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 |
| | ) OCAHO Case No. 96A00113 |
| DRAPER-KING COLE, INC., Respondent. | ) |

**NOTIFICATION OF ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER**

On May 19, 1997, the Honorable Joseph E. McGuire, the Administrative Law Judge (hereinafter the ALJ) assigned to the above styled proceeding, entered a Final Decision and Order. On June 16, 1997, Respondent requested an administrative review of the Final Decision and Order by the Chief Administrative Hearing Officer pursuant to 8 U.S.C. §1324(a)(e)(7) and 28 C.F.R. §68.53(a). In his Memorandum in Support of Request for Review, Respondent presented two issues for review: the ALJ's decision to strike Respondent's affirmative defenses and Complainant's failure to amend the complaint.

I have administratively reviewed the record of this proceeding, the ALJ's order of November 26, 1996, and the ALJ's Final Decision and Order of May 19, 1997. I find no basis for modification or vacation. Accordingly, the Administrative Law Judge's order of May 19,1997 is affirmed and will become the final agency order on June 18, 1997.

It is so ordered, this 18th day of June, 1997.

JACK E. PERKINS
Chief Administrative Hearing Officer

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

May 19, 1997

| | |
|---|---|
| UNITED STATES OF AMERICA, Complainant, | ) |
| v. | ) 8 U.S.C. 1324a Proceeding |
| | ) OCAHO Case No. 96A00113 |
| DRAPER-KING COLE, INC., Respondent. | ) |

**FINAL DECISION AND ORDER**

Appearances: *Kent J. Frederick, Esquire,* Immigration and Naturalization Service, United States Department of Justice, Philadelphia, Pennsylvania for complainant; *James Caulfield, Esquire,* Milton, Delaware for respondent.

Before: Administrative Law Judge McGuire

I. *Procedural History*

On September 27, 1996, the United States Department of Justice, Immigration and Naturalization Service (complainant or INS), filed a three (3)-count Complaint Regarding Unlawful Employment, in which it alleged that subsequent to November 6, 1986, respondent had committed 116 paperwork violations of the Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. §1324a, for which civil money penalties totaling $34,800 were assessed. That Complaint was amended on March 3, 1997, leaving at issue 114 violations and an assessment of civil money penalties totaling $34,200.

Count I of the Complaint alleged that respondent had failed to ensure the 10 listed employees, who had been hired for employment after November 6, 1986, had properly completed Section 1 of their

Employment Eligibility Verification Forms (Forms I–9), in violation of 8 U.S.C. §1324a(a)(1)(B). Civil money penalties of $300 were levied for each of those 10 alleged infractions, for a total of $3,000.

In Count II, complainant charged that respondent had failed to properly complete Section 2 of the Forms I–9 for each of the 69 listed employees, who had been hired for employment after November 6, 1986, thus violating the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $20,700 for that count, or $300 for each of those 69 infractions.

Count III alleged that respondent had failed to ensure that the 35 listed employees, who had been hired for employment after November 6, 1986, had properly completed Section 1 of their Forms I–9, and also that respondent had failed to properly complete Section 2 of those same forms, thus violating the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $10,500 for that count, or $300 for each of those 35 infractions.

On February 19, 1997, the parties filed a pleading captioned Joint Stipulation of the Parties and Joint Request for Telephone Settlement Conference, advising that the respondent had admitted liability as to the 114 violations of IRCA alleged in the Complaint.

During the course of a prehearing telephonic conference conducted on March 17, 1997, the parties were invited to submit concurrent briefs addressing the appropriate penalties to be assessed for those 114 admitted infractions.

Accordingly, on April 14, 1997, complainant filed a pleading captioned Brief Regarding Appropriate Civil Monetary Penalty, in which it reasserted the appropriateness of its prior $34,200 civil money penalty assessment.

On April 15, 1997, respondent filed a pleading captioned Memorandum of Respondent in Support of its Position on Penalty, requesting that the undersigned deny complainant's request for civil money penalties totaling $34,200, and further, decline to impose any monetary penalty because the admitted violations were "technical violations of a minor nature."

On May 2, 1997, respondent filed a pleading captioned Motion of Respondent to File Written Response, together with a Memorandum

in Response, requesting leave to file a memorandum in response to complainant's Brief Regarding Appropriate Civil Monetary Penalty. Because complainant does not oppose that motion, respondent's request is granted.

II. *Assessment of Proposed Civil Money Penalties*

As part of its compliance regime, IRCA provides for civil money penalties to be levied against employers who fail to comply with its paperwork provisions, 8 U.S.C. §1324a(e)(5), with such penalty sums ranging from a statutorily mandated minimum of $100 to a maximum of $1,000 for each violation. *Id*. Imposition of civil money penalties deters repeat infractions of IRCA by the cited employer, while concurrently encouraging compliance by other employers. *See United States v. Ulysses, Inc.*, 3 OCAHO 449, at 8 (1992).

"INS is tasked with enforcing the provisions of IRCA, and is accorded broad discretion in assessing penalties for violations of this type." *United States v. Ricardo Calderon, Inc.*, 6 OCAHO 832, at 7 (1996). Such flexibility allows INS to consider the particular facts of each case when levying an appropriate penalty sum. *Id*. IRCA also grants broad discretion over penalties to the administrative law judge in charge of the case. 8 U.S.C. §1324a(e)(5) provides:

> With respect to a [paperwork] violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an 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.[1]

It is readily apparent that in having admitted to the 114 facts of violation of the paperwork provisions of IRCA in the manner alleged, the minimum civil money penalty sum which complainant could have assessed was $11,400, or the statutory mandated minimum amount of $100 for each proven infraction. Alternatively, complainant could have imposed the maximum sum of $114,000 for

[1]Respondent argues that the statute does not mandate the imposition of civil money penalties for proven paperwork violations. The implementing regulation at 8 C.F.R. §274a.10(b) provides that "[c]ivil penalties may be imposed by the Service or the administrative law judge for violations under 274A of the Act." Despite the precatory language employed by the regulation, the statutory language is controlling.

these infractions. It proposed civil penalties totaling $34,200, instead, or an average of $300 for each violation.

Accordingly, having stipulated to liability, due consideration of the five (5) statutory factors is in order to determine whether complainant's proposed penalty is appropriate.

1. *Size of Business*

According to §1324a(e)(5), the size of respondent's business is the initial statutory factor which must be considered when determining an appropriate penalty. 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. Four Star Knitting*, 6 OCAHO 868, at 9 (1996); *United States v. Tri-Component Prod. Corp.*, 6 OCAHO 273, (1996).

Neither IRCA nor its implementing regulations, however, provide clear-cut definitions of what constitutes "size of the business." *See United States v. Tom & Yu, Inc.*, 3 OCAHO 445, at 4 (1992). Nonetheless, to ascertain the size of a business, previous OCAHO rulings have considered respondent's revenue or income, the size of its payroll, the number of its salaried employees, the nature of its ownership, the length of time it has been in business, and the nature and scope of its business facilities. *United States v. Felipe, Inc.*, 1 OCAHO 93, at 631–32 (1989) ("the point of a penalty is certainly not to put anybody out of business").

Complainant has argued that respondent's business is medium-sized:

> Complainant submits that Respondent should be deemed to be at least a medium sized business. Respondent's business is a canning factory located in Milton, Delaware. The Delaware State Department of Labor generated a list of 720 employees receiving wages from Respondent in June, 1986. Based upon the Department of Labor's records the Respondent has over a six million dollar annual payroll. Respondent has an employee designated as the Director of Human Resources.

Complainant's Penalty Brief, at 2.

Respondent has not offered any evidence which assists in determining the size of its business, but has commented that "Milton,

Delaware is a tiny community almost entirely dependent upon Respondent for its revenue and population base . . . [and that the imposition of a civil penalty] could end a business that has been a steady concern for over 100 years." Respondent's Penalty Brief, at 4. Respondent also acknowledges that its work force consisted of approximately 1000 employees at the time of the initial compliance audit conducted by the Service on October 31, 1995. *Id*. at 1.

Because respondent has neither contested complainant's assertions nor offered evidence in rebuttal, complainant has met its burden of demonstrating that respondent is at least not a small business and is thus not entitled to mitigation of the proposed civil money penalties on the basis of that element.

2. *Good Faith of the Employer*

The second element to be considered is the good faith of the employer. OCAHO 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). In order to demonstrate a lack of good faith on respondent's part, complainant must present some evidence of "culpable behavior beyond mere failure of compliance." *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 3 (1995) (as modified). Furthermore, "[a] dismal rate of Form I–9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion." *Id*. at 4.

Complainant maintains that respondent's conduct under these facts equates to bad faith:

> On October 31, 1995, the Service conducted an audit of Respondent's Forms I–9 for all employees who were presently employed by Respondent at that time. [T]he audit showed that most of the Forms I–9 presented by respondent were seriously flawed. Special Agent William Lowder presented an exhaustive educational session with Respondent, as part of the audit.
>
> . . . Despite the numerous violations of §274A(a)(1)(B) of the Act and the large number of unauthorized aliens employed by Respondent, the Service declined to issue a Notice of Intent to Fine. Following this visit the Service conducted follow up audits on January 4, 1996 and February 12, 1996, to ensure Respondent was in compliance . . .
>
> . . . The Service conducted an additional audit of Respondent's Forms I–9 in July 1996. The Service audited only the Forms I–9 for employees hired after

> the date of the initial audit, October 31, 1995. Respondent produced 192 Forms I–9, from which the Service determined that Respondent committed 114 violations of §274A(a)(1)(B) of the Act.

Complainant's Penalty Brief, at 3. In support of these assertions, complainant has provided the declaration of Special Agent William M. Lowder. Agent Lowder states that during the course of a compliance audit conducted on October 31, 1995, he provided respondent a copy of the INS *Handbook for Employers* and educational instruction on properly completing the Form I–9. Lowder Decl. at ¶4. Agent Lowder further states that he conducted follow up audits on January 4 and February 12, 1996. *Id*. at ¶¶6, 7.

On July 29, 1996, some five (5) months after his last meeting with respondent, Agent Lowder conducted an additional compliance audit in which 114 paperwork infractions were detected. *Id*. at ¶5. Complainant contends that respondent "lapsed into noncompliance once it received assurance that there would be no further inquiry based upon" the Service's favorable inspection notice issued after the February 12, 1996 audit. Complainant's Penalty Brief, at 4.

Respondent disagrees with complainant's allegations of bad faith, noting that "there is a long record of Respondent's cooperation over many years with the [INS] that predates this case." Respondent's Reply Brief, at 2. Respondent also comments that "upon notice of the various mistakes in the Forms I–9, Respondent acted promptly and corrected them." *Id*.

Respondent also asserts that its failure to comply with IRCA was not due to disdain for the law, but rather to carelessness and ignorance, enhanced by the allegedly ineffective educational visits conducted by the INS. Respondent states:

> Complainant also neglected to point out that Respondent's Director of Human Resources . . . admitted his and his staff's unfamiliarity with the Service's requirements and asked the agent-in-charge to please help his staff in becoming adapt [sic] in doing this paperwork since they were all new at their jobs . . . [t]he agent in charge, as was noted, however, was more interested in his personal agenda than in establishing a good working relationship with Respondent's staff.

*Id*. This argument clearly undercuts respondent's other claim of having a long record of cooperation with the INS, and is thus accorded little weight.

A lack of good faith has routinely been found where the complainant has shown prior educational visits to respondent's place of business by officials of the INS in which respondent's responsibilities under IRCA are explained and informational materials provided. *See United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 8–9 (1993); *Karnival Fashion*, *supra*, at 3.

In this case, it is undisputed that the INS made three (3) separate visits within a year prior to the final audit. As noted by complainant, during the final audit Agent Lowder inspected only those Forms I–9, 192 in total, that had been completed after his initial educational visit on October 31, 1995, and of those, 114 or 59%, were improperly completed. That failure rate cannot be explained by merely alleging that Agent Lowder failed to properly educate the respondent as to its obligations under IRCA.

Respondent also draws attention to the Parties' Joint Stipulation, in which the Service concedes that respondent acted promptly to correct any errors. Those facts, while commendable, are not sufficient to overcome the complainant's showing that respondent, by having committed numerous paperwork infractions after three (3) separate visits by the Service, did not act in good faith.

Accordingly, it is found that respondent has not acted in good faith, and is therefore not entitled to mitigation of the proposed civil money penalties based upon this element, and should have had the proposed penalty enhanced based upon this factor.

3. *Seriousness of the Violations*

The third of the five (5) statutory criteria to be considered involves the seriousness of the violations alleged. Paperwork violations, such as those at issue, while less egregious than a knowing hire violation, are to be considered serious in that they undermine the employment eligibility verification system instituted by Congress. *United States v. Eagles Groups, Inc.*, 2 OCAHO 342, at 3 (1992) ("The 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").

Moreover, while all paperwork violations are assessed as serious, some types of infractions are more so than others. For example, it has been held that failure to properly prepare the Form I–9, by hav-

ing either failed to ensure proper completion of section 1 or by having improperly completed section 2, is less serious than not having prepared one at all. *United States v. El Paso Hospitality, Inc.*, 5 OCAHO 737, at 7 (1995); *United States v. Mathis*, 4 OCAHO 717, at 6 (1995) (as modified).

The Complaint charges in Count I that the respondent failed to ensure that the employees completed section 1 of the Forms I–9, in Count II that respondent failed to properly complete section 2 of the Forms I–9, and in Count III that the respondent failed to ensure that the employees properly completed section 1 of the Forms I–9 and that the respondent failed to properly complete section 2 of the Forms I–9.

Complainant maintains that "the large number of violations, as well as the high percentage [59%] of all Forms I–9 containing errors submitted to the Service for inspection support a determination that the fine amount should be aggravated under this factor." Complainant's Penalty Brief, at 5.

Respondent disagrees with complainant's allegations that the proven infractions were either serious or support aggravation of the penalty. Respondent has commented that complainant's "argument here is in direct conflict with its stipulation . . . wherein it agreed that the violations 'were minor' [and] is shocked at the conduct of the Service." Respondent's Reply Brief, at 2.

Because of the large aggregation of violations, no grounds exist to use this factor to mitigate the penalty assessed. However, because the Service has stipulated that most of the violations were minor and respondent acted promptly to correct them, the penalty shall not be aggravated based upon this criterion. Parties' Joint Stipulation, at ¶¶12, 13.

4. *Involvement of Unauthorized Aliens*

The fourth element to be examined consists of determining whether any of the individuals involved were unauthorized aliens. 8 U.S.C. §1324a(e)(5). Complainant acknowledges that there is no evidence that any of the employees named in the Complaint were without employment authorization. Therefore, in the absence of a showing that unauthorized aliens were involved in these infractions,

respondent is entitled to mitigation of the civil money penalty based upon that factor.

5. *History of Previous Violations*

The fifth and concluding criterion to be considered is whether the respondent has a history of previous violations. It is undisputed that respondent has no prior history of IRCA violations and is thus entitled to mitigation of the proposed civil money penalties based on this factor.

In summary, given the fact that it has been demonstrated that respondent is entitled to mitigation of the proposed civil money penalty sums on two (2) of the five (5) statutory criteria and that it has also been shown that its civil money penalty sums should be aggravated based upon on one (1) statutory criterion, this record fails to disclose that complainant has acted unreasonably or that it has abused its discretion in assessing these civil money penalty sums.

That because in having assessed civil money penalty sums averaging $300 for each violation, or $200 in excess of the mandated minimum amount, INS moved upwardly only some 22.22% on its discretionary $900 civil money penalty spectrum in having done so. Given that circumstance, it is also readily discernible that respondent has not been treated unfairly under these facts, nor has INS abused its enforcement discretion in having levied these assessments.

*Order*

Having determined that respondent violated the paperwork provisions of 8 U.S.C. §1324a in the manner described in the three (3)-count Complaint at issue, it is ordered that the total civil money penalty sum for the 114 proven violations is $34,200, as previously assessed.

Respondent is further ordered to cease and desist from further violations of the provisions of 8 U.S.C. §1324a(a)(1)(B).

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 respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (9) and 28 C.F.R. §68.53 (1996).