

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2023A00045
MUNIZ CONCRETE)	
& CONTRACTING, INC.,)	
)	
Respondent.)	
_____)	

Appearances: Emily B. Swanson, Esq., for Complainant
Adrian Ciechanowicz, Esq., and James Hicks, Esq.,¹ for Respondent

ORDER ON NOTICE OF SETTLEMENT, NOTICE OF APPEARANCE, MOTION
TO SUBSTITUTE, AND ELECTRONIC FILING

I. PROCEDURAL HISTORY

On February 28, 2023, Complainant, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Muniz Concrete & Contracting, Inc., violated the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. On April 19, 2023, Respondent, through counsel, filed an answer.

¹ Counsel for Respondent, James Hicks, Esq., did not appear at the initial prehearing conference on February 20, 2024, and OCAHO’s email to Mr. Hicks before the conference was returned as being undeliverable. If Mr. Hicks no longer represents Respondent, he must file a motion to withdraw that comports with 28 C.F.R. § 68.33(g).

On April 26, 2023, OCAHO invited the parties to participate in its Electronic Filing Pilot Program² through which they can electronically file all filings in this case and accept electronic service of case-related documents from OCAHO and the opposing party. On May 16, 2023, OCAHO received a signed Attorney/Participant Registration Form and Certification for Adrian Ciechanowicz, counsel for Respondent.

On January 24, 2024, the Court issued an Order for Prehearing Statements and Scheduling Initial Prehearing Conference through which it ordered the parties to make their initial disclosures and file prehearing statements by February 14, 2024, and set an initial telephonic prehearing conference for February 20, 2024. Neither party filed its prehearing statement as ordered by the Court.

The Court held the initial prehearing conference on February 20, 2024, pursuant to 28 C.F.R. § 68.13,³ and issued an order memorializing the conference on February 27, 2024, in accordance with 28 C.F.R. § 68.13(c). DHS Assistant Chief Counsel (ACC) Ricardo A. Cuellar appeared on behalf of Complainant, and Mr. Adrian Ciechanowicz appeared as counsel on behalf of Respondent. Order Memorializing Initial Prehr'g Conf. 1. During the conference, the Court granted the parties' oral joint motion to extend the deadline for the filing of prehearing statements by thirty days to allow them to continue their settlement discussions. *Id.* at 2-3. The Court ordered the parties to file their prehearing statements by March 21, 2024, by the means set forth in 28 C.F.R. part 68 and email OCAHO courtesy copies of their prehearing statements by 5:00 p.m. Eastern Standard Time on March 21, 2024. *Id.* The Court further scheduled another telephonic prehearing conference for March 26, 2024. *Id.*

² OCAHO's Electronic Filing Pilot Program is described in detail in the Federal Register. *See* 79 Fed. Reg. 31143 (May 30, 2014). Chapter 3.7 of OCAHO's Practice Manual also describes the program. *See* <https://www.justice.gov/eoir/reference-materials/ocaho/chapter-3/7>.

³ Proceedings in this case will generally be governed by OCAHO's Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2024). OCAHO's Rules are available on OCAHO's homepage on the United States Department of Justice's website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

On March 21, 2024, shortly before the Court's deadline for the filing of prehearing statements, Respondent's counsel emailed OCAHO and represented that, given the parties' continued active engagement in settlement negotiations, they might request a short continuance of the prehearing conference. Respondent's counsel further represented that DHS Acting Deputy Chief Counsel (Acting DCC) Emily B. Swanson would be representing DHS in this matter, not ACC Cuellar. Respondent's counsel copied DHS Acting DCC Swanson on his email to OCAHO. OCAHO staff responded to the parties' email and explained that, given the upcoming prehearing conference, the parties should submit a courtesy copy of any motion by email or facsimile and DHS Acting DCC Swanson should file a notice of appearance and motion to substitute as counsel for Complainant in accordance with 28 C.F.R. §§ 68.33(f)-(g). OCAHO staff copied ACC Cuellar on this response.

On March 22, 2024, the parties filed a courtesy copy by email and facsimile of an Agreed Motion for Second Continuance of the Prehearing Conference. Through their jointly signed filing, the parties moved the Court to "continue the case again for at least 35 days, or until April 30, 2024, because they need additional time to continue and complete their ongoing settlement negotiations, which have been fruitful." Agreed Mot. for Second Continuance of Prehr'g Conf. 2. The parties represented that their request was not for delay, "but so that justice may be done." *Id.* On March 25, 2024, OCAHO received a signed Registration Form and Certification for OCAHO's Electronic Filing Pilot Program for DHS Acting DCC Emily B. Swanson.

On March 25, 2024, the Court issued an Order Granting Parties' Agreed Motion to Continue Second Prehearing Conference and Extending Deadline to File Prehearing Statements. *See United States v. Muniz Concrete & Contracting, Inc.*, 19 OCAHO no. 1535 (2024).⁴ Through that Order, the Court granted the parties'

⁴ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the 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 after Volume 8, where the decision has not yet 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 through the Westlaw database "FIMOCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice's website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

Agreed Motion for Second Continuance of the Prehearing Conference and canceled the prehearing conference scheduled for March 26, 2024. *Id.* at 4, 6. The Court further extended the parties' deadline to file prehearing statements to May 1, 2024, and scheduled a prehearing conference for May 8, 2024. *Id.* After noting that it had received the Registration Form and Certification for OCAHO's Electronic Filing Pilot Program for DHS Acting DCC Swanson, the Court refused to extend electronic filing privileges until she filed a notice of appearance and a motion to substitute as Complainant's counsel. *Id.* at 5 (citing 28 C.F.R. §§ 68.33(f)-(g)).

Complainant then filed a Notice of Appearance and Motion for Substitution on March 25, 2024. Through the notice, Emily B. Swanson, now using the title of DHS Assistant Chief Counsel, entered an appearance as counsel for Complainant. Notice Appearance & Mot. Substitution 1. Through its motion, Complainant represented that DHS ACC Ricardo A. Cuellar, Complainant's counsel in this matter, "is now a Deputy Chief Counsel and is no longer handling cases before the Office of the Chief Administrative Hearing Officer." *Id.* As such, Complainant moved the Court pursuant to 28 C.F.R. § 68.33(g) to substitute ACC Emily B. Swanson in his place as counsel for Complainant. *Id.* Complainant also requested that the Court enroll ACC Swanson as Complainant's counsel in OCAHO's Electronic Filing Pilot Program. *Id.* at 2. Complainant attached to the filing the signed Attorney/Participant Registration Form and Certification for ACC Swanson that was previously emailed to OCAHO. *Id.*, Ex. A.

On March 25, 2024, Adrian Ciechanowicz, counsel for Respondent, notified OCAHO staff by email that the parties had reached a settlement in this matter.

II. COMPLAINANT'S NOTICE OF APPEARANCE AND MOTION FOR SUBSTITUTION

Complainant has filed a notice of appearance for DHS Assistant Chief Counsel Emily B. Swanson in this matter and moves the Court, pursuant to 28 C.F.R. § 68.33(g), to substitute as counsel ACC Swanson for ACC Ricardo A. Cuellar. Notice Appearance & Mot. Substitution 1. Complainant represents that substitution is necessary because Ricardo A. Cuellar is now a Deputy Chief Counsel with DHS and is no longer handling OCAHO cases. *Id.* ACC Swanson also seeks the Court's approval to participate in OCAHO's Electronic Filing Pilot Program. *Id.* at 2. Complainant attached to the filing a completed registration form and certification for OCAHO's Electronic Filing Pilot Program. *Id.*, Ex. A.

Complainant did not indicate Respondent's position on the motion, and Respondent has not filed a response. According to Complainant's certification, it served Respondent with the motion by United States Postal Service mail on March 25, 2014. Notice Appearance & Mot. Substitution 3. Given that more than ten days have passed since Respondent was served with the motion, it is ripe for a ruling. See 28 C.F.R. § 68.11(b) ("Within ten (10) days after a written motion is served . . . any party to the proceeding may file a response in support of, or in opposition to, the motion.").

OCAHO's Rules of Practice and Procedure for Administrative Hearings require each attorney to file a notice of appearance. See 28 C.F.R. § 68.33(f). The notice of appearance filed by DHS ACC Swanson comports with OCAHO's Rules as it is signed and identifies "the name of the case or controversy, the case number if assigned, and the party on whose behalf the appearance is made." *Id.* It also is accompanied by "a certification indicating that such notice was served on all parties of record." *Id.*

OCAHO's Rules provide that "[w]ithdrawal or substitution of an attorney or representative may be permitted by the Administrative Law Judge [ALJ] upon written motion. The [ALJ] shall enter an order granting or denying such motion for withdrawal or substitution." 28 C.F.R. § 68.33(g). OCAHO has granted motions to substitute counsel for DHS in similar situations, including where the agency has assigned a different counsel to handle OCAHO cases or where the counsel of record ceases to work as an ACC for the agency. See, e.g., *United States v. El Camino, Inc.*, 18 OCAHO no. 1479b, 2 (2023) (granting motion to substitute where a different agency attorney was assigned to handle OCAHO cases); see also *United States v. Upright Installation Servs., Corp.*, 18 OCAHO no. 1494, 3 (2023) (granting motion to substitute where an ACC was leaving the employ of DHS).

Given Complainant's representation that ACC Ricardo A. Cuellar is now a Deputy Chief Counsel with DHS and is no longer handling cases before OCAHO, the entry of appearance by ACC Emily B. Swanson, the reasonableness of the requested substitution, and the lack of opposition to the motion, the Court grants Complainant's motion for substitution pursuant to 28 C.F.R. § 68.33(g). See, e.g., *United States v. Spring & Soon Fashion Inc.*, 8 OCAHO no. 1003, 102, 128-29 (1998) (granting motion to substitute government counsel because it was reasonable and unopposed). ACC Swanson is substituted for ACC Cuellar as Complainant's counsel of record.

III. ELECTRONIC FILING PILOT PROGRAM

OCAHO invited the parties to participate in OCAHO's Electronic Filing Pilot Program on April 23, 2023. On May 16, 2023, OCAHO received a signed Attorney/Participant Registration Form and Certification for OCAHO's Electronic Filing Pilot Program for Adrian Ciechanowicz, counsel for Respondent. On March 25, 2024, OCAHO received a signed Registration Form and Certification for DHS Assistant Chief Counsel Emily B. Swanson. DHS ACC Swanson now having entered an appearance in this matter and having been substituted as Complainant's counsel for ACC Cuellar, this case now meets the requirements for participation in OCAHO's Electronic Filing Pilot Program as counsel for both parties have registered for the program. *See* 79 Fed. Reg. 31143, 31144 (May 30, 2014) (explaining that "[a] case will not be accepted into the pilot unless both parties consent in writing to participate").

The Court now enrolls this case in OCAHO's Electronic Filing Pilot Program. OCAHO shall serve case-related documents electronically on Complainant's counsel, DHS ACC Swanson, and Respondent's counsel, Adrian Ciechanowicz.⁵ The parties shall electronically file all filings in this case in accordance with the program instructions provided to them unless otherwise permitted by the Court or its designee. The parties shall copy all electronic filers on their filings to the Court. All filings must be accompanied by a certificate of service.

Should the parties wish to designate additional attorneys of record as electronic filers, they may submit supplemental registration and certification forms for OCAHO's Electronic Filing Pilot Program. Parties must copy all electronic filers on these submissions.

IV. NOTICE OF SETTLEMENT

On March 25, 2024, Adrian Ciechanowicz, counsel for Respondent, notified OCAHO staff by email that the parties had reached a settlement in this case. Given that no formal notice of settlement or joint motion to dismiss has been filed, the Court will keep the date for the prehearing conference on May 8, 2024, and the deadline for the filing of prehearing statements of May 1, 2024, at 5:00 p.m. Eastern Standard Time. Should the parties need additional time to finalize their settlement, in lieu of filing prehearing statements, they may file a joint status report with the Court by May 1, 2024, at 5:00 p.m. Eastern Standard Time. Through the status report, the

⁵ OCAHO shall serve this Order by email on DHS ACC Ricardo A. Cuellar and by ordinary mail on James Hicks, Esq.

parties should update the Court as to the status of any agreed resolution of this matter and may move to extend the filing deadline for prehearings statements and propose agreed dates for a rescheduled prehearing conference.

Should the parties finalize their settlement, the Court reminds them that OCAHO's Rules of Practice and Procedure for Administrative Hearings provide two avenues for parties who have entered into a settlement agreement and seek to conclude or dismiss a pending case. The parties either may submit to the Court an agreement containing consent findings, along with a proposed decision and order, or notify the Court that they have reached a full settlement and agree to dismissal of the action. *See* 28 C.F.R. §§ 68.14(a)(1)-(2). Section 68.14(a)(2) provides that, where the parties have entered into a settlement agreement, they shall "[n]otify the [ALJ] that the parties have reached a full settlement and have agreed to dismissal of the action." They may do so by filing a notice of settlement and a joint motion to dismiss signed by counsel for both parties. Dismissal of the case is subject to the Court's approval, and the ALJ has discretion to require the parties to file the settlement agreement. *Id.* As the Court previously explained, the parties should indicate in any agreed motion whether they seek dismissal with or without prejudice. *See Muniz Concrete & Contracting, Inc.*, 19 OCAHO no. 1535, at 4.

V. ORDERS

IT IS SO ORDERED that the Notice of Appearance and Motion for Substitution filed by Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, is GRANTED. DHS Assistant Chief Counsel Emily B. Swanson is substituted for Assistant Chief Counsel Ricardo A. Cuellar as Complainant's counsel of record in this matter.

IT IS FURTHER ORDERED that this case is enrolled in OCAHO's Electronic Filing Pilot Program. Complainant and Respondent, Muniz Concrete & Contracting, Inc., shall electronically file all filings in this case in accordance with the OCAHO Electronic Filing Pilot Program instructions provided to them unless otherwise permitted by the Court or its designee. The parties shall copy all electronic filers on their filings to the Court. All filings must be accompanied by a certificate of service.

IT IS FURTHER ORDERED that the parties shall proceed in accordance with the provisions of 28 C.F.R. § 68.14 either by jointly notifying the Court in writing that they have reached a full settlement and agree to dismissal of the action or by filing an agreement containing consent findings, along with a proposed decision and order.

IT IS FUTHER ORDERED that, should no formal notice of settlement or joint motion to dismiss be filed beforehand, the parties shall file prehearing statements or a joint status report on settlement with the Court by May 1, 2024, at 5:00 p.m. Eastern Standard Time.

IT IS FURTHER ORDERED that, should this case not be resolved beforehand, a telephonic prehearing conference with the parties will be held on Wednesday, May 8, 2024, at 11:00 a.m. Eastern Standard Time.

SO ORDERED.

Dated and entered on April 16, 2024.

Honorable Carol A. Bell
Administrative Law Judge