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

December 1, 2020

In re Investigation of:	)	
	)	
SPACE EXPLORATION,	)	8 U.S.C. § 1324b Proceeding
TECHNOLOGIES CORP.	)	OCAHO Case No. 2021S00001
D/B/A SPACE X	)	
	)	

ORDER DENYING PETITION TO MODIFY OR REVOKE SUBPOENA

I. PROCEDURAL HISTORY

At issue is an administrative subpoena the undersigned issued at the request of the Immigrant and Employee Rights Section, Civil Rights Division of the Department of Justice (IER or the government) in aid of its investigation of Space Exploration Technologies Corporation d/b/a SpaceX (Petitioner or SpaceX). The investigation began because of a charge from F.H. (Charging Party) alleging that Petitioner discriminated against him based on his citizenship status, in violation of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. The subpoena was signed on October 5, 2020, and served on October 12, 2020. IER requests "[f]or each Form 1-9 listed in the Excel spreadsheet that Respondent produced on August 28, 2020, [SpaceX] provide copies of (1) any and all attachments to the Form 1-9, (2) any E-Verify related printouts or other E-Verify document related to the Form 1-9, and (3) any employment eligibility verification documentation related to the Form 1-9." Subpoena Ex. A, at 1.

On October 26, 2020, Petitioner filed its Petition to Modify or Revoke OCAHO Subpoena Duces Tecum. On November 1, 2020, IER filed its Opposition to SpaceX's Petition to Revoke or Modify Subpoena.

II. STANDARDS

Per 28 C.F.R. § 68.25(c), an entity "served with a subpoena who intends not to comply with it has ten days after service of the subpoena in which to file a petition to revoke or modify it." *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198, 2 (2013).[1] Subsequently, the

[1] 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

entity that applied for the subpoena has eight days after receipt of the petition to respond to it. § 68.25(c).

"It is long established that the requirements for enforcement of an administrative subpoena are minimal." *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198 at 3 (citing *United States v. Westinghouse Electric Corp.*, 788 F.2d 164, 166 (3d Cir. 1986)). Generally, an administrative subpoena is enforceable if "1) the investigation is within the statutory authority of the agency, 2) the subpoena is not too indefinite, and 3) the information sought is reasonably relevant to the charge under investigation." *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198 at 3 (first citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); and then citing *EEOC v. Univ. of Pa.*, 850 F.2d 969, 981 (3d Cir. 1988), *aff'd*, 493 U.S. 182 (1990)). If the three elements are satisfied, the subpoena will be enforced unless petitioner meets the "lofty burden" of proving that "the inquiry is unreasonable because it is overbroad or unduly burdensome." *In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751, 238, 243 (1995) (quoting *EEOC v. Children's Hosp. Medical Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983)).

III. DISCUSSION

A. Timeliness

The subpoena was served on October 12, 2020. Pet. 13; Opp'n Ex. K. Per OCAHO's rules, a petition to revoke or modify the subpoena was due on or before October 22, 2020. *See* § 68.25(c). Although Petitioner emailed the petition to Respondent on October 22, 2020, Opp'n 6, OCAHO did not receive a copy until October 26, 2020. Per 28 C.F.R. § 68.8(b), "[p]leadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer of the Administrative Law Judge assigned to the case." As such, the petition is "deficient and must be denied for its untimeliness, as well as for the [following] additional reasons." *See also In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751 at 240 (denying the petition as untimely because it was filed four days after the statutory filing date).

B. Enforceability of Administrative Subpoena

As explained above, "[a]n administrative subpoena will ordinarily be enforceable if: 1) the investigation is within the statutory authority of the agency, 2) the subpoena is not too indefinite, and 3) the information sought is reasonably relevant to the charge under investigation." *In re Investigation of NHS Human Servs.*, 10 OCAHO no. 1198 at 3.

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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 "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

i. IER's Scope of Authority

Although Petitioner does not dispute IER's authority to investigate F.H.'s discrimination claim, Pet. 14, Petitioner contends that IER exceeded the scope of its authority in seeking the employment eligibility verification documentation of over 3,000 employees. As IER notes, it may, on its "own initiative, conduct investigations respecting unfair immigration-related employment practices . . . ." 8 U.S.C. § 1324b (d)(1). This authority exists independent of whether a charge was filed. *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8 (2012). Moreover, IER has authority "to broaden the scope of an existing investigation beyond the allegations made in a particular charge . . . [such as] where it believes a pattern and practice of discrimination exists." *Id.* (citing *In re Investigation of Wal-Mart Distribution Ctr. #6036*, 5 OCAHO no. 788, 551, 553–54 (1995)). Therefore, the investigation of Petitioner's potential pattern and practice of citizenship status discrimination is within IER's scope of authority.

ii. Definiteness of Subpoena

Next, Petitioner argues that the subpoena is not sufficiently definite because it is neither specific nor relevant to IER's investigations. Pet. 17. Additionally, Petitioner objects to the subpoena on grounds of vagueness and ambiguity. Pet. 21–22. Nevertheless, the subpoena is sufficiently definite as Petitioner is able to discern the documents IER requested, the employment eligibility verification documentation of over 3,000 employees. *See In re Investigation of Univ. of S. Fla.*, 8 OCAHO no. 1055, 843, 847–48 (2000) (holding that the subpoena was not too indefinite as petitioner "ha[d] not suggested that it [wa]s unable to discern what documents [we]re requested"). These documents are limited to the I-9s and the I-9 process, which is quite specific. Further, Petitioner is aware of what documents are being sought after because Petitioner references the requested documents, its employees' birth certificates, social security cards, and passports, in its Petition. *See* Pet. 15, 18.

In contesting the definiteness of the subpoena, Petitioner emphasizes IER's refusal to explain its reason for investigating Petitioner and the relevance of the employment eligibility verification documentation of over 3,000 employees. Pet. 18. Petitioner cites to no caselaw, nor has the undersigned found such caselaw, supporting its contention that the definiteness of a subpoena is determined by the reasons for the investigation. In fact, in *United States v. Hill*, 319 F. Supp. 3d 44, 48 (D.D.C. 2018), the court rejected arguments claiming that the subpoenas were too indefinite because the subpoenas cited to general investigations and did not describe whether the individual subpoenaed was the subject of the investigation. The court held that the subpoenas were not too indefinite because the "subpoena requests [we]re sufficiently defined and limited[,]" and it declined to limit the subpoena given that "administrative investigatory subpoenas must by their very nature be broad." *Id.* (citations omitted). Here, in addition to the discernibility of the documents sought, the documents sought are limited to a one-year timeframe. Thus, the subpoena is not too indefinite.

iii. Reasonably Relevant

Petitioner also asserts that the subpoena is not reasonably relevant to IER's investigation. Pet. 18. "[R]elevance in the context of an investigatory subpoena is given an exceedingly generous construction." *In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, 728, 735 (2000) (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984)). Relevance "has been construed to include 'virtually any material that might cast light on the allegations against the employer.'" *In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751 at 243 (quoting *Shell Oil Co.* 466 U.S. at 68–69). Here, the documentation attached to the Forms I-9 of the employees are relevant to IER's investigation of whether Petitioner has engaged in a pattern or practice of discrimination based on citizenship status.

Additionally, Petitioner cites to Tenth Circuit cases to argue that F.H.'s sole claim of discrimination cannot be used to investigate Petitioner's employment practices for a potential pattern or practice of discrimination. Pet. 18–19. However, Petitioner's reliance upon the Tenth Circuit cases is misplaced given that the subpoenas in those cases were issued pursuant to EEOC statutes. *See EEOC v. TriCore Reference Labs*, 849 F.3d 929 (10th Cir. 2017); *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154 (10th Cir. 2012). In *Burlington*, the Tenth Circuit constrained the relevance analysis to the charges filed by two individuals. 669 F.3d at 1157. The EEOC has "authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." 42 U.S.C. § 2000e-6(e). In comparison, as explained above, § 1324b(d)(1) confers independent authority upon IER to investigate unfair immigration-related employment practices. Moreover, "[t]here is no provision requiring OSC to serve notice of the investigation on the person or entity involved when OSC . . . investigates allegations of unfair immigration-related employment practices on its own initiative." *In re Investigation of Carolina Emps. Ass'n, Inc.*, 3 OCAHO no. 455, 605, 611 (1992). Furthermore, OCAHO ALJ's have upheld subpoenas regarding a petitioner's general employment practices that stemmed from an individual's charge. *See In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751 at 241–43 (finding that a subpoena requesting supporting documentation for Forms I-9 was "relevant to petitioner's employment practices, particularly whether petitioner is engaging in any unfair immigration-related employment practices"). Similarly, the subpoena requesting SpaceX's employee's employment eligibility verification documentation related to their Forms I-9 is reasonably relevant to IER's investigation.

iv. Subpoena is Not Unduly Burdensome

Petitioner argues that the subpoena is unduly burdensome given the "tangential relationship" between F.H.'s charge and the information requested. Pet. 20. In lieu of full compliance with the subpoena, Petitioner suggests providing IER with a sample of the records requested. Pet. 21. Petitioner has the heavy burden of proving that an administrative subpoena is unduly burdensome. *In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751 at 243 (citations omitted). Petitioner must prove that compliance with a subpoena "would seriously disrupt its normal business operations" given that "the costs of complying with government subpoenas are a normal cost of doing business which should be borne by the company." *In re Tropicana Casino and Resort*, 9 OCAHO no. 1060, 2 (2000). "Generalized and unsupported

claims of undue burden do not meet this standard." *In re Investigation of Univ. of S. Fla.*, 8 OCAHO no. 1055 at 848 (citations omitted).

As explained above, IER is also investigating whether Petitioner has engaged in a pattern or practice of citizenship status discrimination, which makes the subpoena directly relevant. Additionally, Petitioner has not met its heavy burden of proving that compliance would be unduly burdensome. Although Petitioner did state that providing the documentation would be "extremely burdensome" because it "does not store the requested supporting documents or attachments in a way that would enable production without SpaceX having to manually retrieve each document[,]" Opp'n Ex. H at 8, Petitioner has not shown that compliance would seriously disrupt its normal business operations. Therefore, compliance with the subpoena is not unduly burdensome.

Accordingly, SpaceX's Petition to Modify or Revoke OCAHO Subpoena Duces Tecum is DENIED. Petitioner is directed to comply with the subpoena numbered 2021S00001 within 14 days of the date of this order. In the event of noncompliance within that time, IER is hereby authorized without further application to this office to seek enforcement in the appropriate district court of the United States pursuant to 8 U.S.C. § 1324b(f)(2) and 28 C.F.R. § 62.25(e).

SO ORDERED.

Dated and entered on December 1, 2020.

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Jean C. King
Chief Administrative Law Judge