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

February 13, 2003

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 02A00023
YIN TIEN CHEN INDIVIDUALLY AND WINNING ORCHIDS LLC, LTD., Respondent.	)	

PARTIAL SUMMARY DECISION AND ORDER
WITH REQUEST FOR ADDITIONAL INFORMATION

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a, in which the United States is the complainant, and Yin Tien Chen (Chen) individually and Winning Orchids LLC, Ltd. (Winning Orchids) are the respondents. The Immigration and Naturalization Service (INS or the Service) filed a single-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that the respondents hired or, alternatively, continued to employ an alien, Chen Yu Wen, knowing him to be unauthorized to work in the United States, in violation of Section 274A(a)(1)(A) of the INA, 8 U.S.C. § 1324a(a)(1)(A), or, alternatively, § 1324a(a)(2) and 8 C.F.R. § 274a.3. Chen and Winning Orchids filed an answer denying the allegations and requesting that the complaint be dismissed.

INS has filed a motion for summary decision with exhibits, in response to which Chen and Winning Orchids have filed a memorandum in opposition with exhibits. The motion is ripe for adjudication.

II. EVIDENCE CONSIDERED

Both parties identified their exhibits alphabetically. In order to distinguish between them I have accordingly redenominated them respectively as CXs in the case of complainant's exhibits and RXs in the case of respondent's exhibits. In support of its motion, INS offered the following exhibits: CXA) a certified copy of a two-page Information filed in the United States District Court for the District of Hawaii, dated November 28, 2000; CXB) the transcript of a Hearing on Motion to Withdraw Not Guilty Plea and to Plea Anew before a United States Magistrate Judge consisting of 16 pages; and CXC) a certified copy of a three-page document dated December 8, 2000, captioned Judgment in a Criminal Case, signed by the Honorable Barry M. Kurren of the United States District Court, District of Hawaii.

Chen's memorandum was accompanied by the following exhibits: RXA) a Notice to Appear at Removal Proceedings, INS Form I-862, dated November 11, 2000, and addressed to Yin Tien Chen; RXB) an order of the Immigration Judge dated June 1, 2001, captioned In the Matter of Yin Tien Chen, Case Number A77 054 439; RXC) a Record of Sworn Statement, INS Form I-867A, dated November 10, 2000, referencing File Number 76 599 872, consisting of 7 pages; and RXD) a facsimile transmittal cover sheet dated November 16, 2000, from the INS office in Kona International Airport purporting to transmit three additional pages; attached to the cover sheet is a one-page document labeled "INS Inspection Results" dated February 25, 1999.

I have also considered the pleadings and all other materials of record in order to rule on the instant motion.

III. FACTS ESTABLISHED BY THE RECORD

Chen is a citizen of Taiwan residing temporarily in the state of Hawaii. He holds an E-2 non-immigrant treaty investor visa and is in the business of growing orchids; his memorandum says that around April 2000 he invested over a million dollars in an orchid farm owned and operated by Winning Orchids. The record does not disclose whether Winning Orchids has any other principals.

Chen and another Taiwanese citizen named Chen Yu Wen were stopped upon their arrival at Honolulu International Airport on China Airlines Flight 18 from Taipei in November 2000. Both had been in Hawaii on previous trips as well. Wen gave a sworn statement before an INS inspector (RXC) in which he said that on this trip he had left Taiwan on November 10, 2000, to work in Hilo. He said he had a visitor visa, but that his true intent when he applied for it was to work in the field of greenhouse construction. Wen said he had worked in Hawaii on previous occasions, but the company he used to work for was no longer in business. He said he also worked previously in Hilo building a greenhouse for Chen from August to November 2000.

For that job the money was sent directly to Wen's account in Taiwan. Wen said that on this trip he would be staying with Chen, who would provide him with room and board, and that he intended to remain for about three months, during which time he would spend 40 hours a week advising local workers and overseeing the construction of a greenhouse. Wen said that Chen had promised to pay him 70,000 Taiwanese dollars per month, to be deposited into his Taiwanese bank account by Chen's company in Taiwan, and that Chen had also purchased his plane ticket. Wen said that because he didn't have a working visa, he told the primary immigration inspector he had come for sightseeing.

On November 11, 2000, Chen was issued a Notice to Appear in Immigration Court charging that he knowingly encouraged, induced, assisted, abetted, or aided Wen and another alien named Shun Tsai Chang to enter or try to enter the United States at or near Honolulu in violation of law (RXA). Chen was also charged by Information in the Hawaii District Court on November 28, 2000, with unlawfully hiring and recruiting for employment an alien identified as C.Y.W. while knowing the alien was unauthorized for employment (CXA). Chen was convicted of that charge pursuant to a plea of guilty, and was assessed the maximum criminal monetary penalty under 8 U.S.C. § 1324a(f) of $3,000. (CXB, CXC). Although that section of the statute also authorizes up to six months in prison, Chen was not sentenced to any prison time. Immigration Judge Dayna Dias subsequently terminated the immigration proceedings against Chen on June 1, 2001 (RXB). On December 5, 2001, INS served Chen with a Notice of Intent to Fine (NIF), in response to which Chen filed a Request for Hearing on January 3, 2002. INS filed its OCAHO complaint on April 8, 2002, requesting a cease and desist order, a civil money penalty in the amount of $1,561, and any other appropriate relief.

IV. THE INSTANT MOTION

The Service's motion asserts that Chen's conviction for unlawfully hiring Wen in violation of 8 U.S.C. § 1324a(a)(1)(A) precludes him from further civil litigation of the same issues because Chen necessarily admitted all the facts material to this case by pleading guilty in the district court. Accordingly INS says there is no genuine issue of material fact in dispute and the government is entitled to judgment as a matter of law.

Chen's response contends that the motion should be dismissed and that there are many issues of fact. Chen argues that 1) the immigration judge terminated proceedings against him; 2) he was placed under "severe duress" to plead guilty; 3) Wen was actually an independent contractor; and 4) he has a defense of good faith. Chen also claims he did not clearly or unconditionally admit that he knowingly hired Wen in violation of the law, and that he admitted to knowingly employing Wen unlawfully only because "it was required as part of his elocution [sic] when he accepted the plea agreement."

V. APPLICABLE STANDARDS

A. Summary Decision

Under OCAHO Rules of Practice and Procedure,[1] an administrative law judge may enter summary decision for either party where the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact, and that the party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c). Summary decision may also issue based upon admissions. *United States v. Spring & Soon Fashions, Inc.*, 8 OCAHO no. 1003, 102, 110 (1998). The party seeking summary decision bears the initial burden of showing the absence of a material factual dispute. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). The burden of production then shifts to the non-moving party to show specific facts demonstrating that there is a genuine issue of fact. 28 C.F.R. § 68.38(b).

Only facts which might affect the outcome are deemed to be material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine only if it has a real basis in the record. *Matsushita Elec. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986). Argument of counsel in a legal memorandum or brief is not evidence, and therefore does not create an issue of fact capable of defeating an otherwise valid summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001), citing *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982). The principles and purpose underlying the concept of summary disposition would be defeated if unsupported argument in a memorandum were sufficient to defeat such a motion. *United States v. Flores-Martinez*, 5 OCAHO no. 733, 79, 82 (1995).[2]

B. The Consequences of a Guilty Plea

As a general rule, a person convicted of a criminal offense pursuant to a plea of guilty is precluded from

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[1] 28 C.F.R. Pt. 68 (2001).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

denying the facts necessarily adjudicated based on that conviction. A defendant's attempts to contradict the factual basis of a valid plea agreement thus ordinarily will fail. *United States v. Morrison*, 113 F.3d 1020, 1021 (9th Cir. 1997), citing *United States v. Mathews*, 833 F.2d 161, 165 (9th Cir. 1987). In *Mathews*, for example, the court squarely held that a guilty plea conclusively proves the factual allegations contained in the indictment, so that the defendant there was not permitted to challenge the factual basis for his plea. 833 F.2d at 165. As the Supreme Court observed in *Mabry v. Johnson*, 467 U.S. 504, 508 (1984),

> It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. It is also well settled that plea agreements are consistent with the requirements of voluntariness and intelligence–because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.

Cf. United States v. Broce, 488 U.S. 563, 569 (1989) (noting that a guilty plea "comprehend[s] all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence"). A defendant's post-conviction effort to challenge the validity of a plea agreement will result only in a limited inquiry into "whether the underlying plea was both counseled and voluntary." 488 U.S. at 569. If the answer is affirmative, then the defendant is precluded from collaterally attacking the conviction. *Id.*

A defendant who wishes to challenge the validity of his plea, moreover, is ordinarily expected to do so in the original proceeding, on direct appeal, or, if in custody, by way of attack pursuant to 28 U.S.C. § 2255. *United States v. $31,697.59 Cash*, 665 F.2d 903, 906 (9th Cir. 1982). The underlying policy of providing finality and "an end to seemingly interminable litigation" requires this result. *Id.* Thus in *United States v. Timmreck*, 441 U.S. 780, 784 (1979), the court refused to allow a collateral attack on a guilty plea where the respondent had failed to raise his claim on direct appeal. A collateral attack, said the Court, could not "do service for an appeal." *Id*., quoting *Sunal v. Large*, 332 U.S. 174, 178 (1947). Writing for a unanimous court, Justice Stevens explained,

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> [T]he concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas. 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.'

441 U.S. at 784 (quoting from his dissent as a Circuit Judge in *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971).

OCAHO case law has also considered the question of the preclusive effect of a previous conviction. In *United States v. Alvarez-Suarez*, 4 OCAHO no. 655, 565 (1994), the administrative law judge observed that while acquittal on a criminal charge does not bar a civil action by the government based on the same facts, "[p]reclusion is now frequently allowed after judgments of conviction, both in civil actions between the former criminal defendant and the government and in civil actions by private parties against the former defendant." 4 OCAHO at 573. Although the administrative law judge in *United States v. Noriega-Perez*, 6 OCAHO no. 859, 355, 361 (1996), declined to treat a guilty plea on the same facts as having conclusive effect in a civil document fraud proceeding under 8 U.S.C. § 1324c, he apparently reached the same result on the independent ground that the plea was an admission.

VI. DISCUSSION AND ANALYSIS

A. Whether INS Met its Initial Burden

Chen pleaded guilty to violating 8 U.S.C. § 1324a(a)(1)(A) by hiring Chen Yu Wen, an alien not authorized for employment in the United States, knowing that Wen was not authorized for employment (CXB). INS now seeks a civil money penalty and a cease and desist order against Chen for violation of the same statute, 8 U.S.C. § 1324a(a)(1)(A), by hiring the same unauthorized alien. The elements required to impose criminal penalties under 8 U.S.C. § 1324a(f)(1) are the same elements as are required for assessing civil monetary penalties under 8 U.S.C. § 1324a(e)(4). The motion seeks relief only against Chen, not against Winning Orchids. The Service's initial burden is met; thus the burden of production shifts to Chen to demonstrate the existence of a genuine issue of material fact.

B. Whether Chen Demonstrated a Genuine Issue of Material Fact

1. Termination of the Removal Proceedings

Chen's first contention in response to the motion is that it is "critical" that the Immigration Judge terminated the removal proceedings against him. The Notice to Appear in the removal proceeding (RXA) charges Chen with aiding Wen and another alien, Shun Tsai Chang, to enter the United States in violation of law. It makes no allegations with respect to the unlawful employment of aliens. The Immigration Judge's one-page form termination order (RXB) states no grounds for the termination and the grounds are not self evident.

Chen's memorandum contends, however, that the immigration proceedings were terminated because the Service did not meet its burden of proof on the issue of removability and that the Service "attempted to introduce the same argument" that Chen's guilty plea resolved the issue there. Chen's memorandum does not otherwise explain why termination of immigration proceedings based on allegations of alien smuggling would have any effect on the resolution of the issue of unlawful employment. His contentions as to why the proceedings were terminated, moreover, are not supported by evidence; it is well established that argument of counsel is not evidence for purposes of a summary judgment motion. *Arpin*, 261 F.3d at 923; *Estrella*, 682 F.2d at 819-20. The reason removal proceedings against Chen were terminated is in any event not material because those proceedings were not predicated on any issue related to the employment of unauthorized aliens.

2. Duress

Next, Chen argues that the Service and the U.S. Attorney's Office put him under "severe duress" to plead to a lesser charge than alien smuggling. The Random House Dictionary of the English Language (2d ed. 1983) defines duress as "compulsion by threat or force, coercion, constraint." Black's Law Dictionary (7th ed. 1999) defines it strictly as "the physical confinement of a person or the detention of a contracting party's property," and broadly as "the threat of confinement or detention, or other threat of harm, used to compel a person to do something against his or her will or judgment." These are, of course, serious charges to make against law enforcement officers.

The Ninth Circuit recognizes two types of duress. The first, an affirmative defense in a criminal case, places the burden of proof on the party claiming it. *United States v. Hernandez-Franco*, 189 F.3d. 1151, 1157 (9th Cir. 1999), *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991). The elements which must be demonstrated in order to establish such a defense are 1) an immediate threat of death or serious bodily injury, 2) a well-grounded fear that the threat will be carried out, and 3) lack of reasonable opportunity to escape the threatened harm. *Hernandez-Franco*, 189 F.3d at 1157, citing *United States v. Moreno*, 102 F.3d 994, 997 (9th Cir. 1996). The circuit also recognizes a second, variant form of duress in a commercial context which may render a contract voidable, not void. Economic duress also requires that there be improper or illegal coercive acts or threats on the part of the opposing party. *International Tech. Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1390-91 (9th Cir. 1998).

The burden of proof is on the party claiming economic duress, and the doctrine requires that the victim manifest his intention to avoid the contract to the other party within a reasonable time after the duress ceases or lose the power of avoidance. *Id.* at 1392. There is no suggestion that Chen ever sought to set aside his plea in the district court on the grounds of duress, or indeed on any other grounds. No evidentiary materials were furnished to support Chen's allegation of duress. It is clear, however, that the "duress" of which he complains bears no relationship to the types of duress recognized in the circuit. Chen made no allegation that the Service or the U.S. Attorney forcibly confined him, detained his property, or compelled him by threat or force to enter a plea. He identified no wrongful coercive act on the part of any law enforcement agent. Rather, he says only that if he "took the time" to go to trial his investment would be jeopardized because he had local workers and parts waiting for Wen's instructions to build the greenhouse. The record reflects that Chen had the assistance of counsel in deciding to enter a plea. His allegations do not demonstrate duress in any legally cognizable form. In the absence of an affidavit or other evidence, moreover, the only evidence pertinent to this allegation is that found in the transcript of Hearing, pp. 5-6, which reflects the following exchange:

> THE COURT: Okay. Has anyone made any other or different promise or assurance of any kind in an effort to induce you to plead guilty?
>
> THE DEFENDANT: No.
>
> THE COURT: Has anyone attempted in any way to force you to plead guilty or to pressure you or threaten you in any way?
>
> THE DEFENDANT: No.

Chen failed to present any concrete particulars which raise an issue of duress and has consequently presented no factual issue with respect to that claim.

3. Wen's Status as an Independent Contractor

Chen's next assertion is that Wen was actually an independent contractor retained by a different company, Jet Green, to supervise construction of Chen's greenhouse. Chen's memorandum argues, without evidentiary support, that the allegations of the indictment are incorrect and that the factors enumerated in the test set out under 8 C.F.R. § 274a.1(j) must be applied to the facts he alleges in order to make a determination as to whether Wen was an independent contractor. Again, there is no affidavit or other evidence supporting the version of events given in Chen's memorandum. The transcript, in contrast, reflects the following at pp. 12-13:

> THE COURT: Well, do you agree, Mr. Chen, that you did hire Mr. Wen? Is that correct? To work for you.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay.

Chen's admission that he hired Wen to work for him is thus uncontradicted by any probative evidence, and he has raised no genuine issue of material fact as to this issue.

4. Good Faith

Chen next contends that he has "at minimum" a good faith defense because he believed Wen was authorized to enter the United States on a B-1 nonimmigrant visa for business. This assertion is irrelevant, however, because Wen's authorization to enter the United States has not been disputed and has never been in issue. Authorization to enter the United States is not the same as authorization to be employed. Chen also argues that RXD shows that in 1999 INS admitted Hong Nan Lee, who was Wen's supervisor at Jet Green, and allowed Lee to supervise greenhouse construction for another orchid grower in Hilo. RXD, which purports to have three pages attached, has only one. It is an INS printout form and reflects that Lee was admitted for thirty days to give technical advice and that he was being paid by a company in Taiwan. The page is insufficient to raise a genuine issue of material fact because the undisputed admission of another alien for 30 days in 1999 has no bearing on the resolution of any issue in this case.

The only good faith defense available to a knowing hire violation under 1324a(a)(1)(A) is that contained in § 1324a(a)(3), which provides that an employer who shows good faith compliance with the requirements of subsection (b) [the employment eligibility verification system, 8 U.S.C. § 1324a(b)(1)-(3)] thereby establishes an affirmative defense to a knowing hire charge. There is no suggestion that Chen complied in any way, in good faith or otherwise, with the verification requirements, and I conclude therefore that he would not have been able to demonstrate any good faith defense even had he sought to raise one in the criminal case.

5. Did Chen make an Unconditional Admission

Chen argues that it is "not clear" that he admitted to unlawful employment of Wen during the plea allocution or that he did so "unconditionally." If Chen is attempting to suggest that his plea was a conditional one, he is mistaken as to whose responsibility it is to make the necessary showing: it is the obligation of the party resisting summary decision to produce some factual predicate for the denial of the motion.

Federal Rule of Criminal Procedure 11(a) is strictly construed in the Ninth Circuit. *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997); *United States v. Cortez*, 973 F.2d 764, 766 (9th Cir. 1992). Rule 11(a)(2) specifically requires a conditional plea to be made in writing and have the consent of the court and the government. Chen has not suggested that these requirements were met, nor has he furnished any evidence that he attempted to enter a conditional plea. One of the principal reasons for having the requirement of a writing for a conditional plea is that it prevents post-plea claims that a defendant's plea should retroactively be considered to have been conditional. *United States v. Carrasco*, 786 F.2d 1452, 1454 (9th Cir. 1986). There is no hint in the record that Chen's plea was in any way conditional. Neither does the record show that the admission was not made; indeed, it is clear from the transcript at pp. 13-14 that without the admission the plea would not have been accepted:

> MR. KUBO [ASSISTANT U.S. ATTORNEY]: Your Honor, a material element is that the Defendant must acknowledge that he knowing, he did so knowing the alien is unauthorized.
>
> THE COURT: Well, that's the – why do you always want to ask my next question? And at the time that you hired him, Mr. Chen, did you know that he was an alien not lawfully admitted to the United States?
>
> THE DEFENDANT: I did not pay any attention to his passport.
>
> THE COURT: Well, you also knew that he was an illegal alien in this country; isn't that correct?
>
> MR. KLEIN [DEFENSE COUNSEL]: I think that, may I correct what the Court just said? It wasn't he was an illegal alien in the country because he came in here on a tourist visa. What it was is that he was, he wasn't authorized to work in the United States. So I don't want to confuse him by indicating that (inaudible).
>
> THE COURT: Well, I think he's going to have to admit to me that he was not lawfully, that he knew that he was not lawfully admitted for permanent residence and not authorized to be employed within the United States. Do you admit that you knew that at the time he was, that you hired him and he was working for you?
>
> THE DEFENDANT: For that, I knew.
>
> THE COURT: You knew that. Mr. Kubo, you think I need to cover anything else with him?
>
> MR. KUBO: No, Your Honor.

> THE COURT: Okay. Mr. Klein, do you know of any reason why the Court should not accept Mr. Chen's plea?
>
> MR. KLEIN: No, Your Honor.
>
> THE COURT: So, Mr. Chen, to the information that's been filed against you, what is your plea – guilty or not guilty?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Okay. Well, it appears to me, Mr. Chen, you understand the nature of the charge and the consequences and that there is a factual basis for the plea. So I will accept your guilty plea to the charge of violating Title 8, U.S. Code, Section 1324(A)(1)(a) [sic] pertaining to the hiring of illegal aliens and I judge you guilty of that offense.

Chen has not claimed that he did not have the effective assistance of counsel in entering his plea, or that he was unaware of the consequences of pleading guilty. The transcript reflects the following exchange at p. 4:

> THE COURT: Have you discussed those charges and all the facts surrounding those charges with Mr. Klein?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you satisfied with the representation you've received from Mr. Klein in this case?
>
> THE DEFENDANT: Yes, I'm satisfied.

There is thus no evidence that Chen's plea was conditional, or that he did not make the admission.

6. Chen's reasons for entering the plea

Finally, Chen acknowledges the admission, but contends that he made it only because he believed it was required in order to get the plea agreement. He is correct; it was required. Nevertheless he made the admission, and Judge Kurren explicitly found, as Rule 11(b)(3) required him to do, that there was a factual basis for the plea. Chen acknowledged that he discussed the charges and the facts with his attorney. Yet he now says that had the matter gone to trial, he would have testified that he believed Wen to be authorized and likely would have been exonerated.

Conspicuous by its absence is any affidavit denying knowledge of Wen's unauthorized status. Chen has never explicitly denied under oath that he hired Wen knowing him to be unauthorized for employment in the United States. To file such an affidavit would, of course, put Chen in the awkward position of making conflicting representations under oath in two different fora. Although Chen may now believe that he made a "strategic miscalculation," he is raising his concerns too late and in the wrong forum. *Broce*, 488 U.S. at 571. Whether Chen's admissions are true, or were made simply in an effort facilitate his plea agreement, are "matters well behind us." *Richey v. IRS*, 9 F.3d 1407, 1413 (9th Cir. 1993).

The incentive to every defendant who enters a guilty plea probably includes the wish to avoid more serious charges, or the possibility of incarceration, or the inconvenience of a full-scale trial. Were it not for such incentives, few defendants would enter a plea at all. Chen had the right to challenge his indictment by going to trial. By waiving that right and entering a plea, Chen agreed to accept the penalty for knowing hire of an unauthorized alien and thereby avoid the potential for incarceration. Both sides obtain advantages when a guilty plea is exchanged for sentencing concessions. That is the nature of every plea bargain. As observed in *Mabry*, 467 U.S. at 508, a plea agreement is as voluntary as any other bargained-for exchange.

C. Whether the Service is Entitled to Judgment as a Matter of Law

I conclude for the reasons stated that Chen will not be permitted in this case to contradict the facts he necessarily admitted for purposes of his plea bargain. Chen is therefore collaterally estopped in this proceeding. *Cf. $31,697.59 Cash*, 665 F.2d at 904-05. I note that this conclusion comports with the standard generally applicable in the circuit to questions as to when to apply collateral estoppel. *Richey*, 9 F.3d at 1410, citing *Montana v. United States*, 440 U.S. 147 (1979). The *Montana* test requires three inquiries: 1) whether the issues presented are substantively the same in the present and prior litigation; 2) whether controlling facts or legal principles have changed significantly since the first judgment; and 3) whether "other special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155.

First, the issues presented in the instant civil case against Chen are indeed substantively the same as they were in the previous criminal case. Second, the controlling facts and legal principles in this case remain the same as they were when Chen entered his guilty plea. The third element of the *Montana* test, whether other special circumstances warrant an exception to the normal rules of preclusion, might have required a more rigorous inquiry had Chen actually provided any evidentiary support for the allegations he made his memorandum. He did not do that.

The result comports as well with the general principles of judicial estoppel. Judicial estoppel, in contrast to collateral estoppel, generally precludes a party from arguing inconsistent positions in situations where that party has gained an advantage from taking one position, then attempts to gain another advantage by subsequently changing that position. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). It is an equitable doctrine intended to foster "the orderly administration of justice and regard for the dignity of judicial proceedings" and prevent parties from "playing fast and loose with the courts." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), quoting *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988) (citations omitted). Chen gained an advantage from taking a plea in the criminal case; the position he seeks to argue here is clearly inconsistent with the position he took in that case and will not be entertained. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

Where a party fails to set forth specific facts or identify with reasonable particularity the evidence precluding summary decision, the motion must be granted. *Far Out Prod., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). I find that the Service has met its burden of demonstrating the absence of any material factual issue, and that Chen has failed to provide any evidence to the contrary, and accordingly that INS is entitled to summary decision as a matter of law.

VII. CIVIL MONEY PENALTIES AND OTHER RELIEF

A cease and desist order and civil money penalties are mandatory for the violation established. 8 U.S.C. § 1324a(e)(4). The statute provides a tiered penalty system that assigns higher penalties where a respondent has been the subject of a previous order or orders, 8 U.S.C. § 1324a(e)(4)(ii) and (iii), but gives no further guidance in setting an appropriate monetary penalty. Administrative law judges therefore have discretion in assessing those penalties. *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998); *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1186-87 (1998); *United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993).

The Service has proposed a civil money penalty of $1,561, but has given no explanation of how or why it arrived at that figure. I have consulted the INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties,[3] issued August 30, 1991, to see whether those Guidelines would help clarify the basis for the proposed penalty. Because I am unable to discern the rationale for this proposal and because the paucity of evidence prevents me from considering the matter *de novo*, the entry of a final order and the imposition of a civil money penalty will be delayed pending submission

[3] The Guidelines were intended to standardize INS' penalty-setting process. Guidelines at 1, 3. They are not binding on OCAHO administrative law judges and are not the only consideration in setting penalties, *United States v. Monroe Novelty, Inc.*, 7 OCAHO no. 986, 1007, 1016-17 (1998), but they are sometimes useful in understanding the rationale behind INS's penalty request.

by the parties of any supplemental information they believe relevant to the issue.

VIII. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings, testimony, documentary evidence, memoranda, briefs, and arguments submitted by the parties. All motions and requests not previously disposed of are hereby denied. In addition to findings and conclusions already stated, I find and conclude that:

Findings of Fact

1. Respondent Yin Tien Chen is a citizen of Taiwan.

2. Respondent Winning Orchids LLC, Ltd. is the owner and operator of an orchid farm on the island of Hawaii.

3. Chen holds an E-2 non-immigrant treaty investor visa.

4. Chen is in the business of growing orchids.

5. Chen invested over $1 million in an orchid growing operation owned by Winning Orchids.

6. Chen entered the United States in November 2000.

7. Chen Yu Wen is a citizen of Taiwan.

8. Wen entered the United States in November 2000 on a B-1/B-2 tourist visa.

9. Wen told INS inspectors that he planned to work for Yin Tien Chen in Hawaii.

10. In November 2000, the U.S. Attorney for the District of Hawaii filed an Information alleging that Chen had unlawfully hired an alien identified as Chen Yu Wen, knowing him to be unauthorized to work in the United States.

11. Pursuant to plea of guilty, Chen was convicted in United States District Court in December 2000 of unlawfully hiring Wen.

12. As part of his plea, Chen admitted to the United States magistrate judge that he had hired Chen Yu Wen to work for him.

13. As part of his plea, Chen admitted that he knew Wen was not authorized for employment in the United States.

14. Chen was sentenced to pay a $3,000 criminal penalty under 8 U.S.C. § 1324a(f).

15. After Chen's conviction, INS filed a civil complaint with OCAHO against him and Winning Orchids LLC alleging that they had violated 8 U.S.C. § 1324a(a)(1)(A) or, alternatively, 1324a(a)(2).

Conclusions of Law

1. Yin Tien Chen is a person or entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. Winning Orchids LLC, Ltd. is a person or entity within the meaning of 8 U.S.C. § 1324a(a)(1).

3. The INS is authorized by 8 U.S.C. § 1324a(e)(1) to be the complainant in this proceeding.

4. All conditions precedent to the commencement of this action have been satisfied.

5. At the time Chen hired him, Chen Yu Wen was an unauthorized alien as defined in 8 U.S.C. § 1324a(h)(3).

6. The INS submitted a motion for summary decision that was supported as required by 28 C.F.R. § 68.38(a) and (b).

7. Because he pleaded guilty to violating 8 U.S.C. § 1324a(a)(1)(A) by hiring Chen Yo Wen, an alien not authorized for employment in the United States, knowing that Wen was not authorized for employment, Chen is precluded from denying any of the facts necessarily encompassed in that conviction.

8. Chen failed to set forth specific facts showing that there is a genuine issue of material fact remaining for a hearing, as provided in 28 C.F.R. § 68.38(b).

9. There are no issues of material fact, and the United States is entitled to summary decision pursuant to 28 C.F.R. § 68.38(c).

To the extent that any statement of material fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth herein as such.

ORDER

The complainant's motion for summary decision should be, and hereby is, granted in part as to the issue of liability. Respondent Yin Tien Chen will be ordered to cease and desist from further violations of 8 U.S.C. § 1324a. The parties are requested to submit on or before March 17, 2003, any additional information they believe pertinent to the issue of civil money penalties. Each party will have 15 days thereafter to respond to the other party's filing.

SO ORDERED.

Dated and entered this 13th day of February, 2003.

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Ellen K. Thomas
Administrative Law Judge