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

August 5, 1998

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

FINAL DECISION AND ORDER

Appearances: William F. McColough
Immigration and Naturalization Service for complainant

Nelson Rodriguez
President, Jonel, Inc. for respondent

Before: Honorable Ellen K. Thomas

PROCEDURAL HISTORY

On August 30, 1996, INS filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) which alleged that Jonel, Inc. d/b/a Maaco Auto Painting and Bodyworks (Jonel or respondent) engaged in 10 separate violations of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, by hiring or continuing to employ two individuals knowing them to be unauthorized for employment in the United States and by failing in eight instances to comply with the requirements of the Act's employment eligibility verification system. Jonel, through its President Nelson Rodriguez, made timely answer by a letter-pleading in which he denied the knowing hire violations, contending that the two individuals had been hired by a predecessor company, Elite Auto Craft Inc., and that Jonel had received specific notice from the United States Department of Labor that the individuals were "certified for employment," which he said Jonel "understood to mean that they were allowed to work." As to the paperwork violations, Jonel constructively raised the defense of substantial compliance. Discovery and motion practice

followed.

On September 30, 1997, I entered an order granting in part and denying in part the complainant's motion for summary decision, finding that the defense of substantial compliance was unavailable under the circumstances, and that Jonel had engaged in seven of the eight alleged record keeping violations, but that a hearing was necessary to resolve the remaining allegations. United States v. Jonel, Inc., 7 OCAHO 967 (1997). The issues remaining for adjudication were 1) whether Jonel hired Hezekiah Gibson for employment knowing him to be unauthorized for employment in the United States or continued to employ him after learning of his status, 2) whether Jonel hired Jose Asdrubal Jimenez-Montoya, also known as Jose Jimenez and as Jose Mario Montoya, knowing him to be unauthorized for employment in the United States or continued to employ him after learning of his status, 3) whether Jonel failed properly to complete section 2 of Form I-9 for Robert Brown, and 4) what penalties are appropriate for the violations established. As to these issues, a hearing was scheduled. Prior to the hearing, INS filed a motion seeking to have its requests for admissions admitted on the ground that Jonel had never replied to them. I issued an order on May 20, 1998 granting complainant's motion and deeming certain facts to be admitted for purposes of this action and deeming a number of relevant documents to be authenticated as having been prepared or received by Jonel in the ordinary course of business.

A hearing was held on June 5, 1998 in Norwalk, Connecticut. Witnesses were sworn, evidence was heard, 23 exhibits were entered (CX1-23)[1] and a transcript was prepared consisting of 75 pages, exclusive of the exhibits. Testifying on behalf of the complainant were INS District Adjudication Officer Robert W. Janelle and INS Special Agent Raymond Carton. Although the principal reason that INS' motion for summary decision was denied as to the knowing hire allegations was because a hearing was necessary to assess the credibility of Jonel's claim to have believed Gibson and Montoya authorized to work, Jonel failed to appear for the hearing and thus presented no witnesses or evidence. INS moved at the close of its evidence to dismiss the allegations relating to Robert Brown, which motion was granted (Tr.71). The transcript of hearing was received in this office on June 18, 1998 and the record was closed.

Applicable rules[2] provide that

> A . . . request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a . . . request for hearing if:

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[1] The following abbreviations will be used throughout this decision:
CX - Complainant's Exhibit Tr. - Transcript of hearing testimony

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

. . .

(2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and either

(i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear; or

(ii) Within ten (10) days after the time for hearing or within such other period as the Administrative Law Judge may allow, such party does not show good cause for such failure to appear.

28 C.F.R. § 68.37(b).

On June 12, 1998 I issued an order allowing Jonel 10 days in which to show cause for its failure to appear for the hearing. No response was received to that order. Although I find that Jonel has abandoned its request for hearing pursuant to 28 C.F.R. § 68.37(b)(2)(ii), the hearing has already been held, and in the interest of rendering a decision on the merits this order is issued.

STATUTORY AND REGULATORY BACKGROUND

A. The Employment Eligibility Verification System

The INA makes it unlawful after November 6, 1986 for an employer knowingly to hire an alien who is not authorized for employment in the United States, 8 U.S.C. § 1324a(a)(2), or to continue to employ an alien hired after that date after finding out that the alien is or has become unauthorized for employment. Regulations define the term "unauthorized for employment" to mean "with respect to employment of an alien at a particular time, that the alien is not at that time either: (1) Lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General." A violation of this prohibition is commonly referred to as a "knowing hire" violation.

The Act also imposes an affirmative duty upon employers to review specified documents to verify the identity and employment eligibility of every new employee and to document compliance with the verification system. 8 U.S.C. § 1324a(b)(1). A violation of these requirements is commonly known as a "paperwork violation." Employers are required to prepare and retain certain forms for each employee hired after November 6, 1986, and to make those forms available for inspection by INS officers. 8 U.S.C. § 1324a(b)(3). 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 of the employment eligibility verification system 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). In order to be lawfully employed in the United States, an alien must be authorized to work and must provide valid documents to a prospective employer to evidence identity and employment eligibility. More detailed guidance on compliance with the statute is found in the accompanying regulations, 8 C.F.R. § 274a.2(b), 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.

Compliance with the record keeping requirements of the verification system is satisfied when an employer examines the specific document or documents set out in the statute and regulations to establish an individual's identity and employment eligibility, and attests under the penalty for perjury that the documents reasonably appear to be genuine and to apply to the individual. The preparation of an I-9 form presumptively demonstrates that an employer was presented with documents. United States v. Cafe Camino Real, Inc., 2 OCAHO 307, at 39 (1991).[3]

An employer's obligation to examine documents does not require expertise in ascertaining the legitimacy of the documents. Rather, the law requires only that the employer or agent actually examine each specific document to make sure that it appears genuine on its face and that it appears to apply to the particular individual. The law requires no more than a reasonable effort to ascertain whether the document in question is authentic. See H.R. Rep. No. 99-682(I), at 61-62 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5665-66. It permits, but does not require, an employer to copy the documents presented and to retain copies with the completed I-9 form. 8 U.S.C. § 1324a(b)(4).

B. Procedures for Obtaining Authorization to Employ Alien Workers Not Previously Authorized for Employment

The INA, 8 U.S.C. § 1101 et seq., regulates the admission of aliens into the United States and designates the Attorney General and the Secretary of State as its principal administrators. Most of the Attorney General's immigration functions are performed by the Immigration and

[3] Citations to OCAHO precedents reprinted in the bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 6, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1-6 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 6, however, are to pages within the original issuances.

Naturalization Service (INS), which oversees border enforcement, removal of aliens, some visa petitions, adjustments of immigration status, and citizenship adjudication, but other agencies have immigration-related responsibilities as well. The Department of Labor processes petitions for employment-related visas to ensure compliance with all labor statutes and regulations, while the consular offices of the Department of State issue a variety of visas abroad through embassies and consulates. See generally, Peter M. Schuck and Theodore Hsien Wang, Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990, 45 Stan. L. Rev. 115, 121-22 (1992). In order for an alien to obtain an employment-related immigrant visa, it is generally first necessary to have both a petition approved by the Attorney General and a labor certification issued by the Secretary of Labor. 8 U.S.C. §1153(b)(2) and (3), § 1182(a)(5)(A) (1994).

For an employer seeking to offer employment to an alien worker who is not already authorized for employment, obtaining a labor certification is thus only the first step. Regulations implementing the certification of skilled and unskilled workers are set forth at 20 C.F.R. Pt. 656 (1997), as amended. The employer starts by completing an Application for Alien Employment Certification (Form ETA-750). 20 C.F.R. § 656.21. The employer must show the name of the alien it intends to employ, a description of the alien's qualifications, and various supporting documentation to demonstrate, inter alia, that it has funds available to pay the wages, that the wages will equal or exceed the prevailing wage, and that the job opportunity is also open to any qualified United States worker. 20 C.F.R. § 656.20 (c)(1), (2), (8), (9). Part A of Form ETA-750 consists of an offer of employment and is completed by the employer. Part B is completed by the prospective employee (CX2,6,14). Both the alien and the employer are permitted, but not required, to have agents represent them in the labor certification process, and if they do so, they must sign the statement on the application that the alien and/or employer takes full responsibility for the accuracy of representations made by the agent. 20 C.F.R. § 656.20(b)(1).

Once the application has been approved, the Department of Labor issues its final determination certifying that the statutory criteria have been met and the process may continue. The next step is for the employer to submit a Petition for Immigrant Worker (INS Form I-140) (CX1) to the INS. 8 C.F.R. § 204.5(l). The petition must be accompanied by a fee, and by appropriate supporting documentation, including a copy of the labor certification document. 8 C.F.R. § 204.5(a) and (c). The form I-140 itself contains the following notice:

> Meaning of petition approval
>
> > Approval of a petition means you have established that the person you are filing for is eligible for the requested classification. This is the first step towards permanent residence. However, this does not in itself grant permanent residence or employment authorization. You will be given information about the requirements for the person to receive an immigrant visa, or to adjust status, after your petition is approved (CX1). (emphasis added)

Only after the petition for an immigrant worker is approved and a visa is available is the alien authorized to file an Application for Adjustment of Status (INS Form I-485) (CX18), see 8 C.F.R. §§ 245.1 et seq., 8 U.S.C. § 1255, and an Application for Employment Authorization (INS Form I-765) (CX4). An alien's "priority date" for obtaining one of a limited number of annual visas is then determined by the date the employee filed the application for labor certification. 8 C.F.R. § 204.5(d). The procedures for applying for employment authorization are set out at 8 C.F.R. § 274a.13.

SUMMARY OF THE EVIDENCE

Elite Autocraft Center was a predecessor in interest from which Jonel Inc. acquired a business known as Maaco Autopainting and Bodyworks which is located at 522 Main Avenue, Norwalk, Connecticut. Elite is not charged with any violation of INA and is not a party to this proceeding. The precise date of the transfer of the business ownership from Elite to Jonel is unclear but appears to have been some time between the end of 1993 and early 1994. Wages in the final quarter of 1993 were paid by Elite, and those for the first quarter of 1994 and thereafter were paid by Jonel (CX8,13). Some of Elite's employees were retained by Jonel.[4] Omar Montalvo was the Corporate Secretary and Treasurer for Elite and has no known connection with Jonel. Nelson Rodriguez is the President of Jonel and has no known connection to Elite. The business is a very small one employing approximately twelve people (CX10).

It is undisputed that at all times relevant to this case neither Hezekiah Gibson nor Jose Jimenez-Montoya was a lawful permanent resident or an alien authorized to be employed in the United States. INS records indicate that Gibson was initially admitted into the United States at Miami from Jamaica on June 14, 1985 with a B-1 visa and that his admission expired December 24, 1985 (CX22). INS records for Jose Jimenez indicate that he entered the United States from Colombia at New York City with a B-2 visa on August 1, 1992 and that he departed the United States on July 25, 1993 (CX23). As of July 20, 1995 there was no INS record indicating any subsequent authorized re-entry by Jimenez-Montoya into this country after his departure on July 25, 1993. Thus it appears that during the time period relevant to this case each of these individuals was not only unauthorized for employment, but also unlawfully present in the United States. Gibson appears to have been unlawfully present from December 1985 to at least the middle of 1995 (CX20) and Montoya at all times after July 25, 1993 that he was in the United States (CX23). Jonel has not contended that either Hezekiah Gibson or Jose Jimenez-Montoya was authorized for employment during the time in question; it alleged only that Jonel believed them to be so authorized.

A. Hezekiah Gibson

[4] Employees for whom wages were paid by both Elite and Jonel were Jesus Valle, Richard Millard, Hezekiah Gibson, and Scott Wilson (CX8,13).

On June 1, 1993 Omar Montalvo, on behalf of Elite, Jonel's predecessor, had initiated an application for alien employment certification for Hezekiah Gibson[5] for work as an automobile body repairman (CX6). The form reflected that Gibson had entered the United States on a visitor visa and had extensive experience in autobody repair, having worked in Norwalk at Elite since April 1992, and prior to that at other Maaco shops in Poughkeepsie, New York and Bridgeport, Connecticut starting in July of 1991. Attorney Joseph A. Sena, Jr. of White Plains, New York was designated in the application as the agent for both Elite and Gibson. Elite's employee quarterly earnings reports show that wages were paid to Gibson by Elite during the second through the fourth quarters of 1992 and during all quarters reported in the record for 1993 (CX8).

On the INS Receipt for Jonel's Employer Verification Documents (CX10) Jonel listed Gibson's date of hire as April 24, 1992. However no I-9 form for Hezekiah Gibson was completed by Nelson Rodriguez, President of Jonel, until April 11, 1994 (CX12). It is evident from Jonel's quarterly earnings reports that by the time Rodriguez completed the I-9 form for Gibson on April 11, 1994, Gibson had already been working for Jonel for long enough to have earned $3,860.85 in wages for the first quarter of 1994 (CX13). Rodriguez thus did not complete an I-9 form for Gibson within three days of the time Gibson began work for Jonel. Whether Elite had ever completed an I-9 form for Gibson is unknown.

Attached to Gibson's I-9 were copies of Gibson's Connecticut driver's license and of the Department of Labor's Final Determination dated March 11, 1994. Attached to the final determination were copies of the forms ETA 750A and ETA 750B which had previously been submitted by Elite. The determination advised that the application for Gibson had been certified, and that the certification must be attached to an I-140 petition and filed with the Immigration and Naturalization Service, U.S. Department of Justice, 75 Lower Weldon Street, St. Albans, Vermont 05479-0001 (CX12, p.3).

On July 14, 1994 Jonel filed an Immigrant Petition for Alien Worker (Form I-140) for Gibson. The letter of transmittal was signed by an attorney, Joseph A. Sena, Jr., of White Plains New York, whose notice of appearance on behalf of Jonel was signed, dated, and consented to by Nelson Rodriguez on May 19, 1994. Nelson Rodriguez also signed the petition providing supporting information on May 19, 1994. The petition, together with the approved labor certification, filing fee, and other documentation in its support were forwarded to the INS Service Center in St. Albans, Vermont, with a request that the petition, when approved, be forwarded to the U.S. Consulate in Kingston, Jamaica (CX15).

An approval notice for this petition was subsequently date stamped as having been received in attorney Sena's office on March 6, 1995; the approval also contained a prominent notice that it

[5] Gibson's name appears on some of the employee listings as G. Hezekiah, but the social security number matches Gibson's.

did not convey any right or status (CX16). Sena thereafter on May 17, 1995 filed applications for adjustment of status on behalf of Gibson, his wife and his daughter (CX17). The transmittal letter for these applications requests that appointments be made for issuance of employment authorization documents and an adjustment interview. In the supplemental questionnaire supporting Gibson's application he indicated that he had entered the United States as a visitor in 1985. He checked a box indicating that he was not in lawful immigration status, and checked "yes" in response to the inquiry about whether he had been employed without INS authorization. On May 28, 1996 he was accorded status as a lawful permanent resident (CX20).

B. Jose Montoya

On December 31, 1992, Jonel's predecessor Elite had initiated an application for labor certification for Jose Asdrubal Jimenez-Montoya (also known as Jose Jimenez and Jose Mario Montoya) for employment as an automobile body repair supervisor (CX2). Jonel's employment records identify this individual as Jose Montoya (CX11) and he is hereafter referred to by that name. The attorney of record for both Elite and Montoya was Joseph A. Sena, Jr. of White Plains, New York. The application reflects that Montoya was in the United States on a B-2 or visitor visa, and had extensive prior work experience in the automotive trades in Medellin, Colombia from July 1986 to July 1992. Contrary to Jonel's representations that both Montoya and Gibson had been initially hired by its predecessor, Elite, there is no evidence in the record that Montoya was ever employed by Elite. There is no indication on the labor certification form that Montoya ever worked at Elite, and his last reported employment was in Colombia. Elite's employee quarterly earnings reports for 1991-93 (CX8) do not reflect any wages having been paid to this individual under any of the names he is known to have used, or to any individual with the social security number he used, SSN1.

On the INS Receipt for Jonel's Employer Verification Documents, Jonel listed Montoya's date of hire there as April 25, 1994 (CX10). An I-9 form for Jose M. Montoya was completed by Nelson Rodriguez, Jonel's President, on April 25, 1994 (CX11). It indicates that Rodriguez examined a Connecticut driver's license with the name Jose A. Jimenez as evidence of Montoya's identity and a social security card with the name Jose Mario Montoya as evidence of his employment eligibility. Copies of the driver's license and the social security card were attached to the I-9 form when it was inspected by INS on January 18, 1995, as was a copy of the Department of Labor's Final Determination on the application for labor certification for him, which was not issued by the Department of Labor until May 6, 1994. Thus on April 25, 1994, Jonel had not yet received the Department of Labor's determination regarding Montoya. Employee quarterly earnings reports (CX13) show that Jonel paid wages to Jose M. Montoya in the second, third, and fourth quarters of 1994. Earnings records for 1995 are not part of the record.

Attached to the Labor Department's final determination for Montoya were the forms ETA 750A and ETA 750B previously submitted by Elite. The determination advised that the application

had been certified and that the certification document must be attached to an I-140 petition and filed with the Immigration and Naturalization Service, U.S. Department of Justice, 75 Lower Weldon Street, St. Albans, Vermont 05479-0001 (CX11). There is no record that any further steps were taken by Jonel or that any petition for an alien worker was ever filed for Montoya.

QUESTION PRESENTED

It is clearly established that both Gibson and Montoya were hired after November 6, 1986, and that each was unauthorized for employment and unlawfully present in the United States at all times relevant to this proceeding. The only disputed question is what Jonel knew and when it knew it. The burden of proof and of persuasion on this issue rests with the INS, which must demonstrate by a preponderance of the evidence that Jonel hired the two individuals knowing them to be unauthorized for employment, or continued to employ them after coming to know that they were unauthorized. United States v. Cafe Camino Real, Inc., 2 OCAHO 307, at 34 (1991).

STANDARD TO BE APPLIED

As a general rule, the term "knowing," even in a criminal case, is not limited to positive knowledge but includes the state of mind of one who acts with an awareness of the high probability of the fact in question, such as one who does not possess positive knowledge only because he consciously avoids it. United States v. Jewell, 532 F.2d 697, 702 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976) (deliberate failure to investigate suspicious circumstances is equivalent to knowledge). The theory of conscious avoidance as sufficient knowledge in criminal cases has been the subject of much scholarly criticism as well as judicial discussion, some of which has raised concerns about dilution by the courts of statutorily defined mens rea requirements. See e.g., Judge (now United States Supreme Court Justice) Kennedy, dissenting in Jewell, 532 F.2d at 707-08, Douglas N. Husak and Craig A. Callendar, Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality, 1994 Wis. L. Rev. 29 (1994), Kenneth W. Simmons, Rethinking Mental States, 72 B.U.L. Rev. 463 (1992), Ira Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. Crim. L. & Criminology 191 (1990). The theory is nevertheless widely used in criminal cases.

Courts and commentators have used a variety of terms in discussing the theory, such as wilful ignorance, avoidance of any endeavor to know, conscious purpose to avoid learning the truth, deliberate ignorance, deliberately choosing not to learn, purposely abstaining from all inquiry, connivance, studied ignorance, wilful shutting of the eyes, omitting to inquire, knowledge in the second degree, and other comparable terms, Robin Charlow, Wilful Ignorance and Criminal Culpability, 70 Tex. L. Rev. 1351, 1352 n.1 (1992), Robbins, supra, at 191 n.3, often with no indication of whether the difference in nomenclature is intended to make a difference in the standard to be applied. These courts and commentators do not always distinguish between cases in which they find that the requisite knowledge arises from particular circumstances which would

give any reasonable person sufficient reason to know something, e.g., United States v. Picciandro, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986) ("Any reasonable person would have realized that in today's society the bizarre bearing of shopping bags filled with large sums of cash signalled some form of illegal activity."), and those in which an affirmative legal duty of inquiry is imposed on a certain individuals by an external source such as a statute or some other authority, e.g., United States v. Walker, 896 F.2d 295, 299 n.8 (8th Cir. 1990) (signature clause on tax return creates obligation for taxpayer to ascertain and warrant accuracy of return).

Moreover, notwithstanding Professor Hall's caution against confusing a mental state with proof of its existence, Jerome Hall, General Principles of Criminal Law, 118 (2nd ed. 1960), neither do the courts and commentators consistently distinguish between the concept of wilful ignorance as being itself a guilty state of mind, and wilful ignorance as being simply evidence of facts from which actual knowledge may be inferred. Knowledge is rarely susceptible of proof by direct evidence, and as one commentator has observed, "[P]roof that a defendant appeared deliberately to avoid knowledge could be circumstantial evidence from which to infer that the defendant really did know but pretended not to know." Charlow, supra, at 1360. See also, United States v. Gamez, 1 F. Supp.2d 176, 180 (E.D.N.Y. 1998) ("Substituting conscious avoidance of the truth as a proxy for knowledge is one way in which the law has dealt with the problem of proof ") (citing Model Penal Code Section 2.02(7), and Jonathan L. Marcus, Note, Model Penal Code Section 2.02(7) and Willful Blindness, 102 Yale L. J. 2231, 2233-34 (1993)). Cf. United States v. Cincotta, 689 F.2d 238, 244 n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982) ("[I]f someone refuses to investigate an issue that cries out for investigation, we may presume that he already 'knows' the answer an investigation would reveal, whether or not he is 'certain.'") In the civil arena, the theory that cultivated ignorance or similar states of mind may constitute knowledge has been no less widely utilized and no less inconsistently applied, often with no clearly articulated distinction being drawn between such concepts as wilful blindness, deliberate ignorance, constructive knowledge, constructive notice, implied notice, implied knowledge, imputed knowledge and the like.

The Second Circuit, in which the events complained of here occurred, has made use of the term "inquiry notice" in seeking to ascertain when a plaintiff was in possession of such facts as ought to create a duty of inquiry as to whether a securities fraud had occurred. In Armstrong v. McAlpin, 699 F.2d 79 (2nd Cir. 1983), the court held that the test to be used was an objective one:

> The means of knowledge are the same thing in effect as knowledge itself. Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth and shuts his eyes to the facts which call for investigation, knowledge of that fraud will be imputed to him.

Id. at 88 (citations and internal quotations omitted). See also In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litigation, 815 F. Supp. 620, 637 (S.D.N.Y. 1993).

Statutory language is not always predictive of the result in a given case. Relying on early Second Circuit precedent in The Tompkins, 13 F.2d 552, 554 (2nd Cir. 1926), the Seventh Circuit, in a case where the applicable statute explicitly called for "actual notice", held that the term also included "implied actual notice". Shacket v. Philco Aviation, Inc., 841 F.2d 166, 170 (7th Cir. 1988). Although characterizing the concept of implied actual notice as "a disagreeable oxymoron," Judge Posner approved the use of a standard which he described as a person's having "[k]nowledge of fishy circumstances that would move a reasonable person to inquire further." Id. at 170-71. Implied actual notice in this formulation requires 1) actual knowledge of 2) highly suspicious circumstances, coupled with 3) an unaccountable failure to react to them. Judge Posner observed that this mental state was "a shade short of the form of actual knowledge that consists of closing your eyes because you're afraid of what you would see if you opened them", Id. at 171, but it nevertheless was more than constructive knowledge, which was not encompassed in the statutory language. He also observed that "[n]otice and knowledge are not synonyms: when one says of a person that he was 'on notice' of a fact, one may mean just that he should have known, not that he did know." Id. at 170.

The source of a duty to inquire as to a particular matter is of course less elusive when that duty is expressly mandated by law. As Judge Easterbrook pointed out in another context, "Sometimes the law requires inquiry and treats a person as possessing whatever knowledge inquiry would have produced. This puts teeth into the requirement of inquiry." Contract Courier Servs., Inc. v. Research and Special Programs Admin., USDOT, 924 F.2d 112, 114 (7th Cir. 1991). A statute may impose an affirmative obligation of inquiry, even where the person has no prior knowledge or notice of "fishy circumstances".

Case law and regulations governing employer sanctions cases arising under 8 U.S.C. § 1324a direct that an employer's or agent's knowledge of an employee's immigration status may be proved by a showing of either actual or constructive knowledge. United States v. Cafe Camino Real, Inc., 2 OCAHO 307, at 37-38 (1991). The boundaries of constructive knowledge are not fully developed, but the applicable regulation as well as OCAHO jurisprudence have broadly recognized that such knowledge may be found where an employer is in possession or on notice of such information as would lead a person exercising reasonable care to acquire knowledge of an employee's unauthorized status. The regulation states that the term "knowing" includes not only actual knowledge, but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. 8 C.F.R. § 274a.1*(l)*(1).

The first decided cases to apply the concept of constructive knowledge to employer sanctions proceedings under 8 U.S.C. § 1324a arose in the aftermath of the so-called "transition period," and involved circumstances where employers had continued to employ unauthorized aliens without reverifying their eligibility even after receiving actual notice from INS of their questionable status. These initial cases arose in the context of reverification rather than initial verification on hiring largely because of the manner in which the statute was implemented.

When the Immigration Reform and Control Act was initially passed in 1986, the employer sanctions provisions were phased in over an eighteen month period, with no initial penalties imposed. The first six months, December 1, 1986 to May 31, 1987, was an educational period, during which the INS issued a Handbook for Employers, made educational visits, set up a "hotline," and consulted with employers so that the employers would have an opportunity to learn about and adjust to the requirements of the new law. This educational period was followed by a twelve-month citation period, June 1, 1987 to May 31, 1988, during which a warning citation might be issued, but no penalties were assessed provided that the employer had no prior violations. See generally Michael X. Marinelli, Note, INS Enforcement of the Immigration Control and Reform Act of 1986: Employer Sanctions During the Citation Period, 37 Cath. U. L. Rev. 829, 838-39 (1988), Nancy-Jo Merrott & Joanne T. Stark, The Immigration Reform and Control Act of 1986 & What Employers Need to Know, 22 Ariz. B.J. 6 (1987). The statute in effect provided a grace period to allow employers to have the benefit of learning about its requirements before having to come into full compliance with them.

The first adjudicated employer sanctions case, Mester Mfg. Co. v. INS, 1 OCAHO 18 (1988), aff'd 879 F.2d 561 (9th Cir. 1989), was one of several in which an employer had previously been put on actual notice by INS that certain of its alien employees were likely to be unauthorized for employment, but the company then made no further inquiry and took no corrective action. The Ninth Circuit upheld the finding of the administrative law judge that Mester had continued to employ the aliens after having become aware that they were unauthorized. Similarly, in United States v. New El Rey Sausage Co., Inc., 1 OCAHO 66, at 411, modified on other grounds by the Chief Administrative Hearing Officer, 1 OCAHO 78 (1989), aff'd sub nom. New El Rey Sausage Co., Inc. v. INS, 925 F.2d 1153 (9th Cir. 1991), a finding of constructive knowledge was upheld where the employer had failed to take the appropriate steps after receiving specific notice from INS. These cases held that the employer acquires a duty to reverify the eligibility of its alien workers when it is put on notice by INS that their documentation is faulty. Accord, United States v. Noel Plastering & Stucco, Inc., 3 OCAHO 427, at 322-24 (1992), aff'd sub nom Noel Plastering, Stucco, Inc. v. OCAHO, 15 F.3d 1088 (9th Cir.1993) (table). Mester and the subsequent cases made clear, however, that the knowledge of or notice to the employer can come from any source, and that the law is indifferent as to how the employer's knowledge is acquired. Mester Mfg., 1 OCAHO 18, at 73, United States v. American McNair, Inc., 1 OCAHO 285, at 1853 (1991).

The Ninth Circuit has since cautioned in an initial hiring case where it found that the employer had complied with all the requirements of the verification system that the doctrine of constructive knowledge must be "sparingly applied". Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 555 (9th Cir. 1995). Because the documents presented by the employee in Collins appeared to be genuine (even though one later turned out to be counterfeit), the court found that a reasonable person would not have been alerted to the unauthorized status of the employee. Collins does not suggest, however, that the applicability of constructive knowledge is limited to reverification cases or that an employer's duty to inquire as to a new employee's eligibility for

employment has to be triggered by a warning from INS. Nothing in Collins can be read to imply that after the expiration of the initial citation period it is still permissible for a company to employ illegal aliens with impunity until it gets caught. The grace period for implementation of the statute expired more than a decade ago. The initial duty of an employer to verify the employment eligibility of its new employees is not generated by INS warnings but arises from the mandate of the statute itself: the central purpose of the verification system was to shift the burden of verification onto the employer's shoulders. Mester, 879 F.2d at 566-67, Noel Plastering, 3 OCAHO 427, at 322.

As the circuit court in New El Rey Sausage observed,

> Contrary to the argument of New El Rey that the government has the entire burden of proving or disproving that a person is unauthorized to work, IRCA clearly placed part of that burden on employers. The inclusion in the statute of section 1324a(b)'s verification system demonstrates that employers, far from being allowed to employ anyone except those whom the government had shown to be unauthorized, have an affirmative duty to determine that their employees are authorized. This verification is done through the inspection of documents. Notice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized.

925 F.2d at 1158 (footnote omitted).

Employers, in other words, are required by law to make inquiry as to the eligibility of each prospective new worker to be lawfully employed in the United States; the duty to make that initial inquiry does not depend upon prior IRS notification or upon the presence of any fishy circumstances.

DISCUSSION

Regulations applicable to knowing hire violations under 8 U.S.C. § 1324a provide that an employer's constructive knowledge may include, but is not limited to, situations where the employer:

> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer;
> . . .

8 C.F.R. § 274a.1*(l)*(1). In this case, the conditions described in both subsections (i) and (ii) are implicated: Jonel's employment eligibility verification forms for Gibson and Jimenez-Montoya were defective, Jonel received labor certifications for each of them and, in Gibson's case, it followed through with the rest of the process by filing a petition for immigrant worker.

Notwithstanding the express language of § 274.a1*(1)*(1)(i), OCAHO case law has said that the mere failure to complete paperwork requirements correctly, standing alone, is not sufficient to establish knowledge of an employee's unauthorized status without other probative evidence. United States v. Valdez, 1 OCAHO 91, at 610 (1989). The court in Collins Foods, 948 F.2d at 553, expressly declined to reach the question of whether a violation of the verification requirements by itself would ever be sufficient to establish the knowledge element of section (a)(1)(A). It found that because the respondent in that case had done all that was required of it to comply with the verification requirement, there was no necessity to decide the question. Id. There is no necessity to decide the question here either, because the particular omissions in the I-9 forms are simply one circumstance and not in either instance dispositive of the ultimate issue. The I-9s are simply evidence of facts: with respect to Gibson, the form demonstrates first, that he never presented Jonel with any document to show that he was eligible for employment either when he was hired or thereafter when his I-9 form was completed, and second, that Nelson Rodriguez did not examine any document acceptable under the verification system to evidence Gibson's employment eligibility. With respect to Montoya, in contrast, the I-9 is evidence that he presented a driver's license and a social security card to Nelson Rodriguez on the same day he was hired.

A. Improper Completion of I-9s

A partial summary decision was previously issued in this case finding paperwork violations as to the I-9 forms for both Montoya and Gibson, inter alia. Both their forms were found to have been improperly completed because Jonel failed to ensure that the employees completed Section 1 properly and, as to Hezekiah Gibson's I-9, also failed itself to complete Section 2 properly.

1. Hezekiah Gibson

Gibson's I-9 form was found to be defective in that he had failed to check any box at all in the attestation section, and Jonel had failed to list any verification documents. These are especially serious omissions in that the whole purpose of the verification system is to document that a prospective employer presented evidence of work authorization and Gibson's I-9 in fact demonstrates the exact opposite.

The timing of Gibson's I-9 is another suspicious circumstance. Gibson had apparently been employed by Jonel for most if not all of the first quarter of 1994, which ended on March 31, 1994 (CX13), yet Jonel did not prepare an I-9 form for him until April 11, 1994. Neither when he was hired nor when the I-9 was completed did Gibson present any document evidencing work

authorization; it is therefore unclear what prompted the preparation of an I-9 for him in April.

As noted, Gibson's I-9 evidences that he presented no document to demonstrate his employment eligibility either at the time he was initially hired by Jonel or afterward when the I-9 was completed, and that Nelson Rodriguez did not purport to have examined any document which would be acceptable under the verification system to verify Gibson's employment eligibility. While both Gibson and Nelson Rodriguez signed the I-9 form, neither actually attested to anything because Gibson did not check a box to indicate whether he was a citizen or national, a lawful permanent resident or an alien authorized to work, and because Rodriguez did not list a document from List A, B, or C on the form, nor did he indicate any date that he examined any document. Copies of Gibson's driver's license and a labor certification dated March 11, 1994 were attached to the I-9 but were not referred to on the form (CX12). While a driver's license may be acceptable evidence of identity, neither it nor a labor certification is acceptable evidence of employment eligibility for purposes of the verification system. Thus Gibson at no time presented any document to Nelson Rodriguez which was acceptable to demonstrate his eligibility to work.

Jonel had an affirmative statutory duty early in the first quarter of 1994 when Gibson was initially hired to ascertain his eligibility for work and failed to do so. Contrary to its representations that it believed the labor certification authorized Gibson to work, Jonel could not have relied upon that certification when it initially hired Gibson because it hired him early in the first quarter of 1994 and the certification was not even issued until March of that year. Thus at the time it hired him, Jonel had no reason whatever to believe Gibson authorized to work. There is no suggestion in the record that Gibson at any time ever represented himself either to Jonel or to Elite as being eligible for employment in the United States. Jonel waited months to complete an I-9 form for Gibson; even then he did not present a document to show eligibility to work. Jonel either knew or had reason to know of Gibson's status at the inception of his employment because, having an affirmative statutory duty to make specific inquiry and review his documents, it is chargeable with such knowledge as that inquiry would have revealed.

2. Jose Montoya

Montoya's I-9 form was defective in that he checked a box indicating that he was temporarily authorized for employment in the United States but did not date his signature, provide any date until which he was authorized to work, or furnish an alien registration number. Nelson Rodriguez attested on April 25, 1994 that he examined Montoya's Connecticut driver's license and social security card, copies of which were attached to the I-9. The driver's license shows the name Jose A. Jimenez while the social security card shows the name Jose Mario Montoya. A copy of the labor certification dated May 6, 1994 is also attached to the I-9 but clearly could not have been in Jonel's possession until some time after Montoya was hired on April 25, 1994 because it is dated May 6, 1994.

Apart from the fact that they are in two wholly different names there is nothing in the appearance of the driver's license or social security card per se to suggest that those two documents did not reasonably appear to be genuine. A driver's license is a List B document, acceptable as evidence of identity, 8 U.S.C. § 1324a(b)(1)(D)(i), while a social security card is a List C document, acceptable as evidence of employment eligibility, 8 U.S.C. § 1324a(b)(1)(C)(i). Thus insofar as his I-9 form discloses, Montoya presented the necessary documents required by the verification system. For purposes of complying with the verification system an employer may not request more or different documents than are required to show the person's identity and employment eligibility, or refuse to honor documents tendered for that purpose which reasonably appear to be genuine, 8 U.S.C. § 1324b(a)(6). It appears that Jonel was obligated to honor the documents Montoya tendered, assuming they appeared to be genuine.

INA provides a narrow but complete defense to a knowing hire violation if an employer complies in good faith with the verification requirements, 8 U.S.C. § 1324a(a)(3). Proper paperwork does not, of course, insulate an employer if the employer gains knowledge of the employee's unlawful status. Mester, 879 F.2d at 569. Montoya's I-9 contains errors in that he failed to provide a date, an alien number, or a date until which he was authorized to work, but apart from those errors and the difference in the names on the documents, there appears to be nothing on the face of the I-9 or the accompanying documents which would lead a reasonable person to know on April 25, 1994 that Montoya was unauthorized for employment.

B. The Labor Department Determination Letters

INS reasons that Jonel knew that Gibson and Montoya were unauthorized for employment because the Labor Department determinations certifying the applications for these individuals put Jonel on notice of their status. Jonel would have received Gibson's certification and a copy of the underlying application a few days after the Labor Department issued it on March 11, 1994, and would have received Montoya's shortly after it was issued on May 6, 1994. Contrary to Jonel's unsubstantiated claim that it believed that labor certification meant the person was authorized for employment, the final determination letters say no such thing; they state merely that the form ETA-750 has been certified and must be attached to an I-140 petition and filed with the INS Service Center in Vermont. The I-140 form itself also contains specific notice that its approval if received would not authorize employment or grant permanent residence.

1. Hezekiah Gibson

Jonel would have received the labor certification for Gibson shortly after it was issued on March 11, 1994. Jonel then followed through with the procedures as directed. It filed a petition for immigrant worker on Gibson's behalf, and was represented in that proceeding by attorney Joseph Sena of White Plains, New York, the same attorney who had filed the initial certification applications for Elite. Although the immigrant worker petition was not filed until July 14, 1994, Nelson Rodriguez signed both Sena's appearance form and the petition on May 19, 1994. It is

only reasonable to infer that by that point Jonel's attorney would have advised Rodriguez accurately about the legal effects and consequences of the documents he was signing because the relationship between an attorney and client is that of principal and agent, and, in accordance with basic agency principles, the agent's knowledge is attributed to the principal. Index Fund Inc. v. Hagopian, 609 F. Supp. 499, 507 (S.D.N.Y. 1985). This reflects no more than the assumption that the agent/attorney will honor his obligation to relay relevant information to the principal/client. An attorney's knowledge has long been held to be the client's knowledge. Even in a case where an attorney was called as a witness and testified that he did not examine a document carefully, this testimony was held not to have vitiated the client's knowledge of the contents of the document. The Tompkins, 13 F.2d 552, 554 (2d Cir. 1923).

In United States v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 202, vacated on other grounds by the Chief Administrative Hearing Officer, 1 OCAHO 274 (1990), it was an employer's filing of the Form ETA-750 on behalf of an alien with an expired visitor visa which actually served to trigger the INS' investigation. 1 OCAHO 202, at 1343-44. That may have been the impetus here as well. The labor certification application itself was found in that case to give notice to the employer, in part because it showed on its face that the alien beneficiary was in a non-immigrant visitor classification, B-1, which, even had it been current, would still have prohibited the alien from working in the United States. The same is true in Gibson's case, as Jonel's attorney no doubt advised his client.

United States v. American McNair, Inc., 1 OCAHO 285, at 1852-53 (1991) is one of only a few reported OCAHO cases dealing with facts analogous to those here. In that case, the president of the company had signed applications for alien employment certification (ETA 750) for certain of its workers, and followed up by signing and submitting petitions for prospective immigrant employee (Form I-140). In McNair, however, the president of the company actually attended the hearing and was a witness. He testified that he did not examine the documents closely, that he believed one of the employees to be "in the process" of becoming legalized, and that he was told by a person representing himself as an attorney that he could employ that alien during the pendency of the labor certification process. This was held to be an insufficient defense because the respondent had an affirmative duty to inquire into the employee's work authorization and had chosen to remain ignorant when the employee failed to present any documents demonstrating his work eligibility. 1 OCAHO 285, at 1855. The facts with respect to Jonel and Hezekiah Gibson are strikingly similar.

2. Jose Montoya

Montoya was hired on April 25, 1994 and Jonel did not receive the labor certification for him until shortly after it was issued on May 6, 1994. Jonel evidently did not take any further steps on his behalf at that time or file a petition for immigrant worker for him. Nevertheless, by at least

May 19, 1994 when Nelson Rodriguez signed a petition for immigrant worker for Gibson and an appearance form for attorney Sena in the Gibson matter, he must have been fully aware, if he had not already been, that far from authorizing an illegal alien to be employed in the United States the labor certification was simply the first step in a lengthy process of obtaining approval to hire an immigrant worker. Whatever Jonel did or did not know about Montoya's status when it hired him on April 25, 1994, it must have known by May 19, 1994 that he was unauthorized for employment in the United States. Because Jonel had only twelve employees it is not plausible that Montoya's status could have escaped Rodriguez' notice.

C. Other Circumstantial Evidence

Jonel's unexplained failure to appear for the hearing or to bring forward any company witness willing to state under oath that he or she believed that the approval of the labor certification meant that Gibson and Montoya were authorized to work is powerful circumstantial evidence of the fact that there is no such witness who could truthfully testify to such a belief. This is not just a case of what inferences may be drawn from the fact of a missing witness, see, e.g. United States v. Torres, 845 F.2d 1165, 1169 (2nd Cir. 1988), but one of what inferences may be drawn from a total failure to defend, even after written notice and an opportunity to show cause for Jonel's unexplained absence from the hearing. The fact that Nelson Rodriguez hired the same attorney for Jonel as had earlier represented and filed the labor certifications for Elite is also persuasive circumstantial evidence that by at least May 19, 1994 when he signed both the appearance form for Sena and the Immigrant Petition (Form I-140) for Hezekiah Gibson, Nelson Rodriguez was in full possession of all the relevant facts and also knew that labor certification did not authorize its beneficiary to work in the United States.

I find by a preponderance of the evidence that Jonel, through Nelson Rodriguez, hired Hezekiah Gibson in the first quarter of 1994 with constructive if not actual knowledge that he was an alien not authorized for employment in the United States and continued to employ him after that knowledge was confirmed on or about May 19, 1994. By a preponderance of the evidence I find further that Rodriguez knew by at least May 19, 1994 that Jose Montoya was unauthorized for employment, and that Jonel continued to employ him at least through the end of 1994 if not thereafter knowing him to be unauthorized.

CIVIL MONEY PENALTIES

The permissible range of penalties for these violations is set by statute. Those penalties are between $100 and $1,000 for a paperwork violation, 8 U.S.C. § 1324a(e)(5), and between $250 and $2,000 for a knowing hire violation, 8 U.S.C. § 1324a(e)(4). INS requested penalties in the amount of $175 each for two of three paperwork violations in Count II, and $265 for the third violation in that count involving Jose Montoya. For Count III, the penalty sought for the one

violation shown was $165.[6] For Count IV, $190 each was sought for two of three violations, and $280 was requested for the third violation involving Hezekiah Gibson. A penalty in the total amount of $1,320 was requested for the two knowing hire violations.

My obligation is to consider the statutory factors and to ensure that penalties assessed are within the appropriate statutory ranges in light of those factors. This obligation is not constrained by the amount which INS requested in the complaint.

A. Paperwork Violations

With respect to the imposition of penalties for paperwork violations, the INA also provides that:

> In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. § 1324a(e)(5). See also 8 C.F.R. § 274a.10(b)(2). Consideration of all the statutory factors is obligatory, but neither the statute nor its accompanying regulations precludes consideration of other factors in addition to those enumerated. Neither does the statute require that any one factor be given greater weight than the others, United States v. Reyes, 4 OCAHO 592, at 6 (1994), or that the factors be weighted equally. United States v. J.J.L.C., Inc., 1 OCAHO 154, at 1097, aff'd by the Chief Administrative Hearing Officer, 1 OCAHO 184 (1990). Consideration of a given factor is, of course, possible only where there is relevant evidence in the record. United States v. Catalano, 7 OCAHO 974, at 8 (1997).

With respect to the good faith of an employer, OCAHO case law makes clear that the "mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 1907 (1993). Thus a finding of bad faith must be based upon behavior beyond mere failure of compliance. United States v. Karnival Fashion, Inc., 5 OCAHO 783, at 478-80 (Modification by the Chief Administrative Hearing Officer) (1995) (a high number of deficient I-9s is not sufficient alone to demonstrate a lack of good faith). There can be no presumption of bad faith absent an evidentiary showing. While there is no definitive test for a lack of good faith, OCAHO jurisprudence has held some specific actions to be demonstrative of bad faith, such as failing to verify properly after receiving training. E.g., United States v. Task Force Security, Inc., 4 OCAHO 625, at 339 (1994), Minaco Fashions, 3 OCAHO 587, at 1907 (1993), United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 1738 (1993). The test set out in the cases asks whether the employer exercised "reasonable care and diligence" in ascertaining and following the law. E.g., United States v. Riverboat Delta

[6] INS elected not to pursue the alleged violation as to Robert Brown.

King, Inc., 5 OCAHO 738, at 130 (1995).

There is nothing in the record here which indicates that Jonel acted other than in good faith with respect to completion of the I-9s other than those of Montoya and Gibson, or that it had any prior violations. In this case, there is also no dispute that Jonel is a very small business. The Receipt for Employer Verification Documents dated January 18, 1995 (CX10) listed twelve employees, one of whom had been terminated in July of the previous year. INS acknowledged that Jonel was a very small business and had no prior violations, but urged that the penalties should be aggravated based on the remaining two statutory factors: the seriousness of the violations, and the involvement of illegal aliens.

Section 1 of the I-9 of Jeremia Avelar shows that he failed to provide his date of birth, failed to check any of the boxes in the attestation portion of Section 1 to indicate whether he is a United States citizen or national, a permanent resident, or an alien authorized to work in the United States and failed to date his signature. Jesus Valle did not check any box in the attestation section of his I-9 form either. Jose 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. Neither did he date his signature. He was an illegal alien at all times pertinent to this case, and that fact became known to Jonel early in his employment.

In Section 2 of Richard 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 Millard's I-9 include the omission of the date on which the employee began his employment and the failure of the attesting official to supply his title.

Section 1 of Hezekiah Gibson's I-9 shows that he failed to check any box at all in the attestation section. In Section 2 no verification documents whatever are listed. Gibson was an illegal alien at all times pertinent to this case and was known as such by Jonel. Francisco Hernandez's I-9 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 of 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 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.

Failure of an employer to ensure that the employee properly completes the attestation portion of Section 1 at the time of hire is always a serious violation since attestation is "a critical factor in gauging an employer's compliance with IRCA." United States v. El Paso Hospitality, Inc., 5 OCAHO 737, at 122 (1995); United States v. Task Force Security, Inc., 4 OCAHO 625, at 341 (1994). While a failure to complete the attestation in Section 1 may not be as serious as a total failure to prepare the form, El Paso Hospitality, 5 OCAHO 737, at 122 (1995); United States v. The Body Shop, 1 OCAHO 185, at 1224-25 (1990), it is nevertheless exceedingly serious in that the omission of the individual's immigration status defeats the whole purpose of the employment eligibility verification process. The purpose of the system is to ensure that new employees are lawfully entitled to work in the United States; absent any indication that the employee is a citizen or national, a lawful permanent resident, or an alien authorized to work until a certain date, the attestation in Section 1 is meaningless. Some aggravation of the penalties for all these violations is warranted because they are all serious violations. Aggravation is also warranted as to the violations involving Hezekiah Gibson and Jose Montoya because they were illegal aliens.

The penalties proposed by INS for the paperwork violations are well within the statutory parameters and are warranted by the evidence. Accordingly, penalties will be assessed as requested at $175 each for violations involving the I-9s of Jeremia Avalar and Jesus Valle, $265 for that involving Jose Montoya, $165 for the violation involving Richard Millard, $190 each for those involving Francisco Hernandez and Scott Wilson, and $280 for violations involving Hezekiah Gibson.

B. The "Knowing Hire" Violations

In contrast to the penalty for a paperwork violation, INA does not require that in assessing a penalty for a knowing hire violation I consider those same factors, except for the factor of whether there is a history of previous violations. 8 U.S.C. § 1324a(e)(4). Penalties for knowing hire violations are within the discretion of the administrative law judge. United States v. Day, 3 OCAHO 575, at 1753 (1993).

INS indicated that in requesting the penalty for the two knowing hire violations at a total of $1,320, it considered the other factors because it is their policy to do so (Tr.70). After much consideration I find the proposed penalties as to those two violations to be insufficient. One of the principal reasons for imposing civil money penalties is their deterrent effect on the offending employer: a meaningful penalty enhances the probability of future compliance. A greater penalty is warranted in light of the need to deter future violations of the same character. I have also given consideration the long duration of the unauthorized employment. Accordingly, I assess the two knowing hire violations at $1,200 each, or a total of $2,400.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the record as a whole, including the pleadings, the documentary and

testimonial evidence, admissions, and the partial summary decision previously entered. All motions and other requests not previously disposed of are denied. On the basis of the record and for the reasons stated, I make the following findings, conclusions and order:

1. 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.

2. A Notice of Intent to Fine was served on Jonel on November 14, 1995 and Jonel made a timely request for hearing.

3. Jonel hired Jeremia Avelar, Jesus Valle, Jose Asdrubal Jimenez-Montoya also known as Jose Jimenez and as Jose Mario Montoya, Richard Millard, Hezekiah Gibson, Francisco Hernandez and Scott Wilson for employment after November 6, 1986, and failed properly to complete Form I-9 for each of them.

4. Jonel hired Hezekiah Gibson after November 6, 1986 knowing him to be an alien not authorized for employment in the United States.

5. Jonel continued to employ Jose Jimenez-Montoya, an alien hired after November 6, 1986, knowing that he was an alien not authorized for employment in the United States.

6. All jurisdictional prerequisites to this action have been satisfied.

7. Respondent Jonel, Inc. engaged in seven separate violations of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324a(a)(1)(B) which renders it unlawful after November 6, 1986 to hire an individual without complying with the requirements of §§ 1324a(b)(1), (2), (3), and 8 C.F.R. §§ 274a.2(b)(1)(i) and (ii).

8. Respondent Jonel, Inc. engaged in two separate violations of the Immigration and Nationality Act as amended, 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2) which renders it unlawful after November 6, 1986 to hire an individual for employment while knowing that individual is not authorized for employment in the United States, or to continue to employ an individual while knowing that the individual is an alien not authorized for employment in the United States.

ORDER

Jonel, Inc. shall henceforth cease and desist from further violating the provisions of 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2) by hiring aliens for employment while knowing the aliens to be unauthorized for employment in the United States, or by continuing to employ unauthorized

aliens after learning that they are unauthorized.

Jonel, Inc. shall pay a total civil money penalty of $3,840.

SO ORDERED.

Dated and entered this 5th day of August, 1998.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§ 1324a(e)(7) and (8), and 28 C.F.R. § 68.53.