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

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	CASE NO. 91100202
ROBERT MARNUL D.B.A	)	
LAMONT STREET GRILL,	)	
Respondent.	)	
	)	

Appearances:

Deborah S. Nordstrom, Esquire For the Complainant
Jack R. Turner, Jr., Esquire For the Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

DECISION AND ORDER GRANTING PARTIAL SUMMARY DECISION

I. *Procedural History*

On June 24, 1991, the U.S. Department of Justice, Immigration and Naturalization Service (INS), issued a Notice of Intent to Fine (NIF) against Robert Marnul doing business as Lamont Street Grill (hereinafter "Respondent"), containing 15 allegations of violations of the verification and record-keeping requirements of § 274A(a)(1)(B) of the Immigration and Nationality Act (the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a)(1)(B). The NIF was issued for Respondent's failure to properly complete the Employment Eligibility and Verification Forms (Forms I-9) for the 15 named employees. The INS sought a civil monetary penalty of $350 for each of two violations, $250 for each of twelve violations, and $300 for one violation, for a total fine of $4,000.00

On November 25, 1991, INS (hereinafter "Complainant") filed a Complaint, incorporating the NIF, with the Executive Office of Immigration Review, Office of the Chief Administrative Hearing Officer. Count I alleges the Respondent failed to prepare and/or present the Form I-9 for the two named individuals in violation of 8 U.S.C. § 1324a(b) and 8 C.F.R § 274a.2(b), or, in the alternative, that Respondent failed to present, at the INS inspection, Forms I-9 which Respondent was required to retain, in violation of 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2)(ii). Count I demands a civil monetary penalty in the amount of $700.00, or $350.00 for each violation. Count II alleges that Respondent failed to ensure that the named individuals properly completed section 1 of the Form I-9 and that Respondent failed to properly complete section 2 of the Form I-9 for the named individuals in violation of 8 U.S.C. § 1324a(b)(1) and (2), and 8 C.F.R. §§ 273a.2(b)(1)(i) and (ii). Count II demands a civil monetary penalty of $3,300.00, $250.00 for each violation charged in Count II(A)(1)-(12) and $300.00 for the violation charged in Count II(A)(13). On December 25, 1991, Respondent filed its Answer to the Complaint with this office.

In its Answer to the Complaint, Respondent admitted that it hired the two named individuals named in Count I, but asserted that Complainant's proposed fine "is excessive and unreasonable under the facts and circumstances relating to this count." Respondent's Answer to the Complaint, p. 1. Respondent denied Count II of the Complaint in its entirety and, more specifically, stated as a defense that Respondent did not hire the named individuals who were "already employed or no longer employed at Lamont Street Grill when Respondent took over the business" and, therefore, Respondent is not liable. Respondent's Answer to the Complaint, pp. 2-6.

On March 20, 1992, Complainant filed a Motion for Summary Decision, pursuant to 28 C.F.R. § 68.38, as amended by the Interim Rule of October 3, 1991, 56 F.R. 50049, asserting that there are no material facts in dispute and that Complainant is entitled to summary decision as a matter of law.

On April 4, 1991, Respondent filed its Opposition to the Motion for Summary Decision, stating that it did not violate IRCA's paperwork provisions as it was not responsible for complying with these provisions with respect to those employees who were hired by the prior owner.

On July 17, 1992, the parties filed a set of stipulated facts with this office.

II. *Legal Standards for Summary Decision*

The rules of practice and procedure applicable to this proceeding, set out at 28 C.F.R. Part 68, authorize an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO) to "enter a summary decision 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 C.F.R. § 68.38(c).

Rule 56(c) of the Federal Rules of Civil Procedure parallels this agency's rule regarding summary decision. It is, therefore, instructive to look at the federal courts' interpretation and application of their comparable rule.

The Supreme Court and the Ninth Circuit, recognizing the significant contribution summary judgment motions can make to resolve litigation when there are no factual issues, have established the following standards for considering such motions. The party moving for summary judgment has the initial burden of identifying for the court those portions of the materials on file that the movant believes demonstrate the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party may discharge this burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." Celotex at 325. Once the moving party has met its burden, the burden of production shifts so that the non-moving party must set forth by affidavit or as otherwise required by Rule 56(c), Celotex at 323-4, "specific facts showing that there is a genuine issue for trial." T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e), and citing Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-4 (9th Cir. 1986), cert. denied, 484 U.S. 1066 (1988). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations, T.W. Electrical Service at 630, or weigh conflicting evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and is required to draw all inferences in a light most favorable to the non-moving party. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial. Celotex at 322. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Liberty Lobby, 477 U.S. at 252. The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-2.

Rule 56(c) of the Federal Rules of Civil Procedure also permits consideration of any "admissions on file" as the basis of summary decision adjudications. See, e.g., Home Indemnity Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982); see also Morrison v. Walker, 404 F.2d 1046, 1048-9 (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.").

The above analysis of summary judgment motions in the federal courts gives guidance to this agency's Administrative Law Judges in ruling on motions for summary decision. In addition, OCAHO has a rule which is pertinent. Any allegations of fact set forth in the complaint which respondent does not expressly deny shall be deemed admitted. 28 C.F.R. § 68.9(c)(1). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, e.g., O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958).

III. *Statement of Facts*

The Respondent is a general partner of a limited partnership which was formed on or about August 1, 1990, for the operation of a restaurant called Lamont Street Grill. (Stipulated Fact "SF" 1,2, 40) Prior to August 1, 1990, the restaurant was owned by a corporation. (SF 39) Respondent hired the individuals named in Count I and Count II(A)(2) and (4). (SF 5-8) Respondent admits liability as to these violations. (SF 41) The individuals named in Count II(A)(1), (3), and (5) - (13) performed services at the restaurant both before and after August 1, 1990. (SF 3,4) Respondent presented Forms I-9 relating to these individuals at the time of the inspection on April 24, 1991. (SF 26, 28, 30-38) These Forms I-9 relating to Count II(A)(1), (3), (8) and (9) were improperly prepared because the employer failed to complete both sections one and two of the Forms I-9 until approximately eight months after Respondent purchased the restaurant. See Id. at Exhibits C-12, C-13 and C-14. The Form I-9 relating to Count

II(A)(13) was improperly prepared because it is completely blank except for the name listed in section 1. See Id. at Exhibit C-15.

IV. *Legal Analysis in Support of Partial Summary Decision*

The court finds with regard to Respondent's liability that there are material facts in dispute and, therefore, this issue may be decided as a matter of law. Interpretation and application of the law, however, are in dispute. The regulations at issue, 8 C.F.R §§ 274a.2(b)(1)(i) and (ii), state that a person or entity that hires for employment must ensure at the time of hire that the individual properly complete section 1, "Employee Information and Verification," of the Form I-9 and within three business days of hire, the person or entity that hires must complete section 2, "Employer Review and Verification."[1]

Respondent argues that the regulations at issue do not apply to him with regard to the eleven individuals named in Count II(A)(1), (3) and (5) - (13) because these individuals "had already been hired" by the prior owner, a corporation. (Respondent's Opposition to Summary Decision, 2) Apparently, Respondent's argument is that the limited partnership did not hire the eleven individuals at issue, as "hire" is defined at 8 C.F.R. § 274a.1(c), because they commenced employment at the restaurant when they were hired by the corporation. 8 C.F.R § 274a.1(c). Respondent contends that it was, therefore, the duty of the corporation, and not Respondent, to comply with these regulations. Id.

Complainant calls this argument a "red herring." Complainant's Motion for Summary Decision, 3. Complainant argues that "Respondent had the responsibility to fill out new Forms I-9 for the individuals named in the Complaint once it purchased the restaurant." Id. at 3-4. Complainant contends that the limited partnership and the corporation, as separate and distinct entities were each responsible for properly preparing Forms I-9 as required under § 274A(a)(1)(B) of the Act.

[1] The federal regulations concerning control of employment of aliens define key terms in the regulations at issue. The term "entity" is defined as any legal entity, including a corporation or partnership. 8 C.F.R. § 274a.1(b). The term "hire" is defined as "the actual commencement of employment of an employee for wages of other remuneration." 8 C.F.R. § 274a.1(c). The term "employer" is defined as "a person or entity . . . who engages the services or labor of an employee to be performed in the United States. 8 C.F.R. § 274a.1(g). The term "employment" is defined as "any service or labor performed by an employee for an employer within the United States. 8 C.F.R. § 274a.1(h).

The court agrees with Complainant. Because the limited partnership and the corporation are separate and distinct entities who engage(d) the services or labor of the eleven employees at issue, the eleven individuals had two separate employment situations at the restaurant. See 8 C.F.R. §§ 274a.1(g) and (h). The eleven individuals' commencement of employment with the limited partnership constitutes a "hiring" pursuant to 8 C.F.R. § 274a.1(c). Because the limited partnership hired these eleven individuals on or about August 1, 1990, Respondent was required to comply with IRCA's identification and employment eligibility verification requirements with regard to these individuals within three business days of that hiring.

In support of the court's ruling is the lack of an application exception under 8 C.F.R. § 274a.2(b)(1)(vii), which provides that "[a]n employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times." The subsection closest to the facts of this case states that:

> An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable. For this purpose, a related, successor, or reorganized employer includes an employer who continues to employ some or all of a previous employer's work force in cases involving a corporate reorganization, merger, or sale of stock or assets.

§ 274a.2(b)(1)(vii)(7)(ii).

While the eleven employees at issue continued to work at Lamont Street Grill, they did not continue their employment pursuant to these regulations. As there was no corporate reorganization, merger, or sale of stock or assets, this exception to the duty of identification and employment eligibility verification does not apply.[2]

This court points Respondent to the above mentioned regulations which state Respondent's responsibility as an employer covered by IRCA. Respondent's ignorance of the statutory requirements is no defense to charges of violations of IRCA. Mester Manufacturing Co. v. INS, 879 F.2d 561, 569-570 (9th Cir. 1989).

[2] Respondent admits that "[t]his is not a situation . . . "involving a corporate reorganization, merger, or sale of stock or assets." (Respondent's Opposition to Motion for Summary Decision, p.3)

> It is true that Congress provided for education of employers during the early period of IRCA.. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanctions against an employer that can show that it has not received a handbook or other instruction, or . . . that it has simply failed to pay attention to them.

Id.

In view of Respondent's admissions, pleadings and documents filed herein and the Courts's interpretation of the law, the court finds as to Count I that Respondent has violated section 1324a(a)(1)(B) of Title 8 of the U.S. Code by (1) hiring these two individuals for employment in the United States without complying with the verification requirements provided in 8 U.S.C. §§ 1324a(b)(1) and (2) and 8 C.F.R. §§ 274a.2 (b)(1)(i) and (ii) and by (2) failing to present Forms I-9 for these two individuals at the inspection, in violation of 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2)(ii).

I further find that Respondent has violated section 1324a(1)(1)(B) of Title 8 of the U.S. Code in that Respondent hired for employment in the United States those individuals named in Count II of the Complaint without complying with the verification requirements provided in 8 U.S.C. §§ 1324a(b)(1) and (2) and 8 C.F.R. §§ 274a.2(b)(1)(i) and (ii). Complainant is therefore entitled to partial summary decision as to liability on both counts of the Complaint as a matter of law.

Respondent also argues a variety of other reasons why it is not culp-able for failing to prepare and present the Forms I-9 at issue. These include assurance from the prior owner that there were no problems regarding the documentation of employees, Respondent's knowledge that INS had contacted the prior owner and had taken no action and Respondent's contention that "what the government says is the law is not written down anywhere." (Respondent's Opposition to Motion for Summary Decision, 4-5)

Respondent's Motion for Summary Decision is denied with regard to civil monetary penalty, however, because the issue of mitigation has not been adequately addressed by either party. See 8 U.S.C. § 1324a(e)(5).

V. *Ultimate Findings of Fact and Conclusions of Law*

I have considered the pleadings and memoranda of the parties sub-mitted in support of and in opposition to the Motion for Summary

Decision. Accordingly, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue as to any material fact has been shown to exist with respect to both counts of the Complaint and that, therefore, pursuant to 8 C.F.R. 68.38(c), Complainant is entitled to a summary decision as to both counts of the Complaint as a matter of law.

2. Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired for employment in the United States, the individuals named in both counts of the Complaint without complying with the identification and employment eligibility verification requirements of 8 U.S.C. §§ 1324a(b)(1) and (2) and 8 C.F.R. §§ 274a.2(b)(1)(i) and (ii).

3. The Complainant is entitled to a civil monetary penalty to be assessed against the Respondent as to each count of the Complaint in an amount to be determined after an evidentiary hearing. A hearing is set for August 31, 1992, in San Diego, California, to provide Respondent with an opportunity to present those factors which would mitigate the civil monetary penalty, and to provide Complainant with the opportunity to rebut. The court will follow the standard set out the United States v. Felipe, 1 OCAHO 101 (10/31/89), aff'd by CAHO, 1 OCAHO 108 (11/29/89).

4. The final decision and order in this case shall be issued after I have made findings of fact and conclusions of law as to the appropriate civil monetary penalty to be assessed as prescribed by 28 C.F.R. § 68.52(c)(2)(iv). I shall incorporate my findings of fact and conclusions of law with regard to liability in the final decision on civil monetary penalty and thereby provide Respondent with an opportunity to appeal my decision on both liability and penalty pursuant to 28 C.F.R. § 68.53.

IT IS SO ORDERED this 21st day of July, 1992.

ROBERT B. SCHNEIDER
Administrative Law Judge