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
	)	OCAHO Case No. 92A00090
KIM DONG HUI t/a CHESTNUT GOURMET RESTAURANT WEST, Respondent	)	

FINAL DECISION AND ORDER ON DEFAULT
(December 18, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Richard J. Sharkey, Esq., for Complainant.

I. *Procedural History*

On July 23, 1991, the Immigration and Naturalization Service (Complainant or INS) served a notice of intent to fine in the amount of $6,000.00 pursuant to 8 U.S.C. §1324a, on Kim Dong Hui t/a Chestnut Gormet (sic) Restaurant West, 1614 Chestnut Street, Philadelphia, Pennsylvania 19103 (Respondent or Hui). By letter dated August 19, 1991, H. Ronald Klasko, Esq., (Klasko) requested a hearing on behalf of Hui. On May 1, 1992, INS filed a complaint against Hui t/a Chestnut Gourmet Restaurant West. On May 26, 1992, Klasko filed a timely answer to the complaint.

On June 23, 1992 and July 8, 1992, telephonic prehearing conferences were held, as scheduled by prior agreement among counsel and the judge. At the second conference, Hui's attorney advised that he had been unable to locate his client.

On September 2, a brief scheduling conference was held. On September 9, Klasko filed a motion requesting permission to withdraw as counsel for Hui. As the basis for this request, counsel recited his inability to represent Hui as he has "no ability to communicate with him" and "efforts to do so have been to no avail." Klasko's motion was

discussed, inter alia, at the September 30 prehearing conference. During the conference, I granted the motion, as confirmed by the Third Prehearing Conference Report and Order dated October 1, 1992.

On November 5, 1992, INS filed a motion asking that I order Hui to participate in a telephonic hearing, noting that failure to respond to an order directing his participation may result in a determination that he has abandoned his request for hearing. 8 C.F.R. §68.37(b) (1991). Such a determination can provide the premise for a default judgment adverse to Hui and in favor of Complainant. 8 C.F.R. §68.37(c). I issued such an order in lieu of executing a format tendered by Complainant. Noting that the October 1 order had scheduled a telephonic prehearing conference "for 10:00 a.m. on Monday, November 30, 1992 in three other cases involving the same INS counsel and Hui's former attorney," I provided as follows:

> This order directs Hui to communicate with the office of the judge in writing or by telephone (703/305-0861) not later than 4:00 p.m., Friday, November 27, 1992. Hui is directed to advise of a telephone number where he can be reached in order to participate in the November 30 telephonic prehearing conference. Unless Hui so notifies my office and participates in the conference as directed in this order, I will consider treating his request for hearing as abandoned, and, may issue a default judgment against him.

The conference was held as scheduled on November 30, 1992. At the outset Complainant made an oral motion for default in the case of U.S. v. Kim Dong Hui t/a Chestnut Gourmet Restaurant West. During the conference, I informed counsel that absent notification from Respondent Hui before the close of business that day, i.e., November 30, I would rule in favor of Complainant's motion. As mentioned at the conference, the November 10 order directed Hui to "communicate with the office of the judge in writing or by telephone . . . not later than 4:00 p.m., Friday, November 27, 1992."

The envelope containing that order was returned by the Postal Service to the judge's office marked "MOVED LEFT NO ADDRESS."

II. *Discussion*

In light of the unavailability of Respondent to both the bench and to counsel, I hold that Respondent has abandoned the case and hereby grant Complainant's motion.

A. Liability

The rules of practice and procedure and prior issuances in this case sufficiently apprised Respondent of the peril of his failure to participate in the case as directed by the judge. He has properly served with all issuances by the bench. 28 C.F.R. §68.6(a). As held in an OCAHO case involving a respondent's failure to respond to orders by the judge, such omission "cannot be permitted to frustrate sound case management." U.S. v. El Dorado Furniture Mfg. Inc., 3 OCAHO 417 (4/2/92) at 3. As in El Dorado, by virtue of Respondent's failure to participate in the conference as directed, I deem Respondent to have abandoned his request for hearing.

> A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned . . . a request for hearing if:
>
> (1) A party or his representative fails to respond to orders issued by the Administrative Law Judge;

28 C.F.R. §68.37(b) (1991).

See also, U.S. v. Diamond Construction, Inc., 3 OCAHO 451 (9/8/92); U.S. v. Nu Line Fashions, Inc., 1 OCAHO 147 (3/30/90). Accord Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92) (a case under 8 U.S.C. §1324b).

Moreover, Respondent's failure to respond to the November 10, 1992 order to respond and participate in the November 30, 1992 telephonic prehearing conference renders him vulnerable to sanctions. These sanctions are tantamount to proof of Complainant's case and to default of Respondent's own case. Diamond Construction, 3 OCAHO 451; Palancz, 3 OCAHO 443; U.S. v. Taewon Fashion Corp., OCAHO Case No. 90100231 (11/30/90).

B. Civil Money Penalty

Very early in our practice under 8. U.S.C. §1324a, the allegations of the complaint were treated as admitted, with no distinction as between liability and penalty, where the employer failed to answer the complaint. U.S. v. S. Masonry Fencing Company, 1 OCAHO 4 (5/11/88) at 3. Accord U.S. v. Rodriguez, 1 OCAHO 20 (6/27/88) at 4 ("Respondent has waived its right to appear and contest the allegations of the amended complaint" without distinction between liability and penalty); U.S. v. First Wok Restaurant, 1 OCAHO 52 (4/26/89); U.S. v. El Mexicano Taco Shop, 1 OCAHO 59 (5/31/89). Abandonment of the complaint is tantamount to failure to answer the complaint. It follows

that where the respondent is defaulted for having abandoned his defense, i.e., failing, in violation of the Judge's orders, to participate, the result has been the same. U.S. v. Diamond Construction, Inc., 3 OCAHO 451 (9/8/92); U.S. v. Nu Line Fashions, Inc., 1 OCAHO 147 (3/30/90).

A line of OCAHO decisions directs the parties to file submissions on civil money penalties, notwithstanding entry of default on liability. U.S. Cruz, 3 OCAHO 453 (9/11/92); U.S. v. McNeil Marine, Ltd., OCAHO Case No. 92A00112 (11/30/92); U.S. v. Kampe, 3 OCAHO 462 (11/9/92). Cruz suggests that in consonance with FED. R. CIV. P. 55(b)(2), it is appropriate in cases under 8 U.S.C. §1324a to invite the parties to file submissions on penalty after entry of a default on liability. The rationale for a Rule 55 inquiry is that it may be necessary for the judge to take evidence to determine the amount of damages at issue. Rule 55 authorizes the clerk of court to enter a default where the plaintiff's claim shows a sum certain or if the amount at issue can be made certain by computation.

In the present case, the INS assessment is for a sum certain and within statutory parameters. Accordingly, I prefer not to inquire into the rationale for the penalty assessment. Particularly where repeated efforts to reach Respondent have been unavailing, further inquiry is inappropriate. An inquiry at this juncture would result in delay, without providing any benefit to Respondent.

It has been my consistent understanding that a default for failure to plead or otherwise participate in the proceeding as directed, invites a full and final unitary disposition. I remain of the opinion that there is no need to bifurcate this case to take evidence or argument on the civil money penalty issue.

III. *Ultimate Findings, Conclusions, and Order*

The hearing and prehearing conference previously scheduled are canceled.

In addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That Hui employed the four individuals identified in Count I of the complaint, in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a), as more particularly described in that count.

2. That Hui employed the three individuals identified in Count II of the complaint without preparing employment verification forms (Forms I-9) for them, in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B), as more particularly described in that count.

3. That Hui employed the two individuals identified in Count III of the complaint without properly completing section 2 of the employment verification forms (Forms I-9) for them, in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B), as more particularly described in that count.

4. That Hui is required to pay a civil money penalty in the sum of $4,000.00 for the violations in Count I, in the sum of $1,500.00 for the violations in Count II, and in the sum of $500.00 for the violations in Count III, i.e., a civil money penalty in the aggregate sum of $6,000.00.

5. That Hui will cease and desist from any further violations of 8 U.S.C. §1324a.

6. That this Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(a) (1991). As provided at 28 C.F.R. §68.53(a)(1), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer, shall have modified or vacated it. Except for ministerial or accounting corrections, the judge no longer retains power over this case. As to judicial review, see also 8 U.S.C. §1324a(e)(8), 28 C.F.R. §68.53(a)(3) (1991).

SO ORDERED.

Dated and entered this 18th day of December 1992.

MARVIN H. MORSE
Administrative Law Judge