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. 90100122
CAFE CAMINO REAL, INC., Respondent.	))	
	)	

FINAL DECISION AND ORDER
(March 25, 1991)

MARVIN H. MORSE, Administrative Law Judge

APPEARANCES: Nancy R. McCormick, Esq. for the Complainant. Phillip I. Salerno for the Respondent, pro se.

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA)[1] adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment

[1] Pub. L. No. 99-603, 100 Stat. 3359 (1986), codified at 8 U.S.C. §1324a, amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). IRCA enacted section 274A of the Immigration and Nationality Act of 1952 as amended.

and/or has failed to observe record keeping verification requirements in the administration of the employer sanctions program.

II. *Procedural Summary*

On January 24, 1990 the U.S. Border Patrol, Immigration and Naturalization Service (Complainant or INS) served Cafe Camino Real, Inc. (Respondent or Cafe Camino Real) with a Notice of Intent to Fine (NIF) alleging that it had violated 8 U.S.C. §1324a. Specifically, the NIF charged Respondent with violating 8 U.S.C. §1324a(a)(1)(A) or, in the alternative, 8 U.S.C. §1324a(a)(2), by hiring or continuing to employ an alien knowing that the alien was or had become unauthorized to work in the United States. INS also charged Respondent with eleven violations of the employment verification (paperwork) requirements of 8 U.S.C. §1324a(a)(1)(B). The NIF demanded civil money penalties aggregating $3,000.

On February 6, 1990 Respondent requested a hearing before an administrative law judge. 8 U.S.C. §1324a(e)(3). INS filed a Complaint incorporating the NIF on March 27, 1990.[2] On March 28, 1990,

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[2] The Complaint designates only the corporate entity, Cafe Camino Real, Inc., as Respondent. The president and sole owner of Respondent, Phillip I. Salerno, filed the Answer and all pleadings on behalf of the corporate entity. Mr. Salerno, who alone represented the Respondent at the evidentiary hearing, is not a licensed attorney.

Pursuant to 8 U.S.C. §1103(a), the Attorney General has issued rules of practice and procedure, codified at 28 C.F.R. part 68, for proceedings before administrative law judges on violations of the employer sanctions and antidiscrimination provisions of IRCA, 8 U.S.C. §§1324a and 1324b. With respect to appearances and representation in such proceedings, 28 C.F.R. §68.31(b)(6) informs that "[any individual acting in a representative capacity in any adjudicative proceeding may be required by the Administrative Law Judge to show his/her authority to act in such capacity." There is no requirement that the "individual" must be a licensed attorney, or that a party must be represented by legal counsel. "A party may be represented by an attorney . . ." 28 C.F.R. §68.31(b)(1) (emphasis added).

Here, INS did not object to representation of the corporation by its owner and president. Although the general rule is that sole shareholders of a corporation are not entitled to represent corporations pro SE in federal courts, a federal agency regulation may permit such representation in an administrative adjudicative proceeding. See Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926); cf. National Independent Theater Exhibitors Inc. v. Buena Vista Distribution Co., 748 F.d. 602 (11th Cir. 1984), cert. denied sub. nom. Patterson v. Buena Vista Distribution Co., 471 U.S. 1056 (1985). Under the rules governing this proceeding, therefore, there is no impediment to representation by Salerno of Cafe Camino Real, Inc.

OCAHO issued its Notice of Hearing advising Respondent of the filing of the Complaint and of my assignment to the case.

On April 23, 1990, Respondent timely filed its Answer to the Complaint, substantially denying every allegation.

On May 31, 1990 Complainant filed a Motion To Compel and Motion For Sanctions against Respondent requesting an order to compel Cafe Camino Real to respond to Complainant's Requests for Admissions and an order to impose sanctions should Respondent fail to comply within ten days. By Order issued June 5, 1990, Complainant's Motion was granted in part to compel Respondent to answer the request for admissions, but denied as to the premature request for sanctions. Respondent complied with the June 5 Order on June 11, 1990. In the interim, Respondent on June 7, 1990 filed a "Motion To Compel And Restrain Complainant's Motion To Compel; And Motion For Sanctions In Addition For (sic) Motion to Dismiss."

A plethora of filings followed. Respondent moved to dismiss on June 28, 1990; Complainant responded on July 3, 1990. A telephonic prehearing conference was held July 11, 1990. Respondent filed motions to suppress evidence on July 11, 16, and 18, 1990. Complainant filed a response on July 18. Cafe Camino Real filed a Motion For Summary Decision on July 18, 1990. INS filed its reply on July 25, 1990. On that date Respondent filed its memorandum of law in support of its motions to suppress evidence; INS filed its response on July 30, 1990. Respondent filed on August 7, 1990 a Response to Complainant's July 26, 1990 Response to Respondent's Memorandum of Law filed on July 25.

