

Modified by CAHO (6/16/88) Ref. No. 13.

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

United States of America, Complainant, v. Elsinore Manufacturing, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100007.

MARVIN H. MORSE, Administrative Law Judge

**SUMMARY DECISION ON DEFAULT AND ORDER OF  
THE ADMINISTRATIVE LAW JUDGE**

Appearances: ALAN S. RABINOWITZ, Esq., for the Immigration and Naturalization Service.

Statutory and Regulatory Background:

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 regulation, 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 known by the rubric "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, 16221028, the Department of Justice implemented the employer sanctions provisions of IRCA, now codified at 8 CFR Part 274a. These regulations provide, inter alia, in pertinent part as to paperwork violations, id. at 274a.2(a):

This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting [sic] 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) initiates an action to assess civil liability by issuance of a Notice of Intent to Fine (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 pursuant to 5 U.S.C. 5540557, 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 administrative law judge 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 administrative law judge 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. The Interim Final Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges In Cases Involving Allegations Of Unlawful Employment Of Aliens (Rules) appears at 52 Fed. Reg. 44972085, November 24, 1987 (to be codified at 28 CFR Part 68). The Rules govern practice and procedure in cases heard by administrative law judges under IRCA.

Procedural Developments:

Consonant with the statute and regulations, the INS on February 2, 1988, filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer. The complaint, dated January 29, 1988, contained as Exhibit A, the December 30, 1987, Notice of Intent to Fine Elsinore Manufacturing,

Inc. (Elsinore), and, as Exhibit B, Elsinore's January 14, 1988 letter requesting a hearing before an Administrative Law Judge.

By Notice of hearing on Complaint Regarding Unlawful Employment, dated February 5, 1988, Elsinore was advised of the filing of the complaint; the opportunity to answer within thirty (30) days after receipt of the complaint; my assignment to the case; and the dates and place scheduled for hearing, i.e., on or about July 12-15, 1988, in the Judicial District of Lake Elsinore, California.

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 for each of sixteen (16) paperwork violations at \$250 each, for a total of \$4,000.

By Motion for Default Judgment dated March 21, 1988, INS asks that Respondent be found in default. The motion, accompanied by the INS Attorney's Default Declaration, rests on the premise that Elsinore had ``failed to plead or otherwise defend'' against the complaint served by mail on February 5, 1988, as an attachment to the Notice of Hearing.<sup>1</sup>

On April 14, 1988, 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 Elsinore 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.'' No pleading or other document has been received from Elsinore although the Order to Show Cause required that an answer, if any, be received by April 29, 1988.<sup>2</sup>

Analysis and Decision:

The failure of Elsinore to file a timely, or any, answer to the complaint constitutes a basis for entry of a judgment by default within the discretion of the administrative law judge. Rules, Section 68.6(b). The failure to answer entitles the judge to treat the allegations of the complaint as admitted. Clearly, absent an answer, as here, there can be no genuine issue as to any material fact. (As provided in the Rules, the judge has discretion to issue

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<sup>1</sup>No answer was received to the complaint forwarded to Elsinore by the February 5, 1988, Notice of Hearing. The envelope containing the Notice was not returned to this Office as undelivered.

<sup>2</sup>No response has been received to the April 14, 1988, Order to Show Cause. Two copies were addressed to Elsinore, one by first class mail and one by certified mail return receipt requested. Although no receipt was returned for the copy addressed to Elsinore neither copy was returned to this office as undelivered.

either, or both, a default judgment and a summary decision. See, Rules 68.36(c)).

The INS complaint requests entry of an order directing Elsinore to cease and desist from the violations alleged and to pay the penalties provided in the Notice of Intent to Fine. Those allegations consist of four (4) separate categories, each of which specifies different violations of the statutory requirement for verification of employment in the United States with respect to specified individuals, i.e., failure to prepare form I-9, failure to complete section 2 of the form I-9, failure to properly complete section 2 of the form I-9, and failure to properly complete the form I-9. The NIF appropriately specifies as to each such category of specified individuals that Elsinore was in violation of the paperwork requirements of Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324a), with respect to each employee specified.<sup>3</sup> The NIF contains, on the signatory page under the caption ``Notice of Respondent, ''<sup>4</sup> an apparently ``boilerplate'' provision which includes the following legend:

IF THE CHARGE SPECIFIES A VIOLATION(S) OF SUBSECTION 274A(a)(1)(A) OR SUBSECTION 274A(a)(2) OF THE ACT, THE ORDER ALSO WILL REQUIRE THAT YOU CEASE AND DESIST FROM SUCH VIOLATION(S).

The quoted text, by negative implication, is consistent with statute, 8 U.S.C. 1324a(e)(4) and (5) which contemplate cease and desist orders in unlawful hiring, recruiting, referral for a fee and employment cases but not in cases where paperwork violations only are involved. In the present case, where only paperwork violations are involved, INS is not entitled to a cease and desist order in light of the clear statutory distinction: the statute commands that cease and desist orders issue where there are findings of unlawful hiring, recruitment, referral for a fee, or continued employment of unauthorized aliens, but provides no such command, indeed is silent, except as to civil money penalty, with respect to findings of paperwork violations.

Findings and Conclusions:

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED that Respondent is in violation of 8 U.S.C. 1324a(a)(1)(B) with respect to the following named individuals:

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<sup>3</sup>It is noted that the NIF inconsistently refers to section 274A(a)(1)(B) and sometimes to ``274(a)(1)(B).'' For purposes of this decision, it is understood that all references are to the controlling provision, Section 274A. Section 274A of Immigration and Nationality Act is 8 U.S.C. 1324a.

<sup>4</sup>Presumably, this notification is intended to be ``to'' or ``for'' the respondent.

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|-------------------------|----------------------------|
| 1. Steve Louis          | 9. Allen Dale Wicks        |
| 2. Richard Demember     | 10. Frank Salazar          |
| 3. Terry Bridges        | 11. Benjamin Garibay       |
| 4. Loretto DeLaTorre    | 12. Robert John Chester    |
| 5. Larry Delva          | 13. Michael Robert Linehan |
| 6. Robert A. Walker     | 14. Juan Felipe Gonzales   |
| 7. Eddie R. Taylor      | 15. David Castillo         |
| 8. William D. Rodriguez | 16. Mike Gamboa            |

IT IS FURTHER FOUND AND CONCLUDED that Respondent failed to verify eligibility for employment in the United States on the Forms I-9 designated and established by the Attorney General within the meaning of 8 U.S.C. 1324a(b), by failing to prepare Forms I-9 for the first nine named individuals, by filing to complete Section 2 of Form I-9 for the next two, by failing to properly complete section 2 of the Form I-9 for the next three individuals, and by failing to properly complete Form I-9 (by not recording documentation to establish identity and employment eligibility) for the last two named individuals.

IT IS HEREBY ORDERED:

(1) that Respondent Elsinore pay a civil money penalty in the amount of \$250 each with respect to each of the sixteen (16) named individuals as set forth in the Notice of Intent of Fine and in the Findings and Conclusions of this decision, a total of \$4,000;

(2) that so much of the Motion for Default Judgment and the complaint as seek a cease and desist order are dismissed with prejudice, and

(3) that the hearing previously scheduled is canceled.

This Summary Decision on Default and Order of the Administrative Law Judge is the final action of the judge in accordance with Section 68.51(b) of the Interim Final Rules of Practice and Procedure, supra. As provided in those Rules, id. at Section 68.52, this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this decision and order, the Chief Administrative Hearing Officer shall have modified or vacated it.

**SO ORDERED.**

Dated this 20th day of May, 1988.

MARVIN H. MORSE  
Administrative Law Judge