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. 93A00018
PENROD NATIONAL ENTERPRISES, INC., d.b.a. FLORAL BIONOMICS LANDSCAPE MANAGEMENT, Respondent.	)	

ORDER GRANTING COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES

I. *Procedural History*

On December 3, 1992, Complainant personally served Respondent, Penrod National Enterprises, Inc., d.b.a. Floral Bionomics Landscape Management, with a Notice Of Intent To Fine (NIF). The NIF alleged three counts of violation of Section 274A of the Immigration and Nationality Act (Act) and that Complainant intended to order Respondent to pay a total civil money penalty in the amount of $9,750.00

Specifically, the NIF alleged that, on or after November 29, 1990, in violation of Section 274A(a)(1)(B) of the Act, Respondent had failed to retain or make available for inspection the Employment Eligibility Form (Form I-9) for two named individuals. 8 U.S.C. 1324A(b)(3). Count II also alleged violations of Section 274A(a)(1)(B) in that after November 29, 1990, Respondent failed to properly complete section 2 of the Employment Eligibility Form (Form I-(9) for 4 named individuals. 8 U.S.C. 1324A(b)(1). Count III alleged violations of Section 274A(a)(1)(B) of the Act in that Respondent failed to ensure that 25

named employees properly completed section 1 and that Complainant failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9).

On December 3, 1992, Respondent requested a hearing on this matter. As such, Complainant filed a Complaint on January 28, 1993. On February 5, 1993, Respondent was properly and effectively served with a Notice of Hearing on Complaint Regarding Unlawful Employment and the Complaint itself. In the Notice, the parties were advised of the filing of the Complaint against Respondent and Respondent was:

> 1. informed of the requirement to file its Answer within thirty (30) days after receipt of the Complaint and that any previous answer filed with regard to the NIF would not satisfy this requirement;
>
> 2. warned that failure to file a timely answer might be deemed by the Administrative Law Judge as a waiver of his right to appear and contest the allegations in the Complaint and that a resulting default judgment might be issued in which any and all appropriate relief could be granted;
>
> 3. advised that the hearing would take place in or around San Francisco, California at a time and date to be determined; and,
>
> 4. advised that the proceeding would be conducted in accordance with the Department of Justice's regulations found at 28 C.F.R. Section 68, as amended by the Interim Rule of October 3, 1991, 56 F.R. 50049.

On February 8, 1993, I issued a Notice of Acknowledgment to the parties advising them that I would be presiding over this case. Respondent was again advised of the importance of filing a timely Answer and the resulting consequences of a failure to file. On March 8, 1993, Respondent filed its timely Answer in which it raised three affirmative defenses.

As an affirmative defense to Count I, Respondent's argued that the civil money penalties requested were excessive, that one individual named in Complaint was a United States citizen and that the second individual was terminated when his valid work permit expired. In defense of Counts II and III, Respondent argued that all errors were clerical in nature, that documents containing the necessary information were attached to the Forms I-9, and that the civil money penalties requested were excessive.

On March 19, 1993, Complainant filed a Motion To Strike Affirmative Defenses and a Motion for Summary Decision.

On April 27, 1993, I held a prehearing telephonic conference and after discussion with the parties it appeared that a settlement might be possible. As such, I stated that I would allow the parties more time to try to work out a settlement, but that if they had not been successful by June 14, 1993, I would grant the Complainant's motions. To date, the parties have not reached settlement and Respondent has not replied to either of Complainant's pending motions.

II. *Discussion*

A. Affirmative Defenses

Respondent's arguments raised in defense of Count I have been found, in prior case law, not be be valid affirmative defenses to violations of the Forms I-9 retention and presentation requirements of Section 274A of the Act as Forms I-9 must be prepared for all employees, citizens and non-citizens. U.S. v. Carlson, d.b.a., Jimmy on the Spot, 1 OCAHO 264, (11/8/90) at 2; U.S. v. Diamond Construction, Inc., 3 OCAHO 456 (6/15/92).

Additionally, Respondent's affirmative defenses to Counts II and III, i.e., that the violations were only clerical errors and that appropriate documentation was attached to the Forms I-9, have previously been found invalid as affirmative defenses to violations of Section 274A. U.S. V. Felipe, Inc., 1 OCAHO 93 (10/11/89); U.S. v. Acevedo, 1 OCAHO 95 (10/12/89); and US v. USA Cafe, 1 OCAHO 41 (2/6/89).

Respondent also appears to argue that its violations were not serious. Seriousness of the violation, under OCAHO case law, is not an affirmative defense to a paperwork violation; however, it is one of five factors that the administrative law judge must consider when determining the appropriate civil monetary penalties under § 274A of the Act. Section 274A(e)(5); U.S. v Valladares, 2 OCAHO 316 (4/15/91); U.S. v. Cafe Camino Real, Inc., 1 OCAHO 307 (3/25/91).

Likewise, allegations that copies of documents were attached to incomplete Forms I-9 has not been found to be either an affirmative defense or a satisfaction of the verification requirements of § 274A of the Act. U.S. v. Carlson, 1 OCAHO 260 (11/2/90). Respondent's argument that the requested amount of civil penalties is excessive is an argument that may be raised when the amount of civil money penalties is argued and the factors under Section 274A(e)(5) are considered, but is not an affirmative defense.

Based on the above analysis, Complainant's Motion to Strike Affirmative Defenses is granted.

B. Motion for Summary Decision

1. Legal Standard

Under the Rules of Practice and Procedure 28 C.F.R. 68.38, a party may file a Motion for Summary Decision. Once such a motion is filed, the opposing party may not rest upon the mere allegations or denials of the pleadings but must respond by setting forth specific facts showing that there is a genuine issue of fact for the hearing. 28 C.F.R. 68.38(b). Based on review of the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, I may grant the motion if I find that 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. The Federal Rules contain a similar standard for granting summary decision, i.e., 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." Fed. R. of Civ. P. 56(c).

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 and any judicially noticed matters. Celotex Corp. v. Catret, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.CT. 2505, 2510, 91 L.Ed.2d 202 (1986); see also Consolidated Oil & 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.

2. Application

Respondent in this matter has not responded to the Complainant's Motion to Summary Decision pursuant to 28 C.F.R. 68.38(c) and all its affirmative defenses have been stricken.

With regard to liability for Count I, I have reviewed Complainant's exhibits and find that they prove, by a preponderance of the evidence,

the allegations in the Complaint and that Respondent's denials in the Answer are not persuasive.

As to Count II and III, I have reviewed the Forms I-9 filed by Complainant and Respondent's Answer and find that Complainant has proven the allegations, by a preponderance of the evidence, in Count II and III as the Forms I-9 have not been properly completed.

As there is no genuine issue of material fact in this case, Complainant is entitled to a summary decision. Section 274A(e)(5) provides that five factors must be considered when imposing civil money penalties for violations of Section 274A. Complainant has filed its statement with regard to the application of Section 274A(e)(5). Respondent has not. As such, on or before August 10, 1993, Respondent, may if it wishes, also submit a statement regarding this issue.

SO ORDERED this 27th day of July, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge