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. 93A00085
WOOD 'N STUFF,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION.

(November 9, 1993)

Appearances:

For the Complainant
John B. Barkley, Esquire

For the Respondent
Mark A. Kulla, Esquire

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *Procedural Background*

On April 16, 1992, Complainant ("INS") issued a notice of intent to fine ("NIF") Respondent, Wood N' Stuff ("Wood") $16,000.00. Complainant alleged that Wood failed to perfect employment eligibility verification paperwork (INS Form I-9), as to seventy-seven (77) listed employees, as required pursuant to section 101 of the Immigration Reform and Control Act of 1986 ("IRCA") as amended, 8 U.S.C. § 1324a. On April 23, 1992, INS served the NIF. By letter dated May 26, 1992, in accordance with procedural requirements, Respondent (Wood) addressed its request for hearing to the Immigration and Naturalization Service. Almost a year later, on April 23, 1993, the INS

filed a complaint with the Chief Administrative Hearing Officer ("CAHO") alleging the violations previously set out in the NIF.

The Complaint is in one count and alleges in the alternative that Respondent failed to prepare the Employment Eligibility Verification Form (Form I-9) and failed to retain and/or make available for inspection the Employment Eligibility Verification Form with respect to eighty (80) individuals whom Respondent hired for employment in the United States after November 6, 1986 in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act (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. § 264a.2(b), and alternatively 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)(3) of the Act, 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2).

On July 6, 1993 Respondent's counsel submitted a letter to this office stating that he no longer represented Respondent. I viewed this letter as a motion to withdraw. On July 9, 1993 I denied Respondent's counsel's request to withdraw from the case and ordered him to file an answer.

On July 26, 1993 Complainant filed a motion for default. On July 30, 1993 Respondent filed its opposition to the motion for default and its answer to the complaint, denying all the substantive violations of the complaint and asserting a number of affirmative defenses. Shortly thereafter, the motion for default was denied and I ordered the parties to begin discovery and prepare for an evidentiary hearing.

On September 28, 1993 Complainant filed a motion to amend the complaint and a motion for summary decision on all counts of the complaint. On September 29, 1993 I canceled the evidentiary hearing scheduled for November 8, 1993 and directed Respondent to respond to both motions on or before October 22, 1993.

Complainant's motion to amend, requests that the Complaint be amended to change the name of the twenty-third person in Count I from Jason Garcia to Jason Sheparal. Complainant states that the Notice of Intent to Fine and the complaint contain a typographical error that combines the two names into one person, Jason Garcia. Respondent does not object to the proposed amendment of the complaint. Taking into consideration Complainant's reasons for seeking the amendment and Respondent's failure to object, Complainant's motion to amend the complaint is granted. See 28 C.F.R. 68.9 (e).

The Respondent filed its Opposition to the Motion for Summary Decision on October 25, 1993 but admitted liability on all charges. Although Respondent admits liability to all the charges, it contests the amount of $16,000 as being excessive, and requests that I carefully consider the five (5) mitigating facts provided for in both the statute and regulations, and reduce the amount of the civil penalty. Respondent has also submitted facts which it argues mitigate against the civil money penalties sought by the government.

II. *Findings of Fact and Conclusions of Law*

A. Undisputed Facts

The Respondent, Wood N' Stuff aka Wood N' Stuff, Inc. ("Wood"), a Nevada corporation, was formerly located at 5620 West Charleston Blvd., Las Vegas, Nevada, but is currently defunct and does not have any assets.[1] The company was operated by Joseph Starr, who was its President and Joy Shirley, its Secretary and Treasurer.

On May 21, 1991 Respondent was served with a NIF and an administrative subpoena by Special Agent Greg Norwood. The "Inspection and Return" on the subpoena was set for May 24, 1991. At the request of Joy Shirley, the meeting was held at Wood's offices.

On May 24, 1991 a meeting took place at Respondent's office. At the meeting, Shirley presented Special Agent Cortinas with Respondent's payroll records and W-2 Wage and Tax Statements for the years 1988, 1989, 1990 and 1991. She did not have any Form I-9s for any of her employees, current or past. The Respondent's records show that all eighty (80) individuals listed in Count I of the amended complaint were employed and paid wages by Respondent after November 6, 1986.

B. Legal Standards in a Motion for Summary Decision

1. Motion for Summary Decision

In the interest of efficient resolution of disputes which do not require an evidentiary confrontation, the Supreme Court has established standards for deciding motions for summary decision. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The rules of practice and procedure for § 1324a cases before administrative law judges provide for entry of summary decision if the pleadings, other filing by the

[1] State records show that the corporate charter was revoked on December 1, 1992.

parties, or matters officially noticed" 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(c)[1992]. Title 28 C.F.R. § 68.38 reflects the principles of Celotex as applied in OCAHO caselaw. Esther Din Brooks v. KNK Textile, 3 OCAHO 528 (June 21, 1993). See also Morales v. Cromwell's Tavern Restaurant, OCAHO Case No. 93B00036 (June 10, 1993); U.S. v. Lamont Street Grill, 3 OCAHO 441 (July 21, 1992).

A summary decision may be based on a matter deemed admitted. Matters deemed admitted by a party's failure to respond to a request for admissions can form a basis for granting summary judgment. U.S. V. Sea Pine Inn, 1 OCAHO 87 (September 18, 1989).

C. Liability Found

After examining the pleadings and reviewing the legal arguments presented by both sides in this case, I have concluded that there is no genuine issue of material fact and that Complainant is entitled to summary decision. 28 C.F.R. § 68.38(c).

Although Respondent's answer indicates that it denies the allegations of the complaint and asserted a number of affirmative defenses including that it did not employ some of the individuals listed in the complaint, in its response to the motion for summary decision Respondent states in its "Statement of Facts" that "after reviewing the records and the Amendment to Complainant's Complaint, Respondent can no longer in good faith, deny that each and every individual, on that list, worked for Respondent." Respondent further states in its "Argument" that it "must concur that the only issue is the amount of fine to be assessed in this case." Respondent concludes its response by stating in its "Conclusion" that it "agrees that based upon the evidence before the tribunal there is no genuine issue of material fact regarding liability."(emphasis added).

Thus, for the purpose of analyzing Complainant's motion for Summary Decision, it is my view that, on the basis of Respondent's admissions, there is no need to proceed with an evidentiary hearing on the merits because there is no genuine issue as to any material fact . See Celotex Corp. v. Catrett, supra.

Accordingly, for the forgoing reasons, I find that Respondent has violated § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(1)(B), in that Respondent hired for employment in the United States after November 6, 1986 those individuals named

in count one of the amended complaint without complying with the verification requirements of § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).

D. Civil Penalties

1. Mitigation

Since I have found that Respondent has violated § 1324a (a)(1)(B) of Title 8, in that Respondent hired for employment in the United States, individuals without complying with the verification requirements in § 1324a(b) of the Act and 8 C.F.R. § 274a.2(b) with respect to all charges in Count I of the amended complaint, assessment of civil penalties are required as a matter of law. See, § 1324a(e)(5).

Section 1324a(e)(5) states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The regulations reiterate the statutory penalty provision, including the mitigating factors which should be taken into consideration for paperwork violations. See 8 C.F.R. § 274a. 10(b)(2). These five mitigating factors, however, are not the only factors that may be considered in mitigation of the fine. United States v. Pizzuto, 3 OCAHO 4447 (August 21,1992). I intend in this case to add two additional mitigating factors: the financial condition of the Respondent and the business status of the company.

In the case of United States v. Felipe, 1 OCAHO 93 (October 11, 1989) aff'd by CAHO, November 29, 1989, I discussed my view of the statutory and regulatory language regarding mitigation of penalty for record keeping violations and applied a mathematical formula in determining an appropriate civil money penalty. I do not intend on following the Felipe mathematical method of assessing an appropriate civil monetary penalty in this case but rather a judgmental approach, because the Respondent company is defunct and has no assets, and

there is no evidence that Respondent was involved in deliberately seeking and hiring illegal aliens.[2]

(a) Size of the business

The parties agree that this was a small business. Complainant argues that because this was a small business, it was quite capable of monitoring and complying with the paperwork requirements of IRCA. Although Complainant concedes I should mitigate because of the size of the business, it argues that mitigation should not be for the maximum amount under my formula.

Respondent states that there was a minimal staff that took care of the paperwork, and that most of the staff was involved with selling, finishing, delivering and assembling furniture items. Moreover, Respondent argues that many of these employees worked on a part-time basis and for a very short period of time. Respondent further states that the fact that there were 80 employees working over a four year period indicates that there was a great deal of turnover. Respondent further argues that Shirley, who was operating the business, was not familiar with the reporting requirements and that therefore I should mitigate because of the lack of expertise.

Since it is clear from the record that Respondent is a small company, I will mitigate for size of business.

(b) Good Faith

I have previously defined "good faith" as "the honest intention to exercise reasonable care and diligence to ascertain and comply with the record keeping provisions of IRCA." See United States v. Basim Aziz Hanna, DBA Ferris and Ferris Pizza, 1 OCAHO 200 (July 19, 1990) at 6. Additionally, I have discussed the necessity of applying an objective reasonable standard to the subjective "honest intention component of this definition." United States of America v. The Body Shop, 1 OCAHO 185 (June 19, 1990) at 4-5.

---

[2] If I had applied the Felipe mathematical formula to this case, the civil penalty would have been in excess of $30,000. A fine of this amount for a company, defunct and with no assets would not be fair and reasonable, nor consistent with the purpose of IRCA's sanction provisions, especially if Respondent is considering refinancing and re-opening its business operations. Since the Respondent is defunct and has no assets, it may have been more expedient and cost effective for the parties to have settled this case for a minimum fine instead of by motion for summary decision.

Complainant argues that the facts in this case show that Respondent failed to exercise reasonable care and diligence to ascertain and comply with the record keeping provisions of IRCA, and has given no reason for failing to implement the record keeping requirements of the law. Respondent concedes that it failed to ascertain the record keeping obligations under IRCA, but argues that because INS only found two of its employees who were illegal and unauthorized for employment, this infers Respondent did not intentionally evade the verification requirements of IRCA.

The fact that there were only two illegal aliens working for Respondent that are listed in the complaint shall be considered in assessing as a mitigating factor whether the employees hired by Respondent were unauthorized aliens. This fact, however, does not support a finding that the employer acted in good faith in failing to comply with the record keeping provisions of IRCA.

Since there is no evidence in the record that Respondent made any effort to ascertain or comply with the record keeping provisions of IRCA, I cannot mitigate for this factor.

(c) Seriousness of the Violation

The evidence in this case shows that Respondent did not take any steps to become familiar with the record keeping provisions of IRCA. As a result, it failed to prepare any I-9s for any of its employees. I have previously held that the negligent failure to fill out any part of an I-9 form, even if due to mere carelessness, is serious because it completely defeats the purpose of the verification provisions under IRCA. See Felipe at 11.

Respondent concedes in its responsive brief that it cannot ask for any mitigation under this factor. In view of the fact that it is undisputed that Respondent failed to prepare any I-9 Forms and did not take any steps to discover or learn about its obligation to verify employees eligibility to work, I cannot mitigate for this factor.

(d) Whether or Not the Individual was an Unauthorized Alien

Complainant alleges that two of the employees listed in the complaint are unauthorized aliens. More specifically, on May 18, 1991, INS agents conducted a consensual employee survey at Respondent's business and apprehended two illegal Mexican aliens, Juan Maldonado-Luna ("Luna") and Rafael Lozano-Losa ("Losa") (listed as employees 46 and 49 in the complaint) who were unauthorized for

employment in the United States. Respondent argues that it should receive some mitigation in penalty because only two of the eighty employees listed in the complaint were unauthorized aliens. I agree that mitigation on all but two of the charges in the complaint shall be mitigated because there is no evidence in the record that seventy-eight (78) employees of Respondent were unauthorized aliens.

(e) No Prior History of Violations

The record clearly shows that Respondent has no prior history of violating the paperwork requirements of IRCA. I will therefore mitigate for this factor.

(f) The Financial Condition of Respondent

It is undisputed from the record that Respondent has no assets. Accordingly, I will mitigate for this factor.

(g) The Business Status of the Company

It is also undisputed from the record that Respondent is defunct and is not currently in operation. Accordingly, I will mitigate for this factor.

2. Amount of Civil Penalty.

Upon consideration of the statutorily-mandated factors for determining an appropriate civil money penalty, and the two additional factors included in my analysis under mitigation, I find that for all the alleged violations described in Count I of the amended complaint, except for those relating to employees Luna and Losa, the appropriate amount of penalty for each of the 78 violations shall be $150.00 per violation for a total amount of $11,000.00. I further find that the appropriate amount of penalty for the remaining two violations shall be $200.00 for each individual for a total amount of $400.00.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue as to any material facts has been shown to exist with respect to any of the eighty (80) allegations in Count I of the Complaint and that therefore, pursuant to 8 C.F.R. § 68.38, Complainant is entitled to a summary decision as to the allegations in Count I of the Complaint as a matter of law.

2. That Respondent violated § 274A(a)(l)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a (a)(1)(B), in that Respondent hired, for employment in the United states after November 6, 1986, the eighty (80) employees listed in Count I of the amended complaint without complying with the verification requirements of § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).

3. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. § 1324a(a)(1(B) and considering the business status and financial condition of Respondent, it is just and reasonable to require Respondent to make payment in the sum of $150.00 as to each individual named in the complaint, except as to Juan Maldonado-Luna and Rafael Lozano-Losa. It is further just and reasonable for Respondent to make payment in the sum of $200.00 with respect to Juan Maldonado-Luna and $200.00 with respect to Rafael Lozano-Losa. The total amount of civil penalty that Respondent shall pay for committing the eighty (80) violations listed in the complaint is $11,400.00.

4. This decision and order is the final decision of the judge in accor-dance with 8 U.S.C. §§ 1324a(e)(7), (8) and 28 C.F.R. § 68.52(C)(iv) [1991]. As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final action of the Attorney General unless, within thirty (30) days from the date of this decision and order, the Chief Administrative Hearing Officer shall have notified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. § 1324a(e)(7),(8); 28 C.F.R. § 68.53.

SO ORDERED on this 9th day of November, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge