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

United States of America, Complainant v. Halshan, Inc. d/b/a California Pacific, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100212.

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On July 5, 1990, the Immigration and Naturalization Service (INS) filed a Complaint with the Chief Administrative Hearing Officer (CAHO) against Halshan, Inc., d/b/a California Pacific, Respondent herein, alleging in two counts that Respondent violated Sections 274A(a)(2) and 274A(a)(1)(B) of the Immigration and Nationality Act, 8 USC sections 1324a(a)(2) and 1324a(b)(3).

More specifically, the Complaint alleges that Respondent hired Rosa Hortencia Delgado-Salvatierra a/k/a: Hortencia Salvatierra (hereinafter referred to as ``Delgado'') on or about June 15, 1988, and on February 15, 1989, Respondent became aware that Delgado was not authorized for employment in the United States and that Respondent continued to employ Delgado after February 15, 1989, knowing that she was not authorized for employment in the United States (Count I).

The Complaint also alleges that on January 19, 1990, an agent of INS requested that Respondent present for inspection on January 25, 1990, all Employment Eligibility Verification Forms (Form I-9) prepared for Respondent's employees, but Respondent failed to present and make a Form I-9 for Delgado available for inspection on January 25, 1990.

On July 19, 1990, pro se Respondent filed a letter with this office which I have construed as its answer to the Complaint.

Respondent's letter, which is signed by Sharon F. York for Halshan, Inc., states in pertinent part that:

> Rosa Hortencia Delgado-Salvatierra was hired on October 20, 1986. She performed child care duties at our place of business until January 1987, at which time we moved her into a sewing machine operator position. My daughter was born September 28, 1986, and our company is a family run business. It is not unusual that

> I brought my daughter to work with me. According to page 2, part two of the Employers Handbook, (instructions for the I-9 Form), we are not required to complete, or present this form to an immigration officer on employees hired before November 6, 1986.

On November 6, 1990, Complainant filed a ``Motion for Summary Decision'' on all counts of the Complaint.

In its Motion, Complainant states that `` the Respondent has operated a sandal manufacturing concern since 1972, which was incorporated in the State of California in 1980 and is located in Harbor City, California.''

Complainant further states in its Motion that the undisputed facts include: ``(3) On or about October 20, 1986, Sharon F. York hired Rosa Hortencia Delgado-Salvatierra as a babysitter for her child at the rate of $50 per week; (4) On or about January 20, 1987, Respondent hired Rosa Delgado-Salvatierra for employment in the United States; (5) On June 15, 1988, Respondent signed an Application for Alien Employment (Form ETA 750) on behalf of Rosa Hortencia Delgado-Salvatierra. On or about this date, Respondent also became aware that Delgado had not been born in the United States; (6) On or about February 15, 1989, Respondent signed a Petition for Prospective Immigrant Employee (Form I-140) on behalf of Delgado; (7) The Form I-140 relating to Rosa Hortencia Delgado-Salvatierra on its face makes reference to Delgado's illegal entry into the United States, as `entered without inspection'; (8) Form ETA-750 relating to Rosa Hortencia Delgado-Salvatierra on its face makes reference to Delgado's illegal entry into the United States indicating she has no visa; (9) Respondent has no employment application on file for Delgado; (10) Respondent continued to employ Delgado from her date of hire on January 20, 1987 through February 15, 1989, and from said date through the date of Delgado's arrest by the Immigration and Naturalization Service; (11) On January 25, 1990, following appropriate notice, the INS conducted a compliance inspection of Respondent's Employment Eligibility Verification Forms (Form I-9); (12) Respondent hired Delgado for employment in the United States on or about January 20, 1987; (13) An employment Eligibility Verification Form relating to employee Rosa Hortencia Delgado-Salvatierra was not prepared from November 7, 1986 or at any time thereafter through January 25, 1990.''

On November 30, 1990, Respondent filed its Response to Complainant's Motion for Summary Decision with attached documentation and affidavits in support thereof. In its Response, Respondent deputes the fact that Sharon York hired Delgado to work as a babysitter for her child. Rather, Respondent states that ``on October 10, 1990 a company decision was made to hire an employee to

perform child care duties and light cleaning at our place of business.'' Respondent further states in its response that ``Rosa Delgado was compensated by cash, $50.00 per week. At this time it was a necessity, and in the best interest of our company to provide child care within our facility. Hiring Rosa Delgado was strictly a business decision. On January 20, 1987, Rosa's position changed within our company, and she became involved in the production of our product. At this time, we began paying her with a company check. Rosa simply was promoted to another job position within the company.''

Respondent further states in its response that ``our company has no knowledge that Rosa Delgado was or has been turned down for legalization in the United States.'' Respondent is apparently contending that it did not know that Delgado was not authorized for employment in the United States as charged in the Complaint, and it has a ``good faith'' defense to failure to prepare the Form I-9. (``Good Faith'' is, however, not an affirmative defense to paperwork violations. Good faith can be considered by the ALJ as a mitigating factor in assessing an appropriate civil money penalty for paperwork violations.) Ms. York's statements to the court in a telephonic conference call on December 11, 1990, supports this conclusion.

Both parties acknowledge in their respective pleadings, that under the provisions of 8 C.F.R. section 274a.7(a), employers are not subject to penalties for paperwork violations and knowingly continuing to employ an unauthorized alien after November 7, 1986, if the individual was hired prior to November 7, 1986, and was continuously employed.

The ALJ in this case clearly must determine whether or not the ``grandfather'' provision of the Immigration Reform Control Act of 1986 (IRCA) shall be applied to Delgado. The grandfather provision exempts employers from IRCA violations for employees hired before IRCA's enactment (November 6, 1986).

In the case of Maka v. Immigration and Naturalization Service, Slip Opinion No. 89-70030 (9th Circuit, Filed June 4, 1990), the court discussed the ``grandfather provision'' in a case involving allegations that an employer (Maka) had violated section 274A(a)(1)(A) of the act, 8 U.S.C. section 1324a(a)(1)(A), for unlawfully employing after November 6, 1986, an alien (Kapetaua) not authorized for employment in the United States and for violating section 274A(a)(1)(B) of the Act, section 1324a(a)(1)(B) for failing to comply with the Act's verification requirements.

Maka argued that he believed in good faith that no Forms I-9 had to be completed for his employees, because all of his employees were hired prior to November 6, 1986. Maka contended that Kape-

taua was a grandfathered employee; and, therefore, Maka was not subject to the requirements of IRCA with respect to the hiring of Kaetua. Finally, Maka argued that Kapetaua maintained his grandfathered status under IRCA because, although Kapetaua worked for other employers during 1987, he remained an employee of Maka.

In Maka, the ALJ held that the evidence established that Maka continuously employed Kapetaua from prior to November 6, 1986, until approximately March 1988, as either a tree trimmer, ground maintenance man, or agricultural worker. Consequently, Kapetaua was a grandfathered employee and Maka did not violate IRCA with respect to Kapetaua's employment. The CAHO reversed, holding that the record did not support the ALJ's conclusion. The Court of Appeals affirmed the CAHO decision because there was substantial evidence in the record to support the CAHO's conclusion that Kapetaua quit his employment with Maka at some point after the IRCA's enactment; and, therefore, Kapetaua forfeited his ``grandfathered employee status'' under section 274A(a)(3).

The Maka decision does provide some guideline as to what are the material facts to be considered in deciding whether or not an employee is ``grandfathered'' under the IRCA. Applying the principles of Maka to the case at bar, it is clear that the ALJ must determine whether on October 20, 1986, Delgado was employed to work for Respondent as the company's babysitter, or whether she was hired to work for Ms. York as her personal babysitter. If Delgado was hired to work for Ms. York as her personal babysitter on October 20, 1986, arguably the ``grandfather'' provisions cited above would not apply in this case because there is no dispute that on January 20, 1987, she was working as a sewing machine operator for Respondent company. If the ALJ should find that Delgado is not a grandfathered employee, there will also have to be a determination as to whether or not Respondent knew or should have known that Delgado was not authorized for employment in the United States at the time charged in the Complaint.

In view of the fact that there is a dispute between the parties as to material facts in this case, including: (1) who employed Delgado on October 20, 1986; (2) whether or not that employment was continuous through January 25, 1990; and (3) whether or not Respondent knew or should have known that Delgado was not authorized for employment in the United States, Complainant's ``Motion for Summary Decision,'' is denied.

It is further ORDERED that his case is set for evidentiary hearing on February 25, 1991, at Pasadena, California.

SO ORDERED: This 13th day of December, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge