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

United States of America, Complainant vs. Weymoor Investments, Ltd., Respondent; 8 U.S.C. 1324a Proceeding, Case No. 88100184.

Appearances: JOHN PAULSON, Esq., of Seattle, Washington, for the Complainant.

KATHLEEN PAGE, President, Weymoor Investments, Ltd., for the Respondent.

SUMMARY DECISION AND ORDER

On November 7, 1988, a Complaint Regarding Unlawful Employment was filed against Monte Carlo Restaurant and Lounge,[1] herein called Respondent, by the United States of America, through the Department of Justice, Immigration and Naturalization Service, herein called the Complainant, pursuant to 8 U.S.C. Section 1324a. Attached thereto and incorporated therein is a Notice of Intent to Fine, herein called the Notice, which had previously been served upon Respondent, by mail, on September 21, 1988. A Notice of Hearing issued on November 17, 1988, setting this matter for hearing on March 14, 1989. Thereafter, the hearing was continued to May 16, 1989.

On March 13, 1989, Complainant filed a Motion For Summary Judgment upon the grounds that there is no genuine issue as to any material fact. Respondent has filed no timely response to Complainant's motion.

Ruling on Motion for Summary Judgment

Section 68.6(c)(1) of the Interim Final Rules of Practice and Procedure[2] provides that any allegation not expressly denied in the

[1]By Order dated May 12, 1989, the Complaint was amended to reflect Respondent's correct legal name, Weymoor Investments, Ltd.

[2]52 Fed. Reg. 44971-44985, November 24, 1987, pp. 44975 (to be codified at 28 C.F.R. Part 68).

Answer shall be deemed to be admitted. Section 68.6(c)(2) of the Rules provides that the Answer shall include a statement of the facts supporting each affirmative defense. Section 68.36 of the Rules provides:

> (a) any party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing papers with affidavits, if appropriate, or countermove for summary decision. . . .
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> (c) The Administrative Law Judge may enter summary decision for either party if the pleadings, affidavits, material obtained by 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.

Section 68.1 of the Rules provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulations. Thus, it is appropriate, in considering the standards for granting a Motion for Summary Decision under Section 68.36, to look to Rule 56 of the Federal Rules of Civil Procedures, which relates to summary judgments, and the cases with regard thereto. The Supreme Court has stated that the purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matter. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d (1986). A material fact is one which affects the outcome of a hearing. Anderson v. Liberty Lobby, 477 U.S. 242, ----, 106 S.Ct. 2505, 2510, 91 L.Ed.2d. 202 (1986). If no genuine issue of material fact and no defense exists in the case, the complainant is entitled to summary judgment as a matter of law when it has set forth a prima facie case in its pleadings upon which relief may be granted. See Rawdon v. United States, 364 F.2d 803 (C.A. 9, 1966) cert. denied, 386 U.S. 909 (1967); United States v. Leitner, 865 F. Supp. 628 (N.D. Cal. 1949) aff'd, 184 F.2d, 216 (C.A. 9, 1950).

Upon a full consideration of the pleadings and the affidavits and exhibits submitted in support of Complainant's Motion for Summary Judgment, I conclude there is no genuine issue as to any material fact and the Complaint is sufficiently particularized to support a Summary Decision. Accordingly, Complainant's Motion for Summary Judgment is granted. Upon the entire record, I make the following:

Findings of Fact

The Immigration Reform and Control Act of 1986 (IRCA) establishes several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amends the Immigration and Nationality Act of 1952, herein called the Act, by adding a new Section 274A (8 U.S.C. 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, herein referred to as employer sanctions, upon employers who knowingly hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States. Essential to the enforcement of this provision of the law is the requirement that employers comply with certain verification procedures as to the eligibility of new hires for employment in the United States.

Sections 274A(a)(1)(B) and 274(b) provide that an employer must attest on a designated form that it has verified that an individual is not an unauthorized alien by examining certain specified documents to establish the identity of the individual and to evidence employment authorization. Further, the individual is required to attest, on a designated form, as to employment authorization. The employer is required to retain, and make available for inspection, these forms for a specified period of time. Form I-9 is the form designated for such attestations. Section 274A(e)(5) provides for the imposition of a civil penalty of not less than $100 and not more than $1000 for each individual with respect to whom a violation of 274A(a)(1)(B) occurred.

The Complaint alleges, as set forth in the Notice that Respondent violated Section 274A(a)(1)(B) of the Act by:

> (1) In Count I, failing to prepare the Employment Eligibility Verification Form (Form I-9) for Jenell Leighton and Murrie Ranger, both of whom were hired by Respondent after November 6, 1986;
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> (2) In Count II, failing to properly complete Section 2 (``Employer Review and Verification'') on the Form I-9 for Shawn Diverty, who was hired by Respondent after November 6, 1986.

In support of the Motion for Summary Judgment Complainant submitted affidavits and exhibits which establish the following: on July 13, 1987, Border Patrol Agent Morris O. Berg met with Respondent's manager, Larry Bond, at which time he gave Bond oral and printed information regarding Respondent's responsibilities under the sanction provisions of the Act. On June 13, 1988,[3] Border Patrol Agents George T. Reese and Gerald K. Zevenbergen, upon an anonymous tip that she was an illegal alien, contacted Jenell Leighton, an employee of Respondent, at Respondent's place of

[3]All dates hereinafter will be in 1988 unless otherwise indicated.

business. She admitted in a written, signed and sworn statement being an alien illegally present in the United States and that she was hired by Respondent on May 20. On August 4, after proper notice, Zevenbegen conducted an audit of Respondent's I-9 forms, and payroll and time records. This audit shows that Respondent had failed to prepare Forms I-9 for Leighton and Ranger, and had failed to sign and date the certification in Section 2 of the Form I-9 for Shawn Diverty.

Respondent does not deny these allegations but affirmatively alleges that Zevenbergen told Respondent's vice president, Lawrence Page, that if Respondent did not own the restaurant on July 13, 1987, when the educational visit took place, this would constitute a adequate defense to any allegations of paperwork violations. Respondent contends that it did not own the business prior to July 23, 1987, when the last of its various licenses were issued.

However, Respondent admits that Bond remained in Respondent's employ as manager for at least three months after Respondent acquired the restaurant. Respondent further contends that the manager who replaced Bond was unaware of the requirements of the Act. Respondent also asserts its belief that this matter was unfairly assessed by Complainant because Respondent's owners are resident aliens.

I find no merit in the defenses asserted by Respondent. Even assuming that Respondent had not obtained all of its various licenses as of July 13, 1987, this does not controvert the representation made on July 9, 1987 in Respondent's application for a city license, that Respondent owned the restaurant. Further, the assertion that Respondent's new manager was unaware of the requirements of the Act is not an adequate defense. There is no knowingly, willfully or intentional qualification to the prohibitions of Section 274A(a)(1)(B). Further, Respondent, through Bond, had knowledge of the record-keeping requirements of the Act. Thus, Respondent's alleged ignorance of the law does not excuse it from the law's record-keeping requirements.

Respondent has also failed to assert adequate facts to support its defense that it was improperly selected for prosecution. The decision as to enforcement priorities rests within the prosecutor's discretion unless it can be affirmatively established that the Government's decision to initiate a prosecution is impermissible based on a standard such as race, religion or other arbitrary classification including the exercise of protected statutory and constitutional rights. Wayte v. United States, 470 U.S. 598, 607 105 S.Ct. 1524, 1530-31 (1985); United States v. Ramirez, 765 F.2d 438, 439-440 (C.A. 5, 1985) cert. denied, 474 U.S. 1063 (1986). These is a presump-

tion that a prosecution is undertaken in good faith and in a non-discriminatory manner, United States v. Lee, 786 F.2d 951, 957 (C.A. 9, 1986); United States v. Steele, 461 F.2d 1148 (C.A. 9, 1972). Before a party is entitled to an evidentiary hearing on selective prosecution, the complaining party must make an adequate prima facie showing. United States v. Ness, 652 F.2d 890, 892 (C.A. 9, 1981 [per curiam] cert. denied, 454 U.S. 1126 (1981; United States v. Wilson, 639 F.2d 500, 503 (C.A. 9, 1981).

Respondent has failed to make such a showing. At best, it has ascribed to Complainant unsupported motives of bigotry toward outsiders which Respondent's owners perceive in their relationships within the general community. The only specifics asserted are the arrest of Leighton and a newspaper article which inaccurately describes the Notice of Intent to Fine as the levy of a fine. This does not, separately or collectively, make out a prima facie case of selective prosecution.

For the foregoing reasons, I conclude that Complainant has established a prima facie case which has not been controverted by Respondent and that Respondent has not established a viable defense. Accordingly, I find that Respondent has violated Section 274A(a)(1)(B) of the Act as alleged, 8 U.S.C. Section 1324a(a)(1)(B).

Conclusions of Law

1. Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(B)) by failing to prepare the Employment Eligibility Verification Forms (Form I-9) for Jenell Leighton and Murrie Ranger, both of whom were hired by Respondent after November 6, 1986 for employment in the United States.

2. Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324(a)(a)(1)(B)) by failing to properly complete Section 2 (``Employer Review and Verification'') on the Form I-9 for Shawn Diverty, who was hired by Respondent after November 6, 1986 for employment in the United States.

Civil Penalties

Since I have found violations of Section 274A(a)(1)(B) of the Act, assessment of civil money penalties are required by the Act. Section 274a(e)(5) states:

> (5) ORDER FOR CIVIL MONEY PENALTY FOR PAPERWORK VIOLATIONS. With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the

good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The Complaint seeks a penalty of $750 for the violation with regard to Jenell Leighton; $250 for the violation with regard to Murrie Ranger; and $200 for the violation with regard to Shawn Diverty; for a total civil money penalty of $1,200. None of these individual amounts are outside the statutory limits and the greater amount relates to Jenell Leighton, an unauthorized alien. Since Respondent has failed to assert any mitigating circumstances and the penalties requested do not appear unreasonable on their face, I find the total fine in the amount of $1,200 to be appropriate.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent pay a civil money penalty of $750 for the violation with regard to Jenell Leighton; $250 for the violation with regard to Murrie Ranger; and $200 for the violation with regard to Shawn Diverty; for a total civil money penalty of $1,200.

2. The hearing previously continued indefinitely is cancelled.

3. This Summary Decision and Order is the final action of the Administrative Law Judge in accordance with Section 68.51(b) of the Rules as provided in Section 68.52 of the Rules, and shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Summary Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: May 12, 1989.

EARLDEAN V.S. ROBBINS
Administrative Law Judge