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. 89100162
NU LOOK CLEANERS OF PEMBROKE PINES, INC. Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO RECUSE, DENYING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES UNDER EAJA, REITERATING VIABILITY OF ORDER REJECTING NOTICE OF WITHDRAWAL BY RESPONDENT'S COUNSEL, AND GRANTING EXTENSION OF TIME TO RESPOND TO COMPLAINANT'S MOTION TO COMPEL/MOTION FOR SANCTIONS

A. Synopsis of Proceedings

1. On March 29, 1989, a complaint was issued which alleged that in violation of 8 U.S.C. §1324a(a)(1)(A), respondent, after November 6, 1986, hired for employment in the United States Sherida Allen, knowing she was an alien not lawfully admitted for permanent residence or was not authorized by the Immigration and Nationality Act or the Attorney General to accept employment; or, alternatively, that in violation of 8 U.S.C. §1324a(a)(2), respondent, after November 6, 1986, continued to employ her in the United States knowing she was an alien not lawfully admitted for permanent residence, or was not authorized by the Act or the Attorney General to accept employment; as to this violation, the complaint requested by way of relief a cease-and-desist order and a $1,000 civil penalty. The complaint further alleged that in violation of 8 U.S.C. §1324a(a)(1)(B), respondent, after November 6, 1986, failed to properly verify Mrs. Allen on a verification form I-9; as to this alleged violation, the complaint requested by way of relief a $500 civil penalty. The foregoing allegations were denied in an undated answer which was mailed to me in an envelope postmarked May 2, 1989, and received by my office on May 5, 1989.

2. On September 13, 1989, I issued a subpoena duces tecum against respondent, which has never complied therewith. On January 29, 1990, I issued an order requiring respondent to comply with the subpoena forthwith. Thereafter, on March 1, 1990, I issued an order which stated that if the respondent did not comply with the subpoena forthwith, I would make the findings of inference set forth infra, rhetorical paragraph 3.

3. On July 20, 1990, in reliance on 28 CFR §68.21(c)(1), I issued an order which stated, in part:

> . . . as to the documents called for in the September 13, 1989, subpoena, I make the following findings of inference:
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> a. That if produced, such documents would have shown that after November 6, 1986, respondent hired Sherida Allen for employment, and continued to employ her, in the United States knowing before hiring her and at all times thereafter that she was an alien not lawfully admitted for permanent [residence] or was not authorized by the Immigration and Nationality Act, as amended, or the Attorney General to accept employment; and;
>
> b. That if produced, such documents would have shown that respondent, after November 6, 1986, failed to properly verify Sherida Allen on a verification form I-9.

4. Over date of August 6, 1990, complainant filed a motion for summary judgment against respondent pursuant to 28 CFR §68.36 and Rule 56 of the Federal Rules of Civil Procedure. In the alternative, complainant requested a finding that respondent's failure to comply with orders issued by me on January 29 and March 1, 1990, requiring compliance with the September 13, 1989, subpoena constitute a default calling for the issuance of a final order against respondent pursuant to Rule 37(b)(1)(C) of the FRCP and the applicable agency rules.[1]

On November 5, 1990, I issued an order with respect to the foregoing material filed by complainant. My order contained no ruling regarding complainant's request in connection with Rule 37(b)(1)(C) of the FRCP and the applicable agency rules. However, I did grant complainant's motion for summary judgment in reliance on 28 CFR §68.36 and Rule 56 of the FRCP. Further, I issued an order requiring respondent to

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[1] Complainant cited "28 CFR 69.19(5)." In fn. 4 of my July 20, Order I inferred that complainant meant to cite 28 CFR §21(c) of these rules. That I was correct in so inferring is indicated by the first paragraph of complainant's pending "Motion to Compel/Motion for Sanctions" dated January 31, 1991.

cease and desist from violation of 8 U.S.C. §1324a(a)(1)(A), and to pay certain money penalties.

5. Complainant's August 6, 1990, motion also included a motion requesting that respondent and its attorney, Joel Stewart, be required, jointly and severally, to pay "reasonable expenses including attorney's fees under Rule 11 and Rule 37(b)(2) of the Federal Rules of Civil Procedure and 28 CFR §68.21(c)." Over respondent's opposition, I issued an order requiring the payment of about $800, of which about $160 was to be paid by Mr. Stewart alone, and the rest to be paid by him and respondent, jointly and severally.

6. Over date of November 12, 1990, respondent filed a "Request for Administrative Review" which alleged, inter alia, that my decision "should be reversed for the following reasons. 1. A decision granting summary judgment should not be issued where there is a genuine issue of fact in dispute. Sworn documents . . . have established that there are genuine issues of fact which must be decided by the trier of fact."

7. On December 5, 1990, Chief Administrative Hearing Officer Jack E. Perkins issued a document captioned "Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order." CAHO Perkins stated, in part:

> It is apparent that the July 20, 1990, order, specifically, the finding of inferences, were based upon the respondent's failure to comply with the September 13, 1989, subpoena. However, the ALJ cited to 28 C.F.R. §68.21 as the authority for drawing these inferences. Id. Section 68.21 is entitled, "Motions to compel response to discovery; sanctions". As such, this provision provides sanctions for a failure to respond to discovery orders. 28 C.F.R. §68.21.
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> The applicable language in the INA regarding subpoenas, contained in Section 274A(e)(2), provides that upon refusal to obey a subpoena, the appropriate district court may issue an order requiring compliance with the subpoena. 8 U.S.C. §1324a(e)(2). This language demonstrates that ALJ's were never intended to have the authority to enforce subpoenas and therefore, the ALJ's finding of inference based upon non-compliance was improper.
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> Moreover, 28 C.F.R. §68.21(c)(6) states that in the case of the failure to comply with a subpoena, the ALJ may take the action provided in 28 C.F.R. §68.23(e). Section 68.23(e) provides that an ALJ may, where authorized by law, apply through counsel to the appropriate district court for an order requiring compliance with the order or subpoena. 28 C.F.R. §68.23(e). Therefore, these two sections taken together demonstrate that Section 68.21 should not be used for a sanction of inference in cases where there is non-compliance with a subpoena. Section 68.23 specifically delineates the procedure the ALJ may follow when a party fails to comply with a subpoena. Furthermore, if the complainant's January 18, 1990, Motion to Compel and for

Sanctions and the ALJ's subsequent order regarding this motion were based upon a failure to respond to the request for admissions, then proper authority would exist for the use of Section 68.21.2/ Neither the ALJ nor the complainant suggested 28 C.F.R. §68.23(e) or Section 274A(e)(2) of the INA as a means of requiring the respondent to comply with the subpoena, which would have been the appropriate procedure. The ALJ's granting of the motion for summary judgment was based upon the findings of inference. Because the findings of inference were improperly made, a genuine issue of material fact exists. Therefore, the granting of summary judgment is incorrect.

2/ It is clear from reading of Section 68.21 as a whole that the reference in Section 68.21(c) to actions which an ALJ may take for failure to comply with "an order," is a reference to an order compelling a response to a discovery request made pursuant to Section 68.16 through 68.20. 28 C.F.R. §68.21(a).

In addition, the CAHO found that Rules 11 and 37(b)(2) of the FRCP, and 28 CFR §68.21(c), do not empower Administrative Law Judges to impose monetary sanctions for attorney conduct.

The CAHO's decision concluded as follows:

VI. Findings of Fact and Conclusions of Law

I have conducted a review of the Administrative Law Judge's Decision and Order. The documents identified in the record, and arguments presented by counsel, as contained in the record, have been carefully considered, and I find the following:

(1) Where the statute and regulations set out the method for enforcement of a subpoena, the ALJ has no authority to enforce a subpoena in any other manner. Therefore, the finding of inferences by the ALJ in enforcing the subpoena were improperly made.

(2) Because the finding of inferences was improperly made, a genuine issue of material fact exists and the ALJ's granting of the motion for summary judgment is incorrect.

(3) Given the absence of specific statutory or regulatory authority, the ALJ erred in imposing sanctions against respondent and respondent's attorney as a punitive measure for misconduct.

* * *

ACCORDINGLY, pursuant to 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.51, the Decision and Order of the Administrative Law Judge is hereby vacated.

8. Respondent's appeal had made no contention that I had no authority to enforce a subpoena by making a finding of inferences, or to impose sanctions against a respondent and its attorney for misconduct.

9. By letter to both counsel dated December 10, 1990, I requested them to advise me what action they wished taken in this case.

10. By letter dated December 20, 1990, complainant's counsel stated, in part:

> Since it appears that the December 5, 1990 decision issued by the Chief Administrative Hearing Officer has the effect of shifting jurisdiction back to this Honorable Court, Complainant intends to serve on respondent, on or before December 28, 1990 a Request for Production of Documents pursuant to 28 C.F.R. §68.18.

11. By letter dated December 26, 1990, respondent's counsel, Joel Stewart, stated, in part:

> Order of Vacation is Equivalent to Order of Dismissal
>
> On December 5, 1990, Judge Jack E. Perkins, Chief Administrative Hearing Officer [CAHO], vacated a decision and order which you have issued on November 5, 1990.
>
> The decision was issued under the authority of the CAHO who is authorized to perform de novo administrative review. The scope of the CAHO's review and order is that "The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General." (Sec. 68.51(a) of 28 C.F.R.
>
> The regulations authorized the CAHO to adopt, affirm, modify or vacate your order of November 5, 1990 according to 28 C.F.R. Sec. 68.51(a). Furthermore, the regulations do not provide the CAHO with the authority to remand the case to an ALJ for further proceedings, nor did the CAHO's decision include a remand of any kind.
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> The Final Order of the Attorney General is the Final agency decision:
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> 8 U.S.C. Sec. 1324a(e)(7) provides in part:
>
> The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection.
>
> The December 5, 1990, order of the CAHO is the final order of the Attorney General and the order of vacation acts like an order of dismissal and there is no further action pending before this court or before the Attorney General.

> As the attorney general has reached a final decision and issued a final order, the instant proceedings have been terminated. Otherwise the term "final order" and "final decision" would have no meaning.

12. Mr. Stewart's December 26 letter also included the following:

> Notice of Withdrawal of Attorney
>
> As the present action has been vacated and the Attorney General has issued his final decision, the attorney for the Respondent, Joel Stewart, hereby notifies all parties that he no longer represents the Respondent in the manner of Case No. 89100162 and offers this notice of withdrawal from the said proceedings effective immediately.

13. Over date of December 22, 1990, complainant directed a request for production of documents to attorney Joel Stewart. By letter to me dated January 2, 1991, Mr. Stewart stated, inter alia:

> . . . the CAHO has issued an order of vacation without remand to this Court. This decision automatically became the final order of the Attorney General. Therefore, the Attorney General has completed its administrative/judicial procedure. No further controversy exists and this court no longer has jurisdiction over the Respondent.

14. Under date of January 3, 1991, respondent submitted a request for attorney fees totaling $17,460.00 under the Equal Access to Justice Act, 5 U.S.C. §504(a). This document began with, "United States Department of Justice/Executive Office for Immigration Review/Office of the Chief Administrative Hearing Officer;" and stated, inter alia, that the matter "was pending before this court until a final order and decision was rendered by the Chief Administrative Hearing Officer" on December 5, 1990. Over date of January 31, 1991, complainant filed an opposition to this request, captioned "Motion to Deny Respondent's Request for Attorney's Fees." This document asserted that the application "does not comply with the requirements of §504(a)(2) since a final disposition in this adversary adjudication has not been made by either this Honorable Court or the Office of the Chief Administrative Hearing Officer . . . Furthermore, respondent's application does not show that respondent is a prevailing party."

15. The covering letter on respondent's EAJA application contained the entry, above "Dear Sirs,"

> United States Department of Justice
> Executive Office for Immigration Review
> Office of the Chief Administrative Hearing Officer
> 5107 Leesburg Pike
> Falls Church, VA 22041

At the bottom of the letter is the entry:

> cc: Angel Lahera [complainant's counsel]
> Judge Sherman

Mr. Stewart sent a copy of this letter and the attachments to my office in Rosslyn, Virginia. When I received this packet of documents, I read them as directed to the CAHO and not to me.

By order dated January 4, 1991, I rejected Mr. Stewart's offer of notice of withdrawal from the proceedings. I based this action on the fact that the parties were in dispute as to whether the CAHO's order of December 5, 1990, effected a dismissal of the proceeding or a shift of jurisdiction back to me, and on the fact that confusion generated by various documents filed by Mr. Stewart, which were mutually contradictory as to respondent's present address and present officers, had left him as the only individual with unquestionable power to accept documents on respondent's behalf and his law office as the only address where such documents can be unquestionably delivered.[2] I found it inappropriate to permit Mr. Stewart to withdraw as respondent's counsel unless and until either (1) the CAHO had issued a definitive determination that his December 5 action effected a dismissal of this proceeding (no clarification has since been issued by the CAHO), (2) Mr. Stewart had advised the CAHO, complainant, and me of the name, title, address, and telephone number of someone else who possesses such power to accept documents (he has not done so, although he continues to represent respondent for purposes of the EAJA proceeding), or (3) another attorney filed a notice of appearance on respondent's behalf (no such notice has been filed).

By letter to Mr. Stewart dated January 4, 1991, CAHO Perkins stated that under EAJA, such an application "must initially be presented to the Administrative Law Judge who presided over the case. Accordingly, the Chief Administrative Hearing Officer has

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[2] By letter to me dated January 9, 1991, Mr. Stewart complained, in effect, that my January 4 order was issued "without showing any legal authority for such action." By letter to Mr. Stewart dated January 18, I drew his attention to Ohntrup v. Firearms Center, Inc., 802 F.2d 676, 679 (3rd cir. 1986); ITT Industrial Credit Co. v. Lawco Energy, Inc., 86 FRD 708, 712-713 (D.C. W.Va 1980); Garner v. Pearson, 374 F.S. 591, 600 (D.C. Fla. 1974); In re Philadelphia & Reading Coal & Iron Co., 27 F.S. 256, 257 (E.D. Pa 1939); and 28 CFR Sec. 68.31(c). Mr. Stewart has not thereafter unequivocally questioned my authority to take such action with respect to a proceeding pending before me.

jurisdiction only to review such a decision pursuant to 28 C.F.R. §68.51." By letter to me dated and postmarked January 9, 1991, and received by me on January 15, 1991, Mr. Stewart stated, inter alia, that the EAJA requests:

> were made to the agency but proffered to both Judge Perkins and yourself. You presided over the case, but Judge Perkins issued the final decision. Judge Perkins' name appears on the request as primary addressee, as he is the Chief Administrative Hearing Officer. The request for fees is directed to you equally as to him, as you have both performed the duties of a "deciding official."

16. In addition, the letter stated:

> . . . I am asking you to withdraw yourself from this case, as I believe there is sufficient reason to believe that your decisions can no longer be viewed as objective and fair, equally to the Respondent and the Complainant. I am also asking Judge Jack E. Perkins, by copy of this letter, to assign the EAJA request to another judge.

17. By letter to Mr. Stewart (with a courtesy copy to CAHO Perkins) dated January 18, 1990, I stated, in part:

> Receipt is acknowledged of your letter dated January 9, 1991, requesting that I withdraw from this case, I am not quite clear whether your request is limited to the EAJA fees matter. Your letter also requests Chief Administrative Hearing Officer Jack E. Perkins to assign your EAJA request to another judge. Your attention is called to 28 CFR sec. 68.28(b)(c), which provides:
>
> (b) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified . . . to continue to preside . . . in a particular proceeding, that party shall file with the Administrative Law Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged ground for disqualification. The Administrative Law Judge shall rule upon the motion.
>
> (c) In the event of disqualification or recusal of an Administrative Law Judge as provided in paragraph . . . (b) of this section, the Chief Administrative Hearing Officer shall refer the matter to another Administrative Law Judge for further proceedings.

18. A motion from Mr. Stewart dated January 28, 1991, states, "Kindly recuse yourself," and attaches an affidavit by him. Both the motion and the affidavit are captioned "Pursuant to Request for Attorney Fees."

19. Over date of January 30, 1991, I issued the following order:

> Over date of January 28, 1991, attorney Joel Stewart filed a motion, with an accompanying affidavit, that I recuse myself. Because both the motion and the affidavit are captioned "Pursuant to Request for Attorney Fees," I infer that the motion is limited to the Equal Access to Justice Act aspect of this proceeding (5 U.S.C. §504(a)), and does not extend to any aspect of this proceeding which may arise under

> 8 U.S.C. §1324a. The parties are hereby ordered to show cause, on or before 14 days from the date of this Order, why the motion for recusal as to the EAJA proceeding should not be denied, without prejudice, on the ground that the EAJA petition is premature in that it was filed before a final disposition in the adversary adjudication, and before respondent would be able to show that it is a prevailing party . . . Failure to reply will be deemed to constitute consent.

20. By each of two letters dated February 13, 1991, Mr. Stewart reiterated his request that I recuse myself. In addition, he stated in one of these letters:

> The decision issued by Judge Perkins on December 5, 1990, is clearly a final agency order. Please see my letter of December 26, 1990, entitled, "Order of Vacation is Equivalent to Order of Dismissal".
>
> 8 U.S.C. Sec. 1324a(e)(7) provides in part,
>
> "The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection."
> (Underlining provided)
>
> In addition to the fact that Judge Perkins' order is a "final order", the Respondent prevailed in the proceeding because the final order vacated the orders which had been improperly entered against the Respondent and its attorney.
>
> Thus, Judge Perkins' order provides the respondent with a "final agency order" and in which the respondent is a "prevailing party".
>
> The OSC issued by you on January 30, 1991, does not establish any rationale or legal theory upon which a contrary decision can or should be reached. As the regulations upon which Judge Perkins' action was based are quite clear, and no legal theory to the contrary has been proposed, there is no reason why the order to show cause should be granted.

21. By letter to complainant's counsel dated February 13, 1991, Mr. Stewart stated, inter alia, that he could not accept service of complainant's January 31, 1991, "Motion to Compel," or any other pleadings, because, inter alia, "There is no longer a 1324a proceeding pending before the agency once a final agency order was issued on December 5, 1990, by Judge E. Perkins, dismissing the proceeding." The letter further stated that this proceeding "no longer exists."

22. By letter dated February 15, 1991, but not faxed to me until February 19, complainant's counsel stated, inter alia, that he "has no objection to and in fact consents to dismissal without prejudice of the motion for recusal" (emphasis in original).

23. By letter to me dated February 14, 1991, Joel Stewart stated, in part:

> I received a copy of a document entitled, "Order to Show Cause Why Complainant's Motion to Compel/Motion For Sanctions Should Not Be Granted", in the matter of Nu Look Cleaners of Pembroke Pines, Inc., 8 U.S.C. Sec. 1324a Proceeding, Case No. 89100162.
>
> A final order was issued in this case by order dated December 5, 1990. That order automatically became the final order of the agency. As such, the proceeding in question ceased to exist. I also notified this court and the Complainant that I no longer represent the former proceedings. Since the proceeding was brought to a final agency order, your court has no further jurisdiction, except to consider the application for attorney fees which is presently before you.
>
> In addition, I filed a motion for recusal, but you have thus far ignored the motion. You choose instead to continue to issue orders and perform adjudicative functions, as if the motion for recusal were not before you.
>
> In Your Order to Show Cause dated January 20, 1991, you took the position that you would adjudicate the EAJA request after resolving the issues described in the OSC, i.e., whether the EAJA request was premature. Your OSC dated February 11, 1991, is a contradiction of that position, as you can not concurrently maintain jurisdiction under the 8 U.S.C. Sec. 1324a Proceeding and under the request for fees under EAJA.

B. Analysis and Conclusions

1. Mr. Stewart's request that I recuse myself with respect to the EAJA proceeding.

The affidavit attached to Mr. Stewart's motion for recusal dated January 28, 1991, states in its entirety:

> The unusual actions you have taken in this case, in which you exceeded your authority, given [sic] improper weight to evidence, and ruled that I be held personally responsible for the Respondent, form the basis for this motion for recusal.[3]

To the extent that this affidavit relies on the fact that the CAHO reversed certain rulings by me, the affidavit is insufficient to call for recusal. U.S. v. Partin, 552 F.2d 621, 637-638 (5th Cir. 1977), cert. denied 434 U.S. 903; Cipollone v. Liggett Group, Inc., 822 F.2d 335,

[3] I need not and do not consider whether the requirements for a supporting affidavit in 28 CFR 68.28(b) are the same as the requirements in 28 U.S.C. §144; or whether, if they are, they have been satisfied by Mr. Stewart's affidavit. A letter to me from Mr. Stewart dated February 13, 1991, alleges that the CAHO "found that your decisions were contrary to law, and, as such, they amount to an abuse of discretion. Taken individually and cumulatively, they show prejudice against the movant."

347 (3d Cir. 1987), cert. denied 108 S.Ct. 487; Duplan Corp. v. Deering Milliken Inc., 400 F.S. 497, 514-515 (S.C. Spartanburg Div. 1975). As to the evidence to which I allegedly gave "improper weight," Mr. Stewart's affidavit fails to specify what it was, let alone specify why my alleged error in connection therewith calls for recusal.[4] Accordingly, Mr. Stewart's motion that I recuse myself with respect to the EAJA proceeding is hereby denied.

2. Complainant's motion to deny respondent's request for attorney's fees under the EAJA

As previously noted, complainant has moved to dismiss respondent's request for attorney's fees, on the ground that the application does not comply with the requirements of 5 U.S.C. §504(a)(2) in that a final disposition of this adversary adjudication allegedly has not been made.[5] Complainant bases this contention on the ground that the effect of the CAHO's order of December 5, 1990 is to shift jurisdiction of this case back to me. I agree, particularly in view of the CAHO's finding that "because the findings of fact were improperly made, a genuine issue of material fact exists"; the CAHO would hardly have so stated if he anticipated that such an issue would remain forever unresolved. Respondent's contention that the CAHO's order was the equivalent of an order of dismissal appears to be based largely on the contention that 8 U.S.C. §1324a(e)(7), and 28 CFR §68.51(a), do not afford the CAHO the power to remand a proceeding or to shift jurisdiction back to an administrative law judge. This contention has no merit. U.S. v. Koamerican Trading Corp., OCAHO Case No.

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[4] Up to this point, not much evidence of any kind has been adduced by either party. Mr. Stewart's letter of January 9, 1991, requesting that I recuse myself, complained about my alleged action in giving insufficient weight to an affidavit given by Sherida Allen on September 4, 1990. My reply letter dated January 18, 1991, states, in part, "In connection with any contention you may choose to make regarding my alleged reliance on Sherida Allen's allegedly uncontroverted affidavit dated September 4, 1990, you may wish to discuss pages 5-6 of my 'Final Order' dated November 5, 1990, and the affidavits of Walter Smith and David Levering, dated October 10, 1989."

[5] Complainant's motion is further grounded on the allegation that respondent's application dated January 3, 1991, does not allege that respondent is a prevailing party. In view of my ultimate disposition of this application, I need not and do not consider whether such an omission would call for dismissal assuming that respondent were In fact a prevailing party and in view of respondent's February 13, 1991, claim of such status (see rhetorical paragraph 20, supra). For similar reasons, I need not and do not consider the effect, on an otherwise sufficient and timely application, of its failure to claim that respondent is a "party" within the meaning of 5 U.S.C. §504(b)(1)(B), especially paragraph (ii). This omission is not alluded to by complainant.

89100092 (order of September 26, 1989, in view of order dated June 19, 1989). Indeed, Mr. Stewart's "Request for Administrative Review" dated November 12, 1990, appears to assume that the CAHO has this power; that request stated that "there are genuine issues of fact which must be decided by the trier of fact" (see rhetorical paragraph 6, supra).

In view of my conclusion that the CAHO's order of December 5, 1990, did not terminate these proceedings, a final disposition of this adversary adjudication has not been made, and respondent will not be able to show (at least at this juncture) that as to the merits of the case it is a prevailing party, within the meaning of 5 U.S.C. §504(a). Accordingly, respondent's EAJA request is hereby denied, on the ground that it is premature, without prejudice to respondent's right timely to renew such a request after a final disposition of this adversary adjudication has been made and if respondent can then show that it is a prevailing party within the meaning of 5 U.S.C. §504(a)(2), (b)(1)(B). See Auke Bay Concerned Citizen's Advisory Council v. Marsh, 779 F.2d 1391 (9th Cir. 1986); Taylor v. Heckler, 778 F.2d 674, 677-678 (11th Cir. 1985); Miller v. United States, 753 F.2d 270, 273-274 (3d Cir. 1985). My rejection of respondent's contention that the CAHO's order of December 5, 1990, constitutes a final order makes it unnecessary for me to determine whether, if it had been a final order, respondent's EAJA application would have been timely under 5 U.S.C. §504(a)(2), in view of the format of that application, which format led both the CAHO and me to initially infer that the application was directed to the CAHO alone. Mr. Stewart's letter advising me that the application was also directed to me was not received by me until January 15, 1991, more than 30 days after the issuance of the CAHO's December 5, 1990, order. See U.S. v. G.L.C. Restaurant, Inc., CAHO Case No. 89100063, December 18, 1990, petition for review pending, No. 91-5003, 11th Cir.

3. The status of my order of January 4, 1991, rejecting attorney Joel Stewart's offer of notice of withdrawal from proceedings

In view of my finding that the 1324a proceedings are still pending before me, my order of January 4, 1991, rejecting Mr. Stewart's offer of notice of withdrawal from proceedings, is still viable; and unless vacated by me, remains in force unless and until satisfaction of one of the alternative conditions specified therein will enable complainant's counsel, the Chief Administrative Hearing Officer, and me to know the name and address of someone on whom papers directed to respondent can be effectively served.

4. Complainant's motion to compel/motion for sanctions, dated January 31, 1991.

By letter to complainant dated February 13, 1991, Mr. Stewart stated that he refused to accept service of complainant's January 31, 1991, motion to compel/motion for sanctions, on the ground that (1) the 1324a proceeding is no longer pending because it was dismissed by the CAHO's order of December 5, 1990; (2) Mr. Stewart had withdrawn from these proceedings; and (3) "The order of Judge Sherman dated January 4, 1991, [refusing to accept his notice of withdrawal; see rhetorical paragraph 15, supra] is void for the reasons mentioned above and because Judge Sherman has no jurisdiction to issue such an order." In the foregoing portions of this document, I have found that Mr. Stewart was in error when maintaining the foregoing positions. However, in order to afford Mr. Stewart the opportunity to respond to complainant's motion on the merits, such a response will be entertained by me if received on or before 14 days from the date of this document. Failure to reply will be deemed to constitute consent.

Dated: March 8, 1991

NANCY M. SHERMAN
National Labor Relations Board
Division of Administrative Law Judges