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

October 5, 2022

UNITED STATES OF AMERICA, Complainant, v. COMMANDER PRODUCE, LLC, Respondent.	))))))))	8 U.S.C. § 1324A Proceeding OCAHO Case No. 2022A00033

ORDER ENTERING DEFAULT JUDGMENT ON LIABILITY

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 9, 2022. Complainant alleges that Respondent, Commander Produce, LLC, knowingly continued to employ two workers unauthorized for employment in the United States, in violation of 8 U.S.C. § 1324a(a)(2). Complainant further alleges that Respondent failed to ensure proper completion of Forms I-9 for nine individuals, and failed to prepare and/or present Forms I-9 for twenty individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B).

On March 18, 2022, this office sent Respondent a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA), a copy of the Complaint, the Notice of Intent to Fine (NIF), and Respondent's request for hearing, via certified mail. The NOCA directed Respondent to file an answer within thirty 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.[1]

On May 5, 2022, the Court issued an Order Directing Complainant Execute Service of Process instructing Complainant serve the NOCA, a copy of the Complaint, NIF, and request for hearing, and confirm Respondent's address. *United States v. Commander Produce, LLC*, 16 OCAHO no.

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

1428, 1–2 (2022).[2] On July 12, 2022, Complainant filed a Status Update. Through its filing, Complainant represented that it perfected service of the NOCA and accompanying materials on Kimberly Kennedy, the owner and statutory agent of Respondent. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428b, 2 (2022).

On July 20, 2022, the Court issued an Order to Show Cause, directing Respondent to submit a filing explaining its failure to timely file an answer, and to file an answer comporting with 28 C.F.R. § 68.9. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428a, 1–3 (2022).

On August 3, 2022, Complainant filed a Motion to Correct the Record. Specifically, Complainant moved the Court to "correct the record to reflect that service of the Complaint, [NOCA], [NIF], and Request for Hearing did not occur until July 6, 2022." C's Status Update. On August 24, 2022, the Court issued an Order Granting Motion to Correct the Record and Resetting Order to Show Cause Deadlines. *Commander Produce, LLC*, 16 OCAHO no. 1428b, at 1–3. After granting Complainant's motion and modifying the Order to Show Cause deadlines, the Court instructed:

> "Respondent must submit a filing demonstrating good cause for its failure to file an answer, and file an answer with 28 C.F.R. § 68.9, **no later than** September 9, 2022. In particular, the Court reminds Respondent that failure to file an answer and to show good cause may [result in entry] of default judgment against Respondent."

Id. at 2–3 (citations omitted). To date, Respondent has not submitted a filing demonstrating good cause for its failure to file an answer, nor an answer pursuant to 28 C.F.R. § 68.9(c).

II. FINDINGS OF FACT[3]

[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 on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] 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.

1. Respondent, Commander Produce, LLC, is a corporation with its domicile and principal place of business in Arizona. Compl. 1.

2. On September 17, 2021, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, served the Notice of Intent to Fine (NIF) on Respondent. Compl. Ex. A.

3. On July 6, 2022, Complainant perfected service of the Notice of Case Assignment Regarding Unlawful Employment (NOCA), a copy of the Complaint, the NIF, and the request for hearing on Kimberly Kennedy, the owner and statutory agent of Respondent. C's Status Update Ex. B; Compl. Ex. C.

A. Count I

4. It is contained in the Complaint and it is uncontested that Respondent hired two noncitizens[4] for employment in the United States.[5] Compl. 2.

5. It is contained in the Complaint and it is uncontested that Respondent hired the two noncitizens after November 6, 1986. Compl. 2.

6. It is contained in the Complaint and it is uncontested that the two noncitizens "were, or became, aliens not authorized for employment in the United States." Compl. 2.

7. It is contained in the Complaint and it is uncontested that "Respondent continued to employ the [two noncitizens] . . . in the United States, knowing that they were, or had become, unauthorized aliens with respect to such employment." Compl. 2.

B. Count II

8. It is contained in the Complaint and it is uncontested that Respondent hired nine individuals for employment in the United States.[6] Compl. 2–3.

9. It is contained in the Complaint and it is uncontested that Respondent hired the nine individuals after November 6, 1986. Compl. 3.

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[4] The two noncitizens named at Count I are also named at Count IV; however, "knowingly continue to employ" and "failure to prepare" are distinct violations under 1324a.

[5] The Appendix identifies the two noncitizens listed at Count I of the Complaint.

[6] The Appendix identifies the nine individuals listed at Count II of the Complaint.

10. It is contained in the Complaint and it is uncontested that "Respondent failed to ensure the [nine] individuals . . . properly completed Section 1 of the Employment Eligibility Verification Form (Form I-9); and/or [Respondent] failed to properly complete Section 2 or Section 3 of the Form I-9 for the [nine] individuals." Compl. 3.

C. Count III

11. It is contained in the Complaint and it is uncontested that Respondent hired fourteen individuals for employment in the United States.[7] Compl. 4–5.

12. It is contained in the Complaint and it is uncontested that Respondent hired the fourteen individuals after November 6, 1986. Compl. 5.

13. 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 [fourteen] individuals . . . after being requested to do so by an authorized agency of the United States." Compl. 5.

D. Count IV

14. It is contained in the Complaint and it is uncontested that Respondent hired six individuals for employment in the United States.[8] Compl. 5.

15. It is contained in the Complaint and it is uncontested that Respondent hired the six individuals after November 6, 1986. Compl. 5.

16. 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 [six] individuals . . . after being requested to do so by an authorized agency of the United States." Compl. 5.

III. LEGAL STANDARDS

A. Propriety of Default Judgment on Liability

[7] The Appendix identifies the fourteen individuals listed at Count III of the Complaint.

[8] The Appendix identifies the six individuals listed at Count IV of the Complaint.

The 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 ¶ 3; *see also United States v. Zuniga Torentino*, 15 OCAHO no. 1397, 3 (2021) (citing 28 C.F.R. § 68.9(b)). Thus, 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).
In default judgment, "[w]hile 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." *United States v. Kodiak Oilfields Servs., LLC*, 16 OCAHO no. 1436, 3 (2021) (citing *Zajradhara v. Misamis Constr. Ltd.*, 15 OCAHO no. 1396, 2 (2021) (internal citations omitted)).

B. Knowingly Continue to Employ Unauthorized Workers

8 U.S.C. § 1324a(2) renders it unlawful for an entity, "after hiring an alien for employment . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Knowing "includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, 14 (2022) (quoting 8 C.F.R. § 274a.1(*l*)(1), and then citing *United States v. Buckingham Ltd. P'ship*, 1 OCAHO no. 151, 1059, 1067 (1990)).

C. Failure to Ensure Proper Completion of Forms I-9

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).

"Employers must ensure that an employee complete Section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 9 (2017) (citing 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(i)(A)). "For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization." *Id.* (citing 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(ii)).

D. Failure to Prepare and/or Present Forms I-9

The statute further provides that an employer retain a Form I-9 for a set period of time and present it to the Government upon receiving a Notice of Inspection. *See* 8 U.S.C. § 1324a(b)(3). Specifically, "[e]mployers must prepare and retain I-9 Forms for employees hired after November 6, 1986, and are required to produce the I-9 Forms for inspection by the [G]overnment upon three days' notice." *United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 8 (2021) (citing 8 C.F.R. § 274a.2(b)(2)(ii), and then citing *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014)).

Forms I-9 must be retained for current employees and with respect to former employees, "only for a period of three years after that employee's hire date, or one year after that employee's termination date, whichever is later." *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 (2012) (first citing 8 U.S.C. § 1324a(b)(3), then citing 8 C.F.R. § 274a.2(b)(2)(i), and then citing *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998)).

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 Zuniga 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 Knowingly Continue to Employ Unauthorized Workers

Respondent hired two noncitizens in the United States after November 6, 1986, who were, or became, unauthorized for employment in the United States. Compl. 2. Respondent continued to employ these two noncitizens in the United States, knowing that they were, or had become, unauthorized for such employment. *Id.* Accordingly, Respondent is liable for two violations of 8 U.S.C. § 1324a(2), as it knowingly continued to employ two unauthorized workers.

B. Liability for Failure to Ensure Proper Completion of Forms I-9

Respondent hired nine individuals for employment in the United States after November 6, 1986, and failed to ensure proper completion of Forms I-9 for those nine employees. Compl. 2–3. Therefore, Respondent is liable for nine violations of 8 U.S.C. § 1324a(a)(1)(B) for failing to ensure proper completion of Forms I-9 for nine employees.

C. Liability for Failure to Prepare and/or Present Forms I-9

Respondent hired twenty individuals[9] for employment in the United States after November 6, 1986, and failed to prepare and/or present Forms I-9 for those twenty employees. Compl. 4–5. Thus, Respondent is liable for twenty violations of 8 U.S.C. § 1324a(a)(1)(B) for failing to prepare and/or present Forms I-9 for twenty employees.

V. BIFURCATION OF PENALTY PHASE

With liability established, this case is now ripe for penalty assessment. The Court exercises its discretion and bifurcates the issues of liability and penalty. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO 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." *Zuniga Torentino*, 15 OCAHO no. 1397, at 3 (citing *United States v. Yi*, 8 OCAHO no. 1011, 218, 223 (1998) (citations omitted)).

Here, this record lacks evidence to indicate that Complainant's proposed penalty is "reasonable." Accordingly, 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, 3 (2022). Complainant is reminded of its burden in establishing aggravating statutory factors, and that it must meet that burden through evidence. *See id.* at 2 (citation omitted) ("[T]he [G]overnment 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.").[10] Respondent is free to submit matters in consideration of the statutory factors, and any non-statutory factors rooted in equity.

The parties' filings are due **no later than** November 4, 2022. Failure to timely provide a submission constitutes a waiver of a party's right to be heard on penalties.

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[9] The twenty individuals includes the fourteen individuals named at Count III, and the six individuals named at Count IV. Compl. 4–5; *see also* App'x.

[10] 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 2. Because the complainant failed to provide evidence on penalties, it did not meet its burden to prove aggravating factors by a preponderance of the evidence. *Id.* at 3. Therefore, the ALJ did "not aggravate factors based purely on Complainant's argument." *Id.* (citation omitted).

SO ORDERED.

Dated and entered on October 5, 2022.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge