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

July 23, 1997

UNITED STATES OF AMERICA, Complainant, v. WILLIAM L. GARCIA, DBA: LA BUENA, INC., LA BUENA MEXICAN FOODS, INC., AND LA SUPREMA, INC. Respondent.	)))) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00056)))))

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

I. *Background and Procedural History*

This action arises under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (INA). The United States Department of Justice, Immigration and Naturalization Service (INS) is the complainant and William L. Garcia d/b/a La Buena, Inc., La Buena Mexican Foods, Inc., and La Suprema, Inc. is the respondent.

On May 22, 1996, the INS served respondent with a Notice of Intent to Fine in four counts, alleging: (1) that respondent failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Form I–9) for twenty-eight named individuals hired after November 6, 1986; (2) that respondent failed to ensure that two named individuals hired after November 6, 1986 properly completed Section 1 of the Form I–9 and had itself failed to complete properly Section 2 of the Form I–9 for those individuals; (3) that respondent failed to ensure that seven named individuals hired after November 6, 1986 properly completed Section 1 of the Form I–9; and (4) that respondent failed to properly complete Section 2 of the Form

I–9 for seventeen named individuals hired after November 6, 1986. Each of these alleged acts constitutes a separate violation of the INA. On June 12, 1996, respondent made a written request for a hearing on the allegations. On January 22, 1997, the INS filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), seeking civil money penalties in the total amount of $12,400.00.

On February 4, 1997, the complaint and accompanying notice of hearing was mailed to Carl M. Tootle, the attorney requesting a hearing on behalf of respondent. That notice directed that an answer was to be filed within thirty (30) days, that failure could lead to default, and that the proceedings would be governed by Department of Justice regulations.[1] Nonetheless, respondent failed to answer the complaint.

On May 29, 1997, complainant filed a Motion for Default Judgment on the grounds that respondent had failed to answer the complaint in the time provided.[2] OCAHO rules provide that the failure of a respondent to file a timely answer shall be deemed to constitute a waiver of his/her right to appear and contest the allegations of the complaint. The Administrative Law Judge may thereafter enter a judgment by default. 28 C.F.R. §68.9(b) (1996).

On May 30, 1997, respondent was ordered to show cause why complainant's Motion for Default Judgment should not be granted, or in the alternative, to show good cause for its prior failure to answer, *and* to file an answer comporting with 28 C.F.R. §68.9.

Respondent filed an Opposition to Motion for Default Judgment, on June 4, 1997, consisting of a single paragraph. No answer was filed. Respondent's sole argument is that because William L. Garcia and all of the named corporations have filed for Chapter 11 bankruptcy[3], "11 U.S.C. §362 stays this action." No further detail, analysis, or legal authority is provided in support of this position. As can

[1]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

[2]28 C.F.R. §68.9(a) provides that a respondent shall have thirty days after service of a complaint to file an answer. Section 68.8(c)(2) provides that when service is had by mail, five days shall be added to the prescribed period.

[3]Respondent's Opposition to Motion for Default Judgment states, in pertinent part: "Respondent corporation has filed Chapter 11 bankruptcy in the District of Arizona, Case No. 95–0257. William L. Garcia filed Chapter 11 bankruptcy in the District of Arizona, Case No. 96–00089. These bankruptcies are pending ...." Other than this statement, no other attachments were offered to certify that respondent is actually in bankruptcy proceedings. No date of filing was given so it is not clear whether the INS claims arose pre-petition or post-petition.

best be surmised, it appears that respondent refers to the automatic stay provisions of section 362(a), which provide for a stay in the "continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was ... commenced before the [bankruptcy filing]." 11 U.S.C. §362(a) (1993).

II. *Discussion*

Under OCAHO's rules of practice, failure of a respondent to file a timely answer may result in the entry of a judgment by default. 28 C.F.R. §68.9(b). In this case, not only did respondent fail to file an answer to the original complaint, but also failed to file an answer after specific notice by this office to do so.

On May 30, 1997 respondent was given fifteen (15) days to show cause why a default judgment should not be granted, or in the alternative, to show good cause for its failure to answer. In addition, and in either case, respondent was *also* ordered to file an answer comporting with 28 C.F.R. §68.9. As noted above, Respondent's Opposition to Motion for Default Judgment was the only filing received in response to this Order. Section 68.9(c) requires that an answer must include a statement that respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation. Respondent's filing cannot be characterized as an answer, as it contains no such statement. Accordingly, I find that respondent has once again failed to file an answer to the complaint, despite my specific order. Respondent may have believed that invoking the automatic stay provisions of the bankruptcy code would relieve it of its obligation to file an answer. However, respondent's reliance on these provisions is misplaced. Having already given respondent an additional opportunity to comply with the requirement of an answer, I am not inclined to give another. Respondent was explicitly ordered to file both a response to the Order to Show Cause and an answer to the complaint. It chose to ignore that order. That decision has proven a miscalculation.

In citing to the automatic stay provisions of section 362, respondent fails to note the exemptions to these provisions, found in part (b) of that same section. Specifically, section 362(b)(4) provides an exemption for the "continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." This section has been held to exempt those same gov-

ernmental units when seeking the entry of a money judgment in these enforcement actions. 11 U.S.C. §362(b)(5).

These "police or regulatory power" exemptions have been uniformly honored in the federal circuits as applied to 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 Cos., Inc.*, 913 F.2d 518 (8th Cir. 1990); *United States v. Nicolet, Inc.*, 857 F.2d 202 (3rd 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). The Ninth Circuit, in which this case arises, has stated broadly that all "Congressionally established administrative agencies fall within the category of a governmental unit," within the meaning of section 362(b), and specifically that "section 362(b)(4) operates to exempt a governmental unit in its enforcement of a police or regulatory power. . . ." *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991).

The Ninth Circuit also held that "section 362(b)(5) exempts a governmental unit's actions to seek entry of a money judgment (but not enforcement of a money judgment) in the enforcement of its police or regulatory power." *Id*. at 832. This position is echoed in OCAHO case law. *See United States v. United Pottery Mfg. & Accessories*, 1 OCAHO 57, at 355[4] (1989) (Memorandum of Law in Support of the Final Agency Order by the Chief Administrative Hearing Officer) (adopting language from *Penn Terra Ltd. v. Dept. of Envtl. Resources*, 733 F.2d 267, 275 (1984): "the mere entry of a money judgment by a governmental unit is not affected by the automatic stay, provided of course that such proceedings are related to that government's police or regulatory power."). Furthermore, this exemption has been specifically found to include a judgment by default, because "a default judgment is no more than an entry of a money judgment." *United Pottery* at 355. Thus, not only may an enforcement action proceed in the face of a bankruptcy filing, but may proceed all the way through default judgment to entry of a money judgment.

[4]Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of 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.

OCAHO case law has consistently followed the guidance of *United Pottery*. *See, e.g.*, *United States v. MAC Specialties, Ltd.*, 6 OCAHO 920 (1997), *United States v. A&A Maintenance Enters.*, 6 OCAHO 852 (1996), *United States v. Broadcasters Unlimited*, 4 OCAHO 719 (1994), *United States v. Carlson*, 1 OCAHO 264 (1990), *United States v. DAR Distrib.*, 1 OCAHO 60 (1989).

For an action to be exempted from the automatic stay provisions under section 362(b)(4), that action must simply: (1) involve a governmental unit; (2) acting to enforce its police or regulatory power. The present action satisfies both of these elements. In *United Pottery*, the Chief Administrative Hearing Officer (CAHO) affirmed that the INS is exempted from the automatic stay provision of 11 U.S.C. 362(a) because it is a governmental unit acting to enforce its police and regulatory power. 1 OCAHO 57, at 354. It is in the public interest that the INS be free to enforce our nation's immigration laws. As a matter of public policy, a respondent cannot be allowed to insulate itself from these enforcement measures through the unilateral act of filing for bankruptcy.

III. *Civil Money Penalty*

The complaint seeks a civil money penalty in the amount of $12,400.00, including: (1) $7,000.00 for Count I, failure to prepare and/or make available for inspection Forms I–9 for twenty-eight named individuals; (2) $400.00 for Count II, failure to ensure that two named individuals properly completed Section 1 of the Form I–9 and failure to properly complete Section 2 of the Form I–9 for those individuals; (3) $1,500.00 for Count III, failure to ensure that seven named individuals properly completed Section 1 of the Form I–9; and (4) $3,500.00 for Count IV, failure to properly complete Section 2 of the Form I–9 for seventeen named individuals.

Under 8 U.S.C. 1324a(e)(5), respondent is required "to pay a civil penalty in an amount not less than $100 and not more than $1,000 for each individual with respect to whom each violation occurred." The penalties sought by complainant, between $200.00 and $300.00 per individual, are well within the statutory limit. Since the penalties requested do not appear unreasonable, I find the total fine in the amount of $12,400.00 to be appropriate.

IV. *Findings, Conclusions, and Order*

I have considered the record in this case, on the basis of which I find and conclude that:

1. Complainant's Motion for Default Judgment is granted.

2. As alleged in the complaint, respondent is in violation of 8 U.S.C. §1324a(a)(1) with respect to each individual named in the complaint, as to whom respondent is found to have:

   (a) Count I: failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Form I–9) for twenty-eight named individuals hired after November 6, 1986, at an assessment of $250.00 for each individual and a total civil money penalty of $7,000.00;

   (b) Count II: failed to ensure that two named individuals hired after November 6, 1986 properly completed Section 1 of the Form I–9 and itself failed to properly complete Section 2 of the Form I–9 for those individuals, at an assessment of $200.00 for each individual and a total civil money penalty of $400.00;

   (c) Count III: failed to ensure that seven named individuals hired after November 6, 1986 properly completed Section 1 of the Form I–9, at an assessment of $200.00 for each of six individuals and $300.00 for one individual and a total civil money penalty of $1,500.00; and

   (d) Count IV: failed properly to complete Section 2 of the Form I–9 for seventeen named individuals hired after November 6, 1986, at an assessment of $200.00 for each of sixteen individuals and $300.00 for one individual and a total civil money penalty of $3,500.00.

3. Respondent shall pay a civil money penalty in the total amount of $12,400.00 for violations listed in the complaint.

SO ORDERED

Dated and entered this 23rd day of July, 1997.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

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 shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7) and (8), and 28 C.F.R. §68.53.