

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
) CASE NO. 92A00156
MID-ISLAND JERICHO MOTEL)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING CIVIL PENALTIES

E. MILTON FROSBURG, Administrative Law Judge

Appearances: Jason Raphael, Esquire for Complainant
Bernard Burton, Esquire for Respondent

I. Procedural History

On September 22, 1992, I issued my Decision and Order Granting Complainant's Motion for Default in which I bifurcated the issue of the Appropriate amount of civil penalties to be imposed on Respondent so that Complainant, and Respondent if it wished, could submit a statement regarding the application of the five factors enumerated in 28 C.F.R. 68.52(c)(iv). Complainant filed its timely statement on October 26, 1992. Respondent has continued its pattern of nonresponse in this case.

II. Civil Penalties

Section 274(e)(5) of the Immigration and Nationality Act (Act), which corresponds to 28 C.F.R. 68.52(c)(iv), states:

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 violation.

On October 23, 1992, Complainant filed its Motion for Approval Of Complainant's Proposed Penalty Amounts which incorporated a declaration by Supervising Special Agent Sal R. Alosi, who supervised the investigation of this case. Mr Alosi's declaration is relied on by Complainant to establish the consideration of 28 C.F.R. 68.52(c)(iv) used when setting the amount of civil penalties in this case.

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant asserts that Respondent employs seventy-seven (77) people and has been incorporated since 1965. Respondent has not submitted any argument with regard to this factor.

Although the information at hand is slight, I find that Respondent's business is of small to medium size. See U.S. v. San Yaido Ranch, 1 OCAHO 183 (5/30/90). As such this is more a mitigating factor than an aggravating factor for Counts I, II and III. Id.

2. Good Faith of the Employer

Complainant asserts that Respondent did not show good faith in its compliance with IRCA. Complainant states that the United States Department of Labor Employment Standards Administration inspected Respondent's records as early as May 24, 1988 and found that Respondent did not have the employment eligibility verification forms for its entire work force. When Respondent received an education visit on September 27, 1988, the office manager stated that she was aware of the requirements and responsibilities of Section 274A of the Act. However, on February 25, 1992, Respondent had improperly completed employer verification forms (Form I-9) for sixty-five (65) of its seventy-seven (77) employees.

Respondent has not made any arguments related to this factor.

Based on the facts represented here, i.e., a large number of violations after, both, a previous inspection and an educational visit, I find that Respondent has not shown good faith in its compliance with Section 274A of the Immigration and Nationality Act (Act). As such, Respon-

dent is not entitled to mitigation in Counts I, II or III based on this factor.

3. Seriousness of the Violation

Complainant argues that Respondent's violations are serious as it had failed, in sixty-three (63) of its sixty-five (65) violations, to indicate at least one of the following:

1. What, if any, eligibility documents Respondent's agent had seen;
2. To sign and date certification in Section 2;
3. To have employees indicate their status; and/or
4. Sign and date certification in Section 1.

The other two violations related to Respondent's failure to date Section 2.

Respondent has made no argument with regard to this factor.

I agree with complaint's argument that these violations are serious. U.S. v. Dodge Printing, 1 OCAHO 125 (1/12/90) (paperwork violations may be serious violations of the Act.); A serious violation is one which "render(s) ineffective the Congressional prohibition against employment of unauthorized aliens". U.S. v. Valladares, 2 OCAHO 316 (4/15/91). Although Count I deals with a failure to ensure that the employee completed Section 1, as opposed to Counts II and III which deal with failure to complete Section 2 and failure to complete Section 1 and Section 2, respectively, I find that the violations in all three (3) counts are serious. See U.S. v. Cafe Camino Real, Inc., 2 OCAHO 307 (3/25/92). However, I find that Count I is a less serious violation than Counts II and III. Therefore, I find that Respondent is not entitled to mitigation in Counts I, II and II based on this factor.

4. Whether or Not the Individual was an Unauthorized Alien

Neither Complainant nor Respondent make any representations as to this factor. As such, I will assume that none of the individuals listed in the Complaint were unauthorized aliens, and thus, I will mitigate based on this factor.

5. History of Previous Violations of the Employer

Neither Complainant nor Respondent make any representations regarding this factor. I will assume then that there were no previous violations of Section 274A by this Respondent. As such, I will mitigate based on this factor.

B. Amount of Civil Penalty

Complainant has requested that I assess a total civil penalty in this case of fifty thousand eight hundred forty dollars (\$50,840) which reflects a civil penalty of eight hundred twenty dollars (\$820) for the one violation in Count I, eight hundred twenty dollars (\$820) for each of the fifty-three (53) violations found in Count II, and eight hundred twenty dollars (\$820) for each of the eight (8) violations in Count III. After a review of the record and Complainant's arguments, I find that, using a judgmental approach, the amount of civil penalties requested by Complainant does not seem to be reasonable or appropriate. I find, instead, that the appropriate civil penalties are as follows: two hundred fifty dollars (\$250) for the violation in Count I; three hundred fifty dollars (\$350) for the fifty-three (53) violations in Count II; and three hundred fifty dollars (\$350) for the eight (8) violations in Count III. The total amount of civil penalty in this case is twenty one thousand six hundred dollars (\$21,600). The civil penalty amount is due and payable to Complainant on or before thirty (30) days from the date of this Order.

Under 28 C.F.R. 68.53(a) a party may file, with the Chief Administrative Hearing Officer, a written request for review of this Decision and Order together with supporting arguments. Within thirty (30) days of the date of the Administrative Law Judge's Decision and Order, the Chief Administrative Hearing Officer may issue an Order which modifies or vacates this Decision and Order.

IT IS SO ORDERED this 3rd day of November, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge