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. 94A00007
ERLINA FASHIONS, INC. D/B/A SONG DESIGNS INC., Respondent.	)	

FINAL DECISION AND ORDER

(June 28, 1994)

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural Background*

This case involves a complaint filed by the Immigration and Naturalization Service (INS or Complainant), on January 18, 1994, against Erlina Fashions, Inc. (Erlina or Respondent). The complaint contains three counts which allege violation by Erlina of the obligation by employers to satisfy certain prerequisites to employment of individuals in the United States subsequent to November 6, 1986. Each employer is obliged to undertake employment eligibility verification procedures established by Complainant pursuant to 8 U.S.C. § 1324a(b) as a means whereby both the employer and INS can determine whether a particular employee is authorized for employment in the United States. In this manner, the employment verification system provides a means to audit employer compliance with the prohibition against employment of unauthorized aliens enacted by section 101 of the Immigration Control and Reform Act of 1986, as amended (IRCA). 8 U.S.C. § 1324a.

Count I of the complaint alleges that Erlina hired fifteen named individuals as to whom it failed to prepare or, alternatively, to present upon notice of a scheduled inspection, the required employment eli-

gibility verification forms (Forms I-9). Count II alleges that as to an additional four named individuals, Erlina failed to ensure that (a) the employees properly completed their portion (i.e., section 1) of the Form I-9, and Respondent failed to properly complete section 2 of the Form I-9. Count III alleges that as to an additional four named individuals, Erlina failed to properly complete section 2 of the I-9.

Within the statutory range for civil money penalties of $100 to $1,000 per individual, INS assessed Erlina at the rate of $740 per individual, $11,100 in the aggregate for Count I; $510 per individual, $2,040 in the aggregate for Count II, and $490 per individual, $1,960 in the aggregate for Count III, for a total civil money penalty assessment of $15,100.

Initial efforts by this Office to serve Respondent at its address of record as set out by INS in its underlying notice of intent to fine (NIF), dated August 19, 1993, and in Respondent's request for hearing dated October 5, 1993, were unsuccessful. The Notice of Hearing (NOH), enclosing the complaint to be served on Erlina Fashions, Inc. (Respondent), was returned by the Postal Service as undelivered mail. Personal service was eventually effected by delivery to the individual whose name appears as Respondent's officer who executed the request for hearing, i.e., Erlina A. Villa, Vice President, Secretary, Song Designs Inc. The order dated April 26, 1994, incorporated and set forth herein, summarizes subsequent procedural developments and provided directions to Respondent, as follows:

> On April 25, 1994, this Office received a copy of Erlina A. Villa's letter/pleading dated April 20, 1994, on behalf of Respondent, Erlina Fashions, Inc. Because there was no indication that a copy was served on Complainant, this Order transmits a copy of Respondent's letter/pleading to Complainant. The parties are advised that any filings submitted to this Office should be accompanied by a certificate of service indicating that a copy of such filing has been served on the other party. 28 C.F.R. § 68.6(a). A copy of Respondent's letter/pleading will be enclosed with Complainant's copy of this Order.
>
> Failure of a party to certify service of a copy of each filing on the opposing party, and to effect that service, may result in my resolving this case in favor of the other party.
>
> It is noted that the initial effort to serve Respondent by certified mail at the address provided to this Office by Complainant was not successful. Erlina's April 20, 1994 letter confirms, however, that the Notice of Hearing was served on Respondent on or before April 20, 1994. I will treat the letter as an acknowledgment of receipt of the Notice, including the Complaint, as of April 20, 1994. Nevertheless, the April 20 letter fails to satisfy the minimal requirement of an answer to a complaint. Instead, it asks that the date of hearing be rescheduled. Since no date was specified for hearing, I understand that request to refer to the direction that an answer be filed within 30 days of receipt of the Complaint.

> The request is granted to the extent that Respondent may file a timely answer not later than May 27, 1994. The answer must satisfy the requirements of the rules of practice and procedure of this Office, specifically:
>
> (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted; and
>
> (2) A statement of the facts supporting each affirmative defense.
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> 28 C.F.R. §68.9(c)
>
> Failure to file an answer may result in a default judgment against Respondent.
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> For convenience of Respondent, a copy of the OCAHO rules of practice and procedure is enclosed with Respondent's copy of this Order.

Subsequently, by letter/pleading dated May 15, 1994, filed May 23, 1994, Erlina A. Villa (Villa), on behalf of Respondent admits and pleads "guilty" to Count I but denies liability on Counts II and III. The filing contains no certificate or other indicia of service on INS. Conceding with respect to Counts II and III, that the employment eligibility verification forms (Forms I-9), are unsigned by the employer, Villa suggests the lack of signatures results from her failure to "fully understand the Form I-9." She asserts also that "as of May 5, 1993, Erlina Fashions Inc., D/B/A Song Designs Inc., officially closed due to financial difficulties."

II. *Discussion*

Respondent's filing of May 23, 1994 concedes liability for Count I in terms. By conceding that the I-9s implicated at Counts II and III were unsigned, Respondent implicitly acknowledges liability for failure to have completed section 2 of the I-9s, in violation of 8 U.S.C. § 1324a(b)(1) and its implementing regulation, 8 C.F.R. § 274a.2(b)(1)(ii). See U.S. v. J.J.L.C. 1 OCAHO 154 (4/13/90).

> Absent attestation by the employer, neither INS as the enforcement agency, or the administrative law judge as the adjudicator, can determine from the employment verification system whether an employer has satisfied its statutory obligation to ensure against employment of unauthorized aliens. . . . attestation is crucial to compliance with the employment verification program. Absence of a signature implies that no one in a capacity to hire and fire individuals on behalf of Respondent has actually examined each new employee's documentation.

Id. at 6-7.

Liability for deficient I-9 practices by the employer on all counts of the complaint are established by the pleadings. However, Respondent's posture before the judge is more precarious than that of a litigant whose pleadings are tantamount only to a concession of liability. By its own conduct, Respondent has foreclosed inquiry by the judge as to the appropriate civil money penalty within the statutory penalty range. This is so because Respondent failed to indicate that a copy of the May 23, 1994 filing was served on Complainant. By that failure, Respondent has breached the requirement that every filing with the judge contain a certificate of service. 28 C.F.R. § 68.6(a). That requirement is not a bureaucratic exercise to be observed at the whim of a party to a litigation. It is instead an essential component of procedural due process intended to avoid ex parte contacts and to assure a level playing field.

The failure of the May 23 filing to evidence service is particularly blameworthy where it purports to be "[I]n answer to the order dated April 26, 1994." As quoted above in this final decision and order, two of the four sentences in the first paragraph of that order explicitly addressed the requirement for certification of and actual service. That discussion focused on the failure of Erlina's previous filing to indicate service, advised of the need for such certificates, and provided a citation to the pertinent regulatory provision. The order transmitted a copy of OCAHO rules of practice and procedure, i.e., 28 C.F.R. Part 68. The second paragraph of the order warned Respondent in so many words that:

> Failure of a party to certify service of a copy of each filing on the opposing party, and to effect that service, may result in my resolving this case in favor of the other party.

This final decision and order resolves this case in favor of the other party, i.e., INS.

In a similar situation where despite my warning a subsequent filing by a party "took no heed of the plain requirement" of § 68.6(a), I concluded that failure to adhere to judicial direction to certify service invites dismissal of the party's case:

> Compassion for Complainant's pro se status in the circumstances described must give way to the need for orderly and informed participation by the parties to an administrative adjudication. Failure to certify service on the opponent is at odds with that participation. Failure to adhere to explicit orders by the judge invites dismissal of the complaint, as deemed to have been abandoned. 28 C.F.R. § 68.37(b)(1). Brooks v. Watts Window World, 3 OCAHO 570 (11/1/93); Castillo v. Hotel Casa Marina

(Marriott), 3 OCAHO 508 (4/12/93); Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/93); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92).[1]

Holguin v. Dona Ana Fashions, 4 OCAHO 605 (2/1/94) at 5.

Erlina breached both the regulatory requirement to certify service and the judge's explicit direction to the same effect. For its failure, I treat the filing as naught and the Respondent as having abandoned its request for hearing. 28 C.F.R. § 68.37(b)(1).

III. *Ultimate Findings, Conclusions And Order*

I have considered the pleadings, motions, and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon the preponderance of the evidence:

1. that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or make available for inspection the Form I-9 for fifteen (15) named individuals, the civil money penalty for which is $740 per violation, for a total civil money penalty assessment for Count I of $11,100;

2. that Respondent violated 8 U.S.C. § 1324a(a)(1(B) by failing to ensure that the four (4) named individuals properly completed section 1 of the Form I-9 and that Respondent failed to properly complete section 2 of the Form I-9 with respect to the same individuals, the civil money penalty for which is $510 per violation, for a total civil money penalty assessment for Count II of $2,040; and

3. that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to properly complete section 2 of the Form I-9 for four (4) named individuals, the civil money penalty for which is $490 per violation, for a total civil money penalty assessment for Count III of $1,960.

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[1] Failure to provide any indication that a filing has been served on the other party renders the filing susceptible to treatment as an ex parte communication. Although not the premise on which this final order and decision issues, I note that, as provided at 28 C.F.R. § 68.36(b), one among several sanctions for filing an ex parte communication is an "adverse ruling on the issue which is the subject of the prohibited communication."

4. that the aggregate civil money penalty for the violations as assessed and as adjudicated is $15,100.

5. that this case stands for the proposition that an employer which fails to certify service on INS of its filings with the administrative law judge, particularly where previously it has been explicitly directed to do so by the judge and has been warned that such failure may result in a resolution of the case in favor of the other party, will be treated as though it has abandoned its request for hearing, and judgment will be entered for Complainant.[2]

This Decision and Order is the final action of the judge in ac-cordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c) (iv). As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7), (8); 28 C.F.R. § 68.53.

SO ORDERED. Dated and entered this 29th day of June, 1994.

MARVIN H. MORSE
Administrative Law Judge

[2] A copy of Respondent's letter/pleading filed May 23, 1994 is enclosed with Complainant's copy of this Final Decision and Order.