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

November 7, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 95A00056
FOUR STAR KNITTING, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER AND PARTIALLY GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

Procedural History

The three (3)-count Complaint at issue, filed on March 31, 1995, contains 135 alleged paperwork violations of the provisions of 8 U.S.C. § 1324a, for which civil money penalties totaling $41,000 were assessed.

On July 10, 1995, in the course of earlier motion practice, complainant filed a First Request for Admissions, in which respondent was requested to admit the genuineness of Exhibits 1 thru 4 and Joint Exhibits 5 and 6, as well as the truthfulness of some nine (9) statements. Those cumulative requests fully addressed all elements of the facts of violation in the 135 violations alleged in the Complaint.

On August 17, 1995, respondent's counsel of record, Henry Kohn, Esquire, filed a single-page, uncaptioned pleading on behalf of his corporate client, in which he requested that respondent be granted a 10-day extension of time in order "to interpose an Answer."

On August 18, 1995, in the absence of having received replies to those requests for admissions, complainant filed a Motion to Deem Admitted

Complainant's First Request for Admissions and Motion for Summary Decision.

On August 24, 1995, complainant filed a pleading captioned Complainant's Response in Opposition to Respondent's Motion for Leave to Serve Late Answers, in which it asserted objections to Mr. Kohn's request for an extension of time.

On August 28, 1995, Mr. Kohn responded to Complainant's First Request for Admissions, and on August 29, respondent's counsel further filed an uncaptioned pleading in opposition to Complainant's Motion for Summary Decision.

On September 1, 1995, the undersigned issued an Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions and Staying Complainant's Motion for Summary Decision, granting respondent until September 18, 1995, to file its response to the latter motion.

On September 18, 1995, this Office received a facsimile copy of Respondent's Motion for Reconsideration of Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions.

On September 29, 1995, complainant filed a Response in Opposition to Respondent's Motion for Reconsideration.

On October 19, 1995, respondent filed a pleading captioned Respondent's Reply in Support of Respondent's Motion for Reconsideration.

Respondent's Motion for Reconsideration of September 1, 1995 Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions

The pertinent procedural rule concerning admissions expressly provides that:

> Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party:

> (1) A written statement denying specifically the relevant matters of which an admission is requested;
>
> (2) A written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or
>
> (3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

28 C.F.R. § 68.21(b).

Absent an allowance by the administrative law judge to whom the case is assigned, failure of a party to respond to a request for admissions within the specified 30-day time period results in the admission of each matter about which an admission is requested. Id.

In the instant case, respondent's counsel has expressly acknowledged in an uncaptioned pleading dated August 17, 1995, that he was in receipt of Complainant's Request for Admissions "on or about July 10, 1995." Allowing 30 days after service of complainant's requests, in accordance with the rules, respondent had until August 9, 1995, to respond to those requests. 28 C.F.R. § 68.21(b). Alternately, had respondent not admitted receipt of the requests on July 10, the addition of five (5) days for mailing from August 6, 1995, as provided under 28 C.F.R. §§ 68.21(b) and 68.8(c)(2), would have given respondent until August 11, 1995, to have responded. Under either calculation, Mr. Kohn failed to adhere to the timeframe specified in the rules, and thus "each matter of which an admission is requested is admitted." Id.; see also September 1, 1995 Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions and Staying Complainant's Motion for Summary Decision [hereinafter "September 1, 1995 Order"].

On August 17, 1995, or tardily by some six (6) to eight (8) days, this Office received a facsimile copy of an uncaptioned pleading, accompanied by a cover letter from Mr. Kohn. This pleading requested an extension of time in which to respond to complainant's requests, citing office work load, staffing problems, and his client's unavailability as reasons for his failure to have timely filed responses to those requests.

In his August 17, 1995, pleading, Mr. Kohn acknowledged having received Complainant's First Request for Admissions on or about July 10, 1995, and cited several reasons for not having replied fully within the 30-day period provided for under the pertinent procedural rule, 28 C.F.R. § 68.21(b). Those reasons included: (1) "a severe work load"

during the preceding several week period; (2) the fact that the office secretary had given birth prematurely, resulting in understaffing; (3) that respondent's counsel's file pertaining to this matter had been misplaced; and (4) that the situation had been "further complicated by . . . the respondents being out of town for the last two weeks."

On August 24, 1995, complainant filed a Response in Opposition to Respondent's Motion for Leave to Serve Late Answer, arguing: (1) that respondent had failed to show good cause as to why his responses had not been timely filed; (2) that respondent failed to contact complainant to seek an extension; (3) that Mr. Kohn had three (3) weeks prior to the date responses were due in which to have consulted with his client; and (4) that, in any event, respondent's counsel had sufficient personal knowledge and information to have fully answered the requests for admissions.

While timely requests for extensions of time to respond to various pleadings have been allowed in other cases where good cause has been shown, see United States v. Kumar, OCAHO Case No. 95C00110 (Sept. 27, 1995) (allowing an extension of time to file an answer where counsel had been recently retained by respondent); United States v. Aguas-Avalos, OCAHO Case No. 94C00042 (July 28, 1995) (granting an extension of time to prepare a motion for summary decision where respondent was soon to be released from prison); United States v. Alvarez-Suarez, OCAHO Case No. 93C00208 (June 1, 1995) (permitting an extension of time to file a post-hearing brief due in part to death of a family member and counsel's personal injury), such requests have also been denied in cases in which good cause was not demonstrated, see United States v. Katy Landscape Maintenance, Inc., OCAHO Case No. 94A00124 (Oct. 6, 1994) (denying respondent's request for an extension of time to respond to discovery requests due in part to respondent's counsel's failure to show good cause), and in cases where such requests themselves were not timely filed, see United States v. Alvarez-Suarez, OCAHO Case No. 93C00208 (Sept. 1, 1995) (denying respondent's motion for enlargement of time due in part to its failure to timely file its request).

The issues raised in the parties' pleadings were resolved in the undersigned's September 1, 1995 Order Granting Complainant's Motion to Deem Admitted its First Request for Admissions, effectively denying respondent's untimely Motion for Extension of Time, but allowing respondent until September 18, 1995, to respond to complainant's stayed Motion for Summary Decision.

On September 18, 1995, respondent filed a Motion for Reconsideration of the undersigned's September 1, 1995 Order, arguing that this Office's refusal to grant an extension of time to respond was "improper and unwarranted." While respondent's counsel did acknowledge the procedural rule governing such an outcome, he insists that "the failure to respond was strictly due to a series of facts and circumstances beyond control of Respondents [sic] attorney which created a situation in which procedural regulations were inadvertently not complied within [sic] a timely manner."

Respondent's counsel argues that he has "consistently shown good cause for his failure to have timely answered the Complainants [sic] [request for admissions]." Mr. Kohn generally restates his previously offered reasons for the delay, and notes that failure to grant an extension will result in "extreme prejudice" to respondent.

In response to the provision in the September 1, 1995 Order that respondent's counsel respond to complainant's Motion for Summary Decision on or before September 18, 1995, Mr. Kohn urges that in the event that his Motion for Reconsideration is granted, complainant's Motion for Summary Decision is moot. In that motion respondent also asserts that if its motion is denied respondent should be granted 10 days from the date of its receipt of the ruling on its September 21, 1995 motion in order to reply to complainant's August 18, 1995 Motion for Summary Decision.

On September 29, 1995, Complainant's Response in Opposition to Respondent's Motion for Reconsideration was filed. Complainant (1) urges that the pertinent procedural rules do not allow for requests for reconsideration of substantive matters, 28 C.F.R. § 62.52(c)(4), as held in Workrite Uniform Co., Inc., 5 OCAHO 736, at 2; (2) complainant also maintains (a) that respondent's motion is untimely, (b) that it is without merit, and (c) that it is devoid of any evidence supportive of respondent's counsel's claims that the workflow of his office had been affected by personnel factors.

On October 20, 1995, in response to Complainant's Response in Opposition, respondent filed a pleading captioned Respondent's Reply in Support of Respondent's Motion for Reconsideration. Respondent's counsel alternately argues: (1) that, where not provided for within 28 C.F.R. § 68, the Federal Rules of Civil Procedure may be used as a guideline, 28 C.F.R. § 68.1, and thus reconsideration of substantive matters is allowed; (2a) that his motion for an extension of time in which to respond to Complainant's Motion for Summary Decision is

timely; (2b) that his motion has merit given the "series of technical difficulties suffered" by his office; and (2c) that his reliance on his attorneys' affidavits to support his Motion for Reconsideration is proper, since no third party actions are involved.

Complainant's argument concerning a motion for reconsideration of an intermediate order is flawed because the factual scenario in Workrite did not involve an intermediate order. Instead, that ruling distinguishes between the correction of a final decision and order under sections 274A and 274C of the INA, from those under section 274B, noting that the former may be corrected by the administrative law judge only as to clerical mistakes or typographical errors, whereas the latter may be additionally corrected as to substantive matters. 5 OCAHO 755, at 2; see also 28 C.F.R. § 68.52(c)(4). The rule cited in Workrite specifically applies to "a decision and order issued in a case." 28 C.F.R. § 68.52(c)(4). An intermediate order obviously does not qualify as a final decision and order.

Further, the procedural rule regarding requests for admissions specifically provides that "[a]ny matter admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission." 28 C.F.R. § 68.21(d) (emphasis added). Absent some type of motion to set aside an admission, for example, a motion to reconsider, amend or supplement an order, this portion of the rule is rendered meaningless. Because each portion of a statute must be given effect, it can only be concluded that the legislature intended an order deeming admitted requests for admissions could be subject to amendment or withdrawal given an appropriately supported motion. This interpretation is in harmony with the undersigned's previous consideration of motions for reconsideration. See United States v. Burns, 5 OCAHO 768 (1995) (denying, based on the merits, complainant's motion to reconsider an order addressing summary decision); United States v. Blueberry Hill Family Restaurant, OCAHO Case No. 93A00058 (Dec. 8, 1994) (denying substantively respondent's motion for reconsideration of a summary decision ruling); United States v. 4431 Inc., OCAHO Case No. 93A00065 (Oct. 26, 1993) (granting respondent's counsel's motion to reconsider an order to amend the complaint).

In view of the foregoing, respondent's Motion for Reconsideration is appropriately before this Office. There is also a second issue, that which involves the timeliness of that motion. Our file indicates that respondent's Motion for Reconsideration was timely filed because it was received by facsimile on September 18, 1995, as directed by the

September 1, 1995 Order and as alleged by respondent in its Reply in Support of Respondent's Motion for Reconsideration.

Even though that motion was filed in a timely manner, it nonetheless fails to provide the required good cause as to why the undersigned's September 1, 1995 Order should be amended or supplemented.

In attempting to show good cause, Mr. Kohn points to several "technical difficulties" experienced by his office. Undoubtedly, professional offices such as Mr. Kohn's must frequently cope with such "difficulties" as unexpected shortages of administrative support and misplaced files. Such "technical difficulties," however, do not rise to the level required by a showing of good cause. See United States v. Kirk, 1 OCAHO 72, at 456 (1989) (noting that respondent's counsel's assertions that complainant's "voluminous and unnecessary" discovery requests coupled with counsel's involvement in several other hearings "might have been adequate grounds to support a timely request for extension of time to file [the pleading in question] but do not constitute good cause for failure to file a timely [response]").

In addition, respondent's counsel's motion is replete with unsubstantiated and unsupported assertions that the undersigned has acted in an "improper and unwarranted" manner, resulting in "undue prejudice" to respondent. While his client will undeniably suffer prejudice from the September 1, 1995 Order deeming complainant's requests for admissions admitted, such prejudice arises as a direct result of Mr. Kohn's failure to timely respond to complainant's requests for admissions, and not to any "improper and unwarranted" actions by this Office. Merely stating that an abuse of discretion has occurred, without offering more, is not sufficiently supportive.

Because respondent has failed to show good cause as to why his response to Complainant's First Request for Admissions and request for an extension of time were not timely filed, Respondent's Motion for Reconsideration is hereby denied.

Complainant's Motion for Summary Decision

Complainant's July 10, 1995, First Request for Admissions incorporated and addressed the ultimate facts of violation in all allegations at issue. As noted previously, the September 1, 1995 Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions resulted in respondent's having admitted each matter about which complainant had requested an admission. Given

that fact respondent's request for additional time to respond to Complainant's Motion for Summary Decision is rendered moot. Accordingly, further consideration of Complainant's Motion for Summary Decision is in order.

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material 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." 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. For this reason, Federal caselaw interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera Enters., Inc., 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of

material fact. See Celotex Corp., 477 U.S. at 323. And summary decision may be based upon matters deemed admitted, Edwards v. Aguillard, 482 U.S. 578 (1987); Primera Enters., Inc., 4 OCAHO 615, at 3; Goldenfield Corp., 2 OCAHO 321, at 3-4. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Count I

In Count I of its March 31, 1995 Complaint, complainant alleged that respondent hired the 46 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the required Employment Eligibility Verification Forms (Forms I-9) for those individuals.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available in the course of INS inspections. 8 U.S.C. § 1324a(a)(1)(B). A failure to prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. § 1324a(b), is therefore a clear violation of IRCA.

In order to prove the violations alleged in Count I, Complainant must show that:

(1) Respondent hired for employment in the United States;

(2) the individuals named in Count I;

(3) after November 6, 1986; and

(4) Respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

As previously noted, summary decision may be based, as under these facts, on matters deemed admitted. Primera Enters., Inc., supra; Goldenfield Corp., supra. Concerning the allegations in Count I, respondent corporation, duly organized under the laws of the State of New York, admitted the accuracy of a list of employees, which documented that all 46 individuals listed in Count I had been employed by respondent after November 6, 1986, and that Forms I-9 had not been prepared and/or presented by respondent's counsel to INS agents for any of those individuals. See complainant's August 18, 1995 Request for Admissions [hereinafter "Request"] A.3, B.1, B.2, B.8.1-8.46. B.9. While those individuals were listed on copies of respondent's payroll for

the years 1991-93, which had been furnished to INS agents by Mr. Kohn, or otherwise verified as employees by the request for admissions, no corresponding Forms I-9 were produced. Id. A.3, B.7, B.8.1-8.46, B.9. Because respondent did not respond to Complainant's Request for Admissions, as required by 28 C.F.R. Section 68.21, elements 1-4 were deemed admitted.

Complainant has thus demonstrated that respondent hired the 46 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the required Forms I-9 for those individuals.

Accordingly, Complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability concerning the facts alleged in Count I, since there is no remaining genuine issue for trial with regard to respondent's liability for the 46 violations alleged in that count.

Count II

In Count II, complainant alleged that subsequent to November 6, 1986, respondent hired for employment in the United States the 85 individuals named therein and failed to ensure that those individuals properly completed Section 1 of their Forms I-9, and further, that respondent failed to complete Section 2 of each of those 85 individuals' Forms I-9.

IRCA further requires employers to prepare Forms I-9 in compliance with its employment verification system. 8 U.S.C. §§ 1324a(a)(1)(B), 1324a(b), and failure to do so is a violation of IRCA. 8 C.F.R. §274a.2(b)(1)(ii)(A), (B).

In order to prove the violations alleged in Count II, Complainant must demonstrate that:

(1) Respondent hired for employment and/or continued to employ in the United States;

(2) after November 6, 1986;

(3) the individuals named in Count II; and

(4) Respondent failed (a) to ensure that those individuals properly completed Section 1 of their Forms I-9 and (b) failed to properly complete Section 2 of those forms, which requires employer review and verification of each individual's work eligibility documents.

In Complainant's First Request for Admissions, respondent was requested to admit the truth and accuracy of its employment records, and the truth and accuracy of those Forms I-9 which it made available to INS agents. Request A.3, A.5. With the exceptions of those listed at (61) Matilda Romero and (63) Lorenza Sanchez, for whom no Forms I-9 were included in Complainant's First Request for Admissions, visual inspection of the 83 Forms I-9 attached as Joint Exhibit 5 confirm complainant's allegations that (a) those named individuals failed to properly complete Section 1 of the Form I-9, and (b) that respondent, as alleged, failed to properly complete Section 2 of each Form. Id. A.5. Accordingly, because respondent did not respond to Complainant's Requests for Admissions as required by 28 C.F.R. Section 68.9(c), it is deemed admitted that respondent failed to ensure proper completion of Section 1 by those 83 individuals and further failed to properly complete Section 2 of the pertinent Employment Eligibility Verification Forms, as complainant has alleged in Count II.

Excluding the two (2) exceptions noted, complainant has thus established that there is no genuine issue of material fact with regard to the remaining 83 violations. Therefore, Complainant's Motion for Summary Decision is partially granted as it pertains to those 83 non-excepted violations alleged in Count II and denied as to the alleged violations involving Matilda Romero and Lorenza Sanchez because copies of the relevant Form I-9 copies for those individuals have not been furnished.

Count III

Count III alleges that respondent failed to ensure that the four (4) individuals listed in that count properly completed Section 1 of their Forms I-9.

In order to prove the violations alleged in Count III, complainant must demonstrate that:

(1) Respondent hired for employment and/or continued to employ in the United States;

(2) after November 6, 1986;

(3) the individuals named in Count III; and

(4) Respondent failed to ensure that those individuals properly completed Section 1 of each individual's Form I-9.

Initially, respondent has previously admitted the allegations contained in Count III as they pertain to the individuals listed at one

(1) Fernando Briones and three (3) Domitila Gil in its Answer to Complaint Regarding Unlawful Employment. Second, by its failure to have timely responded to complainant's requests, respondent has been deemed to have admitted those allegations as they pertain to those individuals listed at two (2) Angela Flores and four (4) Judith Schvarcz.

Specifically, as to Count III, respondent has admitted that it prepared and presented, as enclosed at Joint Exhibit 6, true and accurate copies of the Forms I-9 corresponding to those individuals employed by respondent and who were named in Count III of the Complaint. Request A.3, A.6. Visual inspection of those forms reveals improper completion of Section 1 in the case of both individuals. Id. A.6. Respondent's Answer to the Complaint, in conjunction with its failure to gave forwarded a timely response to Complainant's First Request for Admissions, as required by 28 C.F.R. Section 68.9(c), has resulted in respondent's being deemed to have admitted, as alleged, that it failed to ensure proper completion of Section 1 of the Forms I-9 pertaining to those individuals.

Thus, because no genuine issue of material fact remains as to the four (4) allegations contained in Count III of the March 31, 1995 Complaint, complainant is hereby granted summary decision as to that count, also.

Summary and Conclusion

In summary, because complainant has shown that there are no genuine issues of material fact regarding the violations alleged in Counts I and III of the Complaint, as well as in 83 of the 85 violations alleged in Count II, and has also shown that it is entitled to partial summary decision as a matter of law with respect to those 133 violations, complainant's August 18, 1995 Motion for Summary Decision is granted as to the facts of violation concerning those remaining 133 paperwork infractions contained in Counts I, II and III of the Complaint.

The appropriate civil money penalty sums for each of those 133 violations, ranging from the statutorily-mandated minimum sum of $100 to the maximum sum of $1,000 for each violation, remain at issue.

In accordance with the provisions of 8 U.S.C. § 1324a(e)(5), in assessing these 133 civil money penalty amounts, due consideration shall be given to (1) the size of the business of the employer being charged, (2) the good faith of the employer, (3) the seriousness of the

violation, (4) whether or not the individual was an unauthorized alien, and (5) the history of previous violations.

In lieu of an adjudicatory hearing for that purpose, the parties are hereby ordered to address the appropriate civil money penalty sums to be assessed, by duly considering the aforementioned five (5) statutory criteria in the course of filing written concurrent briefs to be submitted no later than November 30, 1995.

JOSPEH E. MCGUIRE
Administrative Law Judge