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

UNITED STATES OF AMERICA, Complainant	))	
v.	)	8 U.S.C. 1324a Proceeding
	)	Case No. 89100389
ABC ROOFING & WATERPROOFING, Respondent	)))	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

I. *Synopsis of Proceedings*

On August 14, 1989, a complaint was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter complainant) against ABC Roofing & Waterproofing (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO), which served the complaint and a notice of hearing on the parties and assigned the matter to the Honorable Richard J. Linton, Administrative Law Judge. The matter was reassigned to the Honorable James M. Kennedy, Administrative Law Judge (hereinafter ALJ), on August 28, 1990, after Judge Linton removed himself by Notice of Unavailability pursuant to 28 C.F.R. §68.27.

The complaint alleged that the respondent violated the provisions of the employment eligibility verification requirements (hereinafter paperwork requirements) of the Immigration Reform and Control Act of 1986 (hereinafter IRCA), codified at 8 U.S.C. §1324a(b), with respect to six individuals. Specifically, the complaint alleged that respondent failed to properly fill out an employment eligibility verification form

(hereinafter Form I-9) for five individuals and that respondent failed to complete any part of a Form I-9 for another individual.

An administrative hearing was held in Brownsville, Texas, on April 9-11, 1991. Subsequently, both parties filed post-hearing briefs, which the ALJ considered prior to rendering the decision and order dated July 25, 1991.

Pursuant to 28 C.F.R. §68.51(a), the complainant timely filed with the Chief Administrative Hearing Officer (hereinafter CAHO), on August 6, 1991, "Complainant's Request for Administrative Review by the Chief Administrative Hearing Officer and Memorandum of Supporting Arguments" (hereinafter *Complainant's Request for Review*). In reply to this request, the respondent filed "Respondent's Motion to Strike Complainant's Request for Administrative Review, or, in the Alternative, to Deny Complainant's Request and to Affirm the Decision of the Administrative Law Judge in Its Entirety" (hereinafter *Respondent's Motion to Strike*), which was received by the CAHO on August 9, 1991.

On August 19, 1991, the complainant filed with the CAHO two additional memoranda, "Complainant's Memorandum in Opposition to Respondent's Motion to Strike Complainant's Request for Administrative Review" (hereinafter *Complainant's Memorandum*) and "Complainant's Supplemental Memorandum in Support of Request for Administrative Review" (hereinafter *Complainant's Supplemental Memorandum*), along with an exhibit entitled "Declaration of Flavio Escobar, Jr." The respondent subsequently filed, on August 21, 1991, a "Declaration of Lisa S. Brodyaga in Support of Respondent's Motion to Strike Complainant's Request for Administrative Review" (hereinafter *Declaration of Lisa S. Brodyaga*).

II. *The Administrative Law Judge's Decision and Order*

In the decision and order, the ALJ dismissed the complaint in its entirety. *ALJ's Decision and Order* at 28. That part of the complaint alleging a failure to complete any portion of the Form I-9 for one individual, Julian Olvera, was dismissed because the ALJ concluded that Mr. Olvera was an independent contractor and therefore the respondent did not have a duty under IRCA to complete a Form I-9 for him. *Id.* at 13. The ALJ concluded that the evidence presented at the hearing overwhelmingly favored the respondent's contention that Olvera was an independent contractor. *Id.* The ALJ found that the type of employment which Mr. Olvera performed (gardening work for

the wife/office manager of the corporation's president) was exempt from the provisions of IRCA's paperwork requirements. *Id.*

The alleged violation relating to Oscar Romero was dismissed because of what the ALJ saw as misleading instructions to employers contained in the complainant's regulations and the Form I-9. *Id.* at 18. The ALJ dismissed this allegation on the ground that both complainant's regulations and its Form I-9 do not prescribe, with sufficient clarity, the time within which the Form I-9 must be completed. *Id.* at 17. The regulation states that the Form I-9 is to be completed "at the time of hiring." 8 C.F.R. §274a.2. The ALJ stated that this regulation is open to several reasonable interpretations, including interpretations different from complainant's, as to what constitutes the time of hiring. *ALJ's Decision and Order* at 17.

The ALJ based his dismissal of the allegation relating to Jose Francisco-Vega on respondent's testimony that there existed a lawfully completed Form I-9 for the named employee. *Id.* at 20. The ALJ noted that although he had credibility problem with witnessed for both the complainant and respondent, respondent's position appeared to be more reasonable. *Id.* Therefore, the ALJ concluded that respondent did in fact properly complete a Form I-9 for Francisco-Vega. *Id.*

The allegation relating to Rene Camarillo was dismissed on policy grounds. *Id.* at 22. The ALJ stated that when Camarillo presented his document establishing employment authorization and identity, "everyone, including Complainant, knew the policies behind IRCA had been satisfied." *Id.* Therefore, the ALJ held that there was nothing to be gained by imposing a penalty against an employer who had performed his duty. *Id.*

The ALJ also determined the allegation against the complainant regarding Manuel Ruiz be dismissed. Id. at 23-24. The ALJ based this determination on his conclusion that the defense established in *U.S. v. New El Rey Sausage*, 1 OCAHO 66 (7/7/89) and 1 OCAHO 78 (8/4/89), *aff'd*, 925 F.2d 1153 (9th Cir. 1991)[1] provided the respondent

[1] In U.S. v. New El Rey Sausage, the complainant INS conducted a compliance inspection of the respondent employer prior to May 31, 1988, during the 12 month citation period. The complainant discovered a number of paperwork violations, but chose not to issue a citation. On June 22, 1988, after the citation period had ended, complainant surveyed respondent's business premises and issued a Notice of Intent to Fine based upon the same violations previously discovered during the citation period. The ALJ held, and the CAHO affirmed, that the paperwork violations must be dismissed (continued...)

with a full defense to the allegation that a Form I-9 was not properly completed for Ruiz. *Id.* at 23. The ALJ continued that even if the *New El Rey Sausage* defense were not available, the fact that the Form I-9 did not specifically list all of the acceptable documents that prove identity was serious enough to require a dismissal of the charge. *Id.* at 24.

The ALJ also dismissed the allegation relating to Joe Alcala based upon "several policy grounds." *Id.* The ALJ first objected to the complainant's having conducted two inspections of the respondent's business records. *Id*. at 25. The ALJ stated that absent suspected criminal conduct, which was not in evidence here, the complainant had no reason to conduct a second inspection. *Id.* The ALJ also cited complainant's field manual, which states that cases involving allegations of strictly paperwork violations, i.e., with no allegations of knowingly hiring or continuing to employ unauthorized aliens, (such as this) should be pursued only where the violations are "egregious"and where there is a "willful failure to complete I-9 forms" following a documented educational visit by the complainant. *Id*. at 26. The ALJ concluded that this alleged violation was indeed too minor to warrant a penalty. *Id.* at 27.

Finally, the ALJ stated that IRCA's policies and requirements are being met by respondent and that a civil penalty against respondent at this time would "not accomplish anything which has not already been accomplished." *Id.*

III. *Contentions of the Parties*

In its request for review, the complainant set forth several contentions raising issues for an administrative review by the CAHO:

1. The ALJ erred in concluding the complainant is estopped from charging any verification violations that pre-dated an earlier educational meeting.

2. The ALJ erred in concluding substantial compliance was a defense to the charged verification violations and in further concluding that

[1](...continued)
because the complainant was under a statutory duty to issue a citation when it discovered possible IRCA violations during the citation period.

respondent substantially complied with IRCA's verification requirements.

3. The ALJ erred in finding that the complainant violated its own internal policy guidelines and, in any event, such guidelines are not substantive defenses.

4. The ALJ erred in holding that the Form I-9 is a fatally defective document.

5. The ALJ erred in failing to impose the mandatory statutory penalty following complainant proving its allegations by a preponderance of the evidence.

6. The ALJ erred by considering respondent's alleged good faith effort as a defense to a paperwork violation.

7. The ALJ erred in considering the entire letter from Adolfo de Lafuente to his Congressman when the letter was admitted only for another limited purpose.

8. The ALJ erred in dismissing the complaint because he speculated and hypothesized as to facts not of record.

9. The ALJ erred in concluding the charged verification violations were not serious within the meaning of the policy directives to warrant imposition of a penalty.

10. The ALJ erred in finding that the holding in *U.S. v. New El Rey Sausage Co*. provided respondent with a full defense to the discrepancy on the Ruiz's Form I-9.

11. The ALJ erred in concluding that Olvera was an independent contractor and not an employee.

Complainant's Request for Review.

The complainant subsequently withdrew for consideration by the CAHO contentions seven through eleven, as enumerated above. *Complainant's Supplemental Memorandum* at 2.

The respondent, in its response to complainant's request for review, contends that:

1. Complainant willfully deceived respondent with respect to the accessibility to complainant of the decisions of OCAHO and other judicial and administrative decision-making bodies.

2. Even if the complainant did not willfully deceive respondent, respondent's lack of access to the OCAHO orders and decisions makes their use by complainant fundamentally unfair.

3. In its request for review, complainant distorts many of the facts and holdings of the ALJ:

a. The ALJ did not base his decision on grounds of estoppel.

b. Substantial compliance is a bona fide defense to paperwork violations and was amply demonstrated in the case at bar.

c. The ALJ did not utilize the letter written by Adolfo de Lafuente (to his Congressman) for any purpose other than that for which it was admitted into evidence.

d. The ALJ's policy reasons for dismissing the count relating to the alleged violation pertaining to section 1 of the Alcala Form I-9 are a viable interpretation of the statute, and, in effect, are simply a restatement of the defense of substantial compliance.

e. The ALJ correctly determined that, on all the facts of the case at bar, it would violate the due process clause of the Fifth Amendment to penalize respondent for omissions in section 2 of the Forms I-9 for Ruiz and Alcala.

f. The complainant misconstrues the ALJ's reference to good faith.

g. There was no separate "impulse" regarding the Ruiz Form I-9 after June 1, 1988, such as would allow a prosecution on the theory of continuing offense.

h. The ALJ was correct in concluding that the complainant had not met its burden of proving that Olvera was an employee, and not an independent contractor.

4. In addition to the bases utilized by the ALJ, the decision also has constitutional underpinnings, as set forth in respondent's post-trial memorandum.

Respondent's Motion to Strike.

IV. *Review Authority of the Chief Administrative Hearing Officer*

Administrative review of an ALJ's decision and order is provided for at 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.51(a). Section 68.51(a) provides in pertinent part that:

> . . . [W]ithin thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.
>
> (1) The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General.

28 C.F.R. §68.51(a).

The scope of administrative review by the CAHO when reviewing ALJ decisions and orders is set forth in the Administrative Procedure Act, which indicates that "the agency has all the powers which it would have in making the initial decision." 5 U.S.C. §557(b). In addition, the U.S. Court of Appeals for the Ninth Circuit, in *Mester Manufacturing Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989), held that the CAHO properly applied a de novo standard of review to the ALJ's decision. Equally important, the Ninth Circuit in *Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990) followed the reasoning in *Mester* by affirming the CAHO's authority to apply the de novo standard of review.

Although the complainant has withdrawn several of its initially asserted contentions, the CAHO may nevertheless review any issues involved in the matter, based on the de novo review authority.

V. *Discussion*

a. *Allegation respecting Romero*

The allegation against the respondent respecting Oscar Romero was dismissed by the ALJ. *ALJ's Decision and Order* at 18. The complainant did not contest the dismissal of this allegation in its request for administrative review. *Complainant's Request for Review* at 5. The ALJ's holding as to the allegation relating to Romero is hereby affirmed.

b. *Allegation respecting Olvera*

The ALJ held that Julian Olvera was an independent contractor and therefore respondent was under no obligation to complete a Form I-9 for him. *ALJ's Decision and Order* at 13. The complainant asserted that Olvera was an employee and therefore respondent had a duty to complete a Form I-9. *Complainant's Request for Review* at 39. Respondent, on the other hand, asserts that this individual was an independent contractor and there existed no duty to complete a Form I-9. *Respondent's Motion to Strike* at 20. I conclude that the ALJ's interpretation was correct, that is, that Olvera was an independent contractor and not an employee of the respondent. The ALJ based this determination upon the INS regulations at 8 C.F.R. §274 a.l(j), which provides a definition of an independent contractor; and the Department of Labor regulations at 29 C.F.R. §552.107 regarding yard maintenance workers. *ALJ's Decision and Order* at 10-13. In reviewing the numerous practical criteria in these two sources in relation to the evidence in the record, I have concluded that the ALJ was correct in determining that Olvera was an independent contractor, based upon the preponderance of evidence.

c. *Allegation respecting Francisco-Vega*

The ALJ dismissed that portion of the complaint regarding Jose Francisco-Vega because he found that while the testimony of witnesses for both parties contained infirmities, he accepted respondent's contention that the INS agent conducting the inspection had simply missed a properly completed Form I-9 in respondent's files and reviewed only a second Form I-9 in which section 1 was totally blank. *ALJ's Decision and Order* at 20. The ALJ also rejected a contention that the completed Form I-9 had been backdated. *Id*. at 19-20. The ALJ's conclusions are based on a well-reasoned and detailed analysis of the credibility of witnesses and corroborating evidence, or the lack of it. Accordingly, I find no basis for modifying or vacating the ALJ's ruling that the evidence shows, by a preponderance of the evidence, that the Form I-9 was properly completed by the respondent. *ALJ's Decision and Order* at 20. That portion of the ALJ's order regarding Francisco-Vega is hereby affirmed.

d. *Remaining charges*

In the respondent's reply to the complainant's request for administrative review, the respondent introduced an issue which had not previously been addressed in the proceeding before the ALJ. *Respon-*

dent's Motion to Strike at 2. The respondent contends that the complainant willfully deceived both the respondent and the ALJ by its failure to truthfully respond to a request for production of documents. *Id.* On December 23, 1990, the respondent served upon the complainant a request for production of documents, which included the following:

> #INFORMATION RETRIEVAL SYSTEM" as used herein means any topical index, computerized or otherwise, which is maintained by the United States Department of Justice, or any subagency thereof, to which the Immigration and Naturalization Service has access, and which includes in its database, some, or all, of the decisions, be they published or unpublished, made by Administrative Law Judges in enforcement proceedings under 8 U.S.C. §1324a, or by the United States Courts of Appeal in reviewing such proceedings.
>
> 1. Copies of all Decisions with respect to enforcement proceedings under 8 U.S.C. §1324a which appear in any information retrieval system to which Complainant has access, in which the defense of "substantial compliance" is discussed in a form which can be identified by means of said information retrieval system.

Respondent's Request for Production of Documents: Set No. 4 at 1.

In its response to this request, the complainant stated:

> To the best of Complainant's knowledge, Complainant does not have access to any such information retrieval system as described by Respondent. Moreover, Complainant provided copies of decisions in 8 U.S.C. §1324a proceedings concerning the defense of "substantial compliance" which were cited by the Complainant in its Motion for Partial Summary Decision. Respondent may contact the various sources of legal publications e.g. Interpreter Releases, for copies of other decisions which discuss "substantial compliance".

Complainant's Answers to Respondent's Requests for Production of Documents: Set No. 4 at 2.

Apparently, the respondent accepted as true complainant's answer to its request for production of documents and there does not appear to be any additional discovery surrounding this matter during the proceeding. However, following issuance of the ALJ's decision and order and after the complainant filed a request for review with the CAHO, together with supporting arguments, the respondent asserted in its response to the request for review that the complainant had not been forthcoming with the discovery information previously requested in respondent's request for production of documents on December 23, 1990. *Respondent's Motion to Strike* at 3. The complainant's brief in support of its request for administrative review cites several OCAHO cases as precedent, which convinced the respondent that the complain-

ant had failed to properly comply with its earlier motion for production of documents. *Id*. Respondent states:

> It strains credulity that Complainant would have been able to produce such an exhaustive document, in such a short period of time, if it did not have access to an information retrieval system, not to mention access to the orders and decisions themselves.

Id.

The complainant denies that it willfully deceived respondent with respect to the accessibility of OCAHO decisions. *Complainant's Memorandum* at 2. Complainant asserts that its response to the request for production of documents was based on the assumption that the information sought consisted of computer databases to which the complainant had access. *Id.*

Complainant also noted that it had a topical index of employer sanction cases, that "a more studied review of [the discovery request] reveals that the request would cover the topical index," and that the complainant "should have more properly asserted" the attorney work product privilege as an objection to the request. *Id.* at 2-3. The memorandum also contained an affidavit by the complainant's attorney of record which described discussions between complainant's attorney, respondent's attorney, and the ALJ, with respect to the availability of OCAHO decisions. *Declaration of Flavio Escobar*, Jr. at 1-3.[2]

However, respondent's attorney, in the declaration filed with the CAHO on August 21, 1991, disputes the complainant's version of these

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[2] OCAHO decisions and orders are available, and have been since June of 1991, by subscription or on an individual basis by contacting the Government Printing Office (GPO) at (202) 783-3238. A subscriber receives all future OCAHO decisions and orders deemed significant by the OCAHO. When ordering by subscription, use Stock Number 872-003-00000-0.

The first 300 decisions, Stock No. 027-002-00407-8, comprising decisions deemed important that were issued prior to March 1, 1991, are available for a one-time cost. A topical index corresponding to the first 300 decisions is included. Updates to the topical index will be released periodically and can be obtained through the GPO subscription service, or on an individual basis through the GPO.

We have also been informed that many OCAHO decisions are available on the LEXIS computer database, under the IMMIG library.

conversations. Respondent contends that the ALJ never stated "that the decisions at issue were routinely available to the general public from OCAHO." *Declaration of Lisa S. Brodyaga* at 1. Additionally, counsel for respondent denies that the complainant's attorney ever offered, as a general principle, to make copies available of all decisions cited by the complainant. *Id.* at 2.

Based only on the arguments and unsworn declarations presented by both sides, I am not prepared to hold that the complainant willfully deceived the respondent or the ALJ regarding its response to the request for production of documents. However, before answering any further issues, I must bring to the attention of the ALJ and the parties two important issues relating to this matter.

First, section 68.16(d) of the OCAHO regulations states that:

> (2) A party is under a duty to amend timely a prior response if he/she later obtains information upon the basis of which:
> (i) He/she knows the response was incorrect when made; or
> (ii) He/she knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
> (3) A duty to supplement responses may be imposed by order of the Administrative Law Judge upon motion of a party or agreement of the parties.

28 C.F.R. §68.16(d).

Secondly, it is of paramount importance that any resolution of this issue take into consideration section 552 of the Administrative Procedure Act. In pertinent part, this section states that:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if:
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. §552(a)(2)(C).

It is clear that the ALJ never had an opportunity to rule on whether the complainant complied with respondent's request for production of

documents, as this issue surfaced only as a result of the complainant's request for administrative review. Also, the proceedings below did not develop sufficient evidence which would allow me to make a determination of whether the complainant properly complied with respondent's discovery request.

The complainant's allegations regarding the Forms I-9 for Ruiz, Alcala and Camarillo and the complainant's objections to the ALJ's rulings on these charges warrant in-depth consideration. However, the issue of the complainant's compliance with the respondent's request for production of documents must be addressed by the ALJ prior to any substantive administrative review of the Ruiz, Alcala and Camarillo charges.

Therefore, I must vacate the ALJ's decision as to the three counts regarding Ruiz, Alcala and Camarillo, and return the order to the ALJ for additional proceedings on the issue of whether complainant complied with 28 C.F.R. §68.16 and the provisions of 5 U.S.C. §552(a)(2)(C).

ACCORDINGLY,

I hereby MODIFY that portion of the ALJ's decision and order which finds that the respondent did not violate 8 U.S.C. §1324a(a)(1)(B) with respect to employees Ruiz, Alcala and Camarillo. Therefore, I return these three allegations to the ALJ for further proceedings. This order leaves intact that portion of the ALJ's decision and order which finds that the respondent is not liable under 8 U.S.C. §1324a(a)(1)(B) for paperwork violations regarding Olvera, Francisco-Vega and Romero.

Modified this 26th day of August, 1991.

JACK E. PERKINS
Chief Administrative Hearing Officer

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UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. 1324a PROCEEDING Case No. 89100389
ABC ROOFING & WATERPROOFING, INC., Respondent	)	

Flavio Escobar, Jr., and John D. Carte, Harlingen, Texas, for Complainant, Immigration & Naturalization Service. Lisa S. Brodyaga, and Thelma O. Garcia, Harlingen, Texas, for Respondent

DECISION AND ORDER

JAMES M. KENNEDY, Administrative Law Judge: I heard this case on April 9, 10 and 11, 1991, in Brownsville, Texas. It is based upon a complaint, dated August 14, 1989, which the Immigration and Naturalization Service (INS) filed with the Office of the Chief Administrative Hearing Officer alleging certain violations of 8 U.S.C. §1324a(a)(1)(B) [§ 274A(a)(1)(B) of the Immigration Reform and Control Act of 1986 (IRCA)]. The complaint was bottomed on a notice of intent to fine issued against Respondent on July 10, 1989. Respondent thereafter demanded a hearing to contest the contentions made in the notice of intent to fine and, in response to the complaint which followed, filed a timely answer. At the hearing Complainant moved to amend the substantive allegations of the complaint in two minor ways and I granted the motion over Respondent's opposition. The amendments do not change the size of the proposed fine and deal with the same documentation involving employees Alcala and Romero brought under scrutiny by the original complaint.

Both parties filed post-hearing briefs which have been carefully considered. In addition, based upon my assessment of various witnesses, not only of their demeanor, but upon certain inherent probabilities, I have drawn conclusions regarding their relative credibility. It should be noted that the transactions involved occurred during the spring and early summer of 1988, almost two and a half years prior to the hearing. In some respects, the recollections of witnesses for both sides do not appear to be wholly reliable. Furthermore, witnesses on both sides of the matter appear to harbor certain beliefs and biases which I conclude have colored their testimony. Accordingly, as will be seen, Iam unable to accept any witness' recollection *in toto*.

The Issues

The complaint asserts that Respondent failed to fill out I-9 forms properly for five named employees. In addition, it asserts that a sixth individual was an employee for whom no I-9 was filled out. Respondent asserts that the sixth individual, Julian Olvera, was an independent contractor, for whom there is no statutory obligation to complete an I-9.

In general, these alleged violations are known as "paperwork" violations. The duty to complete an I-9 is imposed upon employees and employers alike by statute, 8 U.S.C. §1324a. The duties so imposed are specifically found in 8 U.S.C. §1324a(b), known as the employment eligibility verification system. In response to that statutory scheme, the Attorney General has promulgated a document known as the employment eligibility verification form, designated as "Form I-9."

It is this form which is under scrutiny here. Complainant asserts that the forms speak for themselves in that the violations are clear. Respondent makes several arguments in opposition. Some of those arguments are based on factual material relating to the specific employee and the circumstances of his hire and/or his tenure. In addition it makes certain statutory/regulatory construction and policy arguments as well attacking the constitutionality of this portion of the Immigration and Nationality Act as applied. It is unnecessary to deal with the constitutional issues in view of the decision rendered below.

A. *The Facts*

1. *The Investigations*

I proceed to analyze the factual circumstances surrounding the completion of the I-9 forms for the individuals which follow. Where appropriate, I shall include either credibility or legal analyses which are closely connected to the facts. Section B, Legal Analysis, deals with a more general overview of the statute, the applicable regulations and the policies behind IRCA.

Respondent is (or was) a Texas corporation owned by Adolfo de Lafuente and Carlos Posal engaged in the building and construction industry as a roofing contractor. The business was run from an office located on the same lot as the de Lafuente family residence in Harlingen, Texas. Adolfo de Lafuente was the corporate president and Posal the corporate vice president. They were the only corporate shareholders and only corporate officers. Olga de Lafuente, Adolfo's wife, held no corporate office but did serve as the secretary and office manager to the company. At the end of 1989, after the transactions under scrutiny here, the corporation was allowed to lapse and it is not currently in good standing according to the Texas Secretary of State. Despite the lapse of the corporation, Mr. de Lafuente continues to run a roofing contracting business from the same office. It is now known as Adolfo de Lafuente d/b/a ABC Roofing & Waterproofing, apparently his sole proprietorship. Posal is not involved.

Adolfo de Lafuente testified that during 1988, Respondent corporation's gross sales were somewhere between $250,000 and $300,000. He said that the size of his roofing work force varied depending on the number of jobs in progress. The total number of roofers employed ranged between 5 and 30.

At that time the rate of pay for experienced roofers was between $7 and $8 per hour, while inexperienced roofers were paid the minimum wage, which was then $3.35 per hour. For income tax purposes Respondent regarded each roofer as a "contract roofer" but recognized that for other purposes they were actually employees.

Upon the passage of IRCA in 1986, Respondent treated its newly hired roofers as employees and endeavored to have them fill out I-9 forms. As will be seen, it was largely successful in getting these forms filled out properly, but with respect to five of the six persons under scrutiny, problems arose. Insofar as the sixth is concerned, Julian Olvera, Respondent has consistently regarded him as a non-employee as he did not perform any roofing work whatsoever, but was utilized, on a one-time basis, as a gardener performing a small amount of work at the home/office premises.

Four of the five acknowledged employees were hired in the late spring or early summer of 1988. On August 22, 1988, INS agent Gilbert Trevino conducted an inspection of Respondent's I-9 forms. Mrs. de Lafuente provided him with the personnel folders of all employees who had been hired since the passage of IRCA. It is undisputed, however, that agent Trevino asked to see only the I-9 forms of the then current employees. The personnel files of the former employees who had been hired between 1986 and the date of his inspection were offered to him but he decided it was not necessary to review them. He explained that his purpose in conducting the inspection was to determine Respondent's level of understanding with respect to its ability to properly fill out I-9 forms. Even so, he said he would not have ignored, for enforcement purposes, improperly completed I-9's. Enforcement, as well as education, was his purpose.

Mrs. de Lafuente, sometime in 1987, had been given a copy of the INS Handbook for Employers by a Border Patrol officer and she so advised Trevino. Even so, Trevino says he went through it with her in an effort to try to make certain that she understood the statute's document-reviewing and record-keeping requirements. They both agree that he found a minor discrepancy in the I-9 form of a current employee and that they had a discussion regarding the difficulty some employment-eligible individuals were having in obtaining certain types of documents.

Trevino concluded that Respondent's compliance with the statute was very good. Even the discrepancy which he did find related only to a problem which had arisen with the proper handling of an employee's expired driver's license. As a result of his review of the documentation he concluded that Respondent was in compliance with the verification requirements of the statute.

Had he chosen to review the I-9's of former employees, however, he might have reached a different conclusion. Four of the five I-9 forms which are the subject of this complaint, could have been found in the stack of personnel files which Mrs. de Lafuente had offered him. These were forms for Manuel Ruiz, Joe Alcala, Oscar Romero, and Jose Francisco-Vega. All four had been hired in May or June and all four had terminated their employment the time of his inspection on August 22.

It should be observed here that although the statute had been in effect since 1986, a one-year citation, or warning, period had just ended on May 31, 1988. See 8 C.F.R. §274A.9(c) Specifically, that regulation states, "If after investigation the Service [INS] determines that a

person or entity has violated §274A of the Act for the first time during the citation period (June 1, 1987 - May 31, 1988) the Service shall issue a citation. If after investigation the Service determines that a person or entity has violated §274A of the Act for the second time during the citation period or for the first time after May 31, 1988, the proceeding to assess administrative penalties under §274A of the Act is commenced by the Service by issuing a notice of intent to fine. . . ."

Aside from the appropriate procedures to be followed in that circumstance, it is clear that the Act was barely a year old and that at the time of Trevino's August inspection, the penalty features of the Act had been in effect (for first time offenders) for less than two and a half months. Moreover, the INS had made no previous effort to educate Respondent regarding IRCA.

Nine months later, pursuant to notice, INS agent David Leal sought to conduct a second inspection. To assist him in that endeavor, he issued an administrative subpoena returnable on May 23, 1989. Mrs. de Lafuente responded to that subpoena by bringing to the INS office in Harlingen the personnel files of Respondent's current employees in the belief that like Trevino, Leal was interested only in current employees, not past employees. However, Leal now demanded production of the personnel files for all former employees as well.[1]

Mrs. de Lafuente, by agreement with agent Leal, brought the remaining files to the INS office on June 12, 1989. At that time the I-9's found in all 66 files were copied. Of the 66 I-9 forms which Leal reviewed, only five warranted action. Discrepancies were found in the I-9's for the four previously named employees, plus a fifth who had been hired after the Trevino inspection, Rene Camarillo.

In addition to those five, Mrs. de Lafuente had also been instructed to bring in files relating to any independent contractors which Respondent had hired. She did so, bringing four files, and Leal determined that three of those four were established businesses

[1] Consistent with an earlier order, I barred the parties from presenting evidence regarding why Leal chose to conduct a second investigation at that time. I remain of the view that motive for the inspection is not relevant to resolution of the ultimate issues, but do note, by way of explanation, that in previous filings, the parties seem to be in agreement that the second inspection was triggered when an INS inspector discovered a "grandfathered" purportedly illegal alien working for Respondent. That individual, one Zamora, had been employed by Respondent prior to the passage of IRCA and Complainant has not contended that Respondent's continued employment of that individual violated the Act. Nonetheless, his presence at a job site appears to have triggered the second investigation.

while the fourth, Julian Olvera, the gardener, was suspect. He specifically found that there were no discrepancies after the Camarillo hire, which had occurred in September, 1988, and that Respondent appeared to be in current compliance with IRCA. He chose to issue a notice of intent to fine covering the five individuals whose employment and/or contract relation had begun and ended before the Trevino inspection as well as the Camarillo matter which had occurred approximately three weeks later.

2. *The Putative Independent Contractor*

Julian Olvera: As noted, the de Lafuente family residence and Respondent's business office are located in separate buildings on the same lot. In late June or early July 1988, Mrs. de Lafuente sought to obtain the services of a gardener to weed and prune ornamental plants located on that lot. One day, while searching the telephone book for a gardener, one of the roofers, Silvestre Olvera, asked her what she was doing. She said she was looking for a gardener. He told her he had a brother, Julian, who knew how to do that type of work. She says she did not call Julian but believes Silvestre told him about the opportunity; Julian came to her on his own.

She says she spoke to Julian for less than an hour showing him what needed to be done. She recalls that during the conversation, he told her he was experienced and that he had done gardening and landscaping for several hotels. She says she spoke at length regarding the difficulty she was having in finding individuals who were competent, i.e., who knew plants, shrubs and trees and who would not kill them.

She asked him how much he would charge for the work saying she could not pay an "outrageous amount . . . not more than $200." She also asserts that they discussed expenses, if any, and he said there would not be many, so she agreed to pay them.

He agreed to do the work and she says he did a good job. She says she did not supervise his work at all nor did she keep track of his hours. Indeed, she did not know when he came and went. She asserts she did not know how long the work would actually take.

Julian Olvera testified that he did indeed learn of the job through his brother Silvestre. He went with his older brother Juan to find out about it. He and Juan were on lay-off status at their regular job working for a local cottonseed factory, the Rio Grande Oil Mill. Apparently there were seasonal lay-offs in progress and both were

out of work. At that time, Julian was 23 years old, was married and living at his in-laws' house. His wife was pregnant with a second child.[2] She worked at a local discount store but because he was on layoff status, they were also receiving public assistance.

He says, during his conversation with Mrs. de Lafuente, he did not tell her how much the job would cost or even give her an estimate. He denies that he told her the price was going to be approximately $200, and says he did not ask that expenses be paid.

In his direct testimony he also denied having experience in gardening and landscaping and said he had never worked for any "hotel in Houston." However, on cross-examination, when pressed, he admitted that he had indeed worked for a hotel as a gardener although the hotel was located in Corpus Christi, not Houston.[3]

He denies in conclusionary terms that he is an independent contractor saying that he is not in business for himself.

He says he worked for Respondent for only three or four days and that the job did not require any particular skill. He agrees that he provided his own tools saying he borrowed a shovel from his mother and he may also have brought a hoe and a pair of clippers. He did use a wheelbarrow provided by Mrs. de Lafuente.

He says he decided the order in which he was to do the work, first choosing to "clean" [weed] the front yard and then the back yard. He says after he had done that portion, he showed it to Mrs. de Lafuente and she told him to begin pruning the trees. He agrees that the job did not require close supervision because it was so simple, but also agrees that he kept his own hours. He arrived in the morning, left during the hot mid-day and returned in the cooler evening. Although he says the job was "simple," he says he learned how to do it from other gardeners and also from his grandfather. When he was asked if it was possible that he told Mrs. de Lafuente that he had that expertise, both from the hotel and from his grandfather, he didn't directly answer, saying instead, "I told her I could do that type of work." He then admitted

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[2] Olvera is a derivative United States citizen, born in Mexico. He has a ninth grade education, having gone to school both in Mexico and in Harlingen. He does not speak English well and required an interpreter to assist with his testimony.

[3] Complainant adduced this testimony to demonstrate that the prehearing affidavit given by Mrs. de Lafuente was false. In that affidavit she stated that Julian had told her he had worked as a gardener for a hotel in Houston.

that he told her he could do a good job, in response to her demand for one, because of his hotel experience.

Olvera says that he agreed to work by the hour and asserts that Mrs. de Lafuente told him she would pay him by the hour. He does not deny that she gave him an outside figure of $200.

His actual pay was somewhat curious. Mrs. de Lafuente remembers that sometime, although she is not quite certain but believes it was during the early part of his employment, he told her his wife was having some difficulties with her pregnancy and he asked her for an advance. She says she gave him the amount of cash which she had in her purse, $137.83. He signed a company cash receipt for that amount. It is not clear from the pay records exactly when Mrs. de Lafuente gave him the cash. On the "week ending" line of the cash receipt, the date of July 7, 1988, appears. However, on the paysheet which was also maintained, it shows that figure as having been paid to him on July 15. He later signed a second cash receipt for $61.98. In the "week ending" line it is dated July 14. However, again the paysheet shows that figure to have been paid to him on July 22. I tend to think that the latter date is accurate but that the $137 was paid to him on July 7.

I reach that conclusion because he did not have any recollection of the $137 payment. He insisted that he had only been paid once and that the amount had been $61.98. When shown his signature on the $137 receipt he seemed quite puzzled, having no recollection of it whatsoever. Even so, he did not deny that the signature was his.

When added together, the two figures are only nineteen cents short of the $200 outside figure which Mrs. de Lafuente says she agreed to pay. With respect to the manner in which the amounts were calculated, again the testimony is in conflict. Mrs. de Lafuente says the work was to be paid for by the job but not more than $200. Olvera says he was to be paid by the hour at the minimum wage which he recalled to be either $3.30 or $3.35 per hour. Even so, he does not remember how many hours it took for him to do the work, saying it was only three or four days, and he says, although he kept track of his hours he did not directly bill them to her. He recalls her estimate of his hours was about the same as his and it was not necessary for him to advise her of what he thought his hours were. Curiously, however, none of the sums paid him are multiples of the $3.35 minimum wage. Moreover, there is the odd matter of $8.81 in supposed expenses which Mrs. de Lafuente believes are attributable to him, but cannot say for certain.

The only way a multiple of $3.35 approximates an exact hourly figure is to assume that the total of the supposed expenditures, $8.81, was added to whatever the total hourly wage was. Thus, by subtracting that sum from the total figure paid Olvera, $199.81, one gets a total of $191.00 in wages. Dividing that figure by the minimum wage figure of $3.35 per hour, one obtains a quotient of 57 hours. That simply does not jibe with Olvera's own estimate that he performed the entire job in only three to four days. At best, working eight hours per day would total only 32 hours. Even there, given the fact he was working split days, it seems unlikely that he would have spent a total of eight hours each day at the job.

I conclude, therefore, that Olvera's testimony that he was to be paid the minimum wage is not accurate. Moreover, it is clear that his memory on the point is rather poor as he recalled being paid only once for a total of about $60, when the documentation clearly shows that he was paid twice for a total of nearly $200.[4] As explained in the footnote, I am not willing even to assume on a factual basis that the expenses which Respondent wishes to show are even chargeable to Olvera's work. That being the case, the $199.81 figure is not explainable in terms of an hourly wage at all. However, it is also unlikely to be a figure upon which two parties would agree as the total amount to be spent for a project. More likely they would have reached a round number, such as $200.

Thus, neither party's version of the dollar figure actually expended is explained either by a contract likelihood or by a wage likelihood. On the other hand, it is only nineteen cents less than Mrs. de Lafuente's maximum allowable expenditure. Thus, the most likely explanation for that sum is that it was, as she said, an amount not to exceed $200. Certainly Olvera's explanation does not begin to comport with any other wage related figure. I accept his recollection that he spent only

[4] As I observed at the hearing, whether Mrs. de Lafuente agreed to reimburse him for expenses seems to be probative of very little in this circumstance. At the outside the expenses involved were $8.81. It seems quite likely that Respondent would have agreed to reimburse him for any expenses he may have incurred whether he was an independent contractor or an employee. Certainly it was obligated to reimburse him for any expenses he might have incurred as an employee, but the same would have been true were he an independent contractor working on a labor plus expenses basis. In any event, the expenses to which Respondent points have not been specifically tied to Olvera except in the sense that they were incurred during the same general time frame that he was performing his gardening tasks. He has no recollection of incurring any expenses whatsoever and it seems unlikely to me that he would have, given the manual nature of his work. Moreover, the sales receipts explain nothing, not even the names of the stores where the purchases were made and certainly not the items which were bought.

three or four days performing the job. If he were to have been paid approximately a $200 maximum using a wage calculation, he would have been charging her for a little less than sixty hours work. That translates to about seven and a half days. No one has contended that he worked that long. Thus, the $200 figure suggests a profit motive if he allocates his actual labor at $3.35 per hour. I further note that it is undisputed that all roofers are hired either by Adolfo de Lafuente or his construction foreman. Moreover, Mr. de Lafuente testified that Mrs. de Lafuente, as office manager, had authority only to arrange for the hire of subcontractors, not employees. For a roofing company, the exercise of that authority would not usually entail large expenditures.

Although the matter is not totally free from doubt, I am of the view that the relationship between Respondent and Olvera was not an employer-employee relationship.[5] It was instead one in which Olvera was an independent contractor. I reach that conclusion because of several factors. Before discussing those factors, however, a short overview of the independent contractor issue is necessary.

IRCA itself does not provide any guideline for the determination of independent contractor status; only the regulation, 8 C.F.R.§274a.1(j),

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[5] The regulation, 8 C.F.R. §274a.1(f) and (h), which defines "employees" under IRCA, specifically excludes "casual domestic employment," i.e., persons employed by individuals on a "sporadic, irregular or intermittent" basis to work in their private homes. This exclusion tracks the Fair Labor Standards Act, the National Labor Relations Act and the Social Security Act which also define "domestics."

In this regard, because Olvera was hired by Mrs. de Lafuente to work as a gardener at the premises comprising the family residence, a strong case might have been made that Olvera was a domestic and therefore not an employee within the meaning of IRCA. I recognize that the cash receipts which Olvera signed are company forms and the IRS tax form, 1099, show the payments to have come from Respondent and not the household account. Even so, 70% of his remuneration came straight from Mrs. de Lafuente's purse.

Certainly form should not be exalted over substance. Had it been argued, it seems likely that Olvera's gardening work was more aimed at beautifying the residence at the behest of the housewife than sprucing up a contractor's office at the request of the office manager. So far as I am aware, there are no reported cases dealing with the question of whether gardeners are domestics within the meaning of the FLSA or the NLRA. That is no doubt due to the fact that private residences never meet the "enterprise" or "interstate commerce" jurisdictional requirements of those statutes. Nonetheless, the Senate committee considering the FLSA clearly listed gardeners and handymen as individuals intended to be exempt from the FLSA as domestics. The Department of Labor followed that lead in at least two of its regulations. See 29 C.F.R. §§ 552.3 and 552.107. The latter is quoted in its entirety, *infra*. However, that argument is moot here as Respondent has not defended on that ground.

lists seven non-exclusive items by which a claim of independent contractor can be measured, assuming that the individual is not already in a clearly "independent business." Specifically, the rule states: "Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis." The factors to be used in that analysis are whether the worker (a) supplies his own tools; (b) makes his/her services available to the general public; (c) works for more than one client at a time; (d) has an opportunity for a profit or loss on the work in question; (e) invests in the enterprise; (f) directs the sequence of work; and (g) determines the hours during which the work is to be done. In addition, it has been held that these factors are not exclusive and that other standard, quite similar, litmus tests may also be used. Lorenzo Robles Roofing and Construction, OCAHO case No. 90100210. That case also held that the factors set forth in §220 of the Restatement (Second) of Agency (1958) may also be used. These are a restatement of the common law factors commonly found[6] and the Supreme Court has said that the common law may be utilized under a similar statute, the National Labor Relations Act. See NLRB v. United Insurance Company of America, 390 U.S. 254, 256 (1968).

This test is somewhat less stringent, insofar as employers are concerned, than the "economic reality test" under the Fair Labor Standards Act as defined in United States v. Silk, 331 U.S. 704 (1947). None of these tests is particularly helpful standing by itself as all contain elements of n o n -exclusivisity. Even Texas law leaves room for case by case analysis in applying the common law. See Pitchfork Land

[6] The Restatement (Second) of Agency, §220(2) reads as follows: In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or workman supplies the instrumentalities, tools and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

& Cattle Co. v. King, 162 Tex. 331, 346 S.W.2d 598, 603 (1961); also Sherard v. Smith, 778 S.W.2d 546 (Tex.Ct.App. 1989).

I conclude that Olvera was serving as an independent contractor while he performed the gardening work. I note that although Olvera is not technically in business for himself in the sense that he holds himself out to be a businessman engaged in gardening and landscaping, at the time in question he was unemployed and seeking work wherever he could get it. He was willing to perform odd jobs. Mrs. de Lafuente initially was seeking gardeners who were in the business of gardening, but did not really care whether they were in business for themselves, only whether they were sufficiently skilled to do the work. When Olvera presented himself, the conversation which they had dealt with the quality of work he could perform and the sort of expertise which he could provide. A reasonable person could conclude, and it seems Mrs. de Lafuente did, that Olvera was seeking work on an entrepreneurial basis.

While it may be true that it is not difficult to train an individual in proper gardening skills, Olvera presented himself as one who already possessed such skills, asserting that they were sufficient for him to have been employed professionally in the field, i.e., at the hotel in Corpus Christi. Furthermore, both he and Mrs. de Lafuente are in agreement that she did not, nor did she have to, perform close supervision over his work. She pointed him in the general direction and he did it in the order and with level of skill which a professional would provide. Certainly he provided all of his own tools (with the exception of the wheelbarrow).

Moreover, Respondent's normal business is that of a roofing contractor. The work for which Olvera was hired had nothing to do with that. He was clearly hired for the length of the job and no one discussed how many days or hours that might take. As I have noted supra, the method of payment appears to have been by the job, rather than by the time and that profit, not simply wage, seems to have been involved. Finally, it seems to me that one of the parties, if not both, actually held the belief that they were creating the relationship of independent contractor.

With respect to Olvera, I recognize that he will not testify to that conclusion because he insists he was not in business for himself and that an individual who is in business would advertise and have an office. These factors, of course, are not necessary to make one an independent contractor. Indeed, given Olvera's lack of probity with respect to his having been employed as a hotel gardener in Corpus

Christi, one might conclude that he is not being candid with regard to his own belief. It may only be part of the language barrier, but I tend to think he is responding to the authority of the INS. He seemed to display a malleable personality. Frankly, I believe he well knows that Complainant seeks a finding that he was an employee and, eager to please, provided such evidence where he could. That leads me to conclude that factors more objective than his subjective belief must be used.

Nonetheless, Mrs. de Lafuente clearly believed she was creating such a relationship. She normally hired only independent contractors, treated him as an independent contractor and even utilized income tax forms consistent with that status. She hired him to perform the job and told him that she would not pay more than $200. Given the level of education which Olvera possesses, he undoubtedly does not understand that an independent contractor relationship can exist even absent his entering into business for himself. It is certainly common for handymen or gardeners to be regarded as independent contractors under the common law.

Indeed, that common circumstance has been codified by the Department of Labor in an interpretive regulation, 29 C.F.R. § 552.107. Entitled "Yard Maintenance Workers," it states:

> Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as *independent contractors* who are not covered by the [FLSA] as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors. [Italics supplied.]

The regulation fully supports a finding that Olvera was an independent contractor (and probably a domestic as well). Even if there are lingering doubts, utilizing the common law and the INS regulation, the evidence overwhelmingly favors Respondent's contention that he was an independent contractor. Accordingly, I find Olvera to have been an independent contractor. As such, Respondent was under no obligation to complete a Form I-9 for him. This portion of the complaint will be dismissed.

3. *The Employees in Question*

The following discussion will involve the five individual employees whose I-9's have been challenged.

Manuel Ruiz: Manuel Ruiz was hired as a roofer on May 15, 1988, and was on the payroll for approximately eleven weeks. Of those eleven weeks he received pay for eight, although in one of those weeks he received only $13. He earned a total of $720 for his employment.

On May 15 he signed section 1 of the I-9 and certified that he was a citizen of the United States. The regulations and the statute require that an employee demonstrate both his identity and his employment eligibility. That may be done in one of two ways. He or she might provide a document under list A, which does both, or two documents, one under list B and another under list C, which together prove both identity and eligibility. Ruiz provided only a social security card, a list C document. If he could also demonstrate his identity, he could establish employment eligibility. However, he failed to provide a list B document to authenticate his identity.

Mrs. de Lafuente testified that she recalled asking Ruiz to produce a list B document and told him how to do it. She specifically suggested that he go to the Texas Department of Public Safety office, which issues state driver's licenses and identification cards and obtain one or the other. He never did so, nor did he provide another document. On cross examination Mrs. de Lafuente said Ruiz told her that he had never had a driver's license and that he was unable to go get an identity card because he was working during the hours the Public Safety Department was open. She says he didn't ask for time off and she didn't think of it. In addition, she said that the job to which he was assigned was "pressing" and had penalty clauses attached to it, so everyone was needed at the job site.

Mrs. de Lafuente says Ruiz did not respond to her urgings, so she called his home where she spoke to his mother. According to Mrs. de Lafuente, Ruiz' mother advised that Ruiz was a U.S. citizen who had attended school in Harlingen but probably did not have the appropriate papers.

It should be noted here that the I-9 form, list B, provides boxes for only three specific types of identity cards, state driver's licenses and/or I.D. cards with photographs or a U.S. military identification card. In point of fact, however, the regulation, 8 C.F.R. § 274A.2(b)(1)(B), also permits as list B documents school identity cards with photographs, voter's registration cards, draft records, federal or local government identity cards, military dependent's identification cards, native American tribal documents, U.S. Coast Guard merchant mariner cards and Canadian driver's licenses. If Ruiz possessed such documents, there was nothing in the instructions suggesting he obtain

them, though it appears likely a school identity card might have been found at the very least.

In any event, Mrs. de Lafuente came to believe there was nothing she could do. She did not think it was appropriate to discharge him for noncompliance and the alternative of withholding a paycheck pending presentation of that document would be contrary to both state and federal labor law as an individual is entitled to be promptly paid for his labor. She did not consider suspension pending presentation of a list B document. Insofar as Mrs. de Lafuente was concerned, neither the INS Handbook nor the I-9 were of utility in resolving the problem.

Respondent observes that Ruiz was hired on May 15, 1988, two weeks before the expiration of the citation period. Consequently it argues that the failure to fully comply was not subject to a fine, but only a warning. Complainant seeks a civil monetary penalty in this matter of $400.

Joe Alcala: Alcala was hired on June 27, 1988, and was on the payroll for about three weeks, leaving on July 15, 1988. During that period he earned a total of $204. The I-9 which Mrs. de Lafuente provided agent Leal shows that Alcala failed to fill out section 1, but did present a social security card. The social security number was placed in section 2, list C. For list B, he presented a letter from the state welfare office showing that he was eligible for food stamps. Mrs. de Lafuente certified at the bottom that she had seen that form on his date of hire, June 27.

Mrs. de Lafuente has very little recollection of what happened with respect to Alcala. She says she does not know why section 1 of the Alcala I-9 was not filled in. Furthermore, she is unable to recall how section 2 came to be filled out. She says she "probably" filled out section 2 from what Alcala had presented. She thinks she gave him a blank I-9 form to bring back completed but that he never brought it back. This, she said, was a common problem early in her efforts to get the section 1 portion of the I-9 forms filled out. She said she also recalls calling Alcala's home and speaking to his mother as she had with Ruiz. According to Mrs. de Lafuente, she learned from Alcala's mother that he had attended elementary school in Harlingen, was born in Texas and had a birth certificate (a second list C document). However, she told Mrs. de Lafuente that he no longer lived at home and she could be of little help in getting Alcala to assist in filling out the remainder of the form.

Later, Mrs. de Lafuente surmised that perhaps Alcala had not filled out section 1 because a truck was waiting to take him to a job site. She now says the food stamp notation was placed on list B at some point after he was actually employed. She remembered he had brought the letter and they used it because it was the only thing he had. She even says that although he had a social security card she is not clear whether or not he had it with him on June 27 when he was hired or whether he showed it to her beforehand, when he applied for work.

She comments that Alcala had actually applied for employment on June 20 and his job application form lists that social security number. The thrust of her testimony is that she may actually have seen the social security card at that time rather than later. She also says that she generally spoke to Alcala in Spanish and is not certain whether he reads or understands written English, such as the language appearing in section 1 of the I-9 form.

She says that with respect to others, and perhaps Alcala as well, that her practice during that period of time was to give employees blank copies of the I-9 which they were to take with them and bring back. At the same time she would prepare a final copy which she kept, using the material which she had available to her from either the interview or the application form. She learned, rather quickly, that employees often did not bring back completed I-9 forms, (i.e., with section 1 signed and/or the section 2 documents). During that time period, she says it was common, when something was missing, for her to send word to the job site to have the employee come in to resolve problems of this nature. She agrees that Respondent made no effort to go to the site to talk to the individual about such omissions. She says that practice has since been changed and they actually do go to the site to talk to employees who have I-9 problems.

Complainant seeks a $400 civil monetary penalty for the Alcala I-9.

Oscar Romero: Romero was hired on June 30, 1988, as a roofer at the job site. He did not fill out an application but sought employment "off the bank," i.e., by asking for work at the site. He actually worked for only eight hours on that day, earning $26 at the minimum wage (8 hours x $3.35). The blank I-9 found in his personnel file contains only Mrs. de Lafuente's certificate at the bottom of section 2. She testified that he never came into the office to fill out any paperwork whatsoever. She says she signed the certificate portion of the form in anticipation that he would come in with the proper documentation at the end of the day. That never occurred, and according to the paysheet, he was paid off the following day, July 1. She says she does

not know how Romero came in to get paid and says no one apparently thought to ask him to fill out the I-9 form at the time. Complainant makes no contention that Romero was ineligible to work in the United States.

Complainant seeks a fine of $400 for the Romero I-9.

In 1988, the regulation governing the promptness of a long-term employee completing the section 1 certification of his/her own eligibility was 8 C.F.R. §274a(b)(1)(i)(A). That regulation, but not the I-9 instructions, required the employee to complete and sign section 1 of the I-9 "at the time of hiring." [7] The 1990 amendments continue to use the same phrase.[8]

There is no doubt that the phrase "at the time of hiring" is both patently and latently ambiguous. Even when persons are hired routinely through a hiring office, there are at least three reasonable meanings for the phrase. The first is when an offer of employment is actually accepted, even if that is days or weeks before actually beginning work. This is allowable according to the Handbook. The second, the preferred INS meaning, is the moment an employee reports for work. The third is a reasonable time thereafter. A reasonable time might mean "by the end of the first day" (an interpretation used by Complainant for short term employees, see fn. 7) or it might mean "within the first few days." It is quite common for an employer to allow an employee a few days to get his tax exemption and social security number form (W-4) in order. An employer comfortable with that practice might well view the I-9 requirement in the same light.

When employees are hired in the field as Romero was, or perhaps as in certain industries, by long distance telephone, the meaning of the rule becomes more unclear. It may be physically impossible to carry out the task of completing an I-9 at the moment the employee reports for work. In that circumstance, Complainant's preferred

[7] If the employee was being hired for less than three days, the employer would be permitted to await the end of the first day to complete both sections 1 and 2. 8 C.F.R. §274A(B)(1)(iii). This suggests that the "time of hiring" has different meanings depending on whether or not the employee has been hired for more or less than three days.

[8] A newly modified I-9 form (published May 3, 1991) now uses the "at the time of hiring" language in its instructions.

interpretation can never be met and a reasonableness rule seems more sound.

In any event, the Chief Administrative Hearing Officer (CAHO) has recently found the rule to be vague and susceptible to several reasonable interpretations. He has, therefore, refused to enforce it. New Peking Restaurant, OCAHO Case No. 90100301 (June 18, 1991), req. for reconsid. den. (July 2, 1991).

The CAHO referred to the rule as both "opaque" and "less than crystal clear." I agree and add that the rule is unrealistic and does not allow for what happened here though it is a common happenstance. Many people seek employment, obtain it, and then quit on their first day when they discover the work is not to their liking. In the construction industry (particularly the non-union segment) job site hirings are common. When a job site hire is combined with a prompt quit, as here, the employer's efforts to comply with IRCA, and probably the Social Security Act and the Internal Revenue Code as well, is easily frustrated. In that situation, the INS' "report for work" interpretation has little, if any, likelihood of being met. Since the CAHO has found the rule too unclear to warrant enforcement, I cannot but agree. I would have reached that same conclusion even without his decision in New Peking. It has long been the rule that where a regulation subjects private parties to criminal or civil sanctions, the regulation cannot be construed to mean what an agency intended but did not adequately express. Diamond Roofing v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976); Marshall v. Anaconda Co., 596 F.2d 370, 376 (9th Cir. 1979), specifically dealing with rule's ambiguity; Hutto Stockyards v. U.S. Dept. of Agriculture, 903 F.2d 299, 307 (4th Cir. 1990). It is quite clear that the "time of hiring" language is subject to too many reasonable and ordinary interpretations to be solely limited to that preferred by Complainant.

Aside from that analysis, given Romero's momentary hire and minuscule earnings of $23, I am at a loss to understand the size of the proposed fine, $400. One does not obtain willing compliance with laws such as this from people who want to comply, as the de Lafuentes have shown, by levying fines which can have only an antagonistic effect. That is the effect of a fine almost twenty times the supposed worth of the employee's labor. Rather than engendering support for the law, that approach triggers scorn not only for the law but for the Service as being unreasonable.

Accordingly, the count of the complaint dealing with Romero will be dismissed.

Jose Francisco-Vega: Francisco-Vega, too, was hired on June 30. He remained employed for seven weeks, earning a total of $435. For four of those weeks he earned only $23, $30, $41 and $46.

Francisco-Vega's situation is somewhat unusual. During the inspection, agent Leal found and copied an I-9 whose section 1 is totally blank [Exh. C-13]. Section 2, which Mrs. de Lafuente had certified, contains both a list B and a list C document. The list B document, the identity paper which Francisco-Vega presented, was a Florida driver's license. When Mrs. de Lafuente recorded the number, she erroneously wrote down a code number used by the state of Florida, and did not record the actual license number.

Respondent presented a second I-9 form also dated June 30 [Exh. R-7, p.3] which not only has the correct the driver's license number in list B (as well as the list C document), but also contains a reasonably filled out section 1 signed by Francisco-Vega who certified that he was a citizen of the United States.

These two I-9's have caused a great deal of litigation. Respondent contends that both documents were in Francisco-Vega's personnel file and that somehow Leal or his secretary missed the properly completed one. Leal insists that he specifically remembers that there were not two I-9 forms in Francisco-Vega's file. Moreover, the secretary who photocopied the I-9's testified that she could not have missed it had it been given her. Complainant essentially contends that a properly completed I-9 did not exist at the time Leal conducted his inspection, inferring that Exh. R-7, p.3 was prepared afterwards. Based on its assessment of the document which Leal did find, Complainant seeks a civil monetary penalty of $200.

This is a situation in which I think the parties have made a mountain out of a molehill. Each has accused the other of some sort of detrimental conduct. When the notice of intent to fine was issued, Mr. and Mrs. de Lafuente reviewed Francisco-Vega's file and could not understand why any charge had been brought. The only error they could see was that Francisco-Vega had omitted his last name from the name line at the top of section 1 although he had properly signed it. They were so incensed by this charge (as well as by the remainder of the complaint) that on September 26, 1989, Mr. de Lafuente wrote a letter to a number of senators and congressmen complaining that the INS was being excessively petty in its enforcement of the Act.

In that letter he stated among other things, "In our case, we are being fined $200 because Jose Francisco-Vega inadvertently omitted

his last name [emphasis in original] on the I-9 form even though he did sign his full name properly." His letter, coming some five weeks after the complaint was filed, contains the ring of sincere anger for what he perceived to be an unjust complaint over an insignificant matter. Moreover, at that time Francisco-Vega had been gone from Respondent's employ for over a year and it seems unlikely that Respondent could have created a document with Francisco-Vega's signature that long after his employment.

Nonetheless, there is at least one aspect of the second I-9 which causes Complainant some legitimate doubt. Although Mrs. de Lafuente signed and dated the certificate portion of section 2 in her own handwriting on June 30, 1988, the date which appears next to Francisco Francisco-Vega's signature is typewritten. It is the only typewritten material appearing on the document. That in itself suggests that it was placed on the document at a time different than the time Francisco-Vega completed section 1. For that reason Complainant wishes me to reject Exh. R-7, p.3 as an untrustworthy document.

Indeed, Mrs. de Lafuente testified that it is quite conceivable that the date on section 1 of Exh. R-7, p.3 was actually typed a day or two after Exh. C-13 but asserts that its creation was entirely innocent. She testified that the driver's license number error was called to her attention by her adult daughter who was reviewing her paperwork because at the time she was suffering some eyesight difficulties. She further believes that Francisco-Vega had been given a blank I-9 to take home and had returned it with section 1 filled out, signed but undated. Since her first version contained an error, she simply transposed the material to the form which had his signature on it. Yet, her testimony regarding how the typewritten date appeared on the section 1 date line is inconsistent. At one point she said her daughter typed it; at another she said she had it in front of her typewriter so she typed it herself. Either way she says it was designed to reflect the day that the form had been given to the employee.

Frankly, I think Mrs. de Lafuente's inconsistent testimony and the typewritten entry warrant at least a step toward concluding that her description of the creation of that document is doubtful. That is countered rather strongly, I think, by the self-righteous indignation displayed by Mr. de Lafuente when writing about the document to his elected representatives, particularly when coupled with the lack of likelihood that he could create such a document after the fact. Indeed, there was no reason to create this document until sometime in 1989.

I might be more willing to accept Complainant's view of the situation were it not for the fact that Complainant's own witnesses, Leal and his secretary, Gonzalez, displayed some credibility problems of their own. Leal was most eager to convey as positive evidence his affirmative recollection that a second I-9 did not exist. In itself that does not seem credible. It is highly improbable that one would remember the "non-existence" of a fact, particularly when one, such as Leal, was collecting large numbers of similar documents, specifically I-9's and wage records. Over the intervening years he has examined thousands. Indeed, he says he went through 66 such files that day. Therefore, it is highly unlikely that when he found Exh. C-13 that he would have searched any further for a second I-9. For him to so positively say that a second I-9 did not exist seems disingenuous. More likely, his positive recollection is an effort to defend an innocent error. Gonzalez' support is of little help here because she only copied what Leal gave her.[9] She does recall that the amount of paper copied that day was "enormous," lending credence to the likelihood that Leal missed one.

Because the testimony of both Mrs. de Lafuente and Leal suffer infirmities, I rely upon more objective facts in reaching my conclusion. Specifically, I find that Mr. de Lafuente's sincere outrage over what he perceived to be an abuse by the INS actually tends to assure the credibility of Respondent's contention that Exh. R-7, p.3 had been existence since either June 30 or early July 1988. He certainly would not have had any reason to fabricate the document until after the complaint had been issued and there is no suggestion that he had any way of obtaining Francisco-Vega's signature at that late date. Accordingly, I conclude that a properly completed I-9 was in existence during Leal's inspection, was presented, and that it was somehow overlooked. Therefore, this portion of the complaint must be dismissed.

Rene Camarillo: Camarillo was hired on September 6, 1988, and worked for parts of four weeks, terminating on September 29. He earned a total of $350; for one week only $22. On September 6, Olga de Lafuente certified that she had reviewed a list A document for Camarillo which established both his identity and his employment eligibility. He had presented an alien registration card with a

[9] The recollections of Mrs. de Lafuente and Leal/Gonzalez about the manner in which these documents were retrieved from the files are quite different. It is unnecessary to resolve that conflict for even if I accept Leal's and Gonzalez' version, Leal's own defensive assertiveness leads me to conclude that he really does not have the quality of recollection which he claims.

photograph together with an appropriate document number and expiration date. However, he did not fill out section 1 at all.

Mrs. de Lafuente recalled that Camarillo was "uncomfortable" in fill-ing out section 1 and so declined to do so, although she gave him a blank to take with him and to return. She also remembered he was with a woman who was to drive him to the job site. According to her, the woman was in a hurry because she had an appointment somewhere else. Mrs. de Lafuente admits that she regarded the section 2 verification as more important than the one required in section 1. As seen below, she is correct, assuming the section 2 certification occurs at the time of hire rather than thereafter.

Complainant seeks a civil monetary penalty of $200 for the Camarillo I-9 form.

B. *Legal Analysis*

First, I think it is important to note that Respondent is a small busi-ness, essentially run by a husband and wife who appear to be sincerely trying to comply with this new law, IRCA. Complainant does not dis-pute that Respondent has been in compliance with the law since the Camarillo hire on September 6, 1988.

I think it is also true that in her effort to comply with this law, Mrs. de Lafuente has been faced with some confusing fact patterns and some unclear regulations. While she recognizes that the law is designed to prevent the employment of illegal aliens, she has encountered individuals whom no one disputes are eligible for employment but who had not, at that early hour of the Act, been sufficiently educated in their obligation to present proper documentation. Indeed, neither the INS Handbook nor the I-9 list B instructions were helpful in resolving these situations. In fact, the omission of 75% of the proper list B documents, particularly school identity and military dependent identification cards, is downright misleading. Had they known such documents were acceptable, both Ruiz and Alcala may well have been able to produce one or more of them[10]

[10] Apparently Complainant institutionally agrees these omissions have been unfair. On May 3, 1991, less than a month after this hearing closed, it published a revised I-9 form in the Federal Register. Among the changes made on the form, I note that it now lists all twelve documents which are acceptable for list B. That group of documents was not generally available to employees, although it did appear in the Handbook.

On the other hand, despite her willingness to comply, Mrs. de Lafuente has sometimes been a bit cavalier in her approach to some of the I-9's. She knew Alcala's food stamp letter probably wasn't adequate as a list B document;[11] she has sometimes been willing to sign the section 2 certifications in blank; she has accepted at least two mothers' oral representations that their sons were U.S. citizens; and she has allowed job urgencies to interfere with the task of completing the I-9 formalities. In a sense, she did not give the I-9 requirements the respect the law demands.

That is perhaps due to in part to her recognition of the general purpose of the Act and in part due to her unsuccessful experiment in entrusting the I-9's to prospective or newly hired employees who either did not return with the proper documentation or were unwilling to fill out the section 1 certification. Even so, Respondent's compliance has been exemplary except for some of these which we are scrutinizing. It has not hired, nor sought to hire, an illegal alien since the passage of IRCA. Indeed, as already decided, there was not even a paperwork violation with respect to either Romero or Francisco-Vega.

Similarly, the Camarillo situation does not warrant a penalty. On the date of his hire, September 6, 1988, Camarillo presented Respondent with a list A document, a proper alien registration card which established both his identity and his eligibility to work. He simply declined to sign section 1, for reasons known only to him. Complainant has not contended Camarillo was engaged in any fraudulent conduct; it appears to concede Respondent's version of the facts.

Since Camarillo presented his list A document on the same day he was put to work (i.e., the time of hiring), I fail to see what additional safeguards with which IRCA is concerned would have been met had he signed the section 1 attestation at the time. The purpose of IRCA is to ensure that illegal aliens do not obtain employment in the United States. When Camarillo presented his list A document at the moment he was hired, everyone, including Complainant, knew the policies behind IRCA had been satisfied. What then, is to be gained by levying a penalty against an employer who has done its duty? To be sure, the statute, 8 U.S.C. §1324a(b)(2), requires the employee to certify his eligibility. See Golden Eagle Services, OCAHO Case No. 90100368 (June 11, 1991). Yet, is it appropriate to penalize the

[11] The document is not in evidence. It is possible that it might have qualified under list B as a federal or state identification under the 1987 regulations or a receipt for an application therefor.

employer for the personal hesitancy of an otherwise timely proven eligible employee?[12] I am unable to so conclude. Complainant's pursuit of a civil penalty in this circumstance furthers no aim of the Act. Instead, it heightens form over substance. I therefore find no violation with respect to Respondent's handling of the Camarillo I-9. It too shall be dismissed.

With respect to Ruiz, Respondent argues that he was hired on May 15, 1988, during the statutory citation (warning) period [see 8 U.S.C. § 1324a(i)(2)] and, since it was Respondent's first violation, no penalty should be assessed. Complainant's brief does not address the issue.

I am of the view that Respondent is correct. Although the INS' discovery of this deficiency did not occur until over a year after the citation period expired, I am nonetheless persuaded by the administrative law judge's logic in New El Rey Sausage Co., OCAHO Case 88100080 (July 7, 1989).[13] In that case, the INS had discovered the paperwork violations during the citation period, waited until the period expired and then initiated enforcement proceedings. The ALJ dismissed that portion of the complaint based upon his analysis that the INS regulation justifying the complaint was inconsistent with the underlying statute.

The only factual difference between this case and New El Rey is that Complainant did not discover the May 15, 1988 discrepancy until June 12, 1989, during agent Leal's investigation. It could have (and should have) been discovered in August 1988 during agent Trevino's inspection.

The INS regulation, 8 C.F.R. § 274.9(c), justifying proceeding on the Ruiz I-9 is quoted supra at p. 4. To find a violation warranting a penalty I must accept Complainant's apparent contention that a principal element of the violation is when the discrepancy is discovered, not when it occurred. On its face, that is not logical. That reasoning would allow the prosecutor to create the violation simply by ignoring it for a period of time. To the extent that the regulation permits that practice, it is in disharmony with the statute and would

[12] If the list A document had been presented at a time later than the time of hiring, I would not have reached the same conclusion. Section 1 is designed to assist the employer in assuring that the applicant is eligible to be employed. That purpose is defeated if the section 2 documents are not presented for two or three days without a timely section 1 certification.

[13] Enfd. as to matters which were appealed, 925 F.2d 1153 (9th Cir. 1991).

qualify as an ex post facto prosecution. New El Rey Sausage therefore provides Respondent with a full defense to the discrepancy in the Ruiz I-9.

Even if that defense was not available, it seems clear to me that the I-9 form, has material omissions which can only serve to prevent eligible persons from obtaining employment. As previously noted, it omits nine of the twelve documents which an employee may produce to prove identity. That is manifestly unfair to the parties which Complainant is obligated to regulate. Moreover, its largest impact is likely to be upon U.S. citizens who will be denied employment because they have not been told how to comply. The Congress could not have intended that social impact. Indeed, as we all know, it is national policy to encourage the employment of our citizens and our legally qualified aliens. This omission is serious stuff.

Complainant cannot publish a document which supposedly provides a seemingly simple form for compliance (the I-9), then penalize members of the regulated group because they did not know what information had been withheld by it. It is no doubt true that properly promulgated regulations will control in most situations. Yet can that be the case when the INS has taken steps which effectively conceal the beneficial portions of those rules from the parties subject to regulation -- the employees? I think the answer to the question is manifestly clear. That treatment of the regulatees is, simply put, wrong. Hopefully, the new I-9 form has corrected that bar to employment. The old form is a trap for employers such as Respondent who knew IRCA could not be intended to bar citizens and authorized foreigners from employment and chose to hire them anyway. It must also have had the unwanted effect of preventing at least some properly documented persons from becoming employed simply because they could not learn what the acceptable papers were.

Since Ruiz may well have been able to supply a proper document, but he had been deprived of the information regarding the nature of the acceptable documents by an important governmental omission, I cannot find a violation warranting a penalty.

The failure of Alcala to provide a list B document also benefits from the above logic regarding the INS' providing misleading instructions to the regulated group about which documents satisfied list B. He and Respondent hoped the food stamp letter would be sufficient -- hoping it would fall into the category of "other."

Yet, Alcala also neglected to complete the section 1 certification "at the time of hiring" or at any other time. He does not benefit from the logic used supra regarding either Romero or Camarillo. Indeed, there is no legal defense available for this apparent breach of the duty. Even so, I decline to issue a penalty. My decision here is based on several policy grounds.

The first is the balance IRCA must display with other public policies. IRCA is a civil, not criminal, regulatory statute with which the INS is charged in the first instance to enforce. It is not a license to freely conduct serial investigations into the same conduct. In this case agent Trevino had, in August 1988, full access to all of the I-9's in Respondent's possession at that time, including those which have been litigated here. He also had access to the independent contractor files had he but asked. Instead, Trevino chose not to review any matter relating to past employment, limiting his inquiry to current employees and practice. He found, based on that probe, that Respondent was in current compliance with IRCA. In fact, nothing subsequent has demonstrated that his conclusion was incorrect.

Later, apparently triggered by the discovery of the "grand-fathered" employee, agent Leal plowed the same ground which Trevino previously had. He reviewed all of the same documents again, except he now demanded what Trevino could have had but chose to ignore. So far as I can see, Leal totally disdained Trevino's earlier investigation, even though he was aware of it. He simply put Respondent through the same investigative mill it had already undergone for Trevino.

I recognize that the discovery of the grandfathered employee warranted investigation into his singular status and even perhaps into I-9's which had been created after Trevino's visit. But, unless criminal conduct was suspected, and here it was not, there was no reason to do it all a second time. Even if Complainant was simply seeking to regulate, its only accomplishment was to appear to harass, for nothing new could have been discovered, nor was it.

By this observation I do not suggest that Leal's purpose was to harass, but in reinvestigating what Trevino had already covered, Complainant unnecessarily subjected Respondent to a needless and near-gratuitous ordeal. That Respondent regards it as harassment is understandable. That sort of thing is to be avoided in civil regulation and many agencies take steps to do so. The National Labor Relations Board has a rule, similar in purpose, to avoid multiplicitous litigation. Under that rule the Board's prosecutors cannot litigate

matters which could have been litigated in a previous proceeding. Pevton Packing Co., 129 NLRB 1358 (1961). Similarly, the Internal Revenue Service has a practice whereby taxpayers whose deductions have been approved by a previous audit can, by notice, avoid second and third audits over the same deduction in subsequent years. The INS should follow their lead and refrain from investigating what has already been investigated.[14] I see no reason to encourage unneeded multiple investigations by approving this one.[15]

The second policy reason is that Complainant knew, except for the Camarillo I-9 (found to be acceptable herein), that Respondent was in current compliance with IRCA after Trevino's inspection and his education of Mrs. de Lafuente. Can any purpose of the Act be served by fining Respondent over one failure to ensure the completion of one section 1 by an employee long since terminated? A fine in that sense will not cause Respondent to change its ways. It is, and has been, in compliance since then. It can't comply more than it is complying now.

Third, the Alcala section 1 failure is now a truly minor matter. The INS Field Manual (November 20, 1987) [Exh. R-13] seems to recognize that. It sets, as agency policy, the requirement that proceedings in "paperwork only" cases, such as this, be initiated only when the cases are "egregious," including a "willful failure to complete I-9 forms following a documented Service educational contact. . . ." None of the pre-Camarillo I-9 forms (including Alcala) preceded such a contact and none had merit except for the Alcala section 1.

Similarly, INS Commissioner Alan C. Nelson, on May 26, 1988, issued a directive [Exh. R-14] to Regional Commissioners, District Directors, Chief Patrol Agents and Officers-in-Charge. In that document, p. 4, he stated that there were to be "No fines for 'paperwork only' violation(s), unless overall refusal to comply. . . ." He also gave local officers discretion to seek fines in paperwork cases where the circumstances were "egregious."

These two policy statements are of interest principally because they state the Service's actual position regarding that is and what is not

[14] That Trevino chose not to inspect the I-9's of past employees is of no moment. He could have done so and that is, for the purpose of this analysis, the same as having done so.

[15] Agencies should make an effort to avoid "disturbing instances of that may appear to be a punitive mentality." Parchman v. U.S. Dept. of Agriculture, 852 F.2d 858, 886 (6th Cir. 1988).

serious. Clearly a disregard of the IRCA paperwork requirements warrants enforcement action. Contrariwise, action is not appropriate in a paperwork only case where there is a good faith effort to comply.

I agree with that policy. It makes sense and comports with the legislative intent and objectives. There is, therefore, under Complainant's own policy, no reason to issue a civil penalty with respect to the Alcala omission. Indeed, the same could be said about all the I-9's for Ruiz, Romero and Camarillo as well.[16] When taken as a whole, nothing about this group of I-9's qualifies as "egregious." Moreover, the Olvera matter could have been resolved without litigation had either party noticed the the Department of Labor interpretive regulation.

Agencies, sometimes impelled by reviewing courts, have occasionally decided that certain cases are too trivial or minor to pursue, even where the agency prosecutor has chosen to proceed. This is true even where the statute facially mandates action. This what happened in American Federation of Musicians, Local 76 (Jimmy Wakely Show), 202 NLRB 620 (1973). There the National Labor Relations Board said, at 620-621:

> In the circumstances here, . . . the conduct involved was so minimal, and has been so substantially remedied by Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy. . . ..
>
> * * *
>
> . . . Patently, when viewed in the total factual context, there remains little of substance, and in that respect this case is analogous to Columbia Typographical Union No. 101. * Here, as there, the Respondent rescinded its instruction to the members long before the complaint issued, there is no suggestion that this action was taken because of compulsion, or fear of the Board, and there is no basis for concluding that this case is a part of a pattern of harassment against supervisors . . . In our view, therefore, the issue is so remote as to be, for all practical purposes, moot, as it was found by the court to be in the Columbia Typographical Union case. But even if not entirely moot, it seems to us that the alleged misconduct here is of such obviously limited impact and significance that we ought not to find that it rises to the level of constituting a violation of our Act.
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> * NLRB v. Columbia Typographical Union, No. 101 [The Evening Star Newspaper Co. and the Washington Daily News], 470 F.2d. 1274 (D.C. Cir. 1972) denying enf. of 193 NLRB 1089 (1971). And see the comments of the court in Dallas Mailers Union, Local No. 143, et al. [Dow Jones Co.] v. NLRB, 445 F.2d 730 (D.C. Cir. 1971) enfg. 181 NLRB 286.

[16] The Francisco-Vega situation is sui generis and has no bearing on this case whatsoever. It is simply an error, to which no blame should be assigned.

Accordingly, I am unable to find a legitimate reason to proceed here. The policies of the Act are in place at Respondent; the violations occurred very early in the life of the Act; they could have been found in the first inspection; were very minor and occurred in circumstances which were confusing. A civil penalty will not accomplish anything which has not already been accomplished.

Based on the foregoing findings of fact and legal analyses, I hereby make the following

Conclusions of Law

Respondent has not violated 8 U.S.C. § 1324a(a)(1)(B) as alleged.

Order[17]

The complaint is hereby dismissed in its entirety.

JAMES M. KENNEDY
Administrative Law Judge

July 25, 1991

[17] Review of this decision may be obtained by filing a written request for review with the Chief Administrative Hearing Officer within 5 days of this order as provided in 28 C.F.R. §68.51. This order shall become the final order of the Attorney General unless, within 30 days from the date of this order, the Chief Administrative Hearing Officer modifies or vacates it.