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

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 99A00040
	)	
WALDEN STATION, INC. D/B/A	)	Marvin H. Morse
WALDEN GRILLE,	)	Administrative Law Judge
Respondent.	)	
________________________________	)	

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

(April 21, 2000)

As confirmed by the December 16, 1999, Third Prehearing Conference Report and Order, the Immigration and Naturalization Service (INS or Complainant) advised that it would file a motion for summary decision on the three counts of the complaint against Walden Station, Inc., d/b/a Walden Grill (Walden or Respondent). The three counts are summarized as follows:

(1) Count I: That Respondent hired four named individuals, (FERREIRA, Cleide, DO CARMO, Renildo, a/k/a CARMO, Renildo, MEDRANO, Martil, and CASTRO, Mauricio), knowing they were not authorized to work in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A), or, alternatively, that Respondent continued to employ the four individuals knowing they were, or had become, unauthorized to work in the United States in violation of 8 U.S.C. § 1324a(a)(2). INS requests a civil money penalty of $2,200.00 in the aggregate, and an order to cease and desist from future violations of the pertinent statute;

(2) Count II (as amended): That Respondent failed to ensure that five named individuals (FERREIRA, Cleide, MIRANDA, Ivan,

MACHADO, Vilmar, MEDRANO, Martil, and CASTRO, Mauricio), upon hire, properly completed section 1 of the Employment Eligibility Verification Form (Form I–9), in violation of 8 U.S.C. § 1324a(a)(1)(B). INS requests a civil money penalty of $160.00 per individual, for a total of $800.00; and

(3) Count III: That Respondent failed to properly complete Form I–9 Section 2 for PARK, Bill, when it hired him, in violation of 8 U.S.C. § 1324a(a)(1)(B), for a civil money penalty of $160.00.

INS filed its Motion for Summary Decision on January 12, 2000. Walden, after being granted an extension of time to file, filed its opposition to the motion on March 1, 2000.

As more fully explained below, this Order grants the Motion for Summary Decision with respect to Counts II and III, grants the Motion with respect to Count I and MEDRANO, and denies the Motion with respect to Count I and CASTRO, FERREIRA, and DO CARMO.

I. *SUMMARY DECISION GENERALLY*

Title 28 C.F.R. § 68.38(c)[1] authorizes the administrative law judge (ALJ) to dispose of cases, as appropriate, upon motions for summary decision. Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no **genuine issue as to any material fact** and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1997) [emphasis added]. OCAHO jurisprudence is generally consistent with Article III case law;[2] both define a fact as material if it might affect the outcome of the case. *See e.g., United States v. Patrol & Guard Enterprises, Inc.,* 8 OCAHO 1040,

[1] Rules of Practice And Procedure For Administrative Hearings Before Administrative Law Judges In Cases Involving Allegations Of Unlawful Employment Of Aliens And Unfair Immigration-Related Employment Practices, 28 C.F.R. Part 68 (1999) (Rules), implementing 8 U.S.C. § 1324b, enacted as Section 102, Immigration Reform and Control Act (IRCA) of 1996, amending the Immigration and Nationality Act (INA), adding Section 274B.

[2] The Federal Rules of Civil Procedure (Fed.R.Civ.Proc.) are available to the ALJ "as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1.

at 9[3] (2000), (Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision); *United States v. Morgan's Mexican & Lebanese Foods, Inc.,* 8 OCAHO 1013, at 3 (1998), *available in* 1998 WL 1085946 at *3 (O.C.A.H.O.) (citing *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986)). "As to materiality, the substantive law will identify which facts are material." *Anderson,* 477 U.S. at 248. An issue is genuine if a reasonable fact-finder could, on the basis of the record, return a verdict for the non-moving party. *See United States v. Bayley's Quality Seafoods, Inc.,* 1 OCAHO 238, at 1546 (1990), *available in* 1990 WL 512085, at *3 (O.C.A.H.O.) (citing *Brennan v. Hendrigan,* 888 F.2d 189, 191(1st Cir. 1989)).

The law of the United States Court of Appeals for the First Circuit is to the same effect. *See Ramsdell v. Bowles,* 64 F.3d 5, 8 (1st Cir. 1995) ("Summary judgment is appropriate only if the record before the court establishes that the moving party is entitled to judgment as a matter of law."); *Reich v. John Alden Life Insurance Co.,* 126 F.3d 1, 6 (1st Cir. 1997) (citing *Continental Cas. Co. v. Canadian Universal Ins. Co.,* 924 F.2d 370, 373 (1st Cir.1991)). In determining whether a genuine factual issue exists, the court must view all facts and draw all reasonable and justifiable inferences in the light most favorable to the non-moving party, *id.,* i.e. Walden.

As all reasonable inferences must be accorded the employer as the non-moving party, where INS's case is based on inferences of an employer's knowledge it may be "inappropriate to attempt to resolve [disputed] issues of Respondent's knowledge on a motion for summary decision." *United States v. American Terrazzo Corp.,* 6 OCAHO 877, at 580 (1996) *available in* 1996 WL 914005, at *2 (O.C.A.H.O.).

Notwithstanding the presumption favoring the non-movant, summary judgment is available to further the interests of judicial

[3] Citations to OCAHO precedent refer to volume and consecutive reprint number assigned to decisions and orders. Pinpoint citations to precedents in Volumes 1 and 2, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, and Volumes 3 through 7, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS, UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES AND CIVIL PENALTY DOCUMENT FRAUD LAW OF THE UNITED STATES are to specific pages, seriatim of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume VII are to pages within the original issuances.

economy and fairness. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir.1990) (citing *Rossy v. Roche Products, Inc.,* 880 F.2d 621, 624 (1st Cir. 1989); *see also Oliver v. Digital Equipment Corp.,* 846 F.2d 103, 109–10 (1st Cir.1988)); *United States v. American Terrazzo Corp.,* 6 OCAHO 828, at 65 (1995)) *available in* 1995 WL 848945, at *4 (O.C.A.H.O.) (a motion for summary judgment may be appropriate even when state of mind is at issue if the record sufficiently establishes actual or constructive knowledge).

II. *COUNTS II AND III*

Respondent's Answer admits Count III. Respondent also admits the allegations as to three of the four individuals named in Count II, denying as to the fourth (DO CARMO, Renildo, a/k/a CARMO, Renildo) who was subsequently dropped from Count II, as amended at the Second Prehearing Conference on September 29, 1999, which also added two individuals (MIRANDA, Ivan and MACHADO, Vilmar) as requested by INS without opposition by Walden.

Fed. R. Civ. P. 56(c) permits consideration of "admissions on file" as the basis for summary decision adjudications. Summary decision may be based on a matter deemed admitted. See *Bayley's Quality Seafoods,* 1 OCAHO at 1546, *available in* 1990 WL 512085, at *4 (citation omitted).

Respondent neither admitted nor denied allegations with respect to the two individuals (MIRANDA and MACHADO) added to the amended Count II, and Respondent's Opposition to the Motion for Summary Decision is silent with respect to MIRANDA and MACHADO. On motion, Complainant asserts there are no factual disputes as to Counts II and III. Respondent's Answer having admitted Count III and disputing the original of Count II only as to the individual dropped by amendment and to the calculation of the aggregate penalty as a matter of computation, no dispute survived the pleadings stage as to the individuals initially named in Counts II and III, or as to the civil money penalty requested.

Walden's Forms I–9 confirm the deficiencies in I–9 paperwork compliance described at Count II, i.e., failure to ensure that each of the five (as amended) named employees properly completed Section 1, and at Count III, failure to properly complete Section 2 for the named employee. Complainant argues in effect that Walden's I–9 deficiencies are substantive and not technical or procedural. If so, consistent with 1996 enactment of 8 U.S.C. § 1324a(b)(6), as implemented in interim regulatory guidelines at 63 Fed. Reg. 16909–16913 (April 7, 1998), INS avoids the hurdle of providing Walden an opportunity to cure paperwork compliance defects prior to asserting liability. In any event, whether Walden's I–9 deficiencies were substantive as distinct from technical and procedural need not be resolved in the absence of any argument opposing the Motion as to Counts II and III. Because Walden's Opposition is silent as to the additional two individuals named in Count II, as amended, and as to the paperwork violations, I conclude that there is no dispute of fact, material or otherwise, evidenced or asserted with respect to Counts II and III in response to the INS Motion and Memorandum in Support (Memo). Accordingly, this Order finds Respondent liable for the paperwork violations as alleged in the Complaint as amended.

Complainant's Motion explicitly addresses civil money penalties, thereby putting the paperwork violations penalty issue into play. *See United States v. Raygoza,* 5 OCAHO 729 at 50 (1995), *available in* 1995 WL 265080, at *1 (O.C.A.H.O.), distinguishing *Martinez v. I.N.S.,* 959 F.2d 968 (5th Cir. 1992) (where the motion for summary decision fails to raise the penalty issue, the employer "lacks adequate notice," resulting in lack of authority for the ALJ to adjudge the civil money penalty).

Statutorily authorized to assess and seek judicial approval of a penalty of $100.00 to $1,000.00 per individual, 8 U.S.C. § 1324a(e)(5), INS asks $160.00 per individual, a relatively modest point on the penalty spectrum. Complainant's rationale for that assessment level depends in substantial part on finding that Walden employed individuals knowing they were unauthorized for employment in the United States. I am unable to address the paperwork violation civil money penalty prior to resolving in full Walden's liability for the alleged unauthorized employments. Because, as discussed above, that liability is not entirely resolved on the Motion, the penalty issue is not ripe for adjudication.

III. *COUNT I*

Count I of the Complaint alleges, in the disjunctive, an alternative iteration of liability, on the one hand for hiring an individual knowing the individual to be unauthorized for employment in the United States, or, on the other hand, for continuing to employ an individual knowing the individual is or has become unauthorized for such employment. The exhibits tendered in support of the Motion include:

Declarations by four INS Special Agents, including Dana Fiandaca (Fiandaca) who recites that pursuant to notice of I–9 inspection served (together with a copy of the INS Handbook for Employers) October 15, 1997, on Mike Powers, Walden's manager, she inspected 27 Forms I–9 on October 24, 1997. On inspecting the I–9s and a Walden telephone list, she determined that six individuals needed to be interviewed to determine their work eligibility. On November 12, 1997, she delivered a letter to Walden which advised in effect that six individuals appeared to lack work authorization. On that date, she "participated in a worksite inspection" at Respondent's location in Concord, Massachusetts, with three other special agents. Fiandaca Declaration at para.15.

The November 12, 1997, letter advising that the six individuals named in an enclosure [including the four implicated in Count I] were, "according to" INS record checks, "not authorized to work in the United States," cautioned that,

> Unless they present valid identification and eligibility documentation acceptable for completing the I–9 form, other than the documented noted above, they are not authorized to work in the United States. If you continue to employ these individuals without valid documentation, you will be subject to civil money penalties ranging from $250 to $2,000 per unauthorized alien for a first violation. Higher penalties can be imposed for a subsequent offense. Further, criminal charges may be brought against any person or entity which engages in a pattern or practice of knowingly or continuing to employ unauthorized aliens. This is a very serious matter, which requires your immediate attention.

On November 14, 1997, INS advised Walden by a letter (November 14th letter) delivered that day, that on November 12, 1997 (when it conducted a raid at Walden), its agents "apprehended" four named individuals who comprise those named in Count I, and that they "are not authorized for employment in the United States. This letter is to inform you that the . . . individuals at present are unauthorized to work in the United States. This matter requires your immediate attention." INS provided a telephone

number in the event the employer had "any questions regarding the employment pursuant to the Immigration and Control Act of 1986."

It is undisputed that all four were aliens, employed by Walden after November 6, 1986, the effective date of 8 U.S.C. § 1324a, and that they were unauthorized to work in the United States at the time they were apprehended at Walden's place of business on November 12, 1997. INS asserts that at least from and after that date, if not from the outset of their employment, Walden knew or as a matter of law should have known, in violation of § 1324a(a), that they were unauthorized for such employment. INS premises its claim that there can be no substantial dispute of material fact by pointing to signed statements by each alien conceding illegal status, to inferences to be drawn from irregularities in their Forms I–9, and to applications by Walden for labor certifications to obtain work authorization for three of the four.

Complainant argues that Walden's knowledge of the unauthorized status of four of its employees can be inferred from undisputed facts and circumstances, and, in support, cites 8 C.F.R. § 274a.1(l)(1): "The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer: (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9; (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer."

Title 8 C.F.R. § 274a.1(l)(1) must be understood in the context of 8 C.F.R. § 274a.1(l)(2) "Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual."

Respondent's Opposition argues that from Complainant's "evidence [it] is far from conclusive" that (i) Walden had knowledge of the unauthorized status of the employees prior to notification

to that effect by INS in November 1997, and that (ii) Walden continued to employ them after that notification. Respondent's Answer to the Complaint asserts an affirmative defense that it "acted in good faith and reasonably relied on documentation presented by individuals named in the Complaint as proof of their legal authorization to work in the United States." Another affirmative defense contends that all individuals alleged to be unauthorized were terminated upon notice of this fact.

INS not having replied to the Opposition, the Motion is ripe for a ruling as to Count I. The question to be answered is **not** whether the four aliens were unauthorized. Rather, there are three critical questions: (1) Whether the employer was on notice that the individuals were unauthorized at the time of hire; (2) Whether the employer learned or should have learned of their unauthorized status and nonetheless continued to employ them, between the time of hire and November 12, 1997; and, (3) Whether it continued to employ them after November 14, 1997, the date on which INS notified Walden of their unauthorized status.

A. *Knowing Hire of Four Individuals Unauthorized to Work*

A knowing hire can be based on actual knowledge or on constructive knowledge. The statements of the four aliens taken by the INS on November 12, 1997 and their Forms I–9, plus wage- related documents (Exhibit DD attached to the Motion) and work history documents forming part of Labor Certification applications (Exhibits T, U, and V), form the basis of arguments for either actual or constructive knowledge of unauthorized status at the time of hire.

1. *Review of the I- 9's produced for the individuals named in Count I*

(a) FERREIRA. No attestation (citizenship status) box checked. Massachusetts driver's license and unrestricted social security card shown. Signed by FERREIRA 7/7/97, and by manager Valerie Flood 7/7/97. Another document related to time of hire is a W–4 signed 7/7/97.

(b) MEDRANO. No attestation (citizenship status) box checked. A driver's license (state of issue and license number unidentified) and unrestricted social security card shown. Alien states hire was in 1996 and he was not asked for documentation at that time.

The Form I–9 was signed on 7/6/97 by MEDRANO and by manager Valerie Flood. Documents related to periods of employment are W–2s for the tax years 1996 and 1997, and a W–4 signed 7/ 7/97.

(c) CASTRO. The "Alien authorized to work" attestation box checked; no alien number recorded. Connecticut driver's license and unrestricted social security card shown. Signed by CASTRO 10/20/97, and by "manager" [Not in Walden's list of managers] David Keene 10/20/97.

(d) DO CARMO. Citizen/national of United States attestation box checked (alien denies checking it). Massachusetts driver's license and unrestricted social security card (which INS states is fraudulent) shown. Signed by DO CARMO 7/11/96, not attested to by manager Michael Powers until 10/20/97.

2. *Actual knowledge*

The record falls quite short of establishing actual knowledge. Each individual apparently showed an unrestricted social security card (sufficient to establish employment authorization), 8 U.S.C. § 1324a(b)(1)C)(i), and a driver's license (establishing identity), 8 U.S.C. § 1324a(b)(1)(D)(i)). It is not alleged that DO CARMO informed Walden that his social security card was fraudulent, nor that MEDRANO informed that his driver's license was suspended. Respondent states as an affirmative defense that to establish work authorization it reasonably relied on the documents presented by the aliens, recorded on the Forms I–9. None of the employee statements reveals explicit communication to Walden at time of hire, nor at the time of completing the I–9, that the individual was unauthorized, and the record shows no independent basis for Walden to have acquired actual knowledge that any were unauthorized.

3. *Constructive knowledge*

Complainant argues that the fact of the incorrect and incomplete Forms I–9 for the unauthorized individuals, in contrast to 16 Forms I–9 filled out correctly for other employees, implicates Respondent's knowledge of unauthorized status at the time of hire. However, given a high turnover of Walden managers, the evident variety of manager styles in satisfying the I–9 requirements, and Walden's conceded liability for failure to properly complete an I–

9 for one of its citizen employees (Count III), this argument is not persuasive.

Complainant argues that "Respondent's violation of its affirmative duty to comply with the provisions of IRCA without question facilitated the employment of unauthorized aliens." Walden has an affirmative statutory duty to ascertain eligibility for work, a duty to "make specific inquiry and review documents [at the time of hire, and] is chargeable with such knowledge as that inquiry would have revealed." *United States v. Jonel, Inc. d/b/a MAACO Auto Painting and Bodyworks,* 8 OCAHO 1008, at *15 (1998), *available in* 1998 WL 804705, at *13 (O.C.A.H.O.). Constructive knowledge of unauthorized status has been established in situations where, among other factors, an employer failed to complete the Employment Eligibility Verification Form, I–9 for an employee later found to be unauthorized to work. See *United States v. Mark Carter,* 7 OCAHO 931, at 142–43 (1997), *available in* 1997 WL 602725 at *13 (O.C.A.H.O.).[4]

Walden's affirmative duty to comply with 8 U.S.C. § 1324a includes the duty not only to complete the I–9 at the time of hire, but also to assure it is completed correctly. Of particular impor-

[4] *Mark Carter* refers to several OCAHO cases finding constructive knowledge, among them *United States v. American Terrazzo Corp.,* 6 OCAHO 877, at 10–11 (1996) (finding a knowing continuing to hire violation based on constructive knowledge considering, inter alia, that employee never stated she was authorized to work and was not asked to complete an I–9 form until eight months after employee was hired); *United States v. Valdez,* 1 OCAHO 91, at 608–609, *available in* 1989 WL 433882, at *9 (O.C.A.H.O.), reconsideration denied, 1 OCAHO 104, denial of reconsideration aff'd, 1 OCAHO 112 (1989) (the constructive knowledge standard in finding knowing continue to employ violations, in failure to reverify situations, also should be applied in knowing hire cases). *Valdez* held that the "[r]espondent's failure to prepare an I–9 Form [although that alone could not provide the basis for a knowing hire violation], when coupled with her conscious avoidance of acquiring knowledge as to the identification and status of her employees, provide[d] believable circumstantial evidence of her [constructive if not actual] knowledge of an employee's unauthorized status." *Valdez* at 610, 1989 WL 433882, at *10. *Mark Carter* also cites *United States v. Cafe Camino Real, Inc.,* 2 OCAHO 307, at 9 (1991), 1991 WL 531736, at *6 (O.C.A.H.O.), holding that respondent should have known the employee's unauthorized status "because it had a duty reasonably to inquire and to inform itself of [the employee's] employment eligibility." *Cafe Camino Real* further held that, in the circumstances of the that case, "even if [r]espondent, by and through Phillip Salerno [the respondent's owner], lacked actual knowledge of [the employee's] status, it acted with recklessness and wanton disregard for the legal consequences when it introduced a stranger to its workforce [without satisfying I–9 requirements]. That recklessness and disregard is sufficient to charge [r]espondent with constructive knowledge of [the employee's] unauthorized status." *Id.* at 10, 1991 WL 531736, at *7.

tance is the inquiry to be answered through checking one of the attestation boxes in Section 1 of the Form I–9, the omission of which is considered serious and substantive. *See United States v. Jonel, Inc. d/b/a MAACO Auto Painting and Bodyworks,* 7 OCAHO 967, at 747 (1997) (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision), *available in* 1997 WL 1051461, at *10 (O.C.A.H.O.). Identification of proper documents in Section 2 is also fundamental to I–9 compliance. *Id.* OCAHO caselaw consistently holds that verification errors or omissions which lead to the hiring of unauthorized aliens are considered quite serious "because they undermine the verification system itself," whose purpose is to prevent hiring of employees without assuring their entitlement to work in the United States. *See Jonel,* 7 OCAHO 967, at 745, *available in* 1997 WL 1051461, at *8 (citing *United States v. Chef Rayko, Inc.,* 5 OCAHO 794, at 3–4 (1995). *See also United States v. J.J.L.C., Inc.,* 1 OCAHO 154, at 1093 (1990), *available in* 1990 WL 512156, at *4–5 (O.C.A.H.O.).

MEDRANO states that he was asked for no documents at the time of hire, that he filled out the I–9 about a year after he was hired, and that his employer knew he was working illegally. Respondent challenges the probative value of MEDRANO's statements, as recorded by INS. However, copies of W–2 documents and Labor Certification documents indicate MEDRANO worked for Walden in 1996, but the MEDRANO I–9 was dated July 1997. The Form I–9 was substantively deficient, in that no attestation box was checked, and the driver's license[5] establishing identity was not identified, i.e., it lacked both identification of issuing jurisdiction and number.

Respondent's Opposition offers no explanation of Walden's delay in executing the Form I–9. Walden does not explain the serious deficiencies in the I–9, nor does it offer an alternative to the alien's statement that Walden knew he was working illegally. In light of these facts, and in the context of OCAHO caselaw as discussed above and 8 C.F.R. § 274a(1)(l)(1)(i),[6] I find that there is no substantive dispute as to material fact with respect to Wal-

[5] The I–213 records that at the time of the INS inspection, MEDRANO was on probation for operating with a suspended license.

[6] "Constructive knowledge may include, but is not limited to situations where an employer: (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9."

den's constructive knowledge of MEDRANO's unauthorized status at his time of hire.

I distinguish MEDRANO from the other Count I aliens, as to whom there appears to be a dispute of material fact as to the allegations of knowing hire. As stated in *Jonel,* "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)." 8 OCAHO 1008, at *16, *available in* 1998 WL 804705, at *14. If there appears to be nothing on the face of the I–9 or the accompanying documents which would lead a reasonable person to know at the time of hire that the alien was unauthorized to work, a substantive compliance in good faith defense may be available. Proper paperwork does not, of course, insulate an employer who subsequently gains knowledge of the employee's unlawful status. *See id.,* citing Mester, 879 F.2d at 569.

CASTRO, FERREIRA, and DO CARMO's Forms I–9 record identifiable documents evidencing work authorization and identity for each of these three. FERREIRA's Form I–9 suffers the same serious deficiency as does MEDRANO's in that no attestation box is checked; however, she asserts that her employer **did not** know she was illegal. An inference could be drawn that she held herself out to be eligible to work at the time of employment, and no contrary probative evidence is offered to corroborate an inference that Walden knew or should have known she was unauthorized at the time of hire.

The paucity of evidence regarding knowledge at the time of hire renders INS unable to establish a prima facie case, and precludes knowing hire summary decision with respect to CASTRO, FERREIRA, and DO CARMO, because I am unable to conclude that there is no genuine issue of material fact as to liability with respect to each of these.

B. *Continuing to Employ Count I Individuals Unauthorized to Work*

The November 14th letter to Walden establishes Respondent's actual knowledge of the ineligibility of the Count I individuals to be employed in the United States as of that date. Whether Walden had knowledge prior to that date is uncertain.

INS cites arrest reports by the INS Special Agents on INS Forms I–213 [Records of Deportable/Inadmissible Aliens] taken together with INS Forms I–215B [Sworn Statement in Affidavit Form], as testimony of the aliens taken orally at the time of their apprehension and reduced to writing by INS personnel, to confirm that Walden's management knew at some point they were not authorized to work in the United States, and nonetheless continued to employ them. Respondent claims such statements are inherently untrustworthy as English language paraphrases of oral statements, lacking probative value absent corroboration. Suggesting also that reliability turns on whether the alien is available to testify, Walden refers to the guidelines set out in *Richardson v. Perales,* 402 U.S. 389 (1971), for assuring underlying reliability and probative value.

OCAHO jurisprudence, relying on and consistent with *Perales,* make clear that the arrest forms and sworn statements are admissible. *See, United States v. Sunshine Bldg. Maintenance, Inc.,* 7 OCAHO 997, at 1153 (1998); *United States v. Y.E.S. Industries, Inc.,* 1 OCAHO 198, at 1316 (1990); *United States v. Mester Manufacturing Co.,* 1 OCAHO 18, at 79; *aff'd, Mester Manufacturing Co. v. INS,* 879 F.2d 561 (9th Cir. 1989). Walden concedes that the issue is not that of admissibility but rather of the weight to be assigned to the evidence. *United States v. Sunshine Bldg. Maintenance, Inc.,* 7 OCAHO 997, at 1153 *et seq. Mester* is particularly instructive, 1 OCAHO 18, at 79, n.20: While Forms I–213 and 215B "are admissible . . . they are often at the margin of trustworthiness for evidentiary purposes, and, accordingly, are not admissible except where they are internally consistent, mutually consistent, reasonably free of patent error, and either the alien involved, the arresting and/or attesting officer, or another knowledgeable person is available to testify in support."

As summarized in the following discussion, while the INS Forms I–213 and I–215B tendered on motion practice are presumptively admissible, I am sufficiently uncertain as to their internal and mutual consistency and whether they are free of patent error, absent further corroboration than the filed declarations of the Special Agents, to accept them as conclusive for motion purposes, notwithstanding that explanatory and buttressing evidence might dispel that uncertainty at a merits hearing.

1. *FERREIRA*

Complainant argues that "the actions of the Respondent's general manager establishes that on November 12, 1997 respondent had Ferreira in its employ with full knowledge that she was not authorized for such employment." INS is contradicted by FERREIRA's statement, taken by the agent apprehending her on November 12, 1997 that the employer did not know she was illegal. It is reasonable to infer that the letter presented to the general manager that day, naming FERREIRA as unauthorized for employment in the United States, was the first notice Respondent had of such fact.

As confirming the employer's knowledge of the employee's unauthorized status, INS relies on Powers' initial identification of FERREIRA as "Sylvia" and later apology for having done so with no explanation. INS suggests these communications prove Powers tried to conceal FERREIRA's identity from INS agents. However, a conclusion about Walden's knowledge based on one instance of one suspicious action is an insufficient basis on which to grant summary decision. When considered together with Forms I–213 and 215B,[7] there are enough contradictions and inconsistencies to preclude decision absent a hearing as to Walden's knowledge of FERREIRA's ineligibility for employment.

2. *DO CARMO and CASTRO*

(a) DO CARMO, listed on the Phone List as a Kitchen employee, was identified by a Walden manager as working on Nov. 12th, encountered in the kitchen by Agent Heath Simon (Simon) at Walden at 1:15 p.m., and subsequently interviewed by Agent Thomas Carroll (Carroll), who also took his sworn statement in English. The I–213 and I–215B record that: DO CARMO is Brazilian; he entered the US in 1988 and then again (on a B–2 visa, not produced) in 1992; he "has been using a fraudulent social security number to work at the Walden Grill since 1988;" and he claimed

[7] Cleide FERREIRA, identified on Walden's Oct. 9, 1997 Telephone List (Phone List) as a Runner/Bus employee, was observed by Agent Fiandaca "tending to" a table at Walden, apprehended outside the restaurant at 1:15 p.m. and interviewed at 2:30 p.m.. The I–213 records that FERREIRA was "advised of I–214 (Portuguese)." In contrast, although FERREIRA was identified as a Brazilian citizen, with one Brazilian child, the interview, per the I–215B, was in Spanish. Her last entry into the United States is said to have been on September 9, 1997 on a non-immigrant visitor's visa; she was employed by Walden since July 7, 1997, who "does not know" she is illegal.

that Walden's owner and manager knew he was in the United States illegally because they filed papers for him to become "legal—a permanent resident."

(b) CASTRO, not listed on the Phone List, was identified by a Walden manager as working on Nov. 12th. He was encountered by Carroll, and was later interviewed and his sworn statement taken by Simon in English, to whom he provided his non-immigrant visa. Details recorded include that he originally entered April 24, 1995 as a visitor; he is a native and citizen of Brazil; he claims to attend Harvard, but lacks a student visa; he worked at Walden since October 14, 1997, when he began his training; he did not fill out the I–9 form while in training; but was asked to fill it out on October 20, 1997. He claimed that Walden's owner lived in Colorado, was hardly ever around, but told him not to worry after the INS came and took the I–9 forms, because Walden "would take care of everything."

I agree with Walden that, as applied to the inquiry whether it knowingly continued to employ DO CARMO and CASTRO with knowledge of employment ineligibility, the record is insufficient to establish actual or constructive knowledge. DO CARMO's and CASTRO's statements as to the employer's state of mind can reasonably be rejected as proof of knowledge, e.g., filing of papers for someone to become a permanent resident (DO CARMO), is not proof of knowledge of lack of status,[8] and neither is an employer's statement to an employee "not to worry, we are going to take care of everything" (CASTRO). The ALJ's conclusion in *Jonel* is particularly apt: "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 dispute] what Jonel knew and when." *Jonel,* 7 OCAHO 967, at 742.

3. *Review of the Labor Certification Applications for CASTRO, and DO CARMO*[9]

Complainant argues that applications for Alien Employment Certification together with the Forms I–9 "incontrovertibly establish

[8] In fact, the record fails to show any filing for DO CARMO as of November 12, 1997, as to which INS argues that Walden must have known because it filed "papers."

[9] There was no Labor Certification application filed for FERREIRA. Since I have already found a knowing hire violation with respect to MEDRANO, it is unnecessary to discuss alternative arguments for liability with respect to him.

that respondent [. . .] continued to employ after November 6, 1986 CARMO and CASTRO **knowing they were unauthorized for such employment**." [emphasis added].

(a) DO CARMO. Labor Cert: 1/7/98. In current job: 2/95—present. "I assist in preparation of . . . ." Signed by DO CARMO 11/24/97.

(b) CASTRO. Labor Cert: 1/22/98. In current job: <dates omitted>. "I prepare all types of . . . ." Worked at Peppi's Tratoria 6/94–10/96. "I prepared all types of . . . ." Signed by CASTRO 12/15/97.

Complainant references Labor Certification application "papers" in support of both of its theories for proving its continuing to employ allegation as to CASTRO and DO CARMO.

First, Walden "became aware of" the individuals' unauthorized status at some point during their months/years of employment, and continued to employ them. Both Agents Carroll and Simon claim that manager Michael Powers stated he knew "papers" had been filed for employees as of November 12, 1997, and that during the time the papers were being prepared and filed, the individuals continued in respondent's employment. Carroll quoted Powers as saying "this is before I came . . . the owner filled out the papers for them." The record fails to establish any such filing prior to INS inspection.

In any event, this theory is not applicable to CASTRO, as he was hired on October 14, 1997, just prior to the scheduled inspection of I–9s.

DO CARMO appears to have worked for Walden continuously from at least 1993. Given the limitations on the probative value of the forms alone as evidence,[10] however, proof of INS's case

[10] For example, it is instructive that MEDRANO's Labor Certification application indicates Walden hired him in July 1990, and INS argues this earlier "hire" as a constructive awareness of and continuing to employ an unauthorized alien. However, after entering the country without inspection in 1991, he worked for another employer from 1991 until 1996. Further, as his year of birth is 1974, it is unlikely he was employed in 1990 at the age of 16–17 as a specialty cook. The 1990 date appears to be in error. Other records indicate his first employment with Walden was in 1996. (This discrepancy need not be resolved, as Walden has been found to have had constructive knowledge of MEDRANO's unauthorized status). Such errors make suspect

Continued on next page—

with respect to DO CARMO on this theory must wait for a hearing on the merits.

Complainant's second theory is that, after acquiring actual knowledge of the aliens' unauthorized status in November 1997, Walden continued to employ them while it prepared their Labor Certification documents. INS argues that specification of employment "to the present" and use of the present grammatical tense in describing duties on Labor Certification forms dated subsequent to its inspection incontrovertibly establish continued employment of CASTRO and DO CARMO beyond November 14, 1997.

Respondent argues in rebuttal that Walden's payroll records (Opposition, Exhibit 1) confirm that all the Count I employees were terminated upon notice from the INS. It also points to numerous inconsistencies among the forms related to the Count I employees, such as omitted dates, obviously erroneous dates, and inconsistent use of present and past tenses when describing duties at Walden.

Walden argues that the Labor Certification applications submitted subsequent to November 14, 1997 do not prove it "knew" the employees were unauthorized to work, since there are other predicates for employment authorization. See 8 C.F.R. § 274a.12(a).[11] I agree with Walden. As I stated in an earlier case, "As a preliminary matter, application for a labor certification is not an admission that one proposes to or has knowingly hired an illegal." *United States v. Valenca Bar & Liquors, Inc.,* 7 OCAHO 995, at 1112 (1998) *available in* 1998 WL 746o12, at *5 (O.C.A.H.O.). *See also, Jonel,* 7 OCAHO 967.

To summarize, constructive knowledge is imputed to Walden regarding a knowing hire of MEDRANO on the basis of the record. However, the record is insufficiently developed, and there are sufficient material facts in dispute as to FERREIRA, CASTRO, and DO CARMO to deny summary decision as to them.

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the ultimate probative value of the documentary materials for dispositive motion purposes.

[11] Aliens authorized to work without restrictions as to location or type of employment include: certain lawful temporary residents; certain refugees; paroled refugees; asylees; non-immigrant fiancés and fiancees; parents and dependent children of lawful permanent residents; and aliens granted withholding of deportation or removal, extended voluntary departure, and Temporary Protected Status.

IV. *CONCLUSION*

1. The Motion is granted as to Count I with respect to MEDRANO, whom I find by a preponderance of the evidence was hired by Walden knowing that he was unauthorized for employment in the United States.

2. The Motion is denied as to Count I with respect to CASTRO, DO CARMO and FERREIRA. In context of trial preparation, however, the parties should remember that, resolving doubts in favor of Walden as the nonmoving party, inability at this stage to determine that there are no genuine disputes of material fact sufficient to warrant decision for the moving party in no way predicts the outcome of a hearing on the merits. There is no reason to suppose that evidence at hearing cannot satisfy the *Mester* footnote caveats.

There are disputed material facts with respect to FERREIRA, both with respect to knowing hire in July 1997 and to knowingly continuing to employ her up to November 12, 1997.

There are disputed material facts with respect to CASTRO, both with respect to knowing hire on October 14, 1997, and, alternatively, whether Walden continued to employ him after November 14, 1997.

There are disputed material facts with respect to DO CARMO, with respect to knowing hire (date uncertain), and, knowingly continuing to employ him both before and after November 14, 1997.

3. That portion of the Motion for Summary Decision which addresses Counts II and III is granted as to liability on the merits, with decision as to civil money penalty reserved for hearing.

4. Decision on the merits as to Count I for FERREIRA, CASTRO, and DO CARMO is reserved for hearing. Resolution of the question whether Walden's applications for labor certifications for CASTRO and DO CARMO demonstrate knowledge that the two individuals were unauthorized for employment absent issuance of the labor certifications must also await hearing. This is so because denial of the Motion reflects the dispute of material fact whether either individual remained on the payroll at the time Walden applied for the labor certifications.

5. All decisions as to penalties with respect to Count I are reserved for hearing.

6. It is my practice concerning civil money penalty, unless the record were to disclose facts not reasonably anticipated by INS in assessing the penalty, not "to increase the penalty beyond the amount assessed by INS. *See United States v. DuBois Farms, Inc.,* 2 OCAHO 376 (1991); *United States v. Cafe Camino Real,* 2 OCAHO 307 (1991)." *United States v. Raygoza,* 5 OCAHO 729 at 50. Absent an evidentiary reason to do so, I "will only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. *See United States v. Tom & Yu,* 3 OCAHO 445 (1992); *United States v. Widow Brown's Inn,* 3 OCAHO 399 (1992)." *Raygoza* at 50.

With particular reference to the five mandatory factors to be considered in determining reasonableness of the civil money penalty for the paperwork violations found under Counts II and III, "I utilize a judgmental and not a formula approach. *See e.g., United States v. King's Produce,* 4 OCAHO 592 (1994); *United States v. Giannini Landscaping, Inc.,* 3 OCAHO 573 (1993). In this way, each factor's significance is based on the facts of a specific case." *Raygoza* at 51. The likely monetary value of Counts II and III is, therefore, not less than $600.00 [12] nor more than $960.00.

I utilize a similar approach with respect to monetary penalty for employment of unauthorized aliens. *See, e.g., United States v. Vickers,* 5 OCAHO 819 (1995) at 753–754; *Widow Brown's Inn,* 3 OCAHO 399 at 43–47; *Cafe Camino Real,* 2 OCAHO 307 at 44–46. The likely value of Count I (together with a cease and desist and first tier violator status, assuming liability as alleged) is, therefore, not less than $1,000.00 nor more than $2,200.00.

The outside monetary dimensions of this case, therefore, assuming liability as alleged, are $1600.00 and $3,160.00, a difference of $1,560.00.

7. Unless advised by May 11, 2000, that an agreed disposition of the issues which survive this Order is in reach of the parties,

[12] The statutory minimums are those set out in 8 U.S.C. § 1324a, as enacted, because the violations implicated by the Complaint took place prior to March 15, 1999. Violations on or after that date are subject to a penalty enhancement. 28 C.F.R. § 68.52 (c).

my office will promptly after that date initiate arrangements for a telephonic prehearing conference at which, inter alia, hearing dates will be scheduled.

SO ORDERED.

Dated and entered this 21st day of April, 2000.

Marvin H. Morse
Administrative Law Judge