

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

United States of America, Complainant v. United Pottery Manufacturing and Accessories, Respondent; 8 U.S.C. 1324a Proceeding, Case No. 89100047.

**AFFIRMATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE
ADMINISTRATIVE LAW JUDGE'S JUDGMENT BY DEFAULT**

On April 21, 1989, the Honorable Earldean V.S. Robbins, the Administrative Law Judge assigned to this case, issued an order regarding the above-styled proceeding, entitled ``Judgment by Default.'' Pursuant to Title 8, United States Code, Section 1324a(e)(6) and Section 68.52 of the applicable rules of practice and procedure, appearing at 52 Fed. Reg. 44972-85 (1987) [hereinafter Rules] (to be codified at 28 C.F.R. Part 68), the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order, and in accordance with Section 68.52 of the Rules, supra, affirms the Administrative Law Judge's Order, and hereby closes the file and disposes of all proceedings. The attached memorandum of law is incorporated in and made a part of this order.

Any person or entity seeking judicial review may file a petition in the Court of Appeals for the appropriate circuit. The time period for filing expires forty-five (45) days from the date of the Administrative Law Judge's Final Order.

SO ORDERED:

Dated: May 19, 1989.

RONALD J. VINCOLI,
Acting Chief Administrative Hearing Officer

**UNITED STATES DEPARTMENT OF JUSTICE
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United States of America, Complainant v. United Pottery Manufacturing and Accessories, INC., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100047.

**MEMORANDUM OF LAW IN SUPPORT OF THE FINAL AGENCY ORDER BY THE CHIEF
ADMINISTRATIVE HEARING OFFICER**

I. SYNOPSIS OF PROCEEDING

On October 25, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service [hereinafter INS] served on the Respondent a Notice of Intent to Fine, charging Respondent with eighteen violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(B) of the Immigration Reform and Control Act of 1986 (hereinafter IRCA)). The Notice of Intent to Fine was served on Dennis Mecham, general manager for Respondent, and informed Respondent that the INS intended to order them to pay a fine of \$3,600. The Notice of Intent to Fine also stated that Respondent could contest the charges by filing a written request for a hearing before an Administrative Law Judge. This request must be submitted to the INS within thirty days following the service of the Notice of Intent to Fine.

On November 17, 1988, Respondent, by and through Dennis Mecham, filed with the District Director of the INS, Phoenix District, a written request for a hearing.

On January 27, 1989, the INS filed a complaint against Respondent with the Office of the Chief Administrative Hearing Officer, incorporating in it the Notice of Intent to Fine. The complaint formally charged Respondent with eighteen violations of Section 274A (1324a) and asked that an order be issued directing the Respondent to pay a \$3,600 fine.

The Office of the Chief Administrative Hearing Officer assigned this matter to the Honorable Earldean V. S. Robbins, Administrative Law Judge, on February 1, 1989. Also on February 1, 1989, the Office of the Chief Administrative Hearing Officer sent a Notice of Hearing to the parties, setting down a hearing to be held in or around the Glendale, Arizona on May 30, 1989. Pursuant to Section 68.6 of the applicable rules of practice and procedure, appearing at

52 Fed. Reg. 44972-85 (1987) [hereinafter Rules] (to be codified at 28 C.F.R. Part 68), the Respondent was given thirty days (until March 3, 1989) in which to file an answer.

On March 14, 1989, Respondent filed a voluntary Petition for Relief, under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Arizona.

On March 28, 1989, Complainant filed with the Administrative Law Judge a Motion for Summary Decision and a Motion for Default Judgment, along with supporting memoranda. However, on April 5, 1989, Complainant filed a subsequent motion to hold their Motion for Summary Decision in abeyance pending a ruling by the Administrative Law Judge on the Motion for Default Judgment. The Motion for Default Judgment was based on Respondent's failure to answer the Complaint within the thirty day time period.

Prior to the Complainant's Motion to Hold in Abeyance, the Respondent sent notice to the INS and the Administrative Law Judge of their filing in the Bankruptcy Court. The Notice was received by the Administrative Law Judge on March 30, 1989.

II. THE ADMINISTRATIVE LAW JUDGE'S JUDGMENT BY DEFAULT

The Administrative Law Judge issued the Judgment by Default on April 21, 1989. The Administrative Law Judge reasoned that since the respondent filed no response to the Motion for Default Judgment (based on Respondent's failure to file an Answer), as required by 8 C.F.R. 68.6, the allegations of the Complainant were uncontroverted. Thus, the Administrative Law Judge concluded that respondent had violated 274A(a)(1)(B) of the Act (8 U.S.C. 1324a(a)(1)(B)) and ordered that the Respondent pay a money penalty in the sum of \$3,600. The scheduled hearing was cancelled.

Pursuant to Section 68.52(a) of the Rules and in response to the Administrative Law Judge's Judgment by Default, the Respondent filed with the Office of the Chief Administrative Hearing Officer a Request for Administrative Review, received May 4, 1989. The INS filed a reply brief on May 15, 1989.

III. RESPONDENT'S CONTENTIONS

Respondent maintains that the default judgment should be vacated since the entire proceeding should have been stayed pursuant to 11 U.S.C. 362(a); thus the default judgment was entered in violation of the automatic stay. They point out that the Complainant ``never sought relief from the automatic stay in Respondent's bankruptcy proceeding to allow it to continue these proceedings and seek default judgment against Respondent.'' Respondent's Request

for Administrative Review at 1. Furthermore, the INS's action to obtain and enforce the judgment is stayed by 11 U.S.C. 362(b)(5).

IV. COMPLAINANT'S CONTENTIONS

In its reply brief to Respondent's request for administrative review, the Complainant contends that the INS is exempt from the automatic stay provision of 11 U.S.C. 362(a) because the enforcement of employer sanction under IRCA ``is clearly a police and regulatory function of the agency.'' INS Brief at 2. They assert that IRCA expresses the intent of Congress ``that as a matter of public policy employers who fail to comply with the `employer sanctions' laws will be fined.'' Id. at 10. The INS distinguishes obtaining a judgment from seeking to enforce a judgment; by merely obtaining a judgment, the INS asserts, they have not violated the automatic stay.

V. THE INS IS A GOVERNMENTAL UNIT ENGAGED IN THE ENFORCEMENT OF ITS POLICE AND REGULATORY POWER

A petition filed by a party in bankruptcy court under 11 U.S.C. Sections 301, 302 and 303 greatly affects the disposition of any pending matter before other courts. Once a petition has been filed in the bankruptcy court, it operates as a stay of:

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. 362(a)(1)

Pursuant to this section of the Bankruptcy Code, any other judicial, administrative, or other proceeding against the party [provided it is not excepted under 11 U.S.C. 362(b)] is stayed pending the outcome of the case in bankruptcy. The intent of 11 U.S.C. 362(a)(1) is to protect the debtor and permit ``the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.'' Notes of Committee on the Judiciary, Senate Report No. 95-989. This subsection was not intended by Congress to limit the rights of the creditors, but to allow ``an orderly examination of the debtor's and creditor's rights.'' Notes of Committee on the Judiciary, House Report No. 95-595.

Subsection (b) of 11 U.S.C. 362 lists the exceptions to the automatic stay provision of subsection (a) and includes, among others, the commencement or continuation of a criminal action or proceeding. In addition, subsection (b)(4) exempts a governmental unit,

stating that the filing of a petition in bankruptcy does not operate as a stay ``under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.''

A second exemption is codified at Section 362(b)(5). The filing of a petition in bankruptcy does not operate as a stay of ``the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.''

The Complainant argues that this proceeding comes within the exception in Section 362(b)(4) because it is an action relating to the enforcement of employer sanctions under a federal act (Title 8, United States Code, Section 1324a) which prohibits the hiring of illegal aliens and seeks to protect the sovereignty of United States' borders. The Act also places on the employer an obligation to comply with an Employment Verification System. The INS asserts that their agency is charged by Congress to enforce Title 8 and effectuate the public policy that has been expressed.

The question of whether an employer sanction proceeding comes within the exception to the automatic stay does not appear to have been considered by the courts thus far. However, the courts have considered whether actions by other types of regulatory agencies fall under the automatic stay. The Eighth Circuit held that the automatic stay did not apply to an Equal Employment Opportunity Commission (hereinafter E.E.O.C.) action under Title VII and allowed the entry of a money judgment for injunctive relief and backpay. E.E.O.C. v. Rath Packing Company, 787 F.2d 318 (8th Cir. 1986). The court reasoned that ``when E.E.O.C. sues to enforce Title VII it seeks to stop a harm to the public-invidious employment discrimination which is as detrimental to the welfare of the country as violations of equal protection and consumer safety laws, which are expressly exempt from the automatic stay.''

787 F.2d at 325. The entry of a money judgment was permitted but the enforcement of the money judgment, in the form of a detailed payment plan, was not.

In the case of In re Tauscher, 7 B.R. 918 (Bankr. E.D. Wis. 1981), the bankruptcy court, relying on the language of House Report No. 95-595, concluded that the Secretary of Labor was exempt from the automatic stay and the agency was allowed to continue proceedings brought under the Fair Labor Standards Act for the assessment of penalties for violation of the child labor laws, up to and including the entry of a money judgment. 7 B.R. at 920. The court noted there that only the enforcement of a money judgment would be

stayed by the automatic stay. This case is closely analogous to the case at hand in that both involve the assessment of penalties by an agency because of violation of a federal act.

The respondent, relying on Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267, 271 argues that the stay is applicable to ``all entities''--both governmental and private. However, the court in Penn Terra noted that Section 362(b)(4) provides an exception to this broad language. The Court cited the legislative history of the Code (S. Rep. No. 95-989 at 52, 1978 U.S. Code Cong. & Ad. News at 5787, 5838; H. Report No. 95-595 at 343, 1978 U.S. Code Cong. & Ad. News at 6299) for the proposition that ``where a governmental unit is suing a debtor to prevent or stop violations of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.'' 733 F.2d at 272. Thus respondent's reliance on Penn Terra is misplaced. In Penn Terra, the court concluded that the Department of Environmental Resources, in acting to enforce an injunction, was within the scope of its police and regulatory power. That exercise of power was intended to protect the health, safety and welfare of the public. The suit therefore was ``properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a judgment.'' 733 F.2d at 278. The automatic stay provision in that case was inapplicable.

Here, the INS's actions come within the police and regulatory power of a governmental unit. The INS is attempting to carry out Congress' intent to protect our borders and in doing so the INS acts in the public's best interest. Therefore the automatic stay did not bar the INS from obtaining the default judgment. No relief from the automatic stay was required.

VI. THE INS'S ACTIONS DO NOT CONSTITUTE AN ATTEMPT TO ENFORCE A MONEY JUDGMENT

The respondent argues that even if the complainant falls into the Section 362(b)(4) exception as a governmental entity, that since this proceeding involves an attempt to obtain and enforce a money judgment, it would be stayed in accordance with Section 362(b)(5). We agree with Respondent that Section 362(b)(5) provides ``an exception to the exception'' in that actions to enforce money judgments are affected by the automatic stay. However, the case before us does not involve the enforcement of a money judgment.

The Court in Penn Terra distinguished the entry of a money judgment from a proceeding to enforce a money judgment. The court indicated that a seizure of the debtor's property to satisfy a

judgment is what was proscribed by Section 362(b)(5). The Court noted that ``the mere entry of a money judgment by a governmental unit is not affected by the automatic stay, provided of course that such proceedings are related to that government's police or regulatory power.'' 733 F.2d at 275.

The Court cited the legislative history of Section 362(b)(5) for support:

Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

733 F.2d at 272. (Citations omitted) No such preferential treatment is being given to the INS.

In this case, the Complainant's actions in obtaining the judgment of default do not amount to the enforcement of a money judgment. The default judgment is not self executing; no payment plan is set forth in the Order. Cf. E.E.O.C. v. Rath Packing Company, *supra* at 4. Rather, it constitutes the entry of a final judgment. The default judgment is no more than an entry of a money judgment. ``[T]he Courts have allowed governmental units to fix the amount of penalties, up to and including the entry of a money judgment.'' U.S. v. Nicolet, Inc., 857 F.2d 202, 209 (3rd Cir. 1988). Section 362(b)(5) has not been violated; the entry of the default judgment was not improper. As the INS conceded in their brief, ``the Service now takes its place among the other creditors.'' INS Brief at 15. No preferential treatment is being given to the INS; the INS is ``merely protecting its rights, and placing the Government on an equal footing with the other creditors.'' Id. at 2.

In conclusion, the INS is exempted from the automatic stay provision of 11 U.S.C. 362(a) because it is a governmental unit acting to enforce its police and regulatory power. The Order of Default Judgment does not amount to enforcement of a money judgment and therefore it is not violative of Section 362(b)(5) and it is excepted from the automatic stay.