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

April 15, 2015

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 15A00014
VILARDO VINEYARDS, Respondent.	)	

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER VACATING THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER OF DISMISSAL AND REMANDING FOR FURTHER PROCEEDINGS

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2012). 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) on December 1, 2014, alleging that respondent Vilardo Vineyards failed to comply with the employment eligibility verification provisions of 8 U.S.C. § 1324a.

This office sent a Notice of Case Assignment for Complaint Alleging Unlawful Employment of Aliens, a copy of the complaint, the Notice of Intent to Fine, and the respondent's request for a hearing to the respondent and respondent's counsel on December 9, 2014, by certified mail. The Notice of Case Assignment informed the respondent of its right to file an answer to the complaint and that the answer had to be filed within thirty days of receipt of the complaint. The Notice of Case Assignment also informed the respondent that failure to file an answer by the deadline may result in entry of a default judgment. Respondent was further directed to the rules of practice and procedure for cases before OCAHO, 28 C.F.R. part 68.

Based on the date the complaint was received by respondent, respondent's answer was due no later than January 12, 2015. However, the respondent failed to file an answer by this deadline. Accordingly, on February 6, 2015, the Administrative Law Judge (ALJ) assigned to the case issued a Notice and Order to Show Cause. The order informed the respondent that a request for hearing shall be deemed to have been abandoned where the party or its representative fails to respond to orders issued by the ALJ, and that a request for hearing may be dismissed upon such a finding of abandonment. The Notice and Order to Show Cause therefore ordered the respondent to show cause within fifteen days why its request for hearing should not be deemed abandoned,

or in the alternative, to show good cause for its failure to answer and to file an answer which comports with 28 C.F.R. § 68.9.

Vilardo Vineyards' response to the Order to Show Cause was due no later than February 23, 2015. OCAHO did not receive a response to the Order to Show Cause within the designated time period. As a result, the ALJ issued a Final Decision and Order of Dismissal on March 16, 2015, concluding that the respondent had abandoned its request for hearing based on its failure to file an answer and its failure to respond to the subsequent Order to Show Cause. The Final Decision therefore dismissed the complaint, and provided that the Notice of Intent to Fine becomes the final agency order in this matter.

On April 6, 2015, OCAHO received a Notice of Motion to Vacate Order of Dismissal from respondent through its attorney, Herbert L. Greenman. The Motion to Vacate included an affidavit from Mr. Greenman in which he averred that he had previously sent a response to the Order to Show Cause by overnight mail, and was initially confused as to how the ALJ had not received this response. Mr. Greenman further stated that "[w]ithin the past few days" he had received notice of a non-delivered package and therefore "became aware for the first time" that the envelope containing his response to the Order to Show Cause had been improperly addressed and thus not delivered to the ALJ.

The Motion to Vacate also included affidavits from Mr. Greenman's secretary and the office's file clerk. Mr. Greenman's secretary stated that, per normal procedure, she prepared the response to the Order to Show Cause along with the requisite attachments and copies, addressed it correctly to the ALJ, and gave it to the office's file room to prepare the shipping label and mail it to the appropriate address. The affidavit further states that the file room was shorthanded at the time, and that therefore "a floater employee was in the position to prepare" the shipping label, and may have inadvertently given the wrong address, causing the envelope to eventually be returned, rather than delivered to OCAHO. The affidavit from the file clerk similarly states that the file room was shorthanded at the time the envelope was sent, and that a "floater" was filling in and may have inadvertently included the wrong address on the mailing label. The file clerk's affidavit also states that the instructions from Mr. Greenman's secretary did contain the correct address.

Also attached to the Motion to Vacate are copies of the envelope for the response to the Order to Show Cause, which displayed an incorrect address for OCAHO, apparently causing the envelope and its contents to be undeliverable. ICE did not file a response to the Motion to Vacate.

Based on these facts, and for the reasons stated below, the Motion to Vacate will be construed as a request for administrative review pursuant to 28 C.F.R. § 68.54, and will be granted. The ALJ's Final Decision and Order of Dismissal is hereby vacated, and the case remanded to the ALJ for further proceedings.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer (CAHO) has discretionary authority to review any final order of an ALJ in a case brought under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Pursuant to OCAHO's rules of practice and procedure, a party may file a

written request for administrative review within ten days of entry of the ALJ's final order, 28 C.F.R. § 68.54(a)(1), or the CAHO may review an ALJ's final order on his or her own initiative by issuing a notice of administrative review within ten days of the date of the ALJ's final order, 28 C.F.R. § 68.54(a)(2). However, as with many other procedural deadlines, this ten-day deadline for filing a request for administrative review is not jurisdictional and thus may be equitably tolled if circumstances warrant. *See United States v. Chen's Wilmington, Inc.*, 11 OCAHO no. 1241 (2015).[1] The CAHO may enter an order that modifies or vacates the ALJ's order or remands the case to the ALJ for further proceedings within thirty days of entry of the ALJ's final order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision …." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *Chen's Wilmington, Inc.*, 11 OCAHO no. 1241, at 3; *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1217 (2014) (order by the CAHO vacating and remanding the ALJ's final decision and order).

III. DISCUSSION

Respondent's Motion to Vacate Order of Dismissal presents three legal questions. First, can the Motion to Vacate be construed as a request for administrative review pursuant to 28 C.F.R. § 68.54, and thus be considered by the CAHO? Second, if construed as a request for review, should the filing deadline for the request be equitably tolled to permit consideration of respondent's motion, which was filed outside the ten-day filing deadline? Finally, if the motion is construed as a request for review and review is granted despite the late filing, has respondent demonstrated mistake, inadvertence, or excusable neglect sufficient to grant relief from the final order of dismissal?

A. Respondent's Motion to Vacate Will Be Construed as a Request for Administrative Review

Respondent's submission was titled a "Notice of Motion to Vacate Order of Dismissal" and was formally addressed to the ALJ assigned to the case. However, Mr. Greenman's affidavit, which constitutes the bulk of the substance of the motion, is addressed to "the Court" more generally, and at one point urges "this Court and the Chief Administration [sic] Hearing Officer" to grant the motion to vacate the final order of dismissal. Under the statute and OCAHO's rules, the authority to vacate an ALJ's final order in cases under § 1324a is vested in the CAHO. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and case number of the particular decision, followed by the specific page in that 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 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 "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on OCAHO's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

Because it was filed after the ALJ issued the final decision and order in the case and because it requests action by "the Chief Administrat[ive] Hearing Officer," respondent's motion will be construed as a request for administrative review under 28 C.F.R. § 68.54, and evaluated accordingly. *See, e.g.*, *United States v. Greif*, 10 OCAHO no. 1183, 2-3 (2013) (accepting a letter to the CAHO as a request for administrative review even though it did not explicitly request administrative review or reference the relevant regulations or statutory provisions); *United States v. Cordin Co.*, 10 OCAHO no. 1162, 2 (2012) (construing a letter to the CAHO as a request for administrative review); *United States v. Davila*, 7 OCAHO no. 936 (1997) (construing a motion for recusal of the ALJ that was filed after entry of the ALJ's final order as a request for CAHO review).

B. The Filing Deadline for Respondent's Motion Will Be Equitably Tolled

As previously stated, the ALJ's Final Decision and Order of Dismissal in this case was issued on March 16, 2015. Also as noted above, OCAHO's regulations provide that a request for administrative review must be filed within ten days of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). Accordingly, the deadline for filing a request for review in this case was March 26, 2015. Respondent's motion to vacate was not filed until April 6, 2015,[2] eleven days after the deadline. However, it is generally established that filing deadlines (including the deadline for filing a request for administrative review) are not jurisdictional; thus, such deadlines are subject to equitable tolling, under appropriate circumstances. *See, e.g.*, *Chen's Wilmington, Inc.*, 11 OCAHO no. 1241, at 7; *Sall v. Wal-Mart Stores, Inc.*, 10 OCAHO no. 1161, 3 (2012). Equitable tolling is generally only available where a party was prevented from timely filing by circumstances beyond the party's control and has exercised due diligence in preserving its legal rights. *See, e.g.*, *Chen's Wilmington, Inc.*, 11 OCAHO no. 1241, at 7-8.

Mr. Greenman's affidavit, which was dated April 2, 2015, states that "[w]ithin the past few days" he received notice of the non-delivered package containing his response to the Order to Show Cause. The affidavit further states that he therefore "became aware for the first time" that the package had been misaddressed and thus not delivered to OCAHO. It appears, therefore, that respondent did not learn that its response to the Order to Show Cause was not delivered to OCAHO until after March 26 (the deadline for filing a request for review of the ALJ's March 16 final order of dismissal); thus, respondent was prevented from timely filing its Motion to Vacate by circumstances beyond its control. Upon learning of the undelivered mail and the reasons therefor, respondent appears to have acted promptly in gathering the necessary supporting affidavits and copies and subsequently filing its Motion to Vacate. Accordingly, I find that respondent has demonstrated due diligence sufficient to justify equitable tolling of the ten-day filing deadline for its request for administrative review. Respondent's motion will be accepted and considered as if it had been timely filed.

C. The Facts and Circumstances Surrounding Respondent's Failure to Respond to the Order to Show Cause Constitute Excusable Neglect

A final order of dismissal based on abandonment is analogous to entry of a default judgment under the Federal Rules of Civil Procedure. *See Greif*, 10 OCAHO no. 1183, at 6. OCAHO's rules provide that the Federal Rules may be used as a general guide in situations not

[2] Pleadings are not deemed filed until they are received by OCAHO. 28 C.F.R. § 68.8(b).

provided for or controlled by OCAHO's rules, the Administrative Procedure Act, or other applicable statutes, executive orders, or regulations. 28 C.F.R. § 68.1. Under the Federal Rules, a default judgment may be set aside if the party's default was based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

Generally speaking, under OCAHO case law, relief from a final order of dismissal under the Rule 60(b)(1) standard may be granted "if the party is blameless for the default," *Greif*, 10 OCAHO no. 1183, at 6 (quoting *Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 97 (1998)), or where extraordinary circumstances affected a party's ability to meet a deadline or respond to an ALJ's order, *see United States v. Jabil Circuit*, 10 OCAHO no. 1146 (2012). In determining whether to grant relief from a default judgment, a court should consider whether: (a) the failure to respond was willful; (b) setting aside the default judgment will prejudice the opposing party; and (c) the defaulting party presents a meritorious defense to the action. *See Kanti v. Patel*, 8 OCAHO no. 1007, 166, 168 (1998) (citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)); *see also Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 59 (2d Cir. 1996). Ultimately, judgments by default are generally disfavored, and doubts regarding entry of default should be resolved in favor of a decision on the merits of the case. *See, e.g.*, *Jabil Circuit, Inc.*, 10 OCAHO no. 1146; *Kanti*, 8 OCAHO no. 1007, at 169; *United States v. DuBois Farms, Inc.*, 1 OCAHO no. 225, 1500, 1504 (1990).

Respondent's failure to respond does not appear to have been willful. Respondent's counsel and his legal assistant apparently followed their normal office procedures and attempted to file a response to the Order to Show Cause on February 26, 2015, but the package containing this response was misaddressed by someone in the file room and thus was never delivered to OCAHO. When the package was returned as undeliverable, respondent's counsel learned of the mistake and acted reasonably in attempting to remedy that failure.

In addition, "mere delay in and of itself is insufficient to establish prejudice to the opposing party." *Kanti*, 8 OCAHO no. 1007, at 170. Rather, it must be shown that the delay has resulted or will result in some additional prejudice, such as loss of evidence, increased difficulty in discovery, or greater opportunity for fraud. *Id.* (quoting *Enron Oil Corp.*, 10 F.3d at 916); *see also Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010). The record does not reflect any additional prejudice to the opposing party beyond mere delay that would result from setting aside the default judgment; nor did ICE contend that it would be prejudiced by the granting of respondent's motion.

Finally, although the copy of respondent's purported answer to the complaint (which is attached as part of an exhibit accompanying the Motion to Vacate) is fairly sparse and consists only of a general denial of the allegations in each paragraph of the complaint, OCAHO's rules do not necessarily require more. *See* 28 C.F.R. § 68.9(c) (providing that the answer must include "[a] statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation…" and "[a] statement of facts supporting each affirmative defense."). Therefore, since respondent's answer appears to satisfy the requirements of OCAHO's rules regarding the contents of an answer, respondent may ultimately present a meritorious defense to the action.

In light of each of the above elements, it appears that respondent's failure to respond to the Order to Show Cause can fairly be characterized as attributable to "mistake, inadvertence…

or excusable neglect." Fed. R. Civ. P. 60(b)(1). The instant facts are similar to those of previous OCAHO cases finding grounds for relief from a finding of default, where the respondent identified extenuating circumstances and demonstrated an attempt to comply with the ALJ's Order to Show Cause. *Compare Jabil Circuit*, 10 OCAHO no. 1146 (vacating order of dismissal based on abandonment where counsel was out of the office due to a family tragedy during the time the order to show cause would have been received) *and Kanti*, 8 OCAHO no. 1007 (setting aside prior entry of default where respondent reasonably believed that the matter had been resolved by a settlement agreement and that the filing of an answer was therefore unnecessary) *with Greif*, 10 OCAHO no. 1183 (declining to vacate order of dismissal where respondent failed to respond to three successive orders by the ALJ without sufficient explanation and where no extraordinary circumstances were identified). *See also Am. Alliance Ins. Co.*, 92 F.3d 57 (granting relief from default judgment where failure to answer was due to a filing mistake by in-house counsel's clerk, which went unnoticed for two months). Accordingly, I find that respondent's failure to respond to the ALJ's Order to Show Cause was based on mistake, inadvertence or excusable neglect, thereby justifying a grant of relief from the final order of dismissal.

IV. CONCLUSION

For the reasons stated above, I find that: (1) respondent's Notice of Motion to Vacate Order of Dismissal can be construed as a request for administrative review pursuant to 28 C.F.R. § 68.54; (2) the ten-day filing deadline for the request for administrative review may be equitably tolled because respondent did not learn of the grounds for its motion until after the deadline had passed, and respondent subsequently acted with due diligence; and (3) respondent's initial failure to respond to the ALJ's Order to Show Cause (which formed the grounds for the final order of dismissal) was due to mistake, inadvertence, or excusable neglect. Accordingly, I hereby VACATE the ALJ's Final Decision and Order of Dismissal and REMAND the case for further proceedings consistent with this opinion.[3]

It is SO ORDERED, dated and entered this 15th day of April, 2015.

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Robin M. Stutman
Chief Administrative Hearing Officer

[3] Respondent should note that, although it attached a copy of its response to the Order to Show Cause as an exhibit to its Motion to Vacate, the response has not been filed independently. The ALJ may, in her discretion, require that the response be filed properly, in accordance with OCAHO's rules.

Furthermore, the ALJ retains full discretion to determine whether or not to accept the response from respondent's counsel. Similarly, the ALJ retains full discretion to determine whether respondent has indeed shown good cause for its original failure to file an answer to the complaint. I note that the response to the Order to Show Cause was dated February 26, 2015; if sent via overnight delivery, the response would have been received by OCAHO (and thus filed) no earlier than February 27, 2015. Per the Order to Show Cause and OCAHO's rules regarding time computations, *see* 28 C.F.R. § 68.8(a), the response was due on February 23, 2015. Thus, it would have been considered late, even if properly addressed and delivered. The ALJ may take this fact into account upon remand.