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

United States of America, Complainant v. Bayley's Quality Seafoods, Inc.; Respondent; 8 U.S.C. §1324a Proceeding, Case No. 90100080.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION IN PART
(September 17, 1990)

MARVIN H. MORSE, Administrative Law Judge

SYLLABUS

1. The Immigration Reform and Control Act of 1986 (IRCA) imposes no requirement on the Immigrant and Naturalization Service (INS) to provide education as to its provisions to a particular employer.

2. Both liability and quantum of civil money penalty for a paperwork violation will be adjudged upon granting a motion for summary decision by INS, where INS has assessed the penalty for the violation at the statutory minimum.

3. Where an employer is found liable for sixty-three (63) of sixty-four (64) alleged paperwork violations, INS will be required within a time specified in the Decision and Order to advise the bench whether it elects to go to hearing or to obtain dismissal with respect to the remaining alleged violation, as to which it has assessed the minimum civil money penalty.

Appearances: WILLIAM F. McCOLOUGH, Esq., for the Immigration and Naturalization Service.
BRIAN P. WINCHESTER, Esq., for Respondent.

I. PROCEDURAL SUMMARY

On February 27, 1990 the Immigration and Naturalization Service (INS or Complainant) filed a Complaint in the Office of the

Chief Administrative Hearing Officer (OCAHO) alleging violations by Bayley's Quality Seafoods, Inc. (Respondent), of the employment verification (paperwork) requirements enacted by Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), enacting Section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a. Specifically, Respondent is charged with sixty-four violations of 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful after November 6, 1986, for a person or other entity to hire, for employment in the United States, an individual without complying with the paperwork requirements of 8 U.S.C. §1324a(b).

OCAHO served a Notice of Hearing on Respondent and I was assigned to the case on March 2, 1990. Respondent's timely Answer to the Complaint was filed on March 29, 1990. Consistent with my usual practice, a telephonic prehearing conference was scheduled and held on May 10, 1990, followed by a second telephonic prehearing conference held on July 10, 1990. Complainant having served a motion for summary decision (entitled ``Motion for Summary Judgement'') pursuant to 28 C.F.R. §68.36 on July 3, Respondent's time to respond had not expired by the day of the conference. 28 C.F.R. §68.9(b). For that reason, and also because the parties were still in a dialogue and had been unable to reach an agreed disposition of the case, I scheduled a third telephonic prehearing conference for August 28, 1990.

It is customary to issue reports following prehearing conferences. Where, however, as here, rulings are made during such conference which dispose of portions of the proceeding, as by granting in part Complainant's Motion for Summary Decision, it is sufficient that the Decision and Order incorporate the results of the August 28th conference.

In response to Complainant's motion, Respondent on July 23, 1990 filed a Motion for Leave to File Amended Answer, Amended Answer and Memorandum of Law in Opposition to Motion for Summary Judgment (Memorandum). Exhibit A to the Memorandum is a copy of a document which is purported to be Respondent's May 10, 1990 Response to Request for Admissions (Response).

In reply to Question 2(C) of the underlying Request for Admissions, Complainant's Exhibit 6 to the INS Memorandum in Support of the Motion for Summary Judgement shows that Respondent ``admits that the named individuals began employment for Respondent on or about the date shown, with the exception of E. Clark, who began employment in 1980.''

By contrast, Respondent's version (in Exhibit A to the Memorandum) of the same text provides that, ``[I]n response to the question as drafted, Respondent denies the allegations contained in Para-

graph 2(C).'' Because the two versions appeared to me to be irreconcilable, I issued an Order of Inquiry to the Parties on August 15, 1990, requesting a clarification.

Both parties timely responded to the August 15th Order. Complainant's Declaration by Counsel reiterated that the version attached to its prior motion was the ``exact'' and ``true'' document as received during discovery, and that Respondent's version was not. By letter-pleading dated August 21, 1990 the discrepancy was explained by Respondent's counsel who acknowledged that the version submitted by him as Exhibit A to the Memorandum was an inaccurate, computer-generated copy.

II. DISCUSSION

A. The Factual Issues

As appears from materials filed on motion practice, on May 26, 1989, INS notified Respondent by certified mail that it would inspect Respondent's employment verification forms (Forms I-9) on June 6, 1989. On June 6th an I-9 inspection was conducted at Respondent's premises by Special Agent (SA) Craig E. McClasin. Four I-9 forms were presented to SA McClasin. SA McClasin requested additional employment records and was presented with Employee Address Reports and Employee Status Reports dated December 21, 1988, January 25, 1989, February 15, 1989, February 22, 1989, March 1, 1989 and May 24, 1989.

After review of the Employee Status Reports, SA McClasin determined that there were ninety-one individuals employed by Respondent after September 15, 1988, the date of his alleged first telephonic information and education visit. Sixty-four of the ninety-one individuals were included in the Notice of Intent to Fine (NIF).

On December 18, 1989 INSS issued its NIF alleging that Respondent violated Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(1)(B). The NIF was served on Respondent on December 19, 1989. On January 17, 1990 Respondent timely requested a hearing before an administrative law judge. On February 27, 1990 a Complaint incorporating the NIF was filed by INS with OCAHO. Respondent's Answer admits the jurisdiction of OCAHO, and that it had been served with the NIF.

It is undisputed that the individuals identified in the NIF began employment after November 6, 1986, the effective date of IRCA, with exception of one individual, E. Clark. See Response at Q. 2(C) (admission on discovery, as clarified in response to the August 15th Order).

However, Respondent has been inconsistent in characterizing its compliance with employment verification (paperwork) requirements:

1. The answer admits failure to prepare I-9s for the individuals in question but denies failure to present.

2. The Response to the Request for Admissions (at Q. 2(D)) denies failure to prepare the I-9s but admits failure to present them at the inspection (at Q. 2(F)).

3. The proposed Amended Answer of July 23, 1990, consistent with its response on discovery, in contrast to its original Answer, would deny failure to prepare; consistent with its original Answer but in contrast with its discovery response, the Amended Answer would deny failure to present.

During the third prehearing conference counsel and the judge focused primarily on the impact of clarification of the facts implicated in the Response at Q. 2(C). Upon further analysis, Respondent's reply to Q. 2(C) aside, the acknowledgement at Q. 2(F) that Respondent had failed to present the I-9s at a duly noticed inspection leaves no room for the defense raised by the Amended Answer as tendered. Accordingly, this Decision and Order confirms the ruling at the conference that the Amended Answer is rejected.

The Answer to the Complaint asserts four affirmative defenses. First, that Respondent complied in good faith with the requirements of Section 274A of the INA; second, that due to circumstances beyond Respondent's control, it was unable to effect timely compliance and therefore was not a ``willful and neglectful violator.'' Third, Complainant made ``no appreciable effort'' to notify Respondent of its IRCA recordkeeping responsibilities, and finally, that the Complaint ``fails to state a claim for which relief can be sought.''

B. Standards for Consideration on a Motion for Summary Decision

1. Generally

Federal regulations applicable to this case, set out at 28 C.F.R. Part 68 authorize an administrative law judge to ``enter a 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(c); see also Fed. R. Civ. Pro. Rule 56(c) (applicable to cases under 8 U.S.C. §1324a, by virtue of and to the extent contemplated by 28 C.F.R. §68.1).

The function of the summary decision 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 judi-

cially noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Kauffman v. Puerto Rico Telephone Co., 841 F.2d 1169 (1st Cir. 1988). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). See also Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 480. (``An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided.''). An issue is ``genuine'' if a reasonable trier of fact could, on the basis of the proffered proof, return a verdict for the opponent. Brennan v. Hendrigan, 888 F.2d 189, 191 (1st Cir. 1989), citing Anderson, 477 U.S. at 248. See also Schwarzer, supra, at 481.

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of ``admissions on file.'' A summary decision may be based on a matter deemed admitted. Home Indemnity Co. v. Famularo, 530 F.Supp. 797 (D.C. Colo. 1982).

2. Genuine Issue(s) of Material Fact

A motion for summary decision is proper when the allegations of a complainant have been admitted by the opposing party through its response to a request for admissions. Respondent having admitted that sixty-three of the sixty-four individuals named in the NIF began employment by Respondent on or about the date shown as date of hire, i.e. after November 6, 1986, and having admitted that it failed to present I-9s for those individuals, there is no genuine issue of material fact as to liability for failure to comply with paperwork requirements for sixty-three (63) of the sixty-four (64) named individuals. Accordingly, INS prevails as to liability on these sixty-three (63) record-keeping violations without the need for an evidentiary confrontation.

Respondent alleges that employee E. Clark was hired in 1980, implying that he is ``grandfathered'' by IRCA and, therefore, not subject to paperwork requirements. Respondent's Employee Status Report of February 15, 1989, however, reflects under the column for date of hire that E. Clark was hired on ``12/12/88.'' Respondent admits in its Response to Request for Admissions at Q. 1 that the February 15, 1989 Employee Status Report is a ``genuine business record kept in the usual course of business by Respondent.'' The record made on motion practice fails to explain the discrepancy between the recorded date of hire and the statement that employee Clark was hired in 1980.

One may speculate that E. Clark had been hired in 1980, had left Respondent's employ, and then had been rehired in 1988. In such

event he would not have been ``grandfathered,'' and his employment would have been subject to the documentation verification requirements. See Maka's Akamai Service, Inc. v. I.N.S., 904 F.2d 1351 (9th Cir. 1990) (affirming vacation by the Chief Administrative Hearing Officer of the A.L.J.'s Decision and Order in U.S. v. Maka's Akamai Service, Inc., OCAHO Case No. 88100015, December 15, 1988); see also U.S. v. John Gasper, d/b/a John Gaspar Labor Contractor, OCAHO Case No. 89100567, August 15, 1990, (Ruling in Limine: Respondent Has Burden to Prove Grandfather Status; INS Has Burden to Show Forfeiture). But speculation is no basis for a decision against Respondent. Accordingly, I withhold decision in favor of Complainant as to this employee only.

In this case INS has sought only the statutory minimum civil money penalty for each alleged I-9 paperwork violation of IRCA. Obviously the parties had no room for compromise of their dispute short of dropping one or more charges by INS, an option it has not selected. INS has sought summary decision and has obtained its desired result on all but one of its claims.

Considerations of efficiency and economy on the part of the bench and the parties make it reasonable to conclude that where Complainant's motion for summary decision is unsuccessful as to only one paperwork charge assessed by INS at $100.00, all other allegations having been found in its favor on such motion, INS having acknowledged a dispute of fact as to the one remaining charge, (INS Memorandum in Support of Motion for Summary Judgment at 8), INS may be agreeable to dismissal of the remaining charge. While it may be feasible for the judge to dismiss that charge sua sponte, the better practice is for INS to elect whether or not is wants a hearing. This Decision and Order provides an opportunity for INS to advise of its decision in that respect.

3. Respondent's Affirmative Defenses Rejected

The result forecast by the previous discussion presupposes that Respondent is unsuccessful as a matter of law in its effort to maintain affirmative defenses. As discussed below, I so conclude.

(a) The ``good faith'' defense

Under 8 U.S.C. §1324a the affirmative defense of good faith is available with respect to paperwork requirements only to refute a charge of knowingly hiring, recruiting, or referring for employment an unauthorized alien. 8 U.S.C. §1324a(a)(3). Here, Respondent is not charged with such a substantive violation as would invoke subsection 1324a(a)(3). Indeed, the gravamen of such a defense is that the employer evidences good faith in respect to the unlawful hiring

charge by demonstrating paperwork compliance. In the present case paperwork compliance is the issue.

Adjudications under 8 U.S.C. §1324a make clear that the good faith defense is legally inapplicable to the question of liability for paperwork violations. U.S. v. Multimatice Products, OCAHO Case No. 90100155 at 4, August 21, 1990, (Decision and Order on Complainant's Motion to Strike Affirmative Defenses); see also U.S. v. Hollendorfer, OCAHO Case No. 90100124, May 17, 1990, (Order Granting Motion to Strike Affirmative Defenses); U.S. v. Lee Moyle, OCAHO Case No. 89100286, August 22, 1989, (Order Granting Motion to Strike Affirmative Defense).

After a finding of liability, however, good faith is a factor to be considered in determing the amount of penalty for a record-keeping violation. 8 U.S.C. §1324a(e)(5). U.S. v. Big Bear Market, OCAHO Case No. 88100038 at 31-32, March 30, 1989; aff'd by CAHO, May 5, 1989; appeal docketed, No. 89-70227 (9th Cir. May 31, 1989); U.S. v. Mester Manufacturing Co., OCAHO Case No. 87100001 at 38, June 17, 1988; adopted by CAHO, July 12, 1988; aff'd, Mester Manufacturing Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989). It is unnecessary to analyze the statutory factors considered in assessing the civil money penalty where, as here, the assessment by INS is at the statutory minimum.

(b) Not a ``willful and neglectful'' violator

Respondent asserts that it was unable to effect timely compliance due to circumstances beyond its control, such as illness, and, therefore, was not a ``willful and neglectful'' violator. IRCA's paperwork requirements are mandatory. See H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 88, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5843-44 (mandatory nature of the document verification and recordkeeping requirements). Respondent's admissions on discovery leave no room for inference that it had made any effort to comply with I-9 requirements as to the sixty-four individuals involved in this case. Even a failed attempt on the part of Respondent to comply with IRCA's documentation verification and recordkeeping requirements would not diminish or discharge liability. See Big Bear Market, OCAHO Case No. 88100038 at 29.

(c) Alleged lack of INS educational effort

Respondent contends that ``Complainant made no appreciable effort to notify Respondent of any change in its responsibilities with respect to the rules to be enforced against it.''[1]

During the third prehearing conference, Respondent argued that IRCA requires INS to make adequate educational and informational visits to employers prior to conducting an inspection. To the contrary, nothing in IRCA requires each employer in the United States to be individually educated. IRCA required educational visits during the transitional period of six months following enactment, a period which ended May 31, 1987. 8 U.S.C. §1324(a)(i). In the instant case Respondent admits that the INS inspection occurred on June 6, 1989, more than two years after conclusion of the prescribed educational period.

Respondent suggests that because it had no notice of the novel paperwork requirements of IRCA, it is not liable for its infractions. Ignorance of the law is not a defense to charges of paperwork violations. U.S. v. USA Cafe, OCAHO Case No. 88-100098 at 4 n. 1, February 6, 1989, citing Bueno v. Mattner, 633 F.Supp. 1446, 1466 (W.D. Mich. 1986), aff'd, 829 F.2d 1380 (6th Cir. 1987), cert. denied, 486 U.S. _____, 108 S.Ct. 1994 (1988) (ignorance of the law does not preclude finding a violation of the analogous record-keeping requirements of the Migrant and Seasonal Agricultural Worker Protection Act).

In Mester Manufacturing Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989), failure of INS to provide instruction on the requirements of IRCA even during the initial educational period was held not to be a defense to charges of IRCA employer sanctions violations.

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[1]\1\This defense is inconsistent with the facts alleged in an affidavit by INS SA McClasin. SA McClasin claims that Respondent tendered four I-9 forms to INS on the date of inspection, thus implying that Respondent did have sufficient notice of the paperwork requirements of IRCA. INS, however, has not provided to the bench those four documents, or the ``provision list'' signed by Mr. Stanley Bayley attesting to his presentation of the four I-9's. Nevertheless, SA McClasin affirms that he contacted Respondent by telephone on September 15, 1988 and spoke with Dana Googins, Respondent's manager. During that alleged conversation SA McClasin explained to Mr. Googins the IRCA I-9 preparation and retention requirements for every individual hired after November, 1986; he then mailed an M-274, Handbook for Employers (Handbook), and I-9 forms to Respondent at its address of record. SA McClasin also says that on May 30, 1990, four days after the Notice of Inspection was sent to Respondent and after a phone call from Mr. Googins, he again mailed a Handbook and I-9 forms to Respondent. It is immaterial, however, whether these disputed contacts in fact took place, given the conclusion in this Decision and Order that INS is under no statutory obligation to provide education to an employer under IRCA.

> . . . Mester's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. It is true that Congress provided for education of employers during the early period of IRCA. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanctions against an employer that can show it has not received a handbook or other instruction, or . . . that it has simply failed to pay attention to them.

Id. at 569-70.

(d) Failure to state a claim for which relief can be granted

Respondent's Answer claims that the Complaint ``fails to state a claim for which relief can be sought.'' The discussion by an administrative law judge in an early resolution under IRCA of a similar challenge is instructive:

> Motions to dismiss a complaint for failure to state a claim upon which relief can be granted are disfavored by the courts. Only in the most extra ordinary [sic] circumstances are they granted. U.S. v. [City of] Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Viewing the pleadings most favorably to the INS, as I must when ruling on Azteca's affirmative defense #9, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), I find that the Complaint sets forth the elements of a cause of action, which, if the facts pleaded are true, would justify the relief sought by the INS. Middletown Plaza Associates v. Dora Dale of Middletown, Inc. 621 F.Supp. 1163, 1164 (D.C. Conn. 1985).

U.S. v. Azteca Restaurant OCAHO Case No. 88100087, November 8, 1988, (Order Ruling on Motion to Strike).

I hold that the Compliant provides fair notice of what is alleged and the grounds upon which the allegations rest. In no way does it appear that Respondent has been prejudiced by the form of Complainant's pleading. Compare Multimatic Products, Inc., OCAHO Case No. 90100155 (adequate notice was provided to Respondent in the Complaint which satisfied the requirement of 28 C.F.R. §68.6(b)(3) that the complaint shall contain a ``clear and concise statement of facts for each violation alleged to have occurred''). Complainant has established the elements of all sixty-four (64) paperwork violations against Respondent. See also U.S. v. Capitol Arts and Frames, Inc., OCAHO Case No. 90100216, September 10, 1990 (rejecting the affirmative defense that the complaint failed to state a claim upon which relief could be granted).

III. CIVIL MONEY PENALTIES

Administrative adjudications assessing civil money penalties for paperwork violations have applied the statutorily mandated considerations on both a mathematical formula and judgmental basis. 8 U.S.C. §1324a(e)(5). See, e.g., U.S. v. Felipe, OCAHO Case No. 89100151, October 11, 1989; aff'd by CAHO, November 29, 1989 (CAHO approved of ALJ's mathematical computation as one method to determine the amount of the paperwork penalty). The

Chief Administrative Hearing Officer has made plain, on approving the former, that it is not an exclusive or preferred method. Id. at 5 (Affirmation by the CAHO of the ALJ's Final Decision and Order. I have applied the statutory factors on a judgmental basis. See Big Bear Market, OCAHO Case No. 88100038 at 31-32. I have applied the quantum assessed by INS as the ceiling in my consideration of an appropriate money penalty. U.S. v. J.J.L.C., OCAHO Case No. 89100187 at 9, April 13, 1990; aff'd by CAHO, June 7, 1990. See also U.S. v. Buckingham Ltd. Ptnshp. d/b/a/ Mr. Wash, OCAHO Case No. 89100244 at 17, April 6, 1990 (the quantum assessed by INS ``is entitled to some weight but not deference'').

Because I find on the pleadings that Respondent has violated 8 U.S.C. §1324a(a)(1)(B) as to all individuals other than E. Clark, the minimum civil money penalty is required as a matter of law for sixty-three (63) of the sixty-four (64) charges, for a total of $6,300.00. 8 U.S.C. §1324a(e)(5). Where, as here, INS has adopted the statutory minimum, the statutory factors are satisfied as there is no opportunity to analyze considerations in mitigation or aggravation. U.S. v. Armando Palacio d/b/a La Bahia Restaurant, OCAHO Case No. 90100219 at 5, September 10, 1990. Absent an evidentiary record upon which to address such considerations, the assessment by INS is accepted.[2]

VI. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, affidavits, memoranda and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings to fact and conclusions of law:

1. That INS is under no statutory obligation to provide education concerning IRCA to an individual employer.

2. That Respondent's reply to Question 2(C) of the Request for Admissions provides that Respondent ``admits that the named individuals began employment for Respondent on or about the date shown with the exception of E. Clark, who began employment in 1980.''

[2]Compare U.S. v. Yruegas, OCAHO Case No. 88100068 at 4-5 n. 2, March 9, 1989; aff'd by CAHO, March 29, 1989, where, upon granting default judgment in favor of INS, the administrative law judge, finding that the complaint did not explain differing penalty assessments ``even though the violations alleged are identical,'' reduced the single $300.00 penalty to the $250.00 level selected by INS for the other individuals.

3. That with the exception of E. Clark as to whom no finding of fact is made, the individuals named in Count I. A. of the NIF where hired after November 6, 1986.

4. That upon a properly noticed inspection Respondent failed to present Form I-9 for all sixty-four individuals so named, as to one of whom, E. Clark, there is a dispute concerning ``grandfather status,'' the outcome of which would determine whether or not a form I-9 was required.

5. That the motion for summary decision as to all individuals named in the NIF with the exception of E. Clark is granted.

6. That as to charges for which summary decision is granted and assessment of civil money penalty is at the statutory minimum, it is appropriate to adjudge the penalty as well as liability upon disposing of the motion. INS having assessed the civil money penalty at the statutory minimum, i.e., $100.00 per individual violation, the statutory criteria are deemed satisfied, and it is just and reasonable to require Respondent to pay a civil money penalty in the sum of $6,300.00, comprising $100.00 per individual.

7. That because there appears to be a genuine issue of material fact with respect to one individual, E. Clark, the motion for summary decision as to the charge involving that individual is denied. INS shall advise the bench in writing not later than fourteen (14) calendar days after the date of this Decision and Order whether it elects to go to hearing on that charge or, alternatively, that the charge is to be dismissed. In the event INS elects the hearing option I will schedule an evidentiary hearing.

8. This Decision and Order is the final action of the judge in accordance with 28 C.F.R. §68.51(a) with respect to all charges except the one pertaining to a single individual, E. Clark. As provided at 28 C.F.R. §68.51(a), this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. §1324a(e)(7), 28 C.F.R. §68.51(a)(2). Judicial review is controlled by 8 U.S.C. §1324a(e)(8); 28 C.F.R. §68.51(a)(2).

SO ORDERED.
Dated this 17th day of September, 1990.

MARVIN H. MORSE
Administrative Law Judge