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

MOISES REYES, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	CASE NO. 93B00052
PILGRIM PSYCHIATRIC CENTER, Respondent.	)	

FINAL ORDER OF DISMISSAL

I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Immigration and Nationality Act (Act), prohibited discrimination by employers on the basis of national origin or citizenship status. These anti-discrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. 8 U.S.C. 1324b.

Under 8 U.S.C. 1324b, the protected individuals who meet the statutory definition may file charges of national origin and/or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC may then file a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) if it determines that there was a timely

filing of the charge and reasonable cause to believe that the filed charge is true. 8 U.S.C. 1324b(d)(1). If, however, OSC does not file a Complaint within one hundred twenty (120) days of receipt of the charge, the protected individual is authorized to file a Complaint directly with OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2). A charge is timely filed if it is filed with OSC, or an agency that OSC has a Memorandum of Understanding with, at the most, 180 days after the alleged discriminatory event.

II. *Procedural History*

On October 13, 1992, Complainant, Moises Reyes, an alleged United States citizen, filed a charge with OSC alleging national origin and citizenship discrimination against Respondent, in that he was discriminatorily fired on March 21, 1992. In a letter dated February 10, 1993, OSC notified Complainant that, Complainant's charge was not timely filed with that office and that there was insufficient evidence to reasonably believe that Respondent discriminated against Complainant based on citizenship or national origin. Therefore, it would not be filing a Complaint. Hence, on March 8, 1993, Complainant filed the instant Complaint with OCAHO.

On March 18, 1993, a Notice of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices was issued by OCAHO, advising the parties of Complainant's filing of the complaint and Respondent's obligation to file a timely Answer in order to avoid the possible issuance of a default judgment. On March 19, 1993, as is my normal practice, I issued a Notice of Acknowledgment in which Respondent was again cautioned that a timely Answer to the complaint was due in order to forestall the issuance of a default judgment. Respondent filed, on April 19, 1993, its timely Answer.

Upon reviewing the record, as it appeared that Complainant's charge was not timely filed, I issued an Order To Show Cause Why Complaint Should Not Be Dismissed on May 27, 1993. In that Order, I instructed Complainant that according to the record, his charge was not timely filed and that, barring an application of equitable tolling, I would have to dismiss his case. Therefore, after providing the pro se Complainant with some explanation of equitable tolling, I instructed him to file any statement, affidavit(s) or other evidence showing that he was entitled to equitable tolling in this matter.

On May 27, 1993, Complainant filed a packet of papers, which I have inferred was his response to my Order to Show Cause. This Complainant's response is comprised of the following documents:

1. A copy of Complainant's letter, dated November 21, 1992, addressed to the State of New York, Unemployment Insurance Appeal Board, in response to a Board inquiry letter to Complainant.

2. A hand-written letter, signed by Patrick Hihn, President of Local 418 and dated March 4, 1992, which states that Mr. Hihn represented Complainant during an investigation, which I have inferred to be an investigation of alleged theft by Complainant leading to his termination, and that Complainant was questioned at that time about his citizenship status and facility with the English language. Mr. Hihn states that he "felt" that this line of questioning was discriminatory and did not pertain to the investigation.

3. A copy of a hand-written addendum to the letter described in number 2 above. This addendum is signed by Mr. Hihn, however, it is unclear from the contents whether it was authored by Mr. Hihn or by Complainant. This addendum appears to explain the circumstances surrounding Complainant's actions which led to the accusation of theft.

4. A copy of a hand-printed letter, signed by Complainant, but apparently written by another individual for Complainant, and dated May 22, 1993. This letter appears to be the cover letter to Complainant's instant response and placed in this packet out of order. This document contains an apology for the late filing of "evidence" as Complainant does not understand much English and does not read it well.

5. A copy of my Order To Show Cause, dated May 19, 1993 1992

6. A copy of a Decision and Notice of Decision, dated August 7, 1992, from the New York State Department of Labor, Unemployment Insurance Administrative Law Judge Section, in which Complainant's conduct was found not to rise to a level of misconduct justifying disqualification for unemployment benefits.

III. *Discussion*

I have carefully reviewed the documents filed by Complainant in response to my Order to Show Cause. In order to proceed with this case, I would need to find that Complainant is entitled to an application of equitable tolling so that the filing of the charge could be found to be timely.

Equitable tolling is not readily granted by courts and has been found not to apply in some cases of mistaken belief, ignorance regarding filing deadlines, and illiteracy. See e.g., Barrow v. New Orleans S.S. Ass'n., 932 F.2d 473 (5th Cir. 1991); Burkley v. Martin's Super Markets, Inc., 741 F.Supp. 161 (N.D. Ind. 1990)(ignorance of filing requirements was not sufficient for application of equitable tolling where employer had posted notice of requirements in an area that

filing party had access to); Lundy v. OOCL, 1 OCAHO 215 (8/8/90). However, fraudulent concealment of employee's rights by the employer, employer acts which lulled employee into inaction, employee's timely filing in the wrong forum, inadequate notice of the right to sue, court action which has misled the filing party into believing that it has complied with the court's requirements, and facts which amount to "extraordinary circumstances" have all been found to be a basis for equitable tolling. Gomes v. Avco, 964 F.2d 1330 (2nd Cir. 1992) (lack of evidence of employee's union or employer's misleading conduct precludes equitable tolling; see also Dillman v. Combustion Engineering, Inc., 784 F.2d 57 (2nd Cir. 1986); Kendrick v. Sullivan, 784 F. Supp. 94 (S.D. N.Y. 1992) (government misconduct warrants equitable tolling); Brown; Weld County; Halim citing to Miller v. International Telephone & Telegraph Corp., 755 F.2d 20, 24 (2nd Cir. 1985), cert denied, 474 U.S. 851 (1985).

A thorough review of these documents finds that, except for an assertion that Complainant does not read, write or understand English well, there is no assertion of any facts which could be construed or inferred to relate to the lateness of the filing of Complainant's charge. As to Complainant's assertion of difficulty with the English language, that assertion was not raised in connection with the late filing of the charge. It appears to be raised, solely, in relation to the "late" filing of the instant documents.

However, I have considered whether Complainant's lack of facility with English might be seen to rise to a level that would allow an application of equitable tolling. Although the Second Circuit has held that mental impairment may warrant equitable tolling in some circumstances, Complainant's unfamiliarity and difficulty with English does not qualify as mental impairment. See Canales v. Sullivan, 936 F.2d 755, 756 (2nd Cir. 1991); Barrow (illiteracy does not warrant equitable tolling). From the record, I find that Complainant has previously made use of interpreters when asserting his rights in a timely manner and, thus, could have availed himself of an interpreter in helping him in this matter. Further, the Office of Special Counsel has published notices of a person's right to file charges of discriminatory hiring/firing in Spanish, so that an individual's lack of facility with English is compensated for. Thus, notice of Complainant's right to sue, in a language in which he is familiar, has been available. Thus, I find that an application of equitable tolling is not appropriate based on the record before me.

As such, I must dismiss this case as the charge was not timely filed. This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 21st day of June, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge