

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

February 13, 1998

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 97A00148
WESTHEIMER WASH)
CORPORATION)
D/B/A BUBBLES CAR WASH,)
Respondent.)
_____)

**ORDER GRANTING COMPLAINANT’S MOTION TO
COMPEL RESPONSES TO DISCOVERY**

I. Background

On January 22, 1998, Complainant filed its Motion to Compel Responses to Discovery,¹ in which it asks that I enter an order to compel Respondent to answer certain portions of Complainant’s First Set of Interrogatories to Respondent and Complainant’s First Request for Production of Documents. Complainant states that it served its interrogatories and request for production of documents on Respondent on November 15, 1997, and that Respondent served

¹Complainant attached copies of the following documents as exhibits to its Motion to Compel:

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| Exhibit A | Complainant’s First Set of Interrogatories to Respondent |
| Exhibit B | Complainant’s First Request for Production of Documents |
| Exhibit C | Respondent’s Answers to Complainant’s First Set of Interrogatories |
| Exhibit D | Respondent’s Answers to Complainant’s First Request for Production of Documents |
| Exhibit E | Certificate of Conference, signed by Complainant’s counsel, Lisa Luis |
| Exhibit F | Letter from Ms. Luis to Respondent’s counsel, Brian K. Bates, dated January 12, 1998 |

its responses to both of those discovery requests by facsimile on December 15, 1997; Complainant states that, on or about December 17, 1997, Respondent personally served Complainant with some documents in response to the Request for Production of Documents. C. Mot. at 1–2.

Complainant asserts that some of Respondent’s answers to Complainant’s discovery requests are “insufficient, inadequate, and unresponsive.” *Id.* at 1, 2. Complainant states that “counsel for Complainant attempted to confer with the Respondent’s counsel in an effort to secure the requested disclosure without court action, but such effort was unproductive.” *Id.* at 2. Specifically, Complainant’s counsel, Lisa Luis, states that she conferred with Respondent’s attorney, Brian Bates, regarding the alleged deficiencies in Respondent’s discovery answers in her office on the same day that Mr. Bates personally served some of the documents Complainant had requested in its Request for Production of Documents, and again by telephone on December 31, 1997. C. Mot. Ex. E at 1. On both occasions, Complainant’s counsel states, Mr. Bates said he would call her after speaking with Respondent’s president. *Id.* Ms. Luis also states that, on January 12, 1998, she sent Respondent’s counsel a letter in which she detailed the alleged deficiencies in Respondent’s answers to discovery and asked to receive proper answers by January 16. C. Mot. at 2; C. Mot. Ex. E at 1; *see also* C. Mot. Ex. F 1–4. Ms. Luis adds that she telephoned Mr. Bates on January 14 and found that he had not yet spoken with Respondent’s president regarding the disputed discovery and that he was unable to provide a date on which he would respond. *See* C. Mot. Ex. E at 1. As of the date of Complainant’s Motion, Ms. Luis states that Respondent “ha[d] neither submitted the appropriate responses and answers to the discovery requests, nor ha[d] it otherwise contacted, or attempted to contact, the Complainant to discuss this matter.” C. Mot. at 2; *see also* C. Mot. Ex. E. at 1.

Respondent had the right to submit a response to Complainant’s Motion no later than February 5, 1998. *See* 28 C.F.R. §§68.11(b), 68.8(c)(2) (1997). To date, however, Respondent has filed no response to Complainant’s Motion to Compel.

II. *Application Standards*

The scope of inquiry during discovery extends to any relevant information that is not privileged. *See* 28 C.F.R. §68.18(b) (1997).

Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. In the discovery context, relevancy “has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case.” *United States v. Ro*, 1 OCAHO 1700, 1701–02 (Ref. No. 265) (1990),² 1990 WL 512118, at *1–2³ (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

If a party fails to respond adequately to a discovery request, or objects to the request, or fails to permit inspection as requested, the discovering party may move to compel a response or an inspection. See 28 C.F.R. §68.23(a) (1997). Although OCAHO has its own procedural rules for cases arising under its jurisdiction, the Administrative Law Judges may refer to analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. Section 68.23(a) is similar to Federal Rule of Civil Procedure 37(a)(2)(B), which provides for motions to compel responses to discovery requests in cases before the federal district courts. As such, Rule 37 and federal case law interpreting it are useful in deciding whether a motion to compel should be granted under the OCAHO rules. See generally *Ro*, 1 OCAHO at 1701–02 (using federal case law interpreting the Federal Rules of Civil Procedure regarding the scope of discovery); *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 3 (1996), 1996 WL 735954, at *3 (using Federal Rule of Civil Procedure 56 and federal case law interpreting it to help decide whether summary decision is appropriate under the OCAHO Rules). Additionally, the Federal Rules “may be used as

²Citations to OCAHO precedents in bound Volumes 1–2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, and bound Volumes 3–5, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume 5, however, are to pages within the original issuances.

³If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the “FIM–OCAHO” database.

a general guideline in any situation not provided for or controlled by [the OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.” 28 C.F.R. §68.1 (1997). A motion to compel a response to discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” Fed. R. Civ. P. 37(a)(2)(B).

Responses to interrogatories and requests for production must either answer the discovery request or state the reasons of objection to the request. *See* 28 C.F.R. §§68.19(b), 68.20(e) (1997). The party objecting to a discovery request has the burden to demonstrate that the objection is justified. 28 C.F.R. §68.23(a); *Ro*, 1 OCAHO at 1702, 1990 WL 512118, at *2. Even if discovery requests are irrelevant, the party from whom discovery is requested “must have a valid objection to each one in order to escape the production requirement.” *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). The party resisting discovery must demonstrate specifically its objection to the discovery request. *See id.* (finding that a party’s conclusory statement that a discovery request was overly broad and burdensome was not sufficient to raise a successful objection to the request). Identical standards govern responses to interrogatories and responses to requests for production of documents. *See id.* “[W]hen a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived.” *In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989); *see also Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977); *Dorough v. Mullikin*, 563 F.2d 187, 191 (5th Cir. 1977) (“Failure to object waives any available objection and the interrogatory must be answered fully.”); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (“It is well established that a failure to object to discovery requests within the time required [to respond to the requests] constitutes a waiver of any objection.”); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991) (“If the responding party fails to make a timely objection, or fails to state the reason for an objection, he may be held to have waived any or all of his objections”).

III. *Analysis and Discussion*

A. *Complainant's First Set of Interrogatories to Respondent*

Complainant challenges the adequacy of Respondent's answers to Interrogatories numbered 11, 12, 13, 14, 19, 20, 21, 39 and 40. *See* C. Mot. at 3–4.

1. *Interrogatories 11 and 12*

In Interrogatories 11 and 12, Complainant seeks details regarding the specific grounds of Respondent's affirmative defense of inability to pay the civil money penalty. *See* C. Mot. Ex. A at 7. In response to both inquiries, Respondent states that it "is a small, labor intensive business. The fine sought by Complainant exceeds Respondent's ability to pay without severely jeopardizing Respondent's ability to meet payroll and *other obligations*." C. Mot. Ex. C at 5 (emphasis added). Complainant argues that

Respondent's answer is inadequate and evasive because it fails to identify or explain with specificity what "other obligations" it is addressing. Such a general answer will prejudice the Complainant's efforts to adequately prepare a rebuttal to the Respondent's affirmative defense at trial. The Respondent's refusal to elaborate is unjustified since the interrogatories relate to matters plainly within the Respondent's knowledge.

C. Mot. at 3.

Respondent's sweeping reference to "other obligations" is unresponsive to Complainant's requests that Respondent "[d]escribe in detail" and "[s]tate each and every fact," *see* C. Mot. Ex. A at 7, regarding the basis of Respondent's claim that it is unable to pay the civil money penalty sought in the Complaint. Additionally, Respondent voiced no objection to the interrogatories in question, *see* C. Mot. Ex. C. at 5, thus waiving any objection that it might have raised, *see supra* part II. I GRANT Complainant's Motion to Compel with respect to Interrogatories 11 and 12. Respondent is ordered to serve Complainant with an amended answer to Complainant's interrogatories in which Respondent specifically names the "other obligations" it plans to rely on in support of its claim of inability to pay.

2. *Interrogatories 13, 14, 19, 20 and 21*

In this group of interrogatories, Complainant seeks the identities of employees who performed certain responsibilities for Respondent,

as well as the dates on which those employees performed the listed responsibilities.⁴ *See* C. Mot. Ex. A at 7–9. Respondent, however, does not provide the dates on which the employees it names in response to those interrogatories performed the responsibilities in question.⁵ As Complainant contends, *see* C. Mot. at 3–4, Respondent’s answers clearly are deficient because they fail to include the requested dates.

Complainant correctly notes that “Respondent does not indicate whether it has made a reasonable inquiry into the matters in question,” and that “Respondent asserts no objection, but merely fails to provide the information requested.” *Id.* at 4. As Respondent made no objection to the interrogatories in question, *see* C. Mot. Ex. C. at 5–9, it waived any objection it might have raised, *see supra* part II. I GRANT Complainant’s Motion to Compel with respect to Interrogatories 13, 14, 19, 20 and 21. In its amended answer to Complainant’s interrogatories, Respondent shall include the following: with respect to Interrogatory 13, the dates during which each individual named performed the responsibility of hiring employees for Respondent; with respect to Interrogatory 14, the date(s) on which Brent Wilson, the named individual, hired Maria Welcome; with respect to Interrogatory 19, the dates during which each individual named performed the responsibility of terminating employees for Respondent; with respect to Interrogatory 20, the dates during which each individual named performed the responsibility of examining documentation verifying identity and employment eligibility of prospective or new employees for Respondent; and, with respect to Interrogatory 21, the dates during which each individual named performed the responsibility of completing employment eligibility verification forms (I–9 forms) for prospective or new employees for Respondent.

3. *Interrogatories 39 and 40*

In these two interrogatories, Complainant asks Respondent to identify by address all the work sites where Maria Welcome, a/k/a

⁴For example, Interrogatory 13 seeks “the name, job title or position, and current address of the individual or individuals who are or have been responsible for hiring employees for the period of November 6, 1986, through the present date,” as well as the dates on which each individual named performed that responsibility. C. Mot. Ex. A at 7.

⁵Respondent provides the dates for the entire span of employment for the individuals it names in response to Interrogatories 13, 14, 19, 20 and 21, but not the dates on which the listed individuals performed the responsibilities in question. *See* C. Mot. Ex. C at 5–9.

Maria Guzman-Trejo, and Mark Welcome have been employed by Respondent and the dates of such employment at each location. *See* C. Mot. Ex. A at 11. Respondent fails to identify the work locations by address,⁶ and it fails to provide the dates on which each of the named individuals worked at each site. *See* C. Mot. Ex. C at 12–13. Complainant, however, only challenges the sufficiency of Respondent’s answers with respect to its failure to provide the requested dates. *See* C. Mot. at 4. Respondent’s failure to provide those dates clearly is unresponsive to Complainant’s specific request for those dates. As Complainant notes, *see id.*, Respondent does not state whether it made a reasonable inquiry into the matters in question, and it asserts no objections to the interrogatories, *see* C. Mot. Ex. C at 12–13. Consequently, Respondent has waived any objection it might have raised with respect to Interrogatories 39 and 40, *see supra* part II, and I GRANT Complainant’s Motion as to those interrogatories. In its amended answer to Complainant’s interrogatories, Respondent shall include the following: with respect to Interrogatory 39, the dates during which Maria Welcome, a/k/a Maria Guzman-Trejo, has been employed at each of Respondent’s work sites; and, with respect to Interrogatory 40, the dates during which Mark Welcome has been employed at each of Respondent’s work sites.

B. Complainant’s First Request for Production of Documents

Complainant contests the adequacy of Respondent’s responses to Complainant’s First Request for Production of Documents numbered 8, 9 and 14. *See* C. Mot. at 4–5.

1. Request 8

In Request 8, Complainant asks “[t]hat Respondent produce and permit Complainant to inspect and copy all documents submitted by Respondent to the Internal Revenue Service for the years 1993 through the present.” C. Mot. Ex. B at 4. In response, Respondent states that it “has these documents and will produce them for inspection and copying at a time and place to be arranged between Counsel.” C. Mot. Ex. D. at 2. Complainant states that Respondent provided copies of its federal income tax returns for 1993 through 1995, but that its response is inadequate because it failed to provide

⁶Instead, Respondent merely states that the “addresses . . . are known to the INS and have been provided elsewhere.” C. Mot. Ex. C at 12–13.

copies of or to produce for inspection its tax return for 1996 and any other document filed for 1997. C. Mot. at 4. Such failure is unresponsive to Complainant's request, and, as Complainant points out, *see* C. Mot. at 4–5, Respondent asserted no objection to the request, *see* C. Mot. Ex. D at 2.

Generally, federal income tax returns are confidential. *See United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991) (discussing rationales for protecting the confidentiality of private tax information in context of former Internal Revenue Service agent's First Amendment challenge to his criminal conviction for disclosing confidential tax information); *Heathman v. United States Dist. Court for the Cent. Dist. of Calif.*, 503 F.2d 1032, 1035 (9th Cir. 1974) (stating that some lower courts have found that certain sections of the Internal Revenue Code “reflect[] a public policy against disclosure of tax returns,” but that courts, especially the district courts, have held “that tax returns are subject to discovery in appropriate circumstances”); *Eglin Fed. Credit Union v. Cantor, Fitzgerald Securities Corp.*, 91 F.R.D. 414, 416 (N.D. Ga. 1981) (“While the courts vary in their interpretation of the breadth of the statutory protection given tax returns, most courts do not recognize the existence of a privilege against disclosure, but rather recognize a general federal policy limiting disclosure to ‘appropriate circumstances.’”) (citing, *inter alia*, *Fulenwider v. Wheeler*, 262 F.2d 97, 99 (5th Cir. 1958); *but see FDIC v. LeGrand*, 43 F.3d 163, 172 (5th Cir. 1995) (stating that “[t]ax returns are not privileged,” and that, after the discovering party shows their relevance, “the burden shifts to the party opposing production to show that other sources exist from which the information contained in the income tax returns may be readily obtained”).

Aside from the issue of whether federal income tax returns are privileged, Respondent has not asserted a privilege, has not objected to this discovery request, and, indeed, produced the tax returns for 1993–1995. Since the information in the income tax returns is relevant to Respondent's asserted inability to pay the civil money penalty requested in the Complaint, and since Respondent has waived any privilege by not asserting any objection to the request, I GRANT Complainant's Motion to Compel with respect to Request 8. Respondent must provide a copy of or produce for inspection and copying its federal income tax return for 1996 and any other document filed with the Internal Revenue Service for 1997.

2. Request 9

Request 9 asks “[t]hat Respondent produce and permit Complainant to inspect and copy all documents that list the Respondent’s assets and liabilities for the years 1993 through the present.” C. Mot. Ex. B. at 4. As an answer, Respondent states that it “can produce a current balance sheet that would contain this information,” and that its “computer records can produce a balance sheet for past periods if the exact ‘as of’ date is specified.” C. Mot. Ex. D at 2. Ms. Luis states that she “informed Respondent’s counsel on December 17, 1997, as well as by letter dated January 12, 1998, that the ‘as of’ date is January 1, 1993.” C. Mot. at 5; *see also* C. Mot. Ex. F at 2 (copy of the January 12 letter). Complainant states, however, that Respondent’s answer is inadequate because it still has failed to provide the requested documents. *See* C. Mot. at 5. Respondent’s failure is unresponsive to Complainant’s request. Respondent voiced no objection to the request, and, thus, has waived any objection it might have raised. *See supra* part II. I GRANT Complainant’s Motion with respect to Request 9. Respondent is ordered to provide copies of or to produce all documents listing its assets and liabilities for the years 1993 through the present, including a balance sheet, as promised in its answer to Request 9, *see* C. Mot. Ex. D at 2, that contains the requested information as of January 1, 1993. If the balance sheet Respondent refers to in its answer to Request 9 is the only document in its possession that lists its assets and liabilities for any part of the years 1993 through the present, it shall so state.

3. Request 14

In Request 14, Complainant asks “[t]hat Respondent produce and permit Complainant to inspect and copy all documents submitted by Respondent to the Texas Employment Commission [TEC] regarding its employees during every quarter for the years 1993 through the present.” C. Mot. Ex. B at 5. Respondent states in response that it “will produce TEC filings for the period from January 1994 through January 1996, the period subject to this investigation by Complainant and during which violations are alleged in the Complaint to have occurred,” and that it objects to Request 14 “as immaterial insofar as it requests TEC filings falling outside the relevant time period.” C. Mot. Ex. D at 3. Although Respondent refuses to provide TEC filings for 1993 and for years after 1996, Complainant only challenges the sufficiency of Respondent’s answer with respect to its failure to provide copies of or to produce all

documents Respondent filed with the TEC for the year 1993. *See* C. Mot. at 5.

Respondent does not carry its burden of demonstrating that the request to provide its 1993 TEC filings is objectionable. Respondent claims that its TEC filings for that year fall “outside the relevant time period,” specifically alleging that January 1994 through January 1996 is the period subject to Complainant’s investigation and “during which violations are *alleged in the Complaint* to have occurred.” *See* C. Mot. Ex. D at 3 (emphasis added). The Complaint,⁷ however, contains no such date restrictions regarding when the alleged violations occurred. In Count I, Complainant alleges that, after November 6, 1986, Respondent hired or continued to employ a named individual, Maria Welcome, a/k/a/ Maria Guzman-Trejo, knowing that she was an alien unauthorized for employment in the United States. Compl. ¶¶I.A–E. Count II’s alleged violations, failure to prepare or failure to present I–9 forms, are alleged to have occurred either after November 6, 1986,⁸ or on February 5, 1996.⁹ *See id.* ¶¶II.A–E. Complainant alleges that Respondent hired the individuals named in Counts III–V after November 6, 1986, *id.* ¶¶III.B; IV.B; V.B, but makes no specific claims regarding when the violations alleged in those counts occurred. Clearly, the Complaint contains no assertion that the violations alleged in it occurred only within the period from January 1994 through January 1996. Respondent fails to support its assertion that the Complaint narrows the relevant time frame to January 1994 through January 1996. Respondent also provides no basis for its blanket assertion that Complainant’s investigation is limited to that period.¹⁰ Moreover, since Respondent failed to respond to Complainant’s

⁷Any reference or citation to the Complaint refers to the Amended Complaint Regarding Unlawful Employment, dated November 10, 1997.

⁸November 6, 1986, is the date after which Complainant alleges Respondent hired the individuals named in Count II, *see* Compl. ¶II.B, and, consequently, the date after which any failure to prepare I–9 forms for those individuals would have occurred.

⁹February 5, 1996, is the date of the scheduled inspection of Respondent’s I–9 forms, *see* Compl. ¶II.E, and, consequently, the date on which any failure to present I–9 forms for inspection would have occurred.

¹⁰Even if Respondent had supported those assertions, that would not necessarily have made Complainant’s request irrelevant. “Consistent with the notice pleading system established by the [Federal] Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), *quoted in Ro*, 1 OCAHO at 1702.

Motion to Compel, it has not provided the Court with any elaboration of its basis for an objection.

Complainant argues that Respondent's 1993 TEC filings are relevant in determining the dates of hire and periods during which Respondent employed Maria Welcome, the individual named in Count I of the Complaint. *See* C. Mot. at 5. In addition, Complainant states that it requires the TEC filings, which contain wage and payroll information, to prepare an adequate rebuttal to Respondent's inability to pay affirmative defense. *See id.* As Complainant alleges that Respondent either hired or continued to employ Ms. Welcome knowing that she was or had become unauthorized to work in the United States, *see* Compl. ¶¶I.D–E, Ms. Welcome's date(s) of hire and period(s) of employment are relevant to Complainant's allegations. The documents Complainant seeks are relevant to this case, and Respondent has failed to meet its burden to show otherwise. I GRANT Complainant's Motion with respect to Request 14. Respondent must provide Complainant copies of or produce for Complainant's inspection and copying all documents it filed with the TEC for the year 1993.

IV. Conclusion

For the foregoing reasons, I GRANT Complainant's Motion to Compel Responses to Discovery in its entirety. No later than March 5, 1998,¹¹ Respondent must serve Complainant with amended responses to Interrogatories 11, 12, 13, 14, 19, 20, 21, 39 and 40, as provided above in part III.A. If, after reasonable inquiry, Respondent is unable to provide any part of the information requested, it should so state, and explain specifically why it is unable to determine that information. Respondent shall not continue simply to ignore Complainant's inquiries, and no objections may be raised at this late date.

Also no later than March 5, 1998, Respondent must provide Complainant with copies of or produce for Complainant's inspection and copying the documents sought in Complainant's Request for Production of Documents numbered 8, 9 and 14, as provided above

¹¹The deadline for filing dispositive motions is February 23, 1998. This Order does not change that deadline. However, if Complainant needs any of the information that this Order compels Respondent to produce for the preparation of a dispositive motion, I will consider a motion to extend the dispositive motion filing deadline.

in part III.B. Ms. Luis put forth every reasonable effort and exhibited extreme patience in trying to resolve the disputed discovery issues before she was forced to seek court intervention. Mr. Bates promptly shall contact Ms. Luis to arrange a date and time convenient to her to provide her with the documents described in this Order.

ROBERT L. BARTON, JR.
Administrative Law Judge