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. 90100149
CHARO'S CORPORATION d.b.a., "CHARO'S RESTAURANT", Respondent.	)	

ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances:

Dayna M. Diaz, Esquire, for Complainant
Immigration and Naturalization Service,

Gerhard Frolich, Esquire, for Respondent.

I. *Procedural Summary*

On April 26, 1990, the United States of America, Immigration and Naturalization Service, through its attorney June Y.I. Ito, Esquire, filed a Complaint against Charo's Corporation, d.b.a. Charo's Restaurant, Respondent, alleging violations or the Immigration and Nationality Act (the Act), 8 U.S.C. Section 1324a. The Complaint incorporated in its entirety a Notice of Intent to Fine served upon Respondent on

March 23, 1990, containing four counts alleging violations of the Act.

Count I of the Complaint alleged three violations of Section 1324a(a)(1)(A) or Section 1324a(a)(2) of the Act, for knowingly employing aliens unauthorized for employment in the United States, or for continuing to employ aliens knowing they are or have become unauthorized for employment. Count II alleged four violations of Section 1324a(a)(1)(B) of the Act for failing to prepare and/or present employment eligibility verification forms (Forms I-9) for employees hired after November 6, 1986. Count III alleged 58 violations of Section 1324a(a)(1)(B) of the Act for failing to prepare and/or present Forms I-9 for employees hired after November 6, 1986. Count IV alleged two violations of Section 1324a(a)(1)(B) of the Act for failing to properly complete Forms I-9. The Complaint requested penalties for the aforesaid violations in the amount of $41,560.00 (forty-one thousand five hundred sixty).

On May 25, 1990, Respondent, through its attorney Gerhard Frolich, Esquire, timely filed an Answer to the Complaint, denying the substantive allegations of the Complaint and requesting dismissal.

The parties have been involved in settlement negotiations and discovery since that time period. Through telephonic conferences with the parties, I have learned that they were not able to satisfactorily settle this matter. Therefore, a hearing date of March 12-14, 1991 was scheduled. This date was subsequently continued to April 9-12, 1991 in Honolulu, Hawaii upon motion of the parties.

On February 19, 1991, Complainant filed a Motion for Summary Decision and Points and Authorities in Support of the Motion, alleging that no issues of material fact existed for three of the four violations alleged in Count II, for 49 of the 58 violations alleged in Count III, and for the two violations alleged in Count IV of the Complaint. On March 12, 1991, Respondent filed its Response to Complainant's Motion for Summary Decision.

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. *Legal Analysis*

As indicated above, Complainant's Motion for Summary Decision alleges that no issues of material fact exist for most of the violations alleged in Counts II, III, and IV. In its Response to Complainant's Motion for Summary Decision, Respondent admits that no issues of material fact exist for the violations detailed in Complainant's motion, but disputes that the amount of fine for each violation may be determined by summary decision. In particular, Respondent alleges that in computing the amount of fine for each violation, the District Director failed to give due consideration to the five factors set forth in Section 1324a(e)(5) of IRCA.

I have considered the motion and response pertaining to this summary decision, along with the supporting papers. I find that summary decision is appropriate as to liability only for the violations discussed in Complainant's motion, based upon Respondent's

responses the Complainant's First Request for Admissions and its Response to Complainant's Motion for Summary Decision. In its

> responses to admissions, Respondent directly admitted the relevant elements proving many of the allegations listed in Counts II, III, and IV.
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> Respondent either denied or stated it did not have sufficient information to respond to several others of these allegations, and it failed to respond at all to several more of the allegations. Although Complainant does not seek summary decision at this time for the allegations which Respondent denied or which it stated it could neither admit nor deny, Complainant does seek summary decision for those allegations to which Respondent provided no response to requested admissions. Complainant states that the matters to which Respondent did not respond are deemed admitted pursuant to 28 C.F.R. Part 68.19.

I will accept Complainant's argument and deem admitted the admissions numbered 78-80, 197-199, 202-211, 218-226, and 233-237, due to Respondent's failure to respond properly to these requests. I make this ruling in part based upon Respondent's statement in its response to the motion for summary decision that it "concedes the 'paper work' violations outlined in Complainant's Points and Authorities in Support for (sic) Motion for Summary Decision". If Respondent had not conceded the violations corresponding to these admissions, I may have withheld my ruling regarding those allegations to which Respondent did not provide responses and which Complainant deemed admitted. It appeared from a review of Respondent's responses to the admissions that Respondent either neglected to answer certain admissions or made clerical errors in the numbering of its responses. However, since Respondent is satisfied that the allegations were committed, I will so find.

I note also that Respondent failed to respond to the admissions numbered 82-90. Complainant did not request that these admissions be deemed admitted, nor did it request summary decision for the allegations corresponding to these admissions, therefore, I will not grant summary decision to the allegations pertaining to these admissions.

I agree with Respondent that Complainant has presented insufficient information regarding the consideration of applicable criteria to the civil penalties requested. Therefore, I will withhold my ruling as to an appropriate civil penalty.

IV. *Findings of Fact and Conclusions Of Law*

I have considered the pleadings, memoranda, and arguments submitted by the parties. Accordingly, I make the following findings of fact and conclusions of law:

1. That Respondent has violated Section 274A(a)(1)(B) of the Act, 8 U.S.C. Section 1324a(a)(1)(B), as alleged in Count II of the Complaint by failing to prepare Forms I-9 for the below named individuals:

Ruben Hernandez-Elorriaga
Ricardo Hernandez-Elorriaga
Mariano Juarez-Santacruz

2. That Respondent has violated Section 274A(a)(1)(B) of the Act, 8 U.S.C. Section 1324a(a)(1)(B), as alleged in Count III of the Complaint by failing to prepare Forms I-9 for the below named individuals:

James Abercrombie
Marta Birchard
Barbara Brown
Christina Buckley
Amanda Burden
Karin Carswell
Israel Chavez
John Conlogue
Ernest Egan
Brav Ellis
Carol Engling
Francisco Espinaco
Joseph Gelardi
Isabel Gonzales
Carly Goodrich
Wendy Gooding
Crystal Henderson
James Henderson

Ignacio Hernandez
Luis Hernandez
Victor Hernandez
Verna Huddy
Daniel Jensen
Kaethe Kinimaka
William Lanzi
Grant Legault
Tim Liberto
Keoni Kai Lucas
Katherine May
Maureen McHenry
Philippe Mettout
Astrid Mostogl
David Nelson
Crystal Rain Netto
Alan Phelps
Susan Pico
Robert Raming
Jose Rodriquez
Teresa Schwaar
Susan Shepard
Mark Stembler
Jeff Stuart
Tim Terrazas
John Vallier
Dennis Williams
Susan Williams
Paul Wilson
Denise Winn
Dolores Zuniga

3. That Respondent has violated Section 274A(a)(l)(B) of the Act, 8 U.S.C. Section 1324a(a)(1)(B), as alleged in Count IV of the Complaint by failing to properly complete section two of the Form I-9 for the below named individuals:

Jana Lea Heidingsfelder
Sherman Kealoha Maka

4. That there being no genuine issues of material fact with respect to liability as to the individuals named in paragraphs 1-3 above, Complainant's Motion for Summary Decision is GRANTED as to each of them;

5. That I will keep jurisdiction of this matter to make a determination as to the remaining allegations and as to the appropriateness of civil penalties to be imposed.

IT IS SO ORDERED, this 19th day of March, 1991, in San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge