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

December 12, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00092
U.S. STYLE, INC., Respondent.	)	

ORDER ENTERING JUDGMENT BY DEFAULT AGAINST RESPONDENT

Procedural History

On August 4, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by issuing and serving upon U.S. Style, Inc. (respondent), a Notice of Intent to Fine (NIF) NYC–94–EE000027. That three (3)-count citation alleged 21 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, for which civil penalties totaling $13,160 were assessed.

In Count I of the NIF, complainant charged that after November 6, 1986, respondent had hired for employment the three (3) individuals named in paragraph A, knowing that they were aliens not authorized for employment in the United States, in violation of the pertinent provisions of IRCA, 8 U.S.C. §1324a(a)(1)(A). Alternately, complainant contended that respondent had continued to employ those individuals knowing that they were or had become unauthorized for employment in the United States, in violation of 8 U.S.C. §1324a(a)(2). Complainant assessed civil money penalties totaling $3,000, or $1,000 for each violation.

In Count II, complainant alleged that after November 6, 1986, respondent employed the 10 individuals listed in paragraph A for em-

ployment in the United States and that respondent failed to prepare and/or to make available for inspection the Employment Eligibility Verification Forms (Forms I–9) for those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant levied a civil money penalty of $500 for the individual listed in paragraph A, number seven (7), Orlando Singhi, and $640 for each of the remaining nine (9) violations contained in Count II, or civil money penalties totalling $6,260 in that count.

In Count III, complainant averred that after November 6, 1986, also, respondent hired for employment in the United States the eight (8) individuals named in paragraph A, and failed to ensure that those employees properly completed Section 1 of their Forms I–9, and that respondent had failed to properly complete Section 2 of those forms, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant sought civil money penalties of $610 for that employee listed at paragraph A, number six (6), Rosa Maria Martinez Ferra, and $470 for each of the other seven (7) alleged infractions, or civil money penalties totalling $3,900 for Count III.

Respondent was advised in the NIF of its right to file a written request for a hearing before an administrative law judge (ALJ) assigned to this Office, provided that it did so within 30 days from service of that notice.

On August 15, 1994, respondent, through Emanuel F. Saris, Esquire, timely filed a written request for a hearing.

On May 23, 1995, complainant filed the three (3)-count Complaint at issue, reasserting the 21 violations set forth in the NIF, and reassessing the $13,160 civil penalties total sum for those violations.

On May 26, 1995, a Notice of Hearing on the Complaint, along with a copy of that Complaint, was sent by certified mail, return receipt requested to respondent as well as to respondent's counsel of record.

On June 1, 1995, the undersigned issued a Notice of Acknowledgment, advising respondent that it was required to file a written answer to the Complaint within 30 days after its service, in accordance with the pertinent rule of practice governing responsive pleadings, 28 C.F.R. §68.9.

On June 29, 1995, respondent filed its Answer, in which it denied "all allegations in Court [sic] I through Court [sic] III (including all Parts of each Court [sic]) of the July 18, 1994 Notice of Intent to Fine, which was incorporated into the Complaint. Respondent denies that it has violated the provisions of 8 U.S.C. §1324a." Answer at 1.

Respondent further asserted the following affirmative defenses: (1) that the individuals named in the Complaint were not "employees" of respondent, but rather were "independent contractors", and therefore respondent was not required to verify their lawful employment eligibility status; (2) that the Act only applies to employers who "hire" "employees" and not to those who employ "independent contractors", as respondent had done; (3) that respondent complied with the Act in good faith in that it "relied in good faith on generally accepted business standards in its field of industry relating to who is an 'independent contractor'"; and (4) that respondent had relied on the "clear, unambiguous wording in the [INS Employer] *Handbook* which states that employers are not required to complete Form [sic] I–9 for independent contractors." *Id.* at 1–2.

On July 31, 1995, complainant, having been orally granted an enlargement of time in which to submit a response to respondent's Answer, filed an unopposed Motion to Strike Answer and Affirmative Defenses. In that motion and its accompanying Memorandum in Support of Motion to Strike Affirmative Defenses, complainant averred that respondent's affirmative defenses were insufficient as a matter of law, Mot. Strike Affirmative Defenses at 1, because respondent "ha[d] failed to include a statement of facts in support of its assertion." Mem. Supp. Mot. Strike Affirmative Defenses at 1. Complainant stated that despite the fact that respondent refers to an attached memorandum in support of its Answer, such a memorandum had not been attached and in addition respondent's counsel had informed complainant that none had been submitted. *Id.* at 1–2.

On August 28, 1995, as part of an Order Staying Complainant's Motion to Strike Affirmative Defenses, respondent was ordered to file an amended answer within 15 days of its receipt of that Order and to specifically demonstrate why the respondent should be relieved of liability because the individuals cited in the Complaint were independent contractors, and not employees.

Respondent was further ordered to specifically set forth "in a detailed manner why it believes that the individuals cited in the Complaint should be classified as independent contractors, including the statutory, regulatory, and/or decisional bases upon which it relies." Aug. 28, 1995 Order at 4.

On September 19, 1995, respondent filed an Amended Answer, which essentially condensed and reiterated its prior affirmative defenses, and stated that respondent had "relied in good faith on generally accepted standards in its field of industry relating to who is an 'independent contractor'" and "should therefore not be penalized for this good faith reliance." Am. Answer at 2.

On October 26, 1995, complainant filed a second Motion to Strike Answer, Amended Answer and Affirmative Defenses, requesting the undersigned to strike those paragraphs of respondent's Answer (¶¶4A–D) and Amended Answer (¶4) which contained respondent's affirmative defenses because they were insufficient as a matter of law.

On November 2, 1995, an Order to Show Cause was issued which required respondent to file an amended answer in compliance with the rule governing responsive pleadings and to have done so within 15 days of its receipt of that Order. Nov. 2, 1995 Order at 1–2; *see* 28 C.F.R. §68.9. Respondent was warned that failure to do so would result in the entry of a judgment by default. Nov. 2, 1995 Order at 2.

Discussion and Analysis

Legal Standards Regarding Entry of A Judgment by Default

Respondent's original Answer, filed on June 29, 1995, was held insufficient in the undersigned's August 28, 1995 Order. That Order required respondent to file an appropriate amended responsive pleading, and contained the admonition that: "[i]n the event that respondent fails to file such an amended answer, complainant's July 31, 1995 Motion to Strike Affirmative Defenses will be granted." Aug. 28, 1995 Order at 4.

Respondent's Amended Answer, filed on September 19, 1995, was again determined to be deficient because it "did not furnish the specific information requested and ordered in the August 28, 1995, Order, and further because that purported responsive pleading does

not comport with the pertinent procedural rule, 28 C.F.R. §68.9". Nov. 2, 1995 Order at 1–2. That Order again directed respondent "to provide the previously-ordered data supporting its contention that the individuals involved were independent contractors, as opposed to employees", and to have done so within 15 days from respondent's receipt of the Order. *Id.* at 2. Finally, that Order *expressly* put respondent on notice that a failure to cure the shortcomings in its pleading, or the filing of another non-complying pleading, would "be deemed to constitute a waiver of its right to appear and contest the allegations of the Complaint and a judgment by default will be entered". *Id.*

The full text of the pertinent subsection of the procedural rule governing responsive pleadings/answers provides:

> (b) *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.
>
> (c) *Answer.* Any respondent contesting any material fact alleged in a complaint . . . shall file an answer in writing. The answer *shall* include:
>
> (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation . . . ; *and*
>
> *(2) A statement of the facts supporting each affirmative defense. . . .*

28 C.F.R. §68.9(b)-(c) (emphasis added).

Both respondent's Answer and its Amended Answer admitted this Office's jurisdiction; admitted its receipt of the NIF and subsequent request for a hearing; denied all allegations in Counts I through III of the Complaint; and attempted to plead affirmative defenses. However, neither pleading included "[a] statement of the facts supporting each affirmative defense", as required by 28 C.F.R. §68.9(c)(2).

The applicable rule unambiguously states that an answer "shall include" *both* a statement addressing the Complaint's allegations and a statement of facts supporting each affirmative defense set forth. *Id.* Because respondent asserted affirmative defenses, but failed to support them with facts, its Answer and Amended Answer were held to be insufficient, and respondent, having been extended another opportunity to correct those deficiencies, has inexplicably failed to do so.

Respondent was also *explicitly warned* that its failure to comply "shall be deemed to constitute a waiver of its right to appear and contest the allegations of the Complaint and a judgment by default will be entered, in accordance with the provisions of 28 C.F.R. §68.9(b)." *Id.* Despite that admonition, respondent has not complied with the provisions of that Order. Resultingly, a judgment by default is being entered.

While default judgments are generally not favored, *see United States v. Shine Auto Serv.*, 1 OCAHO 94, at 640 (1989) (citing *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962)); *United States v. Dubois Farms, Inc.,* 1 OCAHO 225, at 1504 (1990), they have been entered under similar circumstances where a respondent, whose initial answer was held legally insufficient, was given several opportunities to correct those deficiencies by filing a proper answer, but failed to do so. *United States v. Linkous & Riley*, 3 OCAHO 436, at 2–4 (1992) (entering a judgment by default where respondent, who was *pro se,* had been given three (3) opportunities to file a complying pleading; the third chance was expressly predicated on concern for respondent's *pro se* status). Because respondent has been extended two (2) opportunities to remedy his non-complying pleading, and in light of the fact that, unlike the respondents in *Linkous & Riley*, the instant respondent is represented by counsel, the undersigned hereby deems respondent's continued failure to file a proper answer to constitute a waiver of its right to appear and contest the allegations of the May 23, 1995 Complaint, and hereby enters a judgment by default against respondent.

In view of the foregoing, it is determined that respondent violated IRCA in the manners alleged in Counts I, II and III of the Complaint, and it is ordered that the appropriate aggregated civil money penalty sum for the 21 violations cited in those three (3) counts is $13,160.

Respondent is further ordered to cease and desist from future violations of IRCA, 8 U.S.C. §§1324a(a)(1)(A) & 1324a(a)(2).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324c(d)(4); 1324c(d)(5), and 28 C.F.R. §68.53.