

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2023A00071
OIL PATCH PETROLEUM, INC.,)	
)	
Respondent.)	
_____)	

Appearances: Nain Martinez, Jr., Esq., for Complainant
Carla Snowden, pro se, for Respondent

ORDER ON COMPLAINANT'S MOTION TO SUBSTITUTE AND
DIRECTING COMPLAINANT TO FILE THE NOTICE OF INTENT TO FINE
AND TO SERVE RESPONDENT WITH THE COMPLAINT

I. PROCEDURAL HISTORY

This case arises under the employment eligibility verification provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. On June 20, 2023, Complainant, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Oil Patch Petroleum, Inc., violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for twelve individuals after being requested to do so by an authorized agency of the United States.

The complaint reflects that DHS served Respondent with a Notice of Intent to Fine Pursuant to Section 274A of the INA (NIF) on May 16, 2019, Compl. Ex. A, and that on May 21, 2019, Respondent requested a hearing before this Court (“request for hearing”). *Id.*, Ex. B. Complainant asked OCAHO to serve the complaint on Respondent through an individual it named and identified as Respondent’s

“CEO/Registered Agent” at an address in Corpus Christi, Texas (Address A). *Id.* at 6 (citing 28 C.F.R. § 68.7).¹

On June 26, 2023, OCAHO’s Chief Administrative Hearing Officer (CAHO) attempted to serve Respondent at Address A via United States Postal Service (USPS) certified mail with (a) the complaint, (b) a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA), (c) the NIF, and (d) Respondent’s request for hearing before this Court (collectively the “Complaint package”). OCAHO addressed the Complaint package to the individual DHS identified in the complaint pursuant to 28 C.F.R. § 68.7. *See* Compl. at 6. As is its standard practice, OCAHO requested a tracking number for the Complaint package and proof of service in the form of a USPS certified mail domestic return receipt. On July 12, 2023, OCAHO received a signed return receipt reflecting delivery of the Complaint package to Address A. The signature on the receipt, however, did not match the name of the addressee.²

OCAHO also attempted on June 26, 2023, to serve Respondent with the Complaint package at the address in Laredo, Texas, listed as Respondent’s principal place of business in the complaint, Compl. at 2, and identified as Respondent’s address in the NIF (Address B). *Id.*, Ex. A. Service at Address B was unsuccessful. On July 19, 2023, the USPS returned to OCAHO the Complaint package sent to Address B with an unexecuted return receipt. A label affixed to the envelope and dated July 11, 2023, read, “Return to Sender, Insufficient Address, Unable to Forward.”

On November 1, 2023, the Court issued an Order Directing Complainant to Serve Complaint. *United States v. Oil Patch Petroleum*, 18 OCAHO no. 1508 (2023).³

¹ OCAHO’s Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2023), generally govern these proceedings and are available on OCAHO’s homepage on the United States Department of Justice’s website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

² 28 C.F.R. § 68.3(b) provides that “[s]ervice of complaint . . . is complete upon receipt by addressee.”

³ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which

In the order, the Court directed Complainant to serve Respondent with the Complaint, the NOCA, the NIF, and the request for hearing in a manner that complied with 28 C.F.R. § 68.3(a)(1) within thirty days of the date of the order. *Id.* at 5. The Court then ordered Complainant to file proof of service with OCAHO. *Id.* Complainant did not file the requested information with the Court.

On June 18, 2024, Complainant filed a Notice of Appearance and Motion for Substitution. Through its motion, Complainant represented that its counsel, DHS Assistant Chief Counsel (ACC) Ricardo Cuellar, “has been reassigned and is no longer working on labor exploitation cases.” Notice Appearance & Mot. Substitution 1. Complainant requested that the Court substitute DHS ACC Nain Martinez, Jr., as Complainant’s counsel. *Id.*

II. LEGAL STANDARDS AND DISCUSSION

A. Complainant’s Notice of Appearance and Motion to Substitute

Complainant has filed a Notice of Appearance for DHS Assistant Chief Counsel Nain Martinez, Jr., in this matter and moves the Court, pursuant to 28 C.F.R. § 68.33(g), to substitute ACC Martinez, Jr., for ACC Ricardo Cuellar as counsel in this case. Notice Appearance & Mot. Substitution 1. Complainant explains that ACC Cuellar “has been reassigned” and is no longer handling “labor exploitation cases.” *Id.*

Complainant did not indicate Respondent’s position on the motion, and Respondent has not filed a response. According to Complainant’s certification, it served Respondent with the motion by USPS mail on June 7, 2024. Notice Appearance & Mot. Substitution 2. Given that more than ten days have passed since Respondent was served with the Notice of Appearance and Motion for Substitution,

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 yet 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,” the LexisNexis database “OCAHO,” or on OCAHO’s homepage on the United States Department of Justice’s website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

the motion is ripe for a ruling. *See* 28 C.F.R. § 68.11(b) (“Within ten (10) days after a written motion is served . . . any party to the proceeding may file a response in support of, or in opposition to, the motion.”).

Each attorney must file a notice of appearance in accordance with 28 C.F.R. § 68.33(f). The notice of appearance filed by DHS ACC Martinez, Jr., is signed and includes “the name of the case or controversy, the case number . . . and the party on whose behalf the appearance is made.” 28 C.F.R. § 68.33(f). It also is accompanied by “a certification indicating that such notice was served on all parties of record.” *Id.* The notice of appearance fulfills the requirements of 28 C.F.R. § 68.33(f) and is accepted.

OCAHO’s Rules of Practice and Procedure for Administrative Hearings permit “[w]ithdrawal or substitution of an attorney or representative . . . upon written motion” and permission from the presiding Administrative Law Judge (ALJ). 28 C.F.R. § 68.33(g). This Court has previously granted motions to substitute DHS counsel for similar reasons, including when the DHS counsel of record had changed positions or assignments within the agency. *See, e.g., United States v. Muniz Concrete & Contracting, Inc.*, 19 OCAHO no. 1535a, 4, 7 (2024) (granting motion to substitute where a different agency attorney was assigned to handle OCAHO cases); *United States v. El Camino, Inc.*, 18 OCAHO no. 1479b, 2 (2023) (accord).

Given Complainant’s representation that ACC Ricardo Cuellar has been reassigned within DHS, the entry of appearance by ACC Nain Martinez, Jr., the lack of opposition to the motion, and the reasonableness of the requested substitution, especially as this litigation is in the early stages, the Court permits the substitution and now grants Complainant’s motion for substitution pursuant to 28 C.F.R. § 68.33(g). *See, e.g., United States v. Spring & Soon Fashion Inc.*, 8 OCAHO no. 1003, 102, 128-29 (1998) (granting motion to substitute government counsel because it was reasonable and unopposed); *see also Muniz Concrete & Contracting, Inc.*, 19 OCAHO no. 1535a, at 5 (granting DHS counsel’s unopposed motion to substitute where counsel of record changed positions and was no longer handling OCAHO cases) (citation omitted). ACC Martinez, Jr., is substituted for ACC Cuellar as Complainant’s counsel of record.⁴

B. Notice of Intent to Fine Pursuant to Section 274A of the INA

⁴ OCAHO shall serve this Order by U.S. mail on both DHS ACC Martinez, Jr., and ACC Cuellar. OCAHO also shall serve this Order by U.S. mail on Respondent at Addresses A and B.

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that "[c]omplaints filed pursuant to sections 274A and 274C of the INA shall be signed by an attorney and shall be accompanied by a copy of the Notice of Intent to Fine and Request for Hearing." 28 C.F.R. § 68.7(c). Here, Complainant attached to the complaint Respondent's request for hearing, Compl. Ex. B, and the NIF, being the two-page ICE Form I-763. *Id.* Ex. A. The attached ICE Form I-763 however does not specify the factual allegations and legal violations at issue. *Id.* at 1. Rather, page one of the attached ICE Form I-763 twice references an "attachment" that contains the allegations against Respondent and the provisions of law that DHS asserts Respondent violated. *Id.* The attachment to the NIF was not included as part of Exhibit A to the complaint. As such, the complaint in this matter fails to satisfy 28 C.F.R. § 68.7(c) because the NIF is incomplete. The Court now gives Complainant an opportunity to correct this technical defect and orders Complainant to file with the Court the complete NIF with attachment detailing the factual allegations against Respondent and the provisions of law that DHS asserts Respondent violated. *See, e.g., United States v. PJ's of Texas, Inc.*, 18 OCAHO no. 1524a, 4 (2024) (noting that the ALJ directed the complainant to file "a copy of the complete NIF that it served on the Respondent . . . , including attachment(s)," which was not included with the original complaint); *United States v. Fresco Produce, Inc.*, 19 OCAHO no. 1530, 1 (2024) (noting a prior Court order requiring Complainant to file a copy of the NIF with proof of service on respondent where complainant did not attach the NIF to the complaint it filed with OCAHO).

Complainant's filing is due no later than ten days from the date of this Order. Complainant also shall confirm in that filing that it served the NIF's attachment on Respondent on May 16, 2019. As discussed below, Complainant must serve Respondent with the complete NIF with the referenced attachment containing the factual allegations and alleged violations of the law.

C. Service of the Complaint

The Court turns now to the issue of service. This case cannot move forward unless or until Respondent is served with the complaint. Service of the complaint cannot be waived under OCAHO's Rules of Practice and Procedure for Administrative Hearings. *See* 28 C.F.R. § 68.3(b) ("Service of complaint . . . is complete upon receipt by addressee"); *see also United States v. Iniguez-Casillas*, 6 OCAHO no. 870, 510, 513-14 (1996) (dismissing complaint "since service of the complaint [on respondent by DHS] cannot be effectuated" and service cannot be waived). Here, OCAHO encountered difficulty perfecting service of the Complaint package on Respondent

and, in accordance with 28 C.F.R. § 68.3(c), the Court directed Complainant to effectuate service.

On November 1, 2023, the Court issued an Order Directing Complainant to Serve Complaint because OCAHO had been unable to perfect service on Respondent at either address provided by Complainant. *Oil Patch Petroleum*, 18 OCAHO no. 1508. In the order, the Court directed Complainant to execute service of process by personally serving the Complaint, the NOCA, the NIF, and the request for hearing on Respondent in a manner that complied with 28 C.F.R. § 68.3(a)(1) within thirty days of the date of the order. *Id.* at 5. The Court further ordered Complainant to file proof of personal service of the Complaint package within five days of effectuating service. *Id.* If Complainant was unable to perfect service, the Court ordered it to submit a filing describing its efforts to serve the complaint and accompanying materials on Respondent. *Id.* at 4-5. Lastly, the Court explained that Complainant could, if desired, move to dismiss the complaint without prejudice. *Id.* at 5.

The Court's order was met with seven months of silence. DHS neither filed proof of service by December 1, 2023, nor a filing describing what, if any, attempts it made to serve Respondent with the Complaint package. It also did not move to dismiss the complaint without prejudice. This inaction exacerbates the delay in this case which involves allegations raised in a NIF that DHS served on Respondent on May 16, 2019. Although Respondent requested a hearing before this Court by letter dated May 21, 2019, DHS did not file a complaint until June 20, 2023, over four years later.

The first filing in this case in 2024 was Complainant's Notice of Appearance and Motion to Substitute on June 18, 2024. While that filing represents that DHS ACC Cuellar was reassigned within the agency, it offers no insights as to the timing of that reassignment and sheds no light on what, if any, efforts DHS undertook in the intervening months to locate and serve Respondent with the Complaint package as ordered.

OCAHO ALJs have dismissed cases in a similar posture, including where DHS did not attempt to serve a complaint after being ordered to do so. *See, e.g., United States v. Rios-Villatoro*, 14 OCAHO no. 1364, 2 (2020) (dismissing case without prejudice when DHS did not serve the complaint during the COVID-19 pandemic). Such dismissals are without prejudice so that the government may refile the complaint once it locates the respondent and can perfect service. *See, e.g., Iniguez-Casillas*, 6 OCAHO no. 870, at 514 (dismissing complaint without prejudice to the government's right to refile should it locate respondent and perfect service);

United States v. Baches-Corado, 3 OCAHO no. 571, 1712, 1713 (1993) (granting government's motion to dismiss the complaint without prejudice because it could not serve respondent with the complaint).

Given the assignment of new government counsel to this matter, the Court affords DHS an additional opportunity to serve the Complaint package in this matter. The Court orders Complainant to execute service of process by personally serving the complaint, the NOCA, the complete NIF with attachment, and the request for hearing on Respondent in a manner that complies with 28 C.F.R. § 68.3(a)(1) within thirty days of the date of this Order.

Should Complainant perfect service on Respondent, it shall file, within five days of effectuating service, proof of personal service of the Complaint package on Respondent. The filing shall include (a) an attestation to the personal service and that service was perfected in accordance with 28 C.F.R. § 68.3(b); (b) the name and title of the individual who served the Complaint package; (c) the name and title of the individual served and that individual's relationship to Respondent; and (d) the date upon which personal service was effectuated. *See, e.g., United States v. Sea Dart Trading Corp.*, 2 OCAHO no. 336, 304, 305 (1991) (requiring complainant to effectuate service of complaint and file "an explanatory pleading" advising the Court of the manner in which it served respondent). Complainant's attestation of service may include an affidavit or declaration from its agent(s) and supporting documentation relevant to service. *See, e.g., United States v. Vector Xpress, Inc.*, 16 OCAHO no. 1431a, 2-3 (2022) (describing complainant's perfection of service and subsequent filing of an affidavit and state business record identifying the individual who was served as the registered agent and director of the respondent business). Complainant's filing also shall identify a functional U.S. mailing address for Respondent to which OCAHO will send orders in this case. *See id.* at 3. If Complainant cannot perfect service, it shall submit, no later than thirty-five days from the date of this Order, an explanatory filing describing its efforts to serve the Complaint package on Respondent. Should service not be perfected on Respondent, Complainant may move to dismiss the complaint without prejudice. *See Vector Xpress, Inc.*, 16 OCAHO no. 1431, at 4-5.

The Court puts the parties on notice that, if Complainant cannot perfect service of the Complaint package on Respondent, the Court may consider dismissal *sua sponte*. *See Rios-Villatoro*, 14 OCAHO no. 1364, at 2 (dismissing complaint *sua sponte* where complainant was unable to perfect service of the complaint); *see also Sea Dart Trading Corp.*, 2 OCAHO no. 336, at 305 (cautioning the government that, if service is not effectuated, dismissal may be considered *sua sponte*). Additionally, failure to

respond to the Court's orders may result in the dismissal of the complaint for abandonment under 28 C.F.R. § 68.37(b)(1). As OCAHO's CAHO has explained, "nothing in that regulation prohibits its application to cases arising under 8 U.S.C. § 1324a." *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 6 (2023).

Should Complainant be unable to effectuate service on Respondent and not seek to dismiss the complaint without prejudice, it may, if desired, submit a filing presenting its position on a dismissal *sua sponte* of the complaint. Any such filing is due no later than forty-five days from the date of this Order. Alternatively, Complainant may choose to address dismissal *sua sponte* in any explanatory filing it makes to this Court.

III. ORDERS

IT IS SO ORDERED that the unopposed Notice of Appearance and Motion for Substitution filed by Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, is GRANTED. DHS Assistant Chief Counsel Nain Martinez, Jr., having entered an appearance in this case, is substituted as Complainant's counsel of record for Assistant Chief Counsel Ricardo Cuellar.

IT IS FURTHER ORDERED that, within ten days of the date of this Order, Complaint shall satisfy 28 C.F.R. § 68.7(c) by filing with the Court the complete Notice of Intent to Fine Pursuant to Section 274A of the INA with the attachment detailing the factual allegations against Respondent and the provisions of law that DHS asserts Respondent violated. Complainant also shall confirm in that filing that it served the attachment to the Notice of Intent to Fine on Respondent, Oil Patch Petroleum, Inc., on May 16, 2019.

IT IS FURTHER ORDERED that, within thirty days of the date of this Order, Complainant shall personally serve Respondent with the complaint, Notice of Case Assignment for Complaint Alleging Unlawful Employment, the complete Notice of Intent to Fine, and Respondent's request for hearing, all in a manner that complies with 28 C.F.R. § 68.3(a)(1).

IT IS FURTHER ORDERED that, within five days of effectuating service, Complainant shall file with the Court proof of personal service on Respondent of the complaint, Notice of Case Assignment for Complaint Alleging Unlawful Employment, the complete Notice of Intent to Fine, and Respondent's request for hearing. In its

filing, Complainant shall attest to the personal service and that service was perfected in accordance with 28 C.F.R. § 68.3(b). Complainant also shall provide to the Court the name and title of the individual who served the complaint and accompanying documents, the name and title of the individual served, that individual's relationship to Respondent, and the date upon which personal service was effectuated.

IT IS FURTHER ORDERED that Complainant shall provide a functional United States mailing address for Respondent to which the Court may direct orders in this matter.

IT IS FURTHER ORDERED that, should Complainant be unable to effectuate personal service on Respondent, no later than thirty-five days from the date of this Order, it shall submit an explanatory filing describing its efforts to perfect service of the Complaint package on Respondent and may move to dismiss the complaint without prejudice.

IT IS FURTHER ORDERED that, should Complainant be unable to effectuate personal service on Respondent and not move to dismiss the complaint in this matter, no later than forty-five days from the date of this Order, it may submit a filing presenting its position on a dismissal *sua sponte* of the complaint.

SO ORDERED.

Dated and entered on July 23, 2024.

Honorable Carol A. Bell
Administrative Law Judge