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

United States of America, Complainant vs. Sergio Alaniz d/b/a La Segunda Downs, Respondent; 8 U.S. § 1324a Proceeding; OCAHO Case No. 90100173.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

1. Procedural Facts

On May 22, 1990, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer against Respondent, Sergio Alaniz, d/b/a La Segunda Downs. The Complaint alleged violations of 8 U.S.C. § 1324a(a)(1)(A) for the hiring of four (4) persons not authorized for employment in the United States. The Complaint also alleged violations of the employment verification requirements contained in 8 U.S.C. § 1324a(a)(1)(B) for the same four persons. A hearing on the Complaint was scheduled to be held on or about September 11, 1990, in or around McAllen, Texas.

On June 25, 1990, Respondent filed his Answer to the Complaint generally denying every allegation in the Complaint. Respondent's Answer did not raise any affirmative defenses.

On August 9, 1990, Complainant filed several motions and discovery requests, including a Motion to Strike Respondent's Answer or Alternatively a Motion for Summary Judgment. Thereafter, on August 17, 1990, I issued an Order to Show Cause. Due to Respondent's failure to respond to the Complainant's Motion and to the Motion to Show Cause, I issued a Decision and Order Granting In Part Complainant's Motion for Summary Decision on October 3, 1990. In that Decision and Order, I granted Complainant's Motion for Summary Decision with respect to two of Respondent's employees. I found Respondent had knowingly hired Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal in violation of 8 U.S.C. § 1324a(a)(1)(A). I also found that the Respondent had violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with IRCA's employment verification requirements for these two employees.

On October 19, 1990, in accordance with my October 3, 1990 Decision and Order, Complainant filed Government's Brief in Support of Proposed Civil Money Penalties. Complainant seeks to impose a fine of $1,000.00 for each alleged ``knowing hire'' violation. It is also seeking a fine of $500.00 for each alleged verification violation. The total amount of find proposed by the Complainant in this case is $6,000.00.

On November 2, 1990, the Complainant filed a Renewed Motion for Summary Judgment. In this Motion, Complainant sought a Summary Decision holding Respondent liable for the remaining two employees. I did not immediately act upon this motion because the parties represented that they had settled this case.

However, on January 24, 1991, I issued an Order to Show Cause on Complainant's Renewed Motion for Summary Decision since I had not yet received a Settlement Agreement by that date.

Respondent has not made any response to the Complainant's Renewed Motion for Summary Decision and to my January 24, 1991 Order to Show Cause.

2. Motion for Summary Decision

The Respondent once again failed to oppose the Complainant's Renewed Motion for Summary Decision. Therefore, the only issue presented here is whether Complainant has met its burdens of proof. In a Summary Decision proceeding, the moving party must establish the absence of any genuine disputed issues of material fact and that it is entitled to judgment as a matter of law.

A tribunal may enter a summary decision where the record and evidence show the absence of any genuine issues of material fact and that the moving party is entitled to a summary decision. 28 C.F.R. § 68.36. A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242 (1986). The purpose for the summary decision process in both judicial and administrative proceedings is to avoid unnecessary trials. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

3. Complainant's Factual Showing

In support of its instant Motion, Complainant has offered the following documents and evidence: 1) the sworn statements of Tomas Segundo-Tello and Arturo Rubalcava-Vasquez; 2) the affidavit of Jose D. Guerra which authenticates the said sworn statements; and 3) the Government's Brief in Support of Proposed Civil Money Penalties.

The Complaint alleges that Respondent has violated the ``knowing hire'' and employment verification provisions of the Immigration Reform and Control Act of 1986 (``IRCA'') with respect to four

(4) employees. Respondent's liability for two of the four employees was determined by my October 3, 1990 Decision and Order Granting In Part Complainant's Motion for Summary Decision. Respondent's liability for the remaining two employees (Arturo Rubalcava-Vasquez and Tomas Segundo-Tello) is still in issue at this time.

In my October 3, 1990 Decision and Order, I did not determine Respondent's liability for the ``knowing hire'' and employment verification violations with respect to Arturo Rubalcava-Vasquez and Tomas Segundo-Tello. This was because the sworn statements of these two employees, which lent support to the Complainant's case, lacked proper authentication. In its Renewed Motion for Summary Decision, Complainant has presented the affidavit of Jose D. Guerra to authenticate the sworn statements of the aforementioned employees.

