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

UNITED STATES OF AMERICA Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding Case No. 94A00056
HOSUNG CLEANING CORP. D/B/A SUN CLEANERS, Respondents.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES AND ORDER TO SHOW CAUSE

(July 28, 1994)

I. *Procedural History*

On March 28, 1994, the Immigration and Naturalization Service (Complainant or INS), filed a complaint against Hosung Cleaning Corp. d/b/a Sun Cleaners (Respondent or Hosung), in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint encloses the underlying INS notice of intent to fine (NIF) dated September 24, 1993, served by INS on Hosung on October 5, 1993. By letter dated October 8, 1993, filed with INS, Hosung timely requested a hearing before an administrative law judge.

The complaint consists of three counts, i.e., Count I, alleges failure to prepare and/or to make available for inspection the INS employment eligibility verification form (Form I-9), for ten individuals; Count II alleges that Respondent failed to ensure that seven individuals properly completed section 1 and that as to those seven, Respondent failed to properly complete section 2, of the Form I-9. Count III alleges that Respondent failed to properly complete section 2 of the form I-9 for 14 individuals. Complainant requests a civil money penalty in the amount of $610 per individual, for a total of $18,910.00.

On May 6, 1994, counsel for Hosung filed a letter/pleading which requested an unspecified extension of time in which to answer the complaint. On May 26, 1994, Hosung filed its answer to the complaint, generally denying liability and including three affirmative defenses, with extensive exhibits attached. No objection having been filed by INS to the motion or late-filing of the answer, its tardiness is deemed waived.

On June 6, 1994, INS filed, pursuant to 28 C.F.R. § 68.9(d) and Fed. R. Civ. P. 12(f), a motion to strike the affirmative defenses, with points and authorities in support. On June 8, 1994, pursuant to a transmittal letter dated June 6, 1994, INS filed an amended points and authorities to correct certain dates in its previous filing, and to append as exhibit A a copy of its notice of inspection addressed to Respondent on October 8, 1992, scheduling an October 16, 1992 review of Sun's I-9s.

On June 13, 1994, INS filed, pursuant to 28 C.F.R. § 68.38 and Fed. R. Civ. P. 12(c), a motion for partial judgment on the pleadings, contending that admissions implicit in certain portions of the answer to the complaint comprise a basis for judgment against Hosung with respect to two named individuals, i.e., Jesus M. Hiraldo and Jesus Villaanueva (Count I, charges 5 and 9).

On June 16, 1994, INS filed, pursuant to 28 C.F.R. § 68.11(a) and Fed. R. Civ. P. 7(b), a motion to deem Hosung's answer as admitting certain allegations of the complaint with respect to Hiraldo and Villaanueva, and other individuals named in Counts II and III.

No pleadings subsequent to the answer have been filed by Hosung. Respondent not having asked for an extension of time in which to respond to any of the motions, more than fifteen days having elapsed since service of all of them, the motions are ripe for consideration with no assist from Respondent. See 28 C.F.R. §§ 68.8(b)(2), 68.11(b).

II. *The Affirmative Defenses Are Struck*

Hosung's answer to the complaint, captioned First, Second and Third Affirmative Defenses, includes consecutively numbered paragraphs 7 through 21. In several iterations throughout those paragraphs, Respondent characterizes its defense as one of good faith compliance with the requirements of the employment eligibility verification procedures. Hosung's answer contains argument supporting elements of defense on the merits which have no place in an affirmative defense, as for example at paragraph 16.1, to the effect that an I-9 alleged to be

incomplete for an individual, Jin Il Bahn, was not that of an employee, "He might fill out the Form I-9 to look for work." In short, the affirmative defenses assert claims which, as correctly pointed out in Complainant's motion to strike, either go to the quantum of penalty, or are totally irrelevant.

In very early adjudication of employer obligations under 8 U.S.C. § 1324a, OCAHO case law established that a good faith effort at compliance, such as reliance on the employee's documentation, or cooperation with INS, is one of five statutory criteria to be considered in determining an appropriate civil money penalty. A good faith compliance effort is immaterial to the question of liability for failure to prepare, present or complete the Forms I-9. U.S. v. Mester Mfg. Co., 1 OCAHO 18 (6/17/88) at 38, aff'd sub nom Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989). See also U.S. v. Nevada Lifestyles, Inc., 3 OCAHO 463 (10/16/92) (Order . . . Granting in Part Complainant's Motion to Strike Affirmative Defenses) at 22; U.S. v. Tom & Yu, 3 OCAHO 445 (8/18/92); U.S. v. DuBois Farms, Inc., 1 OCAHO 242 (9/28/90) (Order Granting . . . Motion to Strike Affirmative Defenses) at 2, and cases cited.

It is also not a defense available to the employer that the employee, but not the employer, erred or otherwise failed to properly complete employee entries on the Form I-9. U.S. v. Boo Bears Den, 1 OCAHO 71 (7/19/89) at 3.

Respondent's second affirmative defense contends that it is not obliged to retain Forms I-9 for employees named in the complaint who left its employ more than three years before the inspection. To the contrary, I agree with Complainant's understanding of 8 U.S.C. § 1324a(b)(3) which requires an employer:

> to retain the form and make it available for inspection . . . during a period beginning on the date of hiring . . . of the individual and ending--
>
> * * *
>
> (B) in the case of the hiring if an individual--
> (i) three years after the date of such hiring, or
> (ii) one year after the date the individual's employment is terminated, whichever is later.

For discussion of an employer's I-9 duties, see U.S. v. China Wok Restaurant, Inc., 4 OCAHO 608 (2/9/94) at 12-13; U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89), at 7, aff'd by CAHO, 1 OCAHO 55 (5/5/89), aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990).

INS inspected Respondent's Forms I-9 on October 16, 1992. Accordingly, it is a question of fact whether Hosung prepared and presented I-9s for all current employees hired after November 6, 1986, and all former employees hired after November 6, 1986 who were separated from employment less than a year prior to October 16, 1992, i.e., after October 16, 1991.

Respondent's third affirmative defense appears to assert that any lack of compliance on its part is excused because Complainant breached an obligation to provide educational information, failed to provide direction despite request for help and "either did not have a system in place to provide proper information or provided contradictory or incorrect or vague information." An employer is not entitled to an educational briefing as a condition precedent to enforcement of its obligations under the employer sanctions program of 8 U.S.C. § 1324a. Mester Mfg. v. I.N.S., supra; U.S. v. Boah Fashion Corp., 1 OCAHO 281 (12/21/90); U.S. v. Heisler, 1 OCAHO 150 (4/5/90).

To the extent that Hosung intended to claim estoppel, the speculative and internally inconsistent character of its assertion, i.e., that INS either provided no assistance or its assistance was "contradictory or incorrect or vague," is self-defeating. It is a pleading undeserving of response. To its credit, however, Complainant's motion to strike addresses the affirmative defense as if estoppel were alleged against the Government. INS points out that:

> At the very least, an affirmative defense based on estoppel requires a prima facie showing of "affirmative misconduct," Bolourchian v. I.N.S., 751 F.2d 979, 980 (9th Cir. 1984), (per curiam), which results in significant injury.

U.S. v. Wasem, 1 OCAHO 98 (10/25/89) at 10 n.5.

The answer to the complaint alleges no affirmative misconduct such as would justify an evidentiary confrontation on that subject. U.S. v. Manos & Assocs., 1 OCAHO 130 (2/8/89) at 8. In any event, however, Hosung's pleading fails to establish a legal predicate for adjudging affirmative misconduct and applying equitable estoppel against the government. Complainant's reliance on Heckler v. Community Health Services, 467 U.S. 51 at 60 (1984) is persuasive. "[I]t is well settled

that the Government may not be estopped on the same terms as any other litigant." Heckler also observed that:

> [T]he party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse" and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.

Id. at 59 (footnotes omitted).

For the reasons discussed above, Complainant's motion to strike affirmative defenses is granted.

III. *Other Motions Granted in Part*

Although Hosung's affirmative defenses do not survive the judicial response to Complainant's motion, the logic of Complainant's remaining two motions implicates the factual allegations of those defenses. Particularly where the party asserting the defenses has not defended against utilizing their factual underpinnings as admissions against interest, I concur with the premise implicit in the INS motions that they comprise a basis on which judgment can be reached.

Complainant's motion for partial judgment on the pleadings with respect to Hiraldo and Villaanueva (Count I, charges 5 and 9), is granted only as to Villaanueva. As to Villaanueva, Hosung has acknowledged the critical elements of Count I, including that he remained in its employ in 1992 and 1993. Accordingly, judgment is granted as to Count I, charge 9. Hosung's assertion in its answer to the complaint, at paragraph 14 that it "has found" the employee's record is a concession that it was not presented at the time of inspection. That the employee may have been an individual authorized for employment in the United States is not a defense to a charge of failure to prepare or present an I-9 at a duly noticed inspection.

Since for purposes of its motion INS accepts that Hiraldo was not employed after 1990, there is a question whether Hosung had an obligation to retain Hiraldo's I-9 more than one year after the last date on which he was employed. Because that date presumably would have been no later than December 31, 1991, it is unclear whether § 1324a(b) liability attaches as to Hiraldo.

Complainant's remaining motion requests that Hosung's answer be treated as admitting certain allegations of the complaint with respect to Hiraldo and Villaanueva, and other individuals named in Counts II and III. The disposition of the previous motion just discussed as to

Hiraldo and Villaanueva pertains as to this motion also. Complainant's motion with respect to certain individuals named in Counts II and III proposes findings of fact as to certain but not all elements of the charges. The articulation by INS of those elements it deems undisputed still leaves open the possibility of defense as to the remaining elements. Accordingly, recognizing that Hosung has failed to plead to the motion, I reserve judgment on the motion and as to liability with respect to all named individuals other than Villaanueva, pending Respondent's compliance with this order.

IV. *Order To Show Cause*

This order recognizes that three consecutive motions by INS have gone unanswered. Hosung's lack of responsiveness, while not dispositive, casts doubt on its intentions to pursue its request for hearing. In the circumstances,

Respondent is directed to file a pleading to show cause if any it has,

(a) Why Complainant's motion addressed to Counts II and III of the complaint should not be granted, and

(b) Why judgment should not be entered against it for the liability asserted, with respect to individuals named in all three counts of the complaint, and

(c) Why the assessment imposed by Complainant with respect to each individual named in the complaint should not be adjudged against it.

Respondent is cautioned that failure to file a timely response to this order may result in entry of a judgment against it by default. 28 C.F.R. § 68.37(b)(1). A response will be timely if filed not later than Thursday, August 18, 1994. INS may respond to Hosung's filing, if any, in the form of an appropriate pleading to be filed not later than Tuesday, September 6, 1994.

SO ORDERED.

Dated and entered this 28th day of July, 1994.

MARVIN H. MORSE
Administrative Law Judge

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ADDENDUM TO ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES AND ORDER TO SHOW CAUSE

(July 28, 1994)

At the first full paragraph on page 3, insert after the first sentence the following text:

"U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90) at 6;"

SO ORDERED. Dated and entered this 28th day of July, 1994.

MARVIN H. MORSE
Administrative Law Judge