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

March 15, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding OCAHO Case No. 95A00156
C&K METALS, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO LIMIT SCOPE OF DISCOVERY, MOTION TO SUPPRESS, AND REQUEST FOR HEARING ON SAME

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (INA). On November 3, 1995, the Complainant, United States of America, Department of Justice, Immigration and Naturalization Service (Complainant or INS) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against C&K Metals, Inc. a/k/a Leach Cast & Steel, Inc. (C&K or Respondent), alleging that Respondent had failed to complete Employment Eligibility Verification Forms (Form I–9) for twenty-two named employees hired after November 6, 1986 (Count I), and failed properly to complete or to ensure that employees properly completed Form I–9 for 36 others (Counts II through IV). The complaint was served upon C&K on November 15, 1995, together with a Notice of Hearing and a copy of the applicable Rules of Practice and Procedure[1].

Respondent thereafter filed a Motion to Suppress and Request for Hearing thereon, an Answer "Subject to Motion to Suppress," and a Motion to Limit Scope of Discovery Pending Ruling on Suppression.

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1995).

Complainant filed its timely Opposition to Respondent's Motions to Suppress and to Limit Scope of Discovery, and both Motions are ripe for ruling.

Each appears to be both overbroad and premature, inasmuch as it does not appear that any discovery request has yet been made, or that any evidence has yet been offered. OCAHO Rules provide, moreover, that a motion or request must state with particularity the grounds therefor, 28 C.F.R. §68.11(a); the Motions fail in this respect as well.

Motion to Limit Scope of Discovery

Respondent's Motion to Suppress is directed to its Forms I–9 and personnel and payroll records seized by INS pursuant to an administrative search warrant. Respondent argues that were discovery to proceed while its Motion to Suppress is pending, the INS would be able to "re-obtain" in a facially lawful manner "the very documentation and evidence allegedly unlawfully seized, thereby wholly undermining and rendering meaningless the rights Respondent seeks to assert and protect."

There is no reason articulated why Respondent anticipates that Complainant's discovery requests would be directed to the material already in INS's possession. Neither is there any basis asserted to anticipate that the OCAHO Rules of Practice and Procedure would not afford the Respondent the opportunity to object to specific discovery requests at the appropriate time when they are made, so that a particularized determination could be made in the context of a specific discovery request, rather than, as here, in a vacuum. Similarly, there is no basis asserted to anticipate that Respondent's evidentiary concerns could not be addressed by a motion *in limine* directed to specific items of evidence when they are offered.

Respondent goes on to request that the scope of discovery be limited to the following three categories, the first of which appears to defeat the purpose of the motion to limit scope of discovery:

> 1) the identity and content of the I–9's and other Documents and information obtained by the INS in the course of executing an Administrative Search Warrant on Respondent's premises;
>
> 2) the identity and content of the Administrative Search Warrant itself and of the affidavits and other documents submitted by INS to obtain such warrant; and

3) whether the INS gave Respondent three days' notice, or any notice whatsoever, before seizing its I–9's and other personnel records on March 28, 1995 and/or as a result thereof.

The first category seems to include the very materials (and only the materials) which Respondent asserts were wrongfully seized and now seeks to protect from discovery, and which Respondent purportedly fears would be "re-obtained" if discovery were to proceed. It is thus difficult to reconcile the inclusion of this subject matter in the limited permitted scope of discovery requested, with the other assertions in the motion.

In any event, the Motion to Limit Scope of Discovery is denied, without prejudice to Respondent's right to object to specific discovery requests if and when they are made, or to move *in limine* with respect to particular items of evidence as appropriate, if and when any objectionable evidence is offered.

Motion to Suppress and Request for Hearing on Same

As grounds for the Motion to Suppress, Respondent asserts that INS performed an unreasonable search and seizure in violation of its own regulations and of the Fourth Amendment when it seized Respondent's I–9's and other personnel and payroll records in the course of executing an administrative search warrant on March 28, 1995. Respondent complains first that it was not provided three days' notice prior to inspection of the I–9's as required by 8 C.F.R. §274a 2(b)(2)(ii), and second that the warrant was so broad, unspecific, and all encompassing that its execution "constituted an exercise of unbridled discretion by the INS officers." No case law is cited in support of either proposition.

A. *The Three-Day Notice of Inspection under 8 C.F.R. §274a(2) Does Not Apply to Administrative Search Warrants.*

The short answer to Respondent's argument based on the three-day notice required for an inspection of I–9 Forms is that the administrative search performed on March 28, 1995 was not a routine inspection of I–9's. Such a routine inspection by INS, by the Special Counsel, or by the Department of Labor, calls for a three-day notice precisely because it does *not* require a warrant or a subpoena. Nothing in §274a.2(b)(2) remotely suggests that the power to obtain documents by warrant or subpoena is impaired; in fact, this provision expressly provides to the contrary:

> No subpoena or warrant shall be required for such inspection, but the use of such enforcement tools is not precluded.

A valid administrative inspection program is viewed as a constitutionally adequate substitute for a warrant under certain circumstances, in that it performs the same basic functions as are served by the warrant. First, it advises the owner of the property that the search will take place pursuant to law and within a defined scope. Second, it limits the discretion of the officials by describing what may be searched for or seized. *Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994). For this reason, searches have been sustained under such administrative inspection programs, without the necessity of obtaining a warrant.

Respondent cites no authority, and I am aware of none, for the proposition that the existence of such an administrative inspection program invalidates a search conducted pursuant to a lawfully obtained warrant.

B. *No Fourth Amendment violation has been specifically described.*

It is well established that the Fourth Amendment guarantee against unreasonable searches and seizures extends to administrative searches, *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982)(OSHA citation hearing), including investigations by INS. Similarly, OCAHO precedent makes clear that in appropriate circumstances the exclusionary rule may apply in its administrative proceedings. *United States v. Jenkins*, 5 OCAHO 743 (1995), *United States v. Kuo Liu,* 1 OCAHO 235 at 2 (1990)[2].

As was observed in *O'Connor v. Ortega*, 480 U.S. 709 (1987), however, the impact of the exclusionary rule is necessarily fact-driven. Conclusory pronouncements with no factual basis lending substance to them are simply not adequate to trigger a hearing on a Motion to Suppress when the analysis required to make an appropriate ruling on such motion is driven by evidence, not by hypothesis.

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[2] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

Respondent's description of the challenged warrant as "an exercise of unbridled discretion by the INS officers" ignores the fact that the warrant was not executed by the INS, but by a neutral and detached Magistrate, and is therefore entitled to deference as to its finding that probable cause existed, *Martin v. Int'l Matex Tank Terminals—-Bayonne*, 928 F.2d 614 (3rd Cir. 1991) citing *Massachusetts v. Lipton*, 466 U.S. 727, 773 (1984).

A party seeking a hearing on a Motion to Suppress evidence obtained pursuant to a presumptively valid warrant must come forward with more than vague, general assertions of overbreadth of the warrant. Unlike a challenge to a warrantless search, a challenge under these circumstances must make a substantial preliminary showing that the Respondent had a legitimate expectation of privacy that was violated by the search. *United States v. Kyllo*, 37 F.3d 526 (9th Cir. 1994). That showing has not been made here.

The warrant at issue in this proceeding was signed by a U.S. Magistrate Judge on March 23, 1995. It authorized entry upon specifically described premises, to search for and to seize records, items, and persons described as follows:

1. aliens present in the United States in violation of Immigration Law (see generally 8 U.S.C. Section 1101 et. seq. and 8 U.S.C. 1251);

2. all I–9 Forms required to be kept pursuant to 8 U.S.C. 1324a(b) and 8 C.F.R. 274a.2 and other substitute verification forms relating to all employees at said Place and Premises;

3. all employment applications and all personnel records relating to the hiring of all employees;

4. all payroll records reflecting a list of current personnel since January 1, 1994; and

5. all time cards and other documents reflecting time worked since January 1, 1994, for all employees of said corporation.

The warrant was issued based on the affidavit of Special Agent M.K. Murphy who stated that he had received information from a named Supervisory Special Agent about the employment of illegal aliens at C&K, that he checked with the Texas Employment Commission for a list of C&K employees by name and social security number, and that he checked with the Social Security Administration and found that 10 individuals were using numbers that were not valid or belonged to someone else, which he stated is typical where illegal aliens are using counterfeit documents.

The return on the warrant, indicating the inventory of persons or property seized, lists:

1. Attached list of 6 names
2. personnel/payroll data for all current employees
3. (I–9's) Employment Eligibility Verification Forms for 46 current employees
4. Copies of time cards for current personnel/employees.

Although Respondent asserts that the search was performed in violation of the Fourth Amendment, it does not allege that the warrant was not based upon probable cause. Rather, Respondent indicates that the warrant is defective as "so broad, unspecific, and all-encompassing that its execution constituted an exercise of unbridled discretion by the INS officers, and an unreasonable search and seizure". The Motion further asserts that the warrant is defective in failing to identify:

1. which, if any, of Respondent's employees were unlawfully present in the United States;
2. which, if any, of Respondent's I–9's and other personnel and payroll records constituted evidence of violations of law; and
3. how, if in any manner, the I–9's and other personnel and payroll records of Respondent constituted evidence of any violation of law by anyone.

First, as previously noted, the warrant was not "executed" by the INS but by a neutral United States Magistrate. Second, it is not self-evident in what manner the descriptive terms: I–9 forms, employment applications, personnel and payroll records, time cards, and other documents reflecting time worked since January 1, 1994, or aliens present in the United States in violation of Immigration Law, are lacking in specificity. If Respondent intends to suggest that the suspected individuals must be identified by name in advance, it is simply wrong. The law is otherwise. *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987)*; Int'l Molders & Allied Workers' Local Union v. Nelson*, 799 F.2d 547 (9th Cir. 1986); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981) cert. denied 455 U.S. 940 (1982). If Respondent intends to suggest that it is the subject of the search rather than the Magistrate who must approve in advance the items to be searched for, this too is wrong. As to questions about which I–9's or other records are evidence of a violation of law, and in what manner, that question is answered in the Complaint.

Respondent's Motion to Limit Scope of Discovery is denied. Respondent's Motion to Suppress and Request for Hearing on Same is denied.

SO ORDERED.

Dated and entered this 15th day of March, 1996.

ELLEN K. THOMAS
Administrative Law Judge