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

United States of America, Complainant, vs. Sea Pine Inn, Inc., t/a Sea Pine Inn, Respondent; 8 USC § 1324a Proceeding; Case No. 89100143.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

A. Procedural History and Statement of Relevant Facts

On February 21, 1989, the Immigration and Naturalization Service (INS), pursuant to 8 C.F.R. § 274a.9(a), issued and served a Notice of Intent to Fine against Respondent. The Notice alleged one violation of § 1324a(a)(1)(A), or § 1324a(a)(2) in the alternative, and twenty-four (24) violations of § 1324a(a)(1)(B) of Title 8 of the U.S. Code. On March 1, 1989, Respondent Requested a hearing before an Administrative Law Judge, pursuant to 8 U.S.C. § 1324a(e)(3) and 8 C.F.R. § 274a.9(d). On March 13, 1989, INS (Complainant) issued a Complaint against Respondent alleging violations of 8 U.S.C. § 1324a as set forth in the Notice of Intent to Fine. The Complaint was filed with this office on March 16, 1989.

On April 10, 1989, Respondent filed its Answer. Therein, Respondent admitted service of the Notice of Intent to Fine and its own timely request for a hearing, but generally denied jurisdiction and the violations of law.

Since April 19, 1989, Complainant has served Respondent with various motions and requests for discovery. Specifically, Complainant served Respondent with Interrogatories and Requests to Produce on April 19, 1989; with a Motion to Compel and a Motion for Continuance on June 2, 1989; with a Request for Admissions and a Request for Production on June 27, 1989; and with a Motion for Continuance, a Motion for Summary Decision and, in the alternative, a Motion to Compel on August 9, 1989. Respondent has failed to respond to each and every one of Respondent's requests or motions.

In addition, Respondent has failed to comply with this Hearing Officer's Order of June 21, 1989, compelling response to Complain-

ant's Interrogatories and Requests to Produce of April 19, 1989, and ordering Respondent to consult with Complainant with respect to a range of dates on which a joint prehearing telephone conference could be held.

B. Jurisdiction

Paragraph 1 of the Complaint states that this cause of action arises, and jurisdiction of the Office of the Chief Administrative Hearing Officer is invoked, under § 274A of the Immigration and Nationality Act, 8 U.S.C. § 1324a. By way of answer to the Complaint, Respondent stated that it had no knowledge, information or belief as to the allegations contained in paragraph 1 of the Complaint and left Complainant to its proofs.

Generally, the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986) made unlawful the hiring, or the continuing employment, or the recruitment or referral for a fee, of aliens unauthorized for employment in the United States. IRCA also made unlawful the hiring, or the recruiting or referral for a fee, of individuals without complying with the employment verification requirements established by the same Act. See, 8 U.S.C. §§ 1324a(a)(1)(A) and (B) and 8 U.S.C. § 1324a(a)(2).

Sections 1324a(e) (4) and (5) provide for the imposition of specific orders for violations of 8 U.S.C. §§ 1324a(a)(1) (A) and (B) and 8 U.S.C. § 1324a(a)(2).

Section 1324a(3)(A) of Title 8 of the U.S. Code states that before imposing any such order against a person or entity, the Attorney General shall provide the person or entity with notice and with a hearing, if requested within a reasonable time (of not less than 30 days, as established by the Attorney General). Pursuant to 8 C.F.R. § 274a.9(b), the proceeding to assess administrative penalties under section 274A of the Act is commenced by the Immigration and Naturalization Service by issuing a Notice of Intent to Fine which shall advise that the person or entity has the right to request a hearing before an Administrative Law Judge and that such request must be made within 30 days from the service of the Notice of Intent to Fine.

Title 28, Part 68, Section 68 of the Code of Federal Regulations states, in pertinent part:

> (e) ``Commencement of Proceeding'' is the filing of a complaint with the Office of the Chief Administrative Hearing Officer.
>
> (g) ``Complaint'' means the formal document initiating an adjudicatory proceeding.

Respondent in the instant case, was served with the Immigration and Naturalization Service's Notice of Intent to Fine on February 21, 1989, and requested a hearing on March 1, 1989. On March 16, 1989, the Service filed a Complaint with the Office of the Chief Administrative Hearing Officer as required. The case was then assigned to this Administrative Law Judge for hearing.

The law and regulations having been followed in a proper and timely manner, I find that this cause of action arises, and that jurisdiction lies before the Chief Administrative Hearing Officer, pursuant to § 274A of the Immigration and Nationality Act, 8 U.S.C. § 1324a, as stated in the Complaint.

C. Legal Standards For a Motion for Summary Decision

Complainant has moved for Summary Decision.

The federal regulations applicable to this proceeding 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.'' 28 C.F.R. § 68.36 (1988); see also, Fed. R. Civ. Proc. § 56(c).

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 matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rules 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.'').

Pursuant to 28 C.F.R. § 68.17(a), a party may serve upon any other party a written request for admissions of the genuineness and authenticity of any relevant documents described in or attached to the request, or for the admissions of the truth of any

specified relevant matter of fact. Under subsection (b) of the same section, each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request, the party to whom the request is directed serves on the requesting party: (1) a written statement denying specifically the relevant matters of which an admission is requested; (2) a written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or (3) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

Matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986); see also, Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be ``particularized'' in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (``. . . the standard of `well-controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence. . . .'').

D. Legal Analysis Supporting Decision to Grant Motion

Complainant's Memorandum in Support of Motion for Summary Decision sets forth a prima facie case upon which to grant Summary Decision against Respondent. Complainant's moving papers incorporate by reference the Notice of Intent to Fine and the Complaint which contain factual allegations of one violation of § 1324a(a)(2), in the alternative to a violation of § 1324a(a)(1)(A), and of twenty-four (24) record keeping violations by Respondent pursuant to § 1324a(a)(1)(B).

Respondent has submitted no pleadings which specifically controvert or otherwise dispute the factual allegations set forth in Complainant's pleadings.

Respondent has failed to submit, in Response to Complainant's Request for Admissions, any written statement denying specifically the relevant matters of which the admission was sought, or any written statement setting forth in detail reasons why Respondent could neither truthfully admit nor deny them, or any written objections to such admissions, as required pursuant to 28 C.F.R.

§ 68.17(b). Therefore, each matter upon which an admission was requested by Complainant, has been admitted by Respondent pursuant to that regulation.

Respondent has failed to submit any affidavit to contradict the facts in Complainant's affidavits supporting the Motion for Summary Decision. Therefore, the facts in Complainant's affidavits are deemed admitted.

Thus, for the purpose of analyzing Complainant's Motion for Summary Decision, it is my view that, there is no need to proceed to a hearing on the merits because there is no genuine issue as to any material fact. See, Celotex Corp. v. Catrett, supra.

The facts now before me show that on March 31, 1988, Ignacio Velasquez Lionor, the individual named in paragraph A of Count I, was employed by Respondent. The facts also show that on April 22, 1988, Respondent received written notice from INS that Ignacio Velasquez Lionor was an alien unauthorized to work in the United States and that it was a violation of law to hire, employ or continue to employ such alien. The facts further show that Respondent continued to employ that alien to, at least, November 21, 1988. Affidavit of James P. McGarry, Pages 2-4 and Request for Admissions, Part II, Statement 24, Pages 6-7.

Accordingly, I find, by a preponderance of the evidence as required by 8 U.S.C. § 1324(e)(3)(C), that Respondent has violated § 1324a(a)(2) of Title 8 of the U.S. Code in that Respondent continued to employ the individual named in paragraph A of Count I of the Notice of Intent to Fine and incorporated in the Complaint knowing that the individual was an unauthorized alien with respect to such employment.[1]

I further find, on the basis of the facts now before me and by a preponderance of the evidence, that Respondent has violated § 1324a(a)(1)(B) of Title 8 of the U.S. Code in that Respondent hired for employment in the United States those individuals named in Counts II, III and IV of the Notice of Intent to Fine and incorporated in the Complaint without complying with the verification re-

[1]I do not find that the facts establish that Respondent hired an alien knowing that the alien was unauthorized with respect to employment in the United States, in violation of 8 U.S.C. § 1324a(a)(1)(A). However, I do find that the facts establish that Respondent, after hiring an alien for employment in the United States, continued to employ such alien knowing that the alien was an unauthorized alien with respect to such employment. Therefore, I find that Respondent has violated § 1324a(a)(2), the alternative charge in Count I.

quirements provided for in § 1324a(b) of the Act and in 8 C.F.R. § 274a.2(b). See Request for Administrations.[2]

CIVIL PENALTIES

Since I have found that Respondent has violated sections 1324a(a)(2) and 1324a(a)(1)(B) of Title of 8 of the U.S. Code, penalties are required as a matter of law.

Section 1324a(e)(4) states, in pertinent part:

> With respect to a violation of subsection (a)(2), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil monetary penalty in an amount of not less that $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of such subsection occurred.

The Complainant seeks a fine of $1,200 for Respondent's violation of § 1324a(a)(2). Neither the status nor the regulations provide any guidance in determining what factors the fact finder should consider in determining the amount of penalty for a violation of this subsection of law. I find that the penalty sought by Complainant is well within the parameters specified by law. I further find that the amount is reasonable because of: (1) the length of time Respondent continued to employ the unauthorized alien named in Count I (at least April 22, 1988, to November 21, 1988), (2) the fact that Respondent failed to specifically contest the reasonableness of the fine and (3) the fact that Respondent filed to bring forth, through pleadings or otherwise, any facts that could be considered for mitigation of the amount of the penalty.

Section 1324a(e)(5) states, in pertinent part:

> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay 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 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.

Complainant seeks a fine of $500 per paperwork violation for the Respondent's failure to prepare and/or failure to retain and/or make available for inspection the Employment Eligibility Verification Form (Form I-9) as noted in Count II of the Notice of Intent to

[2]On the basis of Respondent's admissions, all of Complainant's allegations in the alternative charges specified in Count II of the Notice of Intent to Fine have been deemed admitted. Since each one of those allegations refers to violations of 8 U.S.C. § 1324a(a)(1)(B) and the accompanying regulations, there is no need to specifically determine under which of the allegations the violation is based. Therefore, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) in that he failed to comply with 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).

Fine (NIF); a find of $500 per paperwork violation for the Respondent's failure to ensure that the employee properly completed section 1 and for its failure to properly complete section 2 of the Form I-9 as noted in Count III of the NIF; and a fine of $250 per paperwork violation for Respondent's failure to properly complete section 2 of the Form I-9 as noted in Count IV of the Notice of Intent to Fine incorporated in the Complaint.

Again I find that the penalties sought by Complainant are well within the parameters specified by law. I further find that, given the facts of the case and taking into account the factors to be used in determining the amount of the penalty as specified in the law and regulations, as noted above, the amount is reasonable. Further, I note once again that Respondent has failed to contest the reasonableness of the fine.

ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I have considered the pleadings, memoranda and affidavits submitted by Complainant in support of the Motion for Summary Decision. I note the lack of submissions of the same by Respondent. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. The cause of action arises and jurisdiction lies before the Chief Administrative Hearing Officer pursuant to 8 U.S.C. § 1324a.

2. No genuine issue as to any material facts has been shown to exist with respect to Counts I through IV in the Notice of Intent to Fine as incorporated in the Complaint.

3. Complainant is entitled to summary decision as to all counts of the Complaint as a matter of law.

4. Respondent violated 8 U.S.C. § 1324a(a)(2) in that Respondent continued to employ the individual named in paragraph A of Count I knowing that the alien was an unauthorized alien with respect to such employment.

5. Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in Counts II, III and IV without complying without the verification requirements in § 1324a(b) and 8 C.F.R. § 274a.2(b).

6. Complainant is entitled to a civil monetary penalty to be assessed against Respondent as to each count in the Notice of Intent to Fine incorporated in the Complaint.

7. The amounts sought by Complainant to be assessed against Respondent, as to each count in the Notice of Intent to Fine incorporated in the Complaint, are within the parameters specified by law.

8. The civil monetary penalty, assessed at $1,200 for the violation specified in Count I, $500 for each violation specified in Count II, $500 for the violation specified in Count III and $250 for each violation specified in Count IV of the Notice of Intent to Fine incorporated in the Complaint, for a total assessment of $11,950 is just and reasonable.

Accordingly,

IT IS HEREBY ORDERED:

1. That Respondent shall Cease and Desist from violating the prohibitions against hiring, recruiting, referring or continuing to employ unauthorized aliens in violation of 8 U.S.C. sections 1324a(a)(1)(A) and (a)(2).

2. That Respondent pay a civil monetary penalty in the amount of $1,200 for the violation specified in Count I, $500 for each violation specified in Count II, $500 for the violation specified in Count III and $250 for each violation specified in Count IV of the Notice of Intent to Fine incorporated in the Complaint, for a total of $11,950.

3. That the hearing previously scheduled and postponed without date is canceled.

Accordingly, pursuant to 8 U.S.C. § 1324a(e)(6) and as provided in 28 C.F.R. § 68.52, this decision and order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date it shall have been modified or vacated by the Chief Administrative Hearing Officer.

SO ORDERED.

Dated this 18th day of September, 1989.

THOMAS R. WILKS
Administrative Law Judge