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. l324a Proceeding Case No. 93A00211
PAULA SCHWARTZ, d/b/a METROPLEX MAID AND PLACEMENT SERVICE, Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S ORDER

On May 15, 1995, the Honorable Marvin H. Morse, the Administrative Law Judge (ALJ) assigned to United States v. Schwartz, issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. In the complaint filed by the Immigration and Naturalization Service (INS), Count I charged the respondent with knowingly hiring or continuing to employ one unauthorized individual in violation of 8 U.S.C. § 1324a(a)(1)(A). Count II charged the respondent with knowingly recruiting for a fee or referring for a fee 137 named individuals not authorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A).

On November 23, 1994, and April 17, 1995, the respondent made motions for summary judgment and dismissal for both counts, contending that complainant had failed to comply with an ALJ order directing responses to interrogatories. In the alternative, the respondent sought summary decision in regard to 130 of the 137 individuals listed in Count II.[1]

[1] Respondent appears to have conceded that complainant's evidence is sufficient to raise a genuine issue for trial as to seven of the Count II individuals: Delmis Brenda Castro Chevez, Rosa Morales Gallegos, Maria De Lourdes Gonzalez, Elffy Hassenteuffel, Maria Del Carmen Picazo, Ingrid Mereida Ruiz, and Claudia Avalos Sanchez. See ALJ order at 2 n.2 and Respondent's Motion at 12.

In the motion for summary decision, the respondent argued that the complainant has failed to establish a referral [or, in the words of the applicable INS regulation, 8 C.F.R. § 274a.1(d) (1995), "sending or directing a person or transmitting documentation or information"] of each of the individuals to another with the intent of obtaining employment for each of them as required by both the recruit and refer for a fee causes of action. See Motion at 6. The respondent argued that the job applications submitted by the respondent are not sufficient to establish all of the necessary elements to prove that a recruit and/or refer for a fee violation occurred. See Motion at 14-15.

On May 15, 1995, the ALJ issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision [hereinafter ALJ Order]. After reviewing the applicable procedural rules governing motions for summary decision, the ALJ analyzed the elements necessary to establish a violation of the recruitment or referral for a fee provisions of 8 U.S.C. § 1324a(a)(1) in light of the regulations promulgated by the INS for enforcement of the statute. See ALJ Order at 6.

In an apparent case of first impression, the ALJ found that INS regulations promulgated to implement enforcement of 8 U.S.C. § 1324a(a)(1) require both a recruitment and a referral for a fee for each individual in order to establish a cause of action as to recruitment for a fee. The ALJ held that, even though the statute appears to create a recruitment violation that could be established without a showing of a referral, the INS implementing regulations nevertheless include both elements in the definition of "recruit for a fee." See 8 C.F.R. § 274a.1(e); See ALJ Order at 7.

The ALJ concluded that multiple causes of action could not be supported in light of the facts surrounding the complaint. Two INS undercover agents, posing as clients, were given a folder containing 137 job applications from which to choose a maid. See ALJ Order at 2-3. In limiting the cause of action for the referral of the one maid chosen, Olga Villegram-Gonzalez, as the fruit of the INS undercover operation, the ALJ stated that, "Other cognizable claims under Count II would require Complainant to show alternative factual situations in which Respondent referred the individuals in question." ALJ Order at 11.

The ALJ searched the Complainant's affidavits and other submissions looking for specific facts showing that there was a genuine issue for trial as to the referral of any of the other remaining 129 individuals. See ALJ Order at 11. The ALJ found the affidavit of the Respondent's

former employee, Mary Lou Calderon, which asserted the referral of seven individuals: (1) Carmen Maria Ensley, (2) Ana Hail Martinez, (3) Elizabeth Diaz, (4) Elena Castro, (5) Celia Rincon, (6) Blanca Estela Gonzalez, and (7) Irma Chavez to be sufficient to establish a genuine issue as to whether these named individuals were referred for employment. See ALJ Order at 11.

The ALJ did not find any genuine issues of material fact as to the other 122 individuals named in Count II, holding that:

> the Complaint relies on Respondent's handing over the manila folder of employment applications. That conduct cannot provide the basis for finding referral of each individual. Therefore, I find that summary decision in Respondent's favor is appropriate for the remaining 122 of the individuals named in Count II.

ALJ Order at 12.

On May 24, 1995, the complainant filed a Motion for Certification to Chief Administrative Hearing Officer (CAHO) pursuant to 28 C.F.R. § 68.53(d)(1)(i), seeking administrative review of the May 15, 1995, order granting the respondent partial summary decision. The complainant asserted two arguments in favor of certification; the first concerning the ALJ's interpretation of 8 U.S.C. § 1324a(a)(1) in light of 8 C.F.R. § 274a.1(e), the second questioned the appropriateness of the dismissal of a number of the Count II violations.

On May 30, 1995, the ALJ issued an Order Denying Complainant's Motion for Certification to the Chief Administrative Hearing Officer on the grounds that neither of the two arguments asserted in favor of certification were sufficient to meet the standard for certification for interlocutory review found in 28 C.F.R. § 68.53(d)(1)(i)[2] which requires the order in question to "contain[] an important question of law or policy on which there is substantial ground for difference of opinion."

On June 1 and June 5, 1995, the Counsel to the CAHO sent letters to the parties informing them that the CAHO had chosen to review the ALJ order of May 15, 1995, upon his own initiative; as provided in 28 C.F.R. § 68.53(d)(1)(iii). The letter of June 5, 1995, informed the parties that the issue under review was "whether the ALJ incorrectly dismissed a number of Count II violations as having no genuine issues

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[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)).

of material fact based on the record as a whole." This action by the CAHO is the result of that review.

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in 8 U.S.C. § 1324a(e)(7), and delegated to the CAHO in section 68.53(a) of 28 C.F.R.; it is necessary, upon review, to modify the ALJ's May 15, 1995, order in Schwartz. For the reasons set forth below, it was inappropriate for the ALJ to grant summary decision as to seventeen individuals listed in Count II of the complaint because there does exist a genuine issue of material fact sufficient to survive the respondent's motion for summary decision.

Application of Standard of Summary Decision

IT WAS INAPPROPRIATE FOR THE ALJ TO GRANT SUMMARY DECISION AS TO SEVENTEEN (17) VIOLATIONS LISTED IN COUNT II OF THE COMPLAINT BECAUSE THE RESPONDENT, AS THE MOVING PARTY, DID NOT ESTABLISH AN ABSENCE OF GENUINE ISSUES OF MATERIAL FACT.

Although the ALJ's order addressed a novel question of law concerning the interpretation of 8 U.S.C. § 1324a(a)(1), this modification does not pertain to the questions of law contained therein. Rather, at issue in this modification is the finding of the absence of a genuine issue of material fact with regard to seventeen violations dismissed in the ALJ Order. These individuals are:[3]

ALVAREZ, Isidra Amelia (#6)
BARILLAS, Heydi (#14)
CASTANEDA, Maria Josefina (#28)
CONTE, Thais (#43)
CORTINAS, Cabrera (#46)
DE LEON, Griselda (#53)
EGIAS, Maria Helena (#59)
ESQOIVEL, Virginia (#67)
ESTRADA, Leticia (#70)
GARCIA, Cristina del Carmen (#78)
GONZALEZ, Maricela Moya (#84)
GONZALEZ, Teresa (#86)
ORELLANA, Mirsa (#107)
PENA, Palacios Raquel (#112)

[3] The numbers in parenthesis following the names correspond to the number of the individual in the complaint as well as to the number given to the job applications submitted as Exhibit A, at subpart 9 by the complainant.

ROJAS, Alicia Resendez (#122)
RUBIO, Dilsia Josefina (#126)
URIBE, Mercedes (#136)

The standards applying to summary decisions in cases under the jurisdiction of the Office of the Chief Administrative Hearing Officer (OCAHO) are well established. The Regulations governing practice and procedure in OCAHO proceedings state:

> (c) The Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. See 28 C.F.R. § 68.38(c).

In the order of May 15, the ALJ correctly stated the legal standards which apply to the determination of whether granting summary decision would be appropriate in each instance.

> Upon a motion for summary decision, the moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrate the absence of genuine issues of material fact." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. Id. The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. Celotex, 477 U.S. at 324.

ALJ Order at 3-4.

Although the respondent argued in the motion for summary decision that the complainant had failed to establish a referral of each of the individuals, the respondent's own motion repeatedly admitted that notations on 15 of the applications "could imply that Respondent may have sent or directed the alien to another." The respondent summarized the pertinent portions of the job applications as showing, "The only element(s) of recruit and/or refer for a fee violations that each of the 133 applications show." Motion at 15. The summaries relating to fifteen of the individuals at issue contain such admissions:

> ALVAREZ, Isidra Amelia (6): "The application has directions written on it, which could imply that Respondent may have sent or directed the alien to another." Motion at 16.

> CASTANEDA, Maria Josefina (28): "The application has directions written on it, which could imply that Respondent may have sent or directed the alien to another." Motion at 21.

CONTE, Thais (43): "application shows the notation "no papers" and a telephone number and address of another person, which could imply that Respondent . . . may have sent or directed the alien to another." Motion at 24.

CORTINAS, Cabrera (46): "application shows . . . a name and telephone number of another person, which could imply that . . . Respondent sent or directed the alien to another person." Motion at 25.

DE LEON, Griselda (53): "There is an address of another person on the application, which could imply that Respondent sent or directed the alien to another." Motion at 26.

EGIAS, Maria Helena (59): "shows an address of another person, which could imply that Respondent may have . . . sent or directed the alien to another." Motion at 27.

ESQOIVEL, Virginia (67): "has a notation '9:00 a.m. Monday, Zinbi didn't show up'." Motion at 29.

ESTRADA, Leticia (70): "notation of a name and telephone number of another person, which could imply that Respondent . . . may have sent or directed the alien to another." Motion at 30.

GARCIA, Cristina del Carmen (78): "shows an address and a time, which could imply that Respondent . . . may have sent or directed this alien to another." Motion at 31-32.

GONZALEZ, Maricela Moya (84): "a name and telephone number of another person, which could imply that Respondent. . . may have sent or directed the alien to another." Motion at 32-33.

GONZALEZ, Teresa (86): "reflects an address of another person with directions, which could show that Respondent solicited the person and referred that person to another." Motion at 33.

ORELLANA, Mirsa (107): "Application shows telephone number and address, which could imply that Respondent referred the alien to another person." Motion at 37.

PENA, Palacios Raquel (112): "application shows telephone number and address for another person, which could show that Respondent referred the alien to another person." Motion at 38.

ROJAS, Alicia Resendez (122): "application shows telephone number and address of another person, which could show that Respondent referred the alien to another person." Motion at 40.

URIBE, Mercedes (136): "telephone number and address of another person, which could imply that . . . Respondent referred the alien to another person." Motion at 43.[4]

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[4] The applications of two additional individuals, Heydi Barillas (#14) and Dilsia Josefina Rubio (#126), also contain similar notations, but were not summarized as such in the respondent's motion for summary decision. However, they were listed in the complainant's answer. See infra p. 7.

In determining whether the respondent, as the moving party, has met the burden of demonstrating an absence of genuine issues of material fact we are mindful that an issue of material fact is genuine only if it has a real basis in the record, See United States v. Anchor Seafood Distrib., Inc., 4 OCAHO 718, at 3 (1994) citing Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986); and that a genuine issue of fact is material if it might affect the outcome of the suit. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the non-moving party. See Matsushita, 475 U.S. at 587.

Upon a review of the materials contained in the record, viewed in the light most favorable to the non-moving party (the complainant), it is clear that the implications to be drawn from names, addresses, directions, and/or telephone numbers written on the applications of the individuals at issue raise a genuine issue of material fact as to whether these individuals were referred to another with the intent of obtaining employment for these individuals. Whether a referral actually occurred must still be proven, but a genuine issue of material fact exists with a real basis in the record. Besides the admissions as to the implications of addresses and phone numbers on the applications mentioned in the respondent's motion, there are several other submissions in the record which also point toward a genuine issue of material fact as to whether a referral actually occurred.

First, the complainant's answer to the motion for summary judgment points to the notations to be found on twenty applications arguing that the inferences to be drawn from such notations may lead to a finding of a referral of these individuals for employment.

> Various applications also indicate that the Respondent referred these persons to employers. These applications are for Isidra Amelia Alvarez (#6), Heydi Barillas (#14), Maria Josefina Castaneda (#28), Irma Chavez (#39), Thais Conte (#43), Cabrera Cortinas (#46), Griselda De Leon (#53), Elizabeth Diaz (#57), Maria Helena Egias (#59), Virginia Esqoivel (#67), Leticia Estrada (#70), Christina del Carmen Garcia (#78), Maricela Moya Gonzalez (#83), Teresa Gonzalez (#86), Mirsa Orellana (#107), Palacios Raquel Pena (#112), Celia Rincon (#117), Alicia Resendez Rojas (#122), Dilsia Josefina Rubio (#126), and Mercedes Uribe (#136). See Ex. A, at subpart 9. These application [sic] bear names, addresses, phone numbers and times for interviews, either between the Respondent and a potential employer or a maid and a potential employer. For example, the application for Heydi Barillas (#14) has handwritten directions to an address, 7318 Danashire, a date and time, and a car phone number. The reasonable inference to draw from this notation is that the Respondent either scheduled an interview for herself or for Ms. Barillas to meet with the resident of 7318 Danashire

> regarding her employment of Heydi Barillas. This shows that the Respondent referred this woman for possible employment with the person who resides at 7318 Danashire.
>
> The Respondent admitted that she would make notations on the applications regarding directions for herself or potential maids. (Ex. E, at 9). While it does not prove that the Respondent was paid for this referral, actual payment is not required for a referral for a fee. Only an intent to obtain employment is required. See 8 C.F.R. § 274a.(1)(d); see also supra at 8-12.[5]

Complainant's Answer at 17-18.

Second, a review of the deposition testimony of the respondent, Paula Schwartz, in answering questions regarding the notations on the applications, also raises serious questions of fact regarding the nature of the notations. For example, on pages 15-16 of the deposition (Ex. E), when questioned regarding the job application for Isidra Amelia Alvarez (#6), the following exchange took place:

> Q. Okay. Now, there's some writing at the bottom of the application. I think it says 635 west to 121, and it goes on; appears to be some directions. Are these directions that you wrote on the application for a - for the maid to--
> A. It looks like directions to someone's house.
> Q. Okay. Well, were they directions for the maid to go to the house?
> A. Possibly so.
> Q. And this -- and whose handwriting is that?
> A. Looks like mine.
> Q. Okay. And there's this circled box above that Steve -- with the name Steve Lyon circled and the phone number. Do you know who that is?
> A. I don't recall.
> Q. Do you think it was the person that interviewed or was set up to interview Ms. Alvarez?
> A. That's a possibly [sic].
> Q. Okay. And then to the right of that is a circled box. It appears to say -- is it Wednesday 7:30?
> A. Uh-huh.
> Q. Do you know what that is?
> A. Possibly either a time to call the people or a time for her to go. I don't -- I don't know.

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[5] The list of applications containing notations provided by the complainant in the Answer to Respondent's Motion for Summary Decision contain five individuals in addition to those referenced by the respondent in the motion. Three of those individuals: Irma Chavez (39), Elizabeth Diaz (57), and Celia Rincon (117) were not dismissed by the ALJ in the Order of May 15 based in part on the affidavit of Mary Lou Calderon, Respondent's former employee; and thus have already been deemed to have sufficient genuine issues of material fact to survive the respondent's motion for summary decision on other grounds. The other two: Heydi Barillas (14) and Dilsia Josefina Rubio (126) are at issue here.

Conclusion

As often noted in OCAHO case law, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Anchor Seafood Distrib., Inc., 4 OCAHO 718, at 3 citing Celotex, 477 U.S. at 327 (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

However, before the procedural efficiency of summary decision can be employed, great care must be taken that the legal standards for the issuance of a summary decision are observed. In this case, the respondent, as the moving party, did not adequately show an absence of a genuine issue of material fact regarding whether seventeen of the individuals were actually referred for employment. The complainant should be allowed to proceed to an evidentiary hearing on the merits as to the seventeen additional violations in Count II discussed above.

ACCORDINGLY,

For the above stated reasons, the ALJ's decision granting in part and denying in part respondent's motion for summary decision, is hereby MODIFIED in that respondent is denied summary decision as to the following individuals listed in Count II of the complaint:

ALVAREZ, Isidra Amelia (#6)
BARILLAS, Heydi (#14)
CASTANEDA, Maria Josefina (#28)
CONTE, Thais (#43)
CORTINAS, Cabrera (#46)
DE LEON, Griselda (#53)
EGIAS, Maria Helena (#59)
ESQOIVEL, Virginia (#67)
ESTRADA, Leticia (#70)
GARCIA,Cristina del Carmen(#78)
GONZALEZ, Maricela Moya (#84)
GONZALEZ, Teresa (#86)
ORELLANA, Mirsa (#107)
PENA, Palacios Raquel (#112)
ROJAS, Alicia Resendez (#122)
RUBIO, Dilsia Josefina (#126)
URIBE, Mercedes (#136).

It is **SO ORDERED** this 12th day of June, 1995.

JACK E. PERKINS
Chief Administrative Hearing Officer

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. 93A00211
PAULA SCHWARTZ, d/b/a METROPLEX MAID AND PLACEMENT SERVICE, Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR CERTIFICATION TO CHIEF ADMINISTRATIVE HEARING OFFICER
(May 30, 1995)

On May 24, 1995, by facsimile transmission, followed by mail delivery on May 30, Complainant filed a Motion for Certification to Chief Administrative Hearing Officer [Motion for Certification] requesting me to certify the May 15, 1995 Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision [May 15, 1995 Order] to the Chief Administrative Hearing Officer (CAHO) pursuant to 28 C.F.R. § 68.53(d)(1)(i) and (ii).[1] Title 28 C.F.R. § 68.53(d)(1) permits the CAHO to review an Administrative Law Judge's (ALJ) interlocutory order if:

> (i) The [ALJ], within five (5) days of the date of the interlocutory order, certifies the interlocutory order for review to the [CAHO]. The [ALJ] may certify an interlocutory order where the [ALJ] determines that the order contains an important question of law or policy on which there is substantial ground for difference of opinion; and where an immediate appeal will advance the ultimate termination of the proceeding or where subsequent review will be an inadequate remedy; or

[1] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68) [hereinafter cited as 28 C.F.R. pt. 68].

> (ii) A party's request for certification of the interlocutory order has been denied by the [ALJ], and if the [CAHO] determines that a vital public or private interest might otherwise be seriously impaired; or
>
> (iii) The [CAHO], upon his or her own initiative, decides that there has not been an opportunity to develop standards which can be applied in determining whether interlocutory review of a particular issue is appropriate.

Complainant asserts two arguments in favor of certification: (1) that the May 15, 1995 Order is the first ALJ determination to address what constitutes a recruitment and referral for a fee in violation of 8 U.S.C. § 1324a(a)(1) and as such it presents important questions of law and policy on which there is substantial ground for difference of opinion; and (2) that the May 15, 1995 Order incorrectly dismissed a number of Count II violations.

Complainant argues that there is a substantial ground for difference of opinion as to whether group referrals -- where the person who refers the individuals does not intend to receive a fee for each person referred -- can sustain a cause of action for violation of the prohibition against referral or recruitment for a fee, knowing the individual is unauthorized as to the involved employment. Complainant also states that the regulation defining recruitment and referral for a fee should be read,

> in such way as to effect Congress's intention to punish recruitment, while not contradicting the regulations promulgated by the Service which require a referral. To read the regulations to make liable the act of referring a number of recruits to one potential employer for remuneration accomplishes this goal.

Motion for Certification at 2. Complainant requests certification, asserting the issues are significant and "an Agency's interpretation of its own regulation is entitled to considerable deference." Id. citing Mullins Coal Company, Inc. of Virginia v. Director, Office of Worker's Compensation Programs, United States Department of Labor, 484 U.S. 135, 159 (1987).

Complainant correctly notes that an agency's interpretation of its own regulation is entitled to considerable deference, however such deference is not unlimited. Indeed, the May 15, 1995 Order recited that, "in interpreting a regulation, a court generally will give deference to an agency's interpretation of its own regulation, unless such interpretation is plainly erroneous or inconsistent with the regulation's language." Order at 7 citing Mullins Coal Company, Inc. of Virginia, 484 U.S. at 159.

As the May 15, 1995 Order explained, the regulation defining a recruit for a fee violation requires a showing that the respondent referred an unauthorized individual with the intent of obtaining employment for that individual in the United States. See Order at 7 [discussing 8 C.F.R. § 274a.1(e)]. A plain reading of the INS regulation demonstrates that "a recruit for a fee violation is only cognizable when it is integral to a referral." Id. The regulation does not distinguish between (a) a referral which establishes a recruitment for a fee violation and (b) that which establishes a referral for a fee violation under 8 C.F.R. § 274a.1(d). The regulation states that recruitment for a fee requires "soliciting a person . . . and referring that person . . . for remuneration" and referral for a fee requires "sending or directing a person . . . for remuneration." 8 C.F.R. § 274a.1(d) and (e). As the plain reading of the regulation demonstrates, there is no substantial ground for difference of opinion as to this question of law. Accordingly, Complainant's Motion for Certification is denied as to its first asserted basis.

Complainant alternately seeks certification on the basis that "this court incorrectly dismissed a number of Count II violations." Motion at 2. Complainant claims that,

> interlocutory review is necessary as the Service will be prevented from proving up these violations if this matter goes to a hearing. If review by the [CAHO] is deferred until after a full evidentiary hearing, and the [CAHO] reverses this court, the Service would have to retry a substantial number of violations. This interlocutory appeal would therefore advance the ultimate termination of proceedings.

Id. at 3. I agree with Complainant that reversal by the CAHO following an evidentiary hearing might result in retrying a number of matters, as the disposition of the individuals in the May 15, 1995 Order is not finally put to rest until after an opportunity to review the final order. See 8 U.S.C. § 1324a(7) and (8). However, in my judgment, the alternate basis in the Motion does not raise a requisite important question of law or policy on which there is substantial ground for difference of opinion within the meaning of 28 C.F.R. § 68.53(d)(1)(i). Therefore I deny Complainant's Motion for Certification as to the alternate basis as well.

Despite this denial of Complainant's Motion, interlocutory review of the May 15, 1995 Order by the CAHO remains available under 28 C.F.R. § 68.53(d)(1)(ii) and (iii).

SO ORDERED.

Dated and entered this 30th day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge

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. 93A00211
PAULA SCHWARTZ, d/b/a METROPLEX MAID AND PLACEMENT SERVICE, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY DECISION
(May 15, 1995)

I. *Introduction and Background*

A. Procedural History

On November 29, 1993, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint against Paula Schwartz, d/b/a Metroplex Maid and Placement Service, (Schwartz or Respondent) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint, predicated on a Notice of Intent to Fine (NIF) issued by INS on May 20, 1993, alleged two counts in violation of section 101 of the Immigration Reform and Control Act of 1986, (IRCA) as amended, 8 U.S.C. § 1324a.[1]

Count I charges Respondent with knowingly hiring or continuing to employ one named individual not authorized for employment in the

[1] On December 9, 1993, the Chief Administrative Hearing Officer (CAHO) assigned this case to Administrative Law Judge (ALJ) Robert B. Schneider. On February 7, 1995, the CAHO transferred it to me.

United States in violation of 8 U.S.C. § 1324a(a)(1)(A); (a)(2). Count II charges Respondent with knowingly recruiting for a fee or referring for a fee 137 named individuals not authorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A).

On January 5, 1994, Respondent filed its Answer which denied the allegations of both Counts I and II.

Respondent's Motion for Summary Decision filed November 23, 1994, and Respondent's Motion to Dismiss filed April 17, 1995 are pending before me. Respondent requests summary decision on both counts, contending that Complainant failed to comply with ALJ Schneider's August 25, 1994 Order which directed Complainant to respond to Respondent's Interrogatories regarding the factual basis for the allegations of the Complaint. In the alternative, Respondent seeks summary decision for 130 of 137 violations alleged in Count II. Respondent claims that Complainant has failed to show that other than employment applications it has evidence to establish all the necessary elements for 130 violations alleged in Count II.[2]

On March 15, 1995, after obtaining two continuances, Complainant timely filed its Answer to Respondent's Motion for Summary Decision. Complainant opposes Respondent's Motion, asserting that "[t]he evidence will show that the Respondent recruited for a fee and referred for a fee the 130 persons listed under Count II for whom the Respondent has moved for summary decision. Furthermore, the Complainant has fully complied with the Respondent's discovery requests."

On April 17, 1995, Respondent filed its Reply to Complainant's Answer to Respondent's Motion for Summary Decision, as permitted by an Order of April 12, 1995. Concurrently, Respondent filed its Motion to Dismiss.

On April 27, 1995, Complainant filed its Answer to Respondent's Motion to Dismiss.

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[2] Throughout the pleadings, the parties at different times refer to 137 individuals named in Count II, to 133 individuals and to 130 individuals. For clarity, in discussing Respondent's argument in its Motion for Summary Decision that Complainant cannot establish the necessary elements of recruitment or referral for a fee, this Order addresses 130 Count II individuals. Respondent concedes that Complainant's evidence is sufficient to raise a genuine issue for trial as to seven Count II individuals: Delmis Brenda Castro Chevez, Rosa Morales Gallegos, Maria De Lourdes Gonzales, Elffy Hassenteuffel, Maria Del Carmen Picazo, Ingrid Mereida Ruiz, and Claudia Avalos Sanchez.

B. Factual Summary

As drawn from the pleadings, the events leading to the filing of the Complaint are summarized as follows:

On August 10, 1992, INS agents Clayton Booth (Booth) and Tina Tucker (Tucker), posing as husband and wife, met with Schwartz at her residence/business. Booth and Tucker discussed with Schwartz their hiring a maid through her placement service. Schwartz produced a manila file folder marked "live-in" which contained employment applications for maids.

Schwartz explained that for a $625 fee, she would refer a maid selected from among the applications. If, in the first 60 days, the chosen maid's work should be unsatisfactory, Schwartz would replace the maid not more than twice, without additional fees.

On August 18, 1992, Booth and Tucker again met with Schwartz at her residence/business to discuss hiring a maid. Schwartz suggested several applicants whom she believed met the "couple's" needs. She explained that they could expect to pay $125 per week for a maid without employment authorization, or $160 for one with employment authorization. Booth and Tucker selected the application of an individual Schwartz said was unauthorized, i.e., Olga Villegram-Gonzalez. Schwartz then began to complete an agreement form on which she entered $625 as the referral fee. At that juncture, Booth and Tucker served a search warrant on Schwartz, and seized the applications.

II. *Discussion*

The Rules of Practice and Procedure (Rules) which govern this proceeding state, in pertinent part:

> (c) The Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

See 28 C.F.R. § 68.38.[3]

[3] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68) [hereinafter cited as 28 C.F.R. pt. 68].

Upon a motion for summary decision, the moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. Id. The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. Celotex, 477 U.S. at 324.

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the non-moving party. Id. at 587.

A. Discovery Compliance

The Rules state at 28 C.F.R. § 68.23:

> (c) If a party, an officer or an agent of a party, or a witness, fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative Law Judge, the Administrative Law Judge may, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, take the following actions: . . .
>
> (5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both. (Emphasis added).

The August 25, 1994 Order directed Complainant to respond to Respondent's interrogatories ## 8, 9, 10, 11, 12, and 13 as to factual, non-privileged information sought. Respondent argues that Complainant "has grossly failed to comply with the ALJ's August 25, 1994 Order." Motion at 8. Complainant counters by stating that it has fully complied with discovery requests, and by submitting nine (9) exhibits containing copies of documents provided to Respondent in compliance with the ALJ's Order.

Having examined Complainant's voluminous submissions, I find that Complainant has made a good faith and sufficient effort to comply with

Respondent's discovery requests and with the August 25, 1994 Order. Accordingly, it is inappropriate to sanction Complainant and I deny the invitation to render a decision against it on the basis of noncompliance.

B. Recruit or Refer for a Fee Allegations

1. Respondent's Arguments Summarized

Respondent asserts that there is an absence of evidence to support 130 of Complainant's 137 Count II allegations of recruit or refer for a fee violations because:

> (1) Complainant's agents did not pay a fee to Respondent for the referral of the maids and as such Complainant cannot establish a prima facie case of recruitment or referral for a fee;
>
> (2) Complainant is unable to produce evidence showing that Respondent solicited the individuals knowing that they were aliens unauthorized for employment in the United States, or sufficient evidence that each of the individuals in question was an unauthorized alien; and
>
> (3) Complainant is unable to produce any evidence showing that Respondent referred for a fee 130 of the 137 individuals named in Count II.

2. Recruit and Refer for a Fee Causes of Action

Title 8 U.S.C. § 1324a(a)(1) states in pertinent part:

> It is unlawful for a person or other entity -- (A) to hire, or recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment (emphasis added).

So far as I am aware, OCAHO case law has not previously addressed the requirements for causes of action which implicate violations of the prohibitions against recruitment or referral for a fee of unauthorized aliens. However, the pertinent INS regulation defines and expands upon those the terms. See 8 C.F.R. § 274a.1 (1995).[4]

Title 8 C.F.R. § 274a.1(e) defines "recruit for a fee" as:

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[4] Title 8 C.F.R. Part 274a is a Department of Justice regulation promulgated under authority conferred upon INS by the Attorney General. See Section 103 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1103, as amended by § 9(c), Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609, reproduced in Bender's Immigration and Nationality Act Pamphlet 42-43 (1994).

> the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis. (Emphasis added).

"Refer for a fee" is defined at 8 C.F.R. § 274a.1(d) as:

> the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis. (Emphasis added).

Analysis of 8 U.S.C. § 1324a(a)(1), considered in light of the regulation breaks the causes of action down into specific elements.

"Recruit for a fee" violations require:

(1) the direct or indirect act of soliciting a person, 8 C.F.R. § 274a.1(e);

(2) referring that person to another with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis, id.;

(3) in the United States, 8 U.S.C. § 1324a(a)(1);

(4) knowing the person is an unauthorized alien with respect to such employment, id.

"Refer for a fee" violations require:

(1) the direct or indirect sending or directing of a person or the transmitting of documentation or information to another, 8 C.F.R. § 274a.1(d);

(2) with the intent of obtaining employment in the United States for such person, id.;

(3) for remuneration whether on a retainer or contingency basis, id.;

(4) knowing the person is an unauthorized alien with respect to such employment, 8 U.S.C. § 1324a(a)(1).

Presumably, Congress created two separate causes of action, one for recruitment for a fee and one for referral for a fee. 8 U.S.C § 1324a(a)(1). In apparent contrast, the regulation defines recruitment for a fee such that the "recruiter" must be shown to refer the person recruited to another with the intent of obtaining employment for that person. 8 C.F.R. § 274a.1(e). Under § 274a.1(e), the recruit for a fee cause of action is structured to include the act of referring the recruited individual for employment for remuneration. Thus, while § 1324a(1) appears to posit recruitment as a separate cause of action, the regulation subsumes it in the definition of referral for a fee, an actionable violation without recruitment under 8 U.S.C. § 1324a(a)(1) and 8 C.F.R.

§ 274a.1(d). The result is that a recruit for a fee violation is only cognizable when it is integral to a referral.[5]

3. Respondent's Arguments Discussed

a. "For a Fee" Requirement

The "fee" or "remuneration" requirements of both recruitment and referral for a fee state that such remuneration includes a fee, "on a retainer or contingency basis." 8 C.F.R. §§ 274a.1(d) and (e).

It is axiomatic that in determining the meaning of a particular statutory term, courts typically look to the plain meaning of the term. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Courts assume that the legislative purpose is expressed by the ordinary meaning of the words used. American Tobacco Co., 456 U.S. at 68 citing Richards v. United States, 369 U.S. 1, 9 (1962). In interpreting a regulation, a court generally will give deference to an agency's interpretation of its own regulation, unless such interpretation is plainly erroneous or inconsistent with the regulation's language. Mullins Coal Company, Inc. of Virginia v. Director, Office of Worker's Compensation Programs, United States Department of Labor, 484 U.S. 135, 159 (1987).

The word "contingency" is defined as:

> Something that may not happen. Quality of being contingent or casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. A fortuitous event, which comes without design, foresight, or expectation.

BLACK'S LAW DICTIONARY 320 (6th ed. 1990).

INS contemplates that a cause of action for recruitment or referral for a fee can be based on contingent remuneration, or a fee for "something that may not happen." INS interprets such contingent remuneration

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[5] Query whether the regulation could treat the causes of action in a more distinct fashion so as to effectuate apparent Congressional intent to create two distinct violations, stated in the disjunctive at 8 U.S.C. § 1324a(a)(1). For example, the regulatory treatment defining "recruit for a fee" violations could arguably have avoided the use of the word "refer" or differentiated "refer" in 8 C.F.R. § 274a.1(e) from 8 C.F.R. § 274a.1(d) so as to maintain separate and distinct violations. In that event, a regime could have been structured making clear that a violation occurs where individuals are recruited whether or not they are referred.

to mean that payment does not have to be received for a referral or recruitment for a fee to occur. Rather, INS interprets the language of 8 C.F.R. §§ 274a.1(d) and (e) as requiring the intent to obtain a fee for recruitment or referral as determinative of whether remuneration was provided. This interpretation is consistent with federal case law interpreting the term "fee" as used in a "recruit for a fee" determination under the Farm Labor Contractor Registration Act. See De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 235 (7th Cir. 1983). De La Fuente stated that "[i]n the typical situation, it would be the existence of the intention at the time of recruitment which would be the key factor . . ." Id.

Applying the rule of deference, I find that Complainant's interpretation is reasonable and not plainly erroneous or inconsistent with the language of 8 C.F.R. §§ 274a.1(d) and (e). I reject Respondent's contention that a fee must actually be paid/received before a cognizable claim arises.

b. Knowingly Solicit Requirement for Recruitment

Respondent asserts that a § 1324a(a)(1) "recruit for a fee" violation requires proof that the Respondent solicited "an alien knowing the alien is an unauthorized alien." The same "knowing" requirement also applies to a "refer for a fee" violation, where the requisite act is the sending of or directing a person or transmitting documentation or information to another, intending that person to obtain employment. Respondent claims that Complainant is unable to produce evidence that the Respondent knowingly solicited unauthorized aliens. Respondent also asserts that Complainant is unable to produce evidence to establish that each of the 130 Count II individuals were unauthorized aliens.

Complainant counters by asserting that the evidence shows that Respondent did solicit the individuals in question, knowing that they were aliens unauthorized for employment in the United States. In support, Complainant refers to employment applications, an affidavit of Mary Lou Calderon, a former employee of Respondent, and an affidavit of Booth. The Calderon affidavit states:

> When Paula [Schwartz] and I interviewed the girls for future placement as maids, we would always ask them if they had papers which allowed them to work in the United States. . . .
>
> Paula and I would note this information at the top of the applications. Sometimes when I asked them if they had papers, they would say they did but would not actually

> have papers with them. If they didn't have papers with them, I would tell them to show me their papers at a later date. I would tell the girls it was okay if they were illegal, but that I needed to know the truth. If they did have papers, I would write their numbers at the top of the application.
>
> During the time I was with Paula, I would often hear Paula tell girls to tell their friends and relatives in their home countries that Paula might have a job for them in the United States. . . .

This affidavit, with the employment applications containing Respondent's notations, and Booth's affidavit support Complainant's contentions. They demonstrate that there are genuine issues of material fact as to whether the individuals in question were unauthorized aliens known to be such by Respondent at the time they were allegedly recruited and/or referred.

c. Referral for a Fee Analyzed

Respondent asserts that Complainant has not produced sufficient evidence that Respondent referred the 130 individuals for a fee. Respondent states that Complainant's only evidence as to referral of the 130 individuals are the employment applications. Respondent contends that these applications do not show that Respondent referred the named individuals. Respondent asserts that Complainant has not alleged or presented evidence that Respondent sent or directed any of the individuals to the INS agents as putative employers. As such,

> Complainant sets forth the bold assertion that merely conveying a manila folder containing the applications of 133 persons to Special Agents Booth and Tucker should expose the Respondent to substantial liability when she did not provide such information with the understanding or agreement or with intent to receive remuneration for such information.

Respondent's Reply to Complainant's Answer to Respondent's Motion for Summary Decision at 8-9.

Complainant responds that Respondent's act of producing the folder which contained employment applications and subsequent indication that she would refer any one of the maids for employment for a fee of $625 is sufficient to sustain the Count II violations.

Upon review of the pleadings and exhibits, however, it appears that Respondent did not refer to the agents for a fee all or 130 of the individuals named in Count II. The fee requirement dictates that a recruitment or referral in violation of § 1324a must be for a fee, which can be a contingent fee. 8 C.F.R. 274a.1(d) and (e). Even understanding the

fee arrangement to be contingent, 8 U.S.C. § 1324a(a)(1) is only violated to the extent of individuals who are referred. 8 C.F.R. § 274a.1(e). Upon referral of a maid to the INS agents, Respondent did not expect, request or intend to receive payment for every individual whose employment application was in the folder. Rather, she required payment for the referral of one maid, with the understanding that, within a specified time, up to two replacement maids would be referred without additional payment, if the previous hire(s) should be inadequate.

While the allegations of the Complaint are sufficient to allege multiple referrals for a fee, the facts advanced on motion practice do not support cognizable claims for 130 individuals. Under 8 C.F.R. §§ 274a.1(d) and (e), Complainant would need to show that the agents requested 137 (or, 130) maids to support a claim that Respondent referred all 137 (or, 130) individuals named in Count II. At most, the fee charged is for the referral of three maids. However, as the agents selected one maid named in Count II, i.e., Olga Villegram-Gonzalez, and Respondent did not refer any other allegedly unauthorized individuals to the agents, the incident with the INS agents can only support one referral for a fee allegation.

Although Respondent contends that the items in the manila folder were mere applications, construing the factual submissions in the light most favorable to Complainant as the non-moving party, I am satisfied that, as presented to the agents, these are not mere applications but are recruitment folders.

Complainant argues that "to hold that a referral for a fee includes the act of referring a number of persons to an employer seeking to hire one person does not place undue liability on the Respondent. In fact, it fairly punishes the Respondent for a far-reaching and extensive scheme of recruiting hundreds of illegal aliens to work in the United States and attempting to find employment for them." Complainant's Answer to Respondent's Motion for Summary Decision, at 14. Complainant also refers to the rule of statutory construction that interprets statutes and regulations so they harmonize, and comport to the general purposes of the law. Id. citing Internal Revenue Service v. Engle, 464 U.S. 206, 217 (1984). However sympathetic I may be with the public policy implicit in Complainant's rationale, its regulation defeats its argument.

Title 8 C.F.R. § 274a.1(d) requires Complainant to show that Respondent sent or directed a person, or transmitted documentation or information, to another with the intent of obtaining employment in the United States for such person. Because Booth and Tucker only sought

to hire one maid, Respondent could not have intended to obtain and provide to them employment for more than one individual. Therefore, the Booth/Tucker factual situation can only sustain one "referral for a fee" violation. Other cognizable claims under Count II would require Complainant to show alternate factual situations in which Respondent referred the individuals in question.

Respondent seeks summary decision or dismissal for 130 of the individuals listed under Count II. As referral is required to sustain a cause of action for either recruitment or referral for a fee, it is necessary to determine whether Complainant, through its affidavits and other submissions, has set forth specific facts showing that there is a genuine issue for trial as to any of the 130 individuals.

Booth's affidavit states that the INS agents selected Olga Villegram-Gonzalez from the folder of employment applications. The conversation among the agents and Respondent confirms an understanding that the agents were going to hire one maid for a referral fee of $625. The selection of the specific potential employee meets Complainant's burden of showing a genuine issue of material fact as to whether Respondent referred Villegram-Gonzalez for employment for $625, knowing her to be unauthorized for that employment. As such, the allegations as to Olga Villegram-Gonzalez survive.

Mary Lou Calderon's affidavit includes the assertion that:

> Today, I reviewed a number of applications which were taken from girls Paula and I interviewed. Among those were applications for Carmen Maria Ensley, Ana Hail Martinez, Elizabeth Diaz, Elena Castro, Celia Rincon, Blanca Estela Gonzalez, [and] Irma Chavez. I remember that these girls were referred to our customers and were hired by them.

(Emphasis added).

Acknowledging again that on a motion for summary decision factual inferences are to be viewed in the light most favorable to the non-moving party, the materials filed on motion practice are sufficient to establish a genuine issue of material fact as to whether these named individuals were referred for employment. As to them, INS has overcome Respondent's motion.

On discovery, but not referred to by either party on motion practice, Complainant's response to Interrogatory #7 identifies six employers fined for employing unauthorized aliens and who employed aliens "recruited or referred by the Respondent." There is no indication that

the employers so identified employed one or more of the Count II individuals or if they did, how they obtained them. Absent commentary by either party suggesting these employers obtained from Respondent the individuals listed in Count II, the response to Interrogatory #7 casts no light on the issue at hand.

It does not appear that as to 130 individuals that there are any genuine issues of material fact. As to them, the only question is one of law. As already found, under INS regulation exposing the folder to the agent is not a referral. Respondent intended to receive remuneration for one referral, and the putative employer only sought to hire one employee.

I find that as to the other 122 individuals named in Count II, to establish their referral, Complainant relies on Respondent's handing over the manila folder of employment applications. That conduct cannot provide the basis for finding referral of each individual. Therefore, I find that summary decision in Respondent's favor is appropriate for the remaining 122 of the individuals named in Count II.

III. *Ultimate Findings, Conclusions and Order*

I have considered the motions, responses and accompanying documentary materials submitted by the parties and accordingly, as previously found and more fully explained above, I determine and conclude that:

1. Complainant has complied with the August 25, 1994 Order and that as such Respondent's Motion for Summary Decision on the basis of non-compliance with an order is denied.

2. Respondent is entitled to and is hereby granted summary decision as to 122 Count II violations as to which it has shown that there is no genuine issue of material fact remaining for trial. This is so because these individuals were not "referred" as required by 8 C.F.R. §§ 274a.1 (d) and (e) both for "recruit for a fee" and "refer for a fee" violations.

3. That Complainant has adduced sufficient evidence to show that there is a genuine issue of material fact remaining for trial as to: Olga Villegram-Gonzalez, Carmen Maria Ensley,[6] Ana Hail Martinez, Elizabeth Diaz, Elena Castro, Celia Rincon, Blanca Estela Gonzalez, and Irma Chavez, and as such Respondent's Motion for Summary Decision as to these eight (8) individuals is denied.

4. That as a result of this Order the only remaining allegations are: Count I, alleging that Respondent hired or, in the alternative, continued to employ, one named individual in the United States after November 6, 1986, knowing that individual was

[6] Referred to in the Complaint as "Maria Ensley Carmen."

an alien unauthorized for employment in the United States; and Count II, alleging that Respondent recruited for a fee or, in the alternative, referred for a fee, 15 individuals (the eight (8) named in the preceding paragraph and the seven (7) named in footnote 2).

5. That based on the aforementioned Respondent's Motion to Dismiss is denied as moot.

6. That not later than June 19, 1995, the parties shall file a joint statement of their efforts at settling the issues which remain in this case as the result of this Order; failing a joint statement, they shall file separate statements which summarize their efforts at achieving an agreed disposition. In the event of agreement, they shall advise of the date when proposed consent findings or an agreed dismissal will be filed. Absent settlement, upon advice, to be filed by June 19, 1995, that an agreement will not be forthcoming, my office will schedule a telephonic prehearing conference for the purpose of achieving stipulations of fact and, as necessary, scheduling a confrontational evidentiary hearing with respect to Count I and the remaining 15 specifications in Count II.

SO ORDERED.

Dated and entered this 15th day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge