

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

August 11, 1999

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 95B00001
)
TOWNSEND CULINARY, INC.,)
Respondent.)
_____)

FINAL DECISION

Appearances: Carol J. Mackela, Esquire, Office of Special Counsel for Immigration Related Unfair Employment Practices, United States Department of Justice, Washington, D.C., for complainant;
Teresa C. Fariss, Esquire, Young, Conoway, Stargatt & Taylor, Wilmington, Delaware, for respondent;
Carey R. Butsavage, Esquire, Washington, D.C., for charging party, United Food and Commercial Workers Union Local 400.

Before: Honorable Joseph E. McGuire

Background

In this proceeding we evaluate charges brought by this Department's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) against Townsend Culinary, Inc. (Townsend Culinary), for having allegedly violated several provisions of the Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act (INA), 8 U.S.C. §1324b.

On March 25, 1997, OSC received two charges from the United Food and Commercial Workers Union, Local 400 (Union), on behalf of Ms. Delmy Guerrero and Ms. Ana Torres, two former employees of Townsend Culinary who had allegedly been terminated by that firm on February 13, 1997 and March 5, 1997, respectively, for allegedly having failed to produce more or different documents than those required to have established their employment eligibility as a condition for continued employment at Townsend Culinary, in violation of 8 U.S.C. § 1324b(a).

On October 1, 1997, OSC filed the four-count Complaint at issue.

In Count I, OSC alleged that Townsend Culinary had subjected Ms. Guerrero to document abuse, in violation of the provisions of 8 U.S.C. § 1324b(a)(6), by having demanded, as a condition for continued employment at Townsend Culinary, that she produce an INS-issued employment authorization document (EAD) for employment eligibility reverification purposes under 8 U.S.C. § 1324a(b).

OSC further alleged in that count that in having demanded of Ms. Guerrero that she produce such INS-issued documentation, Townsend Culinary had requested more or different documents than those required to have been produced under the provisions of 1324a(b) and did so for the purpose or with the intent of discriminating against Ms. Guerrero, in violation of the document abuse provisions set forth at 8 U.S.C. § 1324b(a)(6).

More specifically, OSC alleged in Count I that Ms. Guerrero had formerly been employed by Grace Culinary, Inc. (Grace Culinary) at its Laurel, Maryland food preparation facility prior to becoming an employee of Townsend Culinary following the latter's purchase of Grace Culinary in March, 1996. On March 26, 1996, in the course of having been requested by Townsend Culinary to reverify her employment eligibility, she completed Section 1 of a Form I-9 and also presented her INS Employment Authorization Card, Form I-688B, which contained the information that Ms. Guerrero was work authorized until February 12, 1997. At that time Ms. Guerrero also provided her unrestricted social security card i.e. one that did not contain the printed wording "not valid for employment purposes" across its face, for the purpose of having established her work authorized status.

It was further alleged that on February 13, 1997, almost 11 months later, Mr. Rudy Medina, then Townsend Culinary's Human Resources Manager, demanded that Ms. Guerrero produce her INS "work permit" in order to continue working at Townsend Culinary. INS had previously issued a new employment authorization card to Ms. Guerrero on that same date, February 13, 1997, but had not yet delivered that card to her. For that reason, Ms. Guerrero was unable to meet Rudy Medina's allegedly unlawful documentation demand that she provide a current INS "work permit" on that date. However, on that date Ms. Guerrero had an unrestricted social security card that she could have presented to Mr. Medina to have established her work authorized status for purposes of workplace reverification. But because she was unable to provide the INS "work permit" which Mr. Medina had specifically demanded on February 13, 1997, she was terminated for that reason on that date, with a resulting loss of earnings and employee benefits.

In Count II, OSC alleged that Townsend Culinary had also practiced document abuse against a second former employee, Ms. Ana Torres, under nearly identical circumstances. On March 5, 1997, Mr. Medina also demanded that Ms. Torres produce her new INS "work permit" as a condition for continuing her employment at Townsend Culinary. OSC also alleged that on that date Ms. Torres' updated INS work permit had not been delivered to her, either, even though INS had approved and issued that EAD on February 27, 1997, some six days earlier, and for that reason she also was then unable to meet Mr. Medina's unlawful demand that she produce that specific INS document.

OSC further alleged in that count that on March 5, 1997, Ms. Torres had a valid driver's license and an unrestricted social security card which she could have furnished to Mr. Medina and thereby have conclusively established her identity and employment eligibility, respectively, for Form I-9 reverification purposes. But because she could not produce the specific INS documentation which Mr. Medina had insisted be produced on that date, she was wrongfully terminated on March 5, 1997, and resultingly incurred a loss of earnings and employee benefits.

In Count III, OSC charged that Townsend Culinary had engaged, and continues to engage, in a pattern or practice of document abuse against those of its employees and its job applicants who

were/are not United States citizens based upon the following factual allegations.

Beginning in March, 1996 it has allegedly been Townsend Culinary's standard operating procedure to routinely request that all non-U.S. citizens produce specific INS-issued documents for employment eligibility verification, as well as reverification reasons, for the purpose or with the intent of discriminating against those individuals, in violation of the document abuse provisions found at 8 U.S.C. §1324b(a)(6).

OSC further alleged that Townsend Culinary's pattern or practice of requesting more or different documents than required for employment eligibility verification and reverification purposes directly and adversely affects the rights of all work authorized non-U.S. citizen employees of Townsend Culinary, as well as non-U.S. citizens who apply for employment at that firm.

Similarly, OSC alleges that Townsend Culinary's pattern or practice of requesting that all non-U.S. citizens produce INS-issued documents for employment eligibility verification and reverification purposes also violates the document abuse provisions of 8 U.S.C. §1324b(a)(6).

In Count IV, OSC has alleged that Townsend Culinary has previously engaged, and continues to engage, in a pattern or practice of citizenship status discrimination, as opposed to the document abuse allegations set forth in Count III, by reason of its having routinely required, as well as continuing to require, that all non-U.S. citizen employment applicants, including many protected individuals, produce INS-issued documents in order to establish their work authorized status as a condition of employment, whereas U.S. citizens are routinely not concomitantly required to establish their citizenship as a condition of employment.

OSC also alleges in that count that by having imposed that unlawful requirement upon non-U.S. citizens Townsend Culinary has violated the provisions of 8 U.S.C. §1324b(a)(1)(B) since that practice directly and adversely affects all non-U.S. citizen employees, as well as all non-U.S. citizen applicants for employment, including many protected individuals, by imposing that condition, or hurdle, only upon non-U.S. citizens and not doing so in the case of U.S. citizens, resulting in disparate treatment of persons in those two groups.

The relief sought by INS in the Complaint includes, but is not limited to, Townsend Culinary's being ordered to cease and desist from the alleged illegal practices described in the Complaint; that Townsend Culinary be ordered to pay a \$1,000 civil money penalty for each of the two alleged document abuse practices alleged in Counts I and II involving Ms. Guerrero and Ms. Torres; that Townsend Culinary pay a civil money penalty of \$1,000 for every other work authorized individual upon whom Townsend Culinary also made a request that each produce more or different documents than those required under 8 U.S.C. §1324a(b), as alleged in Count III; that in Count IV Townsend Culinary be required to pay a civil penalty of \$2,000 for each protected individual against whom Townsend Culinary practiced employment related discrimination based upon such individual's citizenship status; that Townsend Culinary be ordered to fully compensate Ms. Guerrero and Ms. Torres for their respective wage loss sums, plus interest thereon; that Townsend Culinary reinstate Ms. Guerrero and Ms. Torres and provide to each full retroactive seniority and employee benefits; and that Townsend Culinary also be ordered to reinstate, with all back pay and retroactive employee benefits and seniority lost as a result of Townsend Culinary's proscribed document abuse and employment related citizenship discrimination practices, including appropriate interest sums, each and every other work authorized individual identified in the course of discovery who did not apply for employment at Townsend Culinary because he or she was aware of that illegal policy, and who either had not been hired or who had been discharged as a result of Townsend Culinary's illegal document abuse and employment related citizenship status discrimination practices.

On November 5, 1997, Townsend Culinary timely filed its Answer, in which it denied that it had committed the alleged document abuse violations against either Ms. Guerrero or Ms. Torres and further denied that it had committed any immigration-related unfair employment practices against Ms. Guerrero, Ms. Torres, or any other person in the operation of its food preparation operation in Laurel, Maryland. In addition, that responsive pleading of Townsend Culinary asserted nine affirmative defenses.

Following extensive motion practice and discovery activities, the matter was heard before the undersigned in Falls Church, Virginia on May 5-7, 1998.

Summary of Evidence

OSC's case-in-chief consisted of the testimony of 17 witnesses, those having been Ms. Delmy Guerrero, Ms. Ana Torres, OSC Trial Attorney Jeanette Milanes, OSC Paralegal Alexandra Vince, INS Supervisory Immigration Officer Jack Hartsoch, eight current Townsend Culinary employees and four former Townsend Culinary employees, as well as 31 documentary exhibits identified and entered into evidence as Complainant's Exhibits 1 through 9, 10A, 10B, 11 through 20, 22 through 24, 32, 33, and 35 through 39.

Townsend Culinary's evidence was comprised of the testimony of six witnesses, Allison Derickson, currently a Human Resources Manager at Townsends, Inc., headquartered in Millsboro, Delaware, the parent firm of Townsend Culinary, Thelma Lavern Griffin and Linda Thompson, current Human Resources Managers at Townsends, Inc., Rodolfo (Rudy) Medina, a former Human Resource Manager at Townsend Culinary's Laurel, Maryland plant, Zenaida Velez-Dorsey, a former Human Resources Administrator at Townsend Culinary's Laurel, Maryland location, and Barry A. Crozier, of Wilmington, Delaware, a Certified Public Accountant, and 14 documentary exhibits marked and entered into evidence as Respondent's Exhibits 1, 3 through 5, and 7 through 16.

OSC's first witness was Ms. Jeanette Milanes, an OSC trial attorney, who testified that her duties include accepting telephone hotline calls from employers and employees concerning IRCA-related matters. She described those as telephone intervention calls, or ones that pertain to immigration-related employment discrimination practices that have just occurred or are about to occur. Efforts are made to resolve the matters at that stage, and thereby avoiding unnecessary OSC investigations and enforcement proceedings.

On March 10 or 11, 1997, she received a telephone call from one Ms. Felix, an attorney representing Ms. Delmy Guerrero, a former Townsend Culinary employee at that firm's Laurel, Maryland food preparation operation. She further testified that Ms. Felix informed her that Ms. Guerrero had recently been terminated by Townsend Culinary's Rudy Medina on February 13, 1997, the date upon which her EAD had expired.

Ms. Milanes further testified that Ms. Felix advised her that Ms. Guerrero had requested that INS extend her EAD and had

done so some 90 days prior to the February 13, 1997 expiration date. As the expiration date neared, Ms. Guerrero contacted INS' Vermont Service Center and learned that her application had been approved, that there would be a delay in her receipt of the EAD and INS supplied her a telephone number for Townsend Culinary's use in the event that that firm wished to verify her updated work authorized status.

She also testified that Ms. Felix had advised her that on the EAD expiration date, February 13, 1997, Mr. Rudy Medina had requested that Ms. Guerrero furnish her new EAD and that Ms. Guerrero had advised him of the status of her EAD and had given him the INS telephone number which he could then have called in order to have verified her continuing work authorized status. Ms. Guerrero also offered Mr. Medina her unrestricted social security card in order to unquestionably establish her employment eligibility, but he refused to accept that document and terminated Ms. Guerrero's employment on that date. Two days later, Ms. Guerrero received her updated EAD, but Mr. Medina refused to rehire her. Ms. Milanes advised Ms. Felix that she would telephone Mr. Medina in an attempt to have him rehire Ms. Guerrero and Ms. Felix accepted her offer of assistance (T. 57,58).

Continuing her testimony, Ms. Milanes stated that on March 10, 1997 she telephoned Mr. Medina. He denied having requested an INS-issued document and he also told her that he had called the INS telephone number given him by Ms. Guerrero but had gotten a busy signal. Mr. Medina also told her that Ms. Guerrero had not offered to produce any other document, but later in that conversation he told Ms. Milanes that he was aware that Ms. Guerrero possessed an unrestricted social security card. Ms. Milanes also testified that upon asking Mr. Medina whether he would restore Ms. Guerrero to her former position since by then she had received her updated EAD, he stated that he wished to consider that request and stated that he would call her on the following day. Mr. Medina telephoned Ms. Milanes on the next day but refused to discuss the matter with her and instead referred her to Townsend Culinary's attorney (T. 59).

Ms. Milanes telephoned Townsend Culinary's attorney and left a message. On the following day, March 11, 1997, Ms. Felix called Ms. Milanes and told her that Mr. Medina had telephoned Ms. Guerrero to advise her that she could return to work and instructed her to come in and complete an employment application.

Ms. Felix later telephoned Ms. Milanés again and reported that Ms. Guerrero had returned to Townsend Culinary to file an application, as requested, but had been subjected to humiliation and rude treatment and was told that she would not be rehired. Ms. Milanés then called Townsend Culinary's attorney and was told that he would look into the matter and she heard nothing further from him (T. 60, 61).

On cross-examination, Ms. Milanés testified that she advised Mr. Medina that Townsend Culinary could have permitted Ms. Guerrero to continue working beyond February 13, 1997 by allowing her to present an unrestricted social security card and by having her attest under penalty of perjury in Section 1 of her newly prepared Form I-9 that she was work authorized. Ms. Milanés further stated that there is no INS regulation which specifically provides for that procedure, nor is there an enabling provision in the INS Handbook for Employers but that OSC advises employers that they may accept such documentation and attestations since there are no provisions in either IRCA or in the INS Handbook for Employers which specifically prohibit that practice (T. 62, 63).

INS Supervisory Immigration Officer Jack Hartsoch, OSC's second witness, testified that he has worked at INS since 1973 and that he is currently assigned to the INS Office in Clarksburg, West Virginia. He previously worked as the Staff Officer in Charge of Service Center Operations in the INS Service Center Operations Headquarters in Washington, D.C.

He identified the multi-page documents marked and entered into evidence as Complainant's Exhibits 6 and 7 as being the computerized screen prints of the EAD data concerning Ana Torres which had been requested by OSC's Ms. Alexandra Vince. Those printouts reveal that Ms. Torres' application for an EAD was received by INS on November 21, 1996, had been approved on February 26, 1997 and that the EAD had not been created as of March 5, 1997, the date of Ms. Guerrero's termination, but that her EAD had been issued some eight days later, on March 13, 1997, and that an approval notice had been mailed to her on that date (T. 95). The data concerning Ms. Torres in Complainant's Exhibit 7 discloses that her EAD application had been approved on February 26, 1997 and that she was work authorized from that date until February 25, 1998 (T. 77-83).

Hartsoch identified Complainant's Exhibit 8 as being a similar INS printout of EAD data concerning Ms. Delmy Guerrero which discloses that she was work authorized on February 13, 1997, the date of her termination, and has been continuously work authorized since February 12, 1996. Her current EAD will expire on February 12, 1999 (T. 84-86).

On cross-examination, he testified that Ms. Guerrero and Ms. Torres had entered the United States illegally (T. 95).

Ms. Delmy Guerrero, OSC's next witness, testified that she had been employed at Townsend Culinary's Laurel, Maryland food preparation operation from January 22, 1996 until February 13, 1997. Her work duties consisted of packing/boxing food items in that facility's Casing Room.

She identified Complainant's Exhibit 10A as being a copy of the Form I-9 which she completed on March 26, 1996 with the assistance of Zenaida Dorsey, Townsend Culinary's Human Resources Administrator. The third page of that five-page exhibit contains photocopies of her then current EAD, with an expiration date of February 12, 1997, with her photograph thereon, as well as her unrestricted social security card. She testified that Ms. Zenaida Dorsey had requested that she furnish those two documents "in order to fill in other papers when Townsend Culinary bought the firm" (T. 101).

Ms. Guerrero also stated that she had filed an extension request form with INS on December 6, 1996 and that the fourth page of Complainant's Exhibit 10A consists of a copy of that request for an extension of her permission to accept employment. INS did not acknowledge receipt of that extension request and she enlisted the help of one Raina Reyes, who is associated with an organization known as CARECEN, in Washington, D.C. Ms. Reyes contacted INS on her behalf and learned that her extension request had been granted on December 14, 1996. Ms. Reyes' handwritten notations confirm that fact, as well as the telephone number of the INS Vermont Service office, 802 527-3160, and the receipt number assigned by INS (Complainant's Exh. 10B).

Meanwhile, only Ms. Norma Mejia, of Townsend Culinary, had inquired of Ms. Guerrero whether INS had approved her extension request. She testified that she did not reply to Ms. Mejia's inquires since she had not received the written extension document. On

February 12, 1997, Ms. Mejia telephoned her and inquired whether she had received her work authorization extension document from INS. She met with Ms. Mejia and Mr. Rudy Medina, who asked for her INS work authorization document. She testified that she told Mr. Medina that her work extension request had been approved by INS and gave him those six pages comprising Complainant's Exhibits 10A and 10B which verified that fact.

On the following day, February 13, 1997, Mr. Medina telephoned her to advise that in the event that she could not provide the written INS work authorization extension document on that date her employment at Townsend Culinary would be terminated. She asked Mr. Medina to wait an additional week since she had been told by INS that her work authorization extension document was to have been provided to her within that time frame.

She further testified that Mr. Medina advised her that "he already knew what Immigration was going to say, and for that reason, I didn't have a job." (T. 107). Mr. Medina then told her that she could continue working at Townsend Culinary only in the event that she received her INS work authorization document on the next day. When she asked Mr. Medina to be allowed to continue working for the sake of her children, he replied that he was not concerned about that circumstance. On that date, also, she removed her driver's license and her unrestricted social security card from her purse in order to present them to him, but Mr. Medina told her that he would only accept an INS-issued work authorization document (T. 109).

Ms. Guerrero also testified that on February 21, 1997, some eight days after her termination, she received the promised INS Employment Authorization Card, which on its face was valid from February 13, 1997 until the stated expiration date, February 12, 1998 (Complainant's Exh. 11). She attempted to regain her former position at Townsend Culinary and filed an employment application for that purpose on March 11, 1997 (Complainant's Exh. 12). She received a letter from Mr. Rudy Medina offering her a job at \$5.60 per hour. She stated that she went to Townsend Culinary to talk to Mr. Rudy Medina, but he was in meetings that day. She returned on another day and waited for two hours before learning that he did not wish to see her. A secretary at Townsend Culinary telephoned her later and advised her of an opening on the 9:30 pm to 5:00 am shift in the Sanitation Department, Ms. Guerrero testified that as a single mother of an 11-year old daugh-

ter and a son who was then six years of age, she could not accept that position because of the work hours.

Instead, she returned to Townsend Culinary and spoke to Mr. Rudy Medina and requested that she be allowed to resume working in her former job on the 5:00 am to 1:30 pm shift or on the shift which she had worked previously, which began at 6:00am and ended at 3:30pm. Mr. Medina told her that her former position had been filled and that if she wished to return to work at Townsend Culinary she would have to accept the position which had been offered. She told Mr. Medina that she would accept any position as long as she could work during daytime hours since working evening or night hours was difficult, given the fact that she had to care for her two young children. She testified that Mr. Medina told her that he was not concerned with her family situation.

She stated that she then began seeking a daytime position elsewhere. On May 4, 1997 she began working daytime hours at 20/20 Graphics at \$6 per hour, 40 hours weekly and she has worked there continuously since then. Ms. Guerrero testified that she wishes to be reinstated in her former position at Townsend Culinary since that job site was closer to her home and more importantly because the working hours at Townsend Culinary permitted her to bring her children to her sister's home on her way to work on school days. Her sister then brought Ms. Guerrero's children to school. Ms. Guerrero could then pick up her children from school after work and in that manner be able to spend more time with them.

On cross-examination, Ms. Guerrero stated that she did not tell Mr. Rudy Medina that she would not accept the offered position in the Sanitation Department. She also testified that she had been advised to resume work at Townsend Culinary some time in March, 1997. She denied having filed a charge at the National Labor Relations Board in which she had charged that Townsend Culinary had terminated her because of union activities. She acknowledged having filed a charge against Townsend Culinary at the Equal Employment Opportunity Commission, but denied having alleged in that charge that she had been terminated at Townsend Culinary because she had complained of sexual harassment practices.

Ms. Clelia Rodriguez, OSC's next witness, testified that she had worked at Townsend Culinary's Laurel operation for about one year, beginning in June, 1996. She completed an employment application and a Form I-9 and began working only after having shown her INS-issued EAD and her social security card, as she had been required to do.

Some six months or so into her 12-month period of employment at Townsend Culinary, her work permit expired and Mr. Rudy Medina told her that she would be required to furnish the pertinent INS document which extended her work authorization period, as well as her restricted social security card, as depicted on Complainant's Exh. 13, at 2,3.

Ms. Irma Yolanda Del Cid Nolasco next testified that she has been employed by Townsend Culinary since June, 1996 and that Ms. Nancy Barrera, a Townsend Culinary employee, helped her complete her Form I-9 and she had merely signed it (Complainant's Exh. 14 at 1). Another female Townsend Culinary employee asked to see her INS Employment Authorization Card and her restricted social security card (Complainant's Exh. 14 at 3,6, and 7) in order to copy those documents prior to her beginning her employment at Townsend Culinary.

Mr. Rudy Medina later called her into his office and informed her that her INS-issued work authorization had expired and that she could not continue working at Townsend Culinary without obtaining an extension. She then gave him her new work authorization document. One year later, Mr. Medina again requested that she produce such a document in order to photocopy her then current INS extension document.

Oswaldo Padron, OSC's sixth witness, testified that he is an employee at Townsend Culinary's Laurel facility and began work in September, 1996. Prior to having been hired he, his brother and another Cuban had spoken to Mr. Rudy Medina, who invited them to return for an appointment.

Upon doing so, they were shown into a conference room as part of a larger group of 12 to 14 job applicants. Mr. Medina spoke to the group in Spanish and all were given Forms I-9 and instructions as to which portions were to be completed. After the Forms I-9 were completed, Mr. Medina "requested work authorization, the green card and a driver's license" from all job applicants and

if anyone had not produced those requested documents they would not have been hired (T. 150). He identified Complainant's Exh. 15 as being a copy of the five-page exhibit containing his completed Form I-9, as well as the documents which Mr. Medina had requested that he furnish in order to have been hired.

Ms. Maria Gomez testified that she is employed at Townsend Culinary, having begun work there in June, 1995. Prior to beginning that employment, she was required to sign a Form I-9, to provide a "code" and to place her social security number on that form, and the remaining information on the Form I-9 had been supplied by Ms. Zenaida Dorsey, a Townsend Culinary employee.

She also stated that she provided her INS-issued work authorization card and her social security card (Complainant's Exh. 17, at 2,4) to Ms. Zenaida Dorsey, who had requested that she furnish those documents (T. 161, 162). When her INS work authorization card expired on September 29, 1996 she was instructed by Mr. Medina to furnish a new card when it became available and she did so. In April of 1997, Don Carlos, also of Townsend Culinary's Human Resources staff, telephoned her to request that she provide evidence of updated INS work authorization documentation and she later complied with that request, also.

Ms. Maria Umana, OSC's eighth witness, testified that she had worked at Townsend Culinary for some 10 or 11 months in 1996 or 1997 and that she had been required to furnish her INS-issued work authorization card, her unrestricted social security card and her Maryland I.D. card prior to having been hired. Photocopies of the specific documents which she was ordered to produce are those shown on the second, third and fourth pages of Complainant's Exhibit 17.

During her employment at Townsend Culinary her INS-issued work authorization card expired and Mr. Rudy Medina requested that she show him her newly-issued INS document. She also stated that she did not again furnish her Maryland I.D. card or her social security card because Mr. Medina stated that INS work authorization card "was important because it expires and the other documents do not." (T. 173).

Mr. Jose Lazo, then an employee of Townsend Culinary and its predecessor firm, Grace Culinary, for some six years, testified

that he had been required to complete some forms after Townsend Culinary acquired Grace Culinary.

The six-page exhibit marked as Complainant's Exhibit 18 contains copies of his Form I-9, his restricted social security card and the three INS-issued employment authorization cards which show that he was work authorized between the dates September 2, 1995 through October 22, 1998 (Complainant's Exh. 18, at 4,5,6).

He further testified that he began work at Townsend Culinary after it had acquired Grace Culinary and that Ms. Zenaida Lawson, a Townsend Culinary employee, requested that he provide his social security card and his INS-issued work authorization card. A month prior to the expiration date of his earliest INS-issued EAD, Mr. Medina called him to advise that if he failed to provide a new work authorization card he would be fired (T. 178). When the newly-issued INS card arrived, he showed that card and his social security card to Mr. Medina, as the latter had requested.

Ms. Elsa Viera, who testified that she had then been an employee of Townsend Culinary for about two years, stated that Ms. Ellen Perez, a Townsend Culinary employee, requested that she furnish her work authorization and social security cards (Complainant's Exh. 19 at 2,3).

Lemane Dessource, a former Townsend Culinary employee who worked there for two months or so in 1997, testified that he had been required by a Hispanic male manager of Townsend Culinary to furnish his social security card and his INS resident alien card prior to having been hired. That unidentified Townsend Culinary manager told him that if he had not produced those two documents he would not have been hired (T. 192,193).

Ms. Anna Irma Ortega, OSC's twelfth witness, stated that she had been hired at Grace Culinary and had been working there for some four years, as well as at Townsend Culinary after it acquired Grace Culinary.

Upon becoming an employee of Townsend Culinary she was required to make available for photocopying by Townsend Culinary her social security card and her INS employment authorization card (Complainant's Exh. 22 at 3,4). She subsequently also showed a work authorization renewal card to Mr. Medina since he had

telephoned her to remind her to show him that renewal document (T. 198–201).

Ms. Maria S. Turcios, who had been working at Townsend Culinary for one and one half years on the hearing date, testified that in the course of her pre-employment activities Mr. Medina had requested that she provide her social security and “residence” cards.

After completing the upper portion of her Form I-9, a Townsend Culinary employee named Ellen requested and made photocopies of her social security card, as well as her INS resident alien card (Complainant’s Exh. 23 at 3).

Ms. Vilma Romero, a Townsend Culinary employee from June, 1996 until December, 1996, stated that Ms. Norma Mejia, a Townsend Culinary employee, had asked her to produce her work authorization card and her social security card. She did so and those documents, as in the case of Ms. Turcios, were photocopied (Complainant’s Exh. 24, at 3).

Ms. Alexandra Vince, an OSC paralegal specialist and complainant’s 15th witness, testified that she has worked at the U.S. Department of Justice for nine years and most recently at OSC for two years and 10 months.

Her duties include reviewing Forms I-9 and creating tables, charts and spreadsheets based upon the information contained on those forms. She has reviewed slightly more than 9000 Forms I-9 while assigned to OSC, including copies of 934 Forms I-9 completed by Townsend Culinary during the relevant periods at issue. The initial 314 Form I-9 copies, covering the period March 25, 1996 through December 24, 1997, were gathered by OSC during its inspection of Townsend Culinary’s records and the remaining 620 Form I-9 copies were made available to Carol Mackela, Esquire, OSC’s counsel of record, by Townsend Culinary’s counsel of record, Teresa Fariss, Esquire, in the course of the latter having provided copies of those documents to Ms. Mackela in reply to OSC’s discovery requests.

Her analysis of the information contained in those 934 Form I-9 copies began by having grouped separately the Form I-9 copies which concerned the then current Townsend Culinary employees, as opposed to those forms which had been prepared for former

employees. The 934 forms, with those collected by OSC in the investigative phase numbered 1 through 314 and the remainder numbered 315 through 934, consisting of the 620 Form I-9 copies supplied by Townsend Culinary in the course of replying to OSC's discovery requests, were placed in six volumes and entered into evidence as Complainant's Exhibit 35.

Ms. Vince also testified that she created a spreadsheet with a software package called Quatro Pro 7. The spreadsheet contained 12 columns of data which included, among other information, the name of the Townsend Culinary employee, that person's immigration status, the documents which each had provided in order to establish their identity and employment eligibility, the dates of such verification, and the name of the Townsend Culinary employees who acted as verifiers and had also signed Section 2 of the Forms I-9.

After entering that data she created four additional detailed, information-laden spreadsheets in order to identify the Townsend Culinary employees according to their names, the pertinent dates and separate ones for those who were United States citizens, Complainant's Exhibit 37, and those who were non-citizens, Complainant's Exhibit 36. The latter two categories of employees were further listed sequentially by the date upon which the employee had signed the Form I-9. If no such signature appeared, the date listed was that date shown in the Section 2 employer certification box.

According to her further testimony, Ms. Vince prepared a chart, Complainant's Exhibit 38, which reveals that an analysis of the 934 Forms I-9 discloses that those forms covered 847 Townsend Culinary employees, some 672 of whom were non-citizen employees and 169 were United States citizens. The seeming numerical discrepancy of 93, or the difference between 934 and 847, is accounted for by the presence of duplicate Forms I-9 for some employees, multiple Forms I-9 for others, and the fact that some forms had been dated prior to March, 25, 1996.

She also presented a second chart, Complainant's Exhibit 39, which summarized the information contained in Complainant's Exhibit 36, 37, and 38, which discloses that of the 672 alien/non-citizen employees of Townsend Culinary some 662, or 98.5% had produced an INS issued document in order to obtain employment. That documentary exhibit also provides the information that of

those 662 employees, some 628, or 94.9%, also produced a List B or List C document in order to establish their identity and employment eligibility, respectively.

In addition, the comparison table on that exhibit reveals that of the 63 alien/non-citizen Townsend Culinary employees whose Forms I-9 had been reverified by Townsend Culinary employees all had produced INS-issued documents for that purpose. Meanwhile, of the 169 Townsend Culinary employees who were U.S. citizens only 31, or 18.3%, had produced documents, including U.S. passports, certificates of naturalization, or birth certificates, in order to have established their U.S. citizenship and the remaining 81% of those employees, numbering 138, had furnished no documents of that type.

OSC's next witness, Aristides Bermudez, testified that he has worked at Townsend Culinary for six years and had met Ms. Anna Torres while working at that firm. After her employment at Townsend Culinary had been terminated Ms. Torres sought his help in completing a Townsend Culinary employment application form. He saw her sign the application form and took her to Townsend Culinary in order to file it.

He also stated that he knows Mr. Rudy Medina, a Townsend Culinary Human Resources person, and that after Ms. Torres filed her employment application form Mr. Medina did not give him a message to pass along to Ms. Torres in connection with her having filed that form, as Mr. Medina had testified.

Ms. Ana Torres, one of the two complaining witnesses and OSC's 17th and concluding witness, is a native of El Salvador and like many of OSC's witnesses she speaks, reads and writes Spanish but does not speak, write, or understand English. With the assistance of a Spanish-speaking interpreter who was present throughout the three-day hearing to assist the many witnesses in need of that service, she stated that she began working for Grace Culinary in 1992 and continued working for Townsend Culinary after it acquired that firm. Her job duties consisted of opening cans, her hourly rate of pay was \$6.10 and she worked from 1:30 to 10:30 pm Monday through Friday. Ms. Torres stated that her last date of employment at Townsend Culinary was March 6, 1997, and that she had been discharged on that date by Mr. Rudy Medina under the following circumstances.

On March 6, 1997, Mr. Medina telephoned her home at 8:00 am or so and asked her to show him her INS work permit before starting work later that day. Upon arriving for work, she did not punch her time card because Mr. Medina had instructed her not to do so. Instead, and as Mr. Medina had also instructed her, she went directly to his office. She explained to him that her INS documentation extension was being processed at that time. Ms. Torres had brought along a letter from INS which confirmed the fact that her EAD was to have been sent to her by INS within two weeks or so, as her attorney had been advised in that letter. She testified that Mr. Medina stated he could not wait two weeks for the INS employment eligibility documentation and she was not permitted to work and was discharged on that date.

Ms. Torres also testified that on March 6, 1997 she had in her possession a valid and current Maryland driver's license, which contained her photograph, and an unrestricted social security card (Complainant's Exh. 33) but had not shown those documents to Mr. Medina because he had not requested them.

She stated that INS had issued her EAD on February 26, 1997, some nine days before, and that that EAD was valid until February 25, 1998. Ms. Torres received that card some two weeks after she was fired on March 6, 1997, or within that time frame about which INS had previously advised her attorney by letter (Complainant's Exh. 33). Upon receiving her updated work permit on March 20, 1997 or so, she telephoned Mr. Medina to advise him that she had received it and also told him that she wished to return to work. Mr. Medina instructed her to file a new employment application. She then went to Townsend Culinary's office and picked up an employment application, which she completed with the help of Alex Bermudez. She then signed it and returned the completed employment application form to Mr. Medina's secretary.

Ms. Torres heard nothing further from Townsend Culinary after filing that application. She applied unsuccessfully for jobs at local firms for seven months before returning to El Salvador in November, 1997. She remained there until returning to the United States just prior to having given her hearing and deposition testimony in this proceeding. Ms Torres stated that she wishes to be reinstated in her former job at Townsend Culinary.

Townsend Culinary's initial witness, Allison Derickson, testified that she is the Human Relations Manager at Townsends, Inc., located in Millsboro, Delaware, the parent firm of Townsend Culinary, and had been employed there for five years. She described Townsends, Inc. as being in the poultry processing and food business.

She started to work at Townsends, Inc. in 1993 as a Human Relations Representative and was promoted to manager in July 1996. Ms. Derickson has a baccalaureate degree in personnel and labor relations and speaks and understands Spanish very limitedly. She has never been employed at Townsend Culinary, but had been detailed there for some five months in 1996, assisting in the transition of the Grace Culinary workers to Townsend Culinary and she subsequently filled in during the absence of Townsend Culinary's Human Resources Manager, Ms. Zenaida Velez-Dorsey, who had formerly worked at Grace Culinary

Ms. Derickson testified that she and two other Townsends, Inc. employees, Alma Rios and Beverly Caperton, as well as Ms. Zenaida Velez-Dorsey, then of Townsend Culinary, assisted the Grace Culinary employees in preparing updated Forms I-9 during the transition process. She described Ms. Velez-Dorsey's role as that of having requested documents from the Grace Culinary workers and then inspecting, photocopying and stapling those document copies to their new Forms I-9.

She stated that in her current duties as HR Manager at Townsends, Inc. she is not involved in the Form I-9 process and could not recall whether she was so involved with a newly-hired Townsend Culinary worker on or about March 25 and 26, 1996. Ms. Derickson also testified that she has never required that job applicants submit visas with their employment applications in order to be considered for employment. She also stated that to the best of her knowledge Townsend Culinary did not avoid hiring non-citizens.

Ms. Derickson further testified that she was involved in revising Townsend Culinary's previously-used employment application form (Respondent's Exh. 7), of which there was also a Spanish version. Ms. Derickson stated that the wording in the previous employment application form used by Townsend Culinary required that all job applicants provide copies of their visas, but that Townsend Culinary in fact had never requested that persons seeking employment

provide copies of those documents (T. 289). She stated that the government had objected to that wording on the earlier version of that form and that accounted for the revision.

On cross-examination, she testified that the Townsend Culinary employment application form had been revised in February or March of 1998. Her involvement with Townsends, Inc.'s subsidiary, Townsend Culinary, began on March 25, 1996 and extended to August 1996. She identified the documents marked and entered into evidence as Complainant's Exhibits 1 and 2 as being copies of the employment application forms formerly utilized by Townsend Culinary from March 25, 1996, the date upon which it acquired Grace Culinary, until August, 1996, when she concluded her involvement with Townsend Culinary.

While converting some 300 Grace Culinary employees to the Townsend Culinary workforce on March 25 and 26, 1996, she checked in those employees and provided to each a Form I-9, as well as other forms, including those used for tax withholding. She stated that Townsend Culinary's Ms. Zenaida Velez-Dorsey handled the completion of the Forms I-9 and she did not hear which documents Ms. Velez-Dorsey had requested from the former Grace Culinary workers. She did, however, note that Ms. Velez-Dorsey photocopied the documents which were tendered and attached those copies to the pertinent Forms I-9 (T. 293).

After those Forms I-9 and attachments were photocopied they were placed in a pile and she, Alma Rios and Beverly Caperton, both of whom were HR Assistants from Townsends, Inc. in Millsboro, Delaware, finished filling out the information and did so at Townsends, Inc's, offices in Millsboro, Delaware. She also stated that neither Ms. Rios nor Ms. Caperton were in Laurel, Maryland during the conversion of the Grace Culinary workers and that neither of those ladies had seen those workers nor the documents which they had furnished since their Forms I-9 had been sent to Millsboro, Delaware from Laurel, Maryland for completion (T. 294).

While filling in for Ms. Zenaida Velez-Dorsey in Laurel, Maryland for about three days each week from May, 1996 until August, 1996, while Ms. Velez-Dorsey was on vacation, she was the only person there from Townsends, Inc., in Millsboro, Delaware.

It was noted that the only difference in the wording of the earlier version of the Townsend Culinary employment application form and that of the employment application form currently in use, following the revision of the earlier form in February or March, 1998, consisted of the deletion of the one-line question in which non-U.S. citizens were required to advise whether their visas indicated whether they had “the legal right to work in the United States”, and if so, all job applicants were required to provide a copy of their visas to Townsend Culinary.

Ms. Derickson confirmed the fact that that one-line deletion constituted the only change in that form and she reiterated that that question had been removed because the government had objected to its use, even though Townsend Culinary had never asked job applicants for copies of their visas.

It was also shown that OSC had filed the charges at issue in this proceeding in April, 1997 and that the deletion of the visa copy request had been accomplished in the revision completed in February or March, 1998, some 10 or 11 months later. Upon being asked whether the offending question had been deleted as a direct result of these OSC charges, Ms. Derickson testified that she had been asked to eliminate that question from the Townsend Culinary employment application form by Ms. Ferris, Townsend Culinary’s trial attorney and counsel of record, and by one Mr. Major, a HR Vice President at Townsend Culinary (T. 295–298).

Thelma Lavern Griffin, Townsend Culinary’s second witness, stated that she has been employed for two years at Townsend Culinary’s parent firm, Townsends, Inc., in Millsboro, Delaware as the HR Manager on the day shift of that firm’s poultry plant.

Her educational background includes having attended Delaware Technical Community College for one and one-half years and she neither speaks nor understands Spanish. Ms. Griffin’s job duties include recruiting, interviewing and staffing the plant to which she is assigned, but she is rarely called upon to complete the Forms I-9, which are required of all persons to whom jobs are offered.

She testified that she had prior experience in completing Forms I-9, however. In 1996, during the absence of the HR Manager at Townsend Culinary in Laurel, Maryland, she was detailed there and was involved in completing the Forms I-9 for the then newly-

acquired Townsend Culinary employees. Ms. Griffin testified that she could not recall how many Forms I-9 she may have completed during that period, but she did recall that no one had instructed her to avoid hiring non-citizens at Townsend Culinary, nor did she wish or desire to avoid hiring non-citizens (T. 316, 317).

Ms. Griffin also stated that she received her initial formal training in completing Forms I-9 while working at American Regional some 14 years before and that she also received additional Form I-9 training when she began working at Townsends, Inc. In addition, she attended an instructional Form I-9 seminar in Salisbury, Maryland of unspecified length and on undetermined dates. She further testified that whenever she had any questions concerning the manner in which the Forms I-9 were to have been completed, she simply referred to the INS Handbook for Employers for guidance.

In her concluding direct testimony, and in response to her attorney's inquiries, Ms. Griffin was asked about her earlier deposition testimony under oath concerning whether she had required that employees of Townsend Culinary provide documents in order to establish their social security and alien registration numbers in completing Section 1 of their Forms I-9.

More specifically, in the course of pre-hearing discovery activities, OSC's Ms. Mackela secured the sworn deposition testimony of Ms. Griffin on February 24, 1998 in Dover, Delaware (Complainant's Exh. 4 at 2, 3). At pages 26 and 27 of the transcript of her deposition the following six questions were asked by Ms. Mackela and Ms. Griffin, testifying under oath, replied as follows:

Q *** Do you request to see documents to verify the information that employees provide in Section 1, such as their social security number and alien number?

A Do we request to see documents?

Q To verify that information, yes.

A Yes.

Q You do that at the present time?

A Yes.

Q Have you done that since March of 96?

A Yes.

Referring to that earlier sworn deposition testimony and in reply to questions asked by Ms. Ferris, Townsend Culinary's trial attorney and counsel of record, Ms. Griffin testified that she had not in fact required that Townsend Culinary's employees provide such documentation in order to obtain employment at Townsend Culinary.

In order to rehabilitate her earlier, and contradictory, deposition testimony on February 24, 1998, concerning that identical line of questioning, Ms. Griffin explained that at her earlier deposition she did not have before her a copy of a Form I-9, and also because "I don't handle the I-9's that often, I had confused Section one with Section two" (T. 318).

On cross-examination, Ms. Griffin stated that every job applicant at Townsend Culinary was required to fill out an employment application. She also testified that while she filled in for the absent HR Manager at Townsend Culinary in 1996 she met one Norma Mejia, then a HR clerk at Townsend Culinary, who had assisted her in completing Forms I-9 by having acted as a Spanish interpreter in the course of interviewing and hiring unilingual, Spanish-speaking job applicants/employees.

She further testified on cross-examination that she did not believe that Ms. Mejia had asked employees to supply their resident alien cards, their work permits or their social security cards so that Ms. Mejia could photocopy those documents.

Ms. Griffin also denied that she had requested that Townsend Culinary employees provide those same documents so that she could verify their social security numbers, as well as the numbers of their resident alien cards.

She also testified on cross-examination that in the course of filling in at Townsend Culinary in Laurel, Maryland in 1996 she had required employees to complete Forms I-9 and further that she had occasionally filled in Section 1 of those forms for those employees.

Linda Thompson, Townsend Culinary's next witness, the HR Manager at Townsends, Inc. in Millsboro, Delaware, testified that she has been employed there since 1986. She neither speaks nor understands Spanish.

She was detailed to Townsend Culinary in Laurel, Maryland in June or July, 1996. Her duties consisted of having checked the Forms I-9 prepared for that firm's employees. If any employees required assistance, she arranged to have Norma Mejia, one of Townsend Culinary's Spanish-speaking HR clerks, help them.

Ms. Thompson testified that she did not request any particular documents in the course of checking the Forms I-9 for completeness and presumably she only dealt with the Forms I-9 which pertained to the then newly-acquired employees of Grace Culinary inasmuch as she stated that she had not been involved with the preparation of Forms I-9 for newly-hired Townsend Culinary employees.

On cross-examination, she stated that she was present as Ms. Mejia assisted the employees with their Forms I-9 but she was unaware what Ms. Mejia was telling them, presumably since Ms. Mejia spoke to them in Spanish. But it was her understanding that in the event that an employee was required to reverify their continuing work authorization status it was necessary that they present an INS-issued document for that purpose.

Rodolfo (Rudy) Medina, Townsend Culinary's fourth witness, testified that he worked at Townsend Culinary from August, 1996 until December 12, 1997, in the position he described as having been that of Complex HR Manager.

His testimony provided the following biographical data. He was born on March 9, 1966 in Patterson New Jersey and was raised in a "military environment" since he had uncles and relatives who served in the armed services (T. 418). Mr. Medina also testified that he had always wanted to be a Marine because he preferred the structure and authoritarian atmosphere provided by the military services. He feels that the military is "very organized" and that their tasks are carried out with there being, in his words, "no questions asked." (T. 418). He tried to enlist in the Marine Corps and stated that "I made it except for the physical because I declined it because I won the scholarship, ***" and that he thereafter accepted a three-year college athletic scholarship, which had been awarded based upon his participation in martial arts tournaments. He received that scholarship from North Georgia Military College in Dahlonega, Georgia, where he majored in pharmacy initially, prior to changing his major to chemistry. He was a member of the R.O.T.C. program at that school and was

graduated in 1989 with the rank of Second Lieutenant in the U.S. Army and was awarded a Bachelor of Science degree. He is fully fluent in Spanish.

Mr. Medina also testified that upon leaving North Georgia Military College he was required to serve three years active duty in the U.S. Army and he then planned to make the military his career. In 1992 he extended his service period for two additional years before deciding to abandon his military career since the armed services were then downsizing.

After receiving his commission in 1989 he wanted to attend a pharmacy school in the Army but the competition was such that he was not selected for that program. Instead he was assigned to the Medical Services Corps in Fort Hood, Texas after completing an officer training course. Being fully fluent in Spanish, he was detailed as a Spanish translator to Honduras, where he served for an undetermined period. He returned to Fort Hood for one month before serving the next nine months in Desert Storm performing medical administrative duties.

In April, 1991 he returned to Fort Hood and served there for the next 20 months, or until December, 1992. During that period he also served on the Arizona and Texas borders with Mexico as a Spanish translator in a narcotics interdiction effort. He was then transferred to Camp Kesa, Korea where he served for one year prior to his release in January, 1994.

When asked how many jobs, including his then present one, he has held since leaving the military in January, 1994 until testifying on May 7, 1998, or in a period of some 40 months at most, he replied that he had held three positions (T. 360). But his testimony revealed that he had worked for four firms over that 40-month period, or more likely a period which could not have exceeded 38 months in length. Those companies having been Cargill, The Louis Rich Division of Kraft Foods, Townsend Culinary and Con Arga, the firm at which he was employed on May 7, 1998, the date upon which he testified.

His testimony disclosed that he began work at Cargill on an undetermined date, but presumably no earlier than March, 1994 since he worked there for eight months before starting his next job on an undetermined date in 1995. He started at Cargill in

its California, Missouri plant and was subsequently transferred to that firm's Buena Vista, Georgia facility.

His position at Cargill was that of employment supervisor and he remained there for eight months or so before joining the Louis Rich Division of Kraft Foods in Newberry, South Carolina in 1995 as an employment manager for about one year. In August, 1996 he joined Townsend Culinary in Laurel, Maryland as its Complex HR Manager. He interviewed for that position with Jim Waltson, a Vice President in Townsend Culinary's HR Department. He stated that Mr. Waltson described his job duties to include the preparation and oversight responsibilities of Townsend Culinary's Forms I-9 program. He remained for some 16 months before leaving on December 12, 1997, because he wished to be near his parents who were then ill and living in San Antonio, Texas. He now lives in Farmersville, Louisiana, some five hours from San Antonio. He is currently employed by Con Agra in an undetermined capacity at an undisclosed location.

He testified that his assignment at Cargill involved the preparation of Forms I-9 and that those duties in that firm's Missouri facility comprised some five to ten percent of his work duties. His job in Buena Vista, Georgia required that he work on those forms for an unspecified portion of each of his workdays.

At Townsend Culinary, his duties included being responsible for employee benefits, workmen's compensation, and the hiring process, including employee orientation and preparation of employment applications and Forms I-9 for all employees. In his job as Complex HR Manager, he supervised the HR Coordinator, Ellen Howard de Perez.

Mr. Medina described the Form I-9 process at Townsend Culinary during his 16-month tenure as follows. All new employees attended an orientation class, at which a Form I-9 was given to each. They were told to complete Section 1 of the Form I-9 and to provide any of the documents listed in Columns A, B and C on the reverse side of the form. Translators were always present at the orientation sessions in order to assist those newly-hired employees who could not read or write.

On direct examination, he was specifically asked by Townsend Culinary's counsel whether the employees were required to show any particular document or a particular combination of documents,

and he replied: "No. I mean, we're not allowed to ask for specific documents. We went down (sic) as listed on the back of the I-9, column (sic) A, B and C." (T. 352). He stated that those employees who were U.S. citizens were more likely to have presented documents from Columns B and C listed on the Forms I-9. He also testified that he was aware of the difference between a restricted and an unrestricted social security card.

He also testified that Townsend Culinary did not have a policy of trying to avoid hiring non-U.S. citizens since the firm actively recruited persons of that status, a group which comprised in excess of 85 percent of its workforce.

He stated that Townsend Culinary experienced a high rate of employee turnover which he attributed to the fact that a significant number of its employees were seeking other employment for reasons unknown to him (T. 355). Resultingly, he contacted the Lutheran Services and other community service organizations for the assistance in "hiring refugees" (T. 353). As Mr. Medina explained: "If we needed 20 employees, we would call them. They are all legal because they did their checks there. I mean, we didn't do the check. Once they brought them in we interviewed them, went through the process. We hired them, and that's how we did it. I mean, they were all legal employees." (T. 353, 354).

Mr. Medina testified that Townsend Culinary did not require that any or all job applicants provide copies of their visas when filing their Townsend Culinary employment applications.

He also testified that Townsend Culinary maintained a file of their Forms I-9 which were audited each month. Any employee whose employment authorization date was expiring within 60 days was contacted and advised of that fact (T. 367, 368).

Mr. Medina stated that he had met Ana Torres, a former Townsend Culinary employee, in the following manner. In October or November, 1996, in the course of a routine audit of the employees' Forms I-9, he noted that there was no Form I-9 on file for her, there was only an employment authorization card containing a 1992 expiration date.

He stated that he "confronted her" (T. 368) and that she produced an expired INS Notice of Action form. Mr. Medina told Ms. Torres that he could not accept that notice "because it wasn't

part of the I-9 listing”, and that they filled out Section 1 of a Form I-9, to which she affixed her dated signature. On the following day, Ms. Torres gave him a valid notice of action and he computed a date some 80 days forward from the date upon which Ms. Torres had received that notice of action.

He also testified that in February, 1997 he again “confronted” (T. 369) Ms. Torres because he had somehow misplaced her Form I-9 but that he had not misplaced the valid INS Notice of Action document which she had given him in October or November, 1996.

Mr. Medina stated that he informed her that her notice of action document was already past due 80 days. He asked if she had any of those identity and employment eligibility documents listed on the back of the I-9 and she told him that she did not but that her lawyer was in the process of securing a new employment authorization card for her.

He stated that on the undetermined date upon which he had lost her Form I-9, Ms. Torres’ EAD was some 120 days beyond its expiration date. He “finally confronted her again” (T. 369) and told her that her card had expired and he would have to terminate her employment. He testified that Ms. Torres had not offered to show her social security card in order to reverify her work authorized status (T. 369).

He attempted to fill out a new Form I-9 for Ms. Torres on her termination date but she was upset and refused to sign it. He also testified that she did not show any documents to him at that time and that she wanted him to accept her notice of action, instead, as well as her statement that her lawyer was “working on it.” He told her that she had a right to reapply for employment at Townsend Culinary for a period of six months. He also testified that Ms. Torres came in a few weeks later and got an employment application form and took it home.

She returned that application and he noted that she had not signed it. He contacted another employee, Alex Bermudez, and asked him to have Ms. Torres come back and sign the application. A few weeks later, she came to the office and told him that she had received her employment authorization card and wanted to return to work, but at that time Townsend Culinary was laying off people and no jobs were available. He told her that when he had a job opening he would call her. Later, on an unspecified

date, Ms. Torres was replaced by a Vietnamese worker named Hung Viet Pham, who was also a non-U.S. citizen.

Mr. Medina gave the following testimony concerning Ms. Delmy Guerrero, the other former employee of Townsend Culinary on whose behalf an OSC document abuse charge was also filed.

He met Ms. Guerrero in November or December, 1996 as a result of his having conducted his monthly review of the firm's Forms I-9. He noted that her EAD would expire in about 60 days and he advised her to come to his office and he arranged for a supervisor to be present for the purpose, in his words, "to kind of just let her know hey, your card is expiring on this date. I just want you to kind of support me in terms of if you have any legal documentation when that time comes for you to, you know, apply for your employment authorization packet I like to call it." (T. 372).

Mr. Medina further testified that he then reminded her of that upcoming expiration date and she told him that an attorney was assisting her in that matter. Ms. Guerrero gave him written receipts which verified that she had paid the fees in connection with extending the EAD expiration date but he advised her that he could not accept that documentation. He denied that Ms. Guerrero had offered to produce her social security card. He also testified that he told her to produce any of those documents listed in Columns A, B or C on the Form I-9, instead (T. 372, 373).

He gave the following account of Ms. Guerrero's termination in January or February, 1997. Ms. Guerrero requested that she be allowed to continue working since her attorney was still working on her "paperwork." He then asked her whether she had any of the documents listed in Columns A, B, or C and she replied that she did not "so I let her go that day." (T. 374). Ms. Guerrero requested him to call the INS on their toll free telephone number in Plano, Texas. He testified that he did so but that line was busy. He again called that INS hotline number and was advised that "her papers are in the process or something like that to that effect, and the thing is if - - that's all I can remember there." (T. 374).

Before proceeding, it should be noted that Ms. Guerrero did not likely furnish an INS hotline telephone number in Plano, Texas, a suburb of Dallas. That because in her earlier testimony,

as confirmed in OSC's documentary evidence (Complainant's Exh. 10B), Ms. Guerrero's representative, Ms. Raina Reyes, of CARCEN, in Washington, D.C., had been in contact earlier with the Vermont Service Office of INS, the telephone number of which has been shown to be area code 802 527-3160.

It is most unlikely that in February or March, 1997 Ms. Guerrero, in an attempt to convince Mr. Medina that INS was then in the process of updating her work authorized status, would have given him the telephone number of an INS office in Plano, Texas, which is located in area code 972, in order to verify that fact since the INS Vermont Service Office, which is in area code 802, was the office then working on her work authorized status extension request.

Mr. Medina also stated that he telephoned "the Department of Social Security" and provided Townsend Culinary's federal I.D. number, as well as Ms. Guerrero's first name, surname, gender and birth date. He was advised that "her card is expired or whatever the issue is, and she can no longer continue to work there, so please do not hire her. Based on that, that's what I did" (T. 375). Elsewhere in his cross-examination testimony, he stated that he could not remember the name of the Social Security Administration employee with whom he had that conversation, that he could not state whether he had spoken to a man or a woman, but he thought it had been a woman, that he could not remember the length of that telephone call, and that he made no written notes of that conversation (T. 400).

A few days after terminating Ms. Guerrero, he received a telephone call from OSC's Ms. Jeanette Milanés, who had called on behalf of Ms. Guerrero, whom he told "— — before you go any further, I'm not here to cut any deals. Please contact Barry Willoughby." (Townsend Culinary's attorney) (T. 375).

He stated that Ms. Milanés also suggested that Ms. Guerrero be permitted to complete another Form I-9 but that he thought she was referring to an employment application and told her that he would telephone Ms. Guerrero and have her fill out another employment application. In addition, he also told Ms. Milanés that there were no jobs available at that time and again requested that she contact Mr. Willoughby, Townsend Culinary's attorney.

Mr. Medina also testified that “during a union negotiation” an attorney representing an unidentified union “basically told us that Ms. Guerrero will accept any job that Townsend Culinary will provide.” (T. 376). He told that unidentified attorney that he then had an open position in the sanitation department on the third, or midnight, shift at the same rate of pay, plus night shift salary premiums. He also stated that he then sent a letter to Ms. Guerrero on March 19, 1997 (Respondent’s Exh. 12). Ms. Guerrero telephoned him stating that she would accept that position and he told her that he would send another letter to her explaining the orientation procedure. He stated that he then sent a confirming letter to her, but the documentary exhibits of Townsend Culinary fail to support that contention.

Instead, Townsend Culinary’s evidence discloses that on March 27, 1997, some eight days after sending the previous letter to Ms. Guerrero, Mr. Medina sent another letter (Respondent’s Exh. 13) to her in which he recited that Ellen H. de Perez, a Townsend Culinary HR Coordinator, had telephoned Ms. Guerrero on the previous day in order to have Ms. Guerrero attend an orientation class on the next day, March 27, 1997.

That Townsend Culinary exhibit further recites that Ms. Guerrero was advised in that March 27, 1997 correspondence that “You did not appear at your appointment time or call to reschedule. We have not heard from you since March 27, 1997.” The letter went on to advise her that Townsend Culinary was therefore assuming that she was no longer interested in their offer of a job as a sanitation worker on the third shift and for that reason that employment offer was being withdrawn.

Mr. Medina further testified that Ms. Guerrero’s former position in the firm’s Casing Department was filled by one Abukar Amin Mohamed, who is also a non-U.S. citizen. He did not supply the dates upon which that employee had applied for employment at Townsend Culinary nor the date upon which he began working there.

Returning to Ms. Guerrero, he stated that after she had been terminated at Townsend Culinary an unidentified union filed a document abuse charge on her behalf, as well as a sexual harassment charge (T. 379). He was shown the four-page document which was marked and entered into evidence as Respondent’s Exhibit 14. Mr. Medina described that as being a National Labor Relations

Board (NLRB) Charge Against Employer, brought against Townsend Culinary, Inc. on behalf of former employees Delmy Guerrero and Ana Torres because each had supported the charging party, United Food and Commercial Workers International Union, AFL-CIO, apparently in the latter's then ongoing effort to organize the workforce at Townsend Culinary.

That NLRB charge also contained the information that Ms. Guerrero had been unlawfully terminated on February 13, 1997 and that Ms. Ana Torres had been unlawfully terminated on March 3, 1997 for having supported that union. The charge further stated that in December, 1996 Townsend Culinary Supervisor Norma Mejia had unlawfully threatened employee Ms. Guerrero for supporting that union and that in January, 1991 Townsend Culinary Supervisor Rudy Medina had threatened Ms. Guerrero for the same reason.

The NLRB charge contained in Respondent's Exhibit 14 also contained the allegation, among others, that Townsend Culinary had discriminatorily demanded improper immigration documentation from union supporters.

Mr. Medina was also shown the three-page document which was identified and entered into evidence as Respondent's Exhibit 15 by Ms. Teresa Fariss, Esquire, Townsend Culinary's trial attorney and counsel of record. He described that as being a Notice of Charge of Discrimination and a Charge of Discrimination which the same union filed on behalf of Delmy Guerrero with the Equal Employment Opportunity Commission (EEOC) on September 30, 1997. The Charge of Discrimination, Charge Number 120971447, alleges that Ms. Guerrero, then 31 years of age, had been subjected to sex discrimination and retaliation as a result of the egregiously improper job-related sexual misconduct to which Ms. Guerrero was allegedly subjected, as specifically described therein (Respondent's Exh. 15, at 2).

Ms. Fariss also handed to Mr. Medina the three-page document marked and entered into evidence as Respondent's Exhibit 16. He described it as being a copy of Ms. Ana Torres' EEOC Charge of Discrimination, Charge Number 120971449, filed on September 30, 1997, also. That filing alleged that the then 38-year old former Townsend Culinary employee, who had worked as a packer in the can opening room, had also been sexually harassed in March, 1997 in those manners alleged therein and also had been termi-

nated in March, 1997 because she had allegedly refused the sexual advances of the two Townsend Culinary supervisors named therein (Respondent's Exh. 16 at 2).

On cross-examination, Mr. Medina testified that all job applicants at Townsend Culinary were required to fill out an employment application. He also stated that employees sometime provided copies of their required identity and employment eligibility documents with their job applications and did so voluntarily because Townsend Culinary never requested that such documents be produced.

He identified Complainant's Exhibit 10A, consisting of five pages, as being copies of Ms. Guerrero's completed Form I-9, copies of her Employment Authorization Card, as well as her unrestricted social security card, number 223 55 2134, a copy of her fully completed INS Form I-765, Application for Employment Authorization, dated December 6, 1996, and payment receipts dated December 6, 1996 and February 3, 1997.

Mr. Medina could not initially recall having written anything on the reverse side of Ms. Guerrero's Form I-765 but upon having been shown a copy of the reverse side of that form (Complainant's Exh. 10B) by OSC trial counsel on cross-examination he testified that he did in fact recognize the handwriting thereon as being his. He had written the name of OSC Attorney Janet Milanes and her direct line telephone number in Washington D.C., as well as the INS telephone number which he previously testified he had unsuccessfully tried to call, 1 802 527-3160.

He stated that he did recall having spoken to Ms. Milanes on March 10, 1997 and that she had advised him that he could accept the unrestricted social security card which Ms. Guerrero had presented as proof of her work authorized status. He also testified that he did not offer to return Ms. Guerrero to her former job in the Casing Department because that job was not then open since Townsend Culinary was then downsizing and laying off workers.

Mr. Medina testified that Ms. Guerrero's job in the Casing Department had been filled on March 19, 1997, only nine days after his telephone conversation with Ms. Milanes on March 10, 1997, in which he had told Ms. Milanes that Ms. Guerrero's former job in the Casing Department was not available any longer because

the firm was reducing its workforce and laying off workers. He also stated that Ms. Guerrero's position had been filled by Mohamed Abukar Amin and that he could not recall the date upon which he had applied for that position. But upon being shown the four-page exhibit marked and entered into evidence as Complainant's Exhibit 40, he testified that it was a copy of a Townsend Culinary Employment Application signed by one Abukar Mohamed on March 19, 1997 (Complainant's Exh. 40, at 4). It is to be noted that the first page of that employment application is dated March 18, 1997 in the handwriting of a person obviously other than Mr. Mohamed, and presumably the date upon which Mr. Mohamed was given that employment application for completion and return.

Mr. Medina also testified that he had offered Ms. Guerrero an alternate night shift position, one which started at 12 midnight, and he denied that he was then aware that Ms. Guerrero was a single mother raising two young children (T. 391).

Mr. Medina was handed the three-page document marked and entered into evidence as Complainant's Exhibit 34, the first page of which is the first page of a Form I-9 dated March 5, 1997 concerning Ms. Ana Torres. His attention was invited to Section 2, the Employer Review and Verification portion of that form, which is to be completed and signed by the employer.

He stated that he had affixed his signature in Section 2 of that Form I-9, attesting under penalty of perjury that he had examined the EAD which Ms. Torres had presented namely, a Form I-688A, number A094185850, bearing an expiration date of April 20, 1997, that that document appeared to have been genuine and that Ms. Torres began employment at Townsend Culinary on that date, March 5, 1997.

Mr. Medina admitted that his statements on that Form I-9 of Ms. Torres were not true since she had not shown any documents to him on March 5, 1997, nor did she begin her employment at Townsend Culinary on that date. In fact, she had instead been terminated by him on or about that date (T. 393).

He variously testified that on March 5, 1997 he had seen the original Form I-688A, with an expiration date of April 20, 1997, that the only original document provided to him by Ms. Torres was a second Notice of Action, and that he "guessed" that he

had not in fact examined the original document. He could not recall whether he had offered to have Ms. Torres return to her former job at Townsend Culinary but did recall that she had completed and turned in an employment application form, but that that form had been lost and that he did not know its whereabouts (T. 394, 395).

Mr. Medina also testified that Ms. Torres' can opening room position was filled on May 13, 1997 by one Hung Viet Pham. He also denied having asked employees to show their resident alien cards, work permits and social security cards in order to assist in preparing their Forms I-9.

Elsewhere in his cross-examination testimony, Mr. Medina stated that his formal Form I-9 training had been gotten at Cargill, presumably in 1994, and consisted of some eight hours of instruction by a retired INS agent (T. 401).

He could not recall having told Ms. Guerrero that she would lose her job at Townsend Culinary if she did not furnish documents from among those listed on the reverse side of the Form I-9.

However, Mr. Medina did recall having Ms. Guerrero come to his office in February, 1997 to discuss her documentation and that he arranged to have a supervisor present, Norma Mejia, then a supervisor in the Casing Department. He explained that he had arranged to have Ms. Mejia present at his meeting with Ms. Guerrero because "I like to have a supervisor there as a witness just to let the employee know that you have to comply, you know, what the I-9 basically states because I don't like to do things myself. I like to have a witness, and that's my procedure" (T. 408).

On redirect examination by his attorney, Teresa C. Fariss, Esquire, he was reminded that he had used the word "confronting" in his earlier testimony and he was asked whether he had been rude to Ms. Torres. Mr. Medina replied "Oh, no, one thing is — — one thing I've always been taught since I've been young is you never disrespect people. If you want respect, you get respect right back." (T. 413).

He was then asked by Ms. Farris to describe his tone of voice in talking to Ms. Torres and Mr. Medina answered "Usually what I do when I confront an employee I don't like to — — I don't

make scenes or nothing like that. I just pulled her off the line and said you know, Ms. Torres, I'm letting you know that I don't have any type of documentation. Can you please come down to, you know, the Human Resources and fill out an I-9? She said okay. I'll do it. No problem." (T. 413, 414).

Ms. Zenaida Velez-Dorsey, Townsend Culinary's fifth witness, testified that she has a masters degree in human resources development, that she is fluent in Spanish and had worked as a Human Resources Administrator at Grace Culinary before that firm was acquired by Townsend Culinary in 1996. Her last day at Townsend Culinary before going on sick leave was May 9, 1996, some 54 days after Townsend Culinary acquired Grace Culinary. She is currently employed as a human resources specialist at Meals on Wheels of Central Maryland.

She participated briefly in the transition of the Grace Culinary employees to the workforce of Townsend Culinary in the spring of 1996. Her duties consisted of collecting and inspecting documents from Grace Culinary workers for Form I-9 purposes. Ms. Velez-Dorsey stated that the documents which she requested were those listed on the reverse side of the Form I-9.

The completion of the Forms I-9 by the Grace Culinary workers was part of the hiring process. Those employees were required to fill out Townsend Culinary employment application forms and she reviewed those forms, called the applicants when job openings became available, set up appointments, interviewed them, and she requested documents which confirmed their employment eligibility in the U.S. from those Grace Culinary applicants who had accepted job offers from Townsend Culinary. She usually completed their Forms I-9 at that time and assisted any Spanish-speaking employees with the necessary translations. Ms. Velez-Dorsey testified that she has had no formal training in preparing Forms I-9 and simply referred to the INS Handbook for Employers for assistance in completing those forms.

On cross-examination, she testified that she had requested documents, such as social security numbers and alien registration card numbers, from employees in order to verify the information that the employees had provided in completing Section 1 of their Forms I-9. She stated that she was also involved in reverifying the employees' employment eligibility when their work authorization cards had expired. In the course of doing so, she required that

the employees furnish an INS-issued document for that purpose (T. 450).

Mr. Barry A. Crozier, Townsend Culinary's final witness, testified that he is a certified public accountant (CPA) with the firm of Belefant, Lyons and Shuman, P.A., in Wilmington, Delaware. He was awarded a B.S. degree in accounting from the University of Delaware in 1971, a M.S. degree in taxation from Widener University and he became a CPA in 1974.

At the outset of his testimony he was given four exhibits by Ms. Teresa Farris, Townsend Culinary's trial attorney and counsel of record. Those were marked as Respondent's Exhibits 8-11 and were subsequently formally admitted into evidence. Those exhibits consisted of some 13 typewritten pages in total, but only nine pages of compilations since four of these pages were photocopies of the front and rear pages of a blank Form I-9 namely, pages 3 and 4 and 2 and 3 of Respondent's Exhibits 8 and 9, respectively. He testified that the Forms I-9 from which that data had been gleaned were those furnished to him by Ms. Farris some three months prior to the hearing.

Mr. Crozier testified that those two pages of the four-page Respondent's Exhibit 8 consisted of Townsend Culinary Forms I-9 compilations, concerning some 537 of that firm's former employees. He also testified that the single page of Respondent's Exhibit 9 which deals with statistical Forms I-9 data concerns some 381 current employees of Townsend Culinary. He stated that the information summary set forth in Respondent's Exhibit 9 is identical to that contained in Respondent's Exhibit 8, except that it concerns Townsend Culinary's current employees.

He further testified that the information in Respondent's Exhibit 8 was broken out by "Citizen Category" and that that category was further segmented to include U.S. citizens or nationals, a second category for lawful permanent residents and a third grouping which covers those employees who were authorized to work in the U.S. until a specified date. A separate column listed the documents which had been furnished to Townsend Culinary in the Form I-9 process.

Mr. Crozier calculated the percentage of the Forms I-9 given to him by Ms. Farris which pertained to non-U.S. citizen Townsend Culinary employees to have been "just over 79 percent," according

to his recollection (T. 457). That compares to the 79.9 percent, according to the OSC's calculations set forth in Complainant's Exhibit 38.

On cross-examination, Mr. Crozier testified that he had never analyzed Forms I-9 prior to having been requested to do so in February, 1998 by Teresa Fariss, Esquire, Townsend Culinary's trial attorney and counsel of record. When asked how much time he had spent in analyzing the Townsend Culinary Forms I-9 he replied, "I don't recall how long it was, to be honest with you. I didn't bring that data with me." Upon having been asked whether he had been paid to do so, he answered, "I have been paid or will be paid." (T. 467). Ms. Mackela further inquired into the number of hours he had spent analyzing the 841 Forms I-9 upon which he had prepared an analysis, he testified that he had spent more than one day and less than one week (T. 467, 468).

Mr. Crozier also stated that the Forms I-9 provided to him by Ms. Farris had not been Bates stamped or numbered in any manner and that Ms. Farris had instructed him to analyze those Forms I-9. He further testified that he counted the numbers of Townsend Culinary Forms I-9 which had been completed by those employees who were U.S. citizens, by those who were permanent resident aliens and by those whose status was that of work authorized aliens.

He also testified that the detailed statistical data concerning the 211 Townsend Culinary employees whose names are listed on the seven-page document comprising Respondent's Exhibit 10, as were the compilations which concern the 94 Townsend Culinary employees listed on the three-page document marked and entered as Respondent's Exhibit 11, had not been prepared by him. Instead, those documents had been prepared entirely by Townsend Culinary's trial attorney, Ms. Teresa Farris, and simply forwarded to him for his review (T. 469).

Given that fact and in reply to an inquiry by Ms. Mackela, Mr. Crozier testified that he has no idea how the preparation dates for the 305 Forms I-9 covered in Respondent's Exhibits 10 and 11 had been determined. He later testified that he had "spot checked" those dates and still later that he could not recall whether there were any permanent resident aliens included in the Respondent's Exhibit 11 list of aliens who had provided unrestricted social security cards in the Form I-9 process (T. 471, 472).

Mr. Crozier was requested to refer to Respondent's Exhibit 11 and to determine whether any permanent resident aliens were included and he replied that there were none (T. 473). His attention was then invited to Respondent's Exhibit 10, more specifically to the list of Townsend Culinary employees who presented restricted social security cards, and was asked whether he knew if any of those employees had become permanent residents. He replied that he did not.

He was then asked whether he had checked those lists in order to be sure that all employees who were aliens with temporary work authorizations and also had restricted social security cards had in fact been listed in Respondent's Exhibit 11. Mr. Crozier replied that all such Townsend Culinary employees had been so listed in that exhibit (T. 474).

Ms. Mackela then handed to Mr. Crozier the five-page document she had earlier offered into evidence as Complainant's Exhibit 15. She then requested him to review that exhibit and state whether an unrestricted social security card issued to one Oswaldo Padron was included therein. Mr. Crozier acknowledged that there was such an unrestricted social security card, 218 45 8122. Given that fact, Ms. Mackela then inquired whether Oswaldo Padron's name had been listed by him as one of the 94 former and current Townsend Culinary employees whose status was that of an alien who had been granted temporary work authorization and who also had been issued an unrestricted social security card (Respondent's Exh. 11). Mr. Crozier testified that Oswaldo Padron's name was somehow not on that list.

Ms. Mackela then immediately produced two other copies of completed Forms I-9 which she had previously entered as exhibits. Referring to Complainant's Exhibit 17, the copy of the completed Form I-9 and supporting documents pertaining to one Maria Carmen Umana, including an unrestricted social security card, 212 33 3184, she asked Mr. Crozier whether Maria Umana's name was on either of the lists of names in Respondent's Exh. 11. He replied that her name was not on those lists, either.

Ms. Mackela then asked Mr. Crozier the same questions concerning a third Townsend Culinary former or current employee, Elsa Viera, another work authorized alien to whom an unrestricted social security card, 106 78 8384, had been issued (Complainant's Exhibit 19, at 1, 3). Once again, Mr. Crozier had to admit that

at least all three of those names were in fact missing from the claimed complete lists of names contained in Respondent's Exhibit 11.

Finally, Mr. Crozier testified that he had not checked all of the Townsend Culinary Forms I-9 in order to determine whether Ms. Farris "missed any" (T. 476).

At the conclusion of his testimony, Ms. Farris, Townsend Culinary's attorney, stated that she would be happy to stipulate that the names of Oswaldo Padron, Elsa Viera and Maria Umana could be added to the pertinent list of other names contained in Respondent's Exhibit 11. Ms. Mackela stated that those three names were the only ones that she could ascertain quickly and that she had quite a long list of other names, but that she chose not to take time to do so since copies of all of the Forms I-9 were then in evidence. Ms. Mackela stated that she would address that matter in her post-hearing brief.

Issues

The first of the five issues presented is that of determining whether Townsend Culinary subjected one of its former employees, Ms. Delmy Guerrero, to document abuse, as alleged in Count I, in violation of the provisions of 8 U.S.C. §1324b(a)(6), by reason of its having demanded, for the purpose or with the intent of discriminating against her, that she produce an INS-issued document in order to reverify her employment eligibility/work authorized status in order to continue her employment at that firm.

Should it be found that Townsend Culinary practiced document abuse against Ms. Guerrero in that manner, an appropriate civil money penalty must be assessed, ranging from the statutorily-mandated minimum sum of \$100 to the maximum amount of \$1,000. In addition, it must be determined whether Ms. Torres is entitled to be compensated for her lost wages, plus interest thereon to the date of this decision, as well as other related expenses and whether Ms. Torres should be reinstated to her former position with full retroactive seniority and employee benefits.

The second issue presented is whether Townsend Culinary also subjected another of its employees, Ms. Ana Torres, to document abuse, as alleged in Count II, by having made an essentially identical employment eligibility documentation demand upon her.

Should that inquiry be resolved in OSC's favor, a civil money penalty sum must also be levied for that unlawful practice, and as in the case of Ms. Guerrero, it must be determined whether Ms. Torres is similarly entitled to lost wages, with interest, reinstatement, and full retroactive seniority and employee benefits.

The next issue is that of determining whether Townsend Culinary refused to rehire Ms. Torres in retaliation for having permitted the Union to file a charge on her behalf with OSC and more specifically, whether that refusal constitutes a violation of the retaliation provisions of IRCA, 8 U.S.C. §1324b(a)(5). Should such a finding be entered, an appropriate civil money penalty of not less than \$250 and not more than \$2,000 must be assessed.

The fourth issue requiring our consideration consists of deciding whether, as OSC has alleged in Count III, Townsend Culinary engaged in a pattern or practice of document abuse against those of its employees and job applicants who were/are not U.S. citizens because of its routine and repeated practice of requiring that those persons produce an INS-issued document attesting to their work authorized status for initial employment eligibility, as well as for reverification purposes, but not putting in place comparable documentation requirements for those of its employees or job applicants who were U.S. citizens, thus resulting in the disparate treatment of the persons in those two groups.

As in the case of the other alleged document abuse violations, appropriate civil money penalty sums, varying from \$100 to the maximum sum of \$1,000 for each such proven violation, must be assessed against Townsend Culinary in the event that it is found that it had also violated the provisions of 8 U.S.C. §1324b(a)(6) in that manner.

The fifth and final issue to be addressed is the Count IV charge that Townsend Culinary also engaged in a pattern or practice of citizenship status discrimination by reason of its having engaged in a violative pattern or practice of disparate treatment in its hiring process brought about by its having routinely required that all non-U.S. citizen employment applicants, including many protected individuals, produce INS-issued documents to establish their work authorized status as a condition of employment while not requiring that similarly situated U.S. citizens establish their U.S. citizenship for the same purpose.

Should it be found that Townsend Culinary subjected non-U.S. citizen employment applicants, including many protected individuals, to citizenship status discrimination in that manner appropriate civil money penalties ranging from the minimum sum of \$250 to the amount sum of \$2,000 for each such individual against whom that type discrimination was practiced, 8 U.S.C. § 1324b(g)(2)(B)(iv)(1).

Discussion, Findings and Conclusions

In having enacted IRCA in 1986 as an amendment to the Immigration and Nationality Act (INA), Congress did so in order to stem the increasing number of illegal immigrants entering the United States in search of employment. The pertinent provisions of the statute established a procedure for verifying the employment eligibility of all job applicants, including aliens authorized to work, lawful permanent residents and U.S. residents, 8 U.S.C. § 1324a, and outlawed certain unfair immigration-related employment practices, 8 U.S.C. § 1324b.

The provisions of IRCA provide that it shall be illegal for any employer having four or more employees to knowingly hire any undocumented alien, or to hire any person without reviewing those documents presented by those persons in connection with preparing Section I of the required Form I-9 in order to verify that person's identity and employment eligibility status, or to discriminate against U.S. citizens or work authorized aliens based upon their national origin or citizenship status.

The wording in 8 U.S.C. § 1324b was further expanded by the passage of the Immigration Act of 1990 (IMMACT) to include a provision concerning retaliation, among other employer actions, § 1324b(a)(5), as well as the so-called document abuse provision, § 1324b(a)(6). The wording of that latter newly-added subparagraph made it illegal for employers to request, for purposes of satisfying the identity or employment eligibility verification requirements contained in section 1324a(b), that persons present more or different documents than those required under that section or by refusing to honor documents tendered that on their face reasonably appear to be genuine. The wording of § 1324b(a)(6) further provides that such a request by an employer for more or different documents, or its refusal to honor facially acceptable identity and employment eligibility documents, would be regarded as

an unfair immigration-related employment practice relating to the hiring of individuals.

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 identity or employment 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 refuse to accept documents which are facially valid nor may they insist that a job applicant provide a specific document in order to establish employment eligibility. *United States v. A.J. Bart, Inc.*, 3 OCAHO 538 (1993).¹

It should also be noted that IRCA's document provisions also apply, as under these facts, to the employer's reverification of the work authorized status of its employees, such as Ms. Guerrero and Ms. Torres, *United States v. Padnos Iron & Metal Co.*, 3 OCAHO 414, at 9, 10 (1992).

OSC's evidentiary burden in proving all of its allegations, including these document abuse allegations, as well as its charges of retaliation, and patterns and practices of both document abuse and citizenship status discrimination, is that of proving those charges by a preponderance of the evidence 8 U.S.C. § 1324b(g)(2)(a).

We now review this record in order to determine initially whether Townsend Culinary improperly subjected Ms. Delmy Guerrero to document abuse in connection with the reverification of her work authorized status.

Ms. Guerrero entered the United States illegally from El Salvador on an undetermined date but she became authorized to work in the United States by having filed an application for asylum under C.F.R. § 274a.12(c)(8), according to her EAD which was valid from February 12, 1996 until February 12, 1997 (T. 84,85, Com-

¹ Citations to the Office of the Chief Administrative Hearing Officer (OCAHO) precedents reprinted in bound Volumes 1 to 7, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 to 7 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

plainant's Exhs. 8 and 10A, at 2098). She began working at Grace Culinary prior to Townsend Culinary's having acquired that firm in March of 1996. Townsend Culinary prepared a Form I-9, dated March 26, 1996, the date upon some 300 or so Grace Culinary employees were rehired or assimilated into Townsend Culinary's workforce after the acquisition. That Form I-9 copy (Complainant's Exh. 10A) clearly discloses that on that date Ms. Guerrero had presented that EAD, containing her photograph, as well as an unrestricted social security card, and that photocopies of those documents, which indisputably confirmed both her identity and employment eligibility, were attached to that Form I-9 copy.

Later in that year, on December 6, 1996, Ms. Guerrero applied to INS for an updated EAD (T. 101, Complainant's Exh. 10A, at 2099) and INS approved her application on January 23, 1997 (T. 86, Complainant's Exh. 8). INS then issued a new EAD on February 13, 1997, which was valid until February 12, 1998 (Complainant's Exhs. 8, 11) and Ms. Guerrero received that updated work authorization document on February 21, 1997 (T. 109). However, on February 13, 1997, some eight days before she received that updated EAD from INS, Ms. Guerrero had been terminated by Mr. Medina because she could not meet his demand that she present her updated EAD by February 13, 1997, and despite the fact that on that date she had not received her updated EAD from INS and had unavailingly shown to Medina the INS correspondence which confirmed her work authorized status extension (Complainant's Exhs. 10A, 10B). This hearing record further discloses that on March 10, 1997, some 21 days after Ms. Guerrero's termination, OSC attorney Jeanette Milanes, Esquire, telephoned Mr. Medina, who denied having demanded INS-issued work authorization documentation from Ms. Guerrero. Ms. Milanes, in an attempt to avoid having to file a formal charge against Townsend Culinary arising out of Ms. Guerrero's unlawful termination, explained unsuccessfully to Mr. Medina that he could have accepted Ms. Guerrero's unrestricted social security card for the purpose of verifying that she was then work authorized (T. 61, 62). Ms. Guerrero then remained work authorized under an EAD valid from February 13, 1998 until February 12, 1999 (T. 85, Complainant's Exh. 8).

We now review the proven relevant facts that surround Townsend Culinary's termination of Ms. Ana Torres, another former Grace Culinary employee who had been hired by Townsend Culinary in the course of its having acquired the former firm in March

of 1996. On March 5, 1997, Ms. Torres was authorized to work in the United States (Complainant's Exh. 6, at 3, Complainant's Exh. 7, T. 83). Ms. Torres had applied to INS for an EAD, which was issued to her on February 27, 1997 and was valid from February 26, 1997 until February 25, 1998 (Complainant's Exhs. 7, 33, T. 81 and 82, 491). On March 5, 1997, some 21 days before Ms. Torres received that EAD from INS, Mr. Medina demanded that Ms. Torres produce an INS-issued document in order to establish her continued work authorization. When Ms. Torres failed to do so, owing to the fact that INS had not sent the EAD to her by that date, she was terminated at Townsend Culinary by Mr. Medina (T. 488, 499). On March 26, 1997 Ms. Torres received her updated EAD from INS and reapplied for work at Townsend Culinary but has not received a job offer from that firm (T. 497, 498).

Since the facts concerning Townsend Culinary's alleged document abuse allegations concerning Ms. Guerrero and Ms. Torres have been shown to having been nearly identical, the following discussion of its liability on those charges will apply to both alleged document abuse infractions. Initially, OSC has demonstrated that Townsend Culinary is an entity covered by IRCA's unfair immigration-related employment practices provisions since at all times relevant to the charges at issue it employed more than three employees (Complainant's Exh 3, Admission 2).

In *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798 (9th Cir. 1998) it was held that in order to establish a violation of §1324b(a)(6) based upon the proposition that, as here, the respondent firm therein had requested more or different documents than those required under the Form I-9 employment verification system, as distinguished from violations of §1324b(a)(6) based upon an entity's refusal to honor facially valid documents, OSC must prove the following three elements, and do so by a preponderance of the evidence:

- (1) that the 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) that the request was made 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). And in order to establish a "pattern or practice"

of document abuse, OSC must further prove that 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 Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1997)).

Concerning the first element, the evidence persuasively demonstrates that Mr. Medina, despite his denial of having done so, repeatedly made specific requests of Ms. Guerrero and Ms. Torres that each produce INS-issued documents namely, their updated EADs, in order to continue their employment at Townsend Culinary. And merely making such a request satisfies this initial element of proof. *A.J. Bart*, 3 OCAHO 538; *Louis Padnos Iron & Metal Co.*, 3 OCAHO 414.

In considering the second element of proof, whether Townsend Culinary requested more or different documents, OSC has also offered the required measure of reliable and credible evidence in support of its contention that Townsend Culinary, by way of Mr. Medina's unrelenting demands for INS-issued documents had requested that Ms. Guerrero and Ms. Torres furnish more or different documents than required by the employment verification system in order that each establish their continuing work authorized status on the dates in question.

And finally, as concerns the third element, OSC has clearly demonstrated that Townsend Culinary's document requests were made for the purpose of complying with the provisions of 8 U.S.C. §1324a(b). Mr. Medina testified that on March 5, 1997, that date upon which he terminated Ms. Torres, he could not locate her previously completed Form I-9 and that he completed another Form I-9 for her on that date, that form which contained the untrue attestation that she had in fact been hired on that date. OSC urges, and persuasively so, that Mr. Medina had obviously completed that Form I-9, which Ms Torres refused to sign, in order to verify her identity and employment eligibility for purposes of complying with the provisions of §1324a(b).

In addition, OSC's compelling evidence that Townsend Culinary had improperly demanded updated EADs from Ms. Guerrero and Ms. Torres has also proven the third element inasmuch as the pertinent implementing regulation, 8 C.F.R. §274a 2(b)(1)(vii),

deals with verification of employment eligibility, employment verification requirements, and also clearly addresses reverification, thus demonstrating that INS regards reverification efforts as being a part of the employment eligibility verification process.

In view of the forgoing, I find that in having demanded that Ms. Guerrero and Ms. Torres produce updated INS-issued EADs, to the exclusion of all other acceptable documents which would have demonstrated their continued employment eligibility on the dates in question, Townsend Culinary practiced document abuse against Ms. Guerrero and Ms. Torres, in the manners OSC has alleged in Counts I and II, respectively, and in the process clearly intended to subject each and both of them to that unfair immigration-related employment practice.

It is further found that the appropriate civil money penalty sum to be assessed is \$1,000 for each of those proven proscribed practices.

We now consider the remedies available to Ms. Guerrero and Ms. Torres. Persons upon whom employment discrimination is practiced are entitled to back pay, *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 421 (1975). See also *Padnos*, 3 OCAHO 414, at 12, *United States v. Southwest Marine Corp.*, 3 OCAHO 429, at 36 (1992), *DeWitt Nursing Home*, 1 OCAHO 189, at 21.

As the injured parties Ms. Guerrero and Ms. Torres must show that they suffered an economic harm, *Southwest Marine Corp.*, 3 OCAHO 429, at 37. In addition, they must mitigate damages. See e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). Meanwhile Townsend Culinary bears the burden of proving that either or both failed to minimize their damages.

Ms. Guerrero's loss of earnings began on February 13, 1997, her proven termination date, and ended on May 4, 1997, the date upon which she again became employed, or a period of 80 days, or 11½ weeks for our purposes.

Ms. Torres' lost earnings began on her termination date, March 5, 1997 and ended on November 7, 1997, the date upon which she returned to El Salvador following an unsuccessful search for employment. Her lost earnings period is 247 days, or 35½ weeks or so.

The applicable caselaw provides that the back pay award should begin on the respective dates upon which these unfair immigration-related employment practices occurred and that those periods should end on the date of judgment. *See Wellborn v. Reynolds Metal Co.*, 868 F.2d 389, 391 (11th Cir. 1989), *Wells v. North Carolina Bd. of Alcohol Control*, 714 F.2d 340, 342 (4th Cir. 1983), *Cert. Denied*, 464 U.S. 1044 (1984), *Employment Discrimination Law*, 528 (2d ed, Supp. 1989). And back pay awards may not be offset by collateral benefits, *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951), *EEOC v. Ford Motor Co.*, 645 F.2d 183, 195 (4th Cir. 1981), *reversed on other grounds*, 458 U.S. 219 (1982), *Southwest Marine*, 3 OCAHO 429, at 37.

We noted earlier that Ms. Guerrero was unemployed for some 11½ weeks. Her hourly wage at Townsend Culinary was \$5.85, so that her salary for a 40-hour workweek was \$234 and therefore her lost earnings for 11½ weeks total \$2,691.

In addition, Ms. Guerrero has incurred an additional commuting expense of \$27.70 weekly, or \$318.55 in total, as a result of traveling a greater distance to her new employment site. She has computed her weekly commuting expense to Townsend Culinary to have been \$25 whereas her replacement job has caused her to spend \$52.70 each week in travel expenses. She is entitled to be compensated for these additional commuting expense sums. *Harkness v. Sweeny Indep. School Dist.*, 466 F. Supp. 457, 462 (S.D. Tex. 1978), *aff'd*, 608 F.2d 594 (5th Cir. 1979); *United Enviro Systems, Inc.*, 323 N.L.R.B. 8 (1997); *CWI of Maryland, Inc.*, 321 N.L.R.B. 698 (1996), *aff'd in part*, 127 F.3d 319 (4th Cir. 1997); *Maple Tree, Inc.*, 281 N.L.R.B. 612 (1996).

Ms. Torres' hourly rate of pay on her termination date, March 5, 1997, was \$6.10 and applying those criteria to her 35½ week period of unemployment results in a finding that she is entitled to back pay award of \$8,662, or \$244 weekly for 35½ weeks.

In addition to their back pay awards, Ms. Guerrero and Ms. Torres are entitled to prejudgment interest. *Loeffler v. Frank*, 486 U.S. 549 (1988). And that interest should be ordered at the short-term rate for underpayment of taxes utilized by the IRS. *See, e.g., Southwest Marine Corp.*, 3 OCAHO 429, at 37-39. The IRS' short-term underpayment rate from January 1997 through the first quarter of 1998 was 9%, and for the second and third quarters of 1998 was 8% (IRS Press Release, June 8, 1998). In addition,

interest is computed on a quarterly basis, with interest accruing the last day of each calendar quarter. *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291, 1320 (N.D. Ca. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982).

Accordingly, Ms. Guerrero is being awarded prejudgment interest on her \$2,691 back pay award beginning on the last day of that award, May 4, 1997, to August 11, 1999, that date of this Decision, at the rate of 9% from May 4, 1997 through March 31, 1998, or 331 days, or \$219.62, and the rate of 8% from April 1, 1998 until August 11, 1999, or 498 days, or \$293.73, or total prejudgment interest award of \$513.35, or a total back pay and prejudgment interest amount of \$3,204.35. In addition, she is entitled to \$318.55 for commuting expenses.

Ms. Torres is being awarded prejudgment interest on her \$8,662 back pay award from November 7, 1997, or at 9% interest for 144 days, or \$307.54, and at 8% interest for 498 days, or \$945.47, or a combined prejudgment interest sum of \$1,252.01, or a total back pay and judgement interest sum of \$9,914.01.

In addition to the foregoing monetary relief, Ms. Guerrero and Ms. Torres are being granted their requests that they resume working at their former positions and work shifts at Townsend Culinary. Towards that end, Townsend Culinary is hereby ordered to reinstate Ms. Guerrero and Ms. Torres to their original or equivalent positions with fully retroactive seniority rights and all employee benefits.

The next issue to be addressed concerns OSC's charge that Townsend Culinary violated the provisions of U.S.C. §1324b(a)(5) by having committed an unfair immigration-related employment practice by reason of its having refused to rehire Ms. Torres in retaliation for the Union's having filed the OSC charge of document abuse against Townsend Culinary on her behalf.

Before proceeding, it is noted that OSC's retaliation charge against Townsend Culinary was not contained in the October 1, 1997 four-count complaint at issue. However, the retaliation charge is being entertained since the pertinent procedural rule applicable to this proceeding, 28 C.F.R. §68.9(e), provides in pertinent part that: "When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express

or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings . . .”

OSC properly maintains that because the evidence discloses that Townsend retaliated against Ms. Torres and that since the issue of retaliation arises out of the allegations in the complaint, the unlawful retaliatory conduct of Townsend Culinary was also tried by the implied consent of the parties and should be ruled upon in this decision as if that charge had been included in OSC’s complaint.

The retaliation provisions of 8 U.S.C. §1324b(a)(5), provide that:

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate 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 participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against. (Emphasis added.)

In order to prevail on its retaliation allegation, OSC must establish a *prima facie* case of retaliation by showing that Ms. Torres had engaged in a protected activity; secondly, that Townsend Culinary took adverse employment action against her, and lastly, that the protected activity and the adverse action are causally connected. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). Townsend Culinary may then rebut the *prima facie* case by articulating legitimate non-retaliatory reasons for its actions. *Id.* The burden of persuasion then shifts back to Ms. Guerrero to prove that Townsend Culinary’s reason were pretextual. *Id.*

The following proven relevant facts clearly disclose that Ms. Torres has presented a *prima facie* case of retaliation against Townsend Culinary. At the time that the Union filed the OSC charge on Ms. Torres’ behalf she was engaged in a protected activity and Townsend Culinary was aware of that fact, since Mr. Medina had received OSC’s April 1, 1997 notice letter and had forwarded that notice to Townsend Culinary’s attorney (T. 397).

At that time, also, Mr. Medina had in his possession a completed employment application which Ms. Torres had filed on March 26, 1997 (T. 275–77, 497), just five days earlier and which Townsend Culinary presumably received in the mail shortly after April 1, 1997. However, Townsend Culinary refused to restore her to her

former position (T. 498). Rather, it hired a replacement for Ms. Torres on May 13, 1997 namely, Hung Viet Pham (Complainant's Exh. 3, admission 38), who, unlike Ms. Torres, had not filed any type of discrimination charge against Townsend Culinary (T. 398).

OSC's evidence has also demonstrated that there is a casual connection between the protected activity and Townsend Culinary's adverse action owing to the close proximity of the date upon which Ms. Torres' OSC charge filed on March 20, 1997 and May 13, 1997, the date that Townsend Culinary filled her position by having hired a person who had not filed any type of discrimination charge against Townsend Culinary. OSC urges that time periods of less than three months, or some 54 days as here, can establish the required casual connection. *Carter*, 33 F.3d at 459; *see also Muehlhausen v. Bath Iron Works*, 811 F. Supp. 15, 20 (D. Maine 1993) (casual connection established where plaintiff was suspended approximately one month after filing second human rights complaint against employer).

Meanwhile, and seemingly based entirely upon Mr. Medina's testimony, Townsend Culinary implausibly asserts that Ms. Torres had not been rehired because she failed to sign her employment application (*See Answer, Seventh Affirmative Defense; Medina, T. 371*). But Ms. Torres testified that she did sign her employment application (T. 497) and Mr. Bermudez also testified that he witnessed Ms. Torres place her signature on that form (T. 275-277).

Interestingly, Townsend Culinary did not produce that employment application at the hearing and thereby simply establish that fact, as one would have ordinarily expected it to have done if in fact that application did not contain Ms. Torres' signature, despite the fact that that document had been in the exclusive custody of Townsend Culinary. In addition, Townsend Culinary's evidence also disclosed that Ms. Torres had been told that there were no positions open at that time since Townsend Culinary was laying off employees. Mr. Medina's testimony further discloses that he told Ms. Torres that she would be contacted if a position became available, an unlikely happening if in fact she had not signed her employment application, as Townsend Culinary insists. The lack of Ms. Torres' signature on the employment application was not the reason that she was not rehired. Instead, the actual reason can much more reasonably and logically be found to have been based upon the fact that at that time the Union had filed an OSC charge on Ms. Torres' behalf whereas the gentleman who

had been hired to replace her in the can opening room had not filed a discrimination charge of any kind.

I find that the evidence of the parties on the issue of Townsend Culinary's §1324b(a)(5) retaliation allegation supports OSC's position on that issue, also, and in accordance with the provisions of 8 U.S.C. §1324b(g)(2)(B)(iv)(I), the proposed civil money penalty sum of \$2,000 is hereby affirmed for that proven violation.

We now consider whether Townsend Culinary, as alleged in Count III of the Complaint, illegally engaged in a pattern or practice of document abuse against those of its employees and job applicants who were/are not United States citizens, by reason of having required that the persons in that group produce an INS-issued document proving their work authorized status while not imposing comparable documentation requirements upon similarly situated employees and job applicants who were/are U.S. citizens.

OSC urges that its Form I-9 analysis evidence has established that Townsend Culinary committed violations of that type against Ms. Guerrero and Ms. Torres, as well as some 660 other non-U.S. citizens by requesting INS-issued documents for employment eligibility and reverification purposes and did so with the intent to discriminate on the basis of citizenship status. In order to prove a pattern or practice of document abuse it must be shown that such a practice "was the company's standard operating procedure." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The Supreme Court's judicial construction of the term "pattern and practice" in that case, which involved a pattern or practice of employment discrimination under Title VII of the Civil Rights Act of 1964, was adopted by the House Judiciary Committee in enacting IRCA. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1 at 59 (1986). The Judiciary Committee stated that, as in *Teamsters*, the term pattern or practice "has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts." *Id.*

As discussed previously, in order to establish a pattern or practice of document abuse it is necessary that OSC demonstrate that Townsend Culinary's standard operating procedure included making requests for more or different documents than are required by the employment verification system and that the requests were made for the purpose of complying with the provisions of 8 U.S.C. §1324a(b). *See A.J. Bart*, 3 OCAHO 538 at 17: *Louis Padnos*,

3 OCAHO 414 at 9–10; *United States v. Harris Ranch Beef Co.*, 2 OCAHO 335, n. 10 at 8 (1991).

Evidence of such a standard operating procedure can be found in the wording of the employment application form which Townsend Culinary utilized between March 25, 1996 and February 24, 1998, which requested that only non-U.S. citizen applicants, as opposed to applicants who were U.S. citizens, provide copies of their “visas” thus establishing their authorization to work in the United States (Complainant’s Exhs. 1,2,3, Admissions 34, 35). OSC further maintains that such wording on those applications constitutes direct evidence of Townsend Culinary’s specific requests for INS-issued documents from a readily defined and targeted group which consisted solely of those job applicants who were non-U.S. Citizens.

It was also noted that all job applicants were required to complete employment applications in order to be considered for employment (Derickson, T. 290; Griffin, T. 319; Velez–Dorsey, T. 448, 449; Medina, T. 384). OSC further urges that in view of that showing, it has demonstrated that Townsend Culinary had requested that all non-U.S. citizens who were hired, as well as those who were not hired, provide copies of their “visas”, and that since that document abuse practice was incorporated into the standard hiring process, it was thus a practice which was obviously undertaken on a regular and repeated basis.

As further proof that such requests were routinely made by Townsend Culinary, the hearing testimony of two of Townsend Culinary’s managing agents, which included admissions of that nature, ostensibly to confirm the identifying numbers of the documents supplied by job applicants in the course of completing Section 1 of their Forms I–9 (Velez–Dorsey, T. 450; T. 65, Complainant’s Exh. 4 (excerpt from Griffin deposition)) is most instructive. To further establish that such requests were routinely made as part of Townsend Culinary’s standard operating procedure, it is noted that 11 employee witnesses, as well as Ms. Guerrero and Ms. Torres, had testified that each had been requested to produce INS-issued documents (*See generally* T. 128–218). I find that the evidence has overwhelmingly demonstrated that Townsend Culinary routinely made requests of that nature.

In order to establish the second element of its charge that Townsend Culinary engaged in a pattern or practice of document abuse

against its employees and job applicants who were not U.S. citizens namely, that such requests were made for the purpose of satisfying the employment eligibility provisions of 8 U.S.C. 1324a(b), OSC persuasively urges that the evidence undisputedly reveals that those requests were made for that purpose during the process of completing or reverifying the Forms I-9.

Concerning the third element required to be shown, it has been conclusively proven that Townsend Culinary had requested more or different documents than are required to comply with the employment eligibility verification provisions. It has been shown that non-U.S. citizens were routinely required to produce INS-issued documents at the time of hire, and were again required to do so later on in the process of reverifying their continuing work authorized status.

The pertinent IRCA provisions, as well as the applicable implementing regulations, provide very detailed guidance concerning those documents which may be furnished by an individual to establish both their identity and their employment eligibility. See 8 U.S.C. §1324a(b); 8 C.F.R. §274a.2. Any individual, regardless of their citizenship status, may present any combination of legally acceptable documents for that purpose. *Id.* See also *United States v. Strano*, 5 OCAHO 748, at 222 (1995); *A.J. Bart*, 3 OCAHO 538, at 1390 (1993). The choice of documents is that of the individual and employers may not specify those documents which are to be produced. 8 C.F.R. §274a.2(b)(1)(v). And the vast majority of OCAHO rulings have held that requests for specific documents, such as INS documents, constitute document abuse violations. *Strano*, 5 OCAHO 748, at 222-23 (requests for INS documents violate the document abuse provision); *United States v. The Beverly Center*, 5 OCAHO 762, at 351 (1995); *A.J. Bart*, 3 OCAHO 538, at 1387. See also *Robison Fruit Ranch*, 147 F.3d 798 (requiring discriminatory treatment); *United States v. Zabala Vineyards*, 6 OCAHO 830, at 87-88 (1995) (requests for specific documents not a violation unless non-U.S. citizens, as here, are treated differently). The latter ruling cannot be applied herein since Townsend Culinary's discriminatory disparate treatment of its non-U.S. citizen employees, and by implication Townsend's intent to discriminate, have been proven under these facts.

It also has been proven that Townsend Culinary requested that non-U.S. citizens produce INS-issued documents at the time of hire and also for reverification purposes. In addition, its employ-

ment applications constitute direct evidence that in requesting “visas” it illegally requested INS-issued documents from non-U.S. citizens. In addition, it points to the admissions of Townsend Culinary’s managing agents on those points in hearing testimony, as well as the similarly corroborative testimony of 11 employees who were specifically requested to produce INS-issued documents and social security cards during their initial Forms I-9 process, and the testimony of eight other witnesses which established that each had been requested to produce INS-issued documents for work authorization reverification purposes.

The analysis of Townsend Culinary’s Forms I-9 prepared by OSC’s paralegal specialist, Ms. Alexandra Vinces, also supports those conclusions. Of the 672 Forms I-9 completed by non-U.S. citizens, some 662, or 98.5%, produced INS-issued documents during the initial Form I-9 process, as opposed to the reverification stage (Vince, T. 264; Complainant’s Exh. 39). That analysis also made available the information that of those 662 persons, some 628, or 94.9%, also produced additional documents from those listed in Lists B and C on the reverse side of the Form I-9 (Vince, T. 264; Complainant’s Exhs. 36, 39). The analysis also made available the information that all of the 63 non-U.S. citizens whose employment eligibility had been reverified had produced INS-issued documents for that purpose, according to the information shown in Section 3 of their pertinent Forms I-9 (Vince, T. 264, 265; Complainant’s Exhs. 36, 39).

Based upon the foregoing proven facts, it is found that by having requested those specific INS-issued documents from non-U.S. citizens Townsend Culinary put in place an employment barrier that is far different from that required by the employment eligibility verification provisions of IRCA and did so in the following manner. By requesting a specific document or documents, Townsend Culinary denied to those individuals their right to produce any other acceptable Column A document or any combination of Column B and Column C documents for the purpose of establishing their identity and employment eligibility. In addition, neither the provisions of IRCA nor the implementing regulations require that any individual present any specific document in order to complete Section 1 of the Form I-9. In addition, the INS Handbook for Employers, at 13, question 10, an employer, as Townsend Culinary has been shown to have done routinely under these facts in completing Section 2 of the Forms I-9, “*may not ask to see a document with the employee’s Alien Number or Admission Number or otherwise*

specify which document(s) an employee may present.” (Emphasis added.) It is most noteworthy that Townsend Culinary’s managing agents testified that they used that handbook exclusively for guidance in resolving all questions concerning the completion of Forms I–9.

The evidence also discloses that Townsend Culinary intended to discriminate on the basis of citizenship status in the course of having engaged in the proscribed pattern or practice of document abuse against non-U.S. citizens, as alleged in Count III. That because the evidence has clearly shown that Townsend Culinary intentionally imposed illegal document requests upon non-U.S. citizens by having required that they present INS-issued documents in order to prove their work authorized status as a condition for employment, whereas U.S. citizens were and are not similarly required to establish their U.S. citizenship as a condition of employment. Rather, the persons in that category were routinely permitted to prove their citizenship status by simply producing any acceptable combination of identity and employment eligibility documents. It was also proven that Townsend Culinary further treated non-U.S. citizens differently, or disparately, by having required that they again produce INS-issued documents to demonstrate their continued work authorized status as part of the reverification process.

Further proof of that discriminatory intent consists of the wording of Townsend Culinary’s employment application, the testimonial admissions of Townsend Culinary’s managing agents, the composite testimony of some 13 witnesses, including Ms. Guerrero and Ms. Torres, and in OSC’s Ms. Vince’s analysis of the pertinent Forms I–9.

In view of the foregoing, OSC has persuasively shown that it is Townsend Culinary’s standard operating procedure to have routinely requested more or different documents than those required for employment eligibility verification purposes, and that it does so with the intent to discriminate against those of its employees and job applicants who are non-U.S. citizens.

In support of its fifth and final charge, as set forth in Count IV of the complainant, OSC maintains that Townsend Culinary intentionally engaged in a pattern or practice of citizenship status discrimination against those of its employees and its job applicants who were non-U.S. citizens.

OSC maintains that Townsend Culinary's conduct also constitutes illegal citizenship status discrimination against protected non-U.S. citizens since the pertinent provisions of 8 U.S.C. §1324b(a)(1) provide that:

It 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 such individual's citizenship status.

That anti-discrimination provision also prohibits disparate treatment. *See United States v. San Diego Semiconductors, Inc.*, 2 OCAHO 314, at 110 (1991). Proving disparate treatment equates to a mere showing that the employer "treats some people less favorably than others because of their race, color, religion, sex or national origin [or other prohibited factor]." *Teamsters*, 431 U.S. at 335 n. 15; *accord Furnco Constr. Corp. v. Waters*, 438 U.S. at 567, 577 (1978). And employers are found to have violated civil rights law if it is found, as here, that they intentionally treated protected persons differently, even though no ill motive was shown.

In summary, it can be seen that an employer who intentionally treats persons differently based upon a protected characteristic violates anti discrimination laws, despite whatever may have motivated that intent. *United States v. Marcel Watch*, 1 OCAHO 143 (1990). *Jones v. Dewitt Nursing Home*, 1 OCAHO 189 (1990).

Accordingly, in order to prevail in its Count IV charge that Townsend Culinary intentionally engaged in a pattern or practice of citizenship status discrimination against non-U.S. citizens OSC is required to demonstrate by a preponderance of evidence that Townsend Culinary treats non-U.S. citizens less favorably than U.S. citizens and does so based upon their citizenship status. OSC's detailed analysis of Townsend Culinary's relevant Form I-9 copies, as well as previously-mentioned confirming testimony by a very significant number of witnesses, including several of Townsend Culinary's managing agents, has most persuasively proven that non-U.S. citizen employees must produce INS-issued documents to verify their work authorized status as a condition of employment. On the other hand, Townsend Culinary allows U.S. citizens to furnish any acceptable combination of documents listed on the rear of the Form I-9 for that purpose. And that practice has further been shown to be Townsend Culinary's "standard operating procedure." *Teamsters*, 431 U.S. at 336. And it was made initially in the original Form I-9 process and again for reverification pur-

poses. Since conduct of that type has been held to constitute a pattern or practice of document abuse, as well as a violation based upon citizenship status discrimination, *Strano*, 5 OCAHO 748, at 228, I find that Townsend Culinary violated the provisions of 8 U.S.C. §1324b(a)(1)(B) in the manners alleged in Count IV.

OSC has proven that some 660 of Townsend Culinary's non-U.S. citizen employees were shown to have been affected by a pattern and practice of document abuse, as well as one of citizenship status discrimination. OSC further requests that a civil money penalty sum of \$550 be assessed for each of those violations, or a total of \$363,000 in civil money penalties in Counts III and IV.

I find those proposed civil money penalty levies to be reasonable and further that OSC has not abused its discretionary assessment duties in having levied that \$363,000 sum.

Order

Townsend Culinary is hereby ordered to cease and desist from further violating the provisions of 8 U.S.C. §1324b(a)(6), §1324b(a)(1)(B), and 1324b(a)(5).

Townsend Culinary is further ordered to pay to the U.S. Treasury a total civil money penalty of \$367,000, allocated as follows: \$1,000 for the document abuse violation against Ms. Guerrero in Count I; \$1,000 for the document abuse violation against Ms. Torres in Count II; \$363,000 for the patterns and practices of document abuse and citizenship status discrimination involving the 660 persons in Counts III and IV; and \$2,000 for having retaliated against Ms. Torres.

In addition, Townsend Culinary is further ordered to pay to Ms. Delmy Guerrero the sum of \$3,204.35 as back pay and prejudgment interest and \$318.55 as reimbursement of commuting expenses, or a total of \$3,522.90.

Further, Townsend Culinary is ordered to pay to Ms. Ana Torres the sum of \$9,914.01 as back pay and prejudgment interest.

Townsend Culinary is further ordered to reinstate Ms. Guerrero and Ms. Torres to their original or equivalent positions and work

shifts with fully retroactive seniority rights and all employee benefits.

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 timely review of that 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 such Order.