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

June 13, 1997

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. § 1324a Proceeding
	) OCAHO Case No. 95A00083
PRIVATE BRANDS CO. AND PRIVATE BRANDS, INC., Respondents.	)

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Patricia Gannon, Esq.* and *Mimi Tsankov, Esq.*, on behalf of Complainant.

I. *Procedural History*

The Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) on Respondent, Pous Apparel, Inc./Private Brands Co./Private Brands, Inc. (Respondent),[1] a New York corporation doing business at 750 Kent Avenue, Brooklyn, New York on July 20, 1994. On August 16, 1994, Nat Schlesinger, its president, timely requested a hearing.

[1]By Motion To Amend Pleadings filed August 3, 1995, Complainant, by counsel, moved to change the caption to include Private Brands, Inc., after having been notified that Respondent, Pous Apparel, Inc., had ceased doing business in 1983. On September 28, 1995, I granted the motion, effectively removing Pous Apparel, Inc., as a party.

On May 12, 1995, INS filed a Complaint dated May 9, 1995, in the Office of the Chief Administrative Hearing Officer (OCAHO). Count I of the Complaint charges Respondent with failure to make available for inspection the employment eligibility verification form (Form I–9) for each of one hundred thirty-four (134) named individuals. The civil money penalty assessed for Count I is $57,620, at $430 per violation. Count II of the Complaint charges Respondent with failure to complete properly section 2 of Form I–9 for four (4) named individuals. The civil money penalty assessed for Count II is $1,400, at $350 per violation. INS requests an order directing Respondent to pay a total civil money penalty of $59,020.

On May 16, 1995, OCAHO issued its Notice of Hearing.

On June 15, 1995, Respondent requested a thirty (30) day extension to retain counsel. On June 19, 1995, I granted the extension until July 24, 1995.

On August 3, 1995, INS filed a Motion To Amend Pleadings to name Private Brands, Inc., as Respondent, having been notified that Pous Apparel, Inc., ceased doing business in 1983. INS appended a Delaware Secretary of State certification that Private Brands, Inc., filed a certificate of incorporation on September 8, 1986.

On August 10, 1995, Respondent requested a thirty (30) day extension to respond to Complainant's Motion To Amend Pleadings and to file an Answer. Complainant agreed. On September 8, 1995, Respondent filed its Answer, positing as an affirmative defense that INS had requested Forms I–9 for Pous Apparel, Inc., a defunct corporation, and not for Private Brands, Inc., the operating corporation. On September 8, 1995, Respondent also filed a Motion opposing Complainant's Motion To Amend Pleadings, contending that Private Brands, Inc., was not obliged to supply Forms I–9 for a defunct corporation.

During the first telephonic prehearing conference on September 28, 1995, I granted Complainant's Motion To Amend Pleadings. At the second telephonic prehearing conference on November 7, 1995,

Respondent's President, Nat Schlesinger, was unavailable; Issac Schlesinger, his brother, participated instead.

At the third telephonic prehearing conference on November 13, 1995, Respondent advised that it would be represented by Naomi Masliah, Esq. (Masliah), who was reportedly unavailable to participate in the conference.

During the fourth telephonic prehearing conference on December 6, 1995, Complainant asserted, and Respondent did not dispute, that Masliah denied to Complainant that she represented Respondent. Respondent advised that it would henceforth be represented by Michael D. Patrick, Esq. (Patrick), of Fragomen, Del Rey & Bersen, P.C. (Fragomen). On December 15, 1995, Patrick entered an appearance.

A fifth telephonic prehearing conference scheduled to be held on December 19, 1995, did not take place due to the government furlough. Ongoing, informal discussions with counsel for both parties indicated the likelihood of an agreed disposition of the entire case. No settlement being forthcoming, however, by order issued November 25, 1996, I scheduled an *in personam* prehearing conference on Friday, December 20, 1996, in New York City. On December 12, 1996, I issued an order confirming that the "conference is occasioned by the inability of the parties to consummate a settlement which more than six months ago counsel assured the bench was virtually in hand."

On December 13, 1996, Respondent's counsel filed a letter/pleading advising that "our client has recently refused to participate in these efforts and has ceased all communication with our office." Counsel informed the Administrative Law Judge (ALJ) that "[d]espite our repeated attempts to contact Mr. Schlesinger, he has not responded to our phone messages, nor to the correspondence which we forwarded to him by certified mail on November 18, 1996. . . ." Counsel requested to be released from representation on the basis of inability to communicate with the client.

As reflected in the order issued December 16, 1996, at a telephonic prehearing conference on December 13, 1996, Scott Fitzgerald (for Fragomen) entered an appearance for Respondent, reiterating the request to be released as counsel for Respondent. I asked counsel to file a formal motion on notice to Respondent. The December 16, 1996, order canceled the New York prehearing conference.

On December 24, 1996, counsel for Respondent filed a Motion To Withdraw Representation as Attorney. Respondent did not respond. By pleading filed January 22, 1997, Complainant advised that it did not oppose the request to withdraw. By Order dated January 29, 1997, I granted the request to withdraw representation.

By letter/pleading dated February 6, 1997, filed February 12, 1997, Complainant advised that "Nat Schlesinger is an employee of Goodmark Industries Inc. . . . located at the same place of [sic] Private Brands Co., 750 Kent Avenue Brooklyn, New York 11211 which is the same as 50 Wallabout Street Brooklyn, New York." INS also advised that a Request for Admissions was served on Nat Schlesinger on January 29, 1997.

On April 1, 1997, INS filed a Motion For Summary Decision (Motion) dated March 12, 1997. INS requests summary decision on the pleadings on the basis of undisputed facts, because Respondent failed to respond to its Request for Admissions. INS states that:

> (1) Respondent was served with a Notice of Intent to Fine on July 20, 1994; (2) Respondent requested a timely hearing; (3) Complainant filed a complaint on or about May 12, 1995, and the Respondent received service of said Complaint on or about May 15, 1995[.[2]]

INS requests summary decision in the amount of fifty-nine thousand and twenty dollars ($59,020). INS augments its Motion for Summary Decision by the Declaration of INS Agent Edward Kolshorn (Kolshorn). Kolshorn's Declaration recites that the Request for Admissions was served on January 29, 1997, on Elaine Reyes

[2]Motion for Summary Decision, at 1. In fact, however, OCAHO mailed the Complaint to Respondent on May 16, 1995, and the U.S. Postal Service return receipt confirms delivery to Respondent on May 24, 1995.

(Reyes), receptionist at the Wallabout address. Reyes informed Kolshorn that Nat Schlesinger was employed by Goodmark Industries, and that Private Brands, Inc., was out of business. However, the New York Secretary of State, Division of Corporations, informed Kolshorn that Private Brands, Inc., continues to be authorized to do business in New York State, and remains in good standing in Kings County (Brooklyn), New York.

Respondent had 15 days to respond to the April 1, 1997, Motion for Summary Decision. 28 C.F.R. §§68.8(c), 68.11(b). No response was filed. Granting Respondent every benefit of the doubt because of its renewed status as a *pro se* party, on May 6, 1997, I issued Respondent an Order To Show Cause (Show Cause) why summary decision should not be entered. The Show Cause was sent by certified mail, return receipt requested, and also by regular mail to Nat Schlesinger at 750 Kent Avenue, Brooklyn, NY, and at 50 Wallabout Street, Brooklyn, NY. Respondent was given until May 23, 1997, to respond. The U.S. Postal Service return receipt confirms delivery of the certified mail copy of the Show Cause to Respondent on May 8, 1997, at the 50 Wallabout Street address. Although the first class mail copy of the Show Cause addressed to 750 Kent Avenue was returned "Moved Not Forwardable," the U.S. Postal Service return receipt confirms delivery of the certified mail copy at that address on May 12, 1997. Because both certified mail copies were delivered, and the first class mail copy addressed to one of the two addresses was not returned, I am satisfied that service was effected in fact. By terms of the Show Cause, a timely response was due May 23, 1997. None has been filed.

II. *Discussion*

It is now appropriate to rule on the Motion. INS's Motion is granted. The Show Cause placed Respondent on notice as to the consequences of its failure to respond. The Show Cause warned Respondent that:

> [t]his case can be considered ripe for decision on Complainant's motion. **Respondent's failure to contest or otherwise respond to the request for admissions entitles the administrative law judge (ALJ), the trier of fact, to infer that the facts requested to be admitted are conclusively**

> **established, and that there is no genuine issue of material fact, 28 C.F.R. §§68.21(b) and 68.38(c).**
>
> Moreover, 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). However, while recognizing that this is the stalest case on my docket, and its orderly management has frequently been frustrated by Respondent's nonresponsiveness, as a matter of discretion I am providing Respondent this opportunity to show cause, if any it can, why summary decision should not be entered against it. Any response must include explanations of its failure timely to respond to the discovery and to the Motion for Summary Decision, and must be accompanied by answers to the Request for Admissions. **Failure to so respond entitles the ALJ to infer that answers would be detrimental to Respondent as the nonmoving party.** 28 C.F.R. §68.23(c)(4). **Moreover, failure to respond to this Order to Show Cause will be deemed an abandonment by Respondent of its request for hearing.** 28 C.F.R. §68.37(b). *See United States v. M.C.S.M., Inc.*, 3 OCAHO 544, at 4–5 (1993), 1993 WL 469330. **An unpersuasive response will be insufficient to preclude entry of a final decision and order adjudging liability and civil penalty as requested in the Complaint.**

Show Cause, at 4 (emphasis added).

Consistent with this fair warning, and lacking responses to the Request for Admissions, Motion for Summary Decision, and Order To Show Cause, I find and conclude that Respondent has abandoned its request for hearing. OCAHO precedent holds that failure to respond to discovery and to motion practice invites the ALJ to conclude that the alleged violations are proven, and that, therefore, there is no genuine issue of material fact so as to preclude summary decision. *United States v. Vickers*, 5 OCAHO 819 (1995), 1995 WL 813123 (O.C.A.H.O.). The burden on the party moving for summary decision to demonstrate the absence of a genuine issue of material fact is satisfied "by showing that there is an absence of evidence" to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1985). As explained in *Vickers*, 5 OCAHO 819, at 3–4, 1995 WL 813123, at *2–3,

> The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. *Celotex*, 477 U.S. at 324.

> An issue of material fact is genuine only if it has a real basis in the record. *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986). In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the non-moving party. *Id.* at 587.

Because Respondent is deemed to have admitted the facts recited in the Complaint, as amended, by failing to respond to the Show Cause, there remains no genuine issue as to any material fact regarding liability or the amount of civil money penalty. Respondent's Answer denied liability generally, and, as an affirmative defense, contended that INS sued the wrong enterprise. Failure to deny the admissions on discovery practice implicitly invites me to find the violations alleged are proven. The effect is that Respondent admits that it was the employer of the individuals named in the Complaint, that it failed to prepare and/or present Forms I–9 for 134 individuals named in Count I and failed properly to complete section 2 of the Form I–9 for the four (4) individuals named in Count II. Accordingly, I conclude that there is no genuine issue of material fact as to Respondent's liability for the violations. INS's Motion is granted as to Respondent's liability for violation of 8 U.S.C. §1324a(a)(1)(B).

Although in certain OCAHO cases the ALJ, granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry, that separate step is not necessary when the respondent is on notice that the motion addresses the civil money penalty as well as liability. *See United States v. Raygoza*, 5 OCAHO 729, at 3 (1995), 1995 WL 265080, at *2–3 (O.C.A.H.O.) (distinguishing *Martinez v. I.N.S.*, 959 F.2d 968 (5th Cir. 1992) (unpublished), *vacating and remanding in part United States v. Martinez*, 2 OCAHO 360 (1991), 1991 WL 531871 (O.C.A.H.O.)). *Accord*, *United States v. Fox*, 5 OCAHO 756, at 2–3 (1995), 1995 WL 463979, at *2 (O.C.A.H.O.); *Vickers*, 5 OCAHO 819, at 4–5, 1995 WL 813123, at *3. Here, the Show Cause explicitly placed Respondent on notice that failing a persuasive response on its part a final decision might adjudge "liability and civil penalty as requested in the Complaint." Show Cause, at 4.

Applying *Raygoza*, Respondent "is no less on notice of the peril for failing to contest the Motion as to quantum than he is as to liability.

Accordingly, there is no reason to bifurcate this proceeding and to delay judgment on penalty while now adjudicating liability." *Raygoza*, 5 OCAHO 729, at 3, 1995 WL 265080, at *2. Title 8 U.S.C. §1324a(e)(5) mandates five "considerations" to be taken into account in assessing and adjudicating the amount of civil money penalty. However, in light of the obvious conclusion that Respondent by its silence in the face of the Show Cause has abandoned its request for hearing, it would be fruitless to delay the proceeding to obtain Complainant's rationale for calculation of those "considerations."

OCAHO precedent confirms that 28 C.F.R. 68.37(b)(1) "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.'" *United States v. M.C.S.M., Inc.*, 3 OCAHO 544, at 3 (1993), 1993 WL 469330, at *2 (O.C.A.H.O.). In *M.C.S.M.*, the employer, in a context substantially like the present case, did not respond to a motion for summary decision predicated in part on failure to respond to INS discovery. In that case, I issued an order to show cause, cautioning that "[f]ailure to provide a satisfactory explanation and to respond to the motion will be deemed an abandonment by Respondent of its request for hearing." *M.C.S.M.*, 3 OCAHO 544, at 2, 1993 WL 469330, at *2 (referencing 28 C.F.R. §68.37(b) ("Dismissal-Abandonment by Party")). M.C.S.M. failed to respond. Explaining that before OCAHO rules of practice and procedure added §68.37(b)(1) in 1991, failure to respond to ALJ orders led to default, I reiterated 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.'" *M.C.S.M.*, 3 OCAHO 544, at 3, 1993 WL 469330, at *2 (quoting *United States v. El Dorado Furniture Mfg. Inc.*, 3 OCAHO 417, at 3 (1992), 1992 WL 535555, at *2 (O.C.A.H.O.)).[3]

[3]*Accord M.C.S.M.*, 3 OCAHO 544, at 2, 1993 WL 469330, at *1-2; *United States. v. Diamond Constr., Inc.*, 3 OCAHO 451 (1992), 1992 WL 535607 (O.C.A.H.O.). *See Udofot v. Vapor Techs., Inc.*, 3 OCAHO 506, at 7 (1993), 1993 WL 404308, at *4 (O.C.A.H.O.) (early in the development of OCAHO jurisprudence, failure to respond to ALJ orders "was treated as equivalent to failure to appear for hearing, resulting in default") (citations omitted).

I hold that an unexplained failure to respond to the Show Cause is an abandonment of the request for hearing, authorizing adjudication of the civil money penalty in the amount assessed by INS, provided—as I find in this case—the amount assessed is within statutory parameters.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint as amended, as well as the Answer, motions, additional pleadings, and documentary evidence submitted. All motions and other requests not previously disposed of are denied.

I grant Complainant's Motion for Summary Decision, and determine and conclude upon a preponderance of the evidence that:

1. Respondent employed the individuals named in Count I without presenting and/or preparing INS employment eligibility verification Forms I–9 for 134 individuals named in Count I of the Complaint, in violation of 8 U.S.C. §1324a(a)(1)(B);

2. Respondent employed four (4) individuals named in Count II of the Complaint and failed to complete properly section 2 of Form I–9 for each of them, in violation of 8 U.S.C. §1324a(a)(1)(B);

3. Upon finding that Respondent abandoned its request for hearing, it is appropriate to adjudge the civil money penalty in the sum assessed by INS, *i.e.*, as to Count I, $430 per individual, for a total of $57,620, and for Count II, $350 per individual, for a total of $1,400, for an aggregate civil money penalty of $59,020.

This Final Decision and Order Granting Complainant's Motion for Summary Decision is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(5) and 28 C.F.R. §68.52(c)(iv). As provided at 8 U.S.C. §§1324a(e)(7), (8) and by 28 C.F.R. §68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty 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 parties adversely affected.

SO ORDERED.

Dated and entered this 13th day of June, 1997.

MARVIN H. MORSE
Administrative Law Judge