

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

United States of America, Complainant vs. Lola O'Brien d/b/a/
O'Brien Oil Company, Respondent; 8 U.S.C. 1324a Proceeding; Case No.
89100386.

FINAL DECISION AND ORDER

On August 10, 1988, a complaint charging Respondent with violations of the Immigration Reform and Control Act of 1986, 8 U.S.C. Section 1324a, was filed with the Office of the Chief Administrative Hearing Office. The complaint alleged violations of the employment verification requirements for failing to properly verify the employment eligibility of three employees within the mandated time period.

On January 22, 1990, the Complainant filed a Motion to Deem Request for Admissions Admitted and a Motion for Summary Decision based upon those admissions. On January 31, 1990, a prehearing telephonic conference was conducted pursuant to 28 C.F.R. Section 68.11. On that date, a prehearing conference order was issued, giving Respondent until February 16, 1990 to show cause why the Complainant's Motions should not be granted.

On March 6, 1990, a prehearing telephonic conference was conducted, at which time I indicated my intention to grant the Complainant's Motions.

On March 14, 1990, I issued an order deeming the matters in the Complainant's Request for Admissions Admitted, and upon those facts I granted Summary Decision. The only issue remaining is the amount of the civil money penalty to be imposed for the three paperwork violations. The parties filed affidavits and briefs to assist in the consideration of the five factors enumerated by the Rules of Practice and Procedure which govern this action.

The range of allowable fines for paperwork violations is \$100 to \$1,000. Complaint seeks a penalty of \$250 per violation for a total civil money penalty of \$750. In determining the amount of the pen-

alty, the Administrative Law Judge is instructed by 28 C.F.R. Sec. 68.50(c)(2)(iv) that:

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 this history of previous violations.

1. Size of Business

Respondent suggests that because the value of its business is ``somewhat over \$100,000'' it qualifies as a small business. Complainant counsels that lack of profitability should not be considered as justification for a reduction in the amount of a penalty since it would allow equally culpable parties to receive unequal treatment. No evidence of sales or profitability was offered by either party. Given the absence of relevant information on this factor it will not be used to aggravate or mitigate the size of the penalty.

2. Respondent's Good Faith

While the statute and regulations fail to define the parameters of good faith, it would logically require some evidence of culpable behavior beyond mere ignorance if the factor is to be considered aggravating for purposes of increasing the penalty.

Complainant asserts an absence of good faith on the part of Respondent as there is evidence that Respondent was informed of the requirements of the employee verification provisions in August of 1988, prior to the employment of two of the three individuals who are the subject of the paperwork violations. The evidence relied upon is in the form of an affidavit of a Senior Border Patrol Agent, Ronald C. Jauhola, wherein he states that he was told by an official of the Minnesota Department of Labor that this official provided Respondent with an employer handbook and several I-9 forms.

Since strict rules of evidence do not apply in the administrative context, the only limitation on the admissibility of this hearsay statement for purpose of establishing the reasonable level of the proposed fine is whether it is probative and that its use is fundamentally fair. Calhoun v. Bailar, 626 F.2d 145, 148, (9th Cir. 1980) cert. den. 101 S.Ct. 3033. [Allowing use of hearsay affidavits in discharge hearing despite disavowal by affiants on direct examination.]

Complainant further argues that Respondent's compliance with the verification requirements in January of 1989, following the Notice of Inspection on December 27, 1988 by Agent Jauhola, was faulty. Section II of the I-9 forms were not properly filled out. Yet when asked to provide the I-9 forms pursuant to a discovery request, Respondent provided fully completed I-9's bearing the date

of December 28, 1988, predating the Inspection by a week. Complainant suggests that these ``corrected'' forms are evidence of dishonesty since they were not the forms offered at the Inspection on January 3, 1989.

In its defense, Respondent Lola O'Brien offers her affidavit, wherein she states that neither she nor any of her staff knew of the verification requirements as of September 29, 1988. She states that I-9 forms were ``promptly'' prepared for the three individuals when she became aware of the requirement, though she does not state when she gained that knowledge. She attributes the failure to prepare I-9 forms to the death of her husband who had previously managed the business and the departure of the office staff. She states that prior to the death of her husband, the company had properly maintained I-9 forms for its employees.

The assertion that she had no knowledge of the verification requirements prior to September 29, 1988 is in conflict with the hearsay statement attributable to the Minnesota state official. She does not offer any of the forms which she asserts were correctly maintained by the company prior to her assumption of management responsibilities. This would have helped to support her position. Further, when she ``promptly'' filled out the I-9 forms, she did so incorrectly. Finally, she does not explain the discrepancy between the I-9 forms she provided to the INS at the Inspection and the forms she later offered in response to the discovery request.

Respondent is entitled to some latitude due to her assumption of responsibilities of managing the business following the death of her husband, but I find that she had some knowledge of the verification requirements and failed to act accordingly.

3. Seriousness of the Violation

Respondent asserts that the violations were ``only technical ones,'' suggesting the absence a serious violation. Complainant argues that these violations are serious, especially when viewed in light of Respondent's backdating of the I-9 forms and her other case, of which judicial notice is requested.

A failure to prepare an I-9 form is a serious violation, as compliance with the ``technical'' requirements of IRCA is the way in which Congress intended to ensure the effectiveness of the prohibition on the employment of unauthorized aliens.

4. Employment of Unauthorized Aliens

There are no allegations that the employees were unauthorized aliens. Therefore, this factor cannot increase the amount of the fine.

5. History of Violations

While this was the first inspection of Respondent, another entity under her control is also subject to an enforcement action for both verification violations and the knowing hiring of unauthorized aliens. Complainant requests notice be taken of the case of United States v. O'Brien d/b/a Wexford Farms, OCAHO case number 89100387, pursuant to 28 C.F.R. Section 68.39. The Rules provided that the opposing party be given an adequate notice of the matters to be officially noticed and an adequate opportunity to show the contrary. The purpose of Complainant's request for notice of the companion case presumably is to show that Respondent has flouted the requirements of the law. But since the conduct which is the subject of the enforcement action is just now being reduced to a judgment, there is no history of previous violations.

Upon consideration of the five statutory factors, I find that a civil money penalty of \$200 for each of the three violations is an appropriate amount in this case. The total penalty is therefore \$600.

Based upon the facts deemed admitted, the Orders of March 14, 1990, and the above stated factors, I make the following:

Findings of Fact and Conclusions of Law

1. Respondent hired for employment in the United States Susan A. Brannan, Franklin C. Lavine, and Daniel S. Ziebell in 1988 and failed to verify on the form designated by the Attorney General, Form I-9, the employment eligibility of these employees within 3 business days of hiring.

2. Respondent has violated 8 U.S.C. Section 1324a(A)(1)(B) by failing to complete Form I-9 within the time required by the Immigration Reform and Control Act for the three named employees.

3. Respondent is required to pay a civil money penalty in the amount of six hundred dollars (\$600).

4. Pursuant to 8 U.S.C. Section 1324a(e)(7), and as provided in 28 C.F.R. Section 68.51, this Final 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 together with supporting arguments with the Chief Administrative Hearing Officer.

SO ORDERED.

Dated: May 2, 1990.

JAY R. POLLACK
Administrative Law Judge