

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

United States of America, Complainant, v. Mr. Z. Enterprises, Inc., and Edward Zimmerman, Individually, Respondents; 8 U.S.C. § 1324a Proceeding, Case No. 89100435.

FINAL DECISION AND ORDER

ROBERT B. SCHNEIDER, Administrative Law Judge

Appearances: **ALAN S. RABINOWITZ**, Esquire
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For the Complainant, United States of America
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For Respondents, Mr. Z Enterprises, Inc., and Edward Zimmerman, Individually

DATED: January 11, 1991

SYNOPSIS

The Complaint in this case, as amended, charged Respondent Mr. Z Enterprises, Inc., and/or Respondent Edward Zimmerman, in his individual capacity, with violations of both section 274A(a)(1)(A) and section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act). I find and conclude that Respondent Edward Zimmerman, in his individual capacity (and not as an agent of the corporation), is liable for Counts 1 through 4 of the Complaint for knowingly hiring and continuing to employ, after November 7, 1986, the unauthorized aliens named in the Complaint, and for Counts 7 through 10 for failing to comply with the verification requirements of section 274A(a)(1)(B) with respect to the individuals named in those Counts. I further find and conclude that Respondent Mr. Z Enterprises is liable for Count 5 for failing to comply with the verifications requirements of section 274A(a)(1)(B) of the Act for the individual named in that Count. I order Respondent Edward Zimmer-

man to cease and desist from violations of section 274A(a)(1)(A) of the Act, to comply with the requirements of section 274A(a)(1)(B) of the Act, and to pay a civil monetary penalty of \$4200.00. I order Respondent Mr. Z Enterprises to comply with the requirements of 274A(a)(1)(B) of the Act and to pay a civil monetary penalty of \$300.00.

TABLE OF CONTENTS

	<u>Page</u>
I. Procedural History.....	1
II. Background and Factual Summary.....	3
A. Background.....	3
B. Undisputed Facts.....	6
C. Disputed Facts.....	12
III. Legal Analysis.....	17
A. Civil or Quasi-Criminal Proceeding.....	17
B. Francisco Munguia (Counts 1 and 7).....	19
1. Initial Encounter on March 13, 1989.....	20
2. Events at the Trailer on the Property of Edward Zimmerman.....	23
3. Francisco Munguia's Sworn Statement.....	24
C. Gerardo Urbina-Munguia (Counts 2 and 8) and Rafael Urbina-Munguia (Counts 3 and 9).....	30
D. Benjamin Becerril-Saenz (Counts 4 and 10).....	37
E. Humberto Pena-Torres (Count 6).....	41
IV. Civil Monetary Penalty.....	46
V. Ultimate Findings.....	47
VI. Certification of Service.....	50

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I. Procedural History

On September 5, 1989, a Complaint was filed with the Executive Office of Immigration Review, Office of Chief Administrative Hearing Officer, charging Respondent Mr. Z Enterprises, in a total of ten (10) Counts, with violations of three separate sections of 8 U.S.C. § 1324a.

Counts 1 through 4 of the Notice of Intent to Fine allege that Respondent knowingly hired individuals unauthorized to work in the United States in violation of 8 U.S.C. § 1324a(1)(A). Counts 5 through 10 allege that Respondent failed to comply with the verification requirements of 8 U.S.C. § 1324a(a)(1)(B), 8 C.F.R. § 274a.2(b)(1)(i)(A) or, in the alternative, that Respondent failed to retain and/or present Employment Eligibility Verification Forms (Forms I-9) for the named individuals, in violation of section 1324a(b)(3), 8 C.F.R. § 274a.2(b)(2)(ii).

On September 11, 1989, Respondent(s) filed its Answer in this case denying all allegations in Paragraph 3 of the Complaint with respect to each knowing and each verification violation. As affirmative defenses, Respondent(s) allege that (1) the individuals named in Counts 1 through 4 and 6 through 10 were not, at all times alleged, employees of Mr. Z Enterprises, and (2) that it is not subject to the Immigration Reform and Control Act of 1986 ('`IRCA'') as to each named individual in Counts 1 through 4 and 6 through 10.

On December 4, 1989, the parties filed a stipulation permitting Respondent(s) to file an amended Answer. On December 12, 1989, I issued an Order permitting Respondent to amend its Answer. As stipulated, Respondent's amended Answer denies all parts of Paragraph 3 of the Complaint except as follows: ``Respondent admits

that it hired Ray Green (Count 5) after November 6, 1986 without verifying his identity and employment eligibility.'

On December 7, 1989, Complainant filed a Motion to Amend Complaint seeking to correct a typographical error made in the preparation of the Notice of Intent to Fine by changing the name of the individual named in Count 4 to Benjamin Becerril-Saenz. This motion was granted on December 14, 1989.

On December 13, 1989, Complainant filed a Motion to Compel Discovery pursuant to 28 C.F.R. § 68.21 and Rule 37(a) of the Federal Rules of Civil Procedure. Respondent(s) filed its Opposition to Complainant's Motion to Compel on December 29, 1989, along with the Declaration of William Sailer. A hearing was held on January 24, 1990, to determine the merits of Complainant's Motion to Compel, and based on the arguments of counsel and the rulings I made at the hearing, an order was issued on January 25, 1990, granting Complainant's motion.

Complainant filed its second Motion to Amend the Complaint on April 13, 1990. In this second Motion to Amend, Complainant sought to add as a Respondent to this proceeding Mr. Edward Zimmerman, individually. Respondent(s) filed its Opposition to Complainant's Motion to Amend on April 23, 1990. On April 27, 1990, I issued an order denying Complainant's Motion to Amend on the basis that ``the balance of prejudices would unduly tip against Respondent if I were to grant Complainant's Motion.''' However, I did note in that order that, ``pursuant to the regulations governing these proceedings, and the guidelines provided by the Federal Rules of Civil Procedure, I [would] consider carefully additional motions to amend, especially those that may be more strictly in conformity with the evidence yet to be presented at the hearing. Rule 15(b) F.R.C.P.'''

On April 13, 1990, Complainant also filed a Motion In Limine seeking a ``ruling on the admissibility of Forms I-263A, Record of Sworn Statement, of unavailable witnesses and Forms I-213, Record of Deportable Alien, relating to individuals allegedly employed by Respondent.''' Respondent's Opposition to Complainant's Motion In Limine was filed on April 23, 1990. Complainant filed a Reply to Respondent's Opposition on April 25, 1990. I stayed ruling on Complainant's Motion In Limine until evidence was presented at the hearing. At the conclusion of the hearing, I granted Complainant's Motion, admitting the Forms I-263a, Record of Sworn Statement, and Forms I-213, Record of Deportable Alien, introduced by Complainant. (Tr. at 1360-61.)

On April 30, 1990, through May 8, 1990, an evidentiary hearing was held in this case.

During the hearing, Complainant made an oral Motion to Amend the Complaint in the same manner as set forth in its second pre-hearing Motion to Amend, which I granted. On June 1, 1990, I issued an Order Clarifying My Ruling During Hearing Granting Complainant's Motion to Amend based on a request for a clarification made by Respondent(s)' counsel during a telephonic conference on the same date. In my order of June 1, 1990, I explained that, ``after hearing the evidence at trial, I became convinced that the most administratively efficient and practical course of action was to reconsider Complainant's renewed motion to amend [and after] determining that the proposed amendment would not be unduly prejudicial to Respondent, I granted the renewed Motion to Amend'' based upon the evidence developed at the hearing and Rule 15(b) of the Federal Rules of Civil Procedure (FRCP).¹

In accordance with my Order Directing Briefing Schedule, issued on June 1, 1990, the parties timely submitted post-hearing briefs.

II. Background and Statement of Facts

A. Background

The main dispute to be resolved at the hearing, essentially one of fact, was whether or not Respondents ``employed'' the individual aliens named in the Complaint.

Due to the factual complexity of this case, I believe it is important to identify at the outset of this decision the interested parties involved in this matter. Thereafter, I will set forth a summary of both those facts which are, for the most part, undisputed and those facts which are clearly disputed.

Complainant initially charged as Respondent in this case Mr. Z Enterprises, a California corporation engaged in the construction of single family dwellings. Complainant later sought, by way of motion, to amend the Complaint to include Edward Zimmerman, individually, as either an additional Respondent or as an alternative Respondent. Although I initially denied Complainant's motion, I subsequently granted it based on the evidence developed at the hearing and Federal Rule of Civil Procedure 15(b). Thus, the Respondents in this case are Mr. Z Enterprises and/or Edward Dwain Zimmerman, individually.²

¹Pursuant to 28 C.F.R. § 68.1, the Federal Rules of Civil Procedure ``shall be used as a general guideline in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.'' Since neither the regulations or the Act provide for or control the amendment of pleadings to conform to the evidence, I look to the Federal Rules of Civil Procedure; specifically, FRCP 15(b).

²In seeking to amend the Complaint by adding Edward Zimmerman as a Respondent in this case, Complainant argued that a finding of liability could be made

In addition to identifying the Respondents, I believe it would be beneficial to identify those individuals alleged to have been, under IRCA, unlawfully employed by Respondents. Those individuals are: Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), Benjamin Becerril-Saenz (Cts. 4 and 10, as amended). (Respondents are also charged with failure to prepare and/or present Forms I-9 for these unauthorized aliens.) Additionally, Complainant alleges that Respondents failed to prepare and/or present Forms I-9 for the following individuals: Humberto Pena-Torres (Ct. 6) and Ray Green (Ct. 5). It is admitted that Ray Green (Ct. 5) is employed by Respondent Mr. Z Enterprises, and no Form I-9 was prepared for him (Tr. at 597, 603, 686-87, 1124-25, 1130).

The aliens identified above made various statements regarding their relationship, or lack of relationship, with Respondents which were introduced at the hearing. For the sake of clarity, I will list the statements made by each individual:

(1) Francisco Munguia-Bernal: (a) oral statements to Border Patrol agents when he was apprehended on March 13, 1989; (b) a Form I-263A, Record of Sworn Statement, signed by him on March 13, 1989; and (c) videotaped statement on July 17, 1989.

(2) Gerardo Urbina-Munguia: (a) oral statements to agents when he was apprehended on March 15, 1989; (b) Form I-263A, Record of Sworn Statement, signed on March 15, 1989; (c) videotaped statement on July 17, 1989; and (d) oral statements to agents and Form I-263A, Record of Sworn Statement, signed on January 8, 1990.

(3) Rafael Urbina-Munguia: (a) oral statements to agents when he was apprehended on March 15, 1989; (b) Form I-263A, Record of

against both the company and the individual if both are named as Respondents in the Complaint. However, as I indicated in both my Order Denying Complainant's written Motion to Amend the Complaint and in my Order Clarifying My Ruling During Hearing Granting Complainant's Motion to Amend, it is my view that a finding of liability cannot be made against both the company and the individual. Either the individual was acting as an agent of the company, and thus the company is liable, or the individual was acting on his or her own behalf, with the benefit of the employee's services accruing to the individual, and thus the individual is liable. Furthermore, section 274A of the Act specifically refers to "a person or other entity." My decision to grant Complainant's Motion to Amend the Complaint, based upon the evidence presented at the hearing, is not inconsistent with this view. The evidence presented revealed that, while Mr. Z Enterprises was the proper party to be charged with one of the counts alleged by Complainant, Edward Zimmerman, in his individual capacity, was the proper party to be charged with all the remaining counts alleged in the Complaint. Hence, both the company and the individual are found liable, but on different counts.

Sworn Statement, signed on March 15, 1989; and (c) videotaped statement on July 17, 1989.

(4) Benjamin Becerril-Saenz: (a) oral statements to agents when apprehended on April 11, 1989; (b) Form I-263A, Record of Sworn Statement, signed on April 11, 1989; and (c) videotaped statement on July 17, 1989.

(5) Humberto Pena-Torres: (a) oral statements to agents on March 13, 1989; (b) oral statements to agents on April 11, 1989; (c) oral statements to agents and Form I-263A, Record of Sworn Statement, signed on March 8, 1990; (d) deposition statement on April 19, 1990; and (e) testimony at hearing.

A unique aspect of this case that bears noting at this point is the fact that much, if not a majority, of the evidence presented for my consideration consists of numerous, and often inconsistent, hearsay statements of the aliens named in the Complaint, as well as other individuals (i.e. most of the above-mentioned statements). The determination of the proper weight to give these various statements poses a special challenge for the finder of facts. These hearsay statements are discussed in more detail, infra.

At the hearing, in support of its allegations against Respondents, Complainant presented the testimony of eleven (11) witnesses and introduced several exhibits. Complainant's witnesses included: U.S. Border Patrol Agents Carl Alan Creamer, William McCarthy, John Szczepanowski, William Colgan, Paul Blocker, Jr., George Schoen, and Carlos Angulo; Humberto Pena-Torres; Respondent Edward Zimmerman; Michael Zimmerman; and Larry Loughlin, a labor standards investigator. Among the exhibits introduced by Complainant were the sworn statements of Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), Benjamin Becerril-Saenz (Cts. 4 and 10), and Humberto Pena-Torres (Ct. 6).

Respondents introduced at the hearing the testimony of Lisa Bilal, the bookkeeper for Respondent Mr. Z Enterprises (Tr 1074-75); Sheila Dominy, the manager of an apartment complex owned, in part, by Respondent Edward Zimmerman (Tr 1084-85); Ray Green; Edward Zimmerman; and Annette Ancira, an interpreter. In addition, Respondents introduced the videotaped ``testimony'' of Gerardo Urbina-Munguia, Rafael Urbina-Munguia, Francisco Munguia-Bernal, and Benjamin Becerril-Saenz. Respondents also introduced various exhibits, one of which was the deposition of Humberto Pena-Torres.

B. Unidsputed Material Facts

After a thorough review of all the testimony and exhibits presented, I find the following material facts to be undisputed:

(1) Mr. Z Enterprises is a corporation, licensed under the laws of the State of California, and engaged in the construction of single family dwellings. (Tr. at 781-82, 784-85, 875-77.)

(2) Edward Dwain Zimmerman is the President of Mr. Z Enterprises and his wife, Dorothy Zimmerman, is the Secretary/Treasurer. (Tr. at 782-83.) Edward and Dorothy Zimmerman jointly own all the stock issued by Mr. Z Enterprises. (Tr. at 786.)

(3) Edward Zimmerman is known as ``Mr. Z,`` ``Z,`` or ``Zeta.``

(4) The offices of Mr. Z Enterprises are located at 9042 Koonce Drive, Spring Valley, California. This address is also the current residence of Dorothy Zimmerman and, prior to January 3, 1990, the residence of Edward Zimmerman. (Tr. at 592, 783-84.) In addition, ZHZ Properties, Lucas/Zimmerman Properties, AZZ properties, and Valley Properties operated out of the 9042 Koonce Drive, Spring Valley, California, address. (Tr. at 836-37.)

(5) Donald Zimmerman, a son of Edward Zimmerman, is employed by Mr. Z Enterprises as a foreman, superintendent, and carpenter. (Tr. at 595-96, 791, 835.)

(6) Michael Zimmerman, a son of Edward Zimmerman, is employed by Mr. Z Enterprises as an electrician. (Tr. at 589-90, 592, 600, 603, 791-92.) In addition, Michael Zimmerman does occasional maintenance work at apartments owned by Lucas/Zimmerman Properties, a partnership in which his father owns an interest. (Tr. at 601-02.)

(7) Michael Zimmerman resides at 3217 Heliz Street, Spring Valley, California. (Tr. at 609, 660.)

(8) Ray Green (Ct. 5) is employed by Mr. Z Enterprises, and was hired after November 6, 1986. (Tr. at 597, 603, 686-87, 1124-25, 1130.)

(9) Edward Zimmerman is a partner in several business ventures with other individuals in the San Diego area. (Tr. at 787-816.) These partnerships include the Lucas/Zimmerman Properties (Tr. at 602, 807-08), partnerships with family members (Tr. at 804), and the Lamar Associates partnership. (Tr. at 804.) In addition, Edward Zimmerman personally owns other properties. (Tr. at 799-801.)

(10) On occasion, employees of Mr. Z Enterprises worked on Edward Zimmerman's other projects. (Tr. at 835.)

(11) At his partner's request, Edward Zimmerman assumed control of and stored a trailer on a lot on Helix Street, near Olive Street. (Tr. at 822-25.) See also Ex. C-3-E-1 C-3-E-2, C-3-E-3. The

trailer was abandoned by Lee Barta, a son of one of Edward Zimmerman's partners. (Tr. at 809, 823.)

(12) Edward Zimmerman owns the land on which the trailer was located. (Tr. at 822.) The marklift on that property is owned by Mr. Zimmerman's partners and himself, and the backhoe is owned by Mr. Z Enterprises. Other than those items, Edward Zimmerman personally owns everything on the property. (Tr. at 825-26.)

(13) On November 9, 1987, Carl Alan Creamer, an agent with the United States Border Patrol, met with Edward Zimmerman at 9042 Koonce Drive, Spring Valley, California. Agent Creamer gave Mr. Zimmerman a copy of the Employer's Handbook (M-274) and explained the contents of the Handbook to Mr. Zimmerman. (Tr. at 32-35, 39-40, 817.) (Stipulation by counsel that Mr. Zimmerman, individually, and on behalf of Mr. Z enterprises, received an educational visit.) See also Ex. C-1.

(14) Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), and Benjamin Becerril-Saenz (Cts. 4 and 10, as amended) were aliens unauthorized to work in the United States. (Tr. at 72, 266.) Exs. C-4, C-6, C-7, C-8, C-10, C-12, C-19, C-21.

(15) Humberto Pena-Torres (Ct. 6) is authorized for employment in the United States through the special agricultural worker program (8 U.S.C. section 1160). (Tr. at 917-20) Ex. C-30.

(16) In February or March 1989, Edward Zimmerman knew that Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), and Benjamin Bercerril-Saenz (Cts. 4 and 10, as amended) had no papers to be in the United States, which he understood to mean that they were in the United States illegally. (Tr. at 828-29, 852-54.)

(17) Edward Zimmerman was on vacation in Costa Rica from March 10 to March 19, 1989. (Tr. at 79, 279, 623, 820, 869.) In Edward Zimmerman's absence, if anyone was in charge of Mr. Z Enterprises, Don Zimmerman would have been in charge. (Tr. at 821.) Don Zimmerman does not have authority to hire employees for Mr. Z Enterprises, Edward Zimmerman does all the hiring. (Tr. at 791.)

(18) Agent McCarthy obtained the information that Edward Zimmerman was in Costa Rica in a ``collective'' conversation with Mr. Pena-Torres and Mr. Munguia-Bernal on March 13, 1989. (Tr. at 79-80)

(19) On March 13, 1989, Border Patrol Agents McCarthy, Szczepanowski, and Sears observed Humberto Pena-Torres (Ct. 6) doing gardening work at apartments on Bancroft Street, near Olive

Drive. The Border Patrol agents also observed Francisco Munguia-Bernal near Mr. Pena-Torres. (Tr. at 68-71, 263-66, 958-60)

(20) On March 13, 1989, incident to his arrest, Francisco Munguia-Bernal (Cts. 1 and 7) was searched by Border Patrol agents. The agents found on Mr. Munguia a driver's license with the address of 9042 Koonce Drive. (Tr. at 73, 119-21.) See Ex. C-6-A.

(21) Edward Dwain Zimmerman allowed Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), and Benjamin Becerril-Saenz (Cts. 4 and 10, as amended) to live in the trailer located on Helix Drive, near Olive Street. (Tr. at 830-34.) None of the four aliens gave Edward Zimmerman rent in exchange for staying in the trailer on his property. (Tr. at 835.)

(22) Francisco Munguia-Bernal (Cts. 1 and 7) lived at the trailer on Helix Street, near Olive Street. (Tr. at 81-84, 267-68, 623-24, 829-30.) See Exs. C-3-E-1, C-3-E-2, C-3-E-3, and C-6; see also, undisputed facts (11) and (12).

(23) On March 13, 1989, there was a picture of Michael Zimmerman in the trailer on Helix Street. (Tr. at 84, 270, 625-27.)

(24) On March 13, 1989, after initially denying that he knew Francisco Munguia-Bernal (Cts. 1 and 7), Michael Zimmerman conceded that he knew Francisco Munguia-Bernal and that Francisco Munguia-Bernal lived in the trailer. (Tr. at 84-86, 269-70, 286-87, 622-23, 627-28.)

(25) Francisco Munguia-Bernal (Cts. 1 and 7) approached Michael Zimmerman on March 13, 1989, and asked if he could get paid his wages due. (Tr. at 629.)

(26) On March 13, 1989, after his discussion with Mr. Munguia-Bernal (Cts. 1 and 7), Michael Zimmerman left the area of the tractor and trailer and went to the area where his brother Don was, 3217 Helix Street. (Tr. at 624-25, 632-33, 689-91.) Across the street from Michael Zimmerman's house at 3217 Helix Street is a construction site. (Tr. at 98, 100-01, 276-77, 293, 352.)

(27) On March 13, 1989, Francisco Munguia-Bernal (Cts. 2 and 7) signed a Form I-263, Record of Sworn Statement. Ex. C-6.

(28) Francisco Munguia-Bernal (Cts. 1 and 7) was voluntarily returned to Mexico on March 13, 1989. Ex. C-4.

(29) On March 13, 1989, Humberto Pena-Torres (Ct. 6) produced a business card for "Mr. Z Enterprises" with Edward Zimmerman's name on it for the agents. (Tr. at 73-74, 266-67, 351.)

(30) Humberto Pena-Torres did gardening for some of Edward Zimmerman's partnerships, including the Lamar partnership. Edward Zimmerman helped Humberto Pena-Torres get the gardening jobs. (Tr. at 840, 846, 848, 878-79, 893-95.)

(31) In 1987, Humberto Pena-Torres (Ct. 6) worked for one week in construction grading concrete for Edward Zimmerman. Humberto Pena-Torres was paid \$40.00 per day, in cash, for his work. (Tr. at 890-93.)

(32) On March 15, 1989, Agents McCarthy, Szczepanowski, and Sears conducted surveillance on 3217 Helix Street. (Tr. at 133, 292.)

(33) On March 15, 1989, Agents McCarthy, Szczepanowski, and Sears apprehended Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9). (Tr. at 134, 293-94) See also Exs. C-8 and C-10.

(34) On March 15, 1989, Donald Zimmerman stated that he did not know Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9), and that the agents should talk to his father. (Tr. at 142.)

(35) On March 15, 1989, the agents took Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) to the trailer on Helix Street to retrieve their personal belongings. (Tr. at 140, 295-96.)

(36) on March 15, 1989, Gerardo Urbina-Munguia and Rafael Urbina-Munguia entered the trailer on Helix Street by using a key above the door frame. (Tr. at 143, 296.) Gerardo Urbina-Munguia and Rafael Urbina-Munguia lived in the trailer on Edward Zimmerman's property. (Tr. at 470-71.) See undisputed facts #12 and #21.

(37) The agents searched Gerardo Urbina-Munguia and Rafael Urbina-Munguia on March 15, 1989, and found a California identification card with the address 9042 Koonce Drive. (Tr. at 144-45, 151.) Ex. C-9-B.

(38) On March 15, 1989, Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) each signed a Form I-263, Record of Sworn Statement. (Tr. at 156-57, 297, 769, 771-72.) Exs. C-12, C-7, C-9.

(39) Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) were returned to Mexico on March 15, 1989. (Tr. at 155.)

(40) On March 27, 1989, Border Patrol agents scheduled an inspection of Respondent Mr. Z Enterprises' Forms I-9. (Tr. at 161.)

(41) Lisa Bilal, a bookkeeper for Mr. Z Enterprises, agreed to be inspected on March 30, 1989. (Tr. at 161-62.) See also C-14.

(42) On March 30, 1989, Agents McCarthy and Szczepanowski conducted the Form I-9 inspection, as agreed. (Tr. at 165.)

(43) On March 30, 1989, the Respondents presented an employee list containing only one name, that of Ray Green. (Tr. at 165.) Ex. C-16-17.

(44) Edward Zimmerman failed to complete any Forms I-9 prior to the Form I-9 inspection on March 30, 1989. (Tr. at 167, 818-19.)

(45) On April 11, 1989, Agents McCarthy and Szczepanowski apprehended Benjamin Becceril-Saenz (Cts. 4 and 10, as amended) while he was gardening at 3199 1/2 Lamar Springs Court. (Tr. at 182-85, 321-22, 1089-90.) This property is an apartment complex owned by Lamar Associates, of which Edward Zimmerman is a partner. (Tr. at 675, 804.)

(46) Sheila Dominy, the apartment manager at Lamar Springs Court, is supervised by Edward Zimmerman. (Tr. at 186, 1085.)

(47) Benjamin Becerril-Saenz (Cts. 4 and 10) lived in the trailer on Helix Street, near Olive Street. Ex. C-21. (See undisputed fact #21.)

(48) On April 11, 1989, Dorothy Zimmerman, wife of Edward Zimmerman, told Agents McCarthy and Szczepanowski that Edward Zimmerman had a lot of Mexicans working for him. (Tr. at 189-90, 325.)

(49) On April 11, 1989, Benjamin Becerril signed a Form I-263, Record of Sworn Statement (Tr. at 325.), and Agent McCarthy prepared a Form I-213 on Benjamin Becerril-Saenz (Cts. 4 and 10), as amended). (Tr. at 190.)

(50) Benjamin Becerril-Saenz (Cts. 4 and 10) was voluntarily returned to Mexico on April 11, 1989. (Tr. at 336-38.) Ex. C-20.

(51) On April 11, 1989, Humberto Pena-Torres (Ct. 6) had a California driver's license with the address 9042 Koonce Drive, Spring Valley, California. This property was owned by Edward Zimmerman (Tr. at 178-181.) See also Ex. C-18-B.

(52) Humberto Pena-Torres lives in a house that is owned by Edward Zimmerman's ``pension and profit sharing plan.'' (Tr. at 843-45; see also 844.) Previously, Humberto Pena-Torres lived on 9050 Koonce, a property owned by Edward Zimmerman, with his aunt, uncle, and some friends. (Tr. at 845, 889, 916, 977.) Humberto Pena-Torres lived in the trailer on Helix Street, near Olive during 1988 and 1989, for almost a year. (Tr. at 885-86, 936.)

(53) On June 28, 1989, Agents Colgan and Szczepanowski presented Lisa Bilal, a bookkeeper for Mr. Z Enterprises, with ``no-hire letters'' for the four individuals named above. (Tr. at 339-40, 417-18.) Ex. C-23.

(54) On November 22, 1989, Agent McCarthy sent a telefax transmission to the INS in Mexico City, requesting assistance in locating Francisco Munguia-Bernal (Cts. 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), and Benjamin Becerril-Saenz (Cts. 4 and 10, as amended). The INS District Director in Mexico City was unable to locate the above-named individ-

uals. Agent McCarthy sent a second telefax communication to the INS in Mexico City. The INS in Mexico City responded on April 27, 1990, that they were unable to locate the above-named individuals. (Tr. at 104-09.) Ex. C-3-A.

(55) On January 8, 1990, Border Patrol Agents Paul Blocker, George Schoen, and Charles Sears apprehended Gerardo Urbina-Munguia (Cts. 2 and 8) in front of 9042 Koonce Drive, Spring Valley, California. (Tr. at 434-36, 496-98.) (Gerardo Urbina-Munguia was originally apprehended by the agents, and returned to Mexico, on March 15, 1989.) Gerardo Urbina-Munguia told the agents that he was a native and citizen of Mexico without immigration documents. Consequently, he was placed under arrest. (Tr. at 437-38.)

(56) On January 8, 1990, Gerardo Urbina-Munguia (Cts. 2 and 8) said that he reentered the United States in July of 1989, after being returned to Mexico on March 15, 1989. (Tr. at 441, 466.) Ex. C-28.

(57) On January 8, 1990, Gerardo Urbina-Munguia gave a sworn statement. (Tr. at 445) Ex. C-28 (This statement was given after the videotaped statement given on July 17, 1989. This statement is also the second Form I-263, Record of Sworn Statement, signed by Gerardo; the first was signed on March 15, 1989. See undisputed fact #38.

(58) On January 8, 1990, Gerardo Urbina-Munguia was not threatened by the Border Patrol agents. (Tr. at 542.)

(59) Border Patrol Agent Blocker gave Gerardo Urbina-Munguia (Cts. 2 and 8) thirty days voluntary departure on January 8, 1990, to enable to attend a deposition. (Tr. at 445.)

(60) A deposition was scheduled for January 19, 1990. However, Gerardo Urbina-Munguia failed to appear. (Tr. at 447, 455.) Border Patrol agents were unable to locate the address he had provided them. The INS notified Gerardo Urbina-Munguia of the deposition scheduled to be held on January 19, 1990. (Tr. at 510-13.) Ex. C-3-A.

(61) Humberto Pena-Torres (Ct. 6) said that the Border Patrol agents treated him ``very good'' on March 8, 1990, the day he answered their questions at Brown Field Border Patrol Station. (Tr. at 967.) See also Ex. R-10 (deposition of Pena-Torres).

(62) Mr. Z Enterprises is liable for failing to complete a Form I-9 for Ray Green (Ct. 5). (Tr. at 819.) (Admissions by counsel of liability).

C. Disputed Material Facts

Based on the evidence submitted, I find the following material facts to be disputed:

(1) It is disputed that, on March 13, 1989, the Border Patrol agents observed both Mr. Pena-Torres and Mr. Munguia-Bernal doing gardening work at the apartments on Bancroft Street, near Olive Drive, as Complainant's evidence suggests. (Tr. at 68-70, 263-266, 268, 281.) Respondent's evidence suggests that Mr. Munguia was asking Mr. Pena-Torres if there was any work, to which Mr. Pena-Torres responded that he did not have work for Mr. Munguia. (Tr. at 958-960; Pena-Torres deposition, Ex. R-10, at pp. 26-27.)

(2) It is disputed that, on March 13, 1989, the Border Patrol agents found on Mr. Munguia, in addition to a driver's license with the address of 9042 Koonce Drive, a piece of paper with the name and address of Mr. Z Enterprises. (Tr. at 73, 119-21.) See Ex. C-6-A.

(3) It is disputed that Francisco Munguia-Bernal (Cts. 1 and 7) was employed by Edward Zimmerman, in his individual capacity. (Tr. at 837, 857.) Ex. C-6.

(4) It is disputed that Francisco Munguia-Bernal (Cts. 1 and 7) was employed by Mr. Z Enterprises, Inc. Exs. C-4 and C-6.

(5) It is disputed that Edward Zimmerman paid Francisco Munguia-Bernal (Cts. 1 and 7) his wages in cash. (Tr. at 77, 836, 839, 875.) Ex. ^{c-6}.

(6) It is disputed that, on March 13, 1989, both Francisco Munguia-Bernal (Cts. 1 and 7) and Humberto Pena-Torres (Ct. 6) told Agent McCarthy that Edward Zimmerman was in Costa Rica. (Tr. at 79-80.)

(7) It is disputed that, on March 13, 1989, Michael Zimmerman conceded that the trailer on Helix Street, near Olive Drive, belonged to Mr. Z Enterprises. (Tr. at 84-86.)

(8) It is disputed that, on March 13, 1989, Agent Szczepanowski overheard Michael Zimmerman tell Francisco Munguia-Bernal (Cts. 1 and 7), in spanish, that his father, Edward Zimmerman, would send a check to Munguia at his address in Mexico, as Agent Szczepanowski testified. (Tr. at 271-72, 288.) Michael Zimmerman testified that he told Munguia that he did not hire him and there was no reason for him to pay him. (Tr. at 629.)

(9) It is disputed that Michael Zimmerman indicated to Agent Szczepanowski, on March 13, 1989, that Francisco Munguia-Bernal (Cts. 1 and 7) was employed by his father, Edward Zimmerman, or Mr. Z Enterprises. (Tr. at 272-73, 349-50, 652.)

(10) It is disputed that, on March 13, 1989, an individual, believed at the time to be Ray Green (Ct. 5), told Agent Szczepanowski that

he could find more illegal aliens working across an open field. (Tr. at 273-75, 288-89.)

(11) It is disputed that, on March 13, 1989, a person, either Ray Green or a transient named ``Mike,' ' was observed by Agent McCarthy making a ``turkey call' ' into a pipe which ran in the direction of another property, near the site of the trailer, where Agent McCarthy observed individuals working. (Tr. at 93-94, 128, 687-89.) This construction site was over 100 yards from the trailer area, near Olive and Lamar Streets. (Tr. at 277.) Michael Zimmerman told Agent McCarthy that his brother Donnie was in charge of that construction area. (Tr. at 94-96, 632.)

(12) It is disputed that Agent Szczepanowski observed, on March 13, 1989, an individual, later identified as Michael Zimmerman, running toward the construction site over 100 yards from the trailer area. By the time the agents arrived at the site, the individuals they had observed working were no longer there. (Tr. at 275-78.)

(13) It is disputed that Agent Szczepanowski learned at a later date that Mr. Z Enterprises or Mr. Edward Zimmerman was doing construction work in the area of the construction site near 3217 Helix Street (the site over 100 yards from the trailer). (Tr. at 278.)

(14) It is disputed that Francisco Munguia-Bernal (Cts. 1 and 7) knowingly and voluntarily signed the sworn statement under penalty of perjury on March 13, 1989. Exs. C-6 and R-11. (Tr. at 111-18, 121-22, 765-67.)

(15) It is disputed that Francisco Munguia-Bernal (Cts. 1 and 7) was not offered leniency or special treatment in exchange for giving a sworn statement on March 13, 1989. Respondents' evidence suggests that Francisco Munguia-Bernal signed the sworn statement under duress. (Tr. at 110, 118, 765-67.) Ex. R-11.

(16) It is disputed that, on March 13, 1989, Humberto Pena-Torres (Ct. 6) told Agents McCarthy and Szczepanowski that he worked for Edward Zimmerman. (Tr. at 73-76, 266-67, 285, 351, 893-94, 923-26.) Ex. R-10 (deposition of Pena-Torres taken on April 19, 1990).

(17) It is disputed that Humberto Pena-Torres told Agent McCarthy, on March 13, 1989, that Edward Zimmerman paid his wages. (Tr. at 77, 965.) See also Ex. C-30 (sworn statement of Pena-Torres).

(18) It is disputed that, on March 15, 1989, while conducting surveillance on 3217 Helix Street, Agents McCarthy, Szczepanowski, and Sears observed three persons constructing a fence behind the property. (Tr. at 133, 135, 292-93, 660-61.)

(19) It is disputed that Agents McCarthy, Szczepanowski, and Sears apprehended Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) on March 15, 1989, as a con-

sequence of their surveillance of 3217 Helix Street. (Tr. at 134, 293-94.) See also Exs. C-8 and C-10.

(20) It is disputed that Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) worked for Edward Zimmerman, and Edward Zimmerman, personally, paid their salary in cash. (Tr. at 137-39, 151, 153-54, 284-85, 836, 838-39, 857, 875.)

(21) It is disputed that Gerardo Urbina-Munguia and Rafael Urbina-Munguia worked for Mr. Z Enterprises. Exs. C-7, C-9, C-10, C-12. (Tr. at 284-85, 769, 771, 855.)

(22) It is disputed that, on March 15, 1989, Gerardo Urbina-Munguia (Cts. 2 and 8) and Rafael Urbina-Munguia (Cts. 3 and 9) told Agent McCarthy that, on March 13, 1989, Mike Zimmerman told them to hide in some pipe behind the house at 3217 Helix Street. (Tr. at 138, 645.) Ex. C-12.

(23) It is disputed that Agents McCarthy and Szczepanowski did not make Rafael Urbina-Munguia and Gerardo Urbina-Munguia any promises of leniency or special treatment in exchange for giving a statement on March 15, 1989. Respondents' evidence suggests that Gerardo Urbina-Munguia and Rafael Urbina-Munguia signed the sworn statement under duress. (Tr. at 156-57, 297, 769-70, 772-73.) See Exs. C-12, C-7, C-9, R-11.

(24) It is disputed that Benjamin Becerril-Saenz (Cts. 4 and 10, as amended) was employed by Edward Zimmerman, in his individual capacity. (Tr. at 185, 322-23, 333, 838, 856-57, 1086-90.)

(25) It is disputed that Benjamin Bercerril-Saenz was employed by Mr. Z Enterprises. (Tr. at 194, 333, 1086-90, 763, 855.) Exs. C-19, C-21, R-1 through R-8.

(26) It is disputed that Edward Zimmerman paid Benjamin Becerril-Saenz (Cts. 4 and 10) his wages in cash. (Tr. at 836, 839, 875.)

(27) It is disputed that, on April 11, 1989, Sheila Dominy, the apartment manager at Lamar Springs Court, told Border Patrol agents that Bercerril had worked at the complex for about a week and that he worked for Edward Zimmerman. (Tr. at 186-87, 324, 1084-90.)

(28) It is disputed that Agent McCarthy assisted Wilbur Dominy in retrieving keys to the apartment complex from Benjamin Becerril on April 11, 1989. (Tr. at 187-88, 1087.)

(29) It is disputed that the agents did not offer Mr. Becerril any inducements or special treatment in exchange for a statement, and that Mr. Becerril was not under duress when the Form I-213 was prepared or when he gave a statement. (Tr. at 190-91, 325-26, 763-65.) See Exs. C-19, C-21, R-11.

(30) It is disputed that, on April 11, 1989, Agent McCarthy observed Humberto Pena-Torres (Ct. 6) working on a construction site

off Helix Street, where Edward Zimmerman's business was operating. (Tr. at 173-74, 892-93, 925-26.)

(31) It is disputed that Humberto Pena-Torres was not offered any inducements by the agents for speaking with them on April 11, 1989. (Tr. at 181-82.) (Mr. Pena-Torres also gave a sworn statement to the agents on March 8, 1990, see undisputed fact #61 and Ex. C-30, a deposition statement on April 19, 1990, and testified at the hearing.)

(32) It is disputed that, on April 11, 1989, Humberto Pena-Torres told Agent McCarthy that he worked for Mr. Z, and that he began in June 1988. (Tr. at 176-78, 850, 893-94, 923-26.) Ex. R-10.

(33) It is disputed that, on April 11, 1989, Humberto Pena-Torres (Ct. 6) told Agent McCarthy that he feared he would be fired if it was known what he told the agents. (Tr. at 176-77.)

(34) It is disputed that Humberto Pena-Torres lived at 9042 Koonce Drive for a year, along with his aunt, uncle, and some friends, in addition to previously living at 9050 Koonce, a property owned by Edward Zimmerman. (Tr. at 889; see also 180-81, 916, 977.)

(35) It is disputed that, on June 28, 1989, Lisa Bilal told Agents Szczepanowski and Colgan that the four persons named in the ``no-hire letter'' which they had presented to her were not longer working for the company. (Tr. at 342, 418-19, 426, 1076, 1081-83.) Ex. C-24.

(36) It is disputed that, on July 5, 1989, when delivering the Notice of Intent to Fine, Agent Szczepanowski overheard Edward Zimmerman say that he knew he would have problems because of the aliens he had working for him and the lack of Forms I-9s. (Tr. at 344-45, 1142-43.)

(37) It is disputed that, on January 8, 1990, Gerardo Urbina-Munguia (Cts. 2 and 8) told agents that he worked for Mr. Z in February 1989, and that Daniel Zimmerman got him the job, but that Edward Zimmerman was the boss. (Tr. at 441-42, 467-68, 500-01.) He stated that he was paid \$175.00 the first week and \$385.00 the second week, both payments being made by Donald Zimmerman. (Tr. at 443.) See also Exs. C-27 (Form I-213) and C-28.

(38) It is disputed that Gerardo Urbina-Munguia told Agent Blocker on January 8, 1990, that he worked with Humberto Pena-Torres (Ct. 7), Francisco Bernal-Munguia (Cts. 1 and 7), Rafael Urbina-Munguia (Cts 3 and 9), and Benjamin Becerril-Saenz (Cts. 4 and 10). (Tr. at 434-44.) Ex. C-28.

(39) It is disputed that Gerardo Urbina-Munguia was not promised any special inducements or deals for his statements given on January 8, 1990. (Tr. at 444, 449.) (In addition to his statement of

January 8, 1990, Gerardo Urbina-Munguia signed a Record of Sworn Statement on March 15, 1989. See undisputed fact #38, and gave a videotaped statement on July 17, 1989.)

(40) It is disputed that, on March 8, 1990, Humberto Pena-Torres (Ct. 6) agreed to give a sworn statement to Border Patrol Agents Angulo and Schoen, and did not give the statement under duress. (Tr. at 548, 551-60, 967, 974-75, 980-82.)

(41) It is disputed that Humberto Pena-Torres told Border Patrol Agent Angulo, on March 8, 1990, that he was working for Edward Zimmerman seven days a week, for ten hours a day, earning twenty-five dollars a day. (Tr. at 559-60, 893-94, 924-26, 994-96.) See also Exs. C-30 (Record of Sworn Statement signed by Pena-Torres), R-10 (Pena-Torres' deposition).

(42) It is disputed that Humberto Pena-Torres (Ct. 6) is employed as a gardener at the Lamar Street Apartments by Edward Zimmerman. (Tr. at 597-99, 696.) (See undisputed fact #9, Lamar Street Apartments are owned by Lamar Associates, a partnership in which Edward Zimmerman is a partner.) It is further disputed that Mr. Pena-Torres helps at construction sites with landscaping work. (Tr. at 604, 607-08, 696-97, 699, 804, 847, 879, 925, 971-72.) See also Ex. R-10.

(43) The following statement of the events of March 8, 1990, is disputed: Border Patrol agents took Humberto Pena-Torres from his home to Brown Field Border Patrol Station. They did not tell Mr. Pena-Torres that he had the option of not accompanying them. When they arrived at the Station, they took Mr. Pena-Torres' driver's license and his I-688 ('`Amnesty Card''). The agents then proceeded to ask Mr. Pena-Torres questions. Answers were entered on a form, but many of the answers were not the answers given by Mr. Pena-Torres. He was instructed to sign the finished form, which he did because he feared that, if he did not, his immigration documents would not be returned to him and he would be in trouble with the Immigration Service. (Tr. at 967, 982.) Ex. R-10.

III. Legal Analysis

A. Civil v. Quasi-Criminal Proceeding

Before I undertake my analysis of the evidence submitted for my review, I believe it is important to address a primary procedural issue which has been repeatedly raised by Respondents during these proceedings. The issue is whether these IRCA proceedings are civil or quasi-criminal in nature.

Respondents' counsel has persistently argued that these IRCA proceedings are ``quasi-criminal'' rather than ``purely'' civil in nature; and, therefore, it is impermissible to both draw an adverse

inference from Edward Zimmerman's invocation of the Fifth Amendment and to make a finding of liability based upon hearsay statements of unavailable witnesses.

Respondents' counsel bases this argument on his own conclusion that, under the statutory and regulatory scheme of IRCA, it is possible for an ALJ to impose criminal liability directly on Respondents in this administrative proceeding. As an additional basis for his argument, Respondents' counsel notes that, ``it is equally possible for a finding of liability in a `knowingly hire' case to act as a foundational finding for future criminal prosecutions of `pattern or practice' violations under 8 U.S.C. sec. 1324a(f)(1).''

In support of its argument that criminal liability can be directly imposed in this proceeding, Respondents' counsel points out that the statute is silent as to whether criminal proceedings brought pursuant to it must be brought in an Article III court. But as Complainant well noted in its Reply Brief, ``the district courts of the United States have original and exclusive jurisdiction to try all offenses against the laws of the United States.'' 18 U.S.C. § 3231. Thus, even if the authority of the ALJs was not limited, expressly or implicitly, to imposing civil liability and penalties, as it is, by statute and regulation, they would still lack jurisdiction to try respondents for the criminal offense of engaging in a pattern or practice of hiring unauthorized alien workers. 5 U.S.C. § 556(c); 28 C.F.R. § 68.26.

In addition, although it is possible that a finding of liability in a ``knowing hire'' case may be utilized in a subsequent criminal prosecution of ``pattern and practice'' violations under 8 U.S.C. § 1324a(f)(1), this possibility of future criminal liability does not make IRCA cases distinguishable from other ``purely civil'' cases, as Respondent suggests. ``If there was no `specter' of criminal prosecution [in civil cases], the entire Fifth Amendment issue [in such cases] would be moot.'' See Government's Reply Brief at 5.

Respondent's counsel's apparent contention that an adverse inference is impermissible where a civil case and a criminal case could conceivably involve the same acts is unfounded. In at least one of the cases which Respondents' counsel characterizes as ``purely civil,'' the court held that an adverse inference could be taken in the civil penalty proceeding even though the defendant had been subject to criminal proceedings for the same acts and acquitted. Pagel, Inc. v. S.E.C., 803 F.2d 942 (8th Cir. 1986). In the other ``purely civil'' cases, criminal penalties for the same or similar acts involved in the civil proceeding were a possibility, or, logically, the Fifth Amendment would not have been invoked. See, i.e., Baster v. Palmigiano, 425 U.S. 308 (1976) (In this leading case an

adverse inference from a prison inmate's invocation of the Fifth Amendment in an administrative hearing was held permissible even though there was a possibility that the inmate could be prosecuted for a violation of state law based on the same acts.); Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982) (Although a female police officer was facing both an administrative hearing and a criminal trial based on the same facts, the court held that the negative inference drawn from her invocation of the Fifth Amendment in the administrative proceeding was not an impermissible burden on her constitutional rights.).

Furthermore, even if criminal proceedings were indeed subsequently instituted against Respondent, pursuant to 8 U.S.C. § 1324a(f)(1), a finding of civil liability in this proceeding could not alone establish criminal liability for engaging in an intentional ``pattern or practice of violations.'' As the term itself suggests, something more than a single finding of civil liability in a ``knowing hire'' case is needed to establish a ``pattern or practice of violations'' (i.e., A subsequent violation of the ALJ's order to cease and desist from knowingly hiring unauthorized aliens in addition to the fining of civil liability.). It should also be noted that there are no criminal charges presently pending against Respondent.

Based on the foregoing, it is clear that this employer sanction proceeding is civil, not criminal, or even quasi-criminal in nature. Therefore, an adverse inference may properly be taken from Respondent Edward Zimmerman's invocation of the Fifth Amendment, and a finding of liability may be based upon the hearsay statements of unavailable witnesses without violating Respondents' Sixth Amendment right to confrontation (See footnotes infra).

Having determined the nature of these proceedings to be civil, I may now proceed to analyze the evidence presented in this case.

It is my intention to analyze integrally the evidence submitted on each count. The evidence for each of the counts overlaps and interweaves, but for the sake of clarity, I intend on methodically distinguishing each of the aliens named in the separate counts and analyzing the evidence submitted by the parties to support their conclusions vis-a-vis each count.

Though there are numerous technical sub-issues related to the nature of evidentiary proof in this case, it is my view that there is only one ultimate issue that underlies all of Respondents' defenses to liability in this case: whether Edward Zimmerman and/or Mr. Z Enterprises employed the individuals named in the Complaint.

B. Francisco Munguia (Counts 1 and 7)

Two counts of the Complaint allege violations against Respondents involving the employment of Francisco Munguia-Bernal, an alien unauthorized to be employed in the United States. Count 1 alleges that Respondents knowingly hired Francisco Munguia in November 1988. Count 7 alleges that Francisco Munguia was hired by Respondents without completing a Form I-9, Employment Eligibility Verification Form.

In its Answer, Respondents generally deny that they ever hired Francisco Munguia for employment.

Complaint submitted cumulative evidence to support its contention that Francisco Munguia was in fact hired by Edward Zimmerman.

Initial Encounter on March 13, 1989

To begin at the beginning, agents of Complainant testified that they encountered Francisco Munguia at an apartment complex on Bancroft Street in Spring Valley, California, on March 13, 1989. The record is not clear who exactly owned the premises of the apartment complex on March 13, 1989.

The Border Patrol agents testified that when they encountered Francisco Munguia, they observed him gardening with another man. Specifically, the men were observed cutting bushes in front of an apartment complex. This other man was Humberto Pena-Torres, an alien named in Count 6 of the Complaint. (Tr. at 68-70, 263-266, 268, 271.)

After speaking with both men in the Spanish language, Francisco Munguia admitted to the agents that he did not have legal immigration documents. The agents testified that when they asked Francisco Munguia who he was working for, Munguia replied that he was working for Edward Zimmerman, and that Edward Zimmerman paid his wages. (Tr. at 75-77.) In a search incident to the arrest of Francisco Munguia, the agents discovered that Munguia was in possession of a driver's license, and that the license listed his address as 9042 Koonce Drive. See Exhibit C-6A. As stated above, 9042 is the same address as Edward Zimmerman's previous residence and the business offices of Mr. Z Enterprises.

In contrast, Respondents contend that, at the time that Mr. Munguia-Bernal and Mr. Pena-Torres were approached by the Border Patrol agents, Mr. Munguia was not gardening or otherwise working, but that he was asking Mr. Pena-Torres if work was available. To support this contention, Respondents offered the testimony of Mr. Pena-Torres who, as stated, was also present on March 13, 1990, when the agents first approached Francisco Munguia. (Tr. at

958-60.) Respondents also raised continuing objections to that portion of the agents' testimony that contained hearsay statements attributed to Francisco Munguia.

Having marshalled the relevant evidence regarding this initial encounter involving Francisco Munguia, I conclude that the testimony of the agents is more credible than that of Mr. Pena-Torres. Simply stated, I do not believe Mr. Pena-Torres' testimony that Francisco Munguia was only asking him for work. Although his pre-trial deposition and hearing testimony were consistent on this point, other aspects of Mr. Pena-Torres' testimony concerning the identity of Francisco Munguia were equivocal and evasive. (Tr. at 959-60.) I find more believable the testimony of the agents that they initially observed Francisco Munguia performing gardening work at the Bancroft Street site.

There is also the troublesome issue of the hearsay statements that pervades the testimony of all witnesses, especially as it pertains to statements attributed to Francisco Munguia. Complainant's agents attribute to Munguia hearsay statements that admit he was working for Edward Zimmerman and being paid by Edward Zimmerman. Mr. Pena-Torres attributed to Munguia hearsay statements that were offered to show that he was asking for work, not actually working. These two hearsay statements conflict with each other, and must both be comparatively assessed for their reliability and probativeness.

It is well established that hearsay is admissible in administrative proceedings, and can constitute substantial evidence upon which the decision may be based. See Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971) (holding that hearsay may constitute substantial evidence on the condition that an opportunity to cross-examine the witness who made the hearsay statements is offered, even if that opportunity is not exercised); Calhoun v. Bailar, 626 F.2d 145, 148-149 (9th Cir. 1980), cert. den., 452 U.S. 906 (1981); see also 4 Stein, Mitchell and Mezines, Administrative Law § 26.02 (rev. ed. 1990). I have previously discussed at length the issue of assessing the reliability of a hearsay statement as it pertains to the admissibility of hearsay evidence. See, United States v. New El Rey Sausage, OCAHO Case No. 88100080 (Order Granting in Part and Denying in Part Complainant's Post-hearing Motion for Admission of Exhibits) (June 21, 1989).

In the New El Rey Order, I adopted and adapted criteria suggested by the Ninth Circuit in Calhoun in my effort to determine the underlying reliability and probative value of the proffered hearsay statements. These indicia of reliability factors are also useful when addressing questions of what weight to give the already admitted

hearsay evidence. Thus, I intend on applying the following factors to my assessment of the hearsay evidence submitted by Complainant and Respondents.³

First, I conclude that there is more reason to question the independence or possible bias of Mr. Pena-Torres because he admitted to living in both a trailer located on the property of Edward Zimmerman and a house owned by Edward Zimmerman's ``pension and profit sharing plan.'' In addition, he depends for much of his livelihood on the various business operations of Edward Zimmerman.

Second, I found the overall testimony of the agents to be more internally consistent and less equivocal or evasive than that of Mr. Pena-Torres, especially with respect to the identify and domicile of Francisco Munguia.

Third, and most importantly, I found the hearsay testimony of the agents to be supported by more corroborative evidence than that of Mr. Pena-Torres. The many pieces of corroborative evidence in this case must be viewed contextually as part of a entirety of events and encounters which resulted in this proceeding, rather than in isolation of each other. Thus, in identifying what I view to be the evidence corroborating the agents' hearsay testimony that Francisco Munguia admitted that he worked for Edward Zimmerman, and supporting the reliability of the hearsay testimony, I draw upon several chronologically distinguishable parts of this complicated record before me.

For example, I view the following as evidence corroborating the agents' hearsay testimony: 1) that Francisco Munguia kept his belongings in a trailer located on the property of Edward Zimmer-

³In New El Rey, which is presently on appeal in the Ninth Circuit, I refused to admit incriminating hearsay statements similar to those herein (Forms I-213 and I-263) on the ground that they were not, as I saw it, adequately supported by probative corroborating evidence. In the case at bar, however, I not only admitted the incriminating statements, but I am going to recognize and accord them the weight of substantial evidence. My reason for making this evidentiary decision herein is based on what I find to be the far greater accumulation of independently corroborative evidence in this case. *Infra*.

Another basis upon which I find New El Rey to be distinguishable from the present case is the primary issue to be resolved in the case. In New El Rey, the primary issue was whether Respondent ``knew'' the aliens it employed were unauthorized to work in the U.S. In this case, the primary issue is whether Respondents ``employed'' the aliens admittedly known to be unauthorized. In my view, the obvious difficulty of proving a party's state of mind (i.e. knowledge) requires an even more rigorous analysis of the reliability factors than where a determination of employment status must be made. Thus, even if the incriminating hearsay statements in New El Rey were corroborated to the same degree as the statements in the present case, I may have, in my view, reasonably found them still lacking sufficient reliability on the facts of that case.

man, infra.; 2) that he knew where the key to that trailer was located, infra.; 3) that he knew both Edward Zimmerman and Edward Zimmerman's son Mike Zimmerman, infra.; 4) that he asked Mike Zimmerman for his wages, infra.; 5) that he admitted in his Form I-263, Record of Sworn Statement, that he worked for Mr. Z Enterprises, infra.; and 6) that Edward Zimmerman asserted his Fifth Amendment right against self-incrimination when he was asked if he, personally, had ever employed Francisco Munguia, infra.

In contrast, Respondents did not offer any viable evidence to specifically corroborate Mr. Pena-Torres' hearsay testimony that Francisco Munguia was only asking him for work on March 13, 1989.

Accordingly, I find the hearsay testimony of the agents more credible than that of Mr. Pena-Torres concerning what Francisco Munguia is reported to have said during the initial encounter with the agents on March 13, 1989.

2. Events at the Trailer Located on the Property of Edward Zimmerman

Having determined that Francisco Munguia was not in possession of legal immigration documents, the agents prepared to bring him to the Border Patrol station for deportation processing. Since his return to Mexico was imminent, the agents permitted Francisco Munguia to pick up his belongings. In order to do this, Munguia led the agents to a trailer that was located on property owned by Edward Zimmerman.

The record is not clear as to the permanent residence of Francisco Munguia. It is clear, however, that Munguia received the benefit of being allowed to keep his belongings inside the trailer, and that, according to the testimony of Edward Zimmerman, he ``stayed there some of the time.'' (Tr. at 830.) Moreover, this evidence is corroborated by the fact that Munguia's driver's license listed the address of Edward Zimmerman.

While waiting for Francisco Munguia to retrieve his belongings from inside the trailer, one of the agents spoke to Michael Zimmerman, Edward Zimmerman's son and an electrician employed by Mr. Z Enterprises. At the time that he spoke to the agent, Mike Zimmerman testified that he was working on a tractor located in the same area as the trailer. (Tr. at 613-18.) Mike Zimmerman admits that when the agent initially asked him if he knew Francisco Munguia, he lied and said that he did not know Munguia. (Tr. at 622-23.) In fact, as he later admitted after being reminded of the potential criminal penalties that can accrue to someone with an

overly convenient memory lapse, he did know Munguia. Id. (Tr. 627-28.)

Of greater import to me is Mike Zimmerman's testimony that Munguia, after gathering his belongings from the trailer, asked Mike Zimmerman for his wages. The record is not clear as to who owned Francisco Munguia ``wages,'' or what arrangement, if any, was made to pay him. (Cf., Tr. at 271-72 and Tr. at 629.) Conflicts in the underlying record of Mike Zimmerman's deposition testimony do not add any clarity to this question. (Tr. at 630.)

It is not unreasonably, however, to view the totality of circumstances as supporting a reasonable inference that someone or some entity associated with the Zimmerman properties and business operations owed Francisco Munguia ``wages,'' and that such ``wages'' were owned as a result of the traditional exchange of work performed for monies, or some other remunerative benefit, received. I do not arrive at such an inference lightly, but am most persuaded to reason toward it because (1) by merely asking for his wages, Munguia must have through he had done some kind of work, or performed some kind of economic benefit which merited remuneration; and (2) when assessed in its entirety, I do not view Edward Zimmerman's decision to allow Francisco Munguia free access to his property, including the open use of a trailer located on his property, to be an act of benevolent charity. Edward Zimmerman, no doubt like most of use, does not strike me as a man primarily motivated by altruism or uncalculating magnanimity. For this reason, I am all but certain that some kind of quid pro quo served as the basis for his decision to allow Francisco Munguia, and others, to use the trailer located on his property.

Francisco Munquia's Sworn Statement

After speaking with Mike Zimmerman at the trailer where Munguia gathered his belongings, the agents drove with Munguia to another construction site, a property adjacent to Mike Zimmerman's house, where they had, from the vicinity of the trailer, observed other men working. When they got to the other construction site, they encountered Donnie Zimmerman, another son of Edward Zimmerman. The men that they had observed working were no longer at the construction site.

Thereafter, the agents drove Francisco Munguia to the Border Patrol Station located at Brown Field. The agents testified that they asked Francisco Munguia if he wanted a lawyer, and he answered that he did not. (Tr. at 114.) The interview necessary to fill out the deportation processing forms, the Form I-213 and Form I-263, was conducted in the spanish language. At the conclusion of

the interview, after reviewing all his answers and initialing each of the reviewed pages, Francisco Munguia swore under oath that all of the things that he told the agents was reflected on the form and that it was all true.

At the hearing, I admitted the Forms I-213 and I-263 that pertained to Francisco Munguia over the objection of Respondents. See Exhibits C-6 and C-7. I stated at that time, and I reiterate here, that I found Complainants' Exhibits C-6 and C-7 to be reliable in light of the Calhoun factors mentioned above, and especially in light of other corroborative evidence. Supra. In contrast, Respondents offered a subsequent, unnoticed, and unrevealed videotaped retraction by Francisco Munguia to support its assertion that Munguia's Form I-263, Record of Sworn Statement, was made under duress. The entirety of Munguia's videotaped ``testimony'' was transcribed and made a part of the record. (Tr. at 765.)⁴

I find that Francisco Munguia-Bernal's videotaped ``testimony'' not only fails to persuade me that his sworn statement was made under ``duress,'' but it can actually be read, in its most crucial part, as evidence corroborating the testimony of the agents' that they observed Munguia working when they approached him on March 13, 1989. (Tr. at 765.)

⁴The above-mentioned video was, regrettably, not revealed to either Complainant or the court until the hearing. Respondents' counsel explained that the video was not revealed because Complainant's request for discovery did not specifically request videos or witness statements. Complainant's request for discovery did, however, ask Respondents to ``identify by name, home, and a business address, . . . , each and every person whom you contend has knowledge of facts supporting your contention that [the individuals named in Counts 1 through 4 were] not employed by Mr. Z Enterprises.''

In my view, it would be reasonable to conclude that the video testimony of the unauthorized aliens constituted information regarding persons whom Respondents believed had knowledge of facts supporting their contention that the individuals named in Counts 1 through 4 of the Complaint were not employed by Mr. Z Enterprises. Respondents' counsel evidently did not reach the same conclusion that I did. Yet, I gave Respondents' counsel, as officers of the court, the benefit of the doubt as to their reasons for not revealing the video prior to hearing, and did not grant Complainant's request for sanctions against Respondents. I did, however, express my disappointment with the manner in which Respondents' counsel conducted discovery in this case.

As I stated at the hearing, I believe that discovery in these proceedings should be liberally construed by both parties in order to effectuate the purpose of discovery, which is to avoid unnecessary surprise at trial and to enable the parties to better prepare their cases, thus assisting the fact finder in ascertaining the truth. It is unfortunate that Respondents' counsel chose to narrowly construe Complainant's request for discovery. By so doing, opportunities for depositions, settlement or even an earlier resolution of this matter were in all likelihood lost.

Mr. Larrabee: . . . Mr. Munguia, were you arrested by the border patrol on March 13, 1989?

Francisco Munguia: Yes.

Mr. Larrabee: At the time that you were arrested . . . what community were you in?

Francisco Munguia: I was working in Spring Valley. Id. (emphasis added)

Although it is unlikely that Respondents' intended to proffer the videotaped ``testimony'' of Francisco Munguia as evidence corroborating the testimony of Complainants' witnesses, it is not unreasonable to expressly read it that way. Moreover, when read in its brief entirety, the videotaped testimony is, as I see it, contrived to eliminate the kind of comprehensive questioning which would have made it more naturally trustworthy as a piece of proffered evidence. Specifically, the questions by counsel on the videotape were so leading and suggestive as to be virtually useless to any fair and objective fact finder. (Tr. at 766-67.)

Mr. Larrabee: Okay. If the statement that you signed said that, `You were working for Mr. Z Company,' would that statement be true?

Francisco Munguia: To tell you the truth, no.

Mr. Larrabee: Why did you sign the statement if you didn't know what it said or didn't want to?

Francisco Munguia: Because I was forced.

Mr. Larrabee: What do you mean `you were forced'?

Francisco Munguia: In other words, I signed it just because I was afraid because they told me they told me that I should sign or I would have to wait until everything was fixed. Id.

I find this to be an unpersuasive ``retraction'' of the statement that Francisco Munguia gave in his Form I-263, an official document that was completed nearer to the time of the events that it described. Moreover, because of the purposefully narrow scope of the questions asked by counsel during the videotaping, it is reasonably possible to read the Form I-263, Record of Sworn Statement, provided by Francisco Munguia as not being inconsistent with his videotaped ``testimony'' on the key issued at hand_who did Munguia work for?⁵

⁵I cannot understand why Respondents' counsel did not question the aliens about their relationship to Edward Zimmerman. Such an inquiry would have been reasonable in view of the fact that Edward Zimmerman is, as president of Mr. Z Enterprises, an agent of the corporation, and the fact that the aliens probably only understood who they worked for in terms of an individual, rather than a corporation. Additionally, an inquiry into the aliens' relationship with Edward Zimmerman would not only have provided a more complete and more accurate record, but would have

In his Form I-263, Record of Sworn Statement, Munguia stated that he worked for ``Mr. Z. 9042 Koonce Drive, Spring Valley.'' It is undisputed by the parties that Edward Zimmerman, personally, is known by several nicknames, including ``Mr. Z,`` ``Z,`` or ``Zeta.'' (Tr. at 780-781) Thus, I do not have difficulty in believing that Francisco Munguia, in his Form I-263, responded accurately to the question of who do you work for by stating that he worked for Edward Zimmerman, personally, and that his earlier statement is not in any way inconsistent with his subsequently attempted ``retraction,`` in which he stated that he never worked for Mr. Z Enterprises.

With all of the risks and dangers inherent to entering this country illegally, Francisco Munguia came here, undeterred by IRCA, from a small town in central Mexico, to earn money in a currency that would not lose its value on the same afternoon that he worked for it. All Francisco Munguia knew or needed to know was that, if he put in a day's worth of effort, he would be paid \$25.00 in cash by his ``supervisor,`` Edward Zimmerman. Exhibit C-6. Francisco Munguia did not need to know which of the corporate or partnership business hats that Edward Zimmerman was wearing on any of the jobs that he performed because no matter which one it was, some economic benefit, whether shared or not, accrued to the man who hired him, Edward Zimmerman.

In further sifting and sorting through the copious layers of often conflicting hearsay evidence presented, the truth of this basically simple man-to-man employment relationship between Edward Zimmerman and Francisco Munguia (and others) becomes clearer through Edward Zimmerman's own testimony.

The videotape was made on July 17, 1989, in Respondents' counsel's office. Edward Zimmerman testified that he re-encountered the aliens named in Counts 1 through 4 of the Complaint a few days prior to July 17, 1989. These individuals, including Francisco Munguia, had been returned to Mexico several months earlier, and, undeterred by IRCA, re-entered the country illegally to, among other things, look up Edward Zimmerman.

Q. Do you know why they were in Spring Valley on [July 15th or 16th]?

also avoided the problem of Edward Zimmerman's exercise of his Fifth Amendment right against self-incrimination in these proceedings.

Respondents' counsel's justification for not inquiring about the aliens' relationship with Edward Zimmerman was the fact that the Notice of Intent to Fine only named Mr. Z Enterprises, the corporation. It is my opinion that this justification reflects Respondents' counsel's narrow view of his responsibility to ascertain the facts. The purpose of discovery, in my view, is to seek the truth. This purpose was not served by the very structured and very limited in scope video statements.

Edward Zimmerman: No, I don't know why.

Q. Did you talk with them when they were there on that date?

Edward Zimmerman: Yes.

Q. Do you recall what that conversation was about?

Edward Zimmerman: They came back looking for work, I told them I didn't have any work like before. (Tr. at 865.) (emphasis added).

In my view, it is not unreasonable to infer, from Edward Zimmerman's testimony on this point, that he had previously employed these individuals, but that, for whatever business or other reasons, he no longer had ``any work like before.'' It is also not unreasonable to infer that, if Edward Zimmerman had not, in fact, conferred on him some prior benefit (such as opportunities for employment irrespective of the legality of their immigration status), Francisco Munguia, as well as the others, would probably not have risked so much, including the potentiality of federal criminal charges being brought against them,⁶ to cross again illegally into the United States to ask their acquaintance Edward Zimmerman for work.

Based upon my review of the evidence presented, I find, from a preponderance of the evidence, that Edward Zimmerman knowingly employed Francisco Mungia, an alien unauthorized to be employed in the United States, and failed to prepare and/or present a Form I-9 for this employee. That Edward Zimmerman, in this civil proceeding, repeatedly and without qualification, invoked the Fifth Amendment privilege against self-incrimination whenever asked if he, individually, employed any of the individuals or paid any of them in cash for work they performed on projects for him (Tr. at 837-39, 856-57), only confirms my decision to find him liable for Counts 1 and 7 of the Complaint.⁷

⁶8 U.S.C. § 1325(a)(2), section 275(a)(2) of the Immigration and Nationality Act.

⁷Although almost unnecessary in light of the amount of other corroborative and circumstantial evidence supporting a conclusion that Edward Zimmerman knowingly employed Francisco Mungia in violation of 8 U.S.C. § 1324a, it is also worth noting here that it is well established that an adverse inference may be drawn against a party invoking his/her Fifth Amendment right against self-incrimination in a civil proceeding.

Having explicitly determined that these proceedings are civil in nature, and not ``quasi-criminal,'' it is clear that I may properly take an adverse inference from Respondent Edward Zimmerman's exercise of his Fifth Amendment right against self-incrimination in these IRCA proceedings.

As both parties' exceptional briefings on this issue show, the Supreme Court has held that the trier of fact may draw an adverse inference against a party in a civil proceeding who invokes the Fifth Amendment in response to a question the answer to which may tend to incriminate. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); see

With regard to Respondent Mr. Z Enterprises, I find that Complainant has filed to present evidence sufficient to prove, by a preponderance of the evidence, that Mr. Z Enterprises employed Fran-

also Rad Service, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271, 275 (3rd Cir. 1986); Pagel, Inc. v. S.E.C., 803 F.2d 942 (8th Cir. 1986); Brink's Inc. v. City of New York, 717 F.2d 700 (2nd Cir. 1983); Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984); Young Sik Woo v. Glantz, 99 F.R.D. 651 (D.R.I. 1983); Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982); Heidt, The Conjurer's Circle The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982).

The parties also correctly noted in their briefings that, although an adverse inference may be drawn in a civil proceeding, it ``may not be the sole basis for imposing liability on the defendant,'' and the court will require ``independent corroborating evidence of the matters to be inferred from a defendant's invocation'' of the privilege. United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1452 (E.D.N.Y. 1988); see also Pagel, supra; S.E.C. v. Musella, 578 F. Supp. 425, 429-31 (S.D.N.Y. 1984) (A defendant's refusal to testify ``is a factor that may be considered by the court.'') (emphasis added).

Based on the foregoing, it is my view that I may properly take an adverse inference from Respondent Edward Zimmerman's invocation of the Fifth Amendment in this civil proceeding, and that such an inference is appropriate in the present case. Fully understanding that Edward Zimmerman's silence, in and of itself, is insufficient to support an adverse inference, I will make every effort to give his silence no more evidentiary value than is warranted by the facts of this case.

Michael Zimmerman, like his father, Edward Zimmerman, invoked his Fifth Amendment right against self-incrimination during this proceeding. But, unlike the answer to the above question regarding the effect to be given to Respondent Edward Zimmerman's silence in this civil proceeding, the answer to the question regarding the effect to be given to Mike Zimmerman's invocation of the Fifth Amendment in this proceeding is somewhat less clear. Yet, for the reasons set forth below, it is my view that the answer to the question regarding Mike Zimmerman's silence should be, in the instant matter, like that given to the former question.

As Mike Zimmerman is not a party to this civil proceeding, the Supreme Court's decision in Baxter, supra, is not decisive. Moreover, several courts have subsequently held that the fact finder may properly draw whatever inferences are reasonable from the claim of the Fifth Amendment privilege by an employee/agent of a party employer against the witness' employer (or even former employer) in a civil proceeding. E.H. Boerth Company v. LAD Properties, et al., 82 F.R.D. 635, 644 (1979); Rad Services, Inc., 808 F.2d 276; Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471, 1987 U.S. App. Lexis 6833 (1987); see also The Conjurer's Circle, supra, at 1119 (citing at note 214 Ralph Heqman Co. v. Transamerica Ins. Co., 293 Minn. 323, 198 N.W.2d 555 (1972)). Therefore, I may properly take an adverse inference from Michael Zimmerman's silence against Respondents if there is sufficient evidence to support a finding that Michael is/was an employee of Respondents.

It is an undisputed fact that Michael Zimmerman is employed by Respondent Mr. Z Enterprises. (Tr. at 589-590, 592, 600, 603, 791-792.) However, there is insufficient evidence to show that Michael Zimmerman is/was employed by his father, Edward Zimmerman. Hence, it is my view that I may, if I find it is reasonable to do so here, properly draw an adverse inference from Michael Zimmerman's silence only against Respondent Mr. Z Enterprises.

cisco Munguia-Bernal, knowingly or otherwise. Therefore, I do not find Mr. Z Enterprises liable for Counts 1 and 7.

C. Gerardo Urbina-Munguia (Counts 2 and 8) and Rafael Urbina-Muniquia (Counts 3 and 9)

I choose to analyze these four counts, which pertain to these two named individuals, together because there is a common nexus of law and fact that applies to them.

To begin with, they were apprehended together by Border Patrol agents on March 15, 1989, at 3217 Helix Street. It is undisputed by the parties that 3217 Helix Street in Spring Valley is the residence of Michael Zimmerman, the son of Edward Zimmerman and an employee of Mr. Z Enterprises.

The agents testified that they observed three men working on or near a fence on March 15, 1989, at 3217 Helix Street. When they approached the three men, the agents were able to apprehend the Urbina brothers, but the third man fled from them. (Tr. at 293.) The agents testified that they asked the apprehended Urbina brothers standard immigration questions as to place of birth and immigration documents. (Tr. at 135.) The Urbina brothers admitted that they were born in Mexico, and that they did not have legal immigration papers. One of the Urbina brothers did however, present a California identification card to the agents, and the address listed on the identification card was 9042 Koonce Drive, the residence of Edward Zimmerman and the business address of Mr. Z Enterprises. See Exhibit C-9B.

In addition, the agents testified, over continuing hearsay objections, that the Urbina brothers told them that the person who eluded apprehension was Benjamin Becceril (Counts 4 and 10). Id. The agents also testified that the Urbina brothers told them, at the time of their initial apprehension, that they worked for Edward Zimmerman, that they were hired by Edward Zimmerman, and that they were paid in cash by Edward Zimmerman. Id.

After questioning the Urbina brothers at 3217 Helix Street, the agents went with the brothers to retrieve their belongings from the same trailer, located on Edward Zimmerman's property, from which Francisco Munguia retrieved his belongings. Like Mr. Munguia, the Urbina brothers had no difficulty getting into the locked trailer because they knew where the key was to unlock it. (Tr. at 143.)

While waiting for the Urbina brothers to remove their possessions from the trailer, the agents testified that they spoke with Don Zimmerman, who was on the property at the time. It is undisputed that Don Zimmerman is another son of Edward Zimmerman.

Don Zimmerman told the agents that the Urbina brothers did not work for him, that he did not owe them money, and that if the agents had any further questions, they should speak with his father who, it is undisputed, was on vacation in Costa Rica during this time. Id.

Thereafter, the agents drove the Urbina brothers to the Border Patrol Station for deportation processing. The agents and the Urbina brothers completed four documents at the Border Patrol Station, and these documents are exhibits in this case. See Exhibits C-7 and C-9; and, C-10 and C-12.

Exhibits C-7 is the Form I-213, Record of Deportable Alien, for Gerardo Urbina and Exhibit C-9 is the Form I-263, Record of Sworn Statement, for Gerardo Urbina. In his sworn statement, which is initialed at the bottom of every page, Gerardo Urbina declared that he worked for ``Mr. Zimmerman, the father, I think his name is Edward.'' See C-9. He also stated that Edward Zimmerman was his supervisor, and that he was owed more than \$280.00 for employment services that he rendered to ``Mr. Zimmerman.'' Id. Gerardo Urbina's concludes his sworn statement by expressing his hope that Edward Zimmerman will send the earned money to him in Mexico. Id.

Respondents oppose consideration of Complainant's Exhibits C-7, C-9, C-10, and C-12 on the grounds that they are hearsay, and because the statements that they made in those official documents were ``retracted'' in their videotaped ``testimony.''

With respect to the hearsay issue which, as stated above, Respondents raised throughout this proceeding, I have already indicated my general approach to such questions by (1) balancing the out-of-court statement's probativeness with an assessment of its reliability, and (2) assessing the out-of-court statement's reliability in light of the previously mentioned Calhoun factors. Moreover, it is well established, as also stated above, that reliable hearsay can constitute substantial evidence. See Richardson v. Perales, 402 U.S. 389 (1971); see also Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980) (``We have rejected a per se approach that brands evidence as insubstantial solely because it bears the hearsay label.''); 3 K.C. Davis, Administrative Law Treatise 249 (1980) (``Post-Perales cases seem to support the view that no rule should exist that evidence inadmissible in a jury case may not be substantial, but that substantiality should be determined by appraising it in its full context.''). Substantial evidence is ``such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'' See e.g., Freeman United Coal Min. v. Benefits Review Board, 912 F.2d

164 (7th Cir. 1990). The ALJ has sole power to make credibility determinations and resolve inconsistencies in the evidence. Id.

Applied here, there can be no question that the Forms I-263, Record of Sworn Statement, which Respondents object to on hearsay ground are probative. Moreover, nothing in the record convinces me that the sworn statements of the Urbina brothers are unreliable.

As stated and applied above in the Munguia analysis, independently corroborative evidence is, to me, the most persuasive indicia of reliability for an out-of-court statement attributed to a person who is unavailable to testify. The presence of independently corroborative evidence becomes an even more important reliability factor when the party seeking to introduce the hearsay statement is itself instrumental in having administratively effectuated the unavailability of the declarant, i.e. by giving him voluntary departure or by deporting him.⁸

The corroborative evidence which supports a conclusion that the Forms I-263, Record of Sworn Statement, of the Urbina brothers are not unreliable overlaps to some degree with that previously mentioned in the analysis section on Francisco Munguia. For example, it is undisputed that Gerardo Urbina (Cts. 2 and 8) possessed a California identification card with the address 9042 Koonce Drive printed on it. As stated, 9042 Koonce Drive is the address of Edward Zimmerman's previous residence and of Mr. Z Enterprises' business operations. In addition, the undisputed fact that the Urbina brothers kept their belongings in the trailer, and had at least passive permission to live there, causes me to infer, as I did with Munguia, that some kind of quid pro quo existed between Edward Zimmerman and these men. I remain convinced that Edward Zimmerman is not an inherently unreasonable man, and that he would not confer upon these men, known to be aliens living illegally in the United States, the benefit of living on his property (thereby risking potential criminal charges for ``harboring'')⁹ without getting something, such as cheap labor services, in return

⁸Although I have found, under the facts of this case, that the aliens' hearsay statements in the Forms I-263, Record of Sworn Statement, are more than reliable, I want to note that I am somewhat troubled by the administrative practice of deporting, or giving voluntary departure to, a hearsay declarant who makes incriminating statements in an interrogative setting against a third party. I am troubled by this practice because it raises, in my mind, important due process concerns. That there may be a rational administrative practicality underlying such a policy does not mean that the policy should not be administratively reconsidered in light of its consequential fairness in section 1324a, section 274A proceedings.

⁹8 U.S.C. 1324(a)(1), section 274 of the Act.

for it. When asked directly if he had employed, in his individual capacity, the Urbina brothers, Edward Zimmerman, on the recommendation of counsel, invoked his Fifth Amendment right against self-incrimination. Because this present proceeding is simply a civil matter, and for reasons stated above, at footnote 7, it is my judgment to take an adverse inference of liability from Edward Zimmerman's invocation of his Fifth Amendment right, consistent with the holding in Baxter v. Palmigiano, 425 U.S. 308 (1976). It should be noted, however, that I am using this adverse inference not as substantial evidence, per se, on the ultimate issue of whether either or both of Respondents employed the Urbina brothers, but rather as one additional piece of evidence corroborating the sworn statements in which the Urbina brothers declared that they worked for Edward Zimmerman in his individual capacity.

Additional corroborative evidence can be found, as I see it, in the agents' testimony that they observed the Urbina brothers working on or near a fence at the residence of Michael Zimmerman at the time of their apprehension. This evidence has not, as I see it, been persuasively refuted by Respondents. Moreover, I view as corroborative evidence the undisputed fact that the Urbina brothers returned, several months after they were returned to Mexico, to Respondents' residence and business address in order to ask Edward Zimmerman for more work. As noted above with respect to Francisco Munguia, Edward Zimmerman told the Urbina brothers that he ``did not have any work like before.''

Finally, I view as evidence corroborating Gerardo Urbina's March 15, 1989, Form I-263, Record of Sworn Statement, the fact that Gerardo was again arrested by Border Patrol agents in front of 9042 Koonce Drive, Spring Valley, on January 8, 1990. Pursuant to that arrest, Gerardo signed another Form I-263, Record of Sworn Statement, in which he declared that he started working for ``Mr. Zimmerman'' on February 15, 1989.¹⁰I agree with Respond-

¹⁰ Respondents contend that they were prejudiced by not being immediately notified that complainant's agents had, on January 8, 1990, apprehended Gerardo Urbina, who had again entered the U.S. illegally to look for work and visit Edward Zimmerman. I am not, however, persuaded by Respondents' contentions because I find that the notice they received regarding an agreed upon deposition of Gerardo Urbina, scheduled for January 19, 1990, was adequate notice of his apprehension. Respondents cited no authority in support of their apparent contention that they had a right to be present at Gerardo Urbina's interview by government agents on January 8, 1990. That Gerardo Urbina did not show up for his scheduled deposition is arguably indicative of the practical dilemma government agents face in attempting to provide fair access to deportable alien witnesses who have made incriminating statements against third parties. See footnote 9, supra. Without undertaking the

ents' legal argument that Gerardo's second sworn statement is somewhat ambiguous as to which ``Mr. Zimmerman'' is being referred to, and that is why I do not find the January 8, 1990 sworn statement to constitute substantial evidence in support of Complainant's allegations. I do view it, however, as independently corroborative evidence supporting the initial statements of Gerardo Urbina that he worked for ``Mr. Zimmerman, the father, I think his name was Edward.'' See Exhibit C-9. Moreover, I find Respondents' argument that they are not liable for the alleged actions of Donny Zimmerman, Edward Zimmerman's son and a construction foreman for Mr. Z Enterprises, to be very unpersuasive since it is my view that Donny Zimmerman acted as an agent of his father. See United States v. Basim Aziz Hanna, D.B.A. Ferris & Ferris Pizza, OCAHO Case No. 89100331, at 9, nt. 3 (July 19, 1990). Even if Donny Zimmerman did not have actual authority to act on behalf of his father, Edward Zimmerman, and/or Mr. Z Enterprises, I view the record before me as substantiating a conclusion by inference that he certainly had, or otherwise manifested, the appearance of such authority, Id.; see also, Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 876 (9th Cir. 1989).

Having marshalled the various pieces of corroborative evidence supporting a conclusion that the Forms I-263, Record of Sworn Statement, signed by the Urbina brothers should, despite their hearsay status, be accorded significant weight, I note, as well, that additional Calhoun factors support a finding that the sworn statements are reliable. Most specifically, I do not view this record before me as supporting Respondents' continuous contention that the sworn statements were ``made under duress'' and should therefore, be excluded or accorded no weight. Unless there is an adequate showing of actual duress based on credible evidence of governmental misconduct, I shall rebuttably presume that the sworn statement was not completed in a manifestly unfair manner. I find that there has been no such showing here; thus, I rebuttably presumed that the sworn statement was not completed in a manifestly unfair manner. I further find that no evidence sufficient to rebut the presumption was presented by Respondents.

In light of the significant amount and types of evidence corroborating the Urbina brothers' Forms I-263, Record of Sworn Statement, and because I do not view the record as supporting Respond-

drastic, and ultimately unacceptable action of detaining such an alien solely for the purposes of guaranteeing his appearance at a deposition, Complainant attempted, as I see it, to secure from Gerardo a promise that he would appear at his own deposition. Not unpredictably, Gerardo Urbina did not appear for his deposition.

ents' contention that the statements were made under duress, or were otherwise involuntary, I conclude that Exhibits C-9 and C-12 constitute substantial evidence that Respondent Edward Zimmerman ``knowingly'' employed both Gerardo Urbina-Munguia and Rafael Urbina-Munguia, and is, therefore, liable for violations of section 1324a.

It is my view that the videotaped testimony of the Urbina brothers does not contradict this conclusion because counsel for Respondents limited their unnoticed interview questions to the employment relationship that the Urbina brothers may or may not have had with Respondent Mr. Z Enterprises. (See footnote 5, infra.) From this narrow focus of questioning, it is not unreasonable to infer, in light of Edward Zimmerman's invocation of the Fifth Amendment, that Respondents' counsel was deliberately attempting to preclude any inquiry that would compromise the liability of Edward Zimmerman, in his individual capacity.

Moreover, I view Gerardo Urbina's second Form I-263, Record of Sworn Statement, executed on January 8, 1990, as amounting, in effect, to a retraction of the videotaped ``retraction'' of his first Form I-263, executed on March 15, 1989.

For the above stated reasons, I conclude that Respondent Edward Zimmerman is liable on Counts 2 and 3 for knowingly hiring and employing Gerardo and Rafael Urbina-Munguia, aliens unauthorized to work in the United States.

In addition, I find that Respondent Edward Zimmerman is liable on Counts 8 and 9, for his failure to prepare and/or present for inspection Forms I-9 for the Urbina brothers. As previously noted, Respondent Edward Zimmerman failed to prepare and/or present any Forms I-9. Under IRCA, Edward Zimmerman was required to prepare and/or present Forms I-9 for all of his employees. Since Edward Zimmerman employed Gerardo Urbina and Rafael Urbina, and was thus required, under IRCA, to prepare and/or present Forms I-9 for the Urbina brothers, he is liable for failing to do so.

Furthermore, I find that Complainant has failed to present evidence sufficient to prove, by a preponderance of the evidence, that Respondent Mr. Z Enterprises ``employed'' Gerardo and Rafael Urbina-Munguia, as alleged in the Complaint. Therefore, I do not find Respondent Mr. Z Enterprises liable for Counts 2 and 8 or Counts 3 and 9.

D. Benjamin Becerril-Saenz (Counts 4 and 10)

At the evidentiary hearing, U.S. Border Patrol agents testified that, on April 11, 1989, they drove an unmarked vehicle past an apartment complex located at 3199 1/2 Lamar Springs Court. It is

undisputed that this property is an apartment complex owned by Lamar Associates, of which Edward Zimmerman is a partner. (Tr. at 675, 804.)

The agents testified, in slightly conflicting ways, that they observed Benjamin Becerril (Counts 4 and 10) working as a gardener at the 3199 1/2 Lamar Springs Court Complex. The agents stated that they recognized Mr. Becerril as the man who had eluded them on March 15, 1989, when they apprehended the Urbina brothers. For this reason, they approached Mr. Becerril carefully and, after asking him the standard questions concerning his immigration status, determined that he was in the U.S. illegally.

In addition to asking Mr. Becerril about his immigration status, the agents testified that they asked him for whom he was working. Over further hearsay objections, the agents testified that Mr. Becerril told them that he worked for Edward Zimmerman, and that he was paid in cash for his work by Edward Zimmerman. (Tr. at 185.) The agents also testified that they did not see any trucks or cars with other business names on them at or near the apartment complex where they apprehended Mr. Becerril. (Tr. at 190.)

As the agents and Mr. Becerril were leaving the apartment complex, they stopped and spoke with the manager, a woman named Sheila Dominy. The agents' testimony about what Ms. Dominy allegedly said to them regarding the identity of Mr. Becerril and Mr. Becerril's employer was confused and confusing, not to mention hearsay that was ultimately contradicted by Ms. Dominy, herself, when she testified at the evidentiary hearing. (Tr. 1087.) Accordingly, I give no weight to Complainant's proffered hearsay evidence that Ms. Dominy told the agents that Mr. Becerril worked for Edward Zimmerman.

I do note, however, and accord some weight to, the agents' unrefuted testimony that they observed Mr. Becerril retrieve a key to a ``pump shack'' at the apartment complex that apparently contained equipment of some kind. (Tr. at 188.) Ms. Dominy, an admitted employee of Edward Zimmerman, testified that her husband did not retrieve keys from Mr. Becerril; she also contradicted the agents' testimony that she asked the agents to ask Mr. Becerril for the keys before they took him away. (Tr. at 187.) Even if Ms. Dominy were clearly an unbiased witness, and I am far from convinced that she was, her testimony does not actually refute the agents' testimony that they observed Mr. Becerril enter the pump shack and retrieve the keys.

Before proceeding to the Border Patrol Station for deportation processing, the agents and Mr. Becerril stopped at 9042 Koonce Drive. The purpose of the stop, according to the agents, was to

speak with Edward Zimmerman about his relationship to Mr. Becerril. At 9042 Koonce Drive, the agents spoke with Mrs. Dorothy Zimmerman, the wife of Edward Zimmerman, and co-owner and treasurer of Mr. Z Enterprises. The agents testified, over hearsay objections, that Mrs. Zimmerman told them that she did not recognize Mr. Becerril, but that ``Mr. Zimmerman had a lot of Mexicans working there.'' (Tr. at 189.) Mrs. Zimmerman did not testify at the evidentiary hearing, and Respondents did not offer any factual evidence to contradict the agents' testimonial hearsay.

After speaking with Mrs. Zimmerman, the agents proceeded to the Border Patrol Station with Mr. Becerril. As with the aliens described previously, Mr. Becerril and the agents completed a Form I-213 and a Form I-263. See Exhibit C-19 and C-21. At the hearing, I admitted these documents over hearsay objections from Respondents. (Tr. 192.)

In his sworn statement, Mr. Becerril listed the trailer located on the property of Edward Zimmerman as his address in the United States. He declared that he work ``at Lamar, for Mr. Z,'' that his supervisor was ``Mr. Z . . . the old man,'' that he worked as a gardener for \$25.00 per day, and that ``illegal workers are paid less.'' See Exhibit C-21. Mr. Becerril also admitted in his sworn statement (Form I-263) that he was the man who had run away the day that the agents apprehended Gerardo and Rafael Urbina-Munguia. Id.

Respondents contend that Exhibits C-19 and C-21 should be excluded because they contain unreliable hearsay statements attributed to Mr. Becerril in a situation in which he claims, in his videotaped statement, that he was under duress. (Tr. at 764.)

Mr. Larrabee: Do you recall signing a statement or being asked to sign a statement that said that you worked for the company Mr. Z?

Mr. Becerril: Yes, they were stating that they had a paper and they made me sign the paper stated (sic) that they had my permission, that the paper was already filled out and they made me sign it there. Id.

Aside from the fact that counsel's question, as asked, mis-characterizes the facial evidence of the sworn statement (i.e. the sworn statement does not say that Mr. Becerril worked for the ``company'' Mr. Z), I find that I simply do not believe that the agents completely filled out Mr. Becerril's Form I-263, Record of Sworn Statement, and made him sign it without explaining it to him. It is more believable to me that Mr. Becerril imagined this version of the events in the influential presence of Respondents, and was, for no shortage of reasons, predisposed to a certain bias against the Border Patrol agents. Moreover, the agents specifically contradicted Mr. Becerril's assertions by testifying that they obtained the informa-

tion contained on Mr. Becerril's Form I-213 and Form I-263 according to the standard question and answer deportation processing procedures that they used for Francisco Munguia-Bernal and the Urbina brothers. (Tr. at 190; at 325-26.)

Mr. Becerril also stated that he was threatened with imprisonment if he did not sign the Form I-263. (Tr. at 765.) The agents, however, directly and generally denied that they made any threats against Mr. Becerril during his interrogative deportation processing. (Tr. at 203.) Having carefully considered the contradictory evidence before me, I do not find Mr. Becerril's statement that he was threatened by the Border Patrol agents to be credible. Not only does the testimony of the Border Patrol agents directly contradict Mr. Becerril's contention that he was threatened, but, as noted previously, Mr. Becerril's contention was first made in his video statement, which was taped in the influential presence of Respondents and Respondents' counsel about three months after Mr. Becerril signed his Form I-263, Record of Sworn Statement.

At I stated with regard to the similar contentions of the Urbina brothers, I shall rebuttably presume that the sworn statement was not completed in a manifestly unfair manner unless there is an adequate showing of actual governmental misconduct or duress. In the present case, there has been no showing of actual duress. Therefore, I will give to Mr. Becerril's sworn statement the same weight that I have given to the sworn statements of the previously discussed aliens (with the exception of Gerardo Urbina's second sworn statement, which was somewhat ambiguous).

Mr. Becerril's sworn statement is most persuasively corroborated by Mr. Becerril's admission, in his videotape statement, that he was working at the Lamar Street apartments, which are owned, at least in part, by Edward Zimmerman, when he was arrested by the agents on April 11, 1989. (Tr. at 765.)

Mr. Larrabee: And where were you arrested? What community were you arrested in?

Mr. Becerril: In what community? In Spring Valley.

Mr. Larrabee: Okay. Why were you arrested by the Immigration officer?

Mr. Becerril: I was cleaning a yard. Id. (emphasis added)

Respondents' videotape, once again, assists in persuading me that Complainant's allegation that Mr. Becerril was an employee of Respondent Edward Zimmerman is true. Based upon a thorough reading of the record, it is reasonable to infer, in my view, that Mr. Becerril's admission that he was cleaning the yard when the agents apprehended him at the Lamar Street apartments supports a conclusion, corroborated by numerous other pieces of evidence, that

Edward Zimmerman, because of his authority as part owner, was in the best position to have hired Mr. Becerril, or at least to have exercised the principal control over his hiring.

Other corroborative evidence supporting a conclusion that Mr. Becerril was an employee of Edward Zimmerman is the testimony of the agents that they observed Mr. Becerril retrieving a key from an equipment shed located at the Lamar Street apartments. In addition, the sworn statements of the Urbina brothers indicated that Mr. Becerril was working with them when they were apprehended on March 15, 1989, and that he was the man who had escaped from the agents by running away. Finally, I note and take an adverse inference from the fact that, when Edward Zimmerman was asked if he, in his individual capacity, ever employed Mr. Becerril, he asserted, on the advice of counsel, his Fifth Amendment right against self-incrimination.

While these various pieces of evidence would not be conclusive if judged in isolation, I find that their conjunction establishes, by a preponderance of the evidence, that Edward Zimmerman, whether personally or through some directed agent, hired and employed Mr. Becerril in violation of section 1324a. Accordingly, I find and conclude that Respondent Edward Zimmerman is liable for Count 4 of the Complaint. Since Edward Zimmerman admittedly failed to prepare and/or present any Forms I-9 for his employees, as he was required to do under IRCA, and Mr. Becerril is an employee of Edward Zimmerman, I also find Respondent Edward Zimmerman liable for Count 10 of the Complaint.

I further find, however, that Complainant has failed to prove, by a preponderance of the evidence, that Benjamin Becerril-Saenz was an employee of Respondent Mr. Z Enterprises. Thus, I find that Respondent Mr. Z Enterprises is not liable for Counts 4 and 10 of the Complaint.

E. Humberto Pena-Torres (Count 6)

The Complaint alleges that one or both of Respondents hired Mr. Pena-Torres without completing a Form I-9 for him. Respondents contend, however, that Mr. Pena-Torres was an independent contractor who contracted to do gardening work for some of Respondent Edward Zimmerman's partnerships, and thus neither Respondent Mr. Z Enterprises, Inc., nor Respondent Edward Zimmerman was required by IRCA to complete a Form I-9 for Mr. Pena-Torres. See Section 274A(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1324a(b); see also 8 CFR § 274a.1(f) & (j). It is not disputed that Mr. Pena-Torres, as a temporary resident alien, was authorized to be employed in the United States.

The issue I must therefore determine with respect to Mr. Pena-Torres is whether Complainant has met its burden of proving, by a preponderance of the evidence, that Mr. Pena-Torres was an employee of Respondent Mr. Z Enterprises and/or Respondent Edward Zimmerman in June 1988.

Under 8 C.F.R. § 274a.1(f), the term employee is defined as ``an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section''

Paragraph (j) states, in part, that ``the term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.'' 8 C.F.R. § 274a.1(j).

8 C.F.R. § 274a.1(j) also sets forth factors to be considered in determining whether an individual or entity is an independent contractor. The factors ``include, but are not limited to, whether the individual or entity: Supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done''

In addition to the statutory definitions, the common law test for distinguishing between employee and independent contractor adopted by the Ninth Circuit is instructive. The test adopted by the Ninth Circuit considers the ``right of control'' reserved by the person for whom the work is to be done, as well as the ``economic realities''--that is, the degree of economic dependence of the worker on the putative employer.'' Lutcher v. Musician Union Local 47, 633 F.2d 880 (9th Cir. 1980); Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762 (9th Cir. 1988), cert. denied, 109 S.Ct. 1123 (1989).

In Lutcher, the Ninth Circuit set forth factors to be considered in distinguishing between an employee and an independent contractor. These factors are similar to, and expand upon those set out in 8 C.F.R. § 274a.1(j). The court states that the primary factor is ``the extent of the employer's right to control the means and manner of the worker's performance.'' See Smith v. Dutra Trucking Co., 410 F. Supp 513, 518 (N.D. Cal. 1976), aff'd mem., 580 F. 2d 1054 (9th Cir. 1978); and U.S. v. Valdez, OCAHO Case No. 8910014 (September 27, 1989), aff'd by CAHO (December 12, 1989) (citing Dutra Trucking Co.). Additional factors cited by the court are: ``(1) The kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without su-

pervision; (2) The skill required in the particular occupation; (3) Whether the ``employer'' or the individual in question furnishes the equipment used and the place of work; (4) The length of time during which the individual has worked; (5) The method of payment, whether by time or by job; (6) The manner in which the work relationship is terminated, i.e. by one or both parties, with or without notice; (7) Whether annual leave is afforded; (8) Whether the work is an integral part of the business of the employer; (9) Whether the worker accumulates retirement benefits; (10) Whether the employer pays social security taxes; and (11) The intention of the parties.'' Lutcher, supra; U.S. v. Silk, 331 U.S. 704, 716 (1947).

Complainant supports its allegation that Mr. Pena-Torres was an ``employee'' of Respondents with numerous pieces of proffered evidence derived from Mr. Pena-Torres' several communicational encounters with Complainant's agents. The evidence presented indicates that Mr. Pena-Torres conversed with Border Patrol agents on the following dates: March 13, 1989 (Tr. at 69-75, 264-66), April 11, 1989 (Tr. at 173-75), and March 8, 1990 (Tr at 548, 557-58), and Ex. C-30 (Record of Sworn Statement). It should again be noted that Mr. Pena-Torres also gave a deposition statement on April 19, 1990 (see disputed fact #31) and testified at the hearing.

The evidence derived by Complainant from the above communicational encounters includes the following: (1) The testimony of several Border Patrol agents that Mr. Pena-Torres told them he worked for Mr. Z or Edward Zimmerman, and Edward Zimmerman paid his wages. (Tr. at 73-77, 176-78, 266-67, 285, 351, 559-60.) Ex. C-30; (2) The undisputed fact (#30) that Mr. Pena-Torres did gardening work for some of Edward Zimmerman's partnerships, including the Lamar Partnership, and Edward Zimmerman helped Humberto Pena-Torres get the gardening jobs; (3) The undisputed facts (nos. 29, 51, and 52) that Mr. Pena-Torres had both a driver's license and business card listing the address of both Respondents, and Mr. Pena-Torres has lived (and presently lives) on property owned by Edward Zimmerman; and (4) The undisputed fact (#31) that Mr. Pena-Torres worked for Edward Zimmerman in 1987.¹¹

¹¹As previously noted, Complainant made an oral Motion to Amend the Complaint to Conform to the Evidence at the hearing, citing Rule 15(b) of the Federal Rules of Civil Procedure. (Tr. at 1272-73.) I granted the Motion as it pertains to adding Respondent Edward Zimmerman, individually, as an additional party to this proceeding.

It is arguable that Complainant's Motion remained pending as to other portions of the proceeding (although it only clearly sought to amend as to the parties charged, and was based on a previous motion to amend, which clearly sought to amend only

At both his deposition and the hearing, Mr. Pena-Torres testified that he never worked for Respondent Mr. Z Enterprises, and Respondent Edward Zimmerman did not pay his wages. Mr. Pena-Torres also denied telling the Border Patrol agents anything to the contrary. (Tr. at 923-26, 965.) Ex. R-10. Mr. Pena-Torres did testify that he worked for Edward Zimmerman's associates. (Tr. 893-94.) Moreover, Mr. Pena-Torres testified that he uses his own tools when he works, he sets his own hours, and he claims himself as a gardener when he files his tax returns. (Tr. at 971-72.)

Respondent Edward Zimmerman's testimony paralleled that of Mr. Pena-Torres. Edward Zimmerman testified that he had an oral agreement the Mr. Pena-Torres to do the landscape maintenance, gardening on various projects. (Tr. at 849-50.) He also testified that Mr. Pena-Torres did work for some of his partnerships. (Tr. at 879.)

Based upon a thorough review of the above evidence, it is my view that Complainant has failed to prove, by a preponderance of the evidence, that Mr. Pena-Torres was an ``employee'' of either Respondent Mr. Z Enterprises or Respondent Edward Zimmerman.

First, although the hearsay statements introduced by Complainant in support of its allegations were reliable and credible, they were significantly rebutted by the credible testimony of the hearsay declarant at his deposition and the hearing. The testimony of Edward Zimmerman also rebutted many of the hearsay statements introduced by Complainant.

Second, and more importantly, Respondents introduced evidence which, under both the statutory definitions and the more liberal

as to the parties charged); and, therefore, based on the undisputed fact that Mr. Pena-Torres worked for Respondent Edward Zimmerman in 1987, Complainant seeks to amend the Complaint as to when Mr. Pena-Torres worked for Respondents.

Even assuming that Complainant's Motion to Amend remained pending, I would not grant the motion as to when Mr. Pena-Torres worked for Respondents, because it is my view that Respondents would be prejudiced by such an amendment to the Complaint.

Based on Complainant's pre-hearing Motion to Amend, Respondents had noticed before the hearing of a problem with the party charged in the Complaint. Thus, Respondents had an opportunity to deal with the possibility of an additional charged party, i.e. conduct discovery and obtain additional evidence. However, this was not the case with regard to the allegation of when Mr. Pena-Torres worked for Respondents. Complainant made no prior motion to specifically amend the Complaint as to when the individual in Count 6 worked for Respondents, and Complainant's oral Motion to Amend, made at the hearing, only clearly sought to add Edward Zimmerman as an additional party.

Furthermore, although it is undisputed that Mr. Pena-Torres ``worked'' for Edward Zimmerman in 1987, it is less than clear that Mr. Pena-Torres worked as an ``employee''; thus, a finding of liability would not necessarily follow from a decision to amend the Complaint.

common law test for distinguishing between employee and independent contractor, strongly suggests that Mr. Pena-Torres was an independent contractor. Complainant introduced little, if any, evidence to counter this probative evidence.

Both 8 C.F.R. § 274a.1(j) and Lutcher, supra, list the individual's utilization of his/her own means and methods and the ``employer's'' control only as to results as factors indicative of independent contractor status. Mr. Pena-Torres testified that he uses his own tools and sets his own hours. (Tr. at 971-72.) Although the Form I-263, Record of Sworn Statement, signed by Mr. Pena-Torres indicates that Mr. Pena-Torres told the Border Patrol agents that he used Mr. Z's tools and Mr. Z himself set the hours (Ex. C-30), Mr. Pena-Torres denied making that statement, both at the hearing and in his deposition. (Tr. at 938.) Ex. R-10.

Additional factors listed in Lutcher are the type of occupation, whether the employer pays social security taxes, and the intention of the parties. Respondents introduced some evidence of these three (3) factors.

Respondent Edward Zimmerman is involved in construction projects, either individually or in partnership, and Mr. Z Enterprises is involved in the construction of single family dwellings. (Tr. at 785-808.) (See undisputed fact #1) Edward Zimmerman testified that he, individually, and Mr. Z Enterprises frequently use subcontractors. (Tr. at 871.) I take notice of the fact that the use of subcontractors in the construction industry is a common practice.

The employee list presented by Respondents to the Border Patrol agents only listed Ray Green as an employee of Respondent Mr. Z Enterprises. (See undisputed fact #43) Since Mr. Pena-Torres was not listed as an employee of Mr. Z Enterprises, there is no clear evidence that either of the Respondents paid social security taxes for Mr. Pena-Torres. Furthermore, Mr. Pena-Torres testified that he claims himself as a gardener when he files his income tax returns. (Tr. at 971-72.) He also told the Border Patrol agents that he asked the secretary at Mr. Z Enterprises to help him fill out income tax forms as a gardener. (Tr. at 933-35.) All these facts seem to indicate that Mr. Pena-Torres' social security taxes were paid by Mr. Pena-Torres, not Respondents.

Lastly, the intention of the parties was much more clearly expressed by evidence presented by Respondents. Much of the evidence presented by Complainant merely indicates that Mr. Pena-Torres ``worked'' for Mr. Z or Edward Zimmerman, i.e. on March 13, 1989, Mr. Pena-Torres had a business card for Mr. Z Enterprises with Edward Zimmerman's name on it (see undisputed fact #29); Mr. Pena-Torres worked for Edward Zimmerman in 1987 (see

undisputed fact #31); the testimony of Agents McCarthy and Szczepanowski that, on March 13, 1989, Mr. Pena-Torres told them he worked for Edward Zimmerman (Tr. at 73076, 266-67, 285, 351). The fact that Mr. Pena-Torres worked for Edward Zimmerman, even if found to be true, does not necessarily prove that Mr. Pena-Torres worked as an employee. Independent contractors also work for the individual who contracts for their services.

Additionally, other evidence introduced by Complainant merely suggests a ``relationship'' between Mr. Pena-Torres and Edward Zimmerman, i.e. Mr. Pena-Torres did gardening for some of Edward Zimmerman's partnerships (see undisputed fact #30); and Mr. Pena-Torres lives in a house that is owned by Edward Zimmerman's ``pension and profit sharing plan,'' and previously lived on property owned by Edward Zimmerman (see undisputed fact #51). However, the evidence does not necessarily suggest that the relationship was that of employee-employer.

In contrast to Complainant's often vague evidence of a working relationship between Edward Zimmerman and Mr. Pena-Torres, Respondent introduced the testimony of Edward Zimmerman that he had a verbal agreement with Mr. Pena-Torres to do gardening for some of his partnerships (Tr. at 849-50), and that Mr. Pena-Torres was ``a subcontractor_an independent contractor doing gardening work on an individual contract basis.'' (Tr. at 848.)¹² Even extracting the legal conclusion ``independent contractor,'' which is not definitive of the individual's work status, Respondent's characterization of his relationship with Mr. Pena-Torres more clearly expresses the intention of the parties than does Complainant's evidence of some type of work relationship.

Based upon the foregoing, I find that Complainant has not met its burden of proving, by a preponderance of the evidence, that Mr. Pena-Torres was an employee of either of the Respondents in 1988; and therefore, Respondents are not liable for Count 6 of the Complaint.

IV. Civil Monetary Penalty

Having found that Respondent Edward Zimmerman is liable for Counts 1-4 and 7-10 of the Complaint, and Respondent Mr. Z En-

¹²I do not specifically address the relationship between Mr. Pena-Torres and Mr. Z Enterprises because the bulk (and weight) of both parties evidence is directed towards the relationship discussed herein. In addition, at least one of the Border Patrol agents admitted that he did not see a distinction between Mr. Z, Edward Zimmerman, and Mr. Z Enterprises. (Tr. at 529-30.) Therefore, it is very possible that the small amount of evidence of a relationship between Mr. Pena-Torres and Mr. Z Enterprises was simply information misinterpreted by the agents.

terprises is liable for Count 5, I am now required to determine an appropriate civil monetary penalty pursuant to sections 274A(e)(4) and 274A(e)(5) of the Act.

The maximum amount that can be assessed for Counts 1 through 4 is \$2000.00 and the minimum amount that can be assessed is \$250.00. See 274A(e)(4)(A) of the Act. Section 274A(e)(4) also requires that I order the person or entity to cease and desist from such violations. For Counts 5 and 7 through 10, the maximum amount that can be assessed is \$1000.00 and the minimum amount that can be assessed is \$100.00. See 274A(e)(5).

Complainant sought a penalty of \$4800.00, \$750.00 each for Counts 1-4 and \$300 each for Counts 5-10 (since I have made no finding of liability on Count 6 of the complaint, the amount of penalty sought by Complainant is adjusted to \$4500.00: \$4800.00_-\$300.00 for Count 6). At the hearing, Counsel for Respondents stipulated that the fine amount sought by the Complainant is fair. (Tr. at 814.) Respondents having so stipulated, and upon consideration of the record, I find the amount of penalty sought by Complainant to be fair and reasonable. Therefore, the appropriate amount of penalty to be assessed against Respondent Edward Zimmerman for Counts 1 through 4 and 7 through 10 is \$4200.00 (\$750.00 each for Counts 1-4 and \$300.00 each for Counts 7-10); and the appropriate amount of penalty to be assessed against Respondent Mr. Z Enterprises for Count 5 is \$300.00. I further order Respondent Edward Zimmerman to cease and desist from violations of Section 274A(a)(1)(A) of the Act, 8 U.S.C. § 1324a(a)(1)(A).

V. Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, and proposed findings of fact and conclusions of law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

(1) That Respondent Edward Zimmerman, in his individual capacity, admittedly knew that the aliens named in Counts 1 through 4 and 7 through 10 were unauthorized to be employed in the United States.

(2) That Respondent Edward Zimmerman, in his individual capacity, employed Francisco Munguia-Bernal (Cts 1 and 7), Gerardo Urbina-Munguia (Cts. 2 and 8), Rafael Urbina-Munguia (Cts. 3 and 9), and Benjamin Becerril-Saenz (Cts. 4 and 10), aliens unauthorized to employed in the United States.

(3) That Respondent Edward Zimmerman failed to prepare and/or present for inspection any Forms I-9 for the individuals named in Counts 1 through 4 and 7 through 10.

(4) That, as previously found and discussed, Respondent Edward Zimmerman, in his individual capacity, violated 8 U.S.C. § 1324a(a)(1)(A), § 274A(a)(1)(A) of the Act, in that Respondent Edward Zimmerman hired the aliens named in Counts 1 through 4 and 7 through 10 knowing they were aliens unauthorized to be employed in the United States.

(5) That Respondent Edward Zimmerman, in his individual capacity, violated 8 U.S.C. § 1324a(a)(1)(B), § 274A(a)(1)(B) of the Act, in that Respondent Edward Zimmerman hired, for employment in the United States, the aliens identified in Counts 1 through 4 and 7 through 10 without complying with the verification requirements in 8 U.S.C. § 1324a(b), and 8 C.F.R. § 274a.2(b)(1) (i)(A) and (ii) (A) and (B).

(6) That Complainant failed to prove, by a preponderance of the evidence, that Respondent Mr. Z Enterprises employed the unauthorized aliens named in Counts 1 through 4 and 7 through 10 in violation of 8 U.S.C. § 1324a(a)(1)(A), § 274A(a)(1)(A) of the Act; and thus, Respondent Mr. Z Enterprises is not liable for Counts 1 through 4 and 7 through 10.

(7) That Respondent Mr. Z Enterprises admitted that it violated 8 U.S.C. § 1324a(a)(1)(B), § 274A(a)(1)(B) of the Act, in that it hired, for employment in the United States, Ray Green, the individual identified in Count 5, without complying with the verification requirements in 8 U.S.C. § 1324a(b), and 8 C.F.R. § 274a.2(b)(1) (i)(A) and (ii) (A) and (B).

(8) That Complainant failed to prove, by a preponderance of the evidence, that Humberto Pena-Torres was an ``employee'' of either Respondent Mr. Z Enterprises or Respondent Edward Zimmerman, in his individual capacity, rather than an ``independent contractor'' as defined in 8 C.F.R. § 274a.1(j). Therefore, neither Respondent Mr. Z Enterprises nor Respondent Edward Zimmerman is liable on Count 5 for failing to comply with the verification requirements in 8 U.S.C. § 1324a(b), and (8) C.F.R. § 274a.2(b)(1) (i)(A) and (ii) (A) and (B).

(9) That, liability for Counts 1 through 4 having been found, Respondent Edward Zimmerman is hereby Ordered, pursuant to section 274A(e)(4) of the Act, to cease and desist from violations of section 274A(a)(1)(A) of the Act, 8 U.S.C. § 1324a(a)(1)(A).

(10) That Respondent Mr. Z Enterprises and Respondent Edward Zimmerman stipulated that the amount of civil monetary penalty

sought by Complainant, \$750.00 each for Counts 1-4 and \$300.00 each for Counts 5-10, is fair.

(11) That, upon consideration of Respondents' stipulation and the entire record, it is just and reasonable to require Respondent Edward Zimmerman to pay a civil monetary penalty in the amount of \$3,000.00 (\$750.00 each) for Counts 1 through 4, and \$1,200.00 (\$300.00 each) for Counts 7 through 10 of the Complaint.

(12) That, upon consideration of Respondents' stipulation and the entire record, it is just and reasonable to require Respondent Mr. Z Enterprises to pay a civil monetary penalty in the amount of \$300.00 for Count 5 of the Complaint.

(13) That, pursuant to 8 U.S.C. § 1324a(e)(6), and as provided in 28 C.F.R. § 68.51(a), this Decision and Order shall become the final decision and order of the Attorney General as to Counts 1 through 10 of the Complaint unless, within five (5) days of the date of decision a review is requested, and, after such a request is made, and within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 11th day of January, 1991, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge