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

United States of America, Complainant v. James Q. Carlson, d/b/a Jimmy on the Spot, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100273.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

On October 29, 1990, pro se Respondent filed a ``Motion to Dismiss'' the Complaint. In his motion, Respondent sets forth four arguments in support of his Motion to Dismiss which will be discussed infra.

On November 2, 1990, Complainant filed an Answer to Respondent's Motion to Dismiss. Complainant's Answer to Respondent's Motion to Dismiss sets forth three succinct responses: (1) ``Respondent's motion is no more than an elaboration of Respondent's answer and cannot form the basis for an argument that this proceeding be dismissed; (2) ``Respondent's blatant assertions concerning the facts of this case are not evidence and are not supported by affidavits or other evidence''; and (3) ``Respondent presents no facts which constitute a defense to the charges set forth in the Complaint.'' Although I agree with Complainant's assertions, I believe that Respondent's arguments need a more detailed and reasoned response by the court.

Respondent's first argument in support of its Motion to Dismiss states that ``it is the opinion of the respondent that when the hires personnel for the purpose of doing Automotive, repair, those persons have to be experienced mechanics with tools of the Trade as well as Clean driving records so that they may be insured by respondent's insurance co.'' He further argues that ``these types of individuals therefore would not normally fall under the category of undocumented (sic) who are not eligibility restricted.''

The problem with this argument is that it is speculative. There is no assurance that, because of their skills or driving records, any of Respondent's employees are U.S. citizen or lawful permanent residents authorized to work in the United States. Congress decided

when it passed the Immigration Reform and Control Act of 1986 (``IRCA'') that the only way to insure that an employer hires persons authorized to work in the United States is to require each employer to complete an Employment Eligibility Form (Form I-9). IRCA does not permit an employer to hire an individual without completing an I-9 simply because it is the employer's opinion that the individual is authorized for work in the United States. Therefore, Respondent's first argument is without merit.

Respondent's second argument states that, ``since he is a sole owner of a small business, he is of the opinion that the representative of the Immigration and Naturalization Service should have requested a person to person meeting with the respondent in order to get `correct' answers to questions asked, as well as to discuss policy of the Immigration and Nationally Act.'' Respondent further alleges that ``the representative did not do this, but rather elected to take time to ask questions from an employee who had absolutely no knowledge of said matters. He then based his report on this inappropriate information received.''

Respondent's second argument implies that he was deprived of procedural and/or substantive due process because the government did not provide him with an appropriate educational visit, and based its charges on allegedly inaccurate information.[1] This argument is without merit.

In United States v. Mester, 879 F.2d 561 (9th Cir. 1989), the Ninth Circuit Court of Appeals rejected as an affirmative defense an educational visit requirement stating:

> Mester's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. It is true that Congress provided for education of employers during the early period of IRCA. However, we do not read that recommendation to employers as in any way giving them an entitlement to the education, or prohibiting sanction against an employer that can show that it had not received a handbook or other instruction, or (as here) that it has simply failed to pay attention to them.

The fact that the INS agent who prepared a report on Respondent's alleged violations of IRCA may have relied upon inaccurate information is not grounds for dismissal at this stage of the proceedings. However, if the evidence presented to the ALJ in this case (either through affidavits in support of a motion for summary decision for at a hearing) shows that Respondent did not violate the record-keeping provisions of IRCA, the case will be dismissed.

[1]Substantive due process prohibits only governmental conduct that shocks the conscience or interferes with rights implicit in the concept of liberty. See, United States v. Salerno, 481 U.S. 739, 746 (1987).

Respondent's third argument states that, ``he is of the opinion the Immigration and Nationality Act was formed not to harass (sic) the individual small business person for hiring practices, but rather to watch over those who are in business where it is common practice to hire undocumented, unspecialized persons who can preform labor jobs which does not take the advanced training as that of an automobile technician.''

IRCA was passed in response to the illegal entry of an estimated 2 to 12 million immigrants into the United States and their resultant strain on welfare, educational, and social service benefits throughout the country. Robert K. Robinson and Diana L. Gilbertson, The Immigration Reform and Control Act of 1986: Employer Liability in the Employment of Undocumented Workers, 38 Labor Law Journal 658 (October 1987).

As noted by a knowledgeable commentator: ``The stated purpose of the law is to effectively control unauthorized immigration into the United States. Focusing specifically on the employment of illegal aliens, the Act makes it unlawful for a person or an entity to hire, recruit, or refer for a fee, individuals who are not legally eligible for employment in the United States. Moreover, the law provides for employer sanctions and penalties if the law is violated.'' Charles E. Mitchell, Illegal Aliens, Employment Discrimination, and the 1986 Immigration Reform and Control Act, -Labor Law Journal 177 (March 1989).

It is clear from the foregoing that, contrary to Respondent's argument, IRCA applies to all U.S. employers, whether small or large, requiring skilled or unskilled labor, because unauthorized aliens are capable of finding employment in semi-skilled and skilled jobs, as well as in unskilled jobs. Respondent's third argument for dismissal is therefore rejected.

Respondent's fourth argument states that it ``filed for `Chapter 7' bankruptcy filing in order to pay off back taxes with interest. Since respondent no longer has employees working for `Jimmy on the Spot' and he is working the business himself, he feels it would be counter productive to levy `any fines' on him at this time, especially those the Immigration and Naturalization Service is requesting the court to order. The facts presented by the Complainant simply are not the full facts and should not be considered to be damaging to anyone at anytime.''

Respondent seems to be asserting several arguments, some conclusory, in his fourth numbered paragraph. First, that his filing bankruptcy should either stay these proceedings or be an affirmative defense. Second, that his financial condition is an affirmative defense to the charges filed herein. Third, that the government

should not prosecute him because he no longer has any employees working for him.

The question of the effect of bankruptcy on employment sanction enforcement has been discussed in several prior ALJ OCAHO decisions. See, U.S. v. United Pottery Manufacturing and Accessories, OCAHO Case No. 89100047 (April 21, 1989) (Judgment by Default), aff'd by CAHO, (May 19, 1989); U.S. v. Covered Bridge Farm Market, OCAHO Case No. 89100240 (March 2, 1990); U.S. v. Dodge Printing Centers, OCAHO Case No. 89100453 (Jan. 12, 1990); and U.S. v. DAR Distributing, OCAHO Case No. 89100087 (June 5, 1989). None of these prior decisions support Respondent's argument that his bankruptcy should either stay these proceedings or be an affirmative defense. These decisions citing to federal case law hold, inter alia, that (1) bankruptcy does not automatically stay sanction proceedings; and (2) INS is exempted from the automatic stay provision of 11 U.S.C. 362(a) because it is a governmental unit acting to enforce its police and regulatory power.

IRCA does not specifically address whether or not an employer's financial condition is relevant to mitigation. However, IRCA does state that an ALJ, in determining the amount of the civil money penalty to access for paperwork violations, should give due consideration to the size of the business. IRCA Section 274A(e)(5), 8 U.S.C. 1324a(e)(5).[2]

In determining the appropriate fine to assess, and in giving due consideration to the employer's size of business, as the statute instructs, I consider the financial condition of the employer's business. See, United States v. Felipe, OCAHO Case No. 88100151 (October 11, 1989); aff'd by CAHO, (November 29, 1989). Therefore, if the government proves liability in this case, I will take into consideration the Respondent's financial condition in determing an appropriate penalty.

Finally, whether or not the government should prosecute persons whose business operations have been altered because of financial reasons is not an affirmative defense. Whether or not Mr. Carlson, DBA Jimmy on the Spot, is civilly prosecuted by the government is a matter of prosecutorial discretion, and is not an issue for determination by an ALJ.

For the foregoing reasons, Respondent's ``Motion to Dismiss'' is hereby DENIED.

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[2] Section 274A(e)(5) provides, in pertinent part, that: ``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.''

SO ORDERED: This 8th day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge