

6 OCAHO 887

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

August 28, 1996

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 95A00151
GLORIA FASHIONS, INC.,)
Respondent.)
_____)

FINAL DECISION AND ORDER

Procedural History

On March 1, 1996, I issued an order in this matter granting partial judgment on the pleadings as to the facts of the alleged paperwork violations, but taking under advisement the question of penalty and providing the opportunity for the parties to address the statutory criteria to the extent they wished to do so, and to provide me with any other information they wanted me to consider in assessing the appropriate civil money penalties. Only the unrepresented respondent made a timely filing. On April 9, 1996 complainant's counsel telephonically requested leave to file a late response, and was informed that it would be necessary to file a written motion and make a showing of good cause before I would entertain that request. No such motion was filed; however, I delayed issuing a final order respecting the issue of penalties because of assurances that a settlement agreement was in progress and would be forthcoming.

No settlement appears to have been made. I am unwilling to have this case languish indefinitely on my docket without coming to closure, and accordingly make this order of final disposition.

Judgment on the pleadings was previously granted as to the violations described in Count I of the complaint alleging that respondent failed to complete Section 2 of the Form I-9 properly for 15 named individuals hired after November 6, 1986, and failed to ensure that the same 15 named individuals completed Section 1 properly, and as to the violations alleged in Count II that respondent failed to complete Section 2 of Form I-9 properly for two named individuals hired after November 6, 1986.

Determination of Civil Money Penalties

INS's complaint sought \$350 each for the violations involving Joaquina Nunez, Adalgisa Rodriguez, and Jaime Yascaburbay, and \$490 each for violations involving 12 other individuals named in Count I, for a total penalty of \$6930 for Count I. The rationale for treating these violations differently was unelaborated. Complainant requested a penalty of \$450 each for the two violations alleged in Count II for a total penalty of \$900 for Count II. The total penalty sought for both counts was thus \$7830.

The provision governing the imposition of civil money penalties for so-called "paperwork violations" states:

With respect to a violation of this subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil money 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.

8 U.S.C. §1324a(e)(5).

Consideration of the enumerated factors is mandatory, not discretionary. While these five factors are expressly set out in the statute, neither the statute nor the regulations provide guidance as to the relative weight to be allocated to each factor. *United States v. Tom & Yu, Inc.*, 3 OCAHO 445 at 3 (1992).¹ In addition neither the statute

¹ Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within that bound volume, pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

6 OCAHO 887

nor the regulations preclude the consideration of other factors in addition to those enumerated. *United States v. King's Produce*, 4 OCAHO 592 at 9 (1994). The purpose of the civil money penalty portion of the Act is to bring about employer compliance with the employment eligibility verification system, and all the criteria are to be considered in light of that purpose. Here the minimum possible penalty is \$1700, or \$100 each for 17 specified violations, and the maximum is \$17,000, or \$1000 for each violation.

1. *Size of the Respondent*

On behalf of the respondent, it is alleged that "Gloria Fashions, Inc. is a small business which employees (sic) approximately 40—50 employees. Of these employees 15 became an issue in this case."

Complainant has expressed no views on this question. No specific information was provided as to the volume of respondent's business, but the letter-pleading filed in answer to the complaint indicated that respondent was not in a financial position which would allow the lump sum payment requested by INS, so the clear implication is that respondent's profit margin is small, if not marginal. While neither the statute nor the regulations provide criteria for assessing the size of a business, *United States v. Alberta Sosa, Inc.*, 6 OCAHO 831 at 4 (1996), there are prior OCAHO case law decisions addressing this question, and it is these to which I look for guidance. While the record does not contain significant information as to the volume or scope of respondent's business, in light of prior decisions finding businesses with more employees than respondent to be "small," I find that respondent is a small business and is entitled to mitigation on this factor. See, e.g., *United States v. Anchor Seafood Distribs.*, 5 OCAHO 758 at 5 (1995) (93 employees), *United States v. Vogue Pleating, Stitching and Embroidery Corp.*, 5 OCAHO 782 at 3-4 (1995) (100 employees).

2. *Good faith of the Respondent*

On behalf of the Respondent it is alleged: "Since the inception of this case, I have cooperated with all the parties involved. I have kept in touch with Patricia Gannon's office. Throughout this process, I have called her at least 10 times and I am looking to resolve this matter in good faith." Respondent further represented in its letter-pleading in answer to the complaint that the alleged viola-

tions had already been remedied. Complainant has expressed no views on this question.

While the statute and regulations are silent as to how good faith is to be assessed, OCAHO case law has established that mere allegations of paperwork violations, without more, do not constitute lack of good faith. *United States v. Ricardo Calderon, Inc.*, 6 OCAHO 832 at 3 (1996) (citing cases). As set out therein:

To demonstrate a lack of good faith on respondent's part, it is necessary that the complainant present some evidence of culpable behavior on respondent's part beyond mere ignorance of the law (citations omitted).

Id. at 3.

I find the respondent entitled to mitigation on this factor in that it made efforts to comply with the paperwork provisions although it was not fully in compliance.

3. *The Seriousness of the Violations*

Neither party has specifically addressed the issue of just how serious the violations were. Because the I-9's are not part of the record, I am unable to make specific findings as to the precise nature of the omissions. It does appear, however, that I-9's were completed for each employee, albeit with some deficiencies the precise nature of which are not apparent on the record. Obviously a total failure to prepare a Form I-9 is a more serious violation than the omission of some of the information. *U.S. v. Dodge Printing Centers*, 1 OCAHO 125 (1990). Nevertheless, improperly completed I-9's may potentially be serious violations. In *United States v. Task Force Security, Inc.*, 4 OCAHO 625 (1994), it was observed that:

The "seriousness of the violation" factor refers to the degree to which the respondent being charged has deviated from the proper Form I-9 completion format (citation omitted).

Id. at 7.

The record does not contain sufficient information to make an informed decision about this factor. I do note, however, that for each violation the penalty INS requested is less than half the maximum permissible penalty. The logical inference would be that INS did not regard these as the most serious of possible violations. While I find

6 OCAHO 887

no grounds for aggravation of the penalty based on this factor, neither can I find clear grounds for mitigation.

4. Whether Any Individuals were Unauthorized Aliens

Neither party has addressed this issue; however, no allegation was made that any individual named in the complaint was an unauthorized alien. Accordingly, respondent is entitled to mitigation on this factor.

5. Any History of Previous Violations

On behalf of the respondent it is alleged that "Gloria Fashion (sic), Inc. has no previous history of violations. We have resolved the discrepancy of improperly completing the employment eligibility verification forms of our employees and wish to fully comply with all the necessary regulations of the INS." Complainant has expressed no views on this factor. I find that respondent is entitled to mitigation on this factor.

6. Other Considerations

Although the penalties sought by INS are well within the statutory parameters, there is simply no indication of why they were assessed in the specific amounts requested and why three of the violations alleged in Count I were assessed at \$350 each, and the remainder at \$490 each. Why the penalties assessed for the two violations alleged in Count II of failing to complete Section 2 properly were higher than the penalties proposed for three of the instances of failure to complete BOTH Sections 1 and 2 properly is similarly unelaborated. (Ordinarily it would be expected that failure to complete one section would result in a lesser penalty than failure to complete two sections.) In the absence of an explanation I have no basis to make distinctions among the violations.

In reducing the proposed penalties I have also taken into account the fact that upon receipt of the complaint, the unrepresented respondent promptly admitted the violations, and stated it "would like to pay this penalty. Unfortunately, Gloria Fashions Inc. is not in the position financially to make a one lump payment. We would like to propose payments in installments of \$100.00 per month. As soon as we receive an acceptance to our proposal, we will start paying immediately."

6 OCAHO 887

Respondent thus was apparently willing to resolve this matter, even to the extent of paying the full amount, if its proposed payment schedule had been acceptable. Its approach is commendable and I find it appropriate under the circumstances to make modest reductions in the penalty amounts on this basis, as well as because mitigation is warranted based on four of the five statutory criteria. I also find that respondent should be given the opportunity to take advantage of a payment schedule, but in consideration of the reduced penalties, find the payments should be made at the rate of at least \$150 per month.

Penalties will be assessed in the amount of \$250 each for 17 violations, for a total of \$4250.

Findings, Conclusions, and Order

1. Gloria Fashions, Inc. is a New York corporation doing business at 315 West 36th Street, 3rd Floor, New York, New York 10018.

2. Respondent hired the following 15 individuals after November 6, 1986, for whom it failed to complete Section 2 of Form I-9 properly, and failed also to ensure that the individuals completed Section 1 of Form I-9 properly:

1. Pati Alonzo
2. Segundo Dutan
3. Onorina Gonzalez
4. Yolanda Gutierrez
5. Julio Herrera
6. Juana Mateo
7. Monica Martinez
8. Joaquina Nunez
9. Olga Pacheco
10. Zoila Penarron
11. Margarita Perez
12. Carmela Reyes
13. Adalgisa Rodriguez
14. Francisca Rubina
15. Jaime Yascarubay

6 OCAHO 887

2. Respondent hired the following two individuals after November 6, 1986, for whom it failed to complete Section 2 of Form I-9 properly:

1. Wellington Salinas
2. Miguel Torres

3. Respondent acted in violation of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a(b)(1) and (2) with respect to each of the 17 acts alleged.

4. Penalties are assessed in the total amount of \$4250 or \$250 for each of the 17 described violations; PROVIDED however, that respondent shall pay at least \$150 monthly until such time as \$4250 has been paid.

SO ORDERED:

Dated and entered this 28th day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7) and (8), and 28 C.F.R. §68.53.