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

United States of America, Complainant v. Cafe Camino Real, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100122.

ORDER DENYING MOTIONS TO SUPPRESS, TO DISMISS AND FOR SUMMARY DECISION

(August 28, 1990)

This Order addresses in omnibus fashion the several filings by Respondent which seek: (1) to suppress evidentiary items anticipated to be offered by Complainant, (2) dismissal of the charges and (3) to obtain summary decision.

1. Respondent has put at issue the admissibility of certain materials likely to be offered into evidence by Complainant, i.e., the videotaped statement of Roberto Maletti and various forms and documents prepared by agents of Complainant. As discussed below, I deny Respondent's motions to summarily exclude the evidence in its entirety but will instead examine each item on its own merit at the time it is offered at the evidentiary hearing to determine its admissibility, reserving for decision on the basis of the whole record the weight, if any, to be accorded to it.

A. Respondent's Motion to Suppress Evidence, filed July 11, 1990, objects to the introduction of materials which may be relevant to the charges of unlawful employment and paperwork violations, i.e., entries on INS Forms G-123A, G-166C, I-213, I-263B, I-263C, I-9, and the videotaped statement of Roberto Maletti. That Motion argues that because those materials are hearsay and lack reliability, authenticity and validity, they should not be admitted into evidence. Respondent reiterates essentially the same objections in four subsequent pleadings filed on July 16, July 18, July 25, and August 7, 1990. Respondent moves for summary decision in the Motion filed July 18, and moves for dismissal in both its July 18th and August 7th filings.

The references at 8 U.S.C § 1324a(e)(3)(B) to hearings before administrative law judges and to 5 U.S.C. § 554 confirm that hearings under 8 U.S.C. § 1324a are conducted pursuant to the Administra-

tive Procedure Act (APA). That Act, at 5 U.S.C. § 556(d), provides that ``[A]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.''

It is well-settled that hearsay is admissible in administrative proceedings if factors are present which assure the underlying reliability and probative value of the evidence. Gimbel v. Commodities Futures Trading Commission, 872 F.2d 196, 199 (7th Cir. 1989), citing Richardson v. Perales, 402 U.S. 389 (1971). See also Bustos-Torres v. I.N.S., 898 F.2d 1053, 1055-56 (5th Cir. 1990) (affirming the decision of the immigration judge to admit Forms I-213 and finding them to meet the tests for both probativeness and fundamental fairness); accord Trias-Hernandez v. I.N.S., 528 F.2d 366, 369 (9th Cir. 1975); Matter of Mejia, 16 I&N Dec. 6, 8 (BIA 1976) (finding that, in the absence of proof that the Form I-213 contains information which is incorrect or which was obtained by coercion or force, it is an ``inherently trustworthy'' document which would be admissible in court as an exception to the hearsay rule as a public record and report under Federal Rule of Evidence 803(8)).

While an employer sanctions enforcement hearing under 8 U.S.C. § 1324a(e)(3) is a formal proceeding governed by the APA, in contrast to a deportation hearing which is not conducted under the APA, it is instructive that hearsay qua hearsay is admissible before Immigration Judges. For example, the test for admissibility of an alien's sworn statement in a deportation proceeding before an Immigration Judge is one of fundamental fairness and probativeness. See, e.g., Bustos-Torres, 898 F.2d at 1055; Baliza v. I.N.S., 709 F.2d 1231, 1233 (9th Cir. 1983); Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir. 1974). Possible factors to be examined in such an analysis include the possible bias of the declarant, whether the statements are signed or sworn to as opposed to oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant is unavailable and no other evidence is available, and finally, whether the hearsay is corroborated. Richardson, 402 U.S. at 402.

As I stated in U.S. v. Mester Mfg. Co., OCAHO Case No. 87100001, June 17, 1988, aff'd, Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989) such statements are hearsay, admissible, however, even apart from the relatively more lenient evidentiary rules of administrative procedure, under the public records exception of Federal Rule of Evidence 803(8). Such forms are ``often at the margin for trustworthiness for evidentiary purposes'' but are admissible, however, ``where they are internally consistent, mutually consistent, reasonably free from patent error, and either the alien

involved, the arresting and/or attesting officer, or another knowledgeable person is available to testify in support.'' U.S. v. Mester at n. 20.

B. Respondent argues that the videotaped statement of Roberto Maletti is a deposition rather than a sworn statement and, as such, is inadmissible under 28 C.F.R. § 68.22 since Respondent neither attended nor was represented at the taping. This argument overlooks that there is no suggestion by Complainant that a deposition was intended. Not having been designed as a deposition, it is immaterial that deposition formalities were not observed. As an extra-judicial sworn statement, however, its admissibility into evidence will be assessed at hearing taking into account whether Complainant is able to establish a proper foundation and whether there is corroboration. Moreover, even if admitted, the question of weight to be accorded can only be determined on the basis of the hearing record.

C. Respondent's July 25, 1990 filing, objecting to the validity of a subpoena issued by INS, cites provisions of the Florida Rules of Civil Procedure. Respondent argues that under Florida law, a party seeking production of documents and other materials must provide ten days notice on subpoena practice and hence, as the subpoena here did not satisfy the ten day rule, any materials obtained as a result of that process are inadmissible.

I agree with Complainant's argument here that this case arises under federal rather than Florida law and, therefore, the Florida Code of Civil Procedure is inapplicable. The primacy of federal jurisdiction in immigration-related matters is long settled. See, e.g., The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (the power to exclude foreigners is an ``incident of sovereignty''); Fong Yue Ting v. U.S., 149 U.S. 698, 711 (1893) (``the right to exclude or to expel all aliens [is] . . . an inherent and inalienable right of every sovereign and independent nation. . . .''); U.S. v. Curtiss-Wright Export Co., 299 U.S. 304, 317 (1936) (providing broad support for the concept that there is inherent power in the national government to regulate foreign affairs). The extensive exercise of federal power with respect to immigration and foreign affairs, and the supremacy clause, are understood to preempt virtually all state efforts touching on similar subjects. U.S. Const. art. I. § 10, cl. 3 and § 8, cl. 4; art. VI, cl. 2.

Moreover, regardless of subject matter, I am unaware of any principle of law which suggests that state procedures can come into play so as to conflict with procedures established by federal authority pursuant to statute. See particularly, 8 U.S.C. § 1324a(e)(1) (``The Attorney General shall establish procedures_. . . (B) for the investigation of those complaints [for violation of 8 U.S.C.

§ 1324a(a)] which, on their face, have a substantial probability of validity.'').

Pursuant to that statutory mandate, INS regulations require that the Service provide an employer with at least three days' notice prior to an inspection of I-9 Forms, 8 C.F.R. § 274a.2(b)(2)(ii), and provide that the Service ``shall have reasonable access to examine any relevant evidence of any person or entity being investigated,'' 8 C.F.R. § 274a.9(b). The INS Field Manual for Employer Sanctions provides that Service officers may seek production of an employer's I-9 Forms through either a Notice of Inspection or through the service of an administrative subpoena pursuant to 8 C.F.R. § 287.4(a)(2). Issuance of a subpoena which provides at least three days' notice complies with the three-day rule. Field Manual at §§ III-C-1, III-C-5-a.

In this action, a subpoena was served on Respondent's president on January 4, 1990; the I-9 review took place on January 11, 1990, seven days later. Selection by INS of the subpoena mode does not, in my judgment, disadvantage Complainant so as to foreclose reliance on evidence so obtained which, without a subpoena, it would have been entitled to see on three day's notice.

Finally, Respondent seeks support in an array of evidentiary rules, the Federal Rules of Civil Procedure and caselaw. Upon examination, none merit further discussion. Nevertheless, Respondent will have opportunity to be heard on evidentiary matters at the hearing.

2. On the basis of the pleadings to date, genuine issues of material fact appear to remain in dispute, absent stipulation between the parties. For that reason and because none of Respondent's objections are sufficient to overcome the allegations of the Complaint, Respondent's Motions to
Dismiss are denied. All motions to date, whether or not discussed in this Order, are denied.

A second telephonic prehearing conference will be held, as previously agreed, on Monday, October 1, 1990 at 10:00 a.m., EDT to discuss preparations for the evidentiary hearing, scheduled to begin October 30, 1990. This Order advises that the hearing will begin at 9:30 a.m., EDT on Tuesday, October 30, in the Hearing Room, Office of Administrative Law Judges, Suite 605, 200 South Andrews Avenue, Ft. Lauderdale, Florida 33301.

SO ORDERED.
Dated this 28th day of August 1990.

MARVIN H. MORSE
Administrative Law Judge