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

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	Case No. 93A00089
MINACO FASHIONS, INC.	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(December 20, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William F. Jankun, Esq., for Complainant.
Lawrence M. Wilens, Esq., for Respondent.

I. *Background*

A. Liability Established

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324a. As confirmed by the Order Adjudging Liability, Incorporating Second Prehearing Conference, 3 OCAHO 552 (8/19/93), Minaco Fashions, Inc. (Minaco or Respondent), acquiesced as to liability for paperwork violations with respect to all employees named in the complaint. Liability having been established, only the quantum of civil money penalty remained to be adjudicated. Because Minaco requested an evidentiary hearing on the penalty assessment, a hearing was scheduled for November 2, 1993, in New York City. As confirmed by the Third Prehearing Conference Report and Order, Complainant on October 4, 1993, filed a Motion For Approval of Proposed Penalty Amounts (Penalty Motion). A Declaration of Special Agent Mona B. Forman was attached to the motion.

B. Agreement to Resolve Dispute on a Documentary Record

By a Stipulation dated and filed October 15, 1993, the parties agreed that Complainant's Penalty Motion would constitute Complainant's direct case. Respondent was to file its written submission in response not later than November 2, 1993; any rebuttal by Complainant was to

be filed not later than November 16, 1993. The Stipulation proposed that the evidentiary hearing be canceled and the civil money penalty level be determined without an evidentiary hearing, unless the Judge should find a need for such a hearing.

However, two days earlier, on October 13, 1993, Complainant had filed a Motion To Compel Respondent to answer Complainant's First Request For Production of Documents. On October 22, 1993, Respondent filed an October 12, 1993 Opposition To Complainant's Motion to Compel. These filings were not referred to in the Stipulation. Accord-ingly, a discovery dispute appeared to survive the filing of the Stipulation, resulting in an irreconcilable inconsistency with the content and purpose of the Stipulation. Accordingly, I convened an emergency telephonic prehearing conference on October 28, 1993.

As confirmed by the October 28 order, summarizing the conference, the parties reiterated their intent to proceed in accordance with the Stipulation. Counsel agreed that the discovery issue was moot and that Complainant had intended to withdraw the request for production. Respondent withdrew its Opposition to that request. Respondent was to submit its filing on the quantum of civil money penalties not later than November 2, 1993, with an opportunity for Complainant to file rebuttal not later than November 16, 1993. As agreed among the parties and the bench, the October 28, 1993 Order canceled the evidentiary hearing scheduled for November 2, 1993.

Upon agreement of the parties to resolve the dispute upon a paper record, in lieu of a confrontational evidentiary hearing (unless the judge should determine otherwise), this decision and order issues on consideration of their documentary submissions.

C. The Assessments at Issue

The Immigration and Naturalization Service (INS) assessed a total civil money penalty of $49,770, comprised as follows:

> Count I: for failure to prepare and/or make available for inspection the employment eligibility verification form (Form I-9) for each of twenty-nine (29) named individuals, i.e., $800 each for Maged Moussa Iskander, Gabriel Maldonado Espinosa a/k/a Gabriel Maldonado Esponosa, Jeronimo Pacheco Martinez a/k/a Jeronino Pacheco Martinez, Leticia Quintero Robles, and Rosa Rodrigez Mendes, and $620 each for the remaining 24 individuals, $18,880 in the aggregate;

Count II: for failure to ensure that the employee[1] properly completed section 1, and failure to properly complete section 2 of the Form I-9 for thirty-one (31) named individuals, i.e., $440 for Mercedes Chavez, $795 each for 10 named individuals, and $615 each for the remaining 20 individuals, $20,690 in the aggregate;

Count III: for failure to properly complete section 2 of the Form I-9 for seventeen (17) named individuals, i.e., $440 for German Biscaino Felix Perez, and $610 each for the remaining 16 individuals, $10,200 in the aggregate.

D. The Filings

(1) Penalty Motion.

As understood among the parties and the judge, Complainant's Penalty Motion is its direct case in support of the $49,770 assessment. The Penalty Motion consists of a summary statement by INS counsel, supported by an October 1, 1993 Declaration (Decl) by INS Special Agent Mona B. Forman (Forman) in her capacity as "the principal case agent assigned to the inspection, investigation and presentation" of this case.

Forman recites that on August 5, 1992 she visited Respondent and spoke to Sabih Hanouka (Hanouka) who identified himself as the owner.[2] She provided a copy of Complainant's Handbook for Employers (M-274) to Hanouka who conceded he had not been completing I-9s. Three weeks later, on August 26, 1992,[3] seventeen unauthorized

[1] The caption at Count II of the complaint alleges failure "to ensure that employer properly completed section 1, and failed to properly complete section 2" of the Forms I-9. (Emphasis supplied). The Count II reference to completion of section 1 by the employer is an error, and is instead understood as a reference to completion of section 1 by the employee. However, Respondent cannot have reasonably misunderstood or been prejudiced by the error. This is so because the specification of the charge at subparagraph A of Count II, lists the employees implicated in that Count, and at subparagraph C alleges explicitly that, "The Respondent failed to ensure that the individuals listed in paragraph A properly completed section 1 of the Form I-9."

[2] Although both parties treat Sabih Hanouka as Minaco's principal, the pleadings and exhibits accompanying the pleadings confirm that Minaco is a corporation. Whatever his equity position may be, INS has made no effort to add Hanouka as a respondent in his individual capacity. Accordingly, consistent with the filings of the parties, this decision and order treats him as an individual responsible for management of Respondent, but adjudicates liability and civil money penalties against Minaco, and not Hanouka.

[3] Recited in the Declaration as 1993, an obvious error which is understood as 1992.of Yeni Segarra or Cegarre with no status indicated in section 1 and nothing completed in section 2.

aliens were apprehended on Minaco's premises, "where they were employed." Forman Decl at par. 3.

Forman summarized sworn statements of five of the aliens seized on August 26, 1992; Leslie Anadre Demera (Anadre), Jeronimo Pacheco Martinez (Pacheco), Elia Almorin Dominguez (Almorin), Jorge Gomez Huerta (Gomez), and Carmelina Pesantez Cajamarcar (Pesantez). All but Pacheco are listed in Count II (failure to ensure employees properly completed and failure to properly complete I-9s); he is included in Count I (failure to prepare the I-9s). The Declaration is to the effect that:

> Anadre was hired in January 1992, and, when asked if she had "papers," informed Hanouka that she was illegal and was waiting for approval of a petition filed by her sister. Minaco presented an I-9 for Anadre dated September 22-23, 1992, with no status indicated in section 1. Nothing was completed in section 2.

Pacheco was hired in March 1992. Hanouka asked him for legal papers to work in the United States. Pacheco told Hanouka he did not have papers and asked him if that was a problem. Hanouka replied that it was not a big problem and told him he could begin working right away. At the compliance inspection, Minaco failed to present an I-9 for Pacheco.

Almorin was hired in June 1992. She was asked to present documents, specifically, a social security card and a green card. She told Hanouka that she did not have a green card but presented a social security card in the name of "Yeni Cegarra," the name by which she was employed. Hanouka told her she needed a green card to work but let her work even though she did not have one. At the compliance inspection, Minaco presented an undated I-9 for Almorin in the name of Yeni Segarra or Cegarre with no status indicated in section 1 and nothing completed in section 2.

Gomez was hired in June 1992. He was asked for documents to work. Gomez stated that even though he had no documents, he was allowed to work. At the compliance inspection, Minaco presented an undated I-9 for Gomez with no status indicated in section 1 and nothing completed in section 2.

When Pesantez was hired, Hanouka asked her for documents. Pesantez told him that she did not have papers to work and he told her that she could only work for eight (8) days without them. Her employment was not terminated until September 11, 1993. At the time of the compliance inspection, the Respondent presented an undated Form I-9 for Pesantez in the name of Carmen Peralta with no

alien registration number indicated in section 1 and nothing completed in section 2.

The Declaration recites in effect that every one of the 48 incomplete I-9s (of which 31 are included in Count II and 17 in Count III) lack attestation by any Minaco employee or official. The only entry at section 2 on one I-9 is "Resident Alien" on List A. None of the other 47 I-9s had any entry at Lists A, B and C. Moreover, 18 employees had not indicated their status in section 1 of the I-9; seven had indicated status in section 1, but, had not provided their alien registration numbers or expiration dates of employment authorization; three had not attested to their status in section 1, and 19 had failed to date their I-9s.

The Declaration acknowledges that Minaco had not previously been found in violation of §1324a.

(2) Minaco's submission.

On October 29, 1993, Minaco filed an affidavit of Hanouka, accompanying a letter-pleading dated October 28, 1993, in which counsel undertakes "that the company is defunct." Hanouka recites circumstances assertedly relevant to determination of the appropriate civil money penalty. Hanouka claims he is a refugee from Iran. Upon his arrival in the United States on August 30, 1990, he took over the management of Minaco from another Iranian immigrant. Minaco had no I-9s. He thought that because they had social security cards they were authorized to work in the United States.

After a visit by INS, Hanouka tried to complete Forms I-9 for all of his employees to the best of his ability. He was unable to prepare Forms I-9 for employees who no longer worked at Minaco. Hanouka recites, the documents that employees had presented were fraudulent; as he was a new immigrant, he had no way of knowing the authenticity of the documents.

Hanouka claims that Minaco is out of business and has no assets. He maintains that he did his best to manage Minaco and apologizes "to the Department of Justice and the court for his failure to comply with all governmental regulations." Hanouka contends that his failure to comply was not willful but a result of ignorance.

(3) INS Memorandum In Opposition to Mitigating the Assessment

On November 22, 1993, INS filed its opposition to Minaco's submission on mitigation of the proposed penalty amounts. The INS filing

includes a new November 19, 1993 Declaration by Forman. Inter alia, Complainant would have me reject as undocumented the claim of financial inability to pay, because Respondent offered no proof of its financial condition as of the time of the compliance inspection. To rebut Minaco's good faith claim, Complainant points out that all of Minaco's employees listed in the complaint started their employment well after Hanouka took over management of Respondent. Responding to the claim that he could not prepare I-9s for employees no longer at Minaco, INS notes that eight of the employees for whom no I-9s were presented (of 29 named in Count I) were still working for or were hired by Respondent after the August 5, 1992 visit by Forman. At least five of the eight were unauthorized aliens.

Forman's Declaration also identifies eleven employees as unauthorized aliens hired by Respondent in addition to those listed in her October 1, 1993 Declaration.[4]

II. *Discussion*

A. Statutory Framework

Title 8 U.S.C. §1324a(e)(5) set out the statutory parameters for assessment and adjudication of the civil money penalty. Each paper-work violation requires a penalty of "not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." Id. In considering the quantum of penalty, it has been my practice to consider only the range of options between $100 per individual, the statutory minimum, and the amount assessed by INS, absent facts arising during litigation which were unanticipated by INS in assessing the penalty. U.S. v. Giannini Landscaping, Inc., 3 OCAHO 573 (11/9/93); U.S. v. Tom & Yu, 3 OCAHO 445 (8/18/92); U.S. v. Widow Brown's Inn, 2 OCAHO 399 (1/15/92) at 38-39; U.S. v. DuBois Farms, 2 OCAHO 376 (9/24/91) at 30-31; U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91) at 16; U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90) at 9; U.S. v. Big Bear, 1 OCAHO 48 (3/30/89) at 32, aff'd, Big Bear Market No. 3 v. INS, 913 F.2d 754 (9th Cir. 1990). Since the record does not disclose any such unanticipated facts, I have no reason to increase the penalties beyond Complainant's assessments.

[4] It is not certain that Forman's references to Respondent hires is intended to refer to hires by Minaco generically, or by Hanouka on behalf of Minaco. As explained at footnote 2, supra, I do not perceive a distinction for purposes of liability. Consideration of the good faith factor is the only reason that it is relevant whether the hires were effected after Hanouka entered the scene in 1990.

Upon adjudicating a just and reasonable civil money penalty within the delineated range, I am obliged to consider five factors prescribed at 8 U.S.C. §1324a(e)(5).

(1) the history of previous violations,

(2) whether or not the individual(s) named in the complaint were unauthorized aliens,

(3) the size of the business of the employer being charged,

(4) the seriousness of the violation, and

(5) the good faith of the employer.

To facilitate tailoring the facts of each case to the factors, I utilize a judgmental rather than a formulaic analysis. Giannini Landscaping, Inc., 3 OCAHO 573; Tom & Yu, 3 OCAHO 445; Widow Brown's Inn, 2 OCAHO 399; DuBois Farms, Inc., 2 OCAHO 376; Cafe Camino Real, 2 OCAHO 307; J.J.L.C., 1 OCAHO 154; U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90); Big Bear, 1 OCAHO 48. But cf. U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89) (applying a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations); aff'd by CAHO, 1 OCAHO 108 (11/29/89) at 5 and 7. ("This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable," it was not to be understood as the exclusive method for keeping with the five statutory factors.)

B. Statutory Factors Applied

The submissions by the parties do not explicitly address all five statutory factors. However, the record provides an adequate basis on which to adjudicate a just and reasonable civil money penalty upon consideration of the factors.

(1) Previous Violations

There are none.

(2) Named Individuals As Unauthorized Aliens

The Declarations by Forman are unrebutted and undisputed. Minaco does not deny that it hired illegals, but only that all the individuals Hanouka hired presented social security cards which he,

as a new immigrant to the United States, assumed authorized their employment. Of course, newly arrived immigrant or not, the obligation of the employer is to both avoid employing unauthorized aliens and to perfect the paperwork by which the employer and INS can police enforcement of the underlying obligation. Minaco's failure to abide by employment eligibility verification requirements resulted in employment of at least 16 individuals identified as unauthorized aliens.

(3) Good Faith of the Employer

OCAHO rulings establish that the mere fact of paperwork violations is insufficient to show a "lack of good faith" for penalty purposes. See United States v. Valladares, 2 OCAHO 316 (4/15/91). Rather, to demonstrate "lack of good faith" the record must show culpable behavior beyond mere failure of compliance. See United States v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91).

Here, there is more than failure of compliance. Respondent claims ignorance for his failure to comply, but does not rebut the fact that INS had made an educational visit on August 5, 1992, three weeks before the August 26, 1992 apprehension of unauthorized aliens on Minaco's premises. The INS agent briefed Hanouka on the requirements of §1324a, and provided him with a copy of the INS Handbook for Employers. Failure by the employer to prepare I-9s and where they are prepared, failure to attest to the entries at section 2 of the I-9s, frustrates Complainant's ability to audit an employer's effort at compliance. See U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90).

Minaco's lack of I-9 compliance is so pervasive and the number of unauthorized aliens on the payroll so extensive, that this record bespeaks culpability for bad faith. Hanouka's claim of ignorance on the basis that he is a new immigrant has a hollow ring. As a refugee, he owes an obligation to this country which has afforded him refuge, to comply with §1324a duties imposed on all employers in the United States. Some might suggest that, even more than the typical businessperson, a refugee would seek to comply strictly with the economic and social laws of the country that provided a haven. In any case, Respondent is a corporate entity whose responsibility as an employer transcends the intent of its principal. Minaco's performance demonstrates a disregard for §1324a compliance responsibilities which I can only understand as bad faith.

(4) Size of Business of Employer

Neither IRCA nor the relevant procedural regulations provide guidelines to use in determining business size. See Giannini Landscaping, Inc., 3 OCAHO 573; Tom & Yu, Inc., 3 OCAHO 445; Felipe, 1 OCAHO 93. See, e.g., U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91). Neither party submitted evidence on Minaco's size. Patently, however, it is small. On July 16, 1993, Minaco filed a motion, opposed by INS, to terminate this case on the basis that it was insolvent. I overruled the motion "in the absence of persuasive or any argument that I lack the power to go forward with this case." First Prehearing Conference Report and Order (7/19/93) at 1. Respondent accompanied its motion with a copy of its 1992 Federal Income Tax Return. The tax filing, identifying Minaco as an apparel contractor, reveals 1992 annual gross sales approximating $105,000, with wages and salaries approximating $67,900. That is a small business indeed!

(5) Seriousness of the Violations

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." U.S. v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (6/11/92). The seriousness factor must be considered in context of the factual setting of the particular case. Giannini Landscaping, Inc., 3 OCAHO 573.

At the compliance inspection Respondent failed to prepare or present Forms I-9 for twenty-nine of its employees, including the five unauthorized aliens; presented incomplete Forms I-9 for forty-eight employees, including additional unauthorized aliens; Minaco's agents failed to attest that they had seen the required documentation on all forty-eight of the incomplete Forms I-9. Forman's October 1, 1993 Declaration detailed additional deficiencies.

IRCA caselaw makes clear that failure of attestation at §2 of the Form I-9,

> is a serious violation, implying avoidance of liability for perjury, but also reckless disregard for plain and obvious statutory and regulatory mandates. . .

J.J.L.C., 1 OCAHO 154 at 9-10.

The earliest decision on a litigated record, which applied the factors of 8 U.S.C. §1324a(e)(5), found on the facts of that case that the employer's violations were inadvertent. On that basis, the penalty was adjudged at the statutory minimum. Big Bear, 1 OCAHO 48. In contrast to Big Bear, the violations in the present case are more than inadvertent. Attestations were omitted on all I-9s presented. The

presentation of incomplete I-9s while omitting others is more than mere negligence. The seriousness of the deficiency is compounded by the breach of the employer's duty to assure proper entries by the employee. Precedent holds that an employer's failure to ensure proper employee entries constitutes a serious violation. J.J.L.C., at 10. Minaco's breach of its duty to comply with 8 U.S.C. §1324a is so broad in relation to the size of the enterprise as to compel the determination that it is serious in the extreme.

(6) Additional Factors to Consider

Both parties address ability to pay. As I have previously held, in U.S. v. M.T.S. Service Corporation, 3 OCAHO 448 (8/26/92), at 4,

> I am unaware of any inhibition to consideration by the judge of factors additional to those which IRCA dictates. So long as the statutory factors are taken into due consideration, there is no reason that additional considerations cannot be weighed separately. Accord U.S. v. Pizzuto, OCAHO Case No. 92A00084 (8/21/92) at 6 ("Section 1324a(e)(5) does not restrict the ALJ to considering only the five factors enumerated when determining the amount of civil penalties.")

I do not denigrate the quality and persuasiveness of Complainant's proof in support of its assessment. I do not accept Minaco's excuses for failure of compliance. I do not adjudge penalties in this case on the basis of Minaco's putative inability to pay, although the record contains the solemn undertakings of a certified public accountant that Minaco is insolvent and of its attorney that it is defunct. Nevertheless, when considered in context of the only annual data of record, the assessment is disproportionate to Minaco's revenues. Gross receipts in 1992 were $105,000. A penalty approximating $50,000 against an enterprise of that dimension is unduly punitive. For that reason alone, I reduce the assessment by approximately one-third in the aggregate. See Giannini Landscaping, Inc., 3 OCAHO 573 at 11. Because Minaco's compliance failure is more aggravated than was Giannini's, I do not reduce the assessment here by as large a proportion as I did in that case.

C. Civil Money Penalties Adjudged

I have considered Respondent's size in terms of annual receipts, in context of the seriousness of the violations, the lack of good faith, the presence of unauthorized aliens and the absence of prior violations. It is appropriate to adjudge the civil money penalties, count by count, implicitly reflecting the statutory factors, but as a matter of judicial convenience, not differentiating in penalties between unauthorized aliens and other employees. Having considered the statutory factors

in context of the foregoing discussion, I adjudge the civil money penalty in the amounts set forth below.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, and accompanying docu-mentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon the preponderance of the evidence:

1. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing as alleged in the complaint to comply with the requirements of 8 U.S.C. §1324a(b)(1), (2) and (3) with respect to the individuals named in Counts I, II and III of the complaint.

2. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to make payment as follows:

Count I,	$450.00 as to each named individual,	$13,050
Count II,	$425.00 as to each named individual,	$13,175
Count III,	$400.00 as to each named individual,	$ 6,800

For a total of **$33,025**.

3. This 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 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 parties adversely affected. See 8 U.S.C. §§1324a(e)(7), (8); 28 C.F.R. § 68.53.

SO ORDERED.

Dated and entered this 20th day of December, 1993.

MARVIN H. MORSE
Administrative Law Judge