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

March 20, 1996

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding
	) Case No. 95A00086
ITALY DEPARTMENT STORE, INC., Respondent.	)

DECISION AND ORDER DENYING RESPONDENT'S MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural History*

On May 15, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated May 8, 1995, in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF), served by INS upon Italy Department Store (Respondent or Italy), on July 14, 1994.

Count I of the Complaint charges Respondent with failing to prepare and/or make available for inspection the employment eligibility verification form (Form I–9) for two hundred forty-six (246) individuals, in violation of the pertinent provision of the Immigration Reform and Control Act of 1986 (IRCA), i.e. 8 U.S.C. §1324a (a)(1)(B).

Count II alleges that Respondent failed to ensure that each of the thirty-three (33) individuals named properly completed section 1, and failed to properly complete section 2 of the employment eligibility verification form (Form I–9), in violation of 8 U.S.C. §1324a(a)(1)(B).

Count III charges Respondent with violating 8 U.S.C. §1324a(a)(1)(B) by failure to properly complete section 2 of the employment eligibility verification form (Form I–9) for each of fifty-eight (58) individuals named in Count III.

OCAHO issued its Notice of Hearing (NOH) on May 16, 1995, which transmitted to Respondent a copy of the Complaint and a copy of OCAHO rules of practice and procedure, 28 C.F.R. pt. 68.

On July 11, 1995, Respondent, by its attorney, submitted an Answer to the Complaint denying all allegations contained within the Complaint. Specifically, Respondent denied knowledge or information sufficient to form a belief as to paragraphs A and B of Counts I, II, and III.

By Order dated August 11, 1995, a telephonic prehearing conference was scheduled for September 19, 1995. At the prehearing conference, counsel stated that they were unable to negotiate a settlement. Respondent requested and obtained an extension of time to answer Complainant's outstanding discovery requests.

On November 21, 1995, Respondent filed a Motion to Dismiss (Motion) which contends that the proceedings are based upon "an improper notice of inspection or a lack of notice of inspection" and that "the notice, if any, was ambiguous, confusing, and appeared to call for an educational review." The Motion was accompanied by an affirmation by Respondent's then- attorney, Joseph L. Silver (Silver), and by an affidavit of Edmound Nahum, Vice President of Respondent.

On January 22, 1996, Silver filed a letter/pleading stating that he no longer represents Italy. Although counsel did not enter an effective notice of withdrawal as required by 28 C.F.R. §68.33(b)(5), I made no objection to Silver's request in light of consent endorsed on the letter by Respondent's President, Claude Nahum.

Complainant filed a pleading opposing the motion (Response) on January 22, 1996, supported by a declaration of Special Agent Deidre Pollicino (Pollicino). Complainant's Response argues that the Notice of Inspection was the standard notice in sanction cases, and was neither ambiguous nor confusing.

By Order dated February 7, 1996, I canceled a previously scheduled telephonic prehearing conference pending disposition of the Motion. On February 9, 1996, Abe Bunks (Bunks) entered an appearance as attorney for Respondent and requested an opportunity to reply to Complainant's Response. By Order dated February 26, 1996, I granted Respondent until March 15, 1996, to file a timely reply. On March 19, 1996, Bunks filed a letter/pleading to the effect that Respondent will not file a formal reply to Complainant's Response to his predecessor's Motion, but he urged that the Motion be granted.

II. *Discussion*

OCAHO rules of practice and procedure authorize an Administrative Law Judge (ALJ) to dispose of cases upon motions to dismiss for failure to state a claim upon which relief can be granted. 28 C.F.R. §68.10. Frequently, such a motion to dismiss is treated as tantamount to a motion for summary decision. *See* Fed. R. Civ. P. 12(c) ("If, on a motion for judgment of the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[1]

An ALJ may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242,248 (1986). Any uncertainty as to a material fact must be considered in the light most favorable to the non-moving party. *Matsushita V. Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Once the movant has carried its 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).

Respondent argues that this case should be dismissed because it received inadequate notice. On October 8, 1992, Respondent received the Notice of Inspection (Notice) by personal service by Pollicino and another Agent. The asserted inadequacy is that the Notice was addressed to DiRoma Sportswear Corporation (DiRoma), and not Italy.

[1] The Federal Rules of Civil Procedure are generally available as a guideline for the adjudication of OCAHO cases. 28 C.F.R. §68.1.

Considered in light of the Pollicino affidavit, I understand Silver's affirmation to confirm that the Notice addressed to 1249 Fulton Street was the location of DiRoma, a retail outlet owned by Italy. While there are factual disputes as to details, nothing in the Affidavit of Edmound Nahum or Silver's Affirmation detracts from the Pollicino affidavit: " Mr. Nahum told us that Italy operates a number of retail stores, including DiRoma. Mr. Nahum stated that Italy conducts the hiring, staffing, and payroll for these stores and rotates employees to stores where they are needed." Declaration of Pollicino at 2. It is clear that any misidentification of the corporate entity name is overtaken by the reality that a principal officer of Italy was served with a Notice on October 8, 1992, scheduling an inspection for October 16, 1992. The Notice could not have more unerringly pointed to a compliance inspection:

> The purpose of this inspection is to assess your compliance with the provisions of the Immigration Reform and Control Act. During the inspection the Service will make every effort to conduct the review of records in a timely manner so as not to impede your normal business routine.

Nothing that transpired should have confused a reasonably prudent business person. No prejudice attached to the erroneous identification, and there is no suggestion that Respondent was misled to its detriment.

The inspection was postponed to begin on October 23, 1992 and not concluded until September 1993. In the interim, there were many conversations between Pollicino and principals and agents of Italy. These conversations, at a minimum, constitute oral notice. It is well established that such notice is sufficient because "there is no statutory or regulatory requirement that service be effected in [written form]." *United States v. Big Bear Market*, 1 OCAHO 48 at 301 (1989); *aff'd, Big Bear Market No. 3 v. I.N.S.*, 913 F.2d 754 (9th Cir. 1990).

Respondent claims that the INS agents did not advise that the visit was an inspection subject to penalties, and not an educational review. Specifically, Respondent argues that the agents' failure on October 8, 1992 to mention to Italy that the agents wanted to "inspect" Italy renders the Notice ineffective, and that the agents never advised that the employer was entitled to a three day notice . Respondent contends that the INS' failure on October 8, 1992 to explain the " Notice" (in particular, the three day notice requirement) obliges me to dismiss the case.

Respondent's claim is fatuous. A year of intermittent discussions followed service of the written notice. All the information concerning the actual notice of inspection is clearly set forth in the Notice. Respondent had more than the three days actual notice required by the regulations; when Respondent was served on October 8, 1992, the inspection was scheduled for October 16, 1996 but not conducted until October 23, 1992, fifteen days after Respondent received the Notice. Some files were not inspected until September 1993. During the eleven months between the initial notice and the final inspection, Respondent was neither misled nor prejudiced. Respondent's claim "does not implicate any due process rights because the Notice does not lead to final deprivation of Respondent's property. *See Maka v. United States,* 904 F. 2d, 1351, 1357 (9th Cir. 1990); *Mester Mfg. Co. v. INS,* 879 F.2d 561, 569 (9th Cir. 1989)." *United States v. Grand Tradition*, 4 OCAHO 687 at 11 (1994).

Respondent's argument that the agents did not advise that the inspection was not purely an educational review and could subject Respondent to penalties fails on consideration of the notice quoted above. Moreover, IRCA does not require that an employer be served with a Notice of Inspection before the employer can be held liable for violating IRCA's paperwork requirements. Here, as in *Grand Tradition*, Respondent argues that the Notice of Inspection was not proper because it was not aware that the visit by the INS agent constituted a notice of three day inspection. As discussed in *Grand Tradition*, "If such notice were required, every U.S. employer could wait until the INS discovered the employer's failure to comply with IRCA's paperwork requirements and provided a notice of inspection to the employer, after which the employer could prepare an I–9 Form. Clearly, this was not the Congressional intent in enacting IRCA." *Grand Tradition*, 4 OCAHO 687 at 11.

Respondent asserts that the Notice was confusing and ambiguous. Complainant notes that the Notice "was of the type found in various practitioner guides to assist employers in complying with IRCA's requirements." Response at 4. The standard form provided to Respondent recites that INS agents will discuss the requirements of the law and inspect the employer's I–9 Forms and employment file to determine whether the employer is in *compliance* with the requirements of IRCA. Notice of Inspection (October 8, 1992). The Notice clearly identifies the purpose of the inspection and what to expect; there is nothing confusing or ambiguous about it.

Respondent does not dispute that the Notice was served on October 8, 1992. It is undisputed that an inspection, the purpose of which was to determine I–9 compliance, began on October 23, 1992. There is no suggestion in the pleadings or attachments of any objections as to the appropriateness of the Notice during the eleven months before the conclusion of the inspection and no implication that Italy was in doubt that *it* was the object of the inspection. Indeed, Respondent cooperated with INS during the inspection.

Upon consideration of Respondent's Motion to Dismiss, Complainant's Response to the Motion to Dismiss, and in context of the procedural history of this case, I conclude that Respondent was provided adequate notice which was neither confusing nor ambiguous. That INS originally identified the employer as DiRoma is not shown or even claimed by Italy to have occasioned any genuine misunderstandings on its part. Given the fact proper notice was served, that Respondent was neither misled nor prejudiced, and because genuine issues of material fact are not yet resolved, Respondent's Motion to Dismiss is denied.

SO ORDERED.

Dated and entered this 20th day of March 1996.

MARVIN H. MORSE
Administrative Law Judge