Modified by CAHO (8/4/89) Ref. No. 78

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

United States of America, Complainant, v. New El Rey Sausage Company, Inc., Respondent; 8 U.S.C. 1324a. Proceeding; Case No. 88100080.

Appearances: For the Complainant: JOHN B. BARTOS, Esquire

For the Respondent: ALEX JACINTO, Esquire

Before: ROBERT B. SCHNEIDER, Administrative Law Judge

DECISION AND ORDER

INTRODUCTION:

In 1986, after years of public debate, Congress suddenly summoned within itself the compromising consensus with which it enacted the Immigration Reform and Control Act (``IRCA''), and thereby embarked upon what remains, under the law's current sunset and reporting provisions, an experiment in the federal enforcement of immigration laws in the United States.

In effect, IRCA initiated a significant departure from previous immigration law practice by requiring that every employer in the United States participate in a national effort to ``control'' the employment of aliens, who are, according to the federal government agency (the U.S. Immigration and Naturalization Service or ``INS'') that is officially charged with the legal responsibility and resources to make such determinations, ``unauthorized'' to be employed in the U.S.[1]

Without a doubt, IRCA, though in effect for more than two years, remains confusing and controversial. See e.g., GAO Report to Congress, Immigration Reform, ``Status of Implementing Employer Sanctions After Second Year'' (GAO/GGD-89-16) (November 1988).

[1]The regulations define an ``unauthorized alien'' as an alien who, with respect to employment at a particular time, is not at that time either: (1) lawfully admitted for permanent residence or (2) authorized to be so employed by the Immigration and Nationality Act or by the Attorney General. 8 C.F.R. Section 274a.1.

This should not be surprising, however, since the language of law, especially newly-enacted law, must finally discover its practical meaning only through the achieved insights that are incrementally revealed in the often protracted process of public deliberation between variously-interested members of a diverselysituated ``community of interpreters.'' If, in our various institutional and non-institutional roles, we attempt to interpret and apply IRCA in different ways, we at least share the common experience that this new law currently remains, for all of us, experimental and in constant need of further debate to clarify the lineaments of required compliance.

Towards this end, the following Decision and Order interprets and applies the language of section 1324a of Title 8 of the United States Code. [2]

I. PROCEDURAL HISTORY:

This proceeding was initiated when INS (``Complainant'') or ``INS'' filed a ``Complaint Regarding Unlawful Employment'' (``Complaint'') pursuant to Title 8 of the United States Code section 1324a. The Complaint was filed with the Office of the Chief Administrative Hearing Officer (``OCAHO'') in Falls Church, Virginia, on August 11, 1988, and incorporated by reference a Notice of Intent to Fine (``NIF'') which had been served upon Respondent, New El Rey Sausage Company, Inc., on July 1, 1988.

The charges in the NIF included four Counts. Count I contained factual allegations that Respondent unlawfully continued to employ an alien named Martin Compos-Vasquez (``Vasquez'') knowing that he was not authorized to be employed in the United States. Count II contained factual allegations that Respondent unlawfully continued to employ an alien named Rigoberto Gutierrez-Guzman (``Guzman'') knowing that he was not authorized for em-

[2]The statutory authority for the issuance of this order is found at 8 U.S.C. section 1324a(e)(3)(C). Section 1324a(e)(3)(C) provides that the standard of review will be a preponderance of the evidence. On its face, the statute requires that the Administrative Law Judge (``ALJ'') shall issue an order only when there has been a determination that the person or entity named in the complaint has violated subsection (a). Such a limitation is not included in the regulations which were promulgated to provide Rules of Practice and Procedure for section 1324a and section 1324b cases. See, 28 C.F.R. Section 68.51. In addition, the statute, on its face also seems to limit the ALJ to stating only findings of fact in the issuance of an order. But cf., 28 C.F.R. Section 68.51 which provides in pertinent part:

> The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decisions of the Administrative Law Judge shall be based on the whole record. It shall be supported by reliable and probative evidence.

ployment in the United States. Both Counts I and II were charged pursuant to 8 U.S.C. section 1324a(a)(2) and 8 C.F.R. section 274a.3. Count III contained factual allegations that Respondent hired an alien named Vasquez without properly completing section 2 of the Employment Eligibility Verification Form (Form I-9). Count IV contained factual allegations that Respondent hired an alien named Guzman without properly completing section 2 of the Form I-9. Both Counts III and IV were charged pursuant to 8 U.S.C. section 1324a(a)(1)(B) and 8 C.F.R. 274a.2(b)(1)(ii).

A Notice of Hearing was issued by OCAHO on August 29, 1988, scheduling a hearing in this case for February 28, March 1-2, 1989, in Los Angeles, California.

Respondent filed an Answer on September 16, 1988, denying the allegations in the Complaint and asserting an affirmative defense of good faith compliance with the statute and regulations.

On February 24, 1989, Complainant filed a Motion to Amend Complaint. I denied Complainant's Motion on February 27, 1989.

On March 20, 1989, Complainant filed a post-hearing Second Motion to Amend Complaint. Respondent filed a timely response. In addition, after granting a Motion for Leave to File a Brief Amicus Curiae to the Mexican American Legal Defense and Educational Fund (MALDEF), this office also received MALDEF's Opposition to Complainant's Second Motion to Amend Complaint. After due consideration of all briefs, I denied Complainant's Second Motion to Amend Complaint on April 27, 1989.

Prior to the hearing, on February 9, 1989, Complainant filed a Motion for Summary Decision. On February 24, 1989, I issued a Decision Granting and Denying in Part Complainant's Motion for Summary Decision. Specifically, my Decision granted Summary Decision on Count IV of Complainant's Complaint, reserved ruling on Count III and denied Summary Decision on Counts I and II.

A hearing on the merits was held on February 28, March 1, and March 2, of 1989.

On April 19, 1989, both parties and amicus curiae filed post-hearing briefs including proposed findings of fact and conclusions of law. In addition, on the same date, Complainant filed a Motion for Reconsideration of Court's Ruling Denying Admission of Exhibits.

On May 9, 1989, all parties filed post-hearing Reply Briefs there by completing the existing record in this case.

II. STATEMENT OF FACTS:

A proper understanding of this case requires a recitation of the chronology and nature of communicational encounters between INS representatives and Respondent.

Four separate dates are significant in understanding the substance of these communicational encounters.

1. March 16, 1988: ``Telephonic Educational Visit''

Both parties agree that on March 16, 1988, INS Special Agent Brian Cecil telephonically communicated with Respondent. Special Agent (``SA'') Cecil testified that the purpose of his phone call was to ``educate'' Respondent concerning the nature of its obligations under IRCA.

SA Cecil initially asked to speak with company owner and executive officer, Ms. Laura Balverde Sanchez. When he was informed that Ms. Sanchez was not available, he asked to speak to the next highest officer in the company. Ms. Rosa Melendez, a secretary for Respondent, informed SA Cecil that she was, at that moment, the next highest officer in the company.

SA Cecil testified that he asked Ms. Melendez if she was familiar with the provisions of IRCA which requires employers to hire only United States citizens or aliens authorized to be employed in the United States. He further testified that he asked Ms. Melendez if she was familiar with the Form I-9 Employment Eligibility Verification process. Even though she told him that she was already familiar with the provisions under the new law, SA Cecil testified that he nevertheless went section-by-section through the I-9 Form with Ms. Melendez, and instructed her on the ``proper mechanism for filling it out.'' SA Cecil also testified that during the call he asked Ms. Melendez several times if she had any questions concerning IRCA, and that she told him she had no questions for him.

SA Cecil also testified that he informed Ms. Melendez that Respondent would receive by certified mail, within a few days of their telephone conversation, a ``package of information'' from INS containing an M-274 Handbook for Employers, blank I-9 Forms, and a Notice of Inspection. SA Cecil also testified that he reviewed with Ms. Melendez the procedure for acknowledging certified mail through return receipt requested.

Ms. Melendez, who testified briefly at the hearing, indicated that SA Cecil told her that INS would be coming to Respondent's place of business to check employee files.

Ms. Sanchez, the company owner and executive officer, testified that sometime between March 16, 1988, and April 1, 1988, she received a letter from INS (what was apparently the Notice of Inspection) indicating that they were going to come to her place of business, check the I-9 forms, and request information regarding the dates of hire and termination of her employees. She also testified that she had a telephone conversation with SA Cecil in which she

agreed, in her capacity as Respondent's highest-ranking officer, to waive the three-day notice requirement for a compliance inspection.

2. April 1, 1988: On-Site Compliance Inspection

SA Cecil testified that on April 1, 1988, he went to Respondent's place of business and spoke directly with Ms. Sanchez. The purpose of the visit was to conduct an inspection of the I-9 forms. SA Cecil testified that he brought with him with a copy of the M-274 Employer's Handbook and gave it to Respondent.

SA Cecil testified that Ms. Sanchez, in her capacity as the highest-ranking officer of Respondent's company, provided him with the I-9 forms and a list of employees that had been specified in the Notice of Inspection letter.

SA Cecil testified that he told Ms. Sanchez that the Notice of Inspection specified that the list of employees should include their dates of hire and dates of termination. He further testified that when he examined the list that Ms. Sanchez had provided him, he noticed that it did not include the dates of termination of employees.

SA Cecil also reviewed Respondent's I-9 forms. He determined that there were numerous ``deficiencies'' in the preparation of the forms by Respondent. Specifically, SA Cecil testified that, with respect to the I-9 form prepared for an employee named Vasquez, there was no attestation of his employment eligibility in the United States. See, Exhibit 8. With respect to an employee named Guzman, SA Cecil testified that there were two principal deficiencies. See, Exhibit 9. First, in section 1, the top portion of the I-9 form, Guzman had made no attempt to attest that he was a person eligible to be employed in the U.S. Second, in section 2 of the I-9 form, there was no indication that any officer of Respondent's company had made any attempt to verify the documentation of Guzman with respect to his employment eligibility in the U.S.

Ms. Sanchez testified that SA Cecil had told her that there were many ``deficiencies'' in the preparation of the I-9 forms and that she was confused as to how, if at all, she could correct these deficiencies. She testified, that SA Cecil repeatedly told her to refer to the I-9 Employer's Handbook. She also testified that, prior to April 1, 1988, she had not received from INS an I-9 Employer's Handbook.

Sometime after April 1, 1988, and before May 25, 1988, SA Cecil caused a series of computer checks to be initiated by the Investigations Branch of the INS Central Index System (``CIS''). See, Exhibits 10-1, 10-2, 10-3, 10-4.

SA Cecil testified that the CIS has two specific modes of inquiry. He testified that the first mode of inquiry follows from the input of an alien registration number in which the CIS will correlate the alien registration number with the person to whom the number was issued or will indicate that the number has not been issued.[3] He testified that the second mode of inquiry follows from inputting the name of a particular individual into the CIS which, in turn, will correlate the alien registration numbers that correspond to that individual.

SA Cecil testified that, according to a CIS check that had been run under both modes, nine of the employees working for Respondent attested to, on their I-9 Employment Eligibility Forms, alien registration numbers that had not been issued or that had been issued to persons with names other than those of Respondent's employees.

This information was communicated to Respondent in a letter from the INS dated May 24, 1988, and signed by Mr. John Brechtel, the Assistant District Director for INS Investigations in Los Angeles. See, Exhibit 12. The May 24, 1988, letter is formally referred to as the INS Notice of Results of Inspection (``NRI'').

3. May 25, 1988: On Site Discussion Regarding NRI Letter

On May 25, 1988, SA Cecil went to Respondent's place of business, presented the NRI letter, and spoke directly with Ms. Sanchez. SA Cecil testified that the purpose of the visit was to discuss with Respondent the INS NRI letter.

SA Cecil testified that the NRI letter was prepared for the purpose of informing Respondent that nine of its employees had submitted alien registration numbers that were not verified in the official INS computer checks through CIS. SA Cecil further testified that since the INS had no official record verifying these employees' alien registration numbers, it was the official view of INS that these employees fit into a category of aliens unauthorized to be employed in the United States because they were neither permanent residents nor were they aliens authorized to be employed in the U.S.

SA Cecil testified that, on May 25, 1988, he handed to Ms. Sanchez a copy of the May 24 NRI Letter, and explained to her item-by-item, paragraph-by-paragraph, the significance of the letter, the

[3]The primary function of the alien registration number is to identify all files relating to the alien, since they ordinarily are carried under the alien registration number. See, Gordon and Mailman, Immigration Law and Procedure, rev. ed., vol. 4, at 16-9 (1988).

significance of the names and the INS numbers, and most particularly, the significance of the two concluding paragraphs.

SA Cecil testified that Ms. Sanchez asked him many questions about the letter and that he ``did everything in my power as a human being and a Special Agent, assuming the two are not mutually contradictory, to help her comply with the law.''

Specifically, SA Cecil testified that he told Ms. Sanchez that the employees named on the list did not have valid work authorization. He warned her that she was exposing her company to possible fines if she did not accept the credibility of the NRI letter and act on the information it provided to her. He testified further that he told Ms. Sanchez that unless these workers could provide valid work authorization from INS, they were to be considered unauthorized for employment in the United States. He further testified that he told Ms. Sanchez that the continued employment of these workers could result in fine proceedings against her company.

SA Cecil went on to testify that on May 25, 1988, Ms. Sanchez apparently refused to believe that the information recorded on official INS documents as a result of official INS records checks had greater substance than the verbal assertions that she had previously obtained from her employees, Guzman and Vasquez, concerning the genuineness of their documents. SA Cecil testified that even though he recognized that Ms. Sanchez did not believe or accept the information that was provided to her in the NRI letter from INS, he nevertheless went through it again, point-by-point, to make sure that she understood it.

SA Cecil further testified that on May 25, 1988, he also discussed with Ms. Sanchez the question of whether or not she would consent, on behalf of Respondent, to having INS officers enter the premises to question employees regarding their immigration status in the U.S. and eligibility to work. He called this type of a visit by INS officers a ``surveillance`' or ``survey.'' Ms. Sanchez initially consented to this proposed ``survey'' by INS, but expressed concern that it be carried out in a manner consistent with the need to protect her employees' safety as well as preserving the quality control of the company's product--sausages.

Ms. Sanchez testified that, thereafter, she took SA Cecil on a tour of the plant. She further testified that she asked SA Cecil to schedule a specific time and date for their proposed surveillance. In a subsequent telephone call, Ms. Sanchez testified that SA Cecil told her that it was not INS procedure to schedule surveillance appointments. Thereafter, Ms. Sanchez, after consulting informally with an attorney on the issue, rescinded, on behalf of Respondent, her provisional consent to the proposed surveillance.

Ms. Sanchez also testified that she recognized that the NRI letter from INS raised a ``suspicion'' that there was a problem with the work authorization of the identified employees, but that she found the letter to be ambiguous with respect to correcting the problem. She testified that SA Cecil repeatedly told her to refer to her Handbook for Employers and that when she compared a photocopy of Guzman's work authorization that she maintained in his personnel file with the exemplar in the Handbook, it appeared genuine to her.

After SA Cecil left Respondent's place of business on May 25, 1988, Ms. Sanchez testified that she directed one of her top employees, Ms. Guadalupe Aguilar, to speak with all of the employees that were named in the NRI letter from INS.

Ms. Aguilar testified that, on May 25, 1988, Ms. Sanchez directed her to inform the named employees that the company had received a letter from INS indicating that their alien registration numbers did not correspond to INS records and that they should tell her whether or not their numbers actually belonged to them because it was against the law to be employed without work authorization. Ms. Aguilar also testified that she did actually meet with approximately eight to ten individual employees and communicated to them Ms. Sanchez' concerns regarding their eligibility to work in light of the NRI letter from INS.

It was subsequently determined that, of the named individuals in the May 24, 1988, NRI letter from INS, only two were still actually working for Respondent, Vasquez and Guzman. Ms. Sanchez testified that she subsequently met personally with both Vasquez and Guzman, and that both of them told her that their work authorization papers were genuine and that they were authorized to be working in the U.S. She also testified that she did not actually look at their papers, nor did she ask them thereafter to bring their actual identity and work authorization documents to her, but that she reviewed copies of their documentation which she retained in their personnel files and concluded that they looked real and genuine in comparison with the exemplars provided in the I-9 Handbook.

Ms. Sanchez further testified that she did not think that she needed to ask Vasquez or Guzman to provide her with any new or different documentation to substantiate their claims that they were authorized to be employed in the U.S. She also testified that she did not know what other documents to ask for to substantiate their eligibility to work and that she believed them when they showed up for work the next day after being questioned about their status.

She also testified that she expected that SA Cecil was going to contact her again after their meeting on May 25, 1988, to clarify what she could do to correct the situation but that he never did.

4. June 22, 1988: Surveillance and Arrest of Guzman and Seizure of Payroll Records

INS agents conducted a ``survey'' at Respondent's place of business on June 22, 1988, pursuant to a District Court Order. See, Exhibit 29. SA Cecil testified that the purpose of the INS ``surveillance`' was to enter the premises, interview Respondent's employees to determine their eligibility to be employed in the U.S., and to obtain payroll records.

SA Cecil testified that approximately twenty INS agents assisted in the surveillance and that he was the lead agent of the operation. He further testified that he and his assistant agents entered the premises at 8:00 a.m. and discovered that Ms. Sanchez was not on the premises that day.

SA Cecil testified that he secured payroll records from the administrative offices of Respondent, made photocopies of them, and determined through analyzing them that Guzman and Vasquez had been employed by Respondent for a substantial period of time following receipt of the NRI letter of May 24, 1988. See, Exhibits 20 and 21. SA Cecil further testified that he also reviewed Respondent's I-9 forms and found them to be identical to the forms that were reviewed on April 1, 1988.

SA Cecil also testified that the payroll and personnel records of Vasquez indicated that he had been employed by Respondent until at least June 17, 1988.

SA Cecil further testified that INS agents, during the course of conducting their surveillance, found Guzman to be working on the premises. He testified that INS agents apprehended Guzman and brought him to the INS building where he was charged with being a deportable alien. See, Exhibit 13. SA Cecil testified that a United States Immigration Judge subsequently found, by clear, convincing and unequivocal evidence, that Guzman was a deportable alien and granted him three months voluntary departure. See, Exhibit C-19.

III. PARTIES' RESPECTIVE LEGAL ARGUMENTS SUMMARIZED

1. Summary of Complainant's Argument

Complainant charges Respondent with knowingly continuing to employ two aliens unauthorized to work in the U.S. (Counts I and II) and failing to verify the employment eligibility of two of its employees (Counts III and IV).

With respect to the former, and more serious charge, Complainant argues that Respondent, after having spoken with SA Cecil on May 25 concerning the INS NRI letter of May 24, had a duty to make a timely and specific inquiry regarding the work authorization status of the charged aliens.

Complainant argues that this asserted duty consists of two aspects. First, after having received notice of the results of inspection, Complainant argues that Respondent was ``compelled'' to do more than merely re-ask charged employees if their earlier proffered indicia of work authorization were still valid. Complainant argues that this duty to inquire:

> . . . means examining the alien registration numbers placed at issue by the Service to confirm that they are in fact those in use by the suspect employees. Where the numbers match, the employer must demand alternative documentation. Whereas, however, the employee's documents at the time of initial hire had merely to be facially valid to place the employer in good faith compliance, these new documents must not only be facially valid in the abstract, but in relative terms, they must also not conflict with the earlier proffered documents in ways which suggest fraud.
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> See, Complainant's Closing Brief, at 13-14.

The second prong of the asserted duty to inquire, as urged by Complainant, pertains to what INS calls Respondent's ``obligation to contact the Service to seek a non-prejudicial employee survey.'' Complainant indicates that a ``survey'' consists of the INS ``interview(ing) employees and remove(ing) those not authorized for employment without sanction to the employer . . . or negotiate some other arrangement designed (to) relieve the dilemma of an employer who finds himself or herself unable to satisfactorily resolve the issue of work authorization status among one or more of his employees.'' Id.

Complainant does not cite to any specific authority to support its argument asserting a two-prong duty to inquire, nor does it specify what it means by negotiating ``some other arrangement'' to relieve the ``dilemma'' of employers who are put on notice by INS that there may be a problem with the work authorization status of some of its employees.

Nevertheless, Complainant argues that Respondent failed to comply with its duty to inquire because it did not, with respect to the first step described above, demand alternative documentation from aliens whose alien registration numbers were called into question by INS; and, secondly, it did not contact INS to ``resolve (its) dilemma.''

2. Summary of Respondent's Argument

Respondent argues that INS did not properly educate the company regarding its obligations under IRCA. Respondent argues that INS did not fulfill its obligation to educate because INS did not issue a Citation before it issued the NIF. In this regard, Respondent concludes that it was singled out by INS without ever having been educated or properly warned about its prospective liabilities under IRCA.

Additionally, Respondent argues that it did not knowingly continue to employ aliens unauthorized to work in the United States Respondent urges that ``knowing,'' as used in section 1324a of the statute, requires a showing of ``certain, absolute knowledge.'' Respondent asserts that it did not have certain, absolute knowledge that Guzman and Vasquez were unauthorized to work in the U.S. because INS did not unequivocally state that the workers were unauthorized to work. Moreover, Respondent asserts that ``the conversation between Mrs. Sanchez and Agent Cecil did not result in Respondent's absolute knowledge that the two individuals were unauthorized.''

Respondent further argues it acted reasonably by meeting with the questionable employees, asking them about their documents, and reviewing copies of their documents which were retained in the company's personnel files.

3. Summary of Amicus' Argument:

Amicus argues, in support of Respondent, that INS seeks to apply a continuing-to-employ charge in a situation that was not intended by Congress. Amicus cites to a portion of legislative history to argue that a continuing-to-employ charge only applies where an alien who was authorized to work at the time of hire subsequently loses such employment authorization ``due to a change in non-immigrant status or when the alien has fallen out of status for which work permission is authorized.''

In addition, amicus urges that Congress intended a standard of actual or subjective knowledge to prove a ``knowing'' violation of IRCA. In support of its contentions, amicus argues that Congress intended to limit an employer's inquiry into an employee's documents; that a subjective standard is consistent with IRCA's graduated penalty structure for knowing violations; that the Handbook for Employers provides for a standard of actual knowledge; that without a standard of actual knowledge, there is a greater liklihood of potentially unlawful discrimination.

Amicus argues that the INS NRI letter of May 24, 1988, did not provide requisite knowledge to Respondent concerning the employ-

ment authorization of the charged alien-employees. Amicus emphasizes that the NRI was not clear but ``merely informed Respondent of a discrepancy between INS records and I-9 forms.'' In addition, amicus contends that the NRI was based on information derived ``from a data base known to be inaccurate.'' Thus, amicus argues, because of the unreliability of the information presented, Respondent cannot be required to rely on it.

Amicus also argues that Respondent had no duty to inquire further into the documents of employees because 1) it was contrary to Congressional intent; 2) it was precluded by ``impossibility of performance;'' and, 3) such a duty would violate due process. Amicus, in furtherance of its due process argument, gives content to what it conceives as constituting a minimum of due process protections in employer sanctions cases:

> Due process thus requires at a minimum that INS do a secondary manual check of its record, share the information from its files with the employer, clearly notify the employer that an individual is unauthorized to work, and give the employer and employee an opportunity to explain their actions before charging an employer with violations of IRCA. It also requires that employers not be held to a duty to investigate further.

Amicus also argues that Respondent acted reasonably by not asking for additional documents because 1) the original documents appeared facially valid; and, 2) because it did not know what other documents were valid.

Finally, amicus argues that, in light of ``the timing of this investigation as well as the failure to issue the * * * citation * * * a warning is the most severe penalty appropriate for the substantive allegations.''

IV. ANALYSIS AND DECISION:

A. Threshold Issues

In my reading of the record, I find that the parties are in substantial agreement regarding their respective factual representations in this case. Obviously, however, their legal arguments diverge significantly as to the standards of review and resultant consequences which they respectively urge me to consider.

At the outset, it seems to me that there are at least three threshold issues which require analysis and review. One threshold issue is whether Complainant's decision not to issue a citation for events that occurred prior to May 31, 1988, was inconsistent with its statutory obligation, especially as it applies to Counts III and IV. A second threshold issue is whether or not section 1324a(a)(2) was intended to apply to the type of facts that support Counts I and II. A

third threshold issue concerns the standard of review that should be used to decide a ``knowing'' violation.

1. Decision Not to Issue a Citation for Counts III and IV Was Inconsistent With 8 U.S.C. Section 1324a(i)(2)

Complainant INS decided not to issue a citation in this case, despite a recommendation from SA Cecil that it do so. (Tr. at 300)

As stated, Respondent asserts that Complainant should have issued a citation for the charges that it subsequently brought in the NIF.

Complainant argues, in turn, that it was not required to have issued a citation because it did not ``complete its investigation'' with respect to whether or not Respondent had violated sub-section (a) of section 1324a until after May 31, 1988, the tolling date of the 12-month first citation period.

Significantly, there is, on this point, a discrepancy between the statutory and accompanying regulatory language pertaining to the applicability of citations in the enforcement of IRCA's employer sanctions provisions.

The statute provides, in pertinent part, that the Attorney General shall issue a citation in the first ``instance'' (prior to May 31, 1988), in which the Attorney General ``has reason to believe that the person or entity may have violated sub-section (a).'' See, section 1324a(i)(2) (emphasis added). The statute further provides that if the Attorney General issues a citation indicating that a violation ``may have occurred,'' the Attorney General ``shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations.[4] Id. (emphasis added)

[4]The up-shot of this cited provision requires, as I see it, that in cases where a citation has been issued, INS (as a delegate of the Attorney General) is precluded from re-using the factual allegations that served as the basis of the first factual allegations that served as the basis of the first ``instance'' of violation (as incorporated into the citation) in any subsequent liability proceeding. In other words, if INS goes on to issue a NIF, after May 31, 1988, the factual allegations in the NIF must be temporally distinguishable from factual allegations which supported the initial decision to issue a citation even if they involve otherwise similar subject matter (which is, or may be, indicative of an on-going refusal to remedy a violative situation).

It is clear that such confusion is unlikely to occur for much longer into the future in that the majority of 1324a cases currently pending are based on investigations that were initiated after May 31, 1988. Nevertheless, this confusion is, in my view, highly relevant to the way in which INS decided to conduct its investigation and prosecution of the case at hand. Specifically, it is my view, essentially un-argued by the parties, that INS made a tactical decision not to issue a citation prior to May 31, 1988, because it knew that if it had, the factual allegations that would have supported the issuance of the citation would not have been useable in ``any proceeding''

Significantly, the regulations that were drafted by INS and adopted by the Department of Justice changes the wording of the statute. Specifically, the regulations provide, in pertinent part, that if, ``after an investigation,'' INS ``determines'' that a person or entity ``has violated'' section 1324a for the first time (prior to May 31, 1988), then INS shall issue a citation. See, 8 C.F.R. Section 274a.9(c).

It should be clear that the regulations were drafted in a way that, under a plain reading, significantly narrows the scope of circumstances in which INS was required to issue a citation.

Obviously, in the case at hand, Complainant INS urges an application of the regulatory language.

I do not agree. It is my view that insofar as the language of the regulation is inconsistent with the democratically chosen language of the statute, I should apply the statutory language of section 1324a(i)(2). See, Pacific Gas and Electric Company v. United States of America, 664 F.2d 1133, 1136 (9th Cir. 1981). [``It is clear that `regulations in order to be valid must be consistent with the statute under which they are promulgated,' United States v. Larinoff, 431 U.S. 864, 873, 97 S.Ct. 2151, 2156 (1977), and the `agency's interpretation of the statute cannot supersede the language chosen by Congress.' Mohasco Corp. v. Silver, 447 U.S. 807, 825, 100 S.Ct. 2486, 2496 (1980). The power of an administrative officer or agency to administer a federal statute and `to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute,' and a regulation which operates to create a rule out of harmony with the statute, is a mere nullity.'' Manhatten General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 56 S.Ct. 397, 409 (1936) (emphasis added); General Electric v. Gilbert, 429 U.S. 125, 140-42, 97 S.Ct. 401, 410-11 (1976); Security and Exchange Commission v. Sloan, 436 U.S. 103, 98 S.Ct. 1702 (1978)]; see also, Ramon-Sepulvada v. INS, 863 F.2d 1458, 1461 (9th Cir. 1988).

I do not reach the conclusion that the INS regulation is inconsistent with the statute in a stylized or cavalier manner. In my view, a common sense comparison of the language chosen in both texts reveals that they are clearly inconsistent and can be used by INS, as here, to serve as the basis for unacceptably different interpretive applications which, arguably, have the effect of eviscerating

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subsequently pursued. Such a tactical decision, while not an unreasonable exercise of prosecutorial discretion, is not, to me, an acceptable fulfillment of its obligation to comply with the plain language of section 1324a(i)(2).

legislative powers. See, Mohasco Corp. v. Silver, supra. At the very least, the regulations, are, in my view, ``out of harmony'' with the statutory language and are, therefore, null and void in this particular application. See, Pacific Gas, supra.

Therefore, I will apply only the language of section 1324a(i)(2) in reviewing the question of whether or not INS was under a mandatory obligation to issue a citation for instances of first violations that it had reason to believe may have occurred prior to May 31, 1988.

Accordingly, as applied to the facts of this case, it is my view that, with respect to Counts I and II, I find Complainant's decision not to have issued a citation to be reasonably consistent with the statutory language in section 1324a(i)(2).

In coming to this conclusion, it is important to distinguish between various stages of Complainant's investigation and the corresponding quantum of evidence that would be required to give rise to a ``reason to believe'' that a violation ``may have occurred'' and thus warrant the issuance of a citation. Specifically, I find that prior to May 31, 1988, Complainant had ``reason to believe'' that Guzman and Vasquez, the aliens charged in Counts I and II of the Complaint, were unauthorized to work in the United States. To say this, however, is not the same as saying that Complainant had ``reason to believe,'' at that point (prior to May 31, 1988), that Respondent may have violated subsection (a) of section 1324a by knowingly continuing-to-employ aliens unauthorized to be employed in the United States.

In this regard, I accept Complainant's argument regarding its decision not to issue a citation on the factual allegations pertaining to Counts I and II which, while initially being investigated prior to May 31, 1988, were not sufficiently conclusive to warrant any kind of prosecution or even the implication of a prosecution, including the issuance of a citation, until after May 31, 1988, when these same factual allegations were developed further by subsequent investigation and, thereafter, served as the basis for the NIF.

With respect to Counts III and IV, however, it is my view that a common sense reading of the record before me reveals that Complainant INS was in possession of sufficient facts, prior to May 31, 1988, to form a ``reasonable belief '' that Respondent ``may'' have violated sub-section (a) of section 1324a with regards to the paperwork violations that subsequently served as the basis for Counts III and IV of the NIF.

It is my view that INS was in possession of such requisite facts to form the basis of a ``reasonable belief '' that a violation ``may'' have occurred because it conducted its ``compliance inspection'' on April

1, 1988, and found ``numerous deficiencies'' with Respondent's record-keeping obligations, including the ``deficiencies'' which subsequently formed the basis of Counts III and IV.

To say that it did not have sufficient facts to form the basis of such a ``reasonable belief '' that Respondent ``may'' have violated sub-section (a) of section 1324a prior to May 31, 1988, is, in my view, unreasonable, and should not be legally affirmed by me.[5]

I simply do not believe that Complainant INS needed more time to round out its investigation of the paperwork violations in the same way that it needed more time to gather evidence necessary to form a reasonable belief that a knowing continuing-to-employ violation may have occurred. See, supra.

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[5]In trying to understand more thoroughly the position of the INS on this issue, I read, sua sponte, the INS Field Manual for Employer Sanctions. In a section of the Field Manual discussing its internal policy regarding citations, the Service understandably prioritized the allocation of its resources to focus on ``significant cases involving violations of the prohibitions against knowingly employing unauthorized aliens.'' See, INS Field Manual for Employer Sanctions, at section III-E-2 (USDOJ November 1987). Promulgating an internal policy which reasonably prioritized ``knowing'' violations apparently resulted in de-emphasizing the importance of issuing citations for paperwork violations. Id. (``. . . citations . . . should be appended to substantive violations,'' or be issued when ``paperwork violations are egregious''). Although there is clearly an important and difficult administrative need to allocate limited resources in an efficient manner, it is not clear that this particular INS policy is cross-referenced or otherwise in compliance with the mandatory language of the statute regarding the issuance of citations in instances where the Service has ``reason to believe'' that a violation, albeit ``substantive'' or ``non-substantive,'' may have occurred. Cf. section 1324a(i)(2).

Moreover, the Service, in its Field Manual, also distinguished between initial compliance inspections and subsequent follow-up inspections for which an ``employer should be given a reasonable time to correct deficiencies.'' Id. at section IV-B-5. Despite a close reading, it is my view that, there is no authority in the statute or the regulations or, for that matter, the Handbook for Employers, on what an employer who has ``deficient'' I-9 Forms can do, if anything, to ``correct'' or recomplete through re-verification, the ``deficient'' forms. Although the regulations provide, at 8 C.F.R. section 274a.2(b) (vii), that employers are responsible for re-verifying the employment eligibility of an employee whose employment documents carry an expiration date, there are no instructions on how to update the form nor space provided for updates. In this regard, it is not clear to me that Respondent was under a ``comprehensible'' legal obligation to have done anything about her I-9 forms after it was initially discovered, at the April 1, 1988, compliance inspection, that they were ``deficient.'' Thus, the Service policy on ``correcting'' ``deficient'' I-9 Forms does not seem, to me, to be based on a legally authoritative textual source (i.e. the statute or properly consistent implementing regulations) and therefore should not serve as a basis for its claiming that it had not ``completed its investigation'' of Respondent's paperwork violations prior to the termination date of the one-year citation period on May 31, 1988. Cf. Fuller, L., Morality of Law, at 63-65 (``. . . the `inner morality' of law requires that it be comprehensible to those whose conduct it regulates.'') (1969).

Therefore, I believe that Complainant actually had a ``reasonable belief'' that Respondent ``may have violated'' subsection (a)(1)(B) of section 1324a prior to May 31, 1988, and it is my view that, accordingly, INS was under a mandatory obligation to have issued a citation for the ``deficiencies'' that were later worked up into Counts III and IV of the NIF. See, City of Edmund v. U.S. Department of Labor, 749 F.2d 1419, 1421 (9th Cir. 1984)
(``. . . use of the word `shall' indicates a mandatory intent unless a convincing argument to the contrary is made .''); see also, Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977).

By failing to issue such a citation, Complainant violated the plain meaning and intent of that particular statutory provision. Section 1324a(i)(2).

Accordingly, it is my view that INS should not, in effect, be rewarded for making what appears to have been a tactical decision to sidestep its statutory obligation to issue a citation, pursuant to section 1324a(i)(2), for what subsequently become the factual basis for Counts III and IV of the NIF.

In this regard, I am, notwithstanding a modification of my earlier issued Summary Decision on Count IV, going to refuse to permit Complainant to ``conduct any proceeding'' regarding the factual allegation pertaining to Counts III and IV, because I believe that a citation should have been issued, as SA Cecil apparently recommended, for those ``deficiencies'' that were discovered prior to May 31, 1988.[6]

[6]I am obviously aware that such a reconsidered view places me in the somewhat awkward position of modifying and, in effect, vacating my earlier Summary Decision regarding Count IV. That I should change my view on such a question is less indicative of any inherent susceptibility to inconsistency than it is revealing of the fact that all of us continue to struggle with the understanding of this new law and the requirements of its technically various enforcement timetables.

Moreover, I might add, though it is hardly sufficient to say so, that I was not, in reaching my decision on this question, especially enlightened by coherent legal argument from the parties. In particular, Respondent lumped its vaguely-argued citation argument into a more generalized argument regarding what it viewed as an INS failure to properly ``educate.'' Respondent did not make, at any point in this proceeding, the technically precise argument that it needed to make in order to clarify its legal position and how it believed it was harmed by the INS decision not to have issued a citation. Such an argument was, unfortunately, only really discovered and analyzed after all of the post-hearing briefs had been submitted, obviously long after I had rendered, essentially unguided by the parties, my Summary Decision regarding Count IV. Having understood the case in this new light, I do not hesitate to correct my earlier view by vacating my Summary Decision. See, ``Decision Granting and Denying in Part Complainant's Motion for Summary Decision,'' February 24, 1989.

Counts III and IV are therefore dismissed.

2. Adjudicating Counts I and II Requires the Application Section 1324a(a)(2)

The core of this case involves charges that Respondent continued to employ two aliens ``knowing'' that they were ``unauthorized'' to work in the United States.

Thus, this case involves a continuing to employ charge, not an illegal hiring charge. These charges are clearly distinguishable in such a way that separate legal analysis may be necessary for determinations under both sub-sections (a)(1)(A) and (a)(2).

Respondent, through amicus curiae, argues that a continuing employment charge does not apply to the facts of this case. Citing to a portion of legislative history, Respondent asserts that Congress intended that the continuing employment charge only applies in situations wherein the ``employer has knowledge that an alien's employment becomes unauthorized due to a change in non-immigrant status, or that the alien has fallen out of a status for which work permission is authorized . . .'' See, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1 at 57, reprinted in 1986 U.S. Code Cong. & Ad. News, 5649, 5661. See also, Note, ``INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period,'' 37 Catholic Univ L. Rev. 829 (1988).

Notwithstanding a basic respect for and consideration of legislative histories and innovative legal commentaries as sources of fruitful interpretive suggestion, I nevertheless find that I disagree with the view that section 1324a(a)(2) was intended to apply only in the limited circumstances of an expiration or change in immigrant status and/or work authorization.

I disagree with this interpretation because I do not think that a plain reading of the actual language of the statute supports it. Specifically, the statute's language prohibits the continued employment of an alien in the U.S. ``knowing the alien is (or has become) an unauthorized alien with respect to such employment.'' (emphasis added) In my view, a close reading of this language reveals that the parenthesized choice of words (``or has become'') may contemplate the scenario urged by Respondent in that ``has become'' implies a change or alteration in status. It is my view, however, that the use of the word ``is,'' before the parenthesis, contemplates a situation in which an employer who hired an alien not ``knowing'' at the time of hire that the alien was unauthorized nevertheless sub-

sequently comes to know (or, in my view, reasonably should know) that the alien is unauthorized.[7]

3. Standard of Review

a. OCAHO's Position

In the first decided case interpreting the employer sanctions provisions of IRCA, the Honorable Administrative Law Judge, Marvin Morse, held that the statutory use of the word ``knowing'' encompasses ``should have known.'' See, U.S. v. Mester Manufacturing Co., Case No. 87100001 (OCAHO 1988). Specifically, where the employer is advised by INS, verbally or in writing, that an employee is an unauthorized alien, the employer has a duty to make a ``timely'' and ``specific'' ``inquiry.''

Judge Morse's decision in Mester was affirmed by the Chief Administrative Officer on July 12, 1988 and became the final agency decision on that date.[8]

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[7]My contextual justification for such a reading is that I believe it more realistically permits the applied enforcement of IRCA consistent with the achievement of publicly debated social goals, not the least of which is to identify and reduce the usage of fraudulent documentation in this society.

Specifically, I find Respondent's reliance on a limited reading of the legislative history to be unresponsive to remedying the apparently wide-spread use of fraudulently obtained immigration and identification documents that are utilized by persons who have no legal status to reside or work in the U.S. but who, on the basis of material misrepresentations of their identity and immigration status, gain access to the industrial and agricultural work forces of this country. See, GAO Report, Immigration Reform: ``Status of Implementing Employer Sanctions After Second Year,'' Pub. No. B-125051, at 30(1988); See also Schuck, ``Immigration Law and Policy in the 1990's,'' 7 Yale Law and Policy Rev. 1, 13 (1989). That such individuals, using fraudulent documents, have been actually hired by employers who ``verified'' their Apparently genuine documents is not a source of employer liability. In those situations, however, wherein an employer, after having legally hired such an individual (who is, controversial misnomers notwithstanding, an ``illegal alien'' who has duped the employer), subsequently comes to know (or reasonably should know) that the apparently genuine immigration/work authorization documents proffered by the alien were in fact fraudulent, and the employer continues to employ such a person, it seems to me that the employer should be liable under section 1324a(a)(2).

Such an approach, in my view, is necessary to provide a workable enforcement authority that is consistent with the achievement of the social goals addressed by IRCA. See also, infra. at footnote 12. At the very least, as stated, these fraudulent documents not be accorded any legal protection or value whatsoever. If the employer comes to ``know`` (or reasonably should know) that any of their employees have deceived them by utilizing such documents to secure employment, it is reasonable to expect that the employer should ``sanction'' such employees by terminating them, or else themselves face ``sanctions'' by the federal government under IRCA for refusing, on behalf of the rest of society, to do so.

[8]On June 23, 1989, as my decision here was being finalized, the Ninth Circuit Court of Appeals decided Mester. See, Mester Manufacturing Company v. Immigra-

b. Parties' Views

Complainant INS urges a constructive knowledge standard as articulated by Judge Morse in Mester and adopted by the Chief Administrative Hearing Officer on July 12, 1988. See, U.S. v. Mester, supra.

In its Reply Brief, Complainant argues on behalf of a constructive knowledge standard because ``it is the position of the Service that knowledge may be inferrred from circumstances that indicate knowledge.'' See, Reply Brief, at 2. Complainant urges that a distinction be made between ``notice'' and ``knowledge.'' See, Shacket v. Philco Aviation, Inc., 841 F.2d 166, 170 (7th Cir. 1988). Complainant also urges that ``knowing,'' as used in IRCA, is not synonymous with bad faith or evil purpose or criminal intent.

Alternatively, Respondent urges an interpretation of ``knowing,'' as used in IRCA, which would require that the government prove that an employer ``had information that the fact of which he or she is alleged to have known is indeed a certain, absolute fact.'' See, Respondent's Brief, at 9. In support of its legal argument, Respondent cites to a 1952 Supreme Court case interpreting the use of the word ``knowingly'' in a federal statute dealing with the criminal conversion of government property. See, Morrisette v. U.S. 72 S.Ct. 240, 342 U.S. 246 (1952) (a case involving a defendant-hunter who was charged with the ``knowing'' conversion of three tons of ``spent casings of simulated bombs that were left in heaps exposed to the weather'').

Through amicus curiae, Respondent also argued that I should adopt an actual knowledge standard because: 1) such a standard is appropriate in light of Congressional concerns to limit the extent of an employer's obligation to make inquiry into the prospective employee's documents; 2) it is consistent with the INS Handbook for Employers; 3) it is consistent with a graduated penalty structure for knowing violations; and, 4) it is necessary to minimize potential dis-

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tion and Naturalization Service, No. 88-7296 slip op. (9th Cir. June 23, 1989). In affirming the decision of the Office of the Chief Administrative Hearing Officer, the Ninth Circuit concluded, without discussion or analysis, that the ``knowledge element was satisfied: Mester had constructive knowledge. * * * Id. at 6690. In reaching its conclusion, the Court was persuaded by a criminal law case which discussed the so-called ``willful blindness doctrine.'' See, United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc) (deliberate failure to investigate suspicious circumstances imputes knowledge), cert. denied, 426 U.S. 951 (1976). It may seem that the adoption of a constructive knowledge standard of review is now a settled issue in the Ninth Circuit, but I nevertheless feel that it is important to try and contribute to a better public understanding of the legal reasons and policy considerations that justify what, in effect, amounts to an extension of the statute to include liability findings in situations where the employer ``should have known'' or had ``reason to know.''

crimination effects under IRCA in that employers who have reason to suspect that an employee is unauthorized, but no actual knowledge, may prefer to illegally discriminate against them by discharging them.[9]

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[9]Though not determinative of my decision to utilize a constructive knowledge standard of review, each of the points raised by amicus is deserving of brief response.

First, with respect to Congressional concern to limit documentary inquiry, it is clear, from a more contextual reading of the legislative history as cited by amicus in support of its argument, that the House Report is actually talking about documentary inquiry in the context of the verification requirement:

> In other words, if the verification procedure is followed, the language is intended to make clear that there is no requirement that an employer request additional documentation or that an employee produce additional documentation. The `reasonable man' (sic) standard is to be used in implementing this provision. * * *'' H.R. Rep. No. 99-682, pt. 1, supra, at 62, 1986 U.S. Cong & Ad. News at 5666. (emphasis added)

According to the plain language of the House Report, it seems clear to me that Congress intended that the requirements of the verification procedure be fulfilled (which, it should be noted, they were not in the case at hand), in a way that would be reasonably non-intrusive to both the employee and the employer. Moreover, there is nothing in this portion of the House Report or, for that matter, in any other part of the legislative history which indicates that Congress intended to bootstrap its concerns to foster a reasonably non-intrusive verification procedure into an actual knowledge standard to adjudicate alleged hiring, recruiting, referring, or continuing-to-employ violations.

Second, amicus claims that the INS Handbook for Employers provides that ``the government must show that the employer had actual knowledge of the illegal status of the employee.'' The portion of the Handbook which amicus cites to in support of this claim provides:

> Q: What happens if I do everything the new law requires and INS discovers that one of my employees is not actually authorized to work?
>
> A: Unless the government can show that you had actual knowledge of the illegal status of the employee, you will have an affirmative defense against the imposition of employer sanctions penalties if you have done the following things:
>
> -- had employees fill out their part of the I-9 when they started to work;
>
> -- checked the required documents (they should be genuine and relate to the individual);
>
> -- properly completed the I-9;
>
> -- retained the Form for the specified time; and
>
> -- presented the Form upon Request to an INS or Department of Labor officer. * * *'' INS Handbook for Employers, at 9.

I do not agree with the interpretation that is urged by amicus of this passage in the INS Handbook. It is clear to me that this passage is better understood as standing for the proposition that, even if the employer has the benefit of an affirmative defense by virtue of having properly complied with the verification procedures (which, as stated, is clearly not the case in the instant proceeding), INS can still meet its burden of proof to demonstrate a ``knowing'' violation if it can prove that the employer had actual knowledge. It stretches the imagination beyond belief to posit a scenario whereby INS would be advertising in its Handbook a standard of

c. My View

It is clear that there has been, up until now, a wide spectrum of suggested views on the meaning of ``knowing'' as used in IRCA, and that traditional sources of interpretive clarification, i.e., the statutory language itself, its accompanying legislative history and the implementing regulations finalized by the Department of Justice, do not helpfully delineate the conceptual reach or practical consequences of such an important but consistently elusive word.

In this regard, those of us who are faced with following (employers), enforcing (INS), and authoritatively interpreting (administrative and judicial adjudicators) this new law are, to a large extent interdependent, especially at the outset of the law's development, on the various articulations that arise from an on-going public deliberation regarding the suggested meaning to be given the language of the statute and regulations. See e.g., Popkin, ``The Collaborative Model of Statutory Interpretation,'' 61 Univ.So.Cal. L. Rev. 541 (1988).

Towards this end, I have, after considering current trends in legal scholarship[10] as well as reviewing more philosophical discussions of the ways in which social knowledge is inter-subjectively constructed and communicated,[11] come to the view that there is no

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adjudicative review requiring a showing of actual knowledge as a pre-condition for liability. Moreover, and perhaps most significantly, it seems clear to me that a plain reading of section 1324a(a)(3) indicates that the affirmative defense to which Respondent is referring does not, in fact, apply to situations involving a charge of continuing-to-employ under section 1324a(a)(2).

Third, amicus cites to the Modern Penal Code interpretation of ``knowing'' to support its view that an actual knowledge standard should be adopted because it is more consistent with a graduated penalty structure.

It is my view that the Modern Penal Code is not in any way helpful to interpreting the use of the word ``knowing'' as it is used in IRCA and applied by administrative law judges to civil liability proceedings.

Moreover, it is my initial view that, in terms of an employer's understandable concerns regarding the potentiality of criminal liability, the statutory language in IRCA that will be most relevantly applicable, if it gets to that level of prosecutorial enforcement, are the words ``pattern or practice'' of violations. See, section 1324a(f)(1).

Though I maintain a broad interest in all aspects of IRCA, my limited mandate is the adjudication of specifically civil proceedings, and I interpret ``knowing'' within that horizon. Fourth, I agree with amicus that it is essential to try to anticipate any possible sources of illegal discrimination that may unexpectedly result from enforcement of employer sanctions provisions. I do not believe, however, that such a concern necessitates, at this point, the adoption of an actual knowledge standard.

[10]See e.g., Shapiro, Who Guards the Guardians? (1988) pp. 1-36; Note, ``Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law,'' 95 Yale L.J. 969 (1986).

[11]See e.g., H. Gadamer, Truth and Method, at 235-74 (1988); Habermas, Communication and the Evolution of Society (1979).

"bright-line" test for promulgating and applying a standard to determine, in a practical way, a ``knowing'' state of mind as would be necessary to make a finding of ``actual knowledge.'' Moreover, after carefully considering an ``actual knowledge'' standard as urged by a sizable community of defense-minded interpreters, I have decided to adopt and apply a constructive knowledge standard of review because: (1) most importantly, such an approach is consistent with that already worked through by Judge Morse, adopted by OCAHO, and affirmed by the Ninth Circuit and I view such consistency as providing a helpful congealing of the emerging meaning of ``knowing'' as used in cases alleging violations of section 1324a(a)(2); (2) the publicly deliberated social goals underlying IRCA are more flexibly and substantially addressed by commonly reasonable efforts to apply a constructive knowledge standard;[12]and,(3) there

[12]Speaking generally, the purpose of employer sanctions provisions, as I see it, is to engage the cooperative compliance of all employers in approximating the democratically identified social value of fostering a society in which all persons who aspire to permanent residency in the U.S. become, as soon as possible, legally recognized members of our national community in a way that is formally authorized by the agency entrusted with the official responsibility to administer such recognition, the U.S. Immigration and Naturalization Service.

Beneath the technicalities of IRCA's statutory language and administrative implementation, there is, I believe, the societal aspiration to achieve a common social good by formally recognizing the legal status of millions of heretofore marginalized persons in a way that admits and confers upon them their entitlements to institutional accessibility and economic opportunities. Concurrent with the affirmative ``legalization'' of such persons, IRCA also clearly promulgated a historical need to enforce traditional immigration law standards of orderly admission to and residency in the United States.

Towards this end, employers are asked, indeed obligated, to participate in the organized reformation of a nationwide labor pool composed of persons who share equal legal recognition as members of a national community in which they have responsibilities and duties owed as well as entitlements that inhere to them by virtue of their acknowledged status as legal residents of the United States.

Thus, it is my view that IRCA's effort to achieve the desired social good of encouraging common legal membership in the industrial and agricultural work forces of American society, as well as discouraging unequal legal statuses that have, in a historically tragic way, provided opportunists with the possibility of coercively exploiting the human rights of those ``undocumented'' workers who were afforded only a minimum of legal protection and re-dress, justifies the utilization of a statutory construction of ``knowing'' that is based on a more workable constructive knowledge standard. Such an approach will, in my view, prove more practically applicable in the authoritative enforcement of sanctions against recalcitrant employers who choose not to participate, in a reasonable manner, in this on-going experiment embarked upon by Congress in 1986.

Accordingly, the degree to which employers actually comply, or at least reasonably attempt in good faith to comply, with the provisions in IRCA, is the degree to which their understandable concerns regarding bureaucratic intrusiveness into

are, in my view, fruitful legal analogies to be drawn from previous case law interpreting reasonably comparable statutes which, in other contexts, included similar uses of the word ``knowing'' to address legally perceived social problems that were existing at that time.

With respect to this latter point, one such case interpreted a statute promulgated to prohibit the ``knowing'' hire and employment of minors under the age of sixteen in the manufacturing and production of materials that were the subject of federal government contracts. See, United States v. Craddock-Terry Shoe Corp., 84 F. Supp. 842 (W.D. Va. 1948), affirmed, 178 F.2d 760 (4th Cir. 1949).

The statute, referred to as the Walsh-Healy Act of June 30, 1936, was, at that time, codified at 41 U.S.C.A. sections 35 to 45. It required that in any contract made by an agency or instrumentality of the U.S. for manufacture or furnishing of materials, supplies and equipment in any amount exceeding $10,000, there shall be included amongst other things the stipulation that no male person under sixteen years of age will be employed in the manufacture or production of the articles. The statute further provided, at section 36 of Title 41, that any breach of the stipulation ``shall render the party responsible therefor liable to the United States for liquidated damages in the sum of $10 per day for each male person under sixteen years of age knowingly employed in the performance of the contract.'' (emphasis added)

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their business affairs will be minimized. Alternatively, those employers who choose not to participate reasonably in the social and legal effort to re-formulate and newly constitute the citizenship status of U.S. employees shall face appropriate sanctions. See generally, Select Commission on Immigration and Refugee Policy, ``The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States,'' U.S. Immigration Policy and the National Interest (Washington, D.C., 1981), pp. 41-42; Keely, ``The Failure of United States Immigration Policy,'' in Corneilus and Montoya, eds., America's New Immigration Law: Origins, Rationales, and Potential Consequences, Monograph Series, 11 (Center for U.S. Mexican Studies: La Jolla, Ca.) (1983); Colloquium, Panel IV, ``Implementation and Impact of the Immigration Reform and Control Act of 1986: Who Carries the Burden of the Bill,'' 16 NYU R.L. & Soc. Change 109 (1988); Harwood, In Liberty's Shadow (1986), pp. 20-22; cf., M. Lovell, ``Building a More Rational, Enforceable Immigration Policy: Europe's Lessons for America,'' in U.S. Immigration in the 1980s: Reappraisal and Reform, ed. by D. Simcox (Westview Press 1988); and cf., International Labor Organization Convention 143 ``Concerning Migration in Abusive Conditions and the Promotion of Opportunity and Treatment of Migrant Workers,'' Article 6 (1975) (which, in pertinent part, calls for the provision in national laws or regulations ``. . . for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil, and penal sanctions.''

In Craddock-Terry, the District Court was asked to resolve a complaint in which the ``defendant'' had ``knowingly'' employed 25 minors under the age of sixteen for a total of 2305 days.
The initial ``examiner'' (the modern day equivalent to the administrative law judge) in the case made a determination that there was insufficient evidence to sustain the charges of violation of the Walsh-Healy Act with respect to twenty of the minors, but that the charges were sustained with respect to five of them. See, U.S. v. Craddock-Terry Shoe Corporation, supra.

In a thoroughly written opinion, the District Court reviewed the examiner's decision, as approved by the agency ``Administrator'' and supported by a preponderance of the evidence, to apply a ``constructive knowledge'' standard to the adjudication of Walsh-Healy Act claims.

In reviewing the examiner's findings that the minors were knowingly employed, the District Court explicitly acknowledged that:

> The findings of the examiner are not based on proof that the defendant had actual and affirmative knowledge that these employees were under 16 years of age. His report, in fact, impliedly absolves it of such knowledge. He concluded, however, that the defendant made no real effort to ascertain the employee's ages; that it avoided making inquiries which would have disclosed that they were under age; and that it ignored and failed to make any investigation of facts and circumstances which were such as to put it on notice that the employees were under sixteen. In other words, the examiner found that while each of these boys at the time of employment, stated his age as over sixteen, there were various circumstances which should have caused, and did cause, the defendant to suspect these statements to be untrue; and that defendant, thus put on notice, avoided making any further inquiry which would have disclosed the truth. The examiner terms this to be `constructive' knowledge.'' Id. at 846-47. (emphasis added)

After substantially criticizing the examiner for unduly emphasizing the ``appearance of the employees as he observed it at the hearing'' and the degree to which this visual observation furnished the weight of evidence supporting the examiner's findings against the defendant, the District Court goes on to affirm the utilization of a constructive knowledge standard as the basis for making determinations regarding liability, under the Walsh-Healy Act of 1936, for knowingly employing minors:

> The issue here is whether the defendant, when it employed these boys, had knowledge that they were under age. It may be readily conceded that a mere denial of such knowledge would not suffice to absolve the employer in cases such as this. If there existed facts and circumstances which should have impressed the employer with knowledge or should have aroused sound reasons for doubt which dictated further inquiry he could not ignore these and take refuge in the excuse that he did not `know.' Nor would the practice of lightly accepting the statements of employees themselves . . . without firmer proof, seem a sound one for an employer who was careful to observe the law. But the statute does not prescribe methods or formalities which the employer must use to insure that he will hire only those of the

> permitted age. It provides only that he shall not `knowingly' hire anyone under age. Id. at 851. (emphasis added)

Interestingly, the District Court utilized the constructive knowledge standard to reverse the liability findings of the examiner. In addition to criticizing the examiner for improperly emphasizing his own visual observations of employees as a basis for making liability determinations against the employer, the Court was also persuaded by credible evidence that the defendant had a ``fixed practice'' of inquiring as to the ages of all applicants for employment and causing them to sign forms in which their ages were stated. Id. Of further persuasive support to the District Court in reaching its decision, was evidence indicating that:

> There is testimony not denied that on several occasions, including one now in question, the defendant, after receiving information that the employees were in fact under age, investigated such cases and discharged the employee when this was found to be true. This would indicate a good faith intention . . . to deny the knowing employment of such persons. Id., at 851-52. (emphasis added)

I have discussed and cited to this case at length because I believe that the statutory scheme of the 1936 Walsh-Healy Act's prohibition against the ``knowing'' employment of minors unauthorized to work on government contracts is analogous to the 1986 IRCA's prohibition against the ``knowing'' employment of aliens unauthorized to work in the United States. Insofar as these statutes may be usefully, if not strictly, comparable, it is my view that case law interpreting the earlier statute, though clearly non-binding, may nevertheless provide helpful hermeneutic insights into the scope of the word ``knowing'' and thereby serve as further justification for the adoption of a constructive knowledge standard in analogous civil liability proceedings under IRCA.[13]

[13] See, also, United States v. Sweet Briar, 92 F.Supp. 777, 780 (W.D. S.C. 1950) (a case also interpreting the same provision of the Walsh-Healy Public Contract Act holding that ``a person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.''). It should also be noted that Congress statutorily defined the word ``knowingly'' in the 1972 Consumer Product Safety Act, as codified at 15 U.S.C. sections 2051, et seq. Under section 19 of the Act (15 U.S.C. section 2068), the manufacture, distribution, or sale of hazardous products not in conformity with safety standards is prohibited. Parties ``knowingly'' in violation of section 2068 may be subject to civil penalties. Section 2069(d) provides that ``the term `knowingly' means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.'' See, Consumer Product Safety Act, section 20(d), 15 U.S.C. section 2069(d). (emphasis added)

B. Applying a Constructive Knowledge Standard to Counts I and II of this Case

1. No Showing of Actual Knowledge, I-263 Inadmissible

As summarized, the relevant, non-diputed facts which are necessary to adjudicate Counts I and II are: both Vasquez and Guzman (partially) completed I-9 forms and were hired after November 6, 1986; on May 25, 1988, INS told Respondent that the alien registration numbers that Vasquez and Guzman had used to attest to their eligibility to work in the United States were found to pertain to other individuals or there was no record of those numbers ever having been issued; on May 25, 1988, INS also told Respondent, in writing and verbally, that unless Vasquez and Guzman could provide valid employment authorization from INS, they were to be considered aliens unauthorized to work in the U.S.; on June 22, 1988, INS conducted a ``survey'' at Respondent's place of business, arrested Guzman, and seized company payroll records; thereafter, INS determined, from an analysis of the payroll records, that Respondent had continued to employ Vasquez until at least June 17, 1988, and had continued to employ Guzman until at least June 22, 1988; thereafter, Complainant INS charged Respondent with knowingly continuing to employ two aliens unauthorized to be employed in the U.S.

In my view, nothing in the existing record indicates that Respondent possessed actual knowledge that Guzman and Vasquez were unauthorized to work in the U.S.

The only thing that even approximated such a showing of actual knowledge was the attempt, by Complainant, to introduce into evidence, a sworn statement attributed to Guzman and taken at the time of his arrest, on June 22, 1988, by INS agents in the form of the I-263C. At hearing, and on a subsequently filed Motion to Reconsider, I denied the admissibility of this sworn statement on the grounds that it was lacking sufficient indicia of reliability and its introduction into evidence would have been fundamentally unfair to Respondent. See, Order Granting in Part and Denying in Part

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Speaking more generally, it is also worth noting that legal encyclopedia and dictionary definitions all mention that ``knowing'' may imply mere information or belief, rather than exact knowledge; it may include both actual and constructive knowledge. See e.g., Corpus Juris Secundum, volume 51, at 535; Black's Law Dictionary, at 784.

Complainant's Post-Hearing Motion for Admission of Exhibits (OCAHO Case No. 88100080) (June 21, 1989).[14]

2. Respondent Should Have Known That Charged Aliens Were Unauthorized For Continued Employment

It is my view, as discussed at length above, that a determination of whether or not an employer has ``knowingly'' continued to employ an alien who is not authorized to work in the United States in violation of 8 U.S.C. section 1324a(a)(2) can be proven by showing actual or constructive knowledge of the alien-employee's immigration status and/or eligibility to be employed in the United States. 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) or to infer, on the basis of reliable warnings, that such officially questioned employees are not, in fact, authorized to be employed in the United States.

[14]As recorded on Form I-263C, Guzman told the INS that he had informed a representative of Respondent, at the time of hire, that he was an illegal alien. See, Exhibit C-14 at p. 4 (what appears to be question 26). Guzman's statements in this regard were flatly contradicted by the sworn statements of Respondent's agent, Ms. Aguilar, who, contrary to Guzman, appeared and testified at hearing. See, Record at 479.

At the hearing, I refused to admit the sworn statement into evidence because I felt that it was un-exempted hearsay and lacking sufficient indicia of reliability.

After the hearing, I encouraged Complainant to file a Motion to Reconsider with a supporting Memorandum of Points and Authorities. On April 9, 1989, Complainant filed its Motion to Reconsider.

After due consideration of Complainant's legal arguments, I denied its Motion to Reconsider the admissibility of the sworn statement because I felt that it was lacking proper indicia of reliability. In reaching this conclusion, I considered the possibility of Guzman's bias, the circumstances of his arrest, the fact that his sworn statement was directly contradicted by the testimony of a witness for Respondent and was not independently corroborated by any other evidence, his unavailability at the hearing, and his otherwise questionable credibility concerning previous statements pertaining to his immigration status. See, 28 C.F.R. section 68.38(b); see also, Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980). I also found that the introduction of Guzman's sworn statement would have been fundamentally unfair to Respondent primarily because the statement contained highly incriminating assertions and there was no opportunity to cross-examine him or otherwise observe his demeanor.

Thus, for the purpose of deciding the issue of liability regarding the charges contained in Counts I and II, this case comes down to what information Respondent actually possessed concerning the factual allegations that Vasquez and Guzman were aliens unauthorized to work and what, in light of such information and pursuant to exercising reasonable care, it should have ``known'' and/or done to reasonably comply with its obligations under section 1324a.

The record shows that the basis of Respondent's information concerning the factual allegations that subsequently supported the charges in Counts I and II derives from only two sources. First, Respondent's information concerning the work authorization of Vasquez and Guzman was originally derived from the aliens' own representations. Second, Respondent's information concerning the immigration status and work authorization of Vasquez and Guzman was subsequently and alternatively derived from its communicational exchanges with INS.

The relevant substance of Respondent's communicational exchanges with the two aliens occurred at separate times. On at least two occasions, Vasquez and Guzman told Respondent that they were authorized to work in the United States. They clearly represented themselves as authorized to work at the time that they were hired which, no one disputes, was subsequent to November 6, 1986. They also re-asserted that they were work authorized when Ms. Sanchez questioned them on or about May 25, 1988, subsequent to the time that INS presented her with the May 24, 1988, NRI letter.

Respondent has never contended that Vasquez or Guzman were <u>actually</u> authorized to work in the United States. In fact, it clearly appears that they were not, and, accordingly, that they lied to Respondent, on at least these two occasions, by falsely misrepresenting themselves as being work authorized. The issue, however, is not whether Vasquez and Guzman were actually authorized to work or not, but whether Respondent had reason to know that they were lying to it and, accordingly, that they were not authorized to be employed in the United States. Independent of any other information, Ms. Sanchez said that she had no reason not to believe Vasquez and Guzman because they were ``honest people'' and because they showed up for work the day after she had questioned them ``about their papers.''

Of course, the other source of information which Respondent possessed concerning the work authorization status of Vasquez and Guzman was the INS.

As stated, the relevant substance of Respondent's communicational exchanges with INS occurred on May 25, 1988. There are two distinguishable indicia of what was communicated to Respond-

ent. First, there is the NRI letter dated May 24, 1988. See, Exhibit C-12. Second, there is the person-to-person exchange between INS SA Cecil and Respondent's CEO, Ms. Sanchez.

In order to understand the significance of these communicational exchanges between Respondent and INS, and whether or not they were sufficient to inform Respondent that it had, as an employer, exercising reasonable care to comply with IRCA, an obligation to acquire knowledge of the fact in question (i.e. whether or not the alien-employee was unauthorized) or to infer its existence, four questions suggest themselves:

> (1) What information did INS actually provide to the employer to warrant this additional obligation?
>
> (2) What did the employer understand regarding the information provided by INS?
>
> (3) Was the employer's understanding of the INS-based information reasonable?
>
> (4) Assuming that the employer was adequately informed, what did the employer actually do to acquire knowledge of the fact in question and were these actions, if any, reasonable?[15]

Applied here, it is clear that, first of all, as stated above, INS

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[15]It is my view that this analytic approach is consistent with the view expressed by Judge Morse in Mester that an employer has a duty to make a ``timely and specific inquiry'' when the INS has ``advised'' the employer, verbally or in writing, that an employee is an alien unauthorized to work in the United States. What I am trying to emphasize here, however, is that the application of a constructive knowledge standard can only be ultimately justified by recognizing and analyzing the inter-subjective reciprocity of a process which requires that INS properly and thoroughly provide to employers the requisite information upon which to base the additionally imposed ``duty to make a timely and specific inquiry.'' It is not enough, especially in light of potentially problematic discriminatory aspects associated with the attempts to apply and enforce this new law, to expect employers to undertake an obligation to acquire knowledge of an alien's officially questioned work authorization status, without analyzing the content of the information by which INS communicated to the employer the probability that there was good reason to suspect that an alien-employee had fraudulently ``attested'' that they were authorized to work in the United States. I emphasize this because employers are, after all, in the business of generating an economy, and must, to an extraordinary extent, depend on the administrative reliability of INS to serve as an informative counterpoint in those instances when their own employees, for whatever reasons, lie to them. In this regard, it is my intention to scrutinize the communicational capacities that are displayed by both the employer and INS, and to assess, in light of these particularized capacities, what accountability they owe to each other under IRCA's provisions. In particular, I stress here that the communicative action of the INS should be focused on providing sufficient information to the employer in a clearly expressed way that is oriented towards reaching a mutual understanding of an initially unclear situation (unclear because it is difficult, though not impossible, to discern that, in all likelihood, the alien employees have, in this particular situation, verbally and/or with documents, misrepresented to both the employer and the INS, their immigration status and employment authorization) in order to achieve the necessary goal of coordinating IRCA's enforcement action through persuasive compliance.

provided Respondent with two distinguishable but interrelated sources of information, one written, the NRI letter and the other verbal, SA Cecil's on-site visit on May 25, 1988.

The NRI letter provides in pertinent part:

> This letter is to inform you that, according to the records of the United States Immigration and Naturalization Service, the alien registration cards submitted to you were found to pertain to other individuals, or there was no record of the alien registration number being issued. Unless these individuals can provide valid employment authorization from the United States Immigration and Naturalization Service, they are to be considered unauthorized aliens, and are therefore not authorized to be employed in the United States. Their continued employment could result in fine proceedings. See Exhibit C-12. (emphasis added)

SA Cecil's testimony about what he told Ms. Sanchez on the morning of May 25, 1988, which I find to be highly credible, is even more unequivocal regarding Respondent's basis of information concerning the work authorization of Vasquez and Guzman:

> Your people on this list do not have valid employment authorization. You are exposing your company to potential fines by not accepting the credibility of this letter and acting on the information that you've got here . . . I'm telling you . . . that unless these individuals can provide a valid employment authorization from the U.S. Immigration and Naturalization Service, they are to be considered unauthorized aliens and are therefore not authorized to be employed in the U.S. Their continued employment could result in fine proceedings . . . See, Tr. at 170-71 (emphasis added).

The record indicates that Respondent, through Ms. Sanchez, a person who studied linguistics during her university years, interpreted the NRI letter ``literally'' and ``impressionistically'' in the subjunctive, finding it ``vague,'' not ``direct'' or ``specific'' enough, not ``in plain folk English'' for ``business-people'' to understand, See Tr. at 674 (beginning at line 19-686 (ending at line 14).

At the hearing, I permitted Ms. Sanchez to read into the record her interpretation of the NRI letter. See, Tr. at 676-678. The record reveals that as she read the NRI letter, I permitted her to interlineate each sentence with what she represented was her interpretation of the letter's meaning. Significantly, when she read the sentence in the NRI letter which stated: ``They are to be considered unauthorized aliens and are therefore not authorized to be employed in the United States''--Ms. Sanchez made no attempt to interpret this sentence in the subjunctive or in any otherwise ambiguous manner. Id., at 678 (lines 22-24). In fact, she passed right over this sentence and made no comment on it at all. Id.

Similarly, Ms. Sanchez, at no point in her lengthy testimony disputed that SA Cecil had verbally told her point blank during their

meeting on the morning of May 25, 1988, that the persons named in the NRI letter were unauthorized to work in the U.S.[16]

Rather, the disparity in the testimony given by these two key witnesses as to what was said between them on May 25, 1988, relates not to whether Respondent had sufficient information to strongly suggest that the identified workers were unauthorized for employment in the U.S., but to an apparent difference in emphasis with respect to what Respondent expected to be told to do to ``correct'' such a problem.

In this regard, however, it is crucial, in my view, to distinguish between the obligation of the Service to provide employers, (in the form of, for example, the Notice of Results of Inspection letter), with reliable and reasonably clear information regarding the immigration status and/or work authorization of employees, and what this particular Respondent apparently expected that the Service should do in ``getting back to'' it to ``direct'' it on how to ``correct'' the problems identified in the NRI letter.

It is my view that Respondent's effort to interpret ambiguously or subjunctively Complainant's written and verbal efforts to notify it of a definitely suspected problem with the alien registration numbers of its employees is not reasonable and should not serve as the basis for its argument that it is not liable because INS did not provide it with actual knowledge of their status. As Complainant indicates in its Reply Brief, such a position confuses ``notice'' and ``knowledge'':

> `Notice' and `knowledge' are not synonyms; when one says of a person that he was `on notice' of a fact, one may mean just that he should have known, not that he did know. See, Shacket v. Philko Aviation, Inc, 841 F.2d 166, 170 (7th Cir. 1988).

[16]Moreover, her somewhat vague efforts to challenge the reliability and/or accuracy of the computer-generated data which served as the basis of Complainant's official calling into question the employees' alien registration numbers was not, to me, persuasive. Nothing in the existing record convinces me in any way that INS did not actually conduct an accurate records check in this particular case, and Respondent, as stated above, never contested that the aliens were not, in fact, in possession of valid alien registration numbers or that the specific check of the alien registration numbers supplied by Vasquez and Guzman in this case was, in any way, conducted improperly. Respondent's vague efforts to challenge the reliability of the Central Index System was apparently intended only to indicate that since there was the possibility of computer error, then she could not have actually ``known'' whether or not the information contained in the letters was correct. The mere possibility that such computer error could be made should not be used in any way to exculpate an employer in a situation in which there has been no showing whatsoever that such a mistake was actually made. Cf. GAO Report, Immigration Reform: ``Federal Programs Show Progress in Implementing Alien Verification Systems'' (No. GAO/HRD-89-62).

It is my view that, taken separately, and certainly when taken together, the INS NRI letter dated May 24, 1988, and the on-site person-to-person verbal warning by SA Cecil on May 25, 1988, put into the possession of Respondent sufficiently reliable information whereby Respondent, exercising reasonable care, should have acquired some further knowledge of the fact in question (i.e. regarding the work authorization of the officially questioned employees) or inferred that such employees, including Vasqez and Guzman, were in fact unauthorized to work in the United States.

Having made this determination, I turn to the fourth question outlined above, and ask what Respondent did to acquire knowledge of the work authorization status of Vasquez and Guzman.

The record shows that the actions which Respondent took with respect to acquiring knowledge of the work authorization status Vasquez and Guzman can be summarized as follows:

1. On May 25, 1988, after SA Cecil departed the premises, Ms. Sanchez told her production supervisor, Guadalupe Aguilar, to meet with the individual employees identified in the NRI letter and tell them that she had received a letter from ``Immigration'' stating that their ``cards'' did not match with the numbers they had at Immigration and if they didn't have ``good cards'' they couldn't work there any more but that if their cards were ``good'' then, ``fine.'' See, Tr. at 548; see also, Tr. at 478.

2. Ms. Aguilar testified that, on behalf of Respondent, she spoke to the ``eight or ten'' men identified on a list of names provided to her by Ms. Sanchez.[17] See, Tr. at 470. Ms. Aguilar testified that she told the men what Ms. Sanchez had told her to say about the letter from ``Immigration.'' Her testimony was somewhat conflictual as to what, if anything, the men said to her in response. They either said nothing to her (Id. at 469) or they said to her: ``Why do you want to know the numbers? Those are ours.'' Id. at 474.

3. After speaking with a group of men which apparently included Vasquez and Guzman, and relaying to them what Ms. Sanchez told her to tell them about the letter from ``Immigration,'' Ms. Aguilar

[17]There appears to be a minor, but not untroubling factual discrepancy with respect to whom Ms. Aguilar actually spoke to on May 25, 1988, whether these individuals were actually the same men as those listed on the NRI letter, whether or not they were, at that moment in time actually working for Respondent, and when they stopped working for Respondent. According to the testimony of Ms. Sanchez, her Accounting Department told her that only two men on the list, Vasquez and Guzman, were still employed by Respondent and possibly a third man named Edgar. Tr. at 548. In contrast, Ms. Aguilar testified that, of the ``eight or ten'' men that she spoke to that day, all of them, except two, Vasquez and Guzman, ``did not come back'' to work for Respondent after she spoke with them. Cf. Tr. at 469.

told Ms. Sanchez that the men had said nothing to her about their ``cards.'' Ms. Sanchez testified that in response to this information from Ms. Aguilar, she replied ``OK.'' Id. at 550.

4. Thereafter, apparently on the same day, Ms. Sanchez met directly with Vasquez and Guzman. She met with them in the privacy of her conference room and told them, in Spanish, about the letter from INS. She testified that she showed the two of them the letter, their names, and their alien registration numbers as printed in the letter. See, Tr. at 551. She testified that they told her that their ``papers'' belonged to them. Id. She testified that she did not doubt them because they were ``honest people.'' Tr. at 685. Moreover, she did not doubt Vasquez and Guzman because they came to work the next day after she spoke with them. Id. at 681.

5. Thereafter, apparently on that same day, Ms. Sanchez pulled the personnel files of Vasquez and Guzman, and compared the I-9 Forms that the two men had partially filled out at the time of hire with the NRI letter and the exemplar in the I-9 Handbook for Employers. The record is not clear whether Ms. Sanchez was doing this to determine if there was a way to ``correct'' the ``deficiencies'' in the filling out of the I-9 forms or if she was doing this pursuant to apparent admonitions from SA Cecil concerning the use of fraudulent documents. See, Tr. at 716. What is clear is that, despite the NRI letter and SA Cecil's May 25, 1988, statements to her, Respondent concluded, after comparing the photocopies of Vasquez's and Guzman's documents which she retained in their respective personnel files with the exemplar in the Handbook, that their documents ``looked (consistent with what they represented to her at the time of hire and on May 25, 1988, when she spoke with them about the matter) real and genuine to me.'' Tr. at 621. Cf. Tr. at 672-673, especially lines 7-14).

Having reached such a conclusion, the record does not show that Respondent did anything further with respect to acquiring knowledge of whether or not Vasquez and Guzman were authorized to be employed in the United States.

In fact, Respondent testified that she did not do anything else because she did not know what else to do and she expected that SA Cecil was going to get back to her to tell her what to do. Tr. at 654-55.

I do not have any reason to doubt the credibility of Ms. Sanchez regarding what actions she took after May 25, 1988, to acquire knowledge of whether or not Vasquez and Guzman were authorized to work in the U.S. Moreover, I am, as a matter of discretion, cognizant of the fact that there has been, in the slow evolution of IRCA, no small amount of confusion amongst all parties who are

struggling to apply, enforce, and comply with the legal obligations of this new law, and that this confusion has been especially difficult to sort out for employers, and most especially difficult for employers who, for whatever reasons, make decisions without the assistance of legal counsel. I am also cognizant of the fact that, in this particular case, SA Cecil apparently represented to Respondent that he would ``get back to her'' after May 25, 1988, and, in fact, he never did. I take further notice of the frustration experienced by Respondent upon discovering that the 800-number that SA Cecil furnished her with was not, in fact, a functioning phone number.[18] Finally, I am somewhat sympathetic to Respondent's confusion over how to use the generically-worded Handbook for Employers to respond to INS warnings that her employees were unauthorized to work in the United States. In fact, SA Cecil's literalist admonitions notwithstanding, I do not, after several close readings, understand how the Handbook is specifically directive to an employer's efforts to determine how to respond to an official warning regarding the ``knowing'' continued employment of aliens officially suspected of being unauthorized for employment in the United States.

Having said all of this, however, it is nevertheless my view that Respondent did not act reasonably in her attempt to acquire knowledge of whether or not Vasquez and Guzman were, as the INS officially said they were, aliens unauthorized for employment in the U.S.

In terms of the formulation applied by Judge Morse in Mester, her ``inquiry'' may have been ``timely,'' but it was not, in my view, reasonably ``specific.''

According to the record, Respondent did not, between May 25, 1988, and June 22, 1988:

1. Ask Vasquez and/or Guzman to show any documents verifying their work authorization;

2. Contact a lawyer to seek legal counsel about what the company should do concerning the legal status of Vasquez and Guzman; Cf., Tr. at 654 (wherein she testified that she told Vasquez and Guzman that ``we have very good attorneys that will go up and bat for you if you feel that these are your genuine documents.'').

3. Attempt to re-contact INS after May 25, 1988; and

[18]It should be clearly stated, however, that this apparent confusion over the 800-number is more than set off by the fact the NRI letter contained a functioning local phone number which Respondent actually used to speak with SA Cecil's supervisor on May 25, 1988.

4. Attempt to direct Vasquez and Guzman to obtain work authorization from INS consistent with what I interpret to be the clear statements to that effect as contained in the NRI letter and the verbal statements of SA Cecil on May 25, 1988.

It is this latter point, in particular, that I find most unreasonable. It is my view that the NRI letter and SA Cecil's statements unequivocally state, separately and in the context of each other, that Vasquez and Guzman are aliens unauthorized to work unless they get proper employment authorization from INS. In particular, SA Cecil's emphatic warnings concerning Respondent's obligations under IRCA, reasonably imply, though they do not expressly state, that Vasquez and Guzman must obtain and present some other trustworthy indicia of work authorization besides that which has already been officially called into question by INS. That the alien registration numbers of such employees have been officially called into question is not, in itself, unequivocally conclusive that the employees are actually unauthorized workers, but it does raise such a strong inference that an employer exercising reasonable care must do more than merely ask the alien employees themselves if their ``papers'' belong to them. See, Craddock-Terry, supra. In other words, taken together, the INS NRI letter and SA Cecil's verbal warnings gave rise to a rebuttable presumption that these workers were, in fact, not authorized to be employed in the United States. This presumption was never, in the case at hand, substantially rebutted by Respondent because, while continuing to employ the officially questioned alien-employees, it failed, in my view, to act reasonably to acquire knowledge of whether such suspected workers were authorized to be employed in the United States.

In this regard, it is my view that an employer exercising reasonable care to acquire knowledge of the fact in question and to comply with its new obligations under IRCA, would have insisted that the officially questioned employees obtain from INS and thereafter present to the employer some other officially corroborated indicia of the alien's authorization to be employed in the United States, and that until such official authorization was shown, such employees would not, at least temporarily, be allowed to work.

Thus, it is my suggested view that the most appropriately reasonable action for Respondent to have taken would have been to suspend the questioned workers for a relatively brief and specified period of time on the condition that they, in effect, put their ``attestations'' to the fire by voluntarily going to INS, with or without attorneys, and attempting to apply for an official confirmation of their verifiable eligibility to be employed in the United States.

If, within that brief and specified period of time, its employees refused to go to the INS to apply for such confirmation of their work authorization, it is my view that Respondent would have had to have conclusively inferred that they did not, in fact, have proper work authorization and that they should therefore be terminated from further employment.

I think that what really happened after May 25, 1988, is that both INS and Respondent became more preoccupied with the ``survey'' or so-called ``raid'' on Respondent's premises, and that reasonable efforts to remedy or otherwise attend to the legal situation of the workers specifically identified in the NRI letter were secondarily ignored.[19] That Respondent sought legal counsel, on May 25, 1988, regarding her understandable concerns about whether or not she should consent to the impending ``raid'' is entirely

[19]In its closing Brief, Complainant INS asserts that ``the second aspect of the duty of inquiry relates to the obligation to contact the Service to seek a non-prejudicial employee survey or negotiate some other arrangement designed to relieve the dilemma of an employer who finds himself or herself unable to satisfactorily resolve the issue of work authorization status among one or more of the employees.'' Closing Brief at 14 (emphasis added). In my view, Complainant has correctly stated that an employer is in a ``dilemma'' when INS has officially questioned the status of one of its workers. It also seems clear to me that, consistent with what I have said above, the employer does have an obligation to attempt in good faith to ``negotiate'' an ``arrangement'' to ``relieve'' its ``dilemma.'' It is far from clear to me, however, that the employer has an obligation to seek out or otherwise consent to a ``survey'' or ``raid'' or ``factory sweep'' prior to having been given an opportunity to ``negotiate some other arrangement.'' Complainant offers no legal authority for this argument. It appears to me that in the case at hand, INS prioritized the ``survey-raid'' significantly higher than any attempt to ``negotiate some other arrangement'' and that, accordingly, on June 22, 1988, twenty agents were, in the words of SA Cecil, ``deployed'' at the premises of Respondent's place of business. It is at least arguable that INS, by prioritizing ``raids'' in its enforcement of IRCA, instead of a more ``service''-oriented attempt to ``negotiate some other arrangement,'' (i.e. for example, such as opening a special ``window'' whose specific function would be to conduct ``verification'' checks on aliens whose work authorization has been called into question) is contributing to a more acrimoniously adversarial climate which, in my view, will prove counterproductive to the long-term effort to enhance persuasive compliance with section 1324a and section 1324b. Hopefully, some of these tensions will be resolved with the promulgation of cooperative policies through the auspices of the INS Office of Employer and Labor Relations and the development of its programs, including the ``Legally Authorized Worker Program'' and the ``Telephone Verification Program,'' the latter of which would apparently permit employers to obtain telephonic notification of the status of an alien employee. See, Frye and Klasko, Employers' Immigration Compliance Guide, section 4A.02, at 4A-3, ft.nt.10 (May 1989) (``INS has stopped responding to employer's routine requests for verifications of employment status pursuant to a settlement agreement reached in Salinas-Pena V. INS, CV86-1033-DA (D. Ore. March 15, 1988). However, INS may still respond in specific cases in which employers have articulable reasons to believe that documents presented by a particular employee may not be bona fide.'').

reasonable. What is less understandable is why she did not, at the same time, also seek appropriate legal assistance on what to do about the workers whose employment eligibility had been officially questioned in writing and verbally by INS. It is clear that such a decision is indicative that Respondent did not take INS warnings about unauthorized workers as seriously as she took INS statements regarding the un-scheduled ``raid'' of her company's premises.

In the end, what I find to be most unreasonable, however, is not so clearly an issue of ``knowledge'' per se as it is Respondent's apparently determined intent not to acknowledge the official authority of INS to question its employment practices. In my view, Respondent could have and should have made a more reasonable effort to acknowledge INS authority by seeking in good faith to acquire some additionally independent and more ``specific'' corroboration of Vasquez' and Guzman's obviously self-serving representations that they were eligible to work in the United States. In this regard, after being informatively warned by INS that the alien registration numbers presented by its alien-employees did not correspond to official INS records, Respondent should have acknowledged the authority of the INS, by presuming or inferring that the employees were unauthorized to work in the United States unless or until it could, through the exercise of reasonable care, acquire knowledge of their employment authorization and thereby rebut the initial presumption.

Since Respondent continued to employ Vasquez and Guzman after May 25, 1988, when it had reason to know they were aliens unauthorized to work in the United States, I conclude that Respondent is liable for Counts I and II of the Complaint.

V. Remedies

Since I have found that Respondent continued to employ aliens named Vasquez and Guzman in the United States, knowing they were or had become unauthorized aliens with respect to such employment in violation of 8 U.S.C. 1324a(a)(2), assessment of civil money penalties and a cease and desist order are required as a matter of law. Section 1324a(e)(4)(A)(i) calls for an assessment of not less than $250.00 nor more than $2,000.00 per unauthorized alien with respect to whom a violation has occurred. The Complainant, in its NIF, seeks a civil monetary penalty of $500.00 for Count I and $750.00 for Count II.

Although the statute sets out specific factors for a fact finder to consider in assessing civil penalties for paperwork violations, neither the statute nor the regulations provide any guidance in deter-

mining what factors the fact finder should consider in determining the amount of penalty for violating section 1324a(a)(2). It is my view that in determining an appropriate civil penalty in this case, I should consider the amount of penalty asserted by INS in its Complaint and whether or not that amount is reasonable based upon the circumstantial reasons that Respondent gave for continuing to employ aliens whom the Service had identified as being unauthorized to be employed in the United States.

I find that the amount of penalty requested by Complainant in the NIF for Counts I and II is reasonable because: (1) it is less than half the maximum amount which could be assessed; (2) the length of time Respondent continued to employ Vasquez and Guzman after May 25, 1988, justified a fine in excess of the minimum; (3) Respondent's decision to continue to employ Vasquez and Guzman unduly credited their statements that they were authorized to work and, in effect, ignored specific directives, both orally and in writing, from INS that Respondent needed to obtain from these employees some other indicia verifying that they were authorized to work in the United States.

Complainant has further requested in its Complaint that I direct Respondent to comply with section 1324a(b) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of three years. I do not find that it is appropriate in this case to exercise my discretionary authority pursuant to 8 U.S.C. 1324a(e)(4)(B)(i) and require Respondent to comply with the requirements of sub-section (b) because I am confident, based upon the record in this case, that Respondent will make every effort henceforth to fully comply with the law.

ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, proposed findings of fact and conclusions of law submitted by the parties. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

A. Counts I and II.

1. To fulfill its obligations under section 1324a(a)(2) of Title 8 of the United States Code, Respondent is required, after having been properly informed by INS of a reasonably suspected use of fraudulent documents by employees hired after November 6, 1986, to exercise reasonable due care to acquire knowledge of the identification, immigration status and work authorization of the specifically named employees.

2. Upon showing that a proper notice of a reasonably suspected use of fraudulent documents by an employee is communicated by INS to an employer, in either a written or verbal form, a rebuttable presumption arises that all alien employees named in the notice are aliens unauthorized to be employed in the United States.

3. Respondent was properly informed in writing and verbally by INS, and should have rebuttably presumed, that its employees named Vasquez and Guzman had used identification documents containing alien registration numbers that did not correspond to official INS records, and that unless these employees obtained employment authorization from INS they were to be considered unauthorized for employment in the United States.

4. Respondent did not act reasonably to rebut this presumption by exercising due care to acquire knowledge of the identification, immigration status, and work authorization of Vasquez and Guzman. It was not reasonable for Respondent to have merely asked and solely relied on the self-serving statements of the officially-questioned aliens themselves.

5. Upon receiving proper notice that an employee is or may be an unauthorized alien, an employer who exercises reasonable care should acquire knowledge of the fact in question by temporarily suspending the questioned employee on the condition that he or she obtain from INS, and present to the employer, confirmation of their authorization to be employed in the United States. If the employer does not acquire knowledge of the questioned employee's authorization to be employed in the United States, the employer after a reasonable period of time should conclusively infer that the alien employee is unauthorized for employment in the United States, and such an employee should, thereafter, be immediately terminated from further employment.

6. By not substantially rebutting the presumption that arose as a result of being properly informed by INS that Vasquez and Guzman were aliens unauthorized to be employed in the United States, Respondent had reason to know that Vasquez and Guzman were unauthorized to be employed in the United States.

7. Respondent continued to employ Vasquez for at least 22 calendar days and Guzman for at least 27 calendar days after having been informed by INS on May 25, 1988, that these employees were to be considered unauthorized to be employed in the United States.

8. I determine, upon the preponderance of the evidence, that Respondent violated Title 8 U.S.C. 1324a(a)(2), by continuing to employ in the United States Martin Campos-Vasquez knowing him to be, or to have become, an unauthorized alien with respect to his

employment by Respondent during a period of time which ended on or about June 22, 1988.

9. I determine, upon the preponderance of the evidence, that Respondent violated Title 8 U.S.C. 1324a(a)(2), by continuing to employ in the United States Rigoberto Gutierrez-Guzman knowing him to be, or to have become, an unauthorized alien with respect to his employment by Respondent during a period of time which ended on or about June 22, 1988.

10. That the civil money penalty, assessed at $500.00 for Count I and $750.00 for Count II, for a total assessment to be paid by Respondent of $1250.00, is just and reasonable.

11. 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 (a)(1)(A) and (a)(2).

B. Counts III and IV

1. In order for a regulation implementing IRCA to be valid, its language must be consistent with the language of Title 8 section 1324a.

2. Insofar as the language of 8 C.F.R. section 274A.9(c) is not consistent with the language of 8 U.S.C. section 1324a(i)(2), no weight shall be accorded to the regulation because it is not valid.

3. The effective dates of enforcement timetables, including the 12-month First Citation Period, are set out in the statute at section 1324a(i) of Title 8 of the United States Code.

4. The tolling date of the 12-Month First Citation Period was May 31, 1988.

5. Complainant INS conducted a compliance inspection of Respondent prior to May 31, 1988, and determined that, amongst other ``deficiencies,'' Respondent had failed to properly complete Section 2 (``Employer Review and Verification'') on the Employment Eligibility Verification Forms (Forms I-9) of Vasquez (Count III) and Guzman (Count IV).

6. Complainant had reason to believe that Respondent may have violated subsection (a) prior to May 31, 1988 with respect to the Forms I-9 of Vasquez and Guzman.

7. Complainant, pursuant to 8 U.S.C. section 1324a(i)(2), had a mandatory duty prior to May 31, 1988, to issue a citation in instances where it had reason to believe that a violation may have occurred and, further, not to conduct any subsequent proceeding on the basis of such alleged violation or violations.

8. Complainant did not issue a citation to Respondent even though Complainant had reason to believe that Respondent may

have violated subsection (a) prior to May 31, 1988 in that Respondent, as of April 1, 1988, had failed to properly complete section 2 of the Forms I-9 for Vasquez and Guzman.

9. Since Complainant did not issue a citation in an instance where it had a statutory obligation to have done so, it shall not be permitted to conduct any further proceeding on the basis of the alleged violations that were subsequently set forth in Counts III and IV for which it should have issued the citation.

10. Counts III and IV are dismissed.

Accordingly, pursuant to 8 U.S.C. section 1324a(e)(6) and as provided in 28 C.F.R. section 68.52, this decision and order shall become the final decision and order of the Attorney General unless within thirty (30) days from the date of this date the Chief Administrative Hearing Officer shall have modified it or vacated it.

SO ORDERED: This 7th day of July, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge