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. 93A00176
OROZCO-MINJARES, Respondent.	)	

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

(February 2, 1994)

Marvin H. Morse, Administrative Law Judge

Appearances: Lee Abbott, Esq., for Complainant.
Manuel Orozco-Minjares, pro se.

I. *Introduction*

On September 23, 1993, the Immigration and Naturalization Service (INS or Complainant), filed its complaint, dated September 20, 1993, in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint includes an underlying Notice of Intent to Fine (NIF), served by INS upon Manuel Orozco-Minjares (Orozco or Respondent) on April 28, 1993. The complaint consists of one count which charges Respondent with failure to properly complete section 2 of the Form I-9 for two named individuals. INS demands a total civil money penalty of $200, $100 for each individual, as assessed in the NIF. Exhibit B to the complaint is Respondent's May 3, 1993 request for a hearing.

On September 29, 1993, OCAHO issued a Notice of Hearing (NOH), which transmitted the complaint to Respondent. The NOH cautioned Respondent that failure to answer the complaint within thirty (30) days of receipt might result in a waiver of the right to appear and contest Complainant's allegations. Respondent was warned explicitly that absent a timely answer, the judge might "enter a judgment by default along with any and all appropriate relief."

The NOH was served on Orozco on October 4, 1993, by certified mail, as confirmed by the return receipt delivered to OCAHO by the Postal Service.

On November 26, 1993, Complainant filed a Motion For Judgment by Default, asserting that because Respondent did not file a timely answer he is in default. On December 3, 1993, I issued an Order to Show Cause inviting Respondent to show cause, if any, as to why judgment should not be entered against him. That Order gave Orozco until December 20, 1993 to show cause as to why he failed to answer the complaint, and why a default judgment should not issue.

On December 20, 1993 Orozco filed a letter-pleading dated December 16, 1993. His letter-pleading states that:

> I failed to timely answer to the complaint back in Sep 20, 93 due to not understanding the request needed on my part. Now I am answering prior to the date of 20 Dec 93 to ask for a cause to withdraw the Default Judgment. I understand that I didn't ask for proof of been [sic] able to work in the United States. I am, like I stated in a previous letter dated May 3, 93, a sub-contractor and I never get workers on a regular basis and I wasn't aware of such forms that needed to be filed.
>
> Anyhow, my petition is that one of the workers that I am being charged for is my son, Manuel Orozco, Jr. He is a born American Citizen and attached you'll find his birth certificate copy and a copy of his social security. If at any, I should only be charged for Ricardo Sarabi-Caballero for not having the correct or updated documentation needed for legal presentation of employment eligibility verification. This is all in reference to Case #93A00176.
>
> I appreciate any attention given to this matter.

Because that filing failed to show that a copy was served on Complainant, by Order dated December 21, 1993, I forwarded a copy of Respondent's response to Complainant. That order also recited that:

> The rules of practice and procedure of this Office, and common courtesy, require that any filings with the judge must be accompanied by a certificate of service indicating that a copy of such filing has been served on the other party. 28 C.F.R. §68.6(a). A

copy of the rules were provided to Respondent with the Notice of Hearing issued September 29, 1993.

Failure of a party to certify service of a copy of each filing on the opposing party, and to effect that service, may result in my resolving this case in favor of the other party.*

II. *Discussion*

Liability and Civil Money Penalties Discussed

The December 21 Order acknowledged Respondent's defense that one of the employees is his son, a U.S. citizen. As noted in that Order and reiterated here, I find and conclude that the defense of U.S. citizenship and of family relationship is irrelevant to liability for incomplete paperwork under §1324a. Accordingly, I find Orozco liable for failure to complete Forms I-9 for the two individuals named in the complaint.

Complainant proposed the statutory minimum civil money penalty. In that context, it would be a futile exercise to analyze its assessment of $100 per individual upon explicit consideration of the five factors set forth and mandated by 8 U.S.C. §1324a(e)(5). This is so because upon a finding of liability, the Judge lacks discretion to reduce the civil money penalty below the statutory minimum, i.e., $100 per individual. 8 U.S.C. §1324a(e)(5). Where INS proposes the minimum civil money penalty, the statutory imperative of §1324a(e)(5) is necessarily satisfied, and Respondent has no claim to the contrary.

On January 10, 1994, Complainant filed a Motion for Summary Judgment dated January 4, 1994. Complainant's motion, contends that since Respondent did not deny the allegations of the complaint, there is no issue of material fact in dispute. Therefore, says INS, its motion for summary judgment should be granted pursuant to 28 C.F.R. §68.38.

Respondent did not respond to Complainant's Motion For Summary Judgment.

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*Failure to provide any indication that a filing has been served on the other party renders the filing susceptible to treatment as an ex parte communication. Although not the premise on which this final decision and order issues, I note that, as provided at 28 C.F.R. §68.36(b), one among several sanctions for filing an ex parte communication is an "adverse ruling on the issue which is the subject of the prohibited communication."

Summary Judgment Granted to Respondent

In the interest of efficient judicial 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 §1324b cases before administrative law judges provide for entry of summary decision if the pleadings, other filing by the 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. See e.g., Holguin v. Dona Ana Fashions, OCAHO Case No. 93B00005, 4 OCAHO __, (2/1/94) at 4; Brooks v. KNK Textile (Partial Summary Decision Dismissing National Origin Discrimination Claim and Order of Inquiry), 3 OCAHO 528 (6/21/93) at 4; Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524 (6/10/93) at 4-5; Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 2-3; U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92).

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon the preponderance of the evidence:

1. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing as alleged in the complaint to comply with the requirements of 8 U.S.C §1324a(b)(1) with respect to the individuals named in Count One (the only count) of the complaint.

2. 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), it is necessary as a matter of law and appropriate and just that Respondent be required to make payment as follows:

Count One: $100.00 as to each named individual, for a total of **$200.00**.

3. That this case stands for these propositions of law:

(a). The obligation of employers to comply with employment eligibility verification (i.e., Form I-9 paperwork) requirements applies to all hires for employment in the United States, without regard to the citizenship status of the employee and without regard to the familial relationship between the employee and employer.

(b). Adoption by the administrative law judge of an assessment and proposal by INS that civil money penalties be adjudged at the statutory minimum obviates the need for explicit consideration of the factors set out in 5 U.S.C. §1324a(e)(5).

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. §68.52(c) (iv). As provided at 28 C.F.R. §68.53(a)(2), 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. 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. Dated and entered this 2nd day of February, 1994.

MARVIN H. MORSE
Administrative Law Judge