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

United States Of America, Complainant v. Dodge Printing Centers, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100453.

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DECISION AND ORDER

(January 12, 1990)

E. MILTON FROSBURG, Administrative Law Judge

Appearances: WELDON S. CALDBECK, Esquire, Attorney for Complainant, Immigration and Naturalization Service

RICHARD H. DODGE, Pro se 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 and 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 September 14, 1989, Respondent Dodge Printing Centers, Inc., Richard H. Dodge, Registered Agent, was advised of the filing of a Complaint by the Immigration and Naturalization Service (INS), through its Attorney, Weldon S. Caldbeck. The Com-

plaint, which incorporated the Notice of Intent to Fine (NIF) dated July 31, 1989, alleged one Count of twenty-three (23) violations of the employment verification requirements of the IRCA, 8 U.S.C. Section 1324a(b). The NIF demanded a civil monetary penalty of nine thousand two hundred dollars ($9,200.).

The record shows the Complaint was received by an agent of the Respondent on September 18, 1989. Pursuant to the legislation, Respondent had thirty (30) days to answer the Complaint plus five (5) days for service by mail. See, 28 C.F.R. Section 68.6 (1988), and 28 C.F.R. Section 68.5(c) (1988). Accordingly, the Answer in the instant case was due in this office on October 23, 1989.

Respondent's Answer was dated October 12, 1989, and received in this office on November 1, 1989. On November 9, 1989, Complainant moved for default judgment pursuant to 28 C.F.R. Section 68.6(b) (1988), on the grounds that Respondent had failed to respond within the time provided.

Respondent submitted a timely response to the default motion, in the form of an Answer to Complainant's Motion, a Motion to Grant More Time to File Answer, and a Motion to Quash the Plaintiffs November 9 Motion. The documents were received in this office to November 20, 1989.

In defense of his late Answer, Respondent asserted, inter alia, that he wanted the opportunity to defend himself and that he was unfamiliar with the legal process. To ensure that the pro se Respondent was aware of his right to have legal representation at his own cost in this action, and to facilitate the possibility of an agreed disposition of the case, I ordered a telephonic prehearing conference to be held on Tuesday, November 28, 1989.

III. DISCUSSION

As a result of Respondent's responses to my questions during the prehearing conference, I am confident that Respondent was aware of his right to counsel and that his choice to proceed without an attorney was made freely.

In the prehearing conference, the parties expressed their preference not to proceed with the default motion at this time and agreed that going forward on a stipulation as to liability would be in their best interests. On December 1, 1989, Respondent submitted its Admission of Liability, in which it admitted liability for all allegations of the Complaint. In view of Respondent's stipulated liability, there is no longer any need to rule on Complainant's Motion for Default Judgment.

As the parties indicated during the conference, their efforts to negotiate an agreed settlement as to the amount of civil money

penalty were unsuccessful. Each of the parties was aware of its right to a formal administrative hearing on the issue of the penalty. However, in the interests of time and economic efficiency, the parties decided to forego an administrative hearing on the penalty phase and to submit affidavits and written briefs concerning the sole issue of an appropriate penalty amount.

Accordingly, 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 it hired for employment in the United States, twenty-three individuals named in Count I of the Complaint without complying with the verification requirements in Section 274A(b)(3) of the Act, 8 U.S.C. Section 1324a(b)(3). 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 Compliant 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).

Therefore, the parties not having reached an agreed settlement on the penalty amount, and having chosen to submit briefs and affidavits on the issue in lieu of a hearing, the penalty amount is hereby determined on the briefs and affidavits as submitted by the parties.

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 Proposal:

Complainant seeks a penalty amount in its brief equal to that originally demanded in the NIF. That is, a penalty of four hundred dollars ($400) for each of the twenty-three (23) individuals listed in the NIF, for a total of nine thousand two hundred dollars ($9,200.).

It is Complainant's contention that the proposed assessment is justified primarily, if not solely, by the significant adverse facts

that relate to the factors of ``good faith'' and ``seriousness of the violation'' as set out in Complainant's Closing Brief in Support of Complainant's Proposed Penalty Assessment.

B. Respondent's Position:

On the contrary, in his document entitled Answer to the Setting of Fine and Penalty, Respondent requests that I assess no penalty at all. Respondent would have me completely disregard the statutory minimums for the following reasons:

(1) The size of the business is zero. The company is in voluntary liquidation and no funds exist with which to pay the penalty.

(2) The employer is acting in good faith. As acts of good faith, Respondent asserts that he, Richard H. Dodge, is insolvent and has no ability to pay the penalty. Further, he asserts that he has been forthright in his responses and has responded well, if not better than, most pro se respondents.

Respondent includes under good faith that service of the Complaint was made on a copy machine operator and claims he was unaware of the June 12, 1989, inspection visit.

Further, Respondent asserts that while Richard H. Dodge was busy trying to save a bankrupt company, the responsibility for immigration matters has given to Corporate Secretary Kay Friedland. And that, unfortunately, Kay Friedland did not handle the matter properly.

(3) As to the seriousness of the violation, Respondent asserts that the violations were paperwork violations, thereby implying that they were not serious.

(4) Respondent asserts that no individual was found to be an illegal alien.

(5) Respondent asserts there were no previous violations.

(6) As extenuating circumstances, in addition to the factors mandated by the statute, Respondent offers that Richard H. Dodge has gone through a U.S. Bankruptcy Chapter 7 Liquidation and lost his personal assets. Additionally, he asserts that if a penalty were assessed, it would not be cost effective for the government to collect it.

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 contends that the size of the business is zero because Dodge Printing Centers, Inc. has closed its doors, the company is in

voluntary liquidation, and no funds exist to pay unsecured creditors. Nonetheless, for the purposes of this action we are concerned with the size of the business during the time period in which the IRCA legislation was in effect and at the time of the inspection by the INS.

Complainant addresses this factor with exhibits showing that Respondent Dodge Printing, Inc., had, since June 1, 1988, at different times, employed a total of twenty-three people and that balance sheets suggest a ``great volume of business.'' Additionally, regarding Respondents assertion of lack of funds to pay unsecured creditors, Complainant asserts that Richard H. Dodge has opened a new printing business identified as Citywide Printing, Inc., and is currently operating with the same employees, services, equipment, and telephone numbers as the former Dodge Printing Centers, Inc.

In my view, the new business does not fall under size of business and should be considered under the factor of good faith and will be considered as such. For the purposes of the size of business factors, I find that Respondent is a small employer, and will consider that factor in mitigation of the penalty.

2. Good Faith

Complainant asserts a complete lack of good faith on the part of the Respondent to ascertain, understand, and follow-up on its obligations under IRCA. Complainant offers that between August, 1988, and May, 1989, Respondent was on four separate occasions advised of the recordkeeping requirements of IRCA. Exhibits show that Respondent was visited by the Department of Labor (DOL) on August 31, 1988, at which time Respondent claimed to have no knowledge of IRCA and promised to complete I-9 Forms on present and future employees. The DOL representative left a copy of the INS Handbook for Employers with Respondent, outlining the obligations of employers and containing descriptive illustrations on how to achieve compliance with IRCA.

The INS mailed another copy of the handbook to Respondent on December 9, 1988. On April 21, 1989, DOL again reviewed Respondents files and found that Respondent had taken no steps to comply with IRCA. A visit by INS was recommended to enforce compliance. Following DOL's April visit, INS mailed yet another copy of the Handbook for Employers to Respondent on May 1, 1989.

Notwithstanding the four documented contracts, when the Service arrived at the business on June 12, 1989, it was again discovered that no I-9 Forms were made available for inspection, as Respondent had not yet prepared them for any of its employees. In view of the DOL and INS attempts to educate Respondent on the

recordkeeping requirements of IRCA, I find that Respondent has demonstrated a lack of good faith by its failure to understand and to follow-up on its obligations.

As further evidence of Respondent's lack of good faith, Complainant offers the sworn affidavit of Kay Friedland, Bookkeeper for Dodge Printing Centers, Inc. Friedland says that on June 12, 1989, she was advised by Richard Dodge that the INS was coming and she was to see what they wanted. She was told nothing further regarding the visit or what, if any, preparation would be required. She had never before heard of an I-9 Form. Following the June 12, 1989 inspection, Friedland attempted to prepare I-9 Forms on all then present employees.

Friedland's affidavit is supported by her spontaneous statement to INS representatives during the June 12, 1989, inspection (Affidavit of John Himelrick). Therefore, I find Respondent's attempt to shift the blame to Friedland to be further evidence of its lack of good faith.

As to the new business started under another name by Respondent, I find that it, too, is a sign of Respondent's lack of good faith. Just as Respondent asserts in its Answer of December 12, 1989, Respondent affirmatively defended in its Answer dated October 12, 1989, that business had ceased and there were no funds with which to pay a penalty due to the voluntary liquidation of Dodge Printing Center, Inc. It was not until Complainant mentioned the new Citywide Printing, Inc., during the prehearing telephonic conference, that Respondent acknowledged his ownership of that business.

In view of the above instances of lack of good faith, I am persuaded by Complainant's evidence that good faith on the part of Respondent is nowhere to be found in the circumstances of this case. Therefore, I find lack of good faith to be a factor in aggravation of the penalty amount.

3. Seriousness of the Violation

On this factor, Respondent asserts that the violations were paperwork violations and that no employees were found to be illegal aliens. Respondent seems to be saying that paperwork violations alone, unconnected to a charge of hiring an unauthorized alien, are not sufficiently serious to warrant a civil penalty. This view is not supported by the text of the legislation which specifically provides for hiring violations at one subsection and for paperwork violations at another. See, Sections 274A(a)(1)(A) and 274A(a)(1)(B) of the Act, 8 U.S.C. Sections 1324a(a)(1)(A) and 1324a(a)(1)(B).

All of the factors listed at 8 U.S.C. 1324a(e)(5) are factors to be considered in the case of paperwork violations. The legislation does

not list factors to be considered in the case of hiring violations. It is clear, therefore, that paperwork violations can be serious. For example, a distinction can readily be drawn between a failure to date a signature on an otherwise completed form and the total failure to prepare a form.

The facts of this case support the conclusion that there was a deliberate refusal on the part of Respondent to comply with the recordkeeping requirements of the law. The business totally failed to prepare any I-9 Forms whatsoever before June 12, 1989. In its investigation, the INS could not find any attempt, no matter how meager, to do anything to meet the employee eligibility verifications requirement of IRCA.

It is appropriate, then, that I consider seriousness of the violation as a factor in aggravation in regard to the amount of the civil money penalties assessed.

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.

6. Extenuating Circumstances

Respondent requests that I take Richard H. Dodge's personal bankruptcy into account as an extenuating circumstance, or a sixth factor. It is not inappropriate that I consider a respondent's ability to pay a penalty before making an assessment. Nonetheless, the facts of the instant case do not permit me to give significant weight to Respondent's extenuating factor.

Dodge Printing Centers, Inc., the Respondent, is in voluntary liquidation and is not bankrupt. Moreover, even legal bankruptcy of the Respondent would not necessarily preclude an entry of a money judgment, provided the proceeding is related to a governmental unit's police or regulatory power. Additionally, the instant action is merely the entry of a money judgment, and is, therefore, distinguishable from the enforcement of a money judgment against the Respondent. See, e.g., Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267; U.S.A. v. United Pottery Manufacturing and Accessories, Inc., OCAHO Case No. 89100047, (J. Robbins, April 21, 1989) aff'd. OCAHO May 19, 1989.

In the instant case, the INS's actions come within the police and regulatory power of a governmental unit. The INS is attempting to

carry out Congress' intent to protect our borders and in doing so the INS is acting in the public's best interest. More importantly, Richard H. Dodge continues in business as an employer.

Richard H. Dodge is currently responsible for compliance with IRCA regarding his employees at Citywide Printing, Inc. In view of his previous disregard for IRCA, and the possibility that such disregard could continue unless action is taken in the form of civil money penalties to encourage his compliance with the law, it would not be appropriate to reduce the penalty for Dodge Printing Centers, Inc., on the basis of Dodge's personal bankruptcy.

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 potential penalty in this matter ranges from a minimum of $2,300. ($100. for 23 violations) to a maximum of $23,000. ($1,000. for 23 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 previously mentioned, I have found three factors in mitigation, i.e., size of business, no unauthorized aliens, and no previous history of violation. I further found two factors in aggravation, i.e., lack of good faith and seriousness of the violation. No weight was given to Respondent's sixth proposed factor of personal bankruptcy.

Upon careful consideration of the record, I find that the penalty amount proposed by the Complainant to be just and reasonable. Accordingly, I assess a penalty for Count I in the amount of nine thousand two hundred dollars ($9,200.).

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

I have considered the pleadings, memoranda, supporting documents, briefs, exhibits and affidavits. 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 nine thousand two hundred dollars ($9,200.).

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.

IT IS SO ORDERED: This 12th of January, 1990, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
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