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

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| UNITED STATES OF AMERICA, | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | 8 U.S.C. 1324a Proceeding |
| | ) | Case No. 90100201 |
| ALVAND, INC. d/b/a 410 Diner, | ) | |
| Respondent. | ) | |
| | ) | |

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

I. *Synopsis of Proceeding*

On June 22, 1990, a complaint was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter complainant) against Alvand, Inc. (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer, which served the complaint and a notice of hearing on the parties and assigned this matter to the Honorable Gordon J. Myatt, Administrative Law Judge (hereinafter ALJ).

The complaint alleged in five counts that the respondent violated the Immigration Reform and Control Act of 1986 (hereinafter IRCA) by failing to comply with the employment eligibility verification requirements (hereinafter paperwork requirements), appearing at 8 U.S.C. §§1324a(a) and 1324a(b). Specifically, the first count charged that respondent failed to prepare, and/or retain, and/or present for inspection Forms I-9 for the fifty-eight named individuals. The second count alleged that respondent failed to complete Forms I-9 for three employees within three business days of hiring. The third count charged that respondent failed to ensure that three employees completed section 1 of the Form I-9. The fourth count asserted that respondent failed to date section 2 of an employee's Form I-9. The fifth count charged that respondent failed to properly complete section 2 of the Form I-9 for two additional employees.

Respondent filed an answer on July 19, 1990, denying every allegation set forth in the complaint, and asserting three affirmative defenses. The first defense claimed that respondent had complied in good faith with the requirements of IRCA. The second defense asserted was essentially a claim of vindictive prosecution. The third defense did not contest liability, but rather asserted that the civil money penalty proposed by complainant was excessive. In later pleadings, the respondent also asserted that it failed to produce Forms I-9 because they were stolen, destroyed, or lost in a burglary that occurred at respondent's place of business.

The ALJ struck the first affirmative defense in an order dated December 3, 1990. In an order dated February 21, 1991, the ALJ rejected the second affirmative defense and disposed of the third, fourth, and fifth counts in favor of the complainant, thereby ruling against the respondent as to six of the allegations. The order of February 21 also granted complainant's motion for partial summary decision as to nine employees named in the first count of the complaint. The order denied summary decision with respect to the remaining 49 employees named in count one because the ALJ found that the defense of burglary raised a genuine issue of material fact. Complainant's motion for summary decision based on respondent's alleged failure to complete Forms I-9 for three employees within three business days of hiring was also denied by the ALJ.

A hearing was held on February 26 and 27, 1991, in San Antonio, Texas. Subsequently, the ALJ issued a decision and order, dated July 8, 1991, wherein the ALJ held that the respondent was not liable for the charges of paperwork violations regarding the 49 individuals. *ALJ's Decision and Order* at 9. The ALJ held the respondent liable for the second count, as the ALJ found that the respondent had not completed the Forms I-9 for three employees within the time limits prescribed by IRCA. Id. The ALJ imposed a civil money penalty in the amount of $4,500.00 for the eighteen paperwork violations. *Id*. at 13.

Pursuant to 28 C.F.R §68.51(a), the complainant timely filed with the Chief Administrative Hearing Officer (hereinafter CAHO), on July 19, 1991, a request for administrative review, together with a memorandum of supporting arguments.

## II. *The Administrative Law Judge's Decision and Order*

In the decision and order, the ALJ found the respondent was not liable for failing to complete, retain and produce Forms I-9 for forty-nine individuals. *Id*. at 9. However, as stated, the ALJ did rule

for the complainant regarding the three allegations set forth in count two.

Respecting the forty-nine individuals, the ALJ held that the respondent came forward with sufficient evidence to support its defense of burglary. *Id.* at 5. In reaching this conclusion, the ALJ pointed out that papers were scattered on the floor of the office where the burglary occurred and that there was damage to the office, including damage caused by the removal of a safe from its concrete setting. *Id.* at 4. The ALJ stated that this evidence created a strong inference that the Forms I-9 were lost or destroyed as a result of the burglary, thereby establishing a nexus between the burglary and the failure to present the forms. *Id.*

The ALJ also found that the complainant did not rebut respondent's affirmative defense by a preponderance of the evidence. *Id*. at 5. The ALJ stated that the absence of arson[1] and the fact that there were no papers strewn anywhere except inside the office itself did not adequately rebut the defense of burglary. *Id*. Additionally, the ALJ found the testimony of respondent's bookkeeper (that it was possible the Forms I-9 were never completed by the respondent) was "ambiguous and lacked specificity" and therefore the ALJ ruled that this evidence did not rebut respondent's affirmative defense by a preponderance of the evidence. *Id*. at 6

III. *Contentions of the Parties*

In its request for administrative review, the complainant asserts that the ALJ erred in holding that the respondent was not liable for the forty-nine paperwork violations. The complainant claims there are four issues for review. First, the complainant states that the ALJ erred by failing to find the respondent had a continuing obligation to complete Forms I-9 for employees for whom the original could not be found.

*Complainant's Request for Administrative Review by the Chief Administrative Hearing Officer and Memorandum of Supporting Arguments* (hereinafter *Complainant's Request for Review*) at 4, 5.

[1] As stated through the ALJ's order, the respondent apparently asserted initially that there was a fire during the burglary which could have destroyed the Forms I-9. *ALJ's Decision and Order* at 5. However, the investigating police detective testified that there was no evidence of a fire. *Hearing Transcript* at 34.

Second, the complainant asserts that the ALJ improperly shifted the burden of production of evidence back upon the complainant to prove the non-existence of Forms I-9 after the complainant had established that no Forms I-9 had been presented. The complainant furthermore claims that the ALJ's conclusion that the Forms I-9 existed and that they were lost, stolen, or destroyed as a result of the burglary was based upon "mere inference" drawn from evidence which does not support those inferences. *Id.* at 4, 9.

Next, the complainant contends that the ALJ failed to consider all the evidence presented and failed to give such evidence its proper weight in determining whether Forms I-9 had ever been prepared by the respondent. *Id.* at 4, 12.

