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

United States of America, Complainant, v. Buckingham Limited Partnership d/b/a Mr. Wash, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100244.

DECISION AND ORDER
(April 6, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **VIRGINIA L. TOWLER**, Esq., for the Immigration and Naturalization Service. **MICHAEL MAGGIO**, Esq., for the Respondent.

I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986) at Section 101, enacting section 274A of the Immigration and Nationality Act of 1952 as amended (INA), codified at 8 U.S.C. § 1324a, adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment of unauthorized aliens in the United States; civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment and/or has failed to observe record keeping verification requirements in the administration of the employer sanctions program.

Title 8 U.S.C. § 1324a(a)(2) provides that it is unlawful for ``a person or other entity'' [an employer], . . . to continue to employ an alien in the United States ``knowing the alien is (or has become) an unauthorized alien [as defined at 8 U.S.C. § 1324(h)(3)] with respect to such employment;'' Title 8 U.S.C. § 1324a(1)(B) makes it unlawful for such an employer to hire any individual without complying with the employment verification (paperwork) requirements of 8 U.S.C. § 1324a(b).

Title 8 U.S.C. § 1324a(b)(1)(A) provides that an employer is liable for failure to attest ``on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien. . . .'' The term ``individual'' means a putative employee. Title 8 U.S.C. § 1324a(b)(2) requires that the individual attest, under penalty of perjury, on the verification form as to his or her employment authorization. Title 8 U.S.C. § 1324a(b)(3) sets forth requirements for retention and availability for inspection of the verification form. The Immigration and Naturalization Service (INS or Complainant), by delegated authority of the Attorney General, by regulation at 8 C.F.R. § 274a.2(a), has designated the Form I-9 as the Employment Eligibility Verification Form to be used by employers in complying with IRCA's employment verification requirements.

II. PROCEDURAL BACKGROUND

This case began on March 31, 1989 when INS served Buckingham Limited Partnership (Mr. Wash or Respondent) with a Notice of Intent to Fine (NIF) alleging that it had violated Section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a. Specifically, the NIF charged Respondent with violating both 8 U.S.C. § 1324a(a)(2) by continuing to employ an alien knowing that the alien had become unauthorized to work in the United States, and 8 U.S.C. § 1324a(a)(1)(B) by failing to ensure that the employee properly completed Part 1 of the I-9.

By letter dated April 25, 1989, Respondent timely answered the NIF and requested a hearing before an administrative law judge. 8 U.S.C. § 1324a(e)(3). On May 19, 1989 INS filed a Complaint, incorporating the allegations of the NIF, in the Office of the Chief Administrative Hearing Officer (OCAHO). On May 31, 1989, OCAHO issued its Notice of Hearing advising Respondent of the filing of the Complaint and of my assignment to the case. On June 9, 1989, Respondent timely filed its Answer to the Complaint, denying every allegation.

On August 15, 1989, a prehearing conference was held in Falls Church, Virginia, which scheduled an evidentiary hearing to begin on November 2, 1989. On September 12, 1989, Complainant filed a Motion for Partial Summary Judgment, claiming that there was no genuine issue of material fact in this case. On September 22, 1989, Respondent filed a Motion For Leave To File An Amended Answer with a Memorandum of Law in support, an Opposition to Complainant's Motion, and Respondent's Counter Motion For Summary Decision and Memorandum Of Law.

On September 25, 1989, Complainant filed a Motion to Compel Answers To Its Request for Admissions. On September 28, 1989, Respondent filed its Opposition to that motion.

On October 5, 1989, I issued an Order In Preparation For Hearing which detailed the time, place and procedures for the hearing, and denied all pending motions. Prehearing statements were filed by both parties on October 19, 1989.

On October 30, 1989, Complainant filed an Amended Prehearing Statement and a Motion For Leave To File An Amended Complaint. At the hearing, I granted Complainant's motion and received the amended prehearing statement.

An evidentiary hearing was held on November 2 and 3, 1989 in Falls Church, Virginia. I denied Complainant's renewed motion for summary decision at hearing as well as its motion in limine and proceeding under seal with respect to Mr. Rivera's employment history with the INS. The last post-hearing brief was filed on February 23, 1990.

III. STATEMENT OF FACTS

Respondent owns seven car wash locations that operate as Mr. Wash in the Washington, D.C., area. Each location files separate tax returns, but combine various management and advertising devices together in the same corporate image. The only location of Mr. Wash involved in this case is the location at 101 Glebe Road, Arlington, Virginia.

On February 5, 1988, an INS Special Agent conducted an educational visit to Respondent at which time he spoke with Respondent's District Manager, the person primarily in charge of hiring, Mr. Thomas Stevens. Stevens testified that during the educational visit, the INS agent familiarized him with the Employer Handbook, which he later read through.

Michael A. Michelin, INS Special Agent, testified that he initiated an investigation of Respondent after observing large groups of ``what appeared to be illegal aliens gathering in front of the establishment each morning.'' Tr. 40. From his experience as an INS Border Patrol and Special Agent, he believed they were illegal aliens based on their manner of dress, hairstyle, and the fact that they spoke Spanish to one another.[1]Michelin conducted three surveillances of the car wash before INS inspected the premises on January 18, 1989.

[1]As it turned out, INS acknowledged that only two individuals were unauthorized to work in the United States. Most of the rest had temporary relief under asylum proceedings, or were temporary or permanent residents. Tr. 88.

On that day, Michelin and approximately 15 other INS agents conducted an employer target inspection (also known to others as a ``raid'') of Respondent's premises in Arlington. INS apprehended two individuals who were unauthorized to work in the United States according to documents in their possession, i.e., Carlos Abraham Rivera-Hernandez (Rivera) and Carlos Alberto Rodriguez Mejia (Rodriguez).

The results of the investigation prompted INS to audit Respondent's employment verification forms (Forms I-9). Agent Michelin testified that the purpose of the target inspection was to arrest any illegal aliens, not to serve the Notice of Inspection, and for that reason the Notice of Inspection was not served first.

INS subsequently scheduled an I-9 inspection with Respondent for January 27, 1989 to review all its I-9s. INS hand-delivered to Respondent a Notice of Inspection, providing the 3-day notice period called for by INS regulation. 8 C.F.R. § 274a.2(b)(2)(ii).

On January 27, 1989, Agent Michelin inspected the I-9s at the Washington District Office of INS in the presence of Mr. Stevens and Mr. Michael Maggio, counsel for Respondent. Michelin copied approximately five I-9s which he suspected contained violations, including those of both Carlos A. Rivera, Exh. M, and Carlos Alberto Rodriguez Mejia. Exh. G.

Both INS Form I-94 [arrival-departure record] of Carlos Abraham Rivera-Hernandez, Exh. E, in his possession when he was apprehended, and the I-9 of Carlos A. Rivera, indicated that Mr. Rivera's work authorization had expired on October 1, 1988, three and a half months before the target inspection. Michelin testified that he determined that the I-9 of Carlos A. Rivera referred to Carlos Abraham Rivera-Hernandez because of identical A-numbers on both the I-9 and the I-94.[2] [A-numbers are alien registration receipt numbers identifying master files maintained by INS on aliens in its data system].

Michelin testified that Part I of the Rodriguez I-9 was improperly filled out and that the copy of the Social Security card attached was invalid as proof of work authorization because it bore the endorsement ``Not Issued by the United States Government.'' Michelin asserted that the card was obviously invalid.

Stevens testified that he had not noticed that Part I of the I-9 for Carlos Rodriguez had not been completed, nor did he notice the endorsement on the ``Social Security'' card. Neither Part I nor II of

[2]At hearing and on brief, Respondent abandoned the dispute whether Carlos Rivera, known to Stevens, was Carlos Abraham Rivera-Hernandez, whom he previously denied knowing. Tr. 194-5, Resp. Brief 2 n. 5.

the I-9 had been filled in although both Rodriguez and Stevens signed in the appropriate places. A copy of the ``Social Security'' card and of a Virginia Identification Card were attached to the I-9.

As a result of the inspection, Respondent was charged with (1) continuing to employ an alien, namely, Carlos Abraham Rivera-Hernandez (Rivera), knowing he had become unauthorized to work in the United States, and (2) failing to properly complete the I-9 of Carlos Alberto Rodriquez Mejia.

Mr. Stevens testified that he hired Rivera in 1987, and that at that time Rivera had proper work authorization, namely, an INS Form I-94 endorsed with employment authorized. Mr. Stevens conceded that he had been aware that Rivera's authorization was to expire on October 1, 1988, and had properly noted that date on Rivera's I-9.

At the time of the inspection, however, Stevens was surprised when an INS agent told him that Rivera's employment authorization had expired: ``. . . I knew that he had proper work identification and authorization when I hired him, and that was just a mistake, an oversight on my part by not checking to see that it had expired . . . I believed it was still valid.'' Tr. 207-208. When asked if he had read the back of the I-9 form which recites that employers are responsible for reverifying employment eligibility of employees whose employment eligibility shows an expiration date, he stated: ``In this case, it got passed (sic) me. It was just an error on my part. It is not something that is done periodically.'' Tr. 218.

Mr. Rivera testified that he began working at Mr. Wash in December 1987. Initially he knew his work authorization would expire on October 1, 1988, but did not ask for an extension because he forgot that it was going to expire. He conceded that he did not have work authorization on the day of his arrest, although he claimed he could renew the permit virtually at will.

Following his deportation after January 18, 1989, when he reentered the United States without inspection INS once again granted him employment authorization in March 1989. According to Rivera, INS granted him employment authorization each time in exchange for his work with INS. Exh. 6. At the time of hearing he was back at Mr. Wash working with authorization which will expire in July 1990. Exh. N.

Michelin testified that two INS officers in Harlingen, Texas reviewed Rivera's A-file, described by Michelin as the controlling INS documentation which reflects whether or not he did have employment authorization at the time of his arrest. The Harlingen office sent the file to the Washington District Office upon request. Miche-

lin testified that having reviewed the file he did not find an extension of employment beyond October 1, 1988.

On October 26, 1989, at Respondent's request, I had issued a subpoena for Mr. Michelin to bring to the hearing all files, documents, etc., in possession of Complainant ``which identify, name, or make reference to the persons named in Counts I and II of the complaint.'' When counsel for Respondent requested the A-file at hearing, Complainant's counsel responded that all files requested were available; their exact location was not specified. In reply, counsel for Respondent said he had no further questions of this witness [Michelin]. Tr. 152-53.

Respondent clearly made efforts to comply with the employer sanctions provisions of IRCA. When the Arlington location opened on March 31, 1987, Mr. Stephen Harris, general partner, gave the Handbook for Employers to Mr. Stevens to familiarize himself with an employer's obligations under IRCA. On June 3, 1987, Mr. Harris and two other employees of Respondent attended an all-day seminar on IRCA held by the Washington Board of Trade. According to Harris they attended the seminar to understand the mechanics of IRCA in order to correctly comply with the law.

In the spring of 1988, Respondent retained Michael Maggio to audit its I-9 and to teach its managers how to correctly fill them out. Mr. Harris also held a meeting, at which Mr. Maggio was present, with more than 70 employees of all his operations regarding their obligations under IRCA. Mr. Harris also changed Respondent's employment application to include a section summarizing IRCA requirements.

To comply with IRCA, Respondent in the spring of 1988 fired seven to nine employees, and over fifty altogether were fired ``by the other companies trading as Mr. Wash.'' Tr. 291. As a result, Respondent raised wages from $4.00 to $5.00 an hour and spent additional money on classified ads to recruit new employees. Mr. Harris stated that it had cost more than $400,000 to come into compliance with IRCA at all the car wash operations.

Both Stevens and Rivera testified that Mr. Wash does not hire people who cannot show proper work authorization. Stevens demonstrated to me, through his testimony, a general understanding of an employer's obligations under IRCA. He said he fired an employee who had hidden during the INS inspection after the employee failed to respond to Stevens' comment that he thought he was a U.S. citizen; had he known the employee was an unauthorized alien he would have fired him earlier.

John Wright, INS Assistant District Director for Investigations, set the amount of civil money penalties assessed by INS: $250 for

the paperwork violation and $2,000, the statutory maximum, for the knowingly continuing to employ violation. Wright testified that in setting the penalty for both unauthorized employment and paperwork violations, he looks to the five criteria set out in the INS Employers Sanctions Field Manual and the Code of Federal Regulations. [8 C.F.R. § 274a.10(b)(2)], i.e., size of the business; good faith of the employer; seriousness of the violation; whether any unauthorized aliens were apprehended, and any previous history ``that the Service has had with the Company.'' Tr. 221. Cf. 8 U.S.C. § 1324a(e)(5).

IV. DISCUSSION

Count I charges Respondent with violating 8 U.S.C. § 1324a(a)(2) in that it continued to employ an alien knowing that the alien had become unauthorized with respect to employment in the United States. Count II charges Respondent with violating 8 U.S.C. § 1324a(b)(1)(A) in that it failed to properly fill out the I-9 Form. As Respondent has conceded liability to Count II, Resp. Brief 30 n. 28, the only issues to be discussed concern the merits as to Count I and determination of civil money penalties for both Counts I and II.

A. Count I: Continuing to Employ an Alien Who Has Become Unauthorized

1. The Knowledge/Intent Issue

Title 8 U.S.C. § 1324a(a)(2) makes it ``unlawful for a person or other entity, . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.'' (emphasis added). Respondent argues that it is necessary to establish intent in order to sustain a charge of knowingly continuing to employ an alien unauthorized to work. I agree with Complainant, however, that the legislative history of IRCA and case precedent do not support Respondent, and that 8 U.S.C. § 1324a(a)(2) does not require a showing of intent. The issue of intent is properly left to determination of the quantum of civil money penalty.

Mr. Stevens, acting with Respondent's authority, first hired Carlos Rivera in December 1987. For IRCA purposes, as explained in United States v. Sophie Valdez, d.b.a. La Parrilla Restaurant, OCAHO Case No. 89100014, September 27, 1989; aff'd by CAHO, December 12, 1989, an employer is a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. See 8 C.F.R. § 274a.1(g). Stephen Harris confirmed that Mr. Stevens is responsible for hiring at Mr. Wash.

Both Stevens and Rivera knew at the time Rivera was hired that his employment authorization would expire on October 1, 1988. Mr. Rivera's I-9 form, properly completed and signed by Mr. Stevens, recites that his employment authorization was to expire on that date. Respondent proffered no evidence, however, that as of that date, or as of any later time, anyone on Respondent's behalf took steps either to reverify Mr. Rivera's continued employment eligibility or, alternatively, to discharge him if his eligibility had in fact expired. It is instructive in this respect that the reverse of the I-9 form provides in boldface type: ``NOTE: Employers are responsible for reverifying employment eligibility of employees whose employment eligibility documents carry an expiration date.''

Instead, Respondent continued to employ Mr. Rivera until INS apprehended him on January 18, 1989, three and a half months after his employment authorization expired on October 1, 1988. The question to be resolved, therefore, is whether Respondent had the requisite ``knowledge'' that Mr. Rivera was ineligible to work in the United States, and thus liable as an employer under 8 U.S.C. § 1324a(a)(2).

Early cases under 8 U.S.C. § 1324a which address the issue of knowledge have formulated and utilized a constructive knowledge standard, applicable to the case at hand. United States v. Mester Mfg. Co., OCAHO Case No. 87100001, June 17, 1988; aff'd, Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989), held that ``[I]t is irrelevant by what means respondent obtained notice sufficient to form the scienter by which it is concluded respondent knew, or should have known, that the status of the employees was that they were unauthorized aliens.'' Id. at 44. In affirming Mester (OCAHO), the Ninth Circuit held that the employer had constructive knowledge that the alien worker was unauthorized, even if no employee had actual specific knowledge of unauthorized status, and thus, the employer could be held liable for violating IRCA. Mester, supra, at 567.

Subsequent decisions adopted and elaborated the Mester constructive knowledge standard. In United States v. New El Rey Sausage Company, Inc., OCAHO Case No. 88100080, July 17, 1989; modified (on other grounds) by CAHO, August 4, 1989, the ALJ applied a reasonable care standard (id. at 32):

> An employer shall be deemed to have constructive knowledge if it has reason to know that the employee was unauthorized to work in the United States. An employer shall be deemed to have reason to know that an employee is not authorized to work in the United States if it can be shown by a preponderance of the evidence that the employer was in possession of such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question (i.e.) whether or not the alien-employee is authorized to work)...

A recent employer sanctions case held that evidence of knowledge to support a ``knowingly continue to employ'' charge is sufficient where an employer should have known that the alien had become unauthorized. United States v. Collins Food International d.b.a. Sizzler Restaurant, OCAHO Case No. 8900084, February 8, 1990 at 11; aff'd by CAHO, February 8, 1990; United States v. Sophie Valdez, supra, at 11.

These cases inform that knowingly continuing to employ an unauthorized alien in violation of 8 U.S.C. § 1324a(a)(2) can be proven by showing actual or constructive knowledge of the alien's immigration status and/or eligibility to be employed in the United States. Applying the constructive knowledge standard to Mr. Wash, I find that Respondent did violate 8 U.S.C. § 1324a(a)(2) in that it continued to employ an alien, Mr. Rivera, knowing that he had become unauthorized with respect to that employment. Contrary to Respondent's argument, it is not necessary to find that the employer intended to continue to employ Mr. Rivera without regard to his employment authorization. It is enough that Respondent should have known of that unauthorized status and failed to act in conformity with Section 101 of IRCA and implementing regulations. 8 U.S.C. § 1324a(b).

Notice is given when it is communicated. Plunkett v. Roadway Express, Inc., 504 F.2d 417, 418 (10th Cir. 1974); Reeves v. American Optical Co., 408 F.Supp. 297, 301 (W.D.N.Y. 1976). Mr. Stevens has acknowledged that at the time he completed the Rivera I-9 he was on notice that Mr. Rivera's employment authorization would expire on October 1, 1988. An employer is obligated to reverify the employment status of its employees. 8 C.F.R. § 274a.2(b)(1)(vii).

Federal case law instructs that failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law. Mungin v. Florida East Coast Railway Company, 318 F.Supp. 720, 737 (M.D. Fla. 1970), aff'd, 441 F.2d 728 (5th Cir. 1971), cert. denied, 404 U.S. 897 (1971). See also United States v. New El Rey Sausage Co., Inc. supra at 27-30, (analogizing unlawful employment of minors to employment of unauthorized aliens).

To hold that liability attaches only when it is proven that an employer specifically intended to continue to employ an unauthorized alien would minimize the Act's effectiveness by providing a loophole with which to escape liability under 8 U.S.C. § 1324a(a)(2). See Collins Food, supra, at 13:

> There is a strong policy argument in favor or an administrative law judge relying on circumstantial evidence which gives the employer notice of an employee's status as an illegal alien. The argument is that to do otherwise would encourage an employer to consciously avoid acquiring knowledge of the employees immigra-

> tion status whenever the employer suspects, from the circumstantial evidence before him, that his employee is an illegal alien.

To adopt Respondent's argument would, in effect, require the conclusion that an employer is not responsible for reverifying an individual's employment authorization absent proof of intent to continue the employment without regard to expiration of work authorization. I reject Respondent's criterion by which intent to violate the law becomes an essential element of proof. Mester, (OCAHO), supra, at 20. For the same reason, I do not agree that decisional law under provisions of the INA outside IRCA are dispositive of cases arising in this new venue.

Nor am I persuaded by the ``pattern or practice,'' 83 U.S.C. § 1324a(f)(l), or other references to immigration law relied on by Respondent. Pattern or practice violations of the prohibition against hiring or continuing to hire aliens unauthorized to work in the United States in employer sanctions are exclusively criminal and have no bearing on this civil action.

Respondent is correct that the legislative history of IRCA confirms that `` `Pattern or practice' has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts.'' House Report No. 99-682(I), House Committee on the Judiciary, 99th Cong. 2nd Sess. 1, reprinted in 1986 U.S. Code Cong. & Admin. News, 5649, 5663 (USCCAAN); Resp. Br. 12-13.

Respondent overlooks that culpability for ``pattern or practice'' differs from responsibility for the unlawful conduct in the case at hand not on the basis of ``intent'' but on frequency. The House Judiciary Committee made absolutely clear that knowledge would be the critical inquiry. Intent was not mentioned: ``. . . if an employer has knowledge that an alien's employment becomes unauthorized due to a change in nonimmigrant status, or that the alien has fallen out of the status for which work permission is authorized, sanctions would apply.'' Id. at 5661. (Emphasis added).

Respondent's shifting burden argument, Resp. Br. 19-22, also fails for the reason that the ``because of'' clause of 8 U.S.C. § 1324b(a)(l)(b), cited as the basis of the shifting burden language, is absent in a case of knowingly continuing to hire. Moreover, Respondent's reliance on U.S. v. Mesa Airlines, OCAHO Case Nos. 88200001-2, July 24, 1989, it inapposite. References to shifting burdens of proof in Mesa and earlier precedents in case law under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., reflect particularized concerns over allocation of the burden of persuasion in the development of federal discrimina-

tion jurisprudence. They do not per se apply in other contexts, such as the venue established by 8 U.S.C. § 1324a(e)(3).

Finally in this respect, the ``intent'' standard of the discrimination cases does not assist Respondent because it is not intent to violate the law that is at issue but intent to perform an act for which the law has prescribed consequences, i.e., culpability for continuing to employ an unauthorized alien knowing the alien to be unauthorized. Cf. U.S. v. Marcel Watch Corporation, OCAHO Case No. 89200085, March 22, 1990 at 13, 15.

2. The A-File Issue

Count I involves an alien, Mr. Rivera, who concededly entered the country illegally, but when hired by Respondent possessed documentation which authorized employment for a specified period of time. Respondent contends that Count I must be dismissed because Complainant failed to produced Rivera's A-file, without which, it is argued, I am unable to find that Rivera was in fact unauthorized to work in the United States at the time of the INS inspection at Mr. Wash, January 18, 1989. The argument appears to be that since Rivera was authorized to work in the United States for a period ended October 1, 1988 and again from March 31, 1989 until October 5, 1989, extended until July 1990, the A-file is critical to an inquiry whether the also had authorization on January 18, 1989.

It is unquestioned that a valid subpoena duces tecum was issued at Respondent's request. The parties do not agree that the subpoena was sufficiently precise to prompt production of the Rivera A-file. I cannot agree with Complainant on this score, instead finding the description adequate for the purpose. I do conclude, however, that Respondent failed to pursue its effort to obtain access to the A-file at hearing, rendering moot its claim that Count I must be dismissed.

Nothing contained in the Federal Rules of Civil Procedure (Rules or FRCP) cited by Respondent dictates the result sought. Indeed, the Rules make clear that federal trial judges have great discretion in selecting among tools at their disposal in response to failure of a party to obey their orders. See e.g., FRCP 37(b). Moreover, nothing in the rule of practice and procedure of this Office compels an administrative law judge to reach the Draconian result sought by Respondent. Rather, the rules of practice and procedure on this Office leave to the discretion of the trial judge the selection of remedies for noncompliance with discovery orders and subpoenas. 28 C.F.R.

§§ 68.21(a) and (c), 23(b), 26(b) [citations are to 54 Fed. Reg., 48593 (Nov. 24, 1989) (to be codified at 28 C.F.R. Part 68)].[3]

Most importantly, the record is barren of any basis for a reasonable inference to be drawn that INS failed to respond to the subpoena, or that, if it did, Respondent sought any relief from the bench on that account prior to its post-hearing briefing. For whatever reason, Respondent failed to pursue the request for the A-file, electing instead to conclude his examination of Mr. Michelin. (Tr. 152-153):

> Ms. Towler: Your Honor, I would like to state for the record that we do have all files pertaining to the individuals that he is interested in.
>
> Mr. Maggio: I have no further questions of this witness, Your Honor. I just think that the testimony speaks for itself in this regard. Thank you, Your Honor.
>
> Judge Morse: Do you have anything further of the witness?
> Ms. Towler: No Your Honor.
>
> * * * * * * *
>
> Judge Morse: The file's did support this entry.
>
> The Witness: The file did not reflect any extension of work authorization and that he was, indeed, issued this work authorization which expired on October 1st.
>
> Judge Morse: So they both supported the fact that he had the authorization as it appears on there, and, insofar as the file showed no further extensions.
>
> The Witness: That's correct, Your Honor.
>
> Judge Morse: Thank you, Sir, you are excused.

In my judgment, the record does not support a finding that INS failed to produce the A-file, but even if it did, Respondent abandoned any claim it might have had as the result of such failure. Even assuming that Respondent's contention was otherwise well-founded, case law relied upon to support its argument is not persuasive.

Cases mandating dismissal reflect the harshness of such action by implicating situations where a party's failure to comply with discovery orders is due to willfullness, bad faith, or grossly negligent conduct. Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958); Zieses v. Dept. of Social Services of the Human Resources

[3]At the time this case was tried, the Rules of Practice of this Office provided that ``[T]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.'' 52 Fed Reg. 44,972, (November 24, 1987), 28 C.F.R. § 68.1.

Administration of the City of New York, 112 F.R.D. 223 (E.D.N.Y. 1986); Cine Forty-Second Street Theatre Corp. v. Allied Artists, 602 F.2d 1062, 1067 (2nd Cir. 1979); Flaks v. Koegl, 504 F.2d 702, 709 (2nd Cir. 1974). Such cases frequently reflect months and even years of discovery delayed due to a party's conduct or repeated failure to comply with orders compelling such discovery. Zieses v. Dept. of Social Services of the Human Resources Administration of the City of New York, supra; Batson v. Neal Spelce Assocs., 765 F.2d 511 (5th Cir. 1985); Morton v. Harris, 86 F.R.D. 437 (N.D.Ga. 1980), aff'd, 628 F.2d 438 (5th Cir. 1980), cert. denied, Morton v. Schweiker, 450 U.S. 1044 (1981); Affanato v. Merrill Bros., 547 F.2d 138 (1st Cir. 1977); Philpot v. Philco-Ford Corp., 63 F.R.D. 672 (E.D. Pa. 1974). Several cases make clear that only orders ``as are just'' should be entered. FRCP 37; Donovan v. Gingerbread House, Inc., 106 F.R.D. 57 (D. Colo. 1985); Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977), and should not be used where a party's failure to comply is due to confusion or sincere misunderstanding of the court's order. Batson v. Neal Spelce, supra, at 514. Finally, dismissal is not warranted where failure to comply is due to mere oversight of counsel amounting to no more than simple negligence. Cine Forty-Second Street, supra, at 1068. Dismissal is the severest of sanctions a court could order. See e.g., FRCP 37.

Respondent's reliance on Rabb v. Amatex, 769 F. 2d 996 (4th Cir. 1985) is misplaced. In Rabb, the Fourth Circuit, in affirming the district court's dismissal of the complaint, found that plaintiff had ``deliberately disregarded the pretrial order,'' id. at 1000, established by the district court. Here, the facts do not point to a ``deliberate disregard.'' Rather, the record is consistent with the A-file having been available to Respondent. Even though Complainant did not specify where the file was actually located, Respondent gave the government no opportunity to explain its location or to produce it. Tr. 152-153.

Finally, Respondent has offered no showing of specific prejudice as the result of failure to obtain the A-file. Moreover, whatever significance might have attached to the failure of Complainant to produce the A-file at hearing is mooted by Respondent's abandonment of its effort to produce it; at no time during hearing did Respondent ask the bench to assist in obtaining the A-file.

Even absent the A-file, I find the testimony sufficient to determine that Rivera was an unauthorized alien at the time of the inspection. Both Michelin and Rivera testified to that effect. On the basis of his training and experience, Michelin but not Rivera might be expected to know the legal niceties of the term ``unauthorized alien.'' Certainly Mr. Rivera can be credited with the ability to

know whether, as he testified, he lacked work authorization at the time of arrest on January 18, 1989. As appears from his pre-hearing declaration, he was surprised on that date to have learned that his authorization had expired (Exh. 6); on that date, when he handed it over to the agents he was reminded it had expired. Tr. 254.

I attribute to lack of sophistication and matters of translation nuances suggesting modest inconsistency between Rivera's pre-hearing statement that he could get authorization renewed any time he asked, and his testimony that it was renewed at least once without request on his part. Exh. 6, Tr. 270. In sum, I have no reason, based on his demeanor at hearing or by any inference to be drawn from the record, including his relationship to INS, to doubt the probity of Rivera's testimony.

As a statutory term, ``unauthorized alien'' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General. 8 U.S.C. § 1324a(h)(3). There is no reason in the record for me to disbelieve Rivera or Michelin when they testified that Rivera was unauthorized to be employed in the United States on January 18, 1989. There is nothing in this record to support an inference that Complainant acted improperly in initiating this case. Accordingly, I find and conclude that Mr. Rivera was on the date specified in the Compliant an unauthorized alien within the meaning of § 1324a(h)(3) and, consequently, § 1324a(2).

B. Count II: Failure to Comply with Employment Verification Requirements

Respondent has conceded liability for the paperwork violation involving Carlos Rodriguez. It follows that the sole paperwork violation issue in dispute is the appropriate quantum of civil money penalty.

V. CIVIL MONEY PENALTIES

As appears above, I find that Respondent violated both 8 U.S.C. § 1324a(a)(2) and § 1324a(a)(1)(B), as alleged, with respect to Carlos Rivera and Carlos Rodriguez, respectively. Having found culpability, I am required by IRCA to assess civil money penalties ``in an amount of not less than $250 and not more than $2,000 . . .,'' with respect to the knowingly continuing to employ violation, and ``in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred'' for the paperwork violation.

INS has proposed the statutory maximum, $2,000, for knowingly continuing to employ Carlos Rivera and $250 for the paperwork violation involving Carlos Rodriguez. I am obliged, in determining the quantum of penalty of the paperwork violation, to consider the size of the employer's business, the good faith of the employer, the seriousness of the violation, whether the individual involved was an unauthorized alien, and the history, if any, of prior violations. Congress mandated these five criteria in determining the amount of civil penalty for paperwork violations, but failed to require such criteria as to violations of unlawful employment of aliens. Compare 8 U.S.C. § 1324a(e)(4) with 8 U.S.C. § 1324a(e)(5).

A. Count I

In setting the penalty for the unauthorized employment charge, Mr. Wright, applying the criteria of 8 U.S.C. § 1324a(e)(5), concluded as follows: (1) that Mr. Wash is an ongoing daily operation that generates income and employs about 20 at their Arlington, Virginia location, Tr. 223-24; (2) the apprehension of two unauthorized aliens was a serious violation and not good faith on the part of the employer; (3) it was not good faith that three months had elapsed after the expiration of Rivera's work authorization; (4) the employees involved in the violations constituted 10% of the total at the Arlington location, i.e., two illegal aliens out of twenty employees; (5) Mr. Wash had a ``call-up system,'' i.e., a review system by which the employer can periodically review the I-9s for employees who have work authorization to ensure whether or not an authorization has, or is about to, expire; (6) Respondent had no history of involvement with INS; and, finally, (7) INS had visited and provided Respondent with the employer handbook and ample time to review it.

Claiming to have applied the five factors specified in § 1324a(e)(5), Mr. Wright laid particular emphasis on the fact that unauthorized aliens were apprehended. While the factors required for assessing the penalty for paperwork violations are helpful as guidelines in assessing the penalty for unlawful employment of aliens, they do not necessarily apply. This is so both because IRCA does not mandate them and because of the substantive differences between the two types of violations.

As I pointed out in Mester (OCAHO), it may be speculated that the absence of guidelines for assessing civil money penalties for employment violations is accounted for, at least in part, by the nature of the proof required in an unauthorized employment case. Id. at 4 n. 5. Identification of individuals as unauthorized alien employees is inherent in the definition of continuing to employ unauthorized aliens. It follows that on a finding of knowingly continuing

to employ an unauthorized alien the unauthorized status of the alien is a necessary precondition to culpability.

In setting the level of the civil money penalty, Wright evaluated the fact that the employer had filled out most of the I-9s, but conceded on cross-examination that he had not considered that Respondent had revised its employment application. He did testify, however, that reflecting IRCA in the employment application said something good about Respondent's good faith.

James Elder, an INS Employer and Labor Relations Officer, would consider an employer who did the following to be making good effort to comply with IRCA: changed its employment application to indicate the documentary requirements of IRCA; trained its management and supervisory personnel in IRCA's requirements; organized a meeting of all employees to inform them about IRCA; and fired many employees upon learning that they were not authorized to work.

Respondent's noteworthy steps to comply with Section 101 of IRCA demonstrate a positive effort on its part to comply with IRCA and its underlying objectives. Respondent has made a substantial good faith showing of its effort to comply with IRCA requirements. The record reflects its stated intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance.[4] United States v. Felipe, Inc., OCAHO Case No. 89100151, October 11, 1989; aff'd by CAHO, November 29, 1989.

Obviously, the good faith showing is tempered by Respondent's failure to assure Rivera's continued work authorization after October 1, 1988, or to do anything about it, and by blind acceptance of the tainted Rodriguez Social Security card. There are no previous violations, however, and I will consider only offenses proven on this record.

There is no reason to suppose that as a going business Respondent is unable to pay a modest penalty. Notwithstanding that INS made a credible effort to apply the criterion of 8 U.S.C. § 1324a(e)(5), there is no reason to apply them rigidly.

Absent, as here, a credible basis in the record on which to posit the maximum assessment, selection of the maximum in effect writes out of the law the broad discretion granted by 8 U.S.C.

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[4]Good faith, however, is only a consideration in determining the quantum of civil penalty to be assessed and is not a defense to IRCA's employment verification requirements. United States v. Big Bear Market, OCAHO Case No. 8810038, March 30, 1989. Nor is good faith a defense to violations arising under 8 U.S.C. § 1324a(a)(2), for continuing to employ an alien knowing his employment has become unauthorized. See 8 U.S.C. § 1324a(a)(3) (allowing the defense of good faith only for violations arising under 8 U.S.C. § 1324a(a)(1)(A)).

§ 1324a(e)(4). Accordingly, not being bound by a particular statutory formulation, considering all the foregoing, I determine judgmentally that $500.00 is an appropriate and just civil money penalty for Count I.

B. Count II

The civil money penalty assessed by INS for the paperwork violation reflected Mr. Wright's view that the Social Security card was obviously fraudulent coupled with the fact that Part I of Form I-9 was not filled in. I have already discussed, among the five statutory criteria, Respondent's ``good faith'' and lack of a history of previous violations.

Among the remaining criteria, the record is silent as to size except to the extent that I can speculate as to the number of employees based on those at the scene on January 18, 1989, plus Messrs. Harris and Stevens. Certainly the penalty proposed by INS is not disproportionate on the basis of size.

Taking into account the hierarchy of considerations in gauging seriousness of I-9 violations set forth in Felipe, supra, at 11, the penalty proposed by INS is reasonable. There were approximately twenty employees on the premises on the date of the inspection. As the result of the audit, out of more than 100 I-9s examined, only one was charged as defective. In that light, it would be unreasonable to assess a penalty at the higher end of the permissible range. Nevertheless, although the Rodriguez I-9 was signed by both employee and Respondent, Part 1 contained no entries as to status of the employee, and the copy of the document attached as the Social Security card contained the endorsement which made plain on its face that it was not issued by the United States.

The criterion concerning ``whether or not the individual was an unauthorized alien,'' 8 U.S.C. § 1324a(e)(5), requires recognition that Rodriguez was unauthorized, but was the only employee as to whom an I-9 charge was made in the Complaint. I do not understand the quoted criterion to contemplate that I count for paperwork violation purposes the unauthorized status of the other individual, Mr. Rivera.

The criteria of 8 U.S.C. § 1324a(e)(5) must be applied by the judge in determining the amount of the penalty whenever paperwork violations are found. 8 U.S.C. § 1324a(e)(3). In any such case, the question arises as to the weight to be given to the amount of penalty assessed by INS. In my judgment, absent direction in IRCA to the contrary, the amount so assessed by INS is entitled to some weight

but not deference.[5] I conclude, judgmentally, that the civil money penalty assessed by INS reasonably comports with the statutory criteria.

VI. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, and proposed findings of fact and conclusions of law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. As previously found and discussed, I determine, upon the preponderance of the evidence, that Respondent violated 8 U.S.C. § 1324a(a)(2) by continuing to employ in the United States the alien, Rivera, identified in Count I of the Complaint, knowing him to have become authorized with respect to that employment.

2. That upon hiring an alien whose authorization to work in the United States shows on its face, as did that of Mr. Rivera, that it would expire on a date certain, Respondent, as the employer, had an affirmative duty under 8 U.S.C. § 1324a, and its implementing regulations issued by INS, to reverify employment eligibility. Whether negligent or deliberate, Respondent's failure to reverify is not found to have been excusable.

3. That on or about January 18, 1989, Rivera, an alien unauthorized to work in the United States, and so known to Respondent, was employed by Respondent at its Arlington, Virginia location. 8 U.S.C. § 1324a(h)(3)(B).

4. That Respondent, as the employer, is obliged to exercise reasonable care to ensure that it does not continue to employ, after expiration of a work authorization known to it to have a limited duration, an individual who has by virtue of that expiration become unauthorized for that employment in the United States.

5. That Respondent, as the employer, is responsible for compliance with 8 U.S.C. § 1324a under an objective statutory standard, 8 U.S.C. § 1324a(a)(2), i.e., knowledge, whether conceded or imputed, without regard to the subjective state of mind of Respondent, i.e., whether or not it intended to violate IRCA.

6. That on the record in this case it is no defense to a charge of knowingly continuing to employ an unauthorized alien, i.e., Rivera,

[5]Of interest, if not controlling because criminal procedures are implicated, in the case of a sentence to death, the Supreme Court has recently found constitutionally permissible the exercise by a state appellate court of authority to reweigh the jury's consideration of aggravating and mitigating evidence. Clemons v. Mississippi, ___ U.S.___, 58 U.S.L.W. 4395 (March 27, 1990) (No. 88-6873).

that the alien has or may have had a relationship with Complainant that enabled him to obtain new work authorizations from time to time.

7. That knowledge at the time of hire that the alien's work authorization would expire and his continued employment beyond that date is sufficient for culpability under 8 U.S.C. § 1324a(a)(2), without regard to whether Respondent, as the employer, intended to violate 8 U.S.C. § 1324a.

8. That an affirmative defense of good faith is unavailing to Respondent on a charge of violating 8 U.S.C. § 1324a(a)(2) where, as here, Respondent has failed to establish compliance with the requirements of the employment verification system, including reverification, established by and pursuant to 8 U.S.C. § 1324a(b), whether that failure results from errors or acts of omission or commission by Respondent or its employees.

9. That the civil money penalty assessed by INS at $2,000.00 for the single violation with respect to one employee only is unreasonably harsh on this record but that, judgmentally, it is just and reasonable to require Respondent to pay a civil money penalty in the sum of $500.00 for Count I of the Complaint.

10. That Respondent shall cease and desist from violating the prohibitions against hiring, recruiting, referring or continuing to employ unauthorized aliens, in violation of 8 U.S.C. § 1324a(1)(A) and (a)(2).

11. That Respondent failed to ensure that its employee Rodriguez properly completed Part 1 of Form I-9, presented to INS on or about January 27, 1989, following timely prior notice of inspection, as the result of which Respondent is found, by the preponderance of the evidence, to have violated 8 U.S.C. § 1324a(a)(1)(B).

12. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. § 1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty in the sum of $250.00, the amount assessed by INS, for Count II of the Complaint.

13. This Decision and Order is the final action of the judge in accordance with 28 C.F.R. § 68.51(a). As provided at 28 C.F.R. § 68.51(a), this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. § 1324a(e)(7), 28 C.F.R. § 68.51(a)(2).

SO ORDERED.
Dated this 6th day of April, 1990.

MARVIN H. MORSE
Administrative Law Judge