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

IN RE INVESTIGATION OF	)
VALLEY CREST	)
TREE COMPANY, INC.	)
	) OCAHO Subpoena Nos. 93-2-00078
	) 93-2-00079
	) 93-2-00080
	) 93-2-00081
	) 93-2-00082
	) 93-2-00083
	) 93-2-00084
	)

ORDER DENYING PETITION TO REVOKE OR MODIFY
AND DENYING PROTECTIVE ORDER
(November 26, 1993)

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural Background*

On October 29, 1993, the Office of Special Counsel (OSC), on formats provided by the Office of the Chief Administrative Hearing Officer (OCAHO), filed requests for issuance of subpoenas "In Re Investigation of Manuel Jiminez, Justino Davila and Pedro Jaregui v. Valley Crest Tree Company" (Valley). The subpoenas were addressed to seven individuals who were each directed to appear to give testimony at specified times on November 16, 1993 at the Office of the United States Attorney in Los Angeles. The subpoenas were addressed to the potential witnesses at their place of employment, i.e., Valley. Each individual was commanded to appear on November 16, 1993, and to bring his social security card and immigration documents.

On October 29, 1993, I signed and issued the seven subpoenas as requested. On November 12, 1993, followed by a mailed copy received November 15, Valley filed, by facsimile transmission, a Petition to Revoke or Modify Subpoenas Or, In The alternative, For a Protective Order. Valley contends that it is unduly burdened by OSC's subpoenas of its employees both because (1) evidence of their immigration status can as well be obtained by OSC from the Immigration and Naturalization Service, and (2) their evidence might indicate that they are unauthorized for employment, implicating wrongdoing by Valley

and necessitating their prompt discharge. Valley contends also that only two of the seven individuals have expressed an intent to comply.

On November 23, 1993, OSC filed its Response in Opposition to the Petition. OSC claims that Valley lacks standing to challenge the subpoenas and that the subpoenas are otherwise enforceable.

II. *Discussion*

OSC's Response states that the subpoenas were served on November 1, 1993, and that Valley's November 12 filing in opposition is timely. Any disagreement I might have with OSC's calculation of the ten days contemplated by OCAHO rules of practice and procedure for a petition to revoke or modify, 28 C.F.R. §68.25(c), is immaterial because §28.25(c) provides in the alternative that the judge may set the time for filing a petition. Id. Since OSC does not contest timeliness of the petition, I accept it as timely filed.

Accordingly, this Order addresses the merits of the subpoena question. Subpoenas are to be construed in context of the investigation in which they issue. I have no reason to discredit OSC's assertion that its investigation turns on claims of discrimination against authorized employees in favor of retention by Valley of undocumented individuals not authorized for employment in the United States. See 8 U.S.C. §1324(d)(1). See e.g., In re Seafarers International Union, 3 OCAHO 498 (3/19/93) at 2.

In context of OSC's description of the scope of its investigation, I disagree with Valley that OSC lacks authority to make the inquiry it proposes. This inquiry is squarely within the parameters of 8 U.S.C. §1324b: the employment eligibility of Valley employees--the seven prospective witnesses--said to have been retained by Valley in preference to the three individuals against whom §1324b discrimination by Valley is alleged. I reject Valley's proposal that in lieu of subpoena OSC ascertain the immigration status of the employees by inquiry to the Immigration and Naturalization Service (INS). Rather, I agree with OSC that an INS records check may be inadequate to establish employment eligibility. I do not necessarily share OSC's confidence that the subpoenaed employees will "know best whether the [sic] have been granted authorization to work in this country." OSC Response at 8. Nevertheless, I agree with OSC that inquiry of the employees will provide a basis which inquiry to INS cannot, viz, to determine whether, as alleged, the employer with knowledge of their employment ineligibility retained employees not authorized for employment in preference to those claiming §1324b protection.

Significantly, I do not agree with Valley's understanding that OCAHO rules of practice and procedure give it standing to oppose these subpoenas. Valley relies on 28 C.F.R. §68.25(c) which provides that a person served with a subpoena may petition for revocation or for modification. Patently, Valley is not one of the seven persons to whom the subpoenas in question are addressed; it gains no nourishment from §68.25(c). Valley relies also on 28 C.F.R. §68.25(d) which provides that:

> A party shall have standing to challenge a subpoena issued to a non-party if the party can claim a personal right or privilege in the discovery sought.

The matter before me is an investigation by Special Counsel pursuant to 8 U.S.C. §1324b(d)(1) in aid of which the subpoenas were issued pursuant to §1324b(f)(2). The reference at §68.25(d) to party must be understood in light of the pertinent definition of the term, party set out at 28 C.F.R. §68.2(o),

> which, includes all persons or entities named or admitted as complainant, respondent, or intervenor in a proceeding; or any person filing a charge with the Special Counsel under 274B, resulting in the filing of a complaint, concerning an unfair immigration-related employment practice.

(emphasis added).

Consistent with and pursuant to 28 C.F.R. §§68.2(o) and 68.25(d), I conclude that a person or entity authorized by §68.25(d) to challenge a subpoena issued to a third party must satisfy the definition of a party, §68.2(o) i.e., a complainant, respondent, or intervenor in a proceeding. I am not persuaded that this is a proceeding within the scope of the OCAHO definition of party. An investigative inquiry is not a proceeding as that term is commonly understood in administrative adjudication, however much it may impact on the employer. Again, §68.25 provides no assist to Valley. Moreover, I adopt OSC's suggestion that even if Valley were found to have standing, it has failed to establish a personal right or privilege in the discovery sought. More specifically, the notion that Valley might have a claim of privilege as to the immigration status of its employees conflicts with national policy reflected by enactment of §§101 and 102 of the Immigration and Nationality Act of 1986, as amended, 8 U.S.C. §§1324a and 1324b.

I am satisfied upon review of the subpoenas, Valley's petition and OSC's response, that the subpoena inquiries satisfy the requirements of EEOC v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986), as adopted in OCAHO jurisprudence, In re Carolina Employers Assoc., 3 OCAHO 455 (9/19/92). Clearly, the testimony and data sought is

relevant to this OSC investigation. Moreover, it is well-settled that the role of the adjudicative forum is "sharply limited" in an investigatory subpoena enforcement proceeding. EEOC v. South Carolina Nat'l Bank, 562 F.2d 329, 332 (4th Cir. 1977); Maryland Cup at 475. ("[A]dministrative subpoenas are subject only to limited judicial review. See e.g., NLRB v. G.H.R. Energy Corp., 797 F.2d 110, 113 (5th Cir. 1982) (interpreting a statute granting a subpoena power identical to that of the EEOC))." See also, EEOC v. Tempel Steel Corp., 814 F.2d 482, 485 (7th Cir. 1987), cited early in the development of OCAHO caselaw, In re St. Christopher-Otillie, 1 OCAHO 3 (5/5/88); In re Seafarers International Union, 3 OCAHO 498.

I conclude that Valley lacks standing to challenge the subpoenas at issue. The subpoenas are authorized by statute. The testimony and documents sought are relevant to an authorized investigation. The petition is denied.

I understand that Valley represented to OSC that the seven individuals had been advised by Valley's counsel that they need not appear as directed in the subpoenas "because of the filing of his petition," and that OSC agreed "that this was the best course to follow under the existing circumstances." OSC Response at 2, n.1. In light of the effectively indefinite postponement of the initial return date of October 29, 1993, I will expect Special Counsel either to confirm, individually with each of the seven persons, the date, hour and place for their appearance, or to apply for issuance of renewed subpoenas.

Valley's filing implies that five of the seven individuals subpoenaed may intend not to comply. In order to make clear the serious intent with which I grant requests to issue subpoenas, this Order authorizes the Special Counsel, without further request, to seek enforcement in an appropriate United States district court, upon default(s) of appearance by the individual(s) subpoenaed, in event such default(s) should occur. 8 U.S.C. §1324b(f)(2).

This Order issues in lieu of the proposed order tendered by OSC.

SO ORDERED.

Dated and entered this 26th day of November, 1993.

MARVIN H. MORSE
Administrative Law Judge