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

GLORIA ONDINA-MENDEZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 01B00045
SUGAR CREEK PACKING CO., Respondent	)	Judge Robert L. Barton, Jr.

FINAL DECISION AND ORDER

(*November 5, 2002*)

I. *INTRODUCTION*

This decision adjudicates the issue of liability raised in the Complaint that Gloria Ondina-Mendez (Complainant) filed against Sugar Creek Packing Co. (Respondent). The allegation that Complainant was fired based upon her citizenship status in violation of 8 U.S.C. § 1324b(a)(1) is dismissed on the jurisdictional ground that she is not a "protected individual." The allegation that Complainant was fired based upon her national origin in violation of 8 U.S.C. § 1324b(a)(1) is dismissed because, based on the number of employees Respondent employs, it is a cognizable Title VII claim, and not within this tribunal's jurisdiction. Complainant's citizenship status-based document abuse claim under 8 U.S.C. § 1324b(a)(6) is dismissed on the jurisdictional ground that Complainant is not a "protected individual." Finally, regarding Complainant's national origin-based document abuse claim under 8 U.S.C. § 1324b(a)(6), I find that Complainant has failed to show an intent by Respondent to discriminate against an individual in violation of 8 U.S.C. § 1324b(a)(1).

II. *BACKGROUND AND PROCEDURAL HISTORY*

On August 21, 2000, Complainant filed a charge against Respondent with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), alleging unfair immigration related employment practices in violation of section 274B of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. The charge form filed with OSC specifies "document abuse" as the alleged unfair immigration related employment practice. In an attachment to the charge form, Complainant claims that

she was discriminated against and fired from her job by Respondent on July 24, 2000. The attachment explains that she was fired because her Immigration and Naturalization Service (INS) issued employment authorization document (EAD) had expired, and that she was fired despite the fact that her employment authorization had been automatically extended until December 5, 2000, pursuant to the Temporary Protected Status (TPS) program. See INA § 244, 8 U.S.C. § 1254a (authorizing the Attorney General to grant temporary protected status to aliens of certain foreign states experiencing crisis). The attachment further explains that Complainant requested the INS to fax a copy of the "extension" to her, which she obtained and showed to Respondent, but Respondent told her that she was fired unless she showed an unexpired EAD.

By letter dated December 21, 2000, OSC informed Complainant that its initial 120-day period to investigate the charge had expired, and that the investigation would be complete within ninety days. At that time, OSC informed Complainant that she could file her own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). By letter dated April 4, 2001, OSC informed Respondent that it determined that there was insufficient evidence of reasonable cause to believe that Complainant had been discriminated against. Complainant filed her OCAHO Complaint on February 28, 2001. This case was initially assigned to Judge Marvin H. Morse.

The Complaint contains a general allegation that Complainant was discriminated against because of both her national origin and citizenship status. Compl.[1] ¶¶ 8-9. The Complaint alleges that Respondent

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[1] The following abbreviations will be used throughout this decision and order:

Compl.	Complainant's Complaint
Ans.	Respondent's Answer
R. Mot. SD	Respondent's Motion for Summary Decision
C. Resp. Mot. SD	Complainant's Response to Respondent's Motion for Summary Decision
Order Mot. SD	Order Denying Respondent's Motion for Summary Decision
AJPPO	Amended Joint Proposed Prehearing Order
SF	Stipulated Fact
FPO	Final Prehearing Order
FPHC Tr.	Final Prehearing Conference Transcript
Tr.	Transcript of hearing
RPFF	Respondent's Proposed Findings of Fact
CX	Complainant's Exhibit
RX	Respondent's Exhibit
DFI	Disputed Factual Issue
DLI	Disputed Legal Issue
Cbr.	Complainant's posthearing brief

fired her because her "employment permit" was expired and that Respondent refused to accept her "receipt & letters and all evidence I had received from INS showing that my employment permit was being processed." Id. ¶14b. The Complaint also alleges that Respondent refused to accept the documents she presented to show she can work in the United States, i.e., her Kansas ID, documents faxed by the INS, a money order stub, and notices of action and extension permits from the INS. Id. ¶ 16a. Complainant further alleges that Respondent asked for more or different documents than required to show that Complainant was authorized to work in the United States by asking for an EAD. Id. ¶ 17. Complainant does not want to be rehired, but seeks back pay. Id. ¶¶ 13e, 20.

On March 30, 2001, Respondent filed an Answer that denies Complainant was discriminated against because of her national origin or citizenship status. Ans. ¶¶ 8-9. Respondent admits that it fired Complainant, but claims it fired her because her EAD had expired on July 5, 2000, and she failed to provide documentation establishing that she was a person whose EAD had been automatically extended through December 5, 2000, by an INS Notice published in the Federal Register. Id. ¶ 14a. Respondent alleges it asked Complainant to provide her EAD so that it could check for the category A-12 or C-19 notations, or the equivalent statutory citations for EADs issued on Form I-688B, that would automatically extend her work authorization. Id. ¶ 14b. Respondent's Answer explains that the INS Notice that automatically extended the work authorization of certain Honduran nationals, "Extension of Re-registration Period and Work Authorization for Hondurans Under Temporary Protected Status," 65 Fed. Reg. 36719 (June 9, 2000) (hereinafter INS Extension Notice), limited the automatic extension to Honduran nationals with an EAD expiring July 5, 2000, and bearing those notations. Id. The INS Extension Notice provides as follows:

> In addition to extending the re-registration period, this notice extends until December 5, 2000 the validity of Employment Authorization Documents (EADs) that were issued to Honduran nationals (or aliens having no nationality who last habitually resided in Honduras) under the initial TPS designation and that are set to expire on July 5, 2000. To be eligible for this automatic extension of employment authorization, an individual must be a national of Honduras (or an alien having no nationality who last habitually resided in Honduras) who previously applied for and received an EAD under the initial January 5, 1999 designation of Hondurans for TPS. This automatic extension is limited to EADs bearing an expiration date of July 5, 2000 and the notation:

Rbr.	Respondent's posthearing brief
FIF	Findings of Fact
Order Brief Sched.	Order Setting Briefing Schedule

> - "A-12" or "C-19" on the face of the card under "Category" for EADs issued on Form I-766; or,
> - "274(A).12(A)(12)" or "274A.12(C)(19)" on the face of the card under "Provision of Law" for EADs issued on Form I-688B.
>
> EFFECTIVE DATES: The extension of the TPS designation for Honduras is effective July 6, 2000, and will remain in effect until July 5, 2001. The re-registration period began May 11, 2000 and will remain in effect until July 5, 2000. All EADs that were issued to Honduran nationals (or aliens having no nationality who last habitually resided in Honduras) under the initial Honduras TPS designation and that are set to expire on July 5, 2000 are automatically extended until December 5, 2000.

INS Extension Notice, 65 Fed. Reg. at 36719-36720.

Respondent denies that it refused to accept Complainant's receipt, letters, and all evidence she received from the INS showing that the employment permit was being processed. Id. ¶ 14b. The Answer states that the receipt provided by Complainant showed that she had submitted an INS Form I-765 for renewal of her EAD in May 2000, with the required fee, but the receipt did not show any notations described in the INS Extension Notice concerning her EAD request. Id. Respondent also denies that it refused to accept the documents Complainant listed in her Complaint as the ones she provided her employer. Id. Respondent claims that it accepted the documents, but requested that Complainant provide the documentation required under the INS Extension Notice, i.e., showing the notations A-12 or C-19 or equivalent statutory citations, or a current employment authorization card. Id.

Respondent's Answer asserts that it asked Complainant's sister, Idalia Mendez, also a Honduran national employee of Respondent, to assist in determining whether Complainant had documentation which would show the required notations, and that Idalia Mendez told Respondent that the INS had seized Complainant's EAD. Id.

The Answer claims that Respondent contacted the INS, and a representative "generally advised Respondent that the extension of stay for Honduran nationals did not automatically extend all work authorizations and specifically advised Respondent that Complainant did not have a current work authorization." Id. ¶ 14c. Respondent states that it reluctantly fired Complainant after contacting the INS because she could not establish that she was legally authorized to work in the United States. Id.

Respondent admits that Complainant was qualified for her job and was a good worker, and was fired because she was unable to document eligibility to be employed in the United States. Id. ¶ 14d. Respondent's Answer states that Complainant has an unqualified offer of re-employment contingent only

upon providing appropriate documentation. Id. ¶ 14f.

On July 18, 2001, Respondent filed a motion for summary decision supported by a memorandum of law and an affidavit from Lynda Foss. The motion describes the same facts provided in Respondent's Answer. Respondent's motion argues that it is undisputed that Complainant had an EAD that expired on July 5, 2000, and that the documents provided by Complainant after her EAD expired, including a copy of an application for renewal of her EAD and a copy of a receipt for an international money order to the INS for $100, did not include the information required by the INS Extension Notice. R. Mot. SD at 5. The motion acknowledges that, at some point, Complainant provided Respondent with a copy of the INS Extension Notice. Id. at 2.

On August 31, 2001, after obtaining an extension of time to respond to the motion in order to obtain an attorney, Complainant, by counsel, filed a response to the motion for summary decision. Complainant's response argues that the undisputed facts show that her documentation reflected that she could work in the United States. C. Resp. Mot. SD at 2. Attached to the motion and memorandum were Complainant's EAD that expired July 5, 2000, and another EAD that expired July 5, 2001. Complainant also attached an affidavit stating:

> Sugar Creek Packing Company asked me to provide evidence that I had the right to work in the United States. I presented to Sugar Creek Packing Company my [EAD]. My [EAD] is attached hereto as Exhibit A. Exhibit A reflects two [EAD] [sic] that I held. The first one was issued for June 5, 2000. [sic] The second was issued after that date.

Complainant further argued that Respondent failed to address the fact that her EAD includes the C-19 designation, proving that she was entitled to continue to work in the United States. Id. at 2. Complainant also argued that the undisputed facts establish by a preponderance of the evidence that had Respondent examined the EAD, which Complainant claims Respondent admits she submitted to it, Respondent would have known that she had the appropriate status for the automatic extension. Id.

Judge Morse found a genuine dispute of material fact regarding whether the EAD was presented, and denied Respondent's motion. Specifically, he explained that "[w]hether and what [Complainant] provided as work authorization is in dispute." Order Mot. SD at 6 (September 20, 2001) (unpublished).

Judge Morse retired and the case was reassigned to me in February 2002. A telephone prehearing conference was held on February 26, 2002, to discuss the case with the parties. On February 27, 2002, I issued a Prehearing Conference Report and Order Governing Prehearing Procedures. Pursuant to that order, the parties were to file a Joint Proposed Prehearing Order by May 1, 2002, containing stipulations of fact and law, a statement of disputed issues of fact and law, and final witness and exhibit lists. The Joint

Proposed Prehearing Order was not filed until May 8, 2002, and it contained several problems. On May 10, 2002, I issued a Notice of Final Prehearing Conference. The Notice gave the parties until May 21, 2002, to file an AJPPO, and set June 3, 2002, as the date for the final prehearing conference. On May 22, 2002, the parties submitted the AJPPO.

On June 3, 2002, the final prehearing conference was held. At that time, I ruled on the admissibility of the parties' proposed exhibits. Complainant's exhibits admitted during the prehearing conference were Exhibits CX-A, CX-C, and CX-D. Respondent's exhibits admitted during the prehearing conference were Exhibits RX-A, RX-B, RX-C, RX-D, RX-E-1-2, and RX-E-4-5. Additionally, the parties advocated different hearing sites and, after some discussion, they agreed that a telephone hearing would be appropriate. During the prehearing conference, and on the record, the parties waived an in person hearing. See FPHC Tr. at 17; see also 28 C.F.R. § 68.37 (2001). Next, I advised that the AJPPO failed to discuss the issue of a remedy. After some discussion, I suggested, and the parties agreed to, a bifurcated hearing. FPHC Tr. at 18. The parties agreed that the hearing would be divided into a liability phase, and, if necessary, a remedy phase. Id. The possibility of settlement was also discussed. Because a settlement seemed possible, I did not set a hearing date, and instructed Complainant's counsel to notify the court in writing by June 17, 2002, on the status of a possible settlement. A FPO was issued on June 12, 2002, incorporating the parties' stipulated facts, as well as a statement of the remaining factual and legal issues relating to liability.

The parties could not reach a settlement and July 30, 2002, was set as the hearing date for the liability phase of this case. A one day evidentiary hearing was conducted telephonically on July 30, 2002. Present with me in Falls Church, Virginia, on July 30, 2002, were a Spanish language interpreter and a court reporter. Complainant, her attorney, and her witness, Idalia Mendez, were present telephonically from Little Rock, Arkansas. Respondent's attorney, and one of its witnesses, Krissie Holcombe, were present telephonically from Kansas City, Kansas. Respondent's other witness, Lynda Foss, was present telephonically from Washington Courthouse, Ohio. Because Complainant represented that neither she nor her sister were fluent in English, the hearing was conducted both in English and Spanish.

At the conclusion of the hearing, the parties requested and were given leave to file posthearing briefs. I stated that a briefing schedule would be set once the transcript was prepared. On August 28, 2002, I issued an order setting September 20, 2002, as the deadline for submission of posthearing briefs. Both parties timely filed posthearing briefs that included proposed findings of fact and conclusions of law.

Both parties have rested their case regarding the liability phase of this bifurcated proceeding. The record on which this decision is based consists of the record exhibits, the testimony reflected in the hearing transcripts, the transcript of the prehearing conference, the parties' stipulations, and the orders and pleadings filed in this case. Because the liability phase of the hearing has been closed, and the hearing transcripts and briefs have been received, the liability phase is ripe for decision as to the remaining

unadjudicated issues. This constitutes the decision and order of the Administrative Law Judge pursuant to 28 C.F.R. § 68.52 (2002).

III. *REMAINING DISPUTED FACTUAL AND LEGAL ISSUES*

A. Disputed Factual Issues

The disputed factual issues set forth here are the same as those in the FPO issued on June 12, 2002, which was based on the AJPPO signed and submitted by the parties.

1. Did Respondent have a copy of Complainant's expired EAD in its files at the time Complainant's employment was terminated?

2. Did Complainant provide Respondent with her original EAD that had or would expire during the time period in question?

3. Did Lynda Foss and Krissie Holcombe contact the INS to determine if Complainant could be lawfully employed by Respondent?

4. What did Lynda Foss and Krissie Holcombe learn from the INS regarding the Complainant's eligibility to be employed by Respondent?

5. Did Idalia Mendez advise Krissie Holcombe and Lynda Foss that the INS had Complainant's original EAD in its possession?

6. Whether Complainant provided Respondent with her expired EAD and any other documents?

7. Whether Respondent was aware that Complainant had an EAD that indicated C-19 status at the time in question?

B. Disputed Legal Issues

The disputed legal issues set forth here are the same as those in the FPO issued on June 12, 2002, which was based on the AJPPO signed and submitted by the parties.

1. Did Respondent discriminate against Complainant based upon her citizenship status?

2. Did Respondent discriminate against Complainant based upon her national origin?

3. Did Respondent discriminate against Complainant by (1) requesting, for purposes of satisfying section 274A(b) of the INA [8 U.S.C. § 1324a(b)], more or different documents than are required under such section **or** (2) refusing to honor documents tendered that on their face reasonably appeared to be genuine?

IV. *FACT FINDINGS*

The FPO contains twenty stipulated facts that are herein incorporated by reference. As part of their briefs, the parties have submitted proposed fact findings. I have reviewed those findings and have adopted some, but not all, of them by incorporating them in this section. This section reflects my own fact findings based on my independent review of the record, as well as my adoption, in whole or in part, of certain of the parties' proposed fact findings. When I have adopted a party's proposed fact finding, in whole or in substantial part, I have referenced the pertinent proposed fact finding, as well as the record. Respondent's posthearing brief includes fifty numbered proposed fact findings that are supported by citations to the record. Complainant's posthearing brief provides a four-page, unnumbered statement of facts that is supported by citation to the record. I will cite numbered fact findings from Respondent's brief and page numbers from Complainant's brief. Any proposed fact findings not accepted are rejected.

Complainant is a Honduran national who was hired by Respondent in late September 1999, and was employed through July 24, 2000. SF 1, 2. At that time, Complainant was lawfully present in the United States pursuant to the TPS program, and was authorized to work. See CX-A (Complainant's EAD that listed a validity period of August 21, 1999, to July 5, 2000). The parties have stipulated that Complainant is not a citizen, national, or lawful permanent resident of the United States. RPFF 1; Cbr. at 4; Tr. at 9. Complainant has not applied to be a naturalized citizen of the United States. RPFF 3; Cbr. at 4; Tr. at 9.

Lynda Foss processed Complainant's employment application and hired Complainant. Cbr. at 4; Tr. at 13. At the time of the hiring, Complainant presented an EAD that showed an expiration date of July 5, 2000, and contained the category notation C-19. SF 3, 14. The INS Form I-9 upon which Respondent recorded employment eligibility information regarding the EAD that Complainant presented does not contain a space or blank where an employer should record the category notation. RPFF 34; RX-A (numerous Form I-9's completed by Respondent). Complainant's sister, Idalia Mendez, was hired approximately one week after Complainant. Tr. at 31. At all times relevant to this case Respondent employed more than fourteen full time employees. SF 20.

The INS extended the Honduran TPS program for another year and in May 2000, Complainant

applied to the INS for a new EAD. SF 4; Tr. at 21-22. On June 9, 2000, the INS automatically extended the work authorization of any Honduran national possessing an EAD with the category notation A-12 or C-19 that was set to expire on July 5, 2000, until December 5, 2000. See SF 12; RX-C-4-7 (INS Extension Notice). Around July 5, 2000, Respondent asked Complainant if she had any documents showing that her EAD had been extended. SF 5.

Complainant was a good employee that Respondent wanted to retain. RPFF 42; Tr. at 44. Respondent permitted Complainant to continue working beyond July 5, 2000, in order to allow Complainant to obtain documentation establishing that she was able to work in the United States. RPFF 41; Tr. at 44. At an unspecified point in time, Respondent requested an EAD from Complainant. SF 7. On about July 21, 2000, Complainant provided Ms. Foss with Exhibit CX-C, an INS approval notice dated June 16, 2000, granting Complainant TPS through July 5, 2000. Tr. at 15, 37, 39-40; CX-C.

On July 24, 2000, Complainant was fired. SF 8; Tr. at 15. Respondent offered to re-employ Complainant if documentation could be provided establishing Complainant was entitled to work in the United States. SF 9. This offer of re-employment was documented in a letter from Respondent's attorney to OSC dated September 11, 2000. SF 10. After the firing, Complainant provided Ms. Foss with Exhibits RX-C-3 through RX-C-7. See RPFF 45; Tr. at 36. Exhibit RX-C-3 is a facsimile "cover sheet" on Catholic Charities letterhead addressed from Ana Mendez. See RX-C-3. Attached to RX-C-3, was RX-C-4-7, the INS Extension Notice that automatically extended the work authorization of certain Honduran nationals. Cbr. at 5-6; Tr. at 36; see also SF 6(c). In order to have a work authorization extended under the INS Extension Notice, a Honduran needed to have an EAD containing the notation of either A-12 or C-19 on the face of the card. SF 13. After reading the INS Extension Notice, Ms. Foss checked Respondent's files for a photocopy of the EAD that Complainant had provided in September 1999, to determine whether such photocopy contained the correct notations for the automatic work extension. RPFF 46; Tr. at 55-56. Ms. Foss was unable to locate a photocopy of the EAD. Id. In either August or September 2000, Respondent received Exhibit CX-D, an INS Receipt Notice dated August 14, 2000, regarding Complainant's application for a new EAD. Tr. at 19, 54-55, 74-75. The application requests a class C-19 EAD. See CX-D.

Although there were several undisputed facts, as indicated above, there also were several disputed factual issues listed in the FPO, and there was testimony raising several other factual disputes at the hearing.

The first disputed factual issue regards whether Respondent had a copy of Complainant's expired EAD in its files at the time Complainant was fired. See DFI 1, supra. Complainant testified that she saw Ms. Foss photocopy the EAD when she was hired in September of 1999. Tr. at 13, 18, 73. Complainant testified that, at the time she was hired, a photocopy machine was located in front of Ms. Foss' desk. Tr. at 18. She later testified that the photocopy machine is located "across from the office of Ms. Foss." Tr. at 73. For the Respondent, Ms. Foss testified that she does not remember whether a copy of the EAD

was made. Tr. at 45. Also for Respondent, Krissie Holcombe testified that a photocopy machine was not visible from Ms. Foss' office in September 1999. Tr. at 62. Regardless of whether or not the EAD was photocopied, there is un-controverted testimony from Ms. Foss that she looked for a photocopy of the EAD once she read the INS Extension Notice, which was soon after Complainant was fired, and she could not locate a photocopy of the EAD. RPFF 46, Tr. at 55-56. There is no testimony that Complainant's work files were discarded after the firing. I find that Respondent did not have a copy of Complainant's EAD in its files either at the time it fired her, or at any time thereafter.

The parties dispute whether Complainant provided Respondent with the original EAD bearing the expiration date of July 5, 2000, during either July or August of 2000, and also dispute whether Respondent had a copy of the EAD in its files when it fired Complainant. See DFI 1, 2, and 6, supra. Similarly, the parties dispute "[w]hether Respondent was aware that Complainant had an EAD that indicated C-19 status at the time in question?" See DFI 7, supra. Without providing any further details, Complainant testified that she showed Ms. Foss the EAD on "the 24th." Tr. at 20, 24. Conversely, Ms. Foss testified that Complainant did not bring in the EAD during July or August of 2000. Tr. at 43. I have already found Ms. Foss' testimony that she checked the company files for a photocopy of the EAD to be credible. The fact that she searched for a photocopy of the EAD supports the fact that the original was never shown to her. Additionally, Complainant offered internally inconsistent testimony regarding whether she showed the EAD during either July or August of 2000. Complainant testified that she thought it was "enough" to show a renewal application receipt. See Tr. at 16. Similarly, she testified that Respondent photocopied her EAD in September of 1999, and that she therefore did not need to provide that information again. See Tr. at 20-21. Finally, Complainant offered no details relating to when or how she supposedly showed Respondent the EAD in July or August of 2000. I find that Complainant did not provide Respondent with the EAD during July or August of 2000. RPFF 26; Tr. at 43. Therefore, regarding DFI 7, supra, Respondent was unaware that the EAD Complainant provided in September 1999 contained the notation A-12 or C-19. RPFF 28; Tr. at 43, 51.

Another factual dispute, which was not listed as a DFI, but arose during the hearing, was whether Respondent offered to transport Complainant to the INS to help her obtain employment authorization documents before it fired her. Respondent's agent, Krissy Holcombe, testified that, on a couple occasions, she offered Complainant transportation to the INS. Tr. at 60, 66. Complainant testified that no such offer of transportation was made. Tr. at 25-26. I conclude that Respondent's offer was consistent with its desire to continue Complainant's employment. I credit Ms. Holcombe's testimony on this matter, and find that such an offer was extended. See RPFF 48; Tr. at 60, 66.

There is also a dispute regarding whether an alleged conversation between Respondent and an INS agent took place, and, if so, what was said. See DFI 3 and 4, supra. On about July 21, 2000, Complainant provided Respondent with Exhibit CX-C, an INS approval notice dated June 16, 2000, granting Complainant TPS through July 5, 2000. Tr. at 15, 37, 39-40; CX-C. Respondent asserts that

this sparked a call to the INS. Tr. at 37. Ms. Foss and Ms. Holcombe testified that on about July 21, 2000, Ms. Foss called an INS "800 number" and spoke with an INS agent who identified herself as "Candelaria," to determine if Complainant was eligible to work in the United States. Tr. at 37, 61. Ms. Foss was told that Complainant was not currently eligible to work in the United States. Id. Ms. Foss understood this to mean that Respondent could no longer lawfully employ Complainant. Id. Ms. Holcombe testified that she was present during the telephone call and immediately following the conversation, she wrote down Candelaria's name and telephone number on a piece of paper and handed it to Complainant. Tr. at 61. Complainant does not remember receiving this piece of paper. Tr. at 73. While it may be that Complainant does not recall receiving the piece of paper, I find Respondent's description of these events to be credible. See RPFF 45; Tr. at 37, 61.

There was conflicting testimony as to whether certain documents were presented to Respondent before, or after, Complainant was fired. First, I find that Exhibit RX-C-1, an application for a new EAD and a copy of a $100 money order payable to the INS dated May 13, 2000, was first presented to Respondent after Complainant was fired. Tr. at 40. Second, I find that Exhibit RX-C-2, a certified mail receipt dated May 29, 2000, for mail addressed to the "Texas Service Center," was presented to Respondent after Complainant was fired. Tr. at 40-41.

Finally, there is a dispute regarding whether Idalia Mendez told Ms. Holcombe that the INS possessed or had seized Complainant's EAD that expired on July 5, 2000. See DFI 5. I have determined that Complainant did not show her EAD to Respondent in July or August 2000, and that Respondent unsuccessfully attempted to locate a photocopy of this EAD in its files. Because Respondent was never provided or possessed satisfactory documentation showing that Complainant's EAD had been automatically extended, the resolution of this disputed factual issue is unnecessary.

In sum, the disputed factual issues listed in the FPO have been resolved as follows: Respondent did not have a copy of Complainant's expired EAD in its files at the time Complainant's employment was terminated. Complainant did not provide Respondent with her original EAD that had or would expire during the time period in question. Lynda Foss and Krissie Holcombe contacted the INS to determine if Complainant could be lawfully employed by Respondent. They were told by an INS agent named Candelaria that Complainant could not lawfully be employed. For the purposes of determining liability, it is unnecessary to resolve whether Idalia Mendez advised Krissie Holcombe and Lynda Foss that the INS had Complainant's original EAD in its possession. Complainant did not provide Respondent with her expired EAD. Complainant did provide other documents, but none of the documents informed Respondent that Complainant had an EAD that indicated C-19 status at the time in question, and I find that prior to the time Complainant was fired, Respondent was not aware that Complainant had an EAD that indicated C-19 status.

V. *DISCUSSION OF LIABILITY*

A. Unlawful Discrimination Based on 8 U.S.C. § 1324b(a)(1)

Complainant alleges that Respondent discriminated against her because of her citizenship status and national origin in violation of section 1324b(a)(1) when it fired her. Compl. ¶ 14a; DLI 1 and 2, supra. Section 1324b(a)(1) prohibits, as an unfair immigration-related employment practice, employer discrimination in hiring, firing, recruitment, or referral for a fee, "against any individual," other than an unauthorized alien, because of such individual's (1) national origin, or (2) in the case of a "protected individual," as defined at section 1324b(a)(3), because of such individual's citizenship status. See 8 U.S.C. § 1324b(a)(1).

1. Citizenship Status Discrimination

I asked the parties to brief the issue of whether Complainant is a "protected individual" within the meaning of section 1324b(a)(3). "Protected individuals" are U.S. citizens and nationals, lawful permanent residents, lawful temporary residents under 8 U.S.C. § 1160(a) or 1255a(a)(1), and refugees and asylees. See 8 U.S.C. § 1324b(a)(3).

Complainant concedes on brief that she does not meet the definition of "protected individual" found at section 1324b(a)(3). See Cbr. at 10. At the time Complainant was fired, she was lawfully present in the United States under the TPS program. Id. The TPS program is statutorily established at 8 U.S.C. § 1254a. Only lawful temporary residents under 8 U.S.C. § 1160(a) or 1255(a) qualify as protected individuals. Therefore, individuals lawfully present in the United States pursuant to the TPS program do not qualify as "protected individuals" under section 1324b(a)(3) and are not protected from citizenship status discrimination. Because Complainant is not a protected individual, there is no subject matter jurisdiction of her section 1324b(a)(1) citizenship status discrimination claim, and I must dismiss the claim for lack of jurisdiction. See, e.g., Garcia v. Tia Maria's Cantina & Mexican Resteraunte, 7 OCAHO no. 970, 773, at 775-77, 1997 WL 1051464, at *2-3 (OCAHO 1997) (dismissing a citizenship status discrimination claim made by a non-protected individual for lack of subject matter jurisdiction); Speakman v. The Rehabilitation Hosp. of South Tex., 3 OCAHO no. 469, 743, at 746, 1992 WL 535627, at *2-3 (OCAHO 1992).

2. National Origin Discrimination

OCAHO has limited jurisdiction over claims of national origin discrimination under section 1324b(a)(1). Section 1324b(a)(2) provides that section 1324b(a)(1) shall not apply where the employer employs three or fewer employees *or* where the alleged national origin discrimination is covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. See 8 U.S.C. § 1324b(a)(2). Section 703 of the Civil Rights Act of 1964 covers national origin discrimination where the employer employs "fifteen or more employees for each working day in each of twenty or more calender weeks in the current

or proceeding calender year." 42 U.S.C. § 2000e(b) (defining employer). Accordingly, OCAHO case law holds that jurisdiction over claims of national origin discrimination brought under section 1324b(a)(1) is limited to employers who employ between four and fourteen employees. See, e.g., Guzman v. Yakima Fruit & Cold Storage, 9 OCAHO no. 1066, 1, at 8, 2001 WL 909274, at *7 (OCAHO 2001). A cognizable Title VII national origin claim cannot also be the subject of a national origin discrimination claim under section 1324b. See Mikhailine v. Web Sci Technologies, Inc., 8 OCAHO no. 1033, 513, at 514-15, 1999 WL 1893876, at *1-2 (OCAHO 1999).

Respondent has employed more than fourteen full time employees at all times relevant to this case. SF 20. Because Respondent employs more than fourteen employees, Complainant's allegation that she was fired on account of her national origin *is* a cognizable Title VII claim, and not a cognizable section 1324b(a)(1) claim. Accordingly, I lack subject matter jurisdiction over Complainant's section 1324b(a)(1) national origin discrimination claim, and must dismiss the claim for lack of jurisdiction. See, e.g., Mikhailine, 8 OCAHO at 514-515, 1999 WL 1893876 at *1-2 (dismissing a national origin discrimination claim against an employer employing more than fourteen employees for lack of subject matter jurisdiction).

B. Alleged Document Abuse in Violation of 8 U.S.C. § 1324b(a)(6)

Complainant alleges that Respondent committed document abuse, see Compl. ¶¶ 16-17, and discriminated against Complainant because of her citizenship status and national origin, see id. ¶¶ 8-9, in violation of section 1324b(a)(6). See DLI 3, supra.

Section 1324b(a)(6) was amended by section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. As amended, section 1324b(a)(6) reads as follows:

> A person's or other entity's request, for purposes of satisfying the requirements of [8 U.S.C. § 1324a(b)], for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice *if made for the purpose or with the intent of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)]* (emphasis added).

The 1996 amendment added the italicized "intent" language and moved the cross reference to section 1324b(a)(1) from the beginning, to the end, of section 1324b(a)(6). As amended, the plain language of section 1324b(a)(6) conditions liability for document abuse upon proof of discrimination. The Conference Report issued in connection with the passage of IIRIRA reflects this understanding:

> [Section 421] provides that an employer's request of a new employee for

> more or different documents than are required to confirm an employee's identity and authorization to work in the United States under INA section 274A(b) [8 U.S.C. § 1324a(b)] or an employer's refusal to honor documents that reasonably appear to be genuine shall only be considered unfair immigration-related employment practices *under INA section 274B(a)(1) [8 U.S.C. § 1324b(a)(1)] if made for the purpose or with the intent of unlawfully discriminating against the employee on the basis of citizenship status or national origin.*

H.R. Conf. Rep. No. 104-828, at 237-38 (1996) (emphasis added). This language, coupled with the amended statute, makes document abuse a form of citizenship status or national origin discrimination. See United States v. Patrol & Guard Enterprises, Inc., 8 OCAHO no. 1040, 603, at 629, 2000 WL 772987, at *17 (OCAHO 2000) (amended section 1324b(a)(6) "is understood to be a subset of citizenship status discrimination . . . ."). Thus, liability for document abuse is predicated upon proof that the employer discriminated on the basis of citizenship status or national origin.

1. Jurisdiction

Since the passage of the intent amendment, no case has decided what, if any, are the amendment's jurisdictional implications. Because amended section 1324b(a)(6) makes document abuse a form of citizenship status or national origin discrimination, I asked the parties to brief the issue of whether a national origin-based document abuse claim against an employer that employs more than fourteen employees is covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, or whether I have jurisdiction of such an action under section 1324b. See Order Brief. Sched. at 2 (August 28, 2002) (unpublished).

a. Complainant's Position

Complainant argues that "document abuse is a different theory from national origin discrimination." Cbr. at 11. According to Complainant, document abuse is a separate claim from "national origin" discrimination, and because "there is no remedy under the Civil Rights Act of 1964 for document discrimination, this Court has jurisdiction over the document discrimination claim." Id. at 11 (citing Caspi v. Trigild Corp., 7 OCAHO no. 991, 1064, at 1065, 1998 WL 746000, at *1 (OCAHO 1998)).

b. Respondent's Position

Respondent argues that Title VII generally prohibits discrimination based upon national origin, and I do not have jurisdiction over this national origin-based document abuse claim. Rbr. at 15-18. In

Respondent's view, Title VII prohibits discrimination based upon national origin, and "has been interpreted expansively to cover a broad range of activities considered to be an unlawful employment practice." Id. at 16 (citations omitted). As an employer who employed more than fourteen employees for more than twenty consecutive weeks at all relevant times during Complainant's employment, Respondent claims that Complainant "had the ability to pursue her national origin *claims* through the EEOC under Title VII." Id. at 16 (emphasis added). Respondent contends that OCAHO does not have jurisdiction over Complainant's national origin-based document abuse claim. Id. at 18.

c. Discussion of Document Abuse Jurisdiction

As amended by IIRIRA, section 1324b(a)(6) contains an intent requirement. Pre-amendment OCAHO decisions hold that discrimination is not a requirement for liability. In this sense, section 1324b(a)(6) was previously not regarded as a form of national origin or citizenship status discrimination–an employer violated the law simply by refusing to accept a facially valid document or insisting upon more or different documents than required to establish work eligibility. See United States v. A.J. Bart, Inc., 3 OCAHO no. 538, 1374, at 1391, 1993 WL 406027, at *13 (OCAHO 1993) (finding a violation of section 1324b(a)(6) without discussing discrimination); United States v. Strano Farms, 5 OCAHO no. 748, 206, at 223-24, 1995 WL 367114, at *13 (OCAHO 1995) (finding violations of section 1324b(a)(6) without discussing discrimination); Lee v. Airtouch Communications, 6 OCAHO no. 901, 891, at 901, 1996 WL 780148, at *8 (OCAHO 1996) ("With the specific exception of § 1324b(a)(6), the discrimination prohibited by 8 U.S.C. § 1324b is discrimination [based upon] national origin or citizenship status."); but see Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798 (9th Cir. 1998) ("Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment."). Under this interpretation, liability was not predicated upon discrimination, but only upon the documentary violation. See id.

A concomitant to this jurisprudence was the idea that an alleged violation of section 1324b(a)(6) was simply an action for document abuse, not an action for citizenship status or national origin discrimination based on document abuse. After the document abuse provision found at 8 U.S.C. § 1324b(a)(6) was added to the law in 1990, several OCAHO decisions held that document abuse under section 1324b(a)(6) was a completely discrete violation of the immigration act and was not merely a species of citizenship status discrimination. See United States v. Guardmark, 3 OCAHO no. 572, 1714, at 1723, 1993 WL 566128, at *7 (OCAHO 1992). Because document abuse was considered "separate and apart" from citizenship status and national origin discrimination claims, it was held that OCAHO had jurisdiction over document abuse claims so long as the Complainant was authorized to work. Id. at 1723-24, *7. The Guardsmark reasoning was uniformly applied in OCAHO cases. For example, in United States v. Hyatt Regency Lake Tahoe, 6 OCAHO no. 879, 604, 1996 WL 570514 (OCAHO 1996), I explained that "OCAHO case law holds that document abuse is not a subset of citizenship status discrimination and that all work authorized individuals are protected from document abuse, not just

protected individuals." Hyatt Regency, 6 OCAHO at 615, 1996 WL 570514, at *8; see also United States v. Zabala Vineyards, 6 OCAHO no. 830, 72, at 86, 1995 WL 848947, at *10 (OCAHO 1995) (section 1324b(a)(6) "prohibits document abuse against any work authorized individual, and not only against 'protected individuals.'"); United States v. Strano Farms, 4 OCAHO no. 601, 127, at 130, 1994 WL 269210, at *3 (OCAHO 1994) (holding that political asylum applicants have standing to file a claim for document abuse because "it is a violation of IRCA, 8 U.S.C. § 1324b(a)(6), to engage in document abuse against any work authorized individual, not just against those individuals protected against citizenship status discrimination under IRCA.").

Regardless of whether Guardsmark and its progeny were correctly decided (and I now have some doubts about my earlier ruling in Hyatt Regency on that issue), the 1996 amendment to section 1324b(a)(6) compels a contrary conclusion. As discussed above, liability is now predicated upon an employer's intent to discriminate. While section 1324b(a)(6) itself does not explicitly define "intent," it conditions liability for document abuse upon proof of the employer's "purpose or . . . intent of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)]." See 8 U.S.C. § 1324b(a)(6). Section 1324b(a)(1) grants OCAHO jurisdiction over two forms of discrimination: (1) citizenship status discrimination against protected individuals and, in relevant part, (2) national origin discrimination not covered by Title VII. See 8 U.S.C. § 1324b(a). Accordingly, I hold that under amended section 1324b(a)(6), the cross reference to section 1324b(a)(1) defines the type of discrimination prohibited: citizenship status discrimination against protected individuals, and national origin discrimination against employers with four or more employees not covered by Title VII.

Complainant concedes that she is not a protected individual. Under amended section 1324b(a)(6), document abuse is a form of citizenship status and national origin discrimination. OCAHO only has jurisdiction over citizenship status discrimination claims against protected individuals. See 8 U.S.C. § 1324b(a)(1). Because Complainant is not a protected individual, I lack subject matter jurisdiction over her section 1324b(a)(6) citizenship status-based document abuse claim, and must dismiss the claim for lack of jurisdiction.

OCAHO does not have jurisdiction over national origin discrimination claims where (1) the employer employs less than four employees *or* (2) where the alleged violation is a cognizable Title VII claim. The first jurisdictional bar is not an issue in this case because the parties stipulate that Respondent employs more than fourteen employees. See SF 20. The issue is whether an allegation of national origin-based document abuse made pursuant to section 1324b(a)(6) is a cognizable Title VII claim. I hold that national origin-based document abuse is not a form of national origin discrimination cognizable under Title VII.

First, section 1324b(a)(6) is a specific immigration law provision relating to the "employer sanctions program" enacted at section 1324a. Section 1324a(b) establishes an employment verification system

whereby employers are required to examine certain documents to verify that an employee is not an unauthorized alien. See 8 U.S.C. § 1324a (imposing penalties upon employers who knowingly hire aliens who are not authorized to work in the United States). An employer violates sections 1324b(a)(6) only if the documentary violation occurs "for purposes of satisfying the requirements of [section 1324a(b)] . . . ." 8 U.S.C. § 1324b(a)(6). Document abuse cases involve a narrow set of circumstances--document requests or refusals made for the purpose of compliance with the employment eligibility verification process. Section 1324b(a)(6) is a specific, technical provision, that is intertwined with the related immigration laws found at 8 U.S.C. § 1324a. Second, a comparable provision to section 1324b(a)(6) cannot be found at section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Although Respondent argues that Title VII has been interpreted expansively to cover a broad range of activities, Respondent does not cite, and my research of Title VII case law does not reveal, any instance of document abuse being upheld, or even alleged, as a cause of action under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

In view of these factors, I reject Respondent's contention that Complainant could have pursued her national origin-based document abuse claim under Title VII. I accept Complainant's argument that there is no remedy under section 703 of the Civil Rights Act of 1964 for "document discrimination," see Cbr. at 11, and hold that OCAHO has exclusive, original jurisdiction to adjudicate this alleged national origin-based violation of section 1324b(a)(6). Accord Caspi v. Trigild Corp., 7 OCAHO no. 991, 1064, 1065, 1998 WL 746000, at *1 (1998) (claims of document abuse are not within the coverage of Title VII).

2. Liability for National Origin-Based Document Abuse

There are two ways to violate section 1324b(a)(6). First, an employer violates the law by asking an employee for more or different documents than those required by the employment eligibility system established at section 1324a for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. See 8 U.S.C. § 1324b(a)(6). Second, in the course of complying with section 1324a, an employer violates the law by refusing to honor a document tendered that on its face reasonably appears to be genuine, for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. See id. Complainant alleges that Respondent has violated section 1324b(a)(6) both ways.

The Complaint alleges that Respondent refused to honor the following documents: (1) "Kansas I.D.;" (2) "Documents faxed from INS Case Worker (Ana Mendez);" and (3) "Money Order Stub, Notices of Action and Extension Permits from INS." See Compl. ¶16a. The parties stipulate that Complainant provided Respondent "Kansas Identification." See SF 6(d). It is also established that the faxed documents constitute a facsimile cover sheet on Catholic Charities letterhead from Ana Mendez, and the INS Extension Notice. See SF 6(c). Additionally, after Complainant was fired, she provided Respondent with a money order stub for $100 for a money order that she had filed along with her

application for a new EAD. See FIF, supra, at 11. Complainant also provided Respondent with an INS Notice of Action granting Complainant TPS through July 5, 2000. Id. at 10; CX-C. In August or September 2000, Respondent received an INS document acknowledging receipt of Complainant's application for a new EAD. Id. at 9. There is no evidence that any approved extension permits from the INS were presented.

INS regulations implementing the employment eligibility verification system are found at 8 C.F.R. Part 274a. Under the regulations, an employee may present an original document that establishes both employment authorization and identity, or an original document that establishes employment authorization and a separate original document that establishes identity. See 8 C.F.R. § 274a.2(b)(1)(v) (2000). When she was hired, Complainant presented an unexpired EAD that established both employment authorization and identity. See id. at § 274a.2(b)(1)(v)(A)(4). After July 5, 2000, Complainant provided the documents discussed above. Only one of these documents, the Kansas Identification card, falls within the category of documents described by the regulations. A state issued identification card must be presented in tandem with a separate original document that establishes employment authorization. See id. at § 274a.2(b)(1)(v). No such employment authorization document was provided. Additionally, Complainant never presented her EAD in July or August 2000. See FIF, supra, at 10. Therefore, no combination of the documents Complainant provided establish employment eligibility. An employer cannot honor insufficient documents. Accordingly, Respondent did not fail to honor genuine documents.

Complainant also alleges that by specifically requesting an EAD, Respondent violated section 1324b(a)(6) by asking for more or different documents than required to show that Complainant was authorized to work. Compl. ¶ 17. Similarly, Complainant's posthearing brief argues that "[t]he graveman [sic] of this case is that Respondent violated 8 U.S.C. § 1324b(a)(6) by requiring more and different documents than an employer is permitted to require." Cbr. at 12. According to Complainant, "additional evidence of disparate treatment" is not required. Id. Respondent argues that, to incur liability, "the employer must have an intent to discriminate against the employee" when it commits a documentary violation. Rbr. at 19 (citing Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 801 (9th Cir. 1998) ("We hold that Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment.")).

In establishing employment eligibility, an employee may choose to present any document(s) acceptable for establishing work eligibility listed in 8 C.F.R. § 274a.2(b)(1)(v). See 8 C.F.R. § 274a.2(b)(1)(v). Accordingly, the majority of OCAHO cases decided prior to the 1996 amendment to section 1324b(a)(6) hold that "requests for specific documents, such as INS documents, constitute document abuse violations." See, e.g., United States v. Townsend Culinary, 8 OCAHO no. 1032, 454, at 507, 1999 WL 1295209, at *38 (OCAHO 1999) (citations omitted). The parties stipulate that Respondent specifically requested an INS issued EAD. SF 7. The issue, however, is not whether Respondent violated the pre-1996 law, but rather, whether it violated amended section 1324b(a)(6).

As already discussed, the amended version of section 1324b(a)(6) contains an intent requirement. See Tadesse v. United States Postal Serv., 7 OCAHO no. 979, 636, at 940-41, 1997 WL 1051473, at *4-5 (OCAHO 1997). In Tadesse, the issue of "what constitutes 'intent' for the purpose of establishing a violation of 8 U.S.C. § 1324b(a)(6), as amended" was raised but not resolved. See id. at 945, *7 (order not a final adjudication of the meaning of "purpose" or "intent"). The addition of the intent requirement means that now an employer may avoid document abuse liability if the employer can present persuasive evidence that its request for additional documents, or its refusal to accept verification documents that appear genuine on their face, was made for legitimate reasons not attributable to discrimination.

Here, the overwhelming evidence establishes that Respondent's actions were taken because of a genuine concern that Complainant's work authorization had terminated. Indeed, Respondent made a concerted effort to keep Complainant employed. First, Respondent's agents offered Complainant transportation to the INS office in Kansas City to obtain any paperwork that would provide proof of Complainant's eligibility to work in the United States. See FIF, supra, at 10; Tr. at 60, 66. Second, even though Complainant's EAD contained an expiration date of July 5, 2000, and Respondent was never made aware that Complainant remained eligible to work, Complainant was not fired until approximately three weeks later, July 25, 2000. See FIF, supra, at 9-10. Third, Complainant was not fired until after an INS agent specifically informed Respondent that Complainant was not eligible to work in the United States. See id. at 9-10. Fourth, once Respondent learned that Complainant's EAD was automatically extended if it contained the category notations A-12 or C-19, it checked its files for a photocopy of the EAD. See id. at 9. Fifth, Respondent offered to re-employ Complainant if documentation could be provided establishing Complainant is entitled to work in the United States. See id.; SF 9, 10. Sixth, and finally, Respondent offered credible testimony that Complainant was a good worker and it wanted to keep her employed. See FIF, supra, at 9; Tr. at 44.

VI. *CONCLUSION*

In conclusion, there is not a scintilla of evidence demonstrating discriminatory purpose or intent. The evidence demonstrates that Respondent continually went out of its way to help Complainant, and gave her every opportunity to remain employed. In this context, I find that Respondent's request for Complainant's EAD was not made "for the purpose or with the intent of discriminating against" Complainant. Accordingly, I find that Respondent has not violated section 1324b(a)(6).

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This order constitutes the final agency decision. As provided by statute, no later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).