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 OCAHO Case No. 92A00221
JOHNNY NG LIM & CHRISTINA LIM GO, d.b.a., THE NEW ORIENT, Respondent.	)	

DECISION AND ORDER GRANTING PARTIAL SUMMARY DECISION

I. *Introduction*

The United States Department of Justice, Immigration and Naturalization Service ("INS" or "Complainant"), filed a complaint against Respondents, Johnny Ng Lim and Christina Lim Go, d.b.a., The New Orient Restaurant. The complaint alleges various violations of the employment sanction provisions of the Immigration and Reform Control Act of 1986 ("IRCA"), as amended by the Immigration Act of 1990, 8 U.S.C. § 1324a, including the unlawful employment of unauthorized aliens and the failure to comply with the paperwork requirements of the statute.

At all times material to the allegations in the complaint, Respondents had a partnership that operated three Chinese restaurants, located in northern California. Respondents' primary place of business was at 307 North Fair Oaks Avenue, Sunnyvale, California. Complainant has filed a motion for summary decision and requests a civil monetary penalty totaling $17,500.00. For the reasons stated herein, the motion will be granted on all counts as to liability, but denied as to the amount requested for a civil monetary penalty as to each count.

II. *Procedural History*

On October 9, 1993, Complainant filed a six-count complaint against Johnny Ng Lim and Christina Lim Go, d.b.a., The New Orient, alleging thirty-three separate violations of various sub-sections of 8 U.S.C. § 1324a, including §§ 1324(a)(1)(A), 1324a(a)(1)(B) and 1324a(a)(2).

More specifically, Count I of the complaint alleges, inter alia, that Respondents knowingly hired for employment in the United States after November 6, 1986, Angelina Batacan, Dante Batacan, Miguel Batacan and Esteban Castendad, who were aliens not authorized for employment in the United States, in violation of § 274A(a)(1)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1324a(a) (1)(A).[1] The penalty request for this count is a civil money penalty of $4,720.00, or $1,180.00 for each violation.

Count II of the complaint alleges that Respondent failed to prepare the Employment Eligibility Verification Form ("Form I-9") for twenty- one named individuals hired by Respondents for employment in the United States in violation of § 274(a)(1)(B) of the Act, 8 U.S.C. § 1324(a)(1)(B) by failing to comply with the requirements of § 274A(b) of the Act, 8 U.S.C. §1324a(b) and 8 C.F.R. § 274a.2(b). The penalty request for this count is a civil money penalty of $10,080, or $480.00 for each count.

Count III of the complaint alleges that Respondents failed to ensure that three of their employees, Alex Salzmann, Zach Salzmann and Jose Villagomez, properly completed section 1 of the Form I-9 in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324 (a)(1)(B) without complying with the requirements of § 274A (b)(2) of the Act, 8 U.S.C. § 1324a(b)(2) and 8 C.F.R. § 274a.2(b)(1)(i). The penalty request for this count is a civil money penalty of $1,050.00, or $350.00 for each violation.

Count IV of the complaint alleges that Respondents failed to properly complete section 2 of the Form I-9 for Eric Childers aka Frederick Childers, who was hired by Respondents after November 6, 1986, in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a (b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii). The penalty request for this count is a civil money penalty of $350.00.

[1] Count 1 also alleges in the alternative that Respondent violated § 274A(a)(2) of the Act, 8 U.S.C. § 1324a(a)(2) and 8 C.F.R. § 274a.3 by continuing to employ the four named employees after November 6, 1986 knowing that each employee was an alien unauthorized for employment in the United States.

Count V of the complaint alleges that Respondents failed to ensure that Mark Gardner, who was hired by Respondents for employment in the United States after November 6, 1986, properly complete section 1, and that Respondents failed to properly complete section 2 of the Form I-9 in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(b)(1) and (2), and 8 C.F.R. § 274a.2(b)(1)(i) and (ii). The penalty request for this count is a civil money penalty of $400.00.

Count VI of the complaint alleges that Respondents failed to make available for inspection the Form I-9 for three individuals hired by Respondents for employment in the United States after November 6, 1986, in violation of § 274A(a)(1)(B) of the Act by not complying with the requirements of § 2-74a.2(b)(2)(ii). The penalty request for this count is a civil money penalty of $900.00, or $300.00 for each violation.

The pro se Respondents filed an answer to the complaint on November 16, 1992. In their answer, Respondents admit that they had committed the violations alleged in the complaint, but argue that the fine of $17,500.00 is excessive. Respondents contend that a minimum fine would be fair and appropriate because of the restaurants' poor financial condition.

On January 29, 1993, pursuant to 28 C.F.R. § 68.38, Complainant filed a motion for summary decision based upon Respondents' admissions in which Complainant requested that I order Respondents to pay the fine amount set out in the complaint. Complainant filed a memorandum of facts and law in support of its motion. Attached to Complainant's motion are a number of supporting documents. These include (1) a California State Board of Equalization's seller's permit; (2) a public health permit; (3) a permit to operate the New Orient Restaurant in Sunnyvale, Fremont, and Mt. View, California; (4) a list that purports to show Respondent's employees who were employed in at least one of the three New Orient Restaurants between 1988 and an unspecified date; (5) INS records showing that certain employees named in the complaint, including Miguel Angelo Beech Batacan, Dante Antonio Beech Batacan, Angelina Goyena Batacan, Esteban Castaneda-Espinoza, were deportable aliens; (6) the improperly completed Forms I-9 for Alex Salzmann, Zach Salzmann, Jose Villagomez, Mark Gardner, and Frederick K. Childers; and (7) a Quarterly Contribution Returns and Report of Wages under the Unemployment Insurance Code for the State of California for the Johnny Lim New Orient Restaurants located in Fremont and Sunnyvale, California and covering the period from March 31, 1988 to December 31, 1991.

Also attached to the motion is a memorandum date April 4, 1992, prepared by INS Special Agent, Gilbert Toy, setting forth his rationale for recommending the fine against Respondents for the violations charged in the complaint. Another document attached to the motion is the investigation report of INS agent, J.P. Galoski, showing that Angelina Batacan, Dante Batacan and Miguel Batacan were arrested on November 25, 1991, while working at one of Respondents' New Orient Restaurants. Agent Galoski's report indicates that all three employees admitted to being in the United States illegally. The report also shows that Agent Galoski provided one of the owners, Johnny Lim, with a Handbook for Employers (M-274) and I-9 forms.

On February 4, 1993, I ordered Respondents to respond to Complainant's motion for summary decision. Respondents filed two responses. In their first response, filed on February 17, 1993, Respondents state that INS agents Toy and Galoski have made statements which they contend are not true. Respondents do not specify however, the contents of the allegedly false statements. Respondents argue that their hiring of illegal aliens and their failure to properly prepare the I-9 forms was not egregious and therefore they should only be fined the minimum required by law.

Respondents in their second response filed on February 22, 1993, directly address the Complainant's factual arguments with respect to setting an appropriate fine and mitigation. As to the mitigation issue, Respondents discuss the size of their business, their good faith in trying to comply with the law, the nature of the violation, whether the four employees identified in Count I were unauthorized aliens and their lack of previous violations.

III. *Legal Standards for a Motion for Summary Decision*

The regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . 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[2].

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially

[2] Rules of Practice and Procedures 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. § 68").

noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242 (1986); see also Consolidate Oil and Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See Home Indem. Co. v. Famularo, 530 F.Supp. 797 (D.C. Col. 1982); see also Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.9(c)(1). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) ("...matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment").

IV. *Legal Analysis Supporting Decision to Grant Motion*

Complainant argues that summary decision should be granted in this case because Respondents have admitted in their answer to committing all the violations alleged in the complaint. I agree that Respondents have done so, based upon the following statements: (1) that "we were forced to hire this (sic) illegal aliens not because we didn't try to hire legal workers but all off the people that applied are illegals so I had no choice..."; (2) "we never knew that I have (sic) to file an I-9 in (sic) each and every employee"; and (3) "we never deny (sic) our mistake [;] we admit it." Moreover, Respondents' answer does not deny any of the substantive allegations of the complaint relating to liability. The only denials made by Respondents in their answer is that the amount of the civil penalty is excessive.

Complainant's memorandum in support of its motion for summary decision helpfully sets forth a prima facie case upon which to grant summary decision against Respondents. None of Respondents' pleadings controvert of otherwise dispute any of the factual allegations set forth in Complainant's pleadings. Although Complainant, in its motion for summary decision failed to provide any affidavits from witnesses to support any of the allegations of the complaint, the regulations do not require affidavits to support a motion for summary decision. See 28 C.F.R. § 68.38(a). More importantly, the statements of witnesses, documents and other pleadings filed and the admissions of Respondent, provide a sufficient basis to support a finding of liability on all charges in the complaint.

Respondents' responses to the motion for summary decision and Mr. Lim's undated letter to INS counsel contain significant admissions. In Respondent's first response to the motion for summary decision, Mr. Lim states that (1) "I never deny (sic) [illegally hiring] Miguel Batacan when I could . . . ." (2) "I do not exercise (sic) hiring illegals[;] I'm (sic) just forced that time in Fremont when my employees left me when they learned that I'm (sic) selling the business"; and (3) "I never deny my mistakes. I'm willing to take responsibility towards (sic) that [;] all I'm asking is that give (sic) me another chance and find (sic) me the minimum fine. . . ."

Respondents' second response to the motion for summary decision also shows that Respondents admit they committed the acts alleged in the complaint because the response states "I don't make a practice hiring illegal aliens . . . I also swear I never knew that I have to keep records of I-9 forms"; and "I never deny (sic) that these 4 persons [named in Count I] to work (sic) but I did it not to practice it but just to keep my business until I sell it. . . ."

Mr. Lim, in an undated letter to government counsel, also admits committing the violations alleged in the complaint as he states: "I do admit my mistake of hiring some illegal aliens in my place of business but I honestly don't (sic) know that I have to keep records of all employees hired. . ."

Since Respondents have admitted to committing the violations set forth in the complaint, there are no material facts in dispute as to liability. Therefore, Complainant's motion for summary as to all counts is granted.

V. *Civil Penalties*

Respondents have been found liable for hiring for employment in the United States four aliens whom Respondents knew at the time of hiring were not authorized for employment. It is undisputed that this is Respondents first offense under IRCA, 8 U.S.C. § 1324a. The civil penalty for knowingly hiring an unauthorized alien for a first-time offender is a civil monetary penalty not less than $250.00 and not more than $2,000.00 per violation. 8 U.S.C. § 1324a(e)(4), 8 C.F.R. § 274a.10(b)(1). The Complainant seeks $1,180.00 for each of these four violations for a total of $4,720.00. Complainant argues that this fine is reasonable because of the Respondents' lack of good faith. Respondents argue that a minimum fine is appropriate because, inter alia, they were forced to hire the four illegal aliens because of business necessity.

There is clearly a conflict between the parties with respect to material facts relating to why Respondents hired the illegal aliens listed in Count I. Whether or not Respondents' acted inadvertently, intentionally or otherwise, however, can only be determined by hearing the testimony of Respondents. Moreover, there is insufficient evidence in the record to determine the nature and scope of Respondents' hiring policy which may have a bearing on Respondents' conduct in hiring the four named aliens listed in Count I. In order to make an appropriate finding on the fine in this case for knowing violations of IRCA, I am required to make credibility findings. Since there has not been a hearing to provide Respondents an opportunity to testify about their reasons for hiring the illegal aliens listed in Count I, Complainant's motion for summary decision as to the fine requested in Count I is denied.[3]

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[3] In determining the amount of fine to ask on these four charges of Count I, Complainant has relied on an analysis performed by INS Agent Toy Gilbert who arrived at the figure of $1,180.00 per violation by applying a mathematical formula to the mitigating factors applicable to paperwork violations. Agent Gilbert's approach is similar to the method I have used in determining an appropriate civil money penalty for paperwork violations. He begins his calculation from the minimum baseline penalty of $250.00 and adds additional fine amounts based on an analysis of the five mitigating factors. I begin my mathematical approach in determining an appropriate civil penalty in paperwork cases with the maximum penalty of $1000.00, assigning $180.00 per mitigating factor based upon the minimum fine amount of $100.00 permitted by law) and deducting from the maximum penalty the amount I have assigned for the specific mitigating factor. See U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89); aff'd by CAHO, 1 OCAHO 108 (11/29/89) at 5, 7. I will not follow the Felipe approach, however, to determine an appropriate civil money penalty against an employer who knowingly hires an unauthorized alien in

(continued...)

Complainant also seeks substantial fines for the paperwork violations, ranging from $300.00 to $480.00 for each violation. Complainant argues that the fine amount is justified because, inter alia, Respondents were educated about the verification requirements under IRCA two months prior to an INS compliance audit which disclosed the paperwork violations.

Respondents, on the other hand, argue for minimum fine for all paperwork violations because they allege that they did not know that they were required to prepare I-9s for each of their employees. Respondent Lim's response, filed on February 22, 1993, states: I swear I never knew that I have to keep records of I-9s[;] all I thought is that they show (sic) me Green card or birth certificate with driver (sic) license is (sic) enough. . . ."

It is clear from the pleadings and documents filed in this case that there is a significant conflict between the parties as to the "good faith" of Respondents in failing to prepare I-9 forms. This is a material fact that must be considered in mitigation of the civil money penalty for paperwork violations. Therefore Complainant's motion for summary decision as to the amount of civil penalties requested in Counts II through VI is denied.

Since there are material facts in dispute between the parties regarding the good faith of Respondents in hiring the illegal aliens listed in Count I and failing prepare or failing to properly prepare the I-9 forms in Counts II through VI, I will defer making any determination as to the appropriate civil money penalty or other relief provided for by law until after conducting an evidentiary hearing. In my view, failure to conduct an evidentiary hearing to determine an appropriate civil money penalty in this case would deny Respondents due process of law.

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[3](...continued)
violation of 8 U.S.C. § 1324a(e)(4), as neither the statute nor the regulations direct me to do so. 8 U.S.C. § 1324a(e)(5), 8 C.F.R. § 274a.10(b)(2).

Rather than apply a mathematical approach to determining an appropriate civil money penalty for a knowing violation, I will utilize an elastic judgmental approach and will consider numerous factors including the five mitigating factors applicable to paperwork violations. See United States v. Ulysses, Inc. et al, 3 OCAHO 449 (9/3/92) and United States v. Sergio Alaniz, d.b.a., La Segunda Downs, 1 OCAHO 297 (2/22/91) (Both cases stating that the five mitigating factors may be of assistance in determining the appropriate civil money penalty to assess against those who commit "knowing hire" violations).

Accordingly, it is hereby DECIDED and ORDERED that:

1. Complainant's motion for summary decision as to all allegations set forth in Counts I through VI of the complaint are hereby granted.

2. Complainant's motion for summary decision as to the amount of civil penalty requested for each count of the complaint is denied.

3. Respondents have violated § 274A(a)(1)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 324a(a)(1)(A) by hiring, after November 6, 1986, the four named aliens in Count I for employment in the United States, knowing that these aliens were not authorized for employment in the United States.

4. Respondents hired the twenty-one named employees in Count II of the complaint after November 6, 1986 and failed to prepare the Employment Verification Form ("Form I-9") for each of these employees in violation of § 274A(a)(1))(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B), by failing to comply with the requirements of § 274A(b) of the Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b);

5. Respondents hired the three named employees in Count III of the complaint after November 6, 1986 and failed to ensure that these three employees properly completed section 1 of the Form I-9 in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B), by failing to comply with the requirements of § 274A(b)(2) of the Act, 8 U.S.C. § 1324a(b)(1)(i).

6. Respondents hired Eric Childers a.k.a. Frederick Childers for employment in the United States after November 6, 1986 but failed to complete section 2 of the Form I-9 in violation of § 274A(a)(1)(B) of the Act by failing to comply with the requirements of § 274A(b)(1) of the Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii).

7. Respondents hired Mark Gardner for employment in the United States after November 6, 1986 and failed to ensure that this employee properly completed section 1 and Respondents failed to properly complete section 2 of the Form I-9 in violation of § 274A(a)(1)(B) of the Act, by failing to comply with the requirements of § 274A(b)(1) and (2) of the Act, 8 U.S.C. § 13243a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii).

8. Respondents hired the three named employees in Count VI of the complaint after November 6, 1986 and failed to make available for inspection the Employment Eligibility Verification Forms for these

employees in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1 324a(a)(1)(B), by failing to comply with the requirements of § 274A(b)(3) of the Act, 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2)(ii).

9. The amount of a civil monetary penalty and other relief provided for by law shall be determined after conducting an evidentiary hearing.

10. An evidentiary hearing in this case shall be held at the United States Federal Tax Court, Rm. 2041, Federal Building, 450 Golden Gate Avenue, San Francisco, California, on May 17 and 18, 1993, beginning at 9:00 a.m. for the limited purpose of determining an appropriate civil money penalty and any other relief provided for by law.

11. This decision will not become final for purposes of appeal until after I have conducted an evidentiary hearing and made findings of fact and conclusions of law as to an appropriate civil money penalty and other relief provided for by law.

SO ORDERED this 22nd day of March, 1993, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge