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

United States of America, Complainant v. Masoud Pour, D/B/A La Plaza Restaurant, Respondent; 8 U.S.C. Proceeding; OCAHO Case No. 89100573.

FINAL DECISION AND ORDER

By my decision and order dated March 29, 1990, in this proceeding I found that respondent was in violation of the Immigration Reform and Control Act of 1986 (IRCA), codified at 8 U.S.C. 1324a, and I concluded that a civil monetary fine should be assessed against respondent on account of the violations found, in an amount later to be determined. It was my conclusion and finding that a final decision in this proceeding should be issued at a later time, after the amount of the civil monetary fine shall have been considered and decided. I directed the parties to submit to me appropriate legal memoranda and supporting documentation regarding issues relevant to a decision on the amount of the fine to be assessed against respondent, including the prescribed criteria pertaining to mitigation. The parties have now complied with my order by submitting the requested memoranda.

Respondent's violations were of the record-keeping provisions of IRCA. IRCA was enacted to control illegal immigration into the United States through the imposition of fines, among other penalties, upon employers who hire, recruit, or continue to employ illegal aliens or other aliens who are not authorized to work in the United States. Each employer is required under this law to verify that each employee or prospective employee is not an illegal alien or other alien not authorized to work in the United States by examining certain documents in the hiring, recruiting, or continuation of employment of each employee or prospective employee, in order to establish the identity and status of such employee and to evidence the employee's legal authorization to work in the United States. In the course of such examination the employer is required with respect to each employee to complete a form (Form I-9), after partial completion by the employee, to show that the employer has

made the required verification as to each employee. Employers are required, after completion of the forms, to retain them for a specified period of years and, upon demand by officials of the Immigration and Naturalization Service (INS) and others, to present the completed forms for inspection. Employers are subject to the imposition of fines for the failure to properly complete, retain, or present these Forms I-9.

Respondent operates a small restaurant in Spokane, WA. The prior decision and order describes the circumstances in which respondent failed to properly complete, retain, or present Forms I-9 for five specified employees, thus committing the violations for which, in the instant decision and order, appropriate fines are to be imposed.

INS states in its memorandum that the statutory standards for the imposition of civil monetary fines for record-keeping violations of IRCA are set out in INS regulations at 8 CFR 274a.10(b)(2) as follows:

> A respondent determined . . . by an Administrative Law Judge to have failed to comply with the employment verification requirements as set forth in [8 CFR 274a.2(b)] shall be subject to 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, consideration shall be given to:
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> (i) The size of the business of the employer being charged;
> (ii) The good faith of the employer;
> (iii) The seriousness of the violation;
> (iv) Whether or not the individual was an unauthorized alien; and
> (v) The history of previous violations of the employer.

INS points out that the fines which INS seeks are simply a proposal, and do not limit in kind or amount the penalty that the Judge may impose, which within the Judge's discretion may be any fine within the applicable range as stated above.

INS considered the mitigating factors specified in (i) through (v) above, as follows: (1) Good faith of the Employer-INS contends that respondent failed to manifest a good faith intention to ascertain and comply with IRCA's record-keeping requirements, and thus is not entitled to a mitigation of penalty on account of good faith. INS acknowledges that the term ``good faith'' is not defined in the statute, but contends that a recognized good faith standard to be observed is whether a respondent showed an honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance therewith. INS cites in support United States of America v. Felipe, OCAHO Case No. 89100151, October 11, 1989, aff'd by CAHO, November 22, 1989. In the instant

case, INS alleges, respondent did not exercise reasonable care and diligence in ascertaining his obligations. INS contends that the record shows that respondent was visited on several occasions by an INS special agent (Gove) who informed respondent of the record-keeping requirements and presented him with instructional materials and forms. Later, Gove took a sworn written statement from respondent in which respondent admitted that he had never filled out a Form I-9 on any employee. On a subsequent visit from Gove respondent claimed that he was unaware of IRCA's requirements, and during an inspection visit by Gove respondent was unable to comply with a request that he produce completed I-9 Forms for inspection by the agent. INS takes issue with the repeated protestations in this proceeding by respondent that he is an honest, law-abiding businessman with the policy of respect and obedience for the law. INS contends that this is not supported by the evidence, that, to the contrary, there is evidence that on several recent occasions respondent was issued warrants for nonpayment of State taxes and that he was found guilty in an unlawful detainer action.

(2) Seriousness of the Violations-INS points out that respondent committed three violations of the requirement that he promptly complete Form I-9 and five violations of the requirement that he present those forms on demand of the INS. INS regards these as serious record-keeping violations because it frustrates the ability of INS to verify compliance with IRCA, and INS contends that in this manner respondent's indifference undermines the ability of INS to carry out its functions under law. INS states that this factor, seriousness of the violations, should be taken in aggravation rather than in mitigation of the penalty.

(3) Whether or not the Individual was an Unauthorized Alien, and (4) The History of Previous Violations of the Employer-In this case INS has no information as to the immigration status of the involved employees and makes no allegation that they were unauthorized aliens. INS concedes that respondent has no known prior history of IRCA violations and makes no allegation to the contrary. INS takes the position that respondent is entitled to have these factors taken in mitigation of penalty. (5) The Size of the Business of the Employer Being Charged-INS acknowledges that this is a mitigating factor to be considered, and concedes that respondent's business is small, and that it must be taken as a mitigating factor in this case.

In light of the foregoing INS requests that there be imposed a fine of $300 on account of each of the five employees involved, or a

total fine of $1,500. INS views this amount as appropriate and not unreasonable as a penalty for the violations.

Respondent appeared for himself, unrepresented by counsel. The position taken by respondent is that the violations committed were the result of confusion and ignorance as to the record-keeping requirements of IRCA, and not ``intentional falsification'' or refusal to comply. Respondent regards the ``important factor'' of IRCA to be ``hiring prohibition'' and not record-keeping. The Judge understands this to mean that respondent is stressing the fact that none of the involved employees were in fact unauthorized aliens, and that respondent paid more attention to the prohibition against hiring unauthorized aliens than he did to ``paper work'' requirements. Respondent urges that the ``mathematical approach'' not be the ``sole criteria'' in determining the penalty. According to respondent, the purpose of INS in bringing charges against him was educational, not punishment, and he contends that punishment should not take precedence over education. As respondent put it, punishment ``is not going to educate me in the past.''

The principal thrust of respondent's argument is that in light of the mitigating factors he is entitled to full mitigation of penalty for each record-keeping violation, that any penalty, even in small amount, is going to jeopardize his situation and adversely affect his future operations. He emphasizes that financially he is in very critical condition, and he implies that a fine could put him out of business.

In Felipe, supra., the Chief Administrative Hearing Officer (CAHO) affirmed the decision of the Administrative Law Judge in which, by use of a mathematical approach, that is, a fine of $100 for each of eight violations, the Judge exercised his discretion in giving weight to the statutory mitigating factors. The CAHO pointed out there that ``the IRCA was not enacted to punish employers, but rather to encourage employers to improve the workplace through compliance. The imposition of civil money penalties are therefore used to assist in the enforcement if the IRCA.'' Very recently, the Felipe Judge, in United States of America v. Le Merengo/Rumors Restaurant, OCAHO Case No. 89100290, April 20, 1990 (Decision and Order on Amount of Civil Money Penalty), considered the same two mitigating factors that are in dispute in the instant case, good faith and seriousness of the violations. In the latter regard, the Judge found the violations to be ``relatively non-serious, and more closely analagous to negligent inadvertence'', and he reduced the fines from what had been requested by INS but declined to mitigate in full as requested by respondent. As to the ``good faith'' factor in that case where, as here, respondent was

unable to present his completed Form I-9 for inspection, the Judge again found negligent inadvertence and not bad faith, and reduced the fine on that account.

After due consideration of the evidence I conclude and find that indeed there was confusion and ignorance of the law on the part of respondent, and that this is reflected in the actions he took or failed to take. However, I conclude and find, also, that respondent's actions reflect more than that; his actions reflect a reluctance or foot-dragging in his efforts to ascertain what is required of him by IRCA in the area of record-keeping. The INS special agent offered respondent, and more than once, the education or the facts that would enable respondent to perform the relatively simple acts that for him would avoid the predicament in which he presently finds himself. I am not persuaded that it was confusion and ignorance alone that held him back. When agent Gove reminded respondent in June 1989 about the Form I-9 requirements, respondent replied, according to Gove's sworn testimony, that he (respondent) ``did not think that INS was serious about the requirement.'' Respondent's actions and his statements in this proceeding impel the conclusion that respondent resisted or ignored the education that was offered him, that he chose instead to ``stonewall'' the INS in the vain hope, perhaps, that if he did nothing the INS would go away. In a sense, as a businessman, he took his chances. As a businessman, however, he must realize that his non-compliance gave him something of an unfair advantage over competitors who did and do comply with the law.

Respondent is quite correct in that the main purpose in these proceedings is to achieve compliance and not to impose punishment. The ultimate decision with regard to the penalty to be imposed should be calculated to ensure that respondent in the future will be in compliance with the statute. This decision must be part of the education that will motivate respondent to that end. It is well established that an education that costs some money will be retained longer than one which does not, and respondent has shown, as noted above, that he needs to be convinced of INS' seriousness in its verification efforts. At the same time, no good purpose would be served by driving respondent out of business. It is my conclusion and finding a fine of $150 on account of each of the involved employees, or a total fine of $750, would be reasonable and appropriate in the circumstances. Respondent should be aware, however, that any similar violations that may occur in the future would inevitably be more costly to him.

Accordingly, I conclude and find that the appropriate amount of civil money penalty that should be imposed upon respondent for

the violations of record is $750. Respondent is ordered and directed to pay to the United States of America by and through the INS a civil monetary penalty in this total amount no later than thirty (30) days after the date of service of this decision and order, unless this decision and order in this particular shall have been modified or vacated by the Chief Administrative Hearing Officer.

IT IS SO ORDERED.
At Washington, D.C., this 30th day of April, 1990.

PAUL J. CLERMAN
Administrative Law Judge