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

September 9, 1997

UNITED STATES OF AMERICA, Complainant, v. ZIP CITY PARTNER, L.P., D/B/A ZIP CITY BREWING, Respondent.	)))) 8 U.S.C. 1324a Proceeding) OCAHO Case No. 97A00086)))

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On November 26, 1996, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon Zip City Partner, L.P. d/b/a Zip City Brewing (respondent) Notice of Intent to Fine NYC 95 EO 000 269. That four-count citation alleged some 111 paperwork violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, for which civil money penalties totaling $41,290 were assessed.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I–9[1] for each employee hired after November 6, 1986, and to make those forms available to INS personnel in the course of their inspections. 8 U.S.C. §1324a(b). Each instance of a failure to properly prepare, retain, or produce Forms I–9, in accordance with the employment verification system, 8 U.S.C. §1324a(b), is a section 1324a(a)(1)(B) violation.

[1]The Form I–9 is officially known as the Employment Eligibility Verification Form.

In Count I, complainant alleged that respondent had violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to prepare and/or make available for inspection Forms I–9 for the 43 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of $370 were assessed for each of 42 of those alleged violations and $470 for the remaining alleged violation, for a total of $16,010.

In Count II, complainant alleged that respondent had violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to ensure proper completion of section 1 and also by having failed to properly complete section 2 of the Forms I–9 for each of the 37 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of $350 were assessed for each of 24 of those alleged violations and $450 for each of the remaining 13 alleged violations, for a total of $14,250.

In Count III, complainant alleged that respondent had violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to properly complete section 2 of the Forms I–9 for each of the 30 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of $350 were assessed for each of 29 of those alleged violations and $450 for the remaining alleged violation, for a total of $10,600.

In Count IV, complainant alleged that respondent had violated the provisions of 8 U.S.C.§1324a(a)(1)(B) by having failed to ensure that the one (1) employee named therein, who was hired by respondent after November 6, 1986, for employment in the United States, properly completed section 1 of the Form I–9. A civil money penalty of $430 was assessed for that single alleged violation.

The wording of the NIF clearly advised the 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 the NIF.

On December 24, 1996, Andrew K. Chow, Esquire, respondent's counsel of record, timely filed a written request for hearing.

On April 3, 1997, complainant filed the four (4)-count Complaint at issue, realleging the 111 violations set forth in Counts I through IV of the NIF, as well as the requested $41,290 total civil money penalties sum.

On April 14, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of the Complaint at issue, were served upon respondent and also upon respondent's counsel of record, Andrew K. Chow, Esquire.

On May 15, 1997, respondent's answer was filed. In that responsive pleading, respondent denied the allegations in the Complaint and asserted two (2) affirmative defenses, to the effect that a Chapter 7 involuntary bankruptcy petition was filed against respondent on April 4, 1997 in the U.S. Bankruptcy Court for the Southern District of New York, and that respondent permanently ceased to operate its business on May 7, 1997.

In its motion for summary decision, discussed more fully below, complainant has accurately noted that neither of those two cited affirmative defenses may be asserted in defending section 1324a(a)(1)(B) paperwork violations.

Concerning the first affirmative defense, the issue of the effect of bankruptcy on unlawful employment sanction enforcement has been decided adversely to respondent's position in several prior OCAHO rulings, and most recently in *United States v. Garcia*, 7 OCAHO 950, at 3–4 (July 23, 1997). *United States v. United Pottery Mfg. & Accessories*, 1 OCAHO 57, at 355[2] (1989); *United States v. Carlson d/b/a Jimmy on the Spot*, 1 OCAHO 264, at 1698 (1990); *United States v. A&A Maintenance Enters.*, 6 OCAHO 852 (1996).

Those cases clearly instruct that the INS is exempted from the automatic stay provision contained in the U.S. Bankruptcy Code, 11 U.S.C. §362(a), because it is a governmental unit acting to enforce its police and regulatory powers. The purpose of this rule is to prevent

[2]Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration–Related Employment Practices Laws of the United States* reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

employers from frustrating "necessary governmental functions by seeking refuge in bankruptcy court." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991).

With regard to the second affirmative defense, the fact that respondent has ceased operations relates to the issue of respondent's financial condition and may be a factor in mitigation of the civil money penalty assessments, but may not be asserted in order to avoid liability.

On June 5, 1997, complainant served respondent with a Request to Admit Facts and Genuineness of Documents. Respondent did not reply to that request.

On August 1, 1997, complainant filed a pleading captioned Complainant's Motion for Summary Decision requesting that summary decision be granted in its favor on the grounds of respondent's having admitted to the 111 facts of violation alleged in the Complaint and on the basis of the evidence submitted therein.

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) (1996)[3].

Section 68.38(c) 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. *United States v. Limon-Perez*, 5 OCAHO 796, at 5, *aff'd*, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive de-

[3]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (1996) [hereinafter cited as 28 C.F.R. §68.__].

termination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, 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. Alberta Sosa, Inc.*, 5 OCAHO 739, at 5 (1994).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

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." *Id.*; Fed. R. Civ. P. 56(e). The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial." 28 C.F.R. §68.38(b) (1996).

Respondent has not filed a response to complainant's dispositive motion, but that failure does not mean that summary decision is to be granted automatically. Summary decision may properly be granted only if the facts as to which there is no genuine dispute show that the moving party is entitled to summary decision. 28 C.F.R. §68.38(c) (1996); *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996) (per curiam).

Finally, summary decision may be based on matters deemed admitted. *United States v. Alberta Sosa, Inc.*, 5 OCAHO 739, at 5 (1995); *United States v. Anchor Seafood Distribs., Inc.*, 4 OCAHO 718, at 5 (1994).

Complainant has asserted that on June 5, 1997, respondent was served with Request for Admissions and Genuineness of Documents (Exhibit A/Request for Admissions) pursuant to 28 C.F.R. §68.21 (1996).

Attached to complainant's Request for Admissions are several documentary exhibits marked as Exhibits 1 through 5. Exhibit 1 is a copy of the Notice of Inspection served by the INS upon respondent on April 24, 1996. Exhibit 2 consists of copies of Forms I–9 relating to the 37 individuals named in Count II. Exhibit 3 consists of copies of Forms I–9 relating to the 30 individuals named in Count III. Exhibit 4 is a copy of the Form I–9 relating to the one (1) individual named in Count IV. And Exhibit 5 consists of respondent's payroll records.

The procedural rule governing admissions provides in pertinent part:

> (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 July 25, 1997, respondent had failed to respond to those requests for admissions.

Accordingly, because respondent did not respond within the 30 day period provided for at 28 C.F.R. §68.21, it is found that each matter for which an admission was sought is deemed admitted, including the genuineness of the documents proffered by complainant, Exhibits 1 through 5.

In Count I, complainant alleged that respondent had violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to prepare and/or make available for inspection Forms I–9 for the 43 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States.

Respondent has admitted having failed to prepare and/or make available for inspection Forms I–9 for the 43 individuals named in Count I, Request for Admissions, ¶9.

Respondent has also admitted that it hired the 43 individuals listed in Count I for employment in the United States after November 6, 1986, Request for Admissions, ¶14.

Complainant has also provided copies of pertinent payroll records, which respondent has admitted are true and accurate copies of payroll records furnished by respondent to INS agents during the course of the compliance inspection conducted at respondent's place of business on May 6, 1996, Request for Admissions, ¶13.

A visual inspection of those payroll records shows that the respondent had paid wages in 1996 to the 43 individuals named in Count I.

Therefore, complainant has met its evidentiary burden of proof with regard to the violations set forth in Count I.

As explained above, if a party moving for summary decision satisfies its burden of establishing the absence of a genuine question of material fact on an issue, the burden shifts to the nonmoving party to present specific facts that demonstrate a genuine issue for trial.

Respondent has not filed a response to summary decision and thus has failed to offer specific facts that demonstrate a genuine issue for trial. Accordingly, complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability for the 43 section 1324a(a)(1)(B) facts of violation alleged in Count I.

In Count II, complainant alleged that respondent failed to ensure that the 37 individuals named therein properly completed section 1 of the Form I–9 and that respondent had failed to properly complete section 2 of the Forms I–9 for each of those 37 named individuals, all of whom were hired by respondent for employment in the United States after November 6, 1986.

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 37 individuals named in Count II; (3) after November 6, 1986; (4) that respondent failed to ensure that those individuals properly completed section 1 of the pertinent Forms I–9; and (5) that respondent failed to properly complete section 2 of the pertinent Forms I–9.

Complainant has provided copies of the 37 pertinent Forms I–9, which respondent has admitted are true and accurate copies of the Forms I–9 relating to the 37 individuals named in Count II, Request for Admissions, ¶10.

A visual inspection of the Forms I–9 for those 37 individuals indicates that section 1 and section 2 were not completed properly in the manner complainant has alleged.

Respondent has also admitted that it had hired the 37 individuals listed in Count II for employment in the United States after November 6, 1986, Request for Admissions, ¶14.

A visual inspection of respondent's payroll records shows that the respondent had paid wages in 1996 to the 37 individuals named in Count II.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the violations set forth in Count II, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability for the 37 section 1324a(a)(1)(B) facts of violation alleged in Count II.

In Count III, complainant alleged that respondent had violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to properly complete section 2 of the Forms I–9 for each of the 30 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States.

In order to prove the violations alleged in Count III, complainant must show that: (1) respondent hired for employment in the United States; (2) the 30 individuals named in Count III; (3) after November

6, 1986; and (4) that respondent failed to properly complete section 2 of the Form I–9.

Complainant has provided copies of the 30 pertinent Forms I–9, which respondent has admitted are true and accurate copies of the Forms I–9 relating to the 30 individuals named in Count III, Requests for Admissions, ¶11.

A visual inspection of those 30 Forms I–9 indicates that they were not completed properly in the manner complainant has alleged.

Respondent has also admitted that it had hired the 30 individuals listed in Count III for employment in the United States after November 6, 1986, Request for Admissions, ¶14.

A visual inspection of respondent's payroll records shows that the respondent had paid wages in 1996 to the 30 individuals named in Count III.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the 30 violations set forth in Count III, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the 30 section 1324a(a)(1)(B) facts of violation alleged in Count III.

In Count IV, complainant alleged that respondent had failed to ensure that the one (1) employee named therein, who was hired by respondent after November 6, 1986, for employment in the United States, properly completed section 1 of the Form I–9.

In order to prove the one (1) violation alleged in Count IV, complainant must show that: (1) respondent hired for employment in the United States; (2) the one (1) individual named in Count IV; (3) after November 6, 1986; and (4) that respondent failed to ensure that the individual properly completed section 1 of the Form I–9.

Complainant has provided a copy of the pertinent Form I–9 at issue, which respondent has admitted is a true and accurate copy of the Form I–9 relating to the individual named in Count IV, Requests for Admissions, ¶12.

A visual inspection of the Form I–9 indicates that it was not completed properly in the manner complainant has alleged.

Respondent has also admitted that it hired the individual listed in Count IV for employment in the United States after November 6, 1986, Request for Admissions, ¶14.

A visual inspection of respondent's payroll records shows that the respondent had paid wages in 1996 to the individual named in Count IV.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the one (1) violation set forth in Count IV, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the one (1) section 1324a(a)(1)(B) violation alleged in Count IV.

In summary, because complainant has shown that there are no genuine issues of material fact regarding the 111 facts of violation alleged in Counts I, II, III and IV of its April 3, 1997 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 1, 1997 Motion for Summary Decision is granted as to the facts of violation concerning those 111 infractions.

In lieu of conducting an evidentiary hearing on the sole remaining issue, that of assessing the appropriate civil money penalties for these 111 violations, the parties are hereby instructed to submit concurrent written briefs, to be filed no later than Friday, October 3, 1997, containing recommended civil money penalty amounts for those violations.

In doing so, the parties will utilize the five (5) statutory criteria listed at 8 U.S.C. §1324a(e)(5), size of the business, good faith of the employer, seriousness of the violation, whether or not the individuals were unauthorized aliens, and the history of previous violations.

JOSEPH E. MCGUIRE
Administrative Law Judge