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

June 25, 2025

In re Investigation of:	)	
	)	
ADOBE, INC.,	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 2025S00044
	)	

ORDER GRANTING IN PART AND DENYING IN PART PETITION TO MODIFY OR REVOKE SUBPOENA

I. PROCEDURAL HISTORY

At issue is an administrative subpoena the undersigned issued at the request of the Immigrant and Employee Rights Section, Civil Rights Division of the Department of Justice (IER or the government) in aid of its investigation of Adobe, Inc. The investigation began because of a charge from Amanda Bartolotta (charging party) alleging that Petitioner discriminated against her based on her citizenship status, in violation of the Immigration and Nationality Act, 8 U.S.C. § 1324b, when she was not selected for a position. Opp. 1 & Ex. 1. The subpoena was signed on May 14, 2025, and according to IER's motion, the hardcopy was served on May 19, 2025. Subpoena, Opp'n 4, Perkins Decl.

On, May 30, 2025, Petitioner filed its Petition to Modify or Revoke Subpoena. On, June 9, 2025, IER filed its Opposition.

II. STANDARDS

Per 28 C.F.R. § 68.25(c),[1] an entity "served with a subpoena who intends not to comply with it has ten days after service of the subpoena in which to file a petition to revoke or modify it." Subsequently, the entity that applied for the subpoena has eight days after receipt of the petition to respond to it. *Id.*

The requirements for enforcement of an administrative subpoena are minimal. *In re Investigation of Space Expl., Techs.*, 20 I&N Dec. no. 1378, 1–2 (2020).[2] Generally, an administrative subpoena

[1] OCAHO's Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

[2] 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 follow are thus to the pages,

is enforceable if "1) the investigation is within the statutory authority of the agency, 2) the subpoena is not too indefinite, and 3) the information sought is reasonably relevant to the charge under investigation." *Id.* at 3 (first citing *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198, 3 (2013); and then citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) and *EEOC v. Univ. of Pa.*, 850 F.2d 969, 981 (3d Cir. 1988), *aff'd*, 493 U.S. 182 (1990)). "If the three elements are satisfied, the subpoena will be enforced unless petitioner meets the 'lofty burden' of proving that 'the inquiry is unreasonable because it is overbroad or unduly burdensome.'" *Id.* (citing *Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751, 238, 243 (1995) (quoting *EEOC v. Children's Hosp. Medical Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983)).

III. DISCUSSION

A. Timeliness

According to IER's Opposition brief, the subpoena was served on May 19, 2025. Subpoena, Opp'n 4, Perkins Decl. As per OCAHO's rules, a petition to revoke or modify the subpoena is due ten days after service of the subpoena. *See* § 68.25(c). The Petitioner's petition to revoke was therefore timely filed, and IER's opposition was also timely filed as it was filed within eight days of receipt of the petition. *Id.*

B. Parties' arguments

IER's subpoena consists of four discrete requests for production. Subpoena Ex. A. The subpoena asks for information about the applicants for the positions for which the charging party applied, information regarding any PERM applications for these positions, information about the charging party, and personnel files for the applicants for whom Petitioner prepared or filed PERM applications for the positions to which the charging party applied. *Id.*

Petitioner objects to the subpoena on four grounds: (1) IER is exceeding its statutory authority in continuing an investigation when there is no reasonable cause for the charge; (2) the requested information is overly broad, unduly burdensome, and duplicative, and seeks documents protected by the attorney-client privilege and work product doctrine; (3) requests for full personnel files violate employees' privacy interests; and (4) should the Court decide not to revoke the subpoena entirely, Petitioner asks the Court in the alternative to modify the subpoena to limit the requests to specific categories of documents that are non-privileged, protected from disclosure, have not been previously produced, and are known and/or available to Petitioner. Pet. 14–22.

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seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

IER responds that (1) it seeks relevant documents through focused requests, (2) the Petitioner has not produced a privilege log and thus it cannot evaluate whether the documents withheld are subject to any privileges, (3) it does not seek material previously produced, but that Petitioner refused to produce whole categories of information, and (4) in the alternative it seeks court *in camera* review of the documents Petitioner seeks to withhold based on a privilege. Opp'n 4–15.

C. Analysis

1. Reasonable cause

Petitioner first points out that under 8 U.S.C. § 1324b(d)(1), IER has authority "to determine whether or not there is reasonable cause to believe that the charge is true." Pet. 14–15. Here, Petitioner argues that there is clear evidence that the charging party did not meet the qualifications and/or experience for the position, and that the charging party brought the charge for an improper purpose—to influence policy—citing an article the charging party authored on a website and her posts to social media. *Id.* at 15–17. Petitioner does not suggest that IER should not investigate the charge, but that it has done so (Petitioner has provided over 1100 pages of responsive documents), and it is clear that the charge is frivolous. *Id.* at 17.

IER responds that it indisputably has the authority to investigate the instant charge, that it has not determined whether there is reasonable cause for the charge, and therefore Petitioner's opposition on this ground is premature. Opp'n 6. Further, IER claims this Administrative Law Judge (ALJ) does not have authority to weigh the merits of the case as the case in chief is not before her. *Id.*

As noted by both parties, IER is charged with investigating each charge received. 8 U.S.C. § 1324b(d)(1). An ALJ has authority to issue subpoenas prior to the filing of a complaint, and is charged with resolving any disputes regarding that subpoena. 28 C.F.R. § 68.25. It almost goes without saying that OCAHO's ALJs do not have authority to investigate charges; such is the provence of IER. *In Re Investigation of Conoco, Inc.,* 8 OCAHO no. 1049, 744 (2000) ("OCAHO administrative law judges have no inherent general authority to supervise, oversee or direct [IER]'s investigative and charge processing procedures, its determinations, or the disposition of investigative materials in its custody.") Further, IER has authority "to broaden the scope of an existing investigation beyond the allegations made in a particular charge." *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8 (2012).

While the parties agree that IER has the authority to investigate this charge, Petitioner appears to believe that IER has done enough, as there is no merit to the claim. IER argues that it has not received certain documents it requested and thus, presumably, has not completed its investigation. Opp'n 8–9. The limited scope of the task presented to this ALJ is to determine whether the subpoena is sufficiently definite and relevant, and whether the Petitioner has demonstrated that it is overbroad or overly burdensome. *Space Expl., Techs.*, 20 I&N Dec. no. 1378, at 3. A determination on whether IER has conducted a sufficient investigation is beyond this ALJ's authority; nor would this ALJ be aware of whether IER has expanded the scope of the investigation, which it has the authority to do. In any event, it appears that IER has not received the documents it requested, documents that appear relevant to the investigation. Further, a resolution of the merits of the case is outside the scope of these proceedings, and would be improper in any event without a full evidentiary submission. So too is any kind of determination

about why a charging party filed a charge. As noted by IER, counsel's reference to *US Tech Workers et al. v. COHESIONIB, Inc.,* 20 I&N Dec. 1594b, 11 (2024) is misplaced, as the ALJ's point was that the Complainant had brought the issue to the wrong forum.

2. Definiteness

Petitioner next argues that the entire subpoena should be revoked because it fails the second prong —definiteness—because the requests in the subpoena are the same requests previously made to Petitioner, and to which Petitioner provided more than 1,100 pages of documents. Pet. 18. In response, IER clarified that it is not seeking documents previously turned over, but is seeking certain categories of documents that were not produced. Opp. 8. To the extent there is any residual issue, this Court modifies the subpoena to clarify that Petitioner need not produce responsive documents it has previously produced.

3. Privilege Protections

The heart of the dispute appears to be about documents that were not produced that Petitioner argues are subject to attorney-client privilege, work-product privilege, or impinge on non-party privacy interests. Pet. 18–20, Opp. 8–13.

a. Legal Standards

A party claiming a privilege "has the burden to demonstrate the privilege applies in the particular circumstances of the case." *United States v. Terrapower, LLC*, 19 OCAHO no. 1548f, 13 (2025) (citing *United States v. Garza*, 4 OCAHO no. 644, 472, 477 (1994)). OCAHO ALJs have applied the attorney-client privilege in the subpoena context. *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1087 (2002).

"Under Federal Rule of Civil Procedure 26(b)(5), a party claiming a privilege must 'expressly make the claim' of the privilege and 'describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing [] information [itself] privileged or protected, will enable other parties to assess the claim.'" *Terrapower, LLC*, 19 OCAHO no. 1548f, at 13.

"A party asserting a privilege has the burden of demonstrating its applicability." *Id.* (citing *Tingling v. City of Richmond*, 13 OCAHO no. 1324b, 3 (2021) (quoting *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011)); *accord De Leon v. Longoria Farms*, 13 OCAHO no. 1320, 2 (2019) (quoting *EEOC v. BDO USA, LLP*, 876 F.3d. 690, 695 (5th Cir. 2017)). To meet its burden, the party "must present more than a bare conclusion or statement that the documents sought are privileged. Otherwise, the agency, not the court, would have the power to determine the availability of the privilege." *Id*.

b. Analysis

The attorney-client privilege may be "asserted to protect (1) confidential communications made (2) to a lawyer acting in the capacity of a lawyer, (3) for the primary purpose of securing either legal opinion or legal services, or assistance in some legal proceeding." *Terrapower, LLC,* 19

OCAHO no. 1548f, at 13. "Further, the attorney client privilege protects the substance of communications between a client and counsel, not the mere fact that the communications occurred." *Id*.

In this case, IER asserts that it has not received any employment applications, performance appraisals, or interview notes for the PERM beneficiaries, much less other documentation that may be part of a personnel file. Opp'n 8. Petitioner states that it has produced the resumes and applications, but agrees it has not produced other portions of the personnel files. Pet. 20. In addition, there appear to be other documents withheld or redacted that IER asserts have not been identified with specificity. Opp'n 8. The Petitioner argues that it hired outside counsel to handle the PERM process and advise on each application, and thus its documents are protected as there is legal advice contained within these communications. Pet. 4, 11.

Petitioner did not produce a privilege log. Opp. Ex. 3. When information subject to a subpoena is withheld based on privilege, the withholding party must make the same showing as under Rule 26(b)(5); see also *Hsieh*, 9 OCAHO no. 1087, at 5 (requiring a party to produce privilege log that expressly claimed privilege and to give a description of the documents withheld under a claim of privilege). A properly crafted privilege log has the potential to resolve disputes without Court intervention in that it helps the opposing side evaluate whether it should challenge the asserted privileges. When Court intervention is required, that same privilege log (along with supporting evidence), allows the Court to understand the propriety of the party's position on privileges. In this case, the Court has no basis upon which to resolve the dispute as there is no privilege log, and thus no way for the Court to evaluate whether it was properly asserted.[3]

The Court orders Petitioner to create a privilege log for any responsive documents it intends to withhold based on a privilege. The log should be a sufficiently detailed record of the specific document at issue, including, but not limited to: date of creation/dissemination, author, recipient(s) (and if a recipient is a "cc" or "to" recipient), a summary of the document's content, and sufficient information to show all elements of the privilege or protection.[4] The Court declines to review the

[3] While this Court provides no opinion on the merits of the privilege asserted here at this point, the ALJ in *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1087 at 9, found that "[o]rdinarily, information gleaned by attorneys assisting clients with applications to government agencies is not protected by the attorney-client privilege," citing *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992) (holding that the attorney-client privilege did not apply to information given from a client to his attorney in order to file a citizenship application with the Immigration and Naturalization Service); *United States v. Cooper*, 1997 WL 129306, at *3 (D. Colo.) (holding that much of the information communicated between an attorney and a client for purposes of filing a visa application is not protected by the attorney-client privilege); *United States v. Rivera*, 837 F. Supp. 565, 569-70 (S.D.N.Y. 1993) (holding that all information pertaining to a client's application for amnesty was discoverable and not subject to the attorney-client privilege). "This information is not privileged because the client did not have the expectation that it would remain confidential." *Id.* at 10.

[4] Petitioner also mentions a "work product" privilege, which appears to refer to the protections of Federal Rule of Civil Procedure 26(b)(3)(A) and/or Federal Rule of Civil Procedure 26(b)(3)(B),

withheld documents and redactions *in camera* at this point. Instead, the Court asks IER to review the privilege log, meet and confer with the Petitioner, and if any asserted privilege cannot be resolved, the parties may then bring the dispute to this Court to resolve with *in camera* review of the withheld documents and redactions.

4. Relevance and Privacy

Finally, Petitioner asserts that the request for personnel files requested by IER, in particular performance evaluations, "exceeds the scope of its authority" because the information is irrelevant and the value of the information outweighs the privacy interest of the affected individual. Pet. 19. IER argues that the performance appraisals are relevant because the charging party alleges that she sought permanent positions with the Petitioner, and Petitioner selected PERM beneficiaries who were already working for Respondent in temporary positions. Opp.'n11. The appraisals are relevant to why these individuals were selected. *Id.* IER argues that its request is narrow—it only seeks documents relating to nine specific individuals whom Respondent hired instead of the charging party. *Id.* at 12.

Relevance in an administrative investigation is broadly construed—even more so than in discovery. *In re Investigation of Tropicana*, 9 OCAHO no. 1060, 4 (2000), comparing *EEOC v. Shell Oil Co.,* 466 U.S. 54, 68–69 (1984) ("virtually any material that might cast light on the allegations") to Fed R. Civ. P. 26 ("any matter, not privileged, which is relevant to the subject matter involved in the pending action").

In employment discrimination cases, courts have routinely ordered the production of personnel files of third parties. *Nakagawa v. Regents of Univ. of Cal*., 2008 WL 1808902, at *2 (N.D. Cal. Apr. 22, 2008) (citing *Ceramic Corp. of Am. v. Inka Mar. Corp.,* 163 F.R.D. 584 (C.D. Cal. 1995)); *see Sanchez v. City of Santa Ana,* 936 F.2d 1027, 1034 (9th Cir. 1990) (noting that an employee "may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances") (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)).

Though not a recognized privilege, federal courts have nevertheless recognized a person's interest in preserving confidentiality of information contained in his or her personnel files. *Nakagawa,* 2008 WL 1808902, at *2. Courts have balanced the need for discovery and defendants' privacy rights. *Id.* In *Nakagawa*, the court found that a plaintiff's original request for "complete" personnel files to be overbroad, but a narrowed request struck the appropriate balance. *Id.* at *3, n. 2.

IER has persuasively made the case that because the employees selected for the positions were current employees, their performance evaluations may be relevant to why they were selected over the Charging Party. The request is limited to the nine individuals chosen over the Charging Party. In recognition of the employees' privacy, however, the Court will grant a modification and limit

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which relate to documents prepared by a party or its representative in anticipation of litigation. IER argues that these documents were generated before litigation so the work product privilege cannot attach. To the extent Petitioner relies on this privilege, it must provide sufficient support in the privilege log to support the assertion.

the disclosure to those parts of the personnel file relating to the performance and skills of the employees, as well as any other documents the company relied upon in choosing to hire the employees, to the extent the information has not already been produced.

Lastly, as to burden, Petitioner has the heavy burden of proving that an administrative subpoena is unduly burdensome. *Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751, at 243. Petitioner must prove that compliance with a subpoena "would seriously disrupt its normal business operations" given that "the costs of complying with government subpoenas are a normal cost of doing business which should be borne by the company." *Tropicana Casino and Resort*, 9 OCAHO no. 1060, at 2. "Generalized and unsupported claims of undue burden do not meet this standard." *In re Investigation of Univ. of S. Fla.*, 8 OCAHO no. 1055, 843, 848 (2000). Petitioner has merely noted that the request is burdensome. This assertion does not meet the standard articulated in *Tropicana* and falls within the admonishment in *Univ. of S. Fla.* that "[g]eneralized and unsupported claims of undue burden do not meet this standard." *Tropicana Casino and Resort*, 9 OCAHO no. 1060, at 2; *Univ. of S. Fla.*, 8 OCAHO no. 1055, at 848.

Accordingly, the Petition to revoke the subpoena is DENIED. The petition to modify the subpoena is GRANTED in that Petitioner does not need to produce documents relevant to the subpoena that have already been produced. Further, the subpoena is modified to limit the production of the personnel files of the employees hired for the nine positions the Charging Party applied for to those parts of the personnel file relating to the performance and skills of the employees, as well as any other documents the company relied upon in choosing to hire the employees, to the extent the information has not already been produced. Petitioner must produce a privilege log for any documents it intends to withhold based on the privilege. Petitioner must produce any responsive documents by **July 3, 2025**. Should the government remain unsatisfied with Petitioner's response, it may file a motion to compel discovery pursuant to 28 C.F.R. § 68.23.

SO ORDERED.

Dated and entered on June 25, 2025.

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Honorable Jean C. King
Chief Administrative Law Judge