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

United States of America, Complainant vs. S. Masonry Fencing Company, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100006.

SUMMARY DECISION ON DEFAULT AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

MARVIN H. MORSE, Administrative Law Judge.

Appearances: THOMAS E. WALTER, Esq., for the Immigration and Naturalization Service.

Discussion and Decision:

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), adopted significant revisions in national policy with respect to illegal immigrants. Accompanying other dramatic changes, IRCA, at section 101, introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States.

Section 101 of IRCA amended the Immigration and Nationality Act of 1952 by adding a new section, 274A (8 U.S.C. 1324a). Section 1324a provides also that an employer is liable for failure to attest ``on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien....'' In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring (recruiting or referring for a fee) or continuing to employ such aliens. The entire arsenal of public policy remedies against unlawful employment of aliens is commonly known by the rubic “employer sanctions.”

Section 1324a authorizes the imposition of orders to cease and desist with civil money penalty for violation of the proscription

against hiring, recruiting, and referral for a fee of unauthorized aliens and authorizes civil money penalties for paperwork violations. 8 U.S.C. 1324a(e)(4)-(5).

By Final Rule published May 1, 1987, 52 Fed. Reg. 16190, 16221-28, the Department of Justice implemented the employer sanctions provisions of IRCA, now codified at 8 CFR Part 274a. These regulations provide, inter alia, in pertinent part, id. at 274a.2(a):

> This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting [sic] or referring for a fee, individuals in the United States, or continuing to employ aliens knowing that the aliens are (or have become) unauthorized aliens. The Form I-9, Employment Eligibility Verification Form, has been designated by the [Immigration and Naturalization] Service as the form to be used in complying with the requirements of this section.

The regulation provides that the Immigration and Naturalization Service (INS) initiates an action to assess civil liability by issuance of a Notice of Intent to Fine (NIF), and provides also that an employer against whom the NIF is imposed ``has the right to request a hearing before an Administrative Law Judge pursuant to 5 U.S.C. 554-557, and that such request must be made within 30 days from the service of the Notice of Intent to Fine.'' Id. at 274a.9(c)(1)(ii)(C).

An opportunity for a hearing before an administrative law judge as a precondition for a cease and desist order and a civil money penalty is conferred by statute, 8 U.S.C. 1324a(e)(3). The administration of an administrative law judge system pursuant to Section 1324a was established by the Attorney General, 52 Fed. Reg. 44971, November 24, 1987; (corrected), 52 Fed. Reg. 48997, December 29, 1987. That administration is lodged in the Office of the Chief Administrative Hearing Officer (OCAHO), Department of Justice. The Interim Final Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges In Cases Involving Allegations Of Unlawful Employment Of Aliens (Rules) appears at 52 Fed. Reg. 44972-85, November 24, 1987 (to be codified at 28 CFR Part 68). The Rules govern practice and procedure in cases heard by administrative law judges under IRCA.

Consonant with the statute and regulations, the INS on February 1, 1988, filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer. The complaint, dated January 28, 1988, contained as Exhibit A, the December 31, 1987, Notice of Intent to Fine S. Masonry Fencing Company, and as Exhibit B, the January 12,1988, Request for Hearing with an Administrative Law Judge.

By Notice of Hearing on Complaint Regarding Unlawful Employment, dated February 4, 1988, Respondent, S. Masonry Fencing Company (Masonry), 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 date and place of hearing, i.e., beginning June 7, 1988, at the Yuma County Courthouse, 168 South Second Avenue, Yuma, Arizona.

The complaint, incorporating the NIF, requests an order directing Respondent to cease and desist from violating 8 U.S.C. 1324a and seeks civil money penalties for paperwork violations at $100 each for a total of $600.

By motion dated March 25, 1988, INS asks for a summary decision and default judgment. The motion rests on the premise that no answer had been filed to the complaint although the complaint had been filed more than sixty (60) days previously.[1] INS, citing Section 68.6 of the Rules, asks for summary decision pursuant to Section 68.36 on the obvious grounds that absent an answer to the complaint there is no genuine issue of material fact. INS also cites for support, Rule 56 of the Federal Rules of Civil Procedure (FRCP), made applicable to proceedings in OCAHO. Rules, Section 68.1.

On April 18, 1988, having not received an answer to the complaint or any responsive pleading to the INS motion, I issued an Order to Show Cause Why Judgment By Default Should Not Issue. That order provided Respondent an opportunity to ``show cause why default should not be entered against it, any such showing to be made by motion which also contains a request for leave to file an answer.'' No pleading or other document has been received from Respondent although the Order to Show Cause required an answer, if any, to be received by May 3, 1988.[2]

The failure of Respondent to file a timely, or any, answer to the complaint constitutes a basis for entry of a judgment by default within the discretion of the administrative law judge. Rules, Section 68.6(b). The failure to answer entitles the judge to treat the allegations of the complaint as admitted. Clearly, absent an answer, as here, there can be no genuine issue as to any material fact. As provided in the Rules, Section 68.36(c), the judge has discretion to issue a summary decision.

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[1] No answer was received to the complaint forwarded to Respondent by the February 4, 1988, Notice of Hearing. The envelope containing the Notice was not returned to this Office as undelivered.

[2] No response has been received to the April 18, 1988, Order to Show Cause. A copy was addressed to Respondent by certified mail return receipt requested; that receipt was returned endorsed to show delivery on April 23, 1988.

Finally, although INS asked in its complaint for issuance of a cease and desist order it has abandoned that request in its Motion for Summary Decision and Default Judgement. The relief now requested is consistent with 8 U.S.C. 1324a(e) (4) and (5) which contemplate cease and desist orders in unlawful hiring, recruiting, referral for a fee and employment cases but not where, as here, paperwork violations alone are involved.

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED, that Respondent is in violation of 8 U.S.C. 1324a(a)(1)(B) with regard to Fausto Neblina, Julio Neblina, Manuel Sanson-Lopez, Abel Olan Castillo, Juan Lopez-Francisco, and Ramon Flores-Angulo in that the Employment Eligibility Verification Forms I-9, here found to have been the forms designated and established by the Attorney General within the meaning of 8 U.S.C. 1324a(b), were not completed.

IT IS HEREBY ORDERED:

(1) that Respondent pay a civil money penalty in the amount of $100 each for Counts I through VI of the complaint as set forth in the Notice of Intent to Fine, a total of $600, and

(2) that the hearing previously scheduled is canceled.

This Summary Decision on Default and Order of the Administrative Law Judge is the final action of the judge in accordance with Section 68.51(b) of the Interim Final Rules of Practice and Procedure, supra. As provided in those Rules, id. at Section 68.52, 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 shall have modified or vacated it.

SO ORDERED.

Dated this 11th day of May, 1988.

MARVIN H. MORSE
Administrative Law Judge