

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

United States of America, Complainant, vs. Gus and Candy Kirk, d/b/a Kirk Enterprises, Respondent; 8 U.S.C. Section 1324a Proceeding, Case No. 89100190.

Appearances: SCOTT M. JEFFRIES, Esq. of Yuma, Arizona, for the Complainant.

DAVID J. HOSSLER, Esq. of Yuma, Arizona, for the Respondent.

JUDGMENT BY DEFAULT

EARLDEAN V.S. ROBBINS, Administrative Law Judge
Statement of the Case

On April 17, 1989, a Complaint Regarding Unlawful Employment was filed against Gus and Candy Kirk, d/b/a Kirk Enterprises, herein called the Respondent, by the United States of America, herein called the Complainant, alleging that Respondent has violated the provisions of 8 U.S.C. 1324a. On April 28, 1989, the Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer served, by mail, a Notice of Hearing on Complaint Regarding unlawful employment which inter alia notified Respondent that, if Respondent fails to file an answer within the time provided, the Respondent may be deemed to have waived his/her right to appear and contest the allegations of the Complaint, and an Administrative Law Judge may enter a judgment by default along with any and all appropriate relief. Said Notice of Hearing on Complaint together with a copy of the Complaint was received by Respondent on May 5, 1989.

On June 12, 1989, Counsel for Complainant filed a Motion For Default Judgment based on Respondent's failure to file an Answer as required by Section 68.6 of the Interim Final Rules Of Practice And Procedure For the Office Of The Chief Administrative Hearing Officer, herein called the Rules. Subsequently, on June 13,

1989, I issued an Order To Show Cause why Complainant's Motion For Default Judgment should not be granted, which specifically provided that any response thereto must be supported by a sworn affidavit setting forth any good cause alleged by Respondent.

On June 21, 1989, Respondent filed an Answer/Response which purported to answer the Complaint but did not set forth any good cause for Respondent's failure to file a timely answer and was not supported by a sworn affidavit. On June 23, 1989 Respondent filed an Amended Response To Motion For Default Judgment and to the Order To Show Cause and sworn affidavit of attorney in which counsel asserts lack of due process and jurisdiction since the Complaint was served only upon Respondent's attorney. Respondent argues that the March 29, 1989 request for a hearing signed by Respondent's attorney and submitted in response to the Notice of Intent To Fine did not constitute an ``appearance'' sufficient to be termed an ``Attorney of record'' as described in 29 CFR Section 68.3(d). Respondent's argument is not persuasive. The March 29, 1989 letter specifically states ``I have been retained by Gus Kirk in regard to [this] matter. However, even assuming arguendo that the letter does not constitute a pleading herein since it predates the complaint, Respondent's attorney accepted service of the Complaint, and signed and filed a Motion To Quash and a Motion To Vacate Hearing Date, during the period allowed for the filing of an answer. In these circumstances, counsel was clearly attorney of record of Respondent.

Respondent further asserts that Gus Kirk was out of town and not available to sign the Answer/Response. However, nothing in the rules require that an Answer be signed by the party as opposed to the party's attorney. Respondent also asserts that the delay in filing the Answer was occasioned by the ``voluminous and unnecessary'' discovery by Complainant; and counsel's involvement in three other hearings. These all might have been adequate grounds to support a timely request for extension of time to file an Answer but do not constitute good cause for failure to file a timely Answer.

Similarly insufficient to constitute good cause for failure to file a timely answer is Respondent's argument that its response to the Notice of Intent should have been treated as a general denial of the allegations of the Complaint. 28 C.F.R. Section 68.6 provides that failure to file an Answer within thirty days after service of a complaint shall be deemed to constitute a waiver of respondent's right to appear and contest the allegations of the Complaint. Further, the Notice of Hearing on Complaint clearly sets forth the consequence of failure to file a timely Answer. In the absence of a showing of good cause for Respondent's failure to file an Answer

within the time period prescribed by 28 C.F.R. 68.6, Respondent's Answer/Response received on June 21, 1989 in rejected in being untimely filed. Accordingly, the allegations of the Complaint are uncontroverted.

Upon the entire record, I make the following:

Ruling On The Motion For Default Judgment

Section 68.6 of the Rules provide, inter alia,

Section 68.6 Responsive pleadings-answer.

(a) Time for answer. Within thirty (30) days after the service of a complaint, each respondent shall file an answer.

(b) Default. Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his/her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default.

The Notice of Hearing served on Respondent prior to April 28, 1989 specifically states:

2. The Respondent has the right to file an Answer to the Complaint and to appear in person, or otherwise, and give testimony at the place and time fixed for the hearing. The Respondent's Answer must be filed within thirty (30) days after receipt of the Complaint. The Answer and one copy must be filed with the Honorable Earldean V.S. Robbins, Administrative Law Judge, Office of the Chief Administrative Hearing Officer, and must also be served on the Complainant.

3. If the Respondent fails to file an Answer within the time provided, the Respondent may be deemed to have waived his/her right to appear and contest the allegations of the Complaint, and an Administrative Law Judge may enter a judgment by default along with any and all appropriate relief.

As set forth above, Respondent has not filed a timely Answer to the Complaint nor did its Answer/Response allege any good cause for such failure. No good cause to the contrary having been shown, in accordance with Section 68.6(b) of the Rules, Respondent is deemed to have waived its right to appear and contest the allegations of the Complaint. Absent a timely Answer the allegations of the Complaint are hereby deemed to be admitted as true, and I find there is no genuine issue as to any material fact. Therefore, Complainant's Motion For Default Judgment is granted.

On the basis of the entire record, I make the following:

Findings of Fact

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 herein called the Act, by adding a new Section 274A (8 U.S.C. 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, herein

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) provide that an employer must attest on a designated 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 individual is required to attest, on a designated form, as to employment authorization. The employer is required to retain, and make available for inspection, these forms for a specified period of time. Form I-9 is the form designated for such attestations. Section 274A(e)(5) provides for the imposition of a civil penalty of not less than \$100 and not more than \$1,000 for each individual with respect to whom a violation of 274A(a)(1)(B) occurred.

As set forth in the Complaint, Respondent has engaged in the following conduct:

(1) Failed to properly complete Section 2 of the Employment Eligibility Verification Forms (Form I-9) for the following individuals hired after November 4, 1986 for employment in the United States: Artemio Servin, Hector Anaya, Juan Preciado, Jorge Ugalde, Jose Rojas, Pedro Soto, Gilbert Viera, Noah Hefner and Jose R. Vasquez.

Conclusions of Law

1. Respondent has violated Section 274A(a)(1)(B) of the Act (8 U.S.C. 1324a(a)(1)(B)) by failing to properly complete Section 2 of the Form I-9 for Artemio Servin, Hector Anaya, Juan Preciado, Jorge Ugalde, Jose Rojas, Pedro Soto, Gilbert Viera, Noah Hefner and Jose R. Vasquez.:

Accordingly, IT IS HEREBY ORDERED:

(1) That Respondent pay a civil money penalty in the amount of \$250 for each of the nine violations found above; for a total of \$2,250.00.

(2) That the hearing previously scheduled is cancelled.

This Judgment by Default is the final action of the Administrative Law Judge in accordance with Section 68.51(b) of the Rules as provided in Section 68.52 of the Rules, and 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.

Dated: July 19, 1989.

EARLDEAN V.S. ROBBINS,
Administrative Law Judge