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. 94A00163
BENJAMIN P. RAYGOZA, DBA, CIELITO LINDO RESTAURANT, Respondent.	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(January 31, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Frederick E. Newman, Esq.,
for Complainant
Benjamin P. Raygoza, pro se

I. *Procedural History*

On September 9, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its complaint, dated September 6, 1994, in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint includes an underlying Notice of Intent to Fine (NIF), served by INS upon Benjamin P. Raygoza (Respondent or Raygoza) and issued on June 23, 1994.

Count I, the only count, of the complaint charges Respondent with failure to retain and/or make available for inspection the employment eligibility verification form (Form I-9) for 25 individuals in violation of 8 U.S.C. § 1324a(1)(B). The total civil money penalty assessed is $6,250.00, $250.00 per individual employee. Exhibit B to the complaint is Respondent's July 21, 1994 request for a hearing.

On September 14, 1994, this Office issued a Notice of Hearing (NOH) which transmitted to Respondent a copy of the complaint and OCAHO rules of practice and procedure appearing at 28 C.F.R. part 68.[1] The NOH warned Respondent that any "proceedings or appearances will be conducted in accordance with . . . 28 C.F.R. § 68."

On October 18, 1994, Respondent timely filed a letter which he labeled "Answer to Complaint." The letter/Answer contains no denials other than Respondent's vague assertion that it is his "sincere belief that less than ten (10) of these persons were in the employ of the Cielito Lindo Restaurant during the eleven (11) months of my personal operation of the restaurant."[2] Answer at 1-2. Respondent's answer pleads "lack of comprehension of . . . [INS] laws" and offers INS a settlement in the amount of $1,500.00.

On December 1, 1994, INS filed a Motion for Summary Decision (Motion) in which it argues that, under 28 C.F.R. § 68.9(c)(1), "[a]ny allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted." Complainant states that "since no allegations in the Complaint have been denied in the 'Answer[,]'" "every allegation of the Complaint is deemed admitted. . . ." Motion at 6. Therefore, Complainant asserts, no genuine issues of material fact remain with regard to liability, making this case appropriate for summary decision.[3] Complainant provides its evidentiary rationale to substantiate the civil money penalty assessment.

The time for timely response to the Motion for Summary Decision is long past. To date, no response to the Motion has been filed by Respondent.

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[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

[2] Respondent states that although he owns Cielito Lindo Restaurant, he has leased it out to others at various times during the past ten years.

[3] Title 28 C.F.R. § 68.38(c) states that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." See Celotex Corp. v. Catrett, 47 U.S. 317, 326 (1986); Pennsylvania Public Utility Comm'n. v. Federal Energy Regulatory Comm'n., 881 F.2d 1123, 1126 (D.C. Cir. 1989). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Because Respondent failed to deny any of Complainant's allegations, they are deemed admitted.

I agree that this case is appropriate for summary decision for the reasons Complainant asserts. I do not concur with the quantum of the civil money penalty assessment for the reasons stated below. Before that discussion, however, I note that there are OCAHO cases where the administrative law judge (ALJ), granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry. That separate inquiry is not necessary here where Respondent failed to deny the allegations of the complaint with the result that they are deemed admitted. 28 C.F.R. § 68.9(c)(1). The obligation of a respondent to deny each allegation of the complaint pertains as much to "the amount of a proposed penalty" as to liability. 28 C.F.R. § 68.9(c).

In United States v. Martinez, 2 OCAHO 360 (1991), the ALJ entered summary judgment, sua sponte, on the civil money penalty after consideration of an unopposed INS motion for partial summary decision which addressed only the question of liability. Neither party had moved for summary decision on the penalty issue. Upon review, the United States Circuit Court for the Fifth Circuit, concluding that the ALJ granted judgment as to penalty "without adequate notice," vacated and remanded the portion of the decision on summary judgment which concerned the penalty. Martinez v. I.N.S., 959 F.2d 968 (5th Cir. 1992) (unpublished). I distinguish the case at hand from Martinez v. I.N.S. on the basis that Complainant's Motion before me explicitly addresses civil money penalty as well as liability. Raygoza is no less on notice of the peril for failing to contest the Motion as to quantum than he is as to liability. Accordingly, there is no reason to bifurcate this proceeding and to delay judgment on penalty while now adjudicating liability.

II. *Civil Money Penalty Adjudged*

The statutory minimum for the civil money penalty is $100 per individual; the maximum is $1,000. 8 U.S.C. § 1324a(e)(5). As the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I will therefore only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

Five statutory factors must be considered in determining reasonableness of the civil money penalty. The factors are: "the size of

the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of the previous violations." 8 U.S.C. § 1324a(e)(5). In weighing each of these factors, I utilize a judgmental and not a formula approach. See e.g., United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993). In this way, each factor's significance is based on the facts of a specific case.

A. Size of Business

Complainant admits that Respondent's restaurant is small, "employing approximately seven people at any given time." Motion at 7. "1993 gross sales were approximately $110,000" and "Mr. Raygoza has leased to [sic] property to another operator from October 1987 through September 1992 for $276,000." Id. OCAHO case law has consistently held that where a business is 'small', the civil money penalty is to be mitigated. See e.g., United States v. Giannini Landscaping, Inc., 3 OCAHO 573 at 9 (1993); United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990). Consequently, size will be used to mitigate the penalty imposed against Respondent.

B. Good Faith

OCAHO case law has stated 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) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate "lack of good faith" the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

Complainant argues that Respondent's "[f]ailure to prepare I-9s for 25 individuals demonstrates at least a grossly negligent attitude regarding compliance with this statute." Motion at 7. There is no evidence, however, that there were other individuals employed by Respondent for whom he did fill out Forms I-9. Rather, Respondent claims a complete ignorance of § 1324a and his obligations thereunder. Answer at 1. Furthermore, Respondent only operated the business for a short while; the property was leased out during more than 90% of the time of ownership. Motion at 7. Accordingly, Respondent's record does not lead me to find him "grossly negligent" or showing "culpable behavior beyond mere failure of compliance." However, because I find

neither good faith nor lack of good faith on the part of Respondent, this factor does not mitigate or aggravate the civil money penalty.

C. Seriousness

OCAHO case law states that "a failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (citing United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992)). Respondent's failure to provide any Forms I-9 for the 25 individuals listed in Count I is therefore a serious violation which will aggravate the penalty.

D. Unauthorized Aliens

As there is no evidence that Respondent employed unauthorized aliens, I can neither penalize nor reward Raygoza for this factor.

E. History of Previous Violations

Respondent has no history of previous violations, a factor which mitigates the penalty on his behalf. See Giannini, 3 OCAHO 573 at 8.

F. Other Factors

"OCAHO case law instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties." United States v. King's Produce, 4 OCAHO 592 at 9 (1994). One factor which is often looked at in the precedents is the respondent's "ability to pay." See e.g., Minaco Fashions, 3 OCAHO 587 at 9. Respondent states in his Answer that he is unable to pay more than $1,500.00 for the violations alleged in this complaint because during the past two years, he has "suffered numerous personal and financial setbacks." Answer at 2. In addition, he states that he "no longer operates the Cielito Lindo Restaurant, which is leased to another party." These considerations suggest that a penalty in the amount assessed would not enhance the probability of future compliance. Accordingly, I adjudge a civil money penalty in an amount below the already relatively modest per capita sum of $250.00 assessed by INS, i.e., $150.00 per individual.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied.

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the INS assessment. While the size, ability to pay and lack of enhanced compliance do not support a finding for a high penalty, the aggravating factor of seriousness also does not support an assessment for the statutory minimum. Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That Complainant's Motion for Summary Decision is granted;

2. That Respondent failed to retain and/or make available for inspection the Form I-9 for 25 individuals as listed in Count I in violation of 8 U.S.C. § 1324a(a)(1)(B);

3. That upon consideration of the statutory criteria and other relevant factors used 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 pay a civil money penalty in the following amount:

   Count I: $150.00 as to each named individual, for a total of $3,750.

This Final Decision and Order Granting Complainant's Motion for Summary Decision 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 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.

SO ORDERED.

Dated and entered this 31st day of January, 1995.

MARVIN H. MORSE
Administrative Law Judge