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

United States of America, Complainant v. Mester Manufacturing Co., Respondent; 8 U.S.C. Section 1324a Proceeding; Case No. 87100001.

DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Syllabus

Where a citation alleging any violation of 8 U.S.C. 1324a has been delivered to the employer, the statutory requirement that a citation must precede any proceeding or order arising out of alleged violations occurring between June 1, 1987 and May 31, 1988 is satisfied without regard to whether the provision of 8 U.S.C. 1324a alleged in the citation to have been violated is the same as the allegation in the subsequent proceeding or order, or whether the employees involved in both are the same.

Where an employer is notified by the Immigration and Naturalization Service that there is a question with respect to the status of an alien employee, that employer cannot succeed on a subsequent affirmative defense to an allegation of knowingly continuing to employ the unauthorized alien that the employer complied in good faith with the employment verification system absent a showing of timely and specific inquiry concerning that notice so as to perfect compliance with the paperwork requirements and to promptly discharge the unauthorized employee.

Where the complaint, by incorporating the notice of intent to fine, alleges substantive counts which would constitute violation of a different statutory provision than the one alleged to have been violated, and alleges also violation of a non-existent regulatory provision such that it is uncertain whether the regulatory provision intended to have been cited would have been consistent with the cited statute or with another statutory provision the violation of

which would have been consistent with the substantive counts alleged, it is not proper for the judge to speculate as to which violation was intended to have been alleged, and the counts will be dismissed for failure to state a cause of action.

Appearances: Martin D. Soblick, Esq., Alan S. Rabinowits, Esq., and Michael J. Creppy, Esq., for The Immigration and Naturalization Service.

Peter N. Larrabee, Esq., for The Respondent.

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I. STATUTORY BACKGROUND

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), adopted significant revisions in national policy on illegal immigration. Accompanying other dramatic changes, IRCA, at section 101, adopted the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon

employers who hire, recruit, refer for a fee[1] or continue to employ ``unauthorized'' aliens in the United States.

Section 101 of IRCA amended the Immigration and Nationality Act of 1952 by adding a new section, 274A, to the Immigration and Nationality Act (INA, the Act, or statute) (8 U.S.C. 1324a).[2]

> Title 8 U.S.C. 1324a(h)(3) defines those persons whose employment, prospectively, would be unlawful:
> ... the 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.

Title 8 U.S.C. 1324a(b)(1)(A) provides also 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....

In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring (recruiting or referring for a fee) or continuing to employ such aliens, 8 U.S.C. 1324a(f)(1). The entire arsenal of public policy remedies against unlawful employment of aliens is commonly known by the rubric ``employer sanctions.''

Because this is the first decision in point of time to be issued by an administrative law judge under IRCA upon a fully litigated record, it is instructive to focus attention on the statutory and regulatory predicate for such decisions generally. Counsel for both parties and the judge have expressed mutual respect for the innovative and ground breaking aspects of this litigation. See, e.g., Joint Motion To Extend Briefing Schedule (additional briefing time in light of ``novel issues of law and fact''). This is the first employer sanctions case to reach hearing. However, other such cases have been disposed of by decisions which, upon granting default judgments or approving settlements or consent findings, have provided guidance concerning the role and function of the hearing process as dictated by sections 1324a and 1324b of title United States Code, and by the Administrative Procedure Act (APA).[3]

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[1]For convenience, no allegation having been made in this case concerning recruitment, or referring for a fee of unauthorized aliens, those terms generally will not be further mentioned in this decision. The statutory term ``person or other entity'' is understood for purposes of this decision to be ``employer.''

[2]Section 274A of the INA is Modified as 8 U.S.C. 1324a.

[3]See, e.g., United States v. R & R Landscaping & Maintenance, Inc. Case No. 88100003, Supplementary and Final Decision and Order of the Administrative Law Judge, May 3, 1988, (decision adopting consent findings after evidentiary hearing has begun), adopted by the Chief Administrative Hearing Officer (CAHO), May 20,

IRCA provides that the new employer sanctions do not apply to ``grandfathered'' employees, i.e., those who were hired before the date of enactment [November 6, 1986], and whose employment continued subsequent to that date. IRCA, Section 101(a)(3), 100 Stat. 3359, at 3372; 8 U.S.C. 1324a (note).

In recognition of the significant impact IRCA might be expected to have upon the national work place, and the need for public education concerning its provisions, during the six (6)-month period following enactment, beginning on the first day of the next month, 8 U.S.C. 1324a(i)(1), no enforcement action was permitted to take place. During the subsequent twelve (12) months, June 1, 1987 through May 31, 1988, no enforcement action was permitted to occur for a first violation. Instead, the Attorney General, was authorized to issue a citation ``indicating'' that a violation may have occurred; the Immigration and Naturalization Service (INS or Service) was barred during that period from initiating any enforcement action ``on the basis of such alleged violation or violations.'' As to any particular employer, it was required during the year ended May 31, 1988, that there first be a ``citation'' to the effect that the Attorney General (or his delegee) ``has reason to believe that the person or entity may have violated ...'' the employer sanctions provisions. 8 U.S.C. 1324a(i)(2).

The statutory scheme contemplates that INS, as the enforcement agency with responsibility to initiate actions to impose civil liability on an employer will, upon request by a respondent employer, bring an action before an administrative law judge who will conduct proceedings pursuant to the APA.[4]

1988; United States v. Jupiter Crab Company Restaurant, Case No. 88100018, and United States v. Lighthouse Restaurant, Case No. 88100016, Order Dismissing Proceeding Predicated Upon Agreement Between the Parties (in each case) May 25, 1988, (order after review, approving agreed dismissal), adopted by the CAHO, June 8, 1988; United States v. S. Masonry Fencing Company, Case No. 88100006, Summary Decision on Default and Order of the Administrative Law Judge, May 11, 1988 (granting motion for summary decision and for default judgment, noting that paperwork violations alone do not support issuance of a cease and desist order), adopted by the CAHO, June 8, 1988; United States v. Elsinore Manufacturing, Inc., Case No. 88100007, Summary Decision on Default and Order of the Administrative Law Judge, May 20, 1988, (granting motion for default judgment in part, but denying so much of the motion as seeks a cease and desist order for paperwork violations alone), modified by the CAHO, June 16, 1988. See also, and, as to separation of functions discussed in context of unfair immigration-related employment practice cases, 8 U.S.C. 1324b, Romo v., Todd Corporation, Case No. 87200001, Third Post-Hearing Order, May 13, 1988 (interlocutory ruling)

[4]Title 8 U.S.C. 1324a(e)(3)(B) provides that ``[a]ny hearing so requested shall be conducted before an administrative law judge ... [to be] conducted in accordance with the requirements of section 554 of Title 5,'' United States Code.

By providing for an opportunity for hearing before administrative law judges and triggering 5 U.S.C. 554, the statute invokes the formal hearing and adjudication provisions of the APA. The result is that the statute clearly evinces an intent that dispute resolution be accomplished in a way that assures employer access on the record to adjudicators whose decisional independence is conferred by statute, e.g., 5 U.S.C. 3105, 4301, 5335, 5372, and 7521, and acknowledged by the Supreme Court of the United States. See, Butz v. Economou, 438 U.S. 478, 513, 514 (1978); see also, 5 C.F.R. Part 930.

Reference to the APA emphasizes the degree of decisional independence mandated by the new law, unique among immigration-related venues; Section 554(d) of Title 5, United States Code, makes plain that ``[e]xcept to the extent required for the disposition of ex parte matters as authorized by law ...'' the administrative law judge may not ``(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.'' The APA makes explicit the separation of functions, compelled by 5 U.S.C. 554(d)(2), between the judge and the enforcement authority, e.g., the INS: ``An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.'' Id.

The APA dictates in broad terms the procedures to be followed in conducting hearings, and in prescribing the powers available to and to be exercised by administrative law judges in conducting hearings, e.g., 5 U.S.C. 555-557. Title 8 U.S.C. 1324a(e)(6), by explicitly describing the scope and extent of administrative review, overtakes 5 U.S.C. 557 to that extent, and informs also that ``the decision and order'' of the judge becomes ``the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates'' it.

The civil penalties, 8 U.S.C. 1324a(e)(4)(A), include, for violation of the prohibition against continued employment of an alien knowing the alien is, or has become, unauthorized with respect to that employment, an order (a) requiring the employer to cease and desist from such violation and (b) requiring payment of a civil money penalty as to ``each unauthorized alien with respect to whom a violation ... occurred.'' There is a hierarchy of civil money penalties, from not less than $250 to not more than $2,000

per unauthorized alien with respect to an initial order of culpability; $2,000 to $5,000 per unauthorized alien in the case of an employer ``previously subject'' to one such order; and $3,000 to $10,000 per unauthorized alien in the case of an employer previously subject to more than one such order. Id. The civil penalty for failing to comply with the requirements of the employment verification system, i.e., paperwork violations, is a civil money penalty of not less than $100 to not more than $1,000 imposed on the employer for each violation with respect to each employee. 8 U.S.C. 1324a(e)(5).[5]

The Equal Access to Justice Act (EAJA) provisions applicable to adversary adjudications under the APA presumably are available to a prevailing party under Section 1324a other than the United States, in the absence of a provision to the contrary. [6]

II. REGULATORY BACKGROUND

Section 274A of the INA, 8 U.S.C. 1324a, assigns a number of duties and powers to the Attorney General in the administration of employer sanctions. The statutory duties and powers are generally conferred with no limit on the Attorney General's authority to re-

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[5]Title 8 U.S.C. 1324a(e)(5) provides guidelines for assessing civil money penalties for paperwork violations, but none for assessing civil money penalties for violations of the prohibitions against employment of unauthorized aliens. As to paperwork violations:

> ... In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

It may be speculated that, in part at least, the specification of guidelines for assessing civil money penalties for paperwork violations but not for employment violations is accounted for by the nature of the proof required in an unauthorized employment case. As to the latter, of the five elements, (i) good faith compliance with paperwork requirements is a defense on the merits, (ii) the unauthorized status of the alien is a necessary precondition to culpability and (iii) the history of previous violations is a necessary element in assessing monetary liability in conformity with the hierarchy of civil money penalties

[6]Title 5, U.S.C. 504(a)(1), provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

See also, 5 U.S.C. 504(b)(1)(C), `` `adversary adjudication' means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise ***.''

delegate.[7] Absent any constraint on redelegation by the Attorney General, the programmatic and enforcement aspects of the employer sanctions law are within the purview of the Commissioner, INS, by virtue of 8 U.S.C. 1103(a).[8] The implementation of that redelegation authority is set forth at 8 C.F.R. 2.1 which authorizes the Commissioner, INS, subject to limitations, to enforce the INA. See also, 28 C.F.R. 0.105. Accordingly, by Final Rule published May 1, 1987, 52 Fed. Reg. 16190, 16216-28, now codified at 8 C.F.R. Part 274a, the INS implemented the programmatic and enforcement portions of the employer sanctions law.[9]

Inter alia, the INS regulation clarifies that the grandfather clause applies to all employees hired prior to November 7, 1986, i.e., through November 6, 1986. 8 C.F.R. 274a.7. The responsibility of the Attorney General to initiate forms for attestation of employment verification in compliance with 8 U.S.C. 1324a(b) is expressed in the INS regulation which establishes and designates the ``Form I-9,'' to be used with respect to all individuals who are hired after November 6, 1986. 8 C.F.R. 274a.2.

By interim final rule published November 24, 1987, 52 Fed. Reg. 44972-85, the Attorney General adopted rules of practice and procedure for hearings under IRCA before administrative law judges, to be codified at 28 C.F.R. Part 68.

By providing for hearings before administrative law judges, e.g., 8 U.S.C. 1324a(e) (2) and (3), IRCA implicitly compelled the Department of Justice to set up a system of such judges. Accordingly, the Attorney General ``created the position of Chief Administrative Hearing Officer *** responsible for generally supervising the Ad-

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[7]See, however, title 8 U.S.C. 1324a(e)(6): On describing administrative review of administrative law judge decisions and orders, ``[t]he Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.''

[8]``The Attorney General *** is authorized *** to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act ***.'' (INA, Section 103(a)). See also, section 103(b), ``The Commissioner *** shall be charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General.''

[9]The INS regulation, at 8 C.F.R. Part 274a, reflects also an amendment to the May 1, 1987 issuance, published as an interim rule on November 9, 1987, 52 Fed. Reg. 43050-54. The regulation as amended, 8 C.F.R. Part 274a, has since been amended by a final rule published March 16, 1988, 54 Fed. Reg. 8611-14.

ministrative Law Judge Program ***.''[10] The rules of practice and procedure provide, inter alia, that the Chief Administrative Hearing Officer (CAHO, or OCAHO), is the Attorney General's delegee for review of administrative law judge decisions and orders under 8 U.S.C. 1324a(e)(6). See 28 C.F.R. 68.2(d) and 68.52(a).

Nothing in the statute forecasts that requests for hearing should be made to the Service from whose enforcement action the employer seeks escape. That, however, is the means by which the employer, for response to an order to cease and desist and/or for civil money penalties, is afforded the opportunity to request a ``hearing respecting the violation.'' 8 U.S.C. 1324a(e)(3). See 8 C.F.R. 274a.9 (c) and (d). Although the statute contemplates civil money penalties for violations of the prohibition against knowing employment of unauthorized aliens (and, issuance of a cease and desist) and for failure fully to comply with paperwork requirements, the Service insists that ``the proceeding to assess administrative penalties under section 274A of the Act is commenced by the Service by issuing a Notice of Intent to Fine ***'' 8 C.F.R. 274a.9(c).

The INS regulation in effect at the time this proceeding began provided that the Notice of Intent to Fine (NIF) would inform employers of the need to file a timely answer and request for hearing before an administrative law judge in order to avoid a final unappealable order. Id., at 9 (c) and (d).[11]

Under the OCAHO rules of practice and procedure, INS files complaints to initiate the hearing process, 28 C.F.R. 8.2(f) and(g)[12]

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[10]Final Rule, 52 Fed. Reg. 44971-72, November 24, 1987, as amended, Final Rule, 52 Fed. Reg. 48997-98, December 29, 1987. Cf., 28 C.F.R. 68.2(d) (describing and defining the role and delegated duties of the Chief Administrative Hearing Officer. Administrative law judges, appointed to their positions by their employing agencies, 5 U.S.C. 3105, are initially selected from competitive civil service registers as the result of merit selection examinations conducted by the Office of Personnel Management (OPM); the administrative law judge examination is the only examination responsibility of the OPM which cannot be delegated to the employing agencies. 5 U.S.C. 1104(a)(2).

[11]In some cases, but not the present one, respondents seeking hearing have neglected to answer the initial process of the OCAHO because they had already ``answered'' the NIF and erroneously believed a further answer would be duplicative and redundant; 8 C.F.R. 274a.9(d) was recently amended to make clear that a request for hearing was all that the employer need file (with INS) to invoke the hearing process. A respondent may, but need not, file an answer to the NIF. 53 Fed. Reg. 8611, 8613-14, March 16, 1988.

[12]It is consistent with the INS regulation that once a request for hearing is received, initiating ``the proceeding to assess administrative penalties,'' 8 C.F.R. 274a.9(c), there is no requirement to obtain an order under section 1324a, viz, the dispute between the INS and the employer becomes resolved without recourse to OCAHO.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Complaint

By complaint dated November 16, 1987, the INS initiated this proceeding, asking that an administrative law judge be appointed to (1) preside at a hearing and to (2) issue an order ``directing respondent to cease and desist from the violations, and pay the penalties, as specified in the Notice of Intent to Fine.'' The complaint recited that the NIF, exhibit A to the complaint, had been served on October 2, 1987, and that respondent had ``timely requested a hearing'' per exhibit B to the complaint. Exhibit B, for response to the NIF, contained a request for hearing and a general denial of the allegations contained in the complaint.

B. The Notice of Intent to Fine

The cover sheet of the several pages which together constitute the Notice of Intent to Fine dated October 2, 1987 recites that UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

SEE ATTACHED SHEETS

* * * * * * * *

The ``attached sheets'' consist of three pages captioned ``ALLEGATIONS,'' comprising in all seventeen (17) separate counts, and including also another page containing two portions, a ``NOTICE OF (sic) RESPONDENT,'' and a ``CERTIFICATE OF SERVICE.'' The ``notice'' portion appears in form to be substantially consistent with the then-effective version of 8 C.F.R. 274a.9 (c) and (d). Again turning to the cover sheet, INS recites as follows:

> AND on the basis for the foregoing allegations, it is charged that you are in violation of the following provision(s) of law:
>
> Section 274A(a)(2) of the Immigration and Nationality Act and Title 8 C.F.R. Sec. 274a.3.
>
> Section 274A(b)(1) of the Immigration and Nationality Act and title 8 C.F.R. Sec. 274a.2(b)(ii) (sic) and title 8 C.F.R. Sec. 274a.11.
>
> WHEREFORE, pursuant to Section 274A of the Immigration and Nationality Act and Part 274a, Title 8, Code of Federal Regulations, it is the intention of the Service to order you to pay a fine in the amount of $6,000.00, $500.00 for each violation numbered 1 through 7 and $250.00 for each violation numbered 8 through 17.

It is obvious that the NIF is a boilerplate form, not inherently an unacceptable device. The particular form utilized in this proceeding, however, is perilously close to the margin. Here, the employer is represented by knowledgeable, sophisticated counsel who is capa-

ble, as is the judge but only through herculean effort, to understand how the different parts of the NIF fit together. Certainly, the less knowledgeable, particularly the unrepresented among potential respondents cannot be expected except with great difficulty, if at all, to comprehend the NIF, although it is probable that most employers can understand when a money demand is being asserted.[13] Use of the boilerplate NIF needs to be considered particularly in light of the June 1, 1988 expiration of the transition/education period which mandated action-free citations for first violations; the failure to be more than marginally clear suggests possible prejudice to future respondents.

Strained understanding results from another aspect of reliance by the Service on the boilerplate NIF: Paragraph II of the notice on the last page is the first reference to liability to a cease and desist order although the monetary portion of the civil penalty is set forth on the cover page, as quoted above.[14] Only by combing the entire package, understanding that the monetary portion of the civil penalty is contained in the ad damnum clause on the cover page and that the additional cease and desist liability is on the last page, does the targeted employer know the full exposure for failure timely to ask for a hearing and file an answer. More ominously, the sole reference to cease and desist is recited in the subjunctive:

> IF THE CHARGE SPECIFIES A VIOLATION(S) OF SUBSECTION 274A(a)(1)(A) OR SUBSECTION 274A(a)(2) OF THE ACT, THE ORDER ALSO WILL REQUIRE THAT YOU CEASE AND DESIST FROM SUCH VIOLATION(S).

All of which takes the respondent, in order to calculate the full measure of risk/liability, back to the cover sheet to refresh recol-

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[13]That prospective respondents may, indeed, be relatively unsophisticated, see, Corchado, Border Trouble, New Immigration Law Riles Small Businesses in Places Like El Paso, The Wall Street Journal, May 4, 1988, p. 1. Moreover, Congress at 8 U.S.C. 1324a(j) requires annual reports from the General Accounting Office, for three years beginning in November, 1987, ``for the purpose of determining if ... an unnecessary regulatory burden has been created for employers hiring ... [eligible] workers,'' as the result of ``implementation and enforcement'' of employer sanctions. It is to be supposed that one measurement of burden may be an evaluation of the clarity and fairness of the litigating and adjudicative aspects of that implementation and enforcement. Under 8 U.S.C. 1324a there is no employer size threshold for liability to attach; a single employee suffices.

[14]The INS variously describes these as ``administrative penalties,'' 8 C.F.R. 274a.9(c) and as ``civil penalties,'' C.F.R. 274a.10(b). No less mysterious is the Service commitment to a ``civil fine,'' in administering a statute which contemplates a civil money penalty, not a fine.

lection as to which statutory command was alleged to have been violated.[15]

C. The Pleadings

I hold that the structural deficiencies in the NIF and, accordingly, in the complaint which incorporates and depends for its validity on the NIF, are not on this record prejudicial to Mester Manufacturing Co. (Mester or Respondent). This is so both because Mester was represented by an experienced immigration lawyer and because the case was conducted without any question having been raised to suggest that the form or arrangement inter se of the NIF misled the defense.[16] Whether in the circumstances of another employer an NIF in substantially similar form would demand a different result cannot be resolved here.

The seventeen counts against Mester can best be understood as alleging distinct categories of violations:

(a) Continuing to employ an individual hired after November 6, 1986, knowing that the employee is an unauthorized alien with respect to employment by Mester in violation of 8 U.S.C. 1324a(a)(2) and 9 C.F.R. 274a.3:

1. Estrada-Bahena
2. Mejia-Garcia also known as (aka) Mejia-Flores
3. Maciel-Mejia
4. Arriaga-Lopez aka Gonzalez-Picazo
5. Castel-Garcia
6. Santoyo-Zavala

(b) Continuing to employ an individual hired after November 6, 1986, knowing that the employee has become an unauthorized alien with respect to employment by Mester, in violation of 8 U.S.C. 1324a(a)(2) and 8 C.F.R. 274a.3.

7. Barranca-Ballasteros

As to each named individual, INS seeks an order requiring respondent to cease and desist from violating 8 U.S.C. 1324a(a)(2), and to pay a civil money penalty in the amount of $500.00.

(c) Failure to comply, as to an individual hired after November 6,1986, with the employment verification system (paperwork) requirements, in violation of 8 U.S.C. 1324a(b)(1) and 8 C.F.R. 274a.2(b)(ii)(sic) and 274a.11.

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[15]The notice correctly limits cease and desist liability to unlawful hiring of unauthorized aliens (Section 274A(a)(1)(A)) and unlawfully continuing to knowingly employ unauthorized aliens (Section 274A(a)(2)), excluding paperwork violations as to which there is no authority to impose a cease and desist order.

[16]Substantive considerations are more compelling. See discussion III J 7, infra.

8. Arriaga-Lopez
9. Santoyo-Zavala
10. Castel-Garcia
11. Barranca-Ballasteros
12. Ortiz-Cedeno
13. Galeana-L.
14. Beltran
15. Marquez-Figueroa
16. Pelayo-Vasquez
17. Andrade-Salazar

As to each named individual, INS seeks an order requiring respondent to pay a civil money penalty in the amount of $250.00.

The format by which INS pleaded the counts in its NIF requires comment in order to make clear the understanding that each of the counts contains one alleged violation, not two or more. The format utilized in every count an allegation (A) that respondent hired a named individual, followed in every count by an allegation (B) and in all but counts 16 and 17 by an allegation (C).

I conclude that in each of the first seven counts, the alleged "continuing to employ" violations, allegations (B) provide the scienter for the "continuing to employ" allegations at (C). Information relevant to the charges in this proceeding was conveyed on September 3, 1987, to Mester by the INS citation, a handwritten list of individuals entitled "interview list," and remarks by the border patrol upon delivering those materials.

In counts 8 through 15, containing all but two of the ten alleged paperwork violations, allegations (B) recite that respondent did or did not "present" on September 2, 1987, a Form I-9 for the named individual. No other meaning can reasonably be ascribed to (B) except that it is a predicate, a building block, for (C). In each of counts 8 through 15, allegation (C), and, in counts 16 and 17, allegation (B), recites that "on September 25, 1987," no Form I-9 was "presented" for the named individual. I conclude that the reference at (B) in counts 8 through 15 is to the September 2, 1987 compliance inspection.

The compliant filed by INS, dated November 16, 1987 incorporating the NIF (attached as exhibit A) and respondent's answer to the NIF. By notice of hearing dated November 25, 1987 the Department of Justice, by the Chief Administrative Hearing Officer, per delegated authority of the Attorney General, assigned the case to me as the presiding administrative law judge. The notice set the evidentiary phase of the hearing to be held in San Diego, California, beginning February 9, 1988.

Respondent filed a timely answer dated December 22, 1987, which denied every numbered allegation. The answer contended, as

affirmative defenses, inter alia, that, making "every possible attempt to comply with the new employer sanctions law," Mester has met with the refusal in obtaining INS assistance concerning the law and its procedures, had cooperated fully in providing access to its personnel records and had terminated employees "on the Complainant's instructions."

Following my January 5, 1988 prehearing order, a telephonic prehearing conference was held among the parties and the judge on January 19, 1988, as summarized in the January 20 prehearing conference report and order. During extensive discovery between the parties, the INS filed a January 28 motion to amend its complaint as to four of the seventeen counts, three to provide additional names for individuals identified in the complaint as putative unauthorized alien employees, and one to insert a not in count 10 as to presentation of the Form I-9. By pleading dated February 2, respondent answered, by denying the amended counts but amended certain portions of its previous answer to admit subsidiary allegations contained in one each of twelve of the counts. The motion to amend was granted at hearing, and the hearing went forward on the amended pleadings.

D. The Citation

I find that, although there had been prior communication between the Service and Mester, the September 3, 1987 citation arising out of the previous day's inspection is the initial citation, both in fact and for purposes of the statutory immunization provided by law for employers confronted for the first time with employer sanctions violations. Since as a matter of law, 8 U.S.C. 1324a(i)(2), there can be no proceeding or order arising out of an initial citation, none of the allegations (B) may properly comprise a violation in this case and are understood as informational only.

I hold also that the transition period ``citation'' requirement is satisfied if a citation issues at all to a particular employer. It is immaterial whether or not the citation comprehends the same type or a different type of violation, or a violation with respect to the same employee, as that which forms the basis of the subsequent enforcement action. 8 U.S.C. 1324a(i)(2). To the extent that respondent is understood to challenge counts contained in the NIF, not included in the precedent citation, as thereby deficient as a matter of law, the simple answer is that the statute demands no such result. The citation as to an employer's first violations during the twelve (12) month phase-in period is all that is required. The citation need not have addressed a particular violation as a condition precedent to an action against the employer.

E. The Hearing Summarized

The hearing began on February 9, 1988, with a further prehearing conference, and concluded on February 12, after taking testimony of nine witnesses, receiving 73 exhibits, and compiling a transcript of 943 pages plus appendices. Following the hearing, as agreed among counsel and the judge but modified as the result of a joint request by the parties for a modest extension in filing deadlines ``due to the sheer volume of the transcript and the novel issues of law and fact,'' the parties filed substantially concurrent briefs, proposed findings of fact, conclusions of law, and reply briefs. Respondent's reply brief filed May 9, 1988, contained, as attachments, certain evidentiary materials mentioned on brief but not otherwise before the judge.

The Service filed a May 6 motion to strike such ``attempted'' submission of evidence. By pleadings dated May 11, 1988, respondent answered the INS and separately moved to supplement the record, tendering, in lieu of substantially similar but not identical attachments to its reply brief, proposed exhibits BB and CC. In the interests of time, I issued a May 13, 1988 order which invited INS to respond to the evidentiary tender by advising by May 26 how the government would be prejudiced by receipt of these exhibits into evidence ``and, if prejudiced, how that prejudice might be cured or, alternatively, to advise that the INS rests on its previously tendered Motion to Strike.'' No response having been received from the Service, inquiry was made by this office, at my direction, of the intent of the Service; it appeared that INS trial counsel in San Diego had not received the May 13 order and, upon obtaining a telephonic recitation of the contents of the order, asked for an opportunity to file a reply. Accordingly, on June 1, I issued a second order extending the time for reply until June 9, 1988. INS filed a reply in opposition, dated June 8, 1988. For the reasons discussed at section III J 2, infra, the motion to receive respondent's exhibits BB and CC is granted.

F. Initial Training

It is undisputed that the Service made the first contact with respondent to initiate compliance with employer sanctions. Border patrol agent Stephen A. Shanks (Shanks) went to Mester on July 2, 1987 to conduct an initial educational visit. No Mester management officials were present but he left a copy of the INS ``Handbook for Employers'' subtitled ``Instructions for Completing Form I-9 (Employment Eligibility Verification Form)'' (M-274(5-87)) (Handbook). He also left his business card.

James A. Saturley (Saturley), the senior operating official of respondent other than its president and majority owner Barry G. Mester, when told of Shanks' visit, expected Shanks to return on July 3. However, there was no communication concerning the employer sanctions program between INS and Mester until August 7, 1987, when Shanks phoned and spoke to Saturley. Whether or not Mester may reasonably have expected training and information beyond dropping off of the Handbook, Saturley appeared satisfied that he understood the Handbook, had no questions of Shanks, and did not inquire concerning a training session.

G. The First Inspection

A Notification of Inspection to review Forms I-9 was personally served on Barry Mester by Shanks and another agent on August 26, 1987, the inspection to take place on September 2, 1987. Although respondent asked for and was assured there could be a two day delay to accommodate an out of town meeting of respondent's officials, INS reversed itself and held the inspection on September 2 as previously noticed and scheduled. The inspection was conducted by agent Shanks and three other uniformed officers to whom Saturley presented nineteen Forms I-9 in response to a request for all I-9s. A computer printout of Mester personnel was also provided which showed dates of hire for approximately 60 employees.

At the inspection was another Mester employee, Frederick M. Hunter (Hunter), an administrative assistant. According to Hunter, Saturley, upon asking for clarification of the employee verification requirements and whether ``there was anything wrong with the forms the way we were doing them,'' was told by the agents ``we'll get back to you''; Saturley stated that when the agents pointed out omissions in the employee portion (section 1) of several I-9s, he asked what ``we were supposed to do ...'' and they said, ``We'll contact you.'' Saturley recalled four substantially identical remarks by the agents.

On September 3, 1987, the INS delivered to respondent its citation of that date, alleging violations with respect to eleven named individuals, eight of whom are the individuals identified in twelve of the seventeen counts in the complaint. The citation concluded that there was reason in view of the allegations to believe that Mester was in violation of ``Section 274A(b)(1) of the Immigration and Nationality Act, and Title 8 CFR 274a.2(b)(ii).''

Each allegation in the citation was read to Barry Mester by agent Shanks, who was accompanied by agent Gilbert G. Petty (Petty). The agents recalled having advised him that four of those identified were in this country illegally and without work authori-

zation. The interview list was handed to Barry Mester showing among others the names of individuals believed to have used false alien registration cards to obtain employment at Mester. He was advised that if the information obtained during the September 2 inspection was accurate the individuals shown to have used questionable alien registration cards should no longer be employed.

On September 8, Saturley wrote to INS complaining that the presence of four agents wearing weapons to conduct the inspection was intimidating and threatening, and that the agents were less than forthcoming in response to questions as to the correctness of the paperwork. The letter acknowledged ``some problems with some paperwork and some employees,'' protested that the agents seemed to show ``blatant disrespect and distrust of the employer,'' and undertook that ``we don't intend to violate the law, but a little `sweetness' would help.'' Saturley raised no question concerning any particulars contained in the citation. The letter was received at the San Diego INS district office on September 9.

There was no further communication between INS and Mester until another Notification of Inspection was served; on September 22, INS said it would return on or after September 25, 1987. Also on September 22, Mester, through Hunter, sent to the INS a two-page Response to Citation, received by the border patrol, exact data of receipt uncertain, but prior to the second inspection; the response addressed the situation of each of the eleven individuals listed on the citation. The response apparently was not dispatched to INS until after 8:00 a.m., when Mester received the notice for the second inspection.

H. The Second Inspection

An inspection was conducted on September 25, by Shanks accompanied again by three other agents; they met with Hunter whom they say they asked to provide them with all the Forms I-9 and that Hunter represented that the forms he presented were all there were. By early January, 1987, Hunter was fired by Mester for not being sufficiently aggressive.

It is Hunter's firm recollection that, on September 25, he understood the request to be for I-9s for current employees and not at all for those no longer employed; he made available an employee roster for use by the agents, asked if there was anything else they needed and was told ``no.'' Three of the four agents who made the September 25 inspection were called as INS witnesses and testified that the request had been for all Mester I-9s. Shanks prepared a file memorandum dated three days after the inspection, under date of September 28, 1987, which included an entry that ``Fred Hunter

made the comment during the inspection that all I-9's were for only current employees.'' (Emphasis in original.) (Exh. 5).

During the second inspection, Saturley, in Tijuana, spoke with Shanks, probably twice, by phone, allegedly pleading for guidance, and again was told ``we'll contact you.'' As summarized by INS counsel, ``as a result of the second inspection, a Notice of Intent to Fine was served on Barry Mester on October 2, 1987'' (Proposed FF 21). Less succinct but more cavalier is the INS retort of reply brief (page 5) to reiteration in Mester's opening brief of respondent's effort, quoted above in substantial part, to obtain information and guidance, not punishment. By what logic or wry humor is it that ``we'll get back to you'' should be understood reasonably to anticipate imposition of a citation and a Notice of Intent to Fine (id.):

> And despite Mester's claims that the Service never got back with them, the opposite is true. After each inspection the Service came back to Mester the very next day. The first time, a citation was delivered along with notification of the three bad green card holders. Mester did not heed this warning, hence the need for the Notice of Intent to Fine. This notice was delivered the day after the second inspection.[17]

None of which is to say that the Service failed sufficiently to fulfill its public information responsibilities toward Mester to the point that its enforcement initiative is vitiated. Rather, each count of the NIF must be appraised individually. If a gap in Mester's compliance can be laid at the INS door rather than its own, any failure of communication might tip the scales. But it is agreed that the Handbook was in Mester's hands and that the phone was available. In addition, the Service conducted training seminars on employer sanctions. Importantly, considering the totality of the circumstances, I do not find here an employer incapable of self-help and lacking resources, so as to invoke the sympathy of the trier of fact to the point of rejecting the INS allegations as tainted by some pervasive defect. The respondent's pleas for help do not suggest pursuit of assistance by a compliant and concerned employer sufficient to overcome the fact of particular violations.

The Handbook is far from perfect. Neither is the Form I-9 as informative as it might be. Perhaps future editions of both will improve. Inexplicably, the I-9 omits any requirement for entry of the employee's hire date. Improved instructions on both the form and the Handbook should eliminate any doubt that it is the employer in every case, not the employee, who is liable under IRCA for errors, omissions or other defects in promptly and accurately filling in, retaining and presenting the I-9, as appropriate.

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[17]No so, see NIF, dated October 2, 1987.

Respondent suggests that this decision should make clear that the employer is not the responsible person or entity to be held accountable for shortcomings in execution of section 1 of the Form I-9, arguing, inter alia, that liability of employers will chill the hiring of the mentally retarded. The simple answer is that the entire thrust, the only culpability, enacted by IRCA in respect of employer sanctions, 8 U.S.C. 1324a, is addressed to employers and not to those they hire. No provision of the statute exculpates employers from ``the requirements specified'' provisions of the employment verification system. It does not matter that the instructions for filling in section 1, the employee's portion of the I-9, are less than perfect or were not followed to perfection in a given case. It is noted, however, that the law allows the employer to rely on the documentation presented by the employee, id., at subsection (b)(1)(A). Also, good faith compliance with the paperwork requirements is an affirmative defense to an unauthorized employment charge although, with respect to liability for paperwork violations, good faith goes only to the quantum of civil money penalty and not the fact of liability. Compare 8 U.S.C. 1324a(a)(3) with 8 U.S.C. 1324a(e)(5). The distinctions among defenses made available in the legislation confirm that Congress made clear where it was fixing responsibility. No less clear is it that the liabilities created by section 101 of IRCA are those alone of employers.

Acknowledgement here of the potential for improvement of the Handbook and Form I-9 should not be misunderstood as equivalent to judicial disapproval or rejection of the materials in their present form. Nowhere is it demonstrated that respondent has been misled by them.

I have considered the claim that respondent was not kept sufficiently advised and not adequately trained by INS. I share the concern that the border patrol agents might have been more helpful, more forthcoming. I find nothing, however, to warrant the conclusion that the agents misinformed respondent as to what was expected of an employer under the instructions contained in the Handbook and the I-9. Saturley believed he had an ``average'' understanding of the Handbook; that is a sufficient passing grade. In addition, after receiving the citation on September 3, Mester was on explicit notice not only of the particular allegations (which it attempted to address in the September 22 response signed by Hunter) but also of the ``instructions'' page of the citation.

I. The Respondent Described

Respondent has its principal place of business in El Cajon, California, and a second facility just across the border in Tijuana,

Mexico. It is a case goods manufacturing company, primarily in waterbed frames and other bedroom furniture, with annual sales approaching $4,000,000 gross volume; employees at El Cajon average about 70 in number, sometimes ranging between 80 and 90. All events involving the employment of the individuals identified in the NIF occurred at the El Cajon facility.

Rarely in my experience has an employer demonstrated as did Barry Mester on the stand such a manifest lack of interest in personnel practices of his own domain. Obviously self-reliant, in a few years he has created an apparent business success. However, his lack of involvement in the day-to-day management of the personnel resource in general and in an employer's duties under IRCA, in particular, is most clear; he never gave any direction or suggestions concerning the I-9s. Tr. 729.

INS may be correct when on brief it suggests Barry Mester has demonstrated disdain for the employer sanctions program. Whatever his motivation, the recollection is vivid of his lack of awareness of the most fundamental responses provided over his signature to prehearing inquiries. His almost total inability to acknowledge, reject or demur to those prior statements alone prompted my eventual willingness to admit them in evidence in aid of expedition. (Tr. 740-41). No less certain was his testimonial inability to recall matters which other witnesses, even disinterested ones, recalled with clarity. (Tr. 683-84).

Barry Mester candidly conceded, describing his sworn response to interrogatories, that his ``personal knowledge does not apply to each particular employee that's in question at all.'' (Tr. 682). And again, ``I personally did not provide the answers to these questions.'' (Tr. 736).

It is absolutely consistent with Barry Mester's testimonial behavior, a taciturn result-oriented self-starter, that he failed totally to grasp his responsibilities as an employer under IRCA.[18]

J. The Individual Counts

1. Counts 1, 2 and 3.

In Counts 1, 2, and 3 Mester is charged with the following allegations: (A) hiring Francisco Estrada-Bahena (count 1), Santiago Mejia-Garcia aka Santiago Mejia-Flores [19] (count 2 as amended), and Jorge Maciel-Mejia aka Jorge Humberto Maciel-Mejia (count 3 as amended) on July 13, 1987; (B) being informed on September 3,

[18]See, e.g., infra, at III J 1, as to lack of instructions to Fred Hunter concerning green cards of employees in counts 1-3.

[19]Where an employee is identified as having an alias, he is referred to by the name used to identify him in the NIF unless otherwise specified.

1987, that each of the named individuals had presented a false Alien Registration Card [I-151] and was not an alien authorized to work in the United States, and (C) continuing to employ the three individuals on September 25, 1987.

Forms I-9, dated September 1, 1987, were executed for Estrada-Bahena and Mejia-Garcia; a Form I-9 for Maciel-Mejia bears a September 2, 1987 execution date. Estrada-Bahena was hired by Mester on July 13, 1987. However, Mejia-Garcia, first hired on May 5, 1986, and Maciel-Mejia first hired on October 13, 1986, initially had grandfathered status under IRCA.

Both Mejia-Garcia and Maciel-Mejia left Mester's employment on April 9, 1987, and returned on July 13, 1987. Mester claims that each absence was a leave of absence. However, the 1987 Attendance & Vacation Schedules (Schedule) in Mester's personnel files for both employees bear the notation ``quit.'' That term is not included among the preprinted ``codes'' for entries to be made on the form. The notation ``quit'' on the first of two 1987 Schedules for Santiago Mejia-Garcia, is entered on April 9, 1987. While the first 1987 Schedule bears the date 5-5-86 as date of hire, the second one bears a 7-13-87 date of hire. The personnel records prepared and maintained by Mester support the conclusion that Mejia-Garcia quit his employment with Mester on April 9, 1987, and was rehired on July 13, 1987.

Here, the employer in the routine management of its personnel system has recorded an employee as having quit, on a form that does not provide a code for such an entry. The employment record also shows the resumed employment as a hire on a new date, July 13, 1987. An employer cannot impeach its own system of records without presenting a persuasive explanation that its records are in error. No persuasive explanation having been offered, I accept at face value the entries on the personnel records made in the ordinary course. Consequently, Mejia-Garcia lost his eligibility for ``grandfathered'' status.

Personnel records for Maciel-Mejia support the same conclusion. The employee payroll card bears the entry 10/13/86 as date of hire followed by the notation ``rehired 7/13/87.'' In addition, under the date hired portion of the 1987 Schedule for Maciel-Mejia the date 10-13-86 is lined through and ``rehired 7/13/87'' appears in its place. Furthermore, the grid portion of the 1987 Schedule which has the word ``quit'' written in under April 9, 1987, also bears the notation ``rehired'' under July 13, 1987. A W-4 Form for Maciel-Mejia, further confirms the rehire although its notation appears to provide a slightly variant date, namely ``7/10/87 rehired.'' The personnel records prepared and maintained by Mester support the

conclusion that Maciel-Mejia quit his employment with Mester on April 9, 1987, and was rehired on July 13, 1987. Consequently, he also, lost his eligibility for ``grandfathered'' status.

As to all three counts, Mester denies having been informed on September 3, 1987, that Estrada-Bahena, Mejia-Garcia, and Maciel-Mejia had presented false Alien Registration Cards [I-151. and were not authorized to work in the United States. Mester argues that it cannot be charged with knowledge that the named individuals were unauthorized to be employed, having provided false Alien Registration numbers, since no written notice was provided by the border patrol. Mester relies on 8 C.F.R. 103.5a.

Respondent asserts that it cannot be held to knowledge not imparted in conformity with established modes by which INS, in compliance with its own regulation, provides, ``the authorized means of service by the service ... of notices, decisions and other papers ... in administrative proceedings before Service officers....'' 8 C.F.R. 103.5a. Respondent suggests also that the Act has shortchanged employers by not addressing the mode of communication expected of the Service. The suggestion overlooks that the gravamen of a violation of knowingly continuing to employ an unauthorized alien is the state of knowledge not the method of effecting notice sufficient to make out a case of knowledge. Knowledge or notice of an employee's unauthorized status which provides the scienter necessary to find a violation of 8 U.S.C. 1324(a)(2) in knowingly continuing to employ an unauthorized alien can come to the employer from any source. The law is indifferent as to how that knowledge is acquired.

This decision elsewhere notes the extreme detail with which the statute addresses certain concerns, e.g., fair hearing, the employment eligibility verification system, and the penalty hierarchy. I do not agree that failure to guide the parties and judges in similar detail on the permissible means by which knowledge is acquired places employers in a precarious position vis-a-vis the Service, or constrains the latter to act only in accord with arguably analogous procedures.

In its implementation of IRCA the Service expressly states at 8 C.F.R. 274a.9(c) that ``the proceeding to assess administrative penalties under section 274A of the Act is commenced by the Service by issuing a Notice of Intent to Fine on Form I-762.'' At least until the NIF issues there is no proceeding before a Service officer. More significantly, the result claimed by respondent would frustrate the legislative purpose by denying culpability save in those cases where the method of communicating the source of the alleged knowledge satisfies the regulation on formal proceedings before Service offi-

cers. I find the regulation at 8 C.F.R. 103.5a to be a salutary one, to provide regularity in the flow of written materials in proceedings, and not at all addressed to the source of information, or the mode of its transmittal. Certainly, to the extent that written communications reduce doubts as to what was communicated by other means it is a preferred mode.

I do not understand that regulation, favoring administrative regularity in formal proceedings before INS officers, as straitjacketing the INS in its administrative implementation of IRCA in the respect urged here. Accordingly, I reject the assertion that failure to adhere to that regulation bars an action premised on information imparted by another mode.

During the September 2, 1987 I-9 inspection, Agent Shanks identified three individuals he suspected of having fraudulent A-numbers or green cards. After running the three numbers through the computer system, he found that the number used by Estrada-Bahena was assigned to a Federico Agustin Collodo-Diaz, the number used by Mejia-Garcia was assigned to a Salvadore Vega-Aguirre, and the number used by Maciel-Mejia had never been assigned. Upon delivering the citation to Mester on September 3, 1987, Shanks also brought the handwritten interview list which included the names of the three individuals suspected of having false A-numbers along with the names of other people whom Shanks wished to interview (Exh. 21). At hearing, Shanks testified that he presented the interview list to Barry Mester and explained to him:

> ... that the three people with the bad green cards were in fact not authorized to work, that those are fraudulent cards, but that before they terminated those people they should check the numbers to make sure that there had not been a clerical error, and that if the numbers jibed, if the number that we had given Mester jibed with the number on the card and they should be terminated immediately (Tr. 237).

Agent Petty, also present on September 3, 1987, when the citation was delivered to Barry Mester agrees:

> ... [that Shanks] brought out that handwritten list that he had of the names and gave it to Barry Mester explaining that the people on it were not employable, the A-numbers were bad and that he should go check, go take the list back and check with the cards to see if the numbers were in fact the same as on that list in case somebody had copied down the number wrong. (Tr. 423).

Although Barry Mester had no questions, Agent Petty said they ``told him that if he thought of questions later on he could call us at the office and we would be happy to answer any questions for him. (Tr. 425). At hearing, in response to the question ``Did Barry Mester indicate anything as to what action he planned to take on the listed individuals who had the bad A-numbers?'', Agent Petty

responded: ``He said he would fire those people. He told us that he'd get rid of them.'' (Tr. 426).

Barry Mester acknowledges being handed the interview list and that he photocopied it. (Tr. 664-65). Barry Mester denied Shanks' request to interview the people on the list. According to Barry Mester ``[t]he only thing that was asked of me was if they could be interviewed and it was not mandatory that this happen.'' (Tr. 666). He did not recall that anybody had made any reference about the alien registration cards.

Barry Mester did nothing more with the citation or interview list than place it on Hunter's desk and inform Saturley that they had received the citation. At hearing, Barry Mester denied having given Hunter any kind of instructions to check or double check the A-numbers on the interview list. Barry Mester denied ever being instructed by INS to terminate any employee.

Although Hunter recalls not working on September 3, 1987, the interview list was brought to his attention by Barry Mester a few days later. In contradiction of his former boss, Hunter remembered instructions from Barry Mester concerning the first, third, and fourth names on the interview list [the individuals named in counts 1, 2, and 3]: to check the numbers on the list against the I-9 copies of the green cards, ``to make sure that the name and number match.'' Unfortunately, his understanding was exactly opposite what the INS agents intended, and claimed they told Barry Mester that if the numbers matched the employees should be fired. No other instructions having been given him except to check for comparison, Hunter concluded that ``they were legal green cards and they were allowed to be employed.'' (Tr. 568).

Barry Mester denied that he was instructed to do anything about the people listed on the interview list except to grant interviews by the agents with some of them. His recollection is inconsistent not only with the testimony of Shanks and Petty but also with the testimony and actions of Hunter in checking the A-numbers on the list against the green cards. Given the lack of any reference to false A-numbers on the interview list, it is unreasonable to conclude that without some instructions or guidance, Hunter would have checked the A-numbers on the list against the numbers on the green cards. In light of the conclusion last reached, considering also Barry Mester's lack of recall concerning personnel matters, I am constrained to find that Hunter was instructed by Barry Mester to check the A-numbers against the green cards. Whether Barry Mester accurately passed on the instructions given to him by the agents is a different matter.

The border patrol agents had concluded that the continued employment of the three individuals was unauthorized if the numbers on their alien registration cards should match the numbers on the interview list. That conclusion is unimpeached. I find, therefore, that the three individuals having presented false alien registration cards in support of their I-9s were unauthorized employees.

Evidently Hunter did not understand that the agents had concluded that if the numbers matched, the employees should be fired as lacking authorization to be employed. Hunter found that the numbers matched and noted ``OK'' after each of the three names; he did not report the results to Barry Mester. Hunter's ``unaggressive'' personality was clearly at odds with Barry Mester's assertive personality as judged from the latter's demeanor on the witness stand. Considered in context of Barry Mester's disinterest in personnel management, it is credible that he and Hunter had no discussion on the subject.

Whatever Hunter's role, it follows that Mester through its principal officer, Barry Mester, was on notice that if the A-numbers matched, as they did, the employees were unauthorized. Hunter and Saturley do not contradict Shanks that an order to terminate was given to Barry Mester. Rather, their testimony confirms that Barry Mester failed to clearly inform Hunter of the significance of checking the A-numbers on the interview list and never informed Saturley of the existence of the interview list.

