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

United States of America, Complainant v. Juan V. Acevedo, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100397.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History and Relevant Facts

This proceeding was initiated on August 16, 1989, when Complainant filed a Complaint alleging violations of Title 8 of the United States Code § 1324(a)(1)(B) and 8 C.F.R. §§ 274a.2(b)(1)(i)(A), 274a.2(b)(1)(ii)(A) and (B), which provide that is is unlawful for a person or entity to hire for employment in the United States individuals without complying with the verification requirements as set forth in the enumerted statute.

Respondent filed an Answer to the Complaint on September 8, 1989. In its Answer, Respondent admitted all the allegations contained in the Complaint.

On September 1, 1989, Complainant, pursuant to 28 C.F.R. § 68.36, filed a Motion for Summary Decision. In its Motion, Complainant contended that Respondent's admissions to the Notice of Intent to Fine (``NIF'') constituted a basis for concluding that there was no genuine issue of material fact in this case and that Complainant was entitled to a judgment as a matter of law. In support of its Motion, Complainant attached as exhibits twelve I-9 Forms for the 12 employees named in Count II of the NIF.

Respondent, through counsel, filed a ``Reply to Complainant's Motion for Summary Decision'' on September 19, 1989. In its Reply, Respondent does not dispute that it admitted the allegations on the Complaint, but asserts that there are mitigating factors which should be considered in assessing the amount of penalty.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by dis-

covery or otherwise . . . 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. § 68.36 (1988); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.''); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact.).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/ summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be ``particularized'' in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (``. . . the standard of `well-controlled investigations' particularized by the

regulations is a protective measure designed to ferret out . . . reliable evidence. . . .).

III. Legal Analysis Supporting Summary Decision

After examining the pleadings and reviewing the legal arguments presented by both sides in this case, I have concluded that there is no genuine issue of material fact and that Complainant is entitled to summary decision. 28 C.F.R. § 68.36(c).

Respondent, as I have noted and emphasized, is represented by legal counsel. Nowhere in its pleadings, however, does Respondent indicate a willingness to contest liability. On the contrary, in several different pleadings, Respondent clearly and unambiguously admits liability on both Count I and Count II of the Complaint.

Thus, for the purpose of analyzing Complainant's Motion for Summary Decision, it is my view that, on the basis of Respondent's admissions, there is no need to proceed with a trial on the merits because there is no genuine issue as to any material fact. See, Celotex Corp. v. Catrett, supra.

Accordingly, for the foregoing reasons, I find that Respondent has violated § 1324a(a)(1)(B) of Title 8 of the U.S.C. in that Respondent hired for employment in the United States those individuals named in all counts of the Complaint without complying with the verification requirements provided for in § 1324a(b) of Title 8; and 8 C.F.R. §§ 274a.2(b)(1)(i)(A), 274a.2(b)(1)(ii) (A) and (B).

CIVIL PENALTIES

Since I have found that Respondent has violated § 1324a(a)(1)(B) of Title 8 in that Respondent hired, for employment in the United States, individuals without complying with the verification requirements in § 1324a(b) of the Act, and 8 C.F.R. §§ 274a.2.(b)(1)(i)(A) and 274a.2(b)(1)(ii) (A) and (B), with respect to all counts of the Complaint, assessment of civil money penalties are required as a matter of law. See, § 1324a(e)(5).

Section 1324a(e)(5) states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in a amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The regulations reiterate the statutory penalty provision including the mitigating factors which should be taken into consideration for paperwork violations. See 8 C.F.R. § 274a.10(b)(2).

I recently discussed my view of the statutory and regulatory language regarding mitigation of penalty for record-keeping violations. See, United States v. Felipe Cafe, OCAHO Case No. 89100151 (October 11, 1989) I intend to apply the suggested standards of mitigation specified in Felipe to the facts in this case.

As stated, there are two counts in the Complaint and both involve record-keeping violations. Count I involves Respondent's failure to prepare in any way I-9 form for one named individual. Count II involves Respondent's failure to complete section 2 of the I-9 form for twelve (12) named individuals.

A. PENALTY ASSESSMENT FOR COUNT I

Complainant suggests the statutory maximum civil money penalty of $1,000.00 for Court I. As stated in Felipe, the maximum possible amount of mitigation is $900.00. There are, as indicated above, five (5) specified grounds of mitigation. Accordingly, I view each mitigating factor as constituting an amount of $180.00. See, Felipe, supra, at 5.

With respect to Respondent's size of business, I view it as being a small mid-size and am prepared to mitigate penalty in the amount of 75% or $135.00. My reason for coming to this conclusion is that, according to Respondent's affidavit, the harvesting business grosses $400,000.00 per annum, nets approximately $65,000.00 per annum, and employs 35-40 employees in government contracts in national forests.

With respect to good faith, I note that Respondent has presented no facts and made no argument whatsoever in support of mitigating penalty on account of good faith. Though the statute does not specify burden of persuasion with respect to considerations of mitigating penalty for record-keeping violations, it is nevertheless my view that it is the burden of the liable party to present evidence why the penalty should be mitigated pursuant to § 1324a(e)(5). Accordingly, it is my view that Respondent has not met its burden of proof to demonstrate why it should be entitled to mitigation of penalty on account of good faith.

In addition, I find the violation specified in Count I to be serious because it involves a complete failure to prepare an I-9 Form for the named individual. See, Felipe, supra, at 11. Accordingly, I do not intend to mitigate penalty in any amount on account of this factor of consideration.

With respect to the fourth mitigating factor of consideration, it is undisputed that the individual named in Count I was an alien unauthorized to work in the United States. Accordingly, I do not

intend to mitigate penalty in any amount on account of this factor of consideration.

Finally, it is also undisputed that Respondent had no prior IRCA violations. Therefore, I intend to mitigate penalty in full on account of this factor of consideration.

Added up, I conclude that Respondent is entitled to mitigation of penalty in the amount of $315.00 for the above-specified reasons. Accordingly, I find that the amount of penalty for Count I is $ 685.00.

B. ASSESSMENT OF PENALTY FOR COUNT II

My consideration of size of business and good faith as mitigating factors for Count II is exactly the same as for Count I. In other words, it is my view that the amount of penalty for the size of the business should be mitigated 75% or $135.00 for each violation contained in Count II on account of the reasons stated above. Also, as stated above, I do not believe Respondent is entitled to mitigation on account of good faith because it did not present any facts or make any argument in support of such mitigation.

With respect to the seriousness of the violation, I view each of the twelve violations specified in Count II to be serious because Respondent failed to properly complete and sign section 2 of the I-9 forms. See, Felipe, supra. at 11. Section 2 of the I-9 form is the ``Employer Review and Verification'' section and is the very heart of the verification process initiated by Congress in IRCA. Failure to complete any part of section 2, including an employer's failure to sign his or her name is, in my view, a serious violation. Accordingly, I do not intend to mitigate penalty for any of the violations specified in Count II because I consider each of them to be ``serious.''

It is undisputed that none of the individuals named in Count II were aliens unauthorized to work in the United States. Accordingly, I intend to mitigate penalty in full for each of the violations on account of this factor of consideration.

Similarly, it is undisputed that Respondent had no prior IRCA violations, and, therefore, I intend to mitigate in full the amount of penalty due to this factor of consideration.

Summed up, I conclude that Respondent is entitled to mitigation of penalty in the amount of $5,940.00.[1] Accordingly, I find that the amount of penalty for Count II is $6,060.00.[2]

C. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue as to any material facts have been shown to exist with respect to Counts I and II of the Complaint; and, that therefore, pursuant to 8 C.F.R. § 68.36, Complainant is entitled to a summary decision as to all counts of the Complaint as a matter of law.

2. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in Counts I and II without complying with the verification requirements in § 1324a(b), and 8 C.F.R. § 274a.2(b)(1)(i)(A) and (ii)(A)&(B).

3. The Complainant is entitled to a civil monetary penalty to be assessed against the Respondent for Count I of the Complaint in an amount of six hundred eighty-five dollars ($685.00) and for Count II in an amount of six thousand sixty dollars ($6,060.00) for a total amount of six thousand seven hundred forty-five dollars ($6,745.00).

4. That, pursuant to 8 U.S.C. § 1324a(e)(6) and as provided in 28 C.F.R. § 68.52, this Decision and Order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 12th day of October, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

[1]This figure is arrived at as follows. I found mitigation in the amount of $135.00 (on account of size of business) for each of the 12 violations. Therefore, $135.00 x 12 =$1,620.00. I also found full mitigation on account of there being no unauthorized aliens nor any prior history of IRCA violations. Therefore, 2 x $180.00 x 12 = $4,320.00. Added together, these amounts = $5,940.00.

[2]This figure is arrived at as follows. The statutory maximum amount of penalty is $12,000.00. ($12,000.00 minus the amount mitigated ($5,940.00) = $6,060.00.)