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

United States of America, Complainant, vs. La Fiesta, Inc., dba Las Margaritas (Woodinville), Respondent; 8 U.S.C. Section 1324a Proceeding; Case No. 88100027.

United States of America, Complainant, vs. La Fiesta, Inc., dba Las Margaritas (Kirkland), Respondent; 8 U.S.C. Section 1324a Proceeding; Case No. 88100028.

United States of America, Complainant, vs. El Centenario, Inc., dba Las Margaritas, III, Respondent; 8 U.S.C. Section 1324a Proceeding; Case No. 88100029.

ORDER DISMISSING COUNTERCLAIMS

On April 7, 1988, Complaints Regarding Unlawful Employment were filed against the Respondents in the above-captioned cases, by the United States of America, through the Immigration and Naturalization Service, herein called Complainant. On June 21, 1988, Respondents filed identical Answers and Counterclaims requesting that the Complaints be dismissed with prejudice and that Respondents be awarded attorney's fees and costs to be assessed against the Complainant based on the following facts and counterclaims:

1. Following an informational visit and inspection by the Immigration and Naturalization Service, Respondent made a good faith effort to comply with the law and has not thereafter hired or employed any undocumented aliens.

2. The violations alleged in the Complaint are alleged to have occurred prior to the information visit and are not alleged to have been repeated thereafter.

On July 15, 1988, Complainant filed a Motion to Dismiss Counterclaims set forth in Respondent's Answer as failing to state any claim upon which relief can be granted. Respondent has filed no opposition to said Motion.

As counterclaims, Respondent's Motion must fail since Respondent makes no showing that the law authorizes such a cause of action against the United States Government. For a Counterclaim or set-off to be allowed against the United States, there must be a

specific statute authorizing an original suit against the United States on the claim on which the Counterclaim or set-off is predicted. Mitchell v. Richey, 164 F.Supp. 419, 420 (W.D.S.C. 1958). United v. An Article of Food, 395 F.Supp. 1184, 1186 (S.D.N.Y. 1975); United States v. Drinkwater, 434 F.Supp. 457, 460 (E.D. Va. 1977). That the Government is the Complainant does not waive its sovereign immunity against a Counterclaim by the Respondent. United States v. Shaw, 309 U.S. 495, 501-502 (1940); Metropolitan Water District of Southern California v. United States, 830 F.2d 139, 143 (C.A. 9 1987).

Further Respondent's claims fail even if considered as affirmative defenses. Thus Respondent's defense that it made a good faith effort to comply with the law is without merit. Nothing in the Immigration and Nationality Act, as amended by Section 101 of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1324a (IRCA) provides for an exception to compliance with the verification requirement of Section 1324a(b) of the Act based on an employer's good faith efforts to comply. The Act recognizes good faith compliance with the verification requirements as an affirmative defense only to an allegation of unauthorized employment 8 U.S.C. 1324a(a)(3). With respect to paperwork violation, a consideration of good faith goes only to the determination of the amount of civil money penalty and not to the fact of liability. See 8 U.S.C. 1324a(e)(5).

Respondent also avers as a ``counterclaim'' that the violations alleged in the Complaint are alleged to have occurred prior to the informational visit and are not alleged to have been repeated thereafter. The rationale underlying this claim is unclear. Counsel for Respondent argues that it is in the nature of an estoppel defense and correctly asserts that Respondent failed to establish, or even allege, the necessary elements of such a defense against the government. See Heckler v. Community Health Services of Crawford County, 467 U.S. 51, 59-61 (1984).

However, it appears that Respondent may be claiming that the Complaint should be dismissed because the alleged violations occurred prior to Complainant meeting the informational conditions precedent to the conduct of proceedings under 8 U.S.C. 1324a. See 8→U.S.C. 1324a(i)(2). Thus, the Complaint allegations involve failure to comply with paperwork requirements relating to employment of employees on November 7, 1986, and Complainant's first informational visit with Respondent was on June 1, 1987, and a warning citation issued only after compliance audits on October 16, 1987.

Section 1324a(a)(1)(B) makes it unlawful for an employer to hire an individual without complying with the requirements of Section

1324a(b)(3). Section 1324a(b)(3) requires that, after completing the required form, the employer must retain the form and make it available for inspection for 3 years after the date of such hiring or 1 year after the date the individual's employment is terminated, whichever is later. Since 3 years have not elapsed since the dates of hire alleged in the Complaint, the failure to retain and present the required forms would by itself be a violation.

Thus, Respondent's Counterclaims fail to state any claim upon which relief may be granted, and, even if considered as affirmative defenses, fail to state any viable affirmative defense. Accordingly, IT IS HEREBY ORDERED that Respondent's Counterclaims are dismissed.

SO ORDERED.

Dated: August 5, 1988.

EARLDEAN V.S. ROBBINS
Administrative Law Judge