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. 93A00091
EXIM AND MONARDES,	)	
Respondent.	)	
	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION REGARDING LIABILITY

On August 20, 1992, Complainant personally served Respondents with a Notice of Intent to Fine (NIF) in which it alleged three counts of paperwork violations under 8 U.S.C. 1324a(a)(1)(B). As authorized by statute, Respondents, through counsel, filed, on September 15, 1993, a written request for hearing before an administrative law judge. 8 U.S.C. 1324a(e)(3). As such, Complainant filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 3, 1993. The Complaint, which incorporated the NIF and Respondents' request for hearing, alleged that: 1. Respondents failed to prepare, retain, and/or make available for inspection the Employment Eligibility Verification Forms (Form I-9) for twenty-one named employees hired after November 6, 1986; 2. that Respondents failed to ensure that one named employee, hired after November 6, 1986, completed section 1 of the Form I-9; and, 3. that Respondents failed to properly complete section 2 of the Form I-9 for thirteen (13) named employees hired after November 6, 1989. Complainant requested a civil money penalty of $820 for each violation, for a total civil money penalty request of $28,700.

On May 5, 1993, OCAHO issued and served on the parties a Notice of Hearing on Complaint Regarding Unlawful Employment in which Respondents were advised of the filing of the Complaint and their

right to file an Answer within thirty (30) days of receipt of the Complaint so as to avoid the entry of a default judgment. These documents, including the Complaint, were effectively served on Respondents on or before May 13, 1993 as evidenced by the file copy of a U.S. Postal Service Certified Mail Return Receipt. As is my practice, on May 20, 1993, I issued a Notice of Acknowledgment in which I again reminded Respondents of the need to file a timely Answer.

On June 1, 1993, Respondents' counsel filed an Answer in which he stated that the Respondents had refused to retain him or to communicate with him and, thus, he was without sufficient information to admit or deny the allegations. Accompanying this Answer was counsel's Motion to Withdraw as Attorney of Record based on his clients' refusal to communicate. Counsel represented that he had filed an Answer solely to preserve Respondents' rights.

On July 8, 1993, I held a prehearing telephonic conference with William Sims, Esquire, for Complainant, and David Chew, Esquire, for Respondents. At issue was counsel's Motion To Withdraw. However, at the conference, counsel withdrew his motion as moot since his client had agreed to cooperate with him and wished to settle this case. In light of the circumstances, I directed the parties to file a telephonic status report on, or before, July 14, 1993 to inform the court of the progress of settlement negotiations.

As directed, Complainant filed a telephonic status report and represented that settlement negotiations had been positive. Thus, I directed the filing of another status report, to be due on August 11, 1993. In that status report, Complainant represented that Respondents, through counsel, had admitted liability and had agreed to provide a financial statement and additional evidence of Respondents' current financial status. Complainant also represented that, based on the information provided during negotiation, on July 20, 1993, Complainant had sent a settlement agreement to counsel with an offer of settlement of $10,000. However, by August 6, 1993, Complainant had not received a formal response.

On August 13, 1993, Respondents' counsel filed its Status Report and stated that the proposed settlement agreement had been reviewed and forwarded to Respondents and that a decision to accept or reject Complainant's offer would be forthcoming in ten (10) working days.

On September 13, 1993, Complainant filed another status report in which it advised that Respondents' had accepted Complainant's offer of settlement as to Respondent Exim, Inc. but not as to Respondent Jaime Monardes. As such, discussions between Complainant's counsel and its client, the Border Patrol, as to how to proceed, were under way and resolution was expected by September 17, 1993.

On September 21, 1993, Complainant filed a status report in which it represented that its client had determined that it would be more prudent to proceed against both Exim and Monardes and not to dismiss Respondent Monardes, Individually. Complainant's reasoning was based on the alleged fact that Exim, Inc. had sold off all its assets in 1990 and was "apparently pending revocation of its charter by the New Mexico Corporation Commission." Thus, Complainant's position was that unless both Respondents agreed to the proposed settlement agreement by the end of September, it would request 45-60 days to begin and complete discovery in this case.

On October 27, 1993, I held a prehearing telephonic conference with the parties' counsel to discuss the case's status and the settlement possibilities. The parties represented that due to Respondents' financial status, no settlement was possible. I gave the parties until November 12, 1993 to complete discovery and file any appropriate motions.

On November 16, 1993, Complainant filed a Motion for Summary Decision or, in the Alternative, Motion for Judgment on the Pleadings. In that motion, Complainant argued that since Respondents had failed to respond to any of its discovery requests, specifically its Request for Admissions, its Request for Production of Documents and its Interrogatories, that pursuant to 28 C.F.R. 68.21(b), Respondents had admitted all the allegations in the Complaint and that the civil money penalties contained in the Complaint were fair and reasonable. As such, Complaint requested that I enter a summary decision/judgment on the pleadings and a final order pursuant to 28 C.F.R. 68.52. Attached to Complainant's Motion were copies of its discovery requests, including its request that Respondents admit that they had hired the individuals named in Counts I, II and III after November 6, 1986 and that they had violated 8 U.S.C. 1324a(a)(1)(B) in each instance alleged in the Complaint. Also attached were the fourteen Forms I-9 associated with the violations alleged in Counts II and III.

To date, Respondents have not filed their responses to this motion. As Respondents are represented by counsel, I will not issue an Order To Show Cause. See U.S. v. K & M Fashions, Inc., 2 OCAHO 411 (3/16/92); U.S. v. Mid Island Jerico Motel, 3 OCAHO 468 (11/3/92).

II. *Discussion*

Under 28 C.F.R. 68.38, I am authorized to render a summary decision where there is no genuine issue of material fact. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (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 Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Federal Rules of Civil Procedure 56(e).

As Respondents did not submit any responses to Complainant's discovery, based on 28 C.F.R. 68.21(b) which states that:

(1) "Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party;

(2) A written statement denying specifically the relevant matters of which an admission is requested;

(3) A written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or

(4) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part."

Complainant summarily concluded that Respondents had admitted all the allegations in Counts I, II and III of the Complaint as outlined in paragraph 2a-h of the Request for Admissions.

It would have been better practice for Complainant to file a motion entitled "Motion to Deem Admissions Admitted" in conjunction with its Motion For Summary Decision, since, if I had found good cause for Respondent's delay, it was within my discretionary power to lengthen the time allowed for Respondent's response to Complainant's requests for admissions. 28 C.F.R. 68.21(b); see, e.g., U.S. v. Moyle, 1 OCAHO 96 (10/18/89). However, based on the procedural history of this case, the lengthy settlement negotiations, and the fact that Respondents are represented by legal counsel, in the interests of judicial economy I will infer that a motion to deem admissions admitted was included in Complainant's Motion for Summary Decision. Further, as Respondents have not responded to any discovery requests, have not filed responses to the pending motion, and have not filed requests for extension of time to respond to either the discovery requests or the motion for summary decision, I find that it is appropriate to deem all Respondents' requested admissions admitted. Therefore, it is now appropriate to consider Complainant's motion for summary decision.

With regard to Count I, wherein Respondents are alleged to have failed to prepare, retain, and/or make available for inspection the Form I-9 for twenty-one employees named in paragraph A of Count I who were hired after November 6, 1986, I find that with respect to those named individuals in paragraph A of Count I: 1. Respondents have admitted hiring those individuals after November 6, 1986; 2. Respondents have admitted that the Immigration & Nationality Service requested that Respondents make available for inspection the Forms I-9 for the individuals listed in paragraph A of Count I of the Complaint; 3. Respondents admitted that during the scheduled inspection on September 14, 1990, they failed to present the Forms I-9 for those individuals; and, 4. Respondents admitted that they failed to retain the Forms I-9 for those individuals.

As Respondents have not raised any affirmative defenses with respect to Count I, I find that Complainant has proven, by a preponderance of the evidence, that Respondents have violated 8 U.S.C. 1324a(a)(1)(B) as alleged in Count I of the Complaint.

With regard to Count II, wherein Respondents are alleged to have failed to ensure that one named employee, hired after November 6, 1986, completed section 1 of the Form I-9, I find that Respondents have admitted hiring this individual after November 6, 1986 and that they have admitted failing to ensure that the employee properly completed Section 1 of the Form I-9. Further, as the Form I-9 speaks

for itself, my inspection confirms this finding. As Respondents have not raised any affirmative defenses for Count II, I find that Complainant has proven, by a preponderance of the evidence, that Respondents have violated 8 U.S.C. 1324a(a)(1)(B) as alleged in Count II of the Complaint.

With regard to Count III, wherein Respondents are alleged to have failed to properly complete section 2 of the Form I-9 for thirteen (13) employees hired after November 6, 1989, I find that Respondents have admitted hiring the named individuals after November 6, 1986. Upon inspection of the Forms I-9, I find that Respondents failed to properly complete section 2 of the Forms I-9 for these named individuals. As Respondents have not raised any affirmative defenses with regard to Count II, I find that Complainant has proven, by a preponderance of the evidence, that Respondents have violated 8 U.S.C. 1324a(a)(1)(B) as alleged in Count III of the Complaint.

Thus, after a complete review of all the evidence of record, I grant Complainant's Motion for Summary Decision regarding liability, only, at this time. It has been my practice to bifurcate a finding of liability from the awarding of civil money penalties. See U.S. v. Business Teleconsultants, Ltd., OCAHO Case No. 93A00041 (9/27/93).

Therefore, despite Complainant's assertion that Respondents have admitted that the requested civil money penalties are fair and appropriate, I am directing the parties to file, on or before January 20, 1994, statements regarding the factors that should be considered when determining the appropriate amount of civil money penalties. The statements should address 8 U.S.C. 1324a(e)(5) as well as any other relevant factors. See U.S. v. Pizzuto, OCAHO Case No. 92A00084 (8/21/92).

SO ORDERED this 29th day of December, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge