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. 93A00179
EARL & BEVERLY McDOUGAL AND/OR GRAND TRADITION, INC. DBA GRAND TRADITION, Respondents.	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(September 13, 1994)

Appearances:

For the Complainant
Karen E. Martin, Esq.
U.S. Department of Justice,
Immigration and Naturalization Service

For the Respondents
Earl and Beverly McDougal, Pro Se

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *Introduction*

This case arises under section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting § 274A of the Immigration and Naturalization Act of 1952, as amended ("INA" or "the Act"), 8 U.S.C. § 1324a. Section 101 of IRCA contains employer sanctions provisions, which impose penalties on employers who knowingly hire unauthorized aliens or who fail to comply with IRCA's employment eligibility verification system.[1] Congress enacted this section of the statute to serve as the principal means of curtailing the large influx of undocumented aliens into the United States.[2]

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[1] IRCA provides that "[i]t is unlawful for a person or other entity (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or (B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) . . . ."8 U.S.C. § 1324a(a)(1). Subsection (b) provides, in pertinent part that "[a] person or other entity [hiring, recruiting, or referring an individual for employment in the United States] must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien . . . ."8 U.S.C. § 1324a(b)(1)(A).

Verification requires examination of certain documents, such as a United States passport, certificate of United States citizenship, certificate of naturalization, unexpired foreign passport, if endorsed by the Attorney General, or a resident alien card. 8 U.S.C. § 1324a(b)(1)(B). Certain documents, including a social security card, certificate of birth, or other documents established by regulation, may satisfy this requirement, provided they are accompanied by a driver's license, state identification card, or other document established by regulation. 8 U.S.C. § 1324a(b)(1)(C) and (D).

[2] Indicative of the severe problem of controlling illegal immigration, the Immigration and Naturalization Service (INS) predicted that 1.7 million undocumented aliens would be apprehended during the 1986 fiscal year. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 47, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. Immigration officials have asserted that this figure represents only a "small fraction of those who cross the border successfully and stay in the United States for years, [or] for a season." Id. In 1985, the INS apprehended 1.2 million undocumented aliens; in six of the past nine years, more than one million illegal aliens have been apprehended. Id.

The House Committee on the Judiciary reported that

> [e]mployment is the magnet that attracts aliens here illegally, or, in the case of non-immigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment .

(continued...)

On October 1, 1993, the INS filed a complaint against Earl and Beverly McDougal and/or Grand Tradition, Inc. d/b/a Grand Tradition ("Respondents") alleging that Respondents failed to comply with IRCA's employment eligibility verification ("paperwork") requirements. More specifically, the INS alleges in one count that Respondents hired after November 6, 1986, for employment in the United States, twelve listed individuals, and (1) failed to ensure that the employees properly completed section 1 of the Employment Eligibility Verification Form ("I-9 Form") at the time of hire, and (2) failed to properly complete section 2 of the I-9 Form within three business days of hire, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B).

This case is before me on Complainant's motion for summary decision, filed pursuant to 28 C.F.R. § 68.38. For the reasons stated below, the motion is granted.

II. *Facts*

Grand Tradition, Inc. ("Grand Tradition"), an in-house catering business specializing in weddings and private functions, is incorporated in the state of California. Its business operation is located in Fallbrook, California. See Motion for Summary Judgment, Attachment A. Earl E. McDougal and Beverly E. McDougal, husband and wife, are the corporate officers and directors of Grand Tradition. See id. Grand Tradition employs waiters, waitresses, food preparers and building management staff. See Respondents' Letter Pleading, filed August 23, 1994.

In late June of 1993, Steve P. Flores, an INS Special Agent, telephoned Beverly McDougal at the Grand Tradition to set an appointment for a meeting. Mrs. McDougal asked Flores if there were any

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[2](...continued)
Id. at 46.

The U.S. Commission on Immigration Reform has stated that:

> Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of illegal immigration will be impossible. The commission believes that both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet.

Statement of Barbara Jordan, Chair of U.S. Commission on Immigration Reform Before the Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, U.S. Senate (Aug. 3, 1994).

problems and he said "no, [this is] just a routine check." See Respondents' Letter Dated February 23, 1994 to Gustavo de la Bina, Chief Patrol Agent, San Diego Border Commander ("Resps.' Feb.23, 1994 Letter"), at 1. Mrs. McDougal agreed to meet after she and her husband returned from their vacation. Id. According to Respondents, while the McDougals were on their vacation, Agent Flores and several other agents went to the Grand Tradition office unannounced and without showing any identification and spoke to all of the McDougals' employees, including their secretary, who asked Agent Flores if there was a problem. He told her that this was "only a routine call." Id. In late July, Agent Flores telephoned Mrs. McDougal and made an appointment to visit her business. She again asked him if there was a problem and he said that this was a "routine call." Id. at 2.

The parties differ as to what next occurred. According to Respondents, Agent Flores and two other agents met with Mrs. McDougal in late July and asked to see Grand Tradition's I-9 Forms. See Resps.' Feb. 23, 1994 Letter, at 2. Mrs. McDougal asked Flores "what an I-9 Form was, never receiving any type of publication or information in 10 years of business of an I-9 Form." Id. Mrs McDougal asked to see an I-9 Form and Agent Flores told her that he would have to bring her some at a later time. Id. Agent Flores told her she "must have the form and would be fined for not being in compliance." Id. After Agent Flores left, Mrs. McDougal telephoned Agent Flores and spoke to someone in his office named Meressa who stated that she did not know what an I-9 Form was or where to obtain one. Id.

Mrs. McDougal then called the U.S. Post Office, the Internal Revenue Service and her accountant, but she claims no one was familiar with the I-9 Form. See Resps.' Feb. 23, 1994 Letter, at 2. Agent Flores and another agent subsequently returned to Mrs. McDougal's office and brought her a handbook and an I-9 Form and told her that she had violated IRCA's paperwork requirements and would be fined $1,500.00. Mrs. McDougal claims she protested, stating to the agents that she had contacted 45 local businesses in the area and only three--the bank, the high school and the local hospital--were aware of such a form. Id.

In contrast, according to Complainant, on July 26, 1993, Agent Flores personally served Mrs. McDougal with a Notice of Inspection which stated that an I-9 inspection would occur on July 30, 1993. See Complainant's Motion for Summary Judgment ("Compl.'s Mot. for Sum. Judgmt"); Flores Aff.; and Ex. B-1. On July 30, 1993, Agent Flores telephoned Mrs. McDougal to ask if he could postpone the inspection until August 3, 1993. She agreed to the new inspection date. Id. On

August 3, 1993, Flores, accompanied by Special Agent Sal Ochoa, conducted an I-9 inspection at Respondents' place of business in Fallbrook, California. Respondents presented two certified lists showing the names of their employees and dates of hire and thirteen properly-completed I-9 Forms. Id. The lists showed the following:

Name	Date of Hire
Marilyn Smith	4/16/84
Burgie Sybrandy	2/1/87
Sy Sybrandy	12/1/88
Sybren Sybrandy	12/1/87
Sharon Bobo	9/2/88
Mary Chacon	9/9/91
Diane Campbell	11/18/91
Tami Shirley	11/8/91
Carlene Shirley	4/15/93
Laura Mitchell	4/28/93
Maria Moya	5/1/93
Iliceo Olivero	5/1/92
Guadalupe Leal	11/16/92

The completed I-9 Forms which Agent Flores received from Respondents on August 3, 1993 were not completed until after July 26, 1993. See Beverly McDougal's Letter Pleading, dated March 10, 1994. Based upon his review of the case, Agent Flores recommended a one-count Notice of Intent to Fine, citing twelve violations for failure to timely complete Forms I-9. See Motion for Summary Judgment.[3]

III. *Discussion*

A. Legal Standard for Summary Decision

The rules of practice and procedure for § 1324a cases before an administrative law judge ("ALJ") provide that an ALJ may enter summary decision "if the pleadings, affidavits, material 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. § 68.38(c) (1993).

[3] Marilyn Smith, listed first on the current employee list was a grandfathered employee and, therefore, not included in the Notice of Intent to Fine.

OCAHO case law follows the standards set forth by the Supreme Court regarding the parties' respective burdens of production in a motion for summary judgment and in opposition to the motion. The moving party has the initial burden of identifying those portions of materials on file that it believes demonstrate the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party satisfies its burden by showing "that there is an absence of evidence" to support the nonmoving party's case. Id. at 325. The burden of production then shifts to the nonmoving party to set forth by affidavit or otherwise, "specific facts showing that there is a genuine issue for trial." Id. at 323-34.

In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the nonmoving party. See Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Only reasonable inferences, however, need be drawn. See Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). As I stated in United States v. Lamont Street Grill, 3 OCAHO 441, at 3 (July 21, 1992):

> The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).] The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement as to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Id. at 251-52.

B. Liability Found

As stated above, the complaint alleges that Respondents (1) failed to insure that the 12 employees listed in Count I of the complaint properly completed section 1 of the I-9 Form at the time of hire and (2) failed to properly complete section 2 of the I-9 Form within three business days of hire.

IRCA's provisions apply to all individuals hired for employment after November 6, 1986. The statute requires proper completion and retention of the I-9 Form for each covered employee. 8 U.S.C. § 1324a(a)(1)(B). The statute, however, does not indicate when the documents must be seen by the employer or when the I-9 Form must be completed. I therefore look to the regulations for guidance. The

regulations provide that "'hire' means the actual commencement of employment of an employee for wages or other remuneration" (8 C.F.R. § 274a.1(c) (1994)), and that prior to such time, the individual must complete section 1 of the I-9 Form. 8 C.F.R. § 274a.2(b)(1)(i)(A) (1994).

The employer may grant the employee up to three business days from the commencement of employment to produce the documents for the inspection by the employer. 8 C.F.R. § 274a.2(b)(1)(ii)(A) (1994). The employer has until the end of the third business day from the first day of employment to complete section 2 of the I-9 Form. 8 C.F.R. § 274a.2(b)(1)(ii)(B) and (iv) (1994).[4] The "three-day" period may be extended to 90 days after the hire if an employee presents "receipts for application" of an acceptable replacement document(s) within the first three days, but is not applicable to an alien who indicates he or she does not have work authorization at the time of hire. 8 C.F.R. § 274a.2(b)(1)(vi) (1994). The employer must retain the completed I-9 Form and make it available for inspection by the INS or the Department of Labor for a minimum of three years after the date of hire or one year after the date the individual's employment terminated, whichever is later. See 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2) (1994).

Respondents do not dispute that they failed to complete the I-9 Forms within three days of hire for the 12 employees listed in Count I of the complaint, but argue that the complaint should be dismissed for the following reasons: (1) they were entrapped; (2) the prosecution is discriminatory (selective prosecution); (3) INS failed to educate Respondents on IRCA; (4) ignorance of the law; (5) the INS Notice of Inspection was defective because it failed to give Respondents three days notice and therefore violated Respondents' due process rights; and (6) Respondents complied with the verification requirements after notice was given to them. Respondents arguments for dismissal of the complaint, however, are not supported by the law or facts in this case.

1. The Government's Failure to Educate Respondents and Respondents' Ignorance of the Law are Not Affirmative Defenses

Respondents raise as an affirmative defense their lack of education of IRCA's requirements, stating that:

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[4] An exception is provided for employment which will last less than three business days; in such case, the employer is required to review the documents and complete the Form I-9 no later than the end of the employee's first day at work. 8 C.F.R. § 274a.2(b)(1)(iii) (1994).

3. No information was available in regard to the I-9 Form. No information was ever received from the Immigration Office.

4. In calling the I.N.S. Office in San Diego and Laguna Niguel, only tape responses are available and it is impossible to talk to a "live" person.

5. I have taken several courses in laws of State and Federal agencies and this subject was never discussed or mentioned.

6. In contacting 46 Businesses in our local area, only three knew about I-9 Forms or use them.

Answer.

Respondents lack of knowledge of IRCA's paperwork requirements, however, is not an affirmative defense to the charges in this case. As the ALJ stated in Mester Mfg. Co. v. INS, 879 F.2d 561, 563 (9th Cir. 1989):

> Because of the burdens IRCA places upon employers, Congress provided for gradual implementation. The six-month period following enactment in November 1986 was a public information period; the appropriate agencies were to disseminate forms and information to employers during this period, and no enforcement action was to take place. [8 U.S.C.] § 1324a(i)(1). The subsequent twelve-month period, between June 1, 1987 and June 1, 1988, was the "first citation period." [8 U.S.C.] § 1324a(i)(2). "In the case of a person or entity, in the first instance in which the [INS] has reason to believe that the person or entity may have violated [IRCA] . . . the [INS] shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations." [8 U.S.C.] § 1324a(i)(2)."

In Mester, the employer was cited for, inter alia, nine paperwork violation during the first citation period. On appeal Mester argued that it was deprived of substantive due process because it was not given a thorough briefing as to its violations before enforcement. In rejecting that argument, the Ninth Circuit Court of Appeals stated that:

> Mester had a statutory right to receive a citation before any enforcement proceedings were initiated. But the citation was a predicate to the enforcement proceeding, not a part of it. Mester apparently believes that it had a right to a thorough briefing as to its violations of IRCA prior to enforcement. Mester's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. It is true that Congress provided for education of employers during the early period of IRCA. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanctions against an employer that can show that it has not received a handbook or other instruction, or (as here) that it has simply failed to pay attention to them.

Id. at 569-570.

Respondents' lack of knowledge of IRCA's paperwork requirements therefore is not an affirmative defense to the charges in this case. Respondents' business operation is relatively small and is located in a rural area. It is unfortunate that Respondents and many other businesses in their community are not familiar with the requirements of IRCA, a law that has been in effect for over seven years (and over six years at the time of the inspection in this case). The INS, however, has recognized the problems of educating small businesses in rural communities and the need to continue to educate employers about IRCA.[5]

2. Service of a Notice of Inspection By the INS Does Not Trigger an Employer's Duty to Comply With IRCA's Paperwork Requirements

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[5] Although studies have shown that awareness of IRCA among employers and workers has become widespread,

> those who fully understood the law's requirements were less evenly distributed. In particular, field research bears out the observation drawn from the 1988 [Government Accounting Office (GAO)] employer survey that knowledge of IRCA varies directly with the size of the firm. Large firms with professionally-staffed personnel departments possess extensive knowledge about I-9 requirements. Information varies considerably among smaller firms and within this segment of the economy by industrial sector.

Immigration Reform and Control Act: The President's First Report on the Implementation and Impact of Employer Sanctions (July, 1991) at 125.

> The amount of time and effort that INS has devoted to educating the public has been remarkable. As of July 1991, the
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> > INS [had] contacted more than 2.8 million employers about the requirements of the employer sanctions and anti-discrimination provisions. In the March 1990 GAO report, GAO reported that of the employers surveyed, 83 percent were aware of IRCA, stating that "according to our 1989 survey results, about 1.7 million of the 3.1 million employers who were aware of the law and had a basis to judge INS' education efforts said INS' efforts had increased their familiarity with the law." INS faces a continuing challenge to ensure that its educational efforts sustain public information levels essential to compliance in dynamic markets. Although general familiarity with the law has increased, there is a need to improve understanding of the specific details of the employer sanctions provisions. Moreover, fluctuations in the economy--and the consequent creation of new businesses and changing industries--create a constantly changing employer population in need of sanctions and anti-discrimination education.

Immigration Reform and Control Act: The President's Second Report on the Implementation and Impact of Employer Sanctions at 16 (July 1991).

Respondents argue that this case should be dismissed because they received improper notice. Respondents state that on March 5, 1994, they received a copy of the Notice of Inspection, dated July 26, 1993, from government counsel. See Beverly McDougal's Letter Pleading, dated March 10, 1994. Respondents assert that until they received that document, they were not aware that the Notice of Inspection requires a three-day notice to the employer prior to conducting a review of an employer's I-9 Forms. Id. In addition, Respondents state that Agent Flores did not tell them that his July 26 visit was a "notice of 3 day inspection; he only stated [the Grand Tradition] was in violation and he would return for the information on August 3, 1993." Beverly McDougal's Letter Pleading, dated March 10, 1994, at 2. Respondents further argue that even though they did not have any I-9 Forms prepared on July 26, 1993, they had three days from the date of the notice to prepare them and by August 3, 1993, they had done so. Finally, Respondents argue that even though they violated IRCA by not having completed the I-9 Forms within three days of hiring their employees, the violations should be excused because they produced the completed I-9 Forms in the three-day period "to the best of [their] ability." Beverly McDougal's Letter Pleading, dated March 10, 1994, at 2.

Respondents argue that Agent Flores' failure on July 26, 1993 to mention the Notice of Inspection and to explain it is a basis for dismissing this case. I do not find merit in this argument because IRCA does not require that an INS agent orally explain the purpose of the notice of inspection or everything contained therein. Furthermore, all the information concerning the Notice of Inspection is clearly set forth in the Notice which Beverely McDougal signed and received on July 26, 1993. Moreover, even if there was some error committed by the INS agents in failing to provide an appropriate Notice of Inspection, it does not implicate any due process rights because the Notice does not lead to the final deprivation of property from Respondents. See Maka v. United States, 904 F.2d, 1351, 1357 (9th Cir. 1990); Mester Manufacturing Co. v. INS, 879 F.2d 561, 569 (9th Cir. 1989).

Respondents' other arguments are unpersuasive as well. IRCA does not require that an employer be served with a Notice of Inspection before the employer can be held liable for violating IRCA's paperwork requirements. If such notice were required, every U.S. employer could wait until the INS discovered the employer's failure to comply with IRCA's paperwork requirements and provided a notice of inspection to the employer, after which the employer could prepare an I-9 Form. Clearly, this was not Congress's intent in enacting IRCA.

Beverly McDougal does not dispute that she received the Notice of Inspection from Agent Flores and signed the certificate of service on July 26, 1993. In addition, it is undisputed that a Notice of Inspection took place on August 3, 1993, the purpose of which was to determine I-9 compliance. Furthermore, Beverly McDougal admits that she did not complete any I-9 Forms within three days after she employed any of the employees listed in Count I of the complaint. In addition, it is undisputed that Respondents properly completed the I-9 Forms for all of its employees sometime between July 26 and August 3, 1993. Although Respondents attempted to comply with the law once they learned of their duties, the fact that they completed the I-9 Forms for the inspection on August 3, 1993 does not exonerate them from having failed to complete the I-9 Forms within three days after they hired their employees.

3. Selective Prosecution

Respondents argue that this case should be dismissed because of selective prosecution. In support of this argument, Respondents state that they contacted 46 businesses in their local area, and only three knew about the I-9 Forms, or use them, but none of those businesses has been prosecuted.

I have previously held that impermissible selective prosecution can be an affirmative defense to administrative proceedings. See United States v. Law Office of Manulkin, Glaser and Bennet, 1 OCAHO 100 (10/27/89); United States v. ABC Roofing and Waterproofing, Inc., 2 OCAHO 247 (10/10/90); United States v. Alvand Inc. d/b/a 410 Diner, 2 OCAHO 296 (2/21/91); United States v. Weymoor Investments, Ltd., 1 OCAHO 56 (5/12/89). To establish the elements of a defense of selective prosecution, a respondent must make a prima facie showing that others similarly situated are generally not being prosecuted for the same conduct. Second, the government's discriminatory conduct must be motivated by an impermissible motive. United States v. Aquilar, 871 F.2d 1436, 1474 (9th Cir. 1989); United States v. Lee, 786 F.2d 951 (9th Cir. 1986).

An affirmative defense of selective prosecution or enforcement seeks to pierce the shield of prosecutorial discretion to establish that the government's decision to prosecute was based on arbitrary reasons or protected conduct. See Wayte v. United States, 479 U.S. 598, 607 (1985) ("Although prosecutorial discretion is broad, it is not 'unfettered' (citation omitted) . . . . [T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or

other arbitrary classification, (citation omitted) including the exercise of protected statutory and constitutional rights.")

The evidence that Respondents have provided in this case is insufficient to show impermissible selective prosecution. There is no evidence in the record to suggest that the inspection in this case deviated from the directives of the INS Immigration Officer's Field Manual for Employer Sanctions (M-278) (November 20, 1987) ("Field Manual") for selecting and conducting inspections to determine compliance with IRCA.[6] Furthermore, there is no evidence to show that the INS selec-

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[6] The enforcement standards and policies of the INS are set forth in the Field Manual. The General Administrative Plan states that "[b]ecause administrative compliance programs require a neutral selection process for determining sites for inspection, the sole basis for initiating compliance inspections will be the General Administrative Plan. Field Manual, section IV-B-1 and Appendix E. Officers may conduct I-9 inspections at other sites only as a part of an investigation, based upon leads and articulable facts. Field offices may not develop alternative random selection programs for purposes of conducting inspections of I-9 Forms. Id. at section III-A-2. The Field Manual also states the requirements for inspection of I-9 Forms:

> Service regulations at 8 C.F.R. § 274a.2(b)(2)(ii) required the Service to provide an employer with at least three days' notice prior to inspections of I-9 Forms. The three-day advance notice requirement applies to inspections of I-9 Forms both of an employer randomly selected for inspection based upon neutral selection criteria of the General Administrative Plan (compliance inspections) and of an employer in the course of investigations based upon leads and articulable facts (investigative inspections).

Id. at section III C-1.

The Field Manual specifies the basis for initiation under the General Administrative Plan:

> Administrative compliance generally requires a neutral selection process for determining sites of inspection. The emerging case law related to administrative compliance programs suggests that the courts will sustain an inspections program with the following elements:
>
> > Administrative plan: The site selection process should be part of a national program, or General Administrative Plan.
> >
> > Neutral selection factors: Inspections may be weighed using specific neutral criteria.
> >
> > Random selection: Within the categories specified as selection factors, specified sites must be chosen on a statistically random basis.

Id. at IV B-1.

(continued...)

ted Respondents for a compliance inspection because of their race, religion, national origin or some other impermissible basis. Therefore, Respondents have failed to prove that they were victims of an impermissible selective prosecution.

4. Entrapment is Not an Affirmative Defense

Federal decisions hold that entrapment is a defense to criminal charges. Sorrella v. United States, 287 U.S. 435, 442 (1932); Sherman v. United States, 356 U.S. 369 (1958); Lopez v. United States, 373 U.S. 427 (1963); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976). "There can be no conviction if the government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." 2 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 403 at 419-20 (1982) (footnote omitted). Entrapment occurs when "the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission." Sorrells, 287 U.S. at 442. Entrapment clearly is a criminal defense not available as an affirmative defense in this civil administrative proceeding. See United States v. Irvin Industries Inc., 1 OCAHO 139 (3/9/90) and United States v. Multimatic Products, Inc., 2 OCAHO 221 (8/21/90).[7]

C. Conclusion

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[6](...continued)
The Field Manual concludes the section on the basis for initiation by stating that:

> Unlike the General Administrative Plan, the Central Office generates lists of inspection sites using statistical methods to ensure that employers are chosen on a neutral basis. Based upon management determination, a portion of the sample will be directed toward employment sectors which have in the past proven to be unauthorized alien labor intensive . . . .

Id.

> The basis for the INS' administrative compliance plan was the decision in Marshall v. Barlow's, 436 U.S. 307 (1978) which held that a random selection process pursuant to a general administrative plan constitutes probable cause for purposes of obtaining an administrative warrant. Id.

[7] Although I find that entrapment is not an affirmative defense to allegations of paperwork violations, this holding does not necessarily negate entrapment as an affirmative defense in a 8 U.S.C. § 1324c case.

Because it is undisputed that Respondents failed to prepare and retain the I-9 Forms for the employees listed in Count I of the complaint, I hereby find and conclude that Earl McDougal and Beverly McDougal, individually and Grand Tradition, Inc. d/b/a Grand Tradition hired the twelve employees listed in Count I for employment in the United States after November 6, 1986, and failed to ensure that those 12 employees properly completed section 1 of the Employment Eligibility Verification Form (I-9) and Respondents failed to properly complete section 2 of the I-9 Forms for these 12 individuals in violation of section 274A(a)(1)(B) of the Immigration and Naturalization Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and (2), and 8 C.F.R. § 274.2(b)(1)(i) and (ii).

IV. *Civil Money Penalty*

Title 8 of the United States Code, § 1324a(e)(5) sets out the statutory parameters for assessing and adjudicating the civil money penalty. Each paperwork violation requires a penalty of "not less than $100.00 and not more than $1,000.00 for each individual with respect to whom such violation occurred." Id.

In determining the amount of penalty, I am required to consider the five factors set forth in 8 U.S.C. § 1324a(e)(5): (1) size of the employer's business; (2) good faith of the employer; (3) seriousness of the violation; (4) whether the individuals involved were unauthorized aliens; and (5) the history of previous violations. In the initial adjudication of liability for paperwork violations under 8 U.S.C. § 1324a(a)(1)(B), I generally apply a mathematical formula, giving equal weight to each of the five factors in adjudging the civil money penalty for paperwork violations. See United States v. Felipe, Inc., 1 OCAHO 93 (10/11/89), aff'd by CAHO,[8] 1 OCAHO 108, at 7 (11/29/89); United States v. Broadway Tire, Inc., 2 OCAHO 310 (4/2/91); United States v. Cuevas, 1 OCAHO 273 (12/3/90); United States v. Hanna, 1 OCAHO 200 (7/19/90); United States v. Dittman, 1 OCAHO 195 (7/9/90); United States v. Body Shop, 1 OCAHO 157 (4/20/90). But see United States v. Wood'n Stuff, 3 OCAHO 574 (11/9/93) (where the Felipe formula would have resulted in a civil penalty greater than $30,000.00, I refused to

[8] The CAHO's affirmation states that while the Felipe formula was "acceptable," it was not to be understood as the exclusive method for keeping with the five statutory factors. Felipe, 1 OCAHO 108, at 7 (11/29/89).

apply it where the respondent company was defunct and had no assets and there was no evidence that the respondent was involved in deliberately seeking and hiring illegal aliens).

Other OCAHO ALJs have applied the five statutory factors on a judgmental basis. See, e.g., United States v. Giannini Landscaping, Inc., 4 OCAHO 573, at 7 (11/9/93) (and other ALJ decisions cited therein). For the reasons stated below, I will not follow Felipe's methodology of determining a civil penalty.

I have found that Respondents violated all twelve of the violations alleged in the complaint. Although the Prayer for Relief in the complaint seeks a civil penalty of $1,500.00 or $125.00 for each violation, Complainant has stated that it is "willing to accept a minimum penalty of $100.00 for each violation." See Complainant's Motion for Summary Judgment, at 1. The basis for Complainant's recommendation is important to determining an appropriate civil monetary penalty.

On January 28, 1994, I held an informal settlement conference attended by government counsel and Respondents, Earl and Beverly McDougal. The McDougals were given an opportunity to explain their side of the case. Based upon the McDougals' statements to me at that conference, it was clear that they were unfamilar with IRCA's paperwork requirements, did not hire any illegal aliens and wanted to comply with the law. At the conclusion of the conference, I recommended to government counsel an appropriate fine, directed the parties to continue settlement discussions, and asked for a status report on or before February 16, 1994. See Order Directing Parties to Conduct Additional Settlement Discussion, dated February 7, 1994.

On February 4, 1994, government counsel advised me that she was willing to accept a minimum fine for each violation. Id. Considering the time that IRCA's paperwork requirements have been the law in the United States, INS's recommendation of a minimum fine is fair and reasonable. Although Respondents were not familiar with IRCA's paperwork requirements, the law has been in effect for over seven years and as employers, they have responsibility to familiarize themselves with laws and regulations that govern their businesses.

Taking into consideration all the mitigating evidence and government counsel's aggreement to accept a minimum fine of $100.00 for each violation, I find that a fine of $100.00 for each of the twelve violations, totaling $1200.00 is fair and reasonable.

This Decision and Order is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv) (1993). As provided at 28 C.F.R. § 68.53(a)(2) (1993), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer modifies or vacates it. Both administrative and judicial review are available to the parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7) and (8); 28 C.F.R. § 68.53 (1993).

SO ORDERED this 13th day of September, 1994, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge