

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

UNITED STATES OF AMERICA)	
Complainant)	
)	
v.)	8 USC 1324a Proceeding
)	OCAHO Case No. 89100567
JOHN GASPER, Individually)	
and d/b/a JOHN GASPER)	
LABOR CONTRACTOR)	
Respondent)	
_____)	

William Lee Abbott, Esq. El Paso, TX
for the Complainant, the Immigration & Naturalization Service (INS).

Carlos K. Ogden, Esq. (John F. Schaber, P.A.), Deming, NM,
for the Respondent,
John Gasper, Individually and d/b/a
John Gasper Labor Contractor (Gasper).

Before: RICHARD J. LINTON, Administrative Law Judge

ORDER DENYING, WITHOUT PREJUDICE,
COMPLAINANT INS'S MOTION
FOR AN ORDER COMPELLING PRODUCTION

1. Background

On November 6, 1989 Complainant, the Immigration & Naturalization Service (INS), filed the complaint in this proceeding. The complaint alleges paperwork violations only and seeks an order imposing a civil money penalty of \$70,500 for alleged verification violations involving 156 named employees. The Notice of Hearing issued November 9, 1989. Respondent, John Gasper, Individually and d/b/a John Gasper Labor Contractor (Gasper), filed his answer, dated December 7, 1989, on December 11, 1989. By Order dated January 4, 1990 I postponed the hearing indefinitely.

On January 9, 1990 the INS, by counsel, served (by mail) on Gasper, through Counsel, the Complainant's first request for production. The single request reads:

1. That Respondent produce and permit Complainant to inspect and to copy, on or before February 12, 1990, between the hours of 8:30am and 4:30pm, at Complainant's place of business, U.S. Border Patrol Sector Headquarters, 8901 Montana Ave., El Paso, Texas, the following document:
 - a. A complete financial statement concerning all personal and business earnings and debts for the year 1989. This financial statement should include income from all sources, personal and business, and include all expenditures relating to Respondents business and personal expenses. This financial statement should be prepared by a Certified Public Accountant or in the form of a sworn affidavit.

Gasper had 30 days within which to respond, 28 CFR 68.18(d), plus the 5-day grace period allowed by 23 CFR 68.7(c)(2). Receiving no answer from Gasper, INS counsel, on February 16, 1990, wrote Gasper's counsel reminding him of the need to respond and advising that, otherwise, a motion to compel would be filed. Gasper still failed to answer, and on March 19, 1990 the INS filed a motion (dated March 15, 1990) to compel production of documents. On March 23, 1990 Gasper filed his response (dated March 20, 1990). Gasper's brief response states:

[T]hat it is beyond the power and authority of the Immigration and Naturalization Service to request the subject documents and for the reason that the documents are not relevant to the guilt or the innocence of Respondent.

2. Discussion

Gasper's March 23 response is in the nature of an objection. It is arguable that Gasper waived his objection by not filing it within the time allowed or by not filing it within an enlarged time granted under 28 CFR 68.1 and Federal Rules of Civil Procedure (FRCP) 6(b). Moreover, Gasper's response is defective because it fails to articulate either the (1) lack of power ground or the (2) irrelevance ground. Ordinarily in these circumstances I would consider granting the motion to compel. However, the nature of the INS's request to produce gives me pause.

The INS asserts in its March 19 motion that Gasper's ability to pay the civil money penalty is at issue, and therefore "the production of financial information relating to the Respondent's ability to pay is a bona fide area of discovery." (Motion at 2.) The requested document assertedly would allow the INS to determine the "financial 'health' of Respondent and his business." Id.

Unfortunately, the INS fails to explain the relevance of Gasper's financial health or his ability to pay. The relevance is not self-evident. Paperwork violations are alleged. In fixing an appropriate civil money penalty for paperwork violations, an ALJ is to consider five enumerated factors, the first being the size of the employer's business 8 USC 1324a(e)(5). Size would include the number of employees, (managerial, administrative, production), and whether the employer is affiliated with any other company. Some financial information would be relevant to size, such as gross sales, income, and perhaps other factors. But it is not self-evident that Gasper's "ability to pay" is a factor to be considered under the statutory factor of size. Nor is it self-evident that Gasper's sources of income outside his business in issue here are relevant to the statutory factor.

3. *Conclusions and Order*

Because the INS's production request covers such a serious matter with no showing of relevance, I shall decline to grant its motion, without prejudice to its filing either, (1) a brief articulating the relevance of its request (and attaching a proposed order which reflects that articulation), or (2) filing a new, and relevant, request for production. Moreover, the INS must satisfy the additional requirement of citing case authority for any motion ostensibly requiring Gasper to produce documents not already in existence (that is, requiring Gasper to create the requested financial statement). Financial statements no doubt are requested and produced in some cases as part of settlement discussions. But that is a different matter from requesting such as part of discovery. For the reasons stated, **I DENY** the INS's motion to compel, without prejudice.

SO ORDERED at Atlanta, Georgia this March 29, 1990.

RICHARD J. LINTON
Administrative Law Judge