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. 93C00208
ARMANDO ALVAREZ-SUAREZ, Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER
OF THE ADMINISTRATIVE LAW JUDGE'S ORDER

On October 20, 1994, the Honorable Robert B. Schneider, the Administrative Law Judge (hereinafter the ALJ) assigned to United States v. Armando Alvarez-Suarez, an 8 U.S.C. § 1324c proceeding, issued an interlocutory order captioned ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE TAKEN AGAINST RESPONDENT AND RESPONDENT'S COUNSEL FOR FAILURE TO FOLLOW ADMINISTRATIVE LAW JUDGE'S ORDER which is the subject of this order.

THE CHIEF ADMINISTRATIVE HEARING OFFICER'S REVIEW AUTHORITY

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in 8 U.S.C. § 1324c(d)(4), and delegated to the Chief Administrative Hearing Officer in section 68.53(a) of 28 C.F.R.; it is necessary, upon review, to modify the ALJ's October 20, 1994, order in Alvarez-Suarez for the reasons set forth below.

PERTINENT BACKGROUND FACTS

On November 19, 1993, a complaint was filed by the INS alleging that Armando Alvarez-Suarez knowingly provided two forged, counterfeited, altered, and falsely made documents for the purpose of satisfying a requirement of the Immigration and Nationality Act in violation of 8 U.S.C. § 1324c(a)(2).

After significant motion activity concerning affirmative defenses and discovery, an evidentiary hearing was held from August 15 through August 17, 1994 at Seattle, Washington.

On August 19, 1994, the ALJ issued an order which held the record open for the purpose of allowing the parties to submit certain supplemental discovery including the deposition testimonies of the following individuals: Armando Beltran-Gonzalez, J. Guadalupe Sanchez-Gonzalez, Isauro Benitez-Zuniga, and Jose de Jesus Guitron-Barajas. In pertinent part, the August 19 order directs that:

> Complainant shall make a good faith effort to locate (the above named individuals) for the purpose of bringing them to Seattle, Washington so that Respondent's counsel may take their deposition. The parties should make an attempt to video tape the deposition. Whether the depositions are video taped or not, they shall be admitted into evidence as Respondent's exhibits. The depositions shall be taken, on or before October 15, 1994, and submitted to this office at a reasonable time thereafter. If complainant is unable to locate any of these witnesses for deposition, or if Respondent is unable to take the deposition of any of these witnesses on or before October 15, 1994, Complainant shall submit a status report to this office, on or before November 1, 1994, explaining its efforts to locate the witnesses or the failure of Respondent to take their depositions.(emphasis added)

Contained in the record is a letter from Complainant dated August 31, 1994, requesting that the Respondent's counsel prepare and serve a formal request on the Complainant's counsel to take the depositions of the individuals. (It is not apparent in the record that such request was ever served.)

A second letter from the Complainant to the Respondent's attorney dated September 20, 1994, is also in the record. This letter refers to a telephone conversation between the two counsels wherein the Respondent's counsel is said to have told Complainant's counsel that the Respondent could no longer afford to depose the witnesses. Complainant's counsel reiterated that he was prepared to make the individuals available, and offered to find the space and equipment necessary to videotape the statements as suggested by the ALJ order of August 19, 1994. Without referring to the Respondent's position on

the matter, a date, time and place was set for the depositions by the Complainant's counsel.

Also contained in the record is a Status Report from the Complainant dated October 13, 1994, which reports to the ALJ that on September 6, 1994:

> Respondent Informed Complainant that Respondent was going to object to all post hearing depositions. Respondent also told Complainant that Mr. Alvarez could no longer afford to take depositions in this matter and would not schedule the depositions.

This Status Report informs the ALJ concerning the previous offers by the Complainant to defray the deposition costs to Respondent. The Respondent did not appear at the designated place to take the depositions. Apparently, Complainant made a video tape showing the availability of the individuals in compliance with the ALJ's order.

On October 20, 1994, the ALJ issued an ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE TAKEN AGAINST RESPONDENT AND RESPONDENT'S COUNSEL FOR FAILURE TO FOLLOW ADMINISTRATIVE LAW JUDGE'S ORDER. The order, directed to Complainant's counsel, stated in pertinent part as follows:

> In view of the fact that Respondent and Respondent's counsel failed to participate in the scheduled depositions of important witnesses in this case, and failed to comply with my August 19, 1994 order, Complainant shall, on or before November 17, 1994, file a pleading with this office stating any and all reasons why I should not take appropriate action against Respondent and Respondent's counsel for failing to comply with my order. (emphasis added)(ALJ order page 4).

DISCUSSION

1. It was Inappropriate for the ALJ to Order the Complainant to Defend the Respondent from Sanctions for Failing to Comply With an ALJ Order

The purpose of an Order to Show Cause is to give a non-complying party an opportunity to explain the reasons and considerations why a particular action should not be taken by an ALJ. Generally, these orders are directed toward a non-complying party; not the moving party. Although it is unclear from the record that the Complainant ever made a motion for the ALJ to issue such Show Cause Order, it is inappropriate to ask the Complainant to submit a pleading stating any and all reasons why sanctions should not be brought against the Respondent.

2. It Was Inappropriate for the ALJ to State That The Respondent had Failed to Comply With His August 19 Order.

A. The ALJ Order of August 19 wa Not Directed to The Respondent.

A close reading of the ALJ's August 19 order reveals that the ALJ order directed the Complainant to act; not the Respondent. The purpose of the August 19 order was to provide the Respondent with the opportunity to submit supplemental evidence in the form of depositions (See ALJ order page 1). However, it was the Complainant who was ordered to make a good faith effort to produce these individuals. The August 19 order does not contain an order directing the Respondent to take these depositions; only that the witnesses should be made available so that the Respondent may take their depositions. As a result, the Respondent cannot be sanctioned for violating an order which was directed toward the Complainant.

B. The ALJ is Without Authority to Order the Respondent to Take Depositions of the Complainant's Witnesses.

The authority of an ALJ in conducting administrative hearings is derived from the Administrative Procedure Act as supplemented by the applicable regulations found in 28 C.F.R. part 68 (1994), see especially, Authority of Administrative Law Judge, § 68.28. A general reading of the regulations applicable to the taking of depositions clearly establishes that the decision to take depositions in support of a party's own position, is up to the discretion of the party.

In section 68.18(a) of Title 28, C.F.R., the language dealing with general discovery provisions provides that,

> Parties may obtain discovery. . . .The frequency or extent of these methods may be limited by the Administrative Law Judge upon his/her own initiative or pursuant to a motion under subdivision (c) (emphasis added).

This language in the regulations grants an ALJ the authority to narrow the scope of discovery, but does not appear to grant the uni-lateral authority to broaden discovery on the ALJ's own initiative.

The applicable rules regarding the taking of depositions are found in 28 C.F.R. § 68.22. In conformity with the language used generally for discovery, this section also uses the permissive "may" to describe the rights of parties to take depositions and enter them into evidence. There is no language which would give the ALJ the explicit authority to order a party to take a deposition to be entered as that party's own

evidence. Rather, the regulations make repeated references to a "requesting party".

That the ALJ erred in believing he could sanction Respondent or Respondent's counsel for failure to participate in the scheduled depositions is further reinforced by a close examination of the possible actions which an ALJ could take against a non-complying party in 28 C.F.R. § 68.23(c). None of these listed actions would be applicable where the non-complying party is also deemed to be the party who is purportedly damaged by the failure to comply with that ALJ order.

In this matter, it is apparent that the ALJ wishes, for reasons unclear on the record, to have submitted into evidence depositions of the four individuals noted above. However, the ALJ may not force the Respondent to take the depositions of these individuals nor to submit the depositions as part of the Respondent's own evidence.

Discovery generally occurs at the initiative of the party seeking to admit the evidence. However, the Complainant, in an attempt to abide by the August 19 ALJ order to "make a good faith effort", has apparently made all the effort to set up these depositions. There is no evidence in the record before the CAHO at this time that the Respondent ever requested to take the depositions of these four individuals. In fact, the Status Report provided by the Complainant reports the Respondent's unwillingness to take these depositions.

Although the breadth of discovery may be limited or narrowed in scope by an ALJ in accordance with the applicable rules, discovery is still accomplished through the initiative of the parties. It is within the discretion of a party to seek to admit information gleaned from discovery. The Respondent has the prerogative to proffer the depositions for admittance as potential evidence; or not. An ALJ may not force a party to submit evidence for admittance except in the sense that an order to compel response to discovery could produce material which the party seeking the order to compel may subsequently seek to have admitted as evidence.

Accordingly, the ALJ'S ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE TAKEN AGAINST RESPONDENT AND RESPONDENT'S COUNSEL FOR FAILURE TO FOLLOW ADMINISTRATIVE LAW JUDGE'S ORDER is hereby MODIFIED; as it applies to the following issues:

1. It was inappropriate for the ALJ to order the Complainant to defend the Respondent from sanctions for failing to comply with an ALJ order.

2. It was inappropriate for the ALJ to state that the Respondent had failed to comply with his August 19 order.

3. The remaining actions taken in the October 20 order, i.e., the marking for exhibit a video tape, the marking and admitting into evidence certain bank records, and the ALJ order granting Respondent's Motion for Extension until November 17, 1994 are hereby affirmed.

MODIFIED this 15th day of November, 1994.

JACK E. PERKINS
Chief Administrative Hearing Officer