

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

October 23, 2015

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 14A00090
)	
BUFFALO TRANSPORTATION, INC.,)	
Respondent.)	
_____)	

DENIAL OF RESPONDENT’S REQUEST FOR ADMINISTRATIVE REVIEW

Appearances:

Marvin J. Muller III, Esq.
For the complainant

Stephen F. Szymoniak, Esq.
For the respondent

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2012). The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE or complainant), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that respondent Buffalo Transportation, Inc. (BTI or respondent) engaged in 138 violations of 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Employment Eligibility Verification (I-9) Forms for eighty-four employees and failing to prepare Forms I-9 within three business days of their date of hire for fifty-four employees. ICE sought \$109,675.50 in civil money penalties for these alleged violations.

On September 25, 2015, Administrative Law Judge (ALJ) Stacy S. Paddack entered a final decision and order finding BTI liable for 135 of the 138 violations alleged and directing BTI to pay a civil money penalty in the amount of \$75,600. On October 13, 2015, counsel for respondent filed a Request for Administrative Review pursuant to 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. part 68. In its request, respondent asserts four grounds for review: first, that the final

decision and order granted summary decision to complainant on matters in which there are questions of fact requiring a hearing; second, that the final decision and order was against the weight of evidence and contrary to controlling legal authorities; third, that the penalties imposed were extreme, excessive and unsupported in fact and law; and fourth, that respondent's cross-motion for summary decision was unopposed and therefore should have been granted. Respondent did not file any points or authorities in support of its request, and neither respondent nor ICE filed a brief regarding the request for review.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer (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 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 notice of administrative review within ten days of the date of the ALJ's final order, 28 C.F.R. § 68.54(a)(2). The CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings within thirty days of entry of the ALJ's final order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

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. Horno MSJ, Ltd. Co.*, 11 OCAHO no. 1247a, 2 (2015);¹ *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1217, 3 (2014) (decision by the CAHO).

III. DISCUSSION

A. Respondent's Request for Administrative Review Was Filed More Than Ten Days After the Date of Entry of the ALJ's Final Decision and Order and, Therefore, Is Untimely

As mentioned above, OCAHO's rules of practice and procedure provide that in cases arising under 8 U.S.C. § 1324a, a party may file a written request for administrative review within ten days of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). In this case, because the ALJ entered her final decision and order on September 25, 2015, the deadline for filing a request for administrative review was October 5, 2015. Respondent's Request for Administrative Review was dated October 7, 2015, and was not received by OCAHO until October 13, 2015.

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>.

Because pleadings are not deemed filed until they are received by OCAHO, *see* 28 C.F.R. § 68.8(b), the Request for Administrative Review was filed on October 13, 2015, a full eight days after the deadline for filing a request for review. Accordingly, respondent's request for review is untimely.²

Respondent's counsel notes in the cover letter accompanying the request for review that the ALJ's final decision and order bears a postmark of September 28, 2015, and the decision and order was not received by respondent's counsel until October 1, 2015. Respondent's counsel then declares that the request for review is being "submitted within 10 days [of the date of respondent's counsel's receipt of the final decision and order]." However, respondent's counsel's apparent assumption that the Request for Administrative Review was timely filed because it was "submitted within 10 days" of either the date the final decision and order was postmarked or the date it was received by the respondent's counsel is inconsistent with the plain language of OCAHO's rules.

OCAHO's rules provide that "[a] party may file with the Chief Administrative Hearing Officer a written request for administrative review within ten (10) days of the date of **entry** of the Administrative Law Judge's final order, stating the reasons for or basis upon which it seeks review." 28 C.F.R. § 68.54(a)(1) (emphasis added). Accordingly, the operative date which starts

² The ALJ subsequently issued an Amended Final Decision and Order in this case on October 16, 2015. However, the amended decision solely corrected clerical mistakes and typographical errors, pursuant to 28 C.F.R. § 68.52(f). According to well-established case law construing a similar rule in the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 60(a), an amended judgment does not toll or renew the period for filing an appeal (or in this case, by analogy, a request for review) if that amended judgment solely corrects clerical or non-substantive errors. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952) ("the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."); *Perez v. AC Roosevelt Food Corp.*, 744 F.3d 39, 42 (2d Cir. 2013) ("a new or amended judgment may only renew the thirty-day limit if the later judgment changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered") (citing *Priestley v. Headminder, Inc.*, 647 F.3d 497, 502 (2d Cir. 2011) (per curiam) (internal quotation marks omitted)).

It could be argued that one previous OCAHO case, *United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726 (1989), suggests that making corrections to an ALJ's decision and order tolls the time for filing a request for review. However, the changes made in *Felipe* were far more extensive than the changes made here, and were substantive, rather than merely clerical or typographical. In that case, the ALJ issued an initial "Order for Civil Money Penalty for Paperwork Violations" on October 11, 1989. *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626 (1989). On October 27, 1989, the ALJ issued an Errata, changing the caption of the previous decision to "Decision and Order for Civil Money Penalty for Paperwork Violations," and adding a paragraph explaining appeal rights and timing. *See United States v. Felipe, Inc.*, 1 OCAHO no. 99, 667 (1989). Shortly thereafter, on October 31, 1989, the ALJ issued a second Errata due to "confus[ion] about the nature and date of the final disposition of this matter." *United States v. Felipe, Inc.*, 1 OCAHO no. 101, 675 (1989). This second Errata explicitly stated that "the tolling time for effectuating the appeal shall begin as of the date of this Errata." *Id.* It also changed the caption of the order again, this time to "Final Decision and Order," added language regarding the stipulated penalty for Count I of the underlying complaint, and ordered the respondent to cease and desist from further violations of 8 U.S.C. § 1324a (adding an injunctive remedy which was not ordered in the initial decision). *Id.* at 675-76. Accordingly, the changes made to the ALJ's initial order in *Felipe* were clearly substantive – not merely clerical or typographical; they resolved a genuine ambiguity in the original order and added a form of relief. Thus, tolling the time for filing a request for review until the date of the last errata, designated the Final Decision and Order, was appropriate. *See Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 211-12. In contrast, because the changes made to the final decision and order in this case were not substantive, but merely clerical and typographical, tolling of the time period for filing a request for review is not warranted here.

the accrual of the ten-day filing period is the *date of entry* of the ALJ's final order, not the postmark date or the date the order was received by the respondent. Furthermore, the operative date which determines when a pleading is filed is the date the document is received by OCAHO, not the date it is submitted by the party. *See* 28 C.F.R. § 68.8(b). Respondent is not free to declare by fiat its revision of OCAHO's rules of practice and procedure governing the timeliness of requests for administrative review.

Furthermore, repeated, recent OCAHO precedent decisions have explained the importance of strict adherence to the filing deadlines for requests for administrative review. The CAHO decision in *United States v. Greif*, 10 OCAHO no. 1183 (2013), explained that "because review by the CAHO must be conducted within strict time frames, ... prompt and proper service of a request for review and associated documents is particularly important." *Greif*, 10 OCAHO no. 1183, at 4. Furthermore,

The ten-day time limit for requesting review was included in OCAHO's procedural regulations because it was "necessary to provide for an orderly consideration of the parties' submissions" within the statutorily-mandated thirty-day review period. 64 Fed. Reg. 7,066, 7,072 (Feb. 12, 1999). Moreover, since the regulations also impose a deadline for all parties to file briefs or other documents related to administrative review within twenty-one days of the date of the final ALJ order, it is imperative that requests for review be filed and served in a timely manner in order to give the opposing party in the case sufficient time to respond to the request.

United States v. Silverado Stages, Inc., 10 OCAHO no. 1185, 3 (2013).

In this case, respondent's request for review was filed a full eight days beyond the ten-day deadline, without any request or justification to toll the filing period. Assuming ICE received the request for review on the same day it was received by OCAHO, it would have been left with a mere three days to file a responsive brief, given that the deadline for such briefs is twenty-one days after the date of entry of the final decision and order. Therefore, respondent's late filing not only substantially cut short the time in which the CAHO could review the decision and order and the underlying administrative record, but it also prejudiced the complainant by substantially shortening the time period in which it could respond to the request for review.

Although respondent's attorney contends that he did not receive a copy of the final decision and order until October 1, 2015, this was still several days before the deadline for filing a request for review (i.e., October 5, 2015). Requests for review need not be lengthy, complex documents. OCAHO's rules require only that the request "stat[e] the reasons for or basis upon which it seeks review." 28 C.F.R. § 68.54(a)(1). Parties then have an additional eleven days to submit a brief or other filing setting forth their points and authorities in support of their positions regarding the request for review. *See* 28 C.F.R. § 68.54(b)(1). Respondent has not asserted any reason that prevented it from submitting the request for review in a timely manner. Furthermore, as discussed below, respondent's request for review was also improperly filed and served.

B. Respondent's Request for Administrative Review Was Improperly Filed and Served

Not only was respondent's request for review deficient because it was untimely, it was also improperly filed and served. OCAHO's rules provide that all requests for administrative review, as well as all briefs or other filings related to CAHO review, must be filed and served by facsimile, same-day hand delivery, or overnight delivery. 28 C.F.R. § 68.54(c). The Certificate of Service accompanying respondent's request for review indicated that the request was filed and served "by depositing copies of the same on October 7, 2015 in a postage paid envelope in a U.S. Mail receptacle." Taking this certificate of service at face value, *see Lewis v. Ogden Services*, 2 OCAHO no. 384, 704, 705 (1991), respondent failed to comply with OCAHO's rules governing filing and service of requests for administrative review, which require expedited filing and service.

C. Respondent's Request for Review Is Denied Because It Was Both Untimely Filed and Improperly Filed and Served

Requests for review have repeatedly been denied by the CAHO because they were untimely filed and/or improperly served. *See, e.g., Horno MSJ, Ltd. Co.*, 11 OCAHO no. 1247a; *United States v. Chen's Wilmington, Inc.*, 11 OCAHO no. 1241 (2015); *Silverado Stages, Inc.*, 10 OCAHO no. 1185; *United States v. De Luca's Mkt., Inc.*, 8 OCAHO no. 1038, 591 (1999); *United States v. Christie Auto. Prods.*, 2 OCAHO no. 365, 518 (1991). Late filing or improper service of a request for administrative review has been excused only very rarely. *See, e.g., United States v. Vilardo Vineyards*, 11 OCAHO no. 1248 (2015) (accepting a late-filed request for administrative review where respondent set forth a meritorious case for equitable tolling of the filing deadline); *United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 3 (2013) (accepting an improperly-served request for review where the improper service did not delay the opposing party's receipt of the document and the opposing party still had sufficient time to file a timely brief in response).

When a case is before an OCAHO ALJ and is not subject to strict, short statutory deadlines, a single instance of late filing or defective service may not mandate rejection of the improperly-filed document or dismissal of the case. *Greif*, 10 OCAHO no. 1183 at 3. However, given the twenty-one day deadline for filing briefs, *see* 28 C.F.R. § 68.54(b)(1), and the thirty-day statutory and regulatory deadline for the CAHO to modify, vacate, or remand an ALJ order, *see* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1), the filing deadlines and expedited service requirements for requests for review and related documents are of paramount importance. Strict adherence to these deadlines and requirements is necessary to enable all parties to the case to submit briefs related to the request for review and for the CAHO to conduct a thorough review of the request and the administrative record in the case. *See Silverado Stages, Inc.*, 10 OCAHO no. 1185 at 3.³ Respondent's late filing and improper service in this case, without any justification whatsoever, nearly eliminated the complainant's response time and drastically cut short the CAHO's opportunity to review the substance of the request and the underlying case record. For these reasons, the request for review is denied.

³ Moreover, where parties are represented by counsel in a matter, as respondent is here, there is less leniency for noncompliance with OCAHO rules than where the party appears pro se. *Id.* at 5.

IV. CONCLUSION

Because respondent's request for administrative review was filed well beyond the ten-day deadline and was improperly filed and served, without any appropriate justification, it is hereby DENIED.

Because I have denied respondent's request for administrative review, and, thus, declined to modify or vacate the ALJ's order, the ALJ's final decision and order will become the final agency order sixty (60) days after its date of entry (September 25, 2015). *See* 28 C.F.R. § 68.52(g). A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within forty-five (45) days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 23rd day of October, 2015.

Robin M. Stutman
Chief Administrative Hearing Officer