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

November 26, 1993

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 92A00272
POWER OPERATING	)	
COMPANY, INC.,	)	
Respondent.	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION
FOR SUMMARY DECISION

I. *The Immigration Reform and Control Act of 1986*

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA or the Act), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting section 274A of the Immigration and Naturalization Act of 1952 (INA), 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).

Congress's major purpose in passing IRCA was to control illegal immigration to the United States. Staff of House Comm. on the Judiciary, 99th Cong., 2d Sess., The "Immigration Reform and Control Act of 1986": A Summary and Explanation 6 (Comm. Print 1986). To this end, the Act makes it illegal for employers to hire aliens who are unauthorized to work in the United States, either because they entered illegally or because their immigration status does not permit employment, and establishes penalties for violation. Id. This provision is generally referred to as "employer sanctions", and it is intended to deter employers from hiring illegal aliens, thus cutting off the magnet of employment. Id.

Under the employer sanctions provisions of IRCA, employers are vulnerable to civil and criminal penalties for violation of prohibitions against employment of unauthorized aliens in the United States. Employers are also subject to civil penalties for failure to observe

IRCA's record keeping verification requirements, i.e., paperwork requirements. See 8 U.S.C. §1324a et seq.; United States v. Bakovic, 3 OCAHO 482 (1/15/93); United States v. Diamond Construction, 3 OCAHO 451 (9/8/92).

II. *Procedural History*

On July 15, 1991, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served Notice of Intent to Fine (NIF) PIT 89-274A-32 upon Digger, plc. (Digger), Ryan International, plc. (Ryan), Crouch Mining (Crouch), and Power Operating Company, Inc. (Power/respondent). That two-count citation contained 18 alleged violations of the employer sanctions provisions of IRCA, 8 U.S.C. §1324a .

Digger, Ryan, Crouch, and Power were advised in the NIF of their right to request a hearing before an administrative law judge by submitting an appropriate written request within 30 days of their receipt of that citation. By letter dated July 29, 1991, all four named respondents timely filed such a request.

On December 7, 1992, complainant filed the Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO), realleging the charges previously set forth in the NIF, and requesting that Digger, Ryan, Crouch, and Power be ordered to pay civil money penalties totaling $27,000.

On January 19, 1993, Digger, Ryan, Crouch, and Power timely filed a joint Answer, denying therein that Digger as well as its subsidiary corporations and agents, Ryan, Crouch, and Power, is a corporation incorporated under the laws of the Commonwealth of Pennsylvania, denying the allegations made in Count I of the Complaint, and, while admitting that they failed to prepare or present copies of the Forms I-9 for the nine (9) individuals named in Count II, denying that in doing so they violated IRCA, 8 U.S.C. §1324a(a)(1)(B). In their Answer, Digger, Ryan, Crouch, and Power also asserted four affirmative defenses.

For their first affirmative defense, Digger, Ryan, Crouch, and Power asserted that even if they did employ individuals beyond the authorization of their employment status, they acted in good faith, by securing legal opinions concerning the immigration status of the individuals named in the Complaint, ensuring that the named individuals gave truthful information to the immigration inspectors upon their entry into the United States, and exerting substantial

efforts to ensure compliance with applicable laws. They also noted that the individuals named in the Complaint were not employed by a United States entity, remained in the United States for only brief periods of time, and promptly returned to their employment abroad upon completion of their business in the United States. In addition Digger, Ryan, Crouch, and Power noted that they properly completed Forms I-9 for all employees hired after November 6, 1986.

For their second affirmative defense, Digger, Ryan, Crouch, and Power asserted that the Federal government, including complainant, was showing prejudice against them because of their foreign origin and methods, and that, under such conditions, complainant's actions fall outside the legitimate exercise of its authority in immigration matters and violates the guarantees of due process and equal protection under the United States Constitution.

For their third affirmative defense, Digger, Ryan, Crouch, and Power asserted that their activities were legally justified by compelling business considerations and the exigencies of the economic condition of Power.

For their fourth affirmative defense, Digger, Ryan, Crouch, and Power asserted that complainant's actions were motivated by political considerations and instigated by the United Mine Workers of America (UMWA), and its sympathizers, because of resistance by Power to UMWA organizing efforts at Power, and that by instigating this action the UMWA and its sympathizers are attempting to interfere with the rights of Power's employees to refrain from joining, forming, or supporting a union, in violation of Section 7 of the Labor Management Relations Act (LMRA), 29 U.S.C. §157.

On February 2, 1993, Digger, Ryan, and Crouch filed a Motion to Dismiss for Lack of Personal Jurisdiction, asserting therein that they are not United States corporations, that none of them currently does or has done business in the United States, that none of them has ever sold or shipped goods or provided services in the United States, that they do not have the minimum contacts with the Commonwealth of Pennsylvania or with any jurisdiction in the United States to support personal jurisdiction, and that the employer's sanctions provisions of IRCA, 8 U.S.C. §1324a, were not meant to impact on foreign corporations with no United States business presence.

On March 8, 1993, complainant filed its Response to Motion to Dismiss for Lack of Personal Jurisdiction and a Motion to Amend caption, wherein it asserted that it did not oppose the Motion to

Dismiss. Complainant moved that the caption be amended to delete the words "Digger PLC and its subsidiary corporations and agents Ryan International, Crouch Mining."

On March 8, 1993, the undersigned granted the Motion to Dismiss for Lack of Personal Jurisdiction, and ordered that the words "Digger PLC and its subsidiary corporations and agents Ryan International, PLC, Crouch Mining" be deleted from the caption.

On May 20, 1993, complainant filed a Motion to Amend Complaint, requesting therein the following amendments:

> That Count I of the Complaint be amended to remove paragraphs C and D in their entirety and substitute therefor the following:
>
> > C. The individuals listed in paragraph A were admitted to the United States in 1989 as temporary visitors for business as authorized by 8 U.S.C. §1101(a)(15)(B).
> >
> > D. 8 U.S.C. §1101(a)(15)(B) specifically excludes a temporary visitor for business from performing skilled or unskilled labor.
> >
> > E. The individuals listed in paragraph A, subsequent to their admission as set forth in paragraph C, performed skilled or unskilled labor.
> >
> > F. The Respondent hired these individuals knowing that they were aliens not authorized to be employed in the United States.
> >
> > G. In the alternative to paragraph F, the Respondent continued to employ these individuals knowing that they were aliens not authorized to be employed in the United States.
>
> The following charge should be added to Count I:
>
> > WHEREFORE, it is charged that the Respondent is in violation of § 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an alien knowing that the alien is not authorized for employment in the United States.
>
> That Count II of the Complaint be amended to add the following paragraph:

E. You failed to prepare Forms I-9 for any of the individuals listed in paragraph A.

In its Motion to Amend, complainant asserted that it had reconsidered the fine amount and wished to revise its demand as follows:

a. Count I $1400 per violation x 9 = $12,600
b. Count II $720 per violation x 9 = $6,480.

Respondent did not oppose complainant's Motion to Amend the Complaint, and on August 5, 1993, the undersigned issued an Order granting complainant's motion and amending the Complaint accordingly.

On May 27, 1993, complainant filed a Motion for Summary Decision and Memorandum in Support Thereof, concluding therein that respondent employed the nine Crouch employees (the nine) knowing that the nine were not authorized to work in the United States, as alleged in Count I of the Complaint. Complainant asserted that, in so doing, respondent violated IRCA, 8 U.S.C. §§1324a(a)(1)(A) and 1324a(b)(2).

Complainant further asserted that respondent failed to prepare Forms I-9 for the nine, as alleged in Count II of the Complaint and in violation of 8 U.S.C. §1324a(a)(1)(B).

With respect to the penalties to be assessed for these alleged viola-tions, complainant asserted that the fine amounts of $1400 for each violation of Count I and $720 for each violation of Count II were fair and reasonable, and that respondent should be ordered to cease and desist from further violating 8 U.S.C. §1324a.

On June 29, 1993, counsel for complainant filed a copy of a letter to respondent confirming that respondent requested an extension of the response date for respondent's response to complainant's Motion for Summary Decision to June 9, 1993, to which complainant assented. Complainant noted that respondent, in turn, agreed not to oppose a motion by complainant to file a reply to respondent's response.

On July 12, 1993, respondent filed a Memorandum in Opposition to Complainant's Motion for Summary Decision. In its Memorandum, respondent asserted that complainant is not entitled to judgment as a matter of law because there exist numerous genuine issues as to material facts.

In particular, respondent asserted, it is not clear whether the work done by the nine was for the purposes of supervision and training or for the purpose of performing labor, as complainant contended, nor is it clear whether the "labor" performed by those individuals was prohibited for those in the B-1 status.

In addition, respondent contended that there is a genuine issue of fact with regard to the proposition that there was an employment relationship between the nine and respondent, asserting that respondent did not exercise sufficient control over the nine for them to be considered respondent's employees.

Respondent also countered complainant's contention that respondent knowingly hired or continued to employ the nine in violation of the immigration laws, asserting that respondent was not aware that its conduct was in violation of any law.

Finally, noting that the completion of Forms I-9 is only required when an employer hires employees, respondent asserted that Forms I-9 were not completed for the nine because Forms I-9 were not required for them.

On July 26, 1993, complainant filed a Motion to File a Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Summary Decision, and its Reply.

In its Reply, complainant alleged that respondent is collaterally estopped from alleging that the nine were engaged in training, asser-ting that respondent is bound by a prior determination of the National Labor Relations Board (NLRB) that the nine were production "workers", and did little, if any "training."

Complainant also countered respondent's contention that because respondent only gave expense money to the nine, no employer- employee relationship existed, asserting that in receiving both an expense allowance and reimbursement for living expenses, the nine received wages from respondent.

Complainant further asserted that because the nine performed labor at respondent's site, were paid by respondent for room, meals, and other incidentals plus $100 per week, and were knowingly permitted by respondent to work at respondent's site, an employer/employee, not an independent contractor, relationship existed between respondent and the nine.

Finally, complainant asserted that the attorney-client letters attached to its Motion for Summary Decision demonstrated knowledge on respondent's part that the B-1 visa was issued for the purpose of instructing respondent's employees, and that any skilled or unskilled labor performed by the nine must have been incidental to demonstrations of the equipment involved, which, complainant asserted, was not the case.

On August 8, 1993, respondent filed its Motion for Leave to File and a Counter Reply in Opposition to Complainant's Motion for Summary Decision, asserting therein that collateral estoppel should not apply here because the issues litigated are not identical with those involved in the prior NLRB decision, the issue sought to be precluded was not necessarily decided, and the application would be unfair to respondent. Furthermore, respondent asserted, complainant cannot establish as a matter of law that Power had control over the nine requisite to make them Power employees, and that therefore this case is not ripe for summary decision.

On August 24, 1993, complainant filed a Response to Respondent's Motion to File Counter Reply to Motion for Summary Decision, a Motion to File a Further Reply to Respondent's Counter Reply in Opposition to Complainant's Motion for Summary Decision, and a Further Reply to Respondent's Counter Reply in Opposition to Complainant's Motion for Summary Decision.

In its Further Reply, complainant asserted that collateral estoppel is appropriate, but that even if collateral estoppel is not applied, no genuine specific issue of material fact exists with respect to training or later because testimony elicited from respondent's own witness at the NLRB proceeding establishes that the employees in question performed production tasks prohibited by statute.

Complainant further asserts that respondent bears the burden of proving that the employees in question were independent contractors. In addition, complainant asserts that the standard to be applied in these proceedings is by a preponderance of the evidence, not clear, unequivocal and convincing evidence as in deportation proceedings.

On September 2, 1993, the undersigned issued an Order Granting Motion to File a Reply to Respondent's Opposition, Motion for Leave to File A Counter Reply, and Motion to File A Further Reply to Respondent's Counter Reply, permitting the parties to file their additional responsive pleadings, and an Order Extending Hearing Date, continuing the hearing in this matter, previously set for

September 27, 1993, generally, pending ruling on complainant's motion for summary decision.

III. *Legal Standards in a Motion for Summary Decision*

The rules of practice and procedure governing these proceedings provide for the entry of summary decision if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no material fact and that a party is entitled to summary decision. 28 C.F.R. §68.38(c).

This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and requirements needed to determine whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (4/26/91). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) ((s)ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, designed to 'secure the just, speedy and inexpensive determination of every action.').

The "genuine" standard focuses on the sufficiency of the evidence. Applications Research v. Naval Air Dev. Ctr., 752 F. Supp. 660, 665 (E.D. Pa. 1990). An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). Accordingly, a genuine issue is present if the evidence is such that a reasonable fact-finder might decide in favor of the non-moving party. Miller v. Yellow Freight Sys., Inc., 758 F. Supp. 1074, 1076 (W.D. Pa. 1991), aff'd 941 F.2d 1202 (3d Cir.).

A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992); Slotterback by and through Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 287

(E.D. Pa. 1991); United States v. PPJV Inc., 2 OCAHO 337, at 3 (6/23/90).

In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Erie Telecommunications, Inc. v. Erie, 853 F.2d 1084, 1093 (3d Cir. 1988); PPJV Inc., 2 OCAHO 337, at 3.

Regardless of which party would have the burden of persuasion at trial, the party seeking summary decision assumes the initial duty of informing the trial court of the basis of its motion, and of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," the movant believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S. Ct. at 2553; First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 281 (3d Cir. 1987); Keyes v. National R.R. Passenger Corp., 756 F. Supp. 863, 865 (E.D. Pa. 1991); Applications Research, 752 F. Supp. at 665; PPJV, Inc., 2 OCAHO 337, at 3.

Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Smolsky v. Consolidated Rail Corp., 785 F. Supp. 71, 72 (E.D. Pa. 1992). See also Petroleo Brasilero v. Nalco Chem. Co., 784 F. Supp. 160, 163 (D.N.J.), aff'd, 977 F.2d 569 (3d Cir. 1992) ("a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the could be the basis for a jury finding in that party's favor.")

IV. *Summary of the Parties' Arguments*

A. Count I

Count I of the Complaint charged respondent with having violated the provisions of IRCA, 8 U.S.C. §1324a(a)(1)(A), by having knowingly hired and/or continued to employ the nine for employment after November 6, 1986, knowing those individuals were aliens not authorized for employment in the United States.

IRCA, 8 U.S.C. §1324a(a), provides, in pertinent part:

(1) IN GENERAL.- It is unlawful for a person or other entity

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment....

Subsection (h)(3) provides:

DEFINITION OF UNAUTHORIZED ALIEN.- As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

Therefore, in order for complainant to prove the violations alleged in Count I of the Complaint, complainant must show:

1. Respondent hired the individuals named in Count I for employment in the United States
2. after November 6, 1986
3. those individuals were not authorized for employment in the United States
4. Respondent knew or had reason to know that those individuals were not authorized for employment in the United States or
5. Respondent continued to employ those individuals after finding out that they were not authorized for employment in the United States.

See United States v. Primera Enters., OCAHO Case No. 93A00024 (Order Granting in Part and Denying in Part Complainant's Motion for Summary Judgment)(10/5/93).

1. Element One

The implementing regulations define the term "hire" as: "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. §274a.1(c). "Employee" is defined therein as: "an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors...." 8 C.F.R. §274a.1(f). "Employment" is defined as: "any service or labor performed by an employee for an employer within the United States...." 8 C.F.R. §274a.1(h).

Therefore, in order for complainant to prove element one, that respondent hired the nine individuals named in Count I of the Com-plaint for employment in the United States, complainant must show that those individuals provided services or labor, as employees, for respondent, as employer, in exchange for wages or other remuneration.

By giving each of the nine $100 per week in addition to living expenses for their services, complainant argued, respondent paid the nine "wages or other remuneration," making the nine employees, as defined in 8 C.F.R. section 274a.1(f). By allowing those employees to work on its premises, and by giving them $100 per week and paying for their living expenses, complainant reasoned, respondent was their employer, as defined by 8 C.F.R. section 274a.1(g). Finally, complainant argued, a "hire", as defined by 8 C.F.R. section 274a.1(c), occurred when each of the nine performed labor at the mining site. Complainant's Motion, at 12.

In its Opposition, respondent countered these contentions, asserting that complainant's argument that respondent hired and employed the nine is little more than "circular reasoning." Respondent's Opposition, at 12. In particular, respondent assailed complainant's contention that the nine were respondent's employees because they received room and board and $100 expense money from respondent, asserting that the expense money in question is irrelevant to the B-1 status of the nine.

Respondent argued, rather, that the nine were "independent contrac-tors," as the term is defined under the INA, and not respondent's employees.

In support of this contention, respondent asserted that it did not exercise control over the nine sufficient to make them its employees, offering as evidence of this the affidavit of Derek Reed, respondent's treasurer from 1987 to 1989, to the effect that he "had neither the authority nor the expertise" to direct the nine. Respondent's Opposition, at 14. In addition, respondent asserted that the fact that the nine were paid by Crouch, that the nine brought their own tools (i.e., the O&K shovel and the Lectra Haul rock trucks), and that Ryan and Crouch, both British corporations, had the most to gain or lose from respondent's success or failure, all militate in favor of finding that the nine were Crouch's, and not respondent's, employees.

Complainant, in its Reply to respondent's Opposition, assailed respondent's contentions.

With respect to respondent's contention that the expense money paid by respondent to the nine is irrelevant to their B-1 status, complainant argued that the expense allowance and reimbursement for living expenses constituted "wages or other remuneration" from respondent, a U.S. source. To support this proposition, complainant quoted INS Operation Instruction 214.2b, as follows:

> Each of the following may also be classified as a B-1 non-immigrant if he/she is to receive no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay)....

Complainant's Reply, at 5.

Complainant admitted that if respondent had either paid room and board or an expense amount, this operation instruction might apply.

However, complainant asserted, respondent paid both an expense allowance and reimbursement for living expenses, offering as proof of this the following deposition testimony of John McBean:

> Q. It's true that (respondent) paid each of these individuals a hundred dollars a week and reimbursed their living expenses at the Harbor Inn, including meals and incidentals?
>
> A. Yes.

Id., at 4. In a situation where compensation payments are received in addition to room, board and incidentals, complainant argued, those payments are compensation, citing in support of this proposition the decision of the Board of Immigration Appeals in Matter of Bennett, 19 I & N Dec. 21 (1984). Complainant asserted that the Board in Bennett "held that a person who performed purely religious services for a church was employed where the person received 'a salary of $330 every 2 weeks in addition to living quarters.'" Id., at 5. Complainant concluded that in this case the nine received living quarters, meals, and other incidentals plus $100 per week, equaling or exceeding the amount received in Bennett. Id.

With respect to respondent's contention that the nine were independent contractors, complainant asserted that respondent has failed to carry its "burden of production" with respect to this defense, because the "four factors" set forth by respondent are insufficient to establish an independent contractor relationship between respondent and the nine.

Complainant did not identify to which "four factors" set forth by respondent it refers, but it appears from a review of the Reply that complainant meant respondent's assertions that: (1) respondent did not exercise sufficient control over the nine to make them its employees; (2) that Crouch, and not respondent paid the nine; (3) that the nine brought their own tools with them; and (4) that Crouch and Ryan, not respondent, had the most to gain from respondent's success or failure.

With respect to the "control" element, complainant alleged that respondent failed to note that Les Nicholson, a director of respondent who owned 7.5% of Digger plc., respondent's parent, exercised operational control over the nine, or at least "suffered or permitted" the nine to labor at respondent's worksite.

With respect to respondent's contention that Crouch and not respondent paid the nine, complainant again asserted that by paying the nine $100 per week in addition to their living expenses respondent had made the nine its employees.

With respect to respondent's contention that the nine had furnished their own tools, complainant asserted that the O&K shovels and Lectra Haul trucks are "equipment" and not "tools."

Finally, with respect to respondent's contention that Crouch and Ryan had the most to gain from respondent's success, complainant noted that respondent is the most direct beneficiary of the work performed by the nine, and that respondent, not Crouch, is the legal entity operating the business.

In its Counter Reply in Opposition, filed in response to complainant's Reply, respondent split its arguments, dividing out the independent contractor issue from the issues concerning expense money.

First, respondent assailed that complainant's attempt to separate the independent contractor factors from the consideration of whether Power employed the nine, contending that the independent contractor issue is not an affirmative defense which must be proven by respondent, but rather is a means of controverting an element that complainant must prove, and therefore is a method of showing a factual issue for hearing.

Furthermore, respondent asserted, in "conjuring" a special burden of production for respondent to meet, complainant is attempting to shift the focus from the summary decision standard to complainant's

arguments regarding the weight and persuasiveness of the matters submitted in the pleadings, determinations which are entrusted to a finder of fact at an evidentiary hearing.

Respondent further asserted that complainant's arguments highlight some of the factual issues raised by respondent's affidavits, in partic-ular, the issue of control over the nine. Respondent contended that complainant, in its Reply, improperly discounted Reed's averment that he had no operational control over the nine and attempted to make new Corporations Law by suggesting that Nicholson acted without the consent of the other members of the Board of Directors.

Respondent next assailed complainant's contentions that shovels and dump trucks are not "tools" and that the nine had a low skill level, asserting that complainant's arguments were "bizarre" and "baseless," respectively.

Finally, respondent contended that complainant had mischa-racterized respondent's own characterization of the independent contractor relationship, asserting that the relationship was between respondent and Crouch, not respondent and the nine individually.

In addition, respondent took issue with complainant's characterization of the expense money paid to the nine as "remuneration," respondent asserting that complainant has misinterpreted INS Operating Instruction 214.2b to create an either-or situation on the issue of expense money, i.e., that a visitor could receive either an expense allowance or reimbursement, which respondent asserts is not the case.

Furthermore, respondent contended, complainant took McBean's deposition testimony out of context to arrive at the incorrect conclusion that respondent paid the nine $100 per week and reimbursed all of their expenses. Respondent alleged, rather, that it paid living expenses accrued by the nine at the Harbor Inn, and gave the nine $100 per week for their additional expenses, such as for meals eaten away from the Harbor Inn, for transportation, for telephone expenses, and for other expenses incident to travel, all permissible under 214.2b.

Respondent also distinguished the issue of expense money in the matter at hand from that considered in Matter of Bennett. Respondent asserted that the respondent in Bennett entered the United States on a visitor-for-pleasure visa, which, respondent contended, was a more restrictive visa than the B-1 visa at issue here, and received

payments of $330 every two weeks, which was termed a "salary" for services rendered.

The essential points at issue in element one are respondent's remu-neration of the nine, and the existence of an independent contractor relationship between respondent and Crouch. It is uncontested that the nine provided some sort of service at respondent's worksite in Pennsylvania, be it training as permitted within their B-1 visa status or labor exceeding that status.

Therefore, in order for complainant to be entitled to summary deci-sion, it must show that respondent provided the nine with "remuneration" in exchange for their services. 8 C.F.R. §274a.1(f), §274a.1(g). See United States v. Dittman, 1 OCAHO 195, at 3 (7/9/90). Respondent, in turn, can attempt to controvert an element of complainant's case, i.e., that respondent hired the nine "for employment," by asserting the existence of an independent contractor relationship between respondent and Crouch, as employer of the nine. United States v. Robles, 2 OCAHO 349, at 7 (3/29/91).

a. Remuneration

The term "remuneration" is not defined in the implementing regulations. In prior adjudications before this Office, however, the term has been defined as "some kind of payment or expense." Dittman, 1 OCAHO 195, at 4 (quoting Webster's Third New Int'l Dictionary (1986)).

To show that the nine received wages or other remuneration, com-plainant offers two pieces of evidence.

The first is INS Operation Instruction 214.2b, which limits the com-pensation that a B-1 visitor may receive from a United States source.

The purpose of Operation Instruction 214.2b is to specify which payments to B-1 visa holders do and which do not violate that visa status under 8 U.S.C. §1101(a)(15)(B). Complainant's interpretation of that instruction notwithstanding, complainant fails to demonstrate how the instruction establishes an employer/employee relationship between respondent and the nine for the purpose of these proceedings.

The second piece of evidence offered by complainant to show that the nine received wages or other remuneration from respondent is the testimony of one of the nine, John McBean, given at the NLRB

proceedings, averring that respondent paid each of the nine $100 per week and reimbursed their living expenses at the Harbor Inn.

Respondent asserted in response to complainant's introduction of McBean's testimony that the $100 received by each of the nine went to pay all expenses not reimbursed directly by respondent, that is, those expenses accrued outside the Harbor Inn.

McBean's testimony indicating that the nine were paid $100 per week in addition to having their living expenses at the Harbor Inn reimbursed by respondent, standing alone, fails to show that there is no genuine issue as to the fact that the nine received remuneration from respondent, particularly in light of respondent's explanation that the amount in question covered those expenses not directly reimbursed by respondent.

Complainant's final piece of evidence offered to show that the nine received wages or other remuneration is the decision of the Board of Immigration Appeals in Bennett, which, complainant contends, stands for the proposition that expense payments (such as the $100 weekly payment received by each of the nine) constitute compensation.

It is unclear from Bennett what visa status the respondent there had, but respondent asserts that respondent there entered the United States on a B-2 visitor for pleasure visa, which, respondent asserts, is far more restrictive with regard to permissible work activities from the B-1 visa under consideration. Respondent's Counter Reply, at 12.

That notwithstanding, Operational Instruction 214.2b, submitted by complainant in support of its motion, indicates that B-1 visitors for business may permissibly receive reimbursement for their expenses from a United States source. Because complainant has failed to prove that the $100 in expense money received by the nine is "remuneration" as that term is defined in the regulations implementing 8 U.S.C. §1324a, the decision of the Board in Bennett is not relevant in determining whether an employer/employee relationship existed between respondent and the nine.

Because complainant has failed to show that the nine individuals named in Count I of the Complaint received remuneration from respondent, complainant has failed to prove that there is no genuine issue as to any material fact regarding element one above. For this reason, complainant has, in turn, failed to show that it is entitled to summary decision as a matter of law, and its motion must therefore be denied.

Having determined that summary decision is inappropriate at this time, I will consider the validity of the other contentions raised by the parties in their pleadings in order to limit the issues for hearing.

b. Independent Contractor Status of Crouch

As noted previously above, in its Opposition and Counter Reply, respondent attempts to controvert complainant's contention that respondent hired the nine for employment by asserting that the nine were employees of Crouch, an independent contractor, who in turn supplied their services to respondent.

The implementing regulations provide that independent contractors are not employees for the purposes of the employer sanctions provisions. 8 C.F.R. §274a.1(f). In a situation involving an independent contractor or contract labor services, the implementing regulations provide that the "employer" is the independent contractor or contractor, and not the person or entity using contract labor. 8 C.F.R. §274a.1(g).

The section of the implementing regulations defining the term "inde-pendent contractor", 8 C.F.R. section 274a.1(j), provides, in pertinent part:

> The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.

That section lists factors to be considered in determining whether an individual or entity is an independent contractor, including whether the individual or entity:

1. Supplies the tools or materials;
2. Makes services available to the general public;
3. Works for a number of clients at the same time;
4. Has an opportunity for profit or loss as a result of labor or services provided;
5. Invests in the facilities for work;
6. Directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.

Id.

However, the implementing regulation provides that the enumerated factors are not necessarily the exclusive basis for determining whether

an individual or entity is an independent contractor. Consequently, IRCA caselaw has looked to the common law developed in non-IRCA areas in addition to the enumerated factors areas in making this determination. United States v. Bakovic, 3 OCAHO 482, at 5 (1/15/93); Robles, 2 OCAHO 309, at 9 (3/29/91); Mr. Z, 1 OCAHO 288, at 41 (1/11/91).

Three separate tests have generally been employed to determine independent contractor status in federal court cases. The common law or "control" test focuses primarily on the right of the hiring party to control the manner and means by which the end of the labor is accomplished. Frankel v. Bally, 987 F.2d 86, 89 (2d Cir. 1993). The other pertinent factors in the common-law test are:

1. the skill required;
2. the source of the instrumentalities and the tools;
3. the location of the work;
4. the duration of the relationship between the parties;
5. whether the hiring party has the right to assign additional projects;
6. the hired party's discretion over hours;
7. the method of payment;
8. the hired party's role in hiring and paying assistants;
9. whether the work is part of the regular business of the hiring party;
10. whether the hiring party is in business;
11. the provision of employee benefits; and
12. the hired party's tax treatment.

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 2178-79 (1989); Frankel, 987 F.2d at 89; Cox v. Master Lock Co., 815 F. Supp 844, 846 (E.D. Pa. 1993).

In the mid-1940's, the Supreme Court decided that the common law "control" test was too narrow for use in deciding employee status for the purposes of modern far-reaching social legislation. For this reason, the Court enunciated the "economic realities" test, declaring:

> Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those of economic reality are who as matter dependent upon the business to which they render service.(emphasis added)

Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 1549-1550 (1947). See also Rutherford Food Corp. v. McComb, 331 U.S. 722, 730,

67 S. Ct. 1473 (1947); United States v. Silk, 331 U.S. 704, 67 S. Ct. 1463 (1947).

The third test is an amalgam of the common law and "economic realities" test. Under the so-called "hybrid" test, the trial court examines the economic realities of the relationship and the various common law factors, but focuses on the employer's right to control the means and methods of the employee's performance. Frankel, 987 F.2d at 89; EEOC v. Zippo Mfg. Co., 713 F.2d 32, 36 (3d. Cir. 1983); Hickey v. Arkla Indus., Inc., 699 F.2d 748, 751 (5th Cir. 1983). In determining whether an individual was an employee or independent contractor for purposes of IRCA, 8 U.S.C. §1324a, the administrative law judges in this Office have employed the "hybrid test" in tandem with the factors listed in the implementing regulation, 8 C.F.R. section 274a.1(j). Bakovic, 3 OCAHO 482, at 10.

To demonstrate that respondent had little control over the day-to-day work of the nine, respondent offered the affidavit of Derek Reed, respondent's former treasurer, as follows:

> Although for a time I was the acting senior official of Power, and could direct the activities of my subordinates and the employees of Power, I had neither the authority nor to the expertise direct McBean and his team from Crouch mining.

(Reed Aff., at 5).

In response, complainant contended that Reed's affidavit failed to show that the nine were independent contractors because, while Reed indicated therein that he did not direct the nine, neither Reed or respondent indicated who did. The person who did exercise operational control over the nine, complainant alleged, was Les Nicholson, a director of respondent and part owner of Digger. Complainant's Reply, at 8.

In response to complainant's contention that Nicholson exercised control over that nine, respondent asserted that complainant was attempting to make new law by suggesting that Nicholson, a member of respondent's Board of Directors, acted without the consent of the other members of the Board and contended that complainant's argument shows that there is a genuine issue of fact concerning control.

Because of the nature of relationship between respondent and its parent and sister corporations, and because of the nature of the work performed, the question of who exercised control over the activities of

the nine at respondent's worksite is more convoluted in this matter than in previous actions before this Office, and the parties have failed in their pleadings to clarify this issue.

Respondent offers the affidavit of Derek Reed to the effect that he did not exercise control over the nine, but fails to indicate who did. Complainant contends that Nicholson, a member of respondent's Board, exercised control, but fails to offer proof that he exercised that power on behalf of respondent in his capacity as director, and not on behalf of Digger, respondent and Crouch's parent in his capacity as part owner (Complainant's Reply at 8), or on behalf of Crouch itself, where he was Managing Director at one time. (Respondent's Opposition, at 4). Accordingly, it is unclear whether the nine were under the control of respondent, Crouch, or Digger, or any combination of the three. For this reason, the control test provides little guidance in determining whether the nine were employees of Crouch, an independent contractor.

The "economic realities" test offers little guidance in this instance, because it focuses on the independent contractor relationship in terms of an individual to an entity, and not one entity to another. Hickey, 699 F.2d at 751.

Similarly, the factors listed in the implementing regulation do not clarify the status of Crouch as an independent contractor supplying the services of the nine to respondent.

Both respondent and complainant contend that the first factor, namely, whether the individual or entity supplies tools or materials, bolsters their side of the argument. Respondent asserted that because the nine were part of a bargain that included the leasing of an O&K shovel and a purchase agreement governing the Lectra Haul trucks, which respondent contended, constituted "tools." Complainant asserted this argument was frivolous because the shovels and trucks were "equipment" and not "tools," Crouch was an independent contractor, and the nine its employees. Respondent, in turn, contended that complainant's argument is ludicrous, asserting that the term "tools and other materials" is to be defined on a case-by-case, and industry- by-industry, basis.

IRCA precedent appears to favor respondent's argument on this issue. In both Robles and Bakovic, the respective administrative law judges weighed the value of the tools supplied by the alleged independent contractors, implying that the lower the value of the "tools or materials" supplied, the more likely that there is an

employer-employee relationship. Bakovic, 3 OCAHO 482, at 11; Robles, 2 OCAHO 309, at 11. Furthermore, I agree with respondent's contention that heavy equipment would constitute "tools" in this context.

However, IRCA precedent interprets the verb "supplies" in 8 C.F.R. section 274.1(j) in complainant's favor. It does not connote the supplying of business expertise in connection with the sale or lease of a tool, but rather has been interpreted as providing the necessary implements for accomplishing a task, such as roofing tools in Robles or knives and foul-weather clothing for the fishermen in Bakovic.

Because it does not appear that the nine used any tools or materials other than the O&K shovel and Lectra Haul trucks, this factor is not applicable to this situation.

Factors two and three, that the entity makes services available to the general public and works for a number of clients at the same time, are also inapplicable in this situation.

While it does not appear that Crouch has ever contracted out its employees to train employees of any other entities, it is also apparent that Crouch is not in the training business. Therefore, the fact it does not offer training services to the general public or work for any other clients does not necessarily imply an employer/employee relationship between respondent and the nine.

Because neither party has described the terms of the agreement between respondent and Crouch, it is difficult to determine whether Crouch has an opportunity for profit or loss as a result of the labor of the nine.

Furthermore, as Crouch is apparently not in the business of selling equipment and contracting out the labor of its employees to train others to use that equipment, factor five in the implementing regulation, invests in the facilities for work, is similarly inapplicable here.

Factor six, whether the entity alleged to be an independent contractor directs the order or sequence in which the work is to be done, is simply a restatement of the control test, applied previously and inconclusively above.

Finally, both parties have asserted, inconclusively, that the skill level of the nine either establishes the existence of an independent contractor or employer/employee relationship. This is apparently the

result of complainant's mistaken impression that respondent was asserting that the nine were each independent contractors, and not that the nine were employees of Crouch, a separate entity. While skill level of the individual is a consideration in determining whether an individual is an independent contractor for purpose of the economic realities test (see Hickey, 699 F.2d at 751-52), it is not necessarily instructive in a determination of whether a separate entity is an independent contractor, and the individual its employee. In this context, the issues of whether the nine received remuneration from respondent and of who controlled the nine at respondent's worksite are controlling.

Accordingly, neither side has shown that the nine were employees of respondent or, alternatively, were employees of Crouch, an independent contractor, while they were at respondent's worksite.

1. Element Two

It is clear from the pleadings and the record in this matter that the nine individuals in question entered the United States to perform services at respondent's worksite after the effective date of IRCA, November 6, 1986. See Complainant's Motion, at 6.

2. Element Three

The crux of complainant's argument is that the nine performed "skilled or unskilled labor" in violation of their B-1 visa status, by engaging in production work rather than in training at respondent's worksite. Complainant's Motion, at 10.

In support of this contention, complainant relies upon the decision of Administrative Law Judge Irwin Socoloff in an NLRB proceeding in which it was alleged that respondent had committed violations of Section 8(a)(1), (3) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended. In his decision, Judge Socoloff stated, in pertinent part:

> There is another important reason to reject Respondent's argument that the March 10, 1989, layoffs, were but a continuation of the layoff program begun in 1988. The employees laid-off in 1988 were, uniformly, not replaced. The employees laid-off on March 10, 1989, at least many of them, were, in fact, replaced, beginning the following months. Thus, starting in April, and continuing through December, when, as detailed hereinafter, Respondent subcontracted the rock truck operation, a stream of employees of Crouch Mining, as many as seven to nine at a time, arrived on site and engaged in production work, including the operation of the rock trucks, O & K shovel, dozers and all of Power's heavy duty equipment. While respondent argues that these individuals

> were not replacement workers, but, rather, were brought in to "train" Power's employees on the operation and maintenance of the 100-ton work trucks, and the O & K shovel, the record is replete with evidence that this is not how they spent their time. Rather, there is ample record evidence showing that, what training Power's employees received with respect to the new equipment, consumed but a matter of hours and, for the most part, even that training was not supplied by the British "visitors" who were busily engaged in production tasks.
>
> Indeed, despite Respondent's contention that the operation and maintenance of "new and different" pieces of equipment required extensive training of the employees assigned to those tasks, Respondent, in December, subcontracted the operation and maintenance of its 100-ton rock trucks to a business enterprise which had had no previous experience with that equipment.

Complainant's Exhibit IV, at 12-13.

Complainant also offered in support of this contention the testimony of John McBean in that proceeding, establishing, complainant alleged, that the nine were performing "skilled or unskilled labor," specifically prohibited by 8 U.S.C. §1101(a)(15)(B).

In response, respondent asserted that complainant's assertion that the nine performed "labor" in violation of the immigration laws begs the question regarding what actions are strictly "labor" and what actions were necessary to train and to supervise a technology transfer of the type implemented by respondent during 1989. To counter complainant's contentions, respondent offered the affidavits of Ronald Krise, an O&K shovel operator for respondent, and Paul Wild, Mining Engineer and respondent's President.

In his affidavit, Krise described the difficulties of operating the O&K shovel in detail, and asserted that it would take at least six weeks of training for an individual to learn how to operate the shovel. (Krise Aff., at 2-5). In addition, Krise explained how important it was to an O&K shovel operator to have a good truck driver. Id., at 4-5.

In his affidavit, Wild described the complexity of switching over from the previous mining methods employed by respondent, which utilized CAT 992 Power Loaders, 50 ton rock trucks and D9 Dozers, to newer methods, utilizing O&K RH120 shovels and larger capacity rock trucks. Wild explained that this switch over required not just a change in equipment, but a change in mining philosophy and mining technology. (Wild Aff., at 2-3). To indoctrinate respondent's workforce in the uses of the new equipment, Wild averred, the nine had to engage in intense training, both by supervising respondent's workforce in their use of the new equipment, and by demonstrating proper operation of the equipment themselves. Wild further averred:

> The idea that the Crouch employees were not trainers because they operated equipment in production is unfathomable. There is no way under the sun to train without using the equipment in a production capacity. There is no "training mine" at Power where the Crouch team could have shown Power's employees how to reshape the pit and implement the new mining method themselves, all without taking any coal from the ground.

Id., at 5-6.

Respondent further asserted in its Opposition in response to complainant's motion that complainant's use of selected portions of the NLRB case transcripts and decision of Judge Socoloff therein is extremely misleading, contending that contrary to complainant's assertion, the labor dispute at issue in the NLRB proceeding did not develop over respondent's use of British personnel, but rather, the issue at that hearing was whether any of the British nationals were associated with what respondent describes as "laid-off" employees. For this reason, respondent asserted, McBean's testimony that various individuals "drove trucks" leaves unresolved that which respondent contends is the "key issue," in particular, whether the "driving of trucks" was for the purposes of supervision and training, or for the purpose of performing labor. Respondent's Opposition, at 10-11.

Finally, respondent contended that complainant's motion left the "false impression" that B-1 visa holders are prohibited from performing any sort of skilled or unskilled labor, asserting that complainant ignores a body of precedent in which B-1 visa holders have been allowed to engage in a variety of production tasks. Respondent concludes, therefore, that while it may be possible to determine the legal boundaries of the B-1 status, it is impossible to determine whether the nine were within or outside those boundaries without an evidentiary hearing.

In its Reply to respondent's Opposition, complainant asserted that respondent is collaterally estopped from asserting that the nine trained respondent's United States employees. Complainant again referred to Judge Socoloff's statement in the prior NLRB decision that the nine spent their time "busily engaged in production tasks" rather than in training respondent's employees to support this contention. Complainant's Exhibit IV, at 13.

Complainant also noted that in its Decision and Order of May 28, 1993, the NLRB affirmed Judge Socoloff's decision in this matter, stating:

> The Board has considered the decision and in light of the record exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt his recommended Order as modified.

311 NLRB No. 63, at 1 (5/28/93). Complainant asserted, therefore, that the issue of training versus labor has been actually litigated and determined by a valid final judgment. Because that determination was essential to the judgment, complainant alleged it is conclusive in a subsequent action between the parties on the same or different claim. Complainant's Reply, at 2-3. Complainant asserts, furthermore, that because respondent cannot relitigate the issue with the original party (here, the General Counsel of NLRB), it cannot relitigate it here.

Complainant contends that this situation is "on all fours" in Parklane Hosiery v. Shore, 439 U.S. 322 (1978), in which the Supreme Court authorized plaintiff stockholder's offensive use of collateral estoppel to foreclose defendant corporation from relitigating an issue defendant previously litigated unsuccessfully in an action with the Securities and Exchange Commission.

Complainant first noted that although it could have moved to inter-vene in the NLRB proceeding, it had no enforceable interest in that proceeding. Further, complainant asserted, it would not be unfair to respondent to collaterally estop it from relitigating this issue, because respondent defended itself before the NLRB "fully and vigorously," because there are no prior judgments on this issue in respondent's favor, and because the procedural opportunities before the NLRB and this tribunal are very similar, if not identical. Complainant's Reply, at 3-4.

Complainant concluded that no reason then exists not to invoke collateral estoppel and hold respondent bound by the determination of Judge Socoloff, affirmed by the NLRB, that the nine were production "workers," having done little, if any, "training." Id., at 4.

In its Counter Reply in Opposition, respondent contended that complainant incorrectly asserted that the NLRB's decision collaterally estops respondent from "relitigating" the issue of whether respondent unlawfully employed the nine beyond their status.

First, respondent asserted that collateral estoppel is inappropriate in this situation because the issue litigated here is not identical to the issues involved in the prior NLRB decision. Respondent contended that in that action, Judge Socoloff heard the consolidation of nine cases

involving numerous issues and facts taking place over a two-year period. In particular, respondent asserted, Judge Socoloff concluded that Power engaged in an unfair labor practice by laying off 13 employees because of their union activities. In arriving at this determination, respondent alleged, Judge Socoloff relied primarily upon the fact that the 13 union supporters were laid off only two weeks prior to the union election, and upon evidence of threats on the part of respondent's management. Having arrived at this conclusion, respondent contended, Judge Socoloff then included further factors supporting his determination that the layoffs were unlawfully motivated, including the fact that the union supporters were replaced by British workers who engaged in production work. Respondent's Counter Reply, at 4.

Respondent asserted that by contrast, the issue here is not whether the activities of the nine should be labeled with what it contended were the undefined terms "production" or "training," but whether the nine were each "specifically engaged in activity consistent with the purpose for which they came," which was, respondent maintained, to implement new mining methods. Id.

Second, respondent asserted, the language in Judge Socoloff's deci-sion quoted by complainant in support of its argument reveals that the factual findings are not dispositive here. Because Judge Socoloff did not refer to the employees from Crouch mining who arrived at respon-dent's worksite and engaged in production work by name, respondent asserted, it is not clear on the face of the opinion which, if any, are among the nine in question.

Third, respondent asserted that the factual findings made by Judge Socoloff does not estop it from litigating whether the nine engaged in production work in violation of their B-1 visa status, because the finding in question was not necessary to Judge Socoloff's decision. Respondent contended that even if Judge Socoloff had determined that the nine violated their B-1 status, that determination would not have been necessary to his determination that respondent engaged in unfair labor practices by laying off 13 pro-union employees two weeks before the union election.

Fourth, respondent asserted that the nature of the NLRB proceeding makes the application of collateral estoppel on this issue unfair to respondent and therefore inappropriate in this action, because that issue was litigated in consolidated proceedings involving nine cases, in a forum respondent did not choose, and with no discovery. Respondent also asserted that estoppel would be unfair because the

burden of proof in the NLRB action differs from that in this action, and further contended it had little or no incentive to litigate the issue in question at the prior proceeding.

In its Further Reply, complainant counters respondent's contentions that the issue here is not identical with the issues involved in the NLRB decision and that the issue for which preclusion was sought was not necessarily decided, asserting that Judge Socoloff's opinion speaks for itself in that regard. Further, complainant asserts, respondent itself adduced much of the evidence as to the tasks performed by the nine presented by complainant here at the NLRB proceeding.

With regard to respondent's contention that Judge Socoloff did not mention the nine by name in his decision, complainant asserts that because there is no other mention in the NLRB record of employees from Crouch other than in the McBean and in the miner testimony, it is clear that the nine are included.

With regard to respondent's contention that it would be unfair to respondent to apply collateral estoppel on this issue because the prior litigation occurred in a forum that respondent did not choose and in which there was no discovery, complainant asserts that one, respondent elicited McBean's testimony, and two, although no formal prehearing discovery exists in that forum, NLRB regulations permit the taking of depositions and the issuance of ex parte subpoenas to take testimony and for the production of documents, making the distinction between the NLRB and this tribunal one of form rather than of substance, not rising to the level of unfairness. In addition, complainant contends, the burden of proof before the NLRB is similar to that in this proceeding.

Furthermore, complainant asserts that even if the doctrine of collateral estoppel is not applied, no genuine specific issue of material fact exists with regard to this issue, because respondent had McBean testify in detail what each of the nine did, and that testimony, complainant contends, shows that all nine performed production tasks in violation of their B-1 visa status.

a. Collateral Estoppel

The doctrine of collateral estoppel precludes the relitigation of an issue already resolved, effectuating the public policy "that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between parties." Northeast Women's Ctr. v. McMonagle, 665 F. Supp. 1147,

1152 (E.D. Pa. 1987), aff'd in part and remanded 868 F.2d 1342 (3d Cir.), reh'g denied, cert. denied, 493 U.S. 901, 110 S. Ct. 261 (1989), reh'g denied, 494 U.S. 1050, 110 S. Ct. 1515 (1990) (quoting Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S. Ct. 517, 518 (1931)).

The doctrine of collateral estoppel applies to bar an issue if the following criteria are met:

1. The issue decided in the prior adjudication was identical with the one presented in the later action;
2. There was a final judgment on the merits in the prior adjudication;
3. The party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and
4. The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior action.

Schroeder v. Acceleration Life Ins. Co., 972 F.2d 41, 45 (3d Cir. 1992); Temple Univ. v. White, 941 F.2d 201, 212 (3d. Cir. 1991); Gregory v. Chehi, 843 F.2d 111, 121 (3d Cir. 1988), cert. denied, __ U.S. __, 112 S. Ct. 873 (1992); Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 813 F. Supp. 332, 334 n.1 (E.D. Pa. 1993); Edmundson v. Borough of Kennett Square, 818 F. Supp. 798, 801 (E.D. Pa. 1992), aff'd in part and rev'd in part, 4 F.3d 186 (3d Cir. 1993). See also Berger v. Edgewater Corp., 784 F. Supp. 263, 267 (W.D. Pa. 1991); Drum v. Nasuti, 648 F. Supp. 888, 898 (E.D. Pa. 1986), aff'd, 831 F.2d 286 (3d Cir. 1987) (including a fifth criteria, that the issue decided was essential to the judgment, for application of collateral estoppel).

Collateral estoppel is available even where the prior decision was rendered in an administrative proceeding. As the court held in Edmundson:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the court will not hesitate to apply res judicata principles.

Edmundson, 818 F. Supp. at 801 (quoting Frederick v. American Hardware Supply Co., 384 Pa. Super. 72, 557 A.2d 779, 780 (1980)). Although the prior determinations under consideration in Edmundson were made by state administrative agencies, there is no reason why the same preclusive effect should not apply to the determination of Judge Socoloff.

It is uncontroverted that criteria two and three above have been met. Respondent's Counter Reply, at 3. However, the parties are in dispute concerning criteria one and four. Furthermore, respondent asserts that the fifth criterion for applying collateral estoppel discussed in Berger, that the issue decided was essential to the judgment, is required but has not been met.

i. Identity of Issue

Collateral estoppel applies only where the same issue is involved in the prior and present proceeding. The Restatement indicates it applies to both issues of fact and of law. See Restatement (Second) of Judgments §27.

As noted, the crux of complainant's case is that the nine performed "skilled or unskilled labor" at respondent's worksite in violation of the terms of their B-1 visa status, by engaging in production work rather than in the training of respondent's U.S. personnel. Complainant's Motion, at 10.

In the NLRB proceeding, Judge Socoloff made specific determinations concerning the activities undertaken by the nine at respondent's worksite. In particular, in rejecting respondent's argument that the March 10, 1989 layoffs were a continuation of the 1988 layoffs on the ground that those laid off in 1988 were not replaced and that those laid off in 1989 were replaced by the nine, Judge Socoloff found that the nine were engaged in production work rather than in training of respondent's workforce. Complainant's Exhibit IV, at 13.

Respondent argued that collateral estoppel is not appropriate in this regard because Judge Socoloff failed to identify by name the employees whom, he determined, came from Crouch and performed production work, and therefore it is not apparent whether any or all of the nine were included. A review of the record and of Judge Socoloff's decision, coupled with the fact that respondent has failed to allege that other Crouch employees came to respondent's worksite to drive trucks and operate shovels during the period in question, establishes that this argument is without merit.

b. Full and Fair Opportunity to Litigate

While respondent did not expressly argue that collateral estoppel is not appropriate because it was not given a full and fair opportunity to litigate the issue advanced by complainant in this proceeding, this argument may be gleaned from the pleadings.

In particular, respondent asserted that the issue in question was litigated in consolidated proceedings involving nine cases, in a forum that respondent did not choose, and in which there was no formal prehearing discovery.

Furthermore, respondent complained that the burden of proof in the NLRB proceedings differed from the burden in this action, and asserted that it had no incentive to litigate the issue in question in those proceedings.

Complainant countered respondent's contention that there was no discovery in the prior proceedings, asserting that even if there was no provision for formal discovery in those proceedings, NLRB regulations permit the taking of depositions and the issuance of subpoenas.

The Court noted in Parklane Hosiery:

> If the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action.

Parklane Hosiery, 439 U.S. at 331, 99 S. Ct. at 651 n.15. See also Restatement (Second) of Judgments §29(2) and Comment d.

Complainant has asserted that respondent's procedural difficulties in defending itself before the NLRB do not preclude the imposition of collateral estoppel, implying that respondent itself elicited the testi-mony that lead Judge Socoloff to determine that the nine engaged in production work and did little training at respondent's worksite, and contending that the distinction between the discovery procedures in the proceedings before the NLRB and before this Office involve form rather than substance.

Complainant fails to list in full the similarities between the discovery procedures in the NLRB proceedings and this action. However, it is clear that the drafters of IRCA and of the implementing regulations intended for full discovery of all relevant matters in causes of action brought under the employer sanctions provisions of the Act.

The procedural rules governing this action specifically provide for discovery of all relevant evidence that is not privileged, subject only to limit by the administrative law judge, either upon the Judge's own initiative or upon motion for a protective order. See 28 C.F.R. §68.18.

To obtain discovery of that evidence, the procedural regulations provide for service of written interrogatories, requests for production of documents, things, and inspection of land, requests for admissions, and the taking of depositions, both oral and written. See 28 C.F.R. sections 68.19, 68.20, 68.21, and 68.22, respectively. Should a party upon whom a request for discovery is served fail to respond to that request, the discovering party may seek an order compelling a response or inspection in accordance with the request. 28 C.F.R. §68.23(a). Both IRCA and the procedural regulations empower the administrative law judge to issue subpoenas requiring attendance and testimony of witnesses and production of things. 8 U.S.C. §1324a(e)(2); 28 C.F.R. §68.25(a).

The trial court has broad discretion to determine when offensive collateral estoppel should be applied. Parklane Hosiery, 439 U.S. at 331, 99 S. Ct. at 645; United Mine Workers of America Int'l Union by Rabbit v. Nobel, 720 F. Supp. 1169, 1182 W.D. Pa. 1989), aff'd 902 F.2d 1558 (3d Cir. 1990). Because I am unconvinced at this stage that respondent in the NLRB proceedings was able to engage in discovery of the same sort and scope as provided for in this action, it is found that the application of collateral estoppel on the issue of whether the nine engaged in training or production activities at respondent's worksite is unwarranted at this time.

b. Direct Evidence

Complainant asserts that even absent application of collateral estoppel, no genuine issue of material fact exists because McBean's testimony, elicited by respondent during the NLRB proceeding, shows that all nine performed production tasks. Complainant contends that by attempting to retry this issue, respondent "in effect impeaches its own testimony given before the Labor Board." Further Reply, at 3.

With regard to Wilkie and Barrie, McBean testified:

> They drove Electro Haul Dump Trucks to generally, they drove to test them during the week. But as we needed to get production into the weekends, we usually had these mechanics driving trucks on the weekend.

Complainant's Exhibit II, at 1237. When asked to assess how much time Wilkie and Barrie spent as mechanics and electricians, and how much they spent driving, McBean testified: "Five and a half, six days as mechanics and electricians, and they would drive on Sundays, when required." Id. When asked on cross-examination whether Wilkie and Barrie trained any of the operators regarding maintenance of the trucks, McBean testified that they did not. Id., at 1282.

McBean testified that George Mason was sent to give instruction and guidance in the driving of Electro-Haul dump trucks. Id., at 1238. McBean testified that Mason also drove by himself, without instructing anyone, on the weekends. Id., at 1239.

Lamont, McBean testified, was an Electro-Haul dump truck driver and "jack-of-all-trades," able to demonstrate how to drive and to grade roads. Id., at 1239. When asked how much time Lamont spent actually driving equipment, McBean testified that Lamont "drove dump truck (sic) more than anybody else ... (p)erhaps, three, four days a week." Id. McBean further testified that Lamont "initially trained Electro-Haul drivers...assess(ing)(dump truck drivers) performance on a daily basis." Id., at 1297. When asked whether the majority of Lamont's time was spent actually driving a truck in production, McBean answered in the affirmative. Id. McBean testified that Lamont also learned to drive the O&K shovel, and would regularly take turns with Maloney and Mason on it.

With regard to Maloney, McBean testified that he operated an RH-120 shovel full-time, occasionally driving a dump truck on Sunday. Id., at 1239-40. McBean testified that Maloney instructed others to operate the O&K shovel, but failed to attest to how many individuals Maloney trained, or what part of Maloney's time was spent in training. Id., at 1240.

McBean testified that Douglas was an R&H shovel operator and instructor. Id., at 1238.

McCormick, McBean testified, operated the RH-120 shovel constantly during his first visit which lasted from July 16 to August 12. Id., at 1244. During his second visit, from September to December, McCormick occasionally ran the grader and water dozer. Id., at 1276.

White, who also made two separate visits to respondent's worksite (7/16 to 8/12 and 8/27 to 10/25) replaced Barrie. Id., at 1245. McBean testified that White was a mechanic for and occasional operator of Electro-Haul trucks. Id., at 1246. White drove and tested Elec-

tro-Haul trucks during the week, and would drive, when required, on weekends.

With regard to the whole operation, McBean testified that they would run a normal Sunday shift in order to get production overburden production figures up. Id., at 1246. McBean stated that he had also operated a dozer to help out on Sundays, and had driven a water dozer "on occasions when the site a particular dusty (sic)." Id., at 1250.

Finally, McBean testified that "men from the U.K." did production work on Saturday and Sunday.

Standing alone, however, McBean's testimony does not establish that the nine engaged in "skilled or unskilled labor" in violation of their B-1 visa status.

As respondent noted in its Opposition, McBean's testimony leaves unanswered the issue of the purpose for which the various individuals engaged in "production work." Complainant offers no evidence to support its contention that the work performed by the nine was "labor" in violation of their visa status, and not what could be termed permissible "training." Stated differently, while complainant offers ample facts to show that the nine performed "production work," complainant fails to prove that that "production work" constituted "skilled or unskilled labor" for purposes of 8 U.S.C. §1101(a)(15)(B).

4. Elements 4 and 5

Because complainant has failed to establish that there is no genuine issue as to the fact that the nine were employed in violation of IRCA, these issues are not ripe for determination.

B. Count II

Count II of the Complaint charged that respondent hired the nine after November 6, 1986, and that respondent failed to prepare and/or present for inspection employment eligibility verification forms (Forms I-9) for the nine, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

That provision provides, in pertinent part:

> It is unlawful for a person or other entity (B)(i) to hire for employment in the United States an individual without complying with the requirements of (8 U.S.C. §1324a(b)).

The provision referred to, 8 U.S.C. §1324a(b), is the employment verification system. Under that system, any person or entity hiring, recruiting or referring an individual for employment in the United States must verify that the individual is not an unauthorized individual by examining specified documents, and must attest that verification on the Form I-9. The hiring, recruiting or referring person or entity must then ensure that the individual attests on the Form I-9 that he or she is a citizen or national of the United States, an alien lawfully admitted for permanent residence or an alien authorized under IRCA or by the Attorney General to be hired, recruited, or referred for such employment.

Once the Form I-9 is completed, the hiring, recruiting, or referring entity must then retain the Form I-9 for a set period of time, and make it available for inspection by officer of the INS, of the Office of the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor.

Because complainant has failed to establish that there is no genuine issue as to the fact that respondent hired the nine, it is not clear at this time that respondent was obliged to comply with the requirements of the employment verification system.

V. *Decision*

Complainant's Motion for Summary Decision is denied as it pertains to both counts in the Complaint.

An evidentiary hearing will therefore be held to determine respondent's liability for the violations alleged in the Complaint. In the event that respondent is found to have committed the violations set forth therein, an appropriate civil money penalty will be assessed for those violations, in accordance with the provisions of 8 U.S.C. §1324a(e)(4) and §1324a(e)(5).

A telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted. In accordance with the provisions of 8 U.S.C. §1324a(e)(3)(B) and 28 C.F.R. section 68.5(b), the hearing

shall be held at the nearest practicable place to the place where respondent's business is located, or the place where the violations occurred.

JOSEPH E. MCGUIRE
Administrative Law Judge