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) OCAHO Case No. 99A00013
ANTHONY BORRELLI AND SONS, INC. Respondent.	)) Marvin H. Morse) Administrative Law Judge

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(March 25, 1999)

During the first prehearing conference, as confirmed in the First Prehearing Conference Report and Order issued February 26, 1999, I denied Complainant's Motion to Strike (Motion) the Respondent's affirmative defenses of good faith and substantial compliance to Counts II through IV. This Order explains in more detail the basis for that denial and does not determine the merits of Complainant's affirmative defenses.

I. *Procedural History*

On May 20, 1998[1] the Immigration and Naturalization Service (Complainant or INS) served a Notice of Intent to Fine on Anthony Borrelli and Sons, Inc. (Respondent). Respondent timely requested a hearing on June 15, 1998. On December 2, 1998, Complainant filed its four Count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint seeks a total civil money penalty of $26,120.

[1] Although the Complaint states that the "Notice of Intent to Fine [(NIF)] was served on Respondent on April 1, 1998," a copy of the NIF (Exhibit A of the Complaint) shows that it was served by personal delivery to Anthony Borrelli and Sons, Inc. on May 20, 1998, having been issued on April 1, 1998.

Count I alleges that no Forms I–9 were presented for 3 individuals in violation of 8 U.S.C. § 1324a(a)(1)(B), at $240 for each violation, a total penalty of $720.

Count II alleges that sections 1 and 2 of the employment eligibility verification Forms I–9 were incomplete for 17 individuals in violation of 8 U.S.C. § 1324a(a)(1)(B), at a total penalty of $5,420 ($330 per violation for 15 individuals and $235 per violation for 2 individuals).

Count III alleges that Respondent failed to complete section 2 of the Forms I–9 for 65 individuals in violation of 8 U.S.C. § 1324a(a)(1)(B), at a total penalty of $19,660 ($320 per violation for 53 individuals and $225 per violation for 12 individuals).

Count IV alleges that section 1 of the Form I–9 was not completed by 1 individual in violation of 8 U.S.C. § 1324a(a)(1)(B), at a penalty of $320.

On December 29, 1998, Respondent filed a Motion To Substitute Attorney[2] and its Answer. The Answer to the Complaint sets forth the following defenses and affirmative defenses.

(1) *Defenses*

As to Count I, Respondent claims that Complainant withdrew its request for the three Forms I–9 allegedly not prepared while Eileen Borrelli was gathering them.

As to Count II, Respondent admits "one or more of the following deficiencies exists" in section 1 of the Forms I–9: "biographical/address information is incomplete or missing; no work authorized status is indicated in the first part of the attestation; the signature of the employee's attestation is missing or in the wrong place on the form." Respondent also admits "one or more of the following deficiencies exists" in section 2 of the Forms I–9: "the document information (title, issuer, number and expiration date) is incomplete or missing; the employer's attestation is incomplete or missing."

[2] This Order confirms that, as requested by Respondent, Michael J. Boyle, Esq., is substituted as its attorney of record.

As to Count III, Respondent questions the identification of seven of the sixty-five individuals listed by INS and admits that "one or more of the following deficiencies exists" in section 2 of the Forms I–9: "the document information (title, issuer, number and expiration date) is incomplete or missing; the employer's attestation is incomplete or missing."

Respondent questions INS identification of the listed individual in Count IV and admits that the signature attestation is missing in section 1 of the Form I–9.

(2) *Affirmative Defenses to Counts II, III & IV*:

Respondent claims that it complied with the employment verification system, 8 U.S.C. § 1324a(b), because it attempted to comply with the paperwork requirements in good faith as permitted under 8 U.S.C. § 1324a(b)(6); and

Respondent claims to have substantially complied with the employment verification system, 8 U.S.C. § 1324a(b); or, in the alternative, Respondent states that it would be in substantial compliance if INS gave it 10 days within which to comply under § 1324a(b)(6). Because INS did not give Respondent the opportunity to comply, Respondent claimed that it should be considered to have complied because a good faith effort was made.

To support the good faith and substantial compliance affirmative defenses, Respondent asserts in the Answer that: (1) Respondent timely examined documents and verified employment eligibility for each individual; (2) Forms I–9 were timely prepared for each individual; (3) Documents evidencing employment eligibility were photocopied and attached to each individual's Form I–9 (except for 4 individuals listed in Count III); (4) Respondent did not knowingly hire unauthorized individuals; (5) Respondent was not cited for hiring unauthorized individuals; (6) Respondent was not given an explanation of Form I–9 errors nor provided 10 business days to correct errors; and (7) Respondent would have corrected errors had it been given the chance.

On January 20, 1999, Complainant filed a Motion to Strike and Memorandum in Support asserting that Respondent's "affirmative defenses, good faith and substantial compliance," "are inapplicable to the violations as alleged in Counts II, III and IV. . . ." *Memo-*

randum in Support of Complainant's Motion To Strike, at 1. Complainant argues that Respondent's admissions establish that the violations are *not* procedural nor technical, are substantive failures, and "do not come within the purview of the good faith defense as provided in Section 274A(b)(6)(A) of the Act . . . ." *Id.*, at 3. Complainant also states, "The doctrine of substantial compliance is inapplicable as an affirmative defense and should be stricken." *Id.*, at 4.

On February 3, 1999, Respondent filed its Opposition to Complainant's Motion. Respondent argues that: (a) motions to strike are disfavored; (b) the merits of a "good faith compliance defense cannot be determined from the face of the pleadings[;]" and (c) as modified by 8 U.S.C. § 1324a(b)(6), the substantial compliance defense is applicable to the alleged paperwork violations.

On February 26, 1999, during the first telephonic prehearing conference, I denied Complainant's Motion To Strike "because of the dearth of authority interpreting the 1996 enactment of 8 U.S.C. § 1324a(b)(6) which appears to require examination of the paperwork verification forms (I–9) in order to adjudicate employer compliance." *First Prehearing Conference Report and Order*, at 1 (Feb. 26, 1999).

II. *Discussion*

Because motions to strike affirmative defenses are not favored and Respondent has sufficiently demonstrated viable legal theories supporting its affirmative defenses in its Answer and Memorandum, Complainant's Motion To Strike is denied. This is so because

> [t]here is great reluctance in the law to strike affirmative defenses, and motions to strike are only granted when the asserted affirmative defenses lack any legal or factual grounds. *United States v. Task Force Security Inc.*, 3 OCAHO 533, at [1344] (1993). Therefore, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. *Id.*; [*United States v. Makilan*, 4 OCAHO 610, at 205 (1994)].

United States v. Palominos-Talavera, 6 OCAHO 896, at 844 (1996).

A. *Good Faith*

Title 8 U.S.C. § 1324a(b)(6), "Good Faith Compliance," added to the employment verification system by section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[3] provides employers with a good faith affirmative defense to liability for noncompliance with certain technical or procedural paperwork requirements of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a, as amended. The affirmative defense of good faith is set forth as follows:

> (6) Good Faith Compliance
> (A) In general
>
> Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.
>
> (B) Exception if failure to correct after notice
> Subparagraph (A) shall not apply if—
>
> (i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,
>
> (ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and
>
> (iii) the person or entity has not corrected the failure voluntarily within such period.
>
> (C) Exception for pattern or practice violators
> Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

Implementing regulations for the good faith compliance provision have not been finalized. Proposed Rules published in the Federal Register by INS on April 7, 1998[4] and INS Interim Guidelines dated March 6, 1997, however, serve to explain INS understanding of congressional intent underlying enactment of 8 U.S.C. § 1324a(b)(6) and INS procedures to enforce the rule. The Proposed Rule and INS Guidelines implement the congressionally mandated distinction between technical or procedural verification failures and

[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 411, 110 Stat. 3009 (1996).

[4] Limiting Liability for Certain Technical and Procedural Violations of Paperwork Requirements, 63 Fed. Reg. 16,909 (to be codified at 8 C.F.R. pt. 274a) (proposed April 7, 1998).

substantive verification failures. The INS concludes that only certain technical or procedural deficiencies in Form I–9 compliance qualify for the good faith defense.

At this juncture, the pleadings provide an insufficient basis on which to draw distinctions between substantive failures on the one hand and technical or procedural failures subject to the good faith defense on the other hand. The merits of an 8 U.S.C. § 1324a(b)(6) defense have not previously been the subject of published OCAHO jurisprudence. A ruling on the viability of Respondent's assertion of the good faith affirmative defense requires examination of each Form I–9 to determine whether the good faith defense is applicable to the Forms I–9 in question and whether the INS acted in a manner consistent with its Interim Guidelines.

B. *Substantial Compliance*

"Substantial compliance has been defined as satisfaction by a party of the standard of "actual compliance with respect to the substance essential to every reasonable objective of the statute[.]' "[5] "[S]ubstantial compliance is an affirmative defense which must be asserted in the answer, as required by the pertinent procedural rule, 28 C.F.R. § 68.9(c)(2)." *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 817 (1996). OCAHO case law recognizes that under appropriate circumstances substantial compliance with paperwork requirements may provide an affirmative defense with regard to liability for a paperwork violation. *United States v. Fortune East Fashion, Inc.* 7 OCAHO 977, at 919–20 (1997); *United States v. Jonel, Inc.*, 7 OCAHO 967, at 745–47 (1997).[6] "[A] showing of substantial compliance depends upon the factual circumstances of each case." *United States v. Chicken by Chickadee Farms, Inc.*, 3 OCAHO 423, at 254 (1992).

> The doctrine of substantial compliance is an equitable one which is designed to avoid hardship in cases where a party does all that can be reasonably expected of it. Whether or not to apply the doctrine, however, can be determined only

[5] *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1096 (1990) (quoting *Stasher v. Hager-Halderman*, 58 Cal. 2d 23, 29 (1962) cited in International Longshoremen and Warehouse Unions Local 35 v. Board of Supervisors, 116 Cal. App. 3d 265, 273 (1981)).

[6] *See also United States v. Chicken by Chickadee Farms, Inc.*, 3 OCAHO 423, at 254 (1992) (citing *U.S. v. James Q. Carlson d/b/a Jimmy on the Spot*, 1 OCAHO 226 (11/2/90); *U.S. v. Manos and Associates, d/b/a The Bread Basket*, 1 OCAHO 130 (2/8/89); *U.S. v. Broadway Tire, Inc.*, 1 OCAHO 226 (8/30/90)).

> in context of the statutory prerequisites. Substantial compliance is not available to defeat the policies underlying statutory provisions.

United States v. J.J.L.C., Inc., 1 OCAHO 154, at 1096 (1990).

> The overriding purpose of the employment eligibility verification system is to assure that no employee is hired without verification of his or her entitlement to work in the United States. Paperwork requirements are an integral part of the congressional scheme for controlling illegal immigration. *United States v. Noel Plastering and Stucco, Inc.*, 3 OCAHO 427, at [315] (1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1993). To the extent that verification errors or omissions could lead to the hiring of unauthorized aliens, they are considered more serious because they undermine the verification system itself. *United States v. Chef Rayko, Inc.*, 5 OCAHO 794, at [584–85] (1995) (modification by Chief Administrative Hearing Officer). Errors which may seem inconsequential in other settings may nevertheless be significant in the context of the verification system.

United States v. Fortune East Fashion, Inc., 7 OCAHO 977, at 919 (1997); *United States v. Jonel, Inc.*, 7 OCAHO 967, at 745–46 (1997).

In order to determine whether the substantial compliance defense is available to Respondent, the Forms I–9 will need to be examined. See *United States v. Fortune East Fashion, Inc.*, 7 OCAHO 977, at 919–21 (1997); *United States v. Jonel, Inc.*, 7 OCAHO 967, at 746–48 (1997); *United States v. Corporate Loss Prevention Assocs., Inc.*, 6 OCAHO 908, at 972–73 (1996) (Modification by Chief Administrative Hearing Officer); *United States v. Northern Michigan Fruit Co.*, 4 OCAHO 667, at 692–98 (1994).

SO ORDERED

Dated this 25th day of March, 1999.

Marvin H. Morse
Administrative Law Judge