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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding CASE NO. 90100297
CHRISTIE AUTOMOTIVE PRODUCTS, Respondent.	)	

FINAL DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances: Gilbert T. Gembacz, Esquire for Complainant Immigration and Naturalization Service Carlos R. Williams, Pro se Respondent.

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I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress provided for civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

Title 8 U.S.C. § 1324a(b)(1)(A) provides that an employer is liable for failure to attest "on a form designated or established by regulation of the Attorney General that it has verified that the individual is not an unauthorized alien ...." The form used for verification is the Employment Eligibility Verification Form, commonly known as the I-9. The regulations provide that the employee will also attest, under penalty of perjury, as to his or her identity and employment authorization.

Title 8 U.S.C. § 1324a(b)(3) dictates the retention requirements of Forms I-9 by employers, and the inspection procedures to be utilized in the enforcement of this program. Agents of the Immigration and Naturalization Service (INS) are authorized to conduct inspections of employers' I-9 files to ascertain the employers' compliance with IRCA. If violations are found during these inspections, penalties may be assessed in accordance with 8 U.S.C. § 1324a(e). The employer, upon the receipt of an assessment notification, may opt to comply with the assessment, or may elect a hearing before an Administrative Law Judge, thus abating the penalty during the hearing procedure.

II. *Procedural History*

On August 29, 1990, the United States of America, Immigration and Naturalization Service (INS), served a Notice of Intent to Fine (NIF) on Christie Automotive Products, Respondent. The NIF, in Counts numbered I - III, alleged violations of Sections 274A(a)(2) and 274A(a)(1)(B) of the Immigration and Nationality Act (the Act). In a letter dated September 11, 1990, Respondent, through its President, Carlos R. Williams, requested a hearing before an Administrative Law Judge.

The United States of America, through its Attorney Gilbert T. Gembacz, filed a Complaint incorporating the allegations in the NIF against Respondent on September 28, 1990. On October 1, 1990,

the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the Administrative Law Judge in this case and setting the hearing place at or around Los Angeles, California, on a date to be scheduled.

Respondent answered the Complaint on October 26, 1990, in letter format, denying that it had violated the provisions of the Act as cited in the Complaint and requesting that I dismiss the counts based upon a misunderstanding with the INS. I conducted a pre-hearing telephonic conference with the parties on November 21, 1991 in which we discussed the form of Respondent's Answer. Complainant indicated that it had mailed a Motion to Strike the Answer, but I had not received the Motion as of the date of the telephonic conference. On December 3, 1990, I received Complainant's Motion to Strike Answer by Respondent because it did not meet the pleading requirements set forth in 28 C.F.R. Parts 68.5, 68.6, and 68.8. On December 4, 1990 I granted Complainant's motion and ordered Respondent's Answer stricken. I granted Respondent until December 24, 1990 in which to submit an amended answer.

Respondent filed an Amended Answer to Complaint on December 10, 1990, denying the substantive allegations and requesting dismissal of all counts. On December 13, 1990, I issued an Order Directing Procedures for Pre-hearing. On January 24, 1991, I issued an Order confirming the pre-hearing telephonic conference held on January 23, 1991, in which the hearing date of March 26, 1991, was assigned.

On January 24, 1991, Respondent filed a Motion For Summary Decision, stating that no genuine issues of material fact existed. On February 6, 1991 Complainant moved for additional time in which to respond to the Motion for Summary Decision because it had not yet received responses to its discovery requests. Respondent objected to this Motion on February 8, 1991, arguing that Complainant had not timely filed its motion for an extension of time. On February 12, 1991, I granted Complainant's Motion to Extend Time for good cause shown, finding that it had been timely filed with my office. I permitted Complainant to respond to the Motion for Summary Decision within 10 days after receipt of responses to its discovery requests.

On February 22, 1991 Complainant counter-moved for partial summary decision with respect to the allegations in Counts I and II in their entirety and part of Count III. Complainant stated that no genuine issues of material fact existed and that it was entitled to

summary decision as a matter of law. Complainant's accompanying memorandum and attachments set forth its arguments in support of summary decision. Respondent responded on February 25, 1991, objecting to the summary decision. Respondent asserted that material facts were in dispute as a result of new information presented in Complainant's counter-motion for summary decision, and that summary decision was not appropriate.

I conducted a pre-hearing telephonic conference on February 28, 1991 in which the details for the March 26, 1991 hearing were discussed. Respondent stated its intention of calling counsel for Complainant as a witness at the proceeding. Complainant objected to this procedure. On March 1, 1991, I issued an Order denying both motions for summary decision. I believed that certain material facts were in dispute and that neither party was entitled to summary decision at that time.

I received Respondent's Hearing Exhibits and Prehearing Statement on March 12, 1991. On March 18, 1991, I received Complainant's Exhibits and P re-Hearing Statement. The hearing on the merits was conducted in Santa Ana, California on March 26, 1991. I heard testimony from three witnesses and received 19 Complainant's exhibits and six Respondent's exhibits into evidence. A hearing record of 121 pages was compiled.

I failed to state on the record the results of a pre-hearing conference conducted immediately prior to the hearing. During this meeting the parties discussed the question of Attorney Gembacz' ability to testify since he was the attorney of record. I denied Respondent's request to call Attorney Gembacz, as it appeared that the testimony sought by Respondent dealt with conversations relating to settlement discussions. I did not deem this testimony to be relevant to the hearing on the merits.

I also failed to reflect in the record my ruling regarding Respondent's request to admit Exhibit R-3, a copy of a letter from Mr. Williams to me which was dated October 3, 1990 and included in my case file at that time. I did not admit this exhibit, nor consider it in my decision. This letter was Respondent's original Answer which was stricken by my Order of December 4, 1990. For that reason, I did not believe it to be an appropriate exhibit for consideration on the merits of the case.

During the hearing Respondent raised as a defense to one of the allegations in Count III that the employee was a "grandfathered"

employee and exempt from the provisions of 8 U.S.C. § 1324a. I held the hearing record open for 30 days following the hearing to permit both parties to provide support for this defense or to refute its applicability. On April 5, 1991, Respondent submitted a copy of a payroll check for the employee in question which predated IRCA. Complainant provided a report on April 23, 1991, which indicated that the employee had been hired or re-hired on December 9, 1987. Complainant argued that the subject employee had originally been hired prior to IRCA's passage, but that she had left Respondent's employ and was re-hired during the applicable period, thus causing her to be subject to the employment verification requirements. On May 1, 1991, I ordered that the post-hearing briefs would be due in my office no later than June 12, 1991. On June 10, 1991, I received Respondent's post-hearing brief, and on June 13, 1991, I received Complainant's.

III. *Findings of Fact*

After reviewing the pleadings, briefs, hearing record, and evidence submitted for my consideration, I make the following relevant findings of fact:

Christie Automotive Products is a corporation that is incorporated in the State of California and a legal entity within the definition of 8 C.F.R. Part 274a.1(b). Respondent employs between 12 and 15 employees and its yearly gross sales average between $1,200,000 and $1,500,000. Carlos R. Williams is the owner of Christie Automotive Products and has acted as its representative during this proceeding on a pro se basis.

Respondent was originally educated as to its obligations with respect to IRCA when it received a visit by Agent Bobby Coleman on September 5, 1989. Agent Coleman briefly explained the requirements placed upon employers by the Act and provided Respondent with a copy of the Handbook for Employers (M-274) and Forms I-9. On May 1, 1990, Agent Coleman served a Notice of Inspection upon Respondent, informing it of the planned inspection of its Forms I-9, to be held on May 16, 1990. Agent Coleman participated in the scheduled inspection and reviewed Respondent's Forms I-9 in conjunction with Respondent's payroll records and associated documents.

Upon completion of his inspection and review, Agent Coleman prepared a Notice of Inspection Results which was dated May 29, 1990, and personally served upon Respondent on or about June 8, 1990. The

Notice indicated that four individuals in Respondent's employ, who had prepared Forms I-9, did not have Alien Registration Numbers which matched numbers in the INS files. Additionally, a fifth person was found who did not have a Social Security number which matched a number at the Social Security Administration.

The Notice of Inspection Results also informed Respondent that it would be given three days in which to determine whether these individuals were authorized to work in the United States. It also stated that if the employees were unable to provide acceptable documentation, they were to be considered unauthorized for further employment in the United States, and if their employment continued, the employer could be subject to fines. This Notice was signed by John Brechtel, Assistant District Director, Investigations, Los Angeles, California.

Mr. Williams spoke with Agent Coleman at the time he received this Notice, asking him what could be done to extend the employment of these individuals or how he could assist in obtaining work authorization for them. Agent Coleman indicated that he did not have authority to grant permission to Mr. Williams to continue the employment of these employees. Agent Coleman suggested that Mr. Williams submit an appeal of this Notice to John Brechtel.

Mr. Williams prepared a written response to the Notice and provided a facsimile copy to Agent Coleman prior to June 12, 1990. The original response was mailed to John Brechtel on June 12, 1990, and an additional copy was provided to Agent Coleman. Agent Coleman provided a copy of this response to his supervisor.

Mr. Williams' letter indicated that he had verified the employment authorization of three of the five individuals identified in the Notice of Inspection Results. He informed Mr. Brechtel that Leoncio Mendoza obtained work authorization on February 7, 1990, that Bernardo Cervantes had been hired through the Employment Development Department which had certified that his documents had been examined, and that Cindy Rowley had transposed two numerals from her Social Security card on the Form I-9. No information was presented as to Antonio or Mario Gallardo.

This response requested that the INS delay any further action until mid-July, due to business exigencies within Respondent's company. The response also requested assistance from Mr. Brechtel's office in obtaining work authorization for these individuals.

Mr. Williams received no written or oral response from Mr. Brechtel, or any other INS representatives, regarding this request. On June 21, 1990, Agent Coleman submitted a request to John Brechtel to take a survey of Respondent's employees. Agent Coleman received permission to do so on or about July 11, 1990. On July 12, 1990, a representative from the INS telephoned Mr. Williams and indicated that they would come to his business premises on the following day. The agents arrived at Respondent's place of business on July 13, 1990, and arrested Antonio and Mario Gallardo, who could not provide work authorization. Both individuals indicated visa petitions had been filed in their behalf by their father. The agents also sought Bernardo Cervantes, however, he was at the INS office working on his employment authorization documents.

Respondent originally hired Antonio Cardenas Gallardo on May 10, 1989, and Mario Cardenas Gallardo on March 26, 1990. Respondent continuously employed these two individuals until their arrest on July 13, 1990. On or about June 8, 1990, Respondent became aware that these two individuals were not authorized for employment in the United States.

Respondent presented Forms I-9 for employees George Cutting and Megan Williams at the May 16, 1990 inspection. (Ex. C-16, C-18). Respondent did not entirely complete Section 2 on either of these forms.

On August 29, 1990, the INS served a Notice of Intent to Fine upon Respondent. The allegations contained therein form the basis of this contested Complaint.

IV. *Legal Analysis and Conclusions of Law*

Counts I and II:

The ultimate issue in these counts focuses on whether Respondent knew that Antonio and Mario Gallardo were unauthorized aliens and continued to employ them despite this knowledge. Although the statutes and regulations applicable to this proceeding do not specifically define "knowledge", several cases previously decided in this forum have interpreted the knowledge element.

In the case of United States v. Mester Manufacturing Co., OCAHO Case No. 87100001, (June 17, 1988), aff'd, Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir. 1989), the ALJ stated that "[k]nowledge

or notice of an employee's unauthorized status which provides the scienter necessary to find a violation of 8 U.S.C. 1324a(a)(2) in knowingly continuing to employ an unauthorized alien can come to the employer from any source. The law is indifferent as to how that knowledge is acquired." Mester at 20. The ALJ pointed out that the burden falls on the employer to "make timely and specific inquiry" as to the eligibility of the employee for work in the United States. Mester at 23. The employer is liable not only for failing to "know" the status of the employee, but also for failing to take steps necessary to learn the status of the employee. Thus, what the employer "should know" can be construed as knowledge sufficient for a violation of IRCA.

In the case of United States v. New El Rey Sausage Co., OCAHO Case No. 88100080, (July 7, 1989), the ALJ explained that the employer had reason to know that its employees were unauthorized aliens after receiving communications from INS representatives to that effect. The ALJ pointed out what steps the employer should have taken in light of that information. The ALJ explained that the employer should have suspended its employees until it received confirmation that the employees were authorized to work in the United States. By permitting the employees to continue to work subsequent to being contacted by the INS, the employer was liable for an IRCA violation.

In this case, there is no doubt that Respondent employed both Antonio and Mario Gallardo in the United States after November 6, 1986. At the time of their employment, both individuals presented work authorization documents and used these documents to complete their respective Forms I-9. Respondent is not charged with knowing of their unauthorized status at the time of their being hired.

Complainant has proven by a preponderance of the evidence that Respondent learned, on or about June 8, 1990, that both of these individuals were unauthorized for employment in the United States. Respondent learned that the documents demonstrating their work authorization were not genuine.

Respondent did make a timely and specific inquiry as to the employment eligibility status of three of the five individuals named in the Notice of Inspection Results. I find that neither Antonio nor Mario Gallardo presented documents to Respondent as to their work authorization after Respondent received this Notice. Additionally, Respondent admits to the knowledge element for these violations. However, Respondent does rely on the affirmative defense that it acted

reasonably in requesting an extension in the employment of these individuals and that this request was never disapproved by the INS.

Respondent asserts that the steps taken by Mr. Williams were timely and appropriate and done with the full knowledge of the INS investigating agent. Respondent further argues that it should not be held accountable as a result of the failure of the INS to promptly act on its written request, one way or the other.

I can appreciate Respondent's frustration at receiving no response from Mr. Brechtel or any INS representatives regarding his request for an employment extension with respect to the two subject employees. However, I do not believe that the non-action of the INS provides Respondent with a defense to these charges. Respondent admittedly knew of the unauthorized status of Antonio and Mario Gallardo. Respondent acted at its peril by maintaining these two employees on its payroll without the express consent of the INS.

Respondent was informed in writing that the continued employment of these individuals could subject it to fines if the individuals could not provide authentic work authorization. By failing to terminate these employees, Respondent was in violation of the law. In my view, Respondent's action of sustaining their employment without authorization was not reasonable and does not provide it with an acceptable defense.

The better practice would have been for Respondent to temporarily suspend the employment of these individuals while awaiting a response from the INS. Respondent also should have made additional attempts to ascertain whether the INS intended to act favorably upon its request or to deny it. The burden was upon Respondent to either discharge the unauthorized employees or to obtain permission to extend their employment. Respondent's actions defeated the purpose of the Act by keeping these employees on its payroll after being directly informed of their status.

Respondent points out that it is somewhat coincidental that the enforcement action by the INS occurred 30 days from its receipt of the request from Mr. Williams, which had asked for approximately 30 additional days. This apparently caused Mr. Williams to believe that his request had been approved. I do not believe that this assumption on Respondent's part exonerates its actions during the preceeding 30 day period in which it permitted these unauthorized workers to remain in its employ. Respondent also has no justification for failing to

suspend or discharge these workers after the completion of the shipment in early July, 1990, which formed the basis for Respondent's request.

While I do not find that Respondent's actions created a defense to these violations, I feel that I must also comment on the somewhat inappropriate handling of this situation by the INS. Mr. Williams' request was addressed to the point of contact named in the Notice of Inspection Results, Mr. Brechtel. This request was forwarded with the full knowledge of Agent Coleman. Mr. Brechtel testified that his office is not permitted to act in accordance with the type of request made by Respondent, rather it is to be handled by the deportations program. (However, Mr. Brechtel's office is permitted to act upon requests for extensions of time if the employer seeks additional time in which to ascertain the employment status of its employees.) This policy is a district policy and not mandated or controlled by statute or regulation.

The above policy was known to Mr. Brechtel and was in effect at the time Respondent made its request. Mr. Brechtel's office should have contacted Mr. Williams and informed him that his request was inappropriately addressed and that it could not be approved at his level, thus affording Mr. Williams the opportunity to reconsider his actions or to seek approval elsewhere. Mr. Williams requested not only a delay in enforcement activity, but also assistance in obtaining work authorization for these individuals. If Mr. Brechtel's division did not handle that type of request, it could have forwarded Respondent's letter to the appropriate office for disposition. The INS could also have informed Mr. Williams that it considered him to be in violation of Section 274A(a)(2) of the Act during the interim period and that continued employment of the two aliens was not advisable without express approval.

It is also poor procedure, in my view, to fail to respond in writing to a written request. Mr. Williams should have been afforded the courtesy of some type of a written response to his inquiry. Even a telephone call would have been more appropriate than no response whatsoever, as I find occurred here. I would suggest that the INS investigations program re-consider its policies with respect to the handling of inquiries and requests to avoid future instances of confusion on the part of employers, as was indicated here.

In sum, I find that Respondent violated Section 274A(a)(2) of the Act, 8 U.S.C. § 1324a(a)(2) by continuing to employ Antonio Cardenas Gallardo and Mario Cardenas Gallardo, who were unauthorized for

employment in the United States, after November 6, 1986, knowing of their unauthorized status. I do not find that Respondent's defense is sufficient to defeat these charges.

Count III:

Having examined the evidence and testimony presented with respect to Count III, it is my view that Respondent failed to totally complete the Forms I-9 in question. Section 2 of the Form I-9 requires that an appropriate box be checked in either column A or in columns B and C, indicating that the employer has verified employment eligibility and identification documents. This section further requires that the number and expiration date of each document be placed on the face of the form.

Complainant's Exhibits 16 and 18 (Forms I-9 for employees George Cutting and Megan Williams) do not contain any identifying information regarding the documents verified by the employer. Therefore, these forms are incomplete pursuant to 8 U.S.C. § 1324a(b).

Regarding George Cutting, Complainant has shown by a preponderance of the evidence that this individual was employed by Respondent after November 6, 1986, in the United States, and that Respondent did not comply with the requirements of IRCA with respect to his hiring. Respondent asserts as an affirmative defense that the omissions on the Form I-9 were clerical oversights and that Respondent exceeded the requirements of the Act by photocopying and retaining with the Form I-9 each of the documents examined and verified in the course of completing the form. Respondent urges my acceptance of this defense because the only omissions on the form were the document identification numbers for the employee's drivers license and social security card and that these items were contained on the attached photocopies of each of these documents. Respondent did check the appropriate boxes in columns B and C on the form.

The issue regarding the appropriateness of photocopying documents used in the verification of employment eligibility has been addressed in previous cases within this agency. See United States v Manos & Associates, Inc., OCAHO Case No. 89100130, (Feb. 8, 1989); United States v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211, (Apr. 27, 1990); and United States v. San Ysidro Ranch, OCAHO Case No. 89100368, (May 30, 1990). In none of these cases was the defense meritorious.

It is my view that the Act requires that each Form I-9 be completed in its entirety and that photocopies of documents cannot be used as substitutes for proper completion of the form. Although it is acceptable for employers to make photocopies and to retain them with the forms, it is not proper for the employer to use the photocopies instead of completely filling out each piece of information requested on the form. I have rejected this defense previously and this Respondent has not persuaded me to accept it in this instance. Therefore, I find that Respondent has violated Section 2 74A(a)(1)(B) of the Act by not properly completing the Form I-9 for George Cutting.

Regarding Megan Williams, Complainant has presented evidence demonstrating that this employee was hired by Respondent for employment in the United States after November 6, 1986 and that the Form I-9 prepared for her contained the same types of omissions as those for George Cutting.

Respondent contends that Megan Williams is a "grandfathered" employee within the definition of 8 C.F.R. Part 274a.7 because she was hired prior to the enactment of IRCA. Respondent presented evidence supporting this theory by showing that Megan Williams was listed on Respondent's payroll record in June of 1986. Respondent submits that the additional evidence presented by Complainant, which shows that Megan Williams was hired in December of 1987, contained an error in the hire date.

Complainant has not persuaded me by a preponderance of the evidence that Megan Williams was either hired or re-hired by Respondent after November 6, 1986. Therefore, I do not find that Respondent has violated the Act as alleged with respect to Megan Williams. I find that she was indeed a "grandfathered" employee. Therefore, Respondent has not violated the Act with respect to its hiring of Megan Williams.

Civil Monetary Penalty:

It is my judgment that Respondent has violated sections 274A(a)(2) and 274A(a)(1)(B) of the Act. I must, therefore, assess a civil money penalty pursuant to sections 274A(e)(4) and 274A(e)(5) of the Act. The statute states, in pertinent part, that:

> [w]ith respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection - (A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of (I) not less that $250

> and not more than $2,000 for each unauthorized alien with respect to whom a violation of either subsection occurred, . . . [and] with respect to a violation of subsection (a) (1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less that $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §§ 1324a(e)(4) and 1324a(e)(5).

Regarding Counts I and II, I believe that the minimum fine of $250.00 is appropriate for each violation. I find that there are several mitigating factors weighing heavily in Respondent's favor. Although I find that Respondent did technically violate Section 274A(a)(2) of the Act, my consideration of the five criteria outlined above and my assessment of the actions taken by the INS persuade me that the minimum fine is warranted in this case. I also find that the minimum fine of $100.00 is appropriate regarding the sole violation in Count III. I have considered each of the critical factors and believe that full mitigation of the penalty is warranted.

V. *Ultimate Findings of Fact, Conclusions of Law and Order*

I have carefully considered the record in this case, all documents presented by the parties, and all arguments advanced by the parties. Accordingly, and in addition to the findings of fact and conclusions of law previously made, I make the following ultimate findings of fact and conclusions of law.

1. I conclude, by a preponderance of the evidence, that Respondent did violate 8 U.S.C. § 1324a(a)(2) as alleged, by continuing to employ Antonio Cardenas Gallardo and Mario Cardenas Gallardo, knowing that they were unauthorized for employment in the United States.

2. Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) by hiring for employment in the United States, George Cutting, without complying with the verification requirements of 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. Part 274a.2(b)(1)(ii).

3. That it is just and reasonable to require Respondent to pay a total civil penalty in the amount of $600.00 for these three violations.

4. That Respondent shall cease and desist from violating the prohibitions against hiring or continuing to employ unauthorized aliens, in violation of Sections 274A(a)(1)(A) and 274A(a)(2) of the Act.

5. That all motions not previously ruled upon by me are hereby denied.

6. That this Decision and Order is the final action of the Administrative Law Judge in accordance with 28 C.F.R. Part 68.51(a). As provided by that section, this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it.

IT IS SO ORDERED this 5th day of August , 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge