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

December 6, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	Case No. 94C00127
RENATO PARONDO JAQUE, Respondent.	)	

ERRATA

The Order issued on November 30, 1995, titled "Order to Show Cause, and Other Matters," is hereby corrected in the following manner: page seven, paragraph two, sentence two, which reads "If Count II were limited to false making I would be obliged to dismiss Count I entirely on the basis of *Remileh* and *Noorealam,*" is corrected to read "If Count II were limited to false making, I would be obliged to dismiss Count II entirely on the basis of *Remileh* and *Noorealam.*"

SO ORDERED.

Dated and entered this 6th day of December, 1995.

MARVIN H. MORSE
Administrative Law Judge

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RENATO PARONDO JAQUE, Respondent.	)	

ORDER TO SHOW CAUSE, AND OTHER MATTERS

INTRODUCTION

This Order grants the motion of counsel for Respondent to withdraw; *sua sponte* dismisses a portion of Count II of the Complaint, and orders Respondent to show cause, if any he can, why his request for hearing should not be dismissed as having been abandoned.

I. Procedural History

On July 8, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO).[1] The Complaint alleges that Renato Parondo Jaque (Jaque or Respondent) committed document fraud in violation of §274C of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c. Exhibit A to the Complaint is an underlying Notice of Intent to Fine issued by INS upon Respondent on May 3, 1993.

1 This case was originally assigned to Administrative Law Judge (ALJ) Schneider and was reassigned to me on February 7, 1995.

Count I of the Complaint charges Respondent with knowingly obtaining, possessing and using one Form I–688A, A93 271 914, at the Reno, Nevada, Immigration Office, in violation of 8 U.S.C. §1324c(a)(2), for a civil money penalty in the amount of $800. Count II of the Complaint charges Respondent with knowingly counterfeiting and falsely making the following documents in violation of 8 U.S.C. §1324c–(a)(1): (1) a Form I–9 at Safeway Stores for employment in Reno, Nevada, and (2) a Form I–9 at Smith's Food & Drug Store for employment in Sparks, Nevada. The civil money penalty requested for Count II is $1,300 ($650 for each violation). The total civil money penalty requested by INS is $2,100. In addition, INS requests an order directing Respondent to cease and desist from violating §1324c.

On July 11, 1994, OCAHO issued a Notice of Hearing which transmitted to Respondent a copy of the Complaint and pertinent rules of practice and procedure.

On August 1, 1994, Respondent filed a letter/pleading stating that he had contacted his attorney whom he hoped "will send you more information regarding this business the soonest time possible." Respondent also included a copy of an Order of the Immigration Judge granting Respondent's Motion for Change of Venue from El Paso, Texas to San Francisco, California.

On September 6, 1994, Complainant filed a Motion for Default Judgment because Respondent failed to answer the Complaint within 30 days of service. *See* 28 C.F.R. §68.9(a). In addition, Complainant stated that, to the extent it appears that Respondent requests a change in venue, Complainant opposes that Motion. On September 12, 1994, counsel for Respondent filed an Opposition to the Motion for Default Judgment, stating that "[d]ue to his . . overbooked calendar and need to attend to other matters simultaniously [sic] to the need to file an answer herein a timely answer was not filed." Opposition at 1. Also on September 12, counsel for Respondent filed an Answer to the Complaint, denying the allegations contained therein.

An October 3, 1994 Order denied Complainant's Motion for Default Judgment on the ground that the ALJ was "reluctant to punish Respondent for the failure of his attorney to file a timely Answer." Order at 2.

On November 29, 1994, Respondent agreed in a telephonic prehearing conference to "make a good faith effort to respond to all of Complainant's discovery requests on or before January 16, 1995, except for those matters which it objects to." Prehearing Conference Order at 1.

On January 26, 1995, Complainant filed a Motion for Sanctions and/in the Alternative Motion to Compel. Complainant asserted that no response to its discovery had been received from Respondent and that, therefore, the following sanctions were appropriate:

> First, that this court deem the request for hearing abandoned. Second, if this court finds that the request for hearing is not abandoned, that this court deem the admissions admitted by Respondent and that the Interrogatories and Request for Production of Documents be inferred as adverse to Respondent.
>
> Finally, in the alternative, that a [sic] order compelling a response to all discovery requests be issued.

Motion at 4.

Upon motion by Complainant, a telephonic prehearing conference was scheduled for July 13, 1995. The conference was not held because counsel for Respondent failed to participate. The Report and Order memorializing the prehearing conference noted that "[c]ounsel for Complainant stated that substantial outstanding discovery remains unanswered despite numerous attempts to obtain it." The Report and Order also ordered "counsel for Respondent to comply fully with all outstanding discovery requests ***no later than August 4, 1995***." *Id.* A follow-up prehearing conference was also scheduled for August 9, 1995. Counsel for Respondent was

> cautioned that by failing to appear for a duly scheduled conference he has committed a breach of faith with the client as well as having placed the client in a position which authorizes me to deem his client to have abandoned the request for hearing. 28 C.F.R. §68.37(b). One more such failure and I will sua sponte or otherwise consider defaulting Respondent. *See also* 28 C.F.R. §68.9.

Id. at 1–2 (footnote omitted).

During the follow-up telephonic prehearing conference held on August 9, 1995, "counsel for Complainant stated that discovery requests, for which a Motion to Compel has already been filed, remain outstanding." Second Prehearing Conference Report and Order at 1. Respondent was again ordered to respond to all outstanding requests and was given until September 5, 1995 to do so. In addition, another telephonic prehearing conference was scheduled for

September 22, 1995. For the second time, however, the conference could not be held because counsel for Respondent failed to participate. "Instead, he left word with his secretary that he was not available." Third Prehearing Conference Report and Order at 1. In light of counsel for Respondent's actions, Complainant stated its intent to file a dispositive motion.

On October 2, 1995, by overnight express mail, Complainant served on Respondent a second Motion for Default and/in the Alternative Motion for Sanctions. To date, no response by Respondent has been received; the time for said response has expired. See 28 C.F.R. §68.11(b). On October 12, 1995, Counsel for Respondent did, however, file a Motion to Withdraw as Counsel. That pleading contains a certificate of service dated October 4, 1995, to the effect that the attorney, William R. Gardner (Gardner), that day served Respondent Jaque with the Motion to Withdraw which itself contains an assertion that it transmitted a copy of Complainant's Motion.

II. Discussion

A. *Counsel for Respondent's Motion to Withdraw*

Counsel for Respondent's Motion to Withdraw states that

> Respondent has informed present counsel that he no longer wants my representation. He designated another attorney, Miguel D. Gadda as his new attorney. Mr. Gadda however has declined to represent the respondent. Respondent was informed by present counsel to appear in my office to respond to outstanding discovery requests. He failed to appear but spoke with Mr. Gadda. I do not feel able for ethical reasons to continue as counsel, in light of respondent's discharge of me.

Exhibit A to the Motion is a copy of a letter dated September 7, 1995, from Respondent stating "I want Miguel Gadda to represent me in the future. I do not want William Gardner to represent me anymore."

OCAHO Rules of Practice and Procedure, Title 28 C.F.R. Part 68 (Rules), make clear that withdrawal is subject to judicial scrutiny, and that the judge is empowered to grant or deny a request to withdraw. Specifically, 28 C.F.R. §68.33(c) provides:

> Withdrawal or substitution of an attorney may be permitted by the Administrative Law Judge upon written motion.

While the Rules are silent as to factors to consider in determining whether to grant an attorney's motion to withdraw, OCAHO caselaw establishes that counsel are generally required to remain in a proceeding where service of process on the principals is otherwise ineffective or frustrated. *See, e.g.*, *United States v. Flores-Martinez*, 4 OCAHO 647 at 3 (1994) (Order); *United States v. K & M Fashions*, 3 OCAHO 411 (1992); *United States v. Nu Look Cleaners of Pembroke Pines*, 1 OCAHO 284, 1843[2] (1991). Unlike the cases cited above, however, service on Respondent in this case is not ineffective or frustrated; unlike the respondents in the cases previously cited, Respondent is not out of the country and maintains an address in the United States. In addition, counsel for Respondent undertakes that he served Respondent with both the Motion to Withdraw and the Motion for Default. Moreover, Gardner has filed a copy of a notice which purports to evidence that Jaque discharged him and that Jaque wished to substitute Miguel Gadda (Gadda) to represent him. That notification was not followed up by any filing or other correspondence by Respondent or Gadda to perfect such representation, and it appears that Gadda did not agree to represent Respondent. In any case, the failure to perfect new representation cannot serve to frustrate the course of this proceeding. Despite his awareness of the status of the case, and discharge of his attorney, Respondent has not filed a response to either motion, nor has he substituted new counsel.

Significantly, a recent case holds that withdrawal *is* permissible where counsel was unable to communicate with the client. *See United States v. Panamerican Supply Co., Inc.*, 5 OCAHO 804 (1995) (Order Granting Respondent Counsel's Motion to Withdraw); *See also United States v. El Mexicano Taco Shop,* 1 OCAHO 59, 365 (1989) (Order Granting Complainant's Motion for Judgment by Default). In *Panamerican,* the ALJ granted counsel's motion to withdraw from respondent's representation because "it appears that he has made a reasonable effort" to contact his client and "cannot be expected to attempt to represent a party in civil litigation when he cannot communicate with that party." *Id.* at 3. In the case at hand,

2 Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

Respondent has *rejected* future representa tion by Gardner. For purposes of allowing withdrawal, I find no difference between a case where a respondent fails to communicate with his attorney and this case where Jaque has chosen to discharge his attorney. Accordingly, I grant counsel's Motion to Withdraw. Reluctantly I note that the procedural history of this case reflects a substantial lack of zeal on the part of Gardner in representing the interests of his client. It also shows a lack of effort on the part of Respondent to carry his burden, i.e., his failure to file responses to the Motion to Withdraw and to the Motion for Default (considering he had discharged Gardner as his attorney), and failure to effect substitution of counsel.

B. *Complainant's Motion for Default and/in the Alternative Motion for Sanctions*

Although Complainant titles its Motion as one for default judgment, it is essentially a motion under 28 C.F.R. §68.37(b)(1)[3] to deem Respondent's request for hearing as abandoned. *See* Motion for Default at 3. In its Motion, Complainant requests that a judgment based on abandonment be entered because Respondent (by counsel or otherwise) failed to appear for two scheduled telephonic prehearing conferences and failed to comply with my Order that he respond to all outstanding discovery. Second Prehearing Report and Order at 1 (August 10, 1995).

The manner in which this proceeding has been drawn out due to Respondent's and/or counsel's lack of participation leads me to concur with Complainant that Respondent has abandoned his request for a hearing. However, because so much of the apparent lack of interest by Jaque in this proceeding reflects lack of timely activity by his counsel, this Order to Show Cause issues in lieu of granting a decision at this juncture in favor of Complainant on the basis that Jaque has abandoned his request for hearing.

Accordingly, despite his failure to file a response to either the Motion to Withdraw or the "Motion for Default," this Order to Show Cause grants Respondent an opportunity to show such cause as he has as to why he failed to respond to the pending motions and why

3 Subsection 68 37(b) including (b)(1) provides that

[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if . . . [a] party or his or her representative fails to respond to orders issued by the Administrative Law Judge. . . .

his request for a hearing should not be deemed abandoned. *Compare United States v. M.C.S.M. Inc.,* 3 OCAHO 544 (1993); *United States v. Kim Dong Hui*, 3 OCAHO 479 (1992). In addition, Respondent is to provide an address and telephone number at which he or his newly retained counsel, if any, can be reached. ***A response to this Order will be considered timely, if filed no later than Friday, December 29, 1995***. Any filing must include a true certificate that a copy has been sent, postage prepaid to INS. ***Respondent is cautioned that*** **failure to file an adequate response to this Order of Inquiry may** ***result in a decision adverse to him***. *See* 28 C.F.R. §68.37(b)(1). Furthermore, even if Respondent files a response to this Order, failure adequately to respond and/or failure to provide answers to outstanding discovery requests may result in my deeming that the discovery responses would be adverse to Respondent, as requested by Complainant in its Motion.

C. *Dismissal of Count II False Making Allegations*

This Order *sua sponte* dismisses that portion of Count II which alleges false making of documents in supposed violation of 8 U.S.C. §1324c. Dismissal is necessary because in *United States v. Remileh*, the Chief Administrative Hearing Officer (CAHO) held that "the attestation of an employee to false information on a Form I–9 [employment eligibility verification form] does not constitute the creation of a 'falsely made' document in violation of 8 U.S.C. §1324c." 5 OCAHO 724 at 2–3 (1995) (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order).

The CAHO reaffirmed *Remileh* in *United States v. Noorealam*, in which he held that "the *providing of false information* on a Form I–485 and Form I–765 does not constitute the creation of a falsely made document in violation of section 1324c, nor does it constitute the forging or counterfeiting of a document in violation of the INA." 5 OCAHO 797 at 5 (1995) (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order) (Emphasis added).

Count II of the Complaint alleges that Jaque counterfeited and falsely made two Forms I–9 in order to gain employment. If Count II were limited to false making I would be obliged to dismiss Count I entirely on the basis of *Remileh* and *Noorealam*. Because, however, Count II alleges counterfeiting as well as false making, INS is entitled to assert culpability; to that extent, the Complaint asserts a

claim upon which relief can be granted, e.g., liability for counterfeiting, as alleged. *See United States v. Thoronka*, 5 OCAHO 772 (1995) (Affirmation by the Chief Administrative Hearing Officer of the Administrative Law Judge's Order and Certification).

SO ORDERED.

Dated and entered this 30th day of November, 1995.

MARVIN H. MORSE
Administrative Law Judge