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

United States of America, Complainant vs. C & D Plastics, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100042.

DECISION AND ORDER

GERALD A. WACKNOV, Administrative Law Judge

Appearances: PAUL B. MOSLEY, Esq., for Complainant
BERNARD S. KARMIOL, Esq., for Respondent

I. Procedural Background

This case was instigated by the filing of a Complaint with the Office of the Chief Administrative Hearing Officer on February 6, 1990, by the Immigration and Naturalization Service (INS) on behalf of the Complainant. The Complainant charges Respondent with a single violation of Section 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(2), for continuing to employ an alien, Mr. Pracha Thampipop, a national of Thailand, in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

Respondent served its Answer to the Complaint on February 26, 1990, denying the material allegations of the Complaint and as an Affirmative Defense, alleged that since the alien had previously presented authorization to work as an alien nonimmigrant student, which authorization had been extended by the INS, the Respondent expected that the alien would receive a further extension of work authorization from the INS. Finally, Respondent alleged that the INS inspected its Form I-9's in or about April, 1989, and informed Respondent that everything was in order.

On May 1, 1990, a telephonic conference call was conducted with the parties, at which time the parties agreed to submit the matter on a Joint Motion for Summary Decision based upon stipulated evidence. By an Order issued the following day, the hearing in this case was postponed indefinitely.

On June 16, 1990 the parties filed a Motion for Summary Decision based upon stipulated facts and joint exhibits, and waived their right to appear to present evidence or argument. On July 19, 1990, Respondent filed its brief in support of the motion, and on September 7, 1990, the Complainant filed its brief.

II. Stipulated Facts and Evidence

Respondent, C & D Plastics, Inc., a California Corporation and legal entity within the definition of 8 C.F.R. Section 274a.1(b), hired the alien named in Count I of the Complaint, Mr. Pracha Thampipop, on February 3, 1988, for employment in the United States.

Mr. Thampipop was first admitted into the United States as a student on May 16, 1982, with an F-1 student visa valid for the duration of his status. By September of 1987, Mr. Thampipop completed a course of studies in Electrical Engineering at Northrop University, and received a Bachelor of Science degree. He then began to pursue a Master of Science degree in Electrical Engineering.

Mr. Thampipop received employment authorization from the INS for practical training for a six month period beginning on 9/27/87 and expiring on 3/26/88.

Upon being hired by Respondent on February 3, 1988, Mr. Thampipop completed a Form I-9, which form contained his admission number with an expiration date of March 26, 1988. On September 28, 1988, he belatedly received authorization for a second six month period of practical training beginning 3/26/88 and expiring on 11/26/88. At this time the Respondent crossed out the old expiration date of 3/26/88, and inserted the new date of 11/26/88 on his Form I-9.

Respondent's compliance with the employment verification requirements of IRCA had been reviewed on several occasions by the INS in 1987 and 1988. Respondent received an educational visit from a Border Patrol Agent in 1987 and by Special Agent McMillan in October, 1988. During the latter visit, Respondent's Personnel Assistant, Ms. Carol Round, was provided with copies of the M-274 the Handbook for Employers, as well as a supply of Forms I-9.

On October 26, 1988, an inspection was conducted, where a review of 193 I-9 Forms for past and present employees revealed minor errors in only two forms, and inaccurate listing of alien registration numbers on eight I-9's. The Respondent subsequently terminated the employment of five of these employees who could not present valid proof of alien registration and employment authorization. On November 28, 1988, the INS notified Respondent that,

based upon its earlier inspection, there was no ground for further inquiry into Respondent's compliance with the IRCA requirements.

A later investigation into Respondent's compliance was instigated upon the filing of an I-140 Petition for Prospective Immigrant Employee on behalf of Mr. Thampipop in August of 1989. Respondent had previously received Alien Employment Certification from the U.S. Department of Labor for Mr. Thampipop to be employed as a manufacturing engineer.

The INS served a Notice of Inspection upon Respondent on September 15, 1989, to be conducted on September 21, 1989. But on September 18th, INS agents arrested Mr. Thampipop at Respondent's business pursuant to a warrant for violation of the conditions of his visa, and obtained copies of his Forms I-9 and I-94. The previously noticed inspection of Respondent's IRCA compliance was not performed until October 10, 1989, at which time the INS agents noted that the only violation was in the expiration of Mr. Thampipop's employment authorization on his Form I-9.

Mr. Thampipop gave a sworn statement wherein he admitted that he did not have work authorization at the time he was arrested in the employ of Respondent.

III. Discussion

Count I of the Complaint charges Respondent with violating 8 U.S.C. Section 1324a(a)(2) for continuing to employ Mr. Thampipop knowing that he had become unauthorized for employment in the United States on account of the expiration of his practical training work authorization on November 26, 1988.

