

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

United States of America Complainant v. Gauriel Vanounou, d/b/a Surf's Up Custom-T-Shirts Respondent; 8 USC 1324a Proceeding, Case No. 88100111.

Appearances ANN M. TANKE, Esq., Harlingen, TX, for the Complainant, INS.

 LINDA REVNA YANEZ, Esq. (Wiech & Black), Brownsville, TX, for the Respondent.

PARTIAL SUMMARY DECISION

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

Complainant, the INS, has moved for a partial summary decision under 28 CFR 68.36. Respondent has failed to respond. I grant the requested relief.

On September 19, 1988, Complainant, the Immigration and Naturalization Services (INS), filed a complaint (8 USA 1324a Proceeding) with the Office of the Chief Administrative Hearing Officer (OCAHO) against Gauriel Vanounou, d/b/a Surf's Up Custom-T-Shirts (Vanounou or Respondent). OCAHO docketed the complaint as Case No. 88100111. By date of September 22, 1988 the Chief Administrative Hearing Officer issued a notice of hearing on the INS's complaint. Respondent's answer is dated October 26, 1988. The parties thereafter engaged in discovery. By order dated January 19, 1989, I postponed indefinitely the hearing on this case.

On March 24, 1988 the Complainant served on the Respondent a motion for partial summary decision by mailing the motion by certified mail to the Respondent. Service of the motion was effective on the date of mailing. 28 CFR 68.15(d)(1). Respondent had 10 days in which to serve an opposition, 28 CFR 68.36(a), plus the additional 5-day grace period granted by 28 CFR 68.5(d)(2). Because 15 days

after March 24 fell on Saturday, April 8, Respondent had until the following business day, Monday, April 10, 1989, to serve any opposition it desires to file. 28 CFR 68.5(a). Respondent has not filed an opposition.

Because there is no genuine issue as to any material fact on the matters presented in Complainant's motion, I made this partial summary decision in favor of the Complainant based on the following findings of fact and conclusions of law. 28 CFR 68.36(c).

Findings of Fact

1. Incorporating a notice of intent to find (NIF) personally served on Vanounou by an INS special agent on July 14, 1988, the September 19, 1988 complaint alleges that Respondent Vanounou has violated Section 274A (a)(1)(A), (a)(2), and (a)(1)(B) of the Immigration and Nationality Act (8 USC 1324a (a)(1)(A), (a)(2), and (a)(1)(B)).

2. The complaint alleges specifically one (1) KNOWLEDGE violation (or, alternatively, continuing to employ) of the Act,¹ and twelve (12) VERIFICATION violations.²

3. In the complaint the INS asserts that it seeks the relief specified in the NIF. The NIF warns that the INS will seek an order requiring Respondent Vanounou (1) to pay a civil money penalty totaling \$7,500³ and (2) to cease and desist from KNOWLEDGE violations.

4. By its March 24, 1989 motion, Complainant INS seeks a partial summary decision (1) imposing a civil money penalty of \$5,500 for

¹Section 274A(a)(1)(A) of the Immigration and Nationality Act (the Act) [8 USC 1324a(a)(1)(A)] makes it unlawful after November 6, 1986 for a person or other entity to hire, or to recruit or refer for a fee, an alien for employment in the United States, knowing the alien is unauthorized to work in the United States. Section 274A(a)(2) [8 USC 1324a(a)(2)] makes it unlawful for a person or other entity who, after hiring an alien so unauthorized, to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

²Section 274A(a)(1)(B) [8 USC 1324a(a)(1)(B)] makes it unlawful to hire an individual for employment in the United States without complying with the verification requirements (on Form I-9) of 8 USC 1324a(b), as implemented by the regulations of the Attorney General at 8 CFR 274a.2. Section 274A(b)(3) [8 USC 1324a(b)(3)] of the Act requires the employer or referring entity to retain, for a specified period, the verification form (Form I-9) and make it available for inspection by officers of the INS or the Department of Labor. The regulation covering retention by the employer and inspections by the INS appears at 8 CFR 274a.2(b)(2).

³\$1,500 for the single alleged KNOWLEDGE violation and \$6,000 for the twelve (at \$500 each) alleged VERIFICATION violations.

11 of the alleged verification violations⁴ and (2) ordering Respondent Vanounou to comply with the Act's verification requirements for 3 years commencing on the date of the partial summary decision. The motion is supported by copies of various discovery documents plus a March 22, 1989 statement ('`Declaration'') by Special Agent Allen Ray Hughes made pursuant to 28 U.S.C. 1746.⁵

5. The INS conducted inspections of Respondent's records on June 14, 1988 and June 27, 1988. These inspections revealed, and I find, tardy completion dates of I-9 forms as follows:⁶

Employee	Date of hire	I-9 dated
Claudia Yedire Aguirre	6-1-88	6-13-88
Billy Joel Crews	5-2-88	6-27-88
James Dimodica III	4-3-88	6-13-88
Carlos S. Macias	6-1-88	6-13-88
Christy Leigh Shiffleh	5-31-88	6-13-88

6. In his March 22, 1989 declaration, Special Agent Hughes asserts (paragraph 3) that on June 9, 1988 INS Special Agents Luckey and Moreno personally served on Respondent Vanounou a notice of inspection setting the inspection of Respondent's I-9 forms for Tuesday, June 14, 1988. Hughes also asserts (paragraph 6) that on June 22, 1988 Special Agents Leal and Ayala personally served on Respondent Vanounou an administrative subpoena duces tecum requiring the production of various documents. The June 9, 1988 notice apparently was issued to comply with the applicable regulation requiring a notice of at least 3 days before an inspection. 8 CFR 274a.2(b)(2)(ii). Complainant fails to attach copies of the notice or of the subpoena Hughes describes, and there is no affidavit or declaration by any of the serving special agents confirming the service described by Hughes. The assertions of Hughes appear to be hearsay, and Claimant makes no argument that any hearsay exception applies.

7. The 3-day notice requirement is merely a protection an employer may raise at the time of inspection. I find that it is not a

⁴A dispute remains concerning the twelfth alleged verification violation, involving Paula Levy-Hokek, and the single alleged knowledge violation involving the same Levy-Hokek.

⁵Under 28 USC 1746, unsworn declarations made under the penalty of perjury may substitute for an affidavit.

⁶With certain allowed grace periods, the regulations promulgated under the Act required verification of documents and completion of I-9 forms by employers within three (3) business days of an employee's hire. 8 CFR 274a.2(b)(1)(ii)(vi).

jurisdictional requirement which must be proved in support of the Complainant's motion here.

8. On June 27, 1988 Vanounou told INS Special Agent Allen Ray Hughes that in April or May 1988 Respondent's accountant, Will Cabler, had provided Respondent with some blank I-9 forms and informed Vanounou that Vanounou needed to complete an I-9 form for each of his employees. On June 27, 1988 Vanounou admitted to Hughes that he, Vanounou, had failed to document the required I-9 forms for six (6) employees: Steve L. Andrews, Arthur Bryan Diamond, Chevy Gonzalez, Maria Moreno, Sherri St. John, and Rich D. Tarpey. Respondent's records reflect that the six employees were hired between March 15, 1988 and April 22, 1988. At the June 14 and 27, 1988 inspections Respondent failed to produce completed I-9 forms for these six employees. Employers must produce completed I-9 forms for inspection by officers of the INS or the Department of Labor. 8 USC 1324a(b)(3); 8 CFR 2741.2(b)(2)(ii).

9. The potential civil money penalty assessable for each violation of the Form I-9 verification requirement ranges from \$100 to \$1000. 8 USC 1324a(e)(5); 8 CFR 274a.10(b)(2).

10. In setting a fee of \$500 for each verification violation, Special Agent Allen Ray Hughes, in his March 22, 1989 declaration, asserts that he considered the five following factors:⁷

- (a) the size of Respondent's business;
- (b) Respondent's good faith;
- (c) the seriousness of the violation;
- (d) whether the individuals were unauthorized aliens; and
- (e) whether Respondent has a history of previous violations.

11. In considering the statutory factors listed above, Special Agent Hughes considered the violations to be serious because they could have allowed an unauthorized alien to be employed. Hughes particularly noted Respondent Vanounou's lack of good faith in failing to comply with the verification requirements after his own accountant furnished him the I-9 forms and told him to complete one for each affected employee.⁸ Hughes determined that a penalty of \$500 for each verification violation was reasonable. In light of the foregoing, and the fact that the Respondent offered no counter-

⁷The factors are specified in the statute, 8 USC 1324a(e)(5), and the regulations, 8 CFR 274a.10(b)(2).

⁸At page 4 of his declaration, Special Agent Hughes asserts that he considered the size of Respondent's two retail apparel stores. Unfortunately, no data is given concerning the size of the business either in absolute terms or in relation to other businesses in that industry, nor does Hughes describe what weight he assigned to the size factor or how he balanced that factor. Accordingly, I attach very limited weight to his consideration of the size factor.

vailing considerations, and noting that the \$500 figure is only half the maximum allowable penalty, I find \$500 to be a reasonable penalty for each violation.

Conclusions of Law

1. Respondent's failure to complete I-9 forms for the following five employees within three (3) business days of each employee's respective hire date constitutes five separate violations of 8 USC 1324a(a)(1)(B) and 8 USC 1324a(b):

Claudia Yedire Aguirre
Billy Joel Crews
James Dimodica, III

Carlos S. Macias
Christy Leigh Shiffleh

2. Respondent's failure to produce completed I-9 forms during the INS inspections of June 14, 1988 and June 27, 1988 for the following six employees constitutes six distinct violations of 8 USC 1324a(1)(B) and 8 USC 1324a(b):

Steve L. Andrews
Arthur Bryan Diamond
Chevy Gonzalez

Maria Moren
Sherri St. John
Rich D. Tarpey

3. Complainant's requested civil money penalty of \$500 for each of the 11 violations of the Act, a penalty amount I have found reasonable, falls within the \$100 to \$1000 range statutorily permitted, 8 USC 1324a(e)(5).

On these Findings of Fact and Conclusions of Law, I GRANT the Complainant's motion for partial summary judgment. CONSEQUENTLY, I ORDER Gauriel Vanounou, d/b/a Surf's Up Custom-T-Shirts, to:⁹

1. COMPLY WITH the employment eligibility verification requirements of the Act, 8 USC 1324a(a)(1)(B) and 8 USC 1324a(b), for a period of 3 years commencing on the date of this order.

2. PAY A CIVIL MONEY PENALTY within 14 days from the date of this Partial Summary Decision in the amount of \$5,500 in the form of cash (personal delivery only), cashier's check, certified bank check, or money order payable to the ``Immigration and Naturalization Service'' and deliver such payment to: Roy G. Sutton, Assistant District Director for Investigations, 2308 South 77 Sunshine Strip, Suite 7, P.O. Box 1711, Harlingen, Texas 78551.

Material issues of fact exist as to the two remaining allegations (one knowledge allegation and one verification allegation). These two allegations remain for trial or other disposition. The hearing

⁹Review of this final order may be obtained by following the procedure set forth at 28 CFR 68.52(a).

as to those two allegations remains indefinitely postponed by my order of January 19, 1989.

SO ORDERED: This May 4, 1989 at Atlanta, Georgia.

RICHARD J. LINTON
Administrative Law Judge