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

August 13, 1997

UNITED STATES OF AMERICA, IMMIGRATION AND NATURALIZATION SERVICE, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00015
RUPSON OF HYDE PARK, INC. d/b/a SUPER 8 MOTEL—HYDE PARK, Respondent.	)

FINAL DECISION AND ORDER ADJUDICATING CIVIL MONEY PENALTY

Marvin H. Morse, Administrative Law Judge

Appearances: *Soni Sinha, Esq.,* for Complainant.
Kuldip S. Kasuri, Esq., for Respondent.

I. *Procedural Background*

The procedural history of this case is detailed in the Order Granting Summary Decision Finding Liability, 7 OCAHO 940 (1997), which addressed an issue of first impression in OCAHO jurisprudence—*i.e.*, whether an employer's culpability for paperwork violations of 8 U.S.C. §1324a survives the agreed disposition of a prior Notice of Intent to Fine (NIF) for similar violations, some of which involve identical employees. Confirming a prior oral ruling, that Order granted Complainant's motion for summary decision as to liability, holding that Rupson violated 8 U.S.C. §§1324a(b)(1) and (2) by its failure as to certain named employees to prepare and properly complete INS Form I–9s, and 8 U.S.C. §1324a(b)(3) by its failure

as to certain named employees to retain the Forms I–9s as required. I held that because the paperwork compliance obligation is continuous,

> 1) "a prior settlement agreement does not relieve an employer of responsibility for future compliance or the obligation to retain the requisite paperwork for former employees,"
>
> 2) **"**a paperwork violation is not a one-time occurrence, but a continuous violation until corrected,"
>
> 3) "[t]he employer is also liable for failure to retain Forms I–9 for former employees, including, but not limited to, individuals embraced by the prior proceeding," and
>
> 4) "good faith raises no bar to liability for an incomplete Form I–9."

Id. at 5–8. A schedule was set out for the parties to brief the quantum of civil money penalty to be adjudged.

As the result of the grant of summary decision, Respondent is liable as follows:

A) Count I, failure to prepare or, alternatively, to make available for inspection, the employment eligibility verification forms (I–9s) for two (2) named individuals, **Steven K. Bartlett**, and **Heather Birosall**, in violation of 8 U.S.C. §1324a(a)(1)(B), which renders it unlawful for an employer to hire an individual in the United States without complying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(3);

B) Count II, failure to ensure that a named individual, **Ranjana Patel**, properly completed section 1 of the I–9, in violation of 8 U.S.C. §1324a(a)(1)(B), which renders it unlawful for an employer to hire an individual in the United States without complying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(2); and

C) Count III, failure to properly complete section 2 of the I–9 for two (2) named individuals, **Beverly Ann Campbell Robinson**, and **Debra L. Thomas**, in violation of 8 U.S.C. §1324a(a)(1)(B), which renders it unlawful for an employer to hire an individual in the United States without complying with the paperwork regimen established pursuant to 8 U.S.C. §1324a(b)(1).

INS assessed a civil money penalty aggregating $3,278, comprised of $540 for each of the two Count I individuals, $510 for Count II, and $480 for each of the two Count III individuals. The penalty sought was not correctly totaled. As confirmed by the Second Prehearing Conference Report and Order, INS moved, Respondent concurred, and I granted a downward revision of the totals to reflect accurately the assessment per individual. As corrected, the total civil money penalty INS requests is $2,550.

On June 19, 1997, Complainant filed its Motion for Approval of Complainant's Proposed Civil Penalty Amount of $2,550, with Memorandum of Law in support (Motion/Memo), discussing three of the five factors specified in 8 U.S.C. §1324a(e)(5), *i.e.*: (1) good faith; (2) seriousness of violations, and (3) previous history of violations.

On June 23, 1997, Respondent filed its Brief on Civil Money Penalty (Brief), arguing for consideration of the following 8 U.S.C. §1324a(e)(5) factors: (1) the size of its business; (2) good faith;[1] (3) seriousness of the violations, and (4) that the employees involved were lawfully authorized to work in the United States.

II. *Discussion*

A. *Introduction*

The statutory civil money penalty that may be imposed upon an employer is not less than $100 and not more than $1,000 for each individual who is the subject of a violation. 8 U.S.C. §1324a(e)(5). Respondent is liable for civil money penalties for paperwork violations for five (5) individuals, resulting in a civil money penalty of not less than $500 and not more than $5,000; Complainant's $2,550 request is marginally more than 50% of the maximum. To determine the penalty, five factors must be considered: the size of the enterprise; the employer's good faith; seriousness of the violations; whether the individuals were unauthorized aliens, and the employer's history of previous violations. 8 U.S.C. §1324a(e)(5). *See Williams Produce v. INS,* 73 F.3d 1108 (11th Cir. 1995) (Table), *affirming United States v. Williams Produce,* 5 OCAHO 730, at 4–10

[1]As to violations which occur on and after September 30, 1996, depending on the facts of the particular case, good faith can comprise a merits defense. The *Rupson* violations, of course, occurred prior to that date.

(1995), 1995 WL 265081, at *3–7 (O.C.A.H.O.); *Noel Plastering, Stucco, Inc. v.* OCAHO, 15 F.3d 1088 (9th Cir. 1993) (Table), 1993 WL 544526, at *1 (9th Cir. 1993) (Unpublished Disposition)[2]; *A-Plus Roofing, Inc. v. INS,* 981 F.2d 1257 (9th Cir. 1992) (Table), 1992 WL 389247, at *1 (9th Cir. 1992) (Unpublished Disposition); *Big Bear Supermarket No. 3 v. INS,* 913 F.2d 754, 756 (9th Cir. 1990); *Maka v. INS,* 904 F.2d 1351, 1357 (9th Cir. 1990); *Mester Mfg. Co. v. INS,* 879 F.2d 561, 563 (9th Cir. 1989); *United States v. Armory Hotel Assocs.*, 93 B.R. 1, at *1 (D.Me. 1988); *United States v. Task Force Security, Inc.,* 3 OCAHO 533, at 5 (1993), 1993 WL 403086, at *4 (O.C.A.H.O.); *United States v. Giannini Landscaping, Inc.,* 3 OCAHO 573, at 6–7 (1993), 1993 WL 566130, at *4–7 (O.C.A.H.O.); *United States v. Nevada Lifestyles, Inc.,* 3 OCAHO 463, at 22 (1992), 1992 WL 535620, at *15 (O.C.A.H.O.). "Imposition of a penalty without consideration of all relevant factors is improper." *Maka*, 904 F.2d at 1357.

"Consideration of these factors is possible only if there is evidence of them in the record." *Id.* Where the record does not disclose facts not reasonably anticipated by the INS, there is no reason to increase the penalty beyond the amount the INS requests. *United States v. Williams Produce,* 5 OCAHO 730, at 5, 1995 WL 265081, at *3. *See United States v. Dubois Farms, Inc.*, 2 OCAHO 376 (1991), 1991 WL 531888 (O.C.A.H.O.); *United States v. Cafe Camino Real*, 2 OCAHO 307 (1991), 1991 WL 531736 (O.C.A.H.O.). To determine the reasonableness of the INS request, I consider only the range of options between the statutory minimum and that sum. *United States v. Williams Produce*, 5 OCAHO 730, at 5, 1995 WL 265081, at *3. *See United States v. Tom & Yu*, 3 OCAHO 445 (1992), 1992 WL 535582 (O.C.A.H.O.); *United States v. Widow Brown's Inn*, 3 OCAHO 399 (1992), 1992 WL 535540 (O.C.A.H.O.).

Because the significance of each statutory factor derives from the facts of a specific case, I utilize a judgmental, not a formulaic, approach when weighing each. *United States v. Williams Produce,* 5 OCAHO 730, at 5, 1995 WL 265081, at *3. *See, e.g., United States v. King's Produce*, 4 OCAHO 592 (1994), 1994 WL 269183 (O.C.A.H.O.); *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, 1993 WL 566130.

[2]Ninth Circuit Rule 36–3 provides that unpublished dispositions, while not precedential, may be cited when relevant under the doctrine of law of the case.

B. *Consideration of Title 8 U.S.C. §1324a(e)(5) Factors*

1. *"The Size of the Business of the Employer Being Charged"*

Neither statute nor regulation provides guidelines for determining business size. *Williams Produce*, 5 OCAHO 730, at 6, 1995 WL 265081, at *4. *See Tom & Yu*, 3 OCAHO 445, 1992 WL 535582. Previous OCAHO 8 U.S.C. §1324a determinations have considered: (1) the number of employees; (2) the gross profit of the enterprise; (3) assets and liabilities; (4) nature of the ownership; (5) length of time in business; and (6) the nature and scope of the business facility. *Williams Produce,* 5 OCAHO 730, at 6, 1995 WL 265081, at *4. *See, e.g.,United States v. Davis Nursery, Inc.*, 4 OCAHO 694 (1994), 1994 WL 721954 (O.C.A.H.O.); *Giannini*, 3 OCAHO 573, 1993 WL 566130.

Though not dispositive, INS Guidelines[3] note that a test for "size" is "whether or not the employer used all the personnel and financial resources at the business' disposal to comply with the law." Guidelines at 8. The Guidelines support a "secondary test": "whether a higher monetary penalty would enhance the probability of compliance. All other relevant considerations being equal, the statutory minimum penalty will have a greater economic impact on a marginally profitable business than on a highly profitable business." *Id.* Finally, the Guidelines note that even if a company has numerous §1324a violations but has a "frequent turnover rate[, it] . . . might not be able to personally complete all required I–9s." *Id.*

Rupson describes itself as "a small business operation with limited financial resources." Brief at 4. Rupson is an economy motel, one of many low cost facilities on U.S. Route 9 in Hyde Park, New York. Complaint at 1. As of March 24, 1996, it charged $47 a night for a single, $52 for a double.[4] Although the record is silent as to the number of rooms, I take official notice that there are 61. AMERICAN AUTOMOBILE ASSOCIATION ANNUAL TOUR BOOK (1993).

[3]INS MEMORANDUM ON GUIDELINES FOR DETERMINATION OF EMPLOYER SANCTIONS CIVIL MONEY PENALTIES, August 30, 1991 (Guidelines).

[4]John Pope, *Travel: FDR's Place in History*, NEW ORLEANS TIMES-PICAYUNE, March 24, 1996, 1996 WL 11593 (noting that "[t]here is no shortage of motels in Hyde Park, all on U.S. 9 . . . But if you're in the mood for something a bit fancier . . . check out the Beekman Arms").

Rupson's size, not addressed by INS, does not warrant a high penalty per individual. Based on the Guidelines and the subfactors discussed above, a minimum penalty is appropriate.

2. *"The Good Faith of the Employer"*

OCAHO case law holds that "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." *United States v. Minaco Fashions, Inc.*, 3 OCAHO 587 at 7 (1993), 1993 WL 723360, at *5 (O.C.A.H.O.) (*citing United States v. Valadares*, 2 OCAHO 316 (1991)).

OCAHO jurisprudence makes clear that mere failure of compliance is an insufficient predicate for a finding of other than good faith; there must be an affirmative finding of culpable behavior. *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783 (1995) (CAHO Modification of ALJ Final Decision and Order) at 3, 1995 WL 626234, at *1 (O.C.A.H.O.). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." *Minaco*, 3 OCAHO 587, at 7, 1993 WL 723360, at *5 (*citing United States v. Honeybake Farms, Inc.,* 2 OCAHO 311 (1991), 1991 WL 531735 (O.C.A.H.O.)).

As acknowledged in the Guidelines, a subfactor is whether, prior to assessing a penalty, INS made an educational visit. *Minaco*, 3 OCAHO 587, at 7, 1993 WL 723360, at *5. Another subfactor is Respondent's cooperation. Yet another test for good faith is "whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." Guidelines at 9.

The settlement agreement resolving Rupson's prior violations was signed on February 16, 1993. Rupson failed to correct its previous violation in the case of Count I employee Bartlett, who was its employee from at least 1992 until June 1994. Rupson had well over a year in which to complete or to correct Bartlett's Form I–9. By not amending Bartlett's form during this hiatus, Rupson failed to exercise due diligence. Rupson's failure to properly complete Form I–9 Section 1 for Ranjana Patel, the Count II employee whose I–9 was also the subject of the prior NIF, is of the same genre.

By contrast, Count I employee Heather Birosall was hired on March 26, 1994 and discharged almost immediately. Because the

ephemeral nature of Birosall's employment afforded Rupson little opportunity to tidy up her paperwork, Rupson's failure to correct Birosall's form does not argue for other than good faith *per se*. Failure to properly complete Section 2 for two Count III employees, Beverly Ann Campbell Robinson and Debra L. Thomas, also does not in itself indicate bad faith.

However, Rupson's contention that settlement of the prior NIF precludes I–9 compliance liability is sufficiently disingenuous as to bar a finding of good faith. Certainly, as to the continuing violations, the prior NIF experience should have been at least as instructive as an educational visit. Rupson's erratic compliance with the paperwork regimen in the years after the settlement agreement, with no effort to ascertain whether it was obliged to correct prior deficiencies, reflects more than mere confusion or carelessness, but demonstrates noncompliance disposition tantamount to culpable behavior, warranting a finding of bad faith.

3. *"The Seriousness of the Violation"*

"Paperwork violations are always potentially serious, since '[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.'" *Giannini*, 3 OCAHO 573, at 9, 1993 WL 566130, at * 6 (*citing United States v. Eagles Groups, Inc.,* 2 OCAHO 342, at 3 (1992), 1992 WL 531833, at *2 (O.C.A.H.O.)). There are, however, varying degrees of seriousness. *United States v. Davis Nursery, Inc.,* 4 OCAHO 694, at 21, 1994 WL 721954, at *13 (*citing United States v. Felipe, Inc.,* 1 OCAHO 93 (1989), 1989 WL 780150 (O.C.A.H.O.)). In this case, failure to prepare/present the I–9s for the two Count I individuals strikes at the heart of the entire employment eligibility verification regimen, and is patently serious. I agree with INS that because Rupson's Count II failure to ensure proper completion of Section 1 implicates failure of the employee to attest to her status, "it is not possible to determine whether the employer has satisfied its requirement that it verified an employee's eligibility for employment." Motion/Memo at 3. I agree with INS that the Count III violations of failure to complete Section 2 of the I–9 are serious where, as to one employee, no list B document is entered, and as to the other, the I–9 fails to reference a proper list B document.

4. *"Whether or Not the Individual Was an Unauthorized Alien"*

Uncharged events cannot evidence further violations. *Williams Produce*, 5 OCAHO 730, at 9, 1995 WL 265081, at *7. INS has neither charged nor established that Rupson employed unauthorized aliens. Rupson maintains, and the INS does not disagree, that "[a]ll of the employees hired by the Respondent were lawfully authorized to work in the United States." Brief at ¶3. Absent employment of unauthorized aliens, this factor mitigates in favor of Rupson.

5. *"The History of Previous Violations"*

Second tier violations of the prohibitions against employment of unauthorized aliens command enhanced penalties. 8 U.S.C. §1324a(f). While there is no counterpart with respect to paperwork violations, the statutory imperative to consider previous violations obliges me to look to Rupson's prior violations in adjudicating the civil money penalty. 8 U.S.C. §1324a(e)(5). Rupson's second tier violations warrant penalty enhancement.

III. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, briefs, motions, and accompanying documentation supplied by the parties. All motions and requests not previously disposed of are denied. Having found, in the June 5, 1997, Order Granting Summary Decision and Finding Liability, 7 OCAHO 940, that Respondent violated 8 U.S.C. §§1324a(a)(1)(B) by failing to comply with the requirements of 8 U.S.C. §§1324a(b)(1), (2) and (3), upon consideration of the statutory factors mandated for adjudging the amount of civil money penalty for violation of 8 U.S.C. §1324a(a)(1)(B), I conclude that it is just and reasonable for Rupson to pay a civil money penalty of:

—Count I, $400 as to each of two named individuals,	$800
—Count II, $300 as to one named individual,	$600
—Count III, $250 as to each of two named individuals,	$500

For a total civil monetary penalty of: **$1,900.**

This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(c)(iv). As

provided at 28 C.F.R. §68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Final Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. *See* 8 U.S.C. §§1324a(e)(7), (8) and 28 C.F.R. §68.53(a).

SO ORDERED.

Dated and entered this 13th day of August, 1997.

MARVIN H. MORSE
Administrative Law Judge