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

United States of America, Complainant, v. Lighthouse Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100016.

ORDER DISMISSING PROCEEDING PREDICATED UPON AGREEMENT BETWEEN THE PARTIES

MARVIN H. MORSE, Administrative Law judge

Appearances: NANCY R. MCCORMACK, Esq., for the Immigration and Naturalization Service. FRANK W. RICCI, Esq., for respondent.

Procedural Background

This proceeding was started by the filing of a complaint dated March 8, 1988, by the Immigration and Naturalization Service (INS). The complaint attached and incorporated by reference the INS Notice of Intent to Fine (NIF) Lighthouse Restaurant (Lighthouse), and attached the Lighthouse answer to the NIF. The proceeding thus initiated in this Office involves liability for civil penalties for violation of Section 274A of the Immigration and Nationality Act, as amended by Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a.

The parties have submitted a ``settlement agreement'' executed by INS on April 26, 1988, and by Lighthouse on May 9, 1988, forwarded to me for entry of an order of approval by an undated motion of INS received May 16, 1988. The agreement contains some, but not all, of the elements required for consideration by the judge of a consent order under 28 CFR 68.10(b). The agreement otherwise is susceptible to an interpretation that it contemplates an agreed dismissal as different and distinct from providing a predicate for adoption by the judge of consent findings upon which a decision might issue pursuant to 28 CFR 68.10(d).

I convened a telephonic prehearing conference on May 24, 1988, because the agreement appeared ambiguous in that it contained

provisions partially consistent with agreed consent findings on the one hand, and partially consistent with an agreement dismissal on the other hand. Recognizing the obvious intent of the parties to accomplish an agreed disposition, but mindful that only a few prototypes are yet available early in the administration of IRCA, it was important to assist the parties to an agreed disposition rather than remit them to a confrontational hearing for failure technically to accomplish what they both clearly sought substantively to achieve.

During the May 24, 1988 telephonic prehearing conference it became clear that counsel for the parties desired that their agreement be treated as submitted by an oral joint motion to dismiss the proceeding as settled, with predjudice, with civil money penalties payable in a sum not to exceed $2,500. Counsel stated orally that although the agreement reflects their mutual undertakings and is tendered to signal a full settlement as the predicate for dismissal of this proceeding, it is not intended as the predicate for consent findings and decision by the judge.

Discussion:

Once a hearing is requested,[1] by a person or entity against whom the government (INS) has sought a cease and desist order with civil money penalties under 8 U.S.C. 1324a(e)(4) and civil money penalties under 8 U.S.C. 1324a(e)(5), the proceeding is under the control of the administrative law judge, 8 U.S.C. 1324a(e)(3), as assigned pursuant to regulation, 28 CFR 68.2(d), 68.22, 68.25(a) and, as to consent orders or settlements, 28 CFR 68.10.[2]

The controlling regulation, i.e., the rules of practice and procedure of this Office, at 28 CFR 68.10, contemplates two different and distinct forms of agreed dispositions: First, an agreement containing consent findings and an order disposing of any part or all of the proceeding and which provides the basis for a decision, 28 CFR

[1]Although the answer to NIF asked for certain relief including an opportunity to ``present documentary evidence and applicable law'' it nowhere, in terms, requested a hearing as it was notified it might do by the NIF. It may be speculated, therefore, whether the statutory requirement that the Attorney General provide a hearing ``upon request'' as a condition precedent to imposition of civil money penalties was necessarily triggered. Since, however, both parties have proceeded on the assumption that a hearing was in order, the question whether the need to have initiated the hearing procedure appears to have been overtaken. Any such ambiguity will be less likely to occur in the future as the result of recent amendment to the INS regulation which makes more clear than before that only a timely request for hearing before an administrative law judge will preclude a nonappealable final INS order. 8 CFR 274a.9(d) as revised, 53 Fed. Reg. 8611, 8613, March 16, 1988.

[2] See also, as to powers of administrative law judges, Attorney General's Manual on the Administrative Procedure Act (p. 74, 1947).

68.10(c)(1), or, second, a settlement upon the basis of which their representatives of their counsel ``[n]otify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action.'' 28 CFR 68.10(c)(2).

In this proceeding, the agreement as explained by counsel during the May 24, 1988 telephonic prehearing conference constitutes the notification that the parties have reached a full settlement and have agreed to dismiss the proceeding and is not the submission of a proposed agreement containing consent findings for consideration by the Judge.[3] Accordingly, this order disposes of the proceeding pursuant to joint request by the parties and is not a disposition requiring a decision within the contemplation of 28 CFR 68.10(d).

This Order disposes of the proceeding on the basis of the agreement between the parties to obtain a dismissal. The regulatory treatment of dismissals is more cursory and less rigorous than is the treatment of consent findings, 28 CFR 68.10. Nothing contained in the regulation or in this Order, however, should be understood as denying to the administrative law judge the power to inquire, indeed, the obligation in an appropriate case, as in the May 24, 1988 telephonic prehearing conference here, concerning the form and substance of an underlying agreement to obtain a dismissal.

IN VIEW OF THE FOREGOING, IT IS ORDERED:

(1) that the prehearing conference and hearing previously scheduled are canceled;

(2) that this proceeding is dismissed with prejudice, respondent Lighthouse Restaurant to pay a civil money penalty not to exceed $2,500; and

(3) that, consistent with 28 CFR 68.52, this Order Dismissing Proceeding Predicated Upon Agreement Between the Parties, shall become the final order of the Attorney General unless within thirty (30) days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

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[3]The settlement agreement, at paragraph 5, provides that INS will issue on its Form I-764 a ``final and unappealable order pursuant to Section 274A(e)(3)(B) ...'' of the Immigration and Nationality Act, as amended by IRCA. Once a proceeding is begun in this Office, however, pursuant, as here, to 8 U.S.C. 1324a(e)(3)(B), it is the administrative law judge, not the INS, that conducts the proceeding; once the proceeding has begun, it is this Office, not INS, who issues final and unappealable orders pursuant to subsection (e)(3). Whatever powers one party to an agreed disposition confers on another, inter se, is between them, and does not disturb the jurisdiction of this Office until the statutory and regulatory procedures contemplated by IRCA have run their course.

SO ORDERED.

Dated this 25th day of May, 1988.

MARVIN H. MORSE
Administrative Law Judge