

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

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2020A00097
CITYPROOF CORPORATION,)	
Respondent.)	
)	

ORDER

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 25, 2020, alleging that Respondent, Cityproof Corporation, failed to prepare and/or present the employment eligibility form (Form I-9) for twenty-three (23) individuals, and failed to properly complete Forms I-9 for eight (8) employees.

On November 2, 2020, OCAHO sent Respondent a Notice of Case Assignment for Complaint Alleging Unlawful Employment, a copy of the Complaint, and the Notice of Intent to Fine (NIF) via U.S. certified mail. The Notice of Case Assignment directed that an answer was to be filed within 30 days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would be governed by Department of Justice regulations.¹ Thus, Respondent's answer was due no later than December 7, 2020. Respondent did not file an answer.

On January 21, 2021, the undersigned issued a Notice of Entry of Default requiring Respondent, within fifteen (15) days of the order, to file an answer and show good cause for its failure to file a timely answer. The undersigned warned that failure to file an answer and show good cause may result in the entry of a default judgment against Respondent. Respondent's response to the Notice of Entry of Default was due no later than February 5, 2021. Respondent did not file a response or an answer.

On April 30, 2021, Complainant filed a letter to the Court requesting a substitution of counsel in this matter. The letter states that Assistant Chief Counsel Fen Lu has been assigned to

¹ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2018).

this matter, and requests to be substituted with the counsel of record, Assistant Chief Counsel Eli Kirschner.

II. ORDER GRANTING REQUEST FOR SUBSTITUTION OF COUNSEL

The Court grants Complainant's request for Assistant Chief Counsel Fen Lu to be substituted as the counsel of record instead of Assistant Chief Counsel Eli Kirschner. OCAHO's Rules of Practice and Procedure provide that "substitution of an attorney or representative may be permitted by the Administrative Law Judge upon written motion. The Administrative Law Judge shall enter an order granting or denying such motion for withdrawal or substitution." 28 C.F.R. § 68.33(g).

Therefore, IT IS SO ORDERED that Fen Lu is assigned as counsel of record for Complainant, ICE, and Eli Kirschner is removed as counsel of record for Complainant.

III. ORDER ENTERING DEFAULT

In light of the fact that Respondent has not filed an answer or a response to the Notice of Entry of Default, the Court finds that Respondent has waived its right to appear and contest the allegations of the complaint. See 28 C.F.R. § 68.9 ("Failure of the respondent to file an answer within the time provided may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint.").

Therefore, IT IS SO ORDERED that these proceedings are bifurcated into liability and damages proceedings, and with regard to liability the Court finds that Respondent, Cityproof Corporation, through its failure to file an answer or otherwise respond to the show cause order, has both forfeited the opportunity to contest the charges and has conceded liability.

IV. ORDER OF INQUIRY

OCAHO case law has found that "it is appropriate in cases under 8 U.S.C. § 1324a to invite the parties to file submissions on penalty after entry of a default on liability." United States v. Hui, 3 OCAHO no. 479, 826, 829 (1992)² (citing United States v. Cruz, 3 OCAHO no.

² Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is

453, 595, 597 (1992)). Since default is entered against Respondent, the Court finds it appropriate in this case to invite the parties to file submissions regarding the assessment of penalties.

Section 274a of the INA directs that, “[i]n determining the amount of [civil money] penalt[ies], due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violation.” 8 U.S.C. § 1324a(e)(5). The Court considers the facts and circumstances of each case to determine the weight, if any, given to each factor. United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355a, 3 (2020) (citing United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 8 (2017)). While the statutory factors must be considered in every case, § 1324a(e)(5) “does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total.” United States v. Ice Castles Daycare Too, Inc., 10 OCAHO no. 1142, 6-7 (2011) (internal citations omitted). At this point in the proceedings, the Court has no information upon which to consider these five statutory factors.

Therefore, IT IS SO ORDERED that Complainant, ICE, must file a memorandum regarding the assessment of penalties in this case no later than 30 days after the issuance of this order. The memorandum shall address the five statutory factors listed in 8 U.S.C. § 1324a(e)(5).

ENTERED:

John A. Henderson
Administrative Law Judge

DATE: June 3, 2021

accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.