

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

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) CASE NO. 92A00065
RANDALL KURZON, IND., and)
ALONZO RESTAURANT)
VENTURES, INC.,)
Jointly and Severally.)
Respondent.)
_____)

DECISION AND ORDER
(December 6, 1993)

Appearances:

For the Complainant

Weldon S. Caldbeck, Esq.
Leila Cronfel, Esq.

For the Respondents

Randall Kurzon, Pro Se

Before:

E. MILTON FROSBURG
Administrative Law Judge

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I. Introduction

In 1986, the Immigration and Nationality Act of 1952 was amended by the Immigration Reform and Control Act (IRCA), which made significant revisions in national policy with respect to illegal immigrants. 8 U.S.C. §1324a. Accompanying other dramatic changes, IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring or continuing to employ such aliens.

Section 1324a also provides that the employer is liable for failing to attest, on a form established by the regulations, that the individual is not an unauthorized alien, and that the documents proving identity and work authorization have been verified. Additionally, 8 U.S.C. §1324a authorizes the imposition of orders to cease and desist with civil money penalties for violation of the proscriptions against hiring, and also authorizes civil money penalties for paperwork violations. 8 U.S.C. §1324a(e)(4),(5).

II. Background And Procedural History

A. Parties

Pro se Respondent, Alonzo Restaurant Ventures (ARV) is a close corporation of three shareholders which is authorized to conduct business in the state of Colorado. Its primary place of business is Meeker, Colorado. ARV operates two restaurants, one in Meeker and one in Rangely, Colorado. A third restaurant in Delta, Colorado has been closed down.

Pro se Respondent, Randall Kurzon, is the President and General Manager of ARV and resides in Meeker, Colorado. Not named as individual Respondents are the other two shareholders and directors in ARV, Jose Louis Alonzo and Alvaro Munoz.

B. Background

On September 26, 1990, Complainant executed five judicially issued search warrants at Respondent's three ARV restaurants and at two residences associated with ARV in order to seize Forms I-9 and other business records. (Tr. 237-248). The searches were part of an

investigation of serious, and possibly true, accusations made by Ken Jones, a former manager of one of ARV's restaurants, that Respondent, Randall Kurzon, and Alonzo Restaurant Ventures, were violating IRCA by recruiting and/or hiring illegal aliens to work in the restaurants. Almost immediately after the search and seizure, Respondent lodged formal complaints of improper professional conduct and possible criminal action by Complainant. (Tr. 264). The investigation that ensued resulted in a finding that there was no misconduct or criminal action on the part of Complainant. (Tr. 266). However, due to the time it took to complete the investigation, Complainant did not personally serve Respondents with a three count Notice of Intent to Fine (NIF) until February 25, 1992.

In Count I of the NIF, Complainant charged Respondents with fifty-two (52) violations of 8 U.S.C. 1324a(a)(1)(B) in that they failed to prepare the Employment Eligibility Verification Form (Form I-9) or, in the alternative failed to properly complete Section 2 of the Form I-9 within three business days of hire for these same individuals. Complainant assessed a total civil money penalty for this Count of \$28,650.00, with the amount per violation ranging from \$275.00 to \$690.00.

In Count II, Complainant charged Respondents with forty-eight (48) violations of 8 U.S.C. 1324a(a)(1)(B) in that they had failed to properly complete section 2 of the Form I-9. Complainant assessed civil money penalties in amounts ranging from \$200 to \$700 per violation for a total civil money penalty amount of \$21,380.00 for this Count.

In Count III, Complainant alleged eleven (11) violations of 8 U.S.C. 1324a(a)(1)(A) in that, after November 6, 1986, Respondents had knowingly hired and/or continued to employ eleven named individuals, knowing that they were not authorized for employment in the United States. Complainant assessed a civil money penalty of \$1,500 per violation for a total civil money penalty amount of \$16,500 for Count III. The total assessed civil money penalty in the NIF was \$66,530.

In a letter to Complainant, dated March 16, 1992, Respondents requested a hearing. As such, on March 23, 1992, Complainant filed the instant Complaint with OCAHO, incorporating the NIF and Respondents' request for hearing. The three Count Complaint conformed to the NIF.

A Notice of Hearing on Complaint Regarding Unlawful Employment was effectively and properly served on Respondents along with the Complaint on or about April 9, 1992, as evidenced by a record copy of

a signed U.S. Postal Service certified return receipt. In these documents, Respondents were advised that:

1. they were required to file their Answer within thirty (30) days after receipt of the Complaint and that any previous answer filed with regard to the NIF would not satisfy this requirement;
2. failure to file a timely answer might be deemed by the Administrative Law Judge as a waiver of their right to appear and contest the allegations in the Complaint and that a resulting default judgment might be issued in which any and all appropriate relief could be granted;
3. the hearing would take place in or around Denver, Colorado at a time and date to be determined; and,
4. the proceeding would be conducted in accordance with the Department of Justice's regulations found at 28 C.F.R. Section 68, as amended by the Interim Rule of October 3, 1991, 56 F.R. 50049.

On April 2, 1992, I issued a Notice of Acknowledgment to the parties advising them that I would be presiding over this case. Respondents were again advised of the importance of filing a timely Answer and the resulting consequences of a failure to file.

On April 30, 1992, Respondents, through counsel, filed their timely Answer and Affirmative Defenses; on that date, I issued an Order Directing Procedures For Prehearing. On May 20, 1992, I held a prehearing telephonic conference at which time it was represented that extensive discovery would be required in this case. As such, I directed the parties to file a monthly joint status report and encouraged them to work towards settlement of this case as I believed it to be in their best interests.

The parties' first status report, filed on June 26, 1992, indicated that active discovery was underway, that settlement had not progressed and that there was the chance of a substitution of counsel by Respondents. On June 29, 1992, Respondents' counsel filed a Motion to Withdraw based on Respondents' retention of new counsel. On July 9, 1992, at the second prehearing telephonic conference, for good cause, I granted Respondents' counsel's motion based on Respondents' agreement and Complainant's nonopposition. On July 21, 1992, Complainant's First Set of Interrogatories and the responses were filed.

On August 6, 1992, due to Complainant's counsel's unexpected hospitalization, the Court, sua sponte, stayed the proceedings until counsel's return to work.

On October 19, 1992, another status report was filed in which Complainant represented that: 1) active discovery was still in progress, 2) settlement had not been achieved, 3) Respondents were unrepresented and might remain in that position and, 4) discovery was estimated to be completed in January, 1993.

On October 29, 1992, Respondents filed a Motion to Dismiss based on lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. On November 9, 1992, I held another prehearing telephonic conference where I deferred ruling on Respondents' motion in order to give Complainant time to file its written response.

On November 27, 1992, Complainant filed both a Motion for Extension of Time to respond to Respondents' Motion to Dismiss and a Memorandum regarding subject matter jurisdiction. On that date, I granted the motion for good cause. On December 9, 1992, Complainant filed a Motion for Continuance of the hearing because one of its key witnesses, the chief investigator in this case, was subpoenaed to testify in a criminal trial during the same week of this hearing. This unopposed motion was granted for good cause on December 15, 1992.

On December 11, 1992, Respondents filed a letter pleading which I inferred was a Motion for Protective Order and a Motion for Relocation of the Hearing Site. On December 16, 1992, I held a prehearing telephonic conference to discuss the status of this case, the possibility of its settlement, and Respondents' pending motions: a Motion To Dismiss filed October 29, 1992, and a Motion For Protective Order and Relocation of The Hearing, filed December 11, 1992. At that conference, I heard argument and stated that I would issue a written ruling shortly.

On December 22, 1992, Complainant filed a Motion for Order Compelling Production of Documents, and a memorandum in support, in which it argued that Respondents' response to its Request for Production of Documents was evasive and, in effect, a denial of the discovery request because Respondents stated that any documents not provided in its response were either already in Complainant's possession or were not relevant to the case at hand. In its instant motion, Complainant filed affidavits from Dewey S. Swearingen, INS' supervisory special agent for the Immigration and Naturalization Service (INS) associated with this case, Gerald M. Coyle, another INS special agent associated with this case, and copies of the inventories associated with the search warrants executed on September 26, 1990. These filings supported Complainant's position that, while some of the

documentation requested might be in Complainant's possession, much of the requested documentation was not seized and was not in Complainant's possession. Specifically any documentation which came into being after September 26, 1990, obviously, would not be in Complainant's possession by virtue of the execution of the search warrants. Complainant further argued that the requested documentation was relevant as it supported Complainant's position that Mr. Kurzon was individually liable, under "piercing the corporate veil" theory, for any civil penalties that might be awarded in this case, and was also related to Mr. Kurzon's deposition testimony regarding corporation policies.

On December 28, 1992, I issued the following Orders: an Order Confirming Prehearing Telephonic Conference, an Order Denying in Part Respondents' Motion To Dismiss, and an Order Granting Respondents' Motion For Relocation of Hearing Site. In my order pertaining to the Motion to Dismiss, I discussed each of Respondents' arguments in turn. Respondents' first argument was based on lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. I did not grant the Motion on this basis.

Respondents then stated in a conclusionary fashion that they were not afforded a three day notice of inspection as mandated in 8 C.F.R. 274a.2(b)(2)(ii). This argument was addressed in a memorandum filed November 27, 1992 by Complainant pursuant to my Order of November 12, 1992. In that memorandum, Complainant correctly cited to U.S. v. Vanounou, 1 OCAHO 54 (5/4/89) which held that the three day notice specified in 8 C.F.R. 274a.2(b)(2)(ii) is not a jurisdictional requirement, but is, instead, a protective device available to an employer should Complainant wish to inspect employer verification forms (Forms I-9) without notice; see also U.S. v. Goldenfield Corp., 2 OCAHO 322 (4/26/91). As the parties here agreed that the Forms I-9 came into the Complainant's possession as a result of a search warrant seizure, and not by way of inspection, and Respondents had not alleged that the search warrants were invalid, I found that Respondents' argument that this case should be dismissed based on lack of three day notice under 8 C.F.R. 274a.2(b)(2)(ii) was not persuasive.

Respondents argued next that the case against Randall Kurzon, individually, should be dismissed as Randall Kurzon did not meet the definition of "employer" as set forth in 8 C.F.R. 274a.1(g). In response, Complainant stated that when discovery was completed, it would be able to substantiate its position that Mr. Kurzon was a proper party. Complainant stated that it could not do so at that time because Respondents had not complied with its discovery requests. As such,

Complainant filed a Motion to Compel in regard to this matter. In view of the posture of this case, I reserved ruling on dismissal of Mr. Kurzon, individually, as a Respondent and on Complainant's Motion to Compel.

Respondents' third argument for dismissal rested on Respondents' alleged substantial compliance. Although substantial compliance may be a valid defense to violations of Section 274A(b)(1), no set of facts in an OCAHO case has yet been found to satisfy this standard. Therefore, since Respondents' Forms I-9 were not before me, and Respondents had not detailed what they considered to be their substantial compliance, I could not dismiss based on this argument at this time.

Respondents' next argument was that the civil money penalties imposed must be determined after a consideration of the five factors listed in Section 274A(e)(5). Respondents were correct. However, whether these factors have been considered by Complainant when it set the amount of civil penalties requested is not a valid reason to dismiss this case. See, e.g., U.S. v. Watson, 1 OCAHO 253 (10/19/90). Therefore, I did not grant Respondents' motion on this basis either.

Respondents' last argument was that the civil penalties imposed violated the Eighth Amendment of the U.S. Constitution. In Browning-Ferris Industries of Vermont, Inc. v. Kelco, 109 S. Ct. 2909 (1989), the Supreme Court examined the issue of whether the Eighth Amendment Excessive Fines clause applies to punitive damages awarded by a civil jury. In its limited holding, the Court stated that, although it had never considered a civil application of the Excessive Fines Clause of the Eighth Amendment, "its cases had long understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments." Id. at 2913 (citations omitted). The Court then stated that it would not go so far as to hold that the excessive fines clause applied solely to criminal cases. However, it did not determine to what extent it might apply to civil cases. Id. at 2914.

Of course, as no civil penalties had been imposed in this case when Respondents raised this argument, the cited case was not relevant. However, in my December 28, 1992 Order, I noted that Respondents had only advanced this novel argument, but had not supplied any legal or factual support for it. In fact, their whole argument amounted to the statement that the civil fines in this case violated the Eighth Amendment. Therefore, as Respondents had shown no support for it, I did not dismiss based on this argument. I allowed Respondents, if they wished, to raise this issue again at a later time, as long as they supported it on a legal and factual basis.

As to Respondents' motion to relocate, they argued that the corporation's financial resources were depleted and requested that the hearing be set at a site closer to their home base to save money and to enable them to introduce witnesses. Complainant stated that it had no objection to the relocation. As such, I granted Respondents' motion and agreed with the parties to make Grand Junction, Colorado the new hearing site and rescheduled the hearing for February 3-5, 1993.

On January 4, 1993, Respondents filed a response to Complainant's Motion To Compel in which they argued that they had provided all requested paperwork that was in their possession. Their position was that any paperwork not provided was already in Complainant's possession by virtue of Complainant's execution on September 26, 1990 of five (5) search warrants and the corresponding document seizures. Respondents also included argument regarding the correctness of its corporate actions, which although it may be relevant later to rebut an "alter ego" argument by the Complainant, was not relevant to the issue of discovery.

With regard to the Motion to Compel, Complainant's position was that it was not requesting documents already in its possession, but that it was requesting new or additional documentation from Respondents in categories previously requested. Complainant argued that some of this additional documentation should have come into existence after September 26, 1990, the date of seizure of Respondents' documents.

Based on a review of Complainant's Request for Production and the arguments set forth by the parties with regard to the Motion to Compel, I found that Complainant had requested documentation that was, either, directly relevant to its case or would reasonably lead to relevant information. Respondents were directed to comply with the Request for Production in the following manner:

1. Respondents were to reply separately to each paragraph in the Request for Production (A) for documentation in existence on or before September 26, 1990 and (B) for documentation that came into existence after September 26, 1990;
2. Respondents were to include an affidavit signed and sworn before a notary public, or an officer of the Court, indicating that its response to the Request for Production was accurate and complete;
3. Respondents were cautioned to read the definitions included in the Request for Production; and,
4. Respondents could make arrangements with Complainant to produce its Response to the Request for Production at the Complainant's Grand Junction office where

Complainant would photocopy the response, at Complainant's expense, and return the originals to Respondents, or Respondents could photocopy and deliver in person, or by certified return receipt requested mail, its response, at its own expense, to Complainant's Denver office. Respondents' response was due on or before the close of business on January 25, 1993.

On January 27, 1993, Complainant filed a Motion to Dismiss in which it moved to dismiss allegation 5 of Count I regarding Carmelo Alonzo, allegation 12 of Count I regarding Sheila Hackett, allegation 14 of Count I regarding Jorge Munoz, allegation 22 of Count I regarding Rita Thomas, allegation 25 of Count I regarding Deborah Woodal, allegation 10 of Count III regarding Jose Munoz-Alonzo and allegation 11 of Count III regarding Marcos Munoz. Regarding the dismissals in Count I, Complainant stated that these individuals were named elsewhere in the Complaint and it would only be pursuing one allegation pertaining to that individual. Regarding the dismissals in Count III, Complainant stated that it could not locate witnesses for those allegations.

Before Respondents could reply to this motion, upon consideration, I determined that Respondents were aware of the motion and that granting the motion permitted a narrowing of issues and trial preparation for both parties and caused no prejudice to Respondents. Therefore, in the interests of justice and judicial economy, I granted this motion.

On that same date, I held the last prehearing telephonic conference before the hearing. The parties agreed that settlement was not likely at that time and that they were prepared to proceed to hearing. The parties enumerated the stipulations that would be entered into the hearing record.

Complainant represented that it would introduce thirteen (13) witnesses, including three through deposition testimony. Complainant's witness list was filed with this Court on January 27, 1993. Respondents indicated that it would introduce five (5) witnesses who were named at the conference.

Complainant stated that discovery has been complied with and it was in receipt of eleven (11) boxes of documentation supplied by Respondent.

Counsel for Complainant represented that he had recently been advised by his client that in order to reach a settlement in a case of this type, Respondents were no longer required to admit liability

where there was a charge of knowingly hiring and/or continuing to employ. With this new development, I strongly suggested that it was to the parties' benefit to again talk about settlement of all counts. I reminded Respondents that should Complainant prove its allegations, I was bound by the statute, 8 U.S.C. 1324a, to impose a civil penalty of not less than \$100 and not more than \$1,000 for each violation and not less than \$250 and not more than \$2,000 for each paperwork violation of the knowing hire provisions.

The hearing took place on February 3-5, 1993. At hearing, I granted Complainant's unopposed oral motion to dismiss the allegations regarding Juan Cortes in Count III. (Tr. 522).

On March 9, 1993, Respondents filed a motion for extension of time to present a posthearing brief because they alleged a lack of funds to pay for a transcript. On March 29, 1993, I issued an order granting the parties an extension of time to file post hearing briefs. On that same date, I forwarded Respondents a copy of the hearing transcript as the Court was in possession of an extra copy. I stressed to Respondents that this was a unique situation and that it was not required by law. On April 1, 1993, I issued an Acknowledgement of Receipt of the transcript. On April 20, 1993, as neither party had notified the court of error, I issued an order inferring that the transcript was true and correct.

On April 3, 1993, Respondents filed their post hearing brief by way of letter pleading. On April 6, 1993, Complainant notified the Court that the official transcript was missing Exhibit C41, the check stub for ARV's check #3383, but that the original was in the court's possession and, thus, the court's records were complete. Complainant filed its post hearing brief on May 4, 1993.

III. Discussion

At hearing from February 3-5, 1993, Complainant introduced 14 witnesses and 76 exhibits. Respondent introduced 5 witnesses and 2 exhibits. There were 2 joint exhibits. The three day hearing resulted in a 638 page transcript and approximately 1,000 pages of evidence. Respondent, Randall Kurzon, put forth the case for both Respondents, Alonzo Restaurant Ventures and himself. Thus, for simplicity's sake, I have referred to the Respondents in the singular form from this point on in this decision.

A. Stipulations

The parties in this case stipulated to the following facts:

1. That the letters from the Immigration and Nationality Service's Forensic Documents Laboratory analyst (Ex. J1), which state the results of the analysis and comparison of the handwriting of known and questioned samples submitted by Complainant, are true and correct. The analysis determined that 64 of the Forms I-9 related to Count II, which on their face indicate that they were filled out by Ken Jones, one of ARV's former managers, were in fact filled out by Respondent, Randall Kurzon (Tr. 7);
2. That all individuals listed in Counts I, II and III of the Complaint were employees of the Respondent, ARV, being initially hired after November 6, 1986 (Ex. J2);
3. That all Forms I-9 prepared by ARV, as of September 26, 1990, were seized by Complainant's agents pursuant to the searches conducted that same date at the Meeker, Rangely, and Delta restaurants. (Ex. J2);
4. That ARV is a corporation duly organized and authorized under the laws of the State of Colorado (Ex. J2);
5. That ARV's principle place of business is located in Meeker, Colorado and that business operations began in April, 1988 (Ex. J2); and,
6. That ARV's business is conducted under the trade name of "The Last Chance Restaurant". (Ex. J2).

B. Count I-Failure to Prepare

At hearing, Complainant argued that, as to Count I, Respondent had failed to prepare the employment eligibility verification form (Form I-9) or, in the alternative, failed to properly complete section 2 of the Form I-9 within three business days of hire for forty-seven (47) individuals.¹ Respondent's defense at the hearing was simple; he had prepared the Forms I-9 for these individuals properly and timely and had stored them at the appropriate business location until they were seized by Complainant's agents on September 26, 1990. Thus, the fact that they were missing was due to the Complainant's agents' mishandling of the documents after they were seized. Respondent argued that he could not prove that these documents had existed by producing photocopies because Complainant, citing time constraints at the time of seizure, would not allow Respondent an opportunity to copy all the documents that were being seized.

¹ Five alleged violations in the Complaint were dismissed based on Complainant's unopposed motions.

The Court heard extensive, detailed and internally consistent testimony from Complainant's witnesses regarding the procedure which had been followed during the execution of the search warrants, the training of the agents who were involved in the execution of the search warrants, and the chain of custody of the documents from the time of seizure through the process of cataloging, packing, transporting, storage and review. (Tr. 249-264, 332-333, 424-441, 461-465, 534-540, 590-591).²

Through its witnesses, Complainant demonstrated that INS was confident that it had seized all Respondent's Forms I-9 that were existing at the time of the searches, that all documents had been kept under lock and key throughout their review and that access or possession of these documents was limited to the lead agent, Agent Larry Hines. Further, Agent Hines testified that he had reviewed the seized documents, one by one, possibly as many as half a dozen times prior to hearing, in order to be certain that all Forms I-9 in his possession had been accounted for.

In support of its defense against the allegations, Randall Kurzon testified that he had been very familiar with the Form I-9 requirement, both from his previous experience in his Texas restaurant business and from his personal visit to the INS office in Grand Junction to discuss the Form I-9 requirements. (Ex. C9 at 196). He testified further that he had always been specific in his instructions to his managers and to his bookkeeper, all of whom were authorized to complete the Forms I-9, that the Forms I-9 were to be filled out at the time of hire, contemporaneously with the employee's tax information documents. (Ex. C9 at 196-203). Thus, Respondent argued that since no paycheck could be issued without the employee's tax documentation being completed, and since the Form I-9 was completed at the same time, any employee who received a paycheck had, obviously, timely and properly completed a Form I-9. (Ex. C9 at 203).

With regard to liability on this Count, I believe that without photocopies, and considering Complainant's witnesses' strong, credible testimony, it would be difficult for Respondent to prove that these Forms I-9 had been prepared if they, had, indeed, been seized by Complainant and then lost. Thus, in this case my determination must be made, not only on the evidence and the content of the testimony before me, but on the credibility of the testimony.

² This Decision and Order contains many transcript references. However, they are not exhaustive, based on the size of the record.

As to Complainant's witnesses, I find that their testimony, which was internally consistent, detailed, readily forthcoming, knowledgeable and articulate, was highly credible. However, as to Respondent's testimony, I have found the record to be rife with examples of Respondent's incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting, leading me to find that Respondent's testimony was not credible.

One small example of Mr. Kurzon's contradictory testimony regards Mr. Kurzon's explanations about corporate checks to his mother. Now, this example has nothing to do with Form I-9 procedures, but is a model of Mr. Kurzon's less than consistent and clear explanations of facts or events.

At deposition, Mr. Kurzon testified that corporate checks to his mother were gifts and were not in repayment of any debt. (Tr. 139). However, at hearing, his testimony was quite different. He testified that there was no doubt that his mother had lent the business money in 1988 and that he, now, believed that these checks represented repayment of the loan to the corporation. However, he was not positive. But, he testified that he rechecked his business records and he was sure that it was repayment of a loan. Not surprisingly, Mr. Kurzon could not explain why the check stub indicated that the check was for "Support". (Tr. 138-143).

Mr. Kurzon also had a tendency to blame other people, known or unknown, for errors in his financial statements. For instance, Mr. Kurzon agreed that the typed incorrect information on a copy of a Small Business Administration Loan Application regarding L.J. Hooker Homes was false. However he stated that he had not typed it and that someone else had entered the incorrect information. When asked who it might have been, he testified that it might possibly be the same individuals who had "managed to dispose of a bunch of our I-9's, I would think." (Tr. 56).

In making my finding that Mr. Kurzon's testimony was not credible, I also have taken special note of the fact that, not only did Respondent stipulate that all Forms I-9 that existed at his restaurants were seized on September 26, 1990, but that Mr. Kurzon testified that he was fully aware of the proper procedure for Form I-9 preparation and completion. When I consider that testimony, in conjunction with the fact that Respondent stipulated that he had partially completed Section 2 of Forms I-9 indicated in Count II and had personally inserted his former manager's name as the preparer, I can infer that either his testimony regarding his awareness of the proper procedure for completion of the

Form I-9 was not truthful and/or accurate, or he was truthful and he may ignore, thwart or disregard those procedures.

Respondent's defense that he employed an automatic procedure that would ensure that a Form I-9 would be completely and timely prepared also lacked conviction despite the testimony of his bookkeeper, Judy Byrd. What was more believable was Mr. Kurzon's testimonial admission that he had no control policy or checking system to determine if the Forms I-9 were, indeed, being properly completed. He also admitted that it was conceivable that the Forms I-9 were not properly completed as he had made completion mistakes himself and had seen them made by others at ARV. (Tr. 198, 199, 202).

In IRCA proceedings, Complainant bears the ultimate burden of proving the allegations in the Complaint by a preponderance of the evidence. U.S. v. Alvand, 2 OCAHO 352 (8/7/91). A Respondent attempting to establish an affirmative defense must do so by a preponderance of the evidence after the Complainant has made out a prima facie case. Id. Only at that time, does the burden of proof shift back to the Complainant. Id.

In a previous OCAHO case, a Respondent's affirmative defense on a failure to present was that the Forms I-9 had been properly prepared, but had been stolen during a previous burglary. U.S. v. Alvand, 2 OCAHO 352 (8/7/91). The ALJ found, however, that Respondent did not, either, present any evidence that the forms had ever been completed or establish a nexus between the burglary and Respondent's failure to present. Id.

In the case before me, Respondent has alleged that he properly prepared the Forms I-9, but that they were lost by Complainant. However, he has not presented any evidence, besides his non-credible testimony, to prove his defense. He has not proven either, that the forms were completed or the nexus between the seizure and his failure to present. Therefore, I find that Respondent has not met its burden of proving any affirmative defense by the preponderance of the evidence.

As such, based on the record, the evidence and Respondent's lack of credible testimony, I find that Complainant has proven by a preponderance of the evidence that Respondent violated the Immigration and Nationality Act as Respondent failed to prepare the Employment Eligibility Form (Form I-9) for the forty-seven (47) individuals named in the Complaint, and not dismissed, hired after November 6, 1986, in violation of 8 U.S.C. 1324a(a)(1)(B) of the Immigration and Nationality

Act, as set forth in Count I. Civil money penalties for this Count will be discussed later in this decision.

C. Count II-Failure to Properly Complete Section 2

Count II alleged that Respondent failed to properly complete Section 2 of the Form I-9 for forty eight (48) named employees. (Ex. C-37). During his testimony, Randall Kurzon admitted that these named individuals did work for ARV, that they were hired by Respondents, the other shareholders, or his managers and that Section 2 of the identified I-9's was not filled out completely and/or correctly. (Tr. 196-209).

Additionally, Mr. Kurzon testified that he was not surprised by the result of the forensic handwriting examination which indicated that, although Ken Jones' name was printed in Section 2 indicating that he had prepared the Form I-9 and had inspected the employee's work authorization documents, Mr. Jones had not filled out the form or written his name. (Tr. 207-208). The forensic examination determined that it was Mr. Kurzon who had done so.

Respondent did raise the issue of substantial compliance in his Motion to Dismiss. I find that Respondent has not raised any evidence which would entitle him to a finding that he had proven this affirmative defense by a preponderance of the evidence. Therefore, I will not grant his motion to dismiss.

I have examined each of the Forms I-9 associated with Count II. Of these, thirty-four (34) are totally blank in section 2; the others are incomplete. Thus, with regard to the violations alleged in Count II, the documents speak for themselves. Therefore, based on the evidence, the record, Mr. Kurzon's testimony and the relevant law, I find that Complainant has proven its case, with regard to Count II, by a preponderance of the evidence. Civil penalties for these violations will be discussed later in this decision and order.

D. Count III-Knowingly Hiring And/Or Continuing To Employ

In Count III, Respondent was charged with knowingly hiring and/or continuing to employ, after November 6, 1986, eight (8) named

employees³ who were unauthorized to work in the United States at the time they were employed. These individuals are:

1. Carmelo Alonzo
2. Jorge Munoz
3. Salvador Perez
4. Inez Quezada
5. Marcial Campos-Morales
6. Javier Quezada
7. Gil Gonzales-Gutierrez
8. Rafael Mendoza Ponce

Complainant has argued that, in some instances, Respondent recruited these individuals to come to the United States from Mexico for employment.

The burden of proving a violation of the hiring prohibition of Section 274A of the INA, by a preponderance of the evidence, always remains on the government. U.S. v. Valdez, 1 OCAHO 91 (9/27/89), aff'd. by CAHO 1-2/12/89.

1. Whether these individuals were employed by ARV after November 6, 1986

The parties stipulated that these named individuals were employed by ARV after November 6, 1986. There was no argument at hearing to the contrary. Therefore, I find that each of the eight (8) individuals remaining in Count III were employed by ARV after November 6, 1986.

2. Whether these named individuals were aliens, unauthorized to work in the United States.

Identification of individuals as unauthorized alien employees is inherent in the definition of continuing to employ unauthorized aliens. U.S. v. Buckingham Limited Partnership, 1 OCAHO 151 (4/6/90).

Complainant argued, and the Court agrees, that Respondent did not contest that these individuals were unauthorized for employment. Further, I agree that Complainant has established, by a preponderance of the evidence, that these individuals were, indeed, aliens

³ Based on Complainant's unopposed motions, dismissals had been granted regarding Jose Munoz-Alonzo, Marcos Munoz, and Juan Cortes, originally named in the Complaint.

unauthorized for employment in the United States. I make this finding based on the hearing testimony and internally consistent unauthorized aliens' Form I-213's. See U.S. v. Dubois Farms, 2 OCAHO 376 (9/24/91).

I found the hearing testimony of the different agents who questioned the unauthorized aliens and took their sworn statements to be of great significance. These agents credibly testified in detail about their training, their ability to speak and understand Spanish, their experience with the Immigration Service, the procedures that were taken when recording the illegal aliens' sworn statements in the Form I-213, the voluntariness of the sworn statements, and the details of the sworn statements themselves.

With respect to each alleged unauthorized alien, Complainant introduced the following evidence:

a. Carmelo Alonzo:

Certificate of Non-Existence of Record (Ex. C57); certified copy of the Record of Deportable Alien (Form I-213) in which Mr. Alonzo stated that he was a native, citizen and permanent resident of Mexico and that he last entered the United States illegally (Ex. C-72); Mr. Alonzo's sworn statement to Complainant that he was a native and citizen of Mexico and had no legal papers allowing his entry or stay in the United States (Ex. C-73).

b. Jorge Munoz:

Certificate of Non-Existence of Record (Ex. C57); Department of Health and Human Services letter stating that the social security number used by Mr. Munoz when he was employed by Respondent did not belong to him (Ex. C60); sworn statement by Ken Jones, former manager for ARV, that Mr. Munoz was an alien recruited by Respondent for employment; sworn statement from Marcos Campos that he knew Mr. Munoz in Mexico and that they both came across the border illegally, together;

c. Salvador Perez:

Certificate of Non-Existence of Record (EX. C57); certified copy of the Record of Deportable Alien (Form I-213) in which Mr. Perez advised Complainant that he was a native citizen and permanent resident of Mexico and had entered this country illegally (Ex. C67); sworn statement by Mr. Perez to Complainant that he was a native of Mexico and that he never had any documents that would allow him to be in this country legally (Ex. C68); Mr. Perez' Mexican passport indicating that he is a native of Mexico (EX. C69);

d. Inez Quezada:

Certificate of Non-Existence of Record (Ex. C57); certified copy of the Record of Deportable Alien (Form I-213) in which Mr. Quezada advised Complainant that he was a native, citizen and permanent resident of Mexico and had entered this country illegally (Ex. C64); sworn statement by Mr. Quezada to Complainant that he was a native, citizen and permanent resident of Mexico and that he had no legal status allowing him to be in this country (Ex. C65);

e. Marcial Campos:

Certificate of Non-Existence of Record (Ex. C57); sworn statement by Mr. Campos to Complainant stating that he was born in Michoacan, Mexico and that his entry into the United States was illegal;

f. Javier Quezada:

Certificate of Non-Existence of Record (Ex. C57); certified copy of the Record of Deportable Alien (Form I-213) in which Mr. Quezada advised Complainant that he was a native, citizen and permanent resident of Mexico and that he had last entered the United States illegally (Ex. C55); sworn statement by Mr. Quezada to Complainant that he was a native and citizen of Mexico and that he had no documents allowing him to legally be in the United States (Ex. C55);

g. Gil Gonzales:

Certificate of Non-Existence of Record for the "A" number provided to Respondent ARV by Mr. Gonzales; a Department of Health and Human Services letter stating that the social security number used by Mr. Gonzales when he was employed by Respondent ARV was not a number belonging to Mr. Gonzales;

h. Rafael Mendoza:

Certificate of Non-Existence of Record (Ex. C57); certified copy of the Record of Deportable Alien (Form I-213) in which Mr. Mendoza advised Complainant that he was a native, citizen and permanent resident of Mexico and had last entered the United States illegally (Ex. C62); sworn statement by Ken Jones, former manager for ARV, that Mr. Munoz was an alien recruited by Respondent for employment; sworn statement from Marcos Campos that he knew Mr. Mendoza in Mexico and that they both came across the border illegally, together.

The issue before me, then, with regard to this alleged violation is whether Respondent, when he hired and/or continued to employ these unauthorized individuals, knew that these individuals were unauthorized for employment in the United States.

3. Whether ARV knew the aliens were unauthorized to work in the United States

The statute requires that an employer's hiring of an unauthorized alien must be done knowingly. The regulatory definition of "knowing" includes actual as well as constructive knowledge. 8 C.F.R. 274a.1. Constructive knowledge has been defined as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. 274a.1(l)(1).

Under the regulations and case law, "knowing" can include situations where an employee fails to complete, or improperly completes, the Form I-9 or where an employer acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized individual into its work force or to act on its behalf. 8 C.F.R. 274a.1(l)(1)(i), (iii); Mester Manufacturing Co. v. INS, 879 F.2d 561, 567 (9th Cir. 1989); U.S. v. Widow Brown's Inn, 3 OCAHO 399 at 34-35 (1/15/92); U.S. v. Noel Plastering and Stucco, 3 OCAHO 427 (5/12/92); New El Rey Sausage Co., Inc. v. U.S. Immigration and Naturalization Service, 925 F.2d 1153 (9th Cir. 1991).

Complainant presented the following evidence to prove its Count III allegations with regard to the "knowing" element as it pertained to each named alien:

a. Rafael Mendoza

Mr. Mendoza was arrested by Complainant on September 26, 1990 at Respondent's Rangely location where he was working as a cook. At that time, Mr. Mendoza gave a sworn statement to Complainant in which he stated that he had previously worked for Mr. Kurzon in 1987-1988 and had been an undocumented worker at that time (Ex. C62). He stated that he had been recruited to come to work in Rangely and had been rehired in September, 1989 although Mr. Kurzon knew that he was unauthorized to work in this country.

Complainant also introduced Mr. Mendoza's second sworn statement, made on September 27, 1990, in which he gave detailed information regarding his recruitment and entry into the United States. (Ex. C63). Mr. Mendoza detailed the following:

1. He received a letter from Alvaro Munoz, a partner in ARV, telling him to come to the United States as there was a lot of work for him;
2. Arrangements were made by Respondent for Mr. Mendoza to travel to Juarez, Mexico where Mr. Munoz would wire him money so that he could travel to Colorado;

3. Mr. Mendoza was not able to pick up the wired money as planned since he did not have identification;

4. Mr. Mendoza then traveled to El Paso, Texas and called Mr. Kurzon, who canceled the money order to Mexico and sent funds by Western Union in El Paso. This time, Mr. Kurzon instructed Mr. Mendoza to identify himself to Western Union by supplying them with a prearranged birth date;

5. After identifying himself at Western Union with the prearranged birth date and receiving the money, Mr. Mendoza went to Fort Worth, Texas and called Mr. Kurzon who instructed him to go to the bus station where a bus ticket was waiting for him;

6. Mr. Mendoza picked up the bus ticket and traveled to Amarillo, Texas where he was told that he would be picked up in Rifle, Colorado and taken to Rangely, Colorado to begin work.

Complainant introduced other significant objective evidence which corroborated Mr. Mendoza's statements. Phone bills for the months of August and September, 1989 showed collect calls from La Paz, Mexico, Juarez, Mexico, El Paso, Texas, Fort Worth, Texas, and Amarillo, Texas to the Meeker, Colorado restaurant, where Mr. Kurzon would most likely be found. (Ex. C43). These calls track the travel route and time frame set forth by Mr. Mendoza. Complainant also introduced into evidence a copy of a Greyhound Lines, Inc. passenger receipt (Ex. C47) which was seized during the search at Respondent's Rangely location. This receipt was dated September 7, 1989 and shows travel from Fort Worth, Texas to Rifle, Colorado via Amarillo, Pueblo and Denver, Colorado. This exhibit tracks the route Mr. Mendoza stated that he took to reach his new employment with Respondent.

Complainant also introduced copies of Western Union money transfer receipts (Ex. C45, C46). These receipts show an attempt by Respondent to send money to Rafael Mendoza in Juarez, Mexico, on August 31, 1989, in the amount of \$350.00; however, as no identification was provided, the funds were not released. (Ex. C45). Another receipt from Western Union shows that Mr. Mendoza did receive a wire transfer of money, in the same amount, \$350.00, on September 1, 1989, and that a birth date was used for identification. (Ex. C46).

Complainant argued that Mr. Mendoza's sworn statements are highly credible and corroborated by evidence seized at Respondent's establishments. Thus, Mr. Mendoza's statements, that Respondent

recruited him from Mexico and that Respondent knew he was unauthorized, are true.

b. Javier Quezada

Mr. Quezada was arrested on September 26, 1990 at Respondent's location in Meeker, Colorado. At that time, he gave a sworn statement to Complainant (Ex. C55) in which he stated that he came to the United States in May, 1990 with five other individuals including Salvador Perez, his uncle, and Inez Quezada, his brother-in-law, and was transported by pickup truck from Phoenix, Arizona to Hamilton, Colorado. At that point, he learned of employment with Respondent through his brother, Jose Quezada, and was hired by Mr. Munoz. Mr. Quezada stated that Mr. Munoz, Mr. Alonzo, Mr. Kurzon and his brother, Jose Quezada, all knew that he was in this country illegally because he told them so. Further, he stated that he never showed any documents to Respondent and never had to complete a Form I-9.

At hearing, Mr. Quezada testified again that he was hired for employment by Respondent, specifically Alvaro Munoz, and that Mr. Munoz was aware that he did not have any employment authorization documents because he told him so when asked. (Tr. 480-481). He further testified that his sworn statement of September 26, 1990, was true, was his own and was read to him prior to his signing it. (Tr. 480-481).

At hearing, Complainant introduced the Form I-9 which bore Mr. Quezada's name and other information allegedly relating to him. Upon inspection, Mr. Quezada testified that although he did sign the Form I-9, he did not fill out any of the other information, that he did not have work authorization documents at the time he was employed, and that he did not know who had filled out the form.

Complainant argued that Mr. Quezada's testimony, along with the completed Form I-9, indicated that Respondent knew that Mr. Quezada was not authorized to work, but hired him anyway.

c. Mr. Salvador Perez

Mr. Perez was arrested on September 26, 1990, at Respondent's Meeker location along with Mr. Quezada. In his sworn statement of that same date (Ex. C68), he stated that he was smuggled into the United States with five other people and driven from Arizona to Hamilton, Colorado where his nephew worked. His nephew was Jose

Quezada, Javier Quezada's brother. Jose Quezada told him, as he had told Javier Quezada, that Respondent was hiring workers in Rangely.

Mr. Perez stated that he was hired by Jose Alonzo after informing him that he had no work authorization documents although he did show Mr. Alonzo his Mexican passport. Mr. Perez stated that he told Mr. Alonzo, when asked for his social security number, that he did not have one. Mr. Alonzo allegedly replied that one was needed, even if it was "crooked".

Mr. Perez stated that he lived in a residence located behind the Rangely restaurant with two other Mexican individuals named Carmelo and Inez. Upon a search of this residence, Mr. Perez's passport was found. (Ex. C69) There was no authorization found in his passport for work in the United States. No Form I-9 was found for Mr. Perez.

Complainant argued that Mr. Perez' sworn statement was internally consistent and consistent with those of the other individuals with whom he entered the United States. Thus, his statement is highly credible and his statement that Respondent knew that he was not authorized to work in the United States is true.

d. Mr. Inez Quezada

Mr. Quezada was also arrested at the Rangely location on September 26, 1990. In his sworn statement taken at that time (Ex. C64), he stated that he had entered this country illegally in May, 1990 and was taken from Phoenix, Arizona to Rangely, Colorado by a friend of his brother-in-law, Jose Quezada. He stated that he was hired by Jose Alonzo for employment at the Rangely location although he did not have any work authorization documents and did not fill out a Form I-9.

At hearing, Mr. Quezada testified in support of his sworn statement that he was hired by Mr. Alonzo to work at the Respondent's Rangely location despite the fact that he had no work authorization documentation and that his brother-in-law, Jose Quezada, informed Mr. Alonzo that he was in this country illegally. He further testified that he was not asked for any documentation and that he was not asked to fill out any employment documents including a Form I-9.

Complainant argued that Mr. Quezada's sworn statement and testimony are internally consistent and consistent with each other and are corroborated by statements and testimony of the other individuals

with whom he entered the United States. Thus, his statements and testimony are credible and his statement that Respondent knew that he was unauthorized to work in the United States is true.

e. Jorge Munoz, Marcial Campos and Gil Gonzales

Complainant's position with regard to these individuals arose from allegations by one of Respondent's former managers, Mr. Keith Raisanen. Mr. Raisanen advised Complainant that Respondent, ARV, was hiring illegal aliens and that he was personally aware of three, Jorge Munoz, Marcial Campos, and Gil Gonzales. He stated that they were recruited by Respondent in Mexico and directed to come to Colorado. Complainant's investigation of these allegations resulted in the following evidence being introduced:

1. A corporate check, check #3383, made out to Colorado West Travel, for \$357.00; signed by Randall Kurzon, for payment for three airline tickets from San Diego, California to Denver, Colorado with a stop in Las Vegas. (Ex. C41);
2. A business check stub for check #3383 indicating that the check was for Rangely employees. (Ex. C41);
3. Copies of airline tickets corresponding to those purchased by check #3383 indicating that they were issued to Steve, Joe and John Tomas, on the same date as the referenced check. (Tr. 269; Ex. C42);
4. Sworn deposition testimony by Mr. Raisanen on November 17, 1992 (Ex. C54), in which he testified that on an evening sometime after September 15, 1989, he drove to the Denver, Colorado airport, at Respondent's request, to pick up three or four Mexican men who were brought back to Rangely and whom were employed as cooks at Respondent's restaurant;
5. Testimony at hearing by Elaine Graham, Respondent's former waitress, cashier and hostess at the Rangely location, who was present at the time of Complainant's raid. Her testimony corroborated Mr. Raisanen's testimony that he went to Denver, Colorado in early October 1989, at night, to pick up three Mexican men, Jorge Munoz, Marcial Campos, and Gil Gonzales, who were to work at the Rangely location. (Tr. 597-598, 606);
6. The October 30, 1990 sworn statement from Marcial Campos (Ex. C66) in which he stated that, along with Gil Gonzales and Jorge Munoz, he entered the United States illegally from Tijuana, Mexico on October 3, 1989. Mr. Campos stated, further, that the three men picked up airline tickets in San Diego for Denver, Colorado. The flight stopped in Las Vegas. He stated that he was brought to Respondent's restaurant in Rangely, Colorado where he began to work and that he did not show any immigration documents when he began his employment;
7. The Respondent's telephone bills for September and October, 1989. These show long distance calls for the same times and locations that Mr. Campos detailed in his sworn statement as the ones used by these three men and Respondent when arranging, and

making, their journey from Mexico to Colorado for employment with Respondent (Ex. C49);

8. Testimony by Elaine Graham indicating that a former manager of the Rangely restaurant, Tina Fuller, had asked her to help with some documents, apparently immigration documents, relating to Mr. Munoz, Mr. Campos, and Mr. Gonzales. She testified that these documents appeared to be fake green cards because either, the photos on the documents were not of the men they purportedly belonged to, or the names on the document were of other individuals. (Tr. 595-596).

Complainant argued that the testimony and evidence proved that Respondent knew these three individuals were unauthorized for employment in the United States.

f. Carmelo Alonzo

Mr. Alonzo stated in his sworn statement that he was hired by Mr. Kurzon and that Mr. Kurzon was aware that he was in the United States illegally and had no authorization to work. He also testified that Mr. Kurzon helped fill out his employment application and accepted Mr. Alonzo's fake "green card", Form I-151, and fake social security card, although Mr. Kurzon stated that he knew they were fake.

Complainant argued that the sworn statement along with the corroborated evidence proves that the information included therein is credible and true.

(a) Complainant's Additional Arguments on "Knowing"

Complainant set forth the following additional arguments in support of its position that Respondent had knowledge of the unauthorized status of his previously named employees:

1. Both Rangely and Meeker, Colorado are small towns at great distances from large urban areas. Complainant's position is that, although it might be reasonable to find many illegal aliens in a large urban area, it is highly unusual to find eight (8) illegal aliens, all from Mexico, working at two Mexican restaurants, owned by the same corporation, in two small towns in Colorado, by happenstance.
2. The illegal aliens named in the Complaint testified, or stated in sworn affidavits, that they came to Meeker and Rangely because they knew of employment opportunities with Respondent. In fact, the evidence pointed to the fact that four of the individuals, Mendoza, Gonzales, Campos and Jorge Munoz, were contacted in Mexico about employment. Further, all these individuals, except Carmelo Alonzo, swore that they were never requested for, or required to provide, employment documentation. As to Mr. Alonzo, his statement was that he showed his fake identification to Mr. Kurzon, who acknowledged that he knew it was fake but said it would not matter.

3. All of the illegal aliens interviewed in this case stated, in separate statements taken at separate times, that at least one of the shareholders of the corporation, Kurzon, Alonzo or Munoz, was aware that they were illegal.

4. Mr. Kurzon's stated "standard policy" of having Forms I-9's completed for all employees at the time of employment, was not credible. Complainant argued that Mr. Kurzon's testimony appeared to be contradictory when he answered whether it was true that each employee completed his Form I-9 and whether Mr. Kurzon had personally checked that it was done. (Tr. 43, 72, 208-209, 214).

5. If Mr. Kurzon's testimony about his extensive knowledge regarding the immigration law as it relates to legal status is believed, then it is difficult to believe that he was not aware of these alien's illegal status. Randall Kurzon testified that:

And, like I say, I was very sympathetic to these people, because I realize what type of culture they are coming from. I'm very familiar with (the Mexican) culture and their ways. I'm familiar enough with the INS and the laws...So I familiarized myself as much as possible with the laws and the amnesty program and I was aware of I-9's before I-9's were required. I was aware of the fact that they were going to be required.

I was aware of that since before I came to Colorado because of all the news about it in Texas. The illegal-what is it--the sanctions.... (Ex. C9, pp. 195-197).

6. As Mr. Kurzon testified that the two other shareholders in the corporation, Alvaro Munoz and Jose Alonzo, had entered this country illegally and had recently received their legal status through the amnesty program, it can be inferred that they all were aware of the requirements regarding work authorization since Mr. Munoz and Mr. Alonzo needed to carry theirs during the pendency of their permanent residency applications. (Tr. 361; 507).

7. Mr. Kurzon testified that he has known Jose Alonzo and Alvaro Munoz for approximately 14 years and was reasonably familiar with their families and their family members who came to work for the restaurant. (Tr. 29-30). Specifically, Mr. Kurzon was aware that Jorge Munoz was Alvaro Munoz' brother and stated that he assumed that Jorge learned of the employment position with Respondent through his brother. (Tr. 30). Putting it all together, Complainant stated that it can be inferred that, as Jorge Munoz and Carmelo Alonzo were brothers of the recently legalized shareholders, the shareholders were aware of these men's undocumented status.

8. Complainant cited to United States v. Valdez, 1 OCAHO 91 at 11 (9/27/89), which holds that deliberate ignorance cannot be a reasonable defense to not knowing that an employee is unauthorized to work, since every employer has an affirmative duty to inquire into each employee's employment eligibility status and to complete a Form I-9 reflecting the results of that inquiry.

9. The strongest indication that Mr. Kurzon was not credible in his position, i.e., that he did not knowingly employ, was the testimony and evidence regarding Mr. Rafael Mendoza's hiring. Complainant pointed out that Mr. Kurzon's sworn testimony was that he had never sent any money to Mr. Mendoza (Ex. C9 at 194), that Mr. Mendoza showed him his green card (Ex. C9 at 190), that he had never spoken to Mr. Mendoza

before his arrival in Meeker in 1989 (Ex. C9 at 193), and that his first contact with Mr. Mendoza was in 1989 in Meeker. (Ex. C9 at 193). However, Mr. Mendoza's statement and the Complainant's corroborating evidence establish that Mr. Kurzon was involved in Mr. Mendoza's coming to the United States from Mexico to work for Respondent. (Ex. C62, C63).

10. Evidence that Mr. Kurzon supplied a birth date to Mr. Mendoza so that he could identify himself at Western Union to pick up the wired money was especially damaging to Mr. Kurzon's position since it showed that Mr. Kurzon was aware that Mr. Mendoza had no identification that he could use to pick up the money. (Ex. C46). Complainant reasoned that should Mr. Mendoza have been in possession of a green card, that would have been a sufficient and convenient means of identification.

11. The testimony by Ms. Elaine Graham, Respondent's former employee, was also quite damaging to Respondent's position. Ms. Graham testified that on September 26, 1990, the day of the search, Jose Alonzo told her that he needed to call Mr. Mendoza and instruct him to leave because he had learned that the immigration officials were inquiring about him and he knew that Mr. Kurzon would want him to do this. (Tr. 593). Mr. Alonzo also stated that there was no need for concern because this would be the first time that they had been caught with an unauthorized alien, and that until there were three violations there would not be an imposition of the \$10,000 fine. (Tr. 594).

Ms. Graham also testified that when she had asked Respondent what he was planning to do after Rafael Mendoza, Carmelo Alonzo and Salvador Perez were arrested and taken away, she was told that Respondent would have more Mexican employees in no time. She received this same reply when Mr. Gonzales, Mr. Campos and Jorge Munoz left Respondent's employment. (Tr. 593, 599).

Ms. Graham stated that she was fired from Respondent's employment in retaliation for giving too much information to the Complainant's agents at the time of the search, for not lying to Complainant by telling them that Mr. Mendoza was no longer employed by Respondent, and for not agreeing to sign an untrue statement alleging that Complainant had not seized all the Forms I-9 at Respondent's Rangely location. (Tr. 603, 604).

(b) Respondent's Case

In its defense, Respondent tried to refute, impeach or alternatively explain, Complainant's witnesses' testimony and/or evidence. For instance, Respondent's position was that the unauthorized aliens' statements were not truthful. Mr. Kurzon argued that those individuals were aware, and afraid, that they would be incarcerated and/or deported by Complainant if they did not cooperate with Complainant and give statements incriminating Respondent. Thus, in furtherance of their own interests, the unauthorized aliens made untruthful

statements and, not only were they not incarcerated or deported, but they were granted work authorization.⁴

To support this position, Respondent introduced testimony by Alvaro Munoz, a shareholder, in which he stated that he knew, because the aliens had told him so, that many had given false statements to Complainant about the knowing hire allegations in order to get work authorization. (Tr. 503-506). He testified further that, although he did not remember who had hired these individuals, he was sure that he had been told that they had green cards. (Tr. 499-500).

Respondent introduced some testimony with regard to the truthfulness of the statements of Jose Munoz, Carmelo Alonzo and Rafael Mendoza. Mr. Kurzon testified that Mr. Jose Munoz' statement that Mr. Kurzon knew that Jose Munoz was illegal was untrue because Jose Munoz had shown him, and Jose Alonzo, his work authorization, i.e., his "green card". (Tr. 34). Mr. Kurzon also testified that Carmelo Alonzo's truthfulness, in general, was poor and that he had lied when he stated that Mr. Kurzon had identified his work authorization as fraudulent but had accepted it anyway. Respondent also entered Alvaro Munoz's testimony that he knew Mr. Mendoza, that he was a liar, and that he had presented both a social security card and a "green card" when he was employed. (Tr. 500-501).

Respondent tried to discredit the aliens' statements regarding the alleged travel route taken to reach Respondent's restaurants. Respondent's argument was that the alleged route was indirect and that common sense would show that if the aliens had, indeed, traveled from Mexico to Colorado, a more direct route was likely to have been taken. (Tr. 344-346). Respondent also tried to discredit Complainant's evidence that the dates and places of its long distance phone calls matched up with the aliens' rendition of the "facts". Respondent's argument was that this correlation was not significant as the Respondent's telephone bills ordinarily show many calls to Mexico, partly because the shareholders have relatives there. (Tr. 346-347).

With regard to Elaine Graham's testimony, it was Respondent's position that she would have had no knowledge of Forms I-9 as she was a waitress and, thus, not involved in their completion or filing. (Tr. 85). As to Ken Jones' testimony, Respondent argued that it also

⁴ Testimony by Agent Hines revealed that three or four individuals had their work authorization renewed. It was unclear why they were renewed. (Tr. 323-324).

should not be believed as Mr. Jones was a liar and a biased witness because of a money dispute with Respondent. (Tr. 325-326).

Respondent tried to show that Complainant's position, that it could not be by happenstance that so many illegal Mexican aliens would be employed at two Mexican restaurants owned by the same corporation in the small towns of Rangely and Meeker, was erroneous. Respondent questioned Agent Hines who agreed that there were other Hispanics, both legal and illegal, employed in the same county where the restaurants were located. (Tr. 322).

With regard to the damaging evidence that had been prepared by Respondent's own bookkeeper, Judy Byrd, i.e., Respondent's Interrogatory Responses, Mr. Kurzon repeatedly testified that they were inaccurate, prepared without his input, and based on Judy Byrd's own assumptions. (Tr. 37-40, 43, Ex. C1).

Respondent did introduce Judy Byrd as his witness and her testimony was used to support Respondent's position that it could not supply copies of the Forms I-9 that had been allegedly lost by Complainant because she had not been allowed to make copies of all the seized documents. Although Ms. Byrd was not sure if she had started copying documents prior to Mr. Kurzon's arrival during the search and seizure, or whether she began copying them after he arrived and he instructed her to do so, she did testify that the majority of the documents had been taken out of the restaurant without being copied and that a request to bring them back for copying was denied.

She further testified that the standard policy of the corporation, at least since she began there in July, 1990, had been to have new employees automatically fill out a Form I-9 with their W-4. During that process, the new employee was also given an "employment policy" to read and sign. She also testified that between 40-50% of Respondent's employees were Hispanic. (Tr. 560).

In an apparent effort to discredit Complainant's rendition of the attitude and behavior of its agents during the search and seizure, Mr. Kurzon presented Mr. David Clarke, a part-time veteran's assistance officer for the country of Rio Blanco and a former salesman and police officer. Mr. Clarke was present in the Meeker restaurant at the time of the search and seizure raid on September 26, 1990. He testified that he was surprised by the manner in which one of the INS officer's entered the restaurant and was offended by her "gangbuster" approach. (Tr. 492-493). He testified further that he was startled by her manner and approach and that in his experience of executing

search warrants, he had never behaved in that manner. (Tr. 495). However, upon cross-examination, he admitted that he had never been involved in any search where it might have been necessary to ensure that the people that were violating the law did not escape the premises. He further admitted that, based on the information given him during cross-examination by Complainant, he now believed that the INS agent's actions were not unreasonable and were meant to secure the environment and prevent any danger or injury to those involved. (Tr. 495-496).

4. Analysis

Complainant has made a strong argument that Respondent's credibility is seriously suspect and that it is a relevant factor in making a determination in this case. I agree. As I find that it is a very telling factor, I will detail a little of the voluminous testimony and evidence I considered when making a finding regarding Mr. Kurzon's credibility in regard to his testimony on Count III:

- a. With regard to Mr. Kurzon's knowledge as to whether Carmelo Alonzo was related to Jose Alonzo, at hearing, Mr. Kurzon testified that he didn't know if they were related, but he didn't think so, but, then again, maybe they were. However, when he was directed to his Interrogatory Responses which indicated that these men were related, Mr. Kurzon stated that, at the time the responses were prepared, he had "thought" that they were cousins. When Complainant showed Respondent that his response was not qualified, Mr. Kurzon claimed that the discrepancy occurred because he did not type up the document. (Tr. 32).
- b. Mr. Kurzon claimed that Ex. C1, Respondent's Interrogatory Responses [prepared by Judy Byrd, Respondent's bookkeeper, "right hand and secretary in the Mecker office," and the individual who was in charge of all business records containing information regarding employees named in the Complaint] were "mistaken" wherein they referred to him as the hiring individual for the named employees. (Tr. 37-38). Detailed in this document is employment information about each individual named in the Complaint.

With regard to those individuals named in Count III, Ms. Byrd detailed each individual's name, dates of employment, place of employment, hourly wage, position, the person who prepared his Form I-9, and the identity of the person who hired that individual. I note that all the individuals named in Count III appear on this list. Under examination at hearing, Mr. Kurzon testified that this document was inaccurate and that Ms. Byrd had prepared it without his input or consultation and had based it on her "own assumptions".

- c. In sworn deposition statements, Mr. Kurzon stated that he had hired three of the unauthorized aliens, Rafael Mendoza, Gil Gonzales and Jorge Munoz, although he denied it at hearing. (Ex. C9 at 207-209).

d. Complainant's Ex. C2 shows that, in March, 1988, Mr. Kurzon provided the Small Business Administration, with requested information so that ARV could get a loan. Therein he stated that a restaurant that he had previously owned had been "very successful and well known in the area." However, at hearing, he testified that the restaurant had been a failure. (Tr. 46). In trying to explain the discrepancy, Mr. Kurzon testified that he did not know where the information given to the Small Business Administration had come from as it was typewritten. Since the bank handled the application, he stated that he should not be responsible for the information on the application. He stated, further, that it was possible that INS had fabricated the document. (Tr. 49-56).

e. Forms I-9 for many employees contained the name "Ken Jones" as preparer, including the Forms I-9 for the unauthorized aliens Marcial Campos, Gil Gonzales, Rafael Mendoza, Jorge Munoz, Jose Munoz and Marcos Munoz. (Ex. J-1, J2, C53). Mr. Jones told Complainant's Agent Hines that he had not filled out any Forms I-9 for these individuals. Submission to Complainant's Forensic Lab revealed that Mr. Kurzon had prepared the forms and had written Mr. Jones name in as the certifying individual.

f. Mr. Kurzon testified that Rafael Mendoza was terminated by ARV three days before the raid and, thus should not have been named in the Complaint. Mr. Kurzon stated that his testimony was based on the payroll information generated in his Interrogatory Response, by his conversation with Mr. Jose Alonzo and the fact that there was other testimony that Mr. Mendoza had moved out of his home on September 23, 1990. Even though Judy Byrd testified to the same termination date, she had no personal information as to Mr. Mendoza's last employment date and had based the Interrogatory Response on information given to her by another employee from the Rangely restaurant. (Tr. 567, 568). Complainant, through Respondent's time cards for Mr. Mendoza, showed that Mr. Mendoza worked on September 25, 1990, the day before the searches were conducted, corroborating both Agent Messer's, Alvaro Munoz', and Ms. Graham's testimony. (Ex. C70, Tr. 572-575, 576-578).

g. The accuracy of the information Mr. Kurzon has provided on many financial and other documents was deficient. For instance Mr. Kurzon's social security number was incorrect on the following documents: a) his loan application to the Small Business Administration (Ex. C2, Tr. 51-57), b) his 1989 Financial Statement provided to the Rio Blanco State Bank (Ex. C3, Tr. 59), c) both Mr. Kurzon's Colorado Driver's License and the signed declaration sheet stating that the information provided was true and correct (Ex. C5, Tr. 68), d) Colorado Consolidated Employer Registration, signed on September 6, 1989, (Ex. C6, Tr. 73), e) Individual History Record/Colorado Department of Revenue/Liquor Enforcement [also containing an inaccurate driver's license number] (Ex. C7, Tr. 79-80), f) March 1, 1990 Personal Financial Statement (Ex. C10), g) 1988 Individual Income Tax Return (Ex. C12), h) 1988 Corporate Tax Return (Ex. C13), i) 1989 Corporate Tax Return (Ex. C14), and, j) March 1, 1990 Personal Financial Statement. (Ex. C9, Ex. 1).

h. Complainant presented detailed evidence of "questionable entries" in Mr. Kurzon's Financial Statement dated September 15, 1989 Financial Statement and submitted to a bank, and signed as being true and accurate. On this document, Mr. Kurzon listed his income as \$28,653.00 although his total income declared on his 1989 Federal Tax Return was only \$2,905. Mr. Kurzon stated that the large discrepancy was "Just a big mistake". Also listed on the document as an asset was ownership of property at 577

& 579 Ninth Street, Meeker, Colorado (Ex. C3) valued at \$63,000 which was purchased with corporate funds as corporate property, but owned in Randall Kurzon's name. Mr. Kurzon listed rental income of \$4,800 from this property as Mr. Kurzon's; however, it was paid to the corporation and not to Mr. Kurzon. (Tr. 64).

i. There are several apparent discrepancies on Mr. Kurzon's Financial Statement, dated March 1, 1990 (Ex. C10, Ex. C9 at Dep. Ex. 1) despite Mr. Kurzon's signature stating that this was a true and accurate statement of his financial condition. His social security number and date of birth are wrong. The real estate property referred to in the above paragraph is again claimed as Mr. Kurzon's. Mr. Kurzon claims as income, rental payments paid to the corporation. Mr. Kurzon lists his salary as \$22,000, whereas only \$2,905 is declared as income on his 1990 Federal Tax Return. He also lists \$27,500 as cash on hand which Mr. Kurzon claims was kept at home. His deposition testimony was that that he did not have a checking account because he did not have any money to put in there. (Ex. C9 at 24-26).

j. There are errors on the Colorado Consolidated Employer Registration, prepared and signed by Mr. Kurzon on September 6, 1989, stating that ARV's first payroll date was 1/3/89. Mr. Kurzon testified that he did not know what the information referred to or whether the information is true or not. (Tr. 73-77). However, as ARV began business in April, 1988, this information is obviously wrong.

k. Mr. Kurzon testified that he did not have a banking account of his own because he did not have any money. However, he testified that at one time he kept \$9,250 in cash at home until he had spent it and that at another time he had as much as \$27,500 in cash at home. (Tr. 60, 104).

This detailed inventory does not contain the many other examples provided by Complainant of inconsistent or non-credible testimony and evidence; nor does it come close to detailing all the inconsistent and/or non-credible testimony by Mr. Kurzon. Although it is slightly conceivable that there could be an explanation for each and every discrepancy and/or inaccuracy that has been noted, Mr. Kurzon has not provided satisfactory or credible explanations.

With relation to Judy Byrd's testimony that Respondent's standard policy, since July, 1990, has been to have a new employee fill out a Form I-9 at the time of employment, I find it to be irrelevant since an examination of Respondent's Interrogatory Responses (Ex. C1) reveals that each of the unauthorized aliens was hired prior to July, 1990.

Further, she testified that new employees were given an employee handbook to read at the time that these documents were completed. I find it relevant that the employee handbook that she testified was given to each new employee was not introduced as evidence by Respondent of his employment policies and find that this testimony is questionable.

I find Ms. Graham's testimony to be credible. I also find her testimony that recounted a conversation she had with Jose Alonzo wherein he stated that his Mexican employees could work part time for a contractor but, since they had no work authorization, Mr. Kurzon would want them paid in cash, to be an indication of Respondent's knowledge and behavior. (Tr. 601).

Ms. Graham testified that it was her belief, based on attendance at employee meetings, meetings outside the restaurant, and other con-tacts, that all business decisions were made by Mr. Kurzon and not by the other shareholders. (Tr. 602). She also testified that Mr. Jose Alonzo spoke English every day to her, to the employees, to the Coke man and to the American Line laundry man and to the delivery men, which directly contradicted Respondent's testimony. (Tr. 613-614).

The court is aware that good faith is a defense to a knowing hire allegation. U.S. v. Hollendorfer, 1 OCAHO 175 (5/17/90). Case law, though, has held that where a respondent has had numerous opportunities to ascertain his responsibilities as an employer under IRCA and is on personal notice regarding these responsibilities with respect to another business owned by the same respondent, the good faith defense will be unavailable. U.S. v. Hanna, 1 OCAHO 100 (7/19/90). Thus, as Mr. Kurzon, President of ARV, admitted that he was aware of his responsibilities regarding the knowing hires under IRCA because he had previously owned another similar business, I find that the good faith defense is not available here.

After a review of the evidence, the testimony and my previous findings, I find again that Mr. Kurzon's testimony is not credible and that Complainant has met its burden of proof by a preponderance of the evidence. Therefore, I find that Respondent knowingly hired and/or continued to employ the eight (8) individuals previously named. Civil penalties will be discussed later in this Decision.

E. Mr. Kurzon's Individual Liability under 8 C.F.R. 274a.1(g)

Complainant has requested that, should it prevail, this Court find Mr. Kurzon individually liable for all the alleged employer sanctions violations set forth in the Complaint. Complainant supports its position by citing Steiben v. INS, 932 F.2d 1225 (8th Cir. 1991), wherein the Eighth Circuit held that liability under Section 1324a(a)(1) turns on the act of hiring, not upon a person's status as the employer of the unauthorized alien, and thus, an employer's agent, as well as the employer, may be liable under the Act. See also U.S.A. v. Nevada Lifestyles, 3 OCAHO 463 (10/16/92). The Court also held that

Complainant did not exceed its delegated authority when it promulgated the regulatory definition of "employer" to mean "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration". 8 C.F.R. 274a.1(g). Thus, as I am persuaded by the Eighth Circuit's reasoning, I may impose liability on Mr. Kurzon if I find that he hired the individuals named in the Complaint.

In response to Complainant's argument, Mr. Kurzon has argued that he should not be found individually liable in this case as he was not the employer of the individuals named in this Complaint. See Respondent's Motion to Dismiss. To support his position, early in the hearing, Mr. Kurzon testified that he did not remember hiring any of the unauthorized individuals and that he was not sure who had done the hiring. (Tr. 35-40). Later in the hearing, though, he took the position that these individuals were hired, either, by the other shareholders or by Ken Jones, a former manager. (Tr. 227-235). However, based on evidence and the hearing testimony, it is apparent that Mr. Kurzon as president of the corporation, did hire employees. Therefore, I find that Mr. Kurzon is an employer as defined by 8 C.F.R. 274a.1(g). As such, Respondent's pending Motion To Dismiss based on his argument that he is not an employer, is denied.

I have previously found Mr. Kurzon's testimony was not credible. Thus, not only is his testimony that he did not hire the unauthorized aliens not credible, but it seems obvious to me that Mr. Kurzon would not find it in his best interest to testify that he had hired these individuals since that would subject him to the very thing he has been fighting, i.e., liability. Therefore, I must consider all the evidence before me to determine if Mr. Kurzon did, in fact, hire any of the individuals named in the Complaint.

I believe that the most persuasive evidence before me regarding the identity of the hiring individual is Respondent's Interrogatory Responses. (Ex. C1). In that document, Respondent identifies the hiring individual for each person named in the Complaint. At hearing, I have heard from Mr. Kurzon that this information is incorrect and was prepared by Ms. Byrd, the corporation's bookkeeper, based on her own assumptions and without his input. However, based on my previous findings, I am persuaded that since Mr. Kurzon did not help to prepare the Interrogatory Responses, and since Ms. Byrd got the necessary information for them from the employees' files, these responses are accurate, credible and believable.

In making these findings, I have also considered testimony that Mr. Kurzon was the person in charge of the corporate business and that he made all the corporate decisions. This testimony was supported by the shareholder Mr. Alonzo's testimony that Randall Kurzon was responsible for taking care of all the corporation's paperwork and all its "money matters". (Tr. 511).

Therefore, with regard to Count I and Count II, as I have previously found that Complainant has proven, by a preponderance of the evidence, the allegations in those Counts and, as I find that, based on his admission in his Interrogatory Responses, Mr. Kurzon hired the following individuals:

Alonzo Carmelo
Floriberto Alonzo
Noel Alonzo
Angie Brauch
Juan Cortes
Victor Cortes
Alberto Mendoza
Jorge Munoz
Rudolfo Munoz
Salvador Perez
Inez Quezada
Juan Alcantar
Carmelo Alonzo
Bill Chase
Jacklyn Chase
Ruperto Chavez-Rodrigues
Stanley Holveck
Lugo Omar Martinez
Rafael Mendoza-Ponce
Jose Munoz
Marcos Munoz
Gail Plimpton
Patricia Provencher
Javier Quezada
Juanita Reeder
Kurt Stokholm

I find that Complainant has proven, by a preponderance of the evidence, that Mr. Kurzon is individually liable for the violations associated with each of the above named individuals detailed in the Complaint's Count I and II. I further find that Complainant has not met its burden with respect to Mr. Kurzon's individual liability for the

remaining named individuals in Counts I and II. Therefore, I cannot find Mr. Kurzon personally liable for those violations.

With regard to Count III, I have previously found that Complainant has proven, by a preponderance of the evidence, the violations alleged in Count III. Mr. Kurzon is identified in Respondent's Interrogatory Responses as the hiring individual for each unauthorized alien named in Count III except for Gil Gonzales and Marcial Campos. However, Mr. Kurzon testified at deposition that he hired Mr. Gonzalez. Further, Complainant's evidence has persuaded me that Mr. Kurzon hired Marcial Campos. Therefore, I find that Mr. Kurzon hired⁵ the following individuals:

Carmelo Alonzo
Rafael Mendoza-Ponce
Jorge Munoz
Salvador Perez
Inez Quezada
Javier Quezada
Marcial Campos-Morales
Gil Gonzales-Gutierrez

Therefore, I also find that Complainant has proven, by a preponderance of the evidence, that Mr. Kurzon is individually liable for the violations detailed in the Complainant's Count III associated with each of the above named individuals.

F. Piercing the Corporate Veil

Complainant has also requested that, should it prevail, I pierce the corporate veil and find Randall Kurzon individually liable on this basis. Complainant bears the burden of proof.

1. Legal Standard

A corporation is a legal fiction designed to encourage business investment by shielding the investor's personal liability exposure. NLRB v.

⁵ Mr. Kurzon is identified as the hiring individual for "Inez Quezada" in the Interrogatory Response related to Count I whereas he is identified as the hiring individual for the other unauthorized aliens in the responses related to Count III. Further, I have ignored any discrepancy between an alien's statement and Respondent's Interrogatory Responses in the identification of the hiring individual, as I find that Respondent's Interrogatory Responses are accurate and that the unauthorized alien was probably unaware of the technical meaning of the word "hire".

Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993). "The insulation of a stockholder from the debts and obligations of his corporation is the norm not the exception." NLRB v. Deena Artware, Inc., 361 U.S. 398, 402-403 (1960)(citations omitted). However, using the equitable remedy of piercing the corporate veil, a court may disregard the corporate form and place the burden of loss on the party who should be responsible. DeWitt Truck Brokers v. Flemming, 540 F.2d 681 (4th Cir. 1976). Thus, a court may find that the personal assets of the controlling shareholder(s) may be used to satisfy the corporation's debt or liability. See U.S. v. Van Diviner, 822 F.2d 960 (10th Cir. 1987); Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R., 417 U.S. 703, 713 (1974).

It should be noted, though, that due to the strong public interest policy of respecting the corporate form, courts will only reluctantly and cautiously pierce the corporate veil in extreme cases such as where the corporation is used to "perpetrate fraud, evade existing obligations, or circumvent a statute." NLRB v. Riley Aeronautics Corp., 178 NLRB 495,501 (1969) (citations omitted); NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993)[citing Cascade Energy & Metals Corp. v. Bank, 896 F.2d 1557, 1576 (10th Cir. 1990), cert. denied 498 U.S. 849 (1990)].

The Tenth Circuit has enunciated a two prong test to determine if the corporate form should be ignored. The court should consider whether: 1) there was such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct, and 2) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993)(citations omitted).

The first prong of this test determines whether the corporation and the stockholder have maintained separate identities. In making this determination, the court will consider both the degree to which the corporate legal formalities have been maintained, and the degree to which individual and corporate assets and affairs have been commingled. Id. Specifically, the courts have looked at:

- a. whether a corporation is operated as a separate entity;
- b. whether there is a commingling of funds and other assets;

- c. whether there is a failure to maintain adequate corporate records or minutes;
- d. the nature of the corporation's ownership and control;
- e. absence of corporate assets and undercapitalizations;
- f. use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation;
- g. disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and,
- h. diversion of the corporation's funds or assets to noncorporate uses.

U.S. v. Van Diver, 822 F.2d 960, 965 (10th Cir. 1987).

Under the second prong of the test, the court must determine whether there is adequate justification to invoke its equitable power. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993). The showing of inequity necessary to satisfy this prong must flow from the misuse of the corporate form. Id. Thus, before it will pierce the corporate veil, the court looks for unfairness, injustice, fraud, evasion of existing obligations, use of the corporation to circumvent a statute, or some other inequitable conduct arising from the misuse of the corporate form. Id.; NLRB v. Riley Aeronautics Corp., 178 NLRB 495, 501 (1969).

In other words, for the court to pierce the corporate veil the act of disregarding the separation of the corporation from the identity of its shareholders must cause the injustice or inequity or constitute the fraud. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1053 (10th Cir. 1993). Committing a tort, breaking a contract or committing an unfair labor practice will not be enough to result in piercing the corporate veil. Additionally, a corporation's inability to pay all its debts will not usually amount to injustice; the court stated that this condition exists in almost all cases where a party is requesting that the court pierce the corporate veil. NLRB v. Kansas City Roofing, Inc., 2 F.3d 1047 (10th Cir. 1993) (citing Scarborough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989)) (other citations omitted). It should be noted, though, that where the inability to meet corporate debts is the result of substantial undercapitalization of the corporate entity, courts have found this to be a sufficient indication of fraud or inequity.

NLRB v. Greater Kansas City Roofing, Inc., 2 F.3d 1047, 1053 (10th Cir. 1993).

Satisfying these two prongs of the test does not automatically result in a finding of personal liability against a shareholder. It is still necessary for the court to find that for a shareholder to be liable, he must "have shared in the moral culpability or injustice" found in the second prong of the above test. Id.

2. Complainant's Argument

Complainant argues that the corporate entity ARV was the instrumentality of its owners, and that ARV's separateness has not been recognized by the shareholders. Complainant argues, therefore, that as other courts have placed personal liability on directors and officers of the corporation where they control the entity and divert assets for personal use, this court should do the same with respect to Mr. Kurzon. See Lafond v. Basham, 683 P.2d 367 (Colo. Ct. App. 1984). Complainant continues by arguing that Mr. Kurzon is ARV's alter ego and that protecting him from liability would promote an injustice.

Complainant supports its position with the following facts:

- a. Since the formation of the corporation in March 1988, Mr. Kurzon has been President;
- b. Mr. Kurzon testified that, as President, he was obligated to protect the corporation's assets and that he should promote the corporation's welfare. (Tr. 87);
- c. Mr. Kurzon testified that the corporation business was not separate from his individual interest, that each shareholder "holds the interest of the corporation equally with his own interest", and that all shareholders used the corporation for their own personal benefit. (Tr. 87);
- d. Mr. Kurzon controlled the corporate checking account and from this account he paid his rent, utilities, medical, dental, auto fuel, auto repair, food, and for horses, a plane and snowmobiles. Mr. Kurzon paid for many other items which do not appear to be corporate related;
- e. Mr. Kurzon's deposition testimony was that when he had desired to purchase a snowmobile, and did not have personal funds to do so, he purchased the snowmobile in his own name with corporate funds. (Ex. C9 at 135-138). However at hearing, Mr. Kurzon represented that the snowmobile was compensation and showed it as a personal asset on his financial reports he signed. (Ex. C10, C11). Also at hearing, though, Mr. Kurzon repeatedly denied that the snowmobiles were purchased for him. (Tr. 89-90);
- f. Corporate funds were used to pay shareholder's routine medical, dental and eyeglass expenses. (Tr. 174, 176, 177);

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- g. Corporate funds were used to pay for real property in the Meeker, Colorado area as well as to pay its mortgage payments. The property was put in Randall Kurzon's name and kept in his name for two years before its transfer to the corporation. Rental payments made to the corporation for this property but were shown on Mr. Kurzon's Personal Financial Statements as his income. (Tr. 178-179, 183, Ex. C10);
- h. Corporate funds were used to purchase an airplane which was owned in Mr. Kurzon's name. All proceeds from leasing of this airplane to others were deposited in Mr. Kurzon's individual bank account. (Tr. 145-152);
- i. Corporate funds were used to purchase a satellite dish/receiver and a television set for one of the shareholders. (Tr. 133, 155-157);
- j. Corporate funds were used to purchase fuel and maintenance for the vehicles owned by the shareholders. (Ex. C74, Ex. C9 at 40, 157);
- k. Corporate funds were used to pay for a traffic ticket received by one of the shareholders. (Tr. 185-187);
- l. Corporate funds were used to pay for legalization fees for shareholders and employees (Tr. 194-196);
- m. Corporate funds were used to purchase automobiles for the shareholders (Tr. 190-191);
- n. Corporate funds were sent to Randall Kurzon's mother. At deposition, Mr. Kurzon testified that these were a gift, but at hearing he testified that it was a loan repayment. (Tr. 134-143, Ex. C9 at 230-232);
- o. Corporate funds were sent to Mr. Kurzon's sister-in-law (Tr. 144, 159-160);
- p. Additional corporate funds were dispersed to Mr. Kurzon by Mr. Kurzon from the corporate checking account without any indication of the purpose. (Ex. C36).

Complainant stated that it was not alleging that Respondent has acted in an illegal manner. Its position, though, was that the shareholders, especially Mr. Kurzon, failed to distinguish between their own personal interest and that of the corporation.

3. Mr. Kurzon's Argument

Mr. Kurzon appeared to argue that he should not be found individually liable in this case because he did not act improperly. He testified that when he received personal benefits from the corporation, he was following procedures used by many other corporations. Further, he testified that any extra financial benefit he received from the corporation, he received as income.

Respondent also entered testimony from Elizabeth Guthrie, former president of Rio Blanco State Bank. (Tr 551-552). She testified that based on documents submitted to her by Mr. Kurzon, she believed that ARV was a corporation in good standing in the state of Colorado. (Tr. 552-555).

4. Discussion of Piercing the Corporate Veil

Complainant has presented considerable evidence that the shareholders in ARV have blurred the lines between the corporation's separate existence and their own. In this case, the evidence and testimony which I found significant in making my decision regarding whether the corporation's identity was, or was not, kept separate from that of its shareholder(s) was abundant. A sampling follows:

- a. Mr. Kurzon's testimony that his interests and the corporation's were one and the same;
- b. Testimony and evidence that Mr. Kurzon used corporate funds as his own;
- c. Mr. Kurzon's testimony that corporation funds expended on his personal behalf were compensation, yet he could not explain why they were not reported on his income tax returns;
- d. Testimony that corporate formalities were not observed and that corporate meetings, if they were held, could be as little as a passing conversation; minutes of directors' meetings were alleged to possibly exist, but were not produced;
- e. Mr. Kurzon's testimony that he periodically lent the corporation money but also took money from the corporation when his personal funds did not allow him to buy things that he wanted; Mr. Kurzon did not present evidence of these alleged loans;
- f. Inconsistent and non-credible testimony regarding the purchase, ownership and purpose for the snowmobiles, the real property in Meeker, and the airplane;
- g. Testimony and evidence regarding the leasing payments for the airplane being deposited in Mr. Kurzon's account;
- h. Testimony and evidence regarding Mr. Kurzon's receipt and retention of the rental income on property bought with corporate funds, owned in Mr. Kurzon's name; testimony and evidence that the corporation made mortgage payment on this property;
- i. Testimony and evidence that corporate funds were disbursed to Mr. Kurzon's family members who did not supply services or products to the corporation; and,
- j. Testimony that Mr. Kurzon ran the corporation without input from the other shareholders.

Although no one act, alone, has given me a complete sense that the shareholders have not maintained separate identities from the corporation, the accumulation of evidence leads me to find that this separation did not exist. Mr. Kurzon's explanations of events and behaviors were inconsistent, vague, non-existent and/or not credible. For instance, he could not substantiate what other corporations' policies he had followed when taking personal benefit from the corporation. Mr. Kurzon's repeated disavowals of earlier testimony were unconvincing. He did not, or could not, prove, that payments to him from corporate funds were authorized by the other directors.

Thus, in considering all the credible evidence and testimony before me, it is evident that Mr. Kurzon had substantial, if not exclusive, control over the corporation and that the other directors were merely figureheads. See, e.g., G.M. Leasing Corp. v. U.S., 514 F.2d 935 (10th Cir. 1975). Therefore, based on the evidence before me, I find that there was no maintenance of separate identities between the corporation and Mr. Kurzon and that Complainant has met its burden regarding the first prong of the test for piercing the corporate veil.

The second prong of the test for piercing the corporate veil involves a finding of inequity. There have been no allegations by Complainant of fraud or evasion of existing debts or of attempts to circumvent a statute through the use of the corporate form. Complainant has, however, argued that allowing Mr. Kurzon to evade personal liability through the protection of the corporate fiction would be an injustice.

Determination of the existence of an injustice is a question of fact, its finding varying upon individual facts and circumstances. Lowell Staats Mining Co. Inc. v. Pioneer Uranium, Inc., 878 F.2d 1259 (10th Cir. 1989)(citations omitted); DeWitt Truck Brokers v. Flemming, 540 F.2d 681, 684 (4th Cir. 1976). Injustice has been found where not piercing the corporate veil would shield a director from personal liability after he used the assets of the corporation for his personal gain and to defeat the valid claim of a creditor of the corporation. Lafond v. Basham, 683 P.2d 367 (Colo. Ct. App. 1984) (citing Rosebud Corp. v. Baggio, 561 P.2d 367, 370 (1977)), In this case, Complainant has not proven that Mr. Kurzon used the corporate form to avoid complying with IRCA. It has not shown that Mr. Kurzon used corporate funds to avoid incurring or being able to pay the civil money penalties that might be awarded in this case. There has been no evidence that the corporation is on the verge of bankruptcy, despite Mr. Kurzon's statement in a letter implying that it might be a possibility. See, e.g., Audit Services, Inc. v. Rolfin, 641 F.2d 757 (9th Cir. 1980).

Although I find that, at the least, Mr. Kurzon has been sloppy in his observance of corporate formalities, if not downright purposely avoid-ing them, and that the other directors/shareholders have abdicated their responsibilities, I do not find that Complainant has been misled or prejudiced by these actions. See NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1055 (10th Cir. 1993). Further, I find that Complainant has not proven that Mr. Kurzon has drained the corporation so as to avoid payment of the civil money penalties which might be awarded in this case.

I am mindful of the reluctance and caution that courts use when considering piercing the corporate veil. Although I have listened to incredible testimony by Mr. Kurzon, and have found earlier in this decision that Mr. Kurzon is personally liable for many of the violations in the Complaint, I do not find that Complainant has met its burden in proving injustice of the type that would persuade me to pierce the corporate veil. Therefore, I cannot impose personal liability on Mr. Kurzon on this basis.

IV. *Findings of Fact and Conclusions of Law*

Based on all the evidence and testimony in this case, as applied to the relevant law, I make the following findings of fact and conclusions of law:

1. All individuals listed in Counts I, II and III of the Complaint were employees of Respondent, ARV, being initially hired after November 6, 1986;
2. That all Forms I-9 prepared by ARV, as of September 26, 1990, were seized by Complainant's agents pursuant to the searches conducted that same date at the Meeker, Rangely, and Delta restaurants. (Exhibit J2);
3. That ARV is a corporation duly organized and authorized under the laws of the State of Colorado (Exhibit J2); Mr. Kurzon is President of ARV;
4. That ARV's principle place of business is located in Meeker, Colorado and that business operations began in April, 1988 (Exhibit J2);
5. That ARV's business is conducted under the trade name of "The Last Chance Restaurant";
6. That allegations in Count I regarding Carmelo Alonzo, Sheila Hackett, Jorge Munoz, Rita Thomas and Deborah Woodal and, allegations in Count III regarding Jose Munoz-Alonzo, Marcos Munoz and Jose Cortes, are dismissed;
7. That the testimony of the INS agents was credible;
8. That Mr. Kurzon's testimony was not credible;

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9. That Respondent's Interrogatory Responses prepared in preparation for this hearing were credible;
10. That Complainant did not misplace or lose any Forms I-9 which Respondent alleged he prepared;
11. That Respondent's alleged corporate policy of having a new employee fill out a Form I-9 at the time of employment did not exist, or was not followed, at the time the individuals named in Counts I, II and III were hired;
12. That Complainant has proven, by a preponderance of the evidence, that ARV violated 8 U.S.C. 1324a(a)(1)(B) in that it failed to prepare the employment eligibility verification form (Form I-9) for the 47 individuals remaining in Count I;
13. That the Forms I-9 related to the individuals in Count II speak for themselves and are improperly completed as to Section 2;
14. That Respondent has not proven that he substantially complied with the paperwork requirements of 8 U.S.C. 1324a;
15. That Complainant has proven, by a preponderance of the evidence, that ARV has violated 8 U.S.C. 1324a(a)(1)(B) in that it failed to properly complete Section 2 of the Form I-9 for the forty-eight (48) named employees in Count II;
16. That the eight individuals remaining in Count III,
 1. Carmelo Alonzo
 2. Jorge Munoz
 3. Salvador Perez
 4. Inez Quezada
 5. Marcial Campos-Morales
 6. Javier Quezada
 7. Gil Gonzales-Gutierrez
 8. Rafael Mendoza Poncewere unauthorized for employment in the United States at the time of hire;
17. That the eight individuals remaining in Count III were hired by ARV;
18. That ARV was aware of the responsibility to complete a Form I-9 at the time of hire and that it was a violation of 8 U.S.C. 1324a to hire an individual who was unauthorized for employment in the United States;
19. That Mr. Kurzon knew that the individuals associated with Count III were unauthorized for employment in the United States;
20. That Complainant has proven, by a preponderance of the evidence, that ARV knew that the named individuals above associated with Count III were not authorized for work in the United states at the time of hire and thus violated 8 U.S.C. 1324a(a)(1)(A);

- 21. That Randall Kurzon meets the regulatory definition in 8 C.F.R. 274a.1(g) of an "employer";
- 22. That Mr. Kurzon hired the following specific individuals associated with Counts I, II and III:

Alonzo Carmelo
Floriberto Alonzo
Noel Alonzo
Angie Brauch
Juan Cortes
Victor Cortes
Alberto Mendoza
Jorge Munoz
Rudolfo Munoz
Salvador Perez
Inez Quezada
Juan Alcantar
Carmelo Alonzo
Bill Chase
Jacklyn Chase
Ruperto Chavez-Rodrigues
Stanley Holveck
Lugo Omar Martinez
Rafael Mendoza-Ponce
Jose Munoz
Marcos Munoz
Gail Plimpton
Patricia Provencher
Javier Quezada
Juanita Reeder
Kurt Stolkholm
Carmelo Alonzo
Jorge Munoz
Salvador Perez
Inez Quezada
Marcial Campos-Morales
Javier Quezada
Gil Gonzales-Gutierrez
Rafael Mendoza Ponce

- 23. That Mr. Kurzon is individually liable under 8 U.S.C. 1324a(a)(1)(B) for the violations in Count I and II associated with the following specific individuals:

Alonzo Carmelo	Carmelo Alonzo
Floriberto Alonzo	Bill Chase
Noel Alonzo	Jacklyn Chase
Angie Brauch	Ruperto Chavez-Rodrigues
Juan Cortes	Stanley Holveck
Victor Cortes	Lugo Omar Martinez
Alberto Mendoza	Rafael Mendoza-Ponce
Jorge Munoz	Jose Munoz
Rudolfo Munoz	Marcos Munoz
Salvador Perez	Gail Plimpton

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Inez Quezada
Juan Alcantar
Javier Quezada

Patricia Provencher
Juanita Reeder
Kurt Stolkholm

24. That Mr. Kurzon is individually liable under 8 U.S.C. 1324a(a)(1)(A) for all violations in Count III associated with the following individuals:

1. Carmelo Alonzo
2. Jorge Munoz
3. Salvador Perez
4. Inez Quezada
5. Marcial Campos-Morales
6. Javier Quezada
7. Gil Gonzales-Gutierrez
8. Rafael Mendoza Ponce

25. That Mr. Kurzon commingled his personal funds with those of ARV;

26. That the directors failed to maintain adequate corporate records or minutes;

27. That Mr. Kurzon controlled the funds of the corporation and its management;

28. That the other shareholders had abdicated their responsibilities as directors of ARV;

29. That the directors did not maintain a required arms-length relationship with the corporation;

30. That corporate funds were diverted for noncorporate uses;

31. That there was such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and Mr. Kurzon were indistinct;

32. That an injustice of the type necessary to allow a piercing of the corporate veil has not been proven by a preponderance of the evidence;

33. That I am not persuaded to pierce the corporate veil; and,

34. That all other motions not ruled on are denied.

Prior to making a determination of the appropriate amount of civil penalties to award in this case, I am allowing the parties to submit briefs addressing the five factors of 8 U.S.C. 1324a(e)(5) and any other relevant factors. It is noted that Respondent has previously referenced a Supreme Court case dealing with the U.S. Constitution's Eighth Amendment. If Respondent wishes to further address this argument, he should address it in his brief with factual and legal support, if they are relevant.

These briefs are due on, or before January 12, 1994. At that time, I will determine the appropriate amount of civil money penalties and issue a final decision and order.

IT IS SO ORDERED this 6th day of December, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge