

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

United States of America, Complainant vs. Covered Bridge Farm Market, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100240.

**ORDER GRANTING COMPLAINANT'S MOTION FOR 28 CFR 68.19(C)
RELIEF AND FOR SUMMARY DECISION AND ORDER**

A. Summary of Proceedings

1. On March 8, 1989, the United States Immigration and Naturalization Service issued as to respondent Covered Bridge Farm Market, Inc., d/b/a Covered Bridge Garden Center (herein sometimes called ``Covered Bridge'') a notice of intent to fine (herein sometimes called ``the notice'' or ``the notice of intent''). This notice alleged that respondent had hired 45 named individuals after November 6, 1986, for employment in the United States. The notice further alleged that respondent had violated 8 U.S.C. § 1324(a)(1)(B) and 8 C.F.R. § 274a.2(b)(1) and/or (2), (1) as to 6 such named individuals, by failing to prepare an employment eligibility verification form (Form I-9), or, in the alternative, failing to make such forms available to the United States Immigration and Naturalization Service (``the INS'') for inspection; (2) as to 18 such named individuals, by failing to ensure that they properly completed Section 1 of a Form I-9 and by failing to complete properly Section 2 of such a form; (3) as to one such named individual, by failing to ensure that she properly completed Section 1 of the I-9; and (4) as to 20 such named individuals, by failing to complete properly Section 2 of such a form. The notice set forth an intent to order a fine in the amount of \$13,250.00. See infra fn. 1.

2. By letter to the INS dated April 2, 1989, respondent's counsel acknowledged that the notice of intent to fine had been served upon respondent on March 15, 1989, and requested a hearing before an administrative law judge (infra fn. 1). See 8 U.S.C. § 1324a(e)(3)(A); 8 CFR § 280.1.

3. On May 12, 1989, complainant filed against respondent a complaint which incorporated by reference the foregoing notice of intent to fine.

4. A timely answer by respondent's counsel, dated May 29, 1989, admitted that respondent had received the notice of intent to fine and had requested a hearing.¹Further, respondent's answer admitted that after November 6, 1986, respondent had hired each of the 45 individuals named in the notice of intent to fine, but denied the remaining allegations summarized above and, further, alleged ``substantial compliance'' with the statute and with the relevant regulations.

5. About July 20, 1989, ``Complainant's First Set of Interrogatories'' and ``Complainant's First Request to Produce Documents and Things'' were served on respondent's counsel. The content of these documents is to some extent discussed infra. Such documents requested a response within 30 days of service.

6. By letter to me dated September 7, 1989, complainant's attorney stated that since August 10, 1989, when I conducted a conference call with her and respondent's attorney, she had made repeated unsuccessful attempts to communicate with him; and that although the requested documents and the responses to interrogatories were due on August 24, 1989, she had not received them. She attached a motion to compel responses to discovery. On September 13, 1989, I issued an order to respondent to show cause, on or before September 29, 1989, why that motion should not be granted; failure to reply was to be deemed to constitute consent. No reply was received. On October 11, 1989, I issued the requested order to compel responses to discovery.

7. Over date of October 22, 1989, complainant averred that respondent had failed to provide any responses to discovery, and filed the instant motion for 28 C.F.R. 68.19(c) relief and/or for summary decision and order. On November 28, 1989, I issued an order requiring respondent to show cause, on or before December 31, 1989, why that motion should not be granted; failure to reply was to be deemed to constitute consent.

8. Over date of December 28, 1989, respondent filed a document captioned ``Respondent's reply to complainant's motions for 28 CFR 68.19(c) relief and/or for summary decision and order.'' The contents of this document consisted in its entirety of a request that all further proceedings herein be stayed pending Chapter XI bank-

¹This admission forms the basis for my finding to this effect.

ruptcy proceedings initiated by Covered Bridge, respondent herein, on November 11, 1989.²

9. Over date of January 4, 1990, complainant filed an opposition to the request for a stay, and a document in further support of the motion for 28 C.F.R. § 68.19(c) relief and/or for summary decision and order.

10. On January 10, 1990, I issued an order in which, inter alia, respondent's request for a stay was denied in reliance on United States v. Armory Hotel Associates, 93 B.R. 1 (D.C. Me. 1988). However, the order went on to state:

The period within which Covered Bridge may file a reply on the merits is hereby extended until 20 days after the date of this Order. A failure to reply within this period will be deemed to constitute consent to the relief requested by the United States on November 22, 1989, and January 4, 1990.

No such reply has been received. By letter to me dated February 23, 1990, complainant's counsel requested the entry of a final decision and order finding for complainant on the merits and awarding to complainant against respondent a civil monetary penalty in the amount of \$13,250.00.

11. Attached to complainant's motion of November 22, 1989, is the following material:

a. A document addressed to respondent dated September 29, 1988, captioned ``Notice of Inspection'' together with an affidavit by INS special agent James Teczar which stated, inter alia, that he had delivered this document to respondent on September 29, 1988. This document stated, inter alia:

Section 274A of the Immigration & Nationality Act, as amended by the Immigration Reform and Control Act of 1986, requires employers to hire only American citizens and aliens who are authorized to work in the United States. Employer must verify employment eligibility of persons hired after November 6, 1986, using the Employment Eligibility Verification Form I-9.

You have been selected for compliance review and audit by the Immigration and Naturalization Service on October 4, 1988 ...

During this review, a Special Agent of the Service will discuss the requirements of the law with you and inspect your I-9 forms. The purpose of this review is to assess your compliance with the provisions of the law.

b. In connection with Count I of the notice, a statement in Teczar's affidavit that on October 4, 1988, Alan A. Fazi, an agent of respondent, advised him that no Forms I-9 had been prepared for 5

²Before the bankruptcy court, Covered Bridge is represented by counsel not associated with Thomas H. Belote, Covered Bridge's counsel in the proceeding before me. Mr. Belote's affidavit attached to his request for a stay avers that he had been advised on December 28, 1989, that Covered Bridge had filed for bankruptcy.

of the 6 individuals named in Count 1 of the complaint or for ``Sullivan, John Jr.'' (Count 1 of the notice names ``Sullivan, John Sr.'').

c. In connection with Count II of the notice, a statement in Teczak's affidavit that Fazi gave him on October 4, 1988, Forms I-9 for the 18 individuals named in Count II of the notice, together with what Teczak's affidavit identifies as photocopies of such forms. As to each of these forms, neither Section 1 nor Section 2 is properly completed.

d. In connection with Count III of the notice, a statement in Teczak's affidavit that Fazi gave him on October 4, 1988, a Form I-9 for the individual named in Count III of the notice, together with what Teczak's affidavit identifies as a photocopy of that form. As to this form, Section 1 is not properly completed.³

e. In connection with Count IV of the notice, a statement in Teczak's affidavit that Fazi gave him on October 4, 1988, a Form I-9 for the 20 individuals named in Count IV of the notice, together with what Teczak's affidavit identifies as photocopies of such forms. As to each of these forms, Section 2 is not properly completed.

f. In connection with the appropriate penalty:

(1) A letter to respondent from Teczar advising it that 4 of the individuals named in Count II of the notice, and one of the individuals named in Count IV, had been admitted to the United States as visitors not authorized to work there; and that another individual named in Count II was not authorized to work there. Teczar's affidavit stated that he delivered this letter to respondent on September 29, 1988.

(2) A letter to respondent from Teczar, dated October 7, 1988, stating that two more individuals named in Count II were not authorized to work in the United States.⁴

(3) A letter to respondent from John P. Weiss, an INS officer in charge, dated October 12, 1988, with a notation ``personal delivery by hand on respondent'' and the signature ``Raymond [illegible] S.A.,'' which states that on October 12, 1988, the INS had apprehended ``Gusmao-Alves,, Ailton,'' who is not authorized to work in the United States. Count II of the complaint names ``Gusmao-Alves, Ailton, aka Alves, Ailton G.'' Teczar's affidavit states that on October 12, 1988 ``we apprehended another unauthorized . . .

³Section 2 may not be properly completed either. However, Count III does not allege a deficient Section 2.

⁴The letter also contains such allegations as to a third individual, who is named in Count III. The INS later determined that she was in fact authorized to work, and so advised respondent. See page 5, footnote 1 of complainant's memorandum in support of its motions.

alien working for respondent . . . This alien, Alton Gasmao-Alves [sic], also had on record with respondent a defective Form I-9 (See Count II).'

(4) A statement in Teczar's affidavit that on October 4, 1988, the day of the inspection, respondent's agent Fazi stated that respondent employed a total of 64 individuals.

12. The request to produce documents and things, served upon but disregarded by respondent, includes:

6. All Forms I-9 for each employee named in the Notice of Intent to Fine . . . for whom Respondent claims to have had a Form I-9 prepared on or before October 4, 1988.

* * * * *

9. All documents reflecting referring or relating to the facts that you claim support the allegations [in] your Answer concerning ``substantial compliance.'

In addition, as to each of the 9 individuals identified in Teczak's affidavit as not authorized for employment in the United States, the request to produce sought documents showing, referring, reflecting or relating to (1) his employment eligibility or lack thereof; (2) his immigration status; (3) his nationality; (4) his identity; and (5) his social security number or card. The request to produce also requested production of documents reflecting the dates of hire of, inter alia, ``Sullivan, John Sr.'

13. The interrogatories received but disregarded by respondent request, inter alia, the following information:

- a. As to each individual named in the four counts of the notice of intent to fine, whether he was still employed by respondent and, if applicable, when he left or was rehired.
- b. Identification of each individual named in the complaint for whom respondent has prepared a Form I-9 on or before October 4, 1988; identification of each such form not presented to the INS; a copy of each such form; and a statement as to why it was not presented to the INS.
- c. Each and every fact which respondent claims to support its allegation of ``substantial compliance.'
- d. Each and every reason for any denial by respondent that it violated the INA as alleged in the complaint, and each and every fact that, respondent claims, supports such denial.

B. Complainant's Request for 28 CFR 68.19(c) Relief

All of the complainant's factual allegations summarized supra Part All constitute matter as to which respondent necessarily has direct knowledge. Moreover, complainant's disregarded discovery requests summarized supra Part A 12-13, in effect asked respondent whether each of these factual allegations by complainant was

true. Accordingly, and pursuant to 28 CFR 68.19(c),⁵I conclude that for the purposes of this proceeding, the factual allegations set forth in the attachments to complainant's motion are to be taken as established, and that respondent's claim of substantial compliance is without evidentiary basis. This determination extends to Gusmao-Alves, Ailton, aka Alves, Ailton G., who I find is the same individual as Ailton Gasmao-Alves. In addition, I find to be established the factual allegations in the complaint as to Sullivan, John Sr. It is true that Teczar's affidavit states that Fazi advised him that no form I-9 had been prepared for ``Sullivan, John Jr.'' However, both the interrogatories and the request to produce seek any Form I-9 prepared for ``each employee named in the Notice of Intent to Fine,'' which notice names ``Sullivan, John Sr.``

Moreover, because of respondent's failure to comply with those portions of the request to produce documents and things relating to the 9 individuals identified in Teczak's affidavit as not authorized for employment in the United States, I infer (solely with respect to this proceeding, and solely for the purpose of ascertaining the appropriate monetary penalty for the violations alleged in the complaint) that if produced, such documents would show that such individuals were not in fact authorized to be employed in the United States at any relevant time, and that at all relevant times respondent was aware that they were not so authorized.

C. Complainant's Motion for Summary Decision and Order

The federal regulations applicable to this proceeding provide, ``The Administrative Law Judge may enter summary judgment 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 and that a party is entitled to summary decision.'' 28 CFR 68.36(c).

My action in Part B of this Order, with respect to complainant's motion for 28 CFR 68.19(c) relief, means that no genuine issue as to any material fact exists as to the complaint allegations that respondent violated 8 U.S.C. 1324a(a)(1)(B) with respect to the records of the 45 individuals named in the complaint. Accordingly, and pursuant to 8 C.F.R. § 68.36(c), the motion for summary judgment is hereby granted with respect to such allegations.

My action in this respect calls for a civil penalty of at least \$4,500.00, with a statutory maximum of \$45,000.00. 8 U.S.C.

⁵Complainant's motion--filed on November 22, 1989--thus cites the relevant regulations. Effective November 24, 1989, this regulation was renumbered as Section 68.21(c). 54 F.R. 48601.

1324a(e)(5). The complaint seeks a civil penalty of \$13,250.00. 8 U.S.C. 1324a(e)(5) provides in part: ``In determining the amount of the penalty, due consideration 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.'' I have examined the file on the basis of the standards set forth in *United States of America v. Juan V. Acevedo*, Case No. 89100397, October 12, 1989 (Robert B. Schneider, Administrative Law Judge), pp. 3-6. As to each count, the penalty requested is less than the penalty which would be assessed under *Acevedo*. Accordingly, I find the amounts requested to be appropriate--more specifically, \$2,700.00 under Count I, \$6,100.00 under Count II, \$200.00 under Count III, and \$4,250.00 under Count IV, a total of \$13,250.00.

Findings of Fact, Conclusions of Law, and Order

1. As previously found and discussed, I determine that no genuine issue as to any material facts has been shown to exist and that, therefore, pursuant to 8 C.F.R. § 68.36(c), complainant is entitled to a summary decision as to all counts of the complaint as a matter of law.

2. Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired after November 6, 1986, for employment in the United States, the 45 individuals named in the complaint without complying with the verification requirements in 8 U.S.C. § 1324a(b) and 8 C.F.R. 274a.2(b)(1).

3. Complainant is entitled to a civil monetary penalty to be assessed against respondent in the amount of \$13,250.00.

4. Pursuant to 8 U.S.C. § 1324a(e)(6) and as provided in 54 F.R. 48607 § 68.51, 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.

Dated: March 2, 1990.

NANCY M. SHERMAN
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