

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

United States of America, Complainant v. Le Merengo/Rumors Restaurant, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100290.

Appearances: **JOSEPH M. RAGUSA**, Esquire, for the Complainant
MORRIS SANKARY, Esquire, for the Respondent

Before: **ROBERT B. SCHNEIDER**, Administrative Law Judge

DECISION AND ORDER ON AMOUNT OF CIVIL MONEY PENALTY

On January 10, 1990, I issued an Order Approving Settlement Agreement in this case. In that Order, I concluded that Respondent, based on its stipulations, had violated section 1324a(b)(3) of Title 8 of the United States Code as alleged by Complainant in the fourteen-count Complaint.

Also, on January 10, 1990, I issued an Order Setting Briefing Schedule to determine the amount of civil money penalty.

On January 29, 1990, Complainant filed its Opposition to Mitigation of Penalty.

On March 6, 1990, after being granted an extension, Respondent filed its ``Request for Mitigation of Damages.'' See, 8 U.S.C. § 1324a(e)(5).

I have reviewed closely the parties' submissions relevant to deciding the amount of civil money penalty.

I find Complainant's brief, as prepared by counsel, to be thorough, and eminently reasonable. Complainant applied very carefully and, in my view, fairly, the analytic framework that I suggested in an earlier case for determining an amount of civil money penalty in section 1324a cases. See, United States of America v. Felipe, Inc., OCAHO Case No. 89100151, October 11, 1989 (ALJ Schneider); aff'd by CAHO, November 29, 1989.

In essence, Complainant concedes, in light of the analysis suggested by Felipe, that Respondent is entitled to full mitigation on the following factors:

- size of business;
- were any employees unauthorized aliens; and
- history of previous violations.

If, as suggested by Felipe, each factor of mitigation can be mitigated at \$180.00 per factor, then these reasonable concessions by Complainant, regarding the three specified factors per count, reduce the maximum amount of civil penalty that could statutorily be assessed (\$1,000.00) by an amount of \$540.00 per count.

Thus, I accept Complainant's stipulations on these factors, and turn to the mitigating factors on which Complainant suggests some dispute.

Seriousness of Violation

With respect to this factor, Complainant has also agreed to reduce the penalty amount another \$100.00 per count because even though the forms I-9 were not presented at the properly noticed inspection, they were, in fact, Complainant concedes, completed.

Having examined the record, however, I find and conclude that each of Respondent's violations are relatively non-serious, and more closely analogous to negligent inadvertence. I might be inclined to mitigate in full in a situation such as this, but I note that Respondent failed to provide me with a sworn affidavit from the bookkeeper who brought the untimely Forms I-9 after INS agents had departed from the scheduled inspection. Accordingly, I will mitigate the civil money penalty in an amount of 90% of the \$180.00 per factor figure, or \$162.00 per count. While Respondent's not having the Form I-9 available for inspection at the scheduled time was an administrative inconvenience, I note, infra, that Respondent did not, in my view, act in bad faith.

Good Faith

Complainant argues that Respondent is entitled to no mitigation on account of ``good faith.'' Complainant contends that Respondent received an educational visit, a Handbook for Employers, and that he could have ``called Agent Newland and suggested a further postponement of the inspection.''

Having examined the record as a whole, however, I find that there is no evidence to suggest, as I see it, that Respondent failed

to act with an honest intention to exercise reasonable care and diligence to ascertain what IRCA requires to do his best, albeit not enough, to act in accordance with the law's intent. Felipe, supra. The failure of Respondent to assure that its bookkeeper would timely deliver the properly completed Forms I-9 is better characterized, in my view, as negligent inadvertence, and not as a bad faith effort not to comply with the requirements of IRCA.

In this regard, I intend on mitigating a full \$180.00 per factor per count because it is my view that Respondent honestly intended to act with reasonable care and diligence, but nevertheless failed, albeit negligently, to properly present the Forms I-9 at the inspection.

Conclusion

Having looked at the record as a whole, I find and conclude that the appropriate penalty amount, in light of all mitigating factors, is \$118.00 per count, or \$1,652.00 (118.00 * 14 violations) in total.

Accordingly, I hereby **ORDER** Respondent to pay to Complainant, not later than thirty (30) days from the date of this Order, a civil monetary penalty in the amount of one thousand six hundred fifty two dollars, \$1,652.00.

Thus, pursuant to 8 U.S.C. § 1324a(e)(7), and as provided at 28 C.F.R. § 68.51, this Decision and Order shall become the final Decision and Order of the Attorney General, unless within thirty (30) days from the date of this Order, it shall have been modified or vacated by the Chief Administrative Hearing Officer.

SO ORDERED: This 20th day of April, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge