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

United States of America, Complainant v. Sam Y. Ro d/b/a Daruma Japanese Restaurant, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100196.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL

A. Procedural Background

On or about August 24, 1990, Complainant served Respondent with sixty-one (61) interrogatories, including 116 parts and subparts.[1]

In order to comply with my Standard Pre-Trial Order limiting the number of interrogatories to be served upon a party to twenty, Complainant mailed a letter to Respondent dated September 20, 1990, limiting the propounded interrogatories to twenty (20), with no more than two sub-sections each.[2]

Respondent answered the amended interrogatories on October 8, 1990.

On October 16, 1990, Complainant filed a Motion to Compel Responses to Discovery. Complainant asserts that ``the rules of procedure . . . clearly contemplate that a complaint may be amended to add additional violations which may be uncovered during discovery. See, 28 C.F.R. 68.8(e).''

[1]Complainant's Interrogatory No. 1 sets forth a list of forty-six (46) names and the succeeding sixty (60) interrogatories ask such questions as ``whether said employee was referred to you by an employment agency or other referral entity'' and ``the name and address of such employment agency or referral entity'' (Interrogatory No. 3); whether or not all the individuals ``punch a time card for each day he or she worked'' (Interrogatory No. 16); and ``the total hours worked each day and each week by each said employee each week of his or her employment since November 6, 1986. . . .'' (Interrogatory No. 23). Moreover, some of the interrogatories are clearly ``canned.'' See, e.g., Interrogatories Nos. 1 and 22.

[2]The interrogatories were limited by Complainant's letter to: 1, 2(b) and (f), 5-7, 9(a) and (c), 13, 22, 23(a) and (b), 24-25, 31, 33, 44, 54, 57-61.

More specifically, Complainant asserts in its motion that Respondent's responses to Interrogatories 1, 2, 7, 22, 23, and 44 ``reflect non-responsive answers and meritless objections.'' In support of this assertion, Complainant argues that ``these interrogatories are clearly intended to lead to the identification of all of Respondent's employees and request relevant and material information that would assist Complainant in this matter.''

Complainant further argues that ``there is no guarantee that Respondent revealed all such employees to Complainant in the inspection of Forms I-9 that was performed on February 16, 1990, and Complainant has a right to further information to ascertain the thoroughness of Respondent's revelations as to Respondent's compliance with 8 U.S.C. 1324a.''

In addition, Complainant asserts that Respondent's responses to Interrogatories 5, 6, 7, 9(a), 9(c), 13, 24 and 57 are ``incomplete and/or deliberately less than candid based upon the Respondent's failure to fully respond to other interrogatories upon which the indicated interrogatory is derivative.''

B. Applicable Legal Standards

Complainant's interrogatories were submitted ``pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure'' as well as 28 C.F.R § 68.17. The regulations applicable to these proceedings provide that ``the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation <u>not</u> provided for or controlled by these rules, or any statute, executive order, or regulation.'' <u>See</u>, 28 C.F.R. § 68.1.

The relevant Federal Rules of Civil Procedure (``FRCP'') concerning the scope and number of interrogatories include Rules 33(b), 26(b)(1), and 33(c). FRCP 33(b) states that ``interrogatories may relate to any matters which could be inquired into under Rule 26(b) . . . .''

FRCP 26(b)(1) provides that:

> Parties may obtain discovery regarding any matter, not privileged, which is <u>relevant</u> to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . . . It is not grounds for objection that the information sought would be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This tracks, in part, the language relating to scope of discovery in the regulations which states in pertinent part at 28 CFR § 68.16(b) (1989) that ``unless otherwise limited by order of the Administrative Law Judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, includ-

ing the existence, description, nature custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable fact.''

The regulations also provide for protective orders ``upon motion'' and for ``good cause to protect a party or person from annoyance, oppression or undue burden or expense.'' See, 28 CFR § 68.16(c).

It is my view that federal case law interpreting the application of the federal rules pertaining to the scope of discovery, especially relating to interrogatories, is instructive to the case at bar.

Discovery rules are designed to provide parties with access to the fullest possible knowledge of the issues and facts prior to trial; the single initial hurdle which must be cleared by the party seeking discovery is to demonstrate the relevance of the information sought to issues involved in the case.'' See, Pierson v. U.S., 428 F. Supp. 384 (D.C. Del. 1977).

In Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), the Supreme Court has addressed the meaning of relevancy in the discovery context. Writing for a unanimous Court, Justice Powell said, at 351:

> The key phrase in this definition_`relevant to the subject matter involved in the pending action'_has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case. See, Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 388-389, 91 L.Ed. 451 (1947). Consistent with the notice pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Hickman v. Taylor, supra, at 500-501, 67 S. Ct. at 388-389. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

I have previously addressed the issue of the purpose of interrogatories in United States v. R and C Tours (Guam), Inc., OCAHO Case No. 89100204 (Order Denying Respondent's Motion for Protective Order and Directing Respondent to Answer Specified Interrogatories and Requests for Admissions (November 9, 1989), wherein I quoted from federal cases:

> The basic purpose of interrogatories is to discover facts under oath or learn where facts may be discovered and to narrow the issues in the case for trial. Life Music, Inc. v. Broadcast Music, Inc., 41 FRD 16, 26 (E.D.N.Y. 1966); United States v. 216 Bottles, more or less, 36 FRD 695, 701 (E.D.N.Y. 1965); United States v. Grinnel, 30 FRD 358, 361 (D.R.I. 1962). If a party objects to interrogatories, the burden falls on that party to convince the court that the interrogatories are improper and need not be answered. See, Rosenberg v. Johns-Mansville Corp., 85 FRD 292 (E.D. Pa. 1980); In re Folding Carton Antitrust Litigation, 83 FRD 260 (N.D. Ill. 1979); Foneseca v. Regan, 98 FRD 694, 700 (1978), rev. on other grounds, 734 F.2d 944 (2nd Cir. 1984), cert. denied, 105 S. Ct. 249 (1984).

In addition to the aforementioned, I find the following cases cited by Respondent in its brief instructive: Marshall v. Westinghouse Electric Corporation, 576 F.2d 588 (5th Cir. 1978) (discrimination suit where district court denied plaintiff's motion to compel and 5th Circuit affirmed, noting that ``plaintiff [is not permitted] to `go fishing' and the trial court retains discretion to determine that a discovery request is too broad and oppressive.''); Hinton v. Entex, Inc., 93 FRD 336 (E.D. Tex. 1981) (plaintiff in a discrimination suit sought discovery into the employment practices at all of defendant's facilities in the State of Texas. Discovery was denied except as to the facility at which she was employed. ``To burden Entex with having to provide the requested information relating to all its facilities would be to condone (a) fishing expedition.''); Crown Center Redevelopment v. Westinghouse Electric Corporation, 82 FRD 108 (W.D. Mo. 1979) (the court condemned the ``indiscriminate use of either standardized form interrogatories or overly burdensome use of detailed interrogatories which serves no purpose other than to bury one's opponent in paper.''); and Frost v. Williams, 46 FRD 484 (D.Md. 1969) (plaintiff in an automobile accident case served 200 interrogatories which had been copied from a form book. Calling the interrogatories ``oppressive'' and ``frivolous,'' the court did not require the defendant to answer any of them.).

C. Legal Analysis

Respondent argues that the interrogatories to which it has objected are being used for a ``fishing expedition'' to enable the government to determine whether or not Respondent complied with IRCA's record keeping requirements as to ``all persons employed by Respondent since November 6, 1986. Respondent further argues that ``the proper method to obtain the information sought is through INS investigative powers of inspection.''

In order to determine the merits of Complainant's motion, I first need to consider the specific allegations of the Complaint and the relevancy of the interrogatory to those allegations. If the interrogatory is relevant to the subject matter involved in this case, I will take into account the nature and scope of the interrogatory to determine whether or not a response would be oppressive or an undue burden on the Respondent.

The Complaint in this case charges that Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (``the Act'') by failing after November 6, 1986, to comply with the employment verification requirements of Section 274A(b) of the Act for sixteen (16) employees who are identified in the Complaint.

Since the Complaint only charges Respondent with so called ``paperwork'' violations, evidence regarding whether or not Respondent may have violated the Act or its regulations with respect to other employees not named in the Complaint by failing to properly prepare the Employment Eligibility Verification Form (Form I-9) is not relevant to determining the merits of this case. The evidence would not be relevant as to liability of Respondent with respect to the individuals named in the Complaint, nor would it be relevant to mitigation of penalty, i.e. prior violations. Had Respondent been charged with ``knowing'' violations, the evidence would arguably have been relevant to Respondent's ``knowledge.''

If I were to permit Complainant to use discovery in this case to determine detailed employment information from Respondent about other employees who are not named in the Complaint, it would provide the government with a forum to conduct a full scale civil investigation. The delays and costs from such wide-open discovery would be oppressive to Respondent and would not provide any evidence probative of the charges pending in the Complaint.

Complainant's argument that it should be permitted answers to the disputed interrogatories because ``there is no guarantee that Respondent revealed all such employees to Complainant in the inspection of Forms I-9 that was performed on February 16, 1990,'' is without merit. If the government wants to broaden its civil investigation of Respondent's business operations, it can obtain an administrative subpoena or undertake another inspection, including interviewing of witnesses.

I do not find Complainant's argument that, because the regulations provide for amendments to a complaint, this justifies permitting discovery in this case to determine whether or not Respondent properly completed the verification process required by IRCA for other employees hired after November 6, 1986. 28 C.F.R. § 68.8(e), which provides for amendment of pleadings, was not intended to facilitate ``fishing expeditions'' through the discovery process to determine if any violations may exist in addition to those alleged in the Complaint. The language of the regulation itself indicates that amendments should be permitted for matters ``reasonably within the scope of the original complaint.'' Thus, Complainant's interrogatories which require information about employees not named in the Complaint are not relevant to proving the paperwork charges alleged in this case.

However, interrogatories which seek evidence having any bearing on the employment of the employees named in the Complaint, including hiring procedures, who hired them, when they were hired, how long they were employed, what type of work they per-

formed, and any documents provided by them or created by the employer in connection with their employment, are clearly relevant in this case. Moreover, interrogatories which cover the topic of mitigation of penalty would be relevant areas of inquiry as well.

Interrogatory No. 1 asked Respondent whether thirty (30) named individuals are now or have been in Respondent's employ at any time since November 6, 1986. The named individuals include sixteen (16) persons identified in the Complaint and fourteen (14) others. Respondent answered the interrogatory with respect to the employees named in the Complaint, but not as to the others. It is my finding that whether or nor Respondent employed individuals other than those named in the Complaint is not relevant to determining the paperwork violations charged in this case.

Therefore, Complainant's Motion to Compel further responses to Interrogatory No. 1 is DENIED.

Interrogatory No. 2 requests Respondent to state as to each individual identified in Interrogatory No. 1: (a) date of employment; (b) date employee first began working in your employ; (c) job title or position of each employee; (d) whether said employee is still in your employ; (e) the duties employed on your behalf; (f) where applicable, date when employee left your employ, and under what circumstances; and (m) where applicable, date when such employee was rehired.

Respondent limited his answers to these six questions to those individuals named in the Complaint. It is my finding that answers to Interrogatory No. 2 which do not pertain to employees named in the Complaint are not relevant; and, therefore, Complainant's Motion to Compel any additional responses to Interrogatory No. 2 is DENIED.

Interrogatory No. 7 asked Respondent to state as to each individual identified in its answer to Interrogatory No. 1 whether he or she ever presented for inspection documentation establishing identification and employment eligibility. Respondent limited its response to those employees named in the Complaint. I find that the requests in Interrogatory No. 7 which do not pertain to employees named in the Complaint are irrelevant; and, therefore, Complainant's Motion to Compel any additional responses to Interrogatory No. 7 is DENIED.

Interrogatory No. 22 asked Respondent to identify all persons employed by Respondent since November 6, 1986, at Daruma Japanese Restaurant, 550 West Tudor Road, Anchorage, Alaska. Respondent objected to this interrogatory because ``it is not relevant or reasonably calculated to lead to admissible evidence in this action.''

Although the interrogatory is, as phrased, too broad to provide relevant evidence, I will direct Respondent to state in a supplemental response how many employees he has employed, and their respective job titles during the period from on or about January 1988 to the present, because this is relevant to determining the size of its business (one of the mitigating factors set forth in Section 274A(e)(5)). Complainant's Motion to Compel Respondent to answer Interrogatory No. 22, as currently worded, is, however, DENIED.

Interrogatory No. 44 asked Respondent to ``list the names and addresses of all persons who, on behalf of Respondent, have executed forms W-4 or I-9 during the past five years.'' Respondent objected to this interrogatory as overbroad and ``solicits information which is not relevant or reasonably calculated to lead to admissible evidence.'' I agree with Respondent's characterization of the interrogatory as overbroad; however, I will direct Respondent to list the names and addresses of all persons who, on behalf of Respondent, have executed W-4 or I-9 forms during the period from March 1987 to the present because this is the period of time in which the employees identified in the Complaint were employed by Respondent. Complainant's Motion to Compel Respondent to answer Interrogatory No. 44, as amended, is GRANTED.

Interrogatory No. 5 asked Respondent to ``state the name, job title or position, and current address of the individual or individuals who are or have been responsible for hiring employees from November 6, 1986, to the present date. As to each individual so named, state the dates during which he or she performed the responsibility of hiring employees.'' Respondent's answer simply states ``Sam Ro and Jun Ro c/o Daruma Restaurant. (Jun Mo Ro is Sam Ro's son and performs such duties for him).''

I find that Interrogatory No. 5, except as to the period of time covered, is relevant to the charges in this case. The Complaint alleges that the employees listed therein started working for Respondent on or about March 1987, and some are still employed. Thus, Complainant's Motion to Compel is granted in part, and I direct Respondent to state <u>specifically</u> the <u>name, job title</u>, and <u>current address</u> of the individual or individuals who are or have been responsible for hiring employees from March 1, 1987, to the present date. As to each individual so named, Respondent shall state the dates during which he or she performed the responsibility for hiring employees.

Interrogatories Nos. 9(a) and 9(c) will be dealt with together. Interrogatory No. 9(a) states that, as to each of the individuals identified in your answer to Interrogatory No. 7 as having presented documentation establishing identification and employment eligibility,

state: (a) the name, job title or position, and current address of the individual or individuals who physically examined said documentation on your behalf, and (c) the date upon which such documentation was physically examined.''

Respondent's answer to these two interrogatories was ``Jun Mo Ro'' and ``the date upon the document.'' Respondent did not, however, indicate in his response Mr. Ro's job title or position and current address. Additionally, Respondent's answer was limited to those employees listed in the Complaint. For the reasons previously given, I find that answers to Interrogatories Nos. 9(a) and (c) relating to employees not listed in the Complaint would be irrelevant to this case. Therefore, Complainant's Motion to Compel answers with respect to employees not listed in the Complaint is DENIED. I further find that, as to the individuals listed in the Complaint, Respondent has not fully answered the interrogatories with respect to Mr. Ro's job title or position and current address. Respondent is therefore directed to supplement its answer, accordingly.

Interrogatory No. 13 requests ``the name and address of the persons who interviewed and/or hired each of the individuals identified in your answer to Interrogatory No. 1.'' Respondent limited his response to those individuals named in the Complaint. I find that the request of Interrogatory No. 13 for any information relating to employees not listed in the Complaint is irrelevant. Therefore, Complainant's Motion to Compel any further response to Interrogatory No. 13 is DENIED.

Interrogatory No. 24 states, ``Please list the names of each of Respondent's employees who are alleged by Respondents (sic) to be exempt from the provisions of the Immigration Reform and Control Act of 1986.'' Respondent's answer is that ``None of the individuals for whom the INS has alleged violations are exempt.'' I find that Respondent's answer need only cover those employees listed in the Complaint. Therefore, Complainant's Motion to Compel any further response to Interrogatory No. 24 is DENIED.

Interrogatory No. 57 asks Respondent to ``state each and every fact upon which Respondent bases [its] affirmative defenses.'' Respondent's answer states that it ``has not asserted any affirmative defenses.'' Frankly, I do not understand why Complainant is objecting to Respondent's answer. The Respondent's answer clearly admits liability to the paperwork violations. Apparently, the only dispute Respondent has with the charges in this case is over the amount of civil liability. Complainant's Motion to Compel any further response to Interrogatory No. 57 is DENIED.

SO ORDERED: This 8th day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge