

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

ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER AFFIRMING THE
ADMINISTRATIVE LAW JUDGE'S JUDGMENT BY DEFAULT

United States of America, Complainant, v. Gus and Candy Kirk, d/b/a Kirk Enterprises. Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100190.

AFFIRMATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE
ADMINISTRATIVE LAW JUDGE'S JUDGMENT BY DEFAULT

The Honorable Earldean V.S. Robbins, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued a Judgment by Default on July 19, 1989. The Respondent, on July 31, 1989, filed a request for review with the Chief Administrative Hearing Officer in the above-styled proceeding.

Pursuant to Title 8, United States Code, Section 1324a(e)(6) and 28 C.F.R. 68.52, (hereinafter the Rules) the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order and in accordance with the controlling section of the Immigration Reform and Control Act of 1986, (hereinafter IRCA) supra, affirms the Administrative Law Judge's Order.

On April 17, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter INS) filed a complaint with the Office of the Chief Administrative Hearing Officer against the Respondent, Gus and Candy Kirk, d/b/a Kirk Enterprises (hereinafter Kirk Enterprises). The INS charged Kirk Enterprises with violations of IRCA. The INS alleged nine violations of 8 U.S.C. 1324a, for failure to properly complete section two of the Employment Eligibility Verification Forms (Forms I-9).

On May 5, 1989, Respondent's attorney of record, received via certified mail the Notice of Hearing. Respondent failed to file an answer to the complaint within the time period prescribed by the Rules.

Section 68.6(a) provides:

Within thirty (30) days after the service of a complaint, each respondent shall file an answer.

Section 68.5(d)(2) provides:

Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

These two rules, in conjunction, allow the Respondent a total of thirty-five days to file an answer. Respondent was served with the Notice of Hearing on May 5, 1989. In order to calculate the date the answer was due in this proceeding, one must count off thirty-five days beginning with the day after Respondent was served and include all weekends and holidays. If correctly calculated, one shall arrive at a due date of June 9, 1989. Here, the Administrative Law Judge received Respondent's answer on June 21, 1989, twelve days beyond the due date.

Section 68.6(b) of the Rules explicitly addresses this circumstance. It provides in part:

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.

Accordingly, the INS filed a Motion for Entry of Default Judgment, which was received by the Administrative Law Judge on June 12, 1989. The following day the Administrative Law Judge issued an Order to Show Cause, noting that a response to said Order was due by June 23, 1989.

On June 21, 1989, the Administrative Law Judge received Respondent's answer. However, the answer was lacking any explanation for its tardiness. Respondent not only failed to assert a legally sufficient defense as to why a timely answer had not been filed, Respondent failed to provide the Administrative Law Judge with any defense whatsoever. The subject of tardiness was not addressed by Respondent. Instead, Respondent completely disregarded the issue. For this reason alone, the Administrative Law Judge was correct in issuing a Judgment by Default.

Respondent filed a request for review on July 31, 1989 and subsequently, submitted a brief. In Respondent's brief, it is contended that due process has been violated because service of process was improper since only Respondent's attorney was served with a Notice of Hearing and not the Respondent personally. This argument is erroneous.

This untimely defense raised by Respondent is not a legally sufficient reason for failure to file a timely answer. Service of the com-

plaint and Notice of Hearing upon the Attorney of record was proper service pursuant to 28 C.F.R. 68.3(d)(1), which states:

Service of the complaint and notice of the date set for hearing shall be made by the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge to whom the complaint is assigned:

(1) By delivering a copy to the individual party, partner of a party, registered agent for service of process of a corporate party, or attorney of record of a party.

According to 28 C.F.R. 68.30(b):

Each attorney shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the docket number if assigned, and the party on whose behalf the appearance is made.

The Attorney's request for a hearing included the name of the case and that he was requesting a hearing on behalf of the Respondent. The request for hearing was written on the Attorney's professional capacity as a lawyer. Therefore, having completely satisfied the requirements of a notice of appearance by inclusion of the necessary elements within his request for a hearing, the Attorney, in effect, made an entry of appearance at the outset of this proceeding and continued to appear on behalf of the Respondent with each pleading he filed.

The Attorney's initial appearance in this proceeding was on March 29, 1989, when he requested a hearing on behalf of respondent. His second appearance was on May 22, 1989, through a motion to quash. On May 24, 1989, the Attorney filed a motion to vacate hearing date and appeared for the third time. Next, on June 15, 1989, the Attorney executed several documents in this proceeding. They included: an Answer/Response; an Amended Motion to Quash; a Response to Request for Admissions; Respondents' Answers to Complainant's Interrogatories; a Notice of Service of Respondents' Answers to Complainant's Interrogatories; and, a Response to Second Request for Admissions. On June 21, 1989, the Attorney executed a Response to Motion for Default Judgment and to the Order to Show Cause and Sworn Affidavit of Attorney. Finally, on June 22, 1989, the Attorney executed an Amended Response to Motion for Default Judgment and to the Order to Show Cause and Sworn Affidavit of Attorney.

Because the Respondent was obviously represented by counsel and the Rules allow for proper service upon any of the above cited representatives of Respondent, service of the complaint and Notice of Hearing was not defective in this proceeding.

After a review of the full record of this proceeding, it is concluded that: (1) Respondent failed to file a timely answer; (2) Respondent, in its attempt to file a late answer in response to the Administrative Law Judge's Order to Show Cause, failed to assert a legally

sufficient defense as to why its answer was late; (3) the Attorney of record made an appearance as Respondent's representative when he filed a request for a hearing on March 29, 1989; and, (4) according to 28 C.F.R. 68.3(d)(1), service of process was proper as the complaint and Notice of Intent Fine were served at the office of the Attorney of record.

For the above stated reasons, I hereby affirm the Administrative Law Judge's Judgment by Default of July 19, 1989, pursuant to 8 U.S.C. 1324a(e)(6).

SO ORDERED.

August 7, 1989.

B. JACK RIVERS
Acting Chief Administrative Hearing Officer