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. 2021A00014
POPO'S BAR AND RESTAURANT,	)	
	)	
Respondent.	)	

ORDER DISCHARGING ORDER TO SHOW CAUSE AND REQUIRING FILING OF NOTICE OF APPEARANCE

I. PROCEDURAL HISTORY

On January 21, 2021, 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, Popo's Bar and Restaurant, violated the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, Title 8, United States Code, Section 1324a.

On February 25, 2021, the Chief Administrative Hearing Officer served Respondent via United States certified mail with the complaint, a Notice of Case Assignment for Complaint Alleging Unlawful Employment, the Notice of Intent to Fine, and Respondent's request for hearing. The Notice of Case Assignment directed that an answer was to be filed within thirty days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would be governed by United States Department of Justice regulations. Respondent's answer was due no later than April 6, 2021. Respondent did not timely file an answer.

On May 6, 2021, the Court issued an Order to Show Cause, in both the English and Spanish languages, ordering Respondent by May 26, 2021, to show good cause as to why it did not file an answer and to file an answer that comported

with the requirements of 28 C.F.R. § 68.9.[1] The Court cautioned that Respondent's failure to respond to the Order to Show Cause could result in dismissal of its request for hearing.

On May 19, 2021, Respondent's attorney filed a notice of appearance. On May 26, 2021, Respondent filed an Answer to Complaint Regarding Unlawful Employment and a Response to Order to Show Cause within the time frame set by the Court.

II. LEGAL STANDARDS

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that a respondent's failure to file an answer "may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default." 28 C.F.R. § 68.9. Yet default judgments are generally disfavored in this Court as they are in federal court. *See United States v. R & M Fashion Inc.*, 6 OCAHO no. 826, 46, 47-48 (1995).[2] OCAHO case law holds that default judgments generally should be used only when "the inaction or unresponsiveness of a particular party is unexcusable and the inaction has prejudiced the opposing party." *D'Amico, Jr., v. Erie Cmty. Coll.*, 7 OCAHO no. 927, 61, 63 (1997) (citations omitted). It is preferable to resolve cases on their merits, rather than through default judgments. 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2681 (4th ed. 2020).

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[1] The Court issued a Spanish-language translation of the Order to Show Cause after receiving a telephone call from Ms. Quintana during which she represented that Spanish is the language that she speaks and understands best.

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet 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," or in the LexisNexis database "OCAHO," or at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

Since the parties to this matter are located in Texas, and the violations are alleged to have occurred there, the Court looks to the case law of the relevant United States Court of Appeals, here the Fifth Circuit. *See* 28 C.F.R. § 68.57 (designating for appeal purposes "the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business."). The Fifth Circuit has held that "[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by the courts only in extreme situations." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989).

When a respondent fails to timely answer a complaint, the Court may issue an order to show cause as to why a default judgment should not issue, and ask the respondent to justify its failure to timely file its answer. *United States v. Shine Auto Serv.*, 1 OCAHO no. 70, 444, 445-46 (1989) (Vacation by the CAHO of the Admin. Law Judge's Order Denying Default Judgment). In deciding whether to accept a late-filed answer, the Court reviews the respondent's response to its order and determines whether "the [r]espondent possessed the requisite good cause for failing to file a timely answer[.]" *Id.* at 446.

As a means to determine whether good cause exists in this case, the Court will consider the following non-exhaustive factors: "(1) whether the failure to act was willful; (2) whether setting the [order to show cause] aside would prejudice the adversary; and (3) whether a meritorious claim has been presented." *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) (citation omitted); *see also Kanti v. Patel*, 8 OCAHO no. 1007, 166, 168 (1998) (applying factors). The Court also may consider whether the public interest was implicated, there was a significant financial loss to the party not in default, and if the party acted expeditiously to correct the default. *In re Dierschke*, 975 F.2d 181, 184 (5th Cir. 1992).

III. DISCUSSION AND ANALYSIS

A. Order to Show Cause

Before the Court are Respondent's answer and Response to Order to Show Cause. The Court now exercises its discretion and considers whether good cause exists to set aside the Order to Show Cause in this case. Construing good cause generously, the Court finds that the above-listed factors weigh in favor of accepting

Respondent's untimely answer and discharging the Order to Show Cause so that this case can be decided on the merits.

First, the evidence before the Court supports the conclusion that Respondent's failure to timely answer the complaint was not due to a willful disregard for the legal process or an intentional failure to respond to litigation. Rather, in its response to the Order to Show Cause, Respondent asserts that, "Respondent has limited English, and while [sic] is very good at speaking and understanding, this matter was more difficult to comprehend without the assistance of legal representation." Resp. Order Show Cause at 2. Respondent's counsel states that "Respondent's failure to file an Answer was not intentional or reckless, [sic] merely needed to hire legal representative and has done so." *Id.* at 3.

The Court finds credible Respondent's representations regarding its unintentional failure to timely answer the complaint in this matter due, in part, to a language barrier. After receiving the Order to Show Cause translated into the Spanish language, Respondent hired an attorney and acted expeditiously to correct its failure to timely answer the complaint. The Court therefore finds that Respondent's inaction was not willful, and it has not waived its right to appear and contest the allegations of the complaint. *See* 28 C.F.R. § 68.9(b).

The Court next considers whether discharging the Order to Show Cause would prejudice Complainant. Respondent failed to meet a procedural time requirement, but "[m]ere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion." *Nickman v. Mesa Air Group*, 9 OCAHO no. 1106, 3 (2004); *see also* Wright, Miller, & Kane, *supra*, § 2699 (discussing types of prejudice and costs to the non-defaulting party). Complainant has presented no evidence of prejudice should the Court discharge the Order to Show Cause and allow Respondent's late-filed answer to the complaint. It has not moved for default judgment or alleged that it would suffer any harm, evidentiary or otherwise, if the Court allows Respondent's answer. As such, this factor weighs in favor of discharging the Order to Show Cause and requiring Complainant to prove its case.

Lastly, the Court considers whether Respondent has presented any meritorious defenses to the complaint. Although these defenses need not be conclusively established, *Kanti*, 8 OCAHO 1007, at 171, Respondent's answer should clearly lay out both the specific contested allegations and issues in dispute. *Nickman*, 9 OCAHO no. 1106, at 4. In its answer, Respondent admits that the Notice of Intent to Fine was served on it, but as to the allegations contained in the

complaint, it states that it "has insufficient knowledge or information to form a belief as to the matters pleaded and therefore, same are denied." Answer 1-2. Respondent's general denial does not indicate whether it has a valid defense to the government's allegations against it. Nevertheless, the Court finds that this factor is mitigated by the other factors discussed above and the preference for cases to be decided on the merits.

B. Notice of Appearance

Respondent's attorney filed his appearance in this case using Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court. Although an attorney uses Form EOIR-28 to enter an appearance in United States immigration courts, and those courts and this Court are components of the Executive Office for Immigration Review, counsel is advised that Form EOIR-28 does not satisfy OCAHO's requirements for a notice of appearance as outlined in 28 C.F.R. § 68.33(f). Counsel shall file a notice of appearance that comports with OCAHO's rules.

IV. DECISION AND ORDERS

Accordingly, the Court having found that for the above-stated reasons that good cause exists,

IT IS SO ORDERED that Respondent's Answer is accepted and the Order to Show Cause against Respondent, Popo's Bar and Restaurant, is DISCHARGED.

IT IS FURTHER ORDERED that Respondent's attorney must file a notice of appearance that complies with 28 C.F.R. § 68.33(f) within fourteen days of the date of this Order.

ENTERED:

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Honorable Carol A. Bell
Acting Chief Administrative Law Judge

DATE: September 10, 2021