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

United States of America, Complainant v. Lee Moyle, Owner, d.b.a. Moyle Mink Farm, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100286.

DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge.

Appearances: **ROBIN L. HENRIE**, Esquire, **GREGORY E. FEHLINGS**, Esquire, Immigration and Naturalization Service for Complainant.
GUSTAV A. ROSENHEIM, Esquire, for Respondent.

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I. INTRODUCTION

In the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. section 1324a, Congress provided for civil penalties for employers who failed to

comply with the employment eligibility verification requirements of 8 U.S.C. section 1324a(b).

Title 8 U.S.C. section 1324a(b)(1)(A) provides that an employer is liable for failure to attest ``on a form designated or established by regulation of the Attorney General that it has verified that the individual is not an unauthorized alien . . ..'' The form used for verification is the Employment Eligibility Verification Form, commonly known as the I-9. The regulations provide that the employee will also attest, under penalty of perjury, as to his or her identity and employment authorization.

Title 8 U.S.C. section 1324a(b)(3) dictates the retention requirements of Forms I-9 by employers, and the inspection procedures to be utilized in the enforcement of this program. Agents of the Immigration and Naturalization Service (INS) are authorized to conduct inspections of employers' I-9 files to ascertain the employers' compliance with IRCA. If violations are found during these inspections, penalties may be assessed in accordance with 8 U.S.C. section 1324a(e). The employer, upon the receipt of an assessment notification, may opt to comply with the assessment, or may elect a hearing before an administrative law judge, thus abating the penalty during the hearing procedure.

II. PROCEDURAL HISTORY

On April 27, 1989, the United States of America, INS, served a Notice of Intent to Fine on Lee Moyle, Owner, Moyle Mink Farm. The Notice of Intent to Fine alleged 21 violations of Section 274A(a)(1)(B) of the Act for failure to properly prepare and/or complete Section 2 of the Form I-9. In a letter dated May 12, 1989, Respondent, through its counsel, Gustav A. Rosenheim, requested a hearing before an administrative law judge.

The United States of America, through its Attorney, Robin L. Henrie, filed a Complaint, incorporating the allegations in the Notice of Intent to Fine against Respondent, on June 16, 1989. On July 23, 1989, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the administrative law judge in the case and setting the hearing date and place for October 17, 1989, at Twin Falls, Idaho.

Respondent, through Attorney Rosenheim, answered the Complaint on July 24, 1989, specifically admitting or denying each allegation and setting forth four affirmative defenses. The first of which alleged a lack of reasonable belief, on the part of the INS agents who conducted the investigatory inspection, that Respondent had violated any provisions of section 274A of the Act. The

second alleged an illegal seizure of documents from Respondent's premises by the INS agents. The third affirmative defense alleged ``good faith'' on the part of the Respondent. The final defense alleged an improper service of the Subpoena duces tecum.

On July 27, 1989, I issued an Order Directing Procedures for prehearing. On August 3, 1989, counsel for Complainant moved to strike Respondent's third affirmative defense as being insufficient. Respondent failed to respond to this motion within 10 days. On August 22, 1989, Complainant moved for an order striking Respondent's third affirmative defense, since no answer had been filed within 10 days. On the same date, I granted Complainant's motion to strike based upon the pleadings and documents before me at that time. I struck the third affirmative defense as insufficient and improper, citing previous OCAHO cases in which similar rulings were made.

On September 5, 1989, pursuant to a request by Complainant, I issued three subpoenas to compel attendance at scheduled depositions. On September 18, 1989, I issued an order confirming a ruling made during a telephonic conference on September 15 that Attorney Henrie was entitled to be accompanied by an INS agent at the scheduled depositions. I would not, however, permit the agent to be present during the taking of the deposition of another INS agent. I also ordered that Attorney Rosenheim could be accompanied by Respondent, Lee Moyle.

On September 27, 1989, I continued the hearing date indefinitely, based upon anticipated additional discovery. On October 2, 1989, Complainant moved for a ruling deeming the requests for admissions as admitted, based upon the failure of Respondent to respond within 30 days. I issued a show cause order to Respondent on October 5, 1989, granting Respondent until October 20 to explain the reasons for this failure. On October 10, 1989, I received the Respondent's Response to Request for Admissions and Answers to Interrogatories and Requests to Produce, which were mailed on October 4, 1989, along with an Affidavit of Attorney Rosenheim explaining the reasons for the late submission, and a Motion in Opposition to the Complainant's motion. On October 19, 1989, I granted in part Complainant's Motion, deeming numbers 1, 2, 3, 4, 5, 6, 7, 8, and 11 as admitted, and denied in part the motion, deeming numbers 9, 10, 12, and 13 as denied.

A pre-hearing telephonic conference was conducted on November 6, 1989, during which the hearing date was scheduled for February 21-23, 1989, in Twin Falls, Idaho. An additional pre-hearing telephonic conference was held on December 5, 1989, in which the parties discussed the Complainant's November 24, 1989 motion, which

sought to have its second set of admissions deemed admitted due to the failure of Respondent to timely file its response. The parties agreed that Respondent would be granted an extension until December 8, 1989, based upon an earlier agreement between the parties.

A fourth pre-hearing telephonic conference was conducted on January 17, 1990, in which I ordered that all pre-hearing statements, exhibit lists, motions, memos, and briefs were due to me by February 12, 1990. I also confirmed that both parties had the right to a designated representative, to be seated at counsel table during the hearing.

On January 19, 1990, Counsel for Respondent submitted a Motion to Exclude all INS I-213 Forms at hearing, followed by a government motion in opposition on January 22, 1990. The government counsel requested my issuance of several blank subpoenas to insure the attendance of witnesses at hearing, on January 23, 1990. On January 24, 1990, Attorney Gregory E. Fehlings noticed his appearance for Complainant. All of these matters were discussed in the pre-hearing telephonic conference held on January 30, 1990. At that time, I learned that Respondent had moved for suppression of the Forms I-9 and other documents allegedly seized by INS agents during the February 7, 1989 inspection, however, I had not yet received Respondent's motion. In my order confirming this conference, I instructed the parties to submit memoranda of points and authorities supporting their views regarding the two suppression motions by February 12, 1990. I declined to issue the government's requested subpoenas until they identified the persons or things subpoenaed, and I granted the government's request to submit subpoenas for its rebuttal witnesses ex parte.

On January 31, 1990, counsel for Complainant applied for two subpoenas, and an additional subpoena, ex parte, accompanied by a statement in support thereof. I granted the subpoenas on February 5, 1990. I received a joint Stipulation Re: Witnesses on February 5, 1990. On February 7, 1990, pursuant to Complainant's written request, I transmitted copies of Respondent's October 4, 1989 responses to requests for admissions, and October 5, 1989 answers to interrogatories.

On February 6, 1990, Complainant moved to amend two typographical errors in the Complaint. This was later granted, absent objection, at the outset of the February 21, 1990 hearing. On February 8, 1990, the following documents were submitted: Complainant's pre-hearing brief and exhibit list, and Respondent's statement of facts, exhibit list, application for subpoenas, and pre-hearing statement. Complainant's pre-hearing statement was filed on Feb-

ruary 9, 1990, along with a statement regarding Complainant's compliance with pretrial orders. I issued the requested subpoenas on February 14, 1990.

The hearing in this matter was held in Twin Falls, Idaho on February 21-22, 1990. Representing the Complainant were Attorneys Henrie and Fehlings. Attorney Rosenheim represented the Respondent, Lee Moyle, At the outset of the hearing, Complainant orally moved to amend the Complaint by dismissing four counts, numbered 1, 2, 9, and 20, and lowering the fine to $4,750.00, vice $5,550.00. There being no objection, I granted the motion to amend. I received argument by counsel and heard testimony from six witnesses. I admitted 25 Complainant's exhibits and one exhibit from Respondent. A hearing record of 394 pages was compiled.

On March 6, 1990, Complainant moved for additional time to file its brief, and requested permission to file a response brief to Respondent's post-trial brief. After receiving telephonic confirmation that Respondent did not oppose this request, I granted Complainant's motion on March 13, 1990, giving him 40 days from receipt of the transcript to file his brief, and 20 days from receipt of Respondent's brief to file his reply.

On March 12, 1990, I received Complainant's Motion for Leave to Submit Late Evidence, which was apparently mailed on February 8, 1990. The evidence in question was an alleged videotaped interview by Lee Moyle, made after the hearing, which had not yet been received by Complainant. This was denied in my May 15, 1990 Order, due to the speculative nature of such proposed evidence.

On March 12, 1990, Complainant again moved to submit late evidence, specifically seven black and white photographs, and a statement of Scott J. Baker, Border Patrol Agent. This motion was the subject of a telephonic conference conducted on March 16, 1990. I granted Respondent 20 days to respond to Complainant's motion. On April 6, 1990, Respondent submitted an opposition motion, with an accompanying memorandum, requesting me to disallow the opening of the record to receive late proposed evidence. Although Complainant filed to reply to Respondent's motion, he had not requested leave of Court to do so. As Respondent correctly pointed out in his April 28 motion to strike, this was a violation of section 68.9(b) of the Rules of Practice and Procedure, therefore, I did not consider it in my decision. I did, nevertheless, find good cause and granted Complainant's motion in my May 15, 1990 Order, admitting the evidence as exhibits 33 and 34.

Complainant filed its Post-Trial Brief on April 27, 1990, followed by Respondent's on April 28. Complainant submitted a reply brief on May 21, 1990. On June 6, 1990, Respondent moved to open the

record and submit late evidence, specifically six color photographs, and affidavits of Lee Moyle, Marta Moyle, Angel Deltoro, and Gustav Rosenheim. On June 21, 1990, Complainant submitted an opposition motion. I issued an order granting Respondent's request to open the record on June 26, 1990, admitting Respondent's evidence as exhibits 2-4, and making them a part of the record. Complainant submitted a supplemental reply brief on June 12, 1990. I have considered all of these pleadings, memoranda, arguments, testimony, and exhibits in arriving at my decision.

III. LEGAL ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Several issues were presented for my consideration during the course of this hearing. The first issue involves admissions by Respondent concerning discrepancies in the subject I-9's. The second involves the three affirmative defenses raised by Respondent, and what, if any evidence should be suppressed as a result of misconduct alleged in these defenses. The final issue involves appropriate civil penalties to be assessed, if found to be appropriate.

A. Admissions by Respondent

Complainant contends that Respondent admitted the essential facts supporting the 17 allegations of paperwork violations. I have reviewed all of the documents submitted by the parties, particularly the Respondent's responses to requests for admissions. The Respondent has directly admitted to hiring each of the individuals named in Count I, and has further admitted to hiring these 17 employees after November 6, 1986, to work in the United States. All Forms I-9 submitted in evidence in this case, Ex. C-28, are true and correct copies of the forms presented by Respondent to the INS agents during the February 7, 1989 investigatory inspection. Respondent agrees and admits that these forms were deficient in some respects. see Ex. C-3. I find non-compliance on the face of the forms from my examination of Ex. C-9 and C-28, also.

Respondent has not, even remotely, begun to deny any of these elements of section 274A(a)(1)(B). Respondent offered no evidence to disprove any of the allegations of paperwork violations. He raised three affirmative defenses, which I will address below, but these defenses do not go to the issue of proof.

Respondent has also admitted that the INS agents conducted an educational visit at his mink farm prior to the inspection, that the entity name and address as found in the Amended Complaint are correct, that the entity is a business organization from which its employees receive pay, and that the INS agents gave notice of their inspection more than three days prior to February 7, 1989. See Ex.

C-3. I agree with Complainant that these are relevant matters in my consideration of this case, and they are accepted by me as admitted.

I do find, therefore, that Respondent has admitted essential elements of the allegations in this case, and that Complainant has demonstrated, by a preponderance of the evidence, that the violations did occur as alleged. I must now look to the three affirmative defenses to determine whether any or all of them will overcome this finding.

B. Respondent's Affirmative Defenses

1. Basis For Investigatory Inspection

Respondent alleges that the agents conducting the investigatory inspection did not possess sufficient facts to support their suspicion that Respondent was in violation of IRCA, and therefore, they had no legal basis for the I-9 audit. Complainant, on the other hand, contends that their decision to investigate Lee Moyle's farm on February 7, 1989 was lawfully based. They set out the several factors leading them to this decision: discussions with Border Agent Mahoney that he had arrested illegal aliens at the Moyle Mink Farm in Burley, Idaho; Agent Mahoney's recollections of Respondent's attitude and statements to him, during the educational visit, that Respondent was not going to comply with the IRCA laws; the anonymous phone tip that a female illegal alien was living in Burley and working at the Moyle Mink Farm; Agent Baker's observations, during a surveillance of Respondent's farm, of individuals who appeared to be displaying dress and mannerisms of illegal Hispanic aliens; and Agent Baker's conversation with Bruce Ellenberger at the Cassia County Jail, in which Ellenberger stated that Moyle Mink Farm employed illegal aliens. Complainant argues that, taken together, these factors provided the INS agents with a sufficient basis to investigate the Respondent's farm.

Complainant contends that INS may, on its own initiative, and within its discretion, determine which employers to investigate for possible IRCA violations. seeC's Post-Trial Bf. at 29-32. I agree that INS has discretion in determining whether to launch an investigation, even in the absence of a formal written complaint. I will point out here that I find no evidence suggesting that a formal complaint was the basis for this inspection. I do find, as Complainant suggests, that INS relied upon other leads and pieces of information to make that determination, which is within their power. see 8 U.S.C. section 1324a(e)(1)(C).

Complainant continued its detailed argument by asserting that, in the absence of an explicit statutory standard, the discretion of

INS to conduct inspections is unreviewable. I do not concur with Complainant's contention that INS has unreviewable investigatory power.

Case law reveals that the courts do not favor nonreviewabil_ity of agency decisions. The Ninth Circuit has stated, ``[j]udicial reviewability of administrative action is the rule and nonreviewability a narrow exception, the existence of which must be clearly demonstrated.'' City of Santa Clara v.Andrus, 72 F.2d 660 (9th Cir. 1978), cert. denied,439 U.S. 859 (1978).

In the administrative law arena, judicial review is governed by Chapter 7 of the Administrative Procedure Act (APA), which states in part, ``[t]his chapter [Judicial Review] applies, according to the provisions thereof, except to the extent that-(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.'' 5 U.S.C. section 701(a). It is apparent that judicial review of agency action in IRCA cases is available because the IRCA laws themselves so provide. Sections 274A(e)(6) and (7) of the Act and 28 C.F.R. section 68.51 discuss the procedures for administrative appellate review and judicial review. They provide for review of ``final agency actions'' which are either my final order, or the final order of the Attorney General, through the Chief Administrative Hearing Officer, if review by him is timely requested.

Considering these regulations in conjunction with the APA, provisions are made for both ``final actions'' andpreliminary or intermediate actions. The APA states, ``[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action''. 5 U.S.C. section 704. Therefore, Complainant's contention that preliminary agency actions, such as INS investigatory decisions and methods, are unreviewable is misplaced. Clearly an aggrieved party is entitled to judicial review of most agency actions, if requested. See 5 U.S.C. section 702.

Not only do I find that judicial review by appellate and review authorities is available, I find that I may consider and rule on the decisions of INS agents to begin investigations. An Administrative Law Judge (ALJ) has powers and duties comparable to a trial judge, see Butz v. Economou, 438 U.S. 478 (1978); United States v. Manulkin, 2, AdL 3d 254 (1989). In Manulkin, the ALJ ruled that the actions of the INS District Director to issue a Notice of Intent to Fine was reviewable by him at the hearing level. The ALJ also commented that the APA, which defines the powers and responsibilities of ALJ's at 5 U.S.C. section 551-559, ``does not limit the scope and authority of an ALJ to hear and decide any matters relating to the constitutional rights of a Respondent''. Id. at 257. He

continued, ``it is my view, that the regulations do permit and, indeed, require an ALJ in employment sanction cases to decide issues involving Constitutional rights. . . .'' Id. at 258. I find that this issue was properly raised by Respondent, and that my duties as an Administrative Law Judge require my determination of this issue.

Complainant also seems to believe that, because they have discretion to initiate investigations, judicial review is barred. Complainant relies upon a literal reading of 5 U.S.C. section 701(a)(2), which provides an exception for judicial review if ``agency action is committed to agency discretion by law''. Complainant's reliance is misplaced, however, as the courts have explained their interpretation of this section of the APA.

The Ninth Circuit has explained the test for whether ``agency action is committed to agency discretion by law'' to be ``not whether a statute viewed in the abstract lacks law to be applied, but rather, whether `in a given case' there is no law to be applied.'' Strickland v. Morton, 519 F.2d 467, 470 (9th Cir. 1975), citing Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402 (1971); see also Abdelhamid v. Ilchert, 774 F.2d 1447 (9th Cir. 1985).

In Heckler v. Chaney, 470 U.S. 821 (1985), the Court explained the meaning of 5 U.S.C. section 701(a)(2) and analyzed what was believed to be an inconsistency in the APA between it and section 706(2)(A), (which provides for an ``abuse of discretion'' standard for judicial review). The Court settled the question, ``[h]ow is it . . . that an action committed by agency discretion can be unreviewable and yet courts still can review agency actions for abuse of that discretion?''. The Court explained that if there is no ``meaningful standard against which to judge the agency's exercise of discretion . . . the statute can be taken to have `committed' the decisionmaking to the agency's judgment absolutely.'' 470 U.S. at 829-830. In that type of case, the court would be unable to review the decision for abuse of discretion.

The court is Wallace v. Christensen, 802 F.2d 1539 (9th Cir.), explained,

> review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute . . . can be taken to have `committed' the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the `abuse of discretion' standard of review in section 706 (APA)-if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for `abuse of discretion.'

Id. at 1543.

In this case, there exists a meaningful standard against which to judge the agency's actions in the area of I-9 inspections, therefore, absolute discretion does not rest with INS agents. Section 274A(e)(1)(C) of the Act provides for the establishment of procedures by the Attorney General, for the investigation of violations of section 274A(a) of the Act, which the Attorney General deems appropriate. These procedures are found in the Immigration Officer's Field Manual for Employer Sanctions (hereinafter Field Manual) at chapter III. The Field Manual describes what types of leads are acceptable to initiate an investigatory inspection, and states that the `'articulable facts necessary to begin an investigation . . . mean the ability to articulate logical reasons to suspect a violation. . . .'' Field Manual at section III-A-1.

Another notable distinction between Heckler and the case at bar, which further supports review, is that in the former, the agency decision was one not to pursue enforcement, while in this case, the INS decision was one to pursue enforcement. The Court pointed out that agency decisions to refuse enforcement are unsuitable for judicial review. The Court explained:

> When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

470 U.S. at 832.

Having found that judicial review is available, and that I may consider the issue at hearing level, I turn to the issue of the standard of review. I agree with Complainant that ``abuse of discretion'' is the appropriate standard. The APA provides for an abuse of discretion standard in administrative review. see 5 U.S.C. section 706. The courts have applied it as well. see Heckler, supra at 830; Occidental Engineering Co. v. INS, 753 F.2d 766 (9th Cir. 1985).

In analyzing whether the INS abused its discretion in selecting Respondent's mink farm for an investigatory inspection, I look to the factors which they cited as the basis for this decision. I will base my finding on the several factors then in the possession of the INS agents, and not on any one factor. Individually, these items may or may not have formed a sufficient basis to inspect, however, the situation in this case was not one in which any one of these items was alone responsible for the agents' decision. I will address my findings regarding each factor, however, because of the disparity in evidence presented by the parties.

The Field Manual guides agents in determining adequacy of leads by outlining the various sources from which agents may obtain their information. The Field Manual states,

> [l]eads may be received from a variety of sources, including the following:
> -The general public;
> -Conduct on the part of an employer which indicated that he or she may be violating the Act, such as employer statements of intent;
> -Service records, including derogatory information obtained in the course of employer educational contacts;
> -Employees and informants;
> -Arrested aliens;
> -The Department of Labor;
> -Other governmental agencies;

Field Manual at section III-A-1.

Agent Mahoney, who was formerly stationed at the Twin Falls, Idaho office testified that he participated in several arrests of illegal aliens who were employed by Moyle Mink Farm. He stated that the mink farm in question was in Burley, which I find to be close to Heyburn, and in the area of Respondent's mink farm. Agent Mahoney also testified that one of his most reliable sources for information was Bruce Ellenberger, an employee at the Cassia County Jail. This information was passed to Agent Baker when he was assigned to the Twin Falls station. I find that Agent Mahoney's testimony regarding the above information was credible, and was used as a basis for the inspection. This information was verified by Respondent himself when he stated to Agent Baker, following the inspection, that he had employed illegal aliens in 1987 and 1988. Although Lee Moyle's statements to that effect had no influence on the decision to investigate, they added support to the reliance on Agent Mahoney's information. Respondent further supported this information by his admissions at hearing that he employed illegal aliens in the past.

I also find that Agent Mahoney conducted an educational visit at Respondent's farm in October, 1987. He recorded notes of what had transpired during the visit in the office files in Twin Falls. Agent Baker testified that he obtained these notes and relied upon them in determining that an investigatory inspection was warranted. The notes indicated that Lee Moyle refused to comply, that he would not fill out I-9's, and that the agents could jail him first. see Ex. C-12. Agent Mahoney testified at the hearing that he recalled this exchange with Lee Moyle and that Lee Moyle appeared to be serious about his non-compliance. He stated that Lee Moyle was the only employer who had ever outright refused to comply with

the IRCA laws and that Moyle's attitude left an impression on Agent Mahoney that he would not cooperate. I find Agent Mahoney's testimony and recollection of this visit to be credible and the reliance upon his records by Agent Baker to have been appropriate.

I find that Complainant also relied upon an anonymous phone tip that an illegal alien was employed by Moyle Mink Farm. Erma Carson, a Border Patrol secretary in Twin Falls, testified that she received an anonymous telephone call on January 13, 1989, from a young woman. The female caller appeared to be rational as she described an alleged 17 year old Mexican female, named Arecelia Marcus, who was illegally in the United States and working at the Moyle Mink Farm. Mrs. Carson testified that the caller provided details about the living arrangements of Marcus and how she obtained false identification documents. see Ex. C-14. Mrs. Carson testified that, in her mind, the caller was referring to Respondent's farm in Heyburn, because she only knew of one mink farm, despite living in the area her entire life.

I believe Agent Baker acted reasonably, based upon the information he possessed from this tip, although he later discovered that the illegal female described in the call was employed by another Moyle Mink Farm, owned by Respondent's brother. I believe that this tip, standing alone, would have been insufficient for the decision to investigate. The speculative nature of the anonymous call would have necessitated a more thorough check. Since Agent Baker already possessed the leads described above, and had planned on more closely investigating the phone tip, I find that he was acting reasonably in pursuing the next of his activities, a visual surveillance.

I find that Agent Baker drove to Respondent's mink farm on January 14, 1989, and conducted this surveillance. He used binoculars to observe the activity taking place on the farm. Agent Baker testified that he observed three individuals walking in single file across the field on the property. He testified that they appeared to be Hispanic by their style of dress and physical characteristics. Agent Baker testified that his observations led him to believe that these individuals could have been illegal aliens. Agent Baker further testified that he had formerly been assigned to the U.S./Mexico international border, and that the dress and mannerisms of these individuals was consistent with the illegal aliens he had seen at the border. Agent Baker testified that he did not enter the premises, but that he proceeded to record license plate numbers from some vehicles parked on the Respondent's property. I

find that Agent Baker's observations provided an appropriate basis for the subsequent I-9 inspection.

Respondent's attorney questioned whether Agent Baker was observing Lee Moyle's mink farm, or another farm in the area. I find that Complainant has proven, by a preponderance of the evidence, that the property observed by Agent Baker was Lee Moyle's farm. I find that Agent Baker observed what he deemed to be ``silos'' on Respondent's property, and although Lee Moyle, Marta Moyle, and Bruce Ellenberger did not agree that Respondent's property contains ``silos'', it does have feed bins. Agent Baker's improper characterization of these bins as ``silos'' does not discredit his recollection of his surveillance activities. Therefore, I find: that the vehicle owners, whose license plates were checked by Agent Baker, resided on Lee Moyle's property; that Lee Moyle was told that a neighbor saw INS observing his property through binoculars; that Bruce Ellenberger and Agent Baker discussed the Lee Moyle Mink Farm at the Cassia County Jail, while the license check was conducted; and that the geographic location of the farm visited by Agent Baker was in the Heyburn/Burley area, and not in Filer or in Declo.

Finally, I find that Bruce Ellenberger commented to Agent Baker that the Lee Moyle Mink Farm employed illegal aliens. Agent Baker and Bruce Ellenberger both testified that they discussed the Moyle Mink Farm while the license check was being done by another employee at the Cassia County Jail. As I have stated, I believe Bruce Ellenberger was discussing the Respondent's farm because he knew, when he heard the names of the vehicle owners, that they resided on Respondent's property. He also stated that his basis for this knowledge was his relationship to the Moyle family. He told Agent Baker that his daughter was married to Don Moyle, Lee's brother. He also discussed having visited Respondent's farm in the past, and was able to confirm Agent Baker's description of several physical features on the farm.

Although Bruce Ellenberger testified that he did not refer to Lee Moyle's farm in his discussion with Agent Baker, I was not persuaded that he was able to accurately recall the exact contents of that conversation, due to the passage of time. Agent Baker, on the other hand, made a detailed report shortly after the conclusion of the conversation, he recalled in his testimony accurate details of that discussion, and he had much more reason to pay attention to the conversation than did Ellenberger, as he was anticipating an investigation at the Respondent's farm and was gathering as much detailed information as possible about an unfamiliar location.

Bruce Ellenberger also testified that he did not refer to the employees as illegals, but that he told Agent Baker that Lee Moyle

employed Mexicans. I find it difficult to believe that Ellenberger, knowing the function of INS, would refer to Lee Moyle's employees as ``Mexicans'' and not use that in the context of ``illegal Mexicans.'' This is especially incredible since this same Bruce Ellenberger was one of INS' most reliable sources for information on illegal alien employment in the area, according to Agent Mahoney. It is also interesting that Ellenberger requested Agent Baker not to reveal that he was a source for the information communicated to Agent Baker. I agree with Complainant that Ellenberger would not have made that request had he not provided adverse information. Obviously, employment of Mexicans is not considered adverse, while employment of illegal aliens is.

The above factors were distinct and obtained from diverse sources. Their cumulative effect caused INS to suspect a possible violation of IRCA by Lee Moyle. I find that suspicion to have been warranted, and the subsequent decision to investigate Lee Moyle's Forms I-9 to have been appropriate. I do not find that the commencement of this case was arbitrary, or capricious, or an abuse of INS's discretionary power. Therefore, I find no basis for Respondent's first affirmative defense.

2. Seizure of Forms I-9

Now that I have found that the INS agents were properly on the premises of Respondent on February 7, 1989, I must address whether their conduct in seizing the Forms I-9 and related personnel records was appropriate. Respondent contends that by removing the documents from the premises of Lee Moyle's farm, and by using a subpoena to obtain the documents, the agents violated a Fourth Amendment right of Respondent's which should lead to the exclusion of these documents from evidence.

Complainant asserts, on the other hand, that the agents obtained the documents with the consent of Marta Moyle, a co-owner of Respondent's business, or in the alternative, with a valid subpoena duces tecum. It further contends that INS has a right to remove these documents from the business premises, and that since the I-9's are required to be kept by Respondent, Respondent has no protection regarding them. Complainant further claims that Respondent demonstrated no prejudice or damage as a result of its actions. For these reasons, they contend, the exclusionary rule is inapplicable to these records.

I find that the INS agents did not abuse their discretion in the process of inspecting the records of Respondent's farm on February 7, 1989. The agents provided Respondent with the requisite three-day notice prior to entering its property. The agents were met at

the business office by one of Respondent's employees, Doreen Dailey, who explained that she had been left in charge of preparing for and assisting with the agents' inspection. The agents were admitted to the business premises consensually and there was no apparent objection to their conducting the inspection of the I-9 files.

The agents displayed their credentials, explained what they were going to inspect, and acted in a cordial, non-threatening manner. I find that the agents were not attired in their uniforms and they concealed any weapons they may have been carrying. I believe that the agents were cooperative and explained that they would give Doreen Dailey as much time as she needed to gather the documents they requested, stating that they would leave and return at a later time if she so desired.

I further find that Dailey consented to the agents' taking of the Forms I-9, however she did become concerned at the agents' request to remove the other business records (W-4 Forms, payroll records, etc.). At that time the agents presented a subpoena duces tecum to her which specifically enumerated the items to be inspected. I believe that Dailey then sought the approval of Marta Moyle, Lee's wife, to turn over the business records to the agents.

I find that the agents knew that Marta Moyle was Lee's wife and a co-owner in the business. I believe they were cordial and non-threatening to her. In the presence of the agents, Marta Moyle questioned Doreen Dailey as to Lee Moyle's whereabouts and was told that Mr. Moyle had left Ms. Dailey and Mrs. Moyle in charge of the inspection. Lee Moyle apparently had no intention of participating in the inspection, although he was aware of it. The agents again requested to take the relevant business records along with the I-9's pursuant to the administrative subpoena.

I find that Marta Moyle looked at the subpoena, handed it back to the agents, and told Doreen Dailey to give the agents the records they requested. I do not believe that Marta Moyle felt that the subpoena deprived her of her rights, or that her prior residency in Mexico caused her to be intimidated by the agents. I find that Marta Moyle consented to the agents' removal of the I-9's and that she did not request to make copies or retain receipts for any of the documents. I further find that the agents asked Mrs. Moyle if she required additional time to gather the records and that they would return at a later time, if necessary. She declined this offer.

I find that the agents removed the personnel records, including I-9's, of Respondent's then current employees, Respondent's pay records for 1987 and 1988, and personnel records for past employees. I find the chain-of-custody remained intact for these documents from the time Agent Baker removed them from the office on Feb-

ruary 7, 1989, until they were returned to the business office at Respondent's farm. All of the documents removed were hand-delivered to Respondent's farm the following day, with the exception of the Forms I-9. I believe the agents returned photo-copies of the I-9's along with the originals of the personnel documents, and that the original I-9's were returned by certified mail on or about February 9, 1989. All of the above facts lead to the conclusion that the actions of Agents Baker and Hopkins were reasonable and non-prejudicial to Respondent.

There is no evidence that either Ms. Dailey or Mrs. Moyle objected to the use of the subpoena or the physical removal of the documents from the premises. Marta Moyle had more than enough opportunity to call her husband or an attorney if she questioned the agents' actions. Her behavior evidenced more a lack of concern regarding the agents' activities than a fear of them. Neither Marta Moyle nor Doreen Dailey requested to take back-up copies of their documents before the agents removed them from the office. Cooperation is further demonstrated by the agreement of the agents not to take the current payroll records, as per Doreen Dailey's request. This indicates that Ms. Dailey understood that she could limit her consent and that she had some control regarding the items seized. She and Marta Moyle consented to the removal of certain documents, but not others, and the agents readily complied.

Despite Complainant's strong argument that the applicable regulations specifically authorize the physical removal of the documents during an investigatory inspection, I believe that Section 274A(b)(3) of the Act is somewhat unclear as to where the inspection is to take place and whether documents may be removed for the inspection. See Pretrial Brief of Complainant at page 5, et seq. I do not, however, find that the Act specifically prohibits removal. This section states ``the person or entity must retain the form and make it available for inspection by officers of the Service. . . .'' It does not dictate where the documents are to be inspected, thus I must consider the totality of the circumstances surrounding the inspection.

I believe it would be preferable for the agents to conduct their inspections on the business premises, but in the absence of any regulations prohibiting them from removing the documents and returning them, intact, within a reasonable time, I do not believe that prejudice can be shown. Considering the totality of the circumstances, I find the handling of the records in this case to have been proper and the return of the documents the next day to have been timely. The agents' numerous offers to take only the I-9's and to

return at a later time for the other employment records demonstrates their reasonableness in handling this inspection.

I have considered both the Forms I-9 and the other related documents in my analysis of whether the inspection was conducted properly by the agents because all of these documents were seized. I will point out, however, that the other personnel and pay records were not introduced into evidence, so even if I found some mishandling of these related documents which amounted to an abuse of discretion, I would not be able to suppress them. Respondent warrants no protection from a valid inspection, authorized removal of documents, and prompt return of those documents, especially since they were not used to his detriment in this proceeding.

Respondent's pre-trial motion urged suppression of the Forms I-9, found at Exhibit C-28. I agree with Complainant that the Forms I-9 are ``required records'' and that Respondent was obligated to provide them for inspection on February 7, 1989. Because they were required records and not private papers of Lee Moyle, Respondent is not entitled to Fourth or Fifth Amendment protection regarding them. U.S.v. Shapiro, 335 U.S. 1 (1948) is the seminal case regarding this issue and the Court's analysis of what constitutes ``required records'' has been followed in administrative proceedings. See U.S.v. Lehman,887, F.2d 1328 (7th Cir. 1989); In re Grand Jury Proceedings,801 F.2d 1164 (9th Cir. 1986); Donovanv. Mehlenbacher,652 F.2d 228 (2d Cir. 1981). In U.S.v. Thriftimart, Inc.,429 F.2d 1006 (9th Cir. 1970), cert. denied,400 U.S. 926 (1970), the court explained the distinction between criminal and administrative searches, reasoning that administrative searches are less intrusive and not personal in nature. Assuming the Respondent had Fourth Amendment protection, I still would not find any violation as a result of the proper actions of the INS in this case.

Respondent urges the exclusion of the documentary evidence as a result of the agents' seizure of the evidence with ``an invalid subpoena duces tecum which they treated like a search warrant.'' Respondent's Post Trial Brief at 10. Respondent argues that the conduct of the INS agents in seizing the documents and removing them from Respondent's business premises should so offend the Court that the evidence should be suppressed. I do not agree with Respondent's reasoning in this regard. If Respondent had not consented to the removal of the Forms I-9, or had challenged the use of the subpoena, the agents could not have obtained them at that time, as I have explained above.

As I have stated, I did not find an abuse of discretion warranting corrective action. The Ninth Circuit has concluded that, ``[a]s a general rule, the exclusionary rule does not attach to civil or adminis-

trative proceedings.'' In Re Establishment Inspection of Hern Iron Works,881 F.2d 722, 729 (1989), citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); U.S. v. Janis, 428 U.S. 433 (1976), reh'g denied, 429 U.S. 874 (1976). I agree that the exclusionary rule is not an appropriate device in this type of administrative proceeding. It is certainly not justified by these facts.

Based upon my finding that the agents acted properly in seizing them, my belief that they are accurate representations of the I-9's taken by the agents on February 7, 1989, the lack of a showing of loss of or damage to the forms, and the lack of any prejudice to Respondent by their removal, I will not suppress them. Respondent's additional suppression motion, pertaining to INS I-213 Forms, is also denied since Complainant did not introduce any such documents at hearing. For all of the above reasons, Respondent's second affirmative defense fails.

3. Service of Subpoena

Respondent alleges the service of the Subpoena duces tecum by the INS agents on February 7, 1989, was defective because it was not served on Lee Moyle personally, but on his wife and employee, Doreen Dailey. Complaint suggests, to the contrary, that since the subpoena was addressed to Lee Moyle, Owner, Moyle Mink Farm, service upon a co-owner of the farm or an agent of Lee Moyle was appropriate.

I agree with Complainant. In my view the subpoena was addressed to Lee Moyle in his capacity as owner of Moyle Mink Farm. It was also addressed to the Farm as a business. It has been held that service of an administrative subpoena upon a custodian of records or a third party does not nullify the subpoena. See U.S.v. Miller,425 U.S. 435, (1976); U.S.v. Horton,452 F. Supp. 472 (C.D. Cal. 1978), aff'd., 629 F.2d 577 (9th Cir. 1980). I do not find a defect by service upon a co-owner of the business entity, when the entity is named in the subpoena.

In this case, an examination of the totality of the circumstances leads to the opinion that service of the subpoena by the INS agents was proper. The agents gave advance notice of their intended inspection, scheduled for February 7, 1989. The agents asked specifically to speak with Lee Moyle and were told by Doreen Dailey that she had been left in charge by Lee Moyle. Obviously Lee Moyle was aware of the inspection, but chose not to participate. Lee Moyle was on the premises at the time of the inspection, but Marta Moyle, his wife, did not consider it necessary to request his presence at the time the subpoena was presented to her. Marta Moyle explained that she was involved in the business operation of the

farm and was a co-owner, by her marriage to Lee Moyle. The failure of the agents to personally serve Lee Moyle was as much a result of Respondent's decision to be absent, as the agents decision to serve the custodian of the records and the co-owner of the business.

The administrative subpoena used in this case was not self-enforcing. If Marta Moyle or Doreen Dailey had refused to comply with the instructions contained therein, the INS would have been required to enforce the subpoena in a U.S. District Court. See 8 U.S.C. Section 1225(a). As Complainant correctly notes, ``the administrative hearing is not the proper forum in which to challenge a subpoena.'' Pretrial Brief of Complainant at 15. Since Respondent's wife and employee gave the documents to the agents, and no challenge to the subpoena was made at the time of service, exclusion of the documents is not appropriate. See Horton, supra at 579.

Finally, the subpoena was not even used to obtain the Forms I-9. The only items seized thereby were not introduced. Although I have analyzed this issue, consideration of the service of the subpoena was rendered moot when the business records were not introduced. For all of these reasons, Respondent's third affirmative defense fails.

C. Civil Penalties

It is my judgment that Respondent has violated section 274A(a)(1)(B) of the Act, in that it hired for employment in the United States after November 6, 1986, 17 individuals without complying with the verification requirements of 8 U.S.C. section 1324a(b)(1). I must, therefore, assess a civil money penalty pursuant to section 274A(e)(5) of the Act. The statute states, in pertinent part, that

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

8 U.S.C. section 1324a(e)(5).

Complainant has assessed civil penalties for the 17 violations as follows: for violations 1 through 7 and 13 through 17-$300.00 each; for violations 8, 10, and 11-$250.00 each; and for violations 9 and 12-$200.00 each. I have considered the range of possible penalties to run from the statutory minimum of $100.00 to the assessed maximum of $300.00.

In assessing penalties, I have determined that Respondent's business varies in its employment needs, due to the seasonal nature of mink-farming. Regardless of season, however, I find Respondent's farm to be a small business. This is a factor in mitigation of the penalty.

Despite Respondent's assertions of good faith, I do not find sufficient evidence of good faith to mitigate the penalty. Respondent was given an educational visit well prior to the inspection, in which his attitude was one of uncooperativeness. He did not choose to participate in the inspection which demonstrated a lack of interest in the program's enforcement. Respondent's failure to ensure that his business enforced the IRCA regulations, shown by the several violations committed, detracts from his claim of good faith compliance. Although I do not believe Respondent's actions warrant aggravation of the penalty, neither do I find that there is enough to mitigate the penalty.

Record keeping violations are serious in the framework of IRCA. Each of the 17 I-9's introduced at the hearing contained serious deficiencies and multiple omissions. Twelve of the 17 I-9's introduced into evidence contained nothing in Section 2 and contained no certification or date in the verification block. Four of the remaining five I-9's contained only check marks in lists A, B, and C, and were not certified in the verification block. Only one of the forms contained identification numbers for the documents, and this form did not contain the expiration dates for these documents, nor was it certified. Nothing in these forms demonstrated that they were completed by the employees and verified by the employer or his agent within the requisite three days of hire. The great majority of these forms, therefore, were woefully inadequate and serious enough to aggravate the penalty.[2]

I was not asked to determine any violations of knowing employment of unauthorized aliens, yet I received evidence that one of the 17 employees was unauthorized to work at the time of hire. Since I made no finding of knowing employment, I will not consider this evidence adverse to Respondent, but rather will consider it a neutral factor.

Finally, I found no evidence that Respondent was previously warned or cited for similar IRCA violations. Complainant contends that aggravating elements exist for this factor due to Respondent's admissions and the testimony of the INS agents that Respondent employed unauthorized aliens in the past. I will not consider this

evidence as aggravating because there was nothing to indicate that Respondent had a previous history of violations during the time period for citations or warnings to be issued in cases of IRCA violations. I consider Respondent's lack of history with INS pertaining to IRCA to be a mitigating actor.

Accordingly, I assess a civil penalty for these violations at $4,625.00 ($275.00 each for violations 1-8, 10, 11, and 13-17; and $250.00 each for violations 9 and 12).

IV. ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings, memoranda, testimonial and documentary evidence, and arguments advanced by the parties. Accordingly, and in addition to the findings and conclusions previously mentioned, I make the following findings of fact and conclusions of law:

1. I have determined that Respondent Lee Moyle, Owner, d.b.a. Moyle Mink Farm violated Section 1324a(a)(1)(B) of Title 8, Section 274A(a)(1)(B) of the Act, in that it hired for employment in the United States after November 6, 1986, the following individuals without complying with the verification requirements in 8 U.S.C. Section 1324a(b)(1), Section 274A(b)(1) of the Act, and 8 C.F.R. Section 274A.2(b)(1)(ii):

Althea Dillon, aka Althea M. Dillon
Ofelia P. Dominges
Connie F. Herbert, aka Connie A. Herbert
Molly A. Kloer
Gilardo Leon, aka Jilardo Leon
Magdalena G. Morales
Juventino Navarrete
Eufracio Ortega
Vincente Pacheco, aka Vincenti Pacheco
Jesus Ramirez, aka Jesus J. Ramirez
Linda L. Robertson
Marcelino Rodriguez
Miguel Cordova Tovar
Paco Cordoba Tovar
Silverio Tovar, aka Silverio Tobar
Linda M. Warren
Jerrold Edwin Windes

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of four thousand six hundred twenty five ($4,625.00) for Count I of the Complaint.

3. All other motions not previously ruled upon are hereby denied.

IT IS SO ORDERED: This 30th day of July, 1990, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge