

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

United States of America, Complainant, v. Jimmy Bai Huang, d.b.a. Great Wall Chinese Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100283.

ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

Appearances: **LEILA CRONFEL**, Esquire,
Immigration and Naturalization Service for
Complainant.
JOHN RANDOLPH TORBET, Esquire,
for Respondent.

I. PROCEDURAL SUMMARY

On September 11, 1990, the United States of America, Immigration and Naturalization Service, served a Complaint incorporating a Notice of Intent to Fine on Respondent Jimmy Bai Hung, d.b.a. Great Wall Chinese Restaurant, alleging violations of the provisions of Section 274A of the Immigration and Nationality Act (the Act), 8 U.S.C. 1324a.

Count I of the Complaint alleged violations of Section 274A(b)(1) of the Act, 8 U.S.C. 1324a(b)(1), 8 C.F.R. Part 274a.2(b)(1)(ii), for Respondent's failure to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9) for four (4) individuals hired after November 6, 1986. Count II alleged violations of Section 274A(b)(3) of the Act, 8 U.S.C. 1324a(b)(3), 8 C.F.R. Part 274a.2(b)(2)(ii), for Respondent's failure to make available for inspection Forms I-9 for twenty (20) individuals hired after November 6, 1986.

Respondent filed an Answer on September 18, 1990, asserting a general defense of good faith to the allegations contained within the Complaint. Subsequently, a pre-hearing telephonic conference was held on October 22, 1990 to discuss the possibility of settle-

ment, discovery, and other pre-hearing matters. A hearing date of January 10, 1991 was also set at that time (later changed to January 31, 1991 by my Order of December 17, 1990).

On December 20, 1990, Complainant filed a Motion for Summary Decision with a supporting memorandum, alleging that no questions of material fact existed as to Counts I and II. Respondent filed its Response to Motion for Summary Decision on January 3, 1991.

On January 10, 1991, a second pre-hearing telephonic conference was held to discuss Complainant's Motion and Respondent's reply to the motion. As a result of this telephonic conference, Respondent admitted that it saw no genuine defenses to the issues of liability in this matter, and agreed that partial summary decision as to liability only was appropriate.

II. STANDARDS FOR DECIDING SUMMARY DECISION

The federal regulations applicable to this proceeding authorize an ALJ to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. Part 68.36; see also Fed. R. Civ. Proc. 56(c).

The purpose of the summary judgment procedure is to avoid all unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242 (1986); see also Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 1982). See also Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.''); and U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on

file and, as such, may be used in determining presence of a genuine issue of material fact).

III. LEGAL ANALYSIS

Count I of the Complaint alleged four (4) violations where I-9 forms were improperly completed. Copies of the I-9s were attached to the Complainant's Memorandum in Support of Motion for Summary Decision as Exhibit 4 to the Affidavit of Sevie Pacheco, Jr., the investigating officer. Inspection of the I-9s supports Complainant's contention that Respondent failed to properly complete section 2 of the each form, a violation of Section 274A(b)(1) of the Act.

Count II alleged twenty (20) violations of Section 274A(b)(3) of the Act for failure of Respondent to retain I-9 forms for all employees hired after November 6, 1986. Complainant's Motion notes that Agent Pacheco was provided with access to all I-9 forms retained by Respondent, and that by cross-referencing the I-9s with employee time cards, Agent Pacheco determined that no I-9 forms were available for the twenty (20) individuals named in the Complaint. See Affidavit of Sevie Pacheco, Jr. at 4. As Complainant correctly noted in its Memorandum in Support of Motion for Summary Decision, Section 274A(b)(3) of the Act requires an employer:

to retain the form and make it available for inspection by officers of the [Immigration and Naturalization] Service for a period beginning on the date of hiring. . .and ending. . .(B) in the case of the hiring of an individual (i) three years after the date individual's employment is terminated, whichever is later.

Memorandum at 3.

In its Response to Motion for Summary Decision, Respondent stated that it did not dispute the essential facts as set out in Complainant's Motion and Memorandum. Moreover, in both its Answer and Response, Respondent asserted only a ``good faith'' defense to the allegations set forth in the Complaint. As has been held in previous cases, good faith is not a defense to liability regarding paperwork violations, but may be considered as a mitigating factor in consideration of civil penalties. See United States v. Mario Saikon, Inc., OCAHO Case No. 90100176, (Dec. 14, 1990); United States v. Collins Food International, OCAHO Case No. 89100089, (Jan. 9, 1990), aff'd by CAHO, (February 8, 1990); United States v. USA Cafe, OCAHO Case No. 88100098, (Feb. 6, 1989).

As noted above, summary decision may be based on matters deemed admitted. In the January 10 telephonic conference held in this matter, Respondent's attorney agreed that no good faith defense was available on the question of liability as to Counts I and II. Based on this admission, and because Respondent did not dispute the essential facts set out in Complainant's Motion and

Memorandum, summary decision on the question of liability is appropriate.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings, memoranda, and arguments submitted by the parties. Accordingly, I make the following findings of fact and conclusions of law:

1. That Respondent Jimmy Bai Huang, d.b.a. Great Wall Chinese Restaurant, has violated Section 274A(b)(1) of the Act, 8 U.S.C. 1324a(b)(1), 8 C.F.R. Part 274a.2(b)(1)(ii), for failure to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9) for the four (4) individuals named in Count I of the Complaint;

2. That Respondent has violated Section 274A(b)(3) of the Act, 8 U.S.C. 1324a(b)(3), 8 C.F.R. Part 274a.2(b)(2)(ii), for failure to make available for inspection Forms I-9 for the twenty (20) individuals named in Count II of the Complaint;

3. That there are no genuine issues of material fact with respect to liability as to the above listed Counts and Complainant's Motion for Summary Decision is GRANTED as to each of them;

4. That the Court will keep jurisdiction of this matter to make a determination as to the appropriateness of civil penalties to be imposed.

IT IS SO ORDERED: This 11th day of January, 1991, in San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office of Immigration Review
Office of the Administrative Law Judge
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San Diego, California 92101