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

December 6, 2023

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2022A00015
KOY CHINESE & SUSHI RESTAURANT, Respondent.	)	

Appearances: John C. Wigglesworth, Esq., for Complainant
Kevin Lashus, Esq., for Respondent

ORDER EXPLAINING OCAHO PROCEDURAL REQUIREMENTS

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a.

On January 10, 2022, Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Respondent, Koy Chinese & Sushi Restaurant, violated § 1324a(a)(1)(B).

On October 18, 2023, the Court held a prehearing conference[1] to receive an update from the parties on settlement. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416f (2023).[2]

[1] During the prehearing conference, the parties confirmed they have reached a meeting of the minds and are attempting to draft a settlement agreement. Because the parties assured the Court they were actively engaged in settlement discussions, the Court was disinclined to set a case schedule.

[2] 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

During the prehearing conference, the parties provided the Court with a preview of potential settlement terms. Because of the shortcomings in the contemplated terms, the Court felt compelled to provide guidance to the parties[3] so they would succeed in drafting an approvable agreement. *See* 28 C.F.R. § 68.14(a)(2).[4] The Court also noted that if the parties had "drafted or executed an approvable agreement, they are encouraged to file such agreement with the Court attached to a

---

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

[3] Specifically, the Court felt obligated to explain to Complainant that a settlement agreement should contain all terms contemplated by the parties (i.e., if the parties intend to agree that they will jointly move the Court to dismiss a case as a condition of settlement, such a term should expressly appear in the written agreement).

Further, the Court concluded the parties also needed assistance in ensuring the agreement had consideration. *See, e.g.*, *Heath v. Springshine Consulting*, 16 OCAHO no. 1421b, 4 (2023) ("The parties bargained on a lawful object—the release of claims by Complainant against Respondent in exchange for a sum of money.").

Finally, the Court explained (for Complainant) the limitations on use of the term "Final Order" when a case is still in this forum. Notably, DHS does not have the authority to issue any equivalent to an ALJ-issued Final Order prior to issuance of said Final Order by the ALJ. *See, e.g.*, *United States v. Enrique Silva*, 8 OCAHO no. 1014, 252, 253 (1998) (noting that the § 1324a "regimen obliges [DHS] to stay its hand in the issuance of final orders until a case is disposed of by the ALJ"); *United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271d, 2 n.3 (2017) (referring to an ICE Order issued *after* the ALJ's Final Decision and Order as "merely cumulative or repetitive").

Once a case has left this forum, DHS can issue whatever documents or forms it chooses to in accordance with its own regulations and policies. Issuance of a "Final Order" (or its equivalent) by DHS "upon execution of the agreement" is not an approvable settlement term because when the settlement agreement is executed, the case is still in the forum. It leaves the forum if and when it is dismissed by the Court pursuant to a reason provided for in regulation or caselaw.

[4] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

motion requesting the Court review the agreement in advance of the next prehearing conference." *Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416f, at 3.

On November 28, 2023, Respondent attempted to submit a filing to the Court via email. Court staff rejected this filing for several reasons. The parties have not been approved to e-file submissions due to their own collective inaction – specifically Complainant has yet to return the required forms. In addition to the improper method of submission, the filings provided were entitled "joint" yet not signed by both parties and lacked a Certificate of Service.

On November 29, 2023, Respondent attempted to submit a second filing to the Court, again via email. This filing also contains deficiencies which preclude its acceptance. In lieu of issuing another standard rejection notice, the Court elects to take the opportunity to affirmatively REJECT this filing and provide guidance to the parties to assist them in submitting compliant filings in the future. The provision of this guidance should be construed as a courtesy, not an entitlement.

II. OCAHO FILING REQUIREMENTS

The default methods by which parties can file submissions with the Court are mail or delivery. *See* 28 C.F.R. § 68.6(a); OCAHO Practice Manual Chapter 3.2(b). OCAHO does have an electronic filing pilot program. *See* Office of the Chief Administrative Hearing Officer Electronic Filing Pilot Program, 29 Fed. Reg. 31143 (May 15, 2014); OCAHO Practice Manual Chapter 3.7. However, the "e-filer" status is not automatic.

To become "e-filers," both parties must request (in writing) to enter the pilot program. Next, the presiding administrative law judge decides whether parties may become "e-filers" as a matter of discretion. *See* 29 Fed. Reg. 31143. Further, parties are affirmatively notified when they have been designated as "e-filers." *Id.* ("If both parties to a case agree to participate in the pilot . . . they will be notified by mail and email that their case has been accepted into the pilot program.").

On September 6, 2023, the Court invited the parties to participate in the electronic filing pilot program, sending them Instructions for Filing by Email, Instructions for Decrypting Secure Documents, and Email Filing Program Attorney/Participant Registration and Certification Forms. While Respondent submitted its completed registration form on September 13, 2023, Complainant did not submit a completed registration form. Because both parties have yet to submit their required forms, this case is not approvable for e-filing. Absent a change in this status, the parties can only submit filings by mail or delivery pursuant to 28 C.F.R. § 68.6(a).

III. CERTIFICATE OF SERVICE REQUIREMENT

A Certificate of Service is "[a] section of a pleading or motion filed with the court . . . in which the filing party certifies to the court that a copy has been mailed to or otherwise served on all other parties." *Certificate*, BLACK'S LAW DICTIONARY (11th ed. 2019). This document is required by regulation. All filings must contain "certification indicating service to all parties of record." 28 C.F.R. § 68.6(a). The Certificate of Service should indicate "the manner and date of service." *Id*. Practically speaking, a Certificate of Service is documentary evidence created by the moving party detailing past actions taken by that party, to wit: what was sent, how it was sent, and when it was sent.

Setting aside the issue of improper submission via email, the Respondent submitted no such proof of service with his first submission. Even if the parties were approved to e-file, OCAHO still requires a Certificate of Service for each filing with the Court, even filings submitted electronically where parties "cc" opposing party.[5] *See* OCAHO Practice Manual Chapter 3.7(d)(8) ("A certificate of service must be included in all case-related documents filed electronically.").

After Court staff rejected Respondent's first filing, Respondent submitted another filing the following day (also electronically, despite being informed the day prior that he was not approved to submit filings through this method). This second filing (i.e. the one which gives rise to this Order) included a page entitled "Certificate of Service." The text on this unsigned piece of paper was as follows:

> I certify that John [Complainant's counsel] and I collaborated on the attached, we discussed the substance of the motion, edited the Motion to Dismiss and determined that we'd file it jointly. We agreed that I would digitally file[6] the Notice and Motion yesterday, Tuesday, November 28, 2023, and that I would cc: him on the transmittal. I've now added this certificate to overcome the clerk's rejection notice. I would add this to the Joint Motion, and will serve John digitally at the instant that I file it.

[5] Stated a different way, adding opposing counsel to the "cc line" of an e-filed submission does not relieve a moving party of the requirement to attach a Certificate of Service. The Certificate of Service must be created by the moving party because it is the moving parties' evidence and affirmation it complied with procedural requirements. Although a copy of the email correspondence may enter the record, *see* OCAHO Practice Manual Chapter 3.7(d)(3) ("The email notifying the ALJ of the incoming case-related documents will serve as a cover letter."), the email does not constitute an *affirmation* of compliance, and it is not a function of the Court to create such evidence of proper service for the parties.

[6] As an aside, parties not approved to e-file cannot "agree" to approve their own case for e-filing.

Despite being labelled as a Certificate of Service, for obvious reasons, it is not. While it is admirable that parties collaborated on the motion, such collaboration does not meet the requirements outlined above.[7]

Here, Respondent's counsel references his previously rejected filing; however, this deficient filing was rejected - it cannot be revived and amended, rather a compliant filing must be submitted anew. Further, a Certificate of Service is evidence that explains how a party provided (in the past) the submission to opposing party. Here Respondent's counsel states he "will serve" opposing counsel. It is not clear when opposing counsel will be receiving the filing, and if such a baseline data point is unclear, the Certificate of Service is inherently deficient. A Certificate of Service also requires more specificity than what is contained within Respondent's narrative submission. (i.e. assuming parties have agreed to receive filings from one another digitally, a Certificate of Service would have the specific email address to which the filing was sent, just as a Certificate of Service would contain the complete physical address if the filing were mailed). A final note, this narrative submission is unsigned.

Parties must always submit a compliant Certificate of Service. An example of a Certificate of Service is available at the end of this (and every previously issued) Order.

IV. CONCLUSION

Parties must file motions in accordance with regulation (i.e. if they are not approved to e-file, they cannot submit matters electronically). Parties must also provide proof of service for any matter submitted to the Court. Parties are not precluded from re-submitting (not via email) a joint motion to dismiss (signed by all parties) with a compliant Certificate of Service (an example of which follows this order), and a copy of an executed (i.e. signed by all parties)[8] settlement agreement that does not contravene the guidance provided in prior orders.

For the above reasons, the November 29, 2023 filing from Respondent is REJECTED. The Court will reschedule the December 6, 2023 conference in a separate order.

---

[7] The Court separately notes a key forum distinction here for the parties. The Immigration Court Practice Manual has more lenient provisions when parties submit "jointly filed motions agreed upon by all parties." Immigration Court Practice Manual Chapter 3.2(a)(2). In contrast, OCAHO's Practice Manual and regulations make no such exception for joint motions.

[8] As an aside, the parties attached an unsigned copy of a settlement agreement. Because the filing is rejected, the Court did not review the substance this document. If a signed settlement agreement exists, it would be a best practice to attach that document as evidence the parties have entered into a settlement agreement (to the extent the parties now seek to move the Court to dismiss their case).

SO ORDERED.

Dated and entered on December 6, 2023.

_____
Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

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

December 19, 2023

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2022a00015
KOY CHINESE & SUSHI RESTAURANT, Respondent.	)	

Appearances: John C. Wigglesworth, Esq., for Complainant
Kevin Lashus, Esq., for Respondent

ERRATA

The Order Explaining OCAHO Procedural Requirements, issued on December 6, 2023, is hereby amended to correct the following:

1. Page 3 is corrected to read: "OCAHO does have an electronic filing pilot program. *See* Office of the Chief Administrative Hearing Officer Electronic Filing Pilot Program, 79 Fed. Reg. 31143 (May 30, 2014); OCAHO Practice Manual Chapter 3.7."

2. Page 3 is corrected to read: "Next, the presiding administrative law judge decides whether parties may become "e-filers" as a matter of discretion. *See* 79 Fed. Reg. 31143."

SO ORDERED.

Dated and entered on December 19, 2023.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge