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

November 4, 1997

UNITED STATES OF AMERICA, Complainant,	)
	) 8 U.S.C. §1324a Proceeding
v.	)
	) OCAHO Case No. 97A00043
FORTUNE EAST FASHION, INC., Respondent.	)

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION AS TO LIABILITY

I. *Procedural Background*

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (1994) (INA or the Act), in which the United States Department of Justice, Immigration and Naturalization Service (INS) is the complainant and Fortune East Fashion, Inc. is the respondent. On January 9, 1997, INS filed a complaint in three counts with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging in Count I that respondent, after November 6, 1986, failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Form I–9) for six named individuals. Count II alleges that respondent failed to ensure that one named individual hired after November 6, 1986 properly completed Section 1 of Form I–9. Count III alleges that respondent failed to complete Section 2 of Form I–9 within three business days of hire for ten named individuals hired after November 6, 1986. For these alleged violations, complainant seeks civil money penalties totaling $6,110.00.

Service of the complaint, together with a Notice of Hearing and a copy of the applicable rules of practice and procedure,[1] was perfected on respondent following some initial problems with execution of service on an appropriate party.

Respondent Fortune East, proceeding through its president, Mao Sen Lin, filed an answer in letter form on May 13, 1997. In its letter, Fortune East neither admitted nor denied the allegations raised in the complaint, but stated that it has complied with the I–9 process "by filing [sic] most the [sic] information on the I–9." In conjunction with this defense, respondent stated "[t]herefore, the company has established good faith defense [sic] with respect to the charges of knowingly hiring illegal aliens." However, INS did not allege that the respondent knowingly hired unauthorized aliens. Accordingly, the "good faith" defense to knowing hire charges, as codified at 8 U.S.C. §1324a(a)(3), has no applicability to the present case.[2] Respondent has, however, constructively asserted a defense of substantial compliance with respect to the paperwork violations. *See, e.g.*, *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 169 (1991), *United States v. Manos & Assocs., Inc.*, 1 OCAHO 130, at 886 (1989).[3] Fortune East asserted further that it was unable to admit or deny the allegations made in the complaint because the original I–9 forms at issue were seized by the INS. Under OCAHO regulations, a respondent may either admit or deny each allegation or state that it is unable to obtain sufficient information to admit or deny each allegation. "[A] statement of lack of information shall have the effect of a denial." 28 C.F.R §68.9(c)(1). The letter also contended that the proposed penalty amount is "excessive and inappropriate" in view of the company's size, revenue, and profit, and in view of the fact the company went out of business in February 1997.

[1]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

[2]The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104–208, 110 Stat. 3009 (September 30, 1996), made significant changes to enforcement of the verification requirements of the INA for technical or procedural failures found in I–9 inspections conducted after its enactment. IIRIRA has no application to the violations at issue in this case because the events complained of took place prior to September 30, 1996.

[3]Citations to OCAHO precedents reprinted in bound Volumes 1 through 3, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 3 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 3, however, are to pages within the original issuances.

On June 19, 1997, INS filed a motion for summary decision as to liability with supporting documentation and exhibits. Complainant argues that there is no genuine issue of material fact requiring a hearing on any of the allegations, and asserts that it is entitled to judgment on all counts as a matter of law. Fortune East did not file any response to the motion.

II. *Applicable Law*

A. *Standards for Summary Decision*

OCAHO's procedural rules provide that the Administrative Law Judge may enter a summary decision in favor of either party if the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. §68.38(c). This rule 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 cases. Accordingly it is appropriate to look to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO 611, at 10 (1994). A party seeking a summary decision has the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a motion for summary decision is made and supported as provided in the rule, the opposing party may not rest upon the mere allegations or denials in a pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. §68.38(b). An issue is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A genuine issue is material only if, under the governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the non-moving party. *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994). All doubts are therefore resolved in favor of the party opposing summary decision, particularly where, as here, that party is unrepresented. *See, e.g.*, *United States v. Harran Transp. Co.*, 6 OCAHO 857, at 3 (1996).

B. *Duties Imposed by the INA*

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for each employee hired after November 6, 1986, and to make those forms available for inspection by INS officers. Each failure to timely or properly prepare, retain, or produce the forms in accordance with the employment verification system is a separate violation of the Act. *See generally* 8 U.S.C. §1324a(b). Specific requirements include, *inter alia*, the attestation of the employer under penalty of perjury that it has examined certain specified documents to verify that the individual is not an unauthorized alien, 8 U.S.C. §1324a(b)(1); the attestation of the employee under penalty of perjury that he or she is eligible for employment, 8 U.S.C. §1324a(b)(2); and the retention of verification forms for three years after the date of hire, or for one year after the date of termination of employment, whichever is later, 8 U.S.C. §1324a(b)(3). More detailed guidance on compliance with the statute is found in the accompanying regulations, 8 C.F.R. §274a.2(b)(1)(i)(A) and 8 C.F.R. §274a.2(b)(1)(ii)(B).

Applicable regulations designate Form I–9 as the employment eligibility verification form to be used by employers. Form I–9 consists of Section 1, the employee attestation, and Section 2, the employer attestation. Section 2 contains two components, a documentation part and a certification part. Both are critical to enforcement. *See United States v. Corporate Loss Prevention Assocs. Ltd.*, 6 OCAHO 908, at 5 (1997) (modification by the Chief Administrative Hearing Officer). An employer's duty includes both meeting its own attestation requirements and ensuring that the employee's requirement is met as well. *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1093 (1990).

III. *The Evidence*

Evidence submitted in support of INS's motion consists of the Declaration of Special Agent Donald Bruckschen, the INS case agent assigned to the investigation and presentation of the case, together with Exhibits A and B.[4] Exhibit A consists of an I–9 form for Jwe Hua Li, with an attached copy of a social security card and a resi-

[4]For reasons which are unexplained, two copies of each of the I–9s were submitted, one set attached to the motion and one set attached to the declaration. The two sets of documents are each identified as Exhibit A and Exhibit B. However the contents of Exhibits A and B accompanying the motion are not the same as the contents of Exhibits A and B accompanying the declaration. In the interest of clarity I have used the exhibit designations on the materials attached to Agent Bruckschen's declaration.

dent alien card both bearing the same name and I–9 forms for Mei Ip Chan, Dan Tong Chen, Kin Hung Chu, Ying Chen Da, Sandy Lau Fong, Hou Fong, Xian Huang Qiu, Long Chan Tang, Shu Xing Yang, and Bi Yum Ye. Exhibit B consists of an Employer Eligibility Verification Form Investigative Inspection Worksheet (Investigative Inspection Worksheet or Worksheet) consisting of two pages, listing 32 employees, their social security numbers, hire dates, present employment status with respondent, termination dates if applicable, and whether Form I–9 was presented. Attached to the Worksheet is a certification by Andy Lin, title unspecified, that the information contained in the Worksheet is true and correct based upon company employee records and/or personal knowledge.

If a party fails to object or move to strike submitted evidence, that failure ordinarily constitutes a waiver of any objection. *United States v. Kumar*, 6 OCAHO 833, at 5, *appeal filed*, No. 96–70300 (9th Cir. 1996). Nevertheless the proponent of documentary evidence must still authenticate documents by evidence sufficient to demonstrate that a document is what it purports to be, even in administrative proceedings. *United States v. Carpio-Lingan*, 6 OCAHO 914, at 5 (1997) (citations omitted). Authentication of exhibits in support of a motion for summary decision is ordinarily accomplished by an accompanying affidavit of the investigating agent, setting forth the circumstances under which the evidence was obtained. *Id.* This is only one of many ways in which documents may be authenticated, but it is a preferred manner because the statement of an individual with personal knowledge simultaneously establishes the origin and chain of custody as well as the identity of the document. *Id.*

A. *The Declaration of Special Agent Donald Bruckschen*

Notwithstanding any failure to object to evidentiary submissions, §68.38(b) of the OCAHO rules requires that any affidavit shall "show affirmatively that the affiant is competent to testify to the matters stated therein" and shall "set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557." An affiant must ordinarily have personal knowledge of the facts to which he attests. *See Carpio-Lingan*, 6 OCAHO 914, at 8. The Bruckschen affidavit states in pertinent part, "I state the following based upon what I have learned from other officers of the INS's Investigations Branch, INS correspondence with Fortune East Fashion Inc. (the 'Respondent'), and my inspection of INS Employment Eligibility Verification Forms ('Forms I–9') obtained

from the Respondent." Nowhere does the declaration of Special Agent Bruckschen state that he personally participated in the events described. The declaration states that on August 23, 1996, INS served Fortune East with a Notice of Inspection, that a compliance inspection was conducted on August 28, 1996 at which the company presented twenty-six original I–9 forms of which eleven are attached, and that Fortune East's manager, Andy Lin, completed the worksheet. It states that the facts described were "learned from other officers of the INS's Investigations Branch" as well as from INS correspondence with the company and from Agent Bruckschen's inspection of the eleven subject I–9 forms.

Case law provides that, while affiants must generally have personal knowledge of the facts to which they attest, affiants may attest to the contents of records they have reviewed in their official capacities. *Larouche v. Webster*, No. 75 Civ. 6010, 1996 WL 551715, at *1 (S.D.N.Y. Sept. 26, 1996) (citing *Christian Dior-New York, Inc. v. Koret, Inc.*, 792 F.2d 34, 38 (2d Cir. 1986); *Londrigan v. Federal Bureau of Investigation*, 670 F.2d 1164, 1174 (D.C. Cir. 1981)). "[T]he requirement of 'personal knowledge' does not mean that in every case an affiant must have personally participated in the events described. . . . [I]t may be enough if the affiant has personally reviewed the relevant documents." *Morrison v. Blitz*, No. 88 Civ. 5607, 1995 WL 679259, at *2 (S.D.N.Y. Nov. 15, 1995). Agent Bruckschen's statements regarding documents that he reviewed in his official capacity are competent under this standard.

In addition, the declaration itself sets out the type of information routinely obtained in the course of INS compliance inspections. That it may rely on hearsay statements should not affect its admissibility. "'It is well established . . . that hearsay evidence is admissible in administrative proceedings, if factors are present which assure the underlying reliability and probative value of the evidence.'" *United States v. Carter*, 7 OCAHO 931, at 14 n.27 (1997) (quoting *United States v. China Wok Restaurant, Inc.*, 4 OCAHO 608, at 11 (1994)). The information contained in the declaration was procured pursuant to authority granted by law, by an authorized agent, appears to have been obtained in the normal course of an INS compliance investigation, and demonstrates substantial indicia of reliability. There are no inconsistencies presented by any other documents in the record casting doubt upon the veracity of the information in the declaration. Moreover, Fortune East has such a relationship to the facts asserted in the declaration that it is most likely to know the accuracy of the

statements made and yet has lodged no objection to them. Absent objection, I therefore find the affidavit acceptable.

B. *The Accompanying Documents*

The I–9 forms accompanying the affidavit are sufficiently authenticated by Agent Bruckschen's declaration. The Employer Eligibility Verification Form Investigative Inspection Worksheet is the kind of document completed in the normal course of INS investigations. *See, e.g.*, *United States v. Tri Component Prod. Corp.*, 5 OCAHO 821, at 4 (1995). According to Agent Bruckschen's declaration, the worksheet was completed by Andy Lin, manager of respondent company. The certification accompanying the worksheet attests that the information contained in the worksheet is true and correct and is signed by Andy Lin of Fortune East, although his title with the company is unspecified on the certification itself. Given that the worksheet appears to have been completed by respondent's manager and in the absence of any challenge to its authenticity, I find it admissible.

IV. *Discussion*

A. *Count I: Failure to prepare and/or make available for inspection Form I–9*

In Count I, INS alleges that Fortune East failed to prepare and/or make available for inspection Forms I–9 for Hi Peter Chihing, Ye Li Jin, Helen Li, Ling Hai Lindasiu, Nga Huang Su, and You Chen Yug. In order to prove these allegations, INS must establish that the individuals named in Count I were hired for employment at Fortune East after November 6, 1986, and that Fortune East failed to prepare and/or make their Forms I–9 available for inspection.

The Employer Eligibility Verification Form Investigative Inspection Worksheet shows that Hai Peter Chihing was hired on March 4, 1996 and terminated on May 16, 1996; that Ye Li Jin was hired on May 10, 1996 and terminated on June 14, 1996; that Helen Li was hired on March 4, 1996 and terminated on July 29, 1996; that Ling Hai Lindasiu was hired on March 4, 1996 and terminated on May 8, 1996; and that You Chen Yug was hired on April 1, 1996 and terminated on July 15, 1996. There are check marks in the boxes marked "yes" under the heading "Form I–9" for all the named employees except these five and one other appearing to be named Chen Huang Shao, hired May 13, 1996 and terminated June 17, 1996.

There is one other employee listed on the worksheet whose name appears similar to but not exactly the same as Nga Huang Su. A check mark appears in the "yes" box under the heading "Form I–9" for this employee. Therefore, even if the employee is Nga Huang Su, which is far from clear, it appears that Fortune East did prepare and make available a Form I–9 for this individual.

Accordingly, summary decision is inappropriate with respect to the allegation involving Nga Huang Su because the evidence discloses genuine issues of material fact as to whether this individual was employed by Fortune East and if so, whether Fortune East prepared and/or made available for inspection the Form I–9. With respect to the allegations involving the other five individuals, Hai Peter Chihing, Ye Li Jin, Helen Li, Ling Hai Lindasiu, and You Chen Yug, summary decision is appropriate as there is no genuine issue regarding these allegations.[5]

B. *Count II: Failure to ensure that employee properly completed Section 1 of Form I–9*

In Count II, INS alleges that Fortune East failed to ensure that one named individual, Jwe Hua Li, properly completed Section 1 of Form I–9. In order to prove this allegation, INS must establish that Jwe Hua Li was hired after November 6, 1986, and that Fortune East failed to ensure that Jwe Hua Li properly completed Section 1 of Form I–9.

Complainant's evidence establishes a *prima facie* case as to these elements. First, the Employment Eligibility Verification Form Investigative Inspection Worksheet shows that Jwe Hua Li was hired on August 8, 1996. Second, Section 1 of Li's I–9 contains no attestation as to the immigration status of Jwe Hua Li. Section 1 requires the employee to check a box attesting under penalty of perjury that he or she is either (a) a citizen or national of the United States, (b) a lawful permanent resident, or (c) an alien authorized to work until a specified date. 8 U.S.C. §1324a(b)(2); *see United States v.*

[5]The worksheet reveals a correlation between the list of employees for whom an I–9 form was not made available and those employees listed as "terminated" from respondent's employ. Of 32 listed employees, 26 I–9s were presented. Termination dates appear on the form for all employees whose I–9s were not presented. Termination of an employee does not relieve an employer of its responsibility to retain that employee's I–9 form for the designated period of time. *See* 8 U.S.C. §1324a(b)(3), 8 C.F.R. §274a.2(b)(2).

Northern Mich. Fruit Co., 4 OCAHO 667, at 17 (1994), *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 3 (1995). A failure to so attest undermines the very purpose for which the I–9 requirement was instituted: to "disable employers from hiring unauthorized aliens." *J.J.L.C., Inc.*, 1 OCAHO 154, at 1093–94.

C. *Count III: Failure to complete Section 2 of Form I–9 within three business days of hire*

In Count III, complainant alleges that Fortune East failed to complete Section 2 of Form I–9 within three business days of hire for ten named individuals. In order to prove this allegation, INS must establish that the individuals named in Count III were hired at Fortune East after November 6, 1986, and that Fortune East failed to complete Section 2 of Form I–9 within three days of hiring each of the named individuals, in accordance with 8 C.F.R. §274a.2(b)(1)(ii)(B).

First, complainant's evidence establishes that all of the named individuals were hired in the relevant time period: Mei Ip Chan, Dan Tong Chen, Kin Hung Chu, Ying Chen Da, Sandy Lau Fong, Hou Fong, Xian Huang Qiu, Long Chan Tang, Shu Xing Yang, and Bi Yum Ye, were all hired in 1996, as is evident on the face of the I–9s and from the Employer Eligibility Verification Form Investigative Inspection Worksheet.

With respect to the second element, the evidence shows that in nine of the ten instances alleged in this count, respondent completed Section 2 of Form I–9 more than three days after the hire. The I–9 and Investigative Inspection Worksheet demonstrate that Mei Ip Chan was hired on August 15, 1996, while Section 2 of this individual's I–9 was completed eight days later, on August 23, 1996. Dan Tong Chen commenced employment on August 12, 1996, but Section 2 of the I–9 was completed eleven days later, on August 23, 1996. Kin Hung Chu began employment with Fortune East on March 18, 1996, but Section 2 of the I–9 for this individual was filled out on August 23, 1996, over five months after the date of initial hire. Ying Chen Da started with the company on June 17, 1996, but Section 2 of the I–9 was completed on August 23, 1996, a full two months after the hire. Hou Fong was hired on July 22, 1996, but the I–9 was completed one month later, on August 23, 1996. Xian Huang Qiu started at Fortune East on March 11, 1996, but Section 2 of the I–9 was completed over five months later on August 23, 1996. Long Chan

Tang commenced employment on May 10, 1996, but Section 2 of the I–9 was completed over three months later on August 23, 1996. Shu Xing Yang was hired on March 25, 1996, but Section 2 of the I–9 was completed on August 23, 1996, nearly five months later. Finally, Bi Yum Ye was hired on August 13, 1996, but Section 2 of the I–9 was completed ten days later on August 23, 1996.

With respect to the I–9 of Sandy Lau Fong, however, summary decision is inappropriate because the I–9 raises a genuine issue of material fact: while the Investigative Inspection Worksheet and the I–9 show that this individual was hired on July 22, 1996, Section 2 of the I–9 is dated April 15, 1996, a full three months *earlier*. Absent further explanation, this inconsistency is not susceptible to resolution by summary adjudication.

D. *Whether a Defense of Substantial Compliance is Available*

Fortune East constructively asserted a defense of substantial compliance. OCAHO case law recognizes that under appropriate circumstances substantial compliance with paperwork requirements may provide an affirmative defense with regard to liability for a paperwork violation. *United States v. Chicken by Chickadee Farms, Inc.*, 3 OCAHO 423, at 9–10 (1992). The doctrine is an equitable one designed to avoid hardship when a party has done all that can reasonably be expected of it. *J.J.L.C., Inc.*, 1 OCAHO 154, at 1096. It is not available to defeat the policies underlying a statutory provision, thus actual compliance is required with respect to the substance essential to every reasonable objective of the statute. *Id.*

The overriding purpose of the employment eligibility verification system is to assure that no employee is hired without verification of his or her entitlement to work in the United States. Paperwork requirements are an integral part of the congressional scheme for controlling illegal immigration. *United States v. Noel Plastering and Stucco, Inc.*, 3 OCAHO 427, at 20 (1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1993). To the extent that verification errors or omissions could lead to the hiring of unauthorized aliens, they are considered more serious because they undermine the verification system itself. *United States v. Chef Rayko, Inc.*, 5 OCAHO 794, at 3–4 (1995) (modification by Chief Administrative Hearing Officer). Errors which may seem inconsequential in other settings may nevertheless be significant in the context of the verification system.

The defense of substantial compliance is accordingly available only in very limited circumstances. Particularly where, as here, neither the statute nor the regulations provides for such a defense,[6] it is necessary to approach with caution any departure from the goal of full compliance. OCAHO case law has identified certain minimum criteria which must be met before a defense of substantial compliance can be considered: (1) the use of an INS I–9 form to determine an employee's identity and employment eligibility; (2) the employer's or agent's signature in Section 2 under the penalty of perjury; (3) the employee's signature in Section 1; (4) in Section 1, an indication by a check mark or some other means attesting under the penalty of perjury that the employee is either (a) a citizen or national of the United States, (b) a lawful permanent resident, or (c) an alien authorized to work until a specified date; and (5) some type of information or reference to a document spelled out in Section 2, List A, or Lists B and C. *United States v. Northern Mich. Fruit Co.*, 4 OCAHO 667, at 16–17 (1994). In addition, a substantial compliance defense is not available as to Section 2 of the I–9 where an employer fails to provide a verification document identification number and/or expiration date. *Corporate Loss Prevention Assocs., Inc.*, 6 OCAHO 908, at 6.

In this case, as to Count I, failure to prepare a Form I–9 at all or to make it available for inspection can never be construed as substantially complying with the employment eligibility verification requirements because by definition it is a total failure to comply.

As to Count II, the defense of substantial compliance is inapplicable to I–9s lacking the employee attestation in Section 1 because employee attestation is crucial to I–9 compliance. *See, e.g.*, *J.J.L.C., Inc.*, 1 OCAHO 154 at 1093. An I–9 which fails to show affirmatively that an employee is a citizen, a national, a lawful permanent resident, or an alien authorized to work until a specified date defeats the whole purpose of the employment eligibility verification system.

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[6]Some agencies have promulgated regulations specifically defining the term for purposes of the statutes they enforce. *See, e.g.*, *Arent v. Shalala*, 866 F. Supp. 6, 14 (D.D.C. 1994) (FDA regulations at 21 C.F.R. §101.43(c) and (a) define substantial compliance as the term is used in Nutrition Labeling and Education Act, 21 U.S.C. §343(q)(4)(B)(ii)), *aff'd in part and remanded in part*, 70 F.3d 610 (D.C. Cir. 1995); *Flagstaff Med. Ctr., Inc. v. Sullivan*, 773 F. Supp. 1325, 1340–41 (D. Ariz. 1991) (HHS substantial compliance regulations are a reasonable interpretation of the Hill-Burton Act, 42 U.S.C. §291 et seq.), *aff'd in part and rev'd in part*, 962 F.2d 879 (9th Cir. 1992).

As to Count III, in each of nine instances, Section 2 of Form I–9 was not completed until the day respondent was served with the INS Notice of Inspection. Such delay in completing the I–9 is potentially a serious violation of the Act, as "[p]atently, for all an employer knows, employees could have been unauthorized for employment during all the substantial time their eligibility is unverified." *United States v. El Paso Hospitality, Inc*., 5 OCAHO 737, at 7 (1995). Summary decision is therefore appropriate as to nine of the allegations in Count III.

V. *Procedure for Submissions on Civil Money Penalties*

Complainant's motion, although captioned "Motion for Summary Decision as to Liability," nevertheless requests in its prayer that relief be granted in the amount of $6,110. However, the motion does not address the five factors set out in 8 U.S.C. §1324a(e)(5) which are mandatory considerations in setting the amount of the civil money penalty. This section states:

> With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil money penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §1324a(e)(5). While consideration of the statutory factors is obligatory, neither the statute nor the regulation precludes the consideration of other factors in addition to those enumerated. *United States v. Reyes*, 4 OCAHO 592, at 9 (1994).

The determination of the civil money penalty is deferred pending further proceedings to resolve the allegations of Count I as to Nga Huang Su and of Count III as to Sandy Lau Fong, as well as to address the statutory factors and any other considerations the parties wish to offer.

VI. *Findings of Fact and Concluisions of Law*

I have considered the pleadings, memoranda, affidavit, and exhibits submitted in support of the motion for summary decision. Accordingly, I make the following findings of fact and conclusions of law.

1. Fortune East Fashion, Inc. is a New York corporation having its principal place of business at 5921 20th Avenue, Brooklyn, New York, 11204.

2. A Notice of Intent to Fine was served on Fortune East on November 27, 1996 and Fortune East timely requested a hearing.

3. The following individuals were hired for employment at Fortune East after November 6, 1986:

1. Hai Peter Chihing
2. Ye Li Jin
3. Helen Li
4. Ling Hai Lindasiu
5. Nga Huang Su
6. You Chen Yug

4. Fortune East failed to prepare and/or make available for inspection Form I–9 for the following individuals:

1. Hai Peter Chihing
2. Ye Li Jin
3. Helen Li
4. Ling Hai Lindasiu
5. You Chen Yug

5. Jwe Hua Li was hired for employment at Fortune East after November 6, 1986.

6. Fortune East failed to ensure that Jwe Hua Li properly completed Section 1 of Form I–9.

7. The following ten individuals were hired for employment at Fortune East after November 6, 1986:

1. Mei Ip Chan
2. Dan Tong Chen
3. Kin Hung Chu
4. Ying Chen Da
5. Sandy Lau Fong
6. Hou Fong
7. Xian Huang Qiu
8. Long Chan Tang

9. Shu Xing Yang
10. Bin Yum Ye

8. Fortune East failed to complete Section 2 of Form I–9 within three business days of hire for the following nine individuals:

1. Mei Ip Chan
2. Dan Tong Chen
3. Kin Hung Chu
4. Ying Chen Da
5. Hou Fong
6. Xian Huang Qiu
7. Long Chan Tang
8. Shu Xing Yang
9. Bin Yum Ye

9. No genuine issue of material fact has been shown to exist with respect to Count I as it relates to Hai Peter Chihing, Ye Li Jin, Helen Li, Ling Hai Lindasiu, and You Chen Yug, and summary decision is granted as to the specific allegations concerning them.

10. No genuine issue exists with respect to Count II or Count III as it relates to Jwe Hua Li, Mei Ip Chan, Dan Tong Chen, Kin Hung Chu,Ying Chen Da, Hou Fong, Xian Huang Qiu, Long Chan Tang, Shu Xing Yang, or Bin Yum Ye, and summary decision is granted as to these allegations.

11. Fortune East has engaged in 15 separate violations of 8 U.S.C. §1324a(a)(1)(B) in that respondent hired for employment the aforementioned individuals without complying with the verification requirements in §1324a(b) and 8 C.F.R. §274a.2(b)(1)A and (ii)(A) and (B).

12. Genuine issues of material fact exist with respect to Count I as it pertains to Nga Huang Su and Count III as it relates to Sandy Lau Fong, so that the motion for summary decision is denied as to them.

13. The case will be set for prehearing conference at the earliest mutually convenient date in order to discuss further proceedings for resolving the liability allegation involving the I–9's of Nga Huang Su and Sandy Lau Fong, as well as issues related to the appropriate

amount of the civil money penalty in light of the statutory criteria set out at 8 U.S.C. §1324a(e)(5).

SO ORDERED.

Dated and entered this 4th day of November, 1997.

ELLEN K. THOMAS
Administrative Law Judge