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. 95A00080
BROKER'S FURNITURE AND MANUFACTURING, INC., AKA BOOKER'S FRIENZI, AKA BOOKER'S FIRENZI, Respondent.[1]	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT
(August 3, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Alan S. Rabinowitz, Esq., for Complainant
Patricia Fulton, pro se, for Respondent

I. *Procedural History*

On May 8, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). Attached to the Complaint is an underlying Notice of Intent to Fine (NIF) served by INS upon Broker's

[1] The Complaint was originally filed against Broker's Furniture and Manufacturing, Inc. (Broker's) and David Ankenbruck and Patricia Fulton (Fulton), in partnership. However, upon being advised by Fulton that Broker's is in fact a corporation and not a partnership and that Fulton is "not able to accept for Brokers," Complainant informed this Court that it "no longer seeks judgment against any named individuals, but only against the corporation. . . ." Accordingly, the caption has been amended to reflect the proper respondent in this case.

Furniture and Manufacturing, Inc. (Broker's or Respondent) on March 17, 1995.

Count I of the Complaint charges Respondent with failure to prepare and/or present the employment eligibility verification form (Form I-9) for two named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B). The civil money penalty assessed for Count I is $800.00 ($400.00 for each individual). Count II of the Complaint charges Respondent with failure to ensure that seven named individuals properly completed section 1 and that Respondent failed to complete properly section 2 of the Form I-9. The civil money penalty requested for Count II is $2,150.00 ($350.00 for one individual and $300.00 for six individuals). INS demands a total of $2,950 in civil money penalties. Attached to the Complaint is a copy of Respondent's March 30, 1995 request for a hearing. The request was made by Patty Fulton (Fulton), vice president of Respondent.

On May 10, 1995, this Office issued its Notice of Hearing (NOH) which transmitted the Complaint to Respondent. The NOH cautioned Respondent that failure to file an answer within thirty (30) days of receipt might result in a waiver of the right to appear and contest Complainant's allegations. Respondent was warned explicitly that absent a timely answer, the judge might "enter a judgment by default along with any and all appropriate relief."

On June 26, 1995, Complainant filed a Motion for Default Judgment. The Motion was served on Fulton on June 20, 1995. In its Motion, Complainant asserts that Respondent is in default because it failed to plead or otherwise defend within 30 days of the receipt of said Complaint as required by 28 C.F.R. § 68.9(b).[2]

On June 27, 1995, I issued an Order to Show Cause Why Default Judgment Should Not Issue (OSC). The Order stated that:

> This Order provides Respondent an opportunity to explain its failure to have timely answered the Complaint and invites Respondent to show cause, if any he has, why judgment should not be issued against it in the amount and for the reasons specified in the Complaint.
>
> A response to this Order will be considered timely, if **received by me no later than July 14, 1995**. By such filing, Respondent is obliged to show such cause as it has as

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[2] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

> to why it failed timely to file an answer to the Complaint, and why a default judgment should not issue. Any filing must include a true certificate that a copy has been sent, postage prepaid to INS. The filing must be accompanied by a proposed answer to the Complaint.

On July 6, 1995, Fulton telephoned this Office to explain that the proper respondent is not as designated in the Complaint, but instead is solely a bankrupt corporation and that she has no personal liability. She was orally advised by my legal technician that an appropriate response to the Order to Show Cause should be in writing.

On July 10, 1995, Fulton filed a letter, explaining that Broker's "had filed for bankruptcy at the time of inspection and is no longer in business." Fulton further stated that "the case has Brokers as a Partnership which it was not. It was a California Corporation." Although not responding to the Order to Show Cause with regard to her failure to file timely an answer to the Complaint, Respondent admits that "the paper work was not 100% complete but we did have photo copies of all employees[']identification."

On July 11, 1995, I issued an Order requesting "Complainant to respond to the claims set forth by Fulton in her letter to me dated July 6, 1995, and to address the oral claim by Fulton that one or more of the parties identified as Respondents are erroneously so included."

The July 11 Order also warned Respondent that

> [e]ven taking into account that Fulton is not represented by counsel, I am not persuaded from her July 6, 1995 letter that she has provided an adequate explanation to satisfy the Order to Show Cause as to why a timely answer was not filed to the Complaint. Once the matter of proper parties is resolved, I am inclined to grant judgment by default for failure timely to answer the Complaint and failure to provide a response to the Order to Show Cause which adequately explains the lack of timely answer.

In response to the July 11 Order, Complainant informed this Court by a pleading filed on July 25, 1995 that "complainant no longer seeks judgment against any named individuals, but only against the corporation, Broker's Furniture And Manufacturing, Inc. AKA Booker's Frienzi, AKA Booker's Firenzi." Complainant also reiterated its request "that the failure of a timely answer in this matter calls for the entry of a default judgment . . ." against Respondent. No response to either the July 11 Order or the July 25 pleading by Complainant was received from Respondent.

In light of Complainant's July 25 filing, this caption is amended to allege violations of § 1324a against Broker's only.

II. *Discussion*

The Rules of Practice and Procedure of this Office contemplate that:

> A party shall be deemed to have abandoned a complaint or a request for hearing if (1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge.

28 C.F.R. § 68.37(b)(1).

In addition, OCAHO case law demonstrates that failure to respond to an order to show cause triggers a judgment of default, equivalent to dismissal of the employer's request for hearing, against an employer who fails to respond to the invitation of such an order:

> Having made no filing in response, Respondent necessarily positioned itself for entry against it of a judgment by default. This is that judgment.

United States v. Hosung Cleaning Corp., 4 OCAHO 681 (1994). In a number of other OCAHO cases, even though they appeared pro se, without counsel, parties that failed to obey orders of the judge were found to have abandoned their requests for hearing or to have abandoned their complaints. See, e.g., United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994); Holquin v. Dona Ana Fashions, 4 OCAHO 605 (1994); Brooks v. Watts Window World, 3 OCAHO 570 (1993); Speakman v. Rehabilitation Hospital of South Texas, 3 OCAHO 476 (1993); Palancz v. Cedars Medical Center, 3 OCAHO 443 (1992).

Respondent is in default not only for failure to answer the Complaint but also for failure to respond adequately to the Order to Show Cause. Accordingly, I find Respondent in default. See 28 C.F.R. §§ 68.9(b), 68.37(b)(1).

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint filed by the INS, the Motion for Default Judgment and other pleadings. All motions and other requests not specifically ruled upon are denied.

For the reasons already stated, 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)(B) with respect to each employee named in the Complaint, as to whom Respondent is found to have:

   a. Count I: failing to prepare and/or present the Form I-9 for two named individuals, at an assessment of $400 for each individual, for a civil money penalty of $800;

   b. Count II: failing to ensure that seven named individuals properly completed section 1 and failing properly to complete section 2 of the Form I-9 for those same individuals at an assessment of $350 for one individual and $300 for six individuals, for a civil money penalty of $2,150;

3 Respondent shall pay a civil money penalty in the amount of two thousand, nine hundred, fifty dollars ($2,950) for violations listed in the Complaint;

4. The claims against the individual respondents named in the original Complaint are dismissed.

5. The hearing is cancelled.

Pursuant to 8 U.S.C. § 1324a(e)(7), this Final Decision and Order is the final administrative adjudication in this proceeding and shall become final "unless within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final decision and order. . . ."

"A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 3rd day of August, 1995.

MARVIN H. MORSE
Administrative Law Judge