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. 92A00149
EBRAHIM BANAFSHEHA,	)	
ZAHRA FAILY TRUST, YAGHOUB	)	
SOUFFERIAN, JOHN	)	
BANAFSHEHA, INDIVIDUALLY	)	
AND AS PARTNERS, d.b.a.,:	)	
PARK SUNSET HOTEL,	)	
Respondent.	)	
	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

On June 16, 1993, the Administrative Law Judge (hereinafter ALJ) issued a decision and order assessing civil money penalties against the respondent in the above captioned proceeding. The complaint alleged violations of the employer sanctions provisions of the Immigration Reform and Control Act (IRCA). 8 U.S.C. §1324a. Count I of the complaint alleged that the respondent continued to employ an individual not authorized to work in the United States after respondent became aware of the unauthorized status, in violation of section 1324a(a)(2) of Title 8, U.S. Code (hereinafter continuing to employ violation). Count II alleged failure to present the Employment Eligibility Verification Forms (Forms I-9) for fifteen named individuals in violation of section 1324(a)(1)(B) of Title 8, U.S. Code (hereinafter paperwork violations). The ALJ subsequently held that respondent had admitted liability as to Counts I and II of the complaint. ALJ's Decision and Order at 8.

In the decision and order assessing civil money penalties, the ALJ examined five statutory factors that must be considered when establishing a civil money penalty for paperwork violations. ALJ's Decision and Order at 11-17, See 8 U.S.C. §1324a(e)(5). The ALJ, in his discretion, also considered the five statutory factors when

establishing the civil money penalty for respondent's continuing to employ violation. ALJ's Decision and Order at 10. The subsection dealing with assessment of penalties states in pertinent part:

> 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).

The Chief Administrative Hearing Officer's Review Authority

The Chief Administrative Hearing Officer's (hereinafter CAHO) authority to review an ALJ's decision and order is provided for at section 1324a(e)(7) of Title 8, U.S. Code, and section 68.53(a) of Title 28, Code of Federal Regulations.[1] Section 68.53(a) provides in pertinent part that:

> (1) Within thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer may issue an order which modifies or vacates the Administrative Law Judge's decision and order.
>
> (2) If the Chief Administrative Hearing Officer issues an order which modifies or vacates the Administrative Law Judge's decision and order, the Chief Administrative Hearing Officer's decision and order becomes the final agency decision and order of the Attorney General on the date of the Chief Administrative Hearing Officer's decision and order.

28 C.F.R. §68.53(a).

The scope of administrative review by the CAHO when reviewing ALJ decisions and orders is set forth in the Administrative Procedure Act, which states that "the agency has all the powers which it would have in making the initial decision." 5 U.S.C. §557(b). In addition, the U.S. Court of Appeals for the Ninth Circuit, in Mester Manufacturing Co. v. INS, 879 F.2d 561, 565 (9th Cir. 1989), and Maka v. INS, 904 F.2d 1351, 1355 (9th Cir. 1990) held that the CAHO properly applied a de novo standard of review to the ALJ's decision in each case.

[1] Rules of Practice and Procedure for Administrative Hearings 57 Fed. Reg. 57669 (1992) (to be codified at 28 C.F.R. Part 68)(hereinafter cited as 28 C.F.R. §68).

Good Faith Factor

Regarding the good faith of the employer, the ALJ declined to miti-gate the civil money penalty based in part on the conduct of respondent's representative, Jeff Zarrinnam, (hereinafter referred to as respondent), in making a demonstrably unfounded allegation of forgery during a prehearing telephonic conference[2], and on the resultant "expense and allocation of resources that were needed to prove that the allegation of forgery was unfounded." ALJ's Decision and Order at 14. The ALJ also enhanced the civil penalties originally requested by complainant on the basis of respondent's behavior in making the unsupported allegation of forgery. ALJ's Decision and Order at 19. For the reasons set forth below, I have determined that it was inappropriate for the ALJ to use respondent's unfounded forgery claim as a basis for finding a lack of good faith when assessing the civil money penalties and as the basis for enhancing the original penalty request.

Subsections 1324a(e)(4) and (5) of Title 8, U.S. Code, set out the penalty ranges and, as to paperwork violations, the fine level criteria to be used "[w]ith respect to a violation." Prior case law of the Office of the Chief Administrative Hearing Officer (OCAHO) indicates that ALJs have wide latitude in terms of the factors that they may consider when setting civil money penalties and are not restricted to considering only the five statutory factors when making a determination. See e.g., U.S. v. M.T.S. Service Corporation, 3 OCAHO 448 at 4 (8/26/92); U.S. v. Pizzuto, 3 OCAHO 447 at 6 (8/21/92). However, the factors considered have invariably been "with respect to" the substantive IRCA violations charged in the complaint. The factors taken into account, particularly with regard to good faith, have related in some way to the egregiousness of the IRCA violation itself. See e.g., U.S. v. O'Brien, 1 OCAHO 166 at 3 (5/2/90)(showing of lack of good faith requires some evidence of culpable behavior beyond mere ignorance); U.S. v. Ulysses, 3 OCAHO 449 at 7 (9/3/92)(finding bad faith where respondents' attitude concerning their responsibilities under IRCA was "less than cooperative", and they failed to make a good faith effort to comply with the statute even after an educational visit); U.S. v.

[2] Respondent alleged that his signature had been forged by complainant on the list of employees and former employees of Park Sunset Hotel made on the date of complainant's inspection. ALJ's Decision and Order at 5. Subsequently, complainant collected 80 pages of handwriting examples from respondent and had them examined by a forensic expert who determined that respondent's signature was genuine. ALJ's Decision and Order at 15, 18.

Widow Brown's Inn, 2 OCAHO 399 at 40-41 (1/15/92)(premising lack of good faith determination in substantial part on conclusion that employer had deliberately failed to prepare and present Forms I-9 even after educational visit); and U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16 (3/25/91)(holding violations repugnant to claims of good faith where there was forgery of signatures on Forms I-9).

In taking cognizance of respondent's unfounded forgery allegation, the ALJ expressed concern about the resultant "undue delay and expense" and the "lack of due respect to this court." ALJ's Decision and Order at 18-19. While these are clearly legitimate concerns, they pertain to abuse of the administrative judicial process and not the seriousness of the IRCA violations. By expanding the concept of good faith, or lack thereof, to include acts or omissions during the course of litigation (i.e., after the filing of a complaint and in relation to the litigation), the ALJ blurs the distinction between conduct that gives rise to the litigation and conduct that influences the information reaching the tribunal, such as withholding or suppressing information. The former has traditionally been punished by such sanctions as damages, fines, and injunctions. Sanctions for the latter type of conduct include discovery sanctions and penalties for perjury or refusing to testify. Stephen McG. Bundy and Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 Cal. L.Rev. 315, 321 (1991).

Clarifying the nature of the penalty and the misconduct it penalizes helps bring into focus the fact that enhancing IRCA civil money penal-ties on the basis of misconduct during the prehearing phase of litigation is not authorized by anything in the statute or regulations. The Administrative Procedure Act provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. §558(b). Administrative Law Judges do not have inherent contempt powers, nor can they avail themselves of the sanctions in Rule 11 or Rule 37 of the Federal Rules of Civil Procedure. U.S. v. Nu Look Cleaners, 1 OCAHO 274 at 10-11 (12/5/90). OCAHO ALJ's do have certain procedural sanctions

available for various kinds of litigation misconduct[3]; however, enhancing the fine level for IRCA violations is not among them.

Notwithstanding the inappropriateness of factoring in respondent's litigation misconduct, the ALJ clearly indicates that there is sufficient other evidence on the record of a lack of good faith on the part of respondent to support the ALJ's finding on that factor, including a "total lack of preparation of Forms I-9" and "the continued employment of the unauthorized individual after being presented with the Application for Employment Certification." ALJ's Decision and Order at 15-16.

Amount of Civil Penalty

In response to complainant's request for an enhancement of the originally requested civil penalties based on respondent's misconduct during the litigation, the ALJ assessed a civil penalty of twelve hundred dollars ($1,200) for the violation in Count I of the complaint and five hundred dollars ($500) per violation for the fifteen violations in Count II of the complaint. ALJ's Decision and Order at 19. This represented an increase from complainant's original request of one thousand dollars ($1,000) for the violation in Count I and four hundred dollars ($400) for each of the fifteen violations in Count II. Id at 18-19.

In assessing fine levels OCAHO ALJs are not restricted to amounts proposed by the INS in the Notice of Intent to Fine and complaint. The ALJs can increase or decrease the fine amounts proposed by the INS. U.S. v. Cafe Camino Real, 2 OCAHO 307 at 16 (3/25/91); U.S. v. Land Coast Insulation, 2 OCAHO 379 at 28 (9/30/91). OCAHO ALJs, and the CAHO under the de novo standard of review[4], are free to substitute their judgment for that of the INS in assessing fine levels, so long as the five factors mandated by the statute are given due consideration and the approach employed is not arbitrary or capricious. See generally U.S. v. Felipe, 1 OCAHO 108 at 7 (11/29/89). In

[3] 28 C.F.R. §68.23(c)(discovery sanctions), 28 C.F.R. §68.28(b)(applying to Federal District Court for "appropriate remedies" for various kinds of litigation-related misconduct), 28 C.F.R. §68.35(b)(excluding attorneys, parties or witnesses from proceedings). In very egregious cases referral to appropriate law enforcement authorities may be appropriate for consideration of possible criminal violations. E.g., 18 U.S.C. §1001(false statements), 18 U.S.C. §1510-1513 (obstruction of justice), 18 U.S.C. §1621 (perjury).

[4] See discussion supra, at 2-3 concerning the scope of administrative review by the CAHO.

the instant case, the ALJ based the enhancement of the amount originally requested by complainant exclusively on respondent's misconduct during the litigation. ALJ's Decision and Order at 19. As noted above, I find no authority for the enhancement of IRCA civil penalties as a sanction for misconduct during litigation. However, applying the appropriate de novo standard of review, I find there is ample justification for the enhanced fine levels without considering the misconduct during the litigation. See ALJ's Decision and Order at 13-17 (discussion of good faith and seriousness of the violation). Accordingly, the amount of civil penalty assessed by the ALJ will not be modified.

Time Period for Payment of Civil Money Penalties

The ALJ directed respondent to pay complainant "on or before thirty (30) days from the date of this Order, a total of eight thousand seven hundred dollars ($8,700)." ALJ's Decision and Order at 19-20. As discussed above, section 1324a(e)(7) of Title 8, U.S. Code, and section 68.53(a) of Title 28, Code of Federal Regulations for administrative review of an ALJ's decision and order. Section 68.53(a) provides in pertinent part that:

> (2) If the Chief Administrative Hearing Officer issues an order which modifies or vacates the Administrative Law Judge's decision and order, the Chief Administrative Hearing Officer's decision and order becomes the final agency decision and order of the Attorney General on the date of the Chief Administrative Hearing Officer's decision and order. If the Chief Administrative Hearing Officer does not modify or vacate the Administrative Law Judge's decision and order, then the Administrative Law Judge's decision and order becomes the final agency order of the Attorney General thirty (30) days after the date of the Administrative Law Judge's decision and order.

28 C.F.R. §68.53(a)(2).

Pursuant to section 1324a(e)(8) of Title 8, U.S. Code, and section 68.53(a)(3) of Title 28, Code of Federal Regulations, one adversely affected by a final agency order may file a petition for review of the final agency order with the appropriate circuit court of appeals within forty-five (45) days after the date of the final agency order.

Given this legislative and regulatory framework for administrative and/or judicial review, it was inappropriate for the ALJ to direct respondent to pay the civil money penalty by a date certain that falls before it is clear that the ALJ's order has become the final agency order.

ACCORDINGLY,

To the extent that the stated reasons for the assessment of IRCA civil money penalties were premised on a finding of misconduct on the part of respondent during the litigation, it is hereby MODIFIED. In addition, I hereby MODIFY the sentence containing the above quoted language requiring payment "on or before thirty (30) days from the date of this Order" to read as follows: "I direct Respondent to pay to Complainant a total of eight thousand seven hundred dollars ($8,700)."

Modified this 13th day of July, 1993.

JACK E. PERKINS
Chief Administrative
Hearing Officer

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FINAL ORDER AND DECISION REGARDING
CIVIL PENALTIES

I. *Introduction*

In 1986, the Immigration and Nationality Act of 1952 was amended by the Immigration Reform and Control Act (IRCA), which made significant revisions in national policy with respect to illegal immigrants. 8 U.S.C. §1324a. Accompanying other dramatic changes, IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring or continuing to employ such aliens.

Section 1324a also provides that the employer is liable for failing to attest, on a form established by the regulations, that the individual is not an unauthorized alien, and that the documents proving identity and work authorization have been verified. Additionally, 8 U.S.C. §1324a authorizes the imposition of orders to cease and desist with civil money penalties for violation of the proscriptions against hiring, and authorizes civil money penalties for paperwork violations. 8 U.S.C. §1324a(e)(4),(5).

II. *Procedural History*

On August 16, 1991, Respondents were properly served with a Notice of intent To Fine which alleged violations of the Immigration and Nationality Act, specifically 8 U.S.C. 1324a. A timely request for hearing by Respondents was filed with Complainant on September 3, 1991, resulting in the issuance of a Complaint on July 13, 1992. On July 20, 1992, copies of both the Notice of Hearing and the Complaint were effectively served on Respondents by the U.S. Postal Service at Respondent's place of business, as evidenced by a copy of a return receipt for certified mail signed by an individual at the Respondent's business address. The two Count Complaint alleged violations of the Immigration and Nationality Act, in that Respondent had allegedly hired one named individual, after November 6, 1986, who was unauthorized to work in the United States and that Respondent continued to employ that individual after Respondent became aware of the unauthorized status, in violation of 8 U.S.C. 1324a(a)(2) and that it had failed to present the Employment Eligibility Forms (Form I-9) for fifteen (15) named individuals, in violation of 8 U.S.C. 1324a(a)(1)(B). A civil penalty of one thousand dollars ($1,000) was requested for the "continuing to employ" violation and a civil penalty of four hundred dollars ($400) was requested for each paperwork violation, for a total civil money penalty request of seven thousand dollars ($7,000).

No Answer was filed during the regulatory time frame and Complainant filed its Motion For Default Judgment on August 21, 1992. On September 21, 1992, as Respondent had not responded to Complainant's motion and based on Respondent's pro se status, its detailed and well versed Answer to the Notice of Intent to Fine, and in the interests of fairness and justice, I issued an Order To Show Cause Why Complainant's Motion For Entry Of Default Judgment Should Not Be Granted. On October 6, 1992, Respondent, through its representative, Jeff Zarrinnam, who will be referred to as Respondent in this decision and order, filed its responses to my Order To Show Cause, i.e., its Motion To Request For Leave To File Late Answer And To Set Aside Default And Default Judgment, its Declaration In Support Of Motion To Set Aside Default And "Considered" Default Judgment, and its Response To Allegations. Respondent argued that its late filing should be forgiven as it qualified as "excusable neglect" under the California Civil Rules of Procedure.

On October 8, 1992, Complainant filed its opposition response in which it argued that Respondent had offered no explanation or detail concerning its "supposed neglect and mistake" that led to an untimely

Answer, that the Federal Rules of Civil Procedure control in this case, not the California Code of Civil Procedure, and that ignorance of the law did not excuse an untimely filing. On October 14, 1992, I issued an Order in which I deferred ruling on Respondent's motion to accept the late answer in order to allow it to file a statement explaining what it meant by "excusable neglect".

On that same date, Respondent filed its Answer to Complainant's First Set of Requests For Admission and Respondent's First Set of Interrogatories and Request For The Production of Documents To Complainant's(sic).

On October 19, 1992, Respondent filed its Response To Complainant's Response Opposing Respondents' Motion Requesting Leave To File Late Answer in which it argued that improper service and lack of knowledge of service made acceptance of its late Answer appropriate. On October 30, 1992, I held that the California Rules of Civil Procedure did not control in this case, that Respondent did not appear to be have been avoiding service, that Respondent's argument of its nonawareness of service had merit, that it had complied with my Orders and Complainant's discovery requests to date and that by accepting the late Answer, Complainant would suffer no prejudice. Thus, I denied the Complainant's default motion.

On November 13, 1992, I held a prehearing telephonic conference at which time Respondent made a very serious allegation, that his signature had been forged by Complainant on the list of employees or prior employees of Park Sunset Hotel made on the date of Complainant's inspection. As such, with Respondent's cooperation, Complainant stated that it would take Respondent's writing and signature exemplars to its forensic lab for analysis. On December 11, 1992, Respondent filed a status report in which it alleged that Complainant was being "arduous and uncooperative in answering some questions in (Respondent's) first set of interrogatories" and was considering filing a motion to compel.

On December 21, 1992, as the case had not reached settlement, and as previously represented to the court and to Respondent, Complainant filed a motion to amend the complaint to include an allegation of "failure to prepare" in Count II and a motion to shorten time for respondent's response to the amended complaint, from thirty (30) days to fourteen (14). On January 4, 1993, Respondent filed its opposition response to the motion to shorten time, arguing that the shortened time frame would impair its ability to satisfactorily contest any material fact or to allege an affirmative defense.

In my Order of January 5, 1993, I granted Complainant's motion to amend the complaint and its motion to shorten time for respondent's response to the amended complaint as I found that there was no pre-judice to Respondent in so doing and that the public interest was served thereby. In that Order, I also set a prehearing telephonic con-ference, although my usual procedure is to have my staff telephonically contact the parties to arrange a mutually agreeable time for a prehearing telephonic conference. However, in this case, this procedure did not work. Repeatedly, Respondent was not available telephonically, would not return calls or messages to this court, or would not appear for a previously scheduled conference without first notifying the court. Based on Respondent's apparent uncooperativeness, in that Order I warned it that, should it not appear at the conference as ordered, it was within my power to find that it had abandoned its request for hearing and to allow Complainant to recover its requested relief.

At the prehearing telephonic conference, Complainant indicated that its December 11, 1992 report from the forensic lab stated that Respondent's alleged forged signatures were indeed true signatures and that since that report, Respondent had made its first offer of settlement. However, Respondent's settlement offer did not include an admission of liability which Complainant considered critical as it considered this an egregious case based on Respondent's conduct.

Complainant also indicated that it was waiting for submission of discovery requests from Respondent, i.e., tax returns from individual Respondents, and that Respondent had not been cooperative in supplying this information. I directed Respondent to cooperate and to comply with the discovery request. Complainant indicated also that, should this case go to hearing, it would be requesting that Respondent be assessed for the expert witness fees and expenses it had incurred as a result of the unfounded allegation of forgery.

Respondent filed its Answer to the Amended Complaint on January 12, 1993. On January 13, 1993, Respondent filed a Motion Requesting Prehearing Telephonic Conference and its written Admission To Liability To Counts I and II and a motion requesting that I set the civil penalty amount. In that motion, it waived its request for a hearing. However, despite its admission of liability, it requested that I consider all previously raised affirmative defenses. In addition, it argued that it had acted in good faith in resolving this case but that Complainant had not been cooperative in its settlement negotiations.

On January 13, 1993, with the agreement of the parties, I set a prehearing telephonic conference by written Order in order to discuss Respondent's admissions of liability to Counts I and II, Respondent's "Affirmative Defenses", and the possibility of settlement. On January 15, 1993, Complainant filed a declaration by counsel in which it stated that it opposed Respondent's Motions, reserved its right to file a written response, and specifically stated that Respondent had mischaracterized, both, statements it had made and details of the settlement negotiation discussions. Complainant further argued that settlement offers and details of any settlement negotiations were inadmissible as against public policy and not relevant before the court.

In my prehearing telephonic conference on January 15, 1993, Respondent firmly and repeatedly stated that it wished to settle this case without hearing and that its affirmative defenses were not meant to revoke its admission of liability, but were made in an effort to persuade the court to assess a smaller civil penalty for its violations. Therefore, based on Respondent's representations and Complainant's lack of objection, I held that Respondent had admitted liability in Counts I and II of the Complaint, filed on July 13, 1992, and in the Amended Complaint, filed on December 21, 1992, and that his written "affirmative defenses" were arguments in mitigation of civil penalties. Neither Complainant nor Respondent had any objections to this ruling. In addition, both parties affirmed their agreement to have me set the civil penalties in this case.

Therefore, I directed that they file statements regarding the appropriate civil penalties on, or before, February 26, 1993, particularly considering the requirements of 8 U.S.C. 1324a(e)(5) and any other relevant factors. On February 25, 1993, Complainant filed its Brief In Support of Civil Monetary Fines in which it requested enhanced fines of what it had originally requested based on Respondent's egregious conduct during the investigation and litigation. Respondent filed a late brief on March 1, 1993.

III. *Discussion*

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.

I have previously held that I am not restricted to considering only these five (5) factors, though, when making my determination. See U.S. v. Pizzuto, 2 OCAHO 447 (8/21/92).

The statute states that the civil penalty for a "knowing hire/contin-uing to employ" violation:

> (i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,
>
> (ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
>
> (iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph

8 U.S.C. 1324a(e)(4)(A).

In contrast to Section 274A(e)(5), when considering the amount of civil penalties to set for knowing hire/continuing to employ violations of the Act, the statute is silent as to any mandatory or discretionary considerations. 8 U.S.C. 1 324a(a)(1)(A), (a)(2); U.S. v. Buckingham Ltd., 1 OCAHO 151 (4/6/90). Thus, it is left to my sound discretion to set the civil penalty amount for knowing hire/continuing to employ violations, although I generally consider the five factors in my determination.

It is important to note that I am not bound in my determination of the civil penalty amounts by Complainant's request in its complaint. See, in general, 8 U.S.C. 1324a; U.S. Cafe Camino Real, Inc., 2 OCAHO 307 (3/25/91); U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91).

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant asserts that Respondent, Park Sunset Hotel, is a medi-um sized business, owned by the individual Respondents who have substantial assets and interests in other businesses. Respondent, Park Sunset Hotel, which has been in existence since January 7, 1979, is a partnership owned, in different percentages, by Zahra Faily Trust aka

Zahra Faili Trust, Yaghoub Soufferian, Ebrahim Banafsheha, and John Banafsheha. It owns assets totaling one million six hundred fifty eight thousand one hundred sixty nine dollars ($1,658,169), as evidenced by its 1991 Partnership Income Tax Return. Its gross receipts were one million seven hundred twenty nine thousand two hundred sixty three dollars ($1,729,263) and its total income was one million four hundred fifty nine thousand seven hundred seventy five dollars ($1,459,775) for that year. Its tax return shows that there was a net income loss of $205,468, that the partners took draws of $35,000 in total, that there was a total depreciation of $58,390 and that there was a litigation expense of $663,000.

This litigation expense, Complainant asserts, appears to be a one time expense, arising from litigation begun in 1987. Complainant argues that without this deduction, Park Sunset Hotel would have shown a total net income in 1991 of over $400,000.

Based on tax returns submitted to Complainant, Respondent had an increase in gross receipts and ordinary income in 1987, 1988, and 1989. Respondent did not, although requested, produce 1990 tax returns. Thus, I will infer that in 1990, Respondent continued to enjoy an increase in its gross receipts and ordinary income.

As to the partners, three either own or have interests in other busi-nesses. The fourth, the Trust did not submit any financial information for 1991 although requested to do so by Complainant. Total income for 1987 through 1990, respectively, was $51,931, $83,733, $116,556 and $20,292. In 1988, 1989 and 1990, the trust deducted for attorney fees in the respective amounts of $2,000, $26,112, and $110,770.

Mr. Yaghoub Soufferian did not submit any financial information although requested to do so.

Mr. Ebrahim Banafsheha submitted some financial information showing a personal net worth, on market value basis, in 6/90 of $4,258,000 and an adjusted gross income loss of $35,295 for 1989 and an adjusted gross income of $75,521 for 1988.

Mr. John Banafsheha did not submit any financial data for 1991 although requested to do so. In 10/90, he showed a personal net worth based on market value worth of $1,174,000. He showed an adjusted gross income of $39,685 for 1989, $19,378 for 1988 and $14,400 for 1987.

Respondent argues that it is a small business that is not profitable and has shown net losses in 1991 as well as in prior years. Further, it makes the bold allegation, without any documentary support, that it will again have a loss for 1992. Respondent argues that due to the economic climate, it has been forced to cut its expenses and that a civil penalty will add to its losses. Further, it asserts that Complainant's argument that it would have been profitable if it had not taken a deduction for its attorney expenses is without merit.

Respondent admits that it employed approximately twenty (20) employees in 1991, but that it now employs only fifteen (15).

Previous cases have held that Respondents' ability to demonstrate tax losses does not necessarily establish Respondent's poor financial condition or its inability to pay a civil penalty. See U.S. v. A-Plus Roofing, 1 OCAHO 273 (7/27/90).

I have considered the arguments and evidence and have taken note that information for 1990 was not forthcoming. Based on the record before me, I have determined that Respondent is a small to medium sized business.

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 supports its position by quoting Respondent's response to the NIF in which it stated that it did not keep any Forms I-9 because it never knew of the form or its requirement.

As to good faith in respect to the charge of knowing hire, Complainant states that Respondent continued to employ the unauthorized individual for at least nine (9) months after it acquired knowledge, or should have known, that the individual was unauthorized to work. Complainant bases this argument on the fact that Respondent signed an Application for Employment Certification (ETA 750) for the unauthorized individual on September 3, 1990 and employed him until, at least, June 1, 1991 and that these facts show that Respondent did not use good faith or exhibit diligence in complying with 8 U.S.C. 1324a.

Complainant argues further that Respondent's conduct during the litigation and investigation of this case may be considered when determining the good faith factor. U.S. v. Alariz d/b/a La Segunda Downs, 1 OCAHO 297 (2/22/91). Complainant points to Respondent's

unfounded allegation of forgery and of the expense and allocation of resources that were needed to prove that the allegation of forgery was unfounded as evidence of a lack of good faith.

Respondent, on the other hand, argues that it acted in good faith. It states that it never received an educational visit from Complainant and that it had no knowledge of the requirement to prepare Forms I-9 for its employees prior to the Complainant's visit on June 25, 1991. At that time, Respondent did prepare the Forms I-9 for the inspection on July 2, 1991.

Respondent argues that it should not be found to have acted without good faith with regard to the continuing to employ violation since it's only culpability respects not taking the time to properly read the Application for Employment Certification and assuming that it was an application for high school credit.

Respondent makes no mention of its allegations of forgery as it affects this factor.

I have considered the parties' arguments and have determined that Respondent did not show good faith in its compliance with 8 U.S.C. 1324a with regard to both Counts I and II. Not only did it not prepare or present the Forms I-9 at inspection, but it is not credible to me that a businessman would not remember signing an important document during an INS inspection or that he would not recognize his own signature on that document at a later date. I find that the allegation of forgery, Respondent's total lack of preparation of Forms I-9, and the fact that Respondent's first settlement offer was not made until right after Complainant's forensic report was returned stating that Respondent's signature was indeed genuine, allow me to infer that there was no good faith in this case. Further, the continued employment of the unauthorized individual after being presented with the Application for Employment Certification, makes it difficult to believe that Respondent acted in good faith in complying with IRCA.

Therefore, 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 I and II.

3. Seriousness of the Violation

Complainant argues that Respondent's violations are all serious. 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). In addition, a total failure to prepare the Form I-9 is more serious than a failure to fill in certain sections. U.S. v. Dodge Printing Centers, 1 OCAHO 125 (1/12/90).

In this case, Complainant argues that Respondent failed to totally prepare any Forms I-9 and failed to present them at the time of inspection. In addition, it argues that by continuing to employ an unauthorized alien is serious as it circumvents the Congressional intent.

Respondent argues that its violation is not serious as it prepared all the Forms I-9 for inspection within one week after notification of the requirement by Complainant. Further, it argues that its circumstances can be distinguished from U.S. v. Dodge Printing Center for that reason.

It argues further that it did not attempt to circumvent the Congressional intent by hiring an unauthorized individual; in fact it kept information in its employee files which was collected to show that only authorized individuals were hired.

In this case, I find that Respondent's attempt to comply within one week of notification of the inspection requirements does not mitigate the seriousness of its total failure to prepare any Forms I-9 prior to that time. Additionally, I find that the hiring of an unauthorized individual is serious.

4. Whether or not the Individual was an Unauthorized Alien

The parties agree that Respondent has employed one (1) unauthorized alien. Respondent argues, though, that as it was unaware of the unauthorized status and that as it terminated the individual's employment upon notice, it should be allowed mitigation based on this factor. Based on the record in this case, I will not mitigate in Counts I and II based on this factor.

5. History of Previous Violations of the Employer

Both Complainant and Respondent assert that there were no previous violations of Section 274A by this Respondent. As such, in my sound discretion, I will mitigate in Counts I and II based on this factor.

6. Other Factors

Complainant argues that Respondent's egregious conduct during this case should be considered as a separate factor in determining the civil money penalties. Complainant asserts that not only did Respondent not act in good faith, but its blatantly false and frivolous claim of forgery caused undue delay and expense by requiring Complainant to collect 80 pages of handwriting exemplars from Respondent and having them analyzed by a forensic expert.

Complainant had previously argued that it was economically feasible for Respondent to pay the requested civil penalties.

Respondent argues that its allegations of forgery should not be consi-dered as an aggravating factor as the documents that he alleged were forged were irrelevant to this proceeding. Further, Respondent states that the report from the forensic lab is biased; the basis of this allega-tion is the fact that Complainant allegedly referred to the forensic document examiner as a "friend" of Complain-ant's. It argues further that even a fine in the amount of $1,750 will impact negatively on Respondent and cause economic distress.

B. Amount of Civil Penalty

In its complaint and amended complaint, Complainant has requested that I assess a total civil penalty in this case of seven thousand dollars ($7,000), which reflects a civil penalty of one thousand dollars ($1,000) for the violation in Count I and four hundred dollars ($400) for each of the fifteen (15) violations in Count II. However, in its brief on civil penalty amounts, Complainant strongly argued for enhancement of the requested civil penalties based on Respondent's alleged egregious behavior during this case.

After a review of the record, the parties' arguments and the relevant law, I find that, using a judgmental approach, the amount of civil penalties requested by Complainant is not appropriate. During this proceeding, I have observed Respondent's lack of good faith, its lack of due respect to this Court and the undue delay and unnecessary expenditure of judicial time and effort caused by Respondent's conduct. Further, based on Respondent's allegation of bias in the forensic report, I have carefully reviewed that document, and find no basis for Respondent's bold, unsupported allegation. Ex. C-27. Needless to say, Complainant has also suffered unnecessary expense and delay caused directly by Respondent's bad faith conduct.

Therefore, I find that enhancement of the civil penalties, as requested by Complainant, is appropriate.

After much consideration, I have determined that the appropriate and reasonable civil penalties in this case will be set at twelve hundred dollars ($1,200) for the one violation in Count I and at five hundred dollars ($500) per violation for the fifteen (15) violations admitted in Count II. As such, I direct Respondent to pay to Complainant, on or before thirty (30) days from the date of this Order, a total of eight thousand seven hundred dollars ($8,700).

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 16th day of June, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge