UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER
ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER MODIFYING THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

United States of America, Complainant, v. New El Rey Sausage Company, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 8100080.

Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Order and Decision

On July 7, 1989, the Honorable Robert B. Schneider, the Administrative Law Judge assigned to this case, issued an Order regarding the above-styled proceeding entitled ``Decision and Order.'' The Administrative Law Judge's Order was issued after a hearing, which transpired over February 28, March 1-2, 1989. On July 19, 1989, the Immigration and Naturalization Service (hereinafter INS) filed a request for administrative review of the Administrative Law Judge's Decision and Order with the Office of the Chief Administrative Hearing Officer.

Pursuant to Title 8, United States Code, Section 1324a(e)(6) and 28 C.F.R. 68.52, (hereinafter the Rules) the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Decision and Order, and in accordance with the controlling section of the Immigration Reform and Control Act of 1986 (hereinafter IRCA) supra, modifies the Administrative Law Judge's Decision and Order.

On August 11, 1988, the United States of America, by and through its agency, the INS, filed a complaint with the Office of the Chief Administrative Hearing Officer against the Respondent, New El Rey Sausage Company, Incorporated. The complaint charged the Respondent with violations of IRCA. Specifically, the INS alleged two counts of unlawfully continuing to employ two individual aliens not authorized to work in the United States, violating 8 U.S.C. 1324a(a)(2), (Counts I and II), and two counts of failing to properly complete two Employment Eligibility Verification

Forms (Forms I-9), violating 8 U.S.C. 1324a(a)(1)(3), (Counts III and IV).

As a result of the hearing and post-hearing briefs, the Administrative Law Judge concluded in his Order that Respondent did knowingly continue to employ two unauthorized aliens and therefore violated Counts I and II. However, the Administrative Law Judge dismissed Counts III and IV, holding that the INS based these counts on alleged violations for which it had failed to issue a citation while under a statutory mandate to do so.

The Chief Administrative Hearing Office has conducted an administrative review of this Decision and Order and finds the following:

1. The attached Memorandum of Law is incorporated into and made part of this Order.

2. The Administrative Law Judge's Decision and Order dated July 7, 1989, is hereby modified.

3. The Chief Administrative Hearing Officer has jurisdiction to review the Decision and Order of the Administrative Law Judge pursuant to 8 U.S.C. 1324a(e)(6) of IRCA.

4. The INS failed to issue a citation during the citation period although it had reason to believe the Respondent may have violated the employment verification system provisions of IRCA, therefore, Counts III and IV were properly dismissed.

5. The INS regulation at 8 C.F.R. 274a.9(c) is not null and void as being inconsistent with 8 U.S.C. 1324a(i)(2).

6. The INS may use factual allegations stated in a citation in a subsequent Notice of Intent to Fine.

7. Employers who are cited for paperwork violations have a duty to correct deficient employment verification forms.

8. The request by INS to review the Administrative Law Judge's Order Granting in Part and Denying in Part Complainant's Post Hearing Motion for Admission of Exhibits, dated June 21, 1989, is untimely and is not subject to an administrative review by the Chief Administrative Hearing Officer.

Based on findings and conclusions as set forth in the attached Memorandum of Law in support of this Order, I hereby modify the Administrative Law Judge's Decision and Order of July 7, 1989, pursuant to 8 U.S.C. 1324a(e)(6).

SO ORDERED.

August 4, 1989.

B. JACK RIVERS
Acting Chief Administrative Hearing Officer

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

United States of America, Complainant, v. New El Rey Sausage Company, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100080.

MEMORANDUM OF LAW IN SUPPORT OF FINAL AGENCY ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER

I. SYNOPSIS OF PROCEEDING

On August 11, 1988, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS), filed a complaint with the Office of the Chief Administrative Hearing Officer against the Respondent, New El Rey Sausage Company, Incorporated. The complaint charged the Respondent with violations of the Immigration Reform and Control Act of 1986 (hereinafter IRCA). Specifically, the INS alleged two counts of unlawfully continuing to employ two individual aliens not authorized to work in the United States, violating 8 U.S.C. 1324a(a)(2), (Counts I and II), and two counts of failing to properly complete the Employment Eligibility Verification Forms (Forms I-9), violating 8 U.S.C. 1324a(a)(1)(B), (Counts III and IV).

On August 29, 1988, the Chief Administrative Hearing Officer assigned this matter to the Honorable Robert B. Schneider, Administrative Law Judge. The hearing was held in Los Angeles, California, on February 28, March 1-2, 1989.

On June 21, 1989, following a motion filed by the INS, the Administrative Law Judge issued an Order Granting in Part and Denying in Part Complainant's Post Hearing Motion for Admission of Exhibits.

On July 7, 1989, the Administrative Law Judge issued the Decision and Order on the case. The Administrative Law Judge found in favor of the government as to Counts I and II, holding that the Respondent knowingly continued to employ two unauthorized aliens. The Administrative Law Judge dismissed Counts III and IV, holding that the Complainant based these counts on alleged violations for which the INS had failed to issue a citation while under a statutory mandate to do so.

On July 19, 1989, the Office of the Chief Administrative Hearing Officer received a request, filed by the INS, for administrative review of the July 7, 1989, Decision and Order.

II. SUMMARY OF FACTS

In order to fully understand the Decision and Order of the Administrative Law Judge, a brief recitation of the facts of the proceeding is necessary.

On March 16, 1988, the INS conducted a telephonic educational visit with Respondent-employer regarding employer responsibility under IRCA. Between March 16 and April 1, 1988, the INS sent Respondent a Notice of Inspection. On April 1, 1988, the INS conducted an on-site compliance inspection to review Respondent's I-9 forms. During the hearing, the INS Special Agent in charge of the inspection testified that there were numerous deficiencies in the preparation of the I-9 forms by Respondent. However, the INS did not issue a citation to the Respondent for these deficiencies.

Between April 1 and May 24, 1988, the INS conducted a series of computer checks of the alien registration numbers of Respondent's employees on the INS Central Index System (hereinafter CIS). According to the CIS check, nine employees working for the Respondent reported alien registration numbers that had not been issued or that had been issued to persons with names other than those of Respondent's employees. The results of this computer check were conveyed to the Respondent in a Notice of Results of Inspection letter dated May 24, 1988, which was personally delivered to the Respondent by an INS Special Agent on May 25, 1988.

On June 22, 1988, the INS conducted a survey of the Respondent's business premises. The INS secured payroll records of the Respondent and determined that two of the aliens included on the Notice of Results of Inspection letter of May 24, 1988 had been employed by Respondent for a substantial period of time following receipt of the letter. In addition, during the course of the surveillance, the INS apprehended one of the aliens who had been included on the May 24, 1988, letter. This individual was subsequently found to be a deportable alien by an Immigration Judge.

The INS Special Agent in charge of the survey also testified that the INS reviewed the Respondent's I-9 forms and found them to be identical to the forms that were reviewed on April 1, 1988.

III. COMPLAINANT'S CONTENTIONS

The INS maintains that: (1) the Chief Administrative Hearing Officer has jurisdiction to review the Administrative Law Judge's Decision and Order pursuant to 28 C.F.R. 68.52; (2) the Administrative Law Judge was incorrect in his finding that the INS is precluded from using the factual allegations stated in a citation in a subsequent Notice of Intent to Fine; (3) the Administrative Law Judge was incorrect in his finding that the INS regulation 8 C.F.R.

274a.9(c) is incompatible with 8 U.S.C. 1324a(i)(2); (4) the Administrative Law Judge was incorrect by indicating in footnote 5 of the Decision and Order, that employers have no affirmative duty to correct deficient I-9 forms; and (5) the Administrative Law Judge was incorrect in finding that the sworn affidavit of one of the Respondent's employees was not admissible evidence.

IV. RESPONDENT'S CONTENTIONS

During the proceeding, the Respondent contended: (1) the INS was under a statutory mandate to issue citations for violations of IRCA during the period June 1, 1987 to May 31, 1988, and as the INS failed to do so in this instance, the entire complaint against Respondent should be dismissed (Respondent's Post Hearing Brief at pp. 3-6); and (2) that the Administrative Law Judge was correct to deny admitting the sworn affidavits of Respondent's employees as they were impermissible hearsay. (Respondent's Points and Authorities in Opposition to Complainant's Motion for Reconsideration of Court's Ruling Denying Admissions of Exhibits).

V. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

The Administrative Law Judge issued his Decision and Order on July 7, 1989. In regard to Counts III and IV, the Administrative Law Judge made the following conclusions:

1. In order for a regulation implementing IRCA to be valid, its language must be consistent with the language of Title 8 Section 1324a.

2. Insofar as the language of 8 C.F.R. 274a.9(c) is not consistent with the language of 8 U.S.C. 1324a(i)(2), no weight shall be accorded to the regulation because it is not valid.

3. The effective dates of enforcement timetables, including the 12-month First Citation Period, are set out in the statute at Section 1324a(i) of Title 8 of the United States Code.

4. The tolling date of the 12-Month First Citation Period was May 31, 1988.

5. Complainant INS conducted a compliance inspection of Respondent prior to May 31, 1988, and determined that, amongst other ``deficiencies,'' Respondent had failed to properly complete Section 2 (``Employer Review and Verification'') on the Employment Eligibility Verification Forms (Forms I-9) of Vasquez (Count III) and Guzman (Count IV).

6. Complainant had reason to believe that Respondent may have violated subsection (a) prior to May 31, 1988 with respect to the Forms I-9 of Vasquez and Guzman.

7. Complainant, pursuant to 8 U.S.C. 1324a(i)(2) had a mandatory duty prior to May 31, 1988, to issue a citation in instances where it had reason to believe that a violation may have occurred and, further, not to conduct any subsequent proceeding on the basis of such alleged violation or violations.

8. Complainant did not issue a citation to Respondent even though Complainant had reason to believe that Respondent may have violated subsection (a) prior to May 31, 1988 in that Respondent, as of April 1, 1988, had failed to properly complete section 2 of the Forms I-9 for Vasquez and Guzman.

9. Since Complainant did not issue a citation in an instance where it had a statutory obligation to have done so, it shall not be permitted to conduct any further proceeding on the basis of the alleged violations that were subsequently set forth in Counts III and IV for which it should have issued the citation.

10. Counts III and IV are dismissed.

VI. REVIEW AUTHORITY OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Section 8 U.S.C. 1324a(e)(6) of IRCA speaks to administrative appellate review:

> The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

This statute gives the Attorney General review authority over the decision and order of an Administrative Law Judge. The Attorney General delegated this power to the Chief Administrative Hearing Officer, an official having no review authority over other immigration-related matters. 28 C.F.R. 68.2(d).

According to the statute, the Attorney General may, within thirty days from the date of the decision, issue an order which modifies or vacates the Administrative Law Judge's decision and order. Thus, the statute and rules contemplate that the Administrative Law Judge's decision is an initial decision in conformance with Section 557 of the Administrative Procedure Act. The Administrative Law Judge's decision becomes final unless it is modified or vacated by the Chief Administrative Hearing Officer. This policy acknowledges the strong possibility in this new area of developing law that a proceeding may represent a test case and that an Administrative Law Judge's decision will be tantamount to developing policy in an area that is largely unsettled. A provision that pro-

vides for review authority contemplates this scenario and insures that policy decisions will be made by that agency head.

Thus, the Chief Administrative Hearing Officer has jurisdiction to review this Decision and Order of the Administrative Law Judge pursuant to the controlling statute.

VII. THE ADMINISTRATIVE LAW JUDGE CORRECTLY DISMISSED COUNTS III AND IV OF THE COMPLAINT AS THE INS FAILED TO ISSUE THE STATUTORILY MANDATED CITATION.

The Immigration Reform and Control Act of 1986 provides for a 12-month first citation period under which employers who violate the provisions of IRCA for the first time during the period will not be assessed the civil penalties, but rather will be given a citation indicating that a violation has occurred. Specifically, 8 U.S.C. 1324(i)(2) states:

> 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) during the subsequent 12-month period, the Attorney General shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations.

The statute states that the Attorney General ``shall provide a citation'' in the first instance that the Attorney General has ``reason to believe'' that an employer ``may'' have violated the provisions of IRCA relating to the hiring of unauthorized aliens or the employment verification system.

The plain meaning of the statute provides that at any time the INS has reason to believe that provisions of IRCA may have been violated, the INS is required to issue a citation during the citation period. This requirement exists notwithstanding any subsequent interpretation of the statute through regulation, or through any interpretation of enacted regulations.

The purpose of the citation period was to provide employers with an educational period during which they would not be assessed with civil penalties, but instead would be provided with a warning as to the type of penalties they could be liable for in the event of future violations. In addition to the citation period's educational purpose, the period was also intended to provide notice to employers of the consequences they would face for violating the provisions of IRCA. The legislative history of IRCA states that the citation ``is intended to serve as a personal notification to an offending employer as to the existence of a Federal prohibition on the employment of undocumented aliens, as well as a warning as to the penalties that will be applied in the event of further violations.'' H.R. Rep.

No. 682, 99th Cong., 2d Sess., pt. 1, at 58, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5662.

The Administrative Law Judge correctly pointed out that the INS, at the time of its initial compliance inspection on April 1, 1988, had sufficient information to reasonably believe that the Respondent may have violated the employment verification provisions of IRCA. Therefore, the INS was under a statutory mandate to issue a citation at that time. Such a citation would have served the educational purpose intended by Congress as well as providing the Respondent-employer with the required personal notification.

One can only speculate as to whether the issuance of a citation following the April 1, 1988, compliance inspection would have caused the Respondent to comply with the employment verification system and correct the deficient forms I-9. However, we need not reach that issue here; the fact is that the INS failed to issue a citation in an instance that it was under a statutory mandate to do so.

Accordingly, the Administrative Law Judge's decision to dismiss Counts III and IV is affirmed.

In addition, the reasoning that the Administrative Law Judge applied as to why Counts I and II cannot be dismissed under the same logic is also affirmed. As noted by the administrative Law Judge, ``the factual allegations pertaining to Counts I and II which, while initially being investigated prior to May 31, 1988, were not sufficiently conclusive to warrant any kind of prosecution or even the implication of a prosecution, including the issuance of a citation, until after May 31, 1988, when these same factual allegations were developed further by subsequent investigation. . . .'' Decision and Order, p. 16.

VIII. THE INS REGULATION AT 274a.9(c) IS NOT NULL AND VOID AS BEING INCONSISTENT WITH 8 U.S.C. 1324a(i)(2)

The Administrative Law Judge, in his Decision and Order, has ruled that the INS regulation at 274a.9(c) is inconsistent with Section 1324a(i)(2) of the statute, in that, ``under a plain reading, [the regulation] significantly narrows the scope of circumstances in which the INS was required to issue a citation.'' Order and Decision, p. 14.

Specifically, 8 C.F.R. 274a.9(c) states:

> If after investigation the Service determines that a person or entity has violated section 264A of the Act for the first time during the citation period (June 1, 1987 through May 31, 1988) the Service shall issue a citation.

The INS argued that it was not required to issue a citation in this instance because it ``had not concluded its investigation.'' Complainant's Reply Brief, May 8, 1989, pp. 5-6. The Administrative

Law Judge correctly pointed out that the standard for issuing a citation is ``reason to believe [an employer] may have violated [IRCA],'' and to formulate a standard requiring the INS to complete its investigation goes beyond the scope of the statute.

On page 14 of the Administrative Law Judge's Decision and Order, the regulation in question is misquoted as stating ``after an investigation,'' which includes the article ``an'' before the word ``investigation.'' By reading the regulation to state ``after an investigation,'' an argument could be made that the regulation narrows the scope of the statute, requiring the INS to conduct an investigation before issuing a citation, thus implying that an investigation is completed. However, no such article precedes the word ``investigation'' in the regulation. It merely states that ``after investigation'' the INS shall issue a citation. The INS has to conduct some type of investigation in order to reach the required standard of a ``reason to believe [an employer] may have violated [IRCA].'' The words ``after investigation'' fully contemplate that some investigation is necessary to reach that standard. However, the regulation does not necessarily narrow the scope of the statute as a plain reading of ``after investigation'' does not require that the investigation be completed.

The words ``after investigation,'' in the regulation, should be construed so as to be consistent with the statute's requirement that a citation be issued after the INS ``has reason to believe [an employer] may have violated [IRCA].'' ``An administrative regulation, like a statute, is subject to the normal rules of statutory construction, and is to be construed to effectuate the intent of the enacting body.'' Harnishfeger Corp. v. U.S. Environmental Protection Agency, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981). ``A regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'' Trustees of Indiana Univ. v. United States, 618 F.2d 736, 739 (Ct.Cl. 1980). Even if the wording ``after investigation'' is considered ambiguous, it still should be interpreted to be consistent with the statutory language. ``Where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred.'' United Telecommunications, Inc. v. Commissioner, 589 F.2d 1383, 1390 (10th Cir. 1978), cert. denied 442 U.S. 917 (1979).

Accordingly, the Decision and Order of the Administrative Law judge is modified to hold that 8 C.F.R. 274a.9(c) is not null and void as being inconsistent with 8 U.S.C. 1324a(i)(2).

IX. CLARIFICATION OF CURRENT STATE OF THE LAW REGARDING A CITATION AND SUBSEQUENT LIABILITY PROCEEDING, AND EMPLOYER'S DUTY TO CORRECT VIOLATIONS OF COMPLIANCE WITH THE EMPLOYMENT VERIFICATION SYSTEM

The Administrative Law Judge, in his Decision and Order, has addressed two issues in footnotes which have prompted the INS to request an administrative review by the Chief Administrative Hearing Officer.

Although these two issues do not affect the end result of the Decision and Order, due to the fact that the Administrative Law Judge has raised the issues, and the fact that the INS was sufficiently concerned to request administrative review of the issues, it is incumbent on this office, for the sake of clarity, to address the current state of the law.

A. The INS Can Use Factual Allegations Stated in a Citation in a Subsequent Notice of Intent to Fine.

The Administrative Law Judge, in his Decision and Order at footnote 4 (pp. 13-14), discusses the issue of the use of factual allegations that served as the basis of a citation in subsequent liability proceedings.

This issue need not have been raised in the Decision and Order since there was no citation provided to the Respondent. However, because the issue was addressed by the Administrative Law Judge in his dicta, and subsequently raised by the INS in their request for administrative review, it is incumbent on this office to clarify the current state of the law.

In footnote 4, the Administrative Law Judge states:

> The up-shot of this cited provision [1324a(i)(2)] requires, as I see it, that in cases where a citation has been issued, INS (as a delegate of the Attorney General) is precluded from re-using the factual allegations that served as the basis of the first ``instance'' of violation (as incorporated into the citation) in any subsequent liability proceeding.

Decision and Order, pp. 13-14.

While this statement apparently implies that the INS is precluded from using the factual allegations stated in a citation in a subsequent Notice of Intent to Fine (hereinafter NIF), the Administrative Law Judge qualifies this by stating:

> . . . if INS goes on to issue a NIF, after May 31, 1988, the factual allegations in the NIF must be temporally distinguishable from factual allegations which supported the initial decision to issue a citation even if they involve otherwise similar subject matter (which is, or may be, indicative of an on-going refusal to remedy a violative situation).

Decision and Order, p. 14.

Despite the Administrative Law Judge's qualifying statement, the footnote goes on to state that the INS made a tactical decision not to issue a citation to Respondent following the April 1, 1988, compliance inspection ``because [the INS] knew that if it had, the factual allegations that would have supported the issuance of the citation would not have been useable in `any proceeding' subsequently pursued.'' Decision and Order, p. 14. It is not clear from this conclusion why the factual allegations contained in the NIF following the discovery of the paperwork violations during the June 22, 1988, survey could not be ``temporally distinguishable'' from the allegations that would have been used as the basis for a citation following the April 1, 1988, compliance inspection had such a citation been issued.

The Chief Administrative Hearing Officer wishes to make it clear that the reason for affirming the dismissal of Counts III and IV of the compliant is that the INS failed to issue the statutorily mandated citation following the April 1, 1988, compliance inspection, thereby denying the Respondent the educational opportunity and personal notification that Congress intended the citation to provide. Any speculation as to the effect that a citation would have had (had a citation been issued) on the subsequent issuance of the NIF has no relevance to this proceeding.

Moreover, the current state of the law on the issue of allegations used in a citation is quite clear. There are two cases addressing this issue which have precedent value: Mester Manufacturing Co. v. United States, 88-7296 (9th Cir. June 23, 1989) aff'g United States v. Mester Manufacturing Co., OCAHO Case No. 87100001, (July 1, 1988); and United States v. Big Bear Market, OCAHO Case No. 88100038 (May 5, 1989).

In the Mester case, the Administrative Law Judge addressed this issue in a situation in which a citation had been issued against the employer by the INS. In his Decision and Order, the Administrative Law judge stated ``[i]t 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.'' Mester Manufacturing Co., p. 12. (emphasis added). It is implicit from this holding that there is no perpetual immunization granted to an employer for violations that were set out in a previously issued citation. The findings of the Administrative Law Judge have been upheld by the 9th Circuit. Mester Manufacturing Co. v. United States, supra.

This same issue was addressed more directly in the Big Bear Market case, in which the Respondent argued that once paperwork violations are included in a citation, the INS is barred from alleg-

ing and enforcing any future paperwork violations with respect to the same employment of the individuals accounted for in the citation. Big Bear Market, p. 18. The Administrative Law Judge did not agree with this reasoning and held:

> 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.

Big Bear Market, p. 18.

The Administrative Law Judge went on to conclude that ``[t]he fact that a citation addressed a particular violation does not preclude that violation, if uncorrected, from forming the premise for issuance of an NIF.'' Big Bear Market, p. 19.

Any interpretation of 8 U.S.C. 1324a(i)(2) that implies that employers are immunized from any further actions against them merely because the violations have appeared in a citation would frustrate the fundamental purpose of the employer sanction provisions of IRCA.

Accordingly, the Decision and Order of the Administrative Law Judge is modified to the extent that any implication in the Decision and Order that the INS is precluded from bringing action against an employer for violations which had previously been alleged in a citation does not conform to the current state of the law.

B. Employers Who Are Cited for Paperwork Violations Have a Duty to Correct Deficient I-9 Forms

The Administrative Law Judge, in his Decision and Order at footnote 5 (pp. 16-17), states:

> Thus, the Service [the INS] policy on ``correcting'' ``deficient'' I-9 Forms does not seem, to me, to be based on a legally authoritative textual source (i.e. the statute or properly consistent implementing regulations) and therefore should not serve as a basis for its claiming that it had not ``completed its investigation'' of Respondent's paperwork violations prior to the termination date of the one-year citation period on May 31, 1988.

Decision and Order, p. 17.

While the Administrative Law Judge relates his finding about correcting deficient I-9 forms to the claim by the INS that they had not completed their investigation, the INS expressed concern in their request for administrative review that this finding implies that employers have no affirmative duty to correct deficient I-9 forms.

The issue of whether employers have a duty to correct deficient I-9 forms was also addressed in the case United States v. Big Bear Market, supra. As quoted above, the Administrative Law Judge concluded ``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.'' Big Bear Market, p. 18. The Administrative Law Judge further held that ``the statutory requirement to comply with the employment verification system is a pervasive and continuing one. . . . The obligation to comply being continuous, liability for noncompliance is continuous also.'' Big Bear Market, pp. 18-19.

The thrust of the employment verification system is to have employers document the work authorizations of employees hired. Failure to properly document the work authorizations according to the provisions of 8 U.S.C. 1324a(b) can result in a citation during the citation period or civil monetary penalties. As with any law, one of the purposes of issuing citations to violators is to ensure that future violations will not occur.

In addition, the statute provides that a higher civil monetary penalty will be assessed against employers for repeated paperwork violations. Specifically, 8 U.S.C. 1324a(e)(5) states, in part, that ``[i]n determining the amount of the penalty, due consideration shall be given to . . . the history of previous violations.'' It is implicit from the reading of this part of the statute that following a violation, if an employer does not comply with the employment verification system, the civil monetary penalties assessed against the employer for any subsequent paperwork violations may be increased.

Accordingly, the Decision and Order of the Administrative Law Judge is modified to the extent that any implication contained in the Decision and Order that employers have no duty to correct deficient I-9 forms does not conform to the current state of the law.

X. THE CHIEF ADMINISTRATIVE HEARING OFFICER WILL NOT REVIEW THE ORDER REGARDING ADMISSIBILITY OF THE SWORN AFFIDAVIT OF ONE OF RESPONDENT'S EMPLOYEES

On June 21, 1989, the Administrative Law Judge issued an Order Granting in Part and Denying in Part Complainant's Post Hearing Motion for Admission of Exhibits, in which he denied the admissibility of Complainant's Exhibit C-14, the sworn affidavit of one of Respondent's employees, as hearsay.

According to 28 C.F.R. §←68.52, any request for administrative review should have been made within five days of the date of the Order. Had the Complainant been sufficiently concerned about how

the exclusion of this exhibit would affect the decision in this case, a timely request for review of the Order should have been made.

There was no timely request for review of the Administrative Law Judge's Order of June 21, 1989. The Chief Administrative Hearing Officer did not vacate or modify this Order within thirty days of the date of the Order. Therefore, according to 8 U.S.C. 1324a(e)(6), the Administrative Law Judge's Order became the Final Order on July 21, 1989.