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

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| UNITED STATES OF AMERICA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. §1324a Proceeding |
| | ) | Case No. 92A00285 |
| ZEFERINO CASTILLO,<br>INDIVIDUALLY,<br>Respondent. | ) | |

DECISION AND ORDER GRANTING JUDGMENT BY DEFAULT
(April 1, 1993)

On December 21, 1992, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated December 16, 1992. The Complaint includes as its Exhibit A an underlying Notice of Intent to Fine (NIF), served by INS upon Respondent (Castillo or Respondent) on September 19, 1991. Count I charges Respondent with failure to prepare for inspection the Form I-9 for one individual. The civil money penalty assessed for Count I is $500. Count II charges Respondent with failure to properly complete Section 2 of the Form I-9 for two individuals. The civil money penalty assessed for Count II is $500. Count III charges Respondent with failure to complete Section 2 of the Form I-9 for one individual within three business days of hire. The civil money penalty assessed for Count III is $250. INS demands a total of $1,250 in civil money penalties. Exhibit B to the complaint is Respondent's October 18, 1991 request for hearing filed on his behalf by Margarito G. Rodriguez, Esq.

On January 4, 1993, this Office issued a Notice of Hearing which transmitted the Complaint to Respondent. The Notice cautioned Respondent that failure to answer the Complaint within thirty days of receipt might result in a waiver of the right to appear and contest Complainant's allegations. Respondent was explicitly warned that absent a timely Answer, the judge might "enter a judgment by default

along with any and all appropriate relief." The Notice of Hearing was served on Respondent's attorney by certified mail on January 11, 1993,

as confirmed by the signed delivery receipt returned to this Office by the U.S. Postal Service.

By motion dated February 19, 1993, filed February 23, 1993, Complainant asserted that Respondent was in default of his obligation to file a timely Answer to the Complaint. Respondent asked for entry in its favor of a decision and order on default.

At procedural junctures such as the case had reached at that point, it is my general practice to issue orders to show cause why judgment on default should not be entered. Such orders afford respondents an opportunity to explain a failure to have timely answered a complaint. See e.g., U.S. v. Cruz, OCAHO Case No. 92A00247 (3/18/93); U.S. v. Kim Dong Hui t/a Chestnut Gourmet Restaurant West, 3 OCAHO 479 (12/18/92); U.S. v. Vigilante, Inc. "Hercules" Jorge Gonzalez, Owner, OCAHO Case No. 92A00095 (9/25/92); U.S. v. Joseph Lemma, d/b/a J & L Landscaping, OCAHO Case No. 91100205 (2/21/92); U.S. v. Sam Estee Sportswear, Inc., OCAHO Case No. 91100132 (11/13/91); U.S. v. Flat Knitting Mills Co., Inc., OCAHO Case No. 91100047 (9/5/91); U.S. v. Sea Dart Trading Corp., OCAHO Case No. 91100078 (9/4/91); U.S. v. Jay Lee Fashions, Inc., OCAHO No. 91100019 (5/6/91); U.S. v. Lee & Young Co., Inc., OCAHO Case No. 90100348 (4/17/91); U.S. v. Huggems, Inc., OCAHO Case No. 91100008 (4/15/91); U.S. v. Elena Finishing, Inc., 1 OCAHO 132 (2/22/90); U.S. v. Elsinore Manufacturing, Inc., 1 OCAHO 5 (5/20/88).

I issued such an order in this case on March 1, 1993. The order granted Respondent until March 15, 1993 to file an explanation. On March 15, 1993 Margarito G. Rodriguez telephoned my office and informed Ms. Bush, our secretary, that he intended to respond to the order that day by facsimile transmission (fax). She advised him, consistent with our usual practice, that the judge will accept a fax filing as timely. However, it must be promptly followed by hard copy filing, as in the usual course, via mail or express delivery.

Respondent's March 15 filing is defective. No hard copy has been received to date, notwithstanding the certificate on the March 15 transmission that a copy was mailed to me first class postage prepaid that date. Either delivery of the putative mail copy aborted, or the certificate is false. Title 18 C.F.R. §68.6(a) requires filing in duplicate. Respondent's pleadings was not filed in duplicate.

I put aside pleading deficiencies, however, because it is important to address the substantive insufficiency of Respondent's response to the order to show cause.

Castillo, by counsel, asks that I accept as a timely filed answer to the complaint an October 18, 1981 letter of his to INS. That letter, exhibit A to his response to the show cause, is his request for hearing in response to the underlying notice of intent to fine (NIF). I reject the suggestion that response to an NIF is a sufficient answer to service of a complaint. Implementation of the hearing provision of 8 U.S.C. §1324a may well have provided for direct request for hearing by potential respondents. Instead, the Department of Justice adopted a regulatory methodology by which requests are transmitted to INS. At its election, INS files an OCAHO complaint subsequent to issuing an NIF. That methodology is not an invitation for an employer to ignore with impunity an official notice of this office. Respondent makes no claim that he was misled by the regulatory methodology or by INS into a belief that the request for hearing before an administrative law judge transmitted to INS on October 18, 1991 suffices as a reply to process served by OCAHO in January, 1993.

Whatever uncertainty might confront a lay person untrained in law, it is not credible that an attorney should so misread the solemn process of OCAHO as to successfully avoid its command.

A request to INS for a hearing before an administrative law judge is not an answer to a complaint. As discussed above, the notice of hearing cautioned Castillo that he risked default if he failed to timely answer the complaint. Additionally, identity between the counts in the NIF and those in the complaint is neither legally required nor universally experienced. The separation of functions between INS and OCAHO, OCAHO rules of practice and procedure, 28 C.F.R. Part 68, and the plain words of the notice of hearing compel rejection of Respondent's argument. Respondent's posture in the present case is particularly egregious. Exhibit B to the response to the show cause is tendered by Castillo to establish an intent to pursue settlement with INS. That exhibit, a July 22, 1992 letter to Rodriguez from INS counsel explained that absent settlement, "formal pleadings" would be filed with an administrative law judge. As of the time he received that letter, ten months after the NIF was served, five months before the complaint was filed, Respondent, by counsel, was on notice that he would be confronted with a formal proceeding.

Any leniency that might otherwise be accorded for failure timely to file an answer is confronted by Respondent's failure to respond to Complainant's February 19, 1993 motion for judgment by default. A reply to that motion would have been timely if filed by March 2, 1993. Respondent's failure to reply to INS' default motion forfeits the claim that the response to the INS NIF somehow satisfies the requirement to answer a complaint. Certainly, a Respondent represented by counsel cannot with impunity fail to reply to a default motion.

The response to the show cause contends that his attorney "simply did not have sufficient time to file an answer" due to a "heavy caseload." The response suggests that "this circumstance" should not be held against Respondent. Absent fraud or similar misconduct, the client obtains counsel at his peril. The logic of Respondent's claim would universally exculpate principals from responsibility for conduct of their agents. Such a rule would stand principles of principal/agent and client/attorney on their head. I reject this claim as utterly lacking a good cause showing.

OCAHO rules require an answer within thirty (30) days after service of a complaint, 28 C.F.R. §68.9(a) [1992]; the administrative law judge is

authorized to enter a judgment by default if a respondent fails to file its answer within the time provided. 28 C.F.R. §68.9(b). See U.S. v. Prime Landscape Management, Inc., 1 OCAHO 204 (7/25/90). The Notice of Hearing and my Order of March 1, 1993 advised Respondent to the same effect.

I find Respondent in default, having failed to timely plead or otherwise defend against the allegations of the Complaint, and having failed to establish good cause as required by the March 1 Order to Show Cause.

**IT IS HEREBY ORDERED**:

1. that the hearing in this proceeding is canceled.

2. that, as alleged in the Complaint, Respondent is in violation of 8 U.S.C. §1324a(a)(1)(B) with respect to each employee named in the complaint as to whom Respondent is found to have failed to prepare the employment eligibility verification form (Form I-9) (Count One), failed to properly complete section 2 of Form I-9 (Count Two), and failed to complete section 2 of Form I-9 within three business days (Count Three).

3. that Respondent pay a civil money penalty in the amount of One thousand two hundred fifty dollars ($1,250) for the violations charged in the Complaint;

This Decision and Order Granting Judgment by Default is the final action of the judge in accordance with 28 C.F.R. §68.53(a). As provided at 8 U.S.C. §1324a(e)(7), this action shall become the final decision and order of the Attorney General unless the Chief Administrative Hearing Officer modifies or vacates this Decision and Order within thirty (30) days from this date.

**SO ORDERED**.

Dated and entered this 1st day of April, 1993.

3 OCAHO 505

MARVIN H. MORSE
Administrative Law Judge