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

United States of America, Complainant, v. Boo Bears Den, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100097.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History and Relevant Facts

This proceeding was initiated on February 16, 1989, when Complainant filed a Complaint alleging violations of Title 8 of the United States Code section 1324a(a)(1)(B) and 8 C.F.R. sections 274.2(b)(1)(i)(A), 274.2(b)(1)(ii) (A) and (B) which provide that it is unlawful for a person or entity to hire for employment in the United States individuals without complying with the verification requirements as set forth in the enumerated statute.

Respondent filed an Answer to the Complaint on March 27, 1989. The Answer was a general denial of all the allegations contained in the Complaint.

After initiating discovery, Complainant, pursuant to 28 C.F.R. 68.36, filed a Motion for Summary Decision on June 9, 1989. In its Motion, Complainant contended that Respondent's admissions constituted a basis for concluding that there was no genuine issue of material fact in this case and that Complainant was entitled to a judgment as a matter of law. In support of its Motion, Complainant attached as exhibits the nine I-9 Forms of the nine employees named in the Notice of Intent to Fine (``NIF'').

Respondent, through counsel, filed a ``Memorandum in Opposition to the Government's Motion for Summary Decision'' on July 5, 1989. In its Memorandum, Respondent asserts that there are genuine issues of material fact in this proceeding because (1) it verified its workers eligibility to work in the United States; and, (2) the action is ``frivolous and contrary to law.''

II. Legal Standards in a Motion for 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. section 68.36 (1988); see also, Fed. R. Civ. Proc. section 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, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (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) (``[A]n 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, 530 F. Supp. 797 (D.C. Col. 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. 1979) (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. Hardist, 262 F.2d (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).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be ``particularized'' in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609 (1973) (``. . . the standard of `well-controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence. . . .).

III. Legal Analysis Supporting Summary Decision

The heart of the analysis necessary to decide Complainant's Motion for Summary Decision is contained in a straight-forward examination of the I-9 Forms of the nine employees named in the NIF.

It is patently obvious that none of the nine I-9 Forms have been signed by the nine employees and that, accordingly, these employees have not properly attested to being aliens authorized to be employed in the United States in compliance with 8 U.S.C. section 1324a(a)(1)(B) and (b)(2).

At a telephonic conference between the parties and myself on July 14, 1989, Respondent raised for the first time an argument that INS investigators had told it that it did not have to complete section 1 of the I-9 Forms. Respondent had not raised this contention in any previous written pleading, and did not offer, to my satisfaction, any means of corroborating, with affidavits or other sworn statements, such a belated and somewhat unusual assertion. Moreover, while it is clear that the employee actually fills out section 1, it cannot be doubted that the employer is ultimately legally responsible and accountable for the completion and integrity of the form. This legal responsibility is borne out by section 1324a(a)(1)(B) which requires that an employer can only hire individuals after ``complying with the requirements of subsection (b).'' Seen in its totality, subsection (b) includes employer and employee attestations as well as retention of verification forms. See, section 1324a(b)(1), (2), (3). Thus, the employer is clearly responsible for ``complying'' with the statutory requirement that an employee ``attest'' to his or her eligibility to work in the United States. Accordingly, after considering Respondent's contentions in this regard, I decided not to give it any weight.

Alternatively, Respondent also asserted, through counsel, that it did not employ illegal aliens, and that it tried to do its best to comply with the law. I took this argument by Respondent to amount to a statement that it had acted in good faith.

I have no reason to think that Respondent did not attempt, generally speaking, to comply with the Immigration Reform and Control Act, but it is now well-established that ``good faith'' is not a material fact to a case involving record-keeping violations in such a way as to preclude Summary Decision for the Complainant, because assertions of Respondent's ``good faith'' bears solely on determinations of the amount of penalty. See e.g., United States of America v. Big Bear Market, 8 U.S.C. section 1324a Proceeding, Case No. 88100038 (OCAHO, Hon. ALJ Marvin H. Morse) (Decided March 30, 1989) (Affirmed by OCAHO on May 5, 1989).

Having reviewed all of Respondent's assertions, however, it is clear that Respondent does not contest that, at the time of execution, section 1 of the I-9 Forms was not properly signed by any of the employees. In this regard, it is my view that this admission can be used as the basis for concluding that Respondent has raised no genuine issue of material fact and that, accordingly, a summary decision is warranted. See, e.g., Gardner v. Borden, Inc., supra.

Thus, for the purpose of analyzing Complainant's Motion for Summary Decision, it is my view that, on the basis of Respondent's admissions, there is no need to proceed with a trial on the merits because there is no genuine issue as to any material fact. See, Celotex Corp. v. Catrett, supra.

Accordingly, for the foregoing reasons, I find that Respondent has violated Section 1324a(a)(1)(B) of Title 8 of the U.S.C. in that Respondent hired for employment in the United States those individuals named in all counts of the Complaint without complying with the verification requirements provided for in section 1324a(b) of Title 8 and 8 C.F.R. Sections 274a. 2(b)(1)(i) (A) and 274a.2(b)(1)(ii)(A) and (B).

CIVIL PENALTIES

Since I have found that Respondent has violated Section 1324a(a)(1)(B) of Title 8 in that Respondent hired, for employment in the United States, individuals without complying with the verification requirements in section 1324a(b) of the Act, and 8 C.F.R. Section 274a.2.(b)(1)(i)(A) and 274a.2(b)(1)(ii)(A) and (B) with respect to all counts of the Complaint, assessment of civil money penalties are required as a matter of law.

Section 1324a(e)(5) 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 consider-

> ation 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.

The regulations reiterate the statutory penalty provision including the mitigating factors which should be taken into consideration for paperwork violations. See 8 C.F.R. 274a. 10(b)(2).

The Complaint seeks fines as to each count in the amount of $250.00 which total $2250.00. In order to determine whether or not the fine requested by the Complainant is appropriate, I am required by the regulations to consider the mitigating factors described above. Id.

Though Respondent did not make any specific arguments for me to consider in mitigating the amount of penalty, I note that these violations appear to be relatively non-serious and did not involve any individuals who were unauthorized for employment in the United States. Moreover, in a telephonic conference held on July 14, 1989, between the parties and myself, Complainant represented that it was willing to reduce the amount of penalty to the minimum per violation, i.e. $100.00 per count or $900.00 in total.

I have no reason not to believe that Complainant's offer in the telephonic conference call to reduce the amount of penalty to the minimum is not a fair and reasonable way to resolve the issue of an appropriate fine in this case.

Accordingly, Respondent shall be ordered to pay a penalty in the amount of $900.00 for having violated section 1324a by failing to provide that section 1 of the Employment Eligibility Forms of the nine named individuals was properly completed.

ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue as to any material facts have been shown to exist with respect to counts one (1) through nine (9) of the Complaint and that therefore pursuant to 8 C.F.R. section 68.36 Complainant is entitled to a summary decision as to all counts of the Complaint as a matter of law.

2. That Respondent violated 8 U.S.C. section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the indi-

viduals identified in Counts one through seven without complying with the verification requirements in section 1324a(b), and 8 C.F.R. Section 274a.2(b)(1)(i)(A) and (ii) (A) & (B).

3. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, individuals identified in Counts eight and nine of the Complaint without complying with the verification requirements in 8 U.S.C. 1324a(b), and 8 C.F.R. Section 274a.2(b)(1)(i)(A).

4. The Complainant is entitled to a civil monetary penalty to be assessed against the Respondent as to each count of the Complaint in an amount of one hundred dollars ($100.00) per individual count for a total of $900.00.

5. Respondent's ``good faith'' is not a material fact to a case involving record-keeping violations in such a way as to preclude Summary Decision for the Complainant, because assertions of Respondent's ``good faith'' bears solely on determinations of the amount of penalty.

6. That, pursuant to 8 U.S.C. 1324a(e)(6) and as provided in 28 C.F.R. 68.52, this Decision and Order shall become the final Decision and Order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 19th day of July, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge