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

United States of America, Complainant v. DAR Distributing, Inc., d/b/a DAR Cabinets, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100087.

ORDER GRANTING COMPLAINANT'S MOTION FOR JUDGMENT BY DEFAULT

1. Introductory Statement:

The Immigration Reform and Control Act of 1986 (IRCA) establishes several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amends the Immigration and Nationality Act of 1952 by adding a new Section 274A (8 U.S.C. Section 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, commonly referred to as employer sanctions, upon employers who knowingly hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. Essential to the enforcement of this provision of the law is the requirement that employers comply with certain verification procedures as to the eligibility of new hires for employment in the United States.

Sections 274A(a)(1)(B) and 274A(b)(1) and (2) of the Act provide that an employer must attest on a designated form (the I-9 Form) that it has verified that an individual is not an unauthorized alien by examining certain specified documents to establish the identity of the individual and to evidence employment authorization. Further, the employer is required to retain, and make available for inspection, these forms for a specified period of time.

2. Procedural History:

Consonant with the statute and regulations, a Complaint was issued on February 13, 1989, by the United States of America, Complainant, alleging that Respondent, DAR Distributing, Inc., d/b/a DAR Cabinets, was in violation of Section 274a(a)(1)(B) of the Act (8 U.S.C. 1324a(a)(1)(B)). The Complaint incorporated, and attached as Exhibit A, the Notice of Intent to Fine served by the INS on Re-

spondent on January 13, 1989. Attached as Exhibit B was the Respondent's request for a hearing before an Administrative Law Judge written on January 20, 1989, by Darl A. Rutherford, President of DAR Industries.

The Office of the Chief Administrative Hearing Officer assigned this matter to me as the Administrative Law Judge on February 17, 1989, and, by Notice of Hearing on Complaint Regarding Unlawful Employment, advised Respondent of (1) the filing of the Complaint, (2) the right to answer within thirty (30) days after receipt of the Complaint, and (3) the place of the hearing as Phoenix, Arizona, at a date and hour to be specified.

The record shows that the Notice was mailed to Mr. Darel A. Rutherford, President, DAR Industries, and that Respondent, through an agent, signed a return receipt for the Notice of Hearing on February 21, 1989.

By Motion filed April 13, 1989, the Immigration and Naturalization Service asked for a Default Judgment. The Motion rested on the failure of Respondent to file a timely, or any, Answer to the Complaint.

On April 21, 1989, not having 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 May 8, 1989, to respond to the Order and to provide an Answer to the Complaint.

On April 28, 1989, Respondent, through its Attorney, Robert A. Shull, submitted a Response To Order To Show Cause informing this office that Respondent had filed a petition under Title 11 U.S.C. Section 362, and that pursuant to that Bankruptcy Statute, all actions against Respondent were stayed. Although Respondent's attorney advised this office that Respondent had filed a petition for bankruptcy, there was nothing attached to Respondent's Response to certify that it was actually in bankruptcy proceedings.

Moreover, in a subsequent telephone conversation with this office, Respondent's counsel assured this office that it would provide a certification from Bankruptcy Court indicating that it actually was in bankruptcy proceedings. As of the date of this Order, this office has not received such a certification from Respondent.

Finally, and most significantly, no attempt has been offered by Respondent to respond, in the form of a formal answer, to the allegations contained in the Complaint. Presumably, this is because

Respondent thought that it did not have to file an answer in an IRCA proceeding if it asserted that it was in bankruptcy proceedings.

However, it is my view that Complainant's Response To Respondent's Response To Order To Show Cause, filed on May 4, 1989, correctly identified this IRCA action as coming within an exception to the automatic stay of 11 U.S.C. Section 362(a); i.e., 11 U.S.C. Section 362(b), which identifies the ``continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power'' as an exception to the automatic stay of 362(a). Moreover, this matter was addressed by the Chief Administrative Hearing Officer who concluded that INS' actions came within the police and regulatory power of a governmental unit, and therefore, an automatic stay does not bar INS from obtaining the default judgment. See, United States of America v. United Pottery Manufacturing and Accessories, Inc. (OCAHO Case No. 89100047) (1989).

Accordingly, I am granting Complainant's Motion for Default Judgment for the reasons stated below.

3. Findings of Fact and Conclusions of Law:

Notwithstanding the Respondent's Response To Order To Show Cause, I find that the Respondent has not answered the Complaint. The failure of Respondent to answer the Complaint constitutes a basis for entry of default judgment as provided by 28 C.F.R. Section 68.6(b).

Title 28 C.F.R. Section 68.6(c)(1) requires that the Answer must include (1) a statement that Respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation of the Complaint, and (2) a statement of the facts supporting each affirmative defense. The response filed by Respondent on April 28, 1989, contained no such statements.

Therefore, I find that the Complaint remains unanswered and conclude that the Respondent is in default.

As to Respondent's argument that its present bankruptcy status, pursuant to Title 11 U.S.C. Section 362, provides a stay of this judgment, I conclude that this action is exempted from the automatic stay provisions of Title 11 U.S.C. Sections 362(a)(1) by Section 362(b)(4) because it is a proceeding to enforce the Immigration and Naturalization Service's regulatory power to control the employment of illegal aliens.

Accordingly, because this action is not barred by the bankruptcy statute, and because the Respondent failed to file an Answer to the Complaint, thereby leaving the allegations of the Complaint uncon-

troverted, it is found and concluded, that Respondent, DAR Distributing, Inc., d/b/a DAR Cabinets, 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).

Since I have found violations of Section 274A(a)(1)(B) of the Act, assessment of civil money penalties are required by the Act. Section 274A(e)(5) states:

> Order for Civil Money Penalty for Paperwork Violations. With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The Complaint seeks a penalty of $7,050.00 for Respondent's failure to ensure that the employee properly complete section 1 of the I-9 Form, and for Respondent's failure to properly complete section 2 of the I-9 Form, for forty seven (47) employees.

The fines, at $150.00 for each violation, are within the statutory limit. Since the penalties requested do not appear unreasonable on their face, I find the total fine in the amount of $7,050.00 to be appropriate.

4. Consequently, IT IS HEREBY ORDERED:

1. That a judgment by default is entered against the Respondent in the amount of seven thousand fifty dollars ($7,050.);

2. That Respondent shall comply with the requirements of Section 274A(b) with respect to individuals hired during a period of three years;

3. That the hearing previously scheduled to be held in Phoenix, Arizona, is cancelled, and

4. 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, VA 22041, within five (5) days of this Order as provided in 28 C.F.R. Section 68.52. This Order shall become the final Order of the Attorney General unless, within thirty (30) days from the date of this Order, the Chief Administrative Hearing Officer modifies or vacates the Order.

SO ORDERED: This 5th day of June, 1989 at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge