

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. 92A00255  
  )  
SILVER CLOUD                            )  
INVESTMENTS, INC.,                    )  
d.b.a.                                     )  
SILVER CLOUDS RESTAURANT,         )  
Respondent.                             )  
\_\_\_\_\_                                    )

FINAL DECISION AND ORDER  
GRANTING COMPLAINANT'S REQUEST  
FOR RELIEF

E. MILTON FROSBURG, Administrative Law Judge

Representation: Thomas L. Day, Esquire  
for Complainant

I. Procedural History

On February 23, 1993, I issued my Interim Decision and Order Granting Complainant's Motion For Default Judgment. The detailed procedural history of this case is included in that Decision.

In that Order, I bifurcated the issue of the appropriate amount of civil penalties and directed Complainant, and Respondent if it wished, to submit a statement, on or before March 8, 1993, regarding the application of the five factors enumerated in 28 C.F.R. 68.52(c)(iv).

On March 8, 1993, Complainant filed its Supplementary Points And Authorities In Support Of Complainant's Motion For Default Judgment accompanied by Respondent's 1990 corporate tax return, a list of Respondent's employees from June 1, 1988 until September 30, 1991, several of Respondent's relevant Quarterly Contribution Returns, and several of Respondent's relevant Reports of Wages.

To date, Respondent has not filed any statement regarding the appropriateness of the requested civil penalties.

## II. Facts

In my previous Decision and Order, I found Respondent liable for one violation of knowing hire and/or continuing to employ, in violation of 8 U.S.C. 1324a(a)(1)(A) and/or 8 U.S.C. 1324a(a)(2), as set forth in Count I of the Complaint. I also found Respondent liable for twenty-seven (27) violations of failing to prepare the employment eligibility verification form (Form I-9) and for four (4) violations of failing to properly complete section 2 of the employment eligibility verification form (Form I-9). 8 U.S.C. 1324a(a)(1)(B). These violations were set out in Counts II and III of the Complaint. Complainant has requested total civil penalties of six thousand three hundred dollars (\$6,300) for these violations.

## III. Civil Penalties

With respect to the determination of the amount of civil penalties to be set for violations of the paperwork requirements of 8 U.S.C. 1324a, Section 274A(e)(5) of the Immigration and Nationality Act (Act), which corresponds to 28 C.F.R. 68.52(c)(iv), states:

(T)he 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.

In contrast, the statute is silent as to any mandatory considerations when determining the civil penalties for a knowing hire/continuing to employ violation. 8 U.S.C. 1324a(a)(1)(A), (a)(2). Thus, it is left to my sound discretion.

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant argues that Respondent should be considered a small business and asserts: (1) that Respondent employed forty-one (41) persons between June 1, 1988 and September 31, 1991, with ten (10) to twelve (12) individuals employed at any one time and (2) that Respondent's federal tax returns show total assets of one hundred eighty-three thousand two hundred eighty-eight dollars (\$183,288) and gross receipts of five hundred ten thousand one hundred forty-eight dollars (\$510,148) for the year 1990. Respondent has made no argument on this issue.

I agree with Complainant's position and find that Respondent is a small business. As such, I will mitigate with respect to this factor in Counts II and III and, in my discretion, will consider this factor when determining the appropriateness of the requested civil penalties for Count I.

2. Good Faith of the Employer

Complainant asserts that Respondent did not show good faith in its compliance with the requirements of 8 U.S.C. 1324a. Complainant states that not only did Respondent knowingly hire and/or continue to employ an alien not authorized for employment in the United States, but it had failed to complete Forms I-9 for sixty-six percent (66%) of its employees hired after June 1, 1988 and that, of the Forms I-9 which were completed, thirty percent (30%) were improperly done. Respondent has not made any argument with regard to this factor.

I agree with Complainant that the facts indicate that there was no good faith effort on Respondent's part to comply with the requirements of 8 U.S.C. 1324a. As such, I find that it would not be appropriate to mitigate based on this factor in Counts II and III. Further, in my discretion, I have determined that Respondent's good faith in complying with the paperwork requirements of 8 U.S.C. 1324a is irrelevant in this case when considering the civil penalties for the knowing hire/continuing to employ violation.

3. Seriousness of the Violation

Complainant argues that Respondent's violations are all serious. As applied to Count I, Complainant argues that a knowing hire/continuing to employ is the most serious violation of 8 U.S.C. 1324a since the primary purpose of this statute was to prevent the employment of unauthorized aliens. Respondent has made no argument regarding this factor.

I agree with Complainant's position and, in my discretion, will consider the seriousness of the violation when determining the appropriate civil penalty for Count I.

As to Count II which alleges failure to prepare, Complainant argues that the preparation mechanism of the Form I-9 insures that only authorized individuals are employed. By failing to properly complete the Form I-9, Complainant continues, there can be no way for either the employer or the Service to determine whether the individual employed is authorized. Thus, Respondent has taken the "teeth" out of the statute. With regard to the violations in Count III, failure to complete section 2 of the Form I-9, Complainant argues that Respondent disregarded an essential component of the Form I-9 completion process and an essential element in the verification of employment eligibility.

Respondent has made no argument with regard to this factor.

I agree with Complainant'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.). Previous case law has found that 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). Therefore, I find that Respondent is not entitled to mitigation in Counts II and III based on this factor, and, in my discretion, I will consider the seriousness of the offense when determining the civil penalties for Count I.

4. Whether or not the Individual was an Unauthorized Alien

Complainant asserted that Respondent has employed one unauthorized alien. Respondent has made no argument regarding this factor. As such, I will not mitigate in Counts II and III based on this factor.

Obviously, this factor is a consideration when considering the civil penalty for Count I.

5. History of Previous Violations of the Employer

Complainant asserts that there were no previous violations of Section 274A by this Respondent. Respondent offered no argument with regard to this factor. As such, I will mitigate in Counts I and II based on this factor and I will consider it when considering the civil penalties in Count I.

B. Amount of Civil Penalty

Complainant has requested that I assess a total civil penalty in this case of six thousand three hundred dollars (\$6,300), which reflects a civil penalty of nine hundred seventy-five (\$975.00) for the one violation in Count I, one hundred seventy-five dollars (\$175.00) for each of the twenty-seven violations in Count II and one hundred fifty dollars (\$150.00) for each of the four 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 is reasonable and appropriate. Therefore, I direct Respondent to pay to Complainant, on or before thirty (30) days from the date of this Order, a total of six thousand three hundred dollars (\$6,300).

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 19th day of April, 1993, at San Diego, California.

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E. MILTON FROSBURG  
Administrative Law Judge