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

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| UNITED STATES OF AMERICA, Complainant, | ) |
| v. | ) 8 U.S.C. §1324a Proceeding<br>) OCAHO Case No. 97A00116<br>) 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 Decision [1] 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:

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| 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 Sungs 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

[3] According 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*

[4] I 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 *3[5] (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, *aff'd, 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

[7] As 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

served by ordinary mail, the responding party has five additional days in which to serve its answers and/or objections. *See* 28 C.F.R. §68.8(c)(2) (1997). The requests automatically are deemed admitted if the party from whom the admissions are sought does not respond within the appropriate time limit. *See Beberaggi v. New York City Transit Auth.*, No. 93 Civ. 1737 (SWK), 1994 WL 18556, at *2 (S.D.N.Y. Jan. 19, 1994) (citing, *inter alia*, *Donovan v. Carls Drug Co.*, 703 F.2d 650, 651 (2d Cir. 1983)); *American Technology Corp. v. Mah*, 174 F.R.D. 687, 690 (D. Nev. 1997). A motion to deem the requests admitted is not necessary. *See Beberaggi*, 1994 WL 18556, at *2; *Mah*, 174 F.R.D. at 690 (denying a motion to deem requests for admissions admitted on the grounds that it was unnecessary, given the automatic effect of Rule 36(a)).

In the present case, Complainant served its Request for Admissions via first class mail on March 13, 1998. Respondents' answers and/or objections to those requests should have been served on or before April 17, 1998, but Respondents did not do so. In fact, Respondents did not serve their answers to the requests for admissions until May 20, 1998, attached as part of its response to my May 8 Show Cause Order. When Respondents failed to respond to Complainant's Request for Admissions in a timely manner, the matters of which Complainant sought admissions automatically were deemed admitted.

Admissions can be withdrawn and/or amended, upon motion. *See* 28 C.F.R. §68.21(d) (1997) ("Any matter admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission."); *see also* Fed. R. Civ. P. 36(b). In their Response to the SCO, Respondents ask that I order Complainant to accept their responses to Complainant's discovery requests, including their answers to the requests for admissions. *See* R. Response SCO ¶4. Respondents also state reasons in support of the requested relief. *See id.* ¶3. I will treat Respondents' Response to the SCO as a motion to withdraw and to amend their prior admissions. *See Rohman v. Chemical Leaman Tank Lines, Inc.*, 923 F. Supp. 42, 46 n.2 (S.D.N.Y. 1996) (treating party's request that its responses to requests for admissions be deemed timely filed, made in the party's counsel's affirmation in opposition to the opponent's motion for summary judgment, as a formal Rule 36(b) motion when,

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concerning summary judgment and federal case law regarding them as guidelines in interpreting similar OCAHO rules governing summary decision).

among other things, the grounds upon which the requested relief was sought were "clearly set forth" in the affirmation).

The OCAHO Rules of Practice provide no standard for permitting the withdrawal and/or amendment of admissions made in the context of requests for admissions. The Federal Rules of Civil Procedure, however, provide such a standard.[8] *See* Fed. R. Civ. P. 36(b). Under the Federal Rules, the trial judge "*may* permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Fed. R. Civ. P. 36(b) (emphasis added). "[T]he decision to excuse [a party] from its admissions is in the court's discretion." *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 651–52 (2d Cir. 1983). "Because the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule." *Id.* at 652; *see also American Express Travel Related Servs. Co., Inc. v. Ladouceur (In re Ladouceur)*, No. 95–CV–271 (RSP), 1996 WL 596718, at *3 (N.D.N.Y. Oct. 15, 1996); *O'Neill v. Medad*, 166 F.R.D. 19, 22 (E.D. Mich. 1996) (citing *Ropfogel v. United States*, 138 F.R.D. 579, 582 (D. Kan. 1991); *Carls Drug*, 703 F.2d at 652; *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 103 (D. Del. 1988); and *Kleckner v. Glover Trucking Corp.*, 103 F.R.D. 553, 557 (M.D. Pa. 1984)).

In the Response to the SCO, Respondents' attorney, Raymond Aab, gave several reasons for failing to respond to Complainant's Request for Admissions in a timely manner. Mr. Aab stated that he was unable to respond to Complainant's discovery requests sooner because "[t]he requests were quite voluminous and the respondent's principal and person assisting in obtaining the requested documents and answers to the discovery requests, Mr. Sung, was unable to obtain much of the requested documents until May 19th." R. Response SCO ¶3(a). Mr. Aab also stated the "process was rendered more problematic, because Mr. Sung speaks only halting English and he needed to return to [Respondents' counsel's] office three time to assist in the preparation of the respondents' responses to the discovery requests before he fully understood."

[8] The Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by [the OCAHO Rules], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. §68.1 (1997).

*Id.* Additionally, Mr. Aab stated that he was engaged in a three-week criminal trial that "concerned allegations of fraud and involved very complicated issues and facts," and that his "time was virtually fully occupied with that trial," which did not end until 5:30 p.m. on May 19. *Id.* ¶3(b). Mr. Aab, however, did not explain why he did not seek relief from the Court to expand the deadline to respond to Complainant's discovery requests.

Respondents have not shown good cause for failing to respond to Complainant's Request for Admissions in a timely manner or for failing to request an extension of time in which to respond. As of May 20, the date on the Response, Mr. Aab stated that he had "been engaged in a criminal trial and proceedings . . . for the past three weeks." *Id.* Given that time frame, Mr. Aab's trial would have started sometime in the last week of April. Respondents' response to the Request for Admissions was due April 17. Mr. Aab's trial did not begin until more than one week *after* the response was due. The fact that a trial monopolized Mr. Aab's time for the three weeks between the last week in April and May 20 explains nothing about why Mr. Aab failed to respond to Complainant's Request for Admissions by the middle of April. Mr. Aab could have asked for an extension of time, but he did not.

The need to answer other discovery requests also did not excuse Respondents' obligation to respond to Complainant's Request for Admissions. Mr. Aab cited a delay in the ability to obtain requested documents as a reason for failing to respond to Complainant's discovery requests in a timely fashion. *See id.* ¶3(a). Any delay in obtaining the necessary documents, however, did not justify a delay in responding to the Request for Admissions.

Complainant's Request for Admissions was not voluminous. When Respondents finally responded to the requests, they denied most of them. Respondents did not need two months to answer the Request for Admissions.

Finally, Respondents did not bother to respond to Complainant's Request for Admissions until prompted by my May 8 SCO. Not only did Mr. Aab let the deadline for responding to the Request pass, but he persisted in his lack of attention and action when Complainant filed its Motion for Summary Decision, which was based in large part on the admitted requests. The Motion notified Respondents' counsel that Complainant was *seeking judgment*

based on the matters admitted when Respondents failed to answer the Request for Admissions by the deadline. Despite the seriousness of this action, Respondents' counsel did not immediately answer the Request and move to permit Respondents to withdraw and to amend their admissions. Not only did Respondents fail to act with the urgency that this case deserved, but they persisted in their neglect until prompted by my SCO. Although Respondents finally answered the Request for Admissions, they never have responded to Complainant's Motion for Summary Decision.

Courts have concluded there are situations in which it would not "further the interests of justice" to "deem a central fact to have been admitted by the failure of [a] pro se defendant to respond" to requests for admissions. *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Tripodi*, 913 F. Supp. 290, 294 (S.D.N.Y. 1996). I generally agree with that philosophy, but that factual scenario is not the situation in this case. Respondents are represented by an attorney whose duty it is to advise them in legal matters and actively pursue their interests within the bounds of the law. Allowing Respondents to withdraw and amend their admissions under the present circumstances would itself work an injustice by rewarding the glaring disregard of rules designed to promote fairness and efficiency in the legal process. *Cf. Alexander v. Commissioner of Internal Revenue*, 926 F.2d 197, 199 (2d Cir. 1991) (stating, in the context of affirming the trial court's decisions not to permit the late filing of answers to the requests for admissions and to grant summary judgment based on matters deemed admitted, that "[i]t is not the role of appellate courts to make allowances for the patent disregard of clearly stated trial court rules that are in part designed to provide for the expeditious conclusion of litigation"). All the matters about which Complainant sought admissions in its Request for Admissions were admitted when Respondents failed to respond to the Request in a timely manner; all those items deemed admitted stay admitted.

Respondents did not answer the Request for Admissions in time, and, when they did answer, did not raise any objections to the requests. Arguably, any potential objections that Respondents might have raised were waived. *Cf. Boyle v. Leviton Mfg. Co., Inc.*, 94 F.R.D. 33, 36 (S.D. Ind. 1981) (by answering and not objecting to requests for admissions, party waived objections for purposes of later raising them as a bar to being assessed attorney's fees for failure to admit); *Pleasant Hill Bank v. United States*, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973) (by answering request for

admission, party waived objection that it later raised in brief opposing motion for summary judgment).

Even if objections had not been waived, the requests for admissions in this case appear to be proper. A couple of Complainant's requests, that Y Plus is a successor in interest of Spring & Soon and that Y Plus is a mere continuation of Spring & Soon's business, C. Request Admiss. Sec. I ¶¶17, 23, presented the potential issue of whether they called for pure conclusions of law.

Rule 36 was amended in 1970 to resolve a conflict "in the court decisions as to whether a request to admit matters of 'opinion' and matters involving 'mixed law and fact' is proper under the rule." Fed. R. Civ. P. 36 advisory committee's note. Rule 36 now states that requests for admissions may "relate to statements or opinions of fact or of the application of law to fact," Fed. R. Civ. P. 36(a), thereby "eliminat[ing] the requirement that the matters be 'of fact,'" *see* Fed. R. Civ. P. 36 advisory committee's note.

Requests that call for a pure conclusion of law are improper, but requests that ask for a conclusion of law in relation to the facts of the actual case at hand are acceptable. *See Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997); Fed. R. Civ. P. 36 advisory committee's note ("The amended provision does not authorize requests for admissions of law unrelated to the facts of the case."); *see also Audiotext Communications Network, Inc. v. US Telecom, Inc.*, No. Civ. A. No. 94–2395–GTV, 1995 WL 625744, at *6 (D. Kan. 1995) (requests that seek application of law to the facts of the case are acceptable). Allowing requests that call for conclusions of law in relation to the facts of the case meets the Rule 36 objective of narrowing the disputed issues in the case. *See* Fed. R. Civ. P. 36 advisory committee's note ("An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues."); *Leviton Mfg.*, 94 F.R.D. at 35–36. In a related vein, "[t]here is nothing improper about a request simply because it goes to an ultimate fact that may be dispositive of the case . . . ." *Hart v. Dow Chemical*, No. 95 C 1811, 1997 WL 627645, at *8 (N.D. Ill. Sept. 30, 1997).

In *Abbott*, a party requested admissions of law that were based exclusively on hypothetical facts given in the requests. *See Abbott*, 177 F.R.D. at 93. The court ruled that such requests were improper:

> Although admittedly the boundary line is not always plain between permissible questions relating to the application of law to fact and objectionable questions relating to pure questions of law, the questions posed by plaintiff in this case fall outside the bounds of proper discovery. Most telling is that plaintiffs have not posed proper questions requiring application of law to the facts peculiar to this case to clarify the government's legal theories; rather, plaintiffs have posed improper hypothetical factual scenarios unrelated to the facts here to ascertain answers to pure questions of law. This they cannot do.

*Id.*

In the present case, Complainant has not posed requests for admissions based on hypothetical scenarios. The requests regarding Y Plus' status as a successor in interest to and mere continuation of Spring & Soon involve conclusions of law, but in relation to the facts of this case. That is something Rule 36 clearly permits since its 1970 amendment.[9]

B. *Liability Issues*

To rule on Complainant's Motion for Summary Decision, I must examine whether Complainant has demonstrated a lack of genuine issue of material fact and is entitled to judgment as a matter of law. "[I]t is well settled that a failure to respond to a request for admissions will permit the district court to enter summary judgment if the facts admitted by operation of Rule 36(a) are dispositive of the case." *Pleasant Hill Bank v. United States*, 60 F.R.D. 1 (W.D. Mo. 1973) (citing, *inter alia*, *Moosman v. Blitz, Inc.*, 358 F.2d 686, 688 (2d Cir. 1966)); *see also Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 651 (2d Cir. 1983). "[A]dmissions under Rule 36, even those made upon a party's default in responding, may serve as the factual predicate for summary judgment." *Pakistan Int'l Airlines v. Travel Link Int'l, Ltd.*, No. 90 CIV. 1703 (PNL), 1991 WL 130182, at *2 (S.D.N.Y. July 9, 1991) (citing *Carls Drug*, 703 F.2d at 651).

1. *Liability of Spring & Soon*

a. *Count I: knowing hire/continue to hire*

[9] Some post-1970 cases still say that requests that call for legal conclusions, even in relation to the facts of the case, or that go to central facts in dispute are improper. *See, e.g., Whitaker v. Belt Concepts of America, Inc. (In re Olympia Holding Corp.)*, 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995). Those cases, however, cite to pre-1970 case law, or to other post-1970 cases that cite to pre-1970 case law, in support of their position.

In Count I of the Complaint, Complainant alleges that Respondent Spring & Soon hired seven named individuals for employment in the United States after November 6, 1986, that those seven employees were aliens not authorized for employment in the United States, and that Respondent hired those employees knowing that they were aliens not authorized to work in the United States, in violation of section 274A(a)(1)(A) of the INA, 8 U.S.C. §1324a(a)(1)(A). Amended Compl. ¶¶I.A–D. Alternatively, Complainant alleges that Respondent continued to employ the seven individuals knowing that they were aliens not authorized for employment in the United States, in violation of section 274A(a)(2) of the INA, 8 U.S.C. §1324A(a)(2), and 8 C.F.R. § 274a.3. *Id.* ¶I.E. It is unlawful for a person or other entity to hire for employment in the United States an alien knowing the alien is unauthorized for employment in the United States, 8 U.S.C. §1324a(a)(1)(A) (1994), and/or to continue to employ an alien already hired knowing the alien is unauthorized for employment in the United States, *id.* §1324a(a)(2).

Respondents have admitted that the seven individuals listed in Count I were illegal aliens unauthorized to work in the United States at the time of hire, *see* C. Request Admiss. Sec. V, and that Spring & Soon hired them knowing they were unauthorized for employment, *see* C. Request Admiss. Sec. I ¶15. The seven individuals were hired after November 6, 1986, as alleged in the Complaint, because Spring & Soon was not incorporated until after that date. *See* C. Request Admiss. Ex. E[10] (Mrs. Sung signed Spring & Soon's Certificate of Incorporation on October 22, 1991).

In relation to Count I, Complainant has demonstrated the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. I find that Spring & Soon violated 8 U.S.C. §1324a(a)(1)(A) by knowingly hiring the seven individuals named in Count I. I GRANT Complainant's Motion for Summary Decision with respect to Spring & Soon's liability for Count I.

b. *Count II: failure to prepare/present I-9 forms*

In Count II, Complainant alleges that Respondent hired five individuals for employment in the United States after November 6, 1986, and that Respondent failed to prepare the Employment

[10] Respondents have admitted that the document attached to Complainant's Request or Admissions as Exhibit E, Spring & Soon's Certificate of Incorporation, is genuine. *See* C. Request Admiss. Sec. VI.

Eligibility Verification Form (I–9 form) for those five employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). Amended Compl. ¶¶II.A, B, D. Alternatively, Complainant alleges that Respondent failed to present the I–9 forms for those five individuals at a scheduled inspection, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id.* ¶¶II.C, E. An employer must prepare an I–9 form for each employee hired after November 6, 1986, *see* 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. §§ 274a.2(a), (b)(1)(i), (b)(1)(ii) (1996), and present any such I–9 forms at INS inspections, *see* 8 U.S.C. §§ 1324a(a)(1)(B), (b)(3) (1994); 8 C.F.R. §274a.2(b)(2)(ii) (1997).

In its Answer to the Amended Complaint, Spring & Soon admits it "employed persons who identified themselves as indicated in the Complaint, or by different names." Ans. to Amended Compl. ¶3. Respondents have admitted that Spring & Soon did not prepare and/or present at the January 26, 1996, scheduled inspection I–9 forms for the five listed people. *See* C. Request Admiss. Sec. 1 ¶¶4, 9; Sec. IV. Spring & Soon admits that it hired the five people name in Count II. Since Spring & Soon was not incorporated until after November 6, 1986, it may be inferred that the hiring took place after that date.

There are no genuine issues of material fact regarding Count II's allegation of failure to prepare and/or present I–9 forms at the scheduled inspection, and Complainant is entitled to judgment as a matter of law. Therefore, I GRANT Complainant's Motion as to Spring & Soon's liability for Count II.

c. *Count III: Sections one and two*

In Count III, Complainant alleges that Respondent hired twenty-three individuals for employment in the United States after November 6, 1986, that Respondent failed to ensure that those twenty-three individuals properly completed section one of the I–9 form, and that Respondent failed to properly complete section two of the I–9 form for those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). Amended Compl. ¶¶III.A–D. An employer must ensure that its employees properly complete section one of their respective I–9 forms, *see* 8 U.S.C. §§ 1324a(a)(1)(B), (b)(2) (1994); 8 C.F.R. §274a.2(b)(1)(i)(A) (1997), and an employer must properly complete section two of the I–9 form, *see* 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. §274a.2(b)(1)(ii)(B) (1997).

Respondents have admitted that the I–9 forms attached as Exhibit A to Complainant's Request for Admissions are genuine and relate to the named individuals. *See* C. Request Admiss. Sec. II. The I–9 forms reveal errors in sections one and two for all twenty-three listed people. Section one lacks the required attestation[11] for all twenty-three people. One I–9 form, that belonging to Bokyon Cheon (¶III.A.4), has the "lawful permanent resident" box marked, but the employee failed to include the required alien number. All of the other I–9 forms have no attestation boxes marked, and "none" typed or written in the blank for alien numbers.

In section two, all twenty-three forms lack sufficient documentation in List A or Lists B and C. An employer must verify an employee's identity and employment eligibility by examining and recording information in section two about a List A document,[12] *or* by examining and recording information in section two about both a List B document[13] and a List C document.[14] *See* 8 U.S.C. §1324a(b)(1)(A) (1994); 8 C.F.R. §274a.2(b)(1)(v) (1997). Two I–9 forms, belonging to Bokyon Cheon (¶III.A.4) and Rosa Maria Fournier (¶III.A.9), contain social security card information in List C, but have no document information in List B and List A.[15] One form, belonging to Pedro Cabrera (¶III.A.1), displays "I.D. requested" typed under List A, and Lists B and C are completely blank. All of the remaining I–9 forms in Count III have "I.D. requested" typed in List A and "none" typed in Lists B and C.

The twenty-three individuals named in Count III were hired after November 6, 1986, as alleged in the Complaint, because Spring & Soon was not incorporated until after that date, and because the dates of hire listed in section two on all the forms

[11] In section one, the employee must attest, by marking the appropriate box, to one of the following: (1) that he or she is a citizen or national of the United States; (2) that he or she is a lawful permanent resident; or (3) that he or she is an alien authorized to work until a designated date. If the employee marks one of the latter two options, then he or she also must include his or her alien number in the space provided. See Form I–9, OMB No. 1115–0136 (rev. Nov. 21, 1991).

[12] List A documents establish both identity and employment eligibility. Acceptable List A documents are noted at 8 U.S.C. §1324a(b)(1)(B) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(A) (1997).

[13] List B documents establish identity only. Acceptable List B documents are noted at 8 U.S.C. §1324a(b)(1)(D) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(B) (1997).

[14] List C documents establish employment eligibility only. Acceptable List C documents are noted at 8 U.S.C. §1324a(b)(1)(C) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(C) (1997).

[15] Instead, those two I–9 forms contain the words "I.D. requested" under List A and "none" under List B.