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

MAHMOUD M. HAMMOUDAH, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) OCAHO Case No. 98B00072
RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, Respondent.	) MARVIN H. MORSE) Administrative Law Judge

ORDER
(July 16, 1999)

This Order addresses Motions pending, as follows:

1. Complainant's Motion filed June 28, 1999, requesting the ALJ to reverse the determination of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)

The Order dated July 1, 1999, inviting OSC "to consider whether it wishes to move to intervene or otherwise participate in this case," responded to Complainant's request to the administrative law judge (ALJ) that OSC reopen its investigation into his charge against Respondent. OSC's response filed July 14, 1999, notified "the Court and the parties that at this time the Office of Special Counsel does not wish to intervene or otherwise participate in this matter." I do not contemplate directing OSC to participate. *See, e.g.*, 8 U.S.C. § 1324b(f)(2) (delineating authority of OSC and administrative law judges).

Consistent with the role prescribed for ALJs by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et. seq.*, the regimen prescribed by 8 U.S.C. § 1324b is that OSC investigates, the ALJ adjudicates. An ALJ has broad authority to control the proceeding and is authorized, for example, to issue subpoenas, to obtain testimony of witnesses at deposition or evidentiary hearing, and to compel pro-

duction of documents. 28 C.F. R. § 68.28. It is not the function of the ALJ to make a party's case.

To the extent that Complainant is understood to ask that the ALJ compel OSC to resume its investigation into his charge which initiated this proceeding, the ALJ will not. Therefore, Complainant's Motion to reverse OSC's determination is denied.

2. Complainant's Motion To Compel Responses to Discovery, filed June 28, 1999; Respondent's Motion for Summary Decision as to Claims Predating June 14, 1997, filed June 18, 1999; and Complainant's Response ("Counter Move Motion for Summary Decision") filed July 9, 1999 [1]

(1) Respondent's Motion for Partial Summary Decision

As to Respondents July 18, 1999, motion for partial summary decision, I previously suggested, at the fifth telephonic prehearing conference, summarized in the Fifth Prehearing Conference Report and Order (May 27, 1999) and reiterated in substantial part in the July 1, 1999, Order that

> this case arises not out of an employer's multi-year decisional process to resolve a continuing employment application, the rejection of which in Complainant's view comprises a continuing pattern of discrimination, but is rather a case involving a separate and discrete employment application. Indeed, I noted at the May 27, 1999 conference, as confirmed by the Report and Order, that **a ruling that pre-1997 applications are time-barred would not preclude Complainant from "implicating the 1996 application rejection in his citizenship status discrimination claim based on his 1997 employment application rejection."**

(Emphasis supplied).

Respondent's motion for partial summary decision is premised on two bases:

(1) that more than 180 days elapsed between pre-1997 employment applications and filing of the OSC charge on December 11, 1997; and

(2) that Complainant's OSC Charge only alleged discriminatory failure to hire on July 22, 1997.

[1] To simplify analysis of the pending Motions, these filings are discussed together.

Respondent is correct. I find nothing in the OSC Charge or, for that matter, in the OCAHO Complaint which implicates any employment application prior to 1997. Accordingly, I grant Respondent's motion for partial summary decision as to claims predating June 14, 1997. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 68.4(a). Having so concluded, I do not need to resolve whether failed applications more than 180 days prior to the filing of Complainant's OSC charge survive the time-bar on the theory of a continuing violation.

(2) Complainant's Motion To Compel

The July 1, 1999, Order noted my concern "at the prospect of a lingering dispute as to production," suggesting the disagreement between the parties needs to await the response to the Motion To Compel. That response is Respondent's Opposition to Complainant's Motion To Compel, filed July 12, 1999. Respondent asserts it has complied with the Judge's requests to provide information, per its letter dated October 20, 1998. Respondent asserts it has complied with Complainant's discovery requests as comport with traditional interrogatory and document practice, as reflected at 28 C.F.R. §§ 68.19 and 68.20 and as provided at 28 C.F.R. § 68.18, in that it responded to requests that are "relevant to the subject matter involved in the proceeding." Respondent contends that on March 22, 1999, it provided "substantive information in response to almost all interrogatories and document requests," and produced "*all* information in Rush's possession bearing on the 1997 selection decision."

Additionally, Respondent undertakes that on July 8, 1999, it "made a further good faith attempt to provide information to Complainant" in response to "Complainant's Comments to Respondent Answer to Complainant's Third Set of Interrogatories" to the extent it could "parse out specific questions that were amenable to responses." Claiming that as this case involves only "a single hiring decision made in 1997 for the position of Therapeutic Radiologic Physicist within the [Respondent's] Department of Medical Physics," it did object "to producing certain information which far exceeded the issues in this case."

The function of discovery and of pleadings filed in support is to obtain facts, not to argue the case. To the extent, for example, that Respondent asserts that it has produced all the materials in its possession in response to a specific request (as it is reasonably understood), it does not aid Complainant as the requesting

party at the discovery phase to claim to the ALJ that the other party is less than truthful. Unless Complainant can locate documents from another source, it is bound by what it obtains from Respondent on discovery, subject at hearing to a request that inferences be drawn from the failure of the other party to have retained relevant documents.

At the same time, I urge Respondent to be as forthcoming as possible, recalling my caveat that even if pre-1997 claims of non-hire are time-barred, facts concerning rejection in 1996 are discoverable. I will expect Respondent to give reasonably wide latitude to understanding Complainant's requests. Discovery is not limited to matters that will stand the evidentiary test at hearing, but to matters, not privileged, "relevant to the subject matter involved in the proceeding[.]" 28 C.F.R. § 68.18(b). For example, Complainant has pursued documentation as to the work authorization of other candidates, a presumptively irrelevant inquiry except to the extent of determining citizenship status.

Complainant's § 1324b cause of action does not turn either on: (a) the extent of Respondent's employment eligibility verification compliance (INS Forms I–9); or (b) whether the candidates selected were authorized for employment in the United States. For the purpose of establishing in a § 1324b action that an employer maintains a discriminatory hiring policy favoring non–U.S. citizens over U.S. citizens, a determination of the non–U.S. citizens' work eligibility is not critical. *See Weisner v. CIT Tours Inc.*, 5 OCAHO 773, at 404 (1995), *available in* 1995 WL 545468, at *2 (O.C.A.H.O.) (determining work authorization status is not material to proving a *prima facie* case of citizenship status discrimination). Either the preferred candidate is a U.S. citizen or not. Whether a candidate is work authorized is a matter examined under the law of employer sanctions at 8 U.S.C. § 1324a. Therefore, there is no need to delve into an employer's Forms I–9 compliance practices nor the particular immigration status of a candidate over and above the determination that an applicant was a non-citizen at the time of selection for interviews and hire.

As to the Motion To Compel, I note, *passim*, that Respondent's asserted supplemental submissions to Complainant on July 8, 1999, may have mooted certain of his concerns as to production. To the extent issues survive, I defer ruling on the Motion To Compel, preferring that Complainant restate the questions and requests to which he contends he has not received responses. With

due respect to Complainant's *pro se* status, I am uncertain as to what specific queries previously asserted remain unanswered. Accordingly, Complainant should restate his **prior outstanding inquires** as follows:

(1) the interrogatories and production requests should be numbered sequentially, with a single inquiry bearing a discrete number;

(2) each such inquiry should be briefly and directly stated as a question or request for specific information, without argumentation or other rhetoric; and

(3) Forms I–9 and other immigration materials should only be requested for those individuals whose citizenship status is unknown (*i.e.*, Complainant does not know whether an individual is a U.S. citizens or non-citizen).

While the parties are attempting to resolve outstanding discovery issues, the previously established deadlines are still in effect as set forth in the Fifth Prehearing Conference Report and Order:

> One copy of all documents which the parties intend to introduce into evidence will be forwarded to the ALJ to arrive **no later than Monday, August 16, 1999;**
>
> Each party will also provide to the other party a copy of these same documents **no later than Monday, August 16, 1999;**
>
> The parties are to exchange the names and identities of witnesses that each intends to call at the evidentiary hearing **no later than Monday, August 16, 1999; and**
>
> As of this date, the evidentiary hearing remains as scheduled for **September 14 and 15, 1999.**

SO ORDERED.

Dated and entered this 16th day of July, 1999.

Marvin H. Morse
Administrative Law Judge