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

December 10, 1996

UNITED STATES OF AMERICA, Complainant,	
v.	8 U.S.C. §1324c Proceeding
	OCAHO Case No. 96C00024
	OCAHO Case No. 96C00089
LEONOR YOLANDA ORTIZ, Respondent.	

ORDER GRANTING RESPONDENT COUNSEL'S MOTION TO WITHDRAW

I. *Background*

On November 12, 1996, Respondent's Counsel Néstor Ho served a motion to withdraw as counsel for Respondent, stating that Ms. Ortiz consents to the withdrawal, that she had withdrawn her pending asylum application, and appears to have left the United States. Counsel attached an undated Authorization for Withdrawal signed by Ms. Ortiz stating that she consented and authorized Mr. Ho to withdraw as her attorney.

On November 19, 1996, Complainant filed a memorandum in opposition to the motion to withdraw. Complainant stated that it opposed the motion on the authority of *United States v. Flores-Martinez*, 4 OCAHO 647 (1994) and 4 OCAHO 682 (1994). Complainant also referenced and attached an order of Immigration Judge Robert Vinikoor showing that Respondent failed to appear for her asylum hearing before Judge Vinikoor on November 18, 1996, and that she was ordered deported from the United States. Further, Complainant argues that the only way service of process can be effectuated for any court orders or government pleadings is to deny the motion of

attorney Néstor Ho to withdraw from this case; otherwise, so argues Complainant, Respondent will be able to defeat the jurisdiction of the Court by refusing to participate in the hearing she has requested.

Respondent's counsel requested and was granted leave to file a reply to Complainant's opposition, which was filed on November 26, 1996. The reply notes that Respondent has expressly indicated her intention to leave the country and expressly requested her attorney to withdraw his appearance in these two cases. She has failed to appear for the scheduled hearing before the Immigration Judge. The reply further states that Ms. Ortiz's telephone has been disconnected and therefore Respondent's counsel has been unable to contact or receive direction from her. The reply also notes that Respondent has failed to cooperate adequately with the preparation of her case and that irreconcilable differences of opinion between the Respondent and her attorney have arisen.

Respondent's counsel distinguishes *Flores-Martinez* on the ground that in that case the respondent was deported to Mexico with the agreement of District Counsel, and that counsel appeared to have possessed a specific Mexican address for Respondent. Moreover, counsel in that case did not move to withdraw, but merely informed the court that it wished to withdraw.

The reply cites my prior ruling in *United States v. PanAmerican Supply Co.,* 5 OCAHO 804 (1995), in which I granted the motion to withdraw based on the fact that PanAmerican's counsel was unable to communicate with and receive direction from the client. Further, the reply asserts that it is a violation of ethical rules for a lawyer to make crucial decisions concerning the client's representation absent consultation with the client. Minn. Rule of Professional Conduct 1.2(a).

On November 29, 1996, Complainant filed a further memorandum that attached a report from the United States Consular Section in Lima, Peru, that states neither Ms. Ortiz nor her husband has appeared at the United States Embassy in Lima to register their return to Peru.[1]

[1] The communication from the Embassy adds very little to the record. It means only that Ms. Ortiz has not appeared at the Embassy, and is not probative of her present location.

A telephonic conference was scheduled and held on December 2, 1996, primarily to discuss the pending motion to withdraw, but also the pending motion for summary decision in Case No. 96C00089 and the procedural schedule in Case No. 96C00024. A court reporter was present, and a transcript of the conference will be prepared.

II. *Analysis and Ruling*

The OCAHO Rules of Practice and Procedure provide that an attorney may be permitted by the Administrative Law Judge to withdraw upon written motion. 28 C.F.R. §68.35 (1996). Thus, an attorney may not simply withdraw an appearance without the permission of the Judge.

The application of this rule has been addressed in several past cases. In one of the first cases, *United States v. Nu Look Cleaners*, 1 OCAHO 1843 (ref. no. 284) (1991), the respondent's counsel filed a notice of withdrawal from the proceeding, which was founded on the erroneous assumption that, because the Chief Administrative Hearing Officer had vacated the Judge's decision, the proceeding had been effectively terminated. Respondent's counsel then failed to respond to inquiries from the Judge concerning the respondent's current address. The Judge ruled that the proceeding had not been terminated, and that counsel would not be permitted to withdraw until he provided the Judge with the name, title, address and telephone number of someone else who possessed power to accept service of documents. *Id.* at 1845.[2]

In subsequent cases, Judges have refused to permit a party's attorney to withdraw when the attorney is the only person with clear authority to accept service and there is no address other than the attorney's at which documents may be served. *See, e.g., United States v. Midtown Fashion, Inc*., 4 OCAHO 657 (1994); *United States v. K & M Fashions, Inc.,* 3 OCAHO 411 (1992). Also in *K & M,* the respondent's counsel failed to submit a proper motion for withdrawal, submitting instead a letter indicating his intention of withdrawing from representation. *Id.* at 4.

In *United States v. Flores-Martinez*, 4 OCAHO 647, 682 (1994), which is the only case cited by Complainant in support of its opposi-

[2] In contrast to the situation in *Nu Look Cleaners*, here Mr. Ho has provided the last known address for Respondent.

tion to the motion, respondent's counsel had filed an answer to the complaint, participated in discovery and other prehearing procedures and then sought to withdraw because the client left the United States under an order of voluntary departure. Judge Morse denied the motion to withdraw, stating that it was settled OCAHO case law that counsel are required to remain in proceedings, where service of process on the principals would be ineffective or otherwise frustrated. 4 OCAHO 647, at 3; 4 OCAHO 682, at 2. However, as noted by Mr. Ho in his reply, the facts in *Flores-Martinez* were different than those in the present case. There counsel was able to communicate with the client, even though she was out of the country. Moreover, there was no evidence that the client had discharged her counsel.

Mr. Ho has presented at least two distinct but related grounds that justify his withdrawal: (1) that irreconcilable differences have arisen between client and counsel concerning the conduct of the representation which led to counsel's discharge by his client on November 8, 1996 (Ho Affidavit ¶¶2, 4; Reply at 2); and (2) that he has been unable to communicate with his client since that time (Ho Affidavit ¶¶3, 5). Either of those reasons justifies withdrawal.

Considering first the question of counsel's inability to communicate with his client, in prior cases I have permitted counsel to withdraw when, despite reasonable efforts to communicate with their client, they have been unable to do so. *See, e.g., United States v. PanAmerican Supply Co., supra; United States v. Guam Trans-Pacific Builders, Inc.,* Case No. 96A00014 (May 8, 1996) (unpublished). In *PanAmerican* I noted that federal courts have commonly granted motions to withdraw when an attorney has been unable to communicate with or receive direction from his client, citing *Classic Gallery Inc v. Classic Gallery Co.,* 1994 WL 159502 (E.D. Mich 1994) and *Midstar v. United States*, 33 Fed. Cl. 669 (1995).

Further, I would note that my ruling in *PanAmerican* is in accord with a later case decided by Judge Morse in which he permitted counsel to withdraw when counsel had been unable to communicate with the client, noting that representation by counsel had been frustrated by the attorney's inability to communicate with the client. *United States v. Seise*, Case No. 95A00017 (February 7, 1996) (un-

published). Judge Morse specifically stated that he would follow the *PanAmerican* decision. *Id.* at 5.

Here, the fact that Mr. Ho has been unable to communicate with this client, and has no knowledge of her location, is undisputed. Ms. Ortiz's telephone number is disconnected, and she has not responded to written correspondence by Mr. Ho that was sent to her last known address.[3] Thus, Mr. Ho has made reasonable efforts to communicate with his client.

Mr. Ho is a member of the Bar of the State of Minnesota. Consequently, he is bound by the Minnesota Rules of Professional Conduct, which provide in pertinent part that a lawyer shall abide by a client's decisions concerning the objectives of representation, and that he shall consult with the client as to the means by which they are to be pursued. 52 Minn. Stat. Ann., Rule of Professional Conduct 1.2(a). Further, counsel is obligated to keep a client reasonably informed about the status of a matter, so that the client can make informed decisions regarding the representation. 52 Minn. Stat. Ann., Rule of Professional Conduct 1.4. If counsel is unaware of the client's location, and thus unable to communicate with the client, he cannot consult with the client, cannot inform the client about the status of a case, and certainly cannot abide by a client's decisions. If I were to agree with Complainant's position and deny counsel's motion to withdraw, Mr. Ho would not be able to represent his client in accordance with the Minnesota Rules of Professional Conduct. He would simply be a repository for Complainant's pleadings and would not be able to effectively communicate with or represent his client.

Moreover, there is an even more compelling reason to grant the motion than counsel's inability to communicate with his client; namely, the fact that counsel has been discharged by his client. She not only has authorized his withdrawal, but, according to the uncontradicted statements by counsel, she has stated that she does not want Mr. Ho to represent her any longer in these cases because they have had irreconcilable differences concerning the conduct of the case. Thus, as of November 8, 1996, Mr. Ho was discharged by his client.

[3] The correspondence from Mr. Ho to Ms. Ortiz had not been returned to his office, as of the time of the prehearing conference on December 2. It is not certain at this time whether Ms. Ortiz is still receiving mail at her St. Louis Park, Minnesota, address, has indeed moved to another location, or has left a forwarding address.

I have previously permitted counsel to withdraw when they were discharged by their client, even if alternate counsel had not yet entered an appearance. *United States v. Dominguez*, Case No. 96C00027, Order Granting Respondent Counsel's Motion to Withdraw (August 26, 1996) (unpublished); *United States v. Butterfly Legwear, Inc.*, Case No. 97A00007, Order Granting Respondent Counsel's Motion to Withdraw (November 13, 1996) (unpublished). These decisions are in accord with a decision by Judge Morse in *United States v. Jaque*, 6 OCAHO 823, at 5 (1995), in which it was held that since the respondent had rejected future representation by his client, the motion to withdraw should be and was granted.

Further, I would note that the Rules of Professional Conduct mandate that an attorney must withdraw when he is discharged. Rule 1.16 of the Minnesota Rules of Professional Conduct provides that a lawyer shall not represent a client, or where representation has commenced, shall withdraw from representation when the lawyer is discharged. 52 Minn. Stat. Ann., Rule of Professional Conduct 1.16(a)(3). Consequently, it would be contrary to the Rules of Professional Conduct for Mr. Ho to continue his representation of Ms. Ortiz after she has indicated that she does not want him to continue to represent her and in fact has discharged him.

Further, aside from the case law and the Rules of Professional Conduct, common sense dictates that the motion to withdraw should be granted. Respondent has discharged her counsel and apparently has moved without providing counsel with her forwarding address. Yet Complainant wants to compel Mr. Ho to continue to represent Ms. Ortiz, even though she does not want any further representation by him! Moreover, if she has left the country, or even remains in the United States, but has moved without informing her counsel as to her present location, how can he communicate with her and receive her directions? Apparently Complainant merely would have Mr. Ho serve as a mute recipient of Complainant's pleadings. But since he would be unable to communicate with his client, he could not effectively respond to those pleadings. Thus, he would be placed in a position where he would be governed by the Rules of Professional Conduct, but would be unable to comply with those rules. That would be an intolerable situation.

If Complainant is concerned that counsel's withdrawal from the case will mean that this tribunal loses jurisdiction of this case, or

that such withdrawal will prevent service of pleadings or orders, its concern is misplaced. I am aware that past decisions by other judges have not granted motions to withdraw on the ground that service otherwise would be ineffectual. However, in several past cases respondent's counsel was attempting to withdraw prior to the time that an answer had been filed. *See United States v. Midtown Fashion, Inc.*, 4 OCAHO 665 (1994); *United States v. K & M Fashions*, 3 OCAHO 411 (1992). However, to the extent prior caselaw suggests that, after the complaint has been served and an answer to the complaint has been filed, jurisdiction would be defeated or service would be ineffective when an attorney withdraws an appearance, I categorically reject that suggestion and already have ruled to the contrary in *PanAmerican* and other decisions.[4]

The OCAHO Rules of Practice and federal case law support my rulings. Once the complaint has been served on the opposing party pursuant to 28 C.F.R. §68.3 (which can be effectuated by serving counsel), the Rules of Practice provide that service of written orders and decisions may be made by mailing to counsel for the party, or if the party is unrepresented, to the *last known address* of an individual. 28 C.F.R. §68.3(a)(3) (1996). When a party is represented, pleadings shall be served on the attorney, but service of pleadings on unrepresented parties may be made by mailing a copy to the party's last known address. 28 C.F.R. §68.6(a) (1996). That is so whether or not the party was originally represented by counsel or has been acting *pro se* during the entire litigation. Thus, if counsel withdraws, and a party changes addresses or leaves the country and does not provide the Court or the opposing party with a change of address, the Court and opposing party may continue to serve that party at the last known address. Such service is entirely proper under the Rules of Practice. It is the party's responsibility to inform the Court and opposing party of any change of address. Thus, in *PanAmerican*, I stated that it was the respondent's duty to keep both the Court and the opposing party informed as to its current mailing address and telephone number. 5 OCAHO 804, at 2. I ruled that the Court and complainant United States could continue to effect service upon the respondent at its last known address. *Id* at 3. In the instant case, the

[4] Indeed, if jurisdiction or service could be so easily defeated, a *pro se* party could thwart the continuance of a case merely by changing addresses and/or refusing to respond to a judge's orders. However, the Rules of Practice provide that a party may be deemed to have abandoned its request for hearing if, *inter alia*, it does not respond to a judge's order. 28 C.F.R. §68.37(b) (1996).

Court and Complainant will serve Respondent at her last known address, which is 1410 Colorado Avenue #112, St. Louis Park, MN 55416.

For all the above reasons, Mr. Ho's motion to withdraw as Respondent's counsel is granted.

ROBERT L. BARTON, JR.
Administrative Law Judge