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

January 10, 1997

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
JULIO CARPIO-LINGAN, Respondent.	)	OCAHO Case No. 95C00154
and	)	
UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
ISRAEL VELASQUEZ-TABIR, Respondent.	)	OCAHO Case No. 95C00155

ORDER DENYING MOTION *IN LIMINE*

These are companion cases arising under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c (INA or the Act), each of which involves a former employee of the Texas Arai Company and each of which poses a similar issue based on the same search of the employer's premises at Texas Arai and the seizure of certain documents. In each case, the complainant, the Immigration and Naturalization Service (INS) alleged that respondent knowingly used, attempted to use, and possessed a forged, counterfeited, altered, and falsely made alien registration card (Form I–151)[1] after

[1] This document is also referred to as Form I–551. There are numerous versions of both Forms I–151 and I–551, depending upon the date of issue. The document is also known as a resident alien card, an alien registration receipt card, and, more colloquially, as a "green card," although most versions are not green.

November 29, 1990, for the purposes of satisfying a requirement of the Act. Respondents' answers both denied the material allegations of the complaint and set forth certain affirmative defenses, which were subsequently stricken with leave granted to amend. Amended answers alleged two affirmative defenses both of which were stricken on June 13, 1996, without prejudice to the right of respondents to move *in limine* to exclude evidence allegedly obtained unlawfully. Respondents both did so move, seeking to exclude as evidence the allegedly fraudulent alien registration cards which INS obtained from Texas Arai, because of the manner in which INS acquired copies of the alleged fraudulent documents. The individual circumstances differ slightly for each respondent, but the principles applicable to the search, and therefore to both motions, are the same. As the motions *in limine* are virtually identical, the cases are consolidated for the sole purpose of ruling upon the issue of whether the subject resident alien cards should be suppressed.

I. *The Submissions of the Parties*

In support of his motion *in limine,* each respondent filed a brief in which he argues that INS acted in violation of his fourth amendment rights in obtaining the alien registration card from his employer because he has a privacy interest in his employer's personnel records which interest has been invaded. Respondents' argument is that their employer, Texas Arai, "colluded" with INS to have its worksite raided and its workers apprehended by INS in retaliation for their participation in the formation of a union. Respondents seek to exclude the documents as evidence because they therefore believe that they were unlawfully obtained. Each respondent has also filed an affidavit in opposition to complainant's motion for summary decision. Carpio-Lingan's affidavit asserted that Texas Arai "called Immigration" on June 23[2], 1994, acting in the hope of dissolving a newly formed union. That same day he was detained by INS as he arrived for work and subsequently signed papers he did not understand. He was jailed for several days until bail was granted. Velasquez-Tabir's affidavit is less explicit as to any specific act of the employer, but it too sets forth the details of his arrest on June 22, 1994 at or near the premises of Texas Arai and states that the arrest

[2] This appears to be typographical error as respondent elsewhere states he was arrested on June 22, 1994. Stipulations of fact filed jointly by the parties on October 25, 1996 also indicate the date of arrest as June 22, 1994.

took place only a few days after election results favorable to a union were certified by the NLRB.

In opposition to respondents' motions *in limine*, complainant filed a brief arguing that respondents have no possessory interest in their I–9 forms or attachments, together with the affidavit of Mike Murphy, an INS Special Agent in the Houston District Investigations Unit. Briefly, the Murphy affidavit recites that on May 2 and May 16, 1994, INS received complaints about counterfeit documents being used by illegal aliens at Texas Arai, Inc.; that the affiant was assigned on May 16, 1994 to investigate these complaints; that a notice of inspection was sent to Texas Arai on May 27, 1994; and that the affiant personally went to Texas Arai to inspect I–9's on June 2, 1994. As part of his investigation Murphy states he reviewed the company's I–9 forms and the photocopied documents attached, and that upon review, 79 employees were found to have used counterfeit documents. Murphy states that Texas Arai was so informed on June 6, 1994 and an "employer survey" was conducted on June 22, 1994, at which time 30 illegal aliens, including the respondents, were arrested. Neither respondent has alleged that his alien registration card was obtained pursuant to his arrest, and Forms 213, Record of Deportable Alien, completed by Agent Murphy and attached to complainant's motions for summary decision, indicate that the only documents seized from Carpio-Lingan at the time of his arrest were "ID & DL" (identification and driver's license), while no documents were seized from Velasquez-Tabir.

The thrust of respondents' argument is thus that the INS obtained their resident alien cards as a result of Texas Arai's acts of retaliation against its employees for forming a union, and that the documents should therefore be suppressed. These same grounds were previously raised by way of affirmative defense which was stricken on March 8, 1996 and again on June 13, 1996. For the reasons stated in those orders, the motion *in limine* will be denied.

II. *Discussion and Analysis*

Respondents' argument is premised upon two related propositions, both of which are asserted without citation of any supporting authority and both of which are at odds with much of the applicable caselaw: first, that they have a protectible right of privacy in the personnel records their employer is required to maintain to demonstrate compliance with the employment eligibility verification sys-

tem, in particular in copies of the documents they submitted to Texas Arai for completion of the I–9 Form, and that this right was violated; and second, that because their employer, Texas Arai, engaged in unfair labor practices prohibited by the National Labor Relations Act, 29 U.S.C. §151 et seq., the INS should be precluded from using the documents as evidence in these proceedings.

The question of whether evidence should be suppressed generally involves two discrete inquiries: whether the evidence was seized in violation of the fourth amendment, and, if so, whether the exclusionary rule is the appropriate remedy for the violation. *Cf. New Jersey v. T.L.O.,* 469 U.S. 325, 333 n.3 (1985). The fourth amendment, which provides for the right of the people to be secure against unreasonable searches and seizures, does not itself contain any provision precluding the use of evidence. *United States v. Leon*, 468 U.S. 897, 906 (1984). The exclusionary rule is instead a judicially created remedy designed to provide a deterrent against future violations by law enforcement officers. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984). It does not apply to private actions, unless the private party acted as an instrument or agent of the government. *Skinner v. Railway Labor Executives Ass'n.,* 489 U.S. 602, 614 (1989).

A. *Whether the evidence was seized in violation of the fourth amendment*

It is well established that administrative searches are encompassed by the fourth amendment. *Michigan v. Tyler*, 436 U.S. 499, 506 (1978), *United States v. Kuo Liu*, 1 OCAHO 235, at 2 (1990)[3]. An owner or operator of a business has a reasonable expectation of privacy in commercial property. *Lesser v. Espy*, 34 F.3d 1301, 1305 (7th Cir. 1994). It is not well established whether illegal aliens have any fourth amendment rights, *United States v. Verdugo-Urguidez*, 494 U.S. 259, 272 (1990), *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995), *cert. denied*, ___U.S.___ 116 S.Ct. 814 (1996), or when employees have protectible rights in an employer's premises.

[3] 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.

As to respondents' first proposition, an individual seeking to challenge a search of someone else's premises bears a heavy burden to show any protectible interest. *Rakas v. Illinois*, 439 U.S. 128, 133–134, 143 (1978). Absent special circumstances, employees generally have no legitimate expectation of privacy at work where they have no possessory or proprietary interest in the employer's premises. *Martinez v. Nygaard*, 831 F.2d 822, 825 (9th Cir. 1987). Whatever privacy interests an employee may have in his or her personnel records vis-a-vis the general public, moreover, do not have the same force with respect to law enforcement agencies, where, as here, the governing statute makes clear that an employer has a legal obligation to maintain certain records and to make them available for inspection by law enforcement officers.[4] An employee claiming a privacy interest must allege more than that the records are not available to the general public to support the notion that INS has no right to utilize those records to enforce the Act. No misconduct or illegality on the part of INS has been stated, and no assertion is made that Texas Arai had to conduct a search or seizure in order to obtain its own personnel records, or that it would be subject to the strictures of the fourth amendment even if it did. Texas Arai did no more than disclose its records to INS, as it was obligated by law to do regardless of its motivation.

For the reasons more fully stated in my order of June 19, 1996 striking a defense based on the fourth amendment, respondents have failed to articulate an adequate factual basis for any reasonable expectation of privacy in their employer's premises or in personnel records which the employer is required to maintain. They have not, moreover, contended that any search was performed by INS other than with the consent of the employer, Texas Arai, and have not stated facts which constitute a violation of the fourth amendment. Rather, they argue that because Texas Arai acted from anti-union animus and violated labor laws, INS may not use evidence ob-

[4] The INA as amended makes the hiring of unauthorized aliens unlawful, and imposes an affirmative duty upon employers to comply with the employment verification system, to examine documents establishing work eligibility for new workers, to prepare and retain the appropriate forms, and to make them available for inspection by officers of the INS. 8 U.S.C. §§1324a(a)— (b). An employer is permitted, but not required, to copy a document presented by an individual as evidence of identity and work eligibility, and to retain the copy for purposes of complying with the law. The regulations implementing the Act, 8 C.F.R. §274a.2(b)(3), provide that if such a copy is made, it must be retained with the Form I–9.

tained from Texas Arai in an apparently consensual search of the employer's premises.

B. *Whether the exclusionary rule has any application to the facts alleged*

Assuming *arguendo* that Texas Arai acted for improper motives and reported its own illegal workers in violation of the National Labor Relations Act, 29 U.S.C. §151 et seq., this fact still would not call for suppression of the subject documents as evidence.

The precise reach of the exclusionary rule beyond the context of criminal and quasi-criminal proceedings has been addressed by the federal courts in a variety of contexts with results that offer little support for its application in these proceedings. These cases for the most part discuss the rule as a remedy for constitutional, not statutory, violations. In *INS v. Lopez Mendoza*, 468 U.S. 1032 (1984), it was also held that the exclusionary rule would not ordinarily be available to an undocumented alien in a civil deportation hearing to exclude evidence allegedly obtained in violation of the fourth amendment because the constitution generally does not afford the same level of protection to persons subject to civil proceedings as it does to those in criminal proceedings. Respondent cites no authority which would support a different result here. As was observed by the Eighth Circuit,

> The judicially-created exclusionary rule precludes admission of unlawfully seized evidence in criminal trials. "In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." *United States v. Janis*, 428 U.S. 433, 447 (1976). In *Janis,* the Court held that the rule does not apply in federal tax proceedings to bar evidence illegally seized by state officials.

Thompson v. Carthage School District, 87 F.3d 979, 981 (8th Cir. 1996).

The exclusionary rule has been applied by some lower courts in civil and administrative proceedings, again in cases where fourth amendment considerations were implicated. *See, e.g., Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1363 (10th Cir. 1979) (OSHA proceeding), *Jones v. Latino Independent School District*, 499 F.Supp. 223, 237 (E.D. Tex. 1980) (school disciplinary proceeding), *Pike v. Gallagher,* 829 F.Supp. 1254, 1265–66 (D.N.M. 1993) (termination of public employee). Although the Ninth Circuit has held that "as a general rule the exclusionary rule does not at-

tach to civil or administrative proceedings," *In Re Establishment of Hern Iron Works*, 881 F.2d 722, 729 (9th Cir. 1989), it has also found that an "egregious" violation of the fourth amendment may warrant the application of the exclusionary rule in civil proceedings. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994). The Fifth Circuit appears to have adopted a dual standard for OSHA proceedings; the rule is inapplicable for purposes of injunctive relief correcting current violations of the law, but may be applicable where the objective is the punishment of past violations, *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1331 (5th Cir. 1986). It is unclear, however, whether this result was mandated by constitutional considerations or by the Occupational Safety and Health Review Commission's own rules. *See also Donovan v. Sarasota Concrete Co.,* 693 F.2d 1061, 1066 (11th Cir. 1982) (administrative body may exclude evidence otherwise admissible under federal rules).

Administrative agencies generally are not restricted to the rigid rules of evidence. *FTC v. Cement Inst.*, 333 U.S. 683, 705–06 (1948). The Administrative Procedure Act, 5 U.S.C. §551 *et seq.* permits administrative agencies to adopt their own rules, and gives wide discretion in making evidentiary decisions. Although 5 U.S.C. §556(d) excludes only evidence which is irrelevant, immaterial or unduly repetitious, some agencies have fashioned their own specific restrictions. For example, the NLRB has adopted an exclusionary rule of its own, which excludes surreptitiously recorded evidence of collective bargaining negotiations as a matter of policy, not because of any constitutional constraints but because the Board believes such recordings have an inhibiting effect on the collective bargaining process. *See Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60,66 (2d Cir. 1979). OCAHO has not adopted any such specific exclusionary evidentiary rules. Rather, while looking to the federal rules of evidence as a general guide, OCAHO rules of practice and procedure[5] specifically provide that all relevant and material evidence is admissible, but may be excluded if, *inter alia*, its probative value is substantially outweighed by unfair prejudice or confusion of the issues. 28 C.F.R. §68.40(b).

There is authority in OCAHO jurisprudence which holds that the exclusionary rule may apply in proceedings under 8 U.S.C. §1324a. *United States v. Jenkins*, 5 OCAHO 743, at 13 (1995), *United States v. Widow Brown's Inn,* 3 OCAHO 399, at 22–23 (1992), *United States*

[5] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

v. Nevada Lifestyles, 3 OCAHO 463, at 20–21 (1992). There are also some cases which have suggested otherwise. *United States v. Noel Plastering & Stucco Inc.,* 2 OCAHO 396, at 5 (1991), *United States v. Lee Moyle,* 1 OCAHO 212, 1429 (1990).

Assuming, without deciding, that there are factual circumstances which would render the use of the exclusionary rule appropriate in a proceeding under §1324c, those circumstances have not been stated here. For the reasons more fully set forth in my prior order of June 13, 1996, the suppression of evidence in a document fraud case is not an appropriate remedy for a third party's violation of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (3).

SO ORDERED:

Dated and entered this 10th day of January, 1997.

ELLEN K. THOMAS
Administrative Law Judge