

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

March 4, 2013

ERNESTINA C. LOPEZ,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00070
	)	
JAMES JUNG, HALLMARK CLEANERS,	)	
Respondent.	)	
_____	)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which Ernestina C. Lopez is the complainant and James Jung, Hallmark Cleaners, is the respondent. Lopez filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 21, 2012 alleging that respondent discriminated against her by laying her off on the basis of her citizenship status and national origin in violation of 8 U.S.C. § 1324b. The respondent filed a handwritten answer denying the material allegations of the complaint. Neither party is represented by counsel.

The complaint alleged that the complainant filed a charge with the Office of Special Counsel (OSC) on September 9, 2011. It also said that she received a letter from OSC on January 12, 2012 authorizing her to file a complaint with this office. Because the record reflected that the letter was dated January 12, 2012 and it appeared exceedingly unlikely that Lopez received it on the same day it was sent, an Inquiry was made to OSC as to whether it had information or records reflecting when the letter was actually received. OSC reported that the return receipt reflected that the letter was received by Lopez on January 23, 2012. It accordingly appeared that the complaint was not filed within 90 days of Lopez’s receipt of the letter as is required by the applicable statute and regulations. 8 U.S.C. § 1324b(d)(2); 28 C.F.R. § 68.4(c).

A Notice and Inquiry was issued to Lopez advising her that it appeared her complaint was filed on the 119th day after her receipt of the letter and was untimely. Because it was impossible to say on the basis of the bare pleadings that there were no facts which could be proved to show a timely filing or to excuse the lack of it, *see, e.g., Seaver v. BAE Sys.*, 9 OCAHO no. 1111, 6-8 (2004), Lopez was given an opportunity to explain the surrounding facts and circumstances in order to assess whether equitable relief might be unavailable to toll the filing deadline. Lopez made a timely response. Jung was given an opportunity to file responsive materials but did not do so.

In her response, Lopez says that on April 11, 2011, she sent a “letter with [her] side of what happen (sic)” before we sent her the forms to file a complaint. She says she sent the letter here because an attorney at OSC advised her to do so. Attached to her response was Fed Ex receipt for \$1.29, evidently for an 8 ½ by 11 envelope. A copy of receipt showing a delivery to Lopez on January 23, 2012 is also included.

It appears that this office received a copy of Lopez’ OSC letter on April 20, 2012, after which the complaint form was sent to her for completion. Lopez letter explaining her side of events appears as an attachment to the completed complaint form which was received in this office on May 21, 2012, but there is no record of its having been received at any time before that.

## II. DISCUSSION

The OSC letter unequivocally states that,

You may now file your own complaint with an administrative law judge at the Office of the Chief Administrative Hearing Officer (OCAHO). If you do so, you must file the complaint within 90 days of your receipt of this letter.

The letter goes on to provide the address and telephone number for OCAHO, and reflects that a copy of the appropriate rules of procedure was included with the letter.

Nothing in the letter suggests that filing the letter itself will substitute for filing a complaint, and it is well established under analogous Title VII case law that filing a right-to-sue letter does not toll the 90-day period for filing a complaint. *See Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149, 151-52 (1984). The complaint will accordingly be dismissed as untimely filed.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 4th day of March, 2013.

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Ellen K. Thomas  
Administrative Law Judge

#### Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than sixty (60) days after the entry of such Order.