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 OCAHO Case No. 94A00023
DAVID JENKINS, Respondent.	)	

FINAL DECISION AND ORDER
(March 24, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Thomas L. Day, Esq., for Complainant.

Philip A. Boyle, Esq., and Robert Rubin, Esq. for Respondent.

I. *Introduction*

This case arises under § 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting § 274A of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. § 1324a. Section 1324a contains sanctions provisions which impose penalties on employers who knowingly employ unauthorized aliens and/or fail to comply with the employment eligibility verification regime established pursuant to § 1324a(b). Section 1324a renders employers vulnerable to civil and criminal penalties for violating prohibitions against employing unauthorized aliens in the United States and subject to civil penalties for failure to

comply with IRCA's record-keeping and employment eligibility verification requirements (paperwork requirements).

Paperwork requirements must be followed whether or not an individual being hired is a U.S. citizen. The verification system requires the participation of both employers and employees. Completion of the Immigration and Naturalization Service Employment Verification Form (Form I-9) is required within three business days of hire. 8 U.S.C. § 1324a(b)(1)(B)(ii); 8 C.F.R. § 274a.2(b)(1)(ii). However, when an employee is hired for less than three days the Form I-9 must be completed at the time of hire. 8 C.F.R. § 274a.2(b)(1)(iii).

II. *Procedural Background*

On February 7, 1994, the Immigration and Naturalization Service (Complainant or INS) initiated this proceeding by filing a complaint against David Jenkins (Respondent or Jenkins) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint is predicated on a November 19, 1993 Notice of Intent to Fine (NIF) served on Respondent by INS.

The Complaint alleges that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare a Form I-9 for Rolando Mizael Santos-Hernandez (Santos) and/or failing to make the Form I-9 available for inspection by INS agents. Complainant requests that I adjudge a $450 civil money penalty.

On February 9, 1994, OCAHO issued a notice of hearing (NOH), with Complaint attached. The Chief Administrative Hearing Officer (CAHO) assigned the case to Administrative Law Judge (ALJ) Robert B. Schneider. On March 11, 1994, Respondent timely filed his Answer.

Respondent's Answer admits that no Form I-9 was prepared for Santos. Respondent denies that he hired Santos for employment in the United States. Respondent asserts five affirmative defenses: (1) that he never formed the intent to hire Santos; (2) that no work was ever performed because Santos was arrested prior to commencing any physical or manual labor; (3) that even if work was commenced, the nature of the work was not such as to require a Form I-9; (4) that because of an unlawful search and seizure Complainant's actions violate the Fourth Amendment to the United States Constitution; and (5) that Complainant's actions violate Respondent's Fifth Amendment rights.

On April 11, 1994, Complainant filed a Motion to Strike Affirmative Defenses and Points and Authorities in Support of said Motion. Respondent filed his opposition to this motion, with a Supporting Memorandum of Points and Authorities on April 25, 1994.

On April 29, 1994, ALJ Schneider issued an order allowing Respondent to file a supplemental brief in opposition to Complainant's motion. Respondent filed the supplemental brief on May 9, 1994.

On June 15, 1994, ALJ Schneider issued an Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses. The ALJ granted the Motion to Strike the first and the fourth affirmative defenses (that Respondent never intended to hire Santos, and that Complainant's actions constitute a violation of the Fourth Amendment). He denied the motion as to the other three affirmative defenses.

ALJ Schneider explained that he struck the Fourth Amendment defense because it "is not an affirmative defense to the charge in the complaint as the effect of a finding that there was an unlawful search and seizure would not necessarily prevent Complainant from proving its case -- it would only be grounds for suppressing some evidence." Order (6/15/94) at 11. Respondent's opportunity remained unimpaired to file a motion to apply the exclusionary rule to suppress the evidence. Id. at 11, n. 5.

On September 8, 1994, ALJ Schneider conducted an evidentiary hearing in San Francisco, California. On December 23, 1994, Respondent filed his post-hearing brief (R's PHB). On January 25, 1995, Complainant filed its post-hearing brief (C's PHB).[1]

On February 7, 1995, the CAHO reassigned this case to me.

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[1] ALJ Schneider set the time frame for the filing of post-hearing briefs in a September 19, 1994 Order which also instructed the parties to address on brief the following issues:

> (1) whether Mr. Jenkins was required by statute or regulation to prepare an I-9 form for [Santos]; (2) whether Mr. Jenkins hired [Santos] before he was arrested . . . [and] assuming [Santos] was hired, whether he was a casual employee as defined by 8 C.F.R. § 274a.1(h); and (3) whether any and all statements or evidence obtained by the government agents, after they entered the private property of the Respondent should be suppressed as a result of an unlawful search and seizure.

Order (9/19/94) at 1.

III. *Statement of Facts*

A. Facts not in Issue

On April 26, 1993, Jenkins drove to Francisco Boulevard in San Rafael, California and picked up two men, including Santos, for a possible one day employment. Transcript (Tr.) at 20:5-10; 219:3-6. Jenkins described the incident as follows:

> I should say I pulled into this area where they were and a group of men rushed the truck and I said, "I need two guys," . . . and two guys . . . said, "Me. Me," . . . and I said, "I have some work." They said "$5. $5," . . . and I said, "Let's see. You have to see the work."

Tr. at 219:6-14.

The employment, to be performed outside Jenkins' house, consisted of removing displaced earth which had washed down a hill and was undermining Jenkins' driveway. Tr. at 220:21-221:4.

Two INS agents, Robert E. Crebbs (Crebbs) and Craig R. Stutheit (Stutheit), observed Jenkins picking up the two men and followed his truck to Jenkins' residence. Tr. at 18:9-11; 22:12-25. The residence was between eight and ten minutes driving time from the place where Jenkins picked up the men. Tr. at 219:20-21. The agents could not observe Jenkins or the two men from the road as the house is hidden by trees and other foliage. Tr. at 23:22-25. After waiting between five and ten minutes, the agents drove up an unpaved roadway leading to the house. Tr. at 23:5-21. The agents parked their vehicle at the end of the roadway, a paved, fenced in parking area.

The agents spoke with Jenkins and informed him that they wanted to speak with "the two individuals he had picked up." Tr. at 30:10-16. Crebbs arrested Santos while Stutheit pursued the second individual[2] as he fled through a hole in the fence and ultimately escaped apprehension. Tr. at 38:11-39:9.

The agents took Santos to the INS district office and interviewed him. Tr. at 46:3-10. On May 7, 1993, INS served a Notice of Inspection (Tr. at 99:12-100:25; 101:17-22; Exhibit C-3) and a letter notifying Jenkins that Santos had been arrested. Tr. at 103:2-11; Exhibit C-4. On May 12, 1993, Crebbs went to Jenkins' residence to inspect his Forms I-9.

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[2] This individual having escaped custody and identification is identified only as "X." Accordingly references to X in conjunction with Santos will be "Santos & X."

Tr. at 103:18-104:11. Jenkins presented no Forms I-9, admitting that he did not complete an I-9 for Santos. Tr. at 104:16-21.

B. Facts in Dispute

The parties disagree as to certain critical issues, including: (1) whether it was reasonably apparent that the unpaved road was Respondent's private driveway; (2) whether Santos & X had begun to work for the Respondent by the time the agents arrived, or, whether they were determining whether they were able to do the work; and (3) whether Respondent voluntarily consented to the agents entering the parking area in order to speak with Santos & X.

INS contends that when the agents turned off the paved roadway, driving down the unpaved road leading to Jenkins' house, they did not know they had entered a private road. Tr. at 24:1-11. Jenkins testified that the "driveway is off to the right. It's marked 280 on the tree. There's a sign 280 and on the mailbox there's also marked 280. . . . It's an obvious private drive." Tr. at 225:1-7. In addition, a sign on the side and near the start of the unpaved road says "Protected by Bolt Security," and there are low lights lining the sides of the roadway. Tr. at 237:9-11; 237:18-20; Exhibit R-13.

INS contends that Santos & X had begun working by the time the agents arrived at Jenkins' house. Specifically, Crebbs testified that "[t]here was a pile of brush in the middle of a garden area that's kind of like the front yard and kind of like a little field at the front of the house. There was a pile of brush in the center of that. They were on the far side of the pile of brush, moving the brush around." Tr. at 34:18-23.

Jenkins asserted that Santos was at the railing at the top of the hill and X was at the bottom of the hill. Tr. at 239:2-5. Jenkins further testified that there was no brush on the hill at the time because the rains had washed it all out. Tr. at 238:18-22; 240:2-3; 253:16-254:12; 256:8-16. Jenkins contended that Santos & X had not begun work, stating that "[w]e hadn't commenced anything yet. I was showing them what the problem was, and was it possible for manual labor to actually do this job." Tr. at 239:7-10.

INS contends that Jenkins consented to the agents entering the paved area at the end of the roadway to talk to Santos & X. Crebbs testified that "[Jenkins] told me that I could talk to them, and indicated that they were in the field beside his house. We walked over to the -- into

the paved driveway into the rail and he called the individuals out of the field." Tr. at 30:10-16.

Jenkins testified to the following conversation when Crebbs approached him:

> And so I walked out just right about -- just beyond the gate here and said, "May I help you?" Agent Crebbs says, "Is this your house?" "Yes." "Is this your truck?" I answered, "Yes." And at that point he produced his ID and said -- introduced himself as Agent Crebbs. He said, "I want to talk to your workers and then I'll talk to you." I said, "Am I in some kind of trouble?" He said, "Well, let me talk to your workers and then I'll talk to you."
>
> And he was moving forward at that point. And so I turned and walked with him back to the railing and motioned for the guys to come up. And then Agent Crebbs took over from that point.

Tr. at 258:15 - 259:3.

IV. *Discussion*

A. Liability Issues

Respondent did not complete a Form I-9 for Santos. However, the three affirmative defenses which survived Complainant's motion to strike remain at issue. Respondent also raises a Fourth Amendment challenge, asserting that the evidence obtained on and after April 26, 1993 is suppressible as the fruit of an illegal search and seizure.

1. Affirmative Defenses Adjudicated

a. Respondent Hired the Laborer Before He Was Arrested

INS regulations define "hire" as:

> the actual commencement of employment of an employee for wages or other remuneration. For purposes of section 274A(a)(4) of the Act and § 274a.5 of this part, a hire occurs when a person or entity uses a contract, subcontract or exchange entered into, renegotiated or extended after November 6, 1986, to obtain the labor of an alien in the United States, knowing that the alien is an unauthorized alien.

8 C.F.R. § 274a.1(c).

Respondent contends that at the time of arrest Jenkins was describing the potential work to Santos & X and had not yet determined that they were capable of performing the needed tasks. Therefore, Respondent argues, his duty to complete a Form I-9 for

Santos never arose as he had not yet "hired" Santos & X because they had not commenced work.

In contrast, Complainant argues that Santos & X had been hired and were at work when the agents arrived at the house. Complainant states:

> First, Santos was interviewed by Service agents after he was arrested, and that . . . [he] identified Respondent as his employer, and indicated that he was to be paid $5.00 per hour by Respondent for his labor. . . .
>
> Second, when the Service agents arrived at Respondent's home, Respondent admitted that he had hired Santos for the day.
>
> Third, the Service agents testified that they observed the men working clearing brush on the hillside, having hung their jackets on a stump.

C's PHB at 7 (accurately reflecting Crebbs' and Stutheit's testimony found at: Tr. at 82:1-8; 191:13-195:2; 31:6-9; 94:8-12; 34:15-35:13; 174:14-175:5).

In support, Complainant also relies on INS Form I-213 (I-213), Record of Deportable Alien, completed by Stutheit following the arrest on April 26, 1993. Exhibit C-2. The I-213 records information provided by Santos and by the arresting officer. Respondent is named on the I-213 as the worker's employer. Id. Respondent's address is entered by Stutheit as the employer's address, the type of employment is labeled as "Industry" and the salary is quoted as $5.00 per hour. Id. The employment term is defined as lasting from April 26, 1993 (the date of arrest) to "present". Id. The Form I-213 is dated April 26, 1993.

Crebbs, the officer who arrested Santos, testified to the accuracy of the information on the I-213 based on his own participation at the site of the arrest and his interview with Santos to verify the information after Stutheit completed the form. Tr. at 212:14-213:14.

Complainant accurately asserts that "Respondent has not denied that he stated to the agent that he hired [the worker]. Respondent's testimony is that he cannot remember making the statement." C's PHB at 7 (citing Tr. at 260).

The government must establish a violation of IRCA by a preponderance of the evidence. 8 U.S.C. § 1324a(e)(3)(C). Respondent contends that Complainant has not met this burden because the I-213 is inadmissible hearsay, and in any event should be afforded little weight.

Under the pertinent provision of the Administrative Procedure Act, 5 U.S.C. § 556(d), hearsay evidence is admissible if factors exist which assure the underlying reliability and probative value of the evidence. United States v. China Wok, 4 OCAHO 608 at 11 (1994). United States v. Mester Mfg. Co., 1 OCAHO 18 (1988), aff'd, 879 F.2d 561 (9th Cir. 1989), weighing these factors to determine the trustworthiness of the statements recorded on an I-213, stated that such declarations are not admissible "except where they are . . . reasonably free of patent error, and either the alien involved, the arresting and/or the attesting officer, or another knowledgeable person is available to testify in support." Id. at 26, n. 20.

The Santos I-213 satisfies the Mester standards for admissibility. Specifically, the information on the form, including that relating to his statement that he was employed by Respondent, is corroborated by Crebbs' testimony as substantiated by the "Memorandum of Investigation" which Crebbs completed on April 26, 1993. Exhibit C-1. Stutheit, who completed the Form I-213, was present when Crebbs arrested Santos, and both signed the Form I-213 which was filled in with information gathered from Santos. Tr. at 84:6-18 and 192:1-5. Respondent fails to persuade that statements on the Form I-213 are untrue. The Form I-213, coupled with personal observations by the agents, provides a basis for concluding that Santos had begun work prior to his arrest.

I do not find credible the claim by Respondent that the two Spanish-speaking laborers were to assess the job as a prospective employment. The implicit premise in his claim that if they decided they could not do the job he would return them to the pick up point and get more or substitute labor to complete the needed work beggars the imagination. Lacking corroborative evidence to support Respondent's claim, it is intuitively unrealistic to suppose the property owner would back-track to substitute two more potential laborers.

b. The Employment of the Laborers Requires the Completion of the Form I-9

Congress arguably did not intend to include "casual hires" within the employment verification system. Analyzing what became the employer sanctions provisions of IRCA, the House Committee on the Judiciary explained that, "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires (i.e., those that do not involve the existence of an employer/employee relationship)." House Comm. on

the Judiciary, Immigration Control and Legalization Amendments Act of 1986, H.R. Rep. No. 99-682, 99th Cong., 2d Sess., 57 (1986) (Part 1).

Tracking the Congressional intent to exclude casual hires from verification requirements, INS regulations excluded from the definition of employment "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent" (emphasis added). 8 C.F.R. § 274a.1(h). Neither the statute nor the regulation define the terms "individual," "domestic service," "private home," or "sporadic, irregular or intermittent." When a regulation is legislative in character, as is 8 C.F.R. § 274a.1(h), rules of statutory interpretation are available to determine its meaning. Sutherland Stat. Const. § 31.06 5th Ed.; New Ikor, Inc. v. McGlennon, 446 F. Supp. 136 (D. Mass. 1978) (administrative regulations are subject to the same tests for definiteness as are statutes).

Rules of statutory construction provide that the meaning of a statute must first be sought in the language in which it is framed. If that language is plain, and the law is within the constitutional authority of the lawmaking body that enacted it, the statute must be enforced according to its terms. See Caminetti v. United States, 242 U.S. 470, 485 (1917). "Where the language is clear and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." Id. Where a term in a statute is clear, it should be given its common meaning. However, if a term is subject to more than one interpretation, it is necessary to examine the legislative history of the statute to determine the intended meaning of the term.

The casual employment exception of 8 C.F.R. § 274a.1(h) applies only to "individuals" hired on a "sporadic, irregular or intermittent basis." As these terms appear to be clear and unambiguous, they should be given their ordinary meanings.

An "individual" is defined as "a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association . . ." Black's Law Dictionary 396 (5th Ed. 1983). The term "individuals," in this context, refers to the hiring of natural persons or single workers to do labor, rather than hiring a group, corporation or other aggregation. Santos & X clearly are natural persons and individually constitute single workers.

The "sporadic, irregular, or intermittent" element also is clear and unambiguous, terms to be accorded their ordinary meaning. "Sporadic" is defined as "occurring occasionally, singly, or in scattered instances." Webster's Ninth New Collegiate Dictionary 1140 (1990). "Irregular" is defined as "lacking continuity or regularity especially of occurrence or activity." Id. at 640. "Intermittent" is "coming and going at intervals: not continuous." Id. at 632. By including these terms together, § 274a.1(h) limited the casual hire exception to a situation where the employment is not regular or part of an on-going relationship. Santos & X were hired by Jenkins for the first time for one day's work, a hire that is "sporadic, irregular, or intermittent."

The legislative history is not helpful in defining "domestic service" and "in a private home." OCAHO case law has variously defined "domestic service" work "in a private home" both narrowly and broadly. It has been held that:

> [the] exception to the general verification requirements for "casual employment" situations is quite limited, and is apparently best read to include only in-house domestic labor arrangements such as maids, housekeepers, or baby-sitters.

U.S. v. Dittman, 1 OCAHO 195 at 5 (1990).

In contrast, dicta in another case suggested that domestic service includes a broader range of employments, explaining that:

> [t]he regulation . . . which defines "employees" under IRCA, specifically excludes "casual domestic employment." . . . This exclusion tracks the Fair Labor Standards Act, the National Labor Relations Act and the Social Security Act, which also define "domestics."[3]

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[3] Domestic service is variously defined by federal agencies. The Department of Labor defines domestic service employment for enforcement of the Fair Labor Standards Act as:

> [s]ervices of a household nature performed by an employee in or about a home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes baby-sitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. § 552.3.

The Social Security Administration defines domestic work for Social Security Act (continued...)

> In this regard, because [employee] was hired by [employer] to work as a gardener at the premises comprising the family residence, a strong case might have been made that [employee] was a domestic and therefore not an employee within the meaning of IRCA.

United States v. ABC Roofing and Waterproofing, Inc., 2 OCAHO 358 at 10, n. 5 (1991).

It is speculative to import definitions utilized by federal agencies in other contexts. In any event, I cannot agree with INS that "casual domestic employment" is only that labor which is performed inside a residence. Distinctions between identical services performed in an interior or exterior location, such as window washing, are not helpful. More meaningful is whether the chores are of a nature reasonably to be expected in the upkeep and maintenance of a residence and its curtilage. I conclude that casual domestic employment implicates household tasks performed by an individual either inside or outside a structure provided the work performed is of a "domestic" nature.

Respondent claims that he intended to hire Santos & X to rebuild part of his hillside, which had been washed away by rains earlier that year. Tr. at 223:8 - 223:19. Respondent described the work to be done:

> I had a hillside next to this area that we've been discussing next to the drive -- the parking area of our driveway -- . . . that the winter rains had flooded the parking area and gone over this parking area and undermined the driveway and washed away the hillside. . . .
>
> There's a railing along this parking area and the steep hillside. And at this point this hillside was creviced and eroded and threatening the integrity of the driveway, of the parking area. And it was obvious that the water had done some serious damage there. There was nothing left of the hillside but this dirt area and these pretty deep crevices. And all of this material that was there, the dirt that was there had been washed away by this -- a lot of water that had come down the driveway.
>
> So I'm showing these two guys the area and pointing to that and pointing to the dirt (witness gesturing) down at the bottom of this area of the -- we had the railing and then at the bottom of this there's a deer fence, and a lot of this material, this dirt, washed down to the bottom by the deer fence. And I was showing them that I wanted to bring this dirt up and reestablish the plane of this hill. But, you know, just -- yeah,

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[3](...continued)
purposes as:

> '[w]ork of a household nature'...the type of work done by cooks, waiters, butlers, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers and housemothers.

20 C.F.R. § 404.1014.

> like they'd understand reestablish the plane -- to just bring the dirt up and put it back in position.

Tr. at 220:21-221:3; 222:22-223:19. Before seeking workers from the "labor pool" at Francisco Boulevard, Respondent "had two engineers come out and look this job over . . . and both gave me bids on this stuff that were way beyond what I could afford." Tr. at 223:20 - 223:25.

Respondent's testimony confirms that this work was more in the form of construction work than household tasks. While the work was for the maintenance and preservation of the residential property, the fact that Respondent sought out cost estimates from construction companies exemplifies the type of work performed. I find that the work was not "domestic" in nature, and that the hiring does not fall into the casual domestic employment exception. As such, the employment at issue does not escape the need for I-9 compliance.

c. Fifth Amendment Defense is Unavailable

Pleading an affirmative defense to a § 1324a complaint requires "a statement of the facts" in support. 28 C.F.R. § 68.9(c)(2). Respondent's Answer alleged no facts in support of its Fifth Amendment affirmative defense. However, when considering Complainant's Motion to Strike Affirmative Defenses, ALJ Schneider did not strike the Fifth Amendment defense, stating:

> Liberally construing Respondent's Fifth Amendment argument, I find that Respondent is asserting that the INS's conduct in this case was inappropriate and is ground for dismissal. Although governmental misconduct arising to the level of a denial of due process of law is difficult to prove, if proven it is an affirmative defense to the charges in this case. See United States v. Law Offices of Manulkin, Glaser and Bennet, 1 OCAHO 100 (10/27/89). Accordingly, Complainant's motion to strike the affirmative defense that Respondent's Fifth Amendment right was violated, presumably because of governmental misconduct, is DENIED.

Order (6/15/94) at 12.

Respondent failed to recite facts in support of his Fifth Amendment defense. Significantly, he also fails to refer to the Fifth Amendment on brief. Respondent abandoned this defense. In any event, I find no basis in this record to conclude that a due process violation took place.

2. Fourth Amendment Search and Seizure

a. Legal Background

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." As stated in OCAHO precedent, the Fourth Amendment provides a protection:

> against invasions of "the sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524 from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all "unreasonable searches and seizures, and by requiring the use of warrants. . . ."

United States v. Widow Brown's Inn, 2 OCAHO 399 at 21 (1992) (citing Warden v. Hayden, 387 U.S. 294, 300 (1967)).

In order to preclude the prejudice of illegally obtained evidence, courts fashioned the remedial exclusionary rule. Widow Brown's Inn, 2 OCAHO 399 at 21. Precedent demonstrates applicability of the exclusionary rule to administrative proceedings. Id. at 22 (citing O'Connor v. Ortega, 480 U.S. 707 (1987) (plurality opinion); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982)).

It is also well-settled that the Fourth Amendment warrant requirement extends to administrative searches, including investigations by INS. United States v. Kuo Liu, 1 OCAHO 235 at 2 (1990). As stated in Widow Brown's Inn, 2 OCAHO 399 at 23, "I conclude that OCAHO and other jurisprudence confirms the administrative law judge's discretion to hold the exclusionary rule applicable to administrative searches. Accordingly, I hold the exclusionary rule applicable to proceedings pursuant to 8 U.S.C. § 1324a." Id.

Analyzing Fourth Amendment protection, the Supreme Court has stated:

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. 347, 351-352 (1967).

Under Katz, the modern view is that Fourth Amendment protection may attach anywhere. See United States v. Reed, 733 F.2d 492 500-501 (8th Cir. 1984) (The Fourth Amendment is implicated whenever "the government invades an area in which a person entertains a legitimate or justifiable expectation of privacy," following

Katz v. United States, 389 U.S. at 353.). As stated in Widow Brown's Inn, "[e]ven though Fourth Amendment protections are personal, the level of protection is frequently affected by the character of the location in which the search is executed. 'In the search context, the level of suspicion required to justify police action turns on the expectation of privacy that society will recognize in the place in which the search occurred.' U.S. v. Winsor, 846 F.2d 1569, 1577 (9th Cir. 1988) (emphasis added)." 2 OCAHO 399 at 25.

Fourth Amendment protections extend beyond a residential structure to its curtilage. The factors to consider in curtilage analysis are: (1) the proximity of the area claimed to be curtilage to the structure, (2) whether the area is included within an enclosure surrounding the structure, (3) the nature of the uses to which the area is put, and (4) the steps taken by residents to protect the area from observation by passers-by. United States v. Dunn, 480 U.S. 294, 301 (1987).

Fourth Amendment protection applies to businesses as well as private homes. However, the government has "greater latitude to conduct warrantless inspection of commercial property . . . unlike a homeowner's interest in his dwelling, '[t]he interest of the owner of commercial property is not one in being free from any inspections.'" Dow Chemical v. United States, 476 U.S. 227, 237 (1986). As with residential curtilage, Fourth Amendment protection reaches business and commercial activity only to the extent that a court finds a basis for a reasonable expectation of privacy. Widow Brown's Inn, 2 OCAHO 399 at 25.

Consent is one of the recognized exceptions to the warrant requirement. Kuo Liu, 1 OCAHO 235 at 2 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). For consent to be valid, the government has the burden of establishing that it was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Voluntariness is a question of fact determined from the totality of the circumstances. Schneckloth, 412 U.S. at 249. In addition, even where consent is found to be voluntary, a warrantless search will be upheld only if the individual who gave the consent possessed "common authority over or other sufficient relationship to the premises or effects sought to be inspected" to consent to an entry and search. Kuo Liu, 1 OCAHO 235 at 3 (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

b. Fourth Amendment Applied

Respondent contends that Complainant's warrantless entry onto Jenkins' property was an unreasonable search and seizure in violation of the Fourth Amendment. Respondent invokes the exclusionary rule, arguing that such a violation should result in suppression of the allegedly tainted evidence attained during and as a result of the April 26, 1993 incident.

It is uncontested that Crebbs and Stutheit had no warrant when they entered Respondent's property to question Santos & X. Complainant asserts that Crebbs and Stutheit did not know the dirt road by which they entered the property was a private driveway, and that Respondent consented to their entry in the parking area and to their talking to Santos & X.

At issue is whether Jenkins had a reasonable expectation of privacy in the area searched, and whether he voluntarily consented to INS entry onto his property.

The Fourth Amendment is implicated whenever the government invades an area in which a person entertains a legitimate or justifiable expectation of privacy. Reed, 733 F.2d at 500-501. I find that Jenkins had a reasonable expectation of privacy in the parking area and on the property surrounding his house. However, I am not persuaded that he enjoyed a reasonable expectation of privacy as to the unpaved road leading to this parking area. Rather, the totality of the circumstances demonstrate that it was reasonable for the agents to seemingly be unaware that they were on a private road.

I have considered the factual allegations in the evidentiary record and as relied on in the parties' pleadings, including the video tape (Exhibit R-13) depicting the roads leading to Jenkins' house.

Having viewed the video tape, I have no more reason to suppose it had the appearance of a private driveway than that of a public roadway. Common experience suggests that the characteristics relied on by Respondent, i.e., the mailbox, Bolt Security sign, house number tacked to a tree and the low lights along the roadside, are consistent with private property abutting a public roadway. I conclude that the property was not sufficiently sign-posted to reasonably place the agents on notice that they were trespassing on private property.

In contrast, Jenkins does have a reasonable expectation of privacy in the paved parking area. Because this area is separate from the house, curtilage analysis is applicable for determining whether Jenkins is entitled to Fourth Amendment protection with respect to the activities that took place there.

The parking area and the subsided hillside are adjacent to the house. These areas are enclosed by a steep embankment, a fence, dense trees and the railing of the parking area separating them from the dirt roadway. In my judgment, they are therefore clearly private property, separated from the public roadway by dense tree cover. Significantly, passersby could not observe what was occurring in the area.

These factors combine to satisfy the curtilage standards. Crebbs and Stutheit should have been aware they were on residential private property once they reached the parking area.

Because this searched area was within the curtilage of a private home, the government interests in the search must be substantial before they are permitted to infringe upon the homeowner's interests in the privacy and security of his home:

> The right of officers to thrust themselves into a home is also of a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement officer.

Camara v. Municipal Court, 387 U.S. 523, 529 (1967) (citing Johnson v. United States, 333 U.S. 10, 14 (1948)). R's PHB at 16 correctly points out that "[i]n order for government officers to gain lawful access to a private home without a warrant, they must have valid consent." Camara, 387 U.S. at 528-529.

Jenkins, as the property owner, clearly had the authority to consent to the entry/search by the INS agents. He contends that consent was not voluntarily given, arguing that:

> the agents were already on Mr. Jenkins' property by the time they spoke to him. As Mr. Jenkins noted in his testimony, the tone of Agent Crebbs was menacing -- Agent Crebbs refused to state his purpose or even to inform Mr. Jenkins whether he had committed any wrongful act until after he had spoken to Mr. Jenkins' invitees. TOP at 258:20-259:3. Moreover, Mr. Jenkins noted that Agent Crebbs moved forward before Mr. Jenkins gave his permission. The agents further admit that they were armed at the time that they trespassed on Mr. Jenkins' property.

R's PHB at 17.

In contrast, Crebbs testified that when he spoke with Jenkins the tone was "all very friendly, you know, conversation. It was very cordial." Tr. at 36:9-10. He answered Jenkins' question about whether he was in any trouble by saying "there was a possibility." Tr. at 36:19-20. Jenkins did not ask what he had done wrong but "[h]is comment when I first told him that I was with the Immigration Service was, 'Oh, you guys really are working this area.'" Tr. at 36:21-37:1. Finally, while Crebbs was armed when he approached Respondent, he testified that the gun was underneath his jacket and that he does not recall removing it from the holster at any time at Jenkins' residence. Tr. at 32:12-23.

The voluntariness of consent is a factual determination based on the totality of the circumstances. The government has the burden of proving voluntary consent. Schneckloth, 412 U.S. at 248. The Supreme Court, addressing the voluntariness of consent to a search, stated that "knowledge of a right to refuse is not a prerequisite of a voluntary consent." Id. at 234. Other factors to consider in determining the voluntariness of consent to a search include the individual's age, education level, presence of coercive police procedures, and the extent of the individual's cooperation with law enforcement officers. See, e.g., United States v. Mendenhall, 446 U.S. 544, 558-559 (1980); Tukes v. Dugger, 911 F.2d 508, 517 (1990).

In United States v. Mendenhall, 446 U.S. at 557-558, the Supreme Court analyzed whether an individual's consent to a search was voluntarily given by explaining:

> [t]he Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.
>
> On the other hand, it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While there factors were not irrelevant, [citation omitted] neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.

Id.

I find that Jenkins' consent is substantially similar to that in Mendenhall. Significantly, Crebbs and Stutheit asked, rather than demanded, to speak to Santos & X. They made no threats or show of force, their guns remained holstered and under their coats. Jenkins is an adult who, as appears from his comment after Crebbs identified himself, "oh you guys really are working this area," was implicitly aware of the activity of INS in the vicinity. Based on the totality of the evidence, I find, as in Mendenhall, that Respondent's consent was voluntarily given.

Respondent asserts that all evidence obtained as a result of the illegal search must be suppressed by virtue of the fruit of the poisonous tree doctrine. As I previously stated:

> [t]his doctrine, a corollary to the exclusionary rule, is the exclusionary rule for derivative evidence. The doctrine stands for the proposition that the government is prohibited from using, in any manner, any information prejudicial to the defendant, if that information is derived from facts learned as a result of the unlawful acts of its agents. The "poisonous tree fruit" can be either demonstrative or testimonial evidence. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); . . . Wong Sun v. United States, 371 U.S. 471, 485 (1963). . . . The nexus between the unlawful act and the proffered evidence determines whether application of the doctrine bars the evidence in a particular case.

Widow Brown's Inn, 2 OCAHO 399 at 26.

However, as the Jenkins' search is validated by Respondent's consent, the fruits of the poisonous tree doctrine is unavailing. The evidence offered by Crebbs and Stutheit is admissible. On that basis, in light of Respondent's conceded failure to prepare and make available the Form I-9 for Santos, I find liability as alleged in the Complaint.

B. Civil Money Penalty Adjudged

The statutory minimum prescribed for the civil money penalty is $100 per individual; the maximum is $1,000. 8 U.S.C. § 1324a(e)(5). As the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I therefore only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); Widow Brown's Inn, 3 OCAHO 399.

Five statutory factors must be considered in determining the reasonableness of the civil money penalty: "the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of the previous violations." 8 U.S.C. § 1324a(e)(5). In weighing each of these factors, I utilize a judgmental and not a formula approach. See, e.g., United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993). The significance of each factor is considered on the basis of the facts of the specific case.

1. Size of Business

It is settled OCAHO case law that where a business is 'small,' the civil money penalty is to be mitigated. See, e.g., Giannini, 3 OCAHO 573 at 9; United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990). Complainant characterizes Respondent as a small business. There is no suggestion that Respondent was other than a homeowner in respect of the employment at issue. Accordingly, I find the size of the business to be a mitigating factor in assessing Respondent's civil money penalty.

2. Good Faith of the Employer

OCAHO case law holds that the "mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

In its Post-Hearing Brief, Complainant states:

> Respondent failed to complete a Form I-9 for Mr. Santos. It is apparent, however, that Respondent was aware of the requirements of the immigration laws prior to the date of the employment in question, April 26, 1993, particularly in light of Respondent's statement to Service agents that "you guys really are working this area." Tr. at 36-37. Furthermore, Respondent admitted that this was not the first time that he had picked up workers at the labor site to perform work in his yard. Tr. at 274. Respondent produced no Forms I-9 for these employees.
>
> Accordingly, Respondent did not manifest a good faith effort to comply with the law, and failed to exercise reasonable care and diligence to ascertain the nature of his obligation under the Act.

C's PHB at 18.

Respondent admits that he did not prepare a Form I-9 for Santos. Indeed, he did not know what a Form I-9 was until the INS inspection in this case. Tr. at 275:3. In OCAHO case law, one test of good faith "is whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." United States v. Williams Produce, Inc., 5 OCAHO 730 at 8 (1995).

Assuming Respondent knew of the I-9 regimen, the meaning and extent of the "casual domestic employment" exception to the employment eligibility verification requirements would arguably have been sufficiently unclear to cause him to believe he had no obligation to fill out an I-9 for Santos. It is obvious that the parameters of the exception are obscure. While INS has made a broad effort to inform employers of I-9 duties, this is an individual in his capacity as a homeowner, not as a commercial enterprise. Accordingly, I am unable to find an absence of good faith in failing to observe the verification requirements and I mitigate the penalty based on this factor.

3. Seriousness of Violation

Complainant correctly notes the principle that "failure to prepare or present a Form I-9 has been found to be a serious violation." Widow Brown's Inn, 2 OCAHO 399; DuBois Farms, 2 OCAHO 376. OCAHO case law demonstrates that "failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (quoting United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992). (Modification of the Decision and Order of Administrative Law Judge)). Respondent failed to prepare a Form I-9 for Santos. This is a serious violation which is undeserving of mitigation in respect of this factor.

4. Employment of Unauthorized Aliens

Santos was an undocumented alien, unauthorized for employment in the United States. This factor serves to aggravate the penalty.

5. Previous § 1324a Violations

As there is no history of previous § 1324a violations, this is a mitigating factor.

6. Effect of the Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amount assessed by INS. I find that the mitigating factors of size, good faith of the employer, and lack of previous § 1324a violations do not support a finding in the full amount of the penalty assessed by INS. However, the aggravating factors of seriousness of the violation and employment of an unauthorized alien do not support adjudication at the statutory minimum. As a result, this Final Decision and Order reduces the INS assessment for the one violation from $450 to $250.

V. *Ultimate, Findings Conclusions and Order*

I have considered the pleadings, testimony, evidence, memoranda, briefs, and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude upon a preponderance of the evidence:

1. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing as alleged in the Complaint to comply with the requirements of 8 U.S.C. § 1324a(b) with respect to the one individual named in Count I of the Complaint.

2. That upon consideration of the statutory criteria required for determining the amount of penalty for violation of 8 U.S.C. § 1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty of $250.00 for the single violation.

This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv). As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Final Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7), (8) and 28 C.F.R. 68.53.

SO ORDERED.

Dated and entered this 24th day of March, 1995.

MARVIN H. MORSE
Administrative Law Judge