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

December 13, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 94B00151
ZABALA VINEYARDS, Respondent.	)	

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Linda White Andrews, Esq.,*
Juan Maldonado, Esq., for Complainant
Saul M. Weingarten, Esq., for Respondent

I. Procedural History

On August 15, 1994, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC or Complainant) filed a Complaint alleging that Zabala Vineyards (Zabala or Respondent) engaged in a pattern or practice of document abuse in violation of §102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. §1324b. Specifically, OSC alleges that "Respondent makes it a practice to require all non-U.S. citizen employees to present a document issued by INS [Immigration and Naturalization Service] in order to establish their employment eligibility under 8 U.S.C. §1324a(b)." Complaint at 2.

On August 26, 1994, Zabala filed an Answer to the Complaint which denies all allegations and asserts as affirmative defenses that: (1) applicants for Zabala employment were not required to present docu-

mentation issued by INS and, (2) applicants who failed to produce INS documents were not denied employment nor discriminated against.

Following discovery and several telephonic prehearing conferences, an evidentiary hearing was held March 28–30, 1995, in Seaside, California.

Both parties filed opening and post-hearing closing briefs; Complainant on August 18 and September 8, 1995, and Respondent on August 15 and September 8, 1995.

II. Discussion

A. *Introduction*

Zabala, a California Corporation engaged in the harvesting and selling of wine grapes, relies mainly on immigrant labor as its workforce. Tr. at 489–94. Although maintaining a skeletal crew of a few permanent workers, Zabala requires numerous additional temporary workers in order to harvest and prune the grapevines, particularly during the autumn months. *Id*. at 490. At all times relevant to the case, Steve DiGangi (DiGangi), Zabala's general manager, was responsible for hiring and decision-making policy. *Id.* at 488. From January, 1991 to October, 1994, he was assisted by various administrative assistants in processing applications including the employment eligibility verification form (Form I–9). Five of his administrative assistants testified at hearing: Katherine Gard (Gard), Estel Gomez (Gomez), Vincent Calderon (Calderon), Betty Binsacca (Binsacca), and Maria Ruiz (Ruiz).

DiGangi testified that to attract employees, most of whom are Mexican nationals who speak only Spanish, Respondent made radio announcements just prior to harvest. *Id.* at 492–8. Potential employees were told to come to Zabala prepared to show documentation of employment eligibility. *Id.* A second announcement informed new hires what time the harvest would begin. *Id.*

Complainant contends that potential employees who arrived at Zabala to obtain employment and to present documentation were required by Respondent to show both a resident alien card—colloquially known as a "mica"—and a social security card. The accusation is that by requesting *particular* documents of prospective employees

Zabala engaged in a pattern or practice of discrimination in violation of §1324b–(a)(6).

Respondent denies that it practiced a policy of requesting specific documents. Rather, Respondent asserts that the majority of non-citizen applicants voluntarily specified a mica and social security card on their I–9s; applicants were asked only to show the documents already entered on the I–9s to verify the information provided by them. As such, Respondent asserts that it did not engage in discrimination in violation of §1324b.

In order to prove a pattern or practice of §1324b document abuse, Complainant must establish by a preponderance of the evidence that Respondent more than once requested *more or different* documents than are required in order to verify employment eligibility. *See* 8 U.S.C. §1324b(a)(6) and §1324a(b).[1] At the outset, it should be understood that a §1324b(a)(6) violation does not fit the mold of traditional workplace discrimination. Indeed, to establish liability, it is not necessary that employees who are "discriminated" against experience injury. Rather, there is a violation if an employer requests more or different documents than are required or produced by the applicant, whether or not the applicant is ultimately hired. Therefore, Respondent is in error in asserting that, because OSC "*could not identify*" any victims of Respondent's illegal practice who were denied employment . . . , "there can be no §1324b(a)(6) discrimination. Resp. Closing Br. at 3. It is not critical to every finding of a §1324b(a)(6) violation that job applicants interviewed by an employer are hired. Instead, §1324b(a)(6) discrimination occurs where the employer refuses to accept documents which are facially valid . . . [and insists] that a job applicant provide a specific document in order to establish employment eligibility." *United States v. Strano Farms*, 5 OCAHO 748 at 17 (1995) (citing *United States v. A.J. Bart, Inc.,* 3 OCAHO 538 (1993)). As appears from the ensuing discussion, however, the facts on the record before me do not fit within those OCAHO precedents; there is insufficient proof that Respondent's conduct breached §1324b(a)(6).

[1] Subsection 1 1324b(a)(6) provides that it is "an unfair immigration-related employment practice relating to the hiring of individuals" in violation of §1324b(a)(1) if an employer requests "more or different documents than are required" to satisfy employer sanctions requirements under 8 U.S.C. §1324a(b) or refuses "to honor documents tendered that on their face reasonably appear to be genuine."

To prove that an employer engaged in a pattern or practice of §1324b discrimination generally,

> [a]t the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant.

United States v. Mesa Airlines, 1 OCAHO 74, 508[2] (1989) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 (1977) (footnote omitted)), *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991). OSC's evidence to prove its prima facie case against Zabala essentially consists of (1) the direct testimony of former and current Zabala employees, and (2) an inventory of Forms I–9 and a related statistical analysis to establish that Zabala utilized INS documents in implementation of its §1324a verification obligations.[3]

B. *The Individuals*

OSC's witnesses included former Zabala employees, office personnel and eleven field workers who were allegedly asked for specific documents.[4] The five administrative assistants who testified at hearing were employed at one time or other during the relevant time period, January, 1991 to October, 1994. Katherine Gard (Gard), who worked for Zabala for a year, was in charge of I–9 processing from October, 1992 to September, 1993. Tr. at 63–4. Gard testified that,

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[2] Citations to OCAHO precedents reprinted in Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, as published by the Government Printing Office (1995)) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, *seriatim,* of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

[3] I find unavailing Respondent's argument that its potential liability should be limited to violations occurring only during the 180-day period preceding the filing of the Complaint. OCAHO caselaw makes clear that §1324b(a)(6) pattern or practice cases involve continuing violations, overcoming the §1324b(d)(3) requirement that the cause of action be limited to conduct within 180-days prior to filing an OSC charge. *See, e.g., Strano, 5* OCAHO 748; *A.J. Bart,* 3 OCAHO 358.

[4] Josefa Vargas, Yolanda Jaimes, Raquel Serrano, Rosa Raya Rodriguez, Alberto Maravilla, Esther Ramos, Rosalva Perez, Rebeca Flores, Maria Ramirez, Vitalina Morfin and Flavio Arroyo are the field workers who testified at hearing.

upon examining Zabala's records, she found that employees were being asked for specific documents when filling out I–9 Forms. *Id.* at 35. She told DiGangi "we could not ask for it, and that he needed to have the list of acceptable documents to the I–9s so that people could select whatever documents they wanted to provide." *Id.* at 35–6. Gard also stated that DiGangi "was asking for the green card before they applied, so if they didn't have it, they didn't apply." *Id.* at 62. This was a regular practice at Zabala, according to Gard. *Id.* This is how she described Zabala hiring procedures:

> Q. And Madam, . . . did you see him continue the practice of requiring green cards for hiring subsequent to that initial time?
>
> A. Yes, it was the practice, it was how it was done.
>
> Q. Could you tell us—could you elaborate as to when this was, and can you give us other examples, if you can remember?
>
> A. I don't specifically remember—I remember the one occasion in particular, because we needed some people rather soon, and these people had come up and asked, and Steve did not hire them, didn't even get to any paperwork process because there was no green card.
>
> . . .
>
> Q. Did the practice persist?
>
> A. Not after I was given the hiring practices to handle, then it stopped.
>
> The Court:When was that?
>
> A. I would say October, November of '92 is when Steve said, "Then you handle it." Because I raised enough objections about the practices, that he just delegated to me to deal with it.
>
> . . .
>
> I was allowed to do the hiring until—well, I hired the foreign students, and then when it came time to hire the harvest crew for '93, then Steve [DiGangi] wanted to handle the hiring and wanted to handle it his own way again.

Id. at 62–64.

For the 1993 harvest, Gard's duties were reassigned to Estel Gomez (Gomez), a two-month temporary employee. *Id.* at 356. Gomez testified that:

> A. He told me to get a Social Security card and a green card from the persons, and make copies of them and give them back to them, and attach them to the application.
>
> Q. Did he show you how he—what he wanted you to do?
>
> A. Yes.
>
> Q. How did he show you?

A. He showed me a green card, Social Security card, and then, he told me—he took me over to Vincent who was doing the job before me, before I got there. Then, he instructed him to tell me how to make copies, because I don't know how to make a copy.

Id. at 358.

Gomez' testimony conflicts with that of Vincent Calderon (Calderon), who worked with her and helped process I–9s. Calderon, a Zabala employee since 1990, stated that DiGangi did not specify which documents to request from applicants. *Id.* at 513.

OSC argues that Calderon is not credible because he testified both that he "overheard Mr. DiGangi tell Ms. Gomez to accept whatever documents the job applicants presented . . . " and "that he has never been present when Mr. DiGangi gave instructions as to what type of paperwork to request from job applicants." Cplt. Opening Br. at 4–5, n.3. According to Complainant, "[t]he contradictions in Mr. Calderon's testimony renders it too unreliable to be of use to the court." *Id.* at 5, n.3. At a minimum, however, Calderon was simply confused:

Q. Have you been present when Mr. Di Gangi has given instructions as to what type of paperwork to request?

A. No.

Q. Did he ever instruct, in your presence, that you were—to you or anybody else, was to require that people produce a mica?

A. I don't understand the question.

Q. Do you know what a mica is?

A. Yes.

Tr. at 511. Counsel rephrased his question to Calderon:

Q. Now, has Mr. Di Gangi, in your presence there in that area, given any instructions to anyone as to which documents may be listed that are required to be produced by the prospective company?

A. Yes.

. . .

Q. What did he say?

A. I was working. I was weighing and I just heard him say—talk to Flora Estel.

Q. Flora Estel Gomez?

A. It was right there at the shop where everything was being done.

Q. Your position was right next to where she was?

A. Right next to where she worked.

Q What did you hear?

A. Just telling her that whatever paperwork they gave her, to accept it, that he would take a look at it and actually say whether it's okay or not.

Q. Did he or did he not tell her,"You've got to get the green card from them"?

A. No, no.

Q. Have you ever heard him tell anybody there that they had to get a green card from prospective employees?

A. No.

Id. at 512–13. Calderon's initial difficulty in recalling whether he heard instructions is no basis for rejecting his testimony as he was consistent to the effect that he heard *no* instructions as to specific documents to be produced by new hires.

Whether or not Gomez was instructed by DiGangi to request a mica and social security card, she described the application process as follows:

Q. Would you please describe a typical day at Zabala Vineyards?

A. [T]he people would form a line outside, they would come in and ask for an application, I would give them the application, and then, I would tell them to get their Social security card and a green card so I could make a copy of that. Sometimes they took it, sometimes they filled it out right there, and if they needed help, I could help them fill it out.

Id. at 358–59.

Complainant argues that the testimony of Gard and Gomez illustrates that Zabala systematically required field workers to tender INS-issued documents in order to be hired. In support, Complainant also relies on the testimony of Alberto Magallun (Magallun), of the California State Employment Development Department in charge of monitoring employment practices in Zabala's geographic area. *Id.* at 388–9, 428. Magallun testified that he overheard prospective employees being asked for certain documents:

A. [I] over heard [sic] a conversation as to the fact that I want to see your mica, which is in Spanish, and the green card or the immigration card, and both of those people showed the green card, and the lady on the other side took them and went and made some photocopies of them, and

when she came back, then the next lady came up, and it was the same question asked, "I want to see your mica."

Q. Who was this lady in the shed, was it a worker?

A. I understand she was a clerk that was hired just to do the job.

Id. at 392–93.

Gomez is the clerk mentioned by Magallun. Magallun and Gomez concur that he spoke to her about Zabala's hiring process. *Id.* at 375–6, 393–4. According to Magallun, he explained to Gomez that, by requesting certain documents, Zabala was violating the law, to which she replied, "I'm just doing what Steve asked me to ask, I'm asking the questions, whatever Steve asked me to ask, that's all I'm asking." *Id.* at 393.

I agree with Complainant that the testimony of Gard, Gomez and Magallun indicate that Zabala asked employees to provide micas and social security cards as part of the employment eligibility verification process. However, that conclusion does not predicate a finding that Zabala violated the §1324b(a)(6) prohibition against document abuse.

Consistent with Gard's testimony, I understand the testimony of the field workers to the effect that *they* expected to and did produce the mica because they knew that as a condition precedent to being hired for the grape harvest that was what similar employers expected of them. Of the eleven field workers who testified, only two clearly understood that Zabala expected them to provide their micas and social security cards.

Raquel Serrano (Serrano) testified as follows:

Q. Madam, if you could please tell me, did Mr. DiGangi request you to produce anything else beside [sic] the application?

A. No, he just told us that all we needed was the mica and the Social Security, that we needed that, and then we could start.

Q. Madam, did he talk to you directly in Spanish or did he use a translator?

A. No, they had somebody as an interpreter, somebody that could speak English.

Id. at 310.

Rosa Raya Rodriguez (Rodriguez) testified that DiGangi specifically requested the mica and social security cards. *Id.* at 334–35.

Alberto Maravilla (Maravilla) testified that "they told me I definitely—to bring my mica and my Social Security. . . ." *Id.* at 198. *However*, Maravilla also testified that he was aware of the different documents which were acceptable to prove employment eligibility as listed on the I–9 form. He stated that he "looked at it [the list] for a moment, I was studying it and since I needed the job, *I started to fill it out right away*." *Id.* at 197 (emphasis added). His testimony concluded:

> Q. Well, did you understand that they would accept any of the documents that were listed there?
>
> . . .
>
> A. Yes, I did.

Id. at 197.

By the statements of all eleven and from observation at hearing, their understanding of English was virtually nonexistent. With one exception, even in their native Spanish language, they had only completed the grade school level, or less.[6] It would be unrealistic to expect them not to provide the documents they understood would get them employed—presumably the only documents they had. Indeed, it confounds common sense to suppose that an individual who as a new hire enters or on whose behalf is entered an Alien registration number in Section 1 of the Form I–9 would not be expected to identify in Section 2 of the I–9 the document that bears that number, i.e., the mica. I find that as a matter of convention, new employees identified their A-numbers in Section 1, and produced their micas and social security cards.

The former Zabala field workers each testified to the effect that they produced the mica and social security card at the same time or after filling in that data on the I–9s and the Zabala I–9 formats. I do not understand them to say that they were directed to enter that

[6] *See, e.g., Id.* at 198–9 (testimony of Maravilla, "I do not speak English. I do not read English either. I read Spanish. I just have third grade education"); *Id.* at 211 (testimony of Esther Ramos, "I cannot read or write English. I can write my own signature, I can do a little reading, but not too well in Spanish. I never had any schooling"); *Id.* at 222–3 (testimony of Rosalva Perez, "I cannot read or write in English. Spanish, yes. I have a sixth grade education, I finished grammar school").

data to the *exclusion* of other verification documents. The testimony of Esther Ramos (Ramos) is on point:

> Q. Who issued you the application, ma'am?
>
> A. The lady that was at the shop distributing the applications to all the people that were there.
>
> Q. What did you do next, ma'am?
>
> A. When she gave it to me, I filled it out, and then, I turned it in with my mica, my Social Security number and stuff that you have to turn in.
>
> Q. How did you know to turn in the mica and the Social Security card?
>
> A. *After I filled out the application, I turned it into [sic] the lady that was there, I had written the numbers from the mica and from the Social Security. When I gave her the paper, she looked it over, then she said, "Let me have the mica and the other papers so I can photostat."*
>
> Q. Then, what happened after that, ma'am?
>
> A. I asked her, "Why do you want them now, when I already wrote down the number, look, you can verify that I wrote the exact number." She said, "I need them to get a photo-static copy in case the immigration comes, we can show them that we are not hiring any illegals."

Id. at 201–2 (emphasis added).

Rosalva Perez (Perez) also testified:

> Q. After you got the application, how did you fill it out, what did you do to fill it out?
>
> A. A lady that was there filled it out for me.
>
> Q. Was this lady inside the office, was she working for Zabala or was she another person applying?
>
> A. It was another lady looking for a job also.
>
> Q. *Then, when you returned the application, what happened, what were you asked for?*
>
> A. *My Social security and my mica.*
>
> Q. Did they ask you why they needed you—did they tell you why they needed that?
>
> A. Because they wanted to make a copy of it.

Id. at 213–14 (emphasis added).

Maria Ines Ramirez (Ramirez) testified to similar effect:

A. Well, I just went there and asked for an application, *I took it home and filled it out, then I returned, to turn it in at the office. They received the application and they asked me for my Social Security and the mica.*

. . .

Q. You took the application home that day and when did you return it filled out?

A. That same afternoon.

Q. You turned it into the same lady?

A. Yes.

Q. What did the lady ask you to do; if anything?

A. I arrived there, *I turned in my application, and then, she said*, "Also the mica and your Social Security so I can make copies."

Id. at 233–4 (emphasis added).

The testimony of a majority of the field workers is that applicants at Zabala were asked for specific documents at or *after the time they* filled out the I–9s or the Zabala equivalent formats. It is logical, and the employer's duty, to ask to see the documents listed on the I–9. In addition, these are the documents with which the non-English speaking applicant is familiar; these are the documents each of the witnesses testified they are *always* required to produce in order to obtain employment.[7] Therefore, it would be normal for the field workers to produce such documents in order to establish employment eligibility.

Passim, it is noteworthy that according to the administrative assistants after Gard and Gomez the stress on specific documents abated. Succeeding Gomez, Betty Binsacca (Binsacca), a temporary employee, was the new administrative assistant. *Id.* at 531. Binsacca testified that DiGangi did not require specific documents. *Id.* at 529. Rather, he told her "that when we offer someone a job, we have to be

[7] *See, e.g., Id.* at 210 (testimony by Ramos stating that " in every job that I've gone to, in fact, if you don't show your mica and your Social Security, there's no job"); *Id*. at 221 (testimony by Rosalva Perez stating that "all I know is where I have applied, they have asked me for the mica and the Social Security") *Id*. at 248 (testimony byMaria Ines Ramirez that all employers "ask for the Social Security and the mica"). In addition, DiGangi testified that

A. Documents, papers, identification, it doesn't seem to matter what you ask for, you always wind up with the same.
Q. They still produce a green card?
A. Yes, a green card and a Social security card.

Id. at 506.

sure they can provide us with documentation and that we need one document from list A or one each from—each from list B and C." *Id.* at 528. Binsacca also testified that Maria Ruiz (Ruiz), an office assistant during the harvest months of 1994,[8] had been given the same instructions. *Id.* at 529. Ruiz testified that DiGangi never required certain documents to be produced but agreed that when asked for documentation, applicants usually produced micas and social security cards. *Id.* at 547.

On balance, I conclude that Zabala *expected* the eleven field workers who testified to produce specific documents, and that at most two among them understood that they were to present micas and social security cards. However, I am unable to deduce from their testimony that Zabala workers were asked for more or different documents than they otherwise might have provided. That at certain times, DiGangi's staff asked for specific documents and that even when they did not the new employees almost always used micas and social security cards is not conclusive that they were obliged to present them to the exclusion of other forms of employment verification. There is no proof that job applicants were obliged to present particular documents to the exclusion of others.[9] Moreover, the testimony is not sufficiently clear that any demand for specific documents *preceded* execution of the I–9s. Accordingly, this record does not support finding a violation of 8 U.S.C. §1324b(a)(6).

C. *OSC's Reliance on Statistical Evidence*

OSC relies on the testimony of the field workers and office personnel to establish that Zabala required specific documents not only from the field workers who testified but from a total of 686 employees. OSC relies on document analysis to prove that Zabala engaged in document abuse as to individuals in addition to those who testified. Lawrence E. Mitchell Jr. (Mitchell), an OSC paralegal, testified that he analyzed Zabala's I–9 forms dated January 1, 1991 to October 10, 1994. *Id.* at 457–459. Of the 686 non-citizen I–9 forms, he asserts that 96 percent presented an INS-issued document to establish employment eligibility. *Id.* at 466; Cplt. Opening Br. at 9. According to Complainant, this high percentage proves that Zabala

[8] *Id*. at 543.

[9] Serrano, who applied both in 1991 and 1994, is unclear whether on the earlier application the reason she did not get a call to report for work was because she had failed to tender her mica. *Id.* at 307–30.

requested specific documents from all 686. Complainant asserts that Mitchell's analysis is bolstered by the fact that, during the time that Gard was in charge of the I–9 process, non-citizens volunteered their INS-issued documents only 50 percent of the time. Cplt. Opening Br. at 10 (citing Tr. at 119). Furthermore, Complainant states that "during a recent hire of 720 agricultural employees at another employer, Ms. Gard observed that only 50% volunteered their INS-issued documents." Cplt. Opening Br. at 10 (citing Tr. at 118).

I disagree with Complainant that, by toting up which documents are listed on 686 Forms I–9, a deduction can be drawn as to whether new hires were asked for specific documents. Given the employment environment it is just as likely that they voluntarily submitted INS-issued documents in order to establish employment eligibility. While I do not agree, looking at Zabala's I–9s, that "heroic efforts to inform workers of their choices"[10] were made, I also do not conclude that a violation of §1324b(a)(6) is proven.[11] OSC's analysis provides an insufficient basis for finding by a preponderance of evidence that 686 applicants were required, prior to filling out I–9s, to exhibit their resident alien and social security cards. Indeed, as no I–9s were signed by Gard or Gomez, there is no reason to extrapolate from the testimony of the field workers that any others were even asked to produce the mica and social security card.

Moreover, Gard's testimony that there was a lower percentage of micas and social security cards presented at another and similar enterprise is not probative as to whether Zabala engaged in document abuse. What is persuasive as explained by former Zabala field workers is that they routinely produce the mica and social security cards as proof of employment eligibility. *See, supra* note 7. It is reasonable to suppose that one or another of the authorized §1324a documents are more likely to be produced than others. Similarly, although Zabala's cannibalized Forms I–9 are woefully deficient for employment eligibility verification purposes, their use in this case

[10] Resp. Closing Br, at 6.

[11] "Statistical evidence is not usually sufficient by itself to establish a *prima facie* case," *United States v. General Dynamics Corp.*, 3 OCAHO 517 at 39 (1993) (citing to *Employment Discrimination Law* 485 (Supp. 1989)). In addition to the reasons stated above, because the factual premise on which the statistical compilation in this case differs significantly from that relied on by the judge in *Strano Farms,* 5 OCAHO 748, where a number of individuals in the relevant applicant pool were United States citizens, I am not persuaded of a reason to rely on the statistical compilation.

does not establish by a preponderance of evidence that Zabala discriminated against applicants by engaging in a pattern or practice of overdocumentation.

D. *Other §1324b(a)(6) Cases Distinguished, and Concluding Analysis*

The result in this case conflicts with both *Strano Farms*, 5 OCAHO 748, and *A.J. Bart,* 3 OCAHO 538, where the administrative law judges (ALJ) found document abuse based on cumulative evidence including testimony that analysis of Forms I–9 showed that employers requested specific and *additional* documents from applicants.

In *A.J. Bart*, the charging party, Romelia Colon (Colon), upon whose charge the case was initiated, testified that when hired, she filled in Section 1 of the Form I–9 only; Section 2 she left blank. The employer *then* requested specific documents in order to complete Section 2. When Colon could not produce these documents, Respondent requested other specific documents. When Colon could not produce these either, she was terminated. The judge in *A.J. Bart* 3 OCAHO 538 at 13, referred to *Jones v. DeWitt Nursing Home*, 1 OCAHO 189, 1235 (1990)—which preceded enactment of §1324b(a)(6)—as finding that an employer's insistence on a specific document "at the risk of loss of employment after the employee had provided adequate documentation" was a per se violation of §1324b, on the basis of which he found that insistence on a birth certificate to the exclusion of a tendered passport was a violation of §1324b. That scenario is in contrast to Zabala where specification of certain documents accepted by the employer in order to verify employment eligibility was incidental to employment, not rejection.

In *Strano,* the ALJ determined that otherwise valid employment documents tendered by applicants were rejected by the employer because only certain documents were accepted to verify employment. Unlike *Strano,* there is no suggestion on the present record that Zabala rejected documents offered by applicants, nor did it request additional or other documents than those proffered. Unlike *Strano* where the judge found that aliens were asked for different documentation than was forthcoming from United States citizens, in the present case there is no evidence that any individual embraced by the Complaint was treated differently than any other job applicant.

Where, as in the case of Zabala, the proof discloses that the individuals on whose behalf the Complaint was filed were not denied

employment, it is necessary to inquire whether the public interest in securing a discrimination-free workplace is furthered by *assuming* that §1324b reaches such a situation.

This case does not address §1324b(a)(6) obligations of employers to avoid *selectively* requiring new hires to identify and produce one or another specific document, e.g., as by treating aliens differently than other prospects. Rather, it holds that §1324b(a)(6) is not breached in the absence of evidence that (a) aliens but not other new hires were required to rely on and produce specific documents incidental to employment eligibility verification without first having identified them sua sponte, and in the further absence of evidence that (b) new hires were routinely asked to produce specific documents in default of which they were not hired.

As early OCAHO precedents demonstrate, I have long been aware of the gravity of demanding specific documents to satisfy an employer's I–9 obligations, and refusing to employ or discharging those who fail that demand. *See U.S. v. Marcel Watch Corp.,* 1 OCAHO 143, 988 (1990); *Jones v. DeWitt Nursing Home*, 1 OCAHO 189. Similarly, it is understood that invidiously to discriminate between aliens and others in the labor pool of those authorized for employment in the United States is precisely what §1324b, particularly §1324b(a)(6) is intended to prohibit. *See U.S. v. Guardsmark,* 3 OCAHO 572 (1993) (Order denying Respondent's Motion for Summary Decision). That Order, holding that subsection (a)(6), added to §1324b by §535 of the Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4978 (IMMACT 90), prohibits document abuse against any work authorized individual, and not only against "protected individuals" as urged by the employer, provides insightful references to source materials which underlie the IMMACT 90 enactment of (a)(6). Thus, §1324b(a)(6) builds not only on *Marcel Watch* and *DeWitt Nursing Home,* but as suggested by *Guardsmark,* is informed also by the General Accounting Office (GAO) report B–125051 (1990), required by 8 U.S.C. 1324a(j), and by the Report of the Task Force on IRCA-Related Discrimination, mandated by §1324a(k).

The case at hand, not *Guardsmark, A.J. Bart*, or *Strano Farms,* is the first adjudication to confront an administrative law judge with the question whether an employer's demand for production of specific documents is outlawed by §1324b(a)(6). For the reasons already discussed, I am not persuaded by a preponderance of the evidence that such a demand was imposed on all of Zabala's new hires em-

braced by the Complaint. But in any event, the GAO and Task Force reports make clear as does the text of §1324b(a)(6) that it is "more or different documents" and not "specific" documents that are beyond the pale, at least where no one embraced by the Complaint is denied employment. I so hold.

There is precious little legislative history undergirding enactment of §1324b(a)(6), but there can be no doubt in context of the GAO and Task Force Reports that the seminal problem to be addressed was that of "employers' refusal to accept or uncertainty about, valid work eligibility documents." GAO Report at 86. As summarized by the Task Force, "Employers must understand that . . . [r]ejecting individuals who have proper documentation of their work eligibility is a violation of IRCA, and rejecting some kinds of employment verification documents but not other kinds or demanding additional documents from certain individuals is a violation of IRCA." Task Force report at 51–52.

On the pre-IMMACT 90 landscape, neither GAO, the Task Force, *Marcel Watch* nor *DeWitt Nursing Home* instruct that for an employer to demand specific documents while not rejecting other documents is the equivalent of demanding more or different documents. IMMACT 90 did not change that picture. Resolving affirmatively the question whether §1324b(a)(6) pertains to all individuals authorized to work in the United States *whether or* not they are "protected individuals" as defined in subsection b (a)(3), *Guardsmark* provides this assist to the analysis for the present case:

> The only specific mention of 8 U.S.C. §1324b(a)(6) in the Conference Report created when IMMACT was passed appears to be a discussion, in a separate section which was later deleted from the IMMACT, of the use of a biometric driver's license as an additional work authorization document. In addressing fears that this biometric driver's license would become the exclusive method to establish work eligibility, the Conference Report stated:
>
> > This provision is not intended to be the exclusive means by which an individual may establish the individual's identity and authorization to work. In fact under section 535 of the Conference Report [later codified at 8 U.S.C. §1324b(a)(6)] an employer who does not accept a document that reasonably appears to be genuine and that is among the list of documents that can be used to establish either identity or work authorization, or both, may be subjected to significant administrative fines.
>
> H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 133–134 (1990).

In light of all the foregoing, I do not understand that the statutory term "more or different" embraces "specific." As we have seen, the historic predicates for §1324b(a)(6) do not support such a broadening of the statutory terminology. These are simple words; had Congress intended to reach the practice alleged in this case, it could have said so easily. I therefore conclude that the statutory prohibition against an employer's request "for more or different documents" or "for refusing to honor documents tendered that on their face appear to be genuine" does not per se prohibit a request for specific documents, at least where those documents are in fact routinely presented in anticipation of such request or on demand.[12]

Zabala's call for applicants asked them to bring work authorization documents, not specific documents. The evidence that upon arrival at Zabala some of them were asked to present their mica aborted and social security cards is understood in context of their obligation to make appropriate entries in Section 1 of the Form I–9. Given the historic background which informs subsection (a)(6), I have no reason to assume that the statute reaches the facts of this case. Here, where none of the individuals on whose behalf the Complaint was prosecuted were refused employment and no distinction is proven as to documents requested of them and of other applicants, I find a total failure of proof that §1324b–(a)(6) was violated.

This case stands for the proposition that (a)(6) does not intrude on hiring practices for purposes unrelated to overcoming discrimination in the workplace. Eliminating discrimination is what §1324b, including subsection (a)(6), is all about. Section 1324b is an expression of national policy which addresses the evil of exclusionary hiring practices. No one was excluded here. To find liability on this record would not serve that national policy.

This case calls for a word about Complainant's practice of shielding until the confrontational evidentiary phase of the hearing process the number and identification of individuals—other than those who testified at hearing—on whose behalf the Complaint is filed. On presenting its case at hearing, and on brief, OSC indulges in the luxury of viewing a pattern or practice cause of action as in the nature of a class action. I am unaware, however, that the admin-

[12] This case does not reach the situation where there is a preponderance of proof–or where it is implicit–that but for producing the requested documents, the hire would have aborted.

istrative law judge is empowered to entertain a class action. *See Walker v. United Air Lines, Inc.*, 4 OCAHO 686 at 46, n.31 (1994). Accordingly, OSC should be prepared in future cases, at a minimum well before hearing if not at the time of filing its complaint, to identify with particularity the number and identity of all individuals on whose behalf a pattern or practice complaint is premised.

III. Ultimate Findings, Conclusions and Order

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

1. that Complainant has failed to prove by a preponderance of the evidence that Respondent engaged in a pattern or practice of document abuse in violation of 8 U.S.C. §1324b(a)(6);

2. that Respondent has not engaged in the unfair immigration related employment practices alleged in the Complaint with regard to the individual Complainants;

3. that the Complaint is dismissed.

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and shall be final unless appealed not later than 60 days in the appropriate United States court of appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated and entered this 13th day of December, 1995.

MARVIN H. MORSE
Administrative Law Judge