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

United States of America, Complainant v. Mr. Z Enterprises, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100435.

ORDER DENYING COMPLAINANT'S MOTION TO AMEND COMPLAINT

Procedural History

On April 13, 1990, Complainant filed a Motion to Amend the Complaint in this case. Complainant's proposed amendment is to add a Respondent to the Complaint; namely, Edward Zimmerman, owner and chief executive officer of Respondent's business, Mr. Z Enterprises. Complainant proposes that the addition of Mr. Zimmerman, in his personal capacity, is necessary in light of discovery that it recently completed.

Respondent, through counsel, filed a ``vigorous opposition'' memorandum on April 24, 1990. Respondent opposes Complainant's Motion to Amend on the grounds that it is prejudicial, unduly delayed, possibly offered in bad faith, and will result in an unnecessary burden in preparing for the hearing scheduled in less than two weeks.

Legal Analysis

The regulations governing these proceedings provide that:

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints . . . .'' 28 C.F.R. § 68.8(e).

The operative concept in the language of this regulatory provision is the identification and respective balancing of prejudice caused by the proposed amendment. See, also, Smith v. Costa Lines, Inc., 97 F.R.D. 451 (D.C. Ca. 1983) (``Prejudice to the opposing party, not the diligence of the moving party, is the crucial factor in determining whether or not to grant leave to amend complaint.''); and, Wright & Miller & Kane, Federal Practice and Procedure, vol. 6, section 1487, at 613. It is also clear, from the language of the regu-

lation, that considerations of proposed amendments necessitate the exercise of discretion. See, Independent Taxicab Operators Ass'n of San Francisco v. Yellow Cab Co., 278 F. Supp. 979 (D.C. Ca. 1968) (Leave to amend is within the sound discretion of the trial court and will be denied when fairness to the opposing party so requires.).

Rule 15 of the Federal Rules of Civil Procedure also provides procedural guidance in making decisions regarding amendments to complaints. According to Rule 15, leave to amend ``shall be freely given when justice so requires.'' Rule 15(a) of F.R.C.P. (emphasis added).

Having examined closely the parties' respectively well-done memorandums on the issue in this motion, I find and conclude that justice requires that I deny Complainant's Motion to Amend. As I see it, the balance of prejudices would unduly tip against Respondent if I were to grant Complainant's Motion, and it is not clear to me how, if at all, ``the public interest'' would be harmed if the Motion is denied.

In reaching this conclusion, I am most persuaded by the argument that Complainant's failure to include the proposed amendment in his original pleading may put Respondent to the added burden of further discovery, preparation, and expense, thereby prejudicing his right to a speedy and inexpensive trial on the merits. See, e.g., H.L. Hayden Co. v. Siemens Medical Sys., Inc., 112 F.R.D. (D.C. N.Y. 1986). Moreover, it is not clear to me how, in a situation involving an apparently very closely-held corporation, Complainant's case, and the ``public interest,'' will be irrevocably prejudiced if it is precluded from proceeding, simultaneously against Mr. Zimmerman in his private capacity.[1]

[1]In this regard, I might also add that I find Complainant's reliance on a recent OCAHO decision to be unpersuasive, because I do not presently agree with the conclusion reached in that closely-reasoned and well-written decision by ALJ Wacknov. See, United States of America v. Wrangler's Country Cafe, Inc., and Henry D. Steiben, Individually, OCAHO Case No. 89100381 (ALJ Wacknov), March 6, 1990 (``Order Denying Respondent Steiben's Motion to Dismiss and Motion for Summary Decision''). My current reasons for disagreeing with Judge Wacknov's conclusions in the Wrangler's case are somewhat complicated and closely semantic. In short, I read the language of the statute (``person or entity'') in the alternative, and not in the conjunctive; and I read the language of the correlative regulation (``the term `employer' means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof . . . .''), 8 C.F.R. § 274a.1(g), as applying to either a potentially liable ``person'' or a potentially liable ``entity,'' but not, as Judge Wacknov apparently concluded in Wrangler's, both of them simultaneously in the same proceeding.

Finally, Complainant has not yet made a clear record on whether it is contending that the alleged hiring was undertaken as work product for Mr. Z Enterprises, Inc., or work product for the benefit of Edward Zimmerman personally; but, whichever it is, I am of the view that the statute does not permit Complainant to charge a person and an entity in the same proceeding, but only a person or an entity. See, § 1324a(a)(1); and, footnote 1, supra.

Accordingly, I am denying Complainant's Motion to Amend. It should be noted, however, that pursuant to the regulations governing these proceedings, and the guidelines provided by the Federal Rules of Civil Procedure, I will consider carefully additional motions to amend, especially those that may be more strictly in conformity with the evidence yet to be presented at the hearing. Rule 15(b) F.R.C.P.

SO ORDERED: This 27th day of April, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge