

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

UNITED STATES OF AMERICA, )	)
Complainant, )	)
v. )	) 8 U.S.C. 1324a Proceeding
	) Case No. 93A00118
EDUARDO GUTIERREZ, )	)
INDIVIDUALLY, AND D/B/A )	)
DIAMOND TIRES & WHEELS, )	)
Respondent, )	)
_____ )	)

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING  
OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S  
DECISION AND ORDER

On August 25, 1993, the Administrative Law Judge (hereinafter ALJ) issued a decision and order of judgment by default against the respondent in the above captioned proceeding. The complaint alleged violations of the employer sanctions provisions of the Immigration Reform and Control Act (IRCA), as codified at Title 8, U.S. Code, section 1324a. Both Counts I and II of the complaint alleged that the respondent had hired the named individuals after November 6, 1986 and failed to ensure that these employees had properly completed section 1 and that respondent had failed to properly complete section 2 of Employment Eligibility Verification Forms (Forms I-9) in violation of section 1324a(a)(1)(B) of Title 8, U.S. Code, which prohibits hiring individuals for employment in the United States without complying with the employment verification system set forth in section 1324a(b) (hereinafter paperwork violations).

The ALJ held that respondent, by having failed to file an answer, had waived its right to appear and contest the allegations of the complaint and that a judgment by default was appropriate. ALJ's Decision and Order at 2. He found that the complainant's request of a civil money

penalty in the amount of \$390.00 was just and reasonable and ordered the respondent to pay the complainant that amount. ALJ's Decision and Order at 2. In addition, the ALJ ordered respondent to "comply with the verification requests[sic] set forth in Title 8 United States Code, §1324a(b) with respect to any individuals hired, beginning on the date of the order and continuing up to three years thereafter (8/25/96)." ALJ's Decision and Order at 2.

The Chief Administrative Hearing Officer's Review Authority

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in section 1324a(e)(7) of Title 8, U.S. Code, and delegated to the Chief Administrative Hearing Officer in section 68.53(a) of Title 28, Code of Federal Regulations; I find it necessary to modify the ALJ's August 25, 1993, order in the above captioned proceeding. For the reasons set forth below, I have determined that it was inappropriate for the ALJ to order the respondent to comply with the requirements of the employment verification system for a period of three years.

Authorized Remedies for Paperwork Violations

Section 1324a(e)(5) of Title 8, U.S. Code, sets out the available remedies for paperwork violations, providing as follows:

(5) ORDER FOR CIVIL MONEY PENALTY FOR PAPERWORK VIOLATIONS.— With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §1324a (e)(5).

Clearly, there is no reference or language in section 1324a(e)(5) authorizing an ALJ to order compliance with the requirements of the employment verification system for a period of up to three years.

On the other hand, the provisions of the employer sanctions statute dealing with remedies for violations of the hiring, recruiting, and referral provisions of section 1324a(a)(1)(A) and section 1324(a)(2), do authorize such an order. Section 1324a(e)(4) provides, in pertinent part, as follows:

(4) CEASE AND DECEASE ORDER WITH CIVIL MONEY PENALTY FOR HIRING, RECRUITING, AND REFERRAL VIOLATIONS.—With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection-

(A) shall require the person or entity to cease and desist from such violations and to pay a civil money penalty in an amount of—

- (i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either subsection occurred,
- (ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
- (iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

- (i) to comply with the requirements of subsection (b) (or subsection (d) if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and
- (ii) to take such other remedial action as is appropriate.

8 U.S.C §1324a (e)(4) (emphasis added).

Prior case law of the Office of the Chief Administrative Hearing Officer indicates that where, as in the instant case, only paperwork violations are involved, the cease and desist remedy of section 1324a(e)(4)(A) is not available. See e.g., U.S. v. Chuy's Paint and Body Shop, 1 OCAHO 19 (6/27/88); U.S. V. Elsinore Manufacturing, 1 OCAHO 13 (6/16/88); U.S.v. USA Cafe, 1 OCAHO 42 (2/6/89); U.S. v. Torres, 1 OCAHO 83 (8/18/89). The cease and desist remedy applies only to violations which refer to the hiring, recruiting, and referral violations and not to violations of the employment verification system. See U.S. v. Torres, 1 OCAHO 83 (8/18/89).

Similarly, a reading of the language in section 1324a(e)(4) and section 1324a(e)(5) indicates that the ALJ is without statutory authority to order a party to comply with the requirements of the employment verification system for a period of up to three years, where the only violations alleged are paperwork violations.

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ACCORDINGLY,

I hereby MODIFY the ALJ's decision and order by striking the sentence on page two of the order in which he directs the respondent to comply with the requirements of the employment verification system for a period of three years. This order leaves intact that portion of the ALJ's decision and order which grants the Complainant's Motion for Default Judgment and imposes a total fine amount of \$390.00.

Modified this 22nd day of September, 1993.

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JACK E. PERKINS  
Chief Administrative  
Hearing Officer

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JUDGMENT BY DEFAULT

On June 3, 1993, a Complaint Regarding Unlawful Employment was filed by the United States of America, hereinafter referred to as the "Complainant," against Eduardo Gutierrez, individually and D/B/A Diamond Tires and Wheels, hereinafter referred to as the "Respondent," pursuant to Title 8 U.S.C. § 1324a. Attached to the Complaint and incorporated therein by reference was a Notice of Intent to Fine, hereinafter referred to as the "Notice," which previously had been personally served upon the Respondent on June 10, 1993. A Notice of Hearing on the Complaint issued June 4, 1993, setting this matter for hearing in or around the city of El Paso, Texas, before the undersigned Administrative Law Judge on a date to be later specified. The Respondent, in the Notice of Hearing, was advised of the right to file an Answer to the Complaint and to appear in person, or otherwise, and give testimony at the place and time to be determined for the hearing. The Respondent was further advised that its' Answer had to be filed within thirty (30) days after receipt of the Complaint.

Respondent was specifically advised in the Notice of Hearing that if the Respondent failed 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.

On July 20, 1993, Complainant filed a Motion for Default Judgment in accordance with the provisions of 28 C.F.R. § 68.9.<sup>1</sup>

On August 2, 1993, having not received an Answer to the Complaint or any responsive pleading to the INS motion, I issued an Order to Show Cause Why Judgment by Default Should Not Issue. That Order provided Respondent an opportunity to "offer an explanation why a default judgment should not be entered against it," any such showing to be made by explanation (a "Motion") which also contains a request for leave to file an answer. The Order specifically stated that Respondent had until on or before August 17, 1993, to respond to the Order and to provide an Answer to the Complaint. The order was delivered to Respondent by certified mail on August 4, 1993.

As of August 23, 1993, this office has not received from Respondent any response to my Order to Show Cause, nor has it received an Answer to the Complaint.

Respondent having failed to file an Answer, and the time allowed for filing one having elapsed, I find the Respondent has waived its right to appear and contest the allegations of the complaint, and that a judgment by default is appropriate. 28 C.F.R. 68.9.

Upon review and full consideration of the Motion for Default Judgment filed by Complainant, I find that it fully complies with the requirements of 28 C.F.R. 68.9. I further find that Respondent has failed to file an Answer within the time provided in the Notice of Hearing, and that the Respondent must therefore be deemed to have waived its' right to appear and contest the allegations set forth in the Complaint. Based on the foregoing, and upon the preponderance of the evidence, I hereby make the following:

Findings of Fact and Conclusions of Law

1. As alleged in Count I, Respondent hired Jesus R. Gomez and Arturo Porras for employment in the United States after November 6,

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<sup>1</sup> All references to Part 68 of CFR are references to Part 68, as amended by the interim rule published in the Federal Register at vol. 56, no. 192, page 50049 (October 3, 1991).

1986 and Respondent failed to ensure that these two employee properly completed section 1 and Respondent failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9).

2. As a result of Respondent's conduct described in ¶ 1. above, Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. 1324a (b)(1) and (2) and 8 C.F.R. 274a.2(b)(1)(i) and (ii)

3. As alleged in Count II, Respondent hired Vicente Esquivel after November 6, 1986 and Respondent failed to ensure that Vicente Esquivel timely complete section 1 and Respondent failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9).

4. As a result of Respondent's conduct as alleged in ¶ 3. above, Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b)(2) of the Immigration and Nationality Act, 8 USC 1324a(b)(2) and 8 C.F.R. §274a.2(b)(1)(i)(A) and 274a.2(b)(1)(ii).

5. The civil monetary penalty, assessed at \$260.00 for Count I and \$130.00 for Count II, is just and reasonable.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. That Complainant's Motion for Default Judgment is granted;
2. That Respondent pay a civil monetary penalty in the amount of \$260.00 for Count I and a civil monetary penalty in the amount of \$130.00 for Count II, resulting in a total fine amount of \$390.00; and
3. Respondent shall comply with the verification requests set forth in Title 8 United States Code, §1324a(b) with respect to any individuals hired, beginning on the date of this order and continuing up to three years hereafter (8/25/96).

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4. That this Decision and Order is the final order of the judge in accordance with 28 C.F.R. § 68.53. As provided in those Rules, id. at Section 68.53, this Decision and Order shall become the final order of the Attorney General unless within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer vacates or modifies it.

**SO ORDERED.**

Dated: August 25, 1993

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ROBERT B. SCHNEIDER  
Administrative Law Judge