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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	CASE NO. 94A00011
MARIA ELIZONDO GARZA, DBA GARZA FARM LABOR, Respondent.	)	

AMENDED ORDER DENYING IN PART AND STAYING IN PART COMPLAINANT'S MOTION TO COMPEL DISCOVERY

On May 24, 1994, I issued an order "Denying In Part Complainant's Motion To Compel Discovery". Subsequent to issuance of that order, I discovered some typos, errors and omissions which I am correcting in this Amended Order.

The issue before me is whether Respondent's Fifth Amendment privilege against compelled self-incrimination prevents Respondent from needing to respond to Complainant's numerous discovery requests. For the reasons stated herein, with the exception of Respondent's federal and state tax returns, I cannot resolve this issue until (1) Respondent has submitted (a) more detailed information on her objections and (b) information on the degree to which a responsive answer might have a tendency to incriminate her; and (2) (a) Complainant, if it intends to prove that the requested information falls within the required records exception to the Fifth Amendment, has filed a brief arguing that the exception applies to this case; and (b) if Complainant files such a brief, Respondent has had an opportunity to respond.

I. *Procedural History*

On January 18, 1994, the United States Department of Justice, Immigration and Naturalization Service ("Complainant" or "INS") filed a complaint against Maria Elizondo Garza, DBA Garza Farm Labor,

("Respondent" or "Garza") alleging that Garza hired or continued to employ eighteen (18) named individuals after November 6, 1986 who Respondent knew were aliens unauthorized for employment in the United States in violation of section 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(10(A).

Respondent was served with a copy of the complaint on February 2, 1994 and filed her answer on March 3, 1994. In her answer, Respondent generally denies all the allegations in the complaint. Respondent also asserts five affirmative defenses: (1) that the 18 individuals identified in the complaint are properly-documented aliens entitled to work in the United States; (2) that if the 18 individuals are not properly documented, then Garza did not hire them; (3) that if the 18 were hired, they were hired after proper I-9 preparation, entitling Garza to a presumption that Respondent did not knowingly hire illegal aliens; (4) that if the 18 individuals were hired, Garza, having prepared an I-9 form for each, did not know they were unauthorized for employment, and (5) that if Garza did hire the 18 aliens listed in the complaint, she did not hire them knowing they were illegal. See Answer at 3-4.

On February 7, 1994, Complainant, pursuant to 28 C.F.R. § 68.21, served Respondent with 14 requests for admissions of fact and 20 requests for admissions of authenticity of documents (Exhibit A) and 19 interrogatories and a request for production of the "complete copies of Respondent's 1992 and 1993 Federal and State income tax returns, including all schedules and attachments" (Exhibit B).[1]

In Garza's response to Complainant's interrogatories and requests for admissions of fact, authenticity of documents and production of documents, mailed to Complainant on or about March 1, 1994, Garza objected to almost all the discovery requests. In making these objections, Respondent asserted various privileges, including work-product, attorney-client and her constitutional and statutory right against self-incrimination. Respondent, however, did not specify with respect to each separate question to which she objects, the grounds for the objection and, without possible self-incrimination, the degree to which a responsive answer might have a tendency to incriminate her.

As a result of Respondent's alleged failure to adequately respond to Complainant's discovery requests, Complainant filed a motion to

[1] In my standard Order Directing Prehearing Procedures, issued on March 4, 1994, I directed the parties to begin discovery. Complainant, however, had already done so.

compel (Compl.'s Mot. to Compel"). Respondent filed a timely response. For the reasons stated herein, a ruling on Complainant's motion to compel, with the exception of the requests for Respondent's federal and state tax returns, is stayed until after Respondent complies with this order.

II. *The Parties' Argument*

A. Respondent's Arguments

Garza asserts that she has a constitutional and statutory right against self-incrimination in refusing to answer Complainant's 14 requests for admissions of fact and 18 of 19 interrogatories because the violations charged in the complaint have potential criminal and civil consequences. Garza demands a grant of transactional immunity before answering these discovery requests.[2]

In response to Complaint's request for admissions of fact Respondent states in pertinent part:

> With respect to requests for admissions of fact numbers 1 through 20, Respondent asserts all relevant privileges, including but not limited to attorney work-product and attorney-client privilege in refusing to respond to this request for admissions of fact. Particularly, Respondent asserts her constitutional and statutory right against

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[2] In fact, the statute no longer provides for transactional immunity; however, it does provide for "use" immunity. See 18 U.S.C. §§ 6001-6003. The INS in this case will have to follow the Attorney General's Guidelines more fully described in the United States Attorney's Manual ("USAM") should it decide to seek use immunity in this case. These guidelines state that

> [18 U.S.C. §§ 6001-6003] provide the government with an important and effective device for obtain ing needed testimony, and it has significant advantages over former "transactional immunity" statutes in that it provides no gratuity to a testifying witness, it encourages the giving of more complete testimony by prescribing use of everything the witness relates, and they permit a prosecution of the witness in the rare case where it can be shown that the supporting evidence clearly was obtained only from independent sources. . . .
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> An attorney for the government may request authorization from the Assistant Attorney General for the division with responsibility for the subject matter of the case to apply for an order, pursuant to 18 U.S.C. § 6003 and 28 C.F.R. § 0.175. . . . The request for authorization shall contain sufficient information to permit the Assistant Attorney General, and the U.S. Attorney for the district in which the motion for the order is to be made, to make an independent judgment regarding the public interest and the likelihood of the refusal to testify.

USAM 9-23.000 and 9-23.100.

> self-incrimination. . . . Because Complainant's allegations against Respondent potentially have both civil and criminal consequences, Respondent asserts her right against self-incrimination, until and unless a mutually satisfactory and agreeable grant of transactional immunity can be given Respondent. In view of the foregoing, Respondent objects to requests for admissions of fact 1 through 20, asserts her right against self-incrimination, and, therefore, refuses to provide responses to said requests for admission of fact at this time.

Respondent makes the same objection to the first 18 interrogatories. Respondent also objects to the production of her 1992 and 1993 federal and state income tax returns on the grounds that it (1) is burdensome and oppressive as an invasion of Respondent's privacy, (2) seeks privileged information in that tax returns are confidential and (3) seeks information that is irrelevant to the subject matter of the proceedings.

B. Complainant's Arguments

The INS argues that its discovery requests are relevant to the allegations in Count I that Garza hired or continued to employ the 18 individuals named in the complaint knowing they were aliens not authorized for employment in the United States. Moreover, the INS contends that it "is entitled to answers to its discovery because the answers are relevant to the knowledge of the employer and the good faith practices and policies of the employer in hiring, employment and termination duties, recommendations and responsibilities and is relevant to Respondent's affirmative defenses."[3] Compl.'s. Mot. to Compel, at 4 (citation omitted).

In addition, Complainant argues that "mere exposure to civil liability is insufficient to invoke a fifth amendment privilege against self-incrimination." Id. at 4-5 (citation omitted). More specifically, Complainant asserts that "[t]he danger from disclosure must be 'substantial' and 'real' leading to a criminal prosecution." Id. at 5 (citing United States v. Apfelbaum, 445 U.S. 115 (1980); Marchetti v. United States, 390 U.S. 39, 48 (1968); United States v. Paris, 827 F.2d 395, 396 (9th Cir. 1987); United States v. Flores, 729 F.2d 593 (9th Cir. 1983); McCoy v. C.I.R., 696 F.2d 1234 (9th Cir. 1983) (some affirmative disclosure by claimant to show "where the danger lies" is necessary).

Complainant also refers to United States v. Widow Brown's Inn, 3 OCAHO 399 (1/15/92) in which the Administrative Law Judge stated that:

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[3] While I agree with Complainant that its discovery requests are relevant, the issue is not relevance, but whether the answers are privileged or protected.

> The federal district courts are the exclusive venue for federal criminal offenses. 18 U.S.C.§ 3231. The coincidence that criminality may attach to the same conduct does not change the civil character of the cause of action before the administrative law judge [for 8 U.S.C. § 1324a "knowing hire" or "continuing to employ" violations.] Nowhere does it appear that the standard of proof is the same. There has been no showing that the elements of the civil case are identical to those of a criminal cause of action. This is not a criminal or a quasi-criminal proceeding. It is a civil penalty proceeding, even though a criminal "pattern or practice of violations" of 8 U.S.C. § 1324a can arise from the prohibited employment of unauthorized aliens.
> 8 U.S.C. § 1324a(f)(1).

Id. at 18.

Next, Complainant argues that if I find that the privilege against self-incrimination exists in the present civil regulatory enforcement context, the privilege cannot be invoked as a general refusal to answer all questions. Compl.'s Mot. to Compel, at 5 (citation omitted). Rather, Complainant asserts that the privilege may be invoked only to individual questions which may tend to incriminate. Id. (citing Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 480 (1972)). Complainant further contends that a party objecting to a request for admission of fact or a request to authenticate documents or to interrogatories must state with specificity why the requests are objectionable. Id. at 5-6 (citing Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D 12, 24 (D. Neb. 1985)). Thus, Complainant argues that because Respondent has failed to state with particularity her objection to each discovery request, I should grant its motion to compel and order Respondent to answer all of its discovery requests.

III. *Discussion*

A. Legal Standard for Compelling Production of "Privileged" Information

This agency's rules of practice and procedure provide that:

> Unless otherwise limited by order of the Administrative Law Judge . . ., the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

28 C.F.R. § 68.18(b).

Fed. R. Civ. P. 26(b)(1) similarly limits discovery to matter that is "not privileged, which is relevant to the subject matter involved in the

pending action . . . ." "[T]he rules do not spell out when a privilege exists but leave it to the courts to interpret the common law principles of privilege in the light of reason and experience." 8 C. Wright and A. Miller, Federal Practice and Procedure (Supp. 1994) ("Federal Practice and Procedure") § 2016 at 67 (citations omitted). In determining whether any of Respondent's claimed privileges protect her against having to respond to any or all of Complainant's discovery requests, I will rely on 28 C.F.R. § 68.18(b) and will look for guidance to federal decisions addressing Fed. R. Civ. P. 26(b)(1).

The party claiming a privilege has the burden to demonstrate that the privilege applies in the particular circumstances of the case. United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); Weil v. Investment/Indicators, Research and Management, 647 F.2d 18, 25 (9th Cir. 1981). "A claim of privilege may be made by objection to a question asked at a deposition or by serving an objection to an interrogatory, a request for production, or a request for admission." 8 Federal Practice and Procedure § 2016 at 126. The party objecting to discovery must raise the objection and has the burden of establishing the existence of the privilege. Id. (citing Merrin Jewelry Co. v. St. Paul Fire and Marine Ins. Co., 49 F.R.D. 54 (D.N.Y. 1970) (Report of insurer's accountant to insurer's attorney respecting claim of loss of insured under jeweler's block policy was discoverable, and although motion to produce might have generated claim of attorney-client privilege, court would not sua sponte consider the privilege); Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384 (D.C. Texas 1968) (Defendant's bald assertion that production of documents would violate attorney-client privilege was simply not enough and court would not be persuaded that documents were privileged until some facts had been alleged); International Paper Co. v. Fiberboard Corp., 63 F.R.D. 88 (D.C. Del. 1974) (a party resisting discovery on ground of attorney-client privilege must by affidavit show sufficient facts as to bring identified and described document within narrow confines of privilege)). "If the court cannot clearly determine whether a privilege exists, it may postpone decision of the question until the factual picture in which the privilege is claimed has been clearly developed." 8 Federal Practice and Procedure § 2016 at 126 (citations omitted).

Fed. R. Civ. P. 26(b)(5), added to the Federal Rules of Civil Procedure as a 1993 amendment, sets forth the information that should be provided in a privilege claim. The rule requires that a party withholding information on grounds of privilege shall "make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that,

without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."[4]

As OCAHO regulations do not address the information that should be provided in a privilege claim, I will adopt Rule 26(b)(5) as a procedural requirement where an individual claims a common law privilege in refusing to comply with a discovery request. See 28 C.F.R. § 68.1 (providing that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation). In addition, I will look for guidance to the federal courts' interpretation of Rule 26(b)(5).

The Federal Rules of Evidence, in defining what is privileged include the privilege against self-incrimination. See Hickman v. Taylor, 329 U.S. 495, 507-508, 67 S.Ct. 385, 91 L.Ed. 451 (1947).[5] The Fifth Amendment protection against self-incrimination shields against compelled self-incrimination, not legitimate inquiry, in the truth seeking process." National Life Insurance Co. v. Hartford Accident and Indemnity Co., 615 F.2d 595, 598 (3rd Cir. 1980) (citation omitted). "A valid Fifth Amendment objection may be raised only to questions which present a 'real and appreciable danger of self-incrimination.'" McCoy v. C.I.R., 696 F.2d 1234 (9th Cir. 1983) (citation omitted). "If the threat is remote, unlikely, or speculative, the privilege does not apply, and while the claimant need not incriminate himself in order to invoke the privilege, if the circumstances appear to be innocuous, he must make some 'positive disclosure' indicating where the danger lies." Id. at 1236 (citation omitted).

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[4] The Advisory Committee Notes explain why the required showing is not more precisely delineated:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

146 F.R.D. at 639.

[5] Because the privilege is testimonial, it attaches to witnesses; parties therefore claim the privilege as witnesses.

The Fifth Amendment privilege may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d. 212 (1972). See U.S. v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d l (1970). Furthermore, the scope of protection afforded by the Fifth Amendment includes civil pre-trial discovery. Hoffman v. United States, 341 U.S. 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); McCarthy v. Arnstein, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924).

The privilege against self-incrimination justifies a person in refusing to answer questions at a deposition, or to respond to interrogatories or requests for admissions, or to produce documents. See Corbin v. Federal Deposit Insurance Corp., 74 F.R.D. 147 (E.D. N.Y. 1977) (motion to compel witness to testify by deposition in civil proceeding was denied without prejudice to any renewal thereof by any party following sentencing of witness on charges to which he had already pleaded guilty, despite contention that risk of self-incrimination was minimal and that testimony could be protected by restricting attendance at deposition to counsel for parties and sealing transcript with ban on governmental access thereto.); Guy v. Abdulla, 85 F.R.D. 1 (D. Ohio 1973) (party who sought protective order on basis that answering interrogatories would violate his right against self-incrimination would be required to assert his privilege as to individual questions which court could then rule on with court's authority to impose sanctions for frivolous motions or unjustified refusal to answer.

Where a party invokes the privilege against self-incrimination in pretrial discovery matters which could have criminal overtones, he or she may not make a blanket refusal to answer all questions, but must specifically respond to every question, raising the privilege in each instance the party determines necessary. National Life Insurance Co. v. Hartford Accident and Indemnity Co., 615 F.2d 595 (3rd Cir. 1980). The defendant may be required to attend a deposition or make answers to interrogatories until there is a reasonable danger that continuing to answer will tend to incriminate him. In re Turner, 309 F2d 69, 71 (2d Cir. 1962); Duffy v. Currier, 291 F. Supp. 810, 815 (D. Minn. 1968).

Upon a motion to compel discovery under Fed. R. Civ. P. 37(a), the court then determines whether the refusal is within the privilege claimed by ascertaining whether a truthful response would provide "a link in the chain of evidence . . . needed to prosecute, Blau v. United States, 340 U.S. 159, 161, 71 S.Ct. 223,224, 95 L.Ed. 170 (1950), or

whether the answers could possibly have a tendency to incriminate. Hoffman v. United States, 341 U.S. 479, 486 (1951). Even the possibility of prosecution entitles a witness to assert the privilege. Gatoil, Inc. v. Forest Hill State Bank, 104 F.R.D. 580, 581 (D. Md. 1985); de Antonio v. Solomon, 42 F.R.D. 320, 323 (D. Mass. 1967).

The act of production doctrine provides that the Fifth Amendment privilege against self-incrimination can apply to proscribe the act of production of documents where the production of the documents has testimony and self-incriminatory aspects. See United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (applying act of production doctrine to protect owner of sole proprietorship from producing documents to grand jury where by act of producing documents owner would tacitly admit their existence and his production of documents would relieve government of need to authenticate).

The required records doctrine, however, is an exception to the Fifth Amendment privilege against compelled testimonial self-incrimination. See, e.g., Davis v. United States, 328 U.S. 582, 593, 66 S.Ct. 1256, 1261, 90 L.Ed. 1453 (1946); Shapiro v. United States, 335 U.S. 1, 32-35, 68 S.Ct. 1375, 1391-93, 92 L.Ed. 1787 (1948). Required records are those records which meet the following criteria: (1) the purpose of the recordkeeping is essentially regulatory, rather than criminal; (2) the records contain the type of information that the regulated party would ordinarily keep; and (3) the records have assumed public aspects rendering them analogous to public documents. Grosso v. United States, 390 U.S. 62, 67-68, 88 S.Ct. 709, 713-14, 19 L.Ed.2d 906 (1968).

Although the Supreme Court has applied both the act of production doctrine and the required records doctrine, the Court has never explained how the doctrines interrelate. Some circuits have held that the required records exception to the Fifth Amendment overrides the act of production doctrine in appropriate circumstances. See, e.g., In re Grand Jury Subpoena, Robert Spano, No. 93-1538, 1994 WL 111500 (Apr. 6, 1994) (8th Cir.; D. Minn.) (holding that the required records exception to the Fifth Amendment overrode the act of production doctrine where the government sought business records of a sole proprietorship automobile dealer); In re Grand Jury Subpoena Duces Tecum (Underhill), 781 F.2d 64 (6th Cir.), cert. denied, 479 U.S. 813, 107 S.Ct. 64, 69-70, 93 L.Ed.2d 23 (1986) (holding that the act of production doctrine was not applicable to an automobile dealer's odometer statement records, which constituted required records).

The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 318-320, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) (per White, J.). See, e.g., Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 576 (lst Cir. 1989) (police officer was not denied his constitutional right when he was prohibited from testifying after having asserted his right against self-incrimination during discovery); National Acceptance Co. v. Bathalter, 705 F.2d 924, 926-27 (7th Cir. 1983). In Baxter, the Court permitted an inference to be drawn in a civil case from a party's refusal to testify, where the respondent's silence was one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted). In Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977), the Court indicated that the rule in Baxter applies to all civil cases.

The cases suggest that three criteria must be met before an inference may be drawn against a person exercising his privilege against self-incrimination: (1) the action must be a civil action; (2) the party seeking to draw the inference must have established a prima facie case; and (3) the person must be a party and not a mere witness. Moxham, "A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation," 12 New England L. Rev. 265, 267 (1976).

B. Analysis

1. Interrogatories & Requests for Admissions

In addition to civil money penalties, the Immigration Reform & Control Act of 1986 ("IRCA") 8 U.S.C. § 1324a, provides criminal penalties against employers for certain activities associated with the knowing hire of unauthorized aliens. For example, any person or entity that engages in a "pattern or practice" of violating the prohibitions of the knowing hire of unauthorized aliens or continuing to employ known unauthorized aliens, commits a criminal violation. 8 U.S.C. § 1324a(f)(1). Such a criminal violation is punishable by imprisonment for up to six months and/or a fine of up to $3000.00 for each unauthorized alien involved. Id. See generally Schmidt, Paul W., "Establishing An Employer Compliance Program Under IRCA, Immigration Briefing (March 1988) at 6-7.

Although it is not clear from the pleadings in this case whether the federal government is particularly interested in bringing a criminal

action against Respondent, the right to assert the privilege against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution. See Hoffman, 341 U.S. at 486-87.[6]

In view of the fact that Respondent has not specifically stated as to each separate request for admission and interrogatory to which she objects, the grounds for the objection and, wherever possible without self incrimination, the degree to which a responsive answer might have a tendency to incriminate her, a ruling on complainant's motion to compel is STAYED until appropriate responses are filed.

2. Request For Authentication of Documents

It is not clear in this case whether the Fifth Amendment privilege against self-incrimination permits Garza, a sole proprietor, not to be compelled to authenticate the business records of Garza Farm Labor.[7] Respondent has not argued that the documents are covered by the required records exception to the Fifth Amendment. If Complainant intends to prove that the requested information falls within the required records exception to the Fifth Amendment, Complainant shall filed a brief with this office by **Friday, June 24, 1994** arguing that the exception applies to this case. Complainant will then have ten days to respond.

A ruling on Complainant's motion to compel with regard to its request for authentication of documents is STAYED until June 25, 1994. If Complainant does not file a brief regarding the required records

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[6] The nature and number of charges in the complaint clearly implicate a number of criminal statutes, including: (l) 8 U.S.C.§ 1324a(f)(1) (unlawful employment of aliens-pattern and practice); (2) 8 U.S.C. § 1324a(a)(1)(A) (the knowing bringing of an alien to the U.S. at a place other than a designated port of entry, regardless of whether the alien was otherwise authorized to enter); (3) 8 U.S.C. § 1324a(a)(1)(B) (the transportation within the U.S. of an unauthorized alien); (4) 8 U.S.C. § 1324a(a)(1)(C) (the concealment, harboring, or shielding from detection of an unauthorized alien); (5) 8 U.S.C. § 1324a(a)(1)(D) (the encouraging of an unauthorized alien to enter or reside in the U.S., whether the entry is surreptitious or unconcealed; and (6) 8 U.S.C. § 1324a(a)(2)(the unconcealed or surreptitious bringing to the U.S. of an alien who is not authorized to enter.

[7] Privileges ordinarily may be waived by their holder and there can be a waiver at the discovery stage as well as at trial. See In re Folding Carton Antitrust Litigation, 609 F.2d 867, 872-73 (7th Cir. 1979). As many of the documents that are listed in Respondent's Request for Admissions of Authenticity of Documents may have already been authenticated during the inspection, Respondent may have waived her Fifth Amendment right against self-incrimination. Complainant, however, has not raised this argument.

exception, I will rule upon its motion based upon other arguments of the parties.

3. Production of Income Tax Returns

Respondent refuses to produce her 1992 and 1993 federal and state income tax returns, including all schedules and attachments, asserting that Complainant's request that she do so (l) is burdensome and an oppressive invasion of privacy, (2) seeks privileged confidential information, and (3) seeks information that is irrelevant.

Complainant asserts that several Administrative Law Judges (including myself) have considered an employer's tax returns in determining the employer's size for purposes of assessing an appropriate civil monetary penalty. See U.S. v. Noel Plastering and Stucco, Inc., 3 OCAHO 427, at 18 (5/12/92); U.S. v. Tom and Yu, 3 OCAHO 412, at 3 (3/19/92); U.S. v. Widow Brown's Inn, 3 OCAHO 399 at 39 (1/15/92); A-Plus Roofing v. U.S. Immigration and Naturalization Service, No. 90-70547, (9th Cir. Mar. 28, 1991); and U.S. v. Felipe, 1 OCAHO 93, at 6 (10/11/89). Although all of these cases considered the tax returns of Respondent in mitigation of a civil penalty, none held that an individual who asserts her Fifth Amendment right against self-incrimination must disclose her federal and state income tax returns to the INS during discovery.

The size of a Respondent's business is one of the factors that an ALJ must consider for purposes of mitigation in determining an appropriate civil monetary penalty for a paperwork violation of IRCA. 8 U.S.C. § 1324a(a)(1)(B). Although IRCA does not require an ALJ to consider the size of a business in determining an appropriate civil money penalty for violating the knowing hire provisions of IRCA, ALJs have considered it in their determinations. United States v. Ulysses, Inc., 3 OCAHO 449, at 6 (9/3/92), United States v. Sergio Alaniz d/b/a La Segunda Downs, 1 OCAHO 297, at 4 (2/22/91). I consider the amount of income and the financial condition of a company as mitigating factors to consider in determining an appropriate civil money penalty against a Respondent who commits a knowing violation under IRCA.

Respondent's income and financial condition will be reflected in her tax returns. Although Respondent's tax returns are relevant to determining the size of its business and the amount of a civil money penalty, this is not in itself enough to grant Complainant's motion to compel.

Respondent argues that permitting discovery of copies of her tax returns would violate her right of privacy. There is no merit, however, to this argument. See Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973) and Heathman v. U.S. District Court for the Central District of California, 503 F.2d 1032, 1033 (9th Cir. 1974) (court held that discovery of copies of defendants tax returns did not violate defendants constitutional claims of "right of privacy and their right to be free from unreasonable searches and seizures").

Tax returns do not enjoy an absolute privilege from discovery. St. Regis Paper Co. v. United States, 368 U.S. 208, 219, 82 S.Ct. 289, 7 L.Ed. 2d 240 (1961); Premium Service Corporation v. The Sperry and Hutchinson Company, 511 F.2d. 225, 229 (9th Cir. 1975); Trans World Airlines, Inc. v. Hughes, 29 F.R.D. 523 (S.D.N.Y. 1961), aff'd, 332 F.2d 602 (2d Cir. 1964), cert. dismissed, 380 U.S. 249, 85 S.Ct. 934, 13 L.Ed.2d 818 (1965). Nevertheless, a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns. Premium Service Corp. v. The Sperry and Hutchinson Company, supra; Federal Savings and Loan Ins. Corp. v. Krueger, 55 F.R.D. 512 (N.D. Ill. 1972); Wiesenberger v. W. E. Hutton and Co., 35 F.R.D. 556 (S.D.N.Y. 1964). Some courts allow discovery of tax returns if relevant to the proceedings. Shearson Lehman Hutton, Inc. v. Alex S. Lambros, Jr. and Robert L. Swats, and Rudolph Hlavek, Third Party Defendant, 135 F.R.D. 195, 198 (1990) and Weider v. Bache Halsey Stuart, Inc., 76 F.R.D. 624, 627 (S.D. Fla. 1977) (in securities action, plaintiff's tax returns for previous seven years were discoverable as relevant to issue of whether plaintiff gave broker accurate information).

Under ordinary circumstances, I would direct that Respondent disclose her state and federal income tax returns to Complainant when or if she made an issue of her income or financial condition in mitigation. See Kingsley v. Delaware, Lackawanna and Western R. Co., 20 F.R.D. 156 (D.C. 1957) (court held the tax returns were subject to discovery only 'where a litigant himself tenders an issue as to the amount of his income.') However, Respondent has also asserted her Fifth Amendment Right against self-incrimination. In my view her state and federal tax returns may contain information that would be highly incriminating to her, if she were involved in the hiring of illegal aliens. Unless Respondent raises the issue of her income or financial condition in mitigation and waives her fifth amendment right to protect her tax returns, I will not permit Complainant to obtain her tax returns through discovery. If there is a waiver by Respondent of her fifth

amendment privilege either prior to hearing or at the hearing, Complainant may make an appropriate motion for disclosure.

IV. *Conclusion*

For the foregoing reasons, Complainant's motion to compel disclosure of Respondent's federal and state tax returns is DENIED but Complainant's requests for admissions, answers to interrogatories and authentication of documents discovery requests is stayed until I have had an opportunity to consider Respondent's specific objections to each of these discovery request and to what degree a responsive answer or disclosure of documents might have a tendency to incriminate her.

Accordingly, Respondent shall file on or before June 13, 1994 a pleading specifying with respect to each separate discovery requests to which she objects, the grounds for the objection and wherever possible without self incrimination to what degree a responsive answer might have a tendency to incriminate her.

It is further ORDERED that the evidentiary hearing in this case is continued until further order.

SO ORDERED on this 7th day of June, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge