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

February 18, 1997

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 96A00019
SUNSHINE BUILDING MAINTENANCE, INC., Respondent.	)	

ORDER GRANTING LEAVE TO AMEND COMPLAINT

Procedural History

This case was initiated by the filing of a complaint in six counts on February 20, 1996 in which it was alleged that the respondent, Sunshine Building Maintenance (Sunshine), engaged in violations of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a. Complainant INS alleged in Count I that respondent hired six named individuals for whom it failed to ensure that the employee properly completed Section 1 of the Employment Eligibility Verification Form (Form I-9). Count II alleged that respondent hired one named individual for whom it failed to complete Section 2 of Form I-9 properly. Count III alleged that respondent hired ten named individuals for whom it failed to complete Section 2 of Form I-9 within three business days of the hire. Count IV alleged that respondent hired fourteen named individuals for whom it failed to make Form I-9 available for inspection during a scheduled inspection. Count V alleged that respondent hired one named individual for whom it failed to ensure that the employee completed Section 1 of Form I-9 properly, and itself failed to complete Section 2 within three business days of the hire. Count VI alleged that respondent hired or continued to employ ten named individuals knowing that

they were or had become unauthorized aliens. Civil money penalties were sought totaling $38,780.00.

Sunshine filed an answer denying the material allegations of the complaint and setting forth certain defenses. Proceedings thereafter consisted of a number of motions, some of which have been vigorously contested: to compel discovery, to strike defenses, to extend time, for more definite statement, to strike pleadings, to compel production of documents, and to amend. Discovery motions have been addressed. Discovery is still in progress and the case has not been set for hearing. Attacks on the pleadings were mooted by the filing of the first amended complaint and the answer thereto; they have not been renewed. Accordingly, the only motion currently pending is Complainant's Second Motion for Leave to Amend Complaint. It has been fully briefed by both parties.

The Proposed Amendments

Complainant's Request

Complainant seeks leave to amend Count III (involving failure to complete Section 2 of Form I-9) by dismissing therefrom the allegations of violation as to Emma Velasquez a/k/a Emma Sanchez and Jose Luis Gonzalez. Although the motion does not so state, presumably the civil money penalty sought of $820.00 for each of these individuals would also be eliminated, reducing the total civil money penalty sought for this count from $7,300.00 to $5,660.00.

Complainant also seeks leave to amend Count IV (as to failure to make the I-9 Forms available at inspection) by dismissing the allegations of violation as to ten of the original group of fourteen: Carlos Arenas Avila, Alejandro Beltran Arzaga, Edelvina Carbajal a/k/a Alvina Carbajal, Julio De La Rosa Acosta, Thomas Hernandez Picazo, Oman Rodriguez Velasquez, Angeles Solis Cortez, Sophy Onemanivong, Irene Hernandez, and Joaquin Cordillo. Although not specifically stated in the motion, presumably the amendment would also eliminate the civil money penalty sought for each of these violations of $640.00 each for Sophy Onemanivong, Irene Hernandez, and Joaquin Cordillo, and $820.00 each for the remaining seven, reducing the total for count IV from $10,580.00 to $2,920.00.

Complainant seeks leave to amend Count VI (as to knowingly hiring or continuing to employ unauthorized aliens) by adding another

sixteen names: Juan Picazo Herrera a/k/a Cesar Hernandez, Victor Hernandez Picazo, Carlos Arenas Avila, Hugo Arturo Villegas Corral, Omar (previously identified as Oman) Rodriguez Velasquez, Tomas Hernandez Picazo, Isabel Arenas Salazar, Miguel Velasquez Rodriguez, Octavio Murillo Hernandez, Rosalia Jimenez Diaz, Doris De Erazo, Mario Garcia Chavez, Eumelia Ramirez Madrigal, Natalia Montiel De Alvarado, Ernesto Garcia Carbajal, and Carlos Jesus Bernal Alvarado. Although the motion does not so state, presumably additional penalties will be sought for these additional violations. Penalties are sought for the other individuals already named in this count in the amount of $1,560.00 each.

In support of its motion complainant alleges that because the respondent's employees are scattered at different locations, manpower shortages impeded its investigation. In addition, complainant notes the problems attendant upon locating illegal alien witnesses who disperse after losing their employment. At the time the first motion to amend was filed INS states it had not yet located or interviewed the witnesses it needed to corroborate its allegations by the testimony of these former employees.

No specific reason is given for dismissal of the persons named in Counts III and IV other than that through discovery complainant has concluded that the counts as to those persons should be dismissed.

Complainant states further that no prejudice will ensue in this case because discovery is not complete and no hearing date has yet been set.

Respondent's Argument in Opposition

Sunshine opposes the motion on the grounds that the second motion to amend has been unduly delayed, the investigation itself was unduly prolonged, and undue prejudice will result. It asserts that had it known of these additional allegations earlier it would have been better able to preserve evidence which may now be lost, and that it will be required to review numerous documents again, duplicating work already done, but for additional persons. Sunshine also alleges that there has been repeated failure to cure deficiencies because there is no showing why this request could not have been included in the first request to amend. Respondent further observes that six of the sixteen persons whose names are proposed to be

added in Count VI were picked up on July 20, 1995,[1] so INS must have known the facts about them. Sunshine therefore requests that the motion be denied.

Potential Effect of the Proposed Amendments

Although the specific amendments proposed were not individually addressed by Sunshine's response, they must be separately evaluated. Notwithstanding respondent's global assertion of prejudice, it is clear that the arguments about prejudice have no application to the proposed amendment which would drop the names of Emma Velasquez a/k/a Emma Sanchez and Jose Luis Gonzalez from Count III. No prejudice can conceivably result to the respondent from having fewer allegations against which to defend or from having the requested civil money penalty reduced. Similarly, with respect to Count IV, the deletion of the names of 7 of the 10 individuals named, with a concomitant reduction in the penalty sought, would appear to benefit, not to prejudice, respondent's interests. Except as to the three individuals complainant seeks to drop from Count IV but to name instead Count VI, it does not appear under any set of circumstances that prejudice could result from the dismissal of the names from Counts III and IV. Leave to amend Count III to delete the names of Emma Velasquez a/k/a Emma Sanchez and Jose Luis Gonzalez, and to amend Count IV to delete the names Alejandro Beltran Arzaga, Edelvina Carbajal a/k/a Alvina Carbajal, Julio De La Rosa Acosta, Angeles Solis Cortez, Sophy Onemanivong, Irene Hernandez, and Joaquin Cordillo will therefore be summarily granted without further discussion.

With respect to Carlos Arenas Avila, Omar Rodriguez Velasquez, and Tomas Hernandez Picazo, whose names are sought to be deleted from Count IV and added to Count VI, it is similarly difficult to conceive of any prejudice which could result simply from their names being deleted from Count IV. The prejudice, if any, would occur not by virtue of their names being deleted from Count IV, but rather from their being added to Count VI. In this respect their status does not differ from that of any other individual sought to be added, and the proposed amendment to drop their names from Count IV will also be granted.

[1] The six persons allegedly picked up on July 20, 1995 are not identified nor is it clear how long or whether they remained in INS' custody after that.

I cannot credit the assertion that dropping these names, and thereby reducing the penalties sought by a factor of $9,200.00, can result in any prejudice to the respondent. Rather, it is solely the proposed addition of 16 names to Count VI which has that potential, and which must therefore be examined more closely.

Applicable Law

OCAHO rules[2] provide for amendments to complaints or other pleadings if and whenever a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. §68.9(e). This rule permits amendment "at any time prior to the issuance of the. . .final order" upon such conditions as are necessary to avoid prejudice to the public interest or the parties. The OCAHO rule is analogous to and modeled upon Rule 15(a) of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to the caselaw developed by the federal district courts in determining whether to permit requested amendments under that rule. OCAHO jurisprudence has long followed the guidance provided by the federal rules, as is directed by 28 C.F.R. §68.1. *See, e.g., United States v. Mr. Z. Enters.,* 1 OCAHO 162 (1990).

Rule 15(a) does not prescribe any specific time limit within which a motion for leave to amend may be filed. Thus motions to amend have been considered after the close of discovery, after the entry of dismissal or summary judgment, when the case has already been set for hearing, during trial, and even on remand after appeal. 6 C. Wright, A. Miller, and M.K. Kane, Federal Practice and Procedure §1488 (2d Ed. 1990). The rule also provides that leave to amend shall be freely granted when justice so requires, but does not enumerate the many purposes for which leave to amend may be sought. It is left to the discretion of the courts to balance the various considerations posed by the specific circumstances in each case and to impose conditions if necessary or appropriate, or to narrow the scope of an amendment if it considers the request too broad. *See generally*, 6 C. Wright, A. Miller, and M.K. Kane, Federal Practice and Procedure §§1486-87 (2nd Ed. 1990).

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

In ruling on such motions, the Supreme Court has directed that a liberal approach should be taken.

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Prejudice to the opposing party is the most important factor. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330-31 (1971) (trial court "required" to consider potential prejudice).

The Tenth Circuit, in which this case arises, has also held that amendments should be granted with "extreme liberality," *Gillette v. Tansy,* 17 F.3d 308 (10th Cir. 1994), and has followed the guidelines in *Foman,* considering undue delay, undue prejudice, bad faith or dilatory motive, repeated failure to cure deficiencies, and futility of amendment. *Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365 (10th Cir. 1993).

Application of the Standards to this Case

Bad faith or dilatory motive do not appear to be factors affecting this motion. Neither can it fairly be said that there has been any "repeated failure to cure deficiencies" by amendments previously allowed where the only prior motion for leave to amend was addressed solely to a technical amendment correcting the spelling of the names of some individuals and substituting in some cases other names by which some of the same individuals were known. Generally speaking, the factor of failure to cure deficiencies applies, moreover, not to the omission of individual names but to the repeated failure to state a claim at all. *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 416 (10th Cir. 1984). It is thus related to the question of futility.

The test which case law applies for futility of a proposed amendment is whether or not the amendment proposed is legally sufficient to survive a motion to dismiss. *Sooner Products Co. v. McBride,* 708 F.2d 510, 512 (10th Cir. 1983). This analysis looks only to question of whether any facts could be proved in support of the complaint which would entitle the pleader to relief. *Conley v. Gibson*, 355 U.S. 41, 45-

46 (1957). Plainly the addition of more names to already existing allegations is not an amendment of the character contemplated by this criterion. Moreover, the futility factor in this case operates the other way: were leave to amend denied, respondent would not be insulated from having to answer to the new allegations here, because INS would be entirely free to file a new complaint raising the new allegations. In all likelihood either or both parties would then seek to have the two cases consolidated. Accordingly, it is the denial of the motion to amend which would be an exercise in futility, not its granting. The allegations sought to be added here arise out of the same facts and circumstances presented by the original complaint, and it would be more efficient to have all the claims litigated at once and to dispose of all the contentions between the parties in one proceeding. *Cf. Jenn Air Products Co. v. Penn Ventilator, Inc.,* 283 F.Supp. 591, 596 (E.D. Pa 1968).

The critical question is whether the INS has delayed unduly, and whether Sunshine has thereby been unduly prejudiced. The factors of delay and prejudice are interrelated; it is manifest that the risk of substantial prejudice increases proportionately to the length of the delay. *Cf. Tamari v. Bache & Co. (Lebanon) S.A.L.*, 838 F.2d 904 (7th Cir. 1988). Virtually any amendment of a complaint will cause some delay and some degree of prejudice to the opposing party because new discovery will be required. *North Eastern Mining Co. v. Dorothy Coal Sales, Inc.,* 108 F.R.D. 657, 660 (S.D. Ind. 1985), *Koch v. Koch Ind.*, 127 F.R.D. 206, 209 (D. Kan. 1989) ("Any amendment invariably causes some 'practical prejudice' but leave to amend is not denied unless the amendment would work an injustice to the defendants"). That there may have been delay and prejudice is thus not sufficient to deny leave to amend: the question is whether the delay or prejudice is "undue."

Undue Delay

In the Tenth Circuit, delay alone has been held sufficient to deny leave to amend when it is "undue,"[3] particularly where there has been no explanation for the delay. *Frank*, 3 F.3d, at 15 (citing cases). Nevertheless in *Tansy*, denial of leave to amend was held to be an abuse of discretion even though one amendment had already been

[3] The circuits are not unanimous on this point. For the contrary view, *see, e.g., United States v. Continental Illinois National Bank and Trust Co. of Chicago*, 889 F.2d 1248, 1254 (2d Cir. 1989).

allowed and an evidentiary hearing had already been held. In *Frank*, however, where the motion was filed four months after the court's deadline for amending the pleadings and the plaintiffs had known the necessary facts long before that, denial of the amendment was found appropriate. Thus it is relevant to the question of whether the delay was undue whether the moving party did or did not know the facts and theories in the proposed amendment at the time of the original pleading. *EEOC v. Boeing Co.,* 843 F.2d 1213, 1222 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988).

Here the delay from the date of the filing of the complaint is less than one year. While respondent argues that the delay should be measured from the date of the INS' initial investigation rather than the date of filing the complaint, it cites no authority for this proposition. Sunshine also argues that complainant should have known all the facts earlier, but it does not address the complainant's assertions about the problems in locating dispersed illegal alien witnesses. Denial of leave to amend is not appropriate where the proposed amendment is based upon new evidence which may not have been available at the time of the original filing. *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218 (D. Kan. 1995).

Undue Prejudice to the Opposing Party

Respondent alleges generally that because the underlying investigation and the events in question occurred over one and one-half years ago, "it is probable" that witnesses have left or memories have faded. No specific witnesses are mentioned who are no longer available. A time lag of one and one-half years after the events is generally not sufficient to render evidence stale or to create a presumption that it has disappeared. Lawsuits of all kinds routinely address matters older than this. Cases denying motions to amend because of possible loss of evidence have involved much greater lapses of time. *Isaac v. Harvard Univ.,* 769 F.2d 817 (1st Cir. 1985) (motion filed four years after complaint, amendment would have required evidence of oral representations made thirteen years earlier), *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984) (motion filed two years after complaint and amendment would have required locating former prison inmates and remembering conversations which took place four years earlier).

Prejudice to an opposing party has been held to mean undue difficulty in prosecuting or defending a lawsuit as a result of a change in tactics or theories on the part of the other party. *Obbards v. Horton*

Comm. Hosp. Inc., 164 F.R.D. 553, 554 (D. Kan. 1996). While there may be some added discovery to be done and some delay in the hearing date, I can find no injustice where, even if the amendment were denied, complainant could file a new complaint the next day as to the new allegations. That discovery may have to be extended does not carry the same potential for prejudice, moreover, where much of the information about the added claim would ordinarily be available in the opposing party's own records or files, *LaSalvia v. United Dairymen of Arizona,* 804 F.2d 1113, 1119 (9th Cir.), *cert. denied*, 482 U.S. 928 (1987). Because the gravamen of the allegation sought to be added here involves issues of the opposing party's own knowledge or intentions, the added discovery cannot, without more, be found to be unduly burdensome.

No convincing showing of significant prejudice has been made here. The burden of showing undue prejudice rests with the party claiming it and that burden has not been met.

Conclusion

Complainant's Motion for Leave to Amend the Complaint is granted. Complainant shall file its amended complaint by March 3, 1997.

SO ORDERED:

Dated and entered this 18th day of February, 1997.

ELLEN K. THOMAS
Administrative Law Judge