

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

December 9, 1997

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 97A00116
SPRING & SOON FASHION INC.,)
d/b/a Y PLUS S CORPORATION,)
d/b/a/ Y PRUS S CORPORATION,)
Respondents.)
_____)

**ORDER GRANTING COMPLAINANT’S MOTION TO AMEND
THE COMPLAINT AND DENYING COMPLAINANT’S
MOTION FOR DEFAULT JUDGMENT**

I. Background and Procedural History

On September 27, 1996, the Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) relating to Respondent Spring & Soon Fashion Inc. (Spring & Soon) on Mrs. Young S. Sung at the business premises of Y Plus S Corporation, d/b/a Y Prus S Corporation (Y Plus). Shofi Decl. ¶5. By letter dated October 21, 1996, Spring & Soon timely requested a hearing in this matter through its then-attorney Mark C. Kalish. Complainant filed a five-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 22, 1997. The Complaint, which echoes the allegations of the NIF, asserts that Spring & Soon hired or continued to employ seven listed individuals knowing that they were unauthorized to work in the United States and that Spring & Soon committed various violations of the employment eligibility verification system, all in violation of section 274A of the Immigration and Nationality Act (INA), as codified at 8 U.S.C. §1324a.

On July 23, 1997, Mr. Kalish filed a motion to withdraw his representation of Spring & Soon in these proceedings. In support of his motion, Mr. Kalish stated that, after repeated attempts, he had been unable to communicate with his client. Specifically, Mr. Kalish said that he had had no communications with Spring & Soon since approximately January 1997. Mot. Withdraw ¶6. After receiving a copy of the present Complaint in late May or early June 1997, Mr. Kalish tried to telephone Spring & Soon, but found that telephone service was disconnected. *Id.* ¶7. Mr. Kalish stated that, on June 16, 1997, he visited Spring & Soon's business premises at 262 West 38th Street, 15th Floor, New York, New York, but that the business no longer was there. *Id.* ¶8. Mr. Kalish stated that he then requested from directory assistance any listings for "Spring & Soon Fashions" in any of New York City's five boroughs, but that there were no such listings. *Id.* ¶9. Finally, Mr. Kalish asserted that, to the best of his knowledge, Spring & Soon no longer was doing business. *Id.* I granted Mr. Kalish's motion to withdraw by order dated July 24, 1997.

Complainant filed its Motion to Amend Complaint and a document entitled "Second Amended Complaint"¹ on September 3, 1997. Through its proposed amendment, Complainant seeks to correct what it calls a "captioning error in describing the Respondent entity," and to make a corresponding change in paragraph two of the "Parties" section in the Complaint. *See* C. Mot. Amend at 1. Specifically, Complainant moves that Respondent's designation be changed from "Spring & Soon Fashion Inc." to "Spring & Soon Fashion Inc., d/b/a/ Y Plus S Corporation, d/b/a Y Prus S Corporation." *See* Amended Compl. at 1. Complainant would change paragraph two of the "Parties" section to describe Respondent, as newly designated in the amended complaint, as "a corporation duly organized under the laws of the state of New York and . . . doing business at 323 West 39th Street, 7th Floor, New York, New York 10018." *Id.*

Also on September 3, Complainant filed its Motion for Default Judgment. Complainant states that, as of August 14, 1997, no answer had been filed in this case, Mot. Default ¶4, and, therefore, Respondent had "failed to plead or otherwise defend within thirty

¹According to the official case file, no other amended complaint had been filed. Therefore, this is not the second amended complaint but, rather, the first attempted amendment. Thus, it will be referred to as the amended complaint.

days of the receipt of [the] Complaint as required by 28 C.F.R. §68.9(a),” *id.* ¶5. Complainant seeks default judgment against both Spring & Soon and Y Plus.

On September 11, 1997, I entered an Order Regarding Complainant’s Motion to Amend and Motion for Default. In that Order, I noted that Complainant had not explained why Spring & Soon should be considered as doing business through Y Plus S Corporation d/b/a Y Prus S Corporation, other than the fact that it might have the same owner. I ordered Complainant to file a legal brief no later than September 30, 1997, in which it would discuss the facts in the record that support its assertion that Spring & Soon is doing business through Y Plus and the applicable legal principles governing that determination. Since the NIF was not served on Spring & Soon at the address listed for it on the Complaint, I ordered Complainant also to discuss in its brief whether the NIF was properly served on Spring & Soon. I granted leave to the Sungs to file a response to Complainant’s Motion to Amend, its brief, and its Motion for Default Judgment no later than October 14, 1997.

Regarding Complainant’s Motion for Default, I noted that Spring & Soon still had not filed an answer as of September 11. I stated that, if I grant Complainant’s Motion to Amend, Respondent will have thirty days to answer the amended complaint; even though Spring & Soon had not yet filed an answer to the original Complaint, if an amended complaint is filed, a respondent must receive a chance to answer the complaint as amended. As a result, I stated that I would defer ruling on the Motion for Default until I had ruled on the Motion to Amend. I explained, however, that Spring & Soon was in default with respect to the original Complaint and, if I deny the Motion to Amend, Spring & Soon could face a default judgment. Consequently, I ordered Spring & Soon to file an answer to the Complaint immediately upon receipt of my September 11 Order to avoid entry of a default judgment. I also ordered Spring & Soon to explain why it did not file an answer to the Complaint in a timely manner.

Complainant filed its Memorandum of Law in Support of Motion to Amend Complaint on October 14, 1997.² Complainant’s points and

²I granted Complainant’s request, communicated by letter on October 10, 1997, to extend the previous deadline to October 14.

arguments addressed in that Memorandum will be discussed later in this Order.

On October 17, 1997, Raymond J. Aab filed a Notice of Appearance as legal counsel for Spring & Soon. Also on that date, Spring & Soon, through its new attorney, filed its Answer to the Complaint and its Opposition to Government's Motion to Amend Complaint. Spring & Soon's Opposition also responds to Complainant's Motion for Default Judgment. The points raised in Spring & Soon's Opposition will be discussed later in this Order. In its Answer, Spring & Soon responds to the factual allegations of the Complaint and asserts as an affirmative defense that the NIF and the Complaint in this case were not properly served on Spring & Soon.

II. *Service of the Notice of Intent to Fine*

Complainant asserts that, on September 27, 1996, INS officials attempted to serve the NIF in this case at Respondent Spring & Soon Fashion Inc.'s 262 West 38th Street, 15th Floor, New York, New York, business address. C. Mem. at 7; Shofi Decl. ¶5. Upon arrival at that location, Complainant states, the INS officials were informed that Spring & Soon had moved to 323 West 39th Street, 7th Floor, New York, New York. C. Mem. at 7. Complainant states that INS officials then went to the 323 West 39th Street location, where, at the business premises of Y Plus S Corporation d/b/a Y Prus S Corporation, they served the NIF on Mrs. Young S. Sung. *Id.* at 7–8; Shofi Decl. ¶5. Complainant maintains that Mrs. Sung identified herself as an owner of Spring & Soon. C. Mem. at 8; *see also* Shofi Decl. ¶4 (stating that Mrs. Sung identified herself as “owner” of Spring & Soon when she provided consent for the INS' January 22, 1996, survey of Spring & Soon).

Spring & Soon argues that the NIF was not properly served because it was not served in Spring & Soon's place of business and because it was not served on an officer of Spring & Soon or on a person authorized to accept service for Spring & Soon. Ans. ¶20.

“In any proceeding which is initiated by the [Immigration and Naturalization] Service, with proposed adverse effect, service of the initiating notice and of notice of any decision by a Service officer shall be accomplished by personal service,” with certain exceptions

not applicable to the present situation. 8 C.F.R. §103.5a(c) (1997). As Complainant notes, *see* C. Mem. at 8, personal service may be accomplished, among other methods, by “[d]elivery of a copy personally,” 8 C.F.R. §103.5a(a)(2)(i) (1997), or by “[d]elivery of a copy at the office of an attorney or other person, including a corporation, by leaving it with a person in charge,” *id.* §103.5a(a)(2)(iii).

Complainant maintains that there is no issue as to whether Mrs. Sung had identified herself as an owner of Spring & Soon and, therefore, that service of the NIF was properly made on Mrs. Sung. C. Mem. at 8. In the alternative, Complainant argues that, “even if service of the NIF is found to have been defective, there has been no showing of prejudice to Respondent.” *Id.*

Resolution of whether service of the NIF was accomplished in a proper manner goes to the heart of the main substantive issue raised so far in this case, namely, whether Y Plus is merely a continuation of Spring & Soon. As will be discussed in the next section, it is impossible to make a definitive determination of that issue based on the current record. However, even assuming that the NIF was not served properly, that aspect would not warrant a change in the posture of this case.

The U.S. Supreme Court has indicated that an agency generally must adhere to its own regulations. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court reversed the Second Circuit’s affirmation of the U.S. District Court’s refusal of the petitioner’s offer of proof that the Board of Immigration Appeals (BIA or Board) failed to follow regulations that require it to exercise its own discretion in considering and reviewing appeals.³ *See Accardi*, 347 U.S. at 266, 268. The Court was careful to explain that it was not reviewing “the manner in which discretion was exercised,” but instead that it “object[ed] to the Board’s alleged failure to exercise its own discretion, contrary to existing valid regulations.” *Id.* at 268. The Court concluded:

If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list the Board must rule out any consideration

³The petitioner contended that the BIA did not exercise its own discretion in reviewing the denial of his application for suspension of deportation because the Attorney General had circulated to the BIA a list of individuals, including petitioner, that he considered to be “unsavory characters.” *See Accardi*, 347 U.S. at 262.

thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Id. (footnote omitted).

The U.S. Court of Appeals for the Second Circuit⁴ has distinguished *Accardi* in ruling that it would not disturb an action of the Department of Health, Education and Welfare (HEW), even if HEW did not follow the required procedures, because the actual procedures used were fair and worked no prejudice to the appealing party. See *Economic Opportunity Comm'n of Nassau County, Inc. v. Weinberger*, 524 F.2d 393, 399, 400 n.9 (1975). In *Nassau*, HEW was required by statute to “prescribe procedures” regarding notice of and opportunity for appeal in cases involving the funding of certain community programs. See *id.* at 399 (citing 42 U.S.C. §2944). HEW, however, had not formally prescribed such procedures at the time of an appeal involving the Nassau County Economic Opportunity Commission (NCEOC), and, instead, HEW utilized “ad hoc” procedures in the absence of procedures formally promulgated pursuant to the relevant statute. See *id.* The Second Circuit found that the ad hoc appellate procedures had resulted in no prejudice to NCEOC, and that the administrative decisions made pursuant to those ad hoc procedures would “not be set aside in the absence of prejudice to NCEOC.” *Id.* 399–400 (citing *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965); *Sun Oil Co. v. Federal Power Comm'n*, 256 F.2d 233, 239 (5th Cir. 1958); 5 U.S.C. §706 (“due account shall be taken of the rule of prejudicial error”)).

The Second Circuit noted that “NCEOC was given in full measure the notice and opportunity to be heard required by §2944.” *Id.* at 400. The Court stated that:

⁴Judicial review of cases brought pursuant to section 1324a may be had “in the Court of Appeals for the appropriate circuit.” 8 U.S.C. §1324a(e)(8) (1994); 28 C.F.R. §68.53(a)(3) (1996). As the businesses in question in this case are and/or were located in New York, and as the present cause of action arose in that state, judicial review of this case would be appropriate in the Second Circuit. Therefore, I have reviewed and will follow Second Circuit case law in reaching this decision.

... an administrative agency is not a slave of its rules. Ad hoc changes may be made and, in proper cases, may be applied retroactively. In a particular case an administrative agency may relax or modify its procedural rules and its action in so doing will not be subjected to judicial interference in the absence of a showing of injury or substantial prejudice.

Id. (quoting *Sun Oil*, 256 F.2d at 239⁵ (citations omitted)). The Second Circuit distinguished *Accardi* by stating that, in that case, “the administrative decision-making process was conducted in a patently undeliberative manner and *prejudiced substantial interests* of the complaining party. There is and can be no such claim as to the procedures followed in the present case.” *Id.* at 400 n.9 (emphasis added).

Since *Nassau*, the Second Circuit has relied on *Accardi* in ruling that an alien seeking suspension of deportation *did not* have to show prejudice as a result of the immigration judge’s failure to comply with a regulation that required the immigration judge to advise the alien of his right to legal representation, at no expense to the government, and to require the alien to state whether he desires representation. See *Montilla v. INS*, 926 F.2d 162, 166–69 (2d Cir. 1991) (remanding the case to the agency to comply with its regulations). The Court specifically rejected prejudice analysis, and held

that an alien claiming the INS has failed to adhere to its own regulations regarding the right to counsel in a deportation hearing is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien’s benefit and that the INS failed to adhere to them.

Id. at 169.

The Second Circuit has limited the holding in *Montilla* based on the idea that the regulation involved in that case, dealing with the right to counsel, implicated a “fundamental right derived from the Sixth Amendment right to counsel in criminal cases and the Fifth Amendment right to due process in civil cases, and enshrined in section 292 of the [Immigration and Nationality] Act, 8 U.S.C. §1362.” *Waldron v. INS*, 17 F.3d 511, 517 (2d Cir. 1994). The Court states that “*Montilla’s* holding is limited to its express terms and it may not be interpreted as suggesting an ‘absolute “no prejudice” stan-

⁵*Sun Oil* involved the Federal Power Commission’s lack of adherence to a formally promulgated regulation by virtue of an ad hoc order that was entered without notice to the parties. See *Sun Oil*, 256 F.2d at 239.

ard' whenever a challenged regulation is for the benefit of an alien." *Id.* Instead, the Second Circuit clarified its position by holding that,

when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required. This may well be so even when the regulation requires more than would the specific provision of the Constitution or statute that is the source of the right. On the other hand, where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation.

Id. at 518 (citations omitted) (finding that regulations that required the INS to notify a detained alien of his right to communicate with consular or diplomatic officials and required that notice of certification be given to an alien when a case is required to be certified to the BIA do not "implicate fundamental rights with constitutional or federal statutory origins," and, therefore, that the alien alleging lack of compliance with those regulations had to demonstrate prejudice to his case as a result of the lack of compliance before the underlying proceeding would be overturned); *see also Douglas v. INS*, 28 F.3d 241, 245 (2d Cir. 1994) (noting and following *Waldron's* limitation of *Montilla*).

To decide, under the law of the Second Circuit, whether an agency's lack of adherence to one of its regulations warrants reversal of the agency action, it seems that it normally would be necessary to determine, as a preliminary matter, whether the agency regulation in question implicates a fundamental right derived from the Constitution or a statute. That distinction, however, does not control the result in this case because, even assuming that the regulation governing the method of service of a NIF implicates the type of fundamental right subject to *Montilla*, *Montilla* is otherwise distinguishable from the present case.

In *Montilla*, even though the aggrieved party did not have to demonstrate prejudice to his case as a result of the lack of compliance with an agency regulation, the party was in fact deprived of his right to counsel because of the noncompliance: the alien in *Montilla* did not have the advantage of legal representation, regardless of whether the lack of legal representation prejudiced him, i.e., whether having an attorney would have made a difference in the

outcome of his case. That is not the situation in Spring & Soon's circumstance. Even if Spring & Soon did not receive notice of the charges against it in a method that complied with 8 C.F.R. §103.5a, Spring & Soon in fact received notice of those charges. Spring & Soon, through attorney Mark C. Kalish, requested a hearing in this matter by letter dated October 21, 1996. If Spring & Soon had not somehow received the NIF, it would not have known to hire an attorney and to request a hearing because it would not have been aware of the pending charges. Furthermore, the NIF itself contains information regarding the right of a respondent to request a hearing. The letter requesting a hearing also contains other clues that indicate that Spring & Soon received the NIF. The letter includes the same case file number that is on the NIF and refers to the allegations in Counts I–V. Also, the letter, sent by certified mail, is addressed to the person and address exactly as the NIF instructs a request for hearing that is conveyed by certified mail to be addressed. As an additional matter, Spring & Soon has not alleged that it did not receive the NIF.

The fact that Spring & Soon received actual notice of the charges against it, even if it did not receive that notice through the procedures established by regulation, brings the present case more in line with *Nassau* than it does with *Montilla*. In *Nassau*, the agency failed to follow promulgated rules regarding appellate procedure (because formal rules had yet to be promulgated), but the aggrieved party “was given in full measure the notice and opportunity to be heard required” by the statute that mandated the promulgation of such rules. *Nassau*, 524 F.2d at 400.

Because of the factual similarity between *Nassau* and the present case, I will apply *Nassau*'s prejudice analysis to Spring & Soon's claim that it was not served with the NIF in accordance with the relevant regulation. Assuming that the INS failed to serve the NIF in a manner required by its own regulations, Spring & Soon cannot be understood to have been prejudiced by that failing. Spring & Soon actually received notice of the present claims against it. *See supra* this page. If Spring & Soon had received the NIF in a method described in 8 C.F.R. §103.5a, this case would be in the same posture as it is now. Spring & Soon has not been deprived of notice of the claims against it, and it has not been deprived of its right to a hearing regarding those claims. Even if the INS served the NIF improperly under its own regulations, I find that no prejudice has resulted

to Spring & Soon and, therefore, that dismissal of this case to make the INS comply with the relevant regulation is unwarranted.

III. *Successor Liability*

Complainant seeks to amend the Complaint by adding Y Plus S Corporation d/b/a Y Prus S Corporation as a respondent on the grounds that it is a mere continuation of Respondent Spring & Soon Fashion Inc. Complainant acknowledges that a successor corporation generally is not responsible for the debts and liabilities of its predecessor. C. Mem. at 2 (citing 19 C.J.S. *Corporations*, §1380; 1 William M. Fletcher, *Fletcher's Cyclopedia of the Law of Private Corporations* §7122 (perm. ed. & supp. 1994)). Citing New York state law, Complainant states that there are four exceptions to that general rule: (1) when the successor corporation expressly or impliedly assumes such liability; (2) when there is a de facto consolidation or merger of the two corporations; (3) when the second corporation is a mere continuation of the first; or (4) when the transaction was fraudulently executed to escape such obligations. *Id.* (citing *Delgado v. Matrix-Churchill Co.*, 613 N.Y.S.2d 242, 243 (App. Div. 1994) (citing *Grant-Howard Assocs. v. General Housewares Corp.*, 63 N.Y.2d 291, 296, 482 N.Y.S.2d 225 (1984); *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983))).

Complainant maintains that “[t]he second and third exceptions stated above reflect the concept that a successor company that effectively takes over a company in its entirety should carry the predecessor’s liabilities.” *Id.* (citing *Grant-Howard*, 482 N.Y.S.2d at 227). Complainant adds that “*New York courts* that have addressed this issue have analyzed it by adopting a balancing approach where there has been a basic ‘continuity of the enterprise’ of the seller corporation, an expansion of the traditional merger or consolidation exceptions, or where the successor corporation continues to produce the predecessor’s product in the same plant.” *Id.* (citing *Schumacher*, 59 N.Y.2d at 245) (emphasis added).⁶

At least one court questions whether state or federal law should be applied to determine successor liability for federal causes of ac-

⁶*Schumacher* does not state that “*New York courts*” have used the approach described. Instead, it refers to “other jurisdictions” that have used the approach. See *Schumacher*, 59 N.Y.2d at 245. In fact, as Complainant later notes, see C. Mem. at 3, *Schumacher* expressly declines to adopt the noted approach, *Schumacher*, 59 N.Y.2d at 245.

tion.⁷ See *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 634 (S.D.N.Y. 1995). As in *Rols Capital*, however, that distinction does not matter for present purposes because New York state law, as cited by Complainant, and federal law recognize the same four exceptions to the general rule of not holding a successor corporation liable for the debts of its predecessor. See *id.* at 635. Like the New York courts, federal courts will impose successor liability when any of the previously stated four exceptions are present, see *id.* at 635–36; *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1534–35 (S.D.N.Y. 1985); see also *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n.5 (1973).⁸

Complainant cites a variety of facts in support of its motion to amend the Complaint by adding Y Plus as a respondent under the successor liability theory. Complainant states that Spring & Soon is owned by Mr. Chang S. Sung and that Y Plus is owned by his wife, Mrs. Young S. Sung. C. Mem. at 5. Despite the formal difference in ownership of the two corporations, Complainant alleges that Mrs. Sung has represented herself as owner of Spring & Soon to INS officials. *Id.* In addition, Complainant states that employees of Y Plus have stated that they believe Mr. Chung owns Y Plus. *Id.* “Thus it appears,” Complainant surmises, “that in this case, husband and wife have worked together in each of the corporations and have acted in such a manner that to individuals in close professional contact with the companies it has appeared that each holds ownership roles in the companies.” *Id.*

Complainant argues that Spring & Soon and Y Plus have shared “key management personnel” in Mr. and Mrs. Sung. *Id.* Complainant

⁷The court in *Rols Capital*, however, finds it unnecessary to decide that question because the New Jersey state law that it was applying recognizes the same four exceptions to the general non-liability rule that courts have applied to federal claims. See *Rols Capital*, 901 F. Supp. at 635.

⁸Successor liability may be even broader in the federal context. The Seventh Circuit states that, “in order to protect federal rights or effectuate federal policies, [successor liability] allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was a ‘substantial continuity in the operation of the business before and after the sale.’” *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Tasevkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995); see also *Rols Capital*, 901 F. Supp. at 635 n.4 (noting the use of this additional exception in the Seventh Circuit and stating that it is used “when the vindication of an important statutory policy necessitates the creation of this additional and even broader exception to the common-law nonliability rule”).

maintains that Y Plus has continued the same type of business, garment manufacturing, in which Spring & Soon engaged. *Id.* at 6. Complainant also alleges that Y Plus hired two employees of Spring & Soon. *Id.* Complainant concludes:

It is clear from the facts presented above that Respondent SPRING & SOON FASHION INC. has sought to circumvent IRCA liability, by establishing a new entity through which it is now conducting its garment manufacturing business. Thus, Complainant respectfully requests that this court find that Respondent Y PLUS CORPORATION d/b/a Y PRUS S CORPORATION is a successor in interest to Respondent SPRING & SOON FASHION INC., and hold that entity jointly liable for the allegations charged in the Complaint.

Id. at 7.

In opposition to Complainant's Motion to Amend, Spring & Soon argues that "the Government has set forth no facts to show that [Spring & Soon] and Y-Plus are the same and that Y-Plus is the real respondent in interest in this matter." R. Opp. at 2. Spring & Soon propounds that Complainant has presented "two distinct certificates of incorporation demonstrating that each corporation is indeed a distinct corporation, with distinct incorporators." *Id.* An examination of the two certificates of incorporation, attached as exhibits to Complainant's Motion to Amend, reveals that Mr. Sung signed the certificate of incorporation for Spring & Soon on October 22, 1991, *see* C. Mot. Amend Ex. A, and that Mrs. Sung signed the certificate of incorporation for Y Plus on February 12, 1996, *see id.* Ex. C.⁹

Spring & Soon asserts that it has no relation with Y Plus. *Id.* Specifically, Spring & Soon states that Y Plus has a different lease and is located at different premises than Spring & Soon. *Id.* Spring & Soon states that it has a different principal and different employees than Y Plus. *Id.* Spring & Soon also states that, with one exception, Y Plus has different clients than Spring & Soon. *Id.*

⁹It appears that Y Plus was incorporated less than one month after the INS' survey of Spring & Soon, which occurred on January 22, 1996, *see* Shofi Decl. ¶4.

A variety of factors are considered in determining whether a successor corporation is a mere continuation of the predecessor,¹⁰ such as the following:

(1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation.

Lumbard, 621 F. Supp. at 1535 (citing *Arnold Graphics Indus., Inc. v. Electronic Tabulating Corp.*, 775 F.2d 38 (2d Cir. 1985)). Not all of these factors are needed to show that a successor corporation is a mere continuation of the predecessor. *Id.* at 1535 (citing *Menacho v. Adamson United Co.*, 420 F. Supp. 128, 133 (D.N.J. 1976)).

Complainant alleges that Y Plus is a successor to Spring & Soon because of a continuity of ownership, management, personnel, and business operation, but Spring & Soon contests the factual allegations that Complainant has made in support of its argument. Relevant factual issues are in dispute, and there has not yet even been a chance for the parties to conduct discovery to gather more information and evidence that could help resolve the ultimate question of whether Y Plus should be considered a successor of Spring & Soon for purposes of assessing liability. Also, Complainant has provided legal authority that enumerates the exceptions to the general rule of non-liability for successor corporations, but it has not provided any authority that discusses how courts have balanced the factors Complainant puts forth as indicating a successor-predecessor relationship in this case.

It is not necessary, however, for me to rule at this point on the ultimate issue of whether Y Plus is a successor of Spring & Soon.¹¹ I am

¹⁰*Lumbard* uses the same factors to determine whether a corporation is a mere continuation of another corporation as it does to determine whether the de facto merger exception applies, although it notes that another district court tries to draw a distinction between the two in that “a de facto merger contemplates a selling corporation and a purchasing corporation, [but] ‘a continuation accomplishes . . . something in the nature of a corporate reorganization, rather than a mere sale.’” *Lumbard*, 621 F. Supp. at 1535 n.8 (quoting *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977)).

¹¹In fact, it would be inappropriate for me to do so based on the current record and legal briefs filed so far.

not confronted with a motion for summary decision. Complainant merely asks that I add Y Plus as a respondent in this case.

The Federal Rules of Civil Procedure provide that leave to amend should be granted liberally when justice so requires. Fed. R. Civ. P. 15(a). In the context of ruling on a motion to dismiss, the court in *Lumbard* ruled that the plaintiff adequately alleged a claim based on successor liability when it alleged that the second corporation continued the business of the first corporation with the same employees, assets, and management, and that the first corporation was reduced to a “shell.” See *Lumbard*, 621 F. Supp. at 1536. Complainant has made substantially similar allegations in the present case. If Complainant had named Y Plus as a respondent at the outset of this case, it would have alleged enough information to defeat a motion to dismiss relating to the charges against Y Plus. As such, Complainant has alleged enough information at this point to support adding Y Plus as a respondent in this case and giving it the chance to prove its allegations relating to Y Plus.

As a result of the foregoing, I grant Complainant’s Motion to Amend the Complaint by adding Y Plus as a respondent in this action. By granting that Motion, I make no determination regarding whether Y Plus actually is a successor to Spring & Soon for purposes of assessing liability for Spring & Soon’s debts, in the event that Spring & Soon is found liable for any of the alleged violations of the INA. I merely find that Complainant has alleged enough information that it should be given the opportunity to prove its allegations as to Y Plus.

IV. Complainant’s Motion for Default Judgment

Complainant seeks default judgment against Spring & Soon and Y Plus on the grounds that Spring & Soon failed to answer the original Complaint in a timely manner.¹² Although Spring & Soon did not answer the original Complaint by the appropriate deadline, it did eventually file its Answer, and there has been no undue delay to the case or prejudice to Complainant as a result of Spring & Soon’s late filing.

¹²I find it unusual that Complainant would seek default judgment against a corporation, Y Plus, that had not yet been added as a respondent and, thus, also had not received a chance to respond to the amended Complaint, which brings it formally into these proceedings.

Spring & Soon states that it never received a copy of the original Complaint until Mr. Sung received a copy sent to his home address. *See* R. Opp. ¶¶3–4. Spring & Soon contends that it did not have access to the Complaint until that time and, therefore, could not have answered it earlier. *See id.* ¶5. A copy of the original Complaint, however, had been served on Spring & Soon’s then attorney, Mark C. Kalish. The postal return receipt card indicates that Mr. Kalish’s office received the Complaint on June 23, 1997. Although the copy of the Complaint sent to Spring & Soon’s business address was returned marked “Return to Sender-Addressee Unknown,” service on counsel constitutes effective service of a complaint under the OCAHO Rules of Practice and Procedure. *See* 28 C.F.R. §68.3(a)(3) (1996).

Despite Spring & Soon’s inability to show that service of the Complaint was improper, “[d]efault judgments are disfavored in the law and should be used only when the inaction of a party causes the case to grind to a halt.” *D’Amico v. Erie Community College*, 7 OCAHO 927, at 2 (1997) (citing, inter alia, *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95–96 (2d Cir. 1993)). Courts consistently hold “that entry of default judgment is within the sound discretion of the trial court.” *Id.* (citing *Enron*, 10 F.3d at 95; *Action S.A. V. Marc Rich & Co.*, 951 F.2d 504, 507 (2d Cir. 1991), *cert. denied*, 503 U.S. 1006 (1992); *Traguth v. Zuck*, 710 F.2d 90, 94 (2d Cir. 1983)). Courts greatly prefer to reach disposition of cases upon the merits, rather than by the imposition of default judgment. *See id.* at 2–3 (citing, inter alia, *Enron*, 10 F.3d at 95–96). “Because defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party.” *Id.* at 3 (quoting *Enron*, 10 F.3d at 96).

Complainant has failed to demonstrate that it will suffer any prejudice if I deny its Motion for Default and accept Spring & Soon’s Answer to the original Complaint. “Generally, default judgments only should be used when the inaction or unresponsiveness of a particular party is unexcusable and the inaction has prejudiced the opposing party.” *Id.* (citing *Enron*, 10 F.3d at 95–96; *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983); *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981); *Merker v. Rice*, 649 F.2d 171, 174 (2d Cir. 1981); *Gill v. Stolow*, 240 F.2d 669, 670 (2d Cir. 1957)). I deny Complainant’s Motion for Default and accept Spring & Soon’s Answer to the original Complaint. However, as I have granted

Complainant's Motion to Amend the Complaint by adding Y Plus as a respondent, the Respondents must answer the amended Complaint. Respondents must file¹³ that answer no later than January 8, 1998.

ROBERT L. BARTON, JR.
Administrative Law Judge

¹³I remind the parties that "file" means a document must be received in my office on or before the given date, not that it merely must be postmarked by that date. *See* 28 C.F.R. §68.8(b) (1996).