

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. 96A00095
SAVILLE ROW NECKWEAR, INC.,)	
Respondent.)	

**FINAL DECISION AND ORDER
GRANTING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT
(December 11, 1996)**

MARVIN H. MORSE, Administrative Law Judge

Appearances: Mimi Tsankov, Esq., for Complainant
Alan D. Gelbstein, Esq., for Respondent

I. PROCEDURAL HISTORY

On August 30, 1996, the Immigration and Naturalization Service (INS or Complainant) filed in the Office of the Chief Administrative Hearing Officer (OCAHO) a Complaint which alleges that Saville Row Neckwear, Inc., (Respondent or Saville), a New York corporation doing business at 132 North 5th Street, Brooklyn, New York 11211, violated 8 U.S.C. § 1324a. The Complaint includes as Exhibit A a copy of an underlying Notice of Intent to Fine (NIF), served by INS on Respondent on May 13, 1996, and as Exhibit B a copy of Respondent's June 5, 1996 timely request for hearing addressed to INS by Alan D. Gelbstein, Esq. (Gelbstein) as its attorney.

Counts I through V, successively, charge that Respondent:

(I) knowingly hired and/or continued to hire after November 6, 1986, two (2) named individuals who were aliens not authorized for employment in the United States. INS requests a civil money penalty of \$1,300, \$650 for each violation, and an Order obliging Respondent to cease and desist from violating 8 U.S.C. § 1324a(a)(1)(A) and/or § 1324a(a)(2).

(II) failed to prepare and/or to make available for inspection employment eligibility verification Form I-9 for eleven (11) named individuals hired after November 6, 1986. INS requests a civil money penalty of \$5,260, \$500 for violations related to listed individuals 1 and 3 - 10, and \$380 for violations related to listed individuals 2 and 11.

(III) failed to ensure that four (4) named individuals hired after November 6, 1986, properly completed section 1 of Form I-9, and that Respondent failed to properly complete section 2 of Form I-9 for these four (4) individuals. INS requests a civil money penalty of \$1,300, \$325 for each violation.

(IV) failed to ensure that thirteen (13) named employees hired after November 6, 1986, properly completed section 1 of Form I-9. INS requests a civil money penalty of \$2,800, \$250 for each violation related to listed individuals 3, 8, 9, and 11, and \$200 for each violation related to individuals 1, 2, 4, 5, 6, 7, 10, 12, and 13.

(V) failed properly to complete section 2 of Form I-9 for one (1) named individual hired after November 6, 1986. INS requests a civil money penalty of \$200.

Complainant asks for an aggregate civil money penalty of \$10,860, and for the violations in Count I an Order directing Respondent to cease and desist from violations of 8 U.S.C. § 1324a(a)(1)(A) and/or § 1324a(a)(2), and any other appropriate relief.

On September 4, 1996, OCAHO issued a Notice of Hearing (NOH), which addressed copies of the Complaint both to Respondent and Respondent's counsel, Alan D. Gelbstein, Esq. The NOH warned Respondent that failure to file an answer with the Administrative Law Judge (ALJ) within thirty (30) days of receipt may be deemed a waiver of the right to appear and to contest the allegations of the Complaint. The NOH explicitly warned Respondent that absent a timely answer, the ALJ may "enter a judgment by default along with any and all appropriate relief." NOH, ¶ 4.

On September 12, 1996, OCAHO received from the United States Postal Service a signed return receipt for the NOH addressed to Gelbstein. Although undated, the mailing was obviously received by the addressee on whose behalf receipt was acknowledged on a date prior to September 12, 1996, when it reached OCAHO. To date, no answer to the Complaint has been filed.

On November 8, Complainant filed a Motion for Default Judgment, dated and served on both Respondent and its attorney on November 4, 1996. The Motion contends that because Respondent failed to plead or otherwise defend within thirty (30) days of receipt of the complaint as required by 28 C.F.R. § 68.9(a), Respondent waived its right to appear and to contest the charge, and requests that the ALJ find Respondent in default, pursuant to 28 C.F.R. § 68.9(b). To date, no response to the Motion has been filed.

On November 19, 1996, I issued an Order to Show Cause Why Default Judgment Should Not Issue (OSC). The OSC invited a response to be filed no later than December 2, 1996, and specified

that a response must include a true certificate that a copy had been sent to the Complainant and required that the response be accompanied by a proposed answer to the Complaint. The Order also provided that Complainant timely reply to any response by no later than December 16, 1996. The OSC was addressed first class mail prepaid, certified mail, to both to Respondent and its attorney. A certified return receipt for Respondent Saville, postmarked November 25, 1996, was returned. No return receipt from Respondent's attorney has been received. To date, no response to the OSC has been filed.

II. DISCUSSION

A. Respondent's Abandonment

OCAHO Rules contemplate that "[a] party shall be deemed to have abandoned a complaint or a request for a hearing if: (1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge. . . ." 28 C.F.R. § 68.37(b)(1). In addition, OCAHO case law demonstrates that failure to respond to an Order to Show Cause triggers a default judgment, equivalent to dismissal of the employer's request for hearing, against an employer who fails to respond to such an Order's invitation. "Having made no filing in response, Respondent necessarily positioned itself for entry against it of a judgment by default. This is that judgment." United States v. Hosung Cleaning Corp., 4 OCAHO 681, at 2 (1994) 1994 WL 738649 (O.C.A.H.O.).

Even in cases where respondents have appeared pro se (without counsel), parties that failed to obey judicial orders have been found to have abandoned their requests for hearings, United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994) 1994 WL 526369 (O.C.A.H.O.), or to have abandoned their complaints, Holguin v. Dona Ana Fashions, 4 OCAHO 605 (1994) 1994 WL 269357 (O.C.A.H.O.); Brooks v. Watts Window World, 3 OCAHO 570 (1993) 1993 WL 566122 (O.C.A.H.O.); Speakman v. the Rehabilitation Hospital of South Texas, 3 OCAHO 4476 (1992) 1992 WL 535634 (O.C.A.H.O.); Palancz v. Cedars Medical Center, 3 OCAHO 443 (1992) 1992 WL 535580 (O.C.A.H.O.).

Respondent, despite exercising its statutory right to request hearing, has totally abandoned its opportunity to be heard; although represented by counsel, it is in default of its obligation to answer the complaint and has failed to respond to either the Motion or the OSC.

B. Liability Established

There being no evidence to the contrary, I deem the allegations of the Complaint to be true. Accordingly, pursuant to 8 U.S.C. §§ 1324a(e)(3)(C)(e)(4) and (e)(5), I determine that Respondent has violated 8 U.S.C. § 1324a(a)(1)(A) and § 1324a(a)(2) on the basis of the un rebutted allegations. Having defaulted in its failure to answer the Complaint, Motion for Default Judgment, and the OSC, Respondent is disabled from protesting that the Complaint's allegations are not established by a preponderance of the evidence.

C. Complainant's Motion for Default Judgment Granted

The time for a response is past. Therefore, in accord with OCAHO rules of procedure and specific notice to Respondent and its attorney, I find Respondent in default. See 28 C.F.R. § 68.9(b). The Motion is granted.

III. ULTIMATE FINDINGS, CONCLUSIONS AND ORDER

I have considered the Complaint and subsequent pleadings. For the reasons already stated, I find and conclude that:

1. Complainant's Motion for Default Judgment is granted;
2. As alleged in Count I of the Complaint, Respondent has violated 8 U.S.C. § 1324a(a)(1)(A) and § 1324a(a)(2) by knowingly hiring and/or continuing to hire two (2) named individuals who were aliens not authorized to work in the United States. Respondent must cease and desist from such practices, and shall pay a civil money penalty of \$1,300 for these violations;
3. As alleged in Count II, Respondent has failed to prepare and/or to make available for inspection employment eligibility verification forms (Form I-9) for eleven (11) named individuals hired after November 6, 1986. Respondent has therefore violated 8 U.S.C. §1324a(a)(1)(B), and shall pay a civil money penalty of \$5,260 for these violations;
4. As alleged in Count III, Respondent has failed to ensure that four (4) named individuals hired after November 6, 1986, properly completed section 1 of Form I-9, and has failed to properly complete section 2 of Form I-9 for these same individuals. Respondent has therefore violated 8 U.S.C. § 1324 a(a)(1)(B), and shall pay a civil money penalty of \$1,300 for these violations;
5. As alleged in Count IV, Respondent has failed to ensure that thirteen (13) named individuals hired after November 6, 1986, properly completed section 1 of Form I-9. Respondent has therefore violated 8 U.S.C. § 1324a(a)(1)(B) and shall pay a civil money penalty of \$2,800 for these violations;
6. As alleged in Count V, Respondent has failed to complete section 2 of Form I-9 for one (1) named individual hired after November 6, 1986. Respondent has therefore violated 8 U.S.C. § 1324a(a)(1)(B) and shall pay a civil money penalty of \$200 for this violation;
7. Respondent shall pay an aggregate civil money penalty totaling \$10,860 for the violations listed in the five counts of the Complaint.

8. Respondent shall cease and desist from further violations of 8 U.S.C. § 1324a(a)(1)(A) and § 1324a(a)(2).

This Final Decision and Order granting Complainant's Motion for Default Judgment "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324a(e)(7). Moreover, a person or entity adversely affected by a final order may, within 45 days after the date of the final order, file a petition in the Court of Appeals for the appropriate circuit for review. 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 11th day of December, 1996.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order Granting Complainant's Motion for Default Judgment mailed first class and certified mail, return receipt requested as indicated, this 11th day December, 1996, addressed as follows:

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