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

November 14, 2024

VARUN MANGEWALA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00051
SAIL INTERNET INC., Respondent.	)	

Appearances: Varun Mangewala, pro se Complainant
Collin D. Cook, Esq., Ralph Hua, Esq., and David M. Shannon, Esq., for Respondent
Stacey Young, Esq., and Erik Lang, Esq., for the United States

ORDER DENYING RESPONDENT'S RECONSIDERED MOTION TO DISMISS

I. PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b.

On December 9, 2023, Varun Mangewala, Complainant, filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Sail Internet, Inc. Complainant alleges Respondent discriminated against him on basis of his citizenship status, in violation of 8 U.S.C. § 1324b(a)(1), and retaliated against him, in violation of § 1324b(a)(5).

The Complaint included a charge form from the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division (IER), dated April 27, 2023, and an IER letter of determination (also referred to as a "90-day letter"), dated September 6, 2023.

On April 1, 2024, Respondent filed its Answer and a Motion to Dismiss.[1]

[1] Respondent's Motion to Dismiss is not paginated; the Court assigned page numbers to the filing.

On April 17, 2024, Complainant filed a Response.

On April 23, 2024, IER filed a Motion for Leave to File a Statement of Interest,[2] with a Statement of Interest (SOI) attached.[3] In its filing, IER takes a divergent view[4] (from Respondent) of the matter at issue.

On April 24, 2024, the Court granted IER's motion and accepted the filing. The Court invited Respondent to provide a reply filing, but the Court never received such a filing by the deadline. However, FedEx tracking information (later provided by Respondent) shows Respondent sent a reply filing (sent on May 10, 2024, arriving at OCAHO on May 13, 2024). Mot. Reconsider, Ex. B. Despite clear evidence it was sent (and delivered), there is no OCAHO record of its receipt, and so it was never presented to, or reviewed by, the undersigned prior to the Court's Order Denying Respondent's Motion to Dismiss on July 18, 2024.

Subsequently, the Court received Respondent's Motion to Reconsider (the Order Denying Motion to Dismiss) on July 25, 2024. The Court granted the Motion, as Respondent showed the Court failed to consider its timely filed reply, which responded to novel arguments raised in IER's response. *Mangewala v. Sail Internet Inc.*, 19 OCAHO no. 1552b, 3–4 (2024).[5] The Court then instructed the parties to submit additional briefing on several issues.

In the Motion, Respondent alleged the IER notice of receipt letter ("NOR letter"), 28 C.F.R. § 44.301(a), and the IER 90-day letter, 28 C.F.R. § 44.303(b)–(c) were both issued outside the required regulatory time periods. Mot. Dismiss, 3–4. Respondent's conclusion (that these letters were untimely issued) is predicated upon an assertion that an IER charge is "complete" upon submission (versus "complete" at a later date), and it is this date that starts the clock for IER's subsequent notice deadlines. *Id.* at 2–3.

According to Respondent, the consequence of the untimely-issued letters is the Complaint's preclusion from this forum, as "the Complainant does not have any IER letter that would permit him to proceed with this private action under 28 CFR 44.303(c)." *Id.* at 4.

[2] On April 24, 2024, the Court issued an Order Granting IER Motion to File Amicus Brief and Notice of Appearance, agreeing that IER's submission "would assist the Court in fully developing the record on this issue." Order Granting IER Mot. File Amicus Br. 3. The Order also permitted Respondent to file a reply. *Id.*

[3] IER attached a variety of exhibits to this filing, including, *inter alia*, declarations from IER attorneys and dates the parties received IER's correspondence. SOI Exs. B–C; *Id.* at Ex. C, Attach. A.; *Id.* at Exs. F, I–J.

[4] IER takes the position that, when IER receives an incomplete submission, the regulation does not require it to start the clock for its required letters. SOI 8. Instead, the date IER determines an inadequate submission is "complete" is the start date to calculate its subsequent letter deadlines. *Id.* In IER's assessment, "receipt of a charge" implies receipt of a submission compliant (or deemed compliant) with 28 C.F.R. § 44.101(a) (elements of a charge). *Id.* at 11.

[5] 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 pages 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 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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

Specifically, the Court instructed parties to:

> 1. Review of Section II of the July 18, 2024 Order Denying Respondent's Motion to Dismiss, which covers the pre-complaint procedural history. Parties should opine on whether:
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> a. There are inaccuracies contained in this section. If yes, parties should provide evidence and argument on this point (or cite previous filing by name and page).
> b. There are omissions contained in this section. If yes, parties should provide evidence and argument on this point (or cite previous filing by name and page).
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> 2. Review of Section III of the July 18, 2024 Order, which provides law and analysis. Parties should opine on:
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> a. The propriety of characterizing Respondent's contention as jurisdictional or non-jurisdictional (which would bear on whether equitable consideration are available).
> b. The analysis pertaining to the term "complete" as implicit in "receipt of charge."
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> 3. Based on the attachment to the Motion for Reconsideration, it appears Respondent may be framing this issue (at least in part) as whether the charge in this case (filed/submitted on April 27, 2023) was "complete" the instant it was filed.
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> a. Respondent should provide any clarification on this point it deems appropriate and bear in mind its obligations as the moving party.
> b. If this is the proposed dispositive issue, parties should consider providing evidence and argument on this point, and other points arising from such a conclusion (to the extent it is supported by evidence and regulation).
> c. Parties should also consider whether equitable considerations are available should the Court reach a conclusion which requires their analysis.

Id. at 5.

On August 20, 2024, the Court received Respondent's Brief. IER's Responsive Brief of the United States was received on September 12, 2024. Finally, the Court received Respondent's Reply Brief on September 26, 2024. While Complainant was provided an opportunity to submit a written brief, he declined to do so.

This matter has been fully briefed.

II. POSITIONS OF THE PARTIES

A. Pre-Complaint Background

The parties (Respondent and IER) seem to agree with the Court's factual conclusions relative to the timeline of pre-Complaint events (found at Section II of the Court's Order Denying Respondent's Motion to Dismiss). *See* R's Br. 1. For ease of reading this Order, those factual conclusions set forth in the previous Order now follow:

> On April 27, 2023, Complainant submitted IER's "electronic charge form."[6] SOI 4; Decl. of Special Litigation Counsel (IER) ¶ 12. IER Special Litigation Counsel assessed the submission and concluded Complainant's submission "contained inadequate facts and circumstances to meet the criteria of 28 C.F.R. § 44.101(a)(5)[.]" Decl. of Special Litigation Counsel (IER) ¶ 14.
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> On May 3, 2023, IER assigned Complainant's charge form to an IER Senior Trial Attorney, who contacted Complainant (same day) to gather any "additional information that might suffice to complete the charge[.]" *Id.* at ¶ 16; Decl. of Senior Trial Attorney (IER) ¶¶ 5, 8. The two had several conversations, and by May 8, 2023, Complainant had provided additional information to IER. Decl. of Senior Trial Attorney ¶ 9.
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> On May 9, 2023, the Special Litigation Counsel (IER) "deemed" the charge complete. *Id.* at ¶ 11; Decl. of Special Litigation Counsel (IER) ¶ 17.
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> On May 17, 2023, IER sent an NOR letter to Complainant, which advised "his charge had been accepted as complete on May 9, 2023, and that IER had 120 days, until September 6" to investigate and "determine if it would file a complaint with an administrative law judge." Decl. Senior Trial Attorney (IER) ¶ 12. IER sent a similar notice to Respondent the same day. *Id.* These letters were sent eight days after the date IER deemed the charge complete, but 20 days after IER initially received the electronic charge form. *Id.* at ¶¶ 6, 11, 12.
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> The regulation requires IER to send NOR letters to both parties "[w]ithin 10 days of receipt of a charge[.]" 28 C.F.R. § 44.301(a). For incomplete charges, IER must send NOR letters "[o]nce [IER] determines adequate information has been submitted to constitute a complete charge[.]" 28 C.F.R. § 44.301(d)(3).

[6] In the electronic charge form, Complainant, a U.S. citizen, stated he was "laid off on 3/7/2023." IER Charge Form Sec. 6. He claimed to have knowledge of the individual who replaced him and asserted that individual is not a U.S. citizen. *Id.* He claimed Respondent is "in the process of applying for an H1 visa for [this individual]." *Id.* Complainant alleges a violation of the law where this Respondent terminated him "to hire temporary visa workers it prefers instead." *Id.*

> On September 6, 2023, IER sent letters of determination (i.e. 90-day letter) to both parties.[7] SOI Exs. G-H. The letter to Complainant notified him of his right to file a complaint with OCAHO within 90 days of receipt of the notice. Decl. of Senior Trial Attorney (IER) ¶ 16; SOI Ex. G.
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> On September 11, 2023, both parties received letters of determination. Decl. Senior Trial Attorney (IER) ¶ 17 (citing Attach. A); SOI Exs. I–J. The Complaint was filed with OCAHO on December 9, 2023. *See* Complaint. Respondent does not contest the timeliness of the Complaint's filing of the Complaint with OCAHO.

