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

April 19, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 93B00054
ROBISON FRUIT RANCH, INC., Respondent.	)	

DECISION AND ORDER

Appearances: Carol Mackela, Esquire, and Yesica Mantovani, Esquire, Office of Special Counsel for Immigration Related Unfair Employment Practices, United States Department of Justice, Washington, D.C., for complainant;
William Morrow, Esquire, White, Peterson, Petty, Pruss, Morrow & Gigray, Nampa, Idaho, for respondent.

Before: Administrative Law Judge McGuire

Procedural History

On March 9, 1993, the Office of Special Counsel (OSC or complainant) filed a Complaint Regarding Immigration Related Unfair Employment Practices, alleging that Robison Fruit Ranch, Inc., (respondent), had violated the document abuse provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (INMACT), Pub. L. No. 101–649, 104 Stat. 4978 (1990).

Specifically, the Complaint charged that respondent had engaged in a pattern or practice of document abuse in the employment eligibility verification process by having requested that United States citizen employment applicants produce a Social Security card or a document containing a Social Security number, and also by asking non-U.S. citizens similarly situated to present INS-issued documentation, in violation of the provisions of 8 U.S.C. §1324b(a)(6).

In its Complaint OSC sought the following relief: that respondent be ordered to cease and desist from the alleged discriminatory practices; that it be ordered to pay a civil money penalty of $1,000 for each instance in which a new employee had been requested to produce more or different documents than those required by the relevant statutory provisions, 8 U.S.C. §1324a(b); that respondent be ordered to educate its personnel in order to avoid further unfair immigration-related employment practices as defined by 8 U.S.C. §1324b; and any other relief which might be determined to be appropriate, including an order that respondent pay complainant's costs in bringing this action.

On March 10, 1993, the Chief Administrative Hearing Officer (CAHO) issued and transmitted to respondent a Notice of Hearing (NOH) on the Complaint, attaching thereto a copy of the Complaint. The matter was assigned to the Honorable E. Milton Frosburg, then an Administrative Law Judge (ALJ) assigned to this Office.

On April 9, 1993, respondent's counsel, William A. Morrow, Esquire, forwarded to Judge Frosburg, a Notice of Appearance, an Answer to the Complaint, and a Motion to Dismiss. In its Motion to Dismiss, respondent contended that the Complaint was defective because it lacked sufficient specificity, that it was not timely because no individual charges from which to count 180 days had been filed, and that respondent's actions with regard to routinely having requested a Social Security card during the hiring process did not violate IRCA because it fell within those exceptions identified in 8 U.S.C. §1324b(a)(2) and thus the Complaint should be dismissed because respondent was entitled to judgment as a matter of law.

On April 23, 1993, complainant filed a pleading captioned Memorandum of Points and Authorities in Opposition to Respondent's Motion to Dismiss, arguing that the Complaint had specifically alleged a pattern or practice of document abuse, and that individuals and dates need not have been stated in the Complaint;

that the Complaint was filed in a timely manner under the independent powers of OSC; and, finally, that respondent's conduct did not fit within any of the recognized exceptions to the statute.

On June 2, 1993, while respondent's Motion to Dismiss was pending, complainant filed a Motion to Compel Discovery, asserting that it had filed its First Request for Production of Documents, and that respondent had failed to respond to that request in a timely fashion. Complainant requested that respondent be ordered to reply to its discovery requests.

On August 2, 1993, Judge Frosburg issued an Order addressing an issue which had arisen during the parties' discovery namely, the propriety of allowing individuals other than the deponent, counsel and the court reporter to be present at a deposition, the apparent fear having been that some form of "inadvertent intimidation or communication might occur." Judge Frosburg concluded, in the liberal spirit of discovery, as reflected in the applicable rules of practice and procedure, that the presence of such individuals would not result in prejudice to either party, as long as they did not interfere, intimidate, nor attempt to communicate with the deponent. Aug. 2, 1993 Order at 1; *see* 28 C.F.R. §68.18 (1995).

On August 9, 1993, complainant filed its Second Motion to Compel Discovery, in which it maintained that respondent had failed to fully respond to its earlier First Request for Production of Documents and that respondent had also ignored Complainant's [Second] Request for Production of Documents, which had accompanied its Notice of Depositions. Complainant petitioned Judge Frosburg to order respondent to comply with those requests by August 23, 1993.

On August 26, 1993, complainant filed a Motion to Amend the Complaint, in which it sought to amend by including an allegation that "Respondent's pattern or practice of document abuse also includes Respondent's request that non-U.S. citizens produce INS-issued documents during the I–9 process" within each part of the Complaint to which that allegation was appropriate, namely in paragraphs 2, 9 and 13. Mot. Am. Compl. at 1.

On September 9, 1993, respondent filed a Brief of Respondent re: Dismissal of Pattern and Practice Claim as a supplement to its Motion to Dismiss. That brief focused on the propriety of OSC alleging a "pattern or practice" violation against respondent *sua sponte*

where no individual complainant existed. Respondent argued that OSC has no statutory or regulatory authority to prosecute a "pattern or practice" violation under IRCA, 8 U.S.C. §1324b. While respondent acknowledged that the Special Counsel is permitted on his or her own initiative to conduct investigations regarding unfair immigration-related employment practices, it contended that the definition of that term is limited to discriminatory actions against an individual and does not include "pattern or practice" violations. Respondent further insisted that Congressional intent, as documented by legislative history, supports a narrow reading of OSC's power to prosecute "pattern or practice" violations.

On September 20, 1993, respondent filed its Second Motion to Dismiss, in which respondent maintained that "the complainant's pleading of a 'pattern or practice' complaint [is] not tied to a specific individual who was allegedly discriminated against; [is] not tied to specific occurrences or transactions; and [is] not tied to a specific time frame. Consequently, this is an action in excess of the jurisdiction of the OSC." Thus, respondent contended, the Complaint should be dismissed because complainant had failed to state a cause of action upon which relief could be granted. Resp't's Second Mot. Dismiss at 1. Respondent referred Judge Frosburg to its earlier Brief of Respondent re: Dismissal of Pattern and Practice Claim for additional support of its motion to dismiss.

On the same date, respondent also filed an Opposition to Motion to Compel Discovery and an Opposition to Complainant's Motion to Amend Complaint.

On October 4, 1993, complainant filed a Motion to Strike Respondent's Opposition to Motion to Compel Discovery and Respondent's Opposition to Complainant's Motion to Amend Complaint, stating that respondent's pleadings in opposition to complainant's motions had not been timely filed. Complainant, having been granted an extension of time, also filed its Memorandum of Law in opposition to Respondent's Second Motion to Dismiss. That Memorandum of Law advanced several arguments and cited numerous OCAHO rulings in support of its position that OSC does indeed have authority to bring pattern or practice cases *sua sponte*.

On October 8, 1993, complainant filed a Motion for Protective Order, requesting that Judge Frosburg relieve it of the obligation to respond to respondent's discovery requests until respondent had

fully complied with complainant's two (2) requests for document production.

On January 11, 1994, Judge Frosburg issued an Order Denying Respondent's Motion to Dismiss, Denying Respondent's Second Motion to Dismiss, Granting Complainant's Motion to Amend Complaint and Holding in Abeyance Complainant's Motions to Compel and Motion for Protective Order. In that Order, Judge Frosburg agreed that the statute does not expressly and specifically authorize OSC to prosecute pattern or practice cases, but noted that OCAHO case law has recognized, based on an interpretation of legislative intent, that OSC does have implied authority to do so. Judge Frosburg further maintained that, given the broad, remedial nature of IRCA, he was unwilling to find that OSC did not have authority to bring a pattern or practice case absent an original charging party because to "require OSC to stand on the side-line where there may be a case of blatant disregard for the provisions of 8 U.S.C. [§] 1324b, [would] offend[] common sense when considering the full remedial intent of the statute." Jan. 11, 1994 Order at 4. Judge Frosburg found respondent's arguments regarding the specificity and timeliness of the Complaint equally unconvincing. He also rejected respondent's final contention in its several motions to dismiss, noting that any arguments addressing whether respondent's conduct constituted a recognized exception to the statutory prohibitions were issues of fact to be determined only after the parties had had an opportunity to present evidence.

As to complainant's Motion to Amend and respondent's opposition to that amendment, Judge Frosburg determined that neither respondent's rights nor the public interest would be prejudiced by allowing complainant to amend its Complaint, and he therefore granted complainant's Motion to Amend.

On April 13, 1994, Judge Frosburg issued an Order Granting Respondent's Motion for Extension of Time to File Status Report and Sua Sponte Order Granting Respondent Extension of Time to File Objections to Complainant's Third Motion to Compel.

On April 18, 1994, complainant filed a Motion to Strike Respondent's Notice of Objection to Government's Third Motion to Compel, arguing that respondent's notice of objection was untimely.

On April 22, 1994, respondent filed its Response and Objection to the Complainant's Third Motion to Compel Discovery by facsimile. In that motion, respondent indicated that it had made good faith efforts to respond to complainant's discovery requests, that it had not originally understood that complainant also sought Forms I–9 from 1993, and that it did not keep a record of employees' phone numbers, and thus could not provide complainant with that information. Respondent attached letters chronicling that it had forwarded two (2) shipments of documents to complainant, the first containing 772 pages (Forms I–9 from 1990 through 1992 and a list of employees) and the second consisting of 281 pages (Forms I–9 from 1993). Respondent further complained that complainant had not yet responded to any of its discovery requests.

On May 9, 1994, in response to the parties' contentions regarding non-compliance in furnishing discovery replies, Judge Frosburg issued an Order Confirming Prehearing Telephonic Conference, in which he scheduled an in-person prehearing conference in the event that the parties could not satisfactorily resolve their outstanding discovery disputes.

On May 20, 1994, respondent filed a Motion to Compel complainant to more particularly respond to its discovery requests, and identified alleged insufficiencies in complainant's answers and objections to those requests.

On June 3, 1994, complainant filed its Memorandum of Points and Authorities in Opposition to Respondent's Motion to Compel, in which it stated that it had produced all unprivileged information and documents relevant to the case.

On August 9, 1994, owing to the retirement of Judge Frosburg, this matter was reassigned to the undersigned.

On August 15, 1994, complainant filed a Motion for Expedited Trial Date, indicating that it had completed its discovery, that its motions to compel such discovery were therefore moot, and that several migrant workers who were scheduled to testify for complainant were expected to leave the area of the proposed hearing site in the fall of 1994.

The undersigned issued a Prehearing Conference Report and Order on August 31, 1994, in which this matter was set for hearing

in Boise, Idaho on November 29, 1994. Complainant was directed to supply respondent its list of hearing witnesses, and respondent was instructed to prepare and file a memorandum in support of its contention that it should be allowed access to complainant's investigative report based upon respondent counsel's stated belief that it was in the nature of a police report and was thus discoverable.

On September 15, 1994, respondent filed its Brief in Support of Respondent's Motion to Compel Production of Certain Documents. Respondent sought to obtain discovery regarding the fruits of OSC's initial investigation of the incident at issue, alleging that that report was not privileged, as complainant contended.

Complainant filed its response to that brief on September 29, 1994 in a pleading captioned Response to Respondent's Brief in Support of Respondent's Motion to Compel Production of Certain Documents.

On October 17, 1994, the undersigned issued an Order Denying Respondent's Motion to Compel, finding that those materials sought by respondent were privileged, and that respondent had not meet the requisite burden of demonstrating a showing of substantial need or undue hardship.

On November 2, 1994, respondent filed a Motion for Protective Order to preclude complainant from taking some 14 depositions on November 8–9, 1994. In support of its motion, respondent argued that complainant's actions were for "the purpose of annoying, harassing, oppressing, and creating undue burden or expense" for respondent, and that complainant had earlier advised respondent and the undersigned that its discovery was complete. Mot. Protective Order at 2–3. Respondent further indicated that complainant had sent it a Request for Admissions which sought admissions regarding some 30 matters, not including subparts, that would be due on November 10, 1994, and though not explicitly stated, respondent apparently also sought relief from those requests as well. Finally, respondent complained of the burden and expense involved if those 14 depositions were allowed, and sought attorney's fees and costs relating to them.

On November 3, 1994, complainant filed Complainant's Opposition to Respondent's Motion for Protective Order. Complainant pointed out that while it had indicated earlier that it had completed discovery, there is no cutoff date for discovery, and

further, that respondent's witness list had contained the names of 14 witnesses who had not been previously identified during discovery, thus necessitating the requested depositions on such short notice. Complainant asserted that respondent's reply to its Request for Admissions was due on November 8, 1994, and not November 10, as respondent had stated, and noted that such discovery would likely streamline the hearing procedure. It took exception to respondent's request for attorney's fees and costs, and argued that respondent's additional expenses had been incurred as a direct result of respondent's dilatory conduct during discovery. On November 3, 1994, also, complainant also filed an Expedited Motion to Compel Discovery.

On November 8, 1994, the undersigned issued an Order Granting in Part and Denying in Part Complainant's Motion to Compel, in which respondent was ordered to "provide to complainant the requested current addresses, phone numbers, and a brief description of the substance of the individual areas of testimony for those 24 individuals . . . on respondent's witness list and . . . to have done so within three (3) business days of its receipt of this Order." Nov. 8, 1994 Order at 2.

This case was heard by the undersigned on November 29–30, 1994, in Boise, Idaho.

Summary of Evidence

In support of its claim that respondent had engaged in a proscribed pattern or practice of document abuse, OSC's case-in-chief consisted of the testimony of 17 witnesses and the introduction of copies of over 700 Forms I–9 routinely prepared by respondent from 1990 through 1993.

Prior to calling its first witness, complainant offered into evidence several admissions by respondent. The first was that portion of a letter from respondent firm's president, Stanley Robison, to OSC, dated October 28, 1992, which read: "Since the Immigration and Naturalization Service will not check card numbers of employees, we use the Social Security Administration as a valid method of checking possible spurious cards or driver's licenses on a random basis." (T. 27; Complainant's Exh. 1).

The second party admission attributed to respondent consisted of portions of two (2) letters, one from OSC to respondent, which pre-

sented several questions, and respondent's reply to that letter. In reply to this OSC question: "What documents does Robison Fruit Ranch, Inc. require employees to produce for purposes of completing I–9 forms?", respondent replied: "Robison Fruit Ranch, Inc. requires the same documents as listed on the I–9 forms, except that an Idaho driver's license number is the same as that person's social security [sic] number and we accept that number in lieu of an original social security [sic] card if none is available." (T. 27, 28; Complainant's Exhs. 2, 3).

Complainant's final offering of admissions by respondent consists of portions of four (4) depositions. The first was the deposition of Claire Imbler, respondent's office manager:

> Q If someone indicates in the top of the I–9, if they check off box two or three, they are not a U.S. citizen, and write down an alien number, is it your understanding you have to see an alien registration card, or some document by the INS?
>
> A I would believe I would have to see one from list A.

(T. 32; Complainant's Exh. 34).

The second admission was comprised of excerpts from the deposition of Shirley Crockett, respondent's payroll clerk who, in response to a question inquiring as to her understanding of what kinds of documents an applicant is required to furnish when completing a Form I–9, stated:

> I always knew that if they had an alien card from List A, they must show that. And then we also took things from List B and List C if they presented them to show us that they had them.

(T. 34, 35; Complainant's Exh. 35). Crockett's additional deposition testimony indicated that she had "sometimes" called the INS or Social Security Administration to check on "cards [that] looked false to [her]." (T. 35, 37). She indicated that it had "been instilled in [her] since [she'd] started working for an orchard" that it was important not to hire illegal aliens (T. 35). Crockett stated that she had had previous "general knowledge" that she was to "[t]ry not to hire illegal aliens." She could not recall whether this policy was actually "mentioned [at respondent's] . . . but it was something that [she had] brought with [her] from Williamsons [Fruit Ranch, her prior employer]" and while she did not "share that knowledge" with others at respondent's ranch, she believed that her co-workers at Robison knew "[b]ecause they—their policy was the same as ours at

Williamsons to try to verify alien resident cards . . . or any other card that they might give us." (T. 36).

The third such admission offered by complainant consists of a statement made in a discovery deposition of one Encarnacion Garcia, whose self-described position at respondent's ranch was that of a "[k]ind of a foreman." (T. 345). Garcia stated that "[w]hen [he would] send [a new employee] up [to respondent's main office], [he would tell them] that they would need two kinds of ID, because some people don't speak English. So what they need is somebody to be an interpreter, and so [he would say] you need two kinds of ID, just present that, and then you just come back over." (T. 38, 39; Complainant's Exh. 44).

The final admission of that type submitted by complainant consisted of a deposition statement made by Alfredo Chavez, a crew boss for respondent who, while acting as a preparer/translator for a new employee, had asked that employee for his Social Security card and his "immigration card" while filling out Section 1 of his Form I–9 (T. 39–41; Complainant's Exh. 45). When asked why he had asked for that employee's Social Security card and his "other card," which the employee was holding in his hands, Chavez indicated that he did so because Section 1 of the form had a blank for "Social Security number." (T. 41, 42).

Having offered those admissions, complainant began its testimonial evidence. Because many of complainant's witnesses testified to essentially the same facts, with a few differences as to which specific documents had been requested by respondent's office personnel, that lengthy and detailed testimony will be consolidated in order to avoid undue repetition.

Complainant offered the hearing testimony of 16 fact witnesses, the deposition testimony of one (1) unavailable fact witness who was more than 100 miles from the hearing site at the time of the hearing, and the hearing testimony of one (1) expert witness, Denita Adams, an OSC paralegal specialist.

The first witness, Timothy Richardson, testified that he had worked for respondent's retail store, Karcher Ranch Market, in Nampa, Idaho, from September until November 1993 (T. 43). He went to respondent's office in Marsing to complete his Form I–9 (T. 44) and after having completed Section 1 of that form, Richardson

had asked the "older lady" who had given him the Form I–9 which types of identification she wanted, and she requested that he produce his driver's license and Social Security card (T. 44, 45, 50). Richardson stated that he was told by the woman that "she couldn't employ me with the market until I showed my proof of Social Security card." (T. 49). Because he did not have his Social Security card with him, he went home and returned the next day with that card (T. 45). Richardson indicated that the woman accepted his Social Security card, and that he had been hired by respondent (T. 50, 51). Richardson's Form I–9 was admitted as Complainant's Exhibit 21 (T. 53).

Complainant's second witness, Holly Fisher Benjamin, indicated that she had been employed by respondent as a cherry picker for about six (6) weeks in June 1992 (T. 64, 65). She also indicated that an "older woman" had given her a Form I–9 to complete, and that she had done so (Complainant's Exh. 5) (T. 65, 66). At that time, the woman asked to see her Social Security card and her driver's license (T. 66). Respondent did not refuse the documents she presented, nor was she asked for more or different documents other than her Social Security card and driver's license (T. 74). Benjamin's Form I–9 was admitted as Complainant's Exhibit 5 (T. 75).

The next witness, David Gonzalez, testified through an interpreter that he had worked for respondent picking prunes and peaches from August to September 1992 (T. 76, 77). After completing his Form I–9 (Complainant's Exh. 8), he handed it back to the woman who had given it to him, and "[s]he asked me to give her my Social Security card and my green card because she was going to make a copy." (T. 79). He did not give her his Social Security card, however, because he did not have it with him (T. 88). Instead, he presented his resident alien card and his driver's license, which were accepted by her (T. 88, 89).

Gonzalez indicated that there had been five (5) others in the office at the same time, Rafael Gonzalez (his brother), Jose Luis Gonzalez (another brother), Felix Luna, Adrian Savala and Alfredo Martinez (T. 79, 80). He helped two (2) of them, Savala and Luna, complete their Forms I–9 (T. 80). Savala's Form I–9 was admitted as Complainant's Exhibit 19 and Luna's as Complainant's Exhibit 20 (T. 80, 81). Gonzalez stated that after Savala and Luna had signed their forms, he told them to take them to the woman, who then

asked both of them for their Social Security cards and their work permits (T. 81, 82).

Complainant's next witness, Rafael Gonzalez, worked for respondent in August 1992, as a fruit picker (T. 94). He testified that he completed his Form I–9 (Complainant's Exh. 9) and gave it to the "secretary." (T. 94–96). She then asked him for his Social Security card and his green card (T. 96). She accepted those documents, and did not ask for additional or different documents (T. 99). Gonzalez did not ask her if he could show other forms of identification (T. 100).

Complainant's fifth witness was Gloria Schoonover, who had been employed by respondent in July 1991, as a cherry sorter (T. 102, 103). She stated that she had filled out an employment application and was subsequently contacted by telephone by someone at the respondent firm, who "asked me if I could come into work and asked me if I'd bring my driver's license and Social Security card." (T. 103). Complainant's Exhibit 15 is the Form I–9 she completed at respondent's office (T. 104). A woman gave her the form, she filled out Section 1, and then handed it back with her driver's license and Social Security card (T. 104, 105). Respondent did not ask her for additional or different documentation, nor did Schoonover offer any other identification (T. 107, 108).

Connie Aevermann testified next that she had been employed by respondent from approximately August 1992 until February 1994 as a fruit packer (T. 111). She completed her Form I–9 (Complainant's Exh. 6), checking the box to indicate that she is a United States citizen, and gave it back to Shirley Crockett, who then asked to see Aevermann's driver's license and Social Security card (T. 113). Crockett did not ask for any documents other than those listed as acceptable, and Aevermann was hired by respondent (T. 115).

Complainant's seventh factual witness was Nancy Balderas, who had been employed by respondent from June 13, 1992, for about three (3) days as a cherry picker (T. 118, 119). Prior to beginning, she completed a Form I–9 (Complainant's Exh. 14), indicating she is a U.S. citizen, and was asked to produce her Social Security card and driver's license to show work authorization (T. 120, 121). She was not asked for, nor did she attempt to show, any other documents during that process (T. 123, 124).

Kim Couey testified next that she had worked for respondent as an apple sorter in 1991 and again in 1993, and completed Forms I–9 each time (Complainant's Exhs. 7A and 7B) (T. 126, 127). Couey was unable to recall whether she had been asked for specific documents at those times but, having been shown a statement (Complainant's Exh. 46) in which she indicated that she had been asked for her Social Security card and driver's license, she verified that that statement was accurate when made (T. 128–132). Respondent did not ask Couey for any other documents in order to complete her Forms I–9 (T. 135, 136).

Complainant's ninth witness, Ricardo Soto, had been employed by respondent in May 1992, as a fruit thinner. He, his brother Ruben Soto, and his friend, Filiberto Perez, obtained jobs by going "out to the fields and [finding] the foreman, Encarnacion" and asking him for employment (T. 138). He stated that Encarnacion "asked us if we had our documentation like our work permit, our Social Security card and our resident alien card, and we could start working that day." (T. 138, 139). Soto indicated that he and the others began work, and after respondent's office opened they went there with Encarnacion to complete their Forms I–9 (T. 140). Having completed their forms, they were asked for their work eligibility cards, their Social Security cards, and "an ID card." Attached to his Form I–9 (Complainant's Exh. 10) were photocopies of his resident card, Social Security card, and a California identification card (T. 141). All three (3) men were hired by respondent (T. 148). The Form I–9 of Filiberto Perez, who is now deceased, was admitted as Complainant's Exhibit 31B (T. 143, 152).

Jose Rivera Rodriguez testified that he had been employed by respondent in 1993 as a fruit thinner (T. 154). He did not complete his Form I–9 (Complainant's Exh. 11), but was assisted by a translator, Alfredo Chavez (his "boss"), who filled it out, and Rodriguez merely signed the form with an "X." (T. 155–157). As Chavez completed Section 1 of the form, Rodriguez took out his resident alien card and Social Security number (he had not received his card at that time) to assist Chavez (T. 157, 159). While those identification cards were out, respondent's "secretary" examined them (T. 158). Rodriguez stated that he thinks he was told in Spanish, either by Chavez or the secretary, that he needed to present his "mica," or green card/work permit, and his Social Security card (T. 156, 161).

Complainant's eleventh factual witness, Martha Bernal, related that she had worked for respondent beginning on September 8, 1992, sorting apples (T. 163). Bernal, a U.S. citizen, completed a Form I–9 (Complainant's Exh. 16) prior to starting work, and was asked by the secretary for her Social Security card and an "ID card." (T. 165). Bernal presented her Social Security card and Arizona state identification card (Complainant's Exh. 16 at 2) (T. 165). She verified that her husband, Norberto Sanchez, completed his Form I–9 (Complainant's Exh. 17A) on the same date and had been concurrently asked for the same kinds of identification (T. 164–166). Bernal testified that both she and her husband placed their documents on the counter and that the secretary photocopied them (T. 169). They were not asked for other documents, and both were hired (T. 169).

Gladys Chavez, complainant's next witness, has served as an investigator for the Department of Justice, Human Rights Division, Office of the Special Counsel, for over three (3) years. Her testimony concerned her investigatory interviews of respondent's employees, Shirley Crockett and Claire Imbler, on January 8, 1993 (T. 171–173). Prior to working at OSC, Chavez had been self-employed as a criminal investigator and has conducted investigations in over 1,000 cases over 10 years (T. 172). Before handling this investigation of respondent, Chavez had worked on approximately 60 cases at OSC (T. 172). Mr. William Morrow, respondent's counsel of record, was also present when she interviewed Shirley Crockett (T. 173). Chavez testified that:

> During my interview with Shirley Crockett she stated that for the completion of the I–9 she required two forms of identification, and she mentioned the resident alien card, driver's license and Social Security card. I asked Ms. Shirley Crockett why did she require to see the Social Security card. And she says if she would not request the company will be in trouble with the Federal Government or with taxes.
>
> At that time Mr. Morrow (respondent's counsel of record, who was present during the interview) interrupted and says that that information, the Social Security number, was required in form I–9. Based on that Mrs. Shirley Crockett said, "Yes, the information required in the I–9 form is that she requires the Social Security card or the document showing the Social Security number."

(T. 173, 174). When asked if this statement could have been made while Crockett was discussing the Form W–4 instead of the Form I–9, Chavez stated "[n]o, [Crockett] was talking about the I–9 form because that was her role, and we were specifically covering that

point." (T. 178). Further, Chavez, whose native language is Spanish, testified that Crockett did not appear to have any trouble understanding her during the interview (T. 180). Chavez affirmed that an employee's Social Security number is required on the Form I–9 in Section 1 (T. 179).

Complainant's next witness was Janet McDaniel, who worked as a clerk at respondent's retail arm, Karcher Ranch Market, in August 1991 (T. 186). She testified that the manager and "one of the ladies that came in to do the bookkeeping" both told her that she had to go to respondent's ranch and complete employment paperwork (T. 187). The bookkeeper also told her that she needed to "take two forms of ID with [her], a driver's license and a Social Security card." (T. 187). McDaniel filled out her Form I–9 (Complainant's Exh. 26) at respondent's office and showed the woman behind the counter her driver's license and Social Security card (T. 187–189). The woman did not ask McDaniel for specific identification nor did she ask for more or different documents (T. 189–191).

Crystal Nelson was complainant's fourteenth witness. She was employed as a cherry sorter by respondent for about two (2) to three (3) weeks during the summer of 1991 (T. 194). Upon beginning work, she completed a Form I–9 (Complainant's Exh. 27), and she was asked to present two (2) forms of identification (T. 194–196). She presented her driver's license and Social Security card (T. 196).

Complainant's fifteenth witness, Alberto Cardenas, testified that he had worked for respondent in June 1992, for one (1) to two (2) months (T. 199). While there he completed a Form I–9 (Complainant's Exh. 25), which was given to him by a woman behind the office counter (T. 200). The woman "asked [him] for the two papers [I–9 and W–2] and then she asked [him] for two ID cards." (T. 202). At that time, he had already placed his driver's license and his Social Security card on the counter, and presented them to her (T. 200). She did not ask for other documents, and the documents he presented were accepted (T. 202, 203).

Louise Scott, complainant's sixteenth witness, verified that she had been employed as an apple packer by respondent in September 1993 (T. 206). Scott completed her Form I–9 (Complainant's Exh. 28), was asked by the secretary behind the counter to show two (2) forms of identification, and "pulled out three or four of them, my Social

Security card, my Idaho State Board of Nursing card and my driver's license." (T. 207, 208). The secretary "picked up [her] nursing card and [her] Social Security card and copied them." (T. 208). Scott recounted that she was hired, she was not asked for more or different identification, and that the documents she presented were accepted (T. 209).

Complainant produced an expert witness, Denita Adams, employed by OSC as a paralegal specialist, as its final witness (T. 217). Her duties include "reviewing I–9 forms and other documents, conducting telephone interviews for potential witnesses and preparing and assisting attorneys with declarations." (T. 217, 218). Ms. Adams also stated that she had examined between 1500–2000 Forms I–9 in the course of her duties, and had reviewed respondent's Forms I–9 for the years 1990–1993 (T. 218).

Complainant's Exhibit 36 contained respondent's Forms I–9 for 1990, and was divided into three (3) sections: Section 1 was comprised of forms completed by aliens; Section 2 were those of U.S. citizens; and Section 3 contained those of persons whose citizenship status was unknown (T. 218, 219). Adams separated the forms based upon which status box each individual had checked in Section 1 of the Form I–9 and she did not independently verify the status of each individual (T. 220, 237). Further, within each section of Complainant's Exhibit 36, the forms were subdivided by the types of documents those persons had presented, and then arranged alphabetically (T. 219). Respondent's Forms I–9 for 1991 (Complainant's Exh. 37), 1992 (Complainant's Exh. 38) and 1993 (Complainant's Exh. 39) were organized in the same manner (T. 221, 222). Complainant invited the undersigned's attention to five (5) Forms I–9 for the year 1992, each of which bore a handwritten notation regarding the necessity of providing a Social Security card or number and/or driver's license (T. 223–225).

Complainant next introduced Complainant's Exhibit 40, which consists of two (2) identical versions of that document, one measuring 8 " x 11" and the other 3' x 4' (T. 225). The exhibit displayed four (4) columns of data for the years 1990 through 1993. Each of the four (4) columns represented a "breakdown of documents presented by aliens, U.S. citizens and unknown individuals [those whose status as aliens or citizens could not be determined]." (T. 226).

Complainant's Statistics Regarding Aliens Employed by Respondent

Adams explained that in dealing with the 1990 Forms I–9, she had determined that in 94 of 99 such forms the alien had shown an INS document (T. 227). Thus, 95% of the aliens hired by respondent in 1990 who completed a Form I–9 had documented their work authorization by presenting INS-issued documents (T. 227). And, of the 99 aliens hired, 65 of them, or 66%, had also displayed Social Security cards or cards containing their Social Security numbers during that process (T. 227).

For 1991, 37 out of 39, or 95% of the aliens whom respondent had hired displayed INS documentation (T. 227). Of those 39 aliens, some 24, or 62%, had also shown a Social Security card, or a document containing a Social Security number.

The data for 1992 indicated that 103 out of 111, or 93%, of the aliens employed by respondent who completed Forms I–9 that year had produced INS-generated documents. A total of 106 of those 111, or 95%, had also displayed a Social Security card, or a document which contained their Social Security numbers.

In the year 1993, 141 out of 145, or 97%, of the aliens hired by respondent had shown respondent an INS-issued document. Of those 145, four (4), or 3%, had also presented a Social Security card or other document which included that number.

Complainant's Statistics Regarding United States Citizens Employed by Respondent

For 1990, Adams counted 71 out of 73, or 97%, U.S. citizens employed by respondent who had completed Forms I–9 that year who had shown Social Security cards or another document containing that number (T. 227). Because individuals' Social Security numbers appear on their Idaho drivers' licenses, those percentages also included employees who had shown Idaho drivers' licenses but had not necessarily shown Social Security cards (T. 237).

In 1991, 44 out of 45, or 98%, of the U.S. citizens showed a Social Security card or other identification which included their Social Security numbers (T. 228).

Adams calculated that in 1992, some 109 out of 111, or 98%, of the applying United States citizens had presented a Social Security card or a document with a Social Security number to respondent when completing their Forms I–9.

For 1993, 87 out of 93, or 94%, of the U.S. citizens hired by respondent had supplied a Social Security card or another document containing that number during the Form I–9 process.

Complainant's Statistics Regarding "Unknowns" Employed by Respondent

As for those applicants whose status was categorized as "unknown", or those who did not check a box under the "status" portion of the form and whose citizenship status could not be determined from other information supplied for the period 1990 to 1992, virtually all[1] had supplied documents indicating work authorization which were Social Security cards or documents containing Social Security numbers. For 1993, 11 out of 12, or 92%, of those "unknowns" presented either their Social Security cards or other identification which included that number (T. 228, 229).

For the year 1990, some 147 out of 183 (80%); for 1991, 71 out of 87 (82%); for 1992, 234 out of 241 (97%); and for 1993, 102 out of 250 (41%) of those who completed Forms I–9 at Robison Fruit Ranch supplied Social Security cards or documents which included their Social Security numbers (T. 229).

Complainant also introduced Complainant's Exhibit 41, which graphically illustrated the number of aliens employed by respondent from 1990–93 who had presented INS-issued documents during the I–9 process, (T. 230), and Complainant's Exhibit 42, which documented the total number of Forms I–9 produced by respondent during those same years: 184 in 1990; 93 in 1991; 255 in 1992; and 254 in 1993 (T. 231). Adams indicated that the discrepancies between Complainant's Exhibits 40 and 42 in terms of the total Forms I–9 presented from 1990–93 were due to the fact that Complainant's Exhibit 42 showed the total number of forms produced by respondent, some of which had supporting documentation and some of

[1] Eleven out of 11 in 1990; three (3) out of three (3) in 1991; and 19 out of 19 in 1992.

which had none, and that Complainant's Exhibit 40 displayed the total number of Forms I–9 for which documents had been presented, but had excluded those forms for which no documentation had been offered (T. 230, 231).

Complainant's remaining evidence consisted of an excerpt of the deposition of Jose Luis Gonzalez, a former employee of respondent, who was unavailable (T. 257, 258). Gonzalez's July 26, 1994 deposition testimony (Complainant's Exh. 30) essentially provided the information that respondent's secretary had asked to see his "green card" and Social Security card after he had completed Section 1 of his Form I–9 (T. 258–261).

Respondent's Evidence

Respondent began its case by introducing an additional portion of Claire Imbler's testimony from her August 2, 1993 deposition (Respondent's Exh. B), namely respondent's reiteration of complainant's earlier question:

> Q And I believe you were asked [by complainant's counsel] that if an alien number is placed on part one of the I–9 form, you indicated that you would believe you would see a document from List A.
>
> In those instances, would you specifically ask for a document from List A?
>
> A No.

(Respondent's Exh. B at 54).

Respondent next offered as Respondent's Exhibit B, the entire July 27, 1994, deposition of Alfredo C. Chavez, in response to complainant's having earlier entered into evidence a portion of that deposition as an admission by a party-opponent (T. 273). In that deposition, Chavez stated that he acted as translator for "a few more than ten people" whom he had recruited for respondent for a fee (Respondent's Exh. B at 11–13, 18). Chavez indicated that he did not have to ask each worker for specific documents when assisting them with their Forms I–9 because "[a]ll of us that work in labor, we all know. We all know that we have to present or show the Social Security number and some other type of card." (Respondent's Exh. B at 26).

Respondent's Exhibit E consisted of "A Do-It-Yourself Packet" entitled "Filing A Job Discrimination Charge" allegedly printed by OSC but copyrighted by the National Immigration Law Center (T. 280, 281; Respondent's Exh. E at 3). Offered as an admission by a party-

opponent in support of respondent's theory that a document abuse case requires actual discrimination in addition to a pattern and/or practice of abuse, page two (2) presented four (4) photographs with captions alternately reading: "He talks with an accent. I'll say the job is filled."; "I don't think he's a citizen. I can't hire him."; "Her work papers look different. I won't hire her."; and "She looks foreign. I can't hire her." (T. 282; Respondent's Exh. E at 2). Page three (3) included a sidebar which stated:

> Unmask Job Discrimination! In 1986, Congress tried to prevent illegal immigration by making all new employees prove they are authorized to work. Confused about work papers and afraid of being fined, many employers refused to hire immigrants and other workers who look "foreign." Others refused to accept valid work papers. This discrimination is illegal.

(T. 282, 283; Respondent's Exh. E at 3). The next admission offered by respondent consisted of a paragraph which advised the complaining employee how to complete an OSC Charge Form:

> On these lines, you must explain to the OSC why you think you were treated unfairly. Do not just write, "I was treated badly." Instead, write down what the employer did that you think is discrimination.
>
> For example: If you think the employer treated you differently from other workers . . . If the employer said that you had to be a U.S. citizen to get a job, write this. If you think the employer would not accept your legal work papers, write this. If the employer said you had to show an INS document, write this. If an employer told you that you couldn't be hired because there is an expiration date on your work papers, write this . . .

(T. 284, 285; Respondent's Exh. E at 10).

The final admission offered by respondent consisted of a voucher form used by OSC which requests the witness's Social Security number, and notes on the reverse side that "[d]isclosure of your Social Security number is mandatory for Federal income tax reporting purposes under the authority of [the United States Code]." (T. 287, 288; Respondent's Exh. F at 1–2). Respondent argued that this supports its theory that there are nondiscriminatory reasons, i.e. for tax withholding purposes, for requesting one's Social Security and resident alien numbers (T. 292–294).

Respondent further offered portions of the November 8, 1994, deposition testimony of Carolina Cuellar (Respondent's Exh. G) and Patricia Miles (Respondent's Exh. H), former employees of respondent (T. 295–300), to the effect that respondent had not asked either

to produce specific documents during the Form I–9 process (Respondent's Exh. G at 18–19; Respondent's Exh. H at 23).

In response to that segment of Cuellar's testimony, complainant offered additional portions of that deposition for impeachment purposes, namely those parts in which she testified initially that she had not seen a list of acceptable documents while completing her Form I–9 in 1993, but then changed that testimony after seeing a list, and stated that she did "remember when [she] got the form [she] remember[ed] there being a back side to it." (T. 470, 471). However, the back of Cuellar's Form I–9 was blank, and respondent's counsel stipulated at that point that the back of her form was in fact blank (T. 471).

Jose Luis Gonzalez, respondent's first witness, testified that he had been employed by respondent at different times and was currently employed there as well (T. 301). He stated that he had completed Section 1 of the two (2) Forms I–9 shown him by respondent's counsel, but could not recall whether or not he had been asked to supply specific documents when filling out those forms (T. 302, 303). It is interesting to note that Gonzalez also testified that he usually does not carry his "immigration card" with him, and yet that was the document utilized by respondent to complete Section 2 of both of Gonzalez's Forms I–9 (T. 303, 304; Respondent's Exhs. I and J).

Respondent's second witness was Modesto Arechiga, who has been employed by respondent since April 1993, and its third witness was Juan Uvalle, who has been employed by respondent for two and one-half (2½) to three (3) years (T. 309, 313). Both witnesses indicated that they had completed Forms I–9 and that neither had been asked by respondent to show specific documents (T. 311, 315). While Uvalle initially answered "[n]o" to the question "[d]id [the secretary] ask to see any specific documents," he later called the reliability of that statement into question when he stated that he didn't understand the word "specific." (T. 315, 320).

Gregoria Salinas, respondent's fourth witness, testified that she had been employed by respondent since 1987 (T. 321). Salinas at first volunteered that "[the secretary] asked me for my Social Security card and some form of ID, and at that time I didn't have my driver's license yet because I didn't drive. So I didn't have a driver's license" in response to respondent's counsel's query whether Salinas had "show[n] any identification to the secretary." (T. 322, 323).

Salinas later contradicted herself when asked whether the secretary had requested specific documents by stating "[n]o, she just asked me for an ID." (T. 324).

Respondent's next three (3) witnesses were Oralia Cuellar, who was then employed by respondent currently for about two (2) weeks and had also been employed "from time to time . . . through the 1990s"; Norma McAbee, who was also then employed by respondent, and who had worked for respondent seasonally, and whose husband was a supervisor in respondent's apple packing shed; and Wayne McCutchen, who had worked for respondent for some 16 years. All testified that they had not been asked for specific documents during the Form I–9 process (T. 327–329, 334–336, 338–341).

Encarnacion Garcia, respondent's eighth witness and a self-described "[k]ind of a foreman" for respondent, was employed at the ranch from 1987 until about March 1994 (T. 345). While he stated that he did not have the authority to hire people, he could call a "Mr. Wallace," who would then tell Garcia whether or not the person could be hired (T. 346). Garcia indicated that he helped those employees with their Forms I–9 "[o]nce in a while, not all the time, and just unless they call me from the office and they need some help or something." (T. 346, 347). When asked to help, he essentially acted "something like" a translator, and said that he did not fill out the form itself "unless they do not know how to write." (T. 347). When questioned as to whether he "[w]ould . . . ever tell them before going to the office that they needed any kind of ID," Garcia could not recall whether he had done so or not. When asked whether it was possible that he had ever done so, he replied "[c]ould be. Like I said, I don't remember." (T. 347, 348). Garcia did not have any designated responsibilities regarding Forms I–9 (T. 349). He did not "recall the office ever saying specific what you need [for Forms I–9]," nor did he recall having told Ricardo Soto that he would be required to show three (3) forms of identification (T. 350).

Garcia's statement concerning his role as "something like" a translator was partially contradicted by this portion of his July 27, 1994 deposition testimony:

> Q Did you ever help employees at Robison Fruit Ranch fill out forms like that?
>
> A Not exactly because they have to fill it out theirself [sic] or sometimes I would have no time to go to the office. They call me on the radio and they say if I have time to go over and kind of explain it, and I don't have time, so I really don't come over to the office. Like I said, I recognize this [Form I–9] because my wife had one the other day.

(T. 352). In addition, when asked whether it was true "that when people come to you in the fields and you find out through Mr. Wallace that there is a job available, and you send these people to the office, that you tell them they will need two kinds of ID," Garcia answered, "[i]f they ask me what I need, yes, I did." (T. 353).

Respondent next called Ivan Wallace, who stated that he had been employed by respondent for 45 years, and was currently "semiretired." (T. 354). Previously, he was an orchard manager, and in that capacity had occasion to meet new employees. If prospective hires came to Wallace in the field, he "would mainly do the federal regulations, ask if they were legal to work." (T. 355). If the said they were legal, he would send them to the office to do the paperwork," but he did not indicate that they needed to show specific forms of identification. Wallace played no role in respondent's Form I–9 process and he estimated that "probably 95 percent of the people [at respondent's ranch] are Hispanic in the field." He also testified that it was respondent's policy to request specific documents, namely, that aliens must "have a federally-approved card, a green card, or a work visa." (T. 359).

Shirley Crockett, respondent's tenth witness, testified that she has worked as a receptionist, payroll clerk and part-time bookkeeper for respondent since June 1989 (T. 363), that she has been "doing the I–9s for the new employees" since 1989, and indicated that respondent's documentation procedure had been changed in January 1993, following a visit by OSC's Gladys Chavez (T. 364).

Crockett estimated that approximately 75–80% of respondent's employees are Hispanic, and that about 50% of the migrant workers require assistance in completing their Forms I–9 (T. 364, 365). Such assistance ranges "from us making them [the Forms I–9] out down to making sure that they've got all of the form filled out." While she stated that it's difficult to be sure, she estimated that "probably 80 percent [of the Hispanic population at respondent's] understand some English and speak some English, but there are a percentage that don't." (T. 365).

Crockett then detailed respondent's Form I–9 process for those who spoke English and those who did not, prior to OSC's Gladys Chavez's visit. As to those who spoke English, she would give them the form, mark the area they were to complete (Section 1), and direct them to let her know when they were finished. She would then re-

quest identification, take what they would give her, and mark the appropriate boxes in Section 2 (T. 366). When questioned as to how often English speaking workers required assistance in completing their forms, Crockett replied that "sometimes they leave out their birth date, sometimes they leave out their Social Security number, sometimes they forget to date it." She also testified that "[q]uite often they ask me [what they need to show for identification]. When I say, 'I need to see some ID,' they will say 'Well, what do you want?" In response, she "might say, 'If you have a Social Security card or a driver's license,' because that's what normally people carry, 'that I can accept those." Crockett testified that she had not specified which types of documents were to be presented (T. 367).

Crockett stated that "[m]any, many times" new hires would present more documents than were minimally necessary, and that people often "automatically pull their cards out of their wallets and lay them on the counter. Sometimes they [both English speaking and non-English speaking employees] even have to use them to refer to how their name is spelled and this type of thing." (T. 368).

As to those who did not speak English, if she could not find someone to help her (presumably someone who speaks the employee's language), Crockett "would try to get across to them what I was saying and if not, I would finally say, 'If you have an ID card, I can help you,' because I can't even—when they pronounce their names quite fast, I can't understand them that well, either." She would use that identification to complete Section 1; typically, the employee would supply a resident alien card (T. 369). To get their address, she would inquire about their "casa." To complete the portion requesting a Social Security number, Crockett "would tell them that I had to have a Social Security card or I would have to have a Social Security number; that I had to have that number because I need it for my payroll records," and also because it's required in Section 1, "and all blanks have to be filled in." (T. 370). Further, for those that required a resident alien card number in Section 1, she "would have their resident alien card with their name on it, and if not then I would tell them that I needed a number from a card." (T. 370, 371). While this "[took] a lot of handling," Crockett asserted that "they have filled out so many of these that they really kind of know what I'm asking for." As to Section 2, she "already [had] their resident alien card, so [she would] go ahead and use it on Section 2." If she was offered multiple documents by the new hire, she would photocopy all of them and check all the boxes which corresponded to those documents (T. 371).

Once the Form I–9 was completed, Crockett would have the employee fill out a Form W–4 (T. 377).

Crockett estimated that "maybe 10 percent" of respondent's workers do not write (T. 372), and that in those instances either she or Claire Imbler would complete their Forms I–9 (T. 373). She never asked for additional documentation if the employee already had sufficient identification on the counter, nor did she ask for specific forms of identification, and although she admitted that she may have suggested certain documents, she never demanded them (T. 373, 374). Respondent's procedures regarding Forms I–9 have changed since the OSC visit in 1993, and Crockett now informs prospective hires that they can show any identification listed on Lists A, B, and C on the reverse side of the Form I–9 (T. 374).

Crockett indicated that her notations on Forms I–9 regarding the need for a Social Security card or number "probably means that they [the employee] did not have their card with them or didn't remember their number, and I have to have that number for my payroll records." (T. 377, 378).

Crockett also stated that since she has been employed at respondent's ranch, no job applicant has been refused employment because he or she could not produce a Social Security card. Nor has anyone ever been fired or not hired for refusing to show a document requested. She has never requested documents in order to discriminate against any workers, nor has she ever requested documents different from those required by the Form I–9 (T. 378). Crockett testified that in her experience, about 85–90% of "Anglo" employees present driver's licenses and Social Security cards, and that about 95% of the alien employees present resident alien cards (T. 380).

While Crockett denied that it had been her understanding in August 1993 that if an applicant had a resident alien card they had to show it, she was subsequently contradicted by her August 2, 1993 deposition (T. 395). In that deposition, and in response to complainant's question about what documents an employee must show when the Form I–9 is completed, Crockett stated that "I always knew that if they had an alien card from list A, they must show that. Then we also took things from lists B and list C if they presented them to show us that they had them." (T. 396). Crockett also admitted that she did not "really know how many employees volunteered their documents" in any given year from 1990–93 (T. 399, 400).

Finally, Crockett identified some 91 Forms I–9 on which either she or Claire Imbler had completed some portion of Section 1 of those forms (T. 401–422).

Respondent's next witness, Claire Imbler, has been employed as respondent's self-described "office manager" since August 14, 1978. When necessary, she would assist Crockett with the completion of Forms I–9 (T. 428). In assisting Crockett with alien hires who did not understand how to complete Section 1, Imbler would "try to translate and point out the different boxes . . . if they are unclear and cannot read English." (T. 432). Imbler estimated that 99% of the time aliens would take out their documentation to complete Section 1 of their Forms I–9, noting that "[t]hey have been through this process before because they are seasonal migrant workers, and they know that they have to have them." She estimated that 98% of those aliens actually used their documents to aid them in completing their Forms I–9. "If they ask[ed her] to fill out the form or Ms. Crockett, then [she and Crockett would] use those cards to fill out the various boxes that are required by Section 1." When the cards had already been "brought out by the individuals to complete Section 1," she would not request documents for the completion of Section 2 because "[w]e don't have to; they are already there." (T. 433). Imbler, however, could not state definitively which employees had volunteered their documents for the period 1990 to 1993 (T. 455–457).

She also stated that when several people were present in respondent's office, the procedure would change slightly in that she and Crockett would "work together in gathering the information that we need[ed] and making sure that each box is filled in in Section 1 or in some cases even filling [the forms] out ourselves and having [the individuals] sign [them] in the interests of time." She gauged that about 70% of the time the office would be filled with Spanish-speaking groups of two (2) to six (6) workers, and that "[v]ery often" there would be a spokesperson who would assist in the process (T. 434).

She also testified that during the I–9 process for English speaking employees, they would seldom "have their documents out without asking." Before April 1993, respondent was using the "old" Form I–9 which enumerated acceptable documents for each List A, B and C on the front of the form, as opposed to those listed on the reverse side of the revised forms. Thus, during the I–9 process, Imbler would tell English speaking new hires that she needed to see identification from the lists on the front of the form (T. 436). In response, individu-

als would "[v]ery often" ask what was needed, noting that "[w]ell, I don't want to read all this. What do you need?" was a typical response to her request for documentation (T. 436, 437). After April 1993, Imbler recounted:

> After this suit had been filed against us and we received the new I–9s, number one, we no longer photocopied anything and attached it to the I–9, and we were extremely careful.
>
> We had the list in English and Spanish out on the counter. After we started photocopying both sides, we told them to turn it over and choose their form of ID they wanted to give us.

Imbler stated that she never requested more or different documents than those presented by prospective employees, and that respondent did not have a policy of requesting resident alien cards from alien workers or a policy of requesting Social Security cards for I–9 purposes (T. 437).

She also testified that the reason some pre-1993 Forms I–9 contained more documents than were facially necessary namely, documents from Lists A, B and/or C, was not because they had been requesting more or specific documents (such as a Social Security card), but rather was due to the fact that "at that time we were accepting whatever was presented and photocopying it." (T. 437–439). She stated that she made notations on certain forms if the individual completing the form did not have identification with him or her (T. 439, 440). Imbler also testified that no employee had ever been fired or not hired because he or she did not present a Social Security card or a resident alien card (T. 440).

Imbler also related that in her experience the most common document presented by alien employees in the last two (2) to two and one-half (2½) years was a resident alien card, and that the two (2) documents most commonly presented by U.S. citizens, in particular seasonal workers, were drivers' licenses and Social Security cards (T. 441).

Finally, Imbler testified that she had filled in Section 1 of Filiberto Perez's Form I–9, contradicting Ricardo Soto's statement that he had done so (T. 446). She also indicated that she had assisted Jose Rivera Rodriguez with the completion of his Form I–9 by "witness[ing] his X-mark as his signature." (T. 446, 447). She specifically denied having asked Rodriguez for his resident alien card (T. 447).

On cross-examination, Imbler verified two (2) letters from respondent. The first, (Complainant's Exh. 1), dated October 28, 1992, was signed by Stanley Robison, the president of respondent firm, and was addressed to Carol Mackela of the OSC. That letter stated in part "[s]ince the [INS] will not check card numbers of employees, we used the Social Security Administration as a valid method of checking possible spurious cards or driver's licenses on a random basis." (T. 458).

The second, (Complainant's Exh. 3), dated November 20, 1992, was another letter from Robison to OSC's Mackela, and was in response to Mackela's letter of November 16, 1992, which had asked "[w]hat documents does [respondent] require employees to produce for purposes of completing I–9 forms?" and to which Robison had replied that it "requires the same documents as listed on the I–9 forms, except that an Idaho driver's license number is the same as that person's Social Security number, and we accept that number in lieu of an original Social Security card if none is available." (T. 459). Imbler denied that she requested specific documents when asked by employees what she needed to see, and reiterated that she merely suggested types of documents they could present (T. 460).

The respondent's firm president, Stanley Robison, was next to testify (T. 461). He has been in the fruit business for some 56 years, and has grown cherries, peaches, pears, plums, and apples (T. 461, 463). He also stated that he owns a retail store, Karcher Ranch Market, in Nampa, Idaho, at which the ranch's riper fruit is sold (T. 464). The remaining fruit is packed and shipped to more distant destinations (T. 463, 464). Robison testified that his businesses did not have a policy of discriminating against non-citizens or those with accents, and that he has no knowledge that his ranch had not hired someone because they did not supply certain documents during the I–9 process (T. 646–665).

Respondent's final witness, Daniel Hardee, is an associate attorney at respondent's counsel's law firm, and had assisted in preparing this matter for hearing (T. 473). As part of that preparation, Hardee reviewed respondent's Forms I–9 for the years 1990 through 1993 (T. 473, 474). He indicated that he prepared respondent's summary compilation of those forms (Respondent's Exhs. U, V, W and X) in the following manner:

> I took each one of the I–9 forms and went through them one by one, and the first thing I would do that's listed in [part I, A and B] was I would look at the name of the individual that signed the I–9 form, as well as the documentation, if any, that was photocopied to the form, and any of the documentation that was provided to determine whether or not that individual was Hispanic or

> Caucasian. I would just keep a running list of the total of Hispanics and the total Caucasians as set forth on the I–9 forms.
>
> The second thing I would do would be to basically keep a running list of what documents were checked off on the I–9 form, if any, and put that down as well.

(T. 474, 475).

Respondent's Statistical Evidence Regarding Its Forms I–9

He testified that Respondent's Exhibit U documents respondent's Forms I–9 for 1990, and indicated that 144 out of 185, or 78%, of respondent's new hires in that year were Hispanic. Twenty-two (22) percent were determined to be Caucasian. A breakdown of the documentation submitted by new hires demonstrated some 17 different combinations of documents: 60 presented a driver's license and Social Security card; 29 presented a resident alien card only; 46 presented both a resident alien card and a Social Security card; 11 presented a resident alien card and driver's license; five (5) presented a driver's license or Social Security card only; nine (9) presented a Social Security card and a birth certificate; one (1) presented a birth certificate only; two (2) presented an identification card and Social Security card; five (5) presented a driver's license and birth certificate; eight (8) presented a resident alien card, driver's license and Social Security card; one (1) presented a Social Security card and passport; two (2) presented a driver's license, Social Security card and birth certificate; one (1) presented a driver's license, Social Security card and military card; one (1) presented a driver's license and military card; one (1) presented an alien card, Social Security card and INS employment authorization; one (1) presented INS employment authorization only; and two (2) presented no identification.

He also stated that Respondent's Exhibit V documented respondent's Forms I–9 for the year 1991, and indicated that 52 out of 91, or 57%, of respondent's new hires in that year were Hispanic. Forty-three (43) percent were Caucasian. A breakdown of the documentation submitted by new hires for this year illustrated that some 11 different combinations of documents had been supplied: 42 presented a driver's license and Social Security card; 11 presented a resident alien card only; 18 presented both a resident alien card and a Social Security card; two (2) presented a resident alien card and driver's license; four (4) presented a driver's license or Social Security card only; four (4) presented a Social Security card and a birth certificate; one (1) presented a birth certificate only; one (1)

presented a resident alien card, driver's license and Social Security card; one (1) presented INS employment authorization and a Social Security card; one (1) presented a passport only; and six (6) presented no identification.

He explained that Respondent's Exhibit W displayed summary information regarding respondent's Forms I–9 for 1992, and indicated that 155 out of 236, or 66%, of respondent's new hires in that year were Hispanic, while 34% were determined to be Caucasian. Respondent's breakdown of the documentation submitted by new hires demonstrated 15 different combinations of documents: 92 presented a driver's license and Social Security card; four (4) presented a resident alien card only; 80 presented both a resident alien card and a Social Security card; five (5) presented a resident alien card and driver's license; 24 presented a driver's license or Social Security card or identification card only; three (3) presented a Social Security card and a birth certificate; two (2) presented a birth certificate only; three (3) presented an identification card and Social Security card; three (3) presented a driver's license and birth certificate; five (5) presented a resident alien card, driver's license and Social Security card; one (1) presented a driver's license, Social Security card and birth certificate; one (1) presented a resident alien card, Social Security card and identification card; one (1) presented an alien registration card and job service card; one (1) presented a Social Security card and temporary resident card; and 11 presented no identification.

He also testified that Respondent's Exhibit X documented respondent's Forms I–9 for 1993, and computed that 169 out of 241, or 70%, of respondent's new hires were Hispanic and that 30% were Caucasian. A breakdown of the documentation submitted exhibited some 14 different combinations of documents: 68 presented a driver's license and Social Security card; 115 presented a resident alien card only; 21 presented an identification card and Social Security card; 13 presented an employment authorization document; five (5) presented a temporary resident card; one (1) presented a birth certificate only; two (2) presented a Social Security card and birth certificate; one (1) presented a military card and Social Security card; two (2) presented a school identification and Social Security card; four (4) presented a school identification and birth certificate; one (1) presented a resident alien card; one (1) presented a driver's license and birth certificate; one (1) presented a driver's license and Native American identification card; and four (4) presented no identification.

Hardee admitted having no prior experience in analyzing Forms I–9 (T. 476), that respondent's counsel of record had given him instructions as to how to prepare Respondent's Exhibits U through X, and that those forms had not been numbered so he was not sure whether he had been furnished all the Forms I–9 for each year. He simply relied on the forms furnished to him by Mr. Morrow, respondent's counsel of record (T. 477). Hardee rechecked his figures, but no one else did (T. 478, 479). Complainant's counsel noted that Hardee's testimony concerning the total number of Forms I–9 for the period 1990 through 1993 numbered some 37 fewer forms, by her reckoning, than OSC's total number of forms for the same period (T. 480).

Hardee further indicated that he had identified Hispanic, as opposed to Caucasian applicants, by reviewing their surnames, by the use of attached identification, if any, and other documentation provided (T. 479, 480). As for married women with Hispanic surnames, he checked the attached identification in an attempt to properly classify those persons as either having been Hispanic or Caucasian (T. 480).

Arguments of the Parties as Presented in Concurrent Post-Hearing Briefs
Complainant's Post-Hearing Brief

Complainant essentially argues in its post-hearing brief that respondent had engaged in a pattern or practice of document abuse both by (1) "requiring employees to produce, for purposes of completing INS Form I–9 . . . , a Social Security card or document containing a Social Security number" and by (2) "request[ing] that non-U.S. citizens produce INS-issued documents during the I–9 process." Post-Hr'g Br. at 1–2. Complainant proposes several findings of fact, namely that it be held that for the period 1990 through 1993, respondent, through its agents Imbler and Crockett, "regularly requested employees to present Social Security cards or documents containing Social Security numbers . . . [and] regularly requested non-U.S. citizen employees to produce INS-issued documents during the I–9 process." *Id.* at 4. OSC also proposes that the undersigned find that respondent, acting and through Imbler and Crockett, "regularly required two forms of identification from employees for completion of the I–9 form." during the same time period. *Id.*

Complainant also urges that "[t]he injured class includes everyone of whom a request was made for more or different documents than required for I–9 purposes, from November 30, 1990 through

December 31, 1993," and requests a civil money penalty of $60,000. *Id.*

Complainant asserts:

> admissions made by Respondent show that it requested two forms of identification for completion of the I–9 form: Social Security cards or documents containing Social Security numbers from all employees, and in addition, INS documents from aliens and some type of identification from U.S. citizens. Finally, Respondent admitted that it requests Social Security cards and alien registration cards to obtain information to complete section one of the I–9 form for non-English speaking employees.

Id. at 10–11. Complainant contends that the testimony of witnesses Schoonover, Nelson, and Couey confirmed respondent's violative pattern or practice in 1991. *Id.* at 11–12. And that Soto, Benjamin, Balderas, Cardenas, Uvalle, David Gonzalez, Rafael Gonzalez, Jose L. Gonzalez, Aevermann, and Bernal testified concerning respondent's pattern or practice of requesting specific documents in 1992. *Id.* at 12–15. Complainant also argues that witnesses Rodriguez, McDaniel, Scott, Richardson, and Couey established a pattern or practice of requesting specific documents during 1993. *Id.* at 15–17. Complainant further points to the previously summarized testimony of Adams, its paralegal specialist, as additional proof of respondent's pattern or practice of document abuse. *Id.* at 17–19.

Complainant agrees that it bears the burden of persuasion to prove the necessary elements for a *prima facie* document abuse case, and that it must prove those elements by a preponderance of the evidence. *Id.* at 23, 26–28. Complainant also maintains that it has met its burden of proof because it has established (1) that "Respondent's standard operating procedure is to make a request"; (2) that its "request is made for the purpose of satisfying the employment verification provision of 8 U.S.C. §1324a(b)"; and (3) that those requests are made "for more or different documents than are required to comply with the employment verification provisions." *Id.* at 26–28.

Having ostensibly established that respondent is liable, complainant addressed the issue of assessing appropriate civil money penalties. *Id.* at 31. Complainant cites *International Board of Teamsters v. United States* and other OCAHO case law in support of its contention that the total number of respondent's Forms I–9 from 1990–93 "establish[es] the potential number and the identity of the victims of document abuse." *Id.* at 32. Accordingly, it argues, respondent is liable for 600 violations, for each of which complainant re-

quests the statutorily-mandated minimum penalty of $100, for a total of $60,000. *Id.* at 32–33. Complainant also requests that the undersigned order the respondent to cease and desist from future violations of 1324b(a)(6); that respondent be ordered to provide training in IRCA's requirements for Imbler, Crockett and any other employees participating in the Form I–9 verification process; and that respondent be ordered to post notices regarding IRCA's requirements, presumably at its place of business. *Id.* at 33. In arriving at its proposed penalty of $60,000, complainant recommends that the undersigned evaluate its eight (8) suggested factors, and acknowledges that "[t]he large number of I–9's means both that the imposition of the maximum civil penalty for each violation could lead to an inappropriate civil penalty given the circumstances of this case and that a second hearing to offer proof regarding each I–9 form would be unduly burdensome." *Id.* at 35, 34. Finally, complainant asserts that the civil penalties should not be limited to those violations which fell within the 180-day period, but "should also be assessed for violations that occurred going back to the passage of the document abuse provision (November 30, 1990)" because "[t]he statute contains no limitations period for the imposition of civil penalties." *Id.* at 39.

Respondent's Post-Hearing Brief

In his post-hearing brief, respondent's counsel makes several arguments concerning respondent's non-liability, arguing that "[t]his case illustrates how difficult it is for honest people to attempt to comply with the IRCA law—a law that is uncertain and sometimes inscrutable." Closing Argument Br. at 3 (citation omitted).

In its initial argument respondent maintains that a violation of 8 U.S.C. §1324b(a)(6), "Treatment of certain documentary practices as employment practices," requires a showing of discrimination in that it provided:

> *For purposes of paragraph (1)* [the "General Rule" stating that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring . . . because of . . . national origin, or . . . because of . . . citizenship status"], a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. §1324b(a)(6) (emphasis added); see Closing Argument Br. at 6. Because the section cross-references 8 U.S.C. §1324b(a)(1), respondent's counsel asserts that the document abuse described in §1324b(a)(6) has merely been identified by the statute as a type of "unfair immigration-related employment practice," but that absent such conduct discrimination is not, as complainant avers, a *per se* violation of §1324b; this statutory construction is arguably bolstered by the title of §1324b(a)(6)—"Treatment of certain documentary practices as employment practices." 8 U.S.C. §1324b(a)(6); Closing Argument Br. at 7–8.

According to respondent's counsel, therefore, the identification of a pattern or practice of document abuse is to be treated as an unfair immigration-related employment practice, which, if used "to discriminate against any individual . . . with respect to the hiring . . . because of . . . national origin, or . . . because of . . . citizenship status," constitutes a violation of §1324b. *See* Closing Argument Br. at 7–11. Respondent next offers the seemingly similar but actually quite different argument that, even if liability can be established without a showing of discrimination, a penalty can not be assessed absent such a showing because the statute only provides for a penalty "for each individual discriminated against." *Id.* at 10–11 (quoting 8 U.S.C. §1324b(g)(2)(B)(iv)(IV)).

Respondent advances additional support for its reading that the statute requires discrimination by delving into IRCA's regulatory framework, and maintains that prior OCAHO rulings, as well as court decisions concerning pattern or practice violations, have involved situations in which actual discrimination, while perhaps not expressly required, was present. *Id.* at 11–18. Further, it presents portions of various "OSC-endorsed publications" and other evidence regarding Congressional intent in support of its stance that discrimination is a necessary element of document abuse. *Id.* at 18–22.

Having apparently justified its position that discrimination is a required element of a pattern or practice charge, respondent then asserts that respondent cannot be held liable for a violation of §1324b(a)(6) because no evidence of discrimination was submitted at the hearing. *Id.* at 23–27. "Each of the witnesses actually obtained a job with Robison Fruit Ranch," and there was no testimony about any intentional discrimination on respondent's part. *Id.*

Accordingly, respondent asserts that complainant has not met its burden of proof because it has not satisfied the statutory requirements to establish a pattern or practice of document abuse. *Id.* at 27. In addition to respondent's counsel's arguments regarding a requirement of discrimination, respondent divides the statute into its separate elements, namely "(1) a request, (2) made to satisfy the I–9 form, (3) for more documents or for different documents, (4) than are required under such section [i.e., the creation of the I–9 form]," and contends that complainant has also failed to meet its burden of proof as to any of those elements. *Id.* at 28. Respondent's arguments regarding why complainant has not met its burden as to these elements will be discussed in greater detail momentarily. *See infra* at 31–38.

Respondent next contends that the statistical array of documents presented during respondent's employment verification process did not contain an abnormally high percentage of aliens presenting resident alien cards, nor of citizens presenting driver's license and Social Security card combinations. In support of that contention, respondent offers evidence from the March 1990 General Accounting Office's Report to Congress, which reportedly found that "392 of 451 documents shown [for I–9 purposes] were drivers' licenses, Social Security cards and immigration cards." *Id.* at 36. Respondent's counsel observes that "[i]n fact, if one were to suggest one of the obscure documents from the list of acceptable documents, then the Special Counsel would probably quickly label the suggestion as an attempt to weed out employees by requesting documents that could not likely be produced." *Id.* As further evidence of its position that the statistical array of documents was normal, respondent's counsel points out that "the testimony of the witnesses produced by the Special Counsel illustrate [sic] that most of the witnesses had only these type [sic] [resident alien card, driver's license, Social Security card] of documents available to them to use when they, in fact, used them." *Id.* at 38. Accordingly, "[t]he evidence produced by the Special Counsel, rather than demonstrating a pattern or practice, or being suggestive of some nefarious policy or practice . . . really mirrors the GAO study and mirrors reality." *Id.*

The remainder of respondent's brief outlines its various arguments regarding the following: that a penalty is discretionary, and need only be assessed as to "each individual discriminated against"; that respondent's conduct is protected by the statutory exception to §1324b, which exempts any discrimination "otherwise required in order to comply with law"; that complainant has no statutory authority to bring a class action of this sort, and that regardless, to be

part of an "injured class," the individual must have been discriminated against during the 180-day limit because any action as to conduct occurring outside of the 180-day statutory period is time-barred; that OSC only presented evidence as to four (4) individuals who were requested to produce specific documents during that 180-day period, which does not constitute a pattern or practice, and, even if it were determined that such testimony was sufficient to prove a violation of §1324b(a)(6), then the appropriate "injured class" would nonetheless only consist of four (4) individuals; that the OSC has no express authority to prosecute a §1324b(a)(6) pattern or practice violation because these are "private actions" which can only be brought by private persons; that Congress did not intend that OSC be given authority to prosecute such actions; that even if OSC is determined to have such authority, it has not met its burden of proof as to respondent's engaging in an intentionally discriminatory pattern or practice; and finally, that the IRCA document abuse provision is unconstitutionally vague as applied by OSC, and a violation of respondent's substantive due process rights. *Id.* at 39–120.

Several of respondent's latter arguments in its post-hearing brief have previously and correctly been ruled upon by Judge Frosburg in his January 11, 1994 Order Denying Respondent's Motion to Dismiss, Denying Respondent's Second Motion to Dismiss, Granting Complainant's Motion to Amend Complaint and Holding in Abeyance Complainant's Motions to Compel and Motion for Protective Order. *United States v. Robison Fruit Ranch, Inc.*, 4 OCAHO 594 (1994).

Complainant's Reply Brief

On March 6, 1995, complainant filed a reply brief to address certain of the arguments presented by respondent in its closing argument and brief. Specifically, complainant urges that a pattern or practice of document abuse is a *per se* violation of §1324b(a)(6) and does not require discrimination; that respondent should be liable for violations of the document abuse provision before, during and after the 180-day time period; and that the document abuse provision is constitutionally sound. Reply Br. at 1–16.

Legal Analysis of 1324b(a)(6) Document Abuse

Discrimination is Not a Required Element of a Prima Facie Case of Document Abuse

Respondent's counsel argues that statutory construction dictates that 1324b(a)(6) be read in conjunction with 1324b(a)(1), and therefore discrimination based upon national origin or citizenship status must also be provided in a document abuse case. That argumentation is appealing only from a theoretical point of view and respondent's convoluted reading of §1324b(a)(6) cannot be allowed to overcome the plain language employed.

Section 1324b(a)(5)–(6) were both added as part of the amendment of IRCA by IMMACT. *See* H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. §§534–535 (1990). Because of the continued fear of ongoing discriminatory actions against non-citizens, or those perceived to be "foreigners," Congress passed sub-paragraphs five (5) and six (6) in order to address the additional discriminatory actions of "intimidation or retaliation" and "certain documentary practices." 8 U.S.C. §1324b(a)(5)–(6).

Sub-section five (5) specifically classifies other actions, such as "intimidat[ion], threat[s], coerc[ion], or retaliat[ion] against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint . . . under this section," to also be unfair immigration-related employment practices. 8 U.S.C. §1324b(a)(5). Further, sub-section five (5) provides that individuals subject to such actions "shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against." *Id.*

Meanwhile, sub-section six (6) identifies a "request . . . for more or different documents than are required . . . or refusing to honor documents tendered that on their face reasonably appear to be genuine" as additional instances of unfair immigration-related practices. 8 U.S.C. §1324b(a)(6). While such conduct is not expressly identified in the statute as a *per se* violation, later portions of 1324b contradict respondent's counsel's argument that a violation of 1324b(a)(6) requires a showing of discrimination. Specifically, §1324b(g)(2)(B)(iv)(IV) provides for a range of penalties, "not less than $100 and not more than $1,000" for violations involving a "case of an unfair immigration-related employment practice described in sub-section (a)(6)," whereas for first-time violations of 1324b(a)(1)–(5), the statute provides for penalties "of not less that $250 and not more than $2,000." 8 U.S.C. §1324b(g)–(2)(B)(iv). If 1324b(a)(6) were merely a sub-set of 1324b(a)(1), there would logi-

cally have been no need to provide for differing penalty sums for each type of violation.

Further support for the conclusion that respondent's construction is flawed comes from §1324b(g)(3), which is entitled "Orders not finding violations" and states that an ALJ shall dismiss a §1324b complaint if the judge "determines that the person or entity named in the complaint has not engaged . . . in any such unfair immigration-related employment practice." 8 U.S.C. §1324b(g)(3). §1324b(a)(6) expressly classifies a request for more or different documents, or a refusal to honor facially-valid documents, to be unfair immigration-related practices. 8 U.S.C. §1324b(a)(6). Neither 1324b(a)(5) nor 1324b(a)(6) requires that respondent must *both* engage in an unfair immigration-related employment practice and to also discriminate against individuals based on their national origin or citizenship status in order to be liable.

While perhaps not constructed as carefully as one might desire, to follow respondent's reading of the statute would effectively eviscerate §§1324b(g)(2)(B)(iv)(IV) and 1324b(g)(3). Under respondent's theory a 1324b(a)(6) unfair immigration-related employment practice would always have to be filtered through the statutory prism of a 1324b(a)(1) violation. As a result, the adoption of respondent's interpretation of the statute would essentially redefine an unfair practice by requiring that it be accompanied by discrimination based on either national origin or citizenship status in order to be actionable.

OCAHO case law offers additional support for a statutory reading which does not require discrimination to establish a *prima facie* case of document abuse. Previous §1324b(a)(6) cases have not required a showing of discrimination in pattern or practice document abuse cases.

The argument that the phrase "[f]or purposes of paragraph (1)" dictates that "all actions alleging document abuse are in fact actions alleging citizenship status discrimination pursuant to 8 U.S.C. §1324b(a)(1)(B)," and that unless the individual in question was "protected," no violation could occur, was expressly rejected by Judge Robert B. Schneider in *United States v. Guardsmark, Inc.*, 3 OCAHO 572, at 9 (1993). Judge Schneider stated that national origin claims pursuant to 8 U.S.C. §1324b(a)(1)(A), citizenship status claims pursuant to 8 U.S.C. §1324b(a)(1)(B), retaliation claims pursuant to 8 U.S.C. §1324b(a)(5), and document abuse claims pursuant to 8 U.S.C. §1324b(a)(6), "are all completely separate violations of 8 U.S.C.

§1324b." *Id.* He also noted that "this difference can be seen in the remedies available upon a finding of a violation," and discussed the different range of penalties assessed for document abuse violations. *Id.* at 9–10. Accordingly, Judge Schneider also ruled that "the only conclusion is that a document abuse claim filed pursuant to 8 U.S.C. §1324b(a)(6) alleges a violation that is separate and apart from a citizenship status discrimination claim pursuant to 8 U.S.C. §1324b(a)(1)(B)." *Id.* at 10. He further supported that conclusion with a discussion of the pertinent provision in this Office's Rules of Practice and Procedure, namely 28 C.F.R. §68.2(u), which "recognizes that there are three dist[inct] types of claims that can be brought to allege an unfair immigration-related employment practice, and that document abuse claims are not the same as national origin or citizenship status claims." *Id.* at 10–11.

And more recently, even though he did not find complainant's proof sufficient to find respondent liable under §1324b(a)(6), Judge Marvin H. Morse reiterated that §1324b(a)(6) is a *per se* violation in *United States v. Zabala Vineyards*, 6 OCAHO 830, at 3 (1995). In *Zabala,* respondent contended that, "because OSC *'could not identify* "any victims of Respondent's illegal practice who were denied employment . . . ,'" there [could] be no §1324b(a)(6) discrimination." *Id.* Judge Morse rejected that argument, and instead, relying on *United States v. Strano Farms,* 5 OCAHO 748, at 17 (1995), and *United States v. A.J. Bart, Inc.*, 3 OCAHO 538 (1993), stated that "§1324b(a)(6) discrimination occurs where the employer refuses 'to accept documents which are facially valid . . . [and insists] that a job applicant provide a specific document in order to establish employment eligibility." *Id.*

Required Elements of a §1324b(a)(6) Cause of Action

In order to establish a violation of §1324b(a)(6) based on the theory that respondent has requested "more or different documents" than those required by the Form I–9 employment verification system (as distinguished from a violation of §1324b(a)(6) based on an entity's "refusal to honor facially valid documents"), complainant must prove, by a preponderance of the evidence, that:

(1) respondent is a person or other entity which makes a request;

(2) for more or different documents than are required by the employment verification system; and

(3) made that request for purposes of complying with the provisions of 8 U.S.C. §1324a(b).

8 U.S.C. §§1324b(a)(6), (g)(2)(A) (establishing preponderance as proper standard). To establish a "pattern or practice" of document abuse, complainant must further prove that such requests were typical on respondent's part, thus forming a pattern or practice of "regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 59 (1986) (defining IRCA's "pattern or practice" by reference to *International Bd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

Element One

To establish a *prima facie* case, complainant offered various admissions from respondent coupled with the testimony of former employees to substantiate that respondent had indeed requested documents from its new hires, thus satisfying its initial burden of proof regarding element one (1).

Complainant offered the testimony of U.S. citizens Schoonover, Nelson, and Couey, who stated that during the year 1991 they had been requested to either present their driver's license and Social Security card, or, alternately, to present two (2) forms of identification. Post-Hr'g Br. at 11–12.

For 1992, complainant offered the testimony of Soto, David Gonzalez, Rafael Gonzalez, and Jose Luis Gonzalez, work authorized aliens, one (1) of whom stated that he had been requested to show a work eligibility document, Social Security card and "an ID card," and three (3) of whom testified that they were asked to produce their Social Security card and "mica," or "green card." *Id*. at 12–15. As to United States citizens in 1992, complainant offered the testimony of Benjamin, Balderas, Cardenas, Aevermann, and Bernal, three (3) of whom indicated that had been asked to present a driver's license and Social Security card, one (1) of whom was asked to present two (2) forms of identification, and one (1) who had been asked for an "ID card" and a Social Security card. *Id.*

For 1993, complainant offered the testimony of Rodriguez, a permanent resident alien, who stated that he had been asked to see his "mica" and Social Security card, and McDaniel, Richardson, Couey, and Scott, three (3) of whom were asked to present their driver's license and Social Security card, and one (1) of whom was asked to supply two (2) forms of identification. *Id.* at 15–17.

Complainant also relied on the evidence regarding notations on five (5) Forms I–9, admittedly made by Imbler and Crockett, that read "needs SS card," "needs DL and SS number," "needs copy of SS number," or "needs SS number" to establish that respondent had a pattern or practice of requesting certain documents from new hires (T. 223–225; *see also* T. 337–378 (Crockett indicating under what circumstances she would make such a notation) and T. 439, 440 (Imbler stating when she would do so)).

While respondent admits that there is some evidence that "requests" were made, it urges that:

> a variety of different scenarios have occurred at Robison Fruit Ranch . . . Some of the evidence does indicate a request; some of the evidence indicates a generalized request for "identification." . . . Many of the witnesses simply placed the documents on the counter to assist their preparation of the I–9 form, and while the documents were on the counter, [respondent] used them for the verification portion of the I–9.

Closing Argument Br. at 28–29. Respondent also relies in part on Imbler's and Chavez's testimony to insist that "[a]pproximately 98% of the alien workers use the verification cards to assist their filling out the I–9 form." *Id.* at 29. By that observation, respondent appears to be suggesting that 98% of the aliens already had their documents out on the counter, in their hands, etc., and seemingly suggests that a pattern or practice could not have existed as to aliens because the remaining 2%, from whom specific documents may have been requested, is insufficient evidence of a pattern or practice. It should also be noted, however, that respondent's reliance on that estimate is questionable, given the complete lack of a statistical foundation for that number, as evidenced by complainant's cross-examination of Imbler (T. 455–457; Post-Hr'g Br. at 19–20). Further, even if an alien did use his or her resident alien card and Social Security card to complete Section 1, that does not preclude a determination that respondent improperly requested those documents for purposes of completing Section 2 of the pertinent Forms I–9.

After careful consideration of all the evidence, it is hereby determined that complainant has met its burden of proof as to element one (1) by proving by a preponderance of the evidence that respondent did make such requests of its new hires, and did so routinely. Because respondent failed to sufficiently rebut that evidence, complainant is held to have established element one (1) of a pattern or practice cause of action.

Element Two

As to element two (2), complainant's evidence consists of an admission by Encarnacion Garcia, a self-described"[k]ind of a foreman" for respondent, who had apparent authority to speak on respondent's behalf. Garcia stated he told new employees "that they would need two kinds of ID . . . "just present that, and then you just come back over." (T. 38, 39). Obviously, for both an alien with work authorization or a U.S. citizen, a single document from List A would have been sufficient to comply with the Form I–9 Section 2 requirements. Thus, any blanket statement that two (2) forms of identification are necessary constitutes a request for "more or different "documents under 8 U.S.C. §1324b(a)(6).

Additionally, the testimony of former and current employees of respondent for the period 1990 through 1993, as previously detailed, anecdotally establishes that respondent had engaged in a pattern or practice of asking aliens, at the minimum, for their resident alien cards, or "micas," and Social Security cards, and of asking U.S. citizens to supply drivers' licenses and Social Security cards, or, alternately, two (2) forms of identification. *See supra* at 31–32.

Complainant further supported this narrative evidence with the statistical analysis of its Paralegal Specialist Adams, who established that:

> Respondent completed I–9 forms for 184 individuals in 1990; 93 individuals in 1991, [sic] 255 individuals in 1992 and 254 individuals in 1993. In 1990, of 99 aliens who produced documents, 94 (95%) produced documents issued by INS. In 1991, of 39 aliens who produced documents, 37 (95%) produced documents issued by INS. In 1992, of 111 aliens who produced documents, 103 (93%) produced documents issued by INS. In 1993, of 145 aliens who produced documents, 141 (97%) produced documents issued by INS.
>
> Ms. Adams' analysis also shows that in the years 1990–92, before the complaint in this case was filed, a large percentage of alien employees who produced documents produced Social Security cards or documents containing Social Security numbers: 65 of 99 (66%) in 1990; 24 of 39 (62%) in 1991; and 106 of 111 (95%) in 1992. . . .
>
> In 1993, after Respondent was on notice that its I–9 procedures were being reviewed . . . Respondent's I–9's indicate . . . that *no* aliens showed both an INS-issued document and Social Security card.
>
> * * *
>
> Regarding I–9's completed by U.S. citizens, Ms. Adams' analysis shows that from 1990–93, over 90 per cent of those who produced documents produced

> Social Security cards or documents containing Social Security numbers: 97% in 1990; 98% in 1991 and 1992; and 94% in 1993.

Post-Hr'g Br. at 17–19 (citations omitted).

Complainant argues that the element of "more or different documents" has been satisfied because "[b]y requesting specific documents (i.e., a Social Security card and/or INS-issued document), or a total of two documents ('two forms of ID'), Respondent has established a barrier to employment different from what is required by the employment verification provisions." *Id.* at 29. In addition, complainant contends that "[w]hile the employment verification procedures would allow any of the various documents listed at either 8 U.S.C. §1324a(b) or 8 C.F.R. §274a.2 to be presented to establish identity and employment eligibility, Respondent has eliminated these options by requesting specific documents . . . or by requesting a total of two documents." *Id.* at 29–30. Complainant also notes that Imbler and Crockett, when completing Section 1 for non-English speaking employees, routinely requested both a resident alien and Social Security card. *Id.* at 30.

Respondent disagrees with complainant's arguments regarding element two (2), and contends that "well over 1/3 of the I–9's submitted by the Special Counsel reflect documentation of a driver's license and Social Security card. This is not 'more or different' documentation . . . but legitimate and appropriate documenation [sic] in compliance with the verification process." Closing Argument Br. at 30. Respondent further alleged that "[m]ost of the witnesses presented by the Special Counsel testified that they presented no more documents than were minimally necessary for purposes of completion of the form. . . . [and that] even in the instances where there were requests [for specific documents], the requests were not made for *more* documents than were minimally necessary." *Id.* at 30–31. Thus, according to respondent, complainant has not established a "more of different" violation as to those U.S. citizens who had been requested to supply a Social Security card and a driver's license.

As to those aliens who had been asked to produce a resident alien card and Social Security card, respondent argues that "[i]f these particular requests are not excused because they were made to complete Section 1 of the form, or because they were voluntarily proffered by the employees, or because, in the case of the Social Security card[,] to satisfy the W–4, they cannot constitute a violation because the documents are already required by the form." *Id.* at 33.

Respondent also disagrees with OSC's alleged "position that *no* requests for documentation are allowed in the completion of the I–9 process" and argues that "[i]f this were true, there would be no need for the third requirement in the *prima facie* case of document abuse which requires 'more or different documents' because a request alone would be a violation." *Id.* at 35.

The majority of the authorized alien witnesses who testified stated that they had been asked to supply both an INS-issued document and a Social Security card. An INS-issued document "from List A effectively establishes both . . . identity and . . . employment eligibility and no other documents need be furnished." *United States v. A.J. Bart, Inc.*, 3 OCAHO 538, at 16 (1993). Thus, a request by respondent for *both* an INS—issued document and a Social Security card clearly violates §1324b(a)(6).

Most of the United States citizens called as witnesses indicated that they had been asked for two (2) specific types of identification, or for "two forms of ID." Because any employee can chose to supply a document from List A, and thus establish both employment eligibility and identity simultaneously, a request for "two forms of ID"clearly is a request for "more" documentation than required under §1324a(b). *See A.J. Bart, Inc.,* 3 OCAHO 538, at 16 (1993).

However, the majority of complainant's citizen witnesses indicated that they were specifically requested to furnish their Social Security cards and drivers' licenses. Arguably this is not a request for "more or different documents" under §1324b(a)(6) because, if an employee shows a driver's license, a List B document, he or she must also show a document from List C, such as a Social Security card. Thus, one could argue, as respondent has, that while it may have requested specific documents, such a practice does not comprise a request for more or different documents.

Prior OCAHO case law, however, has found differently. The undersigned determined in *United States v. A.J. Bart*, 3 OCAHO 538, at 17 (1993), that a specific request for a "driver's license for the purpose of establishing . . . identity and . . . request[] . . . [for a] Social Security card or birth certificate in order to determine . . . employment eligibility, violated the document abuse provisions set forth in §1324b(a)(6)." Requests for specific documents were also found to be a violation of §1324b(a)(6) in *United States v. Strano Farms*, 5 OCAHO 748, at 17 (1995):

> The choice of documents which a job applicant, without regard to that person's citizenship status, may present to a hiring person or entity in order to establish identify or work eligibility, or both, is exclusively that of the job applicant and not that of the hiring person or entity. At the risk of engaging in an unfair immigration-related employment practice, that of document abuse, the hiring person or entity may not . . . insist . . . that a job applicant provide a specific document in order to establish employment eligibility.

See also United States v. The Beverly Ctr., 5 OCAHO 762, at 4–5 (1995) (noting that "OCAHO case law has consistently held that by insisting on a specific document or documents an employer is in violation of §1324b"); *United States v. Louis Padnos Iron & Metal Co.,* 3 OCAHO 414, at 9 (1992) (holding that a request for an INS-issued document for purposes of re-verifying an employee's Form I–9 work authorization "was in fact a request for more or different documentation than is required by that section of IRCA"). *But see United States v. Zabala Vineyards,* 6 OCAHO 830, at 16 (1995) (concluding that the phrase "more or different" "does not per se prohibit a request for specific documents, at least where those documents are in fact routinely presented in anticipation of such request or on demand") (citation omitted).

Respondent additionally contends that the reference to §1324a(b) in §1324b(a)(6) encompasses both Section 1 and 2 of the Form I–9 requirements:

> Specifically, this statutory reference is to the completion of the *entire* I–9 form, not just Section 2 of the I–9 form. It is beyond dispute that the I–9 form itself mandatorily requires a Social Security number of *all* employees filling out the I–9 form. In addition, if the employee is a legal alien, the form mandatorily requires the employee to insert his/her resident alien number. Thus, Section 1 of the I–9 form *requires* the Social Security number and the resident alien number. In order to constitute a violation of the document abuse provision, then, any such requests for more documents must be a request for more documents than are already required by the form. This means that requests for required documents do not constitute violations of the document abuse provision.

Id. at 32–33. Thus, respondent avers, because Section 1 specifically requires that a newly hired alien furnish his or her Social Security number and resident alien card number, and Section 1 similarly requires that a newly hired citizen supply his or her Social Security card number, that any request for those documents, whether for purposes of Section 1 or 2, cannot be a violation of §1324b(a)(6) under the theory that respondent requested "more or different documents," because those cards are expressly required in Section 1.

Respondent's conclusion, however, misinterprets the requirements of an employing entity under §1324a(b), which delineates an employer's responsibilities under the employment verification system, specifically: (1) an employer must attest on the Form I–9 that it has verified that its employee is not an unauthorized alien by examining (i) a document from List A on the Form I–9, or by examining (ii) both a document listed in List B and C on the form; (2) it must ensure that an employee has properly completed Section 1 of the Form I–9; and (3) it must retain its verification forms for a specified period of time. 8 U.S.C. §1324a(b). Section 1324a(b) does *not* require an employer to examine documents for purposes of Section 1. 8 U.S.C. §1324a(b). Undoubtedly employers are in a delicate position, for fear of violating §1324b(a)(6), they cannot request specific documentation for purposes of complying with the employment verification system of §1324a(b), and yet they expose themselves up to liability under §1324a if they do not ensure that the employee has properly completed Section 1 of the Form I–9. Nonetheless, the requirements of §1324a(b) and §1324b(a)(6) are *not* inconsistent. The requirement that an employer ensure that an employee has properly completed Section 1 does not entail examining any documentation. It merely provides that, if the employee has neglected to complete the form by leaving a portion blank, the employer must inform that employee of his or her oversight, and ensure that he or she corrects it. The employer cannot request that the employee show specific documents for purposes of ensuring that Section 1 and Section 2 are complete.

In light of the foregoing analyses and recognizing that the phrase "more or different" encompasses requests for specific documents, respondent's requests for resident alien cards and Social Security cards cannot be excused merely because those numbers are already required in Section 1 of the Form I–9. Moreover, because a request for two (2) forms of identification clearly is a request for "more or different documents," respondent's specific requests that U.S. citizens present Social Security cards and drivers' licenses or "two kinds of ID," and its requests that aliens present resident alien cards and Social Security cards, both satisfy the second element of a request for "more or different documents," as required by §1324b(a)(6).

Element Three

Element three (3) requires that respondent's request for more or different documents must be made for the purpose of complying with the provision of 8 U.S.C. §1324a(b). 8 U.S.C. §1324b(a)(6).

As to element three (3), complainant states:

> There is no dispute here that requests, when made, for INS-issued documents, were made in the context of the Form I–9 employment verification process. Respondent contends, however, that its request for a Social Security card/document during the I–9 process (i.e., while the individual is filling out the I–9 from [sic]) is somehow justified because employees are required to show their Social Security cards for tax purposes. Even if this were true, Respondent is not justified in requesting to see an individual's Social Security card or document containing its number for completion of *the I–9 form*."

Post-Hr'g Br. at 27–28 (citation omitted).

Complainant also presented the testimony of OSC's Gladys Chavez, who interviewed Crockett on January 8, 1993, in the presence of respondent's counsel of record, Mr. William Morrow. Chavez stated that during the interview she asked Crockett why she had asked to see a new hire's Social Security card. In response, Crockett indicated that she did so because otherwise "the company will be in trouble with the Federal Government or with taxes." Chavez testified that respondent's counsel interjected at that point that the Social Security number was required on the Form I–9, and then Chavez reported that Crockett had stated "Yes, the information required in the I–9 form is that she requires the Social Security card or the document showing the Social Security number." (T. 173, 174). When asked if Crockett could have been referring to a request for purposes of the Form W–4, Chavez replied in the negative and stated that she and Crockett "were specifically covering that point [the I–9 process]" at the time Crockett made the statement, and not the Form W–4 (T. 178).

In her direct testimony, Crockett also stated that she would tell non-English speaking individuals that she needed their Social Security number for payroll purposes, as well as for completing Section 1 of the Form I–9 because "all blanks have to be filled in." (T. 370). Crockett's prior statement that "I always knew that if they had an alien card from list A, they must show that [for purposes of the Form I–9]" was also part of the hearing record (T. 396).

In response, respondent argues that, even if requests for more or different documents are determined to have occurred, such requests were not for the purpose of complying with §1324a(b), but rather that Social Security cards had been requested for purposes of complying with the Internal Revenue Service's withholding requirements, as manifest in its Form W–4. Closing Argument Br. at 29–30.

Respondent argues that such a request is expressly excepted from the document abuse provision, and that, regardless, it is unclear whether Imbler and Crockett were requesting the Social Security card or number for purposes of the Form I–9 or the W–4, since both were completed simultaneously. *Id.* at 29–30. "Thus, it appears especially clear that the Special Counsel has failed to prove that any requests were made entirely for the purposes of the I–9 form." *Id.* at 30.

Respondent also maintains that in those "instances where aliens presented a resident alien card and a Social Security card, the employees did so because Section 1 of the [I–9] form requires both the resident alien number and the Social Security number, and because the W–4 form requires the Social Security card and number." *Id.* at 32.

The overwhelming weight of the credible evidence dictates that the undersigned conclude that respondent's requests for documents were made for purposes of complying with §1324a(b). No other conclusion can reasonably be made based upon the preceding analysis. Further, respondent's contention that such requests are excepted from 8 U.S.C. §1324b(a)(6) is incorrect. Section 44.200(b)(iii)(A) does provide an exception to unfair immigration-related employment practices for "*[d]iscrimination because of citizenship* which (A) [i]s otherwise required in order to comply with law, regulation, or Executive Order . . . " 28 C.F.R. §44.200(b)(iii)(A) (emphasis added). However, it must be noted that this sub-section has three categories of exceptions, one which refers to all unfair immigration-related employment practices, 28 C.F.R. 44.200(b)(i), one which refers specifically to discrimination based on an individual's national origin, 28 C.F.R. §44.200(b)(ii), and the above-quoted provision, which applies only to citizenship status discrimination claims. Thus, this exception, by its express wording, does not apply to document abuse claims because they are not claims based upon "discrimination because of citizenship." 28 C.F.R. §44.200(b)(iii), rendering respondent's argument inapplicable.

Assessment of an Appropriate Penalty

Section 1324b Penalties in General

The statutory sub—section addressing penalties for violations of §1324b(a)(6) provides that an ALJ may impose "a civil penalty of not less than $100 and not more than $1,000 for each individual dis-

criminated against." While neither the term "discrimination" nor the phrase "discriminated against" are expressly defined within the statute, in a case prior to IMMACT's enactment, Judge Schneider recognized that:

> a potentially helpful definition of discrimination can be found in a number of Conventions and Recommendations adopted by the International Labour [sic] Organization. Specifically, . . . [as to] discrimination in employment and occupation, . . . [that concept is defined] as:
>
> > any distinction, exclusion o[r] preference (based on one of the grounds which these instruments enumerate) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
>
> It is interesting to note that the [above] definition . . . covers both situations in which equality of opportunity is "nullified" and those—more difficult to identify—where it is only "impaired."

United States v. LASA Mktg. Firms, 1 OCAHO 106, 698 n.4 (1989) (citations omitted).

Respondent correctly maintains that the imposition of a penalty is not mandated under §1324b(g) in that the sub-section addressing penalties specifically provides that the ALJ's order *may* require the person or entity found to be in violation of §1324b to pay a civil penalty. 8 U.S.C. §1324b(g)(2)(B). This language directly contrasts with the penalty provisions of §§1324a and 1324c, both of which dictate that the ALJ *shall* impose a penalty for violations under those sections of IRCA. 8 U.S.C. §§1324a(e)(4), (5); 1324c(d)(3). Thus, the imposition of a penalty in these types of cases is within the discretion of the presiding ALJ.

Respondent urges that a penalty in the instant proceeding is not warranted because no individuals were "discriminated against," as required by the wording of 8 U.S.C. §1324b(g)(2)(B)(iv)(IV). Respondent points out that the OSC brought its complaint without naming an individual victim. Closing Argument Br. at 40. It also urges that even in the event that there had been a showing of a pattern or practice of requesting specific documents from new hires, all those individuals had been hired, and thus none fit the description of having been "discriminated against." *Id.* Respondent adds that the majority of its workers are Hispanic, and that "[r]ather than discriminate against its workers, Robison Fruit Ranch has assisted its aliens through the amnesty program and in other ways." *Id.* at 41.

In advancing that argumentation, respondent does not recognize the possibility that the phrase "discriminated against" might encompass other instances in which the individual was ultimately hired, but nonetheless experienced discrimination during the hiring process. Judge Schneider has previously observed that "[a]ccording to the GAO Report the discrimination [resulting from the passage of IRCA] existed because employers were being overly cautious. They were demanding more or specific documents, or were refusing to honor documents." *United States v. Guardsmark, Inc.,* 3 OCAHO 572, at 13 (citing U.S. General Accounting Office, Report to the Congress, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, at 3 GAO/GGD–90–62 (March 1990)).

Prior OCAHO cases addressing a pattern or practice of document abuse under §1324b(a)(6) have not expressly required that an individual be fired or not hired in order to establish a showing of discrimination for purposes of assessing a penalty. While, as respondent duly observed in its post-hearing brief, earlier cases addressing §1324b(a)(6) may very well have commonly involved a charging party who had been refused employment, or who had been subsequently improperly discharged, that factual similarity does not inevitably lead to the conclusion that a violation cannot lie absent employment have been refused or an employee having been discharged. To reach such a conclusion ignores the reality that there are varying levels of discriminatory conduct. Failure to hire or wrongful discharge based on a pattern or practice of document abuse is no doubt a more egregious type of discrimination than an employer's insistence on additional or different documentation from a potential employee, who then complies with that employer's request and is subsequently hired. The identification of the former as discrimination, however, does not exclude a similar finding that the pattern or practice of requesting more, different, or specific documentation is also discriminatory.

In accordance with the facts in *United States v. A.J. Bart, Inc.*, 3 OCAHO 538, at 18 (1993), it has been shown that respondent's workforce typically consists of a substantial percentage of non-citizens, and may well "constitute [one of] the very few remaining sources of entry level and near entry level positions that are being provided to [job] applicants."

Concerning the 600 violations of §1324b(a)(6) at issue, complainant is cognizant of the fact that all civil money penalty sums

assessed diminish an employer's net profits and, in recognition of that fact, and given "[t]he large number of I–9's . . . the imposition of the maximum civil penalty for each violation could lead to an inappropriate civil penalty given the circumstances," has requested only the minimum penalty of $100 for each violation, or a total civil money penalty of $60,000. Post-Hr'g Br. at 34. The undersigned agrees that the appropriate civil money penalty sum for each of those 600 document abuse violations is $100, or a total of $60,000 for these infractions.

Determination of the Appropriate Time Frame for Penalties

Respondent contends that, if found liable, it should only be penalized for those individuals discriminated against within the 180-day time frame prior to the Complaint being filed, or from September 9, 1992 until March 9, 1993. Closing Argument Br. at 68.

IRCA's statutory limitation of 180 days, however, does not apply to restrict the imposition of penalties to conduct occurring beyond that period in which a continuing pattern or practice violation occurs. Prior OCAHO case law has specifically recognized the theory of a "continuing violation" of IRCA's §1324b, which has enabled complainant to offer proof that respondent had engaged in uninterrupted conduct over a period of time, provided at least one (1) violation had occurred within the 180-day statutory limitation period. *See Walker v. United Air Lines, Inc.,* 4 OCAHO 686, at 25 (1994) (discussing in detail the continuing violation doctrine, and that "[t]o establish a continuing violation, a complainant 'must allege that a discriminatory act occurred or that a discriminatory policy existed within the period prescribed by the statute" (citing *Johnson v. General Elec.,* 840 F.2d 132, 137 (1st Cir. 1988)); *United States v. Weld County Sch. Dist.,* 2 OCAHO 326, at 18 (1991) (stating that "[i]f a showing of a discriminatory policy is made, the statute may be tolled to include all violations committed during the time period in which the discriminatory policy was in effect").

The Ninth Circuit also recognizes the continuing violation theory. A continuing violation includes "a systematic policy of discrimination [which] is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982). Further, a "challenge to the systematic discrimination is always timely if brought by a present employee, for the existence of the system deters

the employee from seeking his full employment rights or threatens to adversely affect him in the future." *Id.* (having made this pronouncement, the Court goes on to note that the "situation may be different, however, with regard to complainants who have ceased to be employees", requiring that such people show an impact which has occurred within the limitations period; such a requirement is arguably not applicable to IRCA cases where the judgment sought is not solely for the purposes of remedying the harm to employees, but rather serves the dual purpose of deterring future violations through a civil money penalty). Under the continuing violation theory, time-barred conduct, which would ordinarily be beyond the reach of a penalty assessment, could be found to be a violation of IRCA.

Implicit within recognition of the premise that a continuing violation proves liability, is the consequence that respondent, having been found liable for such an ongoing violation of IRCA, could be assessed a penalty not only for conduct occurring within the 180-day period, but also for conduct occurring beyond that statutory time frame. As such, respon dent's contention that it should only be liable for those violations which occurred within 180 days of the filing of the Complaint is unconvincing.

Such a holding is further supported by the wording in a recent ruling of my colleague, Judge Morse:

> I find unavailing Respondent's argument that its potential liability should be limited to violations occurring only during the 180-day period preceding the filing of the Complaint. OCAHO caselaw makes clear that §1324b(a)(6) pattern or practice cases involve continuing violations, overcoming the §1324b(d)(3) requirement that the cause of action be limited to conduct within 180-days prior to filing an OSC charge.

United States v. Zabala Vineyards, 6 OCAHO 830, at 4 n.3 (1995) (citations omitted).

Respondent's liability thus will not be limited to those violations occurring within the 180-day time period. Further, because of the nature of a continuing violation, and the fact that respondent's conduct continued even after it had received notice in OSC's March 9, 1993 Complaint that its actions could potentially subject it to a penalty, the undersigned adopts OSC's contention that respondent should be fined for all instances of document abuse from November 30, 1990 until December 31, 1993. Complainant states that "there were 602 potential victims of document abuse during this time period: 93 individuals in 1991; 255 individuals in 1992; and 254 indi-

viduals in 1993." Post-Hr'g Br. at 42 (Complainant's Exh. 42). Complainant then deleted the violations involving those two (2) individuals who testified that they had volunteered their documents, and thus had not been requested to produce them. *Id.*

Accordingly, the appropriate penalty to be assessed is $60,000, or $100 for each of the 600 violations occurring during that time period, as evidenced by the Forms I–9 contained in Complainant's Exhibits 37, 38, and 39, and the summary of Forms I–9 produced by respondent in Complainant's Exhibit 42.

Order

Having found that respondent violated the document abuse provisions of 8 U.S.C. §1324b(a)(6) in the manner alleged in the Complaint, it is hereby ordered that respondent pay the United States the sum of $60,000, or $100 for each of those 600 violations.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.