UNITED STATES OF AMERICA
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Student Exchange International, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100110.

Appearances: PAUL R. STULTZ, Atty., of Omaha, NE, for Complainant
ROMAN DE LE CAMPA, Atty., of Sioux City, IA, for Respondent

WILLIAM L. SCHMIDT, Administrative Law Judge

SUMMARY DECISION AND ORDER

Statement of the Case

Complaint Regarding Unlawful Employment, filed against Student Exchange International, Inc. (Respondent or SEI) on February 27, 1989,[1] alleges: 1) that SEI continued to employ Maria Filomena Barrientos-Aguirre (Barrientos) in violation of Section 274A(a)(2) of the Immigration and Nationality Act (Act) after November 6, 1986; and 2) that SEI failed to properly verify the employment eligibility of Barrientos in violation of Section 274A(a)(1)(B) of the Act. Later, the complaint was amended to allege that SEI hired Barrientos for employment in the United States knowing that she was an alien not authorized for employment in this country in violation of Section 274A(a)(1)(A) of the Act or, alternatively, that SEI unlawfully continued to employ Barrientos as alleged in the original complaint.[2]

Respondent's timely answer alleged affirmatively that Barrientos had "worked for the corporation continuously from before Novem-

[1] Where not shown otherwise, further dates refer to the 1989 calendar year.

[2] Complainant's motion to amend the complaint in this manner was granted orally during the course of a pre-hearing conference on May 26. Respondent's affirmative defenses were deemed applicable to the added allegation.

ber 6, 1986 up to the present time" and "that Barrientos enjoys an H-1 visa, which also entitles her to be employed in this country by the respondent." [3]

At the conclusion of a pre-hearing conference on August 2, I reconsidered Complainant's prior cross-motion for summary decision denied by written order on May 15 and granted that motion. Based upon the entire record herein I now enter the following written:

Findings of Fact

I. Background [4]

SEI, a Nebraska non-profit corporation which maintains an office and place of business in Omaha, Nebraska, conducts student and cultural exchange programs between South American countries (primarily Chile) and the United States and vice versa. Effectively, the Nebraska corporation is a subsidiary of Student Exchange International headquartered in Santiago, Chile.

The SEI office in Omaha is managed and supervised by its director. That individual recruits host families in this country, locates school sites, enrolls exchange students in local schools, arranges special academic help for exchange students, recruits U.S. students for educational experiences in Central and South American countries, coordinates U.S. activities with the Santiago headquarters, and handles administrative affairs at the Omaha office. SEI maintains an Omaha bank account from which salaries and other corporate expenses are paid.

Following internal wrangling and unfavorable publicity in the United States concerning the management of its student exchange activities, SEI appointed Barrientos, a Chilean national, as its director in Omaha.[5] In mid-May, Barrientos entered the United States to assume her position at Omaha in possession of a B-2 visitors visa which does not provide employment eligibility in the United States.

In October 1987, SEI filed a Form I-129B petition (I-129B petition) designed to classify a nonimmigrant as a temporary worker or trainee, naming Barrientos as the beneficiary of the petition. In so doing SEI sought, in effect, to have Barrientos declared eligible for

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[3] Section 101(a)(3)(A) of the Immigration Reform and Control Act of 1986 exempts employers from sanctions for employees hired prior to November 6, 1986.

[4] The findings in this section are based on documents submitted by the parties from a file of the Immigration and Naturalization Service denoted "LIN 880370032 Northern Regional Service Center (OMA)" which was officially noticed in my Order to Show Cause and Notice of Stay dated April 6.

[5] Barrientos' background reflects that she is a highly qualified educator academic administrator.

an H-1 visa. H-1 visas, authorized by Section 214(c) of the Immigration and Nationality Act, permit aliens of distinguished merit and ability to perform services in the United States of an exceptional nature requiring such merit and ability.

Concurrent with the filing of SEI's petition, Barrientos filed a Form I-506 application for a change of her nonimmigrant status (I-506 application). By this application she sought an H-1 visa to replace her soon-to-expire B-2 visa.[6]

After twice denying the I-129B petition, the Immigration and Naturalization Service (INS) reconsidered and granted that petition in February 1989, vacating its prior orders in the process. The I-506 application, denied following the first unsuccessful appeal of the I-129B petition, was never approved and, consequently, no H-1 visa was ever issued to Barrientos.[7]

Respondent's counsel here entered an appearance on behalf of Respondent in the I-129B petition proceeding and on behalf of Barrientos for the I-506 application. He remained as counsel of record throughout that extended process.

II. Relevant Case Chronology

Following service of the complaint and Respondent's answer, Complainant prepared and served on SEI's counsel of record certain interrogatories and a request for production of documents dated March 20. Among other matters, the interrogatories call upon SEI to state whether Barrientos was employed by it subsequent to November 6, 1986, and, if so, the date of her first employment and her duties.

By motion dated March 27, SEI sought a summary decision on the ground that Barrientos "was hired by this company in 1983" and on the further ground that Barrientos had been granted an H-1 visa on February 16, pursuant to the October 1987 I-129B petition. SEI's motion alleged that the February 1989 decision on the H-1 visa application was effectively retroactive to October 1987 when the I-129 petition was originally filed.

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[6] Section 214(c) and the attendant regulations, in effect, bifurcates the procedure for importing such aliens by requiring the importing employer to establish cause before the visa is granted to the beneficiary alien. See *Matter of the University of Oklahoma*, 14 I&N Dec. 213 (BIA 1973).

[7] In this proceeding, the Complainant argued that as Barrientos violated the terms of the B-2 visa by working in the United States prior to the approval of the I-129B petition, the INS was precluded from issuing the H-1 visa pursuant to the I-506 application while she remained in this country. Instead, it argued, Barrientos would have been required to return to Chile and apply for the H-1 visa through the U.S. Consulate there.

Appended to SEI's motion for summary decision was a statement in the Spanish language executed by Jamie Bustos purportedly stating that "Barrientos is a permanent full time employee [of SEI] since 1983 up to this date" and that "she is located in the United States in the City of Omaha, Nebraska, supervising [SEI's] office at that city." [8] Also appended was a copy of the February 1989 favorable decision on the October 1987 I-129 petition vacating prior unfavorable decisions.

The parties were ordered to show cause why SEI's motion for summary decision should or should not be granted. In that order, dated April 6, Respondent's duty to answer the outstanding interrogatories and produce documents as requested on March 20 was stayed.

Complainant opposed the SEI's motion for summary decision and filed a counter-motion for summary decision. In essence, Complainant asserted that documents filed by Respondent in the I-129 petition proceeding established that Barrientos was first employed in the United States by SEI subsequent to November 6, 1986, and at the time of her initial employment in this country by SEI, Barrientos held only B-2 visitors visa which does not permit employment.

On May 15, 1989, both motions for summary decision were denied because a material issue of fact existed concerning the initial date of Barrientos' employment by SEI as evidenced by the Bustos' statement in this proceeding and a variety of documents to the contrary filed in the I-129B petition proceeding.[9] At the same time, the stay related to Complainant's outstanding interrogatories and request to produce was discontinued.[10]

Following denial of the motions for summary decision a pre-hearing conference was scheduled for May 26. By letter dated May 24, Respondent's counsel returned the interrogatories and request to produce to Complainant unanswered in their entirety. Respondent's counsel explained that upon review he had concluded that only Bustos would be in a position to answer the matters requested and suggested that Complainant "direct . . . these Interrogatories and Requests to Produce [to Bustos at his Santiago address] so they can be answered accordingly."

During the May 26 conference, agreement was concluded by counsel on the terms of a standard settlement with an added com-

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[8] The correctness of the translation of Bustos' statement was disputed in an affidavit furnished by Complainant but this dispute was not deemed material.

[9] For example, Barrientos' curriculum vitae reflects no association with Respondent or its parent prior to her employment in May 1987.

[10] On May 16 a correction to my May 15 Ruling on Motions for Summary Decision issued to correct inadvertent errors in citations and dates.

mitment by INS to promptly dispatch all necessary paperwork in connection with Barrientos' H-1 visa application to the U.S. Consulate in Santiago, Chile, so that her visa application could be expeditiously processed during her summer vacation at home and she could re-enter the United States for lawful employment as SEI director in Omaha.

On June 5, Respondent's counsel served a Notice to Withdraw Attorney's Representation. As a basis for the withdrawal counsel cited Respondent's failure to communicate with counsel between May 31 and June 5, the date of the withdrawal notice. More specifically, counsel cited the failure of a representative to keep an appointment on June 2 to review the aforementioned settlement.

On June 9, I conducted a further pre-hearing conference with counsel. During this conference, Respondent's counsel declined to reconsider his position which was vigorously opposed by Complainant. Complainant's request for leave to file a written opposition was granted. Counsel were notified that the tribunal would enter an order postponing the hearing in light of the development. An order rescheduling the hearing to August 14 was entered on June 12.

On June 12, Complainant served its written opposition to the withdrawal of counsel citing good faith performance of its commitment to expeditiously transmit documents to Santiago for Barrientos' benefit and the cancellation of scheduled depositions in reliance on the settlement understanding of May 26. In addition, Complainant moved for a further conference concerning the status of the case and for an order compelling discovery to obtain material originally requested on March 20.

On June 26, 1989, Complainant propounded and served upon SEI Complainant's First Requests for Admission of Matters and Genuineness of Documents, Pursuant to 28 CFR 68.17. In so doing, Complainant sought to have SEI "within 30 days after service of this request, to make the following admissions for the purpose of this action . . ." Thereafter, a series of statements were set forth by Complainant including the following:

* * * * * * *

4. On December 4, 1987, the Respondent and Maria Barrientos signed an agreement for Respondent to employ Maria Barrientos in the United States of American effective May 15, 1987 through May 14, 1988 plus any extensions. Attached hereto as Exhibit "B" is a true and correct copy of the employment agreement.

5. Maria Barrientos entered the United States of America as a visitor for pleasure on a B-2 visitor visa on May 18, 1987.

6. A visitor for pleasure admitted to the United States of America on a B-2 visa is not authorized to be employed in the United States of America.

7. Maria Barrientos is a citizen and national of Chile. She was not at any time from May 18, 1987 through August 23, 1988 authorized to be employed in the United States of America.

8. On or about May 19, 1987, Respondent opened a bank account with the First National Bank of Omaha, identifying Maria Barrientos as the Director of the Respondent. Attached hereto as Exhibit "C" is a true and correct copy of banking records of Respondent and paychecks from Respondent to Maria Barrientos.

9. The Respondent employed Maria Barrientos in the United States of America from May 18, 1987 through August 13, 1988.

10. The Respondent knew that Maria Barrientos was an alien who did not have employment authorization in the United States of America when Respondent commenced her employment. Attached hereto as Exhibit "D" is a true and correct copy of Form I-129B filed by the Respondent with the Immigration and Naturalization Service (INS).

11. The I-129B indicates that Respondent had knowledge that Maria Barrientos was an alien and that she did not have employment authorization.

12. Maria Barrientos was not an employee of the Respondent prior to November 6, 1986.

13. By letter dated August 5, 1988, Respondent was notified by INS that Maria Barrientos was an alien not authorized to be employed.

14. Attached hereto as Exhibit "E" is a true and correct copy of the letter that INS wrote to Respondent in relation to Respondent's employment of Maria Barrientos.

15. Respondent continued to employ Maria Barrientos after August 5, 1988, knowing that Maria Barrientos did not have employment authorization.

* * * * * * *

Respondent did not reply in any fashion to Complainant's requests for admission of matters or genuineness of documents either within the 30 day period following service or any subsequent time.

After careful consideration of the withdrawal notice, the opposition thereto and the entire record in the case, I rejected counsel's withdrawal notice on July 21 concluding as follows:

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Withdrawal of counsel in these proceedings is governed by 28 CFR 68.30(g) which provides "[a]ny attorney of record who intends to withdraw from a case must provide the Administrative Law Judge and all parties with written notice at least ten (10) days before the hearing date, unless otherwise allowed by the Administrative Law Judge."

There is not the slightest indication that either Respondent or opposing counsel were forewarned such action was contemplated. Given the length of representation by Respondent's counsel and the paucity of reasons provided for withdrawing at such a critical stage in this case, I have reluctantly concluded that counsel's

action is precipitous, without substantial cause, and impedes the timely processing of this case.

Here counsel's notice of withdrawal was dated, served and received within the ten day period provided by the rule for at that time the hearing was scheduled for June 13. Only counsel's actions occasioned the rescheduling of the hearing. For these reasons, the notice of withdrawal of Respondent's counsel is entered in the record as rejected. To do otherwise would suggest the tribunal condones counsel's action and it does not.

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Complainant's motions for a further pre-hearing conference concerning the status of the case and for an order compelling answers to the March 20 interrogatories and the production of documents were granted. That order scheduled a conference for August 2 and fixed July 31 as the deadline for the answering of interrogatories and the production of documents and warned of possible sanctions under 28 CFR 68.19(c) (1) through (5).

On July 25, Respondent served a Request to Reconsider Rulings on Opposition to Withdrawal of Counsel and Pending Motions. That request asserts merely that he had informed his client, including Barrientos, that his decision to withdraw was final and that his client should seek other counsel or proceed pro se. The request further reflects an inquiry from Complainant's counsel concerning a direct contact from Barrientos. Although counsel agreed to participate in the August 2 conference, he asserted that he could not anticipate reimbursement for attending the scheduled hearing. That request was taken under advisement for ruling with this summary decision.[11]

On August 1, 1989, Complainant filed a Motion for Relief Pursuant to 28 CFR 68.19(c) and Notice of Failure to Answer Requests for Admissions Propounded Pursuant to 28 CFR 68.17.

During the August 2 pre-hearing conference Respondent's counsel first asserted that the Complainant's Requests for Admission under 28 CFR 68.17 had been returned to Complainant. When counsel was advised that only Complainant's earlier interrogatories (served in March 1989) had been returned (unanswered), he then asserted that he could not recall if he received Complainant's requests for admission of matters or genuineness of documents. No unequivocal denial of receipt was ever made despite repeated requests for an explanation concerning the disposition counsel in-

[11] By letter of December 6, Complainant advised that Respondent's counsel is now deceased. Accordingly, the request is now moot.

tended to make concerning the Requests for Admission nor was any request for added time to respond made. In addition, counsel acknowledged that no action had been taken to respond to the unanswered interrogatories or request to produce pursuant to the July 21 order.

In view of the foregoing, Complainant renewed its August 1 motion to impose sanctions under 28 CFR 68.17 with respect to the request for admissions and under 28 CFR 68.19 for failure to engage in discovery pursuant to the July 21 order. That motion was granted. On the basis of the admitted facts, Complainant's cross-motion for summary decision was reconsidered and granted. A minute order reflecting that decision and cancelling the August 14 hearing issued on August 4.

III. Basis for Summary Decision

28 CFR 68.17(a) [12] provides that a party to an 8 U.S.C. 1324a proceeding may serve upon any other party a "written request for the admission . . . of the genuineness and authenticity of any relevant document . . . or for the admission of the truth of any specified matter of fact." I find that Complainant's June 26 Request for Admission complies with the letter and intent of 28 CFR 68.17(a).

28 CFR 68.17(b) provides that "[e]ach matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request . . ." the recipient serves a written statement either: 1) specifically denying the requested admission; 2) giving reasons why the requested admission cannot be truthfully admitted or denied; or 3) interposing objections on the ground that some or all of the matters are privileged, irrelevant or otherwise improper.

In addition, 28 CFR 68.19 addresses motions to compel discovery and sanctions for failure to engage in discovery. 28 CFR 68.19(a) provides that a discovering party may move the Administrative Law Judge for an order compelling response or inspection "[i]f a deponent fails to answer a question propounded, or a party upon whom a discovery request is made pursuant to Sections 68.14 through 68.18, fails to respond adequately or objects to the request or to any part thereof, or fails to permit inspection as requested. . ." 28 CFR 68.19(b) and 68.19(c) go on to outline the necessary content of a motion to compel discovery and the sanctions available to the Administrative Law Judge if a party or deponent against

[12] The citations to rules and regulations here are those contained in the interim final rule as published in the Federal Register on November 24, 1987 which were utilized at the time the oral rulings were made in this case.

whom an order compelling discovery issues fails to comply with said order.

Complainant's motion of August 1 seeks relief pursuant to 28 CFR 68.19(c) and gives notice of failure to answer requests for admission under 28 CFR 68.17. I find that the sanction provided in 28 CFR 68.17(b) supplements those in 28 CFR 68.19(c) insofar as requests for admissions are concerned and automatically applies where a request for admission is left unanswered.

In view of the unanswered Requests for Admission here, I find that Respondent now admits that Barrientos was not an employee of Respondent prior to November 6, 1986, and that Respondent employed Barrientos in the United States of America from May 18, 1987 through August 13, 1988, knowing that Barrientos was an alien who did not have employment authorization in the United States of America when Respondent commenced her employment. As Respondent at no time has denied that it did not prepare Form I-9 in connection with her employment in the United States of America, I further find that Respondent failed to prepare Form I-9 or otherwise verify her employment eligibility as required by law in connection with Barrientos' employment in Omaha.

Upon the foregoing findings of fact, I hereby make the following:

Conclusions of Law

1. Respondent violated Section 274A(a)(1)(A) and/or 274A(a)(2) of the Immigration and Nationality Act by hiring Maria Barrientos for employment in the United States commencing in May 1987.

2. Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act by failing to prepare Form I-9 with respect to the employment of Maria Barrientos in the United States which commenced in May 1987.

Upon the foregoing findings of fact, conclusions of law and the entire record herein:

IT IS HEREBY ORDERED THAT

Respondent, Student Exchange International, Inc., its agents, successors and assigns:

1. Cease and desist from:

a. Violating Section 274A(a)(1)(A) or 274A(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1324a(a)(1)(A) or 1324a(a)(2)].

b. Violating Section 274A(a)(1)(B) of the Immigration and Nationality Act [8 U.S.C. 1324a(a)(1)(B)].

2. Take the following affirmative action to effectuate the policies of the Immigration and Nationality Act:

a. Pay a civil money penalty in the total amount of $700 allocated as follows:

(1) $500 for unlawfully hiring or continuing to employ Maria Barrientos in the United States.

(2) $200 for failing to prepare Form I-9 in connection with the employment of Maria Barrientos in the United States between May 1987 and August 1988.

DATED: December 20, 1989.

WILLIAM L. SCHMIDT
Administrative Law Judge
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