

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

April 5, 2012

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 12A00003
	)	
JABIL CIRCUIT, INC.,	)	
Respondent.	)	
_____	)	

ORDER VACATING ADMINISTRATIVE LAW JUDGE’S FINAL DECISION  
AND ORDER OF DISMISSAL AND REMANDING FOR FURTHER PROCEEDINGS

This case arises under the Immigration and Nationality Act (INA or the Act), as amended, 8 U.S.C. § 1324a. In response to a Request for Review filed by the United States of America, through the U.S. Department of Homeland Security, Immigration and Customs Enforcement (hereinafter “ICE” or “Complainant”), this Order vacates the Final Decision and Order of Dismissal entered by the Administrative Law Judge (ALJ) in this case on March 8, 2012, and remands the case to the ALJ for further proceedings in accordance with this order.

Procedural History

On October 5, 2011, ICE filed with this office a Complaint Regarding Unlawful Employment against Jabil Circuit, Inc. (hereinafter “Respondent”). The complaint alleged substantive paperwork violations and failure to prepare and/or present the employment eligibility verification forms (Form I-9) for various named employees in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B). The complaint requested the ALJ to order injunctive relief and civil penalties against Respondent. On October 7, 2011, this Office sent a Notice of Case Assignment Regarding Unlawful Employment, with a copy of the complaint and attachments, to Respondent. Respondent filed its answer to the complaint on November 10, 2011.

On November 16, 2011, the ALJ issued an Order for Prehearing Statements, which required Complainant to file its prehearing statement no later than December 28, 2011, and Respondent to file its prehearing statement no later than February 8, 2012. However, the Complainant did not file its prehearing statement by the due date. Consequently, on January 25, 2012, the ALJ issued a Notice and Order to Show Cause ordering Complainant to show cause within 15 days why its complaint should not be deemed abandoned, or, in the alternative, to show good cause for its

failure to file its prehearing statement, and to file its prehearing statement in compliance with the requirements of 28 C.F.R. § 68.12. In this order, the ALJ specifically noted that under the Office of the Chief Administrative Hearing Officer's (OCAHO) rules, a party may be deemed to have abandoned its complaint, and the complaint consequently dismissed, where the party fails to respond to orders issued by the ALJ. The ALJ further noted that a failure to respond to the Notice and Order to Show Cause may result in dismissal of the complaint. The order was mailed by first-class mail and a response to the order was due by February 9, 2012. *See* Notice and Order to Show Cause (filed January 25, 2012); *see also* 28 C.F.R. §§ 68.8(c)(2); 68.11(b).

Nonetheless, the Complainant failed to respond to the Notice and Order to Show Cause. As a result, on March 8, 2012, the ALJ issued the subject Final Decision and Order of Dismissal.

On March 16, 2012, Complainant filed a timely Request for Administrative Review, along with, *inter alia*, an affidavit from a Mail and File Clerk employed by Complainant and Complainant's Proposed Prehearing Statement. The Complainant's Request for Administrative Review seeks to have the ALJ's order dismissing the complaint vacated and the case remanded for further proceedings. The Respondent did not file a response to Complainant's request.

#### Jurisdiction

The Attorney General's authority to conduct administrative appellate review in § 1324a cases is set forth in 8 U.S.C. § 1324a(e)(7). This provision authorizes delegation of the Attorney General's review authority by regulation. *Id.* 28 C.F.R. § 68.54 delegates to the Chief Administrative Hearing Officer (CAHO) the authority to conduct administrative review of an ALJ's final order in cases arising under INA §§ 274A (Unlawful Employment of Aliens) or 274C (Document Fraud). Under 28 C.F.R. § 68.54, the CAHO has discretionary authority to review any final order of an ALJ in cases arising under INA §§ 274A or 274C. The standard of review is *de novo*. *United States v. Banafsheha*, 3 OCAHO no. 525, 1266, 1267 (1993); *United States v. Applied Computer Technology*, 2 OCAHO no. 367, 524, 526 (1991). The regulation provides that a party may file with the CAHO a written request for administrative review within ten days of the date of entry of an ALJ's final order, or the CAHO may review an ALJ's final order on the CAHO's own initiative. 28 C.F.R. § 68.54. For the reasons discussed below, I hereby grant Complainant's Request for Administrative Review, vacate the ALJ's Final Decision and Order in this case and remand the case for further proceedings in accordance with this order.

#### Discussion

The Complainant admits that it did not file its prehearing statement by the due date. *See* Request for Administrative Review at para. 4. However, Complainant alleges in its Request for Administrative Review that counsel for Complainant and counsel for Respondent were in settlement negotiations at the time counsel for Complainant received the ALJ's Order for Prehearing Statements. *Id.* Complainant further alleges that on January 20, 2012, Complainant's

counsel's younger sister was killed in a tragic accident and Complainant's counsel did not return to the office until January 31, 2012. *Id.* at para. 5.

Complainant also admits that it did not respond to the ALJ's Notice and Order to Show Cause. *Id.* at para. 6. However, Complainant alleges that it appears neither Complainant's counsel nor Complainant's office received the ALJ's show cause order. *Id.* Moreover, Complainant's affiant avers that she was out of the office on one of the days during the time period the show cause order likely would have arrived in the affiant's office, *see* Attachment D to Request for Administrative Review (Affidavit of Jacqueline Hahn) at para. 6; the affiant further avers that her "back-up" would have processed the mail on the day the affiant was out of the office. *Id.* Additionally, the affiant avers that, pursuant to Complainant's counsel's request, the affiant checked her office's mail area and did not find the show cause order. *Id.* at para. 8.

Preliminarily, it must be noted that the fact that parties are in settlement negotiations does not excuse them from complying with an ALJ's order. At the very least, parties should request an extension of time to respond to the order or pleading, or seek a stay of the proceedings pending the outcome of settlement negotiations. Parties who fail to do so, risk the consequence suffered by Complainant in this case. 28 C.F.R. § 68.37(b)(1).

Nonetheless, I find that due to extraordinary, extenuating circumstances presented by the specific facts in this case, the complaint should not be deemed abandoned because Complainant's counsel's failure to respond to the show cause order was due to "excusable neglect." *See* Fed. R. Civ. P. 60(b)(1).<sup>1</sup> Consequently, I hereby vacate the ALJ's Final Decision and Order of Dismissal and remand the case to the ALJ for further proceedings consistent with this order. In support of this ruling, I make the following findings: first, it appears that the ALJ's show cause order may not have been received by Complainant (*see* Request for Administrative Review at para. 6 and Attachment D thereto); second, the ALJ's show cause order most likely would have been delivered to Complainant during the time period Complainant's counsel was out of the office due to the death of her sister in a tragic accident (*see* Request for Administrative Review at para. 5; *see also* Attachment D thereto at para. 4); third, due to Complainant's counsel's absence from the office during the time period the ALJ's show cause order would have been expected to arrive at Complainant's counsel's office and Complainant's affiant's absence from the mailroom on a day during this time period, even if the show cause order had been received by Complainant, it is feasible that the order was misplaced and never received by Complainant's counsel. Finally, a final decision and order of dismissal based on abandonment equates to a default judgment, which is "generally disfavored and [...] reserved for rare occasions ...." *Kanti v. Patel*, 8 OCAHO no. 1007, 166, 169 (1998). Moreover, "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." *Id.* Therefore, based on the foregoing, I find that the complaint in this case should not be deemed abandoned.

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<sup>1</sup> The Federal Rules of Civil Procedure are used as general guidelines in situations not provided for or controlled by OCAHO's rules. 28 C.F.R. § 68.1.

Accordingly, for the above-stated reasons, the ALJ's Final Decision and Order of Dismissal is hereby VACATED and the case is REMANDED for further proceedings consistent with this order.

It is SO ORDERED, dated and entered this 5th day of April 2012.

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Robin M. Stutman  
Chief Administrative Hearing Officer

Appeal Information

The authority and procedures for the Attorney General's review of a CAHO order modifying or vacating an ALJ's order under INA §§ 274A or 274C are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.55.

Pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56, a person or entity adversely affected by a final order respecting an assessment may file a petition for review of the order in the United States Court of Appeals for the appropriate circuit within 45 days after the date the final order is issued.