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

April 16, 2014

UNITED STATES OF AMERICA, Complainant, v. M & D MASONRY, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 13A00023

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER DECLINING TO MODIFY OR VACATE THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2006). 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 M&D Masonry, Inc. (M&D or Respondent) engaged in 364 violations of 8 U.S.C. § 1324a(a)(1)(B). The case was assigned to Administrative Law Judge (ALJ) Ellen K. Thomas.

The complaint was divided into two counts: Count I alleged that M&D failed to ensure that 277 named employees properly completed section 1 of the Employment Eligibility Verification Form I-9 and/or failed to ensure that the company properly completed section 2 of the form; Count II alleged that the company failed to prepare and/or present Forms I-9 for eighty-seven employees. ICE later filed a motion to amend its complaint to withdraw twenty-five of the violations alleged in Count I, leaving 339 alleged violations. ICE sought penalties in the amount of $981.75 for each violation, for a total requested penalty of $332,813.25.

Respondent filed an answer denying Complainant's allegations with respect to forty of the alleged violations in Count I and six of the alleged violations in Count II. Respondent's answer also raised six affirmative defenses.

Thereafter, the parties filed prehearing statements, and a telephonic prehearing conference was held, during which a schedule for discovery was set. Discovery was originally scheduled to terminate on December 2, 2013, but, at Respondent's request, ALJ Thomas extended the

discovery period until January 10, 2014. On January 6, 2014, OCAHO received Complainant's Motion for Summary Decision (dated December 31, 2013). On January 15, 2014, OCAHO received Respondent's Opposition to Complainant's Motion for Summary Decision.

On March 11, 2014, ALJ Thomas issued a final decision and order in the case, finding M&D liable for 338 of the violations alleged, but mitigating the total penalty to $650 for each of the violations in Count I and $750 for each of the violations in Count II, for a total civil money penalty of $228,300.[1]

On March 21, 2014, Respondent filed a request for administrative review by the Chief Administrative Hearing Officer (CAHO), pursuant to 28 C.F.R. § 68.54(a)(1). On April 1, 2014, Respondent filed a brief in support of its request for review. Also on April 1, 2014, Complainant filed a brief in support of affirmance of the final order issued by the ALJ. The request and briefs having been appropriately and timely filed, I gave full consideration to each of the filings, as well as any relevant portions of the official case record, in arriving at this decision.

II. JURISDICTION AND STANDARD OF REVIEW

A party seeking review by the CAHO may file a request for review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). The CAHO may issue an order modifying or vacating a decision by the ALJ in employer sanctions cases within thirty days of the date of the ALJ's final decision and order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1). Under the Administrative Procedure Act (APA), which governs the conduct of 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 decisions made by the 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. Red Coach Rest.*, 10 OCAHO no. 1200, 2 (2013)[2]; *United States v. Karnival Fashion*, 5 OCAHO no. 783, 477, 478 (1995).

III. DISCUSSION

Respondent raises a number of different issues in its request for review. Respondent's brief in support of its request expands upon some of these issues and raises several additional arguments not originally presented in the request for review. Complainant's brief in support of affirmance of the ALJ's order presents counter-arguments to all of the issues raised in Respondent's original request for review.[3] Each of the issues raised by Respondent will be discussed in turn.

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[1] The total penalty assessed by the ALJ amounts to a $104,513.25 reduction in the penalty proposed by ICE.

[2] 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 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 OCAHO's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] Under OCAHO's procedural rules, when administrative review has been properly requested or ordered, "the parties may file briefs or other written statements within twenty-one (21) days of the date of entry of the

A. OCAHO Precedent Regarding the Size of the Business, Proportionality, and Ability to Pay

1. Arguments of the parties

Respondent argues in its request for review that the ALJ's final decision and order constituted a departure from "recent, consistent OCAHO precedent." Respondent argues that it qualifies as a "small business" under OCAHO precedent, as employers with fewer than 100 employees have been considered "small." Respondent also asserts that OCAHO has repeatedly cited the Small Business Administration's classifications as "authoritative" in determining whether a business is small. The request for review also contests ICE's calculation of Respondent's payroll (claiming M&D's true payroll was approximately $1 million lower than the $4.3 million cited by ICE). Respondent further contests ICE's reliance on the number of employees Respondent employed over a three-year period, alluding to OCAHO precedent finding that, in businesses with high turnover, the number of employees over a period of time does not necessarily reflect the company's size.

In addition, the request for review argues that it is a "long-established principle of OCAHO precedent" to ensure that civil fines are proportional to the violation "and would not be a penalty on the respondent." Although Respondent concedes that nothing compels an ALJ to take a respondent's ability to pay into consideration, it nevertheless argues that because the ALJ has frequently considered ability to pay in past decisions, the ALJ must do so here as well.

Respondent's brief in support of its request for review does not provide any additional legal argument or authority on this point, though it does go into more detail about what it contends is the true size of Respondent's payroll.

In its brief in response to the request for review, Complainant argues that the ALJ's penalty determination was reasonable and appropriately within the statutory limits and that the ALJ duly considered the five statutory factors in determining the penalty amount. Complainant notes that, in Respondent's argument that it should be treated as a small business, Respondent inaccurately characterizes the ALJ's recitation of Complainant's evidence and position on this point as findings of fact made by the ALJ in the final decision and order. Complainant notes that the ALJ expressly considered the principle of proportionality, along with the evidence Respondent presented as to its financial position, and ultimately significantly reduced the final penalty by over $100,000. It therefore asks the CAHO to affirm the penalty assessed by the ALJ.

2. Discussion

Though Respondent refers repeatedly to OCAHO "precedent" from which the ALJ allegedly strayed in this case, Respondent's request for review fails to cite a single OCAHO decision that supports its argument; nor does its brief include any such citations. Moreover, Respondent misreads and mischaracterizes the ALJ's final decision and order when it asserts that the ALJ "adopted" ICE's conclusions regarding Respondent's payroll and number of employees in assessing the size of Respondent's business. The ALJ cited ICE's estimation of Respondent's

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Administrative Law Judge's order." 28 C.F.R. § 68.54(b)(1). In this case, the parties served their respective briefs simultaneously on the twenty-first day. Therefore, Complainant did not have the benefit of seeing any additional arguments raised in Respondent's brief that had not been raised initially in Respondent's request for review.

payroll and number of employees only in her summary of ICE's evidence in support of its motion for summary decision. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 5-6 (2014). The ALJ did conclude that ICE "rightly distinguishes M&D from businesses involving 'mom and pop' family restaurants or struggling start-up companies." *Id.* at 11. Based on the record below and the documents submitted by Respondent with its request for review and brief in support of the request for review, as well as prior OCAHO precedent, the ALJ's conclusion that M&D was not equivalent in size to a "mom and pop" restaurant was correct. *Cf. United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 3 (2013) (observing that the respondent in that case, a restaurant with only ten employees, "appears to be the prototypical 'mom and pop' small family restaurant business.").

Even accepting as true Respondent's contentions as to the actual size of its payroll and number of employees during the relevant time period, Respondent was still by no means a business small enough to warrant a more significant reduction in the overall penalty than the ALJ already applied. The ALJ's final decision, at 11, notes ICE's comparison of Respondent in this case to the respondent in *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139 (2011), in terms of both size and number of violations. In *Ketchikan*, ICE asserted that the respondent employed between 125 and 200 employees, adjusted for seasonal fluctuation. *Id.* at 25-26. The respondent countered that it did not have a large permanent staff, and that by the time its case came before OCAHO, it had only four full-time year-round employees and approximately twenty part-time employees. *Id.* at 26.

Based on those facts and arguments, the ALJ in *Ketchikan* stated the following: "Considering the facts and circumstances in light of our case law, I cannot agree with the government that [respondent] is so large as to warrant an enhanced penalty. Neither, on the other hand, is it the type of small family business that necessarily points to reduction." *Id.* at 27 (citing, by contrast, *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990), in which respondent had only 3-6 employees). Ultimately, after consideration of all the required factors, the base penalty in *Ketchikan* was neither mitigated nor aggravated. *Id.* at 30.

The analysis applied in *Ketchikan* seems wholly appropriate in this case as well. That is, Respondent may not have been a large business deserving of aggravation of the penalty, but neither is Respondent so small that further mitigation of the penalty would be required. Although ICE sought penalties in the amount of $981.75 per violation, the ALJ's final decision mitigated these penalties substantially (to $650 for each violation in Count I and $750 for each violation in Count II), despite not crediting Respondent with good faith to the same extent that ICE had in making its initial penalty assessment. *See M & D Masonry, Inc.*, 10 OCAHO no. 1211, at 6, 12. This final penalty determination was appropriate in light of the size of Respondent's business, the number of violations found and consideration of the rest of the statutory factors. Therefore, I do not find a basis for modifying or vacating the ALJ's final decision in this regard.

B. The Reference in the Final Decision and Order to the Racketeer Influenced and Corrupt Organizations Act (RICO)

1. Arguments of the parties

In its request for review and its brief in support of the request for review, Respondent takes issue with the citation in the Final Decision and Order to *Broussard-Wadkins v. Maples*, 895 F. Supp.

2d 1159, 1204-05 (N.D. Ala. 2012). In her discussion of the statutory element of good faith, the ALJ cited *Broussard-Wadkins* as authority for the proposition that "the presigning of hundreds of I-9 forms in batches has been found to constitute 'false attestation' within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1546(b)." *See M & D Masonry, Inc.*, 10 OCAHO no. 1211, at 12.

Respondent does not dispute that it pre-signed over 100 I-9 forms that it delivered to Complainant pursuant to the Notice of Inspection; nor does it dispute that pre-signing I-9 forms is wrong. However, Respondent questions whether this conduct should be "equated with alleged racketeering under RICO." Respondent asserts that the "inflammatory and unfounded suggestion that Respondent has committed a criminal RICO violation jeopardizes its ongoing existence and future," and requests that the CAHO vacate the final decision and order "as a rejection of OCAHO's inclusion of such an allegation." Respondent argues that inclusion of a reference to RICO in a published OCAHO decision threatens the continued viability of Respondent's business because of the "shadow" it casts over Respondent.

In response, Complainant argues that the citation to *Broussard-Wadkins* and RICO provides no basis to amend, modify, or vacate the ALJ's decision. Complainant notes in its brief that the citation to RICO finds support in the statutory definitions, *see* 18 U.S.C. §§ 1546(b), 1961(1)(B)[4]. Moreover, Complainant asserts that Respondent's fear of the implications of the ALJ's citation appears "overblown," as the District Court in *Broussard-Wadkins* dismissed the civil RICO suit, despite finding that pre-signing I-9 forms constituted a false attestation, because plaintiffs could not show the necessary causation and damages. 895 F. Supp. 2d at 1205-06.

2. Discussion

The ALJ's reference to the *Broussard-Wadkins* finding that pre-signing I-9 forms constitutes a false attestation under RICO was not in any way a finding that Respondent in this case committed a civil or criminal RICO violation. Rather, the reference was included by analogy in the ALJ's discussion of the good faith factor, as an illustration of why M&D's conduct prior to the Notice of Inspection was not consistent with the conduct of an employer acting in good faith. Thus, the ALJ found that the Respondent's "conduct fail[ed] to reflect a reasonable attempt by the employer to comply with its obligations under § 1324a," and refused to mitigate the penalty based on good faith, as ICE had done. *M & D Masonry, Inc.*, 10 OCAHO no. 1211, at 12. Respondent discusses *Broussard-Wadkins* in great detail in its brief, delving into the various evidentiary rulings made by the district dourt. This discussion is misplaced, however, as *Broussard-Wadkins* was cited in the ALJ's final decision only with respect to the conclusion by that court that pre-signing I-9 forms qualified as a false attestation under the relevant definitions in RICO, in order for the ALJ to determine whether or not Respondent could be found to have acted in good faith when it exhibited the same conduct in this case. Therefore, the district court's rulings on other distinct RICO issues in that case have no relevance here. Instead, the citation merely offered support for the ALJ's conclusion that "ICE was unduly generous … in treating good faith as a favorable consideration in this case." *Id.* As such, it was neither legally nor

[4] *See* 18 U.S.C. § 1961(1)(B) (defining "racketeering activity" to include any act which is indictable under, *inter alia*, title 18 United States Code section 1546); 18 U.S.C. § 1546(b) ("Whoever uses…(3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.").

factually inaccurate, and thus does not provide grounds for modifying or vacating the ALJ's decision.

C. Denial of Equal Protection

1. Arguments of the parties

Respondent's request for review also contends that the penalty assessment in this case constitutes a denial of equal protection because Respondent was treated less favorably than other similarly-situated businesses. Respondent compares the penalties in this case with the penalties assessed in *United States v. Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204 (2013). Respondent's brief does not contest that the respondent in *Kobe Sapporo* (which both parties in that case agreed was a small business) had many fewer employees and violations than Respondent. However, it questions whether the violations in *Kobe Sapporo* should be considered more serious and more indicative of bad faith than the violations at issue here.

In response, Complainant argues that *Kobe Sapporo* is distinguishable from Respondent's case because *Kobe Sapporo* involved a significantly lower number of violations and employees. It argues that finding an equal protection violation requires that similarly-situated individuals be treated differently; thus, treating dissimilarly-situated individuals differently does not violate equal protection. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007). Because the Respondent and Kobe Sapporo were dissimilarly-situated, Complainant argues, the assessment of different penalties does not constitute a violation of equal protection.

2. Discussion

The principle of equal protection "requires government entities to treat similarly situated people alike." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). In order to prevail on an equal protection claim, a party must first show that they were treated differently from similarly-situated individuals or entities. *Id.* at 1314; *see also Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1045-46 (11th Cir. 2008). As Complainant notes, "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *Griffin Indus., Inc.*, 496 F.3d at 1207 (quoting *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)). When challenging the outcome of a "complex, multi-factored" government decision-making process, the alleged "similarly situated entities 'must be very similar indeed.'" *Griffin Industries, Inc.*, 496 F.3d at 1205 (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004)). The Eleventh Circuit has gone so far as to state that in order for a comparator to be similarly-situated to the party claiming disparate treatment, "it must be *prima facie* identical in all relevant respects." *Campbell*, 434 F.3d at 1314 (citing *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)).

Therefore, in order to support its claim of a denial of equal protection based on a comparison to *Kobe Sapporo*, Respondent must first demonstrate that it is "similarly-situated" to the respondent in that case, in accordance with the above cited authorities. Respondent has not done this.

Respondent openly states in its request for review that it does not contest the fact that the restaurant in *Kobe Sapporo* had fewer employees than M&D. The ALJ's decision in that case described Kobe Sapporo as a "small family business," and, in light of that finding and

consideration of the other statutory factors and the record as a whole, mitigated the penalties accordingly. *Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, at 6. Here, based in part on Respondent's admittedly greater number of employees and violations, the ALJ found that Respondent was rightly distinguished from "businesses involving 'mom and pop' family restaurants." *M & D Masonry*, 10 OCAHO no. 1211, at 11. As discussed previously, there was no error in this determination. *See supra* III.A. Therefore, with respect to the size of the business factor (which must be afforded due consideration, *see* 8 U.S.C. § 1324a(e)(5), and is thus highly relevant), Respondent is admittedly and demonstrably not identical to the respondent in *Kobe Sapporo*. Accordingly, Respondent has failed to show that it was "similarly situated" to the restaurant in *Kobe Sapporo*, and its claim that it was denied equal protection provides no basis for modifying or vacating the ALJ's decision.

D. Deposition of ICE Auditor Melinda Stephens

1. Arguments of the parties

Respondent's request for review further argues that Respondent should be allowed to depose ICE Auditor Melinda Stephens, who audited Respondent's form I-9 compliance. The request lists several questions that Respondent would like to ask Ms. Stephens. Respondent's brief in support of its request for review argues additionally that Complainant relied upon "questionable" audit procedures, challenging, *inter alia*, the records used in the audit (specifically, the "wage inquiry" records from the Georgia Department of Labor), the notations made by the auditors on those records, and the calculation of Respondent's payroll.

Complainant's brief in response to the request for review notes that Respondent does not identify any errors by the ALJ in quashing the deposition of Ms. Stephens and refusing to extend the discovery period for a second time.

2. Discussion

It appears that Respondent now seeks additional information about Complainant's audit and the documents it relied upon in determining the number of violations and assessing the amount of the civil penalty. These items should have been sought in interrogatories or requests for production of documents during discovery, pursuant to 28 C.F.R. §§ 68.19 and 68.20. A review of prior proceedings in this case reveals that the initial discovery period agreed to by the parties was substantially longer than usual, and, in addition, was extended by the ALJ by more than another month. Respondent had ample time and opportunity during the lengthy discovery period to request the information and documents it now seeks through administrative review. Respondent's delay in completing its discovery put it at risk of not being able to secure information it thought necessary for the presentation of its case. However unfortunate this consequence may seem to Respondent, it was not caused by any misconduct by Complainant, nor by any mistakes of law or fact by the ALJ. Therefore, Respondent's request to depose Ms. Stephens based on its suppositions of "questionable audit procedures" does not support modifying or vacating the ALJ's final order.

E. Complainant's Refusal to Modify Its Method for Calculating Penalties

1. Arguments of the parties

The final argument presented in Respondent's request for review concerns ICE's refusal to modify its methodology for calculating penalties. Respondent notes that ICE continues to use its "Enforcement Matrix" in calculating the civil penalties it assesses for violations of 8 U.S.C. § 1324a, despite the number of times that OCAHO has found ICE's penalties to be "excessive" in particular cases.

Complainant counters by noting that its guidelines for setting fines are not binding on OCAHO, and the ALJ has wide discretion in determining a penalty amount. Complainant also notes that because the ALJ's decision in this case was reached independently of ICE's matrix and calculations, Respondent's challenge to ICE's calculations is not a basis for modifying the ALJ's decision.

2. Discussion

In this case, the ALJ arrived at the final penalty assessment independently from ICE's proposed fine, after consideration of the record as a whole and each of the required statutory factors. Therefore, Respondent's challenge to ICE's Enforcement Matrix is inapposite to contesting the ALJ's penalty assessment because the ALJ did not rely upon ICE's matrix. Accordingly, this line of argument provides no reason to modify or vacate the ALJ's final order.

F. Additional Issues Raised in Respondent's Brief

As previously discussed, Respondent filed its request for review on March 21, 2014. Respondent then filed a brief in support of its request for review on April 1, 2014. The brief expanded upon many of the issues and arguments originally included in the March 21 request for review, but also raised a number of arguments not presented in the request for review. The APA provides that, "[o]n appeal from or review of the initial decision, the agency 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) (emphasis added). OCAHO's rules provide that a party may file with the CAHO a written request for review within ten days of the date of entry of the ALJ's final order, "stating the reasons for or basis upon which it seeks review." 28 C.F.R. § 68.54(a)(1). The regulations also provide that "[i]n any case in which administrative review has been requested or ordered pursuant to [§ 68.54(a)], the parties may file briefs or other written statements" with the CAHO. 28 C.F.R. § 68.54(b)(1).

To the extent that Respondent included arguments and evidence in its April 1 brief in support of the request for review that were not first explicitly raised in the request for review itself, those arguments will not be considered, as they were not part of "the reasons for or basis upon which" Respondent originally sought review of the ALJ's final order, in accordance with § 68.54(a)(1).[5] Additionally, any issues not raised by Respondent in the proceedings below cannot be raised for the first time in the context of administrative review, particularly where Respondent had an opportunity to raise such arguments below. As a general principle, issues not raised below may not be raised for the first time on appeal. *See, e.g., Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d

[5] In addition to these arguments and issues being untimely raised, consideration of them would be unfair to Complainant. Any arguments raised by Respondent for the first time on review in its April 1 brief, which was submitted on the twenty-first day after the date of the ALJ's final decision (i.e., the final day for the parties to file their briefs on review), deprived Complainant of any notice and opportunity to respond to those arguments, since its brief was also due by April 1.

1146, 1152 (11th Cir. 2011) ("It is well settled that issues not raised in the district court in the first instance are forfeited.") Furthermore, under OCAHO's regulations, administrative review is of a "final order of an Administrative Law Judge." *See* 28 C.F.R. § 68.54(a). If a party has not presented an issue to the ALJ for proper consideration before the issuance of his or her final order, and, as such, the issue was not included or addressed in the final order, it will not be an appropriate subject of administrative review.

Accordingly, the arguments contained in – and the evidence accompanying – the sections of Respondent's April 1 brief that attempt to challenge the ALJ's determinations on liability will not be considered;[6] nor will any arguments or assertions made by Respondent that were not properly raised before the ALJ.

IV. CONCLUSION

Respondent's request for review failed to provide sufficient legal or factual justification for disturbing the final decision and order issued by the ALJ. Accordingly, I decline to modify, vacate, or remand the order. Because the CAHO has not modified, vacated, or remanded the order on or before 30 days subsequent to the date of the ALJ's final order, *see* 28 C.F.R. § 68.54(d)(1), the ALJ's final decision and order will become the final agency order 60 days after its issuance by the ALJ. 28 C.F.R. § 68.52(g). 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 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 16th day of April, 2014.

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Robin M. Stutman
Chief Administrative Hearing Officer

[6] It is also worth noting that many of these challenges appear to have been waived as a result of Respondent's failure to raise them at the proper time during the proceeding before the ALJ. For instance, Respondent asserts in its brief in support of the request for review that Complainant did not carry its burden of proving Respondent's liability for the alleged violations in Count II of the complaint based on employees identified only by Social Security Numbers and three letters of their surnames. However, in its answer, Respondent denied the allegations in Count II of the complaint only as to six of the eighty-seven alleged violations. OCAHO rules provide that, in an answer, "any allegation not expressly denied shall be deemed to be admitted." 28 C.F.R. § 68.9(c)(1). Thus, Respondent has waived its right to challenge the ALJ's liability determinations with respect to any alleged violations that were not expressly denied in Respondent's answer.