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

November 5, 1997

UNITED STATES OF AMERICA, Complainant, v. NAIM OJEIL AND SAMOEIL ISHK, Individually, and d.b.a.: NAIME'S FILM & TELEVISION BEAUTY SUPPLY, Respondents.	)))) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00127))))))

ORDER DENYING COMPLAINANT'S MOTION FOR PROTECTIVE ORDER

I. *The Procedural History*

March 2, 1994. The Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) upon Naim Ojeil and Samoeil Ishk, individually, and doing business as (dba) Naimie's Film and Television Beauty Supply (Beauty or Respondents), located in North Hollywood, California. By letter dated March 24, 1994 to INS, Beauty timely requested a hearing before an administrative law judge (ALJ).

June 23, 1997. INS filed a Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO), which by Notice of Hearing, dated June 27, 1997, addressed a copy to Respondents and assigned the case to me. The allegations of the Complaint are the same as those of the NIF, *i.e.*, failure to timely prepare employment eligibility verification forms (Forms I–9) for eleven named individuals in violation of the requirements of 8 U.S.C. §1324a(b) and 8

C.F.R. §274a.2(b), except that each of the individuals named in the Complaint is also identified by one or more "aka" names. INS seeks a civil money penalty of $300 per person, $3,300 in the aggregate.

June 30, 1997. Respondents received the NOH.

August 1, 1997. By letter dated July 31, 1997, Respondents requested until August 15, 1997 to answer the Complaint, while considering retaining an attorney.

August 11, 1997. Noting that by its Response filed August 4, 1997, INS did not oppose the extension, ALJ granted Respondents until August 15 to answer the Complaint.

August 14, 1997. Greg Alexanian, Esq., entered his appearance as counsel for Respondents, and filed their Answer, which comprised various denials and nine affirmative defenses.

August 26, 1997. INS filed a Motion To Strike Respondent's (sic) Affirmative Defenses, with Memorandum in Support, dated August 18, served August 20, 1997, arguing that the affirmative defenses are variously insufficient as a matter of law, and lacking in factual content.

August 29, 1997. Respondents requested a 30 day extension of time to reply to the Motion to Strike because, as Respondents' counsel stated, "the two sides are currently in settlement negotiations, and . . . I do not want to bill my client for work in such a small case if a settlement can be reached within this time period."

September 2, 1997. Complainant objected, suggesting instead that a 15 day extension would be "reasonable."

September 3, 1997. ALJ granted extension for 15 days from due date, *i.e.,* until September 19, 1997.

September 22, 1997. Respondents filed a response to Motion To Strike, dated September 16, 1997.

October 21, 1997. Complainant filed a Motion for a Protective Order, with memorandum and declaration of counsel in support, contending that absent judicial approval or written stipulation, Beauty should be limited to 25 interrogatories, including all discrete sub-

parts, in lieu of the 35 contained in "Special Interrogatories, Set No. 1, Propounded Upon Complainant by Respondents," served September 26, 1997. INS seeks to invoke Rule 33(a) of the Federal Rules of Civil Procedure, arguing that as it restrained itself from asking more than the 25 interrogatories contemplated by Rule 33(a) absent judicial authorization in the "First Set of Interrogatories" served by INS on September 22, "fairness dictates that both parties to litigation be held to the same standards and rules." Complainant's Memorandum, at 2. The Declaration by INS counsel advised that she unsuccessfully sought to have Beauty's counsel designate 25 from among the 35 pending interrogatories.

Complainant recited that in addition to its interrogatories served on Beauty on September 22, it served a First Set of Requests for Admissions on July 15, 1997 (to which responses were served on August 28), and served its First Requests for Production of Documents on September 8, 1997 (to which it received responses on September 8).

October 27, 1997. Complainant filed a Motion for More Definite Response, with a 27-page memorandum in support, accompanied by its discovery requests and Respondents' responses. INS seeks an order "directing respondents to adequately respond to... Complainant's First Set of Requests for Admissions, and to produce the documents requested in Complainant's First Requests for Production of Documents."

November 3, 1997. Respondents filed their response to the Motion for a Protective Order, contending that the limit of Fed. R. Civ. P. 33(a) against propounding more than 25 interrogatories, implicates *parties*, not "sides" to a litigation, and, as the respondents are three in number, they are entitled to cumulate their opportunity to enquire, and are not in violation of the Rule. Moreover, say Respondents, the controlling rule is Rule 8.2.1 of the Local Rules of Practice for the United States District Court for the Central District of California which provides that no party may serve more than the specified number of queries (absent agreement or leave of court for good cause shown) on any other *party.* Importantly, Rule 8.2.1 raises the ante from 25 to 30.

November 3, 1997. Complainant filed a Second Motion for a More Definite Response, with a 22-page memorandum in support, accompanied by its First Set of Interrogatories (served September

22), Respondents' Responses to those interrogatories, served October 24, 1997, and Respondents' Amended Responses, served October 23, 1997, to Complainant's prior First Set of Requests for Admissions. INS seeks an order "directing respondents to fully respond to . . . Complainant's First Set of Requests for Admissions, and to fully respond to the questions propounded in Complainant's First Set of Interrogatories."

II. *Discussion*

This is much ado about very little. The principle of proportionality has been breached. Although counsel have demonstrated their ability to articulate their clients' interests, they have managed to escalate this dispute far beyond its due. The allegation, as here, of failure timely to prepare the employment eligibility verification forms (INS Forms I–9), by which those charged with enforcement can audit employer compliance with the national policy of attempting to keep the workplace free of unauthorized aliens, is typically regarded as serious. 8 U.S.C.§1324a(e)(5). However, where a complaint is filed more than three years after the putative violations, and the civil money penalty proposed is $300 on a statutory scale of $100 to $1,000 per individual, the view from the bench is that the dispute calls out for compromise, between $100 and $300 for each of eleven individuals, and not judicial participation, except for receipt and approval of a well-designed agreed disposition to adopt proposed consent findings or to dismiss, settled as the parties may jointly elect.

A. *The Protective Order Denied*

Meanwhile, pending such disposition, this Order overrules Complainant's Motion for Protective Order. So far as appears, it is a question of first impression in OCAHO jurisprudence whether parties are constrained by Fed. R. Civ. P. 33(a) *per se*, as distinct from a ruling by the ALJ in a specific case. Unless and until Rule 33(a) is invoked by the judge at the instance of one or more parties or *sua sponte*, or until the judge dictates a different number than 25, the parties are no more bound to a specific number of interrogatories than they are with respect to requests for admission or for production (as to which Federal Rules 34 and 36 provides no limit). This is so because the OCAHO rules of practice and procedure for cases before ALJs under 8 U.S.C. §1324 provide only that the federal rules "*may* be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by

any other applicable statute, executive order, or regulation." 28 C.F.R. §68.1 (Emphasis added).

That the relatively extensive and detailed regulation of discovery in 28 C.F.R. Part 68 omits any limit upon the number of interrogatories is instructive, considering particularly that the OCAHO rules have several times been amended without introducing any ceiling. There is simply no case for derogating those rules by implicating the limits of Rule 33(a). Indeed, the absence of any numerical limits in OCAHO rules can be understood to be substantially equivalent to the effect of the 1993 amendments to the federal rules where, for example, Rule 33 placed "presumptive limits" on the number of interrogatories, but where "the revisions to Rule 26(b)(2) [granting courts by order or local rule power to 'alter the limits' on the number of interrogatories, etc.] are intended to provide the court with broader discretion to impose additional restrictions." Fed. R. Civ. P. 26(b)(1) Annotation, West's Federal Civil Procedure and Rules, 148 (1997 ed.). The local rule of the Central District within whose geographic boundaries this case arises, albeit not controlling, is informative as having raised the "presumptive limits" on the number of interrogatories from 25 to 30.

Most significantly, nowhere does INS claim hardship or harassment arising from exposure to 35 rather than 25 queries. Both parties ignore the purpose of the presumptive limit of Fed. R. Civ. P. 33(a)— to afford the courts greater control over discovery in context of the introduction of voluntary disclosure mandated by Fed. R. Civ. P. 26(a)(1)–(3), as amended in 1993. Manifestly, "the aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use" of interrogatories. Annotation, 167. Complainant describes only a technical breach of a presumptive limit, which I find neither controlling as a matter of law (because Fed. R. Civ. P. 33, while available, is not imposed on the ALJ) nor compelling as a matter of discretion (because no case is made of difficulty in responding).

Perhaps the most telling factor weighing against granting the relief sought is that at least ten of the interrogatories oblige INS to do no more than identity individuals, an inquiry to which Complainant presumptively can respond out of hand. For example, following inquires as to specific facts, eight interrogatories specify:

> Please identify all witnesses with knowledge of the facts you identify in your response to your [sic] previous interrogatory.

Another inquiry asks for identification of witnesses in event of hearing, and a summary of anticipated testimony; another asks the same with respect to any potential expert witnesses.

On balance, as a matter of discretionary authority I will not apply Fed. R. Civ. P. 33(a) because the circumstances shown do not warrant its application. For that reason, I do not reach Respondents' claim that, because they are three in number, the constraints of Fed. R. Civ. P. 33(a) are understood to be cumulative.

B. *Remaining Issues Deferred*

There remains to be resolved Complainant's Motion to Strike Affirmative Defenses, and Beauty's Response, as well as Complainant's two motions for more definite responses. Upon cursory review of the latter, I detect substance to a number of Complainant's criticisms that Beauty is not sufficiently forthcoming, but also that certain of its discovery is overreaching. Before wrestling with the affirmative defenses issue, and the discovery requests, as to which Beauty's responses are not yet filed, I direct the parties to abate all proceedings for three weeks, freezing the status quo for 21 days, during which I will expect them to engage in settlement discussions. Failing a global settlement, I will expect them to maximize agreement as to the lingering discovery disputes. Against the possibility that the case is not settled by November 28, 1997, my staff will during the next week telephone both counsel to schedule a telephonic prehearing conference to be held in mid-December 1997.

SO ORDERED.

Dated and entered this 5th day of November, 1997.

MARVIN H. MORSE
Administrative Law Judge