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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding Case No. 97A00127
NAIM OJEIL AND SAMOEIL ISHK, Individually, and d.b.a.: NAIME'S FILM & TELEVISION BEAUTY SUPPLY, Respondents.	)	**Marvin H. Morse** **Administrative Law Judge**

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND INQUIRING FURTHER
(January 12, 1998)

I. Introduction

This case poses two related issue(s):

- When, if ever, is an 8 U.S.C. § 1324a paperwork violation which has been cured a "continuing" violation?
- When, if ever, is a complaint which alleges 8 U.S.C. § 1324a(b) paperwork violations barred by a statute of limitations?

I hold that:

- a paperwork violation ceases to be "continuing" from the time it is corrected,
- the 28 U.S.C. § 2462 five-year statute of limitations is applicable to 8 U.S.C. § 1324a(b) enforcement actions involving cured violations,
- the 28 U.S.C. § 2462 statute of limitations, as applied to 8 U.S.C. § 1324a(b), runs from the date of the paperwork violation, *i.e.*, from three days after hire, 8 C.F.R. § 274a.2(b)(ii), until cure,
- the statute of limitations is satisfied by filing a complaint, not by issuing a Notice of Intent to Fine (NIF), and

- by virtue of 28 U.S.C. § 2462, 8 U.S.C. § 1324a complaints involving cured violations are time-barred if not filed in the Office of the Chief Administrative Hearing Officer (OCAHO) within five years.

This result reflects the substantial interest of the United States in prompt and efficient civil prosecution of immigration-related worksite violations, encourages employers to correct deficiencies, and distinguishes between employers who do so and those who flaunt the law.

Further resolution of this case awaits Naime's clarification of employees' actual tenure; INS proof that Naime's employment eligibility verification Forms I-9s were deficient at the time of inspection; and INS explanation of the basis for allegations of § 1324a(b) violations in the face of compliance or cure.

II. Background and Procedural History

Naime's Film & Television Beauty Supply (Naime's or Respondent), a North Hollywood, California, business, hired eleven work-authorized employees between March 9, 1989, and July 26, 1993.

On November 18, 1993, the Immigration and Naturalization Service (INS or Complainant) served Naime's with a Notice of Inspection, advising that an on-site inspection of INS Forms I-9 would take place on November 24, 1993. At Naime's request, inspection was deferred until November 29, 1993.

According to the INS, inspection revealed that Naime's untimely completed Sections 2, the employer attestation entries, of eleven INS Forms I-9. While 8 C.F.R. § 274a.2(b)(ii) requires an employer to complete the form within three business days of hire, INS alleges Naime's did not complete all attestation sections until 1993. Specifically, INS contends that Naime's did not attest to Section 2 of the I-9s until the following dates:

Employee	**Date of Hire**	**Date I-9 Was Cured**
Chekaiban, George	4/1/91	1/13/93
Fischer, Denise	10/17/90	11/23/93
Fischer, Nicole L.	11/8/90	11/22/93
Ingley, Lee C.	7/3/89	11/22/93
Parsikhian, George A.	10/30/91	11/22/93
Reichman, Dena J.	10/4/92	11/24/93
Rosenberg, Susan C.	10/1/92	11/28/93
Ruiz, Armando Nunez	3/9/89	11/22/93
Sarkisyan, Siroun	8/1/91	11/22/93
Silvaroli, Christine	1/1/91	11/29/93
Yacoubian, Ani V.	7/26/93	11/23/93

Complainant's Memorandum in Opposition to Respondent's Motion for Partial Summary Judgment, pp. 15-16.

On March 2, 1994, INS served a NIF, charging that Naime's failed timely to complete Forms I-9 for the eleven above-named individuals. On March 17, 1994, Naime's requested a hearing before an Administrative Law Judge (ALJ).

An enchanted silence ensued. Not until **June 23, 1997** did INS file its Complaint. The Complaint charges Naime's with tardy completion of Section 2 of the eleven Forms I-9, and requests a civil money penalty of $3,300 ($300 per violation).

On August 14, 1997, Naime's filed its Answer, a general denial of all allegations, which interposed numerous affirmative defenses, including (1) failure to state a claim upon which relief can be granted; (2) time bar; (3) insufficient process of the Complaint; (4) insufficient service of process of the Complaint; (5) insufficient service of process of the NIF; (6) violation of due process; (7) good faith compliance; (8) excessive penalty; (9) expiration of time of retention for all or some of the Forms I-9. Naime's contends in its Response to Interrogatories that Forms I-9 were properly and timely prepared; it cooperated with the INS during the on-site inspection; and all employees were eligible to work in the United States.

On November 7, 1997, Naime's moved for partial summary judgment as to eight of the violations, contending they are barred by 28 U.S.C. § 2462. Naime's relies on *Federal Election Comm'n v. Williams*, 104 F.3d 237 (9th Cir. 1996) (28 U.S.C. § 2462 applicable to administrative proceedings involving imposition or enforcement of civil penalties), *cert. denied*, __ S. Ct. ___ (1997), 66 U.S.L.W. 3297 (1997), 1997 WL 629648, and *United States v. Davila*, 7 OCAHO 936 (1997) (time limitation runs from date on which conduct constituting violation took place), *appeal filed*, No. 97-60457 (5th Cir. 1997). Naime's contends that claims regarding the following individuals are time-barred because the alleged deficiencies, if any, as fixed by 8 C.F.R. § 274a.2(b)(ii) ("within three business days of hire"), occurred at least five years before INS filed its Complaint on June 12, 1997:

Employee	**Date of Hire**	**Interval**
Chekaiban, George	4/1/91	6 years
Fischer, D.	10/17/90	6 years
Fischer, N.	11/8/90	6 years
Ingley, Lee C.	7/3/89	7 years
Parsikhian, George A.	10/30/91	6 years
Ruiz, Armando Nunez	3/9/89	7 years
Sarkisyan, Siroun	8/1/91	6 years
Silvaroli, Christine	1/1/91	6 years

On December 15, 1997, INS filed Complainant's Cross-Motion for Partial Summary Decision. Naime's did not respond to that motion.

INS argues that paperwork violations are *per se* continuous, and that 28 U.S.C. § 2462 is inapplicable. INS contends that "the applicability of the Federal Omnibus Statute of Limitations, 28 U.S.C. § 2462, to administrative proceedings pursuant to 8 U.S.C. § 1324a has not yet been decided." INS is incorrect. The applicability of the general limitations period of 28 U.S.C. § 2462 to causes of action under 8 U.S.C. § 1324a was upheld in an interim order issued October 31, 1997, in *United States v. Curran Engineering Co., Inc.*, 7 OCAHO 975 (1997), 1997 WL 751153 (O.C.A.H.O.). *Curran*, discussed at **III.A.**, below, fixed the dates relevant for its application from the date of violation until the date the complaint is filed.

III. Discussion

A. INS Misapplies the Concept of "Continuing Violation"

INS mischaracterizes Naime's conduct as a "continuing violation." Although "a paperwork violation is not a one-time occurrence, but a continuous violation ***until*** corrected," a paperwork mistake, once cured, is no longer a violation. *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO 940, at 2 (1997) (emphasis added). Common sense compels the conclusion that a violation does not "continue" after cure. "[A] paperwork violation continues until it is corrected." *United States v. Curran Eng'g Co., Inc.*, 7 OCAHO 975, at 19, 1997 WL 751153, at *15. An employer who does not correct paperwork violations even after an inspection is in continuing violation; an employer who is in compliance on the day of inspection is no longer in violation. Accepting as true Complainant's contention that Naime's failed to complete Section 2 within three days of hire, Naime's violations ceased if it corrected the Section 2 attestation of Forms I-9 between January 13, 1993 and November 29, 1993. Naime's apparently cured at least ten of the eleven violations ***before*** INS' November 29, 1993, on-site inspection, and corrected the eleventh that day. INS does not contend that flaws remained in the cured I-9s.

The delay in filing the Complaint until 1997 raises significant concerns about when an employer who corrects paperwork violations can repose, confident that it complied with the law. The federal policy embodied in § 1324a, enacted in the Immigration Reform and Control Act of 1986 (IRCA) -- *i.e.*, removal of incentives to violate immigration law by imposing on the employer liability for hiring unauthorized aliens and establishing a verification regimen to ensure compliance -- is not advanced by pursuing as an incorrigible continuous violator an employer who appears to have come into compliance by the date of inspection. The government interest in encouraging employers to correct mistakes is considerable, and is undermined by punishing employers who correct paperwork mistakes at or before inspection.

INS misconstrues *United States v. Big Bear Market*, 1 OCAHO 285, 303 (1989), *aff'd by* CAHO, 1 OCAHO 341 (1989), *aff'd, Big Bear Super Market No. 3 v. INS*, 913 F.2d 754 (9th Cir. 1990), which held that because "[t]he obligation to comply [with paperwork requirements is]

. . . continuous, liability for noncompliance is continuous also." *Big Bear* is distinguishable from Naime's.[1] *Big Bear* involved violations extant on the day of inspection which persisted uncorrected months thereafter. In *Big Bear*, INS conducted an on-site inspection on September 11, 1987, and found that the employer had failed to complete I-9s for 183 employees. 1 OCAHO at 288. INS issued a citation on October 5, 1987. *Id.* As of December 11, 1987, the employer had not yet completed Forms I-9 for 132 individuals. *Id.* The *Big Bear* I-9s were not completed at a time relevant to the on-site inspection. In contrast, from all that appears in the evidence submitted through motion practice, Naime's was already in compliance on the day of inspection. Unlike Naime's, *Big Bear* was promptly prosecuted. The question of a time bar did not arise in *Big Bear*. *Big Bear* stands for the proposition that an employer has an affirmative duty to correct violations, as did Naime's.

> IRCA imposes on employers a duty to prepare and present employment verification forms. It is reasonable that implementing regulations require employers to demonstrate compliance when duly notified. 8 C.F.R. § 274a.2(b)(2). An ensuing investigation provides no defense to an employer who was not in compliance ***at the time set for inspection***. Production of I-9s by Big Bear on January 7, 1988, in response to subpoena or otherwise, does not relieve it from liability for failure to be in compliance on the date of the inspection.

Big Bear, 1 OCAHO at 312 (emphasis supplied).

Similarly, in *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO 940, an employer was found liable for ***never*** having corrected violations that were the subject of a 1993 settlement agreement of an earlier complaint, and the subject of a ***second*** NIF. The *Rupson* employer having failed to cure violations, they were therefore "continuous" as of the date of the OCAHO Complaint. The *Rupson* employer argued that there was no obligation to cure violations which were the subject of a settlement agreement in the first of two cases. *Rupson* held that a settlement agreement in an earlier case does not absolve an employer from liability for failure subsequently to cure ongoing violations.

Naime's is distinguishable from *Rupson*. First, by not raising affirmative defenses of cure, time bar or *laches*, *Rupson* waived them; Naime's raises and preserves them. *See* 28 C.F.R. §§ 68.9 (c) (1), (2), (d); FED. R. CIV. P. 8 (c), 12(h). Second, *Rupson* never cured violations, but, rather, defended the second case on the basis that a settlement agreement in the first case

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[1]Citations to OCAHO precedents in bound Volumes I-V, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, *seriatim*. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume V, however, are to pages within the original issuances.

absolved it of any obligation to so do; in contrast, by the date of inspection, Naime's cured at least ten and possibly all of the violations. INS recognizes that Naime's cured the violations, but argues that violations corrected more than three days after hire are ***forever*** "continuing," presumably ***even when cured.*** Third, INS issued a second NIF in *Rupson;* in Naime's, INS relies on its 1993 inspection and 1994 NIF, itself based on violations cured by November 29, 1993, the date of the first and only INS inspection.

Because neither *Big Bear*, *supra*, nor *Rupson*, *supra*, raised the issue of the application of 28 U.S.C. § 2462 to 8 U.S.C. § 1324a, they are not dispositive of Naime's outcome. The "continuing violation" doctrine they embody does not defeat a statute of limitations defense because the violations giving rise to the actions in *Big Bear* and *Rupson* were uncured and ongoing.

The critical inquiry is to determine (1) if Naime's was ever in violation, and (2) if so, when, if at all, did Naime's come into compliance? Naime's appears to have been in compliance for all but perhaps one of the eleven I-9s no later than November 29, 1993, the date of inspection. Depending on when on November 29, 1993, Naime's corrected Christine Silvaroli's I-9 (either before or after the inspection), it may or may not have been in compliance as to that I-9. What, then, were the last dates on which Naime's was in violation? Does 28 U.S.C. § 2462 place these violations, "continuous" until cured, beyond INS' reach?

B. Title 28 U.S.C. § 2462 Applies to 8 U.S.C. § 1324a Proceedings and Runs From the Date of the Violation That Gives Rise to the Penalty Until the Filing of the OCAHO Complaint

The impact of 28 U.S.C. § 2462 on a ***cured*** 8 U.S.C. § 1324a violation is an issue of first impression. The applicability of the statute of limitations did not arise in earlier ALJ decisions dealing with "continuing violations." Because a time bar is not implicated if a violation subsists at the time INS files a complaint, 28 U.S.C. § 2462 is inapplicable to a violation "continuing" on that date. In contrast, where an I-9 deficiency was cured prior to filing the 8 U.S.C. § 1324a complaint, 28 U.S.C. § 2462 applies.

Title 28 U.S.C. § 2462 ("Time for Proceeding") commands that:

> 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.

This statute of limitations, a derogation of sovereign immunity[2] applicable to actions in which Congress does not include a time limitation in the particular statute under which the penalty action is brought,[3] embraces § 1324a proceedings.[4]

In *United States v. Curran Eng'g Co., Inc.*, 7 OCAHO 975, 1997 WL 751153, which like *Naime's* arose in the Ninth Circuit, INS served an employer with a NIF alleging violations of § 1324a on October 27, 1992. Although the employer requested a hearing on November 10, 1992, INS did not file a Complaint charging the employer with the violations described in the NIF until May 9, 1997, approximately four and one half years after the NIF was issued. Although the parties subsequently entered into a negotiated settlement, an interim *Curran* order held 28 U.S.C. § 2462 applicable to § 1324a administrative enforcement proceedings:

> 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.

Curran, 7 OCAHO 975, at 5, 1997 WL 751153, at *4.

Relying on the decision of the United States Court of Appeals for the Ninth Circuit in *Federal Election Comm'n v. Williams*, 104 F.3d at 240, *Curran* held the statute of limitations to toll from the date of the underlying violation giving rise to the penalty assessment proceeding. *Curran*, 7 OCAHO 975, at 8, 1997 WL 751153, at * 7("*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" and "provides binding precedent"). *Curran* held that the running of the limitations period is halted by filing of a complaint with OCAHO, not by serving a NIF. *Curran*, 7 OCAHO 975, at 16, 1997 WL 751153, at *13 ("[A]ccepting 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").

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[2] *United States v. Weaver*, 207 F.2d 796 (5th Cir. 1953).

[3] *Federal Election Comm'n v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15 (D.D.C. 1995).

[4] *United States v. Curran Eng'g Co., Inc.*, 7 OCAHO 975, at 6-7, 10, 14, 16, 1997 WL 751153, at ** 8, 11, 13 ("[S]ection 2462 applies to administrative action in . . . [8 U.S.C. § 1324a] administrative action," "[F]or purposes of section 2462, . . . [1324a] claims . . . accrued on the dates of the alleged violations and . . . five-year statute of limitations period began to run on those respective dates," "***[S]ection 2462's reference to an action, suit, or proceeding contemplates an adversarial adjudication, not an extrajudicial calculation of a proposed fine such as a NIF,***" therefore, "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") (emphasis added).

Administrative adjudication pursuant to 8 U.S.C. § 1324a starts with filing of the complaint with OCAHO. *Id.* On implementing § 1324a, the Attorney General could have adopted a regimen by which service of the NIF (in statutory parlance, service of a demand for civil money penalty) and request for hearing under § 1324a(e)(3)(A) triggered the proceeding before an ALJ contemplated by § 1324a(e)(3)(B), satisfying the command of 28 U.S.C. § 2462 as comprising a step in a single "action, suit or proceeding." Instead, however, the Attorney General adopted a procedure by which INS serves the NIF and directs the employer to address to INS its request for the ALJ hearing.

That procedure excludes any role by the adjudicator until INS files its OCAHO complaint. INS, as the enforcement agency/program manager, retains full discretion to select among options, which include doing nothing, negotiating to obtain an agreed result at or below the civil money penalty demanded by the NIF, or filing a complaint at its leisure. Assignment to INS of *total* discretion as the enforcement agency/program manager both before and after service of the NIF is irreconcilable with the role of adjudicator under 28 U.S.C. § 2462 of "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." Precisely because the adjudicative role of OCAHO is not triggered unless and until INS files its complaint, it cannot be supposed that events prior to that filing and within the sole discretion of the enforcement agency/program manager comprise any part of the "action, suit or proceeding," the initiation of which brings closure to measurement of the § 2462 period of limitations. That this is necessarily so is demonstrated by the command of § 1324a(e)(3)(B) that ALJ hearings are proceedings pursuant to the Administrative Procedure Act, 5 U.S.C. § 554, as to which there is an absolute separation of functions between the enforcement and adjudicative officials, a bar which would be breached if a NIF in the hands of INS were understood to be the "action, suit or proceeding" before OCAHO. *See* 5 U.S.C. § 554(d) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings").

C. The Earliest Date of Violation Is Three Days After Hire; the Latest, the Date of Attestation

The earliest dates on which Naime's could have been in violation are the third days after each hire; the latest, the dates of attestation. Therefore, according to INS exhibits on motion practice, the first dates on which Naime's could have been in violation were:

Employee	**Date of Hire**	**First Possible Violation Date**
Chekaiban, George	4/1/91	4/4/91
Fischer, Denise	10/17/90	10/21/90
Fischer, Nicole L.	11/8/90	11/11/90
Ingley, Lee C.	7/3/89	7/6/89
Parsikhian, George A.	10/30/91	11/2/91

Reichman, Dena J.	10/4/92	10/7/92
Rosenberg, Susan C.	10/1/92	10/4/92
Ruiz, Armando Nunez	3/9/89	3/12/89
Sarkisyan, Siroun	8/1/91	8/4/91
Silvaroli, Christine	1/1/91	1/4/91
Yacoubian, Ani V.	7/26/93	7/29/93

The last dates on which Naime's could have been in violation, if in fact it hired the employees on the dates listed, were the dates on which the I-9s were cured, *i.e.*, the dates of attestation:

Employee	**Date of Hire**	**Date I-9 Was Cured**
Chekaiban, George	4/1/91	1/13/93
Fischer, Denise	10/17/90	11/23/93
Fischer, Nicole L.	11/8/90	11/22/93
Ingley, Lee C.	7/3/89	11/22/93
Parsikhian, George A.	10/30/91	11/22/93
Reichman, Dena J.	10/4/92	11/24/93
Rosenberg, Susan C.	10/1/92	11/28/93
Ruiz, Armando Nunez	3/9/89	11/22/93
Sarkisyan, Siroun	8/1/91	11/22/93
Silvaroli, Christine	1/1/91	11/29/93
Yacoubian, Ani V.	7/26/93	11/23/93

Whatever the dates of deficiency, the date on which the clock stopped was **June 23, 1997**, when INS filed its Complaint. Actions based on deficiencies cured before **June 23, 1992**, if any, are time-barred. Naime's contends it was in compliance at all relevant times, including, implicitly, as of three days after hire. If any employee was hired within three days before the attestation date, there is presumably no violation as to that employee.

"A paperwork violation continues until it is corrected, or until the employer is no longer required to retain the I-9 form." *Curran*, 7 OCAHO 975, at 19, 1997 WL 751153, at *15. Naime's contends that it was not obligated to comply with the requirements of 8 U.S.C. § 1324a(a)(1)(B) because "the required time for retention of verification forms under 8 U.S.C. 1324a(b) for all or some of their employees had expired." Answer, Ninth Affirmative Defense. "[A]n employer is only 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***." *Curran*, 7 OCAHO 975, at 19, 1997 WL 751153, at *15 (*citing* 8 U.S.C. § 1324a(b)(3)(B); 8 C.F.R. § 274a.2(b)(2)(i)(A)) (emphasis added). Although Naime's invokes the lapse of the statutory retention date as a defense, to date it has provided no factual documentation in support. Since the retention obligation survives termination of employment for

one year where the employment lasts longer than three years after hire, the date on which each employee was terminated, if at all, is critical to this defense.

D. More Information Is Needed To Determine Whether Naime's Was In Violation

If Naime's corrected any of the I-9s before **June 23, 1992**, Naime's shall provide copies of the corrected forms, supported by affidavit. If not, Naime's shall so specify. If Naime's hired any of the employees within three days of the attestation date, it shall so state and shall provide supporting documentation. Naime's shall also provide a list of employees, dates of hire, and date of termination, and shall specify which employees it contends were terminated on a date precluding retention of the I-9.

E. More Information Is Needed To Evaluate Naime's Claim that INS Failed To Provide Due Process and Sufficient Service of Process

Naime's Answer contends that there was insufficiency of process regarding the Complaint, insufficiency of service of process of the Complaint, insufficiency of service of process of the NIF, and violation of the due process clause of the Fourteenth Amendment and of Art. I, § 7, of the California Constitution. Naime's needs to articulate the factual bases supporting these affirmative defenses.

F. Motions for Summary Judgment Are Denied

Both Naime's and INS move for summary decision. "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). *See Curran*, 7 OCAHO 975, at 3, 1997 WL 751153, at *2; *D'Amico v. Erie Community College*, 7 OCAHO 948, at 4 (1997), 1997 WL 562107, at *3 (O.C.A.H.O.). When ruling on motions to dismiss, a forum must assume well-pleaded facts alleged in the Complaint are true. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). However, legal conclusions and unwarranted factual deductions are not assumed to be true. *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 648 n.8 (9th Cir. 1958). An ALJ may only "enter 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." 28 C.F.R. § 68.38(c). A fact is material when it influences a proceeding's outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When deciding whether a genuine issue of material fact exists, a forum views all facts and reasonable inferences drawn from them in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party requesting summary judgment must demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Far from demonstrating absence of any genuine issue of material fact, the parties' pleadings and attachments illustrate an evidentiary *lacuna*. Therefore, I am unable to conclude that there is no genuine dispute of material fact which would warrant decision for either party. This Order elsewhere requires the parties to supply the missing documentation, including copies of actual records proving the dates on which the eleven employees were in Naime's hire -- *i.e.*, the dates on which each was hired and either was terminated or resigned; and the original I-9s which INS asserts it found deficient as to Section 2.

IV. Order

A. The parties are reminded that the Order Denying Complainant's Motion For Protective Order, 7 OCAHO 976, at 5 (1997), obliged them "to abate all proceedings for three weeks [and to] engage in settlement discussions." That Order deferred decision on pending motions by Complainant for more definite responses to discovery and to strike affirmative defenses, and contemplated setting of a telephonic prehearing conference absent report of a global settlement. In light of the cross motions for summary decision rejected today it is obvious that no settlement was achieved. However, pending a further effort at settlement, failing which the parties will file responses to the requests in these ordering paragraphs, it would be premature to schedule a conference.

The parties will be expected promptly to confer, and, by **February 14, 1998,** if they cannot by then report having achieved an agreed disposition, shall provide a joint written report on settlement efforts, failing which they shall file separate reports.

B. As appears from the discussion above, either the I-9 deficiencies were cured as of the date of inspection, or they were not. If they were not, the dates of employment, including those of hire and of termination for each employee, are critical to determining whether time limitations bars any of the charges. Accordingly, by **February 14, 1998**, absent an agreed disposition between the parties,

> **1**. Naime's shall provide, in short list form, the dates of employment (hire and termination) for each of the eleven named employees; the date(s) on which it first completed I-9s for each employee; and copies of the original I-9s which INS asserts lacked Section 2 attestation. If Naime's cannot provide any I-9s for the eleven employees that predate the 1993 attested forms, it shall state the absence of such documentation. Naime's shall also specify, in short list form, the factual bases for its claims of constitutionally deficient service and violation of due process, and shall provide relevant legal authority supporting its claims.

2. INS shall provide, in short list form, the dates on which it asserts the employees were in Naime's employ; documentation that they were so employed; and copies of the original I-9s which INS asserts lacked Section 2 attestation. If INS cannot provide such documentation, it shall so state.

SO ORDERED.

Dated and entered this 12th day of January 1998.

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Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Denying Motions for Summary Judgment and Inquiring Further were mailed first class this 12th day of January 1998, addressed as follows:

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