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

March 22, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00095
ANCHOR SEAFOOD DISTRIBUTORS, INC., D/B/A ANCHOR FISH COMPANY, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On October 15, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by issuing and serving upon Anchor Seafood Distributors, Inc. (respondent) Notice of Intent to Fine (NIF) NYC274A-92005420. That citation contained four (4) counts alleging 56 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, and proposed civil money penalties totaling $40,620.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent hired and/or continued to employ the 13 named individuals knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(a)(2). Complainant levied civil money penalties of $1,150 for each of those 13 alleged violations, or a total of $14,950.

In Count II, complainant alleged that respondent employed the 41 named individuals for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification

Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $480 for each of the three (3) violations numbered 16, 21 and 22, and $620 for each of the remaining 38 violations, or civil money penalties totaling $25,000 for that count.

Complainant alleged in Count III that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and failed to ensure that that individual properly completed section 1 of the pertinent Form I-9, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $310 for that alleged violation.

In Count IV, complainant alleged that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the pertinent Form I-9, again in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $360 for that alleged violation.

Respondent was advised in the NIF of its right to contest those charges by timely submitting a written request with this Office for a hearing before an administrative law judge. On November 8, 1993, Lawrence M. Wilens, Esquire, filed a written request for hearing on respondent's behalf.

On May 13, 1994, complainant filed the four (4)-count Complaint at issue, reasserting the allegations set forth in Counts I through IV of the NIF, as well as the requested civil money penalties totaling $40,620 for those 56 alleged violations. On May 17, 1994, a copy of that Complaint and the Notice of Hearing were served upon the respondent, as well as its counsel of record.

On June 10, 1994, respondent timely filed its Answer, generally denying all allegations set forth in Counts I and II, and denying the appropriateness of the civil money penalties proposed in Counts III and IV.

On November 25, 1994, complainant filed a pleading captioned Motion for Partial Summary Judgment, in which it requested that partial summary judgment be granted on the facts of violation alleged in Counts II, III, and IV of the Complaint, on the grounds that respondent admitted all of the necessary elements needed to establish liability on all allegations in those three counts.

On December 14, 1994, the undersigned found that there was no genuine issue of material fact regarding the facts of violation alleged in Counts III and IV of the Complaint. Accordingly, complainant's motion was granted as it pertained to respondent's liability for the violations set forth in Counts III and IV.

On January 23, 1995, complainant filed an unopposed pleading captioned Motion for Judgment on the Pleadings, in which it requested the undersigned to enter summary judgment against the respondent. The procedural rules applicable in cases involving unlawful employment of aliens, provide for Motions for Summary Decision. See 28 C.F.R. § 68.38. Thus, complainant's pleading will be treated and referred to as a Motion for Summary Decision.

Complainant asserts in its Motion for Summary Decision that on December 15, 1994, respondent was served with Requests for Admissions pursuant to 28 C.F.R. Section 68.21. That procedural rule provides in pertinent part that:

> (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.
>
> (b) Each matter of which an admission is requested is admitted unless, within thirty(30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party;
>
> (1) A written statement denying specifically the relevant matters of which an admission is requested;
>
> (2) A written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or
>
> (3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

Complainant also asserts in its motion that as of January 23, 1995, respondent had failed to respond to complainant's December 15, 1994 Request for Admissions.

Accordingly, because respondent did not respond within the 30 day period provided for at 28 C.F.R. Section 68.21, it is found that each matter of which an admission was sought is deemed admitted.

With that in mind, we will now examine complainant's Motion for Summary Decision. 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). This rule 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 caselaw interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, 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. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera Enters., Inc., 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

In Count I of its May 13, 1994 Complaint, complainant alleged that respondent hired and/or continued to employ, after November 6, 1986, the 13 named individuals knowing that those individuals were aliens not authorized for employment in the United States.

In order to prove the violations alleged in Count I, complainant must demonstrate that:

(1) respondent hired for employment and/or continued to employ in the United States;

(2) after November 6, 1986;

(3) the individuals named in Count I; and

(4) respondent knew that those individuals were unauthorized for employment in the United States.

Summary decision may be based on matters deemed admitted. Primera Enters., Inc., 4 OCAHO 615, at 3; Goldenfield Corp., 2 OCAHO 321, at 3-4. In complainant's Request for Admissions, respondent was requested to admit that it hired and/or continued to employ the 13 individuals named in Count I of the Complaint, after November 6, 1986, knowing that those individuals were not authorized for employment in the United States. See Complainant's December 15, 1994 Requests for Admissions, Requests 9-73. With respect to elements 1, 2, 3, and 4, because respondent did not respond to complainant's Requests for Admissions as required by 28 C.F.R. Section 68.9(c), it is deemed admitted that respondent knowingly hired and/or continued to employ the 13 individuals named in Count I 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.

Complainant has thus established that there is no genuine issue of material fact with regard to the violations alleged in Count I of the Complaint, and respondent has offered no facts to indicate otherwise. Therefore, complainant's Motion for Summary Decision is granted as it pertains to the facts of violation alleged in Count I.

In Count II, complainant alleged that respondent hired the 41 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available in the course of INS inspections. 8 U.S.C. § 1324a(a)(1)(B). A failure to prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. § 1324a(b), is a violation of IRCA.

In order to prove the violations alleged in Count II, complainant must show that:

(1) respondent hired for employment in the United States;

(2) the individuals named in Count II;

(3) after November 6, 1986; and

(4) respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

With regard to elements 1, 2 and 3, respondent certified the accuracy of a list of employees, which documented that all 41 individuals named in Count II of the Complaint were hired by respondent after November 6, 1986. See Complainant's December 15, 1994 Requests for Admissions, Document 2. With respect to element 4, respondent was requested to admit that it failed to prepare and/or make available for inspection the Forms I-9 for those 41 individuals. See Id., Request II. Because respondent did not respond to complainant's Request for Admissions, as required by 28 C.F.R. Section 68.21, element 4 is deemed admitted.

Hence, complainant has shown that respondent hired the 41 individuals named therein, for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

Accordingly, complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability concerning the facts alleged in Count II, since there is no genuine issue for trial with regard to respondent's liability for the violations alleged in that count.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Counts I and II of the Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's January 23, 1995 Motion for Summary Decision is hereby granted as it pertains to respondent's liability for the violations

set forth in Counts I and II. It is therefore being found that respondent has violated the pertinent provisions of IRCA in the manners alleged in Counts I and II.

All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for the 56 violations.

The civil money penalty sums which must be assessed for the 13 illegal hire/continue to employ violations in Count I, together with a mandatory cease and desist order, are those set forth in the provisions of 8 U.S.C. Section 1324a(e)(4).

In regard to the remaining 43 paperwork violations alleged in Counts II, III and IV, those civil money penalty amounts will be determined by giving due consideration to the five (5) criteria listed in the pertinent provision of IRCA governing civil money penalties for paperwork violations. 8 U.S.C. § 1324a(e)(5).

In lieu of conducting an evidentiary hearing in New York, New York on the issue of appropriate civil money penalties for these 56 violations, the parties are hereby instructed to submit concurrent written briefs containing recommended civil money penalty amounts for those violations, utilizing the previously-mentioned criteria found at § 1324a(e)(5).

The parties will file their concurrent briefs within 15 days of their acknowledged receipt of this Order.

JOSEPH E. MCGUIRE
Administrative Law Judge