

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

February 28, 2023

UNITED STATES OF AMERICA, Complainant, v. BRIAN DE JESUS CORRALES- HERNANDEZ Respondent.)))))))))))	8 U.S.C. § 1324c Proceeding OCAHO Case No. 2021C00033
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ORDER GRANTING IN PART COMPLAINANT’S EMERGENCY MOTION FOR
 EXTENSION OF TIME

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324c. The United States Department of Homeland Security, Immigration and Customs Enforcement (DHS or Complainant) filed a complaint against the Respondent on May 19, 2021, charging Respondent with two counts of violating 8 U.S.C. § 1324c.

On February 9, 2023, Administrative Law Judge (ALJ) Andrea Carroll-Tipton issued an Order on Complainant’s Motion for Summary Decision (“Order”) finding Respondent liable for both violations, assessing a total civil penalty of \$888 for the two violations and ordering the Respondent to cease and desist from further violations of 8 U.S.C. §§ 1324c(a)(2) and (5). *See United States v. Corrales-Hernandez*, 17 OCAHO no. 1454b (2023). On February 15, 2023, the Chief Administrative Hearing Officer (CAHO) issued a Notification of Administrative Review, in accordance with 28 C.F.R. § 68.54(a)(2), identifying one issue to be reviewed. *See United States v. Corrales-Hernandez*, 17 OCAHO no. 1454c (2023).¹

The Notification of Administrative Review noted that the review would be conducted in accordance with the provisions of 28 C.F.R. § 68.54(b)-(d). *Id.* at 4. Accordingly, the Notification provided that the parties could submit briefs or other written statements addressing the issue presented within twenty-one days of the date of entry of the ALJ’s order. *Id.*; *see also* 28 C.F.R. §

¹ The issue to be reviewed was summarized by the CAHO as follows: “whether DHS met its burden to establish that the [violation in Count I of the complaint] occurred after November 2, 2015, and, thus, whether the ALJ correctly assessed the civil penalty for this count.” *Corrales-Hernandez*, 17 OCAHO no. 1454c, at 4. Put more specifically, the CAHO noted that he would address “whether a violation of 8 U.S.C. § 1324c(a)(2) for the knowing use of a forged, counterfeit, altered, or falsely made document in order to obtain employment and complete the employment eligibility verification Form I-9 constitutes a ‘continuing violation’ for the duration of employment at the employer to whom the document was presented or, alternatively, whether the knowing use occurs only at the time the document is presented to obtain employment and complete the employment eligibility verification Form I-9.” *Id.*

68.54(b)(1) (establishing the twenty-one day deadline for filing briefs related to administrative review). The CAHO therefore set March 2, 2023 (twenty-one days after the ALJ's February 9 Order) as the deadline for submitting briefs or other written statements related to the administrative review. *Corrales-Hernandez*, 17 OCAHO no. 1454c, at 4.

The CAHO also separately issued an invitation to the public to file amicus briefs. *Id.* The deadline for parties to file amicus briefs was February 27, 2023.² As noted in the Notification of Administrative Review, the parties would be provided with a copy of any amicus briefs received and would have an opportunity to file a response. *Id.* at 4-5. The CAHO set a deadline of March 7, 2023, for the parties to file responses to amicus briefs. *Id.* at 5.

On February 28, 2023, the CAHO received from Complainant an Emergency Motion for Extension of Time to File Complainant's Brief in Response to Notification of Administrative Review ("Emergency Motion"). In the Emergency Motion, Complainant requests that the March 2, 2023 deadline for filing briefs be extended by thirty-five days, to April 6, 2023. As justification for the request, Complainant's counsel notes, *inter alia*, that he will be appearing in Immigration Court over the "next couple weeks," that he is covering additional duties in his office, and that Complainant's brief needs more time to undergo unspecified "multiple levels of review." Emergency Motion at 2.

Although the undersigned appreciates both Complainant's candor and its timely filing of an extension request and is not unsympathetic to the workload demands of Complainant's counsel, I am nevertheless constrained by the statutory and regulatory deadlines for the CAHO to issue an order modifying or vacating the ALJ's decision and order. Specifically, in cases arising under 8 U.S.C. § 1324c, the statute provides in relevant part that "[t]he decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless . . . within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order . . ." 8 U.S.C. § 1324c(d)(4). Similarly, OCAHO's regulations provide that the CAHO may enter an order that modifies or vacates the ALJ's order or remands the case to the ALJ for further proceedings "[o]n or before thirty (30) days subsequent to the date of entry of the [ALJ's] final order." 28 C.F.R. § 68.54(d)(1); *see also* 28 C.F.R. § 68.52(g) (providing that the ALJ's order becomes the final agency order sixty days after the date of the ALJ's order "unless the [CAHO] modifies, vacates, or remands the [ALJ's] final order pursuant to § 68.54, or unless the order is referred to the Attorney General pursuant to § 68.55."). In effect, these provisions require that, if the CAHO intends to issue an order modifying, vacating, or remanding the ALJ's final order, he or she must do so within thirty days of the date of the ALJ's final order. Otherwise, absent review by the Attorney General, the ALJ's final order would become the final agency order.

Complainant's request, in essence, asks the CAHO to unilaterally extend the statutory adjudication deadline in 8 U.S.C. § 1324c(d)(4), as further implemented through regulations in 28 C.F.R. § 68.54, from thirty days to closer to sixty days; however, Complainant identifies no legal authorization for the CAHO to exercise such authority in order to evade the statutory deadline, and the undersigned is aware of none. To the contrary, the U.S. Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises and whose law is applicable to the instant case, 28 C.F.R.

² One amicus brief was received in response to this invitation. A copy of the brief was sent to the parties by expedited mail on February 28, 2023.

§ 68.56, has made it clear that when an agency fails to comply with a statutory deadline for action, it is not acting in accordance with governing law. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (requiring the U.S. Department of the Interior and the U.S. Fish and Wildlife Service to comply with statutory deadlines established by the Endangered Species Act).³ Moreover, although it remains an open question in OCAHO jurisprudence as to whether the thirty-day deadline in 8 U.S.C. § 1324c(d)(4) for the CAHO to modify, vacate, or remand an ALJ’s final order is subject to some type of tolling, *see, e.g., United States v. Bhattacharya*, 14 OCAHO no. 1380b, 5-6 n.6 (2021) (noting the issue but declining to address it); *United States v. Chen’s Wilmington, Inc.*, 11 OCAHO no. 1241, 7-8 n.7 (2015) (noting the same issue regarding a similar deadline in 8 U.S.C. § 1324a(e)(7) but also declining to address it), the instant case does not provide an appropriate vehicle for answering that question for several reasons.

First, to the extent that Complainant’s motion may be construed as a tacit request to equitably toll the deadline in 8 U.S.C. § 1324c(d)(4), equitable tolling is typically a doctrine invoked by a party regarding a *filing* deadline. *Cf., e.g., Arellano v. McDonough*, 598 U.S. ___, 143 S. Ct. 543, 547-48 (2023) (discussing equitable tolling solely in the context of litigants or parties). The undersigned is unaware of any caselaw—and Complainant did not cite any—applying it to an agency *adjudication* deadline or allowing a party to invoke equitable tolling in order to toll a deadline that applies to the adjudicator rather than the party. Thus, even if the deadline in 8 U.S.C. § 1324c(d)(4) were subject to tolling—an issue I do not decide—the deadline could only be tolled by the agency adjudicator to whom it applies, and not through the invocation of a party.⁴

Second, even if equitable tolling could be asserted by a party to toll an adjudicator’s deadline, equitable tolling requires, at a minimum, “a showing of both diligence and extraordinary circumstances beyond a party’s control that prevented a timely [action].” *Bhattacharya*, 14 OCAHO no. 1380b, at 6 n.7. Although Complainant has exercised diligence in seeking a briefing extension, it has not identified any extraordinary circumstances beyond its control to warrant equitable tolling of the statutory deadline in 8 U.S.C. § 1324c(d)(4). The undersigned appreciates that all government attorneys may have heavy workloads, but a heavy workload alone is insufficient to establish an extraordinary circumstance warranting equitable tolling. *See, e.g., Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (declining to apply equitable tolling “just because a lawyer is busy” or “overburdened by a busy docket”). Complainant’s counsel has not alleged, for example, that he is the sole attorney available in his office to cover for his sick colleague or to attend Immigration Court, nor has he alleged any unique or otherwise extraordinary circumstances that would preclude him from timely filing a brief. OCAHO’s deadlines are well-established in both statute and regulation, and Complainant is very familiar with them. Consequently, although the undersigned is sensitive to the workload demands identified by Complainant’s counsel, they are inadequate to constitute extraordinary circumstances sufficient

³ Further, recent caselaw, particularly in the immigration context, has trended toward strict enforcement of statutory or regulatory adjudication deadlines. *See, e.g., Galvez v. Jaddou*, 52 F.4th 821, 832-34 (9th Cir. 2022) (affirming in relevant part a permanent injunction requiring the adjudication of certain immigration petitions by the Department of Homeland Security due to the statutory deadline in 8 U.S.C. § 1232(d)(2)); *see also Gonzalez Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F.Supp.3d 1156, 1160-63 (W.D. Wash. 2018) (granting an injunction requiring the Department of Homeland Security to comply with a regulatory adjudication deadline in 8 C.F.R. § 208.7(a)(1)).

⁴ As discussed in more detail, *infra*, tolling the deadline in 8 U.S.C. § 1324c(d)(4) would require, at the least, the presence of extraordinary circumstances. The undersigned is not aware of any circumstances at the present time that would prevent me from meeting the deadline in 8 U.S.C. § 1324c(d)(4). Thus, even if that deadline were subject to tolling by the CAHO, tolling would not be appropriate in the instant case.

enough to invoke equitable tolling, particularly in light of the statutory deadline in 8 U.S.C. § 1324c(d)(4).⁵

Finally, as an equitable doctrine,⁶ equitable tolling may also implicate considerations of prejudice to the opposing party. *See generally Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151-52 (1984) (discussing the role of prejudice in an analysis of the applicability of equitable tolling). Although an absence of prejudice is not an independent basis for invoking equitable tolling, once a possible justification for such tolling is identified, prejudice to the opposing party is a factor to be considered in determining whether equitable tolling should be applied. *Id.* at 152. In the instant case, Complainant has not addressed the possible prejudice to Respondent, and that failing also warrants a denial of its full request even if equitable tolling were otherwise available. Respondent is pro se, possesses limited English proficiency, and recently had to address a family member’s unforeseen, serious medical issue. *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454, 4-5 (2022) (discharging an Order to Show Cause and accepting Respondent’s late-filed answer due to these factors). He has also not requested any extension of the briefing deadline. In light of Respondent’s particular circumstances, providing Complainant with significant, additional time to prepare its brief and delaying the undersigned’s adjudication of the instant case beyond the statutory deadline would work significant prejudice to Respondent. Accordingly, the potential prejudice to Respondent further cautions against tolling the statutory deadline in 8 U.S.C. § 1324c(d)(4) at Complainant’s request.

The undersigned recognizes that 8 U.S.C. § 1324c(d)(4) imposes an arguably short deadline for administrative review. Nevertheless, that deadline has been in effect for many years, is well-known to the Complainant, and historically has not posed any difficulty for OCAHO to meet. Moreover, it is fully consonant with the Administrative Procedure Act’s directive to agencies to conclude matters before them within “a reasonable time.” 5 U.S.C. § 555(b). Consequently—and mindful that “[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law,” *Brown*, 466 U.S. at 152 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980))—the undersigned will deny Complainant’s Emergency Motion in part.

As the movant, Complainant bears the burden of proof and persuasion for its Emergency Motion. It has demonstrated good cause for a briefing extension within the confines of the statutory deadline imposed by 8 U.S.C. § 1324c(d)(4) due to the workload concerns of its counsel. However, Complainant has not met its significantly higher burden of establishing that the undersigned is authorized to alter and extend that deadline. To allow the undersigned to meet that deadline to

⁵ Nothing in this order should be construed as a blanket conclusion that a party’s workload concerns are always insufficient to warrant a continuance or a briefing extension. To the contrary, in other circumstances not implicating a statutory deadline or in situations in which only “good cause”—a lower standard than “extraordinary circumstances”—is required, such concerns may warrant a continuance or a briefing extension in an appropriate case. Indeed, as noted, *infra*, an extension of the briefing schedule within the confines of the statutory deadline in 8 U.S.C. § 1324c(d)(4) is subject only to a good cause standard.

⁶ The undersigned recognizes that as a statutorily-created administrative agency, OCAHO may not possess any authority beyond what Congress has legislated, including any equitable powers such as the authority to apply equitable tolling. *See, e.g., International Union of Electrical, Radio and Machine Workers v. NLRB*, 502 F.2d 349, 352 n.* (D.C. Cir. 1974) (“An administrative agency possesses no such inherent equitable power, however, for it is a creature of the statute that brought it into existence; it has no powers except those specifically conferred upon it by statute.”). I need not decide the extent, if any, of OCAHO’s equitable authority in the instant case, however, because Complainant has not established a basis to apply equitably tolling to the deadline in 8 U.S.C. § 1324c(d)(4) even if it were available.

issue an order in this case while also giving full consideration to the parties' submissions, all briefs and other documents related to administrative review must be filed in a timely manner. Accordingly, for all of the reasons above, Complainant's Emergency Motion is granted, in part. The original March 2, 2023 deadline for filing briefs related to the administrative review is extended to **March 7, 2023**.⁷

SO ORDERED.

James McHenry
Chief Administrative Hearing Officer

⁷ This is the same deadline for responses to the amicus brief; that deadline remains unchanged.