

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

August 26, 1996

UNITED STATES OF AMERICA,	)
Complainant,	)
	)
v.	) 8 U.S.C. §1324a Proceeding
	) OCAHO Case No. 96A00071
CORPORATE LOSS	)
PREVENTION ASSOCIATES,	)
LTD., D/B/A CORPORATE	)
LOSS PREVENTION,	)
Respondent.	)
_____	)

**PREHEARING CONFERENCE REPORT**

On August 22, 1996, I conducted a telephonic prehearing conference in this matter pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §556(c), and the Rules of Practice and Procedure, 28 C.F.R. §68.13. This prehearing conference was previously arranged and initiated by my office. Complainant was represented by Soni Sinha, Esquire, of the Immigration and Naturalization Service (INS); the Respondent was represented by its President, Joseph V. Clabby, acting *pro se*. A court reporter was present in my office to record the conference, and a verbatim transcript of the conference will be prepared. The primary purpose of the conference was to consider Complainant's pending motion for summary decision. Present with Ms. Sinha were Anya Pryzybylski, Esquire, Reeves Carter, Esquire, and INS Special Agent Jim Grathwohl; present with Respondent was Ronald Williamson, the Vice President who dealt with Special Agent Grathwohl during the August 1995 INS audit of Respondent's employment eligibility verification forms (I-9 forms).

During the conference, following my questioning, Complainant moved to amend its motion for summary decision so as to strike its

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request that summary decision be granted as to penalty as well as liability. As Complainant asserted that it seeks summary decision as to liability only, I granted the motion to amend Complainant's motion for summary decision to reflect that it only encompasses liability and not penalty.

In addressing the liability issues, Complainant argued that Section 2 was not properly completed for any of the 70 I-9 forms at issue in this matter, filed with the Court with Complainant's motion for summary decision. Specifically, Complainant asserts that upon examining all 70 forms it is clear that necessary information is missing from each document. Complainant stated that each I-9 form is missing either required documentation evidencing the employee's identity or employment eligibility, or missing required information from the employer's attestation in Section 2.

As Respondent is *pro se*, I explained that in completing Section 2 of the I-9 form for each employee an employer is required to examine documents which prove an employee's identity and employment eligibility. An employer is required to examine and document either a List A document, *or* a List B *and* a List C document. List A documents, for example a U.S. Passport, show both identity and employment eligibility. List B documents, for example a driver's license or state issued I.D. card, establish identity. List C documents, for example a social security card, establish employment eligibility.

Complainant argued that pursuant to the regulation at 8 C.F.R. §274a.2(b)(1)(ii)(B), an employer must completely fill out Section 2 of the I-9 form for every employee. Complainant acknowledged that while Section 2 was not completed on Respondent's I-9 forms, Respondent had provided some supporting documentation with the I-9 forms given to Special Agent Grathwohl during the I-9 audit. The supporting documentation consisted of photocopies of List A, B and C documents for some of the individual employees at issue.

During questioning about what is sufficient to constitute compliance with the requirement that an employer complete Section 2 of the I-9 form, Complainant acknowledged the doctrine of substantial compliance. I explained to the parties that I had addressed the issue of what constitutes substantial compliance in two decisions and orders: *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801 (1995); and *United States v. Mark Carter d/b/a Dixie Industrial Service Co.*, Prehearing Conference Report and Order, 6 OCAHO 865 (1996). In

the decision in *Mesabi Bituminous*, I adopted the approach to analyzing substantial compliance utilized in *United States v. Northern Michigan Fruit Co.*, 4 OCAHO 667 (1994). The decision in *Northern Michigan Fruit Co.* provided that an employer may have substantially complied with the paperwork verification requirements if the following five requirements have been met: (1) the use of an INS I-9 form to determine an employee's identity and employment eligibility; (2) the employer's (or its agent's) signature in Section 2 under the penalty of perjury; (3) the employee's signature is on Section 1; (4) in Section 1 an indication by a check mark or some other means attesting, under penalty of perjury, that the employee is either (a) a citizen or national of the United States, or (b) a lawful Permanent Resident, or (c) an alien authorized to work until a specified date; and (5) there is some type of information or reference to a document either spelled out or attached either in Section 2, List A, or Section 2, Lists B and C. *Id.* at 17; see also *Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 3. In addition to those five factors, in the *Mark Carter* order I added a sixth requirement: that the employer provide the date in the attestation/signature section of Section 2 of the I-9 form. See *Mark Carter d/b/a/ Dixie Industrial Service Co.*, 6 OCAHO 865, at 9.

After explaining this standard for analyzing substantial compliance, I stated that upon reviewing the 70 I-9 forms provided with Complainant's motion for summary decision I noted that six of the I-9 forms lacked a date in the Section 2 attestation. Therefore, it appears that the substantial compliance defense is unavailable for those I-9 forms of individuals named at ¶¶A-21 (Rafael Cortez), 23 (Felix Degulla), 25 (Thomas Fels), 55 (Eulogio Ruiton), and 59 (Eduardo Santiago) of the complaint. During the conference I stated that the I-9 form for the individual identified at ¶63 (Mack Sheppard) of the complaint also lacked a date in the attestation section. However, following the conference I rechecked the I-9 forms and found that there is a date in the attestation section of this I-9 form. Therefore, the reference in the transcript of the conference to this I-9 form lacking such a date is hereby corrected.

I additionally stated that I had been unable to locate and the parties had not cited any decisions by the Chief Administrative Hearing Officer (CAHO) holding that the attaching of documents to an I-9 form does not constitute substantial compliance where such documents are not identified on the form itself. As previously stated, it

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still would be necessary for the employer to sign and date the attestation portion of Section 2.

Respondent explained at the conference that it maintains a separate "personnel jacket" for each employee which includes their I-9 form, supporting documentation, and other information including releases, licenses, and criminal record checks. Respondent alleged that during the August 1995 INS I-9 audit Agent Grathwohl looked in some of the personnel jackets, and asked for copies of the I-9 forms. Respondent's staff copied the I-9 forms for 300 employees and gave them to Agent Grathwohl. Respondent asserted that in March 1996, the agent telephoned Respondent's personnel manager and asked for the social security numbers and dates of employment for the 70 individuals subsequently named in the notice of intent to fine and the complaint. Respondent acknowledged that not all of the information was on the I-9 forms presented to the INS, but that the requisite information was included in each individual's personnel jacket. Respondent acknowledged that the supporting documents were generally not attached to the I-9 forms for each employee, but rather were included somewhere in the personnel jacket, which in some cases was up to an inch thick.

The parties disagree as to the statements made by Special Agent Grathwohl during the August 1995 I-9 audit. Specifically, Respondent asserts that Agent Grathwohl stated that the files that he reviewed were in very good shape and that Respondent "went far and above any requirement for the I-9." *See Answer ¶7.* During the conference, Complainant stated that Agent Grathwohl did not make that statement, and that even if Agent Grathwohl made the statement that Complainant was still entitled to summary decision.

At the conclusion of the conference, I reserved ruling on Complainant's motion for summary decision pending the filing of further submissions from both parties. Initially, I ordered whichever party has the original I-9 forms at issue in this matter to file them with the Court, and to do so by September 3, 1996. I ordered Respondent to re-check the personnel jackets for those individuals identified at ¶¶A-1 (Satahudeen Kareem Abdul-Adul), 3 (Joseph Aloï), 9 (Andrew Owen Beicht), 11 (Lamont Blackwell), 15 (Samuel Glenn Calloway), 27 (Doreen Forman a/k/a Doreen Foreman), 35 (Mark Hernandez), 36 (Alfonso Herrera), 37 (Robert John), 38 (Danilo Jones), 40 (John Francis Kerins), and 67 (Rasheen Williams-Barnes) and to state whether the personnel jacket contains either a

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List A or a List B and List C document and to identify those documents in a submission to the Court due not later than September 3, 1996. Complainant was ordered to file a supplemental brief on or before September 23, 1996. Complainant's brief shall discuss each I-9 form and specifically why each I-9 in this case is legally insufficient. Complainant also shall discuss why attaching documents to an I-9 form does not constitute substantial compliance and whether or not the CAHO has issued any ruling on this issue. Complainant also shall discuss whether the failure to include certain information in the attestation clause of Section 2, for example the individuals name and/or title, defeats a claim of substantial compliance. Finally, even though Complainant has amended its motion for summary decision to apply only to liability, Complainant also shall discuss which statutory penalty factors in 8 U.S.C. §1324a(e)(5) are present in this case.

During the conference the parties also discussed possible settlement and made respective settlement offers. However, the amount of the offers were widely disparate, and no settlement was reached.

Any rulings made at the prehearing conference which are not reflected in this Prehearing Conference Report remain effective even though they are not mentioned. The transcript will serve as a record of those rulings. If either party objects to any part of this Prehearing Conference Report on the ground that it does not accurately reflect the ruling at the conference, such objection shall be filed and served on or before September 6, 1996. Such objections should not be merely requests for reconsideration. Rather they should be filed only if this Prehearing Conference Report does not accurately reflect the ruling.

ROBERT L. BARTON, JR.  
Administrative Law Judge