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
	)	Case No. 90100316
APPLIED COMPUTER TECHNOLOGY, Respondent	)	

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

I. *Synopsis of Proceedings*

On October 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 Applied Computer Technology (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO), which served the complaint and a notice of hearing on the parties and assigned the matter to the Honorable Jay R. Pollack, Administrative Law Judge (hereinafter ALJ), on October 23, 1990.

The complaint alleged that the respondent violated the provisions of the employment eligibility verification requirements (hereinafter paperwork requirements) of the Immigration Reform and Control Act of 1986 (hereinafter IRCA), codified at 8 U.S.C. §1324a(b), with respect to five individuals. Specifically, the complaint alleged that respondent failed to make available for inspection employment eligibility verification forms (hereinafter Forms I-9) for five individuals during an INS inspection, which would constitute paperwork violations under IRCA, 8 U.S.C. §1324a(b)(3). The complainant requested a civil money penalty be imposed against the respondent in the amount of $2,300.00 for the alleged violations.

An administrative hearing was held in Denver, Colorado, on May 15, 1991. Subsequently, both parties filed post-hearing briefs, which the

ALJ considered prior to rendering the decision and order dated August 20, 1991.

Pursuant to 28 C.F.R. §68.51(a), the complainant timely filed on September 3, 1991, "Complainant's Request for Administrative Review by the Chief Administrative Hearing Officer and Memorandum of Supporting Arguments" (hereinafter *Request for Review*).

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

In the decision and order, the ALJ dismissed each alleged violation set forth in the complaint. *ALJ's Decision and Order* at 11. That part of the complaint alleging a failure to make available Forms I-9 for three employees; Patricia Kinchen, Cindy Koehler and Kevin Olson; was dismissed because the ALJ concluded that complainant failed to prove by a preponderance of the evidence that respondent had not presented the original Forms I-9 during the INS inspection. *Id*. at 6. In weighing the relative credibility of all the witnesses, the ALJ found the testimony for the respondent, which asserted that the three Forms I-9 had been presented, to be the most credible. *Id*. at 5.

In addition to the three alleged IRCA violations discussed above, two further alleged violations of failure to produce Forms I-9 for two former employees, Cy Heath and Paul Orosz, were dismissed by the ALJ. The ALJ noted that throughout the proceeding, respondent never disputed the fact that it did not prepare Forms I-9 for the two former employees. *Id.* at 8. The alleged violations relating to Heath and Orosz were dismissed because the ALJ found the violations to be de minimis. *Id.* at 11. The ALJ further stated that the underlying purpose of IRCA would not be perpetuated in any manner by holding the respondent liable for failing to present Forms I-9 for former employees Heath and Orosz. *Id*. at 9.

III. *Complainant's Contentions*

In the request for review, the complainant's major contention is that the ALJ exceeded the scope of his authority when he dismissed the allegations against employees Heath and Orosz, notwithstanding the fact that the respondent admitted all the essential elements of the violations during the proceeding. *Request for Review* at 2. The complainant contends that the ALJ erred in concluding that he possessed authority to refuse to enforce the penalty provisions of IRCA because he found the violations to be de minimis. *Id*. at 4. The complainant asserts that this error flows from the mistaken premise

that an ALJ has the authority to dismiss a complaint brought in accordance with IRCA or to refuse to enforce the mandatory penalty provisions when, in the opinion of the ALJ, the prosecution of the complaint was unwise as a matter of policy. Id. 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) 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.

28 C.F.R. §68.51(a).

The scope of administrative review by the Chief Administrative Hearing Officer (hereinafter CAHO) when reviewing ALJ decisions and orders is set forth in the Administrative Procedure Act, which states 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), and *Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990) held that the CAHO properly applied a de novo standard of review to the ALJ's decision in each case.

V. *Discussion*

a. *Allegations respecting Kinchen, Koehler and Olson*

The allegations in the complaint respecting Kinchen, Koehler and Olson were dismissed by the ALJ. *ALJ's Decision and Order* at 11. The ALJ based his decision on a detailed assessment of the relative credibility of the respondent's witnesses over that of the complainant's witnesses. The complainant did not contest the dismissal of these allegations in its request for administrative review. *Request for Review* at 2. I have reviewed the testimony as well as the ALJ's credibility assessment, and I here by affirm the ALJ's findings as to the allegations respecting Kinchen, Koehler and Olson.

b. *Allegations respecting Heath and Orosz*

The ALJ did not find the respondent liable as to the portion of the complaint regarding Heath and Orosz and held that the respondent complied with the paperwork requirements. *ALJ's Decision and Order* at 11. The ALJ accordingly dismissed that part of the complaint. *Id.* Furthermore, the ALJ found that requiring the respondent to belatedly complete and produce Forms I-9 for Heath and Orosz would not perpetuate the purpose of IRCA. *Id.* These facts, the ALJ concluded, indicate that the violations were de minimis and the purposes of IRCA would not be effectuated by issuance of a remedial order. *Id.*

The ALJ stated, "It is undisputed that respondent did not comply with any part of the paperwork requirements prior to [the inspection]. More importantly, it is also undisputed that, to this day, [r]espondent has never completed [Forms I-9] for any of its former employees who ceased their employment prior to [the inspection]." *Id.* at 8. Nevertheless, the ALJ continued on to state as a conclusion of law that "Respondent did not violate IRCA['s] paperwork requirements when it failed to present the Employment Eligibility Verification Forms for former employees Cy Heath and Paul Orosz." *Id.* at 11. Although noncompliance with the paperwork requirements was recognized as a violation, the ALJ found no violations because the "'violations' here are de minimis." *Id.* However, the labeling of a violation as de minimis does not alter the fact that it is a violation.

IRCA does not permit a finding of liability without imposition of a penalty. Section 1324(e)(3)(C) of Title 8, U.S. Code, states that if the ALJ finds that the respondent has violated the statute, he "shall state his findings of fact and issue and cause to be served on such person or entity an order..." Specifically with respect to paperwork violations IRCA states:

> Order for Civil Money Penalty for Paperwork Violations.- 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 than $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)(5) (emphasis added).

The ALJ exercised his discretion in rendering what could be, under other circumstances, a reasonable decision. It would seem that the complainant itself has at least implicitly agreed that the prosecution of these relatively technical violations was an unwise use of the agency's limited investigative and prosecutorial resources. *Request for Review* at 5-6. However, in light of the controlling statute, there is no statutory basis for such a policy decision by the ALJ. The language of the statute is clear; therefore, the setting of such a policy on discretionary grounds is inappropriate.

A recent case of the U.S. Court of Appeals for the Ninth Circuit dealt with another section of IRCA in which mandatory language appears. *Soler v. Scott*, No. 89-16051 (9th Cir. Aug. 1, 1991) (LEXIS, Genfed library, Courts file). Section 701 of IRCA provides that the "Attorney General [through the INS] shall begin any deportation proceeding as expeditiously as possible after the date of conviction." 8 U.S.C. §1252(i) (emphasis added). The court said this "use of mandatory language strongly indicates Congress intended to limit INS discretion." *Soler v. Scott* at 4. In the section of the statute involved in this case the use of mandatory language by Congress indicates the intent to limit discretion of ALJs in imposing sanctions for paperwork violations. If anything, the statutory provision governing the assessment of penalties for paperwork violations limits an ALJ's discretion to a greater degree than the provision at issue in *Soler v. Scott* limited the INS. Here, I am not called upon to interpret the meaning of the relatively subjective phrase "as expeditiously as possible." In the absence of an affirmative defense, the liability issue with regard to the Heath and Orosz allegations in the complaint is reduced to the question of whether or not the respondent presented the Forms I-9 during the inspection.

The ALJ in the instant case is evidently equating a minor violation with no violation, and therefore, finds no liability. Under Section 1324a(e)(5) of Title 8, U.S. Code, however, an ALJ must impose a penalty of between $100.00 and $1,000.00 for each violation found. Congress provided for consideration of the seriousness of the violation by including it as one of the five factors listed. Thus, an ALJ who finds that a violation is de minimis would be justified in considering that finding as a mitigating factor and, after giving due consideration to all five statutory factors, could impose a penalty of as little as $100.00. It is at the penalty determination phase that the ALJ should have taken into account the relative de minimis nature of the violations and determined the penalty amount to reflect the lack of seriousness of the violations. The ALJ's only discretion in this matter pertains to the

amount of the penalty. IRCA does not provide the option of waiving the penalty or of imposing a fine of less than $100.00 per violation found. IRCA does not state a range of between $0.00 and $1,000.00 for penalty amounts.

The INS is charged with the authority to prosecute the paperwork violations. Although the ALJ raises some very reasonable questions about whether the prosecution of the particular violations at issue here represented a proper allocation of INS resources, IRCA simply does not leave room for the complete waiver of a civil money penalty once a violation has been found. Such prosecutorial decisions are clearly policy considerations which are ordinarily within the purview of the enforcement agency. Arguably, there are certain unusually compelling circumstances where the exercise of prosecutorial discretion may be successfully challenged; however, this is not one of those circumstances.

Therefore, the ALJ's decision and order of August 20, 1991, is modified by finding for the complainant with respect to the two paperwork violations alleged in the complaint regarding the former employees Heath and Orosz.

VI. *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, dismissed the five paperwork allegations. Having modified the ALJ's order by finding for the complainant with respect to two of the violations, I must now turn my attention to the computation of the civil money penalty to be assessed against respondent for these violations.

Pursuant to 8 U.S.C. §1324(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 $100.00 against the respondent for each of the 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 the two individuals Heath and Orosz as alleged in the complaint. Therefore, I find that the respondent failed to prepare or present Forms I-9 for these individuals and thereby impose a civil money penalty in the amount of $200.00. This amount reflects the assessment of $100.00 per violation.

Modified this 19th day of September, 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 No: 90100316
APPLIED COMPUTER TECHNOLOGY, Respondent.	)	

DECISION AND ORDER

JAY R. POLLACK, Administrative Law Judge

Appearances:

Weldon Caldbeck, and Leila Cronfel, for
United States Department of Justice
Immigration and Naturalization Service, Complainant.

Thomas R. French,
Hasler, Fonfara and Maxwell for Respondent.

Statement of the Case

On August 2, 1990, the Immigration and Naturalization Service (INS) issued a Notice of Intent to Fine against Respondent Applied Computer Technology (ACT or Respondent). The Notice alleged that Respondent violated the Immigration Reform and Control Act of 1986 (IRCA) by failing to produce five Employment Eligibility Verification Forms (I-9 forms) during a previously scheduled inspection by the INS on June 21, 1990. Respondent requested a hearing before an Administrative Law Judge. Thereafter, on October 22, 1990, INS initiated the instant action by filing a Complaint Regarding Unlawful Employment against ACT. Said Complaint reiterated the allegations previously set forth by the INS in the Notice of Intent to Fine.

On November 16, 1990, Respondent filed its Answer to the Complaint. The Answer denied that Respondent failed to produce the five relevant I-9 forms in violation of IRCA. In that Answer, Respondent also advanced five "affirmative defenses" against INS' allegations. Subsequently, Respondent amended its Answer to add a sixth "affirmative defense" which asserts Respondent's good-faith compliance with the law.

Complainant filed a motion to strike Respondent's first five affirmative defenses on March 11, 1991. I denied this motion on the ground that Complainant failed to file it in a timely manner. Complainant next moved to strike Respondent's sixth affirmative defense. On April 11, 1991, I denied Complainant's second motion to strike; instead, I construed Respondent's sixth "affirmative" defense to be a "penalty mitigation" defense.

I heard this case in trial on May 15, 1991 at Fort Collins, Colorado. Both parties filed trial briefs. Respondent also filed proposed finding of facts and conclusions of law.

Issues to Be Decided

1. Whether Respondent made available to the INS the I-9 forms for three current employees (Cindy Koehler, Patricia Kinchen and Kevin Olson) during the I-9 audit of June 21, 1990?

2. Whether Complainant is estopped from asserting its instant I-9 non-production allegations against two of Respondent's former employees named Paul Orosz and Cy Heath?

3. Whether Respondent's failure to prepare and present I-9 forms for the two former employees constitutes IRCA violations under the applicable statute and regulations in light of all the circumstances?

4. If Respondent's liability for the instant allegations is estab-lished, whether the amount of civil money penalty proposed by the Complainant is appropriate?

Findings of Fact

Respondent ACT is a Colorado corporation founded in 1986. Its business address is located at 2573 Midpoint Dr., Fort Collins, Colorado. ACT manufac-tures and retails "clones" of I.B.M. personal

computers. Currently, it is owned by its President, Wiley E. Prentice, Jr., and by its Vice President and General Manager, Cindy Koehler. Prentice owns 75% of the interest in ACT while Koehler owns the remaining 25% interest.

ACT's tax return for 1989 reveals it experienced a slight loss during that year. However, its return for 1990 indicates it realized a profit of fifteen thousand dollars in 1990. ACT's gross sales in 1989 amounted to about two million dollars; in 1990, its gross sales increased to about three and one-half million dollars.

Prior to December 1989, ACT neither prepared nor retained I-9 forms for any of its employees. ACT began preparing I-9 forms only after a pre-arranged visit to its premises by Thomas A. Van Hook during December 1989. Van Hook is a Wage and Hour Compliance Officer of the United States Department of Labor. The primary purpose for Van Hook's 1989 visit was to ensure Respondent was complying with federal wage and hour laws; as a normal part of his wage and hour investigation, Van Hook also asked to see the I-9 forms for ACT's employees. At that time, Van Hook learned from ACT that it has not prepared any I-9 forms for its employees. Van Hook then informed ACT of the I-9 requirement.

On January 4, 1990, Van Hook met with ACT's attorney John A. Jostad to examine the I-9 forms retained by ACT for its employees.[1] Respondent was able to complete I-9 forms for all of its current employees during the interval between Van Hook's initial visit in December 1989 and his inspection visit on January 4, 1990.

On June 21, 1990, special agent John Upson conducted an INS audit of ACT's I-9s at John A. Jostad's office. The allegations currently pending against ACT stem from Upson's June 1990 I-9 audit.

The I-9 Forms for Koehler, Kinchen & Olson

Complainant contends Respondent has violated IRCA by failing to produce the I-9 Forms of Cindy Koehler, Patricia Kinchen and Kevin Olson during the inspection conducted by INS agent John Upson on June 21. 1990.

[1] To the extent Van Hook has testified that he informed Respondent or its agents that the INS might require I-9 forms for former employees, he is not credible. I am persuaded by the credible testimony of Cindy Koehler and John Jostad that Van Hook made no such statement

An employer's failure to produce its employees' I-9 forms during an INS inspection, where that employer has received due notice of the inspection, constitutes a sanctionable paperwork violation under IRCA. See 8 U.S.C. §1324a(b)(3); see also 8 C.F.R. §274a(b)(2)(ii) (1990).

In order for Complainant to demonstrate Respondent has violated IRCA by failing to produce I-9s during an INS inspection, it must show the following elements: 1) that ACT is a person or an entity; 2) which has hired or recruited an individual; 3) for employment in the United States after November 6, 1986; 4) without complying with IRCA's verification provisions by making available the relevant I-9 forms for inspection by officers of the INS. Id.

With respect to the aforementioned liability elements, the main point of contention between the parties rests in the fourth and final element: whether Respondent in fact made available the I-9s for Cindy Koehler, Patricia Kinchen and Kevin Olson during the June 21, 1990 inspection?

In hearings conducted under 8 U.S.C. §1324a, Complainant bears the ultimate burden to persuade the fact finder by a preponderance of the evidence. See 28 C.F.R. §68.50(b) (1990). However, the burden of evidence production does not necessarily fall upon the Complainant; either party may be required to produce evidence where it asserts an affirmative proposition. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), cert. denied 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979) and Town of Mashpee v. Mashpee Tribe, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979), cert. denied 104 S.Ct. 205.

In the present case, the burden of producing evidence as to ACT's failure to produce the claimed I-9 Forms merges with the ultimate burden of persuasion upon Complainant's shoulders. In addition to assuming the ultimate burden of proof by its status as the complaining party, Complainant must also produce evidence which shows ACT has failed to present the required forms since this assertion is an essential element of its claim. Respondent may also present rebuttal evidence. Ultimately, all the evidence must preponderate in Complainant's favor in order for it to prevail upon its claims. These principles shall govern the following analysis.

During the hearing, the parties did not dispute the existence of the three relevant I-9 Forms as of June 21, 1990. It is clear that Respondent has previously prepared the three forms. Complainant's own

evidence demonstrates that ACT had already prepared I-9s for Cindy Koehler, Patricia Kinchen and Kevin Olson on that date. According to DOL agent Thomas Van Hook's testimony, he examined the I-9 forms for these three ACT employees on January 4, 1990; in fact, he had specifically pointed out minor deficiencies which existed in each of the three forms to the Respondent on that date.

Despite the existence of the three relevant I-9s, Complainant contends Respondent has failed to produce the forms during the June 21, 1990 inspection by INS agent Upson.

Complainant's main evidence for its instant non-production claims consists of the testimony of agent Upson. Upson testified during the hearing that ACT's attorney, John Jostad, presented him with two stacks of I-9 Forms at the June inspection. One stack contained original I-9 Forms and the other contained photocopies of the originals. Upson claimed that he then proceeded to " cross-reference" the stacks by making sure a photocopied form existed for each and every original I-9 Forms. Upson even recalled that there at first existed only sixteen copies and that he specifically asked Jostad to make additional copies for three original I-9s which did not have corresponding copies. Upson went on to say that after he received copies of the previously uncopied originals, he again compared the originals with the I-9 copies. From that comparison, Upson testified that Jostad only presented nineteen original I-9 Forms during the course of the June inspection and that ACT did not present to him the I-9s for Cindy Koehler, Patricia Kinchen and Kevin Olson.

Complainant also presented an "I-9 receipt" as evidence to support its contention that only nineteen I-9s were presented by ACT during Upson's inspection. Among other things, the receipt indicates nineteen I-9 Forms were inspected by Upson. Upson also testified that Jostad affixed his signature on the receipt after the number "nineteen" has already been entered under the category of "I-9's inspected". This testimony was confirmed by Jostad.

However, as a result of Respondent's rebuttal evidence and after weighing the relative credibility of all the witnesses, I do not credit Upson's testimony which pertains to the number of original I-9s that he had inspected during the June 21, 1990 inspection.

Upson's claim that he had carefully and repeatedly cross-referenced the original I-9s with the photocopies was not supported by the testimony of Jostad who has no recollection of any such acts. In

addition, Jostad directly contradicted Upson's testimony when he testified that he never copied three original I-9s at Upson's request during the June audit.

I find the most credible testimony concerning these events to be the account given by Cindy Koehler. Koehler testified that she had sent all the I-9 Forms in ACT's possession to Jostad in preparation for Upson's inspection in June 1990; apparently, she did not count the numbers of I-9s at the time. However, immediately after she became aware of the current allegations, Koehler met with Jostad for the purpose of counting the number of I-9s she had sent to Jostad. She did not inform Jostad of the purpose of her visit. The I-9s remained in Jostad's possession after the June audit. Together, Koehler and Jostad counted twenty-two I-9 forms, including the I-9s for Koehler, Kinchen and Olson.

Jostad confirmed Koehler's testimony. He further testified that initially he did not count the number of I-9s which were present in the folder sent to him by Koehler. On about June 11th or 12th, 1990, Jostad made the photocopies of the original I-9s; he speculates that he may only have copied nineteen of the twenty-two I-9s. However, Jostad affirms that he made available all the original I-9s contained in Koehler's mailing envelope to Upson during the June audit. From my observations of the witnesses, I fully credit Koehler's testimony that she had sent all twenty-two I-9s (including the ones for herself, Kinchen and Olson) to Jostad as well as Jostad's testimony that he had presented all the originals to Upson. I also note that Jostad and Koehler's testimony are consistent with each other.

The credited testimony undermines Upson's claim that he had repeatedly and carefully "cross-referenced" ACT's original I-9s with the photocopies. Upson's assertion that he had carefully "crossreferenced" the originals with the photocopies is further weakened by the fact that his own investigation notes, contained in a standard INS "memorandum of investigation", failed to make any references to such activities. Had Upson made such a cross-reference, the discrepancy between the originals and the copies would have been discovered.

In arriving at the above credibility determination, I have also noted Respondent's argument that Jostad's version of the inspection is more credible than Upson's since Jostad's participation in the June 21, 1990 meeting represents his only experience with the INS I-9 audit while Upson has performed more than thirty such audits with various employers.

Based upon the above credibility resolutions, I find Respondent had sent twenty-two original I-9 forms to Jostad in preparation for Upson's I-9 audit on June 21, 1990; that the originals included the I-9s for Cindy Koehler, Patricia Kinchen and Kevin Olson; that Jostad presented all the original I-9s to Upson on June 21, 1990; that Jostad only presented nineteen copies of the original I-9 forms to Upson on that date, and; that Upson did not carefully cross-reference the original I-9 forms with the photocopies in arriving at his determination that Respondent only presented nineteen original forms. Additionally, I also find the "I-9 Receipt" introduced by Complainant does not lend substantial support for its present contentions. The receipt merely referred to the number of photocopies taken by Upson. The receipt does not support Upson's assertion that he had carefully cross- referenced the original I-9s with the reproductions.

In view of my credibility resolutions and in consideration of all the pertinent evidence presented by both parties, Complainant has failed to carry its burden of persuasion. Specifically, the evidence does not preponderate toward the proposition that ACT had not presented the original I-9s for Cindy Koehler, Patricia Kinchen and Kevin Olson during the inspection conducted on June 21, 1990.[2]

Since Complainant has failed to prove an essential liability element, it therefore cannot prevail with respect to the claim that Respondent has failed to present the I-9s for Koehler, Kinchen and Olson during the June 21, 1990 inspection by Upson.

Respondent's Duty to Prepare I-9s for Orosz and Heath

In addition to the IRCA allegations already discussed in previous paragraphs, Complainant also argues that Respondent has further violated IRCA by failing to produce I-9 forms for two of its former employees, Paul Orosz and Cy Heath.

Throughout this proceeding, Respondent has never disputed the fact that it did not prepare I-9 forms for Orosz and Heath. Consequently, it is not surprising that ACT has not disputed the instant allegation that it failed to present I-9s for Orosz and Heath on June 21, 1990 for agent Upson's inspection.

[2] I also note there exists no credible motive for Respondent not to present the three relevant I-9s since their existence is not disputed. Further, any prior defects contained in them were minor and were apparently corrected by ACT shortly after Van Hook's January 1990 inspection.

Instead of controverting the principal elements of the current allegations, Respondent elects to argue that Complainant is estopped from asserting its current claims with respect to Orosz and Heath. It is Respondent's assertion that estoppel against INS is warranted in this case since it relied upon the statements and actions of government employees to its detriment. Respondent's argument is without merit. As Complainant has correctly pointed out, it is well established that estoppel does not operate against a government entity unless a government agent has committed affirmative misconduct which goes beyond negligence. Furthermore, even where such affirmative misconduct is present, imposition of estoppel against the government will be granted only if the agent's behavior will result in serious injustice to the claimant and if estoppel will not unduly damage the public interest. See Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985); see also Heckler v. Community Health Services, 467 U.S. 51, 60-1, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984).

Respondent has failed to present any evidence of affirmative misconduct on the part of government agents which would justify the imposition of the estoppel doctrine against the government in this case. Additionally, Respondent does not argue the government agent's behavior constitutes 'affirmative' misconduct. Complainant therefore cannot be estopped from pursuing its current IRCA paperwork allegations with respect to Orosz and Heath.

Estoppel is not applicable in this case. Nevertheless, I do not find any IRCA liability on the part of Respondent with respect to Orosz and Heath. I base my finding upon the de minimis nature of the alleged 'violations' and upon the fact that enforcement of IRCA's civil penalties in this case will not effectuate the purposes of the Act. The evidence indicates that neither Orosz nor Heath worked for ACT at the time Respondent first discovered the existence of the paperwork requirements as a result of Van Hook's Wage and Hour investigation. The evidence also indicates that neither employee worked for Respondent at any time during 1990.[3] Furthermore, there is no contention that either Heath or Orosz were unlawfully employed.

[3] Heath and Orosz were listed as ACT employees during first quarter 1990 on Respondent's state Unemployment Insurance Report. The report lists Health as receiving total wages of $42.75 during first quarter 1990 and Orosz as receiving wages of $20.95 during the same period. However, the first quarter payments were past-due overtime wages that were paid as a result of Van Hooks 1989 Wage and Hour investigation. Neither Health nor Orosz worked for ACT at any time which is relevant to this case.

Prior OCAHO cases have held that ignorance of the statutory paperwork requirements does not constitute a valid defense to charges of IRCA violation. See U.S. v. The Body Shop, OCAHO Case No. 89100450 (April 2, 1990). In addition, it is clear that neither the statute nor INS regulations have created any general "former employee" exemption to IRCA's paperwork requirements.[4]

However, in light of the intent behind IRCA's paperwork requirements as reflected through legislative history and INS' public representations, a finding of nonliability is warranted in this case.

It is undisputed that Respondent did not comply with any part of the paperwork requirements prior to Van Hook's Wage and Hour investigation in December 1989. More importantly, it is also undisputed that, to this day, Respondent has never completed I-9 forms for any of its former employees who ceased their employment prior to Van Hook's investigation. The INS has not alleged any IRCA violations with respect to most of those former employees; neither has the INS pursued sanctions against Respondent for the untimely completion of Requisite I-9 forms. INS' exercise of its prosecutorial discretion in this case reflects an implicit policy on its part to encourage current compliance from employers by requiring them to comply with the paperwork requirements only from the time they have gained some inkling of the requirements themselves. INS' practice of publishing and distributing "Handbook for Employers" as well as its practice of conducting educational visits for employers are consistent with this implicit policy.

The underlying purpose of IRCA, as well as INS regulations, also lend support to such an enforcement policy. IRCA was enacted in order to deter employment of unauthorized aliens by requiring employers to complete verifying workers' employment eligibilities within three days from the time of hire. See 8 C.F.R. §274a(b) (1990); see also H.R.Rep. 99-603, 99th Cong., 2nd Sess, pt.1, p.92, reprinted in 1986 U.S. Cong. & Admin. News 5649, 5696 (1986) (where the Conference Committee stated that the verification process must be completed by noon of the 'date of hiring; however, this language was not contained in the statute itself). In view of this intent, it does not

[4] Employees who were hired before the enactment of IRCA on November 6, 1986 are "grandfathered" under the statute. I-9s are not necessary for such employees. Under 8 C.F.R. §274a.2(a) (1991), employers also do not need to complete I-9s for employees who were hired after November 6, 1986 but who left the job before the end of the six month public information period on May 31, 1987.

appear the purpose of IRCA will be enhanced by requiring a previously ignorant employer to belatedly complete I-9 forms for its former employees; completion of I-9s in such circumstances can no longer deter unauthorized employment.

Despite the apparent existence, and soundness, of such an implicit enforcement policy, Complainant now seeks to sanction Respondent for failing to produce I-9s for Orosz and Heath, both former employees at the time Respondent first learned of IRCA's requirements.[5]

Presumably, Complainant has ignored the non-existent I-9s for ACT's other former employees and is only seeking sanctions against Respondent with respect to Orosz and Heath because the latter two appeared to have been paid wages by ACT during 1990. As I have already noted, the undisputed evidence is that the only wages paid to Orosz and Heath during 1990 were for overtime work which they performed prior to 1990; the payments themselves were made as a result of Thomas Van Hook's December 1989 Wage and Hour Investigation. Orosz and Heath were not employed by ACT during any part of 1990.

Under such circumstances, the purpose of IRCA will not be perpetuated in any manner by holding Respondent liable with respect to Orosz future compliance with the statute since it is clear that ACT promptly and Heath. IRCA sanctions cannot even enhance Respondent's came into compliance with IRCA's paperwork requirements after Van Hook's investigation in December 1989.

I also note that in Part One of INS' "Handbook for Employers", a copy of which was received and read by the Respondent, it is explicitly stated that:

> "Employment is often the magnet that attracts persons to come to or stay in the United States illegally. The purpose of (IRCA) is to remove the magnet by requiring employers to hire citizens and aliens who are authorized to work here."

While such statements clearly do not possess the binding effects of agency regulations, they may nevertheless lead a reasonable employer in Respondent's circumstances to conclude that it need not complete I-9s for former employees: under the facts of this case, the belated completion of an I-9 form subsequent to the employees'

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[5] Koehler testified that she had no knowledge of IRCA prior to Van Hook's December 1989 investigation and that once she learned of its requirements, she promptly filled out I-9 forms for all current employees. I fully credit her testimony.

termination cannot in any way serve to perpetuate the Act's purpose of eliminating the "magnet" of U.S. employment.

The policy statements contained in the Handbook also do not constitute 'affirmative misconduct' that can trigger application of the estoppel principle against the Complainant. But the statements do lend certain ambiguity to what would otherwise be clear statutory and regulatory languages. This ambiguity is exacerbated in this case by both Van Hook's and INS' decisions to pursue Respondent's compliance only with respect to its current employees (i.e. those employees who were on the job during or after Van Hook's December 1989 investigation). Given the ambiguity created by such conflicting signals, Complainant has failed to establish Respondent's liability as to Heath and Orosz. Cf. U.S. v. New Peking Inc. d/b/a New Peking Restaurant, OCAHO Case No. 90100301, Modification by CAHO of the Administrative Law Judge's Decision and Order (June 18, 1991).

At this point, I note that courts have recognized the need for flexibility in the administrative process and that under certain circumstances, agencies may need to take account of individual parties' peculiar circumstances in applying a general rule. In fact, it has been stated that such flexibility can enhance the effective operation of the administrative process and lends strength to the system as a whole. See Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 399 (D.C. Cir. 1973); generally Alabama Power Co. v. Costle, 636 F.2d 323, 357 (D.C. Cir. 1979).

Additionally, I note that other administrative agencies, such as the National Labor Relations Board, have refused to hold employers for "technical" and "de minimis" violations of federal labor statutes where the conduct involved is "...so insignificant and so largely rendered meaningless by Respondent's subsequent conduct that we will not utilize it as a basis for either a finding of violation or a remedial order." American Federation of Musicians, Local 76, 202 NLRB 620, 622 (1973). See Dallas Mailers Union, Local No. 143 v. N.L.R.B., 445 F.2d 730 (1971).

In the present case, Respondent has complied, and continues to comply, with IRCA's paperwork requirements. In addition, it is clear that requiring Respondent to belatedly complete and produce I-9s for Orosz and Heath will not perpetuate the purpose of the Act as represented by INS' own statements. Such facts indicate the 'violations' here are de minimis. Further, as previous discussions have

shown, the factual situations in this case have imparted certain ambiguities to the relevant statute and regulations.

For the above reasons, I find that under the particular circumstances of this case, Respondent has not violated the paperwork requirements with respect to Paul Orosz and Cy Heath.

For the same reasons, I find that it will not effectuate the purposes of IRCA to issue a remedial order.

Conclusions of Law

1. Respondent Applied Computer Technology did not violate the Immigration Reform and Control Act of 1986 by failing to produce Employment Eligibility Verification Forms for Cindy Koehler, Patricia Kinchen and Kevin Olson.

2. Respondent did not violate IRCA paperwork requirements when it failed to present the Employment Eligibility Verification Forms for former employees Cy Heath and Paul Orosz.

Order

IT IS HEREBY ORDERED that the current allegations brought by the Immigration and Naturalization Service against Respondent Applied Computer Technology be dismissed in its entirety.

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 Adminis-trative Hearing Officer. Any such request for review should be accompanied by the party's supporting arguments.

JAY R. POLLACK
Administrative Law Judge

Dated: August 20, 1991