

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

July 19, 1994

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324a Proceeding
) OCAHO Case No. 94A00091
MIDTOWN FASHION INC.,)
Respondent.)
_____)

ORDER TO SHOW CAUSE WHY MOTION FOR DEFAULT
JUDGMENT SHOULD NOT BE GRANTED

On October 1, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), NYC274A-93006043, upon Midtown Fashion Inc. (respondent). That citation contained four counts which alleged 30 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a and civil penalties totaling \$16,210 were proposed.

Respondent was advised in the NIF of its right to file a written request for a hearing before an Administrative Law Judge assigned to this office in the event it made that request within 30 days of its receipt of the NIF.

On October 22, 1993, Casimir F. Sojka, Esquire, timely filed such a request on respondent's behalf.

On May 5, 1994, complainant filed the four-count Complaint at issue.

In Count I of the Complaint, complainant alleged that subsequent to November 6, 1986, respondent knowingly hired and/or continued to employ the individual listed therein, and then knew that that individual was an alien not authorized for employment in the United States, thus violating the pertinent provisions of IRCA, 8 U.S.C. §§

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1324a(a)(1)(A), 1324a(a)(2). Complainant levied a civil money penalty of \$1,210 for that alleged violation.

In Count II, complainant alleged that respondent employed the five individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. 1324a(a)(1)(B). Complainant requested a civil money penalty of \$600 for each of those alleged infractions, for a total civil money penalty of \$3,000 for Count II.

Count III of the Complaint charged that respondent hired the 14 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure that those individuals properly completed Section 1, and failed to properly complete Section 2, of the pertinent Forms I-9, again in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of \$500 for each of those alleged violations, for a total civil money penalty of \$7,000 on that count.

Complainant alleged in Count IV of the Complaint that respondent failed to properly complete Section 2 of the Forms I-9 for each of the 10 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of \$500 for each of those violations, or a total of \$5000 for the 10 alleged violations on that count.

On May 23, 1994, the Complaint and a Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested.

On May 24, 1994, respondent's counsel filed a letter with this office, in which he stated that he was unable to locate his client and had been advised that the respondent firm was out of business.

On May 26, 1994, respondent's counsel filed a motion to withdraw as respondent's counsel.

On June 30, 1994, the undersigned issued an order denying counsel's motion to withdraw and directed that all further correspondence to respondent firm be served upon respondent's counsel of record, as respondent's agent for that purpose.

On July 5, 1994, complainant filed a Motion for Default Judgment, asserting therein that respondent had not filed an answer to the Complaint.

On July 7, 1994, respondent's counsel filed a letter with this office, in which he stated:

In view of the Order Denying My Motion to Withdraw, I am impelled as the "designated" but unappointed and unauthorized agent, to request an immediate hearing to have the Government proceed to produce its witnesses and Chinese interpreters who were present at the time of the alleged violation and proceed with its evidence and proof to establish its prima facie case - with all rights of cross examination to be reserved.

Contrary to respondent's counsel's contentions, respondent does not have an automatic right to an immediate hearing on the allegations contained in the Complaint.

The procedural regulation governing answers, 28 C.F.R. section 68.9, provides that each respondent must file an answer within 30 days after the service of a complaint. 28 C.F.R. § 68.9(a).

Under the procedural regulations, service of a complaint is to be made by OCAHO or the Administrative Law Judge to whom the case is assigned in one of the three (3) following ways:

- (1) By delivering a copy to the individual party... or attorney of record of a party;
- (2) By leaving a copy at the... residence of a party; or
- (3) By mailing to the last known address of such individual... or attorney.

28 C.F.R. § 68.3(a) (emphasis added).

Service of the complaint and notice of hearing is complete, as here, upon receipt by the addressee. 28 C.F.R. § 68.3(b).

On October 22, 1993, as noted earlier, Attorney Sojka filed a Request for Hearing on the violations contained in NIF NYC274A-93006043. Under the regulations governing these proceedings, the filing of a request for hearing signed by an attorney "shall be considered a notice of appearance on behalf of the respondent for whom the request was made." 28 C.F.R. § 68.33(b)(5). See United States v. Medina, 3 OCAHO 485, at 6 (2/5/93).

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There is no indication in the request for hearing filed by respondent's counsel that Mr. Sojka qualified his entry of appearance on behalf of respondent. Accordingly, service of the Complaint on respondent's counsel of record constitutes notice to respondent. Id., at 7.

The Complaint was received by respondent's counsel on May 23, 1994. Respondent's answer to the Complaint was therefore due by June 22, 1994, but to date no answer has been received.

The procedural regulations provide:

Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his/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(b) (emphasis added).

In the final paragraph of his July 7, 1994 letter to the undersigned, respondent's counsel asserts that: "Under New York Laws, the Secretary of State is the only authorized agent to accept Service on the part of a Corporation, organized and existing under the laws of New York State."

In filing a Request for Hearing on respondent's behalf, Mr. Sojka became respondent's counsel of record in this proceeding. Under the pertinent procedural regulation, 28 C.F.R. section 68.33(c), the Administrative Law Judge may permit an attorney to withdraw upon written motion. On May 26, 1994, as noted, respondent's counsel filed such a motion, advising in support thereof that respondent was no longer in business and that respondent's owner could not be located.

In the order denying that motion, the undersigned noted that in prior proceedings involving generally similar factual settings, the administrative law judges in this office have denied motions/requests of counsel to withdraw in the event that the party's counsel of record is the only person authorized to receive documents on a respondent's behalf, and upon a showing that counsel's law office is the only address for delivery of those documents. See U.S. v. Primera Enters., OCAHO Case No. 93A00024 (Order Denying Respondent's Counsel's Motion to Withdraw), at 2 (5/17/94); U.S. v. K & M Fashions, Inc., 3 OCAHO 411 (3/16/92); U.S. v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 284 (1/4/91).

Respondent reportedly cannot be located, and because respondent's counsel's motion to withdraw has been denied, service of pleadings upon respondent's counsel constitutes valid service upon respondent.

Accordingly, respondent is hereby ordered to show cause, within 15 days of its acknowledged receipt of this order, why complainant's Motion for Default Judgment should not be granted.

JOSEPH E. MCGUIRE
Administrative Law Judge