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

October 29, 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.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

I. *Background*

On September 26, 1996 Complainant served a Motion to Compel answers to questions that were propounded to deponent Manuel Ramirez at a deposition conducted on September 18, 1996. The deposition was conducted by Ms. Lisa Luis, counsel for Complainant. Respondent's counsel Mr. Robert Loughran also was present, and the deponent Manuel Ramirez was represented by Ms. Elizabeth Mendoza. During the course of the deposition the deponent Ramirez refused to answer seventy questions on the ground that the answer might incriminate him. Although neither the witness nor his counsel specifically referred to the Fifth Amendment to the United States Constitution, that clearly was the basis for his claim of privilege. Complainant certified these questions and filed the Motion to Compel, contending that Ramirez did not properly invoke the Fifth Amendment privilege. A telephone prehearing conference was held on October 8, 1996 which was attended by both parties' counsel as

well as Ms. Mendoza, as counsel for Ramirez.[1] During the conference I stated that the response to Complainant's motion was due not later than October 11, 1996. Prehearing Conference (PHC) Tr. 7–8. Respondent's counsel stated that Respondent did not intend to respond to the motion, but Ms. Mendoza stated that she would oppose the motion. PHC Tr. at 8–9.

In its Motion to Compel Complainant argues that the witness has not properly invoked the privilege against self incrimination. Since these administrative proceedings are civil, not criminal, the exposure to civil liability alone is insufficient to invoke the privilege against self-incrimination. Complainant notes that no claim has been asserted against Manuel Ramirez individually. Complainant further contends that there is no obvious showing that a truthful response to the questions would subject Mr. Ramirez to criminal prosecution or establish a significant link of evidence to establish he committed a criminal offense. Finally, Complainant asserts that Ramirez did not describe a rationale basis on which his answers could conceivably incriminate him, so he therefore failed to present a sufficient showing of the required risk to support a refusal to respond.

During the prehearing conference, I noted that in general, "[t]he Fifth Amendment's protection against self-incrimination applies no matter if the proceedings are criminal, civil, administrative, investigatory, or adjudicatory." PHC Tr. at 9–12. *See also Maness v. Meyers,* 419 U.S. 449, 464 (1975); *Kastigar v. United States*, 406 U.S. 441, 444 (1972); *United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor*, 4 OCAHO 644, at 8 (1994). *See also McIntyre's Mini Computer Sales Group v. Creative Synergy Corp.*, 115 F.R.D. 528, 529 (D. Mass. 1987) (holding that a nonparty may invoke privilege against self-incrimination during pretrial discovery of a civil case). Furthermore, during the conference I explained to Ms. Mendoza that the burden is on the witness claiming the privilege against self incrimination to show that the privilege is applicable and properly invoked. PHC Tr. at 12–13. *See also United States v. Alberto Noriega-Perez*, 5 OCAHO 777, at 4 (1995) (finding cursory manner of witness' invocation of Fifth Amendment privilege insufficient). *Accord, North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985); *In re Morganroth*, 718

[1] A court reporter was present for the conference, and a transcript has been prepared. Also, a prehearing conference report which discusses and summarizes the conference was issued on October 9, 1996.

F.2d 161, 167 (6th Cir. 1983). Specifically, I stated that counsel opposing the motion would be expected to articulate the reasons for invoking the protections of the Fifth Amendment, without disclosing the protected information itself.

In *Noriega*, Judge McGuire noted that the procedural rules applicable to proceedings codified at 28 C.F.R. Part 68 were not instructive regarding the manner in which privilege claims should be treated. *Noriega*, 5 OCAHO 777 at 3. However, 28 C.F.R. §68.1 provides that the Rules of Civil Procedure for United States District Courts may be used as general guidelines in situations not covered under part 68. Thus, the relevant Federal Rule of Civil Procedure is Rule 26(b)(5). The applicable part of that rule states that:

> when a party withholds information . . . by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privilege or protected, will enable other parties to assess the applicability of the privilege or the protection.

Fed. R. Civ. P. 26(b)(5).[2] *See also Noriega*, 5 OCAHO 777 at 3 (looking to relevant Federal Rule of Civil Procedure in situations not covered under part 68).

On October 11, 1996 deponent Ramirez's counsel filed a response to the Complainant's Motion to Compel. However, despite clear direction during the conference, counsel did not address the basis for the invocation of the privilege with respect to the specific questions in the deposition. The response was two and a half pages long and merely referred generally to the type of questions asked and recited the elements of a knowing hire violation and document fraud case and asserted that each of the objectionable questions directly correlated with an attempt to link Ramirez with one or more of the elements of a civil document fraud or knowing hire case. However, the response fails to show how it so links the deponent or why the answer would tend to incriminate him. Indeed the response does not discuss even one of the questions.

[2] Although Mr. Ramirez is a witness rather than a party, during the conference I impressed upon counsel for the witness that a response to the motion should include the reasons for the invocation of the Fifth Amendment privilege comparable to the requirements of Fed. R. Civ. P. 26(b)(5). PHC Tr. at 11–12. *See also* Final Prehearing Conference Report, at 2 (October 9, 1996).

Despite the inadequacy of the response and the lack of input from the deponent, given the importance of the Constitutional claim raised, I have carefully considered each of the certified questions in the motion, and have attempted to determine whether there is a "real and appreciable danger of self-incrimination" and whether the witness has "reasonable cause " to apprehend danger from an unprotected answer.

II. *Relevant law*

The protections of the Fifth Amendment may only be invoked in response to questions that present a "real and appreciable danger of self-incrimination." *United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor*, 4 OCAHO 644, at 8 (1994) (internal citations omitted). The privilege is properly invoked where the witness has "reasonable cause" to apprehend danger from an unprotected answer. *Hoffman v. United States*, 341 U.S. 479, 486–87 (1950) (noting that a court must "construe the privilege against self incrimination broadly and must sustain it if it is 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . might be dangerous *because injurious disclosure could result*'") (emphasis supplied). *See also Steinbrecher v. Commissioner*, 712 F.2d 195, 198 (5th Cir. 1983) (finding that the privilege must be sustained when it is "evident from the implications of the question, in the setting in which it is asked that a responsive answer [might lead to injurious results]").

The Supreme Court held that the Fifth Amendment's privilege against self-incrimination protects against evidence that would provide "a link in the chain of evidence needed to prosecute." *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). Lower courts have evaluated the question of privilege in a like manner, with one court noting that there must be "credible reasons why revealing such information presents more than a frivolous fear of incrimination," *SEC v. Parkersburg Wireless Ltd. Liab. Co.*, 156 F.R.D. 529, 537 (D.D.C. 1994) (internal citations omitted), and another holding that a party asserting such a privilege must demonstrate a "nexus" between the information sought and the potential for criminal liability. *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981). Regardless, the determination is to be made by a court on a case-by-case basis. *In re Grand Jury Proceedings*, 13 F.3d 1293, 1295 (9th Cir. 1994) (noting that the prospect of incrimination is "generally determined from the setting and peculiarities of each case") (internal citations omitted).

I also note that Mr. Ramirez may not assert his Fifth Amendment privilege as a means of protecting the Respondent, or other individuals, from future, albeit speculative criminal liability. The Fifth Amendment privilege against self-incrimination may not be vicariously raised. *See Doe v. U.S.*, 487 U.S. 201, 207 (1988) (noting that the Fifth Amendment privilege against self-incrimination protects a person only against being incriminated by his own compelled testimonial communications). *Accord, Bellis v. United States*, 417 U.S. 85, 89–90 (1974) (noting that Constitutional rights are "purely personal rights" that cannot be vicariously asserted) (internal citations omitted); *United States v. Boruff,* 870 F.2d 316, 319 (5th Cir. 1989) (holding same).

Moreover, a witness is not justified in refusing to answer questions based on the Fifth Amendment privilege against self-incrimination if the applicable statute of limitation has run, thus eliminating the possibility that the witness's answers will lead to or assist in his prosecution. *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961) (citing *Brown v. Walker*, 161 U.S. 591 (1896) and *Hale v. Henkel*, 201 U.S. 43 (1906)). However, Complainant has not asserted that the applicable statutes of limitations have run for any possible crimes with which Manuel Ramirez could be charged. The party objecting to the privilege's invocation has the burden of proof "not only to show that the statutory period of limitation has expired, but also that no prosecution has been begun within that period, or, if begun, that it has been discontinued in such manner as to protect the witness from further prosecution." *Goodman,* at 262–63.

The Immigration and Nationality Act criminalizes engaging in a "pattern or practice" of knowingly hiring unauthorized aliens and knowingly continuing to employ an alien who is or has become unauthorized. 8 U.S.C. §1324a(a)(1)(A), (a)(2) (1994). "The term *pattern* or *practice* means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts." 8 C.F.R. §274a.1(k) (1996) (emphasis in original). Complainant seeks to compel deposition testimony regarding whether the witness told an INS agent that the witness had authority to hire and fire employees, and that the witness knew that several employees for whom he had completed Employment Verification Forms (I–9 Forms), *see* Complainant's Proposed Trial Exhibits CX–H, –L, and –Q, were not authorized to work in the United States. Such information is potentially incriminating in that it could show that the witness was en-

gaged in a pattern or practice of knowingly hiring unauthorized workers.

The statute of limitation for prosecuting a non-capital offense is five years after the offense is committed, unless the law provides otherwise. 18 U.S.C. §3282 (1994). A pattern or practice violation is a non-capital offense. *See* 8 U.S.C. §1324a(f)(1) (1994). Because no other statute of limitation is provided regarding pattern or practice violations, the general five-year period for non-capital offenses applies. The witness signed I–9 Forms for Juan Ramirez, Manuel Noguez (whom Complainant alleges is the same person as Francisco Ramirez), and Abel Ramirez on October 30, 1994. *See* Complainant's Proposed Trial Exhibits CX–H, –L, and –Q. Of all the I–9 Forms that the witness completed that Complainant has submitted on its Exhibit List, October 30, 1994 was the earliest date that the witness completed I–9 Forms. Therefore, the time limit for bringing a pattern or practice prosecution against the witness has not expired.

It is also possible that the witness could face criminal liability under various document fraud provisions, such as 18 U.S.C. §1001 (providing for fines and/or imprisonment for anyone who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry") and §1015(c) (providing for fines and/or imprisonment for anyone who "uses or attempts to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or citizenship, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained").

As Congress has not designated a different statute of limitation with respect to those sections, the general five-year limitations period for non-capital offenses applies because neither is designated a capital offense. If the witness knowingly used false or fraudulent documents to complete the I–9 Forms, then those violations would have occurred at the time the witness completed such forms, or around October 30, 1994. All of the witness's potential criminal violations took place approximately two years ago, putting any possible

prosecutions to be brought for them well within the five-year limitations period. As a result, Manuel Ramirez faces a real possibility of prosecution and conviction if he is required to make any statements that could incriminate him and, thus, remains entitled to invoke the Fifth Amendment privilege against self-incrimination.

Finally, it should be noted that even if the limitations period had expired for any crimes with which the witness could be charged, Complainant has not met its burden of asserting and showing such an expiration. It is the burden of the party objecting to the privilege's invocation to show not only that the limitations period has expired, but also that no prosecution was started during that period or, if a prosecution did begin, that it was discontinued in a manner to protect the witness from further prosecution. *Goodman*, 289 F.2d at 262–63. Complainant has made none of those showings. As a result, none of the witness's invocations of the privilege against self-incrimination will be invalidated for the reason that the applicable statutes of limitation have expired and that the witness faces no real danger of prosecution.

III. *Analysis and Rulings*

A. *Deposition questions relating to witness' personal knowledge*

During the deposition at issue, Mr. Ramirez invoked his Fifth Amendment right against self-incrimination seventy times. In her response to the Complainant's Motion to Compel, the witness' counsel quoted the elements of a knowing hire and document fraud case, and asserted that the Fifth Amendment privilege was asserted because each question "attempt[ed] to link him to one or more of the elements of a civil document fraud or knowing hire case." However, counsel for the witness left to the court the mystery of matching each statutory element with the offending question. *See* Manuel Ramirez' Response to Complainant's Motion to Compel Answers at Deposition, filed October 11, 1996.

Complainant's deposition questions concern whether Ramirez had hiring and firing power over workers, participated in filling out I–9 Forms of alien workers not authorized to work in the U.S., and knew that certain employees were not authorized to work in the U.S. Some of the questions seek to elicit information about Remirez's family members, who worked for Respondent. A series of questions during the deposition also delved into certain discussions Ramirez had with

an INS agent, regarding Ramirez's participation in the hiring of unauthorized workers for the Respondent.

Section IIIB of the Order will discuss those questions where it is *not* reasonable for Mr. Ramirez to believe that a full and complete answer would provide a sufficient nexus leading to his becoming criminally liable, and thus the Complainant's Motion to Compel will be GRANTED. Section IIIC of the Order will discuss questions where the Motion to Compel is DENIED. Some questions are grouped together by subject area, as the rationale for one question of a group typically mirrors that of the whole.

B. *Deposition questions to which Complainant's Motion to Compel is granted*

19–2[3] **Do you have any authority to tell employees what to do?**

While this question casts a wide net as to the *potential* power of Mr. Ramirez, the question only directly requests a yes or no answer to the question of whether he has *any* authority to tell employees what to do. As a foreman for Respondent, the answer would seem obvious. Thus, the swath cut by this question is so wide that Mr. Ramirez could not reasonably fear future prosecution from a truthful answer. Moreover, since the witness bears the burden of proving that a privilege exists, *United States v. Alberto Noriega-Perez*, 5 OCAHO 777 at 3 (1995), and has done very little to tip the scales in his favor regarding this question, the Motion to Compel is GRANTED.

20–14 **Do you have any family members who currently work for Dixie Industrial?**

The Motion to Compel regarding this question is GRANTED. Whether any family members currently work for the Respondent would not provide a significant link or nexus to tie Mr. Ramirez to possible criminal liability. Even if the answer is in the affirmative, and if it is further revealed that his family members may be unauthorized to work in the United States, there still is no evidence pro-

[3] The numerical references are the page and line, respectively, of the deposition transcript.

vided by Mr. Ramirez that he was responsible for their hiring. *See Doe*, 487 U.S. at 207.

21–2 **Do you have any family members who have ever worked for Dixie Industrial?**

The Motion to Compel is GRANTED. This question does not ask whether Mr. Ramirez hired family members to work for the Respondent. The fact that members of Mr. Ramirez' family "ever" worked for Respondent should not implicate this witness as part of a knowing hire or document fraud scheme, even if it were shown that those family members were not authorized to work in the United States. The question is sufficiently open to keep the "nexus" attenuated.

26–16 **Did she** (Liz Jackson, a former secretary) **ever have the authority to hire people at Dixie Industrial?**

Mr. Ramirez has failed to show why, as long as he answers this question only as it relates to Ms. Jackson, he could foresee any realistic chance of criminal liability by giving an answer to this question. An answer here could be damaging to Ms. Jackson, not Mr. Ramirez. Fifth Amendment privileges may not be vicariously raised. *Bellis*, 417 U.S. at 89–90. The Motion to Compel is GRANTED as to this question.

29–10 **I want to know if Mr. Del Valle has ever hired anyone to work for Dixie Industrial. Yes or no?**

Mr. Ramirez was not warranted in asserting his Fifth Amendment privilege here. Indeed, Mr. Ramirez could only damage Mr. Del Valle, not himself. *Bellis*, 417 U.S. at 89–90 (vicarious raising of Fifth Amendment privileges prohibited). Finally, it should be noted that in the transcript, Mr. Ramirez answered *each* question about Mr. Del Valle, including a variation of this one. Only when counsel for Mr. Ramirez objected to the question as "[a]sked and answered," did Mr. Ramirez raise the self incrimination objection. Indeed, the previous question and answer was, "[h]as Mr. Del Valle ever hired anyone to work for Dixie Industrial," to which Mr. Ramirez replied, "[h]e recommends them to the office." The Motion to Compel is GRANTED as to this question. Dep. of Manuel Ramirez at 28–29.

32–8 **When did you first discuss the hiring procedure with Mark Carter?**

This question asks for the date of the conversation with Mr. Carter, and thus this is all the witness is required to testify about. Counsel for Mr. Ramirez has failed to demonstrate how this question could be incriminating. The question does not ask whether Mr. Ramirez was given hiring and firing powers, nor does it suggest that Mr. Ramirez was given specific instructions regarding hiring and firing. The *date* of such a conversation have not been shown by Ramirez' counsel to be privileged, and thus, the Motion to Compel is GRANTED as to this question.

37–1 **Has Juan Ramirez ever worked for Dixie Industrial?**

45–16 **Did Francisco Ramirez ever work for Dixie Industrial?**

53–8 **Did Abel Ramirez ever work for Dixie Industrial?**

The Motion to Compel is GRANTED with respect to these questions. The witness was admittedly a foreman for Dixie Industrial. The witness obviously had knowledge and some day-to-day supervisory power over Dixie Industrial's employees. The fact that the witness is *aware* that some individuals worked for Dixie is hardly incriminatory towards the witness. Admittedly, *further* questioning about Mr. Ramirez' power to hire employees, ensure that I–9s were filled out correctly, and his knowledge of these individuals work status could very well lead to criminal liability. However, merely asking a foreman if he recalls if certain individuals "ever worked" for a company where he was a foreman is a very attenuated link to future prosecution, if a link at all. The Respondent could possibly be subject to future criminal liability, but Mr. Ramirez may not assert his privilege against self-incrimination to protect Respondent. *Bellis*, 417 U.S. at 89–90; *Boruff*, 870 F.2d at 319.

37–14 **When was Juan Ramirez hired by Dixie Industrial?**

46–4 **When was Francisco Ramirez hired to work for Dixie Industrial?**

53–21 **When was Abel Ramirez hired to work for Dixie Industrial?**

The Motion to Compel is GRANTED as to these questions. There is still no evidence from Mr. Ramirez that he hired the three individuals mentioned in these questions, nor has Ramirez' counsel demonstrated how the witness' knowledge of the mere *dates* these individuals were hired will provide a link towards possible future prosecution, as is required under *United States v. Alberto Noriega-Perez*, 5 OCAHO 777 (1995).

65–4 **Were Abel Ramirez, Juan Ramirez, and Francisco Ramirez at Kodiak Industries when INS conducted the survey?**

During this series of questions, the Complainant asked Mr. Ramirez if he recalled a November, 1994 incident when the INS surveyed a company known as Kodiak Industries. The witness answered in the affirmative, but maintained that he was not present. The witness admitted to being "the foreman assigned to that project." Dep. of Manuel Ramirez at 65. The witness asserted his Fifth Amendment privilege, however, when asked whether Abel, Juan, and Francisco were present at Kodiak Industries that day.

Once again, it is rather difficult to visualize why the witness' recollection of their presence would be damaging, and again counsel for the witness has not enlightened us. Her one paragraph describing the questions asked is particularly general in nature and does not follow the dictates of Fed. R. Civ. P. 26(b)(5). The witness has not met his burden of proof as is his responsibility under *United States v. Alberto Noriega-Perez,* 5 OCAHO 777 at 3 (1995). Thus, the Motion to Compel with respect to this question is GRANTED.

C. *Deposition questions to which Complainant's Motion to Compel is Denied*

22–20 **Mr. Ramirez, have you ever had the authority to hire employees for Dixie Industrial?**

23–4 **Have you ever—Mr. Ramirez, have you ever had the authority to fire employees for Dixie Industrial?**

These questions concern the authority of Mr. Ramirez in his capacity as a foreman for the Respondent. Information as to his hiring and firing authority could be used to establish an alleged pattern or practice of hiring employees not authorized to work in the United

States and thus could reasonably provide a "reasonable link" in the prosecution of Mr. Ramirez under 8 U.S.C. §1324a(f). Thus, the Motion to Compel with respect to these questions is DENIED.

23–17 **Have you ever had authority to complete the I–9 forms for Dixie Industrial company?**

24–5 **How many I–9 forms have you completed for new hires at Dixie Industrial?**

25–23 **Have you ever had the responsibility for completing section 2 of the Form I–9?**

It is reasonably foreseeable for Mr. Ramirez to believe that answers to these questions could lead to criminal liability under 8 U.S.C. §1324a(f) and/or 18 U.S.C. §§1001, 1015(c), especially if they are of the nature his counsel intimates. Thus, the Motion to Compel with respect to these questions is DENIED.

32–21 **Did you ever discuss with Mark Carter the procedure in which to complete an I–9 form?**

33–9 **Did Mark Carter ever instruct you on who to hire and not to hire?**

Like the previous three questions discussed, it is possible that Mr. Ramirez has declined to answer these questions to prevent criminal liability under 8 U.S.C. §1324a(f) and/or 18 U.S.C. §§1001, 1015(c). If Mr. Ramirez engaged in collaboration with the Respondent, he could conceivably fear criminal liability. Thus, the Motion to Compel with respect to these questions is DENIED.

36–3 **Do you know who Juan Ramirez is?**

36–14 **Is Juan Ramirez related to you?**

43–16 **Do you have his [Juan Ramirez'] address [in the United States]?**

38–15 **Did Juan Ramirez work under your supervision?**

44–2 **Do you know who Francisco Ramirez is?**

44–15 **Does Francisco Ramirez use the name Manuel Noguez[]?**

45–2 **Is Francisco Ramirez related to you?**

47–4 **Did Francisco Ramirez work under your supervision at Dixie Industrial?**

52–8 **Do you know who Abel Ramirez is?**

52–20 **Is Abel Ramirez related to you?**

54–24 **Did Abel Ramirez work under your supervision?**

The Complainant has alleged in the complaint that Juan, Francisco, and Abel Ramirez were not authorized to work in the United States, and were hired. As a foreman with possible hiring and firing powers, the witness could supply a link to his eventual prosecution under 8 U.S.C. §1324a(f), especially if it is shown that they are unauthorized to work in the United States. While Mr. Ramirez knew and confirmed that Juan Ramirez is in the United States, giving Juan's address may aid a criminal prosecution and may provide a "reasonable link" in the chain of evidence. *See Doe*, 487 U.S. at 207–9 (communication must relate factual information to be "testimonial" for Fifth Amendment purposes). The Supreme Court has made plain that a trial judge must be "perfectly clear, from a careful consideration of all the circumstances in the case . . . that the answer[s] cannot possibly have such a tendency to incriminate." *Hoffman*, 341 U.S. at 488 (internal citations and emphasis omitted). Since it is not "perfectly clear" that Mr. Ramirez could not possibly be incriminated, the Motion to Compel with respect to these questions is DENIED.

25–3 **Who is responsible at Dixie Industrial to ensure that new hires complete—or that Section 2 is completed for new hires on the Form I–9?**

38–2 **Who hired Juan Ramirez to work for Dixie Industrial?**

46–16 **Who hired Francisco Ramirez to work for Dixie Industrial?**

54–10 **Who hired Abel Ramirez to work for Dixie Industrial?**

The answers to these questions could potentially expose Mr. Ramirez to criminal liability under 8 U.S.C. §1324a(f), especially if he knowingly hired the individuals in violation of 8 U.S.C. §1324a or was the *only* person responsible for ensuring completion of I–9 Forms by new hires. Thus, the Motion to Compel is DENIED.

39–2 **Did Juan Ramirez fill out a Form I–9 at Dixie Industrial?**

39–15 **Mr. Ramirez, I would like to show you what's been marked as Exhibit B. Is this an accurate copy of Juan Ramirez' Form I–9.**

40–4 **Mr. Ramirez, did you ensure that Juan Ramirez completed Section 1 of the Form I–9?**

40–17 **Did you complete Section 2 of Juan Ramirez' Form I–9?**

41–4 **Is that your signature in the certification block of Juan Ramirez' Form I–9?**

47–16 **Did Francisco Ramirez fill out a Form I–9 at Dixie Industrial?**

48–3 **I'm showing you what's been marked as Exhibit C. Is that an accurate copy of Francisco Ramirez' I–9?**

48–18 **Did you ensure that Francisco Ramirez completed section 1 of this form I–9?**

49–7 **Did you complete Section 2 of Francisco Ramirez' Form I–9 as shown here in exhibit C?**

49–22 **Is that your signature in the certification block of Francisco Ramirez' Form I–9 as shown in Exhibit C?**

55–13 **Did Abel Ramirez fill out a Form I–9 for Dixie Industrial?**

56–2 **I'm showing you what's been marked as Exhibit D. Is this an accurate copy of Abel Ramirez' Form I–9?**

56–16 **Did you ensure that Abel Ramirez completed Section 1 of the Form I–9 shown in exhibit D?**

57–5 **Did you complete Section 2 of Abel Ramirez' Form I–9 as shown in Exhibit D?**

57–18 **Is this your signature in the certification block of Abel Ramirez' Form I–9 as shown in Exhibit D?**

The questions regard all three individuals and Mr. Ramirez' participation in their completion of their I–9 Forms. If Mr. Ramirez hired individuals knowing they were unauthorized to work in the United States, or falsified I–9 forms, he faces potential criminal liability under 8 U.S.C. §1324a(f) and/or 18 U.S.C. §§1001, 1015(c). The Motion to Compel regarding the above series of questions is DENIED.

41–18 **Was Juan Ramirez authorized to work in the United States?**

42–6 **How long have you known that Juan Ramirez was not authorized to work in the United States?**

42–20 **Did you ever tell anyone at Dixie Industrial that Juan Ramirez was not authorized to work in the United States?**

50–11 **Was Francisco Ramirez authorized to work in the [] United States?**

50–25 **How long have you known that Francisco Ramirez was not authorized to work in the United States?**

51–14 **Did you ever tell anyone at Dixie Industrial that Francisco Ramirez was not authorized to work in the United States?**

58–7 **Was Abel Ramirez authorized to work in the United States?**

58–20 **How long have you known that Abel Ramirez was not authorized to work in the United States?**

59–9 **Did you ever tell anyone at Dixie Industrial that Abel Ramirez was not authorized to work in the United States?**

Even more so than the immediately preceding set of questions, these questions directly inquire as to the witness' knowledge of these three individuals's unauthorized status. Answers to these questions could provide a reasonable link in the chain of evidence that would lead to criminal prosecution. The witness could easily envision the possibility of criminal liability under the theories of various cases discussed above. *See, e.g., Hoffman*, 341 U.S. at 488; *Steinbrecher*, 712 F.2d at 198; *Garza*, 4 OCAHO 644 at 8. These questions could readily be answered by the witness in such a way that would give rise to a criminal action under 8 U.S.C. §1324a(f).

60–6 **Is this an accurate copy of the written statement you gave to Mr. Murphy on November 22, 1994?** (Murphy is an INS agent)

64–3 **Did you sign the statement you gave to Agent Murphy on November 22, 1994?**

67–8 **Did you give agent Murphy a written statement on that occasion?**

All three questions seek information that would tend to authenticate witness Manuel Ramirez' statement to INS Special Agent Murphy. Requiring a witness to authenticate an incriminating personal document is subject to the Fifth Amendment privilege against self-incrimination. *See McIntyre's Mini Computer Sales Group v. Creative Synergy Corp.*, 115 F.R.D. 528 (D. Mass. 1987). The court in that case held that the privilege against self-incrimination protects a witness from producing incriminating personal records if such production would be testimonial in nature. *Id.* at 531. "The act of production will be considered testimonial if it compels [the witness] to admit that the documents exist, that they are in his possession or that they are authentic." *Id.* (citing *United States v. Doe,* 465 U.S. 605, 612–14 (1984)). Thus, if the privilege against self-incrimination extends to authenticating a document by the act of producing it, the privilege also should extend to authenticating a document by other

more direct means, like declaring that a document is what it purports to be and identifying a signature on the document. Complainant's Motion to Compel is DENIED with respect to the above three deposition questions.

60–18 **Did you tell agent Murphy . . . that foremen at Dixie Industrial were responsible for completing I–9s?**

61–7 **Did you tell agent Murphy . . . that all foremen, includ ing yourself, had authority to hire and fire employees?**

61–22 **Did you tell agent Murphy . . . that you knew that Juan Ramirez, Francisco Ramirez, and Abel Ramirez were not authorized to work in the United States?**

62–11 **Did you tell agent Murphy . . . that Juan Ramirez, Francisco Ramirez, and Abel Ramirez were related to you?**

63–1 **Did you tell agent Murphy . . . that you knew that Juan Ramirez, Francisco Ramirez, and Abel Ramirez were illegally in the United States?**

65–18 **Were you questioned by INS agents on that day, Novem ber 18, 1994?**

66–20 **What did you tell [agent Murphy when you met with him on an unspecified date]?**

All the above questions require the witness to confirm that he made a statement to an Immigration and Naturalization agent, to confirm the contents of the statement, and to confirm that his signature appeared on the statement. The witness did not waive his right to invoke the privilege against self-incrimination at a deposition by making incriminating statements at an earlier interview with the Immigration and Naturalization agent.

Although an individual may waive the privilege against self-incrimination, such a waiver "is not lightly to be presumed." *Poretto v. United States*, 196 F.2d 392, 394 (5th Cir. 1952) (citing *Smith v. United States*, 337 U.S. 137, 150 (1949)). A prior statement by a witness will not constitute a waiver of the Fifth Amendment privilege

unless the statement is "incriminating," meaning that it increases the likelihood that the witness will be subject to criminal prosecution or conviction, *and* "testimonial," meaning that the statement was made under oath during a judicial proceeding. *E. F. Hutton & Co. v. Jupiter Dev. Corp. Ltd.*, 91 F.R.D. 110 (S.D.N.Y. 1981) (citing *United States v. James*, 609 F.2d 36, 45 (2d Cir. 1979) and *United States v. Diecidue*, 603 F.2d 535, 552 (5th Cir. 1979)). A witness' statement to a federal agent, however, does not waive the witness' right to invoke the privilege against self-incrimination in a later proceeding. *Diecidue* at 551 (witness' admission to a Government agent prior to trial that he had previously committed perjury did not waive his privilege to invoke the Fifth Amendment as to that matter during the trial); *Ballantyne v. United States*, 237 F.2d 657, 665 (5th Cir. 1956) (witness' statement to Internal Revenue agent did not preclude witness from invoking privilege against self-incrimination before grand jury when asked about same subject matter); *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961) (witness' statements to federal agents investigating the tax liability of witness' employer did not waive witness' right to invoke privilege against self-incrimination in a subsequent tax proceeding) (citing *Poretto v. United States*, 196 F.2d 392 (5th Cir. 1952), *Marcello v. United States*, 196 F.2d 437 (5th Cir. 1952), *In re Neff*, 206 F.2d 149 (3d Cir. 1953), and *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958)). Noting the possibility of changes in criminal laws and situations between the time of the original statement and the time that the privilege is invoked, the Fifth Circuit has stated that the "constitutional privilege attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding." *Poretto v. United States*, 196 F.2d 392, 394 (5th Cir. 1952).

Even if a witness has made a statement that is incriminating and testimonial, a court should not necessarily find that the witness has waived the privilege against self-incrimination. Instead, "courts should decide testimonial waiver questions on a case-by-case basis, upon a careful consideration of how seriously the policy concerns relevant to the testimonial waiver issue are implicated by the situation at hand." *E. F. Hutton*, 91 F.R.D. at 115 (citing *Rogers v. United States*, 340 U.S. 367 (1951)). The *E. F. Hutton* court notes that *Rogers* emphasizes two such "policy concerns": the danger of distorting the facts of a case by allowing the witness to select stopping places in his testimony and the concern with upholding the idea that the privilege against self-incrimination should be used only where there is a real risk of increasing the chances of a prosecution. *Id.*

In *Rogers*, the witness refused to reveal the identity of the person to whom she had given records of the Communist Party of Denver after she already had admitted to a grand jury that she was a former treasurer of that organization and that she had turned over the records to some unidentified person. *Rogers v. United States*, 340 U.S. 367, 368 (1951). The witness argued that although her admissions could implicate her with a violation of the Smith Act, 18 U.S.C. §2386, any additional statement identifying the person to whom she had given Communist Party records would further incriminate her with respect to the different crime of conspiracy to violate the Smith Act. *Id*. at 375. The Court ruled that allowing the witness to testify that she had given Communist Party documents to another person without also revealing that person's identity would "open the way to distortion of facts by permitting a witness to select any stopping place in his testimony." *Id.* at 371. Additionally, the Court noted that "[s]ince the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here *would not further incriminate her*." *Id.* at 372–73 (emphasis added). The Court decided that revealing the identity of the person to whom the witness had given Communist Party records would not further incriminate the witness because a person "can be convicted of conspiring with persons whose names are unknown." *Id.* at 375.

Some courts have adopted a "further incrimination" test to implement the second *Rogers* rationale. Under that test, courts will uphold the privilege even if the questions concern a matter previously discussed and the facts already revealed are incriminating, as long as the answers now sought may tend to incriminate the witness further. *See In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 873 (7th Cir. 1979), *United States v. LaRiche*, 549 F.2d 1088, 1096 (6th Cir. 1977), *In re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974), and *Usery v. Brandel*, 87 F.R.D. 670, 683 (W.D. Mich. 1980)).

In *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958), the witness was asked before a grand jury to confirm that he had made a statement to Federal Bureau of Investigation agents, to confirm that he had stated the contents of the statement, and to confirm that his signature appeared on the statement. *Miranti*, 253 F.2d at 137 n.1. The witness refused to answer based on the Fifth Amendment privilege against self-incrimination. *Id.* at 137. The court stated that the witness could invoke the privilege against self-incrimination before the grand jury even though he was being asked to confirm that he

had made certain statements that already incriminated him. The court reasoned that requiring the witness to confirm that he had made earlier incriminating statements would make prosecution and conviction of the witness more likely, stating that

> [e]ven though the prior statements also would be admissible at such a trial, the requested acknowledgments would add to their credibility and could have led to additional admissions in this grand jury proceeding exacted through the waiver route . . . which also would be admissible at a possible trial for the substantive crimes.

Id. at 138 (citing *Rogers v. United States*, 340 U.S. 367 (1951)); *but see E. F. Hutton*, 91 F.R.D. at 115–16 (concluding that such a "strict application of the further incrimination test would limit testimonial waiver to situations where the witness' earlier statement has proven his or her guilt beyond a reasonable doubt" and opining that the *Rogers* Court did not intend such a result).

Although the Fifth Circuit Court of Appeals has not expressly adopted the "further incrimination" test adopted by the Second Circuit in *Miranti*, the Fifth Circuit has indicated that it would follow the approach taken in *Miranti*. In *Ballantyne v. United States*, 237 F.2d 657 (5th Cir. 1956), the witness was asked, among other inquiries, to confirm that he had been interviewed by Internal Revenue agents and to confirm that he had stated the contents of the statement to those agents. *Id.* at 661 n.2. Although the *Ballantyne* court does not specifically refer to a "further incrimination" test in its opinion, it nevertheless concludes that the witness was entitled to invoke the privilege against self-incrimination at the subsequent grand jury proceeding in which the witness was asked to acknowledge his earlier incriminating statements. *Id.* at 665 (citing *Poretto v. United States*, 196 F.2d 392, 394 (5th Cir. 1952)).[4]

[4] Aside from the question of whether the Fifth Circuit would follow the "further incrimination" test in deciding questions of waiver of the privilege against self-incrimination, Complainant's Motion to Compel still would be denied because recognizing the witness' privilege in this situation would not violate the first *Rogers* policy concern. The Court in *Rogers* was concerned that allowing a witness to invoke the privilege against self-incrimination after making some incriminating statements could lead to the facts of a case being distorted by letting the witness select stopping points in his testimony. *See Rogers*, 340 U.S. at 371. Unlike the factual scenario in *Rogers*, here the disputed deposition questions only seek confirmation of statements the witness already has made, and, also unlike *Rogers*, they do not solicit additional information that would clarify what the witness already has said. Moreover, the government can decide not to offer the statements in evidence if it believes that they are misleading.

Similarly, requiring Ramirez to confirm the statements made to the INS agent would serve to increase the likelihood of a subsequent prosecution and conviction of the witness by adding to the credibility of his earlier statements. *See Miranti*, 253 F.2d at 138. Therefore, I conclude that Ramirez is entitled to invoke the Fifth Amendment privilege against self-incrimination with respect to the above inquiries, and, consequently, the Motion to Compel with respect to those questions is DENIED.

IV. *Conclusion*

Since the trial of the case was postponed at Complainant's request to allow the completion of the deposition, I expect Complainant to act promptly to reschedule the deposition and to advise the Court when the deposition is completed and the parties are ready to proceed to trial. At that time I will reschedule the trial in Houston, Texas.

ROBERT L. BARTON, JR.
Administrative Law Judge