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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding Case No. 92A00040
DIAMOND CONSTRUCTION, INC., Respondent.	)	

FINAL DECISION AND ORDER
(September 8, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William F. McColough, Esq. for Complainant.

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA)[1] adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment and/or the record-keep-ing verification requirements of the employer sanctions program.

II. *Procedural Summary*

A. Background Information

On February 19, 1992, the Immigration and Naturalization Service (INS or Complainant) filed a complaint against Diamond Construction, Inc. (Diamond or Respondent), a Massachusetts corporation. Complainant alleged one substantive unauthorized employment count and

[1] Pub. L. No. 99-603, 100 Stat. 3359 (1986), enacted, as Section 101 of IRCA, Section 274A of the Immigration and Nationality Act of 1952 as amended, codified at 8 U.S.C. §1324a, amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

three separate paperwork counts. Respondent timely moved for leave to file a late answer. On April 2, 1992, I issued an order denying the motion and directing that the answer be filed not later than April 16, 1992. Respondent filed its answer on April 16, 1992. On May 6, 1992, the parties and the bench participated in the first prehearing conference. During the conference INS represented, inter alia, that it would file a motion to strike portions of the answer. Respondent represented that it would file an amended answer. A second conference was scheduled for August 4, 1992.

On May 11, 1992, INS filed its motion to strike. Respondent did not respond. By order dated June 15, 1992, I granted the motion in part and denied it in part. That order is incorporated herein by reference as fully as if set forth verbatim.

On July 13, 1992, counsel for Respondent filed a motion to withdraw representation. The stated reasons for the motion were counsel's inability to "coordinate properly" with Respondent's principal "in regard to his pending immigration case;" the client's failure to respond to counsel's "requests for his assistance," including his unsuccessful efforts to obtain responses to Complainant's discovery; and counsel's general inability to communicate with the client. Having forwarded copies of all pleadings and left messages on the client's telephone answering machine without response, counsel concluded that Respondent "has ceased operations." Counsel asserted that he could not respond professionally to Complainant's case, absent "participation of the responsible officer of the company." On August 3, 1992, Complainant opposed the motion so that Respondent's counsel would remain available for service of process "until such time as substitute counsel appears."

During the August 4 conference, Complainant withdrew its objection to withdrawal of Respondent's counsel and I granted counsel's motion. Complainant also made an oral motion to compel responses to outstanding discovery requests previously served upon Respondent, including requests for admissions and for authentication of documents. 28 C.F.R. §68.23 (1991). I granted the motion. I directed Respondent to provide Complainant's counsel with a written response to the outstanding discovery requests, not later than August 17, 1992. The August 4, 1992 Second Prehearing Conference Report and Order, Including Order to Produce, cautioned Respondent "that failure adequately to comply with this order to respond to the outstanding discovery may result in certain actions against Respondent and in

favor of Complainant's case, as contemplated by pertinent regulation, i.e., 28 C.F.R. §68.23(c)."

The August 4 order retained the previously established dates of hearing, scheduled to begin in Boston, Massachusetts on September 30, 1992. The order noted, however, "that Complainant may elect to seek summary decision on the basis of the documentary record depending on the response, or lack thereof, to the outstanding discovery." A third telephonic prehearing conference was set for September 15, 1992. The August 4 order was served by mail at Respondent's address of record in a postage prepaid wrapper. The order has not been returned undelivered by the Postal Service.

On August 20, 1992, I issued an Order to Show Cause, served in similar fashion. It has not been returned undelivered by the Postal Service either. That order recited that "[T]elephonic inquiry by my office to Complainant informs that . . . no responses have been received by Complainant. No communication from Respondent has been received by my office." Referring to the August 4 order and Respondent's failure to comply, the August 20 order stated as follows:

> On reflection, considering the waste of litigant, judicial and other public administrative resources in arranging and preparing for a hearing absent any response by Respondent to my August 4 order, this order cuts short the procedure previously contemplated. Instead, I issue this direction, sua sponte, to Respondent to file a showing of good cause why its request for hearing should not be dismissed for failure to respond to the August 4 order. 28 C.F.R. §68.37(b) (1991).

Quoting subsection 37(b) of the rules of practice and procedure in adjudicatory proceedings before administrative law judges of this Office, I cautioned that "I am authorized to dismiss the request for hearing without further opportunity by Respondent to explain the failure to obey the August 4 order." Instead, however, the Aug order stated that Respondent would be permitted "to file not later than Monday, August 31, 1992, a statement showing good cause, if any it has, why it failed to respond to the August 4, 1992 order ust 20 ." Respondent was advised,

> that its statement in response to this order will not be considered to be timely and adequately filed unless it is accompanied by responses to the outstanding discovery requests. Respondent is "cautioned that failure to make a timely filing in response to this order probably will lead to dismissal of its request for hearing. Respondent is cautioned also that it is within my discretion to determine whether its explanation is sufficient to avoid dismissal of the complaint, and that I may dismiss its request for hearing if I do not deem adequate its explanation for failure to obey the August 4 order.

> Failure timely and adequately to respond to this order also authorizes judgment by default against the disobedient party, as contemplated by Federal Rule of Civil Procedure 37(b)(2)(C). See 28 C.F.R. §68.1 (Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by other applicable statute, executive order, or regulation").

Having received neither a response to the Order to Show Cause nor to the August 4 order, I issue this Final Decision and Order.

II. *Discussion*

The rules of practice and procedure and prior issuances in this case sufficiently apprised Respondent of the peril of its failure to respond. It has been properly served with the August 4 and 20 orders. 28 C.F.R. §68.6(a) (1991). As held in an OCAHO case involving a corporate respondent's similar failure to respond, such omission "cannot be permitted to frustrate sound case management." U.S. v. El Dorado Furniture Mfg. Inc., 3 OCAHO 417 (4/2/92) at 3. As in El Dorado, by virtue of Respondent's failure to respond to the Show Cause I deem Respondent to have abandoned its request for hearing.

> A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned . . . a request for hearing if:
>
> (1) A party or his representative fails to respond to orders issued by the Administrative Law Judge;

28 C.F.R. §68.37(b) (1991).

See also, U.S. v. Nu Line Fashions, Inc., 1 OCAHO 147 (3/30/90). Accord, Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92) (a case under 8 U.S.C. §1324b).

Moreover, Respondent's failure to respond to the August 4 order to compel discovery responses renders it vulnerable to sanctions. These sanctions are tantamount to proof of Complainant's case and to default of its own case. Palancz, 3 OCAHO 443; U.S. v. Taewon Fashion Corp., OCAHO Case No. 90100231 (11/30/90).

III. *Ultimate Findings, Conclusions, and Order*

The hearing and prehearing conference previously scheduled are canceled.

In addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That Diamond employed in the United States after November 6, 1986 the six individuals identified in Count I of the complaint, in violation of 8 U.S.C. §1324a(a), as more particularly described in that count.

2. That Diamond employed in the United States after November 6, 1986 the fourteen individuals identified in Count II of the complaint without preparing and/or presenting employment verification forms (Forms I-9) for them, in violation of 8 U.S.C. §1324a(a)(1)(B) as more particularly described in that count.

3. That Diamond employed in the United States after November 6, 1986 the ten individuals identified in Count III of the complaint without properly completing section 2 of the employment verification forms (Forms I-9) for them, in violation of 8 U.S.C. §1324a(b)(1) as more particularly described in that count.

4. That Diamond employed in the United States after November 6, 1986 the two individuals identified in Count IV of the complaint without properly completing section 2 of the employment verification forms (Forms I-9) for them, and without ensuring that the two individuals properly completed section 1 of the Form I-9, in violation of 8 U.S.C. §§1324a(b)(1) and (2) as more particularly described in that count.

5. That Diamond is required to pay a civil money penalty in the sum of $7,800.00 for the violations in Count I, in the sum of $9,860.00 for the violations in Count II, in the sum of $5,200.00 for the violations in Count III, and $1,220.00 for the violations in Count IV, i.e. a civil money penalty in the aggregate sum of $24,080.00.

6. That Diamond will cease and desist from further and any violations of 8 U.S.C. §1324a.

7. That this Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(a) (1991). As provided at 28 C.F.R. §68.53(a)(1), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer,

shall have modified or vacated it. Except for ministerial or accounting corrections, the judge no longer retains power over this case. As to judicial review, see also 8 U.S.C. §1324a(e)(8), 28 C.F.R. §68.53(a)(3) (1991).

SO ORDERED.

Dated and entered this 8th day of September, 1992.

MARVIN H. MORSE
Administrative Law Judge