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

January 6, 1998

UNITED STATES OF AMERICA, Complainant, v. ALLIANCE CONSTRUCTION, INC., Respondent.	)))) 8 U.S.C. 1324a Proceeding) OCAHO Case No. 97A00145)))

ORDER RESERVING A RULING ON COMPLAINANT'S MOTION FOR JUDGMENT BY DEFAULT

On August 4, 1997, complainant, acting by and through the Immigration and Naturalization Service (complainant/INS), commenced this action, which arises under Section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a, enacted by the Immigration Reform and Control Act of 1986 (IRCA), by having filed the two (2)-count Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO).

The Complaint alleges that Alliance Construction, Inc. (Alliance/respondent) committed 17 paperwork violations, for which complainant requested civil money penalties totaling $5,100.

In Count I of the Complaint, complainant alleges that respondent had employed the six (6) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I–9 for those six (6) individuals, in violation of 8 U.S.C. §1324a(a)(1)(B). For that count, complainant requested a civil money penalty of $300 for each of the those six (6) violations, or civil money penalties totaling $1,800.

In Count II, complainant alleges that respondent had employed the 11 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure that those 11 individuals properly completed section 1 of the Form I–9 and that respondent had failed to properly complete section 2 of those same Forms I–9, in violation of 8 U.S.C. §1324a(a)(1)(B). For that count, complainant requested a civil money penalty of $300 for each of the those 11 violations, or civil money penalties totaling $3,300.

On August 7, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, together with a copy of the Complaint, were served upon respondent's registered agent, Martin W. Rogers, by certified mail, return receipt requested, and by regular mail upon James Galloway, the chief financial officer of respondent corporation.

The Notice of Hearing advised respondent that if it failed to file an answer within the 30-day time period provided under the applicable OCAHO rule, it may be deemed to have waived its right to appear and contest the allegations set forth in the Complaint, and that an Administrative Law Judge may enter a judgment by default along with any and all appropriate relief. *See* 28 C.F.R. §68.9(a) and (b) (1997).[1]

On August 18, 1997, the Notice of Hearing and the U.S. Postal Service Domestic Return Receipt, PS Form 3811, which had been attached to the Notice of Hearing and addressed to respondent's registered agent, Martin W. Rogers, was returned to this Office bearing the stamp "attempted, not known", thus indicating that the respondent had not received service of the Complaint at that address.

However, the Notice of Hearing that had been served by regular mail upon James Galloway was not returned, and thus service was properly effected by regular mail upon an officer of respondent corporation. 28 C.F.R. §68.3(a)(3).

Because the Complaint was served by regular mail, five (5) days were added to the prescribed period for filing an answer, which was

[1]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

thus due on September 11, 1997 (or 35 days after August 7, 1997). 28 C.F.R. §68.8(c)(2).

On September 29, 1997, complainant filed a Motion for Default Judgment, requesting that a default judgment be entered against respondent for its having not filed an answer or other responsive pleading within 35 days of the service of the Complaint as required by 28 C.F.R. §68.9(b).

On October 22, 1997, an Order to Show Cause Why Complainant's Motion for Default Judgment Should Not Be Granted (Show Cause Order) was issued.

That Show Cause Order instructed Alliance to either show cause why complainant's motion should not be granted, or, in the alternative, to file the required answer. Respondent was further advised that failure to respond by November 11, 1997, would result in complainant's motion being granted.

On November 10, 1997, James Galloway, previously identified as an officer of respondent corporation, timely filed a letter/pleading in response to the Show Cause Order. That letter/pleading does not constitute an answer which comports with the applicable OCAHO procedural rule.

Alliance requests in its letter/pleading that the default judgment be set aside owing to the fact that it was engaged in legitimate settlement negotiations with the INS.

It is obvious that Alliance, appearing without the assistance of legal counsel, misapprehends the nature and import of the Show Cause Order, since that Order did not enter a default judgment against Alliance, but rather afforded Alliance the opportunity to explain why it had failed to file a timely answer contesting the allegations of the Complaint and avoid the entry of a default judgment.

For further clarification, respondent's December 20, 1996, written request for hearing previously sent in response to the NIF does not constitute an answer to the Complaint filed in this administrative proceeding. A separate answer must be filed in compliance with OCAHO regulations.

On December 2, 1997, complainant filed a pleading captioned Complainant's Motion for Leave to File Response to Respondent's Answer to the Court's Order to Show Cause.

Complainant argues that Alliance's reply to the Show Cause Order neither addresses complainant's motion for default judgment nor constitutes an adequate answer under OCAHO's regulations.

Complainant further advises that settlement negotiations conducted prior to the filing of the Complaint were unsuccessful and that after filing its Complaint, INS was no longer interested in further settlement discussions and so informed Alliance.

For those reasons, complainant urges that its motion for default judgment should be granted.

Federal and OCAHO rulings disclose that default judgments are generally disfavored. *United States v. R&M Fashion, Inc.*, 6 OCAHO 826, at 2 (1995); *United States v. U.S. Style, Inc.*, 6 OCAHO 827, at 5 (1995); *United States v. Continental Sports Corp.*, 4 OCAHO 640, at 457 (1994); *Matter of Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992); *United States v. One Parcel of Real Property*, 763 F.2d 181, 183 (5th Cir. 1985) ("modern federal procedure favors trials on the merits").

This general rule, which reflects a policy in favor of a trial on the merits, does not relieve Alliance of its burden of demonstrating the requisite good cause for filing a late answer. *United States v. Alvarez-Suarez*, 4 OCAHO 655, at 569 (1994); *United States v. Shine Auto Service*, 1 OCAHO 70, at 446 (1989) (Vacation by Chief Administrative Hearing Officer of the ALJ's Order Denying Default Judgment) (respondent must justify its failure to respond in a timely manner).

The only facts available for resolving this issue are respondent's assertions that the parties had been engaged in good faith efforts to negotiate a settlement of this matter up until the time the Show Cause Order was issued.

Attempts to legitimately negotiate a settlement quite clearly and commendably avoid the cost and time of filing an answer. In *Alvarez-Suarez*, the Administrative Law Judge found this reasoning persuasive in allowing a late answer. *See also United States v. Continental Sports Corp.*, 4 OCAHO 640, at 456 (1994).

Complainant concedes that settlement negotiations had been conducted prior to the filing of the Complaint with this Office, but denies that any such activities occurred subsequent to that filing.

Alliance responded timely to both the NIF and the Show Cause Order, and has thus demonstrated a sincere intent to contest the allegations of the Complaint. Complainant has not proffered any facts showing that it is prejudiced by the delay of this proceeding.

In view of these facts and mindful of respondent's *pro se* status, it is found that there is good cause to allow Alliance to file a late answer. *See United States v. Linkous & Riley*, 3 OCAHO 436, at 438 (1992) (respondent appearing *pro se* given three (3) opportunities to file a complying pleading); *United States v. Cocoa Enterprises Corp.*, OCAHO Case No. 96A00077 (April 8, 1997) (default judgments "should be used only where the inaction of a party causes the case to come to a halt").

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).

Accordingly, respondent is hereby ordered to comply with the October 22, 1997, Order to Show Cause and to file an answer which comports with the requirements set forth at 28 C.F.R. §68.9(c), and to have done so within 20 days of service of this Order by regular mail.

In the event that respondent fails to do so, it will be found that respondent has waived its right to appear and contest the allegations

of the Complaint, and a final order entering judgment by default will be issued.

JOSEPH E. MCGUIRE
Administrative Law Judge