

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

United States of America, Complainant, v. Peter P. Kelley, dba Pete's Southside Cafe, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88-100150.

Appearances: For the Complainant
ARTHUR A. LIBERTY II, Esquire

For the Respondent
CARL E. HAYES, Esquire

Before: ROBERT B. SCHNEIDER, Administrative Law Judge

JUDGMENT BY DEFAULT

Discussion and Decision:

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), adopted significant revisions in national policy with respect to illegal immigrants. Accompanying other dramatic changes, IRCA, at Section 101, introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States.

Section 101 of IRCA amended the Immigration and Nationality Act of 1952 by adding a new section 274A (8 U.S.C. 1324a). Section 1324a provides also that an employer is liable for failure to attest ``on a form designated or established by the Attorney General by regulations, that is has verified that the individual is not an unauthorized alien . . .'' In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring (recruiting or referring for a fee) or continuing to employ such aliens. The entire arsenal of public policy remedies

against unlawful employment of aliens is commonly known by the rubric ``employer sanctions.''

Section 1324a authorizes the imposition of orders to cease and desist with civil money penalty for violation of the proscription against hiring, recruiting, and referral for a fee of unauthorized aliens and authorizes civil money penalties for paperwork violations. 8 U.S.C. 1324a(e)(4)-(5).

By Final Rule published May 1, 1987, 52 Fed. Reg. 16190, 16221-28, the Department of Justice implemented the employer sanctions provisions of IRCA, now codified at 8 C.F.R. Part 274a. These regulations provide, inter alia, in pertinent part, id. at 274a.2(a):

This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting or referring for a fee, individuals in the United States, or continuing to employ aliens knowing that the aliens are (or have become) unauthorized aliens. The Form I-9, Employment Eligibility Verification Form, has been designated by the [Immigration and Naturalization] Service as the form to be used in complying with the requirements of this section.

The regulation provides that the Immigration and Naturalization Service (INS) initiates an action to assess civil liability by issuance of a Notice of Intent to Fine (NIF), and provides also that an employer against whom the NIF is imposed ``has the right to request a hearing before an Administrative Law Judge pursuant to 5 U.S.C. 554-557, and that such request must be made within 30 days from the service of the Notice of Intent to Fine.''

Id. at 274a.9(c)(1)(ii)(C).

An opportunity for a hearing before an administrative law judge as a precondition for a cease and desist order and a civil money penalty is conferred by statute, 8 U.S.C. 1324a(e)(3). The administration of an administrative law judge system pursuant to Section 1324a was established by the Attorney General, 52 Fed. Reg. 44971, November 24, 1987; (corrected) 52 Fed. Reg. 48997, December 29, 1987. That administration is lodged in the Office of the Chief Administrative Hearing Officer (OCAHO), Department of Justice. The Interim Final Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens (Rules) appears at 52 Fed. Reg. 44972-85, November 24, 1987 (to be codified at 28 C.F.R. Part 68). The rules govern practice and procedure in cases heard by administrative law judges under IRCA.

Consonant with the statute and regulations, the INS on October 17, 1988, filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer. The complaint, dated October 11, 1988, contained as Exhibit A, the Notice

of Intent to Fine alleging four (4) counts of violations of the Immigration and Nationality Act and as Exhibit B, a letter from Respondent requesting a Hearing with an Administrative Law Judge.

By Notice of Hearing on Complaint Regarding Unlawful Employment, dated October 26, 1988, Respondent, Peter P. Kelley, d/b/a Pete's Southside Cafe, was advised of the filing of the complaint; the opportunity to answer within thirty (30) days after receipt of the complaint; and the date and place of hearing, i.e., beginning on March 21, 1989.

The complaint, incorporating the NIF, requests an order directing Respondent to cease and desist from violating 8 U.S.C. 1324a and seeks civil money penalties (totaling \$1,300.00).

By motion filed December 22, 1988, INS asks for default judgment. The motion rests on the premise that no answer had been filed to the complaint although the complaint had been filed more than thirty (30) days previously.

On January 3, 1989, having not received an answer to the complaint or any responsive pleading to the INS motion, I issued an Order to Show Cause Why Judgment by Default Should Not Issue. That order provided Respondent an opportunity to ``show cause why default should not be entered against it, any such showing to be made by motion which also contains a request for leave to file an answer.'' On January 12, 1988, Respondent filed a letter dated January 9, 1989, stating that Respondent did not wish to contest the allegations in the complaint and had forwarded payment of the fine to Sector Counsel for the Immigration and Naturalization Service.

I construe Respondent's letter dated January 9, 1989, as an abandonment of the hearing request and not as an answer to the complaint. 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. 28 C.F.R. Section 68.6(b). The failure to answer entitles the judge to treat the allegations of the complaint as admitted. Clearly, absent an answer, as here, there can be no genuine issue as to any material fact. As provided in 28 C.F.R. Section 68.36(c), the judge has discretion to issued a summary decision.

Respondent having failed to file an answer, and the time allowed for filing one having elapsed, I find the Respondent has waived its right to appear and contest the allegations of the complaint, and that a judgment by default is appropriate. 28 C.F.R. 68.6(b).

Accordingly, in view of all the foregoing, it is found and concluded, that Respondent Peter P. Kelley dba Pete's Southside Cafe committed the acts alleged in Counts one through four of the Notice of

Intent to Fine and in the complaint, and by so doing, the Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (the ``Act''), 8 U.S.C. 1324a. Consequently,

IT IS HEREBY ORDERED:

1. That Respondent within 14 days from the date of this Judgment by Default, pay a civil money penalty in the amount of \$1,300.00 in either cash, cashier's check, certified check or money order (if not in cash) to the ``Immigration and Naturalization Service'' and deliver same to: Arthur A. Liberty, II, Sector Counsel, Immigration and Naturalization Service, United States Border Patrol, 6102 Ninth Street, Dublin, California 94568.

2. That the hearing previously scheduled is cancelled. Review of this final order may be obtained by filing a written request for review with the Chief Administrative Hearing Officer, 5113 Leesburg Pike, Suite 310, Falls Church, Virginia 22041, within 5 days of this order as provided in 28 C.F.R. 68.52. This order shall become the final order of the Attorney General unless, within 30 days from the date of this order, the Chief Administrative Hearing Officer modifies or vacates the order.

SO ORDERED: This 17th day of January, 1989, at San Diego California.

ROBERT B. SCHNEIDER
Administrative Law Judge.