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

United States of America, Complainant v. Hilario Rodriguez, Jr., Respondent; 8 U.S.C. § 1324a Proceeding; Case No: 90100185.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History

On June 7, 1990, the Immigration and Naturalization Service (INS) filed a complaint with the Office of Chief Administrative Hearing Officer charging Respondent, Hilario Rodriguez, Jr., with three-hundred and eighty-six (386) violations of section 274A (a)(l)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B).

The Complaint alleged that Respondent had failed to prepare and/or failed to make available for inspection the employment eligibility Form I-9 for 386 named individuals and sought a fine of $193,000.00.

On June 27, 1990, Respondent filed its Answer alleging, inter alia, six affirmative defenses: (l) Some of the 386 persons (listed in Complaint) alleged to have been employed by Respondent in 1989 without Forms I-9 in violation of 8 U.S.C. §1324a did not work for Respondent in 1989 (2) Some of the persons on said list were employed for Respondent prior to November 1986, and their employment continued into 1989; (3) Complainant's list of 386 persons listed is allegedly made up of persons listed on Respondent's payroll for 1989 for which no Form I-9 could be found by the Immigration and Naturalization Service. In many instances, an individual was listed more than once, by having his/her name listed twice, or by being listed under two or three different names, on said payroll of respondent; (4) In some cases, the middle and last names were transposed on the payroll or Form I-9, or the name was misspelled on the payroll or Form I-9; (5) Some of the 386 persons on the list worked for Respondent less than three days in 1989, and some less than one day; and (6) The fine asked for is excessive, unfair, and oppressive.

On September 24, 1990, Complainant filed a Motion for Summary Decision, which sets forth in separately labeled paragraphs its various arguments why summary decision should be granted.

Respondent filed its Response to Complainant's Motion for Summary Decision on November 15, 1990. In its Response, Respondent sets forth its various arguments why summary decision should not be granted in paragraphs corresponding to the paragraphs in Complainant's Motion.[1]

In hopes of providing a clear understanding of the various matters addressed in the above pleadings, I will analyze the parties' arguments in a manner corresponding to the parties' own pleadings, i.e. different groups of violations addressed in labeled paragraphs and make findings of fact and conclusions of law.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. section 68.36 (1989)(emphasis added); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555,91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (lg86); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an

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1 Respondent's Response has attached thereto, inter alia, a "List of alleged violations with color-coded explanations," declarations of Jose Jaramillo, Michael Gragnani, Frank Ruiz, and Hilario Rodriguez, Jr. The color-coded explanations are divided into seven separate categories, each category is assigned a color: (1) Thirty-one violations for employees who worked three days or less in 1989 (orange); (2) Forty-three violations were for employees who worked for Respondent prior to November 6, 1986 (blue) (3) Eight violations were for persons whose names appeared twice or more on payroll and only one I-9 was prepared and submitted (pink) (4) Three violations were for persons whose names appeared once on the payroll, but the I-9 was prepared and presented in a name spelled differently (pink) (5) Five violations where the employee name on payroll and on I-9 were identical, I-9 presented, but apparently overlooked by Border Patrol (bright yellow); (6) Thirteen violations -- valid I-9s prepared-possibly presented (yellow) and (7) Thirteen violations -- incomplete I-9s in possession of counsel and none presented (green).

evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

In other words, summary decision will be granted only if the record, when viewed in its entirety, is devoid of a genuine issue as to any fact that is outcome determinative. See, Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 480 ("An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided."). A fact is "outcome determinative" if the resolution of the fact will establish or eliminate a claim or defense if the fact is determinative of an issue to be tried, it is "material." Id.

Rule 56(c) of the Federal Rules of Civil Procedure also permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 P.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (". . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment."); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D; Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/ summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be "particularized" in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) ("...the standard of 'well controlled investigations' particularized by the regulations is a protective measure designed to ferret out ... reliable evidence . . ..).

III. Findings of Fact and Conclusions of Law

A. Complainant's argument in Para. B.l.a. of its Motion for Summary Decision:

Complainant states under Heading B.l.a. that Respondent failed to prepare and present Forms I-9 £or for the following 31 listed employees:[2]

12. Jose R. Amaya
37. Jose Barrera
38. Rene Barrera
69. Rutilio Castro
71. Ma. Gloria De La Cerda
74. Simon Chavez
75. Joel Checa
77. Domingo Corales
78. Isaias Corona
79. Martin Corona
88. Dionicio Diaz
127. Adan Gomez
128. Angel Gomez
134. Justo Gonzalez
138. Gustino Guesca
161. Elias Juarez
171. Felix Lopez
179. Rene Lozano
193. Agustin Martinez
199. Paula Martinez
218. Jesus Millian
259. Agripina De Paz
306. Jubenal Rodas
308. Mauricio Rodas
324. Antonio Sagrero
325. Ignacio Saldana
340. Ramon Sandoval
343. Roberto Santiago
360. Gabriel Thomas
379. Victor M. Velasquez
384. Ruby Villasenor

Complainant argues that its Motion for Summary Decision should be granted as to these 31 employees because Respondent admitted, in its answers to "Requests for Admissions," that each of these employees was (1) hired for employment in the United States by Respondent; (2) hired after November 6, 1986; (3) that Respondent failed to prepare a Form I-9 for the employee; and (4) Respondent failed to present a Form I-9 for inspection when requested by INS agents.

In opposition, Respondent argues that these employees "worked three days or less in 1989; and he believed no Form I-9 was required." (These violations are identified on Respondent's color chart in orange.) He also argues that it is often impossible to have the Form I-9 completed and signed in less than three days of the commencement of employment. Respondent concludes by stating that, "although this may not be a defense, it is asserted here in mitigation."

Respondent does not dispute that these 31 employees were employed by him after November 6, 1986, or that Form I-9s were not prepared and/or presented to INS for these employees. Moreover, there is no dispute between the parties that these 31 individuals worked for Respondent less than three days during 1989. There is, therefore, no dispute as to any material facts relating to these al-

[2] The names and numbers listed below correspond to those in the Complaint.

leged violations. The issue that must be decided in order to rule on the Motion for Summary Decision is whether or not Respondent was required by statute or regulation to prepare and/or present I-9s for these 31 employees who worked less than three days during 1989. The regulations relating to the requirements for preparing and presenting Forms I-9 for employees working less than three days supports a finding that Respondent violated the verification requirements of the Immigration and Reform Control Act of 1986 (IRCA).

The individual who is hired, recruited or referred must complete Part 1 of the Form I-9 not later than the first day of work. This is called "the time of hire" in the regulations. See 8 C.F.R. § 274a.2(b)(1)(i)(A) and 8 C.F.R. § 274a.1(c). The employee is given three business days from the commencement of employment to produce the documents for the inspection by the employer. The employer has until the end of the three business days to complete Part 2 of the Form I-9. See 8 C.F.R. § 274a.2 (b)(l)(ii), (iv).

An exception to the aforementioned requirement that the Form I-9 be completed within three (3) business days is provided for those situations in which employment will last less than three business days. In such situations, the employer is required to review documents and complete the Form I-9 no later than the end of the employee's first day at work. See 8 C.F.R. § 274a.2(b) (1)(iii).

Respondent has admitted that it did not prepare Form I-9s for these 31 employees because he did not think one was required. Under the regulations this is clearly not an affirmative defense but may be considered as mitigation. Since Respondent admits liability and neither the statute nor the regulations provide it with an affirmative defense for failing to complete Forms I-9 for these 31 employees, the Complainant's Motion for Summary Decision as to these employees is granted.

B. Complainant's argument in paragraph B.l.b.

Complainant argues that Respondent erroneously claims "grandfather" status for the following forty-three employees:

5. Juan L. Aguirre	110. Erica Garcia
10. Ramon Andres Alvarez	114. Juan L. Garcia
15. Ramon Angulo	119. Pascual Garcia
16. Ramiro Aparicio	119. Ramon Garcia
18. Angel Aquino	120. Agustin Gonzalez
35. Marcos Barajas	131. Carmen Gonzalez
39. Juan Barrios	131. Eriberto Gonzalez
41. Agustin Barron	136. Sebastian Gudino
47. Humberto Brito	142. Arnulfo Hernandez
83. Angel Cruz	148. Gildardo E. Hernandez
85. Juan Delgadillo	151. Pedro Hernandez

87. Alejo Diaz
91. Jose Julio Diaz
109. Emeterio M. Garcia
200. Ricardo Martinez
212. Avelino Mendoza
216. Alberto Meza
223. Jaime Morales
232. Ignacio Moreno
236. Apolinar Torres Munoz
239. Guadalupe Negrete
280. Anatalio Ramirez
175. Miguel Lopez
196. Martin Martinez
198. Pascual Martinez
285. Jorge Ramirez
310. Alberto Rodriguez
314. Guadalupe Rodriguez
317. Miguel R. Rodriguez
321. Adrian Ruiz
329. Andres Sanchez
332. Jose F. Sanchez

Complainant argues that Respondent has admitted that he operated a farm labor contracting service. Complainant further argues that all the employees named in the Complaint were seasonal agricultural workers (SAWs). Complainant further argues that this fact is supported by an examination of the Employee Check Details printout for each of these 43 employees, which shows a repetitive pattern of sporadic, irregular work throughout the year. This irregularity, Complainant argues, is due to the seasonal nature of agricultural labor. Complainant further argues that Respondent's statement to investigating agents that "it was his established practice to hire such a great number of employees (over 1,700 in 1989) in order to meet the seasonal agricultural labor demands" supports its position that these 43 employees were SAWs.

Complainant further argues that the "pre-enactment exemptions for employers from the penalty provisions of section 274A(e) and (f) of the Act for violations of section 274A(a)(2) and (b) are not available for seasonal employees." This is because "seasonal employment is the only class of employment specifically mentioned in the regulations as being excluded from pre-enactment exemption." Complainant cites 8 C.F.R. § 274a.7(a) and (b) in support of its argument.

Respondent does not dispute the fact that these 43 employees were SAWs. Instead, Respondent makes two arguments against granting Complainant's Motion for Summary Decision as to these 43 employees. (These violations are color-coded blue on Respondent's chart.) First, Respondent argues that the 43 employees listed on pages 12 and 13 of Complainant's Motion worked for Respondent prior to November 6, 1986. Respondent further argues that the Handbook for Employers states that employers do not have to fill out a Form I-9 for persons hired prior to November 7, 1986. Respondent then points out that "employment" is considered to be continuing notwithstanding a layoff because of "lack of work" citing to 8 Regs 274, page 345 of Pocket Part Section C (sic). I construe this argument to mean that Respondent did not have to fill out the Form I-9 for

these 43 employees because they were "grandfathered" and/or because the employees had every expectation of continuing employment.

Respondent's second argument is that it told Jose Jaramillo, an employee of Respondent, to complete Forms I-9 for these 43 employees, and he did. In support of this argument, Respondent has submitted the affidavit of Jose Jaramillo.

Although I agree, for the reasons stated below, that these 43 employees were SAWs and the "grandfather" provision of the statute does not apply to them, I do find that there is a material issue in dispute regarding whether or not the Forms I-9 were prepared and presented to INS agents.

The penalty provisions set forth in section 274A(e) and (f) of the Act for violations of section 274A(a)(2) and (b)A of the Act (paperwork violations) shall not apply to the "continuing employment" of an employee who was hired prior to November 7, 1986. See 8 C.F.R. § 274a.7. This is the so-called "grandfather" clause of IRCA.

An employee hired prior to November 7, 1986 will lose his/her pre-enactment status ("grandfather" status) if the employee either quits, is terminated by the employer ("the term termination shall include, but is not limited to, situations in which an employee is subject to seasonal employment."), or is excluded or deported from the United States. See 8 C.F.R. § 274a.7(b).

With respect to the 43 individuals named in paragraph B.l.b, I must determine whether a seasonal agricultural worker who was employed prior to November 7, 1986, but was not on the payroll on that date or left the employer's employ after November 6, 1989, and later returns to work, is a "grandfathered" employee? The answer seems to depend upon whether the employee is considered to be returning to "continuing employment" or is considered to be a new hire or a rehired employee. However, as Complainant correctly states, the regulations specifically eliminate seasonal agricultural workers (SAWs) from the "grandfather" provision of IRCA.[3]

Under the regulations, seasonal agricultural workers hired prior to November 7, 1986, and who "return" to the same employer on a seasonal basis, are clearly not considered to be returning to "continuing employment"; rather, they lose their "grandfather" status when they are terminated by their employer. See 8 CFR § 274a.7(b). The very nature of the work, as suggested by the regulations,

[3] At least one legal commentator has questioned whether or not the inclusion of seasonal employment under 8 C.F.R. 274a. 7(b)(2) is consistent with an exception for "continuing employment," because "many seasonal employees have every expectation of continuing employment." See H. Ronald Klasko and Hope Frye, Employers Immigration Compliance Guide, section 3.07(4)(a) n.l7 (1988).

precludes seasonal agricultural workers from the "grandfather" provision of IRCA because the work is not "continuing." Thus, Respondent's first argument fails. He cannot avoid liability on these 43 employees by asserting the grandfather provision because these employees were SAWS which are not subject to the "grandfather" exemption.

However, Respondent's second argument that its employee, Jose Jaramillo, was instructed to complete the Forms I-9 and did complete them for the forty-three (43) individuals addressed in paragraph 8.1.b., does raise an issue of material fact as to those 43 employees.

In his signed declaration, Mr. Jaramillo explains that one of his main responsibilities in 1989, as Respondent's employee, was to prepare Forms I-9. He devoted "almost full time to the" task. In addition, while he admits that he did not complete Forms I-9 for thirty-one (31) of Respondent's employees, Mr. Jaramillo states that, "as to the remaining 355 (386 minus 31) persons, my instructions were to prepare I-9's (sic), and I did so." Lastly, Mr. Jaramillo explains that, "to the best of my knowledge, I-9's were presented by Hilario Rodriguez, Jr. and myself to the Border Patrol on October 10, 1989 for all 386 except for . . . 44 persons." The forty-four (44) persons for whom Forms I-9 were admittedly not presented are not among the 43 individuals discussed herein.

Mr. Jaramillo also states in his declaration that some employees "resist giving time to the I-9 process," thus possibly indicating that some of the Forms I-9 for the 43 individuals at issue were completed. Yet, construing Respondent's evidence in its most favorable light, the declaration of Jose Jaramillo directly contradicts Complainant's allegation that Respondent failed to prepare and/or present for inspection the Forms I-9 for the 43 individuals, thus raising a genuine issue of material fact.

Accordingly, Complainant's Motion for Summary Decision as to the above 43 individuals is denied.

C. Complainant's argument in paragraph B.l.c.

Complainant argues that summary decision should be granted for the following six employees listed in the Complaint: Nos. 44. Santiago Billela, 172. Francisco A. Lopez, 173. Jose Luis Lopez, 230. Norma Morales, 260. Simon Pedro, and 262. Jose Moreno Perez, because Respondent "admitted" that he did not prepare or present for inspection when requested Forms I-9 for these individuals.

Although Respondent denies that he hired the six named employees or that they were hired after November 6, 1986, Complainant points out that "the names of these six, and their qualifying

employment status was derived from Respondent's own records."

Respondent argues that, "[t]here are instances where the same person appeared twice on the payroll with the name spelled differently, or the middle and last names transposed, or even spelled the same. Only one I-9 would be prepared for this person, leaving the other names for the same person not covered by an I-9 and resulting in an incorrect charged (sic) Respondent lists eight names from the Complaint wherein this occurred, but his list does not include Norma Morales, No. 230 (These eight violations are color-coded pink) (No. 230. Norma Morales is addressed infra, Sechone.).

With respect to the eight named individuals (which Respondent has color-coded pink), Complainant's Motion shall be denied, because there is a dispute as to whether or not Respondent hired these eight individuals as identified in the Complaint, **or** whether or not a Form I-9 was prepared for them in another name.

Respondent next states that the information on the Forms I-9 is correct, but that its payroll records are not accurate because many of its employees "give false names so that they can fraudulently draw unemployment insurance benefits and wages at the same time." In this regard, Respondent argues that violation No. 105 (Thomas Manuel Prancisco) is "caused by payroll error, not failure on the part of Respondent to prepare and present I-9s." Since Respondent is disputing whether or not a Form I-9 was prepared for the individual, Thomas Manuel Francisco, Complainant's Motion for Summary Decision as to violation No. 105 is denied.

Respondent also argues that "there are instances when a violation is charged, even though a valid I-9 was submitted to the Border Patrol but overlooked by them. They are violations numbered 34, 46, 72, 165, and 192" in the Complaint. (These employees are color-coded "yellow.") Since there is a dispute over a material fact with respect to these violations, Complainant's Motion for Summary Decision as to violations numbered 34, 46, 72, 165 and 192 in the Complaint is denied.

D. Complainant's argument in paragraph B.l.d.

The government argues that Respondent admitted hiring the following twelve employees, as listed in the Complaint: Nos. 22. Jesus D. Arevalo; 24. Osmin Argueta 145. Eladio Hernandez; 156. Jose Luis Huerta; 158. Jose Jimenez; 237. Socorro Najera; 281. Andres Ramirez; 286. Jose R. Ramirez; 327. Jenaro R.Salinas; 351. Atanasio Solorio, and 362. Ernesto Tinoco. The government further argues that Respondent admitted hiring all of them, except Ernesto Tinoco, after November 6, 1986.

Complainant next makes a well-reasoned argument that Re-

spondent failed to prepare or present for inspection the Forms I-9 and, therefore, either the forms do not exist or they were prepared but not presented for inspection, which is still a violation.

In its response, Respondent argues that it prepared a Form I-9 for the 12 individuals, plus one other (No. 152). (These are colored-coded bright yellow on Respondent's Exhibit A.) Moreover, Respondent states that "these I-9s are in the possession of counsel for Respondent (apparently complete) and they are not "red stamped" as having been received by the border patrol." Respondent further argues that "either this was an inadvertent mistake by the Border Patrol or they were inadvertently not presented to the Border Patrol."[4] Respondent thus raises a dispute over whether or not it actually presented the Forms I-9 to the government agents.

I, therefore, find that there is a dispute over a material fact with respect to these 13 identified employees and deny Complainant's Motion for Summary Decision as to those violations.

Respondent, however, also admits in this section of its argument that its counsel has possession of 13 incomplete I-9s not presented at the inspection by border patrol agents covering another thirteen employees (colored "green" on its exhibit A). These 13 violations relate to the individuals identified in the Complaint as Nos. 3. Cecilia Aguilar; 91. Jose Julio Diaz; 124. Francisco Godines; 134. Justo Gonzalez; 143. Carlos E. Hernandez; 185. Raul R. Madrigal; 214. Juan G. Mercado; 246. Maria Oliva; 261. Simon Juan Pedro; 289. Simon Pedro Ramirez; 292. Antonio Raymundo; 335. Urbano Sanchez; and 358. Hedilbertgo Soto. I find that, with respect to these 13 violation, there is no dispute as to any material facts because of Respondent's admissions and grant Complainant's Motion for Summary Decision.

E. Complainant's argument with respect to Paragraph B.l.e.

Complainant, in this section of its motion, addresses the remaining 293 employees named in the Complaint. Complainant points out that Respondent stated (in its answer) that "he has insufficient information to admit or deny that he failed to prepare and present Forms I-9 to INS for inspection when requested." Complainant further points out that Respondent has "admitted hiring each of the 293 employees for employment in the United States after November 6, 1986."

[4] This statement is somewhat inconsistent with the declaration of Jose Jaramillo who states that "the I-9s were prepared for these 13 employees but inadvertently not presented." Thus admitting liability for these 13 employees.

Complainant makes a detailed and persuasive argument to support its contention that Respondent did not prepare or present Forms I-9 for these employees. But the question at this stage of the proceeding is not whether or not I find Complainant's argument persuasive, but whether or not there are material facts in dispute relating to the preparation and presentation of the Forms I-9 for the 293 employees listed in the Complaint.

Respondent, under section (e) of its Response to Complainant's Motion for Summary Decision, does not clarify the issue. However, in its conclusion, Respondent does provide a detailed defense to liability on all the charges in two ways. First, Respondent color codes explanations for 117 of the charges and argues that its explanations are exculpatory for all but 31 of these violations.

Second, he argues that, with respect to the remaining 269 violations, "(1) the names for each violation came directly from a faulty payroll. In cases where its shows a false name, an I-9 in the true name would not match up to the false payroll name and an incorrect violation would result; (2) because of the tremendous volume, some I-9s were presented, but inadvertently not connected to a true and correct payroll name, resulting in an incorrect violation charged; (3) some of the I-9s presented were misplaced or inadvertently mixed in with the I-9s from other employers in the possession of the Border Patrol and (4) over 40 hours have been spent in reviewing the payroll and I-9s, and this effort is continuing in the hope that more specific explanations will be uncovered for these 269 alleged violations (to repeat, it is Respondent's position that for this group, I-9s were prepared and presented, although it is conceded that to date, they have not been found").

Respondent's varied assertions in its conclusion clearly shows that there are material facts in dispute as to those violations not previously covered herein. I, therefore, find that with respect to those violations <u>not</u> specifically covered in paragraphs (a) through (d) above there are material facts in dispute, and therefore deny Complainant's Motion for Summary Decision as to these remaining violations.

F. <u>A Civil Monetary Penalty</u>

In view of the fact that I have granted a partial summary decision as to some of the violations alleged in the Complaint, I can determine an appropriate civil monetary penalty as to those violations.

However, I will defer making a finding on an appropriate civil penalty until I have heard all the evidence in this case, including testimony relating to mitigation. It is my view that deferring a de-

termination of appropriate penalty is preferable because there are significant differences in how the parties view the mitigating factors and in what they believe is an appropriate penalty in this case, and since there are numerous violations alleged in the Complaint that must be litigated.

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. That, as previously found and discussed, no genuine issue of material fact has been shown to exist with respect to the following numbered violations in Count I of the Complaint:

3. Cecilia Aguilar
91. Jose Julio Diaz
124. Francisco Godines
134. Justo Gonzalez
143. Carlos E. Hernandez
185. Raul R. Madrigal
214. Juan G. Mercado
246. Maria Oliva;
261. Simon Juan Pedro
289. Simon Pedro Ramirez
292. Antonio Raymundo
335. Urbano Sanchez
358. Hedilbertgo Soto

12. Jose R. Amaya
37. Jose Barrera
38. Rene Barrera
69. Rutilio Castro
71. Ma. Gloria De La Cerda
74. Simon Chavez
75. Joel Checa
77. Domingo Corales
78. Isaias Corona
79. Martin Corona
88. Dionicio Diaz
127. Adan Gomez
128. Angel Gomez
134. Justo Gonzalez
138. Gustino Guesca
161. Elias Juarez
171. Felix Lopez
179. Rene Lozano
193. Agustin Martinez
199. Paula Martinez
218. Jesus Millian
259. Agripina De Paz
306. Jubenal Rodas
308. Mauricio Rodas
324. Antonio Sagraro
325. Ignacio Saldana
340. Ramon Sandoval
343. Roberto Santiago
360. Gabrial Thomas
379. Victor M. Velasquez
384. Ruby Villasenor

Therefore, pursuant to 28 C.F.R. §68.36, complainant is entitled to Summary Decision on these specified violations of the Complaint.

2. That Respondent violated 8 U.S.C. §1324a(a)(1)(b) in that Respondent hired, for employment in the United States, the individuals identified in Count I as follows:

12. Jose R. Amaya
37. Jose Barrera
38. Rene Barrera
69. Rutilio Castro
71. Ma. Gloria De La Cerda
171. Felix Lopez
179. Rene Lozano
193. Agustin Martinez
199. Paula Martinez
218. Jesus Millian

74. Simon Chavez
75. Joel Checa
77. Domingo Corales
78. Isaias Corona
79. Martin Corona
88. Dionicio Diaz
127. Adan Gomez
128. Angel Gomez
134. Justo Gonzalez
138. Gustino Guesca
161. Elias Juarez
259. Agripina De Paz
306. Jubenal Rodas
308. Mauricio Rodas
324. Antonio Sagrero
325. Ignacio Saldana
340. Ramon Sandoval
343. Roberto Santiago
360. Gabriel Thomas
379. Victor M. Velasquez
384. Ruby Villasenor

3. Cecilia Aguilar
91. Jose Julio Diaz
124. Francisco Godines
134. Justo Gonzalez
143. Carlos E. Hernandez
185. Raul R. Madrigal
214. Juan G. Mercado
246. Maria Oliva;
261. Simon Juan Pedro
289. Simon Pedro Ramirez
292. Antonio Raymundo
335. Urbano Sanchez
358. Hedilbertgo Soto

without complying with the verification requirements in section 274A(b) of the Immigration and Nationality Act, 8 U.S.C. §1324a (b) and 8 C.F.R. §274a.2.(b), and/or without complying with the retention of verification forms of section 274A(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. 274a.2(b)(2)(ii).

3. That all the remaining violations in Count I present genuine issues of material fact which require an evidentiary hearing, and therefore Complainant's Motion for Summary Decision is denied as to all the remaining violations in Count I.

4. That there are genuine issues of material facts as to mitigation of penalty for all the violations alleged in Count I.

Based upon my findings of fact and conclusions of law, it is hereby ORDERED that an evidentiary hearing shall be held on March 11, 1991, at Fresno, California, to determine the issue of liability on all violations alleged in Count I, except those for which I have granted summary decision and to determine the issue of appropriate civil monetary penalty for all violations.

I further ORDER the parties to present relevant evidence as to the mitigating factors which should be considered by me in determining the amount of civil money penalty.

SO ORDERED, this 10th day of December, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge