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

UNITED STATES OF AMERICA, Complainant, v. WIDOW BROWN'S INN OF PLUMSTEADVILLE, INC. t/a WIDOW BROWN'S INN, and WIDOW BROWN'S INN, INC. t/a WIDOW BROWN'S INN, Respondents.	)))))))))))))	8 U.S.C. §1324a Proceeding Case Nos. 90100261-62

FINAL DECISION AND ORDER
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TABLE OF CONTENTS

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FINAL DECISION AND ORDER
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MARVIN H. MORSE, Administrative Law Judge

Appearances: Donald V. Ferlise, Esq., for
Complainant.
Lawrence H. Rudnick, Esq., for
Respondent.

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA)[1] adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated

[1] Pub. L. No. 99-603, 100 Stat. 3359 (1986), enacted, as Section 101 of IRCA, Section 274A of the Immigration and Nationality Act of 1952 as amended, codified at 8 U.S.C. §1324a, amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

the prohibitions against unlawful employment and/or the record- keeping verification requirements of the employer sanctions program.

II. *Procedural Summary*

A. *Background Information*

The Widow Brown's Inn, Inc., t/a Widow Brown's Inn, operates two restaurants in Pennsylvania, located at Stockertown and Wescosville. Another corporation, Widow Brown's of Plumsteadville Inc., t/a Widow Brown's Inn, operates a third restaurant in Plumsteadville, Pennsylvania. John R. Nyari is the president of both corporations, and his son, John Nyari, is the general manager at all three locations.[2] The events at issue in this case took place primarily in May and June, 1988. During the relevant time period, the two corporations together employed between 111 and 160 employees.

On February 3, 1989, the Immigration and Naturalization Service (Complainant or INS) served Notices of Intent to Fine (NIF) alleging violations of the employment sanctions provisions of IRCA at the Stockertown and Plumsteadville locations.

B. *The NIFs, The Requests for Hearing and The Answers*

The NIF for Stockertown alleged that the employer unlawfully employed two named individuals not authorized for employment in the United States (Count I), failed to comply with the verification requirements of IRCA by failing to prepare and present employment eligibility verification forms (Forms I-9) for those two and eleven others (Count II), and failed to properly complete the forms for seventeen other employees (Counts III and IV).

The NIF for Plumsteadville alleged that the employer unlawfully employed a single named individual not authorized for employment in the United States (Count I), failed to comply with the verification requirements of IRCA by failing to prepare and present Forms I-9 for that individual and ten others (Count II), and failed to properly complete the forms for six other employees (Count III).

[2] For reasons not explained, the Nyari family rejects identifying father and son as Sr. and Jr., or using other distinguishing appellations. For convenience, the senior Nyari is identified in this Decision and Order as JRN, his son as JN.

Upon receipt of the NIF, each corporation timely requested a hearing before an administrative law judge. 8 U.S.C. §1324a(e)(3)(A). On August 22, 1990, INS filed two substantially identical complaints in the Office of the Chief Administrative Hearing Officer (OCAHO). On August 29, 1990, OCAHO issued its Notice of Hearing in each of two cases, advising of the filing of the Complaint and of my assignment to the case. That Notice was served on counsel for Widow Brown's Inn, Inc. on September 5 and on counsel for Widow Brown's of Plumsteadville, Inc. on September 4, 1991.

Timely Answers, filed in both cases on October 3, 1990, denied all allegations and asserted that the assessments sought were excessive. The Answers alleged as affirmative defenses that in violation of the Fourth and Fifth Amendments to the Constitution, INS searched premises of each corporation without warrant, probable cause or consent, and coerced statements from the putative employees.

C. *The Prehearing Conferences and the Motions for Summary Decision*

During the initial telephonic prehearing conference on December 20, 1990, the parties and the bench agreed to consolidate the cases, as contemplated by 28 C.F.R. §68.14 (1990), to be referred to as the Widow Brown's Inn cases; accordingly, the corporate respondents are referred to in this Decision and Order collectively as Respondent or Widow Brown's, with references to the Complaint and Answer in the singular. Among other interlocutory matters and as anticipated at the conference, on December 21, 1990 Respondent filed a Motion for Summary Decision.

Respondent claimed this proceeding was jurisdictionally flawed because INS did not first proceed by issuance of a citation. 8 U.S.C. §13224a(i)(2). Respondent's motion argued that INS, on behalf of the Attorney General, became aware of Widow Brown's alleged wrongdoing prior to June 1, 1988. Sometime before May 23, 1988, INS received an anonymous handwritten letter dated May 18, 1988. Respondent argued that the Attorney General had "reason to believe" a violation had occurred between June 1, 1987 and May 31, 1988, triggering a statutory citation warning requirement which operated as a condition precedent to civil penalty enforcement. 8 U.S.C. §1324a(i)(2). Respondent's claim relied on receipt by INS of the letter prior to May 23, 1988, shortly before the May 31, 1988 expiration of the statutory citation period. Respondent's claim also relied on the

Stockertown educational visit of May 23, 1988,[3] and the June 7, 1988 Stockertown and Plumsteadville employee surveys.[4]

Respondent's claim, that INS' failure to precede its NIF with a citation precluded any enforcement action, relied also on INS regulation 8 C.F.R. §274a.9(c). This regulation provides for a citation to issue "[I]f after investigation the Service determines" there has been a violation.

By its opposition filed January 29, 1991, relying in part on U.S. v. Mester Manufacturing Co., 1 OCAHO 18 (6/17/88), aff'd, Mester Manufacturing Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989), INS argued that not every alleged violation must be specified in a citation. INS emphasized that the cited regulatory provision required a citation to issue after an investigation only if INS determined there was a violation. INS noted that its regulation had been held to comport to the statute. U.S. v. New El Rey Sausage Co., Inc., 1 OCAHO 66 (7/7/89) at 8, modified by CAHO (on other grounds), aff'd, New El Rey Sausage Co., Inc. v. I.N.S., 925 U.S. 1153 (9th Cir. 1991). INS claimed, in effect, that it did not form a "reason to believe" conclusion by May 31, 1988, when the citation requirement expired by its terms; INS was unable to gather sufficient information in the short period between its receipt of the anonymous letter on May 18, the May 23 INS visit to Widow Brown's, and May 31. Therefore, INS was not required to issue a citation prior to this enforcement action.

By Order issued February 15, 1991, I denied Respondent's Motion For Summary Decision on the basis that the events described in the pleadings did not suggest that Complainant's failure to issue a citation breached the statute. 8 U.S.C. §1324a(i)(2). To grant the motion would have required the conclusion that INS, on behalf of the Attorney General, unreasonably failed to believe that there had been a violation of 8 U.S.C. §1324a. It appeared to me, rather, that before June 1, 1988 Complainant lacked a basis for determining [i.e., lacked a reason to believe] that Respondent was in violation of 8 U.S.C. §1324a.

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[3] Erroneously stated in the motion to have also been made at Wescosville.

[4] Erroneously stated in the motion to have also been made at Wescosville.

D. *Other Interlocutory Motions and Orders*

On March 11, 1991, Respondent filed a Motion to Suppress and Dismiss the Government's Complaint, asserting due process and Fourth Amendment violations. Respondent asserted that evidence with respect both to unlawful employment and paperwork violations was obtained in breach of Respondent's constitutional rights, and hence was inadmissible. Complainant's Opposition, filed March 25, argued that Respondent's motion misstated the facts, that INS had statutory and regulatory authority for its searches and that, in any event, documentary evidence was obtained through subsequent subpoenas. Complainant asserted also that there is no requirement to suppress evidence in a civil proceeding. The April 15, 1991 Order, confirming discussion at a prehearing conference of that date, recited as follows:

> I have denied Respondents' Motion to Dismiss, and have advised that I am not now prepared to foreclose the claim that evidence obtained incidental to an INS employee survey may not be, on a given set of facts, amenable or subject to a fourth amendment objection. In the case at hand, I can not determine prior to an evidentiary hearing whether such facts exist. I will not, however, conduct a separate fact inquiry on this issue, but will make a final determination of the suppression claim upon the close of a full hearing on the merits of the entire case.

On April 17, 1991, Complainant filed a Motion for Summary Decision. On the basis of affidavits attached and on inferences to be drawn from interposition of Fifth Amendment privilege claims in lieu of responses to discovery, INS contended that there was no genuine issue of material fact. Respondent's Opposition filed April 29 also included a Motion to Reconsider Denial of Respondent's Motion for Summary Decision. That pleading inter alia highlighted purported deficiencies in the affidavits relied on by Complainant, arguing, in effect, that there were genuine issues of material fact and reiterated its suppression and citation-bar arguments. On April 30, prior to filing of Complainant's May 3 pleading in response to Respondent, I issued this Order:

> I deny all the pending motions. Absent an evidentiary record I am unable to reach a conclusion on the prehearing issues raised by Respondents. Accordingly, I conclude that as to both substantive and paperwork allegations there are genuine issues of material fact, precluding even partial summary decision.

On May 6, 1991, Complainant filed a motion to amend the Complaint reassigning allegations, including the civil money penalty, as to one named individual (Sharon Faith Zeitz) from Stockertown to Plumsteadville.

E. *The Evidentiary Hearing and Post Hearing Filings*

The evidentiary hearing was held in Philadelphia, Pennsylvania on May 8 and 9, 1991. A motion to correct the transcript was granted on July 24. Opening briefs were filed by Complainant on September 3 (followed by a corrected copy dated September 11) and by Respondent on September 6; Complainant's reply brief was filed on September 23, Respondent's on September 27. By letter-pleadings dated December 9 and December 31, 1991, the parties addressed a recent Ninth Circuit IRCA decision, discussed infra at 34.

III. *Statement of Facts*

This section includes findings of facts, as discussed.

A. *Background Information*

The anonymous handwritten letter to INS stated in pertinent part:

> I am a U.S. citizen and I lost my job to the illegal aliens. the (sic) following addresses are (sic) have more illegal aliens AND CASH (emphasis in original) for illegal aliens. . . .

The letter reached INS Special Agent Thad A. Biggs (Biggs) sometime after May 18, 1988 but before May 23, 1988.

On May 23, Biggs conducted an educational visit[5] at Widow Brown's at Stockertown. Upon his request to speak with management personnel, an employee of Respondent led Biggs through the restaurant's kitchen to the manager's office. Biggs talked to Marjorie Gossner (Gossner), a Widow Brown's manager, explaining the employer sanctions handbook and procedures for filling out I-9s. Tr. 45. She indicated that Widow Brown's was aware of and in compliance with IRCA. Biggs wrote in a subsequent memorandum of investigation, "[a]t the time of the education and informational visit, this writer walked through the kitchen area of subject employer . . . and observed six Asian males working there." Tr. 120. INS made no other educational visits to Widow Brown's.

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[5] See Revised Immigration Officer's Field Manual for Employer Sanctions 11/20/87, II-B-1-b. Agents make educational visits to employers to describe the purpose of the employer sanctions provisions, review together with employer personnel the Handbook for Employers, and explain procedures regarding the Form I-9.

Harvey Flaxman, Bigg's Supervisory Special Agent, initiated an investigation of the Widow Brown's restaurants on May 25, 1988. He instructed Biggs to submit a cursory plan by June 1, 1988, entailing a brief outline of the investigation. The Widow Brown's file was endorsed "(C)ase placed in progress." Exh. P.

INS made no further contact with Widow Brown's until June 7, 1988. On that day, INS conducted what it labels employee surveys, but others call raids, at both the Stockertown and Plumsteadville locations, but not at Wescosville.

B. *Employment Survey at Stockertown Location*

Biggs was the designated case agent for the Stockertown Widow Brown's. He and Special Agents Walter Beddow (Beddow) and Kenneth Crane (Crane) arrived at 11:30 A.M. on June 7, 1991. The agents did not have a search warrant. All three agents wore suit coats or blazers, concealing their weapons.

Biggs and Beddow entered the restaurant reception area. Crane was stationed in a parking lot behind the restaurant, which was part of Respondent's commercial curtilage. This area was unencumbered by fences, no trespassing signs, or any other indicia of a privacy expectation. From his position, Crane could observe the rear door.

Biggs and Beddow identified themselves to the hostess, Heather Friedhoff (Friedhoff), and requested permission to conduct employee interviews. Friedhoff telephoned Sue Croyer (Croyer), Respondent's bookkeeper, for instructions on how to proceed. Croyer, in turn, unsuccessfully attempted to contact Gossner and JN. Eventually, on her own initiative, Croyer denied admission to the agents to the non-public area.

Meanwhile, as Biggs and Beddow waited for Croyer's response, Crane radioed Beddow for assistance. Beddow went outside and around the back of the building. Biggs remained in the lobby area and casually questioned Friedhoff. Friedhoff testified that the agents' entry into the lobby and subsequent behavior was professional and cordial.

Friedhoff had no specific knowledge of any illegal aliens, but she told Biggs and Beddow that it was the general perception among Widow Brown's employees that most of the Chinese employees were not authorized to work in the United States. Friedhoff supported her

statement on the basis of her work duties, including timecard oversight and wage distribution. She testified that the Chinese employees did not have timecards and received cash compensation, in contrast to the restaurant's North American employees.

While Biggs was in the lobby, Crane, outside in back, observed two apron-wearing Chinese exiting to take a break. Crane identified himself and despite a serious language barrier attempted to talk to them. Beddow, responding to Crane's radio call for assistance, went around the back to help him.

A third Chinese, Fa Sha Shao (Shao) stepped outside, saw Crane and Beddow with the other two Chinese, and immediately went back inside. He had intended to hide inside a refrigerator. Crane shouted to him, but he did not stop. Crane pursued him three to five feet inside the building and touched him. The parties disagree as to the character of that touching. Complainant asserted that Crane momentarily placed his hand on the man's shoulder, and then both spontaneously walked back outside together. According to Respondent, Crane "physically forc(ed) Fa Sha Shao outside." Resp. Brief at 8. Shao, however, did not recall being touched.

It is undisputed that, ultimately, three Chinese men and two INS agents were in the parking lot behind the building. They were joined by Biggs and Ting Chang (Chang), Respondent's kitchen manager. At his own initiative Chang, a permanent resident alien, acted as trans-lator. The agents released one of the three, determining that he was not an illegal alien. They took the remaining two, (Shao) and Tjen Yen Lee (Lee), into custody.

Shao and Lee asked for an opportunity to collect personal belongings from their living quarters in a nearby Widow Brown's building. The agents acquiesced but Croyer forbade entry. Biggs telephoned for state trooper assistance. After a trooper arrived, Croyer permitted Shao and Lee to go to their apartments, escorted by the INS agents. Complainant asserted that security was the sole purpose of the escort. In con-trast, Respondent claimed that the agents were improperly continuing their investigation. No additional evidence was garnered from the apartment entry.

The agents took Shao and Lee to the INS District Office, transferring them to the Philadelphia Police Administration Building, Roundhouse Holding Facility, where they spent the night. The next day, the aliens were returned to the district office where, with the assistance of inter-

preters, Records of Deportable Alien (Form I-213) were filled out and affidavits were taken, Records of Sworn Statements in Affidavit Form (Form I-215B). Exhs. D and H.

Lee's affidavit, Exh. H, stated inter alia that he entered the country illegally. It also stated that Lee was offered a job at Widow Brown's by the owner's son, and that the owner's son did not ask if he was authorized to work in the United States. According to Lee's affidavit, he never showed the owner's son any documents.

Shao's affidavit, Exh. D, stated inter alia that he entered the country illegally. It also stated that no one at the Widow Brown ever asked if Shao was authorized to work. According to Shao's affidavit, he never showed anyone at Widow Brown's any documents.

I do not find that the agents acted improperly. I do find that the two aliens were not authorized for employment in the United States.

C. *Employment Survey at Plumsteadville Location*

As to Plumsteadville, the parties are agreed that:

- the employment survey took place and was conducted by INS agents Linda Robinson Valentine (Valentine), Ernest Gresko (Gresko) and Albert Mentz (Mentz);
- Valentine and Gresko entered the restaurant through the main, public entry, while Mentz was stationed in the rear parking lot;
- the agents did not have a search warrant;
- an alien was taken into custody pursuant to the survey.

The parties' representations of other Plumsteadville events are largely irreconcilable. Material disparities are addressed below.

Special Agent Valentine was in charge of the Plumsteadville employer survey. She, Gresko and Mentz arrived at the restaurant on June 7, 1988 between 11:30 A.M. and 12:15 P.M. The agents drove through the restaurant's carport style canopied entrance and parked in a back parking lot.

All three carried weapons, concealed by their jackets. None was in uniform. Valentine and Gresko walked back to the entrance under the

carport and entered the front lobby. Mentz, physically the largest of the three agents, remained outside in back of the restaurant.

In the lobby Valentine and Gresko identified themselves to the hostess, Lorraine Felton (Felton). They asked to speak with the manager. In response, Felton brought an individual who claimed to be the manager. Although Agent Valentine recalled that he was introduced as Paul Nyari, it is undisputed that John Nyari [JN] was the individual introduced to the agents as the manager.

Valentine showed JN her INS credentials, and asked consent to go into the non-public areas of the restaurant to interview employees. The parties dispute the character of the agents' demeanor during this conversation.

JN and Paul Greenwald (Greenwald), Respondent's maintenance man, testified that the agents were overbearing. In reply to JN's inquiry as to whether the agents had a search warrant, and to his expression of doubt as to his own lack of authority to consent to government entry, JN said the agents claimed "they didn't need a warrant, that they were the United States government and they had jurisdiction." Tr. 488. JN recalled that Gresko, "cockily," Tr. 504, and with a "smirk", moved his jacket behind his hip, in order to "flash" his gun. Tr. 503. However, JN was not intimidated, Tr. 504, even though "all [the agents'] . . . guns were visible." Tr. 514.

Greenwald was on a ladder near the carport, when the agents walked to the restaurant entrance. Recalling that he saw the agents' holsters and guns, he conceded that possibly their weapons were exposed by the wind. Having characterized himself as an amateur hunter with weapons expertise, Greenwald testified with certainty that all the agents were wearing hip holsters. He then said that they were wearing shoulder holsters, finally changing back to hip holsters.

According to Greenwald, Valentine asked about his employment and citizenship status, without identifying herself. Greenwald asked her whether these were trick questions. Her response was "a little indignant and [she] said, just answer the question properly." Tr. 462. No one else recalled Greenwald's presence at this juncture.

In contrast, the agents denied making any remarks about juris-diction. Gresko testified that he always wore a hip holster and Valentine testified that she always wore a shoulder holster.

I reject as uncorroborated and highly improbable Greenwald's testimony regarding the alleged abusive display of arms. He was inconsistent, despite his self-proclaimed gun expertise.

The parties gave mutually exclusive versions of the consent to entry. JN said he never consented to INS entry into the kitchen area. INS asserted that JN, if not verbally then non-verbally, communicated consent to agent entry into the restaurant's non-public area. Valentine testified,

> . . . we identified ourselves to the manager and we asked if we could have permission to speak with the employees. He said yes, we could and he took us into the kitchen.

Tr. 548.

Gresko's corroborating testimony follows.

> At the point where the gentleman [JN] finished speaking to Agent Valetine, there was an exchange of glances on our part, and I'm sure a nodding of heads, to the extent that I was absolutely clearly sure that that gentleman had given us permission to survey the employees at that restaurant.

Tr. 569.

It is uncontroverted, that after his initial conversation with Valentine, JN, followed by Valentine, walked toward the kitchen area. I hold that even if JN did not give explicit verbal approval, through his demeanor he communicated permission to enter the non-public area of the restaurant.

At the same time, Gresko began questioning at least two employees in a public area, the bar. Shortly thereafter, he also walked toward the kitchen. At this point, the parties' versions again diverge. JN testified that as he and Valentine approached the kitchen, Mentz and three handcuffed Chinese employees, held "by their pants," Tr. 509, walked from the kitchen area toward the public area. According to JN, Valentine "tackled," Tr. 510, and "nailed [one of the aliens] right on the floor." Tr. 510. Felton testified only that Mentz left the kitchen accompanied by "at least two," Tr. 473, Chinese employees, who "seemed to have their hands behind their back [sic]." Tr. 473.

The agents testified that at that point none of them escorted any Chinese individuals from the non-public to the public area of the restaurant. On the stand, they were insistent also that their behavior was not violent, disruptive, or discourteous at any time during the

employee survey. Mentz and the other two agents also agreed that they did not join each other until Valentine and Gresko entered the kitchen.

Respondent's testimony about the interchange in the public area in front of the kitchen is vague and implausible. JN alone, unsupported by any other witnesses, recounted that Ms. Valentine "tackled" an employee. He failed to explain how one agent could hold three employees "by their pants". Furthermore, JN's dramatic and certainly memorable sequence is substantially uncorroborated, even though it occurred during the lunch hour when the restaurant was ostensibly filled with patrons and employees.

I find that, at this juncture, no agent escorted any alien from the non-public to the public area of the restaurant. Complainant's version of the episode is not only more credible, but is also consistent with the testimony of the Chinese cook, Hou Chan Kuo (Kuo).

Mentz, who was outside in back of the building, approached the screen door to the kitchen and began to talk with Kuo, who could speak rudimentary English. While still at the threshold, Mentz identified himself, and asked Kuo for work authorization documentation. Kuo indicated that the requested documents were in his apartment, and he could not leave his cooking duties to retrieve them. It is not certain whether Mentz explicitly asked Kuo if he was in charge, but he did ask permission to enter the kitchen, and Kuo then opened the door for him. He told Kuo that there were agents in the front of the restaurant. Not inconsistently, Kuo testified that no one ever asked permission to speak with him.

I find that Kuo's rudimentary English and his opening of the door for Mentz was sufficient to establish an invitation for entry. Therefore, I conclude that Kuo voluntarily consented to Mentz' entry.

Valentine and Gresko, corroborated by Kuo, said they entered the kitchen with JN, encountering Mentz for the first time since they had entered the building. Mentz and Gresko testified that JN entered the kitchen with Valentine and Gresko. Mentz said he did not lead the aliens from the kitchen area into the reception area with their hands behind their backs. Kuo agreed that Gresko did not use handcuffs when he escorted him through the public area of the restaurant to Kuo's apartment.

On consideration of all the testimony and having observed the witnesses, I find the agents' version overwhelmingly consistent and credible, in contrast to Respondent's. Accordingly, I adopt Complainant's account as the accurate version.

The parties fundamentally agree as to what happened in the apartment. Mentz and Kuo went to the restaurant's living quarters together. While there, Kuo looked for the requisite paperwork. JRN "came barreling up the steps screaming, ranting and raving. . . ." Tr. 586. JRN went back downstairs, calming down after Mentz explained the situation. When Kuo was unable to produce the relevant documents, Mentz arrested him. According to Valentine, just prior to their departure, JRN told her that the events at Plumsteadville caused no hard feelings, and he invited her to return to dine at a later date.

Kuo was taken to the INS District Office. With the assistance of an interpreter, a Record of Deportable Alien (Form I-213) was filled out and an affidavit (Form I-215B), Exh. F, was taken. Kuo's affidavit stated that he was never asked for, nor did he provide, any work authorization to Widow Brown's.

Valentine, Gresko and Mentz surmounted Respondent's allegations of government impropriety during the employee survey. I do not find that the agents acted improperly. I find that the aliens was not authorized for employment in the United States.

D. *Subpoena Compliance*

Subsequent to the June 7 events at Stockertown and Plumsteadville, Widow Brown's submitted Forms I-9 and other documents INS in response to administrative subpoenas, issued on June 8, 1988 and in August 1988. Exhs. A-1, A-2, B-1 and B-2.

IV. *Discussion*

A. *Identifying the Issues*

The principal issues are (1) whether INS had reason to believe prior to June 1, 1988 that Respondent may have violated 8 U.S.C. §1324a; (2) whether INS violated any of the Fourth Amendment rights of Respondent or its employees; (3) whether adverse inferences may properly be drawn from invocation by Respondent's president of the Fifth Amendment privilege against self incrimination; (4) whether, after November 6, 1986, Respondent hired three named individuals

knowing them to be unauthorized to work in the United States [Knowing Hire of Lee, Shao and Kuo]; (5) whether, after November 6, 1986, Respondent failed when required to present Employment Eligibility Forms (Forms I-9) to INS for 24 named individuals alleged to be its employees, [Paperwork Violations]; and (6) whether, after November 6, 1986, Respondent failed to properly complete Forms I-9 for 23 employees.

B. *The Statutory Citation Period: No Bar to this Proceeding*

Respondent on brief renews its assertion that failure by INS to have issued a citation is an absolute bar to this enforcement action because INS "had reason to believe" before June 1, 1988 that Respondent may have violated the prohibition against employment of unauthorized aliens.[6] Respondent argues that INS was obligated under 8 U.S.C.§1324a(i)(2) to issue a citation because INS had reason to believe prior to the end of the citation warning period on May 31, 1988 that Respondent may have violated section 1324a(a). The citation warning phase-in period is aptly summarized in "the first circuit court review of employer sanctions under IRCA," Mester Mfg. Co. v. I.N.S., 879 F.2d at 563:

> Because of the burdens IRCA places upon employers, Congress provided for gradual implementation. The six-month period following enactment in November 1986 was a public information period; the appropriate agencies were to disseminate forms and information to employers during this period, and no enforcement action was to take place. Id. at §1324a(i)(1). The subsequent twelve-month period, between June 1, 1987 and June 1, 1988, was the "first citation period." Id. at §1324a(i)(2). "In the case of a person or entity, in the first instance in which the [INS] has reason to believe that the person or entity may have violated [IRCA] . . . the [INS] shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations." Id. at §1324a(i)(2).

As in Mester, this case arose during the citation period. Here, the sequence of events began on or after May 18, 1988 and culminated on June 7, 1988.

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[6] 8 U.S.C. §1324a(i)(2) provides that "in the first instance in which the Attorney General has reason to believe that the person or entity may have violated" subsection (a) during the 12-month period following the six month educational grace period following IRCA enactment, "the Attorney General shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations." 8 U.S.C. §1324a(i)(2). This case is the first instance of employer sanctions charges against Respondent.

Respondent contends that, as the delegate of the Attorney General, INS became aware of Widow Brown's alleged wrongdoing prior to June 1, 1988. In contrast, INS argues that it was entitled "to conduct some type of investigation in order to reach the required standard of a "reason to believe [an employer] may have violated [IRCA]," quoting the Chief Administrative Hearing Officer (CAHO) order on review in U.S. v. New El Rey Sausage Co., Inc., 1 OCAHO 78 (8/4/89) which approved the ruling by the administrative law judge in this respect. 1 OCAHO 78 at 8. The New El Rey CAHO ruling, rejecting a claim that failure to issue a citation vitiated the enforcement action, agreed with the judge that "to formulate a standard requiring the INS to complete its investigation goes beyond the scope of the statute." Id.

INS emphasizes that its regulatory implementation of IRCA required a citation to issue after investigation, only if INS determined there was a violation. INS relies on case law holding that its regulation comports to the statute. U.S. v. New El Rey Sausage Co., Inc., 1 OCAHO 66 at 8, modified by CAHO (on other grounds), 1 OCAHO 78 (8/4/89), aff'd, New El Rey Sausage Co., Inc. v. I.N.S., 925 F.2d at 1153. INS claims, in effect, that it did not form a "reason to believe" conclusion by May 31, 1988 when the citation requirement expired by its terms. INS was unable to gather sufficient information in the short period in question. Therefore, INS argues it was not required to issue a citation prior to this enforcement action.

Respondent on brief cites Complainant's policy that employer sanctions investigations "require leads and articulable evidence that a violation may exist." INS Field Manual § III-2, at III-A-1. Respondent equates the threshold for investigations to a "reason to believe" standard.

Respondent's argument overlooks that the citation period mechanism was designed to preclude enforcement action absent fair warning during transition to an employer sanctions environment. This mechanism was not intended to nip investigations in the bud or to proliferate issuance of citations without proper foundation. Such outcomes would result from adoption of Respondent's viewpoint. On this point, I hold with INS. "[A]rticulable facts necessary to begin an investigation," the rationale for referring at all to "articulable facts," "simply means the ability to articulate logical reasons to suspect a

violation, and therefore commence a case." INS Field Manual at III A-1.[7]

As I noted in the February 15 Order, to agree with Respondent would require the conclusion that INS unreasonably failed to believe during a period of time ended May 31, 1991 that there had been a violation of 8 U.S.C. §1324a. It appeared to me, at that time as it still does, that before June 1, 1988 Complainant lacked a basis for determining [i.e., lacked a reason to believe] that Respondent may have been in violation of 8 U.S.C. §1324a with sufficient certainty to trigger the citation warning mechanism.

Addressing a time frame substantially similar to that on which Respondent's claim is premised, the Ninth Circuit held as follows:

> the CAHO and the ALJ agreed with the INS's position that the Service did not have "reason to believe" until after the citation period had come to an end. Once the citation period was over, section 1324a(1)(2) no longer applied; the INS was not required to issue a citation and was free to commence enforcement proceedings. (Footnote omitted.)

New El Rey v. I.N.S., 925 F.2d at 115.

There, INS clearly knew before the end of the citation period that unauthorized individuals were employed, and so informed the employ-er. Neither the trial judge, CAHO nor the court charged INS with reason to believe at the time that the employer knowingly continued to employ such aliens so as reasonably to have believed that New El Rey was in violation of 8 U.S.C. §1324a. Significantly, the court held:

> We therefore refuse to hold that New El Rey was in violation when it failed to comply with the May 25 letter in the six days prior to the end of the citation period. Since New El Rey still had time to comply, the INS had no reason to believe that New El Rey might be in violation. Thus, the ALJ was correct in concluding that the INS was not required to issue a citation for the violations of section 1324a(a)(2). (Footnote omitted).

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[7] Assuming INS had acted in derogation of the field manual, Respondent's cause would not ipso facto be advanced. As the Second Circuit Court of Appeals recently noted, citing Schweiker v. Hansen, 450 U.S. 785, 789, reh'g denied, 451 U.S. 1032 (1981), ("intra-office manuals, unlike official regulations, have no legal force,"); Kugel v. United States, 947 F.2d 1504 (D.C. Cir. 1991). See also Jacobo v. United States, 853 F.2d 640, 641-42 (9th Cir. 1988). (Violation of internal guidelines, i.e., Navy Ships Technical Manual, does not by itself establish breach of duty cognizable under the Federal Tort Claims Act because the guidelines do not impose a governmental duty to provide contractors a safe workplace; the Manual "is not a regulation and does not have the force of law.").

Id. at 11.

In the case at hand, the anonymous letter and the educational visit did not necessarily put INS on notice of unauthorized employment or point to culpability for paperwork violations. Unlike the facts in New El Rey, here there was no certainty of Form I-9 violations. Until the events of June 7, suspicion had not matured into a "reason to believe" there may have been unlawful employment violations. The INS regula-tion at 8 C.F.R. §274a.9(c) provided for a citation to issue "[i]f after investigation the Service" determined there was a violation. That text does not inform whether an investigation was a condition precedent to a citation. The regulation required that a citation issue if during the citation period an investigation evidenced a violation.

I reject Respondent's suggestion that because INS nomenclature titles its record of educational visit a memorandum of investigation (Form G-166(c)), an inquiry into possible violations per se ripens into a "reason to believe." In the case at bar, the record of educational visit, the Employer Contact Sheet, Exh. N, routinely required as a notation of such visit, dated the same day as the Stockertown visit, does not establish that an investigation had begun. Instead, the Investigation Preliminary Worksheet, Exh. P, dated two days later, consistent with Bigg's testimony, makes plain that the formal investigative stage was just beginning.

Biggs conceded that some preliminary investigation precedes a "case placed in progress". Exh. P., Tr. 124. After Biggs acknowledged that INS requires "a reasonable suspicion of unlawful activities in order to commence an investigation," he and Respondent's counsel agreed that such a suspicion was formed not earlier than May 25, 1988. The parties appear to be agreed that the earliest date INS may have formed a "suspicion" was May 25, the date of the investigation preliminary worksheet. That document, endorsed "call-up" by June 1, 1988, required an investigative plan by that date. Exh. P, Form G-600A. The record dispels the notion that anything more than mere suspicion was formed even as of May 25, 1988, the date the investigation was initiated.

I am satisfied that the anonymous letter and the May 23 visit reflect a lesser degree of knowledge on the part of INS than did the May 25, 1988 INS letter in New El Rey. Following New El Rey, therefore, I reject Respondent's suggestion that articulable facts sufficient to predicate an investigation are equivalent to or a proxy for a "reason to believe" there may have been violations.

Agreeing that INS "did not have 'reason to believe' until after the citation period had come to an end," the New El Rey court set out in the margin CAHO's quotation and affirmation of the finding of the administrative law judge that,

> the factual allegations pertaining to [knowingly continuing to employ unauthorized aliens] which, while initially being investigated prior to May 31, 1988, were not sufficiently conclusive to warrant any kind of prosecution, including the issuance of a citation, until after May 31, 1988, when these same factual allegations were developed further by subsequent investigation.

New El Rey v. I.N.S., 925 F.2d at 1156 n. 4.

Finally, Respondent's claim that INS deliberately withheld the benefit of a citation warning is unsupported by the record. I am not persuaded that on or before May 31, 1988 Agent Biggs or any other INS employee had formed a reason to believe a violation had occurred nor that INS deliberately delayed further action until after May 31 so as to frustrate the citation warning requirement.

I accept as reasonable Biggs' explanation that where an investigation such as this one is lead-driven, the next step is to educate the employer and then acquire supervisory authorization for the investigative stage. In this case, authorization was issued on May 25. A weekend and holiday (Memorial Day 1988) intervened between May 25 and June 1. Biggs, the principal agent assigned to Widow Brown's, was working other cases at the time and needed to coordinate the employer survey with other agents to assist him. There is no evidence that INS deli-berately delayed concluding the investigation, including its employer surveys, by May 31, 1988. The evidentiary record discloses no basis for altering my February 15, 1991 Order rejecting interposition of the citation period claim as a bar to suit. Since the investigation began in late May 1988, I am unable to conclude that INS breached its 8 U.S.C. §1324a(i) obligations, and I decline, therefore, to find that failure to issue a citation bars this proceeding.

C. *The Fifth Amendment Invoked: Inferences May Be Drawn*

JRN repeatedly invoked his Fifth Amendment privilege against s-elf-incrimination when called as a witness by Complainant. JRN was called as a witness in his capacity as president, an agent of the corporate Respondent. The privilege against self-incrimination is personal to individuals only and cannot successfully be claimed by a corporation. Braswell v. United States, 487 U.S. 99, 102 (1988) ("it is well established that such artificial entities are not protected by the

Fifth Amendment[.]" citing Bellis v. United States, 417 U.S. 85 (1974)). Presumably, JRN invoked the privilege, not for Respondent, the corporate party, but for himself as its agent. Tr. 18. Nevertheless, whether JRN pleaded the Fifth Amendment on his own behalf or on behalf of the corporation is immaterial to the result in this civil proceeding, since adverse inferences can be drawn even from a proper assertion of the privilege.

The federal district courts are the exclusive venue for federal criminal offenses. 18 U.S.C. §3231. The coincidence that criminality may attach to the same conduct does not change the civil character of the cause of action before the administrative law judge. Nowhere does it appear that the standard of proof is the same. There has been no showing that the elements of the civil case are identical to those of a criminal cause of action. This is not a criminal or a quasi-criminal proceeding. It is a civil penalty proceeding, even though a criminal "pattern or practice of violations" of 8 U.S.C. §1324a can arise from the prohibited employment of unauthorized aliens. 8 U.S.C. §1324a(f)(1).[8] Accord, U.S. v. Mr. Z Enterprises, Inc., 1 OCAHO 288 (1/11/91) at 17-19.

In contrast to civil proceedings, the prosecutor in a criminal case may not comment on an accused's silence and the judge may not instruct the jury that silence is evidence of guilt. Griffin v. California, 380 U.S. 609, reh'g denied, 381 U.S. 957 (1965). Explicitly limiting Griffin to criminal proceedings, the Supreme Court has instructed that in a civil proceeding the trier of fact may draw adverse inferences against a party who invokes the Fifth Amendment in response to a question the answer to which may tend to incriminate. Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976). ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.")

Respondent argues that in effect Baxter is idiosyncratic because it involved prison inmate disciplinary proceedings and is otherwise out of step with Supreme Court doctrine. Resp. Reply Brief at 7. That position ignores the Baxter progeny. See, e g., Rad Services, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271 (3rd Cir. 1986); Pagel, Inc. v. S.E.C., 803 F.2d 942 (8th Cir. 1986); Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984); Brink's, Inc. v. City of New York, 717 F.2d 700 (2nd Cir. 1983); Hoover v. Knight, 678 F.2d 578

[8] No criminality attaches to paperwork violations.

(5th Cir. 1982). See also Heidt, The Conjurer's Circle--The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982).

Respondent's reliance on Lefkowitz v. Cunningham, 431 U.S. 801 (1977) is misplaced. There, consistent with established precedent that "no cost" may be imposed on use of the privilege, precedent previously narrowed by Baxter, the Court struck down a state law compelling an official of a political party to waive the privilege in certain circumstances. The Court, however, distinguished Baxter:

> That case involved an administrative disciplinary proceeding in which the respondent was advised that he was not required to testify, but that if he chose to remain silent his silence could be used against him. Baxter did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in Baxter was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions.

Lefkowitz v. Cunningham, 431 U.S. at 808 n. 5.

Case law authorizing inferences implicitly assumes a valid exercise of the Fifth Amendment privilege. A fortiori, inferences are permissible where the claimant lacked a valid basis for asserting the privilege, i.e., where an individual claims on behalf of a corporation. Even if JRN were claiming the privilege for himself, the result is the same where, as on this record, there is no suggestion of a criminal prosecution. This case does not present the same situation as U.S. v. Wrangler's Country Cafe, 1 OCAHO 138 (6/29/90), aff'd, Steiben v. I.N.S., 932 F.2d 1225 (8th Cir. 1991) (a case not involving Fifth Amendment claims) where the judge found the respondent corporation to be the alter ego of the principal and sustained employer sanction penalties against both the corporation and the individual.) Here, there is no claim against JRN in his individual capacity, and none that the corporations lack bona fides.

That JRN would be within reach of 8 U.S.C. §1324a(f)(1) in event of a criminal prosecution of Widow Brown's is speculative. See United States v. Doig, No. 91-1394 (7th Cir. 1991), 60 LW 2381 (12/17/91) (company manager cannot be liable as aider and abettor in prosecution of employer for criminal employer for criminal violation of Occupational Health and Safety Act (OSHA)). Even though OSHA, but not IRCA, defines the term employer and employee, the court's conclusion is applicable here. The Doig court agreed with the Third Circuit that OSHA "gives neither the commission [Occupational Safety and Health Review Commission] nor the secretary of labor the power to sanction

employees. Atlantic & Gulf Stevedores v. OSHRC, 534 F.2d 541 (3d Cir. 1976) . . . We agree that sanctioning employees for OSHA violations is not part of the detailed enforcement scheme Congress established in the statute."

A permissible adverse inference may not, however, be the sole basis for a decision adverse to the party who refuses to testify. Pagel, Inc. v. S.E.C., 803 F.2d at 947 (citing Baxter v. Palmigiano, 425 U.S. at 317, and noting that "[t]his principle was reiterated" in Lefkowitz v. Cunningham, 431 U.S. at 808 n. 5.); U.S. v. Mr. Z Enterprises, Inc., 1 OCAHO 288 at 30-31, n. 7 ("the court will require 'independent corroborating evidence of the matters to be inferred from a defendant's invocation' of the privilege. United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1452 (E.D.N.Y. 1988); . . . S.E.C. v. Musella, 578 F. Supp. 425, 429-31 (S.D.N.Y. 1984) (A defendant's refusal to testify "is a factor that may be considered by the court.").

The evidentiary inferences to be drawn from JRN's refusal to testify with respect both to unlawful hire and paperwork violations obtain independent corroboration from the sworn written statements of the aliens named in Counts I of the Complaints, from the testimony of the aliens at hearing, and from the documents delivered to INS pursuant to subpoena.

The privilege against self-incrimination is unavailing with respect to Widow Brown's payroll records and Forms I-9. It is settled law that the privilege applies to the act of producing business records, not to the content of such records. United States v. Doe, 465 U.S. 605 (1984); Andresen v. Maryland, 427 U.S. 463, 473-477 (1976). As aptly summarized,

> The fact that the privilege is personal has led the Supreme Court to severely restrict its application. This most commonly arises within the context of a party's records and papers. Because the privilege is testimonial in nature, as long as a party's personal papers have been lawfully produced, whether by subpoena or by valid search and seizure, the privilege may not be asserted with regard to them. (Footnotes omitted).

Stein, Mitchell and Menzies, 4 Administrative Law §29.05 (1991).

The Supreme Court found Andresen v. Maryland, 427 U.S. at 473, to fit "within the principle stated by Mr. Justice Holmes: 'A party is privileged from producing the evidence but not from its production.' Johnson v. United States, 228 U.S. 457, 458 (1913)." In Andresen, the Court noted as follows:

> although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information . . . a seizure of the same materials by law enforcement officers differs in a crucial respect -- the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

Andresen v. Maryland, 427 U.S. at 473-4.

In Widow Brown's, the payroll records and Forms I-9 were "seized" by INS pursuant to subpoena. Their admission into evidence does not contravene the Fifth Amendment.

D. *Suppressibility of the Evidence*

1. *The Fourth Amendment Applies*

Respondent contends that Complainant's warrantless entries into the Widow Brown's facilities were unreasonable searches and seizures in violation of the Fourth Amendment. Respondent invokes the exclu-sionary rule, arguing that such violations should result in suppression of the allegedly tainted evidence attained during and as a result of the June 7, 1988 inspection.

The Supreme Court has described the Fourth Amendment's purpose as a protection,

> against invasions of "the sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524 from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all "unreasonable" searches and seizures, and by requiring the use of warrants. . . .

Warden v. Hayden, 387 U.S. 294, 300 (1967).

In order to preclude the introduction of illegally obtained evidence, the courts developed the remedial exclusionary rule. Disagreeing about the rule's applicability outside the criminal context, the parties analyze the issue in terms of whether the charges are quasi-criminal in nature. Compl. Brief. at 5; Resp. Brief at 11.

Resolution of the Fourth Amendment issue does not, however, turn on whether the charges are considered criminal or quasi-criminal. This is so because,

> Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical Co. v. U.S., 476 U.S. 227 (1986).

In any event, as already discussed and decided, supra at 18, this is not a criminal or quasi-criminal proceeding.

Precedent demonstrates that the exclusionary rule applies to administrative proceedings. O'Connor v. Ortega, 480 U.S. 707 (1987) (plurality opinion); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982) (evidence obtained as a result of an unlawful search and seizure is properly excluded in an OSHA citation hearing.) Hearings under 8 U.S.C. §1324a(e)(3) are "conducted in accordance with" 5 U.S.C. §554. Consequently, this is a proceeding pursuant to the Administrative Procedure Act (APA). See Stein, Mitchell and Menzies, 4 Administrative Law at §30.01 (in an APA proceeding, "Fourth Amendment protection against unreasonable searches and seizures may cause evidence to be excluded.")

Opposing applicability of the Fourth Amendment claim, Complainant cites In Re Establishment Inspection of Hern Iron Works, 881 F.2d 722, 729 (9th Cir. 1989), to the effect that "[a]s a general rule, the exclusionary rule does not attach to civil or administrative proceedings." INS, however, overlooks that the court refused to reach the constitutional issue, concluding instead that:

> While in this type of case, the right to invoke the exclusionary rule at an administrative proceeding would carry a reassuring aura of fairness, we are not in a position to decide the question in the context of a contempt case.

Id.

Complainant relies on U.S. v. Moyle, 1 OCAHO 212 (7/30/90) at 18, for support that "the exclusionary rule is not an appropriate device" in a section 1324a civil penalty proceeding. I understand the quoted statement to be dicta, in light of the judge's finding that the respondent had voluntarily produced subpoenaed documents and his conclusion that "[a]ssuming the Respondent had Fourth Amendment protection, [he] still would not find any violation. . . ." I am not inclined to follow either that dicta, or Complainant's misplaced reliance on Hern Iron Works. See Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432 (N.D. Calif. 1989) (INS entries onto work places must be based on either a valid warrant or a valid consent.) See also U.S. v. Kuo Liu, 1 OCAHO 235 (9/14/90) at 2. (Order Denying Respondent's Motion in Limine) ("It is well-settled

that the Fourth Amendment warrant requirement extends to administrative searches, including investigation by the INS.")

INS also relies on a quotation from U.S. v. Noel Plastering & Stucco, Inc., OCAHO Case No. 90100326 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses) (2/12/91) at 5. In Noel, striking a Fourth Amendment affirmative defense, the judge concluded on the basis of Moyle that he was "in effect powerless to hear any constitutional defense" based upon Fourth Amendment claims.

I disagree with the understanding in Noel that anything in Moyle or any other precedent suggests lesser power on the part of an administrative law judge than that of an Article III judge to apply constitutional principles to evidentiary submissions. This is not the same issue as that of power to declare statutes or regulations repugnant to the Constitution, discussed in U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89) at 31; suppl. dec., 1 OCAHO 49 (4/12/89), aff'd by CAHO, 1 OCAHO 55 (5/5/89); aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990). See also U.S. v. Multimatic Products, Inc., 1 OCAHO 221 (8/21/90) at 5 (Decision and Order on Complainant's Motion to Strike Affirmative Defenses) (declining to reach constitutional issue as not "clearly addressed" by the parties but rejecting INS claim that such an issue is necessarily outside administrative law judge jurisdiction).

I conclude that OCAHO and other jurisprudence confirms the administrative law judge's discretion to hold the exclusionary rule applicable to administrative searches. Accordingly, I hold the exclusionary rule applicable to proceedings pursuant to 8 U.S.C. §1324a.

The impact of the exclusionary rule in an employer sanctions case is fact-driven. O'Connor v. Ortega, 480 U.S. at 725. For the reasons explained below, I find Widow Brown's facts within the exceptions to the exclusionary rule. It follows that the warrantless nature of the INS searches is inconsequential and the exclusionary rule unavailing. None of the evidence acquired by INS is suppressible.

2. *The Stockertown Location*

(a) *Suppression of Evidence Gathered Outside the Stockertown Building*

The initial knowing hire evidence was acquired from conversation with two individuals in back of the restaurant near the parking lot. This conversation took place on Respondent's commercial curtilage which was unencumbered by fences, "no trespassing" signs, or any indicia of privacy expectations. Indirectly by subpoena, documentary evidence was also acquired. For the reasons discussed, infra at 32, such evidence is not suppressible.

Fourth Amendment search and seizure protections extend beyond the residential structure to its curtilage. The issue in search and seizure analysis in the residential curtilage context is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." United States v. Dunn, 480 U.S. 294, 301 (1987).

In Dunn, the Supreme Court endorsed the following factors for curtilage analysis: (1) proximity of the area claimed to be curtilage to the structure, (2) whether the area is included within an enclosure surrounding the structure, (3) the nature of the uses to which the area is put, and (4) the steps taken by residents to protect the area from observation by passers-by.

Applying the Dunn analysis, the district court in Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. at 440, held commercial curtilage subject to the Fourth Amendment. Citing Katz v. United States, 389 U.S. 347 (1967), the Pearl Meadows court noted that "as in all Fourth Amendment analysis, the Court must determine whether the reasonable expectations of privacy in the commercial curtilage of . . . the businesses were violated by the INS' entry onto the premises." Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. at 440. To the extent of a legitimate expectation of privacy, the curtilage concept is no longer limited to residential premises.

The modern view under Katz is that Fourth Amendment protection may attach anywhere, including commercial curtilages. See United States v. Reed, 733 F.2d 492, 500-501 (8th Cir. 1984) (The Fourth Amendment is implicated whenever "the government invades an area in which a person entertains a legitimate or justifiable expectation of privacy," following Katz v. United States, 389 U.S. at 353.) The Reed defendants enjoyed no privacy expectation in a parking lot behind a construction company, even though the lot was partially fenced.

In Katz, the seminal case, the Supreme Court declared that "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. at 351. Even though Fourth Amendment protections are personal, the level of protection is frequently affected by the character of the location in which the search is executed. "[I]n the search context, the level of suspicion required to justify police action turns on the expectation of privacy that society will recognize in the place in which the search occurred." U.S. v. Winsor, 846 F.2d 1569, 1577 (9th Cir. 1988) (emphasis added).

The warrant requirement applies to businesses as well as to private homes. The Supreme Court, in Dow Chemical v. United States, 476 U.S. at 237 reminded that it had "pointed out in Donovan v. Dewey, 452 U.S. 594, 598-599 (1981) [that] 'Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment.'" See also Marshall v. Barlow's Inc., 436 U.S. at 307. However, the government has "greater latitude to conduct warrantless inspection of commercial property . . . unlike a homeowner's interest in his dwelling, '(t)he interest of the owner of commercial property is not one in being free from any inspections.'" Dow Chemical v. United States, 476 U.S. at 237.

As already noted in the curtilage discussion, Fourth Amendment guarantees reach business and commercial activity, but only to the extent that a court finds a basis for a reasonable expectation of privacy. For example, the Reed court favorably quoted this commentary:

> business and commercial premises are not as private as residential premises, and . . . consequently there are various police investigative procedures which may be directed at such premises without the police conduct constituting a Fourth Amendment search. W. LaFave, Search and Seizure, §2.4(b) at pp. 338-39 (1978).

United States v. Reed, 733 F 2d. at 501.

Fourth Amendment protections attach to a workplace to a lesser extent than to a home, subject to ad hoc analysis. O'Connor v. Ortega, 480 U.S. at 725-26.

I deny Respondent's motion to suppress evidence garnered directly or derivatively from the agents' encounter with the Chinese individuals behind and outside the Stockertown facility. INS acquired the evidence in question on Widow Brown's fenceless, signless commercial curtilage. The physical circumstances afford Respondent no legitimate privacy expectation. The informal interrogation did not rise to the level of a search but, even if it did, no infringement occurred because Respondent had no reasonable expectation of privacy.

(b)*Suppression of Evidence Gathered Inside the Stockertown Building*

As noted earlier, Crane effected a warrantless entry, three to five feet into the building, lasting less than sixty seconds. He was in pursuit of Shao. Shao had stepped outside the kitchen, had seen the interchange among the agent and two other Chinese individuals, and ran back inside. During the momentary interlude inside the kitchen, there was possible physical contact between Crane and Shao. Respondent alleges as another Fourth Amendment violation, that Crane "physically forced employee Fa Sha Shao outside and took him into custody." (Resp. Brief at 8). The argument claims, in effect, that even if no words were exchanged within the building, any evidence garnered directly or indirectly should be suppressed by virtue of the fruit of the poisonous tree doctrine.

This doctrine, a corollary to the exclusionary rule, is the exclusionary rule for derivative evidence. The doctrine stands for the proposition that the government is prohibited from using, in any manner, any information prejudicial to the defendant, if that information is derived from facts learned as a result of the unlawful acts of its agents. The "poisonous tree fruit" can be either demonstrative or testimonial evidence. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . [such evidence] shall not be used."); In Wong Sun v. United States, 371 U.S. 471, 485 (1963). ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States, 365 U.S. 505 . . ., that the Fourth Amendment may protect against . . . verbal statements as well as against the more traditional seizure of 'papers and effects.' . . . [V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.") The nexus between the unlawful act and the proffered evidence determines whether application of the doctrine bars the evidence in a particular case.

Complainant counters Respondent's constitutional claim in its entirety. Vis a vis Crane's entry, Complainant cites the exigent circumstances exception, Chambers v. Maroney, 399 U.S. 42 (1970), and the hot pursuit exception to the warrant requirement, Warden v. Hayden, 387 U.S. at 294. In reference to Crane's physical contact with Shao, Complainant reasons that the latter's failure to recall contact

demonstrates his lack of intimidation. Complainant notes that no evidence was obtained during the entry itself.

Complainant's position, in effect, is that the agent effected a justified hot pursuit entry. During that entry, the touching, if any, was so de minimus as to lack legal significance. According to Complainant, Crane's entry produced derivative evidence only, neither tainted nor suppressible, admissible by the well-recognized exigent circumstances or hot pursuit exceptions to the warrant requirement.

The hot pursuit exception to the warrant requirement contemplates that, for Fourth Amendment purposes, a law enforcement officer may chase a fleeing suspect into private space with impunity. If such a chase commences without a warrant in a public place, the officer may continue the pursuit, even if the suspect enters a private place. See U.S. v. Santana, 427 U.S. 38, 43 (1976) ("[a] suspect may not defeat an arrest which has been set in motion in a public place, . . . by the expedient of escaping to a private place.")

Just as in the case at hand, the factual focus of the Santana hot pursuit issue was close to the point of entry. The Supreme Court applied the hot pursuit exception in Santana. The Stockertown facts fall even more clearly within the hot pursuit exception. In Santana, in contrast to Stockertown, the suspect stood at the threshold of her home, rather than her workplace; significantly, she never ventured outside. She was "standing directly in the doorway--one step backward would have put her in the vestibule of her residence." Id. at 40, n. 1. Upon police approach, she sought refuge within.

The fact pattern in United States v. Reed, 733 F.2d at 492, is parallel to the Stockertown sequence. In Reed, the Drug Enforcement Agency (DEA) and the St. Louis Police Department conducted an investigation. Two police officers went to a partially fenced parking lot behind a construction company, following up on an informant's tip. During that investigation, Jones, one of the police officers, identified himself, and asked one of the suspects to cooperate and answer a few questions. Meanwhile Detective Wells observed three other suspects unloading cargo into the company's warehouse. One of the suspects noticed Wells and shouted, "here come the cops." All three suspects ran into the main company building. Wells followed, arresting one suspect who was hiding behind a bathroom door on the first floor. Once inside the warehouse, the officer went on to gather substantial real evidence.

The Reed court held that despite the partial fence surrounding the back parking lot,

> there was no indication that the back parking lot was "private" to the owners or to those specifically authorized to use it . . . at most, the back lot was a "semi -private area"; it certainly was not an area in which defendants had a reasonable expectation of privacy. Cf., Magana, 611 F.2d at 1388."

United States v. Reed, 733 F.2d at 501.

The court continued,

> [the initial entry into the building was] clearly justified since Officer Wells had, at the very least, reasonable, articulable suspicion that defendants were involved in the unlawful distribution of marijuana. . . . Probable cause to make a warrantless arrest exists where the facts and circumstances within the collective knowledge of law enforcement and of which they had reasonably trustworthy information, were sufficient to warrant a prudent person to believe that the suspect has committed or was committing an offense.

Id. at 502 (emphasis added).

I hold the Stockertown facts to fall clearly within the parameters of the hot pursuit exception, as set out by Warden and its progeny. In Santana the Supreme Court held the hot pursuit exception applicable, even though the suspect never left her home, a place traditionally endowed with a higher privacy expectation. In the case at bar, the hot pursuit entry justification is even clearer where the law enforcement officer entered a workplace rather than a home.

As noted earlier, Reed was also held to be within the hot pursuit exception, despite the fact that the warrantless entry was launched from a partially fenced parking lot. In Stockertown, at the time of his warrantless entry, Crane was situated in a fenceless location which had an even lower privacy expectation than the Reed location. Due to Shao's public exit and subsequent flight into the building, Crane, like the officer in Reed, had formulated at the time of entry a "reasonable, articulable suspicion that defendants were involved in unlawful [activities]" United States v. Reed, 733 F.2d at 502. See also Berger v. New York, 388 U.S. 41 (1967); Brinegar v. U.S., 338 U.S. 160 (1949); U.S. v. Mason, 661 F.2d 45 (5th Cir. 1981), but see U.S. v. Herrold, 772 F. Supp. 1483 (M.D. Pa. 1991) (the hot pursuit exception as applied in Santana is unavailable where law enforcement officer effected a warrantless entry into a home, as probable cause arose only when the suspect opened the door in response to the officer's knocks).

The entry in Reed was far more intrusive and extensive than Crane's Stockertown entry. It follows that since the Reed entry was held justified under the hot pursuit exception, the more benign Crane entry also passes muster, and Respondent's claim is denied.

I reject as unproven Respondent's auxiliary assertion that Shao was "physically forced outside the restaurant." I hold that no intimidation or coercion accrued from any touching by Crane, since Shao did not even recall it.

(c) *Suppression of Evidence Gathered Inside the Stockertown Dormitory*

After the incidents just discussed, Shao asked to go to his apartment to look for the requested documentation. Once admitted into the living quarters, Crane remained within the scope of the occupant's consent.

Katz and its progeny inform that the employer/landlord's property right does not entitle him to an exclusive privacy expectation in the employee/tenant living quarters. The property owner cannot trump the resident's privacy expectation, absent his abandonment. United States v. Sanford, 493 F. Supp. 78 (D.D.C. 1980); United States v. Sellers, 667 F.2d 1123 (4th Cir. 1981); and United States v. Sledge, 650 F.2d 1075 (9th Cir. 1981).

Since a tenant has a legitimate privacy expectation in his living quarters, it follows that he also has the authority to waive that expec-tation via consent. The state trooper arrived to enforce the resident's right to enter his living quarters. As it turned out, there was no resistance to the trooper's efforts. I find that under these circumstances, agent entry into the employee living quarters was consensual and uncoerced. The allegation of an infringement of owner's privacy rights in the employees' living quarters is totally unsubstantiated.

The knowing hire evidence is not suppressible. Respondent's effort to suppress the evidence supporting the knowing hire charge is rejected. No basis for evidence suppression accrued from the Stockertown facts.

3. *The Plumsteadville Location*

At Plumsteadville the knowing hire evidence, obtained as a result of agents' observations or which followed the arrests of the aliens, flowed from the same consented entry. Indirectly by the same consented

entry and by subpoena, documentary evidence was also acquired. For the reasons discussed, infra at 32, such evidence is not suppressible.

Agent Mentz, standing outside a screen door, initiated a dialogue concerning work authorization with a Widow Brown employee. Within the context of that conversation, the employee consented to the agent's entry.

Respondent claims, in effect, that this warrantless entry violated Fourth Amendment privacy expectations in its property. Where the property in question is a workplace implicating shared usage of space, the privacy expectation must be construed narrowly. O'Connor v. Ortega, 480 U.S. at 725-26 ("Given the great variety of work environments . . ., the question whether [there is] any . . . reasonable expectation of privacy must be addressed on a case-by-case basis"); U.S. v. Beaulieu, 893 F.2d 1171, 1176 (10th Cir. 1990) ("A person cannot be said to retain a unique expectation of privacy in an area which is shared in common with others."); United States v. Padron, 657 F. Supp. 840, 846 (D. Del. 1987).

Consent is probably the most recognized exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593-594 (1945); Zap v. United States, 328 U.S. 624, 630 (1945)"). The issue here is whether the employee's consent excused the agent's warrant-less entry, where the employer/proprietor had only a diminished privacy expectation.

To prevail in its assertion of the consent exception, INS must estab-lish voluntary consent. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Voluntariness is a question of fact to be determined from "all of the circumstances," Schneckloth v. Bustamonte, 412 U.S. at 249. See also United States v. Mendenhall, 446 U.S. 544, 558-59 (1980) (the Court looks to the suspect's age, education level and knowledge of a right to refuse consent in considering whether consent to a body search was voluntary).

I reiterate my factual finding that by means of rudimentary English and gestures and without undue coercion, the Mentz gained entry into Widow Brown's via voluntary consent. Supra at 11. However, for INS to prevail in the face of Respondent's suppression motion at this juncture a showing of voluntariness is not enough.

Beyond the voluntariness of the consent, the record must establish that whoever gave consent had authority to do so. As already noted, a proprietor, such as Widow Brown's, has only a limited privacy expectation and the corollary authority to consent to entry; neither the expec-tation nor the authority are exclusive. The Katz doctrine teaches that Fourth Amendment rights are not predicated exclusively on an owner's property right. Such rights also derive from mutual use of or access to property. "(C)ommon authority over or other sufficient relationship to the premises or effects sought to be inspected" constitutes the requisite authority. United States v. Matlock, 415 U.S. 164, 171 (1974); U.S. v. Dubrofsky, 581 F.2d 208, 212 (9th Cir. 1978) (common authority rests on mutual use of property, joint access or control).

Significantly, common access and employment are strong evidence of common authority. United States v. Gradowsky, 502 F.2d 563, 564 (2d Cir. 1974); see also United States v. Murphy, 506 F.2d 529 (9th Cir. 1974) (an employee with a key has authority to consent to entry); United States v. Felton, 592 F. Supp. 172 (E.D. Penn. 1984) (an employer who gives an employee a key also conveys authority to the employee to consent to entry); United States v. Tussell, 441 F. Supp. 1092 (M.D. Penn. 1977) (aircraft pilot has authority to consent to agent entry to aircraft, even though the employer would not have consented to such entry). It follows that where Respondent and its employees shared mutual access and joint use of the area in question, Respondent's employees shared the authority to consent to INS entry. Kuo was such an employee.

Although I hold the INS' warrantless Plumsteadville entry to have been justified by the cook's consent, above described, I do not base admissibility solely on that consent. I also find that consent was given concurrently by JN, the manager. JN implicitly consented to entry, when, as I find, he led Agent Valentine into the kitchen area.

> . . . it is well settled that consent may be inferred from an individual's words, gestures or conduct. U.S. v. Griffin, supra, 530 F.2d at 742. Thus a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search."

Buettner-Janusch, 646 F.2d 759, 764.

The cook and the manager, acting independently, gave dual entry consent, thus vitiating the necessity for a warrant.

Exactly as in Stockertown, subsequent agent entry into the employee's Widow Brown's apartment was consented to by the alien, who had authority to do so.

Agents entered non-public premises three times at Plumsteadville. On each occasion, these entries followed authoritative consent, there-fore rendering the garnered evidence admissible. Consequently, I hold the warrantless search at Plumsteadville to have been within the purview of the consent exception to the warrant requirement, and I deny Respondent's claims to suppress the Plumsteadville evidence.

4. *Suppression of Paperwork Evidence*

Widow Brown's responded to the administrative subpoenas, issued on June 8, 1988 and in August 1988. Exhs. A-1, A-2, B-1 and B-2. Because the Stockertown and Plumsteadville issues on suppression of the I-9s and payroll materials are analytically identical, this discussion pertains to both locations.

A subpoena duces tecum is an order to produce documents or to show cause why they need not be produced. Nixon v. Sirica, 487 F.2d 700, 709-710 (D.C. Cir. 1973), aff'd 418 U.S. 683 (1974). After receipt of subpoena, a party may either comply or refuse to comply. S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741 (1984). In reference to an administrative subpoena issued by the Office of Thrift Supervision, the Third Circuit recently stated,

> Our analysis begins with the general proposition that administrative subpoenas are not self-enforcing. See Wearly v. FTC, 616 F.2d 662, 665 (3d Cir. 1980) (holding that an FTC subpoena is not self-enforcing). . . . An OTS investigative subpoena is not self-enforcing. If the party fails to comply or contests the subpoena, then a court must decide whether or not it is enforceable. 12 U.S.C. Sec.1467a (g) (2).

Shea v. Office of Thrift Supervision, 934 F.2d 41, 45 (3d Cir. 1991).

An employer's defense to an invalid administrative subpoena is "to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court." Donovan v. Long Steer, Inc., 464 U.S. 408, 415 (1984); see also Reisman v. Caplin, 375 U.S. 440, 445-46 (1964).

An employer's refusal to comply must coincide with the time when he is called upon to comply. Absent this coincidence, the employer waives all defenses pertaining to the subpoena. See U.S. v. Fine, 1 OCAHO 116 (12/19/89), appeal dismissed, Fine v. I.N.S., No. 89-6090

(11th Cir. 1990) (denying motion to quash complaint based on alleged defective INS subpoena); People v. Skelton, 109 Cal. App. 3d 691, 709-710, 167 Cal. Rptr. 636, 645 (1980), cert. denied, 450 U.S. 917 (1981) (search and seizure violations are waived where custodian of records disregards subpoena defects and comes forward with records.); In re Grand Jury Proceedings (Underhill), 601 F.2d 162, 170 n. 4 (5th Cir. 1979) citing Maness v. Meyers, 419 U.S. 449, 460-464 (1975).

This issue has been addressed in the IRCA context. U.S. v. Moyle Mink Farm, 1 OCAHO 212 (7/30/90), aff'd., Moyle Mink Farm v. I.N.S., No. 90-70469 (9th Cir. 1991); see also U.S. v. Fine, 1 OCAHO 116, appeal dismissed, Fine v. I.N.S., No. 89-6090 (11th Cir. 1990). At the time of hearing and subsequent to voluntary subpoena submissions, the Moyle respondent moved to suppress paperwork evidence obtained as a result of his subpoena compliance. As in the case at bar, Moyle made no motion to quash the subpoena, did not refuse to comply with the subpoena, and did not challenge the subpoena in court. See 8 U.S.C. §1225(a). In legal effect, Respondent's rendering of the documents to Complainant was voluntary.

Borrowing from the analysis in Moyle, with reference to Fed. R. Civ. P. 45, I reject Respondent's effort to suppress the documents. Rule 45 requires that opposition to a subpoena duces tecum be initiated "promptly and in any event at or before the time specified in the subpoena for compliance therewith. . . ."

The parties also argue about paperwork suppression on disparate Fourth Amendment analyses. Respondent contends that the paperwork evidence should be suppressed under the fruit of the poisonous tree doctrine. Complainant argues that the evidence should be admitted because it was statutorily required paperwork. See Shapiro v. United States, 335 U.S. 1 (1945). Donovan v. Mechlenbacher, 652 F.2d 228, 231 (2d Cir. 1981); Grosso v. United States, 390 U.S. 62, 67-68 (1968); In re Grand Jury Proceedings, 801 F.2d 1164, 1167-1169 (9th Cir. 1986); but see United States v Lehman, 887 F.2d 1328 (7th Cir. 1989) (status of documents as statutorily required records does not justify the government's seizure of personal records.) I do not need to reach these Fourth Amendment arguments because I conclude that Respondent complied with the subpoenas, delivering the I-9s and payroll records to Complainant. In addition, since Respondent's argument is derivative and hinges on the alleged inadmissibility of the knowing hire evidence, my earlier holding applies, avoiding the need for further consideration of this argument.

Having neither sought judicial remedy, nor protested, nor refused, nor failed to produce in a timely fashion, I hold that Respondent waived its right to object. All the paperwork evidence is admissible.

E. *Sufficient Probable Cause*

As an affirmative defense and on brief, Respondent claims that INS lacked probable cause to "pursue even detentive questioning of the respondent's employees." Resp. Brief at 10. Respondent's reliance on Terry v. Ohio, 392 U.S. 1 (1968), as authority, assumes too much. The Stockertown and Plumsteadville encounters easily meet the standard articulated in Terry. As Justice Harlan succinctly wrote in concurrence,

> The court holds, and I agree, that while the [Fourth Amendment] right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court.

Id. at 31.

In describing the agents' perspective upon their arrival at Stockertown and Plumsteadville on June 7, 1988, INS has accurately noted that the agents, experienced in dealing with illegal aliens, had been briefed about the possibility of finding illegal aliens at the premises. See also discussion of United States v. Reed, 733 F.2d at 501, supra at 27.

At Stockertown, Respondent claims that INS lacked probable cause (1) to question the two Chinese individuals behind the Widow Brown's and (2) to enter the kitchen area. During the dialogue in question, the agents do not appear to have exerted any perceptible control. Crane's testimony that he might have used physical force given different circumstances is sheer speculation, and therefore does not inform the probable cause analysis. Applying Terry and Reed, I hold that the initial conversation behind the restaurant was a reasonable response to the situation at hand. This interchange, which was not detentive, does not implicate the probable cause issue. I further hold, under the same standards, that under these facts Crane's pursuit of Shao was not only reasonable, but that probable cause arose upon Shao's flight into the kitchen.

As already discussed, the agents' entry into Plumsteadville was predicated on consent. Kuo consented to entry from the outdoor kitchen entry, at approximately the same time that JN consented at

the indoor entry. The reasonableness standard of Terry combined with the consensual nature of the Plumsteadville entry precludes the need for further probable cause analysis. Having considered the probable cause arguments, I conclude that Respondent suffered no Fourth Amendment violations.

F. *Knowing Hire Violations Proven*

Referring to the constructive knowledge standard Complainant cited, inter alia, U.S. v. Collins Foods International, 1 OCAHO 123 (1/9/90), aff'd by CAHO, 1 OCAHO 129 (2/8/90). Compl. Brief at 5. Respondent argued that Collins should be limited to its facts. Resp. Brief at 8. After briefs were filed, Collins was reversed, Collins Foods Int'l v. I.N.S., 948 F.2d 549 (9th Cir. 1991). Collins v. I.N.S. does not detract from the reasonableness rule endorsed by the same court in Mester. Collins Foods v. I.N.S. is a caveat that the Ninth Circuit is prepared to place limits on the use of the constructive knowledge standard, which it has applied to IRCA §101. The constructive knowledge dialectic is not dispositive of the case at hand. In Mester the question was whether it was reasonable for the employer not to act upon information which the court attributed to the employer, i.e., the constructive knowledge, as the result of that information having been communicated to the employer by INS. The Collins Foods v. I.N.S. court, expressed caution that constructive knowledge not be carried too far afield. The court simply concluded that the employer's failure to observe and act upon cautionary text on the reverse of the alien's social security card could not be characterized as willful blindness.

Subsequent to Collins, Respondent by letter-pleading dated December 9, 1991 and Complainant by letter-pleading dated December 30, 1991, each interpreted the Ninth Circuit opinion differently. In light of the discussion above, further comment on those filings is unnecessary, except to note my rejection of Respondent's contention that employers need no longer practice "reasonable care." The court's opinion does not support Respondent's claim that employers need only avoid "willful blindness" in order to avoid culpability under 8 U.S.C. §1324a.

Here, the question is whether JRN as Respondent's president and its principal officer, or any other officer or agent of Widow Brown's, knew or had reason to know that the aliens named in Counts I were unauthorized for employment in the United States at the time of hire. Unlike a natural person, Widow Brown's can only operate through its agents and employees. Requisite knowledge on the part of a Widow Brown's officer or agent is imputed to the employer as a matter of

elementary agency law without resort to constructive knowledge analysis. Indeed, Respondent's brief is prescient in this respect. Notwithstanding that constructive knowledge was referred to as an alternative basis for liability in U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91), Respondent refers to Cafe Camino Real as "a case in which this Court . . . imposed a duty on the employer to exercise reasonable care to acquire knowledge of the individual's [alien's] status." Resp. Reply Brief at 8-9. Distinguishing the present case from Cafe Camino Real, the latter "stands for the proposition that IRCA cannot be avoided by having someone else hire the employee and have them work for you, but does not support the concept of constructive knowledge as asserted by the government [in Widow Brown's]." Resp. Reply Brief at 9.

Shao and Kuo testified at hearing and all three aliens gave sworn affidavits attesting to their illegal status and lack of work authorization. Shao and Kuo testified that they were recruited and hired by Widow Brown's chef, Chung Chee (Chee). Lee stated he was assisted by the "chef", without giving his name. According to their respective statements the aliens were all hired despite the aliens' candor with their prospective employer regarding their lack of proper employment authorization. The aliens stated that neither Chee nor anyone else at Widow Brown's ever asked to see any employment documentation. The statements of Kuo and Lee link this flaw directly to JN. For example, Lee stated in his affidavit:

> At the restaurant I met the owner's son who offered a job to me. The owner's son did not ask me if I was authorized to work in the United States. I was replacing another employee who was absent and the owner's son did not ask me any questions. . . . I never showed the owner any documents. . . . I never signed any forms after I was hired.

Exh. H.

Shao's testimony offers an additional example:

> Q. Did you ever tell anybody that you did not have work authorization?
> A. Chung Chee know [sic] that.
> Q. How did Chung Chee know that?
> A. Because I told Chung Chee. . . .
> Q. Did Chung Chee hire you? Did Chung Chee give you the employment?
> A. Yes. . . .

Q. Did Mr. Chung Chee tell either John Nyari, Senior, in the middle or the younger John Nyari that you did not have work authorization?
A. Chung Chee told me that he already told him.

Tr. 298-300.

Kuo, who was recruited in New Jersey for Widow Brown's, corroborated the other aliens that no one had asked for work authorization. Tr. 326 - 27; Exh. F.

At the time of hire, Respondent possessed the requisite knowledge about the illegal status of Shao, Kuo and Lee. At a minimum, Respondent's agents Chee and JN knew of the aliens' lack of work authorization at the time of hire. Having observed the interpreters at hearing, and lacking any persuasive challenge to their accuracy and fluency, I reject Respondent's reservations as to the quality of the two aliens' testimony, as translated into English. JRN's failure to respond to questions at hearing invites inferences which provide a further basis for a finding of knowing hire. As president of Widow Brown's, he hired the three aliens after November 6, 1986, knowing that they lacked permission to work in the United States, and that they were in the United States illegally.

Conduct of other Widow Brown's personnel was consistent with knowledge at the time of hire of the unauthorized status of the aliens. For example, Friedhoff testified that she and other employees had noticed that the Chinese employed by the restaurant were treated differently. This disparate treatment was noted by Friedhoff and her colleagues not because of the aliens' race, but because of the aliens' illegal status. For example, as a result of her responsibilities to monitor employee timecards, Friedhoff had specific knowledge that the Chinese, in contrast to all other non-managerial employees, did not have timecards.

Shao, Lee and Kuo not only worked on Widow Brown's premises, but also resided there. Under such circumstances, Respondent's ignorance defense is even less credible. Widow Brown's agents knew or should have exercised reasonable care to know the illegal status and lack of work authorization of Shao, Kuo and Lee. Accordingly, Complainant has sufficiently established knowing hire of the three unauthorized aliens.

G. *Paperwork Violations Proven*

Count III of the Plumsteadville Complaint and Counts III and IV of the Stockertown Complaint together allege 23 incomplete I-9s. On examination of the tendered documents, Exhs. A-1, A-2, B-1 and B-2, I hold them to be flawed as alleged. They were provided to INS by JN. Respondent's claim that they fall in face of the Hearsay Rule is unpersuasive in light of the APA as I noted at hearing. See 5 U.S.C. §556(d), "[A]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." See also U.S. v. DuBois Farms, Inc., 2 OCAHO 376 (9/24/91) at 8-10. Additionally, drawing an adverse inference from JRN's refusal to respond to specific questions about the I-9s confirms that they are defective. Indeed, objecting to a question put to JRN about omissions on the I-9 for Christopher Olssen, Respondent's counsel commented that "[T]he document is in writing; it speaks for itself." Tr. 30. For the foregoing reasons, I hold Respondent in violation of 8 U.S.C. §1324a(a)(1)(B) as to the individuals listed in these Counts.

In addition to the I-9s produced, the parties are at issue concerning paperwork not produced, the subject of Count II for Stockertown and Count II for Plumsteadville. The Complaints, as amended, allege and the record reflects that during the pertinent time period, the Stockertown facility employed 12 named individuals and the Plumsteadville facility employed 12 named individuals for which Respondent failed when required to produce Forms I-9.[9]

Widow Brown's payroll records, Exhs. B-1 and B-2, confirm employment, including hire after November 6, 1986, of all but two of the individuals named in the paperwork counts. The payroll records fail to reflect employment of Lee at Stockertown and Kuo at Plumsteadville. However, Lee has sworn Widow Brown's hired him about February, 1987; Kuo has sworn Widow Brown's hired him in April, 1988. Respondent offered no evidence to dispute that it hired Lee and Kuo after November 6, 1986. Consequently, I hold Respondent in violation of 8 U.S.C. §1324a(a)(1)(B) as to the individuals listed in these Counts.

[9] Complainant's prehearing motion to amend the complaint is granted, transferring the charge and penalty with respect to Sharon Faith Zeitz from Stockertown to Plumsteadville.

V. *Civil Money Penalties*

A. *Generally*

In this Decision and Order I have found Widow Brown's liable for hiring three aliens knowing them to be unauthorized with respect to those employments. I have also found Respondent liable for 47 paperwork violations, 24 for failure to prepare or present Forms I-9, and 23 for failure properly to complete I-9s.

For each of the three violations of the prohibition against unlawful employment, the civil money penalty is a minimum of $250 and a maximum of $2,000. 8 U.S.C. §1324a(e)(4)(A)(i). Within those mandatory parameters, IRCA provides no guidance concerning what criterion to consider in determining the amount of penalty.

For each of the 47 paperwork violations the civil money penalty is a minimum of $100 and a maximum of $1,000. 8 U.S.C. §1324a(e)(5). In determining the quantum of penalty I am obliged to consider the five factors prescribed by 8 U.S.C. §1324a(e)(5): size of the employer's business, good faith of the employer, seriousness of the violation, whether or not the individuals involved were unauthorized aliens, and history of previous violations. As a matter of discretion, I apply the five statutory factors obligatory for paperwork penalty assessment also to civil money penalties for the unlawful employment violations.

In the initial administrative adjudication of liability for paperwork violations under 8 U.S.C. §1324a(a)(1)(B), I applied the factors on a judgmental basis. U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89), aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d at 754. I utilize a judg-mental and not a formula approach, considering each of the five factors. U.S. v. DuBois Farms, Inc., 2 OCAHO 376 (9/24/91); U.S. v. Cafe Camino Real, 2 OCAHO 307; U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90); U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90).[10]

[10] See U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89) (applying a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations); U.S. v. Felipe, Inc., 1 OCAHO 108 at 5 and 7 (11/29/89) (On administrative appeal, the CAHO commented, "This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable" it was not to be understood as the exclusive method for keeping faith with the five statutory factors).

I consider only the range of options between the statutory minimum, and the amount assessed by INS. U.S. v. DuBois Farms, 2 OCAHO 376 at 30-31; U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16; U.S. v. Big Bear Market, 1 OCAHO 48 at 32; U.S. v. J.J.L.C., 1 OCAHO 154 at 9. Since the record does not appear to disclose any facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond that amount. U.S. v. DuBois Farms, 2 OCAHO 376 at 30-31; U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16.

The NIFs assessed the statutory maximum for each unlawful hire charge, and proposed and adhered to $750 for each failure to prepare or present charge, and $500 for each defective I-9. The total NIF assessment was $35,000.

B. *The Factors Applied*

1. *Size*

Respondent operates two restaurants implicated in this case, with a payroll in excess of 100 employees. Although it is unclear that the statutory requirement to consider size implies focus on profitability, Respondent introduced four federal income tax returns, two for Widow Brown's Inn, Inc. for the years ended March 31, 1989 and 1990, Exhs. 1-S and 2-S, two for Widow Brown's Inn of Plumsteadville for the years ended August 31, 1988 and 1989. Exhs. 3-P and 4-P. Presumably introduced to establish lack of profitability, three of the four returns showed losses on line 21 of the Forms 1120S [U.S. Income Tax Returns for an S corporation].

For rebuttal, Complainant introduced an agent of the Internal Revenue Service who testified to his analysis of the returns, suggesting that certain expenses in fact inured to the benefit of JRN, to the end that Respondent's operations were more profitable than appeared from the net income shown on the returns.

Cash flow for a restaurant operation is arguably more relevant to size than is profit. The returns do inform as to gross sales, $2,571,000 (1989), $2,642,000 (1990) for Widow Brown's Inn, Inc., and $1,0048,000 (1988), $797,000 (1989) for Widow Brown's Inn of Plumsteadville. INS apparently would prefer Plumsteadville data for periods more contemporaneous to the date of hearing. It is unclear, however, that, to satisfy the size consideration, cash flow for accounting periods closer to the date of adjudication is more informative than data for periods

closer to the date of the violations. Also, the probative value of the cash flow data is diminished because Widow Brown's Inn Inc. operates a restaurant at Wescosville not implicated in this case but the record does not inform whether or to what extent Exhibits 1-S and 2-S include the cash flow attributable to Wescosville.

I take official notice of the Standard Industrial Classification Manual (SIC) utilized by the U.S. Small Business Administration for size determination purposes. The SIC standard suggests that Respondent in the locations at issue is a small business. The size standard for SIC 5812, "eating and drinking places" other than institutional is $3,500,000 in annual receipts. On a consolidated basis without deduc-ting for a supposed Wescosville component, the maximum sales volume appears close to the margin. Since, however, neither party focused on gross income and Complainant tendered no pro forma exhibit to reconcile the tax years in question, the bench has no obligation to fill the gap. Consid-ered in context of restaurants involved in prior employer sanctions adjudications, e.g., U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16, discounting 50% of the Widow Brown's Inn Inc. cash flow, the two restaurant locations taken together are only marginally small, but I do not conclude that Respondent is large.

2. *Good Faith*

Neither party explained why I-9s were not forthcoming for the three unauthorized aliens or for the other 21 failure to prepare or present charges. The record provides no insight into Respondent's good faith as to those 21 employees although efforts at compliance concerning the 23 incomplete I-9s suggest a deliberate failure as to the 24. Unlike DuBois Farms, Respondent has not shown that the failure to prepare and present I-9s reflects a minimal percentage of new hires. U.S. v. DuBois Farms, 2 OCAHO 376 at 31. Nor is this a situation like that in Big Bear of a clear negligent failure. Accordingly, as to those 24 employees, I am unable to find that Respondent simply acted carelessly. Compare U.S. v. Big Bear, 1 OCAHO 48 at 32.

Gossner, a manager at Widow Brown's, told Biggs during the May 23 educational visit that Respondent understood and was in compliance with I-9 requirements. Nevertheless, Biggs led her through the employer handbook. Even if Gossner was not previously aware of Widow Brown's employment of illegal aliens, subsequent to this visit she should have been alerted to the employer's affirmative duty to investigate the work authoriza-tion of its employees. Her negligence

in complying with this duty confirms Widow Brown's lack of serious regard for its responsibility to comply with employer sanctions requirements.

Certain of Respondent's officers and employees as its agents knew or should have acquired the requisite knowledge at the time of hire of Shao, Kuo and Lee. Others acquired it during the course of the aliens' employment. In particular, the May 23, 1988 educational visit at Stockertown should have served as a watershed event for Respondent's officers and agents, as to their duty to be in compliance with IRCA §101. Nevertheless, I-9s were not forthcoming for 24 employees.

3. *Seriousness of the Violations*

Here, failure to prepare I-9s for 24 individuals renders a fortiori the conclusion that "failure to prepare Forms I-9 for three individuals is in blatant disregard to the statutory and regulatory mandates of IRCA." U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16. It has become common-place that failure to prepare or present I-9s "is serious, more so for example than failure to properly complete the form. U.S. v. Huang, 1 OCAHO 300 at 4." U.S. v. DuBois Farms, 2 OCAHO 376 at 31. Moreover, 2 of the I-9s presented reflect Respondent's failure to ensure that its employees properly completed section 1 of the I-9. As noted also in Cafe Camino Real, "[e]ven more serious are the omissions by Respondent in its failure to properly review documents required by section 2 of the I-9." U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16. Considering the aggregate of 47 paperwork violations by Widow Brown's, the comment in J.J.L.C., a case involving only paperwork violations, is apropos: "Taken separately or as a whole, Respondent's disregard for substantive compliance frustrates national policy reflected in enactment of §1324a." U.S. v. J.J.L.C., 1 OCAHO 154 at 10.

By the time of the June 7, 1988 investigation, not only JRN, JN and Chee, but also Friedhoff and Gossner knew or had reason to know that Respondent was employing aliens not authorized to work in the United States. In light of the May 23 educational visit, Respondent had express notice of its statutory duty. Having failed in its duties under IRCA initially, it should have come into compliance and dismissed employees lacking appropriate documentation. Respondent, through its corporate principals and agents, knew that it was in violation of IRCA at the time of hire and continued to employ the aliens. It also failed to prepare I-9s for 21 employees in addition to

Kou, Shao and Lee, notwithstanding the educational visit. Its violations can only be understood as serious.

4. *Status of the Employees*

An important consideration, whether or not the individuals involved were unauthorized aliens, is resolved against Respondent with respect to three of the 47 charges of paperwork violations.

5. *History of Previous Violations*

There is no evidence of prior violations of 8 U.S.C. §1324a.

C. *Civil Money Penalties Adjudged*

Applying the statutory criteria to the violations found suggests civil money penalties close to the levels assessed by INS. An additional consideration here is that the unauthorized aliens resided in quarters provided by Respondent.

In Respondent's favor, however, is the fact that this case had its origins in a time period early in the enforcement of IRCA §101. Additionally, Complainant does not explain why INS waited until February 1989 to serve the NIFs and another year and a half, until August 1990, to file the Complaints. Consequently, the penalties warrant discount to a level commensurate with early precedent, e.g., U.S. v. Mester, 1 OCAHO 18 at 43 (where the INS assessment of $500 for each unlawfully employed individual was adopted in addition to a discretionary non-monetary civil penalty imposed sua sponte).

On balance, I adopt the penalties listed below in lieu of those proposed by INS, i.e, $2,000, $750, $500 and $500, respectively. I find just and reasonable the following civil money penalties:

Counts I, as to each alien, $1,000;
Counts II, as to each alien, 500;
Counts III, as to each alien, 250;
Count IV, as to each alien, 250
[Stockertown only].

VI. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, testimony, evidence, memoranda, briefs and arguments submitted by the parties. All motions and all

requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That Widow Brown's Inn, Inc., t/a Widow Brown's Inn (Respondent) hired Fa Sha Shao and Tjen Yen Lee for employment in the United States at its Stockertown, Pennsylvania location after November 6, 1986, knowing them to be unauthorized to work in the United States. [Count I].

2. That Widow Brown's of Plumsteadville, Inc., t/a Widow Brown's Inn (Respondent) hired Hou Chan Kuo (a/k/a/ Hou Can Guo) for employment in the United States at its Plumsteadville, Pennsylvania location after November 6, 1986, knowing him to be unauthorized to work in the United States. [Count I].

3. That the ineligibility of the aliens for such employment was known or should reasonably have been known to John R. Nyari (JRN) the president of each entity collectively identified as Respondent in this Decision and Order, and to his son John Nyari (JN) the operating management official of Respondent's locations in this case, which knowledge is imputed to the corporate principal. Accordingly, with respect to both the Stockertown and Plumsteadville locations, Respondent is found by the preponderance of the evidence to have violated 8 U.S.C. §1324a(a)(1)(A).

4. That having applied Fourth Amendment principles to the evidence in this case, none of the evidence adduced is suppressed.

5. That exercise by Respondent's president of the Fifth Amendment privilege against self-incrimination permits the drawing of appropriate inferences against Respondent from refusal to answer certain questions.

6. That it is just and reasonable to require Respondent with respect to paragraph 1 above to pay a civil money penalty in the sum of $1,000 per violation for a total of $2,000.

7. That it is just and reasonable to require Respondent with respect to paragraph 2 above to pay a civil money penalty in the sum of $1,000 for the single violation.

8. That Respondent shall cease and desist from violating the prohibitions against hiring, recruiting, referring or continuing to

employ unauthorized aliens, in violation of 8 U.S.C. §§1324a(1)(A) and (a)(2).

9. That with respect to the Stockertown location, Respondent failed to prepare or present Forms I-9 for 12 employees, Fa Sha Shao, Tjen Yen Lee, Vicky Cheng, Chuch Shui Cheng, Tenghui Sae Chue, Karen M. Czinke, Poon Le Inghin, Carolyn E. Karvoski, Fu Cheng Poon, Chein Chin Shu, Maureen J. Horn, and Lee To Kwai [Count II]; failed to properly complete Section 2 of Forms I-9 for 15 employees, David W. Ziegenfuss, Jacob M. Woolbert, Melanie Sommons, Heather Jean Parry, Tammy R. Hiller, Bryen Jon Deutsch, Jason A. Davenport, Timothy R. Daniels, Gladys Mae Sutton, Fifine C. Holva, Mark Anthony Lutz, Brian C. Jones, James R. Farber, David W. Keeler and Robert Michael Suranofsky [Count III]; failed to ensure that the employee properly complete Section 1 and to properly complete Section 2 of Forms I-9 for 2 employees, Hua Shan Pan and April Lynn Albert [Count IV]. Accordingly, Respondent is found by the preponderance of the evidence to have violated 8 U.S.C. §1324a(a)(1)(B).

10. That with respect to the Plumsteadville location, Respondent failed to prepare or present Forms I-9 for 12 employees, Hou Chan Kuo a/k/a Hou Can Guo, Jennifer C. Brown, Lisa Brown, Jennifer Conway-Inacone, Lisa Davis, William Hennessy, Paul Edward Kunigus, Jr., Diane B. Miller, Richene E. Morgan, Colette Neff, Yeung Kei Sze, and Sharon Faith Zeitz [Count II]; and failed to properly complete Section 2 of Forms I-9 for 6 employees, Christopher Phillip Olsson, Elisabeth Artie Robbins a/k/a Lisa E. Robbins, Matthew W. Lawrence, Carol Anne Fertitta, Ruth Ann Shomper, and Rosemary Elinor Gardner [Count III]. Accordingly, Respondent is found by the preponderance of the evidence to have violated 8 U.S.C. §1324a(a)(1)(B).

11. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty with respect to the Stockertown location in the sum of $6,000 for violations listed in Count II, $3,750 for Count III, and $500 for Count IV, for a total sum of $10,250.

12. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty with respect to the Plumsteadville location in the sum of $6,000 for violations listed in Count II and $1,500 for Count III, for a total sum of $7,500.

13. This Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(a) (1991). As provided at 28 C.F.R. §68.53(a)(1) (1991), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer, shall have modified or vacated it. See also 8 U.S.C. §1324a(e)(8), 28 C.F.R. §68.53(a)(2) (1991) (judicial review).

SO ORDERED.

Dated this 15th day of January 1992.

MARVIN H. MORSE
Administrative Law Judge