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

United States of America, Complainant v. The Body Shop, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100450

Appearances: **DEBORAH S. NORDSTROM**, Esquire, for the Complainant
**SEBASTIAN D'AMICO**, Esquire, for the Respondent

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

**DECISION AND ORDER ON CIVIL MONETARY PENALTY**

Procedural History

On February 13, 1990, a hearing was held in this proceeding to determine the merits of a Summary Decision and to present evidence, as necessary, to consider the appropriate civil monetary penalty in the event of a finding of liability.

On April 2, 1990, I issued an Order Granting Complainant's Motion for Summary Decision. In the Findings of Fact and Conclusions of Law that supported the Summary Decision, I found that Respondent was liable for 51 Counts alleging violations of 8 U.S.C. § 1324a(a)(1)(B) as charged in the Complaint.

The only issue remaining is the civil money penalty that is appropriate for Respondent's failure to comply with the verification requirements in section 1324a(B), and 8 C.F.R. § 274a.2 (b)(1)(i)(A).

On April 2, 1990, Respondent filed its brief in support of mitigation of civil money penalty for said violations.

On April 20, 1990, Complainant filed its ``Findings of Fact and Conclusions of Law'' regarding civil money penalty.

Statutory and Regulatory Framework

The Immigration Reform and Control Act (``IRCA''), as codified at Title 8 of the United States Code, § 1324a, contains clear language providing for civil money penalties for paperwork violations.

> With respect to the 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 $100.00 and not more than $1,000.00 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. Section 1324a(e)(5).

The regulations reiterate the statutory penalty provision, including the mitigating factors which should be taken into consideration for paperwork violations. See 8 C.F.R. § 274a. 10(b)(2).

Relevant OCAHO Decisions Regarding Issues of Civil Monetary Penalty

In the on-going evolution of this experimental law regarding that sanctioning of employers who hire persons without verifying that they are authorized to be employed in the United States, there have been several approaches taken to resolving the issue of the appropriate civil monetary penalty for violations of the verification requirements. See, e.g., Gonzalez, ``Update on Employer Sanctions Proceedings,'' Immigration and Nationality Law, 1990 Annual, American Immigration Lawyers Association (1990).

My particular suggested approach to resolving these questions has been set out in several different cases. See, United States v. Felipe Cafe, OCAHO Case No. 89100151 (October 11, 1989), aff'd by CAHO November 29, 1989; United States of America v. Juan V. Acevedo, OCAHO Case No. 89100397 (October 12, 1989); United States of America v. Le Merengo/Rumors Restaurant, OCAHO Case No. 89100290 (April 20, 1990). In these decisions, I read the statute to authorize consideration of mitigating factors. In this regard, I initiate my analysis with a consideration of what a maximum possible fine could be ($1,000), and reduce according to the evidentiary presence or absence of factors of mitigation as set out in section 1324a(e)(5).[1] I intend to apply the suggested standards of mitiga-

[1]In contrast to other ``judgmental'' approaches, I do not initiate an analysis of fine amount by starting with the minimum amount provided by statute ($100) and adding to it in proportion to the presence or absence of ``mitigating'' factors. In my view, this approach is less an analysis in ``mitigation'' than its inverse of adding to a base amount according to the presence of what amount to being, under such an analysis, aggravating circumstances.'' In my decisions, I do not find that the statute authorizes a determination of fine amount involving a consideration, de facto or de jure, of aggravating circumstances.

tion specified in Felipe and subsequent cases to the facts before me herein.

Respective Legal Positions of Parties

A. Respondent's Argument Supporting Mitigation of Penalty

Respondent argues in support of a conclusion that would mitigate in the entirety all factors as applied to all counts. Respondent, through counsel, contends that its business is small, that it acted in good faith, that the violations are non-serious, that there is no history of previous violations, and that all but one of the counts involved aliens authorized to be employed in the United States. Respondent concludes that it should pay a minimum civil monetary penalty of $5,100.00.

B. Complainant's Position

Complainant fully stipulates that, as applied to all counts, Respondent has no prior IRCA violations and that this factor of consideration should be wholly mitigated.

Complainant also agrees with Respondent that all but one of the counts involved aliens authorized to be employed in the United States.

Complainant contends that Respondent's is a ``small mid-size'' business, and suggests mitigation in the amount of $135.00 per count for this factor.

Complainant asserts that Respondent did not demonstrate good faith and, therefore, should not receive any mitigation on this account. The crux of Complaint's argument is that Respondent received two educational visits, and, that Respondent did not fill out any Forms I-9 until after its receipt of a Notice of Inspection.

With respect to the mitigating factor of ``seriousness of violation,'' Complainant contends that Counts 1-42 should receive no mitigation because Respondent failed completely to fill out a Form I-9 verifying the authorization for employment in the U.S. of those employees. For Counts 43-51, Complainant contends that each of these violations are serious because Respondent failed to fill out the Forms I-9 until after the issuance of the Notice of Inspection. Complainant suggests a ``minimal reduction'' of 25% mitigation for Counts 43-51.

Based on these contentions, Complainant concludes that the total fine amount should be $24,990.00.

Legal Analysis

Obviously there is a significant quantitative difference in the fine amounts proposed by the parties, as well as a significant quali-

tative difference in the interpretations they respectively suggest be given to the factors of mitigation.

As indicated above, the statute itself provides for a maximum fine amount of $1,000.00 per violation, or $51,000.00 in a case wherein there have been 51 separate violations.

Pursuant to stipulation, I find that Respondent has no prior IRCA violations, and I intend on mitigating in full for all counts on this factor of consideration. Moreover, as stipulated, 50 of the 51 counts involved employees authorized to work in the United States, and for these 50 counts I also intend on recognizing maximum mitigation. Thus, applying these two factors of consideration as specified in section 1324a(e)(5) and as stipulated to by the parties, I conclude that the fine amount should initially be mitigated $18,180.00, i.e. (51x180.00+50+180.00).

I turn separately to each of the factors of mitigation on which the parties disagree.

(1) Good Faith

``Good faith'' is not defined in the Immigration and Nationality Act nor in the employer sanctions regulations. See, 8 U.S.C. §§ 1101 & 1324a; 8 C.F.R. § 274a.1. There are, however, many traditional definitions of the term of art understood as ``good faith.'' Consistent with the analysis in Felipe, I intend to apply in the case at bar a standard which requires a showing of an honest intention to exercise reasonable care and diligence to ascertain and comply with the record-keeping provisions of IRCA.

As applied, the operative words in this adopted standard, (which I have suggested in the effort to give specific analytic content to respectively emerging legal arguments on this issue of determining an appropriate civil monetary penalty), are 1) honest intention; 2) reasonable care and diligence; 3) ascertain; and, 4) comply.

In my view, nothing in the record before me suggests that Respondent acted duplicitously. When I adopted this suggested standard of good faith, however, I concluded that the mere subjective pleading of ``honesty,'' in and of itself, was not sufficient to show genuine good faith; and, accordingly, I purposefully added and applied a more objective reasonableness factor that was intended to serve as a criterial ballast in the frequently difficult and elusive judicial assessment of a party's ``good faith.'' An ``honest intention'' is emptied of content when divorced from a communally recognizable (``reasonable'') effort to comply with an experimental new law.

In this regard, while I do not in any way question Respondent's ``honest intention,'' I am not convinced that Respondent acted with reasonable care and diligence in its effort to actually ascertain

what IRCA required, and to evince its good faith effort to understand the law's requirements by acting in accordance therewith.

It is undisputed by the parties that Respondent received not only one but two visits by INS in which Respondent was given reasonable opportunity to ascertain its responsibilities under IRCA. On November 5, 1987, INS Agent Ramon Putnam explained IRCA's requirements to Respondent's employee, Scott Sequiaw, and left with Sequiaw a Handbook for Employers which outlines the obligations of employers on how to achieve compliance with IRCA. In addition, INS conducted a second educational visit with Respondent's manager, Alfred W. O'Neal, on April 10, 1989. At the second visit, INS Agent Steve Estey explained to Respondent, through its managerial agent, the requirements of IRCA and provided Respondent with a second Handbook for Employers.

In a situation in which there has been an acknowledged INS ``educational visit'' with an entity's manager (involving minimally a thorough and service-oriented explanation of the guidance theoretically provided for in the Handbook for Employers), I intend on rebuttably imputing to the entity that it has had sufficient opportunity to ascertain what its verification requirements are under IRCA. In situations in which there has been no educational visits or in situations in which there is evidence that the so-called ``educational visit'' was conducted in a manner more appropriate to an ``investigation,'' I will not infer that Respondent has ascertained its obligations under IRCA.

In the case before me, however, I find that Respondent, by virtue of two separate educational visits, had more than enough opportunity to ascertain its obligations under IRCA's verification requirements, but that it failed to exercise reasonable care and diligence to comply, in ``good faith,'' with Counts 1-42 in which no Forms I-9 were completed. Accordingly, I will mitigate nothing on these Counts 1-42. In this regard, it is unlikely that I will find that good faith can be shown in an instance wherein no Forms I-9 have been completed.

With respect to Counts 43-51, however, Respondent did complete the Forms I-9, but not within three days of initial hire. Complainant argues that Respondent failed to show any good faith on these counts because it did not fill out these Forms I-9 until after it received a Notice of Inspection. I disagree.

It is my view, instead, that Respondent's effort to completely fill out, albeit in a very tardy manner, the Forms I-9 identified in

Courts 43-51, demonstrates an acknowledgeable[2] effort to comply with the verification requirements of IRCA even though the completion of these forms may have been motivated less by ``good faith'' per se than the anxiety of a pending administrative inspection. Nevertheless, since I do not find, as stated above, that there is any evidence in the record that Respondent acted duplicitously, it is my view that the completion of the forms, at any point in the proceeding, should be considered as a factor in determining mitigation on account of a ``good faith'' effort to comply with one of IRCA's principal goals: the employers verification that all its employees are authorized to be employed in the United States.

Accordingly, I intend to mitigate the penalty amount for Counts 43-51 in an amount of 50% or $90.00 per Count. I have chosen to mitigate in an amount of 50%, because I find that Respondent's completion of these Forms I-9 was in fact accomplished before the INS Inspection took place, even though they were, contrary to law, not completed within the first three days of the employee's hire.

(2) Seriousness of Violation

In Felipe, I sketched my view of the gradations of seriousness of violation as a consideration in determining penalty amount. To reiterate, the most serious violation would be the intentional falsification of the form, a violation that would also, obviously, constitute a federal crime. See, e.g., Title 18 U.S.C. §§ 1001 and 1546.

Somewhat less serious, but still very serious in terms of the importance of IRCA, is the deliberate refusal to fill out any part of an I-9 form. Relatedly, but somewhat less serious, is the negligent failure to fill out any part of an I-9 form. Such a failure, even if it is due to ``mere carelessness'' is still, in my view, ``serious,'' because it completely defeats the purpose of the employment eligibility verification program.

Somewhat less serious, but still serious, is a violation in which parts of the Form I-9 are filled out, but it is not signed by either the employer or the employee. Somewhat less serious, but still seri-

[2] The utilization of a standard of ``acknowledgement,'' as distinguished from knowledge per se, was suggested in my decision in New El Rey Sausage as one way of trying to give more articulable judicial content to the often summarily asserted and applied conundrum of ``reasonableness.'' See, United States of America v. New El Rey Sausage, OCAHO Case No. 88100080 (July 7, 1989), at 43. This distinction, an important one to my way of thinking, was first suggested to me by a quote attributed to Thomas Nagel, professor of philosophy and law at New York University: ``It's the difference between knowledge and acknowledgement. It's what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.'' See, Weschler, L., A Miracle, A Universe: Settling Accounting With Torturers, Pantheon, 1990.

ous, is a violation in which the employee has signed Part 1 of the Form I-9, but the employer has not signed Part 2. Less serious, I would suggest, is a violation in which the employer has signed Part 2, but has not seen to it that the employee sign Part 1.

Significantly less serious, relatively speaking, is a violation in which the I-9 form is signed and substantially completed, but there is a failure to check one of the boxes which request important verification information.

As applied herein, it is clear that Respondent did not prepare any Forms I-9 for Counts 1-42. There is no evidence to suggest that Respondent deliberately refused to fill out these Forms I-9, and for this reason I am going to presume that in fact they were not completed because of Respondent's negligent business practice. Nevertheless, because Respondent received two separate educational visits, I find that the complete failure to fill out any part of the Forms I-9 in Counts 1-42, even if it is a negligent business practice, is sufficiently ``serious'' as not to warrant any mitigation. I conclude that each of the violations is serious because it indicates a complete failure to comply with IRCA's verification requirements, and thereby to serve the law's general public policy goal of verifying, in a non-discriminatory manner, the employment eligibility of every employee actually hired. Thus, consistent with my earlier decisions, I will not mitigate a violation in which Respondent, after receiving an official educational visit, fails to complete any portion of a Form I-9 for a hired employee.

With respect to Counts 43-51, each of the violations charged involves a failure to complete the Forms I-9 within three days of having hired the employees named therein. I have not previously ruled on the ``seriousness'' of this type of violation. In general, however, I do not find this type of violation to be ``serious,'' though the amount of time that transpires after the mandated three days as well as a general ``totality of the circumstances'' assessment may be relevant in determining proportionate amounts of mitigation.

Complainant believes that the verification violations in Counts 43-51 were ``serious'' because ``Respondent failed to fill out the Forms I-9 until after the issuance of the Notice of Inspection.'' For this reason, Complainant asserts that Respondent's monetary penalty should be mitigated only 25%. I do not agree.

It is clear that the timing of the verification of an employee's eligibility to work in the United States is an important element in IRCA's verification requirements. In my view, however, if an employer has completed the Forms I-9 by the time that the inspection takes place, I am not going to find that the violation, for the purpose of making a section 1324a(e)(5) determination, is ``serious''

even though it may be substantially subsequent to the date of the initial hire.

Accordingly, in the case at bar, I intend on mitigating the penalty amount for Counts 43-51 90%, or $162.00 per count.[3]

Size of the Business

In Felipe, I suggested identifying characteristics for determining ``size of the business'':

-business revenue or income;
-amount of payroll;
-number of salaried employees;
-nature of ownership;
-length of time in business; and
-nature and scope of business facilities.

I intend on applying these criteria to the facts at bar. Respondent argues that its business is small because: 1) it is conducted in an area of less than 5,000 square feet; 2) the average number of employees is 25; and 3) the ``profits are minimal.'' Alternatively, Complainant argues that respondent's business is ``small mid-size,'' and that I should mitigate in an amount of only 75%.

The record is not factually thorough on this factor of mitigation. The most specific source of information regarding Respondent's size of business is found in Respondent's ``Answer to Interrogatories.'' Based on this information, I conclude that Respondent's business is small mid-size. I reach this conclusion, because I note that Respondent's business has operated continuously since 1966, and in the last five years of operation has averaged over $100,000.00 in net income. Moreover, I note that it was the considered opinion of Respondent's experienced General Manager, Arnold G. Thomas, that Respondent's business was one of the larger sized businesses of its kind compared to other similarly situated businesses in the San Diego area. Tr. 39.

Thus, I conclude that Respondent's business is a small midsize and I intend on mitigating the penalty amount 75%, or $135.00 per count in light of this factor of mitigation.

Conclusion

Based upon the foregoing analysis, I conclude:

[3]I am deciding not to mitigate a full 100%, because it is not insignificant to me that Respondent did not complete these Forms I-9 until after the Notice of Inspection had been issued, although they were, as stated, completed by the time of the actual inspection.

(1) That the determination of civil monetary penalty for violations of the verification requirements of the Immigration Reform and Control Act are discretionary decisions that are guided and structured by factors of mitigation as set out by Congress in section 1324a(e)(5) of Title 8 of the United States Code.

(2) In determining the amount of penalty, due consideration shall be given to the size of the business of the employer, 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.

(3) That Respondent shall receive full mitigation of penalty for each of the fifty-one record-keeping violations on account of the existence of no prior IRCA violations.

(4) That Respondent shall receive full mitigation on Counts 2-51 because none of the named employees therein were unauthorized aliens.

(5) That Respondent shall receive no mitigation on Count 1, because it was stipulated that the named employee was an alien unauthorized to be employed in the United States.

(6) That Respondent shall receive no mitigation for good faith on Counts 1-42, because Respondent failed to exercise reasonable care and diligence to ascertain and comply with IRCA's verification requirements.

(7) That Respondent shall receive 50% mitigation of penalty for Counts 43-51, because it exercised some degree of diligence in complying with IRCA's verification requirements prior to the INS inspection.

(9) That Respondent shall receive no mitigation of penalty on account of seriousness of violation for Counts 1-42, because the complete failure to fill out any portion of a Form I-9 is a serious violation.

(10) That Respondent shall receive 90% mitigation for Counts 43-51, because the completion of Forms I-9 in a wholly accurate but untimely manner is a violation of IRCA's verification requirements, but it is not a serious violation.

(11) That Respondent shall receive a 75% mitigation of penalty for all Counts because it operates a small mid-size business.

(12) Accordingly, I find that the appropriate amount of civil money penalty for Respondent's 51 IRCA verification violations is $23,667.00.

(13) That, pursuant to 8 U.S.C. § 1324a(e)(6) and as provided in 28 C.F.R. § 68.52, this Decision and Order shall become the final decision and order of the Attorney General unless within thirty (30)

days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

**SO ORDERED:** This 19th day of June, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge