

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

UNITED STATES OF AMERICA,	)	
	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	
	)	OCAHO Case No. 2021A00028
SAL'S LOUNGE,	)	
	)	
Respondent.	)	
_____	)	

Appearances: Martin Celis, Esq., for Complainant
Fernando Chacon, Esq., for Respondent

AMENDED ORDER DISCHARGING ORDER TO SHOW CAUSE
AND SCHEDULING INITIAL PREHEARING CONFERENCE

The Court issued an Order Discharging Order to Show Cause and Scheduling Initial Prehearing Conference in the above-captioned case on February 15, 2022. This Amended Order Discharging Order to Show Cause and Scheduling Initial Prehearing Conference amends the Order dated February 15, 2022, and corrects solely for typographical and clerical errors.

I. PROCEDURAL HISTORY

On April 12, 2021, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Sal's Lounge. The complaint reflects that ICE served Respondent with a Notice of Intent to Fine (NIF) on February 1, 2021, Compl. 2, and Respondent, through counsel, thereafter made a timely request for a hearing on February 2, 2021. Compl. Ex. B.

On May 12, 2021, counsel for Respondent filed an answer to the complaint on behalf of Respondent. The answer included a general denial of the allegations, an assertion of affirmative defenses, and arguments for mitigation of the penalty amount. Answer 1-4.

Through its Order for Prehearing Statements and Initial Disclosures dated May 27, 2021, the Court directed the parties to file prehearing statements, make initial disclosures, and begin discovery at any time. After both parties registered for OCAHO's voluntary electronic filing program, the Court further ordered the parties to file electronically all pleadings in this case. On June 23, 2021, Complainant filed its prehearing statement.

Complainant then sought leave of Court to amend the complaint. *United States v. Sal's Lounge*, 15 OCAHO no. 1394a, 2 (2021).¹ Specifically, Complainant sought to amend the complaint by deleting the word "timely" from the sole count and including additional information from the NIF served on Respondent on February 1, 2021; no additional counts or charges were contemplated. *Id.* at 3. On October 15, 2021, the Court issued an Order Granting Motion to Amend Complaint and Directing Respondent to File Answer and Prehearing Statement. *Id.* at 4. The Court ordered Respondent to file an answer to the amended complaint and a prehearing statement within thirty days of issuance of the order. *Id.*

Having received neither Respondent's answer to the amended complaint nor Respondent's prehearing statement, the Court issued an Amended Notice and Order to Show Cause Regarding Answer to Amended Complaint and Prehearing Statement (Order to Show Cause) on January 11, 2022. *United States v. Sal's Lounge*, 15 OCAHO no. 1394b, 4 (2022). The Court ordered Respondent to file a "response in which it must show good cause for its failure to file an answer to the amended complaint and a prehearing statement[.]" an answer to the amended complaint, and a prehearing statement. *Id.* Moreover, the Court warned that if Respondent failed to respond or demonstrate good cause, "the Court may find that it has abandoned its request for a hearing pursuant to 28 C.F.R. § 68.37(b)(1), and, accordingly, may

¹ 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 at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

dismiss [Respondent's] request for a hearing.” *Id.* Respondent's filings were due by January 11, 2022. *See id.*; 28 C.F.R. § 68.8(c)(2).

Respondent's counsel filed by mail Respondent's Response to Court's Notice and Order to Show Cause Regarding Answer to Amended Complaint and Prehearing Statement (Response to Order to Show Cause), Respondent's Answer to Amended Complaint Regarding Unlawful Employment (Answer to Amended Complaint), and Respondent's Prehearing Statement. Although all three pleadings were dated and mailed January 4, 2022, the Court did not receive them until January 12, 2022. Thus, they are deemed to have been filed one day late. *See* 28 C.F.R. § 68.8(b) (“Pleadings are not deemed filed until received by [OCAHO.]”).

II. LEGAL STANDARDS

A. Default Judgments

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that a respondent's failure to file an answer may “constitute a waiver of his or her right to appear and contest the allegations of the complaint.” 28 C.F.R. § 68.9(b). The Court then “may enter a judgment by default.” *Id.* Nevertheless, OCAHO courts—similar to federal courts—generally disfavor default judgments. *See, e.g., United States v. R & M Fashion Inc.*, 6 OCAHO no. 826, 46, 47-48 (1995). For instance, the Fifth Circuit Court of Appeals has held that “[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by the courts only in extreme situations.”² *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) (citations omitted). It is preferable that cases are resolved on their merits, rather than through default judgments. *See* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2681 (4th ed. 2021). As such, OCAHO Administrative Law Judges (ALJs) generally will enter a default judgment only when “the inaction or unresponsiveness of a particular party is unexcusable and the inaction has prejudiced the opposing party.” *D'Amico, Jr., v. Erie Cmty. Coll.*, 7 OCAHO no. 927, 61, 63 (1997) (citations omitted).

B. Good Cause

² The Fifth Circuit Court of Appeals is the federal judicial circuit in which this case arises. *See* 28 C.F.R. § 68.56. As such, its precedent provides instructive guidance.

When a respondent fails to timely answer a complaint, the Court may issue an order to show cause as to why a default judgment should not be entered, and ask the respondent to justify its failure to file its answer on time. *United States v. Shine Auto Serv.*, 1 OCAHO no. 70, 444, 445-46 (1989) (Vacation by the CAHO of the ALJ's Order Denying Default Judgment). In deciding whether to accept a late-filed answer, the Court reviews the respondent's response to its order and determines whether "the [r]espondent possessed the requisite good cause for failing to file a timely answer[.]" *Id.* at 446.

As a means to determine whether good cause exists in this case, the Court will consider the following non-exhaustive factors: "(1) whether the failure to act was willful; (2) whether setting the [order to show cause] aside would prejudice the adversary; and (3) whether a meritorious claim has been presented." *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) (citation omitted); *see also Kanti v. Patel*, 8 OCAHO no. 1007, 166, 168 (1998) (applying factors). The Court also may consider whether the public interest was implicated, there was a significant financial loss to the party in default, and if the party acted expeditiously to correct the default. *In re Dierschke*, 975 F.2d 181, 184 (5th Cir. 1992).

III. DISCUSSION AND ANALYSIS

A. Timeliness of Respondent's Filings

Before considering whether good cause exists to discharge the Order to Show Cause, the Court must address the untimely filing of Respondent's pleadings, namely, Respondent's Response to Order to Show Cause, Answer to Amended Complaint, and Prehearing Statement, all dated January 4, 2022. Although Respondent could have—and should have—filed its pleadings electronically that same day, it mailed them to Complainant and the Court, resulting in their untimely filing on January 12, 2022. *See* 28 C.F.R. § 68.8(b) ([p]leadings are not deemed filed until received by [OCAHO] . . . or the Administrative Law Judge assigned to the case.).

OCAHO ALJs have discretion to accept late filings. *See Villegas-Valenzuela v. INS*, 103 F.3d 805, 811 n.5 (9th Cir. 1996) (citing 28 C.F.R. § 68.11(b)) ("the [OCAHO] ALJ maintains discretion to accept pleadings within a time period he may fix."); *see also United States v. Ricky Catalano*, 7 OCAHO no. 974, 860, 863-64 (1997) (explaining that "it was within the discretion of the Administrative Law Judge (ALJ) to consider a late response."). Given that Respondent's filings were mailed more than a week before the deadline of January 11, 2022, and were received just one day late,

the Court will exercise its discretion and accept the filings. *See Villegas-Valenzuela*, 103 F.3d at 811 n.5 (finding no abuse of discretion where OCAHO ALJ accepted motion filed three days late); *see also Zajradhara v. Donghui Kengxindun Corp.*, 14 OCAHO no. 1382, 2-3 (2020) (accepting respondent's motion dated and mailed before the filing deadline but received twenty days late).

The Court reminds Respondent that it granted the parties' request to allow them to file electronically all filings in this case and accept electronic service of case-related documents from OCAHO and the opposing party. As the Court ordered on June 7, 2021, the parties shall file electronically their pleadings in this case, rather than sending the filings by United States mail or overnight delivery service. Participation in the electronic filing pilot program is voluntary though. OCAHO's Practice Manual, Ch. 3.7(a).³ If Respondent is unable, or no longer wishes, to participate in the program, it shall file a written motion to that effect with the Court.

B. Order to Show Cause

The Court next exercises its discretion and considers whether good cause exists to discharge the Order to Show Cause against Respondent. Construing good cause generously, the Court finds that the factors identified above weigh in favor of accepting Respondent's Answer to Amended Complaint and Prehearing Statement, and discharging the Order to Show Cause so that this case can be decided on the merits.

First, the Court considers whether Respondent's failure to act was due to a willful disregard for the legal process or an intentional failure to respond to litigation. Respondent's counsel asserts that the failure to answer the amended complaint and file its prehearing statement in a timely fashion was "wholly unintentional and resulted from unavoidable circumstances," namely, counsel's "[p]oor [m]edical [c]ondition." Resp. Order to Show Cause 4. Specifically, counsel discloses and describes medical issues, including one that required hospitalization. *Id.* at 3. These medical issues, including one which affects his eyesight, resulted in Respondent's counsel's inability to monitor his email account through which he receives the Court's orders in this case. *Id.* at 4.

³ OCAHO's Practice Manual may be found within the Executive Office for Immigration Review's Policy Manual on the United States Department of Justice's website: <https://www.justice.gov/eoir/eoir-policy-manual/part-iv-ocaho-practice-manual>.

The Court finds Respondent's counsel's representations to be credible. OCAHO courts have found that serious illnesses or challenges outside work may constitute good cause for a litigant's unintentional failure to meet a filing deadline. *See United States v. Treescapes, Inc.*, 15 OCAHO no. 1389, 2 (2021) (finding good cause for failure to timely file an answer based on the serious illnesses of respondent's president and counsel's care of a dying family member); *Woods v. Philips N. Am., LLC*, 14 OCAHO no. 1371, 3 (2020) (finding good cause for failure to answer complaint where, in part, respondent's counsel "encountered several challenges outside work that may have exacerbated the delay in receiving notice of these [OCAHO] proceedings."). Given counsel's medical issues, hospitalization, and medical difficulties pertaining to his eyesight, the Court finds that Respondent's failure to answer the amended complaint and file its prehearing statement was not willful or an intentional failure to respond to litigation.

Second, the Court evaluates whether Complainant would be prejudiced if the Court sets aside the Order to Show Cause. Although Respondent failed to timely file its answer to the amended complaint and prehearing statement, "[m]ere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion." *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1106, 3 (2004); *see also* Wright & Miller, *supra*, § 2699 (discussing types of prejudice and costs to the non-defaulting party). Here, the delay in answering the amended complaint amounts to less than sixty days, and the Court has not set any deadlines for the completion of the parties' discovery. Respondent's answer to the amended complaint raises no new issues: it is consistent with Respondent's answer to the initial complaint in that it generally denies the allegations, asserts the same affirmative defenses, and makes the same arguments for a lower penalty amount. Answer to Am. Compl. 1-4. Further, Complainant has asserted no prejudice if the Court accepts Respondent's late-filed answer to the amended complaint and prehearing statement. Complainant has neither moved for default judgment nor alleged that it would suffer any harm, evidentiary or otherwise, if the Court allows Respondent's late-filed submissions. Therefore, the lack of prejudice weighs in favor of discharging the Order to Show Cause and requiring Complainant prove its case.

Finally, the Court considers whether Respondent has presented any meritorious defenses to the amended complaint. Although these defenses need not be conclusively established, *Kanti*, 8 OCAHO no. 1007, at 171, a respondent's answer should clearly lay out both the specific contested allegations and issues in dispute. *Nickman*, 9 OCAHO no. 1106, at 4. The Court finds that Respondent has done so here. In its answer to the amended complaint, Respondent asserts a general denial

to the allegations and affirmative defenses, including good faith. Answer to Am. Compl. 1-2. Moreover, Respondent contests the penalty amount as excessive and argues for mitigation of the penalty amount based on a multitude of factors including small business size, inability to pay, and the COVID-19 pandemic. *Id.* at 2-4. Respondent further attaches various exhibits in support of its position, including an affidavit, itemized list of expenses, and a tax return. Answer to Am. Compl. Exs. A-C. In sum, the Court finds that Respondent has not waived its right to appear and contest the allegations of the amended complaint. *See* 28 C.F.R. § 68.9(b). This case shall proceed to a determination on the merits.

IV. INITIAL PREHEARING CONFERENCE

The Court will hold an initial telephonic prehearing conference on February 24, 2022, at 2 p.m. Eastern Standard Time in order to develop a case schedule, including dates for the completion of discovery, the filing of motions, and a hearing in this matter. 28 C.F.R. § 68.13. The Court also may schedule dates for the submission of a proposed final prehearing order and final prehearing conference.

At the conference, the parties should be fully prepared and have authority to discuss any questions regarding the case, including questions raised by the pleadings, jurisdiction, pending motions, motions contemplated to be filed, the probable length of time needed for discovery, and the possibility of settlement of the case. The parties will have the opportunity to discuss any problems confronting them, including the need for time in which to prepare for a hearing.

Before the conference, the parties shall confer regarding their preference for a virtual or in-person hearing. If the parties prefer an in-person hearing, they shall be prepared to tell the Court their preferred location for the hearing. Sections 274A(e)(3)(B) and 274C(d)(2)(B) of the Immigration and Nationality Act require that the Court hold a hearing “at the nearest practicable place to the place where the person or entity resides or to the place where the alleged violation occurred.” 28 C.F.R. § 68.5(b).

If the parties need to reschedule the initial prehearing conference, at least five days in advance of the date set for the prehearing conference, they shall provide the Court with written notice of a minimum of three proposed agreed dates and times in Eastern Standard Time for the rescheduled conference. The Court will confirm the date and time for the rescheduled conference either telephonically or in writing as soon thereafter as practicable.

V. DECISION AND ORDERS

Accordingly, the Court having exercised its discretion for the above-stated reasons, IT IS SO ORDERED that Respondent's late-filed Response to Court's Notice and Order to Show Cause Regarding Answer to Amended Complaint and Prehearing Statement, Answer to Amended Complaint Regarding Unlawful Employment, and Prehearing Statement are ACCEPTED as filings in this matter.

The Court having found that, for the above-stated reasons, good cause exists, IT IS FURTHER ORDERED that the Order to Show Cause against Respondent, Sal's Lounge, is DISCHARGED.

IT IS FURTHER ORDERED that the Court will hold an initial telephonic prehearing conference in this matter on February 24, 2022, at 2 p.m. Eastern Standard Time.

ENTERED:

Honorable Carol A. Bell
Administrative Law Judge

DATE: February 24, 2022