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

United States of America, Complainant v. Nu Line Fashions, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100566.

DECISION AND ORDER GRANTING JUDGMENT BY DEFAULT

(March 30, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **CHESTER J. WINKOWSKI**, Esq., for the Immigration and Naturalization Service.
RONALD H. FANTA, Esq., for Respondent.

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), at section 101, enacted section 274A of the Immigration and Nationality Act of 1952, (INA or the Act), 8 U.S.C. § 1324a, introducing an enforcement program designed to implement employer sanctions provisions prohibiting the unlawful employment of aliens, and requiring compliance with employment verification requirements in the administration of the employer sanctions program.

On November 3, 1989, the Immigration and Naturalization Service (INS or the Service), filed a Complaint against Nu Line Fashions, Inc. (Nu Line, or Respondent), alleging one count of knowing employment of unauthorized aliens and three counts of paperwork violations of 8 U.S.C. § 1324a.

Count One alleges that after November 6, 1986, Respondent hired three named individuals who were aliens not authorized to work in the United States, either so known to Respondent at the time of hire or during the employment in violation of 8 U.S.C. § 1324a(a)(1)(A) or alternatively, 8 U.S.C. § 1324a(a)(2). Count II alleges that respondent failed to prepare and/or to present for inspection an employment eligibility verification form, INS Form I-9, for each of six named individuals, in violation of 8 U.S.C. § 1324a(a)(b). Count III alleges that Respondent failed to ensure

that a named individual properly completed Section 1 of Form I-9, in violation of 8 U.S.C. § 1324a(b). Count IV alleges that Respondent failed to ensure that a named individual properly completed Section 1 of Form I-9 and that Respondent as to that Form I-9 failed to properly complete section 2, in violation of 8 U.S.C. § 1324a(b) and (2). Count V alleges that Respondent failed to update the Form I-9 as to four named individuals, in violation of 8 U.S.C. § 1324a(b).

The Complaint dated October 30, 1989, containing as Exhibit A a Notice of Intent to Fine (NIF) dated August 16 and 18, 1989, contained also, as Exhibit B, Respondent's request for hearing in the form of a letter dated September 10, 1989 to INS from Ronald H. Fanta who on the same date executed an entry of appearance form as Respondent's representative before INS. [The counts of the NIF were reproduced in this case as counts in the Complaint].

The Complaint seeks as civil money penalties for the unlawful employment violation, Count I, $2,000.00 per individual, a total of $6,000.00; for the paperwork violations, for Count II, $1,000.00 per violation, a total of $6,000.00; for Count III, $500.00; for Count IV, $500.00, and for Count V $250.00 per violation, a total of $1,000.00, an aggregate civil money penalty of $14,000.00.

By Notice of Hearing dated November 9, 1989, Respondent was advised of the filing of the complaint, the opportunity to answer within thirty (30) days after receipt of the complaint, my assignment to the case, and the location of a hearing, i.e., in or around New York City, New York, pursuant to further notice. Respondent, by the same attorney who had filed with INS the request for hearing in response to the NIF, filed on November 29, 1989 a response to the Complaint denominated a ``Reply.'' I accept that pleading as an Answer since certainly that is what it appears to be, timely filed since its service certificate was signed although the pleading itself was not. The unsigned Answer was accompanied by a November 27, 1989 certificate of service signed by Mr. Fanta. My staff by telephone requested Mr. Fanta to file a signed copy of the Answer which he did, by transmittal dated December 1, filed December 6, 1989.

By Motion for Judgment on the Pleadings, filed January 16, 1990, INS asked that I enter judgment on the pleadings either on the entire case or, alternatively, on all but Count II, on the ground that Respondent essentially had failed to state legal defenses to the Complaint. Although I received no responsive pleading, I overruled the motion by an Order Denying Motion for Judgment on the Pleadings, issued February 6, 1990.

I overruled Complainant's motion because as I explained in more detail I did not find the Answer to the Complaint wanting but instead held that ``the Motion on its face appears to me unsupportable. . . .'' The Order went on to recite, however, that in view ``of Respondent's failure to have responded to the Motion, Respondent is directed to file within ten calendar days of this Order a statement explaining the omission to file a response to the Motion. That filing will state also whether Respondent intends to defend this action.''

No statement or other response has been forthcoming by or on behalf of Respondent, by counsel or otherwise, although more than five weeks have elapsed since the end of the prescribed ten day period. Instead, INS on March 16, 1990 filed a pleading entitled Motion For Default Judgment And/Or For Other Relief. That motion is accompanied by a certificate dated March 15, 1990 certifying mail service that date to Mr. Fanta, and also by a Declaration of INS counsel. In addition, INS filed copies of written interrogatories and request for production of documents which it had served on Respondent on January 11, 1990.

Complainant predicates its motion for default judgment in part on the theory that by failing to respond to my Order, Respondent has violated a pretrial order, entitling Complainant to judgment by default pursuant to Rules 16(f) and 37(b)(2)(C), among others, of the Federal Rules of Civil Procedure. Complainant asks judgment also on the ground that Respondent fail to respond to the earlier INS motion for judgment on the pleadings, or to discovery, citing ⌊28 C.F.R. § 68.35(b). Alternatively, INS asks that if I deny judgment by default I direct that Respondent answer and comply with the pending discovery demands.

The rules of practice and procedure of this Office make clear that the Federal Rules of Civil Procedure are available ``as a general guideline in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.'' 28 C.F.R. § 68.1. Our rules provide a party ten days in which to respond to service of a pleading (unless otherwise ordered by the judge) plus five days extra for response by mail. 28 C.F.R. §§ 68.9(b), 7(c)(2). Service is complete upon mailing. Id. at 68.7(c)(1).

Neither Respondent or anyone on its behalf has made a timely filing in response to the pending motion. Accordingly, I grant the motion for judgment by default. I do not, however, rely on the authority of the Federal Rules cited by INS because they appear to me to require first that steps in aid of discovery be taken, and none have been.

Title 28 C.F.R. § 68.35(b), however, authorizes dismissal of a case as a consequence of a party having failed to appear ``at the time and place fixed for the hearing.'' This provision assures that the hearing process, and the judges assigned to it, will not be frustrated by failure of a party to respond to hearing schedules.

Although 28 C.F.R. § 68.35(c) is susceptible to greater precision in drafting, I hold here that it provides procedural authority also to enter a default for failure of Respondent, without good cause, to appear at hearing, i.e., failure to respond to my Order of February 6, 1990. No cause has been shown on this record for Respondent's failure to respond to that Order, or to any pleadings subsequent to filing of its Answer.

The statement in the Declaration by INS counsel, supra, that Mr. Fanta ``believed his client to be out of business and he was not in contact with them,'' is not instructive as to why Mr. Fanta, or Respondent, has failed, without cause, to participate in the proceeding since December, 1989.

The conclusion that default judgment is authorized and proper is consistent also with the understanding that the adjudicatory process under 5 U.S.C. § 554, mandated by 8 U.S.C. § 1324a(e)(3)(B), is controlled by 5 U.S.C. § 556 which makes clear that the entire process, not just the confrontational evidentiary phase, constitutes the hearing before me.

In any event, considering the comprehensive catalogue of authority at 28 C.F.R. § 68.26(a), it is inconceivable that an administrative law judge confronted with a party which, having asked for a hearing, has abandoned the process, is unable to terminate the proceeding in favor of the other party. Indeed, subsection 26(a) includes among the powers conferred, authority to ``[T]ake any action authorized by the Administrative Procedure Act.'' Id. at (6). Among the powers assigned by the Administrative Procedure Act, 5, U.S.C. § 556 specifies, inter alia, that the judge, subject to published agency rules, may ``regulate the course of the hearing,'' and ``take other action authorized by agency rule consistent with this subchapter.'' Id. at (c)(5) and (9).

No timely or any response having been received to my Order of February 6, 1990, it is plain that Respondent has abandoned its defense of this case. That conclusion is strengthened by the fact of Respondent's failure to respond to discovery or to the pending motion for default judgment.

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED, that Respondent is in violation of ⌊8 U.S.C. § 1324a(1)(A) for hiring the aliens named in Count I of the Complaint after November 6, 1986, for employment in the United States, knowing them to be unauthorized for employment in the United

States; alternatively, that Respondent is in violation of ⌊8 U.S.C. § 1324a(a)(2) for continuing to employ said aliens for such employment knowing they were (or had become) unauthorized aliens with respect to such employment, and that Respondent is in violation of 8 U.S.C. § 1324a(a)(1)(B) for its failure to comply with the employment verification requirements with regard to the individuals named in Counts II through V of the Complaint.

IT IS HEREBY ORDERED:

(1) that Respondent pay a civil money penalty in the amount of $6,000.00 for the violations in Count I of the Complaint, $6,000.00 for the violations in Count II, $500.00 for the violation in Count III, $500.00 for the violation in Count IV, and $1,000.00 for the violation in Count V, for a total civil money penalty of $14,000.00;

(2) That Respondent shall cease and desist from violating Section 274A of the Immigration and Nationality Act, 8 U.S.C. 1324a.

(3) that the hearing in this proceeding is canceled.

This Decision and Order on Default is the final action of the judge in accordance with ⌊28 C.F.R. § 68.51(a). As provided at 28 C.F.R. § 68.51(a), this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. § 1324a(e)(7), 28 C.F.R. § 68.51(a)(2).

SO ORDERED.
Dated this 30th day of March, 1990.

MARVIN H. MORSE,
Administrative Law Judge