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

February 13, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding Case No. 95A00057
GREAT BEND PACKING CO., INC., d/b/a GREAT BEND PACKING COMPANY, Respondent.	)	

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Karl V. Cozad, Esq.,* for Complainant
Lisa A. Lopatka, Esq., for Respondent

I. *Procedural History*

On March 31, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated March 30, 1995, 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 Great Bend Packing Co. (GBPC or Respondent) and issued on February 17, 1995.

Count I of the Complaint charged Respondent with knowingly continuing to employ one named individual in violation of 8 U.S.C. §1324a(a)(2). The civil money penalty assessed for Count I is $2,000. Count II charged Respondent with failure to complete properly section 1 of the Form I–9 for three named individuals in violation of 8 U.S.C. §1324a(a)(1)(B) and assessed a civil money penalty in the

amount of $600 per individual for a total of $1,800. Count III alleged that Respondent failed to complete Section 2 of the Form I–9 within three business days of hire for three named individuals in violation of 8 U.S.C. §1324a(a)(1)(B), for a civil money penalty of $1,800. Lastly, Count IV alleged that Respondent failed to reverify and/or properly complete Section 3 of the Form I–9 in violation of §1324a (a)(1)(B) for the individual also named in Count I, for a civil money penalty of $600. INS demanded a total of $6,200 in civil money penalties.

On April 5, 1995, OCAHO issued a Notice of Hearing (NOH) which transmitted to Respondent a copy of the Complaint and a copy of OCAHO rules of practice and procedure 28 C.F.R. pt. 68.

On May 10, 1995, Respondent timely filed an Answer which denied the allegations in Count I pertaining to knowingly continuing to employ an unauthorized alien and challenged OCAHO jurisdiction to enter the cease and desist order as requested by INS. Respondent conceded liability for Count II but objected to the civil money penalty amount. Respondent denied the allegations of Count III and denied the allegations in Count IV relating to failure to complete and/or reverify on the basis that the allegations were vague and ambiguous.

On August 10, 1995, Complainant filed a Motion for Partial Summary Decision which argued that it was entitled to summary decision in Count I of the Complaint because Respondent had knowledge of the unauthorized alien's status and did not terminate his employment until three months after his work authorization had expired. Complainant also argued that summary decision should be granted as to Counts II and IV because Respondent admitted the allegations contained in those Counts and offered "good faith" and "cooperation" as affirmative defenses; such affirmative defenses should only be considered in the context of civil money penalties. *See* 8 U.S.C. §1324a(e)(5). On August 15, 1995, Complainant filed a Motion to Dismiss Count III of the Complaint.

On August 18, Respondent filed a letter/pleading requesting an extension of time in which to respond to Complainant's Motion for Partial Summary Decision which I granted by Order of that date.

Respondent filed its Memorandum in Opposition to Complainant's Motion for Partial Summary Decision on September 11, 1995. Respondent conceded liability as to Counts II and IV, but argued as

to Count I that genuine issues of material fact remained as to its knowledge of the unauthorized status of the individual named in Count I. The civil money penalty quantum remained at issue.

On September 18, 1995, I issued an Order Granting Complainant's Motion for Partial Summary Decision and First Prehearing Conference Report and Order (Order). At the prehearing conference held that day, as confirmed by the Order, I granted Complainant summary decision on Count I in violation of 8 U.S.C. §1324a(a)(2), and 8 C.F.R. §274a.3, finding liability for knowingly continuing to employ an unauthorized alien.

That Order concluded that the regulations implementing §1324a obligate an employer to reverify the employment status of its employees, 8 C.F.R. §274a.2(b)(1)(vii), holding that "[r]everification on the Form I–9 must occur *not later than the date work authorization expires.' Id.* (Emphasis added). Moreover, 'failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.' *United States v. Buckingham Ltd. Partnership*, 1 OCAHO 151, 1067 (1990) (citations omitted). 'Notice is given when it is communicated." *Id.* (Citations omitted).[1] Accordingly, as announced at the conference, by recording the alien's work authorization expiration date but continuing to employ him subsequent to that date, Respondent was on notice that the alien had become unauthorized for employment and was, therefore, liable as to Count I.

Complainant's Motion as to Count II, failure to ensure proper completion of Forms I–9 for three individuals, and Count IV, failure to reverify and/or properly complete Form I–9 for one individual, for which Respondent admitted liability in its Memorandum, was also granted. 8 U.S.C. §1324a(1)(B); 8 C.F.R. §§274a.2(b)(1)(i) and (vii). As requested by Complainant, Count III was dismissed. *See* Motion to Dismiss Count III of Complaint Regarding Unlawful Employment. All substantive allegations having been resolved, only the issue of civil money penalty remains to be adjudicated. As confirmed by my Order dated November 6, 1995, both parties agreed to submit penalty briefs without a confrontational, evidentiary hearing.

[1] *See also Mester Mfg. Co. v. I.N.S.,* 879 F.2d 561, 567 (9th Cir. 1989) (holding that "it is irrelevant by what means respondent obtained notice sufficient to form scienter by which it is concluded respondent knew, or should have known, that the status of the employees was that they were unauthorized aliens"), *aff'g., United States v. Mester Mfg Co.,* 1 OCAHO 18, 53 (1988).

In response to my request for memoranda or briefs analyzing the five statutory factors to be considered upon adjudicating a civil money penalty, Complainant filed a Motion for Assessment of Civil Money Penalty on December 1, 1995 (Cplt. Mot.). Respondent submitted its Memorandum in Response to Complainant's Motion for Assessment of Civil Money Penalty on January 6, 1996 (Resp. Mem.).

II. Discussion

A. *Liability Established*

As discussed, the September 18, 1995 Order established liability as to all remaining counts, i.e., I, II and IV.

B. *Civil Money Penalty Adjudged*

1. *The Substantive Violation*

Respondent is liable for knowingly continuing to employ Jorge L. Garcia-Ceniceros a/k/a Jorge Garcia (Garcia), an unauthorized alien. The statutory minimum civil money penalty for a substantive violation is $250; the maximum is $2,000. Since 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 INS assessment, i.e., $2,000. *See United States v. Williams Produce, Inc.*, 5 OCAHO 730 (1995), *aff'd.* (11th Cir.1995); *United States v. DuBois Farms, Inc.*, 2 OCAHO 376 (1991). I, therefore, only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of the assessment. *See United States v. Tom & Yu*, 3 OCAHO 445 (1992); *United States v. Widow Brown's Inn,* 3 OCAHO 399 (1992).

Unlike the statutory treatment of §1324a paperwork violations, the Immigration Reform and Control Act (IRCA) is silent as to factors to consider in determining the appropriate civil money penalty for an unauthorized hire. Complainant asserts that "Respondent knew, or reasonably should have known" that Garcia did not have proper work authorization. Complainant suggests that if Respondent had paid attention to I–9 completion and reverification requirements, Garcia would not have continued in Respondent's employment for over three months past his employment expiration.

According to Complainant, continuing to employ an unauthorized alien knowing him to be ineligible for employment is a serious violation of §1324a.

While I sympathize with Respondent that a high employee turnover rate heightens I–9 compliance responsibility, I do not agree that it is "understandable, if not excusable, that one employees [sic] work authorization would have escaped her notice." Resp. Mem. at 3–4. To conclude on the basis of a relatively high employee turnover rate that knowingly continuing to employ an unauthorized alien is "understandable" or "excusable" would vitiate the purpose of the employment eligibility verification program. *See, e.g., United States v. Felipe, Inc.,* 1 OCAHO 93, at 636 (1989); *United States v. Wood'N Stuff,* 3 OCAHO 574, at 7 (1993).

Complainant is correct that continuing to employ an unauthorized alien after having learned of his illegal status is a serious violation of IRCA.[2] However, while Complainant's evidence indicates that more than one employee may have been unauthorized for employment, the Complaint charges only one such violation. I generally "do not consider uncharged events as evidence of any further violations." *Williams Produce,* 5 OCAHO 730 at 9; *United States v. Chef Rayko, Inc.,* 5 OCAHO 794, at 5 (1995) (Modification [on other grounds] by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order). Accordingly, absent prior violations or other aggravating circumstances, I deem it fair and just to reduce the penalty to $1,200 for knowingly continuing to employ *one* unauthorized alien.

I reject Respondent's suggestion that a cease and desist order must be limited to the particular specification of substantive violations; and cannot pertain generally to subsequent violations of 8 U.S.C. §1324a(a). *See* §1324a(e)(4)(A) ["such violations"]. The cease and desist sought by Complainant as promulgated in this Final Decision and Order is not overbroad within the meaning of the authorities relied on by Respondent.

[2] Respondent argues that until it received the NIF, it did not learn of Mr. Garcia's unauthorized status. However, as stated in the September 18, 1995 Order, "failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *United States v. Buckingham Ltd. Partnership*, 1 OCAHO 151, 1067 (1990).

