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. § 1324a Proceeding Case No. 94A00058
MARK'S ELECTRICAL CONTRACTING CORP., Respondents.	)	

ORDER, INCLUDING ORDER TO SHOW CAUSE

(May 27, 1994)

I. *Procedural History*

On March 28, 1994, the Immigration and Naturalization Service (Complainant or INS), initiated this action by filing a complaint against Mark's Electrical Contracting Corp. (Respondent or Mark's), in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint, which alleges failure to comply with the employment eligibility verification requirement established pursuant to 8 U.S.C. § 1324a, followed service on January 23, 1993 by INS upon Mark's of a prior notice of intent to fine (NIF), asserting the same violations. By letter dated February 10, 1993, a timely written request for hearing was served on INS on behalf of Mark's by Gerald Brown, Esq. Brown recited that he represented Mark's with respect to service of the NIF, and "on behalf of the Respondent, I hereby request a hearing in this matter."

On April 4, 1994, OCAHO issued a Notice of Hearing (NOH) which transmitted the complaint to Mark's and also to Brown. The NOH, with complaint enclosed was separately addressed to Brown and to Mark's. The copy to Brown was sent by certified mail, return receipt requested, the receipt for which confirms delivery to him. The date on the Postal Service return receipt is too obscure to establish a date of

receipt. However, OCAHO records evidence that the receipt endorsed for delivery to Brown was received in OCAHO by April 11, 1994. The copy addressed to Mark's was sent by prepaid first class mail, without request for a return receipt. The wrapper containing that mailing has not been returned to OCAHO, and presumably was received by Mark's.

Inter alia, the NOH advised that the case was assigned to me and cautioned that failure to file an answer to the complaint within thirty days of receipt may occasion a judgment by default against Respondent. Concurrently, by letter dated April 4, 1994, to Brown, with copies to Mark's and to me, the Acting CAHO noted that "a request for a hearing before an Administrative Law Judge, under this office's rules of practice and procedure, is considered an entry of appearance on behalf of the respondent(s) in the case." See 28 C.F.R. § 68.33(b)(5). The CAHO letter continued,

> 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.

Brown addressed a letter to me dated May 6, 1994, filed May 10. He failed to recite the grounds for withdrawal. Instead, the letter in its entirety stated:

> Please be advised that the undersigned will not be appearing for the Respondent, Mark's Electrical Contracting Corp., and I hereby withdraw from such proceeding.

On May 20, 1994, INS filed a motion for default dated May 18, 1994, which alleges that Mark's failed to answer the complaint within thirty days of receipt of the complaint. Complainant's filing certifies that it was served both on Brown and on Mark's. The motion accompanied a copy of a letter from INS to Brown which contends that Brown remains the attorney of record for Mark's because Brown failed to file an appropriate or any motion requesting that the judge permit him to withdraw.

II. *Discussion*

It cannot be disputed that under OCAHO rules of practice and procedure (rules), Brown entered his appearance on behalf of Mark's in February 1993 when he requested a hearing in response to the NIF.

> A request for a hearing signed by an attorney and filed with the Immigration and Naturalization Service pursuant to section 274A(e)(3)(A) or 274C(d)(2)(A) of the INA

> . . . shall be considered a notice of appearance on behalf of the respondent for whom the request was made.

28 C.F.R. § 68.33(b)(5).

The rules make clear also 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, Brown made no such motion, INS is technically correct that his effort to withdraw is defective. Moreover, it is settled OCAHO caselaw that counsel have been required to remain in proceedings, at least where service of process on the principals was 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 April 4, 1994 letter from the Acting CAHO to counsel of record for Mark's, demanded in terms only that the judge 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, Brown'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 an 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). 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.

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. I condition that withdrawal upon his advising the forum in writing that Mark's received the NOH and complaint, and providing in that writing the date and manner of such receipt. I will expect such a writing to be filed not later than Tuesday, June 8, 1994.

At least by April 11, 1994, Mark's, through receipt by Brown, was served with initial process in this case. This is so because at the time the NOH with complaint attached was mailed to Brown, OCAHO was entitled as a matter of law to understand that Brown was the attorney of record for Mark's. Moreover, as the copy of that process addressed directly to Mark's has not been returned to OCAHO, I am satisfied that Mark's received that mailing at a date reasonably proximate to the date of mailing, i.e., within several weeks after April 4, 1994. As of the date of this order, therefore, Respondent is in apparent default of its opportunity to defend against the complaint. Accordingly, this order invites Respondent to show cause, if any it has, why judgment should not be entered against it in the amount and for the reasons specified in the complaint.

A response to this Order will be considered timely, if received by me no later than June 15, 1994. By such filing, Respondent is obliged to show such cause as it has as to why it failed to timely file an answer to the complaint, and why a default judgment should not issue. Any filing must include a true certificate that a copy has been sent, postage prepaid to INS. The filing must be accompanied by a proposed Answer to the complaint. In the event that Respondent makes a timely response to this Order, INS may file a reply to be received not later than June 22, 1994.

SO ORDERED. Dated and entered this 27th day of May, 1994.

MARVIN H. MORSE
Administrative Law Judge