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

United States of America, Complainant v. A-Plus Roofing, Inc., Respondent; 8 U.S.C. 1324A Proceeding; Case No. 89100479

SUMMARY DECISION AND ORDER

On September 25, 1989, a Complaint Regarding Unlawful Employment was filed against A-Plus Roofing, Inc., herein called the Respondent, by the United States of America, through the Department of Justice, Immigration and Naturalization Service, herein called the Complainant. Attached thereto and incorporated therein is the Notice of Intent to Fine. On October 3, 1989, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, scheduling the hearing in this matter to be held on or about January 23, 1990. A timely Answer was filed by Respondent, on November 3, 1989.

On December 12, 1989, Complainant submitted a Motion for Partial Summary Decision as to all counts of the Complaint except with regard to the employment of Manuel Casteneda. On January 2, 1990, Complainant filed a Motion for Leave to Amend Complaint to strike Casteneda from the allegations in Count I and to add a new Count IV alleging the failure to present the Form I-9 for Casteneda. On January 4, 1990, following the failure of Respondent to produce a completed Form I-9 Casteneda, Complainant submitted a second Motion for Partial Summary Decision, in which it sought summary decision as to the new count IV.

On January 12, 1990, the hearing originally scheduled for January 23, 1990 was continued indefinitely pending consideration of Complainant's Motion for Summary Decision. On March 2, 1990, Complainant filed its Second Motion for Leave to Amend Complaint to reduce the amount of the fine from $7,750 to $5,000. Subsequent efforts to reach a settlement were unsuccessful, and on June 18, 1990, the motions to amend the complaint were granted.

Respondent does not contest the violations alleged in the amended complaint but does argue that the amount of the fine sought is excessive. Thus there is no issue as to any material fact with

regard to the alleged violation. The sole issue for determination is the amount of the fine to be imposed.

Ruling on Motion for Summary Judgment

28 CFR Section 68.8(c)(1) provides that any allegation not expressly denied in the Answer shall be deemed to be admitted. Section 68.8(c)(2) provides that the Answer shall include a statement of the facts supporting each affirmative defense. Section 68.36 provides that

(a) any party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing papers with affidavits, if appropriate, or countermove for summary decision. . . .

(c) The Administrative Law Judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

Section 68.1 of the Rules provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by the Final Rules, or by any statute, executive order, or regulations. Thus, it is appropriate, in considering the standards for granting a Motion for Summary Decision under Section 68.36, to look to Rule 56 of the Federal Rules of Civil Procedure, which relates to summary judgments, and the cases with regard thereto.

The Supreme Court has stated that the purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matter. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which affects the outcome of a hearing. Anderson v. Liberty Lobby, 477 U.S. 242 (19896). If no genuine issue of material fact and no defense exists in the case, the complainant is entitled to summary judgment as a matter of law when it has set forth a prima facie case in its pleadings upon which relief may be granted. See Rawdon v. United States, 364 F.2d 803 (9th Cir. 1966), cert. denied, 386 U.S. 909 (1967); United States v. Leitner, 86 F.Supp. 628 (N.D.Cal. 1949), aff'd, 184 F.2d 216 (9th Cir. 1950).

Upon a full consideration of the pleadings and the affidavits and exhibits submitted in support of Complainant's two Motions for Partial Summary Judgment, I conclude that there is no genuine issue as to any material fact and the Complaint, as amended, is

sufficiently particularized to support a Summary Decision. Accordingly, Complainant's Motions for Partial Summary Decision are hereby granted. Upon the entire record, I make the following:

Findings of Fact

The Immigration Reform and Control Act of 1986 (IRCA) establishes several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amends the Immigration and Nationality Act of 1952, herein called the Act, by adding a new section 274A (8 U.S.C. 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, upon employers who knowingly hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States. Essential to the enforcement of this provision of the law is the requirement that employers comply with certain verification procedures as to the eligibility of new hires for employment in the United States.

Sections 274A(a)(1)(B) and 274A(b) provide that an employer must attest on a designated form that it has verified that an individual is not an unauthorized alien by examining certain specified documents to establish the identity of the individual and to evidence employment authorization. Further, the individual is required to attest, on the designated form, as to employment authorization. The employer is required to retain, and make available for inspection, these forms for a specified period of time. Form I-9 is the form designated for such attestations. Section 274A(e)(5) provides for the imposition of a civil penalty of not less than $100 and not more than $1,000 for each individual with respect to whom a violation of 274A(a)(1)(B) occurred.

The Complainant alleges that Respondent violated Section 274A(a)(1)(B) of the Act by:

Count I

Failing to prepare the Employment Eligibility Verification Form (Form I-9) for the following employees hired for employment in the United States after November 6, 1986:

1. Jesus Gomez-Cuebas
2. Bill Giavia
3. Robert Johnson
4. Enrique Martinez
5. Jose Carlos Pedroza
6. Ignacio Tuscano

Count II

Failing to ensure that the following employees, hire for employment in the United States after November 6, 1986, properly completed Section 1 of the Form I-9:

1. Joaquin Aguirre
2. Ricardo Gonzalez
3. David Aguirre-Guzman

Count III

Failing to complete Section 2 of the Form I-9 properly for the following employees hired for employment in the United States after November 6, 1986:

1. Jose Villa
2. Felipe Vega

Count IV

Failing to present a Form I-9 for the following employee, hired for employment in the United States after November 6, 1986:

1. Manuel Casteneda

Since Respondent does not contest the substantive allegations of the complaint, and no controverting evidence has been submitted, I conclude that Complainant has established a prima facie case which has not been controverted by Respondent. Accordingly, I find that Respondent has violated Section 274A(a)(1)(B) of the Act as alleged, 8 U.S.C. Section 1324a(a)(1)(B).

Civil Penalties

Since I have found violations of Section 274A(a)(1)(B) of the Act, assessment of civil money penalties is required by the Act. Section 274A(e)(5) states:

> (5) ORDER FOR CIVIL MONEY PENALTY FOR PAPERWORK VIOLATIONS. With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 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 violations.

The amended complaint seeks a penalty of $490 for the violations found with regard to each of the six employees named in Count I of the complaint; $325 for the violations with regard to each of the five employees named in Counts II and III; and $435 for the violation with regard to the employee named in Count IV; for a total of $5,000. Respondent contends that the fines are excessive. Specifically, Respondent argues that the amount of the fines sought are out-

side the discretion permitted by the statute; that the fines are improperly based upon Respondent's alleged lack of cooperation and its failure to provide reliable evidence to substantiate its claim of inability to afford the amount of the fine; and that there are no rational reasons for the variation in the amount of the fines sought for the different counts of the Complaint.

As noted above, Section 274A(e)(E) sets forth certain guidelines to be used in determining the amount of the fine imposed. The arguments and the evidence submitted by the parties with regard to these factors show:

(1) Size of the business: Respondent, a San Francisco Bay area roofing contractor, with a high employee turnover, employs between five and twenty-five workers at a time, depending upon the season and the workload; employee turnover is very high. Respondent's business grossed $2.6 million in 1987, and $2.4 million in 1988. Figures for 1989 were not made available, through Respondent submits an affidavit of its accountant stating that Respondent reported a 1988 tax loss of $37,104.00 for the taxable year ending June 30, 1988 and an approximate tax loss of $70,000 for the taxable year ending June 30, 1989. However, the most current tax return submitted, 1987-1988, shows that Respondent president and sole shareholder Gary Fabriani received compensation in the amount of $199,794, up from $93.944 in 1987. Evidence as to Fabriani's salary for the 1988-1989 fiscal year is contained in an attachment to the Declaration of Respondent's Corporate Secretary Phyllis Wesson which was prepared for purposes of settlement negotiations herein. That attachment states that Fabriani's annual salary for 1988-1989 has only $24,000. The attachment further shows a salary to Fabriani's wife of $24,000 and a loan from the Fabriani's to Respondent of $143,000. No corroborating statements as to this information have been submitted from Respondent's outside accountant. In the circumstances, I find that Respondent has failed to establish either its inability to pay the fines, or that the fines, which are well below the statutory limits are excessive in relationship to Respondent's size. The ability to demonstrate tax losses does not necessarily establish the Respondent's poor financial condition nor its inability to pay the penalty.

(2) Good faith of the employer: Although Complainant initially asserted that Respondent displayed bad faith both in its compliance with the hiring and verification requirements of the statute and in its subsequent dealing with the INS, it seems to have abandoned, at least partially, this contention in the second motion to amend the complaint to reduce the amount of the fine. Thus it appears that Complainant's assertions of bad faith center mainly upon Re-

spondent's alleged failure to properly verify the eligibility of one third of its workforce. In this regard, Respondent asserts that it must hire people in the field for short periods of time which prevents it from correcting the mistakes of its managerial personnel. However, there is no evidence that Respondent took affirmative steps to ensure that its field managerial personnel complied with the verification requirements of the statute; and Respondent's failure to comply with the law must be attribute to its unwillingness to institute the necessary procedures and training to insure compliance.

(3) Seriousness of the violation: The Complainant asserts that the failure to properly prepare Forms I-9 for its employees precludes the INS from properly verifying the eligibility of Respondent's employees, which impedes the enforcement of the law. A total failure to prepare and/or present the Forms I-9 is even more serious since such conduct completely subverts the purpose of the law. Thus it is appropriate to assess a greater fine for such failure.

(4) Whether the individuals employed were unauthorized aliens: The complaint does not allege the employment of unauthorized aliens.

(5) History of previous violations: This was the first inspection of Respondent. Therefore there is no history of previous violations.

Having considered the evidence and the arguments submitted by both parties, as set forth above, I find that the fines sought fall within the statutory limits and are not excessive in light of the guidelines provided by Section 274A(e)(5) of the Act and 28 CFR 68.50(c)(2)(iv).

Conclusions of Law

(1) Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(B)) by:

(a) Failing to prepare the Employment Eligibility Verification Form (Form I-9) for each of the following employees, all of whom were hired by Respondent after November 6, 1986 for employment in the United States:

1. Jesus Gomez-Cuebas
2. Bill Biavia
3. Robert Johnson
4. Enrique Martinez
5. Jose Carlos Pedroza
6. Ignacio Tuscano

(b) Failing to ensure that the following employees, hired after November 6, 1986, for employment in the United States, properly completed Section 1 of the Form I-9:

1. Joaquin Aguirre
2. Ricardo Gonzalez
3. David Aguirre-Guzman

(c) Failing to complete Section 2 of the Form I-9 properly for the following employees, hired after November 6, 1986, for employment in the United States:

1. Jose Villa
2. Felipe Vega

(d) Failing to present a Form I-9 for the following employee, hired after November 6, 1986, for employment in the United States:

1. Manuel Casteneda

(2) The total fine of $5000 sought in the Amended Complaint is appropriate.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent pay a civil money penalty in the amount of $490 for each of the six violations with regard to the failure to prepare the Employment Eligibility Verification Form (Form I-9); $325 for each of the three violations with regard to failure to ensure that the employees properly completed section 1 of the Form I-9; $325 for each of the two violations with regard to failure to complete properly Section 2 of the Form I-9; and $435 for the one violation with regard to failure to present a Form I-9, for a total of $5,000.

2. The hearing previously continued is hereby cancelled.

3. This Summary Decision and Order is the final action of the Administrative Law Judge in accordance with Section 68.50(b) of the Rules as provided in Section 68.52 of the Rules, and shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Summary Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: July 27, 1990

EARLDEAN V.S. ROBBINS
Administrative Law Judge