

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

United States of America, Complainant, v. Koamerican Trading Corp.,
Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100092.

**DECISION AND ORDER ON DEFAULT
(September 26, 1989)**

MARVIN H. MORSE, Administrative Law Judge

Appearances: CHESTER J. WINKOWSKI, Esq. for the Immigration and
Naturalization Service.

RONALD H. FANTA, Esq. for the respondent.

Statutory Background:

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), at section 101, enacted section 274A of the Immigration and Nationality Act of 1952, (INA or the Act), 8 U.S.C. § 1324a, introducing an enforcement program designed to implement the employer sanctions provisions prohibiting the unlawful employment of aliens.

Procedural Background:

On February 14, 1989, the Immigration and Naturalization service (INS or the Service), filed a complaint against Koamerican Trading Corp. (Koamerican or respondent), alleging two counts of unlawful employment of aliens.

Count I alleges that respondent knowingly hired and/or continued to employ an individual unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2). Count II alleges respondent's failure to prepare and/or present an employment eligibility verification form, INS Form I-9, for the named individual, in violation of 8 U.S.C. § 1324a(a)(1)(B) [for non-compliance with the requirements of 8 U.S.C. § 1324a(b)(1) and/or 8 U.S.C. § 1324a(b)(3)].

The complaint, dated February 9, 1989, incorporating a Notice of Intent to Fine dated December 28, 1988, and a request for a hearing dated January 18, 1989, requests an order directing respondent to cease and desist from violating 8 U.S.C. § 1324a; seeks a \$2,000.00 civil money penalty for knowingly hiring and/or continuing to employ an unauthorized alien; and requests a \$1,000.00 civil money penalty for one paperwork violation.

By Notice of Hearing, dated February 22, 1989, the respondent through its counsel, Ronald H. Fanta, was advised of the filing of the complaint, the opportunity to answer within thirty (30) days after receipt of the complaint, my assignment to the case, and the approximate location for a hearing, i.e., New York, New York.

By Motion For Default Judgment dated April 4, 1989, INS asked that respondent be found in default. The motion, accompanied by an INS attorney's declaration, rests on the premise that respondent had "failed to plead or otherwise defend" within thirty days after service of the complaint.

On April 27, 1989, not having 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 was issued since I was not satisfied, from review of the case file, that service of the complaint and notice of hearing had been perfected in the circumstance where service of the complaint and notice of hearing had been effected only upon the attorney, Ronald H. Fanta, who had filed before INS the request for hearing, and not upon the respondent directly.

In response to the order to show cause, respondent filed an Affidavit In Opposition And Motion For Leave to File An Answer on May 15, 1989, which stated, inter alia, that the respondent had not received notice of the proceedings since it was not served with the "actual papers," i.e. the complaint and notice of hearing. On May 18, 1989, I entered an Order Granting Motion For Leave To File An Answer And Denying Motion for Order of Default.

The respondent on May 26, 1989, filed its answer together with a Notice of Entry of Appearance by Ronald H. Fanta, dated May 23, 1989.

Complainant by petition dated May 26, 1989, asked the Acting Chief Administrative Hearing Officer to review my April 27 order.

On June 19, 1989, the Acting Chief Administrative Hearing Officer (CAHO) granted complainant's request issuing an order pursuant to 8 U.S.C. § 1324a(e)(6) which vacated my April 27 order. The CAHO's order found that service of the complaint and notice of hearing upon the attorney who filed the request for a hearing on behalf of the respondent was satisfactory service pursuant to 28

C.F.R. § 68.3(d), and apparently concluded that it was error to accept the answer filed on May 26, 1989.

On August 14, 1989, I issued an Order Of Inquiry To The Parties which instructed the parties to explore the possibility of an agreed disposition of the entire proceeding. The parties were granted until August 31, 1989, to file pleadings which reported upon the efforts to each such a disposition and to submit an agreement or indicate the date by which such agreement would be filed.

By pleading dated August 25, 1989, complainant filed its First Response To The Order Of Inquiry to The Parties Dated August 14, 1989, reporting that efforts to reach an agreed disposition were unsuccessful and that the complainant intended to renew its motion for a default judgment.

On September 14, 1989, complainant filed its Second Response To the Order Of Inquiry to The Parties Dated August 14, 1989 And Renewal Of Its Motion For Default Judgment; complainant confirmed that no agreed disposition of this case would be forthcoming and, pursuant to my Order Of Inquiry To The Parties, renewed its default motion.

Respondent has failed to respond to my Order Of Inquiry To The Parties, and has not responded to the Service's pleading dated and served September 8, 1989, filed September 14, 1989. No pleadings subsequent to its answer to the complaint has been received from respondent. Since my order allowing the answer has been vacated, the posture of the parties is as though no answer has been filed, as made clear by my order of August 14, 1989.

On September 19, 1989, pending the close of the time provided for respondent's response, if any, 28 C.F.R. § 68.7(b) and § 68.5(c), to the INS motion of September 8, I postponed indefinitely the previously scheduled prehearing conference and hearing.

Findings of Fact and Conclusions of Law:

No response from respondent to my April 14 order having been received, there being, in effect, no answer to the complaint, I hereby find the respondent, Koamerican Trading Corp., in default, having failed to plead or otherwise defend against the allegations of the complaint. Absent an effective answer, failure to respond to my order in light of the Acting CAHO's order of June 19, 1989, constitutes a default within the meaning of 28 C.F.R. § 68.6(b).

The complainant's Motion For a Default Judgment, having been renewed in light of the June 19, 1989 order of the Acting Chief Administrative Hearing Officer and my Order Of Inquiry To The Parties, is hereby granted.

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED, that Koamerican Trading Corp., is in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2) with respect to its hiring and/or continuing to employ Fidel Lazaro Portillo-Serrano aka Fidel Portillo, the individual named in Count I, knowing that this person was unauthorized for employment in the United States, and is in violation of 8 U.S.C. § 1324a(a)(1)(b) for failure to comply with the employment verification requirements with regard to the individual named in Count II, Fidel Lazaro Portillo-Serrano aka Fidel Portillo.

IT IS HEREBY ORDERED:

(1) that respondent pay a civil money penalty in the amount of \$2,000.00 for Count I of the complaint and \$1,000.00 for Count II of the complaint for a total of \$3,000.00;

(2) that respondent cease and desist from further violating section 274A of the Act, 8 U.S.C. § 1324a; and

(3) that the prehearing conference and the hearing previously scheduled in this proceeding are cancelled.

This Decision and Order On Default is the final action of the judge in accordance with 28 C.F.R. § 68.51(b). As provided in 28 C.F.R. § 68.52, this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this decision and order, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED.

Dated this 26th day of September, 1989.

MARVIN H. MORSE
Administrative Law Judge