

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

United States of America, Complainant v. Koamerican Trading Corp.,
Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100092.

**ORDER GRANTING MOTION FOR LEAVE TO FILE AN ANSWER AND DENYING MOTION
FOR ORDER OF DEFAULT
(May 18, 1989)**

No answer having been timely filed following service of the notice of hearing which forwarded the complaint, complainant filed its April 4, 1989 motion for entry of an order of default. Service of the notice of hearing had been effected only upon the attorney who had responded to the notice of intent to fine by requesting a hearing, and not upon respondent. Accordingly, the attorney not being before me, rather than granting complainant's motion out of hand, I issued, on April 27, 1989, an order to show cause why the motion for a default order should not be granted, returnable not later than May 15.

On May 15, 1989, respondent filed his ``Affidavit In Opposition And Motion For Leave To File An Answer,'' dated May 11, accompanied by a certificate of service executed on May 12 by Ronald H. Fanta. I treat the ``affidavit'' as an unsworn statement since it contains no jurat. The individual who signed that statement is identified by name only and I can only speculate as to his/her relationship to respondent. Presumably, the individual who executed the certificate of service is the individual who requested the hearing by letter to complainant dated January 18, 1989, although the certificate, omitting address or representative capacity, fails to confirm that identification.

From the pleadings, respondent appears to be a corporation, although Kyung Ha Choi who signed the statement in opposition to the default speaks in the first person as if he/she were the respondent. In any event, however, the statement explains that the notice of hearing had not been forwarded to respondent by Mr. Fanta (who is implied as having received it), although it is unclear

who is more blameworthy for failure to have timely answered the complaint.

The statement claims that respondent was not served with the notice of hearing, recites, inter alia, a good faith defense to both the unlawful employment and paperwork counts, and asks that complaint's motion be denied and filing of an answer be allowed. The statement is silent as to whether respondent is represented by counsel.

Upon consideration of the pleadings, I order as follows:

1. Respondent through its apparent representative Kyung Ha Choi having recited failure of prior notice has marginally satisfied the burden of the show cause, as the result of which the default motion is denied.

2. Respondent may file an answer to be received by me not later than Friday, May 26, 1989, failing which I will revive complainant's motion and dispose of the case accordingly.

3. Not later than May 26, respondent's counsel, if any, will file an entry of appearance.

4. No documents will be accepted by the judge in this case which fail fully to identify and to provide name, title, if any, mailing address, and telephone number of each and every person on whose behalf and by whom submitted, including attorneys, other representatives, principals, and corporate officials.

5. Promptly upon service of an answer, if any, both parties, through counsel, if counsel are employed or otherwise retained, will talk together with a view to reaching an agreed disposition of this case, and will report to me no later than June 15, 1989, in writing, the results of such discussion. Failing agreement, they, or one authorized to speak for both, will advise in writing or by telephone to my staff of their availability for a telephonic prehearing conference to be held at 10:00 a.m., EDT on June 8, 9, or 13.

SO ORDERED.

Dated this 18th day of May, 1989.

MARVIN H. MORSE
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER
ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER VACATING THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

United States of America, Complainant, v. Koamerican Trading Corp.,
Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100092.

Vacation by the Chief Administrative Hearing Officer of the
Administrative Law Judge's Order Granting Motion for Leave to File an
Answer and Denying Motion for Order of Default

The Honorable Marvin H. Morse, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued an Order Granting Motion for Leave to File an Answer and Denying Motion for Order of Default on May 18, 1989. The Complainant filed a request for review with the Chief Administrative Hearing Officer, in the above-styled proceeding.

Pursuant to Title 8, United States Code, Section 1324a(e)(6) and 28 C.F.R. 68.52, (hereinafter the Rules) the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order, and in accordance with the controlling section of the Immigration Reform and Control Act of 1986 (hereinafter IRCA) supra, vacates the Administrative Law Judge's Order.

On February 14, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS) filed a complaint with the Office of the Chief Administrative Hearing Officer against the respondent, Koamerican Trading Corporation (hereinafter Koamerican). The INS charged Koamerican with violations of IRCA. The INS alleged two violations of the provisions of Title 8, United States Code, Section 1324a, for knowingly employing or in the alternative, continuing to employ an unauthorized alien (Count I), and for failure to prepare an employment eligibility verification form (Count II).

Respondent failed to file an Answer to the Complaint within the 30 days prescribed by Section 68.6(a) of the Rules. Subsequently, the INS filed a Motion for Default Judgment to which the Administrative Law Judge responded with an Order to Show Cause Why Judgment by Default Should Not Issue. In his Order to Show Cause, the Administrative Law Judge explained that he did not grant the Motion for Default Judgment because he was satisfied

from review of the case file that service of the complaint and notice of hearing was perfected. Following the Order to Show Cause, respondent filed an Affidavit in Opposition and Motion for Leave to File an Answer.

On May 18, 1989, the Administrative Law Judge issued an Order Granting Respondent's Motion for Leave to File an Answer and Denying Complainant's Motion for Order of Default.

The Administrative Law Judge ordered that:

1. Respondent through its apparent representative, Kyung Ha Choi having recited failure of prior notice has marginally satisfied the burden of the show cause, as the result of which the default judgment is denied.

2. Respondent may file an answer to be received by me not later than Friday, May 26, 1989, failing which I will revive complainant's motion and dispose of the case accordingly.

3. Not later than May 26, respondent's counsel, if any, will file an entry of appearance.

4. No documents will be accepted by the judge in this case which fail fully to identify and to provide name, title, if any, mailing address and telephone number of each and every person on whose behalf and by whom submitted, including attorneys, other representatives, principals, and corporate officials.

5. Promptly upon service of an answer, if any, both parties through counsel, if counsel are employed or otherwise retained, will talk together with a view to reaching an agreed disposition of this case, and will report to me no later than June 15, 1989, in writing, the results of such discussion. Failing agreement, they, or one authorized to speak for both, will advise in writing or by telephone to my staff or their availability for a telephone prehearing conference to be held at 10:00 a.m., EDT on June 8, 9, or 13.

The Chief Administrative Hearing Office has conducted an administrative review on this Order and finds the following:

1. The attached Memorandum of Law is incorporated into and made a part of this Order.

2. The Administrative Law Judge's Order Granting Motion for Leave to File an Answer and Denying Motion for Order of Default dated May 18, 1989, is hereby vacated.

3. The Chief Administrative Hearing Officer has jurisdiction to review the Order of the Administrative Law Judge pursuant to 8 U.S.C. 1324a(e)(6) of IRCA.

4. The INS filed a request for review of the Administrative Law Judge's Order with the Office of the Chief Administrative Hearing Officer in a timely manner pursuant to 68.5(a), 68.5(d)(2) and 68.52 of the Rules.

5. The attorney for respondent, Ronald H. Fanta, in effect entered a notice of appearance on January 18, 1989, when he requested in writing a hearing on behalf of respondent. As such, respondent was properly served with the complaint and notice of hearing pursuant to 28 C.F.R. 68.3(b). Therefore, failure to effect service of the complaint and notice of hearing directly on respondent is not good cause why a timely answer was not filed, nor is it a defense as to why a default judgment should not issue.

Based on the findings and conclusions as set forth in the attached Memorandum of Law in support of this order, I hereby vacate the Administrative Law Judge's Order Granting Motion for Leave to File an Answer and Denying Motion to Order Default of May 18, 1989, pursuant to 8 U.S.C. 1324a(e)(6).

SO ORDERED,

Dated: June 19, 1989.

RONALD J. VINCOLI
Acting Chief Administrative Hearing Officer

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

United States of America, Complainant v. Koamerican Trading Corp.,
Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100092.

Memorandum of Law in Support of Final Agency Order by the Chief
Administrative Hearing Officer

I. SYNOPSIS OF THE PROCEEDING

On February 14, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS), filed a complaint with the Office of the Chief Administrative Hearing Officer against the respondent, Koamerican Trading Corporation (hereinafter Koamerican). The INS charged Koamerican with violations of IRCA. The INS alleged two violations of the provisions of Title 8, United States Code, Section 1324a, for knowingly employing or in the alternative, continued to employ an unauthorized alien (Count I) and for failure to prepare an employment eligibility verification form (Count II).

On February 22, 1989, the Chief Administrative Hearing Officer assigned this matter to the Honorable Marvin H. Morse, Administrative Law Judge. Despite respondent's request for a hearing, dated January 18, 1989, as of this date no hearing has occurred because respondent failed to file an Answer to the Complaint within the 30 days prescribed by 28 C.F.R. 68.6(a). Subsequently, on April 5, 1989, the INS filed a Motion for Default Judgment.

On April 27, 1989, Judge Morse issued an Order to Show Cause Why Judgment By Default Should Not Issue. Respondent filed an Affidavit in Opposition and Motion for Leave to File an Answer on May 15, 1989. Consequently, Judge Morse issued the Order Granting Respondent's Motion to Leave to File an Answer and Denying Complainant's Motion for Order of Default from which the complainant now seeks review.

II. COMPLAINANT'S CONTENTIONS

The INS maintains that: (1) the Chief Administrative Hearing Officer has jurisdiction to review the Administrative Law Judge's Order pursuant to 28 C.F.R. 68.52; (2) service may be made upon the attorney if respondent is represented by one; (3) Ronald H. Fanta, ``appeared'' in the proceeding when he requested a hearing on behalf of Koamerican, therefore, service was effected upon At-

torney Fanta only, pursuant to 28 C.F.R. 68.3(d); (4) Attorney Fanta clearly indicated his intent to defend against the action through letters, telephone calls and attempts at settlement with the INS; (5) respondent's affidavit is so defective it should not be accorded any weight by the Administrative Law Judge; and, (6) in the event that respondent's affidavit is not considered defective, it remains legally insufficient because respondent failed to state a valid excuse for not filing a timely answer. Finally, the INS requests that the Chief Administrative Hearing Officer stay the proceedings, the Administrative Law Judge's decision be vacated, and an Order for Default Judgment be entered against respondent.

III. RESPONDENT'S CONTENTIONS

Kyung Ha Choi, President of Koamerican: (1) denies the allegations set forth in Counts I and II of the complaint; (2) acknowledges receiving the Notice of Intent to Fine and forwarding it to her attorney, Ronald H. Fanta; (3) maintains that she was advised by Attorney Fanta that he spoke with an INS officer in an attempt to settle, however, claims she did not cooperate with or instruct Fanta to act on her behalf; (4) admits that Attorney Fanta successfully communicated to her, on some occasions, the consequences of her inaction in this matter; and, (5) maintains that she has a good-faith defense to the accusations against Koamerican. Finally, Kyung Ha Choi, on behalf of respondent, asks that the Motion for Default Judgment be denied and that she be permitted to file an answer because she never received the complaint or the notice of hearing and, ``[she] did not understand that in contesting this matter [she had] more of a duty than to merely state that [she didn't] want to pay any money.'' (Respondent's Affidavit in Opposition and Motion for Leave to File an Answer at 2.)

IV. THE ADMINISTRATIVE LAW JUDGE'S ORDER

The Administrative Law Judge issued his Order Granting Motion for Leave to File an Answer and Denying Motion for Order of Default on May 18, 1989. The Administrative Law Judge concluded in part that:

1. Respondent through its apparent representative, Kyung Ha Choi, having recited failure of prior notice has marginally satisfied the burden of the show cause, as the result of which the default motion is denied.
2. Respondent may file an answer.
3. Respondent's counsel, if any, will file an entry of appearance.
4. No documents will be accepted which do not fully identify the person on whose behalf and, by whom they are submitted.

5. The parties are to talk with a view to reaching an agreed disposition of this case and, in the alternative, make themselves available for a telephonic prehearing conference.

V. REVIEW AUTHORITY OF THE OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Section 8 U.S.C. 1324a(e)(6) of IRCA speaks to administrative appellate review:

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

The statute gives the Attorney General review authority over the decision and order of an Administrative Law Judge. The Attorney General in turn delegated this power to the Chief Administrative Hearing Officer, an official having no review authority over other immigration-related matters. 28 C.F.R. 68.2(d).

The applicable Rules of Practice and Procedure, appearing at 28 C.F.R. Part 68 provide that an order ``means the whole or any part of a final procedural or substantive disposition of a matter by the Administrative Law Judge.'' 28 C.F.R. 68.2(k). According to the statute, the Attorney General may, within thirty days from the date of the decision, issue an order which modifies or vacates the Administrative Law Judge's decision and order. Thus, the statute and rules contemplate that the Administrative Law Judge's decision is an initial decision in conformance with Section 557 of the Administrative Procedure Act. The Administrative Law Judge's decision becomes final unless it is modified or vacated by the Chief Administrative Hearing Officer. This policy acknowledges the strong possibility in this new area of developing law that a proceeding may represent a test case and that an Administrative Law Judge's decision will be tantamount to developing policy in an area that is largely unsettled. A provision that provides for review authority contemplates this scenario and insures that policy decisions will be made by that agency head.

Thus, the Chief Administrative Hearing Officer has jurisdiction to review this decision and order of the Administrative Law Judge pursuant to the controlling statute.

VII. NOTICE OF APPEARANCE WAS MADE BY ATTORNEY FANTA ON BEHALF OF THE RESPONDENT KOAMERICAN

On January 6, 1989, respondent was served with a Notice of Intent to Fine. Kyung Ha Choi, President of Koamerican forwarded the Notice of Intent to Fine to her attorney, Ronald H. Fanta, expressing to him that she did not want to pay the fine. (Respondent's Affidavit in Opposition and Motion for Leave to File an Answer at 1.) On January 18, 1989, Attorney Fanta made an appearance in this proceeding when he requested in writing a hearing on behalf of the respondent.

It was not necessary for Attorney Fanta to file a formal notice of appearance in this proceeding. However, it was necessary that he fulfill the requirements set forth in 28 C.F.R. 68.30(b) which states:

Each attorney shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the docket number if assigned, and the party on whose behalf the appearance is made.

Attorney Fanta's request for a hearing included the name of the case and that he was requesting a hearing on behalf of the respondent. The request for hearing was written on Attorney Fanta's professional letterhead indicating that he was acting in his professional capacity as a lawyer. Therefore, having completely satisfied the requirements of a notice of appearance by inclusion of the necessary elements within his request for a hearing, Ronald H. Fanta in effect, made an entry of appearance at the outset of this proceeding.

VII. SERVICE OF THE COMPLAINT AND NOTICE OF A HEARING WERE IN COMPLIANCE WITH 28 C.F.R. 68.3(d)

On February 22, 1989, the Office of the Chief Administrative Hearing Officer served, by mail, Ronald H. Fanta with the complaint and notice of hearing. 28 C.F.R. 68.6(a) requires respondent to file an answer to the complaint within thirty days after service. If respondent fails to do so, Section 68.6(b) of 28 C.F.R. states that respondent has waived its right to appear and contest the allegations of the complaint and the Administrative Law Judge may enter a default judgment. Here, respondent failed to file an answer within the thirty days prescribed, but raised as a defense that she, Kyung Ha Choi was not properly served since only her attorney received the complaint and notice of hearing.

The defense raised by respondent is not a legally sufficient reason for failure to file a timely answer. Service of the complaint and notice of hearing upon Attorney Fanta was proper service pursuant to 28 C.F.R. 68.3(d)(1) which states:

Service of the complaint and notice of the date set for hearing shall be made by the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge to whom the complaint is assigned:

(1) By delivering a copy to the individual party, partner of a party, registered agent for service of process of a corporate party, or attorney of record of a party.

Because the respondent was represented by counsel and the Rules allow for proper service upon any of the above cited representatives of respondent, service of the complaint and notice of hearing was not defective in this proceeding.

After a review of the full record of this proceeding, it is concluded that, the Administrative Law Judge should not have found that the respondent marginally or otherwise satisfied the burden of the show cause order. Furthermore, it is unnecessary to address the issue of the competency of respondent's affidavit because: (1) the Chief Administrative Hearing Officer has found that notice of appearance was entered by Attorney Fanta; (2) Attorney Fanta was properly served with the complaint and notice of hearing; and, (3) even if respondent's affidavit was found competent, the argument maintained by respondent within the affidavit fails as a legally sufficient reason for not filing a timely answer.