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

United States of America, Complainant, v. USA Cafe, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88-100098.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

A. Procedural History and Statement of Relevant Facts

On July 5, 1988, the Immigration and Naturalization Service (INS), pursuant to 8 C.F.R. section 274a.9(a), issued a Notice of Intent to Fine against the Respondent alleging forty-three (43) counts of violating Title 8 U.S. Code section 1324a(a)(1)(B). INS served the Respondent with the Notice of Intent to Fine on July 12, 1988. On August 22, 1988, Respondent, pursuant to 8 C.F.R. section 274a.9(d), requested a hearing before an Administrative Law Judge. On September 2, 1988, INS ("Complainant") issued a Complaint against the Respondent alleging violations of section 1324a(a)(1)(B) as set forth in the Notice of Intent to Fine. On October 25, 1988, Respondent filed its Answer to the Complaint with this office.

In its Answer to the Complaint, Respondent admitted that the court had jurisdiction over the case and that Respondent was properly served with Notice of Intent to Fine. In responding to the allegations that it failed to complete I-9 Forms for its employees as set forth in the Notice of Intent to Fine and incorporated in the Complaint, Respondent stated, "This respondent admits that it failed to provide information as set forth in the allegations contained in the Notice of Intent to Fine, but that said omissions were caused by circumstances as well as other matters set forth in the Affirmative Defenses contained hereinafter which were beyond the control of respondent."

On December 27, 1988, Complainant, pursuant to 28 C.F.R. section 68.36, filed a Motion for Summary Judgment (the regulations refer to this commonly-known procedural device as a Summary Decision, and this Order will hereinafter follow the exact language of the regulations) upon the grounds that "there is no genuine issue as to any material fact in this case and that the Complainant is

entitled to summary judgment as a matter of law." Complainant also filed a Memorandum of Law in Support of its Motion.

On January 4, 1989, I ordered Respondent to answer Complainant's Motion for Summary Decision, and further directed Respondent to present any and all facts in mitigation of the amount of penalty which can be assessed for violation of Section 1324a(a)(1)(B).

On January 23, 1989, Respondent filed its Answer in Opposition to Complainant's Motion for Summary Decision. In its Answer, Respondent admitted the allegations set forth in the Notice of Intent to Fine, but argued, "that there are significant and substantial mitigating circumstances which show that failure to comply with the provisions of 8 U.S.C. section 1324a was (a) unintentional; (b) caused by lack of good and sufficient notice and knowledge of the law; and (c) caused by circumstances arising within the operation of the business which were beyond the control of respondent."

B. Legal Standards For 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 discovery or otherwise . . . show that there is not genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. section 68.36 (1988); *see also, Fed. R. Civ. Proc.* section 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 . . . .).

C. Legal Analysis Supporting Decision to Grant Motion

Complainant's Memorandum in Support of Motion for Summary Decision helpfully sets forth a *prima facie* case upon which to grant Summary Decision against Respondent. Complainant's moving papers incorporate by reference the Notice of Intent to Fine and the Complaint which contain factual allegations of 43 recordkeeping violations by Respondent pursuant to section 1342a(a)(1)(B).

None of Respondent's pleadings controvert or otherwise dispute any of the factual allegations set forth in Complainant's pleadings. In Respondent's Answer in Opposition to the Motion for Summary Decision, Respondent states at the outset that it ". . . admits the facts . . . set forth in the allegations contained in the Notice of Intent to Fine . . . ." It is my view that this admission can properly be used as the basis for a finding that Respondent has raised no genuine issue or material fact and that, thus, a summary decision is warranted. *See, e.g., Gardner* v. *Borden, Inc., supra.*

Respondent's eight page Answer goes on to assert that there are "mitigating circumstances" which explain its failure to comply with 8 U.S.C. section 1324a. Respondent's answer in opposition ap-

parently reiterates its initial Answer to the Complaint which asserts that the verification requirements are commercially impracticable and "unconscionable." The gist of these "mitigating circumstances" is that Respondent did not act intentionally or knowingly, but rather the violations were "caused by circumstances arising within the operation of the business which were beyond the control of respondent."

It is my view, however, that the "mitigating circumstances" of which Respondent, speaks are essentially irrelevant for the purposes of determining actual liability under section 1324a(a)(1)(B). While such factors may be necessary to make a proper discretionary decision regarding the appropriate amount of penalty, I find that nothing in the language of section 1324a(a)(1)(B) requires such consideration in determining actual liability. An employer either complies with the I-9 verification requirements or he does not. In Respondent's case, it is unequivocally *admitted* that these paperwork requirements were not complied with.[1]

Thus, for the purpose of analyzing Complainant's Motion for Summary Decision, it is my view that, on the basis of Respondent's

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[1] Thus, the "difficulty" of complying with the recordkeeping provisions of section 1324a(a)(1)(B) is not, as Respondent asserts, a defense of the charges in this case. *See e.g., Goldberg* v. *Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778, 781-82 (8th Cir. 1961), *quoting Walling* v. *Panther Creek Mines*, 148 F.2d 604, 607 (7th Cir. 1945) (employer's assertion that compliance with the comparatively analogous Fair Labor Standards Act ("FLSA") recordkeeping requirements was not "commercially feasible" was dismissed as an untenable defense); *see also, Walling* v. *Lippold*, 72 F. Supp. 339, 351 (D.C. Neb. 1947) (violation of FLSA record-keeping requirements not excused by difficulty or impracticability). Moreover, Respondent's alleged lack of actual knowledge of the law's requirements and applicability, despite uncontroverted allegations that the INS made several "educational" visits to the premises, does not excuse it from the law's record-keeping requirements. Lack of knowledge of the record-keeping requirements will not stand as a defense to the charges in this case. *See e.g., Bueno* v. *Mattner*, 633 F. Supp. 1446, 1466 (W.D. Mich. 1986); *aff'd.* 829 F.2d 1380 (6th Cir. 1987); *cert. denied*, 486 U.S. ___, 108 S. Ct. 1994 (1988) [defense of ignorance of the law did not preclude finding of a violation of the comparatively analogous record-keeping requirements of the Migrant and Seasonal Agricultural Worker protection Act]. In addition, Respondent's contention that he acted in "good faith" is irrelevant because, as stated, the good faith defense is not defense to a section 1324a(a)(1)(B) record-keeping charge. *See,* 8 C.F.R. section 274a.4.; *see also,* 8 C.F.R. section 274a.10(b)(2) (good faith is only one of the five factors to be assessed in determining the amount of the penalty for a finding of a record-keeping violation); *and, U.S.* v. *Mestor Manufacturing Co.*, No. 87-100001 (OCAHO, J. Morse), at 17, 38 (1988). In essence, Respondent's "good faith" is not a material fact in the determination of liability for record-keeping violations and, thus, is not a legally adequate ground to preclude Summary Decision for Complainant. Finally, I might add that it is my view that the existing regulations, under 8 C.F.R. and 28 C.F.R., are sufficiently "particularized" to warrant the use of Summary Decision procedures in this proceeding. *Cf., Weinberger, supra*

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.*[2]

Accordingly, for the foregoing reasons, I find that Respondent has violated Section 1324a(a)(1)(3) 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 section 1324a(b) of Title 8 and 8 C.F.R. Sections 274a. 2(b)(1)(i)(A) and 274a.2(b)(1)(ii) (A) and (B).

CIVIL PENALTIES

Since I have found that Respondent has violated Section 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 section 1324a(b) of the Act, and 8 C.F.R. Section 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.[3]

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 an 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 consider-

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[2] Though it is not directly relevant for the purpose of analyzing the summary decision motion, Respondent also, in an earlier pleading, conclusorily raises constitutionally-based "affirmative defenses." In its Answer to the Complaint, Respondent asserts, without legal argument, that "the Immigration and Nationality Act as applied to respondent in the circumstances of this case, denies to the respondent equal protection of the law." It should be noted that Respondent made no effort to explicate this argument in its Answer in Opposition to Motion for Summary Decision. Nevertheless, I also note, in passing, that no court in the country has heretofore found that the Immigration Reform and Control Act of 1986, as incorporated into the Immigration and Nationality Act, is constitutionally suspect or defective on account of not being rationally related to a legitimate governmental purpose. Thus, it is my view that I have no basis, either in Respondent's conclusory pleadings or in judicial case law, for a legal conclusion that the application of existing immigration law to Respondent in the circumstances of this case is constitutionally defective in any way.

[3] Complainant has also requested that I direct Respondent to cease and desist from the paperwork violations. Although the Cease and Desist provision of the Act section 274A(e)(4)(A) can be ordered against a party violating section 274A (1)(A) and (a)(2) of the Act (knowingly employing unauthorized aliens) it does not apply to the paperwork violations. *See, United States* v. *Elsinore Manufacturing Inc.,* 8 USC 1324a Proceeding, Case #88-100007 (OCAHO, Morse ALJ) (Decided May 20, 1988, at p. 5). Since all the violations in this case are paperwork violations the cease and desist order has no application to this case.

ation 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).

The Complaint seeks fines as to each count ranging from $100 to $500 which total $10,750.00. In order to determine whether or not the fine requested by the Complainant is appropriate, I am required by the regulations to consider the mitigating factors described above. Although Respondent has alleged facts in his pleadings in mitigation of the civil penalties that could be assessed in this case, Respondent has also requested an evidentiary hearing. It is my view that prior to making a decision on the amount of civil penalty to assess against the Respondent for violating each of the 43 counts of the complaint, I must conduct an evidentiary hearing to determine the actual facts which should be considered as mitigating factors in assessing civil penalties in this case.

Therefore, I am going to temporarily defer on making a finding on the amount of civil penalty to assess Respondent until after I have held an evidentiary hearing concerning the issue of mitigation.[4]

Although I believe that an evidentiary hearing is probably necessary to determine a civil monetary penalty in this case, I will permit the parties to stipulate to the relevant facts which I should consider in determining the appropriate penalty or, in the alternative, I will accept a settlement pursuant to the provisions of 28 C.F.R. 68.10 (1988).

ULTIMATE 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

[4] Although holding an evidentiary hearing on the issue of damages bifurcates this proceeding, the Fed. R. of Civ. Procedure permit a summary judgment to be rendered on the issue of liability alone even though there is a genuine issue as to the amount of damages. See Fed. R. Civ. Proced. 56(c) and *United States* v. *Krasnov*, 143 F. Supp. 184, 202 (E.D.Pa. 1956) *aff'd. per curiam*, 355 U.S. 5 (1957) [extent of award may be determined after summary judgment].

respect to counts one (1) through forty-three (43) of the complaint and that therefore pursuant to 8 C.F.R. section 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. section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in counts one, forty-two and forty-three without complying with the verification requirements in section 1324a(b), and 8 C.F.R. Section 274a.2(b)(1)(ii) (A)&(B).

3. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, individuals identified in counts two (2) through forty-one (41) of the Complaint without complying with the verification requirements in 8 U.S.C. 1324a(b), and 8 C.F.R. Section 274a.2(b)(1)(i)(A).

4. The Complainant is entitled to a civil monetary penalty to be assessed against the Respondent as to each count of the complaint in an amount to be determined after an evidentiary hearing or stipulation of facts or by settlement by the parties.

5. A Cease and Desist Order does not apply to violations of Section 274A(a)(1)(B).

6. The existing regulations under 8 C.F.R. Parts 274a and 28 C.F.R. are sufficiently particularized to warrant a summary decision order.

7. "Good Faith" is not a defense to a charge of violating Section 1324a(a)(1)(B). It is only one of five factors to be assessed in determining the amount of penalty for record-keeping violations.

8. Respondent's "good faith" is not a material fact to a case involving record-keeping violations in such a way as to preclude Summary Decision for the Complainant, because assertions of Respondent's "good faith" bears solely on determinations of the amount of penalty.

9. 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 6th day of February, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge