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

May 9, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00113
KENT B. BURNS AND INTRA-CONTINENTAL ENTERPRISES, INC., Respondents.	)	

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. *Procedural Background*

On March 26, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served a Notice of Intent to Fine (NIF), 93-EPT-274A-2521, upon Kent B. Burns and Intra-Continental Enterprises, Inc. (respondents). That NIF contained eight (8) counts, in which 68 violations of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324a, were alleged, and for which civil penalties totaling $10,887 were assessed.

Respondents were informed in the NIF of their right to file for a hearing before an Administrative Law Judge assigned to this Office, if they filed such a request within 30 days of their receipt of that notice.

On April 25, 1994, respondents timely filed a joint request for hearing.

On June 8, 1994, complainant filed the Complaint at issue, reasserting the violations alleged in Counts I through VII of the NIF, and inadvertently omitted a paragraph from the Count VIII allegations.

On June 10, 1994, the Acting Chief Administrative Hearing Officer served a copy of that Complaint and the Notice of Hearing upon the respondent.

On July 11, 1994, respondents filed their joint Answer, in which respondent Burns denied generally that he had hired any of the individuals named in the Complaint and asserted that as such he did not violate any of the provisions of the INA and should not be personally liable for such violations.

Respondent Intra-Continental Enterprises, Inc. (ICE), admitted that all of the individuals named in the Complaint were its employees, except for two (2) individuals named in Count II and four (4) of the 27 individuals named in Count III, and that it had hired those six (6) individuals and did not complete Forms I-9 for them. However, ICE denies that it intended to fail to comply with the INA. Rather, it asserts that it was unaware of its requirements and that it made a good faith effort to comply after becoming aware of the Form I-9 requirements.

On August 8, 1994, complainant filed a Motion to Amend the Complaint in order to amend Count VIII to include all of the allegations contained in the NIF.

On August 23, 1994, that motion was granted and respondent has not filed an amended answer to the Amended Complaint.

On October 6, 1994, the undersigned issued a Notice of Hearing, setting this matter for hearing in El Paso, Texas on October 26, 1994.

On October 12, 1994, complainant filed a Motion for Continuance on the grounds that due to settlement negotiations, complainant had agreed to respondent's request for extensions of time to respond to discovery requests. That motion was granted and the hearing canceled.

On November 3, 1994, complainant filed a Motion to Compel Response to Discovery, asserting that all agreed extensions of time in which to respond to discovery had expired, and requested that respondent be compelled to answer complainant's First Set of Requests for Admissions, First Set of Interrogatories, and First Request for Production.

On November 18, 1994, that motion was granted and respondent was advised that a failure to comply with the discovery requests would result in the imposition of appropriate sanctions.

On February 1, 1995, the undersigned issued an Order Imposing Sanctions because respondent had failed to file the required discovery responses. This order, pursuant to 28 C.F.R. § 68.23(c), stated:

> (1) That it is inferred and concluded that the information sought in the requests for admissions, as well as the copies of the documents requested from respondent, would have contained evidence adverse to the respondents;
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> (2) That for the purposes of this proceeding, the matters concerning which the November 18, 1994, order was issued, are to be taken as having been established adversely as to the respondents;
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> (3) That the respondents may not introduce into evidence or otherwise rely upon testimony relating to information contained in the copies of any and all documents it has failed to produce, in support of or in opposition to any claim by complainant or any defense available to respondents; and
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> (4) That the respondents may not be heard to object to the introduction and use of secondary evidence by complainant in its case-in-chief in order to show what the withheld admissions and document copies or other evidence would have shown in the event that respondents had supplied those discovery replies and/or document copies as ordered.

See Order Imposing Sanctions (2/1/95) at 1-2.

On March 1, 1995, complainant filed its Motion to Amend Complaint and for Summary Judgment. Complainant sought to amend the Complaint to correct the spelling of the surnames of two (2) individuals in Count II and three (3) individuals in Count III. Furthermore, complainant asserted that it is entitled to full summary judgment due to the admissions by the respondent in its Answer, and the matters deemed admitted based on respondent's failure to respond to discovery requests.

On April 20, 1995, complainant's Motion to Amend Complaint was granted.[1]

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[1] This Order corrected the following misspelled surnames in order to have those spellings coincide with those in the NIF.

Count II: Alfonso Overa amended to Alfonso Olvera; Edwardo Samiengo amended to Edwardo Samaniego.

(continued...)

The respondents' 15-day reply period concerning complainant's Motion for Summary Judgment has passed and respondents have failed to respond. Accordingly only complainant's motion is under consideration.

II. *Discussion*

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 to avoid 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 decision may be based on matters deemed admitted. United States v. Primera Enters., Inc., 4 OCAHO 615, at 3 (1994); Goldenfield Corp., 2 OCAHO 321, at 3-4.

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); Primera Enters., Inc., 4 OCAHO 615, at 2. 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

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[1](...continued)
Count III: Carlos E. Azuremendi amended to Carlos E. Azurmendi; Hector Azuremendi amended to Hector Azurmendi; Gabriel M. Terril amended to Gabriel M. Terrill.

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.

A. Liability of Respondent Burns

In their Answer filed on July 11, 1995, respondents admit that Burns is an individual acting as an agent for Intra-Continental Enterprises, Inc. Answer at 1. However, Burns repeatedly denies individual liability for the alleged violations by denying that he individually hired or employed any of the individuals identified in the Complaint.

Complainant asserts that ICE is Burns' corporate alter-ego. Motion for Summary Judgment at 20. Complainant also asserts that under the applicable regulation, Burns and ICE are the joint employers of the individuals named in the Complaint.

The regulation at 8 C.F.R. § 274a.1(g) defines an employer as a "person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration." Case law demonstrates that this regulation establishes a valid basis for imposing liability on a corporate officer who is personally involved in the activities which form the basis for the corporate employer's liability. See Steiben v. Immigration and Naturalization Service, 932 F.2d 1225 (8th Cir. 1991). In addition, joint and several liability can be imposed on both a corporate employer and its agent. United States v. Ulysses, Inc., 3 OCAHO 409 (1992).

Complainant's First Set of Interrogatories requested that Respondent Burns "[s]tate whether the information provided in the questionnaire attached . . . is for the Respondent individually or whether it is for Intra-Continental Enterprises, Inc." The questionnaire referred to, which is an INS Financial Investigation Questionnaire completed by Burns with a signed affirmation on August 2, 1993, includes the handwritten admission sworn and affirmed as true by Kent Burns, that the questionnaire is for respondent Kent Burns, "d/b/a Intra-Continental Enterprises, Inc."

Furthermore, the respondents have not provided corporate documents requested in Complainant's First Request for Production, nor have they answered interrogatories regarding its corporate structure. Pursuant to the February 1, 1995 Order Imposing Sanctions, it is inferred and concluded that these discovery responses would have contained evidence adverse to the respondents. Therefore, after considering the combined factors of the applicable regulation and case law allowing joint and several liability between a corporate employer and its agent, Burns' admission that he is "doing business as" ICE, and respondents' failure to substantiate ICE's corporate structure despite the order compelling discovery responses, I find that Burns and ICE jointly employed the individuals named in the Complaint at all times relevant to this action and that therefore both respondents, ICE and Burns, are liable for any civil money penalties assessed. Furthermore, as Burns admission establishes that ICE is his corporate alter-ego, any admissions made by either respondent is imputable to the other.

B. Liability Established

In Count I, complainant alleged that respondent hired the one named individual for employment in the United States after November 6, 1986, knowing that that individual was an alien not authorized for employment in the United States, or in the alternative, that respondent continued to employ this individual knowing that he was an alien not authorized for employment in the United States.

In order to prove the violations alleged in Count I, complainant must demonstrate that:

(1) after November 6, 1986;

(2) respondent hired for employment and/or continued to employ in the United States;

(3) the individuals named on Count I; and

(4) respondent knew that those individuals were unauthorized for employment in the United States.

Respondent ICE admits in its Answer that it employed this individual and that he was hired after November 6, 1986. Respondent Burns is deemed to have admitted in the Complainant's First Set of Requests for Admissions at 4, that "on or about July 2, 1993, [he] told or admitted to agents of the United States Border Patrol that he, Burns, knew [the individual] was not authorized to be employed in the United States." Furthermore, the individual, in a sworn statement dated July 1, 1993,

stated that he had told Burns that he did not have authorization to work in the United States, and that Burns hired him.

These admissions, imputable to both respondents based on the above finding, establish that the respondents hired and/or continued to employ the one (1) individual named in Count I, knowing that he was unauthorized for employment in the United States, and did so after November 6, 1986. Therefore, complainant has shown that there is no genuine issue of material fact as to the allegations in Count I and that it is entitled to summary decision on that violation.

In Count II, complainant alleged that respondent hired the 23 named individuals for employment in the United States after November 6, 1986, and had failed to prepare Forms I-9 for these individuals.

In order to prove the violations alleged in Count II, complainant must show that:

(1) after November 6, 1986;

(2) the individuals named in Count II; and

(3) respondent hired for employment in the United States;

(4) respondent failed to prepare Forms I-9 for those individuals.

In its Answer, Respondent ICE admits that it hired these individuals, with the exception of the two (2) whose surnames were misspelled in the Complaint and were corrected in the April 20, 1995 Order Granting Complainant's Motion to Amend Complaint. See supra, fn. 1. Respondent ICE also admits that it failed to complete Forms I-9 for these individuals. These admissions, attributable to both respondents based on the above finding, establish that there is no genuine issue of material fact and that complainant is entitled to summary decision as to 21 of the 23 Count II allegations.

The two (2) remaining Count II allegations concern the two (2) individuals subject to the April 20, 1995 order. These individuals are included on lists of ICE employees signed by respondent Burns as president of the corporation and dated July 8, 1993 and July 16, 1993 respectively. These lists conclusively establish that Alfonso Olvera was hired by respondents on April 5, 1993 and terminated from employment on June 30, 1993. In addition, Edwardo Samaniego was hired by respondents on March 9, 1993 and terminated from employment on June 1, 1993. However, there is no evidence presented that the respondents did not prepare Forms I-9 for these individuals. As such,

there remains the genuine issue of material fact of whether Forms I-9 were prepared for these individuals, and summary decision as to these two alleged violations is denied.

In Count III, complainant alleged that respondent hired 27 named individuals in the United States after November 6, 1986, failing to ensure that those individuals timely completed section 1 of the Form I-9, and failing to complete section 2 of the Form I-9 within three (3) business days of hire.

In order to prove the violations alleged in Count III, complainant must show that:

(1) after November 6, 1986;

(2) respondent hired for employment in the United States;

(3) the individuals named in Count III;

(4) respondent failed to ensure that those individuals timely completed section 1 of the Forms I-9; and

(5) respondent failed to properly complete section 2 of the Forms I-9 for those individuals within three (3) business days of hire.

With the exception of four (4) individuals in Count III, of whom three (3) were subject to the aforementioned Order Granting Complainant's Motion to Amend Complaint, as well as Mark D. Osterberg, respondent ICE admitted in its Answer that it had hired those individuals named in Count III after November 6, 1986 in the United States, and that it had failed to ensure that they timely completed section 1 of their Forms I-9 and had also failed to complete section 2 of their Forms I-9 within three (3) business days of hire.

Regarding Mark D. Osterberg, one of the four (4) individuals whom the respondents denied employing, the employee lists completed and attested to by respondent Burns prove that respondents hired him on December 3, 1988. In addition, an I-9 was prepared for Mr. Osterberg. He completed section 1 and respondents completed section 2 of this I-9 on July 13, 1993, over four (4) years after the date of hire. This is clearly outside of the allocated three (3) day period in which employer's must complete the Forms I-9 for new hires, and as such establishes that respondents are liable for this violation.

Regarding the three persons subject to the order amending the Complaint, the aforementioned employee lists establish that Carlos E.

Azurmendi and Hector Azurmendi were hired in June 1993, while Gabriel M. Terrill was hired on March 5, 1993. An examination of their respective Forms I-9 demonstrates that Carlos Azurmendi completed section 1 and respondent completed section 2 of the I-9 on July 7, 1993, Hector Azurmendi completed section 1 of the I-9 on July 5, 1993, and Gabriel M. Terrill completed section 1 and respondent completed section 2 of the I-9 on July 5, 1993. This documentary evidence establishes that the respondents failed to complete section 2 within three (3) business days of hire and failed to ensure that Carlos Azurmendi and Gabriel M. Terrill completed section 1 of their respective Forms I-9 at the time their employment began and accordingly establishes the liability of both respondents in connection with that violation.

These admissions/findings conclusively establish the joint liability of the respondents and demonstrate that summary decision must be granted in complainant's favor as to these 26 violations of the 27 alleged in Count III of the Complaint.

However, as Hector Azurmendi's hire date is listed as June 1993, there remains a genuine issue of material fact as to respondents' liability as to him. The lack of specificity of the date means that he could have been hired as late as Wednesday, June 30, 1993. In deciding whether to issue summary decision, all facts and inferences reasonably drawn from them must 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. Therefore, exclusively for the purpose of resolving complainant's Motion for Summary Judgment, Hector Azurmendi's hire date must be determined to have been Wednesday, June 30, 1993. Monday, July 7, 1993, would be the third business day after hire and the I-9 would be timely. As there is a genuine issue of material fact namely, the specific date of Hector Azurmendi's hire, complainant's Motion for Summary Judgment must be denied for that alleged violation.

In Count IV, complainant alleged that respondent hired the 13 named individuals for employment in the United States and did so after November 6, 1986, failing to ensure that those individuals properly completed section 1 of the Form I-9, and failing to complete section 2 of the Form I-9 within three (3) business days of hire.

In order to prove the violations alleged in Count IV, complainant must show that:

(1) after November 6, 1986;

(2) respondent hired for employment in the United States;

(3) the individuals named in Count IV;

(4) respondent failed to ensure that those individuals properly completed section 1 of the Forms I-9; and

(5) respondent failed to properly complete section 2 of the Forms I-9 for those individuals within three (3) business days of hire.

Respondents' Answer includes ICE's admission, imputable to respondent Burns, that it hired the 13 named individuals after November 6, 1986 in the United States and that it had failed to ensure that they properly completed section 1 of their Forms I-9 as well as having failed to complete section 2 within three (3) business days of hire. These admissions demonstrate that there is no remaining genuine issue of material fact and that complainant is entitled to summary decision in its favor concerning the 13 violations alleged in Count IV.

In Count V, complainant alleged that respondent hired the single named individual for employment in the United States after November 6, 1986, failing to ensure that he properly completed section 1 of the Form I-9, and that it had failed to properly complete section 2 of the Form I-9.

In order to prove the violation alleged in Count V, complainant must show that:

(1) after November 6, 1986;

(2) respondent hired for employment in the United States;

(3) the individual named in Count V;

(4) respondent failed to ensure that the individual properly completed section 1 of the Form I-9; and

(5) respondent failed to properly complete section 2 of the Form I-9 for the individual.

Respondents' Answer includes ICE's admission, imputable to respondent Burns, that it hired the single named individual after November 6, 1986 in the United State and failed to ensure that he properly completed section 1 of his Form I-9 as well as having failed to properly complete section 2. These admissions demonstrate that there is no remaining genuine issue of material fact and that complainant is

entitled to summary decision in its favor concerning the single violation alleged in Count V.

In Count VI, complainant alleged that respondent hired the single named individual for employment in the United States after November 6, 1986, failing to ensure that he timely completed section 1 of the Form I-9, and having failed to properly complete section 2 of the Form I-9.

In order to prove the violation alleged in Count VI, complainant must show that:

(1) after November 6, 1986;

(2) respondent hired for employment in the United States;

(3) the individual named in Count VI;

(4) respondent failed to ensure that the individual timely completed section 1 of the Forms I-9; and

(5) respondent failed to properly complete section 2 of the Form I-9 for the individual.

Respondents' Answer includes ICE's admission, imputable to respondent Burns, that it hired the single named individual after November 6, 1986 in the United State and failed to ensure that he timely completed section 1 of his Form I-9 as well as having failed to properly complete section 2. These admissions demonstrate that there is no remaining genuine issue of material fact and that complainant is entitled to summary decision in its favor as to the single violation alleged in Count VI.

In Count VII, complainant alleged that respondent hired the single named individual for employment in the United States after November 6, 1986, and failed to complete section 2 of the Form I-9 for that individual within three (3) business days of hire.

In order to prove the violation alleged in Count VII, complainant must show that:

(1) after November 6, 1986; and

(2) respondent hired for employment in the United States;

(3) the individual named in Count VII;

(4) respondent failed to complete section 2 of the Form I-9 for the individual within three (3) business days of hire.

Respondents' Answer includes ICE's admission, imputable to respondent Burns, that it hired that named individual after November 6, 1986 in the United States and had failed to complete section 2 of his Form I-9 within three (3) business days of hire. These admissions demonstrate that there is no remaining genuine issue of material fact and that complainant is entitled to summary decision in its favor as to the single violation alleged in Count VII.

In Count VIII, complainant alleged that respondent hired the single named individual for employment in the United States after November 6, 1986, and failed to ensure that this individual timely completed section 1 of the Form I-9.

In order to prove the violation alleged in Count VIII, complainant must show that:

(1) after November 6, 1986; and

(2) respondent hired for employment in the United States;

(3) the individual named in Count VIII;

(4) respondent failed to ensure that the individual timely completed section 1 of the Forms I-9.

Respondents' Answer includes ICE's admission, imputable to respondent Burns, that it hired that named individual after November 6, 1986 in the United States and failed to ensure that he completed section 1 of his Form I-9 in a timely manner. These admissions demonstrate that there is no remaining genuine issue of material fact and that complainant is entitled to summary decision in its favor on the single violation alleged in Count VIII.

Respondent's lack of knowledge of IRCA's provisions and requirements is not an affirmative defense to the charges in this case. See United States v. Mester Mfg. Co., 1 OCAHO 18 (1988), aff'd, Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989).

III. *Conclusion*

In summary, with the exception of the two (2) alleged Count II violations involving Alfonso Olvera and Edwardo Samaniego, and the alleged Count III violation involving Hector Azurmendi, complainant has shown that there is no genuine issue of material fact regarding the remaining 65 violations alleged in Counts I through VIII of the

Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to those 65 infractions.

Accordingly, complainant's March 1, 1995 Motion for Summary Judgment is hereby granted as to the facts of violation alleged in Counts I, IV, V, VI, VII, and VIII of the Complaint, and is also being granted with respect to those facts of violation alleged in Counts II and III, with the previously-noted exception concerning three (3) alleged infractions namely, those which involve Alfonso Olvera and Edwardo Samaniego in Count II, and that which concerns Hector Azurmendi in Count III.

A prehearing telephonic conference will be held shortly in order to discuss those three (3) remaining alleged infractions and to determine whether an evidentiary hearing will be required to resolve those issues. In that conference, also, the parties will provide an agreed upon schedule for filing concurrent written briefs concerning the appropriate civil money penalties to be assessed for those 65 infractions no longer at issue. In that connection, the civil money penalties levied for those paperwork violations will be determined after having given due consideration to the five (5) criteria set forth at 8 U.S.C. § 1324a(e)(5).

JOSEPH E. MCGUIRE
Administrative Law Judge