Finally, the complainant states that the ALJ failed to consider all the evidence presented, and failed to give such evidence its proper weight in determining that the complainant failed to rebut respondent's affirmative defense of burglary. *Id.* at 4, 16.

Although not clearly asserted in the record, the respondent apparently contends that the I-9s were lost or stolen as a result of the burglary and therefore the respondent cannot be held liable for paperwork violations under IRCA. *ALJ's Decision and Order* at 2.

IV. *Review Authority of the Chief Administrative Hearing Officer*

Administrative review of an ALJ's decision and order is provided for at 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.51(a). Section 68.51(a) of 28 C.F.R. provides in pertinent part that:

> . . . [W]ithin thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.
>
> (1) The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General.

The scope of administrative review by the CAHO when reviewing ALJ decisions and orders is set forth in the Administrative Procedure Act. With regard to administrative appeals, the Administrative Procedure Act indicates that "the agency has all the powers which it would have in making the initial decision." 5 U.S.C. §557(b). In addition, the U.S. Court of Appeals for the Ninth Circuit, in *Mester Manufacturing Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989), held that the CAHO properly applied a de novo standard of review to the ALJ's decision. Equally important, the Ninth Circuit in *Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990) followed the reasoning in *Mester* by

affirming the CAHO's authority to apply the de novo standard of review.

The Ninth Circuit in *Maka* also affirmed the CAHO's authority to disagree with the credibility findings of the ALJ, if there is substantial evidence undercutting the reliability of the testimony and if the CAHO states the reasons for doing so. 904 F.2d at 1355.

V. *Discussion*

a. *The Burden of Proof*

The ALJ correctly analyzed the process of the shifting burden of proof in IRCA cases by noting that in IRCA proceedings, the complainant bears the ultimate burden of proving the allegations of the complaint by a preponderance of the evidence. *ALJ's Decision and Order* at 5. While this burden never varies, the ALJ explained, the burden of producing or going forward with evidence may shift between the parties. *Id.* The party which is in the best position to present evidence will bear the burden of evidence production. *Id.*

The respondent asserted, and the parties do not contest, that a burglary occurred on respondent's premises. *Joint Exhibit 1, Stipulation of Facts* at 3. In attempting to establish an affirmative defense of burglary, the respondent, as the party in the best position to present evidence, could only show that there were papers covering the floor of the office where the burglary occurred, that a safe was missing, and that there was damage to the office as a result of the safe being removed. *Hearing Transcript* at 148. This evidence, standing alone, is insufficient to establish a nexus between the burglary and the failure to present the Forms I-9 and to provide inferences which would establish the affirmative defense by a preponderance of the evidence, thereby shifting the burden of proof back to the complainant.

Although IRCA, its legislative history, and the applicable regulations provide little, if any, guidance as to the burden of proof necessary to establish an affirmative defense, some direction can be gleaned from federal case law. A standard used by some courts is the preponderance of the evidence standard. *Martin v. Weaver*, 666 F.2d 1013 (6th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982), affirmed the general proposition that the "burden of proving an affirmative defense by a preponderance of the credible evidence is on the party asserting the defense". 666 F.2d 1013, 1019, *citing Batesole v. Statford*, 505 F.2d 804, 810 (6th Cir. 1974) and *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928). This proposition also appeared in *U.S. v. Wiring*, 646 F.2d 1037, 1042-43 (5th Cir. Unit B, June 1981). *See also, Shaw v.*

*Grumman Aerospace Corporation*, 778 F.2d 736, 746 (11th Cir. 1985), cert. denied, 487 U.S. 1233 (1988). Accordingly, under this line of cases, not only must the complainant prove its prima facie case by a preponderance of the evidence, but the respondent who asserts an affirmative defense must also establish that defense by a preponderance. Adopting the standard in these cases, I conclude that once a complainant makes out a prima facie case of an employer sanctions violation under IRCA, a respondent attempting to establish an affirmative defense must do so by a preponderance of the evidence. Only then will the burden of proof properly shift back to the complainant.

In this proceeding, the respondent has apparently asserted an affirmative defense that a burglary occurred on the premises and that the burglary was the cause of the failure to present the Forms I-9. *ALJ's Decision and Order* at 2. In order to successfully establish that defense, the respondent must first provide some evidence that the Forms I-9 were actually completed. This evidence must outweigh complainant's evidence. Under this criteria the respondent's evidence was insufficient to maintain the asserted affirmative defense which would have shifted the burden back to the complainant. In fact, a preponderance of the evidence indicates that the Forms I-9 were never completed by the respondent for the forty-nine individuals in question.

b. *Rebuttal of the Affirmative Defense*

Assuming arguendo that the respondent met the preponderance of the evidence standard in establishing its affirmative defense, thereby shifting the burden of proof back to the complainant, I find that the complainant would still prevail because the complainant successfully rebutted the affirmative defense by a preponderance of the evidence. The respondent did not offer, either through its pleadings or at the hearing, any evidence that the Forms I-9 were ever completed for the forty-nine individuals. In fact, the record indicates, by a preponderance of the evidence, that the Forms I-9 were never completed by the respondent. For instance, the ALJ concluded from the record testimony, and I agree, that the respondent had backdated its Forms I-9 with respect to the three individuals named in count two. *ALJ's Decision and Order* at 9. Also, in his order of February 21, 1991, the ALJ ruled that the respondent was liable for paperwork violations for nine employees who were hired after the burglary, (*ALJ's Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision* at 3) even though respondent had asserted that the Forms I-9 for those nine individuals were among those allegedly lost or destroyed as a result of the burglary. *Respondent's Answer to Motion for Summary Judgment* at 5. This certainly is

indicative of the conclusion that respondent's business practices respecting the completion of Forms I-9 were inconsistent with the requirements of IRCA.

It is also relevant that the parties stipulated that respondent's bookkeeper was the person primarily responsible for completing Forms I-9 between 1986 and May of 1988. *Joint Exhibit l, Stipulation of Facts* at 2. However, the testimony of the bookkeeper indicates that the bookkeeper never discussed the requirements of the employment eligibility verification system with the respondent. *Hearing Transcript* at 137. Additionally, it is unclear whether respondent, purportedly responsible for completing the Forms I-9 after May of 1988, even knew of its duties under IRCA. The only evidence of respondent's knowledge of IRCA is introduced through the only representative of respondent who testified, namely, the bookkeeper.

However, the bookkeeper's testimony appears to show that she had little, if any, knowledge of the consequences of failing to comply with the paperwork requirements of IRCA:

> Q: Prior to the inspection and the notice of intent to fine that followed that was issued in this case, were you aware of the consequences of failing to prepare a Form I-9?
> A: No, only that they would not be illegal.
> Q: When you say only that they would not be illegal, what do you mean by that?
> A: Whoever we would hire.

*Id.* at 138.

> Q: Are you aware of any time period within which the I-9 is to be prepared?
> A: Three days after employment.
> Q: Were you aware of that time period in June of 1988?
> A: No.
> Q: Have you really only become aware of that time period after this suit was commenced?
> A: Yes.

*Id*. at 139.

The bookkeeper had even less knowledge regarding the missing Forms I-9 and the testimonial evidence indicates that she did not even know if there were any Forms I-9 scattered on the floor of respondent's office following the burglary:

Q: Let me ask you this: Did you see any Forms I-9 on the floor?
A: I don't know.

*Id*. at 150.

Certainly the conclusion can be drawn that if some Forms I-9 were stolen or destroyed, at least a few of the forms would have been found on the floor of the office (or immediately outside of the office), even if the forms were in tatters. However, the bookkeeper could not testify that a single Form I-9 was found on the floor of the office. Also, the police detective who investigated the burglary testified to the fact that no papers were found outside the confines of the office. *Id*. at 29-31.

In addition, the bookkeeper testified that she could not identify for the record a single Form I-9 that was lost or destroyed as a result of the burglary:

Q: Can you identify for me any I-9 that was destroyed in the burglary?
A: No.
Q: Can you identify for me any employee on that list whose I-9 was lost in he burglary?
A: No, not that I would know of.

*Id*. at 163.

This testimony does not support the conclusion reached by the ALJ, i.e., that Forms I-9 were lost, stolen, or destroyed as a result of the burglary. In fact, the bookkeeper's testimony as a whole did not introduce any probative evidence which would allow me to conclude, more probably than not, that the burglary caused the respondent's failure to present the Forms I-9 at issue.

Without any evidence presented in the record to the contrary, the testimony of the bookkeeper shows, more likely than not, that the burglary of respondent's business premises did not cause respondent's failure to prepare, retain, and/or present the Forms I-9 for the forty- nine named individuals. Also, the respondent never presented evidence that the Forms I-9 existed in the first place.

I believe that this evidence indicates that the complainant established that it was more likely than not that the burglary was not the cause of the respondent's failure to prepare, retain, and/or present the Forms I-9. All of the evidence produced at the hearing indicates that the respondent's business practices were at the very least irregular and inconsistent with an attempt to comply with the employment verification system of IRCA, and therefore, Forms I-9 were most likely

never completed by the respondent with respect to the forty-nine individuals.

The record does not allow me to make any other conclusion, since respondent did not present any evidence, testimonial or otherwise, to show that the Forms I-9 were ever completed. In fact, the record shows that it was probable that the Forms I-9 were never completed by the respondent. Therefore, even if the burden had shifted back to the complainant, the complainant rebutted the affirmative defense by a preponderance of the evidence.

c. *Respondent's Obligation to Replace Forms I-9*

The complainant asserts that the ALJ erred in failing to find that the respondent had a continuing obligation to reverify employment eligibility for those employees for whom the original Form I-9 could not be found. *Complainant's Request for Review* at 4, 5. However, because the respondent failed to establish the existence of the Forms I-9 in the first place or any nexus between the burglary and the failure to present the Forms I-9 for inspection, it is unnecessary to resolve the issue of whether respondent had a duty to reverify employment eligibility following the burglary.

## VI. *Conclusion*

The ALJ erred in holding that the respondent presented enough evidence in asserting its affirmative defense of burglary in order to shift the burden of proof back to the complainant. The burden should not have shifted back to the complainant because the respondent presented virtually no evidence to establish a nexus between the burglary and respondent's failure to present Forms I-9 for inspection. Additionally, in order to successfully establish an affirmative defense of burglary, the respondent must provide evidence which would indicate that the Forms I-9 were completed in the first instance. The respondent proffered no such evidence.

Moreover, even if respondent had established its defense by a preponderance of the evidence, the complainant would still have prevailed, as the complainant successfully rebutted the affirmative defense by a preponderance of the evidence. The respondent offers, and the record is replete with evidence that proves, by a preponderance of the evidence, that the employer did not complete the Forms I-9 for the forty-nine individuals.

Therefore, the ALJ's decision and order of July 8, 1991, is modified by finding for the complainant with respect to the forty-nine paperwork violations alleged in count one of the complaint.

VII. *Civil Money Penalties*

An employer found to have violated the IRCA paperwork requirements is subject to a civil penalty of between $100.00 and $1,000.00 for each violation. 8 U.S.C. §1324a(e)(5). In this proceeding, the ALJ, in the decision and order, ordered the respondent to pay a civil penalty of $4,500.00 for eighteen paperwork violations. *ALJ's Decision and Order* at 13. However, as stated, the ALJ dismissed the other forty-nine paperwork allegations. Having modified the ALJ's order by finding for the complainant with respect to these forty-nine violations, I must now turn my attention to the computation of the civil money penalty to be assessed against the respondent for these forty-nine violations.

Pursuant to 8 U.S.C. §1324a(e)(5), in determining the amount of the civil penalty, the following five factors must be given due consideration: (1) the size of the business, (2) the good faith of the employer, (3) the seriousness of the violation, (4) whether or not the individual was an unauthorized alien, and (5) the history of previous violations.

I have given each of these factors due consideration and therefore assess a civil penalty of $150.00 against the respondent for each of the forty-nine violations.

ACCORDINGLY,

I hereby MODIFY that portion of the ALJ's decision and order which finds that respondent did not violate 8 U.S.C. §1324a(a)(1)(B) by failing to present Forms I-9 for forty-nine individuals as alleged in count one of the complaint. Therefore, I find that the respondent failed to prepare or present Forms I-9 for these forty-nine individuals and thereby impose a civil money penalty in the amount of $11,850.00. This amount includes $7,350.00 for the forty-nine violations and leaves intact the $4,500.00 for the eighteen violations, as assessed by the ALJ in the decision and order of July 8, 1991.

Modified this 7th day of August, 1991.

JACK E. PERKINS
Chief Administrative Hearing Officer

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| UNITED STATES OF AMERICA, | ) | |
| Complainant, | ) | |
| v. | ) | 8 U.S.C. §1324a Proceeding |
| | ) | OCAHO CASE |
| ALVAND, INC. d/b/a 410 DINER, | ) | No. 90100201 |
| Respondent. | ) | |
| | ) | |

DECISION AND ORDER

Gordon J. Myatt, Administrative Law Judge

Appearances:

William G. Putnicki, Esq.
Claire W. Matecko, Esq.
(United States Department of Justice,
Immigration and Naturalization Service),
for the Complainant

Robert A. Shivers, Esq.
(Shivers & Shivers) of San Antonio,
Texas, for the Respondent.

STATEMENT OF THE CASE

A complaint regarding unlawful employment was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service ("Complainant") against Alvand, Inc., d/b/a 410 Diner ("Respondent") on June 22, 1990. The complaint alleged in five causes of action that Respondent violated the Immigration Reform and Control Act of 1986 ("the Act or IRCA"), codified at 8 U.S.C. §1324a(b), by failing to comply with the verification requirements ("paperwork requirements") of the Act.

The first cause of action alleged Respondent failed to complete, retain and produce Form I-9s for 58 of its current and former employees. The second cause of action alleged Respondent failed to complete Form I-9s for three employees within three business days after the date of their hire. The third cause of action alleged Respondent's non-compliance with the paperwork provisions of the Act by failing to ensure that three employees properly completed section 1 of their Form I-9s when employed. The fourth cause of action alleged Respondent failed to date section 2 of an employee's Form I-9. The fifth cause of action alleged Respondent's failure to properly complete section 2 of the Form I-9s for two additional employees.

Respondent timely filed an answer on July 19, 1990, in which it denied every allegation set forth in the complaint. Respondent's answer also advanced three affirmative defenses. The first defense alleged Respondent had complied in good faith with the requirements of IRCA. Respondent's second defense asserted a claim of "vindictive prosecution". Respondent's final "defense" did not contest liability. Rather, it asserted that the proposed civil money penalty in this case was excessive. In subsequent pleadings, Respondent interposed an additional defense in which it asserted a burglary excuse. Respondent claimed it failed to produce the 58 Form I-9s, which constitute the basis of the allegations in the first cause of action, because they were destroyed or lost during a burglary that occurred on its premises on July 16, 1989.

The first affirmative defense of Respondent was held to be insufficient as matter of law by an Order, issued on December 3, 1990, granting Complainant's motion to strike. Respondent's second affirmative defense was subsequently rejected by an Order, issued February 21, 1991, granting in part and denying in part Complainant's motion for summary decision. The February 21 Order also disposed of the third, fourth and fifth causes of actions in favor of the Complainant. In addition, the Order granted Complainant's motion for summary decision as to nine employees named in the first cause of action of the complaint.[1] The Order denied summary adjudication, however, with respect to the remaining 49 employees named in the first cause of action on the ground that the burglary defense raised a genuine issue of material fact as to those allegations. Further, due to

[1] The pre-trial discovery documentation in the record that the nine employees whose Form I-9s were in question had been hired by the Respondent after the occurrence of the burglary in July 1989.

the existence of conflicting evidence produced as a result of pre-trial discovery by the parties, the Order also denied Complainant's motion for a summary decision as to the Second cause of action.

A hearing in this matter was held at San Antonio, Texas on February 26, and February 27, 1991. Complainant filed proposed findings and a post-hearing brief on April 25, 1991. Respondent, in turn, filed a post-hearing brief on May 3, 1991.

## ISSUES TO BE DECIDED

1. Whether Respondent failed to complete, retain and/or produce Form I-9s for the remaining forty-nine employees as alleged by Complainant's first cause of action.

2. Whether Respondent failed to complete Form I-9s for three employees within three business days after the dates of their initial hire.

3. Whether the penalty assessed against the Respondent for the paperwork violations is excessive.

## FINDINGS OF FACTS

Respondent Alvand, Inc. is a corporation organized under Texas laws. Respondent is owned by Dean Badri and Rasol Osoli and conducts a restaurant business in San Antonio, Texas under the name of "410 Diner". The restaurant is located at 8315 Broadway, San Antonio, Texas, and Respondent employs approximately thirty-five employees at any given time.

During the early morning hours of July 16, 1989, a burglary occurred at the premises of 410 Diner. The premises were entered into by prying open a rear door. A small business office, situated at the back of the restaurant, was ransacked. At all times relevant to this case, Respondent kept its employees' I-9 forms in a file cabinet located in the business office. A safe was also removed from that office by prying it out of cement moorings in the floor.

As a result of the burglary, the business office was in a condition of total disarray and papers and other articles were strewn all about the floor of the office. In addition, a vending machine was broken into and

the front counter of the restaurant was ransacked. Except for the business office, no documents were observed to have been scattered about any other parts of the restaurant.

On November 20, 1989, the Immigration and Naturalization Service ("INS") received an anonymous tip that 410 Diner was employing a male alien whose employment eligibility was in doubt. Acting on this information, INS special agents Jose DeLeon, Jr. and Ronald Killebrew made an investigatory visit to the restaurant on November 21, 1989. The investigation, however, failed to reveal any unlawfully employed aliens.

On November 28, 1989, INS served an administrative subpoena on Respondent for the purpose of conducting a compliance inspection of its Form I-9s. On December 5, 1989, Badri and Renee Vickers, 410 Diner's bookkeeper, appeared at the INS District Office on behalf of the Respondent. At that time, Badri and Vickers submitted sixteen I-9 inspection worksheets and a group of I-9 forms in compliance with the subpoena. Based on its inspection of the subpoenaed material, INS issued a Notice of Intent to Fine, and subsequently, the Complaint in this matter.

## I. *First Case of Action*

Complainant's first cause of action alleged Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to prepare, retain and produce Form I-9s for fifty-eight of its current and former employees. As noted, nine of the alleged fifty-eight instances of violations of IRCA's paperwork requirements have already been found to exist by my Order of February 21, 1991. Thus, the present analysis is confined to the remaining forty-nine alleged violations.

The elements for a violation of the paperwork requirements are: (1) a person or an entity; (2) hires, recruits or refers for a fee;[2] (3) an individual for employment in the United States after November 6, 1986; (4) without complying with the verification provisions of 8 U.S.C. §1324a(b). See 8 U.S.C. §1324a. Failure to prepare, retain, and produce Form I-9s constitutes non-compliance with the IRCA verification provisions. See 8 C.F.R. §274a.2(b)(2)(1990).

[2] As a result of amendments made by §521 of the Immigration Act of 1990 [Pub. L. 101-649, 104 Stat. 5053 (1990)] "referral for a fee" is no longer governed by the paperwork provisions contained at 8 U.S.C. §1324a(b).

In the present case, there is no dispute between the parties regarding any of the aforementioned elements or what constitutes non-compli-ance. In its response to Complainant's request for admissions, Respondent admits that it failed to produce the 49 Form I-9s. The unrefuted evidence in the record clearly establishes that a burglary occurred at Respondent's premises. The parties disagree as to whether any of the relevant Form I-9s could have been lost of destroyed as a direct result of the burglary. Therefore, the fundamental issue here is whether there exists a sufficient connection between the burglary and Respondent's failure to produce the 49 Form I-9s so as to absolve Respondent from liability for non-compliance with the provisions of the Act.

During the hearing, Complainant relied on the testimony of Robert Anderson, a detective in the San Antonio Police Department, and Vickers to demonstrate that the Form I-9s could not have been lost or destroyed as a result of the burglary. Anderson was detailed to the 410 Diner soon after the discovery of the burglary.

Anderson testified that the business office located at the rear of 410 Diner was in disarray and papers were strewn across the floor following the burglary. He also indicated there was damage to the office since the burglars employed great efforts in prying out a safe which had been set in concrete. Anderson further testified to the following: that he did not observe any papers outside of the immediate confines of the business office; that the police department did not retain any papers from the scene of the burglary; and that there was no evidence of a fire on the premises.

Vickers had been employed as the bookkeeper for 410 Diner since March, 1986. She was primarily responsible for filling out the Form I-9s for the Respondent until May or June of 1988, at which time her office was relocated across the street from the main premises of the restaurant. According to Vickers' testimony, all Form I-9s in Respondent's possession were kept in a file cabinet situated in the burglarized office. Vickers confirmed Anderson's testimony that the business office was a "mess" immediately following the burglary and that a large quantity of paper was scattered about the floor of the office. She does not recall, however, what types of paper were on the floor. In response to Complain-ant's questioning, Vickers stated that she did not believe any of the Form I-9s were kept in the stolen safe. Vickers also acknowledged there was a possibility that some of the missing Form I-9s were never completed by the Respondent. She testified that the

documents in question were either destroyed during the burglary or never completed by the Respondent.

Photographs of the crime scene were introduced into evidence as Complainant's exhibits C-1a through C-1h. Based on the testimony and the exhibits, Complainant contends the 49 Form I-9s could not have been lost or destroyed during the burglary. Complainant's reasoning appears to be based on the fact that there was no evidence of a fire and no papers were observed outside of the office itself. Hence, according to the Complainant, if the I-9s had been completed by the Respondent, they would have remained in the file cabinet after the burglary, or they would have been scattered on the floor of the office and subsequently retrieved by Respondent.

In IRCA proceedings, the Complainant bears the ultimate burden of proving the allegations of the complaint by a preponderance of the persuasive evidence. See 28 C.F.R. §68.50(b); Cf. Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 551 F.Supp. 1239 (D.C. Pa. 1982). While this ultimate burden never varies, the burden of producing or going forward with the evidence may shift between the parties in accordance with certain well defined rules. Cf. United States v. Marcel Watch Corp., OCAHO Case No. 89200085, March 22, 1990, slip op. 17 (burden of proof in IRCA discrimination proceedings). In IRCA sanction cases, just as in other types of civil proceedings, the party with the best knowledge, or which is in the best position to present the requisite evidence, normally bears the burden of evidence production. See U.S. v. Continental Ins. Co., 776 F.2d 962 (11th Cir. 1985); see also Lindahl v. Office of Personnel Management, 776 F.2d 276 (D.C. Cir. 1985). In addition, the party asserting the affirmative of a proposition normally bears the burden of evidence production as to that proposition. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1979), cert. denied 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 and Town of Mashpee v. Mashpee Tribe 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90, cert. denied 104 S. Ct. 205.

Applying these principles to the instant case, I find that while the Complainant has clearly established that Respondent failed to produce the Form I-9s in question, the record demonstrated Respondent has come forward with sufficient evidence to support its affirmative defense to the first cause of action in the complaint. I also find that the Complainant has not persuasively rebutted Respondent's evidence in this regard and has failed therefore to establish the allegations of this portion of the complaint by a preponderance of the evidence.

It is clear the Respondent has demonstrated that a burglary occurred at its business establishment on July 16, 1989. Equally important, the evidence creates a strong inference that documents were lost or destroyed as a result of the burglary; thereby establishing a nexus between the burglary and Respondent's non-production of the 49 I-9 forms. Indeed, this inference is supported by the unrefuted testimony regarding the condition of the office after the burglary and regarding the extensive efforts employed by the perpetrators to remove contents from the office.

The evidence relating to the condition of areas outside the business office does not refute Respondent's assertion that papers and records, including the Form I-9s, were lost or destroyed during the burglary. Nor does the absence of arson, without more, overcome the defense that the burglary resulted in the loss or destruction of the records.

While it is true that Vickers admitted there was a possibility that Form I-9s were never filled out for some employees, her testimony regarding this was ambiguous and lacked specificity. She could not recall specific instances or whether the failure to do so occurred before or after the burglary. Thus, her admission could relate equally to the nine Form I-9s already determined by my Order of February 21 to be violations of IRCA as well as to the 49 Form I-9s at issue here. Therefore, Vickers' admission, even when considered in conjunction with the other evidence adduced by Complainant, is insufficient to rebut Respondent's evidence in support of its affirmative defense.

Complainant also adduced testimony at the hearing in an effort to establish that Respondent may have staged the burglary of its premises. This testimony indicated the alarm at 410 Diner was deactivated by a special code after it had recorded an entry during the morning of July 16, 1989. While this testimony clearly raises the suspicion that someone with knowledge of the alarm code entered the premises, this suspicion was fully dispelled by the unrefuted testimony of Vickers. By her statement, which I fully credit, Vickers established that the alarm company acknowledged there was a malfunction in the alarm system on that date. As a result of this malfunction, the alarm company reimbursed Respondent a year's monthly payments as compensation for the failure of the system to operate properly on the date of the burglary.

In its post-hearing arguments, Complainant also contends Respondent nevertheless violated the provisions of IRCA because it failed to present any evidence which would demonstrate it had in fact com-

pleted the relevant Form I-9s; Complainant also asserts, as an indication of liability, Respondent's failure to present any evidence of its efforts to reassemble the presumable scattered I-9s after the burglary.

The arguments are totally unpersuasive and misconstrue the placement of the burden of proof required in an adjudicatory proceeding. Respondent here does not bear the burden of demonstrating that it did in fact complete the Form I-9s for the 49 employees. Rather, Respondent is only required to present evidence which establishes the occurrence of the burglary and a direct causal connection between that burglary and Respondent's failure to produce the Form I-9s. The record here demonstrates that Respondent has fulfilled this obligation. In these circumstances, the burden is placed fully on the Complainant to establish that Respondent failed to prepare the Form I-9s in the first instance.

In sum, I find that the Complainant has failed to establish by a preponderance of the evidence that the Respondent has violated the paperwork provisions of IRCA by its failure to produce Form I-9s for the 49 employees in question here. Accordingly, the allegations relating to these violations in the first cause of action in the complaint are hereby dismissed.[3]

Consistent with the Order of February 21, I find the record fully demonstrates that Respondent failed to complete, produce and retain Form I-9s for the nine employees, cited in the first cause of action, who were hired after the burglary in July 1989. I find, therefore, that with regard to these employees, Respondent has violated the paperwork requirements of IRCA.

## II. *Second Cause of Action*

The Complaint's second cause of action alleged Respondent failed to complete Form I-9s for three employees within three days from the date of their hire. The three employees to whom these allegations related were Cesar Francisco Rivera-Duarte, Guadalupe Sanchez-Ceja, and Ramiro Guiterrez.

[3] In its post-hearing brief, Complainant contends that Respondent's failure to produce the requisite Form I-9s for the 49 employees is direct evidence of Respondent's violation of the provisions of IRCA. In view of my findings that Respondent has established that the I-9s in question were lost or destroyed as a result of the burglary, this contention is totally without merit and is rejected.

Complainant introduced into evidence photocopies of the Form I-9s for the three employees. Each document, on its face, indicated that Respondent had timely completed it in accordance with the requirements of IRCA. Complainant argues, however, that Respondent did not complete the Form I-9s for these employees until more that three business days after their employment began at 410 Diner. Complainant contends that Respondent backdated the three forms to reflect the employees' original hire dates in order to escape IRCA liability. In support of its contention, Complainant adduced testimony from Rivera-Duarte and Sanchez-Ceja at the hearing.

Rivera-Duarte testified he was hired by 410 Diner during April of 1989. He further testified that he never saw an I-9 form until after the INS inspection visit to the restaurant in November, 1989. Under Complainant's questioning, Rivera-Duarte stated he did not fill out a Form I-9 until November or December of 1989, when Respondent requested he do so. At that time, according to Rivera-Duarte, he also assisted two other 410 Diner employees (Sanchez-Ceja and Ramiro Guiterrez) in the completion of their respective I-9s.

Upon examining his Form I-9 while testifying, Rivera-Duarte stated he did not enter the date "April 21, 1989" in section 1 of that form. Rivera-Duarte's Form I-9 indicated, in section 1, that the employee's address was 10362 Sahara Dr. #4804, San Antonio, TX. 78216. Rivera-Duarte testified, however, that he did not reside at that address on April 21, 1989. Nor did he anticipate, at that time, that he would reside at that particular address. It is undisputed that Rivera-Duarte did not move to 10362 Sahara Drive until October 1989.

On cross-examination, Rivera-Duarte acknowledged he had incorrectly indicated in his sworn statement to INS that he was hired by 410 Diner on May 20, 1988 rather than April 21, 1989. Respondent also established on c ross-examination that Rivera-Duarte told the INS agents, during their inspection visit in November, that he had completed a Form I-9. Rivera-Duarte subsequently informed the INS agents that he had not filled out the I-9 form. He explained this by stating that he was afraid to say anything to the agents because he feared he would lose his job. Nonetheless, he steadfastly maintained that he never signed any I-9 forms when he was first hired by the Respondent.

The testimony of Sanchez-Ceja corroborated that of Rivera-Duarte in all material respects. Sanchez-Ceja began work at 410 Diner during December 1988 and was employed there until December 1989.

He testified that the only form he completed at the time of hire was an employment application which contained questions in both english and spanish. Sanchez-Ceja further testified that he did not complete a Form I-9 until two or three days after the investigatory visit by the INS agents in November. According to Sanchez-Ceja, Dean Badri asked him to complete the form at that time. Because of his inability to understand english, Sanchez-Ceja stated that "Chinito" (Rivera- Duarte) assisted him in filling out the form. It is evident from the record that the only entry made by Sanchez-Ceja on the entire I-9 form was that of his signature.

During cross-examination, Sanchez-Ceja was unable to recall the exact date that he started work at 410 Diner. Nor could he recall the date of the INS inspection to the restaurant. In addition, Sanchez-Ceja stated he did not fill out an employment application until four days after the date he was hired, and was unable to recall filling out the W-4 form for income tax purposes.[4] In addition, Respondent sought to further demonstrate the unreliability of Sanchez-Ceja's testimony by introducing into evidence his time card for the week the INS inspection occurred at the restaurant. (See Exhibit R-1). The time card, as explained by Vickers, indicated that Sanchez-Ceja worked two hours on November 21 (the day of the INS visit) and did not return to work until after November 26.[5]

Vickers denied that she had ever backdated Form I-9s for any of the employees. She also denied that she was instructed by Badri or Osoli to fill out I-9 forms for employees who had not previously completed them. Contrary to her pre-trial deposition, Vickers stated at the hearing that she had contacted employees for the purpose of getting them to fill out Form I-9s, if they had not previously done so. When asked to reconcile her testimony with her statements in her deposition, Vickers explained that she would complete an Form I-9 for an employee, who had not previously filled one out, only if that worker was a current employee. She denied ever contacting former employees in order to get them to fill out Form I-9s.

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[4] The record indicates that Sanchez-Ceja received an earnings and withholding statement from Respondent based on the information the employee provided on his W-4 form.

[5] The record shows that Sanchez-Ceja's employment with Respondent ended sometime in December 1989.

Upon observing the witness and considering the record evidence, I credit the testimony of Rivera-Duarte and Sanchez-Ceja. The testimony of each of these individuals was candid and forthright. Although each was mistaken as to precise dates and whether certain events occurred, I find these discrepancies were caused by lapses of memory due to the passage of time rather than an intent to deceive or mislead. In addition, it is apparent from the testimony of Vickers that Respondent had employees fill out Form I-9s when they had not been timely completed in accordance with the requirements of IRCA.

In light of the above, I find that the Complainant has established, by a preponderance of credible evidence, that the Form I-9s of Cesar Francisco Rivera-Duarte, Guadalupe Sanchez-Ceja and Ramiro Guiterrez were not completed by the Respondent within the time limitations prescribed by IRCA. Accordingly, Respondent has violated the paperwork requirements of IRCA regarding these three employees.

III. *Third, Fourth and Fifth Causes of Action*

By my Decision and Order of February 21, 1991, granting in part and denying in part Complainant's motion for partial summary decision, the third, fourth and fifth causes of action were all summarily disposed of in the Complainant's favor. Consequently, there are no other liability issues remaining to be resolved here. I find, therefore, that the record establishes that Respondent has committed six additional instances of IRCA paperwork violations as alleged in the third, fourth and fifth causes of action of the complaint.

## CONCLUSIONS OF LAW

1. Respondent has not violated 8 U.S.C. §1324a(a)(1)(B) by failing to produce employment eligibility verifications forms for 49 of the employees alleged in the first cause of action of the complaint.

2. Respondent has violated 8 U.S.C. §1324a(a)(1)(B) by failing to prepare, retain and produce employment eligibility verification forms for nine employees alleged in the first cause of action of the complaint. The nine employees are:

Brenda Barrows
April Coventry
Clare Crespo
Jennifer Henry

Ba Minh
James Putenes
Veronica Rendon
Marjorie Serrano
William Steen, Jr.

3. Respondent has violated 8 U.S.C. §1324a(a)(1)(B) by failing to timely complete employment eligibility verification forms for the following three employees alleged in the second cause of action of the complaint:

Cesar Francisco Rivera-Duarte
Guadalupe Sanchez-Ceja
Ramiro Guiterrez

4. Respondent has violated 8 U.S.C. §1324a(a)(1)(B) by failing to properly complete employment eligibility verification forms for the following six employees alleged in the third, fourth and fifth causes of action of the complaint:

Ali Shamsi
Rodney Surber
Homero Arroyo
Julie McCormick
Rene Martinez
Carole McLaughlin

## THE PENALTY DETERMINATION

IRCA mandates that civil money penalties be imposed upon employers who have violated its paperwork requirements. Such penalties range from a minimum of $100.00 to a maximum of $1,000.00 for each instance of a violation. 8 U.S.C. §1324a(e)(5). The amount of the penalty imposed in a given case is determined by full consideration of five statutorily enumerated factors. These factors are: (1) the size of employer's business; (2) the employer's good faith; (3) the 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.

Complainant here seeks a civil money penalty in the amount of $400.00 for each of the violations found to have occurred in the first cause of action, $500.00 for each of the violations found in the second

cause of action, and $250.00 for each violation found in the third, fourth and fifth causes of action. Thus, on the basis of the findings therein, Complainant would be entitled to a civil money penalty in the amount of $6600.00.

Thomas Scott Robertson, INS supervisory special agent assigned to the San Antonio District, determined the proposed penalty assessment sought by the Complainant in the instant case. Robertson testified that he developed a "worksheet" which, in his opinion, imparted uniformity into the process of fine assessment for IRCA employer sanction cases. This worksheet is only utilized by the INS office in the San Antonio District.

A. *Respondent's Size*

Robertson testified that his worksheet assigns a "raw score" between one and ten in accordance with the employer's size.[6] Under Robertson's method, the employing enterprise is classified into three categories; small, medium, and large. The category into which an employer is placed is determined by the number of employees hired during the year. According to Robertson, a business which hires more that fifty employees in a year is considered to be a "large" business, and merits a raw score between eight and ten. He stated the Respondent in the instant case hired slightly more than fifty employees during the year preceding the 1989 INS inspection. Therefore, Complainant assigned a raw score of eight to Respondent with respect to the size factor.

I find this method for determining an employer's size to be extremely limited and unrealistic. First, its reliance solely on the number employees hired over a period of time is not an accurate indicator of Respondent's size. This measurement fails to take into account employee turnover during the period being considered. Furthermore, by no stretch of the imagination can a business enterprise that has hired fifty employees in the course of a year be deemed a large business entity.[7]

[6] A raw score of one equals $100.00 while a raw score of ten equals $1,000.00. Robertson subsequently adds the raw scores of all the relevant penalty factors and then divides that figure by what he determines to be an appropriate number to arrive at the actual penalty amount.

[7] I note at this point that Vickers testified Respondent's average level of employment was 35 employees at any given time.

Next, it does not take into account the revenue production of profitability of Respondent's business. The congressionally stated purpose for considering "employer size" as a penalty determination factor is to secure compliance with IRCA without driving employers out of business. Thus, an employer's financial condition must first be factored into any evidence relating to Respondent's revenue or profits. Although Vickers testified that Respondent suffered a net loss of about $15,000.00 during 1990, she was unable to recall the profit or loss figure for 1989.

In view of the above, I decline to follow the method of computation relied upon by the Complainant to determine the amount of the penalty assessed against the Respondent for its violations of IRCA. In addition, I find Respondent's size is a factor which mitigates the amount of the penalty to be imposed.

B. *Respondent's Good Faith*

Among the factors which Complainant considered under the rubric of "good faith" are: the degree to which Respondent was aware of the IRCA requirements, the degree of Respondent's cooperation during the INS inspection, the degree to which Respondent expressed an intent to comply with IRCA in the future, and the degree of actual IRCA compliance as determined by an inspection of Respondent's records.

Robertson's testimony indicated that he gave double-weight to the good-faith factor in relation to the other statutory penalty factors. According to Robertson, each of the aforementioned good-faith considerations give rise to a raw score, but he did not identify how the raw scores were arrived at in the present case.

While the evidence does not indicate Respondent was uncooperative with the INS investigation or that it was unaware of the IRCA requirements, it is evident the Respondent failed to complete Form I-9s for a number of its employees. It is equally evident that Respondent sought to give the appearance of compliance with the Act by having three employees complete their Form I-9s well after the time requirement set by IRCA. I consider this to be evidence of culpable behavior which aggravates the amount of the penalty to be imposed.

C. *The Seriousness of The Violations*

Complainant classified the instant violations into three types. The non-production of the Form I-9s alleged in the first cause of action was

classified as "most serious" and a raw score of ten was given for each violation. A raw score of seven was assigned to the violations alleged in the second cause of action since, in light of possible backdating, they were considered to be "very major" violations. As to the remaining six violations, Robertson assigned them a raw score of five because he considered the improper completion of those I-9s to be "major" violations.

There is no question that Respondent's non-production and backdating of Form I-9s constitute serious IRCA violations. An employer's failure either to prepare or to timely complete Form I-9s makes it more likely that unauthorized aliens will be employed in the United States in contravention of congressional intent. I find, therefore, that this fact serves to aggravate the civil penalty to be imposed on the Respondent.

However, the six violations alleged by the third, fourth and fifth causes of action contain only minor discrepancies. Although facially defective, the Form I-9s involved contain sufficient information to ensure that the Respondent did not knowingly hire any authorized aliens. While improper completion of the forms in this regard might hinder potential prosecution for false attestation, there is no evidence of such practice in this case. Consequently, I find the nature of these particular violations to such that it mitigates the penalty to be imposed on the Respondent.

D. *Actual Employment of Unauthorized Aliens*

The evidence does not indicate Respondent has employed any authorized aliens. Therefore, this factor serves to mitigate the penalty determination here.

E. *History of Previous Violations*

The record does not disclose any evidence that Respondent has a history of previous IRCA violations. Therefore, this factor serves to mitigate the penalty to be imposed on the Respondent.

After full consideration of the penalty factors, as noted above, I find the record warrants the following penalties be imposed upon the Respondent for its violations of IRCA:

1. For the nine violations of the failure to produce Form I-9s for employees, found under the first cause of action, Respondent is required to pay a penalty in the amount of $300.00 for each violation.

2. For the three violations of failing to timely complete Form I-9s for employees, found under the second cause of action, Respondent is required to pay a penalty in the amount of $400.00 for each violation.

3. For the six violations of failing to properly complete Form I-9s for employees, found under the third, fourth and fifth causes of action, Respondent is required to pay a penalty in the amount of $ 100.00 for each violation.

The total amount of the civil money penalty imposed on Respondent for the above violations is Four Thousand and Five Hundred Dollars ($4,500.00).

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, I hereby issue the following:

## ORDER

**IT IS HEREBY ORDERED** that Respondent Alvand, Inc. d/b/a 410 Diner pay a civil money penalty in the amount of Four Thousand and Five Hundred Dollars ($4,500.00) for eighteen violations of the employment eligibility verification provisions contained at 8 U.S.C. §1324a(a)(1)(B).

**IT IS FURTHER ORDERED** that, pursuant to 8 U.S.C §1324a(e)(7), and as provided in 28 C.F.R. §68.51, this Decision and Order shall become the final decision and order of the Attorney General, unless, within five (5) days from the date of this decision, any party files a written request for review of this decision with the Chief Administrative Hearing Officer. Any such review requests should be accompanied by the party's supporting arguments.

GORDON J. MYATT
Administrative Law Judge
Dated: July 8, 1991