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

April 2, 1996

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding
	) OCAHO Case No. 95A00160
A&A MAINTENANCE ENTERPRISE, INC., Respondent.	)

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT, GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO STRIKE, GRANTING RESPONDENT'S MOTION FOR LEAVE TO FILE LATE ANSWER, AND ALLOWING 15 DAYS TO AMEND AFFIRMATIVE DEFENSES

Procedural History

This is an action pursuant to the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (INA), in which the United States Department of Justice, Immigration and Naturalization Service (INS) is the Complainant and A&A Maintenance Enterprise, Inc. is the Respondent. INS filed the Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on December 1, 1995. It was mailed to Respondent, together with a Notice of Hearing and a copy of the applicable rules of practice and procedure[1] on December 5, 1995, and was served upon the Respondent on December 11, 1995. As the request for hearing was signed by Respondent's Comptroller, service of the Complaint package was made upon the Respondent at the same name and address as appeared on the request for hearing,

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1995).

that of the Comptroller. It does not appear that a copy was served upon Respondent's Counsel.

On January 17, 1996, an Answer was filed which denied the material allegations of the Complaint and asserted four purported affirmative defenses. On January 18, 1996, Complainant's counsel telefaxed a Motion for Default Judgment and Declaration of Counsel which were followed by hard copies on January 22, 1996. On January 29, 1996, Respondent filed an Affirmation in Opposition to Complainant's Motion for Default, and Complainant telefaxed a Motion to Strike Answer and Affirmative Defenses which was followed by hard copies on January 31, 1996. On February, 9, 1996, Respondent filed an Affirmation in Opposition to the Motion to Strike and a Motion to File Late Answer and for Leave to Amend Affirmative Defenses. No response was made to the last motion.

For the reasons stated *infra*, Complainant's Motion for Default Judgment is denied, Complainant's Motion to Strike is denied in part and granted in part, and Respondent's Motion to File Late Answer and for Leave to Amend Affirmative Defenses is granted, with fifteen days leave to amend.

I. *Motion for Default Judgment*

OCAHO rules provide that an answer to a Complaint shall be made within 30 days after service of the Complaint. Accordingly, as the Complaint was served on December 11, 1995, the Answer in this matter was due on January 10, 1996. Complainant has alleged no prejudice occasioned by the seven day delay in answering the Complaint.

In opposition to the Motion for Default, the Respondent asserts as grounds for the delayed Answer that the Complaint package was not served upon Respondent's counsel, which Respondent did not know, and accordingly Respondent did not immediately notify its counsel that the Complaint had been received.

Default judgments are not favored in the law, particularly where, as here, the length of the delay is not substantial and there is no indication of prejudice to the opposing party caused by the delay. I find that the delay was for good cause and that it was promptly remedied. Thus Complainant's Motion for Default Judgment is denied.

II. *Motion to Strike Answer and Affirmative Defenses*

The grounds alleged for striking the Answer are the same grounds as were asserted in support of the Motion for Default Judgment; for the same reason stated in the denial of that Motion, that portion of the Motion to Strike directed to the Answer is denied as well.

Respondent's Answer denies the material allegations of the Complaint and asserts four attempted affirmative defenses:

1) lack of jurisdiction;

2) failure to properly serve Respondent's counsel;

3) failure to state a cause of action against Respondent; and

4) the claim is time-barred.

As grounds for that portion of the Motion to Strike which is directed to the attempted affirmative defenses, Complainant asserts that the claimed defenses are not supported by a statement of facts as required by 28 C.F.R. §68.9(c), and that they are insufficient as a matter of law.

While it is true that motions to strike affirmative defenses are not favored in the law, it is also true that they are routinely used both in the district courts and in OCAHO jurisprudence to strike defenses which lack any legal or factual grounds. *See, e.g., United States v. Task Force Security, Inc.,* 3 OCAHO 563, at 4 (1993). If there is no *prima facie* viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory, the defense will be stricken. *United States v. Makilan*, 4 OCAHO 610, at 3 (1994). If there is no statement of facts as called for by OCAHO rules, the purported defense will be stricken as well. 28 C.F.R. §68.9(c). Each asserted defense must thus be subjected to scrutiny under two threshold tests, first, whether it states a viable legal theory under which Respondent could establish a defense, and second, whether the factual statement is sufficient to satisfy the requirements of 68.9(c). Any defense which does not satisfy both tests will be stricken.

A. *First Affirmative Defense—Lack of Jurisdiction*

The following allegations are set forth to assert the first affirmative defense of lack of jurisdiction:

5. The Respondent asserts that the Office of the Chief Administrative Hearing Officer lacks jurisdiction over this matter for the following reason.

6. The Respondent, A&A Maintenance Enterprise, Inc. filed for relief under Chapter 11 of the Federal Bankruptcy Code on October 12, 1995 in the Southern District of New York bearing case number 94B21775.

7. The Bankruptcy Court for the Southern District of New York retains jurisdiction over this matter pursuant to 28 U.S.C. §157 (a) and (b).

The defense lacks support in law, and should be stricken. OCAHO precedent makes clear that the bankruptcy of the Respondent has no effect upon the jurisdiction of this tribunal and does not constitute an affirmative defense to proceedings pursuant to the INA. *United States v. Carlson*, 1 OCAHO 264, at 1697–98 (1990).[2] Respondent may not, by the unilateral act of filing for bankruptcy, insulate itself from the jurisdiction of Congressionally established administrative agencies carrying out their Congressionally mandated regulatory actions.

11 U.S.C. 362(a) expressly exempts a governmental unit acting to enforce its police and regulatory power from the automatic stay provision of the bankruptcy code. *NLRB v. 15th Avenue Iron Works*, *Inc.,* 964 F.2d 1336 (2d Cir. 1992). This exemption has been uniformly honored in the federal circuits as applied to a variety of public agencies, both federal and state. *City of New York v. Exxon Corp.,* 932 F.2d 1020 (2d Cir. 1991); *In re Commonwealth Companies, Inc.,* 913 F.2d 518 (8th Cir. 1990); *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988); *EEOC v. Rath Packing Co.,* 787 F.2d 318 (8th Cir. 1986), *cert. denied* 479 U.S. 910 (1986); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

Congress clearly intended the police power exception to allow the various governmental agencies to remain free of the constraints of the bankruptcy code in the exercise of their regulatory powers as well as "to prevent the bankruptcy courts from becoming a haven for wrongdoers," *Commodity Futures Trading Commission v. Co Petro Marketing Group, Inc.,* 700 F.2d 1279, 1283 (9th Cir. 1983), citing 2 Collier on Bankruptcy §362.05 at 362–40 (15th ed. 1982). Where, as

[2] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws in the United States*, reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

here, the primary purpose of the action is not to adjudicate private rights or to protect a pecuniary interest in the debtor's property, but to effectuate a clear public policy, no purpose would be served by staying what is a wholly regulatory action. *Cf. In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988).

The court in *Nicolet, supra,* observed in another context:

> In pressing this lawsuit, the United States is not seeking redress for private wrongs or a remedy for a private contract breach. It is not suing in its role as a consuming participant in the national economy, i.e., suing a negligent motorist for damage to a GSA van or a paperclip manufacturer for a defective order (citation omitted). Rather, the government brought suit against Nicolet in compliance with its explicit mandate under CERCLA . . .

857 F.2d at 209.

This attempted defense cannot pass the first threshold test in that it is not legally viable.

B. *Second Affirmative Defense—Defective Service of Process*

As a second affirmative defense, Respondent asserts that service of process was defective, stating:

> 8. For a further defense the Respondent states as follows.
>
> 9. No process of court was ever served upon Respondent's counsel.
>
> 10. Respondent's counsel served a notice of appearance on Mr. Jason Raphael via facsimile as requested by him on October 11, 1995 (See Exhibit A annexed hereto).
>
> 11. Respondent authorized counsel to enter his appearance and to defend the suit in this matter as Mr. Raphael was aware.

The Complaint package was served by OCAHO, not by Mr. Raphael. It was addressed to the person who signed the request for hearing, as is customary.

OCAHO procedural rules provide that service of a complaint may be effectuated by delivering a copy to the individual party, officer of a corporate party, registered agent for service of process of a corporate party, or attorney of record for a party. 28 C.F.R. §68.3(a)(1). Service of process in this case was made in accordance with these rules. The Complaint package was sent to the party's Comptroller, the person who signed the request for hearing.

The requirements for entering appearances by counsel are described in 28 C.F.R. §68.33(b)(5):

> Except for a government attorney filing a complaint pursuant to sections 274A, 274B, or 274C of the INA, each attorney shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the case number if assigned, and the party on whose behalf the appearance is made. The notice of appearance shall be signed by the attorney, and shall be accompanied by a certification indicating that such notice was served on all parties of record. A request for a hearing signed by an attorney and filed with the Immigration and Naturalization Service pursuant to section 274A(e)(3)(A) or 274C (d)(2)(A) of the INA, and containing the same information as required by this section, shall be considered a notice of appearance on behalf of the respondent for whom the request was made.

With the exception of a request for hearing signed by the attorney and filed with INS, the rule does not provide a means for a valid notice of appearance to be made by service upon opposing counsel without any filing with OCAHO. Although a copy of the notice served upon Complainant's counsel is attached to Respondent's Answer filed on January 17, 1996, no notice of appearance has actually been filed with OCAHO in this matter.

Whatever prejudice may have resulted from the failure to serve Respondent's counsel as well as Respondent, the same is alleviated by the acceptance of a late answer and the leave provided herein to amend. This attempted defense will be stricken. While there are doubtless factual circumstances under which defective service of process could constitute a valid affirmative defense, the service of process in this instance is not defective under applicable rules. The facts here alleged therefore do not state a viable defense.

C. *Third Affirmative Defense—Failure to State a Cause of Action*

As a third affirmative defense, Respondent asserts that the Complainant fails to state a cause of action, and states as follows:

> 12. Respondent has at all times mentioned in the complaint been able to make available for inspection the employment eligibility verification forms for all its employees referred to in Count I of the Complaint.
>
> 13. Respondent has at all times mentioned in the complaint ensured that employees properly completed section 1 and properly completed section 2 of the employment eligibility verification forms for all its employees referred to in Count II of the Complaint.
>
> 14. Respondent has at all times mentioned in the complaint ensured that employees properly completed section 1 of the employment eligibility verification forms for all its employees referred to in Count III of the Complaint.

15. Respondent has at all times mentioned in the complaint ensured that employees properly completed section 2 of the employment eligibility verification forms for all its employees referred to in Count III of the Complaint.

16. Respondent was moving its headquarters from 39 North Lawn Avenue in Elmsford, New York to 200 Mamaroneck Avenue in White Plains, New York when Complainant visited the premises for inspection and most of its records were in boxes.

17. Respondent was preparing to file for bankruptcy and a good portion of its records were with Respondent's bankruptcy counsel and accountants.

18. For the foregoing reasons, Complainant fails to state a cause of action.

The allegations contained in paragraphs 12—15 are simply an elaboration of Respondent's denials of the allegations in the Complaint; they do not constitute an affirmative defense, nor do they address in any way the legal sufficiency of the Complaint to state a claim upon which relief can be granted. To the extent that they simply deny the allegations of the Complaint, they are also redundant. The allegations in paragraphs 16—18 similarly have no bearing on the sufficiency of the Complaint to state a cause of action upon which relief may be granted.

This attempted defense will be stricken as legally insufficient.

D. *Fourth Affirmative Defense—Bar by Bankruptcy Rules*

As a fourth affirmative defense, Respondent states that this action is barred by Bankruptcy Rule 3003(c)(3), stating:

19. Complainant had knowledge of the bankruptcy filing and never moved to file a claim bankruptcy court (sic).

20. The bar date to file all proofs of claim was August 18, 1995 and complainant failed to file said proof of claim.

21. The Complainant's claim is time-barred pursuant to Bankruptcy Rule 3003(c)(3).

This case is governed by OCAHO rules of practice and procedure, 28 C.F.R. Part 68, not by the bankruptcy rules.

As previously indicated, the automatic stay provision of the Bankruptcy Code, 11 U.S.C. §362(a) does not, by its own terms, apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. This is such an action. Whether or not a different

action to enforce a liquidated claim for a money judgment would be barred is another matter to be addressed when and if it occurs. This is *not* such an action.

The distinction has been recognized in both Circuit and Bankruptcy courts in cases brought by governmental units. In *EEOC v McLean Trucking Co.,* 834 F.2d 398 (4th Cir. 1987), it was held that an EEOC suit seeking the entry of a money judgment for back pay in a Title VII action was not barred. In *NRLB v. Edward Cooper Painting, Inc.,* 804 F.2d 934 (6th Cir. 1986), an order by the NLRB for back wages in an unfair labor practice case was not barred. The court noted that "once proceedings are excepted from the stay by section 362(b)(4), courts have allowed governmental units to fix the amount of penalties, up to an including entry of a money judgment." 804 F.2d at 942–43.

The Third Circuit explained the distinction:

> Quite separate from the entry of a money judgment, however, is a proceeding to enforce that money judgment. The paradigm for such a proceeding is when, having obtained a judgment for a sum certain, a plaintiff attempts to seize the property of a defendant in order to satisfy that judgment.

Penn Terra Ltd. v. Dept. Of Environmental Resources, Com. of Pa., 733 F.2d 267, 275 (3d Cir. 1984).

Permitting this claim to be reduced to judgment is not affected by the bankruptcy rules and the defense is stricken as legally insufficient. Respondent asks for dismissal of the Complaint, or in the alternative, that the case be removed to the Bankruptcy Court of the Southern District of New York. I find no basis on which to do either and decline the invitation.

Conclusion and Order

Complainant's Motion for Default Judgment is denied; Complainant's Motion to Strike Answer is denied, and the Motion to Strike Affirmative Defenses is granted. Respondent's Motion for Leave to File Late Answer and to Amend Affirmative Defenses is granted. Respondent's affirmative defenses are stricken without prejudice to the right to amend within 15 days to state any lawful defenses Respondent may plead in compliance with 28 C.F.R. §68.9(c)(2).

SO ORDERED.

Dated and entered this 2nd day of April, 1996.

ELLEN K. THOMAS
Administrative Law Judge