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. 94A00145
RIVERBOAT DELTA KING, INC., Respondent.	)	

FINAL DECISION AND ORDER
(March 8, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Frederick E. Newman, Esq.
for Complainant

Charles B. Coyne, Esq.
for Respondent

I. *Procedural History*

On August 4, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated July 29, 1994, in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF) served by INS upon Riverboat Delta King, Inc. (Riverboat or Respondent) and issued on June 15, 1994.

Count I of the Complaint charges Respondent with failure to prepare the employment eligibility verification form (Form I-9) for five named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B). The civil money penalty assessed for Count I is $500 per individual, for a total of $2,500. Count II charges Respondent with failure to complete properly section 2 of the Form I-9 for 37 named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B) and assessed a civil money penalty in the amount of $200 per individual for a total of $7,400. The total civil money penalty assessed is $9,900.

On August 16, 1994, this Office issued a Notice of Hearing (NOH) which transmitted to Respondent a copy of the Complaint and a copy of OCAHO rules of practice and procedure appearing at 28 C.F.R. part 68.[1]

On September 15, 1994, Respondent filed a letter/pleading requesting an extension of time in which to answer the Complaint which I granted in an Order dated September 19, 1994.

On October 25, 1994, Respondent timely filed an Answer which denied the allegations in Count I of the Complaint and admitted the allegations in Count II. In addition, Respondent argued that the proposed civil money penalty was excessive in light of Respondent's past cooperation with INS and upon consideration of Respondent's ability to pay.

On November 28, 1994, Complainant filed a Motion for Summary Decision which argues that it is entitled to summary decision in Count II of the Complaint because Respondent's Answer admits to those allegations. Complainant also argues that it is entitled to summary decision on Count I because Respondent failed to produce Forms I-9 for the five individuals named in Count I when requested to do so by the Border Patrol Agent in charge of investigating Riverboat. In addition, Complainant discussed the five factors to be "considered" when determining the appropriate civil money penalty for paperwork violations. See 8 U.S.C. § 1324a(e)(5).

On January 3, 1995, Respondent filed an Opposition to Motion for Summary Decision which argues that Complainant did not submit sufficient evidence to support the civil money penalty assessment; Respondent also discusses the five factors of § 1324a(e)(5).

At a January 30, 1995 telephonic prehearing conference, Respondent admitted to all allegations of liability in Counts I and II of the Complaint. The parties agreed to forego an adversarial evidentiary hearing in favor of resolving the remaining issue of civil money penalty on the basis of written pleadings. Final pleadings were welcomed by either party. Respondent was to file any relevant pleadings by February 13, 1995; Respondent was to file a rebuttal by March 3, 1995.

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[1] See 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].

In approximate compliance with the understanding reached at the January 30, 1995 conference, on February 27, 1995, Respondent filed a letter/pleading limited to the statement that (1) it had chosen "not to dispute the issue of liability in an effort to fairly and expeditiously resolve the matter;" and (2) "[t]he complainant's position is insensitive to the beleaguered position of this struggling organization." Complainant filed no response.

II. *Discussion*

A. Liability Established

Respondent admits to the allegations of the Complaint. The only remaining issue is the quantum of civil money penalty.

B. Civil Money Penalty Adjudged

The statutory minimum for the civil money penalty is $100 per individual; the maximum is $1,000. 8 U.S.C. § 1324a(e)(5). As the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I therefore only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

Five statutory factors must be considered in determining the reasonableness of the civil money penalty: "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 the previous violations." 8 U.S.C. § 1324a(e)(5). In weighing each of these factors, 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). In this way, each factor's significance is based on the facts of a specific case.

1. Size of Business

OCAHO case law has consistently held that where a business is 'small', the civil money penalty is to be mitigated. See, e.g., Giannini, 3 OCAHO 573 at 9; United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990). Based on an assessment by the Border Patrol,

Complainant characterizes Riverboat as a medium-size business. It bases this determination on the fact that Riverboat "employed 120 people [at the time of the audit] and paid quarterly wages of $364,438 in 1992-1993." Motion for Summary Judgment at 8. Complainant admits, however, that "[n]o financial data regarding gross sales, taxes, nor earnings was provided to the Border Patrol" and "[t]he Border Patrol was not informed about the number of persons hired annually nor since inception of IRCA." Id.

In contrast, Respondent argues that "[c]ompared to the millions of other businesses in the United States, respondent business is quite small." Opposition to Motion Summary Judgment at 3 [hereinafter Opposition]. It argues that Complainant included no affidavit or other evidence to bolster its assertion of size and additionally did not take "consideration of how many of the employees were full or part time, whether or not the number of employees fluctuates during the year, annual revenues or earnings or a comparison of the quarterly wages to other businesses." Id. at 2-3. Although Respondent's arguments are relevant, Respondent does not include any data to bolster its assertion that Riverboat is a "small business." It only offers an affidavit of Kathleen T. Nitz, a principal of Respondent. The affidavit embraces a letter from Respondent's counsel to Complainant's counsel stating that "[Riverboat] Delta King's most recent financial statement is enclosed" showing that Riverboat's "net profit to October 31, 1994 is $53,004.98" and that Respondent "[h]istorically . . . lose[s] $30,000 to $40,000 in November." Respondent neglected, however, to include the enclosure to counsel's letter to support its financial status. The parties both failed to provide significant support for their assertions. Accordingly, I find size of Respondent to be neither a mitigating nor an aggravating factor in assessing the civil money penalty in this case.

2. Good Faith of Employer

OCAHO case law states that "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

In its Motion for Summary Judgment, Complainant states:

> The company readily complied with the Notice of Inspection and admitted that it could not produce I-9s for five employees. The company produced the necessary DE3B

> Reports of Wages as requested. Riverboat cooperated with the investigating agents. 140 of the 249 I-9s presented for inspection were seriously defective.

Motion for Summary Judgment at 8-9.

Complainant does not state a conclusion as to whether good faith is a mitigating or aggravating factor in this case. From its mention of compliance, a subfactor which has been taken into consideration when assessing the good faith of an employer in OCAHO case law,[2] Complainant appears to acknowledge that Respondent acted in good faith. Nevertheless, its reference to the number of defective Forms I-9 appears to cut the other way, although the fact of paperwork violations is not sufficient per se to show lack of good faith.

Respondent notes its cooperation/compliance with the Border Patrol. Respondent asserts that it will "make an informational announcement to the [California Restaurant Association] . . . recit[ing] our experience, potential fines and compliance requirements." Opposition at 3. While its cooperation with the Border Patrol is a subfactor to take into consideration, the fact that Respondent undertakes prospectively to alert other employers as to IRCA requirements, while admirable, is not a factor which mitigates in its favor. It is only logical that the good faith of an employer is calculated at the time of investigation and not thereafter. See United States v. Danny Mathis, 4 OCAHO 717 (1994) (Modification by the Chief Administrative Hearing Officer (CAHO) of the Administrative Law Judge's (ALJ) Order in which the CAHO ruled that by "according weight to the behavior of the respondent during the discovery phase of the litigation in the context of a good faith analysis . . . [the ALJ went] beyond the scope of a permissible good faith analysis. . . ."). Likewise, the fact that Respondent "attempted to contact all of the former employees whose I-9 forms were allegedly incomplete or missing and . . . [has] provided properly completed paperwork for nine of the employees who are the subject of this motion" is also unavailing as a defense as Respondent is again using "cooperation" as a subfactor to mitigate the penalty after the fact.

Notwithstanding Respondent's cooperation even during the investigation, I determine that Respondent fails the good faith test. OCAHO case law states that one test of good faith "'is whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it.'" Williams, 5 OCAHO 730

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[2] See United States v. Williams Produce, Inc., 5 OCAHO 730 at 7 (1995) (stating that a small delay in producing requested Forms I-9 for inspection as a form of noncooperation is "not enough to show bad faith").

at 8. The I-9s that Respondent did produce, whether complete or not, demonstrate that its officers/managers knew of IRCA's requirement that an employer verify employment eligibility. Respondent did not, however, act in sufficient compliance with § 1324a(b) since it failed in many cases to complete any part of the Form I-9 for numerous employees and where it did, failed to verify properly employment eligibility. Accordingly, this factor serves to aggravate, not mitigate, the penalty.

3. Seriousness of Violation

Complainant correctly notes the principle that "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." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (quoting United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge)). Count I of the Complaint alleging failure to prepare Forms I-9 for five individuals comprises a serious violation.

Count II alleges 37 counts of failure to complete properly section 2 of the Form I-9. While failure to complete properly is not as serious as failure to prepare,[3] "[c]ompletion of these sections of the I-9 form are critical for deterring hiring illegal aliens." Davis Nursery, 4 OCAHO 694 at 22. Although these violations are serious, I adjudge a lower quantum of penalty for them than for those of failure to prepare the Form I-9 at all.

4. Employment of Unauthorized Aliens

Because the parties agree that there is no evidence that Respondent knowingly hired illegal aliens, this factor mitigates the penalty.

5. Previous § 1324a Violations

This too is a mitigating factor as there is no history of previous § 1324a violations.

6. Other Factors

"OCAHO case law instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties." United States v. King's Produce, 4 OCAHO 592 at 9 (1994). One such

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[3] See Williams, 5 OCAHO 730 at 8-9.

factor is the Respondent's "ability to pay." See, e.g., Minaco Fashions, 3 OCAHO 587 at 9. Respondent argues that Complainant failed to take into consideration that Respondent's "[c]ash flow is extremely difficult" as, among other things, Respondent is "several months behind on our mortgage and payments to some creditors." Opposition at 2 (citing letter dated Dec. 12, 1994 to Frederick E. Newman from Charles B. Coyne, [counsel for Complainant and Respondent, respectively]). Aside from the Kathleen T. Nitz affidavit which recites that Respondent has financial difficulties, no other corroborating evidence was submitted. I do not find this assertion probative as evidence of "inability to pay."

No additional factors are specified by the parties as a predicate on which to mitigate or aggravate the civil money penalty.

7. Effect of Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. While the fact that Respondent has had no previous violations and has not knowingly hired any illegal aliens does not support a finding for the penalty assessed by INS with regard to Count I, the aggravating factors of lack of good faith and seriousness do not call for adjudication at the statutory minimum. In addition, I adjudge a higher penalty level for the relatively more serious violations involving failure to prepare the Form I-9 as alleged in Count I of the Complaint than for the 37 allegations of failure to complete properly section 2 of the Form I-9. Based on the aggravating factors of lack of good faith and seriousness, I adjudge that the INS assessment for Count II is just and fair. The result is that this Final Decision and Order reduces the INS assessment for Count I from $500 to $400 per individual and leaves undisturbed the Count II assessment of $200 per individual.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings and accompanying documentary materials submitted by both 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)(B) by failing as alleged in the Complaint to comply with the requirements of 8 U.S.C. § 1324a(b)(1) with respect to the individuals named in Counts I and II of the Complaint.

2. That upon consideration of the statutory criteria and other relevant factors used for determining the amount of the penalty for violation 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, $400.00 as to each of 5 named individuals, $2,000
   Count II, $200.00 as to each of 37 named individuals, $7,400

   For a total of **$9,400.00**.

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 this 8th day of March, 1995.

MARVIN H. MORSE
Administrative Law Judge