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

March 9, 1992

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 91100085
ULYSSES, INC. AND ULYSSES RESTAURANT GROUP, INC. AND OTTIS GUY TRIANTIS, INDIVIDUALLY AND GUS OTTIS TRIANTIS, INDIVIDUALLY, ALL T/A WELLINGTON'S RESTAURANT, Respondents.	)	

ORDER GRANTING COMPLAINANT'S
MOTION FOR PARTIAL SUMMARY DECISION

On May 20, 1991, the Immigration and Naturalization Service (complainant) initiated this proceeding by filing a four-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), naming as respondents therein Ulysses, Inc., Ulysses Restaurant Group, Inc., Ottis Gus Triantis, and Gus Ottis Triantis, all trading as Wellington's Restaurant.

The Complaint alleged several violations of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986). Specifically, complainant alleged that the respondents hired the two individuals listed in Count I, knowing that they were aliens not authorized for employment in the United States, in violation of 8 U.S.C. §1324a(a)(1)(A), and §274A of the Immigration and Nationality Act. Additionally, the complainant alleged that the respondents also failed to properly prepare the required Employment Eligibility Verification Forms (Forms I-9) for the individuals listed in Counts II,

III, and IV, in violation of 8 U.S.C. §1324a(a)(1)(B), and §274A of the Immigration and Nationality Act.

On June 26, 1991, counsel representing all respondents filed separate answers for each respondent, in which each respondent denied involvement or responsibility for the alleged violations.

On July 12, 1991, complainant filed a pleading captioned First Motion to Compel Discovery, in which it averred that on May 31, 1991, respondents had received complainant's First Request for Production of Documents, as well as complainant's First Set of Interrogatories, and that respondents had failed to respond or object to any portion of those discovery requests.

In that motion, complainant requested that respondents be ordered to respond to those discovery requests, in accordance with the provisions of the pertinent procedural regulation, 28 C.F.R. §68.23(a).

On August 19, 1991, respondents filed the required discovery replies, which consisted of answers to the interrogatories, production of docu-ments, and responses to complainant's requests for admissions. Following receipt of those discovery replies, complainant filed a second Motion to Compel Discovery, together with a supporting memorandum, in which complainant acknowledged that respondents had submitted answers to the interrogatories and requests for admissions, and that respondents had provided some documents in response to the request for documents, but complainant stated that most of respondents' answers were either inadequate or incomplete.

As a result, complainant requested that the undersigned order respondents to completely and adequately reply to the interrogatories, requests for admissions, and request for production of documents, in accordance with the provisions of 28 C.F.R. §68.23.

After reviewing respondents' submitted responses to the interrogatories, requests for admissions, and requests for production of documents, the undersigned concluded that the responses were inadequate and incomplete.

Accordingly, on September 27, 1991, the undersigned issued an Order Granting Complainant's Second Motion to Compel Discovery, in which respondents were ordered to fully comply by having furnished to complainant the pertinent documents, answers to the interrogato-

ries, and requests for admissions, within 15 days of their acknowledged receipt of that order.

Respondents were further advised therein that in the event that any or all of the respondents failed to comply fully with the provisions of that order, the undersigned would impose sanctions from among those enumerated at 28 C.F.R. §68.23.

On October 18, 1991, because respondents still had not responded to the September 27, 1991 order, complainant filed a Motion for Sanctions, in which it requested that the undersigned impose sanctions as a result of respondents' failure to comply with the orders of July 10, 1991 and September 27, 1991.

As of November 20, 1991, respondents had not complied with the undersigned's orders of July 10, 1991 and September 27, 1991, by providing full and complete replies to the various discovery requests. As a result, the undersigned granted four of the eight sanctions which complainant had requested, all four of which are provided for in 28 C.F.R. §68.23(c).

That section provides, in pertinent part, that the Administrative Law Judge may impose various sanctions for the purposes of permitting resolution of the relevant issues and disposition of the proceeding, and to avoid unnecessary delay.

For the purposes of permitting resolution of the relevant issues and disposition of the proceeding, the undersigned ordered the following requested sanctions:

1. That the undersigned infers and concludes that the answers to the interrogatories which were insufficient, unresponsive, or unanswered would have been adverse to all respondents, 28 C.F.R. §68.23(c)(1).

2. That for the purposes of this proceeding, the matter or matters concerning which the Orders Granting Complainant's First and Second Motions Compelling Discovery is/are taken as having been established adversely to all respondents, 28 C.F.R. §68.23(c)(2).

3. That the respondents may not introduce into evidence or otherwise rely upon testimony by respondents, their officers or agents, nor may respondents, their officers or agents, introduce into evidence

or otherwise rely upon documents or other evidence, in support of or in opposition to any claim or defense, 28 C.F.R. §68.23(c)(3).

4. That the respondents may not be heard to object to the introduction and use of secondary evidence by complainant in order to show what the withheld admissions, documents, answers to the interrogatories, or other discovery replies, would have shown, 28 C.F.R. §68.23(c)(4).

On December 26, 1991, following the imposition of those partial sanctions, complainant filed a Motion for Partial Summary Decision, in which complainant moved that the undersigned, pursuant to the provisions of 28 C.F.R. §68.38, grant a partial summary decision as to the respondents' liability for the violations charged in Counts I, II, III, and IV of the Complaint. In its motion, complainant seeks summary relief upon the grounds that there is no genuine issue as to any material fact with respect to the facts of violation alleged in Counts I, II, III, and IV, and it asserts that it is entitled to summary judgment as a matter of law.

Complainant also filed a Memorandum in Support of its Motion for Partial Summary Decision. In that memorandum, the complainant moved for summary decision on two issues, that the respondents are liable as charged in Counts I, II, III, and IV, for violations of Section 274A of the Immigration and Nationality Act, and secondly, that liability for all of the aforementioned violations is properly assessed against all four of the respondents.

We now examine the first of those issues, the alleged facts of violation. Complainant contends in its Motion for Partial Summary Decision that respondents are liable as charged in Counts I, II, III, and IV, for violations of Section 274A of the Immigration and Nationality Act.

In its memorandum, complainant points out that if the party moving for summary judgment demonstrates the absence of any genuine issue of material fact and any defense, and the responding party fails to set forth evidence of such an issue or defense, the judge should render summary judgment in favor of the moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Swart v. United States, 568 F. Supp. 763, 764-765 (D.C. Cal. 1982) aff'd mem, 714 F. 2d 154 (9th Cir. 1983) [summary

judgment granted in favor of IRS in action to impose a civil penalty against tax preparer for negligent disregard of IRS regulations].

Based on those rulings, complainant moves to establish the absence of any genuine issue of material fact and the absence of any defense. Complainant begins by stating that the undersigned's order of November 20, 1991 granted various sanctions pertaining to respondents' answers to complainant's First Set of Interrogatories and First Request for Production of Documents. Complainant explains that these sanctions apply to respondents' answers to interrogatories numbered 1, 2, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21, 26, 27, 28, 29, 31, 33, 38, 39, 40, 43, 44, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 66, 67, 68, 71, 72, 73, and 77. More specifically, complainant explains that the undersigned, in response to respondents continuing disregard of the undersigned's previous two orders compelling all four respondents to comply with the complainant's discovery requests, granted those sanctions which are provided for in 28 C.F.R. §68.23(c) against all four of the respondents.

In particular, this involved the inference and conclusion that the answers to the interrogatories which all of the respondents have failed to answer fully would have been adverse to all of the respondents. In addition, the matters covered by the order granting complainant's first and second motions compelling discovery are taken as having been established adversely to all respondents. In addition, that argumentation continues, respondents were prevented from introducing into evidence or otherwise relying upon testimony given by themselves or their officers or agents, nor could they introduce into evidence any claim or defense. Finally, the respondents could not be heard to object to the introduction and use of secondary evidence by complainant in order to show what the withheld admissions, documents, answers to the interrogatories, or other discovery replies would have shown.

Accordingly, complainant contends that these sanctions have the effect of supporting all factual allegations and arguments set forth in its memorandum in support of the pending Motion for Partial Summary Decision.

In support of that contention, complainant invites attention to respondents' unresponsive and insufficient answer to interrogatory number 73, which had prounded this inquiry:

If respondents deny that they violated Section 274A of the Immigration and Nationality Act as set forth in the Complaint and in the Notice of Intent to Fine, state each and every reason why respondents deny the charged violations and describe in detail all facts and information upon which these contentions are based for the following:

(a) Knowingly hired and/or continued to employ the two (2) individuals listed in Count I;

(b) Failed to ensure that employee completed properly section 1 of the Employment Eligibility Verification Form for the seventeen (17) individuals listed in Count II;

(c) Failed to complete properly section 2 of the Employment Eligibility Verification Form for the twenty-five (25) individuals listed in Count III;

(d) Failed to ensure that employee completed properly section 1 and/or failed to complete properly section 2 of the Employment Eligibility Verification Form.

Complainant contends that the imposition of the sanctions in the undersigned's order results in an answer to interrogatory number 73 that is adverse to all respondents, as well as an answer to which all respondents are barred from introducing any defense or contravening evidence.

Put simply, this means that none of the respondents can deny violating section 274A of the Immigration and Nationality Act, as alleged. Resultingly, complainant asserts, there remains no genuine issue of material fact and complainant is entitled to summary decision as a matter of law.

In further support of its Motion for Partial Summary Decision, complainant sets forth this same argument concerning its interrogatories numbered 1, 12, 13, 14, and 15. Complainant asserts that the effect of the sanctions upon interrogatory number 1 is an answer in which all respondents are placed in the adverse situation of stating that "they never had any knowledge of their employees dates of employment, salaries, duties, their reason for leaving or termination, citizenship immigration status or authorization for employment in the United States." Complainant further maintains that the net result of the adverse effect upon interrogatories 12 - 15 would be an answer that "respondents' employees never presented any documentation establishing identification and/or employment eligibility and that respondents have no reason to explain why any Form I-9 was not completed properly." Further, complainant points out that all

opposing respondents are barred from introducing testimony or other evidence concerning those issues.

In conclusion, complainant argues that based on the adverse effect of respondents' refusal to supply full and complete answers to interrogatories 1, 12, 13, 14, 15, and 73, there remains no issue of material fact, and therefore, complainant is entitled to summary decision as a matter of law, pursuant to the applicable section of the procedural regulations, 28 C.F.R. §68.38(c).

That rule provides that the Administrative Law Judge 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 a party is entitled to summary decision.

It should be noted that all respondents were warned on numerous occasions that their failure to comply with the undersigned's orders compelling discovery would result in the imposition of sanctions from among those enumerated at 28 C.F.R. §68.23. Despite those admonitions, all four respondents have failed to comply with the orders namely, that they provide complete and adequate replies to complainant's discovery requests.

As a result of that noncompliance, and as noted previously, the undersigned imposed various sanctions which are provided for in 28 C.F.R. §68.23, including the inference that respondents' answers to the interrogatories which were insufficient, unresponsive, or unanswered, would have been adverse to all of the respondents. Therefore, none of the respondents can introduce into evidence or otherwise rely upon testimony in support of or in opposition to any claim or defense.

Complainant also maintains that based upon those inferences, it should therefore be found and concluded that respondents' answers to complainant's interrogatories are adverse to all respondents. This adverse conclusion applies to all of the interrogatories which were insufficient or incomplete, including interrogatory 73. Accordingly, none of the four respondents can introduce evidence or deny that they violated Section 274A of the Immigration and Nationality Act by knowingly hiring and/or continuing to employ the two individuals listed in Count I, or that they failed to ensure that their employees properly completed section 1 of the Forms I-9 for the 17 individuals listed in Count II, or that they failed to properly complete section 2

of the Forms I-9 for the 25 individuals listed in Count III, or that they failed to ensure that the individuals listed in Count IV properly completed section 1 and/or failed to properly complete section 2 of their Forms I-9.

Thus, there remains no genuine issue of material fact concerning the allegations that the respondents violated the provisions of Section 274A of the Immigration and Nationality Act, as charged in Counts I, II, III, and IV of the Complaint. Accordingly, the complainant, pursuant to the provisions of 28 C.F.R. §68.38(c), is entitled to summary decision on the facts of violation alleged in the Complaint.

The second issue posited in complainant's memorandum in support of its Motion for Partial Summary Decision concerns the imposition of liability against all four of the named respondents as concerns the civil money penalties which may be appropriately assessed for those alleged violations.. More specifically, complainant contends that liability for all of the violations is joint and several and is properly assessed against all of the four named respondents: Ulysses, Inc., Ulysses Restaurant Group, Inc., Ottis Triantis and Gus Triantis.

On January 24, 1992, the four named respondents jointly filed a pleading captioned Opposition to Complainant's Motion for Summary Decision, urging that liability should not be imposed against the individual respondents, Ottis Gus Triantis and Gus Ottis Triantis, or against Ulysses Restaurant Group, Inc.

Respondents argue that liability should not be imposed on Ulysses Restaurant Group, Inc and rely upon the ruling in Bart-Arconti & Sons, Inc. v. Ames-Ennis, Inc., 275 Md. 295, 340 A.2d 225 (1975). Respondents contend that the Arconti case mandates that in order for one corporation to be held liable for the debts of another, it must be shown that it is a successor corporation, per se. Respondents also urge that the Arconti ruling announced that in order to be found to be a successor corporation, the new corporation must at least have the same stockholders and officers. Respondents point out that Susie Harrision and Elizabeth Triantis Blick own all but two of the outstanding 100 shares of Ulysses Restaurant Group, Inc, and that they owned no stock in Ulysses, Inc. Additionally, of the corporate officers of Ulysses Restaurant Group, Inc., only one was also an officer of Ulysses, Inc. For these reasons, respondents maintain that Ulysses Restaurant Group, Inc., is not a successor to Ulysses, Inc.,

and therefore, it should not be found liable for the violations charged in the Complaint.

Complainant counters that argument by urging that in ruling in Colondrea v. Colondrea, 42 Md. App. 421, 401 A.2d 480 (1979), that court found that where, as here, the shareholders and directors are practically the same as those in the predecessor corporation, the shareholders and officers of a successor corporation are liable for the debts of the former corporation.

Complainant further disagrees and believes that liability should be found against all of the four named respondents. Complainant con-cedes that it is difficult to know the real reason or reasons why Ulysses, Inc. transferred its assets to Ulysses Restaurant Group, Inc., but points to the fact that the bank account held by Ulysses, Inc. at the Madision Bank of Maryland was closed just two days following the service of the original Notice of Intent to Fine on Ulysses, Inc. Complainant maintains that Ulysses Restaurant Group, Inc. is merely a continuation of Ulysses, Inc. Accordingly, complainant argues that Ulysses Restaurant Group, Inc. is a successor corporation and should be held liable.

In advancing that argument, complainant and relies upon the ruling in U.S. v. ABC Roofing & Waterproofing, Inc., OCAHO Case No. 89100389 (February 19, 1991) (Order Denying Motion to Dismiss and Denying Permission for Counsel to Withdraw) to support that argument. Complainant explains that that case involved a closely held family run business in which the respondent claimed that the proceeding against it was moot due to respondent's corporate charter having been forfeited for failure to file reports required by the state.

The Administrative Law Judge responded to that argument by finding that the government would no doubt be authorized to pursue respondent in whatever transformed entity it may have become. Complainant analogizes the case at issue to the ABC case and contends that liability must be assessed not only against the corporation operating Wellington's Restaurant at the time of the investigation, Ulysses, Inc., but also against the disguised entity which it later became, Ulysses Restaurant Group, Inc.

Complainant bases this conclusion on the fact that there is a clear continuity of family ownership, management, employment, licensing and control of finances between Ulysses, Inc. and Ulysses Restaurant

Group, Inc. Additionally, complainant points out that the physical location of the establishment is identical and that the operational name, Wellington's Restaurant, remains unchanged, also. Moreover, 77 of Ulysses, Inc.'s 99 employees were retained by the newly formed Ulysses Restaurant Group, Inc. and the newly-chartered corporation continues to withhold taxes, create payroll records and submit reports to the U.S. Department of Labor, and is doing so as Ulysses, Inc., and not as Ulysses Restaurant Group, Inc.

Complainant also contends that the successor corporation was formed only after the owners and management of Wellington's Restaurant and the Triantis family were cited for having allegedly violated the provisions of IRCA and were subject to a civil money penalty, since Ulysses, Inc. had been previously issued a citation by INS for identical Section 274A violations as those alleged in the Complaint at issue.

Respondents maintain that Ulysses, Inc. was the corporate entity operating Wellington's Restaurant at the time of the INS investigation and issuance of the NIF, and therefore, only that corporate entity should be found liable. However, complainant asserts that the recently created Ulysses Restaurant Group, Inc., which presently operates Wellington's Restaurant, should also be found liable since it is but a disguised continuance or a mere continuation of Ulysses, Inc. Complainant insists that the corporate entities are largely paper arrangements that do not reflect the business realities of the enterprises.

Complainant further maintains that this disguised continuation is clearly shown by bank records, by the further fact that all three officers of Ulysses Restaurant Group, Inc. were also employees of Ulysses, Inc., and also, as noted previously, because recent reports to the U.S. Department of Labor were submitted under the name of Ulysses, Inc. In addition, all three signatories for Ulysses Restaurant Group, Inc. were employees of Ulysses, Inc., and all are the children of Ottis Triantis.

In urging that Ulysses Restaurant Group, Inc. be found liable, owing to its being a successor corporation to Ulysses, Inc., complainant relies upon the ruling in NLRB v. Ozark Hardwood Company, 282 F.2d 1 (8th Cir. 1960), a case in which the stockholders of the successor corporation were the same as those of the original corporation, with the exception of one previous stockholder's wife having taken her

husband's former place. In that case, complainant points out, the successor corporation re-opened the plant within 10 days after the original corporation closed, reemployed 114 of the 117 previous employees, and immediately resumed those operations in which the original corporation had engaged. In addition, the former stockholder remained at the plant as an advisor and in a few months returned to the position of general manager, while his wife continued to hold their stock in the new corporation. In ruling on those facts, the Eighth Circuit found that it is possible for a business to have the significance and effect of a disguised continuance of an old employer, without ownership identity necessarily existing, where such business allows itself to be a substitute in carrying some or all of the operations of the old employer, under a relationship serving to benefit the latter's owners and intended as one of cooperation with them in evading the consequences.

Complainant maintains that this scenario has been duplicated in the case of Wellington's Restaurant. More specifically, it asserts that in the case at issue there is continuity in family ownership, management, and control of the finances of Wellington's Restaurant, as well as continuity and overlapping of licensing, reporting to the U.S. Department of Labor, and payroll records. Complainant argues that the only difference is that the corporate name has been changed from Ulysses, Inc. to Ulysses Restaurant Group, Inc. Furthermore, it argues that this new entity continues to carry on all of the operations of Ulysses, Inc., while claiming it is not liable for the violations charged because it did not come into existence until after the INS investigation and the issuance of the citation at issue.

Complainant further challenges respondents' contention that only Ulysses, Inc. is liable under the facts. By noting that Ulysses, Inc., which was in existence at the time of the investigation and no longer has any assets, complainant further urges that this is not a fortuitous happening, but one which the respondents have arranged in order to avoid liability by virtue of what is essentially a paper transfer of assets, ignoring the reality of the operation of Wellington's Restaurant.

Complainant insists that the creation of the new corporate entity has not resulted in a bona fide discontinuation of operations and/or a change of ownership. Instead, it insists that Ulysses Restaurant Group, Inc. is merely a disguised continuance of the old employer, Ulysses, Inc., rather than a distinct and different enterprise. Complainant maintains that as the alter ego of Ulysses, Inc., Ulysses

Restaurant Group, Inc. should be held responsible for the violations committed and detailed in the Complaint.

Moreover, complainant contends that respondents' actions in attempting to avoid liability here replicate those of the defendant in NLRB v. C.C.C. Associates, Inc., 306 F.2d 534 (2d Cir. 1962), a case in which the Board had entered a back pay award against the defendant, but the defendant refused to comply, claiming that it had no assets with which to pay the award. The Board alleged that the three officers, a husband and wife and a third unrelated person, took steps to cause the corporation to cease operating. These officers then had the corporation pay monies over to them, which resulted in the corporation being unable to pay the monetary portion of the Board's decree. Subsequently, the business was transferred to a newly created corporate entity, which was primarily owned by a former officer of the original corporation, with the remaining shares held by her family member. In that case, the court found that the second corporation was the successor of the first and was responsible for carrying out the monetary provisions of the decree. Complainant insists that under the facts at issue, the same scenario is being created and that the same result should obtain.

Complainant also bolsters its argument that Ulysses Restaurant Group, Inc. should be held liable for the charged violations because it is a successor to Ulysses, Inc., by noting that under Maryland law this principle of corporate successor liability is followed. Baltimore Luggage Company v. Holtzman, 562 A.2d 80 Md. App. 282 (1989); 562 A.2d 1286 (1989), Colondrea v. Colondrea, supra.

Complainant reiterates its assertion that Ulysses Restaurant Group, Inc. should be held liable because this case involves a restaurant whose ownership was changed in name only and notes that the identity of the stockholders and corporate officers changed from father, mother and son, to the son and two daughters. Furthermore, this substitution occurred without any change in the operations of the restaurant. Gus Triantis continued in his capacity as manager of operations of the restaurant, which continued to operate with 77 out of the 97 individuals who had been previously employed by Ulysses, Inc.

Accordingly, complainant argues that the reasoning in the aforementioned cases should therefore be applied to assess liability against

Ulysses Restaurant Group, Inc., also, since it is a mere continuation of Ulysses, Inc.

Respondents argue that based upon the Arconti ruling Gus Triantis and Ottis Triantis should not be found individually liable since that decision contains the finding that Maryland shareholders are not generally held individually liable for debts or obligations of the corporation except where necessary to prevent fraud or enforce a paramount equity. Respondents maintain that since complainant has not suggested any fraud or any such paramount equity, the individual respondents, Gus Triantis and Ottis Triantis, cannot be found liable for violations which were committed by Ulysses, Inc., the corporation then in existence.

Complainant maintains that liability is correctly placed against all respondents, arguing that both Gus Triantis and Ottis Triantis are liable because both are employers, as that term is defined at 8 C.F.R. §274a.1(g). Complainant points out that under that regulatory definition "the term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the service of labor of an employee to be performed in the United States for wages or other ....."

Complainant next maintains that the individual liability of Ottis Triantis and Gus Triantis arises from the fact that Wellington's Restaurant has been and continues to be run as a family business. Complainant contends that Ulysses, Inc. and Ulysses Restaurant Group, Inc., have not been operated as formal corporations. To support this contention, complainant points out that there has been little attention paid to the timely transfer of license(s), as well as the filing of articles of dissolution, merger or transfer, as required under the corporate laws of Maryland. In addition, there are no annual reports on file with the Maryland Department of Assessments and Taxation for either corporation, and no serious attention was given to holding stockholder or board of director meetings. Complainant maintains that the corporate entities here serve only as a name for a continuing family run business, and that the real employers in this case are Ottis and Gus Triantis. Therefore, complainant argues, these individual respondents clearly fall within the definition of an employer set forth at 8 C.F.R. §274a.1(g).

Complainant asserts that the informal corporate entities through which the Triantis family operates Wellington's Restaurant appear to

exist for the sole purpose of shielding the individual respondents from liability. To support this assertion, complainant points out that Wellington's Restaurant continues to operate by filing payroll accounts and reports to the U.S. Department of Labor as Ulysses, Inc. In addi-tion, Gus Triantis continues to control the operations of Wellington's Restaurant for Ulysses Restaurant Group, Inc., as he did for Ulysses, Inc.

Complainant further maintains that the discovery replies prove that in running the business there has never been a clear break in any aspect of the operation to signify a truly new and/or different control or ownership of Wellington's Restaurant. For instance, the four family members on the payroll records previous to the sale to Ulysses Restaurant Group, Inc. on December 31, 1990, continue to appear in the employee payroll for the first quarter of 1991 records. In addition, 77 out of the 97 employees of Ulysses, Inc. appear there as well. Complainant argues that the Triantis family as a whole continues to be the controlling power with the corporate formations acting merely as a shield. It explains that the continuity and overlapping of ownership, management, employees, job duties, licensing, reporting and financial control between the corporations show the disregard of the corporate entities by the Triantis family. Complainant contends that considering the nature of this small, family-run business, the undersigned should view the individual respondents as though the corporations did not exist, in order to prevent their evasion of the legal obligations imposed by IRCA.

Complainant also urges the undersigned to consider the corporate entities to be a fiction, and deal with the substance, and not the form, of Ulysses, Inc. and Ulysses Restaurant Group, Inc. Complainant insists that Ottis Triantis and Gus Triantis are the owners and operators of the business known as Wellington's Restaurant, and thus, the actual employers of the individuals listed in the Complaint.

Complainant, as noted previously, bases this argument on the definition of the term "employer", as set forth at 8 C.F.R. §274a.1(g), which provides that an employer is a person or entity, including anyone acting directly or indirectly in the interest thereof, who engages the service or labor of an employee.

Complainant also relies on the ruling in United States v. Wrangler's Country Cafe, Inc., and Henry D. Steiben, Individually, 1 OCAHO 138,

in which respondent Steiben's motion to dismiss the complaint against him individually was denied.

That decision was appealed to the United States Court of Appeals for the Eighth Circuit, which found that the INS was within its authority in finding Steiben, a corporate officer, personally liable for violations of IRCA. Steiben v. Immigration and Naturalization Service, 932 F. 2d 1225 (8th Cir. 1991).

Complainant contends that the facts in the Steiben case closely parallel those at issue, Steiben having incorporated Wrangler's eight months previous to the filing of the complaint, but he failed to file any additional reports with the Missouri Secretary of State, nor did he file articles of dissolution or liquidation after ceasing operations.

Additionally, complainant points out that during the time in which Wrangler's existed Steiben exercised exclusive control over the opera-tion of the business as proprietor and chief executive officer.

Since the Eighth Circuit found in the Wrangler case that it was appropriate to impose personal liability upon individuals who might otherwise hide behind the shield of corporate existence, complainant contends that this principle should also be applied to Gus Triantis and Ottis Triantis. That because they have also violated the provisions of IRCA and are not entitled under these facts to those liability insulating provisions available to bona fide corporate entities.

For the following reasons, I find that all four of the named respondents are liable for all of the violations set forth in Counts I, II, III, and IV of the Complaint.

Factually, the ruling most closely analogous to the facts at issue is U.S. v. Wrangler's Country Cafe, supra. In that case, a complaint was filed against Wrangler's Country Cafe, Inc., and Henry D. Steiben, jointly, for violating IRCA by having hired three individuals knowing that they were not authorized for employment. Respondent Steiben moved to dismiss the action as to him because he contended that personal liability could not be imposed since he was protected by the existence of a corporate entity, Wrangler's Country Cafe, Inc. He contended that the corporation was the legal employer of the aliens, rather than himself, as an individual. The INS responded that the regulation defining an employer included a person who acts directly or indirectly as an agent of the employer. And INS argued that

respondent Steiben could be held personally liable for the obligations of the corporate entity on a theory of piercing the corporate veil, since the facts allegedly demonstrated that Steiben did not adhere to the requisite legal corporate formalities and had created the corporation as a means of perpetrating a fraud upon his creditors.

In his ruling, the Administrative Law Judge explained that the applicable regulation, 8 C.F.R. §274a.1(g), provided that the term employer means a person or entity who engages the services or labor of an employee. He further found that the complainant's attempt to hold respondent Steiben responsible for such violations was justified since the INS was specifically empowered to devise implementing regulations and it had determined that the purposes of IRCA would best be served by placing personal liability upon individuals who might otherwise hide behind the shield of corporate entities. The Administrative Law Judge also found respondent Steiben personally liable, concluding that Steiben was attempting to hide behind the shield of a corporate entity, based upon the fact that the corporation involved had never undertaken to observe even the most basic formalities of corporate existence, such as issuing stock, maintaining a corporate minute book, appointing officers and directors, or filing any reports or any articles of dissolution or liquidation with the Secretary of the State. In addition, respondent Steiben had personally hired the three unauthorized aliens.

Steiben appealed the Administrative Law Judge's findings that Steiben was personally liable for the violations and, as noted earlier, the Eight Circuit Court of Appeals agreed with the judge's findings and affirmed.

Respondents herein argue that Gus Triantis and Ottis Traintis should not be held personally liable for the violations. However, the regulations provide that the term "employer" means a person, or an entity, who engages the services or labor of an employee. With this in mind, the undersigned must consider complainant's assertion that the personal liability of these two individual respondents arises from the fact that Wellington's Restaurant has been and continues to be run as a family business. Complainant points to the sales agreement dated December 31, 1990, which states that the buyers, including Gus Triantis, are presently operating the restaurant known as Wellington's Restaurant. Additionally, complainant maintains that at the time of the INS investigation in July of 1990, both Ottis Triantis and Gus Triantis functioned in an ownership/managerial capacity in operating

Wellington's Restaurant. Finally, complainant points to interrogatory number 51 in which Gus Triantis states that "I was the Director of Operations for Ulysses, Inc. I hired and supervised personnel. As president of Ulysses Restaurant Group, Inc., my functions are basically the same."

Based upon the information disclosed through the discovery materials provided, I find that the situation at hand is almost identical to that in the Wrangler case. The individual respondents, Gus Triantis and Ottis Triantis, are in fact the real employers. When the original corporation was succeeded by the new corporation, there was no substantive change in the business structure, interest, operations, or job situations. Wellington's Restaurant continued to operate under the control of the Triantis family. Gus Triantis continued to supervise, just as he did for the former Ulysses, Inc.

Accordingly, I find that both Gus Traintis and Ottis Triantis were the real employers, and therefore, both are individually liable for the violations.

In summary, I find that the four named respondents are jointly and severally liable for all of the alleged violations contained in Counts I, II, III and IV of the Complaint.

Accordingly, Complainant's Motion for Partial Summary Decision is granted as to the facts of violation alleged in Counts I, II, III, and IV of the Complaint.

Appropriate civil money penalties for those violations will be ordered, in accordance with the provisions of 8 U.S.C. §§1324(e)(4), 1324(e)(5), following an evidentiary hearing conducted solely for that purpose.

In that connection, a telephonic pre-hearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be scheduled at a location most convenient to the parties, their witnesses, and counsel.

JOSEPH E. MCGUIRE
Administrative Law Judge