Saturley, in Mexico during the September 25 inspection, first learned of the interview list during a phone conversation with Shanks and ordered Hunter to fire those employees on the list who were still at Mester. Consistent with that order, respondent's personnel records show each of the three to have been terminated on September 25, 1987, for having fraudulent registration cards. Notwithstanding those entries, Saturley on his return later that day reconsidered his earlier order because he hesitated to ``blatantly fire'' anyone on the basis of the bare text of the interview list. He decided to ``drag our feet'' (Tr. 794) awaiting further contact with Shanks, and concedes that, contrary to his earlier order, none of the three were terminated on September 25, 1987.

Respondent contends that it stayed its hand in part at least for fear it might otherwise be liable for wrongful termination under state law and in violation of IRCA prohibitions against unfair immigration-related employment practices. Considering the total circumstances, I do not find that explanation plausible. Respondent took no steps between September 3 and September 25, 1987, except for Hunter's match-up with respect to these three employees, al-

though Barry Mester had been put on notice that continued employment would be improper if the numbers matched.

Whatever shortcomings there may have been in the response by the Service to requests for guidance, employers have a clear duty to inquire. Once informed by the INS that continued employment of an individual may be unauthorized or otherwise suspect, the employer cannot with impunity rely on an expectation that a border patrol agent will ``contact'' or ``get back'' to it. Rather, the employer must make timely and specific inquiry, as a predicate for either complying with paperwork requirements or discharging the employee. Breakdowns in respondent's internal communication system do not constitute a defense to an enforcement action under IRCA.

In addition to the findings and conclusions already recited, I find and conclude that: (1) on September 3, 1987, Shanks delivered to respondent an interview list which included three named employees who, Shanks explained were suspected of having provided false alien registration numbers on the green cards, copies of which were attached to their I-9s; (2) Shanks instructed that if, upon checking the green card numbers against the numbers on the interview list they should match, the use of false cards would be confirmed; (3) if the cards were false the employees should be terminated as unauthorized; (4) Hunter did check and did find that the numbers matched; (5) at least until September 25, 1987, Mester made no inquiry and otherwise failed to raise any question with INS concerning the cards; (6) on September 25, 1987, the three employees remained on the payroll; (7) Mester was on notice once the issue arose concerning the cards that the continued employment of the three might be unauthorized; (8) once the numbers were matched, respondent was on notice that continued employment was unlawful because the aliens were unauthorized; (9) it was not reasonable to continue their employment as long as September 25 or later in light of the September 3 notification and subsequent confirmation by the numbers match that the use of the cards was improper and the employments, therefore, were unauthorized; and (10) in view of all the foregoing, Mester is in violation of 8 U.S.C. 1324a(a)(2), for the continued employment of Francisco Estrada-Bahena (count 1), Santiago Mejia-Garcia (Count 2), and Jorge Maciel-Mejia (count 3).

2. Count 4

Count 4, as amended, charges Mester with violating 8 U.S.C. 1324a(a)(2) for continuing after September 16, 1987, to employ Ernesto Arriaga-Lopez aka Jesus Gonzalez-Picazo, having been in-

formed on September 3, 1987, that he was an alien not authorized to work in the United States.

It is undisputed that Mester had employed an individual named Mario Lopez (aka Mario Lopez-Vega) prior to November 7, 1986. Mester's ``payroll status change'' record informs that Lopez remained on the payroll until he resigned on June 12, 1987, with three days in February, two in March, and one in May, 1987, recorded as unexcused absences; other ``attendance and vacation schedule'' entries show him present at least into June, 1987. Those work days on which there are no entries are understood to reflect on-the-job status.

At hearing, an individual who testified under oath as Ernesto Arriaga-Lopez (Arriaga) explained that he had previously been employed as Mario Lopez, but that he had gone to Mexico in February (because a grandparent had become ill), returning to the United States in late April, 1987, and returning to work at Mester in early May. The Arriaga testimony can only be reconciled with the personnel records if it is believed either that he was mistaken as to the dates of his absence or had come and gone in the interim.

Arriaga claimed to have returned to Mester on May 6, 1987, under ``my real name of Ernesto Arriaga-Lopez'' (Tr. 154), and remained there until he ``was taken by the Immigration'' on August 21 (Tr. 155); he returned to Mexico and reentered the United States approximately September 6, going back to work at Mester under his ``real'' name until his rearrest on September 16 ``as I was leaving work.'' (Tr. 158).

Once again to Mexico, Arriaga after a week returned to the United States and to Mester. He claimed that upon his return to Mester he was told by a ``secretary/manager'' to ``get some papers that were not under my name.'' (Tr. 159).

Arriaga testified that at Mester there was an employee, named Jesus Gonzalez-Picazo (Gonzalez), who had begun working there that week but was returning to Mexico. It was suggested both by the ``secretary/manager'' and Gonzalez that Arriaga work under the Gonzalez name, and he did so. Mester personnel have no such recollection. Hunter recalls only ``talking to an employee ... that wanted to be hired but did not have a green card.'' Hunter insists that he did not and would not instruct a prospective employee to obtain ``a counterfeit green card in a different name.'' (Tr. 573).

Arriaga, under whatever name, is not a stalwart witness. This is an individual, however strongly motivated to earn a living, who by his own testimony was employed by Mester during at least two episodes under aliases, the last time in an asserted conspiracy with

two others to breach the law. He crossed the border illegally at least three time by his own reckoning.

Arriaga is, moreover, suspect in his testimonial capacity. Whatever skepticism respondent may otherwise have expressed concerning the credibility of the Forms I-213 and I-215B [20], it may be assumed that there will be no cavil to recognizing here that Arriaga, on the Form I-215B executed when he was arrested on August 21, stated under oath that ``I have never used any other names.'' (Exh. 9). That sworn statement included an explicit undertaking that the affiant understood ``that if I lie under oath that I commit perjury.'' That statement if false is a federal crime. (18 U.S.C. 1001).

Arriaga's statement is precisely opposed to his testimony before me on February 10, 1988, when he stated under oath that he had been employed both under the name Mario Lopez and under the name Jesus Gonzalez-Picazo. Assuming he understood what he was saying on August 21, 1987 and on February 10, 1988, Ernesto Arriaga-Lopez must have sworn untruthfully on one or the other date, since, by his testimonial admission, his role as Mario Lopez began and ended prior in time to his August 21, 1987 affidavit.

It follows that, to the extent that Arriaga's testimony is contravened in any particular by credible evidence, I am prepared to, and do, find that conflicting proof is sufficient to overtake his testimony. To the extent, however, that there is no contradiction in proof or, absent an evidentiary rebuttal, where the only opposition is speculative argument, I have no choice but to find the witness credible.

For example, Mester responds to the claim that Arriaga on a date subsequent to the September hiring of Gonzalez assumed the latter's identity in collusion with Mester by asserting that only one individual, namely, Gonzalez was known to have been so employed. Gonzalez came on the payroll on September 21, 1987 (as established by the Form I-9, W-4 Form and application for employment at Mester).

[20]Much attention was given in pre-hearing and evidentiary phases of this proceeding to the admissibility of INS Forms I-213 (Record of Deportable Alien) and I-215B (Affidavit), admitted a substantial portion, though not all, of such documents tendered. It is my present judgment that they are hearsay, admissible, however, in this proceeding as public records, Federal Rule of Evidence 803(8). They are, however, often at the margin of trustworthiness for evidentiary purposes, and, accordingly, are not admissible except where they are internally consistent, mutually consistent, reasonably free of patent error, and either the alien involved, the arresting and/or attesting officer, or another knowledgeable person is available to testify in support. They are often, as in this instance, cumulative, and accordingly, not utilized.

It is respondent's position, effectively, that whoever began work as Gonzalez continued to be so employed and there was no substitution. However, Gonzalez is not one and the same person as Arriaga. So far as I could determine from comparing Arriaga, the witness on the stand, with the reproduction of the photo on the alien registration card appended to the Gonzalez I-9, they are two different people. The Mester argument is, therefore, unpersuasive, standing alone, to overcome the Arriaga claim, weak as it may be as the uncorroborated testimony of a self-confessed co-conspirator, that at some date after September 21 he assumed the identity of Gonzalez on the Mester payroll.

But, for the reasons stated immediately below, it does not really matter. Whether and when Arriaga worked at Mester as Arriaga is not proven on this record. By his own testimony, although his recollection is at odds with the Mester personnel records as to dates, he worked earlier as Mario Lopez-Vega, and later as Jesus Gonzalez-Picazo. It is possible, although not certain, that he worked at Mester between times under some name but nothing contained in the Mester personnel records supports a conclusion to that effect. That he was arrested outside the Mester premises on August 21 and September 16 is insufficient to impeach those records. This is not an employer shown to have maintained a cash payroll and there is no implication that the respondent's books have been cooked to frustrate either employer sanctions or another law enforcement program.

Prior to the start of hearing neither respondent nor the judge was aware that the Service would call Arriaga as a witness. To rebut Arriaga's testimony, respondent tendered certain exhibits for the purpose of establishing that company records comported with its litigating position, i.e., that no individual by that name had been employed by Mester during any relevant period of time. Those exhibits, received in evidence, comprise virtually all the payroll checks issued from May 12, 1987 to October 2, 1987 (exh. AA), certain employee reports (exh. Z), and California State quarterly employee wage returns (exh. O).

There was a modest number of omissions, including payroll checks unaccounted for. In rebuttal to the INS post-hearing opening brief, respondent attached certain evidentiary materials to its reply brief. INS moved to strike. Respondent filed a response and a motion to supplement the record, accompanied by proposed exhibits BB and CC. As previously mentioned, I afforded INS an opportunity to reply; its reply dated June 8, 1988, contends, inter alia, opposing receipt of the evidentiary materials, that respondent ``has still not accounted for all 96 missing checks.'' That argument is dis-

ingenuous. Exhibit BB is a statement by Carol Vaughn, respondent's bookkeeper, which, together with exhibit CC, containing copies of certain previously omitted checks, accounts for substantially all the missing instruments.

Whether one or more than one such instrument remains unaccounted for, it seems to be the INS position that the Arriaga employment in that name is proven since according to his testimony he was only paid once in that name by check. However, his testimony is that he was so employed from May 6, 1987 until August 21, 1987, and again from September 6 until September 16 of that year. I reject, as not credible in the face of rebuttal evidence already of record, the claim that he was on the payroll as Arriaga as he testified, without having received but one paycheck. Even if a few Mester payroll checks remain unaccounted for, I cannot find upon a preponderance of the evidence that he was employed in the name of Arriaga.

I had no substantial doubt before receipt of these post-hearing exhibits that the personnel records, upon analysis, refuted the INS evidence which consists solely of the Arriaga testimony. These exhibits serve the record by reducing uncertainty. Treating the respondent's motion as one to reopen the record for the limited purpose of receiving the two late-filed exhibits, I have granted the motion and exhibits BB and CC are received in evidence. I am unable to make a finding that Arriaga was employed under his own name by Mester at any time relevant to this case. That he may have been employed under still another name is a possibility not accounted for by the record in this proceeding and is, accordingly, no part of this case.

By charging a violation of knowingly continuing to employ an unauthorized alien, the NIF calls for proof both of notice and wrongful intent, e.g., the absence of good faith. Neither can be shown here. It is established that Arriaga had been employed as Mario Lopez-Vega but not that he had been employed as Ernesto Arriaga-Lopez. In view of the conclusion that the evidence fails to support a finding that Arriaga was employed in that name, the allegation at (B) of the charge is a nullity, i.e., Arriaga, not having been employed under that name, it is meaningless to inform the employer that said individual is an unauthorized alien.

The amendment to the allegation to include also the name of Jesus Gonzalez-Picazo is no more successful, since Gonzalez did not become a Mester employee until September 21, 1987. By definition, no other foundation having been laid, the September 3 citation necessarily was the sole basis for the allegation in the NIF that respondent was ``informed'' on September 3, 1987 as to the

Arriaga/Gonzalez unauthorized alien status with respect to employment by Mester. This record fails to disclose that either the name Gonzalez or the name Arriaga was known to Mester on September 3.

It is contrary both to logic and fairness to ascribe knowledge of a state of facts not yet in existence, i.e., Ernesto Arriaga-Lopez aka Jesus Gonzalez-Picazo. Stated differently, at the time of the citation which provides the exclusive foundation for the charge that as of September 3, 1987, Mester was informed that Arriaga was ``an alien not authorized to work in the United States,'' no one by that name was on the payroll and any employment or other relationship with Gonzalez on the part of either Mester or Arriaga was prospective only.

In any event, allegation (B) is but a predicate for allegation (C). Assuming that (B) was intended to describe a violation, it would have been a violation insulated from enforcement action as a matter of law, 8 U.S.C. 1324a(i)(2).

Allegation (C) is unproven because, as just discussed, it is impossible to communicate notice as to the status of an employee who is not known by the employer to be an employee at the time the purported notice is communicated or at any time prior to that notice. There is no substantial evidentiary basis for an inference that, as of September 16, 1987, the name Arriaga had been used by any person employed by Mester. Gonzalez is a stranger to this record at all times prior to September 21, 1987. Moreover, allegation (C) depends for its effectiveness on facts said to exist with respect to Arriaga as of September 16, presumably, but not self-evidently, his arrest on that date. Therefore, any culpability for a switch in the Arriaga/Gonzalez identity which occurred on or after September 21, cannot be founded on an allegation grounded in events of September 16.

Whatever notice the events of September 3 and 16 may have provided to Mester they did not provide warning of the need to defend against a charge of unlawful employment occurring not earlier than September 21 and involving an entirely different set of facts than that which provided the predicate for both the citation and the Notice of Intent to Fine. This is not simply a problem to be cured by conforming the pleadings to the proof. It is rather of the essence of fair hearing. See, e.g., 5 U.S.C. 554(b)(3). For all these reasons, count 4 is dismissed.

3. Count 5

Count 5 charges Mester with violating 8 U.S.C. 1324a(a)(2) for continuing to employ Miguel Castel-Garcia knowing that he had

become an unauthorized alien with respect to such employment. Castel-Garcia was hired by Mester on October 6, 1986, and was absent from approximately December 11, 1986 until April 22, 1987.

INS characterizes Castel-Garcia's absence as a termination on December 10, 1986, which effectively ended his grandfathered status. Mester acknowledges that Miguel Castel-Garcia was terminated on December 10, 1986, was rehired on April 22, 1987, and was terminated on September 17, 1987 upon order of the INS. Testimony of Saturley and Hunter, however, makes clear respondent's belief that Castel-Garcia was to be treated as a grandfathered employee in reliance on the original date of hire.

The 1986 Attendance & Vacation Schedule (Schedule) for Castel-Garcia indicates ten unexcused absences beginning on December 11 and continuing through December 24, 1986 followed by two days as holidays; the 1987 Schedule is lined through from January 1, 1987 until April 22, 1987, indicating that Castel-Garcia was not working during that period. Barry Mester noted at hearing that it was the nature of the people who work at Mester that they might ``go to be on leave for a week and return in five or six weeks.'' (Tr. 688). His testimony demonstrates extreme informality and flexibility in tolerating employee absences.

A stranger may question how a business with up to 90 employees can function if it is subject to the whim of employees as to when they may depart and return from unscheduled, extended absences.

However, IRCA does not substitute the stranger's judgment for that of the employer. There remains, however, the question whether under IRCA a point of time is reached when the absence is so long as to bring into the question the bona fides of the claim that the employment continues throughout the absence.

The INS regulation provides that an employer need not verify an employee's eligibility if the employee is continuing his or her employment and at all times has a reasonable expectation of employment. 8 C.F.R. 274a.2(b)(1)(viii). The regulation defines ``continuing employment'' to include situations where:

> The employee takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer. (Emphasis added.) 8 C.F.R. 274a.2(b)(1)(viii)(A).

Notwithstanding Barry Mester's suggestion that extended absences are commonplace, Saturley concedes that while such employees might be rehired if a job were available, there is no guarantee of re-employment. In the case of Castel-Garcia, there are ten consecutive, unexcused absences following which he was lined out on the schedule. In addition, in April 1987, Castel-Garcia completed

an entirely new application form and a second employee payroll card was issued containing the phrase ``rehire 4/22/87.'' It is unreasonable to conclude, considering also that the absence lasted almost four months, that Castel-Garcia continued in his employment and had at all times a reasonable expectation of employment. These circumstances take the Castel-Garcia situation out of Mester's general rule that unscheduled extended absences may reasonably be understood to contemplate uninterrupted employment status.

The citation included Castel-Garcia's name, erroneously showing a hire date during December 1986. Rather than challenging the accuracy of the citation, Mester claims that it sat back assuming that the citation was simply wrong since a computer list bearing the correct date of hire had been provided to the agents during the September 2, 1987 inspection.

Mester suggests that the citation was inaccurate and also was incomplete because INS failed to inform it that Castel-Garcia had previously been arrested as an undocumented alien, an that the citation therefore was insufficient to put Mester on notice of Castel-Garcia's unauthorized status. I do not agree. Mester asserts a good faith belief that no Form I-9 was required on the premise that the employee was grandfathered. However, upon receipt of the citation, it came under a duty to make specific inquiry. This duty is particularly apt where the discrepancy should be understood as affecting a distinction between a state of facts requiring an I-9 verification and one which does not.

The issuance of a citation per se places an employer on notice that the enforcement authority perceives that the status of one or more of its employees is questionable and imposes on the employer the duty to make further inquiry regarding the employee's status. Here, where Mester noted a contradiction between the citation and the company's records, it was under a duty to inquire or investigate further. Imperfect communications between the INS and Mester do not, as I have already suggested, serve to bar a finding of a violation.

Accordingly, in addition to the findings and conclusions already recited, I find and conclude that: (1) Miguel Castel-Garcia, formerly a grandfathered employee, terminated his employment on or about December 10, 1986, by departing other than on an approved leave within the meaning of 8 C.F.R. 274a.2(b)(1)(viii)(A); (2) that regulation is a valid and reasonable exercise of delegated authority to implement 8 U.S.C. 1324a; (3) by so departing, tantamount to having quit, the employee forfeited his pre-enactment status as explained at 8 C.F.R. 274a.7(b)(1); (4) that regulation is a valid and reasonable

exercise of delegated authority to implement 8 U.S.C. 1324a; (5) Castel-Garcia's return to employment by Mester on April 22, 1987, was a new hire within the meaning of IRCA; (6) Castel-Garcia was an undocumented alien who, lacking grandfathered status, was not authorized to be employed by Mester; (7) Mester was put on notice by the citation that the INS perceived that Castel-Garcia was an unauthorized alien employee; (8) upon receipt of the citation, Mester had an affirmative duty to inquire specifically and in a timely fashion concerning the continued employment eligibility of Castel-Garcia and the need to comply with employment verification requirements for that employee; (9) Mester failed to make such timely inquiry and continued Castel-Garcia on the payroll until September 17, 1987; (10) Mester's delay from September 3 to September 17, 1987, in discharging Castel-Garcia is unreasonable; and (11) in view of all the foregoing, Mester is in violation of 8 U.S.C. 1324a(a)(2) for the continued employment of Miguel Castel-Garcia.

4. Count 6

Count 6 charges Mester with violating 8 U.S.C. 1324(a)(2) for continuing to employee Ramiro Santoyo-Zavala at least until September 16, 1987, knowing that he was not authorized to work in the United States. Santoyo-Zavala had been hired by Mester on April 27, 1987.

Mester asserts that the September 3 citation was the first the company was notified that Santoyo-Zavala was ``an illegal alien from Mexico, '' but contained obvious errors in that the citation stated that no I-9 for Santoyo-Zavala had been completed; the company files did, in fact, contain a Form I-9 for Santoyo-Zavala, dated September 1, 1987. As in the case of Miguel Castel-Garcia (count 5, supra), Mester claims it was confused by the citation, checked its personnel files, saw a Form I-9 for Santoyo-Zavala, and concluded that it was in compliance.

Mester claims to have believed that Santoyo-Zavala as the holder of an I-94 was eligible for legalization as a special agricultural worker and was, therefore, a permissible employee. In fact, the employee's card did have a legalization office notation and referred to 210(a), an apparent reference to statutory authority for legalization.

Respondent, relying upon the I-9, rather than the citation, took no responsive action until, by its own admission, it checked its personnel files for Santoyo-Zavala and the Handbook and subsequently terminated the individual's employment. Fred Hunter's September 22 letter (exh. 28) to the INS stated:

> Ramiro Santoyo-Zavala. Although there was an I-9 in this persons file, it was not totally completed or signed because we were unsure

> if the supporting documentation we received from him was sufficient proof of his right to work in the U.S. Upon referring more closely to the Employer's Handbook, it was decided that the information he provided was insufficient and he was therefore terminated.

The Handbook had been in respondent's possession at least since July 2, 1987, an additional copy having been delivered on September 3 and handed to Barry Mester. At page 13, the Handbook provides that an individual in possession of an I-94 Arrival-Departure Record ``may only be employed if the document bears an employment authorization stamp.'' The Handbook makes clear that an I-94 is relevant to employment status if, but only if, it bears an employment authorization stamp. Santoyo-Zavala's document here was not endorsed with that stamp.

The record suggests some conflict as to whether, in fact, Santoyo-Zavala was discharged as early as September 22. Payroll records and a ``To Whom It May Concern'' letter dated September 28, 1987, signed by Carol A. Vaughn, as bookkeeper, confirm that Santoyo-Zavala was employed by Mester until September 24, 1987, two days after Hunter's letter quoted above.

Whether Santoyo-Zavala's last day on the job was September 24, or even a few days earlier, respondent was on notice from September 3 that the INS questioned his status. Self-serving assumptions on the part of the employer that the INS citation must have been in error because it did not comport with those assumptions is an insufficient defense.

Having received the September 3, 1987 citation, Mester was on notice that INS perceived that there were problems with Santoyo-Zaval's employment status and, therefore, Mester had a duty to inquire and investigate in order to resolve discrepancies between the citation and its personnel records for Santoyo-Zavala. An employer fails at its risk to make prompt, specific inquiry. Only after reviewing the individual's situation a second time and referring more closely to the Handbook did Mester conclude that the documentary information provided by Santoyo-Zavala was insufficient and thus terminated him on or about September 24, 1987.

The record does not inform of the exact date on which respondent formed the judgment that the employment of Santoyo-Zavala should be terminated. It is characteristic of employment at Mester, according to Barry Mester, that employees come and go fairly freely. In that light, there is no reason to suppose that managerial considerations cause any significant delay between the time the decision to terminate an employee is reached and the actual date of termination. It is reasonable to conclude, therefore, that Mester did

not reach a conclusion on the validity of the employment until approximately September 22, 1987.

Both as a matter of fact, and of Mester's understanding as conceded in its September 22 letter, an I-9 for Santoyo-Zavala had not been completed. Respondent, therefore, cannot successfully maintain that it was in good faith compliance with the paperwork requirements, as a defense to the continuing employment charge. 8 U.S.C. 1324a(a)(3).

Accordingly, in addition to the findings and conclusions already recited, I find and conclude that: (1) Ramiro Santoyo-Zavala was hired by Mester on April 27, 1987; (2) Santoyo-Zavala was an undocumented alien not authorized to work in the United States; (3) Mester was put on notice by the citation on September 3, 1987, that the INS perceived that Santoyo-Zavala was an unauthorized alien employee; (4) upon receipt of the citation, Mester had an affirmative duty to inquire specifically and in a timely fashion concerning the employee's status as to employment eligibility; (5) Mester failed to make such timely inquiry and continued Santoyo-Zavala on the payroll until September 24, 1987; (6) the time period from September 3, 1987, until respondent terminated the employee was unreasonably long; and (7) in view of all the foregoing, Mester is in violation of 8 U.S.C. 1324a(a)(2), for the continued employment of Ramiro Santoyo-Zavala.

5. Count 7

Count 7 charges Mester with continuing to employ Juventino Barranca-Ballasteros[21] after September 17, 1987, in violation of 8 U.S.C. 1324a(a)(2) knowing that he had become an unauthorized alien with respect to such employment. Barranca-Ballesteros was hired on or about July 13, 1987, and resigned from Mester's employ on September 21, 1987.

The September 3, 1987 citation notified Mester that ``Juventino Ballasteros B., a ``Special Rule'' alien, was stilled employed after September 1, 1987, with no work authorization document recorded on Form I-9.'' Mester claims that the citation was clearly erroneous: the I-9 executed September 1, 1987, reflects proper work authorization in the form of a social security number card and a California driver's license establishing identity. In addition, Mester asserts that it was confused about the citation because INS had never previously mentioned the special rule issue. Agents Shanks, testifying that the word ``pending'' written in on the portion of the form to be filled in by the employee where the status claimed boxes

[21]So spelled on the NIF, and throughout, by the Service, but as spelled by respondent, is Ballesteros; this decision uses the latter spelling.

went unchecked, suggested that the employee intended to apply for amnesty under the new law.

Once again the employer assumed the citation was in error because it appeared to be in conflict with the employer's understanding of the facts. Here, however, the burden on the employer to make prompt, specific inquiry of the INS is greater than where there is conflict alone because the citation alleged matters, i.e., ``special rule'' status, a term previously unknown to the employer.

Eventually, as recited in the September 22, 1987 letter to INS, Mester conceded that ``[i]nasmuch as you had informed us that if he did not currently have proof of lawful admittance he was ineligible for work, his employment was terminated.'' Company records reflect that Barranca-Ballesteros was on Mester's payroll until September 21, 1987, when he resigned to return to Mexico. As with respect to counts 5 and 6, Mester's difficulties in reconciling its records with the allegations in the citation would have been alleviated had it kept in mind the provisions of the Handbook.

On page 2 of the Handbook, directing How to Complete Form I-9, it is stated:

> Until September 1, 1987, if an employee indicates that he or she intends to or has applied for legalization, Special Agricultural Worker (SAW), or Cuban/Haitian entrant status, the employee is covered by a ``special rule'' and the employer should follow the instructions on page 4.

Page 4 under the heading ``HOW TO FILL OUT FORM I-9 IF THE SPECIAL RULE APPLIES,'' in turn, states as follows:

> Employers may hire applicants or prospective applicants for legalization, SAW, or Cuban/Haitian entrant status. Until September 1, 1987, these applicants are covered by a ``special rule'' that authorizes them to work without providing employment eligibility documents. ``Special rule'' employees will need to fill out the I-9 .↓.↓. and provide one of the specified documents that established identity (see List B in Part Nine). The employer should review the identity document. It should appear to be genuine and to relate to the individual.
>
> After September 1, 1987, the ``special rule'' expires, and these applicants will need to show a work authorization document to be hired or to continue to work. Employers must update the Form I-9 by recording the work authorization document information on the Form. (Emphasis indicates italics in original).

Respondent suggests, on brief, that in the citation INS had not directed it to terminate Barranca-Ballesteros and did not refer to him as ``illegal.'' Simply put, the portion of the Handbook quoted above informed employers that as of September 1, 1987, the prior status of ``special rule'' employers was altered.

Respondent also asserts that it was not directed to terminate the employee. I am unaware of any requirement that INS direct an employer to fire any individual; it is sufficient that INS inform an employer, not otherwise fully apprised, that an employment ap-

pears to be unauthorized by, or in violation of, IRCA. It follows that Mester failed in its burden to make timely inquiry and to take consequential action. As in count 6, supra, Mester delayed too long.

Company records demonstrate that Barranca-Ballesteros resigned on September 21, 1987. Mester failed to properly terminate Barranca-Ballesteros within a reasonable time after learning of his unauthorized status, i.e., the employee was no longer entitled to ``special rule'' status. The specific directions in the Handbook on ``special rule'' employees do not permit the employer after September 1, 1987, to rely alone on documents submitted by the employee to establish employment eligibility and identity. Once INS informed respondent, by the citation (exh. 22), that ``no work authorization document'' was ``recorded on Form I-9,'' Mester should have made specific inquiry. (See supra, at p. 35, quotation from Handbook, p. 4). Respondent's initial compliance with employment verification requirements fails to establish a good faith affirmative defense in light of reference in the citation to the ``special rule'' status of Barranca-Ballesteros. See 8 C.F.R. 274a.4.

Accordingly, in addition to the findings and conclusions already recited, I find and conclude that: (1) Juventino Barranca-Ballesteros was hired by Mester on or about July 21, 1987; (2) as of September 1, 1987, Barranca-Ballesteros had become an undocumented alien not authorized to work in the United States; (3) Mester was put on notice on September 3, 1987, that the INS perceived that Barranca-Ballesteros was an unauthorized alien employee; (4) upon receipt of the citation on September 3, 1987, Mester had an affirmative duty to inquire specifically and in a timely fashion as to the employment eligibility of the employee; (5) Mester failed to make such timely inquiry or take consequential action and continued Barranca-Ballesteros on the payroll until he resigned on September 21, 1987; (6) Mester's September 22, 1987 letter to INS acknowledges Barranca-Ballesteros' unauthorized status; (7) Mester's delay in effecting discharge of Barranca-Ballesteros following the September 3 notice was unreasonable; and (8) in view of all the foregoing, Mester is found to have violated 8 U.S.C. 1324a(a)(2) for continuing to employ Barranca-Ballesteros after September 17, 1987, knowing that he had become an unauthorized alien with respect to that employment.

6. Count 8

This count, alone among the Form I-9 charges, is separately analyzed, in light of the reasons for disposition of count 4. The result would be the same regardless of any hypothesis on which to dispose of counts 8 through 17.

Count 8 charges Mester with failing to present a Form I-9 for Ernesto Arriaga-Lopez on September 25, 1987.

The very proof that persuades me that the individual testifying as Ernesto Arriaga-Lopez worked at Mester under the names of Mario Lopez-Vega[22] and Jesus Gonzelez-Piczo,[23] considering also that there is nothing in the personnel records in evidence to establish employment in the name of Ernesto Arriaga-Lopez, I am persuaded that there is insufficient evidence to suggest that a Form I-9 should have been completed and presented by Mester for Arriaga on September 25, 1987. In short, Mester was not required to comply with the employment verification requirements of 8 U.S.C. 1324a(b) for an individual named Ernesto Arriaga-Lopez.

INS did not amend Count 8 alleging a paperwork violation to include Jesus Gonzalez-Picazo, in addition to Arriaga (as it did at count 4). Mester could not reasonably or logically be held liable for a failure to complete or present a Form I-9 for Jesus Gonzalez-Picazo at any time prior to September 21, 1987, because he was not a Mester employee prior to that date. The record does include an I-9 for Gonzalez dated September 21, 1987, which was presented to INS on September 25, 1987.[24] Count 8 is dismissed.

7. Counts 8 through 17

Counts 8 through 17 each charge Mester with not having presented a Form I-9 for an identified individual on September 25, 1987. The provisions of the NIF in this respect have already been summarized. In view of the result reached in the discussion which follows, with the one exception of count 8 already discussed, it is unnecessary and inappropriate to analyze the evidence.

This is not a common law cause of action-it is, rather, a civil enforcement action to impose sanctions exclusively authorized by statute as part, and in aid, of newly enacted public policy. IRCA directs that ``if the administrative law judge determines, upon the preponderance of the evidence received, that a ... [respondent] ... named in themplaint'' committed a violation of that policy, the judge ``shall state his findings of fact ...'' and impose certain penalties. specified additional and greater penalties are discretionary with the judge. 8 U.S.C. 1324a(e)(3). With precision, if not clar-

[22]No. I-9 Form was required to have been completed or presented by Mester for Mario Lopez-Vega on either September 2 or September 25, 1987; having been employed prior to November 7, 1986, Lopez-Vega was a ganfathered employee, See section 101(a)(3)(A) of Pub. L. 99-603; 100 Stat. 3372; 8 U.S.C. 1324a (note); 8 C.F.R. 274a.7(a).

[23]For discussion of proof, see, supra, at 111 J 2.

[24]See Exhibit 5, p. 2.

ity, the statute distinguishes between the penalties for violation of the policy against employment of unauthorized aliens and the penalties for paperwork violations. At least four important distinctions deserve emphasis:

(1) among penalties which follow directly from a finding of a violation, differential minimum civil money penalties are prescribed, and additional requirements imposed for employment but not for paperwork violations;

(2) the penalty for paperwork violations is self-contained, i.e., only a civil money liability ``of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred,'' but for unlawful employment the range is higher, and successive violations twice trigger still higher ranges.

(3) unauthorized employment findings may lead also to exposure to criminal and injunctive liability for engaging in a ``pattern or practice'' of employment violations; and

(4) ``good faith'' compliance with paperwork requirements, an affirmative defense in a case of unauthorized employment, is but one among five elements to which ``due consideration shall be given'' in determining the amount of the penalty for paperwork violations.

The extremely explicit drawing of fine lines, the statutory delineation among penalties, makes clear the detailed focus brought to bear on the new venue. This Congressional focus must be understood in context of the statutory conferral of an opportunity for hearing under the APA, with the judge's decision and order becoming final unless in 30 days the reviewing authority modifies or vacates it. It necessarily follows that the same care must be given in the implementation of the statute. Common law causes of action are not involved here. Rather, statutory enforcement authority is involved. What might be tolerable in other contexts becomes intolerable when the focus is on the level of care needed to provide adequate notice in a complaint.

That care imparts a responsibility to OCAHO and to the judge, no less than to program officials. Here, the INS regulation implementing IRCA provides, with no equivocation, that ``[a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act.'' (Emphasis added). 8 C.F.R. 274a.2(b)(2)(11).

Paragraph 274a2 title 8 C.F.R. ``Verification of employment eligibility'', containing four subparagraphs, (a) through (d), appears to constitute the entire INS regulation of paperwork requirements; subparagraph (b) is entitled ``Employment verification requirements.'' In the entire regulation, 8 C.F.R. 274a.2, the quoted text is the only reference to a specific 274A (8 U.S.C. 1324a) provision. The

INS necessarily intended by that unique reference to inform the public of a very particular matter: that the obligation that an employer be prepared to present I-9s, although not a requirement in the literal text of the statute, must be understood as called for by the statutory command to retain the Form I-9.

The significance of the citation is inescapable. It must be given meaning and effect. This is the INS message to employers that they may be called on (with at least three days' notice), for inspection of their I-9s. 8 C.F.R. 274a.2(b)(2)(ii). It is, at the same time, the message that the statutory authority for the obligation to ``present'' is, by the Service's own reckoning, the provision of law cited in the quoted regulation, i.e., section 274a(b)(3) of the Act.

Inexplicably, however, the NIF charges Mester with violating not section 274A(b)(3) of the Act but section 274A(b)(1). As already discussed, counts 8 through 16 allege paperwork violations, all in terms of ``failure to present.'' But the cover sheet, the ``charge sheet'' so to speak, alleges violation of subsection (b)(1) of the statute. Where the factual allegations are not consistent with the specification of law said to have been violated, the flaw is pervasive. Here, where the legal specification cannot be identified with certainty, for the reasons discussed below, the flaw is fatal to the charge.

The statute provides a comprehensive system of paperwork compliance imperatives for the Employment Verification System, 8 U.S.C. 1324a(b):

> (1) Attestation after examination of documentation ... (2) Individual attestation of employment authorization ... (3) Retention of verification form. ...

The narrative portion of the NIF alleges conduct which could only have been violative of subsection (b)(3), not (b)(1), of the statute, if its own regulation is to be believed or followed. The regulation on NIFs is instructive (8 C.F.R. 274a.9(c)(1)(i)):

> The the respondent of the act or conduct alleged to be in violation of law, a designation of the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the penalty that will be imposed. Notice of Intent to Fine will contain a concise statement of factual allegations informing

The error of the statutory citation is compounded by citing as one of the ``provision(s) of law'' said to have been violated ``8 C.F.R. 274a.2(b)(ii).'' In point of fact and law there is no such regulation as 274a.2(b)(ii). No such ``law'' could, therefore, have been violated.

Did INS intend to charge and did it try its case as if it had charged a violation of 8 C.F.R. 274a.2(b)(1)(ii), an allegation which would have comprehended proof of failure properly and timely to complete I-9s?

Or, instead, did INS intend to charge and did it try its case as if it had charged a violation of 8 C.F.R. 274a.2(b)(2)(ii) which, as quoted and discussed above, would have comprehended proof of ``refusal or delay in presentation of the Forms I-9.''

If INS meant the first, its ``failure to present'' charges are not consistent with either its statutory (because erroneous) or regulatory (because nonexistent) predicate. If it meant the second, its statutory predicate is inconsistent with its intent, and its regulatory predicate is nonexistent.

On either supposition, the regulatory citation is a legal impossibility. On the first, the narrative charge informs of different conduct than that reasonably comprehended by the `'failure to present'' charge. On the second, the NIF portends a different violation than the one prosecuted. The conclusion is inescapable that the Service breached its own requirement to meaningfully inform respondent concerning the charges intended to be alleged. 8 C.F.R. 274a.9(c)(1)(i).

This is not merely a technical failure by an agency of government to comply with its own regulation. It is, even more importantly, the source of uncertainty and confusion. The reality is that it is unclear on which theory the Service tried the case. Indeed, on brief there are references both to failure to complete and to present.

The Service, whether or not mindful of the difficulty discussed here, would have me conclude that ``[t]he failure to prepare and/or present the employment eligibility verification form (I-9), constitutes a ... violation of Section 274A(b)(1),(2), and (3) of the Act. ...'' That result would render meaningless any distinctions among the statutory imperatives, by granting judgment on two of three which were never pleaded and where the one that was pleaded is inconsistent with the allegations on which it rest. I cannot join in that result. Among other considerations, it is not possible for me in accord with 8 U.S.C. 1324a(e)(3)(C) to determine ``upon the preponderance of the evidence'' that the employer named in the complaint ``has violated subsection (a)'' of title 8 U.S.C. 1324a without knowing which among the provisions of subsection (a) implicated in the NIF by its terms is in play.

It may be argued that the broad scope of the allegations contained in the complaint, i.e., the NIF, cure any deficiency otherwise arising from the failure properly to specify with certainty the statutory provision allegedly violated and to specify an existent regulatory provision where any such provision presumably is intended. The question may be asked whether these deficiencies misled respondent or were otherwise prejudicial.

The simple and necessary answer, however, to such query is that the complaint cannot comprehend more than the underlying NIF which is not wholesale and general but particular in its recitation of names, dates, and violations of law. See 8 C.F.R. 274a.9(c)(1)(i), supra.

While we can conceive of a complaint drawn broadly enough to permit proof of violation of one subsection of 8 U.S.C. 1324a(b) to establish violation of a different subsection, the complaint here does not fit the bill. To the contrary, this complaint relies in terms on the underlying and incorrect NIF, i.e., by the recitation that the United States ``... represents ... that the respondent has violated the provisions of 8 U.S.C. 1324a ... [b]ased upon the allegations contained in the Notice of Intent to Fine, incorporated herein as though fully set forth. ...''

INS cannot have it both ways: either the violation is a failure properly to prepare or complete I-9s, a cause of action arising under 8 U.S.C. 1324a(b)(1) and (2), or it is a failure to properly retain or make available I-9s, a cause of action arising under 8 U.S.C. 1324a(b)(3) as confirmed by INS in its regulatory implementation of IRCA, i.e., 8 C.F.R. 274a.2(b)(2)(ii), supra.

Specification of failure to satisfy a statutory requirement to prepare and complete mandatory paperwork in implementation of national policy is not a specification of failure to satisfy a statutory requirement to retain and make available for inspection that same paperwork.

As already noted, this case arose very early in the administration of the new national policy. But ambiguity in designating the provisions of law alleged to have been violated in an enforcement action particularly during the early administration of new national policy cannot be resolved in favor of that enforcement action.

Had INS intended to prove failure on the part of Mester to prepare I-9s in conformity with regulatory implementation, it presumably would have cited subparagraph (1)(ii) of 8 C.F.R. 274a.2(b), consistent with the statutory provision it did cite. If, instead, it intended to prove failure on the part of Mester to present I-9s, it had a duty to cite the correct statutory provision, and, if it intended to cite any regulatory provision, an existent and correct one, i.e., subparagraph (2)(ii) of 8 C.F.R. 274a.2(b). To conclude otherwise would render meaningless the distinctions among the subsections of the statutory aggregation of imperatives, collectively known as paperwork violations, each comprising a discrete public policy injunction within the ``employment verification system,'' i.e., attestation by the employer, 8 U.S.C. 1324a(b)(1); attestation by the employee, 8 U.S.C. 1324a(b)(2), and the requirement for retention of the verifica-

tion form, 8 U.S.C. 1324a(b)(3). As previously discussed, the INS regulation makes clear that subsection (b)(3) is implicated in cases of failure to present the I-9 for inspection. 8 C.F.R. 274a.2(b)(2)(ii).

The defects in counts 8 through 17 cannot be cured by reference to Rule 15 of the Federal Rules of Civil Procedure on amended and supplemental pleadings. The flaw here is too basic. I grant that all concerned are early on the learning curve in the development of a new substantive body of law. However, traditional principles of fair notice and fair hearing demand, perhaps even more than in time-tested venues, an alertness to the need for scrupulous adherence to basic principles. It is obvious in retrospect that confusion engendered by the pleadings infected the hearing; the parties at one or another time appear to have tried the case on one or another theory of an 8 U.S.C. 1324a(b) violation.

It remains for other cases whether or not INS may effectively charge a violation of 8 U.S.C. 1324a(a)(1)(B) or 8 U.S.C. 1324a(b), without more. It is sufficient here to hold, as I do, that the NIF is fatally flawed when it specifies a different statutory violation than the one reasonably embraced by the factual allegations, where the regulation specified to have been violated is nonexistent, and it may only be speculated as to which regulation was intended to be specified.

To restate: it is unclear, as the result of the ambiguous statutory citation, considered in light of the nonexistent regulatory citation, what was intended to be alleged and tried. It is not for the trial judge to speculate as to which among the statutory imperatives is at issue.

This is not a case where the judge can substitute an obviously omitted portion of a regulatory citation; it is absolutely unclear what citation to substitute because among the three elements, the factual allegation, the statutory specification and the regulatory specification, no two are consistent as charged. Clearly, the complaint must be adequate to provide notice. 5 U.S.C. 554(b)(2) and (3); 8 C.F.R. 274a.9(c)(1)(i). This complaint did not adequately do so. To hold otherwise would be to ignore the statutory purpose of the APA whose requirement for notice is real, not formalistic.

This is a case where traditional notions of double jeopardy probably do not apply.[25] Nonetheless, due process considerations suggest that a hearing conducted on unalleged violations ought not to be followed by another hearing which puts the respondent to sub-

[25]Even in a criminal proceeding, jeopardy typically does not attach where the charge is dismissed after trial because of defects in an indictment, Lee v. United States, 432 U.S. 23 (1977).

stantially similar proof. [26] Concepts of fairness inherent in principles such as administrative finality and avoidance of duplicative hearings demand no less. For all these reasons, counts 8 through 17 are dismissed.

8. Civil Penalties

Having found violations of the prohibition against continuing to employ aliens knowing they were unauthorized as to those employments, 8 U.S.C. 1324(a)(2), with respect to counts 1, 2, 3, 5, 6 and 7, assessment of civil money penalties and a cease and desist order are required as a matter of law. Title 8 U.S.C. 1324a(e)(4)(A)(i) calls for an assessment of not less than $250.00 nor more than $2000.00 per unauthorized alien with respect to whom a violation has occurred. INS, in its NIF, seeks $500.00 per individual. The Act provides no guidance concerning what criterion to consider in determining the amount of the penalty. The parties have provided no guidance.

Generally, although not inevitably, the amount of the penalty asserted by INS in the NIF may be considered as a ceiling. Here, that sum appears reasonable considering, as I do, an obviously aggressive enforcement conducted against an employer clearly failing in its responsibilities during the very earliest days of program implementation under the Act.

I consider also that it is appropriate to exercise in this case the discretionary authority of 8 U.S.C. 1324a(e)(4)(B)(i) to impose an additional civil penalty, authorized upon a finding that there has been a violation of subsection (a)(1)(A) or, as here, of subsection (a)(2). That provision authorizes an order to an employer ``to comply with the requirements of subsection (b) [of section 1324a(b)] ... with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years. ...'' If the employer as to whom such an order is entered fails to comply, the Attorney General is authorized to file suit to obtain compliance. 8 U.S.C. 1324a(e)(8). Enforcement of an order of compliance is in addition to the remedies otherwise available to the Service for enforcement of employer sanctions.

An order of compliance is appropriate in this case to make clear to respondent the significance of the employer sanctions program, i.e., upon the receipt on September 3, 1987 of the citation containing allegations of violations of IRCA, respondent failed to recognize the need to respond with timely and specific inquiry and, as appro-

[26] See, e.g., Letica Corporation, Department of Transportation, RSPA File NO. 87-57-PPM, Order of Administrative Law Judge (allowing notice of probable violation), Yoder, J., June 6, 1988.

priate, to come promptly into compliance. Mester's demonstrated lack of responsiveness to the employer sanctions program suggests the need for added incentive to compliance in the future as can be expected from such an order. I conclude that, given the employment violations found on this record, it is reasonable to impose an order pursuant to 8 U.S.C. 1324a(e)(4)(B)(i) for a period of one (1) year commencing thirty (30) days after the date of this decision.

IV. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER [27]

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, proposed findings of fact and conclusions of law submitted by the parties. 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 aliens identified in counts 1, 2, 3, 5, 6 and 7, knowing them to be, or to have become, unauthorized aliens with respect to those employments by respondent during a period of time which ended approximately on or about September 25, 1987.

2. That those violations were charged subsequent to receipt by respondent of a September 3, 1987 citation which constitutes a condition precedent to a proceeding such as this one, with respect to such violations arising during the period June 1, 1987 through May 31, 1988.

3. That once a citation is provided to the employer which indicates that a violation of 8 U.S.C. 1324a may have occurred during the period June 1, 1987 through May 31, 1987, proceedings such as this one may initiate without regard to whether the employees or the type of violation are the same as in the precedent citation.

4. That it 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.

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[27] Near the turn of the century, Mr. Dooley observed that ``even the Supreme Court reads the newspapers''. Reality dictates recognition that the media and others will focus on the results of this first fully litigated proceeding before an administrative law judge under the new employer sanctions law. Whether or not the law has begun to achieve the ends sought by its enactment ought not to be measured, however tentatively, by the results of this litigation. Rather, this decision and order must be understood as an administrative adjudication, applying the law, statutory and regulatory, to the facts adduced; it should provide no signal as to the success or failure of employer sanctions as visualized by the framers of that statute or as implemented by those charged with its administration.

5. That a good faith affirmative defense is unavailing to a charge of violating 8 U.S.C. 1324a(a)(2) where, as here, the respondent has failed to establish compliance with the requirements of the employment verification system established by and pursuant to 8 U.S.C. 1324a(b), whether that failure results from errors or acts of omission or commission by either the employee or the employer.

6. That upon receiving notice that an employee is or may be an unauthorized alien, an employer has the responsibility to make specific and timely inquiry, as appropriate, and to promptly discharge the employee without awaiting directions from the government to effect the discharge where continued employment would reasonably appear to be in violation of 8 U.S.C. 1324a.

7. That the civil money penalty, assessed at $500.00 for violation, each, of counts 1,2,3,5,6 and 7, for a total assessment to be paid by respondent of $3,000.00, is just and reasonable.

8. 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(a)(1)(A) and (a)(2).

9. That, in addition to the obligations of employers, generally, to comply with the requirements of 8 U.S.C. 1324a, respondent shall be subject for a period of one (1) year, beginning thirty (30) days after the date of this decision, to the direction of this paragraph to comply with the requirements of 8 U.S.C. 1324a(b).

10. That counts 4 and 8 are dismissed on the merits for failure of proof.

11. That counts 8 through 17 are dismissed for failure to state a cause of action upon which a determination may be made of a violation of 8 U.S.C. 1324a(b).

12. That the record having been closed following the evidentiary phase of the hearing, it is reopened for the limited purpose of receiving into evidence respondent's post-hearing exhibits BB and CC, upon which it is, once again, closed.

13. That, pursuant to 8 U.S.C. 1324a(e)(6) and as provided in section 68.52 of the interim final rules of practice and procedure of this office, 28 C.F.R. 68.52, this decision and order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED. Dated this 17th day of June, 1988.
MARVIN H. MORSE
Administrative Law Judge