

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

August 20, 2012

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 11A00030
)	
BKR RESTAURANTS, LLC, D/B/A)	
BURGER KING,)	
Respondent.)	
_____)	

ORDER GRANTING IN PART, DENYING IN PART, AND TAKING UNDER
ADVISEMENT IN PART RESPONDENT’S MOTION FOR PARTIAL SUMMARY
DECISION, DENYING RESPONDENT’S MOTION TO STRIKE AND REQUEST FOR
ATTORNEYS’ FEES, GRANTING IN PART, DENYING IN PART, AND TAKING UNDER
ADVISEMENT IN PART COMPLAINANT’S CROSS MOTION FOR PARTIAL SUMMARY
DECISION, AND SCHEDULE FOR ADDITIONAL FILINGS

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that BKR Restaurants, LLC dba Burger King (BKR or the company) engaged in a total of 91 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). Penalties were requested in the total amount of \$80,535.00. BKR filed a timely answer denying the material allegations and raising various affirmative defenses.

The government subsequently filed a first amended complaint in five counts alleging a total of 87 violations, for which it sought penalties totaling \$54,945.00.¹ Count I alleged that the

¹ A few former employees were dropped from the complaint because BKR was no longer required to retain or present I-9 forms for them. A few were dropped for other reasons. The

company hired 32 named individuals and either failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. Count II asserted that the company hired 11 named individuals for whom it failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. Count III alleged that BKR hired 6 named individuals and either failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. Count IV alleged that BKR hired 16 named individuals and either failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form.² Count V alleges that BKR hired 22 named individuals for whom it failed to prepare and/or present an I-9 form upon request. The government sought penalties ranging from \$605 to \$665 for each alleged violation, for a total penalty of \$54,945.00.

Prehearing procedures ensued and a schedule was entered pursuant to which discovery was originally set to close on December 30, 2011, but was extended until January 13, 2012 at the request of the parties. The schedule for filing dispositive motions provided that such motions were due no later than January 31, 2012 and responses by March 1, 2012. BKR filed a timely motion for partial summary decision on February 2, 2012 and on February 29, 2012, pursuant to the agreement of the parties, the government was given until April 2, 2012 to file its response. The government then filed a response in opposition to the company's motion and a Cross Motion for Partial Summary Decision on April 2, 2012.

BKR filed a Motion to Strike Complainant's Cross Motion for Partial Summary Decision and requested attorneys' fees and costs incurred in connection with the motion. The government filed its response in opposition. All the motions are ripe for decision. In addition to the materials submitted by the parties, I also consider the record as a whole, including pleadings, exhibits, and all other materials of record, in resolving them.

II. BACKGROUND INFORMATION

BKR Restaurants, LLC is a corporation organized pursuant to Arizona law and has its principal place of business at 9119 W. Peoria Avenue, Peoria, Arizona 85345 where it operates a Burger King franchise restaurant. Thomas Barnett is the company's President and CEO. ICE served

government's amended complaint also reduced the penalties sought for the remaining 87 violations alleged.

² The general description of the violations in Counts I-IV is the same, but the treatment of the penalty issue differs for each count.

BKR with a Notice of Inspection and Administrative Subpoena³ on or about December 10, 2007 requesting I-9s for all its current employees and for former employees in accordance with the I-9 mandatory retention requirements as well as other documents and records.

The government issued the company a Notice of Suspect Documents on August 28, 2009 advising BKR that ICE had cause to believe that 18 of the 25 then current employees and 58 of the 178 former employees might be aliens not authorized for employment in the United States.⁴ A Notice of Intent to Fine (NIF) was issued to the company on December 16, 2009. BKR made a request for a hearing on January 14, 2010 and all conditions precedent to the institution of this proceeding have been satisfied.

III. BKR'S MOTION FOR PARTIAL SUMMARY DECISION

A. The Positions of the Parties

1. BKR's Motion

BKR's motion for partial summary decision seeks summary decision in the company's favor as to 10 specific violations alleged with respect to the I-9 forms for Cinthya Torres, named in Count I, and Sonia Ayon, Elizabeth Castro, Liliana Chavez, Melissa Diaz, Jose Encarnacion, Bertha Gonzalez, Rosa Nevarez, Bertha Robles, and Catalina Yanez, named in Count II. The company asserts that the forms speak for themselves and demonstrate that the company substantially complied with the requirements of the employment eligibility verification system, citing *United States v. Anthony Borelli & Sons, Inc.*, 8 OCAHO no. 1027, 392, 397-98 (1999).⁵ Although none

³ The Notice of Inspection filed with the government's exhibits was, however, a copy of the notice sent to another Burger King restaurant at a different location, not the notice that was sent to BKR.

⁴ The lists of names attached to the Notice of Suspect Documents filed with the government's exhibits do not reflect the names in the amended complaint. The lists submitted evidently pertain to employees of another Burger King restaurant at a different location, not to BKR.

⁵ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

of these employees checked a box in section 1 to indicate a particular immigration status, their alien numbers appear elsewhere on the form. Some individuals entered their alien numbers on the line adjacent to a box in section 1, and for other individuals BKR reviewed an alien registration card and entered the number in section 2.

In addition, the company requests summary decision with respect to its status as a small business and requests a downward adjustment in the penalties sought for all counts based on its inability to pay the fines proposed. Accompanying the motion were exhibits A) Attendance Certificate dated October 10, 2007; B) I-9 forms for Cinthya Torres, Sonia Ayon, Elizabeth Castro, Liliana Chavez, Melissa Diaz, Jose Encarnacion, Bertha Gonzalez, Rosa Nevarez, Bertha Robles, and Catalina Yanez (10 pp.); and C) Income Statements for the 9 months ending September 30, 2011 (3 pp.).

2. The Government's Response

The government acknowledges that pursuant to *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139 (2011) no penalties should be assessed for the I-9s of Liliana Chavez, Melissa Diaz, Rosa Nevarez, and Bertha Robles, each of whom entered an alien number on the appropriate line and signed the attestation portion of section 1. The government concedes that *Ketchikan* found substantial compliance under such circumstances and that BKR is entitled to summary decision with respect to the I-9s of those four individuals.

As to the I-9s of Cinthya Torres, Sonia Ayon, Elizabeth Castro, Jose Encarnacion, Bertha Gonzalez, and Catalina Yanez however, ICE argues that summary decision must be denied to BKR and granted to the government because these individuals neither checked a box nor entered an alien number on the appropriate line in section 1, and that the violation is not cured by an entry in section 2.

ICE contends that BKR is not entitled to summary decision as to its size because it did not meet its evidentiary burden by providing support for its factual assertions and that there are genuine issues of material fact with regard to this question. The government pointed out that in any event it did not aggravate the requested penalties based on the size of the company; while its initial calculation did so, this was removed in subsequent discussions. Finally, the government contends that there are also genuine issues of material fact as to the company's ability to pay because this respondent is only one of a number of franchises owned by Barnett Taylor Management, Inc., and the management company's franchises have 500 employees, annual labor costs around \$8 million, and estimated annual revenue in excess of \$25 million.

database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

The government's response was accompanied by exhibits consisting of C-A)⁶ Affidavit of Auditor Keith Campton dated January 13, 2012 (10 pp.); C-B) DHS spreadsheet Barnett Burger King entities (3 pp.); C-C) Arizona Corporation Commission record for BKR Restaurants, LLC (3 pp.); C-D) Affidavit of Special Agent Anthony Sinatra dated January 13, 2012 (3 pp.); C-E) Notice of Inspection⁷ and Administrative Subpoena served December 10, 2007, and Notice of Suspect Documents⁸ dated August 27, 2009 (6 pp.); C-F) ICE Receipt for Property dated January 3, 2008; C-G) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending December 31, 2004 through December 31, 2007 (42 pp.); C-H) Affidavit of Auditor Keith Campton dated March 31, 2012 (7 pp.); C-I) Certificate of Trust Existence and Authority for the Keith R. Krispin, Sr. & Rochelle M. Krispin Family Trust dated September 19, 1997 and amended January 29, 2003 (30 pp.); C-J) BKR Restaurants, LLC corporate income tax return for 2007 (marked Confidential) (19 pp.); C-K) BKR Restaurants, LLC corporate income tax return for 2006 (marked Confidential) (18 pp.); C-L) BKR Restaurants, LLC corporate income tax return for 2005 (marked Confidential) (19 pp.); C-M) BKR Restaurants, LLC corporate income tax return for 2008 (marked Confidential) (17 pp.); C-N) Certificate of Trust Existence and Authority for The Barnett Family Trust dated October 6, 1992 and amended July 16 and 23, 2003 (12 pp.); C-O) BKR Restaurants, LLC corporate income tax return for 2009 (marked Confidential) (22 pp.); C-P) BKR Restaurants, LLC corporate income tax return for 2010 (marked Confidential) (19 pp.); C-Q) printout from the Barnett Management Co. website (10 pp.); C-R) partial Burger King Corp. Franchise Disclosure Document issued April 28, 2011 and amended July 29, 2011 (9 pp.); C-S) Arizona Corporation Commission record for Barnett Management Co. (8 pp.); C-T) Barnett Management Co. list of estimated number of employees and amount of payroll for fourth quarter 2011; C-U) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2008 through June 30, 2011 (but identified in the government's index as 1Q 2008-4Q 2010) for Barnett Administrative Services, Inc. (45 pp.); C-V) Arizona Corporation Commission record for Barnett Administrative Services, Inc. (7 pp.); C-W) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2007 through December 31, 2007 for Barnett Administrative Services, Inc. (15 pp.); C-X) Email messages between ICE and BKR Restaurants, LLC dated January 29, 2008 - February 26, 2008 (2 pp.); C-Y) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarter ending December 31, 2011 for

⁶ Because both parties identified their exhibits alphabetically, the letter "C" has been added to the complainant's designations in order to distinguish between them.

⁷ The Notice of Inspection and Administrative Subpoena are addressed to the owner of a different Burger King restaurant that is the subject of the government's proceedings at OCAHO case no. 11A00031.

⁸ The Notice of Suspect Documents is accompanied by two lists of individuals with suspect documents, none of whom match the individuals named in the amended complaint.

BKR Restaurants, LLC (6 pp.); C-Z) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2008 through December 31, 2011 for BKR Restaurants, LLC (73 pp.); C-AA) Attendance certificate for Tonya Scott dated August 23, 2007; C-BB) Tonya Scott emails dated August 27, 2007, August 30, 2007, September 14, 2007, and September 19, 2007 (4 pp.); C-CC) Attendance certificate for William T. Marshall dated October 10, 2007; C-DD) Attendance certificate for Maria Murguia dated October 10, 2007; C-EE) “Immigration and Employment: New Laws, New Challenges, New Strategies” dated October 10, 2007 (12 pp.); C-FF) Loan agreement between MidFirst Bank, BKR Restaurants LLC and Barnett Krispin Properties LLC (marked Confidential) (35 pp.); C-GG) BKR Restaurants LLC income statement for the 9 months ending September 30, 2011 (marked Confidential) (3 pp.); C-HH) BKR Restaurants LLC income statement for the 12 months ending December 31, 2010 (marked Confidential) (3 pp.); C-II) BKR Restaurants LLC income statement for the 12 months ending December 31, 2009 (marked Confidential) (3 pp.); C-JJ) BKR Restaurants LLC income statement for the 12 months ending December 31, 2008 (showing Management Fees) (3 pp.); C-KK) BKR Restaurants LLC income statement for the 12 months ending December 31, 2007 (marked Confidential) (3 pp.); C-LL) BKR Restaurants LLC income statement for the 12 months ending December 31, 2006 (marked Confidential) (3 pp.); C-MM) BKR Restaurants LLC income statement for the 12 months ending December 31, 2005 (marked Confidential) (3 pp.); C-NN) I-9 forms for Cinthya Torres, Sonia Ayon, Elizabeth Castro, Liliana Chavez, Melissa Diaz, Jose Encarnacion, Bertha Gonzalez, Rosa Nevarez, Bertha Robles, and Catalina M. Yanez (10 pp.); C-OO) Barnett-Taylor Restaurants, Inc. corporate income tax return for 2010 (marked Confidential) (10 pp.).

B. Discussion and Analysis

1. Validity of BKR’s Affirmative Defense

As to the remainder of the violations in issue, BKR cited no case law supporting the proposition that omissions in the required employee attestation in section 1 can be cured by entries in section 2, and the law is clearly otherwise.

The purpose of section 1 of the I-9 form is to demonstrate that the employee actually verified the information entered in the section. *United States v. Mario Saikhon, Inc.*, 1 OCAHO no. 279, 1811, 1822 (1990). When no information is entered in section 1, that purpose is thwarted regardless of what the employer entered in section 2. If an employee failed to provide information sufficient to disclose his or her immigration status on the face of the I-9 form, the employee’s signature actually attests to nothing at all, and the statutory attestation requirement is not satisfied. *Ketchikan*, 10 OCAHO no. 1139 at 15. Accordingly when an employee does not check a box in section 1 and does not enter an alien number on the appropriate line, the employer has failed to ensure that the employee properly completed section 1. This is a substantive violation. *Id.*

There appears to be no genuine issue of material fact with respect to the 10 violations alleged for which BKR seeks summary decision. The defense of substantial compliance was established as to the I-9s of 4 of the individuals and BKR is entitled to summary decision as to those alleged violations. Because substantial compliance does not provide a defense to the remainder of those violations, Barnett Taylor has not established that it is entitled to judgment as a matter of law as to the I-9 of the other 6 employees.

2. BKR's Status as a Small Employer and its Ability to Pay

Finally, BKR's motion seeks summary decision as to the fact that it is a small employer, and seeks adjustment of the penalties based on its inability to pay because of its deteriorating economic position. As the government's response points out, factual allegations made in a brief or memorandum are not evidence and may not be considered as such. *United States v. Yin Tien Chen*, 9 OCAHO no. 1092, 4 (2003). The company's motion will be taken under advisement with respect to these issues and an opportunity will be provided for the company to supplement the record with evidentiary materials to support its factual assertions.

IV. BKR'S MOTION TO STRIKE THE GOVERNMENT'S CROSS MOTION FOR PARTIAL SUMMARY DECISION

A. The Positions of the Parties

1. BKR's Motion

BKR's motion to strike asserts that the company will be prejudiced if the government's untimely cross-motion is considered because the government would then have had the "inequitable advantage" of an additional two months in which to evaluate the respondent's arguments and prepare its motion. In the event the motion to strike is denied, the company requests an additional 30 days within which to respond to the government's cross-motion. BKR also requests attorneys' fees and costs in preparing the motion to strike, which was made necessary by the government's "flagrant disregard" of the scheduling order. The motion to strike was accompanied by exhibits consisting of 1) Memorandum of Prehearing Conference dated September 20, 2011 (2 pp.); 2) Joint Motion for Extension of Time dated February 28, 2012 with attachments (7 pp.); and 3) Extension of Time dated February 29, 2012 (2 pp.).

2. The Government's Response

The government asserts that its cross motion was properly brought under the OCAHO rules⁹ which permit a party to respond to a motion for summary decision by serving opposing papers or to “countermove for summary decision.” 28 C.F.R. § 68.38(a). The government pointed out that its response and cross-motion did not raise any new issues and were both limited to those issues raised in the respondent’s motion for summary decision, and that it filed its response/cross-motion by the due date set by this office for responses. The government also opposed the request for attorneys’ fees, saying there is no basis in either law or fact for such a sanction.

B. Discussion and Analysis

The respondent’s motion to strike the complainant’s cross-motion will be denied. Any “prejudice” resulting to the company from the filing of the government’s cross-motion is self-inflicted; BKR had the opportunity to file a response to the government’s motion and to seek an extension of time in which to do so if needed. That it elected instead to file only a Motion to Strike and a Request for Attorneys’ Fees and Costs was by its own voluntary choice.

As it applies to the issues of liability for the violations as to which BKR sought summary decision, moreover, the motion to strike exalts form over substance. With or without a separate cross-motion from the government, the record reflects that for four of the violations in issue BKR is entitled to summary decision but as to six others the violations occurred and the company’s efforts to establish an affirmative defense to liability for them proved unsuccessful. What the company would be able to accomplish were it to be provided additional time to respond to the government’s arguments with respect to liability for these violations is unelaborated.

The alternative to a summary adjudication is a hearing. While BKR asserts that it was burdened by filing the motion to strike, that burden pales next to the burden of preparing for and participating in an unnecessary hearing. The whole purpose of summary adjudication is to avoid unnecessary hearings. *United States v. Aid Maintenance Co., Inc.*, 7 OCAHO no. 951, 475, 478 (1997). For this reason, our rules require evidentiary hearings only where genuine factual issues are raised. 28 C.F.R. § 68.38(e). Parties should not be put to the burden and expense of a hearing unless it is shown that there are genuine issues of material fact to be determined and agencies routinely decline to hold hearings where there is no factual dispute of substance. *Veg-Mix, Inc. v. Dep’t of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

The company’s Request for Attorneys’ Fees and Costs will also be denied. Such fees and costs are available in these proceedings only in accordance with the provisions of 5 U.S.C. § 504 and only to a prevailing party. 28 C.F.R. § 68.52(c)(9).

⁹ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

V. THE GOVERNMENT'S CROSS MOTION

A. Liability for Violations Alleged

Visual examination of the I-9 forms at issue in light of our caselaw reflects that there is no genuine issue of material fact and BKR is entitled to judgment as a matter of law that it substantially complied with the requirements of the employment eligibility verification system with respect to the I-9s of Liliana Chavez, Melissa Diaz, Rosa Nevarez, and Bertha Robles. The company having failed to establish a defense to the violations involving Cinthya Torres, Sonia Ayon, Elizabeth Castro, Jose Encarnacion, Bertha Gonzalez, and Catalina Yanez, ICE is entitled to judgment as a matter of law with respect to liability for these violations and the government's motion will be granted as to them.

B. Issues Related to Penalties

Issues with respect to the size of the employer, together with other issues respecting the application of the statutory penalty factors, will be deferred pending an opportunity for the submission of additional evidentiary materials. In its Prehearing Statement, BKR introduced the additional question of whether it was appropriate to apply penalty standards adopted in November 2009 to violations that occurred in 2007 and before. The company asserts that any penalties to be assessed should be calculated based on the fine schedule that was in effect in 2007. The government will be requested to address this question.

VI. THE REMAINING VIOLATIONS ALLEGED

Neither party made reference to the remainder of the allegations in Count I and II or to the allegations in Counts III-V. The parties will be given the opportunity to file dispositive motions and evidentiary support with respect to these allegations as well. For the reasons stated, there is no reason the parties should be subjected to a hearing with respect to issues as to which there is no genuine factual dispute. Unless and until it is established that there are such issues, the summary resolution process will be the method used to resolve this case.

ORDER

Respondent's Motion for Partial Summary Decision is granted with respect to the alleged violations involving the I-9s of Liliana Chavez, Melissa Diaz, Rosa Nevarez, and Bertha Robles, as to which BKR established an affirmative defense. The motion is denied with respect to liability for the alleged violations involving the I-9s of Cinthya Torres, Sonia Ayon, Elizabeth Castro, Jose Encarnacion, Bertha Gonzalez, and Catalina Yanez. Issues of penalty are taken under advisement pending further proceedings. Respondent's Motion to Strike Complainant's

Cross-Motion for Partial Summary Decision and Request for Attorneys' Fees and Costs are denied. Complainant's Cross-Motion for Partial Summary Decision is granted with respect to liability for the violations in the I-9s of Cinthya Torres, Sonia Ayon, Elizabeth Castro, Jose Encarnacion, Bertha Gonzalez, and Catalina Yanez, and taken under advisement with respect to the question of penalties.

The parties will have a period of 30 days from the date of this order in which to make additional filings in support of their respective positions respecting the appropriate penalties.¹⁰ The complainant is requested to address in addition the question of whether the November 2009 guidelines have any application to violations that occurred in 2007 or earlier.

The parties will also have 30 days from the date of this order in which to file dispositive motions with respect to the remaining allegations in the complaint. Responses will be due within 30 days after service of any such motion.¹¹

SO ORDERED.

Dated and entered this 20th day of August, 2012.

Ellen K. Thomas
Administrative Law Judge

¹⁰ If the government intends to propose aggravating penalties based on the presence of undocumented workers, it must provide the appropriate Notice of Suspect Documents and lists of employees.

¹¹ At the request of Peter Vincent, his name should be removed from the service list and copies of filings should not be sent to him.