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

United States of America, Complainant v. Big Bear Market, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 88100038.

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DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: ALAN S. RABINOWITZ, Esq., and DEBORAH S. NORDSTROM, Esq., for the Immigration and Naturalization Service. JAMES S. MUNAK, Esq., for the respondent.

I. Introduction

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

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 the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien. . . .'' The term ``individual'' means a putative employee. Title 8 U.S.C. section 1324a(b)(2) requires that the individual attest, under penalty of perjury, on the same verification form as to his or her employment authorization. Title 8 U.S.C. section 1324a(b)(3) sets forth retention and availability for inspection requirements for the verification form. The Immigration and Naturalization Service (INS, Service, or government), as the delegatee of the Attorney General, has designated, by regu-

lation at 8 C.F.R. § 274a.2(a), Form I-9 as the Employment Eligibility Verification Form to be used by employers in complying with IRCA's verification requirements.

IRCA exempted from the coverage of employer sanctions those employees who are ``grandfathered,'' i.e., those who were hired before the date of enactment [November 6, 1986], and whose employment continued subsequent to that date. See IRCA § 101(a)(3), 100 Stat. 3359, at 3372, 8 U.S.C. § 1324a (note); see also 8 C.F.R. § 274a.7(a).

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 first full six (6) months following enactment no enforcement action was permitted to take place, 8 U.S.C. § 1324a(i)(1). 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, 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 delegatee) ``has reason to believe that the person or entity may have violated . . .'' the employer sanctions provisions. 8 U.S.C. § 1324a(i)(2).

The INS was barred during that period from initiating any enforcement action ``on the basis of such alleged violation or violations.'' Id. The Service conducted educational visits at the premises of many employers throughout the country during the transition period, consistent with and in extension of the six-month ``public information period'' required by IRCA. 8 U.S.C. § 1324a(i)(1)(A).

II. Statement of facts

This case had its genesis in an INS notice of intent to fine (NIF) served March 8, 1988, on Big Bear Market (Big Bear, or respondent). The NIF alleged 135 recordkeeping verification violations of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B), asserting a demand for $200.00 per violation for a total civil money penalty of $27,000.00.

In response, consistent with established procedure, Big Bear exercised its statutory right to a hearing before an administrative law judge and to bar enforcement of the NIF pending the hearing, by filing with INS on March 31, 1988, a timely answer to the NIF and a request for hearing. The proceeding before me was initiated when INS filed with the Office of the Chief Administrative Hearing Officer (OCAHO), a complaint against Big Bear dated April 20, 1988, which incorporated the NIF and the answer to the NIF.

The OCAHO Notice of Hearing, dated May 4, 1988, forwarded a copy of the complaint. Respondent's answer, dated May 10, 1988, was timely received by OCAHO on May 11, 1988. By motion dated July 5, 1988, INS asked leave to amend its complaint. Over objection of respondent in its July 15, 1988 Opposition, leave to amend the complaint was granted by my July 15, 1988 order. Subsequently, by order dated August 3, 1988, respondent's July 25, 1988 motion for leave to amend its answer to add a seventh and eighth affirmative defense was granted.

An evidentiary hearing was held in San Diego, California commencing on August 30, 1988, and continuing through September 1, 1988. The last post-hearing brief was filed on December 7, 1988.

While certain essential facts are in dispute, the underlying predicate for the instant action is not. The parties have stipulated to the following facts [as bulleted]:

* Big Bear is a corporation authorized to conduct business in the State of California, with its corporate office located in San Diego, California.
* On or about July 24, 1987, a United States Border Patrol agent met with Bob Boone, who was at that time Big Bear's personnel director.
* Since at least August 1, 1987, and at all times relevant to this proceeding, Diane DePalo, Laura Tolner, and Cassandra Bundy have been employed by Big Bear in its personnel department.
* On September 4, 1987, a Notification of Inspection of Forms I-9 was delivered to Diane DePalo, a Big Bear employee, by a Border Patrol agent.
* On September 11, 1987, an inspection of employment eligibility forms (Forms I-9) was conducted by Border Patrol agents at Big Bear's corporate office.
* On October 5, 1987, a Citation was delivered to Laura Tolner, by a Border Patrol agent.
* On March 8, 1988, a Notice of Intent to Fine (NIF) was delivered by a Border Patrol agent to John MacVean, who was the personnel director of Big Bear at that time.
* Of the 135 alleged paperwork violations, 132 represent individuals listed at the second allegation ``A'' of the NIF who were also included among the 183 individuals accounted for in item 1 of the Citation. Each of the alleged violations set forth in second allegation ``B'' of the NIF were similarly included among the alleged violations set forth in item 1 of the Citation.
* On December 11, 1987, Border Patrol agents reviewed respondent's I-9 forms at Big Bar's corporate office.

* As of December 11, 1987, no I-9 form had been completed for any of the 132 individuals listed both in the NIF and in Exhibit ``C'' to Attachment A to the transcript. However, I-9s were presented to the Border Patrol for the three individuals listed in allegation ``B'' on the second page of the NIF, i.e., (1) Marcella Harris, (2) Roger Kifer, and (3) Angel A. Sarmiento.

* On December 31, 1987, the Border Patrol delivered a subpoena of that date to Steve Cothern, Southern District Manager of Big Bear.

* On January 7, 1988, Laura Tolner and Cassandra (Cassie) Bundy met with Border Patrol agents at Big Bear's corporate office.

* On January 28, 1988, Laura Tolner and John MacVean met with Border Patrol agents at Big Bear's corporate office at which time and place MacVean signed a letter dated January 28, 1988, prepared by the INS.

The stipulated facts apart, it is undisputed that the 135 individuals as to whom paperwork violations are alleged were hired by Big Bear after November 6, 1986, for employment in the United States and none had grandfathered status.

As a result of the September 11, 1987 inspection, the Border Patrol agents determined that Forms I-9 had not been completed for 183 employees who had been hired by Big Bear between November 7, 1986, and June 1, 1987. Within a few days following the September 11, 1987 inspection, Cassie Bundy began preparation of I-9 forms for all employees hired by Big Bear during the period November 7, 1986 through December 31, 1986.

The Citation, served October 5, 1987, was delivered to Laura Tolner because Border Patrol Agent Steven Kean believed Tolner was the acting director of personnel for Big Bear and as such was a proper person to serve. Agent Kean met with Tolner, reviewed the Citation, discussed the purpose of the Citation, and explained to Tolner the verification requirements of IRCA. Agent Kean also told Tolner that the INS ``would move toward intent to fine proceedings'' if the errors noted in the Citation were not corrected. Tr. 100.

On October 5, 1987, when the Citation was served, there was no discussion between the agent and Tolner as to how long a period Big Bear would be allowed to prepare an I-9 for each of the 183 individuals. By telephone on October 8, 1987, Agent Kean told Tolner that Big Bear would be given at least 30 days before INS would reinspect the violations listed in the Citation.

Immediately following service of the Citation, Cassie Bundy began efforts to correct or prepare I-9 forms for those employees listed in the Citation. By approximately late October 1987, Big

Bear employees mistakenly believed that they had prepared or corrected an I-9 for each employee still in Big Bear's employ and who had been the subject of the Citation.

Prior to December 11, 1987, a Border Patrol agent telephoned Big Bear to confirm that an inspection was to be held on December 11, 1987. Tolner acknowledges having received a telephone call; she was aware that there was to be an inspection, although she is not certain how she became aware. According to INS, Cassie Bundy was aware prior to December 11, 1987, that Border Patrol agents would be coming to Big Bear on that date.

Big Bear employees were cooperative with INS and, on December 11, 1987, provided the agents with files of I-9 forms, a personnel roster, and a room in which to conduct the inspection.

INS alleges that I-9 forms presented on December 11, 1987, for Marcella Harris and for Roger Kifer (both named in the complaint) were undated by the employer in the certification blocks. The I-9 presented on December 11, 1987, for Angel Sarmiento (also named in the complaint) did not provide a documentation number for the ``list B'' document recorded at Section 2, ``Employer Review and Verification'' nor did it provide a properly recorded document for ``list C,'' i.e., it recorded a birth certificate to establish employment eligibility but supplied a social security number, not the birth certificate number.

Additionally, on December 11, 1987, Border Patrol agents discovered that I-9s had not been prepared for the 132 individuals listed on Exhibit ``C'' to Attachment A and inquired as to the whereabouts of those I-9s. Big Bear employees explained to the agents that through an oversight, I-9s had not been prepared for those individuals. Big Bear personnel advised Agent Lawrence Pierce, the agent in charge, that they would prepare a I-9 for each of those individuals.

On December 12, 1987, Cassie Bundy began preparation of an I-9 for each of the individuals listed on Exhibit ``C'' who were still in respondent's employ. By the end of December 1987, she believed that an I-9 had been completed for each of those individuals.

On January 7, 1988, Tolner and Bundy met with Border Patrol agents, tendered to the agents I-9s for each employee then employed by Big Bear who had been listed on Exhibit ``C,'' and asked the agents to inspect and review the I-9s.

The parties are in dispute as to certain critical issues, i.e., (1) whether notice of the December 11, 1987 inspection was served on respondent and, if so, the legal sufficiency of such notice and (2) whether it is significant that an investigation continued following the inspection.

INS contends that on December 7, 1987, a notice of inspection was properly served on Cassie Bundy, as the only full time employee in Big Bear's personnel department. Border Patrol agents claim that on that date they made arrangements with Bundy for the inspection to take place on December 11, 1987, and asked that Bundy provide, on December 11, 1987, Forms I-9 together with supporting documentation for individuals hired after November 6, 1986.

Respondent, however, contends that on December 7, 1987, Agent Pierce knew that Cassie Bundy was not the person in charge of the personnel department, and, therefore, he had not delivered written notification of inspection of I-9s to a person in a charge.

INS maintains that the agents completed the second inspection on December 11, 1987, and then complied information, obtained back-up documents, and reviewed the file for the purpose of deciding whether a Notice of Intent to Fine should issue.

According to Big Bear, Agent Pierce advised that the investigation would continue and that he would return in early January, 1988, to inspect the I-9 forms. The investigation did continue beyond December 11, 1987, during which time Border Patrol agents (1) served a subpoena upon respondent; (2) met with Cassie Bundy and Laura Tolner at respondent's corporate office on January 7, 1988, pursuant to the subpoena; (3) accepted on that date in response to the subpoena, thirty-six (36) I-9 forms and a personnel roster from respondent's employees; and (4) met with Tolner and MacVean at respondent's corporate office where MacVean signed the letter tendered by their agents on January 28, 1988.

According to Big Bear, the investigation continued until at least January 28, 1988.

III. Discussion

Title 8 U.S.C. section 1324a(a)(1) makes it ``unlawful for a person to other entity to hire . . . , for employment in the United States--(B) an individual without complying with the requirements of subsection (b) of this section.'' The requirements of 8 U.S.C. § 1324a(b), entitled ``Employment verification system,'' are threefold.

First, under 8 U.S.C. § 1324a(b)(1)(A), an employer must attest ``on a form designated or established by the Attorney General by regulation,'' that it has verified that an individual is not an unauthorized alien by examining documents which establish both employment authorization and identify as delineated at 8 U.S.C. §§ 1324a(b)(1)(B), (C) and (D).

Second, the individual must attest on the same form that he or she ``is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized

under this chapter or by the Attorney General to be hired, recruited, or referred for such employment.'' 8 U.S.C. § 1324a(b)(2).

Third, 18 U.S.C. § 1324a(b)(3) provides that after completion of the form:

> . . . the person or entity must retain the form and make it available for inspection by officers of the Service or the Department of Labor during a period beginning on the date of the hiring . . . and ending-- . . . (i) three years after the date of such hiring, or (ii) one year after the date the individual's employment is terminated, whichever is later.

Mechanics for complying with the verification requirements for employees hired after November 6, 1986, are spelled out in regulations implementing IRCA. Title 8 C.F.R. section 274a.2(a) provides that:

> Employers need only complete the Form I-9 for individuals who are hired after November 6, 1986 and continue to be employed after May 31, 1987. Employers shall have until September 1, 1987 to complete the Form I-9 for individuals hired from November 7, 1986 through May 31, 1987.

As provided at 8 C.F.R. § 274a.2(b), an employee hired after May 31, 1987, must complete section 1 of the Form I-9 and present the necessary documentation of employment eligibility within three business days of hire. The employer in turn must ``[p]hysically examine the documentation presented . . .'' and complete section 2 of the I-9 within the same three business day period. 8 C.F.R. § 274a.2(b). If the employment of an individual is for less than three business days, the I-9 must be completed ``before the end of the employee's first working day.'' 8 C.F.R. § 274a.2(b)(1)(iii).

Respondent concedes that on December 11, 1987, there were no I-9s prepared or presented for 132 individuals named in the complaint. Forms I-9 presented for the three other individuals named in the complaint, i.e., Marcella Harris, Roger Kifer, and Angel Sarmiento, were incomplete.

Both respondent's failure to present I-9s for 132 employees and its presenting defective I-9s for three additional employees appear to be per se violations of IRCA. Respondent, however, contends that circumstances persuade against a finding of liability and consequential imposition of civil money penalties. INS argues that no such circumstances exist and that the violations acknowledged by respondent support a finding of liability and imposition of a civil money penalty.

A. The notice issue

The parties agree that INS regulations require that an employer be provided with at least three days notice prior to a Form I-9 inspection. Title 8 C.F.R. section 274a.2(b)(2)(ii) is explicit:

> Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the Forms by an authorized Service officer. At the time of inspection, the Forms I-9 must be made available at the location where the request for production was made, or if the Forms I-9 are kept at another location, at the nearest Service office to that location. No subpoena or warrant shall be required for such inspection. Any 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.)

During the evidentiary hearing, Big Bear's counsel appeared to pursue a line of questioning which suggested that no one at Big Bear had received notification of the December 11, 1987 inspection. On brief, however, and in its proposed findings of fact, respondent appears to have abandoned its position that no notice of inspection was served and argues instead that respondent was not properly notified of the impending December 11, 1987 inspection.

Big Bear argues that the three day notice must be personally served, in writing, upon a person in charge of the employer's business and that the government's failure to properly effect service rendered any inspection on December 11, 1987, a nullity.

Conceding that the manner of effecting the three day notice of inspection is not prescribed by 8 C.F.R. § 274a.2(b)(2)(ii), Big Bear, nonetheless, urges that both case law and the government's own practice demonstrate that personal service of the notice is required, citing N.L.R.B. v. Vapor Recovery Systems Company, 311 F.2d 782 (9th Cir. 1962) in support. Big Bear argues also that the INS regulation, 8 C.F.R. § 103.5a(a)(2), requires three day advance notice of inspection to be served on a corporate employer ``by leaving it with a person in charge.''

Big Bear relies on Buckley & Company, Inc. v. Secretary of Labor, 507 F.2d 78 (3d Cir. 1975), to demonstrate that at least one federal court of appeals has held that delivery of an effective notice of proposed penalties for violations of the Occupational Safety and Health Act (OSHA) should be to a person with authority to disburse corporate funds to abate the alleged violation, to pay the penalty or to contest the citation or proposed penalty.

INS argues that the three day notice of inspection provided by regulation is intended to allow employers time to prepare for the I-9 inspection and take necessary actions, that the INS policy of providing written notice merely facilitates that purpose, and additionally provides a document verifying that arrangements for the inspection have been made. Neither IRCA nor the implementing regulations require any particular form of service or that any particular person be served with a notice of inspection.

INS argues that even if service of the three day notice were required to be effected by delivery to a person in charge, the agents sufficiently effected service by delivering notice to Cassie Bundy, who was the only full time employee of respondent's personnel department at that time.

Furthermore, according to INS, even if the Service had violated its own regulation regarding the three day notice, respondent has shown no prejudice as the result. Accordingly, INS maintains that the results of the I-9 inspection on December 11th should not be excluded.

INS claims that on December 7, 1987, when Border Patrol agents served a notice of inspection [Exh. H] on Cassie Bundy, they made arrangements with her for the inspection to take place on December 11, 1987, left her a written notice to that effect, and asked that she provide, on December 11, 1987, I-9s and supporting documentation for individuals hired by Big Bear after November 6, 1986.

To support its claim of personal service, INS relies substantially on the testimony of Agent Pierce. Pierce and his partner Michael Gonzalez were assigned to the Big Bear case in early December 1987 and were instructed by their supervisor to do a reinspection.

Pierce testified that he and Gonzalez arrived at Big Bear on December 7, 1987, identified themselves to Cassie Bundy, showed her their credentials, told her they were there to give notice of inspection of Big Bear's I-9s, asked if the personnel manager was there, and were informed by Bundy that she was the only person working full time in the personnel section at that time. Pierce discussed with Bundy what would be covered at the I-9 inspection and testified that Bundy ``mentioned to us that the best date for . . . [the inspection] would be on the 11th of December.'' Tr. 127. Agent Pierce characterized Bundy's reaction regarding the notification of inspection as, `` `All right, if we're going to have it, this would be the best time for us.' '' Id. at 131.

Following what he described as standard procedures, Pierce claims to have filled in the blanks on the notice of inspection to indicate the date the notice was delivered and the date agreed upon for the inspection. He left the original with Bundy. Later that same afternoon, Pierce typed in the information he had handwritten on the original notice at the Big Bear corporate office: ``Served to Cassie Bundy at 210 PM 12/7/87 by Agents L. Pierce and M. Gonzales.'' Exh. H.

Although he could not name whom he had spoken to, Pierce testified at hearing that he had telephoned Big Bear on December 9 or 10th and verified the 9:00 o'clock December 11th date scheduled to perform the I-9 inspection.

Testimony of Agent Gonzalez corroborates that of Agent Pierce concerning December 7, 1987. In addition, Gonzalez testified that the agents advised Bundy that corrections to the violations set forth in the Citation would have to be made.

Cassie Bundy testified that Laura Tolner had informed her of a phone conversation which the latter had received prior to December 11, 1987, but Bundy did not know whom the call was from nor what it was in regard to. Bundy denied recalling any instance when Tolner discussed with her prior to December 11, 1987, any scheduled inspection for that date. However, when the agents came to the Big Bear corporate office on December 11, 1987, Bundy ``knew that they were there to do a review again, and . . . [she] had gotten the I-9s together. . . .'' Tr. 336. On respondent's theory, it is unclear how Bundy, who denies having received notice, became informed of the impending December 11, 1987 inspection.

Countering the testimony of Cassie Bundy in which she denied being served with the Notice of Inspection on December 7, 1987, the government characterizes Bundy's recollection as ``at best, selective and uncertain.'' Govt Brief, 14.

Contrary to respondent's reliance on 8 C.F.R. § 103.5a(a)(2), INS asserts that its regulations do not mandate that a particular person be served with a notice of inspection. The government denies the applicability of 8 C.F.R. § 103.5a(a)(2) which at subsection (iii) requires delivery of a copy of any document within its ambit ``by leaving it with a person in charge.'' Title 8 C.F.R. section 274a.9(c) governing service of a notice of intent to fine directs that such service ``. . . shall be accomplished pursuant to Part 103 of this chapter.'' According to INS, the lack of a similar directive regarding method of service of a notice of inspection implies that no such limitation is intended.

Distinguishing Buckley & Company, Inc. v. Secretary of Labor, supra, INS contends that unlike a notice of intent to fine or a notice of proposed penalties, a notice of inspection involves no assessment of penalty such as to require corporate authority to contest or authorize expenditure of funds to pay proposed penalties.

The draft and revised versions of the INS Field Manual reflect a policy which calls for written notice of inspection. See Field Manual For Employer Sanctions 7/24/87, III-6 to III-7 (hereafter Field Manual); see also Revised Immigration Officers' Field Manual 11/20/87, IV-12 (hereafter Revised Field Manual). INS suggests that such policy ``is far from a statutory mandate and does not, in any sense, have the force of law.'' Govt Reply Brief, 5.

In support, INS relies on Ponce-Gonzalez v. INS, 775 F.2d 1342 (5th Cir. 1985), where an alien claimed that Operations Instructions

imposed an affirmative duty on the Service to investigate the alien's familial status to determine whether he was entitled to avoid deportation. The Fifth Circuit, however, rejected the alien's ``affirmative duty'' argument:

> The Operations Instructions are . . . only internal guidelines for INS personnel, and neither confer upon petitioner substantive rights nor provide procedures upon which he may rely. . . . The alleged ``failure'' of the INS to conduct sua sponte an investigation of petitioner's situation thus affords no legal basis for a conclusion that the failure of the Immigration Judge to sua sponte accord petitioner . . . relief . . . constituted a ``gross miscarriage of justice.''

775 F.2d at 1346 (citations omitted); accord Dong Sik Kwon v. INS, 646 F.2d 909 (5th Cir. 1981) (distinguishing operation instructions from agency regulations which have the force of law).

Other circuits support the assertion that internal operating instructions are guidelines for INS personnel that do not confer substantive rights. See Pasquini v. Morris, 700 F.2d 658 (11th Cir. 1983) (where the Service's failure to comply with internal operating instruction did not deny alien's substantive rights); see also Velasco-Gutierrez v. Crossland, 732 F.2d 792 (10th Cir. 1984).

However, the Ninth Circuit in Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979), reviewing an alien's appeal from denial of relief under Operations Instruction (O.I.) 103.1(a)(1)(ii) governing deferred action status, focused on the directive nature of that O.I. and reasoned that:

> It is obvious that this procedure exists out of consideration for the convenience of the petitioner, and not that of the INS. In this aspect, it far more closely resembles a substantive provision for relief than an internal procedural guideline.

Id. at 807.

While acknowledging that ``in the main, operations instructions are nothing more than intra-agency guidelines which create no substantive rights. . . .,'' id., the Ninth Circuit distinguished O.I. 103.1(a)(1)(ii) by noting that it

> . . . differs from the norm in that its effect can be final and permanent, with the same force as that of a Congressional statute. It clearly and directly affects substantive rights_the ability of an individual subject to its provisions to continue residence in the United States. The purpose and effect of the Instruction are quite similar to those of 8 U.S.C. section 1254(a)(1). It appears that the only major additional requirement for relief under the latter is ``good moral character.'' It would be curious, to say the least, if, of two procedures with potentially identical impact upon the alien, there was qualitatively more discretion for the one without direct Congressional approval than for the Congressionally approved procedure.

Id. (footnote omitted).

INS relies on N.L.R.B. v. Vapor Recovery Systems Company, supra, where the Ninth Circuit, discussing personal service of a written notice mandated by statute, noted that it is sufficient to

show that actual written notice was received by the appropriate party, ``the means employed being unimportant.'' 311 F.2d at 785. The court also recognized that ``[a] measure of cooperation of the party noticed is necessary . . .'' in imparting knowledge of the contents of the notice. Id. at 786. Recognizing the existence of elements beyond the control of the party giving the notice, the Ninth Circuit reasoned that:

> When all facts are considered and it appears that enough has been done by the party attempting to give notice to put the party to be affected on inquiry into the contents of that written notice which he has in his hands, it should be held that notice has been given.

Id.

By personally serving Cassie Bundy, the government claims it adequately notified Big Bear of the impending December 11th inspection. The government maintains that ``[t]he evidence of record, applying applicable legal precedents, leaves no doubt that on December 7th, 1987, respondent was served with a Notice of Inspection in compliance with applicable regulations (8 C.F.R. 274a.2(b)(2)(ii)).'' Govt Brief, 14, 18. Following its discussion of Vapor Recovery, supra, the government argues that ``[w]hat Cassie Bundy did with the Notice is something beyond the control of the Service and it cannot be accountable for her conduct after service.'' Govt Reply Brief, 6.

The Government's final argument to support the legal sufficiency of its notice of inspection is that even if the service violated its own regulations and policies respondent has failed to show prejudice so as to warrant exclusion of the results of the December 11, 1987 inspection. INS argues that the testimony of Bundy and Tolner demonstrate that they ``believed that they had made all the corrections for those violations listed on the Citation and that they were otherwise ready for a Form I-9 review, without any need for prior notice.'' Govt Brief, 18-19.

Bundy denied being surprised when the agents arrived at the Big Bear corporate office on December 11th. She stated ``. . . we were expecting them any time.'' Tr. 393. When asked if it concerned her that the agents had shown up, Bundy responded ``[n]ot at all.'' Id. at 394. At the hearing, Bundy, confirmed her deposition testimony concerning the agents' visit on December 11, 1987:

> ``When they came in to review them, there was no problem for us. We had no preparing to do. The I-9s were done all the time. Like I had mentioned on December 11th when they_we thought we had everything here done.''

* * * * * * *

> ``They didn't have to make an appointment with us. I mean, if they wanted to, fine, but it wasn't required with us. We didn't have to do any preparing or any, you know, going back. We pulled the I-9s for them and that was it. They were all kept together.''

Id. at 396.

Moreover, she added that neither Laura Tolner nor Diane DePalo was concerned or surprised when the agents showed up on December 11th. Bundy, whose responsibility it was to correct the I-9 forms, ``had no problem with them coming in on the 11th . . .'' as she thought that all the I-9s which were required to be done had been done and ``there was no reason . . . to [go] back on the I-9s to do a double check.'' Id. at 404.

Tolner's testimony is consistent with that of Bundy. She was also under the impression until the inspection on December 11th that the I-9s had been completed for all individuals listed in the Citation, and stated that ``Cassie told me they were complete.'' Id. at 435. Referring to Bundy, Tolner added ``[s]he had the corrected I-9 forms. We thought we had corrected all of them. She had them corrected in a file in a drawer.'' Id. at 441.

If the agents on December 11th had not told her that the forms were incomplete, she would not otherwise have known because she ``was under the impression that they were all corrected, and Cassie was under the impression that they were all corrected.'' Id. at 443. Tolner added that ``[t]he agents showed us where we had made an error.'' Id. at 444.

Tolner recalled having a telephone conversation with someone from the Border Patrol a day or two before the agents arrived on December 11th, although she did not recall the contents of the conversation. Tolner communicated with Larry Mabe, President of Big Bear, ``on everything that happened between . . . Big Bear and the Immigration Department.'' Id. at 440.

Although before the hearing Tolner was unfamiliar with Mabe's reply to an interrogatory, she acknowledged at hearing that she was sure that his statement on interrogatory was true to the effect that during the telephone conversation with the personnel department prior to December 11th, a Border Patrol agent stated that the purpose of the visit was to review I-9s and that ``the date of December 11th, 1987 was set for review of the forms.'' Id. at 437. In further colloquy with INS counsel concerning that conversation, Tolner was asked whether December 11th was the date set for review:

> A. . . . I do not recall what was said on the conversation but, if Larry [Mabe]--if that's what he said, that's probably what I told him.

> Q. Well, if one was to accept that as a true statement, you were aware that the agents were going to be there on December 11th, 1987.
>
> A. Right. I said that I was somehow aware of it.

Id. at 440. Asked whether anyone else at Big Bear was aware beforehand of the December 11th review, Tolner responded that ``Cassie was, I'm sure.'' Id.

Respondent's witnesses support the government's contention that respondent's personnel anticipated the review regardless of the means by which they had been notified of the particular date and time for the inspection of December 11, 1987.

As aptly summarized by the government at page 19 of its brief,

> In essence, the testimony of . . . [Bundy and Tolner] establishes that they were not surprised when the Border Patrol Agents appeared December 11th, having anticipated their return, believed they had everything in order, had no preparation to do for the Form I-9 review, and would not have done anything different if a Notice of Inspection had been provided.

It seems plain to me that the agents visited the Big Bear corporate office on December 7 and that later that day Agent Pierce typed in entries on the file copy of the original notice following delivery to Ms. Bundy.

Ms. Bundy had never testified under oath on the witness stand before this case. As might be expected, therefore, she was less poised than were the Border Patrol agents. Her recollection was more ambiguous than theirs, a failing which, on my observation, is more a reflection of a lesser interest than theirs in the subject at issue, i.e., adherence to the employment verification program, than to testimonial unease.

The fact that Bundy's recollection is not consistent concerning the visit fails to persuade me that written notice was not delivered as asserted by Pierce and Gonzalez in view of the clear pattern of vagueness in her recollection. The thread of uncertainty that ran through her testimonial recall is consistent with the inattention to detail that, she conceded, left uncorrected and unnoticed the allegation at item 1 of the Citation that I-9s had not been prepared for 183 individuals at the time of the December 11, 1987 inspection.

I conclude that Border Patrol agents provided the notice of inspection to Cassie Bundy on December 7, 1987, as endorsed by Agent Pierce on the notice. In so deciding, I do not depend on the suggestion that a corporate employee may have more ``motive to fabricate'' than does a public employee. (Govt Brief, 17) I depend, instead, on my impression that, among the witnesses who testified, the events of December 7th were more memorable to the agents than to respondent's personnel and that, therefore, the former are more credible on that subject than the latter.

Assuming for discussion purposes, however, that written notice had not been delivered, I find no precedent to compel a finding that because INS officially favors written notice the employer is shielded from culpability if that notice had not been given. I do not understand Nicholas v. INS, supra, to suggest a different conclusion. There, the Ninth Circuit made clear that it was departing from the general understanding that ``operations instructions . . . create no substantive rights. . . .'' Nicholas, 590 F.2d at 807.

Although not dispositive of the case before it, the Nicholas court was concerned that the operations instruction affected substantive rights. In our case, the INS guideline provides a procedural dimension not demanded by statute or regulation, i.e., advance written notice. Common experience suggests that a written notice provides a better audit trail and a better device to refresh recollection than does an oral communication. To acknowledge a preference does not, however, establish a right to such procedure.

This conclusion may be expected to find favor with the Ninth Circuit. Subsequent to Nicholas, that court, quoting Wan Chung Wen v. Ferro, 543 F. Supp. 1016, 1018 (W.D.N.Y. 1982), held that in light of 1981 revisions to the 1978 version of O.I. 103.1(a)(1)(ii) `` `it is no longer possible to conclude that [the instruction] is intended to confer any benefit upon aliens, rather than [to operate] merely for the INS's own convenience.' '' Romeiro De Silva v. Smith, 773 F.2d 1021, 1024 (9th Cir. 1985). See Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987).

In context of the weight of authority that internal operating instructions confer no substantive rights, considering also that the regulation which explicitly addresses adequacy of notice is silent as to its form, 8 C.F.R. § 274a.2(b)(2)(ii), it is not reasonable to conclude that, standing alone, failure to provide notice in writing impairs substantive rights of employers charged with violations of 8 U.S.C. § 1324a.

I conclude that notice was served upon Cassie Bundy who, for all that appears on this record, was the person in charge of Big Bear's personnel department on December 7, 1987, as the only full-time employee present in that department. I agree with INS, however, that respondent's reliance on Buckley, supra, is misplaced.

The INS notice of inspection lacks the operative and direct impact of a notice of penalty under OSHA received by a business concern at risk lest it abate a violation, pay an assessment or contest the notice. That conclusion is consistent with the distinction in regulatory treatment between service of notices of inspection and notices of intent to fine. Only as to the latter is it suggested that service must be to ``a person in charge.'' Compare 8 C.F.R.

§ 274a.2(b)(2)(ii) [notice of inspection] with 8 C.F.R. § 274a.9(c) [citation and notice of intent to fine] implicating 8 C.F.R. § 103.5a.

Furthermore, although not mentioned by the government, the inapplicability of 8 C.F.R. § 103.5a to service of a notice of inspection is confirmed by the text of the regulation which recites that ``[t]his section states authorized means of service by the Service . . . of notices, decisions, and other papers . . . in administrative proceedings before Service officers. . . .'' At least until the NIF issues there is no proceeding before a Service officer. See United States v. Mester Manufacturing Co., OCAHO docket no. 87100001, June 17, 1988, (Morse, J.), Decision and Order, 20. I conclude that although written notice of inspection was delivered to the apparent person in charge, there is no statutory or regulatory requirement that service be effected in that manner.

In my judgment, Big Bear's claim of defective service of notice is insufficient in fact and law to defeat admissibility of the results of the inspection of December 11, 1987. Big Bear personnel were as prepared for the inspection as ever they would have been, whether or not they had received written notice three or more days in advance. Big Bear's witnesses were consistent in their recollection that they knew there was to be an inspection and that they thought they had corrected all deficiencies called to their attention in the Citation delivered to respondent more than two months earlier.

It being conceded that but for the inspection, respondent's personnel were satisfied that they were in compliance with I-9 requirements, for all that appears there is no reason to suppose they would have corrected the acknowledged omissions but for the results of the inspection on December 11, 1987. I am satisfied, therefore, that whatever deficiencies there may have been in effecting prior notice to Big Bear of a further inspection subsequent to the October 5, 1987 delivery of the Citation, there was no consequential prejudice to Big Bear.

B. Allegations in the complaint included among those in the prior citation

Respondent acknowledges that issuance of a citation during the twelve month period immediately following the first full six months after enactment, 8 U.S.C. § 1324a(i), terminates the ``grace period, regardless of the number of months that have elapsed, and thereafter proceedings may be brought for subsequent violations.'' Resp Brief, 2-3. Legislative history supports this conclusion. See Conference Comm., Immigration Reform and Control Act of 1986, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., p. 86 (1986) (``The Con-

ferees wish to make it clear that following receipt of a citation, an employer is subject to civil penalties even though the citation period has not expired''). Respondent, however, urges that once paperwork violations are listed in a citation, the government is barred from alleging and enforcing any future I-9 violations with respect to the same employment of the individuals accounted for in the Citation. I cannot agree.

The statute provides a grace period only for first violations which occurred during the 12-month citation period; subsequent violations are actionable whether occurring within or after that period and whether or not involving violations alleged in the original citation. To conclude otherwise would be contrary to the purpose of the statute by effectively immunizing employers who upon citation of violations failed or chose not to correct them. I conclude that an employer's failure or refusal to correct violations alleged in a citation constitutes a second or further violation of IRCA for which a notice of intent to fine may issue.

Respondent claims that the statute fails to expressly impose any affirmative duty to prepare or correct retroactively I-9s for 132 individuals accounted for in the Citation who were identified in the NIF. Respondent emphasizes the distinction (at 8 U.S.C. § 1324a(a)(1)(A) and 8 U.S.C. § 1324a(a)(2)) between knowingly hiring unauthorized aliens and knowingly continuing to employ unauthorized aliens, arguing that with respect to paperwork violations there is no corollary to the ``continuing to employ'' violation. Big Bear's argument appears to be that a paperwork violation, unlike an unauthorized employment violation, is related only to the fact of hire and not to continued employment. It is a one-time obligation and, once the subject of a citation, cannot be the subject also of subsequent enforcement. I am asked to conclude, therefore, that an employer cannot be liable on an NIF for paperwork violations identified in a prior citation.

Culpability for employment of unauthorized aliens requires that the employer know the status of the employee, knowledge of which the employer may have acquired at or before the time of hire or later during the subsisting employment. In contrast, the statutory requirement to comply with the employment verification system is a pervasive and continuing one, as to which the state of mind of the employer is irrelevant, the individual either having been hired or not, and the paperwork either having been perfected or not. Moreover, it seems plain that to proscribe employment of unauthorized aliens by employers who knew of that unauthorized status at the time of hire or who became aware of it only after the em-

ployment began, it was necessary for the legislation to comprehend both possibilities.

INS, on reply brief, correctly notes that the requirement to comply is tied to the fact of hire. In my judgment, it does not matter, whether within or after the citation period, how many times an employer is charged with a paperwork violation as to a particular individual. The obligation to comply being continuous, liability for noncompliance is continuous also. The result is that the employer remains liable for failure to prepare and present I-9s.

As noted by the government (Govt Reply Brief, 6), the effect of the interplay of violations alleged in either the Citation or the NIF was addressed in my decision and order in United States v. Mester Manufacturing Co., supra. In Mester, respondent challenged allegations in the NIF because they had not been included in a precedent citation. Here, Big Bear challenges allegations in the NIF because they had been included in the Citation. My understanding of the impact of the citation period pertains to both arguments:

> . . . 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). . . . The citation need not have addressed a particular violation as a condition precedent to an action against the employer.

Mester, 12-13.

The fact that a citation addressed a particular violation does not preclude that violation, if uncorrected, from forming the premise for issuance of an NIF. I agree with the government that ``[t]he Notice of Intent to Fine simply involved subsequent violations that were uncovered during a second inspection and there is nothing to suggest in the legislative history or statute that employers were, somehow, granted absolute immunity for those violations included in a Citation, though never corrected.'' Govt Reply Brief, 6-7.

Once notified of alleged violations, an employer has an affirmative duty to make the necessary corrections within a reasonable time after being so notified whether by citation or otherwise. The fact that certain of the allegations in the NIF were also included in the Citation does not preclude a proceeding from being initiated following a reinspection during which it is determined that errors have gone uncorrected. A fair reading of the statute requires no less.

C. Duty to comply with employment verification requirements

Big Bear claims it is under no obligation to correct the violations set forth in the Citation for two reasons: (1) absent express statutory or regulatory authority to do so there is no affirmative duty to

prepare retroactively I-9 forms for employees listed in the Citation; (2) any requirement to correct violations listed in the Citation was satisfied when Big Bear properly completed and presented the requisite I-9s, on or about January 7, 1988, while the Service's investigation of respondent was still in progress.

1. Reasonable time to comply

The parties agree that neither the express provisions of IRCA nor the regulatory provisions at 8 C.F.R. § 274a directly address the issue of correction of violations which were the subject of the Citation. Respondent characterizes imposition of such an affirmative duty on employers as an enlargement of the statute beyond its intended scope.

Big Bear points out that IRCA expressly provides a separate penalty for an employer who continues to employ an unauthorized alien after notice as distinct from knowingly hiring such an individual; however, no such provision is made among paperwork violations as would impose a penalty for a continuing failure to comply with the paperwork requirements following service of a citation which specified paperwork violations.

The government maintains that the requirement that an employer correct violations identified in the Citation is implicit in that the statute clearly mandates employers' compliance with the employment verification system. INS further maintains that ``[t]he employer, upon service of a Citation is under an obligation to immediately correct any violations, as the statute does not contain an express or implied time limitation on the Service's right to reinspect.'' Gov Brief, 23-24 (emphasis added). In support, INS cites decisions which arise under the Occupational Safety and Health Act (OSHA): Brennan v. Occupational Safety and Health Review Commission, 513 F.2d 553 (10th Cir. 1975); Haybuster Manufacturing Co., 1975-76 OSHD (CCH) Paragraph 20,088 (8th Cir. 1975); Secretary of Labor v. Matthews and Fritts, Inc., 1974-75 OSHD (CCH) Paragraph 18,455 (1974) (2 OSHC 1149).

Big Bear responds that OSHA unlike IRCA provides (1) a procedure to contest a citation and (2) that a citation shall fix a time limit within which corrective action is to be taken. Therefore, it is argued, the OSHA cases are unavailing to the government.

The OSHA grants an employer who receives a citation for alleged violations following an initial inspection 15 working days to notify the Department of Labor (DOL) that it contests the citation. OSHA provides also that such a citation shall set ``a reasonable time for the abatement of the violation.'' When the DOL set compliance deadlines within the 15 day period, the Occupational Safety

and Health Review Commission (OSAHRC) and appellate courts were confronted with the question whether the 15 days granted to advise of contest served as a grace period so as to preclude liability for failure to correct the violation or to bar reinspection to determine whether the alleged violation had been abated.

It is instructive that in both Kesler, supra, and Haybuster, supra, the circuits reversed OSAHRC determinations that no reinspection or demand for abatement could occur during the statutory period to contest the citation. Discussing the Tenth Circuit's rationale in Kesler, noting that ``[t]he court found that since the purpose of OSHA is to assure employees safe working conditions, no delay in abatement of cited violations is authorized where not expressly provided for in the Act,'' the Eighth Circuit in Haybuster concluded that ``. . . abatement may be required and reinspection made prior to the expiration of the 15-working day period. . . .'' Haybuster, 1975-76 OSHD (CCH) at pp. 23,895-96.

Matthews and Fritts, Inc., supra, makes clear the application a reasonableness qualification on the length of time allowed for abatement of cited OSHA violations before reinspection is warranted. Where a citation for noncompliance demanded abatement of a violation on the day that the citation was received, and reinspection the following day found no correction, OSAHRC affirmed the decision of the administrative law judge that a reasonable time to comply had not been afforded.

> The Judge held that a citation must afford an employer a reasonable abatement period to allow him to attain compliance with the Act. Reasonable, according to the Judge, requires giving the employer the opportunity to evaluate the violation, formulate plans for correction, and have time to implement the corrective plans. We agree.
>
> Under the facts of the instant case, the time period allotted for corrective measures was totally inconsistent with the nature of the condition to be corrected.

Matthews, supra, 1974-75 OSHD (CCH) at p. 22,481.

Notwithstanding respondent's argument that it had no affirmative duty to correct violations for which it had been cited, conduct and testimony of respondent's personnel reflect a contrary understanding consistent with the language of the Citation. Cassie Bundy stated that after the September 11, 1987 inspection, Tolner told her that the agents had found paperwork errors and would return to inform them of what needed to be corrected. Tolner also told Bundy that they would have to prepare the I-9 forms for employees from November 6, 1986 to May of 1987. Tr. 328-29. As early as September 11, 1987, she used her ``new hire'' list for November and December 1986 to prepare letters to explain the I-9 to individ-

uals still currently employed by Big Bear and to let them know that she needed to see verification identification. Id. at 329.

Bundy also testified that upon receipt of a copy of the Citation from Tolner, Bundy immediately started to make corrections to the documents for the individuals listed in the Citation. Id. at 332.

Tolner recalled the gist of her discussion with the agent who served the Citation in early October 1987 to the effect that ``. . . we needed to make the corrections, that we would get right on them, immediately.'' Id. at 415. Tolner's testimony corroborates that of Agent Kean that at the time he served the Citation he stated to Tolner that an I-9 was required by law to be prepared thereafter for each of the 183 employees accounted for at item 1 of the Citation.

Agent Kean claims to have discussed with Tolner the contents of the last paragraph of the Citation ``that, if the violations were not corrected, that the Service would move towards a notice and intent to fine.'' Id. at 101. Tolner testified that upon receipt of the Citation she showed it to Larry Mabe and then gave it to Bundy to start making the corrections.

The command of IRCA, the language of the Citation, and INS enforcement procedures make clear that an employer has a duty to correct violations alleged in the Citation. Testimony of Big Bear personnel demonstrates their understanding of this duty, of the intention of INS to reinspect, and of potential liability for cited violations left uncorrected.

IRCA explicitly mandates employer compliance with the employment verification requirements of 8 U.S.C. § 1324a(b). Necessarily implicit in that statutory mandate is the logical implication that employers are duty-bound to correct the violations alleged in the Citation. Clearly, IRCA provides for both a 6-month public information period beginning December 1, 1986, followed by a 12-month first citation period from June 1, 1987 through May 31, 1988, during which no proceeding could be conducted or order issued for violations noted in the Citation. Those transitional provisions do not preclude incorporation in the notice of intent to fine of violations included in the prior citation where such violations are left unabated. The language of the explanatory page of the Citation (Exh. F) makes clear the government's requirement that cited violations be corrected and the risk of failure to do so:

> It is the desire of the Immigration and Naturalization Service to encourage voluntary compliance with the law. The Service anticipates your cooperation in correcting the violation or violations which have resulted in the issuance of this Citation. However, if the listed violations are not corrected, upon subsequent inspection the Service will issue a Notice of Intent to Fine against you.

Having been cited for or otherwise notified of specific violations, it is clear that an employer has a duty to investigate to determine the significance of the allegations and to make the necessary corrections. In the decision and order in Mester Manufacturing Co., supra, I held employers to an inquiry duty:

> 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.

Mester, 23.

I found Mester to be in violation of 8 U.S.C. § 1324a(a)(2) for the continued employment of three individuals whose documented status had been investigated by INS following which

> . . . 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. . . .

Id. at 24.

On October 5, 1987, Big Bear received the Citation notifying it of problems with the completeness and accuracy of its I-9s. The government asserts that Big Bear's duty to correct the violations cited is an immediate one. Having received such notification, Big Bear, like all employers, is held to a duty to correct the cited violations.

As to timeframes, the OSHA cases discussed, supra, inform that respondents in federal enforcement actions are at risk if they fail within a reasonable period of time following notification of noncompliance to come into compliance.

Agent Kean testified that there had been no discussion on October 5, 1987, with any Big Bear employee as to how long Big Bear would have to prepare I-9s for the 183 employees accounted for in item 1 of the Citation. During a phone conversation on October 8, 1987, and in response to a specific inquiry by Tolner as to how long Big Bear would be given to correct the violation Kean assured Tolner that Big Bear would be given at least 30 days before reinspection. Kean explained how he had arrived at the 30 day period:

> . . . at the time I was operating under an instruction that employers should be given a reasonable length of time to make those corrections and the suggested time element was 30 days.

Tr. 77.

Ageny Kean's testimony is consistent with INS procedures as set forth in both the draft and revised versions of the INS Field Manual. The draft version at page III-15 states as follows: ``[t]iming of follow-up inspections is left to the discretion of the case

officer and supervisor. In general, employers should be given a reasonable amount of time to correct deficiencies.'' The November 20, 1987 Revised Field Manual at section IV-D-l-d provides that the follow-up site visit shall be:

> . . . within a reasonable amount of time, generally thirty to sixty days after issuance of the citation. . . . This does not preclude immediate follow-up in circumstances which require, or in which information concerning new violations is received.

Big Bear was not reinspected until December 11, 1987, a little more than 60 days after service of the Citation on October 5, 1987. While recognizing that the Citation accounted for as many as 183 individuals for whom no I-9s were found, a 60-day period following service of the Citation is more than reasonable, in my judgment, to afford the employer's staff the opportunity to make the necessary corrections and come into compliance.

Notwithstanding the direction in the Citation to correct deficiencies found upon inspection, respondent would have me understand that IRCA afforded employers until after May 31, 1988, to come into compliance, arguing that until that time ``no enforcement action other than the service of a Citation was to be taken with respect to first time paperwork violations.'' Resp Brief, 9. This argument misunderstands the comprehensive nature of the transitional provisions by which a six-month public information period was followed by a full year during which every employer was entitled to be confronted with a ``citation'' of alleged violations as a precondition to sanctions liability.

By regulation, as pointed out on reply brief, INS authorized one grace period by allowing an employer until September 1, 1987, to complete I-9s for employees hired after November 6, 1986, who continued to be employed by that employer after May 31, 1987. See 8 C.F.R. § 274a.2(a). That grace period aside, an employer is obliged to complete an I-9 for each employee within at least three business days of hire. See 8 C.F.R. §§ 274a.2(b)(1) (i) and (ii).

Nothing in IRCA suggests that once an employer became the subject of a citation, the otherwise applicable provisions of the Act were to be withheld. To the contrary, 8 U.S.C. § 1324a(i)(2), the sole statutory statement on point, captioned ``12-month first citation period,'' is explicit:

> In the case of a person or entity, in the first instance in which the Attorney General has reason to believe that the person or entity may have violated subsection (a) [8 U.S.C. § 1324a(a)] . . . during the . . . 12-month period, the Attorney General shall provide a citation. . . .

(Emphasis added.)

On respondent's supposition, an employer would be under no duty to abate or otherwise correct violations alleged in a citation during the twelve-month period following the first full six months after enactment (viz, June 1, 1987 through May 31, 1988). I reject that supposition both because it is unsupported by a plain reading of IRCA and as inimical to a rational enforcement program. Indeed, the logic of the argument would have suggested that citations be drawn by INS as narrowly as possible in order to save remaining and other allegations for prosecution without delaying until May 31, 1988.

Respondent's theory stands on its head the educational character of the transition period. Respondent emphasizes the educational character of that period, acknowledging that ``INS through the use of a Citation would inform the employer. . . . '' Resp Brief, 10. Clearly, use of the narrowest of citations is inconsistent with their use as a pedagogical device.

I conclude that the citation period while affording a first-time offender an initial warning was never intended to immunize an employer for subsequent violations whether or not the 12-month citation period had formally expired.

Big Bear asserts that if it had a duty to correct the violations listed in the Citation, it timely did so by January 7, 1988. Respondent's assertion is premised on its characterization that the INS investigation continued after December 11, 1987. Big Bear makes the unassailable point that no timetable was set by statute or regulation to prescribe a date certain by which I-9s for individuals listed in a citation must be completed or corrected. Respondent suggests that INS could have set a date certain ``by an appropriate regulation.'' Resp Brief, 10. Because INS failed to do so, Big Bear would have me conclude that INS could not have required that the violations be cured by December 11, 1987.

Big Bear acknowledges that ``through excusable inadvertence [the I-9s] had not been prepared as of December 11, 1987.'' Resp Brief, 11. On January 7, 1988, pursuant to an administrative subpoena, Agents Pierce and Gonzalez obtained a personnel roster and copies of I-9s which had been previously inspected. Although declining Bundy and Tolner's request to inspect the I-9s presented on that date, Agent Pierce agreed to look at them and ``show them a couple of things.'' Tr. at 157.

On January 28, 1988, Pierce returned to the Big Bear corporate office and obtained the signature of John MacVean, Big Bear's personnel director, acknowledging in a letter that any corrections and modifications made on I-9 forms subpoenaed and obtained on Janu-

ary 7, 1988, had been made after the December 11, 1987 inspection. See Exh. G to Attachment A.

Big Bear's reliance on having completed and provided the I-9 forms for INS' review on January 7, 1988, in order to sustain its claim to have timely corrected the alleged violations listed on the Citation is ill-founded. The relevant date for compliance was December 11, 1987, not January 7, 1988, or any date subsequent to December 11th.

Respondent had in effect a little over 60 days after issuance of the October 5, 1987 Citation until the second inspection on December 11, 1987. That period clearly afforded respondent reasonable and ample opportunity to make the necessary corrections. Respondent, however, failed to do so. The Border Patrol agents' December 11, 1987 inspection revealed numerous violations left uncorrected despite their inclusion on the October 5, 1987 Citation.

On December 11, 1987, Big Bear's noncompliance, whether through inadvertence or otherwise, comprised an ipso facto violation of IRCA. Good faith is not a defense to violations of IRCA's employment verification requirements although it is a consideration in determining the quantum of civil money penalty to be assessed. 8 U.S.C. § 1324a(e)(5). Big Bear was obliged to come into compliance within a reasonable time after service of the Citation. The timespan between October 5, 1987 and December 11, 1987, provided Big Bear a reasonable opportunity to correct discrepancies and to attain compliance with IRCA.

2. Compliance as of the date of the December 11, 1987 inspection

The government asserts that the second inspection of respondent's I-9s began and concluded on December 11, 1987, and was followed by an investigation. Respondent appeared at hearing to suggest that the inspection continued after December 11, 1987. On brief, however, respondent's position is that INS activity after December 11, 1987, was an investigation during which the government having subpoenaed certain Big Bear records, improperly refused to treat Big Bear's tender on January 7, 1988, as compliance with employment verification requirements. Accordingly, Big Bear contends that it cannot be liable for noncompliance at the time of inspection.

The government maintains that the purpose of its investigative actions after the December 11, 1987 inspection was to allow it to properly prepare its case and to determine whether a Notice of Intent to Fine Big Bear should issue. Comments by Agent Pierce to Bundy and Tolner as he was leaving Big Bear's corporate office on December 11th are instructive:

> When it came time to go, we stopped up at the front office. I was asked how it was going. I told them I was unable to tell at this point because--while the inspection itself was completed, I needed time to compile the data and research some things that we had from the information, as I said, where we would take it and run social security numbers, driver's license--checks--other things where we would take it and check the validity of some of the documents that were utilized.

Tr. 144 (emphasis added).

As quoted above, Agent Pierce testified at hearing that he had on December 11, 1987, characterized the inspection as having concluded on that date. On deposition before hearing, however, he had characterized continued operational activity by INS concerning Big Bear as a continued inspection, not an investigation.

Examples from the draft and revised field manuals suggest that the distinction between inspections and investigations engenders a certain confusion:

> Investigations. . . . Reviews of I-9 Forms performed in the course of investigation are referred to as ``investigative inspections.''
>
> * * * * * * *
>
> Compliance Inspections.

Revised Field Manual III-1 (emphasis added).

Whatever appellation is applied, the Revised Field Manual makes clear that, in addition to review of I-9s, ``. . . officers may conclude that they need to review other relevant employment records, such as payroll records or employee lists. Officers may, at their discretion, make an oral request for other records during investigative visits to employers.'' Id. at IV-A-3-c. See also IV-B-3-g, identical text to that quoted, substituting ``the inspection'' for the phrase ``investigative visits to employers.'' Accord Field Manual, III-12 (as to ``inspections''). Agent Pierce attributed his inconsistent characterization of the post-December 11 activity to ``minor semantics or phraseology.'' Tr. 237. None of the post-December 11 activity is inconsistent with a further investigation subsequent to a concluded inspection.

Prior to this proceeding, INS had not shared the field manuals with the public.* Upon request by counsel for Big Bear, following my in camera review and subsequent overruling of the government's objection to full disclosure, selected portions of the draft and revised versions of the field manual relevant to inspections and investigations in employer sanctions enforcement were spread on the record.

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*INS has subsequently released substantial portions of its Revised Field Manual. See Interpreter Releases Vol. 65 No. 47, December 12, 1988, pp. 1283-85.

Nothing in the field manuals is inconsistent with the position of the Service that ``. . . this inspection had been completed on December 11th but investigation continued to properly prepare this case in order to determine if a Notice of Intent to Fine should issue.'' Govt Brief, 21-22.

At least until this case was heard, and the field manuals, draft and revised, made available in pertinent part, distinctions between investigations and inspections were not readily apparent to the uninitiated. Now that the Revised Field Manual currently in effect has become substantially public, the relatively more sophisticated understanding of Service personnel as to differences between investigations and inspections may be expected to become commonplace.

It is my judgment that what took place on December 11, 1987, constituted an inspection both because that is what INS and respondent understood it to be and, also because common usage of the term connotes that is what it was. As such, it was over when the agents departed Big Bear's corporate office that day.

After the inspection on December 11, 1987, Border Patrol agents compiled data, obtained additional documents and continued to review the case files to determine whether an NIF should issue. This continuing activity was in my view an investigation as that term is commonly understood. Big Bear was obliged to have come into compliance with employment verification requirements on the day the agents arrived to conduct the inspection after having provided due notice of their anticipated visit.

IRCA imposes on employers a duty to prepare and present employment verification forms. It is reasonable that implementing regulations require employers to demonstrate compliance when duly notified. 8 C.F.R. § 274a.2(b)(2). An ensuing investigation provides no defense to an employer who was not in compliance at the time set for inspection. Production of I-9s by Big Bear on January 7, 1988, in response to subpoena or otherwise, does not relieve it from liability for failure to be in compliance on the date of the inspection.

Nor does it provide sustenance to respondent that, as recalled by Tolner and MacVean, Agent Pierce on January 28, 1988, may have suggested that no penalty would result from Big Bear's I-9 practices as found by the agents. On that date INS obtained from MacVean an acknowledgment of certain I-9 ``errors or omissions'' during the December 11, 1987 ``Compliance Investigation,'' during the December 11, 1987 ``Compliance Investigation,'' and Pierce signed-off that certain I-9s had now been corrected. Exh. G to Attachment A. According to Tolner, Pierce at that time said `` `. . . there will be no fine,' '' Tr. 429. MacVean testified that he probably

would not have signed the letter without first consulting his counsel if Pierce had indicated that there might have been a fine. See id. at 452, 453. If Pierce gave such assurances, the government is not bound by them. I am unaware of any authority to support an estoppel arising out of such remarks, and do not understand why the circumstances before me argue for such a result, considering that culpability for the violations dates to December 11, 1987, not to January, 1988.

D. The constitutionality issue

Big Bear, by affirmative defenses and on brief, attacks both IRCA and the INS implementing regulations as unconstitutional. The argument is that they are void for vagueness, uncertainty and ambiguity in violation of the Due Process Clause by failing to prescribe the affirmative steps expected of employers to correct deficiencies identified in a citation, and for failing to fix a time certain to take corrective action. It is contended also that, as a penal statute, IRCA must be strictly construed. As such, it is urged that section 101 should not be enlarged to perfect the defects of omission, i.e., failure to inform an employer of both what was expected of it following receipt of a citation and a timeframe in which to comply.

In reply, INS marshals case law to the effect that ``. . . administrative tribunals do not have authority to rule on the constitutionality of the law and regulations'' which they enforce. Govt Brief, 27. INS urges, nonetheless, that ``. . . the statute and regulations are clear on what an employer's obligations are, providing specific provisions on what the employer has to do and what the employer's responsibilities encompass.'' Govt Reply Brief, 9.

Respondent has failed to persuade that as an employer it might not have reasonably anticipated liability for paperwork violations, before and after the December 11, 1987 inspection. The explanatory page of the Citation makes clear an employer's potential liability. The authorities cited by respondent are not dispositive. See e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497, 102 S.Ct. 1186, 1193 (1982) which, although cited by Big Bear, makes clear that:

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

Big Bear does not suggest that 8 U.S.C. § 1324a(a)(1)(B) is ``impermissibly vague in all of its applications.'' Id.

I do not agree that either section 101 or the implementing regulations lack readily ascertainable or sufficiently definite meaning.

Clearly, hindsight implies omniscience. Virtually any law invites improvement. Neither the statute nor the regulations are so defective as not to fairly apprise employers of their post-citation compliance obligations. Accordingly, I agree with INS on the merits of its argument on this score. Strict constructionist or not, but consistent even with the philosophy of those authorities which would construe narrowly the powers delegated by Congress to this department to interpret and administer IRCA, I do not find the statute wanting on its face, or as applied here.

On the question of power to inquire into the constitutionality of an agency's statute or regulatory underpinnings, the general proposition stated by INS has case support. However, the District of Columbia Circuit, as recently as February, 1988, in an opinion upholding refusal of the Federal Maritime Commission to entertain a constitutional challenge to certain tariffs, provided an instructive commentary. Plaquemines Port, Harbor and Terminal District v. F.M.C., 838 F.2d 536 (D.C. Cir. 1988). The court, Bork, J., stated:

> It was entirely correct for the FMC to decline to decide the tonnage clause issue, see, e.g., Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1114-15 (D.C. Cir. 1979), on the ground that the federal courts provide more appropriate forums for constitutional claims. NOSA Order, 23 S.R.R. (P & F) at 1372-73. Administrative agencies are entitled to pass on constitutional claims but they are not required to do so merely because their members, like all government personnel, owe allegiance to the Constitution. Motor & Equip. Mfrs. Ass'n, 627 F.2d at 1115. But cf. Meredith v. FCC, 809 F.2d 863 (D.C. Cir. 1987) (where agency itself has cast grave legal doubt on the constitutionality of its own policy, administrative law judge should consider constitutional defense in an enforcement proceeding).

Id. at 544.

IV. Civil money penalties

As appears from the foregoing discussion, it is my judgment that Big Bear has violated 8 U.S.C. § 1324a(a)(1)(B) as alleged by INS with respect to 135 individuals, as to 132 of whom there were no Forms I-9 and as to three of whom the I-9s were incomplete as a matter of law, on the date of a duly notices inspection, i.e., December 11, 1987. Having found culpability, I am required by IRCA to assess civil money penalties ``in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred.'' 8 U.S.C. § 1324a(e)(5).

The INS proposed in the NIF, and has not varied from, $200 per individual with respect to whom a violation was alleged. The record is informed, however, of the basis on which the Service selected that sum from the range of options available only by the reminder that respondent employs as many as 1400 people and that the Service might have, but did not, allege almost twice as many

violations as those in the NIF. I am obliged, in determining the quantum of penalty to consider the size of the employer's business, the good faith of the employer, the seriousness of the violation, whether the individuals involved were unauthorized aliens, and the history, if any, of prior violations.

The record is silent as to whether any of the 135 individuals were unauthorized aliens. I am unable to speculate whether INS refrained from alleging unlawful employment charges or whether there were none to prosecute. For the purpose of determining an appropriate penalty, therefore, it must be assumed that none of the individuals were unauthorized.

These were the first violations alleged subsequent to the October 5, 1987 Citation. Because IRCA prohibits proceedings based on violations alleged in a citation, I am unable to find that there is a history of previous violations; this is the only proceeding involving alleged violations by Big Bear subsequent to issuance of the Citation.

It follows that the only criteria for consideration are Big Bear's size, its good faith, and the seriousness of the violations.

In absolute numbers, a payroll of 1400 is not small, but neither does it place respondent among the larger employers in the nation.

Good faith although not established beyond all doubt is substantially shown, to my satisfaction, by the candid admission that failure to correct the omission of I-9s for the 183 individuals accounted for in item 1 of the Citation was inadvertent. The failure to prepare I-9s for 132 of those 183 individuals was not deliberate, for all that appears. The defective I-9s involved failure in two instances by the employer to date the employer certification, and in the third, omission of a number for the document to establish identity (I-9 List B) and entry of a social security number for a birth certificate to establish employment eligibility (I-9 List C). While not indicative of good faith, neither do they reflect callousness. To the extent that good faith is the obverse of bad faith, I find carelessness, and not disdain or such gross disregard of the employer sanctions program as to imply malevolence, a determination which is, in all, tantamount to good faith.

As to seriousness, while an aggregation of 135 paperwork violations is not to be minimized, they must be considered in the context of such violations standing alone, unaccompanied by charges of unauthorized alien employment.

On balance, considering only the range of options between $100 per individual and the $200 selected by INS, I gauge $100 per individual to be just and reasonable.

V. Ultimate findings, conclusions, and order

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 discussed, I determine, upon the preponderance of the evidence, that respondent violated 8 U.S.C. § 1324a(a)(1)(B):

a. By failing as of December 11, 1987, having received due notice of an employment verification compliance inspection to be held at its corporate office that date, to prepare Forms I-9 for 132 individuals each of whom was identified in the complaint in this proceeding and was hired by Big Bear after November 6, 1986, and who continued as employees after May 31, 1988.

b. By failing to properly complete Forms I-9 presented to the Immigration and Naturalization Service on December 11, 1987, for three employees each of whom, as identified in the complaint, was hired by Big Bear after May 31, 1987: those for Marcella Harris and Roger Kifer, both being undated by the employer in the signature block provided, were incomplete; and that for Angel Sarmiento, lacking a document number for the list B document at Section 2 and not having a properly recorded document for list C, instead identifying a birth certificate but containing an apparent social security number, was incomplete.

c. As to all 135 employees, Big Bear failed to satisfy statutory employment verification requirements in violation of 8 U.S.C. § 1324a(a)(1)(B) and 8 C.F.R. § 274a.2(b).

2. That those violations were charged subsequent to receipt by respondent of an October 5, 1987 Citation which constitutes a condition precedent to a proceeding such as this one with respect to violations alleged to have occurred during the period June 1, 1987 through May 31, 1988.

3. That once a citation is provided to an employer which indicates that a violation of 8 U.S.C. § 1324a may have occurred during the period June 1, 1987 through May 31, 1988, proceedings such as this one may be initiated without regard to whether the individuals as to whom the violations are alleged or the conduct alleged to have been in violation is identical to the individuals or the conduct alleged in the precedent citation.

4. That in compliance with all statutory and regulatory imperatives, the Service provided timely prior notice to respondent of the inspection to be held on December 11, 1987, but any failure by respondent to have received or perceived such notice was without prejudice to it.

5. That from delivery of the Citation on October 5, 1987 to the date of the inspection, December 11, 1987, was a sufficiently reasonable period of time for respondent to have come into compliance with the employment verification requirements by having completed Forms I-9 for all the individuals included in paragraph 1, supra, and identified in the complaint as employees.

6. That as an employer, Big Bear was obliged to be in compliance at the time of the inspection, December 11, 1987, whether or not investigation continued thereafter; compliance, if any, subsequent to that date is not material to the question of culpability as of the date of the scheduled inspection.

7. That the obligation of Big Bear as an employer to comply with the employment verification system being continuous, liability for noncompliance is continuous also.

8. That the government is not estopped from obtaining an appropriate order in this proceeding by any statement a Border Patrol agent might be understood to have made to Big Bear personnel subsequent to December 11, 1987, i.e., on January 28, 1988.

9. That neither 8 U.S.C. § 1324a nor the implementing regulations implicated in this proceeding at title 8 Code of Federal Regulations are unconstitutional.

10. That, upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. § 1324a(a)(1)(B), it is just and reasonable to require Big Bear to pay a civil money penalty in the amount of $100.00 for each of 135 violations as found above, for a total assessment of $13,500.00.

11. That, pursuant to 8 U.S.C. § 1324a(e)(6) and as provided at 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 it shall have been modified or vacated by the Chief Administrative Hearing Officer.

SO ORDERED.

Dated this 30th day of March, 1989.

MARVIN H. MORSE,
Administrative Law Judge