

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
)	
v.)	OCAHO Case No. 2021A00016
)	
NASH PATIO AND GARDEN LTD., CO.,)	
)	
Respondent.)	
_____)	

Appearances: Martin Celis, Esq., for Complainant
Kathleen Campbell Walker, Esq., and Mark Nash, for Respondent

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

On February 1, 2021, Complainant, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Office (OCAHO) alleging that Respondent, Nash Patio and Garden Ltd., Co., violated the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. Specifically, the complaint alleges that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to ensure that employees properly completed Section 1 and/or by failing to properly complete Section 2 or 3 of the Employment Eligibility Verification Form (Form I-9) for five employees (Count I) and by failing to prepare and/or present Forms I-9 for seven employees (Count II). Compl. ¶ 3. Complainant attached to the complaint the Notice of Intent to Fine Pursuant to Section 274A of the INA (NIF) it served on Respondent through its counsel Kathleen Campbell Walker on August 28, 2020. *Id.* Ex. A. Through the NIF, Complainant notified Respondent that it was seeking a fine for the above-referenced allegations totaling \$24,544.80. *Id.* Respondent,

through its counsel, contested the NIF and timely requested a hearing before this Court.¹ *Id.* Ex. B.

On February 22, 2021, OCAHO's Chief Administrative Hearing Officer (CAHO) separately served Respondent at the business address in El Paso, Texas, listed on the complaint and the NIF (Address A) and Respondent's counsel via United States Postal Service (USPS) certified mail with the complaint, a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA), the NIF, and Respondent's request for a hearing (collectively "the Complaint package").

Through the NOCA, the CAHO informed Respondent and its counsel that proceedings would be conducted according to the OCAHO Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2024),² and applicable case law. NOCA ¶ 2. A link to the rules was provided to Respondent, along with contact information for OCAHO. *Id.* The CAHO advised Respondent that it had the right to file an answer to the complaint and that its answer must be filed within thirty days after it was served with the complaint. *Id.* ¶ 4. The CAHO warned Respondent that if it failed to file a timely answer, it may be deemed to have waived its right to appear and contest the allegations of the complaint and that "the Administrative Law Judge [ALJ] may enter a judgment by default along with any and all appropriate relief." *Id.* (citing 28 C.F.R. § 68.9(b)). Respondent's answer was due on March 24, 2021.

On March 15, 2021, Respondent's counsel filed a Notice of Withdrawal of Counsel for Respondent. In this filing, Respondent's counsel asserted that she and the law firm of Dickinson Wright PLLC would no longer be representing Respondent. Notice Withdrawal Counsel Resp't 1 (citing 28 C.F.R. § 68.11). Further, counsel represented that Respondent "had been informed in writing of our termination as legal counsel." *Id.* At OCAHO staff's request, counsel provided an additional address for Respondent in El Paso, Texas (Address B).

¹ The filing of Respondent's request for a hearing with DHS constitutes an appearance by counsel Kathleen Campbell Walker in these proceedings. *See* 28 C.F.R. § 68.33(f).

² OCAHO's Rules are available on OCAHO's homepage on the United States Department of Justice's website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

On March 25, 2021, OCAHO served Respondent, through business owner Mark Nash, at Address B by USPS certified mail with the Complaint package. As before, the NOCA provided information regarding OCAHO's Rules of Practice and Procedure for Administrative Hearings, contact information for OCAHO, the same advisal regarding the right to a file an answer within thirty days after service of the complaint, and a warning that the ALJ may enter a judgment by default and all appropriate relief if no answer was filed. NOCA ¶¶ 2, 4. The USPS website and the USPS Domestic Return Receipt Form (PS Form 3811) OCAHO received for the delivery indicated that service was completed on March 29, 2021, making Respondent's answer to the complaint due no later than April 28, 2021. Respondent did not file an answer.

On May 27, 2021, the Court issued a Notice and Order to Show Cause to Respondent at Address B and through its counsel. The Court ordered Respondent, within twenty days of the date of the Order, to file an answer to the complaint that comported with 28 C.F.R. § 68.9(b) and a response in which it provided facts sufficient to show good cause for its failure to timely answer the complaint. Notice Order Show Cause 3. The Court put Respondent on notice of the consequences should it fail to respond to the Order. Specifically, the Court explained that pursuant to 28 C.F.R. § 68.37(b)(1), a party may be deemed to have abandoned its request for hearing if the party fails to respond to the Court's orders. *Id.* (citing *United States v. Hosung Cleaning Corp.*, 4 OCAHO no. 681, 776, 777-78 (1994)).³ Abandonment may result in dismissal of Respondent's request for a hearing. *Id.* The Court repeated the CAHO's warning that, should no answer be filed, the Court may enter a default judgement against Respondent pursuant to 28 C.F.R. § 68.9(b). *Id.* at 2, 4. The Court further explained that, if a default judgment was entered, Respondent's request for a hearing would be dismissed and judgment would be

³ Citations to OCAHO precedents in bound Volumes 1 through 8 include the volume and case number of the particular decision, followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the relevant volume. Pinpoint citations to OCAHO precedents after Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1 and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

entered for Complainant without a hearing. *Id.* at 2 (citing *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1106, 1 (2004)). Despite these warnings, Respondent failed to file an answer or a response showing good cause for its failure to file a timely answer. Both filings were due on June 16, 2021.

As of the date of this Order, Respondent has not responded to the Court's orders or communicated with OCAHO.

II. LEGAL AND REGULATORY STANDARDS

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that "[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it." 28 C.F.R. § 68.37(b). In cases where a party or its representative "fails to respond to orders issued by the [ALJ]," OCAHO's Rules state that "[a] party *shall* be deemed to have abandoned a complaint or a request for hearing." *Id.* §§ 68.37(b)-(b)(1) (emphasis added). Although appropriately viewed as a severe sanction, dismissal with prejudice has been upheld where the party is pro se "so long as the court has warned the party that noncompliance can result in dismissal." *Rodriguez v. Tyson Foods, Inc.*, 9 OCAHO no. 1109, 3 (2004) (dismissing complaint for abandonment due to complainant's failure to respond to the court's orders and comply with discovery orders).

III. DISCUSSION AND ANALYSIS

This case has come to a standstill due to Respondent's inaction. The last filing the Court received from Respondent was its counsel's Notice of Withdrawal of Counsel for Respondent, filed approximately nine days before the March 24, 2021, filing deadline for Respondent's answer.⁴ Due to that filing, Respondent was served through its owner with the Complaint package and afforded additional time to file its answer, namely, through April 28, 2021.⁵ Despite this, Respondent failed to file

⁴ Counsel did not move the Court for permission to withdraw from this matter as required by OCAHO's Rules. *See* 28 C.F.R. § 68.33(g). Counsel has remained on the service list for this case and was served with the Court's Notice and Order to Show Cause dated May 27, 2021. Counsel will likewise be served with this Order.

⁵ OCAHO shall serve Respondent with this Order at both Addresses A and B.

an answer to the complaint in this case and has not responded to the Court's Notice and Order to Show Cause dated May 27, 2021, through which it was ordered to file an answer to the complaint that comported with 28 C.F.R. § 68.9(b) and a response in which it provided facts sufficient to show good cause for its failure to timely answer the complaint. Notice Order Show Cause 3.

The Court finds that Respondent has been warned of the potential consequences, including dismissal for abandonment, should it not respond to the Court's orders. First, the CAHO explained to Respondent and its counsel that these proceedings would be governed by OCAHO's Rules of Practice and Procedure for Administrative Hearings and applicable case law, *see* NOCA ¶ 2, and that, under those rules, if Respondent failed to file a timely answer, the Court might deem it to have waived its right to appear and contest the allegations of the complaint and that "the [ALJ] may enter a judgment by default along with any and all appropriate relief." *Id.* ¶ 4 (citing 28 C.F.R. § 68.9(b)). The CAHO explained that "[t]he answer (and two copies) *must* be filed within thirty (30) days after receipt of the attached complaint." *Id.* (citing 28 C.F.R. §§ 68.3(b), 68.9) (emphasis added). Following Respondent's counsel's Notice of Withdrawal of Counsel for Respondent, OCAHO served Respondent at Address B with the Complaint package and reiterated the same warnings through the NOCA. *See id.* ¶¶ 2, 4.

When a timely answer was not filed, the Court gave Respondent an opportunity to show good cause and file a belated answer to the complaint. *See* Notice Order Show Cause 3. Citing OCAHO precedent and 28 C.F.R. § 68.37(b)(1), the Court put Respondent on notice that its failure to respond to the Court's orders may "result in dismissal of its request for hearing" because the Court would deem Respondent "to have abandoned its request for hearing" *Id.* at 3 (citing *Hosung Cleaning Corp.*, 4 OCAHO no. 681, at 777-78). The Court further warned Respondent that if it failed to file an answer in response to the Court's order, Respondent may waive its right to appear and contest the complaint's allegations. *Id.* at 2 (citing 28 C.F.R. § 68.9(b)). Respondent was put on notice that a judgment may be entered for Complainant without a hearing. *Id.* (quoting *Nickman*, 9 OCAHO no. 1106, at 1). At the end of its Notice and Order to Show Cause, the Court cautioned that it "may enter a judgement by default against Respondent" pursuant to 28 C.F.R. § 68.9(b) if Respondent failed to respond as ordered or could not show good cause for its untimely answer. *Id.* at 4.

OCAHO ALJs have ordered dismissal for abandonment in situations like this one where respondents have failed to respond to the Court's orders. For example, in *United States v. Louie's Wine Dive, LLC*, 15 OCAHO no. 1404, 2 (2021), an OCAHO

ALJ found that a pro se respondent who failed to submit an answer or respond to an order to show cause had abandoned its request for hearing pursuant to 28 C.F.R. § 68.37(b)(1) and dismissed the case. *See also United States v. Milwhite, Inc.*, 17 OCAHO no. 1469a, 2 (2023) (dismissing case when respondent did not file an answer or respond to an order to show cause); *United States v. Patmo Concrete LLC*, 17 OCAHO no. 1448b, 2 (2022) (accord); *United States v. Triple Crown Rest. Grp. LLC*, 16 OCAHO no. 1444b, 2-3 (2022) (accord). This approach has been affirmed by the CAHO. *United States v. Cordin Co.*, 10 OCAHO no. 1162, 1, 4 (2012) (holding that it was “entirely appropriate” for an [ALJ] to conclude that a respondent abandoned a request for a hearing under 28 C.F.R. § 68.37(b) when the respondent did not file an answer or respond to an order to show cause).

It is apparent to the Court that Respondent has discontinued its participation in this matter and has ceased taking any action in furtherance of its request for a hearing. Respondent’s last communication with OCAHO was through counsel on or about March 15, 2021. Although this Court recognizes that Respondent may be operating without counsel’s assistance, its representative never contacted OCAHO for assistance or to communicate whether Respondent intended to comply with the Notice and Order to Show Cause or pursue its request for a hearing further. This leaves the Court with little choice but to follow the dictates of 28 C.F.R. § 68.37(b). That regulation clearly states that “[a] party shall be deemed to have abandoned its complaint or request for hearing if,” *inter alia*, that “party or his or her representative fails to respond to orders issued by the [ALJ].” 28 C.F.R. §§ 68.37(b)-(b)(1). The wording of the regulation “suggests that a finding of abandonment is mandatory” when a party fails to respond to an ALJ’s orders. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 5 (2023); *see also Cordin Co.*, 10 OCAHO no. 1162, at 1, 3 (explaining that “[t]he procedures governing abandonment and dismissal provide that ‘[a] party shall be deemed to have abandoned’ a request for a hearing if the party ‘fails to respond to orders issued by the [ALJ].’” (citing 28 C.F.R § 68.37(b)(1)).

Therefore, pursuant to 28 C.F.R. §§ 68.37(b)-(b)(1), the Court finds that dismissal is warranted due to Respondent’s abandonment of its request for a hearing dated October 7, 2020, and its failure to respond to this Court’s orders or participate in this litigation by filing an answer to the complaint. Accordingly, the complaint in this matter is dismissed, which renders the original NIF that DHS served on Respondent on August 28, 2020, the final agency order.

IV. ORDERS

IT IS SO ORDERED that, pursuant to 28 C.F.R. §§ 68.37(b)-(b)(1), the complaint filed on February 1, 2021, with the Office of the Chief Administrative Hearing Officer by Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, is DISMISSED; and

IT IS FURTHER ORDERED that Complainant's Notice of Intent to Fine Pursuant to Section 274A of the Immigration and Nationality Act served on Respondent, Nash Patio and Garden Ltd., Co., on August 28, 2020, is rendered the final agency order.

SO ORDERED.

Dated and entered on April 4, 2024.

Honorable Carol A. Bell
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.