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

United States of America, Complainant v. Camidor Properties, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100317.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **JOHN B. BARKLEY**, Esquire, Immigration and Naturalization Service for Complainant;
TERRY S. BIEHN, Pro se, Respondent.

I. PROCEDURAL HISTORY

On April 26, 1990, the United States of America, Immigration and Naturalization Service (INS), served a Notice of Intent to Fine (NIF) on Camidor Properties, Inc., through Mr. Terry Biehn. The NIF alleged one Count with one violation of Section 274A(a)(1)(A) and two Counts containing a total of nine violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for knowingly hiring an unauthorized alien for employment in the United States and for failure to comply with the employment eligibility verification requirements in Section 274A(b) of the Act. In a letter dated May 16, 1990, Respondent, through Terry S. Biehn, requested a hearing before an Administrative Law Judge (ALJ).

The United States of America, through its Attorney, Dean A. Levay, filed a Complaint, incorporating the allegations in the NIF against Respondent on October 22, 1990. On October 29, 1990, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the ALJ in the case and setting the hearing location in or around Phoenix, Arizona.

Respondent answered the Complaint on November 28, 1990, specifically admitting as to each allegation, but contesting the civil

penalties assessed by INS. Based upon the contents of this Answer, Complainant submitted a Motion for Summary Decision on February 5, 1991 as to all Counts, with supporting memoranda. The motion is grounded on the theory that no genuine issues of material fact exist and that Complainant is entitled to Summary Decision as a matter of law.

Respondent did not provide a written response to the Motion for Summary Decision within the authorized time limitations as provided by 28 C.F.R. Part 68.36(a). I conducted a pre-hearing telephonic conference on February 26, 1991 to ascertain if Respondent had any additional information to provide for my consideration of Complainant's motion.

During said telephonic conference Respondent agreed that it did not dispute liability, but provided justification for its belief that the penalty amounts should be mitigated. Complainant indicated that it would rely on its written motion and accompanying memorandum. I indicated my inclination to grant Complainant's motion as to liability, but provided the parties the opportunity to participate in a hearing as to civil penalties. The parties chose to allow me to set the penalty amount based upon the Motion for Summary Decision and Respondent's comments during the telephonic conference. I have carefully considered all information provided by both parties and my decision follows.

II. STANDARDS FOR DECIDING SUMMARY DECISION

The federal regulations applicable to this proceeding authorize an ALJ to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . 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. Part 68.36; see also Fed. R. Civ. Proc. 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 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242 (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, 539 F. Supp. 797 (D. Colo. 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. 1980) (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).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent has admitted liability to each of the three Counts in its Answer. Therefore, there is no question of material fact as to the liability issue and Complainant is entitled to Summary Decision as a matter of law. I find that Respondent has violated Section 274A(a)(1)(A) of the Act as alleged in Count I of the NIF, and Section 274A(a)(1)(B) as alleged in Counts II and III.

Having found these violations, I must assess a civil money penalty pursuant to Sections 274A(e)(4) and 274A(e)(5) of the Act, which require the person or entity to pay a civil penalty. The statute states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection_(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of_(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either subsection occurred, . . .
>
> 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 consideration 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.

8 U.S.C. Sections 1324a(e)(4) and 1324a(e)(5).

In this case, Complainant assessed a civil penalty of $1,000.00 for the violation in Count I, $500.00 for each of the four violations in Count II, and $200.00 for each of the five violations in Count III, for a total penalty of $4,000.00. Respondent submits that its business is not financially stable at present and that the fines assessed may irreparably damage the financial structure of the corporation. It is not the intent of the Immigration Reform and Control Act (IRCA) to put people out of business as a result of the payment of fines, but to seek compliance with its regulations. Keeping this in mind, I

have considered the parties' positions and the five factors listed above and will address my findings as to each of them.

Size of Business: I find that Respondent is a small business with approximately 10 employees and with gross receipts of approximately $200,000 annually. This mitigates the penalty on behalf of Respondent.

Good Faith: Complainant contends that Respondent has demonstrated a lack of good faith by its hiring a known unauthorized alien and paying her ``under the table'' so to speak through a third party, so as not to seek detection. Complainant also argues that Respondent had been given two educational visits by INS agents prior to the October 19, 1989 inspection, yet failed to comply with the paperwork requirements of the IRCA.

Respondent stresses its humanitarian efforts in hiring the alien, a family friend, who had fallen on hard times. It created the position specifically to assist her financially. Respondent also argued that two of the violations for failure to present Forms I-9 were based upon short-term employees, one of whom was terminated prior to the first educational visit on July 21, 1989. Respondent acknowledged it did not comply with the requirement to complete I-9's for its employees within three days of hire, but attempted to do so within a week of the educational visit for all employees.

Complainant's arguments seem to go more to the lack of good faith in hiring the illegal alien and Respondent's involvement in that scheme. However, the five criteria outlined above go only to paperwork violations. I will certainly consider the arguments as relating to the illegal alien, Carolyn Morley, in my assessment of a civil penalty for Count I, but will only consider this information where appropriate and relevant in Count II. My analysis yields a finding that both parties' views are somewhat meritorious. Therefore, I consider this criteria neutral.

Seriousness of the Violation: Paperwork violations are considered serious in the IRCA framework, with the failure to present I-9's being more serious than the failure to adequately complete the forms. The employer's failure to prepare I-9's completely, demonstrating a failure to verify employment eligibility in the United States, could lead to the hiring of unauthorized aliens, thus defeating the purpose of IRCA.

I find that this factor aggravates the penalty amount in this matter, certainly as it relates to Ms. Morley. However, in regard to Michael Stafford, one of the individuals upon whom Count II is based, I find that the penalty should be mitigated. Although Respondent was under an obligation to comply with IRCA, it did not receive an educational visit until after Mr. Stafford's departure. I

have considered the information provided pertaining to the remaining individuals in Count II and will use a sliding scale in assessing the penalties for each of them, based upon their seriousness and upon my findings of good faith. I find that the violations of Count III were the least serious in that the I-9's were properly completed within a short time after Respondent received its educational visit, although not within the requisite three days of hire.

Evidence of Illegal Aliens: One of the employees for whom no Form I-9 was presented was found to be an illegal alien. This will aggravate the penalty regarding the violation in Count II as to Ms. Morley. No other evidence of illegal alien employment was presented, causing none of the remaining paperwork violations to be similarly aggravated.

History of Previous Violations: Both parties agree that Respondent's history is free from previous IRCA violations, therefore this factor will also mitigate the penalty in Respondent's behalf.

Based upon my findings regarding these five criteria, I will adjust the penalty sought by Complainant downward. I agree that the $1,000.00 amount sought by Complainant is fair and reasonable for Count I. However, I will reduce the civil penalty for each of the violations in Count II as follows: for Carolyn Morley_$350.00; for Debbie Janik_$250.00; for Steven Martinez_$200.00; and for Michael Stafford_$100.00. I believe that the statutory minimum penalty of $100.00 is fair and reasonable for each of the five violations in Count III. The aggregate civil penalty is adjusted to $2,400.00.

III. ULTIMATE FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER

In addition to the findings and conclusions previously mentioned, I make the following ultimate findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondent Camidor Properties, Inc., has violated Sections 1324a(a)(1)(A) and 1324a(a)(1)(B) of Title 8, 274A(a)(1)((A) and 274A(a)(1)(B) of the Act as alleged in the NIF and incorporated into the Complaint.

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of two thousand four hundred ($2,400.00) for Counts I, II, and III of the Complaint.

3. That Respondent will cease and desist from violating the provisions in Sections 274A(a)(1)(A) and 274A(a)(2) of the Act with respect to the employment of individuals unauthorized for employment in the United States.

4. That the hearing scheduled in or around Phoenix, Arizona is cancelled.

5. That as provided by 28 C.F.R. Part 68.51, this Order shall become the final Decision and Order of the Attorney General unless within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

IT IS SO ORDERED: This 25th day of February, 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office for Immigration Review
Office of the Administrative Law Judge
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San Diego, California 92101