

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

October 20, 2022

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324c Proceeding
)	OCAHO Case No. 2020C00011
)	
SAMUEL TOMINIYI FASAKIN,)	
Respondent.)	
_____)	

Appearances: Samuel Yim, Esq., Jeffrey Bubier, Esq., and Mark Wilmoth, Esq., for Complainant
Mark Goldstein, Esq. and Jelena Gilliam, Esq., for Respondent

ORDER SUMMARIZING OCTOBER 18, 2022 POSTHEARING CONFERENCE

I. PROCEDURAL HISTORY

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324c. Complainant, 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) on November 4, 2019, alleging that Respondent, Samuel Tominiyi Fasakin, violated § 1324c(a)(2). On May 10, 2021, the Court issued a Final Decision and Order following a hearing on the merits. On June 8, 2021, the Chief Administrative Hearing Officer issued an Order by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge’s Final Decision and Order and Remanding for Further Proceedings. *See generally United States v. Fasakin*, 14 OCAHO no. 1375b, 1 (2021).¹

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

On September 21–22, 2022, the administrative law judge (ALJ) conducted a hearing pursuant to 28 C.F.R. § 68.39.² For reasons outlined at hearing and discussed below, the record was not closed at the conclusion of the hearing. *See infra* Part II.B.

On October 18, 2022, the ALJ held a posthearing conference. Mr. Samuel Yim appeared on behalf of Complainant.³ Mr. Mark Goldstein and Ms. Jelena Gilliam appeared on behalf of Respondent.

II. POSTHEARING CONFERENCE SUMMARY

A. Transcripts

At the onset, the ALJ inquired whether the parties had obtained transcripts from the September 21–22, 2022 hearing. *See* 28 C.F.R. § 68.48(a). Complainant and Respondent both advised that they had not yet received transcripts, but anticipated receipt shortly. The ALJ then explained that the parties would have the opportunity to submit motions to correct the hearing transcripts following receipt and review of the transcripts. *See* 28 C.F.R. § 68.48(b) (“Corrections of the official transcript will be permitted when errors of substance are involved and only upon approval of the [ALJ.]”)

Accordingly, the ALJ set a deadline of January 13, 2023⁴ for the parties to submit any motions to correct the transcript.⁵ The ALJ stated that a party seeking an extension of this deadline would be required to show good cause. *See Tingling v. City of Richmond*, 13 OCAHO no. 1324c, 2 (2021) (citations omitted). If no motions are filed, the ALJ indicated that the Court would move forward with transcript authentication.

B. Status of the Record

database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

³ Mr. Samuel Yim confirmed that, while not present at this conference, Mr. Jeffrey Bubier and Mr. Mark Wilmoth continue to appear on behalf of Complainant.

⁴ The ALJ selected this date to ensure sufficient time for parties to receive and review the transcript, and to account for a period of ALJ unavailability due to an upcoming detail to OCIJ.

⁵ The Court summarizes all deadlines set at the October 18, 2022 posthearing conference in the final section of this Order.

Next, the ALJ discussed the status of the record following the September 21–22 hearing. For context, the ALJ accepted a late-filed document from Respondent at hearing, marked as Exhibit R(II)-6.⁶ Mindful of Complainant’s inability at hearing to evaluate and determine whether, if at all, this evidence would impact its case in rebuttal, the ALJ elected to keep the record open at the conclusion of the hearing. *See* 28 C.F.R. §§ 68.49–50.

At the posthearing conference, parties provided an update on this issue. The parties confirmed that Respondent provided Complainant with the original of R(II)-6 from Nigeria. Complainant provided an electronic copy of this exhibit to Mr. Jonathan Casper (an expert witness who testified at hearing), who raised concerns regarding R(II)-6. These concerns form the basis of Complainant’s desire to engage in further investigation as to the validity of this document.⁷ Complainant also explained that it did not have a clear sense on when (or how) it would present evidence in response to R(II)-6.

The ALJ next discussed with the parties their positions on whether the record should be closed at this time. Because Complainant desired the opportunity to present additional evidence, Complainant then moved the Court to keep the record open.

The ALJ stated that her initial inclination was to keep the record open to allow Complainant additional time to formulate its position on whether, if at all, it would introduce additional evidence. The ALJ reasoned that this would not unduly delay case processing,⁸ and Complainant appeared to have been acting diligently to resolve the matter. Respondent indicated opposition to keeping the record open. The ALJ allowed Respondent to be heard.

Respondent made an oral motion that the Court close the record. Respondent argued that Complainant’s previous delay in exchanging evidence caused Respondent to untimely file exhibit R(II)-6. Respondent also argued in the alternative that it should be given additional time to respond to any evidence Complainant submits regarding R(II)-6 if the record remains open. Complainant opposed Respondent’s motion. Complainant argued that the amount of time elapsed was not unreasonably long and because Complainant bears the burden, Complainant should present evidence last.⁹

⁶ R(II)-6 is a letter dated September 21, 2022, with the header “LAGOS STATE JUDICIARY.”

⁷ Further investigation would entail providing the original to the witness and possibly coordinating an inter-agency request with the Department of State.

⁸ That is, because the parties had not received transcripts, and the Court would allow the parties to file motions to correct transcripts before setting the post-hearing schedule.

⁹ Specifically, Respondent should not be provided an opportunity to submit evidence after Complainant submits evidence rebutting the exhibit.

The ALJ first noted that as Respondent had placed R(II)-6 in the record, Complainant sought the opportunity to rebut that evidence only. The ALJ noted that the evidentiary presentation framework at hearing recognizes a complainant, who bears the burden, presents its case in chief, followed by an opportunity for a respondent to present evidence, and concluding with a complainant submitting new evidence in rebuttal.

The ALJ further reasoned that, here, allowing Respondent to submit more evidence after Complainant's rebuttal evidence would be inconsistent with the burden-shifting framework as outlined. Thus, the Court indicated it would close the record after receipt of the R(II)-6 rebuttal evidence from Complainant. Further, the ALJ concluded that parties argument and oral motions did not change her assessment that Complainant should be permitted additional time to present evidence in rebuttal.

Based on the foregoing, the ALJ DENIED Respondent's oral motion to close the record on October 18, 2022, or in the alternative, allow Respondent an opportunity to present additional evidence following presentation (if any) by Complainant. The ALJ advised Respondent that it may renew its motion after Complainant's proffer of testimony or its review of Complainant's new documentary evidence (i.e., Respondent may renew a motion to close the record or a motion to permit Respondent to file additional evidence based on Complainant's submission).

Next, the ALJ discussed her responsibility to build a record that memorializes and explains why the record continued to remain open following the hearing and the posthearing conference. *See* 28 C.F.R. § 68.49. Mindful of this responsibility, the ALJ stated that the record would close on January 26, 2023 (with or without any rebuttal evidence from Complainant), unless Complainant filed a motion articulating good cause to keep the record open after that date. Such a motion would need to explain Complainant's diligent efforts to obtain the rebuttal evidence (whether documentary evidence or witness testimony), or how circumstances outside Complainant's control impacted Complainant's ability to submit evidence.

The ALJ advised that such a motion from Complainant must be submitted by January 13, 2023, with the expectation that the parties 'meet and confer' about this issue in advance of that date. Respondent may provide a reply filing if he so desires.

Respondent's counsel indicated a desire to appeal the decisions made by the ALJ in the posthearing conference. The ALJ explained that Respondent was not required to "reserve appeal" in this forum; rather, counsel could review the applicable procedural regulations pertaining to interlocutory appeals located at 28 C.F.R. § 68.53.

Finally, the ALJ set a posthearing conference for January 26, 2023. The ALJ explained that the next posthearing conference would cover transcripts and the status of the record.¹⁰

III. UPDATED CASE SCHEDULE

On or before Friday, January 13, 2023, the parties shall file any motions for corrections of the official transcripts generated from the September 21–22, 2022 hearing.

On or before Friday, January 13, 2023, Complainant, if it desires to keep the record open, shall file a written motion demonstrating articulable good cause to do so.

On Thursday, January 26, 2023 at 11:00 a.m. EST (08:00 a.m. PST), the Court will hold a posthearing conference via the OpenVoice platform. Parties should be prepared to discuss their positions on transcripts, R(II)-6, and whether the record should be closed or remain open.

SO ORDERED.

Dated and entered on October 20, 2022.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

¹⁰ The ALJ previewed that, after closure of the record, the parties would be provided a posthearing schedule. The posthearing schedule would set deadlines for Complainant’s brief, Respondent’s brief, Complainant’s reply, and Respondent’s sur-reply, and provide additional guidance on topics helpful to the ALJ in the parties’ briefing.