B. Section 1324b(d)(2) As Jurisdictional Requirement or Claims-Processing Rule

Regarding 8 U.S.C. § 1324b(d)(2), Respondent contends this section's requirement (a private party receive a 90-day letter from IER before filing a complaint) is jurisdictional, because the letter "is essential to the person's ability to bring a private action . . . . A defective 90-day letter is functionally equivalent to the lack of such letter." R's Br. 3. Respondent argues "[d]ismissal is the only proper remedy," when a complaint is jurisdictionally deficient. *Id.*

Respondent argues in the alternative that, should the Court determine § 1324b(d)(2) is a claims-processing requirement, dismissal remains the appropriate remedy. *Id.* For if this Court "excuses the invalidity of the 90-day letter, this would mean that the Court declares that there is no remedy to a violation of 8 USC 1324b(d)(2) or that violations need not be remedied." *Id.* According to Respondent, anything other than dismissal "would render a 90-day letter wholly irrelevant." *Id.*

IER argues "OCAHO has held repeatedly that charge and complaint-filing deadlines are not jurisdictional, and are subject to remedies such as waiver, estoppel, and equitable tolling… [and] any alleged untimeliness on IER's part would not impact this Court's jurisdiction." IER Resp. 9.

C. Whether Complainant's IER Charge Was "Complete" the Instant It Was Filed

Respondent and IER agree that IER's deadline to issue the NOR letter is triggered by receipt of a complete charge. R's Br. 2. At issue here is when the charge in this case was in fact complete.

Respondent argues the charge was complete the day Complainant electronically submitted it to IER (April 27, 2023). *Id.* In support of this assertion, Respondent notes "[t]he entire content of the charge was in IER custody on April 27, 2023. A review of the content [of the charge] shows it met all the required elements under 28 C.F.R. § 44.101(a)." *Id.* "Even if one were to believe that the April 27 charge was incomplete, all additional information to remedy it arrived at IER's custody by May 8, 2023. May 8, 2023 would thus be deemed the day when IER received a complete charge, making IER's 90-day letter still untimely by one day." *Id.*

In response, IER first takes the position that OCAHO does not have the ability to consider whether or when a submission to IER is or is not complete, stating, "The regulations leave it solely to IER

[7] The regulation requires IER send letters of determination to both parties "by the end of the 120-day period[.]" 28 C.F.R. § 43.303(b). This period refers to the 120-day period of IER investigation triggered upon "the receipt of a charge[.]" 28 C.F.R. § 44.303(a).

to determine whether 'adequate information has been submitted to constitute a complete charge.'" IER Resp. 5 (citing 28 C.F.R. § 44.301(d)(3)). According to IER, "OCAHO's jurisdiction is limited to adjudicating claims involving unfair immigration-related employment practices; it does not extend to providing a 'proper remedy for a violation' by IER of its own regulation." *Id.* (internal citation omitted).

IER then argues in the alternative that, even if OCAHO does possess authority to review IER's pre-complaint actions, IER properly applied its regulations when it determined the initial submission by Complainant was "incomplete," as "it was unclear whether Mangewala was alleging an unfair immigration-related employment practice, . . . or only a violation of H-1 visa program rules." *Id.* at 7. According to IER, it was not until it obtained additional information from Complainant that it could determine the nature of his allegation. *See id.* at 8.

In reply, Respondent argues OCAHO does have the authority to look at IER's regulatory compliance, noting that OCAHO's regulations and § 1324b are silent on an ALJ's authority to consider IER's pre-complaint actions, and then citing several OCAHO cases where an ALJ determined a charge was incomplete, misleading, defective, or timely. R's Reply 2.

Finally, Respondent notes that IER's Response failed to "discuss what exactly made the allegedly incomplete charge complete." *Id.* at 3. According to Respondent, in the NOR that was eventually sent to Complainant, "IER described in this notice circumstances identical to the initial charge. It contains no additional information not already mentioned in the initial charge . . .. This notice shows IER all but admitted that the charge was complete as of April 27, 2023." *Id.*

D. Whether Equitable Considerations Are Available to the Court in Its Analysis

On equitable considerations, Respondent argues "[e]quitable consideration favors dismissal," because "[i]t is quite possible that IER routinely uses its 'accepted as complete' date to unlawfully substitute for the date of receipt of the charge required by the law and regulation. . .. There is strong public interest in correcting an unlawful pattern and practice," for which dismissal is "[t]he only way to do so." R's Br. 3.

IER agrees equitable considerations could apply, but that these considerations support an opposite outcome—that the filing deadline should be tolled, and the Complaint allowed to proceed. IER Resp. 9. IER notes, however, that Complainant "would bear the burden of demonstrating that equitable tolling is appropriate, and IER does not have access to all of the relevant facts." *Id.* at 10. This disclaimer notwithstanding, IER then proceeds to highlight several factors that weigh in favor of the application of equitable tolling here to benefit Complainant. *Id.*

III. LAW & ANALYSIS

A. The Court will not disturb its original conclusion that the issue before it is non-jurisdictional (i.e. it is a claims processing issue).

In its original Motion to Dismiss, the Respondent framed the issue as jurisdictional.[8]

In its July 2024 Order (prior to reconsideration), the Court determined the issue before it was not jurisdictional.[9]

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[8] *See* Mot. Dismiss 4 (arguing that Complainant's alleged failure to present a valid 90-day letter requires this Court to dismiss Complainant's claim for lack of jurisdiction).

[9] The Court noted for the parties in its July 2024 Order:

> The Supreme Court has emphasized its disfavor of "drive-by jurisdictional rulings." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). A jurisdictional classification is highly consequential because such issues "can never be forfeited or waived." *Id.* at 514 (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). When nothing in the statutory text requires courts to consider fulfillment of the element *sua sponte*, and "when Congress does not rank a statutory limitation on coverage as jurisdictional," it is not jurisdictional. *Id.* at 514, 516.

Mangewala, 19 OCAHO no. 1552a, at 4 n.8.

Additionally, the Court explained at footnote 9:

> In *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843 (2019), the Court explained the difference between claim-processing rules and jurisdictional rules.
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> The term "jurisdictional" is "generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction)." *Id.* at 1846.
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> Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1849 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)); *see also Wilkins v. United States*, 598 U.S. 152, 157 (2023) ("[Claim-processing rules] generally include[] a range of 'threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.'" (quoting *Read Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010))). In *Davis*, the respondent argued, *inter alia*, the complainant's failure to include a particular claim in her EEOC charge before filing a Title VII action stripped the district court's jurisdiction. *Id.* at 1848. The Court rejected this argument, reasoning Title VII's charge-filing language "speak[s] to . . . a party's procedural obligations." *Id.* at 1851 (quoting *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014)).
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> Here, the regulations cited by Respondent do not implicate the Court's authority to hear the case; rather, the regulations "promote the orderly progress of litigation by requiring . . . procedural steps at certain specified times." *Davis*, 139 S. Ct. at 1849 (quoting *Henderson*, 562 U.S. at 435); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

Id. at 4 n.9.

Because the Court determined it would "reconsider" its decision, this issue was once more made available for briefing by the parties. Parties did not provide compelling argument to cause the Court to conclude the issue presented here (one of IER regulatory compliance or timeliness)[10] should be viewed as jurisdictional. A regulation requiring an agency to take a particular action within a specified time when all conditions have been met is clearly a rule designed to "promote the orderly process of litigation." *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (citing *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

B. The Court will not disturb its original conclusion that "receipt of charge" means receipt of "complete charge;" and IER may deem an incomplete charge "complete."

Because the Court determined it would "reconsider" its decision, this issue was once more made available for briefing by the parties. After careful review of Respondent's filings, its arguments seem to infer agreement[11] with the Court's statutory and regulatory analysis conducted in the July 2024 Order. Similarly, IER's submissions do not argue against the analysis provided in the July 2024 Order (which aligned with IER's interpretation of the regulation).

[10] IER does make arguments asserting OCAHO ALJ's lack the authority to review the actions (or inactions) of IER; but its rationale in support of such a proposition is wholly unconvincing.

IER first cites a portion of the governing statute which states, "Charges shall… contain such information as the Attorney General requires." IER Resp. 5 (citing 8 U.S.C. § 1324b(b)(1). It is unclear how IER makes a leap from the statute's language to an express limitation of an ALJ's authority. Indeed, the Attorney General's "requirements" are presumably codified in IER's regulations at 28 C.F.R. § 44; and while the Special Counsel is "responsible for investigation of charges and issuance of complaints under this section;" these duties co-exist alongside the express "authority of administrative law judges," who also "conduct investigations and hearings . . . ." 8 U.S.C. §§ 1342b(c)(2), (f)(2).

As a more foundational matter, it is clear that OCAHO may look into whether pre-complaint conditions precedent have occurred, and/or whether claims processing requirements have been met. Particularly when such matters have been timely raised. *See Dakarapu v. Arvy Tech, Inc.*, 13 OCAHO no. 1308, 4–5 (2018) (finding complainant's communications with IER did not constitute a charge, as they failed to include "a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration related employment practice"); *A.S. v. Amazon WebServs., Inc.*, 14 OCAHO no. 1381a, 4 (2021) (finding complainant made misrepresentations in his IER charge); *Caspi v. Trigild Corp.*, 7 OCAHO 991, 1064, 1069–70 (1999) (rejecting OSC's (now IER) argument that complainant's completing a state agency questionnaire could constitute a constructive charge with OSC, in part because the questionnaire did not raise any § 1324b issue).

IER is a central part of pre-complaint processing for § 1324b cases, and its novel assertion that its regulatory compliance is outside the ambit of review is untethered to OCAHO precedent.

[11] Respondent argues the charge was complete on the day it was submitted, or in the alternative, it was complete on May 8, the day Complainant provided the final document. Respondent disputes the date of completion used by IER, which is May 9. These arguments don't contemplate an obligation arising for IER following an "incomplete" charge, which was the crux of the analysis provided by the Court.

"The anti-discrimination provisions of the INA, § 1324b, permit any person to 'file a charge respecting [an unfair immigration-related employment] practice' within 180 days of its alleged occurrence. § 1324b(b)(1), (d)(3)." *Mangewala v. Sail Internet Inc.*, 19 OCAHO no. 1552a, 6 (2024). IER regulations (28 C.F.R. Part 44) provide further clarity for litigants on this timeline, noting "[a] charge is deemed to be filed on the date it is postmarked . . . deliver[ed,] or transmit[ted]" to IER. 28 C.F.R. § 44.300(b).

The statute outlines the expectation for IER, stating: "The Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days." 8 U.S.C. § 1324b(b)(1). Again, IER regulations provide further clarity for litigants on this timing requirement. As the Court previously noted for the parties, "Section 44.301(a) requires IER to 'notify the charging party and respondent' within '10 days of receipt of a [complete] charge[.]' This is the NOR letter." *Mangewala*, 19 OCAHO no. 1552a, at 7.

An analysis that stops here would cause one to reasonably conclude that the 10-day clock begins when a charge is received, but there are additional wrinkles when the charge is incomplete. In that instance, IER has a few options.

It may "deem" an otherwise incomplete charge complete, and then presumably that decision date (date it deemed the charge complete) would start the 10-day clock.

Alternatively, IER may do what it did here (following receipt of a charge it viewed as incomplete), which is to ask for additional information. 28 C.F.R. § 44.301(d)(1). When IER requests additional information from a charging party, the 10-day clock could ostensibly start the day IER receives that information (as Respondent argued); except, here, critically, the regulations expressly state something else. Indeed, 44.301(d)(3) states the clock does not start until "[IER] determines adequate information has been submitted." Thus, it is that (sometimes later)[12] "determination" date, and not the "receipt" of the adequate information date that starts the clock.

C. Application of the Regulation to the Pre-Complaint Chronology

With the regulations outlined above, the Court can now turn to the facts and chronology of this matter, to consider the arguments of the parties in context.

On April 27, 2023, Complainant submitted IER's "electronic charge form."[13] SOI 4; Decl. of Special Litigation Counsel (IER) ¶ 12. IER Special Litigation Counsel assessed the submission

[12] Whether this does or does not incentivize slower case processing, as Respondent argues, is an interesting policy point; however, the regulation is unambiguous, and a review of IER's regulatory compliance does not extend to discussions of what the regulations should or should not say or should or should not incentivize.

[13] In the electronic charge form, Complainant, a U.S. citizen, stated he was "laid off on 3/7/2023." IER Charge Form Sec. 6. He asserted the individual who replaced him is not a U.S. citizen. *Id.* He claimed Respondent is "in the process of applying for an H1 visa for [this individual]." *Id.* Complainant alleges a violation of the law where this Respondent terminated him "to hire temporary visa workers it prefers instead." *Id.*

and concluded Complainant's submission "contained inadequate facts and circumstances to meet the criteria of 28 C.F.R. § 44.101(a)(5)[.]"[14] Decl. of Special Litigation Counsel (IER) ¶ 14. In its more recent filing,[15] IER provides additional explanation. IER explained that:

> [Complainant's] initial submission was inadequate because his statement that [Respondent] laid him off but retained a student visa holder, coupled with his references to violations of H-1 visa rules, was [in IER's estimation] not 'sufficient to describe the circumstances . . . of an alleged unfair immigration-related employment practice.'
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> Specifically, it was unclear whether [Complainant] was alleging an unfair immigration-related employment practice, as required by 8 U.S.C. § 1324b(b)(1) and 28 C.F.R. § 44.101(a)(5), or only a violation of H-1 visa program rules . . . [footnote 7 of IER Brief states "*Compare* 8 U.S.C. § 1324b(a)(1) *with* 20 C.F.R. §§ 655.736-39 (requiring only H-1B dependent employers filling positions with a salary of less than $60,000 to prefer equally or better qualified U.S. workers [unless the visa worker has a master's degree])."]
>
> This is a critical distinction because an alleged violation of H-1 visa rules does not necessarily entail an alleged violation of § 1324b. For instance, if [Complainant] had thought that [Respondent's] actions were unlawful because H-1 visa program rules categorically prohibit participating employers from displacing any minimally qualified U.S. workers (even if the visa holder is more qualified), [Complainant] may not have been alleging intentional discrimination on the basis of citizenship status in violation of § 1324b . . . .
>
> Section 1324b(a)(1) makes it unlawful for an employer to engage in intentional discrimination based upon citizenship status in hiring or firing workers. It does not require an employer to retain "U.S. workers with relevant experience" whenever temporary visa workers are doing similar work or may be more qualified, and it does not require an employer "to prove that they do not have relevant talent available through green card holders and U.S citizens" before retaining an H-1 visa worker and firing a U.S. worker. *See Ojeda-Ojeda v. Booth Farms, L.P.,* 9 OCAHO no. 1121, 6–7 (2006) (finding frivolous the argument that § 1324b prohibits an employer from replacing a U.S. worker with a visa worker, without evidence that the employer was motivated by citizenship status).

IER Resp. 7-8.

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[14] 28 C.F.R. § 44.101(a)(5) requires the charging party to "include[] a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration-related employment practice." Admittedly (and to Respondent's point), this is a broadly worded criteria, and simply noting it, with no additional explanation, does make it difficult to divine wither a charge was or was not complete at initial transmittal.

[15] IER provides this information in the body of its motion—this is not the best way to place evidence in the record; rather, IER should endeavor to file affidavits containing evidence or information attached to motions in the future.

Respondent contends that 28 C.F.R. § 44.101(a)(5) presents a "low bar," and that even with Complainant's reference to "visa workers," the language of the initial charge was "sufficient to describe the circumstances, place, and date of an alleged unfair immigration-related employment practice." R's Reply 3.[16]

While it is clear that the charge identifies the charging party as a protected individual under the statute (U.S. citizen), an employer likely covered by the statute, and a covered employment action (firing), it is less clear whether the charging party's statement surrounding the "law" or his proposed concern (he seems to describe H-1 visa-specific concerns) was intended to spur an investigation into discrimination or an investigation into non-compliance with visa processes.

This distinction matters. One concern is squarely within the purview of the Special Counsel,[17] and eventually OCAHO, and the other is a matter for other federal agencies, like the Department of Labor. Just as OCAHO endeavors to refrain from handling matters outside the ambit of its governing statute, so too, presumably, does IER. In fact, it may even be an IER best practice to consider the precedential decisions of OCAHO on this point,[18] with an eye towards separating the anti-discrimination wheat from the visa-processing-related chaff.

When it is unclear whether a charging party is in the right place, it is reasonable for IER to request additional information or clarification.[19] Implementing Respondent's view of the regulation

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[16] For the benefit of the reader, the charge provided on April 27, 2023, is as follows:

> I was laid off on 3/7/2023. The employee I was replaced with was a foreign student that reported to me as an intern from May 2022 to approx. Jan 23, 2023 and then as an FTE until my departure. That employee is now working in my previous capacity under a post completion OPT employment authorization, and Sail is in the process of applying for an H1 visa for him. I am a U.S. Citizen. According to my understanding of the law, an employer may not fire U.S. workers with relevant experience to hire temporary visa workers it prefers instead. Also, to apply for an H1 for that employee Sail has to prove that they do not have relevant talent available through green card holders and U.S. citizens.

Compl. 14.

[17] *See* 8 U.S.C. § 1324b(c)(2) (limiting authority of Special Counsel to investigating charges and issuing complaints arising under § 1324b).

[18] *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 8 n.12 (2021) ("[A]djudicating compliance or lack thereof with a DOL process is outside the scope of this forum. . . . [F]ailing to follow DOL regulations does not create a per se presumption of citizenship discrimination."); *Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426d, 6, n.8 (finding complainant could not carry burden of proof of § 1324b allegation "by argument or evidence pertaining to CW-1 visa fraud alone, or CNMI DOL labor practices alone," because "[p]rocesses administered by Departments of Labor (federal, state, or territorial) are outside the jurisdiction of this tribunal"); *US Tech Workers et al. v. Gensler*, 20 OCAHO no. 1587a, 10 (2024) ("To the extent Complainant seeks redress related to the existence of the H-1B visa program or whether a particular business has complied with that visa program, it has brought such policy-related concerns or issues to the wrong place.").

[19] In the Title VII discrimination context, the Supreme Court has found that a completed EEOC Intake Questionnaire is not necessarily sufficient to constitute a "complete" charge with the EEOC. For, "[t]here might be instances where the indicated discrimination is so clear or pervasive that the agency could infer from the allegations themselves that action is requested and required, but the agency is not required to treat every completed Intake Questionnaire as a charge." *Fed. Ex. Corp. v. Holowecki*, 552 U.S. 389, 405 (2008).

would strip IER of its ability to engage and get clarification (because doing so may render its NOR letter untimely), which would have adverse impacts[20] on both charging parties and employers. It would also waste the limited resources afforded to IER. For these reasons, a charge seeking to advance a violation of a Department of Labor regulation, or other statutes, may be construed at the discretion of IER as an incomplete charge. That is precisely what happened here.

Returning once more to the facts of this case, and germane to the issue raised by Respondent, the 10-day clock did not start on April 27, 2023, because the charge was incomplete.

With the conclusion that the charge was incomplete on arrival at IER, the uncontroverted record on this issue shows that IER asked for additional information from Complainant. By May 8, 2023, Complainant provided that information.[21] On May 9, 2023, IER determined it had a complete charge. With a start date of May 9, 2023, for the NOR letter clock, IER would have timely served that letter in this particular case, as it served the letter on May 17, 2023, on day eight.

IV. CONCLUSION

After a careful and thorough review of the additional briefings, the Court finds itself at the same conclusion at which it arrived in the July 2024 Order. IER did comply with its regulations, and as a result, Respondent, the moving party, has not demonstrated there is a claims processing issue to analyze. With this outcome, the Court need not address the additional arguments raised by either IER or Respondent.

Respondent's Motion to Dismiss is, once more, DENIED. The Court shall provide instruction via a separate order on resumption of discovery and other case deadlines.

SO ORDERED.

Dated and entered on November 14, 2024.

_____
Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[20] No one, a confused charging party or a respondent employer, would benefit from an unnecessary engagement with IER, who, in such a scenario, would be issuing an NOR only to later conclude it never had an actionable matter before it.

[21] Again, germane to the issue raised by Respondent, May 8, 2023, is also not the start date for the 10-day clock. This is a function of the plain language contained in the governing regulation at section 44.301(d)(3), which clarifies the 10-day clock does not start until "[IER] determines adequate information has been submitted." That determination date is May 9, 2023, based on this record.