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

January 6, 2017

MICHAEL EDWARD JOHNSON, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 16B00019
PROGRESSIVE ROOFING, Respondent.	)	

FINAL DECISION AND ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b (2012). Michael Edward Johnson (Complainant or Mr. Johnson) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 2, 2016, alleging that Progressive Roofing (Respondent or the company), committed document abuse by seeking more documentation from him than is required for the employment eligibility verification process, in violation of 8 U.S.C. § 1324b(a)(6).[1]

Mr. Johnson alleges that on April 1, 2015, he applied for a job as a field labor worker with Progressive Roofing. Complaint at 4, 19. While completing paperwork during the hiring process, Mr. Johnson presented three documents to establish his employment authorization: a voter registration card, a birth certificate, and a social security card. *Id*. at 7. He contends that

[1] Mr. Johnson filed a charge with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on July 14, 2015, alleging discrimination under 8 U.S.C. § 1324b. OSC sent Mr. Johnson a letter dated November 10, 2015, notifying him that after conducting an investigation it determined there was insufficient evidence of reasonable cause to believe that he was discriminated against as prohibited by 8 U.S.C. § 1324b; therefore, OSC was dismissing his charge and not filing a complaint with OCAHO. Mr. Johnson was further advised that he had the right to file his own complaint with OCAHO within ninety days of his receipt of the letter.

"Ms. Tina" [2] is Progressive Roofing's Director of Human Resources and that she informed him that the documentation he provided was insufficient because it did not adequately establish his identity.[3] *Id*. at 7, 42-43. Mr. Johnson contends that Respondent discriminated against him when it refused to accept the documents he presented and, concomitantly, declined to employ him for the position.[4] For relief, he seeks back pay from April 1, 2015, the date he alleges that he was refused employment by Progressive Roofing.[5]

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[2] "Ms. Tina" appears to refer to Ms. Tina Canaan, who is the Employee Support and Training Manager for Progressive Roofing.

[3] More specifically, Mr. Johnson's voter registration card, which was the only card of the three presented that could have legally established identity for purposes of 8 U.S.C. § 1324a(b)(1)(D), did not contain a photograph of Mr. Johnson and, therefore, was not accepted.

[4] Although Mr. Johnson has also generally alleged that Respondent discriminated against him on account of his national origin and citizenship status, it is clear from his Complaint that those allegations are bound to the same nucleus of facts as his document abuse claim and are not freestanding, independent claims themselves. Complaint at 1-31, 36-43, 52-53. Indeed, Mr. Johnson has not alleged any facts that would give rise to independent claims of either national origin or citizenship status discrimination. *Id*. Rather, he appears to have grafted those allegations to his document abuse claim because document abuse requires, *inter alia*, a showing of an intent to discriminate because of an individual's national origin or citizenship status. *See* 8 U.S.C. § 1324b(a)(6). Moreover, even if he had raised a separate, distinct claim for either national origin or citizenship status discrimination, such a claim would nevertheless be subject to dismissal. For instance, Mr. Johnson has acknowledged that Respondent has fifteen or more employees. Complaint at 38. Claims of national origin discrimination against such employers must generally be directed to the Equal Employment Opportunity Commission and are not within the scope of OCAHO's jurisdiction. *See* 8 U.S.C. §§ 1324b(a)(2)(B), (b)(2). Additionally, discrimination because of citizenship status which is required by federal law or federal contract is not an unfair immigration-related employment practice. *Id*. § 1324b(a)(2)(C). As discussed, *infra*, any putative or alleged discrimination against Mr. Johnson based on his citizenship status was required in order to comply with federal law and the requirements of the E-Verify program. Consequently, even if Mr. Johnson had intended to articulate discrete national origin and citizenship status claims against Progressive Roofing, those claims would be barred by statute and subject to dismissal. Thus, the resolution of his document abuse claim as discussed herein necessarily resolves any and all of his claims asserted under 8 U.S.C. § 1324b.

[5] Mr. Johnson also seeks $200,000 in punitive damages. Complaint at 31. Such an award, however, is beyond the scope of OCAHO's authority, even if Mr. Johnson's complaint were not otherwise subject to dismissal at the summary decision stage. 8 U.S.C. § 1324b(g)(2); *see also Naginsky v. Dept. of Defense and EC&G Dynatrend, Inc.*, 4 OCAHO no. 710, 1062, 1064 (1994) (noting that in cases under 8 U.S.C. § 1324b, "request[s] for compensation for emotional

On March 28, 2016, Respondent filed an Answer. In the Answer, Respondent asserts that it has been using E-Verify since 2009 and that the actions it took with regard to Mr. Johnson adhere to the E-Verify practices and procedures. Respondent contends that it wanted to hire Mr. Johnson but that on his first day of work he was unable to provide sufficient documents to complete the Employment Eligibility Verification Form (Form I-9) and E-Verify process. The company maintains that it offered Mr. Johnson continued employment, but that he failed to return after being told that he needed to present a List A document or a List B document with a photograph.[6]

On May 31, 2016, Respondent filed a Motion for Summary Decision (Motion). The Motion further contains several proposed exhibits, including the E-Verify Memorandum of Understanding (MOU) for Employers, U.S. Citizenship and Immigration Services (USCIS) M-274 Handbook for Employers, copies of Mr. Johnson's proffered documents, and declarations from Sherrie Mitchell, Respondent's Office Manager, and Tina Canaan, Respondent's Employee Support and Training Manager.

Mr. Johnson did not respond to the Motion. Nevertheless, on November 21, 2016, the undersigned issued a Notice identifying Mr. Johnson's lack of response to the Motion but giving him additional time, until December 16, 2016, in which to file a response. The Notice also warned Mr. Johnson that a failure to file a response may result in the Motion being deemed unopposed. Despite being given additional time to do so, Mr. Johnson has not filed a response to Respondent's Motion, and it is appropriately deemed unopposed.

For the reasons addressed below, Respondent's Motion for Summary Decision is **GRANTED**.

II. STANDARDS APPLIED

A. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c)[7] establishes that an Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary

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distress, humiliation, and punitive damages exceed[] the forum's jurisdiction which is limited to awards of backpay and reinstatement").

[6] Respondent had already accepted a List C document from Mr. Johnson and, as discussed in more detail herein, could not accept a List B document without a photograph because of its enrollment in the E-Verify program.

[7] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

decision." Relying on United States Supreme Court precedent, OCAHO case law has held, "[a]n issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[8] "While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 8 (2015). Furthermore, "[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." *Id*. at 9 (relying on *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

B. Document Abuse

"Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo*, 11 OCAHO no. 1259 at 5-6. Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. These two elements, an act and an intent, are essential to a claim of document abuse.

A finding of economic harm or of a separate, discrete, or tangible injury is not required to establish a claim of document abuse. *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012); *see also United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 625 (2000) (finding that an individual need not show that he experienced an injury in order

[8] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

to establish liability against an employer for document abuse in violation of 8 U.S.C. § 1324b(a)(6)). Rather, the document abuse itself is the injury as it is inherently an unfair immigration-related employment practice, similar to other such practices prohibited by 8 U.S.C. § 1324b—*i.e*. discrimination with respect to hiring, recruitment or referral for a fee, or discharging an individual for employment because of the individual's national origin or citizenship status and discrimination through intimidation, threats, coercion, or retaliation against an individual for exercising rights under the statute. *See* 8 U.S.C. §§ 1324b(a)(1), (5), (6).

Nevertheless, following amendments to 8 U.S.C. § 1324b(a)(6) in 1996, document abuse is no longer treated as a strict liability offense. *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 3-4; *see also United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 18 (2003) (finding that the post-amendment statutory language of 8 U.S.C. § 1324b(a)(6) is "crystal clear" that "document abuse can no longer be treated as a strict liability offense"). Rather, for individual claims of document abuse, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015).

Under the *McDonnell Douglas* framework, the complainant must first establish a *prima facie* case; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the *prima facie* case disappears. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015). At step two, once the employer satisfies its burden of production by setting forth a facially valid reason for the employment decision, the burden reverts to the employee to show that the employer's reason is pretextual. *Id*. The employer will generally be entitled to summary decision unless the complainant can demonstrate that there is a genuine issue of fact regarding pretext. *Id*. The employer's burden is one of production, not persuasion, and the complainant retains the ultimate burden of persuasion throughout the analysis. *Odongo*, 11 OCAHO no. 1236 at 6.

C. The Employment Verification Requirements and E-Verify

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986. *See generally* 8 U.S.C. § 1324a; 8 C.F.R. § 274a.2; *see also United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014) ("Employers must complete Forms I-9 for each new employee hired after November 6, 1986, in order to document that the employer verified the employee's identity and employment authorization status."). Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 U.S.C. § 1324a(b)(2); 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the

appropriate documents to verify the individual's identity and employment authorization. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii). An employer must attest on Form I-9 that it has either examined a document from List A, which establishes both identity and employment authorization, or examined a document from List B, which establishes identity, and a document from List C, which establishes employment authorization. *See* Motion, Ex. 3, USCIS, Form I-9 Instructions at 3 (Mar. 8, 2013). The employer must also record the document-specific information under List A or under Lists B and C of section 2 of the Form I-9. *Id.* List B documents must generally contain a photograph or other sufficient identifying information relating to an individual, though the Secretary of Homeland Security[9] determines, by regulation, which documents meet this standard. 8 U.S.C. § 1324a(b)(1)(D)(i).

E-Verify is an internet-based employment eligibility verification system operated by USCIS in cooperation with the Social Security Administration (SSA). *See* USCIS, About the Program, https://www.uscis.gov/e-verify/about-program (last updated Feb. 11, 2014). The program provides a way to compare information from an employee's Form I-9 against data in various government databases to determine whether the information matches government records and whether a new hire is authorized to work in the United States. *See id.* Enrollment in the E-Verify program does not relieve an employer of its obligations to properly complete, retain, and present for inspection Forms I-9 for its relevant employees. *United States v. Golf Int'l*, 10 OCAHO no. 1214, 6 (2014).

Generally, in satisfying the requirements of 8 U.S.C. § 1324a(b), an employer may not specify the type of documents it will accept to complete the Form I-9. 8 U.S.C. § 1324b(a)(6); *see also United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 507 (1999) (collecting cases and noting that "[t]he choice of documents is that of the individual and employers may not specify those documents which are to be produced" and that "the vast majority of OCAHO rulings have held that requests for specific documents . . . constitute document abuse violations" (internal citations omitted)). However, the implementing legislation for the E-Verify program modified the requirements for documents referenced in 8 U.S.C. § 1324a(b)(1)(D)—*i.e.* List B documents establishing identity—by requiring that any such document must contain a photograph in order to be acceptable for an employer enrolled in E-Verify. *See generally* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, Illegal

[9] Although 8 U.S.C. § 1324a(b)(1)(D)(i) refers to the Attorney General, in sections 402 and 451 of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, Congress transferred from the Attorney General to the Secretary of Homeland Security the general authority to enforce and administer the immigration laws, including the employment authorization provisions of 8 U.S.C. § 1324a. In accordance with section 1517 of title XV of the HSA, any reference to the Attorney General in a provision of the INA describing functions transferred from the U.S. Department of Justice to the U.S. Department of Homeland Security "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. 557 (codifying the HSA, title XV, section 1517).

Immigration Reform and Immigrant Responsibility Act of 1996, Title IV, Subtitle A, 110 Stat. 3009 (hereinafter IIRAIRA). Thus, for employers who participate in the E-Verify program, a List B document *must* contain a photograph of the individual in order to be acceptable for purposes of 8 U.S.C. § 1324a(b)(1)(D); consequently, if an employee chooses to present a List B document, an employer enrolled in E-Verify can decline to accept the document for purposes of 8 U.S.C. § 1324a(b)(1)(D) if it does not contain a photograph of the employee.[10] IIRAIRA § 403(a)(2)(A)(ii). Although E-Verify was initially implemented in 1997 as one of three pilot programs—and was called the Basic Pilot Program until 2007 when it was renamed E-Verify—it has been repeatedly reauthorized and was in effect at the time of Mr. Johnson's allegations. *See generally* 8 U.S.C. § 1324a, note 3; IIRAIRA §§ 401-405.

III. DISCUSSION AND ANALYSIS

The relevant material facts in this case are not disputed. Progressive Roofing has been enrolled in the E-Verify program since 2009 and was enrolled at the time Mr. Johnson sought employment in 2015. Motion, Ex. 1-E. Mr. Johnson presented three documents to establish his identity and employment authorization: a voter registration card, a birth certificate, and a social

[10] In addition to being plainly stated in the statute, this requirement is also spelled out unequivocally in multiple government publications and postings related to the E-Verify program. The E-Verify MOU, Article II, Section A, Paragraph 6, clearly states, that "[t]he employer agrees to comply with current Form I-9 procedures with two exceptions," one of which is that "[i]f an employee presents a 'List B' identity document, the Employer agrees to only accept 'List B' documents that contain a photo." Motion, Ex. 1-B. Additionally, USCIS's website contains a section regarding frequently asked questions related to E-Verify and one question asks, "Why does DHS require an employer to only accept List B documents that contain a photo?" USCIS, E-Verify: Frequently Asked Questions, https://www.uscis.gov/faq-page/e-verify-frequently-asked-questions#t16966n50348 (last updated Feb 12, 2016). The answer provided states, "When E-Verify was established congress [sic] included the requirement that documents establishing identity (List B documents) must contain a photograph. The legal requirement is found in Section 403 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." *Id.* Moreover, USCIS produces a Handbook for Employers which unequivocally states, "If you participate in E-Verify, you may only accept List B documents that bear a photograph." Motion, Ex. 1-C, USCIS, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* (M-274) (Apr. 30, 2013) at 5. OSC also acknowledges that employers enrolled in E-Verify are required to accept a List B document of an employee's choosing "with a photo." Motion, Ex. 5, OSC, E-Verify Employer DOs and DON'Ts (Mar. 21, 2011).

security card.[11] Complaint at 7, 19-20, 42-43; Motion, Exs. 1-D, 1-E, 1-I, 1-J. Mr. Johnson's voter registration card did not contain a photograph of him. Motion, Ex. 1-I. Progressive Roofing declined to employ Mr. Johnson because although he presented a valid List C document, he did not present for inspection either a valid List A document or a valid List B document with a photograph establishing his identity. Complaint at 19-20, 42-43; Motion, Exs. 1-D, 1-E.

A birth certificate and a social security card are each valid List C documents which establish only employment authorization. 8 C.F.R. § 274a.2(b)(1)(v)(C)(*1*), (*4*). In general, for employers not enrolled in E-Verify, a voter registration card is a valid List B document that establishes identity. *Id*. § 274a.2(b)(1)(v)(B)(*1*)(*iii*). As discussed above, however, for employers who are enrolled in E-Verify, a List B document must contain a photograph in order to be acceptable for purposes of 8 U.S.C. § 1324a(b)(1)(D). IIRAIRA § 403(a)(2)(A)(ii).

As an initial point, Mr. Johnson has not established a *prima facie* case of document abuse. The record shows that Respondent, as an enrolled participant in E-Verify, did not request more or different documents from him than those required by 8 U.S.C. § 1324a(b) nor did it refuse to accept a genuine document that otherwise comported with the requirements of 8 U.S.C. § 1324a(b). To the contrary, it declined to accept a List B document that did not contain a photograph as required by IIRAIRA § 403(a)(2)(A)(ii), and Mr. Johnson has not alleged that he proffered any other documents that otherwise complied with all of the requirements of 8 U.S.C. § 1324a(b). Thus, because Progressive Roofing's actions were fully compliant with the requirements of 8 U.S.C. § 1324a(b)(1)(D) and IIRAIRA § 403(a)(2)(A)(ii) and did not constitute actions encompassed by 8 U.S.C. § 1324b(a)(6), Mr. Johnson's claim necessarily fails to establish a *prima facie* case.

Assuming, *arguendo*, that Mr. Johnson had established a *prima facie* case, Respondent also met its burden of production by putting forth a legitimate nondiscriminatory reason for requesting a

[11] Mr. Johnson also presented a *copy* of his driver's license, as he allegedly could not present his original driver's license due to an outstanding arrest warrant. Complaint at 19; Motion, Ex. 1-D. Regardless of the reason, however, an *original* document is required to be presented for inspection. 8 C.F.R. § 274a.2(b)(1)(v). Thus, Mr. Johnson's copy of his driver's license was appropriately not accepted by Respondent. Mr. Johnson also acknowledged that he had an identification card which had expired. Complaint at 42. Only unexpired documents were acceptable for inspection at the time Mr. Johnson applied for employment, however. 8 C.F.R. § 274a.2(b)(1)(v). Thus, Mr. Johnson's expired identification card also was not an appropriate document for presentation to establish his identity.

List B document with a photograph, namely compliance with federal law, 8 U.S.C. § 1324a(b)(1)(D) as modified by IIRAIRA § 403(a)(2)(A)(ii).[12] Mr. Johnson has not alleged that this reason was pretextual, and the record provides not even a scintilla of pretext; to the contrary, by all accounts, Respondent wanted to employ Mr. Johnson and would have done so had he returned with a valid List A document or a valid List B document with a photograph. Thus, even if Mr. Johnson had established a *prima facie* case, his claim would still fail because there is no evidence that Respondent rejected his List B document without a photograph for the purpose or with the intent of discriminating against him on account of his national origin or citizenship status. *See* 8 U.S.C. § 1324b(a)(6).

Overall, by declining to accept Mr. Johnson's voter registration card which did not contain a photograph, Respondent, as an enrolled participant in E-Verify, did nothing more than comply with the applicable law. It did not request more or different documents than required, nor did it refuse to accept a document that otherwise comported with the requirements of 8 U.S.C. § 1324a(b). Rather, it declined to accept a document that was insufficient to comply with the requirements of 8 U.S.C. § 1324a(b)(1)(D) as modified by IIRAIRA § 403(a)(2)(A)(ii).[13]

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[12] Relatedly, Respondent has also argued that its actions toward Mr. Johnson were required to comply with the E-Verify MOU which it suggests, somewhat implicitly, is equivalent to a contractual obligation. Motion at 6-8. As it pertains to the instant case, the E-Verify MOU simply restates the relevant law, which Respondent is already required to comply with regardless of whether the MOU imposes any additional contractual obligations. Thus, the undersigned need not address whether an E-Verify MOU constitutes a government contract in order to resolve Respondent's Motion.

[13] Mr. Johnson's Complaint posits that because a voter registration card is listed in the regulations as an acceptable List B document without any reference to the need for a photograph on the card, Respondent's refusal to accept it necessarily constitutes document abuse under 8 U.S.C. § 1324b(a)(6). *See* 8 C.F.R. § 274a.2(b)(1)(v)(B)(*1*)(*iii*) (listing a voter registration card as an acceptable List B document without referencing the need for it to contain a photograph). The regulations implementing 8 U.S.C. § 1324a(b) are generally binding in this forum. *See* 8 C.F.R. § 1274a.1(b). Nevertheless, to the extent that 8 C.F.R. § 274a.2(b)(1)(v)(B)(*1*)(*iii*) is in conflict with the clear language of IIRAIRA § 403(a)(2)(A)(ii) regarding employers enrolled in E-Verify and as applied to Mr. Johnson's case, the statutory language controls. *See, e.g.*, *Texas v. EPA*, 726 F.3d 180, 195 (D.C. Cir. 2013) (noting that a "valid statute always prevails over a conflicting regulation" and that "a regulation can never trump the plain meaning of a statute" (internal quotations and citations omitted)). Thus, Progressive Roofing's actions do not constitute document abuse under the relevant statutes even though they may have been in tension with a reading of a regulation in isolation. Moreover, as discussed, *supra*, even if Respondent's actions had raised a *prima facie* case of document abuse premised on 8 C.F.R. § 274a.2(b)(1)(v)(B)(*1*)(*iii*) and notwithstanding IIRAIRA § 403(a)(2)(A)(ii), he nevertheless failed to establish that Respondent rejected his List B document without a photograph for the

Consequently, even construing Mr. Johnson's Complaint liberally and viewing the facts most favorably to him as the nonmoving party, the evidence clearly shows that he has not established a viable claim of document abuse and that Respondent is not liable for discrimination under 8 U.S.C. § 1324b(a)(6). In short, a claim of document abuse requires two essential elements, and Mr. Johnson has failed to make a showing sufficient to establish either one. Accordingly, summary decision is appropriately entered for Progressive Roofing, and Mr. Johnson's Complaint is dismissed.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Michael Edward Johnson was hired by Progressive Roofing on April 1, 2015, to work as a field labor worker.

2. Michael Edward Johnson presented a voter registration card, birth certificate, and social security card to Progressive Roofing at the time he was hired to satisfy the requirements of the employment eligibility verification system, 8 U.S.C. § 1324a(b).

3. Michael Edward Johnson presented his voter registration card as a List B document, but it did not contain a photograph.

4. Progressive Roofing declined to employ Michael Edward Johnson because he did not present for inspection a valid List B document with a photograph establishing his identity.

5. Michael Edward Johnson filed a charge with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices on July 27, 2015, alleging document abuse.

6. The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Michael Edward Johnson a letter dated November 10, 2015, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.

7. Michael Edward Johnson filed his complaint on February 2, 2016.

8. Progressive Roofing has been an E-Verify registered employer since 2009 and was so at the time it declined to employ Mr. Johnson.

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purpose or with the intent of discriminating against him on account of his national origin or citizenship status. Thus, his claim would still fail even if 8 C.F.R. § 274a.2(b)(1)(v)(B)(*1*)(*iii*) were superior to the statutory language of IIRAIRA § 403(a)(2)(A)(ii).

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.

2. "When a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 9 (2015) (relying on *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

3. "Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5-6 (2015).

4. A finding of a discrete, tangible injury is not required to establish a claim of document abuse. *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012); *see also United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 625 (2000) (finding that an individual need not show that he experienced an injury in order to establish liability against an employer for document abuse in violation of 8 U.S.C. § 1324b(a)(6))

5. Following amendments to 8 U.S.C. § 1324b(a)(6) in 1996, document abuse is no longer treated as a strict liability offense. *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 3-4; *see also United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 18 (2003) (finding that the post-amendment statutory language of 8 U.S.C. § 1324b(a)(6) is "crystal clear" that "document abuse can no longer be treated as a strict liability offense").

6. For individual claims of document abuse, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015).

7. Under the *McDonnell Douglas* framework, the complainant must first establish a *prima facie* case; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the *prima facie* case disappears. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015).

8. Employers must prepare and retain Employment Eligibility Verification Forms (Forms I-9) for employees hired after November 6, 1986. *See* 8 U.S.C. § 1324a; 8 C.F.R. § 274a.2; *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014).

9. Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A).

10. For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

11. An employer must attest on Form I-9 that it has either examined a document from List A, which establishes both identity and employment authorization, or examined a document from List B, which establishes identity, and a document from List C, which establishes employment authorization. *See* USCIS, Form I-9 Instructions at 3 (Mar. 8, 2013).

12. For employers who are enrolled in E-Verify, a List B document must contain a photograph in order to be acceptable for purposes of 8 U.S.C. § 1324a(b)(1)(D). IIRAIRA § 403(a)(2)(A)(ii).

13. Michael Edward Johnson failed to demonstrate a *prima facie* case of document abuse because Progressive Roofing's actions were fully compliant with the requirements of 8 U.S.C. § 1324a(b)(1)(D) and IIRAIRA § 403(a)(2)(A)(ii) and did not constitute actions encompassed by 8 U.S.C. § 1324b(a)(6).

14. Assuming, *arguendo*, that Michael Edward Johnson had demonstrated a *prima facie* case of document abuse, pursuant to 8 U.S.C. § 1324b(a)(6), Progressive Roofing met its burden of production by putting forth a legitimate nondiscriminatory reason for requesting a List B document with a photograph, namely compliance with federal law, 8 U.S.C. § 1324a(b)(1)(D) as modified by IIRAIRA § 403(a)(2)(A)(ii).

15. Even if Michael Edward Johnson had established a *prima facie* case, his claim would still fail because there is no evidence that Progressive Roofing rejected his List B document without a photograph for the purpose or with the intent of discriminating against him on account of his national origin or citizenship status. *See* 8 U.S.C. § 1324b(a)(6).

16. Progressive Roofing's Motion for Summary Decision is granted and the complaint must be dismissed.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

Progressive Roofing's Motion for Summary Decision is **GRANTED** and the complaint is hereby **DISMISSED**. Any other pending motions or requests are denied.

SO ORDERED.

Dated and entered on the January 6, 2017.

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James R. McHenry III
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this 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 files a timely petition for 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. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.