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

ESTELA REYES-MARTINON Charging Party, and	)	
	)	8 U.S.C. § 1324b Proceeding
UNITED STATES OF AMERICA, Complainants,	)	OCAHO Case No. 20B00102
v.	)	Judge Robert L. Barton, Jr.
SWIFT & COMPANY, Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DISMISS COUNTS I AND IV OF THE COMPLAINT

(*May 7, 2001*)

I. INTRODUCTION

Swift & Company (Respondent) has filed a Motion to Dismiss Counts I and IV of the Complaint, arguing that those counts are outside the subject-matter jurisdiction of the Office of the Chief Administrative Hearing Officer (OCAHO) and that they fail to state claims upon which relief can be granted. The United States opposes the motion. For the reasons stated below, Respondent's motion is DENIED with respect to Count I, but is GRANTED with respect to Count IV.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Complaint

In January 2000, Estela Reyes-Martinon (Reyes-Martinon or the charging party), a citizen of the United States, filed a charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). On September 6, 2000, the United States filed an OCAHO

Complaint, based on Reyes-Martinon's charge, alleging that Respondent violated both section 274B(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C.§ 1324b(a)(1)(B), which prohibits citizenship-status discrimination with respect to hiring, recruitment or referral for a fee, and discharge, and INA § 274B(a)(6), which prohibits certain discriminatory documentary practices occurring in connection with the employment-eligibility-verification process.

In pertinent part, INA § 274B(a)(1)(B) prohibits employers from discriminating against any individual "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 such individual's citizenship status." INA § 274B(a)(6) states that,

> [a] person's or other entity's request, for purposes of satisfying the requirements of section 274A(b) [requiring employers to verify the identity and work-eligibility of employees], for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

The Complaint contains four counts. Count I alleges that, in August 1999, Respondent violated INA § 274B(a)(6) when it refused, during the employment-eligibility-verification process, to honor Reyes-Martinon's facially valid United States passport, which she had proffered as proof of her identity and work-eligibility. Compl.[1] ¶¶ 45-49. Count I also claims that Respondent compounded its violation of INA § 274B(a)(6) when, after refusing to honor Reyes-Martinon's passport, it requested that she present specific additional identification, including her Social Security card, to prove her identity and work eligibility. Compl. ¶ 50. Count II alleges that Respondent's document requests and refusals, as well as its refusal to hire Reyes-Martinon in late August or early September 1999, constituted

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[1] The following abbreviations will be used throughout this Order:

Compl.	The Complaint
R. Mot. D.	Respondent's Motion to Dismiss Counts I and IV of the Complaint (March 15, 2001)
US Opp. Br.	United States' Opposition to Respondent's Motion to Dismiss Counts I and IV of the Complaint (April 4, 2001)
PHC Tr.	Transcript of prehearing conference, held April 17, 2001
R. Supp. Br.	Respondent's Supplemental Brief in Support of its Motion to Dismiss Counts I and IV of the Complaint (April 25, 2001)
US Supp. Br.	United States' Supplemental Brief in Opposition to Respondent's Motion to Dismiss Counts I and IV of the Complaint (April 25, 2001)

citizenship-status discrimination with respect to hiring in violation of INA § 274B(a)(1)(B). Compl. ¶¶ 51-58. Count III is functionally identical to Count I, except that it encompasses violations of INA § 274B(a)(6) that allegedly occurred in October 1999, rather than August 1999. Compl. ¶¶ 59-64. Count IV alleges that the October 1999, document requests and refusals referred to in Count III also constitute a violation of INA § 274B(a)(1)(B). Compl. ¶¶ 65-68. Count IV does not allege that Respondent refused to hire Reyes-Martinon, nor does it allege that Respondent discharged her.

The Complaint makes the following factual assertions with respect to Reyes-Martinon's first application for employment with Respondent: on or about August 30, 1999, Reyes-Martinon went to the office of the Minnesota Department of Economic Security in Worthington, Minnesota, and filled out an application for a job as a "general production" worker at Respondent's local plant. Compl. ¶ 10. Reyes-Martinon was qualified for the position sought. Compl. ¶ 11. Reyes-Martinon submitted her application to Randy Bruinsma, Respondent's Human Resources Manager. Compl. ¶ 12. Bruinsma has authority to hire individuals on Respondent's behalf. Compl. ¶ 13. The job application at issue asked whether Reyes-Martinon was eligible to work in the United States, and Reyes-Martinon answered that question in the affirmative. Compl. ¶ 14. Upon submission of Reyes-Martinon's application, Bruinsma asked Reyes-Martinon several questions in English. Compl. ¶¶ 15-16. Reyes-Martinon is not a native English speaker, and speaks English with an accent. Compl. ¶ 17. Bruinsma asked Reyes-Martinon if she had proof that she was allowed to work in the United States. Compl. ¶ 18. Reyes-Martinon responded in the affirmative and presented her valid United States passport as proof. Compl. ¶ 19. Bruinsma then asked Reyes-Martinon whether she had any identification in addition to her valid United States passport. Compl. ¶ 20. Reyes-Martinon stated that she had a driver's license, and she showed the license to Bruinsma. Compl. ¶ 21. Bruinsma then indicated that he needed to see Reyes-Martinon's Social Security card. Compl. ¶ 22. Reyes-Martinon informed Bruinsma that her Social Security card had been stolen and that she could not present it to him, but that she had provided her correct Social Security number on her job application. Compl. ¶ 23. Respondent did not hire Reyes-Martinon in August or September 1999, and Reyes-Martinon suffered a loss of earnings as a result. Compl. ¶¶ 24-25.

The Complaint makes the following factual assertions with respect to Reyes-Martinon's second application for employment with Respondent: on or about October 4, 1999, Reyes-Martinon went to the office of the Minnesota Department of Economic Security in Worthington, Minnesota, and filled out an application for a job as a "general production" worker at Respondent's local plant. Compl. ¶ 26. Once again, Reyes-Martinon submitted her application to Bruinsma. Compl. ¶ 27. Bruinsma asked Reyes-Martinon whether she had obtained proof of her eligibility to work in the United States and requested that she show him such proof. Compl. ¶ 28-29. Reyes-Martinon once again showed Bruinsma her valid United States passport and, upon Bruinsma's request for further identification, her driver's license. Compl. ¶¶ 30-32. Bruinsma then told Reyes-Martinon that he needed to see her Social Security card. Compl. ¶ 33. Reyes-Martinon replied that she did not have a card and that she had not obtained a duplicate card. Compl. ¶ 34. At the conclusion of the interview, Bruinsma told Reyes-Martinon that she should report to

Respondent's plant in Worthington that afternoon for a physical and to complete paperwork. Compl. ¶ 35. Reyes-Martinon reported to the plant as instructed and commenced a one-week training period, after which she commenced work as a "general production" worker. Compl. ¶ 36. During the two-week period following her October 4, 1999, job application and interview, Reyes-Martinon completed paperwork required by Respondent. Compl. ¶ 36. Also during that same two-week period, Respondent sought confirmation of Reyes-Martinon's identity and work-eligibility pursuant to the basic employment eligibility confirmation pilot program (basic pilot program) established by Congress in 1996. Compl. ¶ 37. Each submission referring to Reyes-Martinon resulted in a tentative nonconfirmation of Reyes-Martinon's identity and/or work-eligibility. Compl. ¶ 37. During this same two-week period, Reyes-Martinon was informed that she should report to Bruinsma's office, which she did. Compl. ¶ 38. Bruinsma told Reyes-Martinon that she needed to present a copy of her Social Security card and asked her why she did not have such a card. Compl. ¶ 38. Bruinsma then provided Reyes-Martinon with a document notifying her that Respondent had received a nonconfirmation of her identity and work-eligibility under the basic pilot program. Compl. ¶ 39.

B. Respondent's Arguments in Support of the Motion to Dismiss

On March 15, 2001, Respondent filed a Motion to Dismiss Counts I and IV of the Complaint, alleging both that those counts are outside the subject-matter jurisdiction of OCAHO and that they fail to state a claim upon which relief can be granted. Respondent further supported this position during oral argument in a telephone conference on April 17, 2001, and in its supplemental brief, filed April 25, 2001.

1. Count I

Respondent asserts that OCAHO lacks subject-matter jurisdiction over Count I of the Complaint because Bruinsma's August 1999, document requests and refusal were not undertaken by Respondent "for purposes of satisfying the requirements of section 274A(b)." R. Mot. D. at 7-10. Respondent observes that, under INA § 274A(b), an employer is not obliged to verify the work-eligibility of an individual until *after* the individual has been hired. R. Mot. D. at 8. Thus, according to Respondent, document requests or refusals occurring prior to the "hiring" of the individual cannot, by definition, be undertaken "for purposes of satisfying the requirements of section 274A(b)," and therefore cannot constitute "document abuse" cognizable under INA § 274B(a)(6). R. Mot. D. at 9-10. With respect to the particular facts of the instant case, Respondent argues that because Bruinsma did not offer Reyes-Martinon a job after her August 1999, interview, she never became an "employee" of Respondent and Respondent therefore never became obliged under INA § 274A(b) to verify her identity and employment eligibility. R. Mot. D. at 10. Thus, whatever document requests or refusals Bruinsma made with respect to Reyes-Martinon could not have been "document abuse."

Respondent's assertion that Count I of the Complaint fails to state a claim upon which relief can be granted is also premised on the argument that document abuse cannot, by definition, occur until after an individual is hired. R. Mot. D. at 13-15. According to Respondent, a document abuse claim is necessarily insufficient if the alleged document request or refusal occurred prior to the individual's hiring. R. Mot. D. at 14. Because the United States concedes that Reyes-Martinon was not hired after her August 1999, interview with Bruinsma, Respondent argues that Count I is unsustainable as a matter of law, even when viewing all facts in the light most favorable to the United States. R. Mot. D. at 14-15.

Respondent supports its arguments with respect to Count I by referring to a number of OCAHO precedents, most importantly Harris v. State of Hawaii, Dep't of Ed., 6 OCAHO no. 922, 1214 (1997),[2] and Huesca v. Rojas Bakery, 4 OCAHO no. 654, 550 (1994). See R. Mot. D. at 8-10, 14-15 & nn. 32, 37, 38, 61, 66; PHC Tr. 65-67. In Huesca, an OCAHO Administrative Law Judge (ALJ) concluded, during a discussion of the respondent's request for attorney's fees, that "because [INA § 274A(b)] only comes into play where an employer (or recruiter) has hired (or recruited) an individual and Respondent never hired Complainant, Respondent could not have violated [INA § 274B(a)(6)]." Huesca, 4 OCAHO no. 654, at 562. In Harris, another ALJ dismissed a *pro se* complainant's document abuse claim on the ground "that the document abuse provisions of IRCA come into play only where an employer has hired an individual for employment, triggering the duty to comply with the employment verification system." Harris, 6 OCAHO no. 922, at 1220 (citing Huesca).

2. Count IV

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[2] OCAHO precedents appearing in bound volumes or on OCAHO's website are cited according to the following format:

Ruan v. United States Navy, 8 OCAHO no. 1046, 714, at 716 (2000).

(1) "8 OCAHO" refers to the volume number of the relevant bound volume containing OCAHO precedents. Decisions published on OCAHO's website are also catalogued according to these volume numbers.

(2) "no. 1046" refers to the reference number assigned to the specific decision. Each published OCAHO decision bears a chronological reference number. In the example, "no. 1046" simply reflects that Ruan is the 1,046th OCAHO decision that has been published.

(3) "714" refers to the page number of the relevant bound volume upon which the cited decision begins. Thus, in the example, Ruan begins on page 714 of bound volume 8.

(4) "at 716" refers to the pinpoint citation for the language or concept that is being cited.

(5) When citing looseleaf opinions that have been published on OCAHO's website but that have not yet been paginated for publication in a bound volume, no first page is indicated in the citation. Instead, such cases are cited only by reference number and pinpoint citation. Thus, in the following citation, United States v. Allen Holdings, Inc., 9 OCAHO no. 1059, at 2 (2000), "at 2" refers to the pinpoint citation within the looseleaf opinion.

Published OCAHO decisions are available on Westlaw (database identifier FIM-OCAHO), or on OCAHO's website (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

Respondent argues that OCAHO lacks subject-matter jurisdiction over Count IV of the Complaint–which alleges citizenship-status discrimination under INA § 274B(a)(1)(B)–because the discriminatory acts alleged in that count do not involve a discriminatory refusal to hire or a discriminatory discharge. R. Mot. D. at 4-7. According to Respondent, the plain language of INA § 274B(a)(1)(B), the regulatory history of OSC's own regulations implementing that provision, and the weight of OCAHO precedent establish that OCAHO's subject-matter jurisdiction under INA § 274B(a)(1) extends only to employers' discriminatory decisions not to employ (or to discharge) an individual, but not to matters relating to application procedures or the terms, conditions, or privileges of employment. R. Mot. D. at 5-6; PHC Tr. 45-46; R. Supp. Br. 3-5. Thus, because the allegation in Count IV is premised upon an allegedly impermissible document request or refusal, and not upon a refusal to hire or a discharge, Respondent argues that the United States has asserted a claim over which OCAHO lacks subject-matter jurisdiction.

Respondent's contention that Count IV of the Complaint fails to state a claim upon which relief can be granted is also premised upon the United States' failure to allege that Respondent either refused to hire or discharged Reyes-Martinon. R. Mot. D. at 11-13. Moreover, Respondent asserts that the United States has failed to state a claim by neglecting to assert that Reyes-Martinon was treated differently from Respondent's other job applicants; according to Respondent, such a specification is a necessary element of any cause of action for discrimination under a disparate-treatment theory. R. Mot. D. at 12.

C. The United States' Opposition to Respondent's Motion to Dismiss

On April 4, 2001, the United States submitted a brief in opposition to Respondent's motion to dismiss. The arguments presented in the United States' brief were reiterated and enlarged upon during oral argument in a telephone conference on April 17, 2001, and in the United States' supplemental brief, filed on April 25, 2001.

1. Count I

The United States counters Respondent's arguments regarding the jurisdictional and legal adequacy of Count I of the Complaint by arguing that nothing in the language or legislative history of INA § 274B(a)(6) reflects a congressional intent to confine its scope to post-"hire" document requests or refusals. US Opp. Br. at 25-27. According to the United States, INA § 274B(a)(6) encompasses all discriminatory document requests or refusals undertaken for purposes of complying with the employment-eligibility-verification process, regardless of when the requests or refusals are made. US Opp. Br. at 26-29. The United States further notes that OCAHO case law has not, in practice, adopted Respondent's interpretation, but rather has found employers liable for document abuse even where the impermissible document request or refusal occurred prior to an employer's decision whether to hire the applicant. US Opp. Br. at 29-30. During its initial briefing, the United States sought to distinguish Harris and Huesca on

their facts, US Opp. Br. at 31; however, during oral argument the United States intimated that Harris and Huesca were wrongly decided because they were inconsistent with both the language of INA § 274B(a)(6) and other OCAHO decisions. PHC Tr. 63.

