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. 92A00215
DAVID DAY d.b.a.	)	
DAVID DAY MASONRY	)	
Respondent.	)	
	)	

DECISION AND ORDER REGARDING ABANDONMENT
OF RESPONDENT'S REQUEST FOR HEARING

I. *Procedural History*

On June 9, 1992, Complainant, United States of America, personally served Respondent with a Notice of Intent to Fine in which it stated its intention to fine Respondent for violations of § 274A(a)(2) and (a)(1)(B) of the Immigration and Nationality Act, ("Act") in that it knowingly hired and/or continued to employ three unauthorized aliens, that it failed to prepare the employment eligibility verification form (Form I-9) for two named individuals, that it failed to ensure that four named employees properly completed section 1 of the employment eligibility verification form (Form I-9), that it failed to complete section II of the employment eligibility verification form (I-9) for three individuals, and failed to complete section II of the Employment Eligibility Verification Form within three business days of hiring one named individual.

On July 24, 1992, Respondent, exercised its statutory right, and requested a hearing before an Administrative Law Judge (ALJ). As such, on October 5, 1992, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer. In a Notice of Hearing on Complaint Regarding Unlawful Employment, dated October 7, 1992, the parties were advised of the filing of the Complaint, Respondent's right to file an Answer to the Complaint, to

appear in person and to give testimony at a hearing. Further, Respondent was advised of the necessity to file an Answer within thirty days after receipt of the Complaint in order to avoid the possibility of a default judgment being entered against it.

On October 7, 1992, this court was advised that the Notice of Hearing and the Complaint, which OCAHO attempted to serve on Respondent via certified mail, was returned to the Post Office, marked "Refused". Therefore on October 19, 1992, I issued a Sua Sponte Order to Complainant to Effectuate Personal Service of the Complaint on Respondent or in the Alternative to File a Motion for Dismissal.

In written correspondence to this court from Complainant, dated November 6, 1992, I was advised that on October 27, 1992 Complainant personally served Respondent at his residence and primary place of business. On November 16, 1992, Complainant filed a Declaration of John Weess, Special Agent of the Immigration and Naturalization Service, in which the agent detailed the events of the service of process. Also filed by Complainant was a Declaration of Mark Vosper, also a Special Agent with the Immigration and Naturalization Service, who was present at the serving of the documents. Therefore, based on the information in the record, I find that effective service of the Complaint on Respondent has been made.

On November 24, 1992, Respondent filed a letter in which he stated that he was pleading "not guilty" to any and all charges against him and/that he was requesting a hearing. In addition, Respondent alleged that Complainant was not cooperative in that it had not provided him with the information he had requested which he was entitled to under the Freedom of Information Act and under discovery procedures.

On November 25, 1992, this court contacted Respondent in writing, and advised him that his Answer was served without evidence that the Complainant had been served. Respondent was advised that he needed to serve Complainant and to notify the court within 10 days of receipt of the letter that this requirement had been adhered to.

On November 30, 1992, Complainant filed its Motion to Deem Each Allegation in the Complaint Admitted Pursuant to 28 C.F.R. § 68.9. In its Memorandum in Support of Complainant's Motion to Deem Each Allegation in the Complaint Admitted, Complainant argued that the Respondent had failed to specifically and expressly answer any of the allegations in the Complainant as required by 28 C.F.R. § 68.9(c)(1). Complainant argued further that Respondent's behavior resulted in

prejudice to Complainant's enforcement responsibilities under the Act and that, in general, Respondent was frustrating the proceedings.

Based on the fact that Respondent was pro se, and, I inferred, unfamiliar with the court proceedings, I attempted to set a prehearing telephonic conference. However, as my staff encountered difficulty in reaching Respondent telephonically on December 21, 1992, I set the prehearing telephonic conference by written order for January 5, 1993. At the conference, I intended to discuss the status of the case, the possibility of its settlement and Complainant's pending motion. In the Order, I advised Respondent that if it did not appear, I would have the power to determine that it had abandoned its request for hearing and grant Complainant's motion and requests for relief.

On January 6, 1993, I issued an Order Confirming Prehearing Telephonic Conference. In that Order, I held the following:

> 1. Complainant's pending motion was denied based on my finding that Respondent's filed Answer was a general denial as he asserted that he did not have enough information to admit or deny. However, as Complainant's argument was well-taken, that more precise information would allow it to better proceed with the case, I directed Respondent to refile his Answer with a specific admission, denial or assertion that he could not admit or deny based on lack of information, for each allegation related to each individual in each Count. In addition, as Respondent had raised several facts at the conference which might be affirmative defenses to the related charges, he should include them in the Answer with specific detail;
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> 2. Regarding Respondent's allegation that Complainant was not cooperating with his discovery requests, I found that these requests were premature. Upon receipt of the new answer, an order regarding discovery would be issued and both parties could make their discovery requests at that time; and,
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> 3. This case was of the type that should be settled through the parties' negotiations.

On January 22, 1993, Respondent, in compliance with my Order, filed his Amended Answer which contained detailed explanations related to the alleged violations.

On Wednesday, March 10, 1993, I held the second prehearing telephonic conference in this case. The purpose was to discuss the status of the case, the settlement possibilities, discovery issues that had arisen, and a hearing date, if necessary. During the conference, it became apparent that the parties would not be able to settle this case without a hearing. Additionally, Complainant raised the concern that, due to Respondent's lack of cooperation in the discovery process, it would not be ready for hearing; specifically, Complainant noted that Respondent had refused certified mail service of Complainant's First

Request for Admissions, Complainant's First Set of Interrogatories and Complainant's Request for Document Production which was sent on February 17, 1993. Complainant tried re-sending discovery requests, where the responses were due on or before April 8, 1993; however, no responses had been received. As such, Complainant indicated that it would file a Motion to Compel should it not receive timely responses to its discovery requests.

Based on the seriousness of this allegation, I discussed with Respondent the reasons for his refusing service as well as the importance of his cooperation in this case.

Further, I explained to Respondent what an order to compel would entail and its consequences. The parties were directed to file monthly status reports, and to continue their negotiations and to file whatever motions were found to be necessary.

As such, on April 2, 1993, Complainant filed a Motion to Compel Discovery and Complainant's Request to Deem Request for Admissions Admitted pursuant to 28 C.F.R. §§ 68.23, 68.21(b). In its accompanying memorandum, Complainant stated that Respondent had refused to accept postal service delivery of repeated discovery requests. Respondent's refusal continued even after the prehearing telephonic conference where I had discussed the seriousness of Respondent's continued refusal to cooperate.

On April 12, 1993, Complainant, in compliance with my previous Order, filed its monthly status report. This report indicated that there had been no contact between the parties and no further movement towards settlement or preparation for hearing.

On April 23, 1993 I granted Complainant's Motion to Compel. In that Decision, I found that Respondent was properly before the court as effective service had been made on the Complaint. I found further that the Respondent had been effectively notified of the discovery requests and could not argue that it lacked notice of the Complainant's request. Based on the unopposed facts of this case, I held that there was no due process violation as Respondent had been properly served with the discovery requests. I found further that Respondent had been educated as to the consequences of his conduct and appeared to be acting in bad faith. Additionally, Respondent's conduct was prejudicial to Complainant and to the court. As such, I directed Complainant to reserve its discovery requests by both certified mail and by regular mail and I ordered Respondent to accept service. I indicated that I

would consider granting Complainant's motion to deem admissions admitted, as well as other sanctions against Respondent, including inferring that all responses to other discovery requests were adverse to him, should service again be refused.

On May 5, 1993, Complainant filed it Motion for a Continuance of the June 8, 1993 Hearing, based upon Respondent's noncompliance with discovery. On May 16, 1993, I granted Complainant's Motion which was unopposed, as I found that there was no prejudice to Respondent by that ruling and that there was good cause shown.

On May 17, 1993, Complainant filed its monthly status report in which it stated that it had reserved its first set of discovery upon Respondent as ordered. To date, it had not received any response to the discovery.

On June 16, 1993, Complainant filed its Motion for Sanctions, Renewed Request To Deem Request for Admission Admitted and a Motion for Dismissal of Request for Hearing along with its memorandum. Specifically, Complainant requested, pursuant to 28 C.F.R. 68.21, 68.23 and 68.37(b) that I: (1) infer and conclude that the admissions, testimony, documents and other evidence would have been adverse to the Respondent; (2) rule that for the purposes of the proceeding the matter or matters sought by discovery for which the order was issued be taken as established adversely to Respondent; (3) rule that the Respondent may not introduce into evidence or otherwise rely upon testimony, documents, or other evidence in support of, or in opposition to, any claim or defense; (4) rule that the Respondent may not be heard to object to the introduction and use of secondary evidence to show what the withheld admissions, testimony, documents and other evidence would have shown; and (5) render a final decision in this matter against the Respondent finding that Respondent has abandoned his request for a hearing, committed the violations alleged in the Complaint and that Complainant was entitled to reasonable relief as set forth in the requested Complaint.

In its Memorandum in support of its Motion, Complainant set forth some history in this case. Respondent had not complied with my previous Order To Compel; that, as of the close of business on May 20, 1993, Complainant had not received its responses to its discovery requests, that on May 25, 1993, Complainant so informed the court; that on May 26, 1993, the Complainant did receive a response from Respondent in post-marked envelope of May 22, 1993; and that enclosed were two individual federal income tax returns, without any

schedules or attachments, and two copies of Forms I-9 alleged to be for two of the individuals named in the Complaint. However, as Respondent did not include a cover letter or explanation on what these documents were, Complainant argued that Respondent had not responded to my Order To Compel, had not complied with discovery and, that the submissions were not in compliance with its request. Thus, it argued that the sanctions it had requested were appropriate under 28 C.F.R. 68.23(c).

Complainant noted that I had indicated to Respondent in my prior Order of April 23, 1993, that should it not comply with my Order To Compel, I would consider granting sanctions. Complainant noted in its argument that it did comply with my Order and had reserved Respondent and that Respondent had previously been in possession of Complainant's discovery quest by virtue of it being served with the motion to compel. Respondent had actually been in possession of Complainant's discovery request for over two months. Complainant argued further that the lack of response to its discovery request indicated his lack of interest in the proceedings.

Complainant completed its argument by stating that Respondent's actions in failing to obey my Order To Compel, and its failure to submit sufficient response to the discovery were cumulative affirmative actions which have delayed and frustrated this proceeding "constituting abandonment" of Respondent's request for hearing.

II. *Discussion*

I have reviewed the record thoroughly in this case. The facts clearly show that the Respondent has acted in bad faith and has not complied with my Order to Compel. I find that Respondent has been repeatedly advised of the consequences of his actions and noncooperation. Fur-ther, I find that Respondent's action and behavior in this court have caused prejudice to the court and to the Complainant. Therefore, I find that Respondent, through his actions, has abandoned his request for hearing. See United States of America v. Kim Dong Jui t/a Chestnut Gourmet Restaurant West, OCAHO No. 92A00090 (12/18/92); United States of America v. El Dorado Furniture Manufacturing, Inc., d.b.a. El Dorado Furniture Manufacturer Inc., OCAHO No. 91100239 (4/2/92). As such, for good cause shown, I am granting Complainant's Motion for Sanctions, Renewed Request to Deem Request for Admissions Admitted, and, Motion for Dismissal of Request for Hearing.

Based on the record before me and the motions, I find that Respondent hired three named individuals, after November 6, 1986, who were not authorized for employment in the United States and that Respondent knew that they were not authorized for employment in the United States. In the alternative, I find that Respondent continued to employ these individuals knowing that they were not authorized for employment in the United States. These actions were in violation of § 274A(a)(1))A) or the Act, or, in the alternative in violation of § 274A(a)(2) of the Act. Further I find that Respondent failed to prepare the Forms I-9 for two named individuals in violation of 274A(a)(2) of the Act. I find also that Respondent failed to ensure that four named individuals properly completed Section I of the Form I-9 and that these individuals were hired after November 6, 1986. These actions were in violation of § 274A(a)(1)(B) of the Act. I find further that Respondent failed to complete Section II of the Form I-9 for three named individuals, and failed to complete section II within three business days of hire with respect to one named individuals hired after November 6, 1986. This action is in violation of § 274A(a)(1)(B) of the Act

Complainant has requested that I grant the relief requested in its Complaint, specifically that I find that Respondent should pay a civil money penalty of $2,850 or $950 per violation in Count I, $920 or $460 for each violation listed in Count II, plus, $920 or $230 for each violation in Count III, Count IV and Count V. Before awarding civil money penalties, I must consider, at least, the five factors listed in the statute. Therefore, as Complainant has not addressed these matters, I am directing it to submit a memorandum to me, within fifteen days of receipt of this Order, addressing those issues. Respondent, if it should so desire, may also address these issues at that time. Upon filing, I will award civil money penalties.

IT IS SO ORDERED this 20th day of August, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge