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

United States of America, Complainant v. Armando Palacio d/b/a La Bahia Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100219.

DECISION AND ORDER
GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **ARTHUR A. LIBERTY II**, Esquire, Immigration and Naturalization Service for Complainant;
ARMANDO PALACIO, Pro se Respondent.

I. Procedural History

On May 29, 1990, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on Armando Palacio, d/b/a La Bahia Restaurant. The Notice of Intent to Fine alleged one Count with 15 violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to prepare Forms I-9, or in the alternative, failure to present for inspection Forms I-9. In a letter dated June 1, 1990, Respondent requested a hearing before an administrative law judge.

The United States of America, through its Attorney, Arthur A. Liberty II, filed a Complaint, incorporating the allegations in the Notice of Intent to Fine against Respondent on July 10, 1990. On July 10, 1990, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the administrative law judge in the case and setting the hearing for an unscheduled date in or around Stockton, California.

Respondent has failed to file an Answer to Complaint as of this date. On August 23, 1990, Complainant submitted a Motion for Summary Decision and Points and Authorities in Support of

Motion for Summary Decision and Alternative Motion for Default Judgment. Respondent has also failed to oppose or respond in any manner to Complainant's Motion.

The exhibits attached to Complainant's Motion include: a Request for Admissions of Fact and Authenticity of Documents (Ex. 1); a letter from Complainant's counsel to Respondent, dated July 16, 1990, reminding Respondent of the need to file a timely Answer and indicating the proper method for responding to the request for admissions (Ex. 2); a letter from Complainant's counsel, dated August 6, 1990, reminding Respondent of the need to file a timely Answer (Ex. 3); a letter from Respondent to Complainant, dated August 9, 1990, responding to the request for admissions (Ex. 4); and a Memo to File from Raul Diaz, Senior Border Patrol Agent, Stockton, California, dated April 30, 1990, containing an evaluation of the civil penalties assessed against Respondent, including a summary of the five factors considered in the assessment of civil penalties (Ex. 5).

II. 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. 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 (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, 539 F. Supp. 797 (D. Colo. 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. 1980) (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. Hardisty, 262 F.2d 621 (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).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions by Respondent

I have examined all pleadings and memoranda submitted by the parties and am convinced that there are no issues of material fact with respect to the violations alleged in Count I of the Complaint. The Respondent, in response to requests for admissions, has directly admitted essential facts supporting the allegations of paperwork violations. As Complainant correctly pointed out in his motion, when such admissions are made by the opposing party, no genuine issues of material fact are deemed to exist. See United States v. Cann, OCAHO Case No. 89100396, (Jan. 26, 1990); United States v. Acevedo, OCAHO Case No. 89100397, (Oct. 12, 1989) (Order Granting Complainant's Motion for Summary Decision); and United States v. USA Cafe, OCAHO Case No. 88100098, (Feb. 6, 1989) (Order Granting Complainant's Motion for Summary Decision).

I have examined the exhibits attached to the Complainant's motion and find that the Respondent has admitted to hiring each of the individuals named in Count I. Respondent has further admitted to hiring these 15 employees after November 6, 1986, to work in the United States. Respondent has also admitted that he failed to prepare Employment Eligibility Verification Forms (Forms I-9) for the 15 employees, and that he did not present Forms I-9 for these 15 employees to the agents conducting a compliance inspection of his business on January 30, 1990.

As Complainant correctly points out on page 6 of its Motion, Respondent has admitted to each and every element required to prove the violations of the employee verification provisions of the Act al-

leged in the Complaint. Accordingly, I am hereby granting Complainant's motion for summary decision for all allegations in Count I.

In Respondent's response to request for admissions, all requests were admitted, however, Respondent placed question marks beside its responses of ``Admit'' at numbers 1, 3, 26, 34, 42, and 58. These questionable responses are not sufficient to defeat my granting of the Motion for Summary Decision, particularly after examining all other admissions and the payroll records of Respondent, which Respondent admitted to be authentic.

Respondent's failure to submit an Answer further supports my granting of Complainant's Motion for Summary Decision, because Respondent has not denied the allegations in the Complaint, therefore they are deemed admitted. Complainant requested as an alternative to summary decision, an entry of a judgment by default based upon this failure of Respondent. I believed summary decision to be the most appropriate method of disposing of this case, therefore, I deny the request for default judgment.

B. Civil Money Penalties

It is my judgment that Respondent has violated Section 274A(a)((1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, 15 individuals without complying with the verification requirements in 8 U.S.C. Section 1324a(b)(1), Section 274A(b)(1) of the Act, and 8 C.F.R. Section 274A.2(b)(1)(ii).

Having found the violation, I must assess a civil money penalty pursuant to Section 274A(e)(5) of the Act, which requires the person or entity to pay a civil penalty. The statute states, in pertinent part, that:

> 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.

8 U.S.C. Section 1324a(e)(5).

In a case of this type, I would ordinarily grant summary decision on the issue of liability alone, and would request the parties to provide me with argument or briefs outlining the five factors (size of business, good faith of employer, seriousness of the violation, whether unauthorized aliens were employed, and any history of previous violations) to be considered in assessing civil penalties. In this case, however, Complainant has assessed the lowest possible

civil penalty, therefore Respondent could not be benefitted any further through the submission of argument on his behalf.

I believe the amount assessed by Complainant to be fair and appropriate, accordingly I approve the civil penalty of $1,500.00 (one thousand five hundred), figured at $100.00 per violation.

IV. ULTIMATE FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER

In addition to the findings and conclusions previously mentioned, I make the following ultimate findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondent Armando Palacio, d/b/a La Bahia Restaurant, violated Section 1324a(a)(1)(B) of Title 8, 274A(a)(1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, the following individuals without complying with the verification requirements in 8 U.S.C. Section 1324a(b)(1), Section 274A(b)(1) of the Act, and 8 C.F.R. Section 274A.2(b)(1)(ii):

Gaudalupe Avila

Maria R. Castaneda

Fortino N. Cortez

Maria de Consuelo Esparza

Liopoldo Angeles H. Gabriel

Francisco Gomez

Sandra B. Gomez

Maria R. A. Mandujano

Frosty O'Malley

Petra Pecheco

Rosa Velasquez Quiroz

Carmen Ramirez

Silvia Rivera

Margarita Sanchez

Brenda Vinson

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of one thousand five hundred ($1,500.00) for Count I of the Complaint.

3. That the hearing scheduled in or around Stockton, California is cancelled.

IT IS SO ORDERED: This 10th day of September, 1990 at San Diego, California.

E. MILTON FROSBURG
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