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

United States of America, Complainant v. San Ysidro Ranch, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100368.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **ARTHUR A. LIBERTY II**, Esquire Immigration and Naturalization Service for Complainant;
ABBE ALLEN KINGSTON, Esquire for Respondent.

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I. Procedural History

On June 16, 1989, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on San Ysidro Ranch, through its General Manager, Mr. Michael Ullman. The Notice of Intent to Fine alleged one violation of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to prepare a Form I-9, seven violations of Section 274A(a)(1)(B) of the Act for failure to properly complete Section 2 of the Form I-9, and four violations of Section 274A(a)(1) of the Act for failure to verify continued employment eligibility authorizations. In a letter dated June 20, 1989, Respondent, through Michael J. Ullman, requested a hearing before an administrative law judge.

The United States of America, through its Attorney, Arthur A. Liberty II, filed a Complaint, incorporating the allegations in the Notice of Intent to Fine against Respondent on July 31, 1989. On August 10, 1989, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigned me as the administrative law judge in the case and setting the hearing date and place for December 5, 1989, at Santa Barbara, California.

Respondent, through its counsel, Abbe Allen Kingston, answered the Complaint on August 31, 1989, specifically admitting or denying each allegation and setting forth three affirmative defenses. The first of which alleged that Complainant sent confusing and conflicting instructions to Respondent in prior warning notices, resulting from prior compliance inspections of Respondent company. Respondent's second affirmative defense alleged Complaint's failure to comply with document retention and inspection requirements as found in the Immigration Officer's Field Manual for Employer Sanctions (hereafter Field Manual). Respondent's third defense alleged on additional failure to comply with the Field Manual, in that the agents sent a Warning Notice and a Notice of Intent to Fine on the same date.

On September 11, 1989, I issued on Order Directing Procedures for Prehearing. On September 20, 1989, counsel for Complainant moved to strike Respondent's affirmative defenses as being insufficient. Respondent failed to respond to this motion within 10 days. On October 2, 1989, I granted Complainant's Motion to Strike based upon the documents, pleadings, and memoranda before me at that time. I struck the three affirmative defenses as insufficient, however I permitted Respondent 15 additional days to amend its answer. On October 20, 1989, Respondent filed its First Amended Answer, raising again the affirmative defense based upon failure of the Border Patrol agents to comply with the Field Manual in the conduct of their compliance inspection. Respondent did not raise the other defenses previously raised and struck by me.

On November 2, 1989, counsel for Complainant moved to amend the Complaint, at Count I, proposing to change a failure to prepare a Form I-9 to a failure to present a Form I-9 for inspection. The same individual named in the original Count I was the subject of the proposed amended Count I.

On the same date, Complainant submitted a Motion for Summary Decision with supporting memoranda, as to all counts. On November 7, 1989, I ordered that the hearing date, originally set for December 5, 1989, be continued indefinitely. Counsel for Respondent filed its Opposition to Motion for Summary Decision on Novem-

ber 14, 1989. In my Order of November 20, 1989, I granted the Complainant's Motion for Leave to Amend Complaint, and denied the Motion for Summary Decision, as I could not grant summary decision prior to receiving the Respondent's new answer.

Complainant's Amended Complaint was submitted on November 30, 1989, containing the language from the proposed Count I and the language from the original Counts II and III. Respondent's Answer, filed on December 19, 1989, specifically admitted or denied each and every allegation of Count I, and incorporated by reference its original Answer to Counts II and III.

Complainant moved for default judgment on December 19, 1989, based on the failure of Repondent to answer the Amended Complaint. I denied this Motion on January 17, 1990, because I had unintentionally curtailed the Respondent's time in which to answer the amended complaint, and because Respondent did file an answer within the requisite 30 day period.

On February 9, 1990, Complainant again moved for partial summary decision, arguing that no issues of material fact existed with respect to Counts II and III. Respondent's opposition motion was submitted on February 27, 1990, asserting again the affirmative defense that Border Agents removed documents from Respondent's premises in violation of the Field Manual, thereby precluding Respondent from complying with the paperwork provisions of the Act.

Pre-hearing telephonic conferences were conducted on March 20, 1990 and April 11, 1990, in which we discussed the status of the case and set a pre-hearing conference for argument on the Motion for Summary Decision for April 24, 1990. The hearing was held in Santa Barbara on April 24 and I received argument from Attorney Liberty for the Complainant, and Attorney Kingston for the Respondent. Complainant requested summary decision as to the 11 violations comprising Counts II and III. Respondent's Attorney contended issues of material fact existed and further argued an additional defense based on the theory of substantial compliance.

II. STANDARDS FOR DECIDING SUMMARY DECISION

The federal regulations applicable to this proceeding authorize an Administrative Law Judge 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. § 68.36 (1988); 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 judi-

cially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (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 Rule 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).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D. N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

III. LEGAL ANALYSIS

Several issues are presented by the parties' pleadings and arguments on this Motion. The first issue involves admissions by Respondent concerning discrepancies in the subject I-9's. The second involves the alleged violations of the Field Manual by the Border Patrol agents on the date of the compliance inspection. The third involves the proposed defense of ``substantial compliance''. The final issue involves civil penalties to be assessed.

A. Admission by Respondent

I have examined all pleadings and memoranda submitted by the parties, and heard arguments from counsel, all of which have con-

vinced me that there are no disputed facts with respect to Counts II and III, only questions of law. The Respondent, in response to requests for admissions, has directly admitted essential facts supporting the allegations of paperwork violations. As Complainant correctly pointed out in his motion, when such admissions are made by the opposing party, no genuine issues of material fact are deemed to exist. see United States v. Cahn, OCAHO Case No. 89100396, (Jan. 26, 1990); United States v. Acevedo, OCAHO Case No. 89100397, (Oct. 12, 1989) (Order Granting Complainant's Motion for Summary Decision); and United States v. USA Cafe, OCAHO Case No. 88100098, (Feb. 6, 1989) (Order Granting Complainant's Motion for Summary Decision).

I have examined the exhibits attached to the Complainant's motion and find that the Respondent has admitted to hiring each of the individuals named in Counts II and III. Respondent has further admitted to hiring these 11 employees after November 6, 1986, to work in the United States.

Additionally, Respondent admitted that the copies of the Forms I-9 he received in conjunction with the Request for Admissions of Fact and Authenticity of Documents were true and accurate copies of the original I-9's produced by Respondent company during the March 14, 1989 inspection. These 11 documents form the basis for the allegations in Counts II and III.

Each of the Forms I-9 at issue in Count II has an obvious deficiency in Section 2. Although Respondent specifically denied the failure to complete Section 2 of the forms, he has not provided any factual basis to support his responses to the requests of admissions. Respondent has provided a legal argument, that of substantial compliance, by responding that each of the employee's files contained photocopies of employment eligibility documents. I do not agree with Respondent that photocopies can be substituted for actual completion of the Form I-9, and will address this argument below. I, therefore find no factual disputes with respect to any of the employees named in Count II.

Respondent also denied that he did not verify the employee work authorizations for the four employees named in Count III. Again, Respondent did not assert facts on which to base his argument against summary decisions. He claimed that the verification requirements for work authorizations are not well defined in the Handbook For Employers, and further advanced the substantial compliance theory.

Respondent admitted that the verifications of employment authorizations were not recorded on the face of the I-9's, but argued that this was a mere technicality, not warranting a fine. I find that

these admissions form a basis for liability as to Count III, and will discuss the civil penalties below.

Although Respondent's admissions have established a basis for granting the Motion for Partial Summary Decision, the affirmative defenses raised by Respondent must now be addressed.

B. Violations of Field Manual

Respondent has consistently raised the affirmative defense that the Border Patrol Agents did not follow the dictates of the Field Manual as they conducted the March 14, 1989 inspection of Respondent's premises. I previously ruled on the inapplicability of this same defense in my October 20, 1989 Order.

I stated in my Order that ``such internal guidelines alone are neither statute nor regulation, and do not carry the weight of law.'' These internal procedural guidelines do not confer substantive or procedural rights on which to base an affirmative defense. Respondent has not provided any new or different authority, or factual information which would compel a ruling adverse to my previous Order.

The authority cited by Respondent in his brief is misplaced in that it deals with INS regulations regarding deportation, rather than employer sanctions for violation of IRCA laws. I agree with the ruling in the case of U.S. v. Wasem, d.b.a. Educated Car Wash, OCAHO Case No. 89100353, (Oct. 25, 1989) (Order Granting in Part Complainant's Motion to Strike Affirmative Defenses). In Wasem, Judge Schneider held that the INS Field Manual is not a source of substantive rights for employers, and the failure of Border Patrol agents to follow the Field Manual does not deprive an employer of due process rights.

Respondent has repeatedly stated that the actions of the Border Patrol agents precluded him from complying with the Act, yet no facts have been provided in support of this notion. In the absence of any compelling arguments by Respondent, I find that this affirmative defense has no merit in this case.

C. Substantial Compliance

Respondent also raised the possible applicability of the doctrine of substantial compliance. He provided copies of the documents contained in Respondent's employee files pertaining to the identity or employment eligibility of the 11 employees in question. Respondent argued that the I-9's, although not totally complete, were in compliance with IRCA. He further argued that by attaching photocopies of work authorization documents, he had substantially complied with the paperwork requirements of 8 C.F.R. 274a.2.

The theory of substantial compliance has been addressed in previous decisions by this Court and other Administrative Law Judges. In the IRCA case of United States v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211, (Apr. 27, 1990) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision), I was not persuaded by the Respondent's position that the practice of copying documents and attaching them to I-9's, in the absence of recording the data on the forms, was in accordance with 8 C.F.R. 274a.2.

I am similarly not so persuaded here. I again rely on the case of United States v. George Manos, d.b.a. Breadbasket, Inc., OCAHO Case No. 8910013, (Feb. 8, 1989), (hereinafter Breadbasket). In Breadbasket, Judge Robert B. Schneider stated that:

> Like the concept of ``reasonableness'' substantiality of compliance, if applicable, depends on the factual circumstances of each case. See e.g., Fortin v. Commissioner of Mass. Dept. of Welfare, 692 F.2d 790, 795 (1st Cir. 1982); and, Ruiz v. McCotter, 661 F. Supp. 112, 147 (S.D. Tex. 1986). As applied to statutes, ``substantial compliance'' has been defined as actual compliance with respect to the substance essential to every reasonable objective of the statute. See e.g., Stasher v. Harger-Haldeman, 58 Cal. 2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1974). Generally speaking, it means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

Id.

Judge Schneider did not hold, in Breadbasket, that ``substantial compliance'' was a conclusively valid legal defense to liability for alleged paperwork violations, but that, theoretically, it might be. In other words, in the limited context of deciding a motion for summary decision, it would appear, Judge Schneider gave preliminary consideration to ``substantial compliance'' as a potential legal theory of defense to liability for alleged paperwork violations. On the basis of this preliminary consideration, Judge Schneider denied the government's motion for summary decision on those few counts in which he found a ``genuine issue of material fact'', premised on the still-untested defense of ``substantial compliance''. I again concur in Judge Schneider's reasoning.

In the case before me, Respondent urges me to find substantial compliance because ``it was the legislative intent to allow the employer to make copies of a document presented by a prospective employer as a means of compliance with the employment verification procedure established by 8 C.F.R. 274.'' Respondent's Opposition to Partial Summary Decision at 12. Respondent ties this substantial compliance argument to one of good faith.

It has been well established by this Court, as well as other Administrative Law Judges hearing employer sanctions cases that a

good faith defense is not a proper defense to paperwork violations. See U.S. v. Moyle, OCAHO Case No. 89100286, (Aug. 22, 1989) (Order Granting Motion to Strike Affirmative Defenses); U.S. v. Boo Bears Den, OCAHO Case No. 89100097, (July 19, 1989) (Order Granting Complainant's Motion for Summary Decision); and U.S. v. USA Cafe, OCAHO Case No. 89100098, (Feb. 6, 1989) (Order Granting Complainant's Motion for Summary Decision). Good faith of the employer is, however, a consideration when assessing civil penalties and will be addressed in that context.

Unfortunately, Respondent does not support its contentions with an affidavit or plead in a requisitely fact-specific manner. See Fed. R. Civ. Proc. 56(e). Moreover, I am not convinced that the facts, even as conclusorily alleged by Respondent, support a conclusion that Respondent ``substantially complied'' with the verification and record-keeping provisions of IRCA.

Respondent relies on an INS regulation which permits an employer to attach relevant identification and immigration documents to the Form I-9. See 8 C.F.R. section 274a.2(b)(3). Respondent appears to contend that this regulation authorizes compliance in an alternative manner to that of properly completing a Form I-9. In other words, Respondent argues that ``retaining'' photocopies of employee documents can be done in lieu of properly completing a Form I-9 Employment Eligibility Verification Form. This issue was thoroughly addressed and rejected in Judge Schneider's decision in Breadbasket, supra. In Breadbasket, Judge Schneider concluded that:

> I do not agree with the interpretation Respondent urges in support of its argument that it substantially complied with the verification and record-keeping provisions of IRCA by copying the documentation of its employees consistent with 8 C.R.F. section 274a.2(b)(3). Specifically, it is my view that the language of this regulation is clearly permissive and supplemental to the mandatory completion of the Form I-9 Employment Eligibility Verification Process, and is not intended to serve as an alternative mode of complying with the law. Cf. 8 C.F.R. section 274a.2(b)(1).
>
> In analyzing 8 C.F.R. section 274a.2(b)(1) of the regulations, it is unequivocally clear that an employee and employer `must' complete their respective sections of the I-9 Form. Alternatively, the section of the regulations which Respondent urges in support of its substantial compliance argument reads, as stated, that an employer `may, but is not required to' copy appropriate verification documentation. There is simply no way that this section of the regulations can be read, in my view, to substitute, even in the more interpretively elasticized context of a substantial compliance argument, for the mandatory requirement to properly complete, retain, and present Forms I-9 for all employees authorized to be employed in the United States.
>
> In this regard, I conclude that Respondent's reliance on 8 C.F.R. 274a.2(b)(3) is misplaced, and presents neither a `genuine issue of material fact' nor a legal de-

fense that has sufficient prima facie validity to warrant a further hearing on the merits. Id. (emphasis in original)

In United States v. J.J.L.C., Inc., T/A Richfield Caterers, OCAHO Case No. 89100187, (Apr. 13, 1990), Judge Marvin H. Morse also addressed the theory of substantial compliance in great length and found that the Respondent had not substantially complied with verification requirements by attaching copies of employee documentation to the I-9's, but failed to perform other prescribed I-9 duties. As applied to the case at bar, I entirely concur with the Judges' reasoning on this issue.

In addition to simply photocopying documents and attaching them to the I-9's, Respondent asserts that several of the documents produced to provide identity or employment eligibility were sufficient for that purpose. Complainant, on the other hand, specifically points out that the W-4 forms produced for employees Virginia Bilwin, Michael Ullman, and Robin Lemmerman, do not establish employment eligibility under 8 C.F.R. 274a.(2)(b)(1)(C). Other types of documents deemed insufficient by Complainant include applications for duplicate Social Security cards and the form letter from the INS Legalization Office, attached to exhibit C-1, the declaration of William S. King. I concur with Complainant's assessment of the applicability of these documents.

Despite the importance of distinguishing acceptable documents from those which do not prove employment eligibility, the most predominant issues are still whether or not the employer recorded the proper document identification numbers and expiration dates on the I-9's, and whether the employer continued to verify the employment eligibility of those employees whose work authorizations contained expiration dates.

I am not persuaded by Respondent's argument that he did not understand how to properly verify the authorizations for the employees named in Count III. Complainant more persuasively argues that an employer's obligations under the IRCA laws are clearly detailed in the Handbook for Employers. The record of this case shows that Respondent was instructed by INS agents on at least two previous occasions as to the proper procedures for completing I-9's. He was given the Handbook for Employers when he received instruction. He received two warning notices and was told how to correct the deficiencies in his forms. The instructions for completing the I-9 are contained on the reverse of the form itself, and are also printed in the Handbook. A note in bold type clearly states, ``Employers are responsible for reverifying employment eligibility

of employees whose employment eligibility documents carry an expiration date.'' OMB #1115-0136, Form I-9 (05/07/87).

Accordingly, I am hereby granting Complainant's motion for summary decision for all allegations in Counts II and III.

C. Civil Money Penalties

It is my judgment that Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, 11 individuals without complying with the verification requirements in 8 U.S.C. Section 1324a(b)(1), Section 274A(b)(1) of the Act, and 8 C.F.R. Section 274A.2(b)(1)(ii). I must point out that, although the Complaint and Amended Complaint charge, in Count III, a broad violation of Section 274A(a)(1) of the Act, I find a violation of the more specific section 274A(a)(1)(B). I do not find that this pleading error is one which would justify my not awarding civil penalties.

Having found the violation, I must assess a civil money penalty pursuant to Section 274A(e)(5) of the Act, which requires the person or entity to pay a civil penalty. The statute states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. Section 1324a(e)(5).

In assessing penalties, I have determined that Respondent's company employs approximately 60 people. I find that to be a small to medium sized business, and therefore a more mitigating than aggravating factor in this case.

Despite Respondent's assertions of good faith, I agree with Complainant that evidence of good faith is sorely lacking in this record. The prior educational visits and warning notices obviously did not impress Respondent sufficiently to cause him to bring his record keeping system into conformity with the IRCA laws. I consider this to be an aggravating factor.

Record keeping violations are serious in the framework of IRCA. Especially so are the four violations in Count III, as they can, as Complainant illustrates, cause an alien to be employed who no longer has employment authorization. This, in my view, is also aggravating.

Both parties agree that no unauthorized aliens were the subject of the fine in this case, therefore, this is a factor in Respondent's favor.

Respondent was the recipient of two previous warning notices which contained similar violations to those herein. Respondent's argument that the ownership of the company has frequently changed hands in the past three years has not persuaded me to grant him relief. Complainant has shown, and it has not been refuted, that the principal addressee of the second warning notice, Robert Harmon, was a general partner at the time the fine in question was issued. Respondent was given a second chance by INS agents in the issuance of the second notice. He deserves no more.

Accordingly, I assess a civil penalty for Count II at $1,400.00 ($200.00 for each employee), and $1,600.00 for Count III ($400.00 per individual). The total for these two Counts is $3,000.00.

IV. ULTIMATE FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

1. As previously found and discussed, I have determined that Respondent San Ysidro Ranch violated Section 1324(a)(1)(B) of Title 8, 274A(a)(1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, the following individuals without complying with the verification requirements in 8 U.S.C. Section 1324a(b)(1), Section 274A(b)(l) of the Act, and 8 C.F.R. Section 274A.2(b)(l)(ii):

Virginia M. Bilwin (aka Gina M. Bilwin)
Maria Elvia de Navarrete (aka Maria Alicia E. Navarrete)
Adolfo Espinoza (aka Adolfo Espinoza-Lopez)
Jose Luis Ochoa
Guadalupe F. Solorzano (aka Guadalupe Solorzano F.)
Michael John Ullman
Robin Ann Lemmerman (aka R.A. Lemmerman)
Maria Guillermina Contreras
Maribal Leyva
Guadalupe Lopez-Sanchez
Anita Solorio

2. That Respondent did not substantially comply with the Act by copying employee identity and employment eligibility document and attaching them to the I-9 form, rather than filling out the I-9 form correctly, and in its entirety, since the regulations only

permit an employer to attach such identification to I-9 form in addition to completing each section of the form itself.

3. That Respondent did not substantially comply with the Act by failing to verify employment eligibility documents for four employees whose documents contained expiration dates.

4. That a question of fact remains with respect to Count I and this ruling in no way encompasses any further action regarding that allegation.

5. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of three thousand ($3,000.00) for Counts II and III of the complaint.

IT IS SO ORDERED: This 30th day of May, 1990, at San Diego, California.

E. MILTON FROSBURG
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