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

March 31, 1993

ALBERT GIMEIN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 92B00286
DEPARTMENT OF DEFENSE AND GRUMMAN AEROSPACE CORP., Respondents.	)	

ERRATA NOTICE

The Order Granting Motion for Summary Decision dated March 30, 1993, is hereby amended in the following respect:

On page 4, paragraph 5, the first word in sentence 2, "Respondent's", is stricken and the word "Complainant's" is substituted therefor.

JOSEPH E. MCGUIRE
Administrative Law Judge

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

April 8, 1993

ALBERT GIMEIN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding OCAHO Case No. 92B00286
DEPARTMENT OF DEFENSE AND GRUMMAN AEROSPACE CORP., Respondents.	)	

ERRATA NOTICE

The Order Granting Motion for Summary Decision dated March 30, 1993, is hereby amended in the following respects:

On page 1, paragraph 3, sentence 2, which reads: "In April, 1987, complainant alleged, he applied for mechanical engineer positions with Grumman and Armament Research and Development Center (ARDEC) in April, 1987, but was not hired by either employer for "security reasons", in particular, because he was a former citizen of the Soviet Union." is stricken and the sentence "Complainant alleged that he applied for mechanical engineer positions with Grumman from November, 1985 to August 1987 and with Armament Research and Development Center (ARDEC) in April, 1987, but was not hired by either employer for "security reasons", in particular, because he was a former citizen of the Soviet Union." is substituted therefor.

On page 5, paragraph 2, the first words in sentence 1, "On June 25, 1986" are stricken and the words "On June 25, 1985" are substituted therefor.

On page 5, paragraph 3, in sentence 2, the words "February 26, 1986" are stricken and the words "February 12, 1986" are substituted therefor.

JOSEPH E. MCGUIRE
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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March 30, 1993

ALBERT GIMEIN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 92B00286
DEPARTMENT OF DEFENSE AND GRUMMAN AEROSPACE CORP., Respondents.	)	

ORDER GRANTING MOTION FOR SUMMARY DECISION

On June 5, 1992, Albert Gimein (complainant) completed a charge alleging that the Department of Defense (DoD) had engaged in immigration related unfair employment practices proscribed under the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. section 1324b. In particular complainant alleged that he had been adversely affected by DoD's regulations governing the eligibility of naturalized United States citizens from "designated" countries for security clearances in the course of his attempts to obtain a job offer from the Grumman Aerospace Corporation (Grumman). Complainant filed his charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC).

On October 6, 1992, OSC notified complainant by letter that it had completed its investigation of complainant's charge, and had determined that it did not have jurisdiction over the charge because the discrimination alleged therein occurred prior to the effective date of IRCA. The letter further informed complainant that he was entitled to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO), which complainant did on December 31, 1992.

In his Complaint, complainant asserted that he was born in the Soviet Union, admitted as a refugee to the United States on June 1, 1976, and was granted a "green card" two years later. In April, 1987,

complainant alleged, he applied for mechanical engineer positions with Grumman and Armament Research and Development Center (ARDEC) in April, 1987, but was not hired by either employer for "security reasons", in particular, because he was a former citizen of the Soviet Union. Complainant requested backpay from November 22, 1985.

On January 6, 1993, the Chief Administrative Hearing Officer (CAHO) assigned the Complaint in the above-captioned matter to the undersigned. Because complainant failed to assert his allegations with regard to ARDEC in the charge filed with OSC, only DoD and Grumman are named as respondents in this action.

On January 27, 1993, respondent Grumman filed its Answer with the undersigned, asserting therein that complainant sought employment with it in or about 1985. Grumman contended that, although complainant applied for several positions, no offer of employment was made to him. Further, Grumman contended that it unsuccessfully attempted to locate a position for complainant in which no security clearance was required.

Grumman also asserted as an affirmative defense that complainant has failed to state a cause of action.

On February 19, 1993, DoD timely filed its Answer, together with a Motion for Summary Decision. In its responsive pleading, DoD denied therein complainant's allegation that he had not been hired by Grumman because he was ineligible for security clearance.

As affirmative defenses in its Answer, DoD asserted that the Complaint does not establish the jurisdiction of OCAHO over this matter; that the Complaint and every allegation contained therein fails to state a claim upon which relief can be granted; that the Complaint and every allegation contained therein fails to state a cause of action under 8 U.S.C. section 1324b; and that even if this Office does have jurisdiction over the Complaint under IRCA, the Complaint was untimely filed.

In its motion, the DoD asserts that summary decision is appropriate in this action because complainant has failed to establish the jurisdiction of this Office over his claim and has failed to state a cause of action.

The rules of practice and procedure for administrative hearings in cases involving allegations of unfair immigration related employment

practices provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. Consequently, Federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and requirements needed to decide whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510. In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Alvarez, 3 OCAHO 430, at 7; Egal, 3 OCAHO 442, at 9.

In its motion, DoD argues that the authority of this Office to consider IRCA cases in which the United States is named as a respondent is derived from the Settlement Stipulation in Huynh v. Cheney, in which the DoD agreed to submit to OCAHO jurisdiction in cases involving the withdrawal or denial of security clearance resulting from implementation of the 5/10 year rule, formerly codified in 32 C.F.R. section 154.16(c).

That regulation, previously codified at 32 C.F.R. §154.16, prohibited the granting of security clearances to naturalized citizens who were originally from "designated" countries. The prohibition applied only to those citizens naturalized for less than five (5) years or who had resided in the United States for less than 10 years. Roginsky v. Department of Defense, 3 OCAHO 426, at 5.

The regulation was challenged by employees of DoD who were naturalized citizens originally from a "designated" country, Vietnam,

and subsequently declared unconstitutional. See Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988), Huynh v. Cheney, 87-3436 (D.D.C. March 14, 1991).

On December 31, 1991, DoD and the plaintiffs in Huynh entered into a settlement stipulation, under which DoD agreed to post notices publicizing the settlement and permit individuals adversely affected by the regulation to file charges under IRCA with OSC. DoD also agreed to waive the affirmative defense of untimely filing as to those claims. Huynh v. Cheney, No. 87-3436, settlement stipulation at 5-6 (D.D.C. Dec. 31, 1991).

DoD contends in its motion that, although complainant alleged in his Complaint that the 5/10 year rule was applied to him, the record establishes that the rule was not in effect during the alleged period of discrimination from mid-1985 to December 1986. DoD further contends that the record also establishes that during the remaining period of discrimination alleged in the Complaint, from January 1, 1987 to mid-1987, although the 5/10 year rule was in effect, complainant was no longer within the scope of the rule's restrictions, since complainant had, by that time, resided in the United States for more than 10 years. Because complainant's failure to obtain work at Grumman did not involve application of the 5/10 year rule, DoD asserts, the Complaint fails to fall within the limited waiver of sovereign immunity agreed to as part of the Huynh Settlement Stipulation, and, therefore, this Office lacks jurisdiction over the subject matter of the Complaint.

DoD contends, alternatively, that even if this Office does have jurisdiction, complainant's allegations do not establish liability on its part, because it has found no evidence that any application for security clearance was submitted on complainant's behalf by Grumman and was declined because of the 5/10 year rule.

DoD asserts that because Grumman's liability is derived from Grumman's contract relationship with DoD, complainant's failure to establish jurisdiction or establish that the 5/10 year rule was applied in his case should be considered as to both respondents, and summary decision should also be granted as to Grumman.

On March 12, 1993, complainant filed a Brief in Support of Complainant's Position and in Opposition to Respondents Motions for Dismissal and Summary Decision. Respondent's primary contention in his opposition is that the 5/10 year rule was implemented and

applied adversely to complainant as far back as 1985, before complainant had resided in the United States for 10 years.

In support of his contention that the 5/10 year rule was implemented by DoD prior to January, 1987, complainant offers correspondence between complainant and respondent Grumman and between complainant and the Defense Investigative Service, internal notes and memoranda from Grumman, an article from the February 12, 1986, New York Times, and excerpts from the report of the Stillwell Commission, in which, complainant contends, the 5/10 year rule had its genesis.

On June 25, 1986, Secretary of Defense Casper Weinberger established the DoD Security Review Commission, headed by retired Army Gen. Richard G. Stillwell, to examine DoD security procedures and to devise remedies to correct what the Commission identified as "key vulnerabilities and deficiencies." Report of the DoD Security Review Commission (1985).

Among the recommendations of the Commission was the suggestion that DoD implement the following requirement for security clearance:

> Recently naturalized United States citizens whose country of origin is determined by appropriate authority to have interests adverse to the United States, or who choose to retain their previous citizenship, shall ordinarily be eligible for a security clearance only after a five-year period of residence within the United States after becoming a citizen; otherwise, a minimum of 10 years of investigative coverage is feasible.

Id., at 30. Complainant contends that this recommendation was the basis of the 5/10 year rule, and asserts that this recommendation was implemented shortly after the Commission published its report on November 19, 1985, citing to an article published in the New York Times on February 26, 1986, concerning the adoption by the Defense Department of some of the recommendations of the Commission, to support this contention. The article states, in pertinent part:

> The Pentagon will also make greater use of its authority to withhold payments on classified contracts in order to enforce compliance with Defense Department security requirements; establish minimum levels of required training for both military and contractor security personnel; realign the rules governing security clearances for "immigrant aliens," and expand the scope of the investigation conducted on individuals applying for a Secret clearance.

Pentagon Orders Security Changes, New York Times, Feb. 12, 1986, at 20.

Complainant also submitted copies of correspondence between himself and the Assistant Secretary of Defense for Public Affairs and himself and the Deputy Under Secretary of Defense (Policy) to support his contention that the 5/10 year rule was implemented by the DoD prior to January, 1987.

On August 31, 1986, complainant wrote to W. M. McDonald, Director of Freedom of Information and Security Review at the Pentagon, seeking relevant information on any "Department of Defense policies, guidelines, or rules affecting the eligibility of naturalized American citizens for processing of security clearance application". (Letter from Gimein to McDonald of 8/31/86, at 1). In response, complainant received a copy of a draft change to the security regulations. (Letter from McDonald to Gimein of 9/30/86, at 1). The draft change provided that in order for naturalized citizens from designated countries to be eligible for security clearance, they must have been citizens for five (5) years or longer and have resided in the United States for 10 years.

It should be noted that complainant became a citizen on June 29, 1982, and was not a citizen for five (5) years until June 29, 1987.

Subsequently, complainant wrote to the Deputy Under Secretary of Defense, requesting a waiver of the five (5) year citizenship requirement for a security clearance. (Letter from Gimein to Alderman of 10/6/86, at 1). In response, the Deputy Under Secretary noted:

> Paragraph 3-402 of Draft DoD 5200.2-F, "Personnel Security Program"..., has been carefully scrutinized and reviewed during the coordination of this regulation to insure its equity and fairness as well as its applicability to the legitimate protection of classified defense information. Upon further review we have reached the conclusion that paragraph 3-402 required additional minor modification to require that a naturalized citizen from a (designated) country..., must have been a U.S. citizen for five years, or resided in the U.S. for a period of at least 10 years (if the period of citizenship is less than five years).

(Letter from Alderman to Gimein of 10/27/86, at 1).

In support of his contention that respondent Grumman employed the 5/10 year rule prior to January, 1987, complainant submitted two internal memoranda from Grumman indicating that in late 1985 to early 1986, Grumman failed to hire complainant because he was an immigrant from the Soviet Union. The first memorandum, dated December 2, 1985, states: "Albert Gimein was tentatively going to be hired by Dick Gehrt for Bill Bilzi's group in M&ME, until they decided his Russian heritage was an issue." The second, dated March 14, 1986, states: "Offer was forthcoming from M&ME in December in Bill Bilzi's

group. It was canceled at the last minute because of "security" i.e. he was a Russian citizen."

Despite complainant's contentions, however, summary decision is appropriate in this action. DoD has demonstrated that there is no genuine issue as to the fact that complainant was not adversely affected by the 5/10 year rule, as formerly codified at 32 C.F.R. section 154.16(c). As noted in Huynh v. Carlucci, 32 C.F.R. section 154.16(c) did not become effective until January 2, 1987. Huynh v. Carlucci, 679 F. Supp. at 62. See also 52 Fed. Reg. 11,219 (1987). Because, as he himself admits, complainant entered the United States on June 1, 1976, by the time the 5/10 year rule became effective in January, 1987, complainant had been a resident for more than 10 years, and therefore was no longer within the scope of the rule's restrictions.

As noted previously, the DoD agreed in the Huynh settlement stipulation to waive timeliness as a defense to claims based upon application of the 5/10 year rule, as formerly codified at 32 C.F.R. §154.16(c). Cheney, settlement stipulation at 6. See also id. at 1. Those discriminatory acts alleged by complainant not involving application of 32 C.F.R. section 154.16(c) fall outside of that waiver.

Under IRCA, no charge may be filed with OSC more than 180 days after the occurrence of the alleged discriminatory practice on which the charge is based. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §44.300(b); 28 C.F.R. §68.4(a). See Lundy v. OOCL, 1 OCAHO 215, at 8 (8/8/90).

Complainant filed his charge with OSC on May 6, 1992, 1830 days after August 31, 1987, the last time complainant alleges he applied for employment with Grumman, and in excess of the 180-day filing deadline. However, complainant's failure to comply with the 180-day filing deadline is not per se dispositive, because the deadline is subject to equitable modification on a case-by-case basis. United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89). The filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91).

Complainant has failed to demonstrate that any of the described situations occurred here. Because equitable modification is not appropriate, the Complaint is deemed to have been untimely filed as to both DoD and Grumman with respect to those allegations not

implicating 32 C.F.R. section 154.16(c), and summary decision is granted with respect to those allegations against both respondents. See Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 3 (2/13/91).

DoD has satisfactorily demonstrated the absence of a genuine issue of material fact in connection with its contention that it has not violated IRCA, as alleged in the Complaint, because complainant was not adversely affected by the 5/10 year rule, formerly codified in 32 C.F.R. section 154.16(c). Furthermore, it is evident from these pleadings and exhibits that complainant's claims not implicating 32 C.F.R. section 154.16(c) have been untimely filed.

Because complainant has failed to demonstrate that there is a genuine issue for a hearing in this matter, respondent's motion is granted with respect to both respondents and the Complaint is hereby ordered to be and is dismissed with prejudice to refiling against either named respondent.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.