

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

December 16, 2022

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2022A00051
)	
JS DESIGN AND BUILD, LLC)	
D/B/A SPECTRA KITCHEN AND BATH,)	
Respondent.)	
_____)	

Appearances: Josè Solisy, Esq. for Complainant
Christopher L. Scileppi, Esq. and Andrew Ross, Esq., for Respondent

ORDER ON COMPLAINANT’S MOTION FOR LEAVE TO AMEND COMPLAINT

I. Complainant’s Motion for Leave to Amend Complaint

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer on July 11, 2022. Complainant alleges that Respondent, JS Design and Build, LLC, d/b/a Spectra Kitchen and Bath, failed to properly complete Forms I-9 for forty-two individuals, in violation of § 1324a(a)(1)(B). On August 23, 2022, Respondent filed an answer and notices of appearance. On August 31, 2022, the Court issued an Order for Prehearing Statements, and subsequently issued a Notice and Order to Show Cause (Notice) on November 21, 2022, directing the parties to file prehearing statements.

On December 1, 2022, the Court received Complainant’s Motion for Leave to Amend the Complaint (C’s MTA). In its motion, Complainant seeks to amend the charges in the complaint, asserting that “amendment of the complaint will facilitate the determination of this controversy insofar as the First Amended Complaint seeks to clarify Complainant’s legal basis for recovery with respect to the allegations.” C’s MTA 1. Complainant attaches to its motion a First Amended Complaint (FAC), amending the allegations in the paragraphs below the heading for Count II to read: “The Respondent failed to prepare and/or present the Employment Eligibility Verification

Form (Form I-9) for the individuals listed in paragraph A after being requested to do so by an authorized agency of the United States.” FAC 5. Respondent has not filed an opposition to Complainant’s motion.

OCAHO’s rules¹ permit amendment of a complaint “[if] a determination of a controversy on the merits will be facilitated thereby” and “upon such conditions as are necessary to avoid prejudicing the public interests and the rights of the parties[.]” 28 C.F.R. § 68.9(e). “The Court is therefore charged with balancing those interests in determining whether to allow the proposed amendment.” *United States v. KLJ Leasing, LLC*, 16 OCAHO no. 1446, 2 (2022) (citations omitted).²

28 C.F.R. § 68.9(e) is “analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure,” which is permissive guidance in OCAHO proceedings. *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998); *see* 28 C.F.R. § 68.1. Federal Rule 15(a)(1) provides that: “a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Federal Rule 15(a)(2) further provides that “[i]n all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”

As Respondent filed an answer more than twenty-one days prior to Complainant’s Motion for Leave to Amend Complaint, Rule 15(a)(2) applies. Because this case arises in Arizona, the Court may also look to case law from the United States Court of Appeals for the Ninth Circuit. *See* 28 C.F.R. § 68.56. In the Ninth Circuit, courts look to several factors when considering a motion to amend pursuant to Rule 15(a)(2): (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006).

¹ 28 C.F.R. pt. 68 (2022).

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

The Court does not find that any of these factors are present in this case. As to delay, although the complaint was originally filed in June 2022, making the amendment a delay of around five months, the Complainant moved to amend shortly after, and presumably in response to, the Court's November 21, 2022 Notice, which included a footnote describing a discrepancy in the complaint.³ The record does not present evidence of bad faith, nor is there evidence of futility. Finally, given that Complainant's motion is unopposed, the early stage in litigation, and the fact that the proposed amendments are minor, the Court does not find undue prejudice to Respondent at this juncture.

Therefore, Complainant's Motion for Leave to Amend Complaint is GRANTED, and the First Amended Complaint is now the operative pleading in this matter.

As the answer was in response to the original complaint, the Court now sets a deadline for Respondent to file an amended answer. *See* 28 C.F.R. § 68.9; Fed. R. Civ. P. 15(a)(3); *e.g.*, *United States v. MRD Landscaping & Maint., LLC*, 15 OCAHO no. 1407, 4 (2021).

The Court ORDERS that Respondent file its Amended Answer to the Amended Complaint no later than January 12, 2023.

II. RESPONDENT'S PREHEARING STATEMENT

On November 21, 2022, the Court issued a Notice and Order to Show Cause, ordering Respondent to file with the Court a prehearing statement, as well as a response showing good cause for filing an untimely prehearing statement, within twenty days of the issuance of the order (December 11, 2022), in accordance with the Court's August 31, 2022 Order for Prehearing Statements. To date, the Court has not received Respondent's prehearing statement.

The Court will provide Respondent with one final opportunity to file a prehearing statement and a response showing good cause. Respondent is reminded that under OCAHO's Rules of Practice and Procedure for Administrative Hearings, the Court may dismiss "a complaint or a request for hearing" upon its abandonment by the party who filed it. 28 C.F.R. § 68.37(b). A party shall be deemed to have abandoned its complaint or a request for a hearing if it "fails to respond to orders issued by the Administrative Law Judge." 28 C.F.R. § 68.37(b)(1); *see also United States v. Sal's Lounge*, 15 OCAHO no. 1394b, 3 (2022); *United States v. AMA Repiping, LLC*, 15 OCAHO no. 1391, 2 (2021); *United States v. Hosung Cleaning Corp.*, 4 OCAHO no. 681, 776, 777–78 (1994).

³ Although the heading for Count II in the complaint and Notice of Intent to Fine (NIF) is "Failed to prepare and/or present the [Form I-9]," the paragraphs below this heading allege failure to properly complete Section 1 of the Form I-9 and/or failure to properly complete Section 2 or 3 of the Form I-9. *See* Notice 1 n.1 (first citing Compl. 5, and then citing Compl. Ex. A, 5)).

IT IS SO ORDERED that by January 12, 2023, Respondent JS Design and Build, LLC, shall file with the Court a prehearing statement as well as a response in which it shows good cause for filing an untimely prehearing statement, in accordance with this Court's August 31, 2022 Order for Prehearing Statements and November 21, 2022 Notice and Order to Show Cause.

SO ORDERED.

Dated and entered on December 16, 2022.

Honorable Jean C. King
Chief Administrative Law Judge