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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	CASE NO. 90200363
MCDONNELL DOUGLAS CORPORATION, Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS, GRANTING COMPLAINANT'S MOTION TO AMEND, AND DENYING IN PART RESPONDENT'S MOTION FOR SANCTIONS

PROCEDURAL HISTORY

I intend to summarize in some detail the pleadings upon which this Order is based, as many novel and complex issues were presented for my consideration; the great majority of them being issues of first impression in this forum. My decision will follow.

The Complaint, filed on December 17, 1990, alleges a pattern or practice of employment discrimination by Respondent with respect to Respondent's hiring of jig and fixture builders for its contract with the Air Force to construct an aircraft known as the C-17. Complainant alleges that qualified U.S. workers, who applied as jig and fixture builders, were rejected while Respondent obtained approval for certification of workers from the United Kingdom to fill the available positions. Respondent obtained this certification through the use of the H-2B application process. Complainant named 20 injured parties who filed charges of citizenship discrimination with the Office of Special Counsel (OSC) for Unfair Immigration-Related Employment Practices.

Respondent timely filed its Answer on January 23, 1991 and simultaneously filed a Motion to Dismiss the Complaint. Respondent's request is based upon jurisdictional type grounds and was made pursuant to 28 C.F.R. Part 68.36 which permits me to grant a summary decision in the absence of genuine factual disputes. Respondent seeks a dismissal of the present action because it contends that the Complaint is a direct attack on the Immigration and Nationality Act's H-2B process, which is a legal, not a factual argument. Respondent argues that paragraphs 13(a) and (b) of the Complaint raise allegations of "terms and conditions" of employment, which are not proper subjects for my review.

Respondent states that the terms and conditions applicable to the positions sought by the 20 named charging parties are covered by a collective bargaining agreement. As such, they cannot be changed pursuant to the National Labor Relations Act. Respondent further contends that Complainant's attempt to override INS's regulations concerning the H-2B program, in a forum in which the INS cannot participate, is unlawful. Respondent asserts that Complainant's allegations rely on language in the H-2B provisions which is not present in the statute, and that Complainant cannot add language to a statute to benefit its own case. Specifically, Respondent states that 8 U.S.C. Section 1101(a)(15)(H)(ii) prohibits the granting of H-2B visas when unemployed U.S. workers are available. However, the Complaint substitutes for that language the position that if any qualified U.S. worker is available for employment, then the visas shall not issue to foreign employees. Respondent argues that the injured parties were employed at the time the visas were granted, therefore, the visas were properly issued.

Finally, Respondent contends that other channels are available to Complainant to raise an attack upon the H-2B process, but that this is not such a forum. Respondent reasoned that if Complainant's attack was permitted to go forward in a forum designed exclusively for complaints of employment discrimination, the resultant effect would be that employers would not utilize the H-2B process for fear of violating Section 102 of the Act in the process.

On February 25, 1991, Complainant filed its Opposition to the Motion to Dismiss. Complainant disagreed with the contention that summary decision was ripe, due to the existence of disputed factual issues. Complainant denied that its Complaint constituted an attack upon the H-2B process, however, it asserted that Respondent abused the process, resulting in its discriminatory practice. Complainant continued its argument by alleging that Respondent misrepresented its recruiting efforts to the Department of Labor, who, based

upon these misrepresentations, granted the labor certification for United Kingdom workers.

Complainant accused Respondent of hiring foreign workers with higher wages than those offered to U.S. workers and of ignoring the applications of qualified U.S. workers. Complainant responded to the argument that the 20 charging parties were already employed by stating that they were employed by independent contractors to work on the C-17 project, and were, therefore, exempt from the benefits available to Respondent's regular employees. Complainant stated that some of these charging parties were employed by the independent contractors prior to submitting applications to Respondent, and that others became employed by the independent contractors after being rejected by Respondent.

Complainant reiterated its position that it did not find fault with the H-2B process, as administered by the DOL and the INS, but that Respondent's misuse of the process was the source of the discriminatory practice. Complainant further argued that the availability of the applicant, rather than the employment status, is the key consideration in the labor certification process. Therefore, any qualified worker who applied as a jig and fixture builder, and was rejected, would have recourse against the employer, regardless of that applicant's employment status. Since the 20 charging parties were available, the fact that some were employed prior to the hiring of the foreign workers was of no consequence. Responding to the argument that terms and conditions of employment are not actionable under Section 102 of the Act, Complainant stated that its allegations of discrimination encompassed the "hiring process" which is covered, and not simply the terms and conditions of employment. It further denied the alleged attack on the collective bargaining agreement. Finally, Complainant disputed that the INS is an indispensable party, and that even if INS was found to be necessary to the action, nothing prevented the INS from being joined or acting as amicus.

On March 5, 1991, Respondent replied to Complainant's Opposition to the Motion to Dismiss. It repeated its argument that the only issues presented were legal, not factual issues and that no hearing on the merits was necessary. Respondent further argued that even if Complainant's statement of the facts was assumed to be true, such an assumption would not support a claim of intentional discrimination against U.S. workers. Respondent argued that the Complaint does not provide a basis for a prima facie case of discrimination under any proof model. Respondent again contested Complainant's reliance on the term <u>available</u> as opposed to <u>unemployed</u>, since the statutory

language only protects unemployed workers. Respondent argued that Complainant should not impose a duty upon Respondent to recruit employed U.S. workers when the statute, which takes precedence to a regulation, does not impose such a duty. Respondent reasoned that if workers who are employed on the project already (by independent contractors) are merely shifted from one status to another, the same number of workers would still be working on the project and the shortage sought to be relieved by temporary foreign workers would still exist.

Respondent denied that it misrepresented its recruitment efforts to the DOL to obtain the H-2B certification. However, even if Respondent did commit such a fraud, Complainant's Complaint advances no legal or causal connection between any such misrepresentation and the alleged discriminatory practice. The Complaint fails to link the Respondent's use of the H-23 process and the alleged refusal to hire U.S. workers <u>because of their citizenship</u>. Respondent further argues that the Complaint does not allege facts supporting a fraud on the part of Respondent, nor is this the proper forum in which to litigate allegations of fraud in connection with the H-2B application process. Respondent disputed Complainant's suggestion that Section 102 of the Act creates a private right of action for workers to contest the H-2B certification process, when Congress specifically excluded such private challenges. Respondent finally contends that its use of the H-2B program falls within the exception language of 8 U.S.C. Section 1324b(a)(C) which exempts it from discrimination related actions. In other words, without the express consent of the DOL, Respondent could not have hired the foreign workers.

On March 11, 1991, Complainant filed a Motion to Amend the Complaint pursuant to 28 C.F.R. Part 68.8(e), requesting the addition of two charging parties. Complainant based this request upon considerations of judicial economy, since the two charges contained the same allegations as stated in the original Complaint.

Respondent filed its Response to Motion to Amend on March 25, 1991. Respondent based its opposition to the amendment on the assertion that the charges filed by these two individuals were not timely pursuant to 8 U.S.C. Section 1324b(d)(3), in that they were filed more than 180 days after the alleged acts of discrimination.

I issued an Order to Show Cause on March 29, 1991, requesting Complainant to provide further information supporting the claims of the charging parties. I requested Complainant to explain its investigative steps taken with respect to many of the charge forms which did not appear to be timely when submitted. I noted

that other technical deficiencies appeared on many of the charge forms, and desired to know how OSC investigated these charges which resulted in their inclusion in the Complaint.

Respondent raised similar arguments in its Motion to Amend its Motion to Dismiss, filed April 2, 1991. Respondent contended that 18 of the 20 original charging parties improperly submitted their charge forms. Respondent cited as reasons that some were untimely filed, some were incomplete or non-specific as to the alleged discriminatory acts, and others alleged discrimination in terms and conditions of employment which are non-jurisdictional in this forum.

On April 5, 1991, Complainant provided a letter prepared by the DOL for my review. It generally outlined the DOL's procedures with respect to the labor certification process, but did not specifically address its actions taken in response to Respondent's H-2B application.

On April 12, 1991, Complainant filed its Memorandum of Points and Authorities in Response to Order to Show Cause and to Respondent's Motion to Amend its Motion to Dismiss. Complainant fully described its investigative steps taken in response to each charge submitted by the charging parties pursuant to its authority in 28 C.F.R. Part 44.301. Complainant argued that the technical errors on the charge forms would not bar Complainant from proceeding because the use of the form is optional and merely a guide for OSC to use in its investigation.

Complainant asserts that the Complaint and subsequent Motion to Amend indicated only those individuals who applied for and were rejected from employment during the time in which Respondent employed the foreign workers. Complainant argued that timeliness of a charge form is not per se jurisdictional, but is subject to equitable tolling principles.

Complainant further argued that since this was filed as a pattern or practice action, only one member of the protected class was required to timely file his citizenship-based discrimination charge. In this case, the timely filing by Mr. Briant tolled the applicable statute of limitations for all other claimants. Complainant disagreed with Respondent's proposition that the statutory 180 day period began when the charging parties applied for work. Complainant advanced the standard based upon the date on which the applicant possessed sufficient knowledge which would cause a reasonable person to believe he had been discriminated against in the hiring process. Complainant further argued that Respondent's alleged discriminatory

policy constituted a continuing violation which would also toll the statutory 180 day period to include all 22 named charging parties.

On April 16, 1991, Respondent filed a Motion for Sanctions, resulting from alleged unethical behavior on the part of counsel for Complainant during the course of Respondent's deposition of Rebecca Marsh Day, a DOL employee. Respondent requested monetary sanctions for the cost of the deposition because it was allegedly prejudiced by Complainant's interference in the deposition. Respondent contended that Ms. Day was testifying without DOL counsel present, at the choice of the DOL solicitor, and that Ms. Day stated at the outset of the deposition that she was unrepresented. Respondent stated that Attorney Stephens from OSC, during the deposition, engaged in private conversations with Ms. Day, resulting in Ms. Day's failure to adequately respond to questions posed to her.

Respondent also stated that later in the deposition, both Ms. Day and Attorney Stephens acknowledged that an arrangement had been made between the DOL solicitor and Attorney Stephens, whereby Attorney Stephens would act as legal counsel for the deponent. Although the deposition was completed, Respondent sought sanctions based upon Attorney Stephens' alleged violation of the ABA Model Rules of Professional Conduct, because Respondent believed her interference hindered Ms. Day from presenting complete and accurate testimony.

On April 22, 1991, Respondent filed its Memorandum of Law in Reply to the Office of Special Counsel's Response to the Order to Show Cause. Respondent argued that Complainant exceeded the scope of its authority when its filed a pattern or practice Complaint. Respondent contended that none of the 22 named charging parties filed a charge alleging a pattern or practice of discriminatory activity and that Complainant cannot create a lawsuit encompassing more than the activity alleged in the individual charges. Although the EEOC was empowered to investigate and pursue pattern or practice claims on its own behalf, Respondent distinguishes the power given to the EEOC under Title VII from that given to the OSC under IRCA and contends that the OSC does not have authority to file a class action, nor does it seek to have a class certified. Nor does the OSC have the authority to bring a class action under Section 102 of the Act, according to Respondent.

Respondent further asserts that Complainant's reliance upon Title VII case law for support of its timely filed charges is misplaced because classes were certified in those Title VII proceedings. Respondent contends that the requisite class action requirements are absent in

the present case. Respondent further disputes Complainant's characterization of Respondent's practices as comprising a continuing violation. Respondent argues that Complainant has failed to demonstrate that it had a discriminatory policy in place during the time any of the charging parties sought employment. Respondent again argues that the charging parties failed to file timely charges of discrimination and that the Complainant's argument to the contrary is meritless because Complainant relied upon the wrong date in calculating the 180 day filing period.

Respondent suggests that the crucial date in this case was when the H-2B workers openly assumed the positions for which they were hired, to the knowledge of the U.S. applicants. Respondent also disputes Complainant's claim that a timely submission by one charging party operates to toll the statutory period for all others. Respondent contends that the OSC may not pursue claims filed more than 180 days after the alleged discriminatory act and that each individual is responsible for ensuring his right to sue by timely filing his charge, not by relying on the timely submission by another. Respondent again disputes Complainant's ability to pursue charges based upon terms and conditions of employment, for example, over-time pay, when such coverage is not available in this forum. Respondent finally argues that Complainant failed to adequately demonstrate how its investigation cured the technical defects in 13 of the original charges it received.

Respondent disputes the OSC's argument regarding the continuing violation theory, upon which Complainant bases its support for the timeliness of filed charges. Respondent concludes that since the Complaint fails to allege a policy of discrimination, the continuing violation theory must fail. Respondent again argues that Complainant miscalculated the key date for the running of the statutory 180 day filing period, and that the charges were not timely. Since the charges were not timely received by the OSC, the OSC was without authority to pursue them. Finally, Respondent argued that the OSC failed to demonstrate how its investigation cured the defects in timeliness in regard to 13 of the charges.

On April 23, 1991, I met with the parties in a pre-hearing conference in Santa Ana, California, to hear argument and receive further evidence in support of the parties' motions. Respondent presented the testimony of two witnesses and submitted the deposition transcript of another for my review. Complainant presented another witness, whose deposition transcript was also offered as a joint exhibit by the parties. Both counsel presented detailed arguments outlining their respective positions.

Respondent argued that the Complaint is an attack on the H-2B process and that although Complainant's subsequent pleadings allege an abuse of the process, it has not specifically alleged a fraud, which is required to be plead specifically. Respondent denied an abuse of the H-2B process and argued that its recruiting efforts were reasonable and satisfactory. Respondent reasoned that if a fraud had been committed during the certification process, it operated against the DOL and/or the INS, and not against the charging parties. Therefore, any allegations of misrepresentation in the certification process are not triable in this forum as against the 20 charging parties.

Respondent further argued that Complainant has failed in its Complaint to allege that a policy of discrimination, in the form of a preference for U.K. workers, was present at McDonnell Douglas It contends that Complainant's attempts to bring this action within the framework of a pattern or practice case have failed. In the related context of timeliness, Respondent stated that equitable tolling principles are inapplicable in this setting and that a timely filing by one individual cannot save the other stale claims.

Complainant then argued that U.S. citizens, who are protected under IRCA, were refused employment by Respondent at the same time that jig and fixture builders from the U.K. were hired via the H-2B process and that it intends to prove at the hearing that this refusal led to intentional discrimination of the U.S. applicants. Complainant stated that it does have the authority to file a pattern or practice case in this setting, but not a class action. Complainant also stated that it expects to prove at the hearing that a continuing violation was committed by Respondent and that all charges mentioned in the Complaint, as well as the two additional charges, were timely filed.

Complainant contended that the charge forms used as the basis for the Complaint did not have to be technically complete and that if the investigation stemming from the charge forms supported the allegations, then no defect occurred. Complainant argued that each of the 22 charges is timely and complete.

On April 30, 1991, Complainant submitted a Response to Respondent's Motion for Sanctions. Complainant admitted that the OSC and the DOL attorneys agreed, prior to the deposition of Ms. Day, that the OSC's counsel would ensure that the deponent, a DOL employee, was adequately represented during the deposition. The DOL solicitor chose not to attend the deposition based upon that agreement. Complainant disputes the alleged ethical violations because Attorney Stephens did not represent two parties, but only

one party, and a witness. Also, Attorney Stephens did not simultaneously represent two clients whose interests were adverse. Complainant stated that the representation by a DOJ attorney of a DOL witness is appropriate because they are both employees of the federal government. Finally, Complainant argued that a misunderstanding occurred which caused the deponent to inaccurately testify as to her represented status.

Following their receipt of the transcript from the pre-hearing conference, both parties submitted briefs further summarizing their arguments as to the Motion to Dismiss and the Motion to Amend. Both of these documents were received in my office on June 4, 1991.

Complainant reiterated and expanded upon its arguments regarding its authority to file a pattern or practice claim, its lack of authority to file a class action suit in this forum, its belief that a continuing violation occurred, and that the charges which are the subject of this Complaint were timely filed.

Respondent further clarified its arguments concerning the failure of the Complaint to state a claim of intentional discrimination, the untimely filing by the charging parties of charge forms in this case, the OSC's lack of authority to file a pattern or practice action in its own name, the OSC's untimely filing of the Complaint in this office, the defects noted on the charge forms submitted by the charging parties, and the Respondent's suggestion that the OSC is attacking the H-2B process in the wrong forum.

On June 3, 1991, Respondent replied to the Complainant's response to the Motion for Sanctions. Respondent again asserts that Ms. Day's deposition testimony was tainted by the advice given her by Attor-ney Stephens, an attorney obviously interested in the outcome of the testimony. Respondent disagrees with Complainant's contention that two arms of the federal government can be adequately represented by the same attorney and that the OSC's and DOL'S interests are mutual. Respondent represents that Attorney Stephens' failure to reveal the fact that she had agreed to act as legal counsel for Ms. Day at the outset of the deposition, and then her evasion of questions posed to her regarding her representation, was unethical behavior and deserving of sanctions.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

In order to best address each argument and issue presented for my consideration, I will discuss them separately.

Jurisdiction of ALJ:

Respondent has raised the issue of this agency's jurisdiction to hear this matter in a number of contexts. During the pre-hearing conference, Respondent's witness, Richard Boswell, substantially testified that the purpose in enacting Section 102 of IRCA was to prevent employment discrimination of persons who appeared to be foreign. This witness suggested that Congress' intent was not to protect those U.S. citizens who do not speak with foreign accents or who do not appear to be of foreign descent.

Although I agree that native born American citizens were not the primary target of protection in the enactment of IRCA, I disagree with the implication that they are not protected.

The plain language of the statute states, without qualification, that U.S. citizens are within the protected class. 8 U.S.C. § 1324b(a)(3). See Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 (June 29, 1990). As the case at hand illustrates, it is conceivable that U.S. citizens may believe that they have been discriminated against by an employer's preference for foreign workers. After hearing a great many cases involving the employment of unauthorized aliens by U.S. employers, I have come to appreciate that some employers do seek out a foreign work force. This practice, which Congress sought to eradicate with the passage of IRCA, can lead to the discrimination in hiring of U.S. workers.

As I indicated during the pre-hearing conference, I am not aware of any other statute or administrative agency which provides relief to U.S. citizens similarly situated to the charging parties in this action. It is clear that IRCA does not exclude them from protection. Therefore, I find that the basic jurisdiction of this claim is proper and that I have the authority to hear and decide the claims of citizenship-based discrimination of these charging parties.

The remaining arguments relating to jurisdictional type issues will be addressed more fully below.

Amended Complaint:

Complainant seeks to add two individual charging parties to this action whose claims are substantially the same as those of the 20 originally named charging parties. Without considering the timeliness objections raised by Respondent at this point, I agree with Complainant that its request meets the basic requirements of 28 C.F.R. Part 68.8(e) regarding the filing of amended pleadings. I find that Com-

plainant has shown good cause to amend its Complaint and that Respondent will not be prejudiced by the addition of these two charging parties.

I will address the timeliness issues raised with respect to the filing of these two additional charges during my discussion of similar issues involving the original charges.

Timeliness of charges filed:

Both parties agree that the OSC may file a complaint based only upon those charges filed within 180 days of the alleged discriminatory act. 8 U.S.C. § 1324b(d)(3). The parties differ, however, on when the 180 days would begin to run in this case. The parties also disagree on the applicability of the principle of equitable tolling on the charges filed in this case.

Different standards have been proposed for the calculation of the 180 period. It is my understanding at this time that the 180 day period began when the U.S. workers who had applied for the jig and fixture positions first learned that others had been hired for those positions. In the absence of receiving formal notification of rejection in the employment process, an applicant would reasonably suspect that he had not gotten the job when he observed another person in that job. In this case, the U.K. workers did not enter the workplace in sporadic numbers. Respondent hired 100 of the British workers in one group. If a reasonable person were to assume that this action constituted discriminatory hiring, he would assume so at the moment that the foreign workers openly began their employment. It is premature at this point to determine whether this action by Respondent did indeed constitute a discriminatory practice.

It is my view, therefore, that the 180 days would run from approximately April 1, 1989 as Respondent suggests, and not from February 1, 1990 , the date on which the final extension was granted. I make this indication somewhat hesitantly, however, as this standard may not be applicable for each of the individual applicants. I realize that certain factors, individual to each of the charging party's cases, may cause me to adjust my thinking regarding this standard. I will reserve my ruling on the timeliness of each of the charging party's charges and of the timeliness of the Complaint until I hear further evidence at the hearing regarding the circumstances surrounding the 22 individual applications and their knowledge at the time of Respondent's hiring of the H-2B workers.

Complainant relies upon the principle of equitable tolling in connection with the continuing violation and pattern or practice aspects of its case to support its timeliness argument. My comments regarding pattern or practice filings are found below. It is premature at this point to address the continuing violation theory and its possible applicability to this case. I agree that time limitations for filing charges are not jurisdictional per se, but are subject to modification by equitable tolling. I have not been presented with sufficient evidence at this juncture to rule on Complainant's argument that Respondent maintained a policy of discriminatory hiring which led to a continuing violation. I will examine this theory and the applicable case law further upon a factual presentation by the parties.

"Terms and Conditions" of employment:

I find merit in Respondent's argument that OCAHO does not have jurisdiction to hear complaints regarding the terms and conditions of employment. The Complaint does suggest in paragraphs 13a. and 13b. that the charging parties are alleging disparity in terms and conditions of employment. The offering of higher wages to foreign employees does not encompass the "hiring process" as Complainant argues. Similarly, the "imposition of higher standards" does not appear to deal with the actual hiring decision, which is covered by 8 U.S.C. § 1324b. (This alleged violation, found at paragraph 13b. does not explicitly state what higher standards were imposed and I am left to speculate as to its meaning.)

Although the EEOC was granted explicit authority in the area of terms and conditions of employment, no such authority was granted to OCAHO. My jurisdiction extends only to actions involving hiring, recruitment or referral for a fee, or discharge of an employee. 8 U.S.C. § 1324b(a)(1) See Fayyaz v. The Sheraton Corp., OCAHO Case No. 90200430 (Apr. 10, 1990).

Although the filings by the charging parties allude to discrimination through layoffs and other terms and conditions of employment, I will only consider what is before me in the form of the Complaint. The parties' dispute regarding the terms of the collective bargaining agreement has no bearing in this action I will limit my review of this case to those portions of the Complaint which deal directly with the actual employment decisions involved in the refusal to hire the 22 named charging parties. Complainant will not bring before me any allegations involving pay scales or standards of employment, or other allegations encompassing terms and conditions of employment.

Respondent's use of the H-2B process:

Much of the paperwork generated throughout this lengthy pre- hearing proceeding has involved the Respondent's use of the H-2B certification process. It appears to me, after reviewing all of the documents submitted and after hearing arguments from counsel, that the H-2B application and certification process utilized by Respondent has little to do with the merits of this action.

It has been rather confusing for me, as it has apparently been for Respondent to determine whether Complainant is alleging fraud in this process. The Complaint does not allege any wrongdoing by Respondent, yet Complainant's subsequent pleadings suggest fraudulent activity by Respondent in the course of submitting its H-2B applications and extension requests to the DOL.

As Respondent argued, I do not have authority to rule on fraud in the context of the H-2B process. My domain is strictly with IRCA. The DOL has regulations in place to deal with such allegations in the scope of its operation. Nor can I consider allegations which are not present in the Complaint. I find no such allegations presently before me. The interpretation of the controlling statutory and regulatory language pertaining to the H-2B program is best left to the agencies which operate under it, specifically the DOL and the INS. Therefore, I abstain from attempting to interpret whether the term "unemployed" or the term "available" controls in the employer applicant's recruitment efforts. I also will not claim jurisdiction of fraud allegations against Respondent, as this is not the proper forum for such a determination.

Whether Respondent went about its recruitment and application activities under the H-2B program properly or improperly does not appear to affect the underlying issue at hand. My understanding of the case, in its simplest terms, is that Complainant alleges a preference on the part of Respondent for foreign workers. This preference caused Respondent to hire U.K. workers at the same time it was rejecting U.S. applicants who sought jig and fixture positions. Just how Respondent went about this hiring of foreign workers does not appear to be a central issue to this case. Complainant's burden is simply to prove that the preference existed and that discrimination of U.S. workers occurred as a result. Similarly, Respondent's defense does not appear to hinge on whether it went about its application process correctly.

It also does not appear to me that the Complaint alleges an attack on the H-2B process, as Respondent suggests. Complainant apparently has no objection to the process itself, nor to the administration of the program by the DOL and the INS. I do not find that the DOL and the

INS are required to be joined to this action. I was very well educated by the presentation of the parties and their witnesses at the pre- hearing conference regarding the respective roles of these agencies and their implementation of the H-2B program. After considering these presentations I am convinced that Respondent's use of the process and the process itself really have little to do with this action.

The parties will obviously have to discuss Respondent's applications for H-2B certification and the dates upon which the various actions by the DOL were taken during the hearing on the merits. The time frames for these activities may play a key role in each party's case, particularly regarding issues of timeliness of filed charges. However, I do not believe that any further presentation is necessary regarding allegations of fraud in the process or regarding the validity of the program itself. It appears to me that Respondent's use of the H-2B process was a means to obtain foreign workers. Their reasons for wanting foreign workers is important, but the methods used are relatively unimportant to the result in this action.

As Respondent's witnesses demonstrated, the certification itself is not a guarantee by the employer that no U.S. workers could possibly be found for the jig and fixture positions. The DOL certified that Respondent's recruitment efforts were reasonable. Whether or not Respondent acted properly in pursuit of this certification does not really change the nature of the action. Complainant must still bear the burden of proving that discrimination existed in the failure to hire these 22 individuals. The use of the H-2B program by Respondent is not the primary focus in that proof, based upon all that has been presented for my consideration.

With that in mind, I trust that the parties will limit the scope of their future discovery to more relevant areas and that I have helped to narrow the issues for further proceedings in this action.

Pattern or practice action:

Complainant's case was filed as a "pattern or practice" action, alleging systematic discrimination by Respondent against a protected group of persons. Complainant relies upon 8 U.S.C. § 1324b(d) and 28 C.F.R. Parts 44.200(a) and 44.304 for its authority to file such an action. Although a reading of this statutory and regulatory language does not grant the OSC such authority in as specific and unambiguous terms as Complainant suggests, I am not convinced that OSC does not have this authority.

The Administrative Law Judge in the case of United States v. Mesa Airlines, OCAHO Case Nos. 88200001, 88200002 (July 24, 1989), permitted the filing of a pattern or practice case based upon the filing of a charge by one individual with the OSC. This filing prompted the OSC to further investigate the hiring practices engaged in by the employer which resulted in the discovery of a discriminatory policy in place by Mesa Airlines.

Although I understand and appreciate Complainant's reliance upon Title VII case law regarding pattern or practice cases, I am also mindful of the differences in the statutory grants of authority between the EEOC and the OSC. Respondent argues strongly against the OSC's authority to file such an action based upon the lack of a specific grant of power by Congress. I believe that the best course of action at this point is to permit the action to proceed as filed. I will certainly consider evidence by both parties as to the ability of OSC to file pattern or practice cases, and whether such filings are limited to instances in which the individual charging parties designated their actions as such.

Both parties are in agreement that this case has not been filed as a class action suit, and that the requirements for filing such a suit have not been addressed. I agree that I may not have the authority to certify a class in this proceeding. Although Complainant relies upon case law in which class actions were certified, it is apparent that Complainant does not deem this proceeding to be a class action.

Respondent contends that the original charges did not individually and specifically allege each of the violations found in the Complaint, and that, therefore, the OSC overstepped its boundaries in filing the Complaint. Without ruling on the sufficiency of each of the individual charges at this point, it is my view that the OSC is given reasonable investigative authority in 8 U.S.C. § 1324b(c) and 1324b(d). The related Title VII case law permits the filing of complaints which are "like or related to" the original charges or which are reasonably expected to grow out of investigations of them. See Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); Oubichon v. North American Rockwell Corp. 482 F.2d 569 (9th Cir. 1973). Although Complainant made a detailed showing of its investigative actions relative to these charges in its response to my Order to Show Cause, I will await a further presentation by the parties regarding the legitimacy of the Complaint in light of the contents of these charges and the OSC's subsequent investigation.

Finally, it is my view that a showing of a pattern or practice of discrimination is a matter of proof and that Complainant bears the

burden of persuasion. My final ruling regarding the appropriateness of such a filing by the OSC will be reserved until I rule on the sufficiency of Complainant's proof on the merits.

Motion for Sanctions:

After reviewing the transcript of Rebecca Marsh Day's deposition, and the submissions by the parties relative to the Motion for Sanctions, I am somewhat troubled by what I perceive to be a belief on the part of the OSC that it may properly represent the interests of a non-party witness to an action in which the OSC is involved. Although I do not find that the actions of Attorney Stephens rise to the level of an ethical violation, I would advise that counsel should refrain from any action which might be perceived as a possible interference with the testimony of a witness whom they do not and should not represent.

I believe that the above mentioned deposition could have been better handled had Respondent's counsel been informed, at the outset, of any arrangements worked out between the DOL solicitor's office and the OSC. Respondent was obviously left in the dark regarding the represented status of Ms. Day until the deposition was near completion. I do not believe that Complainant's justification for such an arrangement, that is, that the DOL and the OSC are both arms of the federal government, is meritorious.

The procedural regulations applicable to this proceeding do not authorize the imposition of monetary sanctions as requested by Respondent. If I felt that the actions of OSC were so prejudicial to Respondent's ability to conduct a fair deposition, I could authorize the retaking of the deposition, or could compel further testimony by Ms. Day. However, I do not believe that either course of action is necessary in this instance because the deposition was completed and the purpose for the deposition is now moot. I do admonish counsel to refrain from any actions which suggest an interference with witnesses in this action, especially those whose testimony may be adverse.

ULTIMATE CONCLUSIONS AND ORDER

Based upon my findings and analysis regarding the various issues raised thus far in this action, I must deny Respondent's Motion to Dismiss. I find that there are issues of fact which must be addressed at a proceeding on the merits. I also deny Respondent's Motion for Sanctions, in part, as further addressed above. I do grant Complainant's Motion to Amend for good cause shown and to further facilitate this action.

My office will serve upon Respondent the Amended Complaint once it is received from OSC. Complainant will label this pleading "Amended Complaint" and will incorporate all newly raised allegations into the original Complaint for service. Once this document is served upon Respondent, I will permit Respondent 15 days in which to respond with an Amended Answer, pursuant to Fed. R. Civ. Proc. 15(a).

It is obvious that both parties have put a lot of time and effort into this action thus far, and that an appropriate resolution should be reached as expeditiously as possible. The parties are encouraged to complete their discovery as quickly as possible. I will expect a joint status report from the parties, discussing their expectations as to the completion of discovery, no later than the close of business July 29, 1991. I will arrange a pre-hearing telephonic conference thereafter to discuss the scheduling of the hearing on the merits.

I remain available to assist with any procedural inquiries of the parties or to entertain any appropriate motions. If the parties desire a telephonic conference, they should call or write my office to arrange one.

IT IS SO ORDERED this 2nd day of July , 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge