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

July 16, 1997

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. 1324b Proceeding) OCAHO Case No. 97B00039
IBP, INC., Respondent.	)

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Background*

On June 14, 1996, Ester Gomez de Sarabia (Sarabia) filed a charge with the Office of Special Counsel (OSC), U.S. Department of Justice, alleging that IBP, Inc. (IBP or respondent) committed an unfair immigration-related employment practice, that of document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324b(a)(6).

More specifically, on April 18, 1996, Sarabia, a Mexican national who was admitted to the U.S. for lawful permanent residence on February 15, 1994, submitted an application for employment as a production line worker in respondent's meat processing facility located in Joslin, Illinois.

Mary Baylor, IBP's employment manager, interviewed Sarabia, offered her a position and requested that she provide documents to verify her identity and work eligibility. Sarabia allegedly tendered a genuine alien registration receipt card, Form I–551 (alien card), a genuine social security card, a genuine California state-issued identification card and a genuine Iowa state-issued identification card.

Baylor told Sarabia that neither her alien card nor her social security card were valid. Resultingly, she was not hired.

On October 15, 1996, following its investigation of complainant's charges, OSC forwarded a determination letter to Sarabia in which she was advised that OSC had determined that there was insufficient evidence of reasonable cause to believe that IBP had discriminated against her in the manner she had alleged in her June 14, 1996 charge.

Sarabia was also informed of her right to file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO) if she did so within 90 days of her receipt of that determination letter. OSC further advised her that it was continuing its investigation and that it may have filed a complaint on her behalf at any time during that 90-day period.

On January 8, 1997, within the 90-day time period, OSC initiated this administrative proceeding by filing this Complaint with OCAHO on behalf of Sarabia.

In that initiating pleading, OSC realleged that respondent committed document abuse in violation of IRCA by having refused to accept documents which on their face reasonably appeared to have been genuine namely, an alien card, a social security card, and a California state-issued identification card, which had been tendered by Sarabia for the purpose of satisfying IRCA's employment verification system, 8 U.S.C. §1324a(b). Complainant did not reallege that IBP had also refused to accept her Iowa state-issued identification card, an allegation which had also been initially alleged in Sarabia's June 14, 1996 OSC charge.

OSC alleges that respondent's refusal to honor Sarabia's genuine alien card, social security card, and state-issued identification card was a refusal to honor documents which on their face reasonably appeared to be genuine, a practice proscribed by the document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6).

For that alleged violation, OSC seeks an order directing IBP to cease and desist from further discriminatory practices, to educate its personnel concerning their responsibilities under 8 U.S.C. §1324b, to

pay a $1,000 civil money penalty, to pay Sarabia back pay for the period she was unemployed as a result of IBP's unfair employment practices, and for such further relief as justice may require.

On January 15, 1997, OCAHO issued and served upon respondent a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, which informed respondent that it was required to file an answer to the Complaint within 30 days of its receipt of that Notice.

On February 19, 1997, respondent timely filed an answer, in which it admitted having hired Sarabia for employment in its Joslin, Illinois facility, but denied having committed document abuse in the manner alleged by OSC. That because the alien card tendered by Sarabia did not reasonably appear on its face to have been genuine. Respondent also asserted several affirmative defenses.

On May 1, 1997, OSC filed a Motion for Summary Judgment, along with a supporting memorandum, in which it requested that summary decision be entered in its favor, pursuant to the provisions of 28 C.F.R. §68.38(a).

On May 8, 1997, respondent filed a Motion to Extend Deadline for Response to Motion for Summary Judgment, in which it requested additional time, or until May 27, 1997, within which to file a response to OSC's dispositive motion. As grounds for that motion, IBP advised that it needed additional time to secure affidavits from four of its employees who were not available at that time.

On May 8, 1997, complainant filed a Motion to Stay Discovery.

On May 13, 1997, both of the parties' May 8, 1997 motions were granted.

On May 15, 1997, respondent filed a pleading captioned Resistance to Motion to Stay Discovery.

On May 20, 1997, respondent filed a Motion for Reconsideration, requesting that the order staying discovery be vacated.

On May 23, 1997, respondent filed a pleading captioned Resistance to Complainant's Motion for Summary Decision, along with a supporting memorandum.

On May 28, 1997, in the course of a prehearing telephonic conference, the parties agreed that they would engage in no further prehearing activities until complainant's May 1, 1997, dispositive motion was ruled upon.

On May 28, 1997, also, OSC telefaxed to this Office a photocopy of its determination letter, dated October 15, 1997, along with a copy of the postal domestic return receipt showing that Sarabia acknowledged receipt of that correspondence on November 2, 1996.

On June 4, 1997, respondent filed the June 3, 1997, sworn affidavit of its corporate counsel, Rosanne Lienhard, pursuant to Federal Rule of Civil Procedure 56(f).

II. *Standards of Decision*

The pertinent procedural rule governing motions for summary decision in unfair immigration-related employment practices cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c) (1996).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. *United States v. Limon-Perez*, 5 OCAHO 796, at 5, *aff'd*, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e).

The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial." 28 C.F.R. §68.38(b) (1996).

III. *Governing Law*

Enacted in 1986, IRCA makes it unlawful for an employer to knowingly hire aliens not authorized for employment in the United States. 8 U.S.C. §1324a(a). In addition, IRCA's employment verification system requires that all employers verify the identity and employment eligibility of all persons hired after November 6, 1986, by viewing certain specifically described documents or combinations of documents and completing an Immigration and Naturalization Service (INS) Form I–9 within three (3) days of hire. 8 U.S.C. §1324a(b); 8 C.F.R. §274a.2(a); *Costigan v. NYNEX*, 6 OCAHO 918, at 6 (1997).

The preparation of the Form I–9, officially known as the INS Employment Eligibility Verification Form, is a single-page, two-sided document which is utilized by the hiring person or entity for that purpose.

This is accomplished by requiring that all job applicants present documents which establish their identity as well as their work eligibility.

By use of the instructions set forth on the face sheet of the Form I–9, the hiring person or entity is clearly informed of the specific documents which are to be utilized for those purposes, and listings of acceptable documents are set forth in columnar Lists A, B, and C.

List A documents serve the dual purpose of demonstrating the applicant's identity and work eligibility, while the documents listed in List B only establish identity and those in List C simply verify the applicant's work eligibility. *See* 8 C.F.R. §274a.2(b) (1996).

This system of work eligibility verification has been utilized by all of the nation's employers having four (4) or more employees since December 1, 1996. Resultingly, literally millions of Forms I–9 have been and are being routinely prepared by countless thousands of hiring persons or entities throughout the nation, utilizing the previously-described preparation information which INS provides to those users on the face sheet of the Form I–9.

Any employer failing to prepare a Form I–9 for each employee is subject to a potential civil penalty sum ranging from the statutorily mandated minimum amount of $100 to a maximum of $1,000, for each such failure. 8 U.S.C. §1324a(e)(5).

The legislative history of IRCA makes clear that the "'reasonable man standard' is to be used in implementing the [employment verification system and] that documents that reasonably appear to be genuine should be accepted by employers without further investigation of those documents . . . in the event fraudulent documents are utilized, [IRCA] provide[s] serious criminal penalties for such activities." *See* H.R. Rep. No. 99–682 (I), 99th Cong., *reprinted in* 1986 U.S. Code Cong. & Admin. News 5659, 5666 (1986).

Because Congress was also concerned that employers would become overly cautious and would refuse to hire foreign-looking or foreign-sounding individuals in order to avoid violating the employment verification system, it also included within IRCA an anti-discrimination provision, section 102, 8 U.S.C. §1324b.

Section 102 makes it an unfair immigration-related employment practice for a person or entity to discriminate on the basis of an individual's national origin, and, for a more limited category of individuals, to discriminate on the basis of their citizenship status, with respect to the hiring, recruitment or referral for a fee, or the

discharging of an individual. *See United States v. Guardsmark*, 3 OCAHO 572, at 5 (1993); *Boyd v. Sherling*, 6 OCAHO 916, at 16 (1997); *Costigan*, *supra*, at 5–6.

In 1990, because of continuing evidence that the employment verification system was being used by employers for illegal discriminatory purposes, Congress amended section 102 to provide that an employer's refusal to honor facially acceptable documents or to demand that the employee tender additional or particular documents in order to complete the Form I–9 would also violate IRCA's antidiscrimination provisions.

