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

United States of America, Complainant vs. Wrangler's Country Cafe, Inc., and Henry D. Steiben, Individually, Respondents; 8 U.S.C. 1324a Proceeding; Case No. 89100381.

ORDER DENYING RESPONDENT STEIBEN'S MOTION TO DISMISS AND MOTION FOR SUMMARY DECISION

STATEMENT OF THE CASE

On August, 7, 1989, a complaint was filed by the United States with the Office of the Chief Administrative Hearing Officer, charging Respondents Wrangler's Country Cafe, Inc., and Henry D. Steiben, jointly, with violations of the Immigration Reform and Control Act of 1986 (IRCA). The complaint charged Respondents with hiring three named individuals knowing these individuals were not authorized for employment in the United States. The complaint further charged Respondents with paperwork violations for failing to prepare Form I-9 for these three employees and others. A hearing was scheduled to be held on December 5, 1989 in Kansas City, Missouri. That hearing was postponed indefinitely pending the resolution of Respondent Steiben's various motions.

On August 17, 1989, Respondent Steiben filed a motion to dismiss and a motion for summary judgment. Subsequently, on August 28, 1989, both Respondents filed a joint answer to the complaint denying the allegations therein. This answer was filed by Respondent Steiben ``in the alternative'' to his motion to dismiss or for summary judgment.

The parties subsequently filed a stipulation regarding numerous facts at issue.

STATEMENT OF ISSUES

Respondent Steiben moves to dismiss the action as to him, or in the alternative, for the entry of summary decision in his favor. He asserts the absence of any personal liability on his part for the alleged violations, contending that he is protected by the existence of a corporate entity, Wrangler's Country Cafe, Inc., which is the

legal ``employer'' of the aliens, even though he is the sole owner of the corporation, and that the INS regulation, 8 C.F.R. Sec. 274a.1(g), which defines the term ``employer'' in an expansive way, is void as being inconsistent with the intent of Congress. Complainant, the INS, responds that the regulation defining an ``employer'' as including a person who acts directly or indirectly as an agent of the employer, was well within the ambit of the authority delegated by Congress to the INS to promulgate implementing regulations, and serves the intent of Congress to eliminate the economic magnet which draws aliens to this country for employment opportunities.

The Complainant argues, alternatively, that Respondent Steiben may be held personally liable for the obligations of the corporate entity on a theory of ``piercing the corporate veil,'' since the facts allegedly demonstrate that Steiben did not adhere to the requisite legal corporate formalities and set up the corporation as a means of perpetrating a fraud upon his creditors.

STIPULATED FACTS

The parties have stipulated to a number of facts. First, Steiben agrees that he, individually, is an ``employer'' as defined in 8 C.F.R. Sec. 274a.1(g), assuming the validity of that regulation.

Second, the Respondent corporation was incorporated on 1/27/89 when Steiben caused Articles of Incorporation to be filed with the Missouri Secretary of State.

Third, the corporation has never undertaken to respect the formalities of corporate existence, such as issuing stock, maintaining a corporate minute book, appointing officers and directors, or filing any reports with the Missouri Secretary of State.

Fourth, the corporation, which operated a restaurant, existed as a going concern for less than six months: from 1/27/89 to 6/5/89.

Fifth, the corporation has not engaged in any business since the restaurant ceased its operations, and it has no plans to engage in any future business. The corporation has not filed Articles of Dissolution or Liquidation with Missouri Secretary of State.

Sixth, Respondent Steiben exercised control over all aspects of the operation of the corporate business, including personnel matters. Steiben personally hired the three alleged unauthorized aliens who are the subject of the complaint.

Seventh, Steiben opened an unincorporated restaurant, named Wrangler's Country Restaurant in Reed Spring, Missouri after closing Respondent Wrangler's Country Cafe in Kansas City, Missouri.

Finally, the parties stipulate to the admissibility of exhibits 2-7 attached to the INS' opposition papers. These exhibits include the

sworn statement of one of the employees alleged to have been illegally employed by Respondent.

PURPOSES OF IRCA

1. Employer Sanctions

The Immigration Reform and Control Act of 1986 established several major changes in national policy regarding the employment of illegal immigrants. Section 101 of IRCA amended the Immigration and Nationality Act of 1952 by adding Section 274A (8 U.S.C. Sec. 1324a), which attempts to control illegal immigration into the United States by imposing new civil liabilities upon employers who knowingly hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States. The imposition of a civil monetary penalty upon employers who hire non-U.S. citizens who are not authorized to work is intended to confront the problem of illegal immigration at its source by eliminating the magnet which draws people to the United States in search of employment opportunities. The penalty also acts as a deterrent to potential violators who might otherwise exploit unauthorized aliens, knowing their presence in the United States to be unlawful. IRCA therefore seeks to eliminate the jobs available to unauthorized aliens as well as to improve the working conditions for those authorized to work in the United States.

2. Prevention of Discrimination

In Section 102 of the new immigration law, (8 U.S.C. Sec. 1324b) Congress created a new cause of action for discrimination against authorized aliens, citizens, and those intending to become citizens, on the basis of national origin or citizenship status. This provision was introduced in response to the concern that the employer sanction provisions of IRCA would result in discrimination in employment against non-citizens, ethnic minorities, or anyone perceived by an employer as looking or sounding ``foreign.'' To aid in the enforcement of the anti-discrimination provision, IRCA created the Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice for the purpose of investigating and prosecuting cases of discrimination. An individual found to have been the victim of discrimination may be entitled to an award of backpay and attorneys' fees.

VALIDITY OF THE INS REGULATORY DEFINITION OF EMPLOYER

Congress directed the Attorney General to issue ``such regulations as may be necessary in order to implement this section.'' Section 101(a)(2) of IRCA.

The regulation at issue, 8 C.F.R. Sec. 274a.1(g), promulgated under this grant of authority, provides, in part, as follows:

> The term ``employer'' means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. . . .

This was written as a `legislative rule' under a delegation of rulemaking authority to an administrative agency rather than as an `interpretive rule' giving agency guidance on the meaning of a statute.

> The distinction between legislative and interpretive rules is generally drawn to determine one of two questions: 1) whether the APA's procedural requirements for rule making apply, (citation omitted) or 2) whether the rule has the `force and effect of law,' (citation omitted). Legislative rules are said to have the `force and effect of law'--i.e., they are as binding on the courts as any statute enacted by Congress. `A reviewing court is not free to set aside those regulations imply because it would have interpreted the statute in a different manner.' Batterton v. Francis, 432 U.S. 416, 425 (1977). Legislative rules are valid so long as they are reasonably related to the purposes of the enabling legislation, (cite omitted) promulgated in compliance with statutory procedures, (cite omitted), and not arbitrary or capricious, (citation omitted).

Production Tool Corp. v. Employment & Training Admin., 688 F. 2d 1161, 1165 (7th Cir. 1982).

The Court in Production Tool relied upon Professor Davis' Administrative Law Treatise to articulate the test for determining whether a rule is interpretive or legislative. The crucial distinction in determining that a rule is legislative is whether the agency in question ``is exercising delegated power to make law through rules, and rules are interpretive when the agency is not exercising such delegated power in issuing them.'' Id. at 1166.

Here, it is clear that the INS was exercising its power under a statutory grant of general authority. Therefore, its definition of employer is binding on the courts, ``[a]s long as the regulation reasonably implements the purpose of the legislation and is not inconsistent with any constitutional or specific statutory provision . . .'' Morgan v. Office of Personnel Management, 773 F.2d 282, 285 (D.C. Cir. 1985).

In United States v. St. Bernard Parish, 756 F.2d 1116 (5th Cir. 1985), the court discussed the standards for reviewing legislative rules.

> . . . (1) a regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity; and (2) a regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute.
>
> Thus, our scope of review of the agency issued regulations is limited. Such judicial restraint in the assessment of administrative regulations is rooted in a realis-

> tic view of the legislative process. Legislation cannot undertake to deal with every situation. Accordingly, Congress creates an administrative agency so that experts who are familiar with the task Congress has identified can address the problems in all their intracasies.

In Batterton v. Francis, 432 U.S. 416, 425 (1977), the Court reviewed a challenge to a HEW regulation implementing an AFDC program extending benefits to families with unemployed fathers. The Department's regulation defined the statutory term ``unemployment'' to permit states to exclude from the program fathers who could not also qualify under state regulations for unemployment insurance, such as men who were unemployed due to labor disputes. The statute in question explicitly delegated to the Secretary of HEW the authority to prescribe the meaning of unemployment. The statute defined a dependent child as now who ``has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father . . .'' Batterton at 418, n.2 (emphasis added). The Court noted that Congress:

> expressly delegated to the Secretary the power to prescribe standards for determining what constitutes `unemployment' for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner. (cite omitted)
>
> The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is `arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' Batterton at 425-26.

Respondent Steiben asserts that 8 C.F.R. Sec. 274a.1(g) is an invalid regulation because it extends the reach of IRCA beyond the intent of Congress. He asserts that by defining employer to include ``agent or anyone acting directly or indirectly in the interest'' of the employing entity, it sweeps within the grasp of the law employees of the employer, and thus exceeds the purposes of the statute by permitting the Complainant to penalize individuals who act as agents of the employer, even though the individuals may be no more than corporate functionaries, such as a personnel manager in charge of recruiting and hiring employees.

The language of the regulation in question is analogous to the statutory definition of employer found in the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(d), under which individual liability for judgments which the corporate employer is unable to meet has been placed on corporate officers. Section 203(d) of the FLSA

provides that an employer is ``any person acting directly or indirectly in the interests of an employer in relation to an employee.''

Complainant relies upon the definition of employer embodied in the FLSA to support the scope of its own interpretation of the regulation at issue here, and cites FLSA case law wherein agents and/or officers of a corporation have been held personally liable for the unlawful acts of a corporation.

In Donovan v. Grim Hotel Co. 747 F.2d 966 (5th Cir. 1984), the court held the founder and president of a hotel chain personally liable for a judgment for failure to pay overtime to employees. The court noted that ``The Fair Labor Standards Act is to be construed liberally because by it Congress intended to protect the country's workers.'' Id. at 971.

The court in Grim Hotel Co. relied upon Falk v. Brennan 414 U.S. 190, 195 (1973), where the Court found that the statutory definition of employer allowed an agent to be liable for unpaid wages. ``In view of the expansiveness of the Act's definition of employer . . .'', the Court held a company which provided managerial services to a number of apartment complexes was the employer of the maintenance workers who were paid from the tenants' rents, despite the fact that the contract between the managerial company and the property owners stated that they were employees of the property owners.

Similarly, in Donovan v. Agnew, 712 F.2d 1509 (1983 1st Cir.), the court held officers of a bankrupt corporation liable for deficiencies in wage payments to its employees, finding that the officers qualified as ``employers'' under the statutory definition. Despite the ``overwhelming authority'' that corporate officers with operational control of the enterprise could be held personally liable, the court was reluctant to disregard the corporate entity and place liability on the corporate officers.

> We agree that it should not lightly be inferred Congress intended to disregard in this context the shield from personal liability which is one of the major purposes of doing business in a corporate form. It is difficult to accept, as the Secretary argues and as some courts have apparently held, that Congress intended that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable for the corporation's failure to pay minimum and overtime wages as required by the FLSA. Donovan v. Agnew at 1513.

But the court held that in view ``of the entire remedial context of the Act,'' the broad definition of employer contained in the statute was fairly applied to individual officers with significant ownership interest who had operational control of significant aspects of the corporation's day to day functions. Id. at 1513-1514.

CONCLUSIONS

The employer sanctions provisions of IRCA, as noted above, impose civil monetary penalties upon employers or their agents who hire non-U.S. citizens who are not authorized to work in the United States. The discrimination provisions of IRCA require employers or their agents to pay backpay and attorneys' fees to those employees who have unlawfully been denied employment. The end or purpose of such fines and backpay awards is to obtain compliance by employers or their agents with the overriding intent of IRCA, namely, to discourage illegal immigration at its source by eliminating employment opportunities for illegal aliens; and by such means, to provide additional employment opportunities to certain other individuals, to prevent the exploitation of employees generally, and to deter other employers from engaging in similar unlawful conduct.

Clearly, these aims, together with the aims embodied in the Fair Labor Standards Act and other statutes involving the rights of employees to earn a livelihood, are part of an overall scheme to regulate employment within the United States. Respondent Steiben has not shown that the provisions of IRCA are of lesser national importance than those of FLSA, or are so different in intent as to preclude the Complainant from imposing monetary liability in the form of fines upon agents of offending employers, or that such fines would not operate as a deterrent to the unlawful conduct which IRCA was designed to eliminate.

While, to be sure, the broad definition of ``employer'' in Section 274a.1(g) of IRCA would, in a literal sense, permit the Complainant to attempt to impose a fine upon a low level functionary of a business entity, there is no evidence that the Complainant has so interpreted this section of IRCA. Moreover, should such excessive zealousness in enforcing IRCA occur, reviewing authorities would strike down such fines as being beyond the intent of IRCA. Certainly that is not the case herein, as the Complainant is seeking to impose a fine upon the sole owner of the corporation who, it has been stipulated, personally hired the alleged illegal aliens and, it is alleged by Complainant, even provided transportation and board for the illegal aliens so that they would be in a position to render employment services for the Respondents. Under such circumstances, the Complainant's attempt to hold Respondent Steiben responsible for such alleged violations in not unjustified.

The INS, which was specifically empowered by Congress to devise regulations to implement IRCA, determined that the purposes of IRCA would best be served by placing personal liability upon individuals who might otherwise hide behind the shield of

corporate existence. This determination does not fail the test of reasonableness required under United States v. St. Bernard Parish, supra.

Therefore, the motion to dismiss and for summary decision is denied.[1]

SO ORDERED.

Dated: March 6, 1990.

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[1] In view of the foregoing, it is unnecessary to discuss the Complainant's alternative theory, namely, that under the circumstances specified in the ``stipulated facts,'' supra, no legitimate corporate entity existed which would operate to shield Steiben from personal liability.