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

May 20, 2013

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 12A00019
MITCHELL GREIF, PRESIDENT, COAST POLY, LLC Respondent.	)	

ORDER OF THE CHIEF ADMINISTRATIVE HEARING OFFICER DECLINING TO MODIFY OR VACATE FINAL DECISION AND ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

In January, 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) against Mitchell Greif, President, Coast Poly, LLC (Greif or Respondent), alleging numerous violations of Section 274A of the Immigration and Nationality Act (8 U.S.C. § 1324a). A Notice of Case Assignment was issued to all parties on January 26, 2012, and the case was assigned to Administrative Law Judge (ALJ) Ellen K. Thomas.

Respondent initially retained counsel in the matter, and Respondent's Answer to the Complaint was filed by counsel. However, Respondent's counsel withdrew from the case in May, 2012, a week before the deadline for Respondent to file its prehearing statement. Respondent then failed to file a prehearing statement on his own behalf by the June 7, 2012, deadline. Accordingly, the ALJ issued a Notice and Order to Show Cause to Respondent on June 13, 2012, directing Respondent to show cause why its request for a hearing should not be deemed abandoned or to show good cause for its failure to file a prehearing statement and to file a prehearing statement.

Six days later, Respondent filed an acknowledgment of the Order to Show Cause, containing an explanation for his failure to timely file a prehearing statement, and included his prehearing statement. A telephonic prehearing conference was conducted between the ALJ and the parties on August 7, 2012. The ensuing Memorandum of Case Management Conference set a schedule for discovery and a deadline for the parties to file dispositive motions. All dispositive motions were to be filed by January 7, 2013.

Neither party filed any documents with the ALJ on or before the January 7 deadline. As a result, the ALJ issued a Request for Status Report on January 29, asking both parties to inform OCAHO whether discovery had been completed and what their intentions were with respect to dispositive motions. Responses to this request were due no later than February 28, 2013.

On February 26, 2013, ICE filed a brief status report on its own behalf. Respondent failed to file a status report. Because ICE's status report did not answer all of the ALJ's questions and because Respondent did not file a status report, on March 6, 2013, the ALJ issued an Order of Inquiry to the parties, asking specific questions of each. Respondent was directed "to advise *this office* on or before March 29, 2013 whether the company intends to pursue its request for hearing and to litigate this case or whether it intends to abandon the request." Order of Inquiry, at 3 (emphasis added). ICE filed a response to the Order of Inquiry on March 28. Respondent did not file a response with the ALJ .

Accordingly, on April 3, 2013, the ALJ issued an Order to Mitchell Greif to Show Cause, directing him to show cause on or before April 17 why his request for a hearing should not be deemed abandoned. No response was received by Respondent before the April 17 deadline. On April 18, 2013, the ALJ issued a Final Decision and Order of Dismissal, holding that Respondent's request for a hearing had been abandoned due to repeated failure to respond to orders issued by the ALJ. The complaint was therefore dismissed and the Notice of Intent to Fine originally issued by ICE became the final order in the case.

II. REQUEST FOR REVIEW

OCAHO's regulations, at 28 C.F.R. § 68.54 (2012), give parties ten days from the date of the ALJ's final order to request review by the Chief Administrative Hearing Officer (CAHO). The deadline for requesting such review in this case was April 29, 2013.[1] The regulations also require that all requests for review and associated documents be filed with the CAHO and served on the opposing party by expedited service methods. *See* 28 C.F.R. §§ 68.54(c), 68.6(c). On April 29, 2013, OCAHO received a letter and various attachments from Mitchell Greif by fax, ostensibly requesting review of the final decision and order of dismissal. This "request" presents the following issues.

A. Whether Respondent's Filing Constitutes an Acceptable Request for Review Under the Regulations

The letter and attachments filed by Greif do not contain the case caption and did not contain a certificate of service indicating that they had been sent to the opposing party. The letter did not explicitly request administrative review or reference the relevant regulations or statutory provisions allowing for administrative review. However, the letter did reference the OCAHO case number, was addressed to the CAHO, referenced a previous order issued by the ALJ, and asked the CAHO to preserve Respondent's rights to a hearing. The letter also contended that, contrary to the findings that led to the order of dismissal, Respondent had <u>not</u> failed to respond to previous orders in the case.

[1] Because the tenth day after the final order fell on Sunday, April 28, under the regulations the deadline for filing automatically was extended to Monday, April 29. *See* 28 C.F.R. § 68.8(a).

OCAHO's regulations do not expressly require that requests for review be in a specific format. Instead, 28 C.F.R. § 68.54(a)(1) says simply that "[a] party may file with the Chief Administrative Hearing Officer a written request for administrative review … stating the reasons for or basis upon which it seeks review." In light of Respondent's pro se status, and because Respondent's letter expressly requests that the CAHO preserve his rights to a hearing and contests the central basis for dismissal (his failure to respond to previous ALJ orders), his filing will be treated as a request for review under 28 C.F.R. § 68.54.

B. Filing and Service Deficiencies

Requests for review and all related documents must be filed and served using the expedited service methods prescribed at 28 C.F.R. §§ 68.54(c) and 68.6(c). These provisions require that such a request be filed (and served on the opposing party) by facsimile or same-day hand-delivery, or if service cannot be made by either of those methods, then by overnight delivery. Respondent submitted its request for review to OCAHO by facsimile. However, there was no certificate of service included with the fax transmission indicating that it had been served on the opposing party, and, if so, by what method. Filings that are submitted to OCAHO in connection with an ongoing case must be simultaneously served on the opposing party in the case. *See In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, 729, 731 (2000). Documents that are filed with OCAHO, but not served on the opposing party, risk being classified as *ex parte* communications and accordingly rejected for consideration. *See* 28 C.F.R. § 68.36.

On April 30, a day after Respondent's request for review was received, OCAHO contacted Greif to inform him that, pursuant to the regulations, the document he submitted also had to be served on the opposing party in the same manner in which it was filed with OCAHO. Greif promptly acted to correct his omission, and submitted a certificate of service to OCAHO and ICE later that week by regular mail indicating that the documents had been sent to ICE counsel via fax on April 30. However, the certificate of service was not received by OCAHO until May 3, 2013.

A number of OCAHO cases have found that improper service of a filing may be grounds for rejecting that filing or request. *See, e.g.*, *Strauss v. Rite Aid Corp.*, 4 OCAHO no. 721, 1135 (1994); *United States v. Erlina Fashions, Inc.*, 4 OCAHO no. 656, 586 (1994); *Holguin v. Dona Ana Fashions*, 4 OCAHO no. 605, 142 (1994). However, during the prehearing and hearing stages of the case, a single instance of defective or improper service is usually not grounds for dismissal of the matter. Instead, ALJ orders will typically direct the party to properly serve the document and reiterate the requirements for properly serving all future filings. If the party fails to properly serve the opposing party after an order or orders reiterating the service requirements, the ALJ may dismiss the case for failure to comply with orders issued by the ALJ. *See Strauss*, 4 OCAHO no. 721, at 1139 (dismissing the matter on other grounds, but noting that the ALJ would have dismissed the claim "for continuously failing to certify service of filings upon Respondent in the face of repeated judicial warnings regarding the consequences of said failure"); *Holguin*, 4 OCAHO no. 605, at 146 (finding that the complaint had been abandoned when complainant failed to certify service on respondent after two warnings from the ALJ in previous orders); *see also Erlina Fashions, Inc.*, 4 OCAHO no. 656, 586 (similar to the facts in *Holguin*).

This has been the case even when the party guilty of defective service appears before OCAHO pro se. As expressed in *Holguin*, "[c]ompassion for Complainant's pro se status … must give way to the need for orderly and informed participation by the parties to an administrative adjudication. Failure to certify service on the opponent is at odds with that participation." 4 OCAHO no. 605, at 146.

Additionally, because review by the CAHO must be conducted within strict time frames, *see* 28 C.F.R. § 68.54(d), prompt and proper service of a request for review and associated documents is particularly important. Considering that the opposing party must file a brief in opposition to the request for review within twenty-one days of the date of the ALJ's final order, 28 C.F.R. § 68.54(b), and the CAHO has only thirty days from the date of the final order to modify or vacate that order, 28 C.F.R. §68.54(d)(1), there is rarely sufficient time for parties to correct improper service without prejudicing the other party or impeding full consideration of the merits of the case by the CAHO.[2] Therefore, in appropriate circumstances, it may be proper for the CAHO to deny a request for review if filing and service was not properly made.

However, in this case, because Greif appears to have made a good faith effort to comply with the service requirements contained in 28 C.F.R. §§ 68.54(c) and 68.6(c), and he acted promptly to try to effect proper service upon being notified that service was initially improper, Respondent's request for review will be considered.[3]

III. JURISDICTION AND STANDARD OF REVIEW

The statute and regulations governing cases brought under section 274A of the INA authorize the CAHO to modify or vacate the decision and order of the ALJ within 30 days of the date of that decision. *See* 8 U.S.C. §1324a(e)(7); 28 C.F.R. § 68.54. If the CAHO enters an order modifying or vacating the ALJ's order, the CAHO's order becomes the final agency decision, unless it is referred to the Attorney General for further review. 28 C.F.R. § 68.54(e). Under the relevant provision of the Administrative Procedure Act, which governs the conduct of 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 the ALJ's decision. *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); *United States v. Karnival Fashion*, 5 OCAHO no. 783, 477, 478 (1995); *United States v. Remileh*, 5 OCAHO no. 724, 15, 17 (1995).

IV. DISCUSSION

OCAHO's regulations provide that "[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it." 28 C.F.R. § 68.37(b). A request for hearing shall be deemed abandoned if "[a] party or his or her representative fails to respond to orders issued by the Administrative Law Judge." 28 C.F.R. § 68.37(b)(1). In this case, the ALJ deemed the request for hearing to be abandoned based upon Respondent's failure to

[2] In this case, ICE did not respond to Respondent's "request for review."

[3] Here, after receiving notification of improper service, Respondent served opposing counsel with his filing by facsimile the day after it had been filed, so that it was received by opposing counsel only one day late. Therefore, any prejudice to ICE was minimal.

respond to an order of inquiry issued on March 6, 2013, and a subsequent order to show cause issued on April 3, 2013. *United States v. Mitchell Greif*, 10 OCAHO no. 1177, 2-3 (2013). These failures also followed Respondent's initial failure to file a prehearing statement.

In his request for review, Respondent contests the finding that he had failed to respond to previous orders issued by the ALJ. In support of his request, he attached a letter dated "3-15-13" that was addressed to the ALJ and appeared to be in response to the ALJ's January 29 Request for Status Report, for which responses were due to the ALJ by February 28. Among the other attachments accompanying the request for review is an email chain between Respondent and ICE counsel. Respondent appears to have attached the March 15 letter to an email to ICE counsel, and emailed ICE counsel several days later to see if ICE counsel had been able to send the letter to OCAHO. Although the initial email from Greif to ICE counsel stated that Greif also intended to fax the letter to OCAHO, the letter was never received in this office.

ICE counsel replied to Mr. Greif by email on March 19, indicating that he did not have an email address for OCAHO, but that he would forward Greif's message as soon as he obtained the correct email address.[4] Perhaps because of this representation by ICE, Greif did not subsequently submit his letter directly to the ALJ, as the regulations require. However, even if Respondent detrimentally relied upon ICE counsel's representation that he would forward Respondent's message as soon as he learned of a proper email address for OCAHO, this would be insufficient to demonstrate estoppel. Past case law makes clear that the United States is "virtually impervious" to an estoppel claim. *United States v. Tom & Yu*, 3 OCAHO no. 412, 163, 169 (1992) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 379, 380 (1989)). In order to show estoppel against the government, Respondent "must at a minimum allege that the government engaged in affirmative misconduct." *United States v. LFW Dairy Corporation*, 10 OCAHO no. 1129, 7 (2009) (citing *United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 983-84 (1997)).

Here, there was no affirmative misconduct by the government. ICE counsel made no definitive assurance that he would forward Greif's message, as doing so was expressly contingent on obtaining an appropriate email address. Since OCAHO does not currently accept official case communications via email, ICE counsel would not have been able to obtain such an email address, and thus was under no obligation to forward Greif's message. Moreover, the time for filing the response to the ALJ's Request for Status Report had already passed. With certain very limited exceptions, such as the submission of consent findings or joint motions, *see, e.g.*, 28 C.F.R. § 68.14, each party remains solely responsible for submitting its own motions and filings directly with the ALJ. *See United States v. Cordin Co.*, 10 OCAHO no. 1162, 4 (2012) (stating that it is each party's responsibility to file a notice of change of address directly with the ALJ, and that opposing counsel has neither the authority nor the responsibility to communicate to the ALJ on behalf of the other party). Having previously submitted a prehearing statement and a response to a show cause order directly to the ALJ in June, 2012, Respondent was aware of this requirement and capable of complying with it. Therefore, his attempted March 15 submission was defective, untimely, and insufficient to prove estoppel against the government.

[4] Nothing in OCAHO's rules authorizes parties to submit official case documents to OCAHO by email. Rather, all documents must be delivered or mailed to the ALJ assigned to the case. *See* 28 C.F.R. § 68.6(a) (2012).

Turning to the question of whether the ALJ's final decision and order of dismissal was appropriate, OCAHO's regulations provide that the Federal Rules of Civil Procedure may be used as a general guide in situations not provided for or controlled by OCAHO's rules, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1. Under the Federal Rules, a default judgment (which is similar in nature to an order of dismissal based on abandonment) may be set aside if the party's default was the result of "excusable neglect." *See* Fed. R. Civ. P. 55(c), 60(b)(1).

Several OCAHO cases have discussed the circumstances in which a finding of default or a default judgment may be set aside. Generally speaking, relief from a final order under the Rule 60(b)(1) standard may be granted "if the party is blameless for the default." *Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 97 (1998); *see also United States v. Continental Sports Corp.*, 4 OCAHO no. 640, 455, 457 (1994). However, when the party is at fault, that party "must adequately defend its conduct in order to show excusable neglect," *Continental Sports Corp.*, 4 OCAHO no. 640, at 457, and courts are less likely to grant relief, *Monda*, 8 OCAHO no. 1002, at 97 (noting that in a situation where the party is at fault, "the interests of the judicial system and its need for finality and efficiency in litigation predominate.").

Where the delay occasioned by a party's failure to respond is minimal, dismissal may be inappropriate. *See, e.g.*, *Kanti v. Patel*, 8 OCAHO no. 1007, 166, 170 (1998); *D'Amico v. Erie Cmty.Coll.*, 7 OCAHO no. 927, 61, 64 (1997). However, default judgments and dismissal may be appropriate "when the inaction of a party causes the case to grind to a halt." *D'Amico*, 7 OCAHO no. 927, at 63. In such circumstances, a party must show excusable neglect to avoid dismissal or be relieved from a final judgment and order of dismissal. *See Continental Sports Corp.*, 4 OCAHO no. 640, at 457.

"Excusable neglect" requires a higher showing than mere "good cause" for a party's failure to respond to orders issued by the ALJ. *See Kanti*, 8 OCAHO no. 1007, at 168 (citing *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981) ("[T]he standard for setting aside the entry of a default pursuant to Rule 55(c) is less rigorous than the 'excusable neglect' standard for setting aside a default judgment by motion pursuant to Rule 60(b)")). For instance, previous cases have found that failure to locate non-party witnesses in time to obtain affidavits did not constitute "excusable neglect," nor does the fact that counsel has a busy schedule or a backlog of cases. *See United States v. O'Brien Oil Co.*, 1 OCAHO no. 142, 980, 982-83 (1990) (citing, among others, *Davidson v. Keenan*, 740 F.2d 129 (2d Cir. 1984) and *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981)). A party's failure to direct its business mail to the responsible person within the company, without more, is also insufficient to constitute excusable neglect. *See Cordin Co.*, 10 OCAHO no. 1162. However, extraordinary circumstances, such as an unforeseen, tragic accident resulting in a death in a party or counsel's immediate family that causes that party or counsel to be away during the filing period and fail to receive the ALJ's order, may constitute excusable neglect and allow for relief from a final order of dismissal. *See United States v. Jabil Circuit, Inc.*, 10 OCAHO no. 1146 (2012).

Here, Respondent has not demonstrated that his failure to respond to multiple ALJ orders was due to "excusable neglect." After the prehearing conference in August, 2012, Respondent failed to communicate directly with the ALJ or OCAHO for a period of eight months. During that time, the ALJ issued three separate requests or orders directing Respondent to update *this*

office on the status of the case and whether he intended to pursue his request for a hearing further. Respondent did not reply to the January 29 Request for Status Report, the March 6 Order of Inquiry, or the April 3 Order to Show Cause.[5] In these circumstances, Respondent's inaction and unresponsiveness caused the case to "grind to a halt." Although this office recognizes Respondent's pro se status, Respondent has not demonstrated that he acted in good faith or with the requisite due diligence to comply with the orders issued by the ALJ and maintain his defense of this case. Accordingly, the finding that Respondent had abandoned his request for hearing was proper, and the final decision and order of dismissal will not be modified or vacated.

Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final decision and order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have declined to modify or vacate the ALJ's order, the Final Decision and Order of Dismissal will become 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.

It is SO ORDERED, dated and entered this 20th day of May, 2013.

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Robin M. Stutman
Chief Administrative Hearing Officer

[5] Respondent never asserted that he failed to receive any of these orders, and never notified OCAHO of a new address.