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

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 99A00054
WSC PLUMBING, INC., Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR LEAVE TO AMEND ANSWER

(*September 7, 2000*)

I. INTRODUCTION

On July 17, 2000, WSC Plumbing, Inc. (Respondent) filed a Motion for Leave to Amend Answer to add six affirmative defenses. The United States of America (Complainant) filed its Opposition to Respondent's Motion on August 24, 2000. Respondent's Motion is GRANTED IN PART AND DENIED IN PART. Specifically, Respondent may amend its Answer to add (1) the statute of limitations defense with respect to Count II of the Complaint, (2) the "excessive fines" defense, and (3) the "inability to pay civil money penalties" defense. However, Respondent's motion to amend is denied to the extent it seeks to add affirmative defenses alleging (1) that the Notice of Intent to Fine (NIF) was improperly served, (2) that it may not be held liable for "cured" paperwork violations, or (3) that 8 C.F.R. § 274a.2(b)(1)(v) is an invalid regulation.

Respondent must file, by not later than October 10, 2000, a Second Amended Answer to the Complaint. In its Second Amended Answer, Respondent must provide a statement of facts in support of its statute of limitations and "excessive fines" defenses. The Amended Answer shall contain only those affirmative defenses permitted by this Order.

Finally, the parties are expected to confer, either in person or by telephone, concerning a revised joint procedural schedule and to file, not later than October 10, 2000, a REVISED JOINT PROPOSED PROCEDURAL SCHEDULE. If the parties cannot agree on a joint schedule, they

shall submit separate proposed schedules by the due date, explaining why they were unable to agree on a joint schedule.

II. BACKGROUND

On July 29, 1999, Complainant filed a Complaint (Compl.) with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent violated section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a(a)(1)(B), which makes it a violation of law for an employer to hire an individual without complying with the employment eligibility verification procedures specified in INA § 274A(b) and its implementing regulations. The Complaint shows that the Immigration and Naturalization Service (INS) served a Notice of Inspection upon Respondent on June 11, 1997, in which it directed Respondent to produce its Employment Eligibility Verification Forms (I-9 forms) for inspection on June 20, 1997. Compl. "Allegations" at ¶¶ 3, 4, 17, 18. The Complaint also shows that on May 22, 1998, INS served a NIF on Carmelita Combe at Respondent's place of business. Compl. "Jurisdiction" at ¶ 2. Respondent timely requested a hearing before the OCAHO. Id.

The Complaint contains six counts. Count I alleges, with respect to ten individuals, that Respondent failed to make its I-9 forms available for inspection by INS agents as directed in the Notice of Inspection issued on June 11, 1997. Compl. "Allegations" at ¶¶ 3, 4. Count II alleges that Respondent hired eight individuals without preparing I-9 forms in a timely manner. Compl. "Allegations" at ¶ 7. Count III alleges that Respondent hired three individuals without ensuring that they completed section 1 of the I-9 form properly. Compl. "Allegations" at ¶ 10. Count IV alleges that Respondent hired forty-five individuals without properly completing section 2 of the I-9 form. Compl. "Allegations" at ¶ 13. Count V alleges that Respondent hired one individual without completing an I-9 form in a timely manner, Compl. "Allegations" at ¶ 16; in the alternative, Count V alleges, with respect to the same individual, that Respondent failed to make its I-9 forms available for inspection by INS agents as directed in the Notice of Inspection issued on June 11, 1997. Compl. "Allegations" at ¶ 18. Count VI alleges that Respondent hired two individuals without completing I-9 forms in a timely manner, Compl. "Allegations" at ¶ 21; in the alternative, Count VI alleges that Respondent failed to ensure that the same two individuals properly completed section 1 of the I-9 form. Compl. "Allegations" at ¶ 22.

Respondent filed its initial Answer to the Complaint (Answer) on October 21, 1999. During a prehearing conference in this proceeding held on June 13, 2000, Respondent expressed its intention to file a motion with the Court to amend its Answer to add affirmative defenses. I issued an Order directing Respondent to file its motion to amend, if at all, by not later than July 17, 2000. See Third Prehearing Conference Report and Order at 1 (June 14, 2000). I also indicated that, in the event Respondent elected to file its motion to amend, Complainant must file its response by not later than August 21, 2000. Id.

On July 17, 2000, Respondent filed a Motion for Leave to Amend Answer (R. Mot.), as well as a First Amended Answer (Amended Answer). Respondent's Motion seeks the Court's permission

to amend the Answer to raise six affirmative defenses. On August 8, 2000, Complainant filed a Motion for Enlargement of Time in which to respond to Respondent's Motion to Amend. Without objection by Respondent, I issued an Order, dated August 8, 2000, granting Complainant's request and setting a revised deadline of August 25, 2000, for the filing of Complainant's response. On August 24, 2000, Complainant filed its Brief in Opposition to Respondent's Motion for Leave to Amend Answer (C. Opp.).

A. Respondent's Motion to Amend Answer

Respondent seeks to amend its Answer to raise six affirmative defenses. Respondent's first affirmative defense alleges that INS violated 8 C.F.R. § 103.5a(c)(1) when it served its NIF upon Carmelita Combe, an individual identified by INS as Respondent's "former bookkeeper," instead of an "owner or officer of Respondent." R. Mot. at 3-4; Amended Answer at 5. According to Respondent, service of the NIF upon Ms. Combe was not "personal service" as required by 8 C.F.R. § 103.5a(c)(1). Respondent maintains that INS' "failure to properly serve the NIF in this case is a jurisdictional defect of this Complaint and this proceeding," R. Mot. at 4; consequently, Respondent argues that the Complaint must be dismissed. Amended Answer at 5.

Respondent's second affirmative defense alleges that the five-year statute of limitations set forth at 28 U.S.C. § 2462 constitutes a time-bar to "violations alleged in Count II." Amended Answer at 5. It is unclear from the pleadings whether Respondent believes that the statute of limitations bars all eight violations alleged in Count II, or only some of them.

In its third affirmative defense, Respondent asserts that it cannot be held liable under INA § 274A(a)(1)(B) for timeliness violations alleged in Counts II and VI of the Complaint, where those violations were "cured" prior to the date when its I-9 forms were inspected by agents of the INS. R. Mot. at 4; Amended Answer at 5.

Respondent's fourth affirmative defense challenges the validity of 8 C.F.R. § 274a.2(b)(ii)(B)(v). No such regulation exists in the Code of Federal Regulations; however, it appears that Respondent committed an inadvertent scrivener's error, and actually intends to challenge 8 C.F.R. § 274a.2(b)(1)(v), an INS regulation requiring employers to provide the identification number and expiration date of documents proffered by a job applicant as evidence of identity and/or employment authorization. R. Mot. at 4-5; Amended Answer at 5. Respondent contends that this regulation is invalid because it imposes an obligation upon employers that was not specifically contemplated by Congress when it enacted INA § 274A(b). R. Mot. at 5; Amended Answer at 5. Specifically, Respondent maintains that INA § 274A(b) merely requires that an "employer attest that it has examined the documents presented by the employee related to his or her identity and eligibility to work, and that the documents appear to be genuine to the employer." R. Mot. at 5. To the extent the Attorney General's regulation augments the employer's attestation obligations beyond the explicit requirements of the statute, Respondent argues that it is inconsistent with Congressional intent and therefore invalid. Id.

Respondent's fifth affirmative defense alleges that Complainant's requested civil money penalties are "excessive." R. Mot. at 5; Amended Answer at 6. Aside from Respondent's general denial that it violated INA § 274A(a)(1)(B), Respondent does not explain why it believes the requested penalties are excessive.

Respondent's sixth affirmative defense alleges that Respondent is unable to pay the requested civil money penalties. R. Mot. at 5; Amended Answer at 6. Specifically, Respondent alleges that "it is out of business and ceased operation in December 1997, and there are no business assets or income available from which to pay such penalties." Amended Answer at 6.

In anticipation of Complainant's objections, Respondent explains its delay in seeking the present Motion by claiming that the factual bases for its proposed defenses did not manifest themselves until well into the discovery process. R. Mot. at 3, 4, 5, 6. Moreover, Respondent argues that Complainant will not be unduly prejudiced by the addition of its defenses because "they have all been discussed at length between the parties during the progression of this case, with the exception of the service defect of the NIF...." R. Mot. at 2.

B. Complainant's Opposition to Respondent's Motion

As a threshold matter, Complainant opposes Respondent's Motion for Leave to Amend Answer on grounds of undue delay, prejudice, and "lack of good faith." Specifically, Complainant challenges the validity of Respondent's stated justifications for failing to amend its answer at an earlier point in this proceeding, C. Opp. generally, and argues that permitting Respondent to add affirmative defenses ten months after the initial answer was filed will "prejudice Complainant in the form of additional unanticipated litigation expenses and costs." Id. at 10.

In response to Respondent's statement that many of its proposed defenses "have ... been discussed at length between the parties during the progression of this case," Complainant wonders "why [Respondent] elected to wait until after a procedural schedule had been adopted by the Court to file its Motion...." Id. at 5. Moreover, Complainant contradicts Respondent's contention that the factual bases for many of its defenses were only revealed during discovery. According to Complainant, most of the information underlying Respondent's affirmative defenses is derived either from the statute itself, its implementing regulations, or the I-9 forms of Respondent's own employees. Id. at 5-6, 7, 8.

Finally, Complainant challenges the merits of several of Respondent's proposed defenses. With respect to Respondent's argument regarding defective service of the NIF, Complainant contends that the NIF was properly served. Id. at 6-7. In the alternative, Complainant avers that, even if the NIF was served improperly, Respondent has failed to show, or even allege, the existence of any prejudice. Id. According to Complainant, "Respondent cannot and has not asserted that the named Respondent did not receive actual notice of the claims against it." Id. at 7.

Complainant seeks to rebut Respondent's second and third affirmative defenses on the facts. Specifically, Complainant claims that the statute of limitation and cure defenses are "inapplicable to the instant action" because "none of the employment eligibility verification forms for the individuals named in Count II of the Complaint were completed in a timely fashion at either the Section 1 employee attestation or the Section 2 employer verification." Id. at 7-8.

Complainant argues that Respondent's challenge to 8 C.F.R. § 274a.2(b)(1)(v) should be rejected as meritless. Id. at 8-10. Complainant points out that INA § 274A(b)(1)(A) contains an explicit delegation of legislative authority to the Attorney General to designate or establish a form to be used by employers when carrying out their attestation and verification obligations. Id. at 9. Quoting the Supreme Court's landmark opinion in Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984), Complainant explains that "legislative rules" such as 8 C.F.R. § 274a.2(b)(1)(v) must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." C. Opp. at 9. Complainant argues that 8 C.F.R. § 274a.2(b)(1)(v) is not "manifestly contrary to the statute" because "the statute is silent regarding the specific procedures to be followed by employers to comply with the requirements of the Act." Id. Moreover, Complainant rejects the notion that the regulation is "arbitrary" or "capricious;" claiming instead that "the regulatory scheme ... are [sic] a reasonably designed process for carrying out the mandate of the statute." Id. at 9-10.

Complainant makes no substantive legal arguments in opposition to Respondent's fifth and sixth affirmative defenses, which address the "excessiveness" of Complainant's requested penalties and Respondent's inability to pay them, respectively.

III. STANDARD OF REVIEW

A. Motions to Amend Pleadings Under the OCAHO Rules and Federal Rule of Civil Procedure 15

The OCAHO Rules of Practice permit amendments to pleadings "upon such conditions as are necessary to avoid prejudicing the public interest or the other party." See 28 C.F.R. § 68.9(e) (1999). The OCAHO rule is analogous to and is modeled upon Rule 15(a) of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to the case law developed by the federal courts in determining whether to permit requested amendments under Rule 15(a). See, e.g., United States v. WSC Plumbing, Inc., 8 OCAHO no. 1045, at 5 (2000), 2000 WL 831834, at *4; United States v. Agripac, Inc., 8 OCAHO no. 1028, at 2 (1999), 1999 WL 1295207, at *1-2;

United States v. Mr. Z Enterprises, 1 OCAHO no. 162, 1128, at 1129 (1990), 1990 WL 512154, at *1; accord 28 C.F.R. § 68.1 (1999).[1] Because this action arose in the State of California, decisions of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) are pertinent. However, to the extent that those decisions concern Rule 15 of the Federal Rules of Civil Procedure, rather than the OCAHO Rules of Practice, those decisions are persuasive but not binding authority.

B. Ninth Circuit Standards

The dominant Ninth Circuit rule governing motions to amend pleadings under Rule 15(a) appears in DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). According to Leighton, "'[r]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality,'" 833 F.2d at 186 (quoting United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). However, the Leighton court makes clear that motions for leave to amend should not be granted automatically. Specifically, the court identified five factors relevant to determining the propriety of granting a motion for leave to amend: (1) bad faith by the movant; (2) undue delay; (3) prejudice to the non-moving party; (4) whether the movant has previously attempted to amend the pleading; and (5) whether the amendment would be futile. Id. & n.3. Of these five factors, bad faith, prejudice and futility are most important. Indeed, undue delay appears to be mere evidence of prejudice or bad faith rather than an independent factor, and therefore delay alone is insufficient to justify denying a motion to amend. See Leighton, 833 F.2d at 186; Bowles v. Reade, 198 F.3d 752, 758-59 (9th Cir.

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[1] OCAHO precedents appearing in bound volumes or on OCAHO's website are cited according to the following format:

United States v. Davila, 7 OCAHO no. 936, 252, at 262 (1997).

(1) "United States v. Davila" refers to the case name.
(2) "7 OCAHO" refers to the volume number of the relevant bound volume containing OCAHO precedents.
(3) "no. 936" refers to the reference number assigned to the specific decision. Each published OCAHO decision bears a chronological reference number. In the example, "no. 936" reflects that Davila is the 936th OCAHO decision that has been published.
(4) "252" refers to the page number of the relevant bound volume upon which the cited decision begins. Thus, in the example, Davila begins on page 252 of bound volume 7.
(5) "at 262" refers to the pinpoint citation for the language or concept that is being cited.
(6) When citing looseleaf opinions that have been published on OCAHO's website but that have not yet been paginated for publication in a bound volume, no first page is indicated in the citation. Instead, such cases are cited only by reference number and pinpoint citation. Thus, in the following citation, Ruan v. U.S. Navy, 8 OCAHO no. 1046, at 2 (2000), "at 2" refers to the pinpoint citation within the looseleaf opinion.

Published OCAHO decisions are available through Westlaw (database identifier FIM-OCAHO), or through OCAHO's website (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

1999); Webb, 655 F.2d at 980 (citing Howey v. United States, 481 F.2d 1187 (9th Cir. 1973)). Similarly, recidivism in the filing of motions to amend–which the Leighton court raises in a footnote–seems to constitute a basis for denial of a motion to amend only insofar as it reflects bad faith on the part of the movant; it is not a dispositive factor in itself and is only "occasionally considered." Leighton, 833 F.2d at 186 n.3.

Rule 15(a)'s bias in favor of granting leave to amend is reflected in the Ninth Circuit's conclusion that a trial court's denial of a motion for leave to amend must be supported by "contemporaneous specific findings" either of prejudice, bad faith or futility. Id. at 186-87. Indeed, a trial court's failure to set forth such findings constitutes an abuse of discretion warranting reversal. Id. at 187.

1. Futility

Leighton holds that "'futile amendments should not be permitted.'" 833 F.2d at 188 (quoting Klamath Lake Pharm. Assoc. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir.), cert. denied, 464 U.S. 822 (1983)). Elaborating on this general principle, the Ninth Circuit held in Johnson v. American Airlines, Inc., 834 F.2d 721 (9th Cir. 1987), that "courts have discretion to deny leave to amend ... for 'futility,' and futility includes the inevitability of a claim's defeat on summary judgment." Id. at 724 (internal citations omitted). Thus, where a legal claim sought to be added is clearly unsupported by relevant facts, the motion for leave to amend should be denied.

2. Prejudice

The Leighton Court warned that "[t]he party opposing amendment bears the burden of showing prejudice." 833 F.2d at 187 (citing Beeck v. Aqua-Slide 'N' Dive Corp., 562 F.2d 537, 540 (8th Cir. 1977)). It is not possible to define "prejudice" with surgical precision. Of course, all amendments effect prejudice to the non-moving party by making the lawsuit more burdensome to litigate. That is not the sort of prejudice Leighton seeks to prevent. Rather, the non-moving party must demonstrate that it will suffer some peculiar, unforeseeable, and unjustifiable disadvantage if Respondent is permitted to amend its answer.

3. Bad Faith

Like prejudice, "bad faith" is a somewhat indeterminate concept. However, some degree of generalization is possible. At the very least, the term "bad faith" contemplates more than a mere lack of diligence; rather, it implies a culpable state of mind "affirmatively operating with furtive design or ill will." See BLACK'S LAW DICTIONARY at 127 (5th ed. 1981).

C. Affirmative Defenses Under the OCAHO Rules

The OCAHO Rules of Practice indicate that a Respondent's Answer "shall include ... a statement of the facts supporting each affirmative defense." See 28 C.F.R. § 68.9(c)(2). By requiring

respondents to provide a statement of facts in support of each affirmative defense, the OCAHO rule deviates from the more liberal pleading requirement of Federal Rule of Civil Procedure 8(c), which permits affirmative defenses to be pleaded with only a minimal degree of specificity. Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 361 (8th Cir. 1997); Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 444-45 (D.C. Cir. 1994).

Thus, if a responding party in an OCAHO proceeding fails to include a statement of facts in support of an affirmative defense, an OCAHO Judge may, on motion, strike that defense from the Answer. United States v. A & A Maintenance Enter., Inc., 6 OCAHO no. 852, 265, at 267 (1996), 1996 WL 382262, *2. In the alternative, an OCAHO Judge may, either on motion or *sua sponte*, require a defending party to supplement its affirmative defenses with the required statements of facts. Cf. United States v. Mark Carter d/b/a Dixie Indus. Serv. Co., 6 OCAHO no. 865, 458, at 467 (1996), 1996 WL 455009, *7.

IV. ANALYSIS

As discussed previously, Leighton requires that I consider five factors when determining the propriety of granting a motion for leave to amend: (1) bad faith by the movant; (2) undue delay; (3) prejudice to the non-moving; (4) whether the movant has previously amended the pleading; and (5) futility of the amendment. Leighton, 833 F.2d at 186 & n.3. Applying the five Leighton factors to the facts of the instant proceeding, I conclude that Respondent's Motion for Leave to Amend Answer must be GRANTED IN PART AND DENIED IN PART. Specifically, Respondent's Motion is GRANTED with respect to its second, fifth and sixth affirmative defenses (i.e., the statute of limitations defense, the "excessive fines" defense, and the "inability to pay" defense). While Complainant is correct that Respondent has failed adequately to explain why it waited so long before seeking to raise some of these defenses, the Ninth Circuit has made it quite clear that delay alone is not an adequate ground for denying a motion to amend. See Leighton, 833 F.2d at 186; Bowles, 198 F.3d at 758-59. Respondent has not previously amended its answer, so the fourth factor does not apply her. Complainant must show, in addition to delay, that the requested amendments are futile, prejudicial, or the product of bad faith. With respect to the three proposed amendments discussed above, Complainant has failed to satisfy its burden of proof in this regard.

However, Respondent's Motion is DENIED with respect to its first affirmative defense (i.e., the "defective service of the NIF" defense), its third affirmative defense (i.e., the so-called "cure" defense), and its fourth affirmative defenses (i.e., the "invalidity of INS regulations" defense). Complainant has demonstrated to my satisfaction that the addition of each of these three proposed amendments would be futile.

A. Respondent's First Affirmative Defense: Defective Service of the NIF

In its first affirmative defense, Respondent contends that INS erred when it served the NIF upon Carmelita Combe instead of an "officer or owner of Respondent." In support of its argument, Respondent cites 8 C.F.R. § 103.5a(c)(1), which states that "in any proceeding which is initiated by

the [INS], with proposed adverse effect, service of the initiating notice ... shall be accomplished by personal service...."

I conclude that it would be futile to permit Respondent to add its first affirmative defense to the Answer. First, evidence appearing in the record leads me to conclude that Ms. Combe possessed either actual or apparent authority to accept service of the NIF on Respondent's behalf. Second, Respondent has failed to show, or even allege, that the claimed defect in service somehow deprived it of notice that proceedings had been initiated against it. Indeed, the record contains evidence indicating that the claimed defect in service, if it existed at all, effected no prejudice to Respondent. Therefore, Respondent's Motion for Leave to Amend Answer is DENIED with respect to its first affirmative defense.

1. Carmelita Combe Possessed Actual or Apparent Authority to Accept Service of Process on Respondent's Behalf

As a threshold matter, I note that Respondent has apparently misconstrued the regulations governing service of process in proceedings initiated under INA § 274A. Respondent is correct in asserting that the NIF is the "initiating notice" in such proceedings, and is also correct when it maintains that the NIF must be personally served upon Respondent. However, Respondent is incorrect when it implies that a NIF must be personally served upon an "owner or officer" of a corporation. According to 8 C.F.R. § 103.5a(a)(2)(iii), one permissible method of personal service involves "[d]elivery of a copy [of the NIF] at the office of an attorney or other person, including a corporation, by leaving it with a person in charge." Clearly, one may be "a person in charge" of a corporation's office without being an "owner or officer" of the corporation. Therefore, the threshold question under 8 C.F.R. § 103.5a is not whether Ms. Combe was an "owner or officer" of Respondent; instead, the proper question is whether she was "a person in charge" at Respondent's office on the date the NIF was served.

In its opposition to Respondent's Motion for Leave to Amend, Complainant contends that Ms. Combe "clearly held herself out to the INS agents tasked with serving the [NIF] as a person authorized to accept service on behalf of WSC Plumbing, Inc." C. Opp. at 7. The record contains specific evidence to support Complainant's assertion. Respondent's initial Answer, filed on October 21, 1999, bears numerous attachments indicating that, during INS' 1997 inspection of Respondent's I-9 forms, Ms. Combe acted as Respondent's liaison with INS inspectors. See Answer (Exhibit 2, Exhibit 4). In one document, entitled "Employee Information Certification" and dated October 10, 1997, Ms. Combe certified, on Respondent's behalf, that the information provided in the document was true and correct. See Answer (Exhibit 2). Moreover, another series of documents, including a FAX cover sheet and two sheets re-verifying the work eligibility of individuals listed on INS' Notice of Inspection Result (NOIR), also bear Ms. Combe's signature and certification. See Answer (Exhibit 4). Finally, the Answer itself indicates that the correspondence contained in these exhibits was "between Respondent and the INS." See Answer at 2.

By permitting Ms. Combe to certify the authenticity of documents on Respondent's behalf, and by referring to correspondence between Ms. Combe and INS agents as correspondence between itself and INS agents, Respondent implicitly acknowledges that, at the time of INS' investigation in the summer and fall of 1997, Ms. Combe had actual authority to represent it in its dealings with INS. Moreover, even if this actual authority no longer existed on May 22, 1998, the date the NIF was served, Ms. Combe still retained "apparent authority" to act as Respondent's contact with INS agents:

> [w]hen an agent holds a position within an organization, or has been placed in charge of a transaction or situation, a third party acts reasonably in believing that the agent has authority to do acts consistent with the position the agent occupies absent knowledge of circumstances that would lead a reasonable third party to inquire into the existence, extent, or nature of the agent's authority.

RESTATEMENT (THIRD) OF AGENCY § 2.03 (T.D. No. 1, 2000).

The evidence indicates that Respondent willingly permitted Ms. Combe to act on its behalf during INS' 1997 investigation. Once Respondent conferred this authority upon Ms. Combe, the INS agents involved in this proceeding had reasonable grounds for believing (in the absence of any indication to the contrary by Respondent or Ms. Combe) that she would retain that authority. Apparently, Respondent never apprized INS of any change in the nature of Ms. Combe's authority. Consequently, the INS agents had a reasonable basis for believing that Ms. Combe possessed authority to receive the NIF on Respondent's behalf. Having induced the INS agents involved in this proceeding to rely upon Ms. Combe's authority, Respondent will not now be heard to argue that the INS agents' reliance was unreasonable.

In conclusion, I find that Ms. Combe was "a person in charge" of Respondent's office for purposes of service of the NIF. She either possessed actual authority to represent Respondent in its day-to-day dealings with INS agents, including the receipt of official documents such as a NIF, or she possessed "apparent authority" to do so. In either case, INS did not err when it served a copy of the NIF on Ms. Combe at Respondent's place of business.

2. Prejudice to Respondent

Assuming, *arguendo*, that Ms. Combe had no authority to receive the NIF on Respondent's behalf, Respondent's first affirmative defense would still fail because Respondent has failed to show, or even so much as allege, that it was prejudiced by the defect in service.

The purpose of a NIF is to give employers adequate notice of the charges against them and to provide them with necessary information regarding their right to request a hearing. Cf. Mester Mfg. v. INS, 879 F.2d 561, 569 (9th Cir. 1989). Where an employer actually receives the NIF and files a timely request for hearing, the employer has no valid grounds to seek dismissal of the

Complaint on the basis of technical defects in service. See United States v. Spring & Soon Fashion, Inc., 7 OCAHO no. 982, 960, 968-69 (1997); United States v. Mario Saikhon, 1 OCAHO no. 279, 1811, 1818-19 (1990), 1990 WL 512080, *7; cf. Crane v. Battelle, 127 F.R.D. 174, 177-78 (S.D. Cal. 1989).

The Complaint in this proceeding contains several exhibits, the second of which is a copy of Respondent's Request for Hearing (RFH), signed by William S. Combe and dated June 16, 1998. Compl. (Exhibit 2). In this RFH, which Respondent indicated was being written "[p]ursuant to the Notice of Intent to Fine received on or about May 22, 1998," Respondent requested assistance from its local INS office regarding the procedures involved in contesting INS' proposed fines. Because Respondent concedes that it actually received the NIF on or about the date it was served, and also timely requested a hearing pursuant to the directions contained in the NIF, I find that Respondent was not prejudiced by the alleged defects in service. If Respondent had raised this affirmative defense in its initial Answer, I would have sustained a motion to strike it. Therefore, it would be futile to permit Respondent to add its first affirmative defense to the Answer; Respondent's Motion for Leave to Amend Answer must be denied to the extent that it seeks to add this defense.

3. Defects in Service of Process Under the Federal Rules of Civil Procedure

I also note that Rule 12(h)(1) of the Federal Rules of Civil Procedure indicates that "a defense of ... insufficiency of service of process is waived ... if it is [not] included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Hill v. Blind Indus. & Servs. of Maryland, 179 F.3d 754, 757 (9th Cir. 1999). An Answer may be amended "as a matter of course" under Rule 15(a) only if the amendment is sought within twenty days after the initial Answer is served. In this proceeding the requested amendment is being sought nearly ten months after the initial Answer was served; thus, if this action were governed by the Federal Rules of Civil Procedure, I would be compelled to deny Respondent's Motion for Leave to Amend, with respect to its first affirmative defense, on grounds of untimeliness.

B. Respondent's Second Affirmative Defense: Statute of Limitations as to Count II

Count II of the Complaint alleges that Respondent hired eight individuals without completing I-9 forms in a timely manner. Compl. "Allegations" at ¶¶ 5, 7. Respondent is correct in asserting that the statute of limitations codified at 28 U.S.C. § 2462 may constitute a bar to Respondent's liability with respect to any alleged verification failure in Count II that occurred more than five years prior to July 29, 1999–the date the Complaint was filed. See United States v. Curran Eng'g Co., Inc., 7 OCAHO no. 975, 874, at 892-93 (1997), 1997 WL 1051469, *13-14.

Most verification failures are, by their nature, "continuing violations" until cured. See Curran Eng'g, 7 OCAHO no. 975, at 895; United States v. Rupson of Hyde Park, 7 OCAHO no. 940, 331, at 332 (1997), 1997 WL 1051441, *1. However, "timeliness" violations, such as those alleged in

Count II of the present Complaint, represent an important exception to this general rule. As a simple matter of logic, a timeliness violation is not a "continuing" violation:

> An employer must ensure that an employee completes section one of the I-9 form at the time of hire. An employer itself must complete section two of the I-9 form within three business days of the date of hire. An employer violates the timeliness requirements by failing to complete, or to ensure completion, of an I-9 form by the date that the completion is required. The timeliness violation is frozen in time at that point. Unlike the [other] types of [paperwork] violations ... , a timeliness violation is not a continuing violation. An I-9 form either is completed in a timely fashion, or it is not.... As a result, I find that a failure to ensure completion of section one [of the I-9 form] in a timely manner occurs the day after the employee is hired, and that a failure to complete section two [of the I-9 form] in a timely manner occurs on the day after the third business day after hire.

Curran Eng'g, 7 OCAHO 975, at 897 (internal citations omitted). Thus, depending upon which section or sections of each I-9 form that Respondent failed to complete in a timely manner, the five-year statute of limitations began to run on either the first business day after hiring or the fourth business day after hiring.

Respondent's I-9 forms have not yet been received in evidence by the Court. Consequently, I am unable to determine from the record whether the eight timeliness violations alleged in Count II of the Complaint occurred more than five years prior to July 29, 1999. In view of this fact, I find that Respondent's addition of the statute of limitations defense would not be futile because the legal claim Respondent seeks to add would not inevitably be defeated on motion for summary decision or motion to strike affirmative defenses.

Moreover, Complainant is not unduly prejudiced by Respondent's assertion of the statute of limitations defense because this defense, if applicable at all, was effective at the outset of this proceeding. See Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979). If Count II of the Complaint was time-barred on July 29, 1999, it remains time-barred today.

Finally, Complainant has not demonstrated that Respondent's delay in filing its Motion for Leave to Amend Answer was motivated by bad faith. On the record before me, I am unable to conclude that Respondent delayed in filing the present Motion out of a conscious desire to deceive or abuse Complainant or the Court. Respondent may have inadvertently overlooked the availability of the statute of limitations defense until recently. In any event, Complainant has adduced no evidence, apart from the mere fact of delay, to suggest that Respondent filed its Motion for Leave to Amend on the basis of a sinister motive.

In conclusion, Respondent's Motion for Leave to Amend Answer is GRANTED with respect to the statute of limitations defense. The requested amendment is neither futile, prejudicial, nor sought in bad faith. At the same time, Respondent's statement that the statute of limitations constitutes a bar to "violations alleged in Count II" is too vague to constitute a "statement of facts" within the meaning of 28 C.F.R. § 68.9(c)(2). When Respondent files its Second Amended Answer, by not later than October 10, 2000, it must provide details as to which of the eight allegations in Count II are time-barred. Moreover, Respondent must provide a factual statement supporting its defense; specifically, Respondent should be prepared to demonstrate that the violations alleged in Count II occurred prior to July 29, 1994.

C. Respondent's Third Affirmative Defense: "Cure" as to Timeliness Violations Alleged in Counts II and VI

Count II and Count VI of the Complaint both allege that Respondent failed to complete its I-9 forms in a timely manner. Compl. "Allegations" at ¶¶ 7, 21. The bases for these allegations appear at 8 C.F.R. § 274a.2(b)(1)(i)(A), which requires employers to ensure that job applicants complete section 1 of the I-9 form properly "at the time of hire," and 8 C.F.R. § 274a.2(b)(1)(ii)(B), which requires employers to complete section 2 of the I-9 form within three days of hire.

In its third affirmative defense, Respondent argues that it cannot be held liable for the timeliness violations alleged at ¶¶ 7 and 21 of the Complaint because those violations were "cured" prior to INS' inspection of Respondent's I-9 forms in June, 1997. R. Mot. at 4. Moreover, Respondent cites United States v. Naim Ojeil and Samoeil Ishk, Individually, and d.b.a Naime's Film & Television Beauty Supply (hereafter Naime's), 7 OCAHO no. 984, 982 (1998),1998 WL 745989, as support for the proposition that timeliness violations are curable. In Naime's, an OCAHO Judge was confronted with a complaint alleging that respondent had failed, with respect to eleven employees, to complete section 2 of its I-9 forms within three business days of hire. See Naime's, 7 OCAHO no. 984, at 983. In its defense, respondent contended that it should not be punished because it had corrected all of the alleged violations (i.e., by completing section 2 of the relevant I-9 forms) prior to the date of INS' inspection. Id. at 985. The Judge was persuaded by respondent's argument:

> The federal policy embodied in [INA § 274A]–i.e., removal of incentives to violate immigration law by imposing on the employer liability for hiring unauthorized aliens and establishing a verification regimen to ensure compliance–is not advanced by pursuing as an incorrigible continuous violator an employer who appears to have come into compliance by the date of inspection. The government interest in encouraging employers to correct mistakes is considerable, and is undermined by punishing employers who correct paperwork mistakes at or before inspection.

Id. at 986. This language in Naime's appears to support Respondent's argument that an employer cannot be punished for paperwork violations, including failure to complete the I-9 forms in a timely manner, that are cured prior to INS inspection.

Respondent's Motion for Leave to Amend Answer to add the third affirmative defense is DENIED on grounds of futility. Moreover, to the extent that Naime's concludes that employers can immunize themselves from liability under INA § 274A(a)(1)(B) by correcting verification failures prior to the date of the INS inspection, I expressly disagree with its holding.

1. The "Cure" Defense, Generally

In Naime's, the Judge stated that, "[a]lthough a 'paperwork violation is not a one-time occurrence, but a continuous violation until corrected', a paperwork mistake, once cured, is no longer a violation." Naime's, 7 OCAHO no. 984, at 985 (quoting in part Rupson of Hyde Park, 7 OCAHO no. 940, at 332). The Judge therefore concluded that, accepting as true Complainant's contention that Naime's failed to complete section 2 within three days of hire, Naime's violations ceased if it corrected the section 2 attestation for the I-9 forms before the INS' on-site inspection. Id. at 986. To the extent this means that a verification failure, once corrected, ceases to be a "continuing violation," I agree. See Curran Eng'g, 7 OCAHO no. 975, at 895-96. However, contrary to Respondent's assertion, a corrected verification failure is still a punishable paperwork violation with respect to the period of time in which it occurred; its status as a violation is not "cured" by subsequent events.

In Part IV.B. of this Order, *supra* at 11, I noted that most verification failures are "continuing violations" until cured. In this context, the phrase "continuing violation" is a term of art; it contemplates an unlawful course of conduct or a violation which is committed over a span of time. Thus, when an employer fails to complete section 2 of an I-9 form properly, the employer's violation is self-perpetuating (or "continuing") throughout the period of non-compliance. However, a "continuing" verification failure does not cease to exist as a punishable violation simply because the offending course of conduct comes to an end; rather, the violation merely ceases to be self-perpetuating at that point.

Naime's makes a valid point when it calls into question the wisdom of an enforcement policy that draws no distinctions between cured and uncured paperwork violations. Certainly, proportionality in enforcement is, or should be, an important goal of the INA. At the same time, this does not mean that offenders who correct their verification errors are immunized from all liability. Such a solution is itself disproportionate, and may create a moral hazard that generates more problems than it solves. Instead, the most sensible course is to treat different offenders differently with respect to penalty, but to treat all offenders as offenders. See United States v. Applied Computer Tech., 2 OCAHO no. 367, 524, at 527 (CAHO 1991), 1991 WL 531878, *3 (stating that "the labeling of a violation as *de minimis* does not alter the fact that it is a violation" and holding that "IRCA does not permit a finding of liability without imposition of a penalty."); United States v.

Draper-King Cole, Inc., 7 OCAHO no. 933, 212, at 214 & n.1 (1997), 1997 WL 1051434, *2 & n.1, aff'd, 7 OCAHO no. 933, 211 (CAHO 1997).

According to 8 C.F.R. § 274a.2(b)(1), an employer that fails to complete its I-9 forms in a timely manner is, without question, an offender. However, an employer who cures its own verification failures possesses certain distinct advantages over "incorrigible continuous violators" of the type discussed in Naime's. For example, as Part IV. B. of this Order illustrates, an employer who "cures" a verification failure can seek repose under the five-year statute of limitations set forth at 28 U.S.C. § 2462. In this sense, "cure," while not itself a defense, is a catalyst for the application of another defense. Moreover, when determining the proper penalty to be imposed for a proven paperwork violation, an OCAHO Judge is authorized to consider, among other things, "the good faith of the employer." See INA § 274A(a)(5). In many cases, an employer that has cured its paperwork violations prior to INS inspection will be deemed to have acted in good faith.

2. "Cure" as a Defense to Timeliness Violations

In my discussion of Respondent's statute of limitations defense, *supra* at 11-12, I observed that "timeliness" violations, i.e., violations involving an employer's failure to complete its I-9 forms by the deadlines established in 8 C.F.R. § 274a.2(b)(1), are inherently non-"continuing." By the same logic, I also hold that timeliness violations are "incurable." This is so because timeliness violations, unlike verification failures, are "frozen" at a pre-ordained moment in time. Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is "perfected," and the employer is powerless to "cure" it.

By concluding that timeliness violations, such as those alleged in Counts II and VI of the instant Complaint, can be cured, Respondent fails to distinguish between timeliness violations on the one hand and verification or attestation failures on the other. The former type of violation is time-sensitive, and is therefore irreversible at the moment it occurs; by contrast, the latter type of violation is "continuous" rather than time-sensitive, and is therefore correctable at any time. By concluding that the correction of verification or attestation failures also cures any timeliness violations associated with the I-9 form, Respondent blurs the important distinction between timeliness violations and verification failures, and effectively precludes the United States from using the three-day verification requirement of 8 C.F.R. § 274a.2(b)(1)(ii)(B) as a basis for alleging a violation of INA § 274A(a)(1)(B). Such a result would, as a practical matter, write the three-day verification deadline out of the regulations. Timeliness violations occur, or are alleged, only when an employer performs its verification obligations properly, but late. A properly-completed I-9 form, by its nature, contains no verification defects; thus, under Respondent's theory, such an I-9 form can never form the basis for a paperwork violation, even though the employer may have completed section 2 of the I-9 form months, or even years, after hiring the individual. Respondent overlooks the fact that, if the I-9 form contained curable verification defects, Complainant would not have alleged a timeliness violation in the first place; instead, it would have alleged that the employer failed to ensure proper completion of section 1 of the I-9 form or, in the alternative, failed to complete section 2 of the I-9 form properly.

3. Synthesis

Leighton holds that "'futile amendments should not be permitted.'" 833 F.2d at 188 (quoting Klamath Lake Pharm. Assoc. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir.), cert. denied, 464 U.S. 822 (1983)). Elaborating on this general principle, the Ninth Circuit held in Johnson v. American Airlines, Inc., 834 F.2d 721 (9th Cir. 1987), that "courts have discretion to deny leave to amend ... for 'futility,' and futility includes the inevitability of a claim's defeat on summary judgment." Id. at 724 (internal citations omitted). Thus, where a legal claim sought to be added is clearly unsupported by relevant facts, the motion for leave to amend should be denied.

Respondent's argument that a "cure" defense exists is unsupported by the statute or regulations, contrary to sound policy and, in the context of timeliness violations, fundamentally illogical. If it had been included as an affirmative defense in Respondent's initial answer, I would have granted a motion to strike it. Therefore, I find that permitting Respondent to amend its Answer to add this defense would be futile.

D. Respondent's Fourth Affirmative Defense: Invalidity of 8 C.F.R. § 274a.2(b)(1)(v)

As previously established, Respondent challenges the validity of 8 C.F.R. § 274a.2(b)(1)(v), which requires employers to indicate on the I-9 form the identification number and expiration date of documents proffered by an employee as proof of identity and/or eligibility to work. According to Respondent, this regulation is inconsistent with the simple "verify and attest" requirements of INA § 274A(b)(1)(A). I find that Respondent's challenge to 8 C.F.R. § 274a.2(b)(1)(v) is so lacking in merit that it would be futile to permit Respondent to raise this affirmative defense in its Answer. Therefore, Respondent's Motion for Leave to Amend Answer is DENIED with respect to Respondent's fourth affirmative defense.

As a threshold matter, there is some question as to whether administrative tribunals within the Department of Justice have authority to entertain direct challenges to the validity of regulations adopted by the Attorney General. See Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117-18 (6th Cir. 1984). In Gibas, the Sixth Circuit held that the Benefits Review Board (BRB), an administrative tribunal within the Department of Labor, possessed authority to adjudicate challenges to the validity of regulations promulgated by the Secretary of Labor. Id. at 1117 (citing Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940)). The Gibas Court recognized that the BRB lacked inherent constitutional authority to conduct judicial review of legislation or regulations, such inherent authority being confined to the Article III Judiciary. Id. However, the court also found that Congress had expressly vested the BRB with authority to decide substantive questions of law. Id. at 1117-18. Because the validity of the Secretary of Labor's regulations was a substantive question of law, the Gibas Court concluded that the BRB necessarily possessed authority to rule on substantive legal challenges to those regulations.

I find that, like the BRB, Administrative Law Judges within OCAHO also possess authority to adjudicate direct challenges to the Attorney General's regulations implementing INA § 274A. Administrative Law Judges are not part of the Article III Judiciary, and therefore lack inherent judicial review power. However, both INA § 274A(e)(3)(B) and 28 C.F.R. § 68.28(a)(6) direct OCAHO Judges to conduct hearings in accordance with relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et. seq. One of the obligations imposed on an adjudicator under the APA is to issue "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record." See APA § 557(c)(3)(A). Indeed, the Attorney General's Manual on the Administrative Procedure Act itself recognizes that an Administrative Law Judge's powers and decisional independence come directly from the APA, "without the necessity of express agency delegation;" therefore, "an agency is without the power to withhold such powers" from its Administrative Law Judges. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 140 (2d ed. 1992). Because the validity of the Attorney General's regulations implementing INA § 274A(b) is a "material issue of law" that has been "presented on the record" through Respondent's Motion for Leave to Amend Answer, the APA empowers me to consider and rule on this issue.

INA § 274A(b)(1)(A) states that an employer

> must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the [employee] is not an unauthorized alien by examining [appropriate documents]. [An employer] has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine.

The statutory provision quoted above contains an express delegation of legislative authority to the Attorney General to designate or establish, by regulation, an employment eligibility verification form. Pursuant to this delegation of authority, the Attorney General created the I-9 form and issued regulations instructing employers in how to complete it. One such regulation, codified at 8 C.F.R. § 274a.2(b)(1)(v), indicates in part that "[t]he identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I-9." Respondent now challenges the validity of this regulation, arguing that INA § 274A(b)(1) "does not contain any requirement that an employer record the document number or expiration date of documents presented by an employee related to the Form I-9...." R. Mot. at 5. According to Respondent, the fact that the regulation imposes a requirement that does not appear in explicit terms in INA § 274A dictates that the regulation is "invalid and inconsistent with the legislative intent expressed in the specific provisions of the Code." Id.

Respondent appears to overlook the fact that 8 C.F.R. § 274a.2(b)(1)(v) is a legislative rule. It is in the very nature of a "legislative" rule to "'grant rights, impose obligations, or produce other

significant effects on private interests.'" See Zaharakis v. Heckler, 744 F.2d 711, 713 (9th Cir. 1984) (quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980)). In large part, Congress delegates its legislative authority to administrative agencies out of a belief that the agency possesses a comparative advantage in constructing complex and highly-detailed regulatory schemes. The entire purpose of such delegations would be subverted if an agency were prohibited from imposing any obligation not expressly identified in the governing statute. Thus, 8 C.F.R. § 274a.2(b)(1)(v) is not "inconsistent" with INA § 274A(b)(1)(A), as Respondent asserts; on the contrary, the regulation complements the statute in an entirely reasonable manner. Specifically, by requiring employers to indicate the identification number and expiration date of documents, the regulation permits employers and INS inspectors to determine whether "the document reasonably appears on its face to be genuine." A social security card that contained no number, or a demonstrably false number, would not reasonably appear to be genuine on its face; similarly, an expired temporary work authorization card would not be a reliable indicator of an employee's eligibility to work. Moreover, requiring employers to indicate the expiration date of documents permits INS inspectors to determine whether an employer has complied with its obligation to re-verify the employment eligibility of individuals who possess only temporary work authorization.

The regulation codified at 8 C.F.R. § 274a.2(b)(1)(v) is a legislative rule, propounded by the Attorney General pursuant to an explicit delegation of congressional authority. Moreover, the regulation was enacted in full compliance with the notice and comment procedures set forth in the APA. See 55 Fed. Reg. 25,928, 25,929 (June 25, 1990); 56 Fed. Reg. 41,767, 41,784 (August 23, 1991). As such, it has the force and effect of law and must be given deference unless arbitrary, capricious, or manifestly contrary to the statute it purports to implement. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). I find that the regulation is neither arbitrary, capricious, nor manifestly contrary to INA § 274A(b)(1)(A). Thus, it would be futile to permit Respondent to add its fourth affirmative defense to the Answer. Had Respondent raised this affirmative defense in its initial Answer, I would have sustained a motion to strike it.

E. Respondent's Fifth Affirmative Defense: Excessive Fines

Respondent argues, in both its initial Answer and its fifth affirmative defense, that the civil money penalties requested in the Complaint are "excessive." Apart from its general argument that Respondent's Motion for Leave to Amend Answer is untimely, prejudicial, and reflective of a lack of good faith, Complainant makes no substantive arguments in opposition to Respondent's raising the "excessive fines" defense. In light of the fact that Respondent raised the issue of excessive fines in its initial Answer, albeit not in the form of an affirmative defense, I find that Complainant will not be prejudiced by permitting Respondent to amend its Answer to add its fifth affirmative defense. Indeed, the inclusion of this issue in an affirmative defense may actually benefit Complainant, in that Respondent must now support its excessive fines argument with a statement of facts. Thus, Respondent's Motion for Leave to Amend Answer is GRANTED to the extent it seeks to add an "excessive fines" defense to the Answer.

Neither Respondent's Motion nor its Amended Answer contain any factual support for Respondent's assertion that Complainant's requested civil money penalties are excessive. Consequently, Respondent's fifth affirmative defense is as yet unsupported by a statement of facts, as required by 28 C.F.R. § 68.9(c)(2). In order to comply with OCAHO Rules, Respondent's Second Amended Answer must contain, in addition to the fifth affirmative defense itself, a statement of facts explaining why Respondent believes the requested penalties are excessive. Specifically, Respondent should discuss those mitigating factors that Complainant has allegedly failed to consider when calculating its requested penalties.

F. Respondent's Sixth Affirmative Defense: Inability to Pay Civil Money Penalties

In its sixth affirmative defense, Respondent argues that it is unable to pay the civil money penalties requested in the Complaint. Complainant offers no specific opposition to Respondent's addition of this defense. In any event, undue delay and prejudice are generally not valid grounds for opposing the addition of an "inability to pay" defense. As a matter of logic, Respondent's ability to pay civil money penalties depends entirely upon Respondent's financial condition at the time the defense is raised. Thus, Respondent's Motion for Leave to Amend Answer is GRANTED to the extent that it seeks to add an "inability to pay" defense to the Answer. Moreover, because this defense is self-explanatory, Respondent need not provide any additional statement of facts in support of it.

V. ORDER DIRECTING THE PARTIES TO CONFER AND SUBMIT A REVISED JOINT PROPOSED PROCEDURAL SCHEDULE

In my Third Prehearing Conference Report and Order, I vacated the parties then-existing procedural schedule in order to facilitate adjudication of Respondent's Motion for Leave to Amend Answer. Third Prehearing Conference Report and Order at 2 (July 14, 2000). I also indicated that "[a]t the appropriate time, I will issue an Order directing the parties to confer and submit a new joint proposed procedural schedule. . . ." Id. The time is now ripe for the submission of a revised proposed procedural schedule. Therefore, the parties are expected to confer, either in person or by telephone, concerning a revised joint procedural schedule and to file, not later than October 10, 2000, a REVISED JOINT PROPOSED PROCEDURAL SCHEDULE. If the parties cannot agree on a joint schedule, they shall submit separate proposed schedules by the due date, explaining why they were unable to agree on a joint schedule.

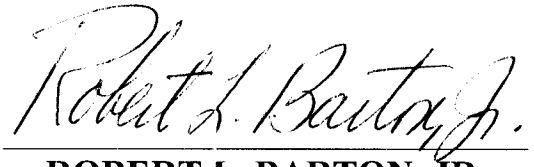
VI. CONCLUSION

In conclusion, Respondent's Motion for Leave to Amend Answer is GRANTED IN PART AND DENIED IN PART. Respondent may amend its Answer to add (1) the statute of limitations defense with respect to violations alleged in Count II of the Complaint, (2) the "excessive fines" defense, and (3) the "inability to pay civil money penalties" defense. However, Respondent's motion is denied to the extent it seeks to amend its Answer to add affirmative defenses alleging (1) that the

NIF was improperly served, (2) that it may not be held liable for "cured" paperwork violations, or (3) that 8 C.F.R. § 274a.2(b)(1)(v) is an invalid regulation.

Respondent must file, by not later than October 10, 2000, a Second Amended Answer to the Complaint. In its Second Amended Answer, Respondent must provide a statement of facts in support of its statute of limitations and "excessive fines" defenses, but need not provide at this time any further statement in support of the "inability to pay" defense.

Finally, the parties must confer and file a REVISED JOINT PROPOSED PROCEDURAL SCHEDULE by not later than October 10, 2000.



ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2000, I have served the foregoing Order Granting in Part and Denying in Part Respondent's Motion for Leave to Amend Answer on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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