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

United States of America, Complainant v. Jimmy Bai Huang, d.b.a. Great Wall Chinese Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100283.

FINAL ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **LEILA CRONFEL**, Esquire, Immigration and Naturalization Service for Complainant;
JOHN RANDOLPH TORBET, Esquire, for Respondent

I. PROCEDURAL HISTORY

On January 11, 1991, I issued my Order Granting In Part Complainant's Motion For Summary Decision. In said Order I found that Respondent was liable for each of the allegations in the Notice of Intent to Fine (NIF), as incorporated into the Complaint. I did not, however, make any findings as to the appropriateness of a civil penalty to be imposed upon Respondent.

The parties agreed in a telephonic conference on January 10, 1991 that they would submit written briefs in support of their respective positions as to the assessment of fines in this matter. Complainant submitted its brief on January 22, 1991. On January 30, 1991, Respondent filed a Stipulated Motion for Extension of Time for Respondent to File Brief Regarding Penalty Amounts, seeking an extension until February 7, 1991 in which to file its brief. Respondent based its request upon the fact that it had difficulty finding the cases upon which Complainant relied in its brief. Complainant idicated no objection to Respondent's request, which I granted on February 1, 1991. Respondent's brief was subsequently filed on February 4, 1991.

Respondent's Brief Regarding Penalty Amount not only discussed its position as to an appropriate penalty, but also requested a reconsideration of my finding of liability regarding two of the individuals listed in the Complaint for whom no Forms I-9 had been presented during the inspection by the INS on March 2, 1990.

Respondent argued that Complainant had no proof that Rotilio Espanoza Martinez was ever employed by Respondent and that Respondent did not recall employing this individual. See Supplemental Affidavit of Respondent, Jimmy Bai Huang. Respondent also contended that Chandra May had been employed by Respondent prior to the date on which Respondent received its Handbook for Employers from the Immigration and Naturalization Service (INS), which was October 14, 1989. Respondent indicated that the INS included only those violations occurring after the date of Respondent's receipt of the Handbook in the NIF, therefore Chandra May should not have been the basis for an alleged violation.

I conducted a telephonic conference on February 20, 1991, to discuss Respondent's arguments regarding these two violations. Complainant stated that it had previously agreed with Respondent to dismiss the violation as to Rotilio Espanoza Martinez. Regarding Chandra May, Complainant contended that Ms. May was hired only two days prior to Respondent's receipt of the Handbook and that she continued in her employment for several months thereafter.

I agreed to consider the parties' positions regarding Ms. May along with their briefs pertaining to civil penalties and to issue my Final Order promptly.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the parties' briefs and accompanying memoranda, the pleadings of record, and arguments made in the telephonic conference, I make the following findings of fact and conclusions of law.

I agree with Complainant that Respondent should have prepared and presented to the INS inspecting agent a Form I-9 for Chandra May. She was employed in close proximity to the time in which Respondent received its Handbook for Employers, therefore Respondent should have been aware of its duty to prepare a Form I-9 for her and could have done so. The fact that her employment continued for a few months beyond October 14, 1989 gave Respondent even more reason to verify her employment eligibility. The violation as to Chandra May will stand.

Because the parties are in agreement as to Rotilio Espanoza Martinez, I will modify my Order of January 11, 1991. The violation as

to Mr. Espanoza Martinez found in Count II of the NIF as incorporated into the Complaint will be dismissed.

Having found the remaining violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(B), I must assess a civil money penalty pursuant to Section 274A(e)(5) of the Act, which requires the person or entity to pay a civil penalty. The statute states, in pertinent part, that:

> With respect to a 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 and not more than $1,000 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.

8 U.S.C. Section 1324a(e)(5).

In this case, Complainant assessed a civil penalty of $280.00 for each of the four violations in Count I, and $370.00 for each of the 19 violations in Count II, for a total penalty of $8,150.00. Respondent submits that the minimum possible fine should be imposed in this case, which would be $100 for each of the 23 violations, or $2,300.00. I have considered the five factors listed above and will address my findings as to each of them.

Size of Business: I agree with Respondent that he owns a small business with less than 10 employees at any one time. This mitigates the penalty on behalf of Respondent.

Good Faith: Both parties have addressed several factors which go to Respondent's good faith, or lack thereof. I agree with Complainant that Respondent was given notice of the scheduled inspection, yet prepared five of the nine Forms I-9 presented on the day of the inspection. Respondent was in possession of the Handbook for Employers for four months prior to the inspection and could have taken affirmative steps to understand and comply with the mandates of the Immigration Reform and Control Act (IRCA).

Respondent stresses its lack of understanding of the English language and its misplaced reliance on either erroneous or misunderstood advice from an accountant regarding its duties under IRCA. Respondent also asserts that six of the individuals for whom violations were found worked less than three days for Respondent. Respondent does not dispute that it received a Handbook, yet contends that if an educational visit had been made by the INS, Respondent would have better understood its obligations.

I find that Respondent's arguments have some merit, yet not enough to mitigate the penalty by a showing of good faith. This factor will be considered neutral.

Seriousness of the Violation: Paperwork violations are considered serious in the IRCA framework, with the failure to present I-9's being more serious than the failure to adequately complete the forms. The employer's failure to prepare I-9's completely, demonstrating a failure to verify employment eligibility in the United States, could lead to the hiring of unauthorized aliens, thus defeating the purpose of IRCA. I find that this factor aggravates the penalty amount in this matter.

Evidence of Illegal Aliens: There has been no showing that Respondent employed any illegal aliens, therefore, this factor will mitigate the penalty in Respondent's favor.

History of Previous Violations: Both parties agree that Respondent's history is free from previous IRCA violations, therefore this factor will also mitigate the penalty in Respondent's behalf.

Based upon my findings regarding these five criteria, I will adjust the penalty sought by Complainant downward. I will reduce the civil penalty for each of the violations in Count I to $120.00, and for those in Count II to $200.00 apiece. The aggregate civil penalty is adjusted to $4,280.00.

III. ULTIMATE FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER

In addition to the findings and conclusions previously mentioned, I make the following ultimate findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondent Jimmy Bai Huang, d.b.a Great Wall Chinese Restaurant, violated Section 1324a(a)(1)(B) of Title 8, 274A(a)(1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, the individuals found in the NIF as incorporated into the Complaint, with the exception of Rotilio Espanoza Martinez, without complying with the verification requirements in 8 U.S.C. 1324a(b)(1), Section 274A(b)(1) of the Act, and 8 C.F.R. Section 274A.2(b)(1)(ii).

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of four thousand two hundred eighty ($4,280.00) for Counts I and II of the Complaint.

3. That the hearing scheduled in or around Denver, Colorado is canceled.

4. That as provided by 28 C.F.R. Part 68.51, this Final Order shall become the final Decision and Order of the Attorney General unless within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

IT IS SO ORDERED: This 25th day of February, 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge