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

United States of America, Complainant v. Collins Foods International Inc., d.b.a. Sizzler Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100084.

TABLE OF CONTENTS

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

United States of America, Complainant v. Collins Foods International Inc., d.b.a. Sizzler Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100084.

DECISION AND ORDER
(January 9, 1990)

E. MILTON FROSBURG, Administrative Law Judge

Appearances: JOHN HOLYA, Esquire, and THOMAS E. WALTER, Esquire, for Immigration and Naturalization Service

JON E. PETTIBONE, Esquire, and TERRY A. MONTAGNE, Esquire, for Respondent

I. Introduction

The Immigration Reform and Control Act of 1986 (IRCA), at Section 274A of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. section 1324a, adopted significant revisions in national immigration policy. IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism, commonly known as employer sanctions, for the imposition of civil liabilities upon employer's who hire, recruit, refer for a fee, or continue to employ aliens unauthorized to work in the United States.

For purposes of the IRCA legislation, an unauthorized alien is defined as an alien who, with respect to employment at a particular time, has not either been lawfully admitted for permanent residence or authorized to be so employed by the INA or by the Attorney General. See, 8 U.S.C. Section 1324a(h)(3).

Essential to the enforcement of the employer sanction provisions of IRCA is the requirement that employers comply with certain paperwork verification procedures as to the eligibility of new hires for employment in the United States. See, 8 U.S.C. Section 1324a(a)(1)(B).

II. Procedural History

This IRCA employer sanction case began on January 13, 1989, when the United States of America, Immigration and Naturalization Service (INS), served a Notice of Intent to Fine (NIF) on Collins Foods International, Inc., d.b.a. Sizzler Restaurant (Respondent). The NIF, at Count I, alleged that Respondent knowingly hired Armando Rodriguez-Montion (Rodriguez), an unauthorized alien, in violation of 8 U.S.C. Section 1324a(a)(1)(A), or alternatively, that Respondent continued to employ Rodriguez in violation of 8 U.S.C. Section 1324a(a)(2).

Counts II through IX of the NIF alleged that Respondent failed to comply with the paperwork verification requirements of IRCA in violation of 8 U.S.C. Section 1324a(a)(1)(B) of the Act.

By letter dated February 7, 1989, Respondent exercised its statutory right to bar enforcement of the NIF pending a hearing before an administrative law judge by filing a timely request for a hearing with the INS. See, 8 U.S.C. Section 1324a(e)(3).

Consistent with established procedure, on February 13, 1989, the United States of America filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), incorporating the allegations of the NIP and including Respondent's request for hearing.

This matter came on before me when, on February 22, 1989, OCAHO issued a Notice of Hearing on Complaint Regarding Unlawful Employment which, inter alia, forwarded a copy of the Complaint to the Respondent, assigned me as the administrative law judge in this case, and set the hearing date and place for June 20, 1989, at Phoenix, Arizona.

Respondent Answered the Complaint on March 23, 1989, denying that it hired Rodriguez knowing he was unauthorized for employment in the United States, and admitting the factual allegations of the paperwork violations. Respondent's Answer affirmatively denied the appropriateness of the proposed fines.

To facilitate an agreed disposition of the case, I ordered prehearing telephonic conferences to be held on May 2, 1989, and June 14, 1989.

On May 25, 1989, Complainant submitted its Memorandum (Motion) for (Partial) Summary Decision with supporting documents, on the grounds that no genuine issue of material fact existed as to Counts II through IX of the Complaint. On June 5, 1989, Respondent submitted its Response to the Motion.

The prehearing conferences not having occasioned an agreed disposition of the case, a hearing was conducted in Phoenix, Arizona, on June 20, 1989, as originally scheduled. At that time, oral arguments were heard on Complainant's Motion for Partial Summary Decision, and a hearing on the merits was conducted on Count I, the knowing hiring or continuing employment charge.

On July 13, 1989, I issued a Decision and Order Granting Complainant's Motion for Partial Summary Decision in which I found Respondent liable for the paperwork violations in Counts II through IX an assessed a civil monetary penalty in the amount of one thousand dollars ($1,000).

On September 15, 1989, Complainant submitted its Opening Brief, and, on September 18, 1989, Respondent submitted its Post-

Hearing Brief. Complainant submitted a Reply Brief on October 3, 1989, and Respondent followed with a Motion to Strike Reply Brief on October 6, 1989,

on the grounds that neither the regulations nor the ALJ had authorized a reply. Complainant filed its Response to Respondent's Motion to Strike on October 19, 1989, alleging a recollection by Complainant's attorneys that a Reply had been authorized. Respondent, on October 23, 1989, replied that it had no such recollection, nor was any found in the record.

The Administrative Law Judge's decision is ordinarily made within sixty (60) days of the hearing. Due to the prolonged responses of the parties, the Chief Administrative Hearing Office, upon my request made pursuant to 28 C.F.R. Section 68.50, granted an extension of time until February 20, 1990.

Not having previously ruled on Respondent's Motion to Strike, I do so now by denying Respondent's motion.

The single issue remaining in this case is Count I, in which Respondent, by and through its managerial employee, Ricardo Soto-Gomez (Soto), is charged with hiring or continuing to employ Rodriguez, knowing he was an alien not authorized to work in the United States.

III. Statement of Facts

Few of the facts surrounding the hiring of Rodriguez by Soto were agreed upon at the beginning of the hearing. During the hearing, the witnesses continued to provide conflicting testimony on a number of issues. Among the material issues were the time period in which Rodriguez presented an alleged Social Security card indicating his employment eligibility, and other circumstances relating to whether or not Soto had actual or constructive knowledge of Rodriguez' unauthorized alien status.

It is undisputed that Rodriguez was hired by Respondent, through its managerial employee, Soto. Respondent operates the Sizzler Restaurant at 4501 E. Cactus Road, Phoenix, Arizona, where Soto was employed as the General Manager from February 1988 until December 1988 (Transcript at page 93, line 15, hereinafter T p.93, 1.15-17). Soto has since transferred to a Sizzler restaurant on West Bell Road in Phoenix (T p.93,1.5). Soto's career with Sizzler restaurants began in 1978 in California. His duties as the General Manager at the time Rodriguez was employed included the hiring and firing of employees (T p.94, 1.5-7, p.132, 1.2).

Soto claims that he hired Armando Rodriguez, at the request of Severiano Rodriguez, Soto's long term friend, and brother of Armando Rodriguez. According to Soto, Severiano assured him that Rodriguez was authorized to work in the United States.

However, much of the testimony regarding the circumstances surrounding Soto's hiring of Rodriguez was contested by Rodriguez.

A. Respondent's Testimony on the Hiring of Rodriguez:

According to Soto, he hired Rodriguez at the request of Rodriguez' brother, Severiano (T p.96, 1.3-11). Soto and Severiano had worked together at a Sizzler restaurant in California and had been friends for seven or eight years (T p.95, 1.1-6). Soto claims that Severiano originally asked for a job for himself in Phoenix because Severiano's wife wanted to live closer to her mother who lived in Yuma, Arizona (T p.95, 1.15). Sometime later, Severiano changed his mind about moving to Arizona and asked if his brother Armando, who was unemployed at the time, could have the job instead (T p.95, 1.21-22). Soto claims he told Severiano that he would be more than glad to give Armando the job, if Armando had the necessary documents for employment (T p.96, 1.10-11).

Armando Rodriguez then telephoned Soto from California to talk with Soto about the job and explained that he had been a cook at a Sizzler restaurant in Victorville, California. It appears at this point, according to Soto's testimony, the Rodriguez was promised a job working as a cook a the Arizona Sizzler for a wage of five dollars and fifty cents an hour (T p.98, 1.15-25).

Approximately three days later, Rodriguez arrived at Respondent's restaurant in Phoenix and Soto and Rodriguez began the application procedure. On that day, Rodriguez completed an application form which listed his experience with the Victorville, California, Sizzler, and his reason for leaving having something to do with Mexico (T p.98, 1.15-24, T p.99, 1.15-23; Ex. C-15)). Soto stated that the reason he was not able to put Rodriguez to work immediately was that the work schedule for that week had already been made up (T p.100 1.5).

Rodriguez left the restaurant and returned a few days later. Soto then asked Rodriguez for his documents proving he was eligible to work in the United States (T p.50, 1.8-18; T p.100, 1.16-23). Rodriguez produced his driver's license and, when asked for his Social Security card, he told Soto that he did not have it (T p.100, 1.19-20). Soto told Rodriguez that he would have to produce his Social Security card, and copies of both of the documents, in order to be put on the payroll (T p.100, 1.20-23).

Finally, on March 22, 1988, Rodriguez returned with an apparent Social Security card (T p.101, 1.9-11). At that time, Soto and Rodriguez filled out the I-9 Form, the form required for compliance with Section 274A(a)(1)(B) of the INA (T p.101, 1.15-17). According to Soto's testimony, Rodriguez then showed Soto the original driver's

license and the Social Security card, and Soto again requested copies of both documents (T p.102, 1.15-16). Rodriguez gave the requested copies to Soto on either the same, or the next day (T p.103, 1.3-6).

Rodriguez was put to work as a cook and Respondent submitted payroll registers showing Armando Rodriguez as an employee for the periods covered by his employment (T p. 119, 1.14-18). According to Soto, he had no knowledge at that time, or after, that Rodriguez was unauthorized to work

in the United States, until the day Rodriguez was arrested (T p.104, 1.8).

B. Complainant's Testimony on the Hiring of Rodriguez

Most of Rodriguez' testimony on material issues of fact conflicted with that of Soto. And some of Rodriguez' testimony conflicted with his own, earlier, deposition. Rodriguez spoke only Spanish during his testimony, using the services of an English/Spanish interpreter to communicate in the hearing room.

Rodriguez testified that he had previously been employed by Sizzler Restaurants in Victorville, California, and Big Bear, California (T p. 21, 1.8-24). Rodriguez recalled that he, as Severiano Rodriguez's brother, had met Soto in Mexico in 1982 (T p. 22, 1.13-14). However, Rodriguez denied any connection between his brother Severiano and his getting the job at the Phoenix Sizzler. Rodriguez testified that he just called the Phoenix, Arizona restaurant, from California, and asked for work, without any contact from his brother (T p. 24, 1.23-25; Rodriguez Deposition, page 11, line 19-20, hereinafter Rod. D p. 11, 1.19-20).

Rodriguez' testimony confirms the statement that Soto told him he had work for him during the telephone call from California (Rod. D p. 12, 1.23-24). On the basis of that call, Rodriguez left California and came to Arizona (D p. 13, 1.4-8).

Rodriguez recalled he was not permitted to begin work immediately, but denied knowing the reason. He further agreed that he completed an I-9 Form (T p. 33, 1.3-4). He said he showed only his California driver's license on the day he was hired, but, in conflict with Soto's testimony, claimed that he did not produce a Social Security Card until a month and a half later (T p. 27, 1.20; T p. 28, 1.4). He said he bought his Social Security card at a swap meet in Phoenix (T p. 28, 1.9).

Upon questioning, Rodriguez specifically denied having checked the box on the I-9 Form indicating he was a United States citizen, although the box did have a check mark in it, and Rodriguez did sign and date that part of the form (Ex. C-15; Rod. D p. 18, 1.2-4). Additionally, Rodriguez testified that due to his lack of a Social Se-

curity card in his own name, he was paid under the name of Michael or Miguel (T p. 35, 1.6, p. 41, 1.1-17). There was no corroboration or evidence available to support this statement, and it was contested by Soto and by Respondent's records.

Most significantly, Rodriguez claimed in his testimony, in conflict with his prior deposition, and in conflict with the statements of Soto, that when he, Rodriguez, gave Soto his Social Security card, he told Soto that he was not eligible to work in the United States (T pp. 50-51; Rod. D p. 27, 1.9-14).

C. Credibility of the Witnessess

Whether the employment procedure took place according to Soto's or to Rodriguez' recollection of the facts, it is certain that Respondent, through Soto, hired Rodriguez to work as a cook, and that Rodriguez worked at the Cactus Road Sizzler until he was arrested on or about September 8, 1988, by the INS (T p. 50, 1.20-21; T p. 98, 1.15-24; T p. 104, 1.10).

It is very often difficult to determine the credibility of witnesses. Determination of the facts as presented during this hearing was made unusually difficult because the testimony extended beyond the ordinary employment procedures into the private lives of the parties.

For example, after Rodriguez was hired by Soto, Soto permitted Rodriguez to live in Soto's apartment during his employment (T p. 36, 1.5-7; T p. 106, 1.16-23). Much was made of the fact that the Soto and Rodriguez families were from the same region in Mexico, and that Soto had been a guest in the Rodriguez family home in Mexico (T p. 78-79, 1.21-14; T p. 107, 1.9-17). Moreover, Soto's girl friend at the time of the hearing was a cousin of Rodriguez (T p. 151, 1.8).

And finally, upon questioning by the Government, under oath, Soto admitted that he, himself, had entered the United States from Mexico, without documents, when he was fifteen years old, and had not become a lawful resident of the United States until 1984. This personal information was intended to show that Soto, because of his background, would have a greater knowledge or understanding of someone who professed to be a United States citizen (T pp. 125-128).

Initially, it would appear that an assessment of the credibility of the witnesses is necessary in this case. Clearly, such an assessment of their credibility is within my parameters as the ALJ. See, e.g., Deukmejian v. Nuclear Regulatory Commission 751 F.2d 1287.

Regarding my assessment of the witnesses, what appeared to be most in dispute between the parties was whether Rodriguez had

ever told Soto that he [Rodriguez] was unauthorized to work in the United States. As mentioned previously, even Rodriguez' testimony is inconsistent on the issue, comparing his deposition to the hearing testimony (T p. 51-55; T p. 76, 1.1-15; D p. 27, 1.9-14). Moreover, Rodriguez' testimony is directly contradicted by the testimony of Soto that Rodriguez never told him that he was unauthorized to work (T p. 104, 1.13-15).

There is no doubt that Rodriguez' testimony on exactly what and when he told Soto about being unauthorized to work was exhaustive; it may also have appeared to be evasive (T p. 51-78). Nonetheless, it is difficult to distinguish between nervousness or confusion and actual fabrication on the part of this witness.

The Respondent attempted to cast doubt on Rodriguez' inability to

understand English by evidence of his successful work in the United States over the past six years, including taking food orders in English, and by his two year marriage to an English-speaking United States citizen. Respondent further pointed out what appears to be a conflict between Rodriguez testifying that he had not left the United States since 1982 and his stated reason for leaving his job with Sizzler in Victorville, California.

The credibility of each of these two witnesses is in doubt. Soto has his job to protect as a long term employee of Sizzler in a managerial position. The evidence showed that, as a part of Sizzler's established policy, a Sizzler employee could be dismissed for failure to comply with IRCA requirements.

Rodriguez, on the other hand, had recently become authorized to work in the United States, a status which requires further involvement with the INS before permanent resident alien status is granted. Some testimony regarding Rodriguez' continuous United States residency since 1982 even appears to be designed to support his eligibility for work authorization (T p. 20, 1.10-12). See, 8 U.S.C. Section 1427(a). And it is almost certain that Rodriguez first became aware of his eligibility for work authorization as a result of his arrest by the INS, as there is no testimony to the contrary (Complainant's Exhibit 17, Record of Deportable Alien and T p. 20, 1.13-25).

Under the circumstances, of this case, it is difficult to determine by a preponderance of the evidence, as required by the legislation, which version of the facts surrounding the hiring is more convincing. Nonetheless, after careful and lengthy review of all of the credible testimony and evidence or record, I am of the opinion, and so find, that Soto's testimony is less convincing.

Accordingly, I find that Respondent, by and through its managerial employee Soto, may not have had actual knowledge of Rodri-

guez' unauthorized status. However, notwithstanding Respondent's lack of actual knowledge, I find that Respondent did violate 8 U.S.C. Section 1324(a)(1)(A), in that Respondent should have known Rodriguez was unauthorized for employment in the United States.

I reach this decision by taking Soto at his word, as it is given in his testimony, on two issues. One, that Soto promised a job to Rodriguez before Soto had an opportunity to examine properly Rodriguez' documents or to form any reasonable belief that said documents were genuine. And two, that at the time, Soto was presented with Rodriguez' documents, despite Rodriguez' delay in producing his Social Security card, Soto accepted the documents as genuine without questioning or in fact examining them.

Accordingly, I find that Soto wilfully and deliberately failed to inquire into the immigration status of Rodriguez, and that such action was taken to avoid learning that Rodriguez was, at that time, an alien not

authorized to work in the United States.

IV. Discussion

A. Count I: Knowingly Hiring or Continuing to Employ an Unauthorized Alien

The elements of the offense of knowingly hiring or continuing to employ an unauthorized alien are that a person or entity, after November 6, 1986, hires, or continues to employ an alien in the United States, knowing that the alien is unauthorized with respect to such employment.

a. Person or Entity. In the Notice of Intent to Fine served by Complainant, and in subsequent pleadings, Respondent is at all times identified as Collins Foods International, Inc., d.b.a. Sizzler Restaurant. Respondent admits that by and through its managerial employee, Ricardo Soto, Respondent hired Armando Rodriguez.

b. After November 6, 1986. The second element is established by admissions and documents, including the Form I-9 signed by Rodriguez on March 22, 1988, a date occurring after November 6, 1986.

c. Hires or Continues to Employ. The fact that Respondent was hired by and continued in Respondent's employ is shown by testimony and documents, including Respondent's payroll records, establishing employment between the approximate dates of March 22, 1988 and September 8, 1988.

d. An Unauthorized Alien. The fourth element, the fact that Rodriguez was an unauthorized alien on September 8, 1988, at the time of his apprehension by the INS, was convincingly established by his admission to the Border Patrol Agents that he entered the United States illegally and that he did not have work authoriza-

tion. His statements regarding his unauthorized status made to the Agents were corroborated by his testimony under oath at the hearing.

As previously mentioned, Rodriguez was released to apply for legalization immediately following his arrest by the INS, and he received work authorization in October of 1988.

This ``temporal'' quality to an employee's unauthorized status for purposes of IRCA actions was anticipated by IRCA legislation. As noted previously, an unauthorized alien is defined by statute as an alien who ``is not at that time either an alien lawfully admitted for permanent residence, or authorized to be so employed by this Act or by the Attorney General.'' (emphasis added.)

Accordingly, I find that Rodriguez was not, between March 22, 1988, and September 8, 1988, an alien authorized to be so employed.

e. Knowing the Alien is Unauthorized. Having satisfied the first four elements of the charge with an abundance of convincing testimony and

physical evidence, proof of the fifth element, ``knowing the alien was not authorized for employment in the United States,'' is significantly less easily arrived at.

It is clear from the pleadings and testimony that Soto was aware of his responsibilities under IRCA. As the General Manager of one of Respondent's restaurants, Soto received written information from his employer and from the INS concerning IRCA legislation, including a copy of the Handbook provided by the INS, with instructions on the proper completion of I-9 Forms, and the need to verify documents.

While Soto asserts that he did not always read the information supplied to him on IRCA, he admits that he was aware of his obligations under the legislation (T p.104, 1.21-25). Some of his awareness came from attending meetings at which compliance with IRCA was discussed with Sizzler personnel (T p.105, 1.7-13). Some of his awareness came from INS information provided to him while he worked at other Sizzler restaurants (T p.135, 1.15-22).

Despite Soto's awareness of his obligation to verify Rodriquez' eligibility for employment, it is uncontradicted that Soto told Rodriguez he would be hired long before Soto ever saw, or had any opportunity to verify, any evidence of Rodriquez' work authorization (T p.137, 1.24-25).

Under the circumstances, and notwithstanding the possibility that Severiano Rodriguez did assure Soto that Armando Rodriguez was authorized to work, the completion of the I-9 Form became a mere formality, and, apparently, would not have resulted in a find-

ing of anything other than an eligible employment status for Rodriguez.

Accordingly, I find, as a result of Respondent's failure to genuinely apply the procedure for completing the I-9 Form before employment, that Respondent should have known that Rodriquez was unauthorized for work in the United States.

It must be emphasized that this is a finding of constructive knowledge, and not of actual knowledge. For the many reasons which came out in the hearing and were discussed previously, the constructive knowledge standard will be applied.

In a prior IRCA case concerning a charge of continuing to employ an unauthorized alien, United States of America v. Mester Manufacturing Co., OCAHO Case No. 87100001, June 17, 1988, (Morse, J.), aff'd OCAHO (July 12, 1988), aff'd 879 F.2d 561 (9th Cir. 1989), the ALJ stated:

> ``It is irrelevant by what means respondent obtained notice sufficient to form the scienter by which it is concluded respondent knew, or should have known, that the status of the employees was that of unauthorized aliens.''

The Mester case involved an employer who had received some form of notice from the INS that a certain number of his employees might not have been authorized to work in the United States. The Mester respondent asserted that it could not be held to ``knowledge not imparted in conformity with established modes by which INS, in compliance with this own regulations, provides the authorized means of service by the Service . . . of notices, decisions and other papers . . . in administrative proceedings before Service officers. . . .'' Id. at 20.

It was, then, the ALJ's position that the gravemen of a violation of knowingly continuing to employ an unauthorized alien is the state of knowledge, and not the method of effecting notice sufficient to make out a case of knowledge. Id. Accordingly, ``knowing'' in a charge of ``knowingly continue to employ'' under IRCA, included the constructive knowledge standard, ``should have known.''

That conclusion was also reached by another ALJ in United States v. New El Rey Sausage Company, Inc., OCAHO Case No. 88100080, (July 7, 1989), (modified in part not affecting this decision, OCAHO August 4, 1989). Like Mester, New El Rey Sausage involved an allegation of ``knowingly continuing to employ'' after the INS had supplied the employer with information which placed upon the employer a duty to inquire further into the authorization of its employees.

Consistent with the Mester and New El Rey Sausage cases, I found in United States of America v. Sophie Valdez, d.b.a. La Parrilla Restaurant, OCAHO Case No. 89100014, (September 27, 1989),

that the constructive knowledge standard could be applied in cases dealing with knowingly hiring, as well as knowingly continuing to employ.

Applying that standard to the instant case, it is not necessary to find that Rodriguez had expressly informed Soto of his unauthorized status. It is sufficient that Soto should have known.

In reaching this conclusion, it is critical to recognize the obligation of the ALJ to remain mindful of the intent of Congress. As stated previously, the Immigration Reform and Control Act of 1986 amended the Immigration and Nationality Act of 1952 by adding a new section 274A which sought expressly to control illegal immigration into the United States by the imposition of civil penalties, and in certain cases of pattern or practice even criminal penalties, upon employers who knowingly hire or continue to employ unauthorized aliens in the United States.

Complainant has offered several facts in evidence to prove that Soto should have known of Rodriguez' unauthorized status at the time of hiring. To wit: Rodriguez' delay in presentation of a Social Security card, the lamination of the card, the misspelling of Rodriguez as Rodriquez on the Social Security card, the lack of any reference to the United States of America on the card, and the use of two family names on Rodriguez California driver's license but not on the card.

Complainant also stresses Soto's admitted failure to timely familiarize himself with his employer's memoranda concerning the requirements of IRCA and the proper completion of I-9 Forms.

Respondent affirmatively defends that it complied with the verification requirements and that it accepted the document in the good faith belief it was genuine. Such a showing of compliance with the verification requirements could establish a good faith affirmative defense against a charge of knowing hiring. See, 8 U.S.C. Section 1324a(a)(3), which reads in pertinent part:

> (3) Defense.--A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

However, it was not the intention of Congress to make the mere completion of an I-9 Form an absolute defense to a charge of knowing hiring. Rather, the assertion of the defense and the presentation of the I-9 Form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized alien. The government may rebut the presumption by offering proof, for example, that the documents did not reasonably appear on their face to be

genuine, that the verification process was pretextual, or that the employer colluded with the employee in falsifying documents, etc.'' See, H.R. Rep. No. 99-682, 99th Cong. 2d Session, p. 57 (1986).

The INA, at Section 274A(b)(1)(A)(ii), describes compliance with respect to examination of documents in the following manner:

> ``A person or entity has complied with the requirements of this paragraph with respect to examination of a document if the document reasonable appears on its face to be
> genuine. . . .''

At a glance, the face of the card might not necessarily appear to be false. Both the genuine and the false card have large letters reading ``SOCIAL SECURITY'' across the top, drawings of columns at the sides, a circle in the center, and a signature across the bottom.

Nonetheless, more than a glance is required by the legislation. The card must appear reasonably to be valid. Had Soto taken the time to make a comparison, he would have found that the printing on the reverse side of the card did not contain all of the language found on the Social Security card example provided in the INS Handbook. He further would have found that every Social Security card is considered void if laminated. Rodriguez' Social Security card was laminated at the time of the hearing and, from the photocopies, appears to have been laminated at the time Soto accepted it.

Finally, Soto would have found that Rodriguez was misspelled, and that the card presented by Rodriguez made no reference to the United States. Soto concedes he did not examine the Social Security card, nor did he compare it with the examples set forth in the Handbook for Employees, Instructions for Completing Form I-9, Form M-274, provided to Respondent by INS (Exhibit C-2; D p. 83-84).

In its brief, Complainant claims that Soto failed to ``physically examine'' the documents as required by 8 C.F.R. Section 274a.2(b)(1)(ii)(A). For the record, failure to comply with 8 C.F.R. Section 274a.2(b)(1)(ii)(A) was not charged in Count I of the Complaint and such a violation is not found here. The charge in the instant case is failure to comply with Section 274A(a)(1)(A) of INA.

As Complainant points out, there is a strong policy argument in favor of an administrative law judge relying on circumstantial evidence which gives the employer notice of an employee's status as an illegal alien. The argument is that to do otherwise would encourage an employer to consciously avoid acquiring knowledge of the employees immigration status whenever the employer suspects, from the circumstantial evidence before him, that his employee is an illegal alien.

The term knowingly, even when used in criminal statutes, is not limited to positive knowledge, but includes the state of mind of one who

acts with an awareness of the high probability of the fact in question, such as one who does not possess positive knowledge only because he consciously avoids it. See, United States v. Jewell, 532 F.2d 597, 702 (9th Cir. 1976 [en banc] cert. denied, 426 U.S. 951, (1976).

At a point late in the hearing, Soto responded to the Government's questioning that he had not read Rodriguez' application when he was hired, saying, ``I didn't pay much attention to the paperwork because I had already told him that he had a job'' (T p. 137, 1.24-25).

Clearly, Soto testified that he had promised a job to Rodriguez before he had any opportunity to examine Rodriquez' documents verifying his authorization to work in the United States.

After carefully weighing all the evidence, I find that Soto deliberately failed to inquire into the immigration status of Rodriguez, and such action was taken to avoid learning of the fact that Rodriguez did not have the necessary documentation for employment.

Accordingly, I find Respondent, by and through its managerial employee, Ricardo Soto, is liable for violation of Section 274A(a)(1)(A) of the INA, in that Respondent hired Armando Rodriguez, knowing that he was unauthorized to work in the United States.

I do not find Respondent liable for a violation of Section 274A(a)(2) of INA, knowingly continuing to employ, in that the charge is offered in the alternative.

V. Civil Monetary Penalties

As appears from the foregoing discussion, it is my judgment that Respondent has violated Section 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(A), in that it hired Armando Rodriguez for employment in the United States, knowing that he was an alien unauthorized with respect to such employment.

Having found the violation, I must assess a civil money penalty pursuant to Section 274A(e)(4)(A) of the Act, which requires the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of:

> ``(1) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred. . . .''

In the Notice of Intent to Fine, and the subsequent Complaint, Complainant proposed a penalty of one thousand dollars ($1,000). For the record, the proposed INS penalty is effective only if the

charge is not contested. Once contested, the ALJ can consider the penalty de novo. See, e.g., California Stevedore and Ballast Company v. OSHRC, 517 F.2d at 986, 988, citing Administrative Procedure Act Section 557(b), 5 U.S.C. Section 557(b).

Upon consideration of the record, I find that the penalty proposed by the Complainant is a just and an equitable amount, and, accordingly, assess a penalty for Count I in the amount of one thousand dollars ($1,000.).

VI. Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, memoranda, supporting documents, oral testimony and physical evidence. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. All motions not previously ruled upon are hereby denied.

2. As previously found and discussed, I determine, upon a preponderance of the evidence, that Respondent violated 8 U.S.C. Section 1324a(a)(1)(A), in that Respondent hired Armando Rodriguez for employment in the United States, knowing he was an alien unauthorized with respect to such employment.

3. That the good faith affirmative defense is unavailing to a charge of violating Section 1324a(a)(1)A) where, as here, the Respondent has admitted it merely made the appearance of compliance with paperwork requirements, having already promised employment to Rodriguez.

4. That, liability for Count I having been found, Respondent is hereby Ordered, pursuant to Section 274A(e)(4), to cease and desist from violations of Section 274A(a)(1)(A) of the INA, 8 U.S.C. Section 1324a(a)(1)(A).

5. That it is just and reasonable to require Respondent to pay a civil monetary penalty in the amount of one thousand dollars ($1,000.) for Count I of the Complaint.

6. That, pursuant to 8 U.S.C. Section 1324a(e)(6), and as provided in 28 C.F.R. Section 68.51 (1989), this Decision and Order shall become the final decision and order of the Attorney General as to Count I of the Complaint, (Counts II through IX had been ruled upon previously) unless, within five (5) days of the date of decision a review is requested, and, after such a request is made, and within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

IT IS SO ORDERED: This 9th day of January, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office of Immigration Review

Office of the Administrative Law Judge
950 Sixth Avenue, Suite 401
San Diego, California 92101
(619) 557-6179