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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a PROCEEDING
	)	OCAHO CASE No. 90100326
NOEL PLASTERING & STUCCO, INC., Respondent.	)	

Erratum

On May 12, 1992, I issued a Final Decision and Order in this case. I now issue this Erratum, in order to correct an inadvertent error, since noted therein.

On Page Nine, Line 20, the word "not" should be inserted between the words "does" and "insulate".

SO ORDERED

FREDERICK C. HERZOG
Administrative Law Judge

San Francisco, California
May 21, 1992

UNITED STATES DEPARTMENT OF JUSTICE
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UNITED STATES OF AMERICA, Complainant,	)	
v.	)	OCAHO CASE No. 90100326
NOEL PLASTERING & STUCCO, INC., Respondent.	)	

FINAL DECISION AND ORDER

This case was tried before me on December 2 and 3, 1991 in San Francisco, California.

On November 7, 1991, United States Department of Justice, Immigration and Naturalization Service, hereafter called Complainant or I.N.S., filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer. The violations of the Immigration Reform and Control Act of 1986 by Respondent Noel Plastering and Stucco, Inc.[1]

Count one of the Complaint alleged that Respondent violated 8 U.S.C. §1324a(a)(1) by hiring fourteen employees while knowing they were not eligible for employment in the United States. In the alternative, this count alleged that Respondent violated 8 U.S.C. §1324a(a)(1) by contin-uing to employ the above-referenced fourteen employees after learning they were ineligible to work in the United States. Count two alleged that Respondent failed to ensure the proper completion of Employment Eligibility Verification Forms[2] by thirteen of its employees; specifically, Complainant alleged that section one of those thirteen forms were completed in an improper manner. Count three alleged that Respondent failed to properly complete section two of the Forms I-9 for sixty-two of its employees. Count four alleged that

[1] The Immigration Reform and Control Act of 1986, as amended, is codified at 8 U.S.C. §§1324a, 1324b, 1324c. It shall hereafter be called IRCA or the Act.

[2] The Employment Eligibility Verification Forms will hereafter be referred to as Forms I-9.

both sections one and two of fourteen Forms I-9 were completed in an improper manner by the Respondent or by its employees. Count five alleged that Respondent failed to make available one hundred and seventy of its employees' Forms I-9 for Complainant's inspection. Count six alleged that Respondent failed to present five Forms I-9 for Complainant's inspection. Count seven alleged that Respondent failed to update Forms I-9 for six of its employees. Finally, count eight alleged that Respondent failed to properly complete section one, and failed to update, three of its employees' Forms I-9.

On September 26, 1991, I issued an Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Granting Complainant's Motion to Amend Complaint. In that Order, I found Respondent violated the Act as alleged by counts two, three, four, six, seven and eight of the Complaint. However, I found there remained issues of material facts which precluded a summary decision with respect to counts one and five. In addition, I declined to impose any civil monetary penalty at that stage of the proceeding.

As a result of the partial summary decision, only three principal factual issues remain in this case. The first issue is whether Respondent attempted to reverify the employment eligibility of the fourteen employees named by count one of the Complaint in a timely manner.[3] The second issue turns on whether any of the Forms I-9, referred to in count five, were destroyed by a fire which occurred in Respondent's Southern California office. The third principal issue addresses the appropriate amount of civil money penalty that must be imposed upon the Respondent for its instant IRCA violations.

Findings of Facts

The burden of persuading the fact finder on the remaining issues rests generally with the Complaint. It must demonstrate Respondent's IRCA liability by a preponderance of evidence. 8 U.S.C. §1324a(e)(3)(C); Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 566 (9th Cir. 1989). However, since Respondent's assertions with respect to the alleged destruction of Forms I-9 by a fire is in the nature of an affirmative defense, it bears the burden of evidence production as to that issue. See Masphee Tribe v. New Seabury Corp., 592 F.2d 575 (1979), cert denied 444 U.S. 866, 100 S. Ct. 138, 62 L.Ed.2d 90 (1979).

[3] A sub-issue is whether Respondent acquired a duty to reverify the relevant individuals' employment eligibility in the first place. I have already addressed this issue in the partial summary decision order; but Respondent presently renews its argument that it never acquired any such reverification duty.

Count One

In this count, Complainant alleges that Respondent continued to employ fourteen individuals after learning they were not eligible to work in the United States. In the alternative, Complainant alleges that Respondent hired the fourteen named individuals while knowing they were not eligible for such employment.

A violation of the Act's continuing employment prohibition exists whenever a covered employer, upon hiring an individual for employment in the United States after 1986, becomes aware of that individual's unauthorized status, but, nevertheless continues to employ that individual. 8 U.S.C. §1324a(a)(2).

An employer may be in violation of the continuing employment prohibition even if it did not possess any actual knowledge of its employee's unauthorized employment status.[4] Liability for continuing employment violation may be premised upon the employer's "constructive knowledge" of its employee's unauthorized status.

Courts have found employers to possess culpable "constructive knowledge" where they failed to take appropriate steps to reverify their workers' employment eligibility after receiving specific and detailed information regarding the workers' possible unauthorized status. Mester Mfg. Co. v. I.N.S., supra at 566-7; New El Rey Sausage Co. Inc. v. I.N.S., 925 F.2d 1153, 1158 (9th Cir. 1991).

With respect to the present allegations, Respondent raised few disputes. Instead, Respondent denies liability as to this count by arguing that it did not possess the requisite knowledge of the fourteen employees' unauthorized status. Specifically, Respondent argues that the "constructive knowledge" theory of liability is not applicable to the present case that its liability, if any, must be premised upon its "actual knowledge" of the relevant employees' ineligible status. Respondent further contends that the Ninth Circuit, in Mester and in New El Rey Sausage, only approved the use of the "constructive knowledge" standard in proceedings brought under IRCA's criminal sanction provision codified at 8 U.S.C. §1324(f).

Respondent's present contentions rest upon an erroneous reading of the cited cases. Contrary to Respondent's argument, neither Mester nor New El Rey Sausage involved IRCA criminal sanction proceedings.

[4] The Act only prohibits employers from continuing the employment of unauthorized aliens who were hired after November 6, 1986. P.L. 99-603 §§101(a)(3)(A), (B), 100 Stat. 3372 (1986).

Instead, both of those cases sought only civil monetary sanctions against the relevant employers.

In New El Rey Sausage, the court compared IRCA's constructive- knowledge liability theory with criminal law's "imputed-knowledge" standard. Respondent may have mistaken the court's comparative discussions to signify that it approved of the constructive knowledge standard only for cases involving criminal sanctions. However, this clearly was not the case. In both Mester and New El Rey Sausage, the court, in fact employed the constructive knowledge theory to arrive at the conclusion that the relevant employers' were liable for civil monetary fines for violating the Act's continuing employment prohibition. Respondent's argument that continuing employment liability must be based upon an employer's actual knowledge of its workers' ineligible status is, thus, a clearly erroneous proposition.

In relation to its aforementioned arguments, Respondent further contends that it did not possess any actual knowledge of the relevant employees' unauthorized status. Respondent claims that Complainant's letter dated August 14, 1989[5], which alerted Respondent as to the 'possible unauthorized status' of twenty-one employees[6], was ambiguous and thus insufficient to give rise to an inference of culpable or actual knowledge on its part. Respondent also contrasts the "ambiguous" nature of the August 14 letter with the "unambiguous" wordings employed by the government in the New El Rey Sausage case.

However, the question of whether Respondent possessed culpable, actual knowledge as a result of the August 14 letter is clearly imma-terial, since Complainant alleges only that Respondent possessed culpable, constructive knowledge.

Nevertheless, the August 14 letter is material evidence on the issue of whether Respondent acquired constructive knowledge of the relevant employees' unauthorized employment status. Specifically, the letter can answer whether Respondent received sufficiently specific information concerning the relevant individuals' unauthorized status as to give rise to a duty on its part to reverify their employment status. If Respondent indeed acquired such a duty, and if it then failed to timely reverify those individual's employment status, it had constructive knowledge of their unauthorized status.

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[5] Hereafter referred to as the August 14 letter.

[6] The fourteen employees who form the subjects of this count are among the twenty- one employees named by the August 14 letter.

The August 14 letter specifically identified each of the fourteen relevant Noel employees. The letter also stated that these individuals used documents which did not pertain to them and that they might be unauthorized to work in the United States. Finally, the letter informed Respondent that, if it continued to believe that the fourteen employees were authorized to work in the United States, those employees must then prove their eligibility by presenting additional immigration documents. Under these facts, a reasonable employer, similarly situated to the Respondent, would have sought to further investigate those employees' work eligibility.

Thus, I find that Respondent acquired a duty to reverify the fourteen employees' work eligibility as a result of the August 14 letter from the Complainant. This finding is further supported by the testimony of Respondent's own witnesses, who indicated that Respondent knew it must embark upon a reverification process for the fourteen employees after receiving the August 14 letter.[7]

In light of the above, the only remaining issue in this count is whether Respondent sought to reverify the fourteen employees' eligibility to work in the United States in a timely manner. See Mester Mfg. Co. v. I.N.S., supra; see also New El Rey Sausage v. I.N.S., supra. A timely reverification effort indicates lack of "constructive knowledge" while an untimely and/or inadequate effort indicates the existence of culpable knowledge, and, consequently, liability.

Whether Respondent undertook a timely reverification effort may be further separated into two constituent factual questions:

> First, whether Respondent ever sought to reverify the employees' work eligibility after receiving information regarding their possible unauthorized status; and,
>
> Second, if Respondent, indeed, embarked upon the reverification process, whether it sought to complete this process in a timely manner by discharging those employees who failed to present adequate documentation within a reasonable time. See Mester Mfg. Co. v. I.N.S., supra at 567.

Complainant presented uncontradicted evidence establishing that Respondent continued to employ the relevant workers for periods lasting from one week to more than one year after receiving the August 14 letter. Complainant argues that, based upon this evidence, and on the absence of any evidence suggesting Respondent had undertaken a diligent reverification effort, Respondent, thus, pos-

[7] Lawrence Noel, Charlie Abril Sr., and Josephine O'Connor all testified that they attempted to reverify the relevant workers' employment eligibility after receiving the August 14 letter from the Complainant.

sessed constructive knowledge of the fourteen employees' unauthorized status. Respondent, on the other hand, argues that it undertook to reverify the employees' work eligibility and that, with respect to five of those employees, it terminated them in a timely manner after they failed to present additional documents.

During the hearing, the parties elicited testimony from Charlie Abril Sr., Lawrence Noel, and Josephine O'Connor on the subject of whether Respondent undertook to reverify the work eligibility of the fourteen relevant employees.

Abril was a worksite supervisor for Respondent during the period in question. According to him, on August 14, 1989, he received a note from Josephine O'Connor, Respondent's payroll clerk, to "get rid of" a number of employees because they were not documented workers. The note accompanied an employee list.[8] Abril indicated that among the twenty-one names which appeared on the August 14 letter, he recog-nized the names of only three individuals in relation to O'Connor's memo. The three employees were Delfino Carrasco, Robert Garcia- Amezcua and Alejandro Lopez-Leon.

Abril also testified that after receiving O'Connor's instructions in August 1989, he told Carrasco and Garcia-Amezcua to present addi-tional paperwork, or risk terminations. However, he admitted that, although he was instructed to fire employees with deficient Forms I-9, he did not do so. Instead, he sent Carrasco and Garcia-Amezcua to Respondent's office, where they were subsequently terminated. Abril also admitted that he did not know at what point in time those two employees were actually terminated by the Respondent.

With respect to the third employee, Lopez-Leon, Abril stated that he did not speak to him regarding the need to present additional documentation. Abril suspects that Lopez-Leon was injured during that period and did not return to work for some time. However, he was not sure if Lopez-Leon was indeed the injured employee.

Lawrence Noel, the owner and founder of Respondent company, also testified on the steps he took to reverify the workers' employment eligibility. According to him, after receiving the August 14 letter from

[8] It is unclear whether O'Connor's memo required Abril to terminate those employees or to seek further documents from them. Abril gave somewhat conflicting testimony on this subject. Although he testified that he received a note from O'Connor to "get rid of" those employees, he also testified that he received a memo from O'Connor indicating that certain employees working on him worksite must present additional eligibility documentation. Abril did not distinguish between the O'Connor's note and her memo.

the Complainant, he asked O'Connor and other supervisors to check the documents of employees named by the letter. However, Noel admitted that he did not give O'Connor any deadline as to when the employees must be fired if they do not present appropriate documents.

Noel also testified that he periodically made verbal inquiries to O'Connor and to his other supervisors regarding the named employees' status. However, Noel further admitted that he possessed little direct knowledge regarding the reverification process. The only specific recollection he retained was that Respondent terminated Delfino Carrasco for lack of appropriate documents. However, Noel did not recall when Carrasco's termination actually took place. Noel also had no knowledge as to whether any other employee was terminated due to lack of appropriate employment eligibility documents.

Josephine O'Connor testified that during the period under consideration, she worked as a payroll clerk at Respondent's Concord, California office. Her testimony confirmed parts of Abril's testimony and contradicted other parts of his testimony. O'Connor testified that after receiving the August 14 letter, Lawrence Noel gave her a list of employees and instructed her to tell those workers' superintendents that their Forms I-9 were deficient and that they need to present additional information. Although O'Connor was instructed as to the requirements of employment eligibility verification[9], she testified that
she asked Respondent's worksite superintendents[10] to find out what documents must be presented by the twenty-one employees named in the letter. She also told the superintendents that the named employees could continue to work until they presented additional documents, and that they had to come into the office to present the documents.

O'Connor recalled that only three of the twenty-one employees came into the office and presented additional eligibility information.[11] She

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[9] O'Connor testified that I.N.S. Special Agent Hornung instructed her on how to pro-perly complete Forms I-9. In addition, she attended a seminar on this subject, although she could not recall when the seminar took place. However, Complainant's Exhibit C-12, a "Memorandum of Investigation" dated June 30, 1989 and prepared by Special Agent Hornung, relates that O'Connor stated she had attended that seminar prior to that date. Therefore, I find O'Connor knew of the Forms I-9 requirements prior to June 30, 1989.

[10] According to O'Connor, Respondent had two or three field superintendents at the time.

[11] The three employees were Juan Atondo, Delfino or Ramon Carrasco (O'Connor was unsure which of these two employees presented additional information) and Carole Griffith.

also testified that one of the twenty-one employees, Alejandro Lopez-Leon, was injured and did not return to work for a number of weeks; when Lopez-Leon finally returned to work, he presented an unacceptable green-card to O'Connor. According to O'Connor, although Lopez-Leon was not eligible to work due to the unacceptable green- card, he nevertheless worked on Respondent's crew because he told his supervisor that O'Connor had approved it. Apparently, Lopez-Leon received one or two paychecks before O'Connor realized that he was still working for the Respondent. O'Connor also admitted that she had no knowledge whether any of the employees named by the August 14 letter was terminated by Respondent for failure to present additional documents. She further testified that she did not have the authority to fire or hire an employee.

Based upon the above uncontradicted evidence, I find that Respondent attempted to reverify the employment eligibility of the twenty-one individuals named by Complainant's August 14 letter. However, I also find Respondent failed to conduct its reverification effort in either a timely or diligent manner.

Neither regulation nor case law explicitly defines what constitutes a diligent and timely reverification effort under IRCA. But it is clear that the employer's effort must be judged in light of all the circum- stances present in a case. Nevertheless, courts have found continuing employment violations when an employer continued to employ an unauthorized worker two weeks after learning of his or her possible unauthorized status. Mester Mfg. Co. v. I.N.S., supra at 567-568.

In its brief, Respondent does not argue that it reverified the employment eligibility of all fourteen workers in a timely fashion. Instead, it only argues that it timely reverified the eligibility of five of those workers. In each of the five instances, the relevant employee ceased his employment with Respondent within forty-five days after Respondent's receipt of the August 14 letter.

I do not agree with Respondent's argument. While there is some evidence that Respondent took initial steps to reverify the employment eligibility of the named employees, there is a complete dearth of evidence which suggests that it took any actions beyond these initial steps. In particular, there is little evidence that Respondent expended any effort to obtain additional eligibility information from the relevant employees.[12] It also appears from the record that Respondent's

[12] Although Abril testified that he told three of the employees to go to the office to present eligibility documents, he also admitted that they may have subsequently worked

(continued...)

reverification effort employment was completely haphazard. This impression is reenforced by the fact that, except in one instance, neither the owner, nor the worksite superintendent, nor the payroll clerk possessed any personal knowledge as to how and when any of the fourteen employees ceased their employment with Respondent. Finally, uncontradicted evidence demonstrates that after Respondent received the August 14 letter from the I.N.S., a majority of the fourteen relevant employees continued to work for Respondent for periods lasting from four months to a year. There is also no evidence that Respondent terminated any of the fourteen employees.

From such evidence, I find that, beyond its initial call for reveri-fication, Respondent failed to take any affirmative act to reverify the employment eligibility of the relevant employees.[13] Under these circumstances, the fact that two of the fourteen employees ceased their employment with Respondent within one week August 14, 1989 does insulate Respondent from liability with respect to them. Even a one week delay in termination may be too long where Respondent failed to undertake any substantial action to reverify their eligibility. In the words of the Ninth Circuit Court of Appeal:

> It is apparent that an inquiry into a reasonable time frame for termination will include consideration, in certain cases, of factors other than the number of days alone--such as the certainty of the information providing the knowledge of unauthorized status, and steps taken by the employer to confirm it. Mester Mfg. Inc. v. I.N.S., supra at 568, n.9.

In light of the above discussions, I find that Respondent failed to diligently or timely reverify the employment eligibility of the fourteen workers alleged in this count after learning that they may be unauthorized to work in the United States after 1986.

Count Five

In count five, Complainant alleges that Respondent failed to present one hundred and seventy Forms I-9 for I.N.S. inspection in violation of 8 U.S.C. §§1324a(b)(3), 1324a(a)(1)(B) and 8 C.F.R. §274a(b)(2)(ii) (1991).

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[12](...continued)
on another crew.

[13] Lawrence Noel's testimony that he periodically inquired into the status of the relevant employees does not establish that he made an effort at reverification, without more. In addition, though Noel testified that things began to improve as he became more involved in the reverification process, he failed to identify any actions that he took to "improve" the situation. There is also no evidence which corroborates that he "got more involved in the process."

Respondent did not dispute any of these allegations prior to the hearing herein; however, it raised an affirmative defense to liability. Respondent claimed that the relevant Forms I-9 were destroyed during a fire which occurred on September 30, 1988 in its Southern California office located in Pomona, California.

In its post-hearing brief, Complainant argues that Respondent's fire defense is insufficient on two grounds. First, Complainant contends that sixty-seven of the relevant Forms I-9, which pertained to Respondent's Northern California employees, were never located in Respondent's Pomona office. Second, Complainant asserts that testimony offered during the hearing indicates none of the Forms I-9 were destroyed as a result of the fire in Pomona.

On the subject of Respondent's Northern California employees, the parties have stipulated that the employment records for such employees' were kept in Concord, California at the time of the fire. In addition, O'Connor gave uncontradicted testimony that employees identified under the code "O-3" in Respondent's "Quarterly Check History" are Northern California employees.[14] A comparison of Respondent's "Quarterly Check History" with the names of the sixty-seven relevant employees indicates that these employees were indeed identified by the "0-3" code.

Based on the stipulation and on O'Connor's uncontradicted evidence, I find that sixty-seven of the one hundred and seventy employees re-ferred to in count five were employed in Northern California and that their employment records, including Forms I-9, were located in Respon-dent's Concord office. As a result, I find the Forms I-9 for these sixty- seven employees were not destroyed by the September 30 fire in Pomona, California.

However, at the hearing, the parties disputed the issue of whether any Forms I-9 for Respondent's Southern California employees were destroyed during the September 30 fire in Pomona. Complainant presented the testimony of Francine Henderson in an effort to demonstrate that no Forms I-9 were destroyed. Respondent offered

[14] According to O'Connor, Respondent prepared its "Quarterly Check History" in order to identify employees who worked during that quarter and to record the amount earned by each of the employees during that period. The geographic identification code (e.g. "0-3") is located at the top left-hand corner of the "Quarterly Check History".

the testimony of Charlie Abril Sr. in order to show that documents were indeed destroyed due to the fire.[15]

On September 30, 1988, Francine Henderson was employed by Respondent as a secretary in its Southern California office located at 3005 West Mission Boulevard in Pomona, California. Her duties included payroll, cost accounting, invoicing and job billings.

Henderson testified that whenever Charlie Abril Sr. hired a worker on behalf of Respondent, she would take a Form I-9 to the worksite, so that the new employee could sign the form; she then made a photocopy of the form and processed that worker for payroll. According to Henderson, employees' Forms I-9 were kept in files which also contained their employment applications and their W-4 forms. The employee files in turn were kept in two file cabinets located in a trailer which served as Respondent's Southern California office.[16] Henderson also testified that the Forms I-9 were kept in the "third drawer from the top" in the cabinet on 'the right-hand side'.[17]

According to Henderson, on Friday, September 30, 1988, she returned to the Pomona trailer at about 3:30 p.m. after delivering payroll to employees in Palm Springs. Shortly after returning to the trailer, Henderson became aware that a fire was developing in a building located behind the trailer. She called the fire department and then ran out of the trailer to the opposite side of the street. Afterwards, she called Charlie Noel in Northern California. Henderson testified that she told Noel that the fire involved Respondent's trailer and two trucks. According to her, Noel told her not to worry and that he would call her later to tell her what to do. Subsequently, Noel called Henderson at home and asked her to retrieve and box any files that remained in the file cabinets; he also asked her to store the boxed files so that they could later be shipped back to Northern California.

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[15] I note that Respondent did not pursue its fire defense in its Final Arguments.

[16] The trailer was located on the premises of 3005 West Mission Boulevard in Pomona, California and was approximately forty feet in length. Henderson's desk, the two file cabinets and the typewriter were situated in part of the trailer which had a sliding glass door. The other part of the trailer contained a drafting table, a photocopying machine and a coffee maker. There was also a division in the trailer which made a section of the trailer inaccessible from the inside; that section of the trailer was used as a storage area and it was only accessible from the outside of the trailer.

[17] According to Henderson, the cabinets contained four drawers. This was corroborated by Charlie Abril.

Henderson testified that she returned to the trailer the next morning at about 10:00 a.m. with her husband. Although the trailer was badly damaged, she found the files to be intact. According to her, except for the files located in one of the cabinet drawers, all the remaining files in both file cabinets were in good condition, though "soggy." Henderson testified that the files contained in the top drawer of the cabinet closet to the wall were singed. Nevertheless, even these singed files contained less than half an inch of damage, on their edge. To the best of Henderson's knowledge, all writing on the singed files remained legible. However, Henderson admitted that she did not closely examine the salvaged documents; according to her, she only briefly looked at the files before placing them in cardboard boxes. She further testified that she did not dry the files before boxing them. Finally, she testified that she did not observe the presence of Charlie Abril at the site of the fire on either the Saturday and the Sunday following the fire.

Francine Henderson's testimony is supported by that of her husband, John Henderson. According to him, he arrived with his wife at the Pomona site the day after the fire at about 9:00 or 10:00 a.m. They stayed for about an hour to load salvageable files into boxes. John Henderson testified that he looked at individual documents present in the cabinets and they appeared to be fine, although there were visible damages such as charred edges and moisture. According to him, he boxed the files and then placed the boxes in the storage compartment located at the end of the trailer; he then locked the compartment. He also testified that he did not see Charlie Abril on that day.

Charlie Abril, however, contradicts parts of the Hendersons' testimony. According to him, he arrived at the site of the trailer the day after the fire and saw that the Hendersons were already there. He then told them that they need not remain and that he would take care of everything. He then took home the boxes of salvaged files in order to ship them to Northern California.

Regarding the conditions of the files contained in the drawer, Abril testified that some of the files were charred "a little" while others were charred "a lot."[18] He further testified that some documents which were taken from the file cabinets were charred beyond the edges; however, he does not know if any personnel files or Forms I-9 were among documents damaged in this way. He also claimed that some of the documents which were kept in the top drawers sustained burn damages on up to 75% of their surfaces, although he does not know what

[18] He also stated that he saw some files which were completely charred. However, he admitted that these files probably did not come from the file cabinets.

documents were kept in the those drawers. But Abril admitted that no documents from the second and third drawers were illegible as a result of the fire. In fact, he specifically stated that he does not dispute Francine Henderson's testimony that employee personnel files were kept in the third drawer (counting from the top) of one of the cabinets.

I credit Francine Henderson's testimony in light of my observations of the witnesses, and in consideration of the fact that parts of her testimony were corroborated by both friendly and adverse witnesses. I further note that Charlie Abril largely corroborated Henderson's testimony on the subject of the extent of fire damage sustained by documents contained in the top drawers of the cabinets, and on other minor points, he also supported Henderson's testimony that most of the documents contained in the file cabinets were intact and were shipped to Northern California. Hence, insofar as factual inconsistencies exist between the testimony of Abril and Francine Henderson, I find the latter's testimony to be more credible.

In its Final Arguments, Respondent does not contend that any of its employees' Forms I-9 were destroyed as a result of the September 30, 1988 fire which occurred on the premises of the Pomona office. Fur-thermore, Francine Henderson's uncontradicted testimony establishes that the Forms I-9 for Respondent's Southern California employees were kept in a drawer which remained unscathed during the fire.

Therefore, I find that the September 30, 1988 fire in Pomona, Califor-nia did not destroy the Forms I-9 for any of the Respondent's employees. In particular, I find that the fire did not destroy any of the Forms I-9 for the one hundred and seventy individuals who are the subject of count five of the Complaint.

Conclusions of Law

The evidence in the record demonstrates that Respondent failed to properly reverify the employment eligibility of fourteen employees in a timely manner after learning that they might be unauthorized to work in the United States after 1986. The evidence further demon-strates that Respondent failed to present one hundred and seventy Forms I-9 for I.N.S. inspection and that none of those forms were destroyed during a 1988 fire which occurred in Respondent's Southern California office located in Pomona, California. As a result, I conclude:

A. Respondent violated 8 U.S.C. §1324a(a)(2) by continuing to employ fourteen individuals in the United States after November 6, 1986 while knowing they were not authorized for such employment. The fourteen individuals are:

1. Juan Atondo
2. Ramon Carrasco-Estrada
3. Delfino Carrasco-Paredes
4. Ariel Carrillo-Rivera
5. Roberto Garcia-Amezcua
6. Eleodoro Gil
7. Alejandro Lopez-Leon
8. Adriel Noriega-Yuriar
9. Ruben Noriega-Yuriar
10. Jesus Salazar-Alcala
11. Juan Salazar-Alcala
12. J. Hector Yuriar Sandoval
13. Martin Yuriar-Sandoval
14. Juan Vacio-Montoya

B. That Respondent violated 8 U.S.C. §§1324a(1)(B), 1324a(b)(3) and 8 C.F.R. §274a.2(b)(2)(ii) by failing to present the Employment Eligibility Verification Forms of one hundred and seventy employees for a previously scheduled I.N.S. inspection. The one hundred and seventy employees are:

1. Tim Abril
2. Charlie R. Abril, Jr.
3. Jesus Gomez Alvarez
4. Salvino Alvarez
5. Arturo Amaro
6. Raymundo Amaro
7. Debra Anderson
8. Arturo Armado
9. Geordie Austen
10. Alex Baca
11. Isidro G. Baca, Jr.
12. Leonard D. Barilowe
13. Royce Barnett
14. Alejandro Barrera
15. Pedro A. Barrera
16. Kevin Bashaw
17. Rollan L. Batts
18. Marco Antonio Baylon
19. Sergio Beltran
20. Michael Benally
21. Fernando Benito De Jesus
22. Stanley Bodonie
23. Robert Alan Bourgean
24. James Richard Brerda
25. Jeffrey L. Brock
26. Monte Brooks
27. Martin Calderon
28. Sergio Mantano Camacho
29. Jose Cardenas
30. Concepcion Carrasco
31. Jesus Carrasco
32. Jesus E. Carrasco
33. Guadalupe Carrasco
34. Jose Carrasco
35. Edwin Carver
36. Tiodoro Cerda
37. Jose G. Cervantes
38. Jose Refugio Cervantes
39. Nicolas Cervantes
40. Agapito Corona
41. Angel Corona-Pulido
42. Juan Corona
43. Martin Corona
44. Miguel Corona
45. Rafael Corona
46. Jim Crandson
47. Lee H. Crippen
48. Francisco Cruz-Sandoval
49. Filiberto Cuevas
50. Martin Cuellar
51. Jimelia Ruth Dallman
52. Lance Davis
53. Michael Deeter
54. David Derka
55. James Duran
56. Gustavo A. Espinoza
57. Scott Edward Farmer
58. Nicolas Fogler
59. Heath Foott
60. Kenneth D. Frye
61. Juan Garcia
62. Victor Arias Garcia
63. Martin Garibay
64. James Gilchrest
65. Shannon Gilmore
66. John Gleason

67. Jesus Gomez
68. Pedro Gomez
69. Teresa Gomez
70. Javier Gonzalez
71. Russell A. Gregory
72. Armando Gutierrez
73. Jesus Gutierrez
74. Cesario Arteaga Guzman
75. John W. Hand
76. Floyd Harris
77. Mark E. Hart
78. Elias Joya Hernandez
79. Manuel Hernandez
80. Ruben C. Hernandez
81. Francisco Herrera
82. Christophe Hevener
83. Jeff Hines
84. Javier Hinojosa
85. Jose F. Hipolito
86. Macarrio Infante
87. Keith Irvine
88. Martin Izquierdo
89. Ronald Eugene John
90. Ronold Roy John
91. Troy Richard John
92. Gordon Johnson
93. Richard Joy
94. Mario Alberto Joya
95. William G. Jurkovich
96. Patricia Kendrick
97. William Kuhaneck
98. Marcy Lane
99. Garcia Salvador Lopes
100. Juan Lopez
101. Marcos Lopez-Herera
102. Jose Antonio Lugo
103. Danny Machado
104. Carlos Maciel
105. Daniel Guerrero Malagon
106. Dustin Marshall
107. Carlos M. Martinez
108. Jorge Martinez
109. Estepen Medina
110. Pete Miano
111. Vincente Montesinos-Vasquez
112. Rex Moore
113. Benjamin Mora-Escobar
114. Jose Antonio Morales
115. Pedro Morales
116. Jack A. Morcom
117. Jesus Moreno
118. Julian Moreno
119. Marshall Moss
120. John Mulhall
121. James Northcutt, Sr.
122. Jose Nunez, Jr.
123. Jose Nunez, Sr.
124. Emilio Ortega
125. Scott Edmund Pathe
126. Greg J. Payne
127. Marie Erlinda Paz
128. Fred Pedro
129. Mariz Aracely Perez
130. Mario Perez
131. Oscar Baker Phillips
132. Robert Pimentel
133. Rolando Ordunes Pirir
134. Francine Poirer
135. Ignacio Pulido-Jimenez
136. Kendall Scott Purvis
137. Martin Quintan
138. Antonio Morales Raya
139. Scott Reisinger
140. Salvador Rivera
141. Jason Robley
142. Ignacio Rodriguez
143. Roderick Rodriguez
144. Francisco Romero
145. Paul Romero
146. Cecilia A. Rosales
147. Jerry Lynn Rowell
148. Dean Calvin Sampson
149. Salvador Sanchez
150. Juan Sandoval
151. Geroge Lyle Scotland
152. Andrew Seagraves
153. Jose Luis Segura
154. Luis Sierra
155. Edward Stevens
156. Hector Tellez
157. David Robert Ulibarri
158. Emiliano M. Uribe, Jr.
159. Mark Varela
160. Celestino Vasques

161. Raymundo Vasques
162. Timothy S. Vaughn
163. Mario Vega
164. Sabas Vega
165. Prudencio Velare
166. Juan Ventura
167. Gary Whitney
168. Alan Leroy Wilkinson
169. Tim Williams
170. Jason Wolfchief

C. That Respondent violated various provisions of the Act with respect to another one hundred and three of its employees. These violations are enumerated in an order issued on September 26, 1991 entitled "Order Granting In Part And Denying In Part Complainant's Motion For Summary Decision And Granting Complainant's Motion To Amend Complaint".[19]

Civil Money Penalty

Except for the fourteen instances involving the continuing employment of unauthorized individuals, all other current violations of the Act by the Respondent are paperwork violations.[20]

The Act requires the imposition of civil money penalties upon employers who violate IRCA's paperwork requirements. The amount of the penalty must be between one hundred dollars and one thousand dollars for each instance of paperwork violation. However, for penalty deter-mination purposes, the Act also requires that due consideration be given to an employer's size, its good faith, the seriousness of the viola-tions, whether any of the individuals was an unauthorized alien and whether the employer possesses a history of previous violations. 8 U.S.C. §1324a(e)(5).

Neither the statute nor the implementing regulations requires administrative law judges to consider the following five penalty factors specified for paperwork violations when determining the proper penalty amount for continuing employ-ment violations. Nevertheless, I will employ such factors as an aid in determining the proper civil penalty for Respondent's instant continuing employment violations. See U.S. v. Sergio Alaniz d/b/a La Segunda Downs, OCAHO Case No. 90100173, February 22, 1991 (Decision and Order Granting Complainant's Motion for Summary Decision) slip op. at 4.

Complainant currently seeks the following penalties:

[19] The above-referenced Order is attached hereto as Exhibit A.

[20] Violations of IRCA's employment eligibility verification requirements are commonly referred to as "paperwork" violations. See 8 U.S.C. §§1324a(a)(1)(B), 1324a(b).

With respect to count two, in which Respondent failed to ensure the proper completion of section one of the Forms I-9 for thirteen of its employees: two hundred dollars for each instance of improper completion.

With respect to count three, where Respondent failed to properly complete section two of the Forms I-9 of sixty-two employees: two hundred dollars for each violation.

With respect to count four, in which Respondent violated the Act by failing to ensure the proper completion of section one and by failing to complete section two of fourteen Forms I-9: four hundred dollars for each violation.

With respect to count five, where Respondent committed one hun-dred and seventy instances of IRCA violations by failing to present the relevant Forms I-9 for I.N.S. inspection: five hundred dollars for each violation.

With respect to count six, in which respondent violated the Act by failing to timely present five Forms I-9 for I.N.S. inspection: one hundred dollars for each violation.

With respect to count seven, where Respondent failed to reverify six of its employees' employment eligibility after the expiration of their prior eligibility: two hundred dollars for each violation.

With respect to count eight, where Respondent failed to ensure the proper completion of the Forms I-9 by three of its employees and addi-tionally failed to reverify those three employees' eligibility after the expiration of their prior eligibility: four hundred dollars for each violation.

The total civil money penalty sought by Complainant for Respondent's current paperwork violations amount to one hundred eight thousand and five hundred dollars ($108,500.00).

In addition to the penalty for Respondent's paperwork violations, Complainant further seeks a civil money penalty of one thousand and five hundred dollars for each instance where Respondent violated the Act by continuing the employment of an unauthorized alien after becoming aware of his or her unauthorized work status.[21] Since there

[21] 8 U.S.C. §1324a(e)(4)(A)(i) requires a penalty between $250.00 and $2,000.00 for employers who are subject to continuing employment liability under IRCA for the first

(continued...)

are fourteen such violations under consideration, the total penalty sought by Complainant for such violations amount to twenty one thousand dollars.

Therefore the total civil money penalty sought by Complainant for Respondent's current IRCA violations is one hundred twenty nine thousand and five hundred dollars ($129,500.00).

I now examine the appropriateness of Complainant's proposed pen-alty amount in light of the aforementioned penalty factors. In doing so, I bear in mind that one of the main purposes for imposing civil money penalties upon violating employers is to secure their future compliance with the Act. U.S. v. Lorenzo Robles d/b/a Lorenzo Robles Roofing and Construction, OCAHO Case No. 90100210, March 29, 1991, (Decision and Order), slip op. at 16.

1. Size of the Employer

Complainant argues that Respondent is a 'large business' by pointing to Respondent's gross revenues, its employee turnover rate, and to Lawrence Noel's admission on this issue. Respondent, on the other hand, argues that its gross profits during the years between 1988 and 1990 indicate it to be small when compared to 'large corporations' such as Chevron Corp. etc.; it further dismisses Lawrence Noel's admission in light of its gross profit figures.

Since employee turnover rates have only indirect correlation to an employer's size, and since such rates vary from industry to industry, I do not consider evidence of such rates to be, by itself, a reliable indicator of Respondent's size. Furthermore, I find Lawrence Noel's "admission" on this issue to be a meaning-less statement absent a proper financial context. In my view, a suitable "financial context" can be established by Respondent's financial statements and its tax returns. Since the only evidence in the record which bears directly on Respon-dent's financial status during the relevant period consists of Respondent's federal tax returns, I shall determine Respondent's size in light of this evidence.

Respondent's I.R.S. Form 1120 (U.S. Corporation Income Tax Return) for fiscal year ending on October 31, 1988 indicates gross receipts totaling $5.8 million, and a total income amounting to $1.3 million. For fiscal year ending October 31, 1989, Respondent recorded gross receipts totaling $6.6 million and a total income of $1.46 million.

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[21](...continued)
time.

Respondent's receipts and income for fiscal years 1988 and 1989 are substantial. While Respondent obviously does not compare with some of the largest employers in the nation, neither can it claim to be 'small'. This impression is reenforced by Lawrence Noel's own statement to the effect that Respondent is a substantial business and by the number of its employees during that period.

Therefore, I conclude that Complainant's proposed fine amount is not unreasonable in light of Respondent's size.

2. Good Faith of the Employer

Respondent claims that it complied with the IRCA requirements in good faith. In particular, it argues that it voluntarily turned over its re-cords to the I.N.S., that it sent one of its employees to receive training on IRCA compliance, that the majority of its Forms I-9 were completed correctly, and that it failed to present a number of its Forms I-9 only because those forms were lost during the relocation of Respondent's office. However, Respondent failed to introduce any evidence which suggests that the majority of its Forms I-9 were completed correctly. Furthermore, there is no evidence establishing that Respondent lost any of its completed Forms I-9 during office relocations.[22] However, there is uncontradicted evidence that Respondent sent Josephine O'Connor to receive training on IRCA compliance procedures.

Complainant, in turn, argues that Respondent failed to demonstrate good faith by its failure to comply with the statute after it received a number of I.N.S. instructional visits and by the "cavalier" and "obstructionist" attitudes it took towards I.N.S. agents. Complainant introduced uncontradicted documentary and testimonial evidence establishing that in 1987 and 1988, Respondent received three separate visits by I.N.S. agents where it was instructed on the Act's requirements. In addition, it presented some evidence which suggests Respondent was uncooperative in its dealings with the I.N.S.[23]

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[22] Lawrence Noel speculated that some of Respondent's documents may have been lost during an office relocation. However there is no evidence which supports Noel's speculation.

[23] Such evidence includes Lawrence Noel's letter to the I.N.S. stating that he will not terminate the employment of any of the suspected unauthorized aliens until I.N.S. can prove those individuals were indeed unauthorized aliens. In addition, Complainant points to evidence which shows Lawrence Noel (continued...)

The parties' evidence on this subject indicates that, on occasions, Re-spondent cooperated with the government agents. However, they also indicate Respondent exhibited uncooperative behaviors on other occa-sions. In addition, while Respondent voluntarily sought to train one of its employees in the requirements of the Act, it is also apparent that it failed to comply with those requirements after repeated instructional visits by I.N.S. agents. In addition, from my examination of the record, I find that Respondent's efforts at IRCA compliance was haphazard and uncoordinated. Taken together, the record indicates that Respondent did not make a serious effort to comply with the Act's requirements, even after it was put on notice as to the importance of compliance and the possible consequences of non-compliance. Hence, I conclude that Respondent did not attempt to comply with IRCA in good faith.

In light of this finding, Complainant's proposed fine amount is not unreasonable.

3. Seriousness of the Violations

Respondent argues that the current violations are not "serious" because, aside from the fourteen continuing employment violations, all other current violations involve only paperwork deficiencies. I cannot agree with this assessment. The Act's paperwork requirements form an integral part of the congressional scheme for controlling illegal immigration into this country. Sporadic violations of these requirements may not be serious. But in cases where, as here, there exists a substantial number of violations, even paperwork violations must be characterized as serious since they tend to undermine the congressionally mandated scheme. Therefore, I conclude that Respondent's current violations are "serious" and that Complainant's proposed civil money fine is not unreasonable for the most part.

Nevertheless, I now reduce the penalty for Respondent's failure to present 170 Forms I-9 to four hundred dollars per violation from the proposed five hundred dollars level. Complainant did not present any evidence which suggests that Respondent failed to complete Forms I-9 for the one hundred and seventy relevant employees. The absence of such evidence cannot insulate Respondent from IRCA liability; however, it also implies that Respondent's violations in these instances may not be more serious than cases where Respondent committed multiple errors in filling out Forms I-9.

4. Actual Hire of Unauthorized Employees

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[23](...continued)
threw an I.N.S. letter into a trash can in the presence of the I.N.S. agent.

Complainant only contends that the fourteen employees involved in Respondent's continuing employment violations were unauthorized aliens. Respondent further points to the uncontradicted testimony of Lawrence Noel and Josephine O'Connor where they indicated that many of the employees involved in the paperwork violations were actually American citizens.

There is ample evidence in the record to establish that the fourteen employees involved in Respondent's continuing employment violations were unauthorized aliens. Hence I conclude that the proposed penalties assessed by Complainant for these fourteen violations are reasonable in light of this penalty factor.

On the other hand, there is no evidence that any of Respondent's employees involved in the paperwork violations were unauthorized. Therefore the present penalty factor serves to mitigate the proper penalty amount with respect to these violations. However, it appears that Complainant has already taken this factor into account by not assessing the maximum fine against the Respondent.

Thus, the proposed fines are reasonable in light of this penalty factor.

5. History of Previous Violations

Respondent has not previously violated the Act. Thus, this penalty factor serves to mitigate the proper penalty amount.

Again, Complainant appears to have already taken this factor into account by not assessing the maximum fine against Respondent for its instant violations.

Therefore, I find that the proposed fines are reasonable in light of this penalty factor.

The Appropriate Penalty Amount

In accordance with the above discussions, I reduce the civil monetary fine for Respondent's failure to present 170 Forms I-9 from five hundred dollars per violation to four hundred dollars per violation. I further find that Complainant's proposed fine is otherwise reasonable.

Therefore the appropriate civil monetary fine that must be imposed upon Respondent for its current violations totals one hundred twelve thousand and five hundred dollars ($112,500.00).[24]

Based upon the foregoing Findings of Fact, Conclusions of Law and examination of the penalty factors, I issue the following:

Order

RESPONDENT SHALL**:**

1. Cease and desist from any further violations of 8 U.S.C. §1324a(a) by continuing the employment of unauthorized aliens in the United States.

2. Comply with the verification requirements of 8 U.S.C. §1324a(b) with respect to individuals hired by insisting upon the presentation of properly completed Forms I-9 and by retaining them for a period of three years.

3. Pay a civil money penalty in the amount of $112,500.00 to the Immigration and Naturalization Service.

IT IS FURTHER ORDERED:

That, pursuant to 8 U.S.C. §1324a(e)(7), and as provided in 28 C.F.R. §68.51, this Decision and Order shall become the final decision and order of the Attorney General, unless, within five (5) days from the date of this decision, any party files a written request for review of this decision with the Chief Administrative Hearing Officer. Any such review requests should be accompanied by the party's supporting arguments.

FREDERICK C. HERZOG
Administrative Law Judge

San Francisco, California
May 12, 1992

[24] In its Final Arguments, Respondent requests that I allow it to make installment payments on any civil money fine that may be imposed in this case. However, this matter is not within my jurisdiction. Respondent should direct any such request to the Immigration & Naturalization Service.

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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding OCAHO Case No. 90100326
NOEL PLASTERING & STUCCO, INC., Respondent.	)	

ORDER GRANTING IN PART AND DENYING
IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION
AND GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT

On November 5, 1990, Complainant United States of America, through its agency Immigration and Naturalization Service (INS), filed the above captioned Complaint against Respondent Noel Plastering & Stucco, Incorporated. The Complaint alleged Respondent has violated the Immigration Reform and Control Act of 1986 (IRCA) in eight counts. Thereafter, on November 7, 1990, the Executive Office for Immigration Review, Office for Chief Administrative Hearing Officer, issued a Notice of Hearing on Complaint in this case.

The Complaint's first count alleged Respondent continued to employ fourteen aliens after learning they were not authorized for employment in the United States in violation of IRCA. Count two alleged Respondent violated IRCA's paperwork requirements when it failed to ensure that thirteen employees have properly completed section one of their employment eligibility verification forms (I-9 forms). Count three alleged Respondent's failure to properly complete section two of the I-9s for another sixty one employees. Count four alleged improper completions of both section one and section two of sixteen I-9s by the Respondent. Count five alleged Respondent failed to produce for INS inspection one hundred and ninety five of its employees' I-9 forms.[1] Count six alleged Respondent failed to timely present another five I-9 forms for INS inspection. Count seven alleged Respondent failed to

[1] Although count five listed 197 separate allegations, number 177 was left blank and another allegation is repetitive. Hence, in reality, only 195 I-9s are the subject of this count.

update the six of its employees' employment eligibility. Finally, count eight alleged Respondent had failed to update another three I-9s in addition to failing to ensure the proper completion of section one of three forms. Complainant sought a civil monetary fine in the amount of one hundred forty three thousand and six hundred dollars from the Respondent for the alleged violations.

On December 13, 1990, Respondent filed its answer to the Complaint. In addition to denying the allegations made by the INS, Respondent also advanced seven affirmative liability defenses through its answer. By my order dated February 12, 1991, six of Respondent's claimed affirmative defenses were stricken from the answer. Respondent's only remaining liability defense alleges that it could not present a number of its employees' I-9 forms for inspection by the INS since they have been destroyed by a fire which occurred in Southern California.

On June 25, 1991, Complainant filed a motion for partial summary decision. In this motion, Complainant seeks summary adjudication with respect to all liability issues contained in counts one, two, three, four, six, seven and eight of the Complaint. Additionally, Complainant also seeks summary adjudication with respect to one hundred sixty eight instances of the alleged IRCA paperwork violations contained in count five of the Complaint.

A response to Complainant's Motion for Partial Summary Decision was filed by Respondent on July 31, 1991. This Response disputes the propriety of a partial summary decision only as to count one's "continuing-employment" issue.

On August 13, 1991, Complainant filed a Supplementary Points and Authorities in Support of Complainant's Motion for Summary Decision. In this document, the INS requests summary adjudication with respect to additional issues in this case. Complainant argues that appropriate civil money penalties should be summarily imposed in those instances where Respondent's IRCA liability have been established by the evidence presented for purposes of this motion.

Finally, on September 20, 1991, Complainant filed a motion to amend Complaint. Through this motion. Complainant seeks to correct the name of one Noel employee alleged in the Complaint, correct the proposed fine amounts, reduce one allegation of violation, delete one redundant allegation and withdraw twenty six additional allegations pursuant to the holding on New Peking, Inc. d/b/a New Peking Restaurant, OCAHO Case No. 90100301, Modification by Chief Administrative Hearing Officer (June 18, 1991). In IRCA cases, amendments to the pleadings are liberally allowed pursuant to 28

C.F.R. §68.8 (1991). Thus, Complainant's present motion to amend the Complaint is granted in its entirety.

Legal Standards Applicable in Summary Decision Proceeding

The Rules of Practice and Procedure promulgated by the Department of Justice for IRCA proceedings allow for the entry of summary decisions "...if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.36(c) (1990). A material fact has been defined by the United States Supreme Court to be one which can potentially influence the outcome of a case. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

In summary adjudication proceedings, the party which is seeking summary relief shoulders the initial burden to establish the lack of any genuine issues of material fact. Richards v. Neilsen Freight Lines, 810 F.2d 898, 901 (9th Cir. 1987). This burden is a heavy one since all evidentiary ambiguities and reasonable factual inferences must be resolved in favor of the nonmoving party. See Harbor Ins. Co. v. Trammell Cross Co., Inc., 854 F.2d 94 (5th Cir. 1988), cert. denied 109 S.Ct. 1315, 103 L.Ed.2d 584. Only where the moving party has satisfied its initial burden must the nonmoving party then come forward with significant probative evidence which tends to support its claims or defense. See Richards v. Neilsen Freight Lines, supra.

The present Motion for Partial Summary Decision will be evaluated in accordance with the aforementioned legal standards.

Complaints Evidence and Applicable Law

Count One

In this count, Complainant alleges Respondent has violated IRCA when it continued to employ fourteen workers after learning they were unauthorized for employment in the United States.

8 U.S.C. §1324a(a)(2) prohibits an employer from continuing the employment of alien workers in the United States if it subsequently discovers that the workers are not authorized for such employment.

A "continuing-employment" violation can be established whenever an employer fails to reverify its workers' employment eligibility after receiving specific and detailed information that the workers may in fact be ineligible to work in the United States. Under such circum

stances, the employer is held to have constructive knowledge of the employees' unauthorized status. Its failure to terminate such employees thus constitutes unlawful continuing-employment. New El Rey Sausage Co., Inc. v. I.N.S., 925 F.2d 1153, 1158 (9th Cir. 1991); see Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 566-567 (9th Cir. 1989).

For purposes of the present motion for partial summary decision, Complainant argues that Respondent possessed constructive knowledge regarding the unauthorized status of the fourteen employees alleged in count one. Hence, the burden rests with the Complainant to establish that there exists no genuine issues of material fact with respect to all requisite violation elements.

From the statute and case law, the elements of a "continuing-employ-ment" violation premised upon the constructive knowledge theory are: 1) Respondent is an individual or entity, that; 2) hired an individual for employment in the United States after 1986, and; 3) that it acquired a duty to reverify the individual's employment eligibility after receiving specific and detailed information regarding that individual's possible unauthorized status; 4) that Respondent continued to employ that individual without taking appropriate steps to reverify his or her employment eligibility, and; 5) that the individual was in fact an unauthorized alien. 8 U.S.C. §1324a(a)(2); see Mester, supra.

Respondent did not dispute the first two violation elements in its Response to Complainant's Motion for Partial Summary Decision. In-stead, Respondent contends the INS has failed to establish the third violation element. Respondent argues that it retained no duty to reverify the fourteen relevant employees' work eligibility because INS had failed to provide it with the "required prima facie notice." A fair reading of Respondent's contention reveals that it is, in effect, asserting that INS must provide it with irrefutable evidence of the employees' 'illegal' status before it can acquire a duty to reverify their employment eligibility. Respondent cites New El Rey as authority for its contention.

However, Respondent's argument is without merit.

The constructive knowledge standard applicable in IRCA proceedings is modeled after the criminal law concept of "imputed-knowledge" which holds that a deliberate failure to investigate suspicious circum-stances imputes knowledge. See New El Rey, supra at 1157-8. This standard implies that an employer acquires an affirmative duty to reinvestigate its employees' work eligibility whenever it becomes aware of specific information which would arouse suspicion regarding its employees' work eligibility. An employer's failure to reverify its

workers' employment eligibility then constitutes violation of its IRCA duty. In these situations, an employer cannot avoid IRCA liability by claiming INS should have offered irrefutable proof of its workers' unauthorized status; this is an untenable position since one central purpose of IRCA is to shift the burden of employment eligibility veri-fication onto employers' shoulders. See Mester, supra at 566-7.

Additionally, contrary to Respondent's assertions, New El Rey did not require the INS to provide an employer with "absolute" evidence of its workers' unauthorized status as a prerequisite to finding the employer possessed a reverification duty. Rather, a reverification duty attaches to an employer so long as the INS has provided it with specific and detailed information which would arouse suspicion regarding its workers' employment eligibility. New El Rey, supra at 1158. The crucial inquiry in constructive-notice cases is whether Respondent has deliberately failed to investigate suspicious circumstances brought to its notice by the INS.

In New El Rey, the INS informed the employer which of its employees were considered to be unauthorized and why the INS reached that conclusion. Such information was adequate to arouse the employer's suspicion; hence the court held that a duty of reverification attached to that employer. The information which the INS provided to the employer in New El Rey is the same type which has been provided to Respondent in the present case.

Here, INS informed the Respondent in writing that "You are hereby put on official notice that these employees (their names were separately listed) may be unauthorized to work in the United States." Further, the INS specifically informed Respondent that the reason why it believed the employees might be unauthorized was because they have used work eligibility documents which did not pertain to them. The fact that INS employed the words "may be unautho-rized" with respect to the employees did not diminish Respondent's awareness of the suspicious circumstances. It is apparent Respondent has received information which would arouse the suspicion of any reasonable employer with respect to the work eligibility of those workers. Therefore, Respondent cannot in good faith assert that it had not acquired a reverification duty with respect to those employees.

Despite the above discussion, I find Complainant has failed to establish the absence of any genuine issues of material fact with respect to count one's allegations. Thus, it is not entitled to a favorable summary decision as to count one of the Complaint.

There exists no genuine factual issues as to whether Respondent hired the named individuals for employment in the United States after

1986. Neither is there any material factual issue remaining on the question of whether Respondent acquired a duty to reverify the employees' employment eligibility. However, Complainant's own evidence establishes the presence of other issues of material factual issues with respect to the fourth violation element, i.e. whether Respondent has taken adequate steps to reverify the employees' work eligibility?

Complainant offered the deposition testimony of Lawrence L. Noel and Charlie Noel in an attempt to demonstrate the employment eligibility of the named employees. However, it is clear that the two men claimed they took some steps to reverify the workers' employment eligibility. Complainant argues that the vague and non-specific testimony of the two men shows Respondent's reverification effort was so inadequate such that there exists no genuine issues of fact on this violation element. Complainant's argument is unpersuasive.

In summary decision proceedings all evidentiary ambiguities and reasonable inferences are resolved in favor of the nonmoving party. In this case, there is some evidence that Respondent has also sought to reverify the employees' eligibility. Respondent has also produced additional documents which pertain to some of the named employees; this demonstrates that it had expended some efforts to reverify the workers' eligibility. Furthermore, Respondent stated that it had terminated a number of the relevant employees because they failed to produce additional eligibility documents. In light of such evidence, and in view of the standard for evidence evaluation in summary adjudication proceedings, I am not prepared to find there is a lack of any genuine issues of material fact in this count. Instead, I find that the question of whether Respondent's has conducted a good faith reverification effort can be fairly resolved only after an evaluation of all the surrounding circumstances; such circumstances can best be brought out by the examination of the witnesses during a hearing.

At this point, I note that even if an employer has attempted to reverify an employees's eligibility, it will nevertheless have violated IRCA's continuing-employment prohibition if it did not terminate that employee after "a reasonable period" during which the worker failed to present adequate documentations. See Mester, at 568 n.9. What constitutes a reasonable period, however, has not been specifically defined by the courts. However, it appears that the number of days elapsed since the employer first received notification regarding the employee's status is not the only determining factor; circumstances surrounding the reverification process may also help define what constitutes a 'reasonable' period in a particular case. See id.

Here, Complainant argues that Respondent has failed to take cor-rective actions with respect to the relevant employees in a timely man-ner. However, I find that material issues of fact exist as to whether Respondent has terminated the employees within a reasonable time, since there is a dearth of evidence which pertains to the circumstances surrounding the termination of each of the fourteen relevant employees.

Complainant argues that Respondent should bear the burden of establishing that it acted in a timely manner. While Respondent may indeed retain the burden of evidence production on this issue during the hearing (Respondent may be in a better position to obtain and produce such information), this burden of production issue is irrevelant for the present summary decision proceeding. In this proceeding, Complainant necessarily bears the initial burden to establish the lack of any genuine issues of material fact; Complainant cannot escape this responsi-bility by making a burden allocation argument.

In advancing the evidence allocation argument at this time,. Complainant has misunderstood the rationale underlying summary decision proceedings. The process of summary adjudication is not intended to function as a full-fledged evidentiary hearing that requires the parties to produce all relevant evidence; rather, it is intended to streamline the eventual hearing by disposing of issues in which no genuine factual disputes exist. For this reason, the party moving for summary adjudication is required to establish the non-existence of any material factual issues in the first instance. The fact that the moving party has little information on certain material factual issues, as is apparently the case here, merely signifies that further proceedings on that issue may be warranted; it does not imply that the moving party is entitled to either shift the burden of proof or a favorable summary decision.

I find there remain genuine issues of material fact with respect to the question of whether Respondent has made a sufficiently good faith effort to reverify the fourteen employees' work eligibility. Additionally, I find there also exist issues of material fact as to whether Respondent terminated the relevant employees in a timely manner after beginning the reverification process. For these reasons, summary decision is inappropriate at this time with respect to count one of the Complaint. Complainant is thus entitled to a favorable summary decision on this count.

Count Two

Count two alleges that Respondent has failed to ensure the proper completion of section one of thirteen forms I-9.

At this point, I note that Complainant has moved to correct the name of one employee alleged in this count from "Guevara-Malagon, AKA Guevara, Guillermo" to "Guevara-Malagon, Guillermo, AKA Guevara, Guillermo". The Complaint will be amended to reflect this correction.

Failure to properly complete I-9 forms is a violation of 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2 (1990).

Complainant introduced photocopies of the thirteen relevant I-9s to support its instant claims. It also introduced Respondent's admission that it hired the relevant employees for employment in the United States after November 1986. Further, it appears that Respondent has admitted the photocopies to be true and accurate reproductions of the original I-9 forms.

An examination of the photocopied I-9 forms reveal they were completed in an ineffectual manner as has been alleged by the INS. In addition, Respondent has not disputed that summary decision is appropriate with respect to this count.

Based upon the above evidence, I find there exists no genuine issues of material fact as to count two and that Complainant has demonstrated it is entitled to a summary decision on this count.

Count Three

In this count, the Complaint originally alleged Respondent had further violated IRCA's paperwork requirements by improperly completing section two of sixty-one I-9 forms. Through the motion to amend the Complaint, this count now alleged sixty-two instances of violations. Complainant has removed the allegation concerning an employee Jose D. Ramos-Gomez from count four (where both section one and section two violations have been alleged), to this count.

Again, Complainant introduced Respondent's admissions as well as photocopies of the relevant I-9 forms as evidence to support its present summary decision motion. The evidence is, to say the least, voluminous; and it unequivocally demonstrates all the requisite liability elements. Most importantly, the evidence establishes Respondent has stipulated that it did not record acceptable eligibility and identification documents in section two of the relevant I-9s. I also note Respondent

has not disputed the propriety of a summary decision as to this count in its Response to Complainant's motion.

Consequently, I find there exists no genuine issue of material fact in this count. I further find Complainant has demonstrated it is entitled to a favorable summary decision with respect to the sixty-one I-9s alleged by count three of the Complaint.

Count Four

Count four alleges Respondent has violated IRCA by failing to properly complete both sections one and section two of fourteen forms I-9.[2]

As support for its summary decision motion as to this count, Respondent has presented the same types of evidence it has already introduced for the previous counts. Complainant's evidence consists of party admissions, joint stipulations and accurate photocopied reproductions of the relevant forms.

After a thorough examination of Complainant's evidence, I find Complainant has established Respondent's liability with respect to the instant allegations. Since Respondent has not presented any evidence which would establish the existence of factual issues as to this count, I therefore find there is a complete lack of genuine issues of material fact in this count. Complainant is thus entitled to a summary decision with respect to count four of the Complaint.

Count Five

This Count originally alleged Respondent has failed to produce one hundred and ninety five form I-9s for its present and former employees in violation of IRCA paperwork requirements.[3] By its motion to amend Complaint, Complainant has now withdrawn twenty five

[2] The allegations with respect to Mario Ascencion have been withdrawn from the Complaint by Complainant's motion to amend the Complaint. Additionally, I note that the allegations concerning Jose D. Ramos-Gomez have now been removed to Count Three also as a result of the motion to amend Complaint.

[3] This count numbered one hundred and ninety seven instances of alleged violations. As previously noted, number 177 was left blank by error. Furthermore, number 67 (regarding Gustavo Espinoza) has since been withdrawn on the ground that it is a redundant allegation. Therefore the total number of allegations is actually one hundred and ninety five.

allegations in this count; consequently, this count presently numbers one hundred and severity instances of alleged violations.

IRCA requires employers to retain and produce form I-9s for INS inspections. An employer's failure to produce the forms during a properly scheduled I-9 inspection constitutes a violation of IRCA's paperwork requirements. See 8 U.S.C. §§1324a(b)(3), 1324a(a)(1)(B) (1990).

Respondent never disputed Complainant's allegation that it failed to produce the one hundred and ninety five relevant I-9s for INS inspec-tion on July 7, 1989. However, it claims an affirmative defense as to these allegations. It is Respon-dent's contention that it could not pro-duce a number of the I-9s since they have been destroyed by a fire that occurred in one of its construction trailers where the forms were kept.

Complainant argues that Respondent's fire defense does not present any issues of material fact with respect to one hundred and sixty eight out of the one hundred ninety five alleged violations. It contends that the fire could not have destroyed one hundred sixty eight of the relevant I-9 forms. This argument is premised upon the fact that Respondent has already admitted it did not keep the records for its Northern California and Arizona workers in the fire-destroyed trailer; rather, it appears that the destroyed trailer contained only the paperwork and records of Respondent's Southern California workers.

Furthermore, Complainant claims that a number of Respondent's I-9s also could not have been affected by the fire since they were not completed until after the date of the fire. The INS claims the parties have stipulated that the fire occurred on September 30th, 1988; thus, according to the INS, Respondent cannot claim the fire had destroyed the I-9s for those employees who were hired after that date.

However, an examination of the evidence produced by Complainant reveals numerous ambiguities in its instant arguments.

For instance, it is clear that Charlie Noel, a former superintendent for Respondent, did not unconditionally stipulate to the date of the fire. By the manner in which Complainant's own counsel had phrased the stipulation during a deposition, Charlie Noel stipulated to September 30th, 1988 as the fire date for purposes of the deposition questions only. Although a fire report furnished by Respondent appears to bear the date of the fire, Complainant did not introduce that item into evidence. Hence, there is insufficient evidence for me to find that the fire occurred on September 30, 1988.

Complainant has also failed to present unambiguous evidence which established that one hundred sixty eight of the employees named by count five were in fact employed outside of Southern California. Complainant introduced into evidence voluminous copies of documents entitled "quarterly check history". These documents apparently consist of Respondent's payroll records for its employees. Such "quarterly check history" includes the following notation: "Field Labor -- N. California". From this notation, Complainant argues that all employees whose names appear in these documents must have been employed in Northern California instead of Southern California; therefore these employees' I-9 forms were not located in Southern California and could not have been destroyed by the alleged fire.

However, Complainant's evidence does not clearly establish the lack of any genuine issues of material fact with respect to the one hundred and sixty eight employees. While it seems likely that the notation "N. California" signifies Northern California, it is not self-explanatory. In addition, even if I take "N. California" to signify Northern California, this does not thereby establish that all employees whose names appeared in the "quarterly check history" must have been employed in Northern California. Complainant has not laid a foundation for establishing a relationship between the notation "N. California" and the employees' place of employment.

As a result of the above discussions, it is unclear whether the one hundred sixty eight employees who are subjects of the present summary decision motion were indeed employed outside of Southern California. It is also unclear whether they were hired before or after the date of the alleged fire. I note again that in a summary decision proceeding, all reasonable inferences are resolved in favor of the nonmoving party. Therefore, I find there exists genuine issues of material fact as to whether the I-9s which form the subjects of the instant motion were indeed destroyed by a fire that occurred in Respondent's construction trailer located in Southern California. As a result, summary decision is not appropriate at this time with respect to the allegations contained in count five.

Counts Six, Seven & Eight

Count six alleges Respondent violated 8 U.S.C. §1324(a)(1)(B) and 8 C.F.R. §274a.2(b)(2)(iii) when it failed to present five I-9 forms during the INS inspection scheduled for July 7, 1989. This count alleges Respondent did not present the relevant I-9s until about October 31, 1989.

Count seven alleges Respondent failed to update the I-9s for six employees in violation of 8 C.F.R. §274a.2(b)(1)(vii).

Count eight alleges another three instances of IRCA violation by the Respondent on the ground that it failed to reverify three employees' work eligibility in addition to failing to ensure the three employees have properly completed section one of their respective I-9 forms.

Evidence presented by Complainant in support of these claims consists of party admissions, stipulations as well as documentary evidence. An examination of the voluminous evidence clearly established the lack of any remaining material issues as to these allegations. The fact that Respondent's Response to the instant motion is silent on these counts merely reinforces this conclusion. Consequently, I find Complainant is entitled to a summary decision as to all allegations contained in counts six, seven and eight of the Complaint.

In view of the fact that I have found it is inappropriate to resolve count one and count five of the Complaint in a summary fashion at this time, and in light of the fact that these two counts contain more than half of the allegations made by the Complainant in this case, I therefore find that it is also not appropriate for me to determine the proper civil money penalties that should be imposed upon Respondent at this time. In particular, I find the remaining unresolved allegations may influence the appropriate penalties in this case because they can contribute to a proper determination of several IRCA penalty factors (e.g. seriousness of the violations, whether the violation involved the employment of unauthorized aliens). See 8 U.S.C. §1324a(e)(3) (1990).

Findings of Fact and Conclusions of Law

As a result of the above discussions, I make the following findings of fact and conclusions of law:

A. That there remain genuine issues of material fact as to count one of the Complaint. Complainant is therefore not entitled to a summary decision on this count.

B. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to ensure the proper completion of the employment eligibility verification forms by the following thirteen employees:

1. Marcos Cena-Garza
2. Jose Luis Cortez
3. E. Javier Estrada-Ibanez
4. Alfonso Franco
5. Marc Lynn George
6. Cresencio Gomez-Villasenor
7. Guillermo Guevara-Malagon
8. Anthony Hernandez
9. Marco Lugo-Castro
10. Juan Madrigal-Vasquez
11. Michael Montoya
12. Luis Rodriguez-Lara
13. Michael Woody

C. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to properly complete section two of the employment eligibility verification forms for the following sixty-two employees:

1. Freddie L. Aragon
2. Angel Ayala
3. Albert Barmes
4. Michael G. Bejar
5. James Richard Benda
6. Robert Boozer, Jr.
7. Wyomi I. Bresnick
8. Katherine Burkett
9. Gerardo Cadena-Sanchez
10. Jorge Cadena-Sanchez
11. Angel Campos-Lopez
12. Hugo Campos
13. Rafael Chavez-Gutierrez
14. Donald Chee
15. Jerome Clemons
16. Richard L. Cordova
17. Kevin L. Davis
18. Robert William Deckman
19. Hector Delgado
20. Paul Richard Dorland
21. Wade Elston
22. Donald Scott Erskine
23. Adan Fernandez-Mejia
24. Robert Fortier
25. Ron Fraijo
26. Ramon Gallegos-Treviso
27. Richard Gower
28. Jason Gregory
29. Kim Robert Harrington
30. Vance Ray Harrington
31. Joe Hill
32. Tim William Kennedy
33. Shad Edward Labriola
34. Richard Duane Louis
35. Lisa W. Low
36. Raudel Lujano
37. Benjamin Manning
38. Mark Anthony Martinez
39. Roberto Antonio Martinez
40. Armando F. Moyza, Jr.
41. Steven Gerard Mueller
42. Theodore Cameron Mullins
43. Shane Nelson
44. Josephine M. O'Connor
45. Donald Oldham
46. Raul P. Perez
47. Grant David Perkins
48. James Albert Reeves
49. Don Eugene Rife, Jr.
50. John Rubalcada
51. Eddie John Rushing
52. Norma Angelica Sanchez
53. Thomas Dawson Stewart
54. Jefrey Robert Taylor
55. Octavio Vasquez-Lombera
56. Hilario Vasquez
57. Ricky Dee Waggoner
58. Murray Williams, Jr.
59. Bobby Yellowhair
60. Johnny Yellowhair
61. Julius Yellowhair
62. Jose D. Ramos-Gomez

D. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to ensure the proper completion of section one, and by failing to properly complete section two, of the employment eligibility verification forms for the following fourteen employees:

1. Jose Luis Callado-Ernandes
2. Juan Carrasco-Paredes
3. Tomas Carrasco
4. Valentin Castro
5. Manuel Delgado-Melendez
6. Cornelio Antonio Gonzalez
7. Efrain Gonzalez-Marrufo
8. Guillermo Gonzalez-Vera
9. Ramon Miranda
10. Gabriel Moreno-Reyes
11. Clyde James Northcutt
12. Francisco Salceda-Rodriguez

13. Michael R. Sullivan 14. Daniel J. York

E. That there remain genuine issues of material fact with respect to count five of the Complaint. Complainant is therefore not entitled to a summary decision as to this count.

F. That Respondent has violated 8 U.S.C. §1324a(a)(1)(B) by failing to make available for INS inspection, in a timely manner, the employment eligibility verification forms for the following five employees:

1. Terry Clugston
2. Rhea Joan Hill
3. Robert Scott McInturff
4. Steven Mark Neff
5. Andrew M. Santistevan

G. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to update the employment eligibility verification forms of the following six employees:

1. Enrique Javier Barrios
2. Ibrahim Barrios
3. Reyes Manuel Carrasco-Paredes
4. Hipolito Montoya-Vacio
5. Saul Mora-Cruz
6. Emigdio Orozco-Olivera

H. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to update, and by failing to ensure the proper completion of section one, of the employment eligibility verification forms for the following three employees:

1. Sergio Garibay-Gonzalez
2. Rafael Nunez-Mendoza
3. Simon Torres-Renterias

I. That issues of material fact remain to be resolved before a proper determination of the appropriate civil money penalties may be made in this case. Therefore Complainant is not entitled to a summary decision as to the appropriate civil money penalties that should by imposed for Respondent's current IRCA violations.

ACCORDINGLY, IT IS HEREBY ORDERED that Complainant's Motion for Partial Summary Decision is granted in part and denied in part as provided by the above findings of fact and conclusions of law.

IT IS FURTHER ORDERED that the Complainant's allegations relating to the following employees be deleted:

(Count Four) Mario Ascencion. (Count Five) Alfredo Aguirre- Orozco; Luis D. Aguirre-Orozco; Saeno Alvarez; Fernando Apericio; Christopher Bahe; Michael Barnes; Amos Begay; Ernest Begay;

Jerordo Cadenas; Damon Dalet; Gustavo Espinoza; Fernando Fernandez; Humberto Flores; Juan Gomez; Paul Gust; Pedro Murgia; Natasha Paust; Scott Peterson; Magarito Roldhan; Todd Sisco; Bryan Steven; Bibiano Tinoco; Sergio Vandera; Charles Wilmoth; Leon Woodard; Donnie Yellowhair.

FREDERICK C. HERZOG
Administrative Law Judge

San Francisco, California
Dated: September 23, 1991