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. 93A00167
ONION RIVER SPORTS, INC., Respondent.	)	

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AS TO LIABILITY ON ALL NINE CHARGES OF COUNT I

I. *Introduction*

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324a. The complaint alleges that Respondent, Onion River Sports, Inc., ("Respondent" or "Onion River") failed to prepare Employment Eligibility Verification Forms (Forms I-9) and/or failed to make available for inspection the Forms I-9 for nine listed individuals who were hired by Respondent after November 6, 1986 in violation of section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with the requirements of section 274A(b) of the Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1) and/or 8 C.F.R. § 274a.1(b)(2).

This matter is before me on the motion of Complainant, the United States Department of Justice, Immigration and Naturalization Service ("INS"), for summary decision as to liability filed pursuant to 28 C.F.R. § 68.38. For the reasons stated below this motion will be granted.

II. *Findings Of Fact And Conclusions Of Law.*

The pleadings and affidavits filed in this case show that there is sufficient undisputed evidence for granting the motion for summary

decision. The facts which are in dispute are not material, but will be noted in the facts.

A. The Facts

Respondent, is a corporation incorporated under the laws of the state of Vermont, with its primary place of business at Montpelier, Vermont where the alleged violations occurred. (Compl. ¶ 2) Warren Kitzmiller ("Kitzmiller") is president and owner of Onion River Sports, Inc.. (Kitzmiller Aff. ¶ 1)

In Complainant's Memorandum in Support of Motion for Summary Decision Complainant asserts that on January 14, 1988 an educational visit was conducted at Respondent's business location by Border Patrol Agent Patrick Huggins. At this time Huggins met with Respondent's owner, Kitzmiller and supplied him with an Employer's Handbook M-274 and I-9 forms. Kitzmiller indicated that he was aware of the Employer Sanctions provisions of the Immigration and Nationality Act. (C's Memo. Supp. Sum. D. at 1; see also Johnson Decl. ¶¶ 11,12).[1]

On February 4, 1993, subsequent to a General Administrative Plan ("GAP") referral, notice was forwarded to Respondent by INS agent James C. Johnson that an inspection of its I-9 forms would be conducted by an INS agent at Respondent's business on February 17, 1993 at 3:00 PM. Agent Johnson states that he contacted Kitzmiller by phone on February 17, 1993 to confirm the scheduled inspection.[2] He further states that Kitzmiller advised him that he was unaware of the law and did not have I-9s for any of his employees but he would meet Johnson at the scheduled time to receive instruction on the completion and maintenance of I-9s. (Johnson Decl. ¶¶ 1-6). Agent Johnson further states that he appeared at Respondent's place of business om February 17th at 3:00 pm but Kitzmiller was unavailable. Johnson states he left an Employers Handbook with one of Respondent's employees and rescheduled the inspection for February 24, 1993 at 10:30am. (Johnson Decl. ¶¶ 7,8).

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[1] The INS Employer Contact Worksheet dated 1/14/88 shows that Kitzmiller was supplied with I-9 forms and a M-274 handbook. The form also shows he knew about the record keeping requirements of IRCA. (Johnson Decl. Ex. B).

[2] Kitzmiller denies that Johnson contacted him on February 17, 1993. (Kitzmiller Aff. ¶ 4).

Kitzmiller declared that on February 18, 1993 he telephoned Agent Johnson to apologize for missing the meeting on February 17th and that during this call Johnson and Kitzmiller agreed to meet on February 24, 1994 at 10:30am. (Kitzmiller Aff. ¶ 7). Johnson stated that he confirmed the rescheduled inspection date with Kitzmiller by telephone on February 18, 1993, and at that time he requested that at the time of the inspection, Kitzmiller provide a list of Respondent's employees for the past two years. Johnson said that during this call Kitzmiller stated he would attempt to complete I-9s for all his then present employees. (Johnson Decl. ¶¶ 9-11).[3]

On February 18, 1993 Agent Johnson also contacted the U.S. Border Patrol Sector Headquarters, Swanton, VT in order to determine if Respondent had ever been a recipient of an education visit as to its responsibilities under the Employer Sanctions Provisions of the Immigration and Nationality Act, and was advised that Respondent's owner, Warren Kitzmiller, was the recipient of such a visit by Border Patrol Agent Patrick Huggins on January 14, 1988 and was then provided a Handbook for Employers and I-9 Forms. (Johnson Decl. ¶¶ 12, 13 and Ex. B).

On February 24, 1994 Agent Johnson met with Kitzmiller at the appointed time and place. At that time, agent Johnson was not presented with any I-9 Forms for any of Respondent's past or present employees. At the meeting Kitzmiller advised agent Johnson that he did not have any I-9 Forms, but he and Respondent's bookkeeper, Bill Cannon provide him with a list of Respondent's then current employees and their dates of hire. Johnson Decl. ¶¶ 15-17. The following is the list of employees working on the date of the inspection with their dates of hire that was provided to agent Johnson:

Christopher H. Moore, 11/9/92 (Count I ¶ A(1))
Charlotte M. Brewer, 3/12/91 (Count I ¶ A(2))
Denise L. Winnie, 6/18/91 (Count I ¶ A(3))
James Huntsman, hired prior to 1986
Judith L. Reiss, 9/29/90 (Count I ¶ A(4))
James Mason, 2/8/93 (Count I ¶ A(5))
Kurt H. Linder, 3/25/91 (Count I ¶ A(6))
Lauren R. Vanderen 7/10/92 (Count I ¶ A(7))

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[3] Kitzmiller denies Johnson's allegation that he would attempt to complete I-9s for all his then present employees. Kitzmiller states that "I was of an incorrect understanding regarding the I-9 Forms. I did not know, at that time, that I needed an I-9 Form for all employees." (Kitzmiller Aff. at ¶ 10).

Mark D. Codling, 3/17/92 (Count I ¶ A(8))
Jennifer Smith, 11/20/92 (Count I ¶ A (9))

(Johnson Decl. Ex. C).

According to Johnson, Kitzmiller stated that he did not have I-9s completed for any of his employees and also stated that he was sure he never hired an alien to work in his store. Agent Johnson said Kitzmiller explained his lack of paperwork on a "too cavalier attitude." (Johnson Decl. Ex. C).

Kitzmiller states that at the meeting he advised Agent Johnson that he had not completed I-9 Forms for any of his employees as it was his belief that none were required, and that Agent Johnson explained what his obligations under the law were at that time. Kitzmiller declared that he only had one I-9 Form and that was the copy that agent Johnson left him. He further stated that he expected that he would be given information regarding the quality of his compliance if there was a problem. (Kitzmiller Aff. ¶ 16).

Although Agent Johnson did not return to Respondent's business office after his February 24th meeting with Kitzmiller to determine if Respondent had complied with the paperwork requirements of IRCA, Kitzmiller claims that once the problem was pointed out to him, he had I-9 Forms completed for all his employees within three days of the February 24, 1993 meeting. (Kitzmiller Aff. ¶ 17).

B. Legal Standards 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 (9/19/85). The rules of practice and procedure for § 1324a cases before administrative law judges provide for entry of summary decision if the pleadings, other filings 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. Esther Din Brooks v. KNK Textile, 3 OCAHO 528 (6/21/93). See also Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524 (6/10/93); U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92).

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 (9/18/89).

C. Liability Found

IRCA provides that "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States--(A) an alien knowing the alien is an unauthorized alien [or] (B) an individual without complying with the requirements of subsection (b)." 8 U.S.C. § 1324a(a)(1)(B)(i). Subsection (b) provides in pertinent part that "[a] person or other entity hiring, recruiting, or referring an individual for employment in the United States . . . must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien." 8 U.S.C. § 1324a(b)(1)(a). Verification requires examination of certain documents, such as a U.S. passport, certificate of U.S. citizenship, certificate of naturalization, unexpired foreign passport (if it has an appropriate unexpired endorsement of the Attorney General authorizing the individual's employment in the U.S.), or a resident alien card or other alien registration card, subject to certain conditions. 8 U.S.C. § 1324a(b)(1)(B). Certain documents, including a social security card, birth certificate, or other documents established by regulation, may satisfy this requirement, provided they are accompanied by a driver's license, state identification card, or other document established by regulation. 8 U.S.C. § 1324a(b)(1)(C) and (D).

Respondent makes several arguments in defense of the allegations of the complaint. Although Kitzmiller admits that he was provided with a M-274 Handbook (January, 1988) on the paperwork requirements of IRCA, (Johnson Decl., Ex. B) he states that he misunderstood the earlier instructions by the Immigration and Naturalization Service as to the appropriate time, manner and means of filling out Form I-9. (Ans. ¶ F). More specifically, Kitzmiller believed that completion of the I-9 Forms was only required for "aliens or immigrants" or "a foreigner." (Kitzmiller Aff. ¶¶ 11, 18). Kitzmiller further stated that most of the employees that have worked for him over the years are people whom he had known for years prior to their employment with him. He stated that some were in the Submarine Service and others were on the Olympic Team. It never occurred to Kitzmiller that any immigration form would be required for these persons. Kitzmiller further states that since he never employed any foreigner or immigrant, he never filled out any I-9 forms. (Kitzmiller Aff. ¶¶ 17,18).

Stated more succinctly, Respondent is arguing that because it did not understand the paperwork requirements of IRCA, it should not be held liable for its failure to comply with the law. Respondent's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 569 (9th Cir. 1989). In Mester, Mester argued that he had a right to a thorough briefing as to its paperwork violations of IRCA prior to enforcement. In rejecting this argument the court stated that:

> Mester's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. It is true Congress provided for education of employers during the early period of IRCA. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanctions against an employer that can show that it has not received a handbook or other instruction, or (as here) that it has simply failed to pay attention to them.

Id. at 569-570.

Although Respondent's argument that it did not understand the law is not an affirmative defense, it can be considered in mitigation.

It is undisputed from the record in this case that Respondent hired for employment in the United States Christopher H. Moore, Charlotte M. Brewer, Denise L. Winnie Judith L. Reiss, James Mason, Kurt H. Linder, Lauren R. Vanderen, Mark D. Codling and Jennifer Smith after November 6, 1986 and failed to prepare an Employment Eligibility Verification form for any of these individuals until after its failure was discovered and disclosed to it on February 24, 1993. It is also undisputed from the record that on February 18, 1993, it was notified by the INS that there would be an inspection of its business records on February 24, 1993 to determine compliance with the paperwork requirements of IRCA. It is further undisputed that the INS conducted an inspection of Respondent's records on February 24, 1993 and no I-9 Forms had been prepared for any of its employees including those listed in Count of the complaint.

For the foregoing reasons, I find that Respondent has violated section 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 I of the complaint without complying with the requirements of section 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1) and 8 C.F.R. § 274a.2(b)(2).

D. Civil Penalties

Title 8 U.S.C. § 1324a(e)(5) sets out the statutory parameters for assessment and adjudication of the civil money penalty. Each paperwork violation requires a penalty of "not less than $100.00 and not more than $1,000.00 for each individual with respect to whom such violation occurred." Id.

In determining the quantum of penalty, I am required to consider the five factors prescribed by 8 U.S.C. § 1324a (e)(5): (1) size of the employer's business; (2) good faith of he employer; (3) seriousness of the violation; (4) whether the individuals involved were unauthorized aliens; and (5) the history of previous violations.

In the initial adjudication of liability for paperwork violations under 8 U.S.C. § 1324a(a)(1)(B), I apply a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations. See United States v. Felipe, Inc., 1 OCAHO 93 (10/11/89), aff'd by CAHO, 1 OCAHO 108, at 5, 7 (11/29/89) ("This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable," it was not to be understood as the exclusive method for keeping with the five statutory factors.); United States v. Broadway Tire, Inc., 2 OCAHO 310 (4/2/91); United States v. Cuevas, 1 OCAHO 273 (12/3/90); United States v. Hanna, 1 OCAHO 200 (7/ 19/90); United States v. Dittman, 1 OCAHO 195 (7/9/90); United States v. Body Shop, 1 OCAHO 157 (4/20/90). But see United States v. Wood'n Stuff, 3 OCAHO 574 (11/9/93) (where the Felipe formula would have resulted in a civil penalty greater than $30,000.00, I refused to apply it where the respondent company was defunct and had no assets and there was no evidence that the respondent was involved in deliberately seeking and hiring illegal aliens).[4]

Other OCAHO ALJs have applied the five statutory factors on a judgmental basis. See United States v. Giannini Landscaping, Inc., 4 OCAHO 573 (November 9, 1993) at 7 citing to other ALJ decisions.

I have found that Respondent violated all nine of the violations alleged in the complaint. Complainant seeks a penalty of $270.00 for each violation for a total of $2,430.00. As stated in Felipe, the maximum possible amount of mitigation is $900.00. There are, as indicated above, five (5) specified grounds of mitigation. Accordingly,

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[4] In view of the difficulty in obtaining OCAHO's earlier decisions, I will mail Respondent's counsel a copy of the Felipe and the Acevedo decisions to help him in advising his client how to proceed in this case.

I view each mitigating factor as constituting an amount of $180.00. See, Felipe, supra, at 5.

In view of the fact that Complainant's motion for summary decision is limited to liability, I will not make any findings on an appropriate civil penalty at this stage of the proceedings. Prior to making any finding on the amount of a civil penalty to access in this case, Respondent shall have an opportunity to submit to me either by testimony or by affidavits and documentation (i.e., Respondent's financial statement for past six months) any and all relevant evidence on mitigation. Complainant shall have an opportunity for rebuttal. Both parties shall also have an opportunity to submit briefs applying the Felipe formula in determining mitigation.

Accordingly, it is hereby ORDERED and ADJUDGED that:

1. Complainant's motion for summary decision as to liability on all nine allegations of Count I is GRANTED;

2. Respondent shall advise this office on or before August 19, 1994 whether is wants to submit evidence in mitigation at an evidentiary hearing or by filing appropriate pleadings.

3. If Respondent decides to submit its evidence in mitigation without an evidentiary hearing, such evidence shall be submitted with a brief in support thereof, on or before September 1, 1994.

4. Complainant may respond to any pleadings or briefs filed by Respondent on or before September 16, 1994.

SO ORDERED this 5th day of August 1994, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge