

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

ANNA J. FLORES,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 93B00144
DANIEL DRY CLEANERS)
Respondent.)
_____)

ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE
TO SUPPLEMENT TRANSCRIPT AND
DENYING COMPLAINANT'S MOTION TO CORRECT
TRANSCRIPT
(September 30, 1994)

As previously scheduled, an evidentiary hearing was held in Fort Worth, Texas on April 21, 1994. The record was closed subject to Respondent taking the deposition of an individual claimed to be essential to its case who had become unexpectedly unavailable for hearing. The witness, Oral Julio Lemus (Lemus), was reportedly on an emergency visit to his ill mother in his native country, El Salvador. The deposition of Lemus was taken at the office of Respondent's attorney in Dallas, Texas, on June 27, 1994. Counsel for both parties were present. The deposition transcript was certified by the shorthand reporter on August 16, 1994, and sworn and subscribed to by Lemus on September 1, 1994.

Because the Lemus deposition was taken on a date later than initially anticipated, and in light of delay in receipt of the transcript by the parties, the post-hearing schedule established by the Order issued June 30, 1994 was revised by Order issued August 24, 1994. On September 12, 1994, Respondent filed a Motion for Leave to Supplement Transcript which tenders the Lemus deposition in evidence. As suggested in the motion, submission of the deposition transcript was to be a

condition precedent to a ruling on supplementing the record. No objection or other pleading has been filed in response to tender of the deposition transcript.

On September 13, 1994, Complainant filed a Motion to Correct Transcript. The motion addresses certain terminology in the cross-examination of Complainant on page 41 and 42 of the hearing transcript which, it is claimed, were incorrectly translated by the interpreter; as interpreted at hearing, the transcript passages proposed to be changed are said to be misleading, confusing and, if unchanged, to imply foolishness on Complainant's part.

By Motion Opposing Correction of Transcript, filed September 19, 1994, Respondent takes issue with Complainant's proposal to correct the transcript through adoption of Complainant's proposed revised translations.

A. Respondent's Motion for Leave to Supplement the Transcript

At hearing, in response to inquiry by Complainant's counsel as to whether the deposition transcript in its entirety would come into the record, I responded that,

So far as its being in its entirety, it would be on the basis that the witness was totally unavailable today. So I would think therefore that we would assume that it would be, subject to whatever objections there might be, or whatever evaluations the Bench might want to make.

Tr. 178.

Counsel for both parties participated throughout the deposition. Indeed, more pages of testimony comprise questions by and answers to Complainant's counsel than with respect to direct examination by counsel for Respondent. Complainant has not filed an opposition to receipt of the deposition in evidence.

The rules of practice and procedure for 8 U.S.C. §1324b cases before administrative law judges (ALJs) contemplate the receipt in evidence of all or part of the deposition of a witness, "to be used by any party for any purpose if" the ALJ finds:

* * *

(ii) That the witness is out of the United States or more than 100 miles from the place of hearing unless it appears that the absence of the witness was procured by the party offering the deposition.

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28 C.F.R. §68.24(a)(4)(ii) (1993).

It is undisputed that Lemus was outside the country at the time of hearing. No claim having been asserted that implicates the §68.24(a)(4)(ii) exception to admissibility, I hold that a deposition taken after hearing is admissible where, as here, the witness was out of the country at the time of hearing, and arrangements for post-hearing procedures were ventilated on the record. See §§68.22(c), 68.24(a), and 68.50. The motion is granted.

B. Complainant's Motion to Correct the Transcript

On cross-examination, Complainant was questioned concerning the bona fides of certain notes she contended were contemporaneous entries in a 1993 Daily Calendar. Complainant contends that certain specific words were misinterpreted, suggesting that the meaning of the phrases in which they were uttered is made comprehensible by her proposed substitutions. Respondent objects:

Complainant makes no offer of proof on these points aside from the bare assertions. Complainant has not sworn to the pleading, or attached an affidavit. Complainant does not rely upon any reliable recording of the hearing, nor has Complainant offered any independent source of evidence whatsoever to corroborate her assertions.

Resp. Opp'n. at 1-2.

Complainant claims that the interpreter erroneously attributed to her the statement that she "put them in the new cover . . . I would have brought the other cover; . . ." Her testimony should instead be understood as saying that she "put the notes in the new booklet . . . I would have brought the other booklet; . . ." It is argued also that her affirmative answer to the question whether she "glued pages" into her calendar from another source should have been understood as answering the question whether she had "posted information" into her calendar.

Respondent's contentions in opposition are more persuasive than Complainant's proffer. As to the first correction, no substitute or other calendar was tendered. As to the second, it would be sheer speculation to reconstruct the allegedly misinterpreted question, absent recourse to an audio recording. In any event, however, these are not corrections to the stenographer's recordation of what she heard. Complainant does not suggest that the transcript erroneously reports the interpreter's English language rendition of his Spanish language translation to and by Complainant on the stand. The quibble is with the interpreter, not

the official stenographer. These are corrections to interpretation which were subject to correction and clarification at hearing. The moment to raise the question of mistranslation is past. The motion to correct the transcript is overruled.

The record, having been opened to receive the Lemus deposition, is now closed.

SO ORDERED.

Dated and entered this 30th day of September, 1994.

MARVIN H. MORSE
Administrative Law Judge