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. 93A00193
DAVIS NURSERY, INC. Respondent.	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION
(September 30, 1994)

Appearances:

For the Complainant
John B. Barkley, Esquire
Immigration & Naturalization Service
U.S. Department of Justice

Pro Se Respondent
Venna Davis

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *General Background*

A. The Immigration Reform and Control Act of 1986

This case arises under section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting section 274A of the Immigration and Nationality Act of 1952, as amended ("INA" or "the Act"), 8 U.S.C. § 1324a. With the enactment of IRCA, Congress adopted significant revisions in national policy on illegal immigration. Congress enacted section 101 of the statute to serve as the principal means of curtailing the large influx of undocumented aliens into the United States.[1] Section 101 of IRCA contains employer sanctions provisions which impose penalties on employers who knowingly hire unauthorized aliens or who fail to

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[1] Indicative of the severe problem of controlling illegal immigration, the U.S. Department of Justice, Immigration and Naturalization Service (INS) predicted that 1.7 million undocumented aliens would be apprehended during the 1986 fiscal year. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 47, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. Immigration officials have asserted that this figure represents only a "small fraction of those who cross the border successfully and stay in the United States for years, [or] for a season." Id. In 1985, the INS apprehended 1.2 million undocumented aliens; in six of the past nine years, more than one million illegal aliens have been apprehended. Id.

The House Committee on the Judiciary reported that

> [e]mployment is the magnet that attracts aliens here illegally, or, in the case of non-immigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

Id. at 46.

The flood of illegal aliens into the United States remains a significant problem especially in states like California and Texas.

The U.S. Commission on Immigration Reform has stated that:

> Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of illegal immigration will be impossible. The commission believes that both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet.

Statement of Barbara Jordan, Chair of U.S. Commission on Immigration Reform Before the Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, U.S. Senate (Aug. 3, 1994).

comply with the Act's employment eligibility verification system.[2] Under this section, employers are vulnerable to civil and criminal penalties for violating prohibitions against employing unauthorized aliens in the United States and are subject to civil penalties for failure to comply with IRCA's record-keeping and employment eligibility verification requirements ("paperwork requirements").

IRCA's paperwork requirements must be followed regardless of whether the individual being hired is a U.S. citizen or an alien. The verification system requires the participation of both employers and employees in record production, examination, attestation and record-keeping. This process requires completion of the INS Employment Eligibility Verification Form ("I-9 form") within three business days of the hire. 8 C.F.R. § 274a.2(b)(1)(B)(ii) (1994).

The employee must present documents to the employer to establish the employee's identity and authorization to work in the United States. In order to comply with the verification requirements, the employer must find that the document or combination of documents presented "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A). After examining these documents, the employer must attest, under penalty of perjury, on the I-9 form that the employer has verified that the alien is not an unauthorized alien. 8 U.S.C. §

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[2] IRCA provides that

> [i]t is unlawful for a person or other entity (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or (B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) . . . .

8 U.S.C. § 1324a(a)(1).

Subsection (b) provides, in pertinent part that "[a] person or other entity [hiring, recruiting, or referring an individual for employment in the United States] must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien . . . ." 8 U.S.C. § 1324a(b)(1)(A).

Employment eligibility verification requires examination of certain documents, such as a United States passport, certificate of United States citizenship, certificate of naturalization, unexpired foreign passport, if endorsed by the Attorney General, or a resident alien card. 8 U.S.C. § 1324a(b)(1)(B). Certain documents, including a social security card, certificate of birth, or other documents established by regulation, may satisfy this requirement, provided they are accompanied by a driver's license, state identification card, or other document established by regulation. 8 U.S.C. § 1324a(b)(1)(C) and (D).

1324a(b)(1)(A). The employee must also attest, under penalty of perjury, and on the same I-9 form, that he or she is a citizen, national, alien lawfully admitted for permanent residence, or an alien authorized to work in the United States. 8 U.S.C. § 1324a(b)(2).

Employers must retain the I-9 forms and make them available to the INS or the Department of Labor for a period of at least three years after the date of hire or one year after the date an individual's employment is terminated, whichever is later. 8 U.S.C. § 1324a(b)(3). Upon request by INS or Department of Labor officers, the employer must make the I-9 forms available for inspection at the location where the request for production was made. 8 U.S.C. § 1324a(b)(3), 8 C.F.R. § 274a.2(b)(2) (1994).

The instant case involves allegations that Davis Nursery, Inc. ("Davis Nursery" or "Respondent"), located in Las Vegas, Nevada, violated various sections of IRCA's employment eligibility verification system.

B. Procedural Background

On November 2, 1993, the INS filed a complaint against Davis Nursery, Inc ("Davis Nursery" or "Respondent"). The complaint alleges in Count I that Respondent failed to prepare the I-9 form and/or failed to retain and/or make available for inspection on September 8, 1992 the I-9 forms for eight employees, Octavio Garcia, Clarren Leavitt, Ignacio Martinez, Jose Medina, Manuel Medina, Raul Medina, Antonio Chaveren and Humberto Nunez, who were hired by respondent after November 6, 1986 in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B) which renders it unlawful after November 6, 1986, for a person or other entity to hire for employment in the United States an individual, without complying with the requirements of Section 274A(b) of the INA, 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) (1994) and, in the alternative, that Respondent violated section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324A(a)(1)(B) which renders it unlawful after November 6, 1986 for a person or other entity to hire for employment in the United States an individual, without complying with the requirements of section 274A(b)(3) of the INA, 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2).

Count II of the complaint alleges that Respondent failed to complete section 2 of the Form I-9 within three business days of hire for employees Jose Capetillo, Carmelo Garcia and Laurino Medina whom respondent hired after November 6, 1986 in violation of section 274A(a)(1)(B) of the INA, U.S.C. § 1324a(a)(1)(B).

Count III alleges that Respondent failed to ensure that Leonardo Gomez-Sanchez, who was hired by Respondent after November 6, 1986, properly completed section 1 of his I-9 form and failed to properly complete section 2 of Gomez-Sanchez's Form I-9, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the united States, an individual without complying with the requirements of section 274A(b)(1) and (2) of the INA, 8 U.S.C. §§ 1324a(b)(1) and (2); 8 C.F.R. § 274a.2(b)(1)(i) and (ii) (1994).

On November 5, 1994, the Office of the Chief Administrative Hearing Officer issued a notice of hearing which told Respondent that it had a right to file an answer to the complaint and to appear in person, and give testimony at the place and time fixed for the hearing.

On December 13, 1993, pro se Respondent filed its answer in the form of a letter, signed by Ms. Venna Davis, the owner of Davis Nursery, Inc. The answer states the following:

> Davis Nursery was founded by J.D. Davis and his wife Venna Davis over forty-two years ago. In that time, we have seen our government enforce more and more regulations on the nursery industry. Although we do not doubt the importance of each regulation, it is increasingly difficult to be aware of each one imposed by each agency. We do our best to comply with the IRS, FUTA, SUTA, OSHA, EPA, Federal Department of Agriculture, State Department of Agriculture, ICC, INS, SIIS and the myriad of state, county and city agencies.
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> Our business is to supply healthy nursery stock and related products. We have hired the appropriate professional experts to help us when necessary, but because we are hones (sic) small business people who have tried to comply with all regulations ourselves, we find it cost prohibitive to hire experts in each area. When we were informed of the law, shown the form and went through the inspection, we endeavored to make all corrections as we were told.
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> We did make the corrections immediately upon being informed of the change in the law, and as we are in full compliance since the time of our interview, we question the reason and purpose of a fine. Is this to make an example of a seventy year old business woman or to insure compliance that is already in place.
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> In forty-two years we have never been charged with violating an immigration law. Had we known that there was a change in the law, we certainly would have complied with it. There should be a requirement upon the government to properly notify and (sic) affected businesses. While there technically may have been a violation, we believe that the fault lies with the INS and would request any documentation in their control that would show otherwise. If they have no proof and we believe that they do not, we request that the charge be dismissed.

On January 24, 1994, the INS, pursuant to 28 C.F.R. § 68.38 (1994), filed a motion for summary decision. In support of its motion, Com-

plainant attached a number of supporting documents, including: the affidavit of Gilberto A. Cortinas, an INS special agent ("Cortinas Aff."); a "Record of Deportable Alien" for Leonardo Gomez-Sanchez; a Notice of Inspection, dated September 2, 1992 and addressed to Davis Nursery; a receipt dated September 8, 1992 showing a list of eight I-9 forms prepared by Respondent; Articles of Incorporation, for Respondent; business license renewal and payroll records received from Davis Nursery; an employee status report; and I-9 forms for Jose Capetillo-Murillo, Carmelo Garcia, Laurino Medina, and Leonardo Gomez.

On February 2, 1994, I issued an order, informing Respondent how to respond to a motion for summary decision and giving Respondent until February 28, 1994 to do so.

On February 7, 1994, Respondent filed its response to my order but captioned its pleading as a "Motion to Dismiss." I will view its motion as a response to my order and a cross-motion for summary decision ("Resp.'s Cross-Motion for Summary Decision"). In that motion, Respondent states that:

> Davis Nursery, Inc. seeks to have all charges dismissed with prejudice and to deny the plaintiff's motion for summary decision. The only true issue in the entire set of charges and allegations against Davis Nursery is whether or not we knowingly broke any rules, regulations or laws. The material fact in this case is simple and stands on its own merit. Never has the office of the INS claimed that we were informed of the changes in what was required of Davis Nursery as an employer. We were never mailed a copy of the I-9 form or told to find one. The burden and responsibility is theirs to inform business of the changes.
>
> The lesser point of contention is whether we tried to hinder or delay or were we in any way uncooperative. Which is simply not true. When the notice of inspection was presented, we immediately consented. When agents inspected our employees' identifications, they were unable to agree as to whether or not Laurino Medina's identification was genuine or not. How when trained INS officers cannot determine the authenticity of a document are we? Before hiring any employee, we required proof of residency. We copied and filed their Social Security Cards, Resident Alien Cards, and Drivers' License or Nevada Identification Cards when available. All of these records were presented to the INS. When we were told that I-9s had to be filed and were given a copy, we immediately answered the forms to the best of our ability. In addition, Davis Nursery is being fined for failing to file an I-9 on Clarren Leavitt, my nephew, whom I absolutely know to be a U.S. Citizen. Davis Nursery acted in good faith. We kept records. We were diligent in maintaining copies of identification on employees and we did not backdate forms or in any manner avoid compliance.

Resp.'s Cross-Motion for Summary Decision (emphasis added).

II. *Facts*

Davis Nursery, Inc., a Nevada Corporation located at 2700 E. Bonanza Road, Las Vegas, Nevada, was founded approximately 42 years ago by husband and wife, J.D. and Venna Davis. Davis Nursery sells nursery stock (i.e. flowers, plants, bushes, trees, and fertilizer) and related products. Respondent's Letter to ALJ Schneider, dated December 13, 1993 ("Resp's." Dec. 13, 1993 Letter"), at 1; Compl.'s Mem. in Support of its Motion for Summary Decision, Attachment 1 at 1.

On August 28, 1992, special agents from the Las Vegas, Nevada INS office conducted a consensual employer survey at Davis Nursery, 2700 E. Bonanza Road, Las Vegas, Nevada. Lowell Davis, Respondent's manager, gave consent for the survey. Compl.'s Mem. in Support of its Motion for Summary Decision, Attachment 2. The INS apprehended one unauthorized alien, Leonardo Gomez-Sanchez, at the nursery. Id. at Attachment 3. Respondent has admitted hiring Gomez-Sanchez for employment in the United States. See Answer at 5.

On September 2, 1992, Special Agent Gilberto Corinas served an administrative subpoena and Notice of Inspection on Lowell Davis. See Compl.'s Mem. in Support of its Motion for Summary Decision, Attachments 2, 4 and 5. The subpoena requested that on September 8, 1992, the business produce various documents, including the I-9 forms for all employees Respondent employed after October 1, 1989, including Gomez-Sanchez. Id. at Attachment 4.

On September 8, 1992, Venna Davis and Denise Selleck Davis appeared at the INS office in response to the subpoena. They produced eight I-9 forms, payroll records, W-2 forms for the employees and Articles of Incorporation for the business. The INS agents gave the Davises a receipt for those documents. See Compl.'s Mem. in Support of its Motion for Summary Decision, Attachment 6.

Respondent has admitted that it employed all the persons named in the complaint and that it hired them after November 6, 1986. Answer. With respect to Count I, Respondent admits that the INS requested the I-9 forms. Respondent admits that "[t]he photo-static copies of identification on all employees were presented for inspection on the date requested." Respondent does not claim to have given the INS I-9 forms for these individuals. Rather, it claims that it was not "informed that they were to have I-9 forms completed and on file." Respondent did not supply I-9 forms for the individuals listed in Count I. See

Compl.'s Mem. in Support of its Motion for Summary Decision, Attachment 2.

With respect to Count II, Respondent also admits that each individual was an employee hired after November 6, 1986. Respondent admits that it did not complete an I-9 form until after service of the Notice of Inspection. See Answer. The date of hire for each of the named employees are as follows:

1. Jose Capetillo, hired October 6, 1991;
2. Carmelo Garcia, hired November 1, 1990; and
3. Laurino Medina, hired January 13, 1992.

Compl.'s Mem. in Support of its Motion for Summary Decision, Attachments 7a-c.

The I-9 forms for these employees were not completed within three business days of the time of hire:

1. Jose Capetillo, I-9 form dated September 15, 1992;
2. Carmelo Garcia, I-9 form dated September 8, 1992; and
3. Laurino Medina, I-9 form dated September 8, 1992.

Id. at Attachments 8(a) - (c).

With respect to Count III, Respondent admits hiring Leonardo Gomez-Sanchez after November 6, 1986. See Answer. The I-9 form for Gomez-Sanchez, however, is incomplete as neither section 1, section 2, nor the attached photocopy of a Social Security card are signed. Compl.'s Mem. in Support of its Motion for Summary Decision, Attachment 9.

Prior to the inspection by the INS, Respondent had not received any instructions on IRCA's requirements and did not know that it was required to complete I-9 forms for its employees. See Resp.'s Cross-Motion for Summary Decision, at 1. Before hiring any employee, Respondent required proof of residency and copies and filed their Social Security Cards, Resident Alien Cards and 5 Drivers' Licenses or Nevada Identification Cards when available. Id. All these records were presented to the INS on the date of inspection. When Respondent's owners and operators were told by INS agents that I-9 forms had to be filed and were given a copy of an I-9, they answered the forms to the best of their ability. Id.

III. *Discussion*

A. Legal Standards for Summary Decision

The rules of practice and procedure for § 1324a cases before an administrative law judge ("ALJ") provide that an ALJ may enter summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1993).

OCAHO case law follows the standards set forth by the Supreme Court regarding the parties' respective burdens of production in a motion for summary judgment and in opposition to the motion. The moving party has the initial burden of identifying those portions of materials on file that it believes demonstrate the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party satisfies its burden by showing "that there is an absence of evidence" to support the nonmoving party's case. Id. at 325. The burden of production then shifts to the nonmoving party to set forth by affidavit or otherwise, "specific facts showing that there is a genuine issue for trial." Id. at 323-34.

In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the nonmoving party. See Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Only reasonable inferences, however, need be drawn. See Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). As I stated in United States v. Lamont Street Grill, 3 OCAHO 441, at 3 (July 21, 1992):

> The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).] The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement as to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

B. Liability Found

As stated above, the complaint alleges that Respondent (1) failed to prepare the I-9 forms and/or failed to retain and/or make available for inspection the forms for eight listed individuals (Count I); (2) failed to complete section 2 of the I-9 forms within three business days of hire for three listed individuals (Count II); and (3) failed to ensure that Leonardo Gomez-Sanchez properly completed section 1 and failed to properly complete section 2 of his form I-9 (Count II).

Respondent does not dispute that it hired all the employees listed in Counts I through III of the complaint after November 6, 1986. Nor does Respondent dispute that it (1) failed to prepare the I-9 forms for the eight individuals listed in Count I, failed to retain their I-9 forms, and failed to make the I-9 forms available for inspection; (2) failed to complete section 2 of the I-9 forms for those individuals listed in Count II within three business days of their hire; and (3) failed to ensure that Leonardo Gomez-Sanchez properly completed section 1 of his I-9 form and failed to properly complete section 2 of his I-9 form.

Respondent argues, however, that the complaint in this case should be dismissed because, among other things: (1) it did not knowingly violate the law; (2) it did not know that the law required it to prepare and maintain I-9 forms for all of its employees hired after November 6, 1986, including Venna Davis' nephew, Clarren Leavitt; (3) the INS failed to educate Respondent as to IRCA's paperwork requirements; (4) Respondents have cooperated with the INS investigation; and (5) Respondents have acted in good faith because they obtained the social security cards, resident alien cards and Nevada Identification Cards when available from all of its employees.

Although Respondent's reasons for not complying with IRCA's paperwork requirements are mitigating factors to consider in assessing a civil money penalty, they are not affirmative defenses to the charges in the complaint. See Mester Mfg. Co. v. INS, 879 F.2d 561, 569-570 (9th. Cir. 1989) (holding that an employer's ignorance of IRCA's statutory requirements are not a defense to charges of IRCA violations and employers are not entitled to education as to IRCA's paperwork requirements); United States v. Earl and Beverly McDougal and/or Grand Tradition, Inc., DBA Grand Tradition, OCAHO Case. No. 93A00179 (9/13/94) (holding that the government's failure to educate respondents as to IRCA's paperwork requirements and Respondents' ignorance of the law were not affirmative defenses).

Respondent also argues that it should not be obligated to prepare an form I-9 for Venna Davis' nephew, Clarren Leavitt, because Respondent knew that he was a U.S. citizen. Respondent, however, misconstrues an employer's obligation under IRCA to prepare I-9 forms for all of its employees hired for employment after November 6, 1986. The statute requires proper completion and retention of an I-9 form for each covered employee, regardless of whether the employer knows that the individual is authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(B).

1. Count I

Respondent admits that it hired the eight individuals listed in Count I after November 6, 1986; that on September 2, 1992, INS agents requested that Respondent produce the I-9 forms for these eight individuals on September 8, 1992; and that Respondent did not produce any I-9 forms for these eights individuals on September 8, 1992. See Answer at 1. In addition to arguing that it did not know the law and was not educated as to IRCA's paperwork requirements, Respondent argues that it substantially complied with IRCA's requirements because on September 8, 1992, it provided photostatic copies of identification documents for all of its employees, except Clarren Leavitt, to the INS agents.

Respondent states that it requires and makes copies of work permits, social security cards and drivers licenses from all of its employees which are kept on file. Substantial compliance with IRCA's paperwork requirements may be an affirmative defense. United States v. Northern Michigan Fruit Co., OCAHO Case No. 94A00093 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses, Including Substantial Compliance; 7/20/94), at 13; United States v. Manos and Associates, DBA Bread Basket, 1 0CAHO 130, at 14 (2/8/89). As I stated in Bread Basket:

> Like the concept of "reasonableness," substantiality of compliance, if applicable, depends on the factual circumstances of each case. See, e.g., Fortin v. Commissioner of Mass. Dept. of Public Welfare, 692 F.2d 790, 795 (1st Cir. 1982); and Ruiz v. McCotter, 661 F.Supp. 112, 147 (S.D. Tex. 1986). As applied to statutes, "substantial compliance" has been defined as "actual compliance with respect to the substance essential to every reasonable objective of the statute. But when there is such actual compliance as to all matters of substance then mere technical imperfections of form . . . should not be given the stature of non-compliance . . . ." See, e.g., International Longshoreman and Warehouseman Unions Local 35 et al. v. Board of Supervisors, 116 Cal.App.3d 170, 175, 117 Cal. Rptr. 630 (1974); Stasher v. Hager-Haldeman, 58 Cal.2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1962). Generally speaking, it means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

1 0CAHO 130, at 14.

That Respondent obtained copies of the above-described documents from seven of the eight employees listed in Count I and maintained these documents in its files does not constitute an affirmative defense to the charges in Count I of the complaint. See United States v. San Ysidro Ranch, 1 OCAHO 183 (5/30/90) (rejecting employer's arguments (1) that although the I-9s were not fully completed, they were sufficient to comply with IRCA; (2) that by attaching photocopies of work-authorization documents, it substantially complied with the paperwork requirements; and (3) that contrary to the INS' assertions, several of the documents it produced for the purpose of establishing work authorization or identity were sufficient); United States v. J.J.L.C., Inc. t/a Richfield Caters and/or Richfield Regency, 1 OCAHO 154 (4/13/90), reconsideration denied, 1 OCAHO 170 (5/11/90) (where several of the I-9 Forms at issue contained as attachments copies of documents which, if attested to, would support a judgment that the individual is authorized to work in the United States, the ALJ held that where the employer failed to attest to part 2 of the I-9 Form that the employee's documents have been verified and failed to ensure that the employee properly completed part 1, such attachment to the I-9 Form did not constitute "substantial compliance" with IRCA's paperwork requirements); United States v. Citizens Utilities Co., Inc., 1 OCAHO 161 (4/27/90) (holding that respondent did not substantially comply with IRCA (1) by photocopying employee identity and employment-eligibility documents and attaching them to the I-9 Form, rather than filling out the I-9 Form correctly and in its entirety (since the regulations only permit an employer to attach such identification to the I-9 Form in addition to completing section 2 itself and ensuring completion of section 1); (2) by accepting commercially-produced social security card facsimiles for two employees (specifically prohibited in the instructions to the I-9 Form); and (3) by omitting its company name and address from the I-9 Form).

Respondent was required to prepare I-9 forms for all eight of its employees (8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)) and maintain them in its office files for inspection by the INS or the Department of Labor for a minimum of three year after the date of hire or one year after the date the individual's employment terminates, whichever is later. See 8 U.S.C. § 1324a(b)(3), 8 C.F.R. § 274a.2(b)(2) (1994). Respondent failed to comply with both requirements of the law. Accordingly, I find that Respondent failed to prepare, retain and make available for inspection the I-9 forms for Octavio Garcia, Clarren Leavitt, Ignacio Martinez, Jose Medina, Manuel Medina, Raul Medina,

Antonio Chaveren and Humberto Nunez; and therefore, violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with the requirements of 8 U.S.C. §§ 1324a(b) and 1324a(b)(3) and 8 C.F.R. §§ 274a.2(b)(1) and (2).

2. Count II

Respondent admits that it hired Jose Capetillo, Carmelo Garcia and Laurino Medina after November 6, 1986. See Answer at 2. Respondent further admits that it did not complete an I-9 form for these three employees until after it was served with a notice of inspection on September 2, 1994. Respondent's "Employee Status Reports" show that Jose Capetillo was hired on October 6, 1991 but his I-9 form was not completed until September 15, 1992; that Carmelo Garcia was hired on November 1, 1990 but his I-9 form was not completed until September 8, 1992; and that Laurino Medina was hired on January 13, 1992 but his I-9 form was not completed until September 8, 1992. See Compl.'s Mem. in Support of its Mot. for Summary Decision, Attachment 7a, 7b and 7c.

The employer may grant an employee up to three business days from the commencement of employment to produce the documents which establish identity and employment eligibility for inspection by the employer. 8 C.F.R. § 274a.2(b)(1)(ii)(A) (1994). Employers must, within three business days of hire, 8 C.F.R. § 274a.2(b)(ii), physically examine the documentation presented by the employee which establish identity and employment eligibility, 8 C.F.R. § 274a.2(b)(ii)(A), as well as complete section 2 of the I-9 form. 8 C.F.R. § 274a.2(b)(ii)(b). There are exceptions, but Respondent does not fit within any of them. The three-day period may be extended to 90 days after the date of hire if an employee presents receipts for application of an acceptable replacement document within the first three days but is not applicable to an alien who indicates he or she does not have work authorization at the time of hire. See 8 C.F.R. § 274a.2(b)(1)(vi) (1994). An exception is also provided for employment which will last less than three business days. In such case, the employer is required to review the documents and complete the I-9 form no later than the end of the employees first day of work. 8 C.F.R. § 274a.2(b)(1)(iii) (1994).

In the instant case, the dates of hire and the dates on the I-9 forms for the persons listed in Count II clearly show (1) that the I-9 forms were not completed within three business days of hire and (2) that the 90-day exception does not apply. I therefore find that Respondent hired Jose Capetillo, Carmelo Garcia and Laurino Medina for

employment in the United States after November 6, 1986 but failed to complete section 2 of the I-9 forms for these three individuals within three business days of their hire; and therefore, that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii) (1994).

3. Count III

Respondent admits that it hired Leonardo Gomez-Sanchez ("Gomez-Sanchez") for employment in the United States after November 6, 1986. See Answer, at 3. In addition to its defenses to the other allegations in the complaint, Respondent argues that Gomez-Sanchez's I-9 form was filled out to the best of its understanding and was made available for inspection to the INS.

An employer is required (1) to ensure that an employee completes section 1 of the I-9 form and (2) to complete section 2 of the I-9 form. See 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii) (1994). The I-9 form for Leonardo Gomez-Sanchez provided to the INS was not signed or dated by the employee in section 1 and was not completed or signed by the employer in section 2. See Compl.'s Mem. in Support of its Mot. for Summary Decision, Attachment 9. Although the I-9 form indicates that Gomez-Sanchez has limited work authorization, no expiration date is included on the form.

Complainant argues that based upon Respondent's admission that it did not know of the requirement to prepare I-9 forms for its employees until after the employee survey of August 28, 1992 that resulted in the apprehension of Gomez-Sanchez, it is likely that Gomez-Sanchez did not complete section 1 of his I-9 form until after his apprehension. More-over, Complainant argues that the signature on Gomez-Sanchez's fraudulent social security card does not match the handwriting in section 1 of the form. I make no findings on these assertions because Respondent did not submit the I-9 form for the purpose of misleading, misinforming or deceiving the INS. Moreover, there is no evidence to show that Respondent knew or had reason to know that the social security card of Gomez-Sanchez was fraudulent. If there was any such evidence, Complainant could have charged Respondent with a "knowing" violation. See 8 U.S.C. § 1324a(a)(1)(A).

Section 2 of Gomez-Sanchez's I-9 form is incomplete. Respondent failed to sign, date and certify that the alien registration card with a photograph of Gomez-Sanchez and his original social security card appeared to be genuine and related to that individual and to the best

of Respondent's knowledge was eligible to work in the United States. I therefore find that Respondent failed to ensure that its employee, Leonardo Gomez-Sanchez, properly completed section 1 and failed to properly complete section 2 of the form I-9 as charged in Count III of the complaint. Therefore, Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii) (1994).

IV. *Civil Money Penalty*

The statutory parameters for assessing and adjudicating the civil money penalty are set forth at 8 U.S.C. § 1324a(e)(5). Each paperwork violation requires a penalty of "not less than $100.00 and not more than $1,000.00 for each individual with respect to whom such violation occurred." Id. In determining the amount of the penalty, I am required to consider the five factors set forth in that section of the statute: (1) size of the employer's business; (2) good faith of the employer; (3) seriousness of the violation; (4) whether the individuals involved were unauthorized aliens; and (5) the history of previous violations. Although the statute requires that I consider these five mitigating factors, I can consider others. See United States v. M.T.S. Service Corp., 3 OCAHO 448, at 4 (8/26/92) ("So long as the statutory factors are taken into due consideration, there is no reason that additional considerations cannot be weighed separately."); United States v .Pizzuto, 3 OCAHO 447, at 6 (8/21/92) ("Section 1324a(e)(5) does not restrict the ALJ to considering only the five factors enumerated when determining the amount of civil penalties.").

In the instant case, I will consider the additional factor of whether the employer took any steps to determine the identity and work authorization of its employees. In the initial adjudication 44 liability for paperwork violations under 8 U.S.C.§ 1324a(a)(1)(B), I generally apply a mathematical formula, giving equal weight to each of the five factors in adjudging the civil money penalty for paperwork violations. See United States v. Felipe, Inc., 1 OCAHO 93 (10/11/89), aff'd by CAHO,[3] 1 OCAHO 108, at 7 (11/29/89); United States v. Broadway Tire, Inc., 2 OCAHO 310 (4/2/91); United States v. Hanna, DBA Ferris and Ferris Pizza, 1 OCAHO 200 (7/19/90); United States v. Dittman, 1 OCAHO 195 (7/9/90); United States v. Le Merengo/Rumors Restaurant, 1

[3] The affirmation of the Chief Administrative Hearing Officer ("CAHO") states that while the Felipe formula was "acceptable," it was not to be understood as the exclusive method for keeping with the five statutory factors. Felipe, 1 OCAHO 108, at 7 (11/29/89).

OCAHO 157 (4/20/90); United States v. The Body Shop, 1 OCAHO 149 (4/2/90); United States v. Juan V. Acevedo, 1 OCAHO 95 (10/12/89). But see United States v. Earl and Beverly McDougal, OCAHO Case No. 93A00179 (9/13/94) (I did not follow Felipe because the government was willing to accept a minimum penalty of $100.00 for each violation); United States v. John A. Torres, DBA Altamont Roofing, OCAHO Case No. 91100162, at 7 (6/11/92) (where INS asked for the minimum fine of $100.00 for each violation, I did not follow Felipe); United States v. Wood'n Stuff, 3 OCAHO 574 (11/9/93) (where the Felipe formula would have resulted in a civil penalty greater than $30,000.00, I refused to apply it where the respondent company was defunct and had no assets and there was no evidence that the respondent was involved in deliberately seeking and hiring illegal aliens); United States v. Cuevas, 1 OCAHO 273 (12/3/90) (where application of the Felipe formula would have resulted in a $640.00 fine, I deferred to the INS recommended fine of $750.00, finding it "fair and reasonable"). Other OCAHO ALJs have applied the five statutory factors on a judgmental basis. See United States v. Giannini Landscaping, Inc., 4 OCAHO 573, at 7 (11/9/93) (and other ALJ decision cited therein).

The Felipe formula has been criticized by legal commentators because it allegedly "invites manipulation and abuse." See Mary E. Pivec and Georgia B. Powell, "1991 Employer Sanctions Update," 91 Immigration Briefings 12 (Dec. 1991) at 17. Ms. Pivec and Ms. Powell state:

> Should the INS decide to apportion its fines on the statutory mitigation factors, it may have its fines reduced again by the ALJ should the employer request a hearing. The INS fine amount would create a ceiling from which the ALJ would subtract the $100.00 minimum and a pro-rata one-fifth share of the difference for each mitigating factor found present. Thus, the INS is discouraged from setting reasonable fine amounts in the beginning, particularly in cases likely to be heard by ALJ Schneider in the event of appeal.

The commentators' assertion that I rely upon the INS fine as a ceiling from which I subtract the $100.00 minimum and a pro-rata 1/5 share of the difference for each mitigating factor does not correctly state the methodology that I formulated in Felipe. See Felipe, 1 OCAHO 93, at 4-5. Furthermore, I do not disregard the INS recommended fine amount, most specifically in cases where the INS has requested a minimum fine of $100.00 per violation.

I developed the mathematical formula set out in Felipe in attempt to be fair and consistent in my rulings on civil money penalties for IRCA paperwork violations. As the cases discussed above show, the Felipe formula has provided such consistency and fairness. When I have

found that application of the Felipe formula was not appropriate, I followed a judgmental approach.

I find that the Felipe analysis is appropriate to this case, but with a sixth mitigating factor. Compare Wood'n Stuff, 3 OCAHO 574 (where I added as mitigating factors the business status and financial condition). With respect to Count I, Complainant has requested that the fine be set at $1,600.00 ($200.00 for each violation); for Count II, Complainant requests $575.00 ($175.00 for each violation); and for Count III, Complainant requests $175.00. Under Felipe, I give equal weight to each of the five factors ($180.00 per mitigating factor, which represents the difference between $100.00, the minimum that can be assessed, and $1,000.00, the maximum that can be assessed, divided by five). From an assessment of each of those factors, I then arrive at an appropriate civil penalty. I do this by deducting from the maximum allowed assessment of $1,000.00 per violation, a percentage of $180.00 per factor depending upon the percentage I determine should be mitigated on that factor. For example, if I find that each factor should be fully mitigated, I will deduct $180.00 x 5, or $900.00 from $1,000.00 and assess a minimum fine of $100.00. In the case at bar, because I have added a sixth mitigating factor, where applicable, each mitigating factor's maximum monetary value is $150.00 (900 divided by six).

A. Applying the Felipe Formula to this Case

Applying the Felipe formula with the adjustments indicated above to the undisputed evidence in this case, I make the following findings:

1. Size of Business

Under Felipe, the size of a business can be determined by business revenue or income, amount of payroll, number of salaried employees, nature of ownership, length of time in business, and the nature and scope of business facilities. Felipe, 1 OCAHO 93, at 7. The determination of the size of the business, however, is not limited to those factors. United States v. Basim Aziz Hanna, DBA Ferris and Ferris Pizza, 1 OCAHO 200, at 6.

I have consistently mitigated the fine by $180.00--the maximum amount I give to the size of the business--in cases in which the respondent was a small business. My rationale is that a small business cannot afford (1) to retain an attorney to continually advise the owner of the law's requirements or (2) to absorb a heavy fine for multiple

paperwork violations. As Respondent in the instant case has pointed out:

> Although we do not doubt the importance of each regulation, it is increasingly difficult to be aware of each one imposed by each agency. We do our best to comply with the IRS, FUTA, SUTA, OSHA, EPA, Federal Department of Agriculture, ICC, INS, SIIS and the myriad of state, county and city agencies.

Respondent's Letter to ALJ Schneider, dated December 13, 1993, at 1.

Respondent states that it is a small business whose employees have tried to comply with all government regulations themselves, but who find it cost prohibitive to hire experts in each area of the law. Id. The government admits that "the number of Form I-9's shows that this business was a small employer." Compl.'s Mem. in Support of its Motion for Summary Decision, at 8-9. As it is undisputed that Respondent is a small business, the fine shall be mitigated $150.00 based on this factor.

2. Good Faith

Good faith has previously been defined as "the honest intention to exercise reasonable care and diligence to ascertain and comply with the IRCA's record-keeping provisions. See Hanna, 1 OCAHO 200, at 6 (citing cases). IRCA's paperwork requirements have been the law for over seven years. The INS and other federal agencies have provided education about IRCA's paperwork requirements to much of the public through brochures, television and educational visits with members of the business community.[4] The government realizes, however, that

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[4] The amount of time and effort that INS has devoted to educating the public has been remarkable. As of July 1991, the

> INS [had] contacted more than 2.8 million employers about the requirements of the employer sanctions and antidiscrimination provisions. In the March 1990 GAO report, GAO reported that of the employers surveyed, 83 percent were aware of IRCA, stating that "according to our 1989 survey results, about 1.7 million of the 3.1 million employers who were aware of the law and had a basis to judge INS' education efforts said INS' efforts had increased their familiarity with the law." INS faces a continuing challenge to ensure that its educational efforts sustain public information levels essential to compliance in dynamic markets. Although general familiarity with the law has increased, there is a need to improve understanding of the specific details of the employer sanctions provisions. Moreover, fluctuations in the economy--and the consequent creation of new businesses and changing industries--create a constantly changing employer population in need of sanctions and anti-discrimination education.

(continued...)

many small business owners still are not aware of IRCA's paperwork requirements and the government, therefore, is continuing in its effort to educate.[5]

Respondent asserts that it has attempted to learn about all federal and state regulations which affect Davis Nursery, but did not learn about IRCA's requirements until the INS inspection. The INS does not dispute Respondent's assertion, but demonstrates no sympathy. Instead, the government argues that because Respondent has given no reason for failing to learn about and implement IRCA's record-keeping requirements, I should not mitigate for the good faith factor in any amount. I disagree.

Respondent's owner, Venna Davis, is 75 years old, has been in business 42 years and has never been charged with violating an immigration law. It is also undisputed that Ms. Davis has tried to keep up with all the federal and state regulations that govern her business operations, but did not learn about IRCA. Her conscientious effort to learn and follow all the laws is entitled to some mitigating weight. Mitigation is also appropriate because the government's reports referred to above indicate that there are numerous small business owners who also do not know about IRCA's paperwork requirements. Taking into consideration Respondent's efforts to keep up with all the federal laws and regulations, its lack of funds to retain corporate counsel and the problems the INS has in educating small business operations about IRCA, I will mitigate the fine by $75.00, 50% of the possible $150.00 mitigation amount for this factor.

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[4](...continued)
Immigration Reform and Control Act: The President's Second Report on the Implementation and Impact of Employer Sanctions at 16 (July 1991).

[5]Although studies have shown that awareness of IRCA among employers and workers has become widespread,

> those who fully underst[and] the law's requirements [are] less evenly distributed. In particular, field research bears out the observation drawn from the 1988 [Government Accounting Office (GAO)] employer survey that knowledge of IRCA varies directly with the size of the firm. Large firms with professionally-staffed personnel departments possess extensive knowledge about I-9 requirements. Information varies considerably among smaller firms and within this segment of the economy by industrial sector.

Immigration Reform and Control Act: The President's First Report on the Implementation and Impact of Employer Sanctions (July, 1991) at 125.

3. Seriousness of the Violation

Complainant correctly notes that there are degrees of seriousness of paperwork violations. Felipe, 1 OCAHO 93, at 11; Basam Aziz Hanna, 1 OCAHO 200, at 11. The CAHO has stated that a complete failure to complete an I-9 form is serious conduct that renders ineffective the Congressional prohibition against the employment of unauthorized aliens. United States v. Charles C.W. Wu, 3 OCAHO 434, at 2 (7/9/92) (Modification of the Decision and Order of Administrative Law Judge):

> Certainly, . . . a failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious.

According to Respondent, after INS agents explained IRCA's paperwork requirements to Ms. Davis, provided her with a sample I-9 form, and instructed her as to how to prepare it, she made photocopies of the I-9 form and gave one to each employee regardless of national origin or family relationship. Respondent states that the I-9 forms for all its employees were filled out to the best of Ms. Davis' ability and were made available at the inspection. Although it is undisputed that Respondent produced I-9 forms for a number of its employees at the INS inspection, the government asserts that no I-9 forms were completed or produced for the eight employees listed in Count I. As Respondent has not disputed that it did not complete or produce I-9 forms for the eight individuals listed in Count I, I find that they were neither prepared nor produced.

All of the violations in Count I are for failure to complete, retain or make available for inspection the I-9 forms. Because the evidence shows that no I-9 forms for the eight listed employees were prepared or made available at the inspection, with regard to Count I, I will not mitigate the fine based on this factor.

Count II includes violations for not completing the I-9 forms within three business days of hire. It is obvious from inspecting the I-9 forms that they were completed at or about the time of inspection. Although this violation is not as serious as the complete failure to complete an I-9 form, complete mitigation is not warranted. I will mitigate the fine by $112.50, 75% of the possible $150.00 mitigation amount for this factor.

Count III includes violations relating to the non-completion of section 1 and section 2 of the I-9 form. Completion of these sections of the I-9 form are critical for deterring hiring illegal aliens. An inspection of this form suggests that it was completed after Gomez-Sanchez was taken

into custody. This violation is more serious than a three-day violation because neither the employer nor the employee ever certified the information on the form. In fact, Gomez-Sanchez claimed he never saw an I-9 form. See Compl.'s Mem. in Support of its Motion for Summary Decision, Attachments 2-3. In view of these facts, I find that the seriousness of Respondent's failure to properly complete this I-9 form does not warrant mitigation based on this factor.

4. Whether the Employee Was an Unauthorized Alien

It is undisputed from the record that none of the 13 employees listed in Counts I and II were unauthorized aliens. Therefore, with regard to these two counts, I will mitigate the fines by $150.00 each, based on this factor. It is undisputed, however, that Gomez-Sanchez was an alien unauthorized for employment in the United States.

Gomez-Sanchez, who was born in Toluca, Mexico, admitted to the INS agents that he began working at Davis Nursery about six months prior to August 28, 1992. He also admitted that he was able to obtain employment with Respondent by using false and fraudulent documents. Although Respondent has not been charged with knowingly hiring any illegal aliens, I cannot mitigate in any amount on Count III for this factor because Gomez-Sanchez was an unauthorized alien. The fact that Respondent did not know Gomez was an illegal alien is not relevant to determining mitigation for a paperwork charge. It is an affirmative defense to a more serious violation of IRCA. i.e. violation 8 U.S.C. section 1324a. If Respondent had prepared an I-9 form at the time Gomez-Sanchez first started to work, it might have realized that the documents presented by Gomez-Sanchez were fraudulent and not hired him.

5. No Prior History of IRCA Violations

Complainant concedes that Respondent does not have any prior history of employer sanction violations. Consequently, I will mitigate $150.00 for this factor on all counts of the complaint.

6. Respondent's Practice of Requiring Each Employee to Prove Identity and Residency

Although Respondent did not prepare any I-9 forms until after the INS inspection, Ms. Davis stated that before hiring any employee, she required proof of residency and filed copies of each employee's Social Security card, resident alien card (work permit) where applicable,

driver's license or Nevada identification card when available arguably to make sure the company did not hire any illegal aliens. See Ms. Davis' Letter to ALJ Schneider, dated February 1, 1994, at 1. Ms. Davis further stated that these forms of identification were photocopied and kept on file and that she made them available to the INS officer at his office. Answer, at l. The only individual as to whom Davis Nursery had no identifi- cation was Clarren Leavitt, Ms. Davis' nephew. Id.

I conclude that Respondent's efforts to ensure that all its non-relative employees provided identification and work permits, the copying and retaining of all these documents for its employees and providing them to the INS shall mitigate each alleged violation by $150.00.

B. Conclusion

The complaint filed in this case seeks a civil monetary penalty of $1,600.00, or $200.00 for each of the eight violations alleged in Count I; $525.00, or $175.00 for each of the three violations alleged in Count II; and $175.00 for the violation alleged in Count III, for a total civil monetary penalty of $2.300.00. Neither the statute nor the regulations require me to follow the Prayer for Relief in the complaint.

1. Count I

I have found Respondent liable on Count I for failing to prepare an I-9 form for each of the eight listed employees. I have mitigated the maximum allowable fine for this Count as follows, for each violation: (1) $150.00, for the size of the business; (2) $75.00, for good faith; (3) $0.00, for the seriousness of the offense; (4) $150.00, for lack of any evidence showing that any of the eight employees were not authorized for employment in the United States; (5) $150.00, for lack of any prior IRCA paperwork violations; and (6) $150.00, for the fact that Respondent required all of its employees to provide Respondent with identification and a work permit (if applicable). The total amount of mitigation for each of the eight violations in Count I is $675.00. Subtracting the $675.00 in mitigation from $1,000.00, the amount of fine for each of the eight violations in Count I is $325.00, for a total of $2,600.00.

2. Count II

I have found Respondent liable on Count II for failing to complete section 2 of the I-9 form within three business days of hire for three employees, Joe Capetillo, Carmelo Garcia and Laurino Medina. I have

mitigated the maximum allowable fine for this count as follows, for each violation: (1) $150.00, for the size of the business; (2) $75.00, for good faith; (3) $112.50, for the seriousness of the offense; (4) $150.00, for a lack of evidence that any of the three employees were unauthorized for employment in the United States; (5) $150.00, for no prior history of IRCA paperwork violations; and (6) $150.00, for Respondent's practice of requiring each employee to prove identity and residency. The total amount of mitigation for each of the three violations of Count II is $787.50. Subtracting the $787.50 in mitigation from $1,000.00, the fine for each of the three violations in Count II is $212.50 for a total fine on Count II of $637.50.

3. Count III

I have found Respondent liable on Count III for failing to complete sections 1 and 2 of the I-9 form for Leonardo Gomez-Sanchez. I have mitigated the maximum allowable fine on this count as follows: (1) $150.00, for the size of the business; (2) $75.00 for Respondent's good faith; (3) $0.00 for the seriousness of the offense; (4) $0.00 because Gomez-Sanchez was unauthorized for employment in the United States; (5) $150.00, for lack of any prior IRCA violations and (6) $150.00, for Respondent's practice of requiring all of its employees to provide Respondent with identification and a work permit. The total amount of mitigation for the violation of Count III is $525.00. Subtracting the $525.00 in mitigation from $1,000.00, the fine for the violation in Count III is $475.00.

Having carefully considered all the mitigating factors required by IRCA and our regulations and the additional mitigating factor of Respondent's practice of requiring each employee to provide documents proving identification and work authorization, and having analyzed the evidence with respect thereto, I find that a civil monetary penalty of $3,712.50 is fair and reasonable.

V. *Conclusion*

There is no dispute as to any material fact in this case and I conclude that the INS is entitled to summary decision as a matter of law. Accordingly, Complainant's motion for summary decision is GRANTED and Respondent's cross-motion is DENIED.

VI. *Ultimate Findings Of Fact And Conclusions Of Law*

Based upon the foregoing analysis, I conclude that:

1. No genuine issue as to any material facts have been shown to exist with respect to Counts I, II and III of the complaint and pursuant to 28 C.F.R. § 68.38 (1993), Complainant is entitled to summary decision as to all counts in the complaint as a matter of law.

2. Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired for employment in the United States the eight individuals named in Count I after November 6, 1986, but failed to prepare, retain and make available for inspection the I-9 forms for those eight individuals, as required by 8 U.S.C. §§ 1324a(b) and 1324a(b)(3) and 8 C.F.R. §§ 274a.2(b)(1) and (2).

3. Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the three individuals named in Count II after November 6, 1986, but failed to complete section 2 of the I-9 forms for these three individuals within three business days of their hire, as required by 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii) (1994).

4. Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent failed to ensure that its employee named in Count III, Leonardo Gomez-Sanchez, properly completed section 1 and failed to properly complete section 2 of the I-9 form, as required by 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii) (1994).

5. Determination of a civil monetary penalty for violations of IRCA's verification requirements are discretionary decisions that are guided by factors of mitigation as set out by Congress in 8 U.S.C. § 1324a(e)(5).

6. In determining the amount of penalty, due consideration shall be given to the size of the employer's business, the employer's good faith, the seriousness of the violation, whether the individual was an unauthorized alien, and the employer's history of previous violations.

7. In determine the amount of penalty in this case, I shall consider Respondent's practice of requiring each employee to prove identity and residency on an equal basis with the five statutorily-required factors.

8. Regarding Count I, for each of the eight violations, the maximum allowable fine (a) will be mitigated by the full weight ($150.00/each) accorded (i) the small size of the business, (ii) the lack of evidence showing that any of the eight employees were not authorized for employment in the United States (iii) the lack of any prior IRCA paperwork violations and (iv) the fact that Respondent required all of

its employees to provide Respondent with identification and a work permit (if applicable); (b) will be mitigated by a 50%-weight ($75.00/ each) for good faith as Venna Davis tried to keep up with all the federal and state regulations that govern her business operations, could not afford corporate counsel and the difficulty the INS has in educating small business operations about IRCA; and (c) will not be mitigated for the seriousness of the violation.

9. Accordingly, the appropriate amount of civil monetary penalty to be assessed against Respondent for Count I of the complaint is $2,600.00.

10. Regarding Count II, for each of the three violations, the maximum allowable fine (a) will be mitigated by the full weight ($150.00/each) accorded (i) the small size of the business, (ii) the lack of evidence showing that any of the three employees were not authorized for employment in the United States (iii) Respondent's lack of prior IRCA paperwork violations and (iv) the fact that Respondent required all of its employees to provide Respondent with identification and a work permit (if applicable); (b) will be mitigated by a 50% weight ($75.00/each) for good faith; and (c) will be mitigated by a 75% weight ($112.50/each) for the seriousness of the violation.

11. Accordingly, the appropriate amount of civil monetary penalty to be assessed against Respondent for Count II of the complaint is $637.50.

12. Regarding Count III, the maximum allowable fine (a) will be mitigated by the full weight ($150.00/each) accorded (i) the small size of the business, (ii) Respondent's lack of prior IRCA paperwork violations and (iii) the fact that Respondent required all of its employees to provide Respondent with identification and a work permit (if applicable); (b) will be mitigated by a 50% weight ($75.00/each) for good faith; and (c) will not be mitigated for the seriousness of the violation and because Gomez-Sanchez was unauthorized for employment in the United States.

13. Accordingly, the appropriate amount of civil monetary penalty to be assessed against Respondent for Count III of the complaint is $475.00.

14. Accordingly, the total civil monetary penalty to be assessed against Respondent four Counts I, II and II of the complaint is $3,712.50.

15. This Decision and Order is the final action of the administrative law judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv) (1993). As provided at 28 C.F.R. § 68.53(a)(2) (1993), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer modifies or vacates it. Both administrative and judicial review are available to the parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7) and (8); 28 C.F.R. § 68.53 (1993).

SO ORDERED this 30th day of September, 1994, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge