

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 5, 1995

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324a Proceeding
) OCAHO Case No. 94A00095
ANCHOR SEAFOOD)
DISTRIBUTORS, INC.,)
D/B/A ANCHOR FISH COMPANY,)
Respondent.)
_____)

DECISION AND ORDER

Appearances: Patricia Gannon, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for complainant; Lawrence Wilens, Esquire, New York, New York, for respondent.

Before: Administrative Law Judge McGuire.

On October 15, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon Anchor Seafood Distributors, Inc. (respondent) Notice of Intent to Fine (NIF) NYC274A-92005420. That citation contained four (4) counts alleging 56 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, and proposed civil money penalties totaling \$40,620.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent illegally hired and/or continued to employ the 13 named individuals knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(a)(2). Complainant levied civil money penalties of \$1,150 for each of those 13 alleged violations, or a total of \$14,950.

In Count II, complainant alleged that respondent employed the 41 named individuals for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of \$480 for each of the three (3) violations numbered 16, 21 and 22, and \$620 for each of the remaining 38 violations, or civil money penalties totaling \$25,000 for that count.

Complainant alleged in Count III that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and failed to ensure that that individual properly completed section 1 of the pertinent Form I-9, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of \$310 for that alleged violation.

In Count IV, complainant alleged that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the pertinent Form I-9, again in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of \$360 for that alleged violation.

Respondent was advised in the NIF of its right to contest those charges by timely submitting to this Office a written request for a hearing before an administrative law judge. On November 8, 1993, Lawrence M. Wilens, Esquire, timely filed a written request for hearing.

On May 13, 1994, complainant filed the four (4)-count Complaint at issue, reasserting the allegations set forth in Counts I through IV of the NIF, as well as the requested civil money penalties totaling \$40,620 for those 56 alleged violations.

On May 17, 1994, a copy of that Complaint and the Notice of Hearing were served upon the respondent, as well as its counsel of record, Lawrence M. Wilens, Esquire.

On June 10, 1994, respondent timely filed its Answer, generally denying all allegations set forth in Counts I and II, and denying only the appropriateness of the civil money penalties proposed in Counts III and IV.

On November 25, 1994, complainant filed a pleading captioned Motion for Partial Summary Judgment, in which it requested that partial summary judgment be granted on the facts of violation concerning the 43 paperwork violations alleged in Counts II, III, and IV of the Complaint, as well as the proposed civil money penalties totaling \$25,670 for those violations.

On December 14, 1994, the undersigned issued an Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Judgment, in which a summary decision was granted concerning the facts of violation alleged in Counts III and IV only, leaving at issue for future adjudication the alleged facts of violation in the 13 alleged infractions in Count I, the alleged facts of violation in the 38 violations set forth in Count II, and the appropriate civil money penalties to be assessed for the single violations alleged in each of Counts III and IV.

That order also advised the parties that in the event that it is subsequently determined that respondent also committed any or all of the violations alleged in Counts I and II, appropriate civil money penalties would also be assessed for those infractions.

In determining the appropriate civil money penalties for the 43 paperwork violations alleged in Counts II, III, and IV, due consideration will be given to the five (5) criteria set forth at 8 U.S.C. § 1324a(e)(5).

On January 23, 1995, complainant filed an unopposed pleading captioned Motion for Judgment on the Pleadings, in which it requested that summary judgment be entered against the respondent on the facts of violation in the remaining two (2) counts, I and II.

On March 22, 1995, the undersigned issued an Order Granting Complainant's Motion for Summary Decision, in which respondent was found to have violated the pertinent provisions of IRCA in the manners alleged in Counts I and II, also. Thus, all that remained at issue were the appropriate civil money penalties to be assessed for the 56 violations alleged in Counts I, II, III, and IV.

Accordingly, the parties were instructed to submit concurrent written briefs containing recommended civil money penalty amounts for those 56 violations, utilizing the five (5) statutory criteria set forth at 8 U.S.C. § 1324a(e)(4) in addressing the 43 paperwork violations alleged in Counts II, III, and IV.

On April 24, 1995, complainant filed its brief in the form of a pleading captioned Motion for Approval of Complainant's Proposed Penalty Amounts, requesting again that civil money penalties totaling \$40,620 be assessed against respondent.

On April 24, 1995, also, respondent filed its written brief, in which it recommended that civil money penalties totaling \$22,650 be levied for the 56 violations at issue.

Civil Money Penalties

Count I - Illegal Hire/Continuing to Employ Violations

With respect to the determination of the amount of civil money penalties to be assessed for the 13 illegal hire/continuing to employ violations charged in Count I, IRCA provides for penalties in an amount of:

- (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).

In the absence of a showing that respondent firm has been previously subject to an order under this IRCA provision, the civil penalty range for the 13 violations in Count I is not less than \$250 and not more than \$2,000 for each infraction.

The provisions of IRCA do not provide any statutory criteria that must be considered when assessing the civil money penalties for those 13 illegal hire/continuing to employ violations. See 8 U.S.C. § 1324a(e)(4). This is in sharp contrast to the section of IRCA addressing paperwork violations, which mandates that in assessing civil money penalties for paperwork infractions, consideration must be given to the five (5) statutory criteria set forth at 8 U.S.C. Section 1324a(e)(5).

Counts II, III, and IV - Paperwork Violations

In determining the appropriate civil money penalties to be imposed for the 43 paperwork violations contained in Counts II, III, and IV, IRCA provides:

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With respect to a (paperwork violation), the order under this subsection shall require the person or entity to pay a civil penalty in the 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 violations.

8 U.S.C. § 1324a(e)(5).

Accordingly, the first statutory factor to be considered in determining the appropriate civil money penalty to be assessed is the size of respondent's business. Neither the provisions of IRCA nor the implementing regulations provide any assistance in determining the size of a business. United States v. Tom & Yu, Inc., 3 OCAHO 445, at 4 (1992).

Complainant contends that respondent's wholesale seafood distributing firm is a large business, is one that has been incorporated for 11 years, and that it employs some 93 full-time and part-time workers. Respondent has not offered any evidence which assists in determining the size of its business.

Based upon the information in the record, it is found that respondent is a small business. Accordingly, the civil money penalty amount will be mitigated based upon this factor. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 6 (1994); United States v. Wood 'N Stuff, 3 OCAHO 574, at 6 (1993).

The second statutory element to be utilized is the good faith which respondent may have demonstrated under these facts. Although IRCA is once again silent on what constitutes good faith, case law has established that mere allegations of paperwork violations do not constitute a lack of good faith for penalty purposes. United States v. Valladares, 2 OCAHO 316, at 6 (1991). To demonstrate a lack of good faith on the part of the respondent it is necessary for the complainant to present some evidence of culpable behavior beyond mere ignorance of the law on respondent's part. United States v. Honeybake Farms, Inc., 2 OCAHO 311, at 3 (1991).

Complainant has supplied these facts in connection with the 13 illegal hire/continue to employ violations alleged in Count I. A consent survey was conducted at respondent's place of business by INS Special Agent Joseph Palmese. Tuccillo, upon having been asked by Palmese whether all of his employees were present or if any of them were hiding in an attic area, stated that none were hiding and proceeded to get a ladder

and climbed up into the attic, looked around, and came back down and again advised Palmese that no employees were hiding. Special Agent Palmese then checked the attic and found thirty-two (32) unauthorized employees hiding in that area.

Additionally, complainant contends that respondent failed to exercise reasonable care and due diligence in complying with IRCA's verification requirements. In particular, respondent failed to prepare or improperly completed 43 Employment Eligibility Verification Forms for its employees. Failure by the employer to prepare Forms I-9 for its employees and/or to properly complete those forms frustrates complainant's ability to perform compliance audits. See United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 7 (1993).

Respondent, on the other hand, denies that it knowingly hired individuals who were not authorized to work in the United States and also contends that it did not have any control over its employees at the time of the consent inspection and that it "did not participate in any attempt to deceive the Service." Respondent's April 24, 1995 Civil Money Penalty Brief, at 1.

It is found that respondent quite clearly did not act in good faith and as a result the proposed civil money penalty sums relating to the paperwork violations will be aggravated based upon this factor. See United States v. Enrique Reyes, 4 OCAHO 592, at 8 (1994); United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 9 (1993).

The third of the five (5) criteria requiring consideration addresses the seriousness of the violations involved. Because "[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" United States v. Eagles Groups, Inc., 2 OCAHO 342, at 3 (1992), paperwork violations are always serious. See Enrique Reyes, 4 OCAHO 592, at 8; United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 8 (1993).

Respondent failed to complete Forms I-9 for 41 of its employees named in Count II and improperly completed Forms I-9 for two (2) additional individuals named in Counts III and IV of the Complaint. These are serious violations under IRCA because they completely undermine the purpose of the law. See United States v. Felipe, Inc., 1 OCAHO 93, 636-37 (1989). Accordingly, it is appropriate to increase the monetary penalties based upon this factor, also. See e.g., United States v. Task Force Security, Inc., 4 OCAHO 625, at 7 (1994); Enrique Reyes, 4 OCAHO 592, at 9 (1994).

The fourth factor to be considered is whether any illegal aliens were involved. Complainant has demonstrated that 32 illegal aliens were seized during INS's consent investigation, and respondent was subsequently charged with failing to prepare and/or make available for inspection the Forms I-9 for 13 of those illegal aliens. Thus, it is appropriate to increase the proposed civil monetary penalties based upon this criterion, also. See United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8 (1993); United States v. Camidor Properties, Inc., 1 OCAHO 299, 1982 (1991); United States v. Alaniz, 1 OCAHO 297, 1969 (1991).

The fifth and final factor to be considered in assessing the appropriate civil money penalty sums is respondent's history of previous violations. Respondent asserts that it has no prior violations and complainant has offered no evidence to the contrary. For those reasons, respondent is entitled to mitigation of its civil money penalties based on this factor. See Task Force, 4 OCAHO 625, at 8; Giannini Landscaping, 3 OCAHO 573, at 8.

In enacting IRCA, Congress significantly modified our policy regarding immigration and mandated that employers have a duty to inspect and verify employment eligibility documents presented in the hiring process. Thus, employers are required, with limited inapplicable exceptions, to verify the identity and work authorization of all individuals hired after November 6, 1986 and employers must refuse to hire individuals not authorized to work in this country. See Task Force, 4 OCAHO 625, at 9.

IRCA provides for civil money penalties for employers who fail to comply with IRCA's paperwork provisions and those fines range from a statutorily mandated minimum of \$100 to a maximum of \$1,000 for each violation. 8 U.S.C. § 1324a(e)(5). Assessment of these civil money penalties serves the dual purpose of deterring repeat infractions of IRCA by the cited employer and also encourages compliance by other employers. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (1992).

For the illegal hire/continuing to employ violations in Count I, IRCA provides for a penalty ranging from the minimum amount of \$250 to a maximum sum of \$2,000 for each infraction for the first violation. 8 U.S.C. § 1324a(e)(4)(A)(i). As noted earlier, repeat violations can result in civil penalties of \$2,000 to \$5,000 for the second infraction, 8 U.S.C. § 1324a(e)(4)(A)(ii), and \$3,000 to \$10,000 civil penalties for three or more violations of this nature, 8 U.S.C. § 1324a(e)(4)(A)(iii).

Additionally, the person or entity must be ordered to cease and desist from further violations. 8 U.S.C. § 1324a(e)(4)(A).

INS is tasked with enforcing the provisions of IRCA, and is accorded broad discretion in assessing penalties for violations of this type. That flexibility permits INS to more fairly levy appropriate penalties based upon fact specific inspection scenarios. *Id.* IRCA also grants to the administrative law judge broad discretion in ordering appropriate civil money penalties for paperwork violations. 8 U.S.C. § 1324a(e)(5).

The pertinent provisions of IRCA also require that complainant assess civil money penalties for the 56 violations at issue. Complainant seeks \$14,950 or \$1,150 for each of the 13 violations in Count I, which equates to 58 percent of the statutory maximum civil money penalty for those 13 illegal hire/continue to employ violations. With regard to the 43 paperwork violations, complainant levied fines of \$25,000 for the 41 violations in Count II, \$310 for the violation in Count III, and \$360 for the Count IV violation, which equates to 60 percent of the statutory maximum civil money penalty for those 43 paperwork violations.

While complainant has levied civil money penalties totaling \$40,620 for the 13 illegal hire/continuing to employee and 43 paperwork violations, allocated as outlined previously, respondent suggests that the appropriate civil penalties total for these 56 violations is \$22,650, apportioned in the following manner. For each of the 13 violations in Count I, respondent proposed a civil money penalty of \$750, or a total of \$9,750 on that count. For the remaining 43 paperwork violations, respondent requests that penalties totaling \$12,900 be levied, or \$300 for each.

It is found that the appropriate civil money penalty for the Count I illegal hire/continuing to employ violations is \$26,000, or the maximum of \$2,000 for each of those 13 infractions.

In addressing the 43 paperwork violations in Counts II, III, and IV, and after having carefully considering the five (5) previously-mentioned statutory criteria, it is found that the complainant appropriately assessed civil money penalty sums totaling \$25,670, or \$480 for each of the Count II violations numbered 16, 21 and 22, and \$620 for each of the remaining 38 infractions in that count. It is also found that complainant has appropriately recommended penalty sums of \$310 and \$360 for those violations described in Counts III and IV, respectively.

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Accordingly, the appropriate total civil money penalty assessment for these 56 IRCA violations is \$51,670, rather than the previously-assessed sum of \$40,620.

Order

It is ordered that the appropriate total civil money penalty assessment for the 56 violations at issue is \$51,670, or \$26,000, or \$2,000 for each of the 13 violations in Count I; \$25,000 for the 43 violations in Count II, or \$480 for each of the violations numbered 16, 21, and 22, and \$620 for each of the remaining 38 violations in that count; \$310 for the violation contained in Count III; and \$360 for the violation set forth in Count IV.

It is further ordered that respondent cease and desist from further violations of IRCA, 8 U.S.C. §§ 1324a(a)(1)(A); 1324a(a)(2).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondents, in accordance with the provisions of 8 U.S.C. §§ 1324a(e)(7), (9) and 28 C.F.R. § 68.53 (1991).