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

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	CASE NO. 92A00182
MANUEL MEDINA, JR.,	)	
INDIVIDUALLY AND D/B/A	)	
THE MONTANA HIDEAWAY,	)	
Respondent.	)	
	)	

FINAL ORDER AND DECISION GRANTING
COMPLAINANT'S MOTION FOR DEFAULT

I. *Introduction*

Currently before me is Complainant's Motion for Judgment By Default, filed pursuant to 28 C.F.R. § 68.9(b).[1] This case involves the novel issue of whether a default judgment can be granted against a respondent where a lawyer filed with the Immigration and Naturalization Service ("INS") a request for an administrative hearing on respondent's behalf, pursuant to 8 U.S.C. § 1324a (e)(3)(A), and was served with the complaint; but fails to timely answer the complaint, claiming he did not represent the respondent at the time he was served with the complaint. For the reasons stated herein, Complainant's Motion for Judgment by Default will be granted.

II. *Background and Procedural History*

On October 8, 1991, INS, Complainant herein, issued a Notice of Intent to Fine ("NIF") alleging in four counts that Manuel Medina, Jr., individually and D/B/A The Montana Hideaway, Respondent herein,

[1] 28 C.F.R. Part 68 was amended by the Final Rule of Dec. 7, 1992, Rules of Practice and Procedure for Administrative Hearings, 57 Fed. Reg. 57669 (to be codified at 28 C.F.R. Part 68). The citations herein, however, will refer to 28 C.F.R. Part 68, as amended by the Interim Rule of October 3, 1991, 56 Fed. Reg. 50049 (hereinafter "28 C.F.R. § 68"), to reflect the law at the time the matters at issue took place.

violated various sections of the Immigration and Nationality Act ("the Act").[2]

The first count alleges that Respondent hired nine (9) individuals for employment in the United States in violation of § 274A (a)(l)(A) of the Act, 8 U.S.C. § 1324a(a)(l)(A), which renders it unlawful, after Novem-ber 6, 1986, for a person or other entity to hire for employment in the United States, an alien knowing that the alien is not authorized to be employed in the United States.[3]

The first count also charges, in the alternative, that Respondent continued to hire the same nine individuals for employment in the United States in violation of § 274A(a)(2) of the Act, 8 U.S.C. § 1324a(a)(2), which renders it unlawful for a person or other entity, after having hired hiring an alien for employment in the United States after November 6, 1986, to continue to employ the alien in the United States knowing that the alien is or has become an unauthorized alien with respect to such employment

Counts two, three, and four allege various violations of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(A)(1)(B), which renders it unlawful, after November 6, 1986, for a person or other entity to hire an individual for employment in the United States, without complying with the requirements of § 274A(b) of the Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). These violations include failure to prepare the Employment Eligibility Verification ("I-9") Form, failure to ensure that the employee properly completed section 1 of the I-9 Forms at the time of hire and failure to complete section 2 of the I-9 Form within three business days of hire.

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[2] The INS, through the authority of the Attorney General, is assigned by law with the duty to investigate and prosecute charges concerning the unlawful employment of aliens. 8 U.S.C. § 1324a (e)(1).

[3] The nine individuals named in this count are:
1. Ruth Osiri-Juaregui a/k/a Jasimine
2. Maria Hernandez-NMN a/k/a Mellissa
3. Araceli Barraza-Casteneda a/k/a Adriana Araceli Barraza-C.
4. Judeth Curiel-Ortiz a/k/a Jessica
5. Maria Luisa Noriega-NMN a/k/a Jacklynn
6. Lorena Carrillo-Renteria a/k/a Martha
7. Gloria Mendez-NMN a/k/a Gloria
8. Perla Lopez-Castillo a/k/a Perla
9. Brenda Almarez-Mendoza a/k/a Brenda

Count two identifies the same nine individuals named in count one as those employees whose I-9 Forms were not prepared by Respondent. Count three identifies Brian Paul Joncoaltz and Jesus Banda as the employees whom Respondent failed to ensure completed Section 1 of the I-9 Form. Count four identifies Joseph Louis Maciel as the employee whom Respondent failed to ensure timely completed section 1 and 2 of the I-9 Form and for whom Respondent failed to complete section 2 of the I-9 Form within three business days of hire. The NIF seeks a total civil monetary penalty in the amount of $43,000.00.

The NIF was personally served upon Respondent on October 9, 1991, by an INS agent. Subsequently, Respondent, through his attorney, Eduardo N. Lerma, timely submitted to INS a request for an administrative hearing, which INS received on November 4, 1991. On August 17, 1992, INS filed the complaint in this case with the Office of the Chief Administrative Hearing Officer (" OCAHO"). The complaint tracks the language of the NIF, alleging the same violations of the Act in the same four counts. The complaint also seeks a civil monetary penalty of $43,000.00 and an order directing the Respondent to cease and desist from any further violations of § 274A(a)(1)(A) of the Act.

On August 20, 1992, OCAHO sent by certified mail a notice of hearing on the complaint, with an attached copy of the complaint to Respondent's counsel, Eduardo Lerma. Mr. Lerma received this on August 24, 1992. A copy of the notice and complaint was also sent to Respondent via regular mail.[4]

On October 13, 1992, a few weeks after the time had passed for the filing of a timely answer, Complainant filed a Motion for Judgment by Default.[5]

On November 17, 1992, I issued an Order to Show Cause Why Default Judgment Should not Issue, which was served upon Mr. Lerma. On December 1, 1992, Mr. Lerma, acting on Respondent's behalf, filed a response to my Order to Show Cause and requested leave to file a late answer.

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[4] There is no evidence in OCAHO's file on this case indicating that the complaint mailed to Respondent was returned to OCAHO for any reason.

[5] The answer was due on or before September 23, 1992, thirty days after receipt of the complaint. See 28 C.F.R.§ 68.9(a).

In his response to the Order to Show Cause, Mr. Lerma asserted that he did not represent Respondent in the matter of the Order to Show Cause; nor had he been retained to represent Respondent in this case. Mr. Lerma stated that although he filed a notice on behalf of Respondent for an administrative hearing, he did so only to protect Respondent's interest; and that he did not represent Respondent at the time he, Mr. Lerma, received the notice of hearing and a copy of the complaint. Furthermore, Mr. Lerma stated that he was unaware that "by forwarding the letter that it would constitute an appearance for all purposes." (Emphasis added.)

In addition, Mr. Lerma asserted that since August 24, 1992, he has made every effort to determine whether Respondent has wanted to retain his services, but he has been unable to contact Respondent. Finally, Mr. Lerma stated that although he had not been retained to represent Respondent in this proceeding, he was filing the answer to "protect the interests of Respondent."

On December 2, 1992, Mr. Lerma filed "Respondent's Original Answer to Complaint and Motion for Default Judgment," generally denying each count in the complaint and arguing that a default judgment would deny Respondent due process as he has not been given notice of the complaint.

III. *Legal Analysis*

In order to determine whether Respondent is in default, the first issue that must be decided is whether Respondent has been afforded proper notice of the complaint; or, in other words, if the complaint was properly served on Respondent's counsel. If there has been proper service of the complaint, then Respondent, by failing to file a timely answer, is in default.[6]

Even if Respondent is in default, however, because an answer has been filed, I must determine whether there is good cause for the late filing. If there is good cause, the default will be set aside and the case will be determined on its merits.

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[6] The regulations governing this proceeding provide in pertinent part that:
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.

28 C.F.R. § 68.9(b).

A. The Complaint Was Properly Served On Respondent's Counsel

The regulations that govern this proceeding provide that service of a complaint shall be made by OCAHO or the Administrative Law Judge ("ALJ") to whom the case is assigned either:

(a) By delivering a copy to the individual party . . . or attorney of record of a party;

(b) By leaving a copy at the . . . residence of a party; or

(c) By mailing to the last known address of such individual . . . or attorney.

28 C.F.R. §68.3 (1991). Furthermore, service of the complaint and notice of hearing is complete upon receipt by the addressee. 28 C.F.R. § 68.3 (d).

While it is uncertain whether Respondent personally received the notice of hearing or a copy of the complaint which OCAHO sent to him by regular mail, the following is undisputed: (1) OCAHO sent by certified mail a notice of hearing and a copy of the complaint to Mr. Lerma on August 20, 1992; (2) Mr. Lerma received the notice of hearing and a copy of the complaint on August 24, 1992 and (3) he filed an answer December 2, 1992. The answer to the complaint was due September 23, 1992, thirty days after it was served on Mr. Lerma. 28 C.F.R. § 68.9(a). Because the answer was not timely filed, if service of process was proper, Respondent is in default. Mr. Lerma argues that I should not enter a default judgment against Respondent because Mr. Lerma did not represent Respondent at the time the complaint was served; and therefore, he could not accept service of process for Respondent. This argument is not persuasive.

The federal regulations that govern this proceeding provide that the filing of a request for a hearing, signed by an attorney "shall be considered a notice of appearance on behalf of the respondent for whom the request was made." 28 C.F.R. § 68.33(b)(5). It is undisputed that after Mr. Lerma was served with the NIF, he filed with INS a request for an administrative hearing.[7] Mr. Lerma contends, however, that he only submitted the request for hearing to protect his former

[7] This request was in the form of a letter, dated November 1, 1992, written on the stationery of Mr. Lerma's law firm, addressed to the United States Border Patrol in El Paso, Texas and signed by Mr. Lerma.

client, Manuel Medina, Jr., and that no arrangement for representation had been made. This is inconsistent, however, with the language of the request for a hearing, which stated in pertinent part:

> This office has been retained by Mr. Manuel Medina, Jr. in regards to the above refer- enced matter.
>
> This office hereby files its appeal in regards to this matter.
>
> If you should have any questions please do not hesitate to contact this office.

Complaint, Exhibit B.

There is no indication in this letter, which was accepted by the INS as a request for hearing, that Mr. Lerma qualified his entry of appearance on behalf of Respondent. Nor did this office or the INS receive any correspondence or pleading from the Respondent or Mr. Lerma concerning any limitations on Mr. Lerma's representation of Respondent regarding this case, until December 2, 1992 when Mr. Lerma filed his response to my Order to Show Cause. Complainant argues that since Mr. Lerma never notified this office or INS of his withdrawal from the case, notice to Mr. Lerma of the complaint constitutes notice to Respondent. I agree.

The general rule is that notice to the attorney is notice to the client. Smith v. Ayer, 101 U.S. 320, 325 (1879); Irwin v. Veterans Administration, 874 F.2d 1092, 1094 (5th Cir. 1989); Cooper v. Lewis, 644 F.2d 1077, 1082 (5th Cir. 1981); Decker v. Anheuser-Busch, 632F.2d 1221, 1223 (5th Cir. 1980). The attorney, however, must have received the notice or knowledge while acting for his client, or the notice must regard matters as to which the relation of attorney and client exists. Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962); Men Keng Chang v. Jiugni, 669 F.2d 275, 277-78 (5th Cir. 1982); Bell v. Brown, 557 F.2d 849, 856 (D.C. Cir. 1977). Furthermore, there must be evidence of actual appointment and not merely an implication from an attorney's activities in order for an attorney to be an agent for service of process. Bennett v. Circus U.S.A., 108 F.R.D. 142, 147 (N.D. Ind. 1985). In Bennett, neither the law firm's forwarding of the complaint and summons to the defendant nor the fact that the firm was conducting negotiations for the defendant with a co-defendant over an indemnification agreement established that the firm was defendant's agent for service of process. The instant case is distinguishable as Mr. Lerma filed a request for hearing on this matter, which he signed, thus constituting a notice of appearance on Respondent's behalf, pursuant to federal regulation. 28 C.F.R. § 68.33(b)(5). As the regulations governing this proceeding expressly provide that service of a complaint

and notice of hearing is complete by mailing to a party's attorney of record, 28 C.F.R. § 68.3(c) and (d), service upon Respondent's counsel was effective to constitute notice to Respondent.

Complainant argues that some jurisdictions require an attorney to get leave of court before withdrawing from a case or controversy when an adverse party is involved or after an appearance has been filed. See, e.g., Daniels v. Brennan, 887 F.2d 783, 785 (7th Cir. 1989) (Preemptive attempt by attorney to remove himself as counsel for plaintiff, involving attorney's statement to district court that it was the last time he would be there on plaintiff's behalf and that plaintiff had fired him had no legal effect where district court did not waive leave of court requirements of the local rule and did not give leave to withdraw).[8]

Complainant further argues that the Code of Professional Responsibility has disciplinary rules that govern this conduct, and an attorney who undertakes an action impliedly agrees that he will pursue it to some conclusion; and is not free to abandon it without reasonable cause. Code of Professional Responsibility, Canon 2, DR-110(C)(1). Moreover Complainant argues that even when cause to abandon representation may exist, an attorney's withdrawal must be undertaken in a proper manner, duly protective of his client's rights and liabilities. DR-110 (A)(2).[9]

I find, however, that the regulations governing this proceeding are controlling. Our Rules of Practice and Procedure specifically provide that "[w]ithdrawal or substitution of an attorney may be permitted by the ALJ on written motion." 28 C.F.R. § 68.33(c). As Mr. Lerma never presented me with a motion to withdraw, I never permitted him to withdraw from his representation of Respondent. Furthermore, Mr. Lerma's entry of his appearance on behalf of Respondent in this case was not qualified on the face of the request for hearing. Moreover, until Mr. Lerma's response to my Order to Show Cause, there was no pleading, request to withdraw, or any other type of document that apprised this office or the INS that Mr. Lerma was no longer representing the Respondent.

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[8] Although Complainant cites only to state court decisions, federal court decisions provide stronger precedent.

[9] I do not have jurisdiction to decide whether Mr. Lerma abandoned Respondent's case without reasonable cause or whether Mr. Lerma duly protected Respondent's rights and liabilities.

Therefore, despite Mr. Lerma's assertion that he did not represent the Respondent at the time he was served with the notice of hearing and complaint and that he does not currently represent Respondent, I find that (1) Mr. Lerma took on the representation of Respondent in this matter on November 4, 1991, the date Mr. Lerma filed with INS his request for hearing; and (2) because he has not withdrawn his representation of Respondent with regard to this case, Mr. Lerma currently represents Respondent.

B. Failure to Show Good Cause

The answer in this case was due on or before September 23, 1992, but was not filed until December 2, 1992. In order to avoid a default judgment, Respondent must demonstrate good cause for having filed his answer 70 days late.

Although OCAHO's regulations are silent as to the factors to consider in determining whether default judgment is warranted in a particular case, both the Federal Rules of Civil Procedure states that "[f]or good cause shown the court may set aside an entry ("FRCP") and OCAHO precedents provide guidance.[10] FRCP 55(c) of default . . . ." See Federal Savings & Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1969 (5th Cir. 1988); United States Parcel of Real Property, 763 F.2d 181, 183 (5th Cir. 1985); United States v. Shine Auto Service [Shine II], 1 OCAHO 94, at 4 (Oct. 11, 1989), aff'd by CAHO, 1 OCAHO 102 (Nov. 8, 1989).

On review of a denial of default, the Chief Administrative Hearing Officer ("CAHO") has held that as a condition precedent to allowing a respondent to file a late answer upon motion for default, the ALJ must find good cause for failure to file a timely answer. United States v. Shine Auto Service [Shine I], 1 OCAHO 70, at 3 (July 14, 1989), vacating OCAHO Case No. 89100180 (June 16, 1989) (Order Denying Default). In the face of a timely motion for judgment by default, IRCA, like the FRCP, requires a showing of good cause before a late answer will be accepted. United States v. Zoeb Enterprises, Inc., 2 OCAHO 356, at 3 (July 24, 1991); United States v. Dubois Farms, Inc., l OCAHO 225, at 2 (August 29, 1990).

[10] The regulations governing this proceeding provide that the FRCP "shall be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1.

In determining whether Respondent has shown good cause for permitting the filing of a late answer and avoiding default, I will consider: (l) whether Complainant would be prejudiced; (2) whether Respondent has a meritorious defense; and (3) whether culpable conduct of Respondent led to the default. One Parcel Real Property, 763 F.2d at 183; Zoeb Enterprises, 2 OCAHO 356, at 2-3.

First, there is no certainty as to when Mr. Lerma would be prepared to litigate this case. The allegations in the complaint suggest that proof thereof may require the testimony of a number of witnesses. If the case is delayed to an indeterminate date, this might make it difficult for Complainant to locate its witnesses and may affect their recollection of relevant facts. Complainant has spent considerable time and effort to prosecute this case and it is important for the INS to resolve this case within a reasonable time after the filing of a complaint and completion of discovery. I therefore find that a delay in granting a default judgment in this case may be prejudicial to Complainant.

Second, Respondent's answer is in the form of a general denial and does not specifically address the allegations in the complaint.[11] Based upon the answer and all other pleadings and documents filed in this case, I find that Respondent has not shown that he has a meritorious defense to the charges in the complaint.

Third, Mr. Lerma states that after August 24, 1992, he made every effort to determine whether Respondent wished to retain the services of his office, but he has not been able to locate Respondent. Mr. Lerma further states that he does not believe Respondent has received the complaint in this case because, based upon his personal experience with Respondent, he is very difficult to reach and has on previous occasions evaded service on other unrelated civil matters. Although Mr. Lerma states that he believes that Respondent has not received the complaint and notice of hearing in this case, such belief is not supported by the record. The complaint and notice were mailed to Respondent and there is no evidence in OCAHO's files that they were returned for any reason. The inference to be drawn is that Respondent received the letter and has deliberately avoided having anything further to do with this case.

[11] The answer states in pertinent part: "Counsel on behalf of his previous client, Respondent, Manuel Medina, enters a general denial to Movant's Complaint as to each and every count contained therein and demands strict proof thereof by preponderance of the evidence."

I find that after their initial contact regarding this case, Respondent deliberately avoided contacting Mr. Lerma; and deliberately avoided service of process and contact with this office in order to avoid judgment against him. I further find that Respondent has no interest in defending himself on the allegations in the NIF or the complaint. Although the federal courts have consistently held that default judgments are not favored, and any doubts are to be resolved in favor of a trial on the merits,[12] I find that Respondent's egregious behavior warrants a default judgment. See, e.g., Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n, 874 F.2d 274, 276 (5th Cir. 1989) (Defendant's lack of responsiveness halted the adversary process, making a default judgment appropriate).

Furthermore, this case involves serious allegations against Respondent including the unlawful employment of nine individuals who were unauthorized for employment in the United States. If employment sanctions are to have any deterrent effect, there must be swift and certain punishment for those who are offending the law. If I were to permit the answer to be filed in this case, it would suggest to employers that they can avoid punishment for the hiring of illegal aliens by avoiding service of process.

C. Conclusion

For the foregoing reasons, I find that Respondent has failed to file his answer within the time frame provided by law, has waived his right to appear and contest the allegations of the complaint and has not shown good cause for his failure to file a timely answer.

D. Findings of Fact and Conclusions of Law:

1. Respondent violated § 274A(a)(1)(A) of the Immigration & Nationality Act, 8 U.S.C. § 1324a(a)(1)(A), by hiring after November 2, 1986 the following nine individuals, who were aliens unauthorized for employment in the United States, knowing that at the time he hired them they were aliens unauthorized for employment in the United States:

Ruth Osiri-Juaregui a/k/a Jasimine
Maria Hernandez-NMN a/k/a Mellissa

[12] See, e.g., Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 895 (5th Cir. 1984); Charlton L. Davis & Co. v. Fedder Data Center, 556 F.2d 308, 309 (5th Cir. 1977); E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284, 285 (5th Cir. 1972).

Araceli Barraza-Casteneda a/k/a Adriana Araceli Barraza-C.
Judeth Curiel-Ortiz a/k/a Jessica
Maria Luisa Noriega-NMN a/k/a Jacklynn
Lorena Carrillo-Renteria a/k/a Martha
Gloria Mendez-NMN a/k/a Gloria
Perla Lopez-Castillo a/k/a Perla
Brenda Almarez-Mendoza a/k/a Brenda

2. Respondent violated § 274A(a)(1)(B) of the Immigration & Nationality Act, by hiring for employment in the United States after November 6, 1986 the following nine individuals without complying with the requirements of § 274A(b) of the Immigration & Nationality Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) by failing to prepare the I-9 Form for these nine individuals:

Ruth Osiri-Juaregui a/k/a Jasimine
Maria Hernandez-NMN a/k/a Mellissa
Araceli Barraza-Casteneda a/k/a Adriana Araceli Barraza-C.
Judeth Curiel-Ortiz a/k/a Jessica
Maria Luisa Noriega-NMN a/k/a Jacklynn
Lorena Carrillo-Renteria a/k/a Martha
Gloria Mendez-NMN a/k/a Gloria
Perla Lopez-Castillo a/k/a Perla
Brenda Almarez-Mendoza a/k/a Brenda

3. Respondent violated § 274A(a)(1)(B) of the Immigration and Nationality Act., 8 U.S.C. § 1324a(a)(1)(B), by hiring for employment in the United States after November 6, 1986 Brian Paul Joncoaltz and Jesus Banda, without complying with the requirements of § 274A(b)(2) of the Immigration and Nationality act, 8 U.S.C. § 1324a(b)(2) and 8 C.F.R. § 274a.2(b)(1)(i) by failing to ensure that Brian Paul Joncoaltz and Jesus Banda properly completed section 1 of the I-9 Form.

4. Respondent violated § 274A(a)(1)(B) of the Immigration & Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), by hiring for employment in the United States after November 6, 1986, Joseph Louis Maciel, without complying with the requirements of § 274(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1)(A) and 8 C.F.R. 274a.2(b)(1)(ii) by failing to have Joseph Louis Maciel complete section 1 of the I-9 Form at the time of hire and failing to complete section 2 of the I-9 Form within three business days of hire.

5. The civil monetary penalty, assessed at $31,000.00 for Count One ($5,000.00 for each violation listed in paragraph A-1 and A-2 and $3,000.00 for each violation listed in paragraph A-3 through A-9),

$9,000.00 for Count Two ($1,000.00 for each violation listed in paragraph A-1 through A-9), $2,000.00 for Count Three ($1,000.00 for the violation listed in paragraph A-1, $1,000.00 for the violation listed in paragraph A-2) and $1,000.00 for Count Four is just and reasonable.

Accordingly, it is hereby **ORDERED**:

1. That Complainant's Motion for Default Judgment is granted;

2. That Respondent pay a civil monetary penalty in the amount of $31,000.00 for Count I; a civil monetary penalty in the amount of $9,000.00 for Count II; a civil monetary penalty in the amount of $2,000.00 for Count III; and a civil monetary penalty in the amount of $1,000.00 for count IV, resulting in a total fine amount of $43,000.00.

3. That Respondent Cease and Desist from any further violations of § 274a(a)(1)(A) of the Immigration & Nationality Act.

This Decision and Order is the final order of the administrative law judge in accordance with 28 C.F.R. § 68.53. It 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 vacates or modifies it. Id.

SO ORDERED this 5th day of February 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge