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

United States of America, Complainant v. Manca Imports, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100203.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AS TO COUNTS II, III, AND IV

A. Procedural History

On April 23, 1990, the Immigration and Naturalization Service (INS), pursuant to 8 C.F.R. section 274a.9(a), issued a Notice of Intent to Fine against Respondent alleging fourteen violations of Title 8 U.S.C. section 1324a(a)(1)(A) and two hundred sixty-five violations of Title 8 U.S.C. 1324a(a)(1)(B).

INS served Respondent with the Notice of Intent to Fine on April 24, 1990. On May 18, 1990, Respondent, pursuant to 8 C.F.R. section 274a.9(d), requested a hearing before an Administrative Law Judge. On June 20, 1990, INS issued a Complaint against Respondent alleging violations of section 1324a(a)(1) (A) and (B), as set forth in the Notice of Intent to Fine.

On July 23, 1990, Respondent filed its Answer. In its Answer, Respondent (1) admitted the jurisdictional allegations in paragraphs one and two of the Complaint; (2) denied that it had violated the provisions of 8 U.S.C. section 1324a; and (3) denied the allegations in Counts I, II, II and IV.

On August 16, 1990, Complainant, pursuant to 28 C.F.R. § 68.36, filed a ``Motion for Partial Summary Decision'' and a supporting ``Memorandum'' with respect to Counts II, III and IV of the Complaint.

The Complainant's ``Motion for Partial Summary Decision'' also contains a well reasoned legal argument as to why summary decision should be granted. The Complainant's argument is based upon the pleadings, documents and affidavits filed in the case.

On September 10, 1990, Complainant, pursuant to 28 C.F.R. § 68.21, filed a ``Motion to Compel Discovery.''

Prior to any ruling by me on its Motion for Partial Summary Decision, Respondent filed a Second Motion for Partial Summary Decision and Memorandum of Law in Support thereof as to Counts II, III and IV. This Motion was filed on September 20, 1990.

In its ``Memorandum,'' Complainant asserted that Respondent has a duty and responsibility, under Federal Rule of Civil Procedure 56(e), to respond to a Motion of Summary Decision. Complainant further asserted, citing Ninth Circuit case law and Vol. 10a Fed. Practice and Procedure by Wright and Miller, that if Respondent fails to respond to a Motion for Summary Decision, summary decision shall be entered, if appropriate. Complainant argued that its Motion for Summary Decision should be granted for the reason that, as of September 17, 1990, Respondent had not responded to its first Motion for Summary Decision.

On September 28, 1990, I conducted a telephonic conference with both parties to discuss pending motions. At that time, I was advised by Respondent that it was his intention to admit liability and not contest the minimum penalty sought by Complainant. On October 1, 1990, I directed Respondent to file a response to Complainant's Motion for Partial Summary Decision on or before October 12, 1990. I further ordered Respondent to respond to Complainant's discovery requests on or before October 12, 1990.

As of the date of this Order, Respondent has not filed a response to Complainant's Motion for Partial Summary Decision.

On October 31, 1990 Complainant filed a ``Motion for Sanctions'' requesting that I sanction Respondent for failing to respond to my October 1, 1990, Order stating that, ``as of Monday, October 29, 1990, Complainant has not received a response from Respondent to Complainant's Request for Production of Documents.''

On November 7, 1990, Respondent filed a ``Response to Motion for Sanctions'' stating, inter alia, that ``this motion is largely moot in that Respondent, by separate filing, has acknowledged that the Complainant is entitled to a partial summary judgment (sic) on the allegations of paperwork violations, as set forth in Counts II, III, and IV of the Complaint against Respondent.[1]

B. Statement of Facts

The relevant facts as alleged in Complainant's ``Memorandum'' are comprehensive and well documented as more fully described below.

[1]I do not know what ``separate filing'' Respondent is referring to that admits liability; but, it is clear to me that this statement is an admission by Respondent of liability as to Counts II, III and IV.

On October 11, 1989, INS inspected the business premises of Manca Imports, Inc., located at 1001-6th Avenue South, Seattle, WA. (See Declaration of Barry Levy.) After speaking with the secretary, Beth Glover, INS officers were directed to a Mr. Enrique Medina-Nelson, the supervisor of the plant. Special Agent Levy asked Mr. Medina if INS agents could enter the plant and interview the plant's workers. Mr. Medina orally consented to the presence of INS officers in the plant and their subsequent interview with plant personnel. (See Declaration of Barry Levy)

As a result of the INS officers' inquiries with the employees of Manca Imports, Inc., twenty-three foreign nationals were detained for questioning and/or determination of their immigration status. Nineteen Orders to Show Cause in deportation proceedings were subsequently issued. Fourteen of the individuals detained for questioning appear in Count I of the Complaint. (See Declaration of Barry Levy)

INS scheduled an audit of the Respondent for October 18, 1989. On October 12, 1989, Special Agent Barry Levy personally notified the president of Manca Imports, Inc., through personal service of an audit letter from the Seattle, INS office. (See Declaration of Barry Levy) The Notice of Inspection letter requested Manca Imports, Inc., present all Forms I-9 and its Employer's Quarterly Tax Reports (Forms EMS-5208) for the quarter periods ending between December 31, 1986, and September 30, 1989, inclusive. (See Exhibit 3) Employer's Quarterly Tax reports are required records in the State of Washington.

On October 18, 1989, Mr. Charles Manca, President of Manca Imports, Inc., appeared at the Seattle INS District office along with his attorney, Antonio Salazar. Mr. Manca provided Special Agent Levy with sixty-three Forms I-9 and the Employer's Quarterly Tax Reports for Manca Imports, Inc. for December 1986 through June 30, 1989. (See Exhibits 4-53, 56-67)

During the course of the audit, Mr. Salazar provided Special Agent Levy with a copy of a computer-generated form entitled, ``Start/Change Notice.'' During the ensuing investigation, INS received two (2) additional ``Start/Change Notices'' from two employees of Manca Imports, Inc. (See Exhibits 54-55) Mr. Salazar asserted that this form was evidence of Manca Imports, Inc.'s good faith effort in complying with the requirements of the Immigration Reform and Control Act (IRCA) of 1986. (See Declaration of Barry Levy) INS Special Agent Levy advised Mr. Salazar and Mr. Manca that the company form does not meet the statutory requirements of IRCA.

Mr. Levy, after carefully reviewing the Respondent's Forms I-9 and Quarterly Tax Reports, determined that the Respondent had failed to prepare and/or present the Form I-9 for two-hundred fifty-three employees. These employees are listed in Count II of the Complaint.

Further review of Respondent's Forms I-9 revealed that Respondent failed to properly complete section 1 of the Form I-9 for ten employees. (See Exhibits 56-65) These employees are listed in Count III of the Complaint. In addition, Respondent failed to properly complete section 2 of the Form I-9 for two employees. These employees are listed in Count IV of the Complaint. (See Exhibits 66-67)

C. Legal Standards in 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, and judicially-noticed matters 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. § 68.36 (1988); see also, Fed. R. Civ. Proc. Rule 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 and 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. Co. 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 decision.''); United States v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357 (9th Cir. 1986) (party opposing summary judgment is required to provide specific facts showing there is a genuine issue of material fact for trial.).

D. Findings of Fact and Conclusions of Law Supporting Summary Decision

The record in this case, as described above, clearly shows that Respondent has failed to respond and contest Complainant's Motion for Partial Summary Decision as to Counts II, III and IV.

Moreover, Respondent has failed to respond to my Order directing a response to Complainant's Motion for Summary Decision. The record is also clear that at no time has Respondent, in writing or during pre-hearing telephonic conference calls, disputed the facts or liability as to Counts II, III and IV.

It is also clear from statements made in pleadings and during at least one telephonic call that Respondent admits liability as to Counts II, III, and IV of the Complaint.

Since Respondent admits and does not wish to contest liability as to Counts II, III and IV of the Complaint, I conclude that there is no genuine issue of material fact as to liability on those counts and, pursuant to 28 C.F.R. § 68.36(c), Complainant is entitled to a partial summary decision.

Accordingly, I find that Respondent has violated section 1324a(a)(1)(B) of Title 8 United States Code in that Respondent hired for employment in the United States those individuals named in Counts II, III, and IV of the Complaint without complying with the verification requirements provided for in section 1324a(b) of Title 8 and 8 C.F.R. § 274a.2(b)(1).

E. Civil Monetary Penalty

Having determined that Respondent is liable for Counts II, III and IV of the Complaint, I am now required to determine an appropriate civil penalty.[2] In determining an appropriate civil penal-

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[2]Only the Complainant addresses how I should determine the appropriate amount of civil penalty in this case. However, in so doing, Complainant misconstrues the applicability of United States v. USA Cafe, Case No. 88-100098 (Order Granting Complainant's Motion for Summary Decision filed February 6, 1989), by suggesting that it is necessary that I hold an evidentiary hearing to determine the amount of civil penalty.

My finding in USA Cafe, that and evidentiary hearing on the issue of appropriate civil penalty was necessary, after granting partial summary decision, is not binding or controlling on all subsequent cases in which I grant partial summary decision as to liability. As I suggested in USA Cafe, there are several methods for determining the appropriate civil penalty to be assessed in a particular case, i.e. ``the parties may stipulate to the relevant facts which I should consider in determining appropriate penalty, or, . . ., I will accept a settlement . . . .'' USA Cafe, supra at 7. The appropriate method(s) for determining amount of civil penalty depends upon the specific facts of each individual case.

In USA Cafe, the Complaint sought a fine in excess of the minimum which could be statutorily assessed. Therefore, evidence of mitigation, which could lead to a reduction of the penalty, was appropriately and necessarily considered. In addition, the Respondent in USA Cafe had alleged facts in his pleadings in mitigation of penalty, and requested an evidentiary hearing on the issue of appropriate civil penalty.

In contrast, the Complaint in the present case seeks only the minimum fine. Since the amount cannot, statutorily, be reduced, evidence of mitigation factors would be irrelevant. Further, Respondent has neither plead facts in mitigation nor requested

ty, where the amount alleged in the Complaint exceeds the minimum amount allowed by law, I am required to give ``due consideration'' 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.'' See, 8 USC § 1324a(e)(5) and 8 C.F.R. § 274a.10(b)(2).

The civil monetary penalty requested for each violation in Counts II, III and IV of the Complaint is $100.00, which is the minimum amount that can be assessed by law. Therefore, there is no need to consider any additional evidence on matters of mitigation, either through testimony or affidavit, to determine an appropriate civil penalty in this case with respect to Counts II, III and IV.

ACCORDINGLY, I find and conclude that Complainant is entitled to a civil monetary penalty to be assessed against Respondent for Counts II, III and IV of the Complaint as follows: (1) Count II of the Complaint in an amount of $100.00 for each violation, for a total of $25,300.00; (2) Count III in the amount of $100.00, for each violation, for a total of $1,000.00; and (3) Count IV in the amount of $100.00 for each violation, for a total of $200.00.

ORDER

It is HEREBY ORDERED that:

1. Respondent pay a civil money penalty of $100.00 for each violation of Counts II, III and IV of the Complaint for a total amount of $26,500.00.

2. Pursuant to 8 U.S.C. § 1324a(e)(96) and Section 68.51 of the practice and procedure of this office, 28 CFR § 68.51, this decision and order as to Counts II, III and IV, shall become the final Order of the Attorney General unless, within thirty (30) days from the date of this decision and order, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 16th day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

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an evidentiary hearing on the issue of penalty.

Hence, it is clear that USA Cafe does not control the method for determining the appropriate civil penalty to be assessed after partial summary decision has been granted. Rather, the facts of the particular case, such as this one, will determine which method or methods should be employed.