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

In Re Charge of Rosita Martinez

United States of America, Complainant v. Marcel Watch Corporation, a Corporation, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200085.

FINAL DECISION AND ORDER

(March 22, 1990)

SYNOPSIS:

1. A Puerto Rican-born citizen of the United States is an individual covered by the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices and as such is protected from citizenship status discrimination in hiring.

2. The limitations of 8 U.S.C § 1324b against duality of proceedings before administrative law judges and the Equal Employment Opportunity Commission, and against overlap between Title VII of the Civil Rights Act of 1964, as amended, and 8 U.S.C § 1324b, pertain only to claims based on national origin discrimination and not to claims based on citizenship status discrimination.

TABLE OF CONTENTS

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MARVIN H. MORSE, ADMINISTRATIVE LAW JUDGE

Appearances: **ANDREW J. STROJNY**, Esq. and SUE GUNTER, Esq., for the United States, Complainant.
FRED I. SONNENFELD, Esq., for the Respondent.

I. Introduction

A. Background Generally

Looking and sounding foreign have been characteristics of American citizens since this nation first began. From the early days of the republic, whether high officials or ordinary citizens Americans reflected the accents of their ancestral homelands or familial roots for generations after arriving in this country. Thomas Jefferson's Secretary of the Treasury, Albert Gallatin, a Swiss by birth, and a naturalized U.S. citizen, spoke with a heavy French accent according to chroniclers of the time. Nor is it surprising that one of the key issues in the War of 1812, impressment of American sailors on the high seas, was in part the problem that British troops were unable to differentiate between American and British sailors in their pronunciation of the English tongue.

As a nation of nations, the United States in its short history has absorbed the masses of Europe, Latin America, Africa and Asia to beome the strong pluralistic society it is today. In this process it is easy to understand that being of foreign countenance or speaking a language other than English may also subject some individuals to discrimination precisely because they retain characteristics of another culture. Concern that the government be wary of any action which is tainted by a ``prejudice against discrete and insular minorities . . . which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities'' in our society, was expressed just over fifty years ago by Chief Justice Stone in his famous dictum in U.S. v. Carolene Products Corp., 304 U.S. 144, 152-53 n. 4 (1938). Similar concern prompted adoption of prohibitions against unfair immigration-related employment practices as a concomitant of the employer sanctions program enacted by the Immigration Reform and Control Act of 1986 (IRCA), Pub. Law 99-603, 100 stat. 3359, 3374 (November 6, 1986). Section 102 of IRCA enacted a new anti-discrimination cause of action, amending the Immigration and Nationality Act by adding a new Section 274B, codified as 8 U.S.C. § 1324b.

Since World War II and especially after the civil rights reforms of the 1960s and 70s the guarantee of equal protection under law had been expanded beyond racial and religious bigotry to prohibit discrimination implicating gender, national origin and age. As understood by the Supreme Court, however, in Espinoza v. Farah Mfg., 414 U.S. 86 (1973), discrimination based on citizenship (sometimes also referred to as alienage) was not legislatively prohibited. It was this omission in large part that Section 102 of IRCA was enacted to correct. See, e.g., Joint Explanatory Statement of the Committee of Conference, Conference Report, Immigration Reform and

Control Act of 1986, H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87-88 (1986) reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842; see also Immigration Control and Legalization Amendments Act of 1986 Committee on the Judiciary, H.R. Rep. No. 99-682(I) 99th Cong. 2d Sess. at 69 (1986), 1986 U.S. Code Cong. & Admin. News 5649, 5673.

The central role of Congress in defining citizenship--its acquisition, its loss, how it is judged, the consequences citizenship or non-citizenship ential--lies at the heart of Section 102 of IRCA. In discussions of the employer sanctions provisions of what was to become IRCA, Congress made clear a paramount concern arising from the pending legislation. Congress was concerned that United States citizens and others who, though not citizens, are legally in the U.S., who ``looked or sounded foreign'' might otherwise fall victim to discriminatory practices by employers trying to screen out employees whose status in this country is illegal. 1986 U.S. Code Cong. & Admin. News, supra at 5842.

Debate on the bill which became IRCA acknowledged that Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. §§ 2000e et seq.) provides a remedy for discrimination on the basis of national origin. But it was also noted that Title VII implicates only employers of 15 or more individuals. Furthermore, at least since Espinoza, supra, it had been understood that no federal law covered discrimination based on alienage or citizenship. This perceived failure of Title VII to reach claims of discrimination based on citizenship was the point of departure for anactment of Section 1324b.

Section 1324b extends protection akin to that of title VII for claims of discrimination based on national origin on the part of any individual other than an ``unauthorized alien'' with respect to employers of four or more but fewer than fifteen persons. For the first time, as enacted by Section 102 of IRCA, discrimination because of citizenship status is prohibited with respect to hiring, recruiting, referring for a fee, or firing, in the case of citizens and ``intending citizens,'' 8 U.S.C. § 1324b(a).

At Article I, Section 8, Clause 4, the United States Constitution authorizes Congress to establish ``a uniform Rule of Naturalization,'' and elsewhere uses the term ``citizen,'' but not until the fourteenth amendment did it define the term, i.e., ``[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'' U.S. Const. Amend. XIV, Sec. 1. As an axiom to citizenship derived through birth and through naturalization, the Supreme Court has long acknowledged that ``instances of collective

naturalization by treaty or by statute are numerous,'' Boyd v. Nebraska, 143 U.S. 135, 162, 36 L. Ed. 103, 110 (1892).

B. Status of the Charging Party

As a person born in Puerto Rico, Rosita Martinez (Martinez), the charging party on whose behalf Special Counsel (OSC, or Complainant) brought this case, is an example of collective naturalization, a United States citizen, and, therefore, an individual covered by Section 102 of IRCA, 8 U.S.C. § 1324b. It is undisputed that Martinez was born in Puerto Rico in 1939 and lived all her life either there or in the mainland United States. Accordingly, she is a citizen by operation of law, 8 U.S.C. § 1402.

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisidiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

(June 27, 1952, ch. 477, title II, ch. 1 § 302, 66 Stat. 236.)

Recent case law has dealt with coverage of individuals who are ``intending citizens'' as defined under Section 1324b, e.g., U.S. v. Mesa Airlines, Nos. 88200001, 02 (OCAHO July 24, 1989) (Morse, J.) appeal pending, No. 89-9552 (10th Cir. filed September 25, 1989), Empl. Prac. Guide (CCH) ♀ 5243); U.S. v. LASA Marketing, No. 88200061 (OCAHO November 27, 1989) (Schneider, J.). Empl. Prac. Guide (CCH) ♀ 5246.

At bar is a case of first impression in determining on a fully litigated record the applicability of Section 1324b to a U.S. citizen. Cf., Wisniewski v. Douglas County School District, No. 88200037 (OCAHO October 17, 1988) (Morse, J.), Empl. Prac. Guide (CCH) ♀ 5191 (U.S. citizen, although a covered individual, failed to make a prima facie showing of discrimination based on citizenship status). The present case is the first under Section 1324b to go to trial in which the charging party is a United States citizen born in Puerto Rico.

II. Procedural Summary

On October 27, 1988, Ms. Rosita Martinez filed a charge with the Office of Special Counsel (OSC) against Marcel Watch Corporation alleging unfair immigration-related employment practices in violation of 8 U.S.C. § 1324b(a)(1)(B). OSC established pursuant to 8 U.S.C. § 1324b(c) to receive such a charge, and if it determines there is reasonable cause to believe such charge is true, to file a complaint before an administrative law judge, filed its Complaint

against Marcel Watch Corporation (Marcel Watch, or Respondent) on February 13, 1989, with the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. § 1324b(d)(1). On February 15, 1989, OCAHO, which provides administrative support for administrative law judges assigned to hear and decide cases filed pursuant to 8 U.S.C. § 1324b, issued its Notice of Hearing which advised Respondent that the Complaint had been filed and that I would hear it.

Marcel Watch filed its Answer to the Complaint on February 27, 1989. Telephonic prehearing conferences were held on April 19, and June 1, 1989. On June 27, 1989, I held an evidentiary hearing in New York City. At the hearing, Respondent filed a motion to dismiss which I denied. The last post-hearing brief was filed October 20, 1989.

III. Statement of Facts

Rosita Martinez, born in Puerto Rico, moved from there to New York City in 1975 to marry Augustine Martinez. She had never been employed before moving to New York. In 1976 Martinez became a packer at Beatrice Frozen Foods Corporation, working there full-time for just over five years. When the factory closed in 1981 her position terminated. Mrs. Martinez remained unemployed outside the home from 1981 until 1987, the year her son began to attend school.

From 1987 until her application to work at Marcel Watch, Martinez held three jobs: a temporary position as a packer which lasted one month, obtained through the New York State Department of Labor; a one month job cleaning vegetables at a greenhouse, found through her own efforts; and a three month job in 1988 as a glove packer at Finales, obtained through the Department of Labor.

On October 5, 1988, Martinez went to the Employment Service, New York Department of Labor (Department). Ms. Grace Allen, a Department employment interviewer referred her to Marcel Watch for a full time, permanent, unskilled position as a packer of clocks and watches for shipment. She was not hired for the position.

On October 23, 1988, the Department referred Martinez to Cosrich, another employer. She was hired as a packer for $3.35/hour plus overtime. The job ended on November 14, 1988. She was unable to find suitable employment on her own or through the Department during the period November 14, 1988 through March 1989.

Ms. Martinez testified that from April 1, 1989, until June 2, 1989, a two month period, she was unable to seek employment because her husband was ill. When she resumed her job search in June the

Department told her that there was no work available and to return in July. As of the time of the evidentiary hearing on June 27, 1989, Martinez was unemployed.

Marcel Watch, a New York corporation which imports and wholesales watches and clocks, employs twenty to twenty-five employees at its principal office in New York, and one at its purchasing office in Hong Kong. Although certain facts involving Martinez's visit to Marcel Watch on October 5, 1988, are disputed, it is undisputed that on the morning of October 5, 1988, Martinez was interviewed by Grace Allen of the New York State Department of Labor Job Service Office (Department) and referred to a watch packer vacancy at Marcel Watch. Ms. Allen gave Martinez a referral card designating ``Dan'' to contact at Marcel Watch. Martinez went directly from her interview with Ms. Allen to Marcel Watch.

It is undisputed that on October 5, 1988, Ms. Martinez was refused employment by Marcel Watch as a watch packer through Mr. Dan Bob, its production manager who was in charge of interviewing, hiring and supervising employees. The parties offer differing versions of what happened while Martinez was at Marcel Watch that day, but they agree that the conversation between her and Dan Bob was in English.

A. Ms. Martinez's Version

Upon arriving at Marcel Watch, Ms. Martinez identified herself as applying for employment and asked to see ``Mr. Dan,'' Tr. at 20. A receptionist took her to Dan Bob. Ms. Martinez gave him the Department referral card, and he asked for her documentation, specifically her birth certificate, social security card and green card. Martinez told Dan that she was from Puerto Rico, an ``American'' and, therefore, did not have a green card. She also testified that she placed her birth certificate bearing a yellow stamp, her social security card and her New York voter registration card on the desk in front of Bob. She claims that he failed to examine them. Instead, he insisted on her producing a green card.

Despite Ms. Martinez' protestations that she was a United States citizen and, therefore, did need a green card, i.e., an alien registration card, Bob told her that he wanted to show her applications of some Puerto Rican individuals who had green cards. Martinez responded that those individuals were not native Puerto Ricans, but rather immigrants who must have originally come from other countries. Martinez testified that Bob proceeded to produce from the office files photocopies of green cards to show Martinez. He did not show her photocopies of any other types of identification documents.

After about twenty minutes, Mr. Marcel Drucker, President of Marcel Watch, came out of his nearby office to the area where Bob and Martinez were talking. Mr. Drucker told Bob that Martinez was a Puerto Rican and, therefore, an American citizen. Unpersuaded, Bob continued to insist that Martinez produce a green card without which she would not be hired. Drucker then told Bob to sign Martinez's Department referral card to take back to the Department. Martinez left immediately.

Martinez testified that the conversation with Bob was simple; she had no difficulty in communicating with or understanding Bob or Drucker. She had no separate conversation with Drucker and was certain that neither Bob nor Drucker suggested that she return with the proper documentation so that she could be hired.

B. Marcel Watch's Version

Mr. Bob confirmed that between 10:00 and 11:00 a.m. on October 5, 1988, a secretary brought Martinez to him and that he interviewed her for a watch packer position.

Consistent with his usual practice Bob asked Martinez whether or not she was an American citizen. Bob testified that she responded affirmatively and that she was from Puerto Rico. He then asked her for her social security card (which he concedes that she showed him) and a birth certificate. Bob maintains that the birth certificate presented by Martinez was not an original but rather an unofficial looking xeroxed copy lacking an original seal.

At hearing Bob claimed that to avoid having to utilize what he thought was an unofficial if not falsified birth certificate, he asked Martinez for a form of picture identification ``like a green card or driver license.'' Tr. at 248. At that point in the conversation, Martinez protested the requirement that she produce another form of identification and started screaming ``I'm American citizen, I'm from Puerto Rico. I'm citizen, I don't need the ID. What kind of ID?'' Tr. at 248.

According to Bob, after he had talked to Martinez for two to three minutes, Respondent's president Marcel Drucker came on the scene because of the noise and tried to calm Martinez down. Bob testified that he tried to show Martinez illustrations from the Employer Handbook as examples of acceptable picture identification. Bob claims that he told her that he needed another form of picture identification to clarify the problem with the birth certificate because it was not an original and did not bear a stamp with a signature on it.

Drucker testified that when he approached the scene he saw Martinez standing near Dan Bob's desk swinging her pocketbook

and heard her screaming ``citizen, citizen.'' Drucker claims that in an effort to calm Martinez he tried to tell her that they needed to see proper documents because of the new law. He asked Martinez to sit down and show him the papers she had brought with her but she flew out of the office without showing him any documents. Drucker had no recollection at hearing whether a referral card for Martinez had been signed during Martinez's visit to Marcel Watch. (Exhibit C-2)

In sum, Dan Bob, acting on behalf of Marcel Watch, decided that Martinez did not provide him with what he felt was satisfactory documentation establishing both her identity and employment eligibility as required by Section 101 of IRCA, 8 U.S.C. § 1324a.

C. The New York State Department of Labor's Continuing Role

After Ms. Martinez left Marcel Watch Corporation she went home and told her husband what had occurred at the interview. Her husband phoned the Department and spoke with Grace Allen the same day. He told Allen that the employer told his wife that she needed a green card even though his wife had tried to explain to the interviewer that she was a Puerto Rican, a U.S. citizen. Tr. at 87. Allen suggested to the husband that his wife file a charge of discrimination against Marcel Watch with the New York City Human Rights Commission. The next day, October 6th, Ms. Martinez made such a filing.

Grace Allen testified that she phoned Marcel Watch after speaking with Ms. Martinez. She spoke with someone named Dan, Tr. at 87. She explained the reason for her call and asked why Ms. Martinez had not been hired for the packer's position for which she had been interviewed on October 5th. Dan told Allen that Martinez was not hired because she could not show him a green card. Allen told Dan Bob that people born in Puerto Rico were American citizens; they did not need green cards. Allen said that she explained to Dan Bob at least three times during the conversation that Puerto Ricans were U.S. citizens who did not require green cards, Tr. at 88.

On October 6, 1988 a second Department interviewer, Eugene Barsotti, referred an applicant to Marcel Watch, Tr. at 117-18. As a matter of routine, Barsotti called Dan Bob at Marcel Watch Co. to tell him he was sending an applicant to fill Marcel's job order. When Dan Bob asked Barsotti whether the applicant was a U.S. citizen, Barsotti responded affirmatively, adding that the applicant was a Puerto Rican. Bob insisted that the applicant needed a green card. After much back and forth in this telephonic conversation Bob finally agreed to interview the applicant. The candidate re-

ferred by Mr. Barsotti, a Puerto Rican female, Ana Gonzalez, was hired by Marcel Watch for the packer position on October 6, 1988.

IV Discussion

The question before me is whether Marcel Watch ``knowingly and intentionally'' discriminated against Ms. Martinez, a United States citizen of Puerto Rican birth, in violation of IRCA.

A. Jurisdiction Over the Claim

OSC contends that Marcel Watch discriminated against Ms. Martinez by rejecting her for citizenship reasons in violation of IRCA, providing the basis for jurisdiction by an administrative law judge to adjudicate her claim. OSC argues that when Bob found that Martinez was Puerto Rican he demanded that she produce a green card and unlawfully rejected her when she was unable to do so. OSC contends that by requiring a job applicant who is a United States citizen to produce an alien registration card as a prerequisite to employment, Bob on behalf of Marcel Watch, effectively discriminated against Ms. Martinez who, as a citizen, was unable to produce such a document.

Respondent challenges jurisdiction of the administrative law judge. Respondent argues that because a complaint filed by Martinez arising out of the same facts was pending before the New York City Human Rights Commission, 8 U.S.C. § 1324b(a)(2)(B), which excepts from IRCA coverage any individual already covered by title VII, and § 1324b(b)(2), prohibiting duality of title VII and IRCA proceedings, effectively bar this proceeding under IRCA. Specifically, 8 U.S.C. § 1324b(b)(2) provides that:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] unless the charge is dismissed as being outside the scope of such title. * * *

Respondent rejects OSC's argument that this proceeding is different from the Equal Employment Opportunity Commission proceeding filed by Martinez (pending before the New York City Human Rights Commission) pursuant to 42 U.S.C. § 2000e, conceding, however, that ``the gravamen of the claim made in this proceeding is based on citizenship and not on national origin.'' Marcel Br. at 5.

Respondent's defense rests on one proposition of law and one of fact:

> (1) Ms. Martinez' Title VII complaint before the New York City Human Rights Commission is substantively identical to the IRCA complaint, and is therefore barred by Section 1324b(b)(2). The distinction that under Title VII Respondent is

> charged with discrimination based on her Puerto Rican national origin whereas the IRCA discrimination arises out of her U.S. citizenship status is insufficient to overcome the bar against dual proceedings.
>
> Respondent argues that ``[t]he alleged insistence by Dan Bob that green cards were needed by Puerto Rican applicants is not evidence of discrimination against citizens, but rather discrimination against one class of citizens, namely Puerto Ricans.'' Marcel Br. at 6-7. This claimed difference in treatment among U.S. citizens is said to support the claim that Ms. Martinez is entitled to relief, if any, only on the basis of national origin.
>
> (2) The evidence fails to establish that discrimination based on citizenship differs in any way from evidence of discrimination based on national origin.
>
> Respondent suggests in effect that had it demanded green cards from all prospective employees regardless of citizenship, all citizens would have been excluded in consequence of which I would have jurisdiction over a citizenship claim by Martinez, a U.S. citizen. In contrast, had it insisted that only Puerto Rican job applicants produce green cards, I would lack jurisdiction in any case where a Title VII proceeding had been initiated.

As to (1), Respondent suggests that IRCA was enacted in part to proscribe national origin discrimination by small employers who, because of their size, were not subject to Title VII. I understand Respondent to claim that because the number of its employees exceeds the threshold for national origin discrimination jurisdiction under 42 U.S.C. § 2000e(b), it is subject to Title VII as confirmed by 8 U.S.C. Section 1324b(a)(2)(B), and that 8 U.S.C. § 1324b(b)(2) prohibits any overlap of proceeding under Title VII and under IRCA.

Title 8 U.S.C. section 1324b(a)(1) provides that:

> [i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment--
>
> (A) because of such individual's national origin, or
>
> (b) in the case of a citizen or intending citizen . . . because of such individual's citizenship status. (Emphasis added).

Subsection 1324b(a)(2) provides certain exceptions to liability from the new prohibition against discrimination:

> (A) a person or other entity that employs three or fewer employees,
>
> (B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e-2 of Title 42, or
>
> (C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, * * *

Another exception permits preference for a U.S. citizen over an alien ``if the two individuals are equally qualified,'' 8 U.S.C. § 1324b(a)(4).

B. Overlap Of Title VII and Section 102 Of IRCA Applies Only To Actions Based On National Origin and and Not On Citizenship

Respondent is subject to Title VII national origin discrimination coverage as an employer ``who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, . . .'' 42 U.S.C. § 2000e(b). Jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324(a)(l)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since Respondent employs more than fifteen (15) employees, 8 U.S.C. § 1324b(a)(2)(B) excludes Respondent from IRCA coverage with regard to national origin discrimination claims; as the result, OCAHO has no national origin discrimination jurisdiction over Respondent. Any national origin claim that she has against Respondent must be brought under Title VII. See Bethishou v. Ohimte Mfg. Co., OCAHO case No. 89200175. Final Decision and Order on Motion for Summary Decision (Morse, J.) slip. op. at 4, Empl. Prac. Guide (CCH) ♀ 5244.

Section 102 of IRCA provides a window through which aggrieved individuals asserting national origin claims not covered under Title VII may obtain an opening for their charges. This window provides a limited opening for employees of employing entities with 4 through 14 employees. Nothing contained in IRCA, however, confers jurisdiction upon such judges to hear and determine causes of action arising under as distinct from analogy to Title VII.

Given the clear line of demarcation between Title VII and IRCA, I reject Respondent's suggestion that any claim by Ms. Martinez of national origin discrimination be merged into her claim before me. Any claim that she has against Respondent arising out of her Puerto Rican national origin falls within the jurisdiction of Title VII claims, and is outside IRCA jurisdiction.

Furthermore, Ms. Martinez is not an intending citizen as that term is applied in 8 U.S.C. § 1324(a)(1)(B) and defined in 8 U.S.C. § 1324b(a)(3)(B). Consequently, her claim under IRCA arises from her status as a United States citizen.

I find against Respondent also on the question whether the prohibition against overlap between Title VII and Section 102 of IRCA impacts on this case. It is to me absolutely clear that the prohibition speaks only to exclusivity with respect to claims of national origin discrimination ``based on the same set of facts.'' 8 U.S.C. § 1324b(b)(2). This is necessarily so because, as the very genesis of Section 102 demonstrates, the new prohibition against discrimination arising out of citizenship status was enacted to provide a cause

of action where none had existed before; conceptually there is nothing in the law with which to overlap. Moreover, the last clause of subsection (b)(2) precludes a filing with the EEOC if there has been a filing under IRCA arising out of the same facts unless dismissed ``as being outside the scope of this section.'' Indeed, by citing subsection (a)(1)(A), the overlap provision refers only to national origin discrimination.

Obviously concerned with causes of action that could be heard in either venue, Congress did not enact the overlap provision to bar dual claims based on differentiated rationale, i.e., national origin and citizenship. As I noted in rejecting an argument similar to that of Respondent, in Romo v. Todd Corporation, No. 87200001 (OCAHO August 29, 1988) Empl. Prac. Guide ♀ 5190, affirmed, U.S. v. Todd Corporation,_____ 2d._____ Nos. 88-7419, 88-7420, 9th Cir. February 26, 1990), the EEOC ``in a policy statement adopted February 26, 1987 explicitly recognized that the same conduct can be in violation of both the prohibition against national origin discrimination and against citizenship discrimination.'' slip op. at 9.

In Romo v. Todd, supra, I held ``that the prohibition against overlap between IRCA and Title VII applies, according to the plain terms of the statute, to charges of national origin discrimination only, without regard to pendency of citizenship status charges arising out of an identical set of facts.''Id., slip. op. at 10. Furthermore, ``[S]ection 1324b(b)(2) simply acknowledges that two agencies are empowered to enforce the statutory prohibition against national origin employment discrimination where the statutes confer jurisdiction differentiated by the size of the employer, a factor not always known by or clear to the protected individual at the outset. Indeed, the EEOC in a policy statement adopted February 26, 1987 explicitly recognizes that the same conduct can be in violation of both the prohibition against national origin discrimination and against citizenship discrimination (See Interpreter Releases, Vol. 64, No. 12, March 26, 1987, p. 383 and Appendix III).'' Id., at 9.

The logic of Respondent's argument would require every charging party who has filed a national origin discrimination cause of action against an employer of fifteen or more individuals to sacrifice all claim to citizenship status discrimination. Upon affirming Romo v. Todd, however, the court in U.S. v. Todd Corporation, supra, clearly understood that national origin claims under Title VII are compatible with IRCA citizenship claims (slip. opinion, 2063 at 2073):

> Our holding in this case is limited to the availability of remedies for discrimination on the basis of citizenship status provided under the Immigration Reform and Control Act of 1986. All parties agree that the petitioner has properly pursued

other remedies for discrimination on the basis of national origin under Title VII of the Civil Rights Act, 21 U.S.C. §§ 2000e-2 et seq.

Congress is understood to have consciously extended redress for wrongs that should in national origin discrimination where no remedy was available before. See e.g., discussion by the House Committee on Education and Labor endorsing the bill reported favorably by the Judiciary Committee, H.R. Rep. No. 99-682, 1986 U.S. Code Cong. & Admin. News 5757, 5762-63, 99th Cong., 2d Sess., pt. 2, at 12-13 (August 5, 1986). Romo, supra, slip. op at 10.

V. Employment Discrimination, Generally

Title VII disparate treatment jurisprudence provides the analytical pont of departure for Section 102 cases. Liability under Section 102 is proven by a showing of deliberate discriminatory intent on the part of an employer. Statement of President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. Pres. Doc 1534, 1537 (November 10, 1986). The Complainant must establish intentional discrimation by a preponderance of the evidence, i.e., ``knowing and intentional discrimination.'' 8 U.S.C. § 1324b(d)(2).

Employment discrimination jurisprudence turns on the basic question whether an employer who intentionally treats persons differently on a prohibited basis violates antidiscrimination laws, regardless of what motivates that intent. Disparate treatment exists when an amployer intentionally treats some people less favorable than others because of their group status. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978), International Bhd. of Teamsters, 431 U.S. 324 at 335, n. 15. (1977). Disparate treatment is precisely what the antidiscrimination provisions of IRCA sought to remedy provided that a prima facie case is established on behalf of the aggrieved individual. President's Statement, supra. See also Note, ``Standards of Proof in Section 274 B of the Immigration Reform and Control Act of 1986.'' 41 VAND. L. REV. 1323 (1988).

To succeed in any Title VII employment discrimination action a complainant must (1) establish a prima facie case that a discriminatory act occurred, and (2) meet the evidentiary burden, i.e., burden of persuasion, that allows a court to find the alleged discriminatory act unlawful. The basic allocation of proof in disparate treatment cases is established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The same burden exists for complaints filed under Section 102 of IRCA. See, e.g., U.S. v. Mesa Airlines, Final Decision and Order, Nos. 88200001, -2 (OCAHO, July 24, 1989) (Morse, J.) at 41 Empl. Parc. Guide 5243.

Title VII case law informs that a plaintiff/complainant may establish a prima facie disparate treatment discrimination case in either of two ways: (1) discrimination is shown by indirect means, e.g., McDonnell Douglas Corp. v. Green, supra, or (2) direct evidence demonstrates that a discriminatory action occurred, e.g., Trans World Airlines, Inc. v. Thurston, 450 U.S. 248, 253 (1981). The test most often used for determining whether a plaintiff has proven a prima facie case of discrimination was set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, supra, and reaffirmed in Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984). The test permits a plaintiff to establish a prima facie case by proving ``(i) that he belongs to a protected minority; (ii) that he applied for and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications.'' McDonnell Douglas Corp., supra, at 802.

The McDonnell Douglas analysis is unnecessary in many Title VII cases. For example, as the McDonnell Douglas court understood, ``[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations.'' 411 U.S. at 802, n. 13. Consistent with that understanding, the Court in Trans World Airlines v. Thurston, supra at 253, rejected the McDonnell Douglas test where the plaintiff presented direct evidence of discrimination. See, e.g., B.L. SCHLEI and P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, (M. Dichter & D.A. Cathcart 2d edition, 1983-83 Cumulative Supplement) at 307. But cf., U.S. v. LASA Marketing Firms, Final Decision and Order, No. 88200061 (OCAHO Nov. 27, 1989) (Schneider, J.) supra. at 18, n. 11, Empl. Prac. Guide ♀ 5246.

Under the McDonnell Douglas/Burdine framework if the plaintiff presents a prima facie case the burden of production shifts to the defendant to establish a legitimate, non-discriminatory reason for its actions. If the defendant carries this burden the plaintiff must then prove that this articulated reason is but a pretext for intentional discrimination. Burdine at 253. Burdine instructs that ``[T]he nature of the burden that shifts to the defendant should be understood in the light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Id.

An employer will not be able to shift the burden back to the complainant if the reason articulated does not contradict the prima

facie case. For example, an employer cannot merely explain away an illegitimate act by producing evidence that a person in the same protected class as the complainant filled the position in question. Howard v. Roadway Express, 726 F.2d 1529 (11th cir. 1984) (hiring a black 11 months after rejecting the complainant does not establish discrimination did not exist.) B. SCHLEI and P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, supra, at 305-306.

Even when an employer's proffered reason for any employment decision appears legitimate, the court must allow an employee/complainant the opportunity to prove the existence of factual issues that can demonstrate the stated reasons were merely a pretext for discrimination. In a case where the complainant has presented substantial direct evidence of discrimination the complainant may be required to show that the employer's reason was pretextual. The direct evidence alone can establish that discrimination was a significant factor in the employment decision. TWA v. Thurston, supra. Thus, the McDonnell/Burdine allocation of proof does not apply where substantial evidence of discrimination is shown. Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir.), cert. denied, 474 U.S. 981 (1985) Cf. Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115, 2125 (1989) 50 Empl. Prac. Dec. ♀ 39021 (discussing the role of legitimate business needs as a defense to discriminatory acts in the context of disparate impact jurisprudence.)

A. Martinez Received Disparate Treatment Because of Her Citizenship Status

In the case at hand I find a preponderance of direct evidence of impermissible citizenship status discrimination. I conclude that the conduct by Marcel Watch on October 5, 1988 constitutes direct evidence of such discrimination which is facially violative of Section 102. This is so because when Martinez was referred for the unskilled packer job for which the Department deemed her qualified, she was rejected for employment on the basis of her citizenship status, in that Marcel Watch refused to accept that she was a U.S. citizen born in Puerto Rico. Only after employment specialists at the Department reiterated to Dan Bob that Puerto Ricans were U.S. citizens was a similarly situated female Puerto Rican hired by Marcel Watch as a packer.

Complainant has established that by direct evidence the Marcel Watch supervisor, Dan Bob, intentionally discriminated against Rosita Martinez by his insistence that she produce a green card, even after she repeatedly stated that she was a United States citizen, Tr. at 59. I conclude that insistence on a green card for Puerto

Ricans, even after being told by the company's President, Tr. at 60, and representatives of the Department, Tr. at 88, 119, that there is no requirement for such a card on the part of U.S. citizens is facially discriminatory in violation of 8 U.S.C. § 1324b. Intent to exclude her from employment for that reason, not motive to discriminate, satisfies the statutory command against knowing and intentional discrimination. OSC has proven a prima facie case of discrimination by direct evidence. Thurston v. TWA, supra.

When asked for her documents by Dan Bob, Drucker's employee and agent, Ms. Martinez showed him a birth certificate indicating her birthplace as Puerto Rico. She also produced a social security card. She tried to explain to him that Puerto Ricans are U.S. citizens. Despite this dialogue, Mr. Bob insisted that Ms. Martinez produce a green card, a document issued only to permanent resident aliens who are permitted employment under the immigration laws of this nation. It is clear to me that her protests that the reason she did not have a green card was because she was a U.S. citizen fell on deaf ears. Mr. Bob insisted on this document before making any decision to hire, Tr. at 22.

The issue of the authenticity of Martinez' birth certificate raises a question of material fact which I am satisfied Complainant successfully rebutted by producing the document at the hearing, Exhibit C-3. Having examined the document, I cannot credit Dan Bob's unwillingness to accept the birth certificate. See HANDBOOK FOR EMPLOYERS, (U.S. Department of Justice, Immigration and Naturalization Service, Doc. M-274 (5-57)) at 11. At hearing, Ms. Martinez produced evidence which clearly establishes her as a United States citizen born in Puerto Rico.

Marcel Watch Corporation's president and its production manager Dan Bob testified that their efforts to comply with the employment eligibility verification procedures of IRCA made them sensitive to seeking out false documents or hiring non-eligible workers. Their discussion of efforts to weed out illegal aliens without attempting discrimination is noteworthy, but does not militate against a finding of intentional discrimination.

Ms. Martinez and Respondent agree that Mr. Drucker, upon hearing a discussion between Ms. Martinez and Mr. Bob that aroused his attention, went out of his office to find out why there was a commotion. Mr. Bob explained to Mr. Drucker that he wanted to see Ms. Martinez' green card. Ms. Martinez said that she was a Puerto Rican and did not need a green card. Mr. Drucker confirmed that what Ms. Martinez was telling Bob was correct: Puerto Ricans are U.S. citizens; they do not need or carry green cards.

After Mr. Drucker left the other two, Mr. Bob persisted in insisting that Ms. Martinez produce a green card if she was to be hired by Marcel Watch. It is this subsequent insistence by Mr. Bob that Martinez produce a green card, even though his boss, Mr. Drucker, and the Department's representatives had plainly stated that one was not required of Puerto Ricans, that the requisite intent is found.

Respondent's counsel has emphasized that the problem between Ms. Martinez and Mr. Bob was one of communication because of Ms. Martinez' failure to completely comprehend English. Marcel Br. at 22. Actually, it seems to me that if there was a communication problem it was between Mr. Bob and Mr. Drucker. Ms. Martinez was the innocent victim of this problem. Even after Bob was told by his own boss that Puerto Ricans were citizens not requiring green cards, he continued to insist on this pre-condition to employment.

For the foregoing reasons, I adopt so much of OSC's proposed ``Conclusion of Law'' No. 14 as recites ``. . . by requiring Martinez to present a green card, the Company treated Martinez differently (by rejecting her) based on her citizenship status. Such disparate treatment violates Section 102 of IRCA `on its face.' '' Cf. Trans World Airlines v. Thurston, supra.
121. Nor do I find persuasive that Puerto Ricans were employed by Marcel Watch, particularly after October 5, 1988. See, e.g. Howard v. Roadway Express, supra.

B. Marcel Watch Failed To Demonstrate Legitimate Grounds For Martinez' Rejection:

A prima facie case having been established by a preponderance of the evidence the inquiry turns to the explanation or justification by the employer for the presumptively discriminatory action or practice. See EEOC v. West Bros. Dep't Store, 806 F.2d 1171, (5th Cir. 1986) (per curiam) (the claim asserted by the plaintiff determines the defense upon which the defendant must rely.) In disparate treatment cases such as this one, it is the burden of the employer to introduce evidence of a legitimate nondiscriminatory reason for its action, but it need not prove that it was actually motivated by the proffered reason. See e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981); Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Mosby v. Webster College, 563 F.2d 901, 904 (8th Cir. 1977).

Where a plaintiff shows that an impermissible motive played a persuasive part in an adverse employment decision the defendant has the burden to show that it would have made the same decision in the absence of the unlawful motive. Price Waterhouse v. Hop-

kins, 109 S.Ct. 1775, 1785 (1989). Having conceded this was an unskilled position, it was incumbent on Marcel Watch to assert a legitimate non-discriminatory reason for not hiring her as an unskilled job applicant.

Marcel Watch, the putative employer, was obliged to rebut the presumption that its rejection of Martinez was based not on her citizenship status but on other legitimate grounds. Respondent has not offered an affirmative defense which would mitigate its actions, but rather argues on brief that rejection of Martinez was part of its efforts to comply with IRCA employer sanctions requirements. As already discussed, motivation for compliance with IRCA, however, is not at issue. A discriminatory act occurred when Dan Bob insisted that citizen-candidate Martinez produce a green card as proof of her eligibility to be employed.

Where a respondent offers a legitimate business reason for the challenged practice the complainant has an opportunity to establish that respondent's proffered reason was a pretext for discrimination. Upon failure by the complainant to do so, the McDonnell/Burdine discrimination presumption drops out. Here, I am persuaded that however, noteworthy may have been Marcel Watch's intentions to comply with employer sanctions mandates, the failure to hire Ms. Martinez emanated from insistence on a precondition to employment not compelled by IRCA. There is no evidence that Marcel Watch imposed on all job candidates, citizen and otherwise, the same precondition imposed on Ms. Martinez. Accordingly, the presumption of discrimination survives the explanation proffered by Respondent. See, United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983). See also, C. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN FEDERAL COURTS (Federal Judicial Center, January 1988 ed.) at A-47-48.

C. Claims of Compliance With Section 101, Whether Or Not In Good Faith Do not Legitimize An Unfair Immigration-Related Employment Practice

1. The Good Faith Defense

Cavalier rejection of proffered documents and insistence on unnecessary ones (i.e., green cards), whether or not in good faith effort to comply with Section 101, is no justification for disparate treatment of Puerto Rican-born U.S. citizens. The company refused to hire Ms. Martinez because of a so-called invalid copy of her birth certificate. Marcel Watch asserts as reason for its conduct the complexity of IRCA. Respondent, by trying to comply with the law ac-

tually wound up breaking it through its own failure to understand the requirements of the verification process. Tr. at 194-95.

Such a defense fails for several reasons. First, as OSC notes on brief, the defense of compliance with Section 101 requirements turns Section 102 on its head. Govt. Br. at 34. As noted by OSC, IRCA's legislative history ``reflects that the concern giving rise to adoption of the antidiscrimination provisions was the fear that employers seeking to avoid sanctions would simply refuse to hire or fire persons who look or sound foreign.'' 52 Fed. Reg. 37402, 37403 (1987) discussion of final rule, codified at 28 C.F.R. Sections 44.100-305. Second, case law in respect of a ``good faith'' defense also fails to relieve Marcel Watch of liability for its disparate treatment of Ms. Martinez. Bollenbach v. Monroe-Woodbury Central School District, 659 F. Supp. 1450, 1471 (S.D. N.Y. 1987), cf. Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 65-66 (S.D. N.Y. 1981). See also, Montana v. First Federal Savings and Loan Assn. of Rochester, 869 F.2d 100 (2nd Cir. 1989).

Although Respondent asserts that its request for a green card was an innocent mistake based in part on Dan Bob's ignorance of U.S. geography and history, that mistake takes on the color of intent. Mr. Bob, an employee of Marcel Watch, and thus an agent of its owner, Mr. Drucker, acted on his behalf under the doctrine of respondeat superior, an employer-agent relationship that is undisputed on this record.

2. Employer Liability For Hiring Decisions By Its Supervisory Personnel

It is to me unexceptional that conduct by an employee responsible for interviewing and hiring imposes liability on the putative employer for violation of Section 1324b. Application of respondeat superior in case law under Title VII provides clearly analogous precedent. See, e.g., Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1978):

> Title VII and Section 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes.

It is no less necessary to apply respondeat superior to employer discrimination cases under IRCA. Congressional intent to extend and broaden the anti-discrimination provisions of Title VII in respect of national origin applies as well to the newly enacted Section 102 protection for U.S. citizens. See, Joint Explanatory Statement of

the Committee of Conference, supra at 87-88, 1986 U.S. Code of Cong. & Admin. News, supra at 5840, 5842.

In the case at hand, Respondent's employee responsible for hiring, Dan Bob, acting in the course of his employment, wronged a prospective employee by his insistence on her showing an alien registration card despite her protestations that she was a U.S. citizen, Tr. at 59. Bob persisted in this demand--which Martinez, being a U.S. citizen, could not satisfy--even after he had been told by Marcel Drucker, his boss, that he based it on an incorrect understanding of what documentation was required of new employees. Although he participated in the three-way dialogue, Marcel Drucker failed to direct Bob to act otherwise.

Even assuming the proof were as urged by Respondent, that Bob, having concededly demanded a green card, Martinez produced no satisfactory supporting documents, but left after screaming ``U.S. citizen, citizen,'' Marcel Watch bears responsibility for Bob's effectively having sent her away unhired. Marcel Watch is responsible as a matter of law for the unchecked action of Dan Bob in rejecting Ms. Martinez. On either the charging party's or Respondent's version of the October 5, 1988 events, she was rejected by Dan Bob on behalf of Marcel Watch.

3. The Reasonable Care Standard

Dan Bob's unfamiliarity with the myriad of qualifying documents to satisfy IRCA employer sanctions requirements, far from mitigating Marcel Watch's responsibility under Section 102 is consistent with the conclusion that intentional discrimination occurred, Tr. at 67; Marcel Br. at 13. Employers or their agents who fail to make an inquiry of a new employee's work eligibility status within three days of hiring are at risk for sanctions. Employers who, however, make a good faith effort to comply with the verification provisions of Section 101 of IRCA may also run the risk of unlawful discrimination on the basis of citizenship.

Congress recognized this dilemma, but also realized that it was soluble. IRCA does not put employers in an untenable position. An employer needs only to exercise reasonable care to ensure fair treatment of all potential employees. That reasonable care was not exercised in this case.

By analogy to Title VII jurisprudence, the obligation of an employer to exercise reasonable care to protect an employee or applicant from discrimination in the workplace, applies to Section 102 of IRCA. When an employer knows or should have known that illegal conduct exists in the workplace and fails to exercise reasonable

care to eliminate it, such inaction attaches liability.[1]See In re Charge of Maria Carmen Valdivia-Sanchez, U.S. v. LASA Marketing Firms, OCAHO Case No. 88200061 (27 November 1989) (Schneider, Jr.) supra.

The reasonable care standard was most recently articulated in LASA, supra, a Section 102 case. There the complainant, an alien, was refused job referrals by an employment agency because the agency decided that the applicant's work authorizations were inadequate for employer sanctions verification purposes. In fact, they were valid but unfamiliar to the Respondent. As Judge Schneider stated, ``I find the Respondent . . . failed to act reasonably to acquire even minimal knowledge of the requisite immigration-related employment documents that all persons need, whether citizens or aliens, to evince eligibility to work in the United States, and to bring his employment practices in compliance with the new requirements of IRCA.'' LASA Marketing, supra at 24. See id., slip op. at 28 (``failure to reasonably attempt to acquire knowledge of relevant immigration-related employment documents resulted in his knowingly and intentionally discriminating, for an illegitimate reason . . .''). See also U.S. v. New El Rey Sausage Company, No. 88100080 (OCAHO July 7, 1989) (Schneider, Jr.) slip op. at 32. Empl. Prac. Dec. ♀5238, modified CAHO (August 4, 1989); appeal pending, No. 89-70349 (9th Cir. filed August 25, 1989).

Reasonable care was lacking in the interview process in the case at hand. Ms. Martinez claimed to Dan Bob that she was a U.S. citizen, showed what she asserted was a birth certificate and a valid social security card, but was refused employment because Marcel's agent, Dan Bob, insisted on a condition no U.S. citizen could meet, i.e., a green card. Furthermore, Marcel Watch had notice of Dan Bob's behavior because the New York Department of Labor on two separate occasions within a 24-hour period confirmed to Dan Bob what Marcel Drucker apparently knew but did nothing about, that Puerto Ricans are United States citizens.

Even though it possessed copies of the Employer's Handbook, (INS Manual M-274), and even though Dan Bob and Marcel Drucker expressed familiarity with its contents, Marcel Watch Corporation in its treatment of Ms. Martinez did not exercise the reasonable care in its hiring process that the law requires. Instead,

[1]The use of a reasonable care standard to establish liability of an employer under Title VII is not uncommon. See, e.g., Smith v. Hennepin Co. Technical Center (D. MN 1988) Lexis 4876 (an employer has a duty to take prompt action when he knows or should know of prohibited conduct); Hall v. Gus Construction Co., Inc., 842 F.2d at 1010, 1015 (8th Cir. 1988) (employer liable where management, in the exercise of reasonable care, should have known of the offensive conduct).

Marcel Watch had a policy of asking certain citizens for proof of work eligibility that was impossible for them to produce. If ever there were a clear cut case of discrimination against one who looks and sounds foreign, this is it. Here a Puerto Rican-born United States citizen was rejected for employment because an uninformed employer set up a condition impossible for any U.S. citizen to meet.

4. Reckless Prescreening of Employees Violates IRCA

Although Judge Schneider rejected as insufficient the direct evidence hypothesis in LASA, he found knowing and intentional discrimination on the basis of indirect, or circumstantial evidence, concluding that the respondent there had failed ``to demonstrate a legitimate non-discriminatory reason for the employment decision it made. . . .'' Supra slip op. at 23. Consistent with the decision in LASA, I find by a preponderance of direct evidence that when Marcel Watch selectively required documentation from Ms. Martinez not called for by IRCA or any other colorable authority, it committed an unfair immigration-related employment practice in violation of 8 U.S.C. § 1324b.

Considered together, Sections 101 and 102 of IRCA provide a conscious legislative balancing of sanctions enforcement and antidiscrimination provisions. Although to an employer whose conduct is incautious, IRCA inherently introduces risk of noncompliance with one or the other provision, Sections 101 and 102 can be harmonized in the case of the reasonably prudent employer.

Regulations implementing Section 101 protect the reasonably prudent employer from risk of violation of Section 102. For example, employers generally are entitled to a period of three business days of hire to confirm identity and employment eligibility of job applicants. 8 C.F.R. § 274a.2(b)(1)(ii) and (b)(1)(vii). In addition, a new employee unable to provide the requisite documents within three business days has 21 business days to produce them, provided he or she presents ``a receipt for the application'' for the document(s) ``within three business days of the hire.'' 8 C.F.R. § 274a.2(b)(1)(vi).

Marcel Watch went further than was required to comply with the employer sanctions provisions of Section 101 of IRCA or with INS implementing instructions, including the Handbook for Employers. I do not credit as a legitimate basis for non-hire, Dan Bob's refusal to accept the proffered birth certificate as qualifying documentation for Section 101 compliance, a tender which he failed to discuss with Ms. Martinez. Moreover, as Marcel Drucker acknowledged, prospective employees were required to provide documentation at the outset:

> [s]ince when the immigration imposed on us burden for us because we don't understand it, we are overworked, we have a hard time to understand these things, but we have to do it. So when the employees come in, we are asking them to give us the proper identification. . . .'' Tr. at 217.

Title VII precedents demonstrate judicial concern with discriminatory pre-hire barriers to employment. See e.g., Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982); See also, Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981). Considering as reasonable the mechanics for implementing Section 101 summarized above, pitfalls to employers for violating Section 101 ought not permit the protections of Section 102 to be written out of the law. The mechanics for compliance with Section 101 provide opportunity to the employer to comply with its obligations under that law without engaging in reckless prescreening of job applicants. Failure by a prospective employer to reasonably understand or perform its obligations under Section 101 is no warrant for avoiding culpability under Section 102. Accordingly, I hold here that reckless prescreening of prospective employees as a rationale for complying with employer sanctions imperatives violates 8 U.S.C. § 1324b.[2]

``[but] good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as `built-in headwinds' for minority groups and are unrelated to measuring job capability.'' Id. at 432.

VI. Liability Established

Based on the evidentiary record as a whole, Ms. Martinez would have been hired by Marcel Watch on October 5, 1988 but for the pre-hire dialogue engendered by Respondent's misplaced effort at compliance with Section 101 of IRCA. Nothing in the job requirement or her background would have disqualified her for the unskilled watch packer job. However, the question of qualifications was never reached. Instead, she failed to satisfy the paperwork requirements imposed by Respondent purportedly in compliance with IRCA as understood by Mr. Bob.

Although Marcel Drucker was the boss, it was Bob who made the hiring decisions and who purported familiarity with employer sanctions compliance requirements. As between conflicting details concerning the events of October 5, 1983, I find the Martinez version the more credible. Her version is sustained by her fresh complaint, i.e., promptly upon returning home that same day she solicited her husband to phone the New York Labor Department; he did so, and spoke to Grace Allen.

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[2]Title VII has long been construed to prohibit any type of screening such as diploma or test requirements that bear no relationship to the actual job. As the Supreme Court noted in Griggs v. Duke Power Co., 401 U.S. 424 (1971):

> "[but] good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring jpb capability." Id. At 432.

The Martinez fresh complaint, confirmed by the two State officials, is inconsistent with Bob and Drucker's recollection. It may well be that, as speculated by counsel for Respondent, there was a communications break-down between Martinez and Bob, each of whom, it was clear to me from the bench, speak English with a heavy accent. No communications break-down, however, accounts entirely for the disparate recollection of the participant of the October 5 confrontation, Martinez on the one hand, Drucker and Bob on the other hand. Drucker was not a participant of the October 5 confrontation, Martinez on the one hand, Drucker and Bob on the other hand. Drucker was not a participant throughout the Martinez-Bob dialogue but only its last moments. His recollection does not fully clash with hers. For example, while he did not recall that her State referral form was signed, neither did he deny it.

The telephone report on her behalf by her husband to the Department was substantially similar to her narrative on the witness stand, a consistency that prompts me to conclude, as I do, that she was rejected for employment by Bob because she failed to produce a green card. Acknowledging disagreement as to portions of the events on October 5, all participants agree she asserted she was an American citizen. I hold against Marcel Watch on the question whether a prospective employer prior to making an employment decision may rely with impunity on the obligation to comply with employer sanctions imperatives in the face of a claim that failure to hire an individual constituted legally impermissible discrimination.

The impetus to enactment of Section 102, 8 U.S.C. § 1324b, was the fear that implementation of the employer sanctions provisions including the employment verification system might lead to employment discrimination based on the national origin or citizenship status of certain individuals. As noted in the preamble to the Department of Justice final rule implementing OSC policies and procedures with respect to unfair immigration-related employment practices:

> . . . history reflects that the concern giving rise to the adoption of the antidiscrimination provisions was the fear that employers seeking to avoid sanctions would simply refuse to hire, or would fire, persons who look or sound foreign.
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> * * * * * * *
>
> By tying the antidiscrimination provisions of the bill closely to the sanctions provisions and in identifying the concerns that underlie the antidiscrimination provisions in the Act, as is reflected throughout the legislative history, it is quite clear that Congress was attempting to reach intentional discrimination and was expanding the scope of such an existing ban in the national origin context. Indeed,

> . . . the Conference Report notes that the bill only provides such protection while sanctions are in effect. H.R. Rep. No. 99-1000, supra, at 87 (1986).

Preamble, final rule, 52 Fed. Reg. 37402, 37403, October 6, 1987.

The demand by Bob that Ms. Martinez produce a green card imposed an unreasonable burden given Martinez' status as a United States citizen of Puerto Rican descent. I reject Respondent's suggestion that, assuming, arguendo, Bob had sought a green card, he did so only of those of Puerto Rican descent and not otherwise, her claim sounds in national origin and not in citizenship discrimination. The logic of that argument would put citizens of Puerto Rican birth or origin beyond the reach of the prohibition against discrimination based on citizenship, a distinction which not only does not appear in IRCA but which is anathema to the very purposes for which section 102 was enacted.

IRCA makes no distinction between one or another citizen of the United States, much less a distinction which turns on the source of one's citizenship status. The conclusion is to me inescapable that the newly enacted prohibition of discrimination based on citizenship, 8 U.S.C. § 1324b(a)(1)(B), applies, and was intended to apply, with equal force to individuals of Puerto Rican birth as to any other citizens of this country, without regard to the source of their U.S. citizen status.

Whatever authority Congress enjoys to draw distinctions among citizens, none is reflected in IRCA. Professor Tribe, discussing the development of our law of naturalization has aptly noted that both types of citizenship recognized by the fourteenth amendment, one by birth, the other by naturalization, are equal. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) at 1544-45.

Certain it is that citizens of the United States of Puerto Rican origin are susceptible to, and doubtless many are in fact, subjected to national origin discrimination. I hold here, however, that a distinction drawn against such an individual in contrast to U.S. citizens generally, i.e., demand for a green card, the only holders of which as a matter of law are non-U.S. citizens, is discrimination based on citizenship status alone and not on national origin.[3]It is as a Puerto Rican-born citizen, equally with any other U.S. citizen, that an individual such as Ms. Martinez, is protected by Section 102 from discrimination in hiring and firing. I conclude on the plain reading of Section 102 that, with respect to United States citizens, the prohibition against citizenship discrimination can have no

[3]The Immigration and Nationality Act of 1952, as amended, Section 101, 8 U.S.C. § 1101(a)(38), defines the ``United States'' to mean ``. . . the Continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States.'' (emphasis added).

higher or better application than on behalf of one such as Ms. Martinez who, of Puerto Rican birth, ``looks and sounds foreign.''

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 or is engaging in an unfair immigration-related employment practice shall issue a cease and desist order. Having recited in this decision my findings of fact to the effect that by a preponderance of the evidence Marcel Watch has so engaged in violation of 8 U.S.C. § 1324b, Marcel Watch is so ordered.

Every other remedy contemplated by Section 102 is within the discretion of the judge. 8 U.S.C. § 1324b(g)(2)(B).

Subsection (g)(2)(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.'' Upon my consideration of the whole record in this proceeding, recognizing particularly that the discriminatory conduct reflects a seemingly transient infraction rather than an institutionalized bias, considering also how early this case arose in the administration of, and acknowledging the paucity of adjudications under, Section 102, I determine that it is just and appropriate for such an order to remain in effect for a period of one year. Cf. U.S. v. Mesa, supra, slip op. at 55 (adjudging a two year compliance order).

For the same reasons, Marcel Watch will be expected during that one year period to retain the name and address of each individual who applies, in person or in writing, for employment with Marcel Watch. 8 U.S.C. § 1324b(g)(2)(B)(ii).

B. Back Pay Award Discussed

The purpose of back pay is to restore the victim of discrimination to his or her proper position but for the discriminatory act. Backpay is also viewed as ``the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible the last vestiges of an unfortunate and ignominious page of this country's history.'' Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Backpay is the fundamental remedy for job bias which should only be denied in extraordinary circumstances. Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496 (2nd Cir. 1980); EEOC v. Sage Realty, 25 Empl. Prac. Dec. 31529 (D.C. N.Y. 1981).

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). Ms. Martinez has made clear that she did not want to work at Marcel Watch because she felt she would not be welcome there (in light of her litigiousness) Tr. at 41. Both OSC and Marcel Watch appear implicitly to assume that back pay may be awarded without the hiring of the aggrieved individual. I agree.

As I noted in Mesa, supra, slip op. at 56, 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. . . .'' 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 71 (1986). 1986 U.S. Code Cong. & Admin. News 5649, 5675.

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 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 contests. Albemarle Paper Co. v. Moody, supra; 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 reinstatement 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 case at bar differs from Mesa for there the charging party became gainfully employed in the skilled career field in which he had been trained, i.e., as an aircraft pilot, with no intention of abandoning his new employer. Id.

at 57. Here, for all that appears, Ms. Martinez, an unskilled worker, never became fully employed and would have worked at Marcel Watch but for the bar of discrimination and her apprehension of the friction between the parties.

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)(20(C). This statutory formula is substantially similar to that of Title VII, 42 U.S.C. § 2000e-5(g).

C. Allocation of the Burden of Proof for Monetary Awards.

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 (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 the interim earnings or lack of diligence properly falls to the defendant'').

Indeed, Respondent acknowledges on brief that the employer bears the burden of establishing that Complainant ``failed to act reasonably to mitigate her damages,'' Marcel Br. at 26, citing Proulx v. Citibank, N.A., 681 F. Supp. 199, 203 (S.D., N.Y. 1988). Accord, Ingram v. Madison Square Garden Center Corporation, Inc., 482 F. Supp. 414 (S.D. N.Y. 1979).

Respondent suggests that the plethora of jobs for unskilled applicants in New York City is so notorious as to warrant judicial notice of newspaper advertisements for unskilled workers Marcel Br. At 27. To the contrary, after Grace Allen had acknowledged there were available unskilled jobs such as fact food counterpersons, and made clear that her component of the Department did not handle restaurant employment, she testified in response to a question from the bench that ``. . . there are more applicants than there are jobs.'' Tr. at 107. From the vantage point of Ms. Allen's six-year ex-

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perience in the Job Service Division at the Department, her expertise as to the job market is instructive.

Ms. Martinez remained in the job market after October 5, 1988, persisting in efforts at obtaining referrals by the Department at least until late March 1989, and in fact took the only job to which she was referred, i.e., Cosrich, on October 23, 1988. I conclude that the pattern of conduct whereby Ms. Martinez sought referrals from the Department, notwithstanding that the agency operated on a compartmentalized basis, failing to refer her for other types of unskilled work, establishes that she exercised reasonable diligence in her continuing job search, at least until April 1, 1989. In contrast, for the foregoing reasons, I find that Marcel Watch did not meet its burden of showing that Ms. Martinez failed to mitigate her loss.

D. Backpay Awarded

It is uncertain what duration Marcel Watch contemplated for the job it failed to offer to Complainant. Although the hire was to meet seasonal demand, Dan Bob testified that no one had been laid off for four years. The Department, a customary supplier of labor to Marcel Watch, treats any hire structured for more than two weeks as permanent. Tr. at 106. The request by Marcel Watch to the Department was to refer job applicants for permanent, i.e., not temporary hire. Although it is a close call in light of the seasonal character of the labor need, the characterization as permanent by the Department of the Marcel Watch request for a packer, coupled with Bob's certainty of no lay offs for four years, prompt my conclusion that the position sought would have had at least a year's duration.

However, there is no question as to when Ms. Martinez took herself out of the labor market, at least temporarily, Tr. at 43-44. By her own admission, she remained at home from April 1 to June 2, 1989, to care for her husband who had suffered a heart attack. Had she been employed by Respondent immediately prior to April 1, 1989, there is no reason to suppose she would have acted differently. It may be argued that taking oneself out of the labor market is not tantamount to leaving gainful employment. However, in her circumstances as an unskilled worker at entry level wages, the need to take care of her husband is equally persuasive in the one case or the other.

Whatever uncertainty there might be on the present record as to whether the job would have remained viable until March 31, rather than terminating before then, there is no basis for assuming that it would have been held open for her so she might return after an hiatus of two months.

Had Ms. Martinez been hired after her interview on October 5, 1988 and been retained at Marcel Watch beyond the holiday season, for personal reasons having nothing to do with Marcel Watch she would have left her job by April 1. I conclude that a constructive resignation would have occurred as of April 1, 1989, even if the job at Marcel Watch had been permanent. Accordingly, her back pay award includes the period October 5, 1988 to April 1, 1989, less the amount she earned during her brief period of employment at Cosrich. See, e.g., Griffin v. George B. Buck Consulting Actuaries, Inc., 566 F.Supp. 881 (D.C. N.Y. 1983) Ms. Martinez, continuing to seek employment after she was denied the position at Marcel Watch, obtained a packer's position from October 23 to November 14, 1988, at Cosrich. She was paid $3.35 an hour plus transportation costs. Tr. at 39-40. Her job search after being laid off at Cosrich was unsuccessful. She was once again unemployed at the time of hearing.

While back pay is normally tolled during those periods in which employees are not available for employment, ``a backpay remedy must be tailored to expunge only the actual, not merely speculative, consequences of the unfair labor practices.'' Sure-Tan, Inc., v. National Labor Relations Board, 467 U.S. 883, 900, (1984); See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (``Only actual losses should be made good. . . .'').

OSC, on brief (at 48) attaches a useful ``backpay analysis'' which Respondent has failed to refute or rebut. I accept the OSC analysis for the period October 5, 1988 through March 31, 1989, but I disallow a back pay award for the balance of the period claimed. Having accepted the OSC calculations, the award to Ms. Martinez for the period October 5, 1988 through December 31, 1988 and for the period January 1, 1989 through March 31, 1989 is derived as follows:

4th Quarter 1988 10/5-12/31	1st Quarter 1989 1/1-3/31
1) # days of work 61	65
2) compensation @ $4.00/hr.....$1952	$2080
3) less interim earnings.....$480.71	0
4) amount forwarded.....0	1511.75
Subtotal..... $1471.29	$3591.75
Interest on subtotal (derived from Internal Revenue Service short-term under-payment rate) 40.46	$98.77
Total..... $1511.75	$3690.52
Total Backpay Award	$5202.27

E. Front Pay Awarded

Future pay, viz; front pay, is the form of make-whole relief recognized by the courts where reinstatement is impractical, e.g., where the court finds it likely that the resulting friction between the parties would make future cooperation impossible. Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980); Francoeur v. Corron & Black Co., 552 F.Supp. 403, 413 (S.D.N.Y. 1982). Front pay is the equitable monetary relief for any future loss of earnings resulting from discriminatory conduct by a Respondent. Johnson v. Ryder Truck Lines, Inc., 10 Empl. Prac. Dec. ♀10535, (W.D. N.C. 1975). In the case at bar such a remedy is appropriate where Complainant ``would not like to'' work at Marcel Watch ``because since I took them to the Commission, they would be after me all the time, but I would have to do it if the judge orders me to.'' Tr. at 41. See E.E.O.C. v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926 (S.D. N.Y. 1976), aff'd. 559 F. 2d 1203 (2d Cir. 1977), cert. den. 434 U.S. 920 (1977).

Ms. Martinez returned to the job market in June 1989; it is speculative whether after a two month break in service she would have had a job to return to at Marcel Watch had she been hired in the first instance. However, as the employer found to have unlawfully discriminated, Marcel Watch should not benefit from that uncertainty. Having already held as to back pay that Ms. Martinez had the option not to demand employment by Marcel Watch because she was reasonably apprehensive of interpersonal conflicts, I determine that make whole relief may be awarded in the form of front pay. Cf. Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 233 (S.D. N.Y. 1986) (where front pay was denied because discharge was not a result of discriminatory act of employer.)

The amount of front pay compensation for Ms. Martinez is determined by the amount of future earnings that would have been realized had there been no discrimination, following the period when she was clearly entitled to less speculative back pay, viz., from the time she was able to return to work until the end of the full twelve month period which began the month following the events of October 5, 1988, i.e., November 1, 1988 through October 31, 1989.

Hyland v. Kenner Products, (D.C. Ohio 1976) 13 Empl. Prac. Guide ♀11,427.

Ms. Martinez is entitled to front pay for the period beginning June 1, 1989, when she would have been able to resume her job search after her husband's illness, until November 1, 1989, calculated as follows:

Total Front Pay Award

# days of work	
6/1-8/31 9/1-10/31.....	108
compensation @$4.00/hr.....	$3456.00
Recapitulation	
Total Front Pay Award	$3456.00
Total Back Pay Award	$5202.27
Total pay award.....	$8658.27

VIII. Ultimate Findings, 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 OSC is charged with investigating and prosecuting before administrative law judges charges of violations of the antidiscrimination provisions of IRCA. 8 U.S.C. § 1324b(c)(2).

2. That Rosita Martinez is a citizen of the United States born in Puerto Rico.

3. That Rosita Martinez was referred on October 5, 1988 by the New York State Department of Labor to Marcel Watch Corporation for unskilled employment as a watch packer for an indefinite, permanent hire.

4. That Marcel Watch, an entity whose principal place of business is in New York, New York, by and through its employee Dan Bob, required Martinez to produce documents to establish identity and work eligibility in compliance with employer sanctions requirements of 8 U.S.C. § 1324b, with respect to employment in New York by an entity which regularly has more than three employees in its employ.

5. That Dan Bob, as agent for Marcel Watch, unreasonably exceeded the requirements for compliance with employer sanctions at

the time of her employment interview by rejecting tender by Martinez of her proper birth certificate and social security card and insisting that she provide a green card [an alien registration card], a requirement with which, as a citizen of the United States, she could not comply.

6. That Ms. Martinez timely filed a charge of an unfair immigration-related employment practice based on her citizenship status arising out of failure of Marcel Watch to hire her on October 5, 1988.

7. That OSC timely filed such a charge before an administrative law judge when it filed its Complaint in this Office.

8. That the prohibitions of 8 U.S.C. § 1324b against overlap between charges under Title VII of the Civil Rights Act of 1964, as amended, and Section 102 of IRCA, and against duality of charges before administrative law judges and the Equal Employment Opportunity Commission arising out of unfair immigration-related employment practices apply only with respect to claims sounding in national origin and not to claims, as here, of citizenship status-based discrimination.

9. That a citizenship status-based claim of discrimination in hiring, i.e., an unfair immigration-related employment practice, in violation of 8 U.S.C. § 1324b may properly be prosecuted on behalf of Rosita Martinez, as a Puerto Rican-born citizen of the United States.

10. That a citizen of the United States is entitled by virtue of the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices to protection against citizenship status-based discrimination in hiring.

11. That a prima facie case of an unfair immigration-related employment practice, i.e., discrimination in hiring, is shown on the record of this case by a preponderance of the evidence where it is established that Marcel Watch, through Dan Bob, its employee authorized to hire watch packers, rejected Ms. Martinez while continuing to hire for the position for which she applied.

12. That Marcel Watch has failed, in turn, to provide by a preponderance of the evidence or at all that it was lawfully entitled to discriminate against Ms. Martinez in its hiring practice by insisting on a green card and rejecting tender of her birth certificate and social security card at the time of her employment interview.

13. That Marcel Watch failed to provide by a preponderance of the evidence or at all that it would not have hired Ms. Martinez even in the absence of citizenship status discrimination.

14. That Marcel Watch failed to provide by a preponderance of the evidence or at all that it failed to hire Ms. Martinez for a legitimate, nondiscriminatory reason.

15. That, based upon the preponderance of the evidence, I determine that Marcel Watch engaged knowingly and intentionally in an unfair immigration-related employment practice, within the meaning of and in violation of 8 U.S.C. § 1324b, when it failed to hire Ms. Martinez, a Puerto Rican-born United States citizen, as a watch packer.

16. That Marcel Watch shall pay:

(a) To and on behalf of Ms. Martinez a total sum of $8,658.27, of which $5,202.27 is denominated back pay for the period October 5, 1988 through March 31, 1989 and $3,456.00 is denominated front pay for the period June 1, 1989 through October 31, 1989, net of offset for interim earnings.

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

17. That Marcel Watch shall:

(a) Cease and desist from the unfair immigration-related employment practice found in this case, including, without limiting the generality of the foregoing, failure to accord reasonable weight to documents tendered as birth certificates by prospective employees, and requesting alien registration cards [green cards], from such applicants who identify themselves as citizens of the United States of Puerto Rican birth;

(b) Comply with requirements of 8 U.S.C. § 1324a(b) during a period of one year 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 Marcel Watch in the United States.

18. That, pursuant to 8 U.S.C. § 1324b(g)(1), this final decision and order is the final administrative order in this case 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 22nd day of March, 1990.

MARVIN H. MORSE
Administrative Law Judge