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

September 23, 1993

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 93A00093
TASK FORCE SECURITY, INC., D/B/A TASK FORCE SECURITY AND INVESTIGATIONS, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE THE AFFIRMATIVE DEFENSE OF SUBSTANTIAL COMPLIANCE, ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADING, AND ORDER GRANTING MOTION TO COMPEL RESPONDENT TO RESPOND TO COMPLAINANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

On May 7, 1993, complainant, acting by and through the Immigration and Naturalization Service, filed the five-count Complaint at issue, assessing civil money penalties totaling $91,200 on the 151 violations alleged therein.

Count I alleged that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Form (Form I-9) for the individual named therein, in violation of the provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(B). Complainant proposed a civil money penalty of $600 for this violation.

Count II charged respondent with violating IRCA, 8 U.S.C. §1324a(a)(1)(B), by reason of its having allegedly failed to ensure that

the 66 employees listed therein properly completed Section 1 of their pertinent Forms I-9, and by having allegedly failed to properly complete Section 2 of those Forms I-9. Complainant assessed a total civil penalty of $39,600 on that count, or $600 for each of those 66 alleged violations.

In Count III, complainant alleged that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to ensure that the six (6) employees listed therein properly completed Section 1 of their pertinent Forms I-9. Complainant assessed a $600 civil money penalty for each of those six (6) alleged paperwork violations, or a total civil money penalty of $3,600 for Count III.

Count IV alleges that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to complete Section 2 of the pertinent Forms I-9 relating to the 76 employees listed therein. For each of those 76 alleged paperwork violations, complainant levied a civil money penalty of $600, or a total civil money penalty of $46,200 for Count IV.

In Count V, complainant asserted that respondent failed to update the pertinent Forms I-9 for the two (2) individuals named therein to reflect that those individuals are still authorized to work in the United States, again, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $600 for each of those alleged violations, for a total civil money penalty of $1,200 for the violations alleged in Count V.

On June 1, 1993, respondent filed its Answer. In that responsive pleading, respondent asserted that the inspection performed by complainant was done in contravention of the guidelines issued by the Commissioner of the INS; that there had been no prior educational visit by complainant or the Department of Labor, nor had any material concerning the I-9 ever been received by respondent prior to the visit resulting in the issuance of the NIF; that complainant had failed to follow the procedures outlined in the memorandum of the Commissioner of INS on 1/9/90 under the heading "Employer and Labor Relations"; and that respondent should have been given "some educational or advisory information, with the issuance of a warning letter." Respondent also asserted two affirmative defenses.

On June 7, 1993, complainant filed a Motion to Strike Affirmative Defenses, requesting that the affirmative defenses contained in

respondent's Answer be stricken, pursuant to 28 C.F.R. section 68.9(d) and to Rule 12(f) of the Federal Rules of Civil Procedure.

On June 25, 1993, the undersigned issued an Order Granting in Part and Denying in Part Motion to Strike Affirmative Defenses and Denying Motion for Judgment on the Pleadings, denying complainant's Motion for Judgment on the Pleadings, ordering respondent's second affirmative defense to be stricken, and ordering respondent to file an amended pleading detailing the manner in which it averred it had substantially complied with the paperwork requirements of 8 U.S.C. §1324a with respect to the charges contained in the Complaint. In addition, having failed to deny any of the allegations contained in the Complaint in its Answer, respondent was deemed to have admitted all of the allegations in the Complaint. 28 C.F.R. §68.9(c)(1).

On July 7, 1993, the undersigned held a telephonic prehearing conference with the parties. At that conference, respondent's counsel asserted that respondent would file an amended Answer on or before August 2, 1993, detailing the manner in which it substantially complied with the paperwork requirements of IRCA, 8 U.S.C. §1324a, with respect to the charges in the Complaint.

On August 26, 1993, complainant filed a Motion to Strike the Affirmative Defense of Substantial Compliance, asserting therein that respondent's affirmative defense of substantial compliance as asserted in its Answer is not in compliance with the procedural regulations and interpreting caselaw, and should therefore be stricken.

On September 26, 1993, complainant also filed a Motion to Compel Respondent to Answer Complainant's First Interrogatories and to Respond to Complainant's First Request for Production of Documents, and a Motion for Judgment on the Pleadings.

On August 31, 1993, respondent filed a letter requesting an extension of time to respond to those motions. Respondent's request was granted, and the time for its response to complainant's motions was extended to September 16, 1993.

On September 20, 1993, respondent filed its Replies to Complainant's Interrogatories. To date, no amended Answer, no response to complainant's Motion to Strike the Affirmative Defense of Substantial Compliance, and no response to complainant's Motion for Judgment on

the Pleadings have been received by this Office. Accordingly, only complainant's motions are under consideration.

In its Answer, respondent asserted:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. That the original I-9 form, dated 05/07/87, which was the form given to respondent, was confusing and unclear, especially as to Part 2, and that as a result of ambiguities and incomplete instructions in the original I-9, the INS revised the document, as of 11/21/91.
6. That, in view of the misleading or unclear condition of the I-9, together with the fact that respondent had had no advice, training, information or other contact prior to the inspection visit, that employer had substantially complied with the requirements of the statute.

Answer, ¶¶5-6.

The procedural regulation governing answers to complaints provides that the answer shall include "(a) statement of facts supporting each affirmative defense." 28 C.F.R. §1324a(c)(2).

Substantial compliance is a proper affirmative defense on the fact of violation with respect to paperwork violations, but in asserting the defense, the supporting facts must be stated with particularity as the defense depends upon the factual circumstances in each case. United States v. Chicken by Chickadee Farms, Inc., 3 OCAHO 423 (4/22/92). See United States v. PPJV Inc., 2 OCAHO 337 (7/17/91).

In its Answer, however, respondent failed to state how it had substantially complied with the requirements of the statute. For this reason, the undersigned gave respondent the opportunity to file an amended Answer detailing its substantial compliance with the paperwork requirements of IRCA with respect to the alleged violations, which respondent has failed to do.

The procedural rules governing these proceedings do not expressly provide for motions to strike. The rules do provide, however, that the Federal Rules of Civil Procedure may be used as a guideline in any situation not provided for or controlled by the rules. 28 C.F.R. §68.1.

Rule 12(f) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party..., the court may order stricken from any pleading any insufficient defense....

Motions to strike affirmative defenses are disfavored in the law, and granted only when the asserted affirmative defenses lack any legal or factual bases. FDIC v. Eckert Seamans Cherin & Mellott, 754 F. Supp. 22, 23 (E.D.N.Y. 1990); Index Fund, Inc. v. Hagopian, 107 F.R.D. 95, 100 (S.D.N.Y. 1985); United States v. Task Force Security, Inc., 3 OCAHO 533, at 4 (6/25/93). Accordingly, an affirmative defense will be stricken only if the legal theory upon which the affirmative defense is premised lacks prima facie viability, or if the supporting statement of facts is wholly conclusory. Id. See also United States v. Watson, 1 OCAHO 253 (10/19/90); United States v. Broadway Tire, 1 OCAHO 226 (8/30/90).

While the affirmative defense of substantial compliance is itself viable, the defense as presented is based solely upon a conclusory statement of facts. In spite of the fact that respondent was given the opportunity to cure this defect, it has failed to do so. Accordingly, complainant's motion is granted, and respondent's first affirmative defense is ordered to be and is stricken.

Complainant has also requested that the undersigned enter judgment on the pleadings in its favor on the ground that complainant is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

Again, there is no provision in the procedural rules governing these proceedings for judgment on the pleadings. The procedural regulations do, however, provide for the entry of summary decision by the administrative law judge where "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).

In support of its motion, complainant asserts that admission of the allegations contained in the Complaint establishes substantive violations of IRCA, 8 U.S.C. §1324a(a)(1)(B).

In Count I of the Complaint, as noted previously above, complainant alleged that respondent hired the individual named therein for employment in the United States after November 6, 1986, that com-plainant requested that respondent make available for inspection Forms I-9 for its employees, and that respondent failed to prepare a Form I-9 for the individual named, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). In the alternative, complainant alleged that respondent failed to make the Form I-9 for that individual available for inspection as requested, again in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

In the June 25, 1993 Order, the undersigned deemed respondent to have admitted all of the allegations contained in the Complaint. Because respondent is deemed to have admitted all of the allegations contained in Count I of the Complaint and to have no defenses thereto, there is no genuine issue as to any material fact regarding the allegations therein. I find therefore that complainant is entitled to judgment on Count I, and complainant's motion is granted as it pertains to that Count.

In Count II of the Complaint, complainant alleged that respondent hired the 66 individuals named therein for employment in the United States after November 6, 1986, that respondent failed to ensure that the individuals named therein properly completed section 1 of the Form I-9, and that respondent failed to properly complete section 2 of the Form I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

Again, respondent is deemed to have admitted the allegations contained in Count II, and to have no defense thereto. There being no genuine issue as to any material fact with regard to the allegations in Count II, I find that complainant is entitled to judgment with respect to that Count as a matter of law. Accordingly, complainant's motion is granted with respect to Count II.

In Count III of the Complaint, complainant alleged that respondent hired the six (6) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure that those individuals properly completed section 1 of the Form I-9, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

Respondent being deemed to have admitted the allegations contained in Count III and to have no defense to the violations contained therein,

there is no genuine issue as to any material fact with regard to the allegations in Count III. I find therefore that complainant is entitled to judgment with respect to that Count as a matter of law. Accordingly, complainant's motion is granted with respect to Count III.

In Count IV of the Complaint, complainant alleged that respondent hired the 76 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to complete section 2 of the Form I-9 for those individuals, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

Respondent being deemed to have admitted the allegations contained in Count IV and to have no defense to the violations contained therein, there is no genuine issue as to any material fact with regard to the allegations in that Count. I find therefore that complainant is entitled to judgment with respect to Count IV as a matter of law, and complainant's motion is granted with respect to that Count.

In Count V of the Complaint, complainant alleged that respondent hired the two (2) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to update the Forms I-9 for those individuals to reflect the fact that those individuals are still authorized to work in the United States, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

As respondent is deemed to have admitted the allegations contained in Count V and to have no defense to the violations contained therein, there is no genuine issue as to any material fact with regard to the allegations in that Count. I find complainant is therefore entitled to judgment with respect to Count V as a matter of law, and grant complainant's motion with respect to that Count.

Accordingly, I find that respondent is liable for all of the violations alleged in Counts I, II, III, IV, and V of the Complaint. Appropriate civil money penalties for those violations will be ordered in accordance with the provisions of 8 U.S.C. §1324a(e)(5), following an evidentiary hearing to be conducted in New York City on November 10, 1993, solely for that purpose.

On August 26, 1993, complainant also filed a Motion to Compel Respondent to Respond to Complainant's First Request for Production of Documents, asserting therein that on July 12, 1993, complainant filed its discovery requests upon respondent. Under the procedural

regulations, respondent had thirty days to respond to complainant's First Request for Production of Documents. 28 C.F.R. §68.20(d). To date, however, no response has been received.

Complainant's Motion to Compel is granted. Because the information to be provided by respondent in its replies to complainant's discovery requests will materially assist the undersigned in determining the appropriate civil money penalties to be assessed for these violations, respondent is ordered to provide complainant copies of the requested documents, and to have done so within 15 days of its acknowledged receipt of this Order.

In the event respondent fails to do so, appropriate sanctions will be ordered from among those enumerated at 28 C.F.R. §68.23.

JOSEPH E. MCGUIRE
Administrative Law Judge