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. 92A00040
DIAMOND CONSTRUCTION, INC.,	)
Respondent.	)
	)

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES
(June 15, 1992)

I. *Procedural Background*

On February 19, 1992, the Immigration and Naturalization Service (INS or Complainant) filed a complaint against Diamond Construction, Inc. (Diamond or Respondent). Complainant alleged one substantive employment count and three separate paperwork counts. Respondent timely moved for leave to file a late answer. On April 2, 1992, I issued an order denying the motion and directing that the answer be filed not later than April 16, 1992. Respondent filed its answer on April 16, 1992. On May 6, 1992, the parties and the bench participated in the first prehearing conference. During that conference, inter alia, INS represented that it would file a motion to strike portions of the answer and Respondent represented that it would file an amended answer. Subsequently on May 11, 1992, INS filed its motion to strike. Respondent has made no subsequent filing.

The requisite time period for a responsive pleading has passed. 28 C.F.R. §68.11(b). Absent a timely responsive pleading, the Motion to Strike is considered on its own merits without any response from Respondent.

The motion to strike asserts that Respondent's answer contains three affirmative defenses to the three paperwork counts of the complaint, i.e., Count II Respondent failed to present the employment eligibility verification form (Form I-9); Count III Respondent failed to properly complete Section 2 of Form I-9; and Count IV Respondent failed to ensure that employee properly completed Section 1, and failed to

properly complete Section 2 of Form I-9. The motion is silent regarding Respondent's answer to the substantive knowing hire count.

II. *Complainant's Motion to Strike*

A. Motions to Strike Generally

The standard for granting a strike motion is stringent. It is the policy of this forum that

> [a]n affirmative defense will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives plaintiff fair notice of the nature of the defense.

United States v. Ed Valencia and Sons, Inc., 2 OCAHO 387 (11/5/91) (Order Denying Complainant's Motion to Strike Affirmative Defenses)(quoting 5 Wright and Miller, Federal Practice and Procedure, Section 1274, p.323 (1990)). Compare U.S. v. Altamont Roofing, OCAHO Case No. 91100162 (6/4/92) (Order Granting Complainant's Motion to Strike Affirmative Defenses); U.S. v. Educated Car Wash, 1 OCAHO 98 (10/25/89).

B. The INS Motion to Strike

INS catalogues the pertinent defenses in the case at bar as follows:

> (1) Respondent "substantially complied" with the provisions of IRCA;
>
> (2) Respondent acted in "good faith;"
>
> (3) "the subjects named [in the paperwork counts] were United States Citizens or aliens lawfully admitted for permanent residents [sic] . . .;"

INS claims that these defenses "are insufficient, irrelevant, and inapplicable as a matter of law."

The INS motion characterizes Respondent's defenses as "affirmative", even though no such characterization was used in Respondent's answer.

B. Substantial Compliance

INS asserts that Respondent answers Counts II (A) - (G), III (A) - (C), and IV with a substantial compliance defense. Interestingly, Respondent's answer does not invoke substantial compliance per se. Presumably, INS infers such a defense from the tone of the answer.

INS argues that the purported substantial compliance affirmative defense is flawed because it is unsupported by a statement of facts.

INS focuses on an answer in which Respondent credits itself with a cooperative course of dealing vis a vis INS. It is not at all clear to me that such an assertion is tantamount to a substantial compliance claim. Being uncertain that Respondent intended to assert substantial compliance, it is inappropriate to grant the motion to strike on the basis of insufficient support.

Complainant's substantial compliance argument does not meet the stringent Valencia standard. I deny INS' motion to strike the substantial compliance defense.

B. Good Faith

INS also asserts that Respondent answers Counts II (A) - (G), Count III (A) - (C), and Count IV with a good faith defense. Respondent's exclusive invocations of the term "good faith" are in its answers to Count II (G), Count III (C), and Count IV. Accordingly, I deny the motion to strike the good faith defense as it applies to answers to Count II (A)-(F) and Count III (A) - (B).

INS objects to Respondent's use of a good faith defense as to paperwork allegations. Citing U.S. v. Mester Mfg. Co., 1 OCAHO 18 (6/17/88) aff'd sub nom Mester Mfg., Co. v. INS, 879 F.2d 651 (9th Cir. 1989), INS argues that the good faith defense

> applies solely to violations of the knowing hiring provisions as stated in Section 274A(a)(1)(A) and does not and cannot shield an employer from liability for violations of the employment verification system.

IRCA jurisprudence sustains this INS analysis.

> . . . when . . . a respondent . . . asserts a good faith affirmative defense to that count which alleges a violation involving the employment verification system/paperwork requirements contained in the provisions of 8 U.S.C. §1324a (b), respondent assumes the risk of having that affirmative defense ordered stricken as a result of a prevailing motion to strike.

United States v. Tuttle's Design Build, Inc., 2 OCAHO 370 (8/30/91) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses).

Accordingly, I grant the INS motion to strike as it pertains to the good faith defense in Count II (G), Count III (C), and Count IV.

C. Employer Paperwork Responsibilities for United States Citizens and Permanent Resident Aliens

INS accurately recites that Respondent answers Counts II, III, and IV with a defense that all of the named individuals are United States citizens or permanent resident aliens authorized to work in the United States. Such a defense, INS asserts, is misplaced and inapplicable. Title 8 U.S.C. 1324a(b) enunciates a universal paperwork obligation which requires employers to maintain Forms I-9 for all employees, irrespective of their national origin or citizenship.

> To comply with the law, you must verify the identity and employment eligibility of anyone you hire, and complete and retain a Form I-9 like the one contained in this Handbook.

INS Handbook for Employers, (Rev. 11/21/91) at Part One (emphasis added); see also U.S. v. Carlson, dba Jimmy on the Spot, 1 OCAHO 264 (11/8/90) at 2.

The proposition, as articulated by INS, is a fundamental tenet of employer sanctions law. 8 U.S.C. §1324a. Accordingly, I grant the INS motion to strike as it pertains to this defense.

D. Summary

In summary, this order:

(1) denies the motion to strike as it pertains to the defense of substantial compliance;

(2) partially grants and partially denies the motion to strike as it pertains to the defense of good faith, as explained above, and

(3) grants the motion to strike as it pertains to the defense that employees were all U.S. citizens or permanent resident aliens.

SO ORDERED.

Dated and entered this 15th day of June 1992.

MARVIN H. MORSE
Administrative Law Judge