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

JENLIH JOHN HSIEH, Complainant,	) 8 U.S.C. § 1324b Proceeding
v.	) OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	) Judge Robert L. Barton, Jr.

PREHEARING CONFERENCE REPORT

(*October 21, 2002*)

I. BACKGROUND

As previously arranged with the parties, a telephone prehearing conference in the above case was conducted on October 9, 2002, at 1 p.m. Eastern Time. The parties were notified of the conference by telephone and by the written Notice of Prehearing Conference issued on October 1, 2002. The primary purpose of the conference was to discuss with the parties Complainant's Motion To Take Telephonic Depositions, Complainant's Motion To Extend Discovery Deadline, Complainant's Motion To Compel Production Of Documents, Respondent's Motion For Protective Order To Limit The Number Of Complainant's Depositions To Ten, and Respondent's Motion To Dismiss the Complaint. Additionally, the court considered the Respondent's Motion for Protective Order For The Deposition Of Motiv Jiandani and Respondent's Motion to Revoke The Subpoena Of Ryan, Swanson & Cleveland that were filed with the Court on the evening of October 8, 2002. Respondent's Motion To Dismiss The Complaint is discussed in a previous order, Order Partially Granting Respondent's Motion To Dismiss, dated October 16, 2002.

Phillip J. Griego, Esq., appeared for Jenlih John Hsieh (Complainant), and Jennifer K. Mathe, Esq., appeared for PMC-Sierra, Inc. (Respondent). The conference was recorded by a court reporter, and a transcript of the same may be obtained by the parties.

Preliminarily, I reminded the parties that the OCAHO Rules of Practice and Procedure require that all communications from a party to the court in which a party seeks some type of action from the Court

should be submitted in the form of a written motion, not a letter or declaration to the court. See 28 C.F.R. § 68.11(a) (2001). Additionally, I reminded the parties that a faxed copy of a motion tolls the filing deadline, but hard copies of the original and two copies still need to be filed with the Court. See 28 C.F.R. § 68.6 (2001). Also, an application for a subpoena should be presented to the judge with sufficient notice to allow service on the subpoenaed individual or entity at least ten days before the due date specified in the subpoena. When any request for return item is received, a self-addressed stamped envelope must be included and overnight return should only be used in rare occasions.

The Court rules on the six motions discussed in this Order as follows:

1. Complainant's Motion To Take Telephonic Depositions is granted.

2. Respondent's Motion For A Protective Order To Limit Complainant To Ten Or Fewer Depositions is denied.

3. Complainant's Motion To Compel Production Of Documents is denied.

4. Complainant's Motion To Extend Discovery To Take The Deposition Of Ashgar Bashteen is granted.

5. Respondent's Motion For A Protective Order Regarding Deposition Subpoena Of Motiv Jiandani is denied.

6. Respondent's Motion To Revoke The Subpoena Of Ryan, Swanson & Cleveland is denied.

II. COMPLAINANT'S MOTION TO TAKE TELEPHONIC DEPOSITIONS

Complainant filed a Motion To Take Telephone Depositions on September 23, 2002. Complainant seeks to take three depositions by telephone: a knowledgeable person designated by Ryan, Swanson & Cleveland in Seattle, Washington, and Ken Huckell and Greg Stazyk, who are employees of Respondent in Vancouver, British Columbia.

Respondent objects to this motion and argues that Complainant must show extreme hardship before telephone depositions should be allowed and has not done so. Additionally, Respondent believes that telephone depositions would prejudice Respondent because the witnesses may be confused by the anticipated large number of exhibits.

To support its arguments, Respondent cites two federal district court cases that required the party

requesting telephone depositions to demonstrate extreme hardship. United States v. Rock Springs Vista Dev., 185 F.R.D. 603 (D. Nev. 1999), Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938, 940 (S.D.N.Y. 1984) (holding a plaintiff should make himself available for deposition in the district where he brought the case, absent extreme hardship). However, those cases are decided by federal district courts within a specific geographic district. The Office of the Chief Administrative Hearing Officer (OCAHO) has jurisdiction over the entire United States with respect to complaints alleging citizenship discrimination under IRCA. The underlying reason that telephonic depositions were rejected in the aforementioned cases is because the party invoking the jurisdiction of the court should be prepared to conduct depositions within the court's geographical limits. For example, in Rock Springs the court reasoned that an intervener plaintiff must make himself available for deposition in the district where the suit was brought. Rock Springs, 185 F.R.D. at 604. In contrast, OCAHO's applicable district is the entire United States.

I have discretion to permit a telephone deposition. 28 C.F.R. § 68.18 (2001). The Federal Rules of Civil Procedure merely serve as a guideline in OCAHO proceedings. 28 C.F.R. § 68.1 (2001). Moreover, Rule 30(b)(7) does not require a showing of "extreme hardship." Fed. R. Civ. P. 30(b)(7); accord Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446 (W.D. Mich. 1993) (holding that nothing in Rule 30(b)(7) requires that a telephone deposition may only be taken after a showing of hardship). In keeping with the spirit of Rule 30 to make discovery more efficient and less expensive, leave to take telephone depositions should be granted liberally. Jahr v. IU Int'l Corp., 109 F.R.D. 429, 431 (M.D.N.C. 1986). The burden is on the party opposing telephonic depositions to demonstrate the prejudice if telephone depositions were taken. Id. at 432.

At the conference, Respondent argued that telephone depositions would be prejudicial because of the number of exhibits, potential confusion of the witnesses, and the expense. Respondent had a copy of the exhibits that were going to be used in the three telephone depositions and argued that fifteen exhibits that totaled sixty pages were voluminous and posed a potential communication problem between Complainant's counsel and the witness. The exhibits are clearly marked, Respondent's counsel has a copy of the exhibits, and will be on the telephone line to clarify or object to confusing questions. Additionally, allowing telephone depositions will not create a prejudicial expense to Respondent. In its own brief, Respondent estimated a round-trip flight from San Jose to Vancouver to be $185. Respondent's Opposition at 1, fn.1. Respondent has the option of flying to the site of the depositions (either Seattle or Vancouver) to be present with the witness or participating by telephone. See Cressler v. Neuenschwander, 170 F.R.D. 20 (D. Kan. 1996). Neither of these options is prejudicial to Respondent.

Complainant's motion to take telephonic depositions of Greg Stazyk and Ken Huckell in Vancouver, Canada, and a person designated by Ryan, Swanson & Cleveland in Seattle, Washington, is granted.

III. RESPONDENT'S MOTION FOR PROTECTIVE ORDER LIMITING

COMPLAINANT TO TEN OR FEWER DEPOSITIONS

On September 16, 2002, Respondent filed a Motion For A Protective Order To Limit The Number Of Depositions Complainant May Take To Ten. Respondent urges this Court to follow the Federal Rules of Civil Procedure which mandates a party to seek leave of court before taking more than ten depositions. Fed. R. Civ. P. 30(a)(2).

This Court may use the Federal Rules of Civil Procedure as a guideline, but is not bound by the rules stated therein. 28 C.F.R. § 68.1 (2001). Even if the language of Rule 30(a)(2) were contained in the OCAHO Rules of Practice and Procedure, I would not grant Respondent's motion. Complainant sent Respondent a letter on June 18, 2002, indicating he wanted to take more than ten depositions and the first written objection from the Respondent was not until August 1, 2002. Complainant's Opposition Ex. A, Respondent's Motion Ex. A. Complainant has justified conducting more than ten depositions in this case. Complainant currently has taken or scheduled fifteen depositions. However, I have ruled that if Complainant wants to take any further depositions, other than those already taken or scheduled, he must seek Court permission.

Apart from this limitation, Respondent's motion for a protective order is denied.

IV. COMPLAINANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Complainant filed a "Notice Of Motion To Compel Production Of Documents" on September 24, 2002 seeking to require the production of certain documents withheld by Respondent under a claim of privilege.

The OCAHO Rules of Practice and Procedure require that a motion to compel set forth the nature of the request, the response or objection of the opposing party, arguments in support of the motion, and a certification that the moving party has made a good faith attempt to confer with the opposing party to obtain the information without soliciting the help of the administrative law judge. 28 C.F.R. § 68.23(b) (2001). As elucidated in prior orders, the rules require a conscientious effort to resolve the discovery dispute without court intervention. See United States v. Select Temporaries, 9 OCAHO no. 1078 (2002); United States v. Allen Holdings, Inc., 9 OCAHO no. 1059 (2000).

Although a privilege log prepared by Respondent is attached to Complainant's notice, no brief in support of the motion was attached, and no certification of a good faith conference to resolve this matter has been presented to the Court.

Complainant's motion to compel production of documents is denied, without prejudice, because Complainant has failed to comply with the requirements of the OCAHO Rules of Practice and Procedure,

as well as the Order Governing Prehearing Procedure dated January 24, 2002. Counsel for Complainant may file another motion to compel if it complies with 28 C.F.R. § 68.23(b).

V. COMPLAINANT'S MOTION TO EXTEND DISCOVERY

Complainant filed a Motion To Extend Pre-Trial Discovery Schedule on October 7, 2002. The discovery deadline is November 4, 2002, as set in the Order Granting Complainant's Motion to Extend the Pretrial Discovery and Motion Schedule of July 9, 2002. Respondent opposes the motion.

Complainant had previously attempted to schedule a deposition of Ashghar Bashteen for October 3, 2002, well before the discovery deadline but apparently Mr. Bashteen will be out of the country until early November. Therefore, Complainant has requested an extension of the discovery deadline solely for the purpose of taking Mr. Bashteen's deposition, which now is scheduled for November 18, 2002. Complainant's counsel stated during the conference that he will try to take Mr. Bashteen's deposition before November 18 if he can secure a date that is acceptable to both the witness and Respondent's counsel.

I find that Complainant has been diligent in trying to schedule depositions, including that of Mr. Bashteen. Because the witness was not available, Complainant could not schedule the deposition before November 4. It would be unjust to deny the extension under such circumstances. Complainant's Motion To Extend The Discovery Deadline Past November 4, 2002, is granted only to the extent necessary to take Mr. Bashteen's deposition. Complainant and Respondent must coordinate on amenable dates for that deposition. The deadline for motions to compel discovery remains November 18, 2002, but motions to compel regarding Mr. Bashteen may be filed past that date.

VI. RESPONDENT'S MOTION FOR PROTECTIVE ORDER REGARDING DEPOSITION SUBPOENA OF MOTIV JIANDANI

Respondent filed a Motion For Protective Order Regarding The Subpoena Of Motiv Jiandani on October 8, 2002. Respondent requested a protective order pursuant to 28 C.F.R. § 68.18 because Mr. Jiandani does not have relevant information regarding Complainant's case. Attached to the motion for protective order was Mr. Jiandani's affidavit stating his knowledge relevant to this case. After reading this affidavit, Complainant would still like to depose Mr. Jiandani about information not discussed in the affidavit.

I signed the deposition subpoena for Motiv Jiandani on August 12, 2002. Respondent does not specify the relief it is requesting nor did it include a draft protective order.

Because Respondent did not request a form of relief in its motion and I have already signed the

subpoena, Respondent's Motion For Protective Order Regarding The Subpoena Of Motiv Jiandani is denied. Pursuant to the rules of practice, a party or person served with a subpoena may file a petition to revoke or modify the subpoena within the time limits set forth in the rules. See 28 C.F.R. § 68.25(c)(d) (2002).

VII. MOTION TO REVOKE THE DEPOSITION SUBPOENA TO RYAN, SWANSON & CLEVELAND

Respondent filed a Motion To Revoke The Deposition Subpoena To Ryan, Swanson & Cleveland on October 8, 2002. I signed the subpoena on October 1, 2002. At the time of the conference, Respondent had served the subpoena on Ryan, Swanson & Cleveland. The subpoena is both a subpoena ad testificandum and subpoena duces tecum.

Ryan, Swanson & Cleveland is the law firm that assisted Respondent in securing an H1-B visa for Ravinder Singh, the individual Complainant alleges replaced him. Ryan, Swanson & Cleveland has not filed an appearance on behalf of, or appeared for, Respondent in any part of this case.

Respondent has standing to challenge the subpoena because it has credibly asserted a personal right or privilege regarding the discovery in compliance with 28 C.F.R. § 68.25(d).

Subpoena Ad Testificandum

Respondent argues that this Court should apply a three-part test formulated by federal courts in cases in which one party seeks to depose current opposing litigation counsel. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) (holding that in order to depose opposing counsel, the party must show that there are no other means to obtain the information sought, the information is relevant and nonprivileged, and the information is crucial to the preparation of the case). The three-part test for deposing opposing counsel was intended to protect against the "ills of deposing counsel in a pending case which could potentially lead to the disclosure of the attorney's litigation strategy." Pamida, Inc. v. E.S. Originals, Inc., 281 F.3d 726, 730 (8th Cir. 2002) (holding that an attorney who represented a client in a completed case could be deposed).

The cases cited by Respondent are distinguishable from cases in which the attorney to be deposed is not involved in the on-going litigation. A party is not prohibited from deposing a witness simply because that person is an attorney or represented that party on a relevant matter in the past. In re Bame, 251 B.R. 367 (D. Minn. 2000) (holding that a party's previous attorney should be treated like any other fact witness and did not have to meet the three-part test for current counsel); Nakash v. U.S. Dept. of Justice, 128 F.R.D. 32 (S.D.N.Y. 1989) (holding that attorneys not involved in the present litigation should be treated as fact witnesses and the three-part test for deposing opposing counsel is not applicable).

Because Ryan, Swanson & Cleveland is not Respondent's current litigation counsel, and Respondent has failed to show that there is any likely disclosure of litigation strategy, the law firm should be treated as any other fact witness. Complainant should be able to depose an individual designated by Ryan, Swanson & Cleveland about non-privileged and relevant information.

Additionally, Respondent argues that all four subjects to be discussed at the deposition are wholly protected by the attorney-client privilege. The four subjects listed in the subpoena are: (1) who prepared or submitted or assisted in the preparation of submission of certain documents to INS, or PMC-Sierra, Inc.; (2) who received or faxed the attached documents from or to Immigration or Naturalization Service (INS) or PMC-Sierra, Inc.; (3) H1-B Visa Requests pertaining to ETA Form 9035, Employer Control Numbers 670502 and 671009; and (4) any and all steps taken to obtain approval of an H-1B visa for Ravinder Singh.

At this time, I cannot conclude that any and all questions pertaining to these four subjects would violate the attorney-client privilege. Until specific questions are posed, and objections are lodged, it is premature to assert that all questions would be improper or protected by privilege. Therefore it is premature to address Respondent's objections to the subpoena ad testificandum at this time.

Subpoena Duces Tecum

In the subpoena to Ryan, Swanson & Cleveland, Complainant requests three types of documents: (1) any documents prepared for either Switchon Networks, Inc., or PMC-Sierra, Inc., for submission to any public agency pertaining to Ravinder Singh; (2) any correspondence, including e-mail, between the firm and either Switchon Networks, Inc., or PMC-Sierra, Inc.; and (3) any notes or memoranda pertaining to either of the above categories.

Respondent asserts that each and every requested document related to the processing and securement of Mr. Singh's visa is a communication protected by the attorney-client privilege. Blanket assertions of privilege are extremely disfavored. Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) (holding that attorney's bills which included the identity of the client, case name, amount of fee, and general services performed were not protected by privilege). As required by the Order Governing Prehearing Procedure, objections on the basis of privilege must be made with specificity: "[i]n responding to a discovery request, if a party withholds information, in whole or in part, otherwise discoverable under these rules by claiming that it is privileged...the party shall make the claim expressly and shall specify the document request to which the privileged document is pertinent, the date of the document, and shall describe the title (if any) and type of document or communications being withheld, the number of pages of each document being withheld, author(s), addressee(s), and subject matter and shall describe how and why the document or information, in whole or part, is protected by the privilege." Prehearing Conference Report and Order Governing Prehearing Procedures, Jan. 24, 2002 at 4-5; see generally Fed.

R. Civ. P. 26(b)(5); Clarke, 974 F.2d at 129. Even when a document contains privileged information, there may also be material that is not privileged, such as the author, title, or factual portions, which must be produced to the requesting party.

In Respondent's motion to revoke, it has not even identified whether Ryan, Swanson & Cleveland has the documents requested in its possession. Respondent, the party asserting the attorney-client privilege, must properly identify the documents being withheld in accordance with the rules articulated in the Order Governing Prehearing Procedures. Respondent has completely failed to provide the Court with any information about the documents it claims are privileged. Consequently, Respondent's objections to the subpoena duces tecum are procedurally deficient.

The motion to revoke the subpoena to Ryan, Swanson & Cleveland is denied.

VII. CONCLUSION

This report does not purport to be a verbatim account of the conference. If the parties wish a verbatim account, the parties may order a transcript from the court reporter. If a party asserts that this Report does not accurately reflect the rulings made during the conference on October 9, 2002, the party must file written objections with this office no later than October 31, 2002. These objections should only be filed if this Report does not accurately reflect the rulings made during the prehearing conference.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE