

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

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|---------------------------|------------------------------|
| UNITED STATES OF AMERICA, |) |
| Complainant |) |
| |) |
| v. |) 8 U.S.C. §1324a Proceeding |
| |) CASE NO. 89100162 |
| |) |
| NU LOOK CLEANERS OF |) |
| PEMBROKE PINES, INC. |) |
| Respondent |) |
| _____ |) |

ORDER WITH RESPECT TO DOCUMENTS
ENCOMPASSED BY COMPLAINANT'S
DECEMBER 27, 1990, REQUEST
FOR PRODUCTION

1. A complaint with the same caption as the instant Order, issued on March 29, 1989, and received by attorney Joel Stewart on April 10, 1989, alleges 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 of 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 resident or was not authorized by the Act or the Attorney General to accept employment; as to this alleged violation, the complaint requested by way of relief a cease-and-desist order and a civil penalty of \$1,000. The complaint further alleges 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 requests by way of relief a civil penalty of \$500. The foregoing allegations are denied in an undated answer, signed on respondent's behalf by attorney Stewart, which was mailed to me in an

envelope postmarked May 2, 1989, and received by my office on May 5, 1989.

2. Over date of November 5, 1990, I issued an order captioned "Final Order Denying Respondent's Request to Strike Findings of Inference of to Give Then No Weight, Granting Respondent's Motion for Summary Judgment, and Granting with Modification Complainant's Renewed Motion for Sanctions." On appeal by respondent through Mr. Stewart, and over date of 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."

3. A document directed by Mr. Stewart to me asserted that the CAHO's order dated December 5, 1990, "acts like an order of dismissal." That same document goes on to state, "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 matter of Case No. 89100162 and offers this notice of withdrawal from said proceedings effective immediately." This document states that a courtesy copy was sent to complainant's counsel. Although the document is dated December 24, 1990, the envelope in which I received it is postmarked December 26, and it was not received by my office until December 28.

4. On December 27, 1990, counsel for complainant submitted to Mr. Stewart, as counsel of record for Respondent, a "request for production of documents" returnable on January 30, 1991, for the following documents (emphasis in original):

1. For all employees hired for employment after November 6, 1986, and for Sherida Allen:

- a. All payroll records, such as paycheck stubs, canceled checks, receipts, etc.
- b. All time cards, sign in attendance sheets and/or any other related documents.
- c. All records relating to the following:
 - i) Contributions for social security.

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- ii) Contributions for unemployment compensation.
- iii) Federal income tax withholding.
- d. All job applications for employment.
- e. All W-2, W-4 forms or copies thereof.
- f. All original I-9 forms.

5. A request by Mr. Stewart for attorney fees, dated January 3, 1991, was received by the CAHO on or before January 4, 1991, and by me on January 4.

6. Over date of January 4, 1991, I issued an order captioned "Order Rejecting Attorney Joel Stewart's Offer of Notice of Withdrawal from Proceedings." My order was based largely on the failure of my file to clearly disclose either respondent's present address, or the name, title, and address of anyone who presently had the power to accept service on respondent's behalf. Although repeatedly requested, both in terms and by implication, no such information has been supplied to me as of the date of the instant order.

7. Over date of January 31, 1991, complainant filed a motion to compel/motion for sanctions, requesting, inter alia, an order requiring respondent to respond to complainant's request for production of documents within 10 days of receipt of such order; and (upon any failure by respondent to comply with the order to compel) a finding that "all information and documents requesting and all matters contained within Complainant's Request . . . be taken as established adversely to Respondent" and (pursuant to 28 CFR §68.21(c) and Rule 37(b)(1)(C) of the Federal Rules of Civil Procedure) that such failure constitutes a default calling for the entry of a final order against respondent. On February 11, 1991, I issued an order to respondent (by means of service on Mr. Stewart) to show cause why the motion should not be granted. Failure to reply within 14 days (a date which I later extended, sua sponte, to 14 days after March 8, 1991) was to be deemed to constitute consent. No response has been received.

8. On March 8, 1991, in response to various letters from and filings by Mr. Stewart and complainant's counsel, I issued a document captioned "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." In a document dated March 16, 1991, but not received by the Chief Administrative Hearing Officer until March 22, 1991, Mr. Stewart filed a request for administrative review of my March 8 order. My courtesy copy of this request did not reach me until the afternoon of Friday, March 22. By letter dated Monday, March 25, 1991, I advised the parties that I would defer ruling on complainant's January 31 motion to compel/motion for sanctions pending the disposition of respondent's request for administrative review. Also on March 25, in an order of which I did not receive a copy until March 26, the CAHO denied the request for administrative review on the ground that it was filed late. Mr. Stewart's request for reconsideration, dated March 28, 1991, was denied by the CAHO on April 2, 1991. On April 11, 1991, I received from Mr. Stewart's office a courtesy copy of the following document dated April 9, 1991:

United States Court of Appeals for the 11th Circuit
Nu Look Cleaners of Pembroke Pines, Inc.

v.

United States of America
Immigration and Naturalization Service

Nu Look Cleaners of Pembroke Pines, Inc., petitions the court for review of the order of Judge Nancy M. Sherman entered on March 8, 1991, and the orders of Jack E. Perkins, Chief Administrative Hearing Officer, dated March 25, 1991, and April 2, 1991, denying request for administrative review of Nancy M. Sherman's order.

Joel Stewart, Attorney
For Petitioner

9. In a document dated April 18, 1991, and captioned "Order to Show Cause Why Respondent Should Not Be Required to Retain Certain Documents in its Possession and Take Related Action," I stated that pending disposition of the foregoing petition to review, it would be inappropriate for me to rule on complainant's motion to compel/motion for sanctions. However, because of my concern about whether the documents encompassed by the request to produce will remain available until the date of any determination that respondent is under a duty to honor that request, I issued an order to respondent to show cause within 10 days why an order should not issue directing respondent (1) to retain all of the documents encompassed by complainant's December 27, 1990, request for production, which could have been produced by respondent on the date it received my April 18 order; and

(2) to specify any documents encompassed by the request for production which became unavailable to respondent before its receipt of this order, and the reasons why each became unavailable. Failure to reply was to be deemed to constitute consent. Further, failure to reply was to be deemed consent (1) to any further action by me, in the drawing of any inferences from any failure to produce documents encompassed by the December 27, 1990, request for production, in drawing no distinction between documents available at the time of any such failure to produce and documents available (or required by statute to be available) at the time respondent received the show-cause order; and (2) to my assuming the availability to respondent of all documents encompassed by the request for production and not so specified by respondent.

10. Mr. Stewart's copy of my April 18, 1991, order was returned to me under a covering letter dated April 26, 1991, and signed by Therese M. Stewart, Mr. Stewart's wife and office manager. This letter stated that Mr. Stewart is a solo practitioner and "is presently traveling in [Brazil] and will not return for several weeks" the letter did not state whether he left for Brazil before or after my April 18 order reached his office, and did not specify a date for his return.¹ Mrs. Stewart's letter further stated:

. . . during Mr. Stewart's absence, I am handling correspondence received by this office.

My records indicate that Mr. Stewart no longer represents the respondent in these proceedings and that the proceedings entitled "Nu Look Cleaners of Pembroke Pines, Inc., 8 U.S.C. §1324a Proceedings, Case No. 89100162" have already been terminated. We do not have any open file on this matter.

Furthermore, Mr. Stewart has appealed the final agency action to the 11th Circuit Court of Appeals.

In view of these facts, I am unable to accept service of your order and am returning it to you herewith.

11. By letter to Mr. and Mrs. Stewart dated May 6, 1991, I stated in part as follows:

¹ I assume he left for Brazil no earlier than April 9, 1991, the filing date of the petition for review described supra, rhetorical paragraph.

The order [appealed by the petition to review pending before the Court of Appeals for the Eleventh Circuit] reiterates the viability of a prior order rejecting Mr. Stewart's offer of notice of withdrawal from the 1324a proceeding, and denies Mr. Stewart's EAJA request as premature on the ground, inter alia, that the 1324a proceeding has not been terminated. The material in my file . . . does not disclose whether the petition for review challenges either of these aspects of the agency order complained of. In any event, such determinations remain viable unless and until they are reversed. Accordingly, I regard service of my order of April 18, 1991, on Mr. Stewart as effective . . .

Accordingly, it is hereby ordered (1) that respondent retain all of the documents encompassed by complainant's December 27, 1990, request for production, which could have been produced by respondent as of the date my order of April 18, 1990 was received by Mr. Joel Stewart's office; and (2) that respondent specify, within 10 days of the date of this order, what documents encompassed by the request for production became unavailable to respondent before my order of April 18, 1990, was received by Mr. Joel Stewart's office, and the reasons why each became unavailable. Failure to provide me with such a list will cause me to assume that all documents encompassed by the December 27, 1990, request for production have been and remain available to respondent at all times since December 27, 1990.

Dated: May 17, 1991.

NANCY M. SHERMAN
Division of Administrative Law Judges