

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

United States of America, Complainant, v. Lee Moyle, Owner, d/b/a Moyle Mink Farm, Respondent; 8 USC 1324a Proceeding; Case No. 89100286.

ORDER GRANTING COMPLAINANT'S MOTION TO
STRIKE AFFIRMATIVE DEFENSE

On June 19, 1989, the United States of America, Immigration and Naturalization Service, by and through its attorney, Robin L. Henrie, filed a Complaint against Respondent in the above-captioned case, alleging violations of Section 274A of the Immigration and Nationality Act (the Act).

On July 24, 1989, Respondent Lee Moyle, Owner, d/b/a Moyle Mink Farm, by and through his counsel of record, Gustav A. Rosenheim, filed an Answer containing, inter alia, four (4) affirmative defenses, the third of which was the Good Faith defense under 8 C.F.R. Section 274a.4.

On August 3, 1989, Complainant, by and through its attorney, Robin L. Henrie, filed a Motion to Strike Said Affirmative Defense.

Pursuant to 28 C.F.R. Section 68.7(b), Respondent had ten days within which to make a response. No response having been received by this office, my decision is based upon the pleadings and documents now before me. I am granting Complainant's Motion for the reasons stated as follows:

Complainant requests that Respondent's Third Affirmative Defense be stricken as being insufficient. Complainant states in its memorandum in Support of Motion To Strike that Respondent did not set forth in his Answer any facts in support of this defense.

Complainant further argues that Respondent's defense of Good Faith is insufficient because Good Faith is not, as a matter of law, a defense to violations of the record keeping requirements of the Act. See Section 274A(a)(3). A plain reading of the language of the regulations supports this assertion. 8 C.F.R. Section 274a.4 reads, in pertinent part:

An employer . . . who shows good faith compliance with the employment verification requirements of Section 274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated Section 274A(a)(1)(A) of the Act. . . .

Section 274A(a)(1)(A) of the Act is the prohibition against knowingly hiring an unauthorized alien. No such charge is made against the Respondent. The INS has charged Respondent with violating Section 274A(a)(1)(B) of the Act, the record keeping requirements.

Complainant's Memorandum cites an OCAHO case filed February 6, 1989, United States of America v. USA Cafe, Case No. 88-100098, in which ALJ Robert Schneider is quoted:

``. . . Respondent's contention that he acted in 'good faith' is irrelevant because, as stated, the good faith defense is not defense to a section 1324a(a)(1)(B) recordkeeping charge.''

In an even earlier OCAHO case dated June 17, 1988, ALJ Marvin H. Morse made clear the distinction in the application of good faith to knowing hiring and record keeping violations:

``. . . 'good faith' compliance with paperwork requirements, an affirmative defense in a case of unauthorized employment, is but one among five elements to which 'due consideration shall be given' in determining the amount of the penalty for paperwork violations.''

United States of America v. Mester Manufacturing Co., Case No. 87100001.

Therefore, the affirmative defense of good faith asserted by Respondent is an improper and insufficient defense.

Accordingly,

Respondent's third affirmative defense, the defense of good faith, is hereby stricken.

IT IS SO ORDERED: This 22nd day of August, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
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