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

UNITED STATES OF AMERICA,)		
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324a PROCEEDING
	)	OCAHO Case No. 90100352
	)	
RAUL E. VALLADARES, JR.	)	
Respondent.	)	
	)	

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

PROCEDURAL HISTORY

On November 26, 1990, the United States of America filed a Complaint with the Office of the Chief Administrative Hearing Officer alleging that Respondent Raul E. Valladares, Jr. has violated the Immigration Reform and Control Act of 1986 ("IRCA").

The Complaint contains two separate counts. Count one asserts the Mr. Valladares has violated 8 U.S.C. §1324a(a)(1)(B) by failing to prepare Employment Eligibility Verification Forms ("I-9"s) for eleven individuals whom he hired after November 6, 1986 for employment in the United States. In the alternative, count one alleges that Respondent has violated the same statutory provision by failing to present the I-9s of those eleven individuals for inspection by the Immigration and Naturalization Service ("INS"). Count two of the Complaint alleges that Respondent has further violated 8 U.S.C. §1324a(a)(1)(B) by failing to properly complete section 2 of the I-9s for an additional sixty-three employees.

On January 9, 1991, Respondent timely filed an Answer to the Complaint. In the Answer, Respondent admitted that he has hired each of the seventy-four relevant individuals for employment in the
United States after November 6, 1986; however, he also specifically denied every allegations of IRCA violation advanced by the Complaint. Respondent did not raise any "affirmative defense" in his Answer.

On February 14, 1991, Complainant filed the instant Motion for Summary Decision. Complainant argues that it is entitled to a favorable summary decision because there does not exist any disputed issues of material fact in this case.

Respondent did not submit any opposition to Complainant's Motion for Summary Decision.

STANDARDS APPLICABLE IN SUMMARY DECISION PROCEEDINGS

The Rules of Practice and Procedure ("Rules") promulgated for IRCA proceedings [28 C.F.R. §68 et seq] authorize an administrative law judge to issue summary decision where there exists no genuine issue of material fact and a party is entitled to summary relief. See 28 C.F.R. §68.36(c) (1990). This is analogous to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") which govern the availability of summary judgments in federal judicial proceedings. A "material" fact in this context is any fact which can potentially influence the outcome of a case. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Under both the Rules and FRCP, the party moving for a summary decision has the initial burden to demonstrate the absence of any issues of material fact. See Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987). Any ambiguities in the evidence as well as all reasonable factual inferences are further resolved in favor of the nonmoving party. See Harbor Ins. Co. v. Trammell Crow Co., Inc., 854 F.2d 94 (5th Cir. 1988), certiorari denied 109 S. Ct. 1315, 103 L.Ed.2d 584. Once the moving party has met its initial evidentiary burden, the nonmoving party must then advance facts which demonstrate the existence of genuine factual issues in order to defeat the motion for summary decision. However, the nonmoving party cannot rest upon mere conclusory allegations. See Nilsson, Robbins Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydroelec, 854 F.2d 1538 (9th Cir. 1988).

In light of the above standards, Complainant must present evidence which demonstrates, without ambiguity, the absence of any material
issues in this case in order to obtain a favorable outcome for its instant summary decision motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A violation of IRCA's employment eligibility verification provisions [8 U.S.C. §1324a(a)(1)(B)] is established when the Complainant demonstrate the following elements: 1) a person or an entity; 2) who hires an individual for employment in the United States; 3) after November 6, 1986; 4) without complying with IRCA's "paperwork" requirement contained at 8 U.S.C. §1324a(b). See 8 U.S.C. §1324a(a)(1)(B).

In the present case, there does not exist any dispute between the parties as to three of the four violation elements enumerated above. The Complaint alleged Respondent's failure to prepare, present or properly complete I-9s for seventy-four of its employees. In each of the seventy-four instances, Respondent has admitted that he has hired that individual for employment in the United States after November 6, 1986. Respondent's admissions are contained in its Response to Request for Admissions of Fact and Authenticity of Documents. The Complainant has attached this document to its instant Motion for Summary Decision as Complainant's Exhibit C.

The remaining question then, is whether Respondent has indeed violated IRCA's paperwork requirements with respect to the seventy-four employees as alleged by the Complainant.

Initially, it is clear that in his Response to Request for Admissions, the Respondent admitted the allegation that he did not present the I-9s for the eleven employees who are the subjects of the Complainant's first count. This is sufficient to conclusively establish Respondent's liability for paperwork violations as alleged by Count One of the Complaint.

Respondent denied Count One's allegation that he has failed to prepare the I-9s for the above eleven employees. But he did not present any concrete evidence which tends to show that he has in fact prepared such forms for those employees. Respondent merely asserted the contrary in a conclusory manner. This is insufficient to defeat liability. But since Respondent has already admitted to the alternative allegation that he failed to present the eleven I-9s for the INS inspection, I will hold him liable for Count One on that alternative ground. Complainant is therefore entitled to summary decision as to Count One of the Complaint.

With respect to Count Two of the Complaint, Respondent has admitted to the authenticity of the sixty-three photocopied I-9s which Complainant has attached to the current summary decision motion as Exhibit B. An examination of these photocopies indicate that they are facially defective. In fact, Respondent has already admitted that some of these sixty-three forms were completed by him in an improper manner. In other cases, however, he denies the allegations of improper completion on the ground that the necessary eligibility information, missing in part two of the I-9s, is present in part one of the form.

Employers have the duty to properly complete part two of the I-9s irrespective of whether the information sought in that part has already been set forth in the previous part of the form.

8 U.S.C. §1324a(b)(1)(A) requires an employer to attest under penalty of perjury that it has verified an employee's work authorization by examining certain enumerated documents. Employer attestation is a crucial element of IRCA's employment verification system. "Absence of a signature implies that no one in a capacity to hire and fire individuals on behalf of Respondent has actually examined each new employee's documentation." United States v. J.J.C.L., Inc., OCAHO Case No. 89100187, April 13, 1990, slip op. at 6-7. The Respondent in this case has properly signed and dated part two of the relevant I-9s. However, he failed to indicate the type of authorization documents employed for the examination. Respondent's failure to indicate the nature of the documents in part two of the I-9s defeats the purpose of attestation; which is to ensure that he was verified the employee's work authorization by examining appropriate documents. Hence, Respondent's instant omissions constitute violations of IRCA's attestation requirement.

The presence of I.D. numbers for the employees' authorization documents in part one of the form is also insufficient to cure the defect present in part two of the form. In J.J.C.L., the employer was found to have violated IRCA's paperwork requirements for failing to sign part 2 of the I-9 forms even though it attached photocopies of the employees' work authorization documents with the forms. Here, Respondent did not even attach any photocopies to the I-9s. In any case, the presence of the employees' document identification numbers in part one of the I-9s cannot remedy Respondent's failure to attest to the fact that he has inspected the documents in part two of the forms.

From the above discussion, and in view of the fact that Respondent has admitted the authenticity of the photocopied I-9s underlying Count Two of the Complaint, it is clear that there exists no genuine issued of material fact between the parties regarding Count Two of the Complaint. Complainant is thus entitled to a summary decision for this count as well.

Therefore, I find Respondent Raul E. Valladares, Jr. to have violated the Immigration Reform and Control Act of 1986. Specifically, I find Respondent Raul E. Valladares, Jr. to have violated 8 U.S.C. §1324a(a)(1)(B) by failing to present the Employment Eligibility Verification Forms (I-9s) for the following eleven individuals:

1. Juan C. Espitia
2. David P. Gallardo
3. Juvencio Garnica
4. Efren Hernandes
5. Jose Hernandez
6. Ramiro Hernandez
7. Ernesto Ledesura

8. Pedro Merino
9. Manuel J. Valladares
10. Hugo Varriga
11. Eberto Zavala

I further find said Respondent to have violated 8 U.S.C. §1324a(a) (1)(B) by failing to properly complete the I-9s for the following sixty-three individuals:

1. Antonio Aguilar-Aburto
2. Richard Lloyd Alberty
3. Francisco Arizmendi-Sanchez
4. Casimiro Calderon
5. Loera Calderon-Onesimo
6. Odilon Camarillo
7. Jose Gonzales Canchola
8. Rigoberto Canchola
9. Rodolfo Castro
10. Anatolio Ceballos
11. Jesus Chaves
12. Arquimides Cortes
13. Francisco Fernandez
14. Gonzalo Fernandez
15. Guadalupe Flores
16. Mauricio Franco-Sanchez
17. Carlos Fuente-Calderon
18. Roberto V. Garcia
19. Valentin Garcia-Valdez
20. Cristobal R. Hernandes
21. Moises Hernandes-Castillo
22. Art Aguilar Huerta
23. Jose Luis Jaime
24. Martin Leon-Garcia
25. Mauricio Luna
26. Neftali Magallan
27. Victor H. Magana
28. Urbano Nanbo-Sagrero
29. Juan Manuel Navarro-Martinez
30. Luis Olivares-Garcia
31. Roberto Hernandez-Perez
32. Agustin Ponce-Angel
33. Adrian Reyes-Marcos
34. Jesus V. Reyes
35. Martin Reyes-Vasquez
36. Guadalupe Rios
37. Jorge Rios-Vargas
38. Jose Rios G.
39. Severiano Rios-Vargas
40. Manuel Rojas
41. Joaquin Sagrero-Rivera
42. Felimon Santiago
43. Jaime Santiago-Baltazar
44. Moises Santiago
45. Sergio Servantes-Ortiz
46. Andres Solis-Barrera
47. Francisco Solis
48. Enrique Solorio
49. Antonio Sosa
50. Baltazar Sosa
51. Eufemio Sosa
52. Herculano Sosa-Aguilar
53. Ernesto Torres-Garcia
54. Salvador Uribe-Garcia
55. Carmen Valdez
56. Donato Vargas
57. Rafael Vargas-Morales
58. Sergio Velasco-Gomes
59. Marco A. Ventura-Cruz
60. Gerardo Vera
61. Gorge Villanueva-Marcias
62. Mario Villarrel-Garcia
63. Carlos Zamudio-Velazquez

CIVIL MONEY PENALTIES

IRCA requires Administrative Law Judges to impose a civil money penalty upon employers who have violated the paperwork requirements. Such a civil

money penalty may range from a minimum on One Hundred Dollars to a maximum of One Thousand Dollars for each instance of violation. See 8 U.S.C. §1324a(e)(5). The actual level of the penalty is to be determined only after a consideration of five statutorily enumerated factors. The five factors are: 1) the size of employer's business; 2) employer's good faith; 3) seriousness of the violations; 4) whether the violations resulted in the actual employment of unauthorized aliens; and 5) whether the employer has a history of previous violations.

In Count One, Complainant seeks a civil money penalty of Five Hundred Dollars for each of the eleven violations. In Count Two, Complainant seeks a civil money penalty of Three Hundred and Fifty Dollars for each of those sixty-three violations. The total penalty proposed by the Complainant amounts to Twenty Two Thousand and Fifty Dollars ($22,050.00). I now examine the propriety of the proposed penalty amount in light of the five statutory factors.

A. *Respondent's Size*

Complainant has presented little direct evidence pertaining to the size of Respondent's business. But Complainant has offered several documents prepared by Senior Border Patrol Agent Steven Munoz which address the question of Respondent's size (attached to Complainant's Motion for Summary Decision as Exhibit F and Exhibit H).

In these documents, agent Munoz stated that from an examination of California Employment Development Department's Report of Wages (Form DE 3B), Respondent appears to have paid wages totaling $493,373.58 during the first three quarters of 1989. Agent Munoz also indicated there exists some evidence that Respondent is a small farm labor contractor who provides labor to local farmers engaged in the production of tree, vine and cotton products. As of November 29, 1989, Respondent employed twenty employees; however, he appears to have employed a total of 615 individuals during the first three quarters of 1989.

I do not find the evidence regarding Respondent's wage payments to be indicative of the size of his business. Because of the fact that he is a labor contractor, the wage figure may bear little relation to the gross receipt or to the net profit of his business. Furthermore, the figure of 615 employees during 1989 does not imply a large business especially since this is a labor contracting operation. In fact, such evidence tend to indicate the Respondent's relatively small size; this impression is buttressed by the fact that at any given time (such as November 29, 1989), Respondent only has about twenty employees.

For purposes of the penalties assessed, consideration has been given to the small size of Respondent's business.

B. *Respondent's Good Faith*

Senior Border Patrol Agent Munoz also argues that Respondent has failed to demonstrate good faith because he has failed to present eleven I-9s and because he has failed to properly complete part two of the I-9s for an additional sixty-three employees.

I disagree. The mere existence of paperwork violations alone is insufficient as a matter of law to establish a lack of "good faith" as that term is used 8 U.S.C. §1324a(e)(5). Moreover, agent Munoz himself indicates that the INS inspected a total of 626 I-9s in Respondent's possession. The instant proceeding involves only seventy-four of those I-9s. The rate of improper I-9 completion is less than 12%. Accordingly, I find no reason to doubt Respondent's good faith.

C. *Seriousness of the Violations*

Complainant claims the current violations are "serious" since they may have allowed the employment of unauthorized aliens. Complainant further argues that improper completion of I-9s are serious since they show Respondent has not "proved bonafide work authorization" for those employees.

A violation is "serious" if it renders ineffective the Congressional prohibition against the employment of unauthorized aliens. In the present case, the defective I-9s alleged in Count One contain no information whatsoever regarding the employees' employment eligibility documents. But for most of the I-9s alleged in Count Two, such documents were recorded in part one of the forms. The fact that these latter I-9s contain some information regarding employment eligibility documentation does not insulate Respondent from IRCA liability. However, they tend to indicate that the current violations are relatively harmless especially since Complainant does not claim any unauthorized aliens were actually employed by the Respondent in this case.

In light of the above, I find this to be a factor which only slightly aggravates the penalty amount for Count One of the Complaint.

D. *Actual Employment of Unauthorized Aliens*

Senior Border Patrol Agent Munoz does not contend that any of the seventy-four employees are unauthorized aliens. However, he states that for the eleven employees alleged in Count One, the INS is unable to determine alienage. He further states that the alien numbers provided for nineteen of the sixty-three employees alleged in Count Two do not match the names and that another sixteen of the sixty-three alien numbers cannot be found in the INS' Central Index System.

Agent Munoz's statement with respect to the eleven employees in Count One has no bearing on whether those employees are actual unauthorized aliens. Therefore, it cannot aggravate the penalty as to Count One.

As to Count Two, there appears to exist some doubts regarding the authenticity of the alien numbers provided by twenty-five of the relevant employees. While this may tend to indicate that these individuals are unauthorized aliens, it is not conclusive. I therefore decline to employ this as an aggravating penalty factor with respect to Count Two of the Complaint.

E. *History of Previous Violations*

Complainant does not argue that Respondent possess a history of previous IRCA violations.

In light of the above statutory penalty factors, the civil money penalty assessed against the Respondent will be: One Hundred and Fifty Dollars for each violation contained in Count One of the Complaint (for a subtotal of $1,650.00); and One Hundred Dollars for the sixty-three violations contained in Count Two of the Complaint (for a subtotal of $6,300.00). The total civil money penalty for this case therefore amounts to Seven Thousand Nine Hundred and Fifty Dollars ($7,950.00).

Order

IT IS HEREBY ORDERED that Respondent Raul E. Valladares, Jr. pay a civil money penalty in the amount of Seven Thousand Nine Hundred and Fifty Dollars ($7,950.00) for seventy-four violations of the employment eligibility verification provisions contained at 8 U.S.C. §1324a(a)(1)(B).

IT IS FURTHER ORDERED that the hearing heretofore postponed indefinitely be, and hereby is, canceled.

WILLIAM L. SCHMIDT
Administrative Law Judge

Dated: April 15, 1991