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

October 31, 1997

UNITED STATES OF AMERICA, Complainant, v. CURRAN ENGINEERING COMPANY, INC., Respondent.	)))) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00103))))

ORDER GRANTING IN PART RESPONDENT'S MOTION TO DISMISS AND GRANTING IN PART COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSE

I. *Background and Procedural History*

On October 27, 1992, Complainant personally served Respondent with a Notice of Intent to Fine (NIF) in which it alleged that Respondent had committed various violations of section 274A of the Immigration and Nationality Act, as codified at 8 U.S.C. §1324a. By letter dated November 10, 1992, Respondent timely requested a hearing regarding the matters set forth in the NIF. On May 9, 1997, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) charging Respondent with the alleged violations as described approximately four and one half years earlier in the NIF. In the Complaint, Complainant seeks a total civil money penalty of $2,980.

On June 20, 1997, the parties filed a Joint Motion to Approve Consent Findings with an attached Settlement Agreement Containing Consent Findings and a proposed Decision and Order Approving Consent Findings. Because of certain questions I had con-

cerning the Settlement Agreement, on July 11, 1997, I convened a telephone hearing with both parties pursuant to 28 C.F.R. §68.14(c). During the conference, I posed certain questions to both parties concerning the dates of the alleged violations and the INS inspection. The possible application of the statute of limitations contained in 28 U.S.C. §2462 also was discussed. Since Respondent is not represented by legal counsel, I could not approve the Settlement Agreement without alerting both parties to the potential statute of limitations issue. While I made no definitive rulings regarding the substantive issues concerning the statute of limitations pending further briefing, I did rule that, given the potential application of the statute, I would accept the Settlement Agreement only if Respondent knowingly waived the statute of limitations defense. PHCR at 6.

The parties were given the option of filing a revised settlement agreement containing the requisite waiver, or to brief the statute of limitations issue. Subsequently, in response to a motion from Complainant, I set a deadline of July 30, 1997, for Respondent to file an Answer to the Complaint and to file a motion to withdraw from the Settlement Agreement.

Respondent filed its Answer, its Motion to Withdraw from Settlement Agreement, and its Motion to Dismiss Complaint on July 23, 1997. In the Answer, Respondent replies to each count of the Complaint and asserts a statute of limitations defense with respect to each count. *See* Ans. ¶¶2–7. Respondent requests that it be allowed to withdraw from the signed settlement agreement; Respondent states that it executed the settlement agreement after Complainant informed it that no statute of limitations applied to the claims asserted against it, but has since learned of the possible application of the statute of limitations contained in 28 U.S.C. §2462. *See* Mot. Withdraw at 1. Respondent seeks "permission to withdraw from the settlement in order to be able to assert a defense based on that statute." *Id.* Respondent also asks that I dismiss the Complaint because the claims asserted in it are barred by the statute of limitations found at 28 U.S.C. §2462. *See* Mot. Dismiss at 1.

On August 14, 1997, Complainant filed a response to Respondent's Motion to Dismiss, which it entitled a "Motion in Opposition to Respondent's Motion to Dismiss Complaint." Attached to Complainant's responsive "motion" was Complainant's Prehearing Brief Regarding Statute of Limitations. On August 15, 1997,

Complainant filed a Motion for Default Judgment in which it argued that Respondent had not timely filed an appropriate Answer to the Complaint. *See* C. Mot. Default Judgment at 4–5. For the reasons stated in my Order of September 2, 1997, I denied Complainant's Motion for Default Judgment. Complainant also asks that, if I accept Respondent's Answer as raising statute of limitations issues, that I construe Complainant's Prehearing Brief Regarding Statute of Limitations as a motion to strike the statute of limitations defense. *See id.* at 4.

II. *Standards Governing Dismissal / Summary Decision*

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d Cir. 1996) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411 (1986), and *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989)); *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332, 333 n.5 (3d Cir. 1975). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. *See Painewebber*, 81 F.3d at 1197–98 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)); *Coleman*, 40 F.3d at 258; *Bent v. Brotman Medical Ctr. Pulse Health Servs.*, 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[1] (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5.

"Conclusory allegations and unwarranted deductions of fact," however, are not assumed to be true. *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974); *see also Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 648 n.8 (9th Cir. 1958) (noting that the mere conclusions in the complaint are not assumed to be true). Also, the court "must not . . . assume plaintiffs can prove facts not alleged." *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir.

[1]If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

1983) (citing *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Id.*

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 20 (2d Cir. 1996) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Coleman*, 40 F.3d at 258; *Bent*, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; *Zarazinski*, 4 OCAHO 638, at 9, 1994 WL 443692, at *5.

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . . ." Fed. R. Civ. P. 12(c);[2] *see D'Amico v. Erie Community College*, 7 OCAHO 948, at 4 (1997), 1997 WL 562107, at *3 (citing *Yosef v. Passamaquoddy Tribe*, 876 F.2d 283 (2d Cir. 1989), *cert. denied*, 494 U.S. 1028, and *United States v. Italy Department Store*, 6 OCAHO 847, at 2–3 (1996), 1996 WL 312113, at *2). As I–9 forms, as well as other exhibits, have been presented for my consideration, I will treat the motion to dismiss as a motion for summary decision.

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c) (1996). Only facts that will affect the outcome of the proceeding are deemed material. *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 4 (1996), 1996 WL 735954, at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)); *United States v. Tri Component Product Corp.*, 5 OCAHO 821, at 3 (1995), 1995 WL 813122, at *3 (Order Granting Complainant's Motion for Summary

[2]The Rules of Practice and Procedure that govern OCAHO proceedings provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. §68.1 (1996).

Decision) (citing same and *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994), 1994 WL 269753, at *2). An issue of material fact must have a "real basis in the record" to be considered genuine. *Tri Component*, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586–87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." *Id.* (citing *Matsushita*, 475 U.S. at 587 and *Primera*, 4 OCAHO 615, at 2, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. *Id.* at 4 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. *United States v. Alvand, Inc.*, 1 OCAHO 1958, 1959 (Ref. No. 296) (1991),[3] 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" *Tri Component*, 5 OCAHO 821, at 4, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." *Alvand*, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. §68.38(b) (1996).

[3]Citations to OCAHO precedents in bound Volumes I-III, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume III, however, are to pages within the original issuances.

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. *Tri Component*, 5 OCAHO 821, at 4, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." *Id.* (citing *Primera*, 4 OCAHO 615, at 3, 1994 WL 269753, at *2, and *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3–4 (1991), 1991 WL 531744, at *3).

III. *Applicability of Section 2462*

Title 8 U.S.C. §1324a does not establish any time limit by which cases arising under its provisions must be commenced. A general statute of limitation provision may supply that time period for such cases:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. §2462 (1994). On a prior occasion, I have discussed the applicability of that statute to cases brought under section 274C of the Immigration and Nationality Act, as codified at 8 U.S.C. §1324c. *See United States v. Davila*, 7 OCAHO 936, at 12–15 (1997), 1997 WL 602730, at *9–12.[4] Complainant also emphasizes that my discussion of 8 U.S.C. §2462 in *Davila* occurred in the context of a section 1324c proceeding, and that its application to a 1324a proceeding "is an issue of first impression." C. Br. at 6. Complainant's observation is correct, but I note that the applicability of section 2462, as a threshold matter, depends on whether another limitations period governs the particular civil fine, penalty, or forfeiture enforcement proceed-

[4]My opinion in *Davila* was issued May 28, 1997, shortly before the parties in the present controversy signed their Joint Motion to Approve Consent Findings, Settlement Agreement Containing Consent Findings, and proposed Decision and Order Approving Consent Findings. Complainant states that the parties were unaware of that decision until the prehearing conference held July 11, 1997. C. Br. at 5 n.1. That statement is not correct. While I accept Complainant's counsel's statement that he was unaware of the *Davila* decision, the INS nevertheless was on notice of that decision because my office sent a copy of it, as it does with all orders I issue, to INS Associate General Counsel Dea Carpenter, who is the supervisor for all employer sanctions cases. Therefore, INS was aware of that decision.

ing involved. The key is that section 2462 applies to such a proceeding "[e]xcept as otherwise provided by Act of Congress." 28 U.S.C. §2462 (1994). No other specified limitations period exists for actions brought under section 1324a or 1324c, so section 2462 would apply equally to each, as long as the other specifications for application of section 2462 are met.

A. *Application of Section 2462 to Administrative Proceedings*

On its face, section 2462 does not reveal whether it applies to administrative actions, suits, or proceedings to enforce civil fines, penalties, or forfeitures. Several U.S. Circuit Courts of Appeals, however, have interpreted section 2462 to apply to administrative as well as judicial proceedings. *See 3M Co. v. Browner*, 17 F.3d 1453, 1455–57 (D.C. Cir. 1994) (involving an Environmental Protection Agency proceeding to impose civil penalties for violations of the Toxic Substances Control Act); *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669–70 (4th Cir. 1997) (involving an administrative action by the Interior Department's Office of Surface Mining Reclamation and Enforcement under the Surface Mining Control and Reclamation Act).

Complainant correctly notes, *see* C. Br. at 7, that the Ninth Circuit's[5] decision in *Federal Election Commission v. Williams*, 104 F.3d 237 (9th Cir. 1996), *petition for cert. filed*, 66 U.S.L.W. 3297 (U.S. Oct. 3, 1997) (No. 97–601), does not itself address whether section 2462 applies to administrative proceedings.[6] Complainant reasons that the Ninth Circuit likely would follow the approach of the D.C. Circuit in *3M*, given the Ninth Circuit's strong reliance on *3M* regarding other aspects of section 2462's application.[7] C. Br. at 7.

[5]Judicial review of a final order may be had "in the Court of Appeals for the appropriate circuit." 8 U.S.C. §1324a(e)(8) (1994); 28 C.F.R. §68.53(a)(3) (1996). As this cause of action arose in California, precedent from the Ninth Circuit is controlling.

[6]*Williams* involved district court proceedings brought by the Federal Election Commission seeking civil penalties and injunctive relief under the Federal Election Campaign Act. *See Williams*, 104 F.3d at 239.

[7]Even though the issue did not appear in *Williams*, I have found one Ninth Circuit decision, albeit an unpublished one, that applies section 2462 to an administrative proceeding. In *Wyatt v. Federal Aviation Administration*, 28 F.3d 111 (9th Cir. 1994) (text available on Westlaw at 1994 WL 273999), the Ninth Circuit applied, without discussion, the limitations period of section 2462 to an administrative proceedings before the FAA. I note the *Wyatt* disposition only in passing because it is not regarded as having any precedential value given its unpublished status. *See* Ninth Circuit Rule 36–3.

I agree that the Ninth Circuit probably would follow the lead of *3M* by applying section 2462 to administrative proceedings. The D.C. Circuit in *3M* provides strong rationales for applying the five-year limitations period of section 2462 to administrative as well as to judicial proceedings. In *3M*, the court notes that the EPA administrative law judge in the underlying case had ruled that section 2462 applied only to judicial proceedings and not to administrative proceedings, based largely on language in a prior version of the statute. *3M*, 17 F.3d at 1456. Section 2462's predecessor statute referred to "suit or prosecution," but the 1948 revision of the Judicial Code replaced that phrase with the current reference to "action, suit or proceeding." *Id.* The ALJ believed that Congress intended no change in substance with the change in phrase and that EPA's assessment of a civil penalty was not a "suit or prosecution." *Id.* The D.C. Circuit decided that the EPA's action to assess a civil penalty meets the prior language of the statute. *Id.* The court notes that the Administrative Procedure Act refers to agency attorneys who bring administrative complaints as carrying out "prosecuting functions." *Id.* (citing 5 U.S.C. §554(d)). It also points out that "[t]he Supreme Court perceives no substantial distinction between the function performed by agency attorneys 'presenting evidence in an agency hearing and the function of a [sic] prosecutor who brings evidence before a court.'" *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 516 (1978)). The court finally notes that administrative proceedings to assess a civil penalty under the Toxic Substances Control Act "emulate judicial proceedings," in that "a complaint is brought, the defendant answers, motions and affidavits are filed, depositions are taken, other discovery pursued, a hearing is held, evidence is introduced, findings are rendered and an order assessing a civil penalty is issued." *Id.* (citing 40 C.F.R. §§22.13–26). The administrative proceedings under section 274A of the INA likewise mirror the development of a judicial action. *See* 28 C.F.R. §§68.6–68.52 (1996) (providing for, *inter alia*, the filing of a complaint and answer, the taking of discovery, the conduct of motion practice, the conduct of a hearing, the presentation of evidence, and the issuance of a decision).

The court also reasons that the rationales for implementing statutes of limitation in judicial proceedings apply with equal force to administrative proceedings. *Id.* at 1457 (noting the dangers that evidence will be lost, memories will have faded, and witnesses will be difficult or impossible to locate after the passage of time; also noting that limitations periods reflect the policy that potential defendants, after a certain time, should be able to rest secure that they

will not be pursued for distant obligations). The court finally notes that the ALJ based his decision partially on the idea that "statutes of limitations ought to be strictly construed in favor of the government." *Id.* The court states:

> While this accurately recites the Supreme Court's general pronouncements, *see Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984), there is another Supreme Court maxim, older still, a maxim specifically relating to actions for penalties and one pointing in quite the opposite direction: "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.).

Id. In light of the foregoing, I conclude that section 2462 applies to the administrative action involved in this case.

B. *Interpretation of "Enforcement" in Section 2462*

Independent of the issue of whether section 2462 applies to administrative proceedings is the issue of whether "enforcement," as used in that section, encompasses the action to impose a civil penalty, or merely refers to the action to enforce payment of a civil penalty already imposed. The Ninth Circuit Court of Appeals interprets "enforcement," as used in section 2462, to include the assessment of the civil fine, penalty, or forfeiture. *See Williams*, 104 F.3d at 239–40 (citing, *inter alia*, *3M*); *see also Davila*, 7 OCAHO 936, at 13–14 n.15, 1997 WL 602730, at *26 n.15 (citing *Williams*, *3M*, and Catherine E. Maxson, Note, *The applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. L.R. 512, 516–20 (1995) ("Most courts assume without debate that section 2462 applies to suits seeking to impose penalties or forfeitures.") (footnote omitted)). Complainant rightfully concedes this point. *See* C. Br. at 6–7.

C. *Date When the Claim First Accrued*

The Ninth Circuit clearly has stated its position that the statute of limitations contained in section 2462 starts to run from the date of the underlying violations that gave rise to the penalty assessment proceedings. *See Williams*, 104 F.3d at 240 (citing *3M*, 17 F.3d at 1460–63). Complainant urges, however, that I should follow what it says is a more factually analogous First Circuit case, which holds that the statute of limitations in section 2462 starts to run after the civil penalty is assessed. *See* C. Br. at 9.

The First Circuit case Complainant cites, *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), does not provide the support for Complainant's position as Complainant would desire. Complainant contends that the statutory provision in the present case (section 274A of the INA) and the regulatory provisions in *Meyer* (antiboycott regulations promulgated under the Export Administration Act (EAA)) are similar because the proceedings brought under INA section 274A are commenced with the government's issuance of a Notice of Intent to Fine (NIF),[8] and the proceedings brought under the regulatory provisions at issue in *Meyer* are commenced in a similar manner with a "charging document."[9] *See* C. Br. at 9. That similarity, however, is irrelevant to Complainant's argument because the event that supposedly commences an action and, thus, *halts* the running of the limitations period says nothing about what event *starts* the running of the limitations period.

Indeed, the present case is factually dissimilar to *Meyer* in a genuinely relevant manner. In *Meyer*, the action, suit, or proceeding to enforce a civil penalty is a true enforcement proceeding; i.e., the action in question was brought to enforce the payment of a civil fine that previously was imposed. *See Meyer*, 808 F.2d at 914. In the present case, the action, suit, or proceeding to enforce a civil penalty is the administrative action that initially imposes a civil penalty.

It is logical that the claim in *Meyer* and the claim in the present case would accrue at different events because two different types of "enforcement" claims are involved in each. The *Meyer* court explains that "the standard definition of the concept of accrual is to the effect that '[a] cause of action "accrues" when a suit may be maintained thereon.'" *Meyer*, 808 F.2d at 914 (quoting Black's Law Dictionary 19 (5th ed. 1979)). The court continues, "it is abundantly clear that no suit to recover a civil penalty can be mounted under the EAA unless and until the penalty has first been assessed administratively." The court concludes that it is an "obvious proposition that a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced." *Id.*

[8]Complainant's argument that the issuance of a NIF commences a 274A proceeding will be addressed below.

[9]The similarity, if any, between a 274A NIF and an EAA charging document is more relevant to the discussion regarding what action stops the running of the limitations period and will be addressed below in that context.

Meyer itself recognizes the distinction between the two types of "enforcement" proceedings that may be the subject of section 2462. In fact, it agrees that the limitations period for an action to assess or to impose a civil penalty starts to run from the date of the violation that gives rise to the proceedings. The court notes that the litigants before it conceded that section 2462 "at least requires that any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation." *Id.* The issue confronting the *Meyer* court, however, was "whether §2462 affords an additional five year period following final administrative assessment of a civil penalty during which the government may sue to enforce the sanction." *Id.* The court held that it does. *Id.* at 922. That conclusion, however, has no bearing on when a claim to impose a civil penalty accrues.

Complainant cites three other cases in addition to *Meyer* for the proposition that a claim does not accrue until the administrative proceeding has concluded and a penalty has been imposed. *See* C. Br. at 9 (citing *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982); *United States v. McIntyre*, 779 F. Supp. 119 (S.D. Iowa 1991); and *United States v. McCune*, 763 F. Supp. 916 (S.D. Ohio 1989)).[10] Like *Meyer*, those three cases all involve claims to enforce the payment of civil fines previously assessed in an earlier administrative proceeding and, thus, are equally inapposite to the question of when a claim for the initial imposition of the penalty accrues.

As *Williams* involves a claim to impose a civil penalty, it is factually on point with the present case in the manner that is relevant to deciding when the statute of limitations begins to run. *Williams* unequivocally finds that, in a case involving the initial imposition of a civil penalty, the limitations period in section 2462 begins to run on the date of the violation that gives rise to the penalty. *Williams*, 104 F.3d at 240. Even *Meyer* supports that result. *See Meyer*, 808 F.2d at 914. Regardless, *Williams*, a Ninth Circuit case, is on point with the present situation and provides binding precedent.

As an alternative, Complainant argues that the action is not time-barred because the date the Notice of Inspection Results (NOIR) was

[10]Complainant cites *McCune* and *McIntyre* as representing the views of the Sixth and Eighth Circuits, respectively. *See* C. Br. at 9. Both of those cases, however, are from district courts within those circuits. District court opinions are not binding on the circuit court and, thus, do not necessarily reflect the view of the circuit court.

served on Respondent should be the determinative date for the date the limitations period begins to accrue. *See* C. Br. at 12. As a reason to support that proposition, Complainant offers that "the NOIR is the first official government document that conclusively informed the [R]espondent that after a review of the Complainant's records at least three of his employees did not have authorized status to be employed in the United States." *Id.* Complainant, however, cites no authority in support of that position. In essence, Complainant seems to argue that the statute of limitations should start to run when it gives notice that a respondent might be in violation of the law. Complainant gives no authority for the suggestion that a limitations period starts to run when a party gives notice that it is aware it might have a cause of action, and, in fact, I am not aware that any such authority exists. Most importantly, the jurisdiction that controls this case clearly has stated in the context of section 2462 that the cause of action accrues at the time of the violation that gives rise to the civil penalty. *See Williams*, 104 F.3d at 240. I conclude, for purposes of section 2462, that the claims that are the subject of the present Complaint accrued on the dates of the alleged violations and that the five-year limitations period began to run on those respective dates.

D. *What Action Constitutes Commencement of the Proceedings*

Now that the date when the statute of limitations begins to run has been determined, it is next important to decide what action halts the running of the limitations period. Section 2462 instructs that the action, suit, or proceeding to enforce a civil penalty "shall not be entertained unless *commenced* within five years from the date when the claim first accrued." 28 U.S.C. §2462 (1994) (emphasis added). Under section 2462, therefore, commencement of the action, suit, or proceeding operates to stop the running of the limitations period. Section 2462, however, does not state what action is considered the commencement of the action, suit, or proceeding.

Complainant argues that the issuance of the NIF constitutes the commencement of proceedings under section 274A and, thus, marks the end of the running of the statute of limitations. *See* C. Br. at 10. In support of that position, Complainant offers one of its regulations, which provides that "[t]he proceeding to assess administrative penalties under section 274A of the Act is commenced when the Service issues a Notice of Intent to Fine on Form I–763." 8 C.F.R. §274a.9(d) (1997). Complainant notes that that regulation seems to

conflict with an OCAHO procedural rule that defines "commencement of proceeding" as "the filing of a complaint with the Office of the Chief Administrative Hearing Officer." 28 C.F.R. §68.2(e) (1996).

Complainant asserts that I should use 8 C.F.R. §274a.9(d), rather than 28 C.F.R. §68.2(e), to decide what action constitutes the beginning of a proceeding under section 274A of the INA. Complainant maintains that section 274a.9(d) traces the language of 28 U.S.C. §2462 more closely than does section 68.2(e). *See* C. Br. at 10. Additionally, Complainant notes a portion of the OCAHO Rules of Practice that provides that "[t]o the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling." 28 C.F.R. §68.1 (1996). Complainant states that section 274a.9(e) is such a "rule of special application" and, therefore, should determine when a proceeding under INA section 274A commences. *See* C. Br. at 10–11. Finally, Complainant contends that the issuance of the NIF satisfies the purposes of a statute of limitations by "put[ting] a defendant on notice of claims and requir[ing] him to defend (by requesting a hearing)." *Id.* at 11.

First, it is uncertain whether the definitions of "commencement of proceeding" in sections 274a.9(d) and 68.2(e) truly are in conflict with each other. The two definitions are in conflict only if "proceeding" means the same thing in each provision. The OCAHO Rules of Practice contained in 28 C.F.R. part 68 apply to the "*adjudicatory* proceedings" before OCAHO Administrative Law Judges. 28 C.F.R. §68.1 (1996) (emphasis added). Therefore, when the OCAHO Rules define "commencement of proceeding," the proceeding referred to must be the adjudicatory, trial-like proceeding administered by OCAHO. In contrast, when the INS defines "commencement of proceeding" in its regulations as the issuance of a NIF, the INS cannot possibly refer to any type of adjudicatory proceeding. When a NIF is issued, it is unknown whether an *adjudicatory* proceeding ever will take place. An adjudicatory, trial-like phase will be entered only if the responding party requests a hearing before an ALJ. *See* 8 C.F.R. §274a.9(e), (f) (1997). Even though "proceeding" is used in both sections 274a.9(d) and 68.2(e), it appears that the word does not mean the same thing in each provision.

Assuming that "proceeding" takes on the same meaning in those sections, Complainant's argument that the definition of "commence-

ment of proceeding" in section 274a.9(d) should override the definition in section 68.2(e) because it is a "rule of special application" is unconvincing. Were I to accept that argument, it would be the equivalent of ruling that the INS could rewrite any of the OCAHO procedural rules simply by authoring its own regulations. It is inconceivable that a litigant can have the unilateral power to establish in any way the procedural rules that govern it during the course of litigation.

As a separate but related matter, neither an INS nor an OCAHO regulation can create definitions for words that appear in a federal statute of general applicability. The same words that appear in different statutes or regulations can have different meanings. *Cf. Leh v. General Petroleum Corp.*, 330 F.2d 288, 294 (9th Cir. 1964), *rev'd on other grounds*, 382 U.S. 54 (1965) (stating that the word "penalty," as used in a federal statute like 28 U.S.C. §2462, may have a different meaning than the same word in a state statute). Additionally, an agency has no special authority or expertise to interpret words in a statute of general applicability. *Cf. Interamericas Investments, Ltd. v. Board of Governors of the Federal Reserve System*, 111 F.3d 376, 382 (5th Cir. 1997) (stating that, while a court should defer to an agency interpretation of a statute that is entrusted to its interpretation, "the interpretation of the general statute, §2462, may not be influenced by the governmental agency bringing the action"); *Johnson v. SEC*, 87 F.3d 484, 486 (D.C. Cir. 1996) (stating that, "[b]ecause §2462 is a statute of general applicability rather than one whose primary administration has been delegated to the SEC, we interpret it de novo"). Consequently, the real objective is to interpret what "commencement" means in the context of section 2462, not what it means in the contexts of either the INS or OCAHO regulations.[11]

"Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "Commence" means "[t]o initiate by performing the first act" or "[t]o institute or

[11]The meaning of "commencement of an action" under section 2462 *might* mirror the definition provided in either section 274a.9(d) or 68.2(e), but, if that occurs, it is merely because the definitions happen to coincide, and not because the definition in either of the cited regulations controls the meaning of words in section 2462.

start." Black's Law Dictionary 243 (5th ed. 1979). Also, a civil action "in most jurisdictions is commenced by filing a complaint with the court." *Id.* (citing Fed. R. Civ. P. 3).

The definitions of "action," "suit," and "proceeding" contemplate the existence of an adversarial process before a court or other adjudicative tribunal. The term "action" indicates "a suit brought *in a court*; a *formal complaint* within the jurisdiction of a court of law." *Id.* at 26 (emphases added). "Action" also signifies

> [t]he legal and formal demand of one's right from another person or party made and insisted on *in a court of justice*. An ordinary proceeding *in a court of justice* by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, *or the punishment of a public offense*. It includes all the formal proceedings *in a court of justice* attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

Id. (emphases added). "Suit" refers to "any proceeding by one person or persons against another or others *in a court of justice* in which the plaintiff pursues, *in such court*, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity." *Id.* at 1286 (emphases added). "Proceeding" indicates "the forms and manner of conducting juridical business *before a court or judicial officer*," and "also refers to administrative proceedings before agencies, tribunals, bureaus, or the like." *Id.* at 1083 (emphasis added).

> ["Proceeding"] may be used synonymously with "action" or "suit" to describe the entire course of an action at law or suit in equity from the issuance of the writ or *filing of the complaint* until the entry of a final judgment, or may be used to describe any act done by *authority of a court of law* and every step required to be taken in any cause by either party. The proceedings of a suit embrace *all* matters that occur in this progress *judicially*.

Id. (underscored emphases added).

"Action," "suit," and "proceeding" all generally refer to an adversarial, adjudicative process before a judge; it is the beginning of the adjudicative process that marks the commencement of proceedings for the purpose of section 2462. In the context of claims brought under section 274A of the INA, it is the filing of the complaint, not the issuance of the NIF, that initiates the adjudicative process.

A case from the Second Circuit[12] supports the idea that a non-adversarial, non-adjudicative occurrence cannot operate as the commencement of an action, suit, or proceeding for section 2462 purposes. In *Capozzi v United States*, 980 F.2d 872 (2d Cir. 1992), the Second Circuit considered the applicability of section 2462 in the context of an Internal Revenue Code provision by which the Internal Revenue Service "assesses" a penalty for the promotion of abusive tax shelters. The "assessment" is the IRS' calculation of an amount it says the taxpayer owes. *See Capozzi*, 980 F.2d at 874. After the IRS "assesses" the penalty, the taxpayer may file suit to challenge the penalty by seeking a refund. *See id.* at 874 n.1. The Second Circuit holds that such an extrajudicial assessment does not qualify as an action, suit, or proceeding within the meaning of section 2462. The court states:

> by its terms section 2462 applies only to "action[s], suit[s] or proceeding[s]." These terms implicate some adversarial adjudication, be it administrative or judicial. An assessment [in the context of the IRC provision in question] of a penalty (or tax), however, is an ex parte act. It is merely the determination of the amount of the penalty and the official recording of the liability. Indeed, the taxpayer is not even entitled to a preassessment hearing.

Id. at 874 (internal footnote and citations omitted).

A NIF is similar to the type of IRS assessment at issue in *Capozzi* because it is an extrajudicial calculation and statement of an amount the INS says a respondent owes. The amount of the NIF, and liability itself, are challenged only if the respondent requests a hearing. *See* 8 C.F.R. §274a.9(e), (f) (1997). An adversarial adjudication, if any, does not take place until after the INS has issued a NIF. *Capozzi* reinforces the idea that section 2462's reference to an action, suit, or proceeding contemplates an adversarial

[12]Although this case obviously does not constitute binding precedent in the Ninth Circuit, under which the present case falls, I cite it as additional, persuasive support for my statutory interpretation of the terms "action, suit or proceeding" in section 2462. The Second Circuit seems to be the only court so far that has addressed the issue of whether "action, suit or proceeding," as used in section 2462, refers only to adversarial adjudications. The point has been raised in at least two other circuits, but both found it unnecessary to reach the issue. *See Lamb v. United States*, 977 F.2d 1296, 1297 (8th Cir. 1992); *Mullikin v. United States*, 952 F.2d 920, 929 n.17 (6th Cir. 1991), *cert. denied*, 506 U.S. 827 (1992).

adjudication, not an extrajudicial calculation of a proposed fine such as a NIF.[13]

Consideration of the policies that drive statutes of limitations weighs heavily in favor of finding that the filing of the complaint, rather than the issuance of a NIF, commences, for purposes of section 2462, the INS' action, suit or proceeding for a civil money penalty. Statutes of limitations exist to guard against the dangers of lost evidence, faded witness memories, and inability to locate witnesses that can plague the judicial process after an excessive passage of time. *See 3M*, 17 F.3d at 1457 (citing *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)); *United States v. Meyer*, 808 F.2d 912, 921 (1st Cir. 1987) (citing *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965)). "Statutes of limitations also reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'" *3M*, 17 F.3d at 1457 (quoting Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950)).

Finding that the issuance of the NIF, rather than the filing of the complaint, stops the running of the statute of limitations would defeat the purposes of having a statute of limitations. Although the respondent may request a hearing, the decision when and if to file a complaint is solely within the discretion of the INS. If the NIF halted the running of the limitations period, the INS could issue a NIF and then wait for several years to file a complaint. In that situation, the statute of limitations would not prevent the problems of lost evidence, faded memories, inability to locate witnesses, and disruption of settled expectations. Complainant argues that the issuance of a NIF "satisfies the purpose behind a statute of limitations which is namely to put a defendant on notice of claims and require him to defend (by requesting a hearing)." C. Br. at 11. Although the NIF gives initial notice to a respondent of the nature of the claims

[13]A cursory look might give the impression that any reliance on *Capozzi* is misguided, given the Ninth Circuit's heavy overall reliance on the D.C. Circuit's decision in *3M*, which soundly criticizes *Capozzi*. *3M*, however, only decries the portion of *Capozzi* it interprets as holding that "enforcement," as used in section 2462, applies exclusively to an action to enforce payment of a penalty previously imposed, but not to the underlying action that determines liability and sets the amount of the penalty. In fact, *3M* itself acknowledges the difference between the IRS extrajudicial assessment process in *Capozzi* and the EPA process in which the penalty assessment is done in an administrative, adversarial proceeding. *See 3M*, 17 F.3d at 1459 n.11.

against it, a respondent reasonably could assume, after requesting a hearing, that no complaint will be filed if no communications from the INS are forthcoming within a reasonable amount of time. A respondent's request for a hearing does not automatically put the case on target for resolution. Instead, the INS must file a complaint with OCAHO before the case may proceed. Once a complaint is filed, the pace of the proceeding is in the control of the judge. As there is no time limit in which the INS must file a complaint after issuing a NIF, and, absent a statute of limitations that is halted by the filing of the complaint, the pace would be left solely at the whim of the complainant.[14] Additionally, Complainant's argument that the complaint mirrors the NIF actually cuts against its position; if the contents of the complaint are identical to the contents of the NIF, it appears that no more investigation or other preparation needs to be done before a complaint may be filed, so there is no reason to delay filing the complaint.

As an alternative avenue, Complainant argues that, even if filing the complaint commences the proceeding, the issuance of the NIF tolls the statute of limitations. *See* C. Br. at 11 (citing *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987); *Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983)). The cases Complainant cites in support of that proposition, however, do not lead to the conclusion in this case that Complainant would like me to make.

Complainant cites *Chevron*, 834 F.2d at 1523, and *Nichols*, 721 F.2d at 660, for the rule that, "if prior resort to an administrative body is a prerequisite to review in court, the running of the limitation period will be tolled during the administrative proceeding." *See* C. Br. at 11–12. Complainant apparently is arguing that the issuance of the NIF is the equivalent of the administrative proceeding that tolls the running of a limitations period before a subsequent court action. A closer examination of the ruling in *Chevron*, in conjunction with its facts, reveals that such an analogy is not appropriate in the present case.[15]

[14]Indeed, were I to accept Complainant's arguments, the INS could wait *years* after the issuance of a NIF and the request for hearing is made to initiate a complaint (without any intervening contact with the respondent). In fact, that is exactly what happened here.

[15]*Nichols* also does not support Complainant's analogy. *Nichols* merely states the general proposition quoted by Complainant and finds that it did not operate to save the plaintiff's claim from being barred by the applicable six-year limitations period because, even assuming the plaintiff's administrative appeals were required, he did not file suit in federal district court until approximately twenty-one years after his last administrative appeal was denied. *See Nichols*, 721 F.2d at 658–60. *Nichols* provides no support for the idea that an event other than an actual administrative proceeding can function as the equivalent of an administrative proceeding to toll the running of a statute of limitations.

Chevron involved the application of section 2462 to citizen enforcement suits under the Clean Water Act. *See Chevron*, 834 F.2d at 1521. Under the Clean Water Act, a citizen suit may not be brought prior to sixty days after the potential plaintiff has given notice of the alleged violation to the EPA Administrator, the state in which the violation is alleged to have occurred, or the alleged violator. *Id.* at 1519. The Sierra Club argued that the filing of its notice of intent to sue tolled the running of the limitations period; Chevron, on the other hand, argued that the limitations period was not tolled until Sierra Club filed its complaint. *Id.* at 1523. The Ninth Circuit held that the "sixty-day notice requirement . . . is analogous to a requirement of prior resort to an administrative body," and that "the five-year statute of limitations period is tolled sixty days before the filing of the complaint, to accommodate the statutorily-mandated sixty-day notice period." *Id.* at 1523, 1524.

That holding does not support Complainant's argument that the service of the NIF tolls the running of the statute of limitations. In fact, the Ninth Circuit expressly rejected the Sierra Club's analogous argument:

> We decline to adopt Sierra Club's argument that the filing of a citizen plaintiff's notice of intent to sue tolls the statute of limitations, even in cases in which the citizen plaintiff files its complaint more than sixty days after filing notice of intent to sue. Under this approach, citizen plaintiffs would be able to file notice of intent to sue *and then delay in pursuing their rights*. This approach would thus accord citizen plaintiffs enforcement power *greater than* that of federal and state agencies.

Id. at 1524 n.5 (underscored emphasis added). The expressed harm the Ninth Circuit sought to avoid by eliminating the ability of plaintiffs to delay in pursuing their claims in the citizen enforcement suit context (unequal enforcement power between citizens and government plaintiffs) is different from the harms that other statute of limitations cases have tried to avoid (lost evidence, faded witness memories, and complete inability to locate witnesses). The point remains, nevertheless, that accepting Complainant's position that the service of the NIF tolls the statute of limitations would allow the government to serve a NIF and then delay indefinitely the actual prosecution of its case. As discussed immediately above, the Ninth Circuit expressly rejects that result.

In light of all the foregoing reasons in part III.D., I find that the action, suit, or proceeding, as used in section 2462, commences for purposes of cases brought before this tribunal on the date that the complainant files a complaint with OCAHO. I reject Complainant's

argument that the filing of a NIF operates to toll the running of the five-year limitations period of section 2462.

E. *Whether Section 2462 Applies to Actions, Suits or Proceedings for Equitable or Injunctive Relief*

As Count I involves a request for injunctive or equitable relief (a cease and desist order) in addition to the request for a monetary penalty, Complainant argues that a claim for injunctive or equitable relief is not subject to the five-year limitations period of section 2462. *See* C. Br. at 15. In *Williams*, the Ninth Circuit clearly holds that, "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both," *Williams*, 104 F.3d at 240, relying on the principle that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy," *id.* (quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)).

Complainant acknowledges that *Williams* applies section 2462 to claims for injunctive relief that are connected to claims for legal relief, as is the situation in this case, but argues that an opposite holding from the Eleventh Circuit should be followed. C. Br. at 15–16. Complainant provides citation and analysis for why I should follow the Eleventh Circuit's holding in *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3297 (U.S. Oct. 2, 1997) (No. 97–602), that section 2462 does not apply to claims for equitable relief.[16] While the Ninth Circuit may represent the minority view on this issue, the fact remains that I am constrained to follow the binding precedent of the controlling jurisdiction in this case. I have no choice but to follow the Ninth Circuit's position in *Williams*. As a result, if subsequent development of the facts[17] reveals that Respondent fired the employee listed in Count I more than five years before the Complaint was filed, then Complainant will be barred from seeking both legal and equitable relief with respect to Count I.

IV. *Application of Section 2462 to the Complaint*

The date the present Complaint was filed, May 9, 1997, marks the date the statute of limitations was tolled in this case. As section 2462

[16]*Banks* is not the only case to so hold. *See Federal Election Comm'n v. The Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997); *United States v. Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990) (cited by Complainant).

[17]I find that a genuine issue of material fact currently exists with respect to the allegation in Count I, which renders disposition of that count inappropriate at this time. *See infra* part IV.A.

only permits the entertainment of an action, suit or proceeding for a civil fine, penalty or forfeiture that is commenced within five years from the date when the claim first accrued, any claims in the present case that accrued before May 9, 1992, fall outside the applicable limitations period. To decide whether any of the present claims against Respondent fall outside the limitations period and, thus, are barred, it is necessary to determine when each alleged violation occurred.

A. *Count I*

In Count I of the Complaint, Complainant alleges that Respondent continued to employ one named individual, Jose Nery Acosta-Medina, after learning on November 4, 1991, that he was unauthorized to work in the United States. Compl. ¶¶1–4. For Count I, Complainant requests a civil money penalty of $900, as well as an order to cease and desist from knowingly hiring or continuing to hire individuals who are unauthorized to work in the United States. *Id.* at 2, 5. Respondent alleges that it terminated this individual's employment on April 22, 1992, and argues that the last day Respondent could have knowingly continued to employ him, the termination date, occurred more than five years prior to the filing of the Complaint. Ans. ¶2.

A knowing continue to employ violation continues, once the employer learns of the employee's work ineligibility, until the employee no longer works for the employer. By its own terms, a knowing continue to *employ* violation only can occur while the employee in question remains employed. Respondent, therefore, correctly argues that the termination date of his employee marks the last date of the alleged violation. Respondent alleges that the termination date for the employee in Count I is April 22, 1992. If that is correct, then Count I would be barred because the last possible date of the violation would have occurred outside the limitations period of section 2462.

Complainant, however, does not concede that April 22, 1992, is the date on which Jose Nery Acosta-Medina was fired.[18] Since in deciding a motion to dismiss or motion for summary decision all reason-

[18]In its discussion of Count I, Complainant states that "Mr. Acosta-Medina was hired on November 5, 1990 and he was terminated on April 22, 1992." C. Br. at 15. In its discussion of Count II, however, Complainant states that, "*[a]ccording to Mr. Curran's representations* during the telephonic prehearing conference held on July 11, 1997, Acosta-Medina was hired on November 5, 1990 and he was terminated on April 22, 1992." *Id.* at 13 (emphasis added). Given Complainant's apparent intention, as revealed in the Count II discussion, not to concede that April 22, 1992, was Mr. Acosta-Medina's termination date, I do not read Complainant's unqualified statement regarding Count I as an admission of the termination date.

able inferences must be drawn in the light most favorable to the non-moving party, and considering the lack of any affidavits or other extrinsic evidence, it would be inappropriate to resolve this disputed factual issue without further evidence. I find that a genuine issue of material fact is in dispute, rendering summary disposition inappropriate for this count. Respondent's Motion to Dismiss, therefore, is DENIED with respect to Count I.

B. *Counts II and III*

Complainant alleges in Counts II and III that Respondent failed to ensure that two named employees, Jose Nery Acosta-Medina (Count II) and Alma Marista Montoya (Count III), properly completed section one of their respective employment eligibility verification forms (I–9 forms). Compl. ¶¶5–10. Complainant requests a civil money penalty of $400 for each of those counts. *Id.* at 3. Respondent argues that Complainant's claims are barred because the I–9 forms for those employees were filled out prior to five years before the filing of the Complaint. Ans. ¶¶3, 5.

Contrary to Respondent's position, "a paperwork violation is not a one-time occurrence, but a continuous violation until corrected." *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO 940, at 2 (1997) (involving failure to ensure proper completion of section one, failure to properly complete section two, and failure to prepare or make available an I–9 form for inspection); *see also United States v. Big Bear Market*, 1 OCAHO 285 (Ref. No. 48) (1989), *aff'd by CAHO*, 1 OCAHO 341 (Ref. No. 55) (1989), *aff'd*, *Big Bear Super Market No. 3 v. INS*, 913 F.2d 754 (9th Cir. 1990) (involving failure to prepare and to make available for inspection I–9 forms). Also, as Complainant points out, *see* C. Br. at 13, an employer only is required to retain I–9 forms either for three years after the date of the individual's hiring or for one year after the date of the individual's termination, whichever is later. 8 U.S.C. §1324a(b)(3)(B) (1994); 8 C.F.R. §274a.2(b)(2)(i)(A) (1997). Consequently, a paperwork violation continues until it is corrected, or until the employer no longer is required to retain the I–9 form.

Based on the date of hire filled in on Mr. Acosta-Medina's I–9 form, Respondent contends that Mr. Acosta-Medina was hired on November 5, 1990. *See* PHCR at 3. Respondent also asserts that it fired Mr. Acosta-Medina on April 22, 1992. *See id.* at 2; Ans. ¶2. As noted previously in the discussion regarding Count I, Complainant

does not concede the accuracy of those dates. Nevertheless, assuming that those dates are correct and applying 8 U.S.C. §1324a(b)(3)(B), Respondent was required to retain Mr. Acosta-Medina's I–9 form until November 5, 1993. That date falls within the five-year limitations period of section 2462.

Based on the date of hire filled in on Ms. Montoya's I–9 form, Respondent contends that Ms. Montoya was hired on February 4, 1992. *See* PHCR at 3. Respondent states that it terminated Ms. Montoya's employment on June 17, 1992. *See id.*; C. Br. Ex. 4. Complainant does not concede that those dates accurately reflect Ms. Montoya's term of employment with Respondent. *See* C. Br. at 14. Assuming that those dates are correct, Respondent would have been required to retain Ms. Montoya's I–9 form until February 4, 1995. That date likewise falls within the applicable statute of limitations.

Respondent's own factual assertions do not support its contention that Counts II and III are barred by section 2462. Consequently, summary adjudication in Respondent's favor is not appropriate for Counts II and III. Respondent's Motion, therefore, is DENIED with respect to those two counts.

C. *Count IV*

In Count IV, Complainant alleges that Respondent failed to properly complete section two of the I–9 form belonging to employee Donald T. Thomas. Compl. ¶¶11–13. Complainant requests a civil money penalty of $280 for this count. *Id.* at 4. Respondent contends that this claim is time barred because Mr. Thomas' I–9 form was executed more than five years before the filing of the Complaint. Ans. ¶6.

As in Counts II and III, the alleged paperwork violation in Count IV would continue to be a violation until corrected, or until Respondent no longer was required to retain the I–9 form in question. Respondent asserts that Mr. Thomas was hired on May 5, 1991, and that he resigned to take another job, leaving his employment with Respondent on September 4, 1992. PHCR at 3. Complainant does not concede the accuracy of those dates. Assuming, however, that the asserted dates are correct, Respondent would have been required to retain Mr. Thomas' I–9 form until May 15, 1994. That date falls within five years of the filing of the Complaint. As Respondent's own factual assertions do not support its contention that Count IV is

time barred, summary disposition of Count IV is inappropriate. Respondent's Motion is DENIED with respect to Count IV.

D. *Count V*

Complainant alleges in Count V that Respondent failed to prepare the I–9 forms for five named individuals in a timely manner. Compl. ¶¶14–16. During the prehearing conference of July 11, 1997, Complainant clarified that it alleges that both sections one and two of the I–9 forms were prepared in an untimely manner. PHCR at 3. Respondent argues that the alleged violations in Count V occurred on the dates recorded in sections one and two[19] of the I–9 forms and that those dates all fall outside section 2462's five-year limitations period. Ans. ¶7.

An employer must ensure that an employee completes section one of the I–9 form at the time of hire. 8 C.F.R. §274a.2(b)(1)(i)(A) (1997). An employer itself must complete section two of the I–9 form within three business days of the date of hire. *Id.* §274a.2(b)(1)(ii)(B) (1997). An employer violates the timeliness requirements by failing to complete, or to ensure completion, of an I–9 form by the date that the completion is required. The timeliness violation is frozen in time at that point. Unlike the types of violations that are charged in Counts II-IV, a timeliness violation is not a continuing violation. An I–9 form either is completed in a timely fashion, or it is not.

An employer meets its obligation to ensure that section one is completed in a timely manner if it ensures that the employee fills out section one at any time on the date that he or she is hired. Likewise, an employer satisfies its duty to complete section two in a timely manner if it fills out section two at any time by the end of the third business day after the employee's date of hire. As a result, I find that a failure to ensure completion of section one in a timely manner occurs the day after the employee is hired, and that a failure to complete section two in a timely manner occurs on the day after the third business day after hire.[20]

Complainant and Respondent both state that employee George L. Smith (Complaint ¶14.A) was hired on September 3, 1991. *See* C. Br.

[19]Those dates mark the dates on which each section was completed.

[20]Complainant agreed with that conclusion during the July 11 conference. *See* PHCR at 4.

at 16; R.'s Resp. to C.'s Motion to Answer C.'s Compl. ¶5. The part of section two of Mr. Smith's I–9 form that is supposed to contain the employee's date of hire contains the same date. There appears to be no factual dispute regarding the date on which Respondent hired Mr. Smith. Respondent violated the requirement that it ensure timely of section one on September 4, 1991, and it violated the requirement that it timely complete section two on September 7, 1991. Both of those dates fall outside the applicable statute of limitations, and, therefore, the claim as to paragraph 14.A is barred.

Complainant and Respondent agree that employee Joe L. Reyes (Complaint ¶14.B) was hired on July 11, 1990. *See* C. Br. at 16; R.'s Resp. to C.'s Motion to Answer C.'s Compl. ¶5. Mr. Reyes' I–9 form also indicates that Respondent hired him on that date. Consequently, there appears to be no factual dispute regarding this aspect of Count V. Respondent violated the requirement that it ensure timely completion of section one on July 12, 1990, and violated the requirement that it timely complete section two on July 17, 1990.[21] Both of those dates occurred more than five years before the Complaint was filed, so the claim with respect to paragraph 14.B is time barred.

Complainant states that Respondent hired employee Miguel Hernandez (Complaint ¶14.C) on August 19, 1988. *See* C. Br. at 16. The I–9 form for Mr. Hernandez likewise indicates that August 19, 1988, was his date of hire. Respondent, however, has stated that it hired Mr. Hernandez on August 3, 1988. *See* R.'s Resp. to C.'s Motion to Answer C.'s Compl. ¶5. Although there may be a factual dispute as to the exact date of hire, it is not a material factual issue because the claim in paragraph 14.C is barred no matter which of the two asserted dates is used. Using the later of the two dates,[22] Respondent would have been in violation of the requirement that it ensure

[21]An employer must complete section two of an employee's I–9 form within three business days of the date of hire, *see* 8 C.F.R. §274a.2(b)(1)(ii) (1997), but the regulations do not define what constitutes a "business day." For purposes of this case, I assume that "business day" excludes Saturdays and Sundays. Therefore, this date of violation is more than four consecutive days removed from the date that Mr. Reyes was hired because an intervening weekend allowed Respondent until July 16, 1990, to complete section two of Mr. Reyes' I–9 form.

[22]Not only is that the date on which Complainant itself says Miguel Hernandez was hired, but using the later date is assuming the facts in the light most favorable to Complainant in examining whether the claim in question fell inside the statute of limitations.

timely completion of section one on August 20, 1988, and would have been in violation of the requirement that it timely complete section two on August 25, 1988.[23] Both of those dates occurred more than five years before the Complaint was filed, so the claim with respect to paragraph 14.C is barred.

Complainant and Respondent both state that employee Mario Hernandez (Complaint ¶14.D) was hired on September 3, 1988. *See* C. Br. at 16; R.'s Resp. to C.'s Motion to Answer C.'s Compl. ¶5. The I–9 form prepared for Mr. Hernandez, however, indicates that Respondent hired him on September 13, 1988. Although there may be a factual dispute as to the exact date of hire, it is not a material factual issue because the claim in paragraph 14.D is barred no matter which of the two asserted dates is used. Using the later of the two dates,[24] Respondent would have been in violation of the requirement that it ensure timely completion of section one on September 14, 1988, and would have been in violation of the requirement that it timely complete section two on September 17, 1988. Both of those dates occurred more than five years before the Complaint was filed, so the claim with respect to paragraph 14.D is barred.

Although the space for the date of hire is blank on employee John Barrera's (Complaint ¶14.E) I–9 form, both Complainant and Respondent state that Mr. Barrera was hired on June 19, 1989. *See* C. Br. at 16; R.'s Resp. to C.'s Motion to Answer C.'s Compl. ¶5. Thus, there appears to be no factual dispute between the parties regarding the correct hire date for Mr. Barrera. Respondent would have been in violation of the requirement that it ensure timely completion of section one on June 20, 1989, and would have been in violation of the requirement that it timely complete section two on June 23, 1989. As both of those dates occurred more than five years before Complainant filed the Complaint in this case, the statute of limitations bars the claim with respect to paragraph 14.E.

Complainant urges that I apply a concept known as the continuing violation doctrine[25] to sustain the claims in Count V. *See* C. Br. at

[23]This date is more than four consecutive days removed from the date that Miguel Hernandez was hired because an intervening weekend allowed Respondent until August 24, 1988, to complete section two of his I–9 form.

[24]Using the later date is assuming the facts in the light most favorable to Complainant in examining whether the claim in question fell inside the statute of limitations.

[25]The continuing violation doctrine Complainant discusses in relation to Count V is not to be confused with the continuing violation principle in *Big Bear* and *Rupson*, discussed *supra*.

16–17. Complainant states that "[t]he continuing violation doctrine allows a plaintiff to base a claim on a series of related wrongful acts even if [some of] the wrongful acts occurred before the beginning of the limitations period." *Id.* at 16 (citing *Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989); *Taylor v. Meirick*, 712 F.2d 1112, 1118–19 (7th Cir. 1983)). Additionally, Complainant notes that the U.S. Supreme Court has "applied the continuation violation doctrine to the statute of limitations in the Fair Housing Act of 1968." *Id.* at 17 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

I am not convinced that the continuing violation doctrine that is outlined in the cases cited by Complainant applies in the present context. First, the Ninth Circuit expressly rejects the proposition in *Taylor* for which Complainant cites it. *See Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994). *Taylor* and *Roley* both involve copyright infringement suits in which the complaining party tried to recover for alleged violations that occurred outside the applicable three-year limitations period. *See Taylor*, 712 F.2d at 1117; *Roley*, 19 F.3d at 481. The Seventh Circuit concludes that a plaintiff may recover for copyright infringements that occurred outside the statute of limitations, as long as the last infringement occurred within the limitations period, and as long as the infringements amounted to a continuing violation. *See Taylor*, 712 F.2d at 1118–19. The Ninth Circuit cites *Taylor* for the continuing violation theory, but rejects the application of that theory in the case before it. *See Roley*, 19 F.3d at 481.

Second, the Ninth Circuit's rationale in *Roley* demonstrates that it would be inappropriate to apply the continuing violation doctrine to the present case. The statute of limitations at issue in *Roley* provides, in language similar to that contained in section 2462, that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." *Id.* (quoting 17 U.S.C. §507(b)). The court reasons that "[s]ection 507(b) is clear on its face. 'It does not provide for a waiver of infringing acts within the limitation period if earlier infringements were discovered and not sued upon, nor does it provide for any reach back if an act of infringement occurs within the statutory period.'" *Id.* (quoting *Hoey v. Dexel Systems Corp.*, 716 F. Supp. 222, 223 (E.D. Va. 1989)). Like the statute of limitations in *Roley*, section 2462 on its face makes no provision to allow the pursuit of claims that fall outside the limitations period if they are closely enough related to

timely claims. I find *Roley*'s analysis applicable to the present case and conclude that the continuing violation doctrine is inoperable in this case because the plain language of section 2462 provides no support for such a theory.

Finally, even absent the guidance from *Roley*, the cases Complainant cites do not support the application of the continuing violation doctrine to the facts of this case. Three of the cases that Complainant invokes involve suits brought by private citizens for the vindication of individual civil liberties. *See Havens Realty*, 455 U.S. at 1115 (involving action brought under the Fair Housing Act of 1968); *Hendrix*, 911 F.2d at 1102 (involving an action alleging discriminatory reduction in pay under the Fair Labor Standards Act); *Malhotra*, 885 F.2d at 1308 (involving an action alleging ethnic discrimination under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866). Also, the types of violations that are found to be subject to the continuing violation doctrine in Complainant's cases all involve the same act repeated at various points in time. *See Havens Realty*, 455 U.S. at 368–69 (involving rental company's repeated acts of racial steering in showing available apartments); *Taylor*, 712 F.2d at 1117 (involving defendant's repeated acts of copying and selling plaintiff's copyrighted maps). In the present case, the acts that Complainant would have me find as constituting a continuing violation are not all the same; some are alleged violations involving failure to properly complete or failure to ensure proper completion of I–9 forms, some are alleged failures to complete I–9 forms in a timely manner, and one is the alleged knowing continue to employ of an unauthorized individual.[26] The various acts that Complainant would have me conclude are related for purposes of satisfying the continuing violations doctrine are not nearly as closely related to each other as the actions that are in dispute in the cases cited by Complainant.

For the foregoing reasons, I conclude that the continuing violation doctrine, as enunciated in the cases cited by Complainant, has no application to the present case. As there are no material factual dis-

[26]Complainant only argues the continuing violation doctrine with respect to Count V, but it is unclear whether Complainant is arguing that a timely violation in Count V saves any untimely violations in the same count, or whether Complainant is arguing that a timely violation in any count saves untimely violations in Count V. As I have found that none of the Count V claims are timely, I take Complainant's position as arguing the latter.

putes with respect to Count V, and as all the claims in that count are time barred as a matter of law, I GRANT Respondent's Motion to Dismiss with respect to Count V.

V. *Conclusion*

I find that the statute of limitations set forth in 28 U.S.C. §2462 applies in this case. With respect to the particular allegations of the Complaint, I make the following findings and rulings:

1. Genuine issues of material fact currently exist with respect to **Count I**. Summary disposition, therefore, is inappropriate for this claim, and I DENY Respondent's Motion to Dismiss with respect to Count I. As Respondent asserts a potentially valid defense, depending on the resolution of the disputed facts, Complainant's motion to strike the statute of limitations defense[27] is DENIED with respect to Count I.

2. The facts as alleged by Respondent with respect to **Counts II, III, and IV** show that the claims contained in those counts fall within the limitations period of section 2462. I DENY Respondent's Motion with respect to Counts II, III, and IV. Also, I GRANT Complainant's motion to strike the statute of limitations defense with respect to Counts II, III, and IV.[28]

3. Regarding **Count V**, no genuine issues of material fact exist, and Respondent is entitled to judgment as a matter of law. As a result, I GRANT Respondent's Motion with respect to Count V, and Complainant's motion to strike is DENIED.

At this time, I defer ruling on the parties' Joint Motion to Approve Consent Findings and Respondent's Motion to Withdraw from Settlement Agreement. I will convene a prehearing conference

[27]Complainant asked that, if I accepted Respondent's Answer as raising statute of limitations issues, I construe Complainant's Prehearing Brief Regarding Statute of Limitations as a motion to strike the statute of limitations defense. *See* C. Mot. Default Judgment at 4.

[28]I may strike from a pleading "any insufficient defense," among other things, *see* 28 C.F.R. §68.1 (1996); Fed. R. Civ. P. 12(f), and that decision is reviewed for abuse of discretion, *see Federal Savings & Loan Ins. Co. v. Gemini Management*, 921 F.2d 241, 244 (9th Cir. 1990). As Respondent's own version of the facts does not support the existence of a statute of limitations defense with respect to Counts II–IV, I strike the defense as to those counts.

to discuss those motions in light of my rulings in this Order. My office will contact both parties to arrange a date and time for such conference.

SO ORDERED.

Dated and entered this 31st day of October, 1997.

ROBERT L. BARTON, JR.
Administrative Law Judge