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. 92A00275
KANGAROO EXPRESS OF PUEBLO, INC., d.b.a. KANGAROO EXPRESS OF PUEBLO, Respondent.	)	

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

(November 29, 1993)

Appearances:

For the Complainant
Weldon S. Caldbeck
General Attorney
Immigration and Naturalization Service

For the Respondent
Frank Titoni, Esquire

Before:

E. MILTON FROSBURG
Administrative Law Judge

I. *Procedural History*

On December 10, 1992, Immigration and Naturalization Service (INS), through its attorney, Weldon S. Caldbeck, Esquire, filed a Com-plainant against Kangaroo Express of Pueblo, Inc., d.b.a., Kangaroo Express of Pueblo, Respondent. In said Complaint, Complainant alleged violations of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1324a. The Complaint, incorporated in its entirety a Notice of Intent to Fine and Respondent's request for hearing dated October 20, 1992, and was served upon the Respondent on or about September 9, 1992. Said Complaint contained one count of alleged violations of the Act. Count I of the Complaint alleged twelve (12) violations of 8 U.S.C. § 1324a(a)(1)(B) of the Act for failure to make available for inspection the Employment Eligibility Verification Form (Forms I-9) for the twelve identified employees. Complainant requested award of civil money penalties in the amount of $1,800.00, i.e., $150.00 for each identified individual.

On January 20, 1993, the Respondent, through its attorney, Frank W. Titoni, timely filed an answer to the Complaint denying the allegations of Count I in the Complaint. Respondent requested a dismissal of the Complaint.

The parties have been involved in settlement negotiations and discovery since that time. The court has had several telephonic confer-ences with the parties in order to try to amicably conclude this case.

The first prehearing telephonic conference was held on February 23, 1993, and at that time the parties represented that they had agreed to a settlement amount but were still in negotiation regarding other issues.

A second prehearing telephonic conference was held with the parties on April 26, 1993, to determine why settlement documents had not been filed. At that conference, Respondent's counsel stated that his client was experiencing some financial difficulties and that he expected that the settlement documents would be completed within the next fourteen days.

A third prehearing telephonic conference was held on June 16, 1993, to discuss the status of the case and to determine why settlement documents still had not been filed. At that time, the parties represented that there were no factual disputes in the case and that the case was for most purposes, settled but that the issue of payment of the civil penalties was delaying completion of the case.

At that time, I directed Mr. Caldbeck to file a telephonic status report, on or before June 28, 1993, and to file the appropriate documents to complete this case.

In Complainant's status report, dated July 2, 1993, the Complainant indicated that the Respondent would agree to settle the matter by paying a reduced penalty of $1200 in sixteen (16) monthly installments of $75.00 each. Complainant stated that a revised settlement agreement, reflecting those terms, was sent to the Respondent's Attorney. They would then be filed with my office upon completion.

As the settlement documents had not been filed by August 2, 1993, I issued an Order of Inquiry on the matter. On August 9, 1993, I received a status report from Complainant indicating that he had not received the settlement papers from Respondent's counsel and had not been able to reach him at his office. Complainant requested that I withhold any telephonic conferences until after August 23, 1993, due to his being on detail.

On August 26, 1993, Complainant filed a status report which indi-cated that negotiations had broken down and that the case did not appear to be settled. Accordingly, Mr. Caldbeck was preparing a Motion for Summary Decision to bring the matter to conclusion.

On October 21, 1993, I issued an Order of Acknowledgment on Complainant's October 19, 1993 Status Report indicating that a Motion for Summary Decision would be filed on or before October 19, 1993.

On November 1, 1993, I received Complainant's Motion for Summary Decision and Memorandum in Support.

To date, neither Respondent nor his counsel has filed a Response to Complainant's Motion.

II. *Legal Standards for Summary Decision*

The relevant 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.

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-

noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 1555 (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 (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).

A summary decision may be based on a matter deemed admitted. See, e.g., Home Idem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 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 not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and U.S. v. One Heckler- Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (summary judgments are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue)

III. *Discussion*

As indicated above both attorneys agreed that there are no material factual disputes concerning the alleged violations in the Complaint. Although neither Respondent nor his attorney has filed a response to the Motion for Summary Decision, said Motion is ripe for consideration.

After a careful review of all the evidence of record, I find that there is no genuine material issue that exists as to the facts in this particular case. The evidence of record substantiates the elements of the alleged violations. Respondent is a corporation authorized to do business in the State of Colorado with its principle place of business being in the city of Pueblo, Colorado, as shown by the Articles of Incorporation for the business, and attached in the Memorandum for Summary Decision. Further, Respondent admitted hiring each of the individuals listed in the Complaint and each can also be found on the employee list provided by the Respondent during the Form I-9 audit conducted on August 4, 1992. It is apparent that none of the said employees are g randfathered as that business did not incorporate and commence business until 1990.

It is also apparent and sustained that the referenced inspection of Forms I-9 was conducted after proper notice to the business; the first Notice of Inspection was personally served on the Respondent on June 23, 1992. See Affidavit under Memorandum of Summary Decision. The Second Audit was conducted on August 4, 1992 after personal service of a Notice of Inspection was served on July 27, 1992. See

Clark Affidavit under Memorandum for Summary Decision. It is also apparent and sustained that the Respondent did not comply with the Employment Verification Requirements of 8 U.S.C. § 1324a(b) in that no Forms I-9 were provided to the Complainant during the July 1, 1992, audit and only one Form I-9 was provided during the August 4, 1992, audit.

Although, Respondent claimed at the August 4, 1992 audit that Daniel Cooper was an independent "contract carrier" and that no Form I-9 was needed for him, Complainant upon inspection, was unable to find an employment contract in his file, but, did find a standard employment application. Additionally, in his Affidavit, Rollie Clark, Special Agent of the INS, stated that Mr. Caselnova, President of the Respondent corporation had admitted that Daniel Cooper worked as an employee for one month before he was switched to a "contract carrier". Thus a Form I-9 would have been required for Mr. Cooper for that time. However, no Form I-9 had been prepared. Therefore, based on a careful review of all the evidence of record, I grant Complainant's unopposed Motion for Summary Decision as to liability.

IV. *Civil Penalties*

With respect to the determination of the amount of civil penalties to be set for the violations of the paperwork requirements of 8 U.S.C. § 1324a; § 274A(e)(5) of the Act, which corresponds to 28 C.F.R. 65.52(c)(4), states:

> The order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100.00 and not more than $1,000.00 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.

I have previously held that I am not restricted to considering only these five (5) factors when considering my determination. See U.S. v. Pizzutto, 2 OCAHO 447 (8/21/92).

A. Factors

In its Memorandum the Complainant indicated that it does not feel that a maximum fine is warranted in this case and as such has miti-gated three out of the five factors for consideration. It assessed a total civil money penalty in the amount of $1,800.00 ($150.00 per violation).

1. Size of the Business of the Employer Being Charged

The Complainant conceded that the Respondent's business size should not be considered as an aggravating factor. Respondent has not submitted argument with respect to this particular factor. Therefore, I find that this Factor should mitigate concerning all violations in Count I.

2. Good Faith of the Employer

The Complainant argued in its Memorandum that there was a lack of good faith on the part of the Respondent to ascertain, understand, and follow-up on its obligations under IRCA.

There was no response from the Respondent considering this factor. I agree with the argument of the Complainant that there was a lack of good faith on Respondent's part and in its obligation to comply with the regulations found in 8 U.S.C. § 1324a. As such, I find that it would not be appropriate to mitigate civil money penalties based on this factor.

3. Seriousness of the Violation

In its Memorandum, Complainant argued that all the violations were serious. Failure to prepare and make the forms available defeats the very purpose of the law and can contribute, significantly to the contin-ued employment of unautho-rized people.

Previous case law has found that a serious violation is one which, "renders ineffective the Congressional prohibition against employment of unauthorized aliens". U.S. v. Vallares, 2 OCAHO 316 (4/15/91). See also U.S. v. Dodge Printing Centers, 1 OCAHO 125 (1/12/90). The Respondent has not responded to this particular factor.

After thoroughly considering this particular factor, I find that Re-spondent's failure to prepare and/or make available the Forms I-9s at the time of the audits is serious. Therefore, I will not mitigate the civil money penalties based on this factor.

4. Whether or not the Individual was an Unauthorized Alien

Complainant argued in its Memorandum that this is not an aggravated factor since there was no indication of an unauthorized alien among the violations in Count I. Therefore, I find that this factor may be used to mitigate the civil money penalties.

5. History of Previous Violations of the Employer

Complainant indicated that there is no history of previous violations. Therefore, I will mitigate this particular factor.

V. *Findings of Fact and Conclusions of Law*

I have considered the pleadings, memoranda and arguments sub-mitted by the parties. Accordingly, I make the following findings of fact and conclusions of law:

1. That the Respondent has violated § 274A(a)(1)(b) of the Act, 8 U.S.C. § 1324a(a)(1)(b), by failing to make available for inspection the Employment Eligibility Verification Forms I-9 for the twelve identified employees in Count I of the Complaint;

2. That there are no genuine issues of material fact with respect to the liability as to the individuals named in Count I of the Complaint and, therefore, the Complainant's Motion for Summary Decision is granted regarding each of them;

3. That after careful consideration of the five factors under § 1324a(a)(e)(5) the total assessment of civil money penalties in the amount of $1,800.00 is found to be both reasonable and proper and well within the parameters of 8 U.S.C. § 1324a(e)(5) of the Act; and

4. That the Respondent is ordered to pay to the Complainant the sum of $1,800.00 in civil money penalties.

Under 28 C.F.R. 68.53(a) a party may file with the Chief Administrative Hearing Officer, a written request for review of this decision and order together with supporting arguments. Within thirty (30) days of the date of the Administrative Law Judges Decision and Order, the Chief Administrative Hearing Officer may issue an order which modi-fies or vacates the Administrative Law Judge Decision and Order.

IT IS SO ORDERED this 29th day of November, 1993.

E. MILTON FROSBURG
Administrative Law Judge