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

April 8, 1996

UNITED STATES OF AMERICA, Complainant, v. TRI-COMPONENT PRODUCT CORP., Respondent.	)	8 U.S.C. §1324a Proceeding OCAHO Case No. 95A00088

DECISION AND ORDER

Appearances: Quynh Vu, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for complainant;
David Frenkel, Esquire, New York, New York, for respondent.

Before: Administrative Law Judge McGuire

Procedural History

On May 19, 1995, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a three (3)-count Complaint against Tri Component Product Corp. (respondent), which contained 48 alleged paperwork violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a. Complainant proposed civil money penalties totaling $11,820 for those alleged infractions.

In Count I, complainant alleged that after November 6, 1986, respondent had failed to ensure that the three (3) employees named therein had properly completed Section 1 of their Employment

Eligibility Verification Forms (Forms I–9), and also had failed to properly complete Section 2 of those Forms I–9, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totalling $750, or $250 for each of those three (3) violations.

In Count II, complainant averred that after November 6, 1986, respondent had failed to ensure that the four (4) employees named therein had properly completed Section 1 of their Forms I–9, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant requested that respondent be fined a civil money penalty of $250 for each of those violations, or a total civil money penalty of $1000 for Count II.

Complainant charged in Count III that after November 6, 1986, also, respondent had failed to properly complete Section 2 of 41 Forms I–9 after having hired for employment in the United States the 41 individuals named therein, in violation of the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $10,070 for that count, or $220 for six (6) of those alleged violations and $250 for each of the remaining 35 alleged violations.

On November 28, 1995, the undersigned issued an Order Granting Complainant's Motion for Summary Decision as to all facts of violation alleged in Counts I, II and III of the Complaint. That Order, which fully set forth the procedural history in this proceeding, directed the parties to submit concurrent written briefs addressing the appropriate civil money penalty sums to be assessed for those 48 violations. Both parties have filed briefs.

Determination of the Appropriate Civil Money Penalties

Statutorily Mandated Factors

All counts of the Complaint involve paperwork violations of IRCA, as opposed to a hiring, recruitment, or referral violation, which carries a higher penalty. *See* 8 U.S.C. §1324a(e)(4). In determining the appropriate civil money penalties to be imposed for paperwork violations, IRCA provides:

> With respect to a [paperwork] violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the serious-

> ness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §1324a(e)(5).

1. *Size of Business*

In determining the appropriate civil money penalties to be assessed, the first factor to be considered is the size of respondent's business. Neither the provisions of IRCA nor the implementing regulations provide definitive parameters in determining the size of a business. *United States v. Tom & Yu, Inc.,* 3 OCAHO 445, at 4 (1992).

Prior OCAHO rulings, however, provide guidance. The size of a business is determined by its revenue or income, the amount of its payroll, the number of salaried employees, the nature of its ownership, the length of time it has been in business, and the nature and scope of its business facilities. *United States v. Felipe, Inc.,* 1 OCAHO 93, 632 (1989).

In its Motion for Approval of Complainant's Proposed Penalty Amounts, complainant states that respondent manufactures and distributes automotive components. Mot. Approval Complainant's Proposed Penalty Amounts at 8. Concerning respondent's revenue or income, complainant advises that:

> Its sales figures have increased from $7.6 million in 1993 to $7.9 in 1994 to $8.0 million in 1995. While the Respondent lists its total liabilities at $3,795,405, a substantial portion of the total liabilities is actually the cumulated retained earnings of the corporation. The retained earnings amount—currently at $2,448,833—is the difference between the corporation's total assets and its total liabilities that has apparently accrued over twenty-eight (28) years of operation. The Respondent's net income of $39,444 for the six-month period from September, 1994 until March, 1995 was added to the corporation's retained earnings figure. It appears that the corporation has been holding the retained earnings amount for the president of the corporation, who is its sole shareholder. When the president/sole shareholder elects to declare the retained earnings as dividends, he would be entitled to the entire amount of $2,448,833.

Id. at 8–9 (citations to exhibits omitted). Respondent's gross payroll for the pay period ending December 24, 1993 was $37,542.58 for 105 active employees; for the pay period ending December 23, 1994, $38,269.93 for 104 active employees; and for a pay period ending October 13, 1995, $38,710.07 for 117 active employees. *Id.* at 8; *see also* Complainant's Ex. B (Respondent's Reply to Interrogatories). Respondent firm was incorporated in 1967, and thus has been in

business over 28 years. *Id.* Respondent's reported business assets and facilities include "two (2) checking accounts at National Westminster Bank; a 50,000 square-foot lot located at 973 Brook Avenue in Bronx, New York; an 8,000 square-foot lot located on 164th Street in Bronx, New York; and production machinery valued at $100,000 to $150,000." *Id.* at 6; *see also* Complain ant's Ex. A (Respondent's Reply to Interrogatories no. 81). Complainant states that respondent reports that it suffered a net loss of $115,920 in 1994, and that it has earned, at best, marginal profits, or, at worst, generated losses in 1992 and 1993; however, complainant points out that respondent has not produced tax returns to corroborate these reports. *Id.* at 9. Based on this criterion, complainant argues that respondent's civil money penalty assessment should be increased.

Respondent disagrees. While it admits that it currently employs "106 individuals and grossed $7,581,786 during its most recent taxable year (1994)," it states that it sustained "a net loss of $115,920. The prior 2 years were equally marginal or generated losses." Br. Support Reduction Civil Penalties at 2–3.

Prior decisions have held that businesses which employ about 100 employees are to be categorized as small, supporting mitigation of civil money penalties. *See United States v. Vogue Pleating, Stitching & Embroidery Corp.,* 5 OCAHO 782, at 3–4 (1995) (classifying respondent, which employed approximately 100 employees, as small). However, in light of respondent's retained earnings, which, as complainant correctly states, comprise that "portion of profits which has not been paid out as dividends," the undersigned is compelled to disagree with respondent's contention that the size of its business should mitigate its penalty, and instead agrees with complainant that this factor argues in favor of aggravating the penalty. *Black's Law Dictionary* 1183 (5th ed. 1979) (defining "retained earnings").

2. *Good Faith of the Employer*

The second criterion to be considered in determining civil money penalties is whether the facts demonstrate a showing of good faith on respondent's part. Although IRCA is again silent on what constitutes good faith, OCAHO case law has established that mere allegations of paperwork violations do not signify a lack of good faith for penalty purposes. *United States v. Valladares*, 2 OCAHO 316, at 6 (1991). To demonstrate a lack of good faith on respondent's part, it is necessary that the complainant introduce some evidence of culpable

behavior on respondent's part beyond mere ignorance of the law. *United States v. Primera Enters., Inc.,* 4 OCAHO 692, at 4 (1994); *United States v. Honeybake Farms, Inc.,* 2 OCAHO 311, at 3 (1991).

Complainant asserts that respondent had been given a copy of the INS Handbook for Employers and a copy of a Form I–9 on July 16, 1987, along with the name of a person to contact in the event it had additional questions as to its legal responsibilities under IRCA. Mot. Approval Complainant's Proposed Penalty Amounts at 9–10. Thus, even though respondent was aware of its duties regarding completion of Forms I–9 and compliance with §1324a, complainant argues that respondent nonetheless failed to act with reasonable care in the performance of those duties. *Id.* Specifically, "[d]uring the inspection, the Respondent presented seventy-nine (79) Forms I–9 for seventy-nine (79) employees, but forty-eight (48) of the Forms I–9 were defective." *Id.* Complainant contends that this evidences a lack of good faith on respondent's part.

Respondent argues that it did act in good faith, and points to the fact that all of the individuals it employed were determined to be legal by INS. Br. Support Reduction Civil Penalties at 3. It further maintains that it "at all times, *fully cooperated* with the [INS] and always was forthright in producing documentation and records indicative of its records [sic] to be in full compliance with INS regulations." *Id.*

Even though respondent failed to comply with IRCA in 48 out of 79 cases, or 61% of the time, complainant has failed to offer any evidence of culpable behavior on respondent's part, beyond mere ignorance of the law. Accordingly, it is found that respondent did act in good faith, and therefore is entitled to mitigation as to the proposed civil money penalties based upon this element.

3. *Seriousness of the Violation*

The third statutory factor to be considered is the seriousness of the violations alleged.

Complainant observes:

> At the compliance inspection conducted on February 8, 1993, the Respondent presented seventy-nine (79) original Forms I–9 for inspection. Forty-eight (48) of the Forms I–9 were incomplete or deficient. On eleven (11) of the Forms I–9, the Respondent failed to state the List A, B or C documentation in section 2 which is required for verifying the employees' employment eligibility. On forty-

> three (43) of the Forms I–9, the Respondent failed to provide the date of attestation in section 2. The respondent failed to ensure that seven (7) of the employees properly completed section 1 of their Forms I–9 . . .

Mot. Approval Complainant's Proposed Penalty Amounts at 11. Thus complainant avers that respondent's civil money penalty should be aggravated based on this factor.

Respondent maintains that its penalty should be mitigated based upon the seriousness criterion. While it acknowledges that prior OCAHO cases have held that failure to complete any part of the Form I–9 is serious, it nonetheless contends that these facts provide distinctions which argue for mitigation. One factual distinction offered is that respondent had attached copies of an employee's documentation to each Form I–9 for which verification information had not been supplied in Section 2. Br. Support Reduction Civil Penalties at 4. Respondent next contends:

> The other violations included failure to date the form and failure to have certain forms signed. Nevertheless . . . the forms were . . . certainly sufficiently completed and documented to provide any agent with [INS] with immediate access to an employees' [sic] eligibility to obtain employment. In that sense, not only was the spirit of IRCA satisfied but essentially the substance of IRCA was conformed to as well.

Id.

While IRCA does allow an employer to make copies of an employee's documentation, 8 U.S.C. §1324a(b)(4), mere attachment of photocopies of employees' documentation has repeatedly been rejected as an affirmative defense; however, while not a defense to liability, it has been held to warrant mitigation at the penalty stage. *See, e.g., United States v. Manos & Assocs., Inc.,* 1 OCAHO 130, 890–91 (1989) (finding that §1324a permits photocopying of documentation as "*permissive and supplemental* to the mandatory completion [requirements] . . . , and is not intended to serve as an alternative mode of complying with the law"); *United States v. Carlson,* 1 OCAHO 260, 1685 & n.1 (1990) (noting that attaching photocopies is a factor to consider in mitigation of penalties); *United States v. Christie Automotive Prods.*, 2 OCAHO 361, at 11 (1991). Thus, respondent's penalties for those 41 infractions listed in Count III will be mitigated somewhat due to its attachment of documentation photocopies. Those violations in Counts I and II which did not address completion of Section 2, however, will not be mitigated on this basis.

Further, respondent's arguments concerning its conformity with the "spirit of IRCA," while eloquent, are not well taken. To attempt to hierarchically classify the seriousness of leaving one (1) line of the form blank as compared to another line involves arbitrary value judgments and would likely result in unending confusion and disagreement. Because "[t]he principal purpose of the I–9 form is to allow an employer to ensure that it is not hiring anyone who is not authorized to work in the United States," *United States v. Eagles Groups, Inc.,* 2 OCAHO 342, at 3 (1992), paperwork violations are always regarded as serious.

4. *Involvement of Unauthorized Aliens*

The fourth element to be considered is whether any of the individuals involved were illegal aliens. 8 U.S.C. §1324a(e)(5).

Complainant alleges that five (5) unauthorized aliens were apprehended on respondent's premises during the compliance inspection. Mot. Approval Complainant's Proposed Penalty Amounts at 11. Further, except for Special Agent Michael T. Ricko's declaration that he "was able to determine that five (5) of the Respondent's employees were unauthorized for employment," the record contains no evidence that unauthorized aliens were involved. *Id.* (Complainant's Ex. G at ¶9).

Respondent denies that unauthorized aliens were involved. In spite of its location "in an area which has a high number of illegal aliens," respondent claims that none of its employees were unauthorized aliens. Br. Support Reduction Civil Penalties at 5.

For penalty assessment purposes, a finding that unauthorized aliens were involved does not necessarily require that respondent be charged with a knowing hire violation of IRCA. *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 8 (1993) (finding that, even though respondent was not officially charged with an illegal hire violation, seven (7) of the 87 infractions at issue should be aggravated on the unauthorized alien basis). Regardless, the burden of proof as to each statutorily mandated factor to be considered rests on complainant. Because respondent denies that any of its employees were illegal, and because the record does not establish by a preponderance of the evidence that unauthorized aliens were employed by respondent, the burden of proof as to involvement of unautho-

rized aliens has not been met. Thus respondent's penalty should neither be mitigated nor aggravated on this basis.

5. *History of Previous Violations*

It is undisputed that respondent has no prior history of IRCA violations.

In summary, respondent is entitled to mitigation of the proposed civil money penalties on the bases of its good faith and a showing of no previous violations. As to 41 of the violations, respondent is entitled to have its penalties mitigated slightly on the basis of the seriousness criterion. Because at least one purpose of assessing civil money penalties upon IRCA is that of deterring repeat violations of this type, the financial ability of respondent to pay the recommended fine, as measured under the statutory criteria "size," is an important consideration. *United States v. Task Force Sec., Inc.,* 4 OCAHO 625, at 9 (1994). Respondent's size and retained earnings dictate that the assessed penalty, to be meaningful, should be significantly aggravated based upon its size. Finally, a lack of involvement of unauthorized aliens impacts neutrally on the penalties.

Penalty Assessment

IRCA mandates that employers inspect and verify employment eligibility documents presented during the hiring process, and requires employers, with limited inapplicable exceptions, to verify the identify and work authorization of all individuals hired after November 6, 1986. *See* 8 U.S.C. §1324a(b). Employers must also refuse to hire individuals who are not authorized to work in the United States. *See Task Force,* 4 OCAHO 625, at 9.

If an employer fails to comply with IRCA's paperwork provisions, the statute provides for obligatory civil money penalties, and those levies range from a statutorily mandated minimum of $100 to a maximum of $1,000 for each violation. 8 U.S.C. §1324a(e)(5). As noted earlier, assessment of these civil money penalties serves the dual purposes of deterring repeat infractions of IRCA by the cited employer and of encouraging compliance by other employers. *See United States* v. Ulysses*, Inc.,* 3 OCAHO 449, at 8 (1992).

INS is officially tasked with enforcing the provisions of IRCA and is accorded broad discretion in assessing penalties for violations of this

type. 8 U.S.C. §1324a(e)(5). That flexibility permits INS to more fairly levy appropriate penalties based upon fact specific inspection scenarios.

In the instant case, INS has argued that respondent's penalties should be aggravated on the bases of size, lack of good faith, seriousness, and involvement of illegal aliens. Disagreeing in part, the undersigned has concluded that respondent's penalties should be mitigated based upon two (2) of those factors namely, good faith and the absence of a showing that unauthorized aliens were involved. However, complainant has assessed a rather benign penalty—less than 25% of the maximum penalty which respondent could have been assessed for these 48 violations. As such, complainant's levy appears to have already taken into account those factors which respondent contends support its arguments for mitigation. Accordingly, while the undersigned's resolution as to the impact of those five (5) factors differs from complainant's, the total amounts levied for each count nevertheless fall within an appropriate penalty assessment range under these facts.

In conclusion, it is found that respondent violated the provisions of IRCA in the manners alleged in Counts I, II and III of the Complaint.

It is further found that complainant properly levied civil money penalties totalling $11,820 for those 48 violations at issue allocated as follows: $250 for each of the three (3) violations in Count I, $250 for each of the four (4) infractions contained in Count II, $250 for each of the 35 specified violations in Count III and $220 for each of the remaining six (6) violations in that count.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondents, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (9) and 28 C.F.R. §68.53 (1995).