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

United States of America, Complainant, v. Shine Auto Service, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100180.

ORDER DENYING DEFAULT JUDGMENT

I. INTRODUCTION AND STATEMENT OF CASE

On April 7, 1989, Complainant, United States of America, by and through its Attorney, Cathy A. Auble, filed a Complaint against Shine Auto Body, Respondent, alleging three violations of Section 274A of the Immigration and Nationality Act (the Act), one violation for knowingly hiring or in the alternative, continuing to employ an unauthorized alien, and two violations for failure to prepare the employment eligibility verification forms. The Complaint requested a civil money penalty of two thousand dollars ($2,000.).

By Notice of Hearing dated April 17, 1989, the Office of the Chief Administrative Hearing Officer (OCAHO) advised Respondent of the filing of the Complaint, of my assignment as Administrative Law Judge to the case, of Respondent's right to file an answer with me within thirty days, and the date and place of hearing, August 1, 1989, at Salt Lake City, Utah.

On June 12, 1989, I received Complainant's Motion for Entry of Default Judgment, made on the grounds that Respondent had failed to file an Answer to the Complaint. By usual practice, an Order to Show Cause Why Default Should Not Issue is issued by this office after receipt of such a default motion. However, on June 12, 1989, Respondent had submitted an Answer through his recently retained Attorney, Todd S. Richardson. Out of keeping with my usual practice, because I had already received an Answer from the Respondent, I did not issue an Order to Show Cause. Instead, I accepted Respondent's Answer as timely, and denied complainant's Motion for Default Judgment.

Complainant opposed Respondent's attempt to file a late answer and, apparently interpreting my denial of the motion as a final Order, requested a review of the order from the Office of the Chief

Administrative Hearing Officer on June 26, 1989. The Acting Chief Administrative Hearing Officer, finding my Order reviewable pursuant to Section 274A(e)(6) of the Act, issued a Vacation By the Chief Administrative Hearing Officer of my order denying default judgment on July 14, 1989.

The Vacation by the Acting Chief found that I had acted in disregard of the time limitation in 28 C.F.R. 68.6(a), and returned the case to me status quo ante. Accordingly, Complainant's Motion for Default Judgment was again before me. As set out in the Vacation by OCAHO, I then had to ``grant Complainant's motion or issue an Order to Show Cause Why Default Should Not Issue.'' I chose the latter.

The Order to Show Cause was issued on July 18 1989. As stated in the Order, to have done less would have denied the Respondent the opportunity to request permission to file a late answer or to proffer good cause for being late. On August 2, 1989, Respondent filed a Request for Leave to File a Late Answer, an Amended Answer, and Respondent's Answer to the Order.

The hearing date, having been set for August 1, 1989, was subsequently continued indefinitely. In the Pre-hearing Telephonic Conference conducted on August 28, 1989, the parties were requested to remain in contact with one another, to explore any possibility of settlement, and to file a joint status report with this office. On August 29, 1989, Complainant advised me by letter the parties had been unsuccessful at reaching a settlement and that settlement was unlikely. Additionally, Complainant requested a decision on its Motion for Default Judgment.

Pursuant to the discretionary authority granted me by 28 C.F.R. Section 68.6(b), it remains my view that Complainant is not entitled to Default Judgment. Before discussing the specific reasons for this decision in the instant case, I note that default is a harsh measure, and that contemporary procedural policy encourages trial on the merits. See e.g., Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962).

This preference for trial on the merits is clearly reflected in prior OCAHO cases. For example, the ALJ in United States of America v. Tiki Pools, Inc., OCAHO No. 98100250, August 1, 1989, (Schneider, Jr.) states:

> ``[i]t is well established that under modern procedure, defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party so as to allow the case to be tried on the merits,'' citing Davis v. Parkhill-Goodloe Co., supra.

Similarly, in his order of inquiry to the parties in United States of America v. Koamerican Trading Corp., OCAHO No. 89100092,

August 14, 1989, (Morse, J.), the ALJ made the statement, ``[m]moreover, American Jurisprudence disfavors defaults. . . .'' He cited Livingston Powdered Metal, Inc., v. NLRB, 669 F.2d 133 (3rd Cir. 1982), in which the Court held that refusing to accept an employer's answer, which was mailed on the due date but received several days later, was an abuse of discretion where the answer alleged defenses deserving evaluation, late filing would not have delayed hearing, and other equities were present.

The Livingston Court also distinguished between summary judgment, in which there is no dispute about the relevant facts, and default, in which the defendant's contentions are not considered and the ex parte allegations of the adversary are accepted as true. I am mindful that the possibility an injustice may occur is much more likely in default where controversies are decided upon a procedural technicality instead of a ruling on the merits.

The policy in favor of trial on the merits is supported by the prevailing view that if a respondent appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default. See, 10 Wright and Miller, Section 2682, at 411. In this regard, I view Respondent's Answer, although late, to ``indicate a desire to contest the action.''

This position is in harmony with the language of the regulations at 28 C.F.R. Section 68.6(b). The discretionary language of the regulation makes clear that the party making the request is not entitled to a default judgment as of right, even when respondent is technically in default. It is my view that 28 C.F.R. Section 68.6(b) requires that a default judgment be not only technically correct, but also a fair and equitable way to resolve the proceeding.

Accordingly, Complainant's Motion for Default Judgment is denied for the following reasons:

II. DISCUSSION

The relevant regulation governing questions involving the use of default judgments in IRCA proceedings are contained in the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens at 28 C.F.R. Section 68 et. seq. Section 68.6(b), reads in pertinent part:

> 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. (Emphasis added).

It must be understood that the authors of the federal IRCA regulations were cognizant of the difference between shall and may,

and fully intended to give discretion to the ALJ in the matter of default judgments. However, as Complainant pointed out in its Memorandum in Support of its Request for Review of the original denial, the regulations do not set out the specific criteria upon which the ALJ's discretion will be based when a tardy Respondent attempts to file a late answer.

The regulations, at 28 C.F.R. Section 68.1, provide for such a void, stating:

> The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation. (Emphasis added).

Default judgment is a situation which is provided for by the rules and, therefore, does not require application of the Federal Rules of Civil Procedure (FRCP). Nonetheless, guidance on the discretionary criteria to be applied to a tardy Respondent might well be sought in the corresponding federal rule, FRCP 55(c). However, as the following discussion will show, neither do the federal rules set out the specific criteria which would apply in the instant case. FRCP 55(c) states:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Because a judgment by default has not yet issued in the instant case, the unspecified criteria of ``good cause'' is applicable. The FRCP 60(b) criteria of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc., to be applied in the setting aside of a judgment of default which has already been entered, do not apply.

The different treatment of the ``default entry'' and ``setting aside a default'' in the federal rules frees a court considering a motion to set aside a default entry from the restraints of Rule 60(b) and entrusts the determination to the discretion of the court. See, 10 Wright and Miller, Sec. 2694, at 493. When determining whether to set aside default entries as well as default judgments, courts uniformly consider whether defendants have a meritorious defense, the timing of the motion for relief, and the level of prejudice that may occur to the non-defaulting party. However, even these requirements are liberally interpreted when used on a motion for relief from a default entry. Id. at 494.

Fortunately, we now have the benefit of the language of the Vacation by OCAHO, in which the Office of the Chief Administrative Hearing Officer, at page 3, sets out what a tardy Respondent must do:

> Notwithstanding its tardiness in filing, Respondent failed to request permission to file a late answer, proffered no good cause for being late with its answer, nor did it raise any defense as to the reason it was late. . . . Based on the Respondent's reply, the Administrative Law Judge shall determine whether the respondent has met the threshold for good cause. If the Administrative Law Judge determines that the Respondent possessed the requisite good cause for failing to file a timely answer, then the Administrative Law Judge may allow the Respondent to file a late answer.

While still employing a nonspecific ``good cause'' criterion, the OCAHO language provides a useful outline of criteria within which to evaluate Respondent's reply.

A. Request Permission to File Late Answer

In response to my Order to Show Cause of July 18, 1989, Respondent filed a Request for Leave to File a Late Answer on August 2, 1989. The motion was accompanied by Respondent's Amended Answer and Respondent's Answer to Order to Show Cause. The documents were submitted by Todd S. Richardson, Respondent's recently retained counsel. The pleadings contained explanations for the failure of Allen Zitting, manager of Shine Auto Service, to Answer during the time period he was acting pro se, and for Attorney Richardson's failure to request leave to file a late answer when he filed the original answer.

Respondent's original answer failed to request leave to answer. He explained he believed such a request was unnecessary because a default judgment had not yet been issued. Respondent's counsel believed that an answer could be filed until the time that the Administrative Law Judge actually entered the default. Accordingly, the Answer was filed immediately after receipt of the Motion for Default, without requesting leave to file.

Respondent's Amended Answer was accompanied by a request to file a late Answer. In his document, Counsel for Respondent indicated he was not convinced that such a request was required.

B. Reasons for Late Answer

Respondent did not retain counsel until after the thirty day answer period had expired. Counsel for Shine Auto Body was at the business premises of Shine on Saturday, June 10, 1989, for other personal business when Allen Zitting asked for some help in interpreting the Government's motion for default judgment. Mr. Zitting was under the impression that no written answer was required in that he had requested a hearing in writing. Counsel for Shine explained that a written answer was required and agreed to file an answer as soon as possible. The original answer was prepared and filed the following Monday.

C. Proffer of Good Cause

Failure to Timely Answer Complaint

Counsel explained that while acting pro se, Mr. Zitting was under the impression that no written answer was required because he had already requested a hearing in writing. He contended the misconception was caused by the Notice of Intent To Fine, which stated:

> [y]ou may submit to the Service, either in person or by certified mail, at the address listed above, a written answer responding to each allegation listed in this notice.

Respondent believed the only mandatory written request was the one required for a hearing. Accordingly, he requested a hearing in writing on March 29, 1989.

Additionally, Respondent stated that because the Notice of Hearing from the Office of the Chief Administrative Hearing Officer stated, ``[t]he Respondent has the right to file an Answer to the Complaint and to appear in person, and give testimony at the place and time fixed for the hearing,'' he did not construe this language as making the filing of a written answer within 30 days a condition to holding the hearing and allowing him to appear in person to give testimony.

Respondent argued that the conjunction ``and'' between the right to answer and the right to appear in person and give testimony was unqualified. Since the NOH gave him a hearing date of August 1, 1989, he believed all that was required was his attendance at the scheduled hearing. He was mistaken. When he learned of the written Answer requirement from his counsel, an answer was immediately filed.

Apparently, Mr. Zitting was not the only Respondent to be confused by the language of the NOH. The format of the Notice of Hearing has been revised by OCAHO since Mr. Zitting received his Notice of Hearing in April of 1989. The NOH contains the additional sentence:

> This required answer is in addition to any answer filed in regard to the Notice of Intent to Fine issued by the INS.

This revision was found necessary on a national level due, it would appear, to the high possibility of misunderstanding by a respondent in the previous format. Granted, the possibility of mistake may have been greater with a pro se respondent than with a represented respondent. Nonetheless, I am persuaded that the instant Respondent, acting pro se, was genuinely mistaken.

In light of this change, I acknowledge the earlier case cited by complainant in its Reply, in which the ALJ found the language of the NOH not to be confusing. See, United States of America v. Dolphin Auto Beauty Salon, OCAHO Case No. 88100137, January 25, 1989, (Robbins, J.). With due respect I note the facts of Dolphin and the instant case are not the same, that Dolphin is not controlling, and that the current NOH language is, in my view, substantially more clear.

Failure to Timely Respond to Motion for Default

It does not appear that Respondent failed to timely respond to the Motion for Default. The Motion for Default is dated June 8, 1989. Respondent's original answer, dated June 12, 1989, was prompted by his receipt of the Motion for Default. Respondent's discussion with Attorney Richardson resulted in an answer being filed as soon as possible.

Adequacy of Pleadings

As Respondent's Attorney points out, the Government's Complaint incorporates by reference the original Notice of Intent to Fine. Respondent contends the NIF contains no substantive allegations except to make reference to Exhibits one and two attached thereto. Although Respondent believes it is being held to a higher standard of pleading than is the Government, Respondent has appropriately amended its answer. The Amended Answer specifically denies the allegations of the Complaint.

Respondents Failure to Effect Service of Response Documents Upon Complainant

Complainant asserted that Respondent failed to serve documents upon the Complainant and requested the failure be treated as an adverse factor in deciding the discretion issue. This is an issue in which the facts are not clear. Additionally, I granted Complainant's Motion for A Copy of Respondent's Response on August 11, 1989, and granted Complainant's Request for an Extension of Time to File a Reply on August 14, 1989. Therefore, there appears to be no resulting prejudice to the Complainant.

C. III. CONCLUSION

In view of the above criteria, it continues to appear to me that it would not be equitable to close off the instant proceeding without hearing the contentions of Respondent. Equity demands a resolution of the presently unresolved issues. It is, nonetheless, possible that a motion for partial summary decision by the Complainant may be appropriate. Such a motion would require supporting documents. Further, Complainant may also want to request stipulations of the Respondent, where appropriate, to reduce the amount of time necessary to try any remaining unresolved issues.

VI. ORDER

ACCORDINGLY:

1. Complainant's Motion for Entry of Default Judgment is denied.

2. The parties are referred to the Order Directing Pre-hearing Procedures issued on June 16, 1989.

3. A prehearing telephonic conference will be arranged by this office.

IT IS SO ORDERED This 11th day of October, 1989, at San Diego, California.

E. MILTON FROSBURG
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