

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. 94C00201
MIREYA PEDRAZA-GUZMAN,)
Respondent.)
_____)

ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT
JUDGMENT

(August 10, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Ann M. Tanke, Esq.
for Complainant
Steven A. Adamson, Esq.
for Respondent

I. Procedural History

On November 25, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint alleging violations of Section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c, enacted by the Immigration Act of 1990, Pub. L. No. 101-649 (1990), in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF), served by INS on Mireya Pedraza-Guzman (Guzman or Respondent) dated March 15, 1994.

Count I charges Respondent with knowingly forging, counterfeiting, altering and falsely making a Form I-9 (employment eligibility verification form) dated July 12, 1993. The civil money penalty for Count I is \$250. Count II charges Respondent with knowing use or attempted use and possession of a forged, counterfeited, altered and falsely made

document in the form of an alien registration receipt card (Form I-151) in the name of Mireya Pedraza Guzman. The civil money penalty for Count II is \$250. Exhibit B to the Complaint is Respondent's request for a hearing; the request was made by Steven A. Adamson, Esq.

On December 2, 1994, this Office issued a Notice of Hearing (NOH), which transmitted the Complaint to Respondent.

On January 4, 1995, counsel for Respondent filed a Motion to Withdraw as attorney for Respondent. To date, no answer to the Complaint has been filed by Respondent.

On January 6, 1995, Complainant filed an Opposition to Motion to Withdraw and a Motion for Default. No response to these motions has been made by Respondent or Respondent's counsel.

II. *Discussion*

A. Motion to Withdraw as Counsel

The Motion for Withdrawal filed by counsel for Respondent states that Respondent, having been granted voluntary departure, now resides in Mexico and that "[c]ounsel does not know of the Respondent's whereabouts and is unable to correspond or communicate with Respondent. . . ." Motion to Withdraw at 1.

"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. . . ." United States v. Flores-Martinez, 4 OCAHO 647 at 3 (1994) (Order). See also 28 C.F.R. § 68.33(c).¹ Although there are no factors to consider in determining whether to grant an attorney's motion to withdraw, "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." Flores-Martinez, 4 OCAHO 647 at 3 (citing United States v. Primera Enterprises, Inc., OCAHO Case No. 93A00024 (1994) (Order Denying Respondent's Counsel's Motion to Withdraw); United States v. K & M Fashions, 3 OCAHO 411 (1992); United States v. NuLook Cleaners of Pembroke Pines, 1 OCAHO 284 (1991)).

¹ See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41, 243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

The principle disfavoring withdrawal of counsel in cases in which difficulty exists in trying to serve Respondent with pleadings is even more applicable to the case at hand than in Flores-Martinez, a case in which counsel for both parties were satisfied that Respondent could be reached at an address in Mexico. United States v. Flores-Martinez, 4 OCAHO 682 at 3 (1994) (Order Denying Motion of Counsel to Withdraw). In contrast, counsel for Guzman admits that Respondent's whereabouts in Mexico are not known, making service of process in the event of counsel's withdrawal impossible. Accordingly, the Motion to Withdraw is denied.

B. Motion for Default Judgment

1. United States v. Remileh Distinguished

Although it is common practice to grant a Motion for Default Judgment where no response to the Complaint is received, the case at hand requires a short preliminary discussion in light of the Chief Administrative Hearing Officer's (CAHO) recent modification in United States v. Remileh, 5 OCAHO 724 (1995).

Count I of the Complaint in Remileh, for which INS was granted summary judgment by the administrative law judge (ALJ), alleged that Respondent knowingly falsely made a Form I-9 for the purpose of satisfying a requirement of the INA in violation of 8 U.S.C. § 1324c. In modifying the ALJ's decision, the CAHO stated that

the attestation of an employee to false information on a Form I-9 does not constitute the creation of a "falsely made" document in violation of 8 U.S.C. § 1324c. It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a.

5 OCAHO 724 at 2-3.

Subsequent to Remileh, I issued an Order in United States v. Thoronka² distinguishing Remileh from cases alleging § 1324c violations other than simply "falsely making" fraudulent documents as was the case in Remileh. Specifically, I held that

² 5 OCAHO 772 (1995) (Order and Certification to the Chief Administrative Hearing Officer) (affirmed by the CAHO on July 19, 1995).

5 OCAHO 792

a specification of a violation of § 1324c(a)(1) which alleges forgery, counterfeiting or altering of documents for the purpose of satisfying a requirement of the INA, is sufficient to state a cause of action under § 1324c. I do not understand Remileh to compel a contrary result.

5 OCAHO 772 at 7 (emphasis added).

Count I of the Complaint at issue alleges that Respondent "forged, counterfeited, altered, and falsely made . . . [a] Form I-9. . . ." Complaint at 2 (emphasis added). As Count I alleges more than simply 'false making,' I find the allegation to fall within Thoronka and not Remileh. Accordingly, the Complaint alleges a viable cause of action.³

2. Motion for Default Judgment Granted

As already stated, on January 6, 1995, Complainant filed a Motion for Default Judgment. No response to the Motion having been filed, Respondent is out of time. Under OCAHO rules of practice and procedure, Respondent had 15 days to respond to this Motion. See 28 C.F.R. §§ 68.11(b) and .8(c). As I have stated before,

[i]t is my frequent although not invariable custom in cases where respondents are not represented by counsel to issue an order to show cause why default judgment should not issue, as an intermediate step before entering such a judgment. The considerations which favor such a step in cases involving pro se respondents do not, however, pertain where as here the record is clear that the respondent is represented by counsel.

United States v. Galvez-Melgarejo, 4 OCAHO 684 at 2-3 (1994).

Accordingly, as no response has been filed by Respondent to either the Motion for Default or the Complaint, I find Respondent in default. See 28 C.F.R. § 68.9(b).

III. Ultimate Findings, Conclusions and Order

I have considered the Complaint, motions and accompanying documentary materials. All motions and other requests not previously disposed of are denied. For the reasons already stated, I find and conclude that:

1. Complainant's Motion for Default is granted;

³ In light of Remileh, this Order, sua sponte, deletes so much of the allegation in Count I as implicates "false making."

2. as alleged in the Complaint, Respondent is in violation of 8 U.S.C. § 1324c(a)(1) and (a)(2) with respect to the following allegations of document fraud:
 - a. Count I: knowingly forged, counterfeited and altered one Form I-9 dated July 12, 1993 at an assessed civil money penalty of \$250;
 - b. Count II: knowingly used, attempted to use and possess a forged, counterfeited and altered alien registration receipt card, Form I-151, bearing A035674786 in the name of Mireya Pedraza Guzman at an assessed civil money penalty of \$250;
3. Respondent shall pay a civil money penalty in the amount of five hundred dollars (\$500) for the violations listed in the Complaint;
4. Respondent shall cease and desist from violating 8 U.S.C. §§ 1324c(a)(1) and (a)(2);
5. the hearing is canceled.

Absent modification or vacation by the CAHO within 30 days, this decision and order shall become the final agency decision and order of the Attorney General. 8 U.S.C. § 1324c(d)(4).

"A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324c(d)(5).

SO ORDERED.

Dated and entered this 10th day of August, 1995.

MARVIN H. MORSE
Administrative Law Judge