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

July 18, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 95A00054
VOGUE PLEATING, STITCHING AND EMBROIDERY CORP., Respondent.	)	

DECISION AND ORDER

Appearances: William Jankun, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for Complainant; Richard Madison, Esquire, New York, New York, for Respondent.

Before: Administrative Law Judge McGuire

On April 1, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by serving Notice of Intent to Fine (NIF) NYC 274A-88000144, upon Vogue Pleating, Stitching & Embroidery Corp. (respondent). That citation contained three (3) counts and alleged a total of 177 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil money penalties totaling $69,180 were assessed.

In Count I, complainant alleged that respondent hired the 124 individuals named therein for employment in the United States after Novem-

ber 6, 1986, and that respondent failed to prepare, retain and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $410 for each infraction, or $50,840 for the 124 Count I violations.

In Count II, complainant asserted that respondent hired the 16 individuals named therein for employment in the United States after November 6, 1986, and failed to ensure that those individuals properly completed section 1 of the pertinent Forms I-9, and also failed to properly complete section 2 of those Forms I-9, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied a total civil money penalty of $5,760 for the violations alleged in that count, or $360 for each of those 16 alleged violations.

In Count III, complainant alleged that respondent had failed to properly complete section 2 of the Forms I-9 for each of the 37 individuals named therein, all of whom were allegedly hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $340 for each of those violations, or a total of $12,580 for the 37 alleged violations in that count.

Respondent was advised in the NIF of its right to contest those 177 charges by submitting a written request for a hearing before an administrative law judge within 30 days of its receipt of that citation.

On April 8, 1994, Richard Madison, Esquire, filed such a written request on respondent's behalf.

On March 23, 1995, complainant filed the Complaint at issue, in which it reasserted the 177 allegations set forth in Counts I, II and III of the NIF, as well as the requested civil money penalties totaling $69,180 for those alleged infractions.

On March 24, 1995, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of the Complaint at issue were served on respondent as well as respondent's counsel of record, Richard Madison, Esquire.

On April 24, 1995, respondent timely filed its Answer, in which it admitted liability with respect to the 177 violations set forth in Counts I, II and III of the Complaint but contested the amount of the civil money penalties assessed as not being reasonable or proper.

On May 12, 1995, a telephonic prehearing conference was conducted in which complainant's counsel, William Jankun, Esquire, as well as respondent's counsel, Richard Madison, Esquire, and the undersigned participated. It was decided that no evidentiary hearing would be held in New York, New York because respondent had previously admitted the facts of violation, as alleged, and contested only the amounts of the civil money penalties which have been assessed.

In lieu of conducting a hearing for the purpose of determining the appropriate civil money penalties for the violations contained in the Complaint, the parties agreed to submit written recommendations for appropriate civil penalty sums for the 177 infractions by giving due consideration to the five (5) statutory criteria listed in the pertinent provision of IRCA governing civil money penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5).

On July 3, 1995, complainant filed a pleading captioned Motion for Approval of Complainant's Proposed Penalty Amounts, requesting therein that fines totaling $69,180 be assessed against the respondent.

On July 6, 1995, respondent filed a pleading captioned Respondent's Brief, in which it recommended that the minimum amount of $100 be assessed for each of the 177 violations, for a total civil money penalty of $17,700.

In determining the appropriate civil money penalties to be imposed for paperwork violations, IRCA provides:

> With respect to a [paperwork] violation, the order under this subsection shall require the person or entity to pay a civil penalty in the 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 seriousness 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).

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

Complainant asserts that respondent's business, Vogue Pleating, Stitching & Embroidery Corp., is a large business. Complainant states that respondent was incorporated in 1967 and employed 177 individuals at the time of the February 26, 1993 compliance investigation. Respondent is engaged in the business of pleating, stitching, embroidery, scalloping and other related services. Complainant did not offer any information regarding respondent's financial condition.

Respondent, on the other hand, contends that its business is a small business, which has approximately 100 employees. Respondent advises that its business is "located in a single office work site in midtown Manhattan, New York City."

Because the record is incomplete regarding any significant business figures, it is found that respondent is a small business. Thus, the civil money penalty amount will be mitigated based upon this factor. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 6 (1994); United States v. Wood 'N Stuff, 3 OCAHO 574, at 6 (1993).

The second element that must be accorded consideration in determining civil money penalties is the respondent's good faith. Although IRCA is once again silent on what constitutes good faith, case law has established that mere allegations of paperwork violations do not constitute 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 the part of the respondent it is necessary for the complainant to present some evidence of culpable behavior beyond mere ignorance on the respondent's behalf. 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 argues that respondent failed to exercise reasonable care in its completion of the Employment Eligibility Verification Forms for its employees. Complainant contends that this is supported by the fact that respondent failed to prepare and/or make available for inspection Forms I-9 for 124 of its employees, and also presented defective Forms I-9 for its remaining 53 employees.

Complainant also argues that respondent was aware of its obligation to complete Forms I-9 for its employees as evidenced by the fact that respondent "received an educational visit from the Immigration and Naturalization Service, received the Handbook for Employers (M-274), and was given a person to contact if there were any additional questions."

Respondent asserts that "[n]owhere in the record, the Notice To Fine, or in the Complaint in this case against Vogue are there any facts that would tend to show bad faith on the part of Vogue." Respondent argues that the violations "were unintended and inadvertent," and that respondent's "fault is at worst carelessness." Respondent thus claims that it acted in good faith, and requests the undersigned to mitigate the fine based on this element.

The record discloses that 100 percent of the 53 Forms I-9 presented for inspection were completed improperly, and additionally that respondent failed to prepare and/or make available for inspection Forms I-9 for 124 of its employees. Failure by the employer to prepare Forms I-9 for its employees and/or to properly complete those forms frustrates complainant's ability to perform compliance audits. See United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 7 (1993).

Furthermore, INS agents briefed respondent on its responsibilities under IRCA, and also provided respondent with a copy of the Handbook for Employers, which also explains an employer's obligations under IRCA. In addition, the Handbook for Employers contains instructions for completing the Forms I-9.

For those reasons, it is found that respondent did not act in good faith, and as such, the proposed civil money penalty sums relating to the paperwork violations will be increased based upon this element. See United States v. Enrique Reyes, 4 OCAHO 592, at 8 (1994); United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 9 (1993).

The third of the five (5) statutory criteria that merits consideration pertains to the seriousness of the violations involved. 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 serious. See United States v. Mathis, 4 OCAHO 717, at 6 (1994), modified (1995); United States v. Enrique Reyes, 4 OCAHO 592, at 8 (1994); United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 8 (1993); United States v. Felipe, Inc., 1 OCAHO 93, 636-37 (1989).

Respondent failed to prepare and/or make available for inspection Forms I-9 for 124 of its employees named in Count I, and also failed to properly complete Forms I-9 for the 53 individuals named in Counts II and III of the Complaint. These are serious violations under IRCA because they completely undermine the purpose of the law. See

Mathis, 4 OCAHO 717, at 6; United States v. Primera Enters., Inc., 4 OCAHO 692, at 5 (1994); Felipe, Inc., 1 OCAHO 93, 636-37.

As the Chief Administrative Hearing Officer (CAHO) emphasized in his Modification of Charles C.W. Wu, "'a total failure to prepare and/or present the Forms I-9 is . . . serious since such conduct completely subverts the purpose of the law,' even where no unauthorized aliens are implicated." United States v. Charles C.W. Wu, 3 OCAHO 434, at 2 (1992), modified (quoting United States v. A-Plus Roofing, Inc., 1 OCAHO 209, at 1402 (1990)); see also United States v. Enrique Reyes, 4 OCAHO 592, at 9 (1994); United States v. San Ysidro Ranch, 1 OCAHO 183, at 1213 (1990); United States v. Cahn, 1 OCAHO 127, 863 (1990); United States v. Dodge Printing Centers, Inc., 1 OCAHO 125, at 852-53 (1990); United States v. Acevedo, 1 OCAHO 95, at 650 (1989).

With regard to the 53 violations for failing to properly complete sections 1 and/or 2 of the Forms I-9 for the individuals named in Counts II and III, complainant asserts that "[f]orty-eight (48) of the Forms I-9 did not have any part of Section 2 filled out and Lists A, B and C were totally blank for three (3) of the other Forms I-9."

Respondent acknowledges that the Forms I-9 were not properly filled in, as alleged by complainant, but points out that "Vogue did attach copies of documents to every form showing that each employee was authorized to work." Respondent's President, Lawrence Geffner, also acknowledged in an affidavit attached to respondent's brief, that respondent did not certify the information on the Forms I-9 by failing to sign the bottom of section 2 of the Forms I-9.

Failure to properly complete sections 1 and/or 2 of the Forms I-9 is also a serious violation under IRCA. See United States v. Mathis, 4 OCAHO 717, at 6 (1994), modified (1995); United States v. Davis Nursery, Inc., 4 OCAHO 694, at 20 (1994); United States v. Primera Enters., Inc., 4 OCAHO 692, at 5 (1994); United States v. Ulysses, Inc., 3 OCAHO 449, at 7-8 (1992); United States v. Felipe, Inc., 1 OCAHO 93, 636-37 (1989). In Wood 'N Stuff, it was held that "the negligent failure to fill out any part of an I-9 form, even if due to mere carelessness, is serious because it completely defeats the purpose of the verification provisions under IRCA. United States v. Wood 'N Stuff, 3 OCAHO 574, at 7 (1993).

In Acevedo, Judge Schneider stated that the failure to complete any portion of section 2 of a Form I-9, including an employer's failure to sign his own name, is a serious violation, because "the 'Employer

Review and Verification' section is the very heart of the verification process initiated by Congress in IRCA." United States v. Acevedo, 1 OCAHO 95, at 651 (1989); see also United States v. Noel Plastering and Stucco, Inc., 3 OCAHO 427, at 20 (1992) (the ALJ stressed that "[t]he Act's paperwork requirements form an integral part of the congressional scheme for controlling illegal immigration into this country").

Thus, it is appropriate to increase the monetary penalties based upon this criterion. See e.g., Mathis, 4 OCAHO 717, at 6; United States v. Task Force Security, Inc., 4 OCAHO 625, at 7 (1994); Enrique Reyes, 4 OCAHO 592, at 9 (1994).

The fourth element to be considered is whether any of the individuals involved were illegal aliens. There is no evidence in the record to indicate that any of respondent's employees were aliens not authorized for employment in the United States. Accordingly, it is appropriate to mitigate the proposed civil monetary penalties based upon this element. See United States v. Honeybake Farms, Inc., 2 OCAHO 311, at 4 (1991).

The fifth and final statutory criterion to be addressed in assessing the appropriate civil money penalty is respondent's history of previous violations. Complainant asserts that respondent has never been cited for any Section 1324a infractions and respondent confirms that it has no history of prior IRCA violations. Therefore, respondent is entitled to mitigation of its civil money penalties based on that factor. See Task Force, 4 OCAHO 625, at 8; United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8 (1993).

In enacting IRCA, Congress, significantly modified the United States policy regarding immigration inasmuch as IRCA mandates that employers have a duty to inspect and verify employment eligibility documents presented during the hiring process. Thus, employers are required, with limited inapplicable exceptions, to verify the identity and work authorization of all individuals hired after November 6, 1986. Additionally, employers must refuse to hire individuals not authorized to work in this country. See Task Force, 4 OCAHO 625, at 9.

IRCA provides for civil money penalties for employers who fail to comply with IRCA's paperwork provisions 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). Assessment of these civil money penalties serves the dual purpose of deterring repeat infractions of

IRCA by the cited employer and also encourages compliance by other employers. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (1992).

INS is charged with enforcing the provisions of IRCA, and is accorded broad discretion in assessing penalties for violations of this type. That flexibility permits INS to more fairly levy appropriate penalties based upon fact specific inspection scenarios. Id. Additionally, IRCA grants to the administrative law judge broad discretion in ordering appropriate civil money penalties for paperwork violations. 8 U.S.C. § 1324a(e)(5).

IRCA also mandates that complainant levy civil money penalties for the 177 paperwork infractions at issue. The range available to complainant begins at $17,700, which represents the minimum $100 assessment for each of the 177 violations and ends at $177,000, which is the maximum $1,000 assessment for each of those violations. Complainant seeks civil money penalties totaling $69,180, that amount representing $50,840 or $410 for each of the 124 Count I violations, $5,760 or $360 for each of the 16 Count II infractions, and $12,580 or $340 for each of the 37 violations set forth in Count III.

Respondent, on the other hand, has recommended the statutory minimum amount of $17,700 for the 177 paperwork violations.

After carefully considering the five (5) previously mentioned statutory criteria, it is found that the appropriate civil money penalty sum for each of the 177 violations set forth in Counts I, II and III, is $325 per violation, or a total civil money penalty of $57,525 for the 177 infractions at issue.

Order

It is ordered that the appropriate total civil money penalty sum for the 177 violations cited in NIF NYC 274A-88000144 is $57,525, or $325 for each of the 177 violations recited in Counts I, II and III.

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 (1991).