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. 93A00134
MUSHTAQ AHMED CHAUDRY, Respondent.	)	

FINAL DECISION AND ORDER
(1) FINDING ABANDONMENT OF RESPONDENT'S REQUEST FOR HEARING
(2) GRANTING COMPLAINANT'S MOTION TO IMPOSE SANCTIONS
(3) SUA SPONTE FINDING FOR SUMMARY DECISION AND
(4) GRANTING CIVIL MONEY PENALTIES

(July 19, 1994)

Appearances:

For the Complainant
Alan S. Rabinowitz, Esquire

For the Respondent
A. Waheed Chaudry
Mushtaq Ahmed Chaudry, Pro se

Before:

E. MILTON FROSBURG
Administrative Law Judge

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I. *Procedural History*

I have decided to give a detailed procedural history of this case. Although some portions may seem repetitive, I believe it is important to restate the presented arguments to provide a clear picture of the case's history.

On June 8, 1993, Respondent, Mushtaq Ahmed Chaudry, was personally served with a Notice of Intent to Fine (NIF) by Complainant. The two-count NIF stated that Complainant intended to order Respondent to pay a civil money penalty in the amount of $3,000 for violations of the Immigration and Nationality Act (ACT).

Count I alleged two violations of the knowing hire and/or continuing to employ provisions of 8 U.S.C. § 1324a. Complainant requested a $1,000 civil money penalty for each of these violations and an order to cease and desist from further violations of § 1324a(a)(1)(A) of the ACT. Count II alleged that Respondent had failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for the two individuals named in Count I. Complainant requested $500 in civil money penalties for each of these violations.

On July 2, 1993, Respondent filed a timely letter requesting a hearing and informed Complainant that his former attorney no longer represented him; he would be appearing pro se.

On July 12, 1993, Complainant filed a Complaint incorporating the NIF and the hearing request. The Complaint conformed to the NIF.

On July 13, 1993, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint Regarding Unlawful Employment. Said Notice and Complaint were served on Respondent on July 17, 1993, as evidenced by the signed file copy of the United States Post Office Certified Return Receipt. These documents informed Respondent that, among other things, he had the right to file an Answer and to appear and give testimony at a hearing. Respondent was also cautioned that failure to file an Answer within the time provided, i.e., thirty (30) days from receipt of the Complaint, might be deemed to be a waiver of his right to appear and contest the Complaint's allegations leading the Administrative Law Judge to possibly enter a judgment of default along with any and all appropriate relief.

On July 21, 1993, as is my usual practice, I issued and served the parties with a Notice of Acknowledgment. Respondent was again cau-

tioned that an Answer pursuant to 28 C.F.R. § 68.9 needed to be timely filed to avoid the possibility of a Default Judgment.

On August 12, 1993, pro se Respondent filed his Answer denying each and every allegation of the Complaint and setting forth five (5) affirmative defenses. These defenses were that: (1) Complainant failed to state a cause of action upon which relief could be granted; (2) the Complaint erroneously alleged that 12212 Spruce Grove Place, San Diego, California 92131 was Respondent's place of business; (3) Respondent was not the named aliens' employer; (4) Respondent did not knowingly violate, or continue to violate, any law; and, (5) Respondent was not responsible for preparing or retaining any Form I-9 for the individuals named in the Complaint since he was not their employer. Respondent requested dismissal of the Complaint and attorney's fees and costs.

On August 13, 1993, I issued an Order scheduling an in-person prehearing for August 27, 1993, with Alan Rabinowitz, Esquire, for Complainant, the pro se Respondent, and Respondent's brother, A. Waheed Chaudry (Mr. Chaudry) as interpreter. The purpose of the conference was to discuss the possibility of settlement and other issues.

The parties were not able to reach settlement during the prehearing but requested additional time for negotiation. As such, I directed them to continue their discovery process as they continued their negotiations. Complainant was directed to file a status report on or before September 14, 1993, when I would set a discovery timetable and hearing date.

On or about September 13, 1993, Complainant filed his status report and asserted that despite meetings with two of its key witnesses and with Respondent's brother, Mr. Chaudry, settlement was not reached. Complainant noted that although Respondent had been urged to appear at the meeting, he had not.

Complainant also asserted that it appeared that this case would proceed towards an evidentiary hearing and planned to immediately begin appropriate and authorized discovery. Complainant voiced a concern that there was a potential conflict in interest with Mr. Chaudry representing his brother in this case.

As such, on September 22, 1993, I rescheduled the September 23, 1993 prehearing conference until October 8, 1993. The prehearing conference was to discuss these issues raised by Complainant. I ordered Respondent to appear. On September 30, 1993, I issued an order

changing the location of the in-person prehearing conference and again ordered Respondent to appear.

On October 6, 1993, Respondent's brother, Mr. Chaudry, filed a Motion to Change the Location of the In-person Prehearing Conference along with a request that all matters concerning this case be addressed to him. Mr. Chaudry cited to 28 C.F.R. § 68.33(b)(6) and stated that Respondent had orally authorized his representation on September 9, 1993, and had executed the Power of Attorney which was attached. Mr. Chaudry asserted that he had been active in settlement negotiations to date and had been working on this case since its inception.

Mr. Chaudry also argued that the new location for the in-person prehearing was prejudicial to Respondent as it was in the Federal Building where Complainant, its agents, and counsel were located. Mr. Chaudry stated that this proximity gave Complainant a psychological advantage over Respondent and would intimidate him. Mr. Chaudry argued that, for fairness, the court should change the conference location, or conduct a prehearing telephonic conference, if no other location were available.

On October 7, 1993, I canceled the October 8, 1993 Prehearing Conference due to my illness.

On October 13, 1993, Complainant filed its opposition response to Respondent's pending motion. Complainant strongly disagreed with Mr. Chaudry's psychological advantage argument and argued that, for the sake of fairness, the hearing should be held where the court determined. Complainant again addressed its concerns about Respondent's brother, Mr. Chaudry, representing Respondent in this matter.

By Order, on October 20, 1993, I rescheduled the postponed in-person prehearing conference to October 28, 1993. The site, the Immigration Courtroom at the Federal Office Building, remained the same. Respondent was directed to appear and was warned that should he not do so, he might suffer a finding that he had abandoned his request for hearing. Respondent was informed that, should he still wish to argue for relocation, I would hear argument at that time. In at least two telephone conversations with my staff, this information was also conveyed to Mr. Chaudry.

On or about October 27, 1993, citing to 28 C.F.R. § 68.58(d), Respondent filed a request with the CAHO to vacate my Order of October 20, 1993 arguing that it was prejudicial to Respondent. Mr. Chaudry based

his argument on alleged inappropriate and prejudicial statements by Complainant made at a settlement conference. Mr. Chaudry stated in his motion, that during a settlement negotiation conference:

> The complainant, (sic) counsel's statements that let the principle wait for another day and put aside high principle and belief in justice indicates that complainant counsel will do anything to deprive respondent his Constitutional Right to have a fair chance to prove his innocence and get justice. The location of the hearing is selected so that respondent can be harassed and intimidated. Court errored in selecting the location and then denying the motion to change it. This is a wrongful prosecution and the only thing respondent wants is a fair chance to prove it.
>
> Therefore, respondent requests to the Chief Administrative Hearing Officer to vacate the October 20, 1993 order.

I did not certify this interlocutory appeal or stay my October 20, 1993 Order. Mr. Chaudry also filed a Motion to Post-Pone the In-person Prehearing Conference Until the Review of the Administrative Law Judge's 10/20/93 Order by the Chief Administrative Hearing Officer. I did not rule on this Motion at that time.

On Thursday, October 28, 1993, I held the prehearing conference. The purpose of the prehearing was: 1) to hear argument and to rule on Respondent's pending Motion to Change The Location of In-person Prehearing Conference, filed on October 6, 1993; 2) to hear argument and to rule on Respondent's Motion to Postpone the In-person Prehearing Conference Until the Review of the ALJ's 10/20/93 Order by the CAHO, filed on October 27, 1993, 3) to discuss with Respondent issues surrounding his representation before this Court, and, 4) to discuss the possibility of a negotiated settlement in this case.

Only Mr. Rabinowitz, attorney for Complainant, and Mr. Chaudry appeared at the prehearing conference. Before I could discover the cause of Respondent's nonappearance, Mr. Chaudry requested permission to tape-record the conference. His request was based on the fact that the official transcript would not be available for fifteen (15) days. Complainant opposed this request since a court reporter was present who was responsible for the official transcript.

Upon consideration, I granted Mr. Chaudry's request but advised and cautioned him that the only official transcript would be the one that would be produced by the court reporter present in the courtroom. Mr. Chaudry then requested a postponement of the prehearing. I denied this request.

Mr. Chaudry then argued that the location for this prehearing conference was prejudicial to Respondent and advantageous to Complainant as it was on Complainant's "home base" as opposed to the previously scheduled location which was fair and neutral. Mr. Chaudry argued that he believed that the present hearing location was selected after an ex parte communication with the court by Complainant and that Respondent's alternative suggestion of a telephonic prehearing conference was ignored.

In response, Complainant's counsel stated that he did not believe that there was any advantage to Complainant or prejudice to Respondent in having the prehearing conference at the present site since the court would be an impartial arbiter. Counsel also noted that the Immigration Judges hold hearings in both courtrooms that Mr. Chaudry was referring to and that, generally, availability was the criteria used for selecting a site for hearings and prehearings before this court.

Prior to denying Respondent's motion, I explained to Mr. Chaudry that I did not have a courtroom at my ready disposal and must make arrangements to "borrow" a courtroom when one is needed. Additionally, I reminded Mr. Chaudry that in scheduling both a time and place for our prehearing conferences, my staff has tried to accommodate his schedule, noting that he had informed my staff that he was not available at most times on Friday because he prays at the mosque. Thus, since the courtroom which he felt was on "neutral" territory was only available to me for a brief time some Friday afternoons, in most instances, that site would not be appropriate for this case.

I stated further that, even though Mr. Chaudry believed that being on, what he termed, Complainant's "home base" was prejudicial to Respondent, I did not find that to be so. Of course, no small consequences to this issue was my impartially and I stated that I would not be influenced by the location of the prehearing conference and would see to it that the location of the prehearing conference was neutral to all parties.

Additionally, I informed Mr. Chaudry that I knew of no ex parte communication between Complainant and this court and, further, that I found it inappropriate to consider the instant issues telephonically. As such, I denied Respondent's motion.

The next order of business was Respondent's nonappearance. Despite my specific Order of October 20, 1993, and my staff informing Mr.

Chaudry that Respondent's attendance at this in-person pre-hearing conference was required, Respondent did not appear. Prior to taking action on what appeared to be a direct violation of my Order, I inquired as to the reason for Respondent's nonappearance.

Mr. Chaudry stated that Respondent had not appeared because this prehearing conference was being held in a biased location selected to harass Respondent. When I asked Mr. Chaudry if he had advised Respondent not to appear, he refused to answer. Then, in response to my statement that Respondent had deliberately avoided my Order, Mr. Chaudry stated that since my Order had been appealed, it was not valid, and further, Respondent would have appeared if the prehearing conference had been held at a different location.

I informed Mr. Chaudry that he was incorrect in his belief. Not only had I not certified his appeal, but I had not stayed my October 20, 1993 Order. See 28 C.F.R. 68. 53. Mr. Chaudry agreed that he had been advised by my staff prior to this prehearing conference that I would not certify the appeal and that I intended to proceed with the in-person prehearing conference.

As it appeared that Respondent had been influenced to avoid my direct Order, making it impossible to make determinations on the pending matters, Respondent had frustrated efforts to proceed with this case and had wasted judicial time and effort. However, I took into consideration Respondent's pro se status, as well as other factors, and in the interest of proceeding to a conclusion of this case, I did not find that Respondent had abandoned his request for hearing at that time.

I cautioned the parties that the hearing location would be determined by the OCAHO, and not by them, and that upon receipt of the CAHO's response to Respondent's appeal, I would reset this prehearing conference. At that prehearing conference, resolution of Respondent's representation, as well as Mr. Chaudry's role in this matter would be made since it appeared that Mr. Chaudry intended to be representative, witness and interpreter.

I directed Mr. Chaudry to inform Respondent that, even should I determine it to be permissible, it would not be in Respondent's best interest to have Mr. Chaudry act in all three capacities. Additionally, I stated that should I find a future attempt to deliberately frustrate the furtherance of this case, I would impose the authorized regulatory sanctions.

On November 1, 1993, the CAHO issued a Notification To Parties In Above Entitled Proceeding in which it held that no administrative action was warranted on Respondent's request to vacate my Order. See 28 C.F.R. § 68.53(d). Thus, my Order of October 20, 1993, stood.

By Order on December 7, 1993, I scheduled another prehearing conference for December 21, 1993 to be held at the United States Tax Court, Federal Building, 880 Front Street, San Diego, California. Respondent again was ordered to appear and again cautioned that under appropriate regulations I might find that he had abandoned his request for a hearing in this matter if he did not appear. See 28 C.F.R. § 68.37(b)(2).

On December 20, 1993, Mr. Chaudry spoke with my attorney-advisor and requested a postponement of the Prehearing Conference. He stated he was ill with the flu. He was advised that I would not postpone the prehearing conference but, as this short pre-hearing conference with Respondent's appearance was to resolve representation, Respondent could bring a doctor's note showing that Mr. Chaudry was ill, that he could not appear, and that Respondent wished Mr. Chaudry to represent him.

On December 21, 1993, present at the prehearing conference were Complainant's counsel, Respondent, and Mr. Chaudry.

Under oath, with Mr. Chaudry acting as interpreter, pro se Respondent stated that he wished Mr. Chaudry to be his representative before the court. As Complainant did not object further and I did not find that the Court would be prejudiced, I held that Mr. Chaudry could represent Respondent before this court.

During the Prehearing Conference, Mr. Chaudry represented that he would object to any questions being put to Respondent that were in English, and not in Respondent's native Punjabi. Complainant disputed Respondent's position that he was not fluent in English. After considering both arguments, I acknowledged Complainant's position but found that, even if Respondent spoke some English, it appeared that he was more comfortable with his native language than he was with English. Thus, questioning through an interpreter was appropriate.

I reminded the parties that, under the relevant regulations, this court was not authorized to provide an interpreter. I informed the parties that since Mr. Chaudry would be acting in a representative capacity, in

order to maintain a fair and proper proceeding, I would not allow him to act as either an interpreter or as a witness in this proceeding. Respondent indicated that he would provide his own interpreter for the hearing, which I hoped to set in February, 1994.

Complainant indicated that it would be conducting discovery, beginning with Respondent's deposition. Complainant stated that due to administrative and scheduling procedures, including arranging for a Punjabi interpreter, it anticipated that the deposition would probably not be scheduled until around January 15, 1994. Subsequent to that, Complainant intended to serve interrogatories and request for admissions. Respondent also indicated that it intended to conduct discovery including deposing several Immigration & Naturalization Service agents. After completing discovery, Complainant and Respondent would notify the Court of their hearing witness lists.

Before concluding the prehearing conference, Complainant stated that it was amenable to settlement of this case, that it was willing to meet informally with Respondent to provide it with the names of the agents it wished to depose, and that it would contact Mr. Chaudry before setting the deposition date so that it would be conducted at a mutually convenient time. Respondent, through Mr. Chaudry, stated that he would cooperate under the law.

I directed the parties to remain in touch and to work towards an amicable settlement. It was my opinion that after Respondent's deposition, the parties might be in a better position to discuss the issues in this case and arrive at a mutually agreeable settlement despite the many disputed facts.

On December 22, 1993, Mr. Chaudry filed a Motion to Postpone the December 21, 1993 prehearing conference due to illness, without affidavit or doctor's note. I denied the Motion as moot.

On January 26, 1994 I issued an Order of Inquiry requesting discovery status of the case and directing the parties to file a joint status report within fifteen (15) days from the date of the order.

On January 31, 1994, Respondent served Complainant with notice that he would not attend the deposition Complainant had scheduled. Respondent did not file this document with the court.

On January 31, 1994 Complainant filed a Response to Respondent's Response to Complainant's Notice of Deposition and the Production of

Documents. Complainant stated that it had served the Notice of Taking Deposition and Production of Documents on Respondent at his home address on January 20, 1994.

In its filing, Complainant stated that Respondent served it with Respondent's Response to Complainant's Notice of Taking of Deposition and For The Production of Documents in which Mr. Chaudry stated that Respondent would not appear for deposition as the Complainant's notice was deficient. Mr. Chaudry stated that Respondent would not appear because Complainant's notice stated that the deposition would pertain to the alleged violations of 8 U.S.C. § 1324 and not of 8 U.S.C. § 1324a.

In its court filing, Complainant informed the court and Respondent that it intended to proceed with the scheduled deposition. Should Respondent not appear, Complainant would move for sanctions and/or an order compelling testimony under 28 C.F.R. § 68.23.

Complainant argued that the reference to 8 U.S.C. § 1324 was inadvertent and the caption properly cited to 8 U.S.C. § 1324a, as had all previous documents in this case. Additionally, in a telephone conversation with Mr. Chaudry on January 27, 1994, Complainant noted this typographical omission. Complainant argued that, as all parties were clear as to the nature of these proceedings, this typographical error should not cause any disruptions in the proceedings. Complainant argued that Respondent's position not to appear because of the typographical error was further support for Complainant's argument that Respondent would resort to any means to subvert the legal process in this matter.

With Complainant's filing was Respondent's Notice for Production of Documents and Taking of Deposition. Mr. Chaudry stated that depositions would be taken in front of a certified court reporter from January 31, 1994 until February 3, 1994 and then again on February 7, 1994 through February 8, 1994. An interpreter would be provided where needed. In part, the notice stated:

> "ALSO, NOTICE GIVEN THAT the complainant counsel to bring on the first day of deposition all original files, documents, formal or informal, hand written or type written computer printouts, interviews conducted by complainant counsel and INS Agents, sworn statements by all witnesses, any surveillance reports, name of the people who conducted the surveillance, their address, telephone number and the company or agency they worked for. In addition to that all the INS Special Agents to bring their personal log books, any other documents related to case, any previous arrest records of alleged illegal aliens, deportation records. Mr. John F. Heinkel to bring the original document he presented at the Municipal Court Hearing held on

August 16, 1993, including the itemized list of his claim signed by Mr. Mitchell F. Mims, tax returns from 1991 to 1993. Mr. Mitchell F. Mims to bring his company records from January 1991 to January 1994 (e.g.,employee records payroll records, workman's compensation, insurance records, I-9 Employment Eligibility Verification Form, business checking account statements. EDD DE3DP Quarterly Contribution return, IRS Form 941, IRS form 940, business tax returns for tax years 1991 through 1993)". (Emphasis added).

Based on Complainant's filing, on February 2, 1994, I issued an order scheduling a prehearing telephonic conference for February 9, 1994 to discuss the status of the case and discovery difficulties. The parties were ordered to have their appointment calendars on hand so that the court could help them schedule matters.

On that same date, Complainant filed its status report. Complainant acknowledged that difficulties had arisen in moving this case forward, despite its good faith efforts to cooperate with the Respondent and his representative. Complainant stated that, on February 1, 1994, neither Respondent nor his Representative appeared for the scheduled deposition and that it would be filing the appropriate motions. As to the progress of Respondent's discovery, Complainant stated that when Respondent's first scheduled individual, Mr. Heinkel, did not appear on January 31, 1994, Mr. Chaudry canceled all remaining depositions despite Complainant's willingness to have the other scheduled individuals go forward.

On February 3, 1994, Complainant filed its Motion for Sanctions and/or to Compel Discovery. Complainant stated that it believed Respondent had violated my Order of December 2, 1993, in not agreeing to deposition and in not appearing for the one scheduled and noticed for February 1, 1994. Complainant argued that Respondent's failure to appear could be construed to mean that his testimony and requested documents would have been adverse to his case under 28 C.F.R. § 68.23(c)(1). Complainant stated that Mr. Chaudry has tried to sabotage these proceedings at every turn by delay and contumacious conduct and, if allowed to continue, would not stop.

In support of its Motion, Complainant summarized the facts in this case in detail. In relevant part, Complainant asserted that on January 3, 1994, pursuant to my court order of December 22, 1993, he contacted Mr. Chaudry in order to make arrangements for Respondent's deposition. Complainant asserted that it was agreed that Mr. Chaudry would contact Complainant's counsel by January 12, 1994 with an agreed date and time for deposition. Complainant asserted that, during this conversation, Mr. Chaudry asked for information regarding Complainant's witnesses. Complainant stated that the two individuals

named in the Complaint were potential witnesses and that Complainant was attempting to locate them. Complainant followed up this conversation with a letter forwarded to Mr. Chaudry on or about January 3, 1994.

Complainant asserted that on January 13, 1994, as he had not heard from Mr. Chaudry, he tried to reach him by telephone and by message. Later that day, Mr. Chaudry returned the Complainant's call but would not agree to a date or time for deposition, apparently alluding to the fact that he wanted to conduct Respondent's discovery first.

Complainant's counsel stated that he informed Mr. Chaudry that Mr. Chaudry was free to conduct whatever discovery he wished, but that Complainant intended to proceed with Respondent's deposition as scheduled. Complainant stated that he provided the addresses that he had available for the individuals named in the Complaint and offered Mr. John Heinkel's address. Complainant stated further that Mr. Chaudry could contact Mr. Mims, another witness, at his business address which was in Mr. Chaudry's possession.

On January 18, 1994, Respondent served Complainant with Notices of Depositions for nine individuals. Depositions were to begin on January 31, 1994.

Complainant stated that he attempted to reach Mr. Chaudry on January 26, 1994, but was not successful; therefore, on January 27, 1994, he forwarded a letter. On that date, Mr. Chaudry contacted Complainant's counsel by telephone and Complainant explained that he had been unable to locate Mr. Heinkel, the first person scheduled for Respondent's depositions, but that Mr. Mims and the Special Agents were prepared to proceed. Allegedly, Mr. Chaudry stated that if Mr. Heinkel did not appear, the remaining depositions would be cancelled. Complainant indicated that Mr. Chaudry could do that, but, Complainant was going to proceed with Respondent's February 1, 1994 deposition anyway. Mr. Chaudry, however, stated that since there was an error in the Notice for Deposition, citing to 8 U.S.C. § 1324 instead of 8 U.S.C. § 1324a, Respondent would not appear. Complainant, in response, explained that it was a typographical error and that the parties understood the nature of the proceedings.

On January 31, 1994, Complainant and Mitchell Mims, the second individual set to be deposed by Mr. Chaudry appeared as scheduled. Mr. Chaudry repeated to Complainant that since the first scheduled individual, Mr. Heinkel, was not present, all the scheduled depositions

were cancelled because he insisted on conducting his depositions in order.

Complainant asserted that despite his attempt to proceed, Mr. Chaudry would not. Complainant asserted that it provided Mr. Chaudry with a set of documents regarding the factual background leading to the Notice of Intent To Fine. Complainant asserted that Mr. Chaudry had not properly noticed the nongovernment individuals, i.e., Mr. Mims and Mr. Heinkel, as required by 28 C.F.R. § 68.22. Complainant asserted that, although, Mr. Heinkel's address had been offered it was refused. Complainant also asserted that Mr. Mims was prepared to proceed with his deposition and that Mr. Heinkel would probably have been able to appear the following Monday for deposition. Complainant asserted that on February 1, 1994, as supported by documents attached to this Motion, neither Respondent nor his representative appeared for the scheduled deposition.

Complainant strongly argued for sanctions. Complainant argued that Respondent's actions were not in good faith, but were motivated by a desire to subvert the legal process by taking every action that would hinder these proceedings.

In the alternative, Complainant requested that an order compelling Respondent's testimony be issued. Complainant argued that the typographical error in the Notice of Deposition did not allow Respondent's nonappearance as it was a harmless error. Complainant noted that the time, date, place, name and address of each witness, as required by 28 C.F.R. 68.22(b), appeared, citing to Wright and Miller, Federal Practice and Procedure, (1970). Complainant argued that a notice of deposition is not required to state the subject matter to be covered, but, in this case, Respondent and Mr. Chaudry already knew the nature of this proceeding and the reason for the deposition.

On February 8, 1994, Mr. Chaudry filed his Status Report on Progress of Discovery pursuant to the court's Order of Inquiry dated January 26, 1994. In response to Complainant's position, Mr. Chaudry stated that he had done everything possible to resolve the difficulties in moving the case forward despite Complainant's claim that Mr. Chaudry had his own agenda. Mr. Chaudry stated that he was seeking justice, no matter what it took. Mr. Chaudry alleged that Complainant's agenda was to deprive Respondent of any opportunity to prove his innocence.

Mr. Chaudry stated that, on January 13, 1994, he did speak with Complainant's counsel, who refused to provide residence addresses for

Mr. Mims and Mr. Heinkel even though he had promised to do so on January 3, 1994. Although Mr. Chaudry agreed that Complainant counsel offered Mr. Heinkel's mother's address, Mr. Chaudry stated that Mr. Heinkel did not live there. Further, as Mr. Heinkel had his own address, he could not be served at the address Complainant offered.

Mr. Chaudry asked the court to also note that, on January 3, 1994, Complainant's counsel stated that deposition Notices for all individuals should be served through him because he was contacting those individuals. Mr. Chaudry also asserted that Complainant's counsel declined Mr. Chaudry's offer to exchange documents prior to any deposition, so that "nothing will be changed or destroyed due to witness testimony."

Mr. Chaudry stated that, on January 20, 1994, he served the Notice for Production of Documents and Taking of Deposition by certified, return receipt, U.S. Mail, also on January 21, 1994, he personally served the Copy of the Notice on him. On January 27, 1994, Mr. Chaudry spoke telephonically with Complainant's counsel and at that time was informed that Mr. Heinkel would not be available for the January 31, 1994 deposition.

Mr. Chaudry strongly asserted that Mr. Heinkel had documents in his possession which Mr. Heinkel had previously presented at a Municipal Court Hearing on August 16, 1993 and that one of these documents was an itemized list of a claim signed by Mr. Mims. In explaining his insistence that all depositions take place in the specified order, Mr. Chaudry stated that this document was particularly critical for Respondent's defense, and without that document, Respondent could not take Mr. Mims' deposition. Mr. Chaudry asserted that on January 27, 1994, he twice offered to put the scheduled depositions off for one week. Mr. Chaudry argued that Complainant's counsel's refusal to delay the depositions had caused the present difficulty.

Additionally, in response to Complainant counsel's argument that Respondent and Mr. Chaudry were aware that the deposition notice's typographical error was of minimal importance, Mr. Chaudry stated that during a settlement negotiation, in September 1993, Complainant's counsel stated that Respondent could face criminal charges for harboring illegal aliens. Thus, upon inspecting the deficient Notice, Mr. Chaudry was concerned that a criminal proceeding was now involved.

After I reviewed the parties arguments, I held a Prehearing Telephonic Conference on February 9, 1994 to discuss discovery issues. Based on developments in this case and arguments and issues discussed on that date, I stated that I would set Respondent's deposition by Order.

In accordance with my oral instructions of February 9, 1994 and in conformance with my February 15, 1994 Order Confirming Pre-hearing Telephonic Conference, Complainant filed a Status Report on February 14, 1994 and supplied the court with three dates, i.e., February 24, 1994, February 28, 1994 and March 3, 1994, when it could engage the services of both a Punjabi interpreter and a court reporter and secure a location for Respondent's deposition. Complainant also stated that, by letter and telephone, it had requested the court records from Mr. Heinkel that Mr. Chaudry believed he had and that Mr. Heinkel indicated that he would forward, immediately, whatever documents he could locate. A letter also went to Mr. Mims since Mr. Heinkel indicated that Mr. Mims might have some of the requested documents. Complainant indicated that upon receipt, he would forward same to Respondent.

Complainant had also notified Respondent of the dates when the lead agent in this case would be available for deposition.

Now, although I intended to set Respondent's deposition date by Order, I would have liked to have Respondent's input as to which of the three above mentioned dates were most convenient. Therefore, on February 18, 1994, my attorney-advisor attempted to reach Mr. Chaudry, telephonically, at his business and through his beeper. The attempts were unsuccessful and messages were not returned.

At that point, I believed that it was in the parties' best interests that I order Respondent's deposition. As such, in order to give the parties the maximum time in which to prepare for the deposition, I considered Respondent's religious observance of Ramadan and his request that the deposition be set no earlier than 6:30 p.m. during that observance. Therefore on February 22, 1994, I ordered Respondent to appear for deposition on March 3, 1994 at 6:30 p.m. at the Federal Building, 880 Front Street, Room 2224, San Diego, California, the General Services Administration Conference Room. Respondent was again cautioned that should he not appear, unless judicially excused, I might find that he had abandoned his request for hearing.

On February 22, 1994, Respondent filed his Response to Complainant's Motion for Sanction and/or To Compel Discovery. Respondent stated that Complainant's version of this case was at odds with the facts in the case and again requested dismissal.

In support, Mr. Chaudry presented the following facts regarding a contract dispute between another of Respondent's brothers, Mr. Arshad Chaudry, and Mr. Mims. Mr. Chaudry alleged that this dispute resulted in Mr. Mims, a landscape contractor, and Mr. Heinkel making a false report to INS that Respondent was hiring illegal aliens to do landscape work.

Mr. Chaudry represented that on March 3, 1993, Mr. Mims signed a contract with Arshad Chaudry to landscape the property at 12212 Spruce Grove Place, San Diego, California, the address specified in the NIF. In April 1993, Mr. Chaudry received an unfavorable evaluation of Mr. Mims work from another landscape consultant. Mr. Mims was not informed at that time of this opinion, but was allowed to complete his work per the contract. However, Mr. Mims now wanted to get out of the contract. Arshad Chaudry allegedly told Mr. Mims that he had to pay the difference between the amount of the actual contract and the amount that would have to be paid to another contractor for completion. A dispute then arose and allegedly, due to this disagreement, Mr. Mims and his friend, Mr. Heinkel, went to the INS office and reported that Respondent was hiring illegal aliens to do the landscaping. Mr. Chaudry alleges that the reason that Respondent was reported to the INS, and not Arshad Chaudry, was because Mr. Mims knew it was not easy to "victimize" Arshad Chaudry.

In support of these allegations, Mr. Chaudry stated that:

(1) on May 18, 1993, Mr. Heinkel filed a lawsuit in Municipal Court against Arshad Chaudry which Mr. Heinkel lost;
(2) although the Complaint reads that Respondent's place of business is at 12212 Spruce Grove Place, San Diego, CA 92131, this property has never been used for any type of business; and,
(3) Respondent has never owned the above property, as stated in the Complainant's Form G-166, Report of the Investigation.

Mr. Chaudry again maintained that Complainant's counsel behaved in an unethical manner in this case, specifically, during a conversation that occurred on September 9, 1993, in settlement negotiation, and again on September 20, 1993. Further, Mr. Chaudry still believed that there was ex parte communication in this case, and, in support of this

belief, stated that one day after his conversation with San Diego INS District Counsel, this court issued an order changing the location of the hearing from 950 Sixth Avenue, San Diego, to 880 Front Street, Room B-250, San Diego.

Mr. Chaudry argued also that actions have been taken in this case to intimidate Respondent. In support, Mr. Chaudry referred to the October 28, 1993 Prehearing Conference held at 880 Front Street, Room B-251, San Diego, California. Mr. Chaudry alleged that he met Complainant's counsel before entering the courtroom but did not enter with him. After a few minutes, "a uniformed and armed" officer came to the door and asked Mr. Chaudry to follow him. After being asked about his nationality, he was requested to remove his jacket and a "body search" was performed. Although the officer stated that it was the standard procedure, Mr. Chaudry alleged that he later called three different attorneys who have used the same courtroom, a Caucasian male, a female attorney and a Latino attorney, who stated they had never experienced the same.

Mr. Chaudry again stated that in a telephone conversation with Complainant's counsel on January 13, 1994, counsel refused to provide the residence address for Mr. Mims and Mr. Heinkel, even though this information was promised on January 3, 1994. Further, Mr. Heinkel did not appear for deposition on January 31, 1994, requiring Mr. Chaudry to cancel all the depositions since Mr. Heinkel possessed the documents that he needed for succeeding depositions.

Mr. Chaudry stated that he believed that Mr. Heinkel would never appear for deposition, that he would never produce the document that has been requested because Mr. Heinkel knew that "he committed a fraudulent act and has conspired to cause pain and suffering to the Respondent and his family." Mr. Chaudry also stated that he believed that Complainant's counsel intentionally did not bring Mr. Heinkel to deposition because he knew the document that Respondent was requesting would show the conspiracy on the part of Mr. Mims and Mr. Heinkel. Finally, Mr. Chaudry argued that Complainant had violated my December 22, 1993 court order and requested sanctions, dismissal of the complaint and attorney's fees.

On February 22, 1994, Complainant filed a copy of a letter he sent to Mr. Chaudry in which he stated that Mr. Heinkel could not locate any of the requested records. However, Mr. Mims had forwarded a receipt that he thought might relate to Mr. Chaudry's request.

On March 1, 1994, I held a prehearing telephone conference at Mr. Chaudry's request. A court reporter was present. During that conference call, Mr. Chaudry orally requested that Complainant's counsel be barred from the proceedings because of comments he made during a settlement conference. I denied Mr. Chaudry's motion as I stated that Complainant's alleged comments during a settlement conference did not bear on the hearing before me and would not prejudice Respondent. Mr. Chaudry then accused me of bias and requested that I remove myself from the case and requested that another judge preside over that hearing and take sworn testimony.

Mr. Chaudry stated that he would not proceed to deposition until that hearing was over.

At the Prehearing Telelphonic Conference, I denied Mr. Chaudry's oral motion for recusal as it was not properly made under the regulations. The recusal request was not in writing or supported by an affidavit setting forth the alleged grounds for disqualification. 28 C.F.R. 68.30. In fact, no such motion or affidavit were ever filed. Therefore, there was no requirement that I recuse myself. I then reiterated my order for Respondent's deposition for March 3, 1994.

On March 8, 1994, Complainant filed Complainant Renewed Motion For Sanctions And Finding That Request For Hearing Abandoned with supporting documents. Complainant asserted that Respondent had not appeared for his court ordered deposition.

On March 10, 1994, I issued an Order to Show Cause Why Complainant's Renewed Motion for Sanctions and Finding That Request for Hearing Abandoned Should Not Be Granted. Said order was served by certified mail.

Respondent was directed to file his written response to Complainant's pending motion(s) and its response to this Order to Show Cause within fifteen (15) days of receipt of same. My Order to Show Cause was served by certified mail. In his response to this Order to Show Cause, Respondent was required to set forth the reasons, both legal and factual, for his alleged and apparent violation of my Orders, i.e., his nonappearance for deposition on March 3, 1994, and the reasons, both legal and factual, as to why I should not grant Complainant's pending motions finding abandonment.

As I had done in my previous Orders, I cautioned Respondent as to the serious nature of this Order and the possible consequences of his

nonresponse. I informed Respondent, further, that should Respondent not comply with this Order or not be able to satisfy this Court that he was not in violation of my previous Orders, I might issue an order finding for Complainant in this case and awarding civil money penalties as requested by Complainant.

On the same date, I issued an Order Directing Parties to Confirm Receipt of the Official Transcript. Each party was directed to notify the court within five (5) days of receipt of the Order as to whether or not it had, or intended to, order a copy of the official transcript of the March 1, 1994 Prehearing Telephonic Conference and then to notify the court within ten (10) days from receipt of the transcript of any errors or corrections.

On March 14, 1994, Complainant filed its Response to Order to Confirm Receipt of the Official Transcript in which it stated it was not intending to order the March 1, 1994 Prehearing Telephonic Conference transcript.

On March 22, 1994, Mr. Chaudry filed his response stating that he was ordering the transcript as soon as it was available.

On April 4, 1994, Mr. Chaudry filed Respondent's Response To the Court's Order To Show Cause and a Renewed Motion For Dismissal of the Complaint. Attached to said motion were the following documents:

(1) Notice Scheduling In-person Prehearing Conference dated September 22, 1993;

(2) Order Confirming Prehearing Telephonic Conference issued on February 15, 1994;

(3) Complainant's Status Report on Progress of Discovery dated February 2, 1994;

(4) Complainant's Motion for Sanctions and Order to Compel Discovery dated February 3, 1994;

(5) Respondent's Lists of Errors in Transcripts dated March 31, 1994, attached to an unofficial transcription of an unofficial tape of the February 9, 1994 prehearing telephonic hearing conference;

(6) Respondent's Response to Complainant's Motion for Sanctions and/or to Compel Discovery dated February 12, 1994;

(7) Plaintiff's Claim and Order to Defendant where the Plaintiff was John F. Heinkel and the Defendant was Arshad Chaudry, dated May 27, 1993, filed in San Diego Small Claims Court;

(8) Complainant's February 22, 1994 letter to Mr. Chaudry regarding his inquiries to Mr. Heinkel and Mr. Mims and Complainant's letter to Mr. Heinkel;

(9) A bill and handwritten letter from Mr. Mims stating that Arshad Chaudry owed him money for 68.5 hours at $8.00 per hour, dated May 14, 1993;

(10) Respondent's Response to Complainant's Notice of Taking Deposition and for the Production of Documents dated January 27, 1994;

(11) Complainant's Response to Respondent's Response to Complainant's Notice of Deposition and the Production of Documents dated January 31, 1994;

(12) Copy of a Proposal and Contract dated March 3, 1993 made out to Mr. Arshad Chaudry from EPHRATH Land-scape, signed by Mr. Mims for landscape work;

(13) Copies of 28 checks, front and back, made out to Mr. Mims showing payment on the landscaping contract and endorsements; these were 13 payment checks plus 15 other checks, apparently for materials;

(14) Copy of United States Department of Justice Immigration and Naturalization Service Worksheet For Oral Report pertaining to the report by Mr. Mims and John Heinkel against Waheed Chaudry, Mushtag Chaudry, and Arshad Chaudry regarding the allegations in this case;

(15) Copies of the I-213 for Julian Rodriguez-Yllescas, and for Carlos Vasquez-Lupercio, the aliens named in the Complaint and their sworn statements;

(16) Mr. Mims' Record of Sworn Statement and Affidavit in which he stated that Respondent did not like the workers that Mr. Mims was using on the landscaping project so Respondent brought in other workers instead; Mr. Mims stated that he did not know that they were illegal aliens;

(17) statement by INS Agent Vernon Young, Special Agent regarding his meeting with Respondent on May 26, 1993;

(18) Agent Young's report of his investigation regarding Respondent in which he states that, on May 21, 1993, he and Special Agents Marty Martinez and Salvador Ochoa went to 12212 Spruce Grove Place, San Diego, California, and spoke to Respondent who was supervising two Hispanic males in the front yard. Agent Young requested, and was given permission, to speak to the men after informing Respondent of the report alleging that they were illegal. The men were arrested and admitted being illegal. Respondent stated that the men were employed by Mr. Mims, the landscape contractor but admitted that he allowed the men to sleep in his garage, that he fed them, that they did extra work for him and that he paid them. Respondent stated he didn't know if they were illegal workers because he had never asked for identification and he was not aware of the Form I-9 requirement. Respondent stated he allowed them to sleep in his garage because they didn't have transportation and he wanted them to report early for work. Respondent, when asked, paid each alien $130.00 in cash before they left. Agent Young later took the alien's statement. They both stated that they came to work after Respondent drove down the street and asked them if they wanted to work for $30.00 a day;

(19) Agent Young's report that Mr. Mims gave a voluntary sworn statement on May 24, 1993 regarding the illegal aliens working for Respondent and that Mr. Mims, was also served with a Notice of Inspection for June 7, 1993;

(20) Mr. Mims' sworn statement that the illegal aliens were working on the landscaping when he began the job; Respondent removed them for one week and then brought them back because Mr. Mims' employees were too slow. Respondent refused to remove them;

(21) Agent Young's May 26, 1993 report stating he and Special Agent Ron Zimmerman meet with Respondent at 12212 Spruce Grove Place, San Diego, California. After noticing a Hispanic male worker doing landscape work, he asked Respondent if the worker was legal. Respondent stated he thought so, and a check showed that he was. Respondent was given a "No Hire Letter" for the two aliens previously arrested on May 21, 1993. Respondent was given an employee educational visit, a Notice of Inspection for his telemarketing company which had seven employees and Respondent was informed that he needed to complete Form I-9's for all his employees including the landscape worker. Respondent was asked to put the new worker's name on a certified employees list. He did not list the two arrested aliens. Respondent stated that he had canceled checks made out to Mr. Mims but the illegal aliens had been paid by Respondent from contract money for Mr. Mim's company; and,

(22) Complainant's June 2, 1993 Report of Inspection addressing the five factors of 8 U.S.C.1324a(e)(5).

In this Motion, Mr. Chaudry presented four arguments to the court and requested a decision on the written record. Mr. Chaudry argued that the court had not treated the Respondent fairly, that Complainant's counsel had not acted with integrity, that Complainant's witnesses were not credible, and that there was no legal basis for the charge against Respondent.

As to Mr. Chaudry's first two arguments, these arguments had been previously presented and been found unpersuasive. Resolution of the other two arguments could not be made on the written record.

To date, Complainant has not filed a reply to Mr. Chaudry's Response to my Order to Show Cause.

II. *Discussion*

A. Recusal

To date, although Mr. Chaudry has stated, both orally and in writing, that this court has been prejudicial to Respondent, no appropriate motion has been filed. An interlocutory appeal to CAHO on or about October 27, 1993, was a request to vacate the Administrative Law

Judge's Order regarding the in-person prehearing conference location. However, in the interest of justice, and as this has been a case where Respondent has repeatedly stated that he was being treated unfairly, I have carefully reviewed the record, which contained only bold allegations by Mr. Chaudry. I have not found an instance where I believe Respondent or Mr. Chaudry has been prejudiced by this court. Therefore, I do not find that it is necessary or appropriate that I recuse myself.

B. Mr. Chaudry's Justification for Respondent's Violation of my Order Compelling Respondent's Deposition

In my Order to Show Cause, I allowed Mr. Chaudry an opportunity to explain why Respondent violated my February 22, 1994 Order and March 1, 1994 directive and did not appear for deposition on March 3, 1994.

In his response, Mr. Chaudry clearly stated the reason for Respondent's nonappearance; it was because Mr. Chaudry "told the Respondent not to appear," since (1) this Court's orders, notably the February 9, 1994 oral order wherein I stated I would order Respondent's deposition and set the date myself after receiving the parties' input, evidenced prejudice to Respondent; and, (2) a "condition", which Mr. Chaudry believed was to be satisfied by Complainant, or Complainant's witnesses, before the deposition, was not.

The first issue, prejudice to Respondent, has previously been raised, examined, and found to be without merit in the October 28, 1993 in-person Prehearing Conference and the March 1, 1994 Prehearing Telephonic Conference. However, as this is a serious matter, in the interest of justice and fairness, I have again reviewed the record and my Orders.

The record shows that Mr. Chaudry has been an active and zealous advocate with competent familiarity with this proceeding's relevant regulations and easy telephonic access to this court for procedural advice from my attorney-advisor. It also revealed that this Court has made every effort to be fair and impartial to both parties while trying to move this case forward.

In Respondent's case, for example, despite Complainant's strong opposition, the court granted Respondent's request that his brother, Mr. Chaudry, a non-attorney, act as his representative; it accommodated Mr. Chaudry's schedule, wherever possible, when sched-

uling prehearing in-person and telephonic conferences; it telephonically explained procedural issues to Mr. Chaudry upon request; it respected and deferred to Respondent's religious holiday observance when scheduling his deposition through his representative, and, it afforded Mr. Chaudry more than adequate opportunity to present his arguments and supporting evidence on relevant matters. Further, despite Respondent's nonappearance at the in person conference on October 28, 1993, in violation of my Order, I did not find abandonment. The court has been respectful of Mr. Chaudry's repeated requests for postponements.

Additionally, despite Mr. Chaudry's implication that I issued my oral Order of February 9, 1994 prior to receiving his responsive arguments to Complainant's Motion to Compel, and thereby prejudicing Respondent, the record shows that my Order was issued after I conducted a prehearing telephonic conference on the matter, heard oral argument from both parties, explained my ruling setting Respondent's deposition and my reasoning to both parties, and requested and accepted input from Mr. Chaudry as to a convenient date and time for Respondent's deposition. Additionally, the actual date for Respondent's Deposition was not set until I attempted to reach Mr. Chaudry, again, for his input, but, Mr. Chaudry did not return my staff's calls.

I note that the record supports the fact that early in these proceedings, Respondent had violated, or ignored, one of my court orders by not appearing. Mr. Chaudry attempted to justify his actions under a "prejudice argument." Specifically, on October 28, 1993, Respondent did not appear at an in-person prehearing conference, despite my order. As justification, Mr. Chaudry stated that the conference site was prejudicial to Respondent.

At that time, erring on the side of caution, and accepting the possibility that Mr. Chaudry was unfamiliar with the law and procedure, I tried to educate and warn him that it was not his unilateral determinations that were to be the basis of Respondent's behavior before this court. Instead, it was my decisions that were controlling, unless reversed by a higher authority. It appears that I was not successful in my efforts to have Mr. Chaudry abide by my orders.

Based on the fact that I find that the court has not shown prejudice to Respondent, I find that Respondent's first justification for his nonappearance at the ordered Deposition to be without merit.

Addressing Mr. Chaudry's second justification, satisfaction by Complainant of a condition precedent, Mr. Chaudry apparently refers to the following language in my Order of February 15, 1994:

> 1. Complainant was to use his best good faith efforts to contact Mr. Heinkel and explain to him the importance of promptly locating and producing the document that Respondent's representative has requested.

Clearly, I did not order delivery of this document to Mr. Chaudry as a condition precedent to Respondent's required appearance for deposition. In fact, due to the procedural history of this case, as an added precaution so that there would be no misunderstanding, I unambiguously and unconditionally stated in my oral Order of February 9, 1994 and in my written order of February 22, 1994, and at the March 1, 1994 prehearing telephonic conference, that Respondent was to appear for deposition on March 3, 1994. Therefore, I find this second justification for Respondent's nonappearance to be without merit.

C. Finding of Abandonment

In his response to my Order to Show Cause, Mr. Chaudry appears to demand that I make a decision in Respondent's favor based on his written assertions. Although it may be appropriate to do so in some cases, see 28 CFR 68.52, in this case there are genuine issues of fact, as well as credibility issues, that can only be determined after discovery and an in-person hearing. Dismissal in this case based on the documents in the record would be improper.

Although I have discussed with Mr. Chaudry the fact that both parties are entitled to discovery and to present their facts, witnesses and arguments in court, the record shows that he has acted in a manner that has not, and apparently will not, allow that to happen. For reasons that I am not privy to, Mr. Chaudry does not appear to wish to present his evidence before me, in person, or to allow Respondent to be examined in deposition or in court.

At this point, Mr. Chaudry has made it impossible to proceed with this case since he has frustrated the court's initiatives. Even more to the point, he has blatantly stated that he will not follow any court order from this bench and will take an appeal from any order that does not dismiss this case. He stated in his response to my Order to Show Cause, "If the case is not dismissed, then the respondent will not respond to any future orders by this Court. The Respondent will let the

Court impose sanctions and respondent will seek justice in another Court".

Under 28 CFR 68.37, I may find that a request for hearing may be dismissed for abandonment if the filing party or his representative fail to respond to my orders.

It is clear that Mr. Chaudry and Respondent failed to respond to my orders of February 22, 1994 and March 1, 1994 in that neither appeared for Respondent's deposition. Therefore, based on Mr. Chaudry's language quoted above, the full language of the response, and the full history and record of this case, I find that Respondent's request for hearing, filed on July 2, 1993, has been rescinded and abandoned. Therefore, Complainant's motion to find abandonment is granted. I find for Complainant as to liability.

D. Granting Complainant's Request for Sanctions

Additionally, under 28 CFR 68.23(c), I may issue sanctions if I find that a party has failed to comply with my orders. The regulation states, in relevant part:

> (c) If a party, an officer or an agent of a party, or a witness, fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative Law Judge, the Administrative Law Judge, may, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, take the following actions:
>
> (1) Infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;
>
> (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;
>
> (3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

As I find that Respondent has failed to respond to my orders, I find that the above enumerated sanctions are appropriate.

Therefore the sanctions set forth in 28 C.F.R. 68.23(c)(1), (2), (3), (4) are granted.

E. Summary Judgment

It is well stated that if there is no genuine issue of material fact, a summary decision is appropriate.

Based on the record and the granted sanctions, I find that there are now no genuine issues of material fact I am sua sponte granting Complainant a Summary Decision as to liability.

F. Civil Money Penalties

After a finding of liability, it is my usual practice to allow the parties an opportunity to address the five factors in 8 U.S.C. § 1324a(e)(5), as well as any other relevant factors, before I set the civil money penalties. In this case, that is not necessary as Mr. Chaudry has stated he will not cooperate with this court and the record already contains the Complainant's consideration of the factors of 8 U.S.C. 1324a(e)(5) of the ACT, which corresponds to 28 C.F.R. 68.52(c)(iv), states:

> (T)he order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100.00 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.

The statute also states that the civil money penalty with respect to a knowing hire/continuing to employ violations is

(1) 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;

(2) Not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph; or,

(3) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph

8 U.S.C. 1324a(e)(4)(A)

III. *Five Factors Of 8 U.S.C. 1324a(e)(5)*

A. Size of Business

Complainant asserts that the "business" is a residence owned by Respondent in an exclusive residential area. Complainant estimates that the home is approximately 13,000 square feet and is worth over $1,000,000. Complainant alleges that Respondent employed individuals in addition to a subcontractor.

Mr. Chaudry has asserted in his pleadings and motions that Respondent is not the owner of this residential home and that this home is not a business. He has not submitted any substantiating documents.

Based on the record and the granted sanctions, I find that this is a small business.

B. Good Faith of the Employer

Complainant asserts that Respondent did not make a good faith effort to comply with IRCA. Complainant argues that although Respondent asserted that he was not the illegal aliens' employer, and that they were hired by Mr. Mims, his landscape contractor, Respondent could not provide means for contacting Mr. Mims so that Complainant could verify the aliens' wages. However, Mr. Mims provided a sworn statement that Respondent had arranged to hire the workers himself and deduct their wages from Mr. Mim's contract price.

Complainant asserts also that Respondent admitted that the illegal aliens did extra work for him, that they had worked for him for four days, that he fed them and that he allowed them to sleep in his garage. Complainant asserts that Respondent also admitted that he was unaware of the Form I-9 requirements.

Respondent had argued in previous pleadings and documents that he was not the aliens' employer and, thus, was not required to complete Forms I-9 for these individuals.

Based on the sworn statements provided by Complainant, from non-parties that support its position and Respondents inadequate refutation and the sanctions granted, I find Complainant has met its burden, by a preponderance of the evidence, in establishing that Respondent did not comply with IRCA in good faith.

C. Seriousness of the Violations

Complainant argues that this is a serious violation with regard to both counts. Respondent fed, housed, hired, employed and paid two illegal aliens without inspecting their documentation or filling out Forms I-9.

Respondent previously asserted in his pleadings and motions that he was not the aliens' employer and was not required to inspect documentation or fill out Forms I-9.

Based on the record and granted sanctions, I find that Respondent's actions seriously impede the Congressional intent behind IRCA. Therefore, I find these to be serious violations.

D. Whether Illegal Aliens Were Involved

Complainant asserts that the two individuals named in the two Count Complaint were illegal aliens.

Respondent does not deny this fact. Therefore, based on the record and the granted sanctions, I find that all individuals named in the Complaint were illegal aliens.

E. Previous Violations

Complainant asserts that there have been no previous violations. I will consider this when determining the appropriate civil money penalties.

F. Determination of Appropriate Amount of Civil Money Penalties

To reiterate, I find that this is a small business, that Respondent did not make a good faith effort to comply with the requirements of 8

U.S.C. 1324a, that these are serious violations, that illegal aliens were involved in each violation and that there were no previous violations. I find, further, that the civil money penalties requested by Complainant are fair, reasonable and well within the parameters of the statute. As such, I find that Respondent is to pay Complainant a total of $3,000 in civil money penalties. This is comprised of a civil money penalty of $1,000 for each of the two (2) violations in Count I and $500 for each of the two (2) violations in Count II.

IV. *Findings Of Fact And Conclusions Of Law*

Based on the record and the findings previously set forth in this Order, I find that:

1. Respondent, Mr. Mushtaq Ahmed Chaudry, has not been prejudiced in this matter and my recusal is not appropriate or necessary;

2. Respondent, without good cause, has not complied with my orders compelling his deposition;

3. Respondent has stated that he will not cooperate with this court or follow its orders;

4. Respondent has abandoned his request for hearing;

5. Sanctions under 28 C.F.R. 68.23(c)(1), (2), (3), and (4) are appropriate and granted;

6. There are no genuine issues of material fact in this case;

7. Respondent, Mr. Mustaq Ahmed Chaudry, hired Carlos Vasquez-Lupercio and Julian Rodriguez-Yllescas, who were aliens not authorized for employment in the United States at the time Respondent hired them;

8. Respondent hired Mr. Vasquez-Lupercio and Mr. Rodriguez-Yllescas after November 6, 1986 knowing that they were aliens not authorized for employment in the United States, or in the alternative, continued to employ them after November 6, 1986 knowing that they were aliens not authorized for employment in the United States;

9. Respondent failed to prepare Forms I-9 for Mr. Vasquez-Lupercio and Mr. Rodriguez-Yllescas;

10. Complainant has met its Burden of Proof by a preponderace of the evidence as to Counts I & II of the Complaint;

11. Respondent has violated sections 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(1)(A), or in the alternative, has violated section 274A(a)(2) of the ACT, 8 U.S.C. 1324a(a)(2);

12. Respondent has violated section 274a(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(1)(B);

13. Respondent is a small business;

14. Respondent did not evidence good faith in complying with the requirements of the Immigration Reform and Control Act (IRCA);

15. Respondent's violations were serious violations;

16. The named individuals in the Complaint were illegal aliens;

17. Respondent had no previous violations of IRCA;

15. Respondent shall cease and desist from further violations of the ACT;

16. Respondent shall pay Complainant a total civil money penalty of $3,000.00 as set forth in the Complaint.

17. Any motions or requests not previously acted upon are denied.

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 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.

SO ORDERED this 19th day of July, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge