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. 92A00052
CARLOS CRUZ, d.b.a. LA ROSA BAKERY aka LA ROSA BAKERY AND RESTAURANT, Respondent.	)	

ORDER REGARDING CIVIL MONEY PENALTY

I. *History of the Case*

On July 1, 1992, I issued a Final Order in which I set out the procedural history of this case and granted Complainant's Motion for Default concerning only Respondent's liability. The Order was based on Respondent's nonfiling of an Answer and, thus, its waiver of its right to appear and contest the allegations in the Complaint filed on March 4, 1992. 28 C.F.R. 68.9(b)[1]. Additionally, I held that the amount of civil penalties to be assessed would be determined after Complainant's submission of a statement regarding the application of the factors enumerated in 28 C.F.R. 68.52(c)(iv). Respondent was also granted the right to submit such a statement.

Complainant has timely filed its statement regarding the factors set out in 28 C.F.R. 68.52(c)(iv); Respondent has not. At this time, deter-mination of the amount of civil penalties is appropriate.

[1] 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).

However, prior to my discussion of the civil penalties, I will address an issue raised by Complainant in its Memorandum Regarding Civil Monetary Penalty. Complainant has argued that since Respondent failed to file an Answer, Respondent has defaulted with regard to both liability and penalty and has waived any right to object to the civil monetary penalty assessed in the Complaint since the amount was within the statutory limits. 8 U.S.C. 1324a.

II. *Administrative Law Judge May Allow Respondent, Who has Suffered Default on Liability, to Contest the Amount of Civil Penalties Requested by Complainant*

In an employer sanctions case, after Respondent requests a hearing before the Administrative Law Judge, Complainant will file a Complaint if it chooses to proceed with the case. The complaint consists of separate and distinct parts, a short plain statement regarding the court's jurisdiction, a statement regarding the parties, a statement(s) regarding the claims to be proven which will allow the court to grant relief, i.e., the allegations, and a statement of the relief which the complainant feels it is entitled to, i.e., prayer or demand for relief. The Complaint filed in this case is so constructed.

After the Complaint is served, Respondent has thirty (30) days to file its Answer. 28 C.F.R. 68.9(a). "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). Note that there is no entitlement to a default judgment as a matter of right even when the Respondent is technically in default; the regulation specifically leaves the determination of this issue to the judge's discretion. 28 C.F.R. 68.9(b).

As previously noted, Respondent in this case did not file its Answer and I granted a default judgment on liability only and allowed the parties to submit argument regarding the appropriate amount of the civil penalties to be assessed. This has been my normal procedure wherein a Respondent has not filed an answer.

Now, the plain language of the regulation states that the allegations cannot be contested subsequent to the nonfiling of a timely Answer. However, there is no directive or preclusion of Respondent's right to contest any other portion of the Complaint, i.e., jurisdiction or demand for relief, when no timely Answer is filed. Therefore, I find that, since

the allegations in a complaint are separate and distinct from the prayer for relief, and the Rules of Practice and Procedure state that upon the nonfiling of an Answer Respondent loses its right to contest only the Complaint's allegations, Respondent is not precluded, under these facts, from contesting the amount of relief requested by Complainant.

I note that there should be no concern that, under this interpretation, Respondent might have an opportunity to escape penalty since a finding of default on the liability automatically triggers a minimum mandatory penalty. 8 U.S.C. 1324a. Further, the Court's interpretation of the regulation in this manner does not prejudice Complainant such that it will not be entitled to the relief prayed for. This interpretation simply allows Respondent, at the Court's discretion, an opportunity to bring pertinent information to the court's attention regarding the appropriateness of the requested penalties.

I find further support for my findings in a review of Federal Rule of Civil Procedure 55 (hereinafter Fed. R. Civ. P. 55), which deals with default judgments, and its application. See 28 C.F.R. 68.1. This review shows that default is considered a drastic remedy, is not favored in modern courts and that doubts are usually resolved in the defendant's favor. See, e.g., Charlton L. Davis & Co. v. Fedder Data Center, Inc., 556 F.2d 308 (5th Cir. 1977); Davis v. P a rkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962). Further, not only does Fed. R. Civ. P. 55 give the judge discretion to hear argument on the relief amount requested when it is not an amount certain, but upon defendant's contention of the damage amount claimed by plaintiff, defendant is entitled to trial on that issue. 10 Charles A. Wright, et al., Federal Practice and Procedure, §2684 (1992). In fact, the rule states, in part, that:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States. (Emphasis added).

Fed. R. Civ. P. 55(b)(2).

An essential question then, when considering a Fed. R. Civ. P. 55 default, is whether the amount plaintiff is requesting in relief is for a sum certain or for "an amount which by computation can be made

certain". According to Wright and Miller, the certainty requirement cannot be satisfied simply by requesting a specific amount of relief and must be established as reasonable under the circumstances. 10 Charles A. Wright, et al., Federal Practice and Procedure, §2683 (1992); U.S. v. Miller, 9 F.R.D. 506 (D.C. Pa. 1949); Ace Grain Company v. American Eagle Fire Insurance Company, 11 F.R.D. 364 (D.C. N.Y. 1951).

In an employer sanctions case, where Respondent is charged with knowingly hiring, recruiting or referring for a fee an unauthorized alien or continuing to employ such individual, Complainant may demand relief in any amount from at least two hundred fifty dollars ($250) to not more than two thousand dollars ($2,000) for a first offense, from at least two thousand dollars ($2,000) to not more than five thousand dollars ($5,000) for a second offense and from not less than three thousand dollars ($3,000) to not more than ten thousand dollars ($10,000) for subsequent violations. In the case where Respondent is charged with violation of paperwork requirements, Complainant may demand relief in amounts of not less than one hundred dollars ($100) but not more than one thousand dollars ($1,000) for each individual in each violation.

The statute and the regulations give no guidance on how Complainant should determine the appropriate amount of civil penalty to request; only in the case of paperwork violations are five factors which must be considered listed. 8 U.S.C. 1324a(e)(5); 28 C.F.R. 68 et al. In fact, it has taken judicial interpretation to hold that the Administrative Law Judge may consider additional factors. U.S. v. Pizzuto, OCAHO Case No. 92A00084 (8/21/92). Thus, it can be easily seen that Complainant basically has free rein in determining the amount to put forth in its prayer for relief.

Obviously, when Complainant has so much discretion as to the relief amount it requests, there is no amount certain. Applying the reasoning associated with Fed. R. Civ. P. 55 to the case at hand, not only must Complainant justify its requested relief amount, but Respondent is entitled to contest the amount requested where default has been granted as to liability only. Therefore, I find that Fed. R. Civ. P. 55 supports my finding that Respondent in this case may, at my discretion, contest the amount of civil penalties requested in the Complaint even after I have granted default as to liability.

III. *Civil Penalties*

Section 274A(e)(5) of the Immigration and Nationality Act (Act), which corresponds to 28 C.F.R. 68.52(c)(iv), states:

> 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 violation.

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant asserts that, at the time of inspection, Respondent employed six (6) individuals. Complainant further assets that it has no other relevant information regarding this factor. Respondent has not submitted any argument.

Although the information at hand is slight, I find that Respondent's business is small. See e.g., U.S. v. Huang, 1 OCAHO 300 (2/25/91). As such I find that Respondent is entitled to mitigation in Counts I, II and III based on this factor.

2. Good Faith Of The Employer

Complainant asserts that Respondent received an educational visit on August 17, 1987. On July 1, 1992, Complainant's agents visited Respondent after getting a "lead" regarding employment of unauthorized individuals and found the individual named in Counts I and II apparently working without any immigration documents. Although arrested and returned to Mexico, this individual was again found at Respondent's business the following day, July 2, 1992.

On July 3, 1992, Complainant states that it returned to Respondent's business with an Employer Handbook at which time Respondent allegedly admitted not having any I-9 Forms for any employee. Although Respondent did complete the I-9 Forms prior to inspection, Complainant alleges that three of them were improperly completed and that no I-9 Form was prepared and/or presented for the unauthorized individual. Respondent has made no argument with regard to this factor.

Although in U.S. v. American McNair, 1 OCAHO 285 (1/8/91) at 13, I held that good faith was a neutral factor where Respondent cooperated with Complainant and tried to obtain Forms I-9 prior to Complainant's educational visit but procrastinated in completing the Forms I-9 until inspection was imminent. In this case however, I find Respondent did not cooperate with Complainant as the unauthorized individual was found at Respondent's establishing the day following his arrest. Therefore, I find that Respondent has not shown good faith. As such, Respondent is not entitled to mitigation in Counts I, II or III based on this factor.

3. Seriousness of the Violation

Complainant argues that, for Counts I and II, both the knowing employment of an unauthorized individual and the failure to prepare an I-9 Form for this individual are serious violations of the Act. Com-plainant further argues that, in regard to Count III, although Respon-dent completed I-9 Forms for his other employees, they were improperly completed and not prepared until after Respondent received a Notice of Inspection. Respondent has made no argument regarding this factor.

I find that, based on the totality of the record, these are serious violations. Therefore, I find that Respondent is not entitled to mitigation in Counts I, II and III based on this factor.

4. Whether or not the Individual was an Unauthorized Alien

Complainant argues that Respondent employed one unauthorized alien at time of the employer survey. Respondent makes no argument regarding this factor.

I will follow my reasoning in U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91) and mitigate the civil penalty amount in the violations not involving the illegal alien, i.e. Count III, but not mitigate in the violations involving the illegal alien in Counts I and II.

5. History of Previous Violations of the Employer

Complainant states that there were no prior violations by this employer. Respondent has made no argument on this factor. Therefore, I will mitigate the civil penalty in Counts I, II and III based on this factor.

B. Amount of Civil Penalty

Complainant has requested that I assess a total civil penalty in this case of two thousand two hundred fifty dollars ($2,250) which reflects a civil penalty of one thousand dollars ($1,000) for the one violation in Count I, five hundred dollars ($500) for the one violation in Count II, and two hundred fifty dollars ($250) for each of the three violations in Count III. After a review of the record and Complainant's arguments, I find that, using a judgmental approach, the amount of civil penalties requested by Complainant is reasonable and appropriate. As such, the total civil penalty for the violations of Count I, II and II will be assessed at two thousand two hundred fifty dollars ($2,250). The civil penalty amount is due and payable to Complainant on or before thirty (30) days from the date of this Order.

Under 28 C.F.R. 68.53(a) a party may file, with the Chief Administrative Hearing Officer, a written request for review of this Decision and Order together with supporting arguments. Within thirty (30) days of the date of the Administrative Law Judge's Decision and Order, the Chief Administrative Hearing Officer may issue an Order which modifies or vacates this Decision and Order.

IT IS SO ORDERED this 11th day of September, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge