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

August 16, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding OCAHO Case No. 95A00125
1010 MORRIS AVENUE FOOD CORP., Respondent.	)	

FINAL DECISION AND ORDER

I. *Procedural History*

On August 25, 1995, the United States Immigration and Naturalization Service (INS or complainant) filed a three-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that 1010 Morris Avenue Food Corporation (respondent) failed to prepare, to prepare properly, and/or to make available for inspection the Employment Eligibility Forms (I–9) for fourteen named employees, as required by the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §1324a(a)(1)(B). Respondent filed an answer on October 17, 1995, in which it denied the material allegations of the complaint, stated that it had prepared the I–9's, "has and always will have" them available for inspection, and that it wanted me to schedule an inspection of the records prior to the hearing.[1]

After initial discovery was conducted, complainant filed a Motion for Summary Decision on June 26, 1996, together with a memoran-

[1] It is unclear whether respondent wanted me to inspect the records or if it was requesting a follow-up inspection by INS.

dum of law in support, a copy of the responses to its requests for admission, and various other documents including, *inter alia*, copies of I–9 forms for: Frank Agovino, Giovanna Cartella, Ramona Escano, Miguel Huezo, Jose Veloz, Luis Cabral, Martin Fernandez, Eligio Garcia, Danielle Knox, Victor Marte, Manuel Medina, Juan Reyes, and Danielle Rinkle. Respondent filed its opposing papers, and the motion for summary decision is ripe for ruling.

II. *The Standards for Summary Decision*

OCAHO rules of practice and procedure[2] authorize an administrative law judge to enter a summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no issue as to any material fact and that the moving party is entitled to a summary decision. 28 C.F.R. §68.38(c)(1995). This rule is based upon Rule 56(c) of the Federal Rules of Civil Procedure which governs summary judgments in the federal district courts. Accordingly, it is appropriate to consider federal case law in allocating the burdens of production and proof and in evaluating whether the appropriate standards have been satisfied.

An issue of fact is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586–87 (1986). It is material only if, under governing law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue of material fact, all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party. *Matsushita,* 475 U.S. at 587.

It is the initial responsibility of the moving party to point to evidence which, if uncontradicted, would entitle it to a directed verdict at trial. Thus it is the applicable substantive law which identifies the material facts. *Sibley v. Natl. Union Fire Ins. Co.,* 921 F. Supp., 1526, 1528 (E.D. Tex. 1996) (citing *Anderson, supra* at 248). Here, in order to prove a violation of §1324a(a)(1)(B), the complainant has the burden of showing that respondent employed or hired for employment in the United States, the individuals named in the com-

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

plaint, after November 6, 1986, and failed to comply with the requirements of §1324a. *United States v. Bailey,* 6 OCAHO 851 at 2 (1996).

Once the movant has carried its burden the opposing party may not rest upon the mere denial in the pleading, but must come forward with specific facts showing that there is a genuine issue for trial. 28 C.F.R. §68.38(b).

III. *Complainant's Evidence*

Responses to discovery requests admit that 1010 Morris Avenue Food Corp. is a corporation organized under the laws of New York, that it did business as Fine Fare Supermarket, that a compliance inspection took place on October 14, 1994, that certain Employment Eligibility Verification Worksheets signed by respondent's president, Neftali Medina, are authentic, and that they certified the information therein to be correct.

These worksheets confirm that respondent hired or employed the following individuals after November 6, 1986:

Huezo, Miguel	Escano, Ramona
Cartella, Giovanna	Cabral, Luis
Veloz, Jose	Medina, Manuel
Medina, Neftali	Garcia, Eligio
Espinal, Mayra	Fernandez, Martin
Rinkle, Danielle	Agovino, Frank
Marte, Victor	Knox, Danielle
Reyes, Juan	

The authenticity of the I–9's for the named individuals is admitted as well.

Respondent also admitted that at the time of the inspection it failed to present an I–9 for Mayra Espinal to INS agents. Examination of the I–9's submitted discloses the following deficiencies:

Frank Agovino: Section 1 is unsigned and undated. No box is checked to indicate the employment status of the individual.

Section 2 is signed but undated, and no documents are identified as having been examined. No date is given for the commencement of employment.

Giovanna Cartella: Section 1 is unsigned. No box is checked to indicate the employment status of the individual. No date of birth is indicated.

Section 2 is undated and does not identify the business organization or disclose the date employee started work.

Ramona Escano: Section 1 identifies the employee as a lawful permanent resident but does not reflect an Alien Registration number.

Section 2 is undated, does not identify any documents as having been examined, and does not identify the business organization or disclose the date employee started work.

Miguel Huezo: Section 1 is unsigned and undated.

Section 2 is undated, does not identify any documents as having been examined, and does not identify the business organization or disclose the date employee started work.

Jose Veloz: Section 1 is unsigned and undated.

Section 2 is undated, does not identify any documents as having been examined, and does not identify the business organization or disclose the date employee started work.

Luis Cabral: Section 2 is undated. No documents are identified as having been examined. The business organization is not named, and the date employee started work is not given.

Martin Fernandez: Section 2 is undated. No documents are identified as having been examined. The business organization is not named, and the date employee started work is not given.

Eligio Garcia: Section 2 is undated and does not disclose the date employee started work.

Danielle Knox: Section 2 is undated and unsigned. It identifies no documents as having been examined and does not disclose the date employee started work.

Victor Marte: Section 2 is undated. No documents are identified as having been examined. The business organization is not named, and the date employee started work is not given.

Manuel Medina: Section 2 is undated. No documents are identified as having been examined. The business organization is not named, and the date employee started work is not given.

Juan Reyes: Section 2 is undated. No documents are identified as having been examined. The business organization is not named, and the date employee started work is not given.

Danielle Rinkle: Section 2 is unsigned and undated. It does not identify the business organization or disclose the date employee started working.

INA §1324a imposes an affirmative duty upon employers to prepare and retain Forms I–9 and to make them available for inspection by INS officers. Failure to prepare, retain, or produce Forms I–9 for inspection in accordance with the employment verification system is a violation. *United States v. Candlelight Inn*, 4 OCAHO 611 at 15–16 (1994). It is the obligation of an employer to ensure that the employee properly completes Section 1 at the time of hire. 8 C.F.R. §274a.2(b)(1)(i)(A). The employer itself must also examine specific documents and complete Section 2 within three business days of the hire. 8 C.F.R. §274a.2(b)(1)(B).

The failure to present a Form I–9 for Mayra Espinal is a violation. Each of the specific deficiencies noted in the I–9's of the employees named is a violation as well.

Complainant thus has shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the individuals named in the complaint. Complainant having shown all the elements necessary to establish a *prima facie* case, the burden of production is accordingly shifted to respondent to come forward with a showing that there is a genuine issue of material fact. The applicable rule provides

> . . . When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. §68.38(b).

IV. *Sufficiency of Respondent's Opposing Papers*

In response to the instant motion, respondent filed a document captioned "Opposition to Motion for Summary Decision" on July 18, 1996. Attached to the document is an affirmation by counsel, executed under the penalties for perjury, stating that:

> I have read the foregoing Motion and know the contents thereof; the same is true to my knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters, I believe it to be true.

The applicable rule governing affidavits to be considered as evidentiary matter in connection with a summary decision motion requires

that any such affidavit "set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein." 28 C.F.R. §68.38(b). An affidavit on information and belief does not meet this standard and lacks evidentiary value. In any event, the matters asserted in the motion itself are conclusory rather than factual and fail to identify any genuine issue of material fact, so that the probative weight of respondent's submission is *de minimis*.

The motion first requests as relief the dismissal (sic) of the complainant's motion "in all respects" and asserts on behalf of 1010 Morris Avenue:

> 1. That it is the Respondent in the above entitled action.
>
> 2. That Respondent submits this motion in opposition of plaintiff's motion (sic) or an order (sic), pursuant to CPLR §3212, dismissing plaintiff's summary judgment on its complaint, based on the fact that defendant has legitimate defenses to this action.
>
> 3. That compliance requirements have been met on all employees. Department of Immigration and Natualization (sic) gave the opportunity to cure violation by reporting the missing information. Employer complied with all requests.

There are several problems with this submission. First, the procedural basis asserted evidently refers to the abbreviation for McKinney's *Consolidated Laws of New York, Civil Practice Law and Rules,* which includes, *inter alia*, the procedural rules governing civil actions in the state courts of New York; Section 3212 is the provision governing summary judgments. New York state court procedural rules have no bearing on this case because OCAHO is a federal administrative agency, proceedings in which are governed by regulations of the United States Department of Justice, 28 C.F.R. Part 68 (1995), not by the rules of the courts of New York. Respondent was so informed by a September 7, 1995 letter from the Chief Administrative Hearing Officer stating that "proceedings or appearances [in this case] will be conducted in accordance with Department of Justice regulations appearing at 28 C.F.R. Part 68."

While the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by" the OCAHO rules, 28 C.F.R. §68.1, nothing in OCAHO rules or case law suggests that the procedural rules of state courts have any application here. Even if they did, it is notable that the New York rules have not been complied with either. "It is well established that in

order to defeat a [CPLR §3212] motion for summary judgment after the movant has made out a prima facie case[,] the opposing party must show facts sufficient to require a trial of any issue of fact. Thus the opposing party must produce evidentiary proof in admissible form; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Roosevelt Savings Bank v. Jaffee*, 643 N.Y.S.2d 619, 620 (N.Y. App. Div. 1996).

Paragraph two of respondent's motion asserts without elaboration that "defendant (sic) has legitimate defenses to this action." No indication is given as to why, if there are affirmative defenses, these defenses were not asserted in the answer[3] as required by the controlling OCAHO regulation concerning affirmative defenses, 28 C.F.R. §68.9(c)(2). This provision requires a "statement of facts supporting each affirmative defense." Respondent has not offered a clue either in its answer or its opposition to the motion for summary decision, as to the legal basis of its affirmative defenses, let alone provided the required statement of facts supporting each defense. It is well settled that even affirmative defenses which have been set forth in an answer will not be considered unless supported by the required statement of facts. *E.g., United States v. Chavez-Ramirez*, 5 OCAHO 774 at 3 (1995); *United States v. Makilan,* 4 OCAHO 610 at 4 (1994). Vague references to unspecified "valid defenses" do not meet the standard for pleading affirmative defenses in an answer in OCAHO proceedings, and *a fortiori* are insufficient to prevent a summary decision. I note that CPLR §3212 would not be satisfied by the conclusive affirmation by counsel either:

> We repeat today a precept frequently stated where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement.

Zuckerman v. City of New York, 49 N.Y. 2d 557, 559, *427 N.Y.S. 2d 585,* 596, 404 N.E. 2d 718 (1980).

Respondent's third paragraph argues that INS gave respondent the opportunity to cure the violations and that respondent has since

[3] Respondent's answer filed October 17, 1995 denies the allegations and asserts as noted *supra* that respondent "has and always will have" I–9's available for inspection. No affirmative defenses are set forth, however.

complied with all of the requests. Belated compliance with the requirements of §1324a is not a defense to past violations of the section. The respondent failed to present an I–9 for Mayra Espinal and presented defective I–9's for the remaining named employees at the compliance inspection on October 14, 1994. Whether respondent has now remedied those deficiencies is not the issue in this case.

V. *Civil Money Penalty*

INS urges that the civil money penalty it proposes, totaling $4900 for fourteen violations, is modest in light of the statutory maximum potential of $14,000, and I agree. While ordinarily I would feel bound to engage in an independent assessment of the statutory factors to be considered in assessing civil money penalties, I am not obligated to do so where, as here, respondent has had an opportunity to contest the penalty and has failed to do so. OCAHO rules provide that:

> Any respondent contesting any material fact alleged in a complaint, *or contending that the amount of a proposed penalty or award is excessive or inappropriate*, or contending that he/she is entitled to judgment as matter of law, shall file an answer in writing. The answer shall include:
>
> (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted; . . .

28 C.F.R §68.9(c)(1) (emphasis supplied).

Respondent's answer does not address the penalty issue and thus concedes that the proposed penalty is not excessive or inappropriate.

VI. *Findings, Conclusions, and Order*

1. Respondent 1010 Morris Avenue Food Corporation is a corporation organized under the laws of the state of New York and conducted business as Fine Fare Supermarket, 1018 Morris Park Avenue, Bronx, New York 10463.
2. On or about September 29, 1994, Respondent was served with a Notice of Inspection by INS.
3. On or about October 14, 1994, INS conducted an employer sanctions compliance inspection of respondent at the office of its accountant, Manuel Vidal, 247 East 149th Street, Bronx, New York.

4. On or about October 14, 1994, Neftali Medina, then president of respondent, delivered to an INS agent I–9 forms for the following individuals hired after November 1986 for employment in the United States:

Huezo, Miguel	Escano, Ramona
Cartella, Giovanna	Cabral, Luis
Veloz, Jose	Medina, Manuel
Medina, Neftali	Garcia, Eligio
Espinal, Mayra	Fernandez, Martin
Rinkle, Danielle	Agovino, Frank
Marte, Victor	Knox, Danielle
Reyes, Juan	

5. Respondent hired Mayra Espinal for employment in the United States after November 6, 1986, but on or about October 14, 1994 did not make her Form I–9 available for inspection by INS.

6. Respondent hired Frank Agovino for employment in the United States after November 6, 1986; respondent failed to ensure that he completed Section 1 of Form I–9 properly and failed itself to complete Section 2 for him properly.

7. Respondent hired Giovanna Cartella for employment in the United States after November 6, 1986; respondent failed to ensure that she completed Section 1 of Form I–9 properly and failed itself to complete Section 2 for her properly.

8. Respondent hired Ramona Escano for employment in the United States after November 6, 1986; respondent failed to ensure that she completed Section 1 of Form I–9 properly and failed itself to complete Section 2 for her properly.

9. Respondent hired Miguel Huezo for employment in the United States after November 6, 1986; respondent failed to ensure that he completed Section 1 of Form I–9 properly and failed itself to complete Section 2 for him properly.

10. Respondent hired Jose Veloz for employment in the United States after November 6, 1986; respondent failed to ensure that he completed Section 1 of Form I–9 properly and failed itself to complete Section 2 for him properly.

11. Respondent hired Luis Cabral for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

12. Respondent hired Martin Fernandez for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

13. Respondent hired Eligio Garcia for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

14. Respondent hired Danielle Knox for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for her properly.

15. Respondent hired Victor Marte for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

16. Respondent hired Manuel Medina for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

17. Respondent hired Juan Reyes for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for him properly.

18. Respondent hired Danielle Rinkle for employment in the United States after November 6, 1986 and failed to complete Section 2 of Form I–9 for her properly.

19. Each of the acts described in paragraphs 5–18 was done in violation of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a(a)(1)(B), which renders it unlawful to hire an individual for employment in the United States after November 6, 1986 without complying with the requirements of 8 U.S.C.§1324a(b) and 8 C.F.R. §274a.2(b).

20. It is just and reasonable to require respondent to pay a civil money penalty of $380 for the violation alleged in Count I of the complaint and described in paragraph 5.

21. It is just and reasonable to require respondent to pay a civil money penalty of $360 for each of the five violations alleged in Count II of the complaint and described in pargraphs 6–10, for a total of $1800 for Count II.

22. It is just and reasonable to require respondent to pay a civil money penalty of $340 for each of the eight violations alleged in Count III and described in paragraphs 11–18, for a total of $2720 for Count III.

23. Respondent is ordered to pay a total for all violations of $4900.

SO ORDERED:

Dated and entered this 16th day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7) and (8), and 28 C.F.R. §68.53.