

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. 94C00032  
ESTHER FLORES-MARTINEZ, )  
Respondent. )  
\_\_\_\_\_ )

ERRATA TO DECEMBER 2, 1994 ORDER

(January 5, 1995)

The Order dated December 2, 1994 is corrected at page 3, last line by substituting "Respondent's counsel" for "Complainant's counsel."

**SO ORDERED.** Dated and entered this 5th day of January, 1995.

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MARVIN H. MORSE  
Administrative Law Judge

4 OCAHO 713

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UNITED STATES OF AMERICA )  
Complainant, )  
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v. ) 8 U.S.C. §1324c Proceeding  
 ) Case No. 94C00032  
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ESTHER FLORES-MARTINEZ, )  
Respondent )  
\_\_\_\_\_ )

ORDER  
(December 2, 1994)

The early procedural history of this unusual and hopefully unique case is set out in two prior orders, i.e., 4 OCAHO 647 (6/15/94), 4 OCAHO 682 (8/26/94), and in the Prehearing Conference Report and Order (10/12/94). The October 12, 1994 Order reflected and confirmed the procedures agreed to by the parties and the bench during the October 11, 1994 telephonic prehearing conference. The salient text of the Report and Order provides as follows:

The Immigration and Naturalization Service (INS) stated its intent to move forward with the case and reiterated its previous request to have a hearing in El Paso, Texas. El Paso is the border-point nearest Respondent's residence, understood to be in Matamoros, Mexico, near Mexico City. INS is of the opinion that Respondent is at an address in Mexico which conforms to the telephone number previously provided by her counsel.

INS is satisfied that Respondent departed the United States pursuant to voluntary departure on May 14, 1994, as confirmed by the entry dated July 26, 1994 on State Department form DDP/SEA. Considering that Respondent's counsel is unprepared to participate in an evidentiary hearing at any substantial distance from Minnesota, and that Respondent resides in Mexico, it is appropriate that INS

separately address future communications to both Respondent and her counsel. (INS will be expected also to mail a copy of this Order to Respondent and to advise her counsel of Respondent's mailing address).

Upon service of the notice of intent to fine, Respondent requested a hearing. Notwithstanding that she left the United States pursuant to voluntary departure, an alternative to deportation, her departure from the United States cannot be allowed to frustrate the hearing process contemplated by 8 U.S.C. §1324c. Accordingly, as discussed at the prehearing conference, INS counsel will advise Respondent that, at its request, an evidentiary hearing will be scheduled to be held on a date during January - March 1995, probably in El Paso, Texas. (Counsel for the parties are welcome to jointly suggest [sic] the feasibility of holding the hearing in Minnesota).

When INS informs Respondent of the opportunity for a hearing at a location in the United States reasonably proximate to her residence, it will invite her to suggest possible dates most convenient for her. INS will be expected also to alert Respondent to the potential danger that, should she fail to respond or to appear, it may seek and obtain a judgment by default against her, in favor of INS.

Confirming the accuracy with which the Report and Order reflects discussion at the conference, Complainant's Response (filed November 21, 1994) asks reconsideration of the direction that it assume the burden of communicating directly with Respondent. Although INS did not at the conference demur to the requirement that it solicit Respondent's amenability to a hearing in Texas, it now interposes Department of Justice policy as a bar to doing so. INS cites the recently revised rule which generally prohibits direct communication by government counsel with a party represented by counsel, absent "consent" of the lawyer representing such party.<sup>1</sup> Complainant asks that I confirm applicability of the exception to the rule which allows direct contact where,

[t]he communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending. . . .

Id. at 28 C.F.R. § 77.6(b).

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<sup>1</sup> 59 Fed. Reg. 39,928 (1994) (to be codified at 28 C.F.R. § 77.5).

In its filing, INS asks me to confirm that my prior direction to communicate with Respondent is within the Department's policy, i.e., is "in accordance with the orders or rules' of this court." INS Response at 2. INS recognizes applicability of the alternative basis for an authorized direct communication to a represented party, *viz.*, consent of opposing counsel. INS asserts it is uncertain whether Respondent's counsel "has consented to this direct contact between INS and Respondent." *Id.* at 2, n.1. INS "is concerned that the Respondent will be confused if the only direction she is receiving in this case is from the INS, not the court or [her] counsel." *Id.* at 2. Complainant suggests that, rather than leave it with the burden, it would be more appropriate for the bench either to direct Respondent's counsel to effect the contacts with Respondent, or make them himself.

Complainant's request presents this forum with a dilemma. Prior to filing its OCAHO complaint, INS initiated a deportation proceeding resulting in Respondent's voluntary departure to Mexico. The immigration judge on January 19, 1994 granted voluntary departure (effective May 19, 1994). Notwithstanding this timetable, INS elects to pursue the case to judgment on its document fraud claim. In the circumstances, it is immaterial to the bench whether INS or counsel for Respondent effects communication with Respondent, so long as it can be established on the record that she is alerted to the potential of an evidentiary hearing,<sup>2</sup> and the need to participate in scheduling such hearing. To satisfy Complainant's concerns with § 77 compliance, however, I understand that by participating in the prehearing conference, Respondent's counsel at least tacitly consented to direct communication with Respondent. Moreover, the subsisting direction to INS to effect direct communication is an order of the tribunal for the purposes of satisfying the salutary policy of § 77.

Both INS and Respondent's counsel are aware of Flores-Martinez's address in Mexico. In further implementation of the prior orders identified above, counsel for both parties, either in concert or separately, are directed to forward all three issuances including this one, to Respondent. Counsel will be expected to advise her that I will consider her in default of her request for hearing unless she agrees to be available for a hearing in El Paso, Texas pursuant to arrangements to be effected by counsel. It is understood that Complainant's counsel

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<sup>2</sup> INS previously volunteered to arrange for Respondent to participate in *Texas* at her §1324c hearing, arrangements which presumably it intends to effect with her directly since her counsel previously made clear in the record her inability to participate outside Minnesota.

is not prepared to participate in a hearing outside Minnesota. The hearing date(s) will be set by the judge in consultation with counsel. Counsel will be expected to file a report concerning such communication, including a rendition of any discussion with Respondent, not later than Friday, December 30, 1994.

Upon advice that communication with Respondent has been effected, my office will initiate a telephonic prehearing conference with counsel with a view to scheduling an evidentiary hearing. It should be remembered on the one hand that the complaint was filed after the deportation proceeding was initiated and voluntary departure scheduled, and, on the other hand, that upon receipt of the notice of intent to fine, Respondent requested a hearing. In that context it is not an appropriate use of governmental, including judicial, resources to simply schedule a hearing convenient to the Mexican border with the hope that Respondent will show up.

As officers of the court, I shall expect counsel to cooperate with each other to move this case forward. In the event the procedure contemplated by this Order is ineffective, I shall consider appropriate alternatives, including filing of dispositive or other motions. In no event will the case be permitted to languish indefinitely on the docket.

As a convenience, a copy of this Order will be mailed directly by my office to Respondent.

**SO ORDERED.** Dated and entered this 2nd day of December, 1994.

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MARVIN H. MORSE  
Administrative Law Judge