By the adoption of the Immigration Reform and Control Act of 1986, Congress prohibited the employment of aliens who lack authorization to work in the United States. This prohibition provides for civil and criminal penalties for the hiring or the continued employment of an alien who the employer knows to be unauthorized. In order to be found in violation of the prohibition on continuing to employ an alien known to be unauthorized, it is not necessary to establish actual knowledge of the alien's status on the part of the employer. Rather, a constructive knowledge standard will be applied to determine whether the employer was in possession of sufficient information to lead a reasonable person exercising due care to discover the alien's unauthorized status. *Mester Manufacturing Co.* v. *I.N.S.*, 879 F.2d 561 (9th Cir. 1989); *United States* v. *Buckingham Ltd. Partnership d/b/a/ Mr. Wash,* OCAHO Case No. 89100244, April 6, 1990, (*Mr. Wash*).

In *Mr. Wash*, the Respondent car wash operator hired an alien whose work authorization was valid at the time of hire and had

properly noted the expiration date on the alien's I-9 form. But at the time an inspection was conducted, the authorization had expired over three months previous to the inspection. In response to the Respondent's argument that it did not intentionally employ the alien, Mr. Rivera, after the expiration of his authorization, the ALJ noted that:

> . . . knowingly continuing to employ an unauthorized alien in violation of 8 U.S.C. Sec. 1324a(a)(2) can be proven by showing actual or constructive knowledge of the alien's immigration status and/or eligibility to be employed in the United States. Applying the constructive knowledge standard to Mr. Wash, I find that Respondent did violate 8 U.S.C. Sec. 1324a(a)(2) in that it continued to employ an alien, Mr. Rivera, knowing that he had become unauthorized with respect to that employment. Contrary to Respondent's argument, it is not necessary to find that the employer *intended* to continue to employ Mr. Rivera without regard to his employment authorization. It is enough that Respondent *should have known* of that unauthorized status and failed to act in conformity with Section 101 of IRCA and implementing regulations.

Mr. Wash, id. at 9.

Since the implementing regulations obligate an employer to reverify the status of an alien employees authorization upon the expiration of the documents used to verify their employment eligibility, 8 C.F.R. Sec. 274a.2(b)(1)(vii), the Respondent here was on notice of the need to reverify the status of Mr. Thampipop. This requirement is plainly stated on the reverse side of each Form I-9, under the instructions to employers for completing the form.

Respondent acknowledges that Mr. Thampipop was obligated to extend his employment authorization, upon its expiration on November 26, 1988, in order to continue to be eligible for employment. But Respondent contends that due to the INS' previous delay in extending Mr. Thampipop's practical training authorization, its expectation that a subsequent extension would again be granted belatedly made its continued employment of Mr. Thampipop reasonable.

The determinative issue is not whether the Respondent had a reasonable expectation that Mr. Thampipop's employment authorization would be extended, but whether the Respondent had knowledge, actual or constructive, that its employee's authorization had in fact expired. The stipulated evidence establishes that the Respondent knew or should have known that Thampipop's employment authorization had expired. Under these circumstances, I find that Respondent's failure to timely reverify Thampipop's status, or alternatively, to terminate his employment upon the expiration of his employment authorization, is violative of the Act, as alleged.

IV. Civil Money Penalties

Having found that Respondent violated 8 U.S.C. Section 1324a(a)(2) as alleged with respect to the employment of Mr. Pracha Thampipop, I am required to assess a civil money penalty "in an amount not less than $250 and not more than $2,000 . . . ."

Complainant urges me to assess a penalty of $1,000, which it asserts is fair and reasonable under the circumstances. Respondent urges that no penalty be imposed.

Congress declined to provide any guidelines for assessing penalties for the knowing employment of aliens, in contrast to the five factors to be addressed when assessing fines for paperwork violations under 8 U.S.C. Section 1324a(e)(5).

The evidence presented by the parties establishes that Respondent repeatedly undertook to abide by the requirements of IRCA, to the extent that it terminated the employment of individuals whose false alien registration numbers were discovered by the INS. Respondent made a good faith effort to complete I-9's for each employee hired, and did so with minimal problems. Respondent's steps to comply with the verification requirements demonstrates substantial good faith.

Under these circumstances, I find that a fine of $500.00 is an appropriate civil money penalty for the violation of Count I.

V. Findings of Fact, Conclusions of Law and Final Order

Having considered the parties joint motion for summary decision and stipulated evidence, I make the following findings of fact and conclusions of law:

1. Based upon the preponderance of the evidence, I find the Respondent violated 8 U.S.C. Section 1324a(a)(2) by continuing to employ in the United States the alien named in Count I, Mr. Pracha Thampipop, knowing him to have become unauthorized for employment.

2. That upon employing an alien whose authorization to work showed on its face that it would expire on a date certain, Respondent failed to fulfill its duty to reverify the eligibility of that alien employee.

3. That Respondent pay a civil money penalty in the amount of $500.00 for Count I of the Complaint.

4. That Respondent cease and desist from violating the prohibitions against hiring, recruiting, referring or continuing to employ unauthorized aliens, in violation of 8 U.S.C. Sections 1324a(1)(A) and (a) (2).

5. This Decision and Order is the final action of the Administrative Law Judge in accordance with 28 C.F.R. Section 68.51(a). As

provided by that section, this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it.

SO ORDERED.

Dated: September 24, 1990.

GERALD A. WACKNOV
Administrative Law Judge
901 Market Street
Suite 300
San Francisco, CA 94102