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

May 9, 1997

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 95A00164
MARK CARTER d/b/a DIXIE INDUSTRIAL SERVICE CO., Respondent.	)

FINAL DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE ROBERT L. BARTON, JR.

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FINAL DECISION AND ORDER

I. *Procedural History*

Respondent provides industrial insulation services, usually for oil refineries, at its clients' business locations. *See* Tr. at 194.[1] A crew

[1]The following abbreviations will be used throughout the Decision:

Tr.	Transcript of the hearing held January 27–29, 1997
Compl.	Complaint as twice amended, unless otherwise indicated
Ans.	Answer as twice amended, unless otherwise indicated
First PHC Tr.	Transcript of the prehearing conference held May 15, 1996
First PHCR	Prehearing Conference Report and Order, issued May 23, 1996, and published at 6 OCAHO 865
Final PHC Tr.	Transcript of the prehearing conference held October 8, 1996
Final PHCR	Final Prehearing Conference Report, issued October 9, 1996
PHCR and Order	Prehearing Conference Report and Order, issued December 23, 1996
C. First Mot. S.D.	Complainant's First Motion for Partial Summary Decision
C. Second Mot. S.D.	Complainant's Second Motion for Partial Summary Decision
C. Third Mot. S.D.	Complainant's Third Motion for Summary Decision
R. Response to C. Third Mot. S.D.	Respondent's Response to Complainant's Third Motion for Summary Decision
C. First Mot. Strike	Complainant's First Motion to Strike Respondent's Affirmative Defenses
C. Second Mot. Strike	Complainant's Second Motion to Strike Respondent's Affirmative Defenses

—*(Continued on next page)*

comprised of people employed by Respondent was working on site at Kodiak Industries on November 18, 1994, when agents of the Immigration and Naturalization Service (INS) conducted a survey at Kodiak. *See* Tr. at 9–10, 195. INS agents apprehended several of Respondent's employees because they were found to be illegal aliens. *See id.* INS agents later conducted a scheduled inspection of the Employment Eligibility Verification Forms (I–9 forms) of Respondent's employees on January 9, 1995. Tr. at 107; CX–ZZZZ–6; Compl. ¶II.E.[2] On April 27, 1995, the INS served Respondent with a Notice of Intent to Fine, alleging that Respondent had violated section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a, and seeking a fine in the amount of $38,025. Compl. Ex. A. By letter dated May 26, 1995, Respondent requested a hearing in this matter. *Id.* Ex. B.

Complainant served a five-count Complaint against Respondent on January 29, 1996. On March 11, 1996, Complainant filed a Motion to Amend Complaint, in which Complainant added an alias to an individual listed in Count I, added an alternative violation to Count II, and corrected an error regarding the civil money penalty requested in Count V. On April 16, 1996, Complainant filed its Second Motion to Amend Complaint, in which Complainant moved six individuals formerly listed in Count IV to Count V. I granted Complainant's first Motion to Amend Complaint by Order of April 2, 1996, and Complainant's Second Motion to Amend Complaint during

(Continued)—

C. Third Mot. Strike	Complainant's Third Motion to Strike Respondent's Affirmative Defenses
R. Mot. Remove Sixth Defense	Respondent's Motion to Remove Respondent's Sixth Aff. Affirmative Defense
Order Granting R. Mot. Remove	Order Granting Respondent's Motion to Remove Respondent's Sixth Affirmative Defense, issued September 26, 1996
CPFF	Complainant's proposed fact finding
RPFF	Respondent's proposed fact finding
RPCL	Respondent's proposed conclusion of law
Cbr.	Complainant's post hearing brief
Rbr.	Respondent's post hearing brief
CX	Complainant's exhibit
RX	Respondent's exhibit
Cpbr.	Complainant's prehearing brief
Stip. Order Add.	Addendum to Order Adopting in Part Complainant's Proposed Stipulations, issued November 8, 1996
DISCO	Dixie Industrial Service Company

[2]As amended by Complainant's first Motion to Amend Complaint.

the prehearing conference held on May 15, 1996, *see* First PHC Tr. at 20; First PHCR at 2–3. Unless otherwise indicated, any mention of or citation to the Complaint refers to the twice amended version.

In Count I of the Complaint, as amended, Complainant alleges that Respondent hired three named individuals after November 6, 1986, for employment in the United States, that those three individuals were aliens not authorized for employment in the United States, and that Respondent hired those individuals knowing that they were aliens not authorized to work in the United States, in violation of section 274A(a)(1)(A) of the INA, 8 U.S.C. §1324a(a)(1)(A). Compl. ¶¶I.A–D. Alternatively, Complainant alleges that Respondent continued to employ the three individuals knowing that they were, or had become, unauthorized to work in the United States, in violation of section 274A(a)(2) of the INA, 8 U.S.C. §1324a(a)(2), and 8 C.F.R. §274a.3. *Id.* ¶E. Complainant seeks a civil money penalty of $1,515 for each violation, for a total Count I penalty of $4,545. Complainant also seeks an order to cease and desist from violating either or both of the above-cited portions of the INA.

In Count II of the Complaint, as amended, Complainant alleges that Respondent hired fifteen named individuals after November 6, 1986, for employment in the United States, and that Respondent failed to prepare the I–9 form for those people, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B), which makes it unlawful to hire an individual without complying with section 274A(b) of the INA, 8 U.S.C. §1324a(b). *Id.* ¶¶II.A–C. Alternatively, Complainant alleges that Respondent failed to make available the I–9 forms for those fifteen individuals at a scheduled inspection held on January 9, 1995, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id.* ¶¶II.D–E. Complainant seeks a penalty of $580 per violation for the individuals listed in paragraphs II.A.5, 6, and 12, and a penalty of $400 per violation for the individuals listed in paragraphs II.A.1–4, 7–11, and 13–15, for a total Count II penalty of $6,540.

In Count III, Complainant alleges that Respondent hired one named individual after November 6, 1986, for employment in the United States, and failed to ensure that that individual properly completed section one of his I–9 form, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id.* ¶¶III.A–C. Complainant seeks a penalty of $400 for Count III.

In Count IV of the Complaint, as amended, Complainant alleges that Respondent hired thirty-seven named individuals after November 6, 1986, for employment in the United States, and failed to properly complete section two of the I–9 form for those individuals, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id*. ¶¶IV.A–C. Complainant seeks a fine of $400 per violation in Count IV, for a total penalty of $14,800.

In Count V, as amended, Complainant alleges that Respondent hired twenty-eight named individuals after November 6, 1986, for employment in the United States, that Respondent failed to ensure that those individuals properly completed section one of their respective I–9 forms, and that Respondent failed to properly complete section two of the I–9 forms for those individuals, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id*. ¶¶V.A–D. Complainant seeks a penalty of $580 per violation for the individuals listed in paragraphs V.A.14, 21, and 22, and a penalty of $400 per violation for the individuals listed in paragraphs V.A.1–13, 15–20, and 23–28, for a total Count V penalty of $11,740. For all five counts, Complainant seeks a total civil money penalty of $38,025.

Respondent filed its original Answer on February 28, 1996. On April 2, 1996, Respondent filed its Motion to Amend Answer to Complaint, in which Respondent sought to clarify responses made in the original Answer and to add a substantial compliance defense. As I have noted previously, *see* First PHC Tr. at 26–27; First PHCR at 4, the amended Answer was more than a mere clarification in that it retracted certain admissions made in the original Answer. I granted Respondent's Motion to Amend, but required Respondent to submit a second amended answer because the amended answer filed with the Motion of April 2, 1996, did not accurately reflect the allegations Respondent contested and because a further amended answer was necessary in response to the second amended Complaint. *See* First PHC Tr. at 20–23, 30, 92; First PHCR at 6. Respondent filed its Second Amended Answer to Complaint on June 4, 1996. Any subsequent reference to or citation of the Answer refers to Respondent's Second Amended Answer, unless otherwise noted.

With respect to Count I, Respondent admitted that it hired the three named individuals after November 6, 1986. Ans. ¶¶1–2. Respondent denied, however, that the three employees were aliens unauthorized to work in the United States and that it hired the indi-

viduals knowing they were unauthorized for such employment.[3] *Id.* ¶¶3–4.

With respect to Count II, Respondent admitted that it hired the fifteen named individuals after November 6, 1986. *Id.* ¶¶6–7. Respondent also admitted that it failed to prepare I–9 forms for the first thirteen employees listed in Count II and admitted that it failed to make available for inspection I–9 forms for those thirteen individuals. *Id.* ¶¶8, 11. Respondent, however, denied that it failed to prepare and that it failed to make available I–9 forms for the remaining two employees in Count II, Arturo Resendez (¶A.14) and Manuel Resendez (¶A.15). *Id.* ¶¶9, 12.

With respect to Count III, Respondent admitted that it hired the one named individual after November 6, 1986, but denied that it failed to properly complete section one of that person's I–9 form.[4] *Id.* ¶¶13–15. Respondent contended that it substantially complied with the employment verification requirements of sections 274A(a)(1)(A) and 274A(a)(2) of the INA, 8 U.S.C. §§1324a(a)(1)(A), 1324a(a)(2). *Id.* ¶15.

With respect to Count IV, Respondent admitted that it hired the thirty-seven named individuals after November 6, 1986. *Id.* ¶¶16–17. Additionally, Respondent admitted that it failed to properly complete section one [sic][5] of the I–9 forms for the employees appearing at paragraphs IV.A.1–3, 6–7, 9, 13, 15–16, 19–22, 25, and 32. Respondent denied that it failed to properly complete section one [sic][6] of the I–9 forms for the employees appearing at paragraphs IV.A.4–5, 8, 10–12, 14, 17–18, 23–24, 26–31, and 33–37 on substantial compliance grounds. *Id.* ¶19.

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[3]Respondent did not expressly deny Count I's alternative allegation of continuing to employ the listed individuals knowing that they were or had become unauthorized to work in the United States. Instead, Respondent included duplicate paragraphs that deny the primary allegation of hiring the listed employees knowing they were unauthorized to work in the United States. *See* Ans. ¶¶4–5.

[4]It should be noted that the employee, not the employer, is supposed to fill out section one of the I–9 form. *See* 8 C.F.R. §274a.2(b)(1)(i)(A) (1996). Respondent's statement is taken as a denial of the actual allegation, i.e., that Respondent failed *to ensure* that the employee properly completed section one.

[5]Count IV alleges that Respondent failed to properly complete section *two*, not section one, of the I–9 form for the listed employees.

[6]*See supra* note 5.

With respect to Count V, Respondent admitted that it hired the twenty-eight named individuals after November 6, 1986. *Id.* ¶¶20–21. Respondent admitted that it failed to properly complete sections one[7] and two of the I–9 forms for the individuals appearing at paragraphs V.A.4, 6, 10, 13–15, 17, 21, 23, and 25. *Id.* ¶22. Stating that it substantially complied with the INA's employment verification requirements, Respondent denied that it failed to properly complete sections one[8] and two of the I–9 forms for the employees appearing at paragraphs V.A.1–3, 5, 7–9, 11–12, 16, 18–20, 22, 24, and 26–28. *Id.* ¶23.

Respondent also asserted six affirmative defenses in its Answer. First, Respondent alleged that it substantially complied with the employment verification requirements of the INA with respect to certain employees in Counts III, IV, and V. *Id.* at 3–8.[9] For each employee addressed in this section, Respondent stated a set of facts in support of its position.[10]

As a second affirmative defense, Respondent maintained that it "acted in good faith and reasonably relied on the documentation presented by the individuals [in Count I] as proof of their legal authorization to work in the United States in compliance with 8 C.F.R. §274a.2 et seq." *Id.* at 8. Specifically, Respondent stated that Juan Ramirez (¶I.A.1), Abel Ramirez (¶I.A.2), and Francisco Ramirez, a/k/a Manuel Noguez, (¶I.A.3) each presented an alien registration card (INS Form I–551) with photograph, an original social security card with signature, and a valid Texas driver's license with signature at the time each was hired. *Id.*

Respondent's third through sixth affirmative defenses asserted in the Answer related to the amount of the civil money penalty, rather than to liability. As a factor in mitigation of the amount of the civil money penalty, Respondent stated, as a third affirmative defense, that it did not continue to employ six individuals, namely Javier Arellano (¶II.A.1), Jaime DelValle (¶II.A.5), Nicodemo DelValle

[7] *See supra* note 4. Here, Respondent's statement is taken as an admission of the actual allegation, i.e., that Respondent failed *to ensure* that the employee properly completed section one.

[8] *See supra* note 4.

[9] Unlike its responses to the specific allegations of the Complaint, Respondent did not set out its affirmative defenses by paragraph number.

[10] With respect to Count IV, Respondent listed facts in support of the claimed substantial compliance affirmative defense for the employees for whom it *admitted liability* in paragraph 18 of the Answer. Respondent set forth *no* facts in support of the defense with respect to the employees for whom Respondent claimed a substantial compliance defense in paragraph 19 of the Answer. *See* Ans. at 4–5.

(¶II.A.6), Miguel Martinez (¶II.A.11), Pablo Perales (¶II.A.12), and Jorge Ramos (¶II.A.13), after they failed to provide evidence that they were authorized to work in the United States. *Id.* As a fourth affirmative defense, Respondent asserted that the civil money penalty should be mitigated because Respondent cooperated with Complainant during its investigations and because Respondent never received any educational visit or information from Complainant. *Id.* at 9. Next, Respondent stated that the proposed penalty is excessive and inconsistent with 8 C.F.R. §274a.10(b)(2). *Id.* As a sixth and final defense, Respondent stated that it is a small business and that the proposed fines would force it out of business, *id.*, but Respondent later deleted that defense.[11]

Complainant filed its First Motion for Partial Summary Decision on March 11, 1996, and its Second Motion for Partial Summary Decision on April 10, 1996. Also, Complainant filed its Motion to Strike Respondent's Affirmative Defenses on March 13, 1996, and its Second Motion to Strike the Respondent's Affirmative Defenses on April 16, 1996. I heard oral argument regarding all four of those motions during the prehearing conference conducted on May 15, 1996.

Complainant's First Motion for Partial Summary Decision requested summary disposition as to the liability issue for Counts III and IV and for all the individuals listed in Count V, with the exception of Benjamin Vargas (¶V.A.20). *See* C. First Mot. S.D. at 4–5. I granted Complainant's Motion with respect to the following individuals for whom Respondent had admitted liability: in Count IV, Marcos Avila (¶A.1), Alvaro Banda (¶A.2), Rogelio Cardona (¶A.3), Jose Davila (¶A.6), Juan DelValle (¶A.7), Herculano Guzman (¶A.9), Jose Hernandez (¶A.13), Salvador Huizar (¶A.15), Virgilio Leija (¶A.16), Alejandro Mateo (¶A.19), Silvio Medina (¶A.20), Leonardo Mejia (¶A.21), Ruben Miranda (¶A.22), Jose Moran (¶A.25), and Celio Resendez (¶A.32); and, in Count V, Juan Avila (¶A.4), Isaias Chavez (¶A.6), Honorato Hernandez (¶A.10), Reyes Mejia (¶A.13), Hector Perales (¶A.14), Pascual Reynaga (¶A.15), Maria Rodriguez (¶A.17), Abel Ramirez (¶A.21), Roberto Carrizal (¶A.23),[12] and

[11]Respondent filed a motion on August 15, 1996, to remove its sixth affirmative defense, that of Respondent's inability to pay the requested civil money penalty, and I granted that motion by Order of September 26, 1996.

[12]Although the I–9 form for Roberto Carrizal is not mentioned in the transcript of the prehearing conference, Respondent admitted the violation with respect to this form, *see* Ans.¶22, and my finding of liability as it relates to this individual's form is recorded in the Prehearing Conference Report and Order of May 23, 1996, *see* First PHCR at 8.

Manuel Ramirez (¶A.25). *See* First PHC Tr. at 49, 94–95; First PHCR at 8–9, 9 n.5.

Of the remaining I–9 forms in Counts IV and V, I noted that certain forms lacked the date of employer certification in section two. I ruled that if an I–9 form lacked that date, then the employer did not substantially comply with the INA's verification requirements to defeat a summary decision motion.[13] First PHC Tr. at 60–61; First PHCR at 9. As a result, I granted Complainant's Motion with respect to the following employees: in Count IV, Hector Lopez (¶A.17), Juan Marroquin (¶A.18), Jose Monsivais (¶A.23), Jose Morales (¶A.24), Hermin Navarro (¶A.26), Jesus Oceguera (¶A.27), Jose Olivas (¶A.28), Juan Olvera (¶A.29), Saul Perales (¶A.30), Pedro Perez (¶A.31), Benito Saenz (¶A.33), Jesus Salas (¶A.34), Rosendo Sanchez (¶A.35), Silvestre Sanchez (¶A.36), and Javier Zuniga (¶A.37); and, in Count V, Alfredo Alvarado (¶A.1), Benito Alvarado (¶A.2), Jose Alvarado (¶A.3), Felipe Cabesos (¶A.5), Jose Faz (¶A.7), Samuel Garcia (¶A.8), Pedro Gonzalez (¶A.9), Antonio Herrera (¶A.11), Mariano Mejia (¶A.12), Benj Rodriguez (¶A.16), Macario Saenz (¶A.18), Benjamin Vargas (¶A.20),[14] Hector Paredes (¶A.24), Jaime Rosales (¶A.26), Jose Sanchez (¶A.27), and Jose Zuniga (¶A.28). First PHC Tr. at 62–67; First PHCR at 9. I also granted Complainant's Motion with respect to the I–9 form for Francisco Ramirez, a/k/a Manuel Noguez (¶V.A.22), which lacked an attestation in section one that the employee was a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work in the United States until a specified date, noting that such an omission does not constitute substantial compliance to defeat a summary decision motion.[15] *See* First PHC Tr. at 74–75; First PHCR at 10.

I did not rule on Complainant's Motion with respect to the one individual who is the subject of Count III. First PHCR at 10. I also reserved ruling on the Motion with respect to seven employees listed in Count IV because Respondent's letter of May 13, 1996, indi-

[13]I did not find, however, that this factor is necessary to defeat a motion to strike. First PHC Tr. at 61.

[14]As a violation was found, I granted summary decision with respect to Benjamin Vargas' I–9 form, even though Complainant's Motion did not encompass that allegation.

[15]I did not find, however, that this factor is necessary to defeat a motion to strike. First PHC Tr. at 75.

cated that Respondent would add those individuals to the substantial compliance defense and because Complainant had not provided I–9 forms for those employees, as follows: Jose Carillo (¶A.4), David Cepeda (¶A.5), Soloman Faz (¶A.8), Louis Hadley (¶A.10), Samuel Hadley (¶A.11), Humberto Hernandez (¶A.12), and Jose Herrera (¶A.14). First PHC Tr. at 56–57; First PHCR at 10. I also reserved ruling on Complainant's Motion with respect to Alejandro Stroot (¶V.A.19) because Respondent asserted substantial compliance in connection to his I–9 form and because the I–9 form Complainant had submitted was illegible. First PHC Tr. at 66; First PHCR at 10.

Complainant's Second Motion for Partial Summary Decision requested summary disposition with respect to liability for thirteen of the fifteen employees listed in Count II. C. Second Mot. S.D. at 2, 4–5. As Respondent had admitted liability with respect to those thirteen employees, I granted Complainant's Second Motion, leaving open the issue of liability for the remaining two employees, who appear at paragraphs II.A.14–15, and the issue of the appropriate level of penalty for all the allegations of Count II. *See* First PHC Tr. at 31–34; First PHCR at 6, 9 n.5.

Complainant's first Motion to Strike Respondent's Affirmative Defenses requested that I strike all five affirmative defenses that Respondent had propounded at that point.[16] C. First Mot. Strike at 3–9. Complainant's Second Motion to Strike requested, if Respondent were permitted to amend its Answer,[17] that I also strike Respondent's substantial compliance defense. C. Second Mot. Strike at 2–3. I stated that I would deny Complainant's motion to strike Respondent's first affirmative defense, that of substantial compliance, as it relates to any I–9 forms in the Complaint that meet the five substantial compliance criteria necessary to defeat such a motion, as those factors are set forth in *United States v. Northern Michigan Fruit Co.*, 4 OCAHO 667, at 16–17 (1994), 1994 WL 555908, at *12[18] (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses, Including

[16]Those were the same affirmative defenses as the ones Respondent asserted in the Second Amended Answer, with the exception of substantial compliance.

[17]As discussed previously, *see supra* p. 4, I allowed Respondent's amendment to the Answer.

[18]If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM–OCAHO" database.

Substantial Compliance), and as I adopted them in *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 3 (1995), 1995 WL 788551, at *2 (Prehearing Conference Report and Order Granting in Part Complainant's Motion for Summary Decision). First PHC Tr. at 47–48.[19] As good faith is a defense to knowing hire allegations, *see* 8 U.S.C. §1324a(a)(3) (1994), I denied Complainant's motion with respect to the second affirmative defense, that of good faith, as it relates to the portion of Count I that alleges knowing hire violations. First PHCR at 7. However, I granted Complainant's motion to strike the second affirmative defense with respect to the portion of Count I that alleges the violation of continuing to employ individuals knowing they were unauthorized to work in the United States. *Id*. at 7. The remaining affirmative defenses, as well as the second affirmative defense as it relates to Counts II–V, all are relevant only to the amount of the civil money penalty. *See* First PHC Tr. at 35, 37; First PHCR at 7. I denied Complainant's motion to strike those remaining defenses, but I required Respondent to include in its amended answer a further statement of facts in support of its inability to pay defense. First PHC Tr. at 39, 41; First PHCR at 7–8.

On June 11, 1996, Complainant filed both its Third Motion for Partial Summary Decision and its Third Motion to Strike the Respondent's Affirmative Defenses Listed in the Respondent's Second Amended Answer to the Complaint. In the Third Motion for Partial Summary Decision, Complainant sought summary disposition regarding liability for the following seven individuals listed in Count IV: Jose Carillo (¶A.4); David Cepeda (¶A.5); Soloman Faz (¶A.8); Louis Hadley (¶A.10); Samuel Hadley (¶A.11); Humberto Hernandez (¶A.12); and Jose Herrera (¶A.14). C. Third Mot. S.D. at 5. The I–9 forms for those seven employees all lacked the date of employer certification in section two. Respondent did not contest Complainant's Motion as it related to liability. R. Response to C. Third Mot. S.D. at 4. As there were no genuine issues of material fact and as Complainant was entitled to judgment as a matter of law, I granted Complainant's Third Motion for Partial Summary Decision by Order of July 8, 1996.

Complainant's Third Motion to Strike requested that I strike Respondent's substantial compliance defense with respect to the seven individuals listed above who were the subject of Complainant's Third Motion for Partial Summary Decision. C. Third

[19]The Prehearing Conference Report, however, states in absolute terms that the motion to strike the substantial compliance defense was denied. First PHCR at 8.

Mot. Strike at 3. By Order of August 2, 1996, I denied Complainant's Third Motion to Strike as rendered moot by my July 8 Order granting Complainant summary decision with respect to those same individuals.

On October 1, 1996, Complainant served its proposed stipulations, in which it addressed the deficiencies in the I–9 forms relating to the individuals who are listed in the Complaint. Respondent submitted a response in which it qualified certain information in Complainant's proposed stipulations. I adopted Complainant's proposed stipulations, with modifications based on Respondent's response and with other modifications, by my Order Adopting in Part Complainant's Proposed Stipulations of November 8, 1996.

Both parties submitted prehearing briefs, and an evidentiary hearing was held in Houston, Texas, on January 27–29, 1997. Complainant presented testimony through nine witnesses: INS Supervisory Special Agent Robert Montgomery, INS Special Agent Michael Murphy, the Respondent Mr. Mark Carter, INS Special Agent Roberto De Los Santos, Mr. Hector Perales, Mr. Manuel Ramirez, Mr. Juan Jose Ramirez, INS Special Agent David Ramirez, and INS Special Agent Luis Martinez, Jr. Respondent presented testimony through Mr. Mark Carter. Both parties also presented documentary evidence. The following exhibits were admitted into evidence either during the hearing or during the prehearing conference held October 8, 1996: CX–A through BBBBB, and RX–B, D–2–3, E–2–3, and M through Q.[20] *See* Final PHC Tr. at 96–101; Final PHCR at 4; Tr. at 3, 17, 20, 56, 91, 103, 173, 298, 435, 467, 473, 480, 517, 639.

On the last day of the trial, Respondent attempted to offer evidence relating to Respondent's inability to pay on the basis that it had started to experience a downswing in business since the Christmas and New Year holidays; Respondent then moved to reassert that defense. Tr. at 579, 583; *see infra* part III.G.6.

[20]On a few occasions, the parties submitted exhibits as part of their respective prehearing exhibit lists that were duplicative of each other. I previously stated that, once an exhibit is admitted into evidence, it is admitted for use by either party. Final PHC Tr. at 99–100; Final PHCR at 5. Consequently, I stated that it is unnecessary to include duplicates in the official hearing record. Final PHC Tr. at 99; Tr. at 640–41. However, as duplicative exhibits were referred to throughout the hearing by both their "CX" and "RX" designations, any duplicate exhibits will be identified by both designations in this Final Decision and Order. I note that the following exhibits are duplicates of each other: CX–E and RX–F; CX–J and RX–J; CX–S and RX–L; CX–V and RX–K; CX–Y and RX–H; CX–BB and RX–I; CX–FF and RX–G; and CX–WWWW and RX–A.

Complainant objected to the motion as untimely, noting that, if Respondent knew of its changed financial situation around the holidays, it waited too long to raise the issue. Tr. at 581–82, 584. I denied Respondent's motion on the ground that it was untimely raised, noting specifically that it was Respondent's duty to notify immediately the opposing party and the Court when a new issue develops so that the opposing party is not forced to enter trial unaware of an issue. Tr. at 585. Instead, Respondent not only waited to raise this issue until trial, but it waited until the third day of the trial, after Complainant had rested its case. *Id*. I also noted that inability to pay is not a statutorily mandated penalty factor, but is an element the OCAHO Administrative Law Judges have considered as a matter of equity in setting an appropriate civil money penalty. *Id*. As such, that factor only can be raised by a party with clean hands, which I stated was not the situation here. Tr. at 585–86. I concluded that Respondent could not assert an inability to pay defense at that juncture because that defense was dropped and not reasserted in a timely manner to give Complainant a chance to conduct discovery on the matter or to be prepared for that issue at trial. Tr. at 586.

Pursuant to 28 C.F.R. §68.49, the record was closed as of the conclusion of the hearing. Tr. at 640. I gave the parties leave to file post hearing briefs, and, on March 4, 1997, I set April 4, 1997, as the date for submission of briefs by both parties. Pursuant to 28 C.F.R. §68.48(b), I also gave the parties leave to file motions to correct the hearing transcript, and, on March 26, 1997, I issued an order correcting the transcript. On that same date I issued an Order Amending Record Exhibits and List of Record Exhibits, which reflects that Complainant's exhibits CX–VV, CX–YYYY and CX–BBBBB are Record Exhibits, since they were received in evidence during the prehearing conference on October 8, 1996. Also, Respondent's exhibits RX–D–2–3 and RX–E–2–3 were added as official Record Exhibits. Therefore, the Amended List of Record Exhibits attached to the March 26 Order constitutes the official exhibits in this proceeding.

On April 4, 1997, both parties filed, by FAX, post hearing briefs, which included proposed findings of fact and conclusions of law.[21]

[21]When I have adopted a party's proposed fact finding, in whole or in substantial part, I have referenced the pertinent proposed fact finding, as well as the record. Complainant's brief includes 48 proposed fact findings, which are supported by citations to the record. By contrast, Respondent's brief contained only six proposed fact findings, four of which did not contain citations to the record. That does not comply with my Order Setting Briefing Schedule, which specifically ordered that each proposed finding must be supported by references to the evidentiary record and further provided that any proposed finding that failed to comport with that requirement might be rejected. I also note that 17 of the 42 pages of Respondent's brief consist of verbatim quotations from the hearing transcript.

This Final Decision and Order will be based only on record evidence. The Record on which this decision is based consists of the record exhibits, the testimony reflected in the hearing transcripts, the transcripts of the prehearing conferences, the parties' stipulations, and the orders and pleadings filed in this case. To the extent that the parties reference in their briefs any documents not included in the official record, such references will not be considered. Since the briefs and hearing transcript now have been received, the case is ready for adjudication, and this constitutes the decision and order of the Administrative Law Judge pursuant to 28 C.F.R. §68.52.

II. *Remaining Issues*

The issues remaining for resolution are as follows:

1. Whether Respondent violated section 274A(a)(1)(A) or 274A(a)(2) of the INA by hiring after November 6, 1986, or continuing to employ, the three individuals in Count I knowing that they were, or had become, unauthorized to work in the United States, and, if so, what civil money penalty is appropriate.

2. Whether Respondent violated section 274A(a)(1)(B) of the INA by failing to prepare or to present I–9 forms for Arturo Resendez (¶II.A.14) and/or Manuel Resendez (¶II.A.15), as alleged in Count II, and, if so, what civil money penalty is appropriate.

3. Whether Respondent violated section 274A(a)(1)(B) of the INA by failing to ensure that the individual listed in Count III properly completed section one of his I–9 form, and, if so, what civil money penalty is appropriate.

4. Whether Respondent violated section 274A(a)(1)(B) of the INA by failing to ensure that Alejandro Stroot (¶V.A.19) properly completed section one of his I–9 form and failing to complete properly section two of that I–9 form, and, if so, what civil money penalty is appropriate.

5. What civil money penalty should be assessed for the paperwork violations for which liability already has been established in Counts II, IV and V.

III. *Findings and Conclusions*

A. *Background*

Mark Steven Carter d/b/a Dixie Industrial Service Company (hereinafter sometimes referred to as Respondent or DISCO) is a sole proprietorship located in Harris County, Texas, and provides insulation services to oil refineries. CPFF 1; Tr. at 189, 194; CX–ZZZZ–14, CX–UUUU. Respondent began to operate as a business during the last week of October 1994. CPFF 2; Tr. at 189, 265. Respondent entered into its first business contract with Kodiak Industries in October 1994, Tr. at 189, 563, and did not assume the contract from any other company, Tr. at 195; CPFF 3. When Respondent began operating in October 1994, it hired several individuals who formerly were employed with Dixie Company, which was a company owned by Mark Carter's brother, Gerald "Charlie" Carter, and which was in the process of closing at the time Respondent came into existence.[22] CPFF 4; Tr. at 190–92. Mark Carter could not recall whether he told those employees that they were working for a different company. CPFF 4; Tr. at 193–94. Moreover, the employees reported directly to the worksite, not to a central office. CPFF 4; Tr. at 194–95. At the time of the INS inspection at Kodiak Industries, several of Respondent's employees on that job did not know for whom they were working or that there had been a change in management. CPFF 4; Tr. at 72–73. At the time of trial, Manuel Ramirez, a foreman who began working for Respondent in October or November 1994, Tr. at 191, testified that he did not know who owned Dixie Industrial Service Company, Tr. at 392–93, and that he believed Respondent did not come into existence until 1995. CPFF 4; Tr. at 361–62.

Similarly, Hector Perales, another employee of Respondent, believed that he worked for Dixie Company from 1990 until November 18, 1994, the day he was arrested at Kodiak. Tr. at 343–44.[23] Like Manuel Ramirez, he testified that he does not know who owns DISCO. CPFF 4; Tr. at 347.

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[22]Gerald Carter d/b/a Dixie Company was the subject of a separate INS proceeding. A default judgment in the amount of $66,040 was entered on January 18, 1996, because the respondent failed to file an answer to the complaint. *See United States v. Gerald "Charlie" Carter d/b/a Dixie Company*, OCAHO Case No. 95A00130, Final Decision and Order Granting Complainant's Motion and Entering Default Judgment (January 18, 1996).

[23]There is no dispute that DISCO, as Respondent's business is called, not Dixie, had the contract with Kodiak, and that Perales was working for the former, not the latter.

Mark Carter delegated the responsibility of completing I–9 forms to his foremen for several reasons, including the fact that they and a majority of the work force were Hispanic, that they worked for other companies in the past, and that Mark Carter assumed they had more experience than he did in filling out the I–9 form. CPFF 7; Tr. at 208–09, 212. However, prior to January 1995, in delegating the responsibility of completing the I–9 forms to the foremen, Mark Carter never determined whether the foremen knew how to complete the form. CPFF 8; Tr. at 211, 215–16. At the time he hired Manuel Ramirez, he never discussed the I–9 procedure with Mr. Ramirez, and Mr. Ramirez did not receive instructions on how to complete the I–9 form until sometime after January 1995. *See* CPFF 9; Tr. at 372–73.

On November 18, 1994, INS agents Robert Montgomery, Michael "M.K." Murphy, Jesse Gonzalez, Roberto De Los Santos, David Ramirez, and Luis Martinez participated in a survey at the Kodiak worksite. CPFF 18; Tr. at 9–10, 294–95, 431–32, 463–64. During the survey, INS agents arrested and processed several of Respondent's employees who lacked authorization to work in the United States, Tr. at 195, including Jaime DelValle, Tr. at 295–96, 300, 313; CX–T, V–3; Nicodemo DelValle, Tr. at 18; CX–W, Y–3 (RX–H–3); Pablo Perales, Tr. at 465–66; CX–Z, BB–3 (RX–I–3); Hector Perales, Tr. at 54, 337, 340; CX–CC, FF–3 (RX–G–3); Abel Ramirez, Tr. at 15, 197; CX–O, S–3 (RX–L–3); Francisco Ramirez, a/k/a Manuel Noguez, Tr. at 200, 470–72; CX–K, N–3; and Juan Ramirez, Tr. at 195–96, 433–34; CX–F, J–3 (RX–J–3). *See* CPFF 19. After proper notice, Special Agent M.K. Murphy conducted an inspection of Respondent's I–9 forms on January 9, 1995. CPFF 21–22; Tr. at 107; CX–A, ZZZZ–6.

Two of Complainant's exhibits that were received in evidence were CX–G, an I–9 form for Juan Ramirez dated in 1993, and CX–P, an I–9 form for Abel Ramirez also dated in 1993. Respondent asserts that those documents probably relate to Dixie Company, which was owned by Mark Carter's brother, Charlie Carter. Tr. at 609–10. The certification for these two forms are blank, and, therefore, the name of the employer is not indicated on the form. However, assuming that the 1993 date is correct, these I–9 forms could have no relevance to DISCO, because the record is clear that DISCO did not begin hiring employees until 1994, which is the year it commenced operations. *See* Tr. at 189–92, 265. Since Complainant has failed to

show the relevance of these documents, I will give no consideration or weight to CX–G or CX–P.[24]

B. *Count I: Knowing hire/continued to employ unauthorized workers*

Complainant alleges in Count I of the Complaint that Respondent hired or, in the alternative, continued to employ three individuals, Juan Ramirez, Abel Ramirez, and Francisco Ramirez, a/k/a Manuel Noguez,[25] after November 6, 1986, for employment in the United States knowing that those individuals were not authorized for such employment. Compl. ¶¶I.A–E. Respondent admits that it hired those three people after November 6, 1986. Ans. ¶¶1–2. The record establishes that those three individuals were unauthorized for employment in the United States while they were working for Respondent. Complainant introduced into evidence Records of Deportable Alien (INS Form I–213) and Records of Sworn Statement for each of the three people listed in Count I.[26] *See* CX–F, J (RX–J), K, N, O, and S (RX–L). Those records demonstrate that Juan, Abel, and Francisco Ramirez admitted they were aliens unauthorized to work in the United States. *See* CX–F, J–2–3 (RX–J–2–3), K, N–2–3, O, and S–2–3 (RX–L–2–3). The statements regarding those employees' eligibility to work in the United States are relevant to the present charge against DISCO even though the employees apparently believed they were working for Dixie Company, *see supra* n.26; the fact that the three employees in question were not authorized for employment in this country is dependent neither on what business held them in its

[24]As I stated during the hearing, while I would not strike CX–G or CX–P, I would give no weight to those documents if they were not shown to be relevant to liability or penalty. Tr. at 611–12.

[25]Hereinafter, this individual will be referred to only as Francisco Ramirez and not also by his alias.

[26]Each of those documents presented for the three individuals in question refers to Dixie Company, located at an address of 555 Exchange, Houston, Texas, as the employer for whom the individuals were working as of November 18, 1994, the date on which those documents were created. *See* CX–F, J (RX–J), K, N, O, and S (RX–L). Although it is undisputed that the three individuals were working for DISCO, not Dixie Company, at Kodiak Industries on that date, the references to Dixie Company on the above documents indicate at least some degree of confusion on the part of the three employees as to the true identity of their employer. Therefore, I want to make it extremely clear that any statements in those documents that only affect Dixie Company cannot be used against DISCO. Statements in those documents may be used only to establish information whose relevance does not depend on which business the employees had in mind when making their statements.

employ nor on what business the employees believed held them in its employ.[27]

The above elements established, the only remaining issue is whether Respondent hired or continued to employ Juan, Abel, and Francisco Ramirez with knowledge of their lack of employment authorization. Complainant bears the burden of proving that element, as all others, by a preponderance of the evidence. *See United States v. American Terrazzo Corp.*, 6 OCAHO 877, at 5 (1996) (Final Decision and Order); *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307, at 6 (1991), 1991 WL 531736, at *4 (citing *United States v. Mester Mfg. Co.*, 1 OCAHO 53 (ref. no. 18) (1988),[28] 1988 WL 507634, *adopted by CAHO*, (July 12, 1988), 1988 WL 409575, *aff'd*,

[27]I note that the statements in the specified documents are hearsay. The OCAHO Rules of Practice provide that "[a]ll relevant material and reliable evidence is admissible, but may be excluded" for certain reasons not at issue here. 28 C.F.R. §68.40 (1996). That provision does not mention the exclusion of hearsay evidence simply because it is so classified. In fact, "[i]t is well established . . . that hearsay evidence is admissible in administrative proceedings, if factors are present which assure the underlying reliability and probative value of the evidence." *United States v. China Wok Restaurant, Inc.*, 4 OCAHO 608, at 11 (1994), 1994 WL 269371, at *8 (Decision and Order Granting in Part Complainant's Motion for Partial Summary Decision, Staying a Ruling on Count III, Directing Respondent to File Additional Evidence and Setting Date for an Evidentiary Hearing). I find sufficient evidence of the reliability of the statements concerning the interviewees' lack of employment authorization based on the testimony of the INS agents, who either took or observed the taking of the statements, regarding their experience with the INS, their abilities to understand and communicate in Spanish, the procedures that would have been implemented if an interviewee had not understood any question, and the interviewees' comprehension of the questions asked of them. *See* Tr. at 7, 13, 15–16, 433–35, 437–38, 441, 443, 463, 466, 472; *see also United States v. Kurzon*, 3 OCAHO 583, at 27 (1993), 1993 WL 595732, at *12 (finding sufficient evidence that the individuals in question were unauthorized aliens based on internally consistent forms I–213 and the hearing testimony of the INS agents who took the individuals' sworn statements, particularly the agents' testimony about their "training, their ability to speak and understand Spanish, their experience with the Immigration Service, the procedures that were taken when recording the illegal aliens' sworn statements in the Form I–213, the voluntariness of the sworn statements, and the details of the sworn statements themselves"). In assessing the credibility of the particular statements in question, I also find exceedingly relevant the distinct lack of incentive the interviewees would have to lie in claiming to be illegal aliens.

[28]Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Law of the United States*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances. Decisions that appear in Volume I will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I decisions.

Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989), and 8 U.S.C. §1324a(e)(3)(C)). In other words, Complainant must show that it is more likely than not that Respondent knew these three employees lacked employment authorization. *American Terrazzo*, 6 OCAHO 877, at 5–6. It is undisputed that Mark Carter, individually, possessed no such actual knowledge at the times those employees were hired or at any time during his employment of them. *See* Tr. at 275, 603. Instead, Complainant pursues the knowing hire or knowing continue to hire allegation under the theories of constructive and imputed knowledge. Cbr. at 22–23 (addressing constructive knowledge issue), and 18–22 (addressing imputed knowledge issue).

Addressing the theory of constructive knowledge first, under the INA, knowledge is not limited to actual knowledge, but includes constructive knowledge, which covers information that a person or entity *should have known*.

> The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
>
> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
>
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

8 C.F.R. §274a.1(l)(1) (1997). In deciding the constructive knowledge issue in this case, the question is whether Complainant has shown, by a preponderance of the evidence, that Mr. Carter should have known that Abel, Juan, and Francisco Ramirez were unauthorized to work in the United States.

In construing the constructive knowledge standard, most prior OCAHO cases finding liability on that basis have done so in the context of an employer receiving information from INS that casts doubt on the authorization of certain employees and subsequently failing to take adequate steps to reverify the employment eligibility of those employees or failing to take such steps in a timely manner. *See United States v. 4431, Inc.*, 4 OCAHO 611 (1994), 1994 WL 269390;

United States v. Noel Plastering & Stucco, Inc., 3 OCAHO 427 (1992),[29] 1992 WL 533132, *aff'd*, *Noel Plastering & Stucco, Inc. v. OCAHO*, 15 F.3d 1088 (9th Cir. 1993) (unpublished; text available at 1993 WL 533526; *United States v. New El Rey Sausage Co.*, 1 OCAHO 389 (ref. no. 66) (1989), 1989 WL 433853, *modified by CAHO on other grounds*, 1 OCAHO 542 (ref. no. 78) (1989), 1989 WL 433842, 433854, *aff'd*, *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991); *United States v. Mester Mfg. Co.*, 1 OCAHO 53 (ref. no. 18) (1988), 1988 WL 507634, *adopted by CAHO*, (July 12, 1988), 1988 WL 409575, *aff'd*, *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989). In fact, the Ninth Circuit has cautioned that the doctrine of constructive knowledge "should not be expansively applied" for fear of upsetting the delicate balance of IRCA's dual goals of "preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens." *Collins Food Int'l, Inc. v. INS*, 948 F.2d 549, 555, 554 (9th Cir. 1991), *rev'g United States v. Collins Foods Int'l, Inc.*, 1 OCAHO 828 (ref. no. 123) (1990), 1990 WL 512062, *aff'd by CAHO*, 1 OCAHO 875 (ref. no. 129) (1990), 1990 WL 512164.[30]

In *Collins*, the Ninth Circuit reversed the decision of the OCAHO Administrative Law Judge who had found constructive knowledge based on the facts that an employee authorized to make hiring decisions offered a job over the telephone without having reviewed the prospective employee's documentation,[31] and that the hiring employee failed to compare the back of the new employee's social security card, which was a forgery, with the example in the INS

[29]The *Noel Plastering* final decision and order is dated September 23, 1991, but an erratum, issued in relation to that decision and order on May 21, 1992, refers to the date of issuance as May 12, 1992. The erratum does not purport to correct the date noted on the final decision and order. Nonetheless, it appears that that date is in error and that the final decision and order actually was issued in 1992.

[30]Decisions of the Ninth Circuit Court of Appeals are not controlling in this case, as it arises in Texas, which falls under the Fifth Circuit's jurisdiction, but they may provide persuasive authority, especially considering that the Ninth Circuit is the only Court of Appeals so far to have addressed the issue of knowledge in knowing hire or knowing continue to hire cases under the INA.

[31]The Court noted that "[t]he Regulations define 'hiring' as 'the actual commencement of employment of an employee for wages or other remuneration,'" *Collins*, 948 F.2d at 551 (citing 8 C.F.R. §274a.1(c)), that employers have until three days after the date of hire to examine an employee's documentation, *id.* at 552, and that employers would place themselves in danger of providing evidence of unlawful discrimination if they were to inquire into a prospective employee's national origin or citizenship status at the pre-employment stage, *id.*

Handbook for Employers.[32] *Id.* at 551. The Ninth Circuit contrasted the context in which constructive knowledge had been found in *Mester* and in *New El Rey* with the situation in *Collins*, stating that "Collins Foods did not have the kind of positive information that the INS had provided in *Mester* and *New El Rey Sausage* to support a finding of constructive knowledge." *Id.* at 555. The Court, however, did not state that constructive knowledge *only* could be found in situations, like the ones in *Mester* and *New El Rey*, where the INS had given the employer notice of the employee's questionable status but the employer failed to take appropriate and/or timely action to reverify the employee's status and, if necessary, terminate the employee.

Several OCAHO cases have found constructive knowledge in other settings. In *United States v. Valdez*, 1 OCAHO 598 (ref. no. 91), 1989 WL 433882, *reconsideration denied*, 1 OCAHO 685 (ref. no. 104), 1989 WL 433869, *denial of reconsideration aff'd*, 1 OCAHO 744 (ref. no. 112) (1989), 1989 WL 433870, Judge Frosburg ruled that the constructive knowledge standard recognized in *Mester* and *New El Rey* in finding knowing continue to employ violations also should be applied in knowing hire cases. *Valdez*, 1 OCAHO 598, at 608–09, 1989 WL 433882, at *9. The Judge found that the "[r]espondent's failure to prepare an I–9 Form [although that alone could not provide the basis for a knowing hire violation], when coupled with her conscious avoidance of acquiring knowledge as to the identification and status of her employees, provide[d] believable circumstantial evidence of her [constructive if not actual] knowledge of an employee's unauthorized status."[33] *Id.* at 610, 1989 WL 433882, at *10.

In *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307 (1991), 1991 WL 531736, Judge Morse addressed the issue of constructive knowledge, as well as imputed knowledge, in light of the following facts: the sole owner of the respondent business allowed a friend to introduce an employee into his workforce, supposedly for training as a busboy; the friend possessed actual knowledge that the employee/busboy was not authorized to work in the United States;

[32]The Court noted that nothing in the statute requires a comparison of the back of the card with an example, that only one example of the back of a social security card out of several existing variations appeared in the handbook, and that "Congress intended to minimize the burden and the risk placed on the employer in the verification process." *Collins*, 948 F.2d at 554.

[33]On a prior occasion, I questioned *Valdez*'s continuing validity in light of the Ninth Circuit's subsequent decision in *Collins*. *See United States v. American Terrazzo Corp.*, 6 OCAHO 828, at 6 n.1 (1995) (Prehearing Conference Report).

and the respondent did not complete an I–9 form for the employee. Judge Morse found that the respondent should have known the employee's unauthorized status "because it had a duty reasonably to inquire and to inform itself of [the employee's] employment eligibility." *Cafe Camino*, 2 OCAHO 307, at 9, 1991 WL 531736, at *6. Judge Morse further stated that, "[i]n the circumstances of the present case, I find that even if [r]espondent, by and through Phillip Salerno [the respondent's sole owner], lacked actual knowledge of [the employee's] status, it acted with recklessness and wanton disregard for the legal consequences when it permitted Salerno's friend Nick to introduce a stranger to its workforce. That recklessness and disregard is sufficient to charge [r]espondent with constructive knowledge of [the employee's] unauthorized status as well as with the friend's actual knowledge." *Id*. at 10, 1991 WL 531736, at *7.

I too previously have found constructive knowledge in a situation factually different from that in *Mester* and *New El Rey*. In *United States v. American Terrazzo Corp.*, 6 OCAHO 828, at 5–6 (1995), 1995 WL 848945, at *5 (Prehearing Conference Report), I denied the complainant's motion for summary decision with respect to a knowing hire or continuing to hire allegation for several reasons, one of which was the inappropriateness of granting summary decision in light of the factual differences between the case that was before me and the cases out of which have come the only U.S. Court of Appeals decisions regarding that issue. However, after the record had been more fully developed, and after a hearing in the case, I found a knowing continue to hire violation based on constructive, if not actual, knowledge. I ruled that the respondent business knew or should have known that the employee in question was ineligible to work in the United States based on the following factors: the employee's testimony that she never told anyone connected with the respondent that she was a U.S. citizen; that she told the person who hired her, the respondent's manager, that she was a foreign student from Budapest; that everyone knew she was a Hungarian citizen; and that she did not complete an I–9 form that contained her name and stated she was a citizen or national of the United States; the respondent completed the I–9 form bearing the employee's name, including section one, which the employee is supposed to complete; the respondent did not complete that I–9 form until after it had received a notice of inspection from the INS; and the employee's social security card stated that it was valid for work only with INS authorization. *United States v. American Terrazzo Corp.*, 6 OCAHO 877, at 10–11 (1996) (Final Decision and Order).

In the case at hand, Mr. Carter delegated the duty to verify documentation and to complete I–9 forms to his business' foremen. CPFF 5; Tr. at 208. One of those foremen was Manuel Ramirez. *See* Tr. at 207. It is significant that Manuel Ramirez was the person who completed section two and signed the I–9 forms for all three of the employees who are the subjects of Count I. *See* CX–H, L, Q. Mr. Carter allowed Mr. Ramirez, a foreman who could not understand all the directions in English on the I–9 form, *see infra* pp. 36–37 and notes 63–64, the authority to complete the I–9 form. The directions on the I–9 form are in English; there is no corresponding Spanish translation. When Mr. Ramirez testified at trial, he did so through a court-appointed Spanish speaking interpreter who translated questions into Spanish for him and translated his answers into English. Mr. Carter testified that his foremen were "fully capable of filling out the form" and that "they can read and understand that form." Tr. at 216. Mr. Carter stated that he made that conclusion "based on knowing all of the foremen that we're talking about." *Id*. When Complainant's counsel presented a blank I–9 form to Mr. Ramirez and asked him to read the portions of each section of the form that he could understand, Mr. Ramirez demonstrated that he was unable to understand large portions of the form, CPFF 12; Tr. at 373–78, even though he had been practicing on his own reading the I–9 form in preparation for the hearing. Tr. at 379–81; *see infra* note 63.

Mr. Carter did not testify that he ever had instructed his foremen in the proper procedures for completing the form. When asked by his counsel, "That was when you discussed with the foremen *the procedures* to fill out the form I–9," Mr. Carter specifically replied, "*No*, I discussed with them the importance of making sure every person was in compliance with filling out the I–9 form and having proper documentation." Tr. at 211 (emphases added). Mr. Carter stated that he impressed upon his foremen the importance of I–9 compliance, but not that he instructed them in the proper procedures for completing the form. Even though Mr. Carter testified that he told the foremen about the importance of I–9 compliance, he said that he did so when he and the foremen were employed at Dixie Company; he did not discuss the I–9 requirement with his foremen in relation to his business. *See* Tr. at 211. Mr. Ramirez did not receive instructions regarding the proper way to complete I–9 forms until sometime after January 1995. CPFF 9; Tr. at 372–73. Mr. Carter said he assigned the I–9 form duties to the foremen because most of them were Hispanic and, because of that, he believed

they possessed greater knowledge of the I–9 requirements. CPFF 7; Tr. at 208–09. In addition, Mr. Carter testified that he delegated the responsibility of completing I–9 forms to the foremen because they had experience in filling out I–9 forms in prior employment greater than his own experience with such forms. CPFF 7; Tr. at 208–09, 212.

Respondent's situation is similar to that in *Cafe Camino*, in that Carter, like the owner in *Cafe Camino*, allowed another person (in this case, foreman Manuel Ramirez) to introduce unauthorized workers into his workforce,[34] although here, unlike *Cafe Camino*, there was some effort to verify the employment eligibility of the people listed in Count I, as evidenced by the completion of I–9 forms for those three employees.[35] *See* CX–H, L (completed under Francisco Ramirez' alias, Manuel Noguez), and Q. Constructive knowledge encompasses "situations where an employer . . . [a]cts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force *or to act on its behalf*." 8 C.F.R. §274a.1(l)(1)(iii) (1997) (emphasis added). While an employer is not strictly liable for the hiring of unauthorized aliens, neither can it delegate the hiring process to an individual who cannot read or understand the employment verification process.

I find that Mr. Carter possessed constructive knowledge that Abel, Juan, and Francisco Ramirez were unauthorized to work in the United States. Mr. Carter acted recklessly in delegating the duty of completing I–9 forms and verifying employment eligibility to a person who could not understand the directions on the I–9 form for completing that form. That kind of delegation was especially reckless because Mr. Carter did not provide instructions to that person concerning proper procedures for completing the I–9 form and for verifying the employment eligibility of other workers. Because Manuel Ramirez completed the I–9 forms for the three employees

[34]Mr. Carter testified that he relied on Manuel Ramirez to recruit Abel, Juan, and Francisco Ramirez. Tr. at 201. Whether Mr. Ramirez "hired" those individuals and whether he had authority to hire employees for Respondent will be addressed *infra*.

[35]It is clear that the context in which constructive knowledge was found in *Mester*, *New El Rey*, *Noel Plastering*, and *4431, Inc.*, is not present in this case. Also, I do not find that Mr. Carter possessed the kind of deliberate ignorance of his employees' identities and work statuses like the Judge in *Valdez* found and upon which he based his conclusion of the respondent's constructive knowledge.

listed in Count I on the day that they were hired,[36] I find that Mr. Carter is responsible for knowingly hiring, based on the theory of constructive knowledge, the three unauthorized workers in Count I.[37]

Complainant also argues that Respondent should be responsible for knowingly hiring or continuing to hire unauthorized workers based on the theory of imputed knowledge. Cbr. at 18–22. "Under ordinary agency concepts the knowledge of an agent is imputed to his principal." *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983). OCAHO recognizes that knowledge of an employee may be imputed to the employer to hold the employer responsible for knowing hire or continue to hire violations. "A principal is chargeable with, and bound by, the knowledge of or notice to its agent while the agent is acting within the scope of his authority and in reference to matters over which his authority extends." *United States v. Y.E.S. Indus., Inc.*, 1 OCAHO 1306, at 1319 (ref. no. 198) (1990), 1990 WL 512171, at *11. Manuel Ramirez has admitted that he knew Abel, Juan, and Francisco Ramirez, who are related to him,[38] were unauthorized to work in the United States.[39] CX–D–4. Complainant argues that Manuel Ramirez had the authority to hire employees for Respondent, that Mr. Ramirez hired the employees listed in Count I, that Mr. Ramirez knew at the time of hire or later during the course of employment that those employees were unauthorized to work in

[36]Because the employee is supposed to complete section one of the I–9 on the day of hire, *see* 8 C.F.R. §274a.2(b)(1)(i)(A) (1997), the date that appears in section one generally indicates the date of hire. The latest (1991) version of the I–9 form contains a space in section two for the employer to indicate the date the employee started working, but it is impossible to discern the date of hire from that block on these three forms because it is blank. For each of the three I–9 forms, the dates that appear in sections one and two are the same (October 30, 1994), indicating that Manuel Ramirez completed section two of those forms at the time of hire.

[37]My holding finds additional support in the fact that the I–9 forms for Abel and Francisco Ramirez lack an attestation in section one of each employee's work authorization. *See* CX–L, Q. A cursory scan of those I–9 forms would have revealed that the two employees had failed to attest to their work eligibility (by indicating that they were U.S. citizens, lawful permanent residents, or aliens authorized to work until a certain date), which should have caused Respondent to inquire into their work statuses. Although that circumstance alone would not be sufficient to find a knowing hire violation, it provides additional support for the conclusion that Respondent should have known those two employees were unauthorized to work in the United States.

[38]Juan Ramirez is Manuel Ramirez' brother, and Abel and Francisco Ramirez are Manuel Ramirez' brothers-in-law. CPFF 16; CX–D–4; Tr. at 367.

[39]In addition, Juan Ramirez testified at trial that Manuel Ramirez knew of his unauthorized status. Tr. at 422–23.

the United States, and that Mr. Ramirez' knowledge should be imputed to Mr. Carter. Cbr. at 18–22.

Respondent argues that Mr. Ramirez did not have hiring authority. Rbr. at 3, 17. Mr. Carter stated that he authorized Mr. Ramirez to complete I–9 forms, but that he did not grant Mr. Ramirez the authority to make hiring decisions. *See* Tr. at 207–08, 219–20, 224, 243. Mr. Carter stated that his business' salesmen had the authority to hire and to fire employees, but that the power of the foremen was limited to completing I–9 forms and recommending people for employment. *Id*. Mr. Carter described the "recommendation" and "hiring" process as follows: the foremen maintained lists of people qualified to perform various jobs and telephoned the main office to make recommendations for people to hire, and those people were hired on the basis of the foremen's recommendations and if the appropriate paperwork was completed. *See* Tr. at 201, 221–23. Mr. Carter admitted that he relied on Mr. Ramirez to recruit the three employees in question. Tr. at 201. Mr. Carter also stated with relation to Juan Ramirez that the person who signed his I–9 form probably was the person who hired him, but promptly recanted upon learning that Manuel Ramirez completed that I–9 form.[40] Tr. at 224–25.

Regardless of whether Manuel Ramirez had the authority to hire employees on behalf of Respondent, whether Manuel Ramirez hired the three employees at issue, or whether Respondent's recommendation process should be considered the equivalent of allowing the foremen the authority to hire employees, the fact remains that Manuel Ramirez completed I–9 forms for the three employees and that Mr. Carter gave him the authority to do that. The person who completes section two of the I–9 form and verifies documentation does so on behalf of the employer. The person who completes section two swears, on behalf of the employer, that he or she has examined the noted documentation, that it appears to be genuine and to relate to the individual presenting it, and that to the best of his or her knowledge, the employee is authorized to work in the United States. *See* Form I–9, OMB No. 1115–0136 (Nov. 21, 1991). For those reasons, the

[40]I do not rely on statements from the records of deportable alien or the interviews of Abel, Juan, and Francisco Ramirez, *see* CX–F, J (RX–J), K, N, O, and S (RX–L), (or on statements from any other such documents in evidence that relate to other individuals) that refer to "Dixie Company" about who had hiring authority at DISCO and who hired whom at DISCO. Those documents indicate, and there is no evidence otherwise, that those statements could have been referring to practices and conduct at Dixie Company rather than DISCO, the only business in question in this case.

knowledge of the person who completes section two and verifies documentation should be imputed to the employer, regardless of whether that person made the actual decision to hire the employee.

Facts strikingly similar to those in the present case appeared in *Y.E.S. Industries*. As in the present case, the respondent in *Y.E.S. Industries* authorized an employee to complete section two of the I–9 form and sign it on behalf of the employer. *Y.E.S. Industries*, 1 OCAHO 1306, at 1318, 1990 WL 512171, at *10. That agent-employee knew that certain people for whom he completed I–9 forms were not authorized for employment in the United States. *Id.* The respondent in that case argued that its agent-employee's knowledge should not be imputed to the respondent because it had taken adequate steps to inform the agent-employee of the INA's verification requirements, including showing him the proper procedures for completing the I–9 form.[41] *Id.* at 1319, 1990 WL 512171, at *10. The respondent also argued that "although [the agent-employee] could provisionally allow employees to start work pending [the employer's] review of their documents, only [the employer] had the authority to verify documents and only [the employer] had the authority to hire new employees." *Id.* Judge Robbins found those arguments of no avail to the respondent, stating that the agent-employee's "signature on the form was intended to communicate to the Attorney General that [r]espondent was in full compliance with IRCA. Respondent thus cloaked [the agent-employee] with the authority to verify the employment eligibility of its employees. Respondent must bear the consequences of [the agent-employee's] wrongful conduct." *Id.*, 1990 WL 512171, at *11.

Imputing knowledge to Respondent in this case is appropriate, even though he is a sole proprietor as opposed to a corporate entity, and does not impose a strict liability standard. A prior OCAHO case has imputed knowledge to a single person operating a business. *See United States v. Fox*, 5 OCAHO 756 (1995), 1995 WL 463979.[42] Fifth Circuit precedent also is instructive on this point. In *Floyd S. Pike Electrical Contractor, Inc. v. OSHRC*, 576 F.2d 72 (5th Cir. 1978), the Court ruled that it was appropriate to impute to the employer the knowledge of one foreman and one other employee who engaged in a workplace safety violation under the Occupational Safety and

[41]In this case, Mr. Carter did not show Manuel Ramirez how to complete the I–9 forms.

[42]Knowledge was imputed to the individual employer without discussion of that specific issue.

Health Act (OSHA), involving the shoring of a trench, where the employer placed in charge a foreman who was inexperienced in shoring, the employer did not adequately reprimand the foreman for walking into an unshored portion of trench on a prior occasion, and the employee never was instructed not to enter an unshored section of a trench.[43] *Pike*, 576 F.2d at 76–77.

Just as OSHA does not establish a strict liability standard for workplace safety violations, the INA does not impose a strict liability standard for employing unauthorized workers. By its own terms, 8 U.S.C. §1324a(a)(1)(A) only imposes a penalty for *knowingly* hiring or continuing to employ unauthorized workers. Imputing knowledge to Mr. Carter in the present circumstances does not make him strictly liable for the misconduct of Mr. Ramirez. Corresponding to the situation in *Pike*, Mr. Carter failed to take adequate steps to ensure that Mr. Ramirez knew the INA's verification requirements and that Mr. Ramirez complied with them. *See supra* pp. 18–20. According to *Pike*, it is entirely appropriate to impute Mr. Ramirez' knowledge to Respondent and hold Respondent responsible for Mr. Ramirez' misconduct in this situation.

Although the record reveals that Manual Ramirez knew that Abel, Juan, and Francisco Ramirez were unauthorized to work in the United States, it does not reflect when he gained that knowledge.[44]

[43] *Pike* distinguished the earlier decision by the Fifth Circuit in *Horne Plumbing & Heating v. OSHRC*, 528 F.2d 564 (5th Cir. 1976), where the Court had reversed an administrative ruling that the employer had violated OSHA in a case also involving the shoring of a trench. In *Horne*, the case record revealed that the employer had an exceptional safety record and "took virtually every conceivable precaution to ensure that his employees were aware of and understood the requirements of [OSHA] and that they conducted themselves in accordance therewith." *Id.* at 569. The Fifth Circuit reversed the ALJ's decision, stating that imputing knowledge to the employer under those facts would be to impose a strict liability standard on the employer, something that OSHA does not permit. *Id.* at 571. As the Court noted, OSHA provides a defense for an employer who "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." *Id.* at 567 (quoting 29 U.S.C. §666(j)).

[44] The questions asked of Mr. Ramirez during his sworn statement inquire whether he knew "*at any time*" that Abel, Juan, and Francisco Ramirez were illegally in the United States and were not authorized to work in the United States. *See* CX–D–4. When asked if he knew the three individuals were not U.S. citizens and, if so, how he knew, Mr. Ramirez stated that he knew they were not U.S. citizens because Juan Ramirez is his brother and Abel and Francisco Ramirez are his brothers-in-law. *See id.* Although Manuel Ramirez' familial relationship with the three noted employees makes it likely that he knew of their unauthorized statuses well before the date they were hired, I am loathe to hold that a family relationship alone is sufficient to prove such knowledge, even by the preponderance standard.

It is unclear, therefore, whether Manuel Ramirez knew at the time of hire[45] that the three individuals were unauthorized. However, it is clear that Manuel Ramirez possessed that knowledge sometime during their employment because he stated on November 18, 1994, that he knew they were unauthorized. *See* CX–D–4. Imputing Manuel Ramirez' knowledge to Mr. Carter makes Mr. Carter responsible at least for a knowing continue to hire violation with respect to the three employees listed in Count I.[46]

Respondent's asserted good faith defense to Count I's knowing hire charge affords him no relief. The INA provides that a respondent who establishes that it has complied in good faith with the requirements of the employment verification system, as set forth in 8 U.S.C. §1324a(b), has established an affirmative defense that it has not committed a knowing hire violation.[47] 8 U.S.C. §1324a(a)(3) (1994). Respondent argues that it "acted in good faith and reasonably relied" on the documentation, namely, the alien registration cards, Texas driver's licenses, and social security cards that each individual listed in Count I presented to demonstrate his identity and work eligibility. Ans. at 8. Information regarding each of those documents, in fact, is recorded in section two of the I–9 forms for Abel, Juan, and Francisco Ramirez. *See* CX–H, L, Q. Respondent, however, failed to comply in good faith with the INA's employment verification requirements when it delegated the duty of examining documentation and completing section two of the I–9 form to a person who, in large part, could neither read nor understand the I–9 form. This asserted defense also does not apply to Respondent's situation because the good faith defense provides only a rebuttable presumption that a respondent did not commit a knowing hire violation, *see United States v. Tuttle's Design Build, Inc.*, 2 OCAHO 370, at 5 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses) (1991); the defense, therefore, is negated upon a finding of knowledge, whether actual, constructive, or imputed.

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[45]October 30, 1994, as reflected by the date in section one for each of the three I–9 forms. CX–H, L, Q; *see supra* note 36.

[46]In any event, since I have held Respondent responsible for the initial hire based on a theory of constructive knowledge, the date on which the imputed knowledge should apply is somewhat academic.

[47]The statute does not provide an affirmative defense for continuing to employ an alien knowing the alien is, or has become, unauthorized. *See* 8 U.S.C. §1324a(a)(2), (3) (1994).

Therefore, applying theories of constructive and imputed knowledge, I conclude that Respondent hired, and continued to employ, Juan Ramirez, Abel Ramirez, and Francisco Ramirez, after November 6, 1986, knowing that they were aliens not authorized for employment in the United States. Complainant has proven, by a preponderance of the evidence, paragraphs A–E of Count I of the Complaint, and has shown that Respondent violated sections 274A(a)(1)(A) and 274A(a)(2) of the INA, 8 U.S.C. §§1324a(a)(1)(A) and 1324a(a)(2).

C. *Count II: Failure to prepare/present I–9 forms*

Complainant alleges in Count II of the Complaint that Respondent hired fifteen named individuals after November 6, 1986, for employment in the United States, and that Respondent either failed to prepare I–9 forms for those individuals or failed to make available I–9 forms for those individuals at the scheduled inspection. Compl. ¶¶II.A–E. Liability for all but two of the fifteen I–9 forms has been adjudicated previously on a motion for summary decision. *See* First PHC Tr. at 32–34; First PHCR at 6; *supra* pp. 7–8. Liability remains an issue for the I–9 forms belonging to Arturo Resendez (¶II.A.14) and Manuel Resendez (¶II.A.15). Respondent admits that it hired those two employees after November 6, 1986, Ans. ¶¶6–7, but denies that it failed to prepare I–9 forms for them and that it failed to make available their I–9 forms at the time of inspection, *id.* ¶¶9, 12.

After serving Respondent with a Notice of Inspection on January 3, 1995, the INS, through Special Agent M.K. Murphy, conducted an inspection of Respondent's I–9 forms at Respondent's place of business on January 9, 1995. CPFF 21–22; Tr. at 106–07; CX–A, ZZZZ–5–6. During the scheduled inspection, Special Agent Murphy created a receipt, on which he listed all the I–9 forms Respondent had provided. CPFF 24; Tr. at 107–08, 113–14; CX–B–1–4. Special Agent Murphy created that receipt so Respondent would know what documents were taken from the business. Tr. at 108. The original I–9 forms were returned to Respondent either on the day of inspection or on the next day. *Id.* At Mr. Carter's request, Special Agent Murphy noted on the receipt which I–9 forms had copies of the employee's identity and/or employment eligibility documentation attached to them. Tr. at 109; *see* CX–B–1–4. Respondent reviewed the I–9 form receipt with Special Agent Murphy to ensure that all the I–9 forms

provided at the inspection were listed.[48] CPFF 25; Tr. at 110, 142, 180–81, 253. In fact, Mr. Carter found one I–9 form that accidentally had been omitted from the receipt. Tr. at 110, 253. That form was added at the bottom of the list. Tr. at 110; CX–B–4. I–9 forms belonging to Arturo Resendez and to Manuel Resendez are not listed on the I–9 receipt. CPFF 27; Tr. at 113; CX–B–1–4. Special Agent Murphy testified that, on the day of inspection, the only I–9 forms that he received were the ones listed on the receipt. Tr. at 113–14. He also testified that Mr. Carter did not bring to his attention the fact that I–9 forms belonging to Arturo Resendez and Manuel Resendez did not appear on the receipt. Tr. at 180–81.

Mr. Carter testified that he presented the I–9 forms of his business' employees in a binder on the day of inspection.[49] *See* Tr. at 252, 255–56, 258. In addition to the I–9 forms, Mr. Carter stated that the binder contained W–4 forms, employment applications, and I–9 supporting documentation for his business' employees. Tr. at 251; *see also* Tr. at 140–41, 255–56. Mr. Carter testified regarding I–9 forms for Arturo and Manuel Resendez, "I *believe* they were in the notebook," and "I would *guess* they were" in the notebook at the time of inspection. Tr. at 252 (emphases added); *see* CPFF 28. Respondent sent the two I–9 forms in question to Complainant at a later date.[50] Tr. at 289–90. Mr. Carter stated that the two forms were in the binder when he went back to look for them, and that he has no reason to believe they were placed in the binder at some time after the inspection. Tr. at 254. Special Agent Murphy admitted that he has no evidence that those forms were forged or made after the fact. Tr. at 142–43, 180. Respondent, however, did not at any point in this case offer the I–9 forms for Arturo and Manuel Ramirez into evidence. Tr. at 176.

Complainant has not proven by a preponderance of the evidence that Respondent did not prepare I–9 forms for Arturo and Manuel Resendez. Mr. Carter testified that I–9 forms for those employees existed, *see* Tr. at 252, 254, and Special Agent Murphy has stated that there is no evidence that the forms later provided by Respondent

[48]Mr. Carter testified, however, that he did not review the receipt on a "name-by-name basis." Tr. at 252.

[49]Special Agent Murphy, however, testified that the I–9 forms were not in a binder, but were placed "loose stacked on a table." Tr. at 140.

[50]Complainant acknowledges that "[i]n response to Complainant's discovery requests, Respondent provided Complainant with what it contends are the Forms I–9 for Arturo Resendez and Manuel Resendez." Cbr. at 25.

were forged or created after the fact, Tr. at 142–43, 180. Complainant, however, has demonstrated by a preponderance of the evidence that Respondent failed to make available the I–9 forms for Arturo and Manuel Resendez at the scheduled inspection held January 9, 1995. I credit Special Agent Murphy's testimony regarding his completion of the receipt and Mr. Carter's subsequent examination of it. I find unconvincing Mr. Carter's equivocal statements about how he "believed" and "guessed" the I–9 forms in question were in the binder available for inspection on January 9, 1995.

As previously noted, Respondent asserted that its I–9 forms were presented to Special Agent Murphy in a binder, but Special Agent Murphy stated that the forms were presented lying loose on a table. *See supra* p. 25 and note 49. Assuming that Respondent's version of the facts is true, I still find unconvincing Respondent's theory that Special Agent Murphy inadvertently skipped the relevant I–9 forms because of pages sticking together. Mr. Carter testified that Special Agent Murphy removed the I–9 forms from the binder. Tr. at 255. At trial, Mr. Loughran, asking the questions, and Mr. Carter, responding, engaged in the following exchange regarding how the I–9 forms were gathered from the notebook:

> Q And so when Agent Murphy took those items out of the binder, he was having—was not grabbing them in one fell swoop. He was going to the first individual and leaving his W–4 and his employment application and taking out—and what you're telling me now is he was also leaving the supporting documentation. He was just taking the I–9 itself.
>
> A That's correct.
>
> Q And then he would have to move those items across, open again, or just leave it open, move it across, and take out the I–9 for the next individual, leaving the supporting documentation.
>
> A Right.
>
> Q And this would go on, and if we have 75 or 78 or [sic] individuals, he would have to repeat that process over and over again.
>
> A Yes.
>
> Q The—so it's your—just to close out this issue, it's your contention that the I–9s for Arturo Resendez and Manuel Resendez were available—were made specifically available, put forward to Agent Murphy and that, for one reason or another, it may be just pages sticking together or whatever, he did not take those particular two. Is that your position?
>
> AI—yes, that's —

Tr. at 255–56. The information in the above dialogue indicates that the documents were grouped in the binder by employee, rather than by document type. If, as Respondent contends, Special Agent Murphy removed the I–9 forms from the binder, he would have had to do so by leafing through a series of other documents for each employee before he could locate the employee's I–9 form. It is unlikely that Special Agent Murphy would have skipped over an I–9 form, because the other documents in the binder for that employee would have alerted Special Agent Murphy to the identity of an employee for whom he had not retrieved an I–9 form. For Respondent's theory about sticking pages to hold true, at least three pages[51] would have had to stick together at once for Special Agent Murphy to have missed an entire person.

Additionally, as Complainant points out, *see* Cbr. at 25, the fact that Respondent later provided the INS with I–9 forms for Arturo and Manuel Resendez does not relieve Respondent of his obligation to make those forms available at the time of inspection. The INS must give an employer at least three days notice before conducting an I–9 inspection; then, "*[a]t the time of inspection*, Forms I–9 must be made available . . . at the location where the request for production was made." 8 C.F.R. §274a.2(b)(2)(ii) (1997) (emphasis added). Also, "[a]ny refusal *or delay in presentation* of the Forms I–9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the [Immigration and Nationality] Act." *Id.* (emphasis added); *see also 4431, Inc.*, 4 OCAHO 611, at 16–17, 1994 WL 269390, at *13 (noting the three day notice requirement and the directive that I–9 forms "must be made available *at the time of inspection*") (emphasis in original); *United States v. Big Bear Market*, 1 OCAHO 285, at 312 (ref. no. 48), 1989 WL 433851, at *23 (noting that a respondent's presentation of I–9 forms after the date of inspection "does not relieve it from liability for failure to be in compliance on the date of inspection"), *aff'd by CAHO*, 1 OCAHO 341 (ref. no. 55) (1989), 1989 WL 433848, *aff'd on other grounds*, *Big Bear Market No. 3 v. INS*, 913 F.2d 754 (9th Cir. 1990).

Complainant has proven by a preponderance of the evidence that Respondent failed to make available I–9 forms for Arturo Resendez (¶II.A.14) and Manuel Resendez (¶II.A.15) at the time of the sched-

[51]Three pages (the I–9, W–4, and employment application) if there were no photocopies of documentation for the employee; four or more pages if the binder contained photocopies of documentation for the employee.

uled inspection conducted January 9, 1995. Consequently, I find that Respondent violated section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B).

D. *Count III: Failure to ensure completion of section one*

Complainant alleges in Count III of the Complaint that Respondent hired one named individual, Javier Aguirre, after November 6, 1986, for employment in the United States, and failed to ensure that Mr. Aguirre properly completed section one of his I–9 form. Compl. ¶¶III.A–C. Respondent admits that it hired Mr. Aguirre after November 6, 1986, but denies that it failed to properly complete section one of his I–9 form.[52] Ans. ¶¶13–15. An examination of Mr. Aguirre's I–9 form reveals that Mr. Aguirre included his alien number at the end of the line that asserts that he is an alien lawfully admitted for permanent residence, but that he did not mark the corresponding box at the beginning of the line. *See* CX–II; Stip. Order Add. at 1. Also, Mr. Aguirre placed his date of birth in the box where he was supposed to supply the date on which he completed section one; consequently, the date of completion of section one does not appear on the form. *See* CX–II; Stip. Order Add. at 1.

Respondent argues that the new statutory good faith compliance defense to paperwork violations[53] shields it from liability. Rbr. at 19–20. That new provision, however, only applies to employment verification failures that occur after the statute's date of enactment, September 30, 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, §411(b), 110 Stat. 3009. The most recent amendment to the Complaint was filed on April 16, 1996; all the violations charged in the Complaint occurred before that date. The new statutory good faith compliance defense, therefore, does not apply to this case.

Respondent's assertion of substantial compliance, *see* Ans. ¶15, also does not negate a finding of liability here. "OCAHO case law

[52]The employer is required to ensure that the employee completes section one of the I–9 form. *See supra* note 4.

[53]Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, amends the INA to add a new paragraph at 8 U.S.C. §1324a(b)(6), which provides that "a person or entity is considered to have complied with a requirement of [the employment eligibility verification] subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement," with certain listed exceptions.

recognizes a viable substantial compliance defense to alleged paperwork violations of section 274A of the INA in certain limited circumstances." *United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO 908, at 6 (1997), 1997 WL 131356, at *4 (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order) (citing *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 2 (1995), 1995 WL 788551, at *2 (Prehearing Conference Report and Order Granting in Part Complainant's Motion for Summary Decision), and *United States v. Northern Mich. Fruit Co.*, 4 OCAHO 667, at 14 (1994), 1994 WL 555908, at *10 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses, Including Substantial Compliance)). An employer's failure to ensure that its employee include the date in section one does not substantially comply with the INA's verification requirements. *See* First PHC Tr. at 45; First PHCR at 9; *Mesabi*, 5 OCAHO 801, at 3, 1995 WL 788551, at *2; *Northern Mich. Fruit*, 4 OCAHO 667, at 16–17, 1994 WL 555908, at *12. In addition, Complainant rightfully points out that "[w]ithout an attestation date [in section one], it cannot be determined whether the employee attested to his work eligibility on the date of hire, as required by 8 C.F.R. §274a.2(b)(1)(i)(A), or a date subsequent at which time he or she may have attained employment authorization where there was none at the time of hire." Cbr. at 26.

As I have found a violation with respect to the lack of attestation date in section one, it is unnecessary to reach a conclusion about whether the failure to place a checkmark in a box when the alien number is present constitutes a violation. Complainant has shown, by a preponderance of the evidence, that Respondent failed to ensure that Mr. Aguirre properly completed section one of his I–9 form, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B).

E. *Count V: Failure to ensure completion of section one and failure to complete section two*

In Count V, Complainant alleges that Respondent hired twenty-eight named individuals after November 6, 1986, for employment in the United States, that Respondent failed to ensure that those individuals properly completed section one of their respective I–9 forms, and that Respondent failed to properly complete section two of those I–9 forms. Compl. ¶¶V.A–D. Liability for all but one of the twenty-eight I–9 forms has been adjudicated previously on a motion for sum-

mary decision. *See* First PHC Tr. at 66; First PHCR at 10; *supra* pp. 6–7. Liability remains an issue for the I–9 form belonging to Alejandro Stroot (¶V.A.19). Respondent admits that it hired Mr. Stroot after November 6, 1986, but denies that it failed to properly complete sections one and two of his I–9 form.[54] An examination of Mr. Stroot's I–9 form reveals that there is no date of completion in section one. *See* CX–MMMM; Stip. Order Add. at 14. In section two, Lists B and C of the documentation portion are completely blank. *See* CX–MMMM. The document title "Certificate of U.S. Citizenship" is noted under List A, but no issuing authority, document number, or expiration date (if necessary) is given. *Id.*; *see* Stip. Order Add. at 14. The certification portion of section two is blank, except for the employer's or agent's signature. *See* CX–MMMM; Stip. Order Add. at 14.

As discussed above, the statutory good faith defense to paperwork violations does not apply to the present case. Also, Respondent does not assert a valid substantial compliance defense with respect to the omissions on Mr. Stroot's I–9 form. As discussed previously, *see supra* p. 28, Respondent's failure to ensure that the employee include the date of attestation in section one is critical. Violations also are present in section two. An employer must verify an employee's identity and employment eligibility by examining and recording information in section two about a List A document *or* by examining and recording information in section two about both a List B document and a List C document.[55] *See* 8 U.S.C. §1324a(b)(1)(A) (1994); 8 C.F.R. §274a.2(b)(1)(v) (1997). Respondent's failure to list complete information for the documentation part of section two constitutes a violation of the INA. *See Corporate Loss*, 6 OCAHO 908, at 4, 1997 WL 131365, at *3 (Modification by the CAHO) (quoting 8 C.F.R. §274a.2(b)(1)(v) (1996)[56] for the proposition that "[t]he identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I–9").

With respect to the certification portion of section two, Respondent's omissions of the business name, business address, and

[54]The employer is required to ensure that the employee completes section one of the I–9 form. *See supra* note 4.

[55]List A documents establish both identity and employment eligibility, List B documents establish identity only, and List C documents establish employment eligibility only.

[56]This provision is unchanged in the subsequently issued 1997 version of volume eight of the Code of Federal Regulations.

attestation date are violations of the INA. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO 908, at 18–19, 1997 WL 131365, at *18, 20 (Order Granting in Part Complainant's Motion for Summary Decision), *modified by CAHO on other grounds*, 6 OCAHO 908 (1997), 1997 WL 131365. The omission of the printed name and title of the employer representative who signed the form does not qualify as a violation in this instance because the printed name and title of Manuel Ramirez, who signed this I–9 form, appear on other I–9 forms of Respondent. *See id.* at 20, 1997 WL 131365, at *20–21. Having found other violations in section two of Mr. Stroot's I–9 form, it is unnecessary to decide whether the omission in section two of his starting date also constitutes a violation. Complainant has proven, by a preponderance of the evidence, that Respondent failed to ensure that Mr. Stroot properly completed section one of his I–9 form and that Respondent failed to properly complete section two of that I–9 form, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B).

F. *Penalty: Substantive violations*

Complainant requests a civil money penalty of $1,515 for each of the three violations charged in Count I, as well as an order to cease and desist from violating the knowing hire and/or continue to hire provisions of the INA. For a respondent's first-time violation of the knowing hire or continue to hire provision, a penalty of "not less than $250 and not more than $2,000 for each unauthorized alien" is required. 8 U.S.C. §1324a(e)(4)(A)(i) (1994). "Patently, knowing hire of unauthorized aliens is serious as it violates the essence of the national immigration policy enacted by IRCA." *United States v. Chacon*, 3 OCAHO 578, at 9 (1993), 1993 WL 597395, at *7. Likewise, a knowing continue to hire violation is a serious offense. *American Terrazzo*, 6 OCAHO 877, at 11 (citing *United States v. Great Bend Packing Co., Inc.*, 6 OCAHO 835, at 4 (1996), 1996 WL 207188, at *3). While a respondent's lack of actual knowledge operates as a factor in mitigation of the civil money penalty, that respondent's "carelessness in permitting [an employee] to proceed on his behalf does not absolve him of a serious violation of §1324a." *Fox*, 5 OCAHO 756, at 4, 1995 WL 463979, at *3. The penalty requested by the INS is meaningfully less than the maximum $2,000 authorized by statute. I find that the requested penalty of $1,515 for each of the three violations found in Count I is reasonable. Therefore, Respondent is ordered to pay a civil money penalty, with respect to Count I, of $1,515 per violation, for a total of $4,545. Also,

Respondent is ordered to refrain from violating sections 274A(a)(1)(A) and 274A(a)(2) of the INA, 8 U.S.C. §§1324a(a)(1)(A) and §§1324a(a)(2). *See* 8 U.S.C. §1324a(e)(4)(A) (1994).

G. *Penalty: Verification violations*

1. *Statutory and Regulatory Factors*

The statute and pertinent regulation provide that in considering an assessment of a civil money penalty for paperwork violations, due consideration shall be given to the size of the business of the employer, the employer's good faith, the seriousness of the violation, whether the employee hired was an unauthorized alien, and whether the employer has a history of previous violations. 8 U.S.C. §1324a(e)(5) (1994); 8 C.F.R. §274a.10(b)(2)(i)-(v) (1997). Com-plainant has the burden of proving the existence of such aggravating factors by a preponderance of the evidence. *See American Terrazzo*, 6 OCAHO 877, at 13; *United States v. Skydive Academy of Haw. Corp.*, 6 OCAHO 848, at 4 (1996), 1996 WL 312123, at *4. In this case, Respondent asserts that there is no history of prior verification violations, and Complainant does not contend otherwise. RPCL 1; Cbr. at 27; Tr. at 25, 31, 119, 168, 260, 517. However, Complainant asserts that the penalty for the record keeping violations charged in Counts II–V should be aggravated on the basis of the other four statutory factors. Cbr. at 27. Therefore, I will consider each of the remaining four factors to determine whether Complainant has met its burden of proof.

2. *Size of Business*

Complainant contends that the relevant factors in determining the size of a business include its revenue or income, the amount of payroll, number of salaried employees, nature of ownership, length of time in business, and the nature and scope of facilities.[57] Cbr. at 27. Complainant addresses each of those factors, and notes that in

[57]Although Complainant is correct that some past cases refer to the nature of ownership and how long the employer has been in business, these do not directly relate to size of business. For example, as to the nature of ownership, an incorporated business may be small, and a sole proprietorship may be large. Similarly, a business may be large even though it has been in business only a few years, and, conversely, a business may be small that has been in business for many years. However, even if these factors were considered here, they would support Respondent's assertion that it is a small business, because it is a sole proprietorship and has been in business for only three years.

June 1996 Respondent employed 200 full-time employees, and continues to experience a steady increase in clients, employees, and sales. Cbr. at 29; Tr. at 228–29, 232. Complainant notes that Respondent reported $2.4 million in gross receipts in 1995 and $2.9 million for the period ending July 31, 1996. Cbr. at 28; Tr. at 234–35. Complainant argues that since the purpose of a civil money penalty is to induce compliance with the law through a reasonably proportioned fine, and since Respondent is a growing company, a non-mitigated fine would enhance the probability of compliance with the worksite enforcement provisions. Citing *United States v. Felipe, Inc.*, 1 OCAHO 626, at 631 (ref. no. 93), 1989 WL 433965, at *5, *aff'd by CAHO*, 1 OCAHO 726 (ref. no. 108) (1989), 1989 WL 433965, Complainant argues that while Respondent is not a large corporate business, it is not a marginally operational "Mom and Pop" operation that would merit mitigation of the fine.[58] *See* Cbr. at 29.

Respondent contends that it is a small business, with gross income figures that fall within the Small Business Administration's (SBA) definition of a small business, with a high turnover of employees, with large but infrequent contracts with occasional shut-downs between contracts, and with highly leveraged assets. Rbr. at 25–26. Given the tenuous nature of Respondent's operations, and considering the sales, profits, assets and number of employees, Respondent argues that it should be classified as a small business. Rbr. at 27.

Both parties, in their briefs, seem to confuse the issue of ability to pay with size of the business. These factors may be related, but they remain distinctly different. Indeed, a small business may be profitable and able to pay a civil penalty and yet still be a small business based on its sales, payroll, number of employees, and value of its assets. The penalty should not be aggravated for a small business, even if it is profitable and able to pay the penalty.

Neither IRCA nor its implementing regulations provide guidelines for determining business size. In past decisions, however, the Small Business Administration's Standard Industrial Classification (SIC) Manual has been utilized as one factor in evaluating the size of the business. *See Skydive*, 6 OCAHO 848, at 5–6, 1996 WL 312123, at *5;

[58]While *Felipe* noted that a minimum penalty would have more impact on a marginally operational "Mom & Pop" business than a large corporate business, the standard is whether an employer is a small business, not whether it is a "Mom & Pop" operation.

United States v. Tom & Yu, 3 OCAHO 445, at 4 (1992), 1992 WL 535582, at *3. In this case, Complainant concedes that, applying the relevant SBA standard to Respondent's gross receipts for 1996, Respondent is a small business.[59] Cbr. at 28. Respondent reported annual gross sales of slightly more than $2.4 million in its 1995 federal tax return. *See* CX–WWWW–5 (RX–A–5). While the 1996 tax return had not been filed as of the date of the hearing in January 1997, if the $2.9 million in sales for the first part of 1996 were extrapolated to a yearly figure, Respondent still would be considered a small business because its annual 1996 sales still would be considerably less than $7 million. The relevant SBA SIC code provides that a company in Respondent's line of work would be considered small if it had annual gross sales of $7 million or less. 13 C.F.R. §121.201, at 198 (1997) (Major Group 17: Construction—Special Trade Contractors). Since Respondent's annual gross sales are considerably less than $7 million, it is considered a small business under the SBA regulations.

However, gross sales are not the only criteria to be utilized in evaluating whether a business should be considered small under 8 U.S.C. §1324a(e)(5). Other relevant criteria are the number of employees, the size of the payroll, and the value of its assets. In this case, the employer has employed as many as 200 employees, but, at the time of the hearing, employed approximately forty to fifty employees. Tr. at 574. In 1995, Respondent paid wages to employees totaling $1,147,019.65.[60] *See* CX–WWWW–5 (RX–A–5).

No bright line standard has been established as to the number of employees or amount of payroll that would transform a business from small to moderate or large, because these are among several factors in determining size of business. Nevertheless, in past cases the penalty has not been aggravated based on the business size factor, even as to businesses that employed more than a hundred employees. *See, e.g., United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 3–4 (1995), 1995 WL 325252, at *2 (120 employees); *United States v. Ulysses, Inc.*, 3 OCAHO 449, at 7 (1992), 1992 WL 535586, at *5 (166–168 employees). Also, companies with a work

[59]Although the INS disputes Respondent's assertion that it is a small business, Special Agent Montgomery did acknowledge that Respondent is not a large business. *See* Tr. at 32.

[60]This figure is based on the 1995 tax return, which, at the time of trial in January 1997, was the latest tax return available.

force of approximately ninety to a hundred employees have been considered to be small companies. *See United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO 782, at 3–4 (1995), 1995 WL 653357, at *3 (approximately a hundred employees); *United States v. Anchor Seafood Distribs., Inc.*, 5 OCAHO 758, at 5, 1995 WL 474129, at *3–4 (ninety-three employees), *appeal filed*, No. 95–4096 (2d Cir. 1995), *petition for review withdrawn*, No. 95–4096 (2d Cir. 1996). Since the size of Respondent's work force fluctuates considerably depending on how many construction jobs are currently in effect, *see* Tr. at 575, and the record reflects that he employed only about forty to fifty employees at the time of the hearing, Tr. at 228, 574, the number of employees does not support Complainant's assertion that this business should be considered anything but small. Similarly, an annual payroll of approximately $1.147 million (which averages less than $23,000 per employee if the work force is fifty employees) is not a basis for considering this employer anything other than small.

Finally, although Respondent also owns certain business assets, including several motor vehicles, office furniture and computers, the cost and value of those assets, as shown in its 1995 federal income tax return, are not so substantial as to make this business anything other than small.[61]

Considering all these factors as a whole, I conclude that Complainant has failed to meet its burden of proving that Respondent's business is anything other than small. Further, although the Respondent does not bear the burden of showing that it is a small business, based on the record evidence in this case, including the gross sales, number of employees, size of payroll, and business assets, I find that Respondent is a small business. Consequently, I will not aggravate the civil money penalty based on this factor.

3. *Employment of Unauthorized Aliens*

Complainant also asserts that Respondent hired unauthorized aliens, and, therefore, that the penalty should be aggravated based on this factor. Cbr. at 36. One of the statutory factors that warrants

[61]The 1995 tax return lists five motor vehicles (including a fork lift), which have a combined cost basis of $39,167. *See* CX–WWWW–12 (RX–A–12). Although he purchased an additional three vehicles in April 1996, Mr. Carter testified that the total purchase price for those three vehicles was only approximately $4,500. Tr. at 231.

an aggravated penalty is the hiring of unauthorized aliens. *See* 8 U.S.C. §1324a(e)(5) (1994); *United States v. Reyes*, 4 OCAHO 592, at 7 (1994), 1994 WL 269183, at *5; *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 8 (1993), 1993 WL 566130, at *5; *United States v. Widow Brown's Inn of Plumsteadville, Inc*, 2 OCAHO 399, at 42 (1992), 1992 WL 535540, at *32. With respect to the individuals listed in Counts II–V, there is no dispute that Respondent did employ six individuals who were not authorized to work in the United States, who are hereby listed by name, complaint paragraph, and the appropriate transcript and exhibit references:

Jaime DelValle, Count II, ¶A.5 Tr. at 296–303, 606; CX–T, U, V (RX–K)

Nicodemo DelValle, Count II, ¶A.6, Tr. at 17–21, 69–72, 607; CX–W, X, Y (RX–H)

Pablo Perales, Count II, ¶A.12, Tr. at 465–70, 607; CX–Z, AA, BB (RX–I)

Hector Perales, Count V, ¶A.14, Tr. at 53–69, 330–59, 607; CX–CC, DD, EE, FF (RX–G)

Abel Ramirez, Count V, ¶A.21, Tr. at 14–17, 440–48, 607; CX–O, Q, R, S (RX–L)

Francisco Ramirez, a/k/a Manuel Noguez, Count V, ¶A.22, Tr. at 470–81, 607, CX–K–N

All of these individuals issued statements conceding their ineligibility to work in the United States. *See* CX–V (RX–K), CX–Y (RX–H), CX–BB (RX–I), CX–FF (RX–G), CX–S (RX–L), and CX–N. A Record of Deportable Alien (Form I–213) was completed for each alien for the purpose of establishing deportability. *See* CX–T, CX–W, CX–Z, CX–CC, CX–O, and CX–K.[62]

Respondent does not dispute the unauthorized status of all six individuals, RPCL 4; Tr. at 538–39, 608, or that this is an aggravating penalty factor, but asserts that the penalty for this factor should be aggravated only with respect to the violations for those six employees. RPCL 4; Rbr. at 34–35. Complainant concedes this point, Tr. at 539;

[62]I note again that I have used information in the records of sworn statement and the records of deportable alien, all of which refer to "Dixie Company" rather than to DISCO, only for the purpose of determining the relevant employees' work statuses. *See supra* note 26 and text accompanying note 27.

Cpbr. at 19–20; Cbr. at 36, and I agree that the penalty for this factor is aggravated only with respect to the violations for those six individuals.

4 *Good Faith*

Complainant also contends that the penalty in this case should be aggravated because of the Respondent's lack of good faith. Cbr. at 34–35. Complainant references Respondent's hiring of unauthorized workers, Respondent's failure after the arrests at Kodiak to correct problems with the employment verification process, and Respondent's delegation of authority to complete the I–9 forms to foremen who he never determined were qualified to complete the forms. *Id*.

By contrast, Mr. Carter asserts his good faith. He notes that he delegated the function of employment verification to employees who he thought would act properly and that he never received an educational visit from the INS. Rbr. at 31–33. Respondent contends that the violations were based on a misunderstanding of law, rather than lack of good faith. Rbr. at 31.

Both parties acknowledge that the record must show culpable behavior beyond the mere failure of compliance to establish an employer's lack of good faith. *See* Cbr. at 34; Rbr. at 31; *see also Giannini Landscaping*, 3 OCAHO 573, at 8, 1993 WL 566130, at *5; *United States v. Minaco Fashions, Inc.*, 3 OCAHO 587, at 7 (1993), 1993 WL 723360, at *5. A lack of good faith is not shown by the mere existence of paperwork violations, no matter how pervasive. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 4 (1995), 1995 WL 626234, at *3 (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order).

In considering the question of whether the penalty should be aggravated on the basis of lack of good faith, as with the other statutory factors, it is Complainant's burden to show, by a preponderance of the evidence, that Respondent acted with a lack of good faith. If Complainant fails to do so, the penalty will not be aggravated on the basis of this factor. However, since the Respondent in this case is a company, not just an individual, it is not simply Mr. Carter's knowledge or actions that are relevant to this issue; rather, it is the knowledge and actions of DISCO and its employees. *See American Terrazzo*, 6 OCAHO 877, at 11 (examining a manager's knowledge

and imputing it to the corporate entity); *Fox*, 5 OCAHO 756, at 2, 1995 WL 463979, at *2 (examining an employee's knowledge and imputing it to the business entity); *Widow Brown's Inn*, 2 OCAHO 399, at 35–36, 1992 WL 535540, at *32–33 (examining a manager's and a hiring agent's knowledge and imputing it to the corporate entity).

Certainly there is record evidence that negates Complainant's assertion that Respondent failed to act in good faith. DISCO was a new business that was just getting started when the INS action began on November 18, 1994. *See* CPFF 2; Tr. at 189, 563. Although Mark Carter had worked for his brother for a number of years at Dixie Company, which performed similar work, the fact remains that DISCO's work at Kodiak was the first job performed by the company he owned. *See* CPFF 3; Tr. at 189, 563. Upon learning of the INS survey at Kodiak, Mark Carter immediately visited the worksite, Tr. at 218, and he immediately gave orders to fire any unauthorized aliens. Rbr. at 17; Tr. at 199.

While those facts support Respondent, after carefully considering the record evidence, I conclude that Complainant has shown that Respondent did not act in good faith. First, Mr. Carter admitted that when he learned that several of his employees had been arrested at the Kodiak site, his primary concern was not complying with the law, but rather with completing the job and keeping the client happy. Tr. at 218. Second, he did not act at that time to determine how the unauthorized aliens were hired, or whether his company's employment verification procedures were being properly implemented. In fact, he admitted that he really was not knowledgeable concerning I–9 compliance until he met with the INS agent in January 1995. Tr. at 218. I must agree with Complainant that, in light of the arrests at Kodiak, a reasonably prudent employer acting in good faith immediately would have reviewed his compliance with the employment verification requirements. *See Reyes*, 4 OCAHO 592, at 8, 1994 WL 269183, at *6.

Moreover, the arrests at Kodiak occurred two months prior to the INS audit of Respondent's work place, which took place in January 1995. During the two month interval, Respondent did little or nothing to determine if his verification process was working, even though he was on notice that he previously had unauthorized individuals in his work force. Tr. at 218. His assertion that he did not have the opportunity in the time between the arrests and the INS audit to become familiar with the employment verification requirements, Tr. at

604, is another indication that he did not give high priority to his legal responsibilities. Respondent's shortcomings with respect to the verification process cannot simply be explained away by unfamiliarity, because he was aware of the verification requirements and had some prior experience supervising and completing I–9 forms. Tr. at 555, 615–16.

Most significantly, Carter delegated the authority to complete the I–9 forms to foremen who he never determined were qualified to complete the forms. *See* Tr. at 211, 215. In fact, he did not even determine whether the foremen could read or understand the I–9 form. Mr. Carter concluded that the foremen were able to read and to understand the form based only on knowing the foremen involved. Tr. at 216. At trial it was evident, however, that one of the foremen, Manuel Ramirez could not read English very well and could not even read and understand the I–9 form. Tr. at 373, 375–78, 380, 391; *see supra* pp. 18–20.[63] Yet Mr. Ramirez signed many of the I–9 forms as the employer's representative, including the forms for employees who were not authorized to work in the United States.[64] Since the I–9 form and its instructions are entirely in English, Carter's actions in delegating the completion of I–9 forms to an employee who could

[63]While Mr. Ramirez stated that he understood some English, Tr. at 359–60, it is clear that he did not have a thorough command of the English language. Therefore, Mr. Ramirez testified at trial in Spanish. The questions directed to him were translated into Spanish by a court appointed interpreter, and his answers, which were given in Spanish, were translated into English. *See* Tr. at 360. He also testified through an interpreter during his deposition. *See* Tr. at 381–82. During the hearing, Complainant's counsel presented Mr. Ramirez with a blank I–9 form and asked him to show the portions he could read and those he could not. Tr. at 374. It was remarkable how little he could read or understand, particularly when he testified that he had been reading the I–9 form in preparation for the hearing and was able to read more of the form than a month earlier during his deposition. *See* Tr. at 379–81.

[64]Manuel Ramirez signed the certification in section two of the I–9 form for at least twenty-nine of the employees who are charged in the present Complaint, including four of the seven unauthorized aliens who were hired and who are listed in various counts of the Complaint. *See* CX–H (Juan Ramirez), CX–L (Francisco Ramirez, a/k/a Manuel Noguez), CX–Q (Abel Ramirez), and CX–DD (Hector Perales). In most cases, Mr. Ramirez signed but did not complete the rest of the certification, *see* the I–9 forms introduced in evidence as CX–H, L, Q, DD, II, KK, OO, RR, TT, UU, XX, GGG, JJJ, KKK, NNN, SSS, TTT, YYY, ZZZ, BBBB, CCCC, DDDD, HHHH, JJJJ, KKKK, MMMM, NNNN, PPPP, SSSS, and TTTT, which lends credence to the evidence that he could not read or understand the I–9 form. Since the I–9 forms are designed to prevent hiring of unauthorized aliens, Respondent undermined the employment eligibility verification procedure by delegating the completion of the I–9 forms to an obviously unqualified individual.

not read and understand the forms reflects a callous disregard for his legal obligations.[65]

Mark Carter testified both during the Complainant's case and as a witness for the defense. The overall impression left by his testimony on those two occasions is that he did not accord a high priority to his legal obligations imposed by the immigration laws of this country, one example being the fact that he gave priority to getting the Kodiak job finished, rather than complying with the law. CPFF 23; Tr. at 218. Because of this misplaced priority, he waited until after the INS inspection of his records, which took place in January 1995, before he reviewed his employment verification process. CPFF 23; Tr. at 616. Further, during his testimony, Mr. Carter suggested that the INS investigation and prosecution was part of an ongoing vendetta against the Carter family that began with the investigation of Dixie Company owned by his brother, Charlie Carter. *See* Tr. at 558–60. He also suggested that the INS was prosecuting him because he employed a primarily Hispanic workforce. Tr. at 209. Indeed, it has been the Respondent's position from the very beginning of this case through the post hearing brief[66] that the INS Houston District's actions are an "abuse of the citizenry," Rbr. at 35, and that it is "utilizing the taxpayer's dollars against him to persecute him civilly for an action of which he is clearly innocent in an effort to punish a relative or relatives," Rbr. at 39.

Considering the numerous violations cited by the Complaint, many of which are admitted by Respondent, and that Respondent hired a number of unauthorized aliens, Respondent's theory of persecution and vexatious litigation is specious. It is troubling to this judge that, two years after the INS audit occurred, Mr. Carter still does not appreciate the need to carefully implement the employment verification procedures required by the law. Employers, such as Mr.

[65]Respondent suggests that Mr. Ramirez' testimony that he could not read or understand the I–9 form was not truthful because he was merely trying to protect himself. *See* Rbr. at 33; Tr. at 390. I observed Mr. Ramirez while he was reading the I–9 form and then testifying as to what he could read and understand. *See* Tr. at 373–78. Based on my careful observation of the witness, it appeared that he genuinely was trying to read and state every part that he could understand. In fact, he admitted that he had attempted to improve his understanding of the I–9 form between the time of his deposition and trial. Tr. at 378–81. I find this testimony to be credible, and, therefore, I reject Respondent's suggestion that Mr. Ramirez was lying.

[66]In fact, Respondent devotes seven of the 42 pages of his post hearing brief to a discussion of what he characterizes as the "vexatious litigation" instituted by the INS. *See* Rbr. at 35–42.

Carter, need to understand that the immigration laws of this country have the highest priority. In this case, Mr. Carter's inattention to the employment verification requirements led to the very problem that the INA was intended to avoid, namely, the hiring of illegal aliens. Moreover, when such illegal aliens were discovered in his work force, he should have given the highest priority to reviewing his employment verification process, and not simply have continued with business as usual. Employers who do not act diligently in attempting to avoid hiring illegal aliens should expect that INS enforcement actions may be initiated against them, and that they may be subject to the levy of significant penalties to deter such conduct in the future.

For the reasons discussed above, I conclude that Complainant has shown that Respondent did not act in good faith, and the penalty should be aggravated based on that factor.

5. *Seriousness of the Violations*

Complainant discusses the various types of violations charged in the Complaint and asserts that all of the eighty-one violations in Counts II–V of the Complaint should be categorized as serious in nature.[67] Cbr. at 29–33. By contrast, Respondent contends that most of the violations are not serious and that even the serious violations, such as failing to prepare an I–9 form for an employee, were mistakes based on a misunderstanding of the law. Rbr. at 28–30.

At the outset, some general observations based on past holdings can be made. While paperwork violations are always *potentially* serious because the principal purpose of the I–9 is to allow an employer to ensure that it is not hiring anyone who is unauthorized to work in the United States, *Reyes*, 4 OCAHO 592, at 8, 1994 WL 269183, at *7

[67]Complainant categorizes the section two violations in Count IV into eight types, including those in which the I–9 forms are completely blank as compared to those where Respondent failed to print the name of the representative, title, and/or the name of the business. Cbr. at 30–32. By using the disjunctive "or," apparently Complainant considers any omission of information in section two as serious, even the failure to print the representative's name after his signature. I have held that failure to complete every part of section two, particularly the printed name of the representative, is not necessarily a law violation, much less a serious violation. *See Corporate Loss*, 6 OCAHO 908, at 19–21, 1997 WL 131365, at *20–21 (Order Granting in Part Complainant's Motion for Summary Decision), *modified by CAHO on other grounds*, 6 OCAHO 908 (1997), 1997 WL 131365.

(citing *United States v. Eagles Groups, Inc.*, 2 OCAHO 342, at 3 (1991), 1991 WL 531833, at *2), in past decisions I have not adopted the sweeping proposition that all paperwork violations are serious, no matter how minor or technical. *See American Terrazzo*, 6 OCAHO 877, at 14; *Skydive*, 6 OCAHO 848, at 8–9, 1996 WL 312123, at *8. Indeed, such an approach would make a nullity of the statutory factor, since a paperwork violation would always be a serious violation. More importantly, the CAHO has never taken that position either, and recently stated that he had no intention of holding that a failure to complete every minute part of an I–9 form must result in a finding of liability and at least a minimum statutory fine. *Corporate Loss*, 6 OCAHO 908, at 6, 1997 WL 131365, at *4 (Modification by the CAHO).[68]

While paperwork violations are always potentially serious, the facts of each case must be considered carefully to evaluate the degree of seriousness. Thus, the seriousness of the violations should be viewed as a continuum. *See Felipe*, 1 OCAHO 626, at 636 (ref. no. 93), 1989 WL 433965, at *9, *aff'd by CAHO*, 1 OCAHO 726 (ref. no. 108) (1989), 1989 WL 433964. Indeed, the Administrative Law Judges (ALJ) and the CAHO have carefully scrutinized the violations in each case to determine the seriousness of the violation. Therefore, I will consider the seriousness of each of the types of violations in the various counts of the Complaint.

a. *Count II*

Respondent failed to prepare or to present I–9 forms for fifteen individuals listed in Count II. Respondent admitted that he did not prepare the forms for the thirteen individuals listed in paragraphs A.1–13, and I found that Respondent failed to present the I–9 forms for the two individuals listed in paragraphs A.14 and 15 (Arturo Resendez and Manuel Resendez). Although Respondent has offered, as mitigation, that most of the individuals in Count II either are relatives (such as Tim Carter and Patricia Freeman) or individuals who he knows are U.S. citizens, Rbr. at 31, Tr. at 603–05, the CAHO has held that a total failure to complete and/or present I–9 forms is serious since such conduct completely subverts the purpose of the law, even when no unauthorized aliens are implicated. *United States v. Wu*, 3 OCAHO 434, at 2 (1992), 1992 WL 535571, at *1–2

[68]Obviously, if certain omissions with respect to I–9 forms are not violations at all, they cannot be considered serious violations.

(Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision and Order). Since such a total failure fundamentally undermines the effectiveness of the employer sanctions statute, it should not be treated as anything less than serious. That holding is in line with many prior ALJ decisions that failure to prepare and/or present an I–9 form is a serious violation. *See, e.g.*, *United States v. M.T.S. Serv. Corp.*, 3 OCAHO 448, at 4–5 (1992), 1992 WL 535585, at *3; *United States v. A-Plus Roofing, Inc.*, 1 OCAHO 1397, at 1402 (ref. no. 209) (1990), 1990 WL 511989, at *4, *aff'd on other grounds*, 981 F.2d 1257 (9th Cir. 1992) (unpublished; text available at 1992 WL 389247); *United States v. Acevedo*, 1 OCAHO 647, at 650 (ref. no. 95) (1989), 1989 WL 433841, at *3. Failing to make I–9 forms available for inspection is a serious violation regardless of whether these individuals were unauthorized aliens. *See Wu*, 3 OCAHO 434, at 2, 1992 WL 535571, at *1. In conformity with such past cases, I conclude that the fifteen violations in Count II of the Complaint, which allege a failure to prepare and/or a failure to present for inspection, are serious violations, and the penalty will be aggravated for those violations.

b. *Count III*

As asserted in Count III, Respondent failed to ensure that one employee (Javier Aguirre) properly completed section one of the I–9 form. I held that Respondent violated section 274A(a)(1)(B) of the INA by failing to ensure that Mr. Aguirre properly completed section one of his I–9 form; namely, in the block after his signature, the employee entered his birth date, rather than the date he completed section one. *See supra* pp. 27–28. Complainant asserts that it cannot be determined whether the employee attested to his work eligibility on the date of hire, as required by 8 C.F.R. §274a.2(b)(1)(i)(A), or a subsequent date. Cbr. at 30. Even if this error were inadvertent, Complainant contends that it is serious because it subverts the legislative intention that employees attest under penalty of perjury that they are authorized for employment. *See* Cbr. at 30 (citing *United States v. Guewell*, 3 OCAHO 478, at 7 (1992), 1992 WL 535636, at *5). Respondent contends it is not a "substantial violation which leads to the employment of unauthorized aliens," Rbr. at 23, and that an employee's starting date can be determined from the payroll records, Rbr. at 30 (making that assertion in the context of arguing that a failure to include the employee's starting date in the certification portion of section two is not a serious violation).

Respondent's argument that the employer's failure to ensure that the correct date is entered is not serious misses the mark on many fronts. The employee is required to complete section one on the first day of employment. The failure to list the correct date prevents a determination as to whether section one was completed on the first day. Furthermore, section one of Mr. Aguirre's I–9 form contains an attestation clause that requires that he attest, under penalty of perjury, that the documents he presented as evidence of identity and employment eligibility are genuine and related to him, and that he is aware that federal law provides for imprisonment and/or a fine for any false statements or use of false documents.[69] By failing to ensure that the correct date is listed in section one, Respondent defeats the purpose of the legislation, which is to require that the employee attest to the validity of his documents and his eligibility for employment *on the day he first begins work*. Checking the payroll records would not enable the INS to determine whether the employee completed section one on the day he began employment or when he was attesting to his employment eligibility. Therefore, that omission is a serious violation.

c. *Count IV*

Count IV involves thirty-seven violations for failing to complete certain portions of section two of the I–9 form. Section two of the I–9 form is entitled Employer Review and Verification, and this section must be completed and signed by the employer. It consists of two related but distinct sections: documentation and certification. With respect to documentation, the employer is required to examine the documents presented by the employer and record information concerning the document title, issuing authority, document number, and expiration date, if any, for the documents.[70] The employee may present one document establishing both identity and work eligibility, which is recorded in List A of section two, or separate documents establishing identity and work eligibility, which are recorded, respectively, in Lists B and C. *See supra* note 55.

The certification section in the 1991 version of the I–9 form consists of six separate blocks of information and an attestation clause

[69]The 1991 version of the I–9 form was used for most of the DISCO employees, but Mr. Aguirre's I–9 form is the 1987 version. The attestation part in section one of the 1987 version is somewhat different from the 1991 version.

[70]The types of permissible documents are listed on the reverse side of the I–9 form.

that states when the employee began employment.[71] The six blocks of information are as follows: the employer representative's signature; the representative's printed name; the representative's title; the employer's name; the employer's address; and the date of the certification (which is required to reflect the date when the employer examined the documents presented by the employee). The employer's representative must attest, under penalty of perjury, that the representative has examined the document(s) presented by the employee, that the documents appear to be genuine and to relate to the employee, that the employee began employment on the stated date, and that, to the best of his or her knowledge, the employee is eligible to work in the United States. Form I–9, OMB No. 1115–0136 (Nov. 21, 1991); *see supra* p. 21.

The I–9 forms for the thirty-seven individuals have been received in evidence in this proceeding.[72] After reviewing the documentation and certification parts of those forms, I conclude that all of the forms contain deficiencies that, for various reasons, constitute serious violations.

Examining the certification part first, I note that the certifications for three employees, Alvaro Banda (¶A.2), CX–LL; Herculano Guzman (¶A.9), CX–SS; and Virgilio Leija (¶A.16), CX–ZZ, are completely blank. *See also* Stip. Order Add. at 1, 3, 5. I am in accord with the case law holding that a blank certification is a serious violation. *See Acevedo*, 1 OCAHO 647, at 651, 1989 WL 433841, at *4. Of the remaining thirty-four I–9 forms, thirty-one are not signed by the employer's representative and/or not dated in section two.[73] Failure to

[71]Although the date in section one is supposed to reflect the date when employment begins, section one is completed by the employee, whereas section two is completed by the employer. Therefore, the 1991 version of the I–9 form also contains an attestation by the employer as to when employment began.

[72]An addendum, which analyzes the I–9 forms for the individuals listed in Counts III, IV and V of the Complaint, is attached to this Decision. The addendum attached to this Decision contains information that, for the most part, parallels the fact findings included in my Order Adopting in Part Complainant's Proposed Stipulations.

[73]The I–9 certifications for Rogelio Cardona (¶A.3), CX–MM; Jose Davila (¶A.6), CX–PP; Juan DelValle (¶A.7), CX–QQ; Salvador Huizar (¶A.15), CX–YY; Silvio Medina (¶A.20), CX–DDD; Leonardo Mejia (¶A.21), CX–EEE; and Celio Resendez (¶A.32), CX–PPP, are neither signed nor dated; the I–9 form for Jose Moran (¶A.25), CX–III, is dated but not signed; and the I–9 forms for Marcos Avila (¶A.1), CX–KK; Jose Carrillo (¶A.4), CX–NN; David Cepeda (¶A.5), CX–OO; Solomon Faz (¶A.8), CX–RR; Louis Hadley (¶A.10), CX–TT; Samuel Hadley (¶A.11), CX–UU; Humberto Hernandez (¶A.12), CX–VV; Jose Herrera (¶A.14), CX–XX; Hector Lopez (¶A.17), CX–AAA; Juan Marroquin (¶A.18), CX–BBB; Jose Monsivais (¶A.23), CX–GGG; Jose Morales (¶A.24), CX–HHH; Hermin Navarro (¶A.26), CX–JJJ; Jesus Oceguera (¶A.27), CX–KKK; Jose Olivas (¶A.28), CX–LLL; Juan Olvera (¶A.29), CX–MMM; Saul Perales (¶A.30), CX–NNN; Pedro Perez (¶A.31), CX–OOO; Benito Saenz (¶A.33), CX–QQQ; Jesus Salas (¶A.34), CX–RRR; Rosendo Sanchez (¶A.35), CX–SSS; Silvestre Sanchez (¶A.36), CX–TTT; and Javier Zuniga (¶A.37), CX–UUU, are signed but not dated. Other pieces of information in the certification blocks are missing as well. *See generally* Stip. Order Add. at 1–9.

sign a certification renders it worthless because no attestation has occurred and, therefore, is a serious violation. Similarly, failure to date the certification is serious because one cannot determine when the employment verification occurred.[74]

Aside from the deficiencies in certification, the I–9 forms for twenty-five of the thirty-seven individuals either are blank or lack certain information as to documentation.[75] Of the twenty-five forms, the documentation part of section two of the I–9 form is completely blank for seven individuals: Marcos Avila (¶A.1), CX–KK; Jose Hernandez (¶A.13), CX–WW; Salvador Huizar (¶A.15), CX–YY; Virgilio Leija (¶A.16), CX–ZZ; Alejandro Mateo (¶A.19), CX–CCC; Ruben Miranda (¶A.22), CX–FFF; and Jose Moran (¶A.25), CX–III. *See also* Stip. Order Add. at 1, 4–7. Even had the certification been properly completed for those employees (which it was not, since the employer did not even sign section two for most of the forms), if the employer fails to identify any documents in section two of the I–9 form, that constitutes a serious violation because, without such information, the attestation is meaningless. *See Corporate Loss*, 6 OCAHO 908, at 5 n.9, 1997 WL 131365, at *4 n.9 (Modification by the CAHO) ("[S]ection 274A(b)(1)(A) of the INA gives an employer an obvious stake in properly discharging its employment eligibility verification responsibilities by requiring the employer to attest, under penalty of perjury, that the employer has examined certain documents in the verification process and that each document 'reasonably appears on its face to be genuine.'"). An employer is required to review the documents presented by the employee to determine if they establish identity and employment authorization and to attest

[74]For three of the individuals, Jose Hernandez (¶A.13), CX–WW; Alejandro Mateo (¶A.19), CX–CCC; and Ruben Miranda (¶A.22), CX–FFF, the representative's signature is contained in section three of the I–9 form, which is the section relating to updating and reverification, rather than in section two. While the form was not properly prepared, I do not need to address the question of whether the location of the representative's signature in section three constitutes a serious violation because the I–9 forms for all three individuals are blank in the documentation part, which is a serious violation, *see infra* page 43. Similarly, I do not need to address the question of whether an employer's failure to complete the information in the other blocks of the certification (printed name of the representative, title, business name and address) constitutes a serious violation.

[75]Twelve of the I–9 forms have complete documentation. *See* the I–9 forms for Jose Carrillo (¶A.4), CX–NN; Juan DelValle (¶A.7), CX–QQ; Solomon Faz (¶A.8), CX–RR; Louis Hadley (¶A.10), CX–TT; Jose Herrera (¶A.14), CX–XX; Silvio Medina (¶A.20), CX–DDD; Hermin Navarro (¶A.26), CX–JJJ; Jesus Oceguera (¶A.27), CX–KKK; Saul Perales (¶A.30), CX–NNN; Rosendo Sanchez (¶A.35), CX–SSS; Silvestre Sanchez (¶A.36), CX–TTT; and Javier Zuniga (¶A.37), CX–UUU. However, as noted previously in this Decision, *see supra* note 73 and accompanying text, all of these forms have significant omissions in the certification that constitute serious violations.

in the certification that he has examined the documents and that they appear to be genuine and to relate to the individual presenting them. *See* 8 C.F.R. §274a.2(a), (b)(ii)(A) (1997). An employer cannot comply with that requirement unless it has stated in the I–9 form what documents were examined. Therefore, I conclude that when the documentation part of section two is completely blank, as it was for the above seven employees, that constitutes a serious violation.

As to eighteen other individuals, some documentation information is provided, but the form is lacking information either as to the document title, issuing authority, document number, and/or expiration date (if applicable). In some instances, the I–9 form contains complete information for one type of document, but either no information or insufficient information for the other type of document.[76] Since I already have concluded, based on the blank or incomplete certifications, that the violations with respect to these eighteen forms are serious, I do not need to decide whether the missing documentation as to each of the eighteen I–9 forms in this case would constitute a serious violation. However, the seriousness of those violations would depend on the type and extent of the missing information and whether the employer had supplied such missing information by attaching photocopies of the supporting documentation to the I–9 form. Thus, if the employer failed to provide the document identification number or the expiration date in the I–9 form, but that information was supplied in a photocopy of the relevant document attached to the I–9 form, that omission may not be a serious violation or justify any more than the minimum $100 penalty, at least with respect to the seriousness factor.[77]

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[76]Unless complete information is provided in section two for a List A document (identity and work authorization), the employer is required to provide the information for both a List B document (identity) and a List C document (work authorization). *See supra* note 55 and accompanying text.

[77]In *Corporate Loss*, the CAHO rejected a respondent's substantial compliance defense asserted as to the issue of *liability*, holding that when an enforcement regulation specifically requires an employer to record a document identification number and/or expiration date on the I–9 form, and further specifies that copying and retaining verification documents does not relieve the employer from the requirement of fully completing section two of the I–9 form, the employer has not complied with section 274A of the INA when the employer omits the identification number and expiration date, but attaches a photocopy of the document that shows the document identification number and expiration date. *Corporate Loss*, 6 OCAHO 908, at 6, 1997 WL 131365, at *4 (Modification by the CAHO). However, while the CAHO ruled that failing to provide such documentation information was a violation of the INA, even when the identification number and expiration date were available in the accompanying documents attached to the I–9 form, he did not reach the issue of whether it is a serious violation or whether it justifies more than the minimum $100 penalty.

d. *Count V*

Count V involves twenty-eight violations for failing to ensure that the employee properly completed section one of the I–9 form and failing to properly complete section two of the I–9 form. Section one must be completed and signed by the employee at the time employment begins. Section one consists of several blocks of information and an attestation. The employee is required to complete this part, which includes the employee's printed name (also, maiden name, if applicable), address, date of birth, and social security number. In the attestation part of section one, above the signature block the I–9 form states: "I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form." Form I–9, OMB No. 1115–0136 (Nov. 21, 1991). The employee is required to check one of three boxes attesting, under penalty of perjury, that he is either a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work until a stated date. Unless he is a citizen, the employee is required to provide his alien or admission number.

All twenty-eight of the I–9 forms lack information in section one that constitutes a serious violation. One of the forms is unsigned, sixteen forms are undated, ten forms do not contain sufficient information as to employment eligibility, and one form is lacking the employee's signature, the date, and work eligibility information.[78] I conclude that all those omissions are serious. I agree with Complainant that Respondent's failure to ensure that an employee signed the I–9 form, or provided information as to his work eligibility, is very seri-

[78]The unsigned form is for employee Reyes Mejia (¶A.13), CX–HHHH; the sixteen undated forms are for employees Alfredo Alvarado (¶A.1), CX–VVV; Benito Alvarado (¶A.2), CX–WWW; Jose Alvarado (¶A.3), CX–XXX; Felipe Cabesos (¶A–5), CX–ZZZ; Isaias Chavez (¶A.6), CX–AAAA; Jose Faz (¶A.7), CX–BBBB (only the year is listed); Samuel Garcia (¶A.8), CX–CCCC; Honorato Hernandez (¶A.10), CX–EEEE; Antonio Herrera (¶A.11), CX–FFFF; Mariano Mejia (¶A.12), CX–GGGG; Pascual Reynaga (¶A.15), CX–IIII; Benj Rodriguez (¶A.16), CX–JJJJ; Macario Saenz (¶A.18), CX–LLLL; Alejandro Stroot (¶A.19), CX–MMMM; Benjamin Vargas (¶A.20), CX–NNNN; and Jose Sanchez (¶A.27), CX–SSSS; and the ten forms lacking sufficient information in section one as to work eligibility are Juan Avila (¶A.4), CX–YYY; Pedro Gonzalez (¶A.9), CX–DDDD; Hector Paredes (¶A.24), CX–PPPP; Hector Perales (¶A.14), CX–DD; Abel Ramirez (¶A.21), CX–Q; Francisco Ramirez, a/k/a Manuel Noguez (¶A.22), CX–L; Roberto Carrizal (¶A.23), CX–OOOO; Manuel Ramirez (¶A.25), CX–QQQQ; Jaime Rosales (¶A.26), CX–RRRR; and Jose Zuniga (¶A.28), CX–TTTT. The I–9 form for Maria Rodriguez (¶A.17), CX–KKKK, lacks a signature, a date, and work eligibility information. *See generally* Stip. Order Add. at 9–16.

ous because the lack of a signature or the failure to indicate work eligibility[79] amounts to a lack of attestation. *See* Cbr. at 33. Further, the lack of a date, or a date that is incomplete because it only states the year, is serious because the form fails to show when the employee began work, or attested to his work eligibility, as required by 8 C.F.R. §274a.2(b)(1)(i)(A). *See supra* p. 40.

At least twenty-six of the twenty-eight forms also have serious deficiencies in section two, which would by themselves be considered serious violations. Four of the forms are neither signed nor dated in the certification part, and one additional form is dated, but not signed. Of the twenty-three forms that are signed, most contain no other information in the certification other than the signature. See the Addendum attached to this Decision for a complete summary of the omissions. Aside from the seriousness of the other deficiencies, as discussed above, the failure to date and/or sign the form in section two is a serious violation.

6. *Ability to Pay the Proposed Penalty*

OCAHO case law holds that the five statutory factors are not exclusive, and that other relevant factors may be considered in setting a penalty. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 14 (1994), 1994 WL 721954, at *10–11; *Reyes*, 4 OCAHO 592, at 9, 1994 WL 269183, at *7; *M.T.S. Serv. Corp.*, 3 OCAHO 448, at 4, 1992 WL 535585, at *2. Among these factors is the ability of the respondent to pay a proposed penalty. *United States v. Raygoza*, 5 OCAHO 729, at 5 (1995), 1995 WL 265080, at *3; *Minaco Fashions*, 3 OCAHO 587, at 9, 1993 WL 723360, at *7; *Giannini Landscaping*, 3 OCAHO 573, at 10, 1993 WL 566130, at *7. However, the burden of asserting and proving this defense rests on the Respondent. In this case, Respondent alleged in its Answer that the proposed penalty would constitute a serious financial hardship. Ans. at 9. However, long before the hearing, Respondent withdrew this defense, admitting that it could not show inability to pay the penalty. R. Mot. Remove Sixth Aff. Defense at 2; Order Granting R. Mot. Remove at 1. This effec-

[79]With respect to this point, *see supra* p. 28, I do not necessarily agree with Complainant that providing an I–9 form with an alien number but no box checked in section one renders the attestation pointless, *see* Cbr. at 30, 33, or that such an omission should be considered a serious violation. However, since there are other serious violations as to all twenty-eight I–9 forms, *see supra* p. 44, I do not need to decide whether the absence of a check mark when a document identification number is included should be considered a serious violation, or even a violation at all.

tively removed the issue from the case, and, of course, Complainant had no reason to conduct discovery or to prepare for trial on this issue.

On the third day of trial, after Complainant had rested its case, and without any warning to the Complainant, Respondent attempted to elicit testimony from Mr. Carter to support a defense of inability to pay.[80] *See* Tr. at 575–77. Because Respondent had not given fair warning prior to trial that it was reasserting this defense, I ruled that Respondent would not be permitted to elicit testimony on that issue and that inability to pay would not be considered as a defense.[81] Tr. at 584–86; *see supra* p. 10.

Even if Respondent had reasserted this defense in a timely manner, the present record does not show Respondent is unable to pay the requested penalty. While Respondent is a small business, it is a successful, growing and profitable business. Respondent's 1995 tax return shows that his insulation and fireproofing business had gross sales of slightly more than $2.4 million in 1995 and a net profit of $160,049.51.[82] *See* CX–WWWW–5 (RX–A–5). Mr. Carter also earned a salary of $47,840, *see* CX–WWWW–15 (RX–A–15), which is in addition to the net profit. Since gross sales for the first part of 1996 were $2.9 million, the record indicates the business is growing. *See supra* p. 32.

7. *Assessment of Penalty*

With respect to paperwork violations, the statute provides for a minimum penalty of $100 and a maximum penalty of $1,000 for

[80]Respondent's counsel did not state that Respondent was reasserting the defense until the third day of trial and did so only after being questioned by the Court. *See* Tr. at 577. Even then, counsel was evasive in answering the question until pressed by the Court. *See* Tr. at 578–79. I find that Respondent's counsel was not forthright with either the Court or the opposing party on this matter.

[81]The parties were required to submit pretrial briefs that would discuss the remaining issues and any defenses to the Complaint. *See* PHCR and Order at 2. Respondent's pretrial brief, filed on January 14, 1997, did not raise or discuss the issue of inability to pay.

[82]There are two Schedule C forms in the 1995 tax return, because Mr. Carter operated a game hunting ranch in addition to the insulation and fireproofing business, both under the name Dixie Industrial Service Company. *See* CX–WWWW–5, 13 (RX–A–5, 13). The latter is profitable, generating a net profit of $160,049.51, whereas the former netted a loss of $51,653.03 (mainly because of a large amount of depreciation). *See id.* Nevertheless, the net profit of $108,396.48 greatly exceeds the proposed penalty of $38,025.

each employee with respect to whom a violation occurred. 8 U.S.C. §1324a(e)(5) (1994). In calculating a penalty, I start with the minimum amount and consider the statutory criteria as possible aggravating factors. *See American Terrazzo*, 6 OCAHO 877, at 18; *Skydive*, 6 OCAHO 848, at 10–11, 1996 WL 312123, at *9. I generally follow the line of cases that have applied a mathematical, rather than judgmental, approach to assessing penalties for paperwork violations. *See Skydive*, 6 OCAHO 848, at 10, 1996 WL 312123, at *9–10; *Felipe*, 1 OCAHO 626, at 629, 1989 WL 433965, at *4, *aff'd by CAHO*, 1 OCAHO 726, at 732 (1989), 1989 WL 433964 (holding that the mathematical approach is an acceptable, although not exclusive, approach); *Davis Nursery*, 4 OCAHO 694, at 14, 1994 WL 721954, at *11. In those cases, the approach was to divide $900, the difference between the statutory $1,000 maximum and statutory $100 minimum, by five for the five statutory criteria, arriving at a general amount of $180 for each penalty factor. The $180 per factor is not rigidly applied, because certain penalty factors may justify a greater penalty amount than others. In this case, there is no history of prior violations, and I have rejected Complainant's assertion that the penalty should be aggravated based on the size of Respondent's business. However, the penalty will be aggravated for all violations based on the lack of good faith and the seriousness of the violations; the penalty will be aggravated additionally for the particular paperwork violations that involved unauthorized workers.

As discussed below, applying these statutory penalty factors in this case, a penalty greater than that requested in the Complaint would be justified. Neither the Administrative Procedure Act (APA), the INA, nor the OCAHO Rules of Practice prohibit an Administrative Law Judge from assessing a penalty greater than that requested in a complaint. Moreover, in several cases Judges have assessed a penalty greater than that requested in a complaint. *See Anchor Seafood*, 5 OCAHO 758, at 8, 1995 WL 474129, at *6 (assessed penalty of $51,670 was 27% higher than requested penalty of $40,620 in the complaint); *Davis Nursery*, 4 OCAHO 694, at 21–22, 1994 WL 721954, at *15–16 (assessed penalty was $3,712.50, which was 61% higher than the requested penalty of $2,300); *United States v. Land Coast Insulation, Inc.*, 2 OCAHO 379, at 28 (1991), 1991 WL 531891, at *22 ($4,500 assessed penalty was 28% higher than requested penalty of $3,500). The procedural rules require that the Judge's decision be based on the record and be supported by reliable and probative evidence, *see* 28 C.F.R. §68.52(b) (1996), which essentially is the standard required by the APA, *see* 5 U.S.C. §557(c)

(1994). Nevertheless, although I have the authority to do so, in this case I have decided not to impose a penalty greater than that sought in the Complaint. In reaching that decision, I have considered the fact that, although these violations were serious and Respondent did not act diligently or conscientiously to ensure its compliance with the law, at the time the INS action commenced in 1994 with the raid at Kodiak Industries, DISCO was a new business that had not received an INS visit, and, in fact, Kodiak was its first job. While those are not strongly mitigating factors, this is not the type of egregious case that would warrant assessing a penalty even greater than that sought by the INS.

Considering the assessment of penalties for each count of the Complaint, Count II seeks a penalty of $6,540 for the thirteen instances in which Respondent failed to prepare I–9 forms and the two instances in which it failed to present the forms for inspection. As discussed previously, those are serious violations. Moreover, three of those employees were unauthorized aliens; namely, Jaime DelValle (¶A.5); Nicodemo DelValle (¶A.6); and Pablo Perales (¶A.12). With respect to the twelve employees who were not unauthorized aliens, a penalty of $460 per violation would be justified (the $100 minimum plus $180 each for the two penalty factors). However, since the Complaint seeks only a $400 penalty for these violations, the lower penalty will be assessed. As to the three violations involving unauthorized employees, a penalty of $640 each would be justified ($100 plus $180 for each of the three statutory factors), but again, since the Complaint only seeks a penalty of $580 for these violations, the lower amount will be assessed. Therefore, the penalty assessed for the fifteen violations in Count II is $6,540.

Count III involves one violation, namely Respondent's failure to ensure that the employee correctly dated section one of the I–9 form. While I have concluded that this is a serious violation, there are varying degrees of seriousness, and not all paperwork violations are equally serious. *See Skydive*, 6 OCAHO 848, at 9, 11–12, 1996 WL 312123, at *8, 10–11. The failure to date section one of the form is not as serious as a total failure to prepare an I–9 form, which was the situation for twelve of the fifteen violations in Count II. Therefore, I will assess $150, rather than $180, for the seriousness of this violation. Applying the statutory factors, a penalty of $430 would be justified (the minimum $100, plus $150 for seriousness, and $180 for lack of good faith), but the Complaint's recommended penalty of $400 will be assessed.

Count IV seeks a penalty of $14,800 for the thirty-seven instances in which section two of the I–9 form was not properly completed. Unlike section one of the I–9 form, which is prepared by the employee and which the employer is required only to review to ensure its completion, the employer is directly responsible for completing section two. Yet, as discussed previously, *see infra* p. 41–42, and from examining the attached Addendum, which summarizes the omissions in the forms, the employer in this case did not even materially complete section two of these forms. This is not a case where most of the information was provided, or even where most of the critical information was provided. For example, the certification in most of the I–9 forms is substantially incomplete. Eleven are not even signed, and even as to those that are signed, they are not dated, and many of the other blocks of information in the certification are missing. All thirty-seven are serious violations justifying the full assessment of the $180 penalty for this factor.[83] Therefore, applying the penalty factors to the violations in Count IV, a penalty of $460 for each violation (the $100 minimum increased by $180 each for the seriousness of the violations and lack of good faith factor) and a total penalty of $17,020 would be justified, but I will assess the $14,800 penalty for this count, as requested in the Complaint.

Finally, Count V involves twenty-eight violations for failing to ensure that section one was properly completed and for failing to properly complete section two. Three of the violations involved the hiring of illegal aliens. Because the Count V violations involve serious deficiencies in both section one and section two, they are at least as serious as the Count IV violations, which only involved section two of the I–9 form. Moreover, as discussed previously, the omissions in sections one and two are quite significant. Section one in nineteen of the twenty-eight I–9 forms is unsigned and/or undated, and there is no work eligibility information provided in section one for nine individuals. As to section two, twenty-six of the twenty-eight I–9 forms are not signed and/or dated (four of the forms are not signed or dated, another is dated but not signed, and twenty-one are signed but not dated), and many forms have other information missing (such as the name of the company, title of the representative, etc.). See the Addendum attached to this Decision for a complete summary of the omissions. All of the twenty-eight violations are of sufficient seriousness to warrant imposition of the full $180 attributable

[83]Given the sloppiness of the employer's verification procedure, it is simply fortuitous that none of the 37 were unauthorized aliens.

to this factor. Moreover, it is undisputed that three of the individuals listed in Count V (Hector Perales, ¶A.14; Abel Ramirez, ¶A.21; and Francisco Ramirez, ¶A.22) were illegal aliens who were not authorized to work in this country. Employing unauthorized aliens fully justifies an aggravated penalty, and, thus, the penalty for these three violations will be increased by $180 for each violation. Applying the statutory penalty factors in this case, a penalty of $460 each would be justified for the individuals listed in Count V ¶¶A.1–13, 15–20, and 23–28 (the minimum $100 plus $180 each for the seriousness of the violation and the lack of good faith factors), and a penalty of $640 each would be justified for the three unauthorized aliens (the $100 minimum plus $180 each for the unauthorized hiring, seriousness of the deficiencies in the I–9 form, and the lack of good faith). The total penalty would be $13,420, but since the Complaint requests a penalty of $11,740 for Count V, I will assess the lesser penalty requested in the Complaint.

IV. *Conclusions and Order*

Complainant has proven the charges in paragraphs A–E of Count I of the Complaint that Respondent hired Juan Ramirez, Abel Ramirez, and Francisco Ramirez, a/k/a Manuel Noguez, after November 6, 1986, and continued to employ them knowing that they were aliens not authorized for employment in the United States, in violation of 8 U.S.C. §1324a(a)(1)(A) and 1324a(a)(2) and 8 C.F.R. §274a.3. I assess a civil money penalty of $4,545 for these violations

Complainant has proven the charges in paragraphs A–E of Count II of the Complaint that Respondent hired the fifteen individuals listed in Count II for employment in the United States after November 6, 1986, and either failed to prepare or failed to make available for inspection the I–9 forms for those individuals, in violation of 8 U.S.C. §1324a(a)(1)(B). I assess a civil money penalty of $6,540 for these violations.

Complainant has proven the charges in paragraphs A–C of Count III of the Complaint that Respondent hired the one individual listed in Count III and failed to ensure that he properly completed section one of the I–9 form. I assess a civil money penalty of $400 for this violation.

Complainant has proven the charges in paragraphs A–C of Count IV that Respondent hired the thirty-seven listed individuals for em-

ployment in the United States after November 6, 1986, and failed to properly complete section two of the I–9 form for those individuals. I assess a civil money penalty of $14,800 for these violations.

Finally, Complainant has proven the charges in paragraphs A–D of Count V that Respondent hired the twenty-eight listed individuals for employment in the United States after November 6, 1986, and failed to ensure that the individuals properly completed section one and failed to properly complete section two of the I–9 form. I assess a civil money penalty of $11,740 for these violations.

Respondent is ordered to pay a total civil money penalty of $38,025 and is ordered to cease and desist from further violations of sections 274A(a)(1)(A) and 274A(a)(2) of the INA, 8 U.S.C. §§1324a(a)(1)(A) and 1324a(a)(2) of the INA.

ROBERT L. BARTON, JR.
Administrative Law Judge

ADDENDUM: ANALYSIS OF I–9 FORMS

Count III: Section One

Name	*Paragraph Number*	*Exhibit Number*	*Omissions in Section One*
Aguirre, Javier	A–1	CX–II	Work eligibility box not checked, but alien number is completed at end of second box; attestation not dated (date of birth listed next to signature)

Count IV: Section Two

Name	*Paragraph Number*	*Exhibit Number*	*Documentation*	*Certification*
Avila, Marcos	A–1	CX–KK	Blank	Blank except for signature
Banda, Alvaro	A–2	CX–LL	List A: Resident Alien Card and expiration date, but no document number or issuing authority; Lists B and C: blank	Blank
Cardona, Rogelio	A-3	CX-MM	List A: document number and expiration date, but no document title or issuing authority; List B: "ID card," document number and expiration date, but no issuing authority	Blank except for employer name and address
Carrillo, Jose	A-4	CX-NN	Complete List A	Blank except for signature, printed name and title
Cepeda, David	A-5	CX-OO	List A: Resident Alien Card and document number, but no expiration date or issuing authority; List B: blank	Blank eccept for signature

Davila, Jose	A-6	CX-PP	List A: document number and expiration date, but no document title or issuing authority; Lists B and C: blank	Blank except for employment starting date; a signature appears immediately above the signature box, but it is the employee's signature
DelValle, Juan	A-7	CX-QQ	Complete List A	Blank except for employer name and address
Faz, Solomon	A-8	CX-RR	Complete Lists B and C	Blank except for signature, employer name and employer address
Guzman, Herculano	A-9	CX-SS	List A: blank; List B references "ID Card by Federal, State or local government," and List C references "ID card for use of resident citizen in the United States," but no document numbers or expiration dates	Blank
Hadley, Louis	A-10	CX-TT	Complete Lists B and C	Blank except for signature
Hadley, Samuel	A-11	CX-UU	List A: blank; List C: birth certificate and document number, but no issuing authority	Blank except for signature
Hernandez, Humberto	A-12	CX-VV	List A: document number and expiration date, but no title; List B: "T.D" listed as document title, document number included, expiration date listed as "1997"	Blank except for signature

Hernandez, Jose	A-13	CX-WW	Blank	Blank except for employer name, employer address and date of completion; a signature appears in section three's employer signature box
Herrera, Jose	A-14	CX-XX	Complete Lists B and C	Blank except for signature
Huizar, Salvador	A-15	CX-YY	Blank	Blank except for employer name and address
Leija, Virgilio	A-16	CX-ZZ	Blank	Blank
Lopez, Hector	A-17	CX-AAA	List A: blank; List B: document title, issuing authority, document number, and expiration date (listed but not on correct lines); List C: document number (matches Social Security number in section one) but no document title or issuing authority	No date of completion; no employment starting date
Marroquin, Juan	A-18	CX-BBB	List A: blank; List B: "I.D." and document number listed, but no expiration date or issuing authority; List C: document number (matches Social Security number in section one) but no document title or issuing authority	Blank except for signature, printed name and title
Mateo, Alejandro	A-19	CX-CCC	Blank	Blank except for employer name, employer address and date of completion; a signa-

				ture appears in section three's employer signature box
Medina, Silvio	A-20	CX-DDD	Complete Lists B and C	Blank except for employer name and address
Mejia, Leonardo	A-21	CX-EEE	List A: Resident Alien Card and document number, but no expiration date; List B: "ID card" and document number, but no issuing authority	Blank except for employer name and address
Miranda, Ruben	A-22	CX- FFF	Blank	Blank except for employer name, employer address and date of completion; a signature appears in section three's employer signature box
Monsivais, Jose	A-23	CX-GGG	List A: Resident Alien Card, issuing authority and document number, but no expiration date; List B: "ID card," document number and expiration date, but no issuing authority	Blank except for signature, employer name and employer address
Morales, Jose	A-24	CX-HHH	List A: document number and expiration date, but no title; List B: "ID" and document number, but no expiration date and no issuing authority	Blank except for signature, printed name and title
Moran, Jose	A-25	CX-III	Blank	Blank except for employer name, employer address and date of completion; a signa-

	signature box		three's employer	ture (probably employee's) appears in section
Navarro, Hermin	A-26	CX-JJJ	Complete Lists B and C	Blank except for signature
Oceguera, Jesus	A-27	CX-KKK	Complete Lists B and C	Blank except for signature
Olivas, Jose	A-28	CX-LLL	List A: document number, but no title or expiration date; List B: "T.D.L." and document number, but expiration date listed as "1996"	Blank except for signature, printed name and title
Olvera, Juan	A-29	CX-MMM	List A: document number and expiration date, but no title; List B: "T.D.L." and document number, but expiration date listed as "1995"	Blank except for signature, printed name and title
Perales, Saul	A-30	CX-NNN	Complete Lists B and C	Blank except for signature
Perez, Pedro	A-31	CX-OOO	List A: document number and expiration date, but no title; List B: "T.D.L" and document number, but expiration date listed as "1995"	Blank except for signature, printed name and title
Resendez, Celio	A-32	CX-PPP	List A: document number, but no title, issuing authority or expiration date; List B: "DL," document number and expiration date, but no issuing authority; List C: document number (which matches social security number in section one) but no document title	Blank except for employer name and address

Saenz, Benito	A-33	CX-QQQ	List A: document number and expiration date, but no title; List B: "ID" and document number, but expiration date listed as "1990" and no issuing authority	Blank except for signature, printed name and title
Salas, Jesus	A-34	CX-RRR	List A: document number and expiration date, but no title; List B: "D.L.," document number and expiration date, but no issuing authority	Blank except for employment starting date, signature, printed name and title
Sanchez, Rosendo	A-35	CX-SSS	Complete Lists B and C	Blank except for signature, employer name and employer address
Sanchez, Silvestre	A-36	CX-TTT	Complete Lists B and C	Blank except for signature
Zuniga, Javier	A-37	CX-UUU	Complete List A	Blank except for signature, printed name and title

Count V: Sections One and Two

Name	*Para No*	*Exhibit Number*	*Section One*	*Section Two Documentation*	*Section Two Certification*
Alvarado, Alfredo	A-1	CX-VVV	No date	List A: blank; List B: "DL," document number and expiration date, but no issuing authority; List C: document number, but no title, issuing authority, or expiration date, if expiration date is necessary	No employment starting date; no date of completion
Alvarado, Benito	A-2	CX-WWW	No address; no date; no employment eligibility	List A: partial document number, but no title or expiration date; List B: "TX.R.L.," document	No employment starting date; no date of completion

			box checked, but alien number included at end of second box	number and expiration date, but no indication of what listed document title refers to	
Alvarado, Jose	A-3	CX-XXX	No date	Complete List A and Lists B and C	No employment starting date; no date of completion
Avila, Juan	A-4	CX-XXX	No indication of employment eligibility	Complete Lists B and C	Blank except for signature, employer name and employer address
Cabesos, Felipe	A-5	CX-ZZZ	No date; no employment eligibility box checked, but alien number included at end of second box	List A: Temporary Resident Card and document number, but no expiration date; List B: document number and expiration date but title and/or issuing authority are illegible	Blank except for signature
Chavez, Isaias	A-6	CX-AAAA	No date	List A: Resident Alien Card and document number, but no expiration date; List B: "DL," document number and expiration date but no issuing authority	Blank except for employer name and address
Faz, Jose	A-7	CX-BBBB	Date listed as "1994"; no employment eligibility box checked, but alien number included at end of second box	Complete Lists B and C	Blank except for signature

Garcia, Samuel	A-8	CX-CCCC	No date	Complete Lists B and C	Blank except for signature
Gonzalez, Pedro	A-9	CX-DDDD	No indication of employment eligibility	Complete Lists B and C	Blank except for signature
Hernandez, Honorato	A-10	CX-EEEE	No date	List A: document number and expiration date, but no title; List B: "T.D.L." and document number, but expiration date listed as "1996"	Blank
Herrera, Antonio	A-11	CX-FFFF	No date	List A: document number and expiration date, but no title; List B: "T.D.L." and document number, but expiration date listed as "1998"	Blank except for signature, printed name and title
Mejia, Mariano	A-12	CX-GGGG	No date; no employment eligibility box checked, but alien number included at end of second box	Complete List A	No employment starting date; no date of completion
Mejia, Reyes	A-13	CX-HHHH	No signature	Complete Lists B and C	Blank except for signature
Perales, Hector	A-14	CX-DD	No indication of employment eligibility; no social security number	List A: blank; List C: blank	Blank except for signature
Reynaga, Pascual	A-15	CX-IIII	No date	Complete Lists B and C	Blank except for employer name and address
Rodriguez, Benjamin	A-16	CX-JJJJ	No date	Complete Lists B and C	Blank except for signature

Rodriguez, Maria -	A-17	CX-KKKK	No indication of employment eligibility; no signature; no date	Complete Lists B and C	Blank except for signature
Saenz, Macario	A-18	CX-LLLL	No date	Complete Lists B and C	No employment starting date; no date of completion
Stroot, Alejandro	A-19	CX-MMMM	No date (note: most of section one is illegible, but it is clear that the attestation date is missing)	List A: document title, but no document number, issuing authority, or expiration date, if expiration date is necessary; Lists B and C: blank	Blank except for signature
Vargas, Benjamin	A-20	CX-NNNN	No date; no employment eligibility box checked, but alien number included at end of second box	List A: Resident Alien Card and document number, but no expiration date; List B: "I.D. Card," document number and expiration date, but no issuing authority	Blank except for signature
Ramirez, Abel	A-21	CX-Q	No indication of employment eligibility	Complete Lists B and C	No employment starting date and no printed name
Ramirez, Francisco (a/k/a Manuel Noguez)	A-22	CX-L	No indication of employment eligibility	Complete Lists B and C	No employment starting date; no printed name
Carrizal, Roberto	A-23	CX-OOOO	No indication of employment eligibility	Lists A, B and C: document numbers but no document titles, issuing authorities or expiration dates, if	Blank except employer name and address

				expiration dates are necessary	
Paredes, Hector	A-24	CX-PPPP	No date of birth; no indication of employment eligibility	Complete Lists B and C	Blank except for signature
Ramirez, Manuel	A-25	CX-QQQQ	No indication of employment eligibility	Complete Lists B and C	No employment starting date; no signature; no printed name
Rosales, Jaime	A-26	CX-RRRR	Lawful Permanent Resident box checked, but no document number included	List A: blank; List B: "T.D.L." and document number, but expiration date listed as "1997"	Blank except for signature, printed name and title
Sanchez, Jose	A-27	CX-SSSS	No date; no employment eligibility box checked, but alien number included at end of second box	List A: Resident Alien Card and document number but no expiration date; List B: driver's license and document number, but no expiration date or issuing authority	Blank except for signature
Zuniga, Jose	A-28	CX-TTTT	No indication of employment eligibility	Complete Lists B and C	Blank except for signature

NOTICE REGARDING APPEAL

Pursuant to the Rules of Practice, 28 C.F.R. §68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review, with supporting arguments, by mailing the same to the CAHO at the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. The request for review must be filed within 30 days of the date of the decision and order. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become the final order of the Attorney General of the United States unless, within 30 days of the date of the decision and order, the CAHO modifies or vacates the decision and order. *See* 8 U.S.C. §1324a(e)(7); 28 C.F.R. §68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a person or entity adversely affected by a final order issued by the Administrative Law Judge or the CAHO may, within 45 days after the date of the Attorney General's final agency decision and order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of the final decision and order. A party's failure to request review by the CAHO shall not prevent a party from seeking judicial review in the appropriate circuit's Court of Appeals. *See* 8 U.S.C. §1324a(e)(8).