Jose D. Guerra stated that on December 15, 1989 he participated in an investigation at Respondent's place of business with three other INS agents. The agents' investigation found three employees who lacked work authorizations. The three men were placed under arrest by the INS agents. Two of the three employees placed under arrest were Arturo Rubalcava-Vasquez and Tomas Segundo-Tello.

Agent Guerra stated that he interviewed Rubalcava-Vasquez and Segundo-Tello at the Rio Grande City Border Patrol Station. The interviews were conducted in Spanish, but the answers were recorded in English. According to Agent Guerra, the two employees testified that Mr. Sergio Alaniz knew they were not authorized to work in the United States because they each told him of that fact. This is supported by the sworn statements of Arturo Rubalcava-Vasquez and Tomas Segundo-Tello which are respectively attached as Exhibit B and Exhibit A to the Declaration of Agent Guerra.

In their sworn statements, Rubalcava-Vasquez and Segundo-Tello stated that they commenced work for the Respondent on October 10, 1989 and October 29, 1989 respectively. They also stated that they never signed the employment verification forms (``I-9''s) nor did they present any documents to the person who hired them. In addition, they admitted that they entered the United States illegally and that they did not posses any work authorizations.

By a preponderance of evidence, the Complainant has demonstrated that Respondent hired Arturo Rubalcava-Vasquez and Tomas Segundo-Tello while knowing they were not authorized to work in the United States. Complainant's evidence also demonstrates the Complaint's allegations that Respondent had failed to verify the employment eligibility of said individuals in accordance with 8 U.S.C. § 1324a(b).

4. Civil Money Penalties

The proper amount of penalties for violations of employment verification provisions can be determined only after a tribunal has considered the five factors specified by 8 U.S.C. § 1324a(e)(5) and by 28 C.F.R. § 68.50(c)(2)(iv). The five factors are: size of the employer's business, employer's good faith, the seriousness of the violation, whether the individual employee involved in the verification violation was an unauthorized alien, and whether there was a history of previous violation on the part of the employer. On the other hand, the civil penalties for ``knowingly hiring'' unauthorized aliens may be imposed without reference to the above factors. Such factors, however, may nevertheless assist a tribunal in determining the appropriate penalty for ``knowingly hire'' violations.

In it's Brief In Support of Civil Money Penalties, the Complainant presented evidence corresponding to each of the five statutory penalty factors.

A. Size of Employer's business

Complainant argues that the Respondent's business is large because the business operates a racing stable as well as a race track. It also claims that Respondent is building a new brick home on the race track property. Complainant support its claims by offering the Declaration of INS agent Richard A. Serra in addition to certain photographs with captions. However, Complainant stated that it has no information as to the size of revenue generated by Respondent's business. This is because the Respondent did not answer its Interrogatories, Requests to Produce, and Requests for Admissions.

Absent information as to the revenue or profitability of the Respondent's business, Complainant has presented insufficient evidence which is relevant to this statutory factor. Therefore I will not use this factor to aggregate or mitigate the size of the penalty.

B. Respondent's Good Faith

Complainant next argues that the Respondent lacked good faith in this matter. Complainant states that, during the investigation, the Respondent indicated it did not hire any employees after November 1986 when in fact it had hired four employees. Complainant further argues that the Respondent was uncooperative in this matter because he sought to conceal his residential address from the INS. Complainant again offered the Serra Declaration in support of its contentions. But the Complainant did not present any information relating to the question of whether the Respondent was advised of IRCA's requirements by the INS.

The statute and regulations fail to define the parameters of good faith. However, there must be some evidence of culpable behavior on the part of the Respondent beyond mere ignorance in order for me to find that Respondent lacked good faith. Without evidence of Respondent's ``culpable behavior'', I will not employ this factor to increase the civil penalty. See United States of America v. Lola O'Brien d/b/a O'Brien Oil Company, OCAHO Case 89100386, May 2, 1990 (Final Decision and Order).

Here, Complainant has presented hearsay evidence regarding Respondent's uncooperative behavior. I find this evidence is probative and is not fundamentally unfair. See Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980). Therefore I will admit Serra's Declaration as evidence showing Respondent's lack of good faith. Pursuant to this evidence, I find that Respondent has failed to comply in good faith with IRCA when it refused to inform the INS agents of its employees during the investigation process. This constitutes ``culpable behavior'' on the part of the Respondent. Hence lack of good faith is a factor which aggravates the civil penalty in this case.

C. Seriousness of Violation

Complainant also argues that the current violations are serious in that they are precisely the type which IRCA seeks to discourage.

In the past, I have stated that violations of IRCA's `technical' I-9 requirements constitute serious violations. See United States of America v. Lola O'Brien d/b/a O'Brien Oil Company, supra. In addition, ``knowing hire'' violations by employers must be characterized as serious since IRCA's employer sanction provisions were enacted in order to prevent such acts. In view of this, I find that Respondent's current violations are serious. Hence, this is an aggravating factor for penalty determination purposes.

D. Unauthorized Status of Aliens

Complainant provided the sworn statements of several of Respondent's employees to show that the aliens were unauthorized to work in the United States. This is sufficient for me to find an additional factor to aggravate the penalty against the Respondent for paperwork violations.

E. History of Previous Violations

Finally, Complainant argues that even through there is no prior sanctions of the Respondent, there was some evidence of prior ``violations'' because the Respondent had previously hired and then discharged one of the four employees involved in the current proceeding. However, it is doubtful that any ``evidence'' of a prior hire of aliens, in the absence of a proceeding which affords the Respondent a due process hearing, constitutes a ``history of previous violation'' for penalty setting purposes. See United States v. Lola O'Brien d/b/a Wexford Farms, OCAHO Case 89100387, May 2, 1990 (Final Decision and Order). Therefore, I will not use this factor as an aggravating factor. In fact, this may be used as a mitigating factor for penalty purposes.

Upon consideration of the five statutory factors, I find that a civil money penalty of $300.00 is appropriate for each of Respondent's four verification violations. And after considering the entire record of this case, I find that a civil money penalty of $700.00 is appropriate for each of Respondent's four ``knowing hire'' violations.

Based upon the facts of this case, the Decision and Order Granting In Part Complainant's Motion for Summary Decision dated October 3, 1990, and the penalty factors, I make the following findings of fact and conclusions of law.

5. Findings of Fact and Conclusions of Law

Based upon the showing provided by the Complainant, I conclude:

1. That no genuine issue as to any material fact exists as to the allegations in Counts I and II of the Complaint with regard to Arturo Rubalcava-Vasquez and Tomas Segundo-Tello. Therefore, Complainant is entitled to a summary decision as to these two individuals in Counts I and II as a matter of law.

2. That, pursuant to my October 3, 1990 Decision and Order Granting In Part Complainant's Motion for Summary Decision, that Complainant is also entitled to summary decision as to Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal in Counts I and II of the Complaint as a matter of law.

3. That Respondent violated 8 U.S.C. § 1324a(a)(1)(A), in that Respondent hired for employment in the United States, Arturo Rubalcava-Vasquez, Tomas Segundo-Tello, Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal, after November 6, 1986, knowing them to be unauthorized for employment.

4. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B), in that Respondent hired for employment in the United States, Arturo Rubalcava-Vasquez, Tomas Segundo-Tello, Juan Francisco Cruz-Rubalcava and Hugo Manuel Garcia-Villarreal, after November 6, 1986, without complying with the verification requirements in 8 U.S.C. § 1324a(b).

5. For the four violations of 8 U.S.C. § 1324a(a)(1)(A), Respondent is required to pay a civil money penalty in the amount of $700.00

for each violation, for a total of $2,800.00. Respondent is ordered to cease and desist from any further violations.

6. For the four violations of 8 U.S.C. § 1324a(a)(1)(B), Respondent is required to pay a civil money penalty in the amount of $300.00 for each violation, for a total of $1,200.00.

7. That, pursuant to 8 U.S.C. § 1324a(e)(7), and as provided in 28 C.F.R. § 68.51, 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 together with supporting arguments with the Chief Administrative Hearing Officer.

SO ORDERED.
Dated: February 22, 1991.

JAY R. POLLACK
Administrative Law Judge