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

United States of America, Complainant, v. Aegis Fashion, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100195.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AS TO LIABILITY ON COUNT II INCLUDING ORDER TO SHOW CAUSE WHY JUDGMENT SHOULD NOT BE ENTERED AGAINST RESPONDENT AS TO QUANTUM

(September 21, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **CHESTER J. WINKOWSKI, Esq.**, for the Immigration and Naturalization Service.
RONALD H. FANTA, Esq., for Respondent.

I. PROCEDURAL SUMMARY

On June 14, 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 Aegis Fashion, Inc. (Respondent) of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting Section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a. Specifically, INS charges in Count I of the Complaint one (1) violation of Title 8 U.S.C. § 1324(a)(1)(A), which makes it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an alien knowing the alien is unauthorized for employment. In the alternative, Count I charges Respondent with a violation of Title 8 U.S.C. § 1324a(a)(2), which renders it unlawful for a person or other entity to continue to employ an alien after November 6, 1986, knowing that the alien is (or has become) an unauthorized alien as to that employment. Count I demands a civil money penal-

ty in the amount of $2,000.00, and a cease and desist order preventing further violations of IRCA.

Count II alleges six (6) violations of IRCA for failure to properly prepare and/or present employment eligibility verification forms (Form I-9). 8 U.S.C. § 1324a (a), (b); 8 U.S.C. § 1324a(b)(3). INS requests a total civil money penalty of $4,750.00 for the employment eligibility verification (paperwork) violations. Complainant assesses $750.00 each for five (5) of six (6) violations. There is one (1) $1,000.00 assessment for the failure to prepare or present paperwork for the individual also named in Count I.

OCAHO served a Notice of Hearing on Respondent, and I was assigned the case on June 15, 1990. Respondent's timely Answer entitled ``Reply'' to the Complaint was filed on July 13, 1990. Consistent with my usual practice, an Order dated August 21, 1990 schedules a telephonic prehearing conference for September 26, 1986. A Motion for Partial Summary Judgment on the Pleadings (Motion) was filed on August 27, 1990 by Complainant. Respondent has failed to timely, or otherwise, respond to the Motion. 28 C.F.R. § 68.9(b). Therefore, as further discussed, I grant Complainant's Motion for Partial Summary Judgment (summary decision) on the Pleadings as to Respondent's liability to Count II of the Complaint.

II. DISCUSSION

The rules of practice and procedure for adjudications before administrative law judges of the Office of the Chief Administrative Hearing Officer, set out at 28 C.F.R. Part 68, authorize the 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. P. 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 judicially noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 248, (1986).

The rules also require a respondent to answer a complaint by either admitting, denying, or stating that respondent lacks sufficient information to admit or to deny. 28 C.F.R. § 68.8(c). See also Fed. R. Civ. P. 8(b). Rule 56(c) of the Federal Rules of Civil Procedure permits consideration of the pleadings as the basis for summary decision adjudications. Allegations of a complaint not expressly

denied in an answer are deemed admitted. 28 C.F.R. § 68.8(c)(1). See also Fed. R. Civ. P. 8(d). A summary decision may be based on a matter deemed admitted. Home Indemnity Co. v. Famularo, 530 F.Supp. 797 (D.C. Colo. 1982).

The issue on the INS Motion is whether Respondent did or did not expressly deny the allegations of paperwork violations set forth in Count II of the Complaint. A finding that Respondent failed to expressly deny those allegations constitutes an admission of liability.

Respondent's Reply at paragraph 2 states, ``Respondent denies that it did not ensure that the alien identified in Count II of Complainant's Complaint were [sic] authorized to be employed in the United States.'' Complainant asserts in its Motion that Respondent's ``denial stated in paragraph 2 . . . is not responsive to, nor does it relate to, any allegation stated in Count II of the Complaint.'' Count II of the Complaint alleges, in four parts, that Respondent hired six (6) named individuals, that they were hired after November 6, 1986, that Respondent failed to prepare Employment Eligibility Verification Forms (Form I-9) within three (3) business days from the date of hire, and, in the alternative, that Respondent failed to present the Forms I-9 for INS inspection.

Clearly, Respondent's answer to Count II of the Complaint does not respond to the specific allegations. Respondent does not deny that it failed to prepare or present the Forms I-9 for the six (6) named individuals in Count II of the Complaint, therefore, it is deemed admitted.

Respondent's literal denial, on the basis that it ``ensured'' that the ``alien''(s) named in Count II were authorized for hire, is insufficient. The gravamen of paperwork violations is not that the employer fails to ensure that the alien is authorized to be employed in the United States, but that the employer complies with the statutory verification eligibility requirements by preparing and/or presenting Forms I-9 in compliance with IRCA. Accordingly, I find that the Reply fails to expressly deny the allegations of Count II; therefore, I find liability as to the six (6) paperwork violations.

Notwithstanding the previous discussion, INS would not be entitled to summary decision if Respondent's affirmative defense were available to it on the paperwork violation charges. To the extent that Respondent's sole affirmative defense can be understood to implicate Count II as well as Count I, it is inadequate as a matter of law, and unavailing to Respondent on the Motion before me. Respondent's one affirmative defense is that the ``alien'' named in Count I was ``eligible for benefits under the provisions of [IRCA] and subsequently received Employment Authorization from the

[INS] under and pursuant to the terms and provisions of [IRCA].'' For the same reasons already discussed in this Decision and Order, such a statement fails to state a legal defense to the paperwork violations alleged in Count II.

Moreover, Respondent's failure to oppose the Motion is consistent with my conclusion that as to liability on Count II there is no contest. Accordingly, I grant Complainant's Motion, and find Respondent liable for six (6) violations of Section 274A(a)(1)(B) of the INA; 8 U.S.C. § 1324a(a)(1)(B).

III. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER.

I have considered the pleadings, including the Motion for Partial Summary Judgment on the Pleadings. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. That paragraph 2 of the Reply by Respondent having been found not to have expressly denied the allegations of Count II of the Complaint, and the affirmative defense as to Count II having been found legally insufficient, liability for the violations alleged in Count II is deemed admitted.

2. That Respondent violated Title 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired the six (6) individuals identified in Count II without complying with the verification requirements of Title 8 U.S.C. § 1324a(b)(1).

3. I make no finding on the present pleadings as to the liability of Respondent as to Count I.

4. That there is no basis on the present record for a determination as to the quantum of civil money penalty for violations of Count II. Respondent not having responded to the INS Motion will be expected during the telephonic prehearing conference on September 26, 1990 to show cause, if any it has, why decision should not be entered against it in the sum assessed in Count II, i.e., $4,750.00.

5. This Decision and Order is the final action of the judge in accordance with 28 C.F.R. § 68.51(a) with respect to the issue of liability as to Count II of the Complaint. 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).

SO ORDERED: This 21st day of September, 1990.

MARVIN H. MORSE
Administrative Law Judge