

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

United States of America, Complainant vs. Sergio Alaniz d/b/a La Sagunada Downs, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100173.

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

1. Procedural Facts

This action was initiated on May 22, 1990, by the filing of a Complaint with the Office of the Chief Administrative Hearing Officer against Respondent, Sergio Alaniz, d/b/a/ La Sagunda Downs. A hearing on the Complaint was scheduled to be held on or about September 11, 1990, in or around McAllen, Texas. The Complaint alleged violations of 8 U.S.C. Section 1324a(a)(1)(A) for the hiring of four persons not authorized for employment in the United States, and violations of the employment verification requirements of 8 U.S.C. Section 1324a(a)(1)(B) for these four unauthorized employees.

On June 25, 1990, Respondent filed his Answer to the Complaint generally denying each and every allegation in the Complaint. Respondent's Answer did not raise any affirmative defenses.

On August 9, 1990, Complainant filed several motions and discovery requests, including a Motion to Strike Respondent's Answer or Alternatively Motion for Summary Judgment. Thereafter, on August 17, 1990, I then issued an order to Respondent to show cause why Complainant's motions should not be granted. The order required a response on or before September 11, 1990. Respondent failed to respond within the time specified.

On September 7, 1990, I issued a prehearing order, postponing the hearing in the action until November 13, 1990 and scheduling a prehearing conference for October 16, 1990.

2. Motion for Summary Decision

In view of the Respondent's failure to oppose the Motion for Summary Decision, the only issue presented is whether Complainant has met its burden to establish an absence of any genuine

issues of material fact in dispute and that Complainant is entitled to judgment as a matter of law. In support of its motion, Complainant has provided the affidavit of Senior Border Patrol Agent Richard A. Serra, who authenticates the sworn statements of four individuals employed by Respondent. Also attached, and authenticated by Agent Serra, are the subpoena issued to Respondent to produce the I-9 verification forms for inspection, and the results of that inspection.

Under the Rules of Practice and Procedure which control these proceedings, a party may move for summary decision on all or any part of the proceedings. Summary decision may be entered ``if the pleadings, affidavits, material obtained from discovery or otherwise, or matters officially noticed 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.

The purpose of the summary decision procedure is to avoid an unnecessary trial when there is no genuine issue of material facts in dispute, as shown by the evidence marshalled by the parties. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

3. Complainant's Factual Showing

As noted above, Complainant relies upon the affidavit of Agent Serra, and the documents authenticated therein, to establish Respondent's violation of both 8 U.S.C. Section 1324a(a)(1)(A) and 1324a(a)(1)(B).

The Complaint alleges that Respondent hired the following individuals for employment in the United States, after November 6, 1986, knowing them to be aliens not lawfully admitted for permanent resident or not authorized to accept employment:

1. Juan Francisco Cruz-Rubalcava
2. Hugo Manuel Garcia-Villarreal
3. Arturo Rubalcava-Vasquez
4. Tomas Segundo-Tello

As to these four individuals, the Complaint further alleges that Respondent failed to properly prepare, retain, or present after request, this I-9 verification form.

The Complaint sought the imposition of a civil money penalty in the amount of \$6,000; \$1,000 for each of four violations of the prohibition on the knowing hiring of unauthorized aliens, and \$500 for each of the four violations of the verification requirements.

A. Knowing Hire Violations

Agent Serra, during the course of an investigation of another business, took a sworn statement from Juan Francisco Cruz-Rubalcava. The interview was conducted in the Spanish language, and the answers were recorded by Agent Serra in English. This interview was witnessed by a third individual. Mr. Cruz-Rubalcava stated that he entered the United States without legal authorization, and did not have any documents permitting him to work in the United States. He was hired by Respondent and began working on June 8, 1989. When he was shown a Form I-9 and asked whether he as ever told by his employer to sign such a form, Mr. Cruz-Rubalcava stated he had never seen the form before. Respondent knew that Mr. Cruz-Rubalcava was not authorized to work in the United States because he told Respondent of his unauthorized status on the first day he started to work.

On December 15, 1989, Agent Serra and three other INS agents with to Respondent's business, where they checked the immigration status of the three men they found working there. Agent Serra determined that all three did not have work authorization, and placed Hugo Manuel Garcia-Villarreal, Arturo Rubalcava-Vasquez, and Tomas Segundo-Tello under arrest.

Interviews were then conducted with each of the three aliens, but only the sworn statement of Hugo Manuel Garcia-Villarreal is authenticated and attached to the Declaration of Agent Serra. The statements of Arturo Rubalcava-Vasquez and Tomas Segundo-Tello are attached to the Memorandum in support of the motion.

All three men made statements similar to that of Mr. Cruz-Rubalcava, in that they entered the United States illegally, were hired by Respondent after November of 1986, told the Respondent of their unlawful immigration status, and were not asked to fill out a Form I-9 upon beginning their employment for Respondent.

B. Verification Violations

On January 22, 1990, Agent Serra served a Notice of Inspection and Subpoena upon the counsel for Respondent to be conducted on January 30, 1990. The subpoena required the production of all INS Employment Eligibility Verification Forms I-9. On the date of the inspection counsel for Respondent provided Agent Serra with a form designed to list the names and employment dates of Respondent's employees. The form, apparently signed by Respondent, contained no names. Agent Serra fails to state whether Forms I-9 were prepared or produced by counsel for Respondent in response to the subpoena.

4. Legal Analysis

Complainant's factual showing is deficient in several respects and precludes the granting of the motion in full. To prevail on the claims contained in the knowing hire count, Complainant must establish the following elements of the violations:

1. That the named employees are aliens unauthorized for employment in the United States;

2. That these authorized aliens were employed in the United States after November 6, 1986.

3. That the Respondent knew, or based upon the circumstances, should have known of the unauthorized status of the employees.

Complainant fails to provide admissible evidence with regard to the hiring of Arturo Rubalcava-Vasquez and Tomas Segundo-Tello since the only evidence of their unlawful status and the Respondent's knowledge of that status, is in the form of copies of unauthenticated statements.

The Rules of Practice and Procedure provide that the Federal Rules of Evidence will be a general guide to all proceedings, unless otherwise provided by statute or the rules. 28 C.F.R. 68.38(a). The Rules also provide that affidavits submitted with a motion for summary decision ``shall set forth such facts as would be admissible in evidence in a proceedings subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'' 28 C.F.R. 68.36(b).

While the Administrative Procedure Act, referred to above, allows for the admission of evidence according to less strict standards than required in jury trials, it is basic to the reliability of evidence that it be authenticated. The requirement that evidence be authenticated applies to administrative proceedings. Ona Corp. v. N.L.R.B., 729 F.2d 713, 721 (11th Cir. 1984).

Federal Rule of Evidence 901(a) provides ``The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'' The testimony of a witness with first hand knowledge is one method for authentication provided for in the rules of evidence, F.R.E. 901(b)(1), and it was properly used by Complainant to authenticate the sworn statements of two of the four aliens.

Similarly, the allegation that the Respondent failed to prepare or present the verification forms (Form I-9) for the individuals listed in Count II is not fully supported by the record provided. Agent Serra's declaration merely states:

14. On January 30, 1990, I met with Jesus Maria Alvarez, attorney for Sergio Alaniz, in order to conduct an inspection of Mr. Alaniz' employer verification (I-9)

forms. Mr. Alvarez provided me with a list (attached hereto as Exhibit ``D'') showing no names of employees, hiring, or termination dates.

Nowhere does Agent Serra state that I-9 Forms were not provided at the inspection.

Support for the allegation comes from the authenticated sworn statements of Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal wherein they state that Respondent had never asked them to sign the verification form. This is sufficient to establish that the required forms were not correctly prepared, if at all, for these two employees, as the proper completion requires the signature of the employee. The failure to authenticate the statements of the other two employees precludes a similar finding.

5. Findings of Fact and Conclusions of Law

Based upon the foregoing analysis, I conclude:

1. As previously found, I determine that no genuine issue as to any material facts exist as to the allegations in Counts I and II with regard to Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal. Therefore, Complainant is entitled to a summary decision as to these two individuals in Counts I and II as a matter of law.

2. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(A), in that Respondent hired for employment in the United States, Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal, after November 6, 1986, knowing them to be unauthorized for employment.

3. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(B), in that Respondent hired for employment in the United States, Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal, after November 6, 1986, without complying with the verification requirements in 8 U.S.C. Section 1324a(b).

6. Civil Money Penalties

Civil Money Penalties are to be imposed if, upon the preponderance of the evidence, I determine that Respondent has violated the Act. The amount of the penalties for violating the verification requirements are to be determined according to certain factors specified in 8 U.S.C. 1324a(e)(5), 28 C.F.R. 68.50(c)(2)(iv). Penalties for the knowing hiring of unauthorized aliens may be imposed without reference to the factors specified by the Act for verification violations.

The consideration of the various factors, both mitigating and aggravating, would be facilitated by the filing of affidavits and briefs in support of the fines sought to be imposed. Therefore the parties are directed to file such written evidence and argument which they consider relevant to the factors listed in 8 U.S.C. 1324a(e)(5), no

later than two weeks from the date of this order. The imposition of sanctions shall be deferred until such time as this additional evidence can be considered.

Therefore, based upon the foregoing, IT IS ORDERED:

That Complainant's Motion for Summary Decision is GRANTED IN PART, as to the allegations in Counts I and II regarding violations involving the individuals Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal.

SO ORDERED.

Dated: October 3, 1990.

JAY R. POLLACK
Administrative Law Judge
San Francisco, California