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

February 18, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding OCAHO Case No. 93A00065
4431 INC., T/A CANDLELIGHT INN, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

On March 9, 1992, complainant, acting by and through the Immigration and Naturalization Service (INS), served Notice of Intent to Fine (NIF) PHI-91-274A-595, upon 4431 Inc., trading as Candlelight Inn (respondent). That citation contained four counts and involved a total of 98 alleged violations of the paperwork requirements of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, as amended, for which civil money penalties totaling $18,855 were assessed.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent knowingly hired and/or continued to employ the individual listed therein, Cidarck Oliveira (Oliveira), knowing that he was an alien not authorized for employment in the United States, thus violating the pertinent provisions of IRCA, 8 U.S.C. §§1324a(a)(1)(A), 1324a(a)(2). Complainant levied a civil money penalty of $425 for that alleged violation.

In Count II, complainant alleged that respondent employed the 85 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare Employment Eligibility Verification Forms (Forms I-9) for those individuals, in

violation of IRCA, 8 U.S.C. 1324a(a)(1)(B). Complainant assessed a civil money penalty of $190 for each of those alleged infractions, for a total civil money penalty of $16,150 for Count II.

Count III of the NIF charged that respondent hired the eight (8) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure that those individuals properly completed Section 1 of the pertinent Forms I-9, again in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $190 for each of those violations, for a total civil money penalty of $1,520 on that count.

Complainant alleged in Count IV of the NIF that respondent failed to properly complete Section 2 of the Forms I-9 for each of the four (4) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $190 for each of those violations, or a total of $760 for the four (4) alleged violations on that count.

Respondent was advised in the NIF of its right to contest the charges contained therein by timely submitting a written request for a hearing before an administrative law judge. Respondent timely filed such a request.

On March 22, 1993, complainant filed the Complaint at issue reasserting the allegations set forth in Counts I through IV of the NIF, as well as the requested civil money penalties totaling $18,855 for the 98 alleged violations.

On April 23, 1993, respondent filed its Answer. In response to Count I of the Complaint, respondent admitted that it hired Oliveira for employment after November 6, 1986, but denied that it then knew that he was an alien unauthorized for employment in the United States, contending that Oliveira provided documentation at the inception of his employment purporting to establish his authorization for employment in the United States.

In response to Count II, respondent admitted that it employed the individuals named therein for employment after November 6, 1986, but specifically denied that it failed to prepare Forms I-9 for 12 of the individuals named therein. To support this contention, respondent submitted copies of the Forms I-9 pertaining to those individuals as an attachment to its Answer. Respondent further asserted that it was

without knowledge or information sufficient to form a belief as to whether it had completed Forms I-9 for the remaining 73 individuals named in Count II of the Complaint, since it then did not have in its possession the pertinent Forms I-9 pertaining to those individuals.

In response to Count III of the Complaint, respondent admitted that it hired the eight individuals named therein for employment in the United States after November 6, 1986, but specifically contended that each of those individuals substantially completed Section 1 of the pertinent Forms I-9.

Finally, respondent admitted that it hired the four individuals named in Count IV for employment in the United States after November 6, 1986, but denied that it failed to complete Section 2 of the Forms I-9 pertaining to those individuals.

On September 20, 1993, complainant filed a letter with the undersigned, advising that it would be filing a motion for summary decision in this matter, and that it would not pursue the knowing hire count allegation set forth in Count I.

On September 24, 1993, complainant filed a Motion to Amend Complaint, as follows:

1. In Count II, add the following factual allegations:

D. In the alternative to paragraph C, on October 11, 1991, an agent of the Immigration and Naturalization Service served a subpoena requesting that you present for inspection on October 22, 1991, all Forms I-9 for your employees hired on or after November 6, 1986.

E. You failed to present for inspection on October 22, 1991 Form(s) I-9 for the individual listed in paragraph A.

2. These paragraphs were inadvertently omitted from Count II of the Complaint.

On October 1, 1993, the undersigned granted that motion and ordered that the Complaint be amended in the manner requested. In doing so, however, respondent was inadvertently deprived of his 30-day period to object thereto, as the parties had agreed upon.

On October 18, 1993, respondent's counsel filed a Motion for Reconsideration of the October 1, 1993 Order, asserting that

complainant's Motion had been granted before the time for the response thereto had expired and respondent requested that the undersigned vacate the October 1, 1993 Order, and permit respondent to file its response to Complainant's Motion to Amend.

On October 26, 1993, the undersigned issued an Order Granting Motion to Reconsider and Order Reaffirming Order Granting Motion to Amend Complaint, granting complainant's Motion to Amend Complaint, and amending the Complaint accordingly.

On November 26, 1993, respondent filed its Answer to the Amended Complaint, reaffirming those assertions set forth in its April 23, 1993 Answer with respect to Counts I, III, and IV.

In response to Count II of the amended Complaint, respondent reasserted the contentions contained in its April 23, 1993 Answer, but denied that it failed to produce Forms I-9 for the individuals named in that count. In particular, respondent asserted that on October 11, 1991, INS served a subpoena requesting that respondent present for inspection on October 22, 1991 those Forms I-9 for all employees hired on or after November 6, 1986. Respondent argued that this time frame was insufficient because it provided only five business days for respondent to locate and gather the documents requested, and also urged that it had responded to INS's subpoena request within a reasonable period of time.

On December 30, 1993, complainant filed a Motion for Summary Decision and Memorandum of Law in Support Thereof.

In that motion, complainant asserted that on February 22, 1991, Special Agents Martinelli and Christino made an educational visit to respondent's place of business and spoke to Ms. Tula Paxos, respondent's manager, who indicated to the agents that she was aware of the I-9 requirement and told them that her bookkeeper had filled out the Forms I-9. Complainant asserted that the agents instructed Ms. Paxos on completion of the Form I-9, and left respondent's office. To support these contentions, complainant submitted with its motion a Memorandum of Investigation completed by Special Agent Martinelli on February 22, 1991, the date of the INS educational visit.

Complainant further averred that on July 29, 1991, Special Agent Martinelli and five other agents conducted an "employer survey" at respondent's place of business and noted the presence of one illegal

alien, Oliveira. Complainant submitted with its motion an affidavit from Special Agent Martinelli attesting to these facts.

Subsequently, on October 10, 1991, INS served a subpoena upon respondent with a return date of October 22, 1991, requesting production of "(a)ll INS employment verification Forms I-9, copies of your Articles of Incorporation, and any relating books, papers, or documents pertaining to the hiring of... employees by (respondent)." Complainant's Exhibit D.

Complainant advises that respondent complied with the subpoena on December 30, 1991.

To support its contention in Count I that respondent continued to employ Oliveira knowing that he was unauthorized for employment in the United States, complainant offered the affidavits of Special Agents Martinelli and Mullin.

In his affidavit, Martinelli averred that during the July 29, 1991 employer survey, he observed Oliveira exiting respondent's place of business by way of a rear door and being detained by two other agents. Martinelli also stated that shortly thereafter it was determined that Oliveira had entered the United States without inspection.

Martinelli further advised that one Mr. Paxos, the owner of respondent firm, gave Martinelli the Form I-9 pertaining to Oliveira, showing that Oliveira had presented a Pennsylvania driver's license and Social Security card to establish his employment eligibility. Martinelli also averred that he advised Mr. Paxos that the Social Security card Oliveira presented was counterfeit, and told Mr. Paxos that Oliveira was being taken into custody because of his illegal status in the United States.

Complainant also contends that over two months later, Special Agent Mullin went to respondent's place of business to serve an administrative subpoena. According to Mullin's affidavit, while at respondent's place of business, she noticed Oliveira, and asked the manager why Oliveira was still working for respondent. Mullin asserted that she was told that Oliveira's attorney had informed respondent that Oliveira then had permission to work in the United States.

Submitted with complainant's motion was the INS Certified Administrative Record relating to Oliveira, which disclosed that

Oliveira had not been granted the purported employment authorization by INS.

Complainant asserted that by allowing Oliveira to work in October 1991 without having him complete a Form I-9, and after it has been shown that respondent learned of his illegal alien status in July 1991, respondent clearly failed to exercise reasonable care in determining whether Oliveira was authorized for employment.

Complainant concluded that the evidence has established that Oliveira had not been authorized for employment in the United States, and argued that the affidavits of Special Agents Martinelli and Mullin demonstrated that respondent knew or had constructive knowledge of that fact but employed Oliveira nonetheless, proving the allegations in Count I of the Complaint.

With respect to Count II of the Complaint, complainant asserted that no dispute exists as to the 85 paperwork charges alleged therein. In particular, complainant charged that respondent admitted in its Answer that it had hired the 85 individuals listed in Count II after November 6, 1986, but does not possess and cannot produce the pertinent Forms I-9 pertaining to 73 of those individuals.

With regard to respondent's contention that it produced Forms I-9 pertaining to the remaining 12 individuals named in Count II, but was unable to do so within the 11 days provided in the October 11, 1991 administrative subpoena because the production period was insufficient, complainant asserted that it is required by law to give respondent only three days notice to comply with a request to produce Forms I-9. 8 C.F.R. 274a.2(b)(2)(ii).

Complainant concluded, therefore, that its amended Complaint and respondent's amended Answer thereto establish respondent's liability as charged in Count II of the Complaint.

With respect to Count III, complainant argued that respondent's assertion in its Answer that it ensured proper completion of Section 1 of the Forms I-9 pertaining to employees 1, 2, 3, 5, 6, 7, and 8 named therein is without merit, and urged that it is entitled to summary decision with respect to the violations alleged in Count III.

In particular, complainant urged that respondent's contention that it ensured that Section 1 of the Forms I-9 for employees 1, 2, 5, 6, 7, and 8 were properly completed is without merit since those individuals

failed to check the appropriate box attesting to their citizenship or alien status as required under IRCA, 8 U.S.C. §1324a(b)(2).

Complainant further argued that respondent incorrectly contended that employee 3 in Count III had properly completed Section 1 of the pertinent Form I-9 inasmuch as that individual checked the block indicating that he was a permanent resident alien but inserted an alien number containing only four digits. Complainant contended that a cursory examination of the Handbook for Employers, M-274, shows that an alien number contains eight digits, a discrepancy that places a duty of inquiry on the employer to check for the number on a document appearing genuine on its face.

Complainant withdrew its allegations of violation with respect to employee 4, Count III.

Concerning Count IV, complainant noted that respondent has admitted that it hired the four individuals named therein for employment after November 6, 1986, and that in Section 2 of the Form I-9 pertaining to the first individual named therein, respondent failed to check a box under List B and List C, and failed to identify the issuing state under item 1, List B, or the type of "other document" under item 3, List B, thereby violating the requirement that an identity document be described.

The violation asserted with respect to the Form I-9 for individual 2 is similar, complainant contended, asserting that although List B, item 1 is checked, the issuing state is not identified, and the document identification number and expiration date are not listed.

Complainant asserted that List B in Section 2 of the Form I-9 pertaining to individual 4, Count IV, has simply not been completed.

Finally, complainant noted that Section 2 of the Form I-9 pertaining to individual 3, Count IV, had been properly completed, and withdrew that alleged violation. Complainant, however, maintains that it is entitled to summary decision for the remaining violations asserted in Count IV.

On January 24, 1994, respondent filed its Answer to Complainant's Motion for Summary Decision and Memorandum in Opposition Thereto, countering therein several of complainant's contentions, and asserted that summary decision is inappropriate under these facts and the law to be applied.

In its opposition, respondent admits that Special Agents Martinelli and Christino visited its place of business on February 22, 1991, but asserts that it was not sure of the purpose of their visit. Respondent denies that Tula Paxos advised the agents that she was aware of the I-9 requirements or that she told them that her bookkeeper filled out the Forms I-9, and specifically denies that the agents explained to Tula Paxos how to complete the Form I-9. To support its denials, respondent submitted the affidavit of Tula Paxos, which sets forth those facts.

Respondent admits that on or about July 29, 1991, several individuals identifying themselves as INS agents visited respondent's place of business, at which time Oliveira was in its employ. While admitting that it has since been advised that Oliveira was an illegal alien at that time, respondent denies having independent knowledge of that fact, and therefore denies its truth.

Respondent admits that Oliveira submitted a driver's license and Social Security card for employment eligibility verification purposes, but specifically denies that it hired Oliveira knowing that he was not authorized for employment in the United States or that it continued to employ him knowing that he was not authorized for employment in the United States.

Respondent admits the facts alleged by complainant concerning the October 11, 1991 administrative subpoena. Specifically, respondent admits that on that date, an INS agent served a subpoena on respondent requesting that respondent present for inspection "all INS Employment Verification Form I-9, copies of (respondent's) Articles of Incorporation, any and all relating books, papers, or documents pertaining to the hiring of any and all employees by (respondent)". Respondent also advises that the documents described in that subpoena were to be delivered to INS on October 22, 1991, or 11 days after the subpoena was served. Respondent further advises that it complied with those subpoena requests on December 30, 1991, or some 90 days thereafter.

Arguing that since Count I had been withdrawn by complainant, respondent contends that if Count I were to be allowed to be reasserted by complainant, it would violate respondent's due process rights.

Addressing the substance of complainant's contentions in Count I, respondent specifically denies that respondent continued to employ Oliveira knowing that he was unauthorized for employment. Respondent notes that at the inception of his employment, Oliveira

presented a Pennsylvania driver's license and a Social Security card to establish his work authorization, and also notes that Oliveira averred in his statement to complainant that neither respondent nor its agents knew that he was an illegal alien.

Respondent admits that on or about July 29, 1991, Special Agent Martinelli and other INS agents entered respondent's place of business and that Mr. Paxos then gave Martinelli the original Form I-9 pertaining to Oliveira. Respondent also admits that on October 10, 1991, Agent Mullin came to respondent's place of business to serve a subpoena, and that Oliveira was then employed by respondent.

Respondent, however, contests the validity of the affidavits of Special Agents Martinelli and Mullin on the ground that those affidavits contained inadmissible hearsay and are therefore insufficient to support complainant's allegations in Count I.

Respondent denies that it knew or should have known that Oliveira was an illegal alien unauthorized for employment in the United States, and asserts that there are three grounds which demonstrate that it acted reasonably in continuing to employ Oliveira.

Respondent initially asserts that it contacted an individual purporting to be an attorney for Oliveira, who "advised" respondent that Oliveira was eligible for employment. Id., at 9-10. Second, it urges that Oliveira presented documentation indicating that he was eligible for employment after returning from INS custody. Id. Finally, respondent argues that it assumed that Oliveira must have been eligible for employment because he was released by INS rather than having been deported. Id.

Respondent concludes that since there is a genuine issue of material fact with respect to Count I, complainant's motion should be denied as it pertains to that count.

Respondent also takes issue with complainant's assertion that there is no dispute with respect to the violations alleged in Count II of the Complaint.

In particular, respondent denies that it failed to prepare Forms I-9 for the twelve individuals named in respondent's Answer in response to Count II, and asserts that it did not admit that it failed to prepare Forms I-9 for the remaining individuals named in Count II, but that respondent had:

> rather indicated that it was unable to make that determination due to the number of individuals in its employ which (sic) may have participated in the completion of these forms.

Id., at 10.

Respondent also notes that the October 11, 1991 administrative subpoena was devoid of any warning that respondent's failure to provide the requested documentation by the October 22, 1991 return date would constitute a violation, and contends that it had produced those forms as quickly as possible.

For these reasons, respondent argues that with respect to the alleged violations in Count II it should be afforded an opportunity to be heard on the reasonableness of the time constraints placed upon it by complainant under the circumstances.

Respondent also asserts that summary decision is inappropriate with respect to the violations alleged in Count III of the Complaint. First, respondent argues, complainant's assertion that employees 1, 2, 5, 6, 7, and 8 named in Count III of the Complaint had failed to attest that the documents that they presented as evidence of identity and employment eligibility were genuine and related to them is incorrect, contending that each of those individuals did attest to that statement on the relevant Forms I-9. Rather, respondent contends, the only item not completed on those Forms I-9 is "a check in a minuscule box," in which those individuals were to have attested to their citizenship or alien status. Id., at 12.

Respondent further asserts that, having examined the Handbook for Employers, it is unable to locate any information that would inform an employer that an alien number would have eight digits, rather than four. For this reason, respondent contends that summary decision is inappropriate as it pertains to complainant's allegation that respondent failed to ensure that employee 3 in Count III properly completed his Form I-9 on the ground that that individual listed a four digit alien number in Section 1.

Respondent contends that the remaining violations alleged in Count IV are de minimis and cannot be determined to be improper completions of the relevant Forms I-9, and asserts that the motion must therefore also be denied as it pertains to those forms.

The applicable rules of practice and procedure provide for the entry of summary decision if the pleadings, affidavits, and material obtained

by discovery or otherwise show that there is no genuine issue as to any material fact. 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, it has been held that Federal caselaw interpreting Rule 56(c) is instructive in determining 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 any other 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, 586-587, 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.), aff'd 941 F.2d 1202 (3d Cir. 1991).

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, 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 also 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, 2 OCAHO 337, at 3.

Once the movant has carried this 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 basis for a jury finding in that party's favor.")

As noted previously, complainant informed the undersigned by letter dated September 3, 1993 that it would not pursue the "knowing hire" count in the Complaint at issue, Count I. However, complainant has not moved to dismiss this count nor has it amended the Complaint to retract that allegation. Resultingly, Count I is still at issue and complainant may offer evidence to support the allegations contained therein.

Concerning Count I, complainant asserts in its motion that respondent violated the provisions of IRCA, 8 U.S.C. §1324a(a)(2), by having continued to employ Oliveira, an individual hired after November 6, 1986, in the United States, knowing that he was an alien not authorized for employment in the United States.

A violation of IRCA's "continuing employment" prohibition, 8 U.S.C. §1324a(a)(2), occurs when an employer fails to reverify the employment eligibility of one of its workers after receiving specific and detailed information that the worker may, in fact, be ineligible for employment

in the United States. United States v. Noel Plastering & Stucco, 2 OCAHO 377, at 3 (9/26/91).

In that scenario, the employer is held to have "constructive knowledge" of the employee's unauthorized status and the employer's subsequent failure to terminate the employee thus constitutes unlawful continuing employment in violation of 8 U.S.C. §1324b(a)(2). Id. See New El Rey Sausage Co. v. INS, 925 F.2d 1153, 1158 (9th Cir. 1991); Mester Mfg. Co. v. INS, 879 F.2d 561, 566-567 (9th Cir. 1989).

Moreover, in order to prove a continuing employment violation premised upon the constructive knowledge theory, complainant must show:

1. that respondent hired the individual for employment in the United States;

2. after November 6, 1986;

3. that respondent acquired a duty to reverify the individual's employment eligibility after receiving specific and detailed information regarding that individual's possible unauthorized status;

4. that respondent continued to employ that individual without taking appropriate steps to reverify the individual's employment eligibility; and

5. that the individual was, in fact, an unauthorized alien.

Noel, 2 OCAHO 377, at 4.

Respondent has admitted that it hired Oliveira for employment in the United States after November 6, 1986, elements 1 and 2 above. Furthermore, element 5 above, that the individual was, in fact, an unauthorized alien, is evident from the INS Certified Administrative Record relating to Oliveira, submitted by complainant with its motion.

To demonstrate that respondent received specific and detailed information concerning Oliveira's unauthorized status, complainant offers the affidavit of Special Agent Martinelli, in which he averred that during the July 29, 1991 INS visit, he "advised Mr. Paxos that the Social Security Card presented by Mr. Oliveria (sic) was counterfeit and

that he was being taken into custody because of his illegal status in the United States." Martinelli Aff., at 1.

Respondent does not dispute complainant's contention that Special Agent Martinelli advised Mr. Paxos that Oliveira was an illegal alien, nor does it dispute the allegation that the Social Security card presented by Oliveira was counterfeit. Instead, respondent contends that these statements are therefore inadmissible solely because of their heresay character.

In considering a motion for summary adjudication, the court may only rely on evidence that is admissible at trial, and may not consider hearsay evidence. Beyda v. USAir, Inc., 697 F.Supp. 1394, 1398 (W.D. Pa. 1988). However, not all out-of-court statements constitute hearsay. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). See E.J. Stewart, Inc. v. Aitken Prods., Inc., 607 F.Supp. 883 (D.C. Pa. 1985).

If the significance of a statement lies solely in the fact that it was made, as opposed to its being truthful of the assertion contained in the statement, the statement does not constitute hearsay because it is not offered "to prove the truth of the matter asserted." United States v. Cantu, 876 F.2d 1134, 1137 (5th Cir. 1989); United States v. Campanaro, 63 F.Supp. 811, 814 (E.D. Pa. 1945).

In particular, "(w)hen it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, ...the evidence is not subject to attack as hearsay." United States v. Norwood, 798 F.2d 1094, 1097 (7th Cir. 1986).

Respondent admits that during the July 29, 1991 INS visit, Agent Martinelli requested, and was shown, Oliveira's Form I-9 whereupon, Martinelli attests, Oliveira was taken into INS custody. Martinelli Aff., at 1.

Agent Martinelli also avers in his affidavit that he informed Mr. Paxos at that time that the Social Security card presented by Oliveira in the course of the employment eligibility verification process was counterfeit, and that Oliveira was being taken into custody because of his illegal status. Id.

These statements are not offered by complainant to prove the truth of Martinelli's assertions, i.e., that Oliveira presented a false document and that he was being taken into custody for being an illegal alien. Rather, Martinelli's testimony is relevant to respondent's state of mind, in particular, respondent's then having been made aware of the fact that Oliveira had presented a false document, and also that Oliveira was unauthorized for employment. Such evidence is no different than any other out-of-court event about which a witness might testify, and for that reason is admissible. See Norwood, 798 F.2d at 1097 n.4.

Respondent fails to rebut Martinelli's testimony as to these facts, and has failed to offer contrary evidence indicating that it was not aware of Oliveira's illegal status or of the fact that the Social Security card presented by Oliveira at the time he was hired was counterfeit. Accordingly, complainant has established that respondent was aware of those facts at the time that Oliveira was taken into custody following the July 29, 1991 INS visit to respondent's premises, thereby establishing element 3 above.

In her affidavit, Special Agent Mullin asserts that on October 10, 1991, she served an administrative subpoena on respondent, and at that time observed Oliveira at respondent's place of business. Mullin Aff., at 1. Respondent admits that Oliveira had returned to its employ and was at respondent's place of business on that date. Opposition, at 9.

Respondent contends that it acted reasonably in continuing to employ Oliveira after he was released from INS custody, because: (1) it relied on the statement of an individual who purported to be Oliveira's attorney, who asserted that Oliveira was eligible for employment; (2) it relied on documentation provided by Oliveira indicating that he was eligible for employment; and (3) it believed that Oliveira would not have been released by INS if he had not been eligible for employment. Id.

Respondent's contentions notwithstanding, this factual scenario reveals that respondent failed to take appropriate steps to reverify Oliveira's work authorization before allowing him to continue his employment following his release from INS custody.

As noted earlier, the evidence establishes that on July 29, 1991, Special Agent Martinelli informed respondent that Oliveira was not authorized for employment, and also informed respondent that the

Social Security card which Oliveira had presented for employment eligibility verification purposes was counterfeit.

Rather than reverifying Oliveira's work authorization by preparing a new Form I-9 before allowing him to continue his employment, respondent asserts that it relied upon the representations of an individual purporting to be Oliveira's attorney, and examined additional documentation indicating that Oliveira was authorized for employment without complying with the Form I-9 process. Id.

Once having become aware that Oliveira was not authorized for employment, and also after learning that he had presented a false document for eligibility purposes, respondent was under a duty to determine whether Oliveira had become authorized for employment by complying with the provisions of the employment eligibility verification system, 8 U.S.C. §1324a(b), before allowing Oliveira to continue his employment. See New El Rey, 925 F.2d, at 1158

This it failed to do. Instead, respondent chose to rely on the representations of Oliveira's reputed attorney and to examine documents purporting to show that Oliveira was authorized for employment without completing a new Form I-9. Having done so, respondent failed to take the appropriate steps to reverify Oliveira's employment eligibility, element 4 above.

Accordingly, complainant has demonstrated that respondent continued to employ Oliveira with constructive knowledge that he was not authorized for employment in the United States, and in doing so violated IRCA, 8 U.S.C. §1324a(a)(2), as alleged in Count I. For this reason, complainant's motion is granted as it pertains to the violation alleged in Count I.

Addressing Count II, complainant asserts in its motion that no dispute exists with respect to the allegation contained in that count, which charges respondent with having failed to prepare or produce Forms I-9 for the 85 employees named.

In particular, complainant notes that respondent admits in its Answer that it does not possess, and cannot produce, those Forms I-9 pertaining to 73 of the individuals listed in Count II, and further admits that it failed to timely produce the Forms I-9 pertaining to the remaining 12, having submitted copies of those Forms I-9 with its Answer.

In response, respondent denies that it failed to produce Forms I-9 pertaining to those 12 individuals, and contends that it did not admit that it failed to prepare Forms I-9 pertaining to the 73 individuals for whom it did not produce Forms I-9, but rather was unable to determine if it had prepared Forms I-9 for those individuals due to the number of individuals who have completed Forms I-9.

Respondent argues that the October 11, 1991 subpoena did not indicate that respondent's failure to produce the requested documentation by the October 22, 1991 return date was a substantive violation, and further contends that it provided all documentation in its possession as expeditiously as possible.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available for inspection by INS officers. 8 U.S.C. §1324a(a)(1)(B); 8 U.S.C. §1324a(b). A failure to prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. §1324a(b), is a violation of IRCA. 8 C.F.R. §274a.2(b)(1); 8 C.F.R. §274a.2(b)(2). United States v. Bayley's Quality Seafoods, Inc., 1 OCAHO 238, at 7 (9/17/90); United States v. Vanouou, 1 OCAHO 54, at 5 (5/4/89). See United States v. Streicher, OCAHO Case No. 93A00092 (Order Granting in Part and Denying in Part Motion to Strike Respondent's General Denials)(9/21/93).

Respondent admitted in its Answer that it hired the individuals named in Count II for employment in the United States after November 6, 1986. Therefore, respondent had a duty to comply with the provisions of IRCA by preparing Forms I-9 pertaining to those individuals, and by retaining those forms and presenting them upon complainant's request. 8 U.S.C. §1324a(a)(1)(B); 8 U.S.C. §1324a(b).

Because respondent has admitted in its Answer that it has failed to produce Forms I-9 pertaining to 73 of the individuals named in Count II, as alleged therein, complainant's motion is granted as it pertains to those violations.

Respondent contends, however, that it presented Forms I-9 pertaining to the remaining 12 individuals, and argues that the 11-day period established by complainant to produce those forms was insufficient for that purpose, and asserts that it was not informed that a failure to timely present those Forms I-9 was a violation of IRCA.

The pertinent implementing regulation provides:

(2) Retention and Inspection of Form I-9

> (ii) Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection by (the INS).... Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in (IRCA, 8 U.S.C. §1324a(b)(3)).

8 C.F.R. §274a.2(b)(2)(ii).

The October 11, 1991 administrative subpoena granted respondent 11 days, or until October 22, 1991, to provide complainant with the Forms I-9 requested therein. Respondent contends that this gave respondent only five (5) business days to locate, gather, and submit the requested forms, which, respondent asserts, was an insufficient period of time for that purpose.

Complainant argues that the 11-day notice given to respondent in the October 11, 1991 subpoena was almost four times greater than the three-day period required in the pertinent previously-noted implementing regulation.

Complainant has established that respondent failed to produce Forms I-9 pertaining to the 12 remaining individuals named in Count II within the time specified in the October 11, 1991 inspection subpoena. In its opposition, respondent defends its failure to timely produce those forms by asserting that the notice period was insufficient for that purpose, basing this contention upon the same conclusory allegations contained in its Answer to the Amended Complaint.

When the party moving for summary decision meets its initial evidentiary burden, the nonmovant must then come forward with specific facts demonstrating the existence of genuine factual issues. Fed. R. Civ. R. 56(e). See Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356; United States v. Scotto Bros. Woodbury Restaurant, Inc., 3 OCAHO 584, at 8 (12/7/93). The nonmoving party cannot rest upon mere conclusory assertions to demonstrate the absence of factual issues. PPJV, 2 OCAHO 337, at 3.

Because respondent has failed to present specific facts showing that there is a genuine issue for hearing with regard to the sufficiency of the notice period, that defense fails.

Similarly, respondent's contention that the subpoena was devoid of any warning that its failure to provide the requested documentation by the return date constitutes a violation of IRCA is not a proper defense to the violation alleged. The pertinent implementing regulation, 8 C.F.R. section 274a.2(b)(2)(ii), provides that Forms I-9 must be made available at the time of inspection, which the administrative subpoena clearly indicated was to commence at 10:00 a.m. on October 22, 1991, some 11 days following the service of the subpoena. Respondent's ignorance of the statutory requirements is not a defense to violations of IRCA. Mester, 879 F.2d at 569-570; United States v. The Body Shop, 1 OCAHO 149, at 3 (4/2/90).

The fact that respondent submitted the Forms I-9 requested in as expeditious a manner as possible goes to respondent's good faith, a factor to be considered in determining the appropriate civil money penalty for paperwork violations (see IRCA, 8 U.S.C. §1324a(e)(5)), but one that is not relevant in determining the facts of violation. United States v. Task Force Security, 3 OCAHO 533 (6/25/93).

Accordingly, I find that respondent failed to produce the requested Forms I-9 pertaining to the remaining 12 individuals named in Count II of the Complaint in a timely manner, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). 8 U.S.C. §1324a(b)(3); 8 C.F.R. §274a.2(b)(2)(ii). Therefore, complainant is entitled to summary decision on the remaining 12 violations alleged in Count II of the Complaint, and its motion is granted as it pertains to those alleged violations, also.

In Count III, the Complaint charged respondent with failing to ensure that the eight individuals named therein properly completed Section 1 of the pertinent Forms I-9.

In its motion, complainant notes that respondent admits in its Answer that it hired the individuals named in Count III for employment in the United States after November 6, 1986, and asserts that individuals 1, 2, 5, 6, 7, and 8 named in that count failed to attest in Section 1 on the pertinent Forms I-9 that they are citizens or nationals of the United States, aliens lawfully admitted for permanent residence, or aliens authorized to work in the United States, as required by IRCA, 8 U.S.C. §1324a(b)(2).

In its opposition, respondent asserts that "the only item not completed in the six above-referenced Form I-9's, is a check in a minuscule box...", that which discloses the prospective employee's citizenship or alien status.

The pertinent provision of IRCA, 8 U.S.C. §1324a(b)(2), provides:

> The individual must attest, under penalty of perjury on the (Form I-9), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under (IRCA) or by the Attorney General be hired, recruited, or referred for such employment.

A review of those Forms I-9 reveals that they have been completed in an ineffectual manner as alleged by complainant. Contrary to respondent's contentions, its failure to guarantee that those individuals completed the portion of Section 1 of the pertinent Forms I-9 in which they attest to their citizenship or alien status constitutes a violation of IRCA. 8 U.S.C. §1324a(a)(1)(B); 8 U.S.C. §1324a(b)(2); 8 C.F.R. 274a.2(b)(1)(i)(A). See United States v. Eagles Groups, Inc., 2 OCAHO 342, at 3 (6/11/91).

For this reason, complainant's motion is granted as it pertains to Count III, violations 1, 2, 5, 6, 7, and 8.

In violation 3, Count III of the Complaint, complainant alleged that respondent violated IRCA by failing to ensure that the individual named therein, Adolfo Rojas (Rojas), properly completed Section 1 of his Form I-9.

In Section 1 of the pertinent Form I-9, Rojas indicated that he is an alien lawfully admitted for permanent resident, listing his Alien Number as "A-1122."

In its motion, complainant contends that a cursory examination of the Handbook for Employers, M-274, shows that this is clearly incorrect, because an alien number has eight digits, and not four as Rojas indicated. Such a discrepancy, complainant argues, places a duty of inquiry on the employer to check for a number on a document appearing to be "genuine on its face." Motion, at 8.

In its opposition, respondent asserts that it has made a "more than cursory" examination of the handbook, and cannot locate any information alerting an employer that an alien number has eight digits, rather than four.

It is unclear whether respondent should have known that by listing an alien number four digits in length, Rojas failed to properly complete Section 1 of the Form I-9 pertaining to him. For this reason, it is unclear whether respondent is liable under IRCA, 8 U.S.C. §1324a, for having failed to ensure that Rojas properly completed Section 1 of his

Form I-9. Accordingly, complainant's motion is denied as it pertains to that violation.

Finally, complainant has withdrawn its allegations pertaining to Count III, violation 4. That violation is ordered to be and is dismissed, with prejudice to refiling.

Finally, in Count IV, complainant asserted that respondent failed to properly complete Section 2 of the Forms I-9 pertaining to the four individuals named therein, all of whom were hired for employment in the United States after November 6, 1986.

In its motion, complainant asserts that respondent admits to having hired individuals 1, 2, and 4 in Count IV for employment in the United States after November 6, 1986. Complainant also asserts therein that the Forms I-9 pertaining to those individuals have been completed in an ineffectual manner. For these reasons, complainant concludes, it is entitled to summary decision with respect to those alleged violations.

In opposition, respondent asserts that it has substantially complied with the requirements of the employment eligibility verification system in the completion of Section 2 on those three (3) Forms I-9.

Substantial compliance with the paperwork requirements may be asserted as an affirmative defense with regard to liability for a paperwork violation. United States v. Chicken by Chickadee Farms, 3 OCAHO 423 (4/22/92).

With regard to violation 1, Count IV, complainant alleged that respondent failed to check a box under List B and List C, and failed to identify the issuing state under item 1, List B or specify the "other" document used for identification purposes in item 3, List B. Complainant contends in its motion that an individual inspecting this Form I-9 can only guess as to the identity document submitted.

In its opposition, respondent argues that the identification number and expiration date are provided in List B of the pertinent Form I-9, and asserts that the only deficiency on that form was its failure to check the box identifying the document in question.

In addition, respondent notes that while the box indicating the document examined to establish employment eligibility in List C is not completed, it is clear that the document that was examined was a

Social Security card, the document identification number having been listed as "SS# 211-34-6138."

Respondent's contentions with respect to its completion of List C are correct, and I find that respondent substantially complied with that portion of Section 2.

However, its contentions with respect to its completion of List B are in error. On the Form I-9 in question, respondent failed to identify the document examined for the purpose of establishing identity, as required under IRCA, 8 U.S.C. §1324a(b)(1)(A)(ii), and in the implementing regulations, 8 C.F.R. section 274a.2(b)(1)(ii)(B).

For this reason, I find that respondent has failed to properly complete Section 2 of the Form I-9, as alleged in Count IV, violation 1 of the Complaint.

With respect to violation 2, Count IV, complainant alleges in its motion that respondent failed to identify the state issuing the driver's license that respondent examined as a List B document in Section 2.

Respondent contends in opposition that there is no dispute that the individual for whom that form was prepared, Karen Banak (Banak), provided proper identification and was not an illegal alien.

The employment authorization of an individual for whom a Form I-9 is prepared is a mitigating factor to be considered in determining an appropriate civil money penalty for a paperwork violation, but is irrelevant for the purpose of determining liability for an alleged paperwork violation. See 8 U.S.C. §1324a(e)(5); United States v. SDI Indus., Inc., (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses) (8/20/92), at 6.

By not specifying the state that issued the driver's license examined as a List B document in Section 2 of the Form I-9 pertaining to Banak, respondent has failed to identify the document that was utilized to establish Banak's identity, as required under IRCA, 8 U.S.C. §1324a(b)(1)(A)(ii), and in the implementing regulations. 8 C.F.R. §274a.2(b)(1)(ii)(B).

For this reason, I find that respondent failed to properly complete Section 2 of the Form I-9 pertaining to Banak, as alleged in Count IV, violation 2.

In violation 4, Count IV, complainant alleged that respondent failed to complete any part of List B of the Form I-9 pertaining to Maximo Ortiz, the individual named therein.

In reply, respondent asserts that a Social Security card was examined in List C, and that there is no dispute that Ortiz is authorized for employment in the United States.

But by having failed to identify any documents which were examined to establish identity, respondent has failed to attest that it examined any documents to establish Ortiz's identity, as required under IRCA, 8 U.S.C. §1324a(b)(1)(A)(ii), and in the implementing regulations, 8 C.F.R. §274a.2(b)(1)(ii)(B). For this reason, I find that respondent has failed to properly complete Section 2 of the Form I-9 pertaining to Ortiz, as alleged in Count IV, violation 4 of the Complaint.

Finally, complainant has withdrawn its allegations pertaining to Count IV, violation 3. That violation is ordered to be and is dismissed, with prejudice to refiling.

In summary, the rulings set forth in this order affect this proceeding in the following respects.

In Count I, the facts of violation in violation 1, the only infraction contained in that count, are resolved in favor of complainant. All that remains at issue is the appropriate civil money penalty to be assessed for that violation, ranging from the statutorily mandated minimum amount of $250 to the maximum sum of $2,000 under these facts, and that civil money penalty sum will be included in the cease and desist order to be issued in conformance with the provisions of 8 U.S.C. §1324a(e)(4).

In Count II, the facts of violation alleged in violations 1 through 85 inclusive are resolved in favor of complainant. Remaining at issue are the appropriate civil money penalty sums to be assessed for each of those 85 paperwork violations, as well as the remaining alleged paperwork violations renumerated in Counts II and IV. The amounts of those assessments will range from the statutorily minimum sum of $100 for each violation to the maximum sum of $1,000 for each violation, in accordance with the provisions of 8 U.S.C. §1324a(e)(5).

In Count III, only the facts of violation alleged in violation 3 remain at issue since complainant's Motion for Summary Decision, as it concerned that specific allegation, was denied. Of the seven remaining

charges in this count, violation 4 has been withdrawn and the facts of violation alleged in the remaining six allegations i.e. violations 1, 2, 5, 6, 7 and 8 of Count III, are being resolved herein in favor of complainant. Resultingly, the remaining issues are the facts of violation alleged in violation 3 and the appropriate civil money penalties to be assessed in violations 1, 2, 5, 6, 7 and 8, as well as in violation 3, but only in the event that the facts of violation in that alleged infraction are resolved in complainant's favor, also.

In Count IV, the remaining issues to be decided include only the appropriate civil money penalties to be assessed for violations 1, 2 and 4. That because violation 3 in Count IV has been withdrawn by complainant and the alleged facts of violation in the remaining three charges are being ruled upon in complainant's favor in this Order.

An evidentiary hearing must be scheduled for the purpose of adducing relevant evidence on the sole remaining allegation at issue, violation 3 in Count III, as well as the appropriate civil money penalties to be assessed, giving due consideration to the five criteria set forth at 8 U.S.C. §1324a(e)(5), in those 95 charges ruled upon in complainant's favor in this Order.

Accordingly, 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 Allentown, Pennsylvania, which, according to the provisions of pertinent procedural rule, 28 C.F.R. §68.5(b), is the nearest practicable place to the place where the person or entity resides or the place where the alleged violation occurred.

JOSEPH E. MCGUIRE
Administrative Law Judge