

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

June 8, 2022

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 2022A00015
	)	
KOY CHINESE & SUSHI RESTAURANT,	)	
	)	
Respondent.	)	
_____	)	

Appearances: John C. Wigglesworth, Esq., for Complainant  
Kevin Lashus, Esq., for Respondent<sup>1</sup>

AMENDED ORDER ENTERED DEFAULT JUDGMENT ON LIABILITY

The Court issued an Order Entered Default Judgment on Liability in the above-captioned case on June 2, 2022. This Amended Order Entered Default Judgment on Liability amends the order dated June 2, 2022, and corrects solely for typographical and clerical errors.

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security, Immigration and Customs Enforcement (DHS)

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<sup>1</sup> Although Respondent’s counsel did not file a formal notice of appearance (NOA) with the Court, 28 C.F.R. § 68.33(f) provides that “[a] request for a hearing signed by an attorney and filed with the Department of Homeland Security pursuant to section 274A(e)(3)(A) . . . of the INA, and containing the same information as required by this section, shall be considered a notice of appearance[.]” Respondent’s counsel does not need to file a formal NOA because he filed the request for hearing with Complainant. Compl. Ex. B.

filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 10, 2022, alleging that Respondent, Koy Chinese & Sushi Restaurant, failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for nine employees and failed to timely prepare the Form I-9 for twenty-nine employees.

On the same day, this office sent Respondent and Respondent's attorney a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA), a copy of the Complaint, the Notice of Intent to Fine, and Respondent's request for a hearing, via certified U.S. mail. The Notice of Case Assignment directed Respondent to file an answer within thirty (30) days of receipt of the Complaint, that failure to answer could lead to default, and that proceedings would be governed by Department of Justice regulations.<sup>2</sup> The U.S. Postal Service website indicates service was completed on Respondent on January 15, 2022.<sup>3</sup> 28 C.F.R. § 68.3(a). Thus, Respondent's answer was due no later than February 14, 2022. *See* 28 C.F.R. § 68.9(a).

On March 22, 2022, the Court issued an Order to Show Cause directing Respondent to submit a filing explaining its failure to timely file an answer. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416, 2–3 (2022).<sup>4</sup> The Court also ordered Respondent to file its Answer pursuant to 28 C.F.R. § 68.9(c). *Id.* Both filings were due on or before April 11, 2022. *See id.* Again, the Court provided notice to Respondent that failure to file an Answer and show good cause regarding its untimely filing could result in an entry of default judgment against Respondent. *Id.* at 3 (citing 28 C.F.R. § 68.9(b)).

To date, Respondent has provided neither a response to the Order to Show Cause, nor an answer pursuant to 28 C.F.R. § 68.9(c).

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<sup>2</sup> Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

<sup>3</sup> Service was completed on Respondent's counsel on January 18, 2022.

<sup>4</sup> 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 on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

II. FINDINGS OF FACT<sup>5</sup>

1. On May 20, 2021, Complainant served on Respondent the Notice of Intent to Fine. Compl. Ex. A, at 1.

A. Count I

2. It is contained in the Complaint and it is uncontested that Respondent hired nine individuals for employment in the United States. Compl. 2–3.
3. It is contained in the Complaint and it is uncontested that Respondent hired the nine individuals after November 6, 1986. Compl. 3.
4. It is contained in the Complaint and it is uncontested that “Respondent failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for the [nine] individuals . . . after being requested to do so by an authorized agency of the United States[.]” Compl. 3.

B. Count II

5. It is contained in the Complaint and it is uncontested that Respondent hired twenty-nine individuals for employment in the United States. Compl. 3–4.
6. It is contained in the Complaint and it is uncontested that Respondent hired the twenty-nine individuals after November 6, 1986. Compl. 4.
7. It is contained in the Complaint and it is uncontested that “Respondent failed to prepare the Employment Eligibility Verification Form (Form I-9) at the time of hire, or in a timely manner for the [twenty-nine] individuals . . . in accordance with § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b).” Compl. 4.

III. LEGAL STANDARDS

A. Propriety of Default Judgment on Liability

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<sup>5</sup> As will be fully explained below, the Court enters a finding of liability in this case as a matter of default. The practical effect of this finding drives the Court to also make factual findings based on the content of the Complaint alone. These findings may be relied upon by the parties as evidence now established in the record.

An Administrative Law Judge (ALJ) may enter a judgment by default if a respondent fails to timely file an answer. 28 C.F.R. § 68.9(b). “If the Respondent fails to file an answer within the time provided, the Respondent may be deemed to have waived his/her right to appear and contest the allegations of the complaint, and the Administrative Law Judge may enter a judgment by default along with any and all appropriate relief.” NOCA ¶ 4; *see also United States v. Torentino*, 15 OCAHO no. 1397, 4 (2021) (citing 28 C.F.R. § 68.9(b)). Accordingly, when default is entered as a result of the respondent’s failure to file an answer, the Court “accept[s] as true all of the factual allegations of the complaint[.]” *United States v. Cont’l Forestry Serv. Inc.*, 6 OCAHO no. 836, 140, 142 (1996); *see, e.g., United States v. Kirk*, 1 OCAHO no. 72, 455, 457 (1998); *United States v. Aquino*, 5 OCAHO no. 818, 746, 748 (1995).

While the Court will take the facts asserted by Complainant as uncontested, Complainant still retains its burden and must allege facts establishing each element of a violation of the law. *See Zajradhara v. Misamis Constr. Ltd.*, 15 OCAHO no. 1396, 2 (2021) (“[W]hen a respondent fails to answer the complaint, the Court accepts the uncontested facts alleged in the complaint as true, and a grant of default judgment may thus be appropriate if the complainant pleaded sufficient facts indicating jurisdiction and a prima facie violation.”) (citations omitted); *see also Nishimatsu Constr. Co. v. Hous. Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

#### B. Failure to Prepare and/or Present and Failure to Timely Prepare

8 U.S.C. § 1324a(a)(1)(B) renders it unlawful for an entity “to hire for employment in the United States an individual without complying with the requirements of subsection (b).” Subsection (b) requires an employer to verify a prospective employee’s eligibility to work in the United States by completing a Form I-9. *See* § 1324a(b)(1)(A). The subsection also requires the employer to retain a Form I-9 for a specified period of time and present it to the Government upon receiving a Notice of Inspection. *See* § 1324a(b)(3).

“An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of the hire.” *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013) (citing 8 C.F.R. § 274a.2(b)(1)(i)(A)).

### IV. DISCUSSION

The Court finds that Respondent’s failure to file an answer constitutes a waiver of its right to appear and contest the allegations of the complaint. *See* 28 C.F.R. § 68.9(b); *see Torentino*, 15 OCAHO no. 1397, at 4. Therefore, Respondent has forfeited the opportunity to contest the charges in the complaint and the factual allegations plead in the Complaint are accepted as true.

#### A. Liability for Failure to Prepare or Present Employment Eligibility Forms

Respondent hired nine individuals for employment in the United States after November 6, 1986 and failed to prepare and/or present the Form I-9 for each of the nine employees upon request by Complainant. Compl. 2–3. Accordingly, Respondent is liable for nine violations of 8 U.S.C. § 1324a(a)(1)(B) for failing to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for nine employees.

B. Liability for Failure to Timely Prepare

Respondent hired twenty-nine individuals for employment in the United States after November 6, 1989 and failed to prepare Forms I-9 at the time of hire, or in a timely manner for those twenty-nine employees. Compl. 3–4. Therefore, Respondent is liable for twenty-nine violations of 8 U.S.C. § 1324a(a)(1)(B) for failing to timely prepare and/or present the Employment Eligibility Verification Form (Form I-9) for twenty-nine employees.

V. BIFURCATION OF PENALTY PHASE

With liability established, this case is now ripe for assessment of an appropriate penalty. The Court exercises its discretion and bifurcates the issues of liability and penalty. *United States v. Eriksmoen Cottages, Ltd.*, 14 O.CAHO no. 1355, 8 (2020) (citing *Hernandez v. Farley Candy Co.*, 5 OCAHO no. 781, 464, 465 (1995)). ALJs may assess penalties de novo. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011) (citation omitted).

When considering an appropriate penalty, the Court has discretion to adopt the penalty proposed by Complainant. Indeed, the Court has previously “approved the requested penalty amounts in cases of default when the amount requested was reasonable.” *Torentino*, 15 OCAHO no. 1397, at 3 (citing *United States v. Yi*, 8 OCAHO no. 1011, 218, 223 (1998)).

Here, there is no evidence in the record to indicate that the penalty proposed by Complainant is “reasonable;” therefore, the parties will have an opportunity to develop the record on penalties by way of supplemental filings. *See United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412, 2 (2022). In providing its supplemental filing, Complainant is reminded of its burden in establishing aggravating statutory factors, and that it must meet that burden through evidence. *See id.* (citation omitted) (“the government has the burden of proof with respect to the penalty . . . and must therefore prove the existence of any aggravating factor by a preponderance of the evidence.”).<sup>6</sup> Respondent is free to submit matters in consideration of the statutory factors, and any non-statutory factors rooted in equity.

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<sup>6</sup> In *Sanjay Jeram Corp.*, the ALJ entered default judgment on liability and provided the parties an opportunity to supplement the record with evidence on penalties; however, the parties declined to do so. 15 OCAHO no. 1412a, at 3. Because the complainant failed to provide evidence on penalties, it did not meet its burden to prove aggravating factors by a preponderance

Finally, the Court notes that as it relates to penalty assessment, the record is silent as to when the violations occurred. The statutory penalty range depends on the date the violations occurred and the date of assessment.<sup>7</sup> See 28 C.F.R. § 85.5 (providing a table of ranges that vary depending on the date of assessment for civil monetary penalties that occurred after November 2, 2015); e.g., *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020). Because the record has not been developed as to the date the violations occurred, which informs the range for the civil penalty amount, Complainant presently cannot meet its burden of proving penalties. Nevertheless, Complainant is permitted to supplement the record with evidence as to when the violations occurred to meet its burden of proving penalties.

The parties' filings are due on or before July 1, 2022. Failure to timely provide a submission constitutes a waiver of a parties' right to be heard on penalties.

SO ORDERED.

Dated and entered on June 8, 2022.

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Honorable Andrea R. Carroll-Tipton  
Administrative Law Judge

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of the evidence. *Id.* Therefore, the ALJ did “not aggravate factors based purely on Complainant’s argument.” *Id.* (citation omitted).

<sup>7</sup> In § 1324a cases, the date of assessment is when Complainant serves the Notice of Intent to Fine (NIF). *Visiontron Corp.*, 13 OCAHO no. 1348, at 9 (citation omitted). Here, the NIF was served on May 20, 2021. Compl. Ex. A, at 1.