



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
) OCAHO Case No. 97A00116
) Judge Robert L. Barton, Jr.
SPRING & SOON FASHION INC.,)
d/b/a Y PLUS S CORPORATION,)
d/b/a Y PRUS S CORPORATION,)
Respondents.)
_____)

**ORDER GRANTING IN PART COMPLAINANT'S MOTION
FOR SUMMARY DECISION, DENYING COMPLAINANT'S
MOTION TO COMPEL, AND GRANTING COMPLAINANT'S
MOTION TO SUBSTITUTE COUNSEL**

(July 8, 1998)

I. INTRODUCTION

This case centers around Complainant's allegations that Respondent Spring & Soon Fashion Inc. (Spring & Soon) violated the Immigration and Nationality Act (INA) by hiring employees knowing they were unauthorized to work in the United States and by failing to comply with the employment eligibility verification requirements of the INA. Complainant also seeks to hold Respondent Y Plus Corporation d/b/a Y Prus Corporation (Y Plus) responsible for any violations actually committed by Spring & Soon. The main issues in this Order are:

- (1) whether Complainant has demonstrated that there are no genuine issues of material fact in this case; and
- (2) whether Complainant has demonstrated that it is entitled to judgment as a matter of law against Spring & Soon and/or Y Plus.

This Order disposes of all outstanding motions. For the reasons discussed in detail below, I find that Complainant has demonstrated that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law as to the liability of both Spring & Soon and Y Plus. However, I find that Complainant has not demonstrated that there are no genuine issues of material fact with respect to the amount of penalty this case warrants. As a result, I

- (1) GRANT Complainant's Motion for Summary Decision¹ as to liability for both Spring & Soon and Y Plus; and
- (2) DENY Complainant's Motion for Summary Decision as to the appropriate civil money penalty to assess.

II. BACKGROUND AND PROCEDURAL HISTORY

On September 27, 1996, the Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) relating to Respondent Spring & Soon Fashion Inc. on Mrs. Young S. Sung at the business premises of Y Plus S Corporation, d/b/a Y Prus S Corporation. Shofi Decl.² ¶5. Mrs. Sung's husband, Mr. Chang S. Sung, is listed as Spring & Soon's incorporator on Spring & Soon's certificate of incorporation, see C. Request Admiss. Ex. E, and as Spring & Soon's president on its I-9 forms, see *id.* Ex. A, but Mrs. Sung allegedly identified herself as Spring

¹ Complainant has entitled its filing a "Motion for Summary Judgment." The OCAHO Rules of Practice and Procedure provide for motions for summary decision, see 28 C.F.R. §68.38 (1997), which are similar to motions for summary judgment under Federal Rule of Civil Procedure 56. I will treat Complainant's Motion as a motion for summary decision, and I will refer to it as such.

² The following abbreviations will be used throughout this Order:

Shofi Decl.	Declaration of INS Agent John Shofi, attached to Complainant's Motion to Amend Complaint
Compl.	Original Complaint
Amended Compl.	Amended Complaint
C. Mot. Default	Complainant's Motion for Default Judgment
Ans.	Answer
Ans. to Amended Compl.	Answer to Amended Complaint
C. Mot. SD	Complainant's Motion for Summary Decision
C. Mot. Compel	Complainant's Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories
SCO	Show Cause Order
R. Response SCO	Respondents Response to Show Cause Order
C. Request Admiss.	Complainant's Request for Admissions, attached to Complainant's Motion for Summary Decision

& Soon's owner at the time of the INS inspection of Spring & Soon's I-9 forms, *see* Shofi Decl. ¶4. Mrs. Sung is listed as Y Plus' incorporator on its certificate of incorporation, *see* C. Request Admiss. Ex. G, and as Y Plus' president on its I-9 forms, *see id.* Ex. J.

By letter dated October 21, 1996, Spring & Soon timely requested a hearing in this matter through its then-attorney Mark C. Kalish. Complainant filed a five-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 22, 1997. That Complaint, which echoes the allegations of the NIF, asserts that Spring & Soon hired or continued to employ seven listed individuals knowing that they were unauthorized to work in the United States, in violation of section 274A(a)(1)(A) or 274A(a)(2) of the INA, as codified at 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2). Compl. ¶¶I.A-E. Complainant alleges that, on August 8, 1995, a Final Order was served on Respondent Spring & Soon for a first violation of section 274A(a)(1)(A) and/or 274A(a)(2) of the INA. Compl. ¶I.F. Complainant also alleges that Spring & Soon committed various violations of the employment eligibility verification system, all in violation of section 274A of the INA, as codified at 8 U.S.C. §1324a. *See* Compl. ¶¶II-V.

On July 23, 1997, Mr. Kalish filed a motion to withdraw his representation of Spring & Soon in this proceeding. In support of his motion, Mr. Kalish stated that, after repeated attempts, he had been unable to communicate with his client. Specifically, Mr. Kalish said that he had had no communications with Spring & Soon since approximately January 1997. Mot. Withdraw ¶6. After receiving a copy of the Complaint in late May or early June 1997, Mr. Kalish tried to telephone Spring & Soon, but found that telephone service was disconnected. *Id.* ¶7. Mr. Kalish stated that, on June 16, 1997, he visited Spring & Soon's business premises at 262 West 38th Street, 15th Floor, New York, New York, but that the business no longer was there. *Id.* ¶8. Mr. Kalish stated that he then requested from directory assistance any listings for "Spring & Soon Fashions" in any of New York City's five boroughs, but that there were no such listing. *Id.* ¶9. Finally, Mr. Kalish asserted that, to the best of his knowledge, Spring & Soon no longer was doing business. *Id.* I granted Mr. Kalish's motion to withdraw by order dated July 24, 1997.

Complainant filed its Motion to Amend Complaint and a document entitled "Second Amended Complaint"³ on September 3, 1997. Through its proposed amendment, Complainant sought to add Y Plus S Corporation d/b/a Y Prus S Corporation as a respondent on the grounds that it was a mere continuation of Respondent Spring & Soon Fashion Inc. and, thus, could be held responsible for the debts and/or liabilities of Spring & Soon. Also on September 3, Complainant filed its Motion for Default Judgment. Complainant stated that, as of August 14, 1997, no answer had been filed in this case. Mot. Default ¶4. Therefore, Respondent had "failed to plead or otherwise defend within thirty days of the receipt of [the] Complaint as required by 28 C.F.R. §68.9(a)." *Id.* ¶5. Complainant sought default judgment against both Spring & Soon and Y Plus.

On September 11, 1997, I entered an Order Regarding Complainant's Motion to Amend and Motion for Default. In that Order, I noted that Complainant had not explained why Spring & Soon should be considered as doing business through Y Plus S Corporation d/b/a Y Prus S Corporation, other than the fact that it might have the same owner. I ordered Complainant to file a legal brief no later than September 30, 1997, in which it would discuss the facts in the record that supported its assertion that Spring & Soon is doing business through Y Plus and the applicable legal principles governing that determination. Since the NIF was not served on Spring & Soon at the address listed for it on the Complaint, I ordered Complainant also to discuss in its brief whether the NIF was properly served on Spring & Soon. I granted leave to the Sung's to file a response to Complainant's Motion to Amend, its brief, and its Motion for Default Judgment no later than October 14, 1997.

Regarding Complainant's Motion for Default, I noted that Spring & Soon still had not filed an answer as of September 11. I stated that, if I granted Complainant's Motion to Amend, Respondent would have thirty days to answer the amended complaint; even though Spring & Soon had not yet filed an answer to the original Complaint, if an amended complaint is filed, a respondent must receive a chance to answer the complaint as amended. As a result, I stated that I would defer ruling on the Motion for Default until I had ruled on the Motion to Amend. I explained, however, that

³According to the official case file, no other amended complaint had been filed. Therefore, this was not the second amended complaint but, rather, the first amendment. Thus, it will be referred to as the amended complaint.

Spring & Soon was in default with respect to the original Complaint and, if I denied the Motion to Amend, Spring & Soon could face a default judgment. Consequently, I ordered Spring & Soon to file an answer to the Complaint immediately upon receipt of my September 11 Order to avoid entry of a default judgment. I also ordered Spring & Soon to explain why it did not file an answer to the Complaint in a timely manner.

Complainant filed its Memorandum of Law in Support of Motion to Amend Complaint on October 14, 1997.⁴ On October 17, 1997, Raymond J. Aab filed a Notice of Appearance as legal counsel for Spring & Soon and also filed Respondent's Answer to the Complaint and its Opposition to Complainant's Motion to Amend Complaint. Spring & Soon's Opposition also responded to Complainant's Motion for Default Judgment. In its Answer, Spring & Soon responded to the factual allegations of the Complaint and asserted as an affirmative defense that the NIF and the Complaint in this case were not properly served on Spring & Soon.

By Order dated December 9, 1997, I granted Complainant's Motion to Amend Complaint by adding Y Plus as a respondent. Although I did not find that Y Plus was in fact a mere continuation of Spring & Soon, I granted Complainant's Motion to Amend by adding Y Plus as a respondent because Complainant had alleged enough information to allow it the opportunity to prove its allegations as to Y Plus. *See* Order Granting C.'s Mot. Amend at 11. Also in the December 9 Order, I addressed the issue of whether the NIF was properly served on Respondent Spring & Soon. For the reasons stated in that Order, I found that, even assuming service was not accomplished in compliance with the applicable regulation, dismissing the case to make the INS comply with the relevant regulation was unwarranted. *See id.* at 3-8. Additionally, I denied Complainant's Motion for Default and gave Respondents until January 8, 1998, to file their answer to the Amended Complaint.

Respondents filed their Answer to the Amended Complaint on January 12, 1998. Although the certificate of service reveals that this Answer was served by mail on January 7, 1998, "file" means that the document must be received in my office by the given deadline, not that it merely must be postmarked by then, *see*

⁴I granted Complainant's request, communicated by letter on October 10, 1997, to extend the previous deadline to October 14.

28 C.F.R. §68.8(b) (1997). I had explicitly reminded Respondents of that provision, *see* Order Granting C.'s Mot. Amend at 13 n.13, but they still failed to ensure that their Answer was filed by the January 8 deadline. Respondents responded to the allegations contained in the Amended Complaint, *see* Ans. to Amended Compl. ¶¶ 1-15, and asserted two affirmative defenses. As a first affirmative defense, Respondents alleged that service of the NIF was "not made in compliance with legal requirement." Ans. to Amended Compl. ¶ 16. As a second affirmative defense, Respondents alleged that "Y Plus S Corporation and/or Y Prus S Corporation is a separate and distinct entity from [Spring & Soon], and [Spring & Soon] is not responsible for the liabilities and conduct of Y Plus S Corporation and Y Prus S Corporation and vice versa." Ans. to Amended Compl. ¶ 17.

On April 23, 1998, Complainant filed a Motion for Summary Decision and a Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories. In the Motion for Summary Decision, Complainant asserted that on March 13, 1998, Complainant served requests for admissions on Respondents (which are attached to its Motion), and that Respondents, as of April 21, 1998, had not responded to the same. In the Motion to Compel, Complainant similarly asserted that it served Respondents with interrogatories and requests for document production on March 13, and that Respondents had failed to respond to those discovery requests as of April 21.

Respondents were entitled to file a response to Complainant's Motion for Summary Decision on or before May 6, 1998; they also were entitled to file a response to Complainant's Motion to Compel on or before May 7, 1998. *See* 28 C.F.R. §§ 68.11(b); 68.8(c)(2) (1997). Respondents had filed no responses to either of those Motions by the appropriate deadlines. On May 8, 1998, I issued a Show Cause Order (SCO) in which I gave Respondents the opportunity to state whether their attorney's office received the requests for admissions and the Motion for Summary Decision, and when each was received, and to show cause why I should not deem each of the admissions admitted by Respondents pursuant to 28 C.F.R. §68.21(b). Respondents filed their Response to the SCO on May 21, 1998. They attached to the Response copies of their answers to Complainant's requests for admissions, as well as their answers to Complainant's interrogatories and requests for production of documents, which had been served on Complainant the previous day, on May 20, 1998. Respondents' counsel stated

several reasons for his failure to respond to Complainant's discovery requests in a timely manner, but he never explained why he did not seek an extension of time in which to answer discovery. Despite my explicit requirement in the SCO, Respondents' counsel also failed to state when his office received Complainant's Request for Admissions and Motion for Summary Decision. Respondents asked that I direct Complainant to accept Respondents' answers to its discovery requests. See R. Response SCO ¶4. Respondents still have not responded to Complainant's Motion for Summary Decision.

On May 27, 1998, Complainant filed a motion to substitute Complainant's counsel, stating that INS Assistant District Counsel Mimi Tsankov, who had been handling this case on Complainant's behalf, no longer works at the INS. Complainant also entered a notice of appearance for INS Assistant District Counsel Paul Szeto. I noted in my Order Staying Proceeding that Respondents were entitled to file a response to the substitution motion on or before June 11, 1998. See 28 C.F.R. §§ 68.11(b), 68.8(c)(2) (1997). Respondents have not filed such a response.

By Order dated May 29, 1998, I stayed this proceeding until I ruled on Complainant's Motion for Summary Decision.

III. *STANDARDS FOR SUMMARY DECISION*

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, 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) (1996). Although OCAHO has its own procedural rules for cases arising under its jurisdiction, the OCAHO Rules of Practice specifically authorize the Judge to reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. *United States v. Aid Maintenance Co.*, 6 OCAHO

893, at 3 (1996), 1996 WL 73594, at *3⁵ (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision)(citing *Mackentire v. Ricoh Corp.*, 5 OCAHO 191, 193 (Ref. No. 746)⁶ (1995), 1995 WL 367112, at *2 and *Alvarez v. Interstate Highway Constr.*, 3 OCAHO 399, 405 (Ref. No. 430) (1992), 1992 WL 535567, at *5, *affd.*, *Alvarez v. OCAHO*, 996 F.2d 310 (10th Cir. 1993) (table form; text available in 1993 WL 213912)); *United States v. Tri Component Product Corp.*, 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, at *2 (Order Granting Complainant's Motion for Summary Decision) (citing same).

Facts are deemed material only if they will affect the outcome of the proceeding. See *Aid Maintenance*, 6 OCAHO 893, at 4, 1996 WL 735954, at *3 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)); *Tri Component*, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing same and *United States v. Primera Enters., Inc.*, 4 OCAHO 259, 260-61 (Ref. No. 615) (1994), 1994 WL 269753, at *2); *United States v. Manos & Assocs., Inc.*, 1 OCAHO 877, 878 (Ref. No. 130) (1989), 1989 WL 433857, at * 2 (Order Granting in Part Complainant's Motion for Summary Decision). An issue of material fact is genuine if it has a "real basis in the record." *Tri Component*, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." *Id.* (citing *Matsushita*, 475 U.S. at 587 and *Primera*, 4 OCAHO at 261, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that

⁵ If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

⁶ Citations to OCAHO precedents in bound Volumes 1-2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, and bound Volumes 3-5, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume 5, however, are to pages within the original issuances.

it is entitled to judgment as a matter of law. *United States v. Alvand, Inc.*, 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" *Tri Component*, 5 OCAHO at 768, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." *Alvand*, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

[w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. §68.38(b) (1997).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. *Tri Component*, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). Similarly, summary decision may be based on matters deemed admitted. *Id.* (citing *Primera*, 4 OCAHO at 261, 1994 WL 269753, at *2 and *United States v. Goldenfield Corp.*, 2 OCAHO 162, 165 (Ref. No. 321) (1991), 1991 WL 531744, at *3).

IV. LEGAL ANALYSIS AND DISCUSSION

A. Requests for Admissions

Complainant's Motion for Summary Decision is based largely on the answers deemed admitted to its Request for Admissions. Requests for admissions are deemed admitted if not responded to within thirty days of service. See 28 C.F.R. §68.21(b) (1997); see also Fed. R. Civ. P. 36(a).⁷ If the requests for admission are

⁷As the OCAHO rule regarding requests for admissions is very similar to Rule 36, federal case law interpreting Rule 36 may be informative in construing the provisions of 28 C.F.R. §68.21. Cf. *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 3 (1996), 1996 WL 73594, at *3 (using Federal Rules of Civil Procedure provisions

