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

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION, SERVICE Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	CASE NO. 93A00103
CHINA WOK RESTAURANT, INC., a Nebraska Corporation Respondent.	)	

ERRATA

On February 9, 1994, I issued a Decision and Order Granting in Part Complainant's Motion for Partial Summary Decision, Staying a Ruling on Count III, Directing Respondent to File Additional Evidence and Setting Date for an Evidentiary Hearing. Upon further review of the order, I noticed an omission and pursuant to 28 C.F.R. 68.52(c)(4) I am correcting that omission as follows:

The last sentence in the text of page 12 an continuing to page 13, stating:

> Although the INS has exclusive enforcement authority to fine employers for sanctions violations, other entities--the Special Counsel for Immigration-Related Employment Practices, authorized to enforce IRCA's antidiscrimination provisions ("Special Counsel") and the Department of Labor ("DOL")--have authority to inspect the Forms I-9.

should be amended to add "in addition to the INS, " at page 13, line 3, so that the sentence reads:

> Although the INS has exclusive enforcement authority to fine employers for sanctions violations, other entities--the Special Counsel for Immigration-Related Employment

Practices, authorized to enforce IRCA's antidiscrimination provisions ("Special Counsel") and the Department of Labor ("DOL")--in addition to the INS, have authority to inspect the Forms I-9.

SO ORDERED this 10th day of February, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge

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

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	CASE NO. 93A00103
CHINA WOK RESTAURANT, INC., a Nebraska Corporation Respondent.	)	

DECISION AND ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION, STAYING A RULING ON COUNT III, DIRECTING RESPONDENT TO FILE ADDITIONAL EVIDENCE AND SETTING DATE FOR AN EVIDENTIARY HEARING

Complainant, the United States Department of Justice, Immigration and Naturalization Service ("INS"), has moved for partial summary decision on Counts II through V of the complaint. For the reasons stated below, the motion is granted as to Count II and as to Counts IV and V with regard to liability. A decision as to the amount of a civil money penalty for the violations of Counts IV and V shall be determined after Respondent has had an opportunity to submit any evidence regarding mitigation. A decision as to Count III is stayed until Respondent has had an opportunity to file affidavits, witnesses' statements and documentary evidence in support of its denials of the allegations contained therein.

I. *Factual Background and Procedural History*

China Wok Restaurant, Inc., the Respondent in this case, is a Nebraska Corporation doing business at 12100 West Center Road in Omaha, Nebraska. Allan Kao is Respondent's owner, president and manager.

In a previous case involving Respondent, the Administrative Law Judge ("ALJ"), in an unpublished decision based on a settlement agreement, held, among other things, that Respondent had violated Section 274A(a)(1)(A) of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 1324a(a)(1)(A) in that Respondent had employed an alien after December 30, 1987, knowing that he was not authorized to be employed in the United States. United States v. China Wok Restaurant, Inc., OCAHO Case No. 88100025 (July 20, 1988).

At some point after that decision was issued, the Immigration and Naturalization Service ("INS") commenced an investigation against Respondent. On July 24, 1991, INS agents arrested Antonio Salinas-Garrido,[1] Jose Antonio Grimaldo-Corona, Juan Manuel Trejo-Castillo and Saul Galaviz-Linares outside Respondent's premises.

On July 24, 1991, an INS Notice of Inspection was delivered to Respondent by certified mail, return receipt, scheduling an inspection for July 30, 1991. On July 30, 1991, INS Special Agent Larry D. Crider conducted an inspection at Respondent's premises. According to Complainant, Kao (Respondent's owner, president and manager) and Tony Gross, Respondent's accountant, were present during the inspection. Kao and Gross presented to Special Agent Crider a number of INS Forms I-9 (Employment Eligibility Verification Forms). Crider retained these forms and gave Kao a receipt for them.

Special Agent Crider asked Kao if he had Forms I-9 for Saul Galaviz-Linares, Jose Antonio Grimaldo-Corona, Juan Manuel Trejo-Castillo and Antonio Salinas-Garrido. Kao gave Special Agent Crider a Form I-9 for Antonio Salinas-Garrido (Counts II and V), but stated that he had no Forms I-9 for the other three individuals, and offered no further

---

[1] Count II of the complaint alleges that Respondent violated IRCA by employing "Antonio Garrido" after his employment authorization had expired and Count V alleges that Respondent violated IRCA by by failing to update the Form I-9 of "Antonio Garrido" after his employment authorization had expired. As this individual's full name is Antonio Salinas-Garrido, see Compl.'s Br., Ex. C-5 [Form I-9 of Salinas-Garrido], this decision will refer to him as such.

explanation. Also during the inspection, Kao presented to Special Agent Crider a list of employees, dated July 29, 1991, and a payroll recap for the period of January 1 through January 30, 1991. The records contain no references to the employment of Galaviz-Linares, Grimaldo-Corona or Trejo-Castillo (Counts I and III).

According to Complainant, the Forms I-9 that Kao provided to Special Agent Crider were Respondent's Forms I-9 for Peter Sader and Victoria Fitzgerald (Count IV). The name "Wei He" (Count III) appeared on Respondent's employee list dated July 29, 1991 and Respondent's payroll recap, covering the period from January 1 through June 30, 1991, which Kao provided to the INS on the date of the inspection. On that day, however, Respondent did not present Special Agent Crider with a Form I-9 for Wei He.

Based upon its investigation and inspection, on July 24, 1992, the INS issued a "Notice of Intent to Fine" against Respondent. Respondent then timely requested an evidentiary hearing before an ALJ. On May 13, 1993, Complainant filed a complaint against Respondent with the Chief Administrative Hearing Officer ("CAHO"), alleging in five separate counts that Respondent had committed multiple violations of the employment sanction provisions of the Immigration Reform and Control Act of 1986, ("IRCA"), § 274A of the INA, codified at 8 U.S.C. § 1324a.

More specifically, Count I of the complaint alleges that Respondent hired Saul Galaviz-Linares, Jose Antonio Grimaldo-Corona and Juan Manuel Trejo-Castillo after November 6, 1986, knowing that they were not, at the time of hire, authorized for employment in the United States, in violation of § 274A(a)(1)(A) of the INA, 8 U.S.C. § 1324a(a)(1)(A). Count I alleges in the alternative that Respondent continued to employ these individuals, knowing that they were aliens who were not authorized for employment in the United States,in violation of § 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2) and 8 C.F.R. § 274a.3.

Count II alleges that Respondent, after November 6, 1986, hired Antonio Salinas-Garrido, who at the time of hire, was authorized to accept employment in the United States only until February 15, 1991; that Respondent continued to employ Salinas-Garrido after February 15, 1991, as he was employed by Respondent from July 3, 1990 to July 24, 1991; and that this constitutes a violation of Section 274A(a)(2) of the Act, 8 U.S.C. § 1324a(a)(2) and 8 C.F.R. § 274a.3.

Count III alleges that Respondent hired Saul Galaviz-Linares, Jose Antonio Grimaldo-Corona, Juan Manuel Trejo-Castillo, and Wei He after November 6, 1986, that Respondent failed to prepare Forms I-9 for them and that Respondent failed to make their Forms I-9 available for inspection on July 30, 1991, in violation of Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) and § 274A(b) of the Act, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). Count III alleges, in the alternative, that Respondent violated Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B), § 274A(b)(3) of the Act, 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2)(ii).

Count IV alleges that Respondent hired Victoria Fitzgerald and Peter Sader after November 6, 1986 and failed to ensure that they properly completed section 1 of their Forms I-9, that Respondent failed to properly complete section 2 of the Forms I-9, and that Respondent failed to complete section 2 of the Forms I-9 within three business days of hire, in violation of Section 274A(A)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) and § 274A(b)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii).

Count V alleges that Respondent hired Antonio Salinas-Garrido after November 6, 1986 and failed to properly update section 2 of his Form I-9 upon expiration of his work authorization, in violation of Section 274A(a)(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) and § 274A(b)(1) of the Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(vii).

On July 6, l993, Respondent filed its answer to the complaint. On September 22, l993, Complainant filed a motion for partial summary decision with respect to Counts II through V, with a supporting brief ("Compl.'s Br."), the affidavit of Special Agent Larry D. Crider ("Crider Aff.") and 19 exhibits.[2]

On October 11, l993, Complainant filed a motion to deem its request for admissions admitted and a motion to compel discovery. On October 29, l993, I stayed a ruling on those motions until after ruling upon the motion for partial summary decision.

---

[2] These exhibits include copies of Respondent's records of its employees for 1991; payroll recaps for the first six months of 1991; Forms I-9 for Antonio Salinas-Garrido, Peter Sader and Victoria Fitzgerald; transcripts of sworn videotaped statements of and copies of an INS Form I-213, Record of Deportable Alien, for Saul Galaviz-Linares, Jose Antonio Grimaldo-Corona, Juan Manuel Trejo-Castillo and Antonio Salinas-Garrido; and sworn statements of Trejo-Castillo, Grimaldo-Corona and Salinas-Garrido.

On October 15, l993, Respondent filed its response to Complainant's motion for partial summary decision ("Resp.'s Br."), without supporting affidavits, statements of witnesses or documents. On October 18, l993, Complainant filed a reply to Respondent's brief. My findings of fact and conclusions of law are set forth below.

II. *Discussion*

A. Legal Standards for Summary Decision

The rules of practice and procedure for administrative hearings in cases involving allegations of unfair immigration-related employment practices provide for the entry of summary decision "if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact." 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal district court cases. Consequently, federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and the standards for determining whether summary decision under § 68.38 is appropriate in proceedings before this agency.

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587. Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Case Analysis

1. Count II

Complainant argues that the undisputed facts in this case, and inferences to be drawn therefrom, show that after November 6, 1986, Respondent hired Antonio Salinas-Garrido, an alien, who at the time of hiring, was authorized to accept employment in the United States until February 15, 1991, but that Respondent continued to employ Salinas-Garrido after February 15, 1991 (through July 24, 1991), knowing that he was not authorized for employment in the United States.

Respondent admits that Salinas-Garrido was hired after November 6, 1986, and that it continued to employ him after February 15, 1991. Answer, at 1. Although Respondent denies that Salinas-Garrido had employment authorization until February 15, 1991 and that Respondent employed him from July 3, 1990 to July 24, 1991, see id., Complainant argues that Respondent has not provided any evidence or facts to show that Salinas-Garrido's employment authorization was different or more extensive than that alleged in the complaint. Complainant further argues that the Form I-9 for Salinas-Garrido shows that his employment authorization date was recorded as valid for one year from the expiration date of February 15, 1990 and that the form did not show employment authorization after February 15, 1991. See Compl.'s Br., Ex. C-5. In addition, Complainant states that the affidavit of Larry Crider and INS records show that Salinas-Garrido's employment authorization expired on February 15, 1991 and Respondent's payroll recap states that Salinas-Garrido was paid wages for employment from March 1, 1991 through May 1, 1991. See Crider Aff. ¶ 14; Compl.'s Br., Ex. C-4 at 3.

Respondent asserts that Complainant's argument is based on speculation that if an agent of Respondent had inquired, he or she might have learned that Salinas-Garrido was not authorized to be employed in the United States. Respondent argues that whether Respondent knew that Salinas-Garrido was not authorized for employment after February 15, 1991 raises a question of fact that must be determined by the ALJ after conducting an evidentiary hearing. More specifically, Respondent argues that the ALJ must determine whether Respondent had constructive or actual knowledge that Salinas-Garrido was not authorized to be employed in the United States. Respondent further argues that Respondent's admission in a prior case that he knowingly hired an alien who was not authorized to be employed in the United States is insufficient to prove that Salinas-Garrido was not authorized for employment in the United States and that Respondent knew of his status as such.

The sufficiency of Complainant's proof that Respondent violated Count II under the constructive knowledge theory, however, is irrelevant to resolving Complainant's motion for partial summary decision. Respondent does not dispute any of the facts which Complainant has asserted that support a finding of constructive knowledge, but merely argues that the facts asserted by Complainant do not support a finding of constructive knowledge. As this is a legal argument, it can be resolved without an evidentiary hearing.

In Count II, Complainant asserts that Respondent has violated 8 U.S.C. § 1324a(a)(2), which provides that:

> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing that the alien is (or has become) an unauthorized alien with respect to such employment.

The statute defines an "unauthorized alien" as follows:

> with respect to the employment of an alien at a particular time, [an] alien [who] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Chapter or by the Attorney General.

8 U.S.C § 1324a(h)(3).

It is significant that IRCA proscribes an employer's continuing employment of an unauthorized alien only in cases in which the employer knows that the alien is unauthorized with respect to such employment. The term "knowing" is defined by 8 C.F.R. § 274a.1(l)(1), as added by 55 Fed. Reg. 25931 (June 25, 1990)[3] as ". . . includ[ing] not only actual knowledge but also 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."[4]

---

[3] This regulation was published an an interim final rule with request for comments, effective June 25, 1990. Prior to its publication, both the statute and the regulations were silent on the issue of whether "knowing" required actual, subjective knowledge on the part of the employer or whether constructive knowledge (circumstances in which the employer "should have known") was sufficient. Administrative law judges, however, have consistently upheld the INS on the viability of the constructive knowledge theory of liability and those decisions, in turn, have been upheld by the Ninth Circuit Court of Appeals. See United States v. Noel Plastering, Stucco, Inc., 2 OCAHO 427 (September 23, 1991), aff'd, Noel Plastering, Stucco, Inc. v. OCAHO, No. 92-70532 (9th Cir. Dec. 27, 1993); United States v. New El Rey Sausage Co., 1 OCAHO 78 (Aug. 4, 1989), aff'd, New El Rey SausageCo. v. INS, 925 F.2d 1153 (9th Cir. 1991); United States v. Big Bear Market, 1 OCAHO 49 (May 5, 1989), aff'd, Big Bear Market #3 v. INS, 913 F.2d 754 (9th Cir. 1990).

[4] The regulation subsequently was clarified by adding to the end of the above-quoted language:

> Constructive knowledge may include, but is not limited to, situations where an employer:

(continued...)

The record clearly shows by a preponderance of the evidence that Respondent continued to employ Salinas-Garrido after his work authorization had expired, and that Respondent had constructive knowledge that Salinas-Garrido was not authorized for employment in the United States. This finding is based on the following undisputed facts: (1) Salinas-Garrido states that Respondent hired him for employment in the United States after November 6, 1986 and that Respondent continued to employ him after February 15, 1991 (see Compl.'s Br., Ex. C-9 at 7-13 [statement of Salinas-Garrido]); (2) Salinas-Garrido worked for Respondent from July 3, 1990 to July 24, 1991; (3) Salinas-Garrido's employment authorization expired on February 15, 1991 and he did not obtain from the INS an extension of time beyond February 15, 1991 for authorization to work in the United States; (4) Respondent noted on the Form I-9 of Salinas-Garrido that his employment authorization expired on February 15, 1991; (5) Salinas-Garrido never extended his employment authorization; and (6) Respondent never requested that Salinas-Garrido provide new or additional documents entitling him to continue employment.

I find, based on the above, that Respondent had notice of the final date of Salinas-Garrido's employment authorization and thus had the responsibility, prior to or upon the expiration date, to ask Salinas-Garrido whether his employment authorization had been extended. See Mester Mfg. Co. v. INS, 879 F.2d 561, 568 (9th Cir. 1989) (upholding ALJ's conclusion that a two-week delay in terminating illegal alien violated IRCA.) Respondent, however, chose not to inquire. If Respondent had done so, it would have learned that Salinas-Garrido was not authorized for employment after February 15, 1991. Moreover, I agree with Complainant that Respondent should have been especially sensitive to insure that its employees were authorized for employment in the United States, because Respondent was the subject of a prior order which found that it had knowingly hired an alien who was not authorized for employment. Because I find that Respondent had constructive knowledge that Salinas-Garrido, an alien, was not authorized for employment in the United States after February 15,

---

[4](...continued)

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or Application for Prospective Employer . . . .

56 Fed. Reg. 41767 (Aug. 23, 1991).

1991 and that Respondent continued to employ him until July 24, 1991, I conclude that Respondent violated Section 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2) and 8 C.F.R. § 274a.3.

Based on the above and Respondent's prior violation of § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) as held in United States v. China Wok Restaurant, Inc., OCAHO Case No. 88100025 (July 20, 1988), I assess a civil money penalty of $3,700.00 for Respondent's violation of Count II, pursuant to Section 274A(e)(4)(ii) of the INA, 8 U.S.C. § 1324a(e)(4)(A)(ii), .

2. Count III

Count III of the complaint relates to employees Saul Galaviz-Linares, Jose Antonio Grimaldo-Corona, Juan Manuel Trejo-Castillo and Wei He. Respondent admits that it hired those employees after November 6, 1986 and that Special Agent Crider at an inspection requested that Respondent make available their Forms I-9. Answer ¶ 3. Respondent, however, denies that it failed to make their Forms I-9 available for inspection, and asserts that it made available all Forms I-9 in its possession. Id. Respondent further states, regarding three of these individuals (all but Wei He), that either their records were not locatable or they were offered to Special Agent Crider, but he did not take them. Resp.'s Br. at 2.

Complainant's version of the facts differ from Respondent's with respect to the presentation of the documents. It is noteworthy that Complainant's version is based on the affidavit of an INS agent, sworn statements and transcribed sworn videotaped statements of witnesses, documents, and pleadings filed in this case. These sworn statements, documents and pleadings show the following facts.

On July 24, 1991, Paul E. Christiansen, Assistant Director of Investigations, INS, sent Respondent a letter notifying it that the INS had scheduled a review of its Forms I-9 for Tuesday, July 30, 1991. See Compl.'s Br., Ex. C-2 [INS Notice of Inspection]. On July 30, 1991, Special Agent Crider went to Respondent's premises to conduct the inspection. Compl.'s Br. at 2. Kao, president, owner and manager of China Wok Restaurant, and his accountant, Tony Gross, were both present during the inspection. Id. Kao provided Special Agent Crider with twenty-nine (29) Forms I-9. See Compl's Br., Ex. C-19 [receipt for the 29 Forms I-9 Kao gave Crider]. Special Agent Crider specifically asked Kao for the Forms I-9 for Antonio Salinas-Garrido, Jose Antonio Grimaldo- Corona, Juan Trejo-Castillo and Saul Galaviz-Linares. Kao

gave the agent a Form I-9 for Salinas-Garrido, but stated that he did not have any Forms I-9 for the three others, and offered no further explanation. Kao also gave Special Agent Crider a list of employees, dated July 29, 1991, and a payroll recap for January 1, 1991 through June 30, 1991. See Compl.'s Br., Ex. C-3, C-4 and C-17.

After reviewing all the Forms I-9, records and the list of employees presented that day, Special Agent Crider determined that Respondent's agents had not presented to him Forms I-9 on the date of inspection for He, Galaviz-Linares, Grimaldo-Corona, or Trejo- Castillo. See Compl.'s Br., Ex. C-19 [the receipt listing the names of the individuals for whom Respondent gave Special Agent Crider a Form I-9 on the date of the inspection on which the names of these four individuals do not appear].

Special Agent Crider also examined the payroll records provided to him by Kao and observed that Wei He's name was on the records. Compl.'s Br., Ex. C-17 at ¶ 3-6. Crider also determined that the names of Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo did not appear in the payroll records. Those three were arrested at the restaurant on July 24, 1991. They were interviewed, at which time, they provided sworn statements to the INS, each stating that he had been employed by Respondent. Crider Aff. ¶ 7.

More specifically, Galaviz-Linares, a native and citizen of Mexico, said that he started working for Respondent in May of 1990, and that he was paid $860.00 a month. Compl.'s Br., Ex. C-9 [transcribed sworn videotaped statement of Galaviz-Linares] at 16. He admitted that he entered the United States legally and that he was not authorized for employment in the United States. Id. at 13-14; see Compl.'s Br., Ex. C-10 [Galaviz-Linares' Form I-213, Record of Deportable Alien, indicating that he is deportable as an alien who entered the U.S. without inspection]. Galaviz-Linares further stated that at the time he applied for a job with Respondent, he completed a Form I-9. Compl.'s Br., Ex. C-9 at ¶ 15-16.

Grimaldo-Corona, also a native and citizen of Mexico, started employment with Respondent on or about June 20, 1991 and was paid $800.00 per month. Compl.'s Br., Ex. C-9 [transcribed sworn videotaped statements of Grimaldo-Corona] at 18-19. He stated that he had entered the United States illegally. Id. at 18; see Compl.'s Br., Ex. C-11 [Grimaldo-Corona's Form I-213, Record of Deportable Alien, indicating that he is deportable as an alien who entered the U.S. without inspection]. Grimaldo-Corona also stated that although he had presented Respondent with his identification and work authorization docu-

ments, he was never asked to fill out a Form I-9, and therefore, never did so.. Compl.'s Br., Ex. C-9 at 20.

Trejo-Castillo, also a native and citizen of Mexico, stated that he started working for Respondent in December 1990 for $900.00 per month, and that he did not have employment authorization from the INS. Compl.'s Br., Ex. C-9 [transcribed sworn videotaped statement of Trejo-Castillo] at 1,4-5. He further stated that at the time he applied for a job with Respondent he filled out a Form I-9. Compl.'s Br., Ex. C-15 [record of sworn statement of Trejo-Castillo] at ¶ 20.

During the course of discovery and in response to requests for admissions, Kao stated that he was uncertain whether a Form I-9 had been prepared for Galaviz-Linares, (Compl.'s Br., Ex. C-18 [Respondent's Response to Complainant's Requests For Admissions] at ¶ 2(e), and stated that he was uncertain as to whether an agent of Respondent had presented or made available to the INS at the inspection on July 30, 1991 a Form I-9 for Galaviz-Linares. Id. at ¶ 2(i). In addition, Respondent denied that an agent of Respondent had not prepared Forms I-9 for Grimaldo-Corona, He and Trejo-Castillo. Id. at ¶ 2(f) - 2(h). Respondent further stated that on the date of the inspection its accountant had the Forms I-9 for Grimaldo-Corona, He, and Trejo-Castillo, but that Special Agent Crider failed to take them. Id. at ¶ 2(j) - (l).

During the course of discovery, Complainant also requested that Respondent produce, among other things, the Forms I-9 for Galaviz-Linares, Grimaldo-Corona, He, and Trejo-Castillo. In a response, dated September 17, 1992, Respondent stated that the Forms I-9 were "either given to Larry D. Crider on July 30, 1991 or are not locatable at this time." Compl.'s. Br., Ex. C-19 [Respondent's Notice of Response to Request for Production] at 1; see id. at 4 [Complainant's Request for Production].

It is undisputed, however, that Respondent has not produced, through discovery or otherwise, the Forms I-9 for the four individuals named in Count III. Respondent has also admitted in answers to interrogatories that it employed Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo. Compl.'s Br., Ex. C-2. The INS Forms I-213, sworn statements and videotaped sworn statements taken by INS agents from Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo show that these three individuals were employed for more than three days. See Compl.'s. Br., Ex. C-9 through C-12 and C-14 and C-15. Respondent's records also show that Wei He was employed by Respondent for more than three days. See Compl.'s. Br., Ex. C-3 and C-4.

Respondent argues that summary decision as to Count III should be denied because Complainant relies on the sworn statements of pretrial detainees who were without benefit of counsel or cross-examination to prove that Galaviz-Linares, Grimaldo-Corona, He, and Trejo-Castillo were paid in cash by Respondent. Resp.'s Br. at 2. This argument implies that this agency may not consider hearsay evidence in determining a motion for summary decision. It is well established, however, that hearsay evidence is admissible in administrative proceedings, if factors are present which assure the underlying reliability and probative value of the evidence. Gimbel v. Commodities Future Trading Commission, 872 F.2d 196, 199 (7th Cir. 1989) (citing Richardson v. Perales, 402 U.S. 389 (1971)); Calhoun v. Bailar, 626 F.2d 145, 148-149 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981); United States v. Mr. Z Enterprises, 1 0CAHO 288 at 21-21 (Jan. 11, 1991) (liability under 8 U.S.C. § 1324a may be based upon hearsay of unavailable witnesses without violating the sixth amendment right to confrontation); United States v. Cafe Camino Real, 1 OCAHO 224 (Aug. 28, 1990) (Order Denying Motions to Suppress, To Dismiss and for Summary Decision) (ALJ denied motion to suppress videotaped statements and entries on various INS forms, finding them reliable and probative; United States v Dubois Farms, Inc., 2 OCAHO 376, at 8-9 (Sept. 24, 1991) (ALJ admitted hearsay statements of witnesses based upon 5 U.S.C. § 556(d) of the Administrative Procedure Act which states that "any oral or documentary evidence may be received but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence."); see generally 4 Stein, Mitchell and Mezines, Administrative Law § 26.02 (rev. ed. 1990). Based upon my review of the record, I will admit the statements of Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo, and consider them in determining whether there are any material facts in dispute with respect to the alleged paperwork violations.[5]

Respondent further argues that there are material facts in dispute regarding whether Respondent prepared Forms I-9 for these employees and presented them to Special Agent Crider, because for at least three of these employees, Grimaldo-Corona, Trejo-Castillo and He, records could not be located or were offered to Special Agent Crider, but he did

[5] Although I will consider these statements for purposes of determining the paperwork violations, I will not consider them admissible for purposes of proving that Respondent employed Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo knowing that they were aliens who were not authorized for employment in the United States, until I have had an opportunity to hear testimony from the INS agent(s) who prepared and obtained their statements.

not take them. Resp.'s Br. at 2. Respondent, however, has not submitted any affidavits, witnesses' statements or documents in support of its argument.

A description of the statutory and regulatory requirements regarding the preparation, verification, retention and government inspection of the Form I-9 is helpful in resolving whether there are material issues in dispute with respect to Count III. The Form I-9 must be signed under penalty of perjury by both the employer and the employee. 8 C.F.R. § 274a.2(a). The employer representative must attest that he or she has examined the documents presented by the employee, that the documents appear to be genuine and relate to the named employee, that the employee began employment on a designated date, and that to the best of the representative's knowledge, the employee is eligible to work in the United States. 8 U.S.C. § 1324a(b)(1)(A). The employ-ee's signature attests that he or she is a citizen or national of the United States, an alien lawfully admitted for permanent residence or an alien who is authorized to work until a specified date. 8 U.S.C. § 1324a(b)(2).

The individual who is hired must complete Section 1 of the Form I-9 "at the time of hire; or if an individual is unable to complete the Form I-9 or needs it translated someone may assist him or her." 8 C.F.R. § 274a.2(b)(1)(A); see 8 C.F.R. § 274a.1(c). The employer may grant the employee up to three business days from the commencement of employment to produce the documents for inspection by the employer. The employer has until the end of the third business day from the date of hire to complete section 2 of the Form I-9. 8 C.F.R. § 274a.2(b)(1)(ii) and (iv).[6] The "three-day" period may be extended to 90 days if an employee presents a "receipt for application" of an acceptable document or documents within the three business days of the hire. 8 C.F.R. § 274a.2(b)(1)(vi).

The completed Form I-9 must be retained and made available for inspection for a minimum of three years after the date of hire or one year after the date the individual's employment terminated, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A). Although the INS has exclusive enforcement authority to fine employers for sanctions violations, other entities--the Special Counsel for Immigration-Related Employment Practices, authorized to enforce IRCA's antidiscrimination provisions ("Special Counsel") and the Department of Labor ("DOL")--have autho-

[6] An exception is provided for employment which will last less than three business days. 8 C.F.R. § 274a.2(b)(1)(iii). In that case, the employer is required to review the documents and complete the Form I-9 on the date of hire. Id.

rity to inspect the Forms I-9. An employer must have at least three days notice prior to an inspection conducted by the INS, Special Counsel or DOL. No subpoena or warrant is required. 8 C.F.R. § 274a.2(b)(2)(ii).

The employer must produce the original forms either at the location where the request for production is made or at the location where the records are kept, if the Forms I-9 are kept at another location. Id. In the latter case, the employer must advise the inspector where the forms are kept, and make arrangements for the inspection. Id. Inspections may take place either at the employer's office or an INS office. Id. Any refusal or delay in presentation of the Form I-9 for inspection is considered a violation of the retention requirements and subjects the employer to penalties. Id. The INS may compel production of the forms by the issuance of a subpoena in the event that an employer fails to comply with a request voluntarily or within the required time. Id.

Complainant argues that I should grant its motion for partial summary decision as to Count III because: (1) there is no question that to date, the employer has not presented the Forms I-9 for any of the four employees named in this count; (2) Respondent was asked about the Forms I-9 for Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo on the date of the inspection, and Kao stated he did not have them and provided no further explanation; (3) Respondent's accountant was present at the inspection and offered no explanation of why the documents were not presented; (4) the names Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo do not appear on the employment records of Respondent but each has admitted that he worked for Respondent and was paid in cash for his work; (5) in response to production requests, Respondent has indicated that there were no employment records locatable for these three employees; (6) Respondent has made equivocal responses in its answers to Complainant's interrogatories as to whether Forms I-9 for those three exist or were made available to the INS by responding that Respondent's "accountant had form" and (7) if respondent had the Forms I-9, it should have produced the forms during discovery the discovery phase of this case.

Complainant's argument is insufficient to sustain its motion regarding this count at this stage because Respondent's answer and brief dispute the material facts relating to the allegations in Count III. Moreover, statements taken by INS agents from Galaviz-Linares and

Trejo-Castillo refute the allegation that Respondent did not prepare an I-9 for them.[7]

Respondent's answer, responses to discovery and its brief in opposition to the motion for partial summary decision, however, are insufficient to avoid summary decision in that Respondent's denials and conclusions are not supported by documents, affidavits or witnesses' statements in support of its affirmative defenses. The regulations governing this proceeding provide that a party opposing a motion for summary decision "may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate . . . ." 8 C.F.R. § 68.38(a)(emphasis added). Another subsection of that regulation provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for hearing." 8 C.F.R. § 68.38(b). Based on § 68.38(a) and (b), I conclude that Respondent should have submitted affidavits or witnesses' state- ments to support its affirmative defenses to the allegations of Count III. Although Respondent has failed to submit sufficient proof to avoid summary decision, I will permit the Respondent to have additional time to provide the appropriate sworn statement(s), affidavit(s) or documents to establish that an evidentiary hearing is necessary to determine the merits of Count III.

3. Count IV

Count IV of the complaint relates to employees, Victoria Fitzgerald and Peter Sader. Respondent admits in its answer that Fitzgerald and Sader were employees hired after November 6, 1986, but denies that sections 1 and 2 of their Forms I-9 were not properly prepared and denies that Respondent failed to prepare section 2 within three days of hire. Answer ¶ 4.

Complainant has submitted copies of the Forms I-9 for Fitzgerald and Sader in support of its motion for partial summary decision. An inspection of Fitzgerald's Form I-9 shows that section 1 lacks a date of birth and an attestation by the employee (which she should have provided by signing her name). See Compl.'s Br., Ex. C-7. Section 2 of Fitzgerald's I-9 Form shows that a social security card was presented

[7] The statements taken by the INS of Galaviz-Linares, Grimaldo-Corona and Trejo-Castillo contain both inculpatory and exculpatory evidence.

to satisfy the List C requirement, but no List A or B document was recorded. Id.

An inspection of the Form I-9 for Peter Sader shows that section 1 is missing a date of birth and an attestation by Sader. See Compl.'s Br., Ex. C-6. Section 2 of the form shows that only a List C document, but no List A or B document, was recorded. Id. Furthermore, the the employee failed to complete the certification section under section 2. Id.

Respondent argues that summary decision as to Count IV is not appropriate because:

> An issue of fact remains, however, over whether these were intentional omissions or whether, as is apparent in Complainant's Complaint and Brief that even the best educated people with good intentions can error (sic) by omitting sentence parts (brief), or jumbling up the alphabet (Count IV), or by mixing the sentence structure (Count I).

Resp.'s Br. at 2.

Respondent thus argues that the omissions and failures to properly complete the Forms I-9 of Fitzgerald and Sader were inadvertent and unintentional. Respondent's argument is essentially a "good faith" argument and is relevant to mitigation of the civil penalty, see 8 U.S.C. § 1324a(e)(5), but is not an affirmative defense to the allegations. United States v. Nevada Lifestyles, Inc., 3 OCAHO 463, at 22 (Oct. 16, 1992) (Order Denying Cross Motions for Summary Decision and Granting in Part Complainant's Motion to Strike Affirmative Defenses); United States v. Goldenfield Corp., 2 OCAHO 321, at 8 (April 26, 1991) (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision); United States v. USA Cafe, 1 OCAHO 42, at 4 n.1 (Feb. 6, 1989) (Order Granting Complainant's Motion For Summary Decision). Imposition of a civil penalty without consideration of all relevant factors is improper. Maka v. INS, 904 F.2d 1351, 1357-8 (9th Cir. 1990). Moreover, "'consideration of these factors is possible only if there is evidence bearing on them in the record.'" Id. at 1358 (quoting Holiday Food Service v. Department of Agricultural, 820 F.2d 1103, 1106 (9th Cir. 1987)). As no genuine issues of material fact has been presented by Respondent's good faith compliance "defense," Complainant's motion for partial summary decision is granted as to liability for Count IV. I will provide Respondent, however, with an opportunity, either by testimony or affidavits from witnesses to present specific evidence on mitigation before deciding an appropriate civil money penalty.

4. Count V

Count V of the complaint alleges that Respondent failed to properly update section 2 of the Form I-9 of Antonio Salinas-Garrido after his employment authorization had expired. Respondent admits that it hired Salinas-Garrido after November 6, 1986 for employment, as alleged in the complaint, but denies that it failed to properly update section 2 of his Form I-9 upon its expiration February 15, 1991. Answer ¶ 5. An inspection of Salinas-Garrido's Form I-9 shows that it was not updated to indicate employment authorization after February 15, 1991. See Compl.'s Br., Ex. C-5.

Respondent argues that the motion for summary decision as to Count V should be denied because "[a] question of fact remains as to whether Respondent failed to reverify any new grant of employment or whether he was given false information by Antonio Salinas-Garrido." Resp.'s Br. at 3. Respondent's argument is not supported by any affidavits, sworn statements or documents.

An employer is required to monitor the expiration date and update the Form I-9 in the case of an individual whose employment authorization document has an expiration date. 8 C.F.R. § 274a.2(b)(1)(vii). At or before the expiration, the employee must present a document that shows either continuing permission to work or evidences a new grant of work authorization. Id. "The employer. . . must review this document and if it appears to be genuine and to relate to the individual, reverify by noting the document's number and expiration date on the Form I-9." Id.

Although Respondent has generally denied the allegations in Count V, it has not presented any facts, supported by affidavit, sworn statement or documentation, to show that its agent updated Salinas-Garrido's Form I-9 or prepared a new Form I-9 to show that he was authorized for employment in the United States after February 15, 1991. As it is undisputed that Salinas-Garrido's Form I-9 was not updated and a new Form I-9 was not prepared to show that Salinas-Garrido was authorized for employment after February 15, 1991, I find that Respondent violated Section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(A)(1)(B) with respect to the allegations in Count V. Complainant's motion for summary decision as to Count V is granted with regard to liability. Consistent with my ruling as to Count IV, however, I will provide Respondent with an opportunity, either by testimony or affidavits from witnesses to present specific evidence on mitigation at

an evidentiary hearing before deciding an appropriate civil money penalty.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, and supporting documents submitted by the parties. Accordingly, as previously found and more fully explained above, I determine and conclude by a preponderance of the evidence:

1. That Respondent violated section 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(2) and 8 C.F.R. § 274a.3, as alleged in Count II of the complaint, by hiring Antonio Salinas-Garrido after November 6, 1986, an alien, who at the time Respondent hired was authorized to accept employment in the United States until February 15, 1991, and by continuing to employ Antonio Salinas-Garrido after February 15, 1991, that is, from July 3, 1990 to July 24, 1991, knowing that his authorization for employment in the United States terminated after February 15, 1991.

2. That a civil money penalty for Respondent's violation of Count II in the amount of $3,700.00 is just and reasonable and is assessed pursuant to Section 274A(e)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1324a(e)(4)(A)(ii), based upon the record in this case as well as Respondent's prior violation of Section 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A)) in United States v. China Wok Restaurant, Inc., OCAHO Case No. 88100025 (July 20, 1988).

3. That Respondent in response to Complainant's motion for summary decision as to Count III has made mere allegations, conclusory statements, or denials. As sworn statements of Galaviz-Linares and Trejo-Castillo refute the allegations that Respondent did not prepare Forms I-9 for them, a ruling on Complainant's motion for summary decision on Count III is stayed until Respondent has had an opportunity to submit affidavits or statements of witnesses, or documents to support its affirmative defenses to Count III.

4. That Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B) as alleged in Count IV of the complaint by hiring after November 6, 1986 for employment in the United States, Victoria Fitzgerald and Peter Sader, without complying with the paperwork requirements of §274A(b)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii).

5. That Respondent violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B) as alleged in Count V of the complaint by hiring Antonio Salinas-Garrido after November 6, 1986 for employment in the United States without complying with the requirements of § 274A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(vii).

6. That prior to determining an appropriate civil money penalty for Respondent's violation of IRCA's paper work requirements, Respondent must have an opportunity, either before or at an evidentiary hearing, to present mitigating evidence including evidence of the size of the business, Respondent's good faith, the seriousness of the violation, whether the individuals employed were unauthorized aliens, and Respondent's history of prior violations.

7. That the motion for summary decision to award a civil money penalty in the amount of $1,200.00 for the violations of Count IV and $1,000.00 for the violation of Count V is DENIED because Respondent has not had an opportunity to present its mitigating evidence.

8. That Respondent shall have until on or before March 4, 1994 to submit appropriate evidence to support its affirmative defenses to Count III for the purpose of showing that there are material facts in dispute.

9. An evidentiary hearing in this case is hereby set for April 25, 1994 in Omaha, Nebraska at a time and place to be designated by future order. The evidentiary hearing will be held pursuant to 28 C.F.R. § 68.39 to hear testimony and receive evidence in order to determine whether Respondent has committed the knowing violations alleged in Count I, the appropriate amount of civil money penalty that should be assessed for Respondent's violations of Count IV and V of the complaint, and to hear and decide any other issues remaining in this case.

SO ORDERED this 9th day of February, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge