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. 92A00094
WELDCO, INC. AND WELDCO COMPONENTS, INC., d.b.a. WELDCO PRODUCTS, Respondent.	)	

FINAL DECISION AND ORDER GRANTING
COMPLAINANT'S MOTION FOR
SUMMARY DECISION
AND
DENYING COMPLAINANT'S MOTION FOR SANCTIONS

E. MILTON FROSBURG, Administrative Law Judge

Appearances: Christine M. Young, Esquire
for Complainant
Dennis Delman, Esquire
for Respondent

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA) adopted significant revision in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment and/or the record- keeping verification requirements of the employer sanctions program.

II. *Procedural History*

On March 11, 1992, a Notice of Intent To Fine (NIF) was personally served on Dennis Delman, Esquire, Respondent's counsel. The NIF notified Respondent that Complainant intended to order it to pay a fine in the amount of sixteen thousand three hundred dollars ($16,300) for knowingly hiring and/or continuing to employ twelve (12) individuals who were unauthorized to work in the United States, in violation of 8 U.S.C. §1324a(a)(1)(A) or, alternatively, 8 U.S.C. §1324a(a)(2), and for one allegation of failure to properly complete Section II of the employment eligibility verification form (Form I-9), in violation of 8 U.S.C. §1324a(a)(1)(B).

On March 26, 1992, Mr. Delman filed a written notice of appearance and a request for hearing with the Office of the Chief Administrative Hearing Officer (OCAHO). Hence, on May 5, 1992, Complainant filed its Complaint in which it requested a civil money penalty in the amount of thirteen hundred fifty dollars ($1,350) for each violation alleged in Count I and one hundred dollars ($100) for the one violation alleged in Count II.

By Notice of Hearing dated May 6, 1992, Respondent was advised of the filing of the Complaint, the opportunity to answer the Complaint within thirty (30) days after receipt of the Complaint, my assignment to the case, and that the hearing, would be held in or around Chicago, Illinois. Effective service of the Complaint is evidenced by a file copy of a United States Postal Service certified mail return receipt signed by Respondent's agent on May 11, 1992.

On May 11, 1992, I issued a Notice of Acknowledgment advising Respondent of my receipt of this case and cautioned Respondent that an Answer, pursuant to 28 C.F.R. part 68.9[1], must be filed within thirty (30) days of its receipt of the Complaint.

Respondent timely filed its Answer To Complaint Regarding Unlaw-ful Employment on June 15, 1992. On June 16, 1992, I issued my Order Directing Procedures For Prehearing.

[1] Citations are to the OCAHO Rules of Practice and Procedure for Administrative Hearings, 57 Fed. Reg. 57669 (1992) (to be codified at 28 C.F.R. part 68) (hereinafter cited as 28 C.F.R. section 68) 8 U.S.C. §1324a.

As this Court was not able to reach Respondent telephonically, or have it return telephone messages, I issued a written Order setting a prehearing telephonic conference for August 19, 1992. At that conference, Respondent's counsel stated that a tentative prior settlement agreement with Complainant could not be completed due to a subsequent serious change in his client's financial status. In addition, he stated that he was having difficulty in reaching his client and, thus, could not make any further representations to the Court. Based on the discussions at this conference, I directed the parties to continue their discovery and to try to work towards settlement.

On September 3, 1992, Mr. Delman filed a letter pleading requesting to withdraw as counsel in this matter based on his client's wishes.

On September 4, 1992, Complainant filed a Motion To Compel Discovery, premised on Respondent's nonresponse to Complainant's discovery requests and Respondent's nonappearance at a scheduled deposition. Complainant also filed a Motion To Strike Respondent's Answer, Or, In the Alternative To Strike Respondent's Affirmative Defenses, Or, In The Alternative, Motion For a More Definite Answer. Complainant argued that Respondent's responses to the Complaint's allegations were not made in good faith or after a reasonable inquiry. In addition, Complainant filed a Motion For Continuance based on Respondent's failure to comply with discovery and Complainant's resulting inability to adequately prepare for hearing.

On September 9, 1993, I issued an Order Granting Complainant's Motion For Continuance and also stayed Respondent's responses to Complainant's outstanding motions pending my ruling on Respondent's counsel's request to withdraw.

On September 16, 1992, Complainant filed its Opposition To With-drawl Of Counsel, alleging that, although Mr. Delman stated that he had been discharged, the individual who discharged him was not an employee of Respondent's. Further, Complainant argued that Mr. Delman's withdrawal would aggravate the difficulty it had repeatedly experienced in trying to serve process on Respondent. On September 22, 1992, Complainant filed a status report in which it stated that Respondent had not filed responses to Complainant's interrogatories and, therefore, it wished to notify the Court that it would file another Motion To Compel after my determination of Mr. Delman's request to withdraw.

On September 24, 1992, I held a prehearing telephonic conference to discuss the pending Motion To Withdraw and the pending Motion To Compel. As a result of that conference, on October 1, 1992, I issued an Order for Mr. Delman to submit an affidavit from his client affirming Mr. Delman's termination as counsel and appointing an individual to receive service. In addition, I granted Complainant's pending Motion to Compel and its September 24, 1992 oral Motion To Compel and ordered Respondent to comply with the discovery requests on or before October 15, 1992. I informed Respondent that should it not comply, I would infer that all responses were adverse to it and that these inferences would not be open to challenge.

On October 14, 1992 Mr. Delman filed the affidavit from his client which indicated that Mr. Delman had been discharged as counsel, that Respondent would accept service at a given address. Respondent also stated that it would not be represented in this matter by other counsel.

On October 14, 1992, Complainant filed its Notice of Deposition for Mr. Mortenson, the Respondent. Then, on October 16, 1992, Complainant filed a Request For Oral Argument On Motion To Withdraw As Counsel arguing that the validity of Mr. Mortenson's affidavit was questionable. On October 22, 1992, Complainant filed Supplemental Information To Service's Request For Oral Argument On Motion To Withdraw As Counsel.

In order to hear argument, I held a prehearing telephonic conference on October 28, 1992. At that time, Respondent stated that it was not contesting, either the liability on any of the violations alleged in the Complaint, or the civil penalties that Complainant was requesting, and agreed to file a signed stipulation so stating. Further, Mr. Delman agreed to continue representation Respondent until the case was completed. Based on this development, Complainant stated that it intended to file a Motion For Summary Decision after it reviewed Respondent's stipulation.

On November 13, 1992, Respondent filed its stipulation and, on December 4, 1992, Complainant filed its Motion For Summary Decision and Motion For Sanctions.

III. *Discussion*

A. Liability

The regulations authorize me to enter a summary decision for a mov-ing party if the pleadings, affidavits, material obtained by discovery or otherwise, or matter officially noticed show that there is no genuine issues as to any material fact and that a party is entitled to a summary decision. 28 C.F.R. §68.38. In this case, not only has Respondent stated at the October 28, 1992 prehearing telephonic conference that it was not contesting its liability on any of the allegations in the Complaint, but it filed its stipulation, dated November 5, 1992, under signature of Respondent, Mr. Mortenson, and counsel, Mr. Delman, which reiterated that Respondent was not contesting either its liability in Counts I or II, or the civil penalties requested by Complainant in the amount of sixteen thousand two hundred dollars ($16,200) for Count I and one hundred dollars ($100) for Count II.

Therefore, with the admission of liability, I find that there is no genuine issue of material fact on that issue. I find that Respondent is liable for knowingly hiring and/or continuing to employ after November 6, 1986 the twelve (12) named individuals in Count I of the Complaint who were not authorized to work in the United States, in violation of 8 U.S.C. §1324a(a)(2). I also find that Respondent is liable for failing to properly complete section 2 of the employment eligibility verification form (Form I-9) for the individual named in the Count II of the Complaint, in violation of 8 U.S.C. §1324a(a)(1)(B).

B. Civil Penalties

In cases involving a default, it is my usual practice to request memo-randa from the parties addressing the five factors enumerated in 8 U.S.C. §1324a(e)(5) before setting the civil penalty amount. See e.g. U.S. v. Carlos Cruz, 3 OCAHO 453 (9/11/92); U.S. v. Kampe, 3 OCAHO 454 (9/11/92). However, since this case is for summary decision and Respondent is not contesting the amount of civil penalty requested, I find that requiring that information is not necessary.

Based on Respondent's admissions, I find that there is no genuine issue of material fact regarding Respondent's liability. I find further that, based on the record, a substantial number of illegal aliens were involved in this case, that Respondent has not shown good faith in complying with IRCA, and that Respondent's violations of IRCA were serious in nature. Therefore, I further find that Complainant has requested civil penalties which are fair and appropriate.

Based on my findings of fact in this case, I direct Respondent to:

1. Pay to Complainant sixteen thousand three hundred dollar ($16,300) on or before the close of business February 22, 1993; and to

2. Cease and Desist from any further violations of 8 U.S.C. §§1324a(a)(1) and 1324a (a)(2).

C. Complainant's Motion for Sanctions

Complainant has requested sanctions against Respondent under 28 C.F.R. §68.23(c) and F.R.C.P. §37(b)(2), i.e., reasonable attorney fees and court reporter costs incurred by Complainant, citing Respondent's failure to attend a scheduled deposition in "direct violation " of my October 1, 1992 Order. The threshold issue that I must examine is my authority to grant sanctions and the breadth of that authority.

Under our Rules of Practice and Procedure, I may use the Federal Rules of Civil Procedure as a general guideline in any situation not provided for or controlled by 8 U.S.C. section 68, the Administrative Procedure Act or any other applicable statute, executive order, or regulation. 28 C.F.R. §68.1. In this case, as 28 U.S.C. §68.23(c) provides the guidelines and parameters for my invoking sanctions, I find that I may not turn to the Federal Rules of Civil Procedure for authority in either issuing sanctions or invoking sanctions not provided for in 28 C.F.R. section 68, even if I would find that they are justified.

The appropriate regulation authorizing me to impose sanctions reads as follows:

> If a party, an officer or an agent of a party, or a witness, fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative law Judge, the Administrative law Judge, may, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, take the following actions:
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> 1. Infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;
>
> 2. Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;
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> 3. Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

4. Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

5. Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both;

6. In the case of failure to comply with a subpoena, the Administrative Law Judge may also take the action provided in §68.42 of this part.

28 C.F.R. §68.23.

The wording of the regulation is detailed and specific. My authority to grant sanctions is strictly geared towards resolving issues and completing the disposition of the case. There is no way to interpret the regulation's wording to show that the drafters intended to allow me to impose monetary sanctions, directly or indirectly. See U.S. v. Ulysses, 2 OCAHO 390 (11/20/91). Therefore, I will not make a determination of whether Respondent did, in fact, directly violate my October 1, 1992 Order, since Respondent has stated that it is not contesting any of the issues in this case and, hence, issuing any sanction authorized by 28 C.F.R. §68.23 would be moot and the sanctions authorized in 28 C.F.R. §68.23(c) are not what Complainant is requesting.

The parties are reminded that review of this final order may be obtained by filing a written request for review with the Chief Administrative Hearing Officer, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. This Order shall become the Final Order of the Attorney General unless, within thirty (30) days from the date of this Order, the Chief Administrative Hearing Officer modifies or vacates the Order. 28 C.F.R. 68.53.

IT IS SO ORDERED this 22nd day of January, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge