

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

February 20, 1998

UNITED STATES OF AMERICA, )  
Complainant, )  
)  
v. ) 8 U.S.C. 1324a Proceeding  
) OCAHO Case No. 96A00069  
HAIM CO., INC., )  
Respondent. )  
\_\_\_\_\_ )

**ORDER GRANTING COMPLAINANT’S SECOND MOTION  
FOR SUMMARY DECISION**

On July 1, 1996, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a three (3)-count Complaint against Haim Co., Inc. (respondent), which alleged 30 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a. Complainant proposed civil money penalties totaling \$17,190 for those alleged infractions.

In Count I, complainant alleged that respondent knowingly hired and/or continued to employ the three (3) individuals named therein for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of 8 U.S.C. §1324a(a)(1)(A) and/or §1324a(a)(2). Complainant proposed civil money penalties of \$950 for each of those three (3) alleged violations, for a total of \$2,850.

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 25 individuals named therein, all of whom were hired by respondent after

November 6, 1986, for employment in the United States. Complainant proposed civil money penalties of \$600 for each of 15 of those alleged violations and \$450 for each of the remaining 10 alleged violations, for a total of \$13,500.

In Count III, complainant alleged that respondent had hired the two (2) individuals named therein after November 6, 1986, for employment in the United States and that respondent failed to ensure proper completion of section 1 of the pertinent Forms I-9, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant proposed civil money penalties of \$420 for each of those two (2) alleged violations, for a total of \$840.

On July 17, 1997, the undersigned issued an Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision, which granted complainant summary decision as to the 27 section 1324a(a)(1)(B) paperwork violations contained in Counts II and III of the Complaint. In that Order, which fully set forth the procedural history in this proceeding, summary decision was denied with respect to the three (3) knowing hire violations in Count I because genuine issues of material fact then remained at issue.

During the course of a prehearing telephonic conference conducted on December 18, 1997, this matter was set to be heard on February 18, 1998.

On January 22, 1998, complainant filed a pleading captioned Complainant's Motion to Dismiss without Prejudice, requesting that the alleged violation in Count I relating to Luis Torealba-Espinosa a/k/a Luis Iorealba be dismissed without prejudice. That request is granted and those allegations in Count I which concern Luis Torealba-Espinosa a/k/a Luis Iorealba are hereby ordered to be dismissed without prejudice. Accordingly, only two (2) alleged violations remain at issue in Count I, those relating to Jose Garcia-Herrera a/k/a Jose Garcia (Garcia) and Maricela Jacobo-Rivera a/k/a Maricela Jacobo (Jacobo).

On January 22, 1998, complainant also filed a Second Motion for Summary Decision, renewing its request for summary decision as to those two (2) remaining allegations in Count I.

On February 2, 1998, complainant's January 30, 1998 request for a continuance of the hearing set for February 18, 1998, pending a ruling on its dispositive motion, was granted.

On February 9, 1998, or three (3) days after its response was due, respondent filed a pleading captioned Respondent's Opposition to Complainant's Cross-Motion to Dismiss, which despite its caption, opposes complainant's Second Motion for Summary Decision. *See* 28 C.F.R. §68.8(c) and 68.11(b).<sup>1</sup> Despite that misdescription, respondent's filing will be given due consideration.

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).

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).<sup>2</sup>

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

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<sup>1</sup>Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (1997).

<sup>2</sup>Citations to OCAHO precedents reprinted in the bound Volume 1 through Volume 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volume 1 through Volume 5 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

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*, 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.

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). It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. *United States v. Curran Engineering Co., Inc.*, 7 OCAHO 975, at 4 (1997) (court may consider any admissions on file as part of the basis for summary decision).

A description of the statutory and regulatory requirements regarding the preparation, verification, retention and government inspection of the Employment Eligibility Verification Form (Form I-9) is helpful in resolving whether there are material issues in dispute with respect to Count I. 8 U.S.C. §1324a(b); 8 C.F.R. §274a.2.

The Form I-9, which consists of three (3) sections, must be signed under penalty of perjury by both the employer and the employee. The employer representative must attest in Section 2 that he or she has examined the documents presented by the employee, that the documents appear to be genuine and relate to the named employee, that the employee began employment on a designated date, and that to the best of the representative’s knowledge, the employee is eligible to work in the United States. 8 U.S.C. §1324a(b)(1)(A). The employee’s signature in Section 1 attests that he or she is a citizen or national of the United States, an alien lawfully admitted for permanent residence or an alien who is authorized to work until a specified date. 8 U.S.C. §1324a(b)(2).

The individual who is hired must complete Section 1 of the Form I-9 “at the time of hire; or if an individual is unable to complete the

Form I-9 or needs it translated someone may assist him or her.” 8 C.F.R. §274a.2(b)(1)(A); 8 C.F.R. §274a.1(c). The employer may grant the employee up to three (3) business days from the commencement of employment to produce the documents for inspection by the employer. The employer has until the end of the third business day from the date of hire to complete Section 2 of the Form I-9. 8 C.F.R. §274a.2(b)(1)(ii). The three (3)-day period may be extended to 90 days if an employee presents a “receipt for application” of an acceptable document or documents within the three (3) business days of the hire. 8 C.F.R. §274a.2(b)(1)(vi).

The completed Form I-9 must be retained and made available for inspection for a minimum of three years after the date of hire or one year after the date the individual’s employment terminated, whichever is later. 8 C.F.R. §274a.2(b)(2)(i)(A). An employer must have at least three (3) days notice prior to an inspection conducted by the INS. No subpoena or warrant is required. 8 C.F.R. §274a.2(b)(2)(ii). Any refusal or delay in presentation of the Form I-9 for inspection is considered a violation of the retention requirements and subjects the employer to penalties. *Id.* The INS may compel production of the forms by the issuance of a subpoena in the event that an employer fails to comply with a request voluntarily or within the required time. *Id.*

Congress enacted the employment verification system primarily to discourage the employment of unauthorized aliens. Civil money penalties may be imposed in the event the employer either fails to comply with the Form I-9 employment verification system or is found to have knowingly hired and/or continued to employ unauthorized aliens. Having reviewed IRCA’s employment verification system, we now assess complainant’s Second Motion for Summary Decision.

In support of its Second Motion for Summary Decision, complainant has offered the following documents and evidence: 1) the declaration of Special Agent Anne Fanning, sworn to under oath on January 18, 1998; 2) the statement of Jose Garcia-Herrera, sworn to under oath on April 6, 1995; 3) the statement of Maricela Jacobo-Rivera, sworn to under oath on April 6, 1995; 4) the Record of Deportable Alien dated April 6, 1995 (Form I-213) for Jose Garcia-Herrera; 5) the Record of Deportable Alien dated April 6, 1995 (Form I-213) for Maricela Jacobo-Rivera; and 6) complainant’s

Memorandum of Law in Support of its Second Motion for Summary. Complainant has also relied on the pertinent Forms I-9 relating to Garcia and Jacobo. That those two (2) documents are true and correct copies of the Forms I-9 relating to those individuals was previously deemed admitted by respondent. See Complainant's January 13, 1997 Request to Admit Facts and Genuineness of Documents, ¶14; July 17, 1997 Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision.

Respondent argues that summary decision as to Count I should be denied because complainant relies on the hearsay statements of Garcia and Jacobo without affording respondent the opportunity for cross-examination. This argument implies that this agency may not consider hearsay evidence in determining a motion for summary decision. Neither the statute nor the regulations applicable to this administrative proceeding require the following of the technical federal rules of evidence. *United States v. Limon-Perez*, 103 F.3d 805, 812 (1996); *United States v. Carpio-Lingan*, 6 OCAHO 914 (1997). For that reason, it is well established that hearsay is admissible in OCAHO administrative proceedings and may be accorded probative force if factors assuring the underlying reliability and probative value of the evidence are present. *United States v. China Wok Restaurant*, 4 OCAHO 608, at 189 (1994); *United States v. Cafe Camino Real, Inc.*, 1 OCAHO 224, at 1497 (1990); *United States v. Mr. Z Enterprises, Inc.*, 1 OCAHO 288, at 1890 (1991); *United States v. Y.E.S. Industries, Inc.*, 1 OCAHO 198, at 1316 (1990); *Rocker v. Celebrezze*, 358 F.2d 119, 122 (2d Cir. 1966); *Richardson v. Perales*, 402 U.S. 389, 402-06 (1971).

Such factors include the possible bias of the declarant, whether the statements are signed or sworn to as opposed to oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant is unavailable and no other evidence is available, and finally, whether the hearsay is corroborated. *Cafe Camino Real, Inc.*, 1 OCAHO 224, at 1497. Because the challenged statements are relevant and material to the issue of scienter, and since they have been properly authenticated by the sworn declaration of Agent Fanning, those statements will be considered in deciding complainant's motion for summary decision. See *United States v. Sergio Alanaz d/b/a La Segunda Downs*, 1 OCAHO 297, at 1967 (1991). The credibility of those statements, in view of respondent's argument that Garcia and Jacobo had a motive to exculpate them-

selves and inculcate their employer, will be weighed in the context of the totality of the available evidence.

In order to prove the knowing hire and/or continuing to employ violations alleged in Count I, complainant must demonstrate by a preponderance of the relevant and credible evidence that: (1) respondent; (2) after November 6, 1986; (3) hired for employment and/or continues to employ in the United States; (4) an unauthorized alien; (5) knowing that the alien is unauthorized with respect to such employment. *United States v. Alberta Sosa, Inc.*, 5 OCAHO 739, at 5 (1995).

Respondent did not deny in its July 23, 1996 answer that it hired Garcia and Jacobo for employment in the United States after November 6, 1986. The OCAHO procedural rule pertaining to answers at 28 C.F.R. section 68.9(c)(1) provides that “any allegation not expressly denied shall be deemed to be admitted.” In addition, the relevant Forms I-9 pertaining to Garcia and Jacobo disclose that Garcia was hired by respondent on March 7, 1995 and that Jacobo was hired on February 4, 1995. Accordingly, it is found that there are no genuine factual issues in dispute as to the first three (3) elements listed above.

Respecting the fourth element, complainant has provided the sworn declaration of Special Agent Anne Fanning, the principal agent in charge of investigating the status of respondent’s employees and conducting the Forms I-9 compliance inspection at respondent’s place of business on April 18, 1995.

In her declaration, Agent Fanning stated that on April 6, 1995, she and other INS agents conducted a consensual survey at respondent’s place of business to determine whether unauthorized aliens were employed there. During that survey, several of respondent’s employees, Garcia and Jacobo among them, were interviewed and determined to be unlawfully present in the United States. Garcia and Jacobo were taken into custody and processed for deportation proceedings at INS Investigations Branch at 26 Federal Plaza, New York, New York. Agent Fanning further stated that Garcia and Jacobo provided sworn statements to INS Special Agents on April 6, 1995, in which they admitted that they were not work authorized and that they had entered the United States illegally.

Respondent has not offered evidence any contravening evidence nor has it objected to Agent Fanning's declaration concerning those alleged illegal hire violations. Accordingly, it is found that there are no genuine factual issues concerning that element, and thus it is further found that complainant has demonstrated that at all times relevant Garcia and Jacobo were unauthorized for employment in the United States.

Having satisfied the first four (4) elements of the charge, we must now assess whether complainant has sustained the more difficult burden of showing that respondent knowingly hired Garcia and Jacobo, despite their unauthorized status. And that knowledge may be proven by showing that respondent had either actual knowledge or constructive knowledge. *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307, 37–38 (1991).

The regulations implementing IRCA's employment verification system at 8 C.F.R. section 274a.1(l)(1) provide:

The term "knowing" includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a reasonable person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work . . . ;
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

Complainant urges that respondent "knew the two individuals [Garcia and Jacobo] were unauthorized at the time of hire" and cites the following two (2) facts in support of that contention: 1) respondent did not comply with IRCA's Form I-9 employment verification requirements with respect to Garcia and Jacobo, and 2) Garcia and Jacobo had orally informed respondent that they were unauthorized for employment and in the United States unlawfully at the time of hire. We must therefore assess whether complainant has submitted



sufficient probative evidence to establish the foregoing factual scenarios that it contends are relevant and, if it has successfully done so, whether those facts are sufficient to establish the scienter element as a matter of law.

In the July 17, 1997 Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision, it was found that respondent failed to ensure that Garcia and Jacobo properly completed section 1 of the Forms I-9 and that respondent had failed to properly complete section 2. It is therefore undisputed, as complainant has argued, that respondent's employment verifications with respect to Garcia and Jacobo were inadequate. However, a verification failure in violation of IRCA's paperwork requirements by itself is not sufficient to establish the knowing element of an alleged knowing hire violation without other probative evidence corroborating the scienter element. *United States v. Valdez*, 1 OCAHO 91, at 610 (1991) ("mere failure to prepare an I-9 Form is not proof of knowledge").

In *Valdez*, the Administrative Law Judge noted that the legislative history of IRCA establishes that the failure to complete "an I-9 Form, in and of itself, was not intended to constitute" a knowing hire violation. *Id.* The Administrative Law Judge was satisfied that complainant had successfully shown, by introduction of other probative evidence, that the employer had knowledge of the employee's unauthorized status: "[r]espondent's failure to prepare an I-9 Form, when coupled with her conscious avoidance of requiring knowledge as to the identification of her employees, provide believable circumstantial evidence of her knowledge of an employee's unauthorized status." *Id.*

In addition to asserting employment verification failures, complainant has submitted the sworn statements given by Garcia and Jacobo while in INS custody on April 6, 1998. In his sworn statement, Jacobo stated that he last entered the United States without inspection on September 22, 1993. Jacobo further stated that at the time of hire respondent's manager asked to see his work authorization documents whereupon he told the manager that he had none and that he was in the United States unlawfully.

Garcia stated that he last entered the United States without inspection in August, 1994, and that on April 6, 1995 he was employed at respondent's place of business in Long Island City, New York. He

further stated that on the date of hire the respondent also requested to see work authorization documents and that he informed respondent, as Jacobo has also done, that he had none and that he was in the United States illegally.

A party opposing summary decision must set forth specific facts showing that there is a genuine issue for trial. Although respondent's counsel, Raymond Aab, Esquire, filed a response to complainant's dispositive motion, it clearly fails to raise a genuine issue of material fact. The response consists of two (2) paragraphs. In the first, Mr. Aab advises that he has been unable to communicate with his client "over the past several months". Mr. Aab has on previous occasions advised this Office of his inability to communicate with his client. The only reasonable inference to be drawn from that information is that respondent does not intend to defend these charges.

Mr. Aab has also objected to the use of the sworn statements of Garcia and Jacobo unless those individuals are made available for cross-examination. The purpose of summary decision is to avoid an unnecessary trial where there is no genuine issue as to any material fact. *United States v. Villages-Valenzuela*, 5 OCAHO 784, at 9 (1995). To defeat a summary decision motion, respondent may not rest upon mere denials nor may it rely upon an allegation that an evidentiary hearing or opportunity for cross-examination will result in a dispute of material fact. *Id.* No further arguments and facts, by way of affidavits or otherwise, have been offered by Mr. Aab.

It should be noted that IRCA statutorily provides a good faith defense for knowing hire violations at 8 U.S.C. §1324a(a)(3): "A person or entity that establishes that it has complied in good faith with the requirements of [the employment verification system] with respect to the hiring . . . for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated [section 1324a(1)(A)]." The general rule in federal courts and in OCAHO cases is that a failure to plead an affirmative defense in the first responsive pleading or by motion within a reasonable time after an answer is filed results in a waiver. Because respondent did not assert this defense in its answer nor in its memorandum opposing summary decision, respondent may fairly be said to have waived the "good faith" defense. *Travellers International, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1581 (2d Cir. 1995).

Accordingly, complainant's uncontroverted evidence has demonstrated that respondent had failed to properly complete the Forms I-9 relating to Garcia and Jacobo, and that Garcia informed respondent of his unauthorized status, as did Jacobo, at the time of hire. It is therefore found that complainant has met its burden of demonstrating by a preponderance of the relevant and credible evidence that respondent had at least constructive, if not actual, knowledge that Garcia and Jacobo were unauthorized for employment in the United States at the time of hire. *United States v. Sergio Alanaz d/b/a La Segunda Downs*, 1 OCAHO 297, at 1967 (1991) (unauthorized alien employees' sworn statements, properly authenticated, sufficient to establish knowledge element in absence of any counter-ing evidence).

In summary, because complainant has demonstrated that there is no genuine issue of material fact with regard to the two (2) violations set forth in Count I, and has also shown that it is entitled to summary decision as a matter of law, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's January 22, 1998 Second Motion for Summary Decision is being granted as it pertains to respondent's liability for the two (2) section 1324a(a)(1)(A) facts of violation alleged in Count I.

The civil money penalty sums which must be assessed in connection with the two (2) proven illegal hire violations in Count I ruled upon in this Order, together with a mandatory cease and desist order, are those set forth in the provisions of 8 U.S.C. §1324a(e)(4), and range from the required minimum amount of \$250 to \$2,000 for each unauthorized alien.

The civil money penalty sums which must be assessed in connection with the 27 proven paperwork violations in Counts II and III, previously ruled upon on July 17, 1997, are those provided in the provisions of 8 U.S.C. §1324a(e)(5), and range from the statutorily-mandated minimum sum of \$100 to a maximum sum of \$1,000 for each proven infraction.

The appropriate civil money penalty sums for each proven paperwork violation will be determined by giving due consideration to the five (5) statutory criteria listed therein, (1) size 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 unauthorized alien, and (5) the history of previous violations.

In lieu of an adjudicatory hearing for that purpose, the parties may file written concurrent briefs or memoranda containing recommended civil money penalty sums for the 29 proven violations and those filings are to be filed by Friday, March 20, 1998.

JOSEPH E. MCGUIRE  
Administrative Law Judge