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

United States of America, Complainant v. Mesa Airlines, A Corporation, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 88200001.

In Re Charge of Zeki Yeni Komsu; United States of America, Complainant v. Mesa Airlines, A Corporation, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 88200002.

FINAL DECISION AND ORDER

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Marvin H. Morse, Administrative Law Judge

Appearances: LAWRENCE J. SISKIND, Esq. and

DANIEL ECHAVARREN, Esq., for the Office of Special Counsel for Immigration Related Unfair Employment Practices.

GARY RISLEY, Esq., for the respondent.

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I. INTRODUCTION

A. Background

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) amended the Immigration and Nationality Act of 1952 (INA), codified at 8 U.S.C. §§ 1101 et seq., by adopting several significant revisions to national policy on illegal immigration. The Supreme Court in Espinoza v. Farah Mfg. Co. Inc., 414 U.S. 86 (1973) had previously held that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 20000e et seq., did not cover alienage as distinct from national origin discrimination. Accordingly, as a concomitant of the newly enacted legaliza-

tion and employer sanctions programs, Congress, at § 102 of IRCA, enacted INA § 274B, 8 U.S.C. § 1324b.

The Supreme Court in Espinoza, supra, held that discrimination based on alienage is not the equivalent of national origin: discrimination which, where the jurisdictional requisites are satisfied as to the employer's size, is prohibited by Title VII, 42 U.S.C. §§ 2000e et seq. The Court concluded that Title VII does not bar discrimination based on alienage or citizenship status.

Accordingly, Title 8, United States Code section 1324b was enacted to create new causes of action arising out of any ``unfair immigration-related employment practice,'' 8 U.S.C. § 1324b(a)(1), and to broaden ``. . . the Title VII protections against national origin discrimination . . . because of the concern of some Members that people of `foreign' appearance might be made more vulnerable'' to employment discrimination ``by the imposition of [employer] sanctions.'' ``Joint Explanatory Statement of the Committee of Conference,'' Conference Report, Immigration Reform and Control Act of 1986, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986).

Practices newly prohibited are those which discriminate against an individual on the basis of that individual's national origin or, in the case of a citizen or national of the United States or an ``intending citizen . . ., because of such individual's citizenship status.'' 8 U.S.C. § 1324b(a)(1). Section 1324b(a) provides that it is a violation of law, subject to specified exceptions, to discriminate against any individual with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. The individuals protected against discrimination are U.S. citizens or nationals and those aliens who (1) have been admitted for permanent residence, (2) have been granted the status of aliens lawfully admitted for temporary residence, as applicants for amnesty, (3) have been admitted as refugees, or (4) have been granted asylum provided that each such individual has evidenced ``an intention to become a citizen of the United States through completing declaration of intention to become a citizen. . . .'' Id. at § 1324b(a)(3).

IRCA directed the President to appoint within the Department of Justice a Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel, or OSC), responsible for investigating charges, issuing complaints and prosecuting cases before administrative law judges, and authorized to seek judicial enforcement of orders issued by such judges. Id. at §§ 1324b(c) and (j)(1).

Remedies provided for breach of the duty not to discriminate, which the administrative law judge may impose upon determining that the respondent has engaged in an unfair immigration-related

employment practice include not only relief on behalf of covered individuals but also liability to the United States upon a finding of a ``pattern or practice of discriminatory activity.'' Id. at § 1324b(d)(2). The present case raises questions of first impression under 8 U.S.C. § 1324b with respect both to relief on behalf of the individual complainant, Mr. Zeki Yeni Komsu (charging party, or Komsu), and to liability to the government.

B. Procedural Summary

The United States, by OSC, to vindicate the public interest and on behalf of Komsu filed two complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 12, 1988, against Mesa Airlines (respondent, or Mesa). The Special Counsel, in effect, asserts in Docket 88200001 that Mesa engaged in a pattern and practice of discrimination in its hiring of airline pilots by promulgating and adhering to a policy of failure to consider for employment those applicants, including Komsu, who are not citizens of the United States, at any time that qualified applicants were available who were citizens of the United States. In Docket 88200002, the Special Counsel contends that Komsu was not hired as a pilot because Mesa, applying its U.S. citizen-only policy, rejected his employment application. (The initial pleadings in these dockets are understood as if they had been amended, implicitly, to conform to the proof.)

By Notices of Hearing dated January 13, 1988, OCAHO advised that those cases were assigned to me and that hearings were scheduled to be held in Albuquerque, New Mexico, beginning on March 22, 1988.

On February 16, 1988, respondent answered the complaints and also moved for dismissal, charging (1) that the complaints fail to state a cause of action upon which relief could be granted, (2) that the statute as applied to respondent is unconstitutional in that it violates due process, denies equal protection, is tantamount to an ex post facto law, and (3) that it is unconstitutional as interpreted by the Department of Justice in that it affords retroactive coverage to individuals filing a declaration of intent prior to December 1, 1987. Memoranda in opposition to and in support of respondent's motions to dismiss were submitted.

On February 29, 1988, OSC with the concurrence of the respondent moved to continue the hearings until June 1988, in order for the parties to conduct adequate discovery and narrow the issues for trial.

On March 7, 1988, a telephonic prehearing conference was held during which the motions for continuance were granted and the

hearings rescheduled for June 13-16, 1988. A second telephonic conference was held on May 6, 1988, at which time the judge deferred ruling on respondent's motions to dismiss and informed the parties of his intent to proceed to hearing as scheduled.

On May 26, 1988, reciting agreement by the Office of Special Counsel, respondent filed motions for continuance stating that an increase in the number of depositions to be taken by complainant necessitated its request for a continuance. During a telephonic conference, the judge granted the motions and, by order of May 26, 1988, rescheduled the hearing to begin on July 25, 1988. During a fourth prehearing conference on June 15, 1988, it was agreed that the two cases would be tried on a consolidated basis.

A joint prehearing statement was filed on July 19, 1988. On July 21, 1988, respondent filed a motion in limine arguing that any evidence regarding the alleged pattern and practice claim was irrelevant and requesting imposition of sanctions against the Office of Special Counsel for alleging a claim which was neither well grounded in fact nor warranted by law. OSC filed its response on July 22, 1988.

The hearing was held from July 25 through July 29, 1988, in Albuquerque, New Mexico, and began in a prehearing mode before the parties went on the record. At the hearing, OSC submitted ``Complainant's Memorandum of Points and Authorities Regarding Permissible Citizenship Preference Under § 102 of I.R.C.A.'' Sixteen witnesses were examined, 62 exhibits were received, and a record of 1108 pages was compiled. On July 25, pending motions addressed to the sufficiency of the complaints were overruled.

The parties and the judge agreed on the record to a post-hearing schedule for submission of briefs, dependent, however, upon the date of receipt by the judge of the transcript. The transcript was received on August 24, 1988, and was followed by the Order Confirming and Amplifying Post-Hearing Procedures dated August 25. Motions to correct the transcript were received from complainant on September 15, 1988, and from respondent on September 16, 1988. A joint post-hearing statement of issues was submitted on October 11, 1988, and resubmitted on October 25 to correct a technical deficiency. A second order on post-hearing submissions issued on October 20, 1988, which detailed the briefing schedule and set forth the transcript corrections.

On November 23, 1988, counsel for respondent filed a motion for extension of time to file its opening brief. By order dated November 23, 1988, the briefing schedule for both parties was extended. Opening and reply briefs were subsequently filed; the last briefs were received on December 27, 1988.

On May 3, 1989, Special Counsel provided a copy of the Supreme Court opinion in Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) to the judge, copy to respondent, in asserted compliance with Rule 3.3(a) and (b) of the ABA Model Rules of Professional Conduct.

C. Jurisdiction Established

There is no claim here arising out of national origin status. Rather, Mesa is charged with breach of its duty not to discriminate against Komsu by rejecting his application for the reason that he was not a U.S. citizen. It is undisputed that he was at all times relevant to this case a citizen of a nation other than the United States, during all of which time Mesa employed more than fourteen individuals.

A preliminary question, not previously addressed judicially, challenges availability of § 1324b relief in cases like the present one where enforcement of employer sanctions is not directly implicated. At least one commentator has suggested that under the view that the antidiscrimination provisions were adopted ``solely to counterbalance IRCA's employer sanctions provisions,'' only discrimination arising in context of employer sanctions would be actionable. Pivec, ``Handling Immigration-Related Employment Discrimination Claims,'' Immigration Briefings (April 1988), at 2.

That suggestion is said to have support in the legislative history of IRCA. For example, the Conference Report, H.R. Rep. No. 99-1000, supra, at 87, explains that the antidiscrimination provisions of IRCA ``. . . are a complement to the sanctions provisions, and must be considered in this context,'' and notes that if, as provided by IRCA, ``the sanctions are repealed by joint resolution, the antidiscrimination provisions will also expire, the justification for them having been removed.'' As reflected by the Conference Report, id. at 87-88, it is a commonplace that § 1324b had its genesis in apprehension that enactment of employer sanctions, 8 U.S.C. § 1324a, might be perceived to generate discrimination. See also House Committee on the Judiciary, Immigration Control and Legalization Amendments Act of 1986, H.R. Rep. No. 99-682, 99th Cong., 2d Sess., Pt. 1, at 68 (1986).

Legislative sunsetting of IRCA's employer sanctions program would terminate the antidiscrimination provisions as well. But the conferees pointed out that ``[t]he antidiscrimination provisions would also be repealed in the event of a joint resolution approving a GAO finding that the sanctions had resulted in no significant discrimination, or that the administration of the antidiscrimination provisions had resulted in an unreasonable burden on employers.'' Conference Report, H.R. Rep. No. 99-1000, supra, at 87. In either of

such situations, sanctions could continue despite repeal of the causes of action enacted at 8 U.S.C. § 1324b.

Obviously, enactment of the antidiscrimination provisions was triggered by enactment of employer sanctions. Just as obviously, IRCA contemplates that once sanctions were enacted, Congress would determine, with the assistance of the Comptroller General and others, whether the antidiscrimination mechanism was (a) unnecessary despite employer sanctions, or (b) too burdensome on employers in any event. Upon an affirmative finding in either case, IRCA anticipates that the antidiscrimination provisions may be sunsetted without regard to continuation of the employer sanctions program. 8 U.S.C. § 1324b(k).

Nothing contained in the unusually structured statutory mechanism for legislative inquiry into the continued viability of either employer sanctions or antidiscrimination provisions, 8 U.S.C. §§ 1324a (m) and (n), spells out or necessarily implies a requirement that causes of action arising under section 1324b must proximately result from enactment (or, implementation) of section 1324a. Nothing contained in IRCA limits causes of action under section 1324b to claims arising out of employer responses to the employer sanctions program mandated by section 1324a. Nothing constrains me to look behind a remedial statute for a limitation that would be inconsistent with the plain words of the statute, 8 U.S.C. § 1324b(a)(1), or included within the catalogue of exceptions to its sweep, 8 U.S.C. §§ 1324b(a)(2) and (4). For all the foregoing reasons, I conclude that 8 U.S.C. § 1324b confers jurisdiction upon administrative law judges to adjudicate complaints whether or not the alleged discriminatory practices implicate either the text or the administration of 8 U.S.C. § 1324a.

This conclusion is consistent also with the expressed views of the Department of Justice in the preamble to the rule establishing the ``. . . standards and procedures for the enforcement of section 102. . . .'' That rulemaking issued 28 C.F.R. Part 44, at 52 Fed. Reg. 37402 et seq. (October 6, 1987), made clear the Department's understanding that Congress banned ``. . . all intentional discrimination in light of the likely difficulty for a charging party or the Special Counsel to prove that such discrimination stemmed directly from an employer's desire to avoid sanctions.'' Id. at 37405.

The Department's comment, quoted above, was provided in explanation of adherence to its views, as expressed earlier by President Reagan upon signing IRCA on November 6, 1986, that the new law established disparate treatment but not disparate impact causes of action. ``President's Statement on Signing S. 1200 into Law,'' 22 Weekly Comp. Pres. Doc. 1534, 1535-37 (Nov. 10, 1986). I

understand the complaints filed by the Special Counsel against Mesa to have been intended to comport with that comment.

It follows that the predicates for jurisdiction are satisfied, subject to resolution of the questions of (1) standing on the part of Mr. Komsu and of the Special Counsel to prosecute the two complaints, and of (2) timeliness in the filing of the charge by Komsu with OSC, as discussed immediately below.

II. STANDING OF THE CHARGING PARTY AS AN INTENDING CITIZEN

Very few of the material facts developed on the record are undisputed. It is unquestioned, however, that Mr. Komsu, who was born on March 19, 1960, in Turkey, and attended high school and aeronautical college in Denmark, lawfully entered the United States in November 1985, on a tourist visa. In July 1986, Komsu married and was issued a temporary resident permit; he has been a permanent resident alien of the United States since at least November 1986.

As a lawfully admitted permanent resident alien he was eligible to qualify as an intending citizen as that term is understood under IRCA. The parties disagree as to whether he evidenced his intent to qualify as an intending citizen in time to obtain standing to maintain this citizenship discrimination charge under IRCA.

Mr. Komsu concededly did not formally evidence his intent to become a citizen prior to October 28, 1987, the date he executed an INS Form N-300, ``Application to File Declaration of Intention.'' Previously, in December 1986 he applied to Mesa for employment as a pilot. Late in March 1987 he filed an updated resume.

Title 8 U.S.C. section 1324b(a)(3) defines an ``intending citizen'' as an individual who:

> (B) is an alien who--
>
> (i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence . . ., is admitted as a refugee . . ., or is granted asylum . . . and
>
> (ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen. . . .

Section 1324b(a)(3) excludes from the definition of intending citizen an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible to apply for naturalization or within six months after November 6, 1986, whichever is later. Similarly excluded is an alien who applied on a timely basis but who does not obtain naturalization within 2 years after the date of the application subject to exception provided that the alien can establish that he/she is actively pursuing naturalization.

Mr. Komsu completed an I-772, ``Declaration of Intending Citizen'' which was received and filed by the INS on November 25, 1987. The parties disagree as to whether this filing was timely so as to allow Komsu to qualify as an intending citizen and obtain standing as such under IRCA. Mesa argues that to obtain standing as an intending citizen, Komsu must have filed his declaration of intention prior to the date on which he was allegedly denied employment by Mesa. OSC argues that consistent with then-existing regulations, the timing of Komsu's completion of an I-772 entitles him to ``intending citizen'' standing.

The statute imposes no time certain by which an alien must evidence his or her intention to become a citizen of the United States in order to qualify as an intending citizen. The implementing regulations in effect at the time of Komsu's filing on November 18, 1987, of his charge of discrimination with OSC, provide guidance. The Department of Justice final rule published at 52 Fed. Reg. 37402-11, October 6, 1987, which became effective November 5, 1987, controls in determining the efficacy of Komsu's filing of the I-772 in obtaining intending citizen status.

Section 44.101(c)(2)(ii) of the October 6 final rule provided that in addition to establishing status as a permanent resident, temporary resident, refugee or asylee, an alien qualifies as an intending citizen by evidencing ``. . . an intention to become a citizen of the United States through completing a declaration of intention to become a citizen (INS Form N-315, `Declaration of Intention'; or INS Form I-772, `Declaration of Intending Citizen') . . . .'' The preamble to the final rule included the following policy statement:

> We believe that the statute affords protection from citizenship discrimination only to those individuals who meet the statutory definition of ``citizen or intending citizen'' at the time of the alleged discriminatory acts. Therefore, the written declaration of intention must be completed prior to the occurrence of the alleged discrimination acts. However, because of the initial unavailability of the new INS Form I-772, ``Declaration of Intending Citizen,'' this requirement will not apply to acts of discrimination occurring prior to December 1, 1987. Therefore, for purposes of determining whether individuals are ``intending citizens,'' the Special Counsel will deem them to have completed the new INS Form I-772 prior to any discriminatory act occurring between November 6, 1986, and December 1, 1987, if such individuals: (1) Complete the new INS Form I-772 on or before December 1, 1987, and (2) assert in a charge that, prior to the alleged act of discrimination, they intended to become U.S. citizens, and would have completed this form had it been available.

Preamble, Final Rule, 52 Fed. Reg. 37402, 37406-07, Oct. 6, 1987 (emphasis added).

In the instant action, Komsu, a permanent resident alien at the time, executed and filed an INS Form I-772 on November 25, 1987. On that same day, he also executed a ``Statement Of Charging

Party Regarding I-772 Form'' in which he stated that ``. . . prior to the alleged act of discrimination alleged in my charge dated November 18, 1987, to the Special Counsel for Immigration Related Unfair Employment Practices I intended to become a U.S. citizen and would have filed the form I-772 `Declaration or (shc) Intending Citizen' had it been available to me.'' Exh. 28. Consistent with the interpretation accorded the filing requirement at that time by the preamble to the October 6, 1987 final rule, Komsu's completion of the I-772 prior to December 1, 1987, was deemed by OSC to have been completed prior to any discriminatory act occurring between November 6, 1986, and December 1, 1987.

The Department of Justice, in an interim final rule adopted as final, with changes, has subsequently amended its position on the timing of the filing of an I-772.[1] See 53 Fed. Reg. 48248, November 30, 1988. The revised rule to be codified at 28 C.F.R. § 44.101(c)(2)(ii) establishes that the declaration of intention filing requirement is satisfied as long as the declaration is completed and filed not later than the filing of the charge with OSC. Contrary to its prior position, the Department no longer requires that a declaration be completed and filed before the occurrence of the alleged discrimination. That change in policy and interpretation which became effective on November 30, 1988, has no bearing on the instant facts where the I-772 was completed on November 25, 1987, in compliance with the provision that recognized an I-772 as timely if filed by December 1, 1987. Mesa's argument that Komsu needed to have filed his declaration of intending citizen prior to the date on which the alleged discriminatory conduct occurred fails in light of the October 6, 1987 regulation.

The preamble to the October 6, 1987 regulation, quoted above in pertinent part, granted a grace period until December 1, 1987, for filing declarations of intent with respect to discrimination alleged

[1]By Notice published at 53 Fed. Reg. 9715, March 24, 1988, the Special Counsel expressed concern that confusion had arisen with regard to the timing of the filing of the I-772 and that neither the statute nor the text of the regulations specifically addressed the question of when the Declaration of Intention must be filed. The Notice announced that the Department of Justice views the declaration of intention filing requirement as satisfied provided that the declaration is completed and filed prior to filing the charge of discrimination with OSC. The effect of that general policy announcement of March 24, 1988, as well as the theory on which it was stated by Special Counsel is unclear. See final decision and order in Romo v. Todd, case no. 87200001, August 19, 1988, (Morse, J.) appeal pending in the United States Court of Appeals for the Ninth Circuit, docket nos. 88-7419, 88-7420, filed October 17, 1988. However, the policy embodied in the Notice has since been codified by the Attorney General and controls as of November 30, 1988. See interim final rule adopted as final with changes at 53 Fed. Reg. 48248, November 30, 1988.

to have occurred prior to that time. Conferral of the grace period was, in my judgment, both reasonable and just in light of the initial unavailability of the new INS Form I-772, ``Declaration of Intending Citizen'' and the reputed disuse of the previously used INS Form N-315, ``Declaration of Intention.'' Allowance of the grace period is a reasonable implementation by the Department of the rights and benefits conferred by IRCA. That the grace period was provided in the preamble rather than in the text of the regulation reflects the reality that the need for such accommodation in light of the initial unavailability of the Form I-772 would be limited in time. Its placement in the preamble in no way lessens the judicial deference which is its due.

Mesa argues on brief that the attempt by the October 6, 1987 regulation to create ``retroactive intending citizens'' is an ultra vires act in that it effects a substantive change to the statute. That argument is misguided because the preamble did not substantively alter the statute which is silent as to the time by which an intending citizen must evidence ``. . . an intention to become a citizen . . . through competing a declaration of intention to become a citizen. . . .'' 8 U.S.C. § 1324b(a)3(B)(ii). Rather, the regulation filled a gap not previously addressed by statute or regulation, constituting a reasonable interpretation which implements the rights and benefits conferred by IRCA.

Mesa further argues that even if the October 6 regulation is lawful, Komsu is not entitled to retroactive intending citizenship status because he cannot meet the prerequisites by which to take advantage of the grace period provided by the preamble. Mesa relies on an apparent inconsistency between Komsu's testimony at deposition and his November 25, 1987 ``statement'' (exh. 28) that prior to the alleged act of discrimination he intended to become a U.S. citizen and would have filed the I-772 had it become available to him.

On brief, Mesa asserts that since Komsu testified at deposition that prior to November 25, 1987, he ``didn't know about all this, that you could be intending to become U.S. citizen and have to file this kind of things before, tr. 205, Komsu could not have formed the requisite intent to become a citizen prior to the alleged discriminatory act. Given the inconsistency, Mesa contends that Komsu's statement is false with regard to his intention and that prior to November 25, 1987, he did not have the requisite intention to become a U.S. citizen, a manifestation of which was required by the preamble to the October 6, 1987 regulation. Consequently, Mesa argues that Komsu may not benefit from retroactive intending citizen status.

Testimony of Komsu at hearing, however, establishes that he did in fact form the requisite intention to become a citizen at least as far back as when he applied for a position with Mesa. Komsu testified that during an April 1987 conversion with Eric Trigg, then Mesa's chief pilot, regarding Komsu's employment application and during which Trigg told Komsu about Mesa's policy of hiring only U.S. citizen pilots, he told Trigg that he intended to become a U.S. citizen but anticipated that it would take him a year or two to complete the process. Tr. 84-85. I understand Komsu's deposition to acknowledge that at the time he filed the charge with OSC he was unaware of the requirement to file an I-772 to obtain individual remedies for citizenship status discrimination.

Komsu's unrebutted testimony supports the conclusion that he had intended to become a U.S. citizens at least as early as the time of his April application for employment and thus not later than Mesa's alleged discriminatory refusal to hire him.

That Komsu did not know that certain forms were required to be filed to evidence his intention to become a citizen does not detract from the fact that his intention did exist. It is undisputed that Komsu began the formal process of evidencing his intention by filling out the INS Form N-300, application to file a declaration of intention (exh. 26), on October 28, 1987, and less than a month later on November 25, 1987, by completing and filing an I-772. Exh. 27.

The October 6, 1987 regulation which was in effect on November 25, 1987, the date that Komsu filed his I-772, determines that the timeliness of his filing a declaration of intention as it relates to his claim to intending citizen status and consequently his standing to assert a claim under IRCA. Under the October 6, 1987 regulation, completion of a written declaration of intent prior to the alleged discrimination was a prerequisite to maintaining a claim as an intending citizen. Komsu, however, benefits from the grace period recited in the preamble to the regulation by having completed and filed his I-772 by December 1, 1987. Accordingly, the Special Counsel would be required to deem Komsu's I-772 as having been completed prior to the alleged discriminatory act. Subsequent changes in policy regarding the time for filing an I-772, not having been announced as having retrospective effect, do not impact on a determination of the timeliness of Komsu's obtaining intending citizen status.

The Department of Justice has the duty to implement IRCA. The preamble to the October 6, 1987 regulation provided a grace period for filing the new I-772 forms due to their initial unavailability. In my judgment, the grant of that grace period reflected the transitional characteristics inherent in implementing the new statute. As

such, it is a just and reasonable exercise of the department's authority to implement the statute.

In sum, by operation of the preamble to the October 6 regulation, Komsu completed an I-772 prior to December 1, 1987. By his written statement of November 25, 1987, he satisfied the additional, regulatory requirement that he assert in a charge that he intended to become a U.S. citizen prior to the alleged discriminatory act and that he would have completed the I-772 had it been available. See preamble, supra, 52 Fed Reg. at 37407. Consequently, I conclude that Komsu is an intending citizen who has standing to assert a claim of citizenship status discrimination alleged to have occurred prior to December 1, 1987.

III. STANDING TO FILE A COMPLAINT BY THE OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES

A. Authority To File Complaints

Title 8 U.S.C. section 1324b(c)(1) explicitly provides for the appointment of a Special Counsel for Immigration-Related Unfair Employment Practices who is responsible for investigation of charges and issuance of complaints of discrimination under section 102 of IRCA. The statute further provides that ``. . . any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf) or an officer of the Service alleging that an unfair immigration-related employment practice has occurred or is occurring may file a charge respecting such practice or violation with the Special Counsel. . . .'' 8 U.S.C. § 1324b(b)(1). ``The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge.'' Id. at § 1324b(d)(1).

If the Special Counsel fails to file a complaint before an administrative law judge, ``. . . the person making the charge may . . . file a complaint directly before . . .'' the judge. Id. at § 1324b(d)(2). In the instant action, Komsu filed his charge of discrimination with OSC on November 18, 1987. Exh. 37. OSC's filing of the two complaints with the OCAHO on January 12, 1988, was clearly within the statutorily prescribed 120-day period from receipt of the charge during which the Special Counsel is to investigate and determine whether or not to file a complaint with respect to the charge.

As Komsu has been found to be an intending citizen with standing to bring a citizenship discrimination claim under IRCA, OSC

has standing to file a complaint on Komsu's behalf, Case No. 88200002. In addition, by virtue of its power to ``. . . conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation . . . file a complaint . . .'' before an administrative law judge, 8 U.S.C. § 1324b(d)(1), Special Counsel has standing to investigate a charge or proceed on its own initiative and, presumptively, to file a complaint alleging a pattern or practice of discrimination by Mesa, Case No. 88200001.

B. Pattern Or Practice Liability May Be Prosecuted By The Special Counsel

IRCA provides no definition of the pattern or practice formulation enacted at section 102, 8 U.S.C. § 1324b. However, the House Judiciary Committee did discuss its understanding of the term as provided in section 101 with respect both to criminal and civil injunctive liability under 8 U.S.C. § 1324a(f) arising out of violations of prohibitions against employment of unauthorized aliens:

> The term ``pattern or practice'' has received substantial judicial construction, since the term appears in the Voting Right [sic] Act (42 U.S.C. 1971 et seq.), the Civil Rights Act of 1964 (42 U.S.C. 2000 et seq.), and the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.). The Committee emphasizes that it intends to follow the judicial construction of that term as set forth in U.S. v. Mayton, 335 F.2d 153 (1964), International Brotherhood of Teamsters v. U.S., 431 U.S. 324, and U.S. v. International Association of Ironworkers Local No. 1, 438 F.2d 679 (1971). These cases all indicate that the term ``pattern or practice'' has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. The same interpretation of ``pattern or practice'' shall apply when that term is used in this bill with regard to the injunctive remedy that may be sought by the Attorney General for recruitment, referral or employment violations, as well as for certain unfair immigration-related employment practices.

H. R. Rep. No. 99-682, supra, at 59 (emphasis added).

For its discussion of proposed pattern or practice liability in the antidiscrimination ambit, the committee, id. at 71, merely paraphrased the language subsequently enacted, now codified as 8 U.S.C. § 1324b(d)(2). There is no reason to suppose that the committee intended that pattern or practice be understood differently in the antidiscrimination context of IRCA than it was to be understood in the employer sanctions context of the same legislation. While there are many differences between provisions of the two sections, here the formulation is identical with no talisman to the contrary. By not having differentiated the meaning of the phrase pattern or practice, the committee is understood implicitly to have intended that the meaning it did articulate as to the one section applies as well to the other.

Before discussing whether the evidence fits the definition, a threshold inquiry must be resolved, i.e., whether Special Counsel may properly maintain a pattern or practice cause of action. This inquiry derives from the peculiar positioning in the statute of the sole provision dealing with pattern or practice in discrimination cases:

> Private actions--
>
> If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge.

8 U.S.C. § 1324b(d)(2).

It may be argued that by such placement under the subsection entitled ``Private actions,'' Congress contemplated that a complaint alleging ``a pattern or practice of discriminatory activity'' might be filed only by ``the person making the charge'' and not by the Special Counsel. I think otherwise.

Absent some such indication in the legislative history, it would be inconsistent with the thrust of the protections sought by IRCA to conclude that Special Counsel was to be limited to prosecuting only individualized actions before administrative law judges. Nor should it be assumed that Congress intended to clothe individuals to the exclusion of the newly created statutory officer with authority to initiate actions which reflect ``regular, repeated and intentional activities'' (as defined by the House Judiciary Committee, H. R. Rep. 99-682, supra, at 59). Patently, pattern or practice jurisdiction implicates causes of action initiated by or prosecuted to vindicate the public interest in eliminating ongoing discriminatory practices. See, e.g., EEOC v. United Parcel Service, 860 F.2d 372 (10th Cir. 1988).

The relevant legislative history states the understanding that subsection 1324b(d) ``[a]uthorizes private action where the Special Counsel has not filed a complaint . . . based on a charge alleging knowing and intentional discriminatory activity or a pattern or practice of such activity.'' H. R. Rep. 99-682, supra, at 93 (Judiciary Committee section-by-section analysis of H.R. 3810 as amended) (necessarily implying authority on the part of the Special Counsel to act prior to expiration of the 120-day period for investigation). See 8 U.S.C. § 1324b(d)(1) (Special Counsel has 120 days after receipt of a charge of an unfair immigration-related employment practice ``to bring a complaint with respect to the charge before an administrative law judge'').

Considering that filing of any charge with the OSC is a condition precedent to filing with a judge, I am unable to conclude that Congress intended that the charging party but not the Special Counsel might maintain an action for ``a pattern or practice of discriminatory activity.'' Moreover, in the preceding subsection, 8 U.S.C. § 1324b(c)(2), assigning duties to the Special Counsel, IRCA charges OSC with ``. . . investigation of charges and issuance of complaints under this section and in respect of the prosecution of all such complaints before administrative law judges. . . . '' There are no words of limitation to suggest that ``such complaints'' exclude the pattern or practice cases contemplated at subsection (d)(2). I do not overlook that (d)(2) is introduced by the catch-line ``Private actions,'' but I am unable to conclude that those words inform the substantive text.

It is generally agreed that statutory titles ``have a communicative function.'' Sutherland, Statutory Construction, § 47.03 (4th Ed 1984). ``Section headings . . . serve the same functions for sections that the title does for the entire act and generally should be accorded the same treatment.'' Id. at § 47.14 (footnote omitted). The several ``well established rules'' for interpretation include the proposition that ``. . . the court may consider the title to resolve uncertainty in the purview of the act or for the correction of obvious errors.'' Id. at § 47.03. Headings ``may serve as an aid to the legislative intent . . .'' Id. at § 47.14. In contrast, another rule provides ``. . . that the words of the heading being more general will not control the more specific words of the act.'' Id. Stated otherwise, ``[t]he title cannot control the plain words of the statute.'' Id. at § 47.03.

On balance, Sutherland teaches that whether the catch-line should control the meaning of other words of the statute ``is a matter of judgment.'' Id. at § 47.14. Exercising that judgment, I conclude that the correct analysis is that the heading ``Private actions'' in 8 U.S.C. § 1324b(d)(2) does not constrain the filing of, but rather, consistent with the purpose of the statute, is the authorization to the Special Counsel to file pattern or practice complaints.

IV. THE TIMELINESS OF KOMSU'S FILING A CHARGE OF DISCRIMINATION

Title 8 U.S.C. section 1324b(d)(3) provides that a complaint may be filed respecting any unfair immigration-related employment practice occurring no more than 180 days prior to the date of the filing of the charge with the Special Counsel. Similarly, the Department of Justice regulation in effect on November 18, 1987, and as codified at 28 C.F.R. § 44.300(b) provides that ``[c]harges shall be

filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice. For purposes of determining when a charge is timely . . ., a charge mailed to the Special Counsel shall be deemed filed on the date it is postmarked.''

It is undisputed that Komsu's charge to OSC was postmarked November 18, 1987. A factual dispute, however, exists in identifying the date of the alleged discriminatory activity from which the 180-day time period would begin to run. Determining the timeliness of Komsu's charge filed with OSC requires an identification of the actual unlawful employment practice of which Komsu complains.

The Special Counsel alleges that Komsu first applied for employment with Mesa in December 1986, concedes that the issue of citizenship as it pertained to Mesa's hiring practices was first discussed in April 1987, but argues that Komsu was not told until August 17, 1987, that he would not be hired by Mesa. Construing August 17, 1987, as the date of the alleged discriminatory conduct, OSC contends that the filing of Komsu's charge on November 18, 1987, was timely in its own right. OSC argues in the alternative that the facts and relevant case law support equitable tolling of the 180-day time limit and that the continuing nature of the violation also makes Komsu's filing timely.

Mesa, however, argues that the alleged discriminatory activity occurred, if at all, in April 1987, and that the charge filed with OSC is thus time-barred in that any discriminatory act occurred more than 180 days prior to November 18, 1987. In addition, Mesa denies the applicability of equitable tolling to overcome the fact that the proceeding is otherwise time-barred.

In determining the commencement of limitation periods for filing charges, courts have tended to focus on communication to or awareness by the charging party of facts which would support a charge of discrimination. For example, the Supreme Court in Delaware State College v. Ricks, 449 U.S. 250 (1980), held that the limitations period for filing a charge of discrimination begins to run on the date that the charging party is notified of an adverse employment decision. In Ricks, a college professor had been offered a one year terminal contract with explicit notice that his employment would cease at the expiration of the contract. The Court agreed with the district court's finding that the limitation period commenced on the date that the employer notified Ricks that he would be offered a terminal contract for the upcoming school year. The Court stated that ``the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks. That is

so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later.'' 449 U.S. at 258 (footnote omitted).

Among the several circuit court opinions on the issue is the standard articulated in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975):

> . . . the statute [of limitation] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.

Precedents make clear that courts undertake factual inquiry to determine whether in applying limitations, charging parties acted with a prudent regard for their rights in respect of their employers' conduct. See, e.g., Wislocki-Goin v. Mears, 831 F.2d 1374 (7th Cir. 1987), cert. denied, 108 S.Ct. 1113 (1988); Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559 (11th Cir. 1987); Bickham v. Miller, 584 F.2d 736 (5th Cir. 1978); Shepherd v. Giant Food, Inc., 434 F. Supp. 28 (D. Md. 1977); Smith v. Rexall Drug Co., 415 F. Supp. 591 (E.D. Mo. 1976), aff'd, 548 F.2d 762 (8th Cir. 1977); Farmer v. Washington Federal Savings & Loan Ass'n, 71 F.R.D. 385 (N.D. Miss. 1976) (the limitation period did not begin to run when plaintiff was originally informed by the employer that she would not be hired due to the fact that no job vacancies existed).

The Tenth Circuit has explained that the 180-day limitation period for filing age discrimination charges with EEOC begins to run in context of plant closings when employees hopeful of transfer to another facility rather than discharge could no longer ``. . . have had any realistic expectation of a transfer'' because the date of the announced closure had arrived. Gray v. Phillips Petroleum Co., 858 F.2d 610, 615 (10th Cir. 1988).

In EEOC v. Safeway Stores, Inc., 634 F.2d 1273 (10th Cir. 1980), cert. denied, 451 U.S. 986 (1981), the plaintiff, a long time employee of the defendant, who had expressed interest in being transferred to the carpentry division, filed a charge of employment discrimination with the EEOC on November 29, 1974. Although plaintiff had been told he would be considered for the job when the incumbent retired, another named Chambers was hired as assistant, becoming the carpenter when the retirement in fact occurred, and plaintiff was not considered. The court's discussion is instructive:

> Chambers was hired on March 11, 1974, but this was a hiring of an assistant. Mr. Nobel, the sole carpenter until March 11, 1974, did not retire until November, 1974. It would appear that the original act of hiring Chambers as an assistant was only the start of the discrimination. The final act or culmination of the discrimination was in November, 1974, at which time Nobel took his retirement. It was only then that the discriminatory act became fully apparent. The 180-day requirement was met. The discriminatory act started in March of 1974, and culminated

> in November, 1974, when Mr. Nobel retired, and Chambers became the full-fledged carpenter. The statute of limitations was not set in motion until the completion of that act.

634 F.2d at 1284 (emphasis added).

In the instant action, the parties dispute when Komsu became aware or should have become aware of facts which would support a charge of citizenship status discrimination under IRCA so as to commence the running of the 180-day limitation period of 8 U.S.C. § 1324b(d)(3).

Mesa asserts that the alleged discriminatory acts became apparent to Komsu in April 1987 and would have been apparent at that time to a person with a reasonably prudent regard for his rights. Mesa states that during a phone conversation with Komsu in April 1987, Eric Trigg told Komsu of Mesa's policy regarding the hiring of United States citizens which was sufficient to put a reasonably prudent person on notice and that Komsu knew, as evidenced by his statements at trial and to Jan Miller, executive secretary of Mesa, that he would not be hired by Mesa. Mesa goes on to argue that while Komsu may not have known of the protection afforded intending citizens, he had sufficient knowledge of his rights to contact the EEOC.

Mesa further asserts that Eric Trigg testified with certainty that April 1987 was the last time he had spoken to Komsu and that in April, Jan Miller informed Komsu that she would not put any more of his calls through to Trigg. Mesa maintains that the record does not show that Trigg gave any further consideration to the matter of Komsu's application after April 1987.

Mesa assert that rejection letters were never sent to pre-interview applicants and that there was no evidence that Komsu ever expected to receive one. Mesa points out that the cards sent acknowledging receipt of Komsu's resume said that the company would contact him if it wanted to schedule an interview. Mesa argues that Komsu had no right to expect any further notice with regard to his resume and that Eric Trigg's telephone conversation with him April 1987 was more than adequate to notify Komsu of his rejection and to commence the 180-day limitation period.

The Special Counsel asserts, however, that in April 1987, Komsu had no reason to believe that Mesa's policy was absolute, that he had not been told with finality that the would not be hired, but rather that Eric Trigg had led him to believe that he was still under consideration.

OSC relies on case law following the Reeb standard that the time for filing Title VII charges does not begin to run until the charging party became aware or should have become aware of facts support-

ing a charge of discrimination. OSC argues that the decision not to hire Komsu was not made known to him during the April conversation; therefore, the 180-day time period did not begin to run in April. OSC asserts that Komsu's optimism that he would be hired despite Mesa's hiring policy is reasonably justified in light of Trigg's conveying a polite, helpful image to Komsu and Trigg's volunteering to talk to Larry Risley, Mesa's president, to see what could be done. Finally, OSC argues that Mesa's decision not to hire Komsu was not made known to him until August 17, 1987, when Eric Trigg explicitly told him that Mesa would not hire him because he was not a U.S. citizen. Consequently, at that point Komsu was aware of facts supporting a charge of discrimination, and it was at that time that the 180-day period began to run. Komsu's charge filed with OSC on November 18, 1987, would, according to OSC, clearly cover discrimination occurring in August 1987.

Although it is disputed whether Komsu and Trigg's conversation in April 1987 was their last conversation, it is clear that the content of the April conversation alone did not adequately inform Komsu that he would not be hired by Mesa. Both Eric Trigg and Komsu agree that during that conversation, Trigg told Komsu about Mesa's policy of hiring only U.S. citizens. Mesa contends that Trigg's statement was tantamount to an outright rejection of Komsu and would have been regarded as such by a reasonably prudent person. As pointed out by Komsu at hearing, however, he did not understand Trigg's statements made in April regarding Mesa's hiring policy to mean that Mesa would not hire him:

> He did not say that he will--they are hiring only U.S. citizen. The way he said was that they had a policy about only hiring U.S. citizen. They just had a policy, that what he told me. He didn't say that he didn't want to hire me or anything like that.

Tr. 222.

Komsu's acknowledgment that he sought an exception to the company's espoused hiring policy did not, as Mesa asserts, amount to a recognition by Komsu that he would not be hired. Rather, Eric Trigg's manner and discussions with Komsu reasonably led the latter to believe that he might be hired despite the policy. On asking Trigg to consider him for a position with Mesa despite the policy, Komsu stated that ``[i]f he said that we are definitely not hiring except for U.S. citizen, I wouldn't have.'' Tr. 217.

Although Komsu concedes that he was concerned and suspicious that he might not be hired, he remained optimistic that he might still be hired. Having seen both Trigg and Komsu on the witness stand, and having heard their testimony, it is my judgment that Trigg's behavior in 1987 gave Komsu reason to be optimistic. Refer-

ring to his conversations with Eric Trigg, Komsu stated that ``. . . every time I called he was nice to me and he said he would consider it and he will try to talk to Larry and see what they can do. He didn't close the doors like say, we don't want to hire you. He never said that to me until August, '87.'' Tr. 221.

Describing his behavior during previous conversations with Komsu in December 1986, Trigg admitted to being ``. . . a little bit too nice to him on the telephone and he kept calling back. . . . Tr. 520. Trigg was not sure how many calls from Komsu were made in December and was unsure also of how many times Komsu called in April asking to be hired. Despite Trigg's unsureness of the number of calls, he recalled that his last conversation with Komsu was in April.

Jan Miller recalled Komsu's calls to Trigg in December and again in April 1987. She remembered Trigg yelling at her the last time that she put a call from Komsu through to him and telling her not to send more calls through. As to her last conversation with Komsu, Miller recalled telling Komsu that Trigg had told her not to put any more calls through at that time. Miller testified that during the conversation with Komsu, he wanted to know if the reason that he was not being hired was because of his not being a U.S. citizen. Miller stated that she told him no and that she thought it ``probably had nothing to do with his being a non-citizen, it probably had to do with the annoying phone calls.'' Tr. 701.

I find that Mesa failed in April 1987 to make it plain to Komsu that the policy was unexceptionable.

Mesa's witnesses concede that they dealt in euphemisms, as made clear by their claim that alienage was not the true reason Komsu was rejected; instead of telling him he was not wanted because he was too ``pushy,'' he was told he was ineligible because he was not a citizen of the United States. In my judgment, they have no claim to credibility on this score, considering their testimony in context of the overwhelming direct evidence of the company hiring policy.

Mesa's witnesses chorus Mesa's posture that the candidate was not rejected by virtue of the discriminatory hiring policy which he purportedly had been told was the reason for his rejection but which Mesa claims was as subterfuge. The judge is expected to conclude, however, that the false explanation for rejection having been communicated to the candidate he was supposed to understand it as a final rejection sufficient to put him at risk if he delayed in applying for legal redress more than 180 days after that rejection. I cannot agree.

Komsu's recollection is at least as good as the recollection of Mesa's witnesses and in fact better for he had a greater interest. Trigg and Komsu are consistent in recalling that the last conversation was definitive. Their testimony conflicts over when the last conversation took place. This is not a matter of credibility in the sense of reliability of testimony on the basis of motive to fabricate. It is rather the resolution of conflicting recollection as to when the last discussion took place. Trigg volunteered that Jan Miller was not the only one who put through his calls, ``. . . Barbara Ell did the same thing when she was receptionist.'' Tr. 528. Moreover, I am not prepared to assume, and there was no testimony to the effect, that the chief pilot of a small emerging airline is protected one hundred percent of the time by a receptionist to screen his calls. Accordingly, I accept Komsu's recollection that when, after persistent inquiry, he understood he was being told he would not be hired, it was August of that year.

Mr. Komsu was not cross-examined on his recollection that his last conversation with Trigg took place on August 17 or 18, 1987, a few days after his daughter was born. It is consistent with my understanding of the record to conclude that ``the discriminatory act became fully apparent'' only at that time, EEOC v. Safeway Stores, Inc., supra, 634 F.2d at 1284, and only then would he no longer have ``any realistic expectation,'' Gray v. Phillips Petroleum Company, supra 858 F.2d at 615, of employment as a Mesa pilot.

I find, therefore, that he was not told in April with finality in a way that he should reasonably have understood that because he was not a U.S. citizen he would be hired. Accordingly, I hold that not until August 1987 was it made plain to Komsu that the policy inexorably applied to him. Once I accept that he was not informed in April 1987 with sufficient finality to take him out of the applicant pool, Komsu's testimony that he was rejected on citizenship grounds in August 1987 is sufficient. It follows that, 180 days not having elapsed from August 1987 to his filing of the charge with the Special Counsel on November 18, 1987, I hold that the charge was timely filed.

A. Equitable Tolling

1. The General Principle

Against the possibility that it would be held that Komsu knew or should have known of his rejection in April 1987, more than 180 days before filing his charge with the Special Counsel, OSC argues that the charge filed by him with EEOC tolled the running of the 180-day limitation period for filing a charge with the Special Counsel. OSC asserts that IRCA is susceptible to equitable tolling as the

180-day period is not jurisdictional but rather operates like a statute of limitation, and that both case law and the facts support tolling in the instant action.

OSC asserts that the August 20, 1987 charge filed by Komsu with EEOC tolled IRCA's 180-day limitation period such that all acts of discrimination by Mesa within 180 days prior to August 20, 1987, are covered. OSC suggests that since Komsu last applied to Mesa in March 1987, equitable tolling would make his charge timely even if he had been rejected in April 1987.

Mesa contends, however, that the circumstances provide no basis for tolling and that the cases cited by OSC are distinguishable from the instant action in which no knowing misrepresentation was made with the intent to cause Komsu not to file his charge and upon which Komsu can be said to have relied. Mesa asserts that Komsu's filing with EEOC does not toll the statute of limitations for filing a charge with OSC. Mesa further asserts that Komsu was aware of his rights under IRCA, and that having failed to file a timely charge of discrimination with OSC, his case is necessarily time-barred.

Initial proceedings pursuant to 8 U.S.C. § 1324b, such as this one, have been tried, more often implicitly than explicitly, on the assumption that, in the main, section 1324b is informed by the body of case law that has developed through judicial application of Title VII of the Civil Rights Act of 1964, as amended. No party in this case has suggested otherwise.

The Supreme Court in Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982), held in a Title VII sex discrimination case that `` . . . filing a timely charge . . . with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.'' The Court reasoned that:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

455 U.S. at 398.

The 180-day period to file a notice of intent to sue in initiating a charge of age discrimination in violation of the ADEA set forth at 29 U.S.C. § 626(d)(1), which is substantially similar to the limitation provision in Title VII, has likewise been found to be subject to equitable tolling. See Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981).

In the Tenth Circuit it is settled law that the limitation periods for filing charges under both Title VII and the ADEA are subject to equitable tolling. For example, in Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99 (1977), reh'g denied, 434 U.S. 1042 (1978), the Tenth Circuit, noting that it had already determined that the 180-day filing period with the EEOC could be tolled under certain circumstances, reasoned that the similarities between the ADEA and Title VII, the liberal reading of analogous time limitations in Title VII, the remedial nature of the ADEA, and the lack of legal training and guidance for many complainants support treating time limitations of the ADEA as analogous to statutes of limitation.

Clearly, the court was concerned that ``strict compliance'' with time limitations in context of such ``. . . remedial and humanitarian legislation * * * should not be required of laymen attempting to enforce their statutory rights.'' 539 F.2d at 1260. Significantly, the plaintiff in Dartt filled out a complaint form of the local wage and hour division of the Department of Labor rather than filing with the Secretary of Labor a notice of intent to file an ADEA action. The Tenth Circuit concluded that the congressional purposes of the ADEA were fulfilled despite the plaintiff's late filing of the notice of intent to sue and that the defendant's posted notice regarding information pertaining to the ADEA was inadequate to inform the plaintiff of the 180-day notice requirement.

Subsequent to Dartt the Tenth Circuit made clear what circumstances would justify tolling of time limitations in such statutes. See particularly Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984):

> This circuit's decisions have indicated that the time limits contained in Title VII will be tolled only where the circumstances of the case rise to a level of ``active deception'' sufficient to invoke the powers of equity. Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 838-39 (10th Cir. 1979). For instance, equitable tolling may be appropriate where a plaintiff has been ``lulled into inaction by her past employer, state or federal agencies, or the courts.'' Carlile v. South Routt School District RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981); see Gonzalez-Aller Balseyro, 702 F.2d at 859. Likewise, if a plaintiff is ``actively misled,'' or ``has in some extraordinary way been prevented from asserting his or her rights,'' we will permit tolling of the limitations period. Wilkerson v. Siegfried Insurance Agency, Inc. 683 F.2d 344, 348 (10th Cir. 1982); see also Cottrell, 590 F.2d at 838.

2. The Principle Applied

It is consistent with Jan Miller's surmise to Komsu that his annoying phone calls, rather than his citizenship status, figured in his non-hire, and my impression that Eric Trigg had clearly evidenced a disinclination to be confrontational, that Komsu did not understand in April that he would not be hired. This is not a situa-

tion unknown to the courts. It has been judicially recognized that the time limit for filing an employment discrimination claim may be interrupted or suspended where a plaintiff's failure to file is caused by an employer's holding out hopes of employment.

In Potter v. Continental Trailways, Inc., 480 F. Supp. 207 (D. Colo. 1979), an unsuccessful applicant for a full-time position as a bus driver charged his employer with age discrimination after he had relied on the advice of an agent of the defendant. The defendant moved to dismiss, citing plaintiff's failure to comply with the ADEA requirement that a notice of intent to commence a civil action be filed within 180 days after the alleged unlawful practice. Denying pretrial summary dismissal, the court noted that:

> . . . the time limit in which a plaintiff must file may be interrupted or suspended where plaintiff's failure to file is caused by employers holding out hopes of reemployment. . . . An employer may not retain a discriminatory policy of hiring, suggest alternative means for a potential employee to get around such a policy, and then, by not hiring the employee under alternative means, enjoy the benefit of the short 180-day ADEA notice requirement barring the employee's claim.

Id. at 211 (citation and footnote omitted).

Mesa contends that even assuming Komsu had discussions with Mesa personnel after April 1987, such conversations are unavailing in light of authority that an effort to keep the door open does not avoid time limitations. I agree with OSC that Mesa's reliance on EEOC v. McCall Printing Corp., 633 F.2d 1232 (6th Cir. 1980) is misplaced. Although words to that effect appear in the opinion, the case turned instead on availability of relief for residual effects of preenactment discrimination. Moreover, only under Mesa's view, but not mine, was Komsu's further inquiry a request for relief from prior discrimination; rather, as already found, it was not brought home to him until August 1987 that he would not be hired, and in the meanwhile it was not unreasonable for him to believe he was still under consideration. See Potter v. Continental Trailways, Inc., supra. See also, in this respect, Cocke v. Merrill Lynch & Co., Inc. supra, 817 F.2d at 1562:

> Although plaintiff was suspicious that the reason he had not been relocated prior to receiving notice of termination was because of his age, he may well have been justified in waiting before resolving that suspicion into a fact he should act upon during the time the employer made a good faith effort to relocate him.

Courts have been lenient in granting equitable relief from limitations where the alleged discriminatee has mistakenly filed its charge in the wrong forum, acknowledging ``. . . the remedial nature of the legislation and the contemplated `. . . initiation of compliance procedures by laymen, unassisted by lawyers,' . . .'' Morgan v. Washington Mfg. Co., 660 F.2d 710, 712 (6th Cir. 1981), quoting Coke v. General Adjustment Bureau, Inc., supra. The gener-

al rule is to the effect that tolling is available where it is shown that the plaintiff having filed a charge in the wrong forum, nevertheless, was diligently attempting to assert his or her rights. In Morgan, the plaintiff had addressed her sex discrimination claim to President Carter at the White House after which it was forwarded to the Department of Labor, reaching EEOC, the appropriate venue, after the limitation period has expired.

The Morgan court reversed the district court's granting of the employer's motion to dismiss the complaint as time-barred, concluding that:

> . . . in the absence of prejudice to the defendant or a showing of bad faith or lack of diligence by a claimant, equitable considerations should toll the 180 day period for filing a complaint under Title VII when the claimant makes a timely filing with a federal agency, like the Labor Department, which has jurisdiction in some fields of employment discrimination and when that complaint is forwarded to the EEOC shortly after the time period has expired. The EEOC has appeared . . . to urge us to adopt a rule permitting equitable tolling under these circumstances, a rule which the EEOC itself applies in its own practice. This tolling standard appears fair and equitable and is not inconsistent with the statute or our cases. It is in accordance with the practice of the federal agency in question and has been adopted by other courts which have addressed the question.

660 F. 2d at 712.

It is reasonable to conclude, as I do, that the time limitation for filing a charge of discrimination under 8 U.S.C. § 1324b(d)(3) is susceptible to equitable modification on a case by case basis. See Order Denying Petitions to Quash . . . in In Re Investigation of St. Christopher-Ottilie, file nos. 88-2-01-0016A0 through -0016D0, (Morse, J.), May 5, 1988. The filing requirement as well as the overall purpose of § 102 of IRCA is analogous to both Title VII and the ADEA and as such, precedent governing Title VII and the ADEA are helpful guidance in interpreting the provisions of IRCA.

For further support see Egleston v. State University College at Geneseo, 535 F.2d 752 (2d Cir. 1976), where the district court had dismissed as time-barred the pro se sex discrimination complaint of an assistant professor who had been notified that her contract would not be renewed. Plaintiff had initially filed a charge with the Office of Federal Contract Compliance (OFCC), then filed a complaint with the New York State Division of Human Resources, and finally with the EEOC. Of particular significance, is the Second Circuit's conclusion that ``[w]e consider the filing with the OFCC as constituting a filing with the EEOC.'' 535 F.2d at 755 n. 4. Reversing the district court, Second Circuit noted:

> . . . Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination

> from the reach of the Act. Prior decisions, both of the Supreme Court and of this Circuit have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today.

Id. at 754-55 (footnotes omitted).

For additional cases which have allowed tolling of the limitation period where the claimant's charge was filed in the wrong forum, see, e.g., Oliver v. State of Nevada, 582 F. Supp. 142 (D. Nev. 1984) (180-day limitation period for filing charge of employment discrimination tolled for time during which employee reasonably believed claim was to be filed with Department of Interior until agency advised her that it had no jurisdiction over claim, and thus subsequent charge filed with EEOC was timely); Dickerson v. United States Steel Corporation, 439 F. Supp. 55 (E.D. Pa. 1977), vacated on other grounds sub nom. Worthy v. U.S. Steel Corp., 616 F.2d 698 (3d Cir. 1980) (date of filing of discrimination charge with the Department of Labor was considered the equitable equivalent of date of filing with the EEOC for limitations purposes); EEOC v. Delaware Trust Co., 416 F. Supp. 1040, 1043 n. 6 (D. Del. 1976) (``[i]t does not seem unreasonable for a layperson . . . seeking assistance concerning an instance of possible discrimination in job hiring, to write to the federal Department of Labor after receiving a cryptic postal rebuff to her first attempt to register a complaint with the nearest EEOC office'').

Case law, as discussed above, clearly supports equitable modification of the filing requirements of Title VII and of the ADEA which have been construed as not jurisdictional but rather more in the nature of statutes of limitation, and, accordingly, subject to equitable tolling. The purposes achieved by equitable modification in Title VII cases and under the ADEA will be equally well-served in respect of IRCA by equitable modification of the section 102 filing requirements. I perceive no prejudice to Mesa as the result of equitable tolling. Indeed, Mesa's submissions to both EEOC and OSC, far from denying discriminatory conduct, recite in terms Mesa's U.S. citizen-only pilot hiring policy.

As in Title VII and ADEA cases, a liberal rather than a strict construction of the filing requirements of IRCA will best facilitate the purpose of 8 U.S.C. § 1324b in eliminating immigration-related unfair employment practices and will prevent shielding on technical grounds, instances of discrimination otherwise violative of IRCA. Claimants who file § 102 charges may often be laypersons unfamiliar with the procedural technicalities of antidiscrimination statutes. Zeki Yeni Komsu is such an individual.

I do not agree with Mesa's claim that the cases relied on by OSC on brief rely on an estoppel theory and that there are no facts to

support an estoppel argument on the instant record. In e.g., Cocke v. Merrill Lynch & Company, Inc., supra, the court distinguished between two analyses whereby equitable modification may suspend the limitations period for filing charges of discrimination: (1) equitable estoppel requiring fraud or misrepresentation by an employer and (2) equitable tolling which does not depend upon employer misconduct. The court noted that rather than focusing on employer misconduct, ``. . . equitable tolling focuses on the employee with a reasonably prudent regard for his rights.'' 817 F.2d at 1561.

The instant facts support equitable modification of the 180-day filing requirement as applied to Komsu's filing a charge of citizenship status discrimination with OSC. Eric Trigg's admittedly polite manner in dealing with Komsu reasonably fostered Komsu's perception of the possibility that he might be hired by Mesa whatever other impact Trigg may have intended. The fact that Trigg agreed to discuss the situation with Larry Risley, as Komsu testified was the case, supports the reasonableness of Komsu's perception that the door to employment with Mesa was still open despite Trigg's espousal of Mesa's hiring policies.

Trigg's failure to reject Komsu explicitly [until August 17 or 18, 1987], implying that Komsu was still under consideration, whether out of softheartedness, desire not to disappoint, unwillingness to reject the candidate in so many words, or some other season, is construed as having lulled Komsu into inaction. Reliance by Komsu on Trigg's representations was entirely reasonable.

However much he reasonably suspected that he might not be hired after hearing of Mesa's hiring policy, Komsu, like the plaintiff in Cocke v. Merrill Lynch, supra, was justified in waiting before resolving suspicion into fact and taking action against Mesa, particularly in light of Trigg's statement of generalized policy coupled with the suggestion that the matter of Komsu's application would be looked into further. In Potter v. Contintental Trailways, Inc., supra, the court noticed that the time limit for filing a charge of discrimination may be interrupted or suspended where the failure to file is due to an employer's holding out the possibility of re-employment. Likewise, Mesa's holding out the possibility of employment for Komsu despite its stated hiring policy regarding U.S. citizens operated to suspend Komsu's obligation to file a timely charge of discrimination after his conversation with Trigg in April 1987. In light of my understanding of the April conversation, this would be so without regard to whether there was another conversation in August.

Komsu did not sleep on his rights so as to deny tolling. Rather he acted as a reasonably prudent person would with respect to pur-

suing his charge of discrimination once the facts which would support a claim became evident. Even if I were to disbelieve Komsu's claim that his August 20, 1987 filing of a discrimination charge with the EEOC was two to three days after he first understood that he would not be hired, he, nonetheless, is entitled to the benefit of equitable tolling.

As demonstrated by the cases marshalled above, equitable tolling applies where a putative discriminatee has mistakenly filed in the wrong forum but can show that he was diligently attempting to assert his rights. Clearly Komsu has so proven.

Komsu's attempt to redress the discrimination by filing a charge with EEOC was reasonable. EEOC has longstanding jurisdiction over claims of employment related discrimination. Claims alleging failure to hire because of discriminatory motive are among the charges frequently filed with EEOC. It is logical that Komsu acting on his own behalf in filing a charge against Mesa would turn to the EEOC.

Title VII and ADEA case law persuades that flexibility in interpreting procedural provisions is essential in achieving the purposes of both statutes. Considering particularly that section 102 alternatives have only recently become available, sensitivity to the need for such flexibility is even more critical than in more seasoned and matured venues.

Both OSC and EEOC have recently acknowledged that the introduction of section 102 causes of action may introduce confusion as to the proper forum for filing citizenship and certain national origin discrimination claims. By a Notice published on May 4, 1988, both agencies have advised of an interim agreement whereby each appoints the other as its agent to receive discrimination charges under Title VII and IRCA. See Notice, 53 Fed. Reg. 15904, May 4, 1988.

Without applying that agreement to the present case, its issuance by the agencies with which discrimination charges must be filed illuminates the very concern that the cases cited above and the facts of this case demonstrate, i.e., that there be no ``. . . loss of rights arising from the operation of a filing deadline against an individual or entity who has mistakenly filed a charge with the wrong agency.'' Id. The agreement confirms that the two agencies assigned to initiate antidiscrimination enforcement proceedings recognize that this is not a situation where a charging party,

having selected one of mutually exclusive remedies, is penalized for having made an inappropriate choice.[2]

In conclusion, Komsu's pro se filing of a charge with the EEOC, an agency having longstanding jurisdiction over employment discrimination claims, was not unreasonable in view of the newness of IRCA and the inherent confusion resulting from the creation of a new forum for bringing certain employment discrimination claims while retaining EEOC's jurisdiction over others. I do not understand from this record that he had a sufficient understanding of the nuances of the venues established by IRCA as to deny him the opportunity to have the filing on August 20, 1987, with EEOC treated as a filing with OSC as of that date, thereby bringing into issue the events of April 1987.

As the result, the timely filing of a charge on August 20, 1987, with EEOC tolled the 180-day limitation period under 8 U.S.C. § 1324b(d)(3) such that all acts of discrimination by Mesa within 180 days prior to August 20, 1987, i.e., from February 22, 1987, fall within the scope of coverage for which a charge and subsequent complaint may issue under IRCA. Komsu last applied for employment with Mesa in March 1987; it follows that any discriminatory rejection of him by Mesa which occurred subsequent to February 22, 1987, is actionable and within the purview of the charge filed by Komsu with OSC on November 18, 1987.

B. Continuing Violation Theory Discussed

OSC asserts also, relying on a continuing violation theory, that Komsu's claim is timely with respect to any acts of discrimination by Mesa after Komsu's application in December of 1986. The argument is that ``[t]he discriminatory acts by Mesa can . . . be seen as a continuing violation, in that they were part of a pattern and practice of citizenship status discrimination.'' OSC Br., at 14.

In light of the findings in this decision that the discrimination charge was otherwise timely filed, it is only necessary to determine whether Mesa's conduct amounted to a continuing violation for the purpose of holding that the period during which the discriminatory conduct is measured reaches back to December 1986. Upon a find-

[2] See Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 670 (4th Cir. 1977), Cert. denied, 434 U.S. 995 (1978) (upholding agreement between OFCC and EEOC that permits charges filed with the compliance office to be treated as filed with the Commission so that when an employee of a federal contractor ``applies for relief at the wrong forum, his complaint should be promptly considered by the proper agency . . .''; ``. . . [b]y facilitating such consideration, . . . [the agreement] avoids technical bars to the administration of Title VII without affecting . . . [the employer's] substantive rights'').

ing of continuing violation, Mesa's conduct from Komsu's first application for employment in December 1986 is brought into play.

The Supreme Court in United Airlines v. Evans, 431 U.S. 553, 558 (1977), made clear that the definition of continuing violations requires not mere continuity of the impact of discrimination but rather that a ``present violation exists''. Post-Evans courts have applied the continuing violation theory. See, e.g., Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 760 (9th Cir. 1980) (``The Evans decision held merely that continuing impact from past violations is not actionable. Continuing violations are'').

The Tenth Circuit in Bruno v. Western Electric Co., 829, F.2d 957, 961 (10th Cir. 1987), recognized that a ``continuing violation can be either a company-wide policy of discrimination or a series of related acts taken against a single individual.'' The court explained that:

> Under the continuing violation theory, a plaintiff who shows a continuing policy and practice that operated within the statutory period has satisfied the filing requirements. See, e.g., Higgins v. Oklahoma ex rel Okla. Employment Sec. Comm'n, 642 F.2d 1199, 1200 n. 2 (10th Cir 1981) ; Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975). When the policy and practice is company-wide, the plaintiff can show that a violation occurred within the statutory period by showing some application of the policy within that period. Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1543 (10th Cir. 1987); Abrams v. Baylor College of Medicine, 805 F.2d 528, 533-34 (5th Cir. 1986). On the other hand, if the defendant can show that the policy was discontinued before the limitations period, then, as a matter of law, plaintiff's claim must be dismissed. Jewett v. International Tel. & Tel. Corp., 653 F.2d 89, 93 (3d Cir.), cert. denied, 454 U.S. 969, 102 S. Ct. 515, 70 L.Ed.2d 386 (1981).
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> * * * * * * *
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> ``To establish a continuing violation [a plaintiff] would have to show `a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.' ''

829 F.2d at 960-61 (citation omitted). See also Acha v. Beame, 570 F.2d 57 (2d Cir. 1978).

Although not dispositive of this case, it is instructive that where a claimant has acted diligently, the continuing violation theory has been applied to render timely the filing of a charge beyond 180 days following the initial rejection of the claimant's application for employment. In Roberts v. North American Rockwell Corp., 650 F.2d 823 (6th Cir. 1981), the plaintiff, having been told that the plant did not hire women, was refused an application for employment with the defendant. Roberts otherwise obtained an application which she submitted in December of 1972. She followed up on her application at several times in the next eight months and was

"repeatedly told that Rockwell did not hire women." 650 F.2d at 826. Plaintiff filed a formal charge of discrimination with the EEOC on October 5, 1973.

The employer contended that the hiring case be treated exactly like a discharge case and that ``. . . the date of failure to hire is necessarily the date from which the alleged discrimination is measured.'' Id. According to the employer the time limitation period necessarily began to run when the plaintiff was first told that the company did not hire women. In rejecting the employer's argument, the court acknowledged that:

> If a company discriminates by firing an employee because of his/her race or sex, the discriminatory act takes place when the employee is fired. The statute of limitations ordinarily starts running from this date. . . .
>
> * * * * * * *
>
> The issue becomes more difficult when a company fails to hire or promote someone because of their race or sex. In many such situations, the refusal to hire or promote results from an ongoing discriminatory policy which seeks to keep blacks or women in low-level positions or out of the company altogether. In such cases, courts do not hesitate to apply what has been termed the continuing violation doctrine.
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> * * * * * * *
>
> . . . by definition, if there is a continuing violation, the company is continually violating Title VII so long as its discriminatory policy remains in effect. An applicant for employment or promotion will, in many circumstances, be interested in any suitable position which opens up. As job openings become available, the applicant will automatically be rejected because of his/her race, sex or national origin. We see no reason to formalistically require an applicant to continuously apply, only to be continuously rejected. We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well.
>
> This case illustrates the continuing violation doctrine well. In this case, Mrs. Roberts made a number of oral inquiries about her application, which was on file. This is empirical proof that she was, in effect, continually applying for a position at Rockwell--and being continually rejected because of her sex.

Id. at 826-27.

Distinguishing United Airlines v. Evans, supra, the Roberts court noted that the company's alleged policy of not hiring women was a patent, continuing violation of Title VII such that ``. . . each time the company hires, it violates Title VII so long as its discriminatory policy is in effect.'' Id. at 827. Cf. Jones v. American Totalisator, 17 Fair Empl. Prac. 523 (D. Md. 1977) (continuing violation theory rejected where applicant filed charge with EEOC 16 months after becoming aware of the discriminatory refusal to hire).

Applying the authorities cited to the instant facts, Komsu's charge of discrimination filed with the EEOC on August 20, 1987,

triggered an inquiry into Mesa's hiring policy as it affected him from the time of his application for employment in December 1986. Consistent with the nature of continuing violations as redefined by the Supreme Court in United Airlines v. Evans, supra, implementation of Mesa's policy of preferential hiring of United States citizen pilots as articulated by Eric Trigg to Komsu in April, 1987, constitutes an ongoing violation and not merely a continuing impact from past violations. Far from neutral in its application and unlike the policy in Evans, Mesa's policy is discriminatory on its face.

Most similar is the situation of the plaintiff in Roberts v. North American Rockwell Corporation, supra, where the policy of not hiring women was found to be a continuing violation of Title VII so long as the policy remained in effect. Mesa's policy of preferential hiring is a continuing violation of IRCA as long as the policy remains in effect, i.e., at least from the time of Komsu's first application through the dates of Mesa's submissions to EEOC after August 20, 1987, (exhs. 14 and 15), including also exhibit 10 dated August 27, 1987, and to OSC (exh. 11) dated December 2, 1987, continuing until at least January 28, 1988 (exh. 12).

Like the plaintiff in Roberts, Komsu made a number of inquiries about the status of his application and thus was in effect, continually applying for a position with Mesa as one became available. Unlike the plaintiff in Jones v. American Totalisator, supra, however, Komsu did not sleep on his rights so as to preclude application of the continuing violation theory to a charge of discriminatory failure to hire. Komsu's charge of discrimination filed with the EEOC on August 20, 1987, is timely and under a continuing violation theory relates back to the filing of his initial application for employment with Mesa.

V. THE CHARGING PARTY WAS UNLAWFULLY DENIED EMPLOYMENT ON CITIZENSHIP GROUNDS

A. Mesa's Policy Articulated

In an undated prehearing statement, Eric Trigg, promoted to director of operations prior to that statement, candidly expressed Mesa's hiring practices as applied to Zeki Yeni Komsu:

> Mr. Komsu was not hired for two reasons. The first reason is that he was not a citizen of the United States and Mesa had more then [sic] enough qualified U.S. citizens applying for those positions that were available. It is the policy of Mesa to hire only U.S. citizens if a sufficient number of qualified citizens is available to fill the positions needed. The second reasons Mr. Komsu was not hired is because of his constant and irritating phone calls to me. These numerous phone calls left me with an unfavorable impression of Mr. Komsu.

Exh. 17.

Within a week of Komsu's filing with EEOC, Larry Risley, in his capacity as Mesa's president, on August 27, 1987, in a letter to EEOC, acknowledged that:

> It is the policy of Mesa Airlines, Inc., to hire U.S. citizens only unless the available employee pool is not adequate at the time. During the past 12 months we have not experienced any shortage of U.S. citizen applicants from which to hire.
>
> It is our understanding that there are no acts, laws or statutus (sic) that prohibit this policy. We therefore request this charge be dismissed as Mr. Yenikomsu was not hired due to his non-citizen status and not because of his national origin--Turkish.

Exh. 10.

Following Komsu's filing of his charge with the Special Counsel, Mesa's general counsel, Gary Risley, nephew also of Larry L. Risley, wrote to OSC on December 2, 1987, ``in reference to the charge of discrimination received by you from Mr. Zeki Yeni Komsu.'' Exh. 11. Gary Risley conceded the charge of discrimination, implicitly relying on an interpretation of the law which countenanced its practices (as being within the exception of 8 U.S.C. § 1324b(a)(4)). His letter stated in pertinent part:

> To summarize Mesa's position, Mesa has a policy, in accordance with its rights under the Immigration Reform and Control Act, of hiring only U.S. citizens when a sufficient number of qualified U.S. citizens are available for a position. Mesa receives a large number of unsolicited resumes from pilots seeking employment with us, and only a small percentage of those individuals are interviewed and hired. The vast majority of these resumes are from U.S. citizens, and we have consistantly (sic) refused the application of non-citizens when sufficient U.S. qualified pilots have been available.

Exh. 11.

Subsequently, in a January 28, 1988 omnibus letter to unnamed addresses, requesting ``. . . action by your organization to help correct the Justice Department's distortion of the statute,'' (presumably referring to OSC's interpretation and application of section 102), Gary Risely provided ``. . . the following background facts,'' inter alia; * * *

> 4.) Mesa Airlines' practice with regard to hiring has been to remove all resumes of pilots who do not have sufficient time according to Mesa's minimum standards to be considered as a pilot. The remaining resumes are usually far in excess of the number of job openings that are available, and an excess 95% of these resumes will be U.S. citizens;
>
> 5.) Once determining that the number of qualified U.S. citizens far exceeds the number of job openings, the Company will remove the non-citizens resumes from the stack to be considered.

Exh. 12.

The Risley omnibus letter, basically a critique of OSC's position on timeliness of an alien's evidencing intent to become a U.S. citizen in context of vulnerability by employers to liability for immi-

gration-related unfair employment practices, conceded that ``[t]he statute as it is drafted is one with which the business community can live . . .'' Id. To my mind, it is exactly the statute as drafted that fails to support Mesa's discriminatory hiring practices, and which makes those practices actionable.

Thus, months after Mesa became aware of Komsu's charge of discrimination, Gary Risley, asserting that ``[t]he Justice Department is attempting to write the U.S. citizen preference out of the statute . . .,'' id., unambiguously described Mesa's practices in a way which I can only understand as reflecting the view that wholesale exclusion of non-U.S. candidates complied with the law so long as any qualified citizen candidates had also applied. Larry L. Risley, president of Mesa since its founding in 1982, conceded as much.

On the witness stand, Gary Risley asserted he had been mistaken as to Mesa's practices, impeaching as erroneous his broadside, omnibus letter as well as documentary and oral evidence of other Mesa officials. I am unpersuaded by his after-the-fact recantations. Mesa both enunciated and practiced invidious discrimination against non-U.S. citizens. Even after Komsu filed his charges, Mesa officials continued to contend that their employment practices were lawful because the U.S. citizens they hired were as qualified as the non-U.S. citizen candidates. Exhibits 10-12, acknowledging Mesa's hiring preference, reflect a discriminatory hiring policy on their face.

I conclude that Gary Risley's testimonial posture is irreconcilable with Mesa's role vis-a-vis the charging party and Mesa's own admissions, including the compilations of pilot hiring data (exhibits 14 and 15), submitted in response to the filing of Komsu's EEOC charge, and including also the letter of January 28, 1988 (exh. 12). Accordingly, I reject as lacking in trustworthiness the testimony of Gary Risley and others that the prior iterations by himself and others of Mesa's employment policy and practices were erroneous. In so deciding, I need not disbelieve Gary Risley's repudiation of his earlier statement that Mesa maintained two physically separate applicant pools. It is sufficient that Mesa implemented its stated policy of preferring U.S. citizen candidates by failing to compare qualifications of non-U.S. citizen candidates with those of citizen candidates.

It follows without question that Mesa's pilot hiring practices fall outside and fail to qualify for the exception provided at 8 U.S.C. § 1324b(a)(4):

> . . . it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or

> national of the United States over another individual who is an alien if the two individuals are equally qualified.

Commenting on the text which became section 102 of IRCA, the House Judiciary Committee emphasized ``. . . that the anti-discrimination provisions of the bill will not create a preference based on national origin or citizenship status. Nor shall any employer charged with an individual act of discrimination be liable for having chosen either of two equally qualified applicants.'' H.R. Rep. No. 99-682, supra, at 70-71 (emphasis added).

Mesa's commitment to hiring U.S. pilots to the exclusion of non-U.S. citizens so long as the supply of qualified citizens meets the demand in no way satisfies the exception. The plain words of the exception are inescapable: the employer avoids liability for discrimination if, but only if, there has been a comparison of qualifications as the result of which the selected citizen is found to have qualifications not less than equal to the non-selected alleged discriminatee. Here there was no such comparison.

B. Komsu Satisifed The Legitimate Qualifications Established By Mesa Airlines For Pilot Positions

Mr. Komsu's qualifications satisfied the objective criteria against which Mesa measured its pilot candidates. That criteria includes governmental certifications, by aircraft type, of eligibility to pilot planes in Mesa's fleet, and threshold numbers of hours flown, by aircraft type.

It is undisputed that Komsu held the requisite certifications. Mesa, pointing to Komsu's inability at the hearing to produce his log book which contemporaneously records hours flown, would have me reject as unproven the total hours he claims to have been at the controls. Mesa overlooks, however, that the log book had been made available to its general counsel after this litigation began, that Komsu had it with him when the respondent took his deposition on June 9, 1988. That the log book remained in his control and that his search for it in preparation for hearing was unsuccessful does not persuade me that Komsu's claim of hours flown lacks bona fides. With the log book in hand, he had been questioned on deposition by Mesa's counsel about particular entries. Moreover, Komsu's explanation of entries on those pages for which copies were available at hearing was consistent and straightforward. I accept , as unimpeached, his oral testimony which, supported in part by log book segments, evidences a total of 1500 hours flown as of December 1986, including instrument time, reaching approximately 1800 hours flown as of March 1987, including instrument time.

Mesa's disparagement of Komsu's professionalism does not convince me that he failed to meet the level of qualifications found by Mesa to be satisfactory on the part of other candidates and pilots on board. It is alleged, for example, that with a student pilot on board but without prior tower clearance for varying from his flight plan, Komsu ``flew in the coulds'' in restricted air space, in violation of federal aviation regulations. Challenged at hearing that on deposition he had testified differently as to the area flown (such that he would not have entered controlled air space), Komsu acknowledged, when shown an Albuquerque aeronautical section chart, that he may have been mistaken as to distance flown when he testified on deposition without a chart. His usual practice was to obtain prior clearance for flying (``in the clouds'') on instruments in restricted airspace, and he denied any deviation when flying with a student named Grant Swafford, who claimed Komsu had not been on the radio long enough to obtain clearance. I agree with Special Counsel, OSC Br., at 42-43, and find that Swafford lacked cockpit experience and did not observe Komsu sufficiently to warrant any inferences as to Komsu lack of compliance with rules of the air.

Mesa has not shown that Komsu was unqualified for hire by it as a pilot. OSC points to infractions and misadventures by Mesa pilots which failed to produce punishment or remonstrance by the employer. That evidence confirms that Mesa has a high tolerance for such conduct by its pilots. Even so, I do not rely here on that evidence where it has not been shown that criteria for job retention are equivalent to criteria for job entry. It is not at all clear that employer tolerance of imperfect conduct by its pilots on board requires consistency on the part of the employer in the selection process.

Mesa has made no showing that those it selected qualitatively bettered Komsu's statistical or operational record; neither did it establish that ``flying in the clouds,'' even if it had occurred, rendered a pilot ineligible for hire by Mesa. Moreover, Mesa had hired pilots (some of whom were later promoted) whose preemployment experience had included damage to aircraft on landing, flying into a tree or through power lines, flying charters without requisite clearance, flipping over on landing, and more. Exhs. 55-64.

Mesa relies on subjective criteria[3] in reaching its hiring decisions, depending primarily on recommendations by its current or

[3]It is recognized the subjective job criteria ``. . . present potential for serious abuse and should be viewed with much skepticism . . .'' and also provide ``a convenient pretext for discriminatory practices.'' Nanty v. Barrows Co., 660 F 2.d 1327, 1334 (9th Cir. 1981).

former pilots where a candidate was not known to Mesa's chief pilot or to management. Except for review of his resume to establish minimum qualifications resulting in mailing an acknowledgment card to him, no one in Mesa's hiring process reviewed Komsu's application. One pilot, David W. Fitzgibbons, who had met Komsu but never flown with him, and to whom Komsu inquired twice as to hire by Mesa, recommended, probably in April 1987, to Eric Trigg that Komsu not be hired. Fitzgibbons has no recollection whether Trigg focused on the bases for his assessment, premised on a hearsay third-party report of the ``flying in the clouds'' incident and of an accident in which Komsu was involved.

Through witnesses and on brief, the parties have speculated as to what Komsu's adherents and detractors would have recommended to Mesa which Mesa might have relied on in evaluating his operational and personal characteristics in order to gauge his performance in the cockpit. However, no such appraisal was made of Komsu. Accordingly, I do not credit for decisional purposes that his employability should be weighed in the balance by such conjectural testimony or argument.

C. Komsu Was Denied Employment As A Pilot by Mesa Airlines Because of Citizenship

Nowhere does it appear that Komsu's qualifications were examined, considered against those of other applicants, and found wanting. To the contrary, Eric Trigg was satisfied that Komsu's resume reflected sufficient qualifying hours and instrument ratings. Trigg undertook, after the discrimination issue arose, that Komsu was not hired, first because ``. . . he was not a citizen of the United States and Mesa had more than (sic) enough qualified U.S. citizens applying, . . .'' and secondly ``because of his constant and irritating phone calls to me.'' Exh. 17. ``Flying in the clouds'' in controlled airspace was not a factor. See Exh. 17.

On the record before me it is a certainty that Komsu was not rejected on the basis of pilot qualifications in head-to-head competition with any one or more of the U.S. citizen candidates who were selected during the pendency of his application form December 1986 to August 1987, or during any interval in between. I Conclude from the testimony of Mesa's witnesses that their evaluation of Komsu's qualifications was after the fact, after he was rejected on citizenship grounds, and not before.

IRCA informs that ``[i]f, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged or is engaging in any such . . . practice . . . ,'' the judge shall issue an order finding a viola-

tion. 8 U.S.C. § 1324b(g)(2)(A). I am unaware of any precedent in which a proceeding under 8 U.S.C. § 1324b has resulted in a finding on a litigated record by an administrative law judge of discriminatory conduct in violation of that statutory prohibition against unfair immigration-related employment practices.

The result reached in the cases first heard under new legislation such as this will be definition establish precedent. To the extent that any one case turns on unique facts, of course, its precedential significance is reduced. This may be one such case because with the passage of time after enactment of IRCA on November 6, 1986, it may be supposed that employers will be less candid than was Mesa in trumpeting to non-U.S. citizen candidates and to public authorities their unwillingness to hire non-U.S. citizens.

The conclusion on this record is unmistakable. Mesa articulated a policy that effectively rejected non-citizen candidates for pilot hire, informed Mr. Komsu of that policy, and did not hire him. At no time did Mesa offer him a position. Instead, after the fact it asserts that it provided the non-citizenship rationale so he would not know that he had been rejected as to ``pushy,'' too persistent in his efforts at obtaining a favorable result.

That Mesa practiced a policy of hiring only U.S. Citizen pilots, when available, is inferred unerringly from its failure to hire Komsu in context of its statement to him to that effect. That conclusion is inescapable on this record which makes clear that even after the fact when faced with the charge in this proceeding, Mesa's president and general counsel reiterated such policy. It follows that the respondent must have done what it said it intended to do, i.e., failed to hire a non-U.S. candidate because of his citizenship status without regard to whether or not he satisfied the legitimate qualifications established by Mesa for pilot positions. That conclusion does not depend, however, solely on that inference. Rather, it finds support also in the explicit written acknowledgments discussed above of its hiring policy see discussion, infra, at 45-46.

Accordingly, I find and conclude that Mr. Komsu was knowingly and intentionally denied employment for the sole reason that he was not a citizen of the United States.

D. Mesa Failed To Prove That Komsu Would Not Have Been Hired Even Had There Been No Discrimination

Section 1324b(a)(1)(B) provides, inter alia, that it is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual because of an individual's citizenship status. Title VII, at 42 U.S.C. § 2000e-2, prohibits dis-

crimination in employment ``because of such individual's race, color, religion, sex, or national origin.''

Where as here the discrimination has been proven, it is the teaching of cases involving Title VII that the burden is on the putative employer to persuade that even absent the discrimination it would not have hired the charging party. See, e.g., McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, (1977); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1986); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975).[4]

McDonnell-Douglas, supra, is the seminal case that articulated a four part formula to establish a prima facie showing of discriminatory disparate treatment in Title VII causes of action. An individual or class plaintiff must demonstrate: (1) that he/she belongs to a protected class; (2) that he/she applied for and was qualified for a position for which the putative employer was seeking applicants; (3) that despite being qualified, he/she was rejected; and (4) that after such rejection, the position remained available and the employer continued to seek applicants from individuals having the plaintiff's qualifications. 411 U.S. at 802. The burden of proof is divided into three stages. At the first stage, the charging party must make a prima facie showing of discrimination by satisfying the four criteria enumerated above. After that showing is made, the second stage shifts the burden to the employer ``to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'' Id. The third stage returns the burden to the plaintiff to disprove the putative employer's explanation as pretextual, i.e., the pretext or gloss designed to conceal an underlying discriminatory motivation.[5]

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[4]See especially, the explanatory statement by Justice Stevens, dissenting, distinguishing disparate treatment cases from the disparate impact case before the Court, in Wards Cover Packing Co., Inc. v. Atonio, 109 S.Ct. 2115, 2131 (1989) (emphasis added):

> In a disparate treatment case there is no ``discrimination'' within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the ``McDonnell/Burdine inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

[5]Of course, ``[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at 253.

The Supreme Court recently reversed the D.C. Circuit as having held erroneously that an employer found to have allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision absent the discrimination. By a plurality decision, six justices recently instructed that an employer in a mixed motive case who proves by a preponderance of the evidence that it would have made the same employment decision if it had not taken the prohibited discriminatory consideration into account may avoid a finding of liability. Price Waterhouse v. Hopkins, supra.

Justice Brennan, writing the plurality opinion, held that Title VII's prohibition against discrimination ``because of '' race, religion, national origin, or gender is not limited solely to decisions which are made because of the illegitimate discriminatory factor. 109 S.Ct. at 1785. The phrase ``because of'' condemns ``. . . those decisions based on a mixture of legitimate and illegitimate considerations'' on the part of the employer. Id. In so holding, the plurality distinguishes between mixed motive and pretext cases. In pretext cases, the employer attempts to deny entirely any illegitimate motivation for the adverse employment decision; there is only one ``true'' motive for the decision instead of both legitimate and illegitimate motives.

The plurality noted that McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) ``. . . dealt with the question whether the employer's stated reason for its decision was the reason for its action; unlike the case before us today, therefore, McDonald did not involve mixed motives. This difference is decisive in distinguishing this case from those involving `pretext.' '' Hopkins, supra, 109 S.Ct. at 1785 n. 6. While ``but for'' analysis may be critical to a pretext case, e.g., McDonald, supra, ``[w]here a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was ``the `true reason' ``. . . for the decision--which is the question asked by Burdine.'' Hopkins, supra, at 1788-89.

The ``critical inquiry'' in a mixed motive case is whether the illegitimate discriminatory factor was the motivating factor ``. . . at the moment . . .'' the adverse employment decision was made. Id. at 1785. The charging party must prove that the employer relied upon prohibited discriminatory considerations in making the negative employment decision, and that the discriminatory factors were a motivating part in the employment decision. Once the charging party has sustained this burden, the employer may assert an ``affirmative defense'' that the employment decision would be the same despite the illegitimate factor. Id. at 1788.

According to the plurality, an employer generally may escape liability by a showing of objective evidence ``. . . as to its probable decision, . . .'' i.e., ``[a]n employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.'' Id. at 1791.

Consistent with this analysis, the plurality rejected the employer's claim that the statutory phrase ``because of'' is a ``colloquial shorthand for `but for causation.' '' Id. at 1785. ``Because of'' rather means that for the employer to prevail the discriminatory factor must be ``irrelevant to employment decisions.'' Id. The plurality continued:

> . . . even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. . . . [T]he situation before us is not one of the ``shifting burdens'' that we addressed in Burdine. Instead, the employer's burden is most appropriately deemed an affirmative defense. . . .

Id. at 1788.

In sum, Hopkins, supra, appears to instruct that, while in a pretextual case the burden of persuasion shifts to the employer once the employee/candidate has made out a prima facie case, in a mixed motive case the plurality (but not the majority) believes the employer must prevail as with an affirmative defense.

Justices White and O'Connor each separately concurred in the judgment of the Court. Justice White agreed that the plurality opinion of Justice Brennan ``is not a departure from and does not require a modification of the Court's holdings . . . [in McDonnell Douglas and Burdine] . . .,'' even though they were pretext cases, involving the search for the one ``true'' motive behind the employment decision. Id., concurring op. at 1795. He disagreed, however, that the employer must carry its burden through objective evidence, suggesting that ``where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof.'' Id. at 1796.

Justice O'Connor disagreed with the plurality as to the analysis to be utilized by a court to determine when a claimant's proof warrants shifting the burden of persuasion to the employer. Title VII prohibits employment decisions made ``because of'' prohibited considerations, i.e., race, color, religion, sex or national origin. Writing that ``[b]ased on its misreading of the words `because of' in the statute . . . the plurality appears to conclude that if a decisional process is `tainted' by awareness of sex or race in any way, the employ-

er has violated the statute, and Title VII thus commands that the burden shift to the employer . . .,'' she concluded instead that the burden shifts only when a disparate treatment claimant shows ``by direct evidence that an illegitimate criterion was a substantial factor in the decision.'' Id., concurring op. at 1804. ``Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations.'' Id. at 1805.

As Justice O'Connor put it:

> The employer need not isolate the sole cause for the decision, rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination. Cf. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977). If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made ``because of'' consideration of the illegitimate factor and the substantive standard for liability under the statute is satisfied.

Id. at 1804.

Even assuming that the law were as Justices White and O'Connor understand it to be, I am satisfied that the record before me proves that Mesa's motive not to hire non-U.S. pilots ``was a substantial factor in the adverse employment action.'' Hopkins, supra, White, J., concurring op. at 1795.

That the improper motive, the discriminatory animus, was a substantial factor, if not the only one, in Mesa's hiring decisions is established here, where it was:

> --the only explanation communicated to Komsu by Mesa officials;
>
> --listed first among the two reasons recited by Eric Trigg (exh. 17);
>
> --the explanation Trigg gave to put off Dan Fisher, operator of Aztec Aviation, who wanted Mesa to place the pilots trained at his school which catered to non-U.S. citizens;
>
> --the subject, after the charge was filed, of Gary Risley's written effort to obtain third-party support for Mesa's contention that its policy, of hiring only U.S. pilots if, qualified and available, was consistent with the intent of IRCA;
>
> --adhered to, the identified non-citizen pilots being hired through inadvertence (Steve Protzen and Mark Smith), by acquisition of the routes and personnel of Centennial Airlines, Inc. (Tore Host-Hansen), or after the charge was filed (Martin Riebeling);
>
> --the explanation given by Eric Trigg to Martin Riebeling in July 1987 for not hiring him: ``. . . we are very sorry, we can't hire you at this point . . . because you're not a U.S. citizen and that shoots us down. I'm sorry, that shoots us down,'' tr. 724, after Trigg had checked with management;

> --a preference expressed for hiring U.S. citizens by Larry Risley to Ken Widger, director of operations from May 1986 to October 1987, after that the vice president for operations;
>
> --the only reason known to Widger as of the dates of his depositions in June 1988, for Komsu's rejection, to the exclusion of pestering phone calls or flying in the clouds in controlled airspace; and
>
> --the stated hiring policy, e.g., Mesa's criteria for pilots (exh. 9), as reiterated in letters by Mesa officials after the discrimination issue arose (exhs. 10-12), and as reflected in Mesa's list entitled ``People Denied Employment Because of Citizenship Status,'' exh. 15.

Unlike Hopkins, the case at hand does not appear to be one of mixed motive, involving a mixture of legitimate and illegitimate reasons which contribute to the employment decision. Hopkins' significance, however, with respect to allocation of the burden would appear to be sufficiently significant across the broad body of Title VII litigation as to require focus here. In view of the foregoing, consistent with any one of the three opinions which comprise the majority in Hopkins, I conclude that the respondent has failed to carry its burden, whether characterized as one to produce evidence sufficient to overcome Komsu's prima facie proof or as to produce proof of an affirmative defense.

VI. PATTERN OR PRACTICE APPLIED

As already discussed, supra, at III.B., Special Counsel is authorized to file complaints which allege pattern or practice violations.

Even after November 6, 1986, Mesa continued to maintain and acknowledge its hiring preference. It has clearly demonstrated a practice of rejecting non-U.S. citizen candidates except when they ``slipped through the net.'' Exh. 14. From March 1987 through August 1987, Mesa hired 27 U.S. citizen candidates; during the period December 1986 through August 1987, 35 such candidates were hired. Although Mesa's management officials recanted the earlier acknowledgment that Mesa maintained two pilot hiring pools, one for U.S. citizens, one for aliens, the record unmistakably confirms that in practice its hiring policy had that effect. No non-U.S. citizen candidates were hired during those periods, and non-U.S. citizen hires before enactment of IRCA had been inadvertent.

Rarely is an employer more candid about its discriminatory druthers. Mesa cannot now duck responsibility for failure of OSC to prove by statistics that Mesa systematically sought to exclude all non-U.S. citizen candidates, when it is obvious that Mesa failed to achieve that result only through inadvertence or, in the case of Martin Riebeling, by hiring him after these proceedings were filed.

I reject respondent's claims that (1) a pattern or practice case depends on statistics and (2) that statistics are lacking here.

As to (1), I am unaware that judicial pattern or practice precedents which depend on statistical underpinnings compel me to find a statistical condition precedent to liability in the face of self-confessed preference considered particularly in context of acknowledged rejection of Mr. Komsu and 15 other pilots. Exh. 15. Mesa itself acknowledges on brief that a pattern or practice case may be established by direct evidence. Mesa Br., at 19. However, Mesa, denies that such direct evidence is present here, ignoring the abundant proof of its confessed failure to hire non-U.S. citizen candidates including, as already found, its rejection of Mr. Komsu.

Mesa overlooks the plethora of evidence, already discussed, reflected in its various acknowledgments of company hiring policy. Mesa's unmistakable admissions constitute direct evidence of discriminatory conduct. See e.g., Cline v. Roadway Express, Inc., 689 F.2d 481, 485-86 (4th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112-13 (4th Cir. 1981), cert. denied, 454 U.S. 860 (1981).

As to (2), recognition of the failure to hire 16 non-U.S. citizen pilot candidates (including Komsu and Riebeling) during a period in which U.S. candidates were hired without comparative analysis of qualifications should satisfy any lingering concern for statistical proof.

It might have been supposed that upon implementing the statutory requirement that intending citizens complete declarations of intent, the Department could have accepted the filing of naturalization applications by permanent residents as satisfaction of that condition precedent to protection, without more. Instead, however, it required that declarations of intent be completed on specified forms, (INS Form N-315 or I-772) not later than the date of a charge filed with the Special Counsel. See 28 C.F.R. § 44.101(c)(2)(ii), as amended at 53 Fed. Reg. 48248-49 (November 30, 1988).

Martin Riebeling, another non-U.S. citizen pilot candidate, having earlier applied and been initially rejected for employment at Mesa, was hired within a week or so prior to the hearing in July 1988. Mr. Riebeling, a permanent resident alien, testified that having already applied for citizenship, he rejected Special Counsel's invitation to file a declaration of intending citizenship because he ``did not want to get further involved in this case.''[6] Tr. 713. In view of the Department's method of implementation, I am unable

[6]Martin Riebeling's failure to complete a Declaration of Intending Citizen, bars his individual charge of discrimination against Mesa even though he had manifested his citizenship intent by filing for naturalization. Riebeling's testimony that he had been rejected due to citizenship status, is direct evidence of a citizenship-based discriminatory hiring decision by Mesa. Tr. 724.

to find on this record that any individual other than Zeki Yeni Komsu qualifies as an intending citizen.[7]

The question to be decided is whether I am authorized to find a pattern or practice of unlawful discrimination on the basis that individuals presumptively eligible for protection of remedial legislation, but not proven to have qualified, may, nevertheless, comprise the universe of individuals on whose behalf it may be found that an employer practiced such a pattern or practice.

An analogy which suggests inclusion in the class to be counted for pattern or practice purposes of individuals ineligible to maintain an action is found in policy guidance recently issued by the EEOC. Discussing IRCA's impact on remedies available to undocumented aliens under Title VII, the Commission has applied the analysis in Sure-Tan v. NLRB, 467 U.S. 883 (1984), which held that undocumented workers were employees for the purposes of, and, therefore, had standing to maintain claims under, the National Labor Relations Act.

EEOC explains that Title VII remedies are intended to discourage employment discrimination both (1) by providing disincentives to potential future discrimination and (2) by restoring an individual charging party as nearly as possible to the position that individual would have been in but for the discrimination. As to both, EEOC explains that Title VII protection is applicable to undocumented workers because if it were not:

> . . . a discriminatory atmosphere might be created in the work place which would violate not only the rights of undocumented workers but also the rights of authorized workers. Therefore, it is essential to the goals of both Title VII and IRCA that undocumented aliens continue to be covered by Title VII.

EEOC Policy Guidance: Effect of the Immigration Reform and Control Act of 1986 (IRCA) on the Remedies Available to Undocumented Aliens Under Title VII, at 5, April 26, 1989, see Interpreter Releases, Vol. 66, No. 23, June 19, 1989, at 655-56.

IRCA does not impair EEOC's precedent national origin jurisdiction. Nevertheless, while the immigration status of the charging party is irrelevant to the availability of remedies to satisfy the

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[7]The Special Counsel may be suspected of an effort to impeach the regulation, at least with respect to naturalization applicants, i.e., by arguing that ``. . . the filing of an I-772 is not a jurisdictional prerequisite for protection against discrimination on the basis of citizenship status. The form I-772 serves only as evidence of an alien's intent to become a citizen. The underlying intent must be there because Congress wanted to protect only those aliens who were moving toward citizenship.'' OSC Br., at 87. OSC appears to conclude that section 102 permits a distinction between applicants for naturalization and other authorized aliens with respect to the requirement for completing a declaration of intent. 8 U.S.C. § 1324b(a)(3)(B)(ii).

goals of Title VII, e.g., eliminating discriminatory practices, IRCA does affect that status with respect to remedies available. Because IRCA provides a legitimate, nondiscriminatory reason for the employer's conduct, ``make whole'' relief is unavailable to an undocumented alien whom the employer refuses to hire after November 6, 1986, or who, having been hired after that date, is fired.

Similarly, supposing there were no words of limitation in section 1324b, it would be appropriate to conclude that the intent to assure a work place free of national origin and citizenship discrimination by providing a pattern or practice venue implicates liability by employers for refusal to hire, or for firing, in other than sporadic or isolated circumstances, any individual who might have successfully asserted national origin or citizenship discrimination. This argument concludes that it is immaterial that one or more of the individuals who comprise the effected class fail to satisfy procedural prerequisites to maintaining an action for individual relief. Once an employer is proven to have discriminated against at least one alien, (other than an unauthorized alien) it does not matter that other individuals (as to whom refusal to hire, or firing, is shown) fail to qualify for the individual relief contemplated by 8 U.S.C. § 1324b(g), e.g., by not having completed a declaration of intention to become a citizen or having waited too long to file a charge with the Special Counsel.

OSC relies on a recent opinion of the Tenth Circuit which sustained authority of the EEOC to maintain a pattern or practice action even where it lacked any ascertainable member of the class to be protected. Without concluding here that precedents implicating EEOC standing necessarily inform IRCA jurisdiction, it cannot be doubted that the court's analysis is instructive, especially in this circuit. In EEOC v. United Parcel Service, supra, the court reversed the district court for having granted summary judgment dismissing EEOC's suit for racial discrimination where the only identified individual injured by defendant's conduct had settled his claim. At issue was a challenge to the United Parcel Service (UPS) ``no beard'' policy on behalf of black males statistically more susceptible than whites to a skin condition alleviated by not shaving.

The Tenth Circuit held that the district court erred in concluding that ``. . . EEOC must proceed on behalf of an actual injured party when challenging a discriminatory employment policy under Title VII. . . .'' The court, relying on ``. . . the broad remedial powers granted by Congress under Title VII . . .'' to EEOC, concluded that ``. . . the EEOC has standing by itself to challenge a policy that represents ongoing discrimination . . .'' and ``. . . to challenge an allegedly discriminatory policy that may affect unidentifiable mem-

bers of a known class.'' United Parcel Service, supra, 860 F.2d at 374. Reciting that it had ``. . . addressed a similar issue'' in EEOC v. St. Louis-San Francisco Ry. Co., 743d F.2d 739 (10th Cir. 1984), citing also General Telephone Co. v. EEOC, 446 U.S. 318 (1980), the court made clear its concern that courts enable EEOC to police ongoing discrimination and to prevent discriminatory policies which may discourage otherwise qualified potential applicants from applying for work. United Parcel Service, supra, 860 F.2d at 376.

Relying on 8 U.S.C. § 1324b(d)(1), and implying that under IRCA its position is analogous to that of the EEOC and the administrative law judge's position is analogous to that of the district court in UPS, Special Counsel suggests that it is authorized by IRCA to``. . . bring suit on a pattern or practice of discrimination that affects a defined but unidentified class of people.'' OSC Response Br., at 26 (footnote omitted).

IRCA's legislative history is illuminating on this point. The House Judiciary Committee had no doubt that pattern or practice ``. . . has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts.'' H.R. Rep. No. 99-682, supra, at 59. The thrust of that comment addressed primarily the breadth of an employer's practices, not the question of qualifying to be counted as a victim of them. Nevertheless, the committee, noting that the term pattern or practice ``. . . has received substantial judicial construction . . .,'' id., emphasized its intent ``. . . to follow the judicial construction of that term as set forth . . .,'' inter alia, in Teamsters, supra. Id. The committee having implicated Teamsters, the seminal opinion on pattern or practice, the Court's discussion is pertinent:

> . . . At the initial, ``liability'' stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

Teamsters, supra, 431 U.S. at 360 (footnote omitted).

Clearly, Mesa's failure to hire the 15 non-U.S. citizen pilot candidates occurred after IRCA was enacted, and the number of new hires after enactment was significant. In addition to Komsu, Martin Riebeling and 14 other pilots were the victims of Mesa's exclusionary hiring policy. Exh. 15. Since, however, I am unable to

conclude on this record that any one of those individuals is an intending citizen, for decisional purposes it must be deemed that they are not.

The legislative history of IRCA makes clear that the proponents of the new discrimination venue were responsive to those who were apprehensive lest IRCA enact too sweeping a cause of action. For example, having commented that it ``. . . does not believe barriers should be placed in the path of . . . aliens who are authorized to work and who are seeking employment, particularly when such aliens have evidenced an intent to become U.S. citizens,'' the House Judiciary Committee explained that ``. . . the protection against discrimination extends only to those who have evidenced `an intention to become a citizen of the United States through completing a declaration of intent to become a citizen.' The aliens referred to are permanent residents, legalized aliens, refugees and asylees.'' H.R. Rep. No. 99-682, supra, at 70 (emphasis added).

As enacted, section 102 prohibits (as an unfair immigration-related employment practice) discrimination with respect, inter alia, to hiring because of the national origin or citizenship status of any individual other than an unauthorized alien. Consistent with the assurance given by the House Judiciary Committee, quoted above, an otherwise covered individual who is not a U.S. citizen cannot, however, obtain ``protection'' unless he or she qualifies as an intending citizen by evidencing ``an intention to become a citizen of the United States through completing a declaration of intention to become a citizen.'' 8 U.S.C. § 1324b(a)(3)(B)(ii).

In the instant action, I follow UPS, supra, and hold that Teamsters, supra, is controlling. This is so because I understand the committee's assurances quoted above to limit standing to bring charges before administrative law judges only on behalf of individual aliens who qualify as intending citizens. Stated differently, remedies for individuals are available for unlawful discrimination in violation of 8 U.S.C. § 1324b only on behalf of intending citizens. As a corollary, the statutory provision for pattern or practice, given the case gloss on that term, means that the public interest in a discrimination-free work place is to be vindicated whether or not each and every affected alien candidate or employee satisfies the technical requirements for standing as an intending citizen.

Absent a constraint to reach a contrary conclusion, I am persuaded by the common understanding of the phrase as it appears in 8 U.S.C. § 1324b(d)(2) and in light of Teamsters and UPS I hold that a pattern or practice of discrimination may be established without proof as to any specified number of victims eligible to maintain actions for individual relief. Because at least one victim

who qualified as an intending citizen, Mr. Komsu, is shown on this record, it is unnecessary to decide whether such a claim may be maintained if there were no intending citizens available. In an appropriate case, however, it may be supposed that absent discrimination proven against even one individual, pattern of practice liability might be established as an abstract proposition consistent with the teaching of UPS.[8]

The commitment by the House Judiciary Committee to limit ``protection'' to intending citizens who so declare their intent does not limit pattern or practice coverage to such aliens. IRCA appears to authorize causes of action to vindicate the public interest in a discrimination-free work place without regard to whether the aliens involved are eligible to qualify as intending citizens. The design of the statute is consistent with the view.

The reference both to charges of ``. . . pattern or practice of discriminatory activity . . .'' and to charges of ``. . . knowing and intentional discriminatory activity . . .'' at 8 U.S.C. § 1324b(d)(2) establishes two separate causes of action. IRCA is silent, however, as to any differentiated qualifications to support standing to maintain a pattern or practice violation, as distinct from standing to obtain redress for discrimination on behalf of individuals. The remedies provision, 8 U.S.C. § 1324b(g)(2)(B), suggests relief both for individuals (instatement or reinstatement with or without back pay) and to vindicate the public interest (civil money penalties). The authorization for the latter is limited to a stipulated sum ``. . . for each individual discriminated against. . . .'' 8 U.S.C. §§ 1324b(g)(2)(B)(iv) (I) and (II).[9]

Given the House Judiciary Committee's understanding of the ``generic meaning'' of pattern or practice, omission of textual differentiation is understandable--the ``generic meaning'' informs the text.[10]

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[8]Special Counsel appears to believe that such jurisdiction exists by virtue of its authority under 8 U.S.C. § 1324b(d)(1) to file complaints on the basis of its investigations without the requirement that there be a charging party. See Response of the United States to Respondent's Motion in Limine and for Sanctions, filed July 22, 1988, at 2-4.

[9]The provision on remedies makes clear that while relief is available to covered individuals entitled to obtain protection, it is available also to vindicate the public interest in a discrimination-free workplace even where there is no pattern or practice allegation. Thus, upon a finding of liability the judge shall issue a cease and desist order, may order instatement or reinstatement with or without back pay, and may order payment of a civil money penalty. 8 U.S.C. § 1324b(g)(2).

[10]It may be argued that the obliqueness of the sole reference in IRCA to ``. . . pattern or practice of discriminatory activity. . .'' at 8 U.S.C. § 1324(d)(2) does

Civil penalties may only be assessed with regard to the individuals ``discriminated against.'' Section 102 does not further define individuals discriminated against to be only intending citizens nor is it certain that it means all aliens whom an employer may have victimized, as has Mesa, by systematic exclusion from the work force. However, it would be a strained result, considering the purposes of the statute to conclude that individuals discriminated against are only those individuals who are also found to have been intending citizens. It may be supposed that had Congress intended to limit either subsection (d)(2) or (g)(2)(B)(iv) to intending citizens it would have done so in terms.

In my judgment, IRCA prohibits unfair immigration-related employment practices against aliens (other than unauthorized aliens) without regard to whether they qualify as intending citizens. Interpreting and applying this remedial statute, it appears that protection is provided in the sense of traditional remedies to obtain ``make whole'' relief only for intending citizens; pattern or practice liability is provided in context of any alien (other than an unauthorized alien) perceived to be the victim of unfair immigration-related employment practices.

Commentary by the Attorney General in the rulemaking which promulgated the current version of 28 C.F.R. § 44.101(c)(2) makes clear that the declaration of intent must be completed by permanent resident aliens as well as by others. That regulation provides that INS Form I-772 ``Declaration of Intending Citizen'' and INS Form N-315 [appears as ``N-135'' in the Federal Register text of subsection 101(c)(2)(ii)] ``Declaration of Intention'' (which had predated IRCA for use by permanent resident aliens but ``. . . had fallen into disuse . . .'') are timely for purposes of prosecuting a claim if completed ``. . . before filing a discrimination charge.''[11] Interim final rule, 53 Fed. Reg. 48248, 48249, November 30, 1988.

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not support a conclusion that such claims may be prosecuted without regard to whether the aliens involved have satisfied the statutory prerequisite to individual actions by evidencing ``. . . an intention to become a citizen . . . through completing a declaration. . .'' Id. at § 1324b(a)(3)(B)(ii). This argument would suggest that subsection (d)(2) is totally dependent upon subsection (a)(3)(B)(ii) in the case of aliens, and devoid of any existence unless the mandate of the latter is satisfied. The answer to that argument, however, is that, as understood by the House Judiciary Committee, pattern or practice is a term of art with a sufficient case gloss such that those familiar with its import might reasonably expect that recitation, without elaboration would suffice to make its meaning plain.

[11]As to Komsu, the current regulation is inapplicable. He had, as previously discussed, satisfied the regulation then in effect as to the time period in which to complete an I-772.

In the preamble to that interim final rule, the Attorney General explains that the preamble to the then current regulations ``. . . published on October 6, 1987 (52 FR 37402) states that the declaration must be completed prior to the occurrence of the alleged discrimination. Id. at 37407. The instructions to the I-772 itself, however, state that filing the I-772 is a prerequisite only `to assert a claim,' not to qualify for protection.'' 53 Fed. Reg., supra, at 48248. (emphasis added). The distinction described in that rulemaking between asserting a claim and qualifying for protection is understood in context of when the declaration must be completed and filed, not whether it must be completed and filed. This is made plain by the next sentence of the preamble:

> To dispel any confusion on this question, this notice announces that the Justice Department views the declaration of intention filing requirement as satisfied as long as the declaration is completed and filed before the charge of discrimination is filed with the Office of the Special Counsel for Immigration Related Unfair Employment Practices. It is not necessary to complete and file the declaration before the occurrence of the alleged discrimination.

Id. I do not understand that the Attorney General expressed an opinion at odds with the conclusion reached here, that completion of a declaration of intent, in whatever form is not a condition precedent to pattern or practice jurisdiction under 8 U.S.C. § 1324b. Had the Attorney General understood that pattern or practice jurisdiction were to turn on whether victimized aliens had perfected their intending citizenship status by the time of filing their charge, presumable he would have said so.

It follows that a pattern or practice of discrimination may arise without proof that more than one alien, as to whom the practice in question impacted, qualifies as an intending citizen within the meaning of section 102. Accordingly, the pattern or practice claim, clearly established, is found to have been proven as a matter of law.

VII. REMEDIES

a. Generally

Title 8 U.S.C. Section 1324b(g)(2)(A) provides that an administrative law judge who finds upon the preponderance of the evidence that the entity named in a complaint has engaged in or is engaging in an unfair immigration-related employment practice shall issue a cease and desist order. Having stated in this decision my findings of fact to the effect that by a preponderance of the evidence Mesa has so engaged in violation of 8 U.S.C. § 1324b, Mesa is so ordered.

All other remedies contemplated by section 102 are within the judge's discretion. 8 U.S.C. § 1324b(g)(2)(B).

Subsection (B)(i) authorizes an order ``. . . to comply with'' section 101 of IRCA ``. . . with respect to individuals hired during a period of up to three years.'' Considering the knowing and intentional discrimination practiced by Mesa against non-U.S. citizen pilot candidates, tempered, however, by recognition that such practice was among the earliest in the nation to become the subject of a complaint before an administrative law judge, I determine that it is just and appropriate for such an order to remain in effect for a period of two years.

For the same period of time, premised on the same considerations, Mesa will be expected to retain the name and address of each individual who applies, in person or in writing, for employment with Mesa. 8 U.S.C. § 1324b(g)(2)(B)(ii).

B. Eligibility for Back Pay

Subsection (B)(iii) authorizes the judge to direct the employer ``. . . to hire individuals directly and adversely affected, with or without back pay. . . .'' 8 U.S.C. § 1324b(g)(2)(B)(iii). Mr. Komsu has not asked to be instated as a Mesa employee. Both OSC and Mesa appear implicitly to assume that back pay may be awarded without the hiring of the aggrieved individual. I agree.

On a literal reading, 8 U.S.C. § 1324b(g)(2)(B)(iii) is susceptible to an interpretation that the hiring of an individual is a condition precedent to an award of back pay. Such a result, however, would frustrate rational implementation of the remedial purpose of the statute. Moreover, the legislative history suggests that an award of back pay should not depend on an order to hire the injured individual. Reporting out a bill which was identical in respect of subsection (B)(iii) as enacted, the House Judiciary Committee Report listed the two remedies, among others, in the disjunctive, stating that the employer may be ``. . . compelled to: (1)hire the aggrieved individual; (2) provide back pay. . . .'' H.R. Rep. No. 99-682, supra, at 71.

Applying Title VII analysis, with focus on substantially identical statutory text, 42 U.S.C. § 2000e-5(g), the courts have recognized instances where it would have been inappropriate to compel an employment relationship while refusing to withhold back pay. See, e.g., Vant Hul v. City of Dell Rapids, 462 F. Supp. 828 (D. S.D. 1978) (where friction has developed in the relationship between the parties), and Brito v. Zia Company, 478 F.2d 1200 (10th Cir. 1973) (where the complainants obtained or should have obtained other employment, the district court's granting of certain back pay while refusing reinstatement was affirmed).

The determination of appropriate relief in Title VII cases is within the discretion of the trial judge although appellate courts will look closely at refusals to grant back pay in employment related contexts. Albermarle Paper Co. v. Moody, 442 U.S. 405 (1975). See also Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); see particularly, id. at 243-44, Blackmun, J., dissenting.

Entitlement to back pay without instatement as an employee is consistent also with the IRCA requirement that ``[i]nterim earnings or amounts earnable with reasonable diligence . . .'' shall reduce back pay. 8 U.S.C. § 1324b(g)(2)(C). The aggrieved individual has a duty to mitigate damages. The discriminatee should not be required to seek employment elsewhere at peril of losing all claim to back pay. Due diligence does not require that the discriminatee forfeit current employment and join the employer found to have unlawfully discriminated against him or her in the first instance.

In the case at hand, by November 1987, Komsu had relocated to California and became employed by Wings West Airlines. I hold that he has the option not to demand employment by Mesa Airlines, whether because he is satisfied with employment at Wings West Airlines, or for any other reason. Accordingly, I determine that back pay may be awarded without ordering the hiring of Komsu by Mesa Airlines.

Section 102 limits back pay liability to amounts which have accrued not more than ``. . . two years prior to the date of the filing of a charge with an administrative law judge,'' and reduces any award by the amount of interim earnings or amounts earnable ``with reasonable diligence by the individual . . . discriminated against. . . .'' 8 U.S.C. § 1324b(g)(2)(C). This statutory formula is substantially similar to that of Title VII, 42 U.S.C. § 2000e-5(g).

The cases on back pay awards under Title VII make clear that while the claimant must establish that ``economic loss'' in fact resulted from the employer's discriminatory conduct, Taylor v. Philips Industries, Inc., 593 F.2d 783, 787 (7th Cir. 1979), ``. . . the employer has the burden of showing that the discriminatee did not exercise reasonable diligence in mitigating the damages caused by the employer's illegal actions.'' United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 937 (10th Cir. 1979) (footnote omitted). Accord Marks v. Prattco, Inc., 633 F.2d 1122, 1125 (5th Cir. 1981) (where a Title VII plaintiff ``. . . has established a prima facie case and established what he or she contends to be the damages resulting from the discriminatory acts of the employer, the burden of producing further evidence on the question of damages in order to establish the amount of interim earnings or lack of diligence properly falls to the defendant'').

OSC asserts that Komsu exercised reasonable diligence in seeking other employment as a pilot.

Mesa is correct that Komsu is multi-talented, with karate and restaurant experience aside from his aviation background. From that, Mesa argues that Komsu's underemployment from December 1986 to November 1987 resulted not from Mesa's refusal to hire, but from his own inaction. Mesa seizes on a footnote citation in Ford Motor Co., supra, where the majority opinion, cataloguing lower court decisions on the duty to mitigate damages, recites that an ``. . . employee need not `seek employment which is not consonant with his particular skills, background, and experience. . . .' '' 458 U.S. at 231 n. 16.

Mesa would have me apply the obverse to the proposition quoted in the footnote, and hold that Komsu should have sought employment consistent with his training and background. But that argument fails to acknowledge an omitted portion of the very case quoted in the footnote, that a discriminatee is under no obligation to seek employment ` ``. . . which involves conditions, that are substantially more onerous than his previous position.' '' Id. The argument also ignores that the Court stated in Ford that ``[a]lthough the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.'' Id. at 231-32 (footnotes omitted). If Ford has any bearing on our case, it is to the effect that Komsu was under no obligation to seek employment in a field other than aviation. It follows that I am unpersuaded that there is precedent to compel me to assess Komsu with the presumed wages of a karate or food service entrepreneur or employee.

To the same effect, United States v. Lee Way Motor Freight, Inc., supra, 625 F.2d at 938, instructs that a discriminatee is not held to the ``. . . highest standards of diligence . . . .,'' but is only required to make an ``. . . honest, good faith effort.'' During the period prior to and after rejection by Mesa, Komsu applied to Ross Aviation, Mesaba Airlines, Suburban Airlines, Business Express, Wings West Airlines, and Emmet West. In addition, Komsu inquired into available job openings when he flew to a fixed-base operation such as Cutter Aviation or New Mexico Flying Service.

It was eleven months after this initial application with Mesa before Komsu obtained comparable employment as a pilot with Wings West Airlines, not an unreasonable time to search. See, e.g., Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985) (a one year search for employment was reasonable).

The record does not establish that Komsu neglected opportunities to obtain employment in aviation. I agree with OSC that Komsu was persistent and diligent in his search for a job. Accordingly, any deduction is limited to earnings, actual and constructive, as discussed below.

The request for back pay derived from the record:

1. $6,000.00--Salary, 12/86 to 6/87, First six months at a first officer's salary at $1,000.00 per month;

2. $7,500.00--Salary, 7/87 to 11/87, next five months at a captain's salary at $1,500.00 per month;

3. $461.23--Medical Insurance Benefits 12/86 to 11/87, Mesa contribution, $14.93 per month per employee, $27.00 per month for dependants;

4. $ 00.00--401K Plan, participation is only available after the first year of employment;

5. $500.00--Travel and Employee Discounts 12/86 to 11/87, Komsu would have accrued a certain number of vacation days and holidays during the year; claimant estimates one family trip flown almost anywhere in the United States.

$14,461.23--Total gross salary and benefits claimed[12]

(448.00)--Less: wages earned, 12/86 to 11/87
$14,013.23--Net claim

I do not agree with Mesa that eligibility for back pay starts only 180 days prior to filing of the charge. There is no basis for such a limitation which would in any event nullify the proscription of 8 U.S.C. § 1324b(g)(2)(C) against accrual of back pay more than two years before a charge filed with me.

C. Back Pay Entitlements

The calculation of $6,000.00 reflects the claim for salary from December 1986 when Komsu first submitted a resume to Mesa, at a first officer's rate of $1,000.00 per month. (Although Larry Risley, having said on deposition that the salary was $1,000.00 monthly, testified that entry level salary was $900.00 per month for the first three months, Mesa on brief treats first officer salary at the $1,000.00 level, as finally agreed to by Mr. Risley, tr. 277, and adopted here in that light.)

Mesa, however, contends that it is improper to calculate back pay from December 1986. Since it conducted no interviews in December 1986 and pilots hired that month had been interviewed in

[12]So much of the prayer for relief in the complaint on Komsu's behalf as claimed interest on his back pay claim was never addressed in proof or on brief. No argument or calculation having been submitted to support an award of money interest, that portion of his claim is deemed to have been abandoned.

November 1986, Mesa asserts that Komsu, having only applied in December, would not have been hired that early. March 1987, the next month that pilot applicants were interviewed and hired would have been the earliest that Komsu's application would have been considered.

There is merit to Mesa's assertion that back pay should not be credited prior to the time there is a vacancy available to be filled. See, e.g., Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); McCoy v. Safeway Stores, Inc., 5 Fair Empl. Prac. Cas. 628 (D. D.C. 1973). Applying that rule, in light of the fact that Mesa's last pilot acquisition before March 9, 1987, was December 16, 1986, exh. 43, the earliest month that there was a position for Komsu to fill was March 1987.

Of those pilots hired in March 1987, Mesa claims that one, Peter Klug, was better qualified than Komsu. Although claiming that April was the first month Komsu could have been hired, Mesa urges that due to his negative recommendations it is unlikely that Komsu would ever have been hired. It would be not only inconsistent with the purposes of section 102 but also unconscionable to indulge Mesa's claim that an after the fact one-on-one comparison of qualifications now warrants denying recompense to a candidate to whom it had unlawfully denied that comparative evaluation when it was his due. It is certain to my mind that Komsu was qualified for a position as first officer in March 1987, had applied for the position, but others similarly qualified were selected. The burden of establishing his case in this respect has been sustained.

OSC maintains that after the initial six months of employment as a first officer, Komsu would have been promoted to a captain at a salary of $1,500.00 per month, for a total of $7,500.00 for the five months from July to November 1987. Mesa wants me to reject that claim as speculative, and to deny captain's pay to Mr. Komsu.

According to Ken Widger, Mesa's vice president of operations, previously director of operations, a promotion to captain generally occurs between nine and fourteen months of service, although he conceded that it is possible for a first officer to be promoted to captain within six months. Mesa maintains that there is no evidence that Komsu's contemporaries who had been hired were promoted to captain in that time frame, if ever, and there is no showing that Komsu was promoted to captain in his job with Wings West Airlines. The most that Mesa would have me allow Komsu would be six months as a first officer at $1,000.00 per month (from May through October 1987), for a total of $6,000.00.

Failure to introduce evidence as to the likelihood of promotion is not fatal to an award of incremental increase to reflect promotion

from first officer to captain. Widger testified that it was possible for a first officer to be promoted to captain within six months and that during the first half of 1987, particularly in May of that year, Mesa experienced a shortage of captains. The burden was upon Mesa to establish that its pilots are not in fact promoted within a six month time frame.

The innuendo that Komsu exhibited poor judgment by flying in controlled airspace without clearance is unavailing to Mesa because I have not found that the alleged incident occurred. But if it had occurred, Mesa would presumably have taken it into account, in context, recalling that several of Mesa's senior officials and captains served in their operational capacities despite aeronautical incidents of greater gravity. I conclude, accordingly, that to provide the appropriate measure of compensation, to place Komsu in the position he would reasonably have been eligible for and could have expected to have attained, he is entitled to $1,500.00 per month captain's pay after six months with Mesa.

Back pay is calculated to run from March 1987, at first officer's rate of $1,000.00 per month for six months, through August 1987. For the remaining two months, September and October 1987, ceasing when Komsu began in early November flying with Wings West Airlines, he is entitled to $1,500.00 per month captain's pay.

After at least 30 days of employment, a pilot is eligible to participate in Mesa's group health insurance program, resulting in seven months of hypothetical coverage for Mr. Komsu. The record is obscure as to whether the employer contributes to coverage for employees' dependants. I conclude, based in substantial part on the specimen billing by Safeco Life Insurance Company, exh. 54, together with the testimony of Larry Risley, that Mesa provides voluntary participation in medical insurance benefits for its pilots, contributing $14.93 per month per employee, and $27.02 per month for dependants.

The major share of the premium is borne by the employee, at a monthly rate of $26.00 each, plus another sum that is payable by each employee who elects dependant coverage. However, it is not feasible to conclude from the record what portion of total dependant insurance cost is assessed to the employee because, although Larry Risley testified that the company paid no part of the dependants' coverage, colloquy with counsel, tr. 759-63, and exhibit 54 suggest otherwise. It is uncertain whether Larry Risley's stated $70.00 monthly cost per employee electing dependant coverage includes, or is in addition to, Mesa's $27.02 contribution. It is noteworthy that while Mesa remitted to Safeco as of October 1, 1987,

for 125 covered employees, the comparable number was only 41 for ``dependent units.'' Exh. 54.

Since fewer than one-third of the 125 covered employees opt for dependent coverage I cannot assume that Komsu would have done so. Indeed, the record is silent as to whether he would have elected to participate at all in the medical insurance program, but it is urged on his behalf that I find him entitled to compensation in lieu of employer's medical insurance contributions. In my view, however, were I to do so it would be appropriate, although Special Counsel is silent on this score, to charge the employer's contribution against Komsu's entitlement. Moreover, there is no evidence that Komsu incurred out-of-pocket expenses for insurance coverage or medical costs. Cf. Brunetti v. Wal-Mart Stores, Inc., 525 F. Supp. 1363, 1377 (E.D. Ark. 1981) (reimbursement authorized on proof of actual expenditures). The charge, whether the employee's dependent coverage is $70.00 monthly or $70.00 less $27.02, would exceed the entitlement.

The claim for 401K retirement plan employer contributions is denied because it appears that a Mesa employee becomes eligible for participation in the plan only after one year on the payroll. Since I have found back pay eligibility for a period of less than one year, Mr.Komsu is ineligible for this entitlement.

The claim for travel benefits and employee discounts is patently speculative. The only pertinent evidence is that of Larry Risley who acknowledged that employees are eligible for certain hotel discounts, airline passes and discounts. No monetary value was established by OSC for possible travel benefits. Mesa asserts that OSC failed to establish when and in what amounts pilots become eligible for vacation time.

Although Risley acknowledged that Mesa pilots obtain travel benefits, I accept Mesa's claim that such benefits are not costed out by the employer because not charged to it. They are, nevertheless, of tangible value to the employee. It is common knowledge that air crews obtain travel perquisites; presumably Komsu would have been eligible for travel benefits and discounts. However, I do not find that simply raising the prospect of benefits constitutes credible proof of record to establish a value for Komsu's loss. Whatever burden of persuasion may rest on the employer, surely it is not compelled to fill such gaps in the claimant's case. Because there is no showing of any bargained for or expected level of such benefits or leave time, I cannot reward the claimant by assessing the employer with those costs. See Taylor v. Philips Industries, Inc., supra, 593 F.2d at 787; cf. Brunetti v. Wal-Mart Stores, Inc., supra, 525

F.Supp. at 1377. Accordingly, I make no allowance for such benefits.

D. Offsets To Back Pay

OSC would have me reduce the sums awarded only for sums earned by Komsu as follows:

$250.00--Flight lessons, January -- March, 1987

$65.00--Additional earnings, July 1987

$133.00--Part-time employment, September 1987

$448.00--Total wages earned 12/86-11/87

Of the $250.00, since $200.00 is attributable to flight lessons during January and February, prior to the period for which this decision awards back pay, the conceded earnings offset is reduced to $248.00.

Mesa contends that a deduction for ``. . . amounts earnable with reasonable diligence by the individual . . .'' is required in addition to the wages or ``[i]nterim earnings,'' 8 U.S.C. § 1324b(g)(2)(C).

As already discussed, I do not agree that Komsu failed in his duty to mitigate damages. Perhaps Komsu might have more effectively sought to obtain compensated flight instructor positions and to have pursued in a more business-like manner employment opportunities at various fixed-base operations. I will not, however, substitute Mesa's after-the-fact judgment as to the quality of his efforts. It is enough that, having observed him testify to the circumstances of his efforts from March through October 1987, I find that Komsu exercised reasonable diligence in seeking employment during that period of time; I find he made ``. . . an honest, good faith effort.'' Lee Way Motor Freight, Inc., supra, 625 F.2d at 938.

Komsu received $532.00 per month in unemployment compensation for each month, May through September 1987. OSC, in conflict with Mesa, asserts that there should be no offset for these receipts by him.

OSC cites NLRB v. Gullett Gin Co., Inc., 340 U.S. 361, 364 (1951), which upheld an NLRB decision not to deduct state unemployment compensation from a back pay award, concluding that the benefit of collateral recovery should be bestowed on the victim. [As noted by the Supreme Court both in Albemarle, supra, 422 U.S. at 419, and Ford Motor Co., supra, 458 U.S. at 226 n. 8, Title VII's back pay provision was ``expressly modeled'' on the analogous remedial provision of the National Labor Relations Act.]

Mesa cites Merriweather v. Hercules, Inc., 631 F.2d 1161, 1168 (5th Cir. 1980) where the Fifth Circuit, affirmed an offset allowed by the district court for unemployment compensation benefits to avoid ``any possibility of a double payment to a plaintiff. . . .'' Sig-

nificantly, the court of appeals expressed the familiar rule that ``. . . . in any case, such a decision is within the discretion of the trial judge.'' Id. (emphasis added).

Mesa's reliance on Cline v. Roadway Express, Inc., supra, 689 F.2d at 490, is misplaced for, although the court said that a discriminatee should not obtain a windfall, its decision did not involve a collateral payment by public authorities as in the case at hand; rather, the court was addressing whether company stock received by the employee upon his discharge should be set off against his award for wrongful termination by the issuer of the securities.

Absent any reason not to do so, I follow here the instruction of Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1137, (10th Cir. 1983), cert. denied, 464 U.S. 938 (1983), where the court affirmed the district court's finding of discrimination on behalf of a Mexican-American employee, saying that ``[t]he court may fashion an order in such cases to eliminate the effects of discrimination and to restore the plaintiff to the position he would have held but for the discrimination. . . .'' The court instructed that the trial court's refusal to deduct the claimant's disability benefits from the employer's back pay liability was ``. . . not error. Such benefits are from a collateral source, and offset is not required.'' 707 F.2d at 1138.

Previously, the Tenth Circuit had affirmed a trial court's rejection of the employer's claim that unemployment compensation was a windfall to be offset as an amount earnable. In EEOC v. Sandia Corp., 639 F.2d 600, 625 (10th Cir. 1980), the court said that ``. . . unemployment compensation is purely a collateral source and is peculiarly the property of the claimant. It would be unfair to give Sandia the benefit of it in these circumstances.''[13]

The Sandia court, commenting on cases in other circuits made this important observation:

> . . . cases which give approval to the crediting of unemployment compensation benefits are largely based on upholding the discretionary decision of the district court. No one of them shows a marked preference for this doctrine.

Id at 625.

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[13]Most recently, after citing Sandia, supra The Tenth Circuit added a further dimension to the rationale not to offset unemployment compensation against backpay:

> . . . An offset is particularly inappropriate in this case because, under Colorado law, an employee who receives a back pay award must repay the Colorado Division of Employment and Training all unemployment benefit payments received for the period covered by the back pay award. Colo.Rev.Stat. § 8-73-110(2) (1986); see Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F.Supp. 936, 951 (D. Colo. 1979).
>
> Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988).

In the interests of fashioning the most complete relief possible, Albemarle Paper Co. v. Moody, supra, I find it inappropriate to reduce Komsu's award by the amount of his unemployment compensation, for the reason that a publicly funded collateral source of funds ought not benefit the employer, and need not be judicially recognized as comprising any part of ``amounts earnable'' for the purpose of calculating offsets to allowable back pay.

Komsu received from friends as in-kind benefits, shelter, food, other goods, cash, flying time, and car repairs. OSC argues that subsistence assistance from friends does not comprise interim earnings and suggests that no court has considered deducting friendly in-kind assistance ``. . . probably because few employers ever ask for such an offset.'' OSC Br., at 58 n. 60.

Rarely have I encountered a litigant with as many helpful friends. Michael J. Whalen let Komsu and his wife stay at this house free of charge, loaned him money and let him fly his plane. Gene Morgan also provided substantial assistance for which no repayment was expected.

Morgan testified that Komsu performed tasks not for compensation but for services. Komsu was not on his payroll as an employee; Komsu's flight training was not in repayment for his help. Morgan further testified that he did not need Komsu to fly planes for him. He simply allowed Komsu to build up his flight time to improve his marketability.

Mesa argues that Komsu bartered or exchanged services for flight time and for goods and services which must be given monetary value and be deducted from the back pay award. Mesa contends that Komsu in effect was self-employed, receiving in-kind services and flight time (which enhanced his marketability) in exchange for giving flight instruction.

Without attempting to calculate the monetary value of the activity performed by Komsu, it is certain that the fair market value of flight instruction and flying services might more than consume his claim here. For example, while his application was pending at Mesa, Komsu flew ``several hundred'' non-compensated hours. Tr. 1084. The issue at hand involves the value both of services and equipment provided to Komsu as well as services provided by him. He was fortunate in obtaining assistance of benefactors in the aviation field who were able to provide him with sustenance of a character consistent with his training and career goals.

Komsu's good fortune does not, however, compel me to convert that assistance into interim earnings. I am unaware of any requirement that I place a monetary value on the goods and services obtained from friends or infer that there was an underlying, or con-

structive, barter arrangement. It is appropriate instead that, relying on the principle of Sandia, supra, I conclude that Komsu's in-kind benefits were personal, from collateral sources which need not be recognized as amounts earnable.

Accordingly, except to the extent of the sum conceded by Special Counsel, $25.00 per month, I reject the claim that in-kind services have been proven which must be assessed against the discriminates. The sum of $25.00 per month for eight months, a total of $200.00 will be deducted from the award.

E. Pattern Or Practice Civil Money Penalty

As previously discussed, for purposes of pattern or practice liability, aliens (other than unauthorized aliens) ``discriminated against,'' 8 U.S.C. § 1324b(g)(B)(iv), are not limited to those who have proven intending citizen status. I have found that Martin Riebeling was not an intending citizen as that statutory term has been implemented by the Department of Justice; nevertheless, he was a qualified non-U.S. citizen applicant rejected by Mesa. In my judgment, it follows that there is power to assess a civil money penalty as to him. However, as a matter of comity and not of power, recognizing that this is the first decision finding liability and imposing penalties under section 102, it is appropriate to assess a civil money penalty in the sum of $1,000.00 allocable only to Komsu.

I cannot agree with Mesa that an assessment of $1,000.00 for a pattern or practice determination would be improper if adjudged in addition to remedies on behalf of Mr. Komsu. Nothing in section 102 suggests that make-whole relief on behalf of the discriminate and civil penalties on behalf of the government are mutually exclusive 8 U.S.C. § 1324b(g)(2)(B).

F. Reconciliation

Total allowed for back pay:	$9,000.00
Less offset for interim earnings:	$(248.00)
Less offset for in-kind receipts:	$(200.00)
Total payable to Mr. Komsu:	$8,552.00
Civil money penalty	$1,000.00

VIII. ULTIMATE FINDING, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, and proposed findings of fact and conclusions

of law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. That applicability of the antidiscrimination provision of IRCA, 8 U.S.C. § 1324b, is not limited to situations arising out of enforcement of the employer sanctions provisions of IRCA, 8 U.S.C. § 1324

2. That Zeki Yeni Komsu (Komsu), was at all times relevant to this proceeding an alien lawfully admitted to the United States.

3. That Komsu is an intending citizen within the meaning of ⌐8 U.S.C. § 1324(a)(3) so as to qualify for relief from, and remedies for, unfair immigration-related employment practices.

(a). The regulatory provision that completion and filing of a Declaration of Intending Citizen not later than December 1, 1987, and a prescribed assertion of intent in a charge filed with the Special Counsel relates back to the time of the alleged discriminatory conduct, although retrospective, is a reasonable and proper implementation by the Department of Justice of the statutory requirement that to obtain individual relief under 8 U.S.C. § 1324b an otherwise qualified alien must complete such a declaration.

(b). Komsu satisfied the statute and regulation by timely completing and filing such a declaration.

4. That Komsu applied for employment in the United States as a pilot with Mesa Airlines (Mesa) in December 1986, was informed in April 1987 that Mesa preferred to hire only United States citizens as pilots if they were available, and was told on August 17 or 18, 1987, that he would not be hired because he was not a U.S. citizen.

5. That Komsu satisfied the statutory requirement that an unfair immigration-related employment practice charge must be filed with the Special Counsel for Immigration-Related Unfair Employment Practices (OSC or Special Counsel) not more than 180 days after the alleged act of discrimination.

(a). Komsu's filing with OSC by mail, postmarked November 18, 1987, was within 180 days of August 17 or 18;

(b). In any event, however, even assuming as Mesa claims that the last conversation between Komsu and any Mesa official was in April 1987, the 180-day period, being one of limitation and not jurisdictional, is subject to equitable tolling. As the result of equitable tolling, Mesa's alleged discriminatory conduct of April 1987 is within the statutory 180-day time frame for filing of the charge with the OSC.

(i). That principle tolls the 180-day period here because Mesa's hiring official in April 1987 failed to reject Komsu's candidacy with finality, lulling him into inaction.

(ii). Tolling is particularly appropriate here where Komsu, on August 20, 1987, mistakenly filed a charge with the Equal Employment Opportunity Commission (EEOC) arising out of the same alleged discriminatory conduct.

6. That the continuing violation theory, applicable to the charge of discriminatory failure to hire, brings into focus Mesa's hiring practices as they impacted on Komsu starting with the filing of his application in December 1986.

7. That in implementation of Mesa's announced policy of preferring to hire only U.S. citizen pilot candidates if any were available, Komsu was denied employment on citizenship grounds.

(a). Mesa having admitted it had such a policy, and having so informed Komsu, there is direct evidence of a prima facie case of discrimination. In any case, however, the record unambiguously supports the inference that Komsu was rejected on citizenship grounds.

(b). From March 1987 through August 1987, Mesa hired 27 U.S. citizen candidates; during the period December 1986 through August 1987, 35 such candidates were hired. Although Mesa's management officials recanted the earlier acknowledgment that Mesa maintained two pilot hiring pools, one for U.S. citizens, one for aliens, the record unmistakably confirms that in practice its hiring policy had that effect. No non-U.S. citizen candidates were hired during those periods, and non-U.S. citizen hires before enactment of IRCA had been inadvertent.

8. That a prima facie case of discrimination is shown on this record where it is established that Komsu was qualified and applied for employment with Mesa as a pilot and was rejected while Mesa continued to hire pilots who satisfied its U.S. citizenship preference.

9. That Mesa, whether by objective evidence or otherwise, has failed, in turn, to prove by a preponderance of the evidence that it was lawfully entitled to discriminate in its hiring practices against Komsu and in favor of U.S. citizen pilot candidates.

(a). Mesa continued to maintain its policy of preferring U.S. citizen pilots even after Komsu had filed his charges with EEOC and OSC. Not having performed any qualifications comparison, candidate to candidate, Mesa fails to qualify for application of the statutory exception which permits an employer to prefer a U.S. citizen over an alien ``. . . if the two individuals are equally qualified.'' 8 U.S.C. § 1324b(a)(4).

(b). Mesa informed Komsu, the EEOC, and OSC, that Komsu was rejected not for a reason which itself was a pretext for a prohibited motive but rather that it maintained and, with respect to Komsu,

applied a discriminatory policy. Mesa subsequently claimed it had in fact rejected him for reasons not covered by claimed it had in fact rejected him for reasons not covered by IRCA. Although one employee had surmised that Komsu was not hired due to ``annoying phone calls,'' Mesa's officials told Komsu only that he was rejected in implementation of the policy which preferred U.S. citizens. Considered in context of systematic exclusion of non-U.S. citizens from its pilot corps, I reject as pretextual the rationale that he was rejected because he was too persistent, obnoxious, or pushy. I find instead that in implementation of Mesa's acknowledged underlying motive Komsu was never considered on the merits at all.

10. That Mesa failed to prove by a preponderance of the evidence that it would not have hired Komsu even in the absence of citizenship status discrimination.

11. That Mesa failed to prove by a preponderance of the evidence that it failed to hire Komsu for a legitimate, nondiscriminatory reason.

12. That, based upon the preponderance of the evidence, I determine that Mesa engaged knowingly and intentionally in an unfair immigration-related employment practice, within the meaning of 8 U.S.C. § 1324b, when it failed to hire Komsu as a pilot.

13. That only Komsu among the alien candidates for employment as pilots by Mesa is proven to be an intending citizen as that term is defined by IRCA, 8 U.S.C. § 1324b(a)(3)(B). Although by having applied for naturalization, Martin Riebeling, a permanent resident alien, may be understood to have signified his intent to become a U.S. citizen, the regulation of the Department of Justice, 28 C.F.R. § 44.101(c)(2), makes clear that only the completion and filing of a Declaration of Intending Citizen satisfies the statutory requirement. There is no evidence that any of the other alien pilot candidates for employment with Mesa have qualified as intending citizens.

14. That OSC is authorized by 8 U.S.C. § 1324b(d) to file a complaint which alleges a pattern or practice of discriminatory activity.

15. That a pattern or practice may be alleged and proven without limitation to proof only of discrimination against aliens who qualify as intending citizens. The requirement that to be protected by 8 U.S.C. § 1324b an alien must qualify as an intending citizen is understood both from the text of the statute and from its legislative history to be a condition precedent to private relief. Vindication of the public interest in a discrimination free work place through pattern or practice determinations does not depend upon intending citizen status.

16. That the legislative history of IRCA acknowledges that the phrase pattern or practice is intended to be consistent with the generic meaning of that phrase. By adverting to the generic meaning of that phrase, the House Judiciary Committee has imparted the understanding that such conduct is legally actionable without the prerequisite of a given number of individuals who could maintain a discrimination action in their own right. This is not to say, however, that there need be even one discriminatee who qualifies as an intending citizen. Because Komsu so qualifies, this decision need not reach that question.

17. That as found and concluded above, and as acknowledged in the testimony of Mesa officials, employees, and third parties, it was the longstanding policy of Mesa to prefer U.S. pilot candidates to the exclusion of non-U.S. citizens so long as qualified U.S. pilots were available. In implementation of that policy both Komsu and Riebeling were rejected, the latter being hired within a week or so before the hearing in this case. Accordingly, I determine upon the preponderance of the evidence that Mesa has engaged in a pattern or practice of discriminatory activity within the meaning of 8 U.S.C. § 1324b.

18. That Mesa shall pay:

(a). To and on behalf of Komsu a total sum of $8,552.00 in back pay (which is available notwithstanding that he has not asked for an order that he be hired by Mesa) as measured by the prevailing salary for new pilots as first officers, with an increment for promotion to captain after initial service. He is entitled to back pay for the period March 1987 through October 1987, in the sum of $9,000.00, less offset for interim earnings ($248.00), less offset also for the conceded value of in-kind receipts ($200.00).

(b). To the United States a civil money penalty in the sum of $1,000.00.

19. That Mesa shall:

(a). Cease and desist from the unfair immigration-related employment practice found in this case, i.e., preference for U.S. citizen hires in violation of 8 U.S.C. § 1324b;

(b). Comply with the requirements of 8 U.S.C. § 1324a(b) during a period of two years from the date of this final decision and order, during which it shall retain the name and address of each individual who applies, in person or in writing, for hiring for an existing position for employment by Mesa in the United States.

20. That, pursuant to 8 U.S.C. § 1324b(g)(1), this final decision and order is the final administrative order in this proceeding and ``. . . shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated this 24th day of July, 1989.

MARVIN H. MORSE
Administrative Law Judge