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. 94A00033
EL PASO HOSPITALITY, INC., Respondent.	)	

FINAL DECISION AND ORDER
(March 7, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Lee Abbott, Esq., for Complainant.

Paul M. Douglass, Esq., for Respondent.

I. *Introduction*

This case arises under § 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacting § 274A of the Immigration and Nationality Act (INA) of 1952, as amended, 8 U.S.C. § 1324a. Section 1324a establishes a regime of sanctions to be imposed on employers who knowingly hire unauthorized aliens or who fail to comply with the employment eligibility verification system established pursuant to it. Employers are vulnerable to civil and criminal penalties for violating prohibitions against employing unauthorized aliens in the United States and are subject to civil penalties for failure to comply with record keeping and employment eligibility verification requirements (paperwork requirements).

Employers are obliged to satisfy paperwork requirements whether or not putative employees are citizens of the United States. The verification system requires the participation of employers and employees in various aspects of document presentation, document examination, attestation and record keeping. This process requires completion of the INS Employment Eligibility Verification Form (Form I-9) within three business days of hire. 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994).

II. *Procedural Background*

Following prior service of a notice of intent to fine and Respondent's request for hearing, the Immigration and Naturalization Service (Complainant or INS) filed a complaint against El Paso Hospitality, Inc. (Respondent or El Paso) on March 4, 1994. Count I of the Complaint alleges that Respondent knowingly hired and/or continued to employ a named individual not authorized for employment in the United States, in violation of 8 U.S.C. §§ 1324a(a)(1)(A) and/or (a)(2). Complainant requests $1,650.00 as a civil money penalty for the violation in Count I.

Count II alleges that Respondent failed to prepare, retain, and/or make available for inspection the Forms I-9 for 43 named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests $27,700.00 ($640.00 for violations 1-42 and $820.00 for violation 43 in the Complaint) for the violations in Count II.

Count III alleges that Respondent failed to ensure proper completion of section 1 of the Form I-9 by five named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests $3,200.00 ($640.00 per violation) for the violations in Count III.

Count IV alleges that Respondent failed to properly complete section 2 of the Form I-9 for 17 named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests $10,880.00 ($640.00 per violation) for the violations in Count IV.

Count V alleges that Respondent failed to ensure that employees properly completed section 1, and failed to properly complete section 2 of the Form I-9 for six named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests $3,840.00 ($640.00 per violation) for the violations in Count V.

Count VI alleges that Respondent failed to complete section 2 of the Form I-9 within three business days of the hire, for two named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requested a civil money penalty of $1,280.00 ($640.00 per violation) for the violations in Count VI.

Count VII involves the failure of Respondent to ensure that two (2) named employees completed section 1 at the time of hire, and also failed to complete section 2 of the I-9 within three business days, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests $1,280.00 ($640.00 per violation) for the violations in Count VII.

On April 11, 1994, Respondent filed its Answer which denies the allegations of Counts I and II, although conceding that the individual named in paragraph C of Count I is unauthorized for employment, while stating that it lacks sufficient information in its records to admit or deny the allegations in Counts III-VII. On April 12, 1994, the presiding administrative law judge (ALJ) issued a Notice Scheduling Hearing for July 18, 1994 in El Paso, Texas, and issued an Order Directing Prehearing Procedures.

The parties engaged in substantial motion practice following the filing of the Answer. On July 25, 1994, the parties filed both a Joint Motion to Waive Hearing and Joint Stipulations of Fact.

On September 22, 1994, Complainant filed Proposed Finding[s] of Facts and Conclusions of Law Relating to the Proper Civil Money Penalty (Cplt. PPF). On December 12, 1994, Respondent filed Proposed Findings of Facts and Conclusions of Law Relating to the Proper Civil Money Penalty (Resp. PPF).

On February 7, 1995 this case was reassigned to me as the presiding ALJ.

III. *Findings of Fact and Conclusions of Law*

A. Liability Resolved

Pursuant to 28 C.F.R. § 68.47,[1] the parties submitted the following stipulations relating to the issue of liability:

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[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

> Respondent agrees that it is liable for a civil money penalty as to Count I of the Complaint.
>
> Respondent agrees that it is liable for a civil money penalty for violations involving 30 of the 43 alleged violations in Count II.
>
> The parties stipulate to the dismissal of the remaining 13 allegations of Count II.
>
> Respondent agrees that it is liable for a civil money penalty as to each of the allegations contained in Counts III, IV, V, VI, and VII.

Upon the basis of the stipulations between the parties, I find and conclude that Respondent is liable for violations alleged in Count I, 30 of the violations alleged in Count II, and each violation alleged in Counts III, IV, V, VI, and VII of the Complaint and, as such, is liable for payment of a civil money penalty for each violation so found.

Upon the same basis, I find and conclude that Respondent is not liable for the remaining 13 alleged violations in Count II, and therefore dismiss those alleged violations.[2]

B. Civil Money Penalty Issues

Title 8 U.S.C. § 1324a(e)(4)(A)(i) sets out the statutory parameters for assessing and adjudicating the civil money penalty for knowing employment of an unauthorized alien. Such violation requires an order to cease and desist from such violations and, in the case of a first order finding violations, a penalty of "not less than $250 and not more than $2000 for each. . . ." Id.

Title 8 U.S.C. § 1324a(e)(5) sets out the statutory parameters for assessing and adjudicating the civil money penalty for paperwork violations. Each paperwork violation requires a penalty of "not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." Id.

No statutory standards are provided for adjudicating the civil money penalty for unauthorized hires. In contrast, for paperwork violations, it is necessary to "consider" the five factors set forth in 8 U.S.C. § 1324a(e)(5), i.e., (1) size of the employer's business; (2) good faith of the employer; (3) seriousness of the violation; (4) whether the individuals

[2] The 13 individuals for whom Respondent will be shielded from liability are: A. Amparan, D. Bagby, J.M. Barrios, A. Castro, G. Davila, L. Gomez, G. Franados, A. Morales, L.A. Pages, A. Portillo, L. Rodriguez, E. Salazar, and N. Tays.

involved were unauthorized aliens; and (5) the history of previous violations. Id.

In weighing the mitigating and aggravating factors to adjudge the penalty, I utilize a judgmental and not a formula approach. See e.g., United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993); United States v. Big Bear Market, 1 OCAHO 48 (1989), aff'd by CAHO (1989); aff'd Big Bear Market No. 3 v. I.N.S., 913 F.2d 754 (9th Cir. 1990). But cf. United States v. Felipe, Inc., 1 OCAHO 93 (1989) (applying a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations); aff'd by CAHO, 1 OCAHO 108 (1989) at 5 and 7. ("This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable," it was not to be understood as the exclusive method for adjudging the five statutory factors). The result is that each factor's significance is based on the facts of a specific case, although the guidance of IRCA jurisprudence as precedent is not ignored.

1. Civil Money Penalty Adjudged

The parties, pursuant to 28 C.F.R. § 68.47, submit stipulations with respect to adjudicating appropriate civil money penalties:

> Count I. Respondent hired the named individual, knowing or having reason to know that she was an alien not authorized to be employed in the United States. The proper civil money penalty for this violation should be $1,000.
>
> Count II. Respondent hired 30 individuals for employment in the United States and as to each, failed to prepare, retain and/or make available for inspection a Form I-9, in violation of 8 U.S.C. § 1324a(a)(1)(B). As to one of the 30 violations, the proper civil money penalty should be $500.

The parties propose partial stipulations as to the 29 other Count II violations agreed to, the five in Count III, the 17 in Count IV, the six in Count V, the two in Count VI, and the two in Count VII: the factors of the size of the business, the good faith of the employer, the history of previous violations, and the involvement of an unauthorized alien should be applied to mitigate the civil money penalty. However, the parties have differing positions on the relative seriousness of the violations. As a result, the July 1994 Joint Motion to Waive Hearing, expresses the intent of the parties to pursue this issue through written argument in the form of proposed findings of fact and proposed conclusions of law. The respective filings of September and December 1994 are to this effect. This Final Decision and Order, analyzing the

seriousness of the violations, and adjudicating civil money penalties utilizes the judgmental approach mentioned above.

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 694 at 21 (1994) (citing United States v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (1992)). There are, however, various degrees of seriousness. United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (citing United States v. Felipe, Inc., 1 OCAHO 93 (1989)). "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." Davis Nursery, 4 OCAHO 694 at 21 (quoting United States v. Charles C. W. Wu, 3 OCAHO 434 at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge)).

As to Count II, the failure to prepare, retain, and/or make available for inspection the Form I-9, OCAHO case law finds such violations to be serious. Therefore, this factor is unavailable to mitigate the civil money penalty for the 29 Count II violations at issue.

Count III implicates the failure to ensure proper completion of section 1 of the Form I-9 for five employees. Respondent asserts that, "[t]aken in the context of the over all [sic] number of employees of Respondent, Respondent [argues] that it had substantially complied, the Respondent would further argue that it in good faith believed that it had substantially complied and that this should be a mitigating factor when calculating the proper civil money penalty. . . ." Resp. PPF at 3.

It is the employer's responsibility to ensure that the employee properly completes section 1 of the I-9. United States v. Big Bear Market, 1 OCAHO 48. Four of the five violations in Count III involve the failure of the employee to attest, under penalty of perjury, that he/she is either a United States citizen, a Lawful Permanent Resident Alien, or an alien specifically authorized by the INS to work in the United States. The fifth violation in Count III involves the failure of an employee to attest, under penalty of perjury, that the documents presented to the employer for the purpose of verifying employment eligibility are genuine and relate to the employee. Respondent's substantial compliance argument is unfounded. This is so because "absent attestation it is not possible to determine whether the employer has satisfied the substantive requirement that it has verified that the individual is not an unauthorized alien." United States v. J.J.L.C., Inc.,

1 OCAHO 154 at 7 (1990). Although J.J.L.C. involved failure by the employer to attest to section 2 of the Form I-9, the principle that failure of attestation impairs employment eligibility verification accountability is equally applicable to failure of attestation by the employee. The audit trail is significantly compromised in either case.

Title 8 U.S.C. § 1324a(b)(2) unequivocally imposes upon the employee the duty to attest to his/her status. As noted in J.J.L.C., the doctrine of substantial compliance is inapplicable in the context of a clear statutory prerequisite known to the party seeking to apply the doctrine. J.J.L.C., at 8 (citing Sawyer v. County of Sonoma, 719 F.2d 1001, 1008 (9th Cir. 1983)). Attestation, whether by the employer or employee is a critical factor in gauging an employer's compliance with IRCA and is therefore an essential substantive requirement. The omissions implicated by Count III fall short of any reasonable substantial compliance hypothesis; Respondent did not substantially comply with the employment eligibility verification requirements. I conclude that the violations in Count III are serious, though not as serious as the failure to prepare Forms I-9.

Count IV involves the failure to properly complete section 2 of the Forms I-9 for 17 employees. Respondent argues that its omissions with respect to these allegations did not result in the hiring of unauthorized aliens, weighing against the seriousness of the violation. As the parties have recognized, any benefit to Respondent because no unauthorized alien was hired is already taken into account. Failure to complete section 2 is no more or less serious because none of the employees are unauthorized aliens. The violations in Count IV can be categorized into three types: Failure to identify documents or reference to improper documents; omitted attestations of the employer or its agent; and, omitted dates of completion of the form.

Failure to identify documents, or reference to improper documents, necessary to establish identity or work authorization are serious omissions which fail to serve the purpose of the employment eligibility verification exercise which is to free the work place from unauthorized aliens. Therefore, I conclude that the 12 of 17 Count IV violations where documents were omitted, or improper documents were referenced, are serious violations, though not as serious as the failure to prepare a Form I-9 or the failure to complete both sections 1 and 2 of the Form I-9. As already discussed, i.e., as to Count III, failure of attestation is also a serious violation. Although Complainant suggests that in most cases omission of a signature in section 2 would not result in the hiring of an unauthorized alien, lack of a signature amounts to

lack of attestation, precluding mitigation of the penalty for this factor for the two Count IV violations which relate to omitted attestations. Finally, as to the missing dates in the remaining three Count IV violations, I agree with Complainant that this is a minor violation, deserving of mitigation.

Count V involves failure to both ensure the completion of section 1 and to properly complete section 2. OCAHO case law demonstrates that "[c]ompletion of these sections of the I-9 form are critical for deterring hiring illegal aliens." Davis Nursery, 4 OCAHO 694 at 22. The six Count V allegations involve missing dates, missing attestation signatures, and missing documents. These are serious omissions, only marginally less serious than the failure to complete Forms I-9.

Count VI concerns the failure to complete section 2 of the Form I-9 for two employees within three business days of hire. Specifically, section 2 was not completed until a year later for one employee, and for over three (3) years for another employee. Patently, for all an employer knows, employees could have been unauthorized for employment during all the substantial time their eligibility is unverified. That the particular employees may have been authorized is immaterial. Due to the lengthy delays in verifying the employees' documents in order to complete section 2 and thereby verify their authorization for employment, I find these are serious violations, though not as serious as failing to complete a Form I-9, or to ensure the completion of section 1 or to properly complete section 2.

Count VII involves the failure of Respondent to ensure that two (2) named employees completed section 1 at the time of hire, and also failed to complete section 2 of the Form I-9 within three business days. As to one (1) employee, Leticia Bazan, the paperwork was completed 12 days after the employee was hired. Complainant concedes that this is not a serious violation as it only encompassed a short time period. As such, I will mitigate for this factor as to that employee. However, in the second allegation of Count VII, sections 1 and 2 of the Form I-9 were not completed for nearly 10 months after hire. This lengthy delay in completing the Form I-9 is a serious violation as Respondent would not have known for a substantial length of time whether or not the employee was authorized as to that employment.

2. Effect of Factors Weighed Together

In determining the appropriate level of the civil money penalty, I have considered the range of options between the statutory minimum ($100 per violation) and maximum ($1,000 per violation). Pursuant to the

stipulations, I have mitigated the penalty based on the size of Respondent's business, the good faith of the employer, the lack of history of previous violations, and the lack of involvement of an unauthorized alien. As to the seriousness of the violations, due to the relatively more serious nature of violations involving the failure to prepare Forms I-9, I adjudge a higher amount for these violations than for violations involving the failure to properly prepare the I-9s. Finally, I make a distinction between violations involving failure to complete only one section of the Form I-9 in contrast to failure to complete both sections. I continue to adhere to the view that omission of attestations is virtually as serious as is a failure to prepare/present the Forms I-9.

IV. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That Respondent violated 8 U.S.C. § 1324a(a)(1)(A), as alleged in the Complaint, by hiring for employment in the United States an alien knowing the alien is unauthorized with respect to that employment as alleged in the Complaint.

2. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing as alleged in the Complaint to comply with the requirements of 8 U.S.C. § 1324a(b)(1), (2) and (3) with respect to the individuals named in Count I; 30 violations in Count II; five (5) violations in Count III; 17 violations in Count IV; six (6) violations in Count V; two (2) violations in Count VI; and two (2) violations in Count VII of the Complaint.

3. That, by agreement of the parties, 13 additional alleged violations in Count II of the Complaint are dismissed.

4. That upon consideration of the stipulations of the parties, and the statutory criteria used for determining the amount of the civil money penalty for violations of 8 U.S.C. § 1324a(a)(1)(B), it is just and reasonable to require Respondent to pay civil money penalties in the following amounts:

Count I:	$1,000.00 as to the named individual for a total of $1,000.00.
Count II:	$500.00 as to one named individual for a total of $500.00. $250.00 per violation as to 29 named individuals for a total of $7,250.00. Total penalty for Count II: $7,750.00
Count III:	$150.00 per violation as to five (5) named individuals for a total of $750.00.

Count IV: $200.00 per violation as to 14 named individuals for a total of $2,800.00. $100.00 per violation as to three (3) named individuals for a total of $300.00.
Total penalty for Count IV: $3,100.00

Count V: $225.00 per violation as to six (6) named individuals for a total of $1,350.00.

Count VI: $125.00 per violation as to two (2) named individuals for a total of $250.00.

Count VII: $100.00 as to one (1) named individual for a total of $100.00.
$125.00 as to one (1) named individual for a total of $125.00.
Total penalty for Count VII: $225.00

For a total civil money penalty of: $14,425.00

5. That Respondent shall cease and desist from further violations of 8 U.S.C. §§ 1324a(1)(A) and (a)(2).

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

SO ORDERED.

Dated and entered on this 7th day of March, 1995.

MARVIN H. MORSE
Administrative Law Judge