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

UNITED STATES OF AMERICA, Complainant, v. K & M FASHIONS, INC., Respondent.	)))) 8 U.S.C. 1324a Proceeding) CASE No. 91100212)))

DECISION AND ORDER ON DEFAULT

E. MILTON FROSBURG, Administrative Law Judge

Appearances: Gilbert T. Gembacz, Esquire
for Immigration and
Naturalization Service
Wilfred Brooks, Esquire
for Respondent

The Immigration Reform and Control Act of 1986 (IRCA) adopted significant revision in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment and/or the record-keep-ing verification requirements of the employer sanctions program.

On December 5, 1991, the Immigration and Naturalization Service (INS) filed a Complaint against K & M Fashion, Inc., (Respondent) alleging a violation of IRCA in six counts. The Complaint, dated November 25, 1991, included the Notice of Intent to Fine which was dated and served on September 24, 1990. Respondent requested a hearing on October 22, 1990.

Count I alleged that Respondent knowingly continued to employ twenty (20) named individuals who were unauthorized for employment in the United States, a violation of 8 U.S.C. §1324a(a)(2). Count II alleged that Respondent failed to prepare an Employment Eligibility Verification Form, (INS Form I-9) for twelve (12) named individuals, a violation of 8 U.S.C. §1324a(a)(1)(B). Count III alleged that Respondent failed to ensure that three (3) named individuals properly completed Section 1 of their Employment Eligibility

Verification Form (Form I-9) and that Respondent failed to properly complete Section 2 of these same forms, a violation of 8 U.S.C. §1324a(a)(1)(B). Count IV alleged that Respondent failed to ensure that five (5) named individuals properly completed Section 1 of their Form I-9, a violation of 8 U.S.C. §-1324a(a)(1)(B). Count V alleged that the Respondent failed to properly complete Section 2 of the Form I-9 for six (6) named individuals, a violation of 8 U.S.C. §1324a(a)(1)(B). Count VI alleged that Respondent failed to present and make Form I-9 available for inspection pursuant to the request of the Immigration and Naturalization Service for two (2) named individuals listed in Count VI, in violation of 8 U.S.C. §1324a(a)(1)(B).

Complainant requested relief in the form of an order directing Respondent to cease and desist from violating 8 U.S.C. §1324a, a thirty thousand dollar ($30,000) civil money penalty for knowingly continuing to employ twenty (20) unauthorized aliens, and an aggregate Thirty-Nine Thousand Six Hundred Dollar ($39,600.00) civil money penalty for the additional five (5) paperwork violations.

By Notice of Hearing dated December 5, 1991, Respondent was advised of the filing of the Complaint, the opportunity to answer the Complaint within thirty (30) days after receipt of the Complaint, my assignment to the case, and that the hearing, would be held in or around Los Angeles, California. On December 10, 1991, 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*, must be filed with thirty (30) days of his receipt of the Complaint.

On January 8, 1992, my office received a request from Respondent's attorney of record requesting an Extension of Time in which to file an Answer to the Complaint. This motion was unopposed by the Complainant. Thus, pursuant to 28 C.F.R. section 68 and for good cause shown, I granted an extension of time to answer until January 24, 1992.

* 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).

On January 22, 1992, my office received a letter pleading from Respondent's attorney of record indicating that the Respondent was no longer in business and that he has not been able to receive instructions from its owner regarding the Complaint. Thus, he stated that he was withdrawing his representation as Respondent's attorney.

On January 28, 1992, I conducted a pre-hearing telephonic conference with the attorneys for the respective parties regarding both the status of the case and Respondent's attorney's allegation that he was withdrawing from representation. On January 29, 1992, I issued an Order Confirming this Conference and called to the attention of Respondent's attorney of record that the proper procedure for withdrawal from representation was in accordance with 28 C.F.R. 68.33 and 28 C.F.R. 68.28. In my order, I also stated that I would defer ruling on attorney withdrawal until a final order was issued in this matter. Additionally, I directed Complainant to submit any appropriate motion for final resolution of the case if it wished.

By Motion for Default Judgment dated February 4, 1992, INS argues that Respondent should be found in default. The motion, accompanied by a Memorandum of Law in support, rests on the premise that Respondent had failed to plead, answer or otherwise defend within thirty (30) days after service of the Complaint.

On February 17, 1992, Respondent's attorney of record informed me by letter that:

> "In response to your Order Confirming Pre-Hearing Telephonic Conference, I wish to place on record that since my request to withdraw my representation as the attorney for the Respondent in this case, I do not consider my office authorized to receive service on behalf of the Respondent.
>
> Furthermore, I would consider any order recognizing my withdrawal for all purposes except service of process to violate procedural due process for the reason that such an order would appear to manifest an excessive judicial concern for facilitating a default judgment against the Respondent."

There have been several cases dealing with attorney withdrawal in IRCA proceedings. In United States of America v. I.K.K. Associates, 1 OCAHO 131 (2/21/90), the Administrative Law Judge (ALJ) issued on Order To Show Cause Why Default Should Not Issue a few days before Respondent's attorney of record withdrew, by letter, as counsel of record. Although the Decision and Order does not discuss the ALJ's reasoning for accepting the attorney's withdrawal, it does specifically state that Respondent was also served with a copy of the Order To Show Cause. However in the case before me, Respondent has not been

served with the Order To Show Cause. Thus, I.K.K. Associates is not applicable to the instant case on the issue of the attorney's request to withdraw. In United States v. El Mexicano Taco Shop, 1 OCAHO 59 (5/31/89), a case previously before me, Respondent's attorney of record submitted a Motion To Withdraw two days after the Service filed a Motion for Default Judgment and on the same day that I issued an Order to Show Cause Why Default Should Not Issue. Counsel's premise for withdrawing was Respondent's failure to respond to any of counsel's telephone calls and Respondent's failure to advise counsel as how to continue with the case. I granted counsel's motion. As in I.K.K. Associates , El Mexicano was decided on different facts than those that are before me in the instant case. In that case, there was a proper motion to withdraw before me, Respondent was still available to receive service and had not ceased business. In the instant case, not only is there no proper motion before me pursuant to 28 C.F.R. §§ 68.28 and 68.33, but Respondent has ceased business and is not available to accept service.

I find that the instant case is most in line with United States of America v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 284 (1/4/91), wherein Respondent's attorney of record "offered a notice of withdrawal from the (instant) proceeding effective immediately" to the ALJ. Id. at 1. In that case, notice was sent to the ALJ that the Respondent's entire interest in the business had been sold and that the Secretary of the business, who was also the registered agent, was no longer employed by Respondent or in possession of any records of the corporation. Also filed, were documents averring that Respondent had not responded to his attorney's letters, that Respondents had relocated to the West Indies and that Respondent's current address was provided by an allegedly knowing person. In Nu Look Cleansers, the ALJ found that there was still disputed action, that no other individual had been "clearly disclose(d)" who had the power to accept service on Respondent's behalf, that counsel was the only one with "unquestionable power to accept documents on Respondent's behalf", and that counsel's office was the only place where the documents could be effectively delivered. Based on those findings, the ALJ ruled that it was inappropriate to allow the withdrawal of counsel until either the action was completed, another person was identified who had the power to accept service or another attorney filed a notice of appearance.

In this case, the attorney of record asserts that since service of the Complaint, Respondent has ceased business and does not respond to his letters or telephone calls and that he believes that he may

withdraw from representation and ignore 28 C.F.R. 68.33 as well as 28 C.F.R. 68.28. However, his belief is erroneous.

I find that, as in Nu Look Cleaners, there is still disputed action at hand, no person or entity other than counsel of record has the clear power to accept service, that there is no other address at which documents may be served, and that no other attorney has filed a notice of appearance. Therefore, based on the fact that I do not have a proper motion for withdrawal before me and the reasoning stated above, at this time I deny counsel's informal request to withdraw as counsel of record in this case.

With regard to Complainant's Motion For Default, Respondent was represented by competent counsel and simply did not file any Answer to the Complaint. As such, and pursuant to 28 C.F.R. 68.9(b), Complainant may file Motion for Default Judgment. The failure of K & M Fashion, Inc. to file a timely Answer to the complaint constitutes a basis for entry of a judgment by default within the discretion of the administrative law judge pursuant to 28 C.F.R. §68.9(b).

In prior cases before me, where INS has motioned for default but there was reason to believe that a pro se respondent was inadequately notified, or otherwise unaware of the risk that failure to file an Answer within thirty (30) days of receipt of the Complaint, I have issued an Order To Show Cause Why Default Judgment Should Not Issue. This is not such a case. Thus, I shall not enter an Order To Show Cause prior to ruling on Complainant's Motion for Default.

The regulations at 28 C.F.R. 68.52(c) states in pertinent part, that:

> (1) If upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity named in the complaint has violated section 274A(a)(1)(A) or (a)(2) of the INA, the order shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of:
>
> (A) Not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred;
>
> (iv) With respect to a violation of section 274A(a)(1)(B) of the INA, 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.

Complainant has assessed civil monetary penalties in the following amounts:

1. For Count I, twenty (20) individuals not authorized for employment in the United States, assessed at One Thousand Five Hundred Dollars ($1,500) for each violation for a total of Thirty Thousand Dollars ($30,000);

2. For Count II, twelve (12) individuals for "paperwork" violations at Five Hundred Dollars ($500) for each violation for a total of Six Thousand Dollars ($6,000)

3. For Count III, three (3) individuals for "paperwork" violations at Four Hundred ($400) each violation for a total of One Thousand Two hundred dollars ($1,200);

4. For Count IV, five (5) individuals for "paperwork" violations at Two Hundred Dollars ($200) for each violation for a total of One Thousand Dollars ($1,000);

5. For Count V, Six (6) individuals for "paperwork" violations at Two Hundred dollars ($200) for each violations for a total of One Thousand Two hundred ($1,200); and

6. For Count VI, two (2) individuals for "paperwork" violations at One Thousand dollars ($1,000) for each violation for a total of two hundred dollars ($200).

I specifically note that the Respondent has not offered any evidence in mitigation of the proposed civil money penalties pursuant to 28 C.F.R. 6 8.52(c)(iv). Therefore, as no Answer has been filed by Respondent within thirty (30) days of its receipt of the Complaint, or even as of this date, and no response to the government's Motion for Default Judgment having been filed by Respondent, I hereby find K & M Fashion, Inc. in default as it has failed to plead or otherwise defend against the allegations of the Complaint.

ACCORDINGLY, in view of all the foregoing, it is found and concluded that Respondent is in violation of 8 U.S.C. §1324a(a)(2) with respect to its continuing to employ twenty (20) individuals named in Count I, knowing that the persons were unauthorized for employment in the United States, and in violation of 8 U.S.C. §1324a(a)(1)(B) for failure to comply with the employment verification requirements with regard to the individuals named in Counts II through VI.

As such, **IT IS HEREBY ORDERED**:

1. That it is reasonable and appropriate that Respondent pay a civil money penalty in the amount of Thirty Thousand dollars ($30,000) for the violations in Count I of the Complaint and Nine Thousand Six Hundred dollars ($9,600) for the violations in Counts II through VI for a total civil penalty of Thirty-Nine Six Hundred dollars ($39,600);

2. That respondent cease and desist from further violating 8 U.S.C. §1324a;

3. That all hearings in this proceeding are canceled;

4. That all Motions not previously ruled upon are hereby denied; and,

5. That upon service of this Final Decision and Order on Default the Respondent's attorney of record, Wilfred Brooks, is permitted to withdraw as attorney of record of behalf of K & M Fashions, Inc.

This Decision and Order on Default shall become the final Order of the Attorney General, unless one of the parties files a written request for review of the decision together with supporting arguments with the Chief Administrative Hearing Officer, 5107 Leesburg Pike, Suite 2519, Falls Church, VA 22041, as prescribed in 28 C.F.R. 68.53, or the Chief Administrative Hearing Officer modifies or vacates it within thirty (30) days of the date of this Order. 28 C.F.R. 68.53.

IT IS SO ORDERED this 16th day of March, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge