

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

IN RE CHARGE OF NATIVIDA ADAME-GOMEZ

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	CASE NO. 92B00162
MOJAVE, INC., d.b.a. CASA JOSE	)	
CAFE, a Texas Corporation	)	
Respondent.	)	
_____	)	

INTERIM DECISION AND ORDER  
GRANTING COMPLAINANT'S MOTION  
FOR DEFAULT JUDGMENT

E. MILTON FROSBURG, Administrative Law Judge

Representation: Kirk M. Flagg, Esquire  
for Complainant

I. Introduction

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Immigration and Nationality Act (Act), prohibited discrimination by employers on the basis of national origin or citizenship status. These anti-discrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. 8 U.S.C. 1324b.

Under 8 U.S.C. 1324b, the protected individuals who meet the statutory definition may file charges of national origin and/or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC may then file a

Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) if it determines that there is reasonable cause to believe that the filed charge is true. 8 U.S.C. 1324b(d)(1). If, however, OSC does not file a Complaint within one hundred twenty (120) days of receipt of the charge, the protected individual is authorized to file a Complaint directly with OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

## II. *Procedural History*

On July 31, 1992, OSC filed a Complaint against Respondent, Mojave, Inc. d.b.a. Casa Jose Cafe, a Texas Corporation, based on the charges filed by Nativida Adame-Gomez. OSC alleged in the Complaint that Respondent violated IRCA, both, when it knowingly and intentionally discriminated against Ms. Adame, a legal permanent resident, by refusing to continue her employment because of her citizenship status and and preferentially continuing to employ an unauthorized individual, and by interfering with her subsequent employment as retaliation for filing the charge with OSC. Accompanying the Complaint was the Charge Form For Unfair Immigration Related Employment Practices which OSC alleges was filed by Ms. Adame on March 6, 1992 and completed on March 17, 1992.<sup>1</sup>

By Notice of Hearing dated August 3, 1992, Respondent was advised of the filing of the Complaint, of the opportunity to answer the Complaint within thirty (30) days after its receipt, of the possibility of a default judgment should it not answer the Complaint, of my assignment to the case, and of the location of the hearing. Proper service of the Complaint is evidenced by a file copy of a return receipt for certified mail signed at Respondent's address and dated August 7, 1992.

On August 10, 1992, I issued a Notice of Acknowledgment advising Respondent of my receipt of this case and cautioned Respondent that an Answer, pursuant to 28 C.F.R. part 68.9<sup>2</sup>, must be filed within thirty (30) days of receipt of the Complaint. To date, Respondent has filed no Answer or any other document. By Motion for Default Judgment filed September 28, 1992<sup>3</sup>, Complainant argues that since

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<sup>1</sup> I note that the Charge Form shows a file stamp date of March 9, 1992.

<sup>2</sup> Citations are to the OCAHO Rules of Practice and Procedure for Administrative Hearings as amended in the Interim Rule published in 56 Fed. Reg. 50049 (1991) (to be codified at 28 C.F.R. Part 68) (hereinafter cited as 28 C.F.R. Section 68).

<sup>3</sup> Complainant filed a subsequent Motion For Default on October 9, 1992 which corrected a regulatory citation error which appeared in its previously filed motion.

Respondent had failed to file its Answer within thirty (30) days of receipt of the Complaint, this motion should be granted.

After reviewing the record, in the interests of justice and fairness, on October 14, 1992, I issued an Order to Show Cause Why Complainant's Motion Of Default Judgment Should Not Be Granted in which I gave the pro se Respondent a final opportunity to comply with the controlling regulations and to proceed to hearing. Respondent was directed to file with this court, within fifteen (15) calendar days of that Order, a legally sufficient motion which was to include a request for leave to file a late Answer and a legally sufficient Answer which complied with 28 C.F.R. parts 68.6. and 68.9, as well as an explanation of Respondent's failure to have timely responded to both the Notice Of Hearing and the Motion For Default Judgment. Respondent was cautioned that if it did not respond to the Order To Show Cause, I would thereafter consider Complainant's Motion For Default Judgment and its request for relief which included a four thousand dollar (\$4,000) civil penalty, full back pay with interest and any other relief I deemed appropriate.

The record shows that, to date, no mail addressed to Respondent has been returned by the postal service. It also shows that Respondent has not filed any document with this court nor has it contacted this court or Complainant in any manner.

### III. Discussion

Under OCAHO regulations, Respondent's failure to file a timely Answer shall be deemed to constitute a waiver of the right to appear and contest the Complaint's allegations. 28 C.F.R. 68.9(b). Under these circumstances, I may, in my discretion, grant a default judgment. Id.

Based on a review of the relevant law and the facts in this case, I find that:

1. Respondent has been properly served with the Complaint;
2. No timely Answer has been filed in this case;
3. Respondent has waived its right to appear and to contest the allegations set forth in the Complaint filed July 31, 1992; and,
4. I find that Respondent has violated 8 U.S.C. 1324b as alleged in the Complaint, in that it has discriminated against Ms. Adame based on her citizenship status and that it has acted against Ms. Adame in retaliation for filing a charge with OSC.

3 OCAHO 473

Therefore,

**IT IS HEREBY ORDERED:**

- (1) that Complainant's Motion For Default is granted with regard to findings of discrimination based on citizenship status and retaliation;
- (2) that Respondent cease and desist from the discriminatory practices described in Counts I and II in the Complaint;
- (3) that Respondent retain for a period of three years the names and addresses of each individual who applies, either in person or in writing, for employment in the United States, to any business entity associated with Respondent;
- (4) that Respondent comply with the provisions of 8 U.S.C. 1324a; and,
- (5) that I will retain jurisdiction of this matter to determine the appropriate civil penalties and Respondent's relief, including but not limited to back pay with interest.

This Decision and Order is not yet the final action of the Administrative Law Judge in this matter. Complainant is to file with this Court and serve on Respondent, no later than thirty (30) days from the date of this Order, all documentation supporting its request for civil penalties and back pay with interest, along with a showing of Ms. Adame's interim earnings from February 24, 1992 to the date of this Order, and/or an explanation of why there were no interim earnings during any period of the relevant frame. Any explanation should include a statement, if appropriate, of what Ms. Adame's interim earnings would have been under a standard of reasonable diligence. Respondent will then have ten (10) days in which to submit any refuting documentation. I will issue a Final Decision and Order after a review of all the documentation.

**IT IS SO ORDERED** this 13th day of November, at San Diego, California.

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E. MILTON FROSBURG  
Administrative Law Judge