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

June 1, 2023

UNITED STATES OF AMERICA, Complainant, v. KOY CHINESE & SUSHI RESTAURANT, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2022A00015

Appearances: John C. Wigglesworth, Esq., for Complainant[1]
Kevin Lashus, Esq., for Respondent[2]

ORDER DENYING COMPLAINANT'S MOTION TO ACCEPT LATE FILING AND DENYING PARTIES' MOTION FOR CONSENT FINDINGS

I. PROCEDURAL HISTORY[3]

Respondent, Koy Chinese & Sushi Restaurant, requested a hearing before an administrative law judge, pursuant to 8 U.S.C. § 1324a(e)(3).

On January 10, 2022, Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (DHS or ICE), filed a complaint with the Office of the Chief Administrative

[1] Wigglesworth is the DHS counsel of record by way of filing the Complaint. 28 C.F.R. § 68.33(f).

[2] Lashus is the Respondent counsel of record by way of filing the Request for Hearing with Complainant. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416, 1 n.1 (2022) (citing § 68.33(f)).

[3] The Court derives this procedural history from prior orders and the May 9, 2023 submission.

Hearing Officer (OCAHO). That same day, OCAHO issued a Notice of Case Assignment Alleging Unlawful Employment (NOCA) for this matter. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416, 1–2 (2022).[4] OCAHO mailed the NOCA and accompanying materials to the parties. *Id.*

On January 15, 2022, Respondent received the NOCA package. *Id.* at 2. On January 18, 2022, Complainant received the NOCA package.

According to Complainant's most recent submission, DHS counsel of record was on extended military orders. *See* Mot. Accept Late Filings 2. Complainant did not file a new notice of appearance for alternate counsel under 28 C.F.R. § 68.33(f).[5]

On February 9, 2022, "while [DHS counsel of record] was on military orders, [Respondent] returned the signed settlement agreement" to DHS. Mot. Accept Late Filings 2 ¶ e; *see also* Settl. Agmt.

On February 14, 2022, Respondent's Answer was due. 28 C.F.R. § 68.9(a).

On March 7, 2022, DHS counsel of record (having returned briefly from military status) reviewed a draft settlement agreement. Mot. Accept Late Filings 2 ¶ f. He "approved [it] as to form" and "forwarded the signed settlement agreement to [the] client, Homeland Security Investigations [(HSI)], for approval." *Id.* at 2 ¶ i; *see also* Settl. Agmt.

Meanwhile, the Court, unaware of the active settlement discussions, issued an Order to Show Cause (regarding Respondent's Answer) on March 22, 2023. *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416, at 1. After receipt of the Order to Show Cause,[6] Respondent filed nothing, and

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[4] 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, 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.

[5] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

[6] Service of an order may be made "[b]y mailing to the last known address" of a party, or that party's attorney of record. 28 C.F.R. § 68.3(a)(3); *see also* 28 C.F.R. § 68.7(b)(2) (requiring a complaint indicate "[t]he names and addresses of the respondents, agents, and/or their

neither party felt compelled to inform the Court of their active settlement discussions and pending settlement agreement.

On March 14, 2022, DHS counsel of record was once more on an extended absence due to military service. Mot. Accept Late Filings 2 ¶ j. Once more, Complainant declined to file a notice of appearance for an alternate counsel.

On April 11, 2022, a Special Agent in Charge from DHS' HSI signed the settlement agreement. *Id.* at 3 ¶ k; *see also* Settl. Agmt. The parties did not contemporaneously advise the Court of settlement, nor did they move the Court for dismissal following execution of the settlement agreement.[7]

On June 8, 2022—after receiving neither an answer nor a response to the Order to Show Cause—the Court entered default judgment as to Respondent's liability. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a, 1 (2022). Following the entry of default judgment in favor of Complainant, the Court elected to bifurcate the penalty analysis. *Id.* at 5–6. This was, in part, due to the state of the record. The Court identified deficiencies in the record, including the lack of "evidence in the record to indicate that the penalty proposed by Complainant is 'reasonable,'" *id.* at 5,[8] and the Court further noted the "record [had] not been developed as to the date violations occurred[,]" *id.* at 6.[9] The Court provided Complainant an opportunity to "develop the record on penalties by way of supplemental filing[,]" *id.* at 5, and to "supplement the record with evidence

representatives"). Absent evidence to the contrary, the Court will presume the represented parties here provided accurate addresses. The Court will also presume delivery of the order to both parties occurred here, because the orders were never returned as undeliverable.

[7] Parties may request to leave the forum by way of a motion to dismiss based on notice of settlement, *see* 28 C.F.R. § 68.14(a)(2).

[8] The Court advised that Complainant had the burden with respect to penalty. *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a, at 5. The Court also identified OCAHO precedent holding that DHS could not meet its burden on penalties when it failed to provide evidence, and declining to aggravate penalty factors based purely on argument. *Id.* at 5–6 n.6 (citing *United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412a, 3 (2022)); *see also United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 32 (2022) ("[A]rgument is not evidence[.]") (citation omitted).

[9] The Court advised that while it would "take facts asserted by Complainant as true," Complainant still had the burden to "allege facts establishing each element of a violation of law." *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a, at 4 (citations omitted).

as to when the violations occurred to meet its burden of proving penalties."[10] *Id.* at 6. The parties filed nothing in response to the June 2022 order entering default judgment.

On February 16, 2023, the Court issued a Notice & Opportunity to be Heard on Non-Statutory Penalty Factor (Lack of Prosecutorial Interest & Insufficiently Developed Record). *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b, 1 (2023).[11] After being provided with notice and an opportunity to respond, the parties again declined to submit matters for the Court's consideration. They also declined to inform the Court they had entered into a settlement agreement almost a year earlier.

On May 9, 2023—eleven months after default judgment and over a year after the parties entered into a settlement agreement—the Court received a filing from Complainant. Complainant provided a Motion to Accept Late Filings wherein it provided evidence which would have been responsive to the June 2022 order. It also contained a "Motion to Approve Consent Findings." Finally, the filing contained a signed copy of the April 2022 Settlement Agreement.

II. COMPLAINANT'S MOTION TO ACCEPT LATE-FILED EVIDENCE & ACCEPT CONSENT FINDINGS

Complainant claims that good cause exists for the Court to accept evidence[12] (which would have been responsive to the Court's June 2022 order). Complainant also seeks to have the Court rule

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[10] The parties' filings were due by July 1, 2022. *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a, at 6. The Court advised that the parties could rely on the Court's findings of fact "as evidence now established in the record" when briefing on penalties. *Id.* at 3 n.3.

[11] The Court (again) observed that the record lacked evidence as to when the failure to timely prepare violations occurred, and the hiring dates being critical to assessing penalties. *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b, at 2–3 nn. 4–5, 8. The Court admonished Complainant for failing to provide evidence (or even argument) as to when these violations occurred, and how that spoke to a lack of prosecutorial interest and insufficiently developed record. *Id.* at 3–4.

After advising Complainant the Court may consider a lack of prosecutorial interest and insufficiently developed record as a non-statutory factor in penalty assessment, the Court provided the parties "an opportunity to be heard ***only on this issue***." *Id.* at 4 (emphasis added). The parties had until March 2, 2023 to comment upon the non-statutory factor.

[12] Attached to its motion, Complainant provided: employment status information from the Texas Worksite Commission (TWC) in support of Counts I and II, along with Forms I-9 and start dates in support of Count I. Mot. Accept Late Filings 4–6; *see id.* at Ex. A–C.

on its Motion to Approve Consent Findings (which contains Consent Findings, a draft Order of Approval of Consent Findings, and the Settlement Agreement).

A. Complainant's Motion to Accept Late-Filed Evidence – Law & Analysis

In support of its Motion to Accept Late Filings, Complainant explains the DHS counsel of record "was not aware the [C]ourt had accepted the [C]omplaint," and the DHS counsel of record had not personally seen any of the Court's orders in this matter until April 2023. *See* Mot. Accept Late Filings 1. DHS counsel of record explained he was on military leave from January 30, 2021 to March 4, 2022, and then from March 14, 2022 to March 31, 2023. *Id.* at 2. DHS counsel also noted there was "an alternate trial counsel monitoring" this case; however, this "monitoring" attorney ceased to "monitor" any matters after August 1, 2022. *Id.* at 2 ¶ l. According to Complainant, this evidence was provided "[p]ursuant to the [C]ourt's order dated February 16, 2023 to supplement the record." *Id.* at 3 ¶ 2.

"[T]he Court employs a standard of good cause in deciding whether to credit a party's explanations and exercise discretion in accepting a late filing." *United States v. De Jesus Corrales-Hernandez*, 17 OCAHO no. 1453, 3 (2022) (citation omitted).

Complainant presents a flawed analysis, which is predicated on the idea that one DHS attorney's reasonable absence[13] from duty absolves Complainant (i.e., the United States) of all responsibility to respond to Court orders and otherwise participate in a forum in which it filed a complaint.

Complainant, at multiple points during these proceedings, could have (and perhaps should have) filed a notice of appearance for alternate counsel. Instead, Complainant used a "monitoring" attorney, which is inconsistent with 28 C.F.R. § 68.33, and here, was certainly ineffective.[14]

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[13] There are many good reasons why a government attorney might be absent from work, including, but not limited to, military service. Nothing in this Order should be construed as an opinion to the contrary; rather, the focus is on the actions (or inactions) of DHS, who did nothing to ensure continuous representation in this forum, among other issues identified in this and prior orders.

[14] The "monitoring" attorney, per Complainant's timeline, "monitored" the execution of a settlement agreement; "monitored" the issuance of default judgment on liability; and "monitored" the Court's annotation of all the deficiencies in the record in its June 2022 order. Additionally, the "monitoring" attorney apparently left this role in August 2022 and after that point, it appears that absolutely no one was "monitoring" this matter.

Even assuming, arguendo, that a "monitoring attorney" is a viable alternative to filing a notice of appearance, the dates here indicate this "monitoring attorney" would have received the order entering default judgement wherein the Court flagged issues in the record for Complainant.

Separately, Complainant characterizes the submitted evidence as responsive to the Court's February 2023 notice. It is not. The time to provide the evidence was in response to the Court's June 2022 order. The evidence is eleven months late-filed, not two months late-filed. The February 2023 notice makes clear that a responsive filing would be one which discusses the Court's consideration of a novel equity-based penalty assessment factor. Curiously, Complainant declined to submit any argument in its filings actually responsive to the notice.

Ultimately, the series of excuses provided by Complainant cannot constitute good cause for an eleven-month delay. *See United States v. MRD Landscaping & Maint. Corp.*, 15 OCAHO no. 1407c, 5 (2022) ("The ultimate inquiry is whether the circumstances in a particular case warrant a finding of good cause[.]") (citing *Efffjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003), and then citing *Dierschke v. O'Cheskey (In re Dierschke)*, 975 F.2d 181, 184 (5th Cir. 1992)). The Motion to Accept Late Filing (evidence) is therefore DENIED.

B. Complainant's Motion to Accept Consent Findings – Law & Analysis

The Court will now separately consider the Motion to Accept Consent Findings, jointly signed by the parties. The parties state they provided consent findings pursuant to 28 C.F.R. § 68.14. *See generally* Mot. Accept Consent Findings. The consent findings include, inter alia, proposed findings of facts pertaining to liability, *see id.*, and a finding that Respondent "agrees to pay penalties in the amount of [$57,240.16] as provided in the settlement agreement between the parties." *Id.* at 3 ¶ 5.

The decision to accept a settlement agreement and subsequently dispose of a case is one of discretion. "In the event an agreement containing consent findings and an interim decision and order is submitted, the [ALJ] . . . ***may***, if satisfied with its timeliness, form, and substance, accept such agreement by entering a decision and order based upon the agreed findings." 28 C.F.R. § 68.14(c) (emphasis added).

Here, the ALJ is not satisfied with the timeliness and substance of the proposed consent findings.

The submission is not timely. Indeed, it comes over a year after the parties executed a settlement agreement. If timing were the only issue, the Court would carefully weigh this deficiency against "strong judicial policy favoring the resolution of disputes through settlement." *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *see United States v. Cal. Mantel, Inc.*, 10 OCAHO no. 1168, 8 (2013) (citation omitted) ("Public policy favors the enforceability of settlement agreements and the concomitant avoidance of litigation."). However, as further explained below, the more serious substantive issues cause the Court to reject the consent findings and foreclose disposal of the case in the manner proposed by the parties.

The consent findings submitted by the parties ignore the findings of fact already made in the Court's June 8, 2022 order wherein it established liability by way of default. The parties provide no comment or argument in their joint submission explaining why the Court should disturb those findings of fact.

Separately, the consent findings are based on a settlement agreement that the Court cannot approve.

The Court generally has authority to consider the contents of a settlement agreement. *See Garcia v. Cam-Am Elec., LLC*, 15 OCAHO no. 1401, 2 (2021) (noting that 28 C.F.R. § 68.14 vests the Court with "the ultimate authority to approve or disprove a dismissal based on a settlement agreement"); *see also United States v. Lectro Tek Servs., Inc.*, 1 OCAHO no. 172, 1164, 1165 (1990) (noting the ALJ's power "to inquire, indeed, the obligation in an appropriate case, concerning the form and substance of an underlying agreement to obtain a dismissal.").

While there are some unorthodox terms in the agreement, generally, parties are free to contract for terms they deem appropriate. However, this is not *carte blanche*.

At issue here is a particular term located at paragraph 7 which states in pertinent part "upon execution of the Agreement, HSI will issue a Final Order (Form I-764) in this Action, which is a final and unappealable order pursuant to Section 274A(e)(3)(B) of the Act."

Simply put, the Complainant does not have the authority to issue a "Final Order."[15] This is clear from both the plain language of the statute and through OCAHO precedential cases.

After a hearing is requested (as is the case here), the statute states the hearing "shall be conducted before an administrative law judge." 8 U.S.C. § 1324a(e)(3)(B). The next subsection, "Issuance of orders," states "if the administrative law judge determines . . . [a person or entity] violated subsection (a) or (g)(1), the administrative law judge shall . . . cause to be served an order described in paragraph . . . (4), (5), or (6)." § 1324a(e)(3)(C).

Further, when a hearing is requested (as is the case here), a respondent is entitled to administrative appellate review and judicial review of the Final Order. § 1324a(e)(7)–(8).

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[15] In the context of settlement, Complainant can: submit an agreement containing consent findings, with a proposed decision and order, *see* 28 C.F.R. § 68.14(a)(1); or file a motion to dismiss based on notice of settlement, *see* 28 C.F.R. § 68.14(a)(2). For context, the requirement for an ALJ's Final Order are found at 28 C.F.R. § 68.52.

Based on the reference to subsection (e)(3)(B), it is possible the parties mistakenly believed that DHS had the authority to deem a request for a hearing abandoned; however the Department does not have this authority, just as it does not have the authority to issue a Final Order.

While the statute itself is quite clear, OCAHO also has long-established precedent reminding Complainant that the authority to issue Final Orders rests exclusively with OCAHO:

> [I]t is the administrative law judge (ALJ), not INS,[16] that conducts a [§ 1324a] proceeding; once the proceeding has begun, it is this Office, not INS, who [can] issue final and unappealable orders pursuant to subsection (e)(3).[17] Whatever powers one party to an agreed disposition confers on another, inter se, is between them, and does not disturb the jurisdiction of this Office until the statutory and regulatory procedures contemplated by IRCA have run their course.

United States v. Jupiter Crab Co. Rest., 1 OCAHO no. 6, 18, 20 n.3 (1988). Moreover:

> Since the outset of the employer sanctions program, both INS and the Administrative Law Judges (ALJ) who exercise jurisdiction over 8 U.S.C. § 1324a complaints have understood that the regimen obliges [DHS] to stay its hand in the issuance of final orders until a case is disposed of by the ALJ . . . [the ALJ] expect[s] INS will remind its personnel of the respective roles of the bench and the bar and the necessity to heed the separation of functions concept.

United States v. Enrique Silva, 8 OCAHO no. 1014, 252, 253 (1998).

As a collateral matter the Court separately notes that based on the content and drafting language in the Settlement Agreement, it is unclear whether the parties began performance. Parties should note that any contractual dispute arising from this Settlement Agreement cannot be resolved in this forum. Rather, disputes pertaining to contracts made with the United States may be resolved in the Court of Federal Claims or any other federal court of competent jurisdiction. *See generally About the Court*, U.S. CT. FED. CLAIMS, https://www.uscfc.uscourts.gov/about-court (last visited May 24, 2023).

C. CONCLUSION

The Court DENIES Complainant's Motion to Accept Late Filings.

The Court DENIES the parties' Motion to Approve Consent Findings.

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[16] References to legacy INS apply to its modern iteration ICE.

[17] Again, to have a final and unappealable order, an ALJ must first deem the request for hearing abandoned. Absent a finding of abandonment, a Respondent is entitled to appellate and judicial review.

The Final Order on Penalties is forthcoming.

SO ORDERED.

Dated and entered on June 1, 2023.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge