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. 99A00054
WSC PLUMBING, INC., Respondent.	)	Judge Robert L. Barton, Jr.

ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER

(*June 4, 2001*)

I. INTRODUCTION

On November 29, 2000, and January 23, 2001, this Court issued orders granting, either in whole or in part, motions for partial summary decision submitted by the United States of America (Complainant). On April 2, 2001, WSC Plumbing, Inc. (Respondent) filed a motion seeking reconsideration of these orders on several grounds. For the reasons set forth below, Respondent's motion to reconsider is DENIED, and my prior summary decision orders are expressly reaffirmed.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Pertinent Authority

Respondent's Motion to Reconsider raises complex procedural issues involving recent statutory and regulatory developments, the full significance of which have not, as yet, been examined in any detail by the Office of the Chief Administrative Hearing Officer (OCAHO) or the federal appellate judiciary. In order to ensure that the record is clear and that there is no misunderstanding of the nature of Respondent's allegations, the Court deems it necessary to briefly describe these procedures and developments.

1. INA § 274A Procedures

Section 274A(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a(b), mandates that employers hiring individuals for employment in the United States must comply with certain employment-eligibility-verification procedures. Specifically, the employer must complete an Immigration and Naturalization Service (INS) Form I-9 (I-9 form) with respect to each individual hired. On the I-9 form, the employer must: (1) ensure that the employee attests, under penalty of perjury, that he or she is authorized to accept employment in the United States; (2) attest, under penalty of perjury, that it has verified the employee's work-authorized status by examining certain documents specified on the I-9 form; and (3) retain its I-9 forms and make them available for inspection by certain governmental entities for three years after the date of hiring. To ensure that the I-9 forms are reliable indicators of employer compliance with the mandates of INA § 274A(b), INS regulations have elucidated specific and detailed requirements for proper completion of the forms. INA § 274A(a)(1)(B) makes it a violation of law for an employer to hire an individual without complying with these procedures, and 8 C.F.R. § 274a.10(b)(2) provides for the imposition of civil money penalties for such violations.

If an INS examination of an employer's I-9 forms reveals that the employer has failed to comply with its obligations under INA § 274A(b), the INS may issue a Notice of Intent to Fine (NIF) to the employer specifying the nature of the alleged verification failures, the provisions of law that are alleged to have been violated, and the penalty that will be imposed for those violations. See 8 C.F.R. § 274a.9(d)(1)(i). In addition, the NIF must advise the employer that it has a right–within thirty days from the date the NIF was served on it–to make a written request for a hearing before the OCAHO, and that its failure to timely request such a hearing will result in the issuance of an *unappealable* final order imposing the penalties indicated in the NIF. See 8 C.F.R. § 274a.9(d)(1)(ii).

2. Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified as INA § 274A(b)(6) and effective as of September 30, 1996, amended INA § 274A(b) by providing that an employer shall be deemed to have complied with the employment-eligibility-verification requirements of INA § 274A(b) *notwithstanding a technical or procedural failure to do so*, if the employer made a good faith attempt to comply. Under this provision, an employer is presumed not to have violated INA § 274A(a)(1)(B) with respect to "technical or procedural" verification failures that were committed in good faith. This provision is subject to two important exceptions. First, an employer cannot avoid liability under INA § 274A(a)(1)(B) for "technical or procedural" verification failures if it fails to correct those failures within 10 business days after the date when the INS or some other governmental enforcement agency notifies the employer of the failure. See INA § 274A(b)(6)(B). Second, an employer which has engaged (or is presently engaging) in a pattern or practice of hiring or continuing to employ unauthorized aliens cannot avoid liability under INA § 274A(a)(1)(B) with respect to its "technical or procedural" verification failures. See INA § 274A(b)(6)(C).

3. INS Interim Guidelines Implementing INA § 274A(b)(6)

Despite the fact that over four years has passed since IIRIRA was enacted, the INS has not yet promulgated a final agency rule specifying precisely which verification failures should be considered "technical or procedural" or elucidating the specific procedures its personnel must follow in order to implement INA § 274A(b)(6), although a proposed rule has been pending since 1998. See 63 Fed. Reg. 16,909-16,913 (April 7, 1998). Until approval of a final agency rule, implementation of INA § 274A(b)(6) has been governed by Interim Guidelines, issued in March 1997 by the INS Office of Programs. The Interim Guidelines are quite detailed, and provide specific guidance as to which verification failures are "technical or procedural" and which "substantive." In addition, the Interim Guidelines instruct INS field officers and attorneys in the requirement that "technical or procedural failures to meet a requirement of section 274A(b) of the Act discovered during an I-9 inspection conducted on or after September 30, 1996 not be included in a NIF unless and until certain notification procedures are followed." See INS Interim Guidelines § A.2.

Among other things, the Interim Guidelines indicate that Supervisory INS officers shall have discretion regarding the issuance of NIFs that include technical or procedural verification failures. Id. If a Supervisory INS officer chooses to include technical or procedural verification failures in a NIF, the Interim Guidelines require that "issuance of the NIF be deferred until the employer is given notice of the failures and at least ten business days to correct the failures. . . ." Id. The section of the Interim Guidelines dealing specifically with "interim procedures" states that,

> [w]here failures to meet the requirements of section 274A(b) of the Act that include technical or procedural failures are encountered at an I-9 inspection, if the decision is made to include the technical or procedural failures in a NIF, the NIF cannot be issued unless and until [notification and correction] procedures are followed.

Id. at § B.4. An appendix to the Interim Guidelines contains a flowchart setting forth the proper method for issuing NIFs that contain allegations of technical or procedural verification failures. This flowchart indicates that the INS cannot charge a good faith technical or procedural verification failure in a NIF unless notification procedures have been followed and the employer has failed to timely correct the failure. Id. (Appendix H).

Finally, the Interim Guidelines contain a provision explaining what INS personnel should do if they discover that a NIF or a complaint has been issued in non-compliance with the notification and correction

procedures. Of particular relevance to the instant case is a provision directing that, "[i]n cases where a [defective] complaint has been filed with the Chief Administrative Hearing Officer, the complaint should be amended, removing technical or procedural failures that were listed as violations." Id. at § B.6.b.

B. Procedural History

1. Complainant's Motions for Partial Summary Decision and for Amendment of the Complaint

On July 29, 1999, Complainant filed a six-count OCAHO Complaint alleging that Respondent had violated INA § 274A(a)(1)(B) by failing to comply with its employment-eligibility-verification obligations with respect to the I-9 forms of 69 individuals. On November 3, 2000, Complainant filed its First Amended Motion for Partial Summary Decision, in which it sought judgment as a matter of law regarding Respondent's liability for 58 of the 69 violations alleged in the Complaint. On November 29, 2000, I issued an Order Granting in Part and Denying in Part Complainant's First Amended Motion for Partial Summary Decision (First Summary Decision Order) in which I concluded that Respondent was liable for having violated INA § 274A(a)(1)(B) with respect to 55 of the 58 allegations set forth in the motion. I denied Complainant's request for summary decision with respect to the remaining 3 allegations (i.e., those at Count IV ¶¶ A, B and H), on the ground that the Interim Guidelines identified those three verification failures as "technical or procedural." I further stated that I agreed with the Interim Guidelines that the verification failures at issue–i.e., the employer's failure to indicate an attestation date in section 2 of the I-9 form–were "technical or procedural" for purposes of INA § 274A(b)(6). Thus, as of November 29, 2000, Respondent's liability had been established with respect to 55 of the 69 allegations in the Complaint.

On January 2, 2001, Complainant filed its Second Motion for Partial Summary Decision, in which it sought judgment as to Respondent's liability with respect to 6 of the remaining 14 allegations in the Complaint. On January 23, 2001, I issued an Order Granting Complainant's Second Motion for Partial Summary Decision (Second Summary Decision Order). Thus, as of January 23, 2001, Respondent's liability had been established with respect to 61 of the 69 allegations in the Complaint, leaving 8 allegations outstanding. During the Fifth Prehearing Conference in this case, held on March 15, 2001, I granted Complainant's request to withdraw the 8 remaining allegations–including the three allegations contained at Count IV ¶¶ A, B and H, which had been addressed in the First Summary Decision Order. Respondent did not object to the withdrawal of these 8 allegations. As a result, the Complaint, as amended, now contains only the 61 allegations for which the Respondent has been found liable under prior orders.

2. Respondent's Motion to Reconsider and Complainant's Opposition

At the conclusion of the Fifth Prehearing Conference, Respondent requested leave to file a motion seeking reconsideration, in whole or in part, of both my November 29, 2000, and January 23, 2001, Orders granting Complainant's requests for partial summary decision. Complainant vigorously opposed Respondent's request; nonetheless, I decided to permit Respondent to file its motion to reconsider by not later than April 2, 2001.

On April 2, 2001, Respondent filed its motion to reconsider. Complainant's Memorandum in Opposition to the motion was filed on April 30, 2001. By leave of court, Respondent filed a Reply to Complainant's opposition on May 8, 2001. On May 9, 2001, I issued an order directing both parties to submit supplemental briefs, and on May 21, 2001, these supplemental briefs were filed.

On May 30, 2001, Respondent submitted a motion asking the Court to take notice of two very recent decisions issued by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) which were arguably germane to my consideration of Respondent's motion to reconsider. I have examined the two cases identified by Respondent and I find that they are of marginal relevance to my disposition of the present motion. Thus, although I grant Respondent's request to take these new cases under consideration, I have not relied upon them as authority for my decision in this matter.

(A) Respondent's Position

In its motion and supplemental pleadings, Respondent argues that I should vacate and reverse my prior determinations of liability and dismiss the Complaint in its entirety on the ground that Complainant intentionally failed to adhere to the requirements of the Interim Guidelines when issuing the NIF in this case. According to Respondent, the NIF charged Respondent with liability for a number of technical or procedural verification failures, despite the fact that Complainant had not notified Respondent of the failures nor given Respondent an opportunity to correct them, as required by sections B.4.a. through B.4.h. of the Interim Guidelines. Respondent argues that Complainant's intentional failure to comply with the requirements of the Interim Guidelines renders the entire NIF–and, by extension, the entire Complaint–void *ab initio*, with the exception of those alleged violations that occurred within the applicable statute of limitations.

Second, and in the alternative, Respondent asserts that I should vacate and reverse my prior determination of Respondent's liability with respect to the I-9 form of Fernando Gonzalez Ambriz, the individual listed at Count II ¶ B of the Complaint. As Respondent explains, my First Summary Decision Order concluded that Respondent had violated INA § 274A(a)(1)(B) when it failed to timely prepare Ambriz's I-9 form. See United States v. WSC Plumbing, Inc., 9 OCAHO no. 1062, at 6 (2000). In so holding, I observed that section A.4. of the Interim Guidelines characterized timeliness failures as "technical or procedural" only if "the date that the particular section should have been completed falls on or after September 30, 1996." Id. The regulations implementing INA § 274A (b) require employers to ensure that employees attest to their work-authorization, in section 1 of the I-9 form, *on the date of hire*, see

8 C.F.R. § 274a.2(b)(1)(i)(A), and require employers to complete their own document review and attestation procedures, in section 2 of the I-9 form, *within three business days of hire*. See 8 C.F.R. § 274a.2(b)(1)(ii). Because Respondent admitted that Ambriz was hired on September 25, 1996, I concluded that "the relevant sections of the I-9 form should have been completed before September 30, 1996," and that Respondent's timeliness failures with respect to Ambriz were therefore "substantive" for purposes of the Interim Guidelines. Id. Respondent's motion to reconsider asserts that my ruling with respect to Ambriz should be reconsidered and reversed. As Respondent points out, Ambriz's hiring date of September 25, 1996, was a Wednesday; thus, although the third "calendar day" after Ambriz's hiring was Saturday, September 28, 1996, the third "business day" did not arrive until the following Monday, September 30, 1996. Because the date that section 2 of Ambriz's I-9 form should have been completed fell "on or after September 30, 1996," Respondent argues that its failure to complete section 2 in a timely manner was a technical or procedural verification failure under the Interim Guidelines, and not a "substantive" failure, as my First Summary Decision Order found. Because Complainant did not give Respondent notice of this failure and an opportunity to correct it, Respondent argues that Complainant has failed to follow the Interim Guidelines, necessitating dismissal of Count II ¶ B.

(B) Complainant's Position

Complainant maintains that it complied with the Interim Guidelines when it issued the NIF and the Complaint in this case. Specifically, Complainant asserts that the notice and correction requirements of INA § 274A(b)(6) and the Interim Guidelines only apply to verification failures occurring on or after September 30, 1996; in Complainant's view, verification failures occurring before that date are simply not covered by INA § 274A(b)(6). Thus, Complainant avers that the INS had a good faith belief that all of the verification failures alleged in the NIF and the Complaint were either outside the scope of INA § 274A(b)(6) or "substantive" within the meaning of the Interim Guidelines. At the same time, Complainant acknowledges that I found, in my First Summary Decision Order, that the allegations contained at Counts IV ¶¶ A, B and H of the original Complaint (involving Respondent's failure to provide a date in the employer attestation portion of section 2 of the I-9 form) alleged "technical or procedural" verification failures under section A.4. of the Interim Guidelines.

Complainant also maintains that any failure by the INS to follow the Interim Guidelines is not a violation of law for which Respondent may seek a remedy. According to Complainant, the Interim Guidelines are merely intended as "interpretive" guidance for INS personnel, and as such they confer no legally enforceable right of action upon private parties such as Respondent. Moreover, Complainant insists that, even if such a right of action did exist, Respondent has failed to demonstrate any substantial prejudice arising out of the INS' alleged failure to follow the Interim Guidelines.

Complainant contends that, even assuming *arguendo* that it failed to follow the Interim Guidelines and that the Interim Guidelines are legally binding in this case, there is no justification for dismissing the

entire Complaint. Complainant points out that section B.6.b. of the Interim Guidelines "clearly contemplates that the appropriate remedy for an error involving the inclusion of an otherwise 'technical or procedural' violation in either a NIF or a Complaint is for the agency to withdraw the offending violation." Complainant then points out that this Court's March 15, 2001, Order effected the withdrawal of the three alleged violations found by this Court to involve "technical or procedural" verification failures.

Finally, with respect to Respondent's argument that Count II ¶ B of the Complaint should be dismissed, Complainant maintains that the verification failure at issue is "substantive" and therefore not subject to the notice and correction regime of the Interim Guidelines. Specifically, Complainant contests Respondent's assertion that the third "business day" after Ambriz's hiring was September 30, 1996. According to Complainant, Respondent often conducted business on Saturdays; therefore, Complainant argues that Saturdays should be considered "business days" with respect to Respondent. Under this theory, Complainant submits that Saturday, September 28, 1996, was the deadline for Respondent to complete section 2 of Ambriz's I-9 form, not Monday, September 30, 1996, as Respondent asserts. If Complainant is correct that September 28, 1996, was the third business day after Ambriz's hiring, Respondent's verification failure would have been "perfected" two days before the effective date of IIRIRA, and the requirements of INA § 274A(b)(6) would not apply to that violation. In the alternative, Complainant argues that, even if Respondent was not obliged to complete section 2 of the I-9 form until September 30, 1996, it was obliged to ensure that Ambriz completed section 1 of the I-9 form on the day of hire–September 25, 1996. According to Complainant, that failure, standing alone, is sufficient to constitute a violation of law.

III. AUTHORITY TO ENTERTAIN MOTIONS TO RECONSIDER

The OCAHO Rules of Practice and Procedure (OCAHO Rules) do not permit substantive reconsideration of final orders in cases arising under INA § 274A; such final orders may only be modified to correct typographical or clerical errors. See 28 C.F.R. § 68.52(f). The present motion does not seek reconsideration of a final order, however, but instead seeks reconsideration of two interlocutory orders. OCAHO case law establishes that Administrative Law Judges may entertain substantive motions to reconsider interlocutory orders, although no such motion has ever been granted in a reported OCAHO decision arising under INA § 274A. See United States v. Four Star Knitting, Inc., 5 OCAHO no. 815, 711, 716 (1995) (motion to reconsider interlocutory order denied on the merits); United States v. Burns, 5 OCAHO no. 768, 378, 379-80 (1995) (same).

The Ninth Circuit recognizes that "[c]ourts have inherent power to modify their interlocutory orders before entering a final judgment." See Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 465 (9th Cir. 1989); see also Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996); Abada v. Charles Schwab & Co., Inc., 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000). Thus, it is within the discretion of the trial court to grant or deny a motion seeking substantive reconsideration of an interlocutory order. See Lockwood v. American Airlines, Inc., 847 F. Supp. 777, 778 (S.D. Cal. 1994). Substantive reconsideration of

interlocutory orders is also contemplated by Federal Rule of Civil Procedure (FRCP) 54(b), which states in pertinent part that, "any order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of [final] judgment." Because the OCAHO Rules do not specifically address substantive reconsideration of interlocutory orders, FRCP 54(b) may be used as a "general guideline" in this case. See 28 C.F.R. § 68.1.

IV. ANALYSIS

As previously discussed, Respondent argues that the INS' failure to adhere to the Interim Guidelines renders the entire Complaint void *ab initio* or, in the alternative, void with respect to Count II.B. I address each of these arguments in turn.

A. Respondent's Argument that the Complaint is Void *Ab Initio*

In order for Respondent to prevail with respect to the first argument advanced in its motion to reconsider, i.e., that the INS' failure to follow the Interim Guidelines renders the Complaint void in its entirety, Respondent must persuade the court of three propositions. As a threshold matter, Respondent must establish that the INS did, in fact, fail to follow the notice and correction procedures set forth in the Interim Guidelines. If Respondent persuades the Court that such a failure did occur, it must then demonstrate that the Interim Guidelines have the force and effect of law, such that the INS' failure to follow them is remediable by this Court. If Respondent satisfies the Court on this point as well, it must then explain why dismissal of the entire Complaint is the proper remedy for such a violation of law.

1. Did INS Comply With the Interim Guidelines?

As previously discussed, the Interim Guidelines require INS officers to provide employers with notice and an opportunity to correct any "technical or procedural" verification failures before those verification failures can be charged in a NIF or, by extension, an OCAHO complaint. As I found in my First Summary Decision Order, at least 3 of the 69 violations alleged in the Complaint (i.e., those contained at Count IV ¶¶ A, B and H) involved verification failures identified by the Interim Guidelines as "technical or procedural." Specifically, those 3 allegations charged Respondent with failure to provide a date in the employer attestation portion of section 2 of the I-9 form. Such a verification failure is identified as "technical or procedural" in section A.4.b.(B)(4) and Appendix B of the Interim Guidelines. Therefore, with respect to those three verification failures, the Interim Guidelines instructed the INS to provide Respondent with notice of the failures and 10 business days in which to correct them. Complainant concedes that the INS issued the NIF in this case without having provided Respondent with any such notice or opportunity to correct. Consequently, the conclusion is inescapable that the INS failed to follow the notice and correction procedures set forth in the Interim Guidelines. In light of the plain language of the Interim Guidelines, Complainant's assertion that the INS complied with them is unsustainable.

Although Complainant is technically correct in its assertion that the Interim Guidelines only apply to verification failures "occurring on or after September 30, 1996," Complainant overlooks the fact that, with the exception of timeliness failures, verification failures are "continuing violations;" they are unlawful courses of conduct, self-perpetuating until "cured" by the employer. Indeed, the commentary accompanying the INS' own proposed rule explicitly acknowledges that "failures to meet a verification requirement continue from the first day the requirement must be met until . . . the day that the failures are corrected. . . ." See 63 Fed. Reg. 16,910 (April 7, 1998). Moreover, this Court has previously observed in this very case that a verification failure *occurs* not at a single moment in time, but rather throughout the period of non-compliance. See United States v. WSC Plumbing, Inc., 9 OCAHO no. 1061, at 14 (2000). Thus, a verification failure that begins prior to September 30, 1996, but that is not cured until after that date, is a failure "occurring on or after September 30, 1996." The drafters of the Interim Guidelines clearly appreciated this point, as well, and therefore concluded that INA § 274A(b)(6) applies to all cases arising from *I-9 inspections conducted on or after September 30, 1996*. See Interim Guidelines § A.2. Hence, Complainant's contrary interpretation–that the Interim Guidelines apply only to verification failures that *began to occur* after September 30, 1996–is simply irreconcilable with INS policy, OCAHO precedent, and the plain language of the Interim Guidelines.

2. Do the Interim Guidelines Have the Force and Effect of Law?

It is a familiar dictum that administrative agencies are obliged to follow their own regulations, even if those regulations are gratuitous, self-imposed procedural rules that limit otherwise discretionary decisions. See, e.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954); Service v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); American Farm Lines v. Black Ball Freight Service, Inc., 397 U.S. 532, 538-39 (1970). This so-called "Accardi doctrine" is informed by principles of fundamental fairness and due process and, accordingly, it is of particular importance where the agency pronouncement at issue affects the rights of individuals. See Vitarelli, 359 U.S. at 539; Morton v. Ruiz, 415 U.S. 199, 235 (1974); Montilla v. INS, 926 F.2d 162, 167 (2d Cir. 1991); Massachusetts Fair Share v. Law Enforcement Assistance Admin., 758 F.2d 708, 711 (D.C. Cir. 1985).

The scope of the Accardi doctrine is not confined to enforcement of formal agency rules; it may also be applied with respect to agency pronouncements that have not been published in the Federal Register. Ruiz, 415 U.S. at 235; Gulf States Mfgs., Inc. v. NLRB, 579 F.2d 1298, 1308-09 (5th Cir. 1978), aff'd in part and remanded in part, 598 F.2d 896 (5th Cir. 1979) (en banc); City Cab Co. of Orlando, Inc. v. NLRB, 787 F.2d 1475, 1480 (11th Cir.) (following Gulf States Mfgs.), cert. denied, 479 U.S. 828 (1986). In Ruiz, the Supreme Court invalidated a Bureau of Indian Affairs (BIA) requirement that general assistance payments be available only to Indians living on a reservation on the ground that the requirement was issued in non-compliance with a procedural requirement of the BIA's internal policy manual. Id. (stating, "[b]efore the BIA may extinguish the entitlement of these otherwise

eligible beneficiaries, it must comply, at a minimum, with its own internal procedures."); see also Lincoln v. Vigil, 508 U.S. 182, 199 (1993) (explaining that, in Ruiz, "[w]e held that the Bureau's failure to abide by its own procedures rendered the provision invalid.").

At the same time, both the Supreme Court and the Ninth Circuit recognize that "[n]ot all policy pronouncements which find their way to the public can be considered regulations enforceable in federal court." See James v. United States Parole Comm'n, 159 F.3d 1200, 1205 (9th Cir. 1998) (quoting United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982); see also Lyng v. Payne, 476 U.S. 926, 937 (1986); Schweiker v. Hansen, 450 U.S. 785, 789-90 (1981), reh'g denied, 451 U.S. 1032 (1981). In Hansen, the Court concluded that a Social Security Administration (SSA) employee's failure to follow a directive in the 13-volume SSA Claims Manual instructing him to inform an individual of a requirement that benefits be requested in writing, did not estop the SSA from denying benefits to the individual because of her failure to file a written application. 450 U.S. at 789-90.

To determine whether the Interim Guidelines should be considered enforceable regulations as applied to the INS, the Court must determine whether they were "intended to confer procedural benefits upon [Respondent] in the face of otherwise unfettered discretion." See American Farm Lines, 397 U.S. at 538. If so, then Ruiz and Vitarelli require that the INS be made accountable for its failure to comply strictly with them. If, however, the Interim Guidelines are more akin to the precatory SSA Claims Manual at issue in Hansen, then the INS' failure to give Respondent notice and an opportunity to correct its technical or procedural verification failures is not a cognizable violation of law. Upon due consideration, I conclude that the Interim Guidelines have the force and effect of law as applied to the INS, such that Respondent may pose a legal challenge to the INS' failure to follow them.

As a threshold matter, it is important to note that the Interim Guidelines effectuate important changes in INS policy with respect to the enforcement of employer sanctions. First, they define the ambiguous statutory concept of the "technical or procedural failure;" indeed, it could be argued that they do so in a more generous manner than the strict language of the statute requires. Second, and equally important, the Interim Guidelines delineate new INS procedures for implementing the notice and correction requirement of INA § 274A(b)(6). In short, the Interim Guidelines "confer procedural benefits" upon employers like Respondent and thereby constrain the INS' discretion vis-a-vis implementation of the statute. There is little doubt that these specific definitional and procedural rules have significant implications for the rights of employers, who are now able to instruct their human resources personnel regarding compliance with INA § 274A(b)(6) and who are given a clear and specific process that protects their interests from government overreaching.

Moreover, the Interim Guidelines were promulgated by the INS pursuant to an implicit delegation of congressional authority. When Congress enacted INA § 274A(b)(6), it made no effort to identify

precisely which verification failures should be considered "technical or procedural" as opposed to "substantive," and it declined to impose a static definition of the expression "good faith." Instead, Congress left substantive gaps in the language of the statute and, in so doing, granted implicit authority to the INS to fill those gaps through regulation. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). During the laborious and time-consuming process of drafting a formal regulation, the congressional purpose underlying INA § 274A(b)(6) must be implemented in a consistent, coherent manner. This was precisely the purpose for which the Interim Guidelines were promulgated and, for the last four years, implemented.

Further, I deem it significant that the Interim Guidelines were publicly disseminated by the INS less than two months after they were issued internally. See 74 Interpreter Releases 509 (April 28, 1997); see also 2 Bender's Immigration Bulletin 430 (July 15, 1997). Indeed, in my Order of May 9, 2001, in which I directed the parties to submit supplemental briefs, I specifically ordered the parties to state whether the Interim Guidelines were disseminated to the public and, if so, how they were disseminated. Although the order was directed to both parties, the information concerning public dissemination of the Interim guidelines is particularly within the knowledge of the INS. Therefore, Complainant's statement that the Interim Guidelines "were published in the Interpreter Releases" will be construed as an admission that the Interim Guidelines were intentionally disseminated by the INS. By releasing the Interim Guidelines for public scrutiny, the INS affirmatively invited the public to rely on them as authoritative statements of agency policy.

I cannot agree with Complainant's assertion that Respondent was not prejudiced by the INS' failure to follow the Interim Guidelines in this case. When Respondent received the NIF, it was confronted with a Hobson's choice: it could either acquiesce in the allegations contained in the NIF, thereby allowing itself to become subject to an unappealable final order imposing fines for a number of "technical or procedural" verification failures that were not in fact violations of law, or it could go to the significant expense of retaining counsel and requesting a formal hearing before the OCAHO to have such allegations removed. It is no answer that Respondent did not specifically rely upon the INS' failure to follow the Interim Guidelines when deciding to request a hearing in this case. Respondent was entitled, whether it knew it or not, to have the INS follow the mandatory notice procedures set forth in the Interim Guidelines. In short, the INS had an affirmative obligation, under section B.4. of the Interim Guidelines, to follow its notice procedures.

Finally, the Interim Guidelines at issue in this case are clearly distinguishable from the internal policy manuals and employee handbooks that have consistently been deemed non-binding by the Supreme Court and the Ninth Circuit. Policy manuals and employee handbooks are purely internal instructions guiding agency employees in how to respond to inquiries or circumstances of particular individuals; they are not disseminated to, and therefore cannot be relied upon by, persons outside the agency. By contrast, the Interim Guidelines were publicly disseminated, and were manifestly intended to be mandatory rules of

general applicability, standing in the place of a formal agency rule on a provisional basis. The procedures set forth in the Interim Guidelines are not merely precatory or aspirational; they are phrased as mandatory constraints upon the discretion of INS officers charged with enforcing INA § 274A. Indeed, the Interim Guidelines openly acknowledge that INS procedures in effect prior to the enactment of INA § 274A(b)(6) are no longer consistent with the law. See Interim Guidelines § B. (stating that "current [INS] practices and procedures must be modified to ensure compliance with section 274A(b)(6).").

In conclusion, I hold that the INS Interim Guidelines are legally binding under the Accardi doctrine. The language of the Interim Guidelines imposes significant restraints on agency discretion and the circumstances surrounding their promulgation reflect both an intent on the part of the INS to be bound by them, see Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987), and an understanding that employers would rely upon them. Having induced such reliance, I reject Complainant's assertion that the Interim Guidelines are mere interpretive guidance.

3. What is the Proper Remedy for Violation of the Interim Guidelines?

Respondent argues forcefully that the INS' failure to follow the notice and correction procedures of the Interim Guidelines before issuing the NIF renders the entire Complaint void. In support of its argument, Respondent notes that the Interim Guidelines employ mandatory language, which in turn suggests that failures of compliance should be construed as attempts by the agency to "ignore the law." In reply, Complainant argues that section B.6.b. of the Interim Guidelines requires only that INS officers who discover that a NIF was issued in non-compliance with notice and correction procedures withdraw from OCAHO Complaints any "technical or procedural verification failures that were listed as violations." According to Respondent, section B.6. is merely a transitional "safe harbor," intended to apply to those NIFs arising from I-9 inspections occurring between September 30, 1996, and the date in early 1997 when the Interim Guidelines went into effect. Because the NIF in the instant case was issued more than one year after the Interim Guidelines went into effect, Respondent argues that the INS cannot seek shelter under section B.6.b.

I conclude that the proper remedy in this case is that the INS be compelled to comply with section B.6.b. of the Interim Guidelines; thus, all allegations in the Complaint charging Respondent with liability for verification failures identified by the Interim Guidelines as "technical or procedural" must be withdrawn. If such allegations are not voluntarily withdrawn by the INS, the Court may dismiss them from the Complaint *sua sponte*. As noted previously, Complainant has already voluntarily withdrawn the three allegations in the original Complaint which were found by the Court to involve technical or procedural verification failures (i.e., those at Count IV ¶¶ A, B and H). Respondent did not object to that withdrawal, and the Court is not inclined to grant Respondent any relief beyond what is called for by the Interim Guidelines. Specifically, I believe it would be inappropriate to dismiss the entire Complaint on the facts presented here. Respondent's motion to reconsider also asserts that Count II ¶ B of the Complaint

involves a technical or procedural verification failure, and I will address that assertion in part IV.B. of this Order, *infra*.

While Respondent is undoubtedly correct that section B.6. of the Interim Guidelines plainly sets forth procedures for dealing with cases "in the pipeline" as of the date the Interim Guidelines were issued, I am not persuaded that the provision applies *only* to such cases. First, the language of the provision contains no such limitation. Section B.6. applies, by its terms, to "[c]ases resulting from I-9 inspections conducted on or after September 30, 1996, where a NIF has been issued and served on an employer without adherence to the notification and correction procedures outlined" in prior paragraphs of the Interim Guidelines. This is such a case.

Second, I find nothing unreasonable or unfair about the INS' providing an escape clause for inadvertent deviations from the Interim Guidelines' requisite notice and correction procedures, even when such deviations occurred after the effective date of the Interim Guidelines. It must be kept in mind that INA § 274A(b)(6) lent significant complexity to an area of law that had theretofore been quite simple, and the INS Office of Programs undoubtedly anticipated that problems in implementation would arise. The INS was not obliged to create an enforcement regime under which any and all innocent failures on its part to comply with the Interim Guidelines would absolutely preclude the imposition of any monetary penalties against employers, even employers which had clearly failed to comply with the law. Such a regime would be not only wasteful of INS resources, but would also be disproportionately punitive, and would likely discourage the agency from pursuing even the most meritorious employer sanctions cases. Section B.6. of the Interim Guidelines reflects a more measured response, one that protects employers from being subjected to monetary penalties for good faith technical or procedural verification failures while simultaneously lending INS enforcement personnel a degree of flexibility as they become accustomed to the new enforcement environment mandated by INA § 274A(b)(6).

Third, contrary to Respondent's assertion, the fact that section B.6. is phrased in the past tense does not mean that the provision is only meant to address cases initiated between September 30, 1996, and the date the Interim Guidelines went into effect. By its very nature, section B.6. is backward-looking; it is *remedial* rather than prophylactic, and it comes into play only where the defective nature of a NIF manifests itself at some point after issuance. In short, section B.6. is phrased in the past tense because it permits the INS to cure past mistakes before they become irremediable.

Finally, I disagree with Respondent's contention that application of section B.6.b. to this case will "allow the INS to ignore the law . . . with no hindrance or sanction." By requiring the withdrawal or dismissal of allegations from its Complaint, section B.6.b. does impose a sanction; perhaps it is not as severe a sanction as Respondent would like, but it is a sanction. Because Complainant has voluntarily withdrawn all allegations from the Complaint that were found by this Court to have involved technical or procedural verification failures, Respondent has already been afforded all the relief contemplated by the

Interim Guidelines. If Respondent could prove that the INS had, in fact, intentionally "ignored" the Interim Guidelines when issuing the NIF, as opposed to inadvertently misconstruing them, I would be inclined to agree with Respondent that section B.6.b. would impose an insufficiently powerful sanction. Indeed, it is implicit in the Interim Guidelines that section B.6. applies only to *innocent* failures to adhere to requisite notice and correction procedures. However, Respondent has provided absolutely no evidence whatsoever to support its repeated assertion that the INS *intentionally* ignored the Interim Guidelines when issuing the NIF. It appears to the Court that the INS officers responsible for issuing the NIF in this case were indeed careless in applying the Interim Guidelines, but it does not appear from any evidence in the record that this carelessness rose to the level of affirmative misconduct.

I am mindful of the concern that unfettered application of the safe harbor of section B.6.b. could create a moral hazard under certain circumstances. For example, it is not totally inconceivable that certain INS officers could abuse the Interim Guidelines by routinely and intentionally issuing NIFs that impose monetary penalties for technical or procedural verification failures, thus placing the onus on employers to challenge such fines before the OCAHO. If an employer who receives such a NIF fails to request a hearing before the OCAHO, such fines would be imposed in an unappealable final order, and the employer would effectively be deprived of the benefits of INA § 274A(b)(6) due to affirmative misconduct by the INS. On the other hand, if such an employer does request a hearing before the OCAHO, the INS could then either issue a complaint in which the technical or procedural verification failures present in the NIF are removed, or simply invoke section B.6.b. of the Interim Guidelines to withdraw alleged technical or procedural verification failures included in the complaint. Respondent has not shown that any such misconduct has occurred in this case. However, to preclude even the possibility that such an abusive situation will occur, I hereby rule that section B.6.b. of the Interim Guidelines is absolutely ineffective to cure *intentional* failures by INS officers to comply with requisite notice and correction procedures when issuing NIFs. I hereby put the INS on notice that such intent may be inferred from a pattern of failing to follow the Interim Guidelines. In the future, I will look with great suspicion upon Complaints, based on NIFs issued after the date of this order, where the Complaint seek civil money penalties for technical or procedural verification failures where no notice and opportunity to correct was provided in accordance with the Interim Guidelines. Indeed, a copy of this Order is being served directly upon the INS' General Counsel, and it is expected that all INS offices will comply with the Interim Guidelines in the future.

4. Synopsis

To recapitulate, I find that the INS failed to follow the Interim Guidelines by charging Respondent with liability under INA § 274A(a)(1)(B) in connection with several technical or procedural verification failures despite the fact that Respondent was not notified of the technical or procedural nature of the failures or given an opportunity to correct them. The specific technical or procedural verification failures at issue are those contained at Count IV ¶¶ A, B and H of the original Complaint. Further, I find that the Interim Guidelines have the force and effect of law as applied to the INS, such that Respondent may present a legal

challenge to the INS' failure to comply with them. Finally, I conclude that, because Respondent has not demonstrated that the INS' failure to follow the Interim Guidelines was intentional or in bad faith, the appropriate sanction is simply to require the INS to comply with section B.6.b. of the Interim Guidelines by withdrawing the offending allegations from the Complaint. Dismissal of the Complaint in its entirety is neither compelled by the Interim Guidelines nor justified on the facts as a matter of the Court's discretion. Therefore Respondent's motion to reconsider is DENIED to the extent it seeks dismissal of the Complaint in its entirety.

B. Respondent's Argument With Respect to Count II ¶ B

Having concluded that the Complaint shall not be dismissed in its entirety as a result of the INS' failure to follow the Interim Guidelines, I now turn to Respondent's second argument: that this Court should vacate its prior finding of liability with respect to Count II ¶ B of the Complaint. Specifically, Respondent argues that the verification failure alleged in Count II ¶ B (i.e., failure to prepare the I-9 form of Fernando Ambriz in a timely manner) is defined as "technical or procedural" by the Interim Guidelines. Because the INS did not notify Respondent of the technical or procedural nature of this failure or give Respondent an opportunity to correct it, Respondent argues that the relevant count must be dismissed for noncompliance with the Interim Guidelines. Complainant argues that the verification failure alleged at Count II ¶ B is not "technical or procedural" under the Interim Guidelines. I agree with Complainant.

Count II ¶ B alleges that Respondent failed to timely prepare Ambriz's I-9 form. An employer can fail to timely prepare an I-9 form in any one of three ways: first, the employer can fail to ensure that the employee attests to his or her work-eligibility, at section 1 of the I-9 form, on the date of hire, see 8 C.F.R. § 274a.2(b)(1)(i)(A); second, the employer can fail to attest, at section 2 of the I-9 form, that it verified the employee's work-eligibility by inspecting appropriate documents within three business days of hiring the employee, see 8 C.F.R. § 274a.2(b)(1)(ii); or, third, it can fail with respect to both section 1 and section 2 of the I-9 form. See generally United States v. New Peking, Inc., d/b/a New Peking Restaurant, 2 OCAHO no. 329, 250, 255-58 (CAHO 1991), modifying 2 OCAHO no. 329, 259 (1991). As I noted in my First Summary Decision Order, Respondent admitted, in response to Complainant's First Request for Admissions, that it failed to ensure completion of section 1 of Ambriz's I-9 form on the date it hired Ambriz and that it failed to complete section 2 of the I-9 form within three business days of Ambriz's hiring. See Complainant's First Motion for Partial Summary Decision (CX-GGG and CX-HHH, Nos. 68 and 69). More specifically, Respondent admits that it hired Ambriz on September 25, 1996, see Complainant's First Motion for Partial Summary Decision (CX-GGG and CX-HHH, Nos. 62), yet the I-9 form itself shows that Respondent did not ensure that Ambriz attested to his work-eligibility in section 1 of the I-9 form until May 5, 1997, more than seven months after Ambriz was hired. See Complainant's First Motion for Partial Summary Decision (CX-E-1).

In order to comply with 8 C.F.R. § 274a.2(b)(1)(i)(A), Respondent was obliged to ensure that Ambriz attested to his work-eligibility *on the date of hire*, i.e., on September 25, 1996. Unlike other verification failures, which are "continuing" in nature, timeliness failures are "frozen in time" at the moment when the deadline passes for completion of the relevant section. See WSC Plumbing, Inc., 9 OCAHO no. 1061, at 12 (2000) (quoting United States v. Curran Eng'g Co., Inc., 7 OCAHO no. 975, 874, at 892-93 (1997)). Under the Interim Guidelines, timeliness failures are subject to the notice and correction requirements of INA § 274A(b)(6) only if "the date that the particular section should have been completed falls on or after September 30, 1996." See Interim Guidelines § A.4. September 25, 1996, is not on or after September 30, 1996; therefore, Respondent's timeliness failure with respect to section 1 of Ambriz's I-9 form is not technical or procedural under the Interim Guidelines, and Respondent was not entitled to notice or an opportunity to correct that failure. Therefore, I reaffirm my prior finding that Respondent is liable under INA § 274A(a)(1)(B) with respect to this failure.

Complainant need not prove that both sections of the I-9 form were completed in an untimely manner in order to prove that a timeliness failure occurred; untimely completion of section 1 is sufficient, standing alone, to prove a single timeliness violation. Had Complainant divided Respondent's timeliness failures into separate counts–one count seeking penalties for Respondent's failures to complete section 1 of the I-9 form on the date of hire and a second count seeking separate penalties for Respondent's failures to complete section 2 of the I-9 form within three business days of hire–it would be necessary, with respect to the second count, to determine whether the third "business day" after Ambriz's hiring was Saturday, September 28, 1996, or Monday, September 30, 1996; however, such is not the case. Instead, Complainant chose to allege all timeliness failures in a single count, for which it seeks only a single civil monetary penalty. Both the NIF and the Complaint have indicated that Respondent's timeliness failures were being charged as violations of 8 C.F.R. § 274a.2(b); moreover, Complainant's discovery requests put Respondent on clear notice that Complainant intended to allege untimeliness with respect to section 1 of Ambriz's I-9 form, as well as section 2.

Accordingly, the Court declines to reconsider its previous finding that Respondent is liable under INA § 274A(a)(1)(B) for the timeliness failure alleged at Count II ¶ B of the Complaint. Count II ¶ B shall not be dismissed, and Respondent's motion to reconsider is hereby DENIED.

V. CONCLUSION

In conclusion, Respondent's motion to reconsider is DENIED. While the INS' failure to comply with the notice and correction procedures of its Interim Guidelines is legally actionable, Respondent has not persuaded me that the agency's failure was intentional, thereby necessitating or justifying dismissal of the Complaint *in toto*. Rather, I find that the appropriate sanction is to compel the INS to comply with section B.6.b. of the Interim Guidelines by withdrawing from the Complaint any and all allegations charging Respondent with liability for verification failures defined by the Interim Guidelines as technical or procedural

in nature. Because Complainant had already withdrawn all such allegations from the Complaint, with Respondent's consent, prior to the filing of Respondent's motion to reconsider, the Court is not disposed to grant any further relief to Respondent at this time. Further, the violation alleged at Count II ¶ B of the Complaint is not technical or procedural within the meaning of INA § 274A(b)(6). Consequently, Count II ¶ B need not be withdrawn by Complainant, and shall not be dismissed by the Court.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE