

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

January 17, 2025

A.S.,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00073
)	
AMAZON WEB SERVICES INC.,)	
Respondent.)	
)	

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER LIFTING THE STAY OF
PROCEEDINGS AND DENYING THE COMPLAINANT’S REQUESTS FOR
ADMINISTRATIVE REVIEW

I. BACKGROUND AND PROCEDURAL HISTORY¹

This case arises under the antidiscrimination provisions of 8 U.S.C. § 1324b. On June 12, 2020, the Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (“OCAHO”), within the Executive Office for Immigration Review (“EOIR”), alleging that the Respondent discriminated against him because of his citizenship status and retaliated against him for exercising his rights under 8 U.S.C. § 1324b. Complainant sought back pay and other remedies for the alleged discrimination and retaliation. Respondent filed an answer denying that it discriminated or retaliated against the Complainant and asserting several affirmative defenses. The case was ultimately assigned to Administrative Law Judge (“ALJ”) Andrea Carroll-Tipton for adjudication.

The parties subsequently engaged in discovery and extensive prehearing motions practice, and the presiding ALJ issued several orders addressing these prehearing motions. On July 6, 2021, the Complainant filed with OCAHO a letter addressed to the Chief Administrative Hearing Officer (“CAHO”) (hereinafter “Complainant’s First Request for CAHO Review”). The letter expressed that the Complainant was “not satisfied with the way proceedings are going on” and expressed his belief that the ALJ was biased toward the Respondent. Complainant’s First Request for CAHO Review, 1. In this letter, the Complainant specifically challenged several orders issued by the ALJ up to that point in the case, including: (1) Order Reframing Scope of Complaint and Partially Granting Motion to Dismiss, *see A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381d (2021);

¹ This case has a lengthy procedural history. This order recounts only those parts of the procedural history that are most relevant to this order. A more complete account of the full procedural history of this case can be found in previous published decisions. *See A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381 (2020) *et seq.* (available at <https://www.justice.gov/eoir/listing-volume-14-decisions>).

(2) Order on Respondent’s Motions, *see A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381f (2021); and (3) two additional orders that denied the Complainant’s motions for reconsideration of previous ALJ orders, *see A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381b (2021); *A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381e (2021). *See generally* Complainant’s First Request for CAHO Review. The CAHO construed this letter as a request for administrative review of an interlocutory order and denied the request because the CAHO did not have authority to conduct administrative review of ALJ decisions in cases arising under 8 U.S.C. § 1324b. *A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381h, 1-2 (2021).

On October 26, 2021, after several subsequent motions filed by the parties and orders issued by the ALJ, the Complainant sent another letter to OCAHO addressed to the CAHO (hereinafter “Complainant’s Second Request for CAHO Review”). This second letter repeated many of the same arguments raised in his first letter, but also challenged several additional actions taken by the ALJ in the intervening months.² Finally, on November 26, 2021, the Complainant sent a third letter to the CAHO (hereinafter “Complainant’s Third Request for CAHO Review”),³ again repeating some of the arguments from the first two letters and raising issues with a more recent ALJ order.⁴ Both the Complainant’s Second and Third Requests for CAHO Review (collectively, “Requests for Review”) sought similar relief, including requesting that the CAHO

² Although the Complainant’s Second Request for CAHO Review was not always clear which ALJ orders he was asking the CAHO to review, this second letter appeared to raise challenges to each of the following ALJ orders in this case: (1) Order Denying Complainant Motion for Jury Trial, *see A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381c (2021); (2) Order Reframing Scope of Complaint and Partially Granting Motion to Dismiss, *see Amazon WebServices Inc.*, 14 OCAHO no. 1381d; (3) Order Denying Complainant’s Motion for Reconsideration and Partially Granting Motion for Extension, *see Amazon Web Servs. Inc.*, 14 OCAHO no. 1381e; (4) Order on Respondent’s Motions, *Amazon Web Servs. Inc.*, 14 OCAHO no. 1381f; (5) Order Memorializing Prehearing Conference and Order Granting Extension for Discovery, *see A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381i (2021); (6) Order Granting Respondent’s Motion for Extension to File Response to Complainant’s Motion to Compel; (7) Order on Respondent’s Motion to Compel, *see A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381j (2021); (8) Order on Complainant’s Motion to Extend the Deadline for Discoverable Material, *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381k (2021); and, (9) three occasions on which the ALJ denied Complainant’s motions to compel prior to September 30, 2021, *see A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381 (2020); *Amazon WebServices Inc.*, 14 OCAHO no. 1381b; *Amazon WebServices Inc.*, 14 OCAHO no. 1381d. *See generally* Complainant’s Second Request for CAHO Review.

³ On November 24, 2021, the Complainant also faxed a brief letter to OCAHO, which was addressed to the CAHO and asked to speak with the CAHO telephonically. Although this, too, could potentially be construed as a request for CAHO review, it will not be considered for multiple reasons. First, the faxed letter does not identify—even obliquely—any specific order(s) by the ALJ that the Complainant wishes the CAHO to review. To the extent the CAHO possesses administrative review authority within OCAHO’s regulations, such review is framed in terms of review of a particular order (either interlocutory or final). *See* 28 C.F.R. §§ 68.53, 68.54. Second, fax filings are permitted by OCAHO’s regulations only “to toll the running of a time limit.” 28 C.F.R. § 68.6(c). In order for such fax filings to be effective, OCAHO’s regulations require that the party filing by fax concurrently forward the original signed document and include in the document a certification “that service on the opposing party has also been made by facsimile or by same-day hand delivery, or, if service by facsimile or same-day hand-delivery cannot be made, a certification that the document has been served instead by overnight delivery service.” *Id.* The Complainant failed to concurrently forward an original signed copy of this fax to OCAHO, and his submission did not include any indication that it had been appropriately served on the opposing party. Accordingly, due to the procedural and substantive deficiencies of this faxed letter, it is expressly rejected and has not been considered by the undersigned in reaching this decision.

⁴ Specifically, the Complainant’s Third Request for CAHO Review took issue with aspects of the ALJ’s Order on Complainant’s Motion to Compel, *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381m (2021). *See* Complainant’s Third Request for CAHO Review, 1, 3-4.

“intervene in the proceedings of this case and make sure that the assigned [ALJ] is not biased towards the Respondent,” “either revisit or reconsider the critical decisions already taken by” the ALJ, and “provide the necessary relief” as outlined in the Complainant’s prehearing statement. Complainant’s Second Request for CAHO Review at 27-28; Complainant’s Third Request for CAHO Review at 4-5.⁵

On January 7, 2022, the Complainant filed a motion to withdraw his case, citing a variety of competing personal and professional time constraints along with his previously-expressed frustrations with the way the case was going. On February 8, 2022, in response to this motion, the ALJ issued an Order Issuing Stay of Proceedings. *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381o (2022). In the order, the ALJ noted that, were she to grant the Complainant’s motion to withdraw his case, the dismissal would be a final order. *Id.* at 2. Due to a then-unresolved question regarding the authority of OCAHO ALJs to issue final orders in cases arising under 8 U.S.C. § 1324b, *id.*, the ALJ issued a stay of proceedings, *id.* at 3. *See also infra* Part II.C.1.

On February 17, 2022, the CAHO issued an order acknowledging the Complainant’s two most recent letters to the CAHO. In light of the ALJ’s Order Issuing Stay of Proceedings, the CAHO found it appropriate to similarly stay further consideration of these letters, which, like Complainant’s first letter, could be construed as requests for administrative review of the ALJ’s interlocutory orders.

Ultimately, on January 22, 2024, the ALJ issued an order lifting the stay of proceedings and dismissing the case with prejudice. *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381p (2024). Evaluating the Complainant’s motion to withdraw his case as an unopposed motion for voluntary dismissal, the ALJ found that dismissal with prejudice was appropriate pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. *Id.* at 2-3.

Given the conclusion of the underlying case before the ALJ, the undersigned now finds it appropriate to issue this order resolving the status of Complainant’s second and third letters to the CAHO, consideration of which was previously stayed due to the stay of proceedings issued by the ALJ. For the reasons stated below, the previous stay is lifted, and the Complainant’s letters, construed as additional requests for review, are denied.

II. DISCUSSION

A. The Stay of Proceedings Regarding Complainant’s Letters Is Lifted.

In an order issued on February 17, 2022, the undersigned previously stayed further consideration of the Complainant’s second and third letters to the CAHO in light of the stay of proceedings issued by the ALJ in the underlying case. On January 22, 2024, the ALJ issued an Order Lifting Stay of Proceedings & Dismissing Case with Prejudice. *Amazon Web Servs., Inc.*, 14 OCAHO no. 1381p. The ALJ found it appropriate to lift the stay of proceedings because the issue that led to the stay had been resolved. *Id.* at 2. For similar reasons, the undersigned finds it appropriate to lift the previous stay and proceed with consideration of the Complainant’s second and third letters to the CAHO.

⁵ Because the Complainant’s Second and Third Requests for CAHO Review are not paginated, the page numbers in these citations refer to the pages of the PDF document on which the quoted language can be found.

B. Complainant's Letters are Construed as Requests for Interlocutory Administrative Review.

Complainant's letters were addressed to the CAHO and requested relief from orders issued by the presiding ALJ; moreover, Complainant's second and third letters were nearly identical, in terms of tenor and intent, to his first letter to the CAHO, which has already been construed as a request for administrative review, *see Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, at 1-2. Accordingly, the undersigned also construes the second and third letters as requests for administrative review of an interlocutory order. *See United States v. Greif*, 10 OCAHO no. 1183, 2-3 (2013) (construing a similar letter to the CAHO as a request for administrative review); *see also United States v. Bhattacharya*, 14 OCAHO no. 1380b, 3-4 (2021).

C. Complainant's Requests for Review Are Denied.

Complainant's letters raise a couple of distinct legal issues. Following a synopsis of the relevant factual, procedural, and legal background, which is necessary both to explain and acknowledge significant, relevant-yet-covert policy changes by OCAHO in recent years, *see infra* note 17, and to provide the foundation for analyzing Complainant's Requests for Review, each issue is discussed in turn in more detail below. Both issues, however, point to the same conclusion—Complainant's Requests for Review should be denied.

1. Background

Complainant's case arises under 8 U.S.C. § 1324b, and he seeks administrative review of certain ALJ orders. Both his First Request for CAHO Review and his subsequent Requests for Review raise the same question of whether the CAHO can adjudicate such requests. Understanding the ultimate answer to that question, however, requires an understanding of an ancillary background question regarding whether *anyone* can review such requests. To that end, the following background summary explains how consideration of that question has evolved since 2018, and particularly since Complainant's First Request for CAHO Review was denied in 2021, *see Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, at 1-2.

In cases arising under 8 U.S.C. §§ 1324a and 1324c, final orders issued by OCAHO ALJs are subject to administrative appellate review by both the CAHO and the Attorney General. *See* 8 U.S.C. §§ 1324a(e)(7), 1324c(d)(4); 28 C.F.R. §§ 68.54, 68.55.⁶ In cases arising under 8 U.S.C. § 1324b, however, the relevant statute provides that the ALJ's order "shall be final" unless appealed to the appropriate circuit court of appeals. 8 U.S.C. §§ 1324b(g)(1), (i). Prior to October 2023, *see* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (hereinafter "interim final rule" or "IFR"), OCAHO's regulations provided that the ALJ's final order in a case under 8 U.S.C. § 1324b is the final agency order, *see* 28 C.F.R. § 68.52(g) (2022), and OCAHO adjudicators interpreted this regulation to mean that ALJ orders under 8 U.S.C. § 1324b are not subject to further review by the CAHO, *see, e.g., Amazon Web*

⁶ In cases arising under 8 U.S.C. §§ 1324a and 1324c, interlocutory orders issued by OCAHO ALJs are also subject to administrative review by the CAHO under certain conditions. *See* 28 C.F.R. § 68.53.

Servs., Inc., 14 OCAHO no. 1381h, at 2; *Wong-Opasi v. Sundquist*, 8 OCAHO no. 1051, 799 (2000).⁷

Two Supreme Court decisions raised questions about this interpretation, particularly if it were extended to preclude Attorney General review of ALJ decisions, as such an interpretation could suggest that the putative authority of OCAHO ALJs to issue unreviewable final orders in cases under 8 U.S.C. § 1324b is unconstitutional under the Appointments Clause, Article II, Section 2, Clause 2, of the Constitution. *See Lucia v. SEC*, 585 U.S. 237 (2018); *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021). First, in *Lucia*, the Supreme Court held that ALJs at one federal agency, the Securities and Exchange Commission (“SEC”), were “‘Officers of the United States’ subject to the Appointments Clause.” 585 U.S. at 251. In light of the authorities common to all ALJs at all federal agencies, *see* 5 U.S.C. § 556(c), and the similarities between the particular authority and responsibilities of the SEC ALJs in *Lucia* and the authority and responsibilities of OCAHO ALJs, *compare Lucia*, 585 U.S. at 241-42 (summarizing various authorities of SEC ALJs) with 28 C.F.R. § 68.28, 68.52 (setting forth authorities of OCAHO ALJs), OCAHO ALJs would likely have also been deemed “inferior officers” under the Appointments Clause. *See Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h at 2 n.4 (referencing guidance from the Department of Justice’s (DOJ’s) Office of the Solicitor General (OSG) that all ALJs in the federal government should be appointed as inferior officers).⁸

Second, in 2021, the Supreme Court concluded that administrative patent judges, as inferior officers appointed by the Secretary of Commerce, could not constitutionally exercise adjudicatory authority that was unreviewable by a superior officer. *See Arthrex, Inc.*, 594 U.S. at 23. OCAHO’s statutory scheme under 8 U.S.C. § 1324b is similar to the one at issue in *Arthrex*, a fact pointed out by the DOJ OSG during the *Arthrex* case *See Reply Br. of the United States, United States v. Arthrex*, Nos. 19-1434, 19-1452, and 19-1458 (Jan. 22, 2021) at 23 (specifically citing 8 U.S.C. § 1324b as an example of an administrative adjudicatory system similar to the one at issue in *Arthrex*).⁹ Consequently, interpreting 8 U.S.C. § 1324b, particularly 8 U.S.C. § 1324b(g)(1), to

⁷ At least since 2017, OCAHO’s own position—if not also EOIR’s position—has been that neither the statute nor its regulations preclude Attorney General review of final orders in cases arising under 8 U.S.C. § 1324b under well-established principles of agency-head review of agency adjudicatory decisions. *See, e.g., Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C., 8, 12-13 (1991); *see also* 5 U.S.C. § 557(b) (providing a general framework for administrative agency review of the decisions of its adjudicators); *contra* IFR at 70587 (“OCAHO has previously concluded that ALJ orders under [8 U.S.C. § 1324b] are not subject to further administrative review, including by the Attorney General.”). Nothing in the undersigned’s decision regarding Complainant’s First Request for CAHO Review should be—or should have been—construed to reach the question of Attorney General review of any decisions by OCAHO. *Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, at 2 (concluding only that the CAHO lacked authority to review Complainant’s First Request for CAHO Review).

⁸ Although there may have been some lingering debate in 2018 as to whether OCAHO ALJs are inferior officers, that debate has been settled. *See United States v. ABS Staffing Sols., LLC*, 21 OCAHO no. 1632, 8 n.6 (2025). (noting the OCAHO ALJs are inferior officers); *see also Space Expl. Techs. Corp. v. Bell*, 701 F. Supp. 3d 626, 632 (S.D. Tex. 2023) (“OCAHO ALJs are appointed by the Attorney General (a principal officer), so they are ‘inferior officers’ who must be ‘directed and supervised’ by the Attorney General.”); *accord Walmart Inc. v. King*, CV 623-040, 2024 WL 1258223, at *3 (S.D. Ga. Mar. 25, 2024) (noting that “[t]he Parties [including DOJ] do not dispute OCAHO ALJs are ‘inferior officers’ under Article II”).

⁹ Although the Supreme Court appeared to acknowledge this point, it dismissed the significance of it with a general citation to regulations in title 8. *See Arthrex, Inc.*, 594 U.S. at 20. However, those regulations, which apply principally to proceedings conducted by immigration courts and the Board of Immigration Appeals, do not implement or address OCAHO’s statutory authority in 8 U.S.C. § 1324b; rather, regulations in title 28 do. *See, e.g.,* 28 C.F.R. § 68.52(d).

preclude further administrative review after an ALJ's final decision would have created the same constitutional violation found in *Arthrex*.

Following the issuance of the *Arthrex* decision in June 2021, OCAHO leadership flagged this potential constitutional issue for EOIR management in July 2021. EOIR management subsequently directed¹⁰ OCAHO in August 2021 to cease issuing any final orders in cases arising under 8 U.S.C. § 1324b, at least until a regulatory clarification was implemented. At the time DOJ estimated that a regulatory adjustment would be straightforward and could be implemented quickly. To that end, a new rulemaking was drafted by OCAHO by the beginning of October 2021.

The directive to cease issuing final orders created awkwardness almost immediately, however. On October 19, 2021, DOJ publicly announced that it had settled a high-profile case originally brought before OCAHO in 2020. *See Justice, Labor Departments Reach Settlements with Facebook Resolving Claims of Discrimination Against U.S. Workers and Potential Regulatory Recruitment Violations*, U.S. DEP'T OF JUST., <https://www.justice.gov/opa/pr/justice-labor-departments-reach-settlements-facebook-resolving-claims-discrimination-against> (Oct. 19, 2021).¹¹ The announcement of the settlement, however, did not actually end the case before OCAHO; to the contrary, OCAHO does not *automatically* dismiss cases when the parties reach a settlement.¹² *See generally* 28 C.F.R. § 68.14 (requiring, at the least, ALJ approval of the dismissal

And, at the time, those regulations did not clearly provide for administrative review authority of ALJ decisions in cases arising under 8 U.S.C. § 1324b. *See* 28 C.F.R. § 68.52(b) (2022); *but see supra* note 7 (noting the position that the Attorney General possessed such review authority regardless of the absence of an explicit regulation).

¹⁰ EOIR leadership also directed OCAHO not to mention this new policy change regarding the handling of cases under 8 U.S.C. § 1324b publicly, even though it represented a significant change in OCAHO policy and a marked deviation from established practice. *Contra FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” (emphasis in original))

¹¹ Whether DOJ's public announcement of a settlement agreement prior to the case actually being dismissed inappropriately brought institutional pressure on the DOJ ALJ assigned to the case to subsequently grant the dismissal regardless of the requirements of 28 C.F.R. § 68.14 is an issue beyond the scope of this order. *Cf. United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 3 (2023) (noting that “the CAHO [and, by extension, all other OCAHO adjudicators] exercises independent judgment and discretion free from ideological or *institutional* pressure” (emphasis added)).

¹² There are two methods for dismissing an OCAHO case pursuant to a settlement specified in 28 C.F.R. § 68.14. *See generally United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416e, 11-12 (2023) (explaining the two options). Both options require the approval of the presiding ALJ to dismiss the case, and both contemplate the possibility of—at the least—ALJ review of a settlement agreement, if not also ALJ approval of the agreement. *See* 28 C.F.R. §§ 68.14(a)(1), (c) (authorizing the submission to the presiding ALJ of, *inter alia*, a settlement agreement containing consent findings and the review of such an agreement by the ALJ) and 68.14(a)(2) (authorizing, but not requiring, the presiding ALJ to require the filing of a settlement agreement in cases where the parties seek dismissal based on a settlement and have notified the ALJ of such an agreement). Although the second method as written includes an odd semantic distinction that does not require the ALJ's approval of the settlement agreement *per se*, *see United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 7-8 n.12 (2023), it still requires the ALJ's approval of the dismissal request itself and clearly contemplates an overall approval role for the ALJ. Moreover, prior to November 2021, “OCAHO's general practice was to require the parties to submit a copy of their settlement agreement for review before dismissing the action [under] 28 C.F.R. § 68.14(a)(2),” *id.* at 7 n.12, a policy that clearly evinced an understanding of the ALJ's role in approving both the settlement and the dismissal under 28 C.F.R. § 68.14. Finally, 28 C.F.R. § 68.14 appears to be the exclusive means for dismissing an OCAHO case pursuant to an agreement between the parties and, thus, would displace any reliance on the use of Federal Rule of Civil Procedure 41(a)(1)(A)(ii), which authorizes dismissal of an action without a court order based on a stipulation of dismissal signed by all parties, as a

based on a settlement). Moreover, as discussed, *supra*, OCAHO had been directed not to issue any final orders, which included dismissals. Consequently, DOJ and OCAHO faced an uncomfortable situation in which DOJ had publicly announced that a high-visibility case had been settled, but the case still remained pending with OCAHO and was likely to remain pending for a significant period of time—implicitly suggesting to the public that there might be a flaw with the settlement—without any acknowledgement of why it could not be dismissed due to the settlement.

In order to resolve this situation, in early November 2021, EOIR leadership modified its directive to OCAHO—now, OCAHO could dismiss cases pursuant to a settlement agreement under 28 C.F.R. § 68.14(a)(2), but only if there were no review of the agreement or no legal involvement of the ALJ and only an administrative order closing the case. Although this distinction appears to misapprehend the legal requirements of 28 C.F.R. § 68.14, *see supra* note 12 and, again, marked a significant change in OCAHO policy¹³ without any public acknowledgment or recognition, *see supra* note 10, it did allow for the dismissal of the high-visibility case, *see Facebook*, 14 OCAHO no. 1386f at 2, as well as the dismissal of others in a similar posture, *see, e.g., Graham v. Ameriflight*, 18 OCAHO no. 1482 (2023).

Meanwhile, the draft regulatory clarification to address the potential *Arthrex* issue remained largely inert—and was expressly excluded from EOIR’s regulatory agenda in 2022, *see, e.g.,* Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022, 88 Fed. Reg. 10966, 11082 (Feb. 22, 2023)—until the end of February 2023. Unexpectedly, and without an official explanation,¹⁴ it suddenly began moving forward and appeared to be nearing completion by June 2023. However, at almost the last minute, it was then substantively

basis to seek dismissal before OCAHO. *See* 28 C.F.R. § 68.1 (noting that “[t]he Federal Rules of Civil Procedure may be used as a general guideline in any situation *not* provided for or controlled by [OCAHO’s] rules. . . or by any other applicable statute, executive order, or regulation” (emphasis added)). Although the exclusivity of the procedures in 28 C.F.R. § 68.14 need not be conclusively determined in the instant case, the undersigned does note that for many years, with only rare exceptions, the consistent practice of parties seeking dismissal before OCAHO based on a settlement agreement has been to comply with the provisions of 28 C.F.R. § 68.14. *See, e.g., United States v. Facebook, Inc.*, 14 OCAHO no. 1386f, 1-2 (2021) (dismissing a case at the request of the parties based on compliance with 28 C.F.R. § 68.14(a)(2)).

¹³ In short, pursuant to the various directives, OCAHO first established a policy of not issuing final orders in cases arising under 8 U.S.C. § 1324b and then, subsequently, established an exception to that policy—sometimes known as the “*Facebook* exception”—to allow for final-order dismissals pursuant to 28 C.F.R. § 68.14(a)(2), though not 28 C.F.R. § 68.14(a)(1). OCAHO further established, *sua sponte*, a second exception to the policy to allow the final-order dismissal of cases where the complainant had died, and no substitute party was identified. *See, e.g., Heath v. Euclid Innovations*, 16 OCAHO no. 1418e (2023) (dismissing a case arising under 8 U.S.C. § 1324b due to the death of the complainant and the lack of a substitute complainant). No other exceptions—not even in cases such as the instant one where Complainant wanted to voluntarily dismiss his case, *see Amazon Web Servs., Inc.*, 14 OCAHO no. 1381o at 2-3 (staying Complainant’s case rather than dismissing it due to the issue raised by *Arthrex*)—were created. All of these policies remained in place until the promulgation of the IFR in October 2023.

¹⁴ Allegations about the timing of the IFR vis-à-vis the investigatory practices of the DOJ subcomponent responsible for enforcing 8 U.S.C. § 1324b, the Immigrant and Employee Rights Section (“IER”), have been raised in multiple fora, including in comments to the IFR. *See, e.g.,* Eric Bord, Comment Letter on Proposed Interim Final Rule to Provide for Attorney General Review of ALJ Decisions and Orders in Cases Arising Under Section 274B of the Immigration and Nationality Act (Dec. 11, 2023), <https://www.regulations.gov/comment/EOIR-2023-0002-0004>. OCAHO has no information regarding the suddenly-accelerated movement of the IFR in 2023 and, in any event, believes it would be inappropriate to comment on speculative allegations against another DOJ subcomponent.

revised,¹⁵ again without any official explanation—and, oddly, without any input from OCAHO senior leadership. Finally, in October 2023, the regulatory clarification was promulgated.¹⁶ Pursuant to the IFR, the Attorney General—but no other DOJ employee—unequivocally has discretionary authority to review final orders issued by ALJs in cases arising under 8 U.S.C. § 1324b. *See* 28 C.F.R. § 68.55(a).

With the relevant background¹⁷ in mind, the undersigned now turns to the issues raised by Complainant’s letters.

2. Administrative Review in Cases Arising Under 8 U.S.C. § 1324b

As discussed, *supra*, the IFR—and the process through which it was promulgated—make clear both that the CAHO has no authority to review a final order issued by an ALJ in cases arising

¹⁵ The revisions removed provisions related to the possibility of interlocutory review in cases under 8 U.S.C. § 1324b similar to that available for cases under 8 U.S.C. §§ 1324a and 1324c. *See* 28 C.F.R. 68.53. They also removed provisions allowing for an additional level of review as of right, also similar to that available for cases under 8 U.S.C. §§ 1324a and 1324c. *See* 28 C.F.R. 68.54. The removal, without explanation, of these provisions, which would have added extra layers of procedural due process for parties in proceedings under 8 U.S.C. § 1324b, was, to say the least, unusual, particularly for an agency ostensibly committed to enhancing due process. Further, the IFR itself was conspicuously silent on how and why these alternative procedures were considered and rejected. At least one commenter has recommended revising the IFR “as a policy matter. . .to provide for at least the same review procedures available for ALJ decisions under [8 U.S.C. §§ 1324a and 1324c],” but whether DOJ will adopt that suggestion when it finalizes the IFR is unknown. *See* Institute for Sound Public Policy, Comment Letter on Proposed Interim Final Rule to Provide for Attorney General Review of ALJ Decisions and Orders in Cases Arising Under Section 274B of the Immigration and Nationality Act (Dec. 11, 2023), <https://www.regulations.gov/comment/EOIR-2023-0002-0005>.

¹⁶ Although the validity of the IFR has been questioned in litigation, *see, e.g., see Space Expl. Techs. Corp. v. Bell*, 701 F.Supp. 3d 626, 633 (S.D. Tex. 2023) (“But the new IFR conflicts with the plain language of § 1324b, which only provides for review in an Article III court. Thus, the IFR is unlawful. . .”) (footnote omitted)), it remains in effect as of the date of this decision. Moreover, the IFR is binding on OCAHO, and OCAHO unequivocally believes that it is not *ultra vires*. Any other concerns or issues regarding the IFR raised by either commenters, parties to litigation, or judges are beyond the scope of this order.

¹⁷ OCAHO recognizes that its multiple significant policy changes between August 2021 and October 2023 were undertaken without any clear explanation—or even acknowledgement—of the changes; thus, the instant Order provides such explanation and acknowledgement in order to comply with fundamental principles of administrative law. *See, e.g., Fox Television Stations*, 556 U.S. at 515 (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” (emphasis in original)); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”); *cf.* 5 U.S.C. § 554(e) (authorizing an agency to issue a declaratory order “to terminate a controversy or remove uncertainty”). Any facts underlying that explanation in this order, including dates, events, structures, procedures, and the existence of policies or practices, are either non-adjudicative, legislative facts which are “not an appropriate subject for a formalized judicial notice treatment,” Fed. R. Evid. 201 advisory committee’s note on proposed rules; *cf., e.g., US Tech Workers v. Northwestern Med.*, 19 OCAHO. No. 1566, 1 (2024) (summarizing various facts related to the United States Postal Service’s handling of OCAHO mailings without taking formal judicial notice), or are facts otherwise subject to official notice, *see* 28 C.F.R. § 68.41; *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 4-5 n.5 (2023), as facts “not subject to reasonable dispute because [they]. . .[are] generally known within the . . . jurisdiction,” Fed. R. Evid. 201(b)(1). *See generally* 28 C.F.R. § 68.40(a) (noting that “[u]nless otherwise provided. . .the Federal Rules of Evidence will be a general guide to all [OCAHO] proceedings”). To the extent such facts may be subject to official notice, either party may file information to the contrary with OCAHO within 30 days of this order. *Cf.* 28 C.F.R. § 68.41. Normative questions about the implications of such facts are beyond the scope of this order. *Cf.* 5 U.S.C. § 2302(b)(8).

under 8 U.S.C. § 1324b. However, Complainant's Requests for Review, like his First Request for CAHO Review, were brought in an interlocutory posture, not following a final order. Consequently, the undersigned's prior denial of Complainant's First Request for CAHO Review, which may have been too cursory, is not necessarily dispositive of his Second and Third Requests for CAHO Review.

Neither the Administrative Procedure Act ("APA"), 8 U.S.C. § 1324b, the decision in *Arthrex*, nor any relevant OCAHO statute clearly addresses interlocutory review within the context of an agency adjudication or the potential interplay of such review and Article II of the Constitution. Further, the undersigned is unaware of any serious argument that the unavailability of interlocutory review of an inferior officer's decision—when review by a superior officer of the inferior officer's final decision remains available—somehow raises a constitutional infirmity. Interlocutory agency decisions are also generally unreviewable by federal courts. *See* 5 U.S.C. § 704. Moreover, no statute that OCAHO administers, 8 U.S.C. §§ 1324a, 1324b, or 1324c, expressly provides for interlocutory review of ALJ decisions, though OCAHO is nevertheless authorized such review in cases under 8 U.S.C. §§ 1324a and 1324c through regulation. *See* 28 C.F.R. § 68.53. Additionally, the IFR did not address interlocutory review at all and, thus, certainly did not prohibit it.¹⁸ In sum, due to its general silence on the subject, the law is not quite as clear on the availability of an interlocutory administrative review in cases under 8 U.S.C. § 1324b as it may first appear.

Nevertheless, the law is clear that there is no final-order review authority by the CAHO for cases arising under 8 U.S.C. § 1324b, *see Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, at 2, and the IFR did not provide any. The undersigned is unaware of any adjudicatory or judicial system providing for interlocutory review but not final review, and nothing about OCAHO's statutory or regulatory structure suggests it is anomalous in that regard. Moreover, OCAHO generally exercises delegated authority from the Attorney General, *see* 8 U.S.C. § 1103(g); 28 U.S.C. § 510, and there has been no clear delegation of *any* administrative review authority under 8 U.S.C. § 1324b to OCAHO. Further, neither 8 U.S.C. § 1324b nor the APA provides any clear authority to conduct an administrative review in these circumstances, and although such authority is not prohibited either, prudence dictates caution when an agency considers assuming an authority without a statutory basis. In short, OCAHO is extremely hesitant to arrogate any authority, such as an interlocutory administrative review authority, that is not clearly provided by either an applicable statute or a delegation from the Attorney General. Accordingly, although the issue is not completely free from doubt, the best reading of all of OCAHO's sources of law is that no interlocutory review authority exists for the CAHO in cases arising under 8 U.S.C. § 1324b. Absent such authority, Complainant's Requests for Review must be denied.

3. Mootness

Finally, even if the undersigned possessed authority to review the ALJ orders that the Complainant challenged in his Second and Third Requests for CAHO Review, the dismissal of the underlying action (based on the Complainant's request for voluntary dismissal) has rendered the

¹⁸ Indeed, OCAHO's position is that the absence of any interlocutory review provision in the IFR certainly would not prohibit the Attorney General from reviewing an ALJ's interlocutory decision in a case under 8 U.S.C. § 1324b, if otherwise appropriate. *Cf. supra* note 7.

Complainant’s requests for interlocutory review moot. Appeals are typically “dismissed as moot when, by virtue of an intervening event, [an appellate body] cannot grant any effectual relief whatever in favor of” the party initiating the appeal. *Koss Corp. v. Bose Corp.*, 107 F.4th 1363, 1366 (Fed. Cir. 2024); *see also Lillbask ex rel. Mauclaire v. State of Conn. Dep’t of Educ.*, 397 F.3d 77 (2d Cir. 2005) (“When the issues in dispute between the parties are no longer live, a case becomes moot, and the court—whether trial, appellate, or Supreme—loses jurisdiction over the suit, which therefore must be dismissed.”); *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015) (“[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, we must dismiss the case, rather than issue an advisory opinion[.]” (quoting *Stevenson v. Blytheville Sch. Dist. No. 5*, 762 F.3d 765, 768 (8th Cir. 2014))). Furthermore, “[g]enerally, if the underlying litigation is complete, an appeal of a denial [of an interlocutory motion] is moot and must be dismissed.” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 593 (9th Cir. 2023).

In the instant case, the ALJ ultimately issued an order lifting the previously-issued stay of proceedings and dismissing the case with prejudice. *Amazon Web Servs., Inc.*, 14 OCAHO no. 1381p. The ALJ’s order of dismissal noted that it was a final order, *id.* at 3, and provided the parties with information on how to appeal the final order, *id.* at 4. As the appeal information noted, the ALJ’s order would “become the final agency order unless modified, vacated, or remanded by the Attorney General.” *Id.* The Attorney General could initiate review of the ALJ’s final order by directing the CAHO to refer the final order to the Attorney General within sixty days of the date of entry of the ALJ’s final order. *Id.*; *see also* IFR at 70591 (amendments to 28 C.F.R. §§ 68.52, 68.55). Because the ALJ’s final order was not referred to the Attorney General for review, it became the final agency order sixty days after the date of entry of the order. Accordingly, even if the undersigned possessed the authority to administratively review the ALJ’s interlocutory orders in this case, the ALJ’s final dismissal of the case in its entirety has already become the final agency order. Given the finality of the ALJ’s Order Lifting Stay of Proceedings & Dismissing Case With Prejudice, the undersigned “cannot grant any effectual relief whatever in favor of” the Complainant, *Koss Corp.*, 107 F.4th at 1366, and the Complainant’s Requests for Review are, therefore, moot and must be denied. *E.g.*, *Ctr. for Biological Diversity*, 69 F.4th at 594, 596 (dismissing an appeal of an interlocutory order and observing that, similar to the present matter, “[h]ere, the district court’s proceedings are complete. Nothing remains pending before the district court: The court resolved all of the claims in its merits order and noted on the docket that ‘this matter is now closed.’ The only potential path to relief for Appellants, then, would be through participation in an appeal of the merits order. But no party has filed such an appeal . . .”).

III. CONCLUSION

The previous stay of consideration of Complainant's Second and Third Requests for CAHO Review is LIFTED. Complainant's Second and Third Requests for CAHO Review are DENIED.

SO ORDERED.

James McHenry
Chief Administrative Hearing Officer