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

October 29, 1997

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding
	) OCAHO CASE NO. 97A00054
RICKY CATALANO, d.b.a. PAPA JOE'S PIZZA, Respondent.	)

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Ann M. Tanke, Esq.*, for Complainant.
Dominic Catalano and *Ricky Catalano*, *pro se*.

I. *Procedural History*

On January 17, 1997, the Immigration and Naturalization Service (INS) filed a Complaint against Ricky Catalano d/b/a Papa Joe's Pizza (Papa Joe's or Respondent). The Complaint alleges that Papa Joe's, between January 20, 1992 and July 18, 1995,[1] failed properly to complete Section 2 of the employment verification forms (Forms I–9) for twenty-three named individuals, and asks a civil money penalty of $200 per individual, for a total of **$4,600**.[2]

[1]The dates of the first and last INS Forms I–9 in question.

[2]Underlying the Complaint is a Notice of Intent to Fine (NIF) served by INS on Papa Joe's on May 8, 1996. The NIF specified the same charges as subsequently alleged in the Complaint following Papa Joe's timely request for hearing on June 11, 1996.

OCAHO issued a Notice of Hearing on January 23, 1997. Respondent, acting *pro se*, filed a statement on February 25, 1997. On February 26, 1997, I issued an order accepting that statement, signed by Dominic Catalano as owner of Papa Joe's, as the Answer to the Complaint. On March 10, 1997, INS filed a suggestion that Papa Joe's was a partnership, and Dominic Catalano a partner. INS proposed that Papa Joe's partnership agreement be filed. There has been no such filing.

By order dated March 26, 1997, I scheduled a telephonic prehearing conference for April 14, 1997.

On April 4, 1997, INS filed a Motion for Summary Decision[3] (dated April 3) as to both liability and civil money penalty with documents in support, including INS Forms I–9 for the individuals named in the Complaint. Papa Joe's failed to counter INS's Motion within the ten (10) days stipulated by 28 C.F.R. §68.38 (a).

The prehearing conference was held as scheduled on April 14, 1997, as confirmed by the First Prehearing Conference Report and Order dated April 15, 1997. In recognition of Papa Joe's *pro se* status, the April 15, 1997 Order explained in detail Papa Joe's opportunity to provide ***specific*** rebuttal to the pending Motion for Summary Decision, and extended the deadline for Papa Joe's response until May 12, 1997:

> **To assist Respondent, who appears here without counsel, the response to the Motion [for Summary Decision] should clearly and concisely:**
>
> 1. **Point out any substantial dispute of material *facts* in reply to facts asserted in . . . [INS'] Motion and statement in support, particularly as regards each Form I–9;**

[3]*See* 28 C.F.R. §68.38(a) ("within **ten (10) days** after service of a motion for summary decision, [a party] may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate, or countermove for summary decision"). Although Papa Joe's was afforded much longer than **ten days** to respond with a documentary submission in opposition to Complainant's evidence in support of its motion, it failed to do so.

> **2. Describe, and support with copies of appropriate documents . . . [any] claimed discrepancies between the I–9's as described by INS and included with its Motion and the I–9's as they supposedly existed at the time of the inspection.**

First Prehearing Conference Report and Order, April 15, 1997, at p. 2 (emphasis added).

I further cautioned Papa Joe's that:

> **[F]ailure in Respondent's written response to rebut adequately the *factual* contentions in Complainant's pending Motion may lead to a decision on the written pleadings that there is no substantial dispute of material fact, requiring an adjudication of not less than $100 per individual. . . .**
>
> **[If] I find there is no substantial dispute of material *fact* and grant the INS Motion, the civil money penalty can by law be no lower than $100 per individual as to whom a violation is found.**

Id. (emphasis added). Although Papa Joe's did not deny having received the Motion for Summary Decision at its address of record in Boise, Idaho, to assist Respondent in its response, INS agreed to send Dominic Catalano by April 15, 1997, a duplicate copy to his temporary residence in Diamond Bar, California. *Id.* To ensure that there would be no problems in serving Papa Joe's, my order directed Dominic Catalano to provide immediately a permanent mailing address in order to ensure that he received all pleadings. *Id. Inter alia*, at the conference, I gave Papa Joe's until May 12, 1997 to respond to the Motion for Summary Decision. Respondent requested, and I granted, subsequent additional extensions.

On June 13, 1997, Respondent filed a letter dated May 28, 1997, which although describing itself as a response to the "Complaint," ignored the explicit directions given in my April 15, 1997 Order; referred to an April 21, 1997 telephone conversation between INS counsel and both Ricky and Dominic Catalano, and suggested that two named Boise, Idaho, attorneys were advising Respondent, one of whom (Burgoynem) was said to have telephoned INS counsel on May 23, 1997.

On July 10, 1997, INS filed a Motion for Ruling dated July 9, 1997, which referred to a May 28, 1997, conversation with Burgoynem, who reportedly was unsure whether he would represent Respondent but "was aware that the response . . . [to the Motion for Summary Decision] was due May 30, 1997." INS Counsel commented that she had not been contacted by the other named attorney. *Id.*

On July 17, 1997, in response to the Motion for Ruling, Dominic Catalano filed a letter to the effect that his May 28 letter was a timely response [i.e., by May 30, 1997] to what he characterized as the "Complaint," and that the two attorneys were friends who were "suggesting thoughts in this matter."

On the basis of the documents noted above, I concluded that Respondent was not represented by counsel, and that despite (both in the letter itself and in response to the Motion for Ruling) twice characterizing the May 28, 1997, letter as a response to the "Complaint," Respondent intended and understood it to be its response to the INS Motion for Summary Decision.

Accordingly, by Order dated September 18, 1997, I advised the parties that I accepted the letter as Respondent's response to the Motion for Summary Decision, that INS was by October 3, 1997 to file a reply to that response or to advise whether it rested on its Motion without further pleading, and that upon receipt of the INS response I would issue an order which addressed the Motion for Summary Decision. By filing of an "Advisal" on September 30, 1997, INS responded to the September 18 Order to the effect that it would rest on its prior Motion for Summary Decision, with no additional pleadings.

There ensued sporadic telephonic communications from each of the Catalanos. On October 9, 1997, Ricky Catalano advised that his father Dominic was out of the country, and that he, Ricky, was uncertain of the status of the case. He was told that the response anticipated in the First Prehearing Conference Report and Order to the INS Motion for Summary Decision was overdue,[4] but that it was

[4]As confirmed by the September 18, 1997 Order, I accepted Papa Joe's May 28, 1997, letter, discussed *supra*, as a timely response to the INS Motion for Summary Decision, although it did not *fully* respond to the Statement of INS Special Agent Barry Hodson submitted in support of that motion.

within the discretion of the Administrative Law Judge (ALJ) to consider a late response. There has been no such filing.

On October 17, 1997, Dominic Catalano telephoned, advising that on September 29, 1997, the Postal Service had returned a communication addressed to him from the Department of Justice, perhaps the INS Advisal, but not the September 18, 1997 Order which he acknowledged having received. As a courtesy, Dominic Catalano was sent by facsimile mail, copies of the OCAHO rules of practice and procedure relating to summary decision,[5] the "Advisal," and another copy of the Motion for Summary Decision. On October 21, 1997, Dominic Catalano again telephoned, inquiring whether further filings were necessary in light of his understanding that Respondent had in fact responded to both motions [*i.e.*, the filing of the May 28 letter and of the letter filed July 17]. He was told that no filings were due, and to put into writing any further communication. There has been no such filing.

II. *Discussion*

A. *Introduction*

The time for decision has come. Decision has been delayed sufficiently to afford Respondent the opportunity to provide a substantive response to the pending motions. Respondent has failed to proffer any material basis for a defense and is on ample notice that the case might turn on the pleadings previously filed. Trial by interval has run its course.

B. *Standard for Summary Decision*

An ALJ may enter summary decision in favor of either party where the pleadings, affidavits, or other record evidence reveal no genuine issue of material fact. 28 C.F.R. §68.38(c).[6] "The purpose of summary adjudication is to avoid an unnecessary hearing when

[5]Respondent had the rules from the outset. The Notice of Hearing transmitting the Complaint to Papa Joe's cautioned that the case would be conducted "in accordance with the Department of Justice regulations appearing at 28 C.F.R. Part 68 (1996), a copy of which is attached for your convenience."

[6]*See* 28 C.F.R. §68.38(c):

> The 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 of material fact.

there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters." *United States v. Tri Component Product Corp.*, 5 OCAHO 821 (1995), at 3 (1995) (Order Granting Complainant's Motion for Summary Decision), 1995 WL 813122, at *2 (O.C.A.H.O.). In addition to 28 C.F.R. §68.38(c), pursuant to §8.1, ALJs are guided in decision making by the Federal Rules of Civil Procedure and federal caselaw applying those rules, including Fed. R. Civ. P. 56(c) which provides for summary judgment in cases before federal district courts.

The Supreme Court has explained that a party seeking summary decision bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party has the burden also of showing that it is entitled to judgment as a matter of law. *United States v. Alvand, Inc.*, 1 OCAHO 296 (1991) (Decision and Ordering [sic] Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision), 1991 WL 717207 (O.C.A.H.O.). In order to refute a motion for summary decision, the opposing party must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. §68.36(b). *See Tri Component,* 5 OCAHO 821, at 3, 1995 WL 813122, at *3. An issue of fact is genuine if it is based in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp,* 475 U.S. 574, 586–587 (1986). *See Tri Component at* 4, 1995 WL 813122, at *2 (*citing Matsushita Elec. Indus. Co.* (to be genuine, an issue of material fact must have a "real basis in the record"). An issue of fact is material if it might affect the outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is for the nonmoving party to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Tri Component*, 5 OCAHO 821 at 4, 1995 WL 813122, at *3. The nonmoving party opposing the motion is not entitled to "rest upon conclusory statements contained in its pleadings." *Alvand*, 1 OCAHO 296, at 1959,[7] 1991 WL 717207, at *2.

C. *Liability Established*

Papa Joe's does not contest that the employees named in the Complaint were hired after November 6, 1986. As to liability for its

[7]Citations to OCAHO precedents printed in bound Volumes 1–3 of ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1–3 are to specific pages, *seriatim* of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 3, however, are to pages within the original issuances.

Form I–9 deficiencies, there is not a glimmer of any substantial dispute of material fact. Papa Joe's response to the Motion for Summary Decision reflects a pervasive misunderstanding of its compliance obligations as an employer for the accuracy and legitimacy of its Forms I–9. Respondent fails to dispute the narrative recited in the statement of Special Agent Hodson that at the August 21, 1995 inspection none of the twenty-three Forms I–9 were signed on behalf of the employer at Section 2, and that Ricky Catalano conceded to Hodson that eight of them were back-dated.

Respondent's contention in response to the Motion for Summary Decision that Ricky Catalano "witnessed" the I–9 documents "upon hiring" the individuals does not contradict, and is not inconsistent with, Hodson's statement that none of the Forms I–9 were signed in Section 2. Viewing the pleadings in a light most favorable to Respondent, the Forms I–9, being unsigned at Section 2, and therefore lacking certification, were deficient as of the inspection. Nothing contained in filings by Respondent subsequent to the Motion for Summary Decision overcomes the INS evidentiary submission in support of the Motion. Accordingly, I find the violations occurred as alleged, *i.e.*, that Section 2 of twenty-three Forms I–9 was incomplete. It follows that INS is entitled to decision in its favor as a matter of law. Accordingly, summary decision is appropriate.[8]

D. *The Civil Money Penalty Adjudged*

1. *Introduction*

This Final Decision and Order finds Papa Joe's liable for twenty-three paperwork violations, and assesses a total fine of **$2,300**, $100 per violation. In determining the amount of the fine, I gave due consideration to the business' small size, the employer's good faith, the violations' seriousness, the individuals' authorized work status, and Papa Joe's lack of previous violations. 8 U.S.C. §1324a(e)(5); 28 C.F.R. §68.52(c)(C)(iv).

[8]*See* 28 C.F.R. §68.38(c):

> The 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 of material fact.

Papa Joe's has submitted no evidence whatsoever to refute INS charges.

It is a violation of §274A(a)(1)(B) of the Immigration and Nationality Act, codified as 8 U.S.C. §1324a(a)(1)(B), for a person or entity to hire an individual after November 6, 1986, without complying with the requirements of 8 U.S.C. §1324a(b)(1), 8 C.F.R. §274a.2(b)(ii). Employer execution of INS Form I–9 is the means by which INS exercises §1324a authority to monitor compliance with the prohibition against the employment of unauthorized aliens.

Papa Joe's argues that the alleged "violations are petty and do not speak to the intent of the law." Ricky Catalano, 6/11/96 Note to INS District Counsel Ann Tanke. Good faith (*e.g.*, lack of intent) at the time of Papa Joe's violations,[9] however, constituted only a factor in mitigation of the penalty and not an affirmative defense.

Papa Joe's Answer to the Complaint admits that it hired the twenty-three individuals, and concedes that its paperwork compliance was less than perfect, but argues that because all the employees were eligible to work in the United States, any failure to properly complete Section 2 of the Forms I–9 is insignificant:

> It was an error, but an honest error and had nothing to do with anything improper. The purpose of why our government created Form I–9, is to be sure the people who are hired are legal, according to the laws of our country.

Although Papa Joe's acknowledges that §1324a relects a national policy to maintain a workplace free of unauthorized aliens, it ignores

[9]Title 8 U.S.C. §1324a(b)(6) was amended by §411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104–208 (Sept. 30, 1996), with respect to violations occurring on or after September 30, 1996, to permit a defense of good faith compliance, as yet undefined by case law:

> (6) Good faith compliance
>
> (A) In general
>
> Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.
>
> (B) Exception if failure to correct after notice
>
> Subparagraph (A) shall not apply if —
>
> (i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,
>
> (ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and
>
> (iii) the person or entity has not corrected the failure voluntarily within such period.

The amendment is inapplicable to this case.

the reality that the purpose of paperwork compliance is to provide a mechanism by which the INS can carry out its mandate to enforce that policy.

The statutory civil money penalty is not less than $100 and not more than $1,000 for each individual who is the subject of a violation. 8 U.S.C. §1324a(e)(5). Respondent is liable for civil money penalties for paperwork violations for twenty-three individuals, resulting in a civil money penalty of not less than $2,300 and not more than $23,000; Complainant's $4,600 request is twice the minimum penalty.

To determine the penalty, five factors must be considered: the size of the enterprise; the employer's good faith; seriousness of the violations; whether the individuals were unauthorized aliens, and the employer's history of previous violations. 8 U.S.C. §1324a(e)(5). *See Williams Produce v. INS,* 73 F.3d 1108 (11th Cir. 1995) (Table), *affirming United States v. Williams Produce,* 5 OCAHO 730, at 4–10 (1995), 1995 WL 265081, at *3–7 (O.C.A.H.O.); *Noel Plastering, Stucco, Inc. v. OCAHO*, 15 F.3d 1088 (9th Cir. 1993) (Table), 1993 WL 544526, at *1 (9th Cir. 1993) (Unpublished Disposition)[10]; *A-Plus Roofing, Inc. v. INS,* 981 F.2d 1257 (9th Cir. 1992) (Table), 1992 WL 389247, at *1 (9th Cir. 1992) (Unpublished Disposition); *Big Bear Supermarket No. 3 v. INS,* 913 F.2d 754, 756 (9th Cir. 1990); *Maka v. INS,* 904 F.2d 1351, 1357 (9th Cir. 1990); *Mester Mfg. Co. v. INS,* 879 F.2d 561, 563 (9th Cir. 1989); *United States v. Armory Hotel Assocs.*, 93 B.R. 1, at *1 (D.Me. 1988); *United States v. Rupson of Hyde Park, Inc.,* 7 OCAHO 958, at 3 (1997); *United States v. Giannini Landscaping, Inc.,* 3 OCAHO 573, at 1737–1740 (1993), 1993 WL 566130, at *4–7 (O.C.A.H.O.); *United States v. Nevada Lifestyles, Inc.,* 3 OCAHO 463, at 691–692 (1992), 1992 WL 535620, at *15 (O.C.A.H.O.). "Imposition of a penalty without consideration of all relevant factors is improper." *Maka*, 904 F.2d at 1357.

"Consideration of these factors is possible only if there is evidence of them in the record." *Id.* Moreover, where the record does not disclose facts not reasonably anticipated by the INS, there is no reason to increase the penalty beyond the amount the INS requests. *United States v. Rupson of Hyde Park, Inc.,* 7 OCAHO 958, at 4; *United States v. Williams Produce,* 5 OCAHO 730, at 5, 1995 WL 265081, at

[10]Ninth Circuit Rule 36–3 provides that unpublished dispositions, while not precedential, may be cited when relevant under the doctrine of law of the case.

*3. *See United States v. Dubois Farms, Inc.*, 2 OCAHO 376 (1991), 1991 WL 531888 (O.C.A.H.O.); *United States v. Cafe Camino Real*, 2 OCAHO 307 (1991), 1991 WL 531736 (O.C.A.H.O.). To determine the reasonableness of the INS request, I consider only the range of options between the statutory minimum and that sum. *United States v. Rupson of Hyde Park, Inc.,* 7 OCAHO 958, at 4; *United States v. Williams Produce*, 5 OCAHO 730, at 5, 1995 WL 265081, at *3. *See United States v. Tom & Yu*, 3 OCAHO 445 (1992), 1992 WL 535582 (O.C.A.H.O.); *United States v. Widow Brown's Inn*, 3 OCAHO 399 (1992), 1992 WL 535540 (O.C.A.H.O.).

Because the significance of each statutory factor derives from the facts of a specific case, I utilize a judgmental, not a formulaic, approach when weighing each. *United States v. Rupson of Hyde Park,* 7 OCAHO 958, at 4; *United States v. Williams Produce,* 5 OCAHO 730, at 5, 1995 WL 265081, at *3. *See, e.g., United States v. King's Produce*, 4 OCAHO 592 (1994), 1994 WL 269183 (O.C.A.H.O.); *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, 1993 WL 566130.

2. *Consideration of Title 8 U.S.C. §1324a(e)(5) Factors*

a. *The Size of the Business of the Employer Being Charged*

Neither statute nor regulation provides guidelines for determining business size. *United States v. Rupson of Hyde Park,* 7 OCAHO 958, at 4; *Williams Produce*, 5 OCAHO 730, at 6, 1995 WL 265081, at *4. *See Tom & Yu*, 3 OCAHO 445, 1992 WL 535582. Previous OCAHO 8 U.S.C. §1324a determinations have considered: (1) the number of employees; (2) the gross profit of the enterprise; (3) assets and liabilities; (4) nature of the ownership; (5) length of time in business; and (6) the nature and scope of the business facility. *Williams Produce,* 5 OCAHO 730, at 6, 1995 WL 265081, at *4. *See, e.g.,United States v. Davis Nursery, Inc.*, 4 OCAHO 694 (1994), 1994 WL 721954 (O.C.A.H.O.); *Giannini*, 3 OCAHO 573, 1993 WL 566130.

Though not dispositive, INS Guidelines[11] note that a test for "size" is "whether or not the employer used all the personnel and financial resources at the business' disposal to comply with the law." Guidelines at 8. The Guidelines support a "secondary test": "whether

[11]INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, August 30, 1991 (Guidelines).

a higher monetary penalty would enhance the probability of compliance. All other relevant considerations being equal, the statutory minimum penalty will have a greater economic impact on a marginally profitable business than on a highly profitable business." *Id.* Finally, the Guidelines note that even if a company has numerous §1324a violations but has a "frequent turnover rate[, it] . . . might not be able to personally complete all required I–9s." *Id.*

Papa Joe's describes itself as a small business operation with limited financial resources. Papa Joe's is a pizzeria, a small restaurant. Presumptively, Papa Joe's, like many fast-food restaurants, has a high turnover in employees. INS concedes in ¶3 of its Motion for Summary Decision that Papa Joe's size and nature do not warrant a high penalty per individual: "Respondent is a small business . . . [with] no unauthorized employees. . . ." Based on the Guidelines and the subfactors discussed below, a minimum civil money penalty is appropriate.

2. *The Good Faith of the Employer*

OCAHO case law holds 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 1907 (1993), 1993 WL 723360, at *5 (O.C.A.H.O.) (*citing United States v. Valadares*, 2 OCAHO 316 (1991)).

OCAHO jurisprudence makes clear that mere failure of compliance is an insufficient predicate for a finding of other than good faith; there must be an affirmative finding of culpable behavior. *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 3 (1995) (CAHO Modification of ALJ Final Decision and Order), 1995 WL 626234, at *1 (O.C.A.H.O.). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." *Minaco*, 3 OCAHO 587, at 1907, 1993 WL 723360, at *5 (*citing United States v. Honeybake Farms, Inc.,* 2 OCAHO 311 (1991), 1991 WL 531735 (O.C.A.H.O.)).

As acknowledged in the Guidelines, one subfactor is whether, prior to assessing a penalty, INS made an educational visit. *Minaco*, 3 OCAHO 587, at 1907, 1993 WL 723360, at *5. INS maintains that on August 24, 1994, a Department of Labor visit served to educate Papa Joe's about employment eligibility verification procedures. In contrast, with respect to another subfactor, employer cooperation, INS

concedes that it encountered a "relatively good level of cooperation." Motion for Summary Decision at ¶5. Another test for good faith is "whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." Guidelines at 9. On balance, the documents of record articulate a repeated, if ineffective, effort by Papa Joe's to ascertain its obligations and to pay lip service to compliance. An example, following the inspection, is Ricky Catalano's August 25, 1995 letter to Agent Hodson:

> I would like to again thank you Mr. Hodson, for your much needed guidance on how to properly fill out our I–9 forms. It's now unanimous [sic], I've errored on every federal and local government form since opening my small business in 1986. As I have with those forms, I assure you our [future] I–9 forms, without exception, will be perfect.

Motion for Summary Decision, Exhibit Z. Accordingly, I am unable to agree with INS that Respondent's compliance disposition evidences an absence of good faith, and conclude instead that a minimum civil money penalty is appropriate.

3. *The Seriousness of the Violation*

"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.'" *Giannini*, 3 OCAHO 573, at 1739, 1993 WL 566130, at *6 (*citing United States v. Eagles Groups, Inc.,* 2 OCAHO 342, at 338 (1992), 1992 WL 531833, at *2 (O.C.A.H.O.)) (emphasis added). There are, however, degrees of seriousness. *United States v. Davis Nursery, Inc.,* 4 OCAHO 694, at 21, 1994 WL 721954, at *13 (*citing United States v. Felipe, Inc.,* 1 OCAHO 93 (1989), 1989 WL 780150 (O.C.A.H.O.)).

According to INS Guidelines:

> The "test" for this factor is whether or not, and to what degree, the violation materially affects the purpose of the verification process, which is to avoid the possibility of hiring an unauthorized alien.

Guidelines at p. 11.

INS contends that Papa Joe's violations are serious because failure to complete Section 2 of Forms I–9 undermines the verification regimen. Papa Joe's violated the law by failing to sign, *i.e.*, certify,

Section 2 of the Forms I–9. It is well established that "[A]bsent attestation by the employer, neither INS as the enforcement agency, or the administrative law judge as the adjudicator, can determine . . . whether an employer has satisfied its statutory obligation to ensure against employment of unauthorized aliens." *United States v. J.J.L.C., Inc.,* 1 OCAHO 154, at 1094–95 (1990), 1990 WL 512516, at *5 (O.C.A.H.O.). *See also United States v. Carter,* 7 OCAHO 931 (1997). It is undisputed that eight of the Forms I–9 were back-dated, further impeaching the credibility of Papa Joe's compliance effort but not inconsistent *per se* with entry of an employer representative's signature at Section 3. It follows that while the record supports the finding that Section 2 was not completed, it appears that Ricky Catalano did sign Section 3, suggesting that the omission at Section 2 may have been inadvertent. By electing to proceed on the Motion for Summary Decision rather than putting the Respondent to its proof at trial, INS has forgone the opportunity to prove more. For example, INS has not proven that this employer's conduct "materially affects" the purpose of the verification regimen, nor has it proven why or when Ricky Catalano signed Section 3 of the Forms I–9. Accordingly, I am unable to conclude that these violations are sufficiently serious to warrant ratcheting up the civil money penalty.

4. *Whether or Not the Individual Was an Unauthorized Alien*

INS advises that "no unauthorized employees were encountered." Motion for Summary Decision at ¶3. This factor mitigates in favor of Papa Joe's.

5. *The History of Previous Violations*

INS advises that Papa Joe's has "no history of previous violations." Motion for Summary Decision at ¶3. This, too, is in Papa Joe's favor.

III. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, including motions, and accompanying documentation supplied by the parties. All motions and requests not previously disposed of are denied.

I find and conclude that Respondent violated 8 U.S.C. §§1324a(a)(1)(B) by failing to comply with the requirements of 8

U.S.C. §1324a(b) with respect to twenty-three individuals as alleged in the Complaint.

Upon consideration of §1324a (e)(5) factors mandated for adjudging the civil money penalty for violation of 8 U.S.C. §1324a(a)(1)(B), I conclude that it is just and reasonable for Papa Joe's to pay a total civil money penalty of **$2,300**, comprising $100 (the minimum fine) for each of the twenty-three paperwork violations alleged and proven.

This Final 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 (30) days from the date of this Final Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Administrative and judicial review are available pursuant to 8 U.S.C. §§1324a(e)(7), (8), and 28 C.F.R. §68.53(a).

SO ORDERED.

Dated and entered this 29th day of October, 1997.

MARVIN H. MORSE
Administrative Law Judge