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

United States of America, Complainant v. Sophie Valdez d.b.a. La Parrilla Restaurant, Respondent; 8 USC 1324a Proceeding; Case No. 89100014.

ORDER DENYING COMPLAINANT'S MOTION FOR PARTIAL RECONSIDERATION AND GRANTING COMPLAINANT'S MOTION FOR CLARIFICATION

I. Introduction

On October 6, 1989, Complainant in the above-entitled case filed a Motion for Partial Reconsideration and Clarification. Complainant's Motion was filed in response to my Decision and Order as rendered on September 27, 1989. Complainant filed Additional Authorities in Support of Complainant's Motion for Partial Reconsideration and Clarification on October 17, 1989.

Respondent filed a brief Reply in opposition to Complainant's Motion For Partial Reconsideration and Clarification on October 19, 1989.

As Complainant points out in its motion, virtually all of the issues in the instant case were matters of first impression, and the record was lengthy. Accordingly, the Court's attention is appropriately called to issues of law and evidence which Complainant believes might have been overlooked.

Complainant's motion makes two requests. One is for reconsideration of the finding on Count II, the alleged failure to prepare or present a Form I-9 for the bookkeeper, Renee Cryblskey, on or before October 7, 1988. Complainant's second request is for clarification of the amount of the penalty assessed by the court in Count I, the knowing hiring of the dishwasher, Pedro Escobedo Guzman.

Respondent opposes the motion stating the court correctly analyzed the facts regarding the bookkeeper's status as an independent contractor. Additionally, although Respondent views the courts penalty as harsh, Respondent believes that the court appropriately exercised its discretion in its assessment of the penalty. Further,

Respondent reminds the court that Respondent cannot afford attorney time to respond in a detailed way.

Complainant's motion is an opportunity to take another look at the facts and law in the instant case. As to Complainant's request for reconsideration on Count II, Consistent with my September 27, 1989, Order, it remains my conclusion, after careful review, that Complainant did not prove one of the elements of the prima facie case, i.e., the hiring of Renee Cryblskey on or before October 7, 1988. I reach this conclusion for the reasons set out below.

In response to Complainant's request for clarification of the penalty assessed in Count I, I welcome this opportunity to review my analysis in the instant action with the benefit of Complainant's Points and Authorities filed in the support of its motion.

II. Reconsideration of Count II

At the heart of Complainant's argument for reconsideration is Complainant's position that it need not prove hiring by the Respondent as part of its prima facie case. On the contrary, Complainant considers the issue of whether the individual is an independent contractor to be an exception to IRCA which must be proven by Respondent as its affirmative defense. I am not persuaded that Complainant's argument is correct.

The Immigration and Nationality Act at Section 274(1)(B) reads, in pertinent part:

> (1) In General.--It is unlawful for a person or entity to hire, or recruit or refer for a fee, for employment in the United States--(emphasis added)
> (B) an individual without complying with the requirements of subsection (b).

Accordingly, as I view it, it is the act of hiring (or recruiting or referring) for employment, without properly completing the Form I-9, which is unlawful and which must be proven by the complainant. It is, therefore, my view that IRCA does not apply to independent contractors. See, 8 C.F.R. Section 274a.1(f).

Additionally, it is my view that it is not sufficient for Complainant merely to prove that the individual in question was hired after November 6, 1986. It is also necessary to prove that the individual was hired on or before the date(s) of the inspection as charged in the complaint. I found that Complainant had failed to do so in the instant case.

As noted in the Decision and Order at page 16, the Immigration and Naturalization regulation 8 C.F.R. Section 274a.1(j), reads in pertinent part:

`The term `independent contractor' includes individuals or entities whocarry on independent business, contract to do a piece of work a` ccording to their own means and methods, and are subject to control only as to results. Whether an individual

or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis.'' (emphasis added)

Accordingly, only after careful application of the statutory and common-law tests for differentiating between employee and independent contractor status, did I find that Renee Cryblskey was not an employee of the Respondent on or before October 7, 1988.

On the same issue, Complainant further argues that I committed a legal error by overlooking Respondent's admission that Renee Cryblskey was an employee of La Parilla Restaurant. On the contrary, I did not overlook Respondent's admission. Respondent's admission was that Cryblskey became an employee on or about October 15th, 1988. The court did not reach a conclusion contrary to that fact as admitted by the Respondent. What the decision said, was:

> ``Having applied the facts to the statutory test and to the common-law standard, Cryblskey was an independent contractor with respect to Respondent and was not required to produce a Form I-9 for herself at the time of the October 7, 1988, inspection.'' (emphasis added, Decision and Order, p.17)

A sentence in the decision which may have caused Complainant to believe that I ignored an admission was: ``Although I need not go beyond that date, it is my opinion, based on competent evidence and testimony, that her status remained that of an independent contractor thereafter.'' (emphasis added, Decision and Order, p. 17)

It is important to read the sentence in its entirety in order to prevent any misunderstanding, since my finding applies only to October 7, 1988, and before, as charged in the complaint. Nonetheless, I do see now that Complainant has raised the point, how that sentence could have created confusion.

Complainant further argues that I impliedly placed the burden on INS to prove that Cryblskey was not an independent contractor. I made no such implication, nor did I place such a burden on Complainant. On the contrary, Complainant's complaint, in which Respondent is charged with hiring Cryblskey for employment in the United States and with failure to present a Form I-9 for her on or before October 7, 1988, placed the burden on itself to prove its charges.

The fundamental rule is ``that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action.'' Complainant has the burden of proof as to the elements of its cause of action. See, Koehler v. Marcona Mining Co., 391 F.Supp. 1158, 1160 (N.D. Cal. 1973), citing Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1949).

III. Clarification of Penalty in Count I

Complainant's motion also requests a clarification of the penalty assessed in Count I. It is clear that Complainant's request is based upon my language in the decision at page 21 in which I use the word ``ceiling:''

> Considering the amount requested by the INS to be a ceiling, I hereby reduce the proposed penalties on Count I from four thousand dollars ($4,000) to three thousand dollars ($3,000). (emphasis added)

As I noted in the decision, I took the ``ceiling'' language from another IRCA case (Decision and Order, p. 21) in order to support my intent to incorporate the proposed INS penalty as one of the factors in my overall and exhaustive consideration of the mitigating, as well as the aggravating factors, in the instant case.

Nonetheless, Complainant asserts that I cannot treat the INS prayer for relief as the ``ceiling'' because the range of penalties is set by statute. The controversy is over the word ``ceiling'' and I find it difficult to disagree with Complainant that the real ``ceiling'' appears in the statute and legislation. See, Immigration and Nationality Act, Section 274(e)(4)(ii), in which the civil money penalty for knowing hiring violations is set out as follows:

> (ii) 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, . . .

It is undeniable that the correct application of the plain meaning of the word ``ceiling'' in the instant case would be to the $5,000 figure in the statute.

Complainant's fear however, that my having considered the proposed INS fine as a ceiling necessarily resulted in a lower penalty than might otherwise have been reached, is unfounded. I note for the record that the proposed INS penalty was only one of several factors very carefully considered in assessing the penalty, and that the assessed fine was one thousand dollars ($1,000) above the statutory minimum of two thousand dollars ($2,000) for the violation charged and proven by the INS.

As Complainant points out, the proposed INS penalty is effective only if not contested; once contested, it appears that the ALJ can consider the penalty de novo. See, e.g. California Stevedore and Ballast Complying v. OSHRC, 517 F.2d at 986, 988, citing Administrative Procedure Act Section 557(b), 5 U.S.C. Section 557(b). Therefore, in the words of the Complainant, the INS prayer for relief is not the ``ceiling'' for imposition of a penalty under IRCA. The prayer is simply the penalty proposed by INS.

Accordingly,

(1) Complainant's motion for partial reconsideration is denied.

(2) Complainant's motion for clarification is granted.

IT IS SO ORDERED: This 15th day of November, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge