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

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) Case No. 93A00127
LOCAL BUILDING AND)
REMODELING OF)
INTERNATIONAL FALLS, INC.,)
Respondent.)
)

FIRST PREHEARING CONFERENCE REPORT AND ORDER
(October 6, 1993)

Appearances: Annette Toews, Esq., for Complainant.
Steven A. Nelson Esq., for Respondent.

The first prehearing conference was held on October 5, 1993 as scheduled.

This order confirms rulings announced in response to Complainant's motion, filed August 27, 1993, to strike affirmative defenses. Although Respondent had not filed a reply to the motion, I accepted as a general opposition its oral representation to that effect.

1. I grant Complainant's motion to strike the first affirmative defense that the Complainant did not possess probable cause to believe that the Respondent was in violation of 8 U.S.C. §1324a. Probable cause to believe that the employer was in violation of 8 U.S.C. §1324a is not a condition precedent to a cause of action for paperwork violations under 8 U.S.C. §1324a(1)(B). Therefore, such a claim does not constitute a legally sufficient affirmative defense. Compare 8 U.S.C. §1324a(e)(1).

2. I deny Complainant's motion to strike Respondent's second affirmative defense of substantial compliance. I agree with Complainant that technical or de minimus violations do not as such qualify as exceptions to liability for failure to perfect employment authorization verification whether as substantial compliance or otherwise. U.S. v. Applied Computer Technology, 2 OCAHO 367 (Modification by CAHO of ALJ's decision and order) (9/19/91). However, nothing in Applied

Computer overtakes OCAHO caselaw to the effect that, in principle, substantial compliance can constitute a legally sufficient affirmative defense. See e.g., U.S. v. PPJV Inc., 2 OCAHO 337 (6/4/91). Nevertheless, Respondent's substantial compliance defense is unavailing unless it provides "more than mere conclusory allegations," U.S. v. Nevada Lifestyles, Inc., 3 OCAHO 463 (10/16/92) at 17 (Order . . . Granting in Part Complainant's Motion to Strike Affirmative Defenses); U.S. v. Noel Plastering and Stucco, Inc., 2 OCAHO 396 (2//12/91). As discussed, Respondent will be expected promptly to amend its answer to the complaint. Respondent suggested at conference that certain of the individuals alleged to have been employees for whom no employment verification authorization forms (Forms I-9) were presented were not its employees. In this respect, I note that such a defense, i.e., that the individuals were instead employees of subcontractors, would not be included in a defense of substantial compliance.

3. I grant Complainant's motion to strike Respondent's third affir-mative defense that it was able to produce I-9s for inspection upon due notice of intent to inspect with respect to Counts II and III of the com-plaint which address incomplete I-9s, a defense inconsistent with the existence of the partially executed forms. Respondent's amended an-swer will be expected to more fully describe the basis for its claim with respect to the allegations of failure to present Forms I-9 in Count I.

4. I grant Complainant's motion to strike Respondent's fourth affirmative defense that it has not hired illegal aliens and, therefore, that penalties for violations do not apply. Liability for failure to comply with paperwork requirements under §1324a does not depend on whether unauthorized aliens were on the payroll. It is relevant to the assessment of civil money penalties, and need not be affirmatively pleaded. 8 U.S.C. §1324a(e)(5).

A second telephonic prehearing conference is scheduled for November 18, 1993 at 3:00 p.m. In event the dispute is not settled between the parties before that date, I will expect them to maximize the opportunity to develop factual stipulations.

SO ORDERED.

Dated and entered this 6th day of October, 1993.

MARVIN H. MORSE
Administrative Law Judge