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

August 12, 1998

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. § 1324a Proceeding) OCAHO Case No. 98A00032
CATHY HYEON YI d/b/a ACE MANUFACTURING COMPANY, Respondent.	)

ORDER GRANTING WITHDRAWAL AND FINAL DECISION AND ORDER GRANTING JUDGMENT BY DEFAULT

I. *PROCEDURAL HISTORY*

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (INA or the Act) in which the United States Department of Justice, Immigration and Naturalization Service (INS) is the complainant and Cathy Hyeon Yi d/b/a Ace Manufacturing Company is the respondent. On December 29, 1997, INS filed a five count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), a copy of which was mailed to Gregory B. Fell, the attorney who filed the request for hearing on Yi's behalf, together with a notice of hearing. The certified mail return receipt indicates that the package was received at Fell's office on January 12, 1998.

No answer was ever received from Yi, and on February 3, 1998, Fell filed a Motion to Withdraw as Counsel, based upon his client's refusal to communicate or cooperate with him. The motion reported Fell's repeated attempts to contact Yi and her repeated failure to return his telephone calls, and alleged further that a settlement had previously been entered into by the parties.

INS opposed Fell's motion to withdraw but made no comment on Fell's assertion that a settlement agreement had been reached. Accordingly, I issued an Order of Inquiry and Order to Show Cause, in which the parties were requested to state their respective views regarding the status of any settlement agreement, and Yi was offered an opportunity to state any objection she had to Fell's withdrawal, to show cause why a default judgment should not issue, and/or alternatively to show good cause for her failure to file an answer. The parties were also requested to comment on the issue of the appropriate civil money penalties.

INS responded by denying that settlement had been reached, and appended a copy of a faxed signature page bearing only Yi's signature together with a complete unexecuted proposed agreement. Fell's response included the same exhibits and also copies of letters from Fell to Yi and to INS' counsel. Fell also renewed his motion to withdraw. Yi did not respond personally to the order. Neither of the responding parties made any substantive comment on the question of civil money penalties.

II. *DISCUSSION*

A. *The Motion to Withdraw*

Because I was hesitant to act upon Fell's request to withdraw without granting Yi an opportunity to respond to it, the order to show cause was issued to give Yi specific notice of and an opportunity to comment on Fell's request to withdraw. Yi did not respond. Correspondence attached to Fell's response to the order of inquiry includes a photocopy of a certified mail return receipt card and a copy of the letter he sent Yi advising her of his intent to withdraw as well as transmitting copies of the complaint and the notice of hearing. The receipt card is dated February 2, 1998. He evidently had no response to the letter.

No useful purpose will be served by requiring Fell's further participation and his motion to withdraw will be granted. As stated in the earlier order, service of the complaint on Yi's attorney of record was sufficient to satisfy the requirements of the OCAHO rules[1] so that Fell's withdrawal will have no impact either on

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997). The rules direct that when a party is represented, service of the complaint

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the already perfected service of the complaint or on future service of any other documents. Fell's exhibits include a copy of a return receipt card acknowledging receipt of the complaint and notice he sent to Yi. Authorized service of any documents subsequent to the complaint may be made by mailing to the last known address of a party, 28 C.F.R. § 68.6(a), and Yi's last known address is part of the record.

B. *The Alleged Settlement Agreement*

Yi's counsel argues that a valid and enforceable settlement agreement was entered into by the parties and that INS' remedies should be limited to enforcement of the agreement. A valid settlement agreement bars the settling parties on the underlying claim. *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976). Whether denominated as accord and satisfaction, compromise and settlement, release by settlement, or other terminology, any alleged bar to this action based on an agreed settlement is in the nature of an affirmative defense upon which respondent bears the burden both of pleading and of proof.

Ordinarily any matter constituting an avoidance or affirmative defense must be set forth affirmatively in a responsive pleading, 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure §§ 1270–71 (2d ed. 1990) and the failure to raise an affirmative defense in an answer is generally held to constitute a waiver of that defense. *Id.* at § 1278.

Although the defense was clearly not sufficiently pleaded, I nevertheless examined the documents submitted by the parties and considered their arguments about the facts and circumstances surrounding the alleged agreement. It appears that a proposed agreement was at some point mailed to Yi, and that she then signed and faxed only the signature page back to Fell, who in turn sent the faxed signature page with a copy of the remainder of the agreement to INS with a letter stating, "Enclosed please find the executed Settlement Agreement in the above referenced matter." Duplicate copies of the signature page submitted by both parties are signed only by Yi, not by INS. Yi's submission states, without citing to any authority, that "[i]t is undisputable that faxed docu-

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shall be made upon the attorney, 28 C.F.R. § 68.6(a), and that such service is complete upon receipt. 28 C.F.R. § 68.3(a)(3) and (b).

ments now carry the same force and effect as originals deposited in the mail not only in [f]ederal [c]ourt, but state courts as well."[2]

INS asserts in contrast that there was never a "meeting of the minds" but only negotiations between the parties. It claims that Yi's faxed signature page is insufficient evidence of her assent to the entire document, because on its face it covers only the final two paragraphs of the proposed agreement. INS also argues that it never agreed to be bound by the agreement because paragraph 22 of the proposed agreement specifically states that "this Agreement is effective on the date it is executed by the parties" and no representative of INS ever signed the document.

A settlement agreement is a contract, and general contract principles apply in determining whether settlement has been reached. *Estate of Kokernot*, 112 F.3d 1290, 1294 (5th Cir. 1997). While an oral settlement may under some circumstances be binding when the cause of action is derived from a federal statute, *United States v. Westin Hotel Co.*, 4 OCAHO 701, at 976 (1994), *Borne v. A & P Boat Rentals No. 4, Inc.*, 780 F.2d 1254, 1258 (5th Cir. 1986), *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981), there has been no assertion here that an oral settlement was contemplated by the parties, there is no evidence of respecting an oral contract, and I consider only the question raised: whether a valid written agreement was achieved.

Even assuming arguendo that a faxed signature is the equivalent of an original signature, the signature of one party does not necessarily create an enforceable contract.[3] Whether and when the parties to a settlement agreement are bound by it depends upon when the parties knowingly and voluntarily intended to be bound. This is a question of fact. *Westin*, 4 OCAHO 701, at 977 (citing

[2] Courts have divided on the question of whether a fax transmission constitutes a writing. *Compare DOT v. Norris*, 474 S.E.2d 216, 218 (Ga. Ct. App. 1996), *rev d on other grounds*, 486 S.E.2d 826 (Ga. 1997) ("[T]he transmission of beeps and chirps along a telephone line is not a writing.") *and Den Norske Stats Oljeselskap, A.S. v. Hydrocarbon Processing, Inc.*, 992 F. Supp. 913, 915 (S.D. Tex. 1998) (recognizing faxes as writings).

[3] Sometimes it does. Under Louisiana law, for example, when one party drafts a contract and presents it to the other for signing, the contract is valid and binding upon the offeree's acceptance even where the offeror fails to sign. *Atlantic Banana Co. v. Standard Fruit & S.S. Co.*, 493 F.2d 555, 559 (5th Cir. 1974). Here there no showing as to the authorship of the proposed agreement. It contains a clause specifically indicating that it will be construed in accordance with the laws of the United States and the state of Texas.

Callie v. Near, 829 F.2d 888, 890–91 (9th Cir. 1987)). *Accord*, *Scaife v. Associated Air Center, Inc.*, 100 F.3d 406, 410 (5th Cir. 1996) (whether parties required that agreement be signed in order to be binding is a question of fact, but whether a contract was formed is primarily a question of law). In both *Westin* and *Scaife*, the history of the back-and-forth negotiations was more fully set forth than has been done here and a clearer factual picture was thus developed.

The language of the proposed agreement here is clear, explicit, and unambiguous: "[T]his Agreement is effective on the date it is executed by the Parties." Since INS never executed the agreement, it never became effective. Nothing in the submissions of the parties suggests otherwise.

This case is similar to *Scaife* in which the court considered various factors in determining whether the parties intended to be bound only by a signed contract, such as the fact that signature blocks were included in the draft and the document contained a clause indicating that the first payment was to be made only upon the execution of the agreement. 100 F.3d at 411. The proposed agreement here contains a similar payment schedule provision. *Scaife* relied on Texas law, citing *Simmons & Simmons Constr. Co. v. Rea*, 286 S.W.2d 415, 418 (Tex. 1955), for the proposition that if parties negotiating a contract intend for the contract to be reduced to writing and signed, then no contract is formed unless and until the writing has been executed by the parties. Thus when an agreement has been reduced to writing, assent to the writing must be manifested, and such manifestation commonly consists of signing and delivery. 100 F.3d at 410–11.

Where the parties to a proposed agreement have expressed the intent to be bound only by a signed agreement there is no reason, absent partial performance or some other compelling consideration, to disregard that expressed intent. No settlement was accomplished here.

C. *Appropriateness of a Judgment by Default*

OCAHO rules provide that a respondent has 30 days after service of a complaint to file an answer, 28 C.F.R. § 68.9(a), and that failure to file a timely answer shall be deemed to constitute a waiver of the right to appear and contest the allegations of the

complaint. 28 C.F.R. § 68.9(b). The administrative law judge may thereafter enter a judgment by default.

Yi neither answered the complaint nor showed good cause for the failure to answer although it is clear she was on notice that default was being considered. Default judgments are not generally favored in the law and should be used only where the inaction of a party causes the case to come to a halt. *United States v. R & M Fashion, Inc.*, 6 OCAHO 826, at 47–48 (1995). A default judgment is appropriate here because Yi's total failure to cooperate with her attorney or to participate in this case on her own behalf has caused precisely that result: the case has come to a halt. Accordingly, I find that a default judgment should issue and I accept as true all the factual allegations of the complaint.

D. *Civil Money Penalties*

Statutory penalties for knowing hire violations range from a minimum of $250 to a maximum of $2,000 for a first offense. 8 U.S.C. § 1324a(e)(4). For paperwork violations the law provides that the permissible penalties range from $100 to $1000 for each violation, and that in setting penalties within those ranges consideration should be given to the size of the business being charged, the good faith of the employer, the seriousness of the violation, whether the individual was an unauthorized alien and the history of previous violations. 8 U.S.C. § 1324a(e)(4). Since neither party addressed those factors, there is no basis in the record upon which to make an independent assessment of them.

OCAHO cases have approved the requested penalty amounts in cases of default when the amount requested was reasonable. *United States v. Continental Forestry Serv. Inc.*, 6 OCAHO 836, at 142 (1996), *United States v. K & M Fashions, Inc.*, 3 OCAHO 411, at 161- 62 (1992), *United States v. Garza*, 1 OCAHO 211, at 1411 (1990). In this case INS sought $500 for the knowing hire violation, and a total of $8,500 for 30 paperwork violations. I find the requested amounts to be modest, on the lower end of the permissible ranges and *prima facie* reasonable. Yi will be ordered to pay civil money penalties in the total amount requested of $9,000.

III. *FINDINGS, CONCLUSIONS, AND ORDER*

I have considered the record in this case, on the basis of which I find and conclude that:

1. Fell's motion to withdraw as counsel is made for good cause and should be granted;

2. As alleged in Count I of the complaint, respondent violated 8 U.S.C. § 1324a(a)(1)(A) by hiring Yolanda Dominguez-Ortiz after November 6, 1986, knowing her to be an alien not authorized for employment;

3. As alleged in Count II of the complaint, respondent violated 8 U.S.C. § 1324a(a)(1)(B) by hiring seventeen named individuals after November 6, 1986 and failing to ensure that they properly completed section 1 of Form I–9, the employment eligibility verification form, and by failing itself to properly complete section 2 of that form for them;

4. As alleged in Count III of the complaint, respondent violated 8 U.S.C. § 1324a(a)(1)(B) by hiring three named individuals after November 6, 1986 for whom it failed to properly complete section 2 of Form I–9;

5. As alleged in Count IV of the complaint, respondent violated 8 U.S.C. § 1324a(a)(1)(B) by hiring two named individuals after November 6, 1986 and failing to ensure that they properly completed section 1 of Form I–9;

6. As alleged in Count V of the complaint, respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to make available for inspection I–9 forms for eight named employees hired after November 6, 1986;

7. There was no showing that a settlement was agreed to by the parties to this action; and

8. Judgment is entered for complainant by default.

ORDER

The request of Gregory B. Fell to withdraw as counsel is granted. The respondent is hereby ordered to cease and desist from hiring or continuing to employ any alien knowing that the alien is or has become unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A) or (a)(2). The respondent is ordered to pay civil money penalties in the total amount of $9,000.

SO ORDERED.

Dated and entered this 12th day of August, 1998.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§ 1324a(e)(7) and (8), and 28 C.F.R. § 68.53.