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

December 8, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00104
R & M FASHION INC., Respondent.	)	

PREHEARING CONFERENCE REPORT

I. Introduction

A telephonic prehearing conference (PHC) was held in this case at 10:00 a.m. Eastern Time on December 6, 1995. Complainant was represented by Jason Raphael, Esq., and Respondent was represented by Juan Rivera, Esq. During the conference I heard oral argument on Complainant's motion for default judgment and motion to strike the answer and affirmative defenses which were filed on August 28, 1995 and October 24, 1995 respectively. A court reporter was present in my office to record the PHC and a transcript will be prepared and may be ordered by the parties. This report is prepared pursuant to 28 C.F.R. §68.13(c) and summarizes the matters discussed at the conference, but the transcript will serve as the official record of the PHC.

II. Procedural History

During the conference I discussed the procedural history of this case, especially with respect to the Complainant's motions. The complaint in this case was served on June 30, 1995 and was received by respondent on July 7, 1995; therefore, the answer was due not later than August 7, 1995. *See* 28 C.F.R. §68.9(a). When an answer was

not filed, Complainant, on August 28, 1995, filed a motion for default. On September 21, 1995 the Court issued an Order Noting Default and Requiring Respondent to Show Cause Why the Motion for Default Judgment Should not be Granted (hereinafter Show Cause Order). On October 10, 1995 Respondent filed an answer to the complaint, but did not otherwise respond to the motion for default. On October 24, 1995 Complainant filed another motion reasserting its motion for default and moving to strike the affirmative defenses (hereinafter motion to strike).

III. Issues

A. *Timeliness of Respondent's response to the Show Cause Order*

In the points and authorities attached to the motion to strike, Complainant contended that Respondent did not respond in a timely manner to the Show Cause Order. The Show Cause Order was dated September 21, 1995 and required that a response be served within twenty days. The answer was served by Federal Express on October 10, 1995 and was filed with the Office of the Chief Administrative Hearing Officer (OCAHO) on October 12, 1995. I ruled that since the Show Cause Order required that the response be *served*, not filed, within 20 days, Respondent had timely responded to the Show Cause Order.

B. *Good Cause for Late Filed Answer*

Aside from the timeliness of the response to the Show Cause Order, the Rules of Practice require that the answer be filed within 30 days of the date the complaint is served. 28 C.F.R. §68.9(a). In this case the answer was due not later than August 7, 1995 but was not filed until October 12, 1995, over two months late. Complainant asserts that Respondent has failed to show good cause for the late filing and that Complainant has been prejudiced by the delay in serving an answer. Respondent's counsel asserted that the Respondent is an unsophisticated small business, was trying to settle the case and that the relatively short delay should be excused.

I did not rule on the motion for default judgment or make a ruling as to whether good cause had been shown. I reserved decision on the motion until after December 21, 1995, when Complainant is to file a status report on settlement negotiations (see below). However, I do note that default judgments are disfavored in the law. Generally the

Courts have held that a default judgment only should be used when the inaction or unresponsiveness of a particular party to the case causes the action to halt. *See H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). The preferred disposition of any case is upon its merits and not by default judgment. *See Gomes v. Williams,* 420 F.2d 1364 (10th Cir. 1970). A manifested intent to defend oneself in an action can serve to prevent a default judgment. *See Pikofsky v. Jem Oil,* 607 F. Supp. 727 (7th Cir 1985). However, the entry of a default judgment largely is left to the discretion of the trial judge and the Rules of Practice employ precatory, not mandatory, language by providing that an "Administrative Law Judge *may* enter a judgment by default." 28 C.F.R. §68.9(b) (emphasis added).

C. *Scope of the Request for Hearing*

When Respondent filed its request for hearing, Respondent only specifically referenced the charges which are contained in Count II, yet in the answer Respondent denies the charges in both Count I and Count II. During the PHC Complainant asserted that Respondent should be limited to the issue raised by the request for hearing.

To my knowledge this issue has never been adjudicated in an OCAHO decision. The Rules of Practice require that a Respondent must file a written request with the Immigration and Naturalization Service (INS) within 30 days of the service of the notice of intent to fine but do not specifically require the request to address the allegations in the Notice of Intent to Fine (NIF). *See* 8 C.F.R. §274a.9(d). Generally it is sufficient for the purpose of preserving one's right to hearing simply to request a hearing without discussing the contentions in the NIF. Neither the statute, the Rules of Practice, nor the case law addresses the question of whether the issues which can be raised by the Respondent before the Judge should be limited by the language of the request for hearing.

Since the statute, regulations, and case law provide no guidance on this issue, and specifically do not limit issues to those raised in the request for hearing, and since Respondent was acting *pro se* when it submitted the request for hearing, I will not strike Respondent's answer to Count I of the complaint or limit its defense based on the language of the request for hearing.

D. *Strict Liability*

Complainant argues in its Points and Authorities in support of its motion for default judgment and motion to strike that the "failure to retain I–9 forms and to present them for inspection results in strict liability", citing *United States v. Elder Jerez*, 3 OCAHO 420 at 2 (1992). However, in that decision Judge McGuire merely referenced the complainant's argument and did not hold that failure to retain or to present I–9 forms results in strict liability.

Moreover, the pertinent OCAHO case law suggests that the failure to retain and/or to present I–9 forms is not strict liability. In *United States v. Alvand,* 2 OCAHO 352 (1991), the Chief Administrative Hearing Officer (CAHO) recognized that Respondent could have a valid affirmative defense to the presentation of Employment Eligibility Verification Forms (hereinafter I–9 forms) if the forms had been burglarized; however, the CAHO held that the burden of proof is on respondent to assert that as an affirmative defense and to prove the facts constituting the defense.

Subsequent to *Alvand,* in *United States v. Noel Plastering and Stucco, Inc.,* 2 OCAHO 396 at 4–5 (1991), the judge denied a motion to strike an affirmative defense that the I–9 forms were destroyed by fire, recognizing that, if proven by respondent, that would constitute an affirmative defense to liability based on "impossibility".

Further, there are no decisions by the CAHO or an ALJ holding that failure to retain or present I–9 forms results in strict liability. Given the lack of authority for Complainant's argument, I ruled that strict liability is not the correct standard. However, the INS presents a prima facie case by showing that the I–9 forms were not retained or presented during the inspection. The burden then shifts to respondent to allege and prove a defense of impossibility, such as fire or burglary, which prevented respondent from retaining or presenting the I–9 forms. Here Respondent has not alleged impossibility as an affirmative defense.

E. *The Complaint and Respondent's Answer*

During the conference we discussed the allegations of the complaint and Respondent's late filed answer. The answer admits the allegations concerning jurisdiction and parties. With respect to ¶E of Count I, that Respondent failed to make the I–9 forms

available for inspection, Respondent did not deny this paragraph in the written answer and admitted its truth at the conference. However, with respect to ¶¶A–D of Count I, Respondent asserts in the written answer that the paragraphs are vague because they fail to state when Respondent became aware that named individuals had not filled out the I–9 forms or were not authorized to work in the United States. During the conference I ruled that the question of when the Respondent became aware of the failure to complete I–9 forms is not relevant to the issue of liability when the allegation concerns paper work violations under 8U.S.C. §1324a– (a)(1)(B). Further, Respondent did not elaborate on how these allegations were vague; instead it appears that Respondent denied the allegations because it is without sufficient knowledge to either admit or deny the allegations. Specifically, Respondent stated that the present owner of the company does not have the employment records for the individuals listed in Count I, because these individuals were hired during the tenure of a prior owner.

Complainant asserts that it has records showing that the four individuals listed in Count I were hired in October 1994 by R & M Fashion and were not authorized to work in the United States. I ordered Respondent's counsel to examine Complainant's documentation and to file an amended answer if such documentation demonstrated that either I–9 forms were not prepared for the four individuals or that the individuals were unauthorized.

With respect to Count II, ¶¶A–D, Respondent again asserted in the answer that Count II is vague and ambiguous and fails to state how and why Sections 1 and 2 of the I–9 forms had been defectively filled out and prepared. Although the I–9 forms are not before the Court, Complainant did discuss at the conference how the I–9 forms were defective. While Respondent explained the circumstances concerning the hiring of these individuals, it did not assert that the I–9 forms were properly completed. While Respondent's counsel stated that it did not have documents to determine when the twenty individuals were hired, it certainly should know for the individual listed in ¶A(1), Margarita Bueno, because she is the current owner of the Respondent. Respondent is ordered to examine Complainant's documents and is expected to file an amended answer if those documents credibly support the allegations in ¶¶A–D of Count II.

IV. Settlement Discussions

Possible settlement of this case also was discussed during the conference. At the request of the parties the settlement discussions were off the record and the substance of those discussions will not be reflected either in the transcript or this Report. However, Complainant has presented a specific settlement proposal to Respondent which Respondent's counsel will discuss with his client and will respond to Complainant not later than December 15, 1995. Complainant will advise the Court in writing, with a copy to Respondent, of the status of the settlement discussions not later than December 21, 1995.

V. Conclusion

I have deferred ruling on the Complainant's motion for default judgment and motion to strike the answer and affirmative defenses until after Complainant informs me as to the status of the settlement discussions. If the parties are unable to settle the case, I will then rule on the motions. Further, if the parties do not settle, and I deny the motion for default judgment, I will expect Respondent to file an amended answer which specifically admits or denies the factual allegations in the complaint.

Any rulings made at the prehearing conference which are not reflected in this Report, unless specifically contravened by this Report, remain effective even though they are not mentioned in this Report. The transcript will serve as a record of those rulings. If any party objects to any part of this Report on the ground that it does not accurately reflect the ruling at the Conference, such objections shall be filed and served within ten days of the service date of this Report. Such objections are not to be merely requests for reconsideration. Rather, they should be filed only if this Report does not accurately reflect the ruling.

ROBERT L. BARTON, JR.
Administrative Law Judge