2. Count IV

The United States also contests Respondent's arguments with respect to the jurisdictional and legal insufficiency of Count IV of the Complaint. The United States argues at length that the plain meaning of the phrase "with respect to the hiring . . . of the individual" appearing in INA § 274B(a)(1) manifests an unambiguous congressional purpose to give OCAHO and OSC jurisdiction over all claims of discrimination related to the "hiring process." US Opp. Br. at 8-23. According to the United States, discrimination in the "hiring process" encompasses not only the employer's decision whether or not to hire an individual, but also more subtle conduct, such as,

> prob[ing] into the citizenship status of job applicants on the basis of appearance or accent, requir[ing] applicants seen as foreign-looking to undergo separate or more difficult application procedures, offer[ing] such applicants less desirable positions (in terms of promotions, wages, and working conditions), and otherwise treat[ing] such applicants differently in other, more humiliating ways.

US Opp. Br. at 9. During oral argument, counsel for the United States further clarified its position regarding the broad scope of the "hiring process," indicating that it included recruitment efforts, selection processes, interview procedures, pre-employment inquiries or testing, negotiation of the terms of the initial contract (including job assignments, wages, benefits, etc.), training and orientation, and completion of necessary paperwork, including the employment-eligibility-verification process. PHC Tr. 31-33.

In support of its comparatively broad interpretation of the language of INA § 274B(a)(1), the United States notes that Congress chose to use broader language in INA § 274B(a)(1) than it has used in other antidiscrimination statutes. For example, the United States notes that both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act make it an unfair employment practice for an employer to "fail or refuse to hire" an individual because of prohibited discrimination. US Opp. Br. at 13. The United States suggests that if Congress had wished to confine OCAHO and OSC jurisdiction to discriminatory refusals to hire and discriminatory discharges, it would have simply engrafted the "fail or refuse to hire" phrase onto INA § 274B(a)(1). US Opp. Br. at 13. According to the United States, Congress' intentional use of the broader, less specific phrase "with respect to the hiring . . . of the individual" manifests its understanding that INA § 274B(a)(1) should encompass conduct other than refusals to hire or discharges. US Opp. Br. at 14. During oral argument, the United States cited federal case authority to support its interpretation, including King v. Trans World Airlines, 738 F.2d 255 (8th Cir. 1984)

and Barbano v. Madison County, 922 F.2d 139 (2d Cir. 1990). PHC Tr. 27-28. Both cases involved interpretation of the scope of Title VII.

The United States also argues that, even if the language and congressional purpose of INA § 274B(a)(1) were ambiguous, the provision should nonetheless be read broadly because of the remedial nature of the statute. US Opp. Br. at 16-17. Further, the United States seeks to distinguish the case law cited by Respondent suggesting that OCAHO jurisdiction extends only to refusals to hire and discharges by noting the unique circumstances surrounding those cases (many of which involved frivolous claims by so-called "tax protesters"), and by citing other OCAHO case law, such as United States v. Lasa Mktg. Firms, 1 OCAHO no. 106, 691, 711-12 n.21 (1989), which support its own broad reading of INA § 274B(a)(1). US Opp. Br. at 20-23.

In its supplemental brief, the United States modified its argument slightly by noting that I need not adopt its broad interpretation of INA § 274B(a)(1) in order to reject Respondent's motion to dismiss. According to the United States, the narrow question to be decided under Count IV is simply whether the employment-eligibility-verification process undertaken with respect to Reyes-Martinon occurred "with respect to the hiring" of Reyes-Martinon. US Supp. Br. 2-6, 8-10. Thus, for purposes of adjudicating the instant motion, the United States concedes that it is really beside the point whether INA § 274B(a)(1) encompasses such things as recruitment, job classifications, wage rates or benefits, none of which are implicated by the facts of this case.

Finally, in response to Respondent's argument that Count IV fails to allege that Reyes-Martinon was treated differently from any of Respondent's other job applicants, the United States argues that the concept of disparate treatment is inferable in the more general language of Count IV, which alleges that Reyes-Martinon was subjected to intentional discrimination. US Opp. Br. at 36-38; PHC Tr. 54.

III. STANDARD OF REVIEW

Respondent argues both that OCAHO lacks subject-matter jurisdiction over Counts I and IV of the Complaint and that those counts fail to state a claim upon which relief can be granted. Yet for both counts the grounds advanced to justify dismissal for lack of jurisdiction are the same as the grounds supporting dismissal for failure to state a claim. In such circumstances, where a challenge to the court's jurisdiction is based upon a complainant's alleged failure to state an essential element of a federal cause of action, applicable judicial authority holds that a trial court should address the legal challenge on the merits. See, e.g., Bell v. Hood, 327 U.S. 678, 682 (1946); Williamson v. Tucker, 645 F.2d 404, 415-16 (5th Cir.), cert. denied, 454 U.S. 897 (1981); Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5, 570 F.2d 757, 760 n.5 (8th Cir. 1978) (quoting Bell v. Hood); United States v. American Airlines, Inc., 8 OCAHO no. 1044, 677, 692-93 (2000). In Bell v. Hood, appellants sought damages against agents of the Federal Bureau of Investigation for violating their rights under the Fourth and Fifth Amendments. The district court

below had dismissed the case for lack of subject-matter jurisdiction on the ground, *inter alia*, that neither the Constitution nor any federal statute authorized the awarding of money damages for such constitutional violations. The Supreme Court reversed, explaining that,

> [j]urisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

327 U.S. at 682. Accordingly, I shall adjudicate Respondent's motion according to the standards governing motions to dismiss for failure to state a claim.

The OCAHO Rules of Practice and Procedure provide for motions to dismiss for failure to state a claim upon which relief can be granted. See 28 C.F.R. § 68.10. A motion to dismiss under 28 C.F.R. § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See, e.g., Bunn v. USX/US Steel, 7 OCAHO no. 985, 996, at 999 (1998);United States v. Tinoco-Medina, 6 OCAHO no. 890, 720, at 728 (1996). In considering such a motion, the court must assume the truth of all facts alleged in the complaint and must allow the nonmoving party the benefit of all inferences that can be derived from the alleged facts. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Duffy et al. v. Landberg, 133 F.3d 1120, 1122 (8th Cir.), cert. denied, 525 U.S. 821 (1998); Kasathsko v. IRS, 6 OCAHO no. 840, 176, 179 (1996). Respondent's motion to dismiss should be granted only if it appears that under any reasonable reading of the Complaint, the United States will be unable to prove any set of facts that would justify relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Jackson Sawmill Co., Inc. v. United States, 580 F.2d 302, 306 (8th Cir.1978), cert. denied, 439 U.S. 1070 (1979); Tinoco-Medina, 6 OCAHO no. 890, at 728.

IV. ANALYSIS

A. Count I

Respondent argues that Count I of the Complaint should be dismissed because the allegedly impermissible documentary practices did not occur after Respondent's hiring of Reyes-Martinon, as required by Harris v. State of Hawaii, Dep't of Ed., 6 OCAHO no. 922, 1214 (1997), and Huesca v. Rojas Bakery, 4 OCAHO no. 654, 550 (1994). Indeed, Respondent points out that, in August 1999, it never hired Reyes-Martinon at all, and therefore never became obliged to verify her employment eligibility. In its opposition to Respondent's motion, the United States points to contrary case law and seeks to distinguish Harris and Huesca on their facts.

Because Respondent's motion challenges the *legal* sufficiency of the claim advanced in Count I of the Complaint, the United States' effort to distinguish Harris and Huesca on their facts is simply unavailing. It seems quite clear that Harris and Huesca do, in fact, embrace the general legal principle advanced by Respondent–that an employer cannot, by definition, be held liable for document abuse unless the challenged documentary practice occurred after the "hiring" of the individual.

While rulings of other ALJs are often persuasive precedents, they do not constitute binding authority, and where the ruling of another ALJ appears to be contrary to law, I must decline to follow it. See United States v. WSC Plumbing, Inc., 9 OCAHO no. 1061, at 14 (2000); United States v. Allen Holdings, Inc., 9 OCAHO no. 1059, at 13 (2000). In this instance, I cannot reconcile Harris and Huesca with my own understanding of the law governing document abuse or with other, more persuasive, OCAHO case law. In fact, the decision in Harris runs directly contrary to the same ALJ's rulings in United States v. Townsend Culinary, Inc., 8 OCAHO no. 1032, 454 (1999) and
United States v. Strano Farms, 5 OCAHO no. 748, 206 (1995), both of which found employer liability for pre-"hire" document abuse. It should be noted, moreover, that although Townsend Culinary was issued two years after Harris was decided and Strano Farms was issued one year after Huesca, neither opinion even attempts to reconcile the contrary cases.

A document request or refusal falls within the scope of INA § 274B(a)(6) only if made for the purpose of complying with INA § 274A(b)–that is, for the purpose of verifying the identity and work-eligibility of the individual. Document requests or refusals undertaken for some other purpose are not "document abuse." See Costigan v. NYNEX, 6 OCAHO no. 918, 1151, at 1161-63 (1997) (holding that complainant had failed to state a claim for document abuse where the document refusal at issue was in connection with the completion of federal income tax and social security withholding forms); Toussaint v. Tekwood Assocs., 6 OCAHO no. 892, 784, at 804-08 (1996) (same). However, with respect to Count I, Respondent misconstrues Costigan and the other similar cases cited in its brief. Those cases found that complainants had failed to state valid claims of document abuse not because the alleged documentary practices occurred prior to hiring, but rather because those document refusals were made in connection with the federal tax laws, and not for purposes of employment-eligibility verification. Thus, the real lesson of Costigan is that INA § 274B(a)(6) only asks "why" a document request or refusal was made, not "when" it was made. Accordingly, I categorically reject the proposition that liability for violating INA § 274B(a)(6)

can only arise with respect to document requests or refusals occurring after an employer has formally hired an individual.

According to the Immigration and Naturalization Service (INS) Office of Business Liaison, "the I-9 process may not be used to *pre-screen* employees for hiring, unless an employer has instituted a policy and *regular practice* to subject *every* applicant for every job, regardless of national origin or citizenship status, to the I-9 process." INS Employer Info. Bulletin 99-102, at 1 (June 1999) (emphasis in original). Accordingly, it is clear that circumstances do exist under which employers may seek to satisfy the requirements of INA § 274A(b) prior to the hiring of an individual. Yet under the interpretation advanced by Respondent, and apparently adopted by Harris and Huesca, an employer which institutes such a "policy and regular practice," but which makes compliance with discriminatory document requests a condition for receiving an initial job offer, would be immune from liability for document abuse. I conclude that Respondent's interpretation is fundamentally incompatible with both the language of INA § 274B(a)(6) and with a number of OCAHO cases finding violations of INA § 274B(a)(6) even though the impermissible documentary practice occurred prior to hiring. See, e.g., Townsend Culinary, 8 OCAHO no. 1032, 454 (1999) (finding a violation of INA § 274B(a)(6) where the employer, *inter alia*, required applicants to produce specific documents, for purposes of filling out I-9 forms, as a condition for receiving initial job offers); Strano Farms, 5 OCAHO no. 748, 206 (1995) (finding a violation of INA § 274B(a)(6) where the employer refused to accept valid documents during the pre-employment verification process). Moreover, even in a case where no liability for document abuse was ultimately found, one OCAHO ALJ indicated quite clearly that pre-"hiring" document requests could constitute document abuse under appropriate facts. In United States v. Zabala Vineyards, 6 OCAHO no. 830, 72, at 74 (1995), the ALJ noted,

> there is a violation [of INA § 274B(a)(6)] if an employer requests more or different documents than are required . . ., whether or not the applicant is ultimately hired. . . . It is not critical to every finding of a [INA § 274B(a)(6)] violation that job applicants interviewed by an employer are hired.

To the extent that Harris and Huesca may be invoked as support for a contrary position, I specifically reject them and decline to follow their holdings.

Consequently, viewing all facts and reasonable inferences to be derived from them in the light most favorable to the United States, I find that Count I of the Complaint has stated a valid claim of document abuse in violation of INA § 274B(a)(6). According to the facts asserted in the Complaint, Bruinsma asked Reyes-Martinon to present documentation showing her eligibility to work in the United States. Moreover, the Complaint asserts that this request was made for the purpose of satisfying the employment-eligibility-verification requirements of INA § 274A(b). Compl. ¶¶ 47-48. The fact that the document request was

not followed by an offer of employment is simply irrelevant under INA § 274B(a)(6). An employer that makes compliance with discriminatory document requests a condition for receiving an initial job offer is no less susceptible to liability for document abuse than it would be if the discriminatory document request or refusal was made after hiring. Thus, Respondent's Motion to Dismiss is hereby DENIED with respect to Count I.

B. Count IV

The legal theory underlying Count IV of the Complaint is that Respondent's allegedly discriminatory documentary practices are cognizable violations of INA § 274B(a)(1), which prohibits discrimination "with respect to the hiring . . . of the individual." Respondent argues that Count IV fails to state a claim because the phrase "with respect to the hiring . . . of the individual" encompasses only discriminatory refusals to hire, and not discriminatory documentary practices such as those alleged in the Complaint. The United States argues in opposition that INA § 274B(a)(1) should be interpreted more expansively, as encompassing the entire "hiring process." In its supplemental brief, however, the United States acknowledges that, for present purposes, it is only necessary that the court accept the ostensibly uncontroversial proposition that the employment-eligibility-verification process occurs "with respect to hiring."

I conclude that Count IV of the Complaint must be DISMISSED for failure to state a claim upon which relief can be granted. In so holding, I need not, and do not, decide the question of whether the phrase "with respect to the hiring . . . of the individual" encompasses the entire "hiring process," including, but not limited to, document requests or refusals undertaken for purposes of employment-eligibility verification. Instead, I conclude that, even if INA § 274B(a)(1) could be interpreted as encompassing the entire "hiring process," discriminatory document requests and refusals, standing alone, are actionable under INA § 274B(a)(6) *only*, and not under INA § 274B(a)(1).

My decision in this regard is derived from the well-established rule, embraced by both the United States Supreme Court and the United States Court of Appeals for the Eighth Circuit, that general statutory provisions should not be held to apply to matters that are already covered by specific provisions within the same statute. As the Supreme Court observed more than one hundred years ago,

> [i]t is an old and familiar rule that 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' This rule applies wherever an act contains general provisions and also special ones upon a subject which, standing alone, the general provisions would include.

United States v. Chase, 135 U.S. 255, 260 (1890). In Chase, the Court held that the mailing of an obscene "letter" did not violate a federal statute penalizing the mailing of obscene "writings" because a specific clause of the same statute already addressed the types of "letters" that were non-mailable under the Act. Id.; see also D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) (citing Chase and holding, with respect to a dispute over the bankruptcy court's statutory power to arrest bankrupts, that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling."); Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957) (quoting D. Ginsberg & Sons, Inc., and holding that a general corporation venue statute did not apply in a patent infringement action because a special venue provision existed for such actions); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524, 527 (1989) (stating that "[a] general statutory rule usually does not govern unless there is no more specific rule," and holding that Federal Rule of Evidence (FRE) 403, which prescribes a general rule supporting exclusion of relevant evidence on grounds of prejudice, was trumped by FRE 609, which specifically required courts to "permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony.").

In Robinson v. United States, 142 F.2d 431 (8th Cir. 1944), the Eighth Circuit adopted the Chase rule in a case involving a challenge to a criminal sentence imposed for larceny of United States Government property. In Robinson, the appellant had been convicted of breaking into, and stealing money from, a United States Post Office, and was sentenced to ten years in prison–five years for the breaking and entering and five years for the larceny. Id. at 431. However, the appellant argued on appeal that, under applicable statutes, the maximum permissible sentence for his combined offenses was eight years–five years for the breaking and entering and three years for the larceny. Id. In support of this claim, the appellant cited a statute–then codified as 18 U.S.C.A. § 313–which prescribed a penalty of "not more than three years imprisonment" for stealing property belonging specifically to the Post Office Department. In support of the original sentence, the government cited a different but related statute–then codified as 18 U.S.C.A. § 99–which prescribed a maximum ten-year term of imprisonment for stealing from the United States Government. Id. at 431-32. The court, quoting at length from Chase and D. Ginsberg & Sons, Inc., concluded that the appellant should have been sentenced under 18 U.S.C.A. § 313 rather than 18 U.S.C.A. § 99:

> [w]here there is a law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception. The special mandate of section 190, forbidding 'more than three years' imprisonment for larceny of the particular property

> that is Post Office property, must therefore prevail over the ten year term permitted for larceny of United States property in general.

Id. at 432; see also Hickman v. Cliff Peck Chevrolet, Inc., 566 F.2d 44, 47 (8th Cir. 1977); Service Life Ins. Co. v. United States, 293 F.2d 72, 76 (8th Cir. 1961).

Other United States Courts of Appeals have adopted reasoning similar to that advanced in Robinson. For example, in United States v. Rose, 570 F.2d 1358 (9th Cir. 1978), a Ninth Circuit case, the appellant had been convicted and sentenced under both 18 U.S.C.A. § 1001 and 18 U.S.C.A. § 542 for making false statements in an attempt to introduce imported merchandise into the United States without paying a customs duty. Id. at 1358. The appellant was fined $5,000 for a single violation of 18 U.S.C.A. § 542, which dealt specifically with false statements in order to avoid customs duties, and $10,000 for each of two violations of 18 U.S.C.A. § 1001, a broad statute that prescribed a maximum penalty of $10,000 for knowingly making false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Id. One of the two violations of 18 U.S.C.A. § 1001 was based on the same conduct that was found to have violated 18 U.S.C.A. § 542. The Ninth Circuit reversed the cumulation of the fines imposed under the two provisions, concluding that 18 U.S.C.A. § 1001 was merely a "catch-all" provision that did not encompass false misrepresentations expressly prohibited by 18 U.S.C.A. § 542. Id. at 1363. In reversing one of the convictions under 18 U.S.C.A. § 1001, the court stated that "the legislative history [of 18 U.S.C.A. § 1001] reveals no evidence of an intent to pyramid punishments for offenses covered by another statute as well as by § 1001." Id.

I recognize, of course, that the present case is not a criminal proceeding. Nonetheless, the principles underlying Chase, Robinson, and Rose apply with equal force in the present context. Thus, even if I assume, *arguendo*, that the language of INA § 274B(a)(1) is broad enough to include discriminatory practices that fall short of outright refusals to hire, Count IV must still fail because it invokes a general statutory provision–INA § 274B(a)(1)–in an attempt to redress discriminatory practices that are already the subject of a more specific provision of the same statute–INA § 274B(a)(6). Where a single statute contains a general prohibition against discrimination and also a specific provision prohibiting employers from discriminating in a particular way (i.e., by refusing to honor valid documents or requesting more or different documents than required), the general provision is presumed to address only those incidents of discrimination not already addressed by the specific provision. This is so even though the general provision could–in its most comprehensive sense–be interpreted as encompassing the matters addressed by the specific provision. This rule is particularly applicable where, as here, the specific provision relating to discriminatory documentary practices carries a smaller civil money penalty than the general provision. Compare INA § 274B(g)(2)(B)(iv)(I) (authorizing a civil money penalty of between $250 and $2,000 for each individual discriminated against in cases arising under the general provision) with INA § 274B(g)(2)(B)(iv)(IV)

(authorizing a civil money penalty of between $100 and $1,000 "in the case of an unfair immigration-related employment practice described in subsection (a)(6)").

Under the United States' interpretation, if Respondent is found to have impermissibly requested or refused a document from Reyes-Martinon in October 1999, it would be liable for a $100 to $1,000 civil money penalty under Count III of the Complaint *and* a $250 to $2,000 civil money penalty under Count IV, both for the very same documentary practice. I have searched the legislative histories of INA §§ 274B(a)(1) and 274B(a)(6), and I find no intimation that Congress intended to "pyramid punishments" under multiple provisions of INA § 274B for a single discriminatory document request or refusal. Accord Rose, 570 F.2d at 1363. Thus, viewing all facts and reasonable inferences in the light most favorable to the United States, I conclude that Count IV of the Complaint fails to state a claim upon which relief can be granted. Respondent's motion to dismiss is GRANTED with respect to Count IV.

I wish to emphasize that my decision with respect to Count IV does not call into question those OCAHO cases holding that an employer's discriminatory documentary practices may constitute powerful *evidence* of the discriminatory nature of a subsequent refusal to hire or discharge. See United States v. Marcel Watch Corp., 1 OCAHO no. 143, 988 (1990) (holding that an employer violated INA § 274B(a)(1)(B) when it refused to hire a United States citizen because of her inability to comply with an unnecessary document request); Jones v. DeWitt Nursing Home, 1 OCAHO no. 189, 1237 (1990) (holding that employer violated INA § 274B(a)(1)(B) when it discharged a United States citizen because of his inability to comply with an unnecessary document request). Those cases are clearly distinguishable from the present case, however, because here the United States asserts that a discriminatory document request is itself a violation of INA § 274B(a)(1)(B), rather than strong evidence of such a violation.

V. ATTORNEYS' OBLIGATION TO DISCLOSE ADVERSE AUTHORITY

In its supplemental brief, the United States identifies a number of OCAHO cases in which it has advanced the argument that the phrase "with respect to the hiring . . . of the individual" includes the entire hiring process. US Supp. Br. 16. Among the cases listed is United States v. McDonnell Douglas Corp., OCAHO Case No. 90200363. What the United States did not reveal is that the ALJ hearing that case *explicitly rejected* its theory in a *published* decision which is not cited in its substantive briefs. In United States v. McDonnell Douglas Corp., 2 OCAHO no. 351, 361 (1991), the United States filed a complaint against a defense contractor, alleging that it had discriminated against United States citizens "with respect to hiring" in favor of H-2B visa holders from the United Kingdom. In pertinent part, sub-paragraphs 13(a) and 13(b) of the United States' Complaint in McDonnell Douglas alleged that respondent had committed citizenship-status discrimination by "offering higher wages to H-2B recruits than to U.S. workers with equal qualifications and experience" and by "imposing higher standards and additional barriers for employment of U.S. workers than are imposed for H-2B recruits."

McDonnell Douglas filed a motion to dismiss the complaint, arguing in part that the subject matter of sub-paragraphs 13(a) and 13(b) was outside the scope of OCAHO jurisdiction because it implicated the "terms and conditions" of the charging parties' employment, rather than their "hiring." In response to the motion to dismiss, the United States filed a memorandum of points and authorities in which it argued that OCAHO possessed jurisdiction over "all discrimination concerning the hiring process," and not just "complete refusals to hire." US McDonnell Douglas Memo. at 18. In McDonnell Douglas, the United States cited United States v. Lasa Mktg. Firms, id. at 19, which has also been cited by the United States in opposition to the present motion to dismiss. The United States' memorandum also clarified that the "higher standards" and "barriers" referred to in sub-paragraph 13(b) of the complaint involved McDonnell Douglas' requirement that "U.S. applicants . . . take tests and undergo security screening that were not required for U.K. recruits." Id. at 18.

The ALJ refused to accept jurisdiction over paragraphs 13(a) and 13(b) of the complaint and expressly rejected the United States' argument regarding the proper scope of OCAHO jurisdiction:

> I find merit in Respondent's argument that OCAHO does not have jurisdiction to hear complaints regarding the terms and conditions of employment. . . . The offering of higher wages to foreign employees does not encompass the "hiring process" as Complainant argues. Similarly, the "imposition of higher standards" does not appear to deal with the actual hiring decision, which is covered by 8 U.S.C. § 1324b. . . . I will limit my review of this case to those portions of the Complaint which deal directly with the actual employment decisions involved in the refusal to hire the 22 named charging parties. Complainant will not bring before me any allegations involving pay scales or standards of employment, or other allegations encompassing terms and conditions of employment.

2 OCAHO no. 351, at 372. Thus, it is clear that at least one OCAHO ALJ has disagreed with Lasa Mktg. Firms and explicitly rejected the United States' theory that discrimination "with respect to hiring" encompassed wage disparities in the initial contract or disparities in the burdensomeness of the selection process, and instead embraced the notion that INA § 274B(a)(1) "deal[s] with the actual hiring decision . . . ." Moreover, in McDonnell Douglas this decision was actually a substantive holding in the case, as opposed to a footnoted dictum, as in Lasa Mktg. Firms.

As a rule, it is the obligation of an attorney "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." See Rule 3.3(a)(3) of the American Bar Association (ABA) Model Rules of Professional Conduct. I recognize that the ABA Model Rules are not binding in this case; however, since OSC was counsel for the United States in McDonnell Douglas, it is presumed to be familiar with the ALJ's adverse

decision in that case, and in keeping with its duty of candor to the tribunal, the United States should have cited McDonnell Douglas as contrary authority and sought to distinguish it or to persuade me that it was incorrectly decided. In future cases before me, I expect OSC counsel to adhere to this standard.

VI. CONCLUSION

In conclusion, Respondent's motion to dismiss is DENIED with respect to Count I and GRANTED with respect to Count IV. Count I states a valid claim of document abuse despite the fact that the document requests and refusal at issue occurred prior to Respondent's hiring of Reyes-Martinon. Count IV fails to state a claim, however, because it invokes a general statutory provision in connection with a type of conduct that is already covered by a specific provision of the same statute.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE