

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

February 4, 2020

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 19A00056
)	
AUTOTECH TECHNOLOGIES LP,)	
Respondent.)	
)	

DENIAL BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF RESPONDENT'S
MOTION TO VACATE FINAL DECISION AND ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This case arises under the employer sanctions provision of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2018). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or Complainant) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent Autotech Technologies LP (Respondent) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to present Employment Eligibility Verification Forms (Forms I-9) for thirty-five employees, failing to timely prepare Forms I-9 for forty-three employees, and failing to properly complete Forms I-9 for an additional four employees. ICE's complaint sought a total of \$76,670 in civil penalties for the alleged violations. The case was assigned to Chief Administrative Law Judge (ALJ) Jean King.

The complaint and Notice of Case Assignment were served on both parties via certified U.S. mail. The Notice of Case Assignment referenced the regulations governing OCAHO cases and identified where and how Respondent could obtain a copy of those regulations. It also informed the Respondent of the procedures and timeline for filing an answer, as well as the potential consequences for failing to do so. Service of the complaint and Notice of Case Assignment was completed on September 23, 2019. OCAHO's regulations provide that each Respondent must file an answer to the complaint within thirty days of service of the complaint, *see* 28 C.F.R. § 68.9(a) (2019), making Respondent's answer due by October 23, 2019. Respondent failed to file an answer by this date.

Due to Respondent's failure to file an answer, on November 8, 2019, Chief ALJ King issued a Notice and Order to Show Cause, directing the Respondent to show cause why its request for hearing should not be deemed abandoned. In order to do so, Respondent was directed to "(1) provide facts sufficient to demonstrate good cause for the prior failure to file an answer;

and (2) file an answer that comports with 28 C.F.R. § 68.9.” Notice and Order to Show Cause, at 2. The Notice and Order to Show Cause also warned that a failure to comply may result in dismissal of the case. *See id.* The deadline for Respondent to file a response to the Notice and Order to Show Cause was November 25, 2019. Respondent did not file a response by this date, or in the ensuing several weeks.

Accordingly, on December 17, 2019, Chief ALJ King issued a Final Decision and Order of Dismissal (Final Order), finding that Respondent had abandoned its request for hearing due to its failure to file an answer or to respond to the Notice and Order to Show Cause. The Final Order therefore dismissed the complaint and provided that ICE’s Notice of Intent to Fine would become the final order in the case.

On January 3, 2020, OCAHO received Respondent’s Motion to Vacate Final Decision and Order of Dismissal (Motion to Vacate). The Motion to Vacate asserted that counsel for Respondent had been working with Complainant to reach a settlement, and requested that the Final Order be vacated and the matter “be reinstated for the sole purposes of accepting a Settlement Agreement and subsequently voluntarily dismissing this matter pursuant to the same.” Mot. to Vacate, ¶ 10.

Respondent’s Motion to Vacate will be construed as a request for administrative review pursuant to 28 C.F.R. § 68.54. For the reasons stated below, Respondent’s Motion to Vacate is DENIED.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer (CAHO) has discretionary authority to review the final order of an ALJ in cases arising under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Pursuant to OCAHO’s rules of practice and procedure, a party may file a written request for administrative review within ten days of entry of the ALJ’s final order, 28 C.F.R. § 68.54(a)(1), or the CAHO may review an ALJ’s final order on his or her own initiative by issuing a notification of administrative review within ten days of entry of the ALJ’s final order, 28 C.F.R. § 68.54(a)(2). Within thirty days of the date of the ALJ’s final order, the CAHO may enter an order that modifies or vacates the ALJ’s order or remands the case for further proceedings. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications “has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.” 5 U.S.C. § 557(b). This authorizes the CAHO to apply a de novo standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263a, 2 (2015);¹ *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1217, 3 (2014) (order by the CAHO).

¹ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and 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, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not been reprinted in a bound volume, are to

III. DISCUSSION

A. Respondent's Motion to Vacate Final Decision and Order of Dismissal Is Construed as a Request for Administrative Review

Respondent's Motion to Vacate was served on Chief ALJ King, rather than on the CAHO, and is styled as a motion rather than as a request for administrative review by the CAHO. However, the Motion to Vacate expressly requests that the Final Order be vacated. The authority to vacate an ALJ's final order in cases under 8 U.S.C. § 1324a has been delegated to the CAHO by regulation. *See* 28 C.F.R. § 68.54(a), (d). An ALJ is authorized to correct "any clerical mistakes or typographical errors" in a final order in a case under § 1324a, but any changes other than clerical or typographical ones (in other words, any substantive changes) in such a final order are considered only through the administrative review process. *See* 28 C.F.R. § 68.52(f). Since Respondent's Motion to Vacate requests more than simply clerical or typographical changes to the Chief ALJ's Final Order, it may only be considered by the CAHO under the administrative review process pursuant to 28 C.F.R. § 68.54. Respondent's Motion to Vacate is therefore construed as a request for administrative review and will be evaluated accordingly. *Cf. United States v. Greif*, 10 OCAHO no. 1183, 2-3 (2013) (construing a letter filed by the respondent as a request for administrative review); *United States v. Davila*, 7 OCAHO no. 936, 252 (1997) (accepting a Motion for Recusal as a request for administrative review).

B. Respondent's Motion to Vacate Was Untimely and Improperly Filed and Served

Having construed the Motion to Vacate as a request for administrative review, the Motion to Vacate will be denied because it was untimely filed and improperly filed and served.

1. Untimeliness

Under OCAHO's rules, a party may file a written request for administrative review within ten days of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). In this case, because the ALJ issued the Final Order on December 17, 2019, the deadline for filing a request for administrative review was December 27, 2019. Respondent's Motion to Vacate was sent by Respondent's counsel on December 30, 2019, and was received by OCAHO on January 3, 2020. Because pleadings are not deemed filed until they are received by OCAHO, 28 C.F.R. § 68.8(b), Respondent's Motion to Vacate was deemed filed on January 3, 2020. Because the Motion to Vacate was filed seven days after the deadline for filing a request for administrative review, Respondent's Motion to Vacate is untimely.

OCAHO case law is replete with examples of requests for administrative review being denied by the CAHO because they were untimely filed. *See, e.g., Buffalo Transp., Inc.*, 11 OCAHO no. 1263a; *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247a (2015); *United States v. Chen's Wilmington, Inc.*, 11 OCAHO no. 1241 (2015); *United States v. Silverado Stages, Inc.*, 10 OCAHO no. 1185 (2013); *United States v. Cordin Co.*, 10 OCAHO no. 1162

pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. OCAHO published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on OCAHO's website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions#PubDecOrders>.

(2012); *United States v. De Luca's Mkt., Inc.*, 8 OCAHO no. 1038, 591 (1999); *United States v. Christie Auto. Prods.*, 2 OCAHO no. 365, 518 (1991); *United States v. Dodge Printing Ctrs., Inc.*, 1 OCAHO no. 181, 1200 (1990). Numerous OCAHO cases have also emphasized the importance of timely filing and service of documents in the administrative review process. *See Buffalo Transp., Inc.*, 11 OCAHO no. 1263a, at 4-5; *Horno MSJ, Ltd.*, 11 OCAHO no. 1247a, at 2-3; *Silverado Stages, Inc.*, 10 OCAHO no. 1185, at 3; *Greif*, 10 OCAHO no. 1183, at 4; *De Luca's Mkt., Inc.*, 8 OCAHO no. 1038, at 592. For instance, in *United States v. Greif*, 10 OCAHO no. 1183, 4 (2013), the undersigned explained that "because review by the CAHO must be conducted within strict time frames, *see* 28 C.F.R. § 68.54(d), prompt and proper service of a request for review and associated documents is particularly important." Furthermore, as noted in *United States v. Silverado Stages, Inc.*, 10 OCAHO no. 1185, 3 (2013):

The ten-day time limit for requesting review was included in OCAHO's procedural regulations because it was "necessary to provide for an orderly consideration of the parties' submissions" within the statutorily-mandated thirty-day review period. 64 Fed. Reg. 7,066, 7,072 (Feb. 12, 1999). Moreover, since the regulations also impose a deadline for all parties to file briefs or other documents related to administrative review within twenty-one days of the date of the final ALJ order, it is imperative that requests for review be filed and served in a timely manner in order to give the opposing party in the case sufficient time to respond to the request. *See* 28 C.F.R. § 68.54(b). Therefore, requests for review that are filed and served more than ten days after the date of the ALJ's order risk being rejected as untimely.

In this case, Respondent's Motion to Vacate was filed a full seven days beyond the ten-day deadline, without any request (or sufficient justification) to toll the filing period. Assuming that the Complainant received the Respondent's Motion to Vacate on the same day it was received by OCAHO, they would have had just four days (and only two business days) to file a responsive brief or other document, given that the deadline for such briefs is twenty-one days after the date of entry of the final decision and order. Respondent's late filing also substantially cut short the time in which the CAHO could review the Motion to Vacate and the underlying record of proceedings to determine if the ALJ's Final Order should be vacated.

Because Respondent's Motion to Vacate was filed well outside the ten-day deadline for filing requests for review pursuant to 28 C.F.R. § 68.54(a)(1), and Respondent did not offer a sufficient explanation for the late filing that might support tolling of the ten-day deadline, the Motion to Vacate is untimely and as such is denied.

2. Improper Filing and Service

In addition to being untimely, Respondent's Motion to Vacate was also improperly filed and served. OCAHO's rules require that all requests for administrative review, as well as all briefs or other filings related to CAHO review, be filed and served by facsimile, same-day hand delivery, or overnight delivery. 28 C.F.R. § 68.54(c). The Certificate of Service accompanying Respondent's Motion to Vacate indicates that it was sent to OCAHO and the Complainant "via US Mail." Mot. to Vacate, at 3. Taking this certificate of service at face value, *see Lewis v. Ogden Servs.*, 2 OCAHO no. 384, 704, 705 (1991), and considering that the Motion to Vacate was not received by OCAHO until four days after the date it was served, Respondent apparently

failed to comply with OCAHO's rules requiring expedited filing and service of requests for review and associated documents. As the undersigned explained in a previous decision,

When a case is before an OCAHO ALJ and is not subject to strict, short statutory deadlines, a single instance of late filing or defective service may not mandate rejection of the improperly-filed document or dismissal of the case. *Greif*, 10 OCAHO no. 1183 at 3. However, given the twenty-one day deadline for filing briefs, *see* 28 C.F.R. § 68.54(b)(1), and the thirty-day statutory and regulatory deadline for the CAHO to modify, vacate, or remand an ALJ order, *see* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1), the filing deadlines and expedited service requirements for requests for review and related documents are of paramount importance. Strict adherence to these deadlines and requirements is necessary to enable all parties to the case to submit briefs related to the request for review and for the CAHO to conduct a thorough review of the request and the administrative record in the case. *See Silverado Stages, Inc.*, 10 OCAHO no. 1185 at 3.

Buffalo Transp., Inc., 11 OCAHO no. 1263a, at 5 (noting also in a footnote that, “where parties are represented by counsel in a matter, as respondent is here, there is less leniency for noncompliance with OCAHO rules than where the party appears pro se.”). As was true in *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263a (2015), in this case, Respondent's late filing and improper filing and service of the Motion to Vacate severely shortened the Complainant's response time and substantially limited the CAHO's opportunity to review the request and the underlying case record. For those reasons, the Motion to Vacate is denied.²

C. The Motion to Vacate Does Not State Sufficient Grounds to Vacate the Final Order of Dismissal

Even if the Respondent's Motion to Vacate had been timely and properly filed and served, the undersigned would nevertheless decline to vacate the Chief ALJ's Final Order. In its Motion to Vacate, Respondent does not dispute that it failed to file a timely answer to the complaint or that it failed to file a timely response to the Chief ALJ's Notice and Order to Show Cause.³ Rather, Respondent merely attempts to explain its failure to file either of these

² The undersigned also notes that the signature on the Respondent's Motion to Vacate is suspect and potentially deficient. Under OCAHO's rules, each attorney appearing before OCAHO must file a notice of appearance. 28 C.F.R. § 68.33(f). In cases under 8 U.S.C. § 1324a, a request for hearing that is signed by an attorney and filed with ICE is generally considered to be a notice of appearance on behalf of the respondent for whom the request was made. *Id.* In this case, the request for hearing filed with ICE was signed by Anish Parikh. No other attorneys have properly entered an appearance on Respondent's behalf. Mr. Parikh is therefore considered to be the only attorney of record for the Respondent in this case. The Motion to Vacate purports to be signed by Mr. Parikh, but the motion does not include a hand-written signature, only the typewritten signature “/s/Anish Parikh.” Appearing under the signature line is not Mr. Parikh's name, but rather the phrase “One of her attorneys.” This raises questions as to whether the Motion to Vacate was indeed signed by Mr. Parikh himself, or whether it was signed by another attorney at Mr. Parikh's firm. To the extent that the Motion to Vacate may have been signed and filed by another unidentified attorney who has not properly entered an appearance in this proceeding, such filing would be in derogation of OCAHO's rules regarding participation by parties and representatives. *See generally* 28 C.F.R. § 68.33. However, Respondent's Motion to Vacate is not being denied on this basis, but rather because it was untimely filed and improperly filed and served.

³ In its Motion to Vacate, Respondent recounts that “OCAHO issued a Notice and Order to Show Cause directed at Respondent for its *alleged* failure to file its Answer.” Mot. to Vacate, ¶ 2 (emphasis added). However, Respondent does not affirmatively assert that it attempted to file an answer, and no answer was ever received by OCAHO. To

documents by asserting that counsel for Respondent had been engaged in settlement negotiations with the Complainant.

The timing of these negotiations is unclear from the face of Respondent's Motion to Vacate. Respondent asserts that counsel for Respondent had been working with Complainant on those negotiations "[t]hroughout the duration of this matter," and thus presumably dating back to the filing of the complaint in September 2019. Mot. to Vacate, ¶ 3. However, the first concrete action that Respondent identifies occurred on November 18, 2019, when "counsel for Respondent reached out to...the representative for Complainant" to attempt to find a resolution to the matter. See Mot. to Vacate, ¶ 4. Respondent asserts that the parties "reached a settlement in principal" on November 19, 2019, Mot. to Vacate, ¶ 5, and that Complainant provided Respondent with a draft copy of the proposed Settlement Agreement on December 5, 2019, Mot. to Vacate, ¶ 6. Respondent further asserts that, "[d]ue to Respondent's officers[]" international travel, counsel for Respondent was unable to discuss the Settlement Agreement with Respondent until December 23, 2019." Mot. to Vacate, ¶ 7. Of course, by that time, the Chief ALJ had already issued the Final Decision and Order of Dismissal, finding that Respondent had abandoned its request for hearing and therefore dismissing the complaint.

Similar cases evaluating a request for relief from a final order of dismissal based on abandonment have evaluated those requests under the standard set out in Federal Rule of Civil Procedure 60(b)(1).⁴ See, e.g., *Greif*, 10 OCAHO no. 1183; *United States v. Jabil Circuit, Inc.*, 10 OCAHO no. 1146 (2012). Rule 60(b)(1) provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" because of "excusable neglect." Fed. R. Civ. P. 60(b)(1). As recounted in *Greif*, demonstrating "excusable neglect" requires a higher showing than mere "good cause" for failure to respond to an ALJ's order. 10 OCAHO no. 1183, at 6. "[P]revious cases have found that failure to locate non-party witnesses in time to obtain affidavits did not constitute 'excusable neglect,' nor does the fact that counsel has a busy schedule or a backlog of cases." *Id.* (citing *United States v. O'Brien Oil Co.*, 1 OCAHO no. 142, 980, 982-83 (1990) (citing additional cases)). The undersigned also previously found that failure to direct mail to the appropriate person within a company, standing alone, was insufficient to constitute excusable neglect. See *Cordin Co.*, 10 OCAHO no. 1162.

In this case, Respondent has not demonstrated that its failure to file an answer or to respond to the Chief ALJ's Notice and Order to Show Cause was due to excusable neglect. Even accepting that counsel for Respondent was timely and actively engaged in settlement negotiations with Complainant throughout the pendency of these proceedings, Respondent nevertheless had a duty to both file an answer and respond to the Chief ALJ's order. As the undersigned noted in a previous case, "the fact that parties are in settlement negotiations does not excuse them from complying with an ALJ's order. At the very least, parties should request an extension of time to respond to the order or pleading, or seek a stay of the proceedings pending the outcome of settlement negotiations." *Jabil Circuit, Inc.*, 10 OCAHO no. 1146, at 3. Merely engaging in settlement negotiations with the opposing party while failing to timely file pleadings

the extent that Respondent's use of the word "alleged" here is an attempt to dispute that it failed to file an answer, the undersigned rejects that assertion and affirms the Chief ALJ's finding in the Final Order that Respondent did not file an answer to the complaint.

⁴ OCAHO's rules provide that the Federal Rules of Civil Procedure may be used as a guide in situations not provided for or controlled by OCAHO's rules or other applicable statutes or rules. 28 C.F.R. § 68.1.

and responses to ALJ orders (or otherwise communicate with the court in any way) does not constitute “excusable neglect” sufficient to relieve a party from a final order of dismissal based on abandonment.

Therefore, even if Respondent’s Motion to Vacate had been timely and properly filed and served, it does not state sufficient grounds to vacate the Chief ALJ’s Final Decision and Order of Dismissal.

IV. CONCLUSION

Respondent’s Motion to Vacate is construed as a request for administrative review by the CAHO. Because Respondent’s Motion to Vacate was filed well beyond the ten-day deadline for filing requests for administrative review, and because it was both improperly filed and served, it is hereby DENIED. Moreover, even if the Motion to Vacate had been timely and properly filed and served, it does not present sufficient grounds to vacate the Chief ALJ’s Final Decision and Order of Dismissal in this case.

Under OCAHO’s rules, an ALJ’s final order becomes the final agency order sixty (60) days after the date of the order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Since I have denied Respondent’s Motion to Vacate, and thus have declined to modify or vacate the Chief ALJ’s final order, the Final Decision and Order of Dismissal will become the final agency order sixty days after its date of entry. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within forty-five days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.⁵

It is SO ORDERED, dated and entered this 4th day of February, 2020.

Robin M. Stutman
Chief Administrative Hearing Officer

⁵ Of course, Respondent remains free to continue negotiating with ICE regarding settlement of the matter, if Complainant is amenable to continuing those negotiations.