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

United States of America, Complainant vs. Lola O'Brien d/b/a O'Brien Oil Company, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100386.

ORDER GRANTING MOTION TO DEEM ADMISSIONS ADMITTED
ORDER GRANTING MOTION FOR SUMMARY DECISION
ORDER GRANTING MOTION TO AMEND COMPLAINT
ORDER POSTPONING HEARING AND SETTING TIME FOR FILING AFFIDAVITS

In August of 1989, the United States filed a complaint against this business entity operated by Lola O'Brien for violations of the Immigration Reform and Control Act (IRCA), 8 U.S.C. Section 1324a.

Now pending are several motions brought by the Complainant: a Motion to Compel a Response to Discovery, a Motion to Deem the Request for Admissions Admitted, and a Motion for Summary Decision. Also pending is Respondent's Motion to Amend her answer to the complaint.

The Complainant served its Interrogatories, Request to Produce, and Request for Admission on Respondent by mail on November 1, 1989. Pursuant to Rule 68.17(b), 68.18(d), 68.19(b) and 68.7(c)(2). Respondent had 30 days, plus an additional five for service by mail, to comply. Respondent did not respond within the time required, nor did Respondent request an extension of time within which to respond.

On December 12, 1989, a telephone conference was held with the parties, at which time the issue of Respondent's failure to respond to the discovery request was raised. I ordered the parties to refrain for two weeks from litigating any issue relating to discovery pending settlement negotiations. Due to the parties' inability to reach a settlement, a new telephone conference was ordered for January

24, 1990. This order did not include a stay on litigating the discovery issues.

On January 17, 1990, the Complainant served its Motion to Deem Request for Admissions Admitted, and for Summary Decision. On February 7, 1990, the Complainant served its Motion to Compel Response to Discovery, seeking an order compelling Respondent to serve answers to the interrogatories and the request to produce.

On January 31, 1990, a telephone conference was held, at which time a written order was issued instructing the Respondent to show cause by February 16, 1990 why the Complainant's motions pertaining to the Admissions and for Summary Decision should not be granted.

On February 13, 1990, Respondent served its opposition to the Complainant's motions, as well as its own Motion for Leave to Amend Answer. Respondent also submitted Answers to Interrogatories and Responses to Request for Admissions.

Respondent's Motion to Amend Answer

Respondent seeks to amend its answer in order to deny all the allegations. Its original answer admitted the allegations contained in the 2nd and 3rd paragraph of the complaint. The third paragraph of the complaint states: "3. Based upon the allegations contained in the Notice of Intent to Fine, incorporated herein as though fully set forth, it is alleged that the Respondent has violated the provisions of 8 U.S.C. Sec. 1324a."

Respondent's counsel states in his affidavit that the original answer was intended to deny the existence of a violation of IRCA and that the error was not detected until the Motion for Summary Decision was filed.

The actual effect of its admission of the allegations in paragraph 3 are unclear. While the parties agree that the original answer admits the violation, it is also possible to read the answer as only admitting that the Notice of Intent to Fine alleges the violations of IRCA. The charging allegation does not clearly allege the violation in unambiguous terms.

The Rules of Practice, 28 C.F.R. Section 68.8(e), provide:

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, all appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.

Given the Respondent's evident intent to deny any violation of IRCA in its original answer to the complaint, this amendment will be allowed so as to fully present Respondent's denial.

Motion to Deem Request for Admissions Admitted

Under the Rules of Practice, unless a proper response is served within 30 days (or such time as the ALJ may allow), "[e]ach matter of which an admission is requested is admitted . . ." Complainant seeks an order deeming the admissions conclusively established.

Complainant notes that the Federal Rules of Civil Procedure may be used as a general guideline, pursuant to 28 C.F.R. 68.1, in determining whether the time to respond has passed. Fed.R.Civ.P. 6 states that the time to respond may be enlarged if a request is made "before the expiration of the period originally prescribed or as extended by a previous order." Here, no request for an enlargement of time to respond was made prior to the date the response was due. But the Rules also allow for an answer to be filed after the due date, where the failure to take the action in time was the result of "excusable neglect." In his affidavit, counsel for Respondent asserts that the response was not provided timely because of "a shortage of secretarial help and a desire to limit the expense of the case."

The determination of whether a party's failure to take the required action was a result of "excusable neglect" "rests with the sound discretion of the . . . court." *Davidson* v. *Keenan,* 740 F.2d 129 (2nd Cir. 1984). In *Davidson,* the court held the plaintiff's failure to file opposition to the defendant's motion for summary judgment was not the result of excusable neglect, where the plaintiff could not locate two non-party witnesses in time to obtain their affidavits. The court stated that the party was not excused from failing to request an extension of time within the prescribed time limits.

In *McLaughlin* v. *City of LaGrange,* 662 F.2d 1385 (11th Cir. 1981), the court similarly held a parties' failure to file opposition to summary judgment inexcusable, stating:

> After the time for making a response, a court may permit response 'where the failure to act was the result of excusable neglect.' Fed.R.Civ.P. 6(b)(2). Appellants' motion for additional time to respond was filed four days late. It asserts as 'excusable neglect' only that appellants' counsel is a solo practitioner and was engaged in the preparation of other cases. The fact that counsel has a busy schedule does not establish 'excusable neglect' under Rule 6(b)(2). *McLaughlin* at 1387.

In *Macwhinnev* v. *Heckler,* 600 F.Supp 783 (D.C.Me. 1985), the failure by counsel for the Department of Health and Human Services to timely file its cross motion for summary judgment due to a backlog of cases was held not to be excusable neglect.

Under the Rules of Practice, the Respondent's failure to file a timely response may be used to conclusively establish the facts sought to be admitted. But Respondent has filed an untimely re-

sponse citing *Gutting* v. *Falstaff Brewing Corp.*, 710 F.2d 1309 (8th Cir. 1983), where the court held it was an abuse of discretion for the district court to refuse to permit the plaintiff to withdraw her deemed admissions by the filing of a late response.

In *Gutting*, the plaintiff's failure to timely file her Response to Admissions resulted from the disqualification of her first and second attorney due to conflicts of interest. The plaintiff's third counsel's request for an extension of time to file a late response was denied, even though the delay in filing the response was caused by the defendant's earlier motion to disqualify the first attorney, an informal continuance to the second attorney who subsequently discovered his own conflict, and the admission of an absence of prejudice by the defendant.

Respondent argues that the court should permit the withdrawal of the admissions in this case, following FRCP 36(b) as "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fail[ed] to satisfy the Court that withdrawal or amendment will prejudice that party in maintaining the action . . ." In *Gutting* the court required the trial court to consider the prejudice resulting from forcing the party which obtained the admission to actively seek to prove the admissions which had been withdrawn. "The prejudice contemplated by the rule 'relates to the difficulty a party may face in proving its case' because of the sudden need to obtain evidence required to prove the matter that had been admitted." *Id.* at 1314.

Complainant urges that it has been greatly hampered by the Respondent's lack of cooperation in discovery in this case. It argues that the settlement negotiations are hindered and that if full discovery were provided the elements of the case may be established leaving only the appropriate amount of the fine to be determined. Complainant further asserts that its trial preparations have been stymied.

Additionally, the Complainant notes that the Rules of Practice do not contain the requirement, found in FRCP 36(b), that the party opposing a motion to withdraw an admission establish that it will be prejudiced by the withdrawal.

In any event, it is noteworthy to examine the Respondent's belated submission to the Request for Admissions. Respondent contends that the Complainant will not be prejudiced now that these responses have been served. The Rules of Practice, Section 68.19(c), provide:

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he/she has made reasona-

ble inquiry and that the information known or readily obtainable by him/her is insufficient to enable the party to admit or deny.

The answer provided by Respondent to each Request for Admission is "DENIED DUE TO RESPONDENT HAVING INSUFFICIENT INFORMATION UPON WHICH TO ADMIT." These responses are wholly inadequate. Counsel has failed to explain how it was unable to discover any relevant information after a reasonable inquiry. It is clear that counsel made no inquiry.

In *Asea. Inc.* v. *Southern Pacific Transportation Co.*, 669 F.2d 1242 (9th Cir. 1981), the court held "that a district court may, under proper circumstances and in its discretion, order admitted matters which an answering party has failed to admit or deny, where the information known or readily obtainable after reasonable inquiry was sufficient to enable the answering party to admit or deny." *Id.* at 1245. The requirement of reasonable inquiry was determined to be a reasonable burden to impose on the parties to facilitate the preparation for trial and ease the trial process. The court stated:

> We are not persuaded that an answer to a request for admission necessarily complies with Rule 36(a) merely because it includes a statement that the party has made reasonable inquiry and that the information necessary to admit or deny the matter is not readily obtainable. The discovery process is subject to the overriding limitation of good faith. Callous disregard of discovery responsibilities cannot be condoned. . . .
>
> We hold, therefore, that a response which fails to admit or deny a proper request for admission does not comply with the requirements of Rule 36(a) if the answering party has not, in fact, made 'reasonable inquiry,' or if information 'readily obtainable' is sufficient to enable him to admit or deny the matter. A party requesting an admission may, if he feels these requirements have not been met, move to determine the sufficiency of the answer, to comper a proper response, or to have the matter ordered admitted. Although the district court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed, this determination, like most involved in the oversight of discovery, is left to the sound discretion of the district judge. [citations omitted] The general power of the district court to control the discovery process allows for the severe sanction of ordering a matter admitted when it has been demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36(a). *Asea, Inc.* at 1246–1247.

Respondent has made no attempt to explain whether it undertook any inquiry into the facts or the availability of sufficient information to enable itself to respond in good faith. The Respondent may claim that it truthfully denied the admissions because it did not have the information. But it is evident that these responses have not been made in good faith.

Therefore, I find that the Respondent has failed to establish good cause for not granting Complainant's motion, and I hold the admissions conclusively established for purposes of this litigation.

Based upon the facts now established, I turn to the motion for summary decision.

Motion for Summary Decision

The Complainant moves for summary decision in this case based upon the facts established through the Respondent's Admissions and the Respondent's original answer to the complaint. Since I will allow the Respondent to amend her answer to deny all the material allegations in the complaint, the resolution of this motion will turn on whether the admissions are sufficient to prove every material fact needed to find that the violations were committed as alleged in the complaints.

An admission may establish the absence of a genuine issue of material fact on which a summary decision may be premised. *O'Bryant* v. *Allstate Insurance Co.* 107 F.R.D. 45 (D.Conn 1985).

> While the loss to a party of his right to contest a matter on its merits is not to be treated lightly, where that loss results from that party's own failure to file an answer to requests for admissions and further its failure to utilize the procedure founded in Rule 36 to rectify the deficiency, the loss is a casualty of the court's obligation to process cases to disposition in an orderly, effective, expeditious manner and in accordance with its published rules. *O'Bryant,* 107 F.R.D. at 48.

A motion for summary judgment asserts through the presentation of admissible evidence that there are no factual issues in dispute and that the moving party is entitled to a legal judgment based upon those undisputed facts. Such a motion cannot succeed if there exist any material facts in dispute which require a hearing for their resolution. 28 C.F.R. Sec. 68.36 provides that the ALJ

> may enter a summary decision for either party if the pleadings, affidavits, material otherwise 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.

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact. *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. *Anderson* v. *Liberty Lobby,* 477 U.S. 242 (1986). A summary decision is an extreme remedy, which places a clear burden on the moving party to establish its right to a judgment so as to leave no room for controversy. *See e.g., Ozark Milling Co.* v. *Allied Mills, Inc.,* (1973 8th Cir.) 480 F.2d 1014.

The complaint alleges a violation of Section 274A(a)(1)(B) of IRCA for failing to timely complete section 2 of the I-9 verification form for three named employees, Susan A. Brannan, Franklin C. Lavine, and Daniel S. Ziebell.

Complainant correctly submits that the elements of this violation requires them to establish that Respondent is a person or entity which hired, after November 6, 1986, an individual for employment in the United States, and failed to comply with the verification requirements found in IRCA and the INS' implementing regulations. The statute and regulations require an employment eligibility verification form, I-9, to be completed for each employee within three business days of his or her hiring. 8 C.F.R. Sec. 274a.2(b)(ii)(A) and (B).

The admissions establish the following facts. O'Brien Oil Company is a corporation doing business in Wisconsin, and is owned and operated by Respondent Lola O'Brien. (Admissions #1, 2) Respondent caused to be hired each of the named employees in 1988. (Admissions #3, 6, 9) Respondent did not complete section 2 of the I-9 form for these three employees within three business days of their hiring. (Admissions #4, 5, 7, 8, 10, 11).

Therefore, the admissions establish the elements necessary to prove the allegations contained in the complaint and, in the absence of contrary evidence, are sufficient to warrant the granting of a motion for summary decision in Case Number 89100386.

Motion to Compel Response to Discovery

Complainant's motion to compel response to its interrogatories only requested an order compelling "an immediate response." Respondent has served its answers to the interrogatories. The copy served with the O'Brien Oil case fails to respond to interrogatories 24-61. Respondent does not address this motion or its failure to complete its answers. An appropriate order would be to grant the motion to compel. But given the resolution of the motion for summary decision, this issue is moot.

Civil Money Penalty

The determination of the Motion for Summary Decision leaves to be resolved the amount of the civil money penalty to be assessed for the paperwork violations. Section 1324a(e)(5) of Title 8 enumerates five factors which are to be considered in setting the amount of the fine within the range of $100 to $1,000 for each violation. The consideration of the various factors, both mitigating and aggravating, would be facilitated by the filing of affidavits and briefs by the parties in support of their respective positions. Therefore the parties are directed to file such written evidence and argument which they consider relevant to the factors listed in 8 U.S.C. 1324a(e)(5), no later than April 10, 1990. A hearing will be ordered only to resolve issues raised by the affidavits.

Therefore, based upon the foregoing. IT IS ORDERED:

1. That Respondent's Motion to Amend Answer is GRANTED;
2. That Complainant's Motion to Deem Admissions Admitted is GRANTED;
3. That Complainant's Motion for Summary Decision is GRANTED.
4. That the hearing previously scheduled in this case is indefinitely postponed.

SO ORDERED.

Dated: March 16, 1990.

JAY R. POLLACK
Administrative Law Judge