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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding Case No. 94A00093
NORTHERN MICHIGAN FRUIT COMPANY, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, INCLUDING SUBSTANTIAL COMPLIANCE

I. *Introduction*

Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted section 274A of the Immigration and Nationality Act of 1952 ("the Act" or "INA"), as amended, 8 U.S.C. § 1324a. This section of IRCA contains employer sanctions provisions which impose penalties on employers who knowingly hire unauthorized aliens or who fail to comply with the statute's employment eligibility verification system.[1] Congress

[1] IRCA provides that "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States--(A) an alien knowing the alien is an unauthorized alien [or] (B) an individual without complying with the requirements of subsection (b)." 8 U.S.C. § 1324a(a)(1)(B)(i). Subsection (b) provides in pertinent part that "[a] person or other entity hiring, recruiting, or referring an individual for employment in the United States . . . must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien." 8 U.S.C. § 1324a(b)(1)(a). Verification requires examination of certain documents, such as a U.S. passport, certificate of U.S. citizenship, certificate of naturalization, unexpired foreign passport (if it has an appropriate unexpired endorsement of the Attorney General authorizing the individual's employment in the U.S.), or a resident alien card or other alien registration card, subject to certain conditions. 8 U.S.C. § 1324a(b)(1)(B). Certain documents, including a social (continued...)

included this section in IRCA with the hope that it would be the principal means of curtailing the large influx of undocumented aliens into the United States by eliminating job opportunities for illegal immigrants in the United States.[2] H.R. Rep. No. 682, Part I, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5649-50.

The case at bar, involving IRCA's employment eligibility verification provisions, is currently set for an evidentiary hearing on September 28, 1994 in Detroit, Michigan. Currently before me is Complainant's Motion to Strike Affirmative Defenses filed pursuant to 28 C.F.R. § 68.1 and Rule 12(f) of the Federal Rules of Civil Procedure. This order, among other things, sets forth a novel approach to deciding motions to strike the "substantial compliance" affirmative defense to allegations of IRCA paperwork violations.

II. *Procedural Background*

On May 9, 1994, the INS filed the complaint in this case, charging Northern Michigan Fruit Company ("Respondent" or NMFC") with various violations of IRCA's paperwork requirements. On May 17, 1994, the INS filed an amended complaint, which makes the same substantive allegations against Respondent, but adds a prayer for relief which totals the civil money penalties from all counts.

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[1](...continued)
security card, birth certificate, or other documents established by regulation, may satisfy this requirement, provided they are accompanied by a driver's license, state identification card, or other document established by regulation. 8 U.S.C. § 1324a(b)(1)(C) and (D).

[2] In 1985, the United States Department of Justice, Immigration and Naturalization Service (INS) apprehended 1.2 million undocumented aliens. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 47, reprinted in 1986 U.S. CODE CONG. ADMIN. NEWS 5649. In six of the nine years prior to IRCA's passage, more than one million illegal aliens were apprehended. Id. According to immigration officials, that figure represents only a "small fraction of those who cross the border successfully and stay in the United States for years, [or] for a season." Id.

The House Committee on the Judiciary reported that:

> Employment is the magnet that attracts aliens here illegally or, in the case of non-immigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

Id. at 46.

Count I alleges that Respondent failed to ensure that the "employer (sic)" properly completed section 1 of the Employment Eligibility Verification Form ("Form I-9" or "I-9 Form") for 25 listed employees who were hired by Respondent after November 6, 1986 in violation of Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) without complying with the requirements of section 274A(b)(2) of the Act, 8 U.S.C. § 1324a(b)(2) and 8 C.F.R. § 274a.2 (b)(1)(ii).

Count II alleges that Respondent failed to properly complete section 2 of the Form I-9 for 13 listed employees who were hired by Respondent after November 6, 1986 in violation of section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) without complying with the requirements of section 274A(b)(1) of the Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii).

Count III alleges that Respondent failed to complete section 2 of the Form I-9 within three business days of the hire for 18 listed employees hired by Respondent after November 6, 1986 in violation of section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) without complying with the requirements of section 274A(b)(1) of the Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii).

Count IV of the complaint alleges that Respondent failed to prepare the Form I-9 for Maria Ramos, whom Respondent hired after November 6, 1986 in violation of Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B) without complying with the requirements of section 274A(b)(1) of the Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1)(ii).

Respondent filed an answer to the original complaint on May 23, 1994 and an answer to the amended complaint on May 31, 1994. In its answer to the amended complaint, Respondent states:

Count I

> . . . Respondent denies that Cantu Genaso was hired by the Respondent in the United States. Respondent lacks sufficient information to form a belief as to the allegation that it hired Maria Lamas, because the Respondent's employee records contain numerous employees with that name and Complainant has failed to specify with particularity which employee is the basis for its allegations. . . . Respondent further states that it has substantially complied with the employment eligibility verification requirements. The Respondent maintains employee files containing relevant

> information pertaining to the requirements of the I-9 form. [The] records were available to the Complainant at the time the I-9 Forms which are the subject matter of the complaint were examined. If the Respondent has violated the provisions of the . . . Act, then such violation is of a de minimis nature. Respondent has exercised its best efforts in complying with the Act and has not knowingly or intentionally failed to comply with it.

Answer to Amended Complaint at 2 (emphasis added).

With respect to Counts II, III, and IV, Respondent's answer leaves the Complainant to its proof in proving the allegations contained in paragraph C of the Complaint. With respect to these three counts,

> Respondent further states that it has substantially complied with the employment eligibility verification requirements. The Respondent maintains employee files containing relevant information pertaining to the requirements of the I-9 Form. Said records were available to Complainant at the time the I-9 Forms . . . were examined. If the Respondent has violated the provisions of the . . . Act then such violation is of a de minimis nature. Respondent has exercised its best efforts in complying with the Act and has not knowingly or intentionally failed to comply with it.

Answer to Amended Complaint at 3-5 (emphasis added).

In a separate pleading, filed contemporaneously with its amended answer, Respondent asserts the following affirmative defenses: (1) Respondent has complied in "good faith" with the requirements of the Act; (2) Complainant failed to timely serve a Warning Notice upon Respondent because the Warning Notice was served on March 10, 1994, the Notice of Intent to Fine was served on February 17, 1994 and Complainant failed to provide Respondent with an opportunity to correct the alleged violations; and (3) other affirmative defenses raised in Respondent's answer.

On June 10, 1994, Complainant, pursuant to Fed. R. Civ. P. 12(f), filed a motion to strike Respondent's three affirmative defenses, alleging that: (1) Respondent has failed to provide a statement of facts supporting each affirmative defense alleged, as required by 28 C.F.R. § 68.9(c)(2); (2) Respondent's assertion of good faith alleged in its First Affirmative Defense is irrelevant to these proceedings and does not constitute a legally sufficient affirmative defense to the complaint; and (3) the assertions in the Second Affirmative Defense concerning the

issuance of a Warning Notice are irrelevant and immaterial in that the violations noted in the Warning Notice are not now, nor have they been the subject of this complaint.

On June 17, 1994, Respondent filed its response to the motion to strike, in which it supplemented its affirmative defenses with further factual support by attaching to its response the I-9 Forms for fifty-three (53) employees.

III. *Facts*

The pleadings provide a limited understanding of the facts involved in this case but are sufficient to enable me to rule on the pending motion to strike. The facts, viewed in a light most favorable to Respondent,[3] show the following.

Northern Michigan Fruit Company is a Michigan corporation, located at 7234 N. Maitou Trail, Omena, Michigan. See Notice of Intent to Fine, Exhibits A and B. The INS conducted an inspection of Respondent's business premises sometime during 1993, prior to December 2, 1993. During that inspection, the INS discovered numerous paperwork violations of IRCA, some of which are included in the amended complaint. At the time of the inspection, Respondent maintained employee files containing relevant information pertaining to the requirements of the I-9 Form for all of the employees listed in the amended complaint. INS agents examined these files during the inspection. Respondent also had I-9 Forms in its business files for fifty-four (54) of the fifty-seven (57) employees listed in the amended complaint, which were apparently not shown to or seen by the INS agents on the date of the inspection. The individuals for whom Respondent had I-9 Forms were:

Count I:

1. Elizar Ansiso
2. Dan Binder
4. Horacio Estrada
5. Adelina Gonzalez
6. Guillermina Gonzalez
7. Claudia Gonzalez

[3] Although I find certain facts from the pleadings, these are not ultimate findings and the facts may substantially change after discovery is completed and additional evidence is presented.

8. Enrique Gonzalez
9. Hector Gonzalez
10. Maria Gonzalez
11. Yolanda Gonzalez
12. Alfonso Guadarrama
13. Mary Hawley
14. Danny Herman
15. Michaella Huerta
17. Javier Martinez
18. Gilberto Ontiveros
19. Aurelio Perez
20. Guadalupe Rangel
21. Jesse Rodriguez
22. David Santamaria
23. Virginia Santamaria
24. Joan Zywicki
25. Imella Villerreal

Count II:

1. Irineo Acuna
2. Juan Aleman
3. Maria Elena Contreras
4. Harvey Fischer
5. Ramiro Lucas
6. Lino Magdeleno
7. Andrea McDowell
8. Owen McDowell
9. Roman Raquel
10. David Scott
11. Gerard Stallman
12. Aaron Trudeau
13. Robert Wonegeshir

Count III:

1. Ronald Boyd
2. Wallace Hall Jr.
3. David Lamas
4. Vincente Lamas
5. Jesus E. Rodriguez
6. Craig Stallman
7. Pedro Torres
8. Sheri Udell

9. Alicia Vasquez
10. Ana Cristine Vasquez
11. Hortencia Vasquez
12. Jose Vasquez
13. Marcos Vasquez
14. Maria Vasqiuez
15. Sergio Vasquez
16. Rodney Westphal
17. Adalberto Zavala
18. Hermila Zavala

Each of the I-9 Forms of the above-listed individuals, with the exception of the I-9 Forms of Danny Herman (Count I #14), David Scott (Count II, #10), Gerard Lee Stallman (Count II, #11) and Robert Wonegeshir (Count II, #13), have the signatures of both the employee and an employer representative in their respective signature boxes on the form.

As to Count I, the following evidence taken from section 1 of the I-9 forms ("form") shows that: (l) Ansiso Elizar, Adelina Gonzalez, Guillermina Gonzalez, Enrique Gonzalez, Hector Gonzalez, Yolanda Gonzalez, Alfonso Guadarrama, Mary Hawley, Javier Martinez, Gilberto Ontiveros, Aurelio Perez, Jesse Rodriguez, David Santamaria, Virginia Santamaria, Joan Zywicki, Imella Villerreal, and Dan Binder did not have any of the boxes on the form marked or checked in the attestation portion of section 1, and on Binder's form, his name, address, date of birth and social security number is not completed in section 1; (2) There is no I-9 form for Cantu Genaso, but Respondent denies employing this individual; (3) Horacio Estrada's form has marked the block attesting that he is a lawful permanent resident, but does not have his alien number written out on the form; (4) Claudia Gonzalez's, Michaella Huerta's and Maria Gonzalez's forms have all the boxes in section 1 filled in except the box showing maiden name; (5) Although the Form I-9 for Danny Herman has a check mark in box one of section 1, indicating Herman is a citizen or national of the U.S., and is dated September 11, 1991, section 1 of the form is neither attested to nor signed; and (6) There is no form I-9 for Maria Lamas, but as stated in the amended answer, Respondent has numerous employees with that name and apparently did not know which form to produce;

As to Count II, the following evidence taken from section 2 of the I-9 forms for the following individuals shows: (1) Irineo Acuna's form has a document listed in list B, but none in list A or C; (2) Juan Aleman's form lists documents in section 2, list B and C, but document B does not

show an expiration date; (3) Maria Elena Contreras' form lists a document in list A of section 2 but does not show its document number or expiration date if any (if the document is attached, it raises an interesting question of substantial compliance); (4) Harvey Fischer's form does not show in the certification portion of section 2, the date when Mr. Fischer began his employment; (5) the I-9 forms for Ramiro Luca and Lino Magdeleno (Count II, #6) list documents in list A and C, but each document on list A on the forms does not show the expiration date or document number, and the certification portion of section 2 does not have the beginning date of employment; (7) Andrea McDowell's form does not have a date in the certification portion of section 2 to show the beginning date of employment; (8) Owen McDowell's form lists documents in list B and C of section 2, but the year of his driver's license in list B is missing, and the certification section does not have the beginning date of employment; (9) Raquel Roman's form has no documents listed in list A, B or C; (10) the I-9 form for David Scott (Count II, #10) is signed by David Scott in section 2 of the form and not by a representative of the Respondent; (11) the I-9 form for Gerard Stallman (Count II, #11) is not signed in section 2's signature box by any representative of the company. Section 2 of the form in the box marked "Business or Organization Name," however, has the company's name written in long hand; (12) Aaron Trudeau's form has documents listed only in list B; and (13) Robert Wonegeshir's form has documents listed only in list C.

As stated previously, Count III alleges failure to complete form I-9 within three days of the hire. Respondent has submitted completed I-9 forms for all the individuals listed as employees in Count III. Respondent has not submitted an I-9 form for Maria Ramos (Count IV), because Respondent claims it did not hire Ms. Ramos.

As a result of this inspection, INS issued a Notice of Intent to Fine ("NIF") on December 2, 1993, for a number of paperwork violations. These were not the only violations discovered. The INS chose to charge those violations listed in Counts I through IV of the NIF. The remaining violations were placed in a Warning Notice to Advise Respondent of its failure to comply with IRCA's verification requirements. These violations in the Warning Notice are not the subject of any charges in this case. The NIF was served on Respondent on February 17, 1994.

IV. *Discussion*

A. Legal Standard for Motions to Strike Affirmative Defenses

I have recently written extensively about my approach to determining motions to strike affirmative defenses. See United States v. Jenkins, OCAHO Case No. 94A00023, at 2-4 (6/15/94) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses); and United States v. Alvarez-Suarez, OCAHO Case No. 93C00208, at 6-7 (6/24/94) (Order Denying Complainant's Motion for Default and Granting and Denying in Part Complainant's Motion to Strike Affirmative Defenses).

As those decisions point out, I rely on Fed. R. Civ. P. 12(f) for guidance in determining the merits of a motion to strike. I will not grant a motion to strike when the sufficiency of the defense depends upon disputed issues of fact and law. Id. Moreover, in disposing of a motion attacking affirmative defenses as insufficient on their face, I will construe defenses in a light most favorable to respondents, but in this regard allegations of the complaint are not conclusively binding on the defendants, and do not bar them from asserting defenses based upon their version of the facts. United States v. Jenkins, supra at 4 (citing McCormick v. Wood, 156 F.Supp. 483 (S.D.N.Y. l957)).

A motion to strike is a drastic remedy and I am reluctant to grant such a motion, especially when there has not been any discovery in the case. Id. In determining whether I will strike an affirmative defense, I must first decide whether the alleged defense is in fact by law an affirmative defense.

Because the rules of practice and procedure governing these proceedings are not as comprehensive as the Federal Rules of Civil Procedure, the federal rules may be used as a guideline. See 28 C.F.R. §§ 68.1. Our regulations provide that a respondent shall file an answer within thirty days after service of a complaint. 28 C.F.R. § 68.9. Although the answer must include a statement of the facts supporting each affirmative defense, the regulations do not state or list affirmative defenses for unlawful employment violations under section 274A of the Act, including paperwork violations, nor do they provide for the utilization of motions to strike affirmative defenses. See 28 C.F.R. § 68.9(c)(2).

The Federal Rules of Civil Procedure provide guidance on the meaning of the term "affirmative defenses," and federal decisions help explain the purpose of affirmative defenses. Fed. R. Civ. P. 8(c) requires that a responsive pleading set forth certain enumerated affirmative defenses and "any other matter constituting an avoidance or affirmative defense." Rule 8(c) makes no attempt to define the

concept of affirmative defense. Rather, it obligates a defendant to plead affirmatively any of the nineteen listed defenses he or she wishes to assert. 5 C. Wright and A. Miller, Federal Practice and Procedure (1990) (hereinafter "C. Wright and A. Miller") § 1279 at 413; Henry v. First Nat. Bank of Clarksdale, 595 F.2d 291, 298, (5th Cir. l979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980).

"Since an affirmative defense will defeat plaintiff's claim if it is accepted by the court, Rule 8(c), by requiring defendant to plead his defense or risk waiving it, also serves the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be barred completely. C. Wright and A. Miller, § 1279 at 414 (citations omitted); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 350, 91 S.Ct. 1434, 1453-54, 28 L.Ed. 2d. 788 (1971). "The policy behind Rule 8(c) is to put plaintiff on notice well in advance of trial that defendant intends to present a defense . . . ." Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 458 (10th Cir. 1982). See also Allied Concrete, Inc. v. NLRB, 607 F.2d 827 (9th Cir. 1979).

I intend to follow the guidelines on motions to strike affirmative defenses set forth in the cases above in determining the merits of Complainant's motion to strike. I shall strike defenses which cannot succeed under any set of circumstances. When there is any question of fact or any substantial question of law, however, I shall refrain from acting until a later time when I can more appropriately address those issues.

B. Analysis

There has been little or no opportunity for discovery in this case, and therefore, little or no opportunity to develop the factual background. I thus conclude that it is premature to strike defenses that have any possible merit based upon the facts alleged in Respondent's answers.

1. That Respondent Has a Statutory Defense to the Allegations in the Complaint Pursuant to 8 U.S.C. § 1324a(a)(3) in That Respondent Has Complied in "Good Faith" With the Requirements of the Act

Complainant makes several arguments to support its motion to strike this alleged affirmative defense. First, it argues that there is no statement of any factual basis giving rise to the claim of such defense. Complainant next argues that Respondent's claim of "good faith"

pursuant to 8 U.S.C. § 1324a(a)(3) does not constitute an affirmative defense to violations of 8 U.S.C. § 1324a(b).

The amended complaint alleges three counts of violations of 8 U.S.C. § 1324a(a)(1)(B) for Respondent's failure to comply with IRCA's employment eligibility verification system. If an employer shows that he acted in "good faith" in trying to comply with IRCA's verification and record-keeping provisions, the evidence of his "good faith" must be considered (in addition to at least four other specified factors) by the Administrative Law Judge ("ALJ") in mitigating a civil monetary penalty, but is not an affirmative defense. See 8 U.S.C. § 1324a(e)(5); United States v. Chicken by Chickadee Farms, Inc., 3 OCAHO 423 (4/22/92) (Order Granting In Part and Denying In Part Complainant's Motion to Strike Affirmative Defenses); United States v. DuBois Farms, 1 OCAHO 242 (9/28/90) (Order Granting in Part Complainant's Motion to Strike Affirmative Defenses); United States v. Bayley's Seafoods, Inc., 1 OCAHO 238 (9/17/90) (Decision and Order Granting Complainant's Motion for Summary Decision in Part); United States v. Hollender, 1 OCAHO 175 (5/17/90) (Order Granting Motion to Strike Affirmative Defenses).

If liability is found as to a paperwork violation, Respondent will be provided an opportunity to submit to this agency any mitigating evidence, including that he acted in "good faith" in attempting to comply with the law.

Respondent has confused the applicability of 8 U.S.C. § 1324a(a)(3) which provides an affirmative defense to a charge of knowingly hiring an illegal alien, but not to a charge of failing to comply with IRCA's verification requirements. Compliance with IRCA's verification and record-keeping provisions establishes an affirmative defense to a possible charge of knowingly hiring an authorized alien. However, this is not an absolute defense and can be rebutted by a finding that the documents did not reasonably appear on their face to be genuine, the verification process was pretextual, or similar circumstances. See 8 U.S.C. § 1324a(a)(3); see also Committee on the Judiciary, H.R. Rep. No. 99-682 Part I, 99th Cong., 2d Sess. 56 (1986) at 57.

Respondent is not charged with any "knowing" violations. Because Respondent's first affirmative defense fails to state a defense to liability under 8 U.S.C. § 1324a(a)(1)(B), Complainant's motion to strike the alleged affirmative defense that it acted in "good faith" is GRANTED.

2. That The INS Failed To Timely Serve a Warning Notice Upon Respondent Because the Warning Notice Was Served on March 10, 1994, the NIF Was Served on February 17, 1994, and the Complainant Failed to Provide Respondent With an Opportunity to Correct the Alleged Violations

Respondent asserts as its second affirmative defense that Complainant failed to timely serve a warning notice in that it was served approximately three weeks after service of the NIF. Respondent further asserts as its second defense that it was not provided with an opportunity to correct the violation.

Complainant states that 8 U.S.C. § 1324a(i)(2) provides that "in the first instance in which the Attorney General has reason to believe that the person or entity may have violated" subsection (a) during the twelve-month period following the six-month educational period following enactment of IRCA, "the Attorney General shall provide to the person or entity indicating that such a violation or violations occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations." 8 U.S.C. § 1324a(i)(2).

Complainant, relying on Mester Mfg. Co. v. INS, 879 F.2d 561, 563 (9th Cir. 1989), argues that the twelve-month citation period referred to in this section ended on May 31, 1988. Looking for support to United States v. Widow Brown's Inn, 2 OCAHO 399 (1/15/92) and United States v. New El Rey Sausage Co., 1 OCAHO 6, modified on other grounds by CAHO, 1 OCAHO 78 (8/4/89), aff'd, New El Rey Sausage Co., Inc. v. INS, 925 F.2d 1153 (9th Cir. 1991), Complainant argues that the INS has no obligation to first issue a citation and allow Respondent an opportunity to remedy any violations prior to issuance of a NIF.

The INS further states that it conducted an investigation of Respondent's records and as a result issued the NIF for a number of violations, but not all that were discovered. Complainant chose to charge those violations contained in Counts I-IV of the NIF. The remaining violations were set out in a warning notice to advise Respondent of its failure to comply with the law. Respondent has not submitted any rebuttal to Complainant's argument.

I agree with Complainant that for the reasons stated in its motion and briefs, the INS was not required to provide Respondent with a warning notice or an opportunity to correct its failure to comply with IRCA's employment verification requirements. Consequently, I find

that Respondent's second affirmative defense has no basis in fact or law, and therefore, Complainant's motion to strike Respondent's second affirmative defense is GRANTED.

3. That Respondent Substantially Complied With IRCA's Employment Eligibility Verification Requirements

Respondent's third affirmative defense is that it substantially complied with IRCA's paperwork requirements. A careful review of Respondent's answer and response to the motion to strike shows that Respondent is making two distinct arguments involving "substantial compliance." One argument is that because Respondent substantially complied with IRCA's paperwork requirements, the charges should be dismissed. More specifically, in its amended answer to the complaint, Respondent asserts as an affirmative defense to all counts charged that:

> it has substantially complied with the employment eligibility verification requirements. The Respondent maintains employee files containing relevant information pertaining to the requirements of the I-9 form. Said records were available to the Complainant at the time the I-9 Forms . . . were examined. If the Respondent has violated the provisions of the [Act] then such violation is of a de minimus nature.

Amended Complaint at 2-5.

In its response to the motion to strike, Respondent argues that 8 U.S.C. § 1324a(e)(5) supports its affirmative defense of "substantial compliance" because (1) its business is small; (2) the violations allegedly committed by Respondent were de minimus, (3) no one was injured; and (4) no property has been destroyed. Respondent concludes that "[s]ubstantially complying with merely procedural paperwork requirement (sic) should be sufficient to allow the Respondent to avoid liability on a first time (and unwarned) offense." Respondent's Response to Motion to Strike Affirmative Defenses, at 3.

The second argument is that in determining the appropriate fine in this case, the ALJ must consider Respondent's substantial compliance with IRCA's paperwork requirements. That argument relates not to an affirmative defense, however, but to mitigation. Respondent confuses the application of substantial compliance as a mitigating factor (by showing the employer acted in "good faith" by trying to comply with the paperwork requirements) with "substantial compliance" as an affirmative defense.

If liability is found in this case, Respondent will be provided an opportunity to submit any evidence as to mitigation, including evidence of substantial compliance and that this is its first offense under IRCA's employment sanctions provisions.[4]

Numerous OCAHO decisions have addressed the affirmative defense of substantial compliance for paperwork violations. Very early in the development of OCAHO case law, I held that substantial compliance with IRCA's paperwork requirements may be an affirmative defense. As I stated in United States v. Manos and Associates, DBA Bread Basket, 1 0CAHO 130, at 14 (2/8/89):

> Like the concept of "reasonableness," substantiality of compliance, if applicable, depends on the factual circumstances of each case. See, e.g., Fortin v. Commissioner of Mass. Dept. of Public Welfare, 692 F.2d 790, 795 (1st Cir. l982); and Ruiz v. McCotter, 661 F.Supp. 112, 147 (S.D. Tex. 1986). As applied to statutes, "substantial compliance" has been defined as "actual compliance with respect to the substance essential to every reasonable objective of the statute. But when there is such actual compliance as to all matters of substance then mere technical imperfections of form . . . should not be given the stature of non-compliance . . . ." See, e.g., International Longshoreman and Warehouseman Unions Local 35 et al. v. Board of Supervisors, 116 Cal.App.3d 170, 175, 117 Cal. Rptr. 630 (1974); Stasher v. Hager-Haldeman, 58 Cal.2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1962). Generally speaking, it means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

In deciding a motion for summary decision in Manos, I had to rule on various paperwork violation allegations to which the respondent had raised substantial compliance as an affirmative defense. I divided the respondent's substantial compliance arguments into three types: (1) technical violations; (2) attaching photocopies of documents to the Form I-9; and (3) use of a business personnel form in conjunction with a Form I-9.

I held with respect to seven of the paperwork violation allegations that attaching photocopies of an employee's identification and immigration documents to the back of a facially uncompleted I-9 Form was not an affirmative defense. There were other alleged paperwork violations, however, where the respondent had presented enough prima facie evidence to suggest that there was a genuine issue of material fact as to whether it had substantially complied with IRCA, including: (1) where the employee signed and dated section 1 and provided as attachments an INS-issued "Request for Information" regarding a pending

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[4] The fact that this is Respondent's first offense is not a basis for avoiding a fine, but may be considered as to mitigation. 8 U.S.C. § 1324a(e)(5).

legalization application submitted to INS by the employee, but did not check a box in section 1 indicating what he attested to, e.g., that he is a citizen, lawful permanent resident or that he is authorized to work until a specific date; (2) where two I-9 Forms were prepared and attached and the second had a box checked for the section 1 attestation, when read together arguably constituted substantial compliance (where the charge involved an allegation of a failure to properly complete section 1 of the Form I-9); and (3) where attached to one I-9 Form was a second I-9 Form executed by the employer which together arguably fulfilled IRCA's employment eligibility verification requirements (where the specific charge was failure to properly complete section 2 of the Form I-9). I also held that respondent's use of its own business personnel form or "Application for Employment" in lieu of an I-9 Form did not constitute substantial compliance.

To date, all other OCAHO decisions addressing the issue have agreed that substantial compliance may be an affirmative defense to allegations of paperwork violations. None of those decisions, however, have found substantial compliance. See, e.g., United States v. J.J.L.C., Inc. t/a Richfield Caters and/or Richfield Regency, 1 OCAHO 154 (4/13/90), reconsideration denied, 1 OCAHO 170 (5/11/90), aff'd 1 OCAHO 184 (6/7/90) (where several of the I-9 Forms at issue contained as attachments copies of documents which, if attested to, would support a judgment that the individual is authorized to work in the United States, the ALJ held that where the employer failed to attest to part 2 of the I-9 Form that the employee's documents have been verified and failed to ensure that the employee properly completed part 1, such attachment to the I-9 Form did not constitute "substantial compliance" with IRCA's paperwork requirements); United States v. Citizens Utilities Co., Inc., 1 OCAHO 161 (4/27/90) (holding that respondent did not substantially comply with IRCA (1) by photocopying employee identity and employment-eligibility documents and attaching them to the I-9 Form, rather than filling out the I-9 Form correctly and in its entirety (since the regulations only permit an employer to attach such identification to the I-9 Form in addition to completing section 2 itself and ensuring completion of section 1); (2) by accepting commercially-produced social security card facsimiles for two employees (specifically prohibited in the instructions to the I-9 Form); and (3) by omitting its company name and address from the I-9 Form); United States v. San Ysidro Ranch, 1 OCAHO 183 (5/30/90) (rejecting employer's arguments (1) that although the I-9s were not fully completed, they were sufficient to comply with IRCA; (2) that by attaching photocopies of work-authorization documents, it substantially complied with the paperwork requirements; and (3) that contrary to the INS' assertions, several of the documents it

produced for the purpose of establishing work authorization or identity were sufficient).

ALJ's have dealt with INS motions to strike substantial compliance as an affirmative defense in various ways. Some have required detailed facts forming the basis for the affirmative defense either by requiring the filing of an amended answer, a motion to dismiss or for summary decision, or some other pleading. See United States v. Chicken by Chickadee Farms, Inc., 3 OCAHO 423, at 10 (4/22/92) (ALJ rejected argument that the party asserting substantial compliance as a defense must plead facts showing that it did all that can be reasonably expected, holding that substantial compliance may be asserted as an affirmative defense on the fact of the violation, but ordering respondent to file an amended pleading detailing the manner in which it averred that it substantially complied with IRCA's paperwork requirements); United States v. Robert Watson, D/B/A North State Tile Co., 1 OCAHO 253, at 5 (10/19/90) (because respondent did not detail in its answer how it had "substantially complied" with IRCA's paperwork requirements, I directed respondent to file an amended answer with a supporting statement of facts or, in the alternative, a motion to dismiss based upon the same theory, detailing the facts and law in support of its argument); United States v. Broadway Tire Inc., 1 OCAHO 226 (8/30/90) (same).

Some ALJs have granted an INS motion to strike substantial compliance as an affirmative defense because the respondent alleged conclusory statements in support thereof or the defense was insufficient at law. See United States v. Task Force Security, Inc. D/B/A Task Force Security and Investigations, 3 OCAHO 563 (9/23/93) (ALJ granted complainant's motion to strike affirmative defense that employer had substantially complied with IRCA's paperwork requirements because it was based upon conclusory facts); United States v. Penrod National Enterprises, Inc. D/B/A Floral Bionomics Landscape Management, 3 OCAHO 541 (7/27/93) (Order Granting Complainant's Motion to Strike Affirmative Defenses) (ALJ granted INS' motion for summary decision and rejected respondent's affirmative defense argument that all the paperwork errors were clerical in nature and that documents containing the necessary information were attached to the I-9 Forms); United States v. Ulysses, Inc. and Ulysses Restaurant Group, Inc. and Ottis Guy Triantis and Gus Ottis Triantis and all T/A Wellington's Restaurant, 3 OCAHO 449, at 2 (9/3/92) (substantial compliance is not an affirmative defense on theory that violations for paperwork offenses are de minimis); United States v. Applied Computer Technology, 2 OCAHO 367 (9/19/91) (Modification by CAHO of ALJ's Decision and Order) (technical or de minimus violations do not as such qualify as

exceptions to liability for failure to perfect employment authorization verification, whether as substantial compliance or otherwise); United States v. Local Building and Remodeling of International Falls, Inc., 3 OCAHO 567, at 1 (10/6/93) (although ALJ denied complainant's motion to strike affirmative defense of substantial compliance, he required respondent to amend its answer to provide factual basis for its affirmative defense); United States v. Goldenfield Corp. D/B/A Rodeway Inn, Pueblo, Colorado, 2 OCAHO 321, at 7 (4/26/91) (granting complainant's motion for summary decision relating to paperwork allegations and rejecting the employer's argument that retaining copies of the identifying documents needed to complete an I-9 Form was substantial compliance); United States v. Mario Saikhon, Inc., 1 OCAHO 279, at 12-13 (12/14/90) (ALJ (1) rejected substantial compliance defense where employer provided copies of the documents contained in employees' files showing the identity or employment eligibility for most of the 500 forms in question where many of the I-9 Forms lacked signatures in section 1 and 2 and (2) rejected argument that an employer may comply with IRCA's paperwork requirements by copying a document presented by an individual and retaining a copy); United States v. James Q. Carlson, DBA Jimmy on the Spot, 1 OCAHO 260 (11/2/90) (holding that photocopying documents and attaching them to an incomplete I-9 Form is not substantial compliance, but a factor to consider as to mitigation).

After reviewing the cases discussed above, I have determined that where a respondent alleges that it has substantially complied with IRCA's paperwork requirements and has provided some evidence of legal sufficiency, a motion to strike should be denied and the issue of substantial compliance should be resolved by summary motion or after an evidentiary hearing. If the answer details the affirmative defense, specifically asserting a legally and factually deficient theory of substantial compliance, however, the motion to strike should be granted. This approach is based on the notion that if there is any way an employer can prove substantial compliance with IRCA's paperwork requirements, the employer should have an opportunity to prove its affirmative defense. This may be difficult to articulate in an answer that must be filed within thirty days after service of the complaint. Although Respondent has additional time to provide this agency with the specifics of its affirmative defense in response to a motion to strike, I do not want to be overly restrictive in limiting Respondent's opportunity to provide all the relevant information in the preparation and maintenance of its employee records, including the form I-9s. Determining substantial compliance may require detailed affidavits or statements from witnesses.

In order to determine whether Respondent has provided me with some evidence of legal sufficiency, it is important to note that I do not agree with those ALJs who suggest that an employer is strictly liable for every portion of the I-9 Form that is not complete. In my view, an employer may have substantially complied with IRCA's paperwork requirements if certain requirements have been met: (1) use of an INS Form I-9, Employment Eligibility Verification Form, to determine an employee's identity and employment eligibility;[5] (2) the employer's (or its agent's) signature is on section 2 under penalty of perjury; and (3) the employee's signature is on section 1 in the "employer's signature box"; (4) in section 1 an indication by a check mark or some other means attesting, under penalty of perjury that he or she is either (a) a citizen or national of the United States or (b) a Lawful Permanent Resident or (c) an alien authorized to work until a specified date;[6] and (5) there is some type of information or reference to a document either spelled out or attached in either section 2, list A or list B and C.

At this stage of the proceeding, I am willing to allow an employer who satisfies the above five (5) requirements an opportunity by motion for summary decision or at an evidentiary hearing to provide additional evidence by affidavit or testimony to prove substantial compliance. In this regard, I think it is important to obtain a statement, affidavit, or testimony of those individuals representing the employer who were involved in preparing each of the I-9 Forms at issue to determine (1) when the forms were prepared, (2) the procedures taken to verify identity and employment eligibility (including, if applicable, copying and maintaining any documents received from the employee), and (3) how each employee's Form I-9 was maintained. As the precedent shows, Respondent has a heavy burden in proving that substantial compliance is an affirmative defense to the paperwork charges in this case. Although I am not granting the motion to strike as to a number of the alleged paperwork violations, Respondent will have to fully develop its evidence relating to the preparation of the I-9s, and where there are

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[5] Employers may photocopy the form from an original. Originals may be obtained from an INS District Office or the Government Printing Office. 8 C.F.R. § 274a.2(a). The address of the Government Printing Office is Superintendent of Documents, Washington, D.C. 20402.

[6] The employer must attest that it has verified that the individual is authorized to work and is the person he or she claims to be by examining specified documents. 8 U.S.C. § 1324a(b)(1)(A). The employee's signature attests that he or she is a citizen or national of the United States, an alien lawfully admitted for permanent residence or an alien who is authorized to work in that particular job. 8 U.S.C. § 1324a(b)(3).

omissions on the form, it will have to show this agency that the omissions do not defeat the purpose of the Act.

Based upon my legal premises stated above and the pleadings and evidence submitted by the parties, the Complainant's motion to strike substantial compliance as an affirmative defense in Count I is GRANTED as to the Form I-9s' of Elizar Ansiso, Dan Binder, Adelina Gonzalez, Guillermina Gonzalez, Enrique Gonzalez, Hector Gonzalez, Yolanda Gonzalez, Alfonso Guadarrama, Mary Hawley, Danny Herman, Javier Martinez, Gilberto Ontiveros, Aurelio Perez, Guadalupe Rangel, Jesse Rodriguez, David Santamaria, Virginia Santamaria, Joan Zywicki, and Imella Villerreal and is DENIED as to the remaining employees listed in Count I; Complainant's motion to strike the affirmative defense of substantial compliance in Count II is GRANTED as to Irineo Acuna, Raquel Roman, David Scott, Gerard Stallman, Aaron Trudeau and Robert Wonegeshir and DENIED as to all the remaining employees listed in Count II; and is DENIED as to all the allegations in Count III and IV.

4. Other Affirmative Defenses Raised in the Answer

Respondent's answer to the amended complaint asserts that it relies on other affirmative defenses raised in its answer and reserves the right to amend these affirmative defenses. Respondent states in its answer to Count I that it denies that it hired Cantu Genaso and that it lacks information to form a belief that it hired Maria Lamas because its employee records contain numerous employees with that name and the INS has failed to specify with particularity which Maria Lamas is the basis for its allegations. I find that Respondent's affirmative defense to these two allegations of the complaint provides a sufficient basis for denying Complainant's motion to strike. Complainant's motion to strike as an affirmative defense that Respondent did not or may not have hired Cantu Genaso and Maria Lamas is DENIED.

I further hold that Respondent may amend and assert any new or additional affirmative defenses to any of the charges in the complaint subsequent to completion of its discovery, but must notify this ALJ and Complainant of any new affirmative defenses at least 20 days before hearing.

C. Miscellaneous

It is further ORDERED that both parties make every effort to complete discovery in this case by the end of August, 1994 and either

move for summary decision or prepare for the evidentiary hearing scheduled for September 28, 1994.

SO ORDERED this 20th day of July, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge