

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

United States of America, Complainant, v. David Ley Salido, Individually, and d/b/a David Ley Salido Rockwall Subcontractor, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100023.

DECISION AND ORDER GRANTING JUDGMENT

Statement of the Case

The Complaint in this matter was filed on January 13, 1989,¹ with the Office of the Chief Administrative Hearing Officer (OCAHO). On January 23 OCAHO issued a notice of hearing on the Complaint fixing May 2 as the hearing date. The notice of hearing with complaint attached was personally served on the Respondent on March 27, 1989.²

Under the applicable rules, Respondent was required to file an answer to the Complaint within thirty (30) days after the service of the Complaint. 28 CFR 68.6(a). In this instance, Respondent's answer was due on April 26.

No answer, timely or otherwise, having been filed, Complainant filed a motion for default judgment dated June 16. Thereafter, Complainant filed a motion for partial summary judgment dated June 28. Default is granted.

Findings of Fact

A. Applicable Rules and Precedent

Under the applicable rules, the failure of a 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.'' Where no timely answer is filed, the assigned judge

¹Unless shown otherwise, all other dates refer to the 1989 calendar year.

²Arrangements for the personal service of the complaint and notice of hearing here were made by the administrative law judge. It is recommended that OCAHO consider revision of 28 CFR 68.3(d) to the extent that imposes the burden of perfecting service of the complaint and notice of hearing on OCAHO or the assigned administrative law judge.

``may enter a judgment by default.'' 28 CFR 68.6(b). Moreover, 28 CFR 68.6(c)(1) provides, in part, that ``any [complaint] allegation not expressly denied shall be deemed admitted.''

The administrative law judge has discretion under 28 CFR 68.6(b) to grant a motion for default when filed or to issue an order to show cause. See U.S. v. Shine Auto, 89100180, July 14, 1989 slip dec., at pp. 2-3. And see generally, U.S. v. Koamerican Trading Corp., 89100092, June 19, 1989 slip dec. Where, as here, the latter course is chosen, the burden is on the respondent to provide good cause for the filing of a late answer. Failure of respondent to meet that burden and provide a late answer obliges the administrative law judge to grant the motion for default judgment. U.S. v. Shine Auto, Id.

B. Facts

Respondent has totally ignored the requirement to file an answer in this case notwithstanding ample warning concerning that requirement and the effects of failing to file an answer.

The Notice of Hearing personally served on March 27 advises on the front page that an answer to that attached Complaint is required within thirty (30) days and that the failure to file an answer within the time allowed may result in the entry of a default judgment.

On April 20, the tribunal rescheduled the hearing from May 2 as originally fixed in the notice of hearing to June 22 because the Complaint and Notice of Hearing was not properly served until March 27. The April 20 order rescheduling the hearing specifically calls attention to the fact that Respondent's answer was due April 26.

On June 19, the tribunal ordered the hearing rescheduled from June 22 to July 19. That order states that no answer had been filed and that Complainant had administratively advised the tribunal of its intention to file a motion for default judgment.

On June 21, Complainant's motion for default judgment was received. On June 27, an order to show cause why ``Complainant's motion for default judgment should not be granted on the ground that [Respondent] has failed to file a timely answer to the complaint'' issued. The order to show cause specifically calls attention to the fact that a timely answer was due on or before April 26.

On July 14, the tribunal issued an order postponing the hearing indefinitely pending consideration of Complainant's motions for default judgment and partial summary judgment.³

All of the foregoing orders and notices were served upon Respondent by certified mail to both of the addresses where Respondent has received mail in the past. Those addresses are: (1) 1028 Macadamia Circle, El Paso, Texas 79907; and (2) 139 Whittier, Apt. #1, El Paso, Texas 79915. In certain instances, the notices and orders were claimed; in other instances the notice or order was not claimed.⁴ The tribunal has been provided with no other address where notices and orders are to be served. No response of any kind has been received from Respondent to date.

On the basis of the foregoing, I find Respondent has had adequate notice of the progress of the proceeding generally and of the requirement to file an answer specifically. As Respondent has failed, after adequate notice, to file a timely answer or explain in any way his failure to do so, I further find that Respondent has waived his right to appear and contest the allegations of the Complaint. Hence, the allegations of the complaint are deemed to be admitted. Accordingly, Complainant's motion for default judgment is granted.

Conclusions of Law

1. By hiring Rafael Dominguez Blanco for employment in the United States after November 6, 1986, knowing Rafael Dominguez Blanco was an alien not lawfully admitted for permanent residence or was not authorized by the Immigration and Nationality Act or the Attorney General to accept employment, Respondent violated 8 U.S.C. 1324a(a)(1)(A).

2. By failing to complete Form I-9 to verify the employment eligibility of Rafael Dominguez Blanco after November 6, 1986, Respondent violated 8 U.S.C. 1324a(a)(1)(B).

³The motion for partial summary judgment seeks summary judgment on the merits and a hearing on the amount of the civil monetary penalty. Because of the decision herein, I find it unnecessary to rule on the motion for partial summary judgment. Moreover, given the circumstances found here, it would not be a prudent use of the tribunal's finite resources to conduct even a limited hearing without some minimal assurance Respondent would appear.

⁴The following documents, served by mail following personal service of the complaint and notice of hearing, were not claimed: (1) the April 20 order rescheduling hearing mailed to the Macadamia address; (2) The June 19 order rescheduling hearing mailed to both addresses; and (3) the June 27 order to show cause mailed to the Whittier address. No report of delivery has been received by the tribunal concerning the July 14 order postponing hearing nor has that document been returned.

Remedial Action

Having concluded that Respondent violated 8 U.S.C. 1324a(a)(1)(A) and (B) in connection with the employment of Rafael Dominguez Blanco after November 6, 1986, the Order entered below requires Respondent to cease and desist from such violations and to pay a civil monetary penalty prescribed by the Act.

In its motion for default judgment, Complainant seeks to compel Respondent to pay the fine provided in the Notice of Intent to Fine incorporated as a part of the Complaint. In that Notice, Complainant set the fine at \$1000 for the hiring violation and \$500 for the paperwork violation. The Complaint contains no allegation that Respondent had been previously adjudged to have violated the Act or had voluntarily consented to the entry of a final order finding that Respondent had violated the Act.

The penalty specified by the statute for first hiring violations is not less than \$250 and not more than \$2000. 8 U.S.C. 1324a(e)(4)(A)(i). The penalty specified by the statute for paperwork violations is not less than \$100 and not more than \$1000. 8 U.S.C. 1324a(e)(5). With respect to paperwork violations, the statute requires due consideration for the size of the employer's business, the employer's good faith, the seriousness of the violation, whether or not the employee involved was an unauthorized alien, and the history of previous violations, Id.

Appended to Complainant's motion for partial summary judgment are the affidavits of three senior Border Patrol agents, J.R. Ash, Amancio Cantu, and Crispin Pena, Jr.⁵ The sum of those affidavits reflect that Respondent is a very small business often employing casual labor on an intermittent basis. The affidavits further reflect that in August 1988, a deportable alien who claimed to be in Respondent's employ was apprehended while at work in or about El Paso by the Border Patrol agents. As a consequence, agents of the Border Patrol visited the Respondent for the purpose of calling attention to the provisions of the Immigration Reform and Control Act of 1986 (Act) and to deliver a written account of the incident involved.

Approximately 3 weeks later, Rafael Dominguez Blanco, the individual involved here, was apprehended at work on a construction project and deported as an illegal alien. That individual provided a written statement to the Border Patrol wherein he acknowledged that he was not authorized to work in the United States, claimed

⁵No response has been received to the motion for partial summary judgment and no information has been provided to the tribunal otherwise which in any way rebuts or contradicts the assertions made therein.

that he had been employed by Respondent on the morning of his apprehension and further asserted that Respondent had made no inquiry concerning his employment eligibility in the United States.

On the basis of the unrebutted information provided by Complainant, I find that the fines levied for both the unlawful employment violation and the paperwork violation alleged in the Complaint are not unreasonable. Although it appears that Respondent's operation is quite small, the violations appear serious in that they involved the employment of an illegal alien shortly after Respondent was instructed and warned concerning the requirements of the Act. From the information presently before me, the violations involved reflect a deliberate disregard of the Act. In these circumstances, the fines sought will be affirmed and a cease and desist order will be entered.

ORDER⁶

Respondent, including its officers, agents, successors and assigns, are hereby ordered to:

1. Cease and desist knowingly hiring, recruiting or referring for a fee, or continuing to employ, any alien not lawfully authorized to work in the United States.
2. Cease and desist employing any individual in the United States without timely completing Form I-9.
3. Pay a civil money penalty in the amount of \$1,500.00 for the violations found above.

IT IS FURTHER ORDERED that the hearing heretofore postponed indefinitely be, and the same hereby is, cancelled.

DATED: August 8, 1989.

WILLIAM L. SCHMIDT
Administrative Law Judge
901 Market St., Suite 300
San Francisco, CA 94131
(415) 995-5212

APPENDIX
Requests For Review

This Decision and Order is the final action of the administrative law judge in accordance with 28 CFR 68.51(b). Under 28 CFR 68.52, this Order shall become the final order of the Attorney General unless within thirty (30) days from the date of this Decision and

⁶See attached ``Appendix'' concerning your right to appeal this Order.

Order the Chief Administrative Hearing Officer shall have modified or vacated it.

PLEASE TAKE NOTICE that, pursuant to 28 CFR 68.52(a), any party may file with the Chief Administrative Hearing Officer within five (5) days of the date of this Decision a written request for review of any issue of law together with supporting argument. Under 28 CFR 68.5(a) and (d)(2), Saturdays, Sundays and holidays shall be excluded from the computation of prescribed time periods which are seven (7) days or less and five (5) days may be added to the period prescribed for filing a written request for review where, as here, the Decision and Order is served by mail. Accordingly, the request for review here is due on or before August 21, 1989.

Address for all requests for review to: CHIEF ADMINISTRATIVE HEARING OFFICER, U.S. Department of Justice, Executive Office for Immigration Review, 5113 Leesburg Pike, Suite 310, Falls Church, Virginia 22041.