

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

UNITED STATES OF AMERICA,)
Complainant)
v.) 8 U.S.C. 1324a Proceeding
) CASE NO. 91100027
THE GROWERS COMPANY, INC.,)
d.b.a. HARVEST MANAGEMENT,)
INC.,)
Respondent)
_____)

ORDER GRANTING COMPLAINANT'S MOTION
TO STRIKE AND GRANTING RESPONDENT'S
MOTION TO FILE AMENDED ANSWER

On May 17, 1991, Complainant submitted a Motion to Strike Respondent's affirmative defenses, contained in its Answer of March 22, 1991, as being insufficient. Respondent subsequently moved to file an amended answer and responded to the Motion to Strike.

Complainant's Motion contends that the three affirmative defenses are not supported by a statement of facts, as required by 28 C.F.R. Part 68.(c)(2), and are insufficient because similar defenses have been dismissed by Administrative Law Judges in previous rulings. The affirmative defenses basically asserted that: (1) no civil penalties could be awarded when Respondent had not received an educational visit by the INS; (2) civil penalties could not issue based upon an employer's failure to prepare Forms I-9 for employees who worked three days or less; and (3) the INS violated its own policy by fining Respondent prior to issuing a warning citation.

Complainant provided a response opposing Respondent's motion to amend the Answer on June 7, 1991. Complainant objects to the addition of additional affirmative defenses as being untimely and insufficient, based upon previous rulings in this forum.

Respondent's Motion to Request Permission to File Amended Answer is intertwined with the Motion to Strike and the two Motions will be decided simultaneously. Respondent's Amended Answer is more detailed and provides a much more solid factual base for its affirmative defenses. I agree with Complainant that factual support was lacking in the original Answer. Respondent also eliminates its third affirmative defense, as styled in its original Answer.

I will grant Complainant's Motion to Strike Respondent's affirmative defenses as found in the original Answer due to the technical deficiencies noted above. I will accept Respondent's Amended Answer in its entirety and do not at this time strike the affirmative defense presented. I do not agree that these defenses were untimely, rather, I view them as a means for Respondent to more clearly articulate its response and to provide me with a clearer understanding of its arguments. This conforms to 28 C.F.R. Part 68.8(e) which permits amendments to pleadings in order to facilitate the controversy. I do not believe that Complainant has been or will be prejudiced by this amendment.

The legal issues raised in Respondent's newly drafted affirmative defense have generally been addressed and discarded in previous rulings by ALJ's in this agency, as Complainant correctly notes in its response. However, it appears that Respondent may have some unique facts to present regarding the information received by Respondent in the educational visit conducted by the INS and also pertaining to Respondent's understanding of its obligations to timely prepare the Form I-9 for each of its employees.

It appears that the newly added affirmative defense regarding the hiring of Mr. Bermudez is appropriate, however, it is also supported by a somewhat scanty factual statement. It also appears through Complainant's exhibits to its response to the motion to amend, that Mr. Bermudez was employed by Respondent in 1989. I am somewhat puzzled by Respondent's defense, but will await further presentation of evidence regarding this alleged violation in Count IV of the NIF, as incorporated in the Complaint.

It is premature at this point to strike Respondent's affirmative defenses entirely. Respondent is obviously aware of the decisions relied upon by Complainant in its Motion to Strike, yet believes that its arguments can prevail despite the current state of the law and this agency's interpretation of the IRCA. I do not want to prejudice Respondent's case or to preclude it from introducing novel arguments

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or facts which may persuade me to rule differently than has been done in the past on these types of defenses.

Accordingly,

1. Complainant's Motion to Strike is Granted and Respondent's affirmative defenses, contained in its original Answer, are stricken.
2. Respondent's Motion to Request Permission to File Amended Answer is Granted and the Amended Answer with affirmative defenses is accepted.

IT IS SO ORDERED this 17th day of June, 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge