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

United States of America, Complainant v. Doug Eier, d.b.a. Blue Mountain Recreation and C. Street Bikes, d.b.a. Blue Mountain Recreation and Cyclery, Respondent; 8 U.S.C. 1324a Proceeding, Case No. 90100186.

DECISION AND ORDER GRANTING PARTIAL SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: KRISTIN W. OLMANSON, Esquire for Complainant,
Immigration and Naturalization Service
DOUG EIER, pro se Respondent.

Procedural History and Statement of Relevant Facts:

On April 27, 1990, the United States of America, Immigration and Naturalization Service (INS), served a Notice of Intent to Fine (NIF) on Doug Eier, d.b.a. Blue Mountain Recreation and C. Street Bikes, d.b.a. Blue Mountain Recreation and Cyclery. The NIF, in Count I, alleged four violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act). In an undated letter, Respondent, through Doug Eier, requested a hearing before an Administrative Law Judge.

The United States of America, through its attorney, Kristin W. Olmanson, filed a Complaint incorporating the allegations in the NIF against Respondent on June 7, 1990. On June 11, 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 this case and setting the hearing place at or around Pullman, Washington, on a date to be determined.

I received a letter from Respondent on June 20, 1990, in which he indicated some difficulty understanding how to prepare an

Answer to the Complaint. I responded by letter that same date, indicating that the Answer should follow 28 C.F.R. section 68.8, a copy of which was enclosed. A more formal Answer was not filed.

On August 1, 1990, Complainant filed a Motion to Compel Discovery, seeking a response to Complainant's Request for Production of Documents. Complainant stated that Respondent had not provided the requested documents within 30 days of the Request being made. Respondent failed to provide any opposition to this Motion within the requisite 10 day time period as provided by 28 C.F.R. section 68.9. I then granted Complainant's Motion to Compel Discovery in my August 14, 1990 Order.

On September 7, 1990, Complainant filed a Motion for Summary Decision/Judgment, along with a supporting Memorandum, additional documents, and a Declaration of Gary Gove, Special Agent, INS. Complainant argued in its Motion that no genuine issues of material fact existed and that it was entitled to summary decision as a matter of law.

On September 13, 1990, I issued an Order to Show Cause to Respondent, inviting a response to the Motion for Summary Decision. On September 21, 1990, I received from Complainant a letter which had been sent by Respondent to the Seattle, Washington office of INS rather than to my office. In this letter Mr. Eier stated that he had not been receiving correspondence regarding this case which had been sent to the business address, as he had been involved in a sale of the business and had not gone to the business premises. On September 24, 1990, I sent a letter to Mr. Eier's home address, containing copies of all documents previously mailed to his business address, and suggesting that he consult an attorney regarding this matter.

Respondent provided a handwritten letter, dated September 28, 1990, along with supporting documentation, explaining Respondent's compliance with IRCA, and providing responses to Complainant's Request for Production of Documents. Respondent indicated that he owned Blue Mountain Recreation and Cyclery and C. Street Bikes at the time of the alleged IRCA violations, but that he was in the process of transferring ownership of his business to Chris Orheim, the subject of one of the alleged paperwork violations in this case. I considered this letter to be in response to Complainant's Motion for Summary Decision.

On October 18, 1990, Complainant submitted a Motion to Dismiss Charge With Respect to Chris Orheim, arguing that the documents recently provided by Respondent demonstrated that Chris Orheim had been employed by Respondent prior to November 6, 1986, and

that he was, therefore, a ``Grandfathered Employee''. I granted Complainant's Motion in my Order of October 24, 1990.

Complainant filed a Motion for Leave to File a Reply to Respondent's Letters and Production of Documents on October 18, 1990, along with Complainant's Response to Respondent's Letters and Production of Documents. Complainant based this request on the fact that Attorney Olmanson had been away from the office during the period of time in which the handwritten letters of Doug Eier of September 13 and 28, 1990, had been submitted.

I hereby GRANT Complainant's request pursuant to 28 C.F.R. section 68.9(b), and will consider its reply to these letters in my determination of this Motion for Summary Decision.

Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding, set out at 28 C.F.R. section 68, 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.'' See 28 C.F.R. section 68.36.

The purpose of the summary decision procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact. 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 (1986). See also, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Legal Analysis Supporting Decision

Complainant's Motion sets forth each of the elements required for a finding of an IRCA paperwork violation, as found in section 274A(a)(1)(B) of the Act. Complainant further demonstrates, through the supporting Declaration, Memorandum, and pleadings of record, that:

1. Doug Eier owned the business ``Blue Mountain Recreation and C. Street Bikes'' and ``Blue Mountain Recreation and Cyclery'' at the time of the INS inspection on May 11, 1989. Complainant cited the Master Business Application completed by Doug Eier on July 26, 1989.

2. Doug Eier, d.b.a. Blue Mountain Recreation and C. Street Bikes and/or Blue Mountain Recreation and Cyclery, paid remuneration or compensation for services to the three remaining individuals listed in Count I of the NIF. These employees are David Chew, Mark Pubols, and Reid Burkett. All three individuals are listed as employees of Respondent in the Washington State Department of Labor Field Audit Report (DOL Report) for the time period

to include 1989, a copy of which was provided with Complainant's Motion. Additionally, the DOL Report indicates the amounts paid to these individuals for their services.

3. The three employees listed above were hired for employment in the United States according to the DOL Report cited above, and the Declaration of Gary Gove. Agent Gove stated that Doug Eier told him at the time of the May 11, 1989 inspection that Mark Pubols and Reid Burkett worked for him in his shop, which is located in the State of Washington.

4. As evidenced by the Declaration of Gary Gove, Respondent failed to present Forms I-9 for the three individuals listed above during the inspection of May 11, 1989. Agent Gove indicated that he had conducted an educational visit with Doug Eier at his place of business on April 13, 1989, providing Mr. Eier with a copy of the Handbook for Employers.

The above evidence demonstrates, as Complainant argues, that Respondent failed to comply with the employment eligibility verification requirements of IRCA at the time of the INS inspection, by failing to present for inspection Forms I-9 for the employees listed in the Complaint.

I will now look to the defenses and other information provided by Respondent to ascertain if any issues of material fact remain which would necessitate a hearing on the merits. As I have indicated throughout this proceeding, I am granting Respondent some latitude in the form and substance of his pleadings because he is acting pro se.

Respondent has raised several potential defenses which require my consideration prior to issuing a ruling on this Motion. These issues were raised in Respondent's undated request for a hearing, his undated letter received by me on June 20, 1990, and his letters of September 13 and 28, 1990.

Respondent has consistently relied upon the theory that at least two of the named individuals, Mark Pubols and David Chew, were hired prior to November 6, 1986, and were, therefore, ``Grandfathered employees''. Unfortunately, Respondent has not provided even the least bit of evidence to support this theory. As pointed out by Complainant's Memorandum in Support of Motion for Summary Decision, Respondent has the burden of proving that an employee was hired prior to the exemption period. See U.S. v. Gasper, OCAHO Case No. 89100567, Ruling in Limine, (Aug. 15, 1990).

Furthermore, by examining the documents provided by Complainant from the DOL Report, I am satisfied that David Chew and Mark Pubols would not fall within the exemption language of 8 C.F.R. section 274a.7. Although both individuals were arguably

hired prior to November 6, 1986 (I rely on Respondent's unsupported assertion for this proposition), the records from the DOL demonstrate that for the periods of the third quarter of 1987 through the fourth quarter of 1988, neither employee performed any work for or received any compensation from Respondent. That break in employment would constitute a termination for both employees. Respondent has not provided any documentation, affidavits of employees, or other evidence to demonstrate that these employees, worked continuously from prior to November 6, 1986, to the time of the May 1989 inspection. I do not find that Respondent has met its burden of proof regarding this affirmative defense. Therefore, I find no issues of material fact exist with respect to the employment of Mark Pubols and David Chew.

Respondent has asserted that David Chew was not employed by Respondent business, but rather as a private employee of Dour Eier for carpentry work on Mr. Eier's home. Again, Respondent has not shown, beyond this assertion, that Mr. Chew was not employed by Respondent business. On the other hand, the records of the DOL suggest to the contrary, that David Chew was employed by Blue Mountain Recreation and C. Street Bikes and/or Blue Mountain Recreation and Cyclery during 1989. Respondent has not met his burden on this affirmative defense, therefore, I find that no issue of material fact remains with respect to the employment of David Chew by Respondent.

Regarding Reid Burkett, Respondent argues that he was not technically an employee, but rather was sponsored by Respondent's business to perform bicycle stunts as part of the ``Just Say No'' program. Respondent's statement to Agent Gove on May 11, 1989, however, indicates to the contrary. Agent Gove stated in his Declaration of September 7, 1990, that Doug Eier told him he employed Reid Burkett to clean out his shop. The records of the DOL Report support that statement. I am satisfied that Reid Burkett was an employee of Respondent during the relevant time frame, and that no genuine issue as to his employment remains.

I additionally find that Respondent still has not properly answered the Complaint, despite being provided more than enough opportunity in which to do so. I wrote to Mr. Eier, explaining the necessity of filing an Answer, and my Attorney Advisor attempted to speak with Mr. Eier, leaving detailed messages for him regarding this failure, all to no avail. According to 28 C.F.R. section 68.8(c)(1), any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed admitted. These admissions can form the basis for a summary decision. See U.S. v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211 (Apr.

27, 1990); U.S. v. Boo Bears Den, OCAHO Case No. 89100097, (July 19, 1989).

In this case, Respondent has never denied that he failed to present Forms I-9 for the three individuals in question on May 11, 1989, that these individuals were not employed by him in the United States, and that he owned and operated the business named in the Complaint at the time of the inspection. Therefore, I deem these allegations as admitted.

Accordingly, after careful consideration of the documents before me, I conclude that no genuine issue of material fact exists as to Count I and that Complainant is entitled to partial summary decision as to liability on Count I as a matter of law. I do not decide the issue of civil penalty by this Decision and Order.

Findings of Fact and Conclusions of Law

I have considered the pleadings, memoranda and supporting documents submitted regarding the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issues as to any material facts have been shown to exist with respect to the issue of liability. Therefore, Complainant is entitled to summary decision as a matter of law pursuant to 28 C.F.R. section 68.36.

2. I find that Respondent has violated 8 U.S.C. section 1324a(a)(1)(B) in that Respondent hired David Chew, Mark Pubols, and Reid Burkett for employment in the United States without complying with the verification requirements in section 1324a(b)(1).

3. I will keep jurisdiction of this matter to make a determination as to the civil penalty to be imposed. I will be contacting the parties to ascertain if they wish to provide written briefs or oral argument pertaining to the five criteria, outlined in 28 C.F.R. section 68.50, which I must consider when evaluating a just and reasonable penalty.

SO ORDERED: This 26th day of October, 1990, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge