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

May 4, 2015

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00045
HORNO MSJ, LTD. COMPANY Respondent.	)	

DENIAL OF RESPONDENT'S REQUEST FOR ADMINISTRATIVE REVIEW

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), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that respondent Horno MSJ, Ltd. Company (Horno or respondent) engaged in thirty-two violations of 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Employment Eligibility Verification (I-9) Forms for nine employees and failing to ensure proper completion of Forms I-9 for twenty-three other employees. ICE sought $30,574.50 in civil money penalties for these alleged violations.

On April 3, 2015, Administrative Law Judge (ALJ) Ellen K. Thomas entered a final decision and order finding Horno liable for the thirty-two violations alleged and directing Horno to pay a civil money penalty in the amount of $14,600. On April 15, 2015, respondent filed a Petition for Administrative Review pursuant to 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.54(a)(1). In its petition, respondent contends that the ALJ "failed to apply the law" regarding good faith compliance, citing "8 U.S.C. § 1324b(6)(A) [sic]."[1] ICE did not file a response to the petition. For the reasons stated below, the petition for review is denied.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer (CAHO) has discretionary authority to review any final order of an ALJ in a case brought under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7);

[1] Because the statutory section cited by respondent does not exist, it appears that this provision was miscited. Presumably, respondent meant to cite to 8 U.S.C. § 1324a(b)(6)(A), the "Good Faith Compliance" provision of the statute, which excuses certain "technical or procedural" Form I-9 violations if there was a good faith attempt to comply.

28 C.F.R. § 68.54. Pursuant to OCAHO's rules of practice and procedure, a party may file a written request for administrative review within ten days of entry of the ALJ's final order, 28 C.F.R. § 68.54(a)(1), or the CAHO may review an ALJ's final order on his or her own initiative by issuing a notice of administrative review within ten days of the date of the ALJ's final order, 28 C.F.R. § 68.54(a)(2). The CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings within thirty days of entry of the ALJ's final order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision…" 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an 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. Chen's Wilmington, Inc.*, 11 OCAHO no. 1241, 3 (2015); *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1217, 3 (2014).

III. DISCUSSION

A. Respondent's Request for Administrative Review Was Filed More Than Ten Days After the Date of Entry of the ALJ's Final Decision and Order and Is Therefore Untimely

OCAHO's rules of practice and procedure provide that in cases arising under 8 U.S.C. § 1324a, a party may file a written request for administrative review within ten days of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). In this case, because the ALJ issued her final decision and order on April 3, 2015, the deadline for filing a request for administrative review was April 13, 2015. Respondent's Petition for Administrative Review was dated April 14, 2015, but the certificate of service indicates that it was not sent until April 15, 2015. In any event, it was received by OCAHO by facsimile transmission on April 15, 2015, and was therefore not deemed filed until that date. *See* 28 C.F.R. § 68.8(b). Accordingly, since respondent's request for administrative review was filed two days after the deadline for such a request, it is considered untimely.

Although during the prehearing and hearing stages of a case, a single instance of late filing or improper service does not necessarily mandate rejection of the late-filed document or dismissal of the matter entirely, *United States v. Greif*, 10 OCAHO no. 1183, 3 (2013), the analysis differs somewhat in the context of administrative review, *see United States v. Silverado Stages, Inc.*, 10 OCAHO no. 1185 (2013). The CAHO decision in *United States v. Greif* observed that "because review by the CAHO must be conducted within strict time frames, … prompt and proper service of a request for review and associated documents is particularly important." *Greif*, 10 OCAHO no. 1183, at 4. Therefore, "in appropriate circumstances, it may be proper for the CAHO to deny a request for review if filing and service was not properly made." *Id*. Furthermore, as explained in *United States v. Silverado Stages, Inc.*:

> The ten-day time limit for requesting review was included in OCAHO's procedural regulations because it was "necessary to provide for an orderly consideration of the parties' submissions" within the statutorily-mandated thirty-day review period. 64 Fed. Reg. 7,066, 7,072 (Feb. 12, 1999). Moreover, since the

> regulations also impose a deadline for all parties to file briefs or other documents related to administrative review within twenty-one days of the date of the final ALJ order, it is imperative that requests for review be filed and served in a timely manner in order to give the opposing party in the case sufficient time to respond to the request.

Silverado Stages, Inc., 10 OCAHO no. 1185, at 3. *But see United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 3 (2013) (accepting an improperly-served request for review for consideration where the improper service did not actually delay the opposing party's receipt of the document and where the opposing party received the request for review in time to file a timely brief in response).

However, this ten-day time limit is not jurisdictional and may be equitably tolled if circumstances warrant. *See United States v. Vilardo Vineyards*, 11 OCAHO no. 1248, 4 (2015) (holding that the ten-day filing deadline for a request for administrative review could be equitably tolled where the party did not learn of the grounds for seeking review until after the ten-day deadline had passed and subsequently acted with due diligence in preserving its legal rights); *Chen's Wilmington, Inc.*, 11 OCAHO no. 1241, at 7-11 (finding no grounds for equitable tolling of the ten-day deadline for requests for administrative review). Additionally, although some consideration may be given to a party's pro se status, accommodation of that status must at some point "give way to the need for orderly and informed participation by the parties to an administrative adjudication." *Holguin v. Dona Ana Fashions*, 4 OCAHO no. 605, 142, 146 (1994).

Respondent offers no explanation for its late filing of the petition for administrative review. Respondent, who appears pro se in this matter, cites 28 C.F.R. § 68.54(a)(1) as the regulatory authority under which its petition for review is submitted; this very provision supplies the ten-day deadline for filing such a request, so it cannot be said that respondent was unaware of this time limit. In any case, "parties are presumed to know the rules of practice and procedure that govern OCAHO cases," *United States v. Cordin Co.*, 10 OCAHO no. 1162, 2-3 (2012), and a party's "own ignorance of the law will usually not justify equitable tolling" of a filing deadline, *Seaver v. BAE Sys.*, 9 OCAHO no. 1111, 7 (2004).

Accordingly, because respondent's petition for administrative review was filed outside the ten-day deadline for filing requests for review pursuant to 28 C.F.R. § 68.54(a)(1), and respondent offered no explanation for its late filing that might support equitable tolling of the ten-day deadline, the request for review is untimely and as such is denied.

B. Respondent's Petition For Administrative Review Confuses the Effect of an Employer's Good Faith as Prescribed by the Statute

Respondent's only argument for administrative review is that the ALJ "failed to apply the law pursuant to good faith compliance[,] 8 U.S.C. 1324[a(]b[)](6)(A)." The petition then quotes the passage from the ALJ's final order that discussed good faith, *see United States v. Horno MSJ, Ltd. Co.*, 11 OCAHO no. 1247, 11 (2015), and asserts that because the evidence presented by ICE fell short of establishing bad faith, respondent "is entitled to the benefits the law provides for these instances."

Respondent confuses the defense of good faith compliance for purposes of assessing liability, as set out in 8 U.S.C. § 1324a(b)(6)(A), with the requirement in 8 U.S.C. § 1324a(e)(5) that the good faith of the employer be given due consideration in determining the amount of the civil penalties for paperwork violations. The good faith compliance defense set forth in § 1324a(b)(6) "provides a narrow but complete defense where an entity is charged with technical and procedural failures in connection with the completion of an I-9 form." *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 5 (2009). However, such defense "has no application to substantive violations." *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 6 (2013); *see also United States v. Schaus*, 11 OCAHO no. 1239, 7 (2014). In this case, all of the violations alleged by ICE and found by the ALJ were substantive – not technical or procedural – violations. *See Horno MSJ, Ltd. Co.*, 11 OCAHO no. 1247, at 7-8; *see also* Paul W. Virtue, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997).[2] Therefore, the good faith compliance defense provided by § 1324a(b)(6)(A) is inapplicable to the case at hand.

However, as mentioned above, 8 U.S.C. § 1324a(e)(5) directs that, in determining the amount of a civil money penalty for paperwork violations, "due consideration shall be given to," among other things, "the good faith of the employer…" 8 U.S.C. § 1324a(e)(5). Accordingly, after finding respondent liable for the thirty-two violations alleged, the ALJ discussed the appropriate civil money penalty for these violations. It was here that the ALJ held that ICE's allegations of bad faith were not supported in the record, and thus weighed the good faith factor "more favorably to the company than the government [did]." *Horno MSJ, Ltd. Co.*, 11 OCAHO no. 1247, at 11. Based on consideration of the good faith factor (and the other four required statutory factors) in particular and the record as a whole, the ALJ ultimately mitigated the civil penalty assessment closer to the midrange of permissible penalties.[3] *See id.* at 14-15. Thus, the ALJ correctly applied the relevant law regarding the good faith of the employer, as found at 8 U.S.C. § 1324a(e)(5). Therefore, even if respondent's request for review had been timely and properly filed, it fails to state an appropriate ground for modifying or vacating the ALJ's final decision and order.

IV. CONCLUSION

Because respondent's petition for administrative review was filed beyond the ten-day deadline for requests for review without explanation for the late filing, it is untimely and hereby DENIED. Moreover, respondent's petition misapplies the effect of good faith in this case. Instead, I find no error in the ALJ's analysis of the good faith of the employer in her final decision and order. Since I have denied respondent's request for administrative review, and thus have declined to modify or vacate the ALJ's order, the ALJ's final decision and order will become the final agency order sixty (60) days after its date of entry. *See* 28 C.F.R. § 68.52(g). A

[2] The *Interim Guidelines*, also known as the "Virtue Memorandum," characterize as substantive violations all of violations that were found by the ALJ in her final decision and order, namely: failure to prepare or present a Form I-9; failure to sign the section 2 employer attestation; failure to review and verify proper documents in section 2; failure to ensure that the employee checks a box in section 1 attesting to his or her immigration or citizenship status; failure to ensure that the employee signs the section 1 attestation; and failure to ensure that an employee attesting to lawful permanent resident status provides his or her A number in section 1, unless the A number is provided in section 2, section 3, or on a legible copy of a document retained with the Form I-9.

[3] The total civil money penalty was less than fifty percent of the penalty originally requested by ICE.

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 forty-five (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 4th day of May, 2015.

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Robin M. Stutman
Chief Administrative Hearing Officer