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

January 16, 2015

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00048
CHEN'S WILMINGTON, INC., D/B/A HIBACHI GRILL SUPREME BUFFET RESTAURANT, Respondent.	)	

DENIAL OF RESPONDENT'S REQUEST FOR ADMINISTRATIVE REVIEW

I. PROCEDURAL HISTORY

This action arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2012). The Department of Homeland Security, Immigration and Customs Enforcement (ICE or complainant), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Chen's Wilmington, Inc., d/b/a Hibachi Grill Supreme Buffet Restaurant (respondent or Chen's Wilmington, Inc.) alleging that respondent hired twenty-five individuals for whom it failed to prepare or present Employment Eligibility Verification (I-9) Forms, in violation of 8 U.S.C. § 1324a(a)(1)(B). The complaint requested civil penalties in the amount of $24,543.75 (or $981.75 per violation). The complainant identified the party to be served for the respondent as "Yue Chen, President, Chen's Wilmington, Inc. d/b/a Hibachi Grill Supreme Buffet Restaurant."

The Chief Administrative Hearing Officer (CAHO) issued a Notice of Case Assignment, assigning the case to Administrative Law Judge (ALJ) Ellen K. Thomas. The Notice of Case Assignment was served, along with a copy of the complaint, on the parties, informing them of the procedural rules applicable to OCAHO cases (located at 28 C.F.R. pt. 68), and informing the respondent of its right to file an answer to the complaint (as well as the deadline for doing so). Respondent filed an answer to the complaint, denying the material allegations of the complaint. This answer was signed and submitted by Ms. Chen in her capacity as president of Chen's Wilmington, Inc.

ALJ Thomas subsequently issued an Order for Prehearing Statements, and ICE timely filed its Prehearing Statement. Because respondent did not timely file its prehearing statement, ALJ Thomas issued a Notice and Order to Show Cause, directing respondent to show cause why its request for hearing should not be deemed abandoned, or in the alternative, to show good cause for its failure to file its prehearing statement and to file a prehearing statement that comports with OCAHO's procedural rules.

Before the deadline for a response to the Notice and Order to Show Cause, ICE filed a Motion to Approve Consent Findings. Although the motion was not titled as a joint motion, it was signed by both ICE counsel and Ms. Chen. The Consent Findings attached to the motion reflected a settlement agreement between ICE and respondent, wherein respondent admitted all allegations of the complaint and agreed to pay a total sum of $24,543.75 in penalties for the admitted violations (this represented 100 percent of ICE's proposed penalty). The settlement agreement, which was signed by both ICE Chief Counsel and Ms. Chen, expressly stated that, "each Party represents and warrants that this Agreement has been duly approved by such party and constitutes a binding obligation of such party, and that the officer or official signing this Agreement is authorized by the Party to sign on its behalf…."

On August 19, 2014, ALJ Thomas issued a final decision and order finding that the Motion to Approve Consent Findings and the accompanying Consent Findings substantially conformed to the requirements of 28 C.F.R. § 68.14(b), and were incorporated by reference. Accordingly, the parties were directed to perform the promises undertaken in the Consent Findings and to bear their own costs and expenses.

On December 22, 2014, OCAHO received a Request for Administrative Review from respondent through an attorney. The request for review requested equitable tolling of the filing deadline and sought revocation of the settlement agreement, among other things. ICE did not file a response to the request for review. For the reasons stated herein, the request for administrative review is denied.

II. JURISDICTION AND STANDARD OF REVIEW

Under the applicable statute and regulations, the CAHO has discretionary authority to review any final order of an ALJ in a case brought under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Pursuant to OCAHO's rules of practice and procedure, a party may file a written request for administrative review within ten days of the date of entry of the ALJ's final order, 28 C.F.R. § 68.54(a)(1), or the CAHO may review an ALJ's final order on his or her own initiative by issuing a notification of administrative review within ten days of the date of the ALJ's order, 28 C.F.R. § 68.54(a)(2). The CAHO may then enter an order that modifies or vacates the ALJ's order, or remands the case to the ALJ for further proceedings, within thirty days of the date of entry of the ALJ's final order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1). If the CAHO does not enter an order modifying, vacating or remanding the ALJ's order, and the ALJ's order is not referred to the Attorney General for review, the ALJ's order becomes the final agency decision and order sixty days after the date of the order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.52(g). A party may then file an appeal of the agency's final order with the appropriate federal circuit court of appeals within 45 days after issuance of the order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1217, 3 (2014) (order by the CAHO vacating and remanding the ALJ's final decision and order); *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 478 (1995).[1]

III. RESPONDENT'S ARGUMENTS

Respondent's Request for Administrative Review was filed 125 days after the date of the ALJ's final decision and order, well beyond the 10-day deadline for filing a request for review by the CAHO. However, respondent requests equitable tolling of the filing deadline for its untimely request and asks the CAHO to: (1) revoke the settlement agreement entered into between respondent and ICE; (2) order that any funds paid by respondent to ICE as a result of the settlement agreement be returned; (3) deny ICE's complaint; and (4) order ICE to "cease and desist its practice of allowing the unauthorized practice of law in all matters before this tribunal." Respondent bases its request for equitable tolling on assertions of "misconduct of Complainant," alleging that ICE "intentionally disregarded Respondent's use of an unauthorized representative and knowingly failed to disclose legal authority known to be adverse to its claim in order to secure an inappropriate and excessive penalty." Respondent's specific arguments underlying its request are set forth below.

A. Factual Assertions in the Request for Review

In its request for review, respondent contends that Chen's Wilmington, Inc. is a small Chinese restaurant in Wilmington, North Carolina that is owned and operated by Yue Chen, a lawful permanent resident with poor English skills. Respondent asserts that when Ms. Chen received the Notice of Intent to Fine from ICE, she "expressed her concerns over the restaurant's inability to afford the proposed penalty," and enlisted the help of her accountant, Dr. Steve Niu of Triangle Accounting, with regard to ICE's proposed penalty. When the Notice of Intent to Fine was served upon respondent at Dr. Niu's office, Ms. Chen was present and signed on behalf of respondent in her capacity as president and owner of the restaurant. Ms. Chen then submitted a timely request for hearing to ICE. The request for hearing was issued on Chen's Wilmington letterhead and signed by Ms. Chen as "President for Chen's Wilmington, Inc. dba Hibachi Grill Supreme Buffet Restaurant." The request challenged ICE's findings, sought mitigation of the proposed penalty and proposed a lower fine amount. The request also stated that if ICE had any questions or concerns, to contact "my [Ms. Chen's] representative Dr. Steve Niu," and provided

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

his telephone number. The request also indicated that a copy was sent to Dr. Niu at Triangle Accounting.[2]

Respondent's request for review asserts that ICE engaged in negotiations with Dr. Niu for more than four months leading up to the filing of its complaint, and continued negotiating with Dr. Niu/Triangle Accounting after the complaint was filed, ultimately resulting in the settlement agreement and consent findings that formed the basis of the ALJ's final order. The request for review alleges that ICE "took advantage of Dr. Niu's lack of knowledge and experience … in order to secure 100% of its proposed penalty."

B. Equitable Tolling

Respondent acknowledges that its request for review is untimely, but contends that the ten-day filing deadline "is subject to the principles of equitable tolling and may be extended if justified." Respondent cites several OCAHO cases that discuss equitable tolling,[3] and asserts that the doctrine applies (and thus the running of the filing period is tolled) "when a respondent is unaware that she has been prevented in some extraordinary way from exercising her rights."

C. ICE's Duty to the Tribunal

Respondent asserts that OCAHO rules "explicitly forbid representation by a non-attorney without prior approval from the ALJ" (citing 28 C.F.R. § 68.33(c)(3)(i)). Respondent also points to 28 C.F.R. § 68.35(a), which provides that "All persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity, and in an ethical manner." Respondent alleges that "ICE knowingly allowed a non-attorney [Dr. Niu] to proceed in the representation of Respondent in direct violation of the Rules," and that this "constitutes a refusal to adhere to reasonable standards of orderly and ethical conduct, and is a willful failure to act in good faith."

D. ICE's Duty to the Respondent

Respondent also argues that by appearing before OCAHO, "ICE assumes not only the affirmative duty to notify the ALJ if a respondent's counsel is engaged in the unauthorized practice of law, but also to communicate directly to an unrepresented respondent the benefit of using licensed counsel in OCAHO proceedings." Respondent does not cite any legal authority whatsoever (e.g., statutes, regulations, or case law) in support of this purported affirmative duty.

[2] Although respondent's request for review also asserts that respondent's answer to the complaint cited Dr. Niu as its representative, this assertion is incorrect. Dr. Niu's name does not appear anywhere in respondent's answer, which is signed and served by Ms. Chen exclusively, as President of Chen's Wilmington, Inc.

[3] *United States v. Cordin Co.*, 10 OCAHO no. 1162 (2012); *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198 (2012); *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071-72 (1998) (citing *United States v. Auburn Univ.*, 4 OCAHO no. 617, 268, 274 (1994)); *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 396 (1994); *United States v. Weld Cnty. Sch. Dist.*, 2 OCAHO no. 326, 199, 217 (1991). Respondent also cites one Supreme Court case: *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).

E. Procedural Unconscionability

Finally, under the heading of "Procedural Unconscionability," respondent argues that "ICE took advantage of Dr. Niu's lack of knowledge and experience in section 274A [§ 1324a] cases in order to secure 100% of its proposed penalty." Respondent then speculates that it "seems unlikely that a qualified representative" would enter into a settlement agreement "in which respondent pays 100 percent of the proposed penalties." Respondent further notes that shortly before the Notice of Intent to Fine was served in this case, OCAHO issued three precedent decisions involving the same ICE Office of Chief Counsel, and the ALJ in these cases reduced the penalties assessed by approximately fifty percent.[4] Respondent contends (without relying on any evidence) that these precedent decisions "played a determinative role" in ICE's prosecutorial strategies in this case. Respondent asserts that, "[r]ather than report Dr. Niu's status as a non-attorney to the ALJ, [ICE] proceeded to negotiate with the notario, and in doing so it secured an outcome significantly more favorable than those in the precedent decisions." Respondent concludes that through this alleged "malfeasance," ICE "compromised the integrity of the judicial system and prevented Respondent from exercising its rights."

IV. DISCUSSION

Respondent's request for review presents three major issues: first, who may serve as a representative in a case before OCAHO (and what constitutes "representation" under OCAHO rules); second, the standards for equitable tolling of a filing deadline; and third, whether the circumstances of this case warrant equitable tolling of the filing deadline for the request for administrative review.

A. Representation Before OCAHO

Under OCAHO's procedural rules, persons who may appear before OCAHO ALJs on behalf of parties other than the government include: (1) attorneys, 28 C.F.R. § 68.33(c)(1); (2) law students under direct supervision of a faculty member or attorney, 28 C.F.R. § 68.33(c)(2); and (3) individuals who are neither attorneys nor law students, "upon a written order from the Administrative Law Judge assigned to the case granting approval of the representation," 28 C.F.R. § 68.33(c)(3). Non-attorneys seeking to appear before an OCAHO ALJ on behalf of a party must submit a written application to the ALJ, "set[ting] forth in detail the requesting individual's qualifications to represent the party." 28 C.F.R. § 68.33(c)(3)(i). Parties also have the unqualified right to appear in a proceeding on their own behalf (i.e., "*pro se*"). *See* 28 C.F.R. § 68.33(a), (c)(3)(iv).

Respondent, in its request for review, therefore deduces that, "OCAHO rules *explicitly* forbid representation by a non-attorney without prior approval from the ALJ" (emphasis added). What is not explicit or clear from the text of the regulation is whether the restrictions and qualifications on non-attorney appearances before the ALJ to represent private parties in OCAHO cases extend to representation in all respects, or merely to official appearance before the ALJ. 28 C.F.R. § 68.33(c) provides that "[p]ersons *who may appear before the*

[4] *United States v. Kobe Sapporo Japanese Inc.*, 10 OCAHO no. 1204 (2013); *United States v. Kobe Sakura Japanese Inc.*, 10 OCAHO no. 1205 (2013); *United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206 (2013).

Administrative Law Judges on behalf of parties" (emphasis added), other than the government, include attorneys, law students, and non-attorneys only with prior approval by the ALJ. 28 C.F.R. § 68.33(c)(3)(iii) discusses "[d]enial of authority *to appear*," (emphasis added), providing that the ALJ "may enter an order denying the privilege *of appearing* to any individual" (emphasis added) under certain circumstances. On the other hand, other sections of the relevant rule refer to "representation" rather than "appearance." *See, e.g.*, 28 C.F.R. § 68.33(c)(3) ("An individual who is neither an attorney nor a law student may be allowed to *provide representation* to a party upon a written order from the Administrative Law Judge assigned to the case granting approval of *the representation*") (emphases added); § 68.33(c)(3)(i) ("A written application by an individual who is neither an attorney nor a law student for admission *to represent* a party in proceedings shall be submitted…") (emphasis added).

OCAHO's rules do not define the term "appear" or delineate what constitutes an "appearance" or "representation," and no prior OCAHO precedent decisions have discussed the issue comprehensively. However, some previous cases are instructive on this question. In *United States v. Catalano*, 7 OCAHO no. 974, 860 (1997), for instance, respondent was not represented by an attorney (he proceeded *pro se*), but several filings and communications from the parties suggested that two named attorneys were advising the respondent during the proceedings. One of the attorneys had engaged in discussions with Immigration and Naturalization Service (INS) counsel in the case, and reportedly told INS counsel that he was unsure whether he would represent respondent. In a later filing, the respondent said that the two attorneys were friends of his who were "suggesting thoughts in this matter." On the basis of these facts, the ALJ concluded that respondent was <u>not</u> represented by counsel under OCAHO rules, but rather was appearing *pro se*, notwithstanding the assistance he was receiving in the case from the two attorneys.

In *United States v. Reyes*, 4 OCAHO no. 592, 1 (1994), respondent filed an answer on his own behalf. At a later prehearing conference, INS counsel reported that they had been advised that respondent had retained an attorney and that they had spoken to the attorney by phone, but she had not yet entered an appearance. The ALJ noted that he would continue to deal with respondent as unrepresented until an attorney entered an appearance. The respondent's attorney subsequently filed an entry of appearance in conjunction with filing a response to a motion for summary decision.

In *Kalil v. Utica City School District*, 9 OCAHO no. 1101 (2003), complainant was proceeding *pro se* in her case before OCAHO. However, when respondent sought to take complainant's deposition, complainant requested permission (through application to the ALJ) to bring an attorney with her to the deposition. The ALJ allowed the complainant to have an attorney accompany her to the deposition without requiring the attorney to file a notice of appearance.

Finally, in *United States v. Tropicana Casino & Resort*, 9 OCAHO no. 1064 (2001), the attorney for respondent (who had previously entered a notice of appearance) was unavailable at the time of a telephonic prehearing conference, so two other attorneys represented respondent at the conference (neither of whom had previously entered an appearance). Because counsel for complainant had no apparent objection and because the substitute attorneys assured the ALJ that their participation in the proceeding would likely be confined to that conference, the ALJ

expressed a willingness to proceed with the conference despite the absence of a formal entry of appearance. However, the ALJ cautioned that, in the future, an associate participating in a prehearing conference in an attorney of record's stead must first enter an appearance pursuant to OCAHO's rules.

In the instant case, Ms. Chen (as president of respondent) apparently enlisted her accountant, Dr. Niu, to assist her with the ICE inspection and subsequent negotiations of the fine. However, the record reflects that Dr. Niu never filed anything with OCAHO on respondent's behalf. All filings made by respondent with OCAHO were submitted by the company and signed by Ms. Chen alone, and only her name appears on the certificate of service and service list. Even if Dr. Niu assisted respondent in preparing her answer to the complaint and in negotiating and finalizing the settlement agreement, both documents were ultimately signed and affirmed by Ms. Chen. The record also reflects that Dr. Niu never participated in any prehearing conferences with the ALJ on respondent's behalf. Therefore, in light of the precedents discussed above, it does not appear that Dr. Niu appeared in the proceedings or represented respondent before OCAHO to the extent that he would have been required to request permission from the ALJ to represent respondent under 28 C.F.R. § 68.33(c)(3).[5]

This is not to say that an attorney or lay individual may in effect represent a party by conducting an entire case before OCAHO "in the shadows," without ever filing a notice of appearance or requesting permission to represent the party, merely because the party alone signs and submits each document prepared by the representative and participates solo in prehearing conferences. In certain circumstances, "informal" representation by an attorney or other individual may rise to the level of an appearance, requiring either a notice of appearance or an application to represent the party under 28 C.F.R. § 68.33. However, the record before us does not demonstrate that this is such a case.[6]

B. Equitable Tolling of Deadline for Filing Request for Administrative Review

It is generally established that filing deadlines are not jurisdictional in nature, and thus are subject to equitable remedies, such as equitable tolling, under appropriate circumstances. *See e.g., Sall v. Wal-Mart Stores, Inc.*, 10 OCAHO no. 1161, 3 (2012).[7] However, equitable tolling is

[5] Moreover, OCAHO's rules regarding representation do not apply to activities by a purported representative before a complaint is filed. 28 C.F.R. § 68.1 provides that OCAHO's rules of practice and procedure apply to "adjudicatory proceedings" before OCAHO. An "adjudicatory proceeding" is defined in 28 C.F.R. § 68.2 as "an administrative judicial-type proceeding … commencing with the filing of a complaint …." By the terms of the regulation, therefore, OCAHO's rules and restrictions regarding representation do not apply to activities preceding the filing of a complaint.

[6] In any event, I am not persuaded that the failure of *respondent's* representative to apply for approval of his representation may be the basis for finding misconduct by *ICE*. If such a failure did exist in this case, it was a failure by respondent and/or her representative to comply with OCAHO's rules, not misfeasance by the opposing party.

[7] Although the ten-day deadline for filing a request for review is not jurisdictional in nature and thus may be subject to equitable tolling, it is an open question whether the thirty day deadline for the CAHO to modify or vacate the ALJ's decision and order is also subject to equitable tolling, or whether that time limit is in fact jurisdictional. 8 U.S.C. § 1324a(e)(7) provides that the ALJ's decision and order in a case under § 1324a becomes the final agency order if it is not modified or vacated by the CAHO within thirty days or referred to the Attorney General within sixty days of the date of the decision and order. Once this time period has passed and the ALJ's order becomes the final agency order, it is not clear that the CAHO retains any jurisdiction over that decision and order. *See generally Bowles v. Russell*, 551 U.S. 205 (2007) (holding that jurisdictional time limits and deadlines are not subject to

a rare remedy available only where a party has exercised due diligence in preserving her legal rights. *See, e.g.*, *Cruz v. Maypa*, 2014 WL 6734848, at *5 (4th Cir. 2014); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result."); *Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 2 ("[d]ue diligence is the sine qua non for equitable relief.").

Cases in the Fourth Circuit[8] have generally held that equitable tolling is appropriate in two circumstances: (1) when a party was prevented from asserting his or her claims by some kind of wrongful conduct on the part of the opposing party; or (2) when extraordinary circumstances beyond the party's control made it impossible to file the claims on time. *See Cruz*, 2014 WL 6734848, at *5 (citing *Harris*, 209 F.3d at 330). However, "[e]quitable tolling is not available to avoid the consequences of a [party's] own negligence … and the [party's] own ignorance of the law will usually not justify equitable tolling." *Seaver v. BAE Systems*, 9 OCAHO no. 1111, 7 (2004) (citations omitted).

Since respondent's request for review was filed well outside of the ten-day time limit for requesting administrative review, it is untimely unless principles of equitable tolling excuse the late filing. In its request for review, respondent asserts that the filing deadline should be equitably tolled because of misconduct by ICE. Because "wrongful conduct on the part of the opposing party" that prevents a party from asserting its claims is one of the circumstances in which equitable tolling may be appropriate, *see Cruz*, 2014 WL 6734848, at *5, the alleged misconduct by ICE in this case, as well as whether respondent exercised due diligence, must be evaluated.

1. Alleged Misconduct By ICE

In its request for review, respondent alleges that ICE committed misconduct in several different ways. First, respondent argues that by knowingly allowing a non-attorney (Dr. Niu) to proceed in the representation of respondent in violation of OCAHO's rules regarding representation, ICE failed "to adhere to reasonable standards of orderly and ethical conduct," and committed "a willful failure to act in good faith." This conduct, respondent alleges, constitutes a violation of ICE's duty to the tribunal, which requires all persons appearing in proceedings before OCAHO "to act with integrity, and in an ethical manner." 28 C.F.R. § 68.35(a).

Second, respondent asserts (without citation to any legal authority) that by appearing before OCAHO, "ICE assumes not only the affirmative duty to notify the ALJ if a respondent's counsel is engaged in the unauthorized practice of law, but also to communicate directly to an unrepresented respondent the benefit of using licensed counsel in OCAHO proceedings." Respondent claims that ICE violated this purported affirmative duty.

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equitable tolling). A date certain for finality of the agency's order is particularly important here because it determines when the circuit court appeal period begins to run. 8 U.S.C. § 1324a (e)(8). Because the request for review can be denied on other grounds, I do not reach this point here.

[8] Because respondent has its principal office in North Carolina, Fourth Circuit case law provides the controlling legal authority here. *See* 28 U.S.C. § 2343.

Finally, respondent alleges that ICE took advantage of Dr. Niu's lack of knowledge and experience in OCAHO cases in order to secure 100 percent of its proposed penalty, speculating that "it seems unlikely that a qualified representative would join a motion to approve Consent Findings in which respondent pays 100% of the proposed penalties."

The standards of conduct articulated at 28 C.F.R. § 68.35(a) have been described as "general aspirational goals" rather than specific standards of conduct. *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1104, 3 (2004). OCAHO rules provide that the ALJ may exclude a party, witness, or representative from the proceedings "for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against *ex parte* communications." 28 C.F.R. § 68.35(b). However, neither of these provisions amounts to the declaration of specific standards of conduct for parties or their representatives in cases before OCAHO. Rather, where ethical issues are raised in OCAHO proceedings, the general approach is for OCAHO adjudicators to "look to the ethical rules applicable to the bar in the state where the events in question occurred." *Santiglia*, 9 OCAHO no. 1104, at 5; *see also Avila v. Select Temporaries, Inc.*, 9 OCAHO no. 1079, 8 (2002).[9]

Respondent has failed to cite to any specific rules of professional responsibility that ICE attorneys allegedly violated through their conduct in this case, and I find no such violations. Nothing in the record suggests that ICE violated any specific rules regarding candor toward the tribunal, N.C. RULES OF PROF'L CONDUCT R. 3.3 (2014), fairness to opposing party and counsel, *id.* at R. 3.4, dealing with an unrepresented person, *id.* at R. 4.3, or any other identifiable rule of conduct or professional responsibility.

The only specific allegation of misconduct that respondent makes against ICE is that it engaged in negotiations with Dr. Niu both prior to and after the filing of the complaint knowing that Dr. Niu was not an attorney, and did so in violation of OCAHO's rules. However, as discussed previously, *see supra* section IV.A, OCAHO's rules explicitly allow for representation by a non-attorney under certain circumstances. 28 C.F.R. § 68.33(c)(3). Although a non-attorney representative must request permission from the ALJ in order to formally appear in OCAHO proceedings, this requirement does not prevent the representative from representing a party before a formal complaint is filed with OCAHO; nor does it necessarily prohibit the individual from continuing to assist the party once the complaint has been filed.

Assuming ICE knew that Dr. Niu was not an attorney, it was not unreasonable for it to continue to negotiate with Dr. Niu under the circumstances when respondent expressly directed ICE to Dr. Niu as its representative in regard to the Notice of Intent to Fine. Even after the complaint was filed, OCAHO's rules, as discussed in section IV.A above, did not prohibit ICE's continued interactions with Dr. Niu, even absent approval of a formal application to represent respondent before OCAHO, because OCAHO rules do not require representation exclusively by attorneys, and do not require permission of the ALJ for non-attorneys to provide assistance to parties with regard to OCAHO proceedings.

[9] In this case the North Carolina State Bar Rules of Professional Conduct apply.

Respondent insists that ICE should have communicated directly to respondent the benefit of using licensed counsel in OCAHO proceedings. Rule 4.3 of the North Carolina Rules of Professional Conduct provides that in dealing on behalf of a client with a person who is not represented by counsel, the only legal advice a lawyer may give to the unrepresented party is the advice to secure counsel. However, this rule does not *require* the attorney to advise an unrepresented party to secure counsel, and respondent points to no other rules, regulations, or statutes that would require ICE to give this advice. In any event, page two of the Notice of Intent to Fine that ICE issued to respondent in this case expressly advised respondent: "You have a right to representation by counsel of your choice at no expense to the U.S. Government." I decline to require anything more from ICE under the facts and circumstances of this case. Accordingly, respondent has failed to demonstrate any misconduct by ICE counsel in this case that would rise to the level justifying equitable tolling of the request for administrative review filing deadline.

2. Due Diligence By Respondent

Respondent has also failed to show that it exercised due diligence in pursuing its legal rights. Notably, respondent is now represented by counsel in filing this request for administrative review. However, respondent offers no information as to how or when it secured the services of present counsel, or why it was unable to obtain the assistance of counsel at an earlier time. Further, it is clear from respondent's letter requesting a hearing that it was well aware of its right to challenge the bases and amount of ICE's proposed penalty and seek mitigation of the fine. In addition, OCAHO's rules (notice of which was explicitly provided to respondent at the inception of this case in the Notice of Case Assignment) provided respondent with actual notice of its right to have counsel or a qualified representative appear before OCAHO to represent it and the requirements for doing so. Respondent failed to identify any evidence that it was prevented from procuring the assistance of counsel during the OCAHO proceeding. Instead, it appears that respondent voluntarily chose to have its accountant assist it in its dealings and negotiations with ICE, and only procured counsel after it had second thoughts about the deal it agreed to with ICE. Therefore, I find that respondent did not demonstrate due diligence sufficient to justify equitable tolling of the request for administrative review filing deadline.

As previously discussed, equitable tolling is a rare remedy available only where the party seeking tolling has exercised due diligence in pursuing her legal rights, *Cruz*, 2014 WL 6734848, at *5, and does not extend to a "garden variety claim of excusable neglect," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Rather, there must be some "extraordinary circumstance" beyond the party's control that made it impossible to file the request for review on time. *See Cruz*, 2014 WL 6734848, at *5. Past OCAHO and Fourth Circuit cases have declined to apply equitable tolling where late filing was the result of counsel's mistake in interpreting a statutory provision, *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000); where a complainant was "preoccupied by working and caring for her children, and … was unable to retain legal counsel," *Seaver*, 9 OCAHO no. 1111, at 7; where a charging party failed to notify the Office of Special Counsel for Immigration-Related Unfair Employment Practices of his change in address, causing delay in delivery of a letter that started the running of a ninety-day filing period, *Sall v. Wal-Mart Stores, Inc.*, 10 OCAHO no. 1161 (2012); or where respondent claimed that he did not receive notices from OCAHO because they were addressed to his brother, even though they were sent to the same business address, *United States v. Cordin Co.*, 10 OCAHO no.1162 (2012). *But*

see Cruz, 2014 WL 6734848 (finding that plaintiff's "virtual imprisonment" by defendants justified tolling the start of the limitations period until the date of plaintiff's escape). In this case, respondent has neither alleged nor demonstrated sufficient facts to distinguish its circumstances from the "garden varieties of excusable neglect" above that were previously found to be insufficient to justify equitable tolling of the filing period.

V. CONCLUSION

Since respondent has failed to demonstrate misconduct by ICE, extraordinary circumstances that prevented it from filing on time or due diligence on its part to justify equitable tolling of the filing period for the request for administrative review, I find that that the request for administrative review is untimely and therefore DENIED.

It is SO ORDERED, dated and entered this 16th day of January, 2015.

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Robin M. Stutman
Chief Administrative Hearing Officer