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

United States of America, Complainant v. Elena Finishing Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100581.

DECISION AND ORDER ON DEFAULT

(February 22, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: CHESTER J. WINKOWSKI, Esq., for the Immigration and Naturalization Service.

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), at section 101, enacted section 274A of the Immigration and Nationality Act of 1952, (INA or the Act), 8 U.S.C. § 1324a, introducing an enforcement program designed to implement the employer sanctions provisions prohibiting the unlawful employment of aliens.

On November 27, 1989, the Immigration and Naturalization Service (INS or the Service), filed a complaint against Elena Finishing Inc., (Elena, or Respondent), alleging one count of unlawful employment of aliens and two counts of paperwork violations of IRCA.

Count One alleges that Respondent knowingly hired and/or continued to employ five named individuals unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2). Count Two alleges that Respondent failed to prepare and/or failed to make available for inspection an employment eligibility verification form, INS Form I-9, for each of seventy-one named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Count Three alleges that Respondent failed to complete properly section 2 of INS Form I-9 for each of eleven named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B).

The Complaint dated November 21, 1989, containing as an Exhibit A a Notice of Intent to Fine which dated June 12, 1989 and

served June 14, 1989, contained also as Exhibit B Respondent's request for hearing in the form of a pleading (before INS) entitled ``Demand for Hearing'' by Wilens & Baker as ``attorneys for Respondent,'' dated July 11, 1989, and a letter dated July 20, 1989 signed by Howard L. Baker for Wilens & Baker, P.C., which recites that it enclosed the Demand for Hearing accompanied by a sworn proof of service dated July 11, 1989, that that document had been delivered to the INS.

The Complaint requests an order in effect directing Respondent to cease and desist from violating 8 U.S.C. § 1324a; seeks a $10,000.00 civil money penalty for knowingly hiring and/or continuing to employ unauthorized aliens; and requests an aggregate $40,750.00 civil money penalty for the paperwork violations, for a total civil money penalty of $50,750.00.

By Notice of Hearing dated November 30, 1989, Respondent was advised of the filing of the Complaint, the opportunity to answer within thirty (30) days after receipt of the complaint, my assignment to the case, and the approximate location for a hearing, i.e., in or around New York, New York. Although the request to INS dated July 11, 1989 had been accompanied also by an answer to the Notice of Intent to Fine, that answer was not only a gratuitous filing with INS but clearly does not constitute an answer to the Complaint, as required by the explicit terms of the Notice of Hearing issued by this Office.

By Motion for Default Judgment dated January 22, 1990, INS asks that Respondent be found in default. The motion, accompanied by an INS attorney's Declaration of Counsel, and a proposed Decision and Order for entry by the Judge, rests on the premise that Respondent had ``failed to plead or otherwise defend within thirty days after receipt of the complaint.''

The file contains a certified mail receipt addressed to Howard L. Baker endorsed to show delivery on December 5, 1989.

In prior cases where there was reason to believe that a respondent was inadequately notified or otherwise unaware of the risk that failure to file an answer within 30 days of receipt of the complaint would permit INS to request and obtain an order of default from the judge, I have issued orders to show cause why judgment by default should not issue. This is such a case.

Although an attorney had appeared before INS in response to the Notice of Intent to Fine and had requested hearing before an administrative law judge on behalf of Elena, that attorney had not appeared before me. Participation before the investigative and prosecutorial agency, i.e. INS, can not constitute implied represen-

tation before me without violating the separation of functions doctrine of the Administrative Procedure Act, 5 U.S.C. § 554(d).

Considering the foregoing, in a situation where the Notice of Hearing containing the Complaint was served only on the attorney who had appeared before INS and had not entered an appearance or otherwise participated in the proceeding before the presiding administrative law judge, there is no certainty in fact and law that service had been effected upon the Respondent. Accordingly, because the record of this proceeding appeared to reflect only service of the Notice of Hearing (containing the Complaint as an enclosure) upon that attorney, I issued on January 25, 1990, an Order to Show Cause Why Default Judgment Should Not Issue. That Order, addressed separately to both the attorney (who had appeared for Respondent before the INS) and upon Respondent at its address of record, provided respondent opportunity until February 5, 1990 to show such cause as it may have why default judgment should not issue. Respondent was invited to accompany such filing with a proposed answer.

The failure of Respondent to file a timely, or any answer to the Complaint constitutes a basis for entry of a judgment by default within the discretion of the administrative law judge pursuant to 28 C.F.R. § 68.8(b).

No Answer having been received from Respondent, or on its behalf, within 30 days of its receipt of the Complaint, or even as of this date, no response to the government's Motion for Default Judgment having been filed by Respondent, or on its behalf, and no response to my Order to Show Cause having been filed by Respondent or on its behalf within the time period specified in that Order, or even as of this date, I hereby find Elena Finishing Inc., Respondent, in default, having failed to plead or otherwise defend against the allegations of the Complaint.

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED, that Respondent is in violation of 8 U.S.C. § 1324(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2) with respect to its hiring and/or continuing to employ the individuals named in Count One of the Complaint, knowing that these persons were unauthorized for employment in the United States, and in violation of 8 U.S.C. § 1324a(a)(1)(B) for its failure to comply with the employment verification requirements with regard to the individuals named in Counts Two and Three of the Complaint.

IT IS HEREBY ORDERED:

(1) that Respondent pay a civil money penalty in the amount of $10,000.00 for the violations in Count One of the Complaint and

$40,750.00 for the violations in Counts Two and Three of the Complaint, for a total civil money penalty of $50,750.00;

(2) that Respondent cease and desist from further violating section 274A of the Act, 8 U.S.C. § 1324a; and

(3) that the hearing in this proceeding is canceled.

This Decision and Order on Default is the final action of the judge in accordance with 28 C.F.R. § 68.51(a). As provided at 28 C.F.R. § 68.51(a), this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this decision and order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it.

SO ORDERED.

Dated this 22nd day of February, 1990.

MARVIN H. MORSE
Administrative Law Judge