By Order dated August 28, 1990, I denied in omnibus fashion Respondent's motions to suppress, to dismiss and for summary decision. By Order dated September 25, 1990, the hearing was rescheduled from October to November. A second telephonic prehearing conference was held on October 1, 1990. On October 3, 1990 Complainant filed a Motion For Partial Summary Decision to which Respondent filed a response on October 22, 1990. By Order issued October 24, I denied Complainant's motion. A third telephonic prehearing conference on October 31, 1990 focused on procedures for the hearing.

The evidentiary hearing was held on November 7 and 8, 1990 in Fort Lauderdale, Florida. The last post-hearing brief was filed on January 22, 1991.

III. *Statement of Facts*

Respondent is a corporation doing business as the Cafe Camino Real, a restaurant in Boca Raton, Florida. It is wholly owned and operated by Phillip Salerno. The restaurant began operation in 1988.

On December 13, 1989 Senior Border Patrol Agent Kevin Douglas, accompanied by Agent Brian Doerk, visited Cafe Camino Real. The Border Patrol had previously received information that Respondent employed undocumented aliens. Upon entering the restaurant, the agents observed a male individual, who was dressed in black slacks and a white shirt, clearing a table. Agent Doerk recalled that this individual wore "a black, formal type outfit, with a half apron over his waist, with a tub, clearing dishes off of the table." Tr. 104.

That individual, subsequently identified as Roberto Maletti, approached the agents and spoke to Agent Douglas. Based on the individual's accent, Douglas suspected that Mr. Maletti may have been an alien. Agent Douglas then identified himself and inquired as to Maletti's immigration status. Maletti stated that he was in the United States as a visitor, and that he was employed by Respondent. Douglas arrested Maletti. The agents then drove him to his apartment to obtain his passport and clothing. While on the way to the apartment, Maletti repeated that he was employed by Respondent. He was subsequently processed at the Border Patrol's Riviera Beach office. At that time Maletti gave a sworn statement, INS Form I-263 C. Exh. E.

INS charged Maletti as deportable from the United States as a non-immigrant alien who had violated the terms of his visitor status by being employed without authorization in the United States.

On January 4, 1990 Agent Douglas personally served a subpoena on Phillip Salerno for Cafe Camino Real. Exh. F. An inspection of Respondent's Forms I-9 and employment records was scheduled for January 10, 1990 at the Border Patrol Station. On January 10 Salerno telephoned Douglas and requested that the inspection be

rescheduled because his cook had not shown up for work. The inspection was held on January 11, 1990. Only Douglas and Salerno were present. During the inspection Salerno presented eight Forms I-9. No other employment records were produced. At the request of Agent Douglas, Salerno prepared a hand-written list of current employees. Salerno denied that Respondent had employed Maletti.

As a result of the arrest and statements made by Roberto Maletti and the inspection of the Forms I-9, INS issued a NIF charging Respondent with violations of IRCA. Exhibit A of the NIF listed the one charge against Respondent for violation of 8 U.S.C. § 1324a(a)(1)(A) or, in the alternative, 8 U.S.C. § 1324a(a)(2), by hiring or continuing to employ Roberto Maletti, an alien, knowing that he was or had become unauthorized to work in the United States. Exhibits B and C of the NIF listed eleven individuals for whom Respondent was charged with violations of the paperwork requirements of 8 U.S.C. § 1324a(a)(1)(B). Exhibit B listed three individuals, Roberto Maletti, Mitzi Shelton and Paula Yannicelli for whom Respondent failed to prepare, maintain or present Forms I-9. Exhibit C listed eight employees for whom Respondent failed to properly verify employment eligibility on Forms I-9: Robert Staab, Gina Pinbaz, Angela Salerno, Carlton Fitts, Marie St. Armand, Jose Vega, Linda Miller, and Paul Volland.

The NIF dated January 17, 1990, was served on January 24, 1990. On January 30, 1990 Mr. Salerno telephoned Michael Sheehy, Assistant Chief, Miami Border Patrol Sector, regarding the NIF. On February 2, 1990 Salerno addressed a letter to Agent Sheehy which contained as attachments ten Forms I-9, his alleged "original" I-9s (relating to charged violations 2 and 3 of exhibit B and violations 1 through 8 of exhibit C of the NIF). Exhs. 1, 2. The letter explained that Respondent's original Forms I-9 were in the possession of its accountant at the time of the inspection.

The letter reiterated Salerno's denial that Respondent hired or employed Maletti. He asserted that Maletti was merely "observing" American restaurant techniques. Liability for unauthorized employment and paperwork violations turns on resolution of the factual disputes regarding the hiring of Roberto Maletti and the bona fides and location of Forms I-9. Factual findings as to these issues are incorporated into the discussion, infra.

Almost two months after INS filed its Complaint, i.e., on June 21, 1990, INS counsel participating, Agents Douglas and Steven Rickman through an Italian language interpreter interrogated

Roberto Maletti and videotaped his sworn statement.[3] Exhs. Q1, Q2. Maletti apparently has departed the country.

IV. *Discussion*

A. *Knowingly hiring or continuing to employ Roberto Maletti*

Title 8 U.S.C. 1324a(a)(1)(A) makes it unlawful for a "person or other entity [an employer] to hire for employment in the United States an alien, knowing the alien is unauthorized [as defined at 8 U.S.C. § 1324(h)(3)] with respect to that employment." Title 8 U.S.C. § 1324a(a)(2) in addition makes it unlawful for an employer "to continue to employ an alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

Complainant charges Respondent with violating 8 U.S.C. § 1324a(a)(1)(A) by hiring Roberto Maletti, an alien, knowing him to be unauthorized for employment in the United States; alternatively, Complainant charges violation of § 1324a(a)(2) in that Respondent continued to employ Maletti, knowing that he was or had become unauthorized with respect to that employment.

In order to prevail, INS must prove by a preponderance of the evidence that a person or other entity, after November 6, 1986, hired for employment or continued to employ in the United States, an unauthorized alien, knowing that the alien was or had become unauthorized for that employment. See United States v. Mester Manufacturing Co. Inc., OCAHO Case No. 87100001 (June 17, 1988) aff'd, Mester Manufacturing Co., Inc. v. I.N.S., 879 F.2d 561 (9th Cir. 1989).

Respondent submits that "Complainant . . . secerely (sic) failed in every respect to show that Cafe Camino Real, Inc. and Phillip I. Salerno employed an illegal alien beyond any doubt." Resp. brief at 11. The standard of proof in a civil employer sanctions proceeding is preponderant evidence, 8 U.S.C. § 1324a(e) (3)(C), not "proof beyond any doubt," or even proof beyond a reasonable doubt. For the reasons discussed below, I find that Complainant has sustained its burden.

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[3] By order dated August 27, 1990, I denied Respondent's prehearing motion to suppress Maletti's videotaped statement. I advised, however, that any objection to the videotaped statement could be raised again at the hearing. The videotape was received without renewal of the objection at hearing.

It is uncontested that Respondent is a Florida corporation that began operations in 1988.[4] It follows that for purposes of 8 U.S.C. § 1324a any employment by Respondent must comply with IRCA because, as a matter of fact and law, any hires would have taken place after the effective date of IRCA, i.e., November 6, 1986. It is not disputed that Maletti "worked" at Cafe Camino Real. Respondent contests having knowingly hired or continued to employ Maletti for employment.

Mr. Salerno suggested a dichotomy between "working" and "employing" for purposes of establishing liability under IRCA. Resp. Brief at 8-11. Salerno conceded that Maletti was "obviously working (at Cafe Camino Real), unless he called it pleasure." Tr. 339. He saw Maletti clearing and setting up tables at Cafe Camino Real on at least three occasions. Salerno, however, denied that Respondent hired and paid Maletti for these activities. Rather, Maletti was training to be a busboy by following another busboy, Carlton Fitts.

The applicable regulation defines hire as "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. §274a.1(c). According to Salerno, Respondent merely permitted Maletti on the premises to be trained as a busboy as a favor to his friend Nick. Salerno said he personally "hire(s) everyone that (is) employed" at Cafe Camino Real, but that people who work there are not necessarily his employees. Tr. 335. "The only thing employment in my mind is a person that is hired, directed, and paid by me." Tr. 336. Salerno testified that Nick Marcolus, a friend who owned the Family Carry Out restaurant a few doors away from Cafe Camino Real, hired Maletti and paid him whatever compensation or other remuneration he received. Mr. Marcolus was not subpoenaed and did not testify.

At the time of the arrest and again at the videotaping, Maletti told INS agents that he was employed by Cafe Camino Real. Exhs. E, Q1 and Q2. When questioned as to who hired him, Maletti's sworn statement just after his arrest was that Nick hired him. Exh. E. Maletti's videotaped testimony, however, is ambiguous as to

[4] Respondent is an "employer" as defined at 8 C.F.R. 274a.1(g), i.e., a "person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. . . ."

who did the hiring. At one point he stated that "verbally, it was Phil, but

I think it was thru (sic) consent of Nick." Exh. Q1 at 4. A few moments later, "Phil, I understand. At first I thought you meant Nick." Exh. Q1 at 8.

Paula Yannicelli and Denise Hunt, former waitresses of Respondent knew Maletti and that he was employed as a busboy by Respondent. Waitresses at Cafe Camino Real customarily apportion a percentage of their tips to the busboys. The two waitresses had each worked with Maletti more than once, and had split tips with him. Respondent's waitress Linda Miller testified that she never saw Salerno give orders to Maletti although she had seen him give orders to the other busboy, Fitts; she never had shared tips with Maletti nor had seen anyone pay him.

Yannicelli, Hunt, and Miller, however, testified alike that employees at Cafe Camino Real had a dress code, i.e., black pants and white tops. When Agents Doerk and Douglas arrested Maletti they observed that he was engaged in busboy activity, and he was dressed in that fashion. The waitresses also agreed that only Salerno distributed the weekly pay on Fridays.

Salerno said that he alone hired and paid all employees of Respondent. The employees of Respondent substantiate that only Salerno hired and paid employees, and that Nick was a friend of Salerno and frequent customer at Cafe Camino Real. According to Salerno, Nick "never hired anybody" to work there, but, inconsistently he claimed Nick hired Maletti, who he conceded worked at Cafe Camino Real. Tr. 322, 288. Salerno did not contest that Maletti received tips. Disingenuously, however, receipt of tips according to Salerno is no proof of employment: "If I didn't pay him the tips . . . I guess (he) would be working for whoever tipped (him)." Tr. 336.

It is undisputed that Salerno permitted Maletti to engage in busboy activity on the premises of Respondent. Maletti's sworn statement is that he was paid a wage plus tips. Exhs. E, Ql and Q2. He said that he was paid every Friday, as Salerno paid all the employees of Respondent. Exhs. Ql and Q2. "Phil" (Salerno) also scheduled his work hours, and determined his weekly wages. Maletti's physical description of Salerno and his pattern of activity at the restaurant is detailed and plausible, and comports with the testimony of the former waitresses. Despite variation in Maletti's statements as to the level of

wages, his explanations are sufficiently consistent to provide credibility.

Maletti's statements are probative despite their hearsay character because they were corroborated in their essentials by the testimony of the agents and the two waitresses. See United States v. Mr. Z Enterprises Inc., OCAHO Case No. 89100435 (Jan. 11, 1991); Mester Manufacturing Co. Inc., OCAHO Case No. 87100001, (June 17, 1988) aff'd, Mester Manufacturing Co., Inc. v. I.N.S., 879 F.2d 561 (9th Cir. 1989). Even without Maletti's testimony as to payment, however, two former waitresses would not have shared tips with him unless he provided services, services Salerno acknowledged he saw him provide.

It strains credulity to accept the Salerno version, that he permitted "Nick" to introduce a stranger onto Respondent's business premises to provide service to customers, whether for the stranger's training or otherwise, with no responsibility as an employer. I reject Salerno's implicit claim that by such conduct he can with impunity avoid the legal consequences of an employment relationship. See United States v. Dittman d/b/a Ready Room Restaurant, OCAHO Case No. 90100027 (July 9, 1990).

I am satisfied from the evidence that Phillip Salerno on behalf of Respondent hired and employed Roberto Maletti at Cafe Camino Real, within the meaning of 8 U.S.C. 1324a. I further find that the testimony of two of three waitresses that they shared tips with Maletti, a practice consistent with their relationship with busboys generally, establishes a pattern of remuneration for Maletti. That Linda Miller may not have shared tips with Maletti does not impeach their credibility. I conclude, from the testimony, including Salerno's, that Respondent consented to and engaged directly, or indirectly through Nick, the services of Roberto Maletti at Cafe Camino Real for wages or other remuneration. Dittman, OCAHO Case No. 90100027 at 4. Accordingly, through direct and circumstantial evidence Complainant has sustained its burden as to hiring Roberto Maletti.

Respondent is liable if at the time of hire it had knowledge within the meaning of 8 U.S.C. § 1324a of Maletti's lack of work authorization. As discussed below, I am satisfied that INS has established that Maletti was an unauthorized alien and that the employer knew of that status. Precedents under 8 U.S.C. § 1324a which address the issue of knowledge have formulated and utilized a constructive knowledge standard, applicable to the present case. Mester, 879 F.2d 561, 567 (9th Cir. 1989). This standard was discussed at length

by the judge in United States v. New El Rey Sausage Co.. Inc., OCAHO Case No. 88100080 (July 17, 1989) modified on other grounds by CAHO (Aug. 4, 1989), aff'd, New El Rey Sausage Company Inc. v. I.N.S., No.

89-70349 slip. op. (9th Cir. Feb. 2, 1991). In New El Rey Sausage Co., a reasonable care principle was applied:

> An employer shall be deemed to have constructive knowledge if it has reason to know that the employee was unauthorized to work in the United States. An employer shall be deemed to have reason to know that an employee is not authorized to work in the United States if it can be shown by a preponderance of the evidence that the employer was in possession of such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question (i.e. whether or not the alien-employee is authorized to work). . . .

OCAHO Case No. 88100080 (July 17, 1989) at 32 (emphasis omitted). Other employer sanctions decisions have applied the constructive knowledge standard, finding that an employer knew or should have known that the alien was or had become unauthorized in cases alleging knowingly hiring and knowingly continuing to employ violations. United States v. Collins Food International d/b/a Sizzler Restaurant, OCAHO Case 8900084 (Jan. 9, 1990), aff'd by CAHO (Feb. 8, 1990); United States v. Sophie Valdez d/b/a La Parrilla Restaurant. OCAHO Case No. 89100014 (Sept. 27, 1989) aff'd by CAHO (Dec. 12, 1989).

Applying the constructive knowledge standard, I find that even if Respondent were not otherwise aware that Maletti was unauthorized at the moment of hire, i.e., when he began to work at Cafe Camino Real, Respondent should have known. This is so because it had a duty reasonably to inquire and to inform itself of Maletti's employment eligibility.

The parties do not dispute that Maletti was a visitor to the United States without INS work authorization. Exh. D. For the first time on brief, Salerno contends that Nick Marcolus alone knew that Maletti was an unauthorized alien. Brief at 11. I understand that assertion to be a concession that Marcolus, at least, had actual knowledge of Maletti's unlawful work status. The question, however, is whether Respondent and its principal, Phillip Salerno had constructive knowledge that Maletti was unauthorized at the time of his employ.

Maletti affirmed that "he knew I was illegal . . .," apparently referring to Nick. Exh. E. Maletti's videotaped testimony was

that both Phil and Nick knew that he was unauthorized "from the first day." Exh. Q1 at 7 and Q2. Moreover, it is undisputed that he never presented work authorization documents to Respondent.

An employer has an "affirmative duty to determine that (its) employees are authorized." New El Rey Sausage Co., slip op. 89-70349 at 1654. In the circumstances of the present case, I find that even if Respondent, by and through Phillip Salerno, lacked actual knowledge of Maletti's status, it acted with recklessness and wanton disregard for the legal consequences when it permitted Salerno's friend Nick to introduce a stranger to its workforce. That recklessness and disregard is sufficient to charge Respondent with constructive knowledge of Maletti's unauthorized status as well as with the friend's actual knowledge. Cf. United States v. Jewell, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976) (deliberate failure to investigate suspicious circumstances imputes knowledge in criminal proceedings).

This Decision and Order does no more than apply the constructive knowledge standard to the bizarre circumstances of this case. An employer that permits a third party to introduce an individual to the workplace to provide services in support of its staff and to its clientele is found thereby to have hired the individual. The moment Respondent permitted Maletti to perform services in its restaurant it effected a hire as to which it was obliged to satisfy the requirements of 8 U.S.C. 1324a. Such an employer that fails to make any effort to satisfy itself that the individual was authorized for that employment within the scope of IRCA is liable for the consequences of that failure.

Although not essential to the decision here, it is noted that preparation of the Form I-9 presumptively demonstrates that an employer was presented with documentation of an individual's employment eligibility. It may be inferred that an employer failed to request documentation because it knew the individual did not possess documentation which satisfied I-9 requirements. See Collins Foods International, OCAHO Case No. 89100084 at 10. Consistent with denial that Maletti was an employee, Respondent failed to prepare an I-9. I do not decide here that failure to prepare a Form I-9 for an employee unauthorized as to that employment is a per se violation of the prohibition against knowing hire of an unauthorized alien. I do find, however, that failure to execute an I-9 for an individual permitted to perform services in the manner of Maletti provides additional underpinning for the conclusion that Respondent

hired Maletti knowing him to be unauthorized as to that employment. I hold that Respondent knowingly hired Maletti, an alien not authorized for that employment.

The alternative charge of knowingly continuing to employ an unauthorized alien placed Respondent on notice that the proof might form the basis for an additional finding to that effect. Having found liability on the one charge, however, the better judicial practice is not to adjudicate the alternative charge. See United States v. Taewon Fashion Corp., OCAHO Case No. 90100231 (November 30, 1990).

B. *Paperwork violations*

Title 8 U.S.C. 1324a(1)(B) makes it unlawful for an employer to hire any individual without complying with the employment verification (paperwork) requirements of 8 U.S.C. § 1324a(b). An employer is liable for failure to attest "on a form [Form I-9] 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).[5]

The Complaint includes eleven verification violations comprising three allegations of failure to prepare, maintain or present Forms I-9 and eight allegations of defective preparation of Sections 1 and 2 of the Form I-9. 8 U.S.C. § 1324a(a)(1)(B), 8 C.F.R. § 274a.2.

There are two sets of Forms I-9 in evidence. One set, comprising eight Forms I-9, was introduced by Complainant as those presented by Mr. Salerno at the January 11, 1990 inspection. Exhs. H-O. The second set, consisting of ten Forms I-9, was sponsored by Respondent as the original I-9s in the possession of its accountant at the time of the inspection. Exh. 2.

[5] The term "individual" includes a putative employee. United States v. J.J.L.C.. Inc., OCAHO Case No. 89100187 (April 13, 1990) at 1 . Title 8 U.S.C. §1324a(b)(2) requires that the individual attest, under penalty of perjury, on the verification form as to his or her employment authorization. The requirements for retention and availability for inspection of the verification forms are set forth at 8 U.S.C. § 1324a(b)(3). INS by delegated authority of the Attorney General has designated the Form I-9 as the Employment Eligibility Verification Form to be used by employers in complying with IRCA's employment verification requirements. 8 C.F.R. § 274a.2(a).

As of the date of the inspection Respondent had no list of employees with dates of hire. Rather, as Agent Douglas testified, at the inspection Mr. Salerno compiled a list of ten employees with their alleged dates of hire. Respondent does not contest that all ten employees listed were hired after November 6, 1986.

Agent Douglas testified that at the January 11 inspection, Salerno presented eight Forms I-9. At no time during the inspection did Salerno indicate that there were additional Forms I-9. In contrast, Salerno testified that he told Agent Douglas that the ones presented were duplicate Forms I-9. Respondent's Exhibit 2 contains its alleged original Forms I-9, transmitted by letter dated February 2, 1990 from Mr. Salerno to Agent Sheehy. Exh. l. Salerno claimed that at the time of the inspection substantially all of Respondent's employment records were with its accountant, Mr. Jerry Healey, in Pensacola, Florida.

Respondent failed to present testimony of the accountant or any evidence that Mr. Healey had the ten, or any, I-9s at the time of the inspection. Only Linda Miller, besides Mr. Salerno, testified favorably on behalf of Respondent as to completion of the Forms I-9. Ms. Miller, who still works at Cafe Camino Real, began her employment there in October, 1988. At hearing, she identified Exhibit 2-Miller as the I-9 she had signed when she began working at Cafe Camino Real i.e., the version Salerno claimed the accountant had at the time of the January 11, 1990 inspection. Although Section 2 of that Exhibit states that Ms. Miller presented to Mr. Salerno a Florida driver's license and her social security card at the time of hire, she acknowledged on cross-examination that she had never presented such documentation to him.

Inconsistencies between the two sets of I-9s are abundant, only partly accounted for by the lack of a credible employee register. Salerno conceded at hearing that he had no independent recollection of hire dates, and now relied on the dates stated on the I-9s to establish hire dates. For example, on Linda Miller's employment verification form at section 2, the date this I-9 was purportedly executed by Phillip Salerno, October 1989, prompted this exchange between Salerno and the bench:

JUDGE MORSE:	But, if I understand you, Linda Miller's I-9 is one year later than it should have been; is that correct?
MR. SALERNO:	That is an error. It should have been 10/15/88.

JUDGE MORSE: Well, are you telling us today that in 1988 you wrote down 1989 by mistake?

MR. SALERNO: Yes. That is definitely what it looks like.

Tr. 355 (emphasis supplied).

I reject Respondent's claim that INS should have honored the posture that the real I-9s were unavailable to Respondent at the time of inspection but were instead in the accountant's possession. An appropriate case might turn on whether operative I-9s were available for inspection, and whether INS should have responded to such availability at a location other than the one noticed for inspection. This is not that case. Instead, this case might well be captioned, "Will the real I-9s please stand up?"

At hearing I formed the judgment that Respondent had engaged in deceit, either on January 11, 1990, or at hearing. As in the transcript extract quoted above, nothing in Salerno's demeanor at hearing lent any confidence to his narrative. The after-the-fact effort, as by Exhibits 1 and 2, lent no credence to the naked claim that the "true" I-9s had been available all along. Moreover, the bona fides of the I-9s tendered on January 11, 1990 are suspect. For example, during the inspection Agent Douglas saw Salerno fill in the employer certification portion of Section 2 on at least two of the I-9s, although all the forms purport to have been signed on dates prior to January 11, 1990.

The mischief in Respondent's claim of better and more I-9s not produced at the inspection is nowhere more evident than by comparison of the employee signatures on the I-9s obtained at the inspection (Exhs. H-O) with the signatures on those allegedly in the accountant's hands on January 11, 1990, introduced by Respondent (Exh. 2). The discrepancies are sufficiently gross as to avoid the need for a handwriting expert. I take notice that no two of the so-called duplicate I-9s for any one employee were signed by the named employee. As to every employee, including Linda Miller, one or the other version is a patent forgery.[6] Having heard and observed the witnesses, including the waitresses, present and former, and the

[6] INS should consider referring to the United States Attorney the Forms I-9 in evidence, the transcript and this Decision and Order.

cook, I conclude that for the purposes of I-9 compliance only one set of forms existed on the date of the duly noticed INS inspection.

Neither Exhibit 2 nor its testimonial rationale constitute credible evidence. Accordingly, I find that the Forms I-9 tendered at the January 11, 1990 inspection were the only Forms I-9 of Cafe Camino Real presented, and they alone must pass or fail the test of compliance. Even assuming, however, that Respondent's rationale

were credible, I am unaware of any principle of law that permits an employer with impunity to fabricate spurious documents in lieu of those required by statute and regulation in order to pretend compliance, whether or not the "true" documents otherwise existed.

I hold that Salerno did not communicate to INS that duplicate I-9s were available for inspection elsewhere on the date of inspection at the Border Patrol Station. He either was untruthful in testifying that he had so informed Agent Douglas on January 11, 1990, or he failed to effectively so inform him. In either event, finding as I do that the two sets of I-9s are irreconcilable, Exhibit 2, Forms I-9 sponsored by Respondent at hearing, are inherently untrustworthy. They are not, as claimed by Respondent, originals of those presented on January 11.

For two of the employees listed by Salerno, Mitzi Shelton and Paula Yannicelli, no Forms I-9 were presented at the inspection. Ms. Yannicelli testified that at no time during her employment at Cafe Camino Real did she show any documentation to establish employment eligibility or fill out a Form I-9. Respondent's defense is that the accountant possessed the forms I-9 for both waitresses. Having found that the only Forms I-9 of Cafe Camino Real were those submitted at the time of the inspection, and that no I-9s were submitted for Shelton or Yanicelli, I conclude that there were no forms I-9 prepared, maintained or presented for them.

As already found, Roberto Maletti was hired as an employee by Respondent. It is undisputed that no Form I-9 was prepared, presented or maintained for Mr. Maletti. Accordingly, I find that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare, maintain or present employment verification forms for Maletti, Shelton and Yannicelli.

Eight improperly completed Forms I-9 were presented at the time of the inspection. All eight forms presented have defects in both

Sections 1 and 2. Of the Forms I-9 presented to INS at the inspection, each of the Section 1 violations include omitting the address, date of birth, and attestation of citizenship. Exhs. H-O. The signature is not in the proper attestation box for Carlton Fitts, Marie St. Armand, Jose Vega, and Paul Volland. Exhs. K-M, O. Upon review, the Forms I-9 of Robert Staab a/k/a Stabb and Marie St. Armand a/k/a Armand contain different spellings of the names as written in the identification block and as signed. Marie St. Armand testified that although she signed an I-9 shortly after she started working, the

signature on the Form I-9 presented at the time of the inspection, is not hers. Exh. L.

I find the Section 2 defects as alleged. By failing properly to designate employee documents to establish identity and employment eligibility, Respondent frustrated the purpose of the verification requirement that an employer examine employee documentation so as to establish that the employment complies with IRCA.

The employer has a duty not only to properly complete Section 2, but also a duty to ensure that the employee has properly completed Section 1 of the Form I-9. J.J.L.C., OCAHO Case No. 89100187 at 5. Respondent's compliance with those duties was lacking in both respects. Accordingly, I find that Respondent violated 8 U.S.C. § 1324a(b) by failing properly to complete the Forms I-9 for the eight individuals listed in Exhibit C of the Notice of Intent to Fine.

V. *Civil Money Penalies*

As appears from the foregoing discussion, I adjudge that Respondent has violated 8 U.S.C. § 1324a(a)(1)(A) as alleged by INS with respect to Roberto Maletti. Having found culpability, I am statutorily required to order the Respondent to cease and desist from such violations and to assess a civil money penalty, "not less than $250 and not more than $2,000. . . ." 8 U.S.C. § 1324a(e)(4)(A)(i).

Complainant in its NIF proposed, and has adhered to, a $750 civil money penalty for this single, first-time violation. I find judgmentally that the amount proposed by INS is reasonable.

I have also found Respondent liable for eleven paperwork violations. IRCA requires that I assess civil money penalties "in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." 8

U.S.C. § 1324a(e)(5). INS proposed in the NIF and has not varied from $250 with respect to the paperwork violation as to Roberto Maletti, and $200 per individual with respect to the other violations.

In determining the quantum of penalty I am obliged to consider the five factors as prescribed at 8 U.S.C. § 1324a(e)(5): whether or not the individuals involved were unauthorized aliens, history of previous violations, size of the employer's business, seriousness of the violation and good faith of the employer. In the first administrative adjudication under 8 U.S.C. § 1324a(a)(1)(B) I applied the five factors on a judgmental basis. United States v. Big Bear Market, OCAHO Case No. 88100038 (March 30, 1989), aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990).

Subsequently, in United States v. Felipe, Inc., OCAHO Case No. 89100151 (October 11, 1989), in adjudging the civil money penalty, the judge applied a mathematical formula to the five factors. Upon administrative appeal, the Chief Administrative Hearing Officer (CAHO) commented that "[T]his statutory provision does not indicate that any one factor be given greater weight than another," Id., affirmation by CAHO, (November 29, 1989) at 5. The CAHO affirmation explained also that while the formula utilized by the judge was "acceptable" it was not to be understood as the exclusive method for keeping faith with the five statutory factors. Id. at 7. Consistent with that understanding, I have consistently utilized a judgmental approach, considering each of the five factors in respect of paperwork violations. J.J.L.C., OCAHO Case No. 89100187 at 9; United States v. Buckingham Limited Partnership d/b/a Mr. Wash, OCAHO Case No. 89100244 (April 6, 1990) at 15.

In the past I have considered only the range of options between $100 per individual, the statutory minimum, and the higher amount proposed by INS. J.J.L.C., OCAHO Case No. 89100187 at 9; Big Bear, OCAHO Case No. 88100038 at 32. In the instant case, INS assessed amounts in the lower quadrant of the authorized range. I do not find here any basis for a judgment that proof of violations developed at hearing were so unanticipated by INS as to warrant increasing the penalty above that which it proposed.

In view of the modest penalties assessed, it is sufficient to merely note how the five statutory factors are taken into account.

1. Only one alien not authorized for employment is implicated in the paperwork violations.
2. There is no evidence of prior violations of 8 U.S.C. § 1324a.

3. Respondent's size was clearly established. Mr. Salerno is the sole owner and President of Cafe Camino Real. It is an individually owned, small, family run restaurant in a strip shopping mall. There are five to ten employees at any one time. The restaurant is open for three meals daily except holidays. Agent Sheehy testified that he took into consideration the small size of the enterprise when assessing the quantum.

4. As to seriousness, failure to prepare Forms I-9 for three individuals is in blatant disregard to the statutory and regulatory mandates of IRCA. Moreover, all eight I-9s presented on January 11, 1990 manifest Respondent's failure to ensure that the employees properly completed section 1 of the I-9. Even more serious are the omissions by Respondent in its failure to properly review documents required by Section 2 of the I-9. "Taken separately or as a whole, Respondent's disregard for substantive compliance frustrates national policy reflected in enactment of § 1324a." J.J.L.C., OCAHO Case No. 89100187 at 10. Respondent's I-9 violations could not have been more serious: either the I-9s presented at the inspection or those placed in evidence by Respondent, or both, were spurious.

5. I find this record barren of good faith compliance. For the reasons already stated as to seriousness, the violations are repugnant to claims of good faith. The declared forgery of Marie St. Armand's signature and the apparent forgery of at least seven other Form I-9 employee signatures deprives Respondent of any good faith contention.

I am satisfied that in assessing the amount of the penalties, INS took into consideration that one of the individuals was an unauthorized alien, there was no prior history of violations, the size of the business, the seriousness of the violations, and the lack of good faith on the part of Respondent. Clearly, there is no basis for a reduction of the amount requested. Accordingly, I find just and reasonable the penalties proposed, i.e. for the paperwork violation regarding the one unauthorized hire, $250 and for the ten other Form I-9 violations, $200 each, for a total paperwork civil money penalty of $2,250.

VI. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, testimony, exhibits, memoranda, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. That Respondent hired Roberto Maletti for employment by Respondent at its Boca Raton, Florida, location after November 6, 1986 and prior to December 13, 1989.

2. That Respondent knew that Maletti was an alien unauthorized to work in the United States. 8 U.S.C. § 1324a(h)(3)(B).

3. That Respondent, as the employer, is obliged to exercise reasonable care to ensure that it does not employ an individual who is unauthorized for that employment in the United States, failure of which requires a finding that imputes to the employer knowledge that the individual is not so authorized.

4. That I determine upon the preponderance of the evidence that Respondent violated 8 U.S.C. § 1324a(a)(1)(A) by hiring for employment in the United States the alien, Roberto Maletti, identified in Exhibit A of the Notice of Intent to Fine, incorporated into the Complaint, knowing him to be unauthorized with respect to that employment.

5. That Respondent, as the employer, is responsible for compliance with 8 U.S.C. § 1324a with respect to an individual whom the employer permits to provide services to its staff and clientele on its premises for pay or other remuneration, whether in the form of wages, an opportunity to earn tips or a training experience.

6. That the civil money penalty assessed by INS at $750 for the single violation with respect to one employee is just and reasonable so as to require Respondent to pay such civil money penalty.

7. That Respondent shall cease and desist from violating the prohibitions against hiring, recruiting, referring or continuing to employ unauthorized aliens, in violation of 8 U.S.C. § 1324a(1)(A) 2nd (a)(2).

8. That Respondent failed to prepare, present or maintain Forms I-9 for three employees; improperly completed Sections 1 and 2 of eight Forms I-9 presented to INS on or about January 11, 1990,

following timely prior notice of inspection, as the result of which Respondent is found, by the preponderance of the evidence, to have violated 8 U.S.C. § 1324a(a)(1)(B).

9. That a defense of maintaining properly completed Forms I-9 in a separate location at the time of inspection is unavailing to Respondent on a charge of violating 8 U.S.C. § 1324a(a)(1)(B) where, as here, Respondent has failed to establish that INS had notice of the location of those Forms I-9 prior to the inspection.

10. That a defense of maintaining properly completed Forms I-9 in a separate location at the time of inspection is unavailing to Respondent on a charge of violating 8 U.S.C. § 1324a(a)(1)(B) where, as here,

putative duplicate Forms I-9 presented at the inspection are not in fact duplicates of the originals alleged to have been available at that time at another location.

11. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty in the sum of $2,250, the amount assessed by INS.

12. This Decision and Order is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.51(a) (1990). As provided at 28 C.F.R. § 68.51(a), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. § 1324a(e)(8), 28 C.F.R. § 68.51(a)(2) (judicial review).

SO ORDERED.

Dated this 25th day of March, 1991.

MARVIN H. MORSE
Administrative Law Judge

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