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

October 16, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00048
RICARDO CALDERON, INC., Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On October 8, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by issuing and serving upon Ricardo Calderon, Inc. (respondent), a Notice of Intent to Fine (NIF), NYC274A-92005309. That two (2)-count citation contained 27 alleged violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a and civil penalties totaling $17,990 were proposed for those alleged infractions.

Respondent was advised in the NIF of its right to contest the NIF by filing a written request for a hearing before an administrative law judge assigned to this office provided that it made that request within 30 days of its receipt of the NIF.

On November 5, 1993, Lawrence M. Wilens, Esquire, timely filed with INS a written request for hearing on respondent's behalf.

On March 18, 1994, complainant filed the two (2)-count Complaint at issue, reasserting those alleged violations and civil money penalties set forth in the underlying NIF.

In Count I, complainant alleged that respondent had employed the 13 individuals named therein for employment in the United States after November 6, 1986, and that respondent had failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of the provisions of 8 U.S.C. § 1324a(a)(1)(B).

Complainant levied civil money penalties of $785 for each of the eight (8) violations numbered 1, 3, 4, 6, 8, 9, 12 and 13 and $620 for each of the remaining five (5) infractions numbered 2, 5, 7, 10 and 11, or civil money penalties totaling $9,380.

In Count II, complainant charged that respondent had failed to complete Section 2 of 14 Forms I-9 within three (3) business days after having hired the 14 individuals named therein, all of whom had been hired by respondent for employment in the United States after November 6, 1986, in violation of the provisions of 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $615 for each of those 14 violations, or a total of $8,610 in that count.

On March 21, 1994, a Notice of Hearing, as well as a copy of the Complaint, were served on respondent's counsel by certified mail, return receipt requested.

On April 28, 1994, respondent filed a timely but unsigned Answer to the Complaint.

On September 8, 1994, following its having commenced discovery on April 28, 1994, complainant filed a Motion for Default, in which it asserted that respondent's counsel's failure to have been available for three (3) scheduled prehearing conferences constituted an abandonment of his client's request for a hearing, and effectively placed the respondent in default.

On September 20, 1994, the undersigned issued an Order to Show Cause Why Motion for Default Should Not be Granted.

On October 3, 1994, respondent filed a pleading captioned Opposition to Motion for Default Judgment.

A March 20, 1995, telephonic pre-hearing conference was scheduled, but could not be conducted owing to the unavailability of respondent's counsel of record.

On March 23, 1995, complainant filed a Second Motion for Default. As grounds for that motion, complainant asserted that respondent's counsel had again failed to participate in the March 20, 1995, prehearing conference. Complainant also urged that respondent had further failed to show good cause in its Opposition to the First Motion for Default Judgment as to why respondent's counsel had been similarly unavailable on three (3) prior occasions. Complainant therefore alleged that respondent's counsel's failure to be available for the scheduled March 20, 1995 pre-hearing conference was his fourth such non-appearance and should effectively establish a constructive abandonment of respondent's request for a hearing.

On March 28, 1995, the undersigned issued an Order in which respondent and/or respondent's counsel were ordered to participate in any and all future telephonic prehearing conferences. Respondent's counsel was warned that a future failure to participate, absent advance notice to this Office and complainant's counsel, would be treated as an abandonment of respondent's request for a hearing, which could result in the entry of a default judgment against respondent.

On July 12, 1995, respondent's counsel filed a pleading captioned Motion to Withdraw Representation as Attorney, requesting that he be allowed to withdraw because he was unable to contact his client.

On July 21, 1995, that motion was denied.

On July 31, 1995, respondent's counsel filed a pleading captioned Reconsideration on Motion to Withdraw as Attorney.

On August 11, 1995, that request was denied.

On August 29, 1995, complainant filed an unopposed Motion for Summary Decision, in which it requested that a summary decision be entered against the respondent as a matter of law on all facts of violation alleged in the Complaint, as well as on the proposed civil money penalties totaling $17,990. Complainant asserts in its motion that on July 24, 1995, 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 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 also asserts in that dispositive motion that as of August 25, 1995, respondent had failed to respond to those Requests for Admissions.

Because respondent has not responded within the 30-day period provided, as required by the provisions of 28 C.F.R. Section 68.21, it is found that each matter of which an admission has been sought is hereby deemed to have been admitted.

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 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 18, 1994 Complaint, complainant alleged that respondent hired the 13 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 required Employment Eligibility Verification Forms (Forms I-9) for those individuals.

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 therefore a clear violation of IRCA.

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

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

(2) the individuals named in Count I;

(3) after November 6, 1986; and

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

Summary decision may be based, as under these facts, on matters deemed admitted. Primera Enters., Inc., 4 OCAHO 615, at 3; Goldenfield Corp., 2 OCAHO 321, at 3-4. With regard to elements 1, 2 and 3, respondent admitted the accuracy of a list of employees, which documented that all 13 individuals named in Count I of the Complaint were hired by respondent after November 6, 1986. See Complainant's July 24, 1995 Request for Admissions, part III. With respect 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 13 individuals. See Id., Request, part II. Because respondent did not respond to complainant's Request for Admissions, as required by 28 C.F.R. Section 68.21, elements 1-4 are deemed admitted.

Complainant has thus demonstrated that respondent hired the 13 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 required Forms I-9 for those individuals.

Accordingly, complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability concerning the facts alleged in Count I, since there is no genuine issue for trial with regard to respondent's liability for the violations alleged in that count.

In Count II, complainant alleged that subsequent to November 6, 1986, respondent hired for employment in the United States the 14 individuals named therein and failed to complete Section 2 of each of those 14 individuals' Employment Eligibility Verification Forms (Forms I-9) within the required three (3) business day period of their dates of hire.

IRCA also requires employers to prepare Forms I-9 in compliance with its employment verification system. 8 U.S.C. §§ 1324a(a)(1)(B) and 1324a(b). Failure to complete Forms I-9 within three (3) business days of an individual's hiring date is a violation of IRCA. 8 C.F.R. §274a.2(b)(1)(ii)(A) & (B).

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

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

(2) after November 6, 1986;

(3) the individuals named in Count II; and

(4) respondent failed to complete Section 2, which requires employer review and verification of work eligibility docu-ments, of each individual's Form I-9 within three (3) business days of the individual's hire.

In complainant's Request for Admissions, respondent was requested to admit that it hired the 14 individuals named in Count II of the Complaint, after November 6, 1986. See Complainant's July 24, 1995 Request for Admissions, part V. Respondent was further requested to admit that the Forms I-9 attached to the Request as Exhibit B were genuine and related to the individuals named therein. See Complainant's July 24, 1995 Request for Admissions, part IV. Visual inspection of the Forms I-9 attached as Exhibit B confirm complainant's allegation that more than three (3) business days elapsed between the date upon which each individual had begun employment and the date upon which each Form I-9 was certified. Accordingly, with respect to elements 1, 2, 3, and 4, 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 failed to complete Section 2 of the Employment Eligibility Verification Form within three (3) business days of the hire, as complainant has alleged in Count II.

Complainant has thus further established that there is no genuine issue of material fact with regard to the violations alleged in Count II 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 II, also.

In summary, because complainant has shown that there are no genuine issues of material fact regarding the violations alleged in Counts I and II of the Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's August 29, 1995 Motion for Summary Decision is hereby granted as it pertains to respondent's liability for the facts of violation set forth in Counts I and II. It is therefore found that respondent has violated the pertinent provisions of IRCA in the manners alleged in those counts.

Accordingly, the sole remaining issue is that of determining the appropriate civil money penalties to be assessed for these 27 paperwork violations.

In arriving at those civil money penalty sums, due consideration must be given to the five (5) criteria listed in the pertinent provision of IRCA

governing civil money penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5). Those being (1) the size of the business of the employer being charged, (2) the good faith of the employer, (3) the seriousness of the violation, (4) whether or not the individual was an authorized alien, and (5) the history of prior violations.

In lieu of conducting an evidentiary hearing in New York City solely for the purpose of determining the appropriate civil money penalties to be assessed for these 27 violations, the parties are hereby instructed to submit concurrent written briefs, within 15 days of their acknowledged receipt of this Order, and no later than November 6, 1995, containing recommended civil money penalty amounts for these 27 violations, utilizing the previously-mentioned criteria found at § 1324a(e)(5).

JOSEPH E. MCGUIRE
Administrative Law Judge