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. 95A00014
KARNIVAL FASHION, INC., Respondent.	)	

ORDER GRANTING COMPLAINANT PARTIAL SUMMARY DECISION
(June 6, 1995)

I. *Introduction*

On January 30, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint against Karnival Fashion, Inc (Karnival or Respondent) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes two underlying Notices of Intent to Fine (NIF) served by INS on August 3, 1993 and September 24, 1993. The first NIF was served upon the owner of Karnival; the second NIF was served upon Dan Brecher, attorney of record for Respondent.

Count I of the Complaint charges Respondent with failing to prepare and/or make available for inspection the employment eligibility verification form (Form I-9) for 17 named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B); the civil money penalty requested for this Count is $11,900 ($700 for each individual). Count II charges Respondent with failing to complete section 2 of the Form I-9 within 3 business days of hire for 22 named individuals; the civil money penalty

requested is $10,980[1] ($620 for three of the individuals and $480 for 19 of the individuals). The total civil money penalty requested is $22,880.

On February 2, 1995, this Office issued its Notice of Hearing transmitting the Complaint to Respondent.

On March 6, 1995, Respondent timely filed an Answer to the Complaint in which it made a "good faith" argument as to why a civil money penalty should not issue. In addition, Respondent asserted two affirmative defenses: (1) laches and (2) statute of limitations. By Order dated April 6, 1995, I granted Complainant's Motion to Strike these defenses on the grounds that Respondent failed to include a factual statement to support its affirmative defenses, and OCAHO case law does not recognize the defenses asserted, including that of "good faith" for paperwork violations. See, e.g., United States v. Central Nebraska Packing, Inc., 4 OCAHO 714 (1994); United States v. Mester Mfg. Co., 1 OCAHO 18 (1988), aff'd, 879 F.2d 561 (9th Cir. 1989).

On May 10, 1995, Complainant filed a Motion for Judgment on the Pleadings which, as Complainant states in the Motion, is in effect a Motion for Summary Decision under 28 C.F.R. § 68.38.[2] No response to the Motion was filed by Respondent.

II. *Complainant's Motion For Summary Decision*

In support of its Motion, Complainant asserts that on March 17, 1995, it served Respondent with its Request for Admissions. As of the date of the Motion, Respondent has not answered the Request. OCAHO rules of practice and procedure (rules) state that, unless responded to within 30 days, "[e]ach matter of which an admission is requested is admitted. . . ." 28 C.F.R. § 68.21(b). See also United States v. Anchor Seafood, 5 OCAHO 742 at 3 (1995). Since Respondent has not responded to either the Request for Admissions or the Motion for Summary Decision, I deem the Request for Admissions admitted.

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[1] A typographical error appears in the Complaint where Complainant requests a civil money penalty for Count II of "$8,980: $620.00 for each of the violations listed in paragraph A, numbers 10, 14, and 22; $480.00 for each of the violations listed in paragraph A, numbers 1-9, 11-13, and 15-21." When added up, the total amount requested for Count II should read $10,980.

[2] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

OCAHO rules authorize the ALJ to dispose of cases, as appropriate, upon motions for summary decision. 28 C.F.R. § 68.38(c). An ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed . . ." show that there is "no genuine issue as to any material fact." Id. A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden of proof shifts to the non-moving party to prove that there is a genuine issue of fact for trial. Matsushita, 475 U.S. at 587.

A. Liability Established

1. Count I

Complainant's Request for Admissions asks Respondent to admit that "on February 2, 1993 it failed to prepare and/or make available for inspection the employment eligibility verification form for the . . ." individuals listed in Count I. Request at 2. As Respondent is deemed to have admitted to Count I, I grant Complainant summary decision on this Count.

2. Count II

In support of its Motion as to Count II, Complainant cites to Respondent's admission that the Forms I-9 attached to the Motion are genuine and relate to the individuals named in Count II. From Respondent's Answer, I understand it to claim that since it photocopied and attached to its I-9s the individuals' employment eligibility documents, it should not be penalized for failing to complete the Forms I-9.[3] The requirement of § 1324a that employers complete Forms I-9, however, does not allow for partial completion. The statute is unequivocal; an employer is obliged to fill out the entire Form I-9 for each individual hired. See United States v. J.J.L.C., Inc., 1 OCAHO 154, 1094 (1990) (attachment to I-9s of verification documents without completing I-9 attestation is not substantial compliance, and defeats

[3] Although Respondent does not explicitly argue that because Forms I-9 are mostly filled in, it is not deficient; Respondent does attach copies of verification documents to its Answer.

the purpose of the verification system).[4] Therefore, Respondent is also liable on Count II.

B. Civil Money Penalty

The statutory minimum civil money penalty in a § 1324a paperwork case is $100; the maximum $1000. In assessing and adjudicating the penalty, five factors must be taken into consideration. See 8 U.S.C. § 1324a(e)(5). These are size of the business, good faith, seriousness, unauthorized aliens and previous violations. In previous § 1324a cases, where discussion of the five factors was lacking in motions for decision on the pleadings, I was nevertheless able to adjudicate a penalty based upon documentary file materials allowing for analysis of the five factors. See, e.g., United States v. Fox, 5 OCAHO 756 at 3 (1995). Where, as here, I am presented with no factual predicate on which to analyze the factors, I am unable to grant summary decision on the civil money penalty.

Accordingly, the parties are directed to file memoranda or briefs setting forth analysis, with documentary support as appropriate, of the five statutory factors. Filings will be timely if filed **no later than June 20, 1995**. Failure by Respondent to file a memorandum or brief may result in a civil money penalty at the level assessed by INS.

SO ORDERED.

Dated and entered this 6th day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge

[4] Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.