjective beliefs will not save an otherwise discriminatory decision" -- a violation exists although employer "harbors no ill motive" toward pregnant women). At issue is whether the discriminatory act is deliberate, not whether the violation of the law is deliberate or the result of an employer's invidious purpose or hostile motive. See, e.g, Nguyen v. ADT Engineering, 3 OCAHO 489, at 8 (Feb. 18, 1993) ("The discriminatee must only prove that the violative conduct occurred. A complainant does not need to prove that the conduct was intended to violate the proscription against discrimination"); United State v. Buckingham Ltd. Partnership, 1 OCAHO 151, at 10 (April 6, 1990) (In case arising under IRCA's employer sanctions provisions, ALJ stated that "it is not intent to violate the law that is at issue but intent to perform an act for which the law has prescribed consequences.").[38] A complaining party, however, will not Id.

[38] Based on several well reasoned OCAHO decisions and the addition of 8 U.S.C. § 1324b(a)(6) to IRCA in 1990 by Pub. L. 101-649, § 535(a) I retreat from my earlier interpretation of "knowing and intentional discrimination" as used in 28 C.F.R. §

(continued...)

prevail on a disparate treatment claim where the evidence shows the employer was aware that a given policy would lead to adverse consequences for a given group, if there is insufficient evidence of discriminatory intent. AFSCME v. State of Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).

Discriminatory intent may be established by direct or circumstantial proof. Spaulding v. University of Washington, 740 F.2d 686, 699-700(9th Cir. 1983), cert. denied, 105 S.Ct. 511 (1984). If a claimant presents direct evidence of discrimination which in itself is sufficient to carry the complainant's burden, the McDonnell Douglas/Burdine framework does not apply. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985); Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985). Direct evidence of discrimination may take the form of an employer's written policy which is discriminatory on its face. See, e.g., Thurston, 469 U.S. at 121 (only pilots disqualified due to age not allowed to bump flight engineers). Statements expressing bias have also been found to constitute direct evidence of discrimination. See, e.g., Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) (racial slur about work abilities of blacks). To prove discrimination, however, the plaintiff need not produce "a smoking gun." Nguyen, 3 OCAHO 489, at 8 citing Resare v. Raytheon Co., 981 F.2d 32 (1st Cir. 1992). Circumstantial evidence of discrimination is sufficient.

In order to prove disparate treatment, a plaintiff may assert either that the employer's challenged decision stemmed from a single ille-gitimate motive (e.g., citizenship status discrimination) or that the decision was the product of both legitimate and illegitimate motives. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-248 (1989). In Price Waterhouse, a plurality of the Supreme Court found that the McDonnell Douglas/Burdine frame-work does not apply to a case involving mixed motives. Id. Under a mixed motive analysis, the plaintiff must show that it is more likely than not that a protected characteristic "played a motivating part in [the] employment decision." Id. at 244, 247 n.12. Once that is done, the employer may escape liability only by proving by way of an affirmative defense that the

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[38](...continued)
44.200(a). I suggested that "knowing and intentional" implies that an employer must know that it is violating the law when it discriminates against an individual. Lasa, 1 OCAHO 141, at 16-20. I also stated that an employer would have to know a job applicant's protected citizenship status, refuse to hire the applicant on the basis of that status, and know that denial of employment on that basis is illegal. Id.

employment decision would have been the same even if the characteristic had played no role. Id. at 243-47.

A complainant need not choose between a single motive and mixed motive theory at the beginning of a case. The Supreme Court has stated:

> [We do not] suggest that a case be correctly labeled as either a "pretext" case or a "mixed motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point the proceedings, of course, the District court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following Burdine, that the employer's stated reason for its decision is pretextual.

Price Waterhouse, 490 U.S. at 247 n.12.

The mixed motive theory, developed in Price Waterhouse applies to § 1324b proceedings. See San Diego Semiconductors, 2 OCAHO 314, at 8-9 (Apr. 4, 1991) (ALJ, applying Price Waterhouse, stated that under IRCA, if the evidence shows "that the individual's citizenship or national origin was a factor in the decision to refuse to hire . . . then the inquiry [focuses] on whether the ultimate employment decision would have been made even in the absence of the prohibited factor.")

b. Pattern or Practice Discrimination Generally

While the McDonnell Douglas/Burdine analysis generally applies to pattern or practice cases, courts have adopted some modifications to account for the unique nature of pattern or practice claims. In Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court set forth the method of proving a pattern or practice claim of disparate treatment. As in an individual disparate treatment case, the plaintiff bears the initial burden of establishing a prima facie case of discrimination, Id. at 336, which the plaintiff may achieve by introducing evidence that "give[s] rise to an inference of unlawful discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). See Teamsters, 431 U.S. at 358. The ultimate factual issues are whether there was a pattern or practice of disparate treatment and if so, whether it was based on the discriminatory factor alleged. Teamsters, 431 U.S. at 334 (citation omitted). The plaintiff ultimately has to establish by a preponderance of the evidence that the alleged discrimination "was the company's standard operating proce-

dure -- the regular rather than the unusual practice." Bazemore v. Friday, 478 U.S. 385, 396 (1986) quoting Teamsters, 431 U.S. at 336. A pattern or practice cannot be inferred from isolated or sporadic discriminatory acts. Teamsters, 431 U.S. at 336. See also Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (two discriminatory acts over four-year period not enough to establish pattern or practice).[39]

As employers rarely announce their discriminatory policies, but see Mesa, 1 OCAHO 74, the requisite discriminatory intent is usually proven indirectly through the introduction of statistical and anecdotal evidence. See, e.g., Teamsters, 431 U.S. at 334-40; Penk v. Oregon State Bd. of Higher Education, 816 F.2d 458, 463 (9th Cir. 1987). Relevant statistical comparisons in a refusal to hire case include comparisons between groups of individuals in the appropriate labor pool, such as between groups applying for a particular position and their rate of hire. See Payne, 673 F.2d at 820. "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 817 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982). A plaintiff may establish a prima facie case "by show[ing] a disparity in the relative position or treatment of the minority group and [eliminating] 'the most common nondiscriminatory reasons' for the observed disparity." Segar v. Smith, 738 F.2d 1249, 1273 (D.C. Cir. 1984) quoting Burdine, 450 U.S. at 253-54. The most commmon nondiscriminatory reason is "a lack of qualifications among the minority group members." Segar, 738 F.2d at 1274.

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[39] As discussed supra at part V.A.1.c, IRCA's antidiscrimination provisions provide for "pattern or practice" claims, see 8 U.S.C. § 1324b(d)(2), although the statute does not define the term as used in section 102 of IRCA, 8 U.S.C. § 1324b. In enacting IRCA, however, the House Judiciary Committee discussed ("Committee") the meaning of "pattern or practice" as used in section 101 of IRCA, 8 U.S.C § 1324a(f). The Committee followed the judicial construction of the term "pattern or practice" as set forth by the Supreme Court in Teamsters, 431 U.S. 324 (1977). H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 59 (1986). The Committee stated that, as in Teamsters, the term pattern or practice "has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts." Id. I agree with ALJ Morse who stated in Mesa that because the Committee did not provide a different interpretation of the term "pattern or practice" for section 102, the Committee intended that this meaning apply to section 102 as well. Mesa, 1 OCAHO 74, at 14.

The Ninth Circuit has held that statistical evidence is critical in creating an inference of discriminatory intent, Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439, 444 (9th Cir. 1987), but has cautioned that the weight given to statistics depends on "proper supportive facts and the absence of variable." Spaulding v. University of Washington, 740 F.2d 686, 703 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, Atonio v. Ward Cove Packing Co., Inc., 810 F.2d 1477 (en banc).

Statistical evidence is not usually sufficient by itself to establish a prima facie case. See generally, Employment Discrimination Law 485 (Supp. 1989). Therefore, it is often coupled with anecdotal evidence of specific instances of discrimination. Id. Other types of non-statistical evidence may be offered as well. See, e.g., Segar, 738 F.2d at 1279 (al-though trial court discredited testimony regarding specific instances of discrimination, it credited testimony regarding disparate treatment in disciplinary procedures, evaluation and general perceptions that Drug Enforcement Administration's work environment was discriminatory).

The prima facie case creates an inference that, absent other expla-nation, the disparity more likely than not resulted from illegal dis-crimination. Teamsters, 431 U.S. at 358. If the plaintiff succeeds in making a prima facie showing of a pattern or practice, the burden then shifts to the defendant to defeat that inference. Id. at 360. The employer's defense "must . . . be designed to meet the prima facie case of the [plaintiff]." Id. at 360 n.46. The employer can challenge the plaintiff's proof by showing that it "is either inaccurate or insignificant" by demonstrating, for instance, that "during the period it is alleged to have pursued a discriminatory policy, it made too few employment decisions to justify the inference that it engaged in a regular practice of discrimination." Teamsters, 431 U.S. at 360.

Alternatively, the employer can offer a legitimate nondiscriminatory explanation for the disparity. Segar, 738 F.2d at 1267. The Supreme Court has explained the rationale for shifting the burden to the employer at this point:

> [A statistical] imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. at 339 n.20. The Court uses the word "purposeful," indicating that statistically disparate results alone are insufficient unless they

support an inference of purposeful discrimination. The strength of the evidence the employer in a pattern or practice case must introduce to meet its rebuttal burden will typically need to be much greater than the strength of the evidence sufficient to "rebut an individual plaintiff's low threshold McDonnell Douglas [prima facie] showing." Segar, 738 F.2d at 1269-70.

The McDonnell Douglas/Burdine tripartite analysis "does not inflex-ibly apply" to pattern or practice cases. Penk v. Oregon State Board of Higher Education, 816 F.2d 458, 461 (9th Cir. 1987) citing Aikens, 460 U.S 711, 715; Burdine, 450 U.S. 248, 253-54; Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 538 (9th Cir. 1982); Employment Discrimination Law, 244 (2d ed. Supp. 1985). For example, some courts in analyzing a claim of a pattern of practice of discrimination have basically collapsed the prima facie and pretext stages of a case involving an individual plaintiff. Segar, 738 F.2d at 1270 n.15 citing McKenzie v. Sawyer, 684 F.3d 62, 71 (D.C. Cir. 1982); Vuyanich v. Republic Nat'l Bank of Dallas, 521 F.Supp. 656, 662 (N.D. Tex. 1981), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984). This is done where "the plaintiff's initial offer of evidence [is] so strong that the bare articulation of a nondiscriminatory explanation will not suffice to rebut it." Segar, 738 F.2d at 1269. Where the employer's rebuttal is sufficiently strong, however, the plaintiff may have to introduce evidence to discredit the rebuttal. Id. at 1270 n.15.

Where a case has been fully tried on its merits, some courts have found it unnecesary to address the question of whether the plaintiff has established a prima facie case. See, e.g., Aikens, 410 U.S. at 713 (In such circumstances, to do so "unnecessarily evade[s] the ultimate question of discrimination vel non."). As the Supreme Court stated in Bazemore v. Friday:

> [I]f the defendant[] [has] not succeeded in having a case dismissed on the ground that the plaintiff[] [has] failed to establish a prima facie case, and [has] responded to the plaintiff['s] proof by offering evidence of [its] own, the factfinder then must decide whether the plaintiff[] [has] demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiff[] [has] actually proved discrimination.

478 U.S. at 398 (citation omitted).]

In each of these scenarios, the plaintiff always retains the ultimate burden of persuading the trier of fact, by a preponderderance of the evidence, that the employer engaged in intentional discrimination. See, e.g., Burdine, 450 U.S. at 253; Penk, 816 F.2d at 463; Segar, 738 F.2d at 1269-10 and n.15. If the plaintiff makes a showing that the

employer has engaged in a pattern or practice of intentional discrimination, the court may award relief. Teamsters, 431 U.S. at 361. In the initial liability stage of a pattern or practice suit, however, "the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." Id. at 360; Mesa, 1 OCAHO 74, at 50. Rather, individual relief is addressed at a second stage of trial. Unlike an individual disparate treatment case, where the plaintiff carries the ultimate burden of persuasion, however, in the remedial stage of a pattern or practice case, there is a presumption that any employment decision made during the period when the discriminatory policy was in effect "was made in pursuit of that policy." Teamsters, 431 U.S. at 362.

2. Case Analysis

In this case, OSC bears the ultimate burden of proving that GD engaged in a pattern or practice of intentionally treating U.S. contract jig and fixture builders less favorably than British citizen contract jig and fixture builders on temporary work visas. OSC may prevail only by establishing that citizenship status discrimination was GD's "standard operating procedure -- the regular rather than the unusual practice." Teamsters, 431 U.S. at 336. OSC's statistical evidence, GD's internal documents, the Contract and the Proposal on which it was based, and the testimony of Gaylene Slocum are the foundation for its claim. OSC must show by a preponderance of the evidence that the disparity between GD's treatment of U.S. workers and non-U.S. workers (1) is based on citizenship status and (2) such difference in treatment is GD's regular rather than unusual practice. While proof of discriminatory intent is critical, it can sometimes be inferred from the "mere fact of differences in treatment." Id. at 335 n.15. GD's defense must be designed to meet OSC's proof. Teamsters, 431 U.S. 324, 360 n.46. GD's burden is to challenge plaintiff's proof as "inaccurate or insignificant," Id. at 360, or "to provide a nondiscriminatory explanation for the apparently discriminatory result." Id. at n.46 (citation omitted). If GD provides a legitimate nondiscriminatory explanation, OSC, in order to prevail, must discredit the explanation by proving that it is pretext or is not credible. If OSC fails to do so, then no liability on GD's part can be found. Segar, 1738 F.2d at 1269-170 and n.15.

a. GD's Motive Need Not Be Established

OSC's theory is that GD discriminated against U.S. workers on the basis of an alleged consequence of their citizenship status. More

specifically, OSC argues that Respondent preferred the Falcon/GK British citizens whom Respondent believed would be in the United States on visas that would prohibit them from leaving employment with Respondent and working for another employer in the United States, over U.S. workers who would not be subject to such a prohibition. OSC contends that:

> [GD's] true motive in entering into the Contract is captured by the Proposal ([Appendix A]), which explains the dilemma of companies such as [GD] who only need these workers "for a finite period of time." As the Proposal elaborates the challenge is guaranteeing that the company can keep the workers while it needs them without having them run off to another company, or to a technical service firm who will pay them more. The solution of many companies, says the Proposal, has been to get foreign labor -- especially foreign labor from the United Kingdom. And one of the great advantages to this, according to the Proposal, is that it solves the problem of worker mobility because the foreign workers "are basically indentured to the company(s) sponsoring their employment tenure". But there are problems with this solution, the Proposal concludes, because the U.S. Government makes it extremely difficult for companies to use this beneficial solution legally.
>
> To bypass the difficulties posed by U.S. Government regulations, Falcon offered to be the company to bring the workers in. Then Falcon could contract them to [GD] "for a specific period of time and/or indefinitely" -- in short for as long as [GD] liked, and when it didn't need them, they would be gone. Falcon guaranteed that while the company needed the workers, they would not be going off to other companies. As the Proposal put it, "we offer continuity in the work force."

OSC Br. at 24 (footnote added).

Respondent contends that the sole basis for OSC's argument is its misinterpretation of the reference to "indentured" workers in the Proposal, in which "the word 'indentured' appears in a description of the method used by McDonnell-Douglas, which hired foreign workers directly by petitioning for H2-B visas for the workers." GD Br. at 2. Respondent further argues:

> It is undisputed that Falcon/GK never proposed [GD] use the "hire direct" procedure described in the Introduction section of the Proposal." The "Methodology" section of the Proposal makes it clear that what is being offered to [GD] is an alternative to the "hire direct/H-2B" method discussed earlier in the Proposal. Thus, upon even a cursory examination, [OSC's] argument that the Proposal offers [GD] "indentured" workers is simply an overzealous, and mistaken, reading of the plain language of the document.

GD Br. at 2-3. See also Id. at 40-41 ("The true core of [OSC's] theory of this case appears to be its persistent attempts to twist the language of the [Proposal].")

At the center of the dispute between the parties is the meaning of a part of the Proposal which states:

> Falcon International can:
>
> Supply as many . . . workers as needed (Jig & Fixture Builders, . . . etc.) for an indefinite period of time, within INS guidelines. . .
>
> * If General Dynamics so desires, the workers they like can be transferred to G.D.'s direct payroll, and still stay indefinitely, within INS guidelines.

Appendix A, at G 2310.

I find that the meaning of this section is subject to different interpretations. One could infer, as does OSC, that these workers were somehow indentured to Falcon/GK so that they could be contracted to GD indefinitely or they could be transferred to GD's direct payroll for an indefinite period of time. This view is supported by Falcon/GK's statement that it "offer[s] continuity in the work force." Id. at G 2311. Another reading of the Proposal, however, takes into account a reference in the Introduction section to a negative aspect of U.S. companies directly hiring British workers: "the period these people can work in the United States is finite and the INS can revoke these Visas at any time." With this in mind, one could interpret the quoted section of the Proposal to mean that the British workers could stay in the United States "for an indefinite period of time, within INS guidelines" without any restriction on their right to move to another job and could "stay indefinitely, within INS guidelines" in the United States as direct employees of GD. I presume that this is Respondent's reading of this section, although, as noted above, Respondent does not address the language of this section and focuses solely on OSC's alleged misapplication of the term "indentured" as used in an earlier section of the Proposal. See GD Br. at 2-3, 40-41.

Respondent's argument that GD would not have control over the Falcon/GK workers is supported by the testimony of each witness who testified on the subject, including Donald Yuhas of Falcon/GK, who denied that Falcon/GK ever told GD the workers would be indentured. Id. at 41. Furthermore, GD made no mention in any internal document listing reasons it entered into or renewed the contract, any type of control it would have over these workers. I therefore do not agree with OSC that Respondent's motive in hiring the Falcon/GK workers was related to its ability to prohibit their working for another employer.[40]

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[40] I also note that OSC's legal assertion that a British citizen worker on an "E" visa is restricted in moving from job to job is correct only in the sense that an individual on a temporary visa must obtain permission from the INS before changing employment.

(continued...)

It is not Respondent's motive, however, but its intent which is at issue. United States v. San Diego Semiconductors, 2 OCAHO 314, at 6 (April 14, 1991); Marcel Watch, 1 OCAHO 143 at 13. I therefore need to decide only whether Respondent deliberately committed a discriminatory act, not whether the violation of the law was deliberate or the result of Respondent's invidious purpose or hostile motive. Nguyen v. ADT Engineering, 3 OCAHO 489, at 8 (Feb. 18, 1993).

b. Complainant Established a Prima Facie Case of a Pattern or Practice of Knowing and Intentional Discrimination

I will now set out the evidence by which OSC established its prima facie case of a pattern or practice of citizenship status discrimination.

i. The Contract & the Proposal

OSC contends that the written contract ("Contract") (Appendix C) is "direct evidence that Respondent knew the status of the British workers and wanted to hire them exclusively until its quota of 25 was met." (OSC Br. at 37 (footnote omitted)). OSC states that "Respondent in fact selected its next 25 contract jig and fixture builders pursuant to the Contract" while "[a]t the same time . . . ignor[ing] the drawers full of U.S. worker resumes submitted by B&M and ITS for contract jig and fixture builder positions." OSC Br. at 37-38. Respondent disputes that the Contract excluded U.S. jig and fixture builders from consideration and, if it did, Respondent disputes that it was aware of such exclusion.

OSC argues that "Respondent carried out its discriminatory hiring policy over a period of time pursuant to a facially discriminatory contract for '25 English Jig and Fixture Builders.'" (OSC Br. 37.) Respondent, calling OSC's characterization of the contract as such "nothing more than a blatant misrepresentation of the evidence in this case," denies that the Contract is direct evidence of discriminatory intent. GD Br. at 39.

It is undisputed that the written contract which was sent to Falcon/ GK did not contain a written requirement that the workers provided

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[40](...continued)
(Mautino, Tr. 1020-21.) As an "E" visa holder is not prohibited from changing employers, an employer may not prohibit an "E" visa holder from leaving its employ and working for another employer.

by Falcon/GK had to be of a particular citizenship or immigration status. (Appendix C [taking into account OSC's stipulation that the highlighted portions of Appendix C were not sent to Falcon/GK]; Wilson, Tr. 677-681; and 680 [OSC's stipulation].) There is a line on the Contract referring to "English Jig and Fixture Builders" which a GD employee testified was strictly an internal record-keeping item. (Wilson, Tr. 677-82. See Appendix C [highlighted portion].) I find this testimony persuasive as OSC stipulated at hearing that the copy of the Contract that was sent to Falcon/GK did not contain this line. (Tr. 680.) I therefore disagree with OSC's contention that "[t]he clear language of the contract excluded from consideration U.S. workers who were qualified to work" (OSC Br. at 3.), and find that the Contract was not discriminatory on its face.

The parties are also in dispute as to whether GD knew that the Contract was discriminatory in effect. Respondent argues that the citizenship of the GK employees to be supplied was not a material term of the contract; rather, it was required that those employees would be qualified jig and fixture builders without regard to citizenship. Respondent contends that it did not know that the Contract could or would exclude U.S. workers from consideration as (1) no discussions took place between GD and Falcon/GK "that the workers provided by [Falcon/GK] pursuant to the written contract had to be of any particular citizenship status or immigration status" (GD Br. at 11 citing Wilson, Tr. 665-666); (2) Wilson, the Procurement Department employee who in internal documentation "described the Contract . . . as involving "English" jig and fixture builders stated emphatically and repeatedly that citizenship was never discussed as a contract term" (GD Br. at 12); and (3) "Wilson understood that [Falcon/GK] could provide U.S. citizens under the contract." (Id. citing Wilson, Tr. 545.)

The Proposal, however, makes clear that Falcon/GK was offering GD only British citizen workers from the United Kingdom. As Falcon/GK stated:

> Because we are in fact a British company, we can bring British employees to the United States to work without having to worry about the INS because those guidelines do not affect a British company bringing British citizens in to work for an American subsidiary.

Appendix A, at G 2310 (emphasis added). In addition to the plain words of the Proposal, Donald Yuhas testified at the hearing that he and Turner were "looking to provide" workers "from the United King-dom, British jig and fixture [builders.]" (Yuhas, Tr. 324.) Furthermore, Gaylene Slocum testified that when she called Falcon/GK in

August of 1990 to inquire about work for her husband, a jig and fixture builder, she was told "We do not place Americans, only British." (Slocum, Tr. 357.)

In light of the clear language of the Proposal indicating that Falcon/ GK would bring "British citizen[]" workers "to the United States" and the credible testimony of both Yuhas and Slocum, I find lacking in credibility Wilson's testimony that he understood that Falcon/GK could provide U.S. citizens under the contract. Furthermore, that citizenship status was never discussed as a contract term (see GD Br. at 11-12) only adds to the weight of the plain words of the Proposal. I therefore agree with OSC that "[b]oth GD and Falcon/GK clearly understood that only United Kingdom workers could be provided pursuant to the terms of the contract" as "U.S. workers were not part of any discussions or an option under the [C]ontract." (OSC Br. at 2- 3, citing Yuhas, Tr. 285-86, 295-96, 300, 324).

ii. The Recap

OSC also contends that the Recap (Exh. C-14) is direct evidence of Respondent's intent to discriminate against U.S. workers. OSC Br. at 37. The Recap provides in pertinent part that: "Falcon International made a presentation to [GD] on a system for recruiting United King-dom workers into our labor force." Respondent argues that OSC's "bold statement" that the Recap is direct evidence of intentional discrimination "is totally unsupported" as the Recap does not even refer to U.S. workers -- let alone suggest that such workers would be excluded." GD Br. at 41. See text of Recap supra part III.C. Respondent further contends that (1) "the B&M and ITS contracts remained in full force during the [Falcon/GK] contract"; (2) that "[d]uring 1990, there were more workers from B&M and ITS than form (sic) [Falcon/GK] (Wilson, Tr. 708)"; and (3) neither of "the Operations Supervisors were ever told to stop using contractors from other agencies during the [Falcon/GK] contract."

GD Br. at 41. I find that the Recap is only helpful to OSC as further support for the inference that the contract labor workers GD would be hiring under the Contract would not be U.S. workers.

iii. Statistical Evidence, Contract Extension & Qualified U.S. Workers Were Available

In support of its case, OSC offers statistical evidence showing that from March through June of 1990, GD hired 2 of 224, or 8% of the U.S. workers who had submitted applications before June, 1990 and hired

25 of 25, or 100% of the British citizen/temporary visa holders whose applications it had received before June, 1990. OSC argues that "[t]he statistical evidence alone is enough to establish a prima facie case because the disparity in treatment between the two groups is so great" (.8% of its U.S. citizen applicants hired compared to 100% of its British citizen/temporary visa holder applicants). GD Br. at 42.

Respondent argues that I should completely disregard OSC's statis-tical evidence because it:

> focus[es] on a time period which, in its entirety, falls outside the 180-day period preceding the filing of [OSC's] complaint. Therefore, even if the statistics supported a claim that a "pattern or practice' of citizenship status discrimination occurred, [I do] not have jurisdiction over that claim. As far as the seven-week period from September 18, 1990 through the termination of the [Falcon/GK] contract on November 7, 1990, [OSC's] statistics actually show that [GD] favored so called "U.S. workers."

GD Br. at 42.

I find the fact that the statistics focus outside the 180-day period preceding the filing of the complaint does not make them irrelevant but goes to their weight. I find that the statistics establish that there was a gross disparity in the number of U.S. workers versus non-U.S. workers hired by GD during the first few months of the initial 6-month Contract.

Respondent contends that OSC's statistics "are based on too small of a sample to be given any probative value." Id. at 43. Respondent relies on four cases, three of which have such a small sample size that one more decision either way would have significantly altered the statistics. See, e.g., Murray v. District of Columbia, 34 F.E.P. 644, 646 (D.D.C. 1983), aff'd, 740 F.2d 58 (D.C. Cir. 1984). As OSC argues in the case at bar, "if Respondent had only selected 24 [Falcon/GK] workers, and not 25, the result would still have been a far greater percentage of non-U.S. workers (96%) than U.S. workers (.8%) selected in March through June, 1990." OSC Reply Br. at 23. Similarly, if Respondent would have selected three U.S. workers instead of two, only 1.3% of the U.S. workers applicants would have been selected. I therefore find Respondent's argument unpersuasive.

At least 52 of the U.S. worker applicants were qualified contract labor jig and fixture builders and 38 of the 52 were available before the first group of Falcon/GK workers started work at GD. (Exhs. C-6, C-7 and OSC Br. at 18-19 [list of qualified U.S. workers by date of submis-

sion].)[41] The statistics, along with the facts that (1) the Contract excluded U.S. workers from consideration for 25 positions, (2) U.S. workers were available, and (3) the Contract was extended for another six-month period in September of 1990, support an inference of a policy of intentional discrimination on the part of GD.[42]

iv. Finding

I find that the Contract, Proposal and Recap, along with testimony that Turner of Falcon/GK had told GD that the workers were not authorized to work directly for GD, and Gaylene Slocum's testimony constitute direct evidence that GD knew the workers supplied under the Contract would not be U.S. workers. I further find that this knowledge, coupled with GD's execution of the Contract, and GD's failure to select a single U.S. jig and fixture builder until it had obtained all 25 British citizen workers when more than 25 qualified U.S. workers were available, establishes an inference that GD intentionally discriminated based on citizenship status. In addition, I find, based on the fact that during a span of several months in 1990, Respondent hired a grossly disproportionate number of non-U.S. worker applicants than U.S. worker applicants pursuant to a contract which Respondent subsequently renewed, along with the fact that qualified U.S. workers were available, to make a prima facie case of a pattern or policy of discrimination based on citizenship status.

c. Respondent Rebutted the Prima Facie Case by Producing "Legitimate Nondiscriminatory Reasons" for its Allegedly Discriminatory Conduct

The burden thus shifts to Respondent to assert legitimate nondiscriminatory reasons for its actions. Respondent has stated three rea-

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[41] The parties stipulated to the fact that 28 individuals from B&M and ITS appeared qualified from their resumes which had been submitted to GD between January and September of 1990. (Exh. C-20, SF 25). Gifford also testified that 24 other individuals were qualified jig and fixture builders, but that he would not have selected them because either they were currently employed elsewhere or because the resume appeared altered. (Exh. C-25 [portions of Gifford deposition identified at Tr. 770-72]; Exh. C-9 [resumes of qualified individuals].)

[42] Moreover, regardless of the strength of OSC's evidence, Respondent's failure to have filed a motion for summary decision to dismiss this case on the ground that OSC failed to establish a prima facie case and its response to OSC's proof with evidence of its own, leads me to infer that whether OSC has established a prima facie case is not at issue. Aikens, 410 U.S. at 713; Bazemore, 478 U.S. at 398.

sons for entering the Falcon/GK contract, the primary one being its belief that the contractors to be supplied wanted to eventually become direct hires of GD. Respondent has expressed two other reasons as well. Respondent claims that the fact that the Falcon/GK workers would accept an hourly pay rate equivalent to the top of the direct-hire labor rate was a substantial reason for entering the Contract. Re-spondent also contends that the fact that the Falcon/GK workers were familiar with McDonnell Douglas MD-11 jigs and fixtures was important because Respondent was building part of the MD-11 for McDonnell Douglas, and the workers would be assigned to this project.

i. Experience at McDonnell Douglas

OSC challenges Respondent's claim that the Falcon/GK workers' experience with McDonnell Douglas parts was a legitimate business reason for entering the Contract, as "many of the resumes of U.S. workers submitted by B&M and ITS also show experience at McDonnell Douglas." OSC Reply Br. at 26 (footnote citing names of 37 U.S. workers with experience at McDonnell Douglas omitted). I find that OSC has shown that the Falcon/GK workers' experience at McDonnell Douglas did not make them any more desirable than the many U.S. workers who also had experience at McDonnell Douglas. I find credible, however, that one of the reasons Respondent entered the Contract was the Falcon/GK workers' experience. The fact that several U.S. workers also had experience working for McDonnell Douglas, does not make Respondent's reason illegitimate.

ii. Falcon/GK Workers Would Accept Pay Rate Equivalent to Top of Direct Hire Rate

Respondent claims that it was an economic benefit to GD to pay the Falcon/GK workers $15.97 an hour, the top of the direct hire labor rate, instead of the $22 an hour received by contract workers from B&M and ITS. OSC challenges Respondent's claim that the Falcon/GK workers' pay rate was a legitimate business reason that GD entered into the Contract, pointing out that "Respondent failed to mention that it paid $24.62 an hour to [Falcon/GK], and . . . initially, Respondent was willing to pay $26.29 an hour, the same rate paid to other contract houses." OSC Reply Br. at 26. OSC contends that saving money was not an incentive for entering into the Contract and [t]he fact that a better rate was later negotiated does not obviate the original intentions and reasons for Respondent's actions." Id. I find that OSC has shown that Respondent's economic benefit justification is not credible. I further find, however, that this lack of credibility is overcome by Respondent's other legitimate reasons.

Respondent asserts that the higher hourly rate normally paid to contractors caused a morale problem, and lured away its direct workers, who would later return to GD as contractors. Respondent contends that because the Falcon/GK workers were paid the same rate as direct employees, GD would not lose any more direct employees. OSC responds:

> Of course Respondent would not lose any direct employees to [Falcon/ GK] -- no qualified contract workers would choose to work for $15.97 an hour when they could work for $22 an hour for B&M or ITS (unless they were not authorized to work in the United States for B&M or ITS).

OSC Reply Br. at 27.

Complainant apparently argues that it is not legitimate for a company to hire non-U.S. contract workers who are willing to accept a lower rate of pay than U.S. workers. I conclude, however, that a company may do so, without violating IRCA's anti-discrimination provisions.[43] Therefore, Complainant has failed to prove that Respondent's "morale" justification was pretextual.

iii. Direct Hire Justification

In the Single Source Justification (Appendix B), Respondent justifies pursuing the Proposal because it would "lessen [GD's] reliance on a parade of job shoppers with no real allegiance to Convair." Respondent has explained this statement "on the basis of the need for a stable, direct hire work force, and [GD's] belief that it was acquiring a pool of future direct hire employees." (GD Br. at 45 citing Robinson, Tr. 192, 196; Sullivan, Tr. 886-87). I find the Single Source Justification as highly reliable evidence of Respondent's primary business reason for pursuing the Falcon/GK contract: the unique opportunity to obtain 25 skilled direct hire jig and fixture builders. I further find, for the reasons stated below, that OSC failed to prove that GD's direct hire justification was a pretext for discrimination.

d. OSC Failed to Prove GD's Reasons Are Pretextual

Once the employer states its busines reasons for its allegedly discriminatory conduct, the burden shifts to the complainant to prove that these reasons are a pretext for discrimination. As I have discussed Respondent's secondary reasons above, I will now address

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[43] If the workers are unauthorized to be employed in the United States, however, the employer may be committing a violation of section 101 of IRCA, 8 U.S.C. § 1324a(a)(1)(A).

its primary reason for hiring the Falcon/GK workers -- the opportunity to obtain direct hires. OSC contends that Respondent's direct hire justification is a "post facto justification" that "is nothing more than pretext." OSC Br. at 23. I find, however, that this justification was present from before the initial contact between GD and Falcon/GK and continued through the negotiation and extension of the Contract based on the following. In 1989 and 1990, GD's company policy and its collective bargaining agreement required that it fill its needs for manpower through the recruitment of direct hire employees where possible, instead of contract labor. (Sullivan, Tr. 877- 78; Anyon, Tr. 930 [company policy to hire direct where possible]; Robinson, Tr. 241-42 and Exh. R-25 [agreement with union].)

I find that because GD's substantial efforts to recruit direct hire jig and fixture builders fell far short of satisfying its need for such workers (Robinson, Gr. 211-217 and Exh. R-4, R-44; Sullivan,Tr. 169-70, 864-5; Maczka, Tr. 382-3), and other job shoppers were unwilling to become direct hires of GD (Sullivan, Tr. 899-900), the company pursued the Falcon/GK offer in order to have the opportunity to hire a group of 25 direct hires, as soon as the workers could legally be directly hired. I further find that GD at first rejected Falcon/GK's offer precisely because the company did not want job shoppers. (Robinson, Tr. 168; Sullivan, Tr. 878-79.) Because the company's need for jig and fixtures continued to grow and the Human Resources Department was continually unable to provide direct hires, however, GD pursued the Falcon/GK proposal. (Robinson, Tr. 168, 170-72; Maczka, Tr. 369.)

OSC argues, however, that the fact that the Falcon/GK job shoppers were let go in November of 1990 supports its theory that GD did not really want direct hires. OSC maintains that:

> [w]hen Respondent extended its contract with [Falcon/GK], it knew there was no guarantee of long-term work -- it merely wanted bodies for the short term. In fact, no job shopper from [Falcon/GK] was directly hired by Respondent other than one who returned several months after the Complaint in this case was filed.

OSC Br. At 51

I find, however, that the evidence shows the substantial cutback in labor -- both direct and contractor -- was the result of budgetary concerns which were first made known in August of 1990. (Exhs. R-32, 38, 39, 40; Anyon, Tr. 934, 938-45; Wilson, Tr. 712.) Furthermore, I agree with Respondent that OSC's argument is misplaced because Respondent's desire to hire direct employees while at the same time

realizing that its budget may be cut at any moment are not inconsistent. As Respondent notes:

> It is commonplace in the aerospace industry to work feverishly to get work done, knowing full well that at any time the budget would be cut, and workers, including direct hires as well as contract workers, would have to be let go. (See Anyon, 954-55; Henetz, Tr. 1009 [impending lay off did not affect day-to-day operations -- "We still had a product to get out"].) In fact, even after the budget cuts were imminent, in September 1990 the company hired two direct-hire jig and fixture builders. (See Exh. R-46).

GD Br. At 54. Therefore, I find the fact that the Falcon/GK workers were released along with dozens of other GD employee to not discredit GD's direct hire justification.

OSC also argues that the fact that no GD employee asked the workers from Falcon/GK if they wanted to eventually become direct hires, is evidence of pretext. OSC Br. At 25, 51. This argument is not compelling as I find that Falcon/GK made the representation to GD that the workers wanted to become direct hires, but that they could not do so initially because they lacked the proper paperwork. I further find, based on internal corporate documents that GD believed Falcon/GK's representation. See e.g., Appendix B [Sole Source Justification]; Exh. C-1/255 [Memorandum from Bob Henetz to John McSweeney, corporate vice president, stating: "Upon attaining residency [the Falcon/GK workers] will become direct hires at [GD]."]. I also find that GD's reliance on the representation, without asking for confirmation directly from the workers, was reasonable because unlike U.S. job shoppers who would be taking a drastic pay cut to become direct hires, the Falcon/GK workers were earning the top of the labor rate for direct hires. As it would not be unusual for individuals in such circumstances to want to become direct employees, I conclude that Respondent's failure to confirm their intentions individually does not show pretext.

OSC contends, however, that even if I find Respondent's explanation for hiring the Falcon/GK workers and not hiring U.S. workers to be credible, Respondent's motive of control over its workers is illegitimate. As discussed above, Respondent's motive is not at issue. See supra part V.C.2.a. Even if motive was at issue, however, I have not found no evidence that the alleged motive existed. Furthermore, I find that the Falcon/GK workers were treated no differently than any other GD contract jig and fixture builder as in November of 1990, all of GD's contract labor workers (include workers from Falcon/GK, B&M and ITS) were terminated without notice. Thus, all GD's contract workers could be released quickly when no longer needed.

OSC also argues that Respondent's selection of foreign labor was not legitimate in view of Respondent's knowledge that U.S. workers from other technical service firms were available. OSC asserts that "to hire a group of temporary foreign workers while U.S. workers are available . . . ignores the spirit of labor certification and immigration laws." OSC Br. At 52. This argument is based on the fact that E-2 visas (the type of nonimmigrant visas Falcon/GK claimed to be attempting to obtain for the British workers) are not issued by the State Department to workers with specialized skills if the State Department finds that U.S. workers are available to do the jobs. (See discussion supra at part IV.D n.12; Mautino, Tr. 1040.)

I find OSC's argument unavailing. Furthermore, even if I agreed that Respondent ignored the spirit of labor certification and immigration laws, I would not find that Respondent violated IRCA's antidiscri-mination provisions.[44] OSC appears to have based its argument on a phantom exception to IRCA's prohibition against citizenship status, making it an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a temporary visa holder over another individual who is a U.S. worker if the two individuals are equally qualified (or perhaps even if the U.S. worker is minimally qualified).

No such exception to IRCA's prohibition against citizenship status exists. There is an exception, however, which provides that an employer may prefer to hire, recruit or refer a U.S. citizen or national over an alien if the two are equally qualified. 8 U.S.C. § 1324b(a)(4).[45] This exception was relevant in Mesa, 1 OCAHO 74, a case in which the employer's company policy of hiring only U.S. citizen pilots, when available, without comparing the qualifications of the citizens and non-citizens, was held to constitute a pattern or practice of knowing and intentional discrimination on the basis of citizenship status. The ALJ stated that an employer avoids liability for discrimination, if and only

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[44] Again, GD's failure to insure that the Falcon/GK workers were properly documented may be a violation of § 101 of IRCA, 8 U.S.C. § 1324a(a)(1)(A), but not such claim is before me.

[45] This section provides that:

it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

if, there has been a comparison of qualifications as a result of which the selected citizen is found to have qualifications not less than equal to the non-selected discriminatee. The ALJ found that the employer "failed to hire [the] non-U.S. candidate because of his citizenship status without regard to whether or not he satisfied the legitimate qualifications established by Mesa Airlines for pilot positions." Id. The ALJ further found that either the employer maintained two hiring pools, one for U.S. citizens and one for aliens or in practice, its hiring policy had that effect. Id. at 68.

OSC attempts to analogize Mesa to the case at bar, based on the fact that prior to selecting the 25 Falcon/GK contract workers (and the 2 replacements), Respondent had not examined the hundreds of resumes of U.S. workers that Eggert and Gifford had in their desk drawers (Eggert, Tr. 845). OSC asserts that "in the present case, Respondent did not hire any U.S. citizens during a period in which it hired the group of 25 British workers from [Falcon/GK], and like Mesa, it never compared the qualifications of the two groups." OSC Br. At 38. OSC contends that GD's failure to compare the qualifications of the U.S. workers from B&M and ITS with those of the Falcon/GK workers constitutes direct evidence of GD's discriminatory hiring policy. OSC Br. At 38.

I find, however, that the case at bar is distinguishable as GD did not receive individual applications from temporary visa holders whom GD systematically preferred over U.S. workers. Based on Gifford's testimony that he only "glanced at" two or three cover letters of each stack of resumes that he received (Tr. 794), I find that the resumes of U.S. workers were not reviewed and their qualifications were not compared to those of the Falcon/GK workers. I further find, however, that Respondent's failure to do so does not demonstrate an intent to discriminate based on citizenship status. Rather, I find that the Falcon/GK contract was a unique procurement sought for legitimate business reasons. Furthermore, I find credible Respondent's statement that the only reason "`qualified' B&M or ITS workers were knowingly rejected" over the period of a few months at issue was the company's failure to consider their resumes due to "the unusually frantic press of business." GD Br. At 15.

I find improper OSC's suggestion that GD should have ignored Falcon/GK's representations that its workers wanted to become direct hires, and select U.S. workers merely because it had on file hundreds of resumes from B&M and ITS. It is not my role to second-guess an employer's business decision, but to look at evidence of discrimination. Cotton v. City of Alameda, 812 F.2d 1245, 1249 (9th Cir. 1987). See

also Douglas v. Anderson, 656 F.2d 528, 534 (9th Cir. 1981) ("The reason for a business decision need not meet the unqualified approval of the judge or jury, so long as it is not based on [a protected characteristic]."). I hold that IRCA does not require an employer to hire a U.S. worker over a non-U.S. worker who is authorized for employment in the United States. IRCA's legislative history reveals that the focus of the statue is to sanction employers for hiring unauthorized workers; I do not find mention of a mandatory preference for U.S. workers over authorized non-U.S. workers.

i. OSC Failed to Prove Knowing and Intentional Discrimination

I find that it was legitimate for GD to prefer the Falcon/GK workers over U.S. workers because I find that Respondent did not consider the citizenship status of the workers in deciding to hire them as contract jig and fixture builders.[46] Furthermore, I find that GD actually believed the Falcon/GK workers were temporary visas holders who were authorized to work in the United States for GD and who would be able to obtain authorization to become GD's direct employees. I thus find that OSC has failed to prove by a preponderance of the evidence that in entering and renewing the Falcon/GK contract, Respondent knowingly and intentionally discriminated on the basis of citizenship status.

ii. OSC Has Failed to Prove a "Pattern or Practice"

Even if OSC had proven that Respondent had engaged in knowing and intentional discrimination, OSC would not have prevailed because I find, for the reasons stated below, that the challenged conduct falls far short of a "pattern or practice."

OSC contends that "[t]he discriminatory contract in this case is synonymous with a discriminatory policy" (OSC Br. At 43) and that:

> [t]he issue is whether there was enough thought or enough action, that it can be presumed by circumstantial (indirect evidence) or found by direct evidence that authoritative and responsible persons were behind the action and/or policy -- in this case the Contract.

Id.

[46] Because I found that citizenship status was not a factor in Respondent's hiring of the Falcon/GK workers, I concluded that "mixed motive" analysis did not apply to this case; rather, the principles set forth in Teamsters were controlling.

OSC relies for support on several cases, none of which changes the established standard for proving a pattern or practice of discrimination: (1) proof of discrimination and (2) proof that the discrimination is the company's "standard operating procedure -- the regular rather than the unusual practice." Teamsters, 431 U.S. at 334, 336. Although the complaining party needs to prove both elements, the strength of the evidence required to prove one element is inversely proportional to the strength of the evidence required to prove the other. In the cases cited by OSC, there was very strong proof of one element, typically through an admission, which lessened the amount of evidence needed to prove the other element.

For example, in its effect to prove a pattern or practice, OSC relies on United States v. Youritan Construction Co., 370 F. Supp. 643, 650-51 (N.D. Ca. 1973), modified as to relief and aff'd, 509 F.2d 623 ((th Cir. 1975), in which the owner of apartment buildings was held liable for race discrimination in the renting of apartments. In that case, many "testers" who had visited various buildings of defendant's to inquire as to the availability of apartments, testified that black applicants were told that no apartments were available while white applicants on virtually contemporaneous occasions were told that apartments were available. 370 F. Supp. At 647.) Furthermore, former employees testified that the resident manager of one of the buildings had instructed them to discriminate against blacks, and had made other statements indicating that it was the defendant's policy to avoid renting to blacks. The discrimination in the case occurred over a ten-year period. Therefore, there was strong direct evidence of multiple instances of discrimination by the defendant's managers and rental agents and strong evidence of a widespread pattern or practice of intentional discrimination as the company's standard operating procedure.

I find that the case at bar is distinguishable because there was not strong evidence of intentional discrimination and because I find, based on the following facts, that GD did not have a policy to avoid hiring U.S. workers: (1) during the course of the Falcon/GK contract, (a) GD's annual contracts with B&M and ITS for contract labor remained intact and GD continued to employ the jig and fixture builders it had obtained from B&M and ITS in accordance with the terms of its contracts with them and (b) neither of the Operations Supervisors were told at any time to stop using contract workers from other agencies; (2) on August 10, 1990, approximately five weeks prior to the extension of the Falcon/GK contract, GD General Foreman George Eggert began processing the paperwork for the Procurement Department to bring in 20 contractors from B&M and ITS; (3) in the three-

month period preceding the filing of the complaint, while GD effectively rehired the 25 Falcon/GK workers by extending the Contract, 18 U.S. contract jig and fixture workers from B&M or ITS began work at GD (Exhs. C-13 and C-10); and (4) between January 1990 and January 1991, GD hired approximately 30 U.S. worker contract jig and fixture builders from B&M and ITS. (McKim, Tr. 84-5, and Exh. R-49; Katz, Tr. 140-41; Wilson, Tr. 708-9.) I therefore find that OSC's statistics regarding GD's hiring of contract labor jig and fixture builders during the periods of March through June of 1990 did not provide an accurate picture of GD's standard operating procedure or regular practice regarding the hiring of jig and fixture contract workers.

Because I find that GD's entrance into and renewal of the Contract in this case did not constitute a discriminatory policy, I find that OSC misplaced its reliance on cases in which an admission of a discriminatory policy obviated the need for proof of numerous instances of discrimination. See United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976) (managing agent's blatant statements to effect that blacks not permitted on premises constituted admission, which when coupled with agent's refusal to permit a tenant to entertain two guests at party because they were black, established pattern or practice of discrimination in violation of Fair Housing Act of 1968); United States v. Real Estate Development Corp., 347 F. Supp. 776, 779 (N.D. Miss. 1972) (pattern or practice of discrimination found from landlord's refusal to sign nondiscrimination agreement with the Defense Department, making landlord ineligible to house both black and white servicemen, where other indications that apartment rental was "completely arbitrary and subjective," including uncontradicted testimony showing that defendant's rental agents had rejected black applicants based on race, and defendant made extrajudicial admissions of a racially discriminatory policy); United States v. Alexander & Cloutier Realty Co., 1 EOHC (P-H), para. 13,570, p. 13,781 (N.D. Ga. 1971) (under Fair Housing Act, a discriminatory incident was found to not be isolated "when by the defendant's own admission, it conformed precisely to a previously announced policy").

OSC also argues that proof of an openly written or declared policy of discrimination alone is sufficient to establish a pattern or practice of discrimination. OSC Br. At 44. OSC then cites to "admission" cases, in which the defendants unequivocally declared to third parties that they intended to treat members of a protected group less favorably because of their protected status. See Alexander & Cloutier Realty Co., 1 EOHC (P-H), para. 13,570 (defendants declared in a public forum that it maintained a policy of discriminating against black buyers when the house was located in an exclusively white neighborhood); United

States v. Gregory, 871 F.2d 1239 (4th Cir. 1989) (a sheriff's oral admissions that he considered women unfit to be hired as deputies was held sufficient to establish a pattern or practice); United States v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975) (admissions of trustees of children's home that they had denied admission to black children on account of race were held sufficient in spite of few specific instances of discrimination). Because there has been no evidence proving an admission of intentional discrimination on the part of GD, the facts of this case are distinguishable.

OSC also relies on cases in support of the proposition that discrimination need not be uniform to support a pattern or practice finding. See United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir. 1971); Real Estate Development Corp., 347 F. Supp. At 783; Alexander & Cloutier, 1 EOHC (P-H) para. 13,570. All of the cited cases, however, were decided before the Supreme Court established the standard for proving a pattern or practice in Teamsters, requiring the plaintiff to prove that the discriminatory conduct was "the company's standard operating procedure" or "regular, repeated and intentional activities, but . . . not . . . isolated, sporadic or accidental acts." 431 U.S. at 336. Therefore, discrimination that is not uniform would only support a finding of a pattern or practice if it complied with Teamsters' controlling principles.

OSC, relying on United States v. Pelzer Realty Co., 484 F.2d 438, 445 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974), also contends that a pattern or practice of discrimination has been established where "a number of employees participate in the bad act for a measurable time period," or "[i]n other words, when a company reflects a great deal about the discriminatory act for a period of several weeks (as opposed to an offhand comment by a single employee)." OSC Br. At 47. In Pelzer, there was strong direct evidence of intentional discrimination where a realtor ultimately entered into fictitious contracts to sell two houses to other buyers in order to foreclose the rights of two black buyers to purchase them. The court found that the discrimination rose to the level of pattern or practice as the treatment of the black buyers occurred over a period of several weeks, racially discriminatory remarks were repeated by several people on several occasions and the president of the company was quite involved in the transaction over time. I find the case at bar distinguishable as GD had legitimate nondiscriminatory reasons for entering into and renewing the Falcon/GK contract. I also find the GD employees' labelling of the Falcon/ GK workers as "British" or "English" to not constitute evidence of intentional discrimination based on citizenship status.

Finally, OSC contends that:

> [t]he fact that [GD] chose to engage in this discriminatory conduct through a contract should not, and does not, insulate it from having engaged in an unlawful pattern or practice of discrimination. Finding otherwise sets forth a road map by which all companies so inclined can employ individuals "indentured to the company" to the exclusion of U.S. workers with impunity.

OSC Br. at 48.

While I can conceive of a situation in which an employer's use of a contract for contract labor could be the basis for a finding of a policy of intentional discrimination, I do not find such circumstances in this case. I do not agree with OSC that the involvement of the dozen or so GD employees who took part in the execution and renewal of the Falcon/GK contract constituted a plan to systematically exclude U.S. workers based on their citizenship status. GD's standard operating procedure for acquiring contract labor jig and fixture builders was through technical service firms that employed U.S. workers. This is demonstrated by the fact that the Human Resources Department was required to submit to the Procurement Department a Single Source Justification, a practice only necessary at GD when a department requests that the Procurement Department refrain from following its normal procedure of using the services of technical service firms with which GD had contracts. See discussion supra part III.E.2. Furthermore, the evidence shows that GD's use of foreign labor was a unique occurrence. (Sullivan, Tr. 904-5 [recalling only one other contract involving foreign labor, in 1983].) In addition, even if the alleged conduct were discriminatory, I would have found it to consist of only two acts -- the entry into the Contract and the extension, thereby finding misplaced OSC's reliance on criminal law for the argument that there were 225 distinct acts. See Blockburger v. United States, 284 U.S. 299, 302 (1932) ("When the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in selling a common stream of action, separate indictments lie.")

Based on the above, I find that GD's use and renewal of the Contract did not reflect its "standard operating procedure" or "regular practice." Even though as a consequence of these two decisions, a number of individuals were affected over a period of time, I conclude that they were isolated employment decisions that occurred based upon the peculiar circumstances in effect at the company in early 1990.

D. Attorney's Fees

Respondent has requested the recovery of attorney's fees against OSC. It is within my discretion to grant such fees as long as (1) Respondent is the "prevailing party" and (2) OSC's arguments were without reasonable foundation in law and fact. 8 U.S.C. § 1324b(h). See also 28 C.F.R. § 68.52(c)(2)(V). If both of these factors are present, the prevailing party's counsel would need to submit an itemized list of "actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. § 68.52(c)(2)(V). Because I find only one of the factors present in this case, no inquiry into such expenses is necessary.

1. Respondent is the Prevailing Party

Respondent is clearly the prevailing party within the meaning of 8 U.S.C. § 1324b(h). See Banuelos v. Transportation Leasing Co., 1 OCAHO 255, at 17 (Oct. 24, 1990), appeal docketed, No. 90-567 (9th Cir. Dec. 21, 1990) (threshold requirement is that there is "a clearly identifiable `prevailing party' and `losing party'").

2. OSC's Arguments Were Not Without Reasonable Foundation in Law and Fact

Several OCAHO cases have addressed the issue of whether to grant a prevailing Respondent attorney fees. See, e.g., Banulos, 1 OCAHO 255, at 15-20 (in which I granted a Respondent attorney fees in a § 1324b case, after analyzing in great length the legal basis for that determination); Nguyen, 4 OCAHO 489, at 17-20 (ALJ denied such fees); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406, at 11-14 (Feb. 26, 1992) (same). See also San Diego Semiconductors, 2 OCAHO 314, at 23 (ALJ summarily denied attorney fees against OSC).

Title VII case law is also relevant to the issue of whether OSC's arguments were without reasonable foundation in law and fact because it is based on an analogous standard for determining attorneys' fees requests by prevailing Respondents. See 42 U.S.C. § 2000e-5(k). In Christiansburg Garment Co. V. EEOC, 434 U.S. 412 (1978), the Supreme Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Id. At 421. See also Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732, 2736 (9th Cir. 1989) (Court held that district courts should award Title VII attorney's fees against losing intervenors only where the action was "frivolous, unreasonable, or without foundation.").

In a case addressing a prevailing defendant's request for attorney fees against the EEOC, the Ninth Circuit has stated that because "Congress intended to `promote the vigorous enforcement of the provisions of Title VII, . . . [a] district court must exercise caution . . . in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may not be `airtight.'" EEOC v. Bruno's Restaurant, 976 F.2d 521, 523 (9th Cir. 1992) quoting Christiansburg, 434 U.S. at 422. In Bruno's Restaurant, 976 F.2d 521, the Ninth Circuit Court of Appeals affirmed the district court's finding that the EEOC's failure to present credible testimony of discriminatory conduct was the basis for awarding attorney fees to a prevailing defendant. In that case, the district court found that the EEOC had acted unreasonably as it failed to present credible evidence of discrimination in support of its claim that a former employee was fired by a restaurant operator because she was pregnant. The court elaborated:

> [t]he hurdle a Title VII plaintiff must overcome to avoid paying attorney's fees is greater than simply putting witnesses on the stand. At least some testimony must be credible to the point of demonstrating that the litigation is not groundless. This is not a difficult hurdle to overcome.

Id. At 523-24.

In the case at bar, I find that OSC overcame this hurdle with the testimony of Gaylene Slocum to the effect that Falcon/GK did not hire Americans, the testimony of Donald Yuhas that the Proposal was for workers from the United Kingdom, testimony indicating GD's understanding that the Falcon/GK workers were temporary visa holders, and testimony regarding the statistical evidence. Furthermore, I find that even though OSC did not prevail in its case, it addressed legitimate issues throughout the pleading stage and during the evidentiary hearing. Thus, I do not find its filing of the complaint to have been frivolous. While I found OSC's legal theories of discrimination and pattern or practice to be unusual, based on IRCA and Title VII case law, I am unable to conclude that OSC's arguments lacked a reasonable foundation in fact and law. Accordingly, I deny Respondent's request for attorney's fees.

VI. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, testimony, evidence, briefs, arguments and memoranda submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, in addition to the findings and conclusions already stated, I find and conclude that Complainant has failed to prove a pattern or practice

of discrimination based on citizenship status. Upon the basis of the whole record, consisting of the evidentiary record and the pleadings of the parties, I am unable to conclude that a state of facts has been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. § 1324b(g)(2)(A). I find and conclude that Respondent has not engaged and is not engaging in the unfair immigration-related employment practice alleged. Accordingly, the complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order 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 this 6th day of May, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge