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. 92A00131
NEVADA LIFESTYLES, INC.	)	
DBA: COMMERCIAL DRAPERY	)	
CLEANERS,	)	
Respondent.	)	
	)	

SECOND PREHEARING CONFERENCE REPORT AND ORDER
SUBSTANTIVE RULINGS
ERRATA TO ORDER OF OCTOBER 16, 1992
(October 22, 1992)

The second prehearing conference was held as scheduled at 3:30 p.m., EDT on October 19, 1992. The conference focused on the October 16 order, on the remaining schedule in light of that order and on hearing preparation.

In its commerce clause defense, urged principally in its motion for summary decision filed July 27, 1992, Respondent relies on Ritch v. Puget Sound Bridge & Dredging Co., Inc., 60 F. Supp. 670 (N.D. WA 1945). The October 16 order commented that "Respondent fails to mention that Ritch was reversed on appeal. Ritch v. Puget Sound Bridge & Dredging Co., Inc., 156 F.2d 334 (9th Cir. 1946)." During the conference, Respondent took issue with the quoted statement. It claimed that the reversal was based on other than intrastate/ commerce clause grounds. Respondent argued, in effect, that reference to the appellate reversal was beside the point.

Further review of Ritch confirms the quoted understanding. The District Court in Ritch held that federal regulation did not apply to certain employees because "they did nothing that had any causal connection with, or in any way affected, or related to, . . . movement in commerce . . ." Ritch, 60 F. Supp. at 672. The Ninth Circuit reversed, holding that federal regulation applied because the employees in question were "engaged in commerce." Ritch, 156 F.2d at 337.

It is customary to afford pro se parties a certain measure of procedural leeway. Respondent has received such consideration. Nevertheless, because Respondent's representative has recited that he attended law school and the pleadings reflect familiarity with legal terminology, it is appropriate to adjust the standard accordingly. Respondent's filings to date have been noteworthy for incomplete citations, e.g., as with Ritch and for omission of dates (as noted in the October 16 order at note 2). The parties are advised that they will be expected to adhere substantially to "Blue Book" form when citing authority.

During the conference, Respondent invited discussion on two issues. In effect, Respondent argued that:

(1) IRCA forbids the enforcement of actions based on unwritten tips;

(2) its predecessor in interest, the entity which allegedly effectuated the actual hire, should be named in the complaint and made liable for civil money penalties.

Respondent's first proposition was contained in its statement of issues filed October 19 and reiterated at the conference. During the conference, I rejected Respondent's first proposition. I held that an employer cannot successfully defend against §1324a enforcement on the basis that INS acted pursuant to an oral complaint.

Section 1324a(e)(1)(A) authorizes establishment of procedures "for individuals and entities to file written, signed complaints respecting potential violations" of §§1324a(a) and (g)(1). This subsection is a basis for developing procedures for the receipt of written complaints. The subsection does not bar enforcement arising from oral "tips," i.e., unwritten complaints.

Nowhere in IRCA do I find immunity against liability resulting from unwritten complaints by third parties. To the contrary, as stated at the conference, I hold that §1324(e)(1)(C), providing for investigation of other violations of §§1324(a) and (g)(1), would be substantially nullified by Respondent's construction of IRCA. I applied the rule that provisions of a statute are to be construed harmoniously. Such interpretation bars Respondent's claim. I stated my interpretation of §1324(e)(1)(A) in context of §1324(e)(1)(C) to the effect that failure to reduce an oral "tip" to writing is unavailing as a defense to enforcement under 8 U.S.C. §1324a.

As discussed in the October 16 order, Respondent previously asserted that it is not liable for paperwork violations because its predecessor hired the employees named in the complaint. After receipt of the

October 16 order which inter alia rejected this claim, Respondent modified its argument. Respondent urged for the first time during the conference, that without regard to liability of the successor, the predecessor enterprise is liable. I advised that Respondent is at liberty to amend its answer to the complaint to perfect its claim. Complainant's statement of issues cited U.S. v. Marnul, 3 OCAHO 441 (7/21/92). On request by Respondent, INS agreed to provide a copy of the decision. This courtesy is not to be understood as a precedent for requiring INS to provide respondents with copies of published OCAHO decisions.

The October 16 order rejected Respondent's claim that pendency of the motion for summary decision automatically stayed the proceeding. Consequently, Lifestyles sought a one week extension of the deadline set by the October 16 order to respond to Complainant's discovery requests. INS objected to an extension. After discussion, I extended the date by which Respondent must deliver its discovery responses to November 4.

Complainant identified 14 potential witnesses; Respondent identified 3, and agreed to identify to INS other potential defense witnesses not later than October 26. Recognizing that Respondent and the witnesses are in the Las Vegas area and that Complainant is in the Phoenix area, the parties agreed to coordinate discovery efforts. In order to maximize efficiency and reduce travel costs, the parties will attempt to take depositions in tandem.

The following schedule has been adopted by the parties and the bench:

Not later than October 26, 1992, Respondent will finalize its tentative witness list and so inform Complainant. Complainant will notify Respondent of any modifications to its witness list, if any;

Not later than November 4, 1992, Respondent will respond to Complainant's outstanding discovery;

Not later than November 15, 1992, the bench will have received parties' requests for subpoenas. These requests will clearly indicate names and addresses. Post office box addresses are not useful. Each calling party must effect service of its subpoenas.

On November 19, 1992 at 3:30 p.m., EST, the parties and the bench will reconvene for the third prehearing conference.

The evidentiary hearing will commence on December 2, 1992, at a time and place to be announced.

The parties are expected to stipulate to as many facts as possible and to narrow both the factual and legal issues prior to evidentiary hearing. At the third prehearing conference, the parties should be prepared to address matters as set forth at 28 C.F.R. §§68.12 and 68.13 (1991). Specifically, they should be prepared to identify what issues, both factual and legal, remain in dispute, and to identify to the bench witnesses and documentary materials to be introduced into evidence.

Errata

The following typographical corrections should be made to the October 16, 1992 Order:

Page 13, 1st full paragraph, line 11 - delete "what."

Page 17, 1st full paragraph, line 1 - delete "also" after "refers."

Page 19, 2nd full paragraph, line 8 - add "448" after "3 OCAHO."

Page 22, line 3 - delete "(XIV)."

SO ORDERED.

Dated and entered this 22nd day of October, 1992.

MARVIN H. MORSE
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	Case No. 92A00131
NEVADA LIFESTYLES, INC. DBA: COMMERCIAL DRAPERY CLEANERS, Respondent.	)	

ORDER DENYING CROSS MOTIONS FOR SUMMARY DECISION AND GRANTING IN PART COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(October 16, 1992)

I. *General Background*

A. The Immigration Reform and Control Act

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 990603, 100 Stat. 3359 (November 6, 1986) at section 101, enacting section 274A of the Immigration and Control Act of 1952 as amended (INA, or the Act), 8 U.S.C. §1324a. With the enactment of IRCA, Congress adopted signi-ficant revisions in national policy on illegal immigration. Under IRCA, employers are vulnerable to civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. They are also subject to civil penalties for failure to observe IRCA'S record keeping verification requirements, i.e. paperwork requirements.

B. Procedural Background

On June 11, 1992, the Immigration and Naturalization Service (INS or Complainant) filed a complaint against Nevada Lifestyles, Inc. (Lifestyles or Respondent). Complainant alleged forty seven paper-

work violations. Respondent timely filed an answer raising a variety of defenses, objections and affirmative defenses.

The parties and the bench participated in a telephonic prehearing conference on July 10, 1992. At Respondent's request, a verbatim transcript was made of the conference. Inter alia, the bench noted Respondent's venue and jurisdictional objections for the record, but declined to dismiss the complaint on the basis of these objections at that juncture. First Prehearing Conference Report and Order (7/14/92).

Vigorous motion practice followed. On July 16, 1992, Complainant filed a Motion to Strike Affirmative Defenses. Both parties filed Motions for Summary Decision and responses in opposition thereto.[1] Additionally, on July 30, 1992, Respondent filed a "First Amended" answer to the complaint, and apparent amendments to its prior "objections." A list of filings and issuances comprising an integral part of this order is attached after page 27.

Among its myriad of defenses, Respondent asserts a threshold, jurisdictional defense. Respondent recites, without substantiation, that its business is exclusively **intra**state and that congressional regulatory competence is limited to **inter**state commerce. Based on this factual and legal recitation, Respondent argues that the commerce clause of the United States Constitution prohibits IRCA jurisdiction as here applied. Respondent claims, in effect, that there can be no genuine dispute of material fact and, accordingly, summary decision lies because the administrative law judge lacks jurisdiction over the subject matter of the complaint. Absent a finding in Respondent's favor on its jurisdictional claims, the answer to the complaint puts in issue such disputes of fact. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985); 28 C.F.R. §68.38(c).

Section II of this order focuses exclusively on Respondent's commerce clause defense.

II. *Respondent's Commerce Clause Defense*

[1] Respondent has participated by pleadings and in the conference through Jack Ferm as vice president, joined on occasion by Mario Sanders as president. Mr. Ferm has telephoned the office of the judge several times to ask when a ruling would be forthcoming on the motion for summary decision. Mr. Ferm is at liberty to make procedural inquiries of the judge's staff. However, he will be expected in the future to refrain from inquiring as to when rulings will be forthcoming.

A. The Legal Context

1. Constitutional Issues in Administrative Hearings

Respondent may properly raise pertinent commerce clause and other constitutional defenses in this forum. Constitutional issues implicating statutory applicability are appropriate for consideration in administrative adjudications, i.e. by administrative law judges (ALJs), where those issues pertain to the constitutionality of the statutory application, as distinct from the constitutionality of the statute itself. Branch v. F.C.C., 824 F.2d 37, 47 (D.C. Cir. 1987).

Judicial economy is one rationale for allowing certain constitutional issues to be decided at the agency level. Continental Air Lines v. Department of Transportation, 843 F.2d 1444, 1455 (D.C. Cir. 1988).

Agency adjudicators are not only competent to consider certain constitutional issues, but are obliged to consider them.

> [An agency] may not simply ignore a constitutional challenge in an enforcement pro-ceeding. . . . [T]he Commission [i.e. the agency] must discharge its constitutional obli-gations by explicitly considering [Complainant's] claim that [it was] deprive[d] . . . of its constitutional rights.

Meredith Corp. v. F.C.C. and the United States, 809 F.2d 863 (D.C. Cir. 1987).

See also Rafeedie v. INS, 880 F.2d 506, 515 (D.C. Cir. 1989); North-western Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc. v. Federal Communications Commission and United States, 872 F.2d 465, 470 (D.C. Cir. 1989).

OCAHO jurisprudence is in conformity with circuit case law. Several decisions have addressed OCAHO's competence to address constitutional challenges of IRCA applications. U.S. v. Big Bear, 1 OCAHO 48 (3/30/89) (quoting Plaquemines Port, Harbor and Terminal District v. F.M.C., 838 F.2d 536, 544 (D.C. Cir. 1988), Bork, J. ("[A]dministrative agencies are entitled to pass on constitutional claims. . . ."); aff'd Big Bear Super Market v. INS, 913 F.2d 747, 757 (9th Cir. 1990); U.S. v. Multimatic Products, Inc., 1 OCAHO 221 (8/21/90); U.S. v. Law Offices of Manulkin, Glaser, and Bennett, 1 OCAHO 100 (10/27/89) ("The APA . . . does not limit the scope and authority of an ALJ to hear and decide any matters relating to the constitutional rights of a Respondent. . . . See, 5 U.S.C. §5569 (c)(7)."). See also U.S. v. Rodriguez, 1 OCAHO 158 (4/24/90) (OCAHO is not competent to decide the constitutionality of

the statute itself, but not addressing whether OCAHO is competent to decide the constitutionality of an application of the statute).

2. The Congressional Power to Regulate Immigration Generally and Workplace Immigration Specifically

IRCA is a congressional expression of national immigration policy. It is possible to imply the power to enact that policy from specific con-stitutional grants, even though the United States Constitution does not specify congressional power to regulate immigration per se. Various grants of power have been cited as constitutional underpinnings for the congressional power to regulate immigration: power to establish a uniform rule of naturalization, U.S. CONST. art. I, §7, cl.4; to prohibit the importation of persons, U.S. CONST. art. I, §9, cl. 1; to declare war, U.S. CONST. art I, §7, cl. 11; to regulate foreign commerce, U.S. CONST. art. I, §7, cl. 3; and to make all necessary and proper laws, U.S. CONST. art. I, §7, cl. 18; Toll v. Moreno, 458 U.S. 1 (1982); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Graham v. Richardson, 403 U.S. 365, 376 (1971); Harisades v. Shaughnessy, 342 U.S. 580 (1952); Mathews v. Diaz, 426 U.S. 67, 81 (1976); United States v. Curtiss- Wright Export Corp., 299 U.S. 304, 318 (1936). GORDON, MAILMAN, IMMIGRATION LAW AND PROCEDURE (1992) at §§9.01, 9.02; T. ALEINIKOFF, D. MARTIN, IMMIGRATION PROCESS AND POLICY (1985) at 7-14; J. NOWAK, R. ROTUNDA, J. NELSON, CONSTITUTIONAL LAW (1986) note 16, at 628, 642; Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 255-60 (1984).

Other cases hold the power to regulate immigration is inherent in national sovereignty. The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889); Ekiu v. United States, 142 U.S. 651 (1982); GORDON, MAILMAN, supra, at §9.01; T. ALEINIKOFF, D. MARTIN, supra, at 14; J. NOWAK, R. ROTUNDA, J. NELSON, supra, at note 16, at 628.

Recitation in judicial opinions and commentaries that Congress has plenary power to regulate immigration is consistent, despite differing views as to the precise source of that legislative power.

> Immigration law is a constitutional oddity. "Over no conceivable subject," the Supreme court has repeatedly said, "is the legislative power of Congress more complete." See Oceanic Steam Navigation Co. v. Stranahan, 214, U.S. 320, 339 (1909), quoted appro-vingly in Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Accord, Olotoe v. I.N.S., 643 F.2d 679, 680 (9th Cir. 1981). At the heart of that sentiment lies the "plenary power" doctrine, under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional

> restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review . . . immigration provisions. . . .

Legomsky, supra, at 255. See also GORDON MAILMAN, supra, at §9.01; ALEINIKOFF, MARTIN, supra, at 14; NOWAK, ROTUNDA, YOUNG, supra, at 626 ("The Congressional ability to set standards for naturalization of aliens has never been significantly limited by the court."); Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Monrad, Comment: Ideological Exclusion, Plenary Power, and the PLO, 77 Calif. L. Rev. 831 (1989). ("U.S. immigration law is dominated by the doctrine of the plenary power of Congress and the executive to regulate immigration, largely unreviewed by the judiciary for conformity with constitutional constraint.") Cf. Elias v. U.S. Department of State, ___F. Supp.___. No. C-88-0854 (N.D. CA. 1989). ("Although Congress is granted substantial deference in the immigration field, it cannot be exempt from constitutional precepts simply because it is dealing with non-citizens.").

Among Congress' far-reaching authority in the field of immigration law is the power to regulate the workplace. The Supreme Court recog-nizes that "a primary purpose in restricting immigration is to preserve jobs for American workers." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893, (1984); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (stating that Congress has the power to establish immigration employment restrictions.)

An attack on either the generic or the employment aspect of plenary congressional power over immigration is virtually unsustainable.

3. Constitutionality and IRCA

It is a well-accepted rule of statutory construction that where pos-sible, federal courts decline to reach issues of constitutionality. New York v. United States, 112 S.Ct. 2408, 44 (1992); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988); In re Salem Mortgage Co., 783 F.2d 626, 633 (6th Cir. 1986) (it is "the general principle that dispositive non-con-stitutional issues are to be treated before reaching constitutional matters," citing Wolston v. Reader's Digest Assoc. Inc., 443 U.S. 157, 160-161 n.2 (1979)).

To date, 8 U.S.C. §1324a has been upheld in every case where constitutionality has been an issue. U.S. v. Maka, 1 OCAHO 36 (12/15/88); aff'd Maka v. INS, 904 F.2d 1351, 1356-57 (9th Cir. 1990); U.S. v. Big Bear, 1 OCAHO 48, aff'd Big Bear Super Market v. INS,

913 F.2d 747, 757; U.S. v. Mester, 1 OCAHO 18 (6/17/88); aff'd Mester Manufacturing Co. v. INS, 879 F.2d 561, 569 (9th Cir. 1989); U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91) (rejecting "respondent's argument that the provisions of 8 U.S.C. §1324a (a)(1)(B) are unconstitutional inasmuch as that section of IRCA regulates the employment practices of an employer concerning individuals who are not in fact unauthorized or illegal aliens.") at 17; Multimatic Products, Inc., 1 OCAHO 221.

The Supreme Court has dealt indirectly with the constitutionality of §1324a, in deciding the validity of an INS employment related immigration regulation,

> In view of the then-recent enactment of the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat 3359, which cast serious doubt on the Court of Appeals' conclusion that employment of undocumented aliens was only a "peripheral concern" of the immigration laws, we vacated that court's judgment and remanded for further consideration in the light of IRCA. 481 U.S. 1009 . . . (1987).

INS v. National Center for Immigrants' Rights, 112 S.Ct. 551, 555 (1991).

Upholding the regulation, the Court declined to consider constitutional issues. Such declination can be understood to tangentially affirm IRCA constitutionality. Had the IRCA-related regulation been constitutionally infirm, the court would have had to deal with that infirmity in order to validate the regulation on its face. See also Del Rey Tortilleria Inc. v. National Labor Relations Board, 970 F.2d 262 (7th Cir. 1992) (construing the NLRA in light of IRCA without mention of the potential unconstitutionality of an immigration statue regulating labor issues, thereby implicitly upholding IRCA's constitutionality.)

B. The Merits of the Commerce Clause Challenge

1. Complainant's Response

Respondent's filing of August 17 recites that INS ignores its jurisdictional question. However, Complainant's Response and Counter Motion, filed August 6, 1992, states,

> Congress' plenary power to exclude a whole class of aliens, affirmed by the Supreme Court in 1889, has never been successfully challenged. Chinese exclusion case, 130 U.S. 581 (1977). . . . In INS v. National Center for Immigrants Rights, 112 S.Ct. 551 [19], the Supreme Court applied immigration laws to employment: '[W]e have often recognized that a 'primary purpose in restricting immigration is to preserve jobs for

> American workers.' [Id. at 558]. Therefore, it is clear that, whether or not a business is engaged in interstate commerce, 8 U.S.C. §1324a, is applicable.

Id.

I conclude that Complainant responded to Respondent's commerce clause claim.

2. OSHA and FLSA

IRCA's statutory language does not invoke congressional power under the commerce clause and the issue has not been addressed in prior OCAHO cases. The commerce clause challenge is novel. Respondent relies on two non-IRCA cases to support the claim that it is exempt from federal regulation in general and from 8 U.S.C. §1324a employer paperwork obligations in particular. Austin Road Co. v. Occupational Safety and Health Review Commission, 683 F.2d 905 (5th Cir. 1982); Ritch v. Puget Sound Bridge & Dredging Co., Inc., 60 F. Supp. 670 (N.D. WA 1945).

The scope of federal regulation under the Occupational Safety and Health Act (OSHA) was at issue in Austin. The Occupational Safety and Health Review Commission (OSHRC) ordered Austin to comply with an OHSA citation. On appeal, the Fifth Circuit reversed. The court held that because the agency failed to establish that the business at issue was interstate, Austin could not be compelled to comply with the citation at issue. The holding stemmed from the court's recognition that in enacting the relevant legislation, Congress drew on its powers under the commerce clause. Austin, 683 F.2d at 907.

The other case relied on by Respondent predates statutory developments and modern case law which significantly altered the landscape of federal public interest enforcement. Ritch, 60 F. Supp. at 670.[2] In Ritch, as in Austin, the applicability of a federal regulation to a primarily local enterprise was at issue. Fair Labor Standards Act (FLSA), 29 U.S.C.A. §207 (1938). The district court held that the

[2] Many of Respondent's case citations lack for dates, and are significantly out of date, e.g. in its Points & Authorities in Support of Motion for Summary Decision, filed July 27, 1992 (citing Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 **(1894)**; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 **(1899)**; Geer v. Connecticut, 161 U.S. 519 **(1896)**; Lehigh Valley Railroad Co. v. Pennsylvania, 145 U.S. 192 **(1892)**; Louisville, New Orlean & Texas Railway Co. v. Mississippi, 133 U.S. 587 **(1890)**; Sands v. Manistee River Improvement Co., 123 U.S. 288 **(1887)**; Wabash St. Louis & Pacific Railway Co. v. Illinois, 118 U.S. 557 **(1886)**; Lord v. Goodall Nelson & Perkins Steamship Co., 102 U.S. 541 **(1881)**; Hall v. De Cuir, 95 U.S. 485 **(1877)** (emphasis added).

intrastate nature of the Ritch business shielded it from FLSA regulation. The holding stemmed from the court's recognition that in enacting the relevant legislation, Congress drew on its powers under the commerce clause.

Notably, Respondent fails to mention that Ritch was reversed on appeal. Ritch et al. v. Puget Sound Bridge & Dredging Co., Inc., et al. No. 11150, 156 F.2d 334 (9th Cir. 1946).

The text of both OSHA and FLSA in terms invoke Congress' regulatory power under the commerce clause. For example, OSHA defines an employer as "a person engaged in a business affecting commerce who has . . . employees." Godwin v. OSHA, 540 F.2d 1013 (9th Cir. 1976); Brennan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974).

The commerce clause is not the sole source of congressional power. Therefore, the clause does not define the parameters of congressional legislation. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991). The commerce clause underpins OSHA and FLSA; IRCA's constitutional basis is different. Supra, at §II.A.2. Accordingly, it is immaterial whether Respondent's business is intrastate or interstate.

I conclude that the commerce clause is not the constitutional basis of IRCA. The cited OSHA and FLSA law is, therefore, inapposite here.

C. Respondent's Commerce Clause Challenge Fails on Other Grounds Also

1. Overview of the Commerce Clause

Even if the commerce clause were the constitutional underpinning of IRCA, Respondent's claim necessarily fails.

It is well understood that the reach of the commerce clause is broad. The 1937 Supreme Court initiated modern commerce clause interpretation, declaring

> the Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources.

NLRB v. Jones & Laughin Steel Corp., 301 U.S. 1, 36 (1937).

The Court reaffirmed and expanded its broad commerce clause interpretation in numerous subsequent decisions. Modern commerce clause determinations turn on the "engaged in commerce" or "affecting commerce" standards. Fry v. United States, 421 U.S. 542, 547 (1975) ("[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that Ollie's Barbecue, a small restaurant more than a mile from an interstate highway affected commerce because either it served interstate travelers or served products which had moved interstate to its intrastate patrons.); NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); Polish National Alliance v. NLRB, 322 U.S. 643 (1944); Wickard v. Filburn, 317 U.S. 111 (1942).

A helpful commentary, on Wickard, makes clear the Court's understanding that Congress may properly legislate under the commerce clause in three general situations.

> First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce. . . . Third, Congress could regulate--under a combined commerce clause-necessary and proper clause analysis-- intrastate activities in order to effectuate its regulation of interstate commerce.

NOWAK, ROTUNDA, YOUNG, supra, at 153-54.

Essentially applying this test, the Supreme Court held that Congress could regulate the output of wheat grown by a farmer, even though the crop was intended for the exclusive use of his family. Wickard, 317 U.S. at 111.

All the circuits, including the Ninth, have construed the commerce clause broadly. The Ninth Circuit, the relevant circuit here, compiled an informative catalogue.

> It has been found sufficient that an illegal gambling casino served orange juice and coffee and was heated by fuel oil, all of which perforce were from out of state, United States v. Barton, 647 F.2d 224, 232 (2d Cir.) (1981). . .; a cafe located in the building sold candy, gum and vegetables from out of state, United State v. Schwanke, 598 F.2d at 578; a bookstore sold books that had traveled interstate; United States v. Corbo, 555 F.2d 1279, 1282 (5th Cir.) (1977) . . . a tavern served liquor originating out of state, United States v. Sweet, 548 F.2d at 200-02; and a commercial fishing boat shipped its catch interstate, United States v. Keen, 508 F.2d at 990. . . . Accordingly, we have no difficulty finding the jurisdictional nexus here. . . . [T]he construction of a commercial

office building using out-of-state materials is a commercial activity affecting interstate commerce.

United States v. Andrini, 685 F.2d 1094, 1096 (9th Cir. 1982).

Accord Winterrowd v. Freedman and Co., Inc., 724 F.2d 823 (9th Cir. 1984).

2. Commerce Clause Applications Under OSHA and FLSA

The expansive interpretation of the commerce clause extends to OSHA and FLSA. Godwin, 540 F.2d at 1016 (OSHA applies to "the activity of clearing land for the purpose of growing grapes [because it] is an activity which, if performed under unsafe conditions, will adversely affect commerce. Clearing land is an integral part of the manufacturing of wine, and therefore commerce is affect by the activity. . . . We do not think it significant that, at the time of the hearing, grapevines had not yet been planted and grapes had not been harvested and turned into wine. The effect on interstate commerce nevertheless exists."); Hodgson v. Ewing, 451 F.2d 526, 528 (5th Cir. 1971) (the FLSA applies to an employer in the business of clearing brush for the improvement of agricultural land); Marshall v. Rose, 616 F.2d 102 (4th Cir. 1980) (under the commerce clause, as invoked in the FLSA, Congress can regulate the employment of watchmen on a private estate); Ruenkamol v. Stifle, 463 F. Supp. 647 (DC NJ 1978) (under the commerce clause, as invoked in the FLSA, Congress can regulate the employment of domestic servants.)

3. Using Intrastate Suppliers Does Not Automatically Vitiate Congressional Power to Regulate

Respondent asserts that it uses only local intrastate suppliers and therefore is shielded from federal regulation. The circuits have held that where a local supplier of the regulated enterprise uses and/or markets goods from out of state, its customers affect interstate commerce. Brennan v. Occupational Safety and Health Comm'n., 492 F.2d at 1027; Usery v. Lacey, 628 F.2d 1226 (9th Cir. 1980).

4. The Commerce Clause and Title VII

I have already held that the OSHA & FLSA are inapposite. Supra, at II.B.2. Additionally, as explained above, the precedents powerfully dictate against finding an enterprise not to affect interstate commerce. Title VII of the Civil Rights Act of 1964, as amended, is arguably more germane. Part of the rationale for IRCA, albeit for the remedial discrimination provisions, was to supplement Title VII, 42 U.S.C.

§§2000e et seq. Furthermore, there is precedent for an IRCA/Title VII analogy. Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92) at 7; U.S. v. Mesa, 1 OCAHO 74 (7/24/89) at 2, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991).

Despite commonalities, there are fundamental differences between Title VII and IRCA. Pertinent to Respondent's motion, Title VII expressly invokes its regulatory power under the commerce clause. 42 U.S.C. §2000e(b).[3]

In light of my earlier holding that the commerce clause simply does not apply to 8 U.S.C. §1324a, Respondent's claim would have been denied in any event. However, Ninth Circuit law instructs that Respondent could not prevail on his commerce clause claim, even under Title VII. E.E.O.C. v. Ratliff, 906 F.2d 1314, 1315 (9th Cir. 1990).

Reversing the district court on review of a summary judgment on the issue whether the employer's activity "affects commerce," the court reasoned,

> If the defendant uses items that have moved through interstate commerce at some point in their lives [cite omitted] or has moved through interstate commerce at some point in their lives [cite omitted] or serves persons from out of state [cite omitted] or engages in activity [sic] that, even if purely local, would alter the relationships of an interstate market, Wickard v. Filburn, 317 U.S. 111 (1942) . . . the "affects commerce" requirement is satisfied.

Id. at 1316.

At the summary judgment stage, the movant must show the absence of any genuine issue of material fact and, therefore, bears the burden of showing that it does not engage in interstate commerce. Lifestyles did not carry that burden in support of its motion. In light of the con-clusion that IRCA in no way depends on commerce clause principles, it could not have prevailed in any event.

To reiterate, IRCA is not impacted by commerce clause jurisprudence. Analogies to OSHA, FLSA, and Title VII are unavailing to Respondent.

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[3] For purposes of Title VII, an employer is a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . 42 U.S.C. §2000e(b).

For the above cited reasons, I deny Respondent's motion for summary decision as to the commerce clause claim.

III. *Respondent's Remaining Summary Decision Claims Rejected*

Respondent's motion initially filed July 27, amended by the pleading filed July 30, asserts two additional grounds for summary decision, both of which are rejected. First, the claim that in effect there is no genuine issue of material fact is not creditable. Second, the claim that Respondent is not liable under §1324a, with respect to employees who were hired (after November 6, 1986) by a predecessor employer whose business Lifestyles purchased in 1991, is a matter to be determined on the factual record.

Respondent's first claim cannot be decided at the summary decision stage. The documents filed in support of Complainant's August 6 filing in support of its counter motion for summary decision demonstrate unmistakably that liability and quantum of civil penalty are at issue as to all counts in the complaint.

Respondent's second claim is predicated on issues as yet factually unresolved. It remains for the parties to ventilate at hearing when the individuals employed in December 1991 were hired and by whom. It is appropriate to develop the record also with respect to the transaction by which Lifestyles acquired the December 1991 enterprise, including its payroll, and the circumstances of the inspection.

If at evidentiary hearing, Respondent is able to show that employees were hired by a predecessor employer, I may still conclude that Lifestyles is liable under §1324a for paperwork violations. I am not persuaded that IRCA is applicable only to employers who effect initial hire. Such interpretation would permit successor employers to ignore IRCA with impunity as to such employees, thereby undermining the very purpose of the statute.

Respondent's reliance on Steiben v. I.N.S., 932 F.2d 1225 (8th Cir. 1991) to support the claim that IRCA holds liable only those employers who effect a hire is misplaced.[4] The Steiben court affirmed the admin-

[4] Respondent's original motion appeared to assert as separate grounds that (a) it was not liable because under Steiben only the act of hiring is culpable and (b) any effort to hold liable a purchaser of a business whose workforce is already in place is in derogation of IRCA. Although it is unclear whether in light of its First Amended Answer filed July 30, Respondent continues to allege these contentions as separate claims, this order should be understood as rejecting the arguments in their entirety.

istrative law judge. The ALJ had found IRCA liability on the part of the proprietor and chief executive officer of a corporation who "exercised exclusive control over the operation of the business." Id. at 1226. He rejected the claim that INS regulations exceeded IRCA authority by implicating the person who did the hiring and not only the employing entity. Respondent's quotation from the court's opinion omits the mesne clause set off by hyphens, which is what the crux of the case, i.e., whether an employer's agent is culpable under 1324a:

> Liability turns upon the act of hiring -- which may be performed by the employer or an agent of the employer -- and not simply upon the fact of being an employer of an unauthorized alien.

Steiben, 932 F.2d at 1228 (emphasis added), aff'g U.S. v. Wrangler's Country Cafe, 1 OCAHO 191 (6/29/90). See also U.S. v. Wrangler's Country Cafe, 1 OCAHO 138 (3/6/90) (Order Denying Respondent Steiben's Motion to Dismiss and Motion for Summary Decision).

In the same paragraph, the Eighth Circuit held,

> We conclude that the regulation at issue does not exceed INS' authority. Foremost, we reject Steiben's argument that the statute unambiguously imposes liability only upon the employer.

Steiben, 932 F.2d at 1228.

It follows that the court's sole conclusion, upholding the validity of the INS regulation imposing liability upon employers' agents as well as employers, is of no avail to Lifestyles. The court plainly was not dealing with the same question as the one raised by Lifestyles.

For the reasons above discussed, Respondent's motion for summary decision is denied.

IV. *Respondent's Objections Stricken*

Both in the pleading filed June 29, 1992 and in the First Amended pleadings filed July 30, 1992, Respondent asserts in the form of Objections the same jurisdictional claims contained in its motion for summary decision, arguing the Steiben case and Respondent's status as successor to the enterprise that hired the alleged employees.

The Objections also demand that the hearing be held in Las Vegas, not in Virginia. Respondent overlooks that the June 15, 1992 OCAHO Notice of Hearing advised that the hearing would "be held in or around Las Vegas, Nevada." Instead, Respondent's July 30 filing

repeats the demand, notwithstanding that the July 10 prehearing conference set it for Las Vegas. First Prehearing Conference Report and Order at 2. Title 8 U.S.C. §1324a(e)(3)(B) provides that "[T]he hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred."

I have already dealt with these claims in their previous iterations. The Objections are stricken as surplusage.

V. *Complainant's Counter Motion for Summary Decision Denied*

A. Liability

I cannot agree with Complainant that there is no genuine issue of material fact. Notwithstanding that the documents attached to its motion appear to establish a prima facie case of paperwork violations as alleged, INS is confronted with claims by Lifestyles which I deem sufficient to put the government to its proof. In this respect, I note that the documents considered together with Complainant's discussion at paragraphs B.1 and 2 of its memorandum of points and authorities provide a powerful impetus to conclude in its favor. Lifestyles failed in its opposition to the motion to comply with the requirement that it "may not rest upon" mere allegations or denials but "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. §68.38(b). I am authorized, but not compelled, by §68.38(c) to enter a summary decision as to liability. Considering the pro se status of Lifestyles and that I must deny the motion as to the civil penalty for the reasons discussed, infra, at §V.B. I deny it entirely.

I understand the remainder of Respondent's response to Complainant's motion to turn on constitutional claims. This order has already disposed of the commerce clause claim. Supra, at §II.B. Respondent also makes a facial constitutional claim, i.e. "[W]hether the Act is constitutional." The latter claim implies a constitutional challenge to IRCA on its face as distinct from a challenge to its applicability. Facial constitutional claims have also been discussed. Supra, at §II.A.1.

It is sufficient to note that Lifestyles has preserved its facial constitutional challenge on the record. However, I am unaware of any constitutional infirmity in Section 101 of IRCA. Big Bear, 1 OCAHO 48 at 30.

B. Civil Money Penalties

Title 8 U.S.C. §1324a(e)(5) sets out the statutory parameters of an employer's civil money penalty exposure, assuming a finding of liability on the merits. A paperwork violation triggers a penalty of "not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." Id.

Complainant's motion fails. I am unable to conclude that no genuine issue of material fact exists as to the appropriate quantum of civil money penalties. Complainant's memorandum of points and authorities marshals its version of the facts in context of the five statutory factors to be considered in assessing the penalty, 8 U.S.C. §1324a(e)(5). INS fails, however, to ascribe dollar amounts to the factors. Consequently, there is no way of determining how the factors were taken into account.

INS is disingenuous in its citation of U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89) aff'd by CAHO, 1 OCAHO 108 (11/29/89). Felipe and its progeny adjudge the penalty by mitigating, as applicable, the maximum allowable penalty allocable to each factor, i.e., one-fifth of $1,000.00 per paperwork violation. By merely citing Felipe as having been affirmed by CAHO, INS omits a critical feature of that affirmance. Finding that section 1324a(e)(5) "does not indicate that any one factor be given greater weight than another, id. at 5, the affirmance concluded that,

> . . . the Administrative Law Judge's approach is in accordance with the statutory language and the Chief Administrative Hearing Officer holds this method acceptable. This is not to indicate that the Administrative Law Judge's mathematical approach is the sole criteria and method to be used when determining the proper civil money penalty for paperwork violations.

Id. at 7. (emphasis added).

I do not understand that adjudication of a just and reasonable civil money penalty within the delineated range of $100 to $1,000 per violation implies mitigating down from the ceiling any more than it implies aggravating up from the floor. IRCA provides no such guidance. Title 8 U.S.C. §1324a(e)(5) prescribes these factors:

(1) the history of previous violations,

(2) whether or not the individual(s) named in the complaint were unauthorized aliens,

(3) the size of the business of the employer being charged,

(4) the seriousness of the violation, and

(5) the good faith of the employer.

In contrast to the Felipe rationale relied on by INS to support its motion, I utilize an elastic judgmental rather than a formulaic analysis to facilitate tailoring the factors to the facts of the case. U.S. v. M.T.S. Service Corp., 3 OCAHO 448 (8/26/92); U.S. v. Tom & Yu, Inc., OCAHO Case No. 91100082 (8/18/92); U.S. v. Widow Brown's Inn, 2 OCAHO 399 (2/15/92); U.S. v. DuBois Farms, Inc., 2 OCAHO 376 (9/4/91); U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91); U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90); U.S. v. Buckingham Ltd. Ptnshp, 1 OCAHO 151 (4/6/90); Big Bear, 1 OCAHO 48. But cf. Felipe, 1 OCAHO 93 (applying a mathematical formula to the five factors).

To establish a civil money penalty predicate higher than the statutory minimum, INS will be expected at hearing to explain how, taking the statutory factors into account, it arrived at its assessment. The parties are further advised that in determining the quantum of penalty, I have generally applied the principle that:

> I consider only the range of options between $100 per individual, the statutory minimum, and the amount assessed by INS, absent facts arising during litigation which were unanticipated by INS in assessing the penalty.

M.T.S. Service Corp., 3 OCAHO 448.

VI. *Complainant's Motion to Strike Affirmative Defenses Granted in Part and Denied in Part*

INS addresses seriatim all fifteen affirmative defenses set forth in Lifestyle's answer to the complaint. In its motion filed July 16, 1992, Complainant relies on 28 C.F.R. §68.9(c)(2). INS argues that Lifestyles failed to provide any factual content to its affirmative defenses. Respondent failed to satisfy the requirement, that an employer sanctions respondent must set forth "a statement of the facts supporting the affirmative defense."

INS also refers also to §68.1. Section 68.1 states that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by" OCAHO rules of practice and procedure. INS urges the judge to exercise discretion to "order

stricken from any pleading any insufficient defense." FED. R. CIV. P. 12(f).

I adopt Complainant's contention that OCAHO case law establishes that affirmative defenses must be more than mere conclusory allegations. Affirmative defenses must afford the complainant fair notice of the content of the claim in order to permit a response and preparation for trial. U.S. v. Noel Plastering and Stucco, Inc., 2 OCAHO 396 (2/12/91) at 2. As well summarized by INS,

> an affirmative defense raised under IRCA can survive a motion to strike only if it satisfies two requirements: (1) the defense must have a facially viable legal theory; and (2) the defense must give fair notice to the complainant as to the content of the Respondent's proposed defense. Noel Plastering, supra at page 2-3.

INS Motion (7/16/92) at 4.

I reiterate my holding in a previous case, that

The standard for granting a strike motion is stringent. It is the policy of this forum that

> [a]n affirmative defense will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives plaintiff fair notice of the nature of the defense.

United States v. Ed Valencia and Sons, Inc., 2 OCAHO 387 (11/5/91) (Order Denying Complainant's Motion to Strike Affirmative Defenses) (quoting 5 Wright and Miller, Federal Practice and Procedure, Section 1274, p.323 (1990)). Compare U.S. v. Altamont Roofing, OCAHO Case No. 91100162 (6/4/92) (Order Granting Complainant's Motion to Strike Affirmative Defenses); U.S. v. Educated Car Wash, 1 OCAHO 98 (10/25/89).

U.S. v. Diamond Construction, Inc., OCAHO Case No. 92A00040 (6/15/92) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses) at 3.

A number of the affirmative defenses are repeated in Respondent's motion for summary decision. These defenses have been addressed in the discussion of the motion, e.g., as to venue for hearing (II), and as to the distinction between the act of hire and the status of employment (I, III, VI). I note also that several among the fifteen affirmative defenses overlap and are redundant, multiple but varied iterations of a single theme, e.g., (I) that IRCA jurisdiction is lacking because Respondent was not the employer "at the time of the alleged acts," (III) that Respondent is exempt from IRCA "as to all employees hired prior

to November 14, 1991," and (VI) that only the act of hire not employment triggers IRCA liability.

(I), (III), (VI).[5]

The motion to strike affirmative defenses I, III and VI, all of which assert that Lifestyles did not hire the employees identified in the com-plaint, is granted. The claim is sufficiently and appropriately raised and put at issue by the answer to the complaint. See discussion, supra, at §III.

(II).

Affirmative defense II, as to venue, is stricken as superfluous. See discussion, supra, at §IV.

(IV).

Affirmative defense IV is stricken as insufficient, describing neither its factual underpinnings nor its theory of law. Affirmative defense IV initially recites only that Complainant's "mode of enforcement is discriminatory and constitutionally impermissible." As amended, it asserts that INS "has failed to establish a neutral criteria for investigating alleged violations . . . ," that enforcement is exclusively predicated on employee "tips," not equally applied to all businesses but rather "to larger businesses exclusively for the purpose of raising revenue." Respondent asserts a claim of impermissible selective prosecution. Such claims are cognizable before administrative law judges in cases under IRCA. U.S. v. Law Offices, 1 OCAHO 100. However, Respondent's bald allegations are inadequate to maintain such a claim. Conclusory assertions of discriminatory enforcement do not, per se, impose a burden on INS of disproving the claim.

On the basis of more than two hundred case dispositions under §1324a, I am satisfied that "larger" enterprises are not in fact selectively prosecuted by INS. By claiming that INS targets only "larger" enterprises, Respondent implies it is other than small, a question of fact to be developed on the record.

(V).

Affirmative defense V is stricken as lacking in legal and factual predicates. As amended, Respondent asserts INS unlawfully retains

[5] Roman numerals in parentheses indicate the affirmative defenses.

IRCA civil money penalties, a claim which even if true fails to state a defense to an action under §1324a. Nothing in §1324a nor its implementation precludes enforcement which focuses on paperwork violations. Indeed, the viability of the enforcement of Section 101 of IRCA depends on employment eligibility verification. M.T.S. Service Corp., 3 OCAHO at 4 (quoting U.S. v. Eagles Groups, Inc., 2 OCAHO 342 (6/11/92) at 3.) Neither do the numbers in this case support Respondent. The complaint alleges 46 violations for which INS could have assessed $46,000.00. In contrast to Respondent's revenue maximization hypothesis, INS asserts a demand from Lifestyles for $10,175.00, less than 25% of the legally permissible maximum.

(VII).

The motion to strike affirmative defense VII is denied. As amended, Respondent contends in effect that INS instructions to employers are inherently inconsistent, rendering paperwork compliance impossible where the employee is an alien. This claim is inconsistent with Respondent's defense that it is not amenable to liability for hires effected by its predecessor who hired the employees, but it otherwise survives Complainant's generalized objection.

(VIII).

Affirmative defense VIII, alleging violation of due process guarantees of the Fifth Amendment is stricken as lacking in legal and factual predicates. As amended, Respondent couches as violative of the Fifth Amendment the same affirmative defenses it claimed at IV and V, without additional specification of any constitutional infirmity. See United States v. Salerno, 481 U.S. 739, 746 (1987) (substantive due process prohibits only governmental conduct which shocks the con-science or interferes with rights implicit in the concept of liberty), cited in U.S. v. Carlson, 1 OCAHO 264 (11/8/90) (Order Denying Respondent's Motion to Dismiss the Complaint) at 2, n.1.

(IX).

The motion to strike affirmative defense IX is denied. As amended, Respondent contends, in effect, that INS violated the Fourth Amendment by subpoenaing Lifestyle paperwork and investigating compliance with employment eligibility verification requirements absent "a showing of probable cause." Complainant fails to amend its generalized objection to the Respondent's initial allegation before it was amended. Most importantly, while Lifestyles does not now seek to

suppress documents obtained pursuant to subpoena, I understand that to be the import of its claim.

I reject Complainant's assertion that an administrative law judge "is powerless" to hear any constitutional defense based upon claims of Fourth Amendment violations. Its reliance on OCAHO case law is misplaced. To the contrary, the exclusionary rule has been held applicable to §1324a proceedings.

> I disagree with the understanding in Noel [U.S. v. Noel Plastering & Stucco, Inc., OCAHO Case No. 90100326 (Order Granting in Part and Denying in Part Com-plainant's Motion to Strike Affirmative Defenses) (2/12/91) at 5.] that anything in Moyle [U. S. v. Moyle, 1 OCAHO 212 (7/30/90) at 18] or any other precedent suggests lesser power on the part of an administrative law judge than that of an Article III judge to apply constitutional principles to evidentiary submissions. This is not the same issue as that of power to declare statutes or regulations repugnant to the Constitution, discussed in U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89) at 311 suppl. dec., 1 OCAHO 49 (4/12/89), aff'd by CAHO, 1 OCAHO 55 (5/5/89); aff'd, Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990). See also U.S. v. Multimatic Products, Inc., 1 OCAHO 221 (8/21/90) at 5 (Decision and Order on Complainant's Motion to Strike Affirmative Defenses) (declining to reach constitutional issue as not "clearly addressed" by the parties but rejecting INS claim that such an issue is necessarily outside administrative law judge jurisdiction).
>
> I conclude that OCAHO and other jurisprudence confirms the administrative law judge's discretion to hold the exclusionary rule applicable to administrative searches. Accordingly, I hold the exclusionary rule applicable to proceedings pursuant to 8 U.S.C. §1324a.

Widow Brown's Inn, 3 OCAHO 399 at 22-23

The above quoted discussion was followed by the observation that "[T]he impact of the exclusionary rule is fact-driven." Id. at 23. If Lifestyles intends at the hearing to pursue its Fourth Amendment claim, it will need to demonstrate with particularity how its rights were violated. See e.g., U.S. v. Kuo Liu, 2 OCAHO 235 (9/14/90) (Order Denying Respondent's Motion in Limine).

(X).

Affirmative defense X, alleging violation of the employer/ employment relationship and impairment of contracts is stricken as lacking in legal and factual predicates. Although stated in constitutional dialectic, e.g., that IRCA "unreasonably and unnecessarily conditions the right" to free association (viz, employment) and penalizes exercise of that right. Respondent's claim essentially is an attack on the national policy reflected by enactment of IRCA. Its challenge more

appropriately addresses legislative, not judicial, concerns. See also, supra, II. A. 2.

(XI).

Affirmative defense XI, alleging that INS (inferentially also implicating ALJs) may only properly exercise jurisdiction over aliens, and none over American employers or non alien employees, is stricken as lacking in legal and factual predicates. As at X, above, Respondent's claim essentially is an attack on the national policy reflected by enactment of IRCA. Its challenge more appropriately addresses legislative, not judicial, concerns.

(XII).

Affirmative defense XII, alleging that the cost to employers of verifying employment eligibility and the magnitude of civil money penalties imposes an unreasonable economic burden on employers, is stricken as lacking in legal and factual predicates. As at X and XI, above, Respondent's claim essentially is an attack on the national policy reflected by enactment of IRCA. Its challenge more appropriately addresses legislative, not judicial, concerns.

(XIII).

Affirmative defense XIII, alleging that IRCA requires employers to serve as unpaid I.N.S. agents in verifying employment eligibility, in-cluding paperwork compliance obligations, in violation of the Thirteenth Amendment is stricken as lacking in legal and factual predicates. The logic of Respondent's involuntary servitude claim applies to virtually every obligation citizens of this nation are asked to assume. As at X, XI and XII, above, Respondent's claim essentially is an attack on the national policy reflected by enactment of IRCA. Its challenge more appropriately addresses legislative, not judicial, concerns.(XIV).

Affirmative defense XIV, alleging a good faith defense to the com-plaint, is stricken. INS correctly objects to Respondent's use of a good faith defense as to paperwork allegations. I agree that the good faith defense is only relevant to paperwork violations as one of the factors to be considered in respect of the quantum of civil money penalty. As to culpability, good faith applies solely to violations of the knowing hiring prohibition, 8 U.S.C. §1324a (a)(1)(A) by virtue of 8 U.S.C. §1324a(a)(3), and does not shield an employer from liability for violations of the employment eligibility verification system. See e g.,

U.S. v. Mester Mfg. Co., 1 OCAHO 18 (6/17/88) at 17, 28, aff'd sub nom Mester Mfg., Co. v. INS, 879 F.2d 651 (9th Cir. 1989).

As held with respect to a challenge similar to that here,

> IRCA jurisprudence sustains this INS analysis.
>
> . . . when . . . a respondent . . . asserts a good faith affirmative defense to that count which alleges a violation involving the employment verification system/paperwork requirements contained in the provisions of 8 U.S.C. §1324a (b), respondent assumes the risk of having that affirmative defense ordered stricken as a result of a prevailing motion to strike.
>
> United States v. Tuttle's Design Build, Inc., 2 OCAHO 370 (8/30/91) (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses).

Diamond, OCAHO Case No. 92A00040, at 3.

See also Big Bear, 1 OCAHO 48; U.S. v. Alvand, Inc., OCAHO Case No. 90100201 (12/3/90) (Order Granting Motion to Strike Affirmative Defense and Rescheduling Hearing); Multimatic, 1 OCAHO 221 (8/21/90); U.S. v. B uckingham Limited Partnership, 1 OCAHO 151 at 16, n.4; USA v. USA Cafe, 1 OCAHO 42 (2/6/89) (Order Granting Complainant's Motion for Summary Decision) at 4, n.1.

(XV).

Affirmative defense XV is stricken as inapplicable to this proceeding. Affirmative defense XV, initially contended that Complainant's IRCA inspection was tainted as a search for a crime absent a "Miranda Warn-ing," in context of an informant's tattling to INS. The result, says Lifestyles, is that documentary evidence adduced is inadmissible. Com-plainant's response that Respondent's claim is immaterial to this civil proceeding is correct, despite the Respondent's amended defense which no longer refers to Miranda but asserts the investigation "from its commencement was criminal in nature since I.N.S. was informed that illegal aliens were employed by an informant who was alleged to be a former employee."

Simply stated, although criminal liability can attach to a pattern or practice of unlawful employment violations, §§1324a(1)(A) and (a)(2), the issue as addressed by the parties simply does not arise in this case which involves only paperwork violations as to which no criminality attaches. 8 U.S.C. §1324a(f)(1).

VII. *Complainant's Motions for Protective Order and to Compel Discovery*

A. The Motion for Protective Order Granted

Complainant's August 6, 1992 filings included, inter alia, a motion for protective order with accompanying brief and copy of the nine enumerated requests. By its pleading, INS urged that it should be relieved from fulfilling requests for production of documents served on it by Lifestyles on July 6, 1992. The request for production demanded every document relating "to I.N.S. internal policy manuals in regard to" and "I.N.S. internal procedures for the enforcement of the Employer Verification Act" (sic); every writing pertaining to that Act by or between INS, the Government Accounting Office, the Department of Justice, State and Labor, Office of the President and the Congress. The other demands are of similar reach. INS objected on the grounds of relevancy, and that the requests are vague, over-broad, unduly burdensome, voluminous, calculated to harass, in violation of the attorney-client and attorney work product privileges, and seek documents protected from discovery to the extent they consist of investigatory records compiled for law enforcement purposes.

Respondent's pleadings filed August 17, 1992 included a "Request to take the Government's motion for protective order off calendar until after the jurisdictional question has been resolved," in addition to its opposition to Complainant's motion for summary decision and "state-ment of issues." The concluding paragraph of the August 17 filing is captioned "Request to set motion for Protective Order off Calendar until after the Court has rendered its Decision." The full text of the Lifestyles statement is that "[S]ince the Court is obligated to find for Respondents, the Motion for a Protective Order will become moot."

Respondent could not be more incorrect. Complainant's motion is not mooted by the rulings made in this order. To the contrary, the rationale for Respondent's excursion into the records of two branches of government fails to survive those rulings. Not having previously acted upon Complainant's motion, it is now appropriate to consider it in light of those rulings. INS correctly relies on 28 C.F.R. §68.18(b) to the effect that discovery only reaches materials which are "relevant to the subject matter involved in the proceeding . . ." None of Respondent's affirmative defenses, which might arguably have made relevant Respondent's broad inquiry, survives. The requests for production are moreover excessive in scope, over-broad, burdensome in compliance both as to fiscal costs and resource commitment, and in breach of

privileges against disclosure. Accordingly, this order serves as the protective order requested by and in lieu of the form tendered by INS.

B. The Motion to Compel Discovery Granted

On October 1, 1992, Complainant filed a motion to compel responses to interrogatories and requests for production (exh. A to the motion) and requests for admissions (exh. B) served on Lifestyles on July 22, 1992. Pursuant to 28 C.F.R. §68.21(b), the motion seeks to have the matters which were the subject of the request for admission deemed admitted for failure of a response. The motion recites that on August 14, 1992, Respondent was permitted to and did take the deposition of INS agent Gilberto Cortinas pursuant to notice by Respondent on July 20, 1992. The motion also refers to and attaches a September 21, 1992 letter (exh. D) from Jack Ferm to INS in reply to an INS inquiry of September 9 (exh. C) as to its outstanding discovery. Ferm's letter contends that Lifestyles did not respond to INS discovery initiatives on the basis of "my understanding that until the [summary decision] matter is resolved all further activity under the case is suspended."

I am unaware of any basis for the "understanding" relied on in Lifestyles' September 21 letter to INS. Doubt is cast on that purported state of mind when I take into account that Respondent filed its motion for summary decision on July 27, after the date, July 20, that it noticed Mr. Cortinas' deposition but went ahead and took it on August 14. Moreover, on August 19, 1992, unaware of the contretemps brewing over discovery, I cautioned the parties that, as previously agreed, the evidentiary hearing was still scheduled to begin on December 2, 1992.

Respondent's response to the pending discovery motion was due October 15, 1992. 28 C.F.R. §§68.8(c)(2)and 68.11(b). None has been filed. Nevertheless, I will permit Lifestyles to avoid sanctions against its failure to respond to the request for admissions. See U.S. v. S.K. Plastics Corp., OCAHO Case No. 92A00082 (9/30/92) (Second Prehearing Conference Report and Order) at 2. ("subsection 68.211, standing alone and also in conjunction with 28 C.F.R. §68.23, clearly confers judicial discretion to control discovery, including inferences to be drawn from failure to respond. The text in subsection 21(b) that dictates a 30 day response . . . provides that that period may be 'shorter or longer . . . as the Administrative law judge may allow.'").

By this order, Lifestyles is directed to respond to the outstanding discovery requests not later than October 30, 1992, a date for receipt by INS, not a service date. Until that date, Respondent may respond

to the requests for admissions as well as the remaining outstanding discovery. This order issues in lieu of that tendered by INS with its motion to compel.

VIII. *Administrative Law Judge Jurisdiction*

The parties have apprised of the pendency of an action initiated by Lifestyles in the United States District Court for the District of Nevada. That suit, a declaratory judgment action, styled Jack Ferm et al v. I.N.S. and George Bush (Case No. CV-S92- 428-LDG-LRL) filed May 28, 1992, contains substantially the same allegations as set out in the affirmative defenses before me. Plaintiffs in that case seek a declaratory judgment that §1324a is facially unconstitutional and INS implementation improper.

The scheme of IRCA confers jurisdiction on administrative law judges to adjudicate civil actions to enforce employer sanctions liabilities, with provision for administrative appellate review and appeal to the appropriate United States court of appeals. §§1324a (e)(3), 1324a(e)(7), and 1324a(e)(8). Subject matter jurisdiction is exclusive and not conferred on the district courts. Law Offices, 1 OCAHO 100 at 4. Even if administrative law judge jurisdiction were not exclusive, the primary jurisdiction doctrine is applicable. See e.g., Allnet Communication Services, Inc. v. Nat'l Exchange Carrier Ass'n Inc., 965 F.2d 1118 (D.C. Cir. 1992). The case before me will, accordingly, move forward as scheduled during the July 10, 1992 telephonic prehearing conference.

Conclusion

Except as discussed and disposed of above, all motions and requests previously filed in this docket have been considered and are denied.

SO ORDERED.

Dated and entered this 16th day of October 1992.

MARVIN H. MORSE
Administrative Law Judge

Attachment

Attachment

Procedural History

(Issuance and Filing Dates)

6/11/92 Complaint filed

6/15/92 Notice of Hearing

6/29/92 Answer to Complaint, including Objections and Affirmative Defenses

7/2/92 Order Scheduling Prehearing Conference

7/14/92 First Prehearing Conference Report and Order

7/16/92 Complainant's Motion to Strike Affirmative Defenses with Points and Authorities in Support

7/27/92 Respondent's Motion For Summary Decision with Points and Authorities and other documents in support

7/30/92 Respondent's Motion to Amend Answer to the Complaint with documents in support; also, First Amended Answer to Complaint, Objection to Venue and Objection to Jurisdiction, Motion to Dismiss Complaint sua sponte (including revised affirmative defenses), and Supplemental Points and Authorities in support of Motion for Summary Decision

8/6/92 Complainant's Response to Respondent's Motion for Summary Decision and Counter-Motion for Summary Decision with points and authorities and supporting documents, and Motion for Protective Order as to discovery

8/17/92 Respondent's reply memorandum in Opposition to Complainant's Motion for Summary Decision with Memorandum of Issues, Request to take Complainant's Motion for Protective Order off the calendar, and Request for Oral Hearing on Issue of Jurisdiction

8/19/92 Order denying request for hearing on jurisdiction issue, and adhering to established schedule

10/1/92 Complainant's Motion to Compel Discovery, with attachments

10/9/92 Complainant's Statement of Issues