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. 91100082
TOM & YU, INC. T/A PEKING GARDEN RESTAURANT, Respondent.	)	

DECISION AND ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION
(March 19, 1992)

MARVIN H. Morse, Administrative Law Judge

Appearances: Donald V. Ferlise, Esq., for Complainant.
Josephine Ferro, Esq. and Edward J. Cuccia, Esq., for Respondent.

I. *Background*

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324a. The Immi-gration and Naturalization Service (Complainant or INS) alleges that Respondent failed to comply with employment verification (paperwork) requirements imposed by IRCA on all employers in the United States.

Specifically, Complainant alleges that Respondent failed to:

> prepare and/or present for inspection an employment eligibility verification form (Form I-9) for one (1) named individual, assessing a civil money penalty of $1,000.00
>
> properly complete §2 of the Form I-9 for twenty one (21) named individuals, assessing a civil money penalty of $500.00 for each violation, and ensure that one (1) named employee properly completed §1 and failed to properly complete §2 of the Form I-9, assessing a civil money penalty of $500.00.

The total civil money penalty demanded is $12,000.00.

II. *Procedural Summary*

A. The NIF, the Request for Hearing and The Answer

On November 27, 1989 the Immigration and Naturalization Service (Complain-ant or INS) served Tom & Yu, Inc. t/a Peking Garden Restau-rant (Respondent or Tom & Yu) with a Notice of Intent to Fine (NIF), alleging specified paperwork violations. INS charges Respondent with twenty three (23) violations of the paperwork requirements of 8 U.S.C. 1324a (a)(1)(B) for its failure to prepare, present, complete or ensure employees' completion of Forms I-9.

Respondent timely requested a hearing before an administrative law judge. 8 U.S.C. §1324a(e)(3)(A). On May 20, 1991 INS filed its com-plaint. On May 22, 1991 the Office of the Chief Administrative Hearing Officer (OCAHO) issued its Notice of Hearing. Respondent's answer, filed on June 28, 1991, denied the paperwork allegations, asserting affirmative defenses of substantial and good faith compliance.

B. The Prehearing Conferences and Complainant's Motion for Summary Decision

Subsequently, there were four telephonic prehearing conferences leading to an evidentiary hearing scheduled to be held in Philadelphia, Pennsylvania on December 3 and 4, 1991. As confirmed by my order dated November 13, 1991, however, the hearing was postponed indefi-nitely due to unavailability of hearing facilities.

On November 19, 1991, Complainant filed a Motion for Summary Decision with copious attachments and enclosures. Both parties have filed other motions which, in view of the outcome in this Decision and Order, need not be addressed except to the extent discussed below.

In effect, Complainant's Motion for Summary Decision turns on its claim that Respondent's sole defense is that INS failed to follow proper notification procedures prior to inspection of Respondent's Forms I-9. The motion asserts that on April 19, 1989 INS agents served Respondent with a subpoena for delivery of the Forms I-9 by April 27, 1989, thereby complying with the requirement that three day notice be given an employer prior to inspection. 8 C.F.R. §274a.2(b)(2)(ii). Complainant asks me to draw inferences against Respondent arising out of the

latter's allegedly flawed compliance with Complainant's discovery requests. Relying on responses to its discovery initiatives, Complainant asserts, that there is no genuine dispute of material fact as to liability or as to the civil money penalty assessment. 8 U.S.C. §1324a (e)(5).

Complainant's motion supposed also that Respondent's claim of inadequate notice included a contention that no subpoena had been served. However obscure the pleadings may have been on that score, it is undisputed that a subpoena for the I-9s and specified additional documents was served on April 19, 1989.

C. Other Disputes Resolved or Unnecessary

Respondent did not timely respond to Complainant's summary decision motion nor to all of Complainant's Requests for Admissions (RFAs). On January 6, 1992 Complainant filed a motion for default dated December 31, 1991. INS accompanied its motion with a request to treat as admitted the unanswered RFAs. By a January 17, 1992 order, I denied Complainant's motion and request, also rejecting Respondent's explanations for its failure to have timely responded to outstanding discovery requests, and directing subsequent procedures.

The parties have been embroiled in disputes involving the mechanics and substance of outstanding discovery requests. They have displayed a general inability to comply with the January 17 order. For example, Respondent's efforts to depose the INS agents who participated in the events of April 19, 1989 have been the subject of extensive pleadings by both parties. The pleadings suggest an underlying misunderstanding between the parties concerning the purpose of the intended depositions. Assertions by both parties reflect a lesser degree of cooperation and candor between counsel than I have come to expect of attorneys in this forum.

In view of my conclusion that there is no dispute of material fact as to the Form I-9 deficiencies alleged, any misunderstanding is immaterial. In light of the discovery responses, I am satisfied that the materials filed with the various pleadings provide a sufficient evidentiary basis on which to adjudicate the liability, but not the civil money penalty portion of Complainant's motion.

III. *Discussion*

The function of the summary decision procedure is to avoid an unnecessary trial when pleadings and other materials indicate that there is no genuine issue as to any material fact. Lewis v. McDonald's Corporation, 2 OCAHO 383 at 2 (10/4/91); U.S. v. Bayley's Quality Seafoods, Inc., 1 OCAHO 238 at 4 (9/17/90); Celotex Corp. v. Catrett, 477 U.S. 316, 327 (1986). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

A. The Proper Notification of Inspection

The principal dispute of material fact on the question of liability arises from Respondent's claim that INS breached its duty to afford proper notification procedures, i.e. to provide Respondent three days notice, prior to inspecting the Forms I-9. According to Respondent, it has no liability for paperwork deficiencies because INS failed to provide three days notice prior to inspection as required by its own regulation. 8 C.F.R. §274a.2(b)(2)(ii). As discussed, inter alia, in its motion for summary decision, supra at 2, Complainant replies that the allegations turn on deficiencies in the paperwork submitted in response to its subpoena served more than three days in advance.

It is undisputed that in February, 1989, an INS representative left an employment verification instruction booklet with a Tom & Yu employee. On April 19, 1989 five agents conducted what INS labels an employee survey, but others call a raid, at Respondent's restaurant. This survey was performed with the knowledge and consent of Kwie Lan Yu, the restaurant manager who is the Yu of Tom & Yu and the wife of Tom. These facts aside, the versions of the parties substantially diverge.

According to Respondent, the agents demanded that Forms I-9 be presented for INS inspection, and Yu complied. INS served her with a subpoena to present the Forms I-9 "at a later date." On May 6, 1989 Respondent forwarded I-9s to INS, asserting in its February 18, 1992 reply to the motion for summary decision that they were, "in exactly the same posture as they were in when first inspected." Reply to Motion for Summary Decision at 4.

In contrast, INS contends that the agents did not demand the production of Forms I-9 on April 19. Rather, while they were interviewing restaurant employees, Yu volunteered the forms and the agents looked at them. Before leaving, the agents served Yu with a subpoena for the Forms I-9. The subpoena ordered Respondent to deliver the paperwork by April 27, 1989. After requesting postpone-

ment of the delivery date, Respondent mailed the I-9s to INS, postmarked May 6.

Based on their different interpretation of the facts, INS and Tom & Yu seek to draw different legal conclusions. At issue is Respondent's characterizing as an inspection its presentation of the Forms I-9 on April 19, 1989, in response to its claim that the agents demanded to see them.

On considering each party's version of the April 19 production of paperwork in light of the production pursuant to subpoena, I conclude that neither version is critical to determining liability. It is immaterial whether presentation of I-9s on April 19 was instigated by Complainant or Respondent. Supporting its NIF and complaint here, INS does not rely on the I-9s presented on April 19. Instead, Complainant relies upon I-9s which were transmitted to INS by letter from Respondent's counsel pursuant to subpoena. The conclusion here, however, should not be understood as a judicial invitation to INS to inspect I-9s in derogation of its own three day notice requirement.

Although not dispositive of the present case even on its own rationale, Respondent failed to challenge the alleged demand for production of the I-9s on April 19. Dicta in a previous IRCA case suggests that a Respondent's failure to contemporaneously challenge the lack of a three day notice, precludes a subsequent claim. See U.S. v. Vanounou, 1 OCAHO 54 (5/4/89), reh'g denied, 1 OCAHO 73 (7/21/89) ("The 3-day notice requirement is merely a protection an employer may raise at the time of inspection . . . it is not a jurisdictional requirement which must be proved in support of the Complainant's motion here.")

B. Responses to Requests for Admissions

Collateral to their conflicting views on liability, the parties dispute the proper application of 28 CFR §68.21(b), which delineates, inter alia, the requirements for timely response to requests for admissions. In order to resolve the question of liability, this Decision and Order focuses on the substance of the admissions filed by Respondent March 9, 1992 dated March 4, 1992, and not on the timeliness dispute.

Complainant's RFA consists of six items. Respondent admits to five of them. The only controverted RFA focuses on the notice issue:

> 3. Do you admit that during the employer survey on April 19, 1989 custody of forms I-9 relating to employees of Tom and Yu,

Inc., t/a Peking Garden Restaurant was not relinquished to the I.N.S.?

Respondent's reply states:

3. Deny. Custody of the Forms I-9 was relinquished to the I.N.S.

Significant to the three day notice of inspection issue is Respondent's admission that INS did not remove Forms I-9 from Respondent's restaurant on April 19, 1989. The question:

4. Do you admit that Special Agents from the INS did not remove forms I-9 relating to the Respondent's employees from the Respondent's restaurant on April 19, 1989?

The reply:

4. Admit.

The juxtaposition of Respondent's responses to RFAs 3 and 4 suggests an unusual reading of the term custody. In effect, Respondent asserts that although it relinquished custody of the forms to INS during the April 19 employer survey, INS' custody of the documents ended prior to the departure of the agents on that day.

I do not concur with such a strained definition of custody. The plain meaning of custody is "the care and control of a thing or person." BLACK'S LAW DICTIONARY 347 (5th ed. 1979). Considering both the conventional understanding of the word custody and Respondent's admission that INS did not remove any I-9s on April 19, I hold that INS did not have custody of the paperwork on that day. If, however, I were to conclude with Respondent that INS had custody of the Forms I-9 during the course of the survey, such custody was so temporary and transitory as to elude any legal significance.

C. The Equitable Estoppel Claim

Bootstrapped to its characterization of the April 19 presentation of paperwork as an inspection, Respondent asserts equitable estoppel against INS to further its liability disclaimer. Respondent concedes that the Forms I-9 submitted in response to the subpoena were incomplete. Respondent asserts, however, that as a consequence of the Government's allegedly infirm inspection, the Government is estopped from charging paperwork violations. I understand Respondent to

claim that in reliance on that allegedly infirm inspection, Respondent was prevented from perfecting its I-9s prior to tendering them in compliance with the subpoena. Believing that Complainant had already inspected its Forms I-9, Respondent suggests it was compelled to submit unaltered paperwork after April 19 to avoid vulnerability to tampering or fraud charges.

Respondent misapplies the equitable estoppel doctrine to the case at hand. So far the Supreme Court has declined to estop the United States from enforcing a statute based on reliance by a private party on even a conceded mistake by a governmental agent. In its seminal case, the Supreme Court defined the broad parameters of governmental immunity from an estoppel defense.

> It is a well-established rule that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. . . . Respondents were duty bound to read the regulations. [cite omitted]. . . . In any event, their publication in the Federal Register was sufficient, under the Federal Register Act, to afford notice to all affected persons.

Federal Crop Insurance Corporation v. Merrill, 332 U.S. 379, 380 (1947).

Merrill stands for the proposition that, the Government is virtually impervious to an equitable estoppel claim.

In the context of Merrill and its progeny, it is clear that Respondent's reliance argument cannot prevail. The Supreme Court recently reiterated the Merrill ruling. Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S. Ct. 246 (1990). The Court exonerated the Government, even though Department of the Navy agents misinformed a disability retiree, verbally and in writing, as to the amount of money he could earn without impairing the amount of his Navy disability income. The retiree accepted overtime employment solely in reliance on that misinformation. The Court rejected the retiree's estoppel claim.

> . . . equitable estoppel will not lie against the Government as against private litigants . . . it ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent" Hansen v. Harris, 619 F.2d 945 (CA 2 1980). . . . To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens.

Id. 110 S. Ct. at 2469.

See also Heckler v. Community Health Service of Crawford County, 467 U.S. 51, 59 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."); INS V. Hibi, 414 U.S. 5 (1973) (per curiam) ("Neither the failure to fully publicize the right to naturalization afforded by the Nationality Act of 1940 to noncitizens who served in the United States Armed Forces during World War II nor the failure to have an authorized naturalization representative stationed in the Philippine Islands during the time such rights were available, estopped the Government from relying on the fact that the deadline for filing naturalization applications such as respondent Filipino's had expired more than 20 year earlier."); Montana v. Kennedy, 366 U.S. 308, 317 (1961) (". . . we need not stop to inquire whether, . . . there may be some circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials.")

Even assuming, arguendo, that INS agents inspected the Forms I-9 on April 19, no reliance interest accrued therefrom. At no point was Respondent excused from its statutory obligation to comply with IRCA's paperwork requirements. Respondent, no less than every employer in the United States, was and remains under a continuing obligation to maintain the paperwork required by IRCA. U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89), aff'd by CAHO, 1 OCAHO 55 (5/5/89), aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990). I reject the suggestion that an employer may with impunity maintain deficient Forms I-9 following an inspection.

D. Conclusion as to Deficient Forms I-9s

With respect to allegations of Form I-9 deficiencies, I hold that Respondent's three day notice of inspection defense cannot be sustained. Respondent's April 19 presentation of the Forms I-9 did not rise to the level of an INS inspection and custody did not pass to INS. More importantly, Complainant did not base its charges on the April 19 presentation, but on Respondent's response to a subpoena served more than three days in advance of its call for production. Furthermore, Respondent's collateral reliance argument falls because the United States is, on the facts of this case, immune from an estoppel claim.

E. Failure to Prepare or Present A Form I-9

Complainant alleges that no I-9 was presented, with respect to one individual i.e., Jun Ying Xie. Respondent asserts a hire for less than three days, as a result of which the employer is not obliged to prepare and present a Form I-9.

The materials of record do not support Respondent's claim. Instead, the record confirms employment from March 10, 1989 until April 27, 1989. More to the point, hires for three days or less do not avoid liability for compliance with paperwork verification requirements. As previously held,

> I reject as a categorical defense the proposition that a hire which does not survive beyond one day cannot as a matter of law be the subject of employer liability for paperwork completion.

U.S. v. DuBois Farms, 2 OCAHO 376 (9/24/91) at 26; DuBois Farms, 1 OCAHO 242 (9/28/90) (Order Granting In Part Complainant's Motion to Strike Affirmative Defenses) at 4. ("An employer is responsible for an employee's completion of Section 1 of the Form I-9 at the time of hire without regard to the duration of employment.")

F. The Civil Money Penalty

Although discovery responses by Respondent provide a basis for finding liability, the record is not sufficient on the question of the civil money penalty to permit the conclusion that there is no dispute of material fact. It appears, for example, that an issue remains as to whether one Tom & Yu employee, i.e., Jun Ying Xie, was authorized for employment in the United States. Accordingly, this Decision and Order, is a final disposition as to the issue of liability only. The issue of civil money penalty is reserved. The civil money penalty assessment argument at pages 3-5 of Complainant's summary decision motion provides a focus for the parties to attempt resolution of the quantum issue.

IV. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, including evidence filed in response to discovery requests and arguments submitted by the parties. All motions and requests not disposed of previously or in this Decision and Order are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations,

findings of fact, and conclusions of law, and direct the parties as to the further procedures specified below:

1. That there is no genuine dispute of material fact as to allegations of Tom & Yu's liability for failure in the manner specified in the complaint to comply properly with the employment verification system required pursuant to 8 U.S.C. §1324a with respect to the individuals there named.

2. That so much of Complainant's motion for summary decision as implicates such liability is granted.

3. That the parties shall file a joint statement of issues which identifies those questions to be resolved in order to reach a decision on the quantum of civil money penalties. Failing their ability to achieve a joint statement on one or more such issues, they shall each make two filings. (1) The parties shall file a joint statement to the extent feasible, and if necessary concurrently file separate statements which summarize their unsuccessful efforts and which identify those issues each asserts separately. (2) Concurrently with the statement(s) of issues, the parties shall file such factual submissions and argument as they each elect to submit to support their respective positions on quantum, consistent with the factors to be considered pursuant to 8 U.S.C. §1324a(e)(5). The statements required by this paragraph shall be filed not later than Tuesday, April 21, 1992. Not later than Tuesday, April 28, 1992, either party may file a request for a confrontational evidentiary hearing. Any such request shall recite the reasons such a hearing is necessary and shall specify the testimony and exhibits to be tendered, with particular reference to the April 21 submission by the other party.[*]

4. That with respect to the issue of liability for paperwork violations as alleged in the complaint, this Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R.

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[*] The parties are reminded that in adjudicating civil money penalties for paperwork violations under 8 U.S.C. §§1324a(a)(1)(B), 1324a(e)(5), I utilize a judgmental and not a formula approach. U.S. v. Widow Brown's Inn, 2 OCAHO 399 at 38-42 (1/15/92); U.S. v. Big Bear Market, 1 OCAHO 48; U.S. v. DuBois Farms, Inc., 2 OCAHO 376; U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91); U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90); U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90). Absent unanticipated evidence, I will consider only the range of options between the statutory minimum and the amount assessed by INS. U.S. v. DuBois Farms, 2 OCAHO 376 at 30-31; U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16; U.S. v. Big Bear Market, 1 OCAHO 48 at 32; U.S. v. J.J.L.C., 1 OCAHO 154 at 9.

§68.52(a) (1991). As provided at 28 C.F.R. §68.53(a)(1) (1991), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer, shall have modified or vacated it. See also 8 U.S.C. §1324a(e)(8), 28 C.F.R. §68.53(a)(2) (1991) (judicial review).

SO ORDERED.

Dated and entered this 19th day of March 1992.

MARVIN H. MORSE
Administrative Law Judge