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

UNITED STATES OF AMERICA Complainant,	)	
v.	)	8 U.S.C. § 1324c Proceeding Case No. 94C00032
ESTHER FLORES-MARTINEZ, Respondent.	)	

ORDER
(June 15, 1994)

I. *Procedural Background*

On May 5, 1993, the Immigration and Naturalization Service (INS or Complainant) served a notice of intent to fine (NIF) upon Esther Flores Martinez (Flores or Respondent). The NIF alleged that Flores forged, counterfeited, altered or falsely made certain documents for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA), in violation of § 274C(a)(1) of the INA, 8 U.S.C. § 1324c(a)(1). The NIF identified as the two fraudulent documents an Alien Registration Receipt Card (Form I-551), and a Social Security Card.

By letter dated May 14, 1993, a timely request for hearing on behalf of Flores was transmitted to INS. The request was signed by George W. Perez (Perez) as "Attorney at Law, Centro Legal, Inc.," (Centro) at a St. Paul, Minnesota, address.

On March 3, 1994, INS filed its complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint refers to the same allegedly fraudulent documents specified in the NIF. In lieu of alleging forgery, etc., in violation of 8 U.S.C. § 1324c(a)(1), Flores is charged with knowing use of the documents to satisfy an INA requirement, in violation of 8 U.S.C. § 1324c(a)(2). On March 4, 1994, OCAHO issued a notice of hearing which transmitted a copy of the complaint to

Flores and to Perez at Centro. Simultaneously, OCAHO addressed a letter to Perez/Centro which recited, inter alia, that

> If you have withdrawn from this proceeding subsequent to the signing and mailing of the request for a hearing, or if you withdraw from representation of the respondent(s) prior to this matter's conclusion, it is incumbent upon you to immediately notify, in writing, the Administrative Law Judge to whom this case has been assigned.

On April 6, 1994, an answer to the complaint was filed for Flores, and an appearance entered, by Paula J. Duthoy (Duthoy). Duthoy's filing holds her out as Respondent's attorney, and also as an attorney with Centro, identified on its letterhead as a non-profit community law office.

On June 6, 1994, Duthoy filed a pleading in affidavit form (dated June 2, 1994), which recites that Centro represented Flores; that on January 19, 1994, Immigration Judge Robert D. Vinikoor granted Flores voluntary departure (in lieu of deportation), provided she departs by May 19, 1994; that Flores advised Duthoy she would depart the United States on May 14, 1994, through El Paso, Texas, and that Duthoy sent Flores a Form G-146 to be turned in at the United States Consulate in Ciudad Juarez, Mexico. The affidavit states that as of June 1, 1994, INS in Bloomington, Minnesota told Duthoy it had not received the G-146. Nevertheless, Duthoy undertakes on information and belief that Flores is at a specified Mexican address pursuant to the order of the Immigration Judge. The affidavit assumes that,

> Since Ms. Flores is in Mexico, and therefore not a resident of Minnesota Centro Legal Inc. can no longer represent Ms. Flores in any legal matter.

Duthoy concludes by

> . . . withdrawing personally and withdrawing Centro Legal Inc. as representative for Ms. Flores in this and all matters pending before the Immigration and Naturalization Service.

On June 8, 1994, by facsimile transmission, Complainant filed a pleading containing (1) a memorandum in opposition to withdrawal of Respondent's counsel, (2) a motion that I deem admitted unanswered admissions requested in discovery served on Duthoy on May 5, 1994, and on the basis of the admissions, (3) a motion for summary judgment. On June 14, 1994, Duthoy filed a copy of a letter addressed to INS trial counsel Terry M. Louie (Louie) that returned Complainant's June 8 pleading on the basis that Centro "no longer represent" Flores. Duthoy stated also that as early as May 4, 1994 she had advised INS counsel that Flores would be departing for Mexico on May 14 in consequence of

which she would no longer be represented by Duthoy and Centro. Duthoy attaches and refers to a letter of March 8, 1994 to the INS district director, Bloomington, Minnesota which advised that Centro, which had formerly represented individuals resident outside that state, now limits its services to "low-income persons residing in" Minnesota.

On June 14, 1994, INS filed a June 13, 1994 letter which contends that Duthoy has not submitted verification of departure by Flores, and reiterating its claim that she continue to be treated as attorney of record for Flores.

On June 15, 1994, INS filed by facsimile transmission a motion to compel Duthoy to accept service of Complainant's June 8 pleading. This order issues in order to bring this case to a head without awaiting a response by Duthoy/Centro in order to avoid further exchanges between counsel.

OCAHO deems a request for hearing to be an entry of appearance on behalf of the respondent for whom the request is made. 28 C.F.R. § 68.33(b)(5). Centro was on notice of that regulatory implementation of 8 U.S.C. § 1324a by virtue of its publication in the Federal Register and its codification at Title 28 Code of Federal Regulations. Centro was placed on specific notice by the March 4, 1994 OCAHO letter.

II. *Discussion*

Centro did not take exception to the notification that by requesting a hearing it had entered its appearance. Rather, Centro filed an answer to the complaint on behalf of Flores, accompanied by Duthoy's entry of appearance. Moreover, OCAHO rules of practice and procedure make clear that withdrawal is subject to judicial scrutiny, and that the judge is empowered to grant or deny a request to withdraw:

> Withdrawal or substitution of an attorney may be permitted by the Administrative Law Judge upon written motion.

28 C.F.R. § 68.33(c).

OCAHO rules are silent as to the factors to consider in determining whether to exercise judicial discretion by granting an attorney's motion to withdraw from a representation. Because, however, Centro/Duthoy made no such motion, INS is technically correct that the effort to withdraw is defective. Moreover, it is settled OCAHO caselaw that counsel are required to remain in proceedings, at least where service of process on the principals is ineffective or otherwise frustrated. See e.g.,

U.S. v. Primera Enterprises, Inc., OCAHO Case No. 93A00024 (5/17/94) (Order Denying Respondent's Counsel's Motion to Withdraw); U.S. v. K & M Fashions, 3 OCAHO 411 (3/16/92); U.S. v. NuLook Cleaners of Pembroke Pines, 1 OCAHO 284 (1/4/91). Compare United States v. I.K.K. Associates, 1 OCAHO 131 (2/21/90) (withdrawal authorized where respondent as well as counsel was served with pleading).

The March 4, 1994 letter from OCAHO to Centro demanded in terms only that the administrative law judge (ALJ) be notified of withdrawal, i.e., "it is incumbent upon you to immediately notify" the judge. That instruction did not demand a motion asking permission to withdraw. In addition, Centro's attention was invited to the specific subsection of OCAHO rules that equates a request by an attorney for a hearing (on behalf of the client) to entry of appearance before OCAHO. 28 C.F.R. § 68.33(a)(5).

Despite the particularity of the citation, no reference was made to the related subsection that confers discretion on the judge to grant or deny a request for withdrawal. Id. at § 68.33(c).

A recent case discussed the same tension created by the inconsistency between the regulatory requirement for submission to the ALJ of a motion to withdraw and an OCAHO letter calling only for notification of such withdrawal. In that case, U.S. v. Mark's Electrical Contracting Corp., OCAHO Case No. 94A00058 (5/27/94) (Order, Including Order to Show Cause), I held, inter alia, that

> It seems to me certain that as a matter of authority the judge is entitled to assume that counsel is on notice of the provisions of the rules, and that counsel understands the obligation to adhere to them or to ignore them at his peril. The particularized nature of the April 4 letter, however, impairs that assumption. Accordingly, in the circumstances of this case I treat Brown's letter as effective to constitute withdrawal.

Id., at 3.

The order in Mark's Electrical stated also that

> An additional consideration, although not critical to the ruling on withdrawal, is that more than twelve months elapsed from the date of the request for hearing until filing of the complaint, issuance of the NOH and receipt of the NOH by Brown.

Id.

The present case is readily distinguishable from Mark's Electrical. First, unlike that respondent, there is no reason to suppose that Flores can be served by process in the United States, as she is either in Mexico

or her whereabouts are unknown. Second, Centro entered an appearance concurrently with filing the answer to the complaint in contrast to counsel in Mark's Electrical who only appeared before OCAHO by virtue of executing a request for hearing in response to the NIF more than a year before the complaint was filed. Third, subsequent to the order in Mark's Electrical, the stereotypical OCAHO letter which accompanies the complaint and is addressed to counsel who executed requests for hearing in response to service of NIFs has been modified to track the text of 28 C.F.R. § 68.33(c). That revision in light of Mark's Electrical makes clear the understanding of the forum, as reflected in the text of the new standardized letter that "it is within the discretion of the presiding ALJ to grant or deny such motion for withdrawal."

In U.S. v. Medina, 3 OCAHO 485 (2/5/93), at 8, where the focus was only on the request for hearing, the judge found that counsel's entry of appearance "was not qualified on the face of the request," and concluded that a putative withdrawal by counsel was legally ineffective absent a request to the bench for permission to do so. The file in the present case contains two entries of appearance by Centro and its attorneys, one each accompanying the request for hearing and one accompanying the answer to the complaint. Neither contains any limitation to the scope of that representation, geographical or otherwise.

III. *Conclusion and Order*

Amenability to OCAHO jurisdiction is nationwide. In that context, it is deeply troubling that legal services counsel offer their assistance in a matter of national venue and then seek to limit their representation to individuals resident in a specific location. Americans, whatever their national heritage or immigration status, are too ambulatory and mobile to have their representation before OCAHO ALJs frustrated by limiting the obligations of counsel to state lines. In any event, since the last known address of Flores in the United States appears to have been in Minnesota, I do not understand that Duthoy/Centro representation is aborted wherever Flores may be in fact. For all the foregoing reasons, I conclude that Duthoy/Centro remains as counsel of record in this case.

It is no less troubling to attempt to understand the intentions of INS to pursue this action if Flores has indeed departed the United States pursuant to voluntary departure, the agreement to which INS was a necessary party.

Counsel are directed to confer together for the purpose of ascertaining the whereabouts of Respondent. I will expect INS counsel on a best efforts basis to obtain such data as he can through INS resources. INS should advise whether it intends to pursue this action in the event Respondent has left the country. INS should advise also whether and to what extent it is prepared to accept a basis other than a particular INS form for concluding that Flores has complied with the voluntary departure. Duthoy/Centro should advise whether it has any response to the discovery served May 5, 1994. Not later than July 12, 1994, counsel, preferably jointly but if not separately, shall file a status report(s) consistent with the directions in this paragraph.

SO ORDERED.

Dated and entered this 15th day of June, 1994.

MARVIN H. MORSE
Administrative Law Judge