

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. 95A00069
RODEO NIGHT CLUB,)
Respondent.)
_____)

FINAL DECISION AND ORDER OF DISMISSAL
(October 30, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William L. Sims, Esq., for Complainant
H. Tati Santiesteban, Esq., for Respondent

I. *Procedural History*

On April 17, 1995, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). The four-count Complaint alleges that Rodeo Night Club (Rodeo or Respondent) violated § 274A of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Exhibit A to the Complaint is a Notice of Intent to Fine served on Seferino Gallegos d/b/a Rodeo Night Club on November 14, 1994. Exhibit B is Respondent's request for a hearing, filed by its counsel of record, Heather A. Ronconi (Ronconi).

Count I of the Complaint charges Respondent with knowingly hiring and/or continuing to employ one named individual for a civil money penalty of \$1,087. Count II charges Respondent with failing to prepare,

retain, and/or make available for inspection the employment eligibility verification form (Form I-9) for one named individual for a civil money penalty of \$550. Count III charges Respondent with failing to ensure that one named individual properly completed section 1 of the Form I-9 and Respondent with failure to complete section 2 of the Form I-9 within three business days of hire for one named individual for a civil money penalty of \$150. Count IV charges Respondent with failure to ensure that one named individual properly completed section 1 and failure properly to complete section 2 of the Form I-9 for a civil money penalty of \$110. Count V charges Respondent with failing to ensure timely completion of section 1 and 2 of the Form I-9 for three named individuals for a civil money penalty of \$350 (\$120 for two of the individuals and \$110 for the third). The total civil money penalty requested is \$2,247.

On April 18, 1995, OCAHO issued a Notice of Hearing which transmitted to Respondent a copy of the Complaint as well as a copy of pertinent rules of practice and procedure.

On May 16, 1995, Ronconi, counsel for Respondent, filed a "Notice of Withdrawal" in which she stated that "Respondent has retained other counsel and the withdrawal is not sought for delay alone, but so justice may be served." Although no formal motion was made by counsel for Respondent, my Order dated May 19, 1995 deemed the Notice as a motion to withdraw in accordance with 28 C.F.R. § 68.33(c), and I treated the filing of the Answer on May 16, 1995 on Respondent's behalf by H. Tati Santiesteban, Esq., as an entry of appearance. The Answer denied the allegations contained in the Complaint.

On June 19, 1995, during a telephonic prehearing conference, the parties stated that they have negotiated a settlement, pursuant to which they would file a joint motion to dismiss on or before July 14, 1995.

On August 28, 1995, Complainant filed a Motion to Compel Respondent to execute and file the settlement agreement and joint motion to dismiss. Complainant stated that, on June 15, 1995, the settlement agreement and Joint Motion to Dismiss were executed and forwarded to Respondent to sign and send to the administrative law judge. To date, Respondent has not filed the settlement agreement and Joint Motion with my Office.

On September 21, 1995, I issued an Order providing "Respondent an opportunity to explain, if it can, why the settlement agreement as negotiated should not be placed into effect." Despite the fact that

Respondent was specifically "cautioned that failure to respond to this Order may result in an adverse ruling," no response has been filed. See 28 C.F.R. § 68.37(b)(1). October 13, 1995, the deadline for filing a response or other pleading to the Order has passed.

II. Discussion

OCAHO rules of practice and procedure provide that, where "a party or his or her representative fails to respond to orders issued by the Administrative Law Judge . . .," a "complaint or a request for hearing may be dismissed . . ." and deemed abandoned. 28 C.F.R. § 68.37(b) and (b)(1). Accordingly, as Respondent has failed to respond either to Complainant's Motion to Compel or the September 21 Order, I find Respondent to have abandoned its request for a hearing.

In addition, OCAHO case law demonstrates that failure to respond to an order triggers a judgment of default, equivalent to dismissal of the employer's request for hearing, against an employer who fails to respond to the invitation of such an order:

Having made no filing in response, Respondent necessarily positioned itself for entry against it of a judgment by default. This is that judgment.

United States v. Hosung Cleaning Corp., 4 OCAHO 681 (1994); See also United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994); Brooks v. Watts Window World, 3 OCAHO 570 (1993). Accordingly, Respondent is in default for failure to respond to my Order dated September 21, 1995.

III. Ultimate Findings, Conclusions and Order

I have considered the Complaint, the Answer and all motions and documents filed with my Office to date. All motions and other requests not specifically ruled upon are denied.

For the reasons already stated, I find and conclude that:

1. Respondent's request for hearing is abandoned;
2. Respondent is in default;
3. As alleged in the Complaint, Respondent is in violation of 8 U.S.C. § 1324a with respect to each employee named in the Complaint, as to whom Respondent is found to have:

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- a. Count I: knowingly hired and/or continued to employ one named individual at an assessment of \$1,087;
 - b. Count II: failed to prepare, retain, and/or make available for inspection the Form I-9 for one named individual at an assessment of \$550;
 - c. Count III: failed to ensure that one named individual properly completed section 1 of the Form I-9 and failed to complete section 2 of the Form I-9 within three business days of hire at an assessment of \$150;
 - d. Count IV: failed to ensure that one named individual properly completed section 1, and failed properly to complete section 2 of the Form I-9 at an assessment of \$110;
 - e. Count V: failed to ensure timely completion of section 1 and 2 of the Form I-9 for three named individuals at an assessment of \$110 for one of the individuals and \$120 for two of the individuals, for a civil money penalty of \$350;
4. Respondent shall pay a civil money penalty in the amount of two thousand, two hundred and forty-seven dollars (\$2,247) for violations listed in the Complaint.
- 5 Respondent shall cease and desist from violating 8 U.S.C. § 1324a;
6. The hearing is canceled.

Pursuant to 8 U.S.C. § 1324a(e)(7), this Final Decision and Order is the final administrative adjudication in this proceeding and shall become final "unless within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final decision and order. . . ."

"A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 30th day of October, 1995.

MARVIN H. MORSE
Administrative Law Judge