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

United States of America, Complainant v. Robert Cleek, d.b.a. Robert Cleek Concrete Company, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100623.

JUDGMENT BY DEFAULT

Discussion and Decision:

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), adopted significant revisions in national policy with respect to illegal immigrants. Accompanying other dramatic changes, IRCA, at Section 101, introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States.

Section 101 of IRCA amended the Immigration and Nationality Act of 1952 by adding a new section 274A (8 U.S.C. § 1324a). Section 1324a provides also that an employer is liable for failure to attest ``on a form designated or established by the Attorney General by regulations, that it has verified that the individual is not an unauthorized alien.'' In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring (recruiting or referring for a fee) or continuing to employ such aliens. The entire arsenal of public policy remedies against unlawful employment of aliens is commonly referred to as ``employer sanctions.''

Section 1324a authorizes the imposition of orders to cease and desist with civil money penalty for violation of the proscription against hiring, recruiting, and referral for a fee of unauthorized aliens and authorizes civil money penalties for paperwork violations. 8 U.S.C. § 1324a(e)(4)-(5).

By Final Rule published May 1, 1987, 52 Fed. Reg. 16190, 16221-28, the Department of Justice implemented the employer sanctions provisions of IRCA, now codified at 8 C.F.R. Part 274a.

These regulations provide, inter alia, in pertinent part, id. at 274a.2(a):

> This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting or referring for a fee, individuals in the United States, or continuing to employ aliens knowing that the aliens are (or have become) unauthorized aliens. The Form I-9, Employment Eligibility Verification Form, has been designated by the [Immigration and Naturalization] Service as the form to be used in complying with the requirements of this section.

The regulation provides that the Immigration and Naturalization Service (INS) initiate an action to assess civil liability by issuance of a Notice of Intent to Find (NIF), and provides also that an employer against whom the NIF is imposed ``has the right to request a hearing before an Administrative Law Judge (ALJ) pursuant to 5 U.S.C. 554-557, and that such request must be made within 30 days from the service of the Notice of Intent to Fine.'' Id. at 274a.9(c)(1)(ii)(C).

An opportunity for a hearing before an ALJ as a precondition for a cease and desist order and a civil money penalty is conferred by statute, 8 U.S.C. § 1324a(e)(3). The administration of an ALJ system pursuant to Section 1324a was established by the Attorney General, 52 Fed. Reg. 44971, November 24, 1987; (corrected) 52 Fed. Reg. 48997, December 29, 1987. That administration is lodged in the Office of the Chief Administrative Hearing Officer (OCAHO), Department of Justice.

Consonant with the statute and regulations, the INS on January 31, 1989, filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer. The Complaint, dated January 27, 1989, contained as Exhibit A, the Notice of Intent to Fine alleging numerous violations of the Immigration and Nationality Act and as Exhibit B, a letter from Respondent requesting a Hearing with an Administrative Law Judge.

By Notice of Hearing on Complaint Regarding Unlawful Employment, dated January 5, 1990, Respondent, Robert Cleek, DBA Robert Cleek Concrete Company, was advised of 1) the filing of the Complaint; 2) that they had the opportunity to answer within thirty (30) days after receipt of the Complaint and; 3) the date and place of hearing. The record shows that Respondent, as unrepresented by counsel, filed with this office on January 30, 1990, a return receipt of the Notice of Hearing and Complaint.

The Complaint, incorporating the NIF, requests an order directing Respondent to cease and desist from violating 8 U.S.C. § 1324a and seeks civil money penalties totaling $4,850.00.

By motion filed February 21, 1990, INS asks for default judgment. The motion rests on the premise that no Answer had been

filed to the Complaint, although the Complaint had been filed more than thirty (30) days previously.

On March 12, 1990, having not received an Answer to the Complaint or any responsive pleading to the INS motion, I issued an Order to Show Cause Why Judgment by Default Should Not Issue. That Order provided Respondent an opportunity to ``show cause why default should not be entered against it, any such showing to be made by motion which also contains a request for leave to file an answer.'' The Order specifically stated that Respondent had until on or before March 27, 1990, to respond to the Order and to provide an Answer to the Complaint.

On April 30, 1990, the copy of the Order to Show Cause sent certified mail_return receipt requested to Respondent at its address of record was returned unclaimed.

Accordingly, the failure of Respondent to file a timely, or any, Answer to the Complaint constitutes a basis for entry of a judgment by default within my discretion as provided by 28 C.F.R. Section 68.8(b). The failure to answer entitles the ALJ to treat the allegations of the Complaint as admitted.

Respondent having failed to file an Answer, and the time allowed for filing one having elapsed, I find the Respondent has waived its right to appear and contest the allegations of the complaint, and that a judgment by default is appropriate. 28 § C.F.R. 68.8(b).

Accordingly, in view of all the foregoing, it is found and concluded, that Respondent, Robert Cleek, DBA Robert Cleek Concrete Company, committed the acts alleged in the Notice of Intent to Fine and in the Complaint, and by so doing, the Respondent violated 8 U.S.C. Section 1324a(a)(1)(B). Consequently,

IT IS HEREBY ORDERED:

1. That Respondent shall, within 14 days from the date of this Judgment by Default, pay a civil money penalty in the amount of $4,850.00 in either cash, cashier's check, certified check or money order (if not in cash) to the ``Immigration and Naturalization Service'' and deliver same to: Alan S. Rabinowitz, Assistant District Counsel, Immigration and Naturalization Service, 880 Front St., San Diego, California 92188.

2. Review of this final order may be obtained by filing a written request for review with the Chief Administrative Hearing Officer, 5113 Leesburg Pike, Suite 310, Falls Church, Virginia 22041, within 5 days of this order as provided in 28 C.F.R. § 68.52. This order shall become the final order of the Attorney General unless, within

30 days from the date of this order, the Chief Administrative Hearing Officer modifies or vacates the order.

SO ORDERED: This 30th day of April, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge