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

July 18, 1997

UNITED STATES OF AMERICA, Complainant, v. AID MAINTENANCE COMPANY, INC., A/K/A AID JANITOR SERVICE, AID WINDOW CLEANING, AID FLOOR CLEANING, AID CLEANING SERVICE, Respondent.	)))) 8 U.S.C. 1324a Proceeding) OCAHO Case No. 94A00154))))))

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S SECOND MOTION FOR SUMMARY DECISION

I. *Background*

On August 17, 1993, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon Aid Maintenance Company, Inc. (respondent) Notice of Intent to Fine (NIF) PRO–92–034. That citation contained seven (7)-counts alleging 139 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, for which civil money penalties totaling $67,250 were assessed.

On September 2, 1993, John D. Biafore, Esquire, respondent's counsel of record, timely filed a written request for hearing.

On August 18, 1994, complainant filed the seven (7)-count Complaint at issue, realleging the 139 violations set forth in Counts

I through VII of the NIF, as well as the requested $67,250 total civil money penalties sum.[1]

On September 15, 1994, respondent filed a timely answer to the Complaint. In that responsive pleading, the respondent admitted having hired for employment in the United States after November 6, 1986, those individuals identified in Counts I through VII; denied having violated IRCA in the manners alleged; and asserted four (4) affirmative defenses.

On October 20, 1994, complainant's October 3, 1994 Motion to Strike respondent's four (4) affirmative defenses was granted.

On January 12, 1995, complainant's Motion to Amend Complaint, in which it requested that four (4) names be stricken from the Complaint, was granted, resulting in 135 alleged facts of violation remaining at issue.

On September 26, 1996, complainant's July 3, 1996 Motion for Summary Decision for the 120 alleged paperwork violations in Counts II, III, IV, V, VI, and VII of the Complaint was granted in part. Specifically, in ruling on that motion, it was found that respondent had committed 116 of the 120 alleged paperwork violations.

On February 2, 1997, Walter C. Hunter, Esquire and Lincoln D. Almond, Esquire entered appearances on behalf of the respondent.

On February 24, 1997, complainant filed a pleading captioned Second Motion For Summary Decision requesting that summary decision be granted in its favor on 14 of the 15 alleged facts of violation contained in Count I. Complainant does not seek summary decision on the remaining alleged facts of violation concerning Gustavo Cadavid, thus limiting our factual inquiry.

In Count I of the Complaint, complainant alleges that the respondent knowingly hired and/or knowingly hired through a labor contract and/or continued to employ the 15 individuals named therein for employment in the United States and did so after November 6,

[1]A NIF and Complaint containing the same allegations and assessing the same civil money penalties sum were also filed by the INS against Cerca, Inc. Complainant consented to dismissal of that Complaint after it was determined and stipulated that Cerca, Inc. functioned as respondent's payroll company, and was not a separate entity.

1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(A) and/or §1324a(a)(2). Civil money penalties of $1,010 were assessed for each of those 15 alleged violations, for a total sum of $15,150.

In its September 15, 1994 answer, respondent admitted having hired those 15 individuals for employment in the United States after November 6, 1986. Respondent also asserted that it "had no knowledge that said individuals were not authorized for employment and believes that said individuals were in fact so authorized."

On March 5, 1997, respondent's counsel filed a Motion for Extension of Time To File Opposition to Motion for Summary Decision seeking a 30-day extension to file its response to complainant's dispositive motion.

On March 10, 1997, the request for an extension of time was granted.

On April 24, 1997, respondent's counsel filed a motion seeking a further extension of time until May 30, 1997 to file its response. That request was also granted.

Despite having been granted an additional 60 days to do so, respondent has not filed a response to complainant's dispositive motion.

II. *Standards of Decision*

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and 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." 28 C.F.R. §68.38(c) (1996); *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 327 (1st Cir. 1996).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in

proceedings before this Office. *United States v. Limon-Perez*, 5 OCAHO 796, at 5, *aff'd*, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986);

Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e). The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial." 28 C.F.R. §68.38(b) (1996).

The mere fact that respondent has failed to file a response does not mean that summary decision is to be granted automatically. Summary decision may properly be granted only if the facts as to which there is no genuine dispute show that the moving party is entitled to summary decision as a matter of law. 28 C.F.R. §68.38(c) (1996); *Ramsdell v. Bowles*, 64 F.3d 5, 8 (1st Cir. 1995).

III. *Discussion*

Enacted in 1986, the Immigration Reform and Control Act (IRCA) established an employment verification system which requires that

all employers verify the employment eligibility of all persons hired after November 6, 1986, by viewing certain specifically described documents or combinations of documents and completing an INS Form I–9 within three (3) days of hire. 8 U.S.C. §1324a(b); 8 C.F.R. §274a.2(a) (1996); *Costigan v. NYNEX*, 6 OCAHO 918, at 6 (1997).

The Form I–9, officially known as the INS Employment Eligibility Verification Form, is a single-page, two-sided document which is utilized by the hiring person or entity for that purpose.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I–9, and to make those forms available to INS personnel in the course of their inspections. 8 U.S.C. §1324a(b). A failure to properly prepare, retain, or produce Forms I–9, in accordance with the employment verification system, 8 U.S.C. §1324a(b), is a violation of IRCA.

In addition, IRCA makes it unlawful for an employer knowingly to hire an alien who is unauthorized for employment in the United States, or to continue to employ an alien with the knowledge that the employment is or has become unauthorized. 8 U.S.C. §1324a(a)(1) and §1324a(2).

In order to prove the violations alleged in Count I, complainant must show that: (1) respondent; (2) after November 6, 1986; (3) hired for employment and/or continued to employ in the United States; (4) unauthorized aliens; (5) knowing that those aliens were unauthorized with respect to such employment. *United States v. Alberta Sosa, Inc.*, 5 OCAHO 739, at 5 (1995).

As noted earlier, in its September 15, 1994 answer respondent admitted that it hired the 15 individuals named in Count I for employment in the United States after November 6, 1986.

Complainant's May 1, 1997 Motion for Summary Decision is accompanied by a memorandum of law, the declaration of Special Agent Mark J. Furtado, and documentary data which has been marked as exhibits A through Z. From those sources as well as the pleadings, the following facts have been made available.

Respondent, a Rhode Island corporation with offices in Pawtucket, Rhode Island, is in the business of providing on-site cleaning and janitorial services. On September 18, 1989, INS personnel visited re-

spondent firm for the purpose of conducting an employer sanctions education session visit.

In April and May 1991, agents of the INS apprehended several of respondent's employees in the greater Providence, Rhode Island area. Those individuals were found to have been aliens unauthorized for employment in the United States.

As a result, on June 11, 1991, Furtado conducted an employer sanctions compliance inspection at respondent's office in the presence of respondent's payroll clerk, Sylvia Baril, who provided 269 Forms I–9 for inspection.

On April 23, 1992, Furtado personally delivered a letter to respondent which informed respondent that 102 of its employees "may not be eligible for employment in the United States", exhibit B. That correspondence also advised that every effort should be made to redetermine the employment eligibility for each of those 102 employees.

Included among the names of the 102 identified unauthorized aliens were 12 of the 15 individuals listed in Count I: Juan Badillo, Miguel Angel Cante, German Chavez, Abelardo Cruz, Jose Luis Diaz, Marcos Hernandez, Porfirio Hernandez, Joaquin Jaramillo, Jose Martinez, Mario Sasbim a/k/a Mario Sasbin, Jerzy Solak, and Alvaro J. Zapata.

Specifically, the INS determined that the following employees presented alien registration cards which had been issued to another person: Juan Badillo, Miguel Angel Cante, German Chavez, Abelardo Cruz, Jose Luis Diaz, Marcos Hernandez, Mario Sasbim a/k/a Mario Sasbin, and Alvaro J. Zapata.

In addition, the INS determined that Porfirio Hernandez, Joaquin Jaramillo, Jose Martinez and Jerzy Solak presented alien registration cards which have never been issued.

In proving the final element of its prima facie case, complainant may demonstrate that respondent had either actual or constructive knowledge that the 14 aliens named in Count I were unauthorized for employment in the United States.

Specifically, 8 C.F.R. §274a.1(l) (1996) provides:

> The term "knowing" includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
>
> (i) Fails to complete or improperly completes the Employment Verification Form, I–9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work . . . or
>
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

Constructive knowledge is most readily proven when it is shown that the employer had positive information supplied by the INS, as shown under these facts, that some of its employees are unauthorized for employment in the United States, and subsequently fails to take reasonable steps to reverify the employment eligibility of those employees. *See, e.g.*, *United States v. Carter*, 7 OCAHO 931 (1997); *United States v. 4431, Inc.*, 4 OCAHO 611 (1994); *United States v. Mester Mfg. Co.*, 1 OCAHO 53 (ref. no. 18) (1988), *aff'd*, *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *United States v. New El Rey Sausauge Co.*, 1 OCAHO 389 (ref. no. 66) (1989), *aff'd New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).[2]

Accordingly, on April 23, 1992, respondent at least had constructive, if not actual, knowledge that 12 of the 15 individuals listed in Count I were unauthorized for employment.

The Ninth Circuit has held that "the INS must provide an employer with a reasonable amount of time for compliance after the employer acquires knowledge that an employee is unauthorized." *New El Rey Sausage*, 925 F.d. at 1156.

[2]Because the Ninth Circuit is the only federal circuit to have addressed the issue of knowledge in illegal hire/continue to employ cases, OCAHO decisional law on that issue has primarily developed from Ninth Circuit precedents and is quite persuasive.

The Administrative Law Judge in *Mester Mfg. Co.* also advised that an employer may choose any number of options upon learning of an employee's unauthorized status, including suspension or discharge.

It is quite clear that the employer must, at a minimum, make timely and specific inquiry to ascertain the status of questionable employees. In *Mester Mfg. Co.*, the Ninth Circuit affirmed the Administrative Law Judge's determination that an employer's two-week delay in discharging an unauthorized alien amounted to a section 1324a(a)(2) continue to employ violation.

In this case, respondent attempted to reverify the employment eligibility of only two (2) of its 12 employees after acquiring knowledge of their unauthorized status specifically, Mario Sasbim a/k/a Mario Sasbin and Jerzy Solak, exhibits X and N–11. However, in neither instance did respondent act reasonably in having done so.

Sasbim signed and dated a new Form I–9 on August 20, 1992 or some four (4) months after respondent acquired knowledge of his unauthorized status, exhibit X.

With respect to Solak, the record indicates that he signed and dated a new Form I–9 on May 5, 1992 or 12 days after respondent learned of his unauthorized status, exhibit Y. Specifically, in section 1 Solak attested that he was an alien lawfully admitted for permanent residence, but failed to list his alien registration number. In section 2, respondent failed to attest that Solak was eligible to work in the United States. Finally, one of the two documents, a Social Security Card (128–65–2975), tendered by Solak and physically examined by respondent to reverify his work eligibility, had previously been tendered by Solak on November 10, 1989, the date of his initial hire. The other tendered document was an unspecified state driver's license.

These facts clearly disclose that respondent did not make a reasonable attempt to reverify Solak's work eligibility and therefore has been properly cited for knowing of Solak's unauthorized status. *New El Rey Sausage*, 925 F.d. at 1159.

Having shown that respondent had at least constructive knowledge that 12 of the 15 individuals listed in Count I were unauthorized aliens, complainant must also demonstrate that respondent continued to employ those 12 individuals after acquiring that knowledge.

On that issue, complainant has provided relevant wage reports of the Rhode Island Department and Training for the second and third quarters of 1992, exhibit J.

Those wage records show that those 12 employees continued to receive wages from respondent into September 1992, or some five (5) months after respondent learned they were unauthorized aliens.

Complainant has also provided respondent's employee earnings records, exhibits O-Z, showing that Juan Martinez received wages through September 24, 1992; Juan Badillo and German Chavez through September 25, 1992; and Jerzy Solak through September 26, 1992.

Those earnings records further show that Miguel Angel Cante, Abelardo Cruz, Jose Luis Diaz, Marcos Hernandez, Porfirio Hernandez, Joaquin Jaramillo, Mario Sasbim a/k/a Mario Sasbin, and Alvaro J. Zapata received wages through October 24, 1992.

Based on these facts, it is found that complainant has met its burden of demonstrating that respondent hired for employment in the United States Juan Badillo, Miguel Angel Cante, German Chavez, Abelardo Cruz, Jose Luis Diaz, Marcos Hernandez, Porfirio Hernandez, Joaquin Jaramillo, Juan Martinez, Mario Sasbim a/k/a Mario Sasbin, Jerzy Solak, and Alvaro J. Zapata, and did so after November 6, 1986, and continued to employ them despite having been aware of their unauthorized status, in violation of IRCA, 8 U.S.C. §1324a(a)(2).

As noted earlier, respondent has not filed a response to complainant's dispositive motion and has thus failed to offer specific facts showing that there is a genuine issue of material fact with regard to its liability for those 12 infractions.

Complainant is also seeking summary decision in its favor on two (2) other alleged facts of violation in Count I, involving Martha Escobar and Denis E. Florez.

Complainant argues that respondent hired Escobar and Florez knowing that they were unauthorized for employment, in violation of 8 U.S.C. §1324a(a)(1)(A), and continued to employ them knowing of their unauthorized status, in violation of 8 U.S.C. §1324a(a)(2).

Complainant also urges that the respondent had knowledge that Escobar and Florez were unauthorized aliens at the time of hire.

To demonstrate such knowledge, complainant has submitted copies of the relevant two (2) page employment applications completed by Escobar and Florez, exhibits K and L. Complainant notes that the application form seeks information concerning U.S. citizenship and that those spaces were inexplicably left blank.

In addition, complainant has also submitted copies of the pertinent Forms I–9 relating to Escobar and Florez. Those Forms I–9 show that Escobar was hired on January 25, 1990 and that Florez was hired on March 3, 1992. Complainant invites attention to the fact that neither Escobar nor Florez informed of their alien status in section 1 of their Forms I–9.

Failure to ensure that an employee properly completes section 1 of the Form I–9 is a violation of IRCA's paperwork requirements, 8 U.S.C. §1324a(b).

Complainant urges that those paperwork infractions coupled with the partially completed employment application forms conclusively establish that respondent knew or should have known that neither Escobar nor Florez were authorized for employment in the United States at the time both were hired.

We are mindful that the Ninth Circuit has instructed that the constructive knowledge doctrine must be applied "sparingly" in illegal hire cases under section 1324a(1)(A). *Collins Food Int'l, Inc. v. INS*, 948 F.d. 549, 555 (9th Cir. 1991).

In *Collins*, an employee had tendered a false Social Security Card to verify his work eligibility. The Administrative Law Judge held that the employer had constructive knowledge of the employee's unauthorized status because the employer had failed to compare the Social Security card with that of a specimen contained in the INS Handbook for Employers, in violation of the employment verification system.

In reversing, the Ninth Circuit held that the employer had reasonably complied with the employment verification system with respect to the employee at issue and did not possess the "kind of positive in-

formation" that would support a finding of constructive knowledge. 948 F.d. at 555.

The Court also announced that "the ALJ's holding extends the constructive knowledge doctrine far beyond its permissible application in IRCA employer sanction cases" and would upset the delicate balance between IRCA's goal of "preventing unauthorized alien employment while avoiding discrimination against citizens and unauthorized aliens." *Id*. at 554.

The Court expressly left open the question of whether a failure to comply with the employment verification system, as shown under these facts, is sufficient to establish the knowledge element of a section (a)(1)(A) illegal hire violation. 948 F.d. at 553. OCAHO rulings, however, have held that such a failure does not so equate.

For example, in *United States v. Valdez*, 1 OCAHO 596 (ref. no. 91) (1989), the Administrative Law Judge, citing IRCA's legislative history, noted that the mere failure to prepare a Form I–9 is not sufficient alone to show knowledge in an illegal hire charge.

In *Valdez* and in prior OCAHO cases, constructive knowledge has been found where post-hearing evidence discloses a failure to comply with the employment verification system, but there was also other substantial evidence indicating that the employer should have known of the employee's unauthorized status. *See, e.g.*, *United States v. American Terrazzo Corp.*, 6 OCAHO 877 (1996); *United States v. Carter*, 7 OCAHO 931, at 16 (1997); *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307 (1991). That type of showing has clearly not been made by complainant in this case.

Complainant's evidence is insufficient to charge respondent with constructive knowledge of Escobar's and Florez's unauthorized status and falls far short of the "willful blindness" found in *Mester Mfg. Co.* and *New El Rey Sausage*. *See United States v. American Terrazzo Corp.*, 6 OCAHO 828 (1995) (finding of actual or constructive knowledge inappropriate where based on inference and circumstantial evidence).

Finally, complainant has not provided any evidence on the fourth element of its prima facie case namely, whether Escobar and Florez were in fact unauthorized aliens at the time of hire.

Because of those evidentiary shortcomings, those portions of complainant's Motion for Summary Decision concerning the facts of violation involving Martha Escobar and Denis E. Florez in Count I, must be and are hereby being denied.

IV. *Summary*

Because complainant has shown that there are no genuine issues of material fact regarding 12 of the 15 facts of violation alleged in Counts I of its August 18, 1994 Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's May 19, 1997 Second Motion for Summary Decision is granted as to the facts of violation concerning those 12 infractions.

However, since complainant has failed to show that there are no genuine issues of material fact regarding two (2) other facts of violation alleged in Count I, those involving Martha Escobar and Denis E. Florez, complainant's Second Motion for Summary Decision is denied as to the facts of violation concerning those two (2) alleged violations.

As noted earlier, complainant did not seek summary decision on the facts of violation contained in Count I involving Gustavo Cadavid and therefore that alleged infraction remains at issue, also.

An evidentiary hearing will be scheduled for the purpose of adducing relevant evidence concerning the alleged facts of violation involving the three (3) illegal hire/continue to employ violations remaining at issue in Count I and the four (4) paperwork violations remaining at issue in Counts V and VI, as well as the appropriate civil money penalties for those infractions in the event that complainant proves those allegations.

In that hearing, also, we will address the appropriate civil money penalties to be assessed for the 116 paperwork violations in Count II, III, IV, V, and VII which have previously been ruled upon in complainant's favor, as well as the 12 continue to employ violations in Count I which have been ruled upon in complainant's favor in this Order.

The civil money penalty sums which must be assessed in connection with the 12 proven continue to employ violations in Count I, as

well as the possible civil money penalties to be assessed on the three (3) illegal hire/continue to employ violations remaining in Count I, together with a mandatory cease and desist order, are those provided in the provisions of 8 U.S.C. §1324a(e)(4).

Those civil money penalty sums to be assessed for the 116 proven paperwork violations in Counts II, III, IV, V and VII, as well as the possible civil money penalties to be assessed on the four (4) paperwork violations remaining in Counts V and VI, will be determined by giving the required due consideration to the five (5) criteria listed at 8 U.S.C. §1324a(e)(5).

In view of this ruling, a telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted in or near Pawtucket, Rhode Island.

JOSEPH E. MCGUIRE
Administrative Law Judge