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

March 9, 1995

UNITED STATES OF AMERICA,	)	
Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00034
ALBERTA SOSA, INC.,	)	
Respondent.	)	
	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION AND ORDER DENYING RESPONDENT'S COUNSEL'S MOTION TO WITHDRAW AS COUNSEL

On October 4, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), NYC274A-93006210, upon Alberta Sosa, Inc., (respondent). That five (5)-count citation contained 40 alleged violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil penalties totaling $28,080 were proposed.

In Count I, complainant charged respondent with having knowingly hired and/or continued to employ the six (6) individuals named therein for employment in the United States and that respondent had done so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(A). Complainant assessed civil money penalties of $1,270 for each of those six (6) violations, or total civil money penalty sums of $7,620.

In Count II, complainant alleged that respondent hired the 11 individuals named therein for employment in the United States and had done so after November 6, 1986, and that respondent had failed to prepare and/or to make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $725 for each of the 10 violations numbered 1-7 and 9-11, and $555 for violation number 8, or civil money penalties totaling $7,805 for that count.

Complainant alleged in Count III that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for each of the 13 individuals named therein, all of whom had been hired by respondent after November 6, 1986, for employment in the United States in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $700 for each of the three (3) violations numbered 7, 8 and 13, $545 for those numbered 1, 2, 4, 10 and 12, $530 for violations 3, 5 and 9, and $465 for violations 6 and 11, or a total of $7,345 for those 13 alleged violations.

Complainant alleged in Count IV that respondent had failed to ensure proper completion of section 1 of the Forms I-9 for each of the six (6) individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $635 for each of the violations numbered 1 and 2, and $465 for the four (4) remaining violations numbered 3-6, or a total of $3,130 for those six (6) alleged violations.

In Count V, complainant alleged that respondent had hired the four (4) individuals named therein after November 6, 1986, for employment in the United States and did so and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $545 for each of those four (4) violations, or civil money penalties totaling $2,180 on that count.

The wording of the NIF advised respondent of its right to file a written request for a hearing before an administrative law judge assigned to this office provided that such written request be filed within 30 days of its receipt of that citation. On November 1, 1993, Arthur L. Alexander, Esquire, respondent's counsel of record, timely filed such a request.

On March 7, 1994, complainant filed the five (5)-count Complaint at issue, reasserting the allegations set forth in the NIF, as well as the requested civil money penalties totaling $28,080 for those 40 alleged infractions.

On March 8, 1994, a Notice of Hearing on Complaint Regarding Unlawful Employment, as well as a copy of the Complaint at issue, were served on respondent's counsel by certified mail, return receipt requested.

On April 6, 1994, respondent filed a timely Answer to the Complaint, in which it denied having violated IRCA in the manners alleged, and also asserted two (2) affirmative defenses.

In the initial affirmative defense, respondent asserted that "Respondent did not create any defect or omission of a material nature in completion of any form [sic] I-9."

For its second affirmative defense, respondent stated that "The respondent did not misrepresent any material matter in any incomplete form [sic] I-9. With respect to any of the counts alleged herein."

On November 28, 1994, complainant filed a Motion to Strike Affirmative Defenses, in which it requested that both affirmative defenses be stricken, pursuant to the provisions of 28 C.F.R. §68.9(c), because those defenses had been improperly asserted.

On December 16, 1994, the undersigned granted complainant's Motion to Strike Affirmative Defenses, finding that both affirmative defenses were entirely conclusory and had not been supported by the required statements of fact.

On February 2, 1995, complainant filed a pleading captioned Motion for Judgment on the Pleadings, requesting that the undersigned "enter judgment on the pleadings in favor of the Complainant herein on the ground that Complainant is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings." The procedural rules applicable in cases involving unlawful employment of aliens, provide for Motions for Summary Decision. See 28 C.F.R. § 68.38. Accordingly, complainant's pleading will be treated and referred to as a Motion for Summary Decision.

On February 21, 1995, respondent firm's counsel of record, Arthur L. Alexander, Esquire, filed a pleading captioned Notice of Cross-Motion

for an Order to Withdraw as Counsel, in which he requested that an order be issued allowing him to withdraw as respondent's counsel. In that pleading respondent also opposed complainant's Motion for Summary Decision, based upon the fact that "the issues raised are subject to objection and interpretation."

In support of its dispositive motion, complainant asserts that on December 13, 1994, respondent was served with Requests for Admissions pursuant to 28 C.F.R. Section 68.21. That procedural rule provides in pertinent part that:

> (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.
>
> (b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, 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.

Complainant further asserts in its motion that as of January 30, 1995, respondent had failed to respond to complainant's December 13, 1994 Request for Admissions.

Accordingly, because respondent did not respond within the 30 day period provided for at 28 C.F.R. Section 68.21, it is found that each matter of which an admission was sought is deemed admitted.

Given that fact, we review complainant's request for a summary decision. The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and 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." 28 C.F.R. §68.38(c). This rule is similar to and based upon

Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. For this reason, Federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is that of avoiding an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera Enters., Inc., 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

In Count I of its March 7, 1994 Complaint, complainant alleged that subsequent to November 6, 1986, respondent had hired and/or continued to employ the six (6) individuals named therein knowing that those individuals were not authorized for employment in the United States, in violation of 8 U.S.C. § 1324a(a)(1)(A).

In order to prove the violations alleged in Count I, complainant must show that: (1) respondent; (2) after November 6, 1986; (3) hired for employment and/or continued to employ in the United States; (4) unauthorized aliens; (5) knowing that those aliens were unauthorized with respect to such employment.

Summary decision may be based on matters deemed admitted. Primera Enters., Inc., 4 OCAHO 615, at 3; Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991). In complainant's Request for Admissions, respondent was requested to admit that it hired and/or continued to employ the six (6) individuals named in Count I of the Complaint, after November 6, 1986, knowing that those individuals were not authorized for employment in the United States. See Complainant's December 13, 1994 Requests for Admissions, Requests 10-39. With respect to elements 1 through 5, because respondent did not respond to complainant's Requests for Admissions as required by 28 C.F.R. Section 68.9(c), it is deemed admitted that respondent knowingly hired and/or continued to employ the six (6) individuals named in Count I for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States.

Complainant has thus established that there is no genuine issue of material fact with regard to the violations alleged in Count I of the Complaint, and respondent has offered no facts to indicate otherwise. Therefore, complainant's Motion for Summary Decision is granted as it pertains to the facts of violation alleged in Count I.

In Count II, complainant alleged that respondent hired the 11 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B).

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available in the course of INS inspections. 8 U.S.C. § 1324a(a)(1)(B). A failure to prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. § 1324a(b), is a violation of IRCA.

In order to prove the violations alleged in Count II, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Count II; (3) after November 6, 1986; and

(4) that respondent also failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

With respect to elements 1, 2 and 3, respondent was requested to admit that it hired four (4) of the 11 individuals named in Count II of the Complaint, Minerva Condado-Rivera, Alberta Cruz-Munoz, Georgina Flores-Reyes and Maria Narraiaez-Calle, after November 6, 1986. See Complainant's December 13, 1994 Requests for Admissions, Requests 10-11, 15-16, 20-21, 25-26. With regard to element 4, respondent was requested to admit that it failed to prepare and/or make available for inspection the Forms I-9 for those four (4) individuals. See Complainant's December 13, 1994 Requests for Admissions, Request II.

Accordingly, because respondent did not respond to complainant's Requests for Admissions as required by 28 C.F.R. Section 68.9(c), respondent is deemed to have admitted that it hired four (4) of the 11 individuals, namely Minerva Condado-Rivera, Alberta Cruz-Munoz, Georgina Flores-Reyes and Maria Narraiaez-Calle, for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

However, complainant has not shown that respondent hired the remaining seven (7) individuals named in Count II for employment in the United States after November 6, 1986.

Complainant has demonstrated that there is no genuine issue of material fact with regard to the Count II violations involving those four (4) individuals, and respondent has failed to offer any facts to the contrary. Accordingly, complainant's Motion for Summary Decision is granted as it pertains to respondent's Count II liability for Minerva Condado-Rivera, Alberta Cruz-Munoz, Georgina Flores-Reyes and Maria Narraiaez-Calle. Complainant's motion is denied as to respondent's liability for the remaining seven (7) individuals, Maria Benavidez-Garcia, Veronica Castillo-Sanches, Tomas Figueroa-Medina, Dominga Garcia-Castillo, Maria Gutierres, Magdalena Pena-Zapeta and Jose Ignaciao Zagel-Mendez.

In Count III, complainant alleged that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for the 13 individuals named therein, who were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violation alleged in Count III, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Count III; (3) after November 6, 1986; (4) respondent failed to ensure that those individuals properly completed section 1 of the Forms I-9; and (5) that respondent failed to properly complete section 2 of the Forms I-9 for those individuals.

Respondent admitted elements 1, 2 and 3 in its April 6, 1994 Answer. With regard to elements 4 and 5, a review of the Forms I-9 for those individuals illustrates that they were completed in an ineffectual manner, as claimant has alleged. See Complainant's December 13, 1994 Requests for Admissions. Accordingly, complainant has shown that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for each of the 13 individuals named therein, all of whom had been hired by respondent for employment in the United States after November 6, 1986.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the violations set forth in Count III, and because respondent has failed to show that there is a genuine issue for trial, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the facts alleged in Count III.

In Count IV, complainant alleged that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the six (6) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violations alleged in Count IV, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Count IV; (3) after November 6, 1986; and (4) that respondent failed to ensure that those individuals properly completed section 1 of the pertinent Forms I-9.

Respondent admitted elements 1, 2 and 3 in its Answer. With respect to the fourth element, a review of the pertinent Forms I-9 indicates that they were completed in an ineffectual manner as complainant has alleged in Count IV. See Complainant's December 13, 1994 Requests for Admissions. Thus, complainant has demonstrated that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the six (6) individuals named therein, all of whom were hired by

respondent for employment in the United States after November 6, 1986.

Complainant has therefore demonstrated that there is no genuine issue of material fact with regard to the violations alleged in Count IV, and respondent has offered no facts to indicate otherwise. Accordingly, complainant's Motion for Summary Decision is granted as it pertains to the facts of violation alleged in Count IV of the Complaint.

Complainant alleged in the fifth and final count, that subsequent to November 6, 1986, respondent employed the four (4) individuals named therein for employment in the United States, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violations alleged in Count V, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Count V; (3) after November 6, 1986; and (4) that respondent failed to properly complete section 2 of the Forms I-9 for those individuals.

Concerning the charges in Count V, respondent admitted elements 1, 2 and 3 in its Answer. Regarding element 4, a review of the Forms I-9 illustrates that they were completed in an ineffectual manner, as alleged. Therefore, complainant has shown that respondent hired the four (4) individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals.

Complainant has again demonstrated that no genuine issue of material fact exists with regard to respondent's liability for the violations set forth in Count V, and respondent has again failed to offer specific facts showing that there is a genuine issue for trial with regard to its liability for the violations alleged in that count. For those reasons, complainant's Motion for Summary Decision must also be granted as it pertains to respondent's liability for the violations alleged in Count V.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Counts I, III, IV and V of complainant's March 7, 1994 Complaint, and has also shown that it is entitled to decision as a matter of law with respect to those violations, complainant's February 2, 1995 Motion for Summary Decision is hereby granted as it pertains to respondent's liability

concerning the facts of violation alleged in the 29 violations set forth in Counts I, III, IV and V. Accordingly, it is found that respondent has violated the pertinent provisions of IRCA in the manners alleged in Counts I, III, IV, and V of the Complaint.

With regard to Count II, complainant has shown that there is no genuine issue of material fact regarding four (4) of the 11 violations alleged in that count namely, Minerva Condado-Rivera, Alberta Cruz-Munoz, Georgina Flores-Reyes and Maria Narraiaez-Calle, and has also shown that it is entitled to decision as a matter of law with respect to those violations. Therefore, complainant's February 2, 1995 Motion for Summary Decision is hereby granted as it pertains to those four (4) of the 11 violations alleged in Count II. Accordingly, it is therefore being found that respondent has violated the pertinent provisions of IRCA in the manners alleged in those four (4) violations of Count II.

Regarding the remaining seven (7) violations alleged in Count II namely, those involving Maria Benavidez-Garcia, Veronica Castillo-Sanches, Tomas Figueroa-Medina, Dominga Garcia-Castillo, Maria Gutierres, Magdalena Pena-Zapeta and Jose Ignaciao Zagel-Mendez, complainant's Motion for Summary Decision is hereby denied and the facts of violation concerning those alleged infractions remain at issue.

We next address the request of respondent firm's counsel of record, Arthur L. Alexander, Esquire, contained in his February 21, 1995 Motion to Withdraw as Counsel, that he be permitted to withdraw as respondent's counsel at this stage of the proceeding. In support of that motion, counsel asserts that he is unable to locate his client and was recently notified by the United States Postal Service that all mail sent to respondent's address was being returned since no forwarding address had been provided.

Prior OCAHO rulings, involving generally parallel factual settings, have denied motions/requests of counsel to withdraw where, as here, the party's counsel of record is the only person authorized to receive documents on respondent's behalf, and where it was shown that requesting counsel's law office was the only address at which the delivery of such documents could be effectuated. See, e.g., United States v. Midtown Fashion, Inc., 4 OCAHO 657 (1994).

Accordingly, respondent's counsel's Motion to Withdraw is denied. All further correspondence directed to the respondent firm will continue to

be served upon respondent's counsel of record, as respondent's agent for that purpose.

An evidentiary hearing will be scheduled for the purpose of adducing relevant evidence concerning the alleged facts of violation involving the seven (7) violations remaining at issue in Count II, as well as the appropriate civil money penalties for those infractions in the event that complainant proves those allegations. In that hearing, also, we well address the appropriate civil money penalties to be assessed for those 33 violations in Counts I, II, III, IV and V which have been ruled upon in complainant's favor in this Order.

The civil money penalty sums which must be assessed in connection with the six (6) illegal hire/continue to employ violations in Count I, together with a mandatory cease and desist order, are those provided in the provisions of 8 U.S.C. § 1324a(e)(4).

Those civil money penalty sums to be assessed for the 27 paperwork violations alleged in Counts II, III, IV and V, as well as the possible civil money penalties to be levied for the seven (7) remaining paperwork violations alleged in Count II, will be determined by giving the required due consideration to the five (5) criteria listed at 8 U.S.C. § 1324a(e)(5).

In view of this ruling, a telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted in New York City.

JOSEPH E. MCGUIRE
Administrative Law Judge