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

December 7, 1993

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 93A00069
SCOTTO BROS. WOODBURY RESTAURANT, INC., D/B/A FOX HOLLOW, D/B/A FOX HOLLOW INN, Respondent.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Procedural History

On November 20, 1992, complainant, acting by and through the Immigration and Naturalization Service (INS), initiated this proceeding by serving Notice of Intent to Fine (NIF) NYC274A-88000447 upon Scotto Bros. Woodbury Restaurant, Inc., doing business as Fox Hollow and as Fox Hollow Inn (respondent).

In Count I of the NIF, complainant alleged that respondent hired the 13 individuals named therein after November 6, 1986 for employment in the United States, and that respondent failed to ensure that those individuals properly completed section 1, and that respondent had failed to properly complete section 2, of the pertinent employment eligibility verification forms (Forms I-9) for those 13 individuals, in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $10,660 for the 13 violations alleged in Count I.

Count II of the NIF charged that respondent hired the 13 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 pertinent Forms I-9, again in

violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $820.00 for each of these violations, for a total civil money penalty of $10,660.

Complainant asserted in Count III of the NIF that respondent failed to properly complete section 2 of the Forms I-9 for each of the 24 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $19,680 for those 24 alleged violations.

In Count IV, complainant charged that respondent hired the three (3) individuals named therein for employment in the United States after November 6, 1986, but that respondent failed to update Forms I-9 for those individuals to reflect the fact that those three (3) individuals continue to be authorized to work in the United States, also in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). A penalty of $820 was assessed for each of these violations, for a total civil money penalty of $2,460.00 for the violations in that count.

In Count V, complainant alleged that respondent hired the individual named therein for employment in the United States after November 6, 1986, and that that individual was, at the time of hire, an alien with temporary work authorization. Complainant asserted that the work authorization documents tendered by the individual to complete section 2 paragraph A of the Form I-9 expired on or after June 25, 1990, but before November 21, 1991. Complainant asserted that respondent failed, however, to complete a new Form I-9 for that individual within three business days of the date that individual's work authorization expired, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $820 for that alleged violation.

Respondent was advised in the NIF of its right to contest the alleged charges by submitting a written request for a hearing before an administrative law judge. On December 14, 1993, respondent timely filed such a request.

On March 30, 1993, complainant timely filed the Complaint at issue with this office, in which it reasserted the allegations set forth in Counts I through V of the NIF, as well as the requested civil money penalties totaling $44,280 for those 54 alleged violations.

On September 27, 1993, complainant filed a Motion for Summary Judgment, advising that on April 26, 1993, complainant served its

First Interrogatories and First Request for Production of Documents on respondent. On June 15, 1993, complainant contended, respondent served its unsigned partial response to complainant's First Interrogatories, enclosing therewith copies of 55 Forms I-9, some attached to additional pages.

In Interrogatory #1, complainant's First Interrogatories, complainant requested that respondent "(i)dentify... all persons in Counts I, II, III, IV and V of the Complaint filed in this action designating the beginning and ending dates... of their employment..." In response, respondent stated: "Complainant is in possession of all documentation..."

In Interrogatory 23, complainant requested that respondent "(i)dentify ... all written records of the hours worked or of work performed by the individuals named in Counts I, II, III, IV and V of the said Complaint... If any such records exist, identify ... the persons having present custody of such records." In response, respondent stated: "Payroll records. Complainant has possession of same."

In Interrogatory 73, complainant requested that respondent identify Jerry Scotto. In response, respondent stated: "Jerry Scotto a/k/a for Gennaro Scotto is the General Manager from 1988 - present."

It its Motion, complainant asserted that on April 14, 1992, Jerry Scotto provided Special Agent Joseph A. Palmese with "Employee First and Last Payroll Summary Report(s)" for 1988, 1989, 1990, 1991, and 1992, which, complainant contended, are the only payroll records in its possession. Those payroll records, complainant alleged, establish that the 54 individuals named in Counts I, II, III, IV, and V were hired for employment after November 6, 1986.

Complainant averred that respondent forwarded Forms I-9 with its Response to Complainant's First Interrogatories, 53 of which are in the same names as the 53 individuals named in Counts I, II, III, IV, and V.

Complainant asserted that respondent failed to ensure that the 13 individuals listed in paragraph A of Count I properly completed section 1, and respondent failed to properly complete section 2, of the 13 Forms I-9 marked as Complainant's Exhibit E. A review of those 13 Forms I-9 reveals that they have been completed in an ineffectual manner as alleged by complainant.

With respect to the 13 Forms I-9 marked as Complainant's Exhibit F, complainant asserted that respondent failed to ensure that the individuals for whom those Forms I-9 were completed, and who were listed in paragraph A of Count II of the Complaint, properly completed section 1 of those Forms I-9. A review of those 13 Forms I-9 reveals that they were completed in an ineffectual manner as alleged by complainant.

Complainant also asserted that respondent failed to properly com-plete section 2 of the 23 Forms I-9 marked as Complainant's Exhibit G for 23 of the individuals listed in paragraph A of Count III. A review of Complainant's Exhibit G reveals that those Forms I-9 were completed in an ineffectual manner as alleged by complainant. In addition, complainant asserted that respondent failed to properly complete section 2 of the Form I-9 for Joel R. Salas, who is listed in Count III, paragraph A, number 21. The Form I-9 pertaining to Mr. Salas was included with Complainant's Exhibit L, and a review of that Form I-9 reveals that it has been completed in an ineffectual manner as alleged by complainant.

Three (3) Forms I-9, with attachments, constitute Complainant's Exhibit H. Complainant asserted in its Motion that respondent failed to update those three (3) Forms I-9 to reflect that the three (3) individuals for whom those Forms I-9 were completed, and who were listed in Count IV, paragraph A of the Complaint, continued to be authorized to work in the United States. A review of those Forms I-9 reveals that they have been completed in an ineffectual manner as alleged by complainant.

Complainant contended that the Form I-9 marked as Complainant's Exhibit I shows that the individual for whom that Form I-9 was completed, one Nitin Kumar Mathur, was, at the time of hire, an alien with temporary work authorization until June 17, 1991. Complainant further contended that the Form I-9 in Exhibit I was the only Form I-9 presented for Mathur.

Complainant asserted that based on the evidence presented above, there is no genuine issue as to any material fact in this action, and complainant is entitled to summary decision, as provided in the pertinent procedural regulation, 28 C.F.R. section 68.38. Complainant requested that summary decision therefore be granted in its favor, and that an Order be issued directing respondent to pay civil money penalties totaling $44,280.

On October 12, 1993, respondent filed a Cross-Motion to File an Amended Answer, Affirmation from respondent's counsel, Affidavit in Opposition to Motion for Summary Judgment and for Motion to File an Amended Complaint, and an Amended Answer to Complaint.

In his Affirmation, respondent's counsel asserted that respondent sought to oppose complainant's Motion for Summary Judgment, and for that reason moved to amend its Answer to the Complaint to include the defense of estoppel. Respondent also requested an oral deposition and production of documents in support of this defense.

Respondent's counsel asserted that during an educational visit by complainant, respondent's representatives met with complainant's representatives for approximately three (3) to four (4) hours "over lunch and drinks" to review the employment eligibility verification procedure. (Wilens Affirmation, at 2.) Respondent's counsel alleged that: "(u)pon completion of the meeting respondent was advised, by the INS inspector, that his people knew how to complete said forms. The Forms I-9 in question in this action were completed in accordance with the instructions and directions given to respondent at its educational visit." Id.

Respondent's counsel asserted that the date of this "educational visit has never been brought to his attention, and that complainant never indicated this visit in its responses to respondent's interrogatories." Id. For this reason, respondent's counsel asserted, there is a factual discrepancy that must be resolved before this matter can be decided. Respondent's counsel further asserted that complainant will not suffer any undue prejudice if the undersigned allows respondent to amend its Answer.

In his Affidavit in Opposition to Motion for Summary Judgment and for Motion to File an Amended Complainant, Vincent Scotto, respondent's general manager and proprietor, asserted that complainant should be estopped from bringing this action on the ground that respondent completed the Forms I-9 in question according to instructions and directions given by complainant and relied upon by respondent to its detriment. For this reason, Scotto continued, respondent moved to amend its Answer to include an estoppel defense, and to continue its discovery by deposing those agents of complainant who, Scotto contends, had improperly instructed respondent's employees concerning the completion of the Form I-9.

In the alternative, Scotto requested that the statutory $100 minimum civil money penalty be assessed against respondent for each

alleged violation in light of the fact that all of the individuals involved were authorized for employment, and also because all of the violations "were technical in nature." (Scotto Aff., at 3).

Respondent requested that its Answer be amended to add the following affirmative defense:

> Estoppel base (sic) on complainant's conduct and acts in teaching respondent to complete Forms I-9 which was relied on by the respondent to its detriment.

The procedural regulation governing amendments to responsive pleadings provides, in pertinent part:

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.

28 C.F.R. §68.9(e). Because no prejudice would accrue to complainant in allowing respondent to amend its Answer, respondent's Cross- Motion to File an Amended Answer is granted, and respondent's Answer is ordered to be and is amended accordingly.

On October 25, 1993, complainant filed a Motion to Strike Respondent's Affirmative Defense, with supporting memorandum and declaration.

In the memorandum in support of its Motion, complainant asserted that respondent received an educational visit on June 10, 1988, but that there were no further educational visits by complainant until March 3, 1993, the date of the compliance inspection in this matter. Complainant supported this assertion with the Declaration of Special Agent Joseph A. Palmese, filed with its Motion.

Complainant concluded, therefore, that respondent's vague paraphrasing of the instructions that it allegedly received was factually insufficient to support its estoppel defense.

Furthermore, complainant contended, even if respondent had made a sufficient prima facie factual showing of oral misstatements by complainant's agents, it would not be sufficient to establish a legal ground for equitable estoppel, because respondent's reliance on the alleged representations of complainant's agents would not have been reasonable.

In support of this contention, complainant asserted that respondent received a copy of the M-274 Employer Handbook (Instructions for Completing Form I-9) during the educational visit of June 10, 1988; that respondent has been cited previously for violations of the same nature; and that respondent was previously represented by experienced counsel who, complainant contends, are well acquainted with the paperwork provisions of 8 U.S.C. §1324a. Complainant also noted that the appropriateness of respondent's reliance on the alleged representations of complainant's agents is further undermined because that alleged advice was oral, as opposed to written.

Complainant concluded that respondent's affirmative defense should be stricken as insufficient as a matter of fact and law, pursuant to the pertinent procedural regulation, 28 C.F.R. section 68.9(d), and to Federal Rule of Civil Procedure 12(f).

On October 25, 1993, complainant also filed a Memorandum in Opposition to Respondent's "Cross-Motion" to File an Amended Answer. In its Memorandum, complainant reasserted the contentions made in the memorandum supporting its Motion to Strike, arguing that respondent's request to amend should be denied because its affirmative defense is insufficient as a matter of fact and law, and asserted that, because the facts stated in its declarations for summary decision are not contradicted by facts in respondent's affidavit, they are deemed admitted.

On November 19, 1993, respondent filed a Motion to File Additional Affidavits in Support of Cross-Motion and in Reply to Opposition, requesting an order permitting it to file an additional affidavit in support of its Cross-Motion and in Reply to Complainant's Opposition.

In the Affidavit, Francesca Leonardini, an employee of respondent, averred that in or about 1991, she and Linda Sparks, another employee, had a meeting with two of complainant's agents in which several topics were discussed. At that meeting, the affiant averred, she was told that:

> regarding the completion of Forms I-9, I recall being told that the employess (sic) were to fill out the top portion and that when reviewing the employment documentation of the employees, it was best to just make a copy of their verification and staple it to the forms and not to worry about completing every line of the form because the documentation verifying same was attached.

(Leonardini Aff., at 1).

The affiant asserted that following that meeting, she conveyed the information that she received to Gennaro Scotto. Id., at 1-2.

On November 26, 1993, complainant filed a Memorandum in Opposition to respondent's motion to file additional affidavits. In its memorandum, complainant asserts that, because respondent's claimed affirmative defense is insufficient as a matter of fact and law, respondent's requests to file an additional affidavit and to amend its answer should be denied.

Complainant's contentions notwithstanding, in order to expedite a determination of the issues in this matter, and because complainant will not be prejudiced by a consideration of respondent's additional affidavit, respondent's motion to file the affidavit of Francesca Leonardini is granted.

Standards for Summary Decision

The rules of practice and procedure for these proceedings provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c). Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, the Administrative Law Judges in this Office have determined that Federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

The movant bears the initial responsibility of demonstrating the absence of any issues of material fact. Celotex Corp. v. Catrett, 477

U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). United States v. PPJV Inc., 2 OCAHO 337, at 3 (6/4/91). Once the movant has carried its burden, the party opposing the motion must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; PPJV Inc., 2 OCAHO 337, at 3.

As noted previously above, a review of the Forms I-9 submitted by complainant with its Motion reveals that those Forms I-9 at issue in Counts I, II, III, and IV were completed in an ineffectual manner as alleged in the Complaint. Furthermore, because respondent has not contested complainant's contention that respondent failed to complete a new Form I-9 for the individual named in Count V of the Complaint within three (3) business days of the date that his work authorization expired, complainant has also established the facts of the violation alleged in Count V.

Respondent has asserted, however, that summary decision is not appropriate in this circumstance because it has an affirmative defense to the violations alleged in the Complaint, namely, estoppel based on acts allegedly committed by complainant. In particular, respondent alleged, complainant's agents made an educational visit to respondent's place of business on an indeterminate date in or about 1991 and misinformed two of respondent's concerning the paperwork requirements of the employment verification system.

Complainant urged, in response, that the undersigned order respondent's affirmative defense stricken as insufficient as a matter of fact and of law.

Standards for Motion to Strike Affirmative Defenses

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. See United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (9/23/93).

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).

Equitable Estoppel

Complainant asserted that respondent's affirmative defense is factually insufficient on the ground that respondent's description of the events pertaining thereto is vague, and asserted further that, even if respondent's affirmative defense is found to be factually sufficient, those facts are insufficient to establish a legal ground for equitable estoppel.

The burden of proof is on the party asserting estoppel, here, the respondent. See Heckler v. Community Health Services of Crawford County, 467 U.S. 51, at 61, 104 S. Ct. 2218, at 2224 (1984). While the Supreme Court has declined to state that estoppel may never be asserted against the Federal Government, it has held that the Federal Government "may not be estopped on the same terms as any other litigant." Id., 467 U.S. at 60.

To prevail on its estoppel defense, respondent must show:

(1) Complainant's agent(s) committed affirmative, serious misconduct;

(2) Respondent relied on complainant's agent(s) conduct in such a manner as to worsen its position;

(3) Respondent's reliance was reasonable in that it did not know nor should it have known that complainant's agent(s) conduct was misleading.

Ensign Fin. Corp. v. FDIC, 785 F. Supp. 391, 407-408 n. 9 (S.D.N.Y. 1992); FMH Constructors v. Canton Hous. Auth., 779 F. Supp. 677, 682 (N.D.N.Y. 1992).

Determination

As noted previously above, a party opposing summary decision has an affirmative obligation to present specific evidence in opposition. The opposing party may not rest upon the mere allegations or denials of its pleading. See Manos, 1 OCAHO 130, at 7.

It is clear that respondent has failed to meet this standard. To demonstrate affirmative misconduct on complainant's part, respondent has submitted the affidavits of Vincent Scotto, respondent's proprietor and general manager, and of Francesca Leonardini, an employee of respondent, to the effect that on an unspecified date in or about 1991, Leonardini and another employee met with two unidentified INS agents. Those INS agents, Leonardini avers, told Leonardini and the other employee that in completing the Form I-9, it was sufficient for respondent to have the employee complete Section 1 and for respondent to simply copy the verification documents required in Section 2.

As the Administrative Law Judge held in Manos:

> the vague paraphrasing of an unidentified INS agent on an unspecified date is not enough of a prima facie factual showing of equitable estoppel based on "affirmative misconduct" to merit the administrative expense of proceeding to a full evidentiary hearing.

Id., at 8.

However, even if the affidavits submitted by respondent had demon-strated affirmative misconduct on the part of complainant's agents, respondent's equitable estoppel defense would still fail because respondent's reliance on the statements made by those agents was not reasonable.

In the affidavit of Joseph Palmese, Special Agent for the INS, sub-mitted with complainant's Motion to Strike, Palmese avers that respondent received an educational visit from Special Agent Charles Mitchell on June 10, 1988. Palmese asserts that at that time Mitchell provided Vincent Scotto, respondent's owner, and Greg Apostle, respondent's manager, with a copy of the Handbook for Employers (M-274), and gave them the phone number of the employer and labor relations officer for the New York district of INS, and instructed

respondent to contact that individual should any additional questions regarding compliance arise.

Palmese also stated that on January 25, 1989, respondent received a Notice of Inspection and that in course of a subsequent inspection on February 1, 1989, Forms I-9 were not presented for two (2) individuals, and deficient Forms I-9 were presented for an additional 14 individuals. Palmese further asserted that it was determined at that time that at least 12 of respondent's employees were unauthorized aliens.

Palmese also averred that on March 26, 1990, respondent received a prior NIF alleging four (4) violations of IRCA, 8 U.S.C. §1324a(a)(1)(A) and/or §1324a(a)(2), and 16 violations of IRCA, 8 U.S.C. §1324a(a)(1)(B), for which a total civil money penalty of $16,000 had been assessed. On April 9, 1990, as noted by Palmese, respondent also requested a hearing, and on June 14, 1990, a Complaint was filed with this Office concerning the previous citation.

Palmese asserts that on December 17, 1990, pursuant to a Settlement Agreement, respondent admitted one (1) violation of IRCA, 8 U.S.C. §1324a(a)(1)(A), and all 16 violations of IRCA, 8 U.S.C. §1324a(a)(1)(B), contained in that earlier Complaint. By the terms of the Final Order issued in that action, respondent was ordered to pay a fine in the amount of $8,000 and to cease and desist from further violations of IRCA, 8 U.S.C. §1324a.

In defining "reasonable reliance" for estoppel purposes, the Court in Heckler held: "reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." Heckler, 467 U.S. at 59, 104 S. Ct. at 2223. See also Soler v. G & U, Inc., 615 F. Supp. 736, 748 (S.D.N.Y. 1985) (defense of equitable estoppel can succeed only if the party asserting the defense had no knowledge of the true facts).

At the time of the alleged visit, respondent had received copies of the Handbook for Employers, had previously been under employer sanctions proceedings before this Office, and was represented by experienced attorneys. Consequently, respondent not only should have known, but apparently was under a duty to know, the proper procedure for complying with the employment eligibility verification system. For this reason, respondent's purported reliance on the representations of the unidentified INS agents cannot be viewed as reasonable.

The inappropriateness of respondent's reliance is compounded by the fact that the advice allegedly received from the unidentified INS agents was oral in nature. See Heckler, 467 U.S. at 65, 104 S. Ct. at 2227.

Decision

In view of the foregoing, it is found that respondent's affirmative defense of equitable estoppel is both factually and legally deficient. Accordingly, complainant's Motion to Strike Respondent's Affirmative Defense is granted, and respondent's affirmative defense, estoppel based on complainant's conduct and acts, is ordered to be and is stricken.

Because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in the Complaint, and has shown that it is entitled to decision as a matter of law with respect to those violations, complainant's Motion for Summary Judgment is granted, and I find that respondent violated the pertinent provisions of IRCA in the manners alleged in Counts I, II, III, IV, and V of the Complaint.

Appropriate civil money penalties for those violations will be ordered, by the use of the criteria set forth in the provisions of 8 U.S.C. §1324a(e)(5), following an evidentiary hearing to be conducted for that purpose in New York, New York.

A telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted.

JOSEPH E. MCGUIRE
Administrative Law Judge