UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 8, 1994

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324a Proceeding
) OCAHO Case No. 93A00024
PRIMERA ENTERPRISES, INC.,)
D/B/A J.B.'S LOUNGE,)
Respondent.)
)

ORDER GRANTING COMPLAINANT'S SECOND MOTION FOR SUMMARY JUDGMENT

On December 29, 1993, complainant filed a Motion to Compel Answers to Discovery, asserting therein that on November 23, 1993, respondent and its counsel received complainant's Second Request for Admissions.

Under the governing procedural rule, 28 C.F.R. section 68.21(b), respondent was required to have replied to the request for admissions, or to have objected thereto, within 30 days of its receipt of that discovery request. Because the discovery request was served by mail, the response period was enlarged by five (5) days, so that respondent's reply was due by December 28, 1993. 28 C.F.R. § 68.8(c)(2).

Complainant asserted that respondent failed to respond to that discovery request, and requested that the undersigned issue an order compelling respondent to answer complainant's Second Request for Admissions, or to file proper objections thereto.

On January 14, 1994, the undersigned issued an Order Granting Complainant's Motion to Compel, in which respondent was ordered to

respond to complainant's request for admissions, and to have done so within 15 days of its acknowledged receipt of that order.

The Domestic Return Receipt attached to respondent's copy of the Order Granting Complainant's Motion to Compel indicated that it was received by respondent's counsel on January 21, 1994, giving respondent until February 7, 1994, to respond to that order.

On February 22, 1994, because no response had been received from respondent, complainant filed a Second Motion for Sanctions, requesting therein that the undersigned sanction respondent for failing to respond to the January 14, 1994 Order by deeming the facts contained in complainant's Second Request for Admissions as having been admitted by respondent.

On February 28, 1994, the undersigned issued an Order Granting Complainant's Second Motion for Sanctions, ordering therein that all matters contained in complainant's Second Request for Admissions be deemed admitted for the purpose of this proceeding, consistent with the provisions of 28 C.F.R. § 68.21(b).

On February 22, 1994, complainant also filed a Second Motion for Summary Judgment, asserting therein that if the undersigned were to deem the matters contained in its Second Request for Admissions as admitted by respondent, there would be no material fact in dispute, and complainant would be entitled to summary decision as a matter of law.

The rules of practice and procedure governing these proceedings provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c).

Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, providing for the entry of summary judgment in Federal court cases, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

The movant bears the initial responsibility of demonstrating the absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). United States v. PPJV Inc., 2 OCAHO 337, at 3 (6/4/91). Summary decision may be based on a matter deemed admitted. United States v. Goldenfield Corp., 2 OCAHO 321, 3 (4/26/91); United States v. Manca Imports, 1 OCAHO 267, at 5 (11/16/90).

Once the movant has carried its burden, the party opposing the motion must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; PPJV Inc., 2 OCAHO 337, at 3.

By order dated October 5, 1993, the undersigned granted complainant summary decision on the facts of violation alleged in Counts I and III in the Complaint.

The only violation alleged in the Complaint which remains at issue therefore is that which is set forth in Count II, in which complainant alleged that respondent hired Bretzel Leticia Garcia-Herrera for employment in the United States after November 6, 1986, but failed to prepare an Employment Eligibility Verification Form (Form I-9) for that individual, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

In order to prove that violation alleged in Count II, complainant must show:

1. Respondent hired for employment in the United States

2. Garcia-Herrera

3. after November 6, 1986

4. Respondent failed to prepare an employment verification form (Form I-9) for Garcia-Herrera.

As noted in the October 5, 1993 Order, respondent was deemed to have admitted elements 1, 2, and 3 above in the Order Granting Complainant's Motion for Sanctions. Order Granting in Part and Denying in Part Complainant's Motion for Sanctions, at 7 (10/5/93). Therefore, only element 4 remains at issue.

In its Second Request for Admissions, complainant requested that respondent make the following admission:

> That you failed to prepare an Employment Verification Form (Form I-9) relating to the following employee:
>
> 1. Bretzel Leticia Garcia-Herrera

In the February 28, 1994 Order Granting Complainant's Second Motion for Sanctions, respondent was deemed to have admitted that fact, as set forth in element 4 above.

Respondent's admissions are therefore sufficient to satisfy all four elements of the offense alleged in Count II of the Complaint. Because there are no material facts at issue with regard to that count, complainant is entitled to summary decision on the facts of violation therein as a matter of law.

For this reason, complainant's Motion for Summary Judgment is granted as it pertains to the facts of violation in Count II.

Because respondent is deemed to have admitted the facts of violation in all three counts contained in the Complaint, and because summary decision has been granted in complainant's favor as it pertains to the facts of violation in Counts I, II, and III, only the appropriate civil money penalty sums to be assessed with respect to those violations remain at issue.

An evidentiary hearing will therefore be held in order to determine the appropriate civil money penalty to be assessed for those violations, in accordance with the pertinent provisions of IRCA, 8 U.S.C. §§ 1324a(e)(4), 1324a(e)(5).

A telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted.

In accordance with the provisions of 8 U.S.C. §1324a(e)(3)(B), as well as the pertinent procedural regulation, 28 C.F.R. section 68.5(b), the

hearing shall be held at the nearest practicable place to the place where respondent resides or to the place where the violations occurred.

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JOSEPH E. MCGUIRE
Administrative Law Judge