

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

United States of America, Complainant v. Culinary Artistry, Inc.,  
d.b.a. Footer's Catering, Respondent; 8 U.S.C. § 1324a Proceeding; CASE  
NO. 89100438.

**ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR  
SUMMARY DECISION**

Procedural History

This proceeding was initiated on September 5, 1989, when Complainant filed a Complaint alleging violations of Title 8 of the United States Code § 1324a(a)(1)(B) and 8 C.F.R. § 274a. 2(b)(1)(ii) (A) and (B), which provide that it is unlawful for a person or entity to hire for employment in the United States individuals without complying with the verification requirements as set forth in the enumerated statute.

Respondent filed an Answer to the Complaint on November 3, 1989. The Answer consisted of a detailed letter and the Court, by Order of November 8, 1989, ruled that the letter would be deemed a general denial to all the allegations of the Complaint.

On January 11, 1990, Complainant, pursuant to 28 C.F.R. § 68.36, filed a Motion for Summary Decision. In its Motion, Complainant contended that Respondent's Forms I-9, as presented to the Service at the audit of February 23, 1989, along with the affidavit of Robert Firth, constituted a basis for concluding that there was no genuine issue of material fact in this case and that Complainant was entitled to a judgment as a matter of law.

On January 23, 1990, Respondent filed a Response to the Motion for Summary Decision.

On February 5, 1990, the Court ordered Complainant to depose Mr. James Lambatos for the purpose of more fully developing the record and for the purpose of clarifying to which documents, if any, Respondent lacked access.

On February 21, 1990, Complainant deposed both Mr. James Lambatos, president and sole owner of Culinary Artistry, and INS Agent Robert Firth.

Pursuant to Respondent's letter of February 23, 1990, which suggested the record would not be complete without the testimony of Jeri Crater, this Court issued an Order allowing Respondent to submit an affidavit of Jeri Crater.

On March 22, 1990, the affidavit of Jeri Crater was filed. In this affidavit, Ms. Crater asserts that Agent Firth did not conduct the December 30, 1988, educational visit with her but with her receptionist, who was not authorized to receive the instruction, and that Ms. Crater happened to have walked out of her office, asked what was going on, and was instructed by Agent Firth to sign for the Handbook for Employers.

On April 23, 1990, Complainant filed a Memo in Support of Assessment of Fines and a Proposed Order Granting Complainant's Motion for Summary Decision.

On May 17, 1990, Respondent filed a Response to the Proposed Order Granting Complainant's Motion for Summary Decision in which it contends that some of the records needed are those of Footer's, Inc., a separate and distinct business from Culinary Artistry.

On August 6, 1990, pursuant to the Court's order of July 25, 1990, Respondent filed a Response to the Order in which it (1) identified those individuals who were named in the Complaint but were not actually employees of Culinary Artistry; and, (2) submitted financial statements to support the financial position of the company.

On August 13, 1990, Complainant filed a Response to Respondent's letter of August 6, 1990, in which it asserts all individuals named in the Complaint were employees of Respondent and in which it questions the accuracy of the financial statements submitted by Respondent.

#### Summary of Relevant Facts

Based on the pleadings, motions, affidavits, and depositions, the following is a summary of the relevant facts.

On August 19, 1988, James Lambatos, as president and sole owner, created Culinary Artistry, Inc., d.b.a. Footer's Catering, the named Respondent. (Lambatos deposition p. 5) Mr. Lambatos created the company by accumulating a portion of the assets and liabilities of the catering business of Footer's, Inc. (Lambatos deposition pp. 53-54, 62) Respondent company has at times employed up to 400 people a year. (Response to Complainant's Motion for Summary Decision p. 2)

Prior to incorporating the Respondent company, Mr. Lambatos was a minority stock holder and manager in Footer's, Inc. (Re-

sponse to Complainant's Motion for Summary Decision p.1) On July 18, 1988, INS Agent Robert Firth conducted an employer sanctions operational (ESO) visit with Mr. Lambatos, who was then acting as manager of Footer's, Inc. (Firth deposition pp. 4-5) During the visit which lasted about 20-30 minutes, Mr. Lambatos gave Agent Firth a guided tour of the business operations. (Firth deposition p. 6) Agent Firth specifically recalls telling Mr. Lambatos about the importance of completing the Form I-9s. (Firth deposition p. 6) Agent Firth left a Handbook for Employer with Mr. Lambatos. (Firth affidavit p. 2)

However, upon cross examination by Mr. Lambatos, Agent Firth stated that he, during the July 18th visit, did not formally or informally train Mr. Lambatos regarding the requirements of IRCA, but Agent Firth does remember stating some of the requirements of IRCA such as the obligation of the employer to complete a Form I-9 for each employee hired after November 6, 1986. (Firth deposition pp. 13-14) Agent Firth stated that Mr. Lambatos assured him that he was in compliance with the requirements of IRCA and that this was corroborated by the fact that no aliens unauthorized to work were found on the premises. (Firth deposition p. 14)

On or about December 19, 1988, Agent Firth again conducted an ESO visit at the business location. (Firth deposition p. 7; Firth affidavit pp. 2-3) At this time, Mr. Lambatos had created and incorporated Culinary Artistry, Inc. (Firth p. 7) Agent Firth found two employees unauthorized to work on the business premises. (Firth deposition p. 7; Firth affidavit pp. 2-3)

On December 30, 1988, Agent Firth conducted an educational visit with Jeri Crater, controller at Respondent company, and left a Handbook for Employers with her. (Firth deposition pp. 10-11) Upon cross examination by Mr. Lambatos, Agent Firth stated that he did not instruct Ms. Crater on how to properly complete the Form I-9s or how to read the Handbook for Employers, but he did explain generally the obligations of employers under IRCA. (Firth deposition p. 18; See, Crater affidavit p. 1) Agent Firth further testified that he may not have left a Handbook for Employers with Ms. Crater, but that the INS had previously left a Handbook for Employers at Respondent company. (Firth deposition p. 17)

In her affidavit filed on March 22, 1990, Jeri Crater stated that Agent Firth never explained to her or to Mr. Lambatos the proper manner to complete the Forms I-9. (Crater affidavit p. 1) She further stated that the educational visit was made to the receptionist, not to herself, and that she just happened to step out of her office to see what was going on and Agent Firth told her he was leaving the Handbook for Employers and asked her to sign for it. (Crater

affidavit p. 1) Ms. Crater further testified that the receptionist had no authority to receive instruction on the employer's paperwork requirements under IRCA, nor to sign for the Handbook for Employers. (Crater affidavit p. 1)

On February 23, 1989, pursuant to the Notice of Inspection served on Respondent on February 17, 1989, the INS conducted an audit of Respondent's Forms I-9. (Firth affidavit p. 3) At this audit, Respondent presented 67 Forms I-9, none of which were properly completed. (Firth affidavit p. 3; Lambatos deposition pp. 24, 32) Additionally, a cross reference of the Forms I-9 with the employee list revealed that there were no Forms I-9 presented for 190 employees. (Firth affidavit pp. 3-4; Lambatos deposition pp. 25, 32)

In March 1989, Respondent received an educational visit from Charles McClure of the INS. Since this visit, Respondent asserts that he is now in compliance with the paperwork requirements of IRCA. (Respondent's Response to Motion for Summary Decision p. 3)

#### Legal Standards for Deciding Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. § 68.36 (1988); see also, Fed. R. Civ. Proc. Rule 56(c).

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 matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555. 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); see, also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See, also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admit-

ted.''); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) ('. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.');

see, also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Legal Analysis Supporting Summary Decision

After examining the pleadings and reviewing the legal arguments presented by both parties in this case, I have concluded there is no genuine issue of material fact for fifty-three of the individuals named in the Complaint. Therefore, Complainant is entitled to summary decision with respect to these counts. 28 C.F.R. § 68.36(c).

Furthermore, I find that there is a genuine issue of material fact for the remaining twenty-five counts and therefore, I deny Complainant's Request for Summary Decision with respect to these counts.

A. Granting Summary Decision in Part

After careful review of Complainant's Motion for Summary Decision, Respondent's Answer thereto, the depositions of Mr. James Lambatos and Agent Robert Firth, the letter from Respondent dated August 3, 1990, and Complainant's response to this letter dated August 7, 1990, I find there is no dispute as to material facts for fifty-three of the named individuals and therefore partially grant Complainant's Motion for Summary Decision for the following individual's named in the Complaint:

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|----------------------|--------------------|
| 1. Maria Amaya       | 27. Monica Meier   |
| 2. Luis Escobar      | 28. Marcos Mendoza |
| 3. Scott Garfield    | 29. Koreen Moan    |
| 4. Elizabeth Newgard | 30. Mattew Moraya  |
| 5. Barbara Prescott  | 31. Robin Newberry |
| 6. Shannon Rhodes    | 32. Lord Perez     |
| 7. James Saylor      | 33. Donald Picconi |
| 8. Robert Zurenko    | 34. Mark Picconi   |

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|----------------------|------------------------|
| 9. Steven Alie       | 35. Wallace Reese      |
| 10. John Armstrong   | 36. Morgan Rhodes      |
| 11. Curt Bacon       | 37. Waldeen Richardson |
| 12. Michael Barnett  | 38. Patrick Ritcho     |
| 13. David Callender  | 39. Jeannie Schall     |
| 14. William Cookson  | 40. Terri Schank       |
| 15. Jeri Crater      | 41. Janelle Sjordall   |
| 16. Peggy Dennis     | 42. Elaan Thomas       |
| 17. James Driscol    | 43. Leon Washington    |
| 18. Melissa Driscol  | 44. Michael Wright     |
| 19. Corinna Fabbri   | 45. Eric Yates         |
| 20. George Fancher   | 46. Cheryl Aldrich     |
| 21. Jeffrey Ficher   | 47. Matthew Bullock    |
| 22. Thomas Foutch    | 48. Sean Daly          |
| 23. Donald Jones     | 49. James Daniel       |
| 24. David Kretoovics | 50. Ester Escobar      |
| 25. Kim Mason        | 51. Eric Lundell       |
| 26. Kathy McKenna    | 52. Jonathon Noller    |
|                      | 53. Karen Schmock      |

Respondent is acting pro se in this proceeding. Except for the twenty-five individuals indicated in Respondent's letter of August 3, 1990, Respondent does not appear to deny liability. In fact, Respondent admitted in his Response to Complainant's First Request for Admissions to Respondent and it hired and employed after November 6, 1986, each of the named individuals in the Complaint. Respondent also admitted that for the seventeen individuals named in Count II of the Complaint it did not present a Form I-9 to the INS at the Inspectional visit on February 23, 1989. (See, Lambatos Deposition Exhibits 11, 14)

Although Respondent did present Forms I-9 for the sixty-one individuals named in Count I of the Complaint, not one was properly completed. The sixty-one Forms I-9 ranged from having only section one completed to having the entire form completed except for the employer's signature and date in section two. This attempt at compliance is not a defense to liability, although it may be a factor in determining mitigation of the civil monetary penalty. See, United States v. Felipe, Inc., OCAHO Case No. 89100151, October 11, 1989 (Order for Civil Monetary Penalty for Paperwork Violations).

Additionally, in its Answer to the Complaint, Respondent states that after an educational visit with Charles McClure of the INS in March of 1989, ``we have been in 100 percent compliance [with the paperwork requirements of IRCA].'' (p. 2) Also, in its Response to Complainant's Motion for Summary Decision, Respondent states that ``[t]he compliance [with the paperwork requirements of IRCA] began in March of 1989 following an educational visit conducted by Charles McClure'' (p. 3). This implies that prior to this educational

visit in March (i.e. at the Inspectional visit on February 23, 1989), Respondent was not in compliance.

Respondent argues that if it had been properly educated by Agent Firth before the Inspectional visit on February 23, 1989, it would have been in compliance with the verification requirements of IRCA. Although this may be a consideration in evaluating good faith when determining mitigation of the civil monetary penalty, this is not a defense to liability. See, United States of America v. Thomas R. Heisler, Individually, and d.b.a. The Owner of the Playground Bar, Formerly Playground, Inc., OCAHO Case No. 90100002, April 5, 1990 (Order Granting Complainant's Motion to Strike Respondent's Third and Fourth Affirmative Defenses); United States v. Walia's, Inc., d.b.a. Walia's Restaurant, OCAHO Case No. 89100259, January 5, 1990 (Order Granting in Part Complainant's Motion for Summary Decision and Denying in its Entirety Respondent's Motion for Summary Decision); United States v. The Body Shop, OCAHO Case No. 89100450, April 2, 1990 (Order Granting Complainant's Motion for Summary Decision).

Finally, Respondent argues that ``[a] fine of any amount would be devastating to my company as well as the present and future employees'' (Answer to Complaint p. 2) and that it would be a ``serious detriment to our operation if any fines were imposed.'' (Response to Complainant's Motion for Summary Decision p. 2) For these reasons, Respondent asks the Court to find it to be in full compliance with the verification requirements of IRCA. (Response to Complainant's Motion for Summary Decision p. 2).

However, the appropriateness of a civil monetary penalty is irrelevant for the purposes of determining actual liability, although it may be a factor to consider when determining the mitigation of the civil penalty. See, United States v. Collins Foods International, Inc., d.b.a. Sizzler Restaurant, OCAHO Case No. 89100084, July 13, 1989.

Thus, because Respondent has admitted to employing the fifty-three individuals named above after November 6, 1986, and has either admitted no Forms I-9 were presented or has submitted improperly completed Forms I-9 for them, I find that there is no genuine issue of material fact regarding the above referenced fifty-three individuals named in the Complaint. Accordingly, I grant Complainant's Motion for Summary Decision with respect to these individuals.

#### B. Denial of Summary Decision in Part

I further find that there is a dispute as to the material facts concerning the remaining twenty-five individuals named in the Complaint.

Specifically, Respondent indicated the following individuals were never employed by Culinary Artistry, however, Respondent has submitted W-2 forms for each of these individuals. Complainant asserts that the existence of the W-2 forms suggests that Respondent did in fact employ them. The individuals for which there are W-2 forms are:

1. Hilaron Guererro
2. Anuch Hasadinratana
3. Jose Ortega
4. Shane Arnold
5. Vallorie Thomas
6. Joshus Thompson
7. Michael Alexander
8. Tammy Patulano

Furthermore, Respondent has indicated the following individuals were not employees of Culinary Artistry even though there are W-2 forms for them. Respondent states that these individuals were employees only of Footer's Catering and that Culinary Artistry, Inc., merely made corrections to their W-2 forms. Complainant points out that Respondent used the employer name Culinary Artistry, Inc., and used its own state and federal identification numbers for reporting the tax and social security amounts withheld and that Respondent would not claim withholding responsibilities for these individuals if they were not employees. The individuals for which there are corrected W-2 forms are:

1. Curtis Savitz
2. Michael Snagacz
3. Joseph Torbica
4. Peter Lev
5. Harry Lordino
6. Susan Simon

Respondent has also indicated that one individual, Candy Slutzher, is not an employee of Culinary Artistry, Inc. However, Complainant points out that this is inconsistent with the information provided by Jeri Crater in her letter dated August 10, 1989, in which Ms. Crater indicated that Candy Slutzher was an active employee. (Exhibit L-6 to Lambatos Deposition)

Furthermore, there are partially completed Forms I-9 for seven individuals who Respondent indicates were not employees. Complainant raises the question that if they were not employees, why



did Respondent attempt to complete Forms I-9 for each in 1989. The seven individuals are:

1. Maria Cardenas
2. Ascencion Dominez
3. Ramon Dominquez
4. Steve Romero
5. Mary Alexander
6. Saul Garza
7. Bhajan Williams

Complainant also contends that during discovery, pursuant to a Request to Produce directed specifically to Culinary Artistry Inc., d.b.a Footer's Catering, it obtained employment applications and/or W-4 forms for twelve of the individuals who Respondent indicated were not employees. All employment applications and W-4 forms were dated 1988 and at least nine of them were dated after August 16, 1988.

Respondent has continually asserted that many of the individuals named on the employee list were employees of Footer's, Inc., who were rolled over to Culinary Artistry, Inc., on August 16, 1988, and who were deleted from this list on December 31, 1988. Complainant argues that although this may be true there are three individuals, Maria Cardena, Mary Alexander, Bhajan Williams, who purportedly are not employees of Respondent, who have hire dates after August 16, 1988, and for which there are no terminations dates. There are an additional three individuals, Ramon Dominquez, Saul Garza, Steve Romero, who purportedly are not employees, who have hire dates of August 16, 1988, and for which there are no termination dates. Thus, these six individuals do not appear to fall within this category of individuals who were erroneously contained in Respondent's employee list when it was rolled over from Footer's, Inc.

Three of the individuals who Respondent has indicated were not employees, Alamour Mamour, Marvin Brown, and Kyle Howlin, have hire dates on or before August 16, 1988, and termination dates of December 31, 1988. These individuals would appear to be Footer's, Inc., employees that were part of the employee list which was rolled over to Culinary Artistry, Inc., at its inception. However, Complainant points out that in its Response to Complainant's Interrogatory, Respondent indicated that there were no individuals listed in the Complaint who should be exempt from the verification requirements of IRCA and that in Respondent's Answer to Complainant's Request for Admissions, Respondent admitted having hired these three individuals.

Accordingly, since there is a dispute as to the material facts concerning whether these twenty-five individuals named in the Complaint were actually employees of Respondent, I hereby ORDER that an evidentiary hearing is needed to resolve this dispute.

Findings of Fact and Conclusions of Law

I have considered the pleadings, depositions, and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, I make the following findings of fact and conclusions of law:

1. That Respondent has admitted to liability as to fifty-three individuals named in the Complaint and thus, no genuine issue as to any material fact has been shown to exist with respect to these fifty-three individuals named in the Complaint and enumerated in part A of this Order; and that, therefore, pursuant to 8 C.F.R. § 68.36, Complainant is entitled to a summary decision as to these counts as a matter of law.

2. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the fifty-three individuals named in the Complaint and enumerated in part A of this Order without complying with the verification requirements in § 1324a(b), and 8 C.F.R. § 274a.2(b)(1)(ii) (A) and (B), and 8 C.F.R. § 274a.2(b)(2)(ii).

3. That Respondent asserts that it did not hire twenty-five individuals named in the Complaint and thus, there is a genuine issue of material fact with respect to these remaining twenty-five individuals; and that, therefore, pursuant to 8 C.F.R. § 68.36, Complainant is not entitled to a summary decision as to these counts.

Furthermore, in addition to presenting evidence at the evidentiary hearing to resolve the dispute as to the material facts in this case, the parties should be prepared to address any mitigating factors. The factors of mitigation to be considered are size of business, good faith, seriousness of violation, prior history of IRCA violations, and whether any aliens unauthorized to work were employed.

Thus, it is ORDERED that an evidentiary hearing will be held at a date to be scheduled pursuant to a subsequent order.

**SO ORDERED:** This 15th day of August, 1990, at San Diego, California.

ROBERT B. SCHNEIDER  
Administrative Law Judge