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

December 7, 2012

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00079
CORDIN COMPANY, Respondent.	)	

DENIAL OF RESPONDENT'S REQUEST FOR ADMINISTRATIVE REVIEW

Procedural History

On June 7, 2012, the United States of America, through 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) against Cordin Company (Respondent). The complaint charged Respondent with failure to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a. On June 25, 2012, OCAHO issued a Notice of Case Assignment to the parties and the case was assigned to the Honorable Ellen K. Thomas, Administrative Law Judge (ALJ). The Notice of Case Assignment referenced the regulations governing OCAHO cases and identified where and how Respondent could obtain a copy of those regulations. It also informed Respondent of the procedures and timeline for filing an answer, as well as the potential consequences for failing to do so.

The Notice of Case Assignment and the complaint were received by Cordin Company on June 29, 2012. The regulations grant Respondent 30 days to file an answer, making the answer in this case due no later than July 30, 2012. Respondent did not file an answer by the deadline. On August 23, 2012, the ALJ issued a Notice and Order to Show Cause, directing the Respondent to show cause why its request for a hearing should not be deemed abandoned, or alternatively, to show good cause for its prior failure to answer and to file an appropriate answer. A response to the Notice and Order to Show Cause was required from Respondent within 15 days. The Notice and Order to Show Cause stated that, "a request for hearing may be dismissed upon its abandonment by the party who filed it," and further cautioned that, "a party shall be deemed to have abandoned such a request where the party or its representative fails to respond to orders

issued by the Administrative Law Judge." Despite these warnings, Respondent filed no response to the ALJ's show cause order.

Accordingly, on October 3, 2012, pursuant to 28 C.F.R. § 68.37(b), the ALJ issued a Final Order of Dismissal, deeming the request for a hearing to be abandoned and holding that the Notice of Intent to Fine issued by ICE would become the final order in the case. The ALJ's Final Order of Dismissal advised the parties of the procedure for administrative review, indicating that a request for administrative review must be filed with the Chief Administrative Hearing Officer (CAHO) within 10 days of the date of the final order. The ALJ's final order also set forth the deadline for filing a petition for review of the final agency order with the appropriate U.S. Circuit Court of Appeals.

On November 9, 2012, OCAHO received a letter from Respondent referencing the October 3, 2012, Final Order of Dismissal and the August 23, 2012, Notice and Order to Show Cause and reiterating Respondent's desire to present its case before the ALJ. Letter from Nathan Nebeker, Cordin Company General Manager, to CAHO Robin Stutman, dated October 29, 12 [sic] (hereinafter "Respondent's Letter"). While the letter did not explicitly state that it was a request for administrative review, it was addressed to the CAHO and raised several arguments concerning both the substance and procedure of Respondent's case. Therefore, the letter will be construed as a request for administrative review and will be evaluated accordingly. *See, e.g.*, *United States v. Davila*, 7 OCAHO no. 936, 252 (1997) (construing Respondent's Motion for Recusal, filed after the ALJ had granted complainant's motion for summary decision, as a request for administrative review).

Discussion

Under 28 C.F.R. § 68.54(a)(1), a party may file a written request for administrative review with the CAHO within 10 days of the date of entry of the ALJ's final order. Because the Final Order of Dismissal in this case was entered on October 3, 2012, the deadline for filing a request for administrative review was October 15, 2012. Respondent's request for review was not received until November 9, 2012.[1] Because the request for administrative review was not filed by the deadline, it is untimely. *See, e.g.*, *United States v. De Luca's Mkt., Inc.*, 8 OCAHO no. 1038, 591, 591-92 (1999); *United States v. Christie Auto. Prods.*, 2 OCAHO no. 365, 518, 519 (1991). Accordingly, I hereby deny the Respondent's request for administrative review.[2]

In its letter, Respondent argues that it did not understand that an answer to the complaint was required. *See* Respondent's Letter at 1. However, parties are presumed to know the rules of

[1] Pleadings are not deemed filed until they are received by OCAHO or the ALJ. *See* 28 C.F.R. § 68.8(b).

[2] Although filing deadlines are generally not jurisdictional and, therefore, are subject to equitable tolling under appropriate circumstances, *see Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071-72 (1998); *see also Sall v. Wal-Mart Stores, Inc.*, 10 OCAHO no. 1161, 3 (2012), as discussed *infra* at 4, Respondent has not acted with the requisite due diligence to justify tolling the filing deadline here. *See Sall*, 10 OCAHO no. 1161, at 3; *Caspi*, 7 OCAHO no. 991, at 1072-73.

practice and procedure that govern OCAHO cases. *See Yakus v. United States*, 321 U.S. 414, 435 (1944) (publication of regulations in the Federal Register is sufficient to give constructive notice of their contents to all persons affected by the regulations) (citing former 44 U.S.C. § 307, now codified at 44 U.S.C. § 1507); *see also George v. United States*, 672 F.3d 942, 944 (10th Cir. 2012). OCAHO's regulations are published at 28 C.F.R. Part 68. The Notice of Case Assignment referenced these rules and informed the parties where and how they could obtain a copy of the regulations. *See* Notice of Case Assignment at ¶ 2. The Notice of Case Assignment informed Respondent that its answer to the complaint "*must* be filed within thirty (30) days after receipt of the attached complaint." *Id.* at ¶ 4 (emphasis added); *see* 28 C.F.R. § 68.9(a) ("Within thirty (30) days after the service of a complaint, each respondent *shall* file an answer.") (emphasis added). The Notice of Case Assignment also clearly stated that failure to file an answer could result in the entry of a default judgment against the Respondent. Notice of Case Assignment at ¶ 4.

Furthermore, the regulations in Part 68 set out the procedures for dismissal on grounds of abandonment. Section 68.37(b) provides that, "a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if: (1) A party ... fails to respond to orders issued by the Administrative Law Judge." 28 C.F.R. § 68.37(b). In this case, even after its failure to file an answer to the complaint, the Respondent was given an opportunity to show cause why it failed to do so and given another opportunity to file an answer; Respondent failed to respond to the ALJ's Notice and Order to Show Cause. Accordingly, the ALJ correctly found that Respondent's request for a hearing had been abandoned and dismissed the case in accordance with 28 C.F.R. § 68.37(b).

In Respondent's letter, Respondent's General Manager asserts that he was confused by the use of the word "may" instead of "must" in the Notice of Case Assignment, which stated that, "[i]f the Respondent fails to file an answer within the time provided, the Respondent *may* be deemed to have waived his/her right to appear and contest the allegations of the complaint." Notice of Case Assignment at ¶ 4 (emphasis added).[3] However, as is evident from the language quoted above from the Notice of Case Assignment (i.e., "must" and "shall") regarding filing an answer, such requirement is mandatory – not permissive. It is also clear that the use of the word "may" relied upon by Respondent grants discretion to the ALJ in determining whether or not to deem the failure to answer a complaint a waiver of a request for a hearing. It does not make the requirement to file an answer optional.

Additionally, in this case, it was not just the failure to file an answer that resulted in the finding of abandonment and the Final Order of Dismissal. The procedures governing abandonment and dismissal provide that "[a] party *shall* be deemed to have abandoned" a request for a hearing if the party "fails to respond to orders issued by the Administrative Law Judge." 28 C.F.R.

[3] In its letter, Respondent also raised substantive arguments challenging the fine levied by ICE. Respondent's Letter at 2.

§ 68.37(b) (emphasis added). The Notice and Order to Show Cause cited and explained this provision. It was Respondent's failure to respond to the Notice and Order to Show Cause that ultimately resulted in a finding that the request for a hearing had been abandoned and the consequent Final Order of Dismissal. This was entirely appropriate under 28 C.F.R. § 68.37(b). *See, e.g., United States v. Columbia Sportswear Mfrs., Inc.*, 5 OCAHO no. 808, 669, 672-73 (1995) (concluding that Respondent had abandoned its request for a hearing after neither Respondent nor Respondent's counsel filed an answer or responded to an order to show cause); *Gallegos v. Magna-View, Inc.*, 4 OCAHO no. 628, 359, 362 (1994). Consequently, Respondent forfeited its opportunity to raise its substantive arguments against the ICE fine and for a hearing before the ALJ by failing to file an answer and then subsequently failing to respond to the ALJ's show cause order.

Respondent's General Manager also asserts that he did not receive the Notice and Order to Show Cause, dated August 23, 2012, or the Final Order of Dismissal, dated October 3, 2012, until much later because they were addressed to his brother, instead of him.[4] Respondent's General Manager further asserts that he contacted opposing counsel at ICE in July, 2012, to have future documents in the case addressed to him, instead of his brother. However, the Respondent in this case is Cordin Company, not any one individual within the company. The Notice of Case Assignment, the Notice and Order to Show Cause, and the Final Order of Dismissal were all addressed and sent to Cordin Company's current business address, an address which Respondent does not claim was incorrect. Moreover, it is incumbent upon Respondent to ensure that its office mail, particularly in the case of pending litigation, is appropriately and timely routed to the responsible individual in the company.

In accordance with OCAHO regulations, after the complaint has been properly served and filed, "service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address" of a party. 28 C.F.R. § 68.6(a). It is the Respondent's responsibility (indeed, the responsibility of all parties before OCAHO) to file a notice of change of address or other contact information directly with the ALJ, as well as serving that notice on the opposing party. *See United States v. Ortiz*, 6 OCAHO no. 904, 919, 925 (1996); *United States v. Panamerican Supply Co.*, 5 OCAHO no. 804, 654, 655 (1995) ("it is the Respondent's duty to keep both the Court and the opposing party informed as to its current mailing address."). It is not enough merely to notify opposing counsel; opposing counsel has neither the responsibility nor the authority to inform the ALJ of Respondent's changed contact information. The notice and orders issued by OCAHO and the ALJ were properly served on Respondent Cordin Company in this case by mailing them to the Respondent's last known (and correct) address, and Respondent failed to act with the requisite due diligence to justify equitable tolling of the filing deadlines. *See supra* note 1.

[4] Although Respondent does not expressly request equitable tolling of the filing deadline for its untimely request for administrative review, because Respondent is acting *pro se* I have considered its arguments under equitable tolling principles.

Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have denied Respondent's request for administrative review and, thus, have not modified, vacated, or remanded the ALJ's order, the Final Order of Dismissal became the final agency order 60 days after its issuance by the ALJ. A 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 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56; *see A-Plus Roofing, Inc. v. INS*, 929 F.2d 489, 490 (9th Cir. 1991) (holding that the 45-day appeal period begins to run on the date the ALJ's order becomes the final agency order, not on the date the ALJ's order was issued).

It is SO ORDERED, dated and entered this 7th day of December, 2012.

_____

Robin M. Stutman
Chief Administrative Hearing Officer