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

FRANK FARZIN NICKMAN, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00005
MESA AIR GROUP, Respondent	)	Judge Robert L. Barton, Jr.

ORDER VACATING NOTICE OF ENTRY OF DEFAULT

(May 11, 2004)

I. BACKGROUND

A Complaint alleging violations of 8 U.S.C. 1324b was filed on November 13, 2003. The Complaint, along with the Notice Of Hearing and a copy of the Office of the Chief Administrative Hearing Officer (OCAHO) rules of practice and procedure, was mailed to Respondent by certified mail, and the return receipt card indicates that Respondent received the Complaint on November 24, 2003. The Notice Of Hearing advised Respondent that Respondent's answer to the Complaint must be filed within thirty days after receipt of the attached Complaint, and that if Respondent failed to file an answer within the time provided, Respondent may be deemed to have waived the right to appear and to contest the allegations of the Complaint, and that the Judge may enter a judgment by default along with any and all appropriate relief.

Although Respondent received the Complaint on November 24, 2003, it failed to file an answer to the Complaint in a timely manner. As stated in the OCAHO rules of practice, failure by a respondent to file an answer within the thirty day period may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint, and the Judge may enter a judgment by default. 28 C.F.R. § 68.9(b) (2003). If a default judgment is entered, the request for hearing is dismissed, AND judgment is entered for the complainant without a hearing.

Since an answer was not received within the thirty day period, Respondent was in default, and therefore on January 8, 2004, I issued a Notice of Entry of Default. I ordered Respondent to file an

answer to the Complaint not later than January 28, 2004, and at the same time to file a pleading stating why the answer was not filed in a timely manner. If Respondent failed to show good cause for the late filing, I stated that I may refuse to accept the answer.

Subsequently, Stephanie Quincy filed a notice of entry of appearance as counsel for Respondent, and also filed a motion to dismiss the Complaint for lack of jurisdiction. On January 27, 2004, she filed by facsimile, on behalf of Respondent, an Answer to the Complaint. However, Respondent failed to file with its Answer a pleading stating why the Answer was not filed in a timely manner and did not even attempt to show good cause for the late filing. Consequently, Respondent did not comply with my January 8 Order. Accordingly, because Respondent failed to comply with my Order, on February 3, 2004, I rejected Respondent's Answer and noted that Respondent remained in default and was subject to default judgment, either upon motion of Complainant or sua sponte. On that same date, I also denied Respondent's motion to dismiss for lack of jurisdiction. After I issued my Order Rejecting Respondent's Answer, Respondent filed a pleading entitled Explanation of Good Cause. For the reasons set forth below, I am now vacating the Notice of Entry of Default and Respondent's Answer is accepted.

II. STANDARDS FOR SETTING ASIDE ENTRY OF DEFAULT

The OCAHO rules of practice provide that the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by the rules. 28 C.F.R. § 68.1 (2003). Because this case arises in Arizona, the decisions of the Court of Appeals for the Ninth Circuit are controlling, and decisions by the federal district courts in that circuit provide persuasive authority.

Under the pertinent federal rules, "[f]or good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. Proc. 55(c). As I only have entered Respondent's default and not an actual default judgment, the standard of Rule 55(c), rather than the more stringent standard of Rule 60(b), is the appropriate one to apply.

Default judgments are generally disfavored in the law and thus should not be granted on the claim, without more, that the defendant had failed to meet a procedural time requirement. Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986), United States v. Spring & Soon Fashion Inc., 7 OCAHO 960, 974, 1997 WL 1051476, *10; D'Amico, Jr. v. Erie Community College, 7 OCAHO 61, 63, 1997 WL 1051429, *2. The Court has especially broad discretion when, as here, a party is seeking to set aside an entry of an order of default, rather than setting aside a default judgment. Hart v. Parks, supra at 3.

In determining whether good cause to set aside an entry of default exists, a court should consider:

(1) whether there was culpable or wilful conduct; (2) whether setting the default aside would prejudice the adversary; and (3) whether the defaulting party presents a meritorious defense to the action. See Kanti v. Patel C/O Blimpie, 8 OCAHO 166, 168, 1998 WL 745987, *2. Although the factors examined in deciding whether to set aside an entry of default and a default judgment are the same, courts apply the factors more leniently with respect to the former. Id.
The grant or denial of a motion to set aside entry of default rests in the sound discretion of the trial court. See Spring and Soon Fashion Inc., supra, at 974, *10; D'Amico, Jr., supra, at 63, *2.

III. DISCUSSION

With respect to the first factor, in applying Rule 55(c), courts usually focus on the defaulting party's willfulness and consider whether the party intended to violate court procedures. Hart v. Parks, supra at 3. Respondent states in its "good cause" pleading that Complainant has filed several actions, including a charge with the Equal Employment Opportunity Commission and the United States District Court, as well as the charge with the Department of Justice. Respondent states that because of the multiple pleadings and many communications with the Department of Justice, counsel for Respondent believed that it had filed its answer in this action. Although this is not the strongest showing of good cause, nothing in the record demonstrates that Respondent failed to answer the Complaint in a timely manner because of willful disregard or disrespect for the legal process. The answer originally was due in December 2003, and was filed in January 2004, a matter of a few weeks. Moreover, once Respondent was notified that I had entered a default, it acted promptly to file an answer within the time provided in my order (although it was not timely in filing its "good cause" statement). This is not a situation in which the defaulting party simply ignored its responsibility to defend against this action or otherwise acted in bad faith.

In addition, Complainant has neither moved for a default judgment nor objected to the filing of the late Answer. In fact, he has not filed any pleading, and thus has not provided any evidence that setting aside the default would cause him prejudice. Mere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion. Here, Complainant has not alleged that he would suffer such harm if I vacate the entry of default and allow Respondent's late filed Answer. Even if he had, the minimal delay involved here would weigh against a finding of prejudice.

Lastly, I consider whether Respondent has presented any meritorious defenses to the Complaint. Whether moving to set aside an entry of default or an actual default judgment, the

defaulting party need not conclusively establish its defenses. Kanti, supra, at 171, *4 (citing SEC v. McNulty, 137 F.3d 732, 740 (2d Cir. 1998); American Alliance Insurance Co., Ltd. v. Eagle Insurance Co., 92 F.3d 57, 61 (2d Cir. 1996); Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 98 (2d Cir. 1993)). A respondent adequately presents a defense by clearly stating in the answer the precise contested allegations and indicating the existence of disputed issues. Id. at 171-172, *4. In its Answer, Respondent either outright denies, or asserts lack of knowledge to deny the central allegations of the Complaint and asserts in its affirmative defenses that the Complaint fails to state a claim upon which relief can be granted, as well as other affirmative defenses. Accordingly, I conclude that Respondent's assertion of defenses weighs against the entry of default judgment.

IV. CONCLUSION

I have great discretion to grant relief from default, or not to grant relief from default, based on the unique facts and circumstances of each case. See Spring and Soon Fashion Inc., supra, at 974, *10; D'Amico, Jr., supra, at 63, *2. In the instant matter, I find that the balance of factors weighs in favor of granting Respondent relief from the prior entry of default. Respondent's failure to answer the Complaint does not appear to be willful, and Complainant has not shown that accepting Respondent's late filed Answer will prejudice Complainant. Respondent also has raised several potentially meritorious defenses in its Answer. Therefore, I vacate the entry of default, and I accept Respondent's late filed Answer to the Complaint.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE