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

June 5, 1997

UNITED STATES OF AMERICA, IMMIGRATION AND NATURALIZATION SERVICE, Complainant, v.	) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00015
RUPSON OF HYDE PARK, INC. d/b/a SUPER 8 MOTEL—HYDE PARK, Respondent.	

ORDER GRANTING SUMMARY DECISION FINDING LIABILITY

I. *Procedural Background*

On April 7, 1997, during an initial telephonic prehearing conference, as confirmed by the First Prehearing Conference Order addressing a pending motion for summary decision as to liability by the Immigration and Naturalization Service (INS or Complainant), counsel for both parties rested on their previous pleadings, asserting there was no need for further filings. Accordingly, it was understood I would rule on the motion not later than the next scheduled conference. On May 19, 1997, during the second telephonic prehearing conference, I orally granted Complainant's motion, deferring for briefing by the parties the amount of civil money penalty. I held that Rupson of Hyde Park, Inc., d/b/a Super 8 Motel—Hyde Park (Super 8 or Respondent), not only failed to prepare and properly complete INS Form I–9s under 8 U.S.C. §1324a(b)(1) and (2), but also failed to retain the I–9s as required at 8 U.S.C. §1324a(b)(3). In compliance with 28 C.F.R. §68.38(d), this order discusses that holding, and addresses an issue of first impression in OCAHO jurisprudence.

The principal issue is whether an employer who was the subject of a previous INS enforcement proceeding implicating employment eligibility verification non-compliance is liable for continued failure to prepare and/or perfect INS Forms I–9 in keeping with the regimen established by 8 U.S.C. §1324a(b). As confirmed by the Second Prehearing Conference Report and Order (May 30, 1997), I held that "a prior settlement agreement does not relieve an employer of responsibility for future compliance or the obligation to retain the requisite paperwork for former employees." In February 1993, the parties executed a settlement agreement resulting from a 1992 INS inspection of the employer's paperwork compliance. Even though the violations alleged in the present case involve three of the same individuals implicated in the earlier episode, Super 8 remains liable for failure to cure deficiencies. **OCAHO caselaw establishes that a paperwork violation is not a one-time occurrence, but a continuous violation until corrected**. The employer is also liable for failure to retain Forms I–9 for former employees, including, but not limited to, individuals embraced by the prior proceeding.

The present case began on February 16, 1996, when INS served a Notice of Intent to Fine (NIF) on Super 8. The NIF charged three counts of failure to present, and/or defects in the employer's Forms I–9 under the compliance obligations of 8 U.S.C. §1324a(a)(1)(B). Super 8, by letter to INS dated March 15, 1996, requested a hearing before an administrative law judge (ALJ). On October 30, 1996, INS filed a Complaint with OCAHO. The Complaint contained the same counts as the NIF, i.e.:

> Count I, failure to prepare or, alternatively, to make available for inspection, the employment eligibility verification forms (I–9) for two named individuals,
>
> Steven K. Bartlett and Heather Birosall,
>
> in violation of 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful for an employer to hire an individual in the United States without complying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(3);
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> Count II, failure to ensure that the named individual,
>
> Ranjana Patel,
>
> properly completed section 1 of the Form I–9, in violation of 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful for an employer to hire an individual in the United States without com-

plying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(2); and

Count III, failure to properly complete the Forms I–9 for two named individuals,

Beverly Ann Campbell Robinson and Debra L. Thomas,

in violation of 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful for an employer to hire an individual in the United States without complying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(1).

INS assessed a civil money penalty aggregating $3,278, comprised of $540 for each of the two Count I individuals, $510 for Count II, and $480 for each of the two Count III individuals. The penalty sought as to each individual was not correctly totaled. As confirmed by the Second Prehearing Conference Report and Order, INS moved, Respondent concurred, and I granted a downward revision of the totals to reflect accurately the assessment per individual. As corrected, the total civil money penalty at issue is $2,550.

Super 8 timely filed its Answer, on December 11, 1996, denying culpability as to all five individuals implicated in the Complaint. As to Count I, concerning the employee Bartlett, Respondent claimed that no further penalty could be imposed as Bartlett was previously included among employees who were the subject of a July 1992 NIF, liability for which was settled by a February 1993 agreement between INS and Super 8. Respondent denied liability as to the other Count I employee, Birosall, on the basis that although Respondent hired Birosall on March 26, 1994, Respondent terminated her "after a few days."[1] Respondent denied liability as to both individuals, contending that I–9s need be completed only at time of hire and need not be retained more than three years after hire, nor more than one year after termination.

As to the Count II employee and the Count III employee, Campbell Robinson, Respondent denied liability on the basis of the settlement agreement. Respondent asserted that the Form I–9 for the remaining Count III employee, Thomas, was completed in good faith. Respondent asserted that it acted in good faith "in hiring legally authorized-to-work employees,"[2] and demanded dismissal

[1]Answer, at Count IA.2.
[2]Answer, at 3.

and "damages against the Complainant for bringing a frivolous and malicious complaint."[3]

On March 5, 1997, INS filed a Motion For Summary Decision As To Liability, with a memorandum in support (Memo). Contending that the pleadings demonstrate the lack of any genuine issue of material fact, INS argued that its regulations contemplate employer paperwork compliance throughout the employment, not limited to the time of hire. 8 C.F.R. §274a.2(a). Complainant also contended that settlement of the prior NIF did not relieve the employer of its compliance obligations, but, in contrast, provided "[t]hat nothing in [the Settlement] Agreement shall be construed as relieving the Respondent of liability for future violations [of §1324a] or shielding it from subsequent applicable penalties."[4] INS argued that liability for I–9 compliance survived the settlement as to any employee who remained employed at the time of the March 1995 inspection.

As to retention, INS noted that Bartlett was terminated in June 1994 and Birosall in April 1994. The I–9 inspection, on March 22, 1995, was within the statutory retention period, i.e., three years after the date of hire, or one year after the date "the individual's employment is terminated, whichever is later." 8 U.S.C. §1324a(b)(3)(B).[5]

On March 24, 1997, Respondent filed an Opposition to the INS Motion, contending that had INS requested Super 8 to complete Forms I–9 for employees covered by that settlement, it would have done so in the 1992 agreement. Acknowledging that in 1992 its Form I–9 compliance was defective, Super 8 insisted "the matter was resolved by the Settlement Agreement,"[6] contending that "[t]o now revisit the same violation . . . is unwarranted, capricious, and meanspirited."[7]

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[3]*Id.*

[4]Answer, Exhibit R–1, at ¶8 (Settlement Agreement).

[5]Both parties refer to Bartlett's hire as beginning in January 1993, terminating in June 1994. However, as Bartlett was included in the prior NIF issued and served in July 1992 (as to liability conceded), he necessarily was employed earlier than 1993. Therefore, either the parties are in error as to his hire date, or he was rehired. In either case, Respondent's obligation to prepare and/or present an I–9 at the 1995 inspection fits within the retention requirement of §1324a(b)(3)(B), there being no dispute that the employment terminated less than one year before March 22, 1995.

[6]Respondent's Opposition, at ¶2.

[7]*Id.* at ¶3.

II. *Discussion*

While the Opposition suggests that the Motion "is not supported by admissions of any violation by the Respondent, and any such violation is really in dispute[,]"[8] Super 8 proffered no facts beyond the assertions in its Answer. Having consented in the first telephonic prehearing conference to a ruling on the Motion and its Opposition, with no additional pleadings to be filed, Respondent is disabled from asserting that its defense raised any genuine issue of material fact. Accordingly, as agreed by the parties, the Motion was ripe for decision at the second telephonic prehearing conference on May 19, 1997, and I concluded there was no genuine issue of material fact.

Title 28 C.F.R. §68.38(c) (1996) authorizes the ALJ to grant a motion for summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Grants of summary decision are well established in OCAHO caselaw, drawing upon federal court precedent and experience in the context of Federal Rule of Civil Procedure 56(c). *See e.g.*, *United States v. Fox*, 5 OCAHO 756 (1995), 1995 WL 463979 (O.C.A.H.O.); *United States v. Raygoza*, 5 OCAHO 729 (1995), 1995 WL 265080 (O.C.A.H.O.). As summarized in *Fox*, 5 OCAHO 756, at 3, 1995 WL 463979, at *2:

> A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden of proof shifts to the non-moving party to prove that there is a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Matsushita*, 475 U.S. at 587.

The case at hand involves no issue of material fact. Super 8 limited its defense to the Complaint and its response to the Motion to three legal rationale, none of which can prevail for the reasons explained below.

A. *Culpability Is Not Defeated by Prior Liability*

Super 8 castigates the INS for revisiting its compliance disposition after having previously settled an I–9 NIF, claiming immunity

[8] *Id.*

as to three individuals implicated in both the 1992 and 1995 NIFs. While relying in part on the text of the settlement agreement, Super 8 fails to place the agreement in the context of a ***continuing*** obligation to comply with the law. Paragraph 13 of the agreement contains language which can leave no doubt that it is the ***entire*** understanding of the parties. The agreement explicitly states that it is "the entire understanding of the Parties [and] there have been no representations, express or implied, as to the subject matter hereof, except as contained herein." Paragraph 8 in terms certain provides "[t]hat nothing in this Agreement shall be construed as relieving the Respondent of liability for ***future violations*** of Section 274A of the Act [8 U.S.C. §1324a] or shielding it from subsequent applicable penalties." (Emphasis added).

INS is correct in observing that

> an employer must comply with section 274A requirements when "hiring, or . . . ***continuing to employ*** individuals in the United States." 8 C.F.R. §274a.2(a) (emphasis added). The law's obligations do not cease even if a settlement agreement has been reached on particular individuals if these individuals are continuing their employment with an employer. *See id*.

INS Memo, at II.A.1 (emphasis added).

The paperwork undertaking by employers demanded by §1324a(b) is the principal means by which the government audits employer compliance with the national policy of deterring employment of unauthorized aliens in the United States. Absent a continuing obligation to perfect the paperwork, an employer once found to have been at fault, whether or not intentional, could provide a safe harbor as to employees whose I–9s were previously found to be insufficient. To concede Super 8's claim would, as a matter of law, seriously cripple that national policy. While this appears to be the first case which addresses the effect of a prior determination of paperwork deficiencies, whether by final order following a controverted NIF or by agreed disposition, it has been understood virtually from the outset of OCAHO caselaw that the paperwork compliance obligation is continuous. For example, in *United States v. Big Bear Market*, 1 OCAHO 48, at 303 (1989)[9], 1989 WL 433851, at *15 (O.C.A.H.O.), *aff'd* by

[9]Citations to OCAHO precedents in bound Volume I, UNITED STATES DEPARTMENT OF JUSTICE, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES (1991), 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.

CAHO, 1 OCAHO 55 (1989), *aff'd*, *Big Bear Super Market No. 3 v. INS*, 913 F.2d 754 (9th Cir. 1990), I held that because the obligation to comply with IRCA's[10] paperwork requirements is continuous,

> liability for noncompliance is continuous also. The result is that the employer remains liable for failure to prepare and present I–9s. . . . Once notified of alleged violations, an employer has an affirmative duty to make the necessary corrections within a reasonable time after being so notified. . . . [A] proceeding [is not precluded] from being initiated following a reinspection during which it is determined that errors have gone uncorrected. A fair reading of the statute requires no less.

The rule of *Big Bear Market* is inescapable in the case of Super 8. Paperwork violations were **not** settled "once and for all"[11] as claimed by Respondent. Rather, without any obligation on the part of the enforcement agency to predicate prospective compliance on explicit instructions to the employer to cure paperwork deficiencies, the employer remains liable for uncorrected paperwork violations. *See United States v. Walia's Inc.*, 1 OCAHO 122, at 821 (1990), 1990 WL 512123, at *6 (O.C.A.H.O) (concurring with *Big Bear Market*, finding that "liability for a record-keeping violation is continuous if (1) INS has issued a citation, and (2) the employer warned by the citation fails to correct the violation").[12]

On appeal, the Court of Appeals for the Ninth Circuit affirmed *Big Bear Market*, holding that

> [IRCA] imposes a continuing duty on [the employer] to prepare and make Forms I–9 available for all of its employees notwithstanding the fact that it

[10]The Immigration Reform and Control Act of 1986 (codified at 8 U.S.C. §1324a, et seq.) (IRCA).

[11]Answer, at Count I, Count IIC & Count IIIC; Respondent's Opposition, at ¶1.

[12]"Citations" prescribed at 8 U.S.C. §1324a(i)(2) are no longer issued by INS. 8 U.S.C. §1324a(i) (repealed 1996). The six-month period following the enactment of IRCA served to inform employers of their statutory responsibilities during which penalties for IRCA violations were not imposed. As required by IRCA, during the subsequent twelve months, June 1, 1987 through May 31, 1988, INS issued "citations" to each employer whom INS believed violated IRCA for the first time. Subsequent violations either within or after the twelve-month "citation period" resulted in a NIF. 8 U.S.C. §1324a(i)(2). "[T]he citation period mechanism was designed to preclude enforcement action absent fair warning during the transition to an employer sanction environment." *United States v. Widow Brown's Inn of Plumsteadville, Inc.*, 3 OCAHO 399, at 13–14, 15 (1992), 1992 WL 535540, at *10, *11 (O.C.A.H.O.). *See United States v. Williams Produce, Inc.*, 5 OCAHO 730, at 3, 4–5 (1995), 1995 WL 265081, at *2, *3 (O.C.A.H.O.), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (unpublished). Since June 1, 1988, NIFs have issued in the first instance without "citations."

> previously received a citation for failing to prepare and maintain a form for some or all of them. . . . **A company's failure to present records regarding its employees at one government inspection does not relieve it of the obligation to present records regarding those same employees at a subsequent date . . . and its failure to do so constituted a separate and second violation.**

Big Bear Super Market No. 3 v. INS, 913 F.2d 754, 757 (9th Cir. 1990) (emphasis added). Significantly, the Ninth Circuit stated, "Since IRCA [8 U.S.C. §1324a] imposes a continuing obligation on employers to maintain the requisite paperwork for inspection by the government, [the employer's] failure to present Forms I–9 [at a second inspection] constituted an actionable violation of the statute." *Id.* at 757. Having previously failed to comply with paperwork obligations, Super 8's failure to comply at a time subsequent constitutes separate, second and actionable violations. I hold that once the earlier NIF proceeding placed Super 8 on notice of its need to comply, Super 8 could reasonably have expected that its need to comply would be greater, not lesser, than that of an employer which lacked that experience. Like that of the employer in *Big Bear Market*, Super 8's rationale is "unsupported by a plain reading of [§1324a] and is inimical to a rational enforcement program." *United States v. Big Bear Market*, 1 OCAHO 48, at 309 (1989), 1989 WL 433851, at *20.

The earlier NIF was issued and served in July 1992. The NIF in the present case was issued and served in February 1996. These are two cases, not one. On the basis of the foregoing, Super 8 is liable, as alleged in the Complaint, with respect to Bartlett (Count I), Patel (Count II) and Robinson (Count III).

B. *The Employer Is Liable for Failure to Retain Forms I–9 for Former Employees, Including, But Not Limited to, Individuals Embraced by the Prior Proceeding*

It is undisputed that Bartlett was terminated within the year prior to March 22, 1995,[13] as was Birosall, who Super 8 acknowledged was hired on March 26, 1994. The parties' characterization of Birosall's tenure at Super 8 differs in detail but is consistent. The Answer to the Complaint at Count IA.2 "alleges that her services were terminated after a few days." INS contended, without demurrer by Respondent in either of the subsequent prehearing

[13] *See note 5, supra.*

conferences, that Birosall's employment was not terminated until April 1994. Relying on 8 U.S.C. §1324a(b)(3)(B) and 8 C.F.R. §274.a.2(b)(2)(i)(A), INS argued, therefore, that Super 8 is liable for failure to present an I–9 for her at the March 1995 inspection because she was on the payroll within the prior year. I agree with Complainant. Even a few days of employment on and after March 26, 1994, is by definition within statutory and regulatory reach of March 22, 1995. *See United States v. Dubois Farms, Inc.*, 1 OCAHO 242, at 1568 (1990), 1990 WL 512088, at *3 (O.C.A.H.O.) (Order Granting In Part Complainant's Motion To Strike Affirmative Defenses). It is immaterial for purposes of §1324a(b)(3)(B) that the individual is no longer employed; indeed, measuring the retention period to post-employment, §1324a(b)(3)(B) unerringly points to Respondent's liability for failure to present a Birosall I–9 on March 22, 1995.

C. *Good Faith Raises No Bar to Liability for An Incomplete Form I–9*

Respondent's defense of good faith with respect to the I–9 for Thomas is immaterial as to liability, but can be taken into account as one of five prescribed considerations in adjudging the civil money penalty. 8 U.S.C. §1324a(e)(5). *See e.g., United States v. Task Force Security, Inc.*, 3 OCAHO 533, at 5 (1993), 1993 WL 403086, at *4 (O.C.A.H.O.) (Order Granting in Part and Denying in Part Motion To Strike Affirmative Defenses and Denying Motion for Judgment on The Pleadings); *United States v. Nevada Lifestyles, Inc.*, 3 OCAHO 463, at 22 (1992), 1992 WL 535620, at *15 (O.C.A.H.O.) (Order Denying Cross Motions for Summary Decision and Granting in Part Complainant's Motion To Strike Affirmative Defenses) (citing cases). As to violations which occur on and after September 30, 1996, however, depending on the facts of the particular case, good faith can comprise a merits defense.[14]

[14]Title 8 U.S.C. §1324a(b) was amended with respect to violations occurring on and after September 30, 1996, by section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104–208, §411, 110 Stat. 3009, to add a new subsection (6), which provides, subject to certain exceptions, that an employer "is considered to have complied with a requirement of [§1324a(b)] notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement." 8 U.S.C. §1324a(b)(6) ("Good Faith Compliance").

III. *Findings and Conclusions*

Having considered the pleadings of the parties, and confirming the rulings announced at the second telephonic prehearing conference on May 19, 1997, I find and conclude that Respondent is liable as follows:

(1) for failure, as alleged in Count I of the Complaint, to prepare and/or present the Forms I–9 for Steven K. Bartlett and Heather Birosall;

(2) for failure, as alleged in the Complaint, to ensure that Ranjana Patel properly completed section 1 of the Form I–9; and

(3) for failure, as alleged in the Complaint, to properly complete section 2 of the Forms I–9 for Beverly Ann Campbell Robinson and Debra L. Thomas.

Motion practice having been limited by INS as the moving party solely to a merits determination, the record is held open as agreed among counsel and the bench for the filing of briefs on the issue of the amount of civil money penalty. The Second Prehearing Conference Report and Order extended the period for such filings until Monday, June 23, 1997.

SO ORDERED.

Dated and entered this 5th day of June, 1997.

MARVIN H. MORSE
Administrative Law Judge