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

April 25, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00145
HARRAN TRANSPORTATION CO., INC., Respondent.	)	

ORDER DENYING IN PART AND GRANTING IN PART COMPLAINANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (INA). On October 18, 1995, the United States of America, Department of Justice, Immigration and Naturalization Service (Complainant or INS) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Harran Transportation Co., Inc. (Harran or Respondent), alleging that Respondent failed to ensure that 29 named individuals properly completed Section 1 of the Employment Eligibility Verification Form (Form I–9), and failed itself to complete Section 2 of Form I–9 properly for 10 additional individuals. The Complaint, Notice of Hearing, and a copy of the applicable Rules of Practice and Procedure[1] were served upon Respondent via certified mail on November 21, 1995, and Respondent timely answered by letter-pleading by its Insurance and Risk Manager, George E. Blank, on December 7, 1995.

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1995).

On February 8, 1995, Complainant filed its Motion for Judgment on the Pleading[2] (sic), asserting that Respondent "did not deny any of the allegations in the Complaint". On February 12, 1996, Harran responded to this Motion by letter-pleading in which it disagreed, and asked that the Motion

> . . . be denied based on the fact that we have, indeed, expressly denied all the allegations contained in the complaint against us. In the last sentence of the paragraph of my position paper preceding the section entitled **Answer to Complaint, Count I** I state: "We vigorously disagree with the allegations contained in the complaint and wish to contest those allegations."
>
> That statement seems very clear in that it denies the allegations in the complaint. Our position paper and respondent's brief sets out our position and defense. The motion for summary judgment is baseless and should be denied.

The parties thus dispute the legal consequences of the Answer, and whether the material allegations of the Complaint were denied. In part this dispute appears to be one as to what is encompassed in the term "allegations."

Applicable Law

OCAHO procedural rules do not specifically provide for any functional equivalent of Rule 12(c) of the Federal Rules of Civil Procedure. In considering a motion for judgment on the pleadings, I therefore look to the case law interpreting Rule 12(c) under those rules for a general guideline, as directed by 28 C.F.R. §68.1.

The federal courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings. *See generally*, 5A C. Wright and A. Miller, Federal Practice and Procedure §§1367 and 1368. The governing standard, like that for Rule 56 of the Federal Rules of Civil Procedure, is that the moving party must clearly establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Alexander v. City*

[2] Although captioned as a Motion for Judgment on the Pleading (sic), the relief sought is "that summary judgment be entered against the Respondent. . . . " While the applicable standards governing these two motions are similar, I treat this Motion as it is captioned because there is nothing before me at this stage other than the pleadings, no affidavits or exhibits having been filed. The I–9 Forms at issue in this proceeding are not part of the record.

of Chicago, 994 F.2d 333 (7th Cir. 1993). The difference is that matters outside the pleadings, with a few narrow exceptions, may not be considered in ruling upon a motion for judgment on the pleadings. The contents of the pleadings thus provide the only appropriate basis for decision on this motion. The issue at this stage is not whether the nonmoving party will prevail, but whether the moving party is required to offer evidence. If additional factual development is essential to a proper decision on the merits, the motion may not be granted. If the pleadings do not resolve all of the factual disputes, a hearing or further development is more appropriate than judgment on the pleadings.[3]

For purposes of considering this motion I therefore take as true all well pleaded factual allegations in the Answer, and as false all controverted assertions in the Complaint, but I do not take as true any conclusions of law or any facts which would be inadmissible at a hearing. I draw no inferences in favor of the moving party and all reasonable inferences in favor of the nonmoving party. All doubts are resolved in favor of the nonmoving party, particularly where, as here, Respondent is unrepresented. Only if it appears to a certainty that the moving party is entitled to judgment as a matter of law can a judgment on the pleadings be granted.

Pursuant to OCAHO rules, I also take as admitted those well pleaded factual allegations in the Complaint which are not expressly denied, 28 C.F.R. §68.9(C)(1), but I do not deem admitted any conclusions of law, whether expressly denied or not.

The INA imposes an affirmative duty upon employers to prepare and retain a Form I–9 for each employee hired after November 6, 1986, and to make these forms available for inspection by INS officers. Failure to prepare, retain, or produce the forms in accordance with the employment verification system is a violation of the Act. Specific requirements include *inter alia*, the attestation of the em-

[3] Some confusion appears in the caselaw as to the appropriate standard to be applied to a motion for judgment on the pleadings. As with a motion to dismiss, the facts must be viewed in the light most favorable to the nonmoving party, with inferences drawn in the nonmovant's favor. *United States v. Wood,* 925 F.2d 1580–81 (7th Cir. 1991). Well pleaded allegations of the nonmovant's pleading are taken as true. *Gilman v. Burlington NorthernR.R. Co.*, 878 F.2d 1020 (7th Cir. 1989). Where the motion is used to attempt a disposition on the substantive merits, however, in contrast to a 12(b)(6) motion raising procedural defenses, the substantive legal standard to be applied is that of Rule 56. *Alexander, supra.*

ployer under the penalties for perjury that it has examined specific documents to verify that the individual is not an unauthorized alien, 8 U.S.C. §1324a(b)(1), and the attestation of the employee under the penalties for perjury that he or she is eligible for employment, 8 U.S.C. §1324a(b)(2)

Allegations in the Complaint and Answer

Count I of the Complaint alleges that Harran hired 29 named individuals after November 6, 1986, and failed to ensure that they properly completed Section 1 of Form I–9. The manner in which Section 1 was improperly completed is not specified in the Complaint, so all the information as to the specific defects is that which is provided in the Answer.

In response, Respondent states:

> Of the 29 forms identified as improperly completed, nine had no date in Section 1 but had a date on another part of the form. The form is thus effectively dated. The representations made in Section 1 are effective concurrently with the date in Section 2. It would be illogical to assume that the representations, which are not time sensitive, have no effect for lack of a time-date stamp so long as a date appears elsewhere.
>
> Furthermore, an I–9 prepared for Edgar Ticas in 1990 was properly prepared and executed; however, when this employee had a brief break in his employment and a subsequent I–9 was prepared, the latter form was lacking a date on Section 1 of the form. Both forms were available to the investigators. They saw fit to ignore the previous form and to cite us for a paperwork violation on the subsequent form.
>
> There were 21 forms that did not have a box checked under the attestation; yet, everyone (sic) was properly signed and executed. No adverse inference can be drawn against the employee with respect to employment eligibility inasmuch as eligibility documents were proffered and authenticated to the extent required by law.

Respondent appears to admit (by failing to deny) hiring the 29 named individuals after November 6, 1986, but to deny the failure to "properly" complete Section 1. It does appear to acknowledge and describe specific omissions in the I–9's, however.

Count II asserts that Harran hired 10 named individuals after November 6, 1986, for whom it failed properly to complete Section 2 of Form I–9. Again, the only specifics as to any alleged omissions in Section 2 are those provided by the Answer.

In response, Respondent states:

> Of the ten (10) discrepancies found in Section 2 of the Form I–9, six (6) had no certification date. Again, the date found in Section 1, arguably, runs concurrent with the date in Section 2, even if the date were innocently omitted in Section 2. Again, with respect to verifying eligibility and document authentication, no adverse inference can be drawn against the employee.
>
> There were discrepancies uncovered in Section 2 of five (5) individuals for whom eligibility documentation was incorrectly identified, such as the Drivers Licence (sic) expiration date being omitted. Again, respondent is not charged with not exercising due diligence in authenticating such documentation. The requisite information is available to support the representations made on the Form I–9 and no adverse inference can be drawn against the employee with respect to employment eligibility.

Again, Respondent appears to admit (by failing to deny) hiring the 10 named individuals after November 6, 1986, but to deny that it failed to "properly" complete Section 2. It does acknowledge certain specific "discrepancies" or omissions, however, and also acknowledges others which are not specifically described.

Further, by way of defense, Respondent also argues:

> Furthermore, the Immigration and Naturalization Service has developed several versions of the Form I–9 over the years. It has not been abundantly clear on some of these forms as to what is to be filled out and what can be left blank. Such ambiguity should be resolved in favor of the respondent and we intend to raise this issue as an affirmative defense in this matter.

Respondent also contends that the nature of the alleged violation is marginal and insignificant, consisting of a few technical violations which Respondent believes are *de minimis,* and that the penalty sought is excessive and violates the Eighth Amendment.

Although Respondent says it disputes "all the allegations" of the Complaint, it has not, in fact, explicitly denied the specific factual assertions that it does business at 30 Mahan Street in Babylon, New York; that it hired all the named individuals after November 6, 1986; or that there were some defects or omissions in the I–9's for at least some of the named individuals. It denied an allegation which was not made: that of hiring any ineligible persons, and appears to have denied also the proposition that it did not "properly" complete I–9's.

The question posed is whether on this record the undisputed facts entitle Complainant to judgment as a matter of law. That question implicates three others:

1. Are the discrepancies or omissions admitted to and described by Respondent's Answer sufficient to conclusively warrant judgment for Complainant without any further evidence?

2. Has Respondent suggested any possible defenses which could affect the outcome as to liability?

3. Do the pleadings alone establish that the penalties sought are appropriate?

I. *Liability*

As to the first of these questions I look initially to the specific defects identified in Respondent's Answer in response to Counts I and II, to see whether they conclusively provide sufficient certainty and specificity for me to find as a matter of law that Complainant is entitled to judgment.

As to Count I, Respondent indicates that 21 of the 29 forms "did not have a box checked under the attestation." If, as seems most likely, this means that 21 of the 29 named individuals did not attest under oath as to their employment eligibility status, such an omission would appear to go to the very heart of the verification system. Without the forms before me, however, I cannot identify which 21 of the 29 individuals made no such attestation, or if that is the case. Neither can I ascertain from the pleadings which nine of the 29 forms lack a date or where else on the form the date may appear.

As to Count II, one of the forms of an unnamed individual did not have a driver's license expiration date. Four discrepancies, not otherwise described, were also found. Ten forms of unidentified individuals had no date in Section 2. With the exception of Edgar Ticas, whose second I–9, created after a break in employment, omitted a date, no specific omission is linked to any specific individual.

Even were I inclined to find these descriptions sufficient as a matter of law to establish violations, I would be disinclined to enter a judgment making findings as to the I–9's of persons who cannot be identified by name. A finding of violation needs to be described with at least sufficient specificity to ensure that a second charge based on the identical violation could not occur.

II. *Affirmative Defenses*

Pleading an affirmative defense to a §1324a complaint ordinarily requires both a viable legal theory and a statement of facts in sup-

port of the alleged defense. The OCAHO rule governing the pleading of defenses, 28 C.F.R. 68.9 (c)(2), is analogous to Rule 8(c) of the Federal Rules of Civil Procedure which requires that an affirmative defense be pleaded with specificity in order to give the opposing party fair notice of the nature of the defense. *United States v. Northern Mich. Fruit Co.,* 4 OCAHO 667, at 9 (1994).

For purposes of ruling on a motion for judgment on the pleadings, however, I do not inquire whether an affirmative defense has been sufficiently pleaded here to satisfy these standards in order to withstand a motion to strike, but rather, whether or not any possible defense has even been suggested which could operate to preclude a judgment on the pleadings.[4]

To the extent that Respondent asserts the omissions were inadvertent or unintentional, that assertion may bear on the issue of good faith and thus have relevance to mitigation of the civil penalty, but is not itself an affirmative defense to liability. *United States v. China Wok Restaurant*, 4 OCAHO 608 (1994).

The employment authorization of an individual for whom a Form I–9 is prepared, like good faith, is one of several mitigating factors to be considered in determining an appropriate civil money penalty for a paperwork violation, but is not relevant to the initial issue of determining liability for such a violation. *United States v. Candlelight Inn,* 4 OCAHO 611 (1994). Similarly, the seriousness of the violation is also a mitigating factor to be considered in assessing a penalty, not a defense to liability.

Prior OCAHO decisions have established, however, that substantial compliance with the paperwork requirements may be asserted as an affirmative defense with regard to liability for a paperwork violation. *United States v. Chicken by Chickadee Farms*, 3 OCAHO 423 (1992). Respondent arguably has pleaded such a viable defense, at least sufficiently to survive a motion for judgment on the pleadings, a motion which can only be granted where it appears certain that there is no disputed issue of material fact and the movant is entitled to judgment as a matter of law. Giving Respondent the benefit of every doubt, as I am obliged to do for purposes of this motion, I can-

[4] The reason for this distinction is obvious: where an insufficiently pleaded defense is stricken, the result is ordinarily leave to amend to cure the defect, not an adverse judgment.

not conclude on the basis of the pleadings alone, and without even viewing the disputed I–9's, that there is no set of facts possible which would permit Respondent to demonstrate substantial compliance. Respondent suggests, for example, that the information omitted appears elsewhere on the form. I have no way of knowing on this record, moreover, whether any other documents are attached to any of the I–9's, which show additional information.

Whether or not Harran will be able to succeed in establishing a defense of substantial compliance cannot be determined on the bare pleadings. Regardless of the eventual outcome, the defense has at least been sufficiently suggested to avoid an adverse judgment as a matter of law on these limited facts.

The same cannot be said of the claimed "defense" that there have been changes in the I–9 forms over the years; this is not an affirmative defense at all, and cannot be considered as such.

III. *Penalty Sought*

INA provides that for each paperwork violation, the penalty should be assessed in amount not less than $100 and not more than $1000 for each individual. 8 U.S.C. §1324a(e)(5).

Complainant here has sought penalties in the amount of $300 for each of 29 violations, and $320 for each of 10 other violations. Respondent asserts that the penalties sought are excessive in light of the magnitude of the violations.

Factors which I am required to consider in assessing the amount of a penalty include:

1.the size of the business;

2.the good faith of the employer;

3.the seriousness of the violation;

4.whether or not the individual was unauthorized alien; and

5.the history of previous violations.

8 U.S.C. §1324a(e)(5).

Consideration of these factors is mandated by the statute and does not depend upon their being raised as a defense. Because the bare pleadings do not provide sufficient information about any of those

factors for me to give them the consideration which is due, judgment on the pleadings as to penalty would be inappropriate at this stage, even were I to find that violations had occurred.

Findings, Conclusions, and Order

The Motion for Judgment on the Pleadings is granted as to the following undisputed facts:

1. Harran Transportation Co., Inc. is a New York corporation doing business at 30 Mahan Street, Babylon, New York 11704.
2. A Notice of Intent to Fine was served on Respondent on July 29, 1995, and Respondent timely requested a hearing.
3. Harran hired the following twenty-nine (29) individuals for employment in the United States after November 6, 1986:
    1. Ahmed Maqsood
    2. Hani Barakat
    3. Carole Fogle-Belgrave
    4. Madison Bennett
    5. Linwood Brinkley
    6. Charles Crennel
    7. Rocco DiGilio
    8. Herman Jones
    9. Terry Hill
    10. Harry Hunter
    11. Dana Jackson
    12. Douglas Kroener
    13. Sachindra Kumar
    14. James Mehrman
    15. John Paranzino
    16. Winnie Rodriguez
    17. Dion Rummage
    18. Crystal Schewire
    19. Harlan Simonson
    20. Dean Singh
    21. Robert Siegman
    22. Antonio Tabarez

23. Edgar Ticas
24. Jeffrey Trone
25. Earl Washington
26. Albert Watt
27. Mohammad Wattoo
28. Francis Zaid
29. Robert Pittman

4. On the I–9 forms of nine unidentified individuals from this list, a date was missing.
5. On the second I–9 form of Edgar Ticas, created after a break in employment, a date was omitted.
6. On the I–9 forms of 21 unidentified individuals from this list, no box was checked on the attestation.
7. Harran hired the following ten individuals for employment in the United States after November 6, 1986:
    1. Dennis Bushelow
    2. Moses Davis
    3. Sylvester Green
    4. Melvin Hurdle
    5. Lillian McGloin
    6. English Patterson
    7. Donald Pugliese
    8. Michael Rampolla
    9. Patrick Titus
    10. Sean Wenchell
8. On the I–9 forms of six unidentified individuals on this list, one of the certification dates is missing.
9. There are other unspecified discrepancies in Section 2 of the I–9 forms for five unidentified individuals on this list.
10. At least one of the five discrepancies referred to in item number 9 is the omission of a driver's license expiration date.

Judgment on the pleadings is granted as to two conclusions of law:

1. the enumerated statutory factors to be considered in assessing civil money penalties do not constitute a cognizable affirmative defense, and

2. changes in the format of Form I–9 over the years do not give rise to any cognizable affirmative defense.

The Motion is otherwise denied.

In concluding that the rigorous standard for judgment on the pleadings has not been met here, I do not imply that the case is necessarily inappropriate for summary decision with proper development of the record. That record, however, has not yet been made. The parties are encouraged to make it. The case will be set for prehearing conference at the earliest mutually convenient date in order to facilitate their doing so.

SO ORDERED.

Dated and entered this 25th day of April, 1996.

ELLEN K. THOMAS
Administrative Law Judge