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

May 23, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00164
MARK CARTER d/b/a DIXIE INDUSTRIAL SERVICE CO., Respondent.	)	

PREHEARING CONFERENCE REPORT AND ORDER

I. *Background*

A prehearing telephonic conference was held in this case on May 15, 1996. A court reporter was present during the conference, and a verbatim transcript of the conference will be prepared. During the conference, I heard oral argument on the following pending motions:

Complainant's first motion for partial summary decision filed on March 11, 1996;

Complainant's first motion to strike affirmative defenses filed on March 13, 1996;

Respondent's motion to amend its answer to the complaint filed on April 2, 1996;

Complainant's second motion for partial summary decision filed on April 10, 1996;

Complainant's second motion to amend complaint filed on April 12, 1996; and

Complainant's second motion to strike affirmative defenses filed on April 12, 1996.

Prior to hearing argument and ruling on the motions, I ruled that the employment eligibility verification forms (I–9 forms) served with Complainant's motion to strike were received in evidence. Respondent's counsel stated that there was no objection to the authenticity of the I–9 forms.

On May 13, 1996, Respondent served by facsimile a letter and a pretrial conference worksheet on the Court and on Complainant's counsel. These documents clarified which individuals were named in each count of the complaint, and specified those who Respondent alleges are covered by the substantial compliance affirmative defense to paperwork violations. The letter also put the Court and opposing counsel on notice that Respondent intended to file a second amended answer which added seven Count IV individuals to the substantial compliance defense, and removed five Count V individuals from the asserted defense.[1] However, the letter makes clear that Respondent does not intend this filing to constitute a motion, rather Respondent states that it is merely a visual aid to facilitate discussion.

Complainant objected to the filing, stating it constitutes a motion disguised as a letter, and should be rejected as violating the May 8, 1996 Amended Notice of Prehearing Conference which stated at that "[n]o new motions shall be filed prior to the conference except by leave of the Court." Notice at 1, n. 1. Complainant's counsel also stated that she had not had sufficient time to address the matters raised in the filing.

I ruled that the filing is not technically a motion and therefore did not violate the May 1, 1996 Notice of Prehearing Conference and,

[1] The individuals are identified by the paragraph numbers from Complainant's second amended complaint. The seven Count IV individuals who Respondent intends to add to the substantial compliance defense are: Jose Carrillo (Count IV, ¶A–4), David Cepeda (Count IV, ¶A–5), Soloman Faz (Count IV, ¶A–8), Louis Hadley (Count IV, ¶A–10), Samuel Hadley (Count IV, ¶A–11), Humberto Hernandez (Count IV, ¶A–12), and Jose Herrera (Count IV, ¶A–14). The Count V individuals who Respondent will remove from the substantial compliance defense are: Juan Avila (Count V, ¶A–4), Reyes Mejia (Count V, ¶A–13), Pascual Renaga (Count V, ¶A–15), Maria Rodriguez (Count V, ¶A–17), and Manuel Ramirez (Count V, ¶A–25).

therefore, accepted the filing. However, since Complainant received the pleading shortly before the conference, certain rulings were reserved pending additional filings.

Complainant also asserted that Respondent's analysis of the potential penalty is premature. I informed the parties that in a recently issued decision in *United States v. Skydive Academy of Hawaii Corp.,* 6 OCAHO 848 (1996), I discussed my approach to assessing a civil money penalty and analyzing the five mitigating factors to such an assessment required at 8 U.S.C. §1324a(e)(5). A copy of this decision is provided with this order.

II. *Rulings on Motions*

A. *Complainant's Second Motion to Amend Complaint*

On April 12, 1996, Complainant filed its second motion to amend complaint. Respondent has not filed any response to this motion and stated during the conference that it does not oppose the motion. Therefore, Complainant's second motion to amend complaint was granted. Pursuant to this motion, six individuals named in count four of the complaint were moved into count five.[2] The penalty for count four was reduced by $2,400, and that for count five was increased by $2,400. Therefore, the total penalty requested remains unchanged.

B. *Respondent's Motion to Amend the Answer to the Complaint*

On April 2, 1996, Respondent filed a motion to amend the answer to the complaint, seeking to clarify the denials made in the original answer, and to amend its first affirmative defense to clarify the substantial compliance defense raised therein. As discussed at the conference, this motion to amend answer raises three issues: whether the substantial compliance defense that Respondent wishes to raise is a viable defense to a §1324a violation, whether Respondent can retract admissions so as to plead the substantial compliance affirmative defense, and whether the motion to amend answer is timely.

[2] The six individuals moved from Count IV to Count V are: Roberto Carrizal (formerly Count IV, ¶A–5; now Count V, ¶A–23), Hector Paredes (formerly Count IV, ¶A–32; now Count V, ¶A–24), Manuel Ramirez (formerly Count IV, ¶A–34; now Count V, ¶A–25), Jaime Rosales (formerly Count IV, ¶A–36; now Count V, ¶A–26), Jose Sanchez (formerly Count IV, ¶A–39; now Count V, ¶A–27); and Jose Zuniga (formerly Count IV, ¶A–5; now Count V, ¶A–28).

On April 12, 1996, Complainant filed its opposition to the motion to amend answer. Complainant asserts that the amendment should not be allowed because: it would prejudice the Complainant due to requiring more and different discovery which would not be completed in the 60 days that Complainant stated was needed for discovery, it was not timely filed because it followed Complainant's motion for partial summary decision and therefore Respondent did not put Complainant on notice sufficiently in advance of trial of the substantial compliance affirmative defense, Respondent is represented by counsel who is presumed to be aware of the law and the consequences of admitting liability, and that as a matter of law the defense of substantial compliance is not implicitly included in Respondent's first affirmative defense of good faith.

OCAHO Rules of Practice and Procedure (Rules) provide that if and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order. 28 C.F.R. §68.9(e). Consistent with the policy set out in Rule 15 of the Federal Rules of Civil Procedure, it is OCAHO policy to allow liberal amendment of pleadings. *Monjaras v. Blue Ribbon Cleaners*, 3 OCAHO 496, at 3 (1993). This is true especially in the early stages of the case. *See United States v. The Growers Company, Inc., d/b/a Harvest Management, Inc.,* 2 OCAHO 346 (1991). Moreover, contrary to Complainant's suggestion, this liberal amendment policy is not limited to cases involving a *pro se* respondent. Indeed, as in this case, Judges have allowed government counsel to amend complaints and represented respondents to amend answers. *See United States v. Northwest Airlines,* 3 OCAHO 408 (1992) (order granting motion to amend complaint); *The Growers Company,* 2 OCAHO 346 (order granting motion to amend answer).

Initially, during the conference, I ruled that the substantial compliance defense is a viable defense. Several OCAHO decisions have held that substantial compliance may be asserted as an affirmative defense to allegations of paperwork violations. *See, e.g., United States v. Northern Michigan Fruit Company*, 4 OCAHO 667 (1994) and the myriad of cases cited therein. In *Northern Michigan Fruit Company,* Judge Schneider, after reviewing at length the decisions on the issue, concluded that when a respondent alleges that it has

substantially complied with IRCA's paperwork requirements and has provided some evidence of legal sufficiency, a motion to strike should be denied. *Id.* at 16. OCAHO case law holds that, in principle, substantial compliance can constitute a legally sufficient affirmative defense.[3] *See United States v. Local Building and Remodeling of International Falls, Inc.*, 3 OCAHO 567 (1993); *United States v. Goldenfield Corp. d/b/a Rodeway Inn, Pueblo, Colorado*, 2 OCAHO 321, at 7 (1991). Thus, the defense of substantial compliance would have been proper if raised by Respondent in its original answer.

Contrary to Respondent's suggestion that the defense of substantial compliance was implicitly included in the good faith defense asserted as its first affirmative defense in the original answer, I agree with Complainant that the Respondent did not allege substantial compliance in its original answer. OCAHO case law recognizes that good faith and substantial compliance are separate and distinct defenses. *See United States v. Interdynamic*, 3 OCAHO 433 (1992); *United States v. Chicken by Chickadee Farms, Inc.*, 3 OCAHO 423, at 5 (1992); and *United States v. Goldenfield Corporation d/b/a Rodeway Inn, Pueblo, Colorado*, 2 OCAHO 3212, at 7–8 (1991). Good faith relates only to penalty, not liability. Substantial compliance, by contrast, is a defense to liability.

Moreover, Respondent, in its original answer, explicitly admitted the allegations in Counts III and IV in their entirety and all but paragraph A–20 in Count V, which includes the allegation that Respondent violated

Section 274A(a)(1)(B) of the Immigration and Nationality Act. Thus, the amended answer is not merely a clarification but a wholesale change of position since Respondent's amended answer now seeks to disavow the admissions of liability made in its original answer to the complaint. As Respondent does not merely seek to amend its answer, but also to retract admissions of liability, the motion to amend answer is similar to a motion to retract an answer to a request for admission. Such a motion is governed by 28 C.F.R. §68.21, which provides that "any matter admitte . . . is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission." 28 C.F.R.

[3] While the defense of substantial compliance has been recognized, I am not aware of any OCAHO decisions which have found that a respondent has proven substantial compliance. *See Northern Michigan Fruit Co.,* 4 OCAHO 667, at 14.

§68.21(d). As no standards are provided for deciding whether to permit the withdrawal or amendment of an admission, the Federal Rules of Civil Procedure (FRCP) may be used as a general guideline for ruling on such a motion. *See* 28 C.F.R. §68.1. Therefore, I refer to FRCP 36 which provides, in pertinent part, that:

> [a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

See Fed. R. Civ. P. 36(b).

In interpreting this Rule, Courts have stated that while a court has considerable discretion over whether to allow amendment, it must be exercised within the bounds of a two-part test. *American Automobile Association v. AAA Legal Clinic of Jefferson Crooke*, 930 F.2d 1117, 1119 (5th Cir. 1991). This two-part test states that: (1) the presentation of the merits must be subserved by allowing withdrawal or amendment; and (2) the party that obtained the admissions must not be prejudiced in its presentation of the case by their withdrawal. *Id.* (citing *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 876 (1st Cir. 1990); *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1577 (11th Cir. 1988), *cert. denied* 488 U.S. 821 (1988)). Although the Court in *Jefferson Crooke* reversed the District Court's decision *sua sponte* to disallow admissions, in other cases the Circuit Court has approved withdrawal or amendment of admissions prior to or during trial. *Laughlin v. Prudential Insurance* Co., 882 F.2d 187, 191 (5th Cir. 1989); *Reyes v. Vantage S.S. Co.*, 672 F.2d 556, 557–58 (5th Cir. 1982).

In applying this test at the Conference, I ruled that on balance the equities favor Respondent's motion to amend the answer to the complaint. Specifically, I ruled that as the motion to amend answer was served only one month after the filing of the original answer Respondent was not dilatory in proposing the amendment and there is not reason to believe that Respondent acted in bad faith. Moreover, while Respondent's amended answer may have delayed the case to some extent, Complainant will not be prejudiced by Respondent's delay in asserting the defense of substantial compliance. I do not minimize the fact that Complainant relied on the original answer and formulated its discovery requests based on the Respondent's admissions of liability and that Complainant would have sent out broader discovery requests if it had known that liabil-

ity was contested as to Counts III–V. Also I recognize that Complainant may need to prepare some additional discovery as a result. But I disagree with Complainant's contention that Respondent has not put the Complainant on notice well in advance of trial that Respondent intends to present substantial compliance as an affirmative defense. The amendment was not made on the verge of trial, and in fact the case is still in its early stages. Complainant will be able to conduct further discovery so that it is well prepared for trial. I concluded that Complainant was not prejudiced by Respondent's delay in asserting the defense. Moreover, it will serve the merits of this case to allow Respondent to refine its defense to drop certain individuals and add others.

Therefore, for the reasons expressed above and at the conference, Respondent's motion to amend its answer was granted.

However, while the motion to amend the answer to the complaint has been granted, the amended answer filed with the motion on April 2, 1996, is not acceptable. At the conference Respondent was ordered to file a second amended answer which accurately admits and/or denies all allegations in the second amended complaint. *Respondent's second amended answer is due ten days from the date of this Prehearing Conference Report and Order.*

C. *Complainant's Second Motion for Partial Summary Decision*

On April 10, 1996, Complainant filed its second motion for partial summary decision. Complainant's motion specifically seeks summary decision on the issue of liability for thirteen of the fifteen individuals named in Count II. Respondent admitted liability as to those individuals covered by Complainant's second motion for partial summary decision, but contests the amount of the penalty assessed. Therefore, Complainant's second motion for partial summary decision as to liability was granted. Pursuant to this ruling, liability is established for ¶¶A–1 through A–13 of Count II of the complaint. Remaining at issue in Count II is liability for those individuals named at ¶¶14 and 15, and the quantum of penalty for all individuals for whom liability is established.

D. *Complainant's Motions to Strike Affirmative Defenses*

On March 13, 1996, Complainant filed its first motion to strike affirmative defenses (C.'s First Mot. to Strike), asserting that all five of

Respondent's affirmative defenses should be stricken. On April 16, 1996, Complainant filed its second motion to strike affirmative defenses (C.'s Second Mot. to Strike) asserting that if the Respondent is allowed to amend its answer, as permitted above, then the substantial compliance affirmative defense should be stricken due to the factual and legal insufficiency of the pleadings, or because omissions on the employment eligibility verification forms (I–9 forms) do not demonstrate substantial compliance with 8 U.S.C. §1324a.

The five alleged affirmative defenses are: (1) substantial compliance; (2) that Respondent acted in good faith in completing the employment verification requirements; (3) that Respondent did not continue to employ six of the individuals named in Count II after discovering that they did not have authorization to be employed in the United States; (4) that Respondent cooperated in the investigation and did not receive any educational visits from the Immigration and Naturalization Service; and (5) that Complainant's proposed fines are excessive and overly punitive and would force Respondent out of business.

During the conference, Respondent acknowledged that affirmative defenses three, four and five relate only to the quantum of penalty. Respondent also stated that affirmative defense number two, that of good faith, relates to liability for Count I, the allegation of hiring and/or continuing to employ three individuals knowing that they were unauthorized for employment in the United States, and to the quantum of penalty for Counts II–V.

With regard to Respondent's second affirmative defense, good faith, as to Count I of the complaint, 8 U.S.C. §1324a(a)(3) is clear that if an employer establishes that it has complied in good faith with the employment verification system then it is a defense to a knowing hire of an unauthorized alien allegation. As the statute is explicit that good faith is an affirmative defense to an allegation of knowingly hiring an unauthorized alien, Complainant's motion to strike was denied as to that the second affirmative defense, that of good faith, as it relates to that portion of Count I alleging knowing hire violations. However, as Complainant stated in its first motion to strike, good faith is not a valid affirmative defense to an allegation of knowingly continuing to employ unauthorized aliens. C.'s First Mot. to Strike at 4–5 (*citing Mester Mfg. Co. v. INS*, 879 F.2d 561, 569 (9th Cir. 1989); *United States v. Chicken by Chickadee Farms, Inc.,* 3 OCAHO 423, at 9 (1992)). As the good faith affirmative de-

fense lacks prima facie viability in regards to an allegation of knowingly continuing to employ unauthorized aliens, Complainant's motion to strike is granted as to the good faith defense to those portions of Count I relating to continuing to employ allegations.

Affirmative defenses three through five, and defense two as to Counts II–V, admittedly are only relevant to the quantum of penalty. Complainant argues that these defenses do not constitute defenses to the allegations charged in the complaint and therefore should be stricken. Complainant also argues that the affirmative defenses should be stricken because they did not include a sufficient statement of facts in support of each defense, as required by 28 C.F.R. §68.9(c)(2).

Affirmative defenses two through four, as they relate to the quantum of the penalty, are all relevant to the question of Respondent's good faith. Good faith is one of five factors which must be considered in assessing a civil money penalty. *See* 8 U.S.C. §1324a(e)(5). While the burden of proof is on the Complainant to demonstrate a lack of good faith by the Respondent, *see United States v. Skydive Academy of Hawaii Corp.,* 6 OCAHO 848, at 4 (1996), I denied Complainant's motion to strike with respect to these affirmative defenses as applied to Counts II–V. A motion to strike is a drastic remedy and therefore is not favored. *United States v. Jenkins,* 4 OCAHO 649, at 3 (1994) (Order Granting in Part and Denying Part Complainant's Motion to Strike Affirmative Defenses). A motion to strike should not be granted when the sufficiency of the defense depends upon disputed issues of fact or unclear questions of law; a motion to strike is often not granted in the absence of a showing of prejudice to the moving party. *Id.* at 3 (citing 5A C. Wright and A. Miller, *Federal Practice and Procedure* §1380 at 672; *United States v. Marisol, Inc.,* 725 F. Supp. 833, 836 (M.D. P. 1989)). Here, as the aforementioned affirmative defenses relate to disputed issues of fact regarding the civil money penalty, and as Respondent is entitled to present evidence in support of the five mitigating factors despite the fact that Complainant has the burden of proof regarding those factors, I ruled that the defenses would not be stricken as Complainant is not prejudiced and the issues in the case are not confused by allowing them to remain in the answer.

The fifth affirmative defense also relates only to the quantum of penalty, alleging that the penalty is excessive and would put Respondent out of business. OCAHO case law demonstrates that the five mitigating factors are not exclusive, and that the Respondent's ability to pay may be considered in mitigation of a requested

penalty. *See, e.g., United States v. Minaco Fashions, Inc.,* 3 OCAHO 587, at 9 (1993). During the conference, I informed the parties that while I would consider the Respondent's ability to pay in assessing a penalty, it would be Respondent's burden to prove that its inability to pay should be a mitigating factor. As the question of Respondent's ability to pay is a disputed issue, and as Respondent has the burden of proving the issue, I denied the motion to strike as to the fifth affirmative defense.

Regarding Complainant's argument that the affirmative defenses lack sufficient statements of fact in support of the defenses as required by 28 C.F.R. §68.9(c)(2), I ruled that the allegations in defenses two, three and four were sufficient, however, the statement of facts in support of affirmative defense five was not sufficient. Therefore, Respondent was ordered to provide a further statement in accordance with Section 68.9(c)(2). The amended answer must include an addendum with the name, address and telephone number of any person with knowledge of the assertion that the fine would force Respondent out of business, and a copy or description by category and location of all documents in Respondent's possession that are relevant to Respondent's financial condition. *See* 28 C.F.R. §68.1 and Rule 26(a)(1) of the Federal Rules of Civil Procedure which provides for required disclosures.

Respondent's first affirmative defense relates to substantial compliance. As previously stated, substantial compliance is recognized as a valid defense to paperwork violations. *See* supra. at 3. I ruled that a defense of substantial compliance is conceptually a valid defense with strict limits on its application. *See Northern Michigan Fruit Co.,* 4 OCAHO 667; *United States v. Mesabi Bituminous, Inc.,* 5 OCAHO 801 (1995). The present posture of this case on the issue of the substantial compliance defense is that Complainant has filed both a motion to strike the affirmative defense as factually and legally insufficient, and a motion for partial summary decision as to liability for Counts III–V. Complainant's motion to strike the substantial compliance defense was denied. The substantive allegations relating to the substantial compliance defense are discussed below in the ruling on Complainant's first motion for partial summary decision.

E. *Complainant's First Motion for Partial Summary Decision*

On March 19, 1996, Complainant filed its first motion for partial summary decision. This motion sought summary decision as to liability for all individuals in Counts III and IV, and all individuals in

Count V except for Benjamin Vargas, named at ¶A–20, Count V of the second amended complaint. On March 27, 1996, Respondent filed its response to the first motion for partial summary decision in which it asserted that summary decision is inappropriate for certain individuals in Counts III, IV and V because of the substantial compliance defense.

Respondent's answer, as amended, and its May 13, 1996 letter admit liability for those individuals at Count IV, ¶¶A–1 (Marcos Avila), 2 (Alvaro Banda), 3 (Rogelio Cardona), 6 (Jose Davila), 7 (Juan DelValle), 9 (Herculano Guzman), 13 (Jose Hernandez), 15 (Salvador Huizar), 16 (Virgilio Leija), 19 (Alejandro Mateo), 20 (Silvio Medina), 21 (Leonardo Mejia), 22 (Ruben Miranda), 25 (Jose Moran), and 32 (Celio Resendez); and at Count V, ¶¶A–4 (Juan Avila), 6 (Isaias Chavez), 10 (Honorato Hernandez), 13 (Reyes Mejia), 14 (Hector Perales), 15 (Pascual Reynaga), 17 (Maria Rodriguez), 21 (Abel Ramirez), 23 (Roberto Carrizal), and 25 (Manuel Ramirez) of the second amended complaint. Pursuant to these admissions, Complainant's first motion for partial summary decision is granted as to these individuals.

With respect to the substantial compliance defense, at the conference I ruled that unless certain factors are present on I–9 forms, a respondent's substantial compliance defense would not survive a motion for summary decision. Initially, the employer/respondent must demonstrate (1) use of the I–9 form to determine an employee's identity and employment eligibility; (2) the employer's or its agents signature on Section 2 of the I–9 form under penalty of perjury; (3) the employee's signature is on Section 1 of the I–9 form; (4) an indication in Section 1 by a check mark or some other means attesting under penalty of perjury that the employee is either a citizen or national of the United States, a Lawful Permanent Resident, or an alien authorized to work in the United States until a specified date; and (5) there is some type of information or reference to a document either spelled out or attached in either Section 2 list A, or list B and C. *Mesabi Bituminous Inc.*, 5 OCAHO 801; *see also, Northern Michigan Fruit Co.,* 4 OCAHO 667, at 17.[4] In addition, I ruled that in order to overcome a motion for

[4] The ruling in *Northern Michigan Fruit Co.* was made with respect to a motion to strike and stated what a respondent must minimally show to survive a motion to strike a substantial compliance defense. At the conference I stated that the five criteria should not be viewed as definitive or exclusive in deciding whether there has been substantial compliance when the defense is considered in the context of either a motion for summary decision or following an evidentiary hearing.

summary decision, a respondent alleging substantial compliance must demonstrate that Section 2 of the I–9 forms in question is dated.

Upon examination of the remaining I–9 forms in question from Counts IV and V of the second amended complaint, I ruled that if the I–9 form lacked a date for the employer's certification in section 2, then the employer did not substantially comply with the requirements of the Act. Therefore, I granted Complainant's first motion for partial summary decision with respect to the complaint allegations relating to those individuals whose I–9 forms lacked a date in Section 2. Specifically, summary decision as to liability was granted for those individuals at Count IV, ¶¶A–17 (Hector Lopez), 18 (Juan Marroquin), 23 (Jose Monsivais), 24 (Jose Morales), 26 (Hermin Navarro), 27 (Jesus Oceguera), 28 (Jose Olivas), 29 (Juan Olivas), 30 (Saul Perales), 31 (Pedro Perez), 33 (Benito Saenz), 34 (Jesus Salas), 35 (Rosendo Sanchez), 36 (Silvestre Sanchez), and 37 (Javier Zuniga); and Count V, ¶¶A–1 (Alfredo Alvarado), 2 (Benito Alvarado), 3 (Jose Alvarado), 5 (Felipe Cabesos), 7 (Jose Faz), 8 (Samuel Garcia), 9 (Pedro Gonzalez), 11 (Antonio Herrera), 12 (Mariano Mejia), 16 (Benj Rodriguez), 18 (Macario Saenz), 20 (Benjamin Vargas), 24 (Hector Paredes), 26 (Jaime Rosales), 27 (Jose Sanchez), and 28 (Jose Zuniga) of the second amended complaint.[5]

As to the allegation at Count V, ¶A–22 relating to Francisco Ramirez a/k/a Manuel Noguez, Section 1 of the I–9 form lacks a notation attesting that the individual is either a citizen or national of the United States, a Lawful Permanent Resident, or an alien authorized to work in the United States until a specified date, and Section 2 is missing an expiration date from the List A document. However, in addition to the incomplete List A document, Section 2 of the I–9 form contains a complete List B and List C document, thereby showing employment eligibility and work authorization. The attestation in Section 1 is critical though. Therefore, the failure to check the box in Section 1 does not constitute substantial compliance and

[5] The paragraph numbers in the ruling on Complainant's first motion for partial summary decision refer to those identified in Complainant's second amended complaint. The paragraph numbers in the transcript of the conference may differ from these numbers as they may refer to the original complaint or the first amended complaint. The numbers in this Report and Order supersede those identified in the transcript if and where they differ.

Complainant's first motion for summary decision is granted as to this individual.

I did not rule on Complainant's first motion for summary decision as to the one individual named in Count III. In addition, I reserved ruling on the motion in regards to those individuals named at Count IV, ¶¶A–4 (Jose Carillo), 5 (David Cepeda), 8 (Soloman Faz), 10 (Louis Hadley), 11 (Samuel Hadley), 12 (Humberto Hernandez), and 14 (Jose Herrera) of the second amended complaint because Respondent's May 13, 1996 letter indicates that it will add these individuals to the substantial compliance defense, and since I do not have the I–9 forms for these individuals, I reserve ruling on these individuals until a later date. I also reserved ruling on the first motion for partial summary decision as to the individual at Count V, ¶19 (Alejandro Stroot) because the Respondent has alleged substantial compliance as to this individual's I–9 form and the I–9 form submitted by Complainant is illegible.

III. *Other Rulings*

As previously stated, Respondent's second amended answer is due ten days after the date of this Prehearing Conference Report and Order.

Respondent moved for attorney fees for Complainant's second motion to strike because Complainant argued that the defense of substantial compliance should not be considered a valid defense which is contrary to the case law on the issue. I denied the motion, ruling that even under Rule 11 of the Federal Rules of Civil Procedure a party is entitled to argue for reversal of the law and, moreover, there are cases which have disallowed a defense of substantial compliance. *See Northern Michigan Fruit Co.,* 4 OCAHO 667 for a discussion of such cases.

The hearing in this case was set for October 22–23, 1996, in Houston, Texas. The address of the hearing location will be provided in a later order after I know the specific courtroom that will be used.

Any rulings made at the prehearing conference which are not reflected in this Report and Order, remain effective even though they are not mentioned in this Report and Order. The transcript will serve as a record of those rulings. If either party objects to any

part of this Report and Order on the ground that it does not accurately reflect the ruling at the conference, such objection shall be filed and served on or before June 14, 1996. Such objections should not be merely requests for reconsideration. Rather they should be filed only if this Report and Order does not accurately reflect the ruling.

SO ORDERED:

ROBERT L. BARTON, JR.
Administrative Law Judge