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

United States of America, Complainant v. Ramada Inn Old Town, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100364.

ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

A. Procedural History

On or about September 18, 1989, Respondent, who is acting pro se, served on Complainant a ``Request to Produce Documents.''

Respondent's ``Request to Produce Documents'' sets out nine separate requests to produce documents in enumerated paragraphs. Paragraph one of the Request seeks inter alia Complainant's complete files covering all activities from the period June 1, 1987, to date, for Respondent including but not limited to agent's reports, summaries, comments, tabulations and notes, memorandums of meetings and telephone conversations, fee and fine calculations, research notes and references and all other letters, interoffice memoranda and writings. Paragraphs 2-9 of the Request for Production seeks all the materials requested in paragraph one for the same period of time but for other motels or hotels located in San Diego and vicinity.

On or about October 19, 1989, Complainant mailed to Respondent its Responses to the Request to Produce Documents. Complainant's objected to producing the documents requested by Respondent stating that the requests to produce are ``unreasonable, unduly burdensome, violates the attorney-client privilege, consists of attorney work product, and the documents requested are investigatory files and consist of official information.''

On November 1, 1989, Respondent, pursuant to 28 C.F.R. section 68.19, filed a ``Request for Order Compelling Production of Documents.'' In support of its request, Respondent argues the government (INS) has acted with prejudice in its investigation because Respondent ``believes that the INS allowed other hotels to alter their records and rectify errors and omissions of Form I-9 which were discovered at these hotels during the course of their inspection.''

Respondent further argues that ``respondent has reason to believe that his (sic) hotel was singled out for unusually harsh treatment by the INS for reasons now unknown to the Respondent and that his (sic) examination of the requested documents will reveal the basis for prejudice and provide a valuable insight into the Complainant's selective inspection and enforcement of the law.''

Respondent also argues that Complainant has deliberately delayed responding to its discovery requests and is ``attempting to circumvent the discovery process by consuming a large segment of the time allowed by the Court as well as using the attorney-client privilege to conceal evidence contained in its files.'' (emphasis added) Respondent further argues that its discovery requests are reasonable and not unduly burdensome. Moreover, it suggests that any materials which Complainant contends are privileged can be removed from the files by the government and replaced with a document stating the nature of the removed item, why it was removed, who removed it and under what authority.

On November 1, 1989, Complainant filed its ``Opposition to Respondent's Motion to Compel and Motion for Protective Order.'' In its Opposition to the Motion to Compel, Complainant states that on October 25, 1989, it allowed Respondent to review and copy its files of the Ramada Inn Old Town.[1]

Complainant further argues that the remaining items (2-9) are not discoverable because to do so would be burdensome, the documents requested were prepared for litigation, Respondent has not made a sufficient showing of selective enforcement to justify the discovery requests, and disclosure of some of the files would interfere with ongoing enforcement proceedings against the Bahia and Catamaran Hotels. For the reasons stated below, I agree with Complainant's arguments and deny Respondent's Motion to Compel.

B. Legal Analysis and Conclusions

Respondent's Motion to Compel raises different issues relative to each of the paragraphs in its ``Request to Produce Documents.'' In this regard, I intend on analyzing each of the paragraphs separately in terms of the respective issues that are raised and in terms of the resolution that I shall order.

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[1]On November 14, 1989, for purpose of clarification of its Opposition pleading, but at my request, government counsel telephonically advised this office that some of its documents relating to Ramada Inn Old Town were not disclosed to Respondent because of a claimed privilege. Government counsel further stated that in lieu of providing these privileged documents to Respondent, it gave Respondent a list of what it was not disclosing.

Respondent's Request Paragraph 1:

In view of the fact that the government has provided Respondent with its discovery request to paragraph 1, except for alleged privileged matters, I will merely request that the government provide me at an in camera meeting copies of those documents which it alleges are privileged so that I can inspect them and make an appropriate finding as to whether or not they are privileged. If I find that they are privileged, I will have them marked as exhibits, sealed and preserved for any appeal.

Respondent's Request Paragraph 5:

With respect to Respondent's Request #5, Complainant has stated in its Opposition pleading that it has no files for San Diego Princess Resort; therefore, the request to produce is denied as moot.

Respondent's Request Paragraphs 2, 3, 4, 6, 7, 8, 9:

With respect to the remaining Requests to produce, these requests relate to the government's investigative files of motels or hotels which are not parties to this case. Respondent's pleadings suggests that these documents are relevant to this case to determine whether or not its constitutional right to equal protection have been violated by selective enforcement.[2]

I recently discussed the applicability of selective prosecution to administrative enforcement cases in United States v. Law Offices of Manulkin, Glaser and Bennet, 8 U.S.C. § 1324a Proceeding, Case #89100307 (Pending Hearing). See Order Staying Ruling on Motion to Dismiss for Selective Enforcement and Directing Further Discovery. In the Manulkin case, Respondent filed a Motion to Dismiss the Complaint based upon selective prosecution. Respondent argued that INS was vindictive in selecting the law firm for administrative prosecution because Manulkin had participated in a large number of proceedings as an adversary on behalf of aliens and Manulkin had been the target of unlawful surveillance. Respondent conceded that it did not have enough evidence at the time it filed its motion to prove selective prosecution, but argued for au-

[2]``The conscious exercise of some selectivity in enforcement does not, by itself, deny equal protection, Oyler v. Boles, 368 U.S. 448, 456 (1962). Selectivity in enforcement offends the Equal Protection Clause when the decision to prosecute is based upon un-justifiable standards. The decision to prosecute may not be based on such considerations as race or religion or the desire to prevent the exercise of constitutionally protected rights.'' 45 ALR Fed 732. I will refer to the concept of selective prosecution as selective ``enforcement'' in administrative enforcement cases.

thorization to discover relevant documents within the possession of the government to prove its case.

Although I held that a Motion to Dismiss a Complaint for selective enforcement is applicable to administrative proceedings and granted Respondent's request for discovery in Manulkin, it is my view that the facts in this case are distinguishable and Respondent has not in this case presented sufficient facts to justify its Requests for Production of Documents in paragraphs 2-9 of its pleading.

As I stated in Manulkin, the rules which apply to criminal cases in federal cases wherein allegations of selective prosecution have been made are instructive in administrative enforcement cases.

Federal courts have held that mere allegations of discriminatory prosecution in criminal cases do not authorize a defendant to engage in a fishing expedition for government documents. Before a defendant will be allowed to subpoena documentary evidence related to a selective prosecution defense, the party must show a ``colorable basis'' for the claim. The ``colorable basis'' standard has been defined as some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of those elements. See United States v. Berrios, 501 F.2d 1207 (2nd Cir. 1974); United States v. Kerley, 787 F.2d 1147, 1150 (7th Cir. 1986); and Wayte v. United States, 105 S. Ct. 1524, 1531 (1985). It is my view that the colorable basis standard should be applied to discovery request in employer sanction cases involving allegation of selective enforcement.

In United States v. Ness, 652 F.2d 890 (9th Cir. 1981), cert. denied, 454 U.S. 1126 (1981), cited by Complainant in its Response, the defendant who was a tax protester, was convicted of willfully filing a false W-4 form. He appealed and argued inter alia that he made a non-frivolous prima facie showing that he was a victim of selective prosecution, but was improperly denied the discovery and hearing necessary to prove his claim.

The Court of Appeals stated that ``to succeed on a claim of selective prosecution a defendant has the burden of establishing that others <u>similarly situated</u> have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was based on an impermissible motive.'' (emphasis added) (citations omitted) The court held that Ness failed to make an adequate prima facie showing on either prong stating that ``while he showed that similarly situated members of his tax protest group had also been prosecuted, Ness did not show a single instance of a similarly situated but non-protesting violator who had not been prosecuted.'' The court further stated that, ``The fact that access to the Government's files

might be helpful to a defendant seeking to prove discriminatory prosecution does not relieve him of the burden of making an initial showing, nor does that fact, in itself, entitle every defendant raising such a claim to discovery.'' (citations omitted)

The court also held that Ness failed to suggest any discrimination in the decision to prosecute him. The court stated that ``to make a prima facie case of selective prosecution a defendant must show evidence of impermissible motive at some crucial stage in the procedures leading to the initiation of prosecution.'' (citations omitted) The court held that Ness made no showing that the Government ``focused its investigation on him because of first amendment protest activities nor did he show any discriminatory policies underlying the selection of cases for prosecution.''

In the case at bar, Respondent has not presented me with any credible evidence tending to show that others similarly situated have not been administratively prosecuted and that the prosecution is based on impermissible motives.

More specifically, Respondent has not shown that other motels/hotels who have failed to comply with the employer sanction provisions of Section 274A(a)(1)(A) and Section 274A(a)(1)(B) of the Immigration and Nationality Act are generally not prosecuted. Nor has Respondent shown that INS has a policy of prosecuting only Ramada Inn motels for violating the employer sanction law.[3]

The fact that some motels or hotels may not have been prosecuted or were permitted to correct their mistakes is not grounds to support a motion to dismiss for selective enforcement. INS' decision not to prosecute other motels or hotels owners, as described in Respondent's pleadings, is well within INS' discretionary power.[4]

Moreover, Respondent has not stated any facts in its pleading to suggest that INS instituted its action against it because of vindictiveness or other bad motive.[5] Indeed, Respondent admits in its

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[3]``The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group.'' U.S. v. Aguilar, 871 F.2d 1436, 147 (9th Cir. 1989). In my view, motels/hotels breaking the employer sanction laws should be considered as similarly situated to Respondent.

[4]It is also clear that Respondent's allegations that other motels/hotels who are similarly situated have not been prosecuted is based upon conjecture and speculation because it has presented no credible evidence to support its assertions.

[5]As I have stated previously in order to prevail on a motion to dismiss, the complainant on the basis of selective enforcement, Respondent must show that the government has normally not prosecuted others for the violations which it has been charged, and that the decision to prosecute was made on invidious or impermissible grounds. While criminal cases have dealt with prosecutions instituted in retaliation
for defendants' exercise of constitutional rights. See United States v. Steele, 461 F.2d 1148

pleadings that it does not know why it was administratively prosecuted. Respondent attempts to support its argument that the INS has singled it out and has acted improperly in this case because of ``a deliberate delay of the full month's time allowed to answer Respondent's request to examine certain files.'' I find these arguments frivolous, because Complainant's answers to Respondent's discovery were timely and the regulations provide that answers or objections to interrogatories and production of documents shall be answered within thirty days after service. See 28 C.F.R. §§ 68.15 and 68.16.

Respondent has also argued that ``Complainant is attempting to circumvent the discovery process by consuming a large segment of the time allowed by the Court as well as using the attorney-client privilege to conceal evidence contained in its files.'' This argument is also without merit because the regulations do provide that the scope of discovery does not include privileged documents. See 28 C.F.R. § 68.14(b).

I think it is important to note that I take allegations of governmental misconduct with grave concern. Although Respondent is acting pro se, it should not accuse responsible government officials whose duties include the investigation and prosecution of violations of the employment sanction laws, a difficult task, with improper conduct, unless based upon clear and credible evidence.

For the foregoing reasons it is hereby ORDERED that:

1. Respondent's request to compel discovery as set forth in paragraphs 2 through 9 of its ``Request to Produce Documents'' is hereby denied.

2. Complainant is directed to submit to me for an in camera inspection on or before November 21, 1989, all documents which it has withheld from production because of its alleged ``privileges'' in response to paragraph 1 of Respondent's ``Request to Produce.'' The documents shall be separated and identified by number and indexed. Complainant is further directed to file on or before November 21, 1989, for in camera review a legal memorandum which specifically sets forth its legal argument in support of why the documents are privileged.

3. Respondent's Motion for a Continuance of the hearing in this case is hereby denied.

(9th Cir. 1972), personal vindictiveness on the part of a prosecutor or responsible member of the administrative agency recommending prosecution would also sustain a charge of discrimination. See, generally, Moss v. Horniug, 314 F.2d 89 (2d Cir. 1963).

SO ORDERED: This 15th day of November, 1989, at San Diego, California.
ROBERT B. SCHNEIDER
Administrative Law Judge