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

March 7, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00124
CHUMS CORP., Respondent.	)	

ERRATA

In my Order Granting In Part, and Denying in Part, Complainant's Motion for Judgment on the Pleadings dated March 5, 1996, on page 2, the second full paragraph which currently reads

> Because OCAHO procedural rules do not provide specifically for the equivalent of Rule 15(c) of the Federal Rules of Civil Procedure, in considering a motion for judgment on the pleadings I look to the case law interpreting Rule 15(c) for a general guideline as directed by §68.1.

is hereby corrected to read

> Because OCAHO procedural rules do not provide specifically for the equivalent of Rule 12(c) of the Federal Rules of Civil Procedure, in considering a motion for judgment on the pleadings I look to the case law interpreting Rule 12(c) for a general guideline as directed by §68.1.

SO ORDERED.

Dated and entered this 7th day of March, 1996.

ELLEN K. THOMAS
Administrative Law Judge

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

March 5, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00124
CHUMS CORP., Respondent.	)	

ORDER GRANTING IN PART, AND DENYING IN PART, COMPLAINANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This case[1] arises under the Immigration and Nationality Act as amended, 8 U.S.C. §1324a (INA). On August 24, 1995, the United States of America, Immigration and Naturalization Service (Complainant or INS) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against CHUMS Corp. (Respondent) alleging that Respondent knowingly hired three named aliens not authorized for employment in the United States, and that Respondent failed to complete Employment Eligibility Verification Forms (Form I–9) properly for thirteen named individuals. After some initial difficulties effecting service, the Complaint, Notice of Hearing, Notice of Reassignment, and a copy of the applicable Rules of Practice and Procedure[2] were personally delivered to Respondent's owner by Special Agent Richard Gallagher on November 2, 1995. CHUMS Corp. answered by letter-pleading which was received on November 22, 1995.

[1] This case was initially assigned to Administrative Law Judge (ALJ) Morse. It was reassigned to me on October 2, 1995.

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1995).

On February 8, 1995, Complainant filed its Motion for Judgment on the Pleadings asserting that CHUMS "did not deny any of the allegations in the Complaint". No response has been made to this Motion and it is ripe for ruling.[3]

Although captioned as a Motion for Judgment on the Pleading (sic), the motion itself seeks as relief "that summary judgment be entered against the Respondent in the amount of eight thousand eighty dollars ($8,080.00) as specified in the Complaint." Because the record contains no materials outside the pleadings and the applicable legal standards are substantially similar, I decline to convert the Motion to one for Summary Decision at this stage of the proceedings.

Applicable Law

Because OCAHO procedural rules do not provide specifically for the equivalent of Rule 15(c) of the Federal Rules of Civil Procedure, in considering a motion for judgment on the pleadings I look to the case law interpreting Rule 15(c) for a general guideline as directed by §68.1.

The federal courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings, see generally 5A C. Wright and A. Miller, Federal Practice and Procedure §§1367 and 1368. The governing standard, like that for Rule 56, is that the moving party must clearly establish that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. *Alexander v. City of Chicago,* 994 F.2d 333 (7th Cir. 1993).

For purposes of considering this motion I therefore take as true all well pleaded factual allegations in the answer, and as false all controverted assertions in the complaint, but I do not take as true any conclusions of law or any facts which would be inadmissible at a hearing. I draw no inferences in favor of the moving party and all reasonable inferences in favor of the nonmoving party. All doubts are resolved in favor of the nonmoving party, particularly where, as here, Respondent is unrepresented.

[3] §68.11(b) provides that a party has ten (10) days after service of a written motion to file a response. §68.8(c)(2) provides that where service is had by ordinary mail, five (5) days shall be added to the prescribed period.

Factual Allegations in the Complaint and Answer

The Complaint alleges that a Notice of Intent to Fine (NIF) was served on the Respondent on June 1, 1995 and that the Respondent has its primary place of business at 43–15 Queens Street, Long Island City, New York 11101. No response was made to these assertions. The letterhead on the letter-pleading reflects the address alleged in the complaint.

As §68.9(c)(1) provides that failure to deny will constitute an admission, I deem these facts admitted.

Count I of the Complaint alleges that Respondent hired Jose Jeronimo Huerta-Gonzalez, Carmen Sanchez-Cortes, and Maria de Lourdes Serrano-Aguirre after November 6, 1986 knowing that they were aliens not authorized for employment in the United States, or alternatively that Respondent continued to employ them knowing them to be aliens not authorized to work in the United States.

In Response, CHUMS states:

> It is alleged that as for the Allegations in Count I, we had not known the individuals listed in paragraph A were not authorized to work in the United States by the time they were arrested by the Special Agents from the Immigration and Naturalization Service because they asserted their rights to work in the United States when hiring them and we did not know how to comply with the Immigration and Nationality Act.

Count II alleges that for 11 named individuals hired after November 6, 1986, Respondent failed to ensure that they properly completed Section 1 of Form I–9, and failed itself to complete Section 2.

Count III alleges that for 2 named individuals hired after November 6, 1986, Respondent failed properly to complete Section 2 of Form I–9. In response, Respondent states:

> That as for the allegations on Count II and Count III, we have not had any chance to be instructed how to complete the I–9 Form and the employer's responsibilities for completing the I–9 Form by any one (sic) or authorities. Accordingly the reason why we failed to properly complete the I–9 Form is our document preparation techincal (sic) problems. We think the INS is responsible for instructing the employers so as to conform to the immigration and Nationality Act. So it is unreasonable to impose such a heavy penalty money on our company without even a chance to be instructed or corrected.

> On the other hand we are in the face of slow business and we are at a critical moment to close the business and we even shut down the factory for about two months by the last Jewish holidays. Therefore, we are incapable of paying such a heavy penalty money and we can not accept the civil money penalty for Count II and Count III, but we admit we are in violation for the Count I.

Although INS requests judgment on the grounds that CHUMS did not deny any of the allegations, this conclusion appears to a certainty only with respect to Counts II and III. With respect to Count I, the statement that "we had not known the individuals . . . were not authorized to work in the United States . . . ", given the ordinary meaning of those words, must be construed as a denial of knowledge, one of the requisite elements of the offense alleged. Although later in the letter-pleading the statement appears that ". . . we admit we are in violation for the Count I", that statement constitutes a legal conclusion, not a statement of fact. To the extent it is inconsistent with the factual allegations in the second paragraph of Respondent's letter-pleading, I disregard it. Particularly where, as here, a Respondent is unrepresented, I am unable to conclude that the Respondent's statement is other than a denial of knowingly hiring unauthorized workers.[4]

The facts of the paperwork violations, in contrast, do appear to be admitted by virtue of the failure expressly to deny them and by the admission in paragraph three that "the reason why we failed to properly complete the I–9 form is our document preparation techincal (sic) problems."

Respondent's exculpatory assertions respecting the lack of training or instruction and inability to pay the penalties requested, while insufficient to state an affirmative defense, nevertheless are adequate to contest the amount of the penalty.

Finally, in any event, the language of the last paragraph,

> Please take a deep consideration of our circumstances that we have stated in this letter and business difficulties and give us a chance to survive. If you give us a chance to appear in person before you and explain our situations and compromise it would be very much appreciated. . . .

seems clearly to request a hearing on the amount of penalty.

[4] This is not to imply that upon a proper showing, a summary decision could not be made; it is, however, to point out that on the pleadings alone, that showing has not been made.

Accordingly, partial Judgment on the Pleadings is entered only as to the following facts:

1. A Notice of Intent to Fine was served on the Respondent on June 1, 1995, and Respondent has timely requested a hearing.

2. CHUMS Corp. is a corporation having its primary place of business at 43–15 Queens Street, Long Island City, New York 11101.

3.A. The Respondent hired the following eleven (11) individuals for employment in the United States:

1. Carlos Alberto CABRERA-MUYCELA a.k.a. MUYCELA-CABRERA

2. Miriam del Rocio CORNEJO-SOLANO

3. Monica FLORES-MORALES

4. Carlos Santiago GAJAMARCA-CRIOLLO

5. Jose Jeronimo HUERTA-GONZALEZ

6. Nelly LOPEZ-LUNA

7. Margarita MARIN-AGUIRRE

8. Maria PENARANDA-PENARANDA

9. Carmen SANCHEZ-CORTES

10. Maria de Lourdes SERRANO-AGUIRRE

11. Luis Arturo URJILES-CORONEL

B. The Respondent hired the individuals listed in paragraph A after November 6, 1986.

C. The Respondent failed to ensure that the individuals listed in paragraph A properly completed section 1 of the Form I–9.

D. The Respondent failed to properly complete Section 2 of the Form I–9 for the individuals listed in Paragraph A.

4. A.The Respondent hired the following two (2) individuals for employment in the United States:

1. Thi MinhHein DO

2. Luisa Martinez ROMANO a.k.a. Maria L. ROMANO

B. The Respondent hired the individuals listed in paragraph A after November 6, 1986.

C. The Respondent failed to properly complete section 2 of the Form I–9 for the individuals listed in paragraph A.

As a matter of law, the facts stated constitute violations of §1324a.

A telephonic pre-hearing conference will be scheduled at the parties' earliest mutual covenience to establish a timetable for further Proceedings for this case.

SO ORDERED.

Dated and entered this 5th day of March, 1996.

ELLEN K. THOMAS
Administrative Law Judge