

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

United States of America, Complainant v. Dr. Merrill Cahn, D.P.M.,  
Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100396.

DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances: DEBORAH S. NORDSTROM, Attorney for Complainant,  
Immigration and Naturalization Service

EARL J. THOMAS, Attorney for Respondent

I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA), at Section 274A of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. section 1324a, adopted significant revisions in national immigration policy. IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism, commonly known as employer sanctions, for the imposition of civil liabilities upon employers who hire, recruit, refer for a fee, or continue to employ aliens unauthorized to work in the United States.

Essential to the enforcement of the employer sanction provisions of IRCA is the requirement that employers comply with certain paperwork verification procedures as to the eligibility of new hires for employment in the United States. 8 U.S.C. Section 1324a(a)(1)(B), reads, in pertinent part:

(a) Making Employment of Unauthorized Aliens Unlawful--

(1) In General.--It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States--

(B) an individual without complying with the requirements of subsection (b)

Subsection (b) of 8 U.S.C. Section 1324a requires an employer to attest that it has verified that an applicant is not an unauthorized alien by properly completing an I-9 Form. Subsection (b) further

requires the employer to retain the form and make it available for inspection upon request. See, 8 U.S.C. Section 1324a(b).

## II. PROCEDURAL HISTORY

This proceeding was initiated before me when, by Notice of Hearing issued by the Office of the Chief Administrative Hearing Officer (OCAHO) on August 21, 1989, Respondent Dr. Merrill Cahn, D.P.M., was advised of the filing of a Complaint by the Immigration and Naturalization Service (INS), through its Attorney, Deborah S. Nordstrom. The Complaint, which incorporated the Notice of Intent to Fine (NIF) dated June 15, 1989, alleged six Counts in violation of the employment verification requirements of the IRCA, 8 U.S.C. Section 1324a(b). The NIF demanded a civil monetary penalty of one thousand three hundred and fifty dollars (\$1,350.).

Respondent, through his Attorney, Earl J. Thomas, Answered the Complaint on September 11, 1989. Respondent denied the allegations of the Complaint and alleged the following three affirmative defenses:

1. The respondent does not have and has not had in excess of three employees at any time.
2. That at all times the respondent acted in good faith and was not properly notified of the rules herein complained.
3. That complainant used fraud and misrepresentation to obtain information from the respondent in that complainant asked respondent if he needed help in understanding and complying with the new laws and that complainant falsely stated that if respondent needed help and got together the necessary information complainant requested, that complainant would help him properly set up his files. In truth and in fact, complainant was not going to help respondent but was using this pretext to obtain information to penalize respondent.

In order to facilitate an agreed disposition of this case, a prehearing telephonic conference was held on Monday, November 20, 1989. In response to questioning, the parties indicated that settlement discussions had resulted in an agreement as to liability, but that no agreement had been reached on the proposed civil money penalties. It was determined at that time that a hearing would be necessary.

Complainant submitted its Prehearing Statement on December 11, 1989, in which it identified the following issues:

1. Whether Regina Burnham was given an educational visit by an agent of the United States Border Patrol on October 2, 1987.
2. Whether Regina Burnham was given an Employer Handbook by an agent of the United States Border Patrol on October 2, 1987.
3. Whether the Complainant used fraud and misrepresentation to obtain information from the respondent.
4. Whether the civil money penalty proposed in the Complaint is justified by the factors set out at Section 274A(e)(5) of the Immigration and Nationality Act.

Respondent's Prehearing Statement, submitted on December 12, 1989, included the following issues:

1. Whether the principals of estoppel should apply when the federal agents misled Respondent as to the nature and purpose of the ``inspection'' thus nullifying the effect of the ``notices'' served on him, at least insofar as failure to present forms to the federal inspectors was concerned. (See Count 3.)
2. Whether Respondent's penalty should not be other than the minimum for such items in which a violation occurred and there is no estoppel because:
  - a. He has a small office with one, two, and on few occasions up to three employees;
  - b. He acted in good faith, no illegal aliens were hired, Respondent was unaware of the paperwork requirement, and this was Respondent's first violation.

The administrative hearing was conducted on December 19, 1989, at San Diego, California.

### III. DISCUSSION

Prior to the commencement of the hearing, Respondent's Attorney indicated that Respondent would stipulate to the fact that Regina Burnham received an educational visit from an agent of the United States Border Patrol on October 2, 1987. As previously determined, Respondent admitted liability for the following:

Count 1. Failure to prepare or present an I-9 Form for Rose M. Brito, employment date March 6, 1989.

Count 2. Failure to prepare or present an I-9 Form for Cheryl Bennett, employment date August 24, 1988.

Count 3. Failure to present an I-9 Form for Josefina Yarbro, employment date April 1, 1988.

Count 4. Failure to properly complete Section 2 of the I-9 Form within three (3) business days of hire for Regina D. Burnham, employment date September 14, 1987.

Count 5. Failure to properly complete Section 2 of the I-9 Form within three (3) business days of hire for Maria Martha Lucero, employment date July 13, 1987.

Count 6. Failure of employee to properly complete Section 1 of the I-9 Form and failure of employer to properly complete Section 2, of the I-9 Form for Magda Ivette Rivera (a.k.a. Magda Miranda), employment date July 13, 1987.

During the hearing, Respondent introduced into evidence the following four exhibits. Each is an I-9 Form signed by Merrill Cahn:

- Ex. R.1: Maria Lucero, dated October 6, 1987
- Ex. R.2: Magda Rivera, form not dated
- Ex. R.3: Regina Burnham, dated October 7, 1987
- Ex. R.4: Josefina Yarbro, dated April 19, 1988

Upon Respondent's Admission of Liability, I find that Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(B), in that he hired for employment in the United States six individuals named in Counts

1 through 6 of the Complaint without complying with the verification requirements in Section 274A(b) of the Act, 8 U.S.C. Section 1324a(b).

As the parties indicated during the prehearing conference, their efforts to negotiate an agreed settlement on the amount of the civil money penalty were unsuccessful. I now proceed to the issue of determining an appropriate civil monetary penalty.

#### IV. CIVIL MONEY PENALTY

As appears from the foregoing discussion, Respondent has violated 8 U.S.C. Section 1324a(a)(1)(B). Therefore, assessment of civil monetary penalties is required as a matter of law. See, 8 U.S.C. 1324a(e)(5). The penalty originally proposed by the INS in the Complaint is effective only if not contested; once contested, the ALJ will consider the penalty de novo. See, e.g., California Stevedore and Ballast Company v. OSHRC, 517 F.2d at 986, 988, citing Administrative Procedure Act Section 557(b), 5 U.S.C. Section 557(b).

Title 8 U.S.C. Section 1324a(e)(5) states, in pertinent part, that:

With respect to a violation of subsection (a)(1)(B), the 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 violations.

#### A. Complainant's Position:

Complainant seeks a penalty amount in its prehearing statement equal to that originally demanded in the NIF; i.e., three hundred dollars (\$300) each for Counts 1, 2, and 3, and one hundred fifty dollars (\$150) each for Counts 4, 5, and 6, for a total of one thousand three hundred fifty dollars (\$1,350.).

It is Complainant's contention that the proposed assessment is justified by two of the factors set out at Section 274A(e)(5) of the Act, in that Complainant denys the good faith of Dr. Cahn because he had a previous employee who was educated by an INS agent in how to complete an I-9 Form, and Complainant asserts that the six paperwork violations are serious.

Additionally, Complainant believes the proposed penalty is ``more than generous'' because, ``had United States of America v. Felipe, Inc., OCAHO Case No. 89100151 (October 11, 1989) been decided prior to the issuance of the Complaint, the Service would have assessed the penalty at a higher value.''

In Felipe, supra, the Administrative Law Judge, in his discretion, chose to implement a mathematical formula in order to assess civil

money penalties for paperwork violations. As the Acting Chief Administrative Hearing Office stated in his affirmation of the ALJ's order dated November 29, 1989:

``[t]he Administrative Law Judge's use of a mathematical formula in figuring the amount of the civil money penalty is acceptable. The formula was well thought out and reasoned and in no way did the Judge act in an arbitrary or capricious manner. However, while the Administrative Law Judge's formula is acceptable, it does not preclude another separate and distinct formula or system from being considered acceptable.''

B. Respondent's Position:

Respondent asserts he is being charged for both the inability of his employee, Regina Burnham, who was educated by an INS agent, to properly fill out the I-9 Forms, and for his own failure, after Burnham left his employ, to prepare forms on other employees and to present the forms for inspection, even though he was personally unaware of the necessity to fill out these forms or of the penalties for failure to present the forms to the agents.

Additionally, Respondent believes that all five of the mitigating factors at Section 274A(e)(5) of the Act are in his favor. As Complainant concedes, the size of the business is small, no individual was found to be an illegal alien, and there were no previous violations.

Respondent also believes that he acted in good faith when he consented to have the federal officials come to his business to help him to comply with the law, and that his failure to present a form which was later found in his files was not a serious offense.

C. Analysis:

I have given due consideration to the factors in mitigation and aggravation as submitted by the parties and make the following determinations:

1. Size of Business:

Respondent has indicated, and Complainant agrees, that Dr. Merrill Cahns business is small, having one, two, or three employees at any one time. The total number of employees hired since September 14, 1987, appears to be six. Therefore, size is a mitigating factor in the instant case.

2. Good Faith:

Complainant asserts a lack of good faith on the part of the Respondent because the employer, through the agency of his receptionist Regina Burnham, was educated by Agent John D. Scott on the preparation of I-9 Forms on October 2nd, 1987.

The record shows that Burnham was hired on September 14, 1987, approximately two weeks before the training took place. It also shows that no I-9 Forms were prepared before or during Agent Scott's visit, suggesting that Respondent was unaware of his obligations under IRCA before the visit, and that no forms were prepared while the agent was present.

Following the visit by Agent Scott, it appears that Burnham prepared an I-9 Form for herself on October 7, 1987, for Maria Lucero on October 6, 1987, and for Josefina Yarbrow on April 19, 1988. An undated I-9 Form was also prepared for Magda Rivera. No I-9 Forms were prepared for the two employees hired after August 24, 1988, apparently a time when Burnham was no longer employed by Respondent.

Respondent argues that while it may be reasonable to objectively impute knowledge for purposes of liability for the violation, sentencing should, nonetheless, be subjective in determining whether there is good faith, since the nature of a penalty is to punish the culpability of the defendant. I am persuaded by Respondent's argument. I am further persuaded by the testimony of Respondent at the hearing that Respondent may have been inattentive when he signed at the bottom of the I-9 Forms prepared by Burnham, but that he was not acting purposefully in bad faith (Transcript page 15, line 23, and page 16, line 1).

### 3. Seriousness of the Violation:

The single remaining factor is seriousness of the violation. First, Respondent argues that his failure to present the I-9 Form for Josefina Yarbrow was not serious because, had he known that the visit by the INS agents to his office was for purposes of an investigation which could result in a fine, he would have tried harder to find the form before the agents arrived. The form had, in fact, been prepared and was introduced into evidence at the hearing.

Secondly, Respondent denies the seriousness of the failure of Burnham to properly complete the I-9 Forms for Lucero, Rivera, and Burnham because her failure was influenced only by the agents of the Complainant and by no act of the Respondent. Respondent further believes that the forms not filled out after Burnham left should not be serious violation since no illegal aliens were hired.

I am not persuaded by Respondent's assertion as to the unprepared forms. As Complainant states, a failure to prepare and or present an I-9 Form is a serious violation. As previously stated, the purpose of the IRCA legislation is to prohibit the employment of individuals who are unauthorized to work in the United States. It

is clear that the verification of employment eligibility is essential to achieve compliance with IRCA.

Accordingly, I find that as to Count 1 and 2, the failure to prepare and or present an I-9 Form for Rose M. Brito or Cheryl Bennett, the factor of seriousness of the offense will be taken in aggravation of the civil money penalty.

4. Whether Individuals Were Unauthorized Aliens

It has been mentioned previously that there were no allegations of hiring unauthorized aliens. This factor is, therefore, taken in mitigation.

5. Previous History of Violations

There was no history of a previous violation by the Respondent. Therefore, this factor is taken in mitigation.

The Immigration Reform and Control Act is the law of the land. It expresses the will of Congress that, as a matter of public policy, employers who fail to comply with the employee eligibility verification requirements will be penalized.

D. Conclusion

The maximum potential penalty in this matter is six hundred dollars which is \$100 for each of the 6 violations. The maximum possible penalty is six thousand dollars which is \$1,000 for each of the 6 violations. The Administrative Law Judge is required to assess, at the very least, a minimum penalty for each violation.

Upon considering each of the factors, it is clear that a penalty in excess of the statutory minimum is warranted as to Counts 1 and 2. As previously mentioned, I have found four factors in mitigation, i.e., size of business, good faith of the employer, no unauthorized aliens, and no previous history of violation. I further found one factor in aggravation, i.e., seriousness of the violation.

Upon careful consideration of the record, I find that the penalty amount proposed by the Complainant for Counts 1 and 2 to be just and reasonable. Having found a factor in aggravation applying only to those two Counts, I find the minimum penalty to be appropriate in Counts 3, 4, 5, and 6.

ACCORDINGLY: I assess a civil money penalty in the amount of one thousand dollars (\$1,000.).

V. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings, testimony, supporting documents, and exhibits. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. All motions not previously ruled upon are hereby denied.

2. As previously found and discussed, I determine, upon Respondent's Admission of Liability, that Respondent has violated 8 U.S.C. Section 1324a(a)(1)(B).

3. That, liability having been found, Respondent is required to pay a civil money penalty in the amount of one thousand dollars (\$1,000.).

4. That, pursuant to 8 U.S.C. Section 1324a(e)(7), and as provided in 28 C.F.R. Section 68.51 (1989), this Decision and Order shall become the final decision and order of the Attorney General unless, within five (5) days of the date of this decision any party files a written request for review of the decision with supporting arguments with the Office of the Chief Administrative Hearing Officer. After such a request is made, and within thirty (30) days from this date, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order have modified or vacated it.

**IT IS SO ORDERED:** This 26th day of January, 1990, at San Diego, California.

E. MILTON FROSBURG  
Administrative Law Judge