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

United States of America, Complainant v. Mario Saikhon, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100176.

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **ALAN S. RABINOWITZ**, Esquire, Immigration and Naturalization Service for Complainant;
NEIL GERBER, Esquire for Respondent.

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I. PROCEDURAL HISTORY

On January 10, 1990, the United States of America, Immigration and Naturalization Service (INS), served a Notice of Intent to Fine (NIF) on Mario Saikhon, Inc., through Ms. Charlotte Johnston. The NIF alleged 520 violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to comply with the employment eligibility verification requirements in Section 274A(b)

of the Act. In a letter, dated February 2, 1990, Respondent, Mario Saikhon, requested a hearing before an Administrative Law Judge (ALJ).

The United States of America, through its Attorney, Alan S. Rabinowitz, filed a Complaint, incorporating the allegations in the NIF against Respondent on May 24, 1990. On May 30, 1990, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the ALJ in the case and setting the hearing location in or around San Diego, California.

Respondent, through its counsel, Neil Gerber, answered the Complaint on June 25, 1990, specifically admitting or denying each allegation and setting forth three affirmative defenses. The first of which alleged that Respondent acted in good faith to comply with the requirements of the law. Respondent's second affirmative defense alleged Respondent's substantial compliance with IRCA. Respondent's third defense alleged that no penalties could be imposed against Respondent with respect to seasonal agricultural employees hired prior to December 1, 1988.

On July 16, 1990 a pre-hearing telephonic conference was held. At that time the parties indicated that they were involved in settlement negotiations. Complainant stated that if no settlement was reached, a motion for summary decision would be filed.

On October 5, 1990 Complainant filed its Government Motion for Summary Decision as to all counts, with supporting memoranda. The motion is grounded on the theory that no genuine issues of material fact exist and that Complainant is entitled to summary decision as a matter of law.

Respondent filed its Opposition to Motion for Summary Decision on October 25, 1990. Respondent's arguments in opposition allege genuine issues of material fact, including: (i) that the INS did not properly serve the NIF; (ii) that the Complaint with respect to Count I was unintelligible; (iii) that the INS could not sanction employers of seasonal agricultural employees hired before December 1, 1988; (iv) that the INS could not sanction employers of seasonal agricultural employees hired and terminated before December 1, 1988; (v) that employers need not complete Forms I-9 for employees who were terminated prior to June 1, 1987; (vi) that Respondent substantially complied with IRCA; (vii) that Respondent acted in good faith with respect to IRCA.

On October 31, 1990 Complainant submitted a Government Reply to Opposition to Motion for Summary Decision. This brief addresses the issues raised by Respondent in its opposition brief as well as in its Answer. Respondent further responded in its Supplemental Op-

position to Motion for Summary Decision, dated November 14, 1990.

The Rules for Practice and Procedure dictate that motion practice consists of the motion and the response. No replies are to be filed except upon leave of the ALJ. 28 C.F.R. Part 68.9(b). In this case no leave was requested by either party regarding submission of responsive documents. Although the rules do not provide for my consideration of the two latest filed documents, I will consider them because they address not just the original motion, but also the Answer. I also believe it is reasonable to consider these briefs considering the size and complexity of this matter. Therefore, I will accept and consider the previously filed reply and supplemental opposition briefs at this time. I expect the parties in the future to request leave to file responsive briefs which they desire me to consider.

II. STANDARDS FOR DECIDING SUMMARY DECISION

The federal regulations applicable to this proceeding authorize an ALJ to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact that a party is entitled to summary decision.'' 28 C.F.R. Part 68.36; see also Fed. R. Civ. Proc. 56(c).

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

Rule 56(c) of the Federal Rule of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 1982). See also Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.'') and U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on

file and, as such, may be used in determining presence of a genuine issue of material fact).

III. LEGAL ANALYSIS

Several issues are presented by the parties' pleadings and briefs on this Motion. I will analyze the issues separately, yet attempt to group the similar Counts in my discussion for organizational purposes.

A. Amendments to Complaint

In paragraph VI of Complainant's motion, Complainant requests to amend the Complaint in Certain respects to correct typographical errors. Complainant bases this request upon Respondent's responses to interrogatories which revealed the errors and made correction to the misspelled names.

Complainant moves to amend Counts 182, 184, 392, and 393 to conform the names listed in the Complaint to the correct names of the individuals. Complainant correctly states that leave to amend should be freely given to facilitate the merits of the controversy and to avoid prejudicing the public interest and the rights of the parties. Fed. R. Civ. Proc. 15(a); 28 C.F.R. Part 68.8(e). It is evident that the misspelled names in the Complaint were typographical errors. Respondent obviously knew which individuals were intended to be included in the Complaint in Counts 182, 184, 392, and 393. I find no prejudice to Respondent by granting Complainant's motion to amend.

The parties are instructed that the Complaint is amended in the following particulars:

Count 182-Oscar Alberto Antunez de Santos to Oscar Alberto Atunez de Santos;

Count 184-Nicholas Baiba to Nicholas Barba;

Count 392-Luis Acenceo to Luis Asencio; and

Count 393-Martin Acenceo to Martin Asencio.

Complainant points out also that Respondent's Answer raises additional errors in the Complaint regarding the alleged hire dates for the employees listed at Counts 60, 110, 127, 158, 201, 262, 395, and 444. Respondent signifies the correct hire dates for these employees in its response to interrogatory number one. Although Complainant does not specifically request to amend the dates indicated, I find no prejudice to either party by causing the pleading regarding certain of these Counts to be amended also. The dates listed in the Complaint appear to contain mere typographical errors which the Respondent has revealed.

I will, on my own motion, amend the dates of hire in the Counts listed below in the following particulars:

Count 110-May 29, 1989 to April 29, 1989;

Count 127-February 8, 1989 to February 13, 1989;

Count 201-March 4, 1989 to March 24, 1989;

Count 262-April 4, 1989 to May 4, 1989;

Count 395-December 17, 1988 to February 17, 1989; and

Count 444-January 24, 1989 to February 10, 1989.

Although Respondent points our errors pertaining to the dates of hire in Counts 60 and 158, I will not cause the Complaint to be amended as indicated. I find that the dates of hire for these particular Counts are essential to other issues which will be addressed. I will not prejudice either party by causing amendments which are crucial to resolutions of other questions of fact.

B. Admissions by Respondent

The Respondent, in its Answer and in responses to discovery, directly admits essential facts supporting the allegations of paperwork violations. As Complainant correctly points out in its motion, when such admissions are made by the opposing party, no genuine issues of material fact are deemed to exist. See United States v. Cahn, OCAHO Case No. 89100396, (Jan. 26, 1990); United States v. Acevedo, OCAHO Case No. 89100397, (Oct. 12, 1989) (Order Granting Complainant's Motion for Summary Decision); and United States v. USA Cafe, OCAHO Case No. 88100098, (Feb. 6, 1989) (Order Granting Complainant's Motion for Summary Decision).

I find that the Respondent has admitted to hiring each of the individuals named in Counts 5, 7-8, 10, 16, 18-29, 31-33, 35-59, 61-70, 72, 74-80, 82, 84-101, 103-118, 120-123, 124-145, 147-157, 159-168, 170-171, 174-182, 186-202, 204-210, 212-216, 218-264, 266-268, 270-282, 284-297, 299-320, 322-323, 325-333, 335-340, 342-358, 360-387, 389, 391-398, 400-403, 406-420, 422-452, 454-459, 461-466, 469-471, 473, 475-476, 478-479, 481-506, and 508-520. I further find that Respondent has admitted to hiring these 460 employees after November 6, 1986, to work in the United States. Included within these findings are some of the amended counts listed in section A, above, which were originally denied, but deemed admitted when amended to conform to the evidence.

The Complainant alleges that for each of the Forms I-9 listed above, Respondent has failed to comply with the verification requirements in Section 274A(b), resulting in certain deficiencies. Although Respondent does not admit to every deficiency alleged, it does admit to certain omissions on each of the forms.

Complainant contends in its motion that the relevant signatures and dates are omitted from Section 1 and/or Section 2 of each

Form I-9. Complainant correctly cites the passage in IRCA which requires that all employees attest to their authorization to work in the United States on Section 1 of the form. See 8 U.S.C. Section 1324(a)(b)(2). Section 2 of the form must be signed by the employer after it verifies the work authorization and identification documentation of the employee. See 8 U.S.C. Section 1324a(b)(1).

Prior rulings in IRCA paperwork cases have established that failure to record the verification attestation on the form amounts to a violation, even if the remainder of the form is complete. See United State v. Richfield Caterers, OCAHO Case No. 89100187, (Apr. 13, 1990); United States v. Acevedo, OCAHO Case No. 89100397, (Oct. 12, 1989); United States v. Boo Bears Den, OCAHO Case No. 89100097, (July 19, 1989).

The Respondent's Answer admits the omission of these crucial signatures and dates from either Section 1 or Section 2 of the Forms I-9 described in the counts listed above. Additionally, Respondent admits the Counts 29, 49, 89, and 422, that the forms were not completed within the requisite three days of hire See 8 C.F.R. Part 274a.2(b)(i). Respondent also admits the omission of relevant employee identification information from the forms pertaining to Counts 53 (date of birth), 447 (date of birth), 458 (social security number), 462 (social security number), 482 (address), 483 (date of birth), 493 (date of birth), and 515 (address).

Based upon these admissions, I find that Respondent did not complete the Forms I-9 in question as required by IRCA. Therefore, I find no factual disputes with respect to any of the employees named in Counts 5, 7-8, 10, 16, 18-29, 31-33, 35-59, 61-70, 72, 74-80, 82, 84-101, 103-118, 120-123, 125-145, 147-157, 159-168, 170-171, 174-182, 186-202, 204-210, 212-216, 218-264, 266-268, 270-282, 284-297, 299-320, 322-323, 325-333, 335-340, 342-358, 360-387, 389, 391-398, 400-403, 406-420, 422-452, 454-459, 461-466, 469-471, 473, 475-476, 478-479, 481-506, and 508-520.

Although Respondent's admissions to these 460 counts have established an adequate basis for granting the partial summary decision, the affirmative defenses raised by Respondent must be addressed prior to ruling on the motion. Respondent has made admissions regarding many of the remaining counts, however, they will be analyzed more completely below.

C. Counts 1, 60, 269, and 474

Respondent asserts in its Opposition to Motion for Summary Decision that the Complaint as to Count 1 should be dismissed because a violation of ``Sec. 274a(b),'' a non-existent section of the Act, was cited. Relying on United States v. Mester Manufacturing

Co., OCAHO Case No. 87100001, (June 17, 1988), Respondent argues that it should not be made to guess at its peril as to the proper section violated, which it surmised to be Sec. 274A(b).

Complainant replies that Respondent was on notice as to the charged violation because, with the exception of Count 1, the NIF contained proper and identical cites throughout. That Respondent was on notice and understood the charge in Count I is further evidenced by its citing in its Opposition Motion the correct section number, 274A(b). As such, Complainant asserts, there is no prejudice to Respondent resulting from the typographical error.

I find that Respondent was on notice as to the charge alleged in Count 1, and that the incorrect citation of Sec. 274A(b) of the Act as ``274a(b)'' is not prejudicial to Respondent. By its own motion, Respondent indicated that it understood that Sec. 274A(b) was the proper section. Unlike Mester, where the NIF was replete with improper citations of the Act, the NIF in this case contained only the single error, which is not fatal to the Count charged.

Respondent admitted in its Answer that the Form I-9 for Count 1 was not signed and dated in Section 1. By applying the analysis of Section B., above, to this Count, I find no remaining factual disputes. Again, Complainant has established a basis for summary decision, subject to my consideration of Respondent's remaining affirmative defenses.

Complainant requests summary decision as to Count 60 based upon admissions by Respondent that it did not attest to its verification of Section 2 of the I-9, nor did the employee attest to Section 1 of the form. Respondent attempts to rely on the ``Grandfather'' clause of 8 C.F.R. Part 274a.7(b)(1)(2) in its Answer by denying the hire date alleged by Complainant. It then answers interrogatory number one by stating that this employee was first hired on June 9, 1986.

If Sergio Urzua was first hired by Respondent in June of 1986 and remained continuously employed by Respondent, the exemption of the ``Grandfather'' clause would apply. However, as Complainant correctly points out, Respondent's response to interrogatory 16 also admits that Sergio Urzua did not work for Respondent in 1987 or 1988. I agree with Complainant that the continuity of employment required for coverage of the ``Grandfather'' clause is not present in the case of Sergio Urzua. Accordingly, the admissions made by Respondent relative to the allegations in Count 60 satisfy my inquiry as to liability under IRCA, and no genuine questions of fact remain. My ruling as to summary decision will be held open pending my review of the affirmative defenses raised by Respondent.

Regarding Counts 269 and 474, a thorough review of the information presented again demonstrates Respondent's admission as to the dates of hire, which were subsequent to November 6, 1986. Respondent's Answer admits that Pedro Alba (Count 269) was hired on April 28, 1989, yet denies the alleged IRCA violation based upon a lack of information. Respondent denies all elements of Count 474, including the date of hire, in its Answer. However, the response to interrogatory one indicates Respondent's acknowledgement of December 10, 1988 as the date of hire for Miguel Angel Garcia. Respondent bases its denial regarding Count 474 on its inability to locate employment documents for Miguel Angel Garcia.

Complainant's argument in support of summary decision as to those two Counts is very persuasive. My review of the Forms I-9 accompanying Complainant's motion, along with the Affidavit of Norma Alicia Graham, Border Patrol Agent, supports the allegations set forth in the NIF. However, Complainant has presented a question of fact with respect to the authenticity of the Forms I-9 for these two Counts by presenting Respondent's responses to requests for admissions. In its response to Request No. 1, Respondent denies the authenticity of the copies corresponding to Counts 269 and 474. I do find this to be a question of fact which must be resolved. Therefore, summary decision as to Counts 269 and 474 is denied.

D. Service of Notice of Intent to Fine

Respondent requests that I deny the Motion for Summary Decision because of its contention that the NIF was improperly served. Its opposition motion contains affidavits of Charlotte Johnston and Mario Saikhon who state that Ms. Johnston was not ``in charge'' of Respondent's business office when INS served the NIF upon her. Respondent relies upon 8 C.F.R. Section 103.5a(a)(2)(iii) which requires that the NIF be delivered to the business office and left with a person ``in charge''.

In this case, when the NIF was delivered to Respondent's office, both Ms. Johnston and John Buscaglia were allegedly present. According to Respondent, Mr. Buscaglia was the general manager who supervised the office in Mario Saikhon's absence, while Ms. Johnston was a bookkeeper. Therefore, the NIF should have been delivered to Mr. Buscaglia and not Ms. Johnston.

Complainant relies upon the Affidavit of Norma Alicia Graham, Senior Border Patrol Agent, who delivered the NIF to Respondent's business office. Agent Graham alleges that Ms. Johnston, Mr. Buscaglia, and Carmen Lizaola, personnel officer, were present when she presented the NIF to them. She states that she explained the

contents of the NIF to all of them and responded to questions by Mr. Buscaglia, after which he stated that an appeal would be brought. Ms. Johnston signed the NIF for the office.

Complainant argues that even if the service of the NIF is found to have been defective, there has been no showing of prejudice to Respondent. Respondent counters in its reply that a defect in service is not cured simply because no prejudice can be shown. I find that Respondent's argument is without merit.

Respondent admits that Mr. Buscaglia was present in the office at the time the NIF was served. Respondent does not deny Complainant's allegation that Mr. Buscaglia was informed as to its contents and asked questions of the agent. In my view, the service of the NIP was properly executed. I find that the NIF was actually delivered to all three occupants of the office by the border patrol, one of whom was ``in charge''.

The fact that Ms. Johnston receipted for service of the NIF is a mere hypertechnical defect. Respondent can show no prejudice by service on Ms. Johnston, when Mr. Buscaglia was present and taking part in the entire process.

I rely on the case of Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir. 1989), in which the court reasoned that the NIF, although not as clear as it could have been, provided Respondent with adequate notice of the charges. Thus, the Respondent was able to defend itself against the charges. The same conclusion can be made here. Accordingly, Respondent's affirmative defense of defective service of the NIF is denied.

E. Seasonal Agricultural Employees

Respondent has consistently argued in its defense that it was not required to complete Forms I-9 for seasonal agricultural employees who were hired before December 1, 1988, based upon 8 U.S.C. Section 1324a(i)(3)(C)(i). It further maintains that the exclusion applicable to employees hired prior to December 1, 1988 applies even more so to employees hired and terminated prior to that date. Respondent also relies upon a Statement of Mutual Understanding, dated January 12, 1988, and entered into between the INS Commissioner and representatives of local agricultural organizations. The relevant language states:

> Employers of workers in seasonal agricultural services are not subject to penalties for hiring illegal aliens or for failure to complete and keep I-9 forms until December 1, 1988.
>
> INS will not retroactively enforce the sanctions provisions of the Act against seasonal agricultural employers after November 30, 1988.

Respondent argues that summary decision should not be granted with respect to the following Counts, as the employees were seasonal agricultural employees hired prior to December 1, 1988: 2-4, 6, 9, 11-15, 17, 30, 34, 71, 73, 81, 83, 102, 119, 124, 146, 158, 169, 172-173, 183-185, 203, 211, 217, 265, 283, 298, 321, 324, 334, 341, 359, 388, 390, 399, 404-405, 421, 453, 460, 467-468, 472, 477, 480, and 507. Of that number, several were also terminated prior to December 1, 1988.

Complainant included with its motion a memorandum entitled ``Application of Employer Sanctions to Employers Engaged in Seasonal Agricultural Services as of December 1, 1988'', from the Office of the Commissioner, INS, to INS regional offices. The memorandum dictates the INS policy with respect to enforcement of IRCA in the community of seasonal agricultural employers. In paragraph I.A.4. of the memorandum it states that ``[a]s of December 1, 1988, employers engaged in seasonal agricultural services must have completed an I-9 for all individuals hired after November 6, 1986, who continue to be employed as of December 1, 1988.'' The memorandum cites the January 12, 1988 Statement of Mutual Understanding in a discussion of its enforcement policies.

Complainant states in its reply brief that the INS policy is to enforce IRCA violations regarding seasonal agricultural employees hired prior to December 1, 1988 who continue to work after that date. However, INS will not enforce the sanctions provisions for seasonal agricultural employees who were both hired and terminated prior to December 1, 1988. Complainant agrees with Respondent that summary decision should not be granted if Respondent can demonstrate that its employees were terminated prior to that date.

After researching and fully evaluating this issue, I do not believe that summary decision is appropriate for the following counts: 2-4, 6, 9, 11-15, 17, 30, 34, 71, 73, 81, 83, 102, 119, 124, 146, 158, 169, 172-173, 183-185, 203, 211, 217, 265, 283, 298, 321, 324, 334, 341, 359, 388, 390, 399, 404-405, 421, 453, 460, 467-468, 472, 477, 480, and 507. It is obvious, the Complainant concedes, that a factual issue exists as to the hire and termination dates of employees listed in the majority of these Counts.

Contrary to Complainant's arguments, I also believe that a mixed question of law and fact exists regarding Counts 14, 83, 158, 184, 203, 211, 334, 421, and 507 (employees hired prior to December 1, 1988 who continued to work after that date). I am troubled not only by the question of the applicability of the State of Mutual Understanding, but also by its interpretation by the parties. I would be greatly benefited by further argument on this issue and evidence regarding the parties' reliance on this Statement and the

regulations in effect at that time. I do not feel that I have enough information before me to summarily dispose of these Counts. Accordingly, Complainant's Motion for Summary Decision is denied as to these Counts.

F. Employees Terminated Before 6/1/87

Respondent relies upon 8 C.F.R. Part 274a.2(a) for its argument that it was not required to complete Forms I-9 for employees who were terminated prior to June 1, 1987. The individuals named in Counts 2, 30, 34, 102, 390, and 467 would not have required I-9's, according to the Affidavit of Carmen Lizaola, Respondent's personnel clerk.

In its reply motion, Complainant agrees that a genuine issue of fact was raised by this defense. Therefore, summary decision would not be appropriate for these Counts. I accept the representations of the parties and will not grant summary decision as to Counts 2, 30, 34, 102, 390, and 467.

G. Substantial Compliance

Respondent also raises the possible applicability of the doctrine of substantial compliance. He provided copies of the documents contained in Respondent's employee files pertaining to the identity or employment eligibility for most of the 520 employees in question. Respondent argues that the photocopying of documents establishing identification and employment authorization of employees is an adequate and permissible substitute for completion of the forms.

The theory of substantial compliance has been addressed in previous IRCA decisions. In the case of United States v. George Manos, d.b.a. Breadbasket, Inc., OCAHO Case No. 89100130, (Feb. 8, 1990), the ALJ did not hold that ``substantial compliance'' was a conclusively valid legal defense to liability for alleged paperwork violations, but that, theoretically, it might be.

The defense of substantial compliance has been raised in the context of photocopying documents on several previous occasions. Each time the defense has failed. In the case of United States v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211, (Apr. 27, 1990) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision), I was not persuaded by the Respondent's position that the practice of copying documents and attaching them to I-9's, in the absence of recording the data on the forms, was in accordance with 8 C.F.R. Part 274a.2.

I considered the argument again in the case of United States v. San Ysidro Ranch, OCAHO Case No. 89100368, (May 30, 1990) and

again ruled against the merit of such a defense. In the present case Respondent has attempted to persuade me that the substitution of photocopied documents for completion of the forms is an acceptable practice. Respondent contends that the previous rulings pertaining to the photocopying issue were erroneously decided.

Respondent argues that the language found in the statute at 8 U.S.C. Section 1324a(b)(4) is not present in the regulation at 8 C.F.R. Part 274a.2(b)(3). Respondent states that the language, `` `Notwithstanding any other provision of law' means that an employer may comply with the law by copying and retaining the documents, notwithstanding the provisions of 8 C.F.R. Part 274a.2(b)(1) which otherwise would require the completion of a Form I-9.'' Respondent's Opposition to Motion for Summary Decision at 9.

It would appear that Respondent's theory of substantial compliance would be stronger when the deficiencies in the Forms I-9 are in Sections A, B, or C, rather than in the required attestations. The items which are photocopied and attached to the forms contain the employment eligibility and identification information which is to be placed in Sections A, B, and C. As explained above, this issue has been thoroughly reviewed in previous IRCA cases, all of which have ruled against the substitution of photocopies for actual completion of the forms, even if the information contained on the photocopies corresponds directly to the information to be placed on the forms. I abide by those decisions.

Respondent's theory would be even less applicable to the regulation requiring that signatures of employee and employer appear on the form. The signatures demonstrate that the employee has verified the information contained in Section 1 of the form, and that the employer has verified the information contained in Section 2. The mere presence of photocopied identification and work authorization cards does not substantially demonstrate the verification of these forms by the employee or the employer, even if the contents of the photocopied documents demonstrate the employee's eligibility to work in the United States. Since it has been held that the photocopies are not adequate substitutes for the items they represent in Sections A, B, and C, the photocopies would be even less suitable as substitutes for attestations.

In this case the deficiencies forming the sole basis for the summary decision for the great majority of the counts are the missing signatures from Section 1 and/or Section 2 of the Forms I-9. Therefore, Respondent's argument fails.

H. Good Faith

Respondent raises the defense of good faith in its opposition motion, however, it concedes that this defense is acceptable only in a consideration of the appropriateness of civil penalties. I will certainly permit Respondent to present any information it desires as to mitigation of penalties at the appropriate time. I will not, however, consider any good faith defenses in my analysis of summary decision or the merits of the case. As previously held, good faith is not a defense to paperwork violations, but only a consideration in the penalty phase of the case. See United States v. Collins Food International, OCAHO Case No. 89100089, (Jan. 9, 1990), aff'd by CAHO, (Feb. 8, 1990); United States v. USA Cafe, OCAHO Case No. 88100098, (Feb. 6, 1989).

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

I have considered the pleadings, memoranda, and arguments submitted 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. That Respondent Mario Saikhon, Inc., has violated Section 1324a(a)(1)(B) of Title 8, 274A(a)(1)(B) of the Act, in that it hired for employment in the United States after November 6, 1986, the individuals identified in the following Counts 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. Part 274a.2(b)(1):

1, 5, 7-8, 10, 16, 18-29, 31-33, 35-70, 72, 74-80, 82, 84-101, 103-118, 120-123, 125-145, 147-157, 159-168, 170-171, 174-182, 186-202, 204-210, 212-216, 218-264, 266-288, 270-282, 284-297, 299-320, 322-323, 325-333, 335-340, 342-358, 360-387, 389, 391-398, 400-403, 406-420, 422-452, 454-459, 461-466, 469-471, 473, 475-476, 478-479, 481-506, and 508-520.

2. That there are no genuine issues of material fact with respect to the above listed Counts and Complainant's Motion for Summary Decision is Granted as to each of them.

3. That genuine issues of material fact remain for the following Counts and summary decision is Denied as to each of them:

2-4, 6, 9, 11-15, 17, 30, 34, 71, 73, 81, 83, 102, 119, 124, 146, 158, 169, 172-173, 183-185, 203, 211, 217, 265, 269, 283, 298, 321, 324, 334, 341, 359, 388, 390, 399, 404-405, 421, 453, 460, 467-468, 472, 474, 477, 480, and 507.

4. That Respondent did not substantially comply with the Act by photocopying employee identity and employment eligibility docu-

ments and attaching them to the Forms I-9, rather than completely filling out the forms.

5. That any assertions regarding Respondent's good faith efforts to comply with IRCA will be considered in mitigation of civil penalties only.

6. That the issue of civil penalties will be held open until the merits of the case are disposed of.

7. That a date for argument on those Counts not granted under Complainant's Motion for Summary Decision will be set upon notification to the parties.

IT IS SO ORDERED: This 14th day of December, 1990, at San Diego, California.

E. MILTON FROSBURG
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