Well prior to the enactment of the 1990 amendment, it was held that an employer's refusal to accept an employee's birth certificate and having insisted upon having been shown a resident alien card constituted unlawful citizenship status discrimination. *United States v. Marcel Watch*, 1 OCAHO 189 (1990).

IRCA's document abuse provision, 8 U.S.C. §1324b(a)(6), provides:

> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.[1]

The pertinent rule implementing those document abuse provisions provides that "[a] person or other entity's request, for purposes of satisfying the requirements of 8 U.S.C. §1324a(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual shall be treated as an unfair immigration-related employment practice." 28 C.F.R. §44.200(a)(3).

[1]On October 6, 1996, Congress amended the document abuse provision of IRCA, prospectively, to provide that a person or other entity's request for more or different documents shall be treated as an unfair immigration-related employment practice "if made for the purpose or with the intent of discriminating against an individual in violation of [section 1324b(a)(1)]." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, §421, 110 Stat. 3009. That amendment applies to acts of document abuse occurring on or after October 1, 1996.

In addition, section 1324b(a)(6) has been interpreted to prohibit document abuse against any work authorized alien. *United States v. Guardsmark*, 3 OCAHO 572, at 15 (1993); *cf. United States v. Strano Farms*, 5 OCAHO 748 (1994).

For proven document abuse violations, an Administrative Law Judge is authorized to assess a civil penalty "of not less than $100 and not more than $1,000 for each individual discriminated against." 8 U.S.C. §1324b(g)(B)(IV).

There are three ways in which an employer can engage in proscribed document abuse. Initially, an employer's request, for purposes of satisfying the requirements of section 1324a(b), for more or different documents than are required by section 1324a(b) is treated as an unfair immigration-related employment practice. *See, e.g.*, *United States v. Strano Farms*, 5 OCAHO 748 (1995) (employer violated document abuse provisions by having refused to accept acceptable work eligibility documents and demanding certain INS-issued documents); *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO 414, at 9 (1992).

Secondly, the choice of documents which a job applicant may present to a hiring person or entity in order to establish his or her identity and/or work eligibility is exclusively that of the job applicant and not that of the hiring person or entity. *United States v Strano Farms*, 5 OCAHO 748, at 17 (1995); *United States v. A.J. Bart, Inc.*, 3 OCAHO 538 (1993). OCAHO decisional law has therefore consistently held that an employer's insistence on a specific document or documents to verify identity and/or employment eligibility is also a violation. *See, e.g.*, *Westerndorf v. Brown & Root*, 3 OCAHO 477, at 9 (1992) ("Section 1324b(a)(6) prohibits a potential employer from demanding any particular document to satisfy the employment eligibility requirements of 8 U.S.C. §1324a(b)");

Lastly, section 1324b(a)(6) also states that an employer who refuses to honor documents tendered that "on their face reasonably appear to be genuine" is also a proscribed practice. *See, e.g.*, *United States v. The Beverly Center*, 5 OCAHO 762, at 5 (1995).

OSC argues that it is entitled to summary decision because respondent allegedly refused to honor Sarabia's alien card, a dual purpose document which served to identify her and also to verify her

work eligibility, and which on its face reasonably appeared to be genuine. *United States v. The Beverly Center*, *supra*.

It is acknowledged by OSC that a dispute exists concerning its remaining factual allegations namely, that IBP allegedly refused to accept Sarabia's social security card and California-issued state identification card. Therefore, our areas of inquiry and discussion will be confined accordingly to those facts relating to the presentation of her alien card.

OSC's evidentiary burden consists of demonstrating that (1) IBP hired Sarabia for employment, (2) that IBP requested documents to satisfy the requirements of the employment verification system, 8 U.S.C. §1324a(b), (3) that Sarabia tendered a document specified by the employment verification system, enumerated at 8 C.F.R. §274a.2(b), namely, an alien card, (4) which on its face reasonably appeared to be genuine, and (5) that IBP wrongfully refused to accept that document.

IV. *Discussion*

In its Motion for Summary Decision, OSC maintains that no genuine issues of material fact exist as to the following facts.

IBP, a Delaware corporation with over 32,000 employees[2], is in the primary business of processing and marketing beef and pork products in locations throughout the Midwestern and Western United States. Sarabia received the status of an alien lawfully admitted to the U.S. for permanent residency on February 15, 1994 and has been work authorized at all times relevant to this proceeding.

On April 18, 1996, Sarabia applied for a position as an hourly production employee in IBP's Joslin, Illinois meat processing facility and completed an application for that purpose. After an interview with IBP's employment manager, Mary Baylor, she was offered a job and was asked to produce documentation for Form I–9 employment eligibility verification purposes.

Sarabia tendered her alien card, which is a document listed in Column A as being acceptable in order to establish both identity and

[2]IRCA's antidiscrimination provisions apply to the nation's employers having more than three (3) employees. 8 U.S.C. §1324b(a)(2)(A).

employment eligibility. After visually inspecting the alien card, Baylor decided that the card was not genuine.

Baylor then showed the alien card to a co-worker, Robert Morisette, a former IBP personnel manager, who also agreed that it was not genuine. After a brief period of further investigation to verify Sarabia's social security number, Baylor withdrew the offer of employment.

OSC further contends that the alien card was in fact genuine, and that this factual scenario establishes a violation of 8 U.S.C. §1324b(a)(6), and therefore its motion for summary decision should be granted.

The evidence offered by OSC in support of its factual contentions consists of four exhibits. Particularly probative is exhibit four, a letter dated August 29, 1996, addressed to OSC's Special Counsel Anita Stephens, and prepared by IBP's corporate attorney, Russell P. Wright (Wright), in response to Sarabia's June 14, 1996 OSC charge.

In that correspondence, Wright admitted that Sarabia had been offered employment on April 18, 1996 in IBP's Joslin, Illinois facility, and that in response to Baylor's request for documents to verify her work eligibility, Sarabia had tendered her alien card.

Wright further advised that after Baylor decided that the alien card did not reasonably appear to be genuine and because "Sarabia was so insistent," IBP attempted to verify Sarabia's social security number. For that purpose, Tamera Kratky telefaxed a memo to the Social Security Administration (SSA) requesting verification of Sarabia's social security number. SSA did not verify the information and advised IBP that Sarabia should be referred to the local SSA office. Finally, Wright conceded that "the individuals who reviewed the document apparently made a mistake."

OSC has also provided a photocopy of Sarabia's June 14, 1996 OSC charge, submitted on Form OSC–1A, in which Sarabia states:

> Mrs. Mary Baylor reviewed my application for employment. She asked me for a form of identification. I showed her my resident card [(Form I–551)]. She just looked at it and told me that it was not good. Then I showed her the identification from the State of California. She told me to come back on Monday. On

> Monday I returned and this time she told me that my social security was not valid. I told her that my documents were valid and I showed her my children's cards, and I also showed her an identification from the State of Iowa. She repeated to me again that my resident card was not good nor my social security, and because of that she wasn't giving me a job.

OSC has also submitted a photocopy of a printout from the INS' Central Index System relating to Sarabia showing that she received permanent resident status on February 15, 1994, and was assigned a Form I–551 number, A044366396.

Finally, OSC has provided a photocopy of Sarabia's alien card. Except for a single and relatively insignificant discrepancy, the alien card appears in all respects to be genuine. That slight discrepancy consists of the variation in spelling of Sarabia's first name, the typed-name appearing on the alien card is "GOMEZ DE SARABIA, ESTER" and the signature appearing on the alien card is "Esther Sarabia".

Based on the preceding facts, it can readily be seen that OSC has satisfied its burden of demonstrating that IBP committed document abuse, that of refusing to accept a document which on its face reasonably appeared to have been genuine for purposes of satisfying IRCA's employment verification system, 8 U.S.C. §1324a(b).

In summary decision, once the movant has carried its initial burden, as here, the burden shifts to the party opposing the motion to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Initially, it should be noted that respondent has admitted four of the five elements of complainant's *prima facie* case, *see* respondent's February 19, 1997 answer, at ¶¶7–11: (1) on April 18, 1996, respondent hired Sarabia for employment; (2) respondent requested identification to comply with the Form I–9 process; (3) Sarabia tendered her alien card; and (4) respondent rejected her alien card.

IBP urges that genuine issues of material fact remain concerning the fifth element of complainant's evidentiary burden, specifically whether Sarabia's alien card reasonably appeared to have been facially genuine.

IBP maintains that Sarabia's alien card did not and therefore it was entitled to conduct further investigation of Sarabia's work eligibility, including verification of her social security number, and that it acted properly in having done so and also in having refused to hire her.

In support of that argumentation, IBP has supplied the following facts contained in the May 21, 1997, sworn affidavit of its employment manager, Mary Baylor.

Baylor attested that after interviewing Sarabia for employment and having decided to hire her, she followed IBP's usual procedure and asked for identification. Sarabia tendered her alien card.

Baylor noted four (4) discrepancies on the face of the alien card:

1) that the card appeared darker than similar cards she had seen previously,

2) that the photograph appearing on the card appeared larger than normal,

3) that a section of the photograph "had a slight seam giving it the appearance that more hair had been added to the photograph," and

4) that Sarabia had spelled her first name differently on her employment application, with "Ester" appearing on her alien card and "Esther" on her employment application. Baylor aff., at ¶5.

OSC concedes that "[u]nbeknownst to IBP the INS had started to allow larger photographs on the alien registration cards than Respondent had previously seen and which INS had originally told Respondent would be on the cards," complainant's Motion for Summary Decision, at 8.

Based upon her inspection of Sarabia's alien card, as well as her experience with the Form I–9 process, Baylor determined that the card did not reasonably appear to be genuine. When Sarabia insisted that the card was genuine, Baylor sought the advice of Robert Morisette, a former employment manager, who told her that "he did not feel the card was valid," Baylor aff., at ¶5. Alice Kuster, Baylor's assistant, agreed with those conclusions, also.

Baylor then informed Sarabia that even though she did not believe that the alien card was genuine, she would continue to investigate the matter further, and asked Sarabia to return the following day, April 19, 1996, at 10:00 a.m.

In the interim, Baylor called Burneill Ott, IBP's EEO/Affirmative Action Department coordinator in Dakota City, Nebraska, and telefaxed a photocopy of the alien card to her office. Sometime later Ott telephoned Baylor and advised her that Sarabia should be referred to the local SSA office. When Sarabia returned on April 19, 1996, Baylor told her that her alien card was not genuine and, following Ott's instructions, referred her to the local SSA office.

As noted earlier, IRCA only requires that an employer act reasonably when inspecting documents tendered to verify work eligibility. If the document relates to the prospective employee and reasonably appears to be genuine, there is no requirement that the employer conduct further investigation, as IBP did under these facts.

In asserting the affirmative defense that the alien card at issue did not on its face reasonably appear to be genuine, IBP relies entirely upon the conclusions of its employment manager, Mary Baylor.

In summary decision all evidentiary ambiguities and reasonable inferences are resolved in favor of the nonmoving party. After those evidentiary evaluations, the Administrative Law Judge must decide "whether the evidence presents a sufficient disagreement as to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

After having resolved all reasonable inferences from the record in IBP's favor, and after having also carefully reviewed the evidence provided by IBP in opposition to summary decision, it is found that respondent has failed to designate specific facts which demonstrate that there is in fact a genuine issue for trial.

That because IBP has wholly failed to provide the required quantum of evidence to show that Sarabia's alien card did not on its face reasonably appear to be genuine. Respondent has identified only superficial facial irregularities on Sarabia's alien card, none of which would serve as a reasonable basis for having rejected that proffered

document. IBP's sincere, but nonetheless mistaken, belief that Sarabia's alien card was not genuine, is unavailing.

Before ruling upon OSC's dispositive motion, IBP's two remaining defenses in opposition to summary decision merit discussion.

Initially, IBP argues that the May 13, 1997, Order Staying Discovery deprived it of obtaining material facts in opposing summary decision, thus rendering summary decision inappropriate at this juncture, citing *First Chicago Int'l v. United Exchange Co., Ltd.*, 836 F.2d 1375, 1379 (D.C. Cir. 1988).

IBP further advises that it has not received responses from OSC to its outstanding discovery requests, consisting of four interrogatories, seven production requests, and fifteen requests for admissions.

The Supreme Court has recognized that the trial court's decision concerning the existence of genuine factual disputes depends on the ability of the nonmoving party to come forward with concrete materials that demonstrate such a dispute, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Roger v. Yellow Freight Systems, Inc.*, 21 F.3d 146, 148 (7th Cir. 1994), and that the nonmoving party's ability to do so will often turn on the progress it has made in discovery.

It has been held that incomplete discovery will not preclude summary judgment in every case, *Farmer v. Brennan*, 81 F.3d 1444, 1450 (7th Cir. 1996), and the party seeking more time to respond to a summary judgment motion must give an adequate explanation to the court of the reasons why the extension is necessary. *Id*. 81 F.3d at 1449; *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987); *Korf v. Ball State Univ.*, 726 F.2d 1222, 1230 (7th Cir. 1984).

Under the Federal Rules of Civil Procedure[3], a litigant in need of additional time to respond to a Rule 56(c) summary judgment motion in order to complete discovery must file a Rule 56(f) motion setting forth by way of affidavit reasons why discovery is necessary.

[3]OCAHO Rule of Practice and Procedure, 28 C.F.R. §68.1, provides that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules."

Rule 56(f) provides: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The U.S. Court of Appeals for the First Circuit succinctly described the nature of a Rule 56(f) motion:

> A litigant who desires to invoke Rule 56(f) must make a sufficient proffer. In all events, the proffer should be authoritative; it should be advanced in a timely manner; and it should explain why the party is unable currently to adduce the facts essential to opposing summary judgment. When, as is often the case, the reason relates to incomplete discovery, the party's explanation must take a special form: it should show good cause for the failure to have discovered the facts sooner; it should set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist; and it should indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion. . . . When all five requirements are satisfied, however, a strong presumption arises in favor of relief. . . . Unless the movant has been dilatory, or the court reasonably concludes that the motion is a stalling tactic or an exercise in futility, it should be treated liberally. (citation omitted)

Resolution Trust Corp. v. North Bridge Assoc., 22 F.3d 1198, 1203 (1st Cir. 1994).

On June 4, 1997, respondent filed the June 3, 1997, sworn affidavit of its corporate counsel, Rosanne Lienhard, pursuant to Federal Rule of Civil Procedure 56(f).

Lienhard attested that IBP sought production of Sarabia's INS file in order to gather additional information concerning the previously noted discrepancies found on Sarabia's alien card specifically, that of the inconsistencies involving the spelling of Sarabia's first name "Ester", Lienhard aff., at ¶6.

Lienhard further attested that these spelling inconsistencies appear on Sarabia's alien card, social security card and employment application, *id*. at ¶6. Lienhard further explained that an alien card containing spelling errors is not facially valid. However, that contention is not supported by any statutory, regulatory or decisional bases, and therefore constitutes merely an opinion on IBP's part.

Accordingly, it is found that respondent has failed to show that "it lacks the facts essential to resist the summary [decision] motion," and was thus entitled to additional time to complete discovery. *Limon-Perez v. INS*, 103 F.3d 805, 813 (9th Cir. 1996).

In addition, on May 13, 1997, as noted earlier, IBP was granted an extension of time, or until May 27, to gather necessary affidavits from four of its employees.

Secondly, IBP also argues that the Complaint should be dismissed because OSC failed to comply with the 120-day notification period stipulated in 8 U.S.C. §1324b(d)(2) specifically, that it failed to provide a determination letter to the charging party, Sarabia, within that 120-day investigatory period.

The pertinent provisions of IRCA, as well as the applicable OSC regulations, provide that a charging party must file a charge with OSC within 180 days of the alleged occurrence of a discriminatory act. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §44.300(b) (1995). By having filed her initial OSC charge on June 14, 1996, Sarabia timely filed the charge at issue.

Accordingly, OSC was required to have investigated that charge and determined, within 120 days of that filing date, or by Saturday, October 12, 1996, whether to have filed a complaint with respect to the charge. 8 U.S.C. §1324b(d)(1); 28 C.F.R. §44.303(a) (1995).

Section §1324b(d)(2) further requires that OSC notify the charging party of its decision to file or not file a complaint on the charging party's behalf within 120 days of receiving the charge. *United States v. Workrite Uniform Company, Inc.*, 5 OCAHO 736, at 4 (1995); *see also* OCAHO Rules of Practice and Procedure 28 C.F.R. §68.4(b)(2) (1995).

The charging party and OSC (if it has not already done so) then have 90 days from the charging party's receipt of that notice to file a complaint with an Administrative Law Judge assigned to this Office. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §44.303(c) and (d) (1995). In the pending proceeding, OSC received Sarabia's charge on June 14, 1996 and therefore the 120-day notification period expired on Saturday, October 12, 1996. OSC, however, did not send its determination letter to Sarabia until Tuesday, October 15, 1996, or three calendar,

non-working days after the 120-day notification period of section 1324b(d)(2) had expired.

IRCA does not specify the consequences in the event OSC fails to comply with the procedural deadline set forth at 8 U.S.C. §1324b(d)(2). In *Workrite*, it was held that section 1324b(d)(2) is akin to a statute of limitations and requires that OSC comply strictly with the 120-day limitation period as a condition precedent to filing a §1324b complaint with OCAHO. It was further found that because OSC had filed a document abuse claim on behalf of the charging party some 10 days after the 120-day filing deadline, that claim was properly dismissed since OCAHO lacked jurisdiction over that claim. It was also suggested, however, that there may be appropriate circumstances in which to excuse a delay. *Cf. United States v. Frank's Meat Co.*, 4 OCAHO 513 (1993) (10-day notification rule, requiring OSC to notify an employer of charges filed by an individual within 10 days, is not jurisdictional).

It might well be noted that IRCA, like Title VII, is a remedial statute which should be construed in such a manner as to avoid overly technical applications which might otherwise defeat its mandated purposes. *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995); *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321, 323 (7th Cir. 1991)

Consistent with the broad remedial purposes of IRCA's antidiscrimination provisions, a failure to timely issue a determination letter should not serve, under all circumstances, as an absolute bar to OSC's filing a subsequent complaint on behalf of an injured party for unlawful immigration-related discrimination. *See, e.g.*, *Hart v. J.T. Baker Chemical Company*, 598 F.2d 829, 832 (3d Cir. 1979). That reading of the statute is in harmony with the Supreme Court's admonition that "a technical reading [of Title VII] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' " *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

Moreover, it is a settled principle of public administration, repeatedly articulated by the Supreme Court, "that the public interests should [not] be prejudiced by the negligence of the officers or agents to whose care they are confided." *Brock v. Pierce County*, 476 U.S. 253, 261 (1986) (failure of Labor Secretary to act within statutorily mandated 120 days to recover misused funds did not deprive

Secretary of the power to act after that time); *see also*, *Kinion v. United States*, 8 F.3d 639, 643 (8th Cir. 1993) (the FmHA's failure to conform with a statutory procedural requirement did not divest the agency of its jurisdiction to act); *Navistar Int'l Transp. Corp. v. United States Envtl. Protection Agency*, 858 F.2d 282, 286 (6th Cir. 1988) (failure by administrative agency to follow procedural requirements does not automatically render an agency without jurisdiction to proceed); *City of Camden v. United States Dept. of Labor*, 831 F.2d 449, 451 (3d Cir. 1987) (agency's ordering repayment of misspent funds six years after infraction not barred by timeliness requirement).

In a very recent decision rendered on May 7, 1997, just 74 days ago, *Hendrickson v. FDIC*, 113 F.3d 98 (7th Cir. 1997), that court was called upon to decide the effect of FDIC's failure to have rendered a decision within a 90-day period under the provisions of the Federal Deposit Insurance Act, as well as FDIC's Uniform Rules of Practice and Procedure.

In assessing the effect of FDIC's "relatively minor delay", it was announced that:

> With respect to statutory deadlines, a trilogy of Supreme Court decisions has established "that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63, 114 S.Ct. 492, 506, 126 L.Ed.2d 490 (1993). *See id*. at 62–65, 114 S.Ct. at 505–07 (timing of forfeitures under customs laws); *United States v. Montalvo-Murillo*, 495 U.S. 711, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990) (timing of hearing under Bail Reform Act); *Brock v. Pierce County*, 476 U.S. 253, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986) (timing of Secretary of Labor's investigation of misuse of Comprehensive Employment and Training Act funds). Standing alone, moreover, use of the word "shall" in connection with a statutory timing requirement has not been sufficient to overcome the presumption that such a deadline implies no sanction for an agency's failure to heed it. *See Montalvo-Murillo*, 495 U.S. at 718, 110 S.Ct. at 2077–78; *Brock*, 476 U.S. at 262, 106 S.Ct. at 1840; *Brotherhood of Ry. Carmen Div. v. Pena*, 64 F.3d 702, 704 (D.C. Cir.1995). Rather, the general rule is that "Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." *Brock*, 476 U.S. at 259, 106 S.Ct. at 1838 (emphasis in original) (citations and internal quotations omitted).

113 F.3d at 101.

In addition, it can be seen that under these facts a refusal to entertain Sarabia's meritorious claim of document abuse against IBP based solely upon OSC's failure to meet a 120-day limitation by some three calendar days, consisting of a Saturday, Sunday and a Monday upon which Columbus Day, a Federal holiday was being celebrated in the year 1996, would be particularly unfair. As a practical matter, it is equally discernible that such a ruling would not only impose an unfair sanction upon OSC but have the undeniable, albeit unintended, effect of denying administrative relief to Sarabia, a member of the very class of persons for whom IRCA's provisions were intended to afford protection against discriminatory immigration-related employment practices of this type.

IRCA should be read in accordance with public policy guidelines which provide that societal interests should not be sacrificed in cases where agencies charged with the protection of those interests do not act in a suggested timely manner. Accordingly, although the statute requires the determination letter to be issued within 120-days of the initiating charge, that filing period, akin to a statute of limitations, is subject to equitable modifications, as these facts warrant.

In this proceeding, fairness compels that the 120-day determination notification period be waived for several reasons. Sarabia, through no fault of her own, will be left without a remedy in the event the Complaint is dismissed. *See, e.g.*, *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1992) (employee was entitled to have Illinois Fair Employment Practices Commission consider merits of claim despite Commission's failure to comply with 120-day convening requirement).

Secondly, the Complaint at issue was filed within 210 days of the original June 14, 1996 OSC charge filing date, considering OSC's 120-day notification period and Sarabia's 90-day period in which she would have been required, if necessary, to file a private action with this Office.

Finally, in mailing its determination letter to Sarabia on Tuesday, October 15, 1996, OSC failed to observe the 120-day notification period by some three non-working days, which as previously noted consisted of the three-day Columbus Day holiday weekend in 1996. It is inconceivable that IBP was prejudiced in any manner by that minimal delay.

Accordingly, respondent's argument that Sarabia's meritorious Complaint must be dismissed because OSC failed to timely comply with IRCA's 120-day determination notification requirement is not well taken.

For the foregoing reasons, OSC's Motion for Summary Decision is hereby granted.

It is found that (1) IBP hired Sarabia for employment in its Joslin, Illinois facility, (2) that IBP requested unspecified documents in order to satisfy the requirements of the employment verification system, 8 U.S.C. §1324a(b), (3) that Sarabia tendered her genuine alien registration receipt card, Form I–551, an acceptable identity and work eligibility document for employment verification system purposes, 8 C.F.R. §274a.2(b), (4) which on its face reasonably appeared to be genuine, and (5) that IBP wrongfully refused to accept that document. Accordingly, it must further be found that respondent therefore violated the document abuse provisions of 8 U.S.C. §1324b(a)(6), as OSC has alleged.

The only remaining issue to be addressed is that of the appropriate relief to be ordered. In its Complaint OSC has requested that IBP be ordered to cease and desist from further discriminatory practices, to educate its personnel concerning their responsibilities under 8 U.S.C. §1324b, to pay the maximum civil money penalty sum of $1,000, to pay Sarabia back pay for the period she has been unemployed as a result of IBP's unfair employment practices, and for such further relief as justice may require.

However, additional facts must be made available by counsel before a final order can be entered. In its Answer filed on February 19, 1997, IBP advises that Sarabia's alien card was subsequently determined to have been valid and that "an offer of employment was immediately communicated to Sarabia and that Sarabia was requested to contact the personnel at respondent's meat processing facility in Joslin, Illinois, to report for work.".

IBP also advised in that responsive pleading that that offer of employment was communicated to complainant's counsel of record on at least two separate occasions by one Russell P. Wright, Esquire, one of IBP's corporate counsel.

In view of the foregoing, a telephonic conference will be arranged shortly in order to determine whether Sarabia is entitled to back pay under these facts.

In that conference call, OSC will advise whether Sarabia in fact sustained any loss of wages or was directly caused to have been unemployed as a direct result of IBP's practice of document abuse and, if so, to specifically document that alleged wage loss.

A final order will be entered following the receipt of that information.

JOSEPH E. MCGUIRE
Administrative Law Judge