2. *Paperwork Violations*

In addition to the knowingly continuing to employ violation, Respondent is also liable for paperwork violations as alleged in counts II and IV. The statutory minimum civil money penalty is $100; the maximum is $1,000. 8 U.S.C. §1324a (e)(5). In determining the quantum of a penalty, I am obliged to consider the five factors prescribed by 8 U.S.C. §1324(a)(e)(5): size of the employer's business; good faith of the employer; seriousness of the violation; whether or not the individuals involved were authorized; and the history of previous violations. *Id.* In weighing each of these factors, I utilize a judgmental and not a formula approach. *See, e.g., Williams Produce*, 5 OCAHO 730; *United States v. Enrique Reyes*, 4 OCAHO 592 (1994); *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573 (1993). The result is that each factor's significance is based on the facts of a specific case, consistent with the guidance of IRCA jurisprudence as precedent. As with substantive violations, I assess a civil money penalty which is not less than the statutory minimum and, except in unusual circumstances not present here, not in excess of the sum sought by INS.

Complainant's underlying NIF, as adopted in the Complaint, proposed $600 for each failure to properly complete an I–9, for a total of $4,400. Respondent's Memorandum, citing the five factors, asserts that the assessment is "grossly disproportionate to GBPC's offenses." Resp. Mem. at 2.

a. *The Factors Applied*

(1) *Size of Business*

Complainant and Respondent agree that Respondent is a small business. Cplt. Mot. at 4; Resp. Mem. at 4. Complainant argues, however, that smallness should not be a mitigating factor. Complainant argues that the employee terminations, discrepancies with the verification forms at the time of hire, and the improper review of documents at the time of hire are reasons not to consider the size of business a mitigating factor. Cplt. Mot. at 4–5.

I disagree with Complainant's assertion that Respondent's small size is not a mitigating factor. OCAHO caselaw holds that where a business is 'small,' the civil money penalty may be mitigated. *United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 3 (1995);

Giannini, 3 OCAHO 573 at 9; *United States v. Cuevas d/b/a El Pollo Real*, 1 OCAHO 273, 1746 (1990). Whatever was intended by size as a consideration, I cannot suppose that the small size of an enterprise was to be considered an aggravating factor except in extraordinary circumstances. *Chef Rayko, Inc.,* 5 OCAHO 794. None of the considerations cited by Complainant militate in favor of an enhanced penalty which turns on size of the enterprise. Therefore, since it is undisputed that Respondent is a small business, the factor of size mitigates in its favor.

(2) *Good Faith of the Employer*

OCAHO case law holds that "the mere fact of paperwork violations is 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)).

In its Motion for Assessment of Civil Money Penalties, Complainant states:

> [s]omewhere between 10% and 38% of Respondent's workforce were found to lack employment authorization. The Service believes the state of the Respondent's work force requiring such terminations would not have occurred if the Respondent had been serious about complying with employment verification procedures prior to its notification of the I–9 inspection.

Cplt. Mot. at 6. Complainant concludes that the lack of compliance *prior* to its notification of I–9 inspection is an aggravating factor in assessing civil money penalties. Respondent argues, however, that the record must show culpable conduct beyond failure of compliance. Further, Respondent asserts that there exists no culpable behavior, just a lack of compliance.

In response to Complainant's argument, OCAHO case law states that "[a] dismal rate of Form I–9 compliance alone should not be used to increase the civil money penalty sum based upon the statutory good faith criterion." *United States v. Karnival Fashion, Inc.*, 5 OCAHO 769, at 4 (1995) (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order). On the facts of the present case, I am satisfied that less than full compliance with Form I–9 requirements does not *per se* lead to a conclusion that the employer acted in bad faith in failing to

fully comply with I–9 verification requirements. *See Chef Rayko*, 5 OCAHO 794 at 6.

Respondent, on the other hand, notes that it has been cooperative and forthcoming with INS Special Agent Sharp. Resp. Mem. at 3. While its cooperation with the INS is a subfactor to take into consideration, the fact that Respondent undertakes *prospectively* to conduct a self-audit, while admirable, is not a factor which mitigates in its favor. It is only logical that as a general proposition, the good faith of the employer is calculated as of the time of investigation and not thereafter. *See United States v. Danny Mathis*, 4 OCAHO 717 (1994) (modification by the Chief Administrative Hearing Officer (CAHO) of the Administrative Law Judge's (ALJ) Order in which the CAHO ruled that by "according weight to the behavior of the respondent during the discovery phase of the litigation in the context of a good faith analysis . . . [the ALJ went] beyond the scope of a permissible good faith analysis . . . "); *Chef Rayko*, 5 OCAHO 794 at 7. There may be a difference between the significance of behavior *after* investigation or inspection, as here, and *after* litigation commences, as in *Danny Mathis.* In either case, the employer did not act in compliance *sua sponte*, but in the *Danny Mathis* situation, behavior during litigation does not inform the record as to compliance disposition,whereas compliance which commences after investigation/inspection may in a given case be informative. Here, however, balancing the arguments of the parties, I conclude that the factor of good faith neither mitigates nor aggravates the civil money penalty.

(3) *Seriousness of the Violations*

As well established in OCAHO jurisprudence:

> 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 Group, Inc.,* 2 OCAHO 342, at 3 (1992). The seriousness factor must be considered in context of the factual setting of the particular case. *Giannini Landscaping, Inc.,* 3 OCAHO 573.

United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 8 (1993) (emphasis added).

Complainant argues that Respondent knew, or reasonably should have known that a substantial number of its workforce were not authorized for employment in the United States. Complainant includes in the "substantial number" individuals not named in the Complaint. As stated above, I generally "do not consider uncharged

events as evidence of any further violations." *Williams Produce*, 5 OCAHO 730 at 9; *Chef Rayko*, 5 OCAHO 794 at 5.

Respondent asserts that failure to properly complete a Form I–9 is less serious than failure to prepare and present any I–9s. Therefore, Respondent argues the less serious violation of failure to properly complete an I–9 is a factor which mitigates the civil money penalties. In this case, Respondent failed to ensure that three employees properly completed Section 1 of the Form I–9. Also, Respondent did not properly complete Section 3 of the Form I–9 or a new Form I–9 as to one individual. OCAHO precedent supports the notion that failure to properly complete the I–9 is less serious; it is, however, still serious in that the sections of the I–9 not completed by Respondent "are critical for deterring hiring illegal aliens." *United States v. Davis Nursery*, 4 OCAHO 694, at 22 (1994). Accordingly, the seriousness factor will be moderately aggravated, and the penalty adjudged will reflect their relatively less serious nature. *See, e.g., Chef Rayko*, 5 OCAHO 794 at 7.

(4) *Employment of Unauthorized Aliens*

OCAHO caselaw holds that employment of unauthorized aliens is generally considered a factor which aggravates the civil money penalty. *See, e.g., Giannin*i 3 OCAHO 573 at 8; *United States v. Fox,* 5 OCAHO 756, at 3–4 (1995). One unauthorized alien is included in Count I and Count III, i.e., Garcia. The fact that one employee among the four failures to properly complete I–9s is an unauthorized alien, is a factor which weighs against the employer. *See United States v. Enrique Reyes,* 4 OCAHO 592, at 7 (1994).

(5) *Previous §1324a Violations*

As Complainant concedes that Respondent had not been previously cited for a violation of 8U.S.C.§1324a, this factor will mitigate in Respondent's favor. Cplt. Mot. at 6. *See also Giannini*, 3 OCAHO 573 at 8.

(6) *No Additional Factors to Consider*

"OCAHO case law instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties." *United States v. Enrique Reyes*, 4 OCAHO 592, at 9 (1994). *See, e.g., Minaco Fashions,* 3 OCAHO 587 at 9; *Giannini Landscaping, Inc.,* 3

OCAHO 573 at 10. As stated in *United States v. M.T.S. Service Corporation*.

> 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 money penalties.")

3 OCAHO 449, at 4 (1992). No additional factors are specified by the parties as a predicate on which to mitigate or to aggravate the civil money penalties.

(7) *Effect of Factors Weighed Together*

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. On the basis of the foregoing, I moderately reduce the assessment. I do not find a basis for a substantial reduction foregoing, I moderately reduce the assessment. I do not find a basis for a substantial reduction. Accordingly, taking the five factors into consideration in context of the entire circumstances, this Final Decision and Order reduces the INS assessment to $500 per individual.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings and accompanying documentary materials submitted by both 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 a preponderance of the evidence:

1. that Respondent violated 8 U.S.C. §1324a(a)(2) as alleged in Count I of the Complaint. As a result, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of **$1,200**;

2. that upon consideration of the statutory criteria and other relevant factors used for determining the amount of the penalty for violation of two counts of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay civil money penalties in the following amount:

Count II, $500 as to the three named individuals, **$1,500**

Count IV, **$500** as to the one named individual

For a total civil money penalty of **$2,000**;

3. that Respondent pay a total civil money penalty of **$3,200**;

4. that Respondent will cease and desist from further violations of 8 U.S.C. §1324a(a).

This Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324(e)(7) and 28 C.F.R. §68.53(a)(2). 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 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.

SO ORDERED.

Dated and entered this 13th day of February, 1996.

MARVIN H. MORSE
Administrative Law Judge