

## **Employer Commits Substantive Violations in Section 2 of I-9s**

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A Department of Justice Administrative Law Judge, in U.S. v. New China Buffet Restaurant, 10 OCAHO No. 1132 (2010), found a restaurant committed substantive, not technical, violations of immigration law, when it failed to complete most of Section 2 on the I-9 forms of seven employees.

In 2009, Immigration and Customs Enforcement (ICE) conducted an audit of New China's I-9 forms. As a result of the audit, ICE charged New China with substantive violations of the Act for its failure to complete Section 2 for seven employees. Specifically, there were no documents identified as having been examined, and the certification section was missing both the date and the signature. On each I-9 form, the business name and address was filled out in Section 2, but no other information was provided.

New China's asserted each of its I-9 forms in Section 2 was partially completed. Each was signed by Chang Jiang Jin, who is identified as "Member LLC," and is dated November 19, 2009. The start dates for the employees, however, were listed as July 1, 2007 for five individuals, September 1, 2007 for one individual, and April 1, 2008 for the remaining individual. The section, for listing the specific documents examined to verify the identity and employment eligibility of the employee, was blank in New China's revised forms.

In court filings, New China argued its failure to sign and date the I-9 forms was a technical or procedural failure, and it should have been given 10 business days in which to correct the forms. New China argued because it had now corrected its I-9 forms, the complaint was moot and should be dismissed.

The statute provides an entity charged with technical and procedural failures in connection with the completion of an I-9 form must be afforded a 10-day period, after being advised of the basis for the failure, in which to correct technical and procedural errors. No such relief is available, however, when the violation is substantive in nature rather than technical or procedural.

Failure to properly complete Section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one. Failure of the employer to sign the certification within three business days is a substantive violation, and failure to identify proper List A, or List B and C documents on the form and to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the form, is also a substantive violation.

The ALJ found New China's attempts to belatedly "correct" what are clearly substantive violations was ineffective. The ALJ further noted even on the

“corrected” forms, Section 2 of all the I-9s was still defective in substantive ways with respect to both the documentation portion and the certification portion: failure to identify any List A, or List B and C documents on the form or to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the I-9 form. Failure to complete the form within three days of the employee’s hire is also a substantive violation, and is not cured or “corrected” by belated partial completion of the form.

The ALJ remanded the matter to ICE to recalculate the amount of the fines for the substantive violations.