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. 89100389
ABC ROOFING & WATER-	)	
PROOFING, INC.,	)	
Respondent	)	
	)	

ORDER DENYING MOTION TO DISMISS
AND
DENYING PERMISSION FOR COUNSEL TO WITHDRAW

On February 4, 1991, Respondent's counsel filed an "Advisal of Non-Existence of Respondent" together with a motion to dismiss asserting the matter to now be moot. Thereafter, on February 11, Complainant filed a response in which it opposed the motion to dismiss.

In addition, because of their client's purported non-existence, Respondent's co-counsel each profess that they "consider that their authority to continue representing the Respondent no longer exists." While not clear, the motion may fairly be construed as their seeking permission to withdraw from the proceedings. Of course, 28 C.F.R. § 68.31(c) requires lawyers who wish to withdraw from the proceedings to seek by written motion the permission of the administrative law judge presiding over the case. Normally such a motion would have greater clarity than this; yet because it raises the question, it appears appropriate for me to answer it.

Having reviewed Respondent's "advisal" together with Complainant's response, I have determined that Respondent's motion to dismiss is without merit. Essentially it observes that about 7 months ago, on June 22, 1990, the Texas state comptroller issued a notice that

Respondent's corporate charter, originally issued in 1988, had become forfeit on June 18, 1990 for failure to file the reports required by the state. It contends that such forfeiture has rendered the instant proceedings moot. Complainant observes that Texas law provides otherwise and notes that this action was begun on August 14, 1989, when the corporate charter was in good standing. It points to Texas statutes which require an involuntarily dissolved corporation, such as Respondent, to remain in existence for 3 years to defend any action which may be brought or may be pending against it.

While I regard Complainant's observations to have merit, I also note that the manner in which Respondent does business may not offer a defense to the conduct alleged. The corporate form may never have actually provided a shield to the personal assets of the shareholders, the indirect employer.[1] Moreover, there is no showing that Respondent no longer exists; indeed, it may still be operating even without a corporate charter. Noting that Respondent is no doubt a closely held family owned corporation, it is also possible that its stockholders are continuing to perform as a roofing contractor either under Respondent's name, the shareholders' name, another name or indeed under another business form. That might constitute either a disguise or evidence of an effort to evade responsibilities under the Act. In that circumstance the government would no doubt be authorized, under a yet-to-be-determined theory or proceeding, to pursue Respondent in whatever transformed entity it may have become. See, for example, NLRB v. Deena Artware, 361 U.S. 398 (1960); NLRB v. Ozark Hardwood, supra; and NLRB v. C.C.C. & Associates, 306 F.2d 534 (2d Cir. 1962). Even if it is legitimately out of business the government may be entitled to a remedy. See e.g., Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942); NLRB v. Electric Steam Radiator Corp., 321 F.2d 733, 738 (6th Cir. 1963). Whatever the facts may be, Respondent's motion fails to adequately explicate them. In any of these situations either Respondent, its successors, or its shareholders might be found personally liable for the civil monetary penalties. Therefore, the matter cannot be considered moot. Accordingly, Respondent's motion to dismiss must be denied.

[1] See 8 C.F.R. § 274a.1(g) which defines the term "employer" as a "person or entity . .. acting directly *or indirectly* in the interest thereof, who engages the services or labor of an employee. . . ." [Italics supplied]. This language is very similar to certain statutory language quoted by the court of appeals in NLRB v. Ozark Hardwood, 282 F.2d 1, 5 (8th Cir. 1960) in looking to the derivative liability of a successor.

And, I am singularly unimpressed by Respondent's counsels' suggestion that they lost their authority to act on their client's behalf when the corporate charter lapsed. To the extent that the motion must be construed as a request for permission to withdraw as Respondent's counsel it, too, must be denied. They have simply not shown any reason to justify granting permission. Certainly, they have not demonstrated that the client or its principals have authorized them to withdraw and they have continued to represent it [them] throughout the period of lapse. In this regard, counsel for Respondent are directed to the ABA ethics rules, in particular DR2-110, for guidance.

Accordingly,

IT IS ORDERED that Respondent's motion to dismiss and its counsels' effort to withdraw be, and hereby is, DENIED.

JAMES M. KENNEDY,
Administrative Law Judge

February, 14, 1991