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

September 25, 1996

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No.94A00154
AID MAINTENANCE COMPANY,	)	
INC., A/K/A AID JANITOR	)	
SERVICE, AID WINDOW	)	
CLEANING, AID FLOOR	)	
CLEANING, AID CLEANING	)	
SERVICE,	)	
Respondent.	)	
_____	)	

**ORDER GRANTING IN PART AND DENYING IN PART  
COMPLAINANT'S MOTION FOR PARTIAL SUMMARY  
DECISION**

*I. Background*

On August 17, 1993, the United States Department of Justice, Immigration and Naturalization Service (complainant or INS), issued and served upon Aid Maintenance Company, Inc. (respondent) a Notice of Intent to Fine (NIF) PRO-92-034. That citation contained seven (7) counts alleging 139 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, for which civil money penalties totaling \$67,250 were assessed.

In Count I, complainant alleged that the respondent knowingly hired and/or knowingly hired through a labor contract and/or continued to employ the fifteen (15) individuals named therein for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for

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employment in the United States, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(A). Civil money penalties of \$1,010 were levied for each of those 15 alleged violations, for a total of \$15,150.

In Count II, complainant alleged that the respondent employed the 10 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to make available for inspection and/or failed to prepare the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$420 were levied for each of six (6) of those alleged violations and \$580 for each of the remaining four (4) violations, for a total of \$4,840.

In Count III, complainant alleged that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the 36 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$410 were levied for each of 34 of those alleged violations and \$520 for each of the remaining two (2) violations, for a total of \$14,980.

In Count IV, complainant alleged that respondent failed to properly complete section 2 of the Forms I-9 for each of the 21 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$400 were levied for each of those 21 alleged violations, for a total of \$8,400.

In Count V, complainant alleged that respondent failed to ensure proper completion of sections 1 and 2 of the Forms I-9 for the 52 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$410 were levied for each of 49 of those alleged violations and \$570 for each of the remaining three (3) violations, for a total of \$21,800.

In Count VI, complainant alleged that respondent employed the three (3) individuals named therein for employment in the United States after November 6, 1986, and that respondent accepted documents from those individuals which did not reasonably appear to be genuine and/or relate to those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$420 were levied for each of those three (3) alleged violations, for a total of \$1,260.

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In Count VII, complainant alleged that respondent failed to complete new Forms I-9 and/or failed to update the Forms I-9 for each of the two (2) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of \$410 were levied for each of those two (2) alleged violations, for a total of \$820.

The wording of the NIF clearly advised the respondent of its right to file a written request for a hearing before an administrative law judge assigned to this Office provided that such written request be filed within 30 days of its receipt of the NIF. On September 2, 1994, John D. Biafore, Esquire, respondent's counsel of record, timely filed a written request for hearing.

On August 18, 1994, complainant filed the seven (7) count Complaint at issue, reasserting the allegations set forth in Counts I through VII of the NIF and reiterated its request that civil money penalties totaling \$67,250 be levied for those 139 alleged violations.

On April 19, 1994, copies of the Complaint and Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested.

On September 15, 1994, respondent filed a timely answer to the Complaint. In that responsive pleading, the respondent admitted having hired for employment in the United States after November 6, 1986, those individuals identified in Counts I thru VII; denied having violated IRCA in the manners alleged; and asserted four (4) affirmative defenses.

On October 20, 1994, the complainant's Motion to Strike those four (4) affirmative defenses was granted.

On January 12, 1995, the complainant's Motion to Amend Complaint, in which it requested that four (4) names be stricken from the Complaint, was granted,<sup>1</sup> resulting in 135 alleged violations remaining at issue.

<sup>1</sup> Specifically, the following names were stricken from the Complaint: in Count II, Louis Castano and Jozef Czerwonk; in Count III Guillermo Ochoa; and in Count V, Francisco Chacon.

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On March 27, 1995, complainant filed a pleading captioned Motion to Compel Answers to Interrogatories and Response to Request for Production.

On July 3, 1996, complainant filed a pleading captioned Motion for Summary Decision, seeking summary decision on Counts II, III, IV, V, VI, and VII of the Complaint, as amended, pursuant to 28 C.F.R. §68.38. That motion was accompanied by a memorandum of law, the declaration of Mark J. Furtado, and documentary data, marked as Exhibits A through S.

On August 5, 1996, respondent filed a pleading captioned Memorandum in Opposition of Motion for Summary Decision.

## II. *Standards of Decision*

The rules of practice and procedure for administrative hearings before administrative law judges in section 274A cases provide for the entry of a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, show that there is no genuine issue as to any material fact and that the movant is entitled to summary decision as a matter of law. 28 C.F.R. §68.38(c).

Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this office. *Mackentire v. Ricoh Corp.*, 5 OCAHO 756, at 3 (1995); *Alvarez v. Interstate Highway Construction*, 3 OCAHO 430, at 17 (1992).

As to materiality, only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. V. Zenith Radio*, 475 U.S. 574 (1986); *U.S. v. Lamont St. Grill*, 3 OCAHO 442, at 9 (1990).

One of the principal purposes of the summary decision rule is that of isolating and disposing of factually unsupported claims or de-

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fenses, and to avoid unnecessary trials. However, a party seeking summary decision always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the movant has carried its burden, the party opposing must “go beyond the pleadings and by [introduction of] affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 322; Fed. R. Civ. P. 56(c). This evidence need not be in a form that would be admissible at trial.

#### A. *Count II*

In Count II, as amended, complainant alleged that the respondent employed the eight (8) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to make available for inspection and/or failed to prepare the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B).

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available in the course of INS inspections. A failure to prepare, retain, or produce Forms I-9 for inspection, in accordance with the employment verification system, 8 U.S.C. §1324a(b), is therefore a clear violation of IRCA.

The pertinent implementing regulation provides that “[a]ny person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection by (the INS) . . . [and] [a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in [IRCA, 8 U.S.C. §1324a(b)(3)].” 8 C.F.R. §274a.2(b)(2)(ii).

In order to prove the violations alleged in Count II, complainant must demonstrate that i) respondent hired for employment in the United States; ii) the individuals named in Count II; iii) after November 6, 1986; and iv) respondent failed to prepare and/or make available for inspection the Forms I-9 for those individuals.

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The declaration of Mark J. Furtado, sworn to under oath on June 21, 1996, relates that he is employed by the United States Department of Justice, Immigration and Naturalization Service, as a special agent in Providence, Rhode Island. On September 24, 1992, he notified the respondent in writing that he would conduct an inspection of its Forms I-9 beginning on September 30, 1992. On that date, and continuing on the following day, October 1, 1992, Agent Furtado inspected a total of 1,763 Forms I-9, and prepared two handwritten lists containing the names of each and every individual for whom a Form I-9 was presented. Those lists have been submitted by complainant as Exhibits D and E.

In response to a subpoena served upon the Rhode Island Department of Employment and Training, Agent Furtado received the respondent's wage records covering the period from the fourth quarter 1989 through the third quarter 1992, Exhibit J. Those records, properly authenticated in the Furtado declaration, have demonstrated that the eight (8) individuals named in Count II were hired by the respondent for employment in the United States after November 6, 1986. That evidence thus satisfies the first three (3) elements of the charge.

Complainant has also alleged that the eight (8) individuals listed in Count II do not appear on the handwritten lists prepared by Agent Furtado. Respondent has not contested that allegation, and in having failed to do so, has confirmed that it failed to prepare and/or present for inspection Forms I-9 for those eight (8) individuals. Complainant has thus carried its burden of proof as to the remaining element of Count II.

Complainant thus has shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the individuals named in Count II of the Complaint, and the burden of production is accordingly shifted to the respondent to come forward with a showing that there is a genuine issue of material fact. The party opposing summary decision may not rest upon the mere allegations or denials of such pleading, but must set forth specific facts showing that there is a genuine issue of fact necessitating an evidentiary hearing. 28 C.F.R. §68.38(b).

In its answer, respondent has admitted the first three (3) elements of complainant's *prima facie* case: that it hired the eight (8) individu-

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als named in Count II for employment in the United States, and did so after November 6, 1986.

Respondent has argued that a genuine issue of material fact remains concerning the last element of complainant's burden of proof. In support of that argumentation, respondent has offered its sworn answers to complainant's first set of interrogatories. In response to complainant's interrogatory number 9(a), "state each and every fact that supports your denial" that respondent failed to prepare and/or produce Forms I-9 for the eight (8) individuals named in that count, respondent answered as follows:

1. Wilson Castaneda — provided I-9 form in 1991 audit and was not returned to company.
2. Gabriel Catalan — have I-9 form.
3. Jesus Chavez — provided I-9 form in 1991 audit and was not returned to company. Informed on April 23, 1992 about invalidity and was terminated.
4. Rudy Deleon-Perez — I have no knowledge or record of this person.
5. Victor Gonzalez — have I-9 form.
6. Juan Lopez — have I-9 form.
7. Benjamin Magana — have I-9 form.
8. Vitalino Sicajo — have I-9 form.

This response fails to raise a genuine issue of material fact and, if anything, confirms the allegations contained in Count II of the Complaint.

First, with respect to Wilson Castaneda and Jesus Chavez, allegations that their Forms I-9 were produced in 1991 is neither a defense to the charge nor sufficient to raise a genuine issue of material fact. Rather, this response is an admission that the Forms I-9 pertaining to those two (2) individuals had not been produced on the dates of inspection, as alleged. Moreover, the statement that Jesus Chavez was terminated on April 23, 1992 is unexceptional. An employer is obligated to retain an employee's Form I-9 for a period of three (3) years after the date of the hire or (1) year after the date the individual's employment is terminated, whichever is later. 8 U.S.C. §1324a(b)(3)(B)(ii); 8 C.F.R. §274a.2(b)(viii)(2).

Second, respondent's allegation that it has no knowledge of Rudy Deleon-Perez is directly contradicted by the Rhode Island wage

records, Complainant's Exhibit J. The name Rudy Deleon-Perez appears on those wage records, demonstrating that Deleon-Perez had been employed by and received wages from the respondent in 1991 and 1992. This allegation is also an admission that respondent failed to produce a Form I-9 for that individual.

Third, with respect to the remaining five (5) individuals, allegations that respondent has in its possession Forms I-9 for those persons, even if true, is also insufficient to raise a genuine issue of material fact. Belated compliance with the requirements of §1324a is not a defense to past violations of that section.

Moreover, in none of respondent's pleadings has it expressly alleged that it had produced the Forms I-9 for inspection for these eight (8) individuals or offered affidavits, evidence, or otherwise, to show that it did so, but instead has suggested that Agent Furtado may have overlooked the Forms I-9 pertaining to these individuals during his inspection of the 1,763 Forms I-9 on September 30 and October 1, 1992, and that he should be granted an opportunity to cross-examine Agent Furtado to develop facts to prove that theory. The purpose of summary decision is to avoid an unnecessary trial where there is no genuine issue as to any material fact. *U.S. v. Villages-Valenzuela*, 5 OCAHO 784, at 9 (1995). To defeat a summary decision motion, respondent may not rest upon mere denials nor on an allegation that an evidentiary hearing or opportunity for cross-examination will result in a dispute of material fact. *Id.*

Finally, respondent has alleged for the first time substantial compliance with the requirements of IRCA. Several OCAHO decisions have held that substantial compliance may be asserted as an affirmative defense to allegations of paperwork violations. *See, e.g., U.S. v. Tri Component Corp.*, 5 OCAHO 821, at 5 (1995); *United States v. Northern Michigan Fruit Company*, 4 OCAHO 667 (1994), and the myriad of cases cited therein. However, there are no reported cases addressing whether a substantial compliance defense may be posed against a charge of failure to prepare and/or present Forms I-9 for inspection and what standards would apply to make such a determination. Because that defense has been waived by respondent, that issue need not be reached.

An allegation of substantial compliance is an affirmative defense which must be asserted in the answer, as required by the pertinent procedural rule, 28 C.F.R. §68.9(c)(2). Failure to do so constitutes a



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waiver of that defense. Here, respondent did not raise that defense in its answer nor has it moved to amend its answer when it had ample time and opportunity to do so. Moreover, in the instant motion, respondent has provided no legal or factual arguments to support a substantial compliance defense or that would persuade the undersigned that such a defense should be made available in cases where failure to prepare and/or present Forms I-9 charges are alleged. Accordingly, consideration shall not be given to respondent's statement that it has substantially complied with IRCA.

Hence, complainant, having shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the individuals named in Count II of the Complaint, and the respondent having failed to demonstrate that there are any triable issues, is hereby granted summary decision as to the allegations contained in Count II.

### B. Count III

In Count III, as amended, complainant alleged that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the 35 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B).

In order to prove the violations alleged in Count III, complainant must demonstrate that i) respondent hired for employment in the United States; ii) the individuals named in Count III; iii) after November 6, 1986; and iv) respondent failed to ensure that those individuals properly completed Section 1 of their Forms I-9.

Respondent's answer, as well as the wage records supplied in response to complainant's subpoena, and the handwritten lists prepared by Agent Furtado, all indicate that the respondent hired the 35 individuals listed in Count III for employment in the United States, and did so after November 6, 1986.

Examination of section 1 of the Forms I-9, submitted by complainant as Exhibit O, discloses the following deficiencies:

- |                      |   |
|----------------------|---|
| 1. Reimed Alzate     | No box is checked to indicate the employment status of the individual. It is also undated.              |
| 2. Eugeniusz Adamiec | Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number. |

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3. Ana B. Yanez No box is checked to indicate the employment status of the individual.
4. Maria C. Blanco No box is checked to indicate the employment status of the individual.
5. Efrain M. Carias No box is checked to indicate the employment status of the individual.
6. Romaldo Carrizalez Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number.
7. Maria P. Castano Section 1 identifies the employee as a lawful permanent resident but does not reflect an Alien Registration number.
8. Marco Castro No box is checked to indicate the employment status of the individual.
9. Silvestre Catalan No box is checked to indicate the employment status of the individual. It is also undated.
10. Domingo Coronado Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number.
11. Efrain Domenech No box is checked to indicate the employment status of the individual. It is also undated.
12. Martha Escobar No box is checked to indicate the employment status of the individual.
13. Tomas Feregrino No box is checked to indicate the employment status of the individual. It is also unsigned and undated.
14. Carlos F. Galindo Section 1 identifies the employee as a lawful permanent resident but does not reflect an Alien Registration number.
15. Fernando V. Guerrero No box is checked to indicate the employment status of the individual. It is also undated.
16. Heriberto Guerrero Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number.
17. Luis F. Lorenzana Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number.
18. Victor Matias Section 1 identifies the employee as a lawful permanent resident but does not reflect an Alien Registration number.
19. Oscar Mazo No box is checked to indicate the employment status of the individual.

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- |                            |   |
|----------------------------|---|
| 20. Napoleon Menywant      | No box is checked to indicate the employment status of the individual.  |
| 21. Jorge A. Nunez         | No box is checked to indicate the employment status of the individual.  |
| 22. Carmelina Ocampo       | No box is checked to indicate the employment status of the individual. It is also undated.                                  |
| 23. Luis Orellana          | No box is checked to indicate the employment status of the individual. It is also unsigned and undated.                     |
| 24. Arnovia Perez          | No box is checked to indicate the employment status of the individual. It is also unsigned and undated.                     |
| 25. Luis F. Puerta         | No box is checked to indicate the employment status of the individual.  |
| 26. Gloria Romero          | No box is checked to indicate the employment status of the individual. It is also undated.                                  |
| 27. Luz E. Zapata          | No box is checked to indicate the employment status of the individual.  |
| 28. Jozef Sobanski         | No box is checked to indicate the employment status of the individual.  |
| 29. Fabian Tavares         | Section 1 identifies the employee as work authorized but does not reflect an Alien Registration number. It is also undated. |
| 30. Arturo Torres          | No box is checked to indicate the employment status of the individual. It is also unsigned and undated.                     |
| 31. Samuel Torres          | No box is checked to indicate the employment status of the individual.  |
| 32. Felix Vasquez-Martinez | No box is checked to indicate the employment status of the individual.  |
| 33. Geraldo R. Vasquez     | No box is checked to indicate the employment status of the individual. It is also unsigned.                                 |
| 34. Juan Badillo           | No box is checked to indicate the employment status of the individual.  |
| 35. Mario Sasbin           | No box is checked to indicate the employment status of the individual.  |

It is the obligation of an employer to ensure that the employee properly completes section 1 of the Form I-9 at the time of hire. 8 C.F.R. §274a.2(b)(1)(i)(A). Accordingly, each of the specific deficiencies noted in the foregoing Forms I-9 is a violation, and thus the complainant has shown a *prima facie* case of a §1324a(a)(1)(B) viola-

tion for each of the individuals named in Count III of the Complaint. The burden of production is thus shifted to respondent to come forward with a showing that there is a genuine issue of material fact.

Respondent has admitted that section 1 of the Forms I-9 for the 35 individuals listed in Count III were not properly completed. See Respondent's Memorandum in Opposition to Summary Decision, dated August 2, 1996, at 5. Nonetheless, respondent argues that there are mitigating facts precluding summary decision in complainant's favor.

First, respondent claims that all of the individuals produced supporting documentation. Those facts, even if true, are not material. Second, respondent alleges that each of the individuals were lawfully authorized to work in the United States. Those facts, even if true, are also not material. Third, respondent argues that the INS determined that these omissions were cured. That because the individuals named in Count III allegedly produced supporting documentation. That allegation is unsupported by affidavits, evidence, or any other relevant evidence, and appears to be an attempt to resurrect an estoppel defense that had been stricken by order dated October 20, 1994.

Fourth, respondent asserts without elaboration that it has substantially complied with IRCA. As noted earlier, an allegation of substantial compliance is an affirmative defense that must be plead in the answer, as required by the pertinent procedural rule, 28 C.F.R. §68.9(c)(2). Failure to do so constitutes a waiver of that defense. Here, respondent did not raise that defense in its answer nor has it moved to amend its answer when it had ample time and opportunity to do so. Moreover, under these facts, such a defense would not prevail. See, e.g., *U.S. v. Northern Michigan Fruit Co.*, 4 OCAHO 667, at 16-17 (1994); *U.S. v. San Ysidro Ranch*, 1 OCAHO 183 (1990) (rejecting employer's arguments that although the Forms I-9 were not fully completed, they were sufficient to comply with IRCA, and that by attaching photocopies of work-authorization documents, it substantially complied with the paperwork requirements).

If liability is found in this case, respondent will be provided an opportunity to submit any evidence as to mitigation, including, among others, evidence of substantial compliance (by showing the employer acted in "good faith" by trying to comply with the paperwork requirements), the size of business, the seriousness of the violations, and

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whether the individuals named in the Complaint were eligible for employment in the United States.

Hence, complainant, having shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the 35 individuals named in Count III of the Complaint, and the respondent having failed to demonstrate that there are any triable issues, is hereby granted summary decision as to the allegations contained in Count III.

#### C. Count IV

In Count IV, complainant alleged that respondent failed to properly complete section 2 of the Forms I-9 for each of the 21 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B).

In order to prove the violations alleged in Count IV, complainant must demonstrate that i) respondent hired for employment in the United States; ii) the individuals named in Count IV; iii) after November 6, 1986; and iv) respondent failed to properly complete section 2 of the their Forms I-9.

Respondent's answer, as well as the wage records supplied in response to complainant's subpoena, and the handwritten lists prepared by Agent Furtado, all indicate that the respondent hired the 21 individuals listed in Count IV for employment in the United States, and did so after November 6, 1986.

Examination of section 2 of the Forms I-9, submitted by complainant as Exhibit P, discloses the following deficiencies:

- |                      |   |
|----------------------|---|
| 1. Soledad Alvisares | Section 2 is unsigned and undated, and does not identify any documents as having been examined to verify identity and employment eligibility.     |
| 2. Cesar Aristizabal | Section 2 is unsigned and undated.  |
| 3. Alberto Benitez   | No documents are identified as having been examined to verify identity and employment eligibility. Section 2 is signed and dated by the employee. |
| 4. Henryk Bogus      | In section 2, a document that is identified as having been examined to verify identity and  |

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- employment eligibility does not indicate an expiration date.
5. Tibursio Cante Section 2 is undated and shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete. The date the employee started work is not given.
6. Victor Cante Section 2 is undated. No documents are identified as having been examined to verify identity and employment eligibility, and the date the employee started work is not given.
7. Charles Corriedu Section 2 is undated and shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete.
8. Victor Raul Duque Section 2 is unsigned and undated.
9. Leonardo Estrada Section 2 is unsigned and undated.
10. Mario Garcia No documents are identified as having been examined to verify identity and employment eligibility, and the date the employee started work is not given.
11. Otilio J. Gatica Section 2 shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete. Section 2 is signed and dated by the employee.
12. Ronald Hardy Section 2 is undated and signed by the employee.
13. Lucas Mario Magana Section 2 shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete.
14. Guillermo Mazariego No documents are identified as having been examined to verify identity and employment eligibility.
15. Victor Monteiro Section 2 is undated and shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete.
16. Juan J. Monterrosa Section 2 is unsigned and undated. No documents are identified as having been examined to verify identity and employment eligibility.
17. Luis A. Posada Section 2 is unsigned, undated, and shows that the examination of documents to verify the

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- |                              |   |
|------------------------------|---|
|                              | employee's identity and/or employment eligibility as having been incomplete.  |
| 18. Maria Restrepo           | Section 2 is undated and shows that the examination of documents to verify the employee's identity and/or employment eligibility as having been incomplete. |
| 19. Jetzabel Xiomara Ruano   | Section 2 is unsigned and undated.  |
| 20. Margaret Lillian Solonga | Section 2 is unsigned and undated.  |
| 21. Maria Szumilas           | Section 2 is unsigned and undated.  |

It is the obligation of an employer to properly complete section 2 of the Form I-9. 8 C.F.R. §274a.2(b)(1)(ii)(B). Accordingly, each of the specific deficiencies noted in the foregoing Forms I-9 is a violation, and thus the complainant has shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the individuals named in Count IV of the Complaint. The burden of production is thus shifted to respondent to come forward with a showing that there is a genuine issue of material fact.

Respondent has not denied that section 2 of the Forms I-9 for the 21 individuals listed in Count IV were not properly completed. *See* Respondent's Memorandum in Opposition to Summary Decision, dated August 2, 1996, at 5-6. Instead, respondent has argued that those employees identified in Count IV had been legal aliens and had tendered sufficient documents to verify identity and employment eligibility. These facts are relevant only to the issue of mitigation of the civil penalty and do not raise a genuine issue of material fact.

Hence, complainant, having shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the 21 individuals named in Count IV of the Complaint, and the respondent having failed to demonstrate that there are any triable issues, is hereby granted summary decision as to the allegations contained in Count IV.

#### D. Count V

In Count V, as amended, complainant alleged that respondent failed to ensure proper completion of sections 1 and 2 of the Forms I-9 for the 51 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B).

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In order to prove the violations alleged in Count V, complainant must demonstrate that i) respondent hired for employment in the United States; ii) the individuals named in Count V; iii) after November 6, 1986; and iv) respondent failed to ensure that those individuals properly completed Section 1 and/or respondent failed to properly complete section 2 of their Forms I-9.

Respondent's answer, as well as the wage records supplied in response to complainant's subpoena, and the handwritten lists prepared by Agent Furtado, all indicate that the respondent hired the 51 individuals listed in Count V for employment in the United States, and did so after November 6, 1986.

Examination of sections 1 and 2 of the Forms I-9, submitted by complainant as Exhibit Q, discloses the following deficiencies:

- |                     |   |
|---------------------|---|
| 1. Huber Alvarez    | Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is undated.   |
| 2. Cecilia Araujo   | Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is undated and no documents are identified as having been examined to verify identity and employment eligibility.   |
| 3. Luis A. Arroyo   | In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated, and a document that is identified as having been examined to verify identity does not indicate an expiration date.   |
| 4. Paula Avila      | In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.  |
| 5. Aurelio Benitez  | Section 1 is unsigned. In section 2, document identification numbers are not provided for documents that are identified as having been examined to verify identity and employment eligibility.  |
| 6. Pablo Benitez    | Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 indicates a failure to properly record the title and expiration date of a document that had been examined to verify identity and employment eligibility, and the date the employee started work is not given. |
| 7. Maria Barrientos | In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.  |



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8. Carmen Vega Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is undated and the date the employee started work is not given.
9. Luis Chacon In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and the expiration date of a document that had been examined to establish identity is not recorded.
10. Roberto Chavez In section 1, the employee has failed to record an alien registration number and an expiration date for employment authorization. Section 2 is undated, indicates a failure to properly record the expiration dates of documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.
11. Ferney Clavijo In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.
12. Rudy L. Contreras In section 1, the employee has failed to provide an alien registration number. Section 2 is undated indicates a failure to properly record the expiration dates of the documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.
13. Jairo Correa In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to properly record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
14. Jaime Delacruz Section 1 is unsigned. Section 2 is unsigned and undated and indicates a failure to properly record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
15. Nelly Delgado In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.
16. Jose Luis Diaz Section 1 is unsigned and undated. Section 2 is undated.
17. Fabian Fernandez Section 1 is unsigned and undated, and no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the docu-

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- ments that had been examined to verify identity and employment eligibility.
18. Denise Florez In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
19. Alfredo Franco In section 1, no box is checked to indicate the employment status of the individual. Section 2 indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
20. Ignacio Fuentes In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
21. Juan Garcia Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.
22. Edgar Gomez In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.
23. Emanuel Vieira Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
24. Jaime Jaramillo Section 1 is undated. Section 2 is unsigned and undated.
25. Hugo Llontop In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
26. Maria Lopera Section 1 is undated. Section 2 is unsigned, undated, and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.

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27. Cesar Montero In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.
28. Maria Morales Section 1 is unsigned, undated, and no box is checked to indicate the employment status of the individual. Section 2 indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
29. Jose D. Ochoa Section 1 is unsigned and undated. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
30. Hugo Ortiz Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
31. Victor Pineda In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility and the date the employee started work is not given.
32. Kvizystof Pytel In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility and the date the employee started work is not given.
33. Jose Restrepo In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.
34. Fernando Reyes Section 2 is undated.
35. Diana Rios Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is unsigned, undated and the date the employee started work is not given.
36. Herbert Rodas In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.

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37. Israel Rodriguez Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
38. Jose Romero Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is unsigned and undated. The date the employee started work is not given.
39. Jaime Rosalez In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.
40. Luis Ruiz In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
41. Maria Sicaju Section 1 is unsigned and no box is checked to indicate the employment status of the individual. Section 2 indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility. The date the employee started work is not given.
42. Jerzy Solak In section 1, the employee has failed to record an alien registration number. Section 2 is unsigned and undated.
43. Martha Soto In section 1, no box is checked to indicate the employment status of the individual. Section is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
44. Zdzislaw Stachurski In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
45. Jan Wenc Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 is undated and indicates a failure to record the expiration dates of the documents that had been examined to verify identity and employment eligibility.
46. Carlos Valencia In section 1, the employee has failed to record an alien registration number. Section 2 indicates a failure to properly record the document identifica-

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- tion numbers and expiration dates of documents that had been examined to verify identity and employment eligibility.
47. Tulio Velez In section 1, the employee has failed to record an alien registration number and an expiration date for employment authorization. Section 2 is undated.
48. Noe Cabrera In section 1, the employee has failed to record an alien registration number and an expiration date for employment authorization. Section 2 is undated.
49. Nicolas Hernandez Section 1 is undated and no box is checked to indicate the employment status of the individual. Section 2 indicates a failure to properly record the expiration dates of documents that had been examined to verify identity and employment eligibility.
50. Fidel Sosa In section 1, no box is checked to indicate the employment status of the individual. Section 2 is undated.

Each of the specific deficiencies noted in the foregoing Forms I-9 is a violation. Accordingly, the complainant has shown a *prima facie* case of a §1324a(a)(1)(B) violation for fifty (50) of the fifty-one (51) individuals listed in Count V of the Complaint, but has failed to prove a *prima facie* case of violation with respect to Haber Alvarez, by having failed to furnish a Form I-9 copy for that individual.

Respondent has not disputed the allegations nor the evidence provided by complainant with respect to the 50 violations identified above. Instead, respondent has argued that those employees identified in Count V had been legal aliens and had tendered sufficient documents to verify identity and employment eligibility. These facts are relevant only to the issue of mitigation of the civil penalty and do not raise a genuine issue of material fact. Moreover, respondent has again argued substantial compliance as a defense, which, for the reasons set forth earlier in this opinion, is unavailing.

Hence, complainant, having shown a *prima facie* case of a §1324a(a)(1)(B) violation for 50 of the 51 individuals named in Count V of the Complaint, and the respondent having failed to demonstrate that there are any triable issues, is hereby granted summary decision as to the facts of violation concerning those 50 individuals. Complainant is denied summary decision as to that alle-

gation involving one Haber Alvarez listed in Count V of the Complaint.

E. *Count VI*

In Count VI, complainant alleged that respondent employed the three (3) individuals named therein for employment in the United States after November 6, 1986, and that respondent accepted documents from those individuals which did not reasonably appear to be genuine and/or relate to those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B).

In order to comply with the verification requirements, an employer must record information about the documentation that has been examined for purposes of completing section 2 of the Form I-9. The employer must sign a certification attesting, under penalty of perjury, that it has examined the documents listed in section 2, that the documents appear to be genuine and relate to the employee, and that the employee is eligible to work in the United States. 8 U.S.C. §1324a(b)(1); 8 C.F.R. §274a.2(b)(1)(ii). Unless the employee is hired to perform less than three days' work, the employer must complete section 2, including the certification, within three working days of the date of hire. *Id.*

Complainant has argued that each of the three (3) individuals listed in Count VI had indicated in section 1 of their Forms I-9 that they were United States citizens. Therefore, complainant avers that the alien registration receipt cards (green cards) that were accepted by respondent as evidence of employment authorization could not have related to those individuals. That argumentation is based upon the assumption that United States citizens would not present green cards to demonstrate work authorization.

In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Viewing the evidence under this standard, it is quite clear that summary decision must be denied with respect to the allegations in Count VI. Those individuals may have been lawful permanent residents and received United States citizenship on or about the time of obtaining employment with respondent; or the Forms I-9 may not have been

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properly completed. Without a more complete factual record, these inconsistent inferences concerning the evidence cannot be settled.

Accordingly, complainant, having failed to show a *prima facie* case of a §1324a(a)(1)(B) violation for each of the three (3) individuals named in Count VI of the Complaint, is denied summary decision as to the allegations contained in Count VI.

#### F. Count VII

In Count VII, complainant alleged that respondent failed to complete new Forms I-9 and/or failed to update the Forms I-9 for each of the two (2) individuals named therein, Luis E. Castano and David Enrique Domingues, both of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of 8 U.S.C. §1324a(a)(1)(B).

IRCA obligates an employer to monitor the expiration date and reverify the employment eligibility of its employees not later than the date work authorization expires. *See* 8 C.F.R. §274a.2(b)(vii). The employee must present a document that shows continuing permission to work or evidences a new grant of work authorization. *Id.*

Respondent's answer and the Forms I-9 presented as Exhibit S indicate that the respondent hired the two (2) individuals listed in Count VII for employment in the United States, and did so after November 6, 1986.

An inspection of David Enrique Dominguez's Form I-9 shows employment authorization until October 22, 1990. In addition, an inspection of the Rhode Island Department of Employment and Training wage records shows that Dominguez earned wages from respondent during the first, second, and third quarters of 1991, Exhibit J, confirming that Dominguez had been employed by respondent after the expiration of employment authorization. Accordingly, the complainant has shown a *prima facie* case of a §1324a(a)(1)(B) violation with respect to David Enrique Dominguez.

Respondent has not presented any facts, supported by affidavit, sworn statement or documentation, to show that its agent updated Dominguez's Form I-9 or prepared a new Form I-9 to show continued work authorization after October 22, 1990. Accordingly, it is found that respondent failed to complete new Forms I-9 and/or

failed to update the Forms I-9 for David Enrique Dominguez, in violation of §1324a(a)(1)(B).

An inspection of Luis E. Castano's Form I-9 shows employment authorization until July 29, 1992. In addition, an inspection of the Rhode Island Department of Employment and Training wage records shows that Castano was employed during the second quarter of 1992, earning \$3,961.14 for that period. Those records also show that Castano was employed during the third quarter of 1992, July through September, earning \$3,245.38 for that period.

Respondent has argued that this evidence fails to show conclusively that Castano continued employment after July 29, 1992. That argumentation is based on the dubious assumption that Castano had earned \$3,245.38 from July 1 to July 29, 1992. As complainant has noted, Castano earned \$3,961.14 during the second quarter, or an average of \$1320.38 per month. Unreasonable inferences may not be drawn from the evidence to defeat summary decision. Respondent has not presented any facts, supported by affidavit, sworn statement or documentation, to show that it paid Castano \$3,245.38 from July 1 to July 29, 1992, or that his employment was terminated after July 29, 1992.

Hence, the complainant, having shown a *prima facie* case of a §1324a(a)(1)(B) violation for each of the two (2) individuals named in Count V of the Complaint, and the respondent having failed to demonstrate that there are any triable issues, is hereby granted summary decision as to the allegations contained in Count VII as to those two (2) individuals.

### III. *Summary and Conclusion*

Because complainant has shown that there are no genuine issues of material fact regarding the 66 violations alleged in Counts II, III, IV and VII of the Complaint, as well as in 50 of the 51 violations alleged in Count V, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's Motion for Summary Decision is granted as to the facts of violation concerning those 116 infractions contained in Counts II, III, IV, V, and VII.

However, since complainant has failed to show that there are no genuine issues of material fact regarding the one (1) remaining vio-



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lation alleged in Count V and the three (3) violations alleged in Count VI, complainant's Motion for Summary Decision is denied as to the facts of violation concerning those four (4) alleged infractions.

Accordingly, the facts of violation in those four (4) alleged violations, as well as the 15 violations asserted in Count I, or a total of 19 remaining alleged infractions, remain to be adjudicated, as well as the appropriate civil penalties to be assessed for the 116 alleged violations ruled upon in this Order.

Towards that end, a telephonic prehearing conference will be conducted shortly. The parties may wish to address the facts of violations in the remaining 19 alleged violations by way of briefs, in lieu of a hearing. They may also choose to submit briefs concerning the appropriate civil penalties to be assessed for these violations, utilizing the five (5) criteria set forth a 8 U.S.C. §1324a(3)(5), where applicable namely, the four (4) paperwork violations alleged in Counts V and VI.

JOSEPH E. MCGUIRE  
Administrative Law Judge