

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

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

**MODIFICATION BY THE CHIEF ADMINISTRATIVE
HEARING OFFICER OF ADMINISTRATIVE LAW
JUDGE'S ORDER**

On January 7, 1997, the Honorable Robert L. Barton, Jr., the Administrative Law Judge (ALJ) assigned to *United States v. Corporate Loss Prevention*, issued an order granting in part the United States' motion for summary decision. The one-count complaint in this proceeding alleged that Corporate Loss Prevention (hereinafter Respondent) failed to properly complete section two of the Employment Eligibility Verification Form (Form I-9) for seventy employees in violation of section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a(a)(1)(B).

Procedural History

On August 14, 1996, Complainant filed a Motion for Summary Decision on the Pleadings, attaching photocopies of all seventy I-9 forms as Exhibit A. Because the photocopies were not entirely legible, the ALJ requested all seventy original I-9 forms. Complainant produced sixty-six of the original I-9 forms. The ALJ declined to grant summary decision as to the four employees whose original I-9 forms were not produced as he found that a genuine question exists

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concerning the authenticity of the photocopies. In examining the sixty-six original I-9 forms produced, the ALJ found that Respondent did not fully complete the Employer Review and Verification section (section two) on any of the I-9 forms. Since the Complaint only alleges deficiencies with respect to section two of the I-9 form, the ALJ's inquiry was limited to that part of the I-9 form.

The ALJ noted that section two of the I-9 form contains two distinct parts: a documentation part and a certification part. The documentation part of section two requires the employer to indicate those documents that the employer has examined, either one A List document or one B List and one C List document.¹ The certification part of section two requires the employer's signature under the following attestation clause: "I attest under penalty of perjury that I have examined the documents presented by the above individual, that they appear to be genuine and relate to the individual named, and that the individual to the best of my knowledge is eligible to work in the United States." Form 1-9, OMB No. 1115-0136 (May 7, 1987).² Section two in eleven of the I-9 forms was completely blank. The ALJ found Respondent had not substantially complied with employment eligibility verification requirements³ and granted summary decision for Complainant as to those eleven employees. The documentation part of section two in forty-two other I-9 forms contained a reference to a List B document, or to a List C document, but not to both. The ALJ granted summary decision as to the I-9 forms for the forty-two employees.

In section two of the remaining thirteen I-9 forms, Respondent referenced either an A List document or both a B List and a C List document but failed to record the document identification number and the expiration date with respect to the List A document or with respect to either or both of the List B and C documents. The ALJ

¹ The back of the I-9 form lists documents acceptable for employment eligibility verification. List A lists documents that establish both identity and employment eligibility. List B lists documents that establish identity, and List C lists documents that establish employment eligibility.

² A revised version of the I-9 form was approved November 21, 1991. However the version of the I-9 forms at issue in this case is the 1987 version.

³ The ALJ found that Respondent had, in effect, raised a substantial compliance defense in its answer to the Complaint by stating that, although it did not complete every part of the I-9 forms for the seventy employees, it maintained information and photocopies of documents establishing identity and work authorization for each employee in the personnel file.

found that, provided that the certification part of section two was properly completed and photocopies of the documents that show the document identification numbers and the expiration dates were attached, Respondent would establish a prima facie showing of substantial compliance sufficient to withstand a motion for summary decision as to that particular omission.⁴ However, the ALJ also found that in one of the thirteen I-9 forms Respondent referenced a temporary employee identification card for List B purposes which is not one of the documents authorized to establish identity for employment eligibility verification purposes⁵ and granted summary decision as to the I-9 form for that employee. On further examination of the remaining twelve I-9 forms, the ALJ found other omissions with respect to the certification part of section two in eight I-9 forms which led the ALJ to conclude that Respondent had failed to establish a substantial compliance defense. One I-9 lacked a signature, while four other I-9 forms lacked the date of certification. Three of the I-9 forms lacked Respondent's name and/or address. The ALJ found that these eight I-9 forms were in violation of section 274A(1)(B) of the INA and granted summary decision as to the I-9 forms for those eight employees.

The ALJ denied summary decision with respect to the remaining four I-9 forms, because they contained only the omissions to which the ALJ had found a viable substantial compliance defense could apply. The denial of summary judgment as to these four I-9 forms is the subject of this modification. I find it necessary to modify the ALJ's January 7, 1997 order in this proceeding for the reasons set forth below.⁶

⁴ The ALJ noted that Respondent has admitted that it did not physically attach photocopies to all seventy I-9 forms, but rather placed the photocopies in the employees' personnel folders. Thus, the ALJ acknowledged that "[a]n additional issue that will have to be addressed should this case go to trial is whether the photocopy of the supporting documentation must be physically attached to the I-9 form or whether the documents may be simply retained with the I-9 form." Order at 16 n.16. In this connection, the ALJ outlined a possible inconsistency between one INS regulation that contemplates that the photocopy must be "appended to" to the I-9 form, 8 C.F.R. §274a.2(b)(4) (1996), and another regulation that states that the photocopy must be "retained with" the I-9 form. 8 C.F.R. §274a.2(b)(3)(1996). Fortunately, we need no struggle with the practical difficulties raised by the ALJ. The precise physical location of photocopies is not a critical issue for the reasons set forth below in the discussion portion of this order.

⁵ See 8 C.F.R. §274a.2(b)(1)(v)(B) (1996).

⁶ The Attorney General's authority to review an ALJ's decision and order is set out in 8 U.S.C. §1324a(e) (7) and delegated to the Chief Administrative Hearing Officer (CAHO) in 8 C.F.R. §68.53 (a).

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Discussion

Immigration and Naturalization Service (INS) regulations clearly establish that an employer must complete section two of the I-9 form. 8 C.F.R. §274a.2(b)(1)(ii) (1996) (“an employer . . . must within three business days of hire: . . . [c]omplete section 2—‘Employer Review and Verification’—of the Form I-9.”). The regulations also clearly state that the photocopying of documents does not excuse the employer from completing the entire I-9 form. 8 C.F.R. §274a.2(b)(3) (1996). The ALJ correctly acknowledges that “photocopying identification and employment authorization documents instead of completing section two is insufficient.” Order at 14. As previously noted, section two of the I-9 forms at issue are incomplete, having no document identification numbers and expiration dates as to at least one document. The ALJ found that, although Respondent left the portion of section two requiring the identification number and/or expiration date blank, it could assert a substantial compliance defense if the information required was contained in an attached photocopy of the document. This holding contradicts the requirements set out in the instructions on the I-9 form. The instructions in section two require that the employer “[p]rovide the *Document Identification Number* and *Expiration Date* for the document checked.” Form I-9, OMB No. 1115-0136 (May 7, 1987) (italics in the original). However, the ALJ reasoned as follows:

Unlike the I-9 form instructions, the regulation does not enumerate exactly what steps an employer ‘must’ take to complete section two. The regulation’s lack of such a specific list suggests that an employer *reasonably might* be able to comply with the requirements of section two of the I-9 form, even though it omitted some information in that section or has not included all requested information on the face of the form.⁷

Order at 17 (emphasis in the original).

Although the applicable INS regulations do not provide step-by-step instructions for the completion of section two, with respect to the omissions at issue here, the regulations are quite specific:

⁷ The ALJ also cited prior OCAHO rulings as being “consistent with” his holding in the instant case. Order at 16. Without delving into the merits of that characterization, suffice it to say that I am no more bound by a prior decision of an OCAHO ALJ than the ALJ in the instant case. See the ALJ’s excellent discussion of the effect of precedent in OCAHO cases. Order at 10 n.10.

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The individual [employee] may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. *The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I-9.*

8 C.F.R. §274a.2(b)(1)(v) (1996) (emphasis added).

Moreover, as previously noted, the INS regulations make it equally clear that the provision allowing an employer to photocopy documents and attach them to the I-9 form, does not permit compliance in a manner other than properly completing the I-9 form:

An employer, or a recruiter or referrer for a fee may, but is not required to, copy a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy is made, it must be maintained with the Form I-9. The retention requirements in paragraph (b)(2) of this section do not apply to the photocopies. *The copying of any such document and the retention of the copy does not relieve the employer from the requirement to fully complete section 2 of the Form I-9.*

8 C.F.R. §274a.2(b)(3) (1996) (emphasis added).

It has long been recognized that “[t]he [INA’s] paperwork requirements form an integral part of the congressional scheme for controlling illegal immigration into this country.” *United States v. Noel Plastering & Stucco, Inc.*, 3 OCAHO 427 at 20 (1992). Section two of the I-9 form is a crucial part of the enforcement procedures. See *United States v. Acevedo*, 1 OCAHO 95, at 652 (1989)⁸ (stressing that “the ‘Employer Review and Verification’ section is the very heart of the verification process initiated by Congress in IRCA.”). The agency charged with the practical implementation of section 274A’s enforcement scheme, the INS, has developed regulations and procedures to carry out this congressional mandate. Where these regulations clearly impose a duty that does not require an administrative interpretation, I see no basis for declining to enforce the regulation. Clearly it is not my province to adjudicate the usefulness or practi-

⁸ Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

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cality of the clear regulatory requirement to record document identification numbers and expiration dates on the I-9 form.⁹

OCAHO case law recognizes a viable substantial compliance defense to alleged paperwork violations of section 274A of the INA in certain limited circumstances. See *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 2 (1995) (Prehearing Conference Report and Order Granting in Part Complainant's Motion for Summary Decision) (holding that "substantial compliance may be an affirmative defense to paperwork violations."); *United States v. Northern Mich. Fruit Co.*, 4 OCAHO 667, at 10 (1994) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses, Including Substantial Compliance) (noting that "all other OCAHO decisions addressing the issue have agreed that substantial compliance may be an affirmative defense to allegations of paperwork violations."). It is not my intention to negate that line of cases and hold that a failure to complete every minute part of an I-9 form must result in a finding of liability and at least a minimum statutory fine. However, I am holding that where, as in this case, an enforcement regulation specifically requires an employer to record any verification document identification number and/or expiration date on the I-9 form, and further

⁹ However, it is worth noting that failing to enforce that regulatory requirement could unnecessarily impede enforcement efforts. Thus, for example, section 274A(b)(1)(A) of the INA gives an employer an obvious stake in properly discharging its employment eligibility verification responsibilities by requiring the employer to attest, under penalty of perjury, that the employer has examined certain documents in the verification process and that each document "reasonably appears on its face to be genuine." 8 U.S.C. §1324a(b)(1)(A). With respect to the I-9 forms in question in the instant case, Respondent is literally attesting to the *type* of document examined only, not that a specific individually referenced document has been examined and "reasonably appears on its face to be genuine." This clearly is not the type of straightforward audit trail the regulations, the I-9 form and the instructions that accompany the I-9 form were designed to create.

Another potential impact may be discerned with respect to the civil penalty document fraud provisions of section 274C of the INA, 8 U.S.C. §1324c, which were primarily enacted to deter the increasing use of fraudulent documents to evade effective compliance with the employment eligibility verification requirements. See *Villegas-Valenzuela v. INS*, *Limon-Perez v. INS*, 1996 WL 729585 at *5 (9th Cir. 1996); *U.S. v. Remileh*, 5 OCAHO 724 at 6 (1995). Finding substantial compliance with section 274A's paperwork requirements, when no document identification numbers and expiration dates are provided on the I-9 form, would mean that if a fraudulent document is knowingly proffered and/or accepted in such circumstances, there would be nothing on the I-9 form to substantiate it in any subsequent enforcement effort under section 274C.

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specifies that copying and retaining verification documents does not relieve the employer from the requirement to fully complete section two of the I-9 form, the employer has not complied with section 274A of the INA when the employer omits the identification number and expiration date but attaches a photocopy of the document that shows the document identification number and expiration date.

Accordingly,

For the above stated reasons, the ALJ's Order is hereby MODIFIED in that: Summary decision for Complainant is granted as to the Complaint paragraphs concerning Hans Andresen (§5), Ronald Brow (§13), Robert John (§28) and Robert Rivera (§54) and the case is remanded for further proceedings.

It is so **ORDERED**, this 5th day of February, 1997.

JACK E. PERKINS
Chief Administrative Hearing Officer

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

January 7, 1997

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

**ORDER GRANTING IN PART COMPLAINANT'S MOTION
 FOR SUMMARY DECISION**

I. Procedural Background

Complainant alleges in a one-count Complaint filed on June 28, 1996, that Respondent hired seventy employees for employment in the United States after November 6, 1986, and failed to properly complete section two of the Employment Eligibility Verification Form (Form I-9) for those employees in violation of section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a(a)(1)(B). Compl. ¶¶A-C.¹

¹The following abbreviations will be used throughout this Order:

- NIF Notice of Intent to Fine
- Compl. Complaint
- Ans. Respondent's Answer to the Complaint
- C. MSD Complainant's Motion for Summary Decision on the Pleadings, filed August 14, 1996
- C. Memo. SD Complainant's Memorandum of Law in support of its Motion for Summary Decision on the Pleadings, filed August 14, 1996
- R. Opp. Respondent's letter opposing Complainant's Motion for Summary Decision, filed August 15, 1996
- C. Supp. Memo. Complainant's Supplemental Memorandum of Law in Support of Summary Decision, filed September 19, 1996
- R. Supp. Resp. Respondent's letter and submission containing further documentation, filed September 3, 1996
- PHC Tr. Transcript of August 22, 1996, Prehearing Conference
- PHCR Prehearing Conference Report, issued August 26, 1996

The Complaint seeks a penalty of \$300 per violation, for a total penalty of \$21,000. In its Answer to the Complaint, Respondent admits the allegations of the Complaint regarding jurisdiction and the parties. However, in a detailed response to the Complaint, Respondent asserts that it complied with the law, Ans. ¶¶5-7, and specifically addresses each of the seventy individuals named in the Complaint, noting the date of hire and the documentation attached to the I-9 form, *id.* ¶10.

Although Respondent does not use the words “substantial compliance” in its Answer to the Complaint, in essence Respondent has raised a substantial compliance defense, stating that while it did not complete every part of the I-9 forms for the seventy employees, it maintained information and photocopies of documents establishing identity and work authorization for each employee in the personnel file.² *Id.* ¶5. In support of its position, Respondent relies on instructions appearing on the I-9 form that state, “Copies of documentation presented by an individual for the purpose of establishing identity and employment eligibility may be copied and retained for the purpose of complying with the requirements of this form and no other purpose. Any copies of documentation made for this purpose should be maintained with this form.” *See id.* ¶4 (quoting Form I-9, OMB No. 1115-0136 (May 7, 1987)). Respondent also makes what amounts to an equitable estoppel argument, stating that Immigration and Naturalization Service (INS) Special Agent James Grathwohl told Respondent that Respondent’s procedures with respect to completing the I-9 forms met and even went beyond the requirements for completing such forms. *Id.* ¶¶6-7.

On August 14, 1996, Complainant filed a Motion for Summary Decision on the Pleadings. Respondent submitted a letter-answer opposing the Motion. An on-the-record telephone prehearing conference was conducted with the parties on August 22, 1996, and, on August 26, 1996, I issued a Prehearing Conference Report that summarized the conference. Although Complainant’s Motion for Summary Decision on the Pleadings requests summary decision as to liability and penalty, Complainant moved during the August 22, 1996, prehearing conference to amend its Motion to reflect

²In its Motion for Summary Decision, Complainant acknowledges that Respondent has asserted an affirmative defense of substantial compliance. C. MSD at 1; *see also* C. Memo. SD at 1-2.

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that it only encompasses liability and not penalty. PHC Tr. at 18; PHCR at 1.

Complainant attached photocopies of all seventy I-9 forms as Exhibit A to its Motion for Summary Decision. However, because the photocopies were not entirely legible, I ordered Complainant to submit the original I-9 forms to me. PHC Tr. at 21. On August 28, 1996, Complainant sent by Federal Express the original I-9 forms for sixty-six of the seventy employees named in the Complaint. See August 28, 1996 Letter from Soni Sinha to Judge Barton. To date, however, Complainant has not submitted the original I-9 forms for four of the seventy individuals listed in the Complaint; namely, the original I-9 forms for Theodore Boney (§12), Brent Franklin (§28), Joel Hammond (§34) and Winston Sealey (§60).³ Since the original I-9 forms for Boney, Franklin, Hammond and Sealey have not been submitted, summary decision will not be granted at this time with respect to the paragraphs of the Complaint addressing those employees.

Moreover, in comparing the original forms with the photocopies, there appear to be significant discrepancies with respect to some of the forms. For example, with respect to the following eleven individuals, there are boxes in Lists A, B, and/or C of section two that are checked on the original I-9 forms but that are not checked in the photocopied I-9 forms: Joseph Aloï (§3), Hans Alan Andreasen (§5), Ronald Brow (§13), Thomas Fels (§25), Alfredo Garcia (§29), Robert John (§37), Winston Malliet (§45), Robert Rivera (§54), Eduardo Santiago (§59), Demetrios Telio (§65) and John Wolf (§69).

Normally, a duplicate is admissible to the same extent as an original *unless* (1) a genuine question is raised as to authenticity or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003. As the Advisory Committee Notes to Rule 1003 provide, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. Here, however, because of the discrepancies between the original I-9 forms and the photocopied I-9 forms with respect to the above individuals, a genuine question exists concerning the authenticity of the photocopies. Accordingly, the photocopied

³ A used here, and throughout the Order, the paragraph number refers to the number preceding the employee's name in Section A of Count I of the Complaint.

forms with respect to the above individuals are not admissible to prove the contents of those forms. *See id.* 1002, 1003.⁴ For the purpose of this Motion, only the original I-9 forms will be considered as genuine.

Given the discrepancies between the originals and the photocopies, on November 25, 1996, I issued an Order Requiring Complainant to Explain Discrepancies in I-9 Forms. On December 2, 1996, I granted Complainant's motion for an extension of time until January 6, 1997, to respond to the November 25 Order. On January 2, 1997, Complainant filed its response to the above Orders. As Complainant's response does not offer a definitive explanation concerning why the photocopies are different from the originals, I will use only the original I-9 forms for the purpose of deciding the present Motion.

II. *Standards for Summary Decision*

Complainant has captioned its present request as a "Motion for Summary Decision on the Pleadings." OCAHO procedural rules and case law recognize motions for summary decision, *see* 28 C.F.R. §68.38 (1996), and motions for judgment on the pleadings, *see United States v. Harran Transp. Co.*, 6 OCAHO 857 (1996) (Order Denying in Part and Granting in Part Complainant's Motion for Judgment on the Pleadings). As in a motion for summary decision, the party seeking judgment on the pleadings must demonstrate that no genuine issue of fact exists and that it is entitled to judgment as a matter of law. *Id.* at 2. "The difference is that matters outside the pleadings, with a few narrow exceptions, may not be considered in ruling upon a motion for judgment on the pleadings. The contents of the pleadings thus provide the only appropriate basis for decision on this motion." *Id.* at 2-3.

The rules governing motions for summary decision, however, contemplate that the record as a whole will provide the basis for deciding whether to grant or to deny that motion. *See* 28 C.F.R. §68.38(c) (1996) (authorizing the ALJ to grant a motion for summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine

⁴ Although Respondent has not challenged the authenticity of the photocopies, PHC Tr. at 23, the discrepancies between the originals and photocopies raise questions about the reliability of the latter.

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issue as to any material fact and that a party is entitled to summary decision”); *United States v. Tri Component Product Corp.*, 5 OCAHO 821, at 3 (1995) (Order Granting Complainant’s Motion for Summary Decision) (noting that “[t]he purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters”). Because Complainant’s Motion relies on matters outside the pleadings, such as the I-9 forms, the appropriate rules to use in deciding the present motion are the rules governing summary decision, rather than the rules controlling judgment on the pleadings. See Fed. R. Civ. P. 12 (c); *Walker v. United Air Lines*, 4 OCAHO 686, at 21 (1994) (Amended Decision and Order Granting in Part and Denying in Part Respondent’s Motion for Summary Decision and Granting in Part and Denying in Part Complainants’ Motion for Joinder with the Complainants in *Lardy v. United Airlines*, OCAHO Case No. 92B00085) (citing Federal Rule of Civil Procedure 12(c) in treating party’s motion to dismiss as a motion for summary decision where ALJ considered matters outside the pleadings).

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to “enter a summary decision for either party if the pleadings, affidavits, 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). Although the Office of the Chief Administrative Hearing Officer (OCAHO) has its own procedural rules for cases arising under its jurisdiction, the ALJs may reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. The OCAHO rule in question is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 3 (1996) (Order Granting in Part and Denying in Part Complainant’s Motion for Partial Summary Decision) (citing *Mackentire v. Ricoh Corp.*, 5 OCAHO 746, at 3 (1995) (Order Granting Respondent’s Motion for Summary Decision) and *Alvarez v. Interstate Highway Constr.*, 3 OCAHO 430, at 7 (1992)); *Tri Component*, 5 OCAHO 821, at 3 (citing same).

Only facts that might affect the outcome of the proceeding are deemed material. *Aid Maintenance*, 6 OCAHO 893, at 4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)); *Tri Component*, 5 OCAHO 821, at 3 (citing same and *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994) (Order Granting Complainant's Second Motion for Summary Judgment)); *United States v. Manos & Assocs., Inc.*, 1 OCAHO 130, at 878 (1989) (Order Granting in Part Complainant's Motion for Summary Decision). An issue of material fact must have a "real basis in the record" to be considered genuine. *Tri Component*, 5 OCAHO 821, at 3 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." *Id.* (citing *Matsushita*, 475 U.S. at 587 and *Primera*, 4 OCAHO 615, at 2). The court must resolve any doubts in favor of the non-moving party, especially when that party is not represented by legal counsel, *see Harran*, 6 OCAHO 857, at 3, as is the situation in the present case.

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. *Id.* at 4 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. *United States v. Alvand, Inc.*, 1 OCAHO 296, at 1959 (1991) (Decision and Ordering [sic] Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" *Tri Component*, 5 OCAHO 821, at 4 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." *Alvand*, 1 OCAHO 296, at 1959 (citing *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

[w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. §68.38(b) (1996).

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Under the Federal Rules of Civil Procedure, the court may consider any admissions as part of the basis for summary judgment. *Tri Component*, 5 OCAHO 821, at 4 (citing Fed. R. Civ. P. 56(c)). “Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted.” *Id.* (citing *Primera*, 4 OCAHO 615, at 3 and *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3–4 (1991) (Order Granting in Part and Denying in Part Complainant’s Motion for Summary Decision)).

III. *Facts*

For the purpose of deciding this Motion, the facts asserted by the Respondent in its opposition to the Motion, as well as the facts admitted in its Answer to the Complaint, will be considered as true.

Corporate Loss Prevention Associates, Ltd., was incorporated in New York State in March 1980 and has its main office at 39–50 Crescent Street, Long Island City, New York. Ans. ¶1. The company is owned by Joseph V. Clabby, President, and Michael J. Cherundolo, Vice President. *Id.* Respondent has been licensed since 1980 by the New York State Department of Licensing as a licensed private investigative agency. As of July 12, 1996, it employed 205 personnel, including security officers, electronic technicians, investigators and clerical staff. *Id.* ¶2.

In August 1995, INS Special Agent Jim Grathwohl visited Respondent’s office in Long Island and informed the staff that he wanted to examine the I–9 forms in Respondent’s files. Agent Grathwohl examined the files and conversed with Mr. Clabby concerning the files. *Id.* ¶6. Mr. Grathwohl requested that Respondent make copies of the I–9 forms, and, several days later, he picked up the I–9 forms. *Id.* ¶7. Further information concerning the forms was requested by the INS and provided by Respondent in March 1996. *Id.* ¶8. On May 7, 1996, Respondent received a Notice of Intent to Fine (NIF) from the INS that requested payment of a fine of \$21,000 (\$300 per individual for seventy employees). *Id.* ¶9. Following receipt of the NIF, Respondent telephoned and met with Complainant’s counsel in an attempt to resolve this matter, but the parties were unable to do so. *Id.* ¶¶11–13.

Respondent asserts, and Complainant does not dispute this assertion, that none of its employees were unauthorized aliens. Moreover, it is apparent that Respondent did maintain a thorough personnel

file for the employees. Further, although Complainant disputes the accuracy of the statements attributed to Mr. Grathwohl, PHC Tr. at 12, for the purpose of this Motion I must assume that they are true. Therefore, I accept as true *for the purpose of this Motion* that Mr. Grathwohl made a number of complimentary remarks about the condition of the files and the in-depth background checks that were being conducted on all personnel that were being considered for employment and that he told Respondent “you are going far above what was required for the I-9 form.” Ans. ¶6. Further, I accept as true for the purpose of this Motion that the files he reviewed were in very good shape and that he felt Respondent went far and above any requirement for the I-9. *Id.* ¶7. Finally, I accept as true for the purpose of this Motion that Mr. Grathwohl had a conversation with Mr. Clabby on June 20, 1996, and that he commented that while the form was not filled out, Respondent should not be fined for that. *Id.* ¶14.

For the purpose of this Motion, the sixty-six original I-9 forms will be considered as genuine and authentic. Twenty-one of the sixty-six I-9 forms have photocopies of supporting documentation physically stapled to the I-9 form. (See Attachment A to this Order). However, it is beyond cavil that section two of the I-9 forms for these sixty-six employees is not complete. Section two of the I-9 form consists of two parts: the documentation section and the certification section. All are lacking some information as to documentation, and many of the forms are lacking information in the certification as well. The omissions in the specific I-9 forms are listed in Attachment B to this Order. However, some general observations can be made. For eleven employees, there is no information recorded in the documentation part of section two. These are Ronald Baldwin (¶7), Gregory Clark (¶18), Rey Cortes (¶19), John Kerins (¶40), Richie Kouroupakis (¶41), Alfred Lee (¶43), Willie Merriweather (¶47), Julio Orzoria (¶50), Fernando Pizarro (¶51), Chet Samuel (¶57) and Nelson Serrano (¶62).⁵ All the other I-9 forms contain some type of information as to documentation in section two.

With respect to certification, the attestation clause of the May 1987 I-9 form (which is the version of the I-9 forms at issue in this case) requires that the employer or employer’s representative state, as follows: “I attest, under penalty of perjury, that I have examined

⁵ As noted in Attachment A, a photocopy of one piece of documentation is attached to the I-9 form for Serrano.

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the documents presented by the above individual, that they appear to be genuine and to relate to the individual named, and that the individual, to the best of my knowledge, is eligible to work in the United States.” Form I-9, OMB No. 1115-0136 (May 7, 1987). The certification consists of six blocks of information: signature; printed or typed name of the signatory; title; employer name; employer address; and date. Of the sixty-six I-9 forms, all six blocks of information have been completed in the certification part of section two for only twelve employees: Carl Destler (§24); Jane Finnegan (§26); Edwin Gelabert (§31); John Hahnenberger (§33); Alfonso Herrera (§36); Robert John (§37); John Kerins (§40)⁶; Richie Kouroupakis (§41); Jose Lappin (§42); Winston Malliet (§45); Alberto Ruiz (§56); and Nelson Serrano (§62).

IV. *The Parties’ Positions*

In seeking summary decision as to liability only, Complainant argues that no issue of material fact exists because Respondent has admitted that it did not complete all portions of the I-9 forms and instead attached photocopies of required documents to the forms. C. Memo. SD at 1. Complainant also asserts that it is entitled to judgment as a matter of law because OCAHO case law holds that attaching photocopies of documents instead of filling out information in section two of the I-9 form does not constitute substantial compliance. *See id.* at 2.

Complainant also argues that Respondent’s failure in certain I-9 forms to include the employer’s or agent’s title, the employer’s name, and/or the employer’s address in section two does not constitute substantial compliance. C. Supp. Memo. at 5-6. Complainant supports that argument by citing *United States v. Tri Component Product Corp.*, 5 OCAHO 821 (1995) (Order Granting Complainant’s Motion for Summary Decision), for the proposition that the failure to complete *any* part of section two is a serious violation.⁷ C. Supp. Memo. at 6. Stripped to its essentials, Complainant’s argument for summary decision is a neat syllogism:

⁶ Although the I-9 form for Kerins is signed, the representative’s signature is outside the signature block.

⁷ However, Complainant concedes that a failure to complete every item may not be a violation. For example, during the prehearing conference, Complainant’s counsel stated that an employer could be considered to be in substantial compliance even though some parts of the I-9 form were not completed (e.g., a missing zip code). PHC Tr. at 15.

failure to complete any part of section two of the I-9 form is a violation of law; the I-9 forms on their face show that information was not provided in the documentation and/or certification parts of section two of the I-9 form; therefore, the Respondent violated section 274A of the INA, 8 U.S.C. §1324a.

Respondent asserts that it substantially completed the I-9 forms for its employees and that it placed the I-9 forms along with photocopies of supporting documentation in each employee's personnel folder. R. Opp. at 1. Respondent argues that the INS did not review or request copies of the photocopied documents that were either attached to or that were contained in its employees' personnel folders. *Id.* at 2. Respondent also contends that it relied on the instructions in the I-9 form that state that employers may retain copies of required documentation with the I-9 form for the purpose of complying with the requirements of the I-9 form. *Id.*

V. *Legal Analysis and Rulings*

A. *Equitable Estoppel Defense*

Respondent makes what is essentially an equitable estoppel argument, stating that the INS agent who conducted the inspection of its I-9 forms told Respondent that Respondent's procedures with respect to completing the forms met and even went beyond the requirements for completing such forms. Ans. ¶¶6-7. The parties disagree about whether the INS agent made any such statements. PHC Tr. at 11-12. Even so, there is no genuine issue of material fact with respect to this issue because the law does not recognize an equitable estoppel defense under the present conditions.

When the respondent in *United States v. Manos & Assocs., Inc.*, 1 OCAHO 130 (1989) (Order Granting in Part Complainant's Motion for Summary Decision), made an argument similar to the one Respondent is making in this case, the ALJ treated it as an argument for equitable estoppel. *Manos*, 1 OCAHO 130, at 882-86. Judge Schneider notes in *Manos* that it is "well established" that "the government may not be estopped on the same terms as other litigants." *Id.* at 885. He also notes that, for purposes of asserting equitable estoppel against the government, "a simple misstatement is not affirmative misconduct. The fact that the incorrect information is given orally makes it even less likely

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to rise to the level of affirmative misconduct.” *Id.* (quoting *Rider v. United States Postal Service*, 862 F.2d 239, 241 (9th Cir. 1988)). The reason for treating oral representations differently from written ones is as follows:

Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority . . . argues strongly for the conclusion that an estoppel cannot be erected on the basis of . . . oral advice . . .

Id. (quoting *Heckler v. Community Health Servs.*, 467 U.S. 51, 65 (1984)).

The INS agent’s alleged oral representations to Respondent cannot form the basis of an equitable estoppel claim against the government. Also, unlike the respondent in *Manos*, Respondent in the present case cannot claim that it relied on the INS agent’s alleged statements to its detriment: the alleged statements occurred after Respondent already had completed all of the I-9 forms in question, so it is impossible for Respondent to have committed any of the alleged paperwork violations currently in issue because of any representations that the INS agent may have made.

Although Respondent’s argument does not afford it a complete defense to the allegations, the INS agent’s comments, if proven by a preponderance of the evidence, may be relevant to the penalty issue.

B. Substantial Compliance Defense

Initially, I address Complainant’s assertion that a failure to complete any portion of section two of the I-9 form constitutes a violation. C. Memo. SD at 1. Complainant cites as support *United States v. Tri Component Product Corp.*, 5 OCAHO 821 (1995) (Order Granting Complainant’s Motion for Summary Decision), *United States v. Acevedo*, 1 OCAHO 95 (1989) (Order Granting Complainant’s Motion for Summary Decision) and *United States v. Wood ’N Stuff*, 3 OCAHO 574 (1993). *Id.* After carefully reviewing the case law cited by Complainant, I conclude that OCAHO case law does not support that assertion and, instead, has consistently recognized the viability, in certain circumstances, of a substantial compliance defense. In *Tri Component*, the respondent did not argue a substantial compliance defense and did not even respond to the motion

for summary decision.⁸ Moreover, the two other cases cited as standing for the proposition that a failure to complete any part of section two is a serious violation actually suggest a different conclusion. For example, in *United States v. Wood 'N Stuff*, 3 OCAHO 574, at 3–4, it was undisputed that the respondent had no I–9 forms for its employees. Thus, the decision’s statement that a failure to “fill out any part of an I–9 form” is a serious violation, *id.* at 7, must be viewed in the context of the facts of that case; i.e., respondent had prepared no I–9 forms, which is undoubtedly a violation (and, in fact, a serious violation). Finally, in *United States v. Acevedo*, no I–9 form at all was prepared (count I), or the certification part of section two was completely blank (count II).⁹ Those failures clearly are violations of the law.

However, there is a profound difference between a complete failure to prepare an I–9 form, or a complete failure to prepare section two of the form, and a failure to complete each individual item of the I–9 form or of section two of the I–9 form (i.e., filling out some, but not all, of the items of the I–9 form or of section two of the I–9 form). To the extent that any OCAHO cases suggest that a failure to complete every minute part of an I–9 form, including an employer’s zip code, constitutes a violation of law subjecting an employer, at the very least, to a minimum statutory fine, I emphatically reject that position.¹⁰

⁸ Although *Tri Component* states that prior OCAHO rulings have held that failure to complete any portion of section two of a form I–9 is a serious violation, the decision in *Tri Component* does not so hold. The decision in *Tri Component* specifically notes that the respondent in that case failed to argue a defense of substantial compliance and, in fact, totally failed to respond to the motion for summary decision. Therefore, the issue of whether the respondent might have been able to assert a substantial compliance defense never arose in *Tri Component*. 5 OCAHO 821, at 5–6.

⁹ For the twelve individuals listed in count II in *Acevedo*, the certification part of section two was completely blank (none were signed or dated), and all, except four forms, were blank as to documentation.

¹⁰ Although in this case I am generally in accord with the rulings and decisions in other OCAHO cases, I also reject Complainant’s assertion, *see* C. Supp. Memo. at 3, that I am bound by prior decisions of other OCAHO Judges unless the Chief Administrative Hearing Officer (CAHO) vacates or modifies those decisions. Section 68.53 provides in pertinent part that “[i]f the Chief Administrative Hearing Officer does not modify or vacate the Administrative Law Judge’s decision and order, then the Administrative Law Judge’s decision and order becomes the final agency decision and order of the Attorney General, thirty (30) days after the date of the Administrative Law Judge’s decision and order.” 28 C.F.R. §68.53(a)(2) (1996). That pronouncement means that an ALJ’s decision and order that is not vacated or modified by the CAHO becomes the final agency decision and order with respect to that case, but it does not also mean that it becomes *binding* precedent for subsequent cases. First, the regulations do not specifically state that such decision and order becomes binding precedent. Next, such a reading of the regulation is illogical. Complainant’s reading of—continued

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Indeed, OCAHO case law recognizes, in certain constrained circumstances, the availability of a substantial compliance defense to alleged paperwork violations occurring under section 274A of the INA. *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 2–3 (1995) (Prehearing Conference Report and Order Granting in Part Complainant's Motion for Summary Decision); *United States v. Northern Mich. Fruit Co.*, 4 OCAHO 667, at 14 (1994) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses, Including Substantial Compliance); *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1093–96 (1990); *Manos*, 1 OCAHO 130, at 889–90.

As elaborated in the above decisions, an employer establishes a prima facie showing of substantial compliance sufficient to withstand a motion for summary decision if the following preconditions are met: (1) the employer must use an I–9 form to determine the identity and employment eligibility of employees; (2) the employer or his agent must sign the I–9 form in section two under penalty of perjury; (3) the employee must sign the I–9 form in section one; (4) an indication by check mark or other means must appear in section one attesting that the employee is either a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work until a certain date; and (5) some type of information or reference to a document must either be spelled out or attached in section two, List A or Lists B and C.¹¹ See *Northern Mich. Fruit*, 4 OCAHO 667, at 16–17; see also *United States v. Mark Carter*, 6 OCAHO 865, at 9 (May 23, 1996) (Prehearing Conference Report and Order); *Mesabi*, 5 OCAHO 801, at 3. Additionally, the date of the employer's certification must appear in section two of the I–9 form before the employer may be deemed in substantial compliance with the paperwork requirements of INA section 274A. *Mark Carter*, 6

the above provision would create a situation where the first OCAHO ALJ to decide an issue would bind all other Judges, even when the CAHO did not review the particular decision and order. Finally, stare decisis generally does not apply to administrative proceedings. See *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978) (“An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.”). Therefore, while I will consider decisions by other Judges as persuasive authority, I am not bound by those decisions.

¹¹ The above requirements relating to section one, however, do not apply to the present case because Complainant has not alleged any violations relating to section one.

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OCAHO 865, at 9. The issue presented by Complainant's Motion is whether Respondent has alleged sufficient facts with respect to its substantial compliance affirmative defense to withstand Complainant's Motion.

I note that, "[l]ike the concept of 'reasonableness,' substantiality of compliance, if applicable, depends on the factual circumstances of each case." *Northern Mich. Fruit*, 4 OCAHO 667, at 13 (quoting *Manos*, 1 OCAHO 130, at 889). Since the Complaint only alleges deficiencies with respect to section two of the I-9 form, my inquiry will be limited to that part of the I-9 form. As previously noted, section two of the I-9 form consists of two related but distinct parts: documentation and certification. An employer is required to review certain documents that establish identity and employment authorization and to attest in the certification that it has examined the documents and that they appear to be genuine and to relate to the individual presenting them. I will review each of those issues in turn with respect to the individuals named in the Complaint.

1. Documentation

The original I-9 forms submitted by Complainant show that Respondent did not complete all of the documentation part of section two of the I-9 forms for sixty-six of the employees.¹² However, Respondent contends that there were copies of the needed documentation of the workers' authorized status either attached to the I-9 forms or contained in the personnel folders for each employee, and that those were offered to, but declined by, the INS. R. Opp. at 1-2. This documentation is described in Respondent's Answer to the Complaint and in its supplemental response filed on September 3, 1996. Since all reasonable inferences must be accorded the non-moving party, for the purpose of deciding this Motion, Respondent's factual statements concerning the documentation will be considered as true.

Although photocopying documents may mitigate the civil money penalty, see *United States v. Tri. Component Product Corp.*, 6 OCAHO 853, at 5 (1996); *United States v. James Q. Carlson*, 1 OCAHO 260, at 1685 (1990), prior OCAHO decisions indicate that it

¹² As previously noted, pursuant to the Court's order, Complainant has submitted the original I-9 forms for sixty-six employees to the Court. Given the discrepancies between the originals and some of the photocopies, the former will be utilized for the purpose of deciding this Motion.

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will not negate liability. In *United States v. San Ysidro Ranch*, 1 OCAHO 183 (1990) (Decision and Order Granting Complainant's Motion for Partial Summary Decision), the respondent "admitted that the verifications of employment authorizations were not recorded on the face of the I-9's." *San Ysidro Ranch*, 1 OCAHO 183, at 1208. The respondent in that case argued that providing copies of such documents in its employee files constituted substantial compliance. *Id.* at 1209. Judge Frosburg stated that, as in his decision in *United States v. Citizens Utilities Co.*, 1 OCAHO 161 (1990) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision), he "was not persuaded by the Respondent's position that the practice of copying documents and attaching them to I-9's, in the absence of recording the data on the forms, was in accordance with 8 C.F.R. 274a.2." *San Ysidro Ranch*, 1 OCAHO 183, at 1210.

The *San Ysidro Ranch* decision states that the INS regulation allowing an employer to photocopy documents and attach them to the I-9 form, see 8 C.F.R. §274a.2(b)(3) (1996), does not permit compliance in a manner other than properly completing the I-9 form. The ALJ adopts the reasoning and language of another OCAHO opinion as follows:

Specifically, it is my view that the language of this regulation is clearly *permissive and supplemental* to the mandatory completion of the Form I-9 Employment Eligibility Verification Process, and is not intended to serve as an alternative mode of complying with the law. *Cf.* 8 C.F.R. section 274a.2(b)(1).

In analyzing 8 C.F.R. section 274a.2(b)(1) of the regulations, it is unequivocally clear that an employee and employer 'must' complete their respective sections of the I-9 Form. Alternatively, the section of the regulations which Respondent urges in support of its substantial compliance argument reads, as stated, that an employer 'may, but is not required to' copy appropriate verification documentation. There is simply no way that this section of the regulations can be read, in my view, to substitute, even in the more interpretively elasticized context of a substantial compliance argument, for the *mandatory* requirement to properly complete, retain, and present Forms I-9 for all employees authorized to be employed in the United States.

San Ysidro Ranch, 1 OCAHO 183, at 1211 (italics in original) (quoting *Manos*, 1 OCAHO 130, at 890-91); see also *J.J.L.C.*, 1 OCAHO 154, at 1095.

I have previously held that merely attaching photocopies of identification and work authorization documents to an I-9 form does not constitute substantial compliance. In *Mesabi Bituminous*, the respondent argued that it had substantially complied with the re-

quirements of completing I-9 forms by attaching photocopies of driver's licenses and Social Security cards to the forms. *Mesabi*, 5 OCAHO 801, at 3. I noted that "OCAHO case law demonstrates that this is not considered substantial compliance with the requirements of IRCA and that the attaching of documents to a Form I-9 without completing Section 2, including an employer's signature and attestation under the penalty of perjury, does constitute a violation of 8 U.S.C. §1324a." *Id.* (citing *Northern Mich. Fruit*, 4 OCAHO 667, *J.J.L.C.*, 1 OCAHO 154, and *Citizens Utilities*, 1 OCAHO 161). As a result, I granted the complainant's motion for summary decision regarding the respondent's liability for violations of section 274A(a)(1)(B) of the INA. *Id.*

However, in *Mesabi Bituminous*, for all but two of the eighteen I-9 forms, section two was *completely* blank.¹³ Not only did most of the forms lack any documentation under Lists A, B and C, none of the forms contained the employer's signature or other information in the certification! Therefore, the employer was not in substantial compliance because it had not signed any of the I-9 forms. That alone constituted a violation.

By contrast, with respect to the I-9 forms for the individuals listed in the present Complaint, all have some information in section two. Most have some type of information recorded in the documentation part, and almost all of the forms have been signed by the employer's representative. However, it is also true that *all* of the I-9 forms are lacking some type of information with respect to documentation in section two.

The original I-9 forms for the sixty-six individuals at issue in this case can be grouped initially into three major categories as follows: (1) those in which no information as to documentation has been provided; (2) those in which some information has been provided either as to a List B document or a List C document, but not both; and (3) those in which a document has been referenced in List A or in both Lists B and C, but the identification number and/or expiration date has not been provided with respect to the List A document or with respect to either or both of the List B and C documents. Assuming that the employer either has attached photocopies to the I-9 forms

¹³ One of the I-9 forms listed a Social Security card in List C, and another I-9 form listed both a List B and List C document. However, the employer had not completed the attestation or certification in section two.

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or has retained photocopies in the personnel files of the employees, the issue is whether the employer has asserted a substantial compliance defense that is sufficient to defeat a motion for summary decision. For the reasons discussed below, I conclude that the defense may not be maintained for the first two categories, but does apply with respect to the third category.

There are eleven employees listed in the Complaint for whom there is no information provided in the documentation part of section two of the I-9 forms; namely, Ronald Baldwin (§7), Gregory Clark (§18), Rey Cortes (§19), John Kerins (§40), Richie Kouroupakis (§41), Alfred Lee (§43), Willie Merriweather (§47), Julio Orzoria (§50), Fernando Pizarro (§51), Chet Samuel (§57) and Nelson Serrano (§62).

Respondent's affirmative defense is grounded on the assertion that it has evidence in the file for each of the employees at issue in the Complaint that satisfies the requirements of the Act; namely, the employer has photocopies of documents that establish identify and/or employment eligibility sufficient to satisfy List A or Lists B and C. In the present case, Respondent relies on a segment of the instructions on the I-9 form that is strikingly similar to the regulation permitting the copying of documentation. *See* Ans. ¶4. OCAHO case law interprets the I-9 form instructions as being permissive and, therefore, merely supplemental to completing the I-9 form. *J.J.L.C.*, 1 OCAHO 154, at 1095 (“[T]he instructions on the reverse of each Form I-9 for completing the form, reproduced in the *Handbook for Employers*, are patently preemptory; accompanied by text similar to that of the regulation, they address in obviously permissive terms the copying of employee documentation.”).

Moreover, Respondent's reliance on that portion of the instructions is misplaced because the instructions clearly state that “[e]mployers *must* complete [section two] by examining evidence of identity and employment eligibility,” and must check “the appropriate box in List A or boxes in both Lists B and C,” among other things. Form I-9, OMB No. 1115-0136 (May 7, 1987) (first emphasis added). Furthermore, the pertinent regulations provide that photocopying identification and employment authorization documents instead of completing section two is insufficient. *See* 8 C.F.R. §274a.2(b)(1)(ii)(B) (1996) (“an employer . . . must within three business days of hire: . . . [c]omplete section 2—‘Employer Review and Verification’—of the Form I-9.”); 8 C.F.R. §274a.2(b)(3) (1996) (“The

copying of any such document and retention of the copy does not relieve the employer from the requirement to fully complete section 2 of the Form I-9.”).

In accordance with my prior rulings in *Mesabi* and *Mark Carter* and other case law, namely, *Northern Michigan Fruit*, *San Ysidro Ranch*, *Citizens Utilities*, *Manos* and *J.J.L.C.*, I reaffirm the general rule that a complete failure to provide information as to documentation in section two (i.e., the documentation portion of section two is completely blank) does not constitute substantial compliance. Thus, with respect to the eleven individuals whose I-9 forms are completely blank with respect to documentation, even assuming that Respondent could prove that supporting documents were attached to the I-9 forms, I reject Respondent’s substantial compliance defense.

If the employer fails to identify any documents in section two, the certification has no meaning because, as Complainant correctly observes, *see* PHC Tr. at 39-40, the employer has not attested to anything. The employer must attest under penalty of perjury that it has examined the documents presented by the employee and that they appear to be genuine and to relate to the individual presenting them. *See* 8 C.F.R. §274a.2(a), (b)(ii)(A) (1996). An employer cannot have substantially complied with that requirement unless it has stated in the I-9 form what documents were examined. Without such information listed on the I-9 form, the certification is meaningless. Therefore, I conclude with respect to the I-9 forms that are completely blank in the documentation portion of section two that Respondent did not substantially comply with the law, even though it may have attached photocopies of the documentation. Summary decision is granted as to liability with respect to the Complaint paragraphs concerning these eleven individuals: Ronald Baldwin (¶7), Gregory Clark (¶18), Rey Cortes (¶19), John Kerins (¶40), Richie Kouroupakis (¶41), Alfred Lee (¶43), Willie Merriweather (¶47), Julio Orzoria (¶50), Fernando Pizarro (¶51), Chet Samuel (¶57) and Nelson Serrano (¶62).

I next address the forty-two I-9 forms that contain a reference to a List B document, or to a List C document, but not to both.¹⁴ Some forms contain information (checkmark, document identification

¹⁴ The list of the forty-two individuals, by name and Complaint paragraph, along with a description of the documentation referenced in the I-9 form, is included in Attachment C to this Order.

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number and/or expiration date) for a List B document, which establishes identity, but no information for List C; other forms contain information for List C documents, which establish work eligibility, but no information for List B documents. For example, the I-9 form for employee Albert Sand (§58) references a List B document, but no List C document, whereas the I-9 form for employee Manuel Aguirre (§2) references a List C document, but no List B document. The other forty I-9 forms are similarly deficient. Most of those forms fail to reference any List B document; none reference a List A or both List B and C documents, as required by the regulation and the I-9 form instructions. Consequently, even assuming the employer properly has completed the certification part of section two of the I-9 form, the attestation is ineffective because the employer has not referenced documents that provide both identity and employment eligibility. Therefore, with respect to the paragraphs of the Complaint pertaining to those forty-two individuals, I grant Complainant's Motion with respect to liability.

However, I reach a different conclusion with respect to the I-9 forms for the thirteen employees that reference either a List A or both List B and C documents, but that do not contain a document identification number and/or expiration date for the List A document or for both the List B and C documents in the I-9 form. Listing these by name and paragraph of the Complaint, they are Joseph Aloï (§3), Hans Alan Andreasen (§5), Ronald Brow (§13), Samuel Calloway (§15), Thomas Fels (§25), Alfredo Garcia (§29), Robert John (§37), Robert Rivera (§54), Eulogio Ruiton (§55), Eduardo Santiago (§59), Demetrios Telio (§65), Rodney Waiters (§66) and John Wolf (§69).¹⁵ All of those I-9 forms have boxes checked under either List A or Lists B and C, thus identifying the type of documentation reviewed and verified by the employer. However, except for Fels, Garcia, Rivera and Waiters, the forms do not contain any document identification number or expiration date. The I-9 form for Fels provides a document identification number and expiration date for the state driver's license in List B, but does not contain a document identification number for the List C document. Conversely, the I-9

¹⁵ The I-9 form for Felix Deguilla references a List B document, but the form does not appear to reference a List C document, although it is difficult to be certain since "See Attached" is written across Lists B and C. However, even assuming that both List B and C documents were referenced in the form, Respondent still would not have made a prima facie showing of substantial compliance because the employer's certification in section two is not dated. See *Mark Carter*, 6 OCAHO 865, at 9.

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forms for Garcia, Rivera and Waiters contain a document identification number for the List C document, but do not provide the document identification number or expiration date for the document checked for List B. Thus, none of the I-9 forms is complete.

In its Answer to the Complaint, and in its supplemental response, Respondent lists the document identification numbers for that group of thirteen individuals and asserts that photocopies were attached to the I-9 form or provided in the personnel file for each employee. As noted previously, for the purpose of deciding this Motion for Summary Decision, I must assume that Respondent's assertions are true. Therefore, the precise issue presented is whether a summary decision motion should be granted when the I-9 form identifies either a valid List A document or both a List B and List C document, but does not list either the document identification number or expiration date, and the employer has attached a photocopy of the document that shows the document identification number and the expiration date. Assuming those facts, I conclude that the employer has set forth a substantial compliance defense sufficient to defeat a motion for summary decision.¹⁶

This holding is consistent with the rulings in *Northern Michigan Fruit, Mesabi Bituminous* and *Mark Carter* that there must be some type of information or reference to a document either spelled out or attached in section two, List A or Lists B and C, before an employer may maintain a substantial compliance defense. *See Northern Mich. Fruit*, 4 OCAHO 667, at 16-17. As noted previously, the employer in *Mesabi Bituminous* had not signed any of the I-9 forms, and section two of the I-9 forms was completely blank except for two of the forms. Photocopies cannot substitute entirely for the required infor-

¹⁶ An additional issue that will have to be addressed should this case go to trial is whether the photocopy of the supporting documentation must be physically attached to the I-9 form or whether the documents may be simply retained with the I-9 form. *See* PHC Tr. 59-60. As noted previously, twenty-one of the original I-9 forms presently have photocopies stapled to the I-9 form. However, Respondent has admitted that it did not physically attach photocopies to all seventy I-9 forms but, rather, it placed such photocopies in the employees' personnel folders. *See id.* at 41, 45-46; PHCR at 3. One regulation contemplates that photocopies will be "appended to" the I-9 form, 8C.F.R. §274a.2(b)(4) (1996), whereas another regulation states that the photocopy must be "retained with" the I-9 form. 8 C.F.R. §274a.2(b)(3) (1996). Since the possible inconsistency between these regulations has not been briefed by the parties, and because it is not entirely clear how many I-9 forms had documents attached to them, I will defer ruling on the issue of whether, to constitute substantial compliance, the supporting documents have to be physically attached to the I-9 form.

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mation. However, in those instances when the employer has referenced the documents in the I-9 form, but has provided the identification number and/or expiration date only through a photocopy of the document, and otherwise has satisfied the requirements of a substantial compliance defense, I conclude that the motion for summary decision should be denied.

This result not only is consistent with prior rulings, but is in accord with common sense as well. Unlike the I-9 form instructions, the regulation does not enumerate exactly what steps an employer "must" take to complete section two. The regulation's lack of such a specific list suggests that an employer *reasonably might* be able to comply with the requirements of section two of the I-9 form, even though it omitted some information in that section or has not included all requested information on the face of the form. Moreover, the I-9 instructions inform the employer that copies of documents presented by an individual for the purpose of establishing identity and employment eligibility may be copied and retained for the purpose of complying with the form. It would be nonsensical to conclude that a violation has occurred where the employer has provided all required information on the I-9 form except that it has provided the identification number and expiration date in a document attached to the I-9 form. In fact, the existence of the photocopy is some evidence that the employee presented a verification document, whereas if only the I-9 form is completed, there is no evidence, other than the sworn statement, that a document actually was presented and reviewed by the employer.

However, the defense may be maintained only if the employer identifies a proper List A or List B and C document. Respondent has done so with respect to twelve of the employees. With respect to employee Rodney Waiters (§66), the I-9 form contains document information in both Lists B and C. The document identified for List B is a Management Safeguards temporary ID card, a photocopy of which is attached to the I-9 form. The documents acceptable to establish identity for List B are listed in the regulations. *See* 8 C.F.R. §274a.2(b)-(1)(v)(B) (1996). The temporary employee identification card identified in List B for Waiters is not an authorized document. Consequently, Respondent has failed to establish a substantial compliance defense with respect to this individual, and summary decision is granted for Complainant as to the paragraphs of the Complaint with respect to Rodney Waiters.

2. Certification

Having concluded that Respondent has set forth a prima facie defense of substantial compliance with respect to the documentation part of section two for twelve I-9 forms, I next consider the adequacy of the certification with respect to those twelve forms. As noted previously, section two consists of both a documentation and a certification section. The certification section contains six separate blocks of information: the employer representative's signature; the representative's printed or typed name; the representative's title; the employer's name; the employer's address; and the date of the certification. In signing the certification, the employer's representative states as follows: "I attest, under penalty of perjury, that I have examined the documents presented by the above individual, that they appear to be genuine and to relate to the individual named, and that the individual, to the best of my knowledge, is eligible to work in the United States." Form I-9, OMB No. 1115-0136 (May 7, 1987).

With respect to the twelve individuals identified in the previous section of this Order whose documentation is sufficient to constitute a substantial compliance defense, only the I-9 form for employee Robert John (§37) is completed in all six blocks of the certification, including the employer representative's signature and the certification date. Therefore, with respect to the Motion for Summary Decision concerning John, I find, at this stage of the proceeding, that Respondent has alleged sufficient facts to maintain a substantial compliance defense and to defeat a summary decision motion.

However, all of the I-9 forms for the other eleven employees lack some information in the certification. Prior cases hold that a substantial compliance defense fails if the employer either fails to sign or date the certification. *See Mark Carter*, 6 OCAHO 865, at 9 (failure to sign and/or date the certification); *Mesabi Bituminous*, 5 OCAHO 801, at 3 (failure to sign the certification); *Northern Mich. Fruit*, 4 OCAHO 667, at 16-17 (failure to sign the certification). I hold that Respondent is not in substantial compliance with respect to employee Samuel Calloway (§15) because the certification is not signed by an employer's representative.¹⁷ Since the certification is invalid without a signature, *see Northern Mich. Fruit*, 4 OCAHO

¹⁷ The name of the employer's representative, Gloria Khalil, is typed in the second block, but she did not sign the I-9 form. In fact, the signature block contains what appears to be the crossed out signature of Calloway.

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667, at 16–17, summary decision is granted as to the paragraphs of the Complaint concerning Mr. Calloway.

Similarly, Respondent is not in substantial compliance with respect to employees Joseph Aloï (§3), Thomas Fels (§25), Eulogio Ruiton (§55) and Eduardo Santiago (§59) because the employer certification is not dated. *See Mark Carter*, 6 OCAHO 865, at 9. Accordingly, summary decision is granted as to the paragraphs of the Complaint with respect to those four individuals.

Although the certification is signed and dated, certain other blocks of information are missing for the other six employees. The employer's name and address are not provided in section two of the I-9 forms for Alfredo Garcia (§29), Demetrios Telio (§65) and John Wolf (§69). The question, then, is whether an employer can maintain a substantial compliance defense when it fails to include an employer's name and address in the certification part of section two of the I-9 form.

This issue does not appear to have been directly addressed by prior OCAHO cases. Several OCAHO decisions by Judge Schneider cite *United States v. Citizens Utilities Co.*, 1 OCAHO 161 (1990) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision) (opinion by Judge Frosburg), as holding that a respondent did not substantially comply with the INA's paperwork requirements by omitting the employer's name and address from section two of the I-9 form. *See United States v. Davis Nursery*, 4 OCAHO 694, at 12 (1994); *Carlson*, 1 OCAHO 260, at 1685; *United States v. Broadway Tire, Inc.*, 1 OCAHO 226, at 1508 (1990) (Order Granting in Part and Taking Under Advisement in Part Complainant's Motion to Strike Affirmative Defenses). However, *Citizens Utilities* does not specifically address the omission of the employer's name and address alone. Rather, in that case, the employer representative's printed name and title, as well as the employer's printed name and address, were omitted. In *Citizens Utilities*, Judge Frosburg did not decide the issue of whether omitting the employer's name and address constitutes a showing of substantial compliance to defeat a motion for summary decision because the respondent did not argue "with sufficient specificity" to show that it had met the standards for summary decision. *Citizens Utilities*, 1 OCAHO 161, at 1124. Also, Judge Schneider's subsequent opinions in *Davis Nursery*, *Carlson* and

Broadway Tire do not specifically address the issue of whether failure to include the employer's name and address would constitute a violation of the INA.

In arguing that omitting the employer's name and address in section two does not constitute substantial compliance, Complainant cites *Tri Component*, 5 OCAHO 821, and *Acevedo* for the view that the failure to complete any portion of section two is a serious violation. C. Supp. Memo. at 6. I have already rejected that contention earlier in this Order. Further, although Respondent cites *Tri Component* for the broad statement that the failure to complete *any* portion of section two is a serious violation, the actual violations that occurred in that case "rang[ed] from a total lack of document identification information on Lists [sic] A or Lists B and C, to incomplete information having been furnished, as well as missing certification dates." *Tri Component*, 5 OCAHO 821, at 8. Failure to include the employer's name and/or address was not specifically addressed in *Tri Component*. Similarly, *Acevedo*, which *Tri Component* cites, does not specifically address whether failure to include the employer's name and address constitutes a violation.

Nevertheless, while I do not agree with Complainant that the failure to complete every part of section two is a violation, and recognizing that this issue has not been definitely resolved in prior opinions, I conclude that omitting the employer's name and/or address is a violation of section 274A of the INA. As with the employer's or its agent's signature, the attestation is not complete unless it is clear on the face of the I-9 form which employer is attesting to the verification. I find that omitting the employer's name and address is a fatal flaw. Therefore, Complainant is entitled to judgment as a matter of law with respect to employees Alfredo Garcia (§29), Demetrios Telio (§65) and John Wolf (§69).¹⁸

With respect to the remaining three individuals, Hans Alan Andreasen (§5), Ronald Alexander Brow (§13) and Robert Louis Rivera (§54), the certification part of section two of the I-9 forms for those individuals lacks both a printed or typed name of the repre-

¹⁸ However, I do not express an opinion at this time as to whether omitting the employer's name and/or address is a *serious* violation. Complainant will bear the burden of establishing seriousness as part of its case in support of its recommended penalty.

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sentative and the title of the representative. Complainant contends that these failures are a violation of section 274A of the INA.¹⁹

The I-9 forms for those three individuals are signed by Gloria Khalil, Respondent's personnel manager, who also signed many of the I-9 forms for the individuals listed in the Complaint and whose name is printed and whose title appears on many other forms. Complainant does not assert that it cannot read Ms. Khalil's signature, or that it does not know who she is. Complainant merely contends that failure to complete any portion of section two is a serious violation, without addressing why the lack of a title or printed name should be construed as a law violation. Without any input from Complainant, the only purpose I can divine for requiring the signatory's name to be typed or printed is to enable a reader to identify and spell the name, since signatures are not always clear. However, Complainant does not contend that it cannot read the signature. Moreover, given the number of I-9 forms that are signed by Gloria Khalil, and in which her name is printed (such as the I-9 form for Robert John), an argument that Respondent violated section 274A because of a lack of a printed or typed name would strike me as particularly specious.

As with the absence of the printed name, no cases have been cited by Complainant directly addressing the issue of whether omitting the signatory's title from section two constitutes a violation. Failure to include the employer's or agent's title was not addressed in *Tri Component* or *Acevedo*.²⁰

In the present instance, although Respondent failed to include Ms. Khalil's title in the I-9 forms for Andreasen, Brow and Rivera, Complainant clearly was aware that Ms. Khalil was personnel manager for Respondent. Indeed, her title is typed or written in many other I-9 forms. Therefore, given the circumstances in this case, I conclude that Respondent is not precluded from maintaining a sub-

¹⁹ In its Motion for Summary Decision, and in its supplemental memorandum filed in support of its Motion, Complainant does not specifically address the absence of a printed or typed name. However, since Complainant contends that the failure to complete any part of section two is a violation of the INA, citing *Tri Component*, 5 OCAHO 821, and *Acevedo*, I will construe Complainant's position as contending that failure to include a printed or typed name is a violation.

²⁰ *Acevedo* does not specifically list all the deficiencies of the I-9 forms in question, but the decision emphasizes the fact that the employer failed to complete and sign the certification in section two. *Acevedo*, 1 OCAHO 95, at 651.

stantial compliance defense because those three forms did not have a printed/typed name or a title.

However, lest there be any confusion on this matter, I am not holding that failure to include a printed name or a title in the certification part of section two is never a law violation. In those instances where the signature is unclear, or a title for the employer's representative is not provided on any of the I-9 forms, it may very well constitute a violation. In this case, nevertheless, it would be putting form over substance to find a violation where the identity and title of the signatory are clear. Thus, I find that Respondent has set forth sufficient facts to defeat the Motion for Summary Decision with respect to the Complaint allegations concerning Andreasen, Brow and Rivera.

C. Civil Money Penalty

As Complainant orally has amended its Motion for Summary Decision to encompass liability only, I do not set a civil money penalty at this time. I note, however, that I must consider five statutorily mandated factors in setting the civil money penalty: (1) size of the employer's business, (2) the employer's good faith, (3) seriousness of the violation, (4) whether unauthorized workers were hired, and (5) the employer's history of prior violations. 8 U.S.C. §1324a(e)(5) (1994). Additionally, OCAHO case law instructs that those factors are not exclusive, and that an ALJ may consider other factors when appropriate. *United States v. Skydive Academy of Hawaii Corp.*, 6 OCAHO 848, at 3-4 (1996). Complainant has the burden of proving whether the above factors are present in this case. *Id.* at 4; *see also United States v. American Terrazzo Corp.*, 6 OCAHO 877, at 13 (1996). If the record is insufficient to establish a particular factor, I will not aggravate the penalty based on that factor. *Skydive*, 6 OCAHO 848, at 4.

In this case, Complainant argues that I should aggravate the penalty based on only two of the five statutory factors: size of business and seriousness of the violation. C. Supp. Memo. at 6-8. With respect to the size of Respondent's business, Complainant states that it does not know Respondent's gross receipts. *Id.* at 6. I remind Complainant that it is Complainant's burden to obtain that information and present it if it wants me to conclude that Respondent is not a small business. Similarly, it is Complainant's burden to establish that these were serious violations.

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VI. *Conclusion*

Because there are no genuine issues of material fact that would preclude judgment for Complainant as to liability with respect to certain individuals named in the Complaint, I grant Complainant's Motion for Summary Decision as to the paragraphs of the Complaint pertaining to the following individuals:

Complaint Paragraph and Name

- | | |
|--------|------------------------------|
| ¶A-1. | Satahudeen Kareem Abdul-Adul |
| ¶A-2. | Manuel J. Aguirre |
| ¶A-3. | Joseph Aloï |
| ¶A-4. | Daiwchand Amechand |
| ¶A-6. | Thomas V. Aroksaar |
| ¶A-7. | Ronald Baldwin |
| ¶A-8. | Roxrory George Barton-Smith |
| ¶A-9. | Andrew Owen Beicht |
| ¶A-10. | James Bennett |
| ¶A-11. | Lamont Blackwell |
| ¶A-14. | Fletcher Burley |
| ¶A-15. | Samuel Glenn Calloway |
| ¶A-16. | Stephen Calt |
| ¶A-17. | Steven Joseph Cannon |
| ¶A-18. | Gregory Clark |
| ¶A-19. | Rey Francisco Cortes |
| ¶A-20. | Johnny Chevere |

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- ¶A-21. Rafael Cortez
- ¶A-22. Kenneth Dancer
- ¶A-23. Felix Deguilla
- ¶A-24. Carl Destler
- ¶A-25. Thomas Fels
- ¶A-26. Jane Finnegan
- ¶A-27. Doreen Foreman
- ¶A-29. Alfredo Garcia
- ¶A-30. James David Gates
- ¶A-31. Edwin Gelabert
- ¶A-32. Michael Gonzalez
- ¶A-33. John Hahnenberger
- ¶A-35. Mark Hernandez
- ¶A-36. Alfonso Herrera
- ¶A-38. Danilo Jones
- ¶A-39. Nidin Botchi Julien
- ¶A-40. John Francis Kerins
- ¶A-41. Richard Kouroupakis
- ¶A-42. Jose R. Lappin
- ¶A-43. Alfred Eugene Lee
- ¶A-44. Gilbert Lopez
- ¶A-45. Winston Spencer Malliet

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- ¶A-46. Anthony Wayne McClendon
- ¶A-47. Willie James Merriweather
- ¶A-48. Clyde Mohan
- ¶A-49. Elvis A. Nolasco
- ¶A-50. Julio Cesar Ozoria
- ¶A-51. Ferrando Joel Pizarro
- ¶A-52. Dennis R. Pogan
- ¶A-53. Monique Rivera
- ¶A-55. Eulogio Ruiton
- ¶A-56. Alberto Ruiz
- ¶A-57. Chet Cornell Samuel
- ¶A-58. Albert Sand
- ¶A-59. Eduardo Santiago
- ¶A-61. Angel Serra
- ¶A-62. Nelson Serrano
- ¶A-63. Mack Sheppard
- ¶A-64. Clinton R. Southerland
- ¶A-65. Demetrios Telio
- ¶A-66. Rodney Jermaine Waiters
- ¶A-67. Rasheen Williams-Barnes
- ¶A-68. Vashawn L. Williams
- ¶A-69. John Peter Wolf

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¶A-70. Glenn Zukoff

Because Complainant has neither presented original I-9 forms for four employees, nor explained why they have not been presented, summary decision is denied at this time as to Theodore Boney (¶12), Brent Franklin (¶28), Joel Hammond (¶34) and Winston Sealey (¶60). Furthermore, summary decision is denied as to the Complaint paragraphs concerning Hans Andreasen (¶5), Ronald Brow (¶13), Robert John (¶37) and Robert Rivera (¶54).

ROBERT L. BARTON, JR.
Administrative Law Judge

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ATTACHMENT A

The originals of the following twenty-one I-9 forms have photocopies of documentation physically stapled to them:

<i>Paragraph of Complaint and Name</i>	<i>Type of Documentation</i>
¶A-4. Daiwchand Amechand	Social Security card
¶A-8. Roxrory George Barton-Smith	Social Security card
¶A-14. Fletcher Burley	Social Security card
¶A-15. Samuel Glenn Calloway	New York City birth certificate
¶A-16. Stephen Calt	Social Security card
¶A-23. Felix Deguilla	F.I.S. Access Pass; Postcard from Board of Elections, Nassau County, NY, seeking address correction information (the postcard attached is the original, not a photocopy)
¶A-24. Carl Destler	Social Security card
¶A-25. Thomas Fels Jane Finnegan	Florida driver's license A-26. New York State driver's license; New York State, Nassau County pistol license
¶A-30. James David Gates	Social Security card
¶A-31. Edwin Gelabert	Social Security card
¶A-36. Alfonso Herrera	Social Security card
¶A-38. Danilo Jones	Social Security card
¶A-48. Clyde Mohan	Social Security card
¶A-56. Alberto Ruiz	Social Security card (the photocopy of the card contains an original signature)
¶A-62. Nelson Serrano	New York State learner's permit
¶A-63. Mack Sheppard	New York State driver's license
¶A-64. Clinton R. Southerland	Social Security card
¶A-66. Rodney Jermaine Waiters	Social Security card; Management Safeguards temporary identification card
¶A-67. Rasheen Williams-Barnes	Social Security card
¶A-68. Vashawn L. Williams	Social Security card

ATTACHMENT B

The following is a summary of the information missing from the documentation and certification parts of section two of the I-9 forms that are the subject of the Complaint, except for the four forms for which originals have not been presented. This list excludes any omissions appearing in section one of the I-9 forms because the Complaint only alleges violations in section two.

<i>Name</i>	<i>Summary</i>
¶A-1. S. Kareem Abdul-Adul	No List A ²¹ document reference ²² and no document information; ²³ no List B ²⁴ document reference and no document information; no printed/typed name of signatory; no title of signatory.
¶A-2. Manuel J. Aguirre	No List A document reference and no document information; no List B document reference and no document information; no List C ²⁵ document information; no printed/typed name of signatory; no title of signatory.
¶A-3. Joseph Aloï	No document information for Lists A, B and C; no date of employer's certification.
¶A-4. Daiwchand Amechand	No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

²¹ List A documents establish both the employee's identity and employment eligibility.

²² The term "reference," as used throughout this list, means that section two of the I-9 form references a document, either by checking the appropriate box or by listing the document.

²³ The phrase "document information," as used throughout this list, refers to document identification numbers and expiration dates.

²⁴ List B documents establish the employee's identity only.

²⁵ List C documents establish the employee's employment eligibility only.

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¶A-6. Thomas V. Aroksaar No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

¶A-7. Ronald Baldwin No documents referenced in List A or in Lists B and C, and no document information;no printed typed name of signatory; no title of signatory.

¶A-8. Roxrory G. Barton-Smith No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

¶A-9. Andrew Owen Beicht No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.

¶A-10. James Bennett No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory; no employer name; no employer address.

¶A-11. Lamont Blackwell No List A document reference and no document information; no List B document reference and no document information; no List C document information.

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- ¶A-14. Fletcher Burley No List A document reference and no document information; no List B document reference and no document information; no date of employer's certification.
- ¶A-15. Samuel Glenn Calloway No List A document information; no List B document reference and no document information; no List C document information; no employer signature.
- ¶A-16. Stephen George Calt No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory.
- ¶A-17. Steven Joseph Cannon No List A document reference and no document information; no List C document reference and no document information; no printed/typed name of signatory; no title of signatory; no employer name; no employer address.
- ¶A-18. Gregory M. Clark No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-19. Rey Francisco Cortes No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-20. Johnny Chevere No List A document reference and no document information; no List B document reference and no document information; no List C document in-

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formation; no printed/typed name of signatory; no title of signatory.

¶A-21. Rafael Cortez

No List A document reference and no document information; no List B document reference and no document information; no List C document information; no employer address; no date of employer's certification.

¶A-22. Kenneth Allen Dancer

No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory; no employer name; no employer address.

¶A-23. Felix Deguilla

A List B document is referenced, but it is impossible to tell from the photocopy whether a List C document is referenced; no date of employer's certification.

¶A-24. Carl Joseph Destler

No List A document reference and no document information; no List B document reference and no document information.

¶A-25. Thomas Robert Fels

No List C document information; no printed/typed name of signatory; no title of signatory; no date of employer certification.

¶A-26. Jane A. Finnegan

No List A document reference and no document information; no List B document information; no List C document reference and no document information.

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- ¶A-27. Doreen Foreman No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-29. Alfredo Garcia No List B document information; no printed/typed name of signatory; no title of signatory; no employer name; no employer address.
- ¶A-30. James David Gates No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.
- ¶A-31. Edwin Gelabert No List A document reference and no document information; no List B document reference and no document information.
- ¶A-32. Michael A. Gonzalez No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.
- ¶A-33. John Hahnenberger No List A document reference and no document information; no List B document reference and no document information.
- ¶A-35. Mark Hernandez No List A document reference and no document information; no List B document reference and no document information; no List C document in-

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formation; no printed/typed name of signatory; no title of signatory.

¶A-36. Alfonso Herrera

No List A document reference and no document information; no List B document reference and no document information.

¶A-38. Danilo Jones

No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

¶A-39. N'Din Botchi Julien

No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

¶A-40. John Francis Kerins

No documents referenced in List A or in Lists B and C, and no document information.

¶A-41. Richie Kouroupakis

No documents referenced in List A or in Lists B and C, and no document information.

¶A-42. Jose R. Lappin

No List A document reference and no document information; no List B document reference and no document information; no List C document information.

¶A-43. Alfred Eugene Lee

No documents referenced in List A or in Lists B and C, and no document

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information; no printed/typed name of signatory; no title of signatory.

¶A-44. Gilbert Lopez

No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.

A-45. Winston Spencer Malliet

No List A document reference and no document information; no List B document reference and no document information; no List C document information.

¶A-46. Anthony Wayne McClendon

No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

¶A-47. Willie James Merriweather

No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.

¶A-48. Clyde Mohan

No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.

¶A-49. Elvis A. Nolasco

No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.

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- ¶A-50. Julio Cesar Ozoria No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-51. Fernando Joel Pizarro No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-52. Dennis R. Pogan No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.
- ¶A-53. Monique Rivera No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no employer name; no employer address.
- ¶A-55. Eulogio Ruiton No List A document information; no List C document reference and no document information; no printed/typed name of signatory; no title of signatory; no employer address; no date of employer's certification.
- ¶A-56. Alberto Ruiz No List A document reference and no document information; no List B document reference and no document information.
- ¶A-57. Chet Cornell Samuel No documents referenced in List A or in Lists B and C, and no document information; no printed/typed name of signatory; no title of signatory.

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- ¶A-58. Albert Sand No List A document reference and no document information; no List B document information; no List C document reference and no document information; no employer's address.
- ¶A-59. Eduardo Santiago No List B document information; no List C document information; no date of employer's certification.
- ¶A-61. Angel Serra No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.
- ¶A-62. Nelson Serrano No documents referenced in List A or in Lists B and C, and no document information.
- ¶A-63. Mack L. Sheppard No List A document reference and no document information; no List C document reference and no document information; no printed/typed name of signatory.
- ¶A-64. Clinton R. Southerland No List A document reference and no document information; no List B document reference and no document information; no List C document information; no printed/typed name of signatory; no title of signatory.
- ¶A-65. Demetrios Telio No List B document information; no List C document information; no printed/typed name of signatory; no title of signatory; no employer name; no employer address.

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¶A-66. Rodney Jermaine Waiters Unauthorized List B document listed: an identification from "Management Safeguard" is referenced in List B. That is not a document authorized for establishing identity. See 8 C.F.R. §274a.2(b)(1)(v)(B) (1996); no printed/typed name of signatory; no title of signatory.

¶A-67. R. A. Williams-Barnes No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory; no title of signatory.

¶A-68. Vashawn L. Williams No List A document reference and no document information; no List B document reference and no document information; no employer signature; no printed/typed name of signatory; no title of signatory.

¶A-69. John Peter Wolf No List B document information; no List C document information; no printed/typed name of signatory; no employer name; no employer address.

¶A-70. Glenn Zukoff No List A document reference and no document information; no List B document reference and no document information; no printed/typed name of signatory.

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ATTACHMENT C

The following forty-two I-9 forms contain a reference to a List B document or to a List C document, but not to both (this list does not include I-9 forms that have a List A document referenced):²⁶

<i>Paragraph of Complaint and Name</i>	<i>Reference to Documentation</i>
¶A1.Satahudeen Kareem Abdul-Adul	List C: Social Security card box checked and document identification number included
¶A2.Manuel J. Aguirre	List C: Social Security card box checked
¶A4.Daiwchand Amechand	List C: Social Security card box checked
¶A6.Thomas V. Aroksaar	List C: Social Security card box checked
¶A8.Roxrory George Barton-Smith	List C: Social Security card box checked
¶A9. Andrew Owen Beicht	List C: Social Security card box checked and document identification number included
¶A10. James Bennett	List C: Social Security card box checked
¶A11. Lamont Blackwell	List C: Social Security card box checked
¶A14. Fletcher Burley	List C: Social Security card box checked and document identification number included
¶A16. Stephen Calt	List C: Social Security card box checked and document identification number included
¶A17. Steven Joseph Cannon	List B: Driver's license box checked, state specified, document identifica-

²⁶ The I-9 forms for Joseph Aloï (¶13), Samuel Calloway (¶15) and Eulogio Ruiton (¶55) reference a List A document.

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	tion number included, and expiration date included
¶A20. Johnny Chevere	List C: Social Security card box checked
¶A21. Rafael Cortez	List C: Social Security card box checked
¶A22. Kenneth Dancer	List C: Social Security card box checked and document identification number included
¶A23. Felix Deguilla	List B: "Other" box checked, "Voter's Registration" specified, and document identification number included (Note: a postcard from the Board of Elections, Nassau County, NY, seeking address correction information, rather than a voter registration card, is attached to the I-9 form)
¶A24. Carl Destler	List C: Social Security card box checked and document identification number included
¶A26. Jane Finnegan	List B: Driver's license box checked and "Other" box checked
¶A27. Doreen Foreman	List C: Social Security card box checked and document identification number included
¶A30. James David Gates	List C: Social Security card box checked
¶A31. Edwin Gelabert	List C: Social Security card box checked and document identification number included
¶A32. Michael Gonzalez	List C: Social Security card box checked
¶A33. John Hahnenberger	List C: Social Security card box checked and document identification number included
¶A35. Mark Hernandez	List C: Social Security card box checked

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¶A36. Alfonso Herrera	List C: Social Security card box checked and document identification number included
¶A38. Danilo Jones	List C: Social Security card box checked
¶A39. Nidin Botchi Julien	List C: Social Security card box checked
¶A42. Jose R. Lappin	List C: Social Security card box checked
¶A44. Gilbert Lopez	List C: Social Security card box checked and document identification number included
¶A45. Winston Spencer Malliet	List C: Social Security card box checked
¶A46. Anthony Wayne McClendon	List C: Social Security card box checked
¶A48. Clyde Mohan	List C: Social Security card box checked and document identification number included
¶A49. Elvis A. Nolasco	List C: Social Security card box checked
¶A52. Dennis R. Pogan	List C: Social Security card box checked and document identification number included
¶A53. Monique Rivera	List C: Social Security card box checked
¶A56. Alberto Ruiz	List C: Social Security card box checked and document identification number included
¶A58. Albert Sand	List B: Driver's license box checked
¶A61. Angel Serra	List C: Social Security card box checked
¶A63. Mack Sheppard	List B: Driver's license box checked, document identification number included, and expiration date included

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¶A64. Clinton R. Southerland	List C: Social Security card box checked
¶A67. Rasheen Williams-Barnes	List C: Social Security card box checked and document identification number included
¶A68. Vashawn L. Williams	List C: Social Security card box checked and document identification number included
¶A70. Glenn Zukoff	List C: Social Security card box checked and document identification number included