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

United States of America, Complainant, v. Manos & Associates, Inc., d.b.a. the Bread Basket Restaurant, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100130.

ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History

On March 8, 1989, a Complaint was filed with the Executive Office of Immigration Review, Office of Chief Administrative Hearing Officer, charging Respondent with violations of two separate sections of 8 U.S.C. section 1324a. There are 58 Counts in total. All counts allege violations of the verification and record-keeping provisions of the Immigration Reform and Control Act (``IRCA'').

The first Count, and Counts 26 through 58 of the Notice of Intent to Fine, allege that Respondent failed to comply with verification requirements of 8 U.S.C. § 1324a(a)(1)(B), 8 C.F.R. § 274a.2(b)(1)(i)(A) and 8 C.F.R. § 274a.2(b)(1)(ii)(A) and (B). The remaining Counts, 2 through 25, allege, in the alternative, that Respondent failed to prepare and/or present Employment Eligibility Verification Forms (Forms I-9) for the named individuals, in violation of Sections 1324(a)(1)(B) and 1324a(b)(3), and 8 C.F.R. § 274a.2(b)(2)(ii).

On April 10, 1989, Respondent filed its Answer in this case denying the allegations in the Complaint, but asserting no affirmative defenses.

On April 21, 1989, Complainant filed its first set of Interrogatories, Request to Produce, and Request for Admissions.

On June 30, 1989, Complainant, pursuant to 28 C.F.R. § 68.36, filed a Motion for Summary Decision on all counts, except Count 8, on the ground that there was no genuine issue of material fact be-

tween the parties regarding allegations contained in the Complaint.

On July 26, 1989, Respondent filed its opposition to Complainant's Motion for Summary Decision. The Government filed its Reply Brief on August 4, 1989.

An evidentiary hearing was held on Complainant's Motion for Summary Decision on September 11, 1989. At the hearing, and consistent with its supplemental Motion papers, Complainant stipulated that Counts 5 and 6 related to the same employee, Mr. Frank T. Collins, and that it was seeking Summary Decision with respect to only one of the two Counts. The same confusion existed in Counts 37 and 58 concerning an employee named Ceaser Valdez, and Complainant similarly stipulated that it was seeking Summary Decision with respect to only one of the two Counts. Tr. at 14-15.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . 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. section 68.36 (1989) (emphasis added); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555. 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

In other words, summary decision will be granted only if the record, when viewed in its entirety, is devoid of a genuine issue as to any fact that is outcome determinative. See, Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, at 480 (``An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided.''). A fact is ``outcome determinative'' if the resolution of the fact will establish or eliminate a claim or defense; if the fact is determinative of an issue to be tried, it is ``material.'' Id.

Rule 56(c) of the Federal Rules of Civil Procedure also permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.''); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat., Inc. 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F. 2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be ``particularized'' in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609 (1973) (``. . . the standard of `well controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . .).

III. Legal Analysis

A. Factual Overview

As succinctly summarized in Complainant's thorough briefs in support of its Motion, the salient non-disputed facts in this case are as follows:

(1) A Notice of Inspection regarding an I-9 inspection was served on Respondent on November 14, 1988.

(2) The Notice of Inspection scheduled the I-9 inspection for November 21, 1988.

(3) On December 2, 1988, a Form I-9 inspection occurred at Respondent's place of business.

> (4) At the Form I-9 inspection on December 2, 1988, agents of the United States Border Patrol requested to see and examine all Forms I-9 for employees hired after November 6, 1986.
>
> (5) At the Form I-9 inspection on December 2, 1988, Forms I-9 had not been prepared for a number of respondent's employees hired for employment after November 6, 1986.
>
> (6) At the Form I-9 inspection on December 2, 1988, Forms I-9 were not presented for a number of Respondent's employees hired after November 6, 1986.
>
> (7) At the Form I-9 inspection on December 2, 1988, Forms I-9 were presented for a number of Respondent's employees hired for employment after November 6, 1986, which were incomplete and not prepared properly.

Respondent, as I have noted and emphasized, is represented by legal counsel. Through counsel, Respondent made numerous technical opposition arguments in its pre-hearing written pleadings, and during the course of the summary decision hearing conducted on September 11, 1989. These imaginative arguments can be summarized as follows.

B. Respondent's Legal Defenses Summarized

(1) Notice

First, Respondent argues that it was entitled to a second notice from INS regarding the I-9 inspection that was re-scheduled from November 21, 1988, to December 2, 1988. Respondent alleges that a violation of 8 C.F.R. § 274a.2(viii)(2)(ii) occurred when INS did not issue a second written notice after November 21, 1988.

In pertinent part, this regulation provides that:

> Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the forms by an authorized Service officer. Id.

Respondent does not deny that it received such notice, but argues that insofar as the Inspection occurred on a date different than that which was originally scheduled for November 21, 1988, the notice that was issued on November 14, 1988, had no effect. Therefore, Respondent argues, it was entitled to a second notice, and was ``prejudiced'' by this failure to receive a second notice. Respondent applies this argument to Counts 1-5, 7-21, 23-25, 40, 45-46, 50-52, 54, and 56. See, ``Respondent's Opposition to Complainant's Motion for Summary Decision,'' at 12.

In its well argued and methodical Reply Brief, Complainant argues that nothing in the statute or regulations required INS to issue ``date certain'' notices, nor to issue a second notice in situations wherein the anticipated original inspection has been administratively re-scheduled. I agree. Moreover, I find that Respondent's argument does not raise a genuine issue of material fact, but only,

at best, an aspirationally legalistic interpretation of a regulation which is not, on its face, required by the language of the statute.

INS agents visited Respondent's place of business on November 21, 1988, the original date of the I-9 inspection. It is not clear exactly what arrangements were made, but INS agents decided that it was necessary to return at a later date to complete the inspection. Respondent's own affidavit admits that INS agents ``discussed'' with them several dates before arriving at the date of December 2, 1988. See, ``Affidavit of George Manos and Teresa Manos on Behalf of Manos and Associates, Inc.,'' at 2.

I find that the written Notice of Inspection, dated November 14, 1988 was, in conjunction with the oral ``discussion'' regarding a re-visitation by INS agents subsequent to November 21, 1988, adequate procedural due process protection of Respondent's interests, and not a reason to preclude summary decision. In this regard, I conclude that INS was not under any obligation to have issued a second written notice to Respondent when the November 21, 1988, I-9 inspection was re-scheduled to December 2, 1988.

Moreover, I am not convinced that Respondent was ``prejudiced,'' because Respondent has failed to persuade me that insofar as it was ``ready and able to submit to Inspection on November 21, 1988,'' why was it not prepared on December 2, 1988, less than two weeks later. While it is not impossible to imagine that the re-scheduled inspection may have caused a managerial inconvenience to Respondent's operation of business, I do not find that mere inconvenience precludes it from cooperating to its fullest extent with federal agents attempting to conduct a compliance review consistent with the statute and regulations promulgated to implement IRCA in a fair and consistent manner.

Moreover, Respondent's affidavit, at page 2, item 8, asserts that Jan Hertl, who was present for the Form I-9 inspection on December 2, 1988, was ``an employee who at that time (November 21, 1988) was responsible for personnel matters.'' (emphasis added) As Complainant indicates, there is nothing suggested in the affidavit that Mr. Hertl was not in charge of personnel matters on December 2, 1988, when the official Form I-9 Compliance and Review Inspection took place. As the personnel manager of Respondent's business, Mr. Hertl was the person who would have been in the best position to respond to an IRCA-related audit, and in this regard I remain additionally unconvinced by Respondent's abstractly legalistic contention that it was ``prejudiced'' by the re-scheduled I-9 inspection.

Thus, I do not find that Respondent has shown that Complainant was under an obligation to have issued a second written notice on

account of an administratively re-scheduled compliance and review inspection, nor do I find, in this particular instance, that Respondent was legally ``prejudiced'' by the re-scheduled inspection.

(2) Estoppel

Respondent asserts that it was informed by agents of the INS that its practice of using its own employment personnel form in combination with the official Form I-9 would be authorized. Respondent goes on to assert that, in reliance on INS representations, it created a combination form in which it was ``led to believe that information which was repetitive would not be required on both sides of the form.'' Thus, according to Respondent, ``several counts as charged are based on a missing piece of information which is contained on the other side'' of the officially-issued Form I-9 Employment Eligibility Verification Form. Respondent asserts that Counts 26, 27, 30, 35, 36, 37, 38, 55, and 57, are included in this defense.

In its Reply Brief, Complainant counter-argues that Respondent's estoppel assertions are factually vague and legally defective. Without specifically denying Respondent's factual assertion that an INS agent made representations about the propriety of Respondent's proposed ``combination of forms,'' Complainant argues that Respondent has not met its legal burden of proof to show ``affirmative misconduct'' that results in ``profound and unconscionable injury.'' See e.g., INS v. Miranda, 459 U.S. 14, 17 (1982); and, Bolourchan v. INS, 751 F.2d 979, 980 (9th Cir. 1984). Complainant concludes that there is no basis for invoking estoppel in this case, because Respondent offers insufficient explanation as to why the agent's representations, even assuming they were made, would have caused it to have not completed the I-9 Form.

I have not previously addressed in any of my earlier decisions issues involving equitable estoppel. Analyzing an estoppel question in the context of a motion for summary decision is certainly distinguishable from rendering a decision after a full hearing on the merits. Nevertheless, allegations by a respondent of affirmative misconduct by government agents is a serious charge, and I intend to scrutinize all such allegations very carefully for their genuineness.

The practice and procedure of summary decision jurisprudence clearly indicates, however, that the party opposing summary decision has an affirmative obligation to present specific evidence and may not rest upon the mere allegations or denials of its pleading. See, e.g., Rule 56(e) Fed. R. Civ. Pro.; see also, U.S. v. Potampkin Cadillac Corp., 689 F.2d 379 (2nd Cir. 1982) (``a genuine issue for

trial precluding summary judgment is not created by a mere allegation in the pleadings nor by surmise or conjecture on the part of the litigants''); Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978), cert. den., 99 S. Ct. 1044, 439 U.S. 1127; Local 314, National Post Office Mail Handlers v. National Post Office Mail Handlers, 572 F. Supp. 133, 140 (D.C. Mo. 1983) (``A memorandum stating in conclusory fashion that many issues of fact existed and that defendants `are surely entitled to present further evidence' did not meet the obligation imposed on the party opposing a motion for summary judgment.''); Wright, Miller & Kane, Federal Practice and Procedure, vol. 10A, sect. 2739.

The most specific evidence that Respondent presents in the case at bar regarding its opposition to Complainant's Motion for Summary Decision on the grounds of equitable estoppel is the ``Affidavit of George Manos and Teresa Manos on Behalf of Manos and Associates, Inc.; In its ``Affidavit,'' Respondent states that George Manos spoke with an ``unidentified'' INS agent in the Spring of 1988 concerning the use of the Form I-9. Respondent asserts that ``it was agreed that if the Breadbasket created a Form I-9 with an employment application attached, such a form would be acceptable.'' Id., at 3.

At the hearing, I questioned Respondent's counsel about exactly what was said by the INS agent in Spring of 1988 concerning the authorized use of combined forms. See, Tr. at 73:8-24. In pertinent part, Respondent's counsel replied that:

> Mr. Manos was going through an educational visit and . . . in that discussion he showed them what he was currently using and has been using for quite some time for an employment application, which had quite a bit of the same information on it . . . and in discussions with that between--this is what I'm currently using, this is what your new form is, how about if I combine them, put them together and use it, is that going to be alright . . . the substance of what was said was, yes, you can do that, it will comply with the law, and you have our permission to do so . . . . Id.

Comparing counsel's statements at hearing with Respondent's ``Affidavit'' does not yield an unambiguous degree of specificity as may be required by Rule 56(e), supra. Respondent never identifies, even in a post-hearing supplemental memorandum capacity, the INS agent who allegedly made these statements; nor is Respondent specific about the date on which this communication took place, or the actual circumstances under which it took place. Moreover, in both the affidavit and the representative statements made at hearing, Respondent merely paraphrases the statements that it attributes to INS agents, and at no time offers to show, with an specificity necessary to substantiate in a prima facie manner such a serious charge as ``affirmative misconduct,'' what exactly was said;

there also appears to be a minor inconsistency between Respondent's ``Affidavit'' and the representations made at hearing concerning the date of the ``educational visit'' and whether the alleged INS agent's statements were made during the ``educational visit'' or at some other time.

Though I am certainly interested in understanding clearly all facets of government agents' conduct in the ongoing effort to implement IRCA in a fair manner, it is my view that the vague paraphrasing of an unidentified INS agent on an unspecified date is not enough of a prima facie factual showing of equitable estoppel based on ``affirmative misconduct'' to merit the administrative expense of proceeding to a full evidentiary hearing. Cf. e.g., J. Moore, W. Taggert & J. Wicker, Moore's Federal Practice, (2d ed. 1988) section 56.15[3] (and text accompanying notes 42-52) (other citations omitted) (``The opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, not merely suspicious''). Id. at 6 Moore's Federal Practice, at section 56.15.

Moreover, it is well established that the party opposing the summary decision does not have the right to withhold his evidence until trial. See, Walker v. Hoffman, supra, at 1075; see also, Wright, Miller & Kane, at 521. The cases make clear that an opposing party cannot demand a trial because of the speculative possibility that a material issue of fact may appear at that time. See, Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Ceazan, 559 F. Supp. 1210, 1219 (D.C. Ca. 1983); see also, Frito-Lay of Puerto-Rico, Inc. v. Canas, 92 F.R.D. (D.C. Puerto Rico 1981) (``defendant's suggestions that he might discover evidence sufficient to defeat plaintiff's motion for summary decision by, inter alia, cross-examining plaintiff's affiant was unavailing as a substitute for the showing required by Rule 56, since summary judgment may not be defeated on gossamer threats of whimsy, speculation and conjecture'').[1]

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[1]I note, as well, that Respondent made no effort to file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) exists in federal (and state) courts to prevent premature summary decisions. The Rule provides that a court may order a continuance, upon request by affidavit, if the non-movant party ``cannot for reasons stated present by affidavit facts essential to justify the party's opposition.'' See, Rule 56(f) of F.R.C.P.; see also, Moore's Federal Practice, section 56.24; and, Wright & Miller & Kane, Federal Practice and Procedure, at v. 10A, section 2740. In order to satisfy the requisites of Rule 56(f), an affidavit is generally required. See, e.g., Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146, (5th Cir.) cert. denied, 414 U.S. 1116 (1973). The affidavit must be made with diligence and must specifically express facts explaining why a Rule 56(e) response is not presently possi-

Even if I were to accept, however, that Respondent had made a sufficient prima facie factual showing of an INS agent's oral misstatement, it is my view that this would not be enough to establish a legal grounds for equitable estoppel. See, Heckler v. Community Health Services, 467 U.S. 51, 104 S. Ct. 2218 (1984); Rider v. U.S. Postal Service, 862 F.2d 239 (9th Cir. 1988), cert. den., 109 S. Ct. 2439 (1989).

As is well established in these authoritative cases, it is clear that the government may not be estopped on the same terms as other litigants. Id. The Ninth Circuit requires, as stated above, a showing of ``affirmative misconduct going beyond mere negligence.'' See, e.g., Wagner v. Director, Fed. Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988); see also Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985) (``. . . estoppel will apply only where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability'').

More specifically, however, the Ninth Circuit, in Rider, supra, has found that ``a simple misstatement is not affirmative misconduct. The fact that the incorrect information is given orally makes it even less likely to rise to the level of affirmative misconduct.'' See, Rider v. U.S. Postal Service, supra. The reason for treating oral misstatement differently is given in Heckler v. Community Service, supra, 467 U.S. at 65, 104 S. Ct. at 2227:

> 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. . . .

This distinction between oral misstatements and written ``advice'' is, in my view, applicable to the case at bar because Re-

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ble. See, e.g., SEC v. Spence & Green Chem. Co. 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981). The Rule 56(f) affidavit must particularize how a continuance will augment the non-moving party's ability to establish the presence of a genuine issue of a material factual issue. See, e.g., Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir. 1975) (plaintiff-non-movants' submitted affidavits insufficient to justify Rule 56(f) continuance); cert. denied, 424 U.S. 915 (1976). If, however, a Rule 56(f) affidavit is insufficient, or has not even been requested, then a judge must rule on the motion for summary decision in light of the materials on the record. See, e.g., Reflectone, Inc. v. Farrand Optical Co., 862 F.2d 841, 844 (11th Cir. 1989) (although acknowledging that Rule 56(f) is ``infused with the spirit of liberality,'' the court stated that it would not ``go so far as to . . . make such a motion on behalf of a party that deliberately chooses not to do itself,'' quoting, Wallace v. Brownell Pontiac-GMC Co., 703 F.2d 525, 527 (11th Cir. 1983)).

spondent admits, in its ``Affidavit'' that it received, in June of 1987, the Handbook for Employers (Form M-274) containing explicit written instructions for completing the I-9 Employment Eligibility Verification Form. See, ``Affidavit,'' at page 1, item 5. In this regard, Respondent was in possession of detailed and official written information which instructed it as to how to comply with the Employment Eligibility Verification process of IRCA. Thus, it is my view that even if an oral misstatement was actually made by an INS agent that resulted in an understanding that was arguably inconsistent with the employer's obligations as described in the Handbook, such a misstatement is not, under the current law of the Ninth Circuit, valid grounds for prevailing on a claim of equitable estoppel against the government.

(3) Substantial Compliance

In addition to its notice and estoppel arguments, Respondent also makes several different arguments that essentially can be summarized as a defense to alleged paperwork violations on the grounds that Respondent ``substantially complied'' with the verification and record-keeping provisions of IRCA. None of Respondent's contentions present clear-cut ``genuine issues of material fact'' per se, but instead present somewhat convoluted legal arguments interwoven with threads of speculatively possible fact which Respondent offers to prove at hearing. Nevertheless, since I have not previously analyzed or discussed in any way legal arguments regarding the issue of substantial compliance in IRCA cases, I intend to review at length each of Respondent's contentions.

(a) ``Technical Violations of Regulations Do Not Always Constitute a Violation''

Respondent's first argument in support of its contention that it substantially complied with IRCA's verification and record-keeping provisions appears to be that ``omissions on the I-9 forms are nothing more than technical errors and the verification requirements have been substantially met.'' Respondent appears to apply this argument to Counts 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 47, 48, 49, and 55. Respondent does not present to me in a sufficiently clear manner how it distinguishes what it refers to as mere ``technical violations'' from what it seems to deem a legally effective statutory ``violation,'' or how, if at all, such a distinction, even if properly clarified, relates to this case in a fact-specific way.

Nevertheless, an examination of Respondent's ``Opposition to Motion as to Each Count'' offers examples of the type of ``technical violations'' that Respondent apparently believes are not sufficient

to warrant a finding of substantive liability. I view some of these per-Count conclusory defenses as being wholly frivolous (i.e., Count 28 is defended on the grounds that ``we are unable to locate the I-9 but believe it has the missing Social Security number and a date attached'') or without sufficient factual basis for me to decide whether there is a ``genuine issue of material fact.'' In contrast, however, several of the so-called per-Count defenses, as raised by Respondent, assert factual grounds that are, by way of illustrative examples of what Respondent seems to mean in its contention that it substantially complied with IRCA's verification and record-keeping provisions, deserving of close attention.

For example, Respondent defends Count 31 on the grounds that ``although the attestation is not checked, the employee did sign and date Part 1 and provided as attachments to Form I-9, Exhibit 5.'' In other words, as I understand it, Respondent's employee failed to check a box in section 1 of Form I-9. Nevertheless, an examination of Respondent's Exhibit 5 reveals that it is an INS-issued ``Request for Information'' regarding a pending legalization application submitted to INS by Respondent's employee as named in Count 31.

Though not specifically argued by Respondent, Respondent appears to imply, consistent with its substantial compliance argument, that even though the employee named in Count 31 did not actually attest, in section 1 on the face of the I-9 Form, to being authorized for employment in the United States, Respondent asserts that it did provide INS, at the time of the compliance inspection, with sufficient evidence to indicate that the employee was in fact legally authorized to be employed in the U.S. pending the outcome of its legalization application. Assuming, arguendo, that Respondent did in fact provide Complainant, during the compliance inspection, with what it represents as Exhibit 5, is this official INS ``Request for Information,'' if permissibly incorporated by reference into the allegedly attached Form I-9, sufficient to establish a claim for ``substantial compliance'' with the verification and record-keeping provisions of IRCA? Though I am not currently prepared to render my final legal conclusion on this issue, I am willing to hold that such a set of facts presents, in my view, a ``genuine issue of material fact'' and should, at the very least, preclude the utilization of Summary Decision on Count 31.[2]

[2]Inferences as well as facts are examined in determining whether there exists a genuine issue. Federal (and state) courts generally determine if possible inferences, when viewed in the light most favorable to the non-movant, indicate reasonable grounds for dispute. The federal standard has been expressed as follows:

Another noteworthy example is Count 35. In Count 35, Respondent contends that ``two I-9s were prepared and attached. The second one had the required box checked for the Part 1 attestation and when read together constitutes compliance.'' The record is not unambiguously clear on the factual accuracy of this state defense, but it may, in my view, be sufficient to raise the possibility of a ``genuine issue of material fact.'' Such a act, assuming it is true, may be ``material,'' because it raises the heretofore undecided issue of whether the preparation and presentation of two separate I-9s regarding the same employee, neither of them complete in themselves, can be read together, and through incorporation by reference, constitute ``substantial compliance'' with the verification and record-keeping provisions of IRCA. Though such a practice of inexplicably preparing and presenting two separate, but allegedly attached, Forms I-9, neither of them complete in themselves, is economically and managerially inefficient, it nevertheless raises the question, at least in my mind, of whether such a practice is necessarily the kind of ``violation'' that Congress intended to prohibit in its enacting of IRCA?

Similarly, but distinguishably, Count 38 also involves the unfortunate, but possibly permissible utilization of two Forms I-9 on the same employee.[3] Respondent contends that Count 38 is defensible because ``attached to the I-9 was a second I-9 executed by the employer which together fulfills the verification requirements.'' As stated above, I am prepared, in the limited context of deciding a motion for summary decision, to conclude that Respondent has presented enough prima facie evidence to suggest that there is a ``genuine issue of material fact'' with respect to whether the preparation and presentation of two separate I-9's, as allegedly ``attached''

Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do. See, Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 557 (5th Cir. 1980) (quoting, American Tel. & Tel. Co. v. Delta Communications Corp., 590 F.2d 100, 102, (5th Cir.), cert. denied, 444 U.S. 926 (1979), cert. denied, 454 U.S. 927 (1981).

Thus, the federal standard for considering possible inferences is that the inference must be a rational conclusion drawn from facts contained in the record. However, the line between weighing inferences against each other, which is improper, and weighing inferences against the standard of reasonableness, which is required, is a difficult line to draw.

[3]Count 38 is distinguishable from Count 35 in that Count 38 involves an allegation of a failure to properly complete section 2 of the Form I-9 and Count 35 involves an allegation of a failure to properly complete section 1 of the Form I-9.

at the time of presentation, can be read together to incorporate by reference the information that is otherwise incomplete if the two Forms I-9 are read separately.

Thus, with respect to these three discussed Counts,[4]I intend to consider, in the more factually detailed context of a formal evidentiary hearing, the parties' respective legal arguments on Respondent's asserted defense to liability on the grounds that it ``substantially complied,'' in the specific context of Counts 31, 35, and 38, with IRCA's verification and record-keeping provisions.

Like the concept of ``reasonableness,'' substantiality of compliance, if applicable, depends on the factual circumstances of each case. See, e.g., Fortin v. Commissioner of Ma. Dept. of Welfare, 692 F.2d 790, 795 (1st Cir. 1982); and, Ruiz v. McCotter, 661 F. Supp. 112, 147 (S.D. Tx. 1986). As applied to statutes, ``substantial compliance'' has been defined as ``actual compliance with respect to the substance essential to every reasonable objective of the statute. But when there is such actual compliance as to all matters of substance then mere technical imperfections of form . . . should not be given the stature of non-compliance . . . .'' See, e.g., International Longshoreman & Warehouseman Unions Local 35 et. al. v. Board of Supervisors, 116 Cal. App. 3d 273, 171 Cal. Rptr. 875, 880 (Ca. 1981); Coe v. Davidson, 43 Cal. App. 3d 170, 175, 117 Cal. Rptr. 630; (1974); Stasher v. Hager-Haldeman, 58 Cal. 2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1962). Generally speaking, it means that a court

[4]It should be noted that I reviewed all Counts and all of Respondent's somewhat scattered submissions for their potential ``substantial compliance'' implications. Several other defenses per-Counts were also, in my view, non-frivolous in that they are premised on Respondent's confusion and frustration regarding the nature of prosecutorial discretion exercised in situations involving what are arguably ``minor omissions'' from an otherwise completed and signed Forms I-9. For example, Respondent defends itself on Count 42 on the grounds that ``the absence of driver's license information does not invalidate the verification and does not constitute a violation of 8 U.S.C. section 1324a(1)(B).'' While not frivolous, I find that this conclusory legal assertion, as tendered by Respondent in its defense of Count 42, does not raise a genuine issue of material fact; nor does it, as distinguished from Counts 31, 35, and 38 discussed above, include a situation involving the utilization of relevant supplementary information that can, arguably, be incorporated by reference to complete the deficient Form I-9 through the use of officially recognized documents that were allegedly attached to the inspected I-9. For this reason, I conclude that there is no ``genuine issue of material fact'' on Count 42, and extend this reasoning to other similar types of Counts in which Respondent asserts a defense that what it deems a ``minor omission'' from the Form I-9 is not a violation of IRCA. See, e.g., Count 39, Count 44. Though I intend to consider these types of ``defenses'' in the context of arguments supporting mitigation of penalty, i.e. seriousness of violation, or ``good faith,'' see, 8 U.S.C. section 1324a(e)(5), I nevertheless do not view these relatively ``minor omissions'' to constitute grounds for substantive defenses to issues of liability.

should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

While I am reserving decision on the actual legal validity and/or administrative merits of such a defense in the limited context specified above, I am prepared to consider it in more detail after an evidentiary hearing and submission of appropriate legal memorandum by the parties. In this regard, I am currently prepared to consider arguments that ``substantial compliance,'' in circumstances such as are presented by Counts 31, 35, and 38, may constitute a valid defense to allegations of liability concerning the verification and record-keeping provisions of IRCA, and that such a defense shall be considered by me to be distinguishable from ``good faith'' or ``seriousness of violation'' as utilized in a mitigation of penalty context.

(b) Attaching Photocopied Documentation

Another aspect of Respondent's substantial compliance argument concerns the use of an employee's photocopied identification and immigration documents. Respondent applies this argument to Counts 26, 27, 30, 32, 41, 53, and 55. Specifically, Respondent argues that it substantially complied with the verification requirements when it ``photocopied'' the employee's documentation and attached it to the back of the facially uncompleted Form I-9. See, Tr. at 91:4-9. Respondent contends that the regulations support its position. See, 8 C.F.R. § 274a.2(b)(3).

8 C.F.R. § 274a.2(b)(3) provides, in pertinent part, for the permissive ``copying of documentation'':

> An employer . . . 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. (emphasis added)

Because of the language that I have emphasized in my quoting of the regulation, I do not agree with the interpretation Respondent urges in support of its argument that it substantially complied with the verification and record-keeping provisions of IRCA by copying the documentation of its employees consistent with 8 C.F.R. § 274a.2(b)(3). 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. § 274a.2(b)(1).

In analyzing 8 C.F.R. § 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.

In this regard, I conclude that Respondent's reliance on 8 C.F.R. § 274a.2(b)(3) is misplaced, and presents neither a ``genuine issue of material fact'' nor a legal defense that has sufficient prima facie validity to warrant a further hearing on the merits.

(c) Use of Business Personnel Form in Conjunction with I-9 Form

Respondent makes a separate substantial compliance argument with respect to its utilization of its own business personnel form, the ``Application for Employment.'' Respondent contends that the information that appears on its ``Application for Employment'' is the same, or at least substantially similar to what the I-9 Form requires, and, therefore, it is in substantial compliance with the law. Respondent applies this argument to Counts 26, 27, 30, 35, 36, 37, 38, 55, and partially to 57.

At the hearing, I questioned Respondent's counsel regarding the legal validity of the personnel form that it created. See, Tr. at 63-64.

> Judge Schneider: But is there anything on the side that (Respondent) created--provided, that relates to his making sure the employee swore to it, subscribed to it, or that he verified it?
>
> Mr. Larrabee: No, your Honor.
>
> Judge Schneider: Isn't that required by statute?
>
> Mr. Larrabee: It is.

Id.

I do not think that Respondent's utilization of its self-propagated ``Application for Employment'' (in conjunction with incomplete Forms I-9) even approximates ``substantial compliance'' with the verification and record-keeping provisions of IRCA. A facial examination of Respondent's ``Application for Employment'' reveals that none of the application's questions ask anything that is in any way related to the prospective employee's immigration authorization to be employed in the United States. Since Respondent's I-9 Forms do not contain such a verification, and the submitted ``Application for Employment'' does not even ask the question, I fail to see logic or substance of Respondent's argument that it ``substantially com-

plied'' with the verification and record-keeping provisions of IRCA on these grounds. See, e.g., Stasher v. Harger-Haldeman, supra.

(4) Summary of My Views Regarding Respondent's Asserted Defenses

As summarized, it is my view that Respondent's notice and estoppel arguments do not present a ``genuine issue of material fact'' and are not a persuasive preclusion of the application of Summary Decision. Respondent's arguments concerning the application of a modified version of the doctrine of ``substantial compliance'' do, however, present, in my view, a ``genuine issue of material fact'' with respect to Counts 31, 35, and 38. Accordingly, I intend to grant a partial Summary Decision to Complainant; to deny or dismiss the stipulated redundant Counts (i.e. Counts 5 and 58), and to schedule an evidentiary hearing on (1) the issue of liability for Counts, 31, 35, and 38, and (2) the factual and legal arguments for and against mitigation of penalties for all non-dismissed Counts. See, 8 U.S.C. § 1324a(e)(5); see also, United States v. Felipe, Inc., ``Order for Civil Money Penalties for Paperwork Violations,'' OCAHO Case No. 89100151 (ALJ Schneider, Oct. 11, 1989); United States v. Juan V. Acevedo, ``Order Granting Complainant's Motion for Summary Decision,'' at 3-6 OCAHO Case No. 89100397 (ALJ Schneider, Oct. 12, 1989).

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue of material fact has been shown to exist with respect to Counts 1-4, 6-7, 9-30, 32-34, 36-37, 39-57 of the Complaint, and that, therefore, pursuant to 28 C.F.R. § 68.36, Complainant is entitled to a Summary Decision on these specified Counts of the Complaint.

2. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in Counts 1-4, 6-7, 9-30, 32-34, 36-37, 39-57 without complying with the verification requirements in section 1324a(b), and 8 C.F.R. § 274a.2(b)(1)(i)(A) and (ii) (A)&(B).

3. That Complainant stipulated to dismissing the charges alleged in Counts 5, 8, and 58 of the Complaint, and that, accordingly, Counts 5, 8, and 58 are hereby dismissed.

4. That Counts 31, 35, and 38 of the Complaint present genuine issues of material fact which require an evidentiary hearing.

5. That Complainant's Motion for Summary Decision is denied with respect to Counts 31, 35, and 38 for the reasons stated above.

6. That, the written INS Notice of Inspection, dated November 14, 1988, in conjunction with the oral ``discussion'' regarding a re-visitation by INS agents at a time subsequent to that originally scheduled, provided adequate notice pursuant to the regulations and was not a reason to preclude summary decision.

7. That, Respondent did not make a prima facie showing that there is a genuine issue of material fact that Complainant should be equitably estopped from charging Respondent with IRCA violations because an INS agent may have orally misstated the nature of authorized compliance with the verification and record-keeping provisions of IRCA.

8. That, Respondent presented a genuine issue of material fact in the factual situations of Counts 31, 35, and 38, all of which involved the use of official documents that were allegedly attached to the Form I-9 and which, arguably, incorporate by reference information that is missing from the Form I-9 in a manner that may substantially comply with the reasonable verification and record-keeping objectives intended by Congress it its enactment of IRCA.

9. That, the regulation found at 8 C.F.R. § 274a.2(b)(3) provides for the permissive ``copying of documentation'' and is not, as Respondent argued, an alternate way of complying with the mandatory verification and record-keeping provisions of IRCA which require that sections 1 and 2 of the Forms I-9 be completed by both the employee and employer. 8 C.F.R. § 274 a.2(b)(1).

10. That, Respondent's use of its own self-generated business personnel form, in lieu of properly completing a Form I-9, is not a legally valid manner of complying with the verification and record-keeping provisions of IRCA.

Based upon my findings of fact and conclusions of law, it is hereby ORDERED that an evidentiary hearing shall be held on Tuesday, March 13, 1990, beginning at 9:00 a.m., at the Office of the Chief Administrative Hearing Officer in San Diego, California, to determine the issue of liability with respect to Counts 31, 35, and 38. In addition, I further ORDER the parties to present relevant evidence as to the mitigating factors which should be considered by me in determining the amount of civil money penalty to assess against Respondent in this case for all non-dismissed Counts.

SO ORDERED: This 8th day of February, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge