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. 92A00183
M.C.S.M. INC. D/B/A	)	
TRE FRATELLI RESTAURANT,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(August 2, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Donald V. Ferlise, Esq., for Complainant.
Natale F. Carabello, Esq., for Respondent.

I. *Procedural Background*

On August 17, 1992, the United States, by Complainant Immigration and Naturalization Service (INS), filed a complaint against M.C.S.M. Inc. d/b/a Tre Fratelli, (Respondent). The three count complaint alleges that Respondent violated 8 U.S.C. §1324a as follows: Count I, by hiring three named individuals not authorized for employment in the United States; Count II, by failing to prepare employment eligibility verification forms (Forms I-9) for 12 named individuals including the three named in Count I; and Count III, by failing to perfect Forms I-9 for nine named individuals.

The complaint, served on Respondent and its counsel, was received by counsel on September 3, 1992. On October 5, 1992, Respondent filed its answer to the complaint. An initial telephonic prehearing conference, scheduled by agreement confirmed by my order dated December 9, 1992, was held on January 12, 1993. As confirmed by the First Prehearing Conference Report and Order of February 1, 1993, "efforts to contact Respondent's counsel [to schedule a second confer-

ence] have been unavailing." Accordingly, that order scheduled the second conference for February 18, 1993.

The February 18 report of that conference noted that unless the parties "agree on a date for late responses by Respondent to outstanding discovery by Complainant, counsel for Complainant anticipates filing of motions which address failure to respond." A third telephonic prehearing conference was scheduled for March 25, 1993 in preparation for an evidentiary hearing set for April 27-28.

On February 19, 1993, INS filed its Motion to Compel Response to Discovery.

On March 9, 1993, the office of counsel for Respondent, advising that the attorney planned to be out of the country on the date of the third conference and that INS counsel agreed to a continuance, asked that the conference be postponed to the week beginning March 29. I changed the date for the conference to March 30, 1993.

At the prehearing conference, INS reported that the Government had not received responses to its discovery requests. Respondent did not dispute Complainant's report. Respondent, by counsel, instead stated that it relies on its answer to the complaint. Accordingly, as confirmed by the report of the conference,

> I granted the Government's Motion to Compel Response to Discovery, filed on February 19, 1993. That motion set out the sanctions enumerated in 28 C.F.R. §68.23. In light of the above result, the Government intends to file an appropriate motion and Respondent indicates that its response to the motion may address the amount of civil money penalties.
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> Because of the anticipated motion practice, the evidentiary hearing dates previously reserved, i.e. April 27 and 28, are canceled, as agreed among counsel and the bench. Should an evidentiary hearing be deemed necessary at a later date, new dates will be reserved at that time.

Third Prehearing Conference Report and Order Granting Government's Discovery Motion (3/30/93).

On April 23, 1993, INS filed an April 22, 1993 motion for summary decision based in part on Respondent's alleged failure to respond to the outstanding discovery by virtue of which inferences adverse to Respondent might be drawn. No response to the motion having been filed, on July 7, 1993 I issued an Order to Show Cause:

> Respondent is in default of its obligation to file a timely response, if any, to Complainant's motion. 28 C.F.R. §68.11(b). This Order provides Respondent an opportunity to show cause, if any it can, with an accompanying response to the motion. Said response to this order to show cause accompanied by its proposed response to the motion for summary decision will be timely if filed not later than July 22, 1993. Failure to provide a satisfactory explanation and to respond to the motion will be deemed an abandonment by Respondent of its request for hearing. 28 C.F.R. §68.37(b).

II. *Discussion*

No response to the Show Cause or any communication having been received from or on behalf of Respondent or its counsel, this decision and order finds that Respondent has abandoned its request for hearing, and enters judgment for Complainant.

Early in the development of OCAHO jurisprudence,

> failure of parties to respond to orders of judges was treated as equivalent to failure to appear for hearing, resulting in default. Williams v. Deloitte & Touche, 1 OCAHO 258 (11/1/90) at 5-6; U.S. v. Nu Line Fashions, 1 OCAHO 147 (3/30/90) at 3-4; Troncoso v. Ferlin Service Industries, 1 OCAHO 110 (12/5/89).

Udofot v. Vapor Technologies, Inc., 3 OCAHO 506 (4/1/93) at 7.

At the time those early OCAHO cases were decided, OCAHO rules of practice and procedure provided for dismissal of a party's case for an unexcused failure to appear at the time and place fixed for hearing. The rules did not then address specifically failure to adhere to orders of the judge; rather, dismissals for such omissions were issued in the nature of default judgments.

Title 28 C.F.R. §68.37(b)(1), added in 1991, explicitly authorizes dismissal of a request for hearing, authorizing judgment for INS, where "[A] party or his or her representative fails to respond to orders issued by the Administrative Law Judge." It is axiomatic that a party's unexplained failure to respond to pleadings of an opponent, and, even more, such dereliction with respect to orders of the judge "cannot be permitted to frustrate sound case management." U.S. v. El Dorado Furniture Mfg. Inc., 3 OCAHO 417 (4/2/92) at 3. Accord U.S. v. Diamond Construction, Inc., 3 OCAHO 451 (9/8/92). In context of cases under 8 U.S.C. §1324b, it has been held that

> The risk of not responding to judicial orders was clarified by explicitly raising [by means of the 1991 revision promulgating §37(b)(1)] such failure to the same level as one of the preexisting sanctions for failure to appear at hearing, i.e., dismissal of the complaint. As explained in the preamble to that revision, '[T]his provision allows an

> Administrative Law Judge more authority to dismiss a case where a complainant for whatever reason, has seemingly abandoned his complaint.' 56 Fed. Reg. 50049, 50051 (1991).

Udofot v. Vapor Technologies, Inc., 3 OCAHO 506 at 7.

See also U.S. v. Landscapes by Suzanne, OCAHO Case No. 92A00238 (7/26/93); U.S. v. Hui, 3 OCAHO 479 (12/18/92) at 3; U.S. v. McDonnell Douglas Corp., OCAHO Case No. 90200363 (8/28/92) (Order Dismissing Charging Party David Martin); Palancz v. Cedars Medical Center, 3 OCAHO (8/3/92) (applying also Federal Rule of Civil Procedure 37(b)); Egal v. Sears Roebuck and Co., 3 OCAHO 442 (7/23/92) at 12, n. 9 (dicta), Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/92).

III. *Ultimate Findings, Conclusions, and Order*

The July 7, 1993 order provided fair warning that failure to respond by July 22, 1993 "will be deemed an abandonment by Respondent of its request for hearing. 28 C.F.R. §68.37(b)." Moreover, the procedural history of this case demonstrates Respondent's unwillingness and/or inability to defend against the complaint. Accordingly, I find and conclude that Respondent has abandoned its request for hearing.

The hearing previously scheduled is canceled.

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

1. That Respondent employed in the United States after November 6, 1986 the three 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 Respondent employed in the United States after November 6, 1986 the twelve 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 Respondent employed in the United States after November 6, 1986 the nine individuals identified in Count III of the complaint without properly completing section 2 of the employment verification

forms (Form I-9) for them, and without ensuring that the nine 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.

4. That Respondent is required to pay a civil money penalty in the sum of $3,000.00 for the violations in Count I, and the sum of $6,000.00 for the violations in Count II, $4,500.00 for the violations in Count III, i.e., a civil money penalty in the aggregate sum of $13,500.00.

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

6. 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. §69.53(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.R.F. §68.53(a)(3) (1991).

SO ORDERED.

Dated and entered this 2nd day of August, 1993.

MARVIN H. MORSE
Administrative Law Judge