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

April 5, 2018

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00088
ROSE ACRE FARMS, INC., Respondent.	)	

ORDER FINDING DOCUMENTS PROTECTED FROM DISCLOSURE BY WORK PRODUCT AND ATTORNEY CLIENT PRIVILEGES

On June 10, 2016, Administrative Law Judge (ALJ) Stacy Paddack issued an order addressing Respondent's request for in camera review of alleged privileged documents that Respondent wants to withhold from Complainant's discovery requests. Thereafter, Respondent sought reconsideration of Judge Paddack's Order and claimed privilege with respect to fifty-six documents. On March 21, 2017, after Judge Paddack left this office, ALJ James McHenry ordered Respondent to clarify the documents for which it sought reconsideration. Thereafter, following Judge McHenry's departure from this office, the undersigned was assigned this case.

My review of the administrative record establishes that Respondent seeks to protect fifty-six documents from disclosure under attorney work-product or attorney-client privilege.[1] Having

[1] Complainant asserts there is no good cause to reconsider the privilege claims and that the motion should be rejected on procedural grounds. July 5, 2016, United States Opposition to Respondent's Motion for Reconsideration. An OCAHO ALJ may consider "substantive motions to reconsider interlocutory orders." *United States v. WSC Plumbing, Inc*., 9 OCAHO no. 1071, 7 (2001). The power to modify an interlocutory order is authorized by 28 C.F.R. § 68.1, which incorporates the Federal Rules of Civil Procedure and by reference, Federal Rule 54(b). *Id.* at 7-8 (citing FED. R. CIV. P. 54(b)). On March 21, 2017, Judge McHenry ordered clarification of Respondent's privilege claims. I find that discretionary review of the documents for which Respondent claims privilege is appropriate. *See WSC Plumbing, Inc*., 9 OCAHO no. 1071 at 7 (substantive reconsideration of interlocutory orders is within an ALJ's discretion as an inherent

reviewed each of the fifty-six documents in camera after Respondent's request for reconsideration, I find that all the documents are protected from disclosure by attorney work-product privilege and other documents are also protected from disclosure by attorney-client privilege.

The attorney work-product privilege protects written or oral materials prepared by or for an attorney in the course of legal representation, especially in preparation for litigation for the purpose of analyzing or preparing a client's case. Fed. R. Civ. Proc. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *United States v. Smith*, 502 F.3d 680, 689 (7th Cir. 2007). Generally, an opposing party may not discover or compel disclosure of work product. In limited circumstances, however, an opposing party may discover or compel disclosure of work product upon a showing of "substantial need" to produce the materials to avoid "undue hardship." Fed. R. Civ. Proc. 26(b)(3)(A)(ii). The attorney has an independent privacy interest in his work product and may assert the work-product doctrine on his own behalf. The doctrine's protection is not waived simply because the attorney shared the information with his client. *See Hobley v. Burge*, 433 F.3d 946, 949-50 (7th Cir. 2006). Work-product protection applies to investigations led by an attorney when the documents at issue "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Logan v. Commercial Union Ins. Co*., 96 F.3d 971, 976-77 (7th Cir. 1996) (internal quotation marks omitted). A distinction is drawn between precautionary documents "developed in the ordinary course of business" for the "remote prospect of litigation" and documents prepared because "some articulable claim, *likely* to lead to litigation, [has] arisen." *Sandra T.E., v. South Berwyn School District 100*, 600 F.3d 612, 622 (7th Cir. 2010), citing *Binks Mfg., Co. v. Nat'l Presto Indus., Inc*., 709 F.2d 1109, 1120 (7th Cir. 1983). The latter are protected. The former are not. *Id*.

The administrative record establishes on or about July 13, 2010, the Department of Homeland Security, Immigration and Customs Enforcement (ICE) began a Forms I-9 document verification investigation of Respondent. *See* document 232170. On December 14, 2011, the Department of Justice, Immigrant and Employee Rights Section (IER) began an employment-eligibility-verification investigation of Respondent. *See* June 12, 2015 United States Response to Oral Inquiry; First Amended Compl. ¶ 20. These investigations were conducted pursuant to enforcement authority of 8 U.S.C. 1324a, and 8 U.S.C. 1324b, which authorize the Attorney General (through IER) and the Department of Homeland Security to investigate and litigate claims before OCAHO.

On July 13, 2010, Respondent requested assistance from Jay Ruby, an immigration attorney working for the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., to respond to an

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power of the administrative tribunal).

ICE Forms I-9 Audit and inspection. *See* documents 232169, 232170. Additional documents were then created in the direct wake of the December 14, 2011 IER investigation, as Respondent sought legal input and advice for Forms I-9 compliance. *See* documents 226402-433; 219029; 219117-123. The record shows that all the documents at issue were created after the ICE investigation began in 2010, or the IER investigation began in late 2011 and early 2012. Having reviewed each of the fifty-six documents in camera, I find that each of them were created after the respective ICE and IER investigations raised an articulable claim that was likely to, and did in fact lead to, litigation against Respondent.[2] I further find that these documents were not produced in the ordinary course of business. Rather, they were created in anticipation of litigation because of the IER and ICE investigations and in furtherance of Respondent's preparation for anticipated litigation. Complainant has failed to establish substantial need for the documents or undue hardship in prosecuting its case without them. *See* Fed. R. Civ. Proc. 26(b)(3)(A)(ii).[3] Accordingly, I find that each of the fifty-six documents is protected from disclosure as privileged attorney work-product prepared in anticipation of litigation. *Logan*, 96 F.3d at 976-77.

In addition, a number of the documents are also protected from disclosure under the attorney-client privilege. The attorney-client privilege protects communications made in confidence by a client to an attorney for the purpose of obtaining legal advice. *See Upjohn Co., v. United States*,

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[2] The subject documents are numbed here: (1) 141051–52; (2) 219029–60; (3) 219108–112; (4) 219113–14; (5) 219115–16; (6) 219117–23; (7) 219124–29; (8) 0219139–41; (9) 219493–95; (10) 219496–97; (11) 220414–18; (12) 222697–98; (13) 223742–43; (14) 224592–93; (15) 224795; (16) 225833–34; (17) 225918; (18) 225961–63; (19) 225964–67; (20) 225968–73; (21) 225980–85; (22) 225986–92; (23) 225996–98; (24) 226309; (25) 226315; (26) 226402–33; (27) 226570–73; (28) 227251–53; (29) 227254-227257; (30) 229319; (31) 229448; (32) 230060; (33) 232169–70; (34) 232470–72; (35) 233431–32; (36) 233682–83; (37) 233692–93; (38) 233962–63; (39) 234121–22; (40) 234906–09; (41) 236283; (42) 236401–02; (43) 236403–04; (44) 240705; (45) 240760–63; (46) 240775–76; (47) 240790–91; (48) 241059–60; (49) 241339–40; (50) 241560–61; (51) 241668–72; (52) 243706–07; (53) 243984-85; (54) 320715-320716; (55) 328582; and (56) 367483-367484.

[3] The Federal Rules of Civil Procedure and Supreme Court and Seventh Circuit precedent provide that documents produced in anticipation of litigation must nonetheless be produced when it "would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice." *Hickman*, 329 U.S. 495 at 509; Fed. R. Civ. Proc. 26(b)(3)(A)(ii); *Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1022 (7th Cir. 2012). IER does not argue that "substantial need" overrides the work-product privilege or that protecting the documents would cause its trial preparation to suffer an "undue hardship." *See* July 5, 2016, United States Opposition to Respondent's Motion for Reconsideration.

449 U.S. 383, 394-99 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980). The privilege belongs to the client, although an attorney may assert the privilege on the client's behalf. *See United States v. Smith*, 454 F.3d 707, 713 (7th Cir. 2006). My in camera review indicates that Tapia sought confidential legal advice from immigration attorney Ruby about how to respond to the ICE I-9 Audit, and Ruby rendered legal advice to Respondent. *See e.g*., documents 224592 and 224593. In documents 232470, 232471, and 232472, Respondent solicited and received legal and strategic advice about how an ICE investigation is prosecuted and resolved. In documents 219496, 219497, 226309, 226315, 233431, and 233432, Respondent sought and received legal advice from counsel about how to respond to the IER investigation. These eleven documents are also protected from disclosure by the attorney-client privilege.

IT IS ORDERED that the fifty-six documents numbered below are protected from disclosure by attorney work- product privilege. In addition, documents 224592, 224593, 232470, 232471, 232472, 219496, 219497, 226309, 226315, 233431, and 233432, are also protected from disclosure by attorney-client privilege.

The parties shall file a status report by **April 12, 2018** with an update on any pending issues or outstanding motions. The status report shall also indicate three possible dates in late April 2018 when both parties are available for a telephonic conference call.

SO ORDERED.

Dated and entered on April 5, 2018.

Thomas P. McCarthy
Administrative Law Judge