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. 94A00015
CONTINENTAL SPORTS CORP., Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

On January 19, 1994, the Immigration and Naturalization Service ("Complainant" or "INS") filed a Complaint Regarding Unlawful Employment ("Complaint") with the Office of the Chief Administrative Hearing Officer ("OCAHO") against CONTINENTAL SPORTS CORP. ("Respondent").

On March 30, 1994, the Complainant filed a Motion for Default Judgment. In its Motion, Complainant correctly states that the rules and regulations which guide these proceedings provide for a judgment by default when a Respondent has failed to answer or otherwise defend itself against the allegations contained in the Complaint. See 28 C.F.R. § 68.9(b).

On April 15, 1994, I issued an Order to Show Cause Why Default Judgment Should Not Issue. I gave Respondent until May 2, 1994 to respond to the order with a formal legal explanation and a request for leave to file a late Answer.

On May 2, 1994, Respondent filed a Motion For A Leave to File Late Answer, an Affidavit in Support of Respondent's Motion For Leave To File Late Answer, Respondent's Memorandum In Support of Leave To File Answer and Deny Complainant's Motion For Default Judgment, and an Answer to Complaint Regarding Unlawful Employment.

In the Affidavit In Support of Respondent's Motion For Leave To File Late Answer, Respondent's counsel states that in the months of February and March, 1994, he was lead counsel in a lawsuit in the county of Spokane, in Washington state.

Respondent's counsel goes on to say, "This case was scheduled to begin trial on March 21, 1994 and the Plaintiffs were requesting in excess of $400,000.00 in damages." Respondent's counsel states that he was also counsel on another case during this time, and therefore delegated the responsibility of responding to the complaint to a staff person in his office. Respondent's counsel states that he was unaware that the answer had not been filed and that Complainant had filed a motion for default, until his client, Continental Sports Corp. brought it to his attention. Respondent's counsel requests that his Motion for Leave to File a Late Answer be granted as he does not believe his client, Continental Sports Corp. should be penalized for his inadvertence.

In Respondent's Memorandum In Support of Leave to File Answer and Deny Complainant's Motion for Default Judgment, Respondent requests that his failure to file an answer by March 2, 1994, not be construed as a waiver of Respondent's right and that the Court exercise its discretion and deny the Complainant's Motion for Default Judgment. Respondent states that, "[b]asically, there is no factual dispute with regard to the timeliness of the failure to file an answer." Respondent cites Wood v. Detroit Auto and Inter-Insurance Exchange, 1981, 321 N.W. 2d 653, 660 to support his argument that default judgments are not favored in the law and that they have been described as one of the most drastic actions a court may take to punish disobedience to its command.

Respondent goes on to point out, "In exercising its discretion to vacate the default judgment, the Court considers four factors: Primarily (1) the existence of substantial evidence to support, at least, prima facia, defense to the claim asserted; (2) the reason for the mistake, inadvertence surprise or excusable neglect; and secondarily (3) the parties' diligence in asking for relief following notice of entry of the default; (4) the effect of vacating a judgment on the opposing party.

Respondent further states that, "[T]he Federal Courts have on many occasions dealt with setting aside default judgments when it is not the parties' fault a judgment was entered but the attorney's. Leshore v. County of Worchester, C.A. 1st, 1991, 945 F.2d 471; New Field Int'l Sales, Inc. v. Salem, D.C. Ill. 1986, 116 F.R.D. 215; and Sprague &

Rhodes Commodity Corp. v. M/V Procer Fulgencio Yegros, D.C.N.Y. 1985, 617 F.Supp. 911." "Furthermore, the Federal courts have held that when the party is blameless and the attorney is at fault, default judgment should ordinarily be set aside, but when the party is at fault, the party must adequately defend its conduct in order to show excusable neglect. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., C.A. 4th 1988, 843 F.2d 808.

In its Answer to Complaint Regarding Unlawful Employment, filed on May 2, 1994, Respondent denies the allegations contained in Count I because a good faith effort was made to locate the employment eligibility verification forms that were prepared, and some were found, but, Respondent states, in no way, did it attempt to fail to make available for inspection the Form I-9's, as they may be in the control of someone other than the Respondent due to the change of administration and management.

Respondent states, "that they, in fact, did comply with 8 U.S.C. § 1324a (a)(1)(B), but evidence of that compliance is now missing. Furthermore, Respondent believes the penalties alleged to be imposed are extremely excessive, especially in light of the names of the thirty-four people listed in Count I."

Respondent goes on to deny the allegation contained in Count II, Count III and Count IV for the same reasons as set forth in the answer to Count I. Respondent also asserts that the penalties in Count II, III and IV are excessive for the same reasons as set forth in answer to Count I.

Finally, Respondent requests that the Administrative Law Judge issue an Order "directing the INS to allow Respondent to ameliorate the requests for penalties in this matter and to explain to the ALJ the mitigating circumstances concerning this matter especially the lack of control the absent owner had over the administration of the coliseum with regard to record keeping and storage of records."

Federal and OCAHO decisions consistently hold that default judgments are generally not favored and any doubts are resolved in favor of a trial on the merits. See United States v. Zoeb Enterprizes Inc., dba Papa Sam's Deli, dba Papaya Paradises, 2 OCAHO 356, at 2 (July 24, 1991) (citing federal and OCAHO precedent). OCAHO rulings indicate that a default judgment will be entered unless good cause is shown by Respondent for the late filing U.S. v. Zoeb Enterprizes supra at 3; United States v. DuBois Farms, 1 OCAHO 225 (August 29, 1990)

at 2; and U.S. v. Onion River Sports, Inc., OCHAO Case #93A000167 (ALJ held statements concerning attorney's negligence were forthright and understandable, and the fact that he completed Respondent's answer and motion pleadings in a timely manner, but inadvertently failed to mail them to this office shows he has acted in "good faith.")

The federal cases provide guidance in what factors a court should consider in determining the merits of a motion for default judgment. The federal cases hold that a number of factors may be considered including "the amount of money potentially involved; whether material issues of fact or issues of substantial importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds are clearly established or are in doubt. Furthermore, the court may consider whether the default was caused by a good faith mistake or excusable neglect; how harsh an effect a default judgment might have; and whether the court thinks it later would be obliged to set aside the default on defendant's motion." 10 Federal Practice and Procedure, supra at 423-427 (footnotes and citations omitted).

Although the answer in this case was filed some two months late, I do not find that Respondent's counsel's failure to file a timely answer was based on bad faith or willfulness. I find rather that the reasons for the late filing were caused by counsel's inadvertence and excusable neglect. See Anilinia Fabrique de Colorants v. Aakash Chems. and Dyestuff, Inc., 856 F.2d 837 (7th Cir. 1988) (Held that in the absence of any bad faith or willfulness, the district court abused its discretion in entering default judgment); Eitel v. McCool, 782 F.2d 1470 (9th Cir. 1986) (Held that the district court did not abuse its discretion in refusing to enter a default judgment in a malpractice action against an attorney when the district court could have had serious reservations about the merits of the substantive claim based upon the pleadings, the parties disputed material facts in the pleading, the failure to answer was excusable neglect arising out of settlement negotiations and the attorney responded promptly after negotiations failed); and Katz v. Moregenthau, 709 F.Supp. 1219 (D.C.N.Y. 1989) (Default judgment did not have to be entered against three defendants who filed answer to civil rights complaint in the form of a motion to dismiss, 30 days late; attorneys representing multiple defendants stated that they inadvertently left out three defendants when requesting extension of time to file the motion to dismiss and the record did not suggest that plaintiff was prejudiced by the late filing.).

In summary, I am denying Complainant's motion for default judgment in this case because Respondent's counsel acted in good faith, his failure to file a timely answer was inadvertent, and I do not find that the filing of a late answer prejudiced Complainant's case in any way. I accept Respondent's late answer as filed.

Further I am DENYING Complainant's Motion To Continue The Time Limit For The Filing Of Its Response To The Late Filing Of Respondent's Answer And Request For Late Filing, which was filed with this office on May 17, 1994.

SO ORDERED this 25th day of May, 1994, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge