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

UNITED STATES OF AMERICA, Complainant, v. ADVANCED DIGITAL SOLUTIONS INTERNATIONAL, INC., Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00088

ORDER DISCHARGING ENTRY OF DEFAULT

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 28, 2020, alleging that Respondent, Advanced Digital Solutions International, Inc., violated the employer sanctions provisions of the INA.

On September 2, 2020, the Chief Administrative Hearing Officer (CAHO) served Respondent via United States certified mail with (a) the complaint, (b) the government's notice of intent to fine, (c) Respondent's request for a hearing, and (d) a notice of case assignment for complaint alleging unlawful employment. The CAHO informed Respondent that these proceedings would be governed by OCAHO's Rules of Practice and Procedure for Administrative Hearings located at 28 C.F.R. § 68 and applicable case law. A link to the rules was provided to Respondent, along with contact information for OCAHO. The CAHO directed Respondent to answer the complaint within thirty days and cautioned that failure to do so could lead the Court to enter a judgment by default and any and all appropriate relief, pursuant to 28 C.F.R. § 68.9(b). Thus, Respondent's answer was due no later than October 2, 2020. Respondent did not file its answer by October 2, 2020.

On October 28, 2020, the Court issued a Notice of Entry of Default requiring Respondent, within fifteen days of the order, to file an answer and show good cause

for its failure to file a timely answer. The Court warned that failure to file an answer and show good cause could result in the entry of a default judgment against Respondent. Respondent's response to the Notice of Entry of Default was due no later than November 12, 2020. Respondent failed to file a response.

On November 3, 2020, the Court received a letter and a notice of appearance from Respondent regarding this case. In the letter, Respondent asserted that its employees, who were identified in the complaint, were natural born or United States citizens. It blamed clerical errors and office moves for the alleged violations. Moreover, Respondent asserted that the COVID-19 pandemic had destroyed its business and asked for clemency from the government. Although the Court received the letter on November 3, 2020, the letter was dated October 19, 2020. Respondent gave the date of service as August 20, 2020, presumably an error as service would predate the filing of the complaint in this action. While the letter bore the typewritten signature of Frederick Solomon, who identified himself as Respondent's representative, the notice of appearance was signed by Respondent's manager, Farhaad Sheikh. There was no indication that either Mr. Solomon or Mr. Sheikh is an attorney.

II. LEGAL STANDARDS

Under the OCAHO Rules of Practice and Procedure for Administrative Hearings, "[w]ithin thirty (30) days after the service of a complaint, each respondent shall file an answer." 28 C.F.R. § 68.9. As to each allegation of the complaint, an answer must include a statement that a respondent admits, denies, or does not have, or is unable to obtain, sufficient information to admit or deny a particular allegation. *See* 28 C.F.R. § 68.9(c). Moreover the OCAHO rules provide that, "a statement of lack of information shall have the effect of a denial (any allegation not expressly denied shall be deemed to be admitted)." *Id.* A respondent's answer also must include a statement of the facts supporting each affirmative defense it raises. *See id.*

A respondent's failure to respond to a complaint in a timely manner is a waiver of the respondent's right to appear and contest the allegations of the complaint. *See* 28 C.F.R. § 68.9(b). The Court then may enter a judgment by default. *Id.* The effect of the entry of default is that the respondent is no longer able to respond to the complaint. A default judgment may follow.

The Court has discretion to set aside an entry of default or a default judgment upon a showing of good cause. While the OCAHO rules do not lay out this standard, the Federal Rules of Civil Procedure may be used as "'a general guideline in any situation not provided for or controlled' by OCAHO's rules." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 2 (2016) (quoting 28 C.F.R. § 68.1). Here, the Court looks to Federal Rule of Civil Procedure 55(c) which provides that, "[t]the court may set aside an entry of default for good cause[.]"

In determining whether good cause exists to set aside an entry of default or a default judgment, the Court considers: "(1) whether there was culpable or willful conduct; (2) whether setting aside would prejudice the adversary; and (3) whether the defaulting party presents a meritorious defense to the action." *United States v. Sanchez*, 13 OCAHO no. 1331, 3 (2019) (citing *Kanti v. Patel C/O Blimpie*, 8 OCAHO no. 1007, 166, 168 (1998)). The Court considers the same factors when deciding whether to set aside an entry of default or a default judgment, but the Court applies the factors more leniently when the case involves an entry of default. *Id*.

III. DISCUSSION

The Court first considers whether Respondent's letter of October 19, 2020, is sufficient to constitute an untimely answer to the complaint in this case. The Court finds that it is. Important to this conclusion is the fact that Respondent is not represented by counsel. Although a notice of appearance was attached to Respondent's letter, portions of the notice were left blank and it did not contain any eligibility information for an attorney or accredited representative. Rather, it included general contact information for Respondent's manager, Farhaad Sheikh.

If a party is not represented by counsel, the Court will attempt to construe that party's response to a complaint as an answer even if the response does not fully comport with the traditional requirements of an answer. This is rooted in OCAHO's long-recognized policy of disfavoring default judgments, *see M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305, 5 (2017), as well as OCAHO's general approach of liberally construing documents filed by *pro se* litigants, *see M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305b, 5 (2017) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed.")).

Although Respondent's letter does not fully comport with the requirements for an answer under 28 C.F.R. § 68.9(c), in that it fails to admit or deny each factual allegation in the complaint, it does discuss Respondent's liability and state facts supporting its offered defenses. Specifically, Respondent admits that it employed each of the seven individuals identified in the complaint and asserts that they are all natural born or United States citizens. Respondent also appears to admit that one or more of the employment eligibility forms (Form I-9) at issue contained incorrect dates. It argues though that it acted in good faith and claims that any inaccuracies on the Forms I-9 were due to data entry errors by clerical staff and/or honest mistakes made after documentation was lost during one or more office relocations. Further, Respondent takes issue with the requested penalties for these violations, and seeks clemency from the government due to the pandemic's effect on its business. The Court concludes that Respondent's letter sufficiently responds to the complaint and will construe it as an answer, although one untimely filed after the Court issued a Notice of Entry of Default in this case.

The Court next considers whether to discharge its entry of default in this case. The Court has discretion to do so, and case law weighs in favor of setting it aside and determining the case on its merits. *See, e.g., Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979, 982 (3d. Cir. 1988); *Nickman v. Mesa Air Group*, 9 OCAHO no. 1106, 2 (2004). Applying the three-factor test described in *United States v. Sanchez*, 13 OCAHO no. 1331, 3 (2019), the Court finds that good cause exists to set aside the entry of default and allow this matter to proceed before the Court.

First, the Court looks to Respondent's conduct. Respondent's untimely answer was dated October 19, 2020, before the Court issued the Notice of Entry of Default on October 28, 2020. Although the Court received Respondent's letter on November 3, 2020, the date suggests that Respondent sought to answer, or respond to, the allegations in the complaint before the Court entered the default. Although Respondent's answer would have been untimely even if it had been received by the Court on October 19, 2020, the Court considers that Respondent still attempted to respond to the complaint before it lost the right to do so. As such, the Court finds that Respondent did not waive its right to appear and contest the allegations of the complaint. *See* 28 C.F.R. § 68.9(b).

The Court also finds that there has been no showing of prejudice to Complainant should the Court set aside the entry of default and allow Respondent's late-filed response to the complaint. OCAHO case law states that default judgments "should not be granted on the claim, without more, because the [respondent] failed to meet a procedural time requirement." *Nickman*, 9 OCAHO

no. 1106 at 2 (citations omitted). This is, in part, because "[m]ere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion." *Id*. at 3. Here, Complainant did not move for an entry of default and has not alleged that it would suffer any harm, evidentiary or otherwise, if the Court allows Respondent's late filing and sets aside the entry of default.

Next, Respondent appears to have presented meritorious defenses in its answer. When moving to set aside an entry of default, the defaulting party does not need to establish its defenses conclusively. *Sanchez*, 13 OCAHO no. 1331 at 3. "A respondent adequately presents a defense by clearly stating in the answer the precise contested allegations and indicating the existence of disputed issues." *Nickman*, 9 OCAHO no. 1106 at 4. In its answer, Respondent admits employing the individuals identified in the complaint and acknowledges incorrect dates on one or more of the Forms I-9s, but disputes its liability and asserts that the employees were all natural born or United States citizens. Respondent requests clemency in regards to the penalty amount, arguing that it operated in good faith, that any mistakes were unintentional clerical errors, and that it "cannot handle a penalty" due to the financial difficulties it is currently suffering as a result of the COVID-19 pandemic. The Court views this argument as a clearly stated defense with regard to the penalty assessment.

Respondent's explanation of its good faith attempts to comply with the law, as well as its assertion that the employees identified on the complaint were authorized, directly refer to two of the statutory factors that the Court considers in assessing penalties. *See* 8 U.S.C. § 1324a(e)(5). Moreover, Respondent's argument that it should be granted clemency because it "cannot handle a penalty" refers to an equitable consideration that the Court may use to assess penalties. Under the principles of equity, the Court may consider a non-statutory factor, such as inability to pay, when determining the appropriate penalty amount. *See United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (citation omitted). Accordingly, Respondent appears to have presented several meritorious defenses in its letter to the Court.

IV. CONCLUSION

Accordingly, construing Respondent's letter as a late-filed answer to the complaint in this case and having found that good cause exists,

IT IS SO ORDERED that the Court accepts Respondent's answer and the Notice of Entry of Default against Respondent, Advanced Digital Solutions International, Inc., is DISCHARGED in this case.

ENTERED:

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Honorable Carol A. Bell
Administrative Law Judge

DATE: December 17, 2020