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

September 30, 1997

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 96A00096
JONEL, INC. D/B/A MAACO AUTO PAINTING AND BODYWORKS, Respondent.	)

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Procedural Background*

This is an action arising under the Immigration and Nationality Act, 8 U.S.C. §1324a (1994) (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which the United States Department of Justice, Immigration and Naturalization Service (INS) is the complainant and Jonel, Inc. d/b/a Maaco Auto Painting and Bodyworks is the respondent. On August 30, 1996, INS filed a Complaint in four counts with the Office of the Chief Administrative Hearing Officer (OCAHO). Count I alleges that after November 6, 1986 Jonel knowingly hired and/or continued to employ two named individuals not authorized for employment in the United States. Count II alleges that Jonel failed to ensure that three named individuals hired after November 6, 1986 properly completed Section 1 of Form I–9. Count III alleges that Jonel failed to properly complete Section 2 of Form I–9 for two individuals hired after November 6, 1986. Count IV alleges that Jonel hired three named individuals after November 6, 1986, failed to ensure that those individuals properly completed Section 1 of Form I–9, and failed itself to properly complete Section 2 of Form I–9. For these alleged viola-

tions, INS seeks civil money penalties totaling $2,925.00. Service of the Complaint, together with a Notice of Hearing and a copy of the applicable rules of practice and procedure,[1] was completed on September 9, 1996.

Jonel, proceeding through its president, Nelson Rodriguez, filed an Answer on October 10, 1996 initially purporting to deny all of the allegations raised in the complaint but admitting that it employs Hezekiah Gibson and Jose Asdrubal Jimenez-Montoya, a/k/a Jose Mario Montoya both named in Count I. Jonel states that Gibson and Jimenez-Montoya were hired by the former owner of the company which "supported their immigrant visa petition (sic) with the guarantee of a job." Jonel states that it received notice from the Department of Labor in March 1994 that Gibson and Jimenez-Montoya were "certified for employment," which Jonel understood to mean that they were allowed to work.[2] Jonel admitted that it continued to guarantee jobs to these individuals in order to support the visa petitions filed by Elite Auto Craft Center, Inc., the predecessor company, and said it notified INS by letter July 11, 1994 that it was currently employing the two named individuals. Jonel did not indicate when it took over operations from the Elite. Jonel's answer indicated that it received correspondence from the Department of Labor in March of 1994, suggesting that Jonel, and not Elite, was in control of the company at that time, but this is far from clear. Jonel further stated that INS never informed it that Gibson and Jimenez-Montoya were not authorized for employment over "years of contact" between Jonel and INS. As to the paperwork allegations, Jonel constructively asserted an affirmative defense of substantial compliance by stating that the "[o]missions and errors made on the I–9 form were so minor so as to not affect the validity of the employees (sic) availability for employment. The aplication (sic) should be viewed in its entirety rather than on small errors."[3]

Pursuant to a telephonic prehearing conference conducted on January 10, 1997, the parties agreed to the deletion of the words

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

[2]Documentation submitted by INS, however, shows that only the notice for Gibson was dated March 11, 1994. The notice for Jimenez-Montoya was dated May 6, 1994.

[3]The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub.L.No. 104–208, 110 Stat. 3009) (September 30, 1996) (IIRIRA), made significant changes to enforcement of the verification requirements of the INA for technical or procedural failures found in I–9 inspections conducted after its enactment. IIRIRA has no application to the violations at issue in this case.

"formerly Elite Auto Craft Center, Inc." from the caption of the complaint on the grounds that the predecessor owner had not been served and was not a party to the proceeding. A scheduling order was agreed upon to govern further proceedings.

On February 20, 1997 INS filed a Motion for Summary Decision, a Memorandum In Support of Motion for Summary Decision, and supporting documentation and exhibits. INS seeks summary decision for nine of the ten violations alleged in the Complaint,[4] arguing that there is no genuine issue of material fact requiring a hearing on any of these nine violations. On April 7, 1997, I vacated the hearing date previously set for April 21, 1997 pending resolution of the motion. Jonel filed no opposition or response to the motion and it is ripe for ruling.

II. *Applicable Law*

A. *Standards for Summary Decision*

OCAHO rules provide that the Administrative Law Judge may enter a summary decision in favor of either party if the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. §68.38(c). This rule 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 cases. Accordingly it is appropriate to look to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO 611, at 10 (1994).[5] Case law directs that the party seeking a summary decision has the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When a motion for summary decision is made and supported as provided in the rules, the opposing party may not rest upon mere allegations or denials in a pleading, but must "set

[4]INS did not move for summary decision with respect to the I–9 of Robert Brown, named in Count III of the Complaint.

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

forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. §68.38(b). An issue of fact is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). An issue of fact is material only if, under the governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the non-moving party. *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994). All doubts are therefore resolved in favor of the party opposing summary decision, particularly where, as here, that party is unrepresented. *See, e.g.*, *United States v. Harran Transp. Co.*, 6 OCAHO 857, at 3 (1996). Moreover, even in the absence of a response, a summary decision may issue only if it is clear that the moving party is entitled to judgment as a matter of law. 28 C.F.R. §68.38(c).

B. *Duties Imposed by the INA*

The INA makes it unlawful after November 6, 1986 to hire an alien for employment or to continue to employ an alien hired after that date in the United States knowing the alien is or has become unauthorized for employment. 8 U.S.C. §1324a(a). The INA also imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986, and to make those forms available for inspection by INS officers. Each failure to properly prepare, retain, or produce the forms in accordance with the employment verification system is a separate violation of the Act. Specific requirements include *inter alia*, the attestation of the employer under penalty of perjury that it has examined documents as specified in the statute to verify that the individual is not an unauthorized alien, 8 U.S.C. §1324a(b)(1), and the attestation of the employee under penalty of perjury that he or she is eligible for employment, 8 U.S.C. §1324a(b)(2). More detailed guidance on compliance with the statute is found in the accompanying regulations, 8 C.F.R. §274a.2(b)(1)(i)(A) and 8 C.F.R. §274a.2(b)(3), and in the Handbook for Employers which gives instructions for completing Form I–9, the employment eligibility verification form designated by applicable regulations for use by employers. The form itself contains a list of acceptable documents on the reverse side.

III. *Evidence Submitted in Support of the Motion*

Evidence submitted by complainant in support of its motion include the Declaration under oath of INS Special Agent Raymond Carton and a catalogue of the documents upon which INS relied in conducting the investigation. The documents are identified by the declaration as:

> Exhibit A, a letter dated February 1, 1994 from the Connecticut Department of Labor to INS, containing a list of names and addresses of employers and aliens whose applications for alien employment certification were forwarded to the United States Department of Labor in Boston or placed in inactive files in January;
>
> Exhibit B, an Application for Alien Employment Certification for Jose Asdrubal Jimenez-Montoya which was requested and received by Agent Carton from the Department of Labor. It is signed by Omar Montalvo, Jr., Corporate Secretary/Treasurer of Elite Autocraft Center, Inc. d/b/a Maaco Auto Painting and Bodyworks, and by Jose A. Jimenez, and is dated December 31, 1992;
>
> Exhibit C, an Application for Alien Employment Certification for Hezekiah Gibson which was requested and received by Agent Carton from the Department of Labor. It was signed by Omar Montalvo, Jr. for Elite and by Hezekiah Gibson and is dated June 1, 1993;
>
> Exhibit D, a letter from INS to an official of the Connecticut Department of Labor dated November 25, 1994 requesting a list of the employees working for Elite since 1992 and continuing through to the time of the letter;
>
> Exhibit E, received by INS from the Connecticut Department of Labor on or about December 5, 1994, consisting of Employee Quarterly Earnings Reports for the first quarter of 1992 through the first[6] quarter of 1993 for Elite, with a transmittal letter dated December 1, 1994. It shows wages paid by Elite to Hezekiah Gibson, named in Count I and IV of the Complaint,

[6]Although the Affidavit states that the report is for the first quarter of 1992 to the first quarter of 1993, in fact the report is through the fourth quarter of 1993.

Jesus Valle, named in Count II, Richard Millard, named in Count III, and Francisco Hernandez and Scott Wilson, named in Count IV;

Exhibit F, an INS Notice of Inspection dated January 11, 1995 addressed to Nelson Rodriguez and served by Special Agent Raymond Carton;

Exhibit G, an INS "Receipt for Employer Verification Documents" provided by Agent Carton which acknowledges receipt of documents and lists the names of twelve employees with their dates of hire;

Exhibit H1, an I–9 form for Jeremia Avelar, with an attached copy of a social security card and a resident alien card bearing the name Jeremia Velasquez Avelar;

Exhibit H2, an I–9 form for Jesus Valle, with an attached illegible copy of a Connecticut state driver's license, and a copy of what appears to be a social security card;

Exhibit H3, an I–9 form for Jose Montoya, with attached copies of a social security card bearing the name Jose Mario Montoya, a Connecticut state driver's license bearing the name Jose A. Jimenez, and a U.S. Department of Labor Final Determination letter dated May 6, 1994 to Maaco Auto Painting and Bodyworks stating that the application for Jose Jimenez-Montoya had been certified;

Exhibit H4, an I–9 form for Richard Millard, with an attached copy of a Connecticut state driver's license;

Exhibit H5, an I–9 form for Hezekiah Gibson, with an attached copy of a U.S. Department of Labor Final Determination letter dated March 11, 1994 to Maaco Auto Painting and Bodyworks stating that the application for Hezekiah Gibson had been certified, and a copy of a Connecticut state driver's license bearing the name Hezekiah Gibson;

Exhibit H6, an I–9 form for Francisco Hernandez;

Exhibit H7, an I–9 form for Scott Wilson;

Exhibit I, a letter received by INS from Jonel's President, Nelson Rodriguez, dated April 28, 1995 stating that Hezekiah Gibson is steadily employed by Maaco, describing his job duties and pay, and proclaiming him an excellent worker whom Maaco would like to employ permanently; and

Exhibit J, copies of Employee Quarterly Earnings Reports received by INS from Department of Labor for the first through fourth quarters of 1994 for Jonel, Inc. with a cover letter dated June 27, 1995. These reports show wages paid to Hezekiah Gibson, Jesus Valle, and Richard Millard during all four quarters, to Jose A. Jimenez-Montoya beginning in the second quarter, to Jeremia Avelar during the last two quarters, and to Scott Wilson for the first three quarters.

The Exhibits are attached to complainant's Memorandum rather than to the declaration of Agent Carton. Nevertheless, the declaration clearly identifies them and asserts with respect to Exhibits H1—7 that they are true copies of the forms presented to Carton on January 18, 1995, and that Exhibits B and C are true copies of the applications provided by the Department of Labor. The declaration alleges that an employer sanctions case was initiated by INS upon receipt of information from the Connecticut Department of Labor that Maaco Auto Painting and Bodyworks had filed applications for Alien Employment Certification for Jose Jimenez-Montoya and Hezekiah Gibson, both of whom were in the United States on B–2 visas. It asserts facts within the agent's personal knowledge and establishes the origin, chain of custody, and identity of the exhibits. While the better practice is to attach exhibits to the declaration or affidavit,[7] absent any challenge, the documents will be admitted as sufficiently authenticated under 8 C.F.R. §68.40(b). *See, e.g.*, *United States v. Kumar*, 6 OCAHO 833, at 5–7, *appeal filed*, No. 96–70300 (9th Cir. 1996); *United States v. Alaniz*, 1 OCAHO 245, at 1576 (1990).

Respondent has filed no evidence or other response in opposition to the motion.

[7]OCAHO rule 28 C.F.R. §68.38 does not specifically refer to papers other than affidavits. But *cf.* Federal Rules of Civil Procedure 56(e), and, e.g., *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993),"'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)'" quoting 10A Charles A. Wright et al., *Federal Practice and Procedure* §2722, at 58–60 (2d ed. 1983 and 1993 Supp.).

IV. *Discussion*

A. *Count I*

Count I alleges that Jonel hired or continued to employ Hezekiah Gibson and Jose Asdrubal Jimenez-Montoya a/k/a Jose Mario Montoya, knowing that they were not authorized for employment in the United States. In order to prove these allegations INS must show that the individuals were hired after November 6, 1986, and that Jonel knew that they were unauthorized for employment in the United States.

INS argues that liability is established as to Count I because: (1) Jonel admits in its answer that it employs Jose Asdrubal Jimenez-Montoya, a/k/a Jose Mario Montoya, and Hezekiah Gibson; (2) Applications for Alien Employment Certification were filed on behalf of these individuals by Elite, respondent's predecessor; (3) the applications were approved, and Jonel was sent copies of the certification letters which expressly required it to attach the I–140 petitions to the certifications and send the completed packets to INS, thereby putting Jonel on notice that the sponsored individuals were not yet authorized; (4) the Employee Quarterly Earnings Reports reflect that these individuals were employed; (5) Jonel sent correspondence to INS regarding its employment of Hezekiah Gibson; (6) the I–9s themselves establish that Jonel hired/continued to employ the two named individuals knowing that they were unauthorized for employment given respondent's failure to properly identify authorization documents in Section 2; and (7) Jonel has failed to set forth evidence that there is a genuine factual issue. INS also asserts that the record shows that the applications for Alien Employment Certification filed by Elite for Jose Jimenez-Montoya and Hezekiah Gibson clearly state that each of these individuals had entered on a B–2, or visitor for pleasure, visa.

Although Jonel made no response to the motion, the record itself raises significant questions regarding the issue of Jonel's knowledge. First, there is no evidence in the record which shows when Jonel took over operations from Elite. Although INS' memorandum states that Elite ceased operations around September of 1993[8] the Employee Earnings Reports for all quarters of 1993 list Elite as the

[8]This assertion is unsupported by evidence in the record. Factual assertions in a memorandum are not evidence.

owner. The earliest signature of Nelson Rodriguez on any I–9 is April 11, 1994. Omar Montalvo, known to the record only as Elite's Corporate Secretary/Treasurer, *see* Exhibits. B and C, was the attesting officer on Section 2 of an I–9 possibly filled out as recently as April 3, 1995. Exhibit H4.[9] No connection is shown between Montalvo and Jonel. Neither has complainant alleged any specific facts tending to establish that Elite's knowledge can be imputed to Jonel, e.g. continuity in the operation of the business before and after the sale, *see, e.g.*, *NLRB v. Hot Bagels & Donuts of Staten Island, Inc.*, 622 F.2d 1113, 1116 (2d. Cir. 1980), or identity of any of the officers or of the corporations themselves, *see, e.g.*, *R-T Leasing Corp. v. Ethyl Corp.*, 494 F. Supp. 1128, 1136–37 (S.D.N.Y. 1980).

Attached to the I–9 of Jose Montoya (Exh. H3), moreover, are documents appearing to be a valid Connecticut driver's license, a List B document sufficient to establish identity, 8 U.S.C. §1324a(b)(1)(D)(i), and an unrestricted social security card, a List C document sufficient to establish work authorization, 8 U.S.C. §1324a(b)(1)(C)(i). IRCA makes it an unfair immigration-related employment practice for an employer to refuse to honor such documents when they appear on their face to be genuine. There is no suggestion that these documents did not so appear.

Complainant argues that under the theory of constructive knowledge an employer may be deemed to have such knowledge "if it can be shown by a preponderance of the evidence that the employer was in possession of such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question . . . or to infer, on the basis of reliable warnings that such officially questioned employees are not, in fact authorized to be employed . . . " What a preponderance of the evidence shows, however, is not appropriate for resolution at the summary decision stage.

It is not the function of summary judgment to weigh evidence or resolve disputed issues of fact. The question a judge must ask at the

[9]There are questions as to the authenticity of Montalvo's signature on this I–9 when compared with the signatures of the same individual on Exhibits B and C. However given that all doubts must be resolved in favor of the non-moving party at this stage, Jonel is afforded the benefit of the doubt as to the authenticity of the signature for the purposes of resolving the motion. In addition, the date following the attesting official's signature on Ex. H4 is not altogether legible. It appears to be "4–3–95." However, the individual named in Section 1 of the I–9, Richard Millard, completed the I–9 on January 14, 1994.

summary decision stage is not whether the weight of the evidence favors one side or the other, but whether there is any evidence which would permit a rational fact finder to find for the non-moving party. A summary decision is appropriate only if the facts give rise to no reasonable inferences other than the one urged by the moving party. Summary decision is therefore generally an inappropriate method for resolving contested issues of fact concerning the state of mind of a party, especially where credibility may be an issue. *Cf. United States v. American Terrazzo Corp.*, 6 OCAHO 828, at 5 (1995). Case law cautions that state of mind is seldom amenable to summary disposition. Issues of intent or knowledge are often subject to proof only by circumstantial evidence "which makes summary judgment a seldom useful tool for resolving such issues." *Friedel v. Madison*, 832 F.2d 965, 972 (7th Cir. 1987). Because reasonable minds could differ as to the import of the evidence here, summary decision will be denied as to Count I. The evidence simply falls short of establishing without a doubt what Jonel knew and when.

The Paperwork Violations

1. *Count II: Failure to ensure that employees properly completed Section 1 of Form I–9.*

In Count II, complainant alleges that Jonel failed to ensure that Jeremia Avelar, Jesus Valle, and Jose Asdrubal Jimenez-Montoya a/k/a Jose Mario Montoya, properly completed Section 1 of Form I–9. In order to prove these allegations, complainant must establish that the individuals were hired after November 6, 1986, and that Jonel failed to ensure that they properly completed Section 1 of Form I–9.

Complainant's evidence establishes a *prima facie* case as to each of these elements. Exhibit G lists the dates of hire for these individuals as: Jeremia Avelar, August 15, 1994; Jesus Valle, October 23, 1991 (sic); and Jose Montoya, April 25, 1994. The I–9 for Jeremia Avelar was signed by Nelson Rodriguez, president, on August 15, 1994. The I–9 for Jesus Valle appears to have been signed by Nelson Rodriguez on January 14, 1995, although Valle's signature is dated January 14, 199*4*. The I–9 for Jose Montoya was signed by Nelson Rodriguez on April 25, 1994. Jonel's answer to the complaint admits that Jimenez-Montoya, Jose Asdrubal aka Jose Mario Montoya continued to be employed by Jonel after it took over the company from Elite.

Section 1 of each individual's I–9 reveals deficiencies. Visual inspection of Exhibit H1 shows that Jeremia Avelar failed to provide his date of birth, check any box in the attestation section, or date his signature. Exhibit H2 shows that Jesus Valle did not check any box in the attestation portion. Exhibit H3 shows that Jose Jimenez-Montoya declared himself to be temporarily authorized for employment in the United States but provided no date until which he is authorized to work and furnished no alien authorization number. He also did not date his signature.

INS' proof therefore establishes that Jonel failed to ensure that the three individuals properly completed Section 1 of their I–9 forms.

2. *Count III: Failure to properly complete Section 2 of Form I–9.*

In order to prove the violation alleged in Count III for which summary decision is sought, complainant must establish that Richard Millard was hired for employment at respondent company after November 6, 1986, and that Jonel failed to properly complete Section 2 of his I–9.

In Exhibit J, Millard's name appears on the earnings reports during all quarters of 1994, the only year in which Jonel is identified as the employer. His date of hire is shown in Exhibit G as April 3, 1992. While there is some uncertainty regarding the date Jonel took over operations from Elite, it is clear that Millard remained in Jonel's employ after the transfer of operations from Elite to Jonel, which, as the evidence clearly shows, was after November 1986. In Exhibit H4, Millard's signature is dated January 14, 1994. However, the I–9 is signed by Omar Montalvo, not Nelson Rodriguez. Omar Montalvo's signature appears to be dated April 3, 1995.

In Section 2 of Millard's I–9, a Connecticut birth certificate is entered under List A, but is not a List A document. No other identifying information, such as a document number, is provided. Moreover, a birth certificate, as a List C document, is adequate evidence only of employment authorization. It does not suffice to establish identity. 8 U.S.C. §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(A), (B), (C)(4). Other deficiencies in Section 2 of this I–9 include the omission of the date on which the employee began employment and the failure of the attesting official to supply his title. It bears noting also that the signature of the attesting official in Section 2 of Millard's I–9 is purportedly

that of Omar Montalvo, Corporate Secretary/Treasurer of Elite. Assuming *arguendo* that the signature is authentic and that Montalvo holds no position in Jonel, Jonel still cannot escape liability for the deficiencies on the I–9 on the basis that an official of Elite improperly completed it. A successor relies on the I–9s executed by its predecessor at its own peril. Jonel thus cannot successfully defend by asserting that Elite effected Millard's initial hire or completed the I–9:

> Title 8 U.S.C. §1324a obliges an employer of individuals in the United States to comply with I–9 requirements whether such employer initiated the hire or is an arms length successor in interest of a previous employer who effected the hire. The §1324a regime obliges both successor and predecessor employers to comply with national policy with respect to employment in the United States.

United States v. Nevada Lifestyles, Inc., 3 OCAHO 518, at 10 (1993). Thus, whether Jonel or Elite initiated the hire is not an issue of material fact for the purposes of ruling on paperwork violations, as the outcome would be unaffected by the determination.

3. *Count IV: Failure to ensure that employee properly completed Section 1 of Form I–9 and failure itself to properly complete Section 2 of Form I–9.*

Count IV alleges that both sections of the I–9s for Hezekiah Gibson, Francisco Hernandez, and Scott Wilson, are deficient. INS must establish that these individuals were hired after November 6, 1986, and that Jonel failed to ensure that these individuals properly completed Section 1 of Form I–9, and failed itself to properly complete Section 2.

Exhibit G shows that the individuals were hired on April 24, 1992, June 10, 1992 and May 15, 1992 respectively. Hezekiah Gibson's I–9 (Exh. H5) was signed by Nelson Rodriguez on April 11, 1994. Gibson's name appears on earnings reports for all quarters of 1994 and respondent admits in its answer that it continued to employ Gibson after taking over Maaco. Francisco Hernandez's I–9 (Exh. H6) was signed by Nelson Rodriguez on January 5, 1995. Scott Wilson's I–9 was signed by Omar Montalvo and is undated. Wilson was evidently terminated on July 8, 1994 (Exh. G). His name appears on the earnings reports for the first through the third quarters of 1994 and it is evident that Jonel was in control of the company for at least a part, if not all, of this time.

Visual inspection of Section 1 of Hezekiah Gibson's I–9 (Exh.H5) shows that he failed to check any box in the attestation section. In Section 2 no verification documents at all are listed. Examination of Francisco Hernandez's I–9 (Exh. H6) shows neither an employee signature nor a date in Section 1. Section 2 lists a Puerto Rican birth certificate in List A, but a birth certificate is a list C document evidencing proof of work authorization, not identity as required under 8 U.S.C. §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(A), (B), (C)(4). There is also no indication of the date on which Hernandez began his employment. Scott Wilson's I–9 (Ex. H7), is undated in both Sections 1 and 2. In Section 2, a Connecticut state birth certificate is identified under List A, but a birth certificate is a List C document which may establish employment authorization but not identity. 8 U.S.C. §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(A), (B), (C)(4). Further, the attesting official in Section 2 failed to provide his title.

INS therefore establishes a *prima facie* case with respect to deficiencies in both sections of the I–9's for Hezekiah Gibson, Francisco Hernandez, and Scott Wilson.

V. *Whether a Defense of Substantial Compliance Was Sufficiently Stated to Avoid Summary Decision as to Any of the Violations*

Jonel constructively asserted a defense of substantial compliance. OCAHO case law recognizes that under appropriate circumstances substantial compliance with paperwork requirements may provide an affirmative defense with regard to liability for a paperwork violation. *United States v. Chicken by Chickadee Farms, Inc.*, 3 OCAHO 423, at 9–10 (1992). The doctrine is an equitable one designed to avoid hardship when a party has done all that can reasonably be expected of it. *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1096 (1990). It is not available to defeat the policies underlying a statutory provision, thus actual compliance is required with respect to the substance essential to every reasonable objective of the statute. *Id.* The overriding purpose of the employment eligibility verification system is to assure that no employee is hired without verification of his or her entitlement to work in the United States. Paperwork requirements are an integral part of the congressional scheme for controlling illegal immigration. *United States v. Noel Plastering and Stucco, Inc.*, 3 OCAHO 427, at 20 (1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1993). To the extent that verification errors or omissions could lead to the hiring of unauthorized aliens, they are considered more serious because they undermine the verification system itself. *United*

States v. Chef Rayko, Inc., 5 OCAHO 794, at 3–4 (1995) (modification by Chief Administrative Hearing Officer). Errors which may seem inconsequential in other settings may nevertheless be significant in the context of the verification system.

IRCA imposes attestation responsibilities upon both employer and employee. Applicable regulations designate Form I–9 as the employment eligibility verification form to be used by employers. An employer's duty includes both meeting its own attestation requirements and ensuring that the employee's requirement is met as well. *J.J.L.C., Inc.*, 1 OCAHO 154, at 1093. Form I–9 consists of Section 1, the employee attestation, and Section 2, the employer attestation. Section 2 contains two components, a documentation part and a certification part. Both are critical to enforcement. *See United States v. Corporate Loss Prevention Assocs. Ltd.*, 6 OCAHO 908, at 5 (1997) (modification by the Chief Administrative Hearing Officer).

The defense of substantial compliance is accordingly available only in very limited circumstances. Particularly where, as here, neither the statute nor the regulations provides for such a defense,[10] it is necessary to approach with caution any departure from the goal of full compliance. OCAHO case law has identified certain minimum criteria which must be met before a defense of substantial compliance can be considered: (1) the use of an INS I–9 form to determine an employee's identity and employment eligibility; (2) the employer's or agent's signature in Section 2 under the penalty of perjury; (3) the employee's signature in Section 1; (4) in Section 1, an indication by a check mark or some other means attesting, under the penalty of perjury, that the employee is either (a) a citizen or national of the United States, (b) a lawful permanent resident, or (c) an alien authorized to work until a specified date; and (5) some type of information or reference to a document spelled out in Section 2, List A, or Lists B and C. *United States v. Northern Mich. Fruit Co.*, 4 OCAHO 667, at 16–17 (1994). In addition, a substantial compliance defense is not available as to Section 2 of the I–9 where an employer fails to pro-

[10]Some agencies have promulgated regulations defining the term. *See, e.g.*, *Arent v. Shalala*, 866 F. Supp. 6, 14 (D.D.C. 1994) (FDA regulations 21 C.F.R. §101.43(c) and (a) defining substantial compliance as term used in Nutrition Labeling and Education Act (NLEA), 21 U.S.C. §343(q)(4)(B)(ii)), *aff'd in part and remanded in part*, 70 F.3d 610 (D.C. Cir. 1995), *Flagstaff Med. Ctr., Inc. v. Sullivan*, 773 F. Supp. 1325, 1340–41 (D. Ariz. 1991) (HHS substantial compliance regulations are reasonable interpretation of Hill-Burton Act, 42 U.S.C. §291 et seq.), *aff'd in part and rev'd in part*, 962 F.2d 879 (9th Cir. 1992).

vide a verification document identification number and/or expiration date. *Corporate Loss Prevention Assocs., Inc.*, 6 OCAHO 908, at 6.

Completion of the attestation portion of Section 1 is absolutely essential to the purpose of the statute. *See, e.g.*, *J.J.L.C., Inc.*, 1 OCAHO 154, at 1093. In none of the three I–9s listed in Count II is the attestation portion complete, and accordingly no defense of substantial compliance is available as to these violations. The failure to sufficiently identify Richard Millard's birth certificate or to specify appropriate documents in Section 2 are also serious violations which preclude a defense of substantial compliance as to Count III. *See United States v. Mesabi Bituminous, Inc.*, 5 OCAHO 801, at 3 (1995); *Corporate Loss Prevention Assocs. Inc.*, 6 OCAHO 908, at 6. Identification of appropriate documents in Section 2 are among the minimum criteria that must be met before the substantial compliance defense can even be considered. *See Northern Mich. Fruit Co.*, 4 OCAHO 667, at 17.

Employee attestation in Section 1 and identification of proper documents in Section 2 are both fundamental to I–9 compliance and failure to comply with these provisions undermines "the intent for which the statute was adopted." *United States v. Manos & Assocs. Inc.*, 1 OCAHO 130, at 890 (1989). *See, e.g.*, *J.J.L.C., Inc.*, 1 OCAHO 154, at 1093 (employee attestation crucial to I–9 compliance), *Candlelight Inn*, 4 OCAHO 611, at 20 (defense of substantial compliance unavailable where documentation is not adequately identified in Section 2). No defense of substantial compliance may be made to Count IV as to Section 2 of the I–9's of Hezekiah Gibson, Francisco Hernandez, or Scott Wilson because the documentation in each instance is either nonexistent or wholly inadequate. Summary decision is therefore appropriate in each instance as to Section 2.

As to Section 1, Hernandez's failure to sign the attestation at all and Gibson's failure to check any of the boxes in the attestation are not mere technical or procedural errors. Both go to the heart of the employment eligibility verification system. Failure to complete these portions of the I–9 frustrates the very purpose of the employment eligibility verification requirement. *See, e.g.*, *J.J.L.C., Inc.*, 1 OCAHO 154, at 1093–94. Summary decision will therefore be granted as to Section 1 of the I–9's of Hernandez and Gibson. With respect to Section 1 of Scott Wilson's I–9, I note that the employee's failure to date his signature is not among the threshold criteria required before a substantial compliance defense may be considered. *Northern*

Mich. Fruit Co., 4 OCAHO 667, at 17, *Mesabi Bituminous, Inc.*, 5 OCAHO 801, at, 3. Nevertheless, the failure to enter the correct date has been held to be a serious violation because the employee's obligation is to attest to the genuineness of the documents and his eligibility to work on the first day he begins work. Failure to enter the date prevents a determination of whether the section was completed on the first day. *United States v. Carter*, 7 OCAHO 931, at 40 (1997). Jonel has presented neither evidence nor legal and factual argument beyond a conclusory statement that the errors on the I–9's are minor. Assuming without deciding that there could be circumstances under which a defense could be made to the employee's omission of the date, those circumstances have not been articulated here. The defense has not been asserted with sufficient specificity or particularity to survive a motion for summary decision. Accordingly, summary decision is appropriate as to Section 1 of Wilson's I–9 as well.

Findings of Fact and Conclusions of Law

I have considered the pleadings, memoranda, briefs, affidavits, and exhibits in support of the motion for summary decision. Accordingly, I make the following findings of fact and conclusions of law:

A. Jonel, Inc., formerly Elite Autocraft Center, Inc., d/b/a Maaco Auto Painting and Bodyworks, is a Connecticut corporation having its principal place of business at 504 Main Street, Norwalk, Connecticut 06851–9999.

B. A Notice of Intent to Fine was served on respondent on November 14, 1995 and respondent timely requested a hearing.

C. The following individuals were hired for employment at Jonel after November 6, 1986, for whom it failed to ensure that they properly completed Section 1 of Form I–9:

   1. Jeremia Avelar
   2. Jesus Valle
   3. Jose Asdrubal Jimenez-Montoya a/k/a Jose Mario Montoya

D. Richard Millard was hired by Jonel after November 6, 1986, and Jonel failed to properly complete Section 2 of Form I–9 for him.

E. The following individuals were hired after November 6, 1986 for whom Jonel failed to ensure that Section 1 of Form I–9 was properly completed and failed itself to properly complete Section 2:

1. Hezekiah Gibson
2. Francisco Hernandez
3. Scott Wilson

F. No genuine issue of material fact has been shown to exist with respect to Count II, Count III as it applies to Richard Millard, and Count IV, and complainant is entitled to summary decision on these counts.

G. Jonel, Inc. has engaged in seven separate violations of 8 U.S.C. §1324a(a)(1)(B) in that it hired the named individuals without complying with the requirements of §1324a(b) and 8 C.F.R. §274a.2(b)(1)(A) and (ii)(A) and (B).

H. Count I alleging knowing hire of Hezekiah Gibson and Jose Asdrubal Jiminez Montoya and the portion of Count III concerning Robert Brown are not amenable to summary decision on this record, and summary decision is denied as to them.

With respect to the resolution of the remaining issues, a telephonic prehearing conference will be scheduled at a mutually convenient date to establish a schedule for further proceedings and a new hearing date.

SO ORDERED.

Dated and entered this 30th day of September, 1997.

ELLEN K. THOMAS
Administrative Law Judge