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

May 4, 2016

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00073
FRIMMEL MANAGEMENT, LLC D/B/A UNCLE SAM'S, Respondent.	)	

ORDER OF THE CHIEF ADMINISTRATIVE HEARING OFFICER DECLINING TO MODIFY OR VACATE THE ADMINISTRATIVE LAW JUDGE'S INTERLOCUTORY ORDER

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2012). The U.S. 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 respondent Frimmel Management, LLC engaged in 388 violations of 8 U.S.C. § 1324a(a)(1)(B). ICE subsequently filed an amended complaint removing a handful of the alleged violations. The amended complaint alleged that respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare or present Employment Eligibility Verification (I-9) Forms for sixty-three employees and failing to properly complete Forms I-9 for 320 employees, for a total of 383 alleged violations. ICE's amended complaint sought a total of $380,404.75 in civil penalties for the alleged violations. The case was assigned to Administrative Law Judge (ALJ) Stacy S. Paddack.

Respondent filed an answer to ICE's original complaint and to ICE's amended complaint. In its answer, respondent denied the alleged violations and raised a number of affirmative defenses. Several of the affirmative defenses asserted, in varying terms, that complainant's evidence supporting each of the alleged violations was the fruit of an illegal investigation by the Maricopa County Sheriff's Office (MCSO) that violated the Fourth and Fifth Amendments to the U.S. Constitution. Respondent therefore requested that the complaint be dismissed in its entirety.

The parties subsequently filed prehearing statements setting forth the issues presented, as well as each party's proposed stipulations and preliminary witness and exhibit lists. In its

prehearing statement, ICE identified Forensic Auditor N. Ryan Miller as the sole witness it intended to call to present testimony. Respondent, in its prehearing statement, again raised the issue of whether the complainant's evidence had been tainted by an illegal search; it identified this as a "threshold issue" and requested that it therefore be resolved first. In addition to listing Forensic Auditor Miller, respondent's preliminary witness list included Matthew Allen (ICE Agent in Charge) and Cesar Brockman and Josh Henderson (both of the Maricopa County Sheriff's Office).

Both parties participated in a telephonic prehearing conference with the ALJ and agreed on a schedule for discovery and dispositive motions. Shortly after this prehearing conference, respondent filed Notices of Deposition for five individuals: Ryan Miller; Matthew Allen; Harold Beasley; Pat Contreras; and Joshua Henderson. ICE subsequently filed a motion to quash the deposition notices for Matthew Allen, Harold Beasley, Pat Contreras, and Joshua Henderson. ICE asserted that the testimony of each of the four individuals "has little or no relevance to the instant matter and would not lead to relevant information." ICE also argued that, at most, the testimony from these four would be duplicative of Auditor Ryan Miller's testimony.[1]

Respondent filed a response to the motion to quash, arguing that the requested depositions were likely to lead to admissible evidence. Specifically, respondent asserted that the challenged depositions might uncover "communications between MCSO and ICE" that might reveal the extent to which ICE learned about the respondent as a result of MCSO's "tainted" raids and the related news media coverage. Respondent argued that "[i]f ICE initiated its audit in response to MCSO communications or information from MCSO published by news media, the audit was tainted and the ALJ must suppress all evidence from the audit as fruit of the poisonous tree." Therefore, respondent argued, the matters expected to be covered by these depositions were "highly relevant."

On March 31, 2016, ALJ Paddack issued an order granting complainant's motion to quash the notices of deposition. The ALJ held that "respondent failed to prove that any communications between MCSO and ICE are relevant to this action," and thus failed to prove that the notices of deposition for the four individuals should be upheld. *United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271, 6 (2016).

On April 11, 2016, respondent filed a Motion for Interlocutory Review by the Chief Administrative Hearing Officer under 28 C.F.R. § 68.53(a)(2). Although § 68.53(c) (by reference to § 68.54(b) through (d)) authorizes the parties to file briefs or other written statements related to such a motion, ICE did not file a responsive brief, and the respondent did not file a supporting brief or other documentation. I therefore have reviewed the ALJ's March 31 order, the respondent's motion for interlocutory review, and relevant portions of the official case record in arriving at this decision. For the reasons stated below, I decline to modify or vacate the ALJ's interlocutory order.

[1] ICE did not move to quash the deposition notice for Auditor Miller, conceding that Auditor Miller's deposition "is appropriate given that he is the one who initiated and conducted the audit."

II. JURISDICTION AND STANDARD OF REVIEW

Under OCAHO's rules of practice and procedure, the Chief Administrative Hearing Officer (CAHO) may review an ALJ's interlocutory order if, within ten days of the date of entry of the interlocutory order, a party requests by motion that the CAHO review the order. 28 C.F.R. § 68.53(a)(2).[2] Such a motion must contain a statement of why interlocutory review is proper under the standards set forth in § 68.53(a)(1) – namely, the party must demonstrate that the interlocutory order "concerns an important question of law on which there is a substantial difference of opinion" and "[t]hat an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy." 28 C.F.R. § 68.53(a)(1).

Respondent argues in its motion that interlocutory review is appropriate here because "the correct application of the fruit-of-the-poisonous-tree doctrine presents an important question of law that is essential to Respondent's ability to put forth a full defense in this case." The respondent asserts that allowing these depositions will "provid[e] a basis to dismiss all charges against Respondent," thereby advancing the ultimate termination of the proceeding. Because the ALJ's order does concern an important question of law on which there is arguably a substantial difference of opinion,[3] and because an immediate appeal, if successful, would advance the ultimate termination of the proceeding, interlocutory review is appropriate in this case.

III. DISCUSSION

A. The ALJ's Order Granting Complainant's Motion to Quash

In her Order Granting Complainant's Motion to Quash Notices of Deposition and Denying Respondent's Motion for Extension of Discovery Deadline, the ALJ found that respondent had failed to show that the requested depositions sought information that might be relevant to the instant case. This finding rested on two related legal principles. First, the ALJ noted that, according to the U.S. Supreme Court's decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the identity of a respondent in a civil proceeding is "never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation

[2] Because the tenth day after the interlocutory order fell on Sunday, April 10, under OCAHO's procedural rules, the deadline for filing a request for interlocutory review was automatically extended to Monday, April 11. *See* 28 C.F.R. § 68.8(a).

[3] Respondent did not expressly state or argue in its motion for interlocutory review that there was "a substantial difference of opinion" on the questions of law at issue here. Respondent's disagreement with the ALJ's decision, standing alone, does not suffice to establish that a substantial difference of opinion exists. Rather, "[t]here must be substantial independent grounds (e.g., contrary authority) to question the ruling." *United States v. Dominguez*, 7 OCAHO no. 973, 844, 849 (1997). Although respondent cited only a handful of potentially-conflicting cases in its motion, there appears to be some disagreement among the federal circuit courts of appeal as to the proper construction and application of the Supreme Court's holding in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), a case which was discussed at some length in the ALJ's decision in this case. *See, e.g.*, *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007) ("The meaning of the *Lopez-Mendoza* 'identity statement' has bedeviled and divided our sister circuits.") (citing *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 754-55 (8th Cir. 2001); *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Garcia-Beltran*, 389 F.3d 864, 868 (9th Cir. 2004); *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994)).

occurred." *Id*. at 1039-40. The ALJ found that what respondent sought to suppress in this case was its identity, which was foreclosed by the principle announced in *Lopez-Mendoza*. *See Frimmel Mgmt.*, 12 OCAHO no. 1271, at 6. Therefore, because respondent's identity could not be suppressed, the method by which it came to ICE's attention was irrelevant to the proceeding before OCAHO. *Id.* at 7.

Second, the ALJ also held that "even if respondent sought to suppress evidence other than its identity, respondent has failed to prove that the Fourth Amendment's exclusionary rule could lead to the suppression of evidence in this action before OCAHO." *Id.* The ALJ noted that under relevant case law, application of the exclusionary rule is generally only appropriate where suppression of evidence would be a "'substantial and efficient deterrent' to the unlawful police action at issue in the case." *Id.* (quoting *Adamson v. Comm'r of Internal Revenue*, 745 F.2d 541, 546 (9th Cir. 1984)). Because OCAHO adjudications do not fall within the "zone of primary interest" of the MCSO, the ALJ found that respondent failed to show that the suppression of evidence in this case would have the requisite deterrent effect on MCSO, which is the entity that conducted the allegedly unlawful search and seizure.[4] *Id.* at 7-8.

Therefore, the ALJ ordered the four depositions at issue to be canceled "because respondent has failed to demonstrate that its identity can be suppressed pursuant to the exclusionary rule and because respondent has failed to demonstrate that testimony relevant to the action pending before OCAHO would result" from the challenged depositions. *Id.* at 8.

B. Respondent's Motion for Interlocutory Review

Respondent makes two primary arguments in its motion for interlocutory review. First, respondent argues that the ALJ misapplied *INS v. Lopez-Mendoza*, 468 U.S. 1032. Second, respondent asserts that the evidence in this case must be suppressed under the "fruit-of-the-poisonous-tree" doctrine.

1. Application of *INS v. Lopez-Mendoza*

Respondent argues that the ALJ misapplied *INS v. Lopez-Mendoza* by "fail[ing] to distinguish what was at issue in *Lopez-Mendoza*—knowledge about the ongoing legal status of an individual—from what is at issue here—knowledge of evidence of past violations of law." Respondent asserts that this distinction between past violations and ongoing, future violations is a "material difference."

Although this distinction may be a difference, under relevant precedent,[5] it is not a material one. In *United States v. Del Toro Gudino*, 376 F.3d 997 (9th Cir. 2004), the Ninth Circuit discussed this very point, finding that "the rule that identity evidence is not suppressible is not limited" to cases involving ongoing or continuing violations, though the court acknowledged that "its practical force is particularly great" in the context of such violations. *Id.* at 1001-02.

[4] As the ALJ observed, respondent did not allege any unconstitutional or egregious conduct by relevant ICE officials in their audit of respondent's employment eligibility verification forms or hiring practices. The only unlawful search or seizure alleged by respondent is that conducted by MCSO.

[5] Because respondent has its principal office in Arizona, Ninth Circuit case law provides the controlling legal authority here. *See, e.g., United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 880 n.5 (1997).

Respondent next argues that "[c]ourts have long applied the exclusionary rule" to claims for past violations of federal law. In support of this proposition, respondent cites *Adamson v. Commissioner of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984), a decision which respondent characterizes as "applying the exclusionary rule to suppress evidence in a civil tax proceeding." This is a misrepresentation of the Ninth Circuit's holding in *Adamson*. Although the court in *Adamson* did suggest that the exclusionary rule could be applied to suppress evidence in a civil tax proceeding if the case involved a "bad faith violation of an individual's fourth amendment rights," 745 F.2d at 545, the court did not find that the officers in that case acted in bad faith, *id.* at 545-46. Because the court also concluded that "exclusion of the evidence from the civil tax proceeding would not provide a substantial and efficient deterrent," *id.*, the Ninth Circuit declined to exclude the evidence in question and thus affirmed the Tax Court's holding, *id.* at 543.

Respondent argues further that courts have applied the exclusionary rule even where a different sovereign violated the fourth amendment, again citing *Adamson* as well as *United States v. Medina*, 181 F.3d 1078, 1082 (9th Cir. 1999). Notably, in neither case did the court actually apply the exclusionary rule to suppress the challenged evidence. *See Adamson*, 745 F.2d at 543, 545-46; *Medina*, 181 F.3d at 1082 ("Absent any threshold showing of a connection or 'nexus' in time, place, or purpose between the searches and the subsequent prosecution, there is no appreciable deterrent purpose in suppressing the evidence."). Indeed, in both cases, the court found that the subsequent proceedings were not within the "zone of primary interest" of the officers who conducted the allegedly unlawful searches, and thus suppressing the resultant evidence would not provide a deterrent significant enough to justify application of the exclusionary rule. *See Adamson*, 745 F.2d at 546; *Medina*, 181 F.3d at 1082.

The ALJ in this case made a similar finding, concluding that "respondent has failed to demonstrate that the suppression of evidence in this OCAHO case pursuant to the exclusionary rule's sanction would have a deterrent effect on MCSO, especially in light of the fact that OCAHO adjudications are not within the 'zone of primary interest' of MCSO police actions…." *Frimmel Mgmt.*, 12 OCAHO no. 1271, at 7-8. Nothing in respondent's motion or in the cases cited demonstrate that the ALJ's order was incorrect in this regard; to the contrary, the cited cases are consistent with and support the ALJ's analysis.

Furthermore, respondent's reliance on the language in *Medina*, which states that "it is irrelevant to this inquiry whether the evidence is seized by one sovereign and utilized by the same or a different sovereign," 181 F.3d at 1082, is misplaced. There is authority indicating that the identity of the sovereign who seized the evidence and the sovereign who subsequently attempts to use it may be relevant in assessing the deterrent effect that might be produced by application of the exclusionary rule in a particular case. *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 455-58 (1976); *Adamson*, 745 F.2d at 546. Indeed, as the Supreme Court stated in *Janis*, 428 U.S. at 457-58, "common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." Such is the case here.

Therefore, I find no error in the ALJ's holding that "respondent has failed to demonstrate that its identity can be suppressed pursuant to the exclusionary rule." *Frimmel Mgmt.*, 12 OCAHO no. 1271, at 8.

2. Suppression of Evidence Under the "Fruit-of-the-Poisonous-Tree" Doctrine

Respondent further argues that the evidence in this case "must be suppressed under the fruit-of-the-poisonous-tree doctrine if the investigation obtaining that evidence was triggered by knowledge of evidence obtained in an illegal search and seizure, unless the government can show that the evidence would have been obtained otherwise." However, the "inevitable discovery" doctrine that respondent raises is not the only exception to the "fruit-of-the-poisonous-tree" doctrine. Indeed, the primary case respondent cites on this point notes that the Supreme Court "has fashioned three distinct exceptions" to the "fruit-of-the-poisonous-tree" exclusionary rule: (1) the "independent source" exception; (2) the "inevitable discovery" exception; and (3) the "attenuated basis" exception. *United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998).

In any event, the proper application of any relevant exceptions to the "fruit-of-the-poisonous-tree" doctrine was neither fully briefed by the parties in the proceedings below nor squarely addressed by the ALJ in her interlocutory order. Similarly, these arguments were not fully briefed on review. Accordingly, this particular line of argument is not properly the subject of this interlocutory review, and I decline to address it here. *See, e.g.*, *United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1215, 8-9 (2014) ("If a party has not presented an issue to the ALJ for proper consideration before the issuance of his or her […] order, and, as such, the issue was not included or addressed in the […] order, it will not be an appropriate subject of administrative review."). To the extent respondent's arguments on this point are not foreclosed by the ALJ's holding in the interlocutory order with respect to exclusion of respondent's identity under *INS v. Lopez-Mendoza*, respondent may raise and fully brief this issue at the appropriate time in the ongoing proceedings before the ALJ.

IV. CONCLUSION

Respondent's motion for interlocutory review failed to provide sufficient legal or factual justification for modifying or vacating the ALJ's interlocutory order. Accordingly, I decline to do so. Because I have not modified, vacated, or remanded the ALJ's interlocutory order within thirty days of the date the order was entered, the order is deemed adopted. 28 C.F.R. § 68.53(c). Pursuant to 28 C.F.R. § 68.53(d)(2), "all parties retain the right to request administrative review of the final order of the ALJ pursuant to § 68.54 with respect to all issues in the case."

It is SO ORDERED, dated and entered this 4th day of May, 2016.

Robin M. Stutman
Chief Administrative Hearing Officer