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

United States of America, Complainant, v. Felipe, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100151.

ORDER FOR CIVIL MONEY PENALTY FOR PAPERWORK VIOLATIONS

On July 31, 1989, the parties to this proceeding entered into a stipulated agreement on all issues of liability. In an Order dated August 1, 1989, I approved a joint motion for a settlement agreement containing consent findings pursuant to 28 C.F.R. § 68.10. The consent findings included an admission, by Respondent, through counsel, of liability on two counts of the Complaint.

With respect to Count I, Respondent admitted that it hired a person named Juan Antonio Toquero del Vado knowing that he was an alien unauthorized to work in the United States. In a stipulated agreement worked out subsequent to its admission of liability on Count I, Respondent agreed to pay a $1,000.00 penalty in full settlement of all claims regarding Count I.

Respondent also admitted liability with respect to Count II. Count II consists of eight separate violations of failing to properly prepare and present Employment Eligibility Forms, or Forms I-9. Though it admitted liability in failing to properly prepare and/or present the eight I-9 Forms as charged in Count II, Respondent did not agree to pay the amount of civil penalty that Complainant, as represented by the U.S. Immigration and Naturalization Service (``INS''), proposed. In subsequent efforts to negotiate the amount of penalty for Count II, the parties failed to reach an agreement.

Thus, the sole issue that remains for me to decide in this case is what amount of penalty is appropriate for the paperwork violations contained in Count II. For reasons of administrative efficiency, and by agreement of the parties, an evidentiary hearing on the facts relevant in considering arguments for and against mitigation of penalty was thought unnecessary. In lieu of a hearing, both parties submitted briefs and sworn affidavits in support of their respective positions.

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 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 $100.00 and not more than $1000.00 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).

This statutory language is virtually mirrored in the regulations as drafted by INS. See 8 C.F.R. § 274a.10(b)(2).

RESPECTIVE LEGAL POSITIONS OF PARTIES

(a) Complainant Argues in Support of a Civil Penalty of $500.00 Per Violation, or $4,000.00 for the Totality of Count II.

In its analysis of the issue that is before me, Complainant argues in support of a civil penalty that is exactly one-half of the statutory maximum. At the outset of its argument, Complainant emphasizes that the administrative law judge is not bound by the dollar figure that is proposed by the charging party but may, in his or her discretion, decide upon a civil penalty that is higher than the proposed amount.

Complainant argues that it considered all the facts and circumstances of Respondent's violations in reaching the amount of penalty that it proposes, and in its supporting memorandum of law it methodically sluices its argument through the five mitigating factors set out in the statute and regulations. See, § 1324a(e)(5); and 8 C.F.R. § 274a.10(b)(2)(i-v).

Complainant argues that Respondent did not demonstrate good faith in its effort to comply with the record-keeping provisions of IRCA. Complainant represents Respondent as having stated, at the time of the INS educational visit, that it knew about IRCA's record-keeping requirements. Complainant also asserts that Respondent made a belated effort to comply with IRCA only under the pressure of an INS audit and that its violations are not the result of carelessness, but are instead the result of its ``disdain or gross disregard of the employer sanctions requirements.'' In this regard, Complainant argues that Respondent did not manifest the requisite good faith to merit mitigating the penalty for the paperwork violations.

Complainant further argues that Respondent's admission of liability is serious because it failed to prepare any Forms I-9 for the

eight individual employees named in Count II. In addition, Complainant argues, Respondent failed to present the Forms I-9 for the same eight employees. Complainant contends that these violations are serious because they frustrate the ability of INS to verify an employer's compliance or non-compliance with IRCA.

Complainant goes on to argue that the administrative law judge should take any hiring violations into account in determining the amount of penalty because ``the hiring violation shows the seriousness of the employer's manner of conduct and the lack of mitigating factors.'' In support of this argument, Complainant relies on a portion of legislative history which it argues is indicative of Congressional intent. In the view of Complainant, Congress intended that, where an employer has violated recordkeeping requirements, IRCA ``provides that violations of the hiring prohibition in the bill shall be considered in assessing the level of the civil fine to be imposed.'' See, House Conf. Rep. 99-1000, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS: vol. 6, at 5844.

For these reasons, Complainant urges that the seriousness of Respondent's violations do not warrant mitigating the penalty amount.

With respect to whether the individuals named in the paperwork violations were unauthorized aliens or not, Complainant states straightforwardly that the ``record is void of any information that would establish whether or not the employees who are the subject of record-keeping violations . . . are aliens or citizens of the United States. As a result, INS is unable to verify the employment status of these employees.''

Complainant concedes that Respondent has no prior history of previous IRCA violations.

With respect to size of the business, Complainant urges that ``it is crucial that a court avoid the inference that a lack of business profitability is proper justification for reduction in the penalty amount.'' In other words, Complainant argues, the size of the employer's business should not be equated with profitability. Instead, Complainant argues that business size ``is a reflection of the business' ability to generate income and the size of the business work force.''

b) Respondent Argues in Support of A Civil Penalty of $100.00 Per Violation or $800.00 in Full Settlement of Count II.

In its analysis of the issue that is before me, Respondent argues in support of a civil penalty that amounts to the statutory minimum. Respondent argues in support of mitigation of penalty on the grounds that it is a small enterprise which has not made a profit since its first year of operation in 1985. Respondent also argues

that the employees for whom the Forms I-9 were not properly prepared or presented were not unauthorized workers. In addition, Respondent argues that the employees for whom the Forms I-9 were not properly prepared or presented were not unauthorized workers. In addition, Respondent argues that its failure to ``submit'' the Forms I-9 for those employees was due to ``misunderstanding'' and not a ``willful disregard of his duty as an employer.'' This ``misunderstanding'' is, in the view of Respondent, the ``result of ignorance and mistake,'' and includes the ``impression that compliance was delayed'' for employment eligibility verification.

LEGAL ANALYSIS AND CONCLUSIONS

The issue raised by the parties in this proceeding is an issue of first impression for me. I have not previously been asked to determine the specific disputed amount of monetary penalty in an employer sanctions proceeding. In arriving at my decision in this case, I intend to suggest an analytic approach to ascertain the amount of civil penalty that is appropriate in a proceeding involving paperwork violations, and to apply it to the facts of this case.

In determining the amount of penalty that is appropriate in this case, I am required by the language of the statute to give ``due consideration'' to the five enumerated factors specified in section 1324a(e)(5).[1] The statutory maximum for amount of penalty is $1,000.00 See, section 1324a(e)(5). The statutory minimum is $100.00. Id. The difference between these statutory amounts is equivalent to the maximum amount of possible mitigation and equals, obviously, $900.00.

It is my view that, in order to narrow the specific focus of ``due consideration'' of mitigating factors, the five enumerated factors of mitigation can be divided into the maximum amount of possible mitigation. Thus, I intend to divide 5 (factors) into 900 (dollars) and, in a mathematical process something short of the formulas of Steven Hawking,[2] arrive at a figure of $180.00 per mitigating factor.

Accordingly, I intend to analyze the arguments of the parties in terms of how they respectively allocate particularized factors of consideration within each of the five statutorily mandated categories of mitigation and, thereafter, to fractionalize the $180.000 amount in proportion to the persuasiveness of the respective arguments. That, as I see it, is the easy part.

The difficult part, in my view, is determining the definitional scope of the language used by Congress (and faithfully reiterated

[1] "Due consideration'' requires that I ``give such weight of significance to a particular factor as under the circumstances it seems to merit, and this involves discretion.'' See, BLACK'S LAW DICTIONARY 261. (5th ed. 1983).

[2] See e.g., A Brief History of Time, (Bantum 1988).

in INS regulations) in its effort to express the public values that it deemed necessary to duly consider in deciding an appropriate penalty for paperwork violations. In other words, it is important to ask what is the most practical meaning to give to the terms ``size of the business,'' ``good faith of the employer,'' and ``the seriousness of the violation,'' in the context of deciding cases involving the unlawful employment of aliens pursuant to § 1324a?[3]

In trying to render a decision that resolves the case at bar and is prospectively useful in contributing to the slow evolution of this law, I have considered the legislative history of § 1324a(e)(5) and previous OCAHO case law decisions.

Unfortunately, I discovered very little in the legislative history that is useful in assisting with an interpretive clarification of the language used by Congress in § 1324a(e)(5).

Previous OCAHO case law decisions have interpreted some of the language in § 1324a(e)(5). For example, Judge Morse held that ``'carelessness,'' as distinguished from ``disdain or such gross disregard of the employer sanctions program as to imply malevolence'' is ``tantamount to good faith.'' See, United States of America v. Big Bear Market (OCAHO Case No. 88100038) (ALJ Morse Dec., March 30, 1989)), at 32. In assessing the statutory language regarding ``the seriousness of the violation,'' Judge Morse aggregated and contextualized the 135 record-keeping violations in the case and concluded that they were not serious because they were ``unaccompanied by charges of unauthorized employment.'' Id. In giving content to the ``size of the business'' as a mitigating factor, Judge Morse appears to have essentially equated that language with the size of the company ``payroll.'' Id.

Judge Frosburg recently issued a decision in which, amongst other things, he addressed the issue of civil monetary penalties for record-keeping violations. See, United States of America v. Sophie Valdez, d.b.a. La Parrilla Restaurant, (OCAHO Case No. 89100014) (J. Frosburg, September 27, 1989)). In La Parrilla, Judge Frosburg took into consideration the number of employees, the physical size of the business, and the past and present profitability of the business activity. He found that the sole proprietorship restaurant with

[3]I do not find, at this stage, that the other two mitigating criteria, as spelled out in § 1324a(e)(5) (i.e. the history of previous IRCA violations, and evidence that the individual named in the Form I-9 is an unauthorized alien), suggest the same degree of semantic ambiguity that these other specified words suggest. In this respect, they are comparatively much easier to apply. There is either evidence of prior IRCA violations, or there is not. The individual for whom an I-9 was not properly prepared or presented is either an unauthorized alien (a term which is carefully defined in INS regulations) or they are not.

an employee work force of approximately three persons demonstrated such limited profitability that it was best characterized as a small business. Id. at 23. In considering ``good faith,'' Judge Frosburg appears to consider evidence that Respondent therein ``experienced problems with several governmental agencies'' and concluded that Respondent lacked a ``strong showing of good faith'' because she exhibited a ``lack of control over the day to day operations of the business.'' Id. Similar to Judge Morse, as outlined above, Judge Frosburg seems to consider `'the seriousness of the violation'' as requiring an aggregated reading of the violations in the seriousness of their totality. He also states that ``it is . . . appropriate here to consider the employees for whom I-9 Forms were completed correctly and the circumstances under which they were properly completed.'' Id. at 24.

These decisions are helpful in understanding the scope of the statutory language used in § 1324a(e)(5). I intend to contribute to the further clarification and application of this language by considering each of these factors of mitigation in the order that they appear in the statute and regulations.

(i) the size of the business of the employer being charged

The size of business of an employer who has violated IRCA's record-keeping provisions is a relevant mitigating factor to consider because the purpose of the civil monetary penalty is, as I see it, to legally induce, through a reasonably proportioned fine, uniform compliance with a new immigration law that applies across-the-board to all employers. In other words, the size of an employer's business is a relevant factor to consider because any employer that fails to comply with the record-keeping provisions of IRCA shall be penalized for its omission of a duty enjoined by federal statute and regulation, and each business should be fined in equitable proportion to whatever statutorily permissible disincentive is necessary to encourage compliance.

It should be clear that a statutory minimum amount of monetary penalty, all other relevant considerations being equal, would no doubt be ``felt'' differently by a marginally operational ``Mom & Pop'' than it would by a large corporate business. While the record-keeping omission may be exactly the same in both instances, the point of the civil monetary penalty is to, in effect, punish the employer for failure to comply, and it is clear, to me, that this punishment may impact the economic capabilities of a sole proprietor to a far greater degree than it would a corporation with several hundred employees. As stated, the point of the penalty is certainly not to put anybody out of business, or even to cause any substantial economic intrusion on the normal functioning of business decision-

making, but to foster required compliance with IRCA through appropriate disincentive mechanisms that would, hopefully, deter or at least discourage future non-compliance.

Accordingly, I intend to interpret and apply ``size of the business'' as including, but not limited to, a showing of, most significantly

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

In the case at bar, Respondent, states, through the affidavit of the restaurant owner, Mr. Philip Monino, that in its first year of business, 1985, the restaurant lost $78,576.00; in 1986, Respondent lost $28,352.00. In 1987, the taxable income was $3,400.00. In 1988, the taxable income was $9,806.00.

Mr. Monino indicates in his sworn statement that he is a part-time manager of the restaurant and receives no salary for his services rendered. He indicates that the restaurant employs nine (9) full-time employees, including his daughter, Ms. Maria Smeraldo, who also submitted a sworn affidavit on behalf of Respondent.

In her sworn affidavit, Ms. Smeraldo indicated that she is employed in the restaurant as a full-time manager and that she receives a salary of $1,000.00 for her services. (She also indicates that, as one of two business shareholders (the other shareholder is Mr. Monino), she has never received any dividends on her investment.

An examination of Respondent's income tax returns for the years 1985-1988 indicate that Respondent reported wages and salaries paid out to employees as follows: in 1985, Respondent paid out a reported $63,185.00; in 1986, Respondent paid out a reported $90,957.00; in 1987, Respondent paid out a reported $76,569.00; in 1988, Respondent paid out a reported $55,443.00.

The record also reveals relevant information concerning the number of employees who were reported by Respondent in its Employer's Quarterly Report of Employee's Wages. An examination of these Reports indicates that the largest number of employees at any given point in time was 24, as reported on June 30, 1987. In the September 1988 Report, Respondent reported that it had 22 employees.

As stated, there are basically two shareholding owners of the business, Mr. Monino and his daughter. In their affidavits, Mr.

Monino and Ms. Smeraldo indicate that they have made an investment into the business of $35,000.00. In addition, they loaned the business $98,397.00.

As stated, the restaurant was opened in 1985, and has apparently been in continuous operation since that time. In addition, Mr. Monino states in his affidavit that the restaurant seats 65 persons at its capacity.

Having considered all these factors, I conclude that Respondent's ``size of business'' is best viewed as being small. In this regard, it is my view that Respondent's civil penalty for paperwork violations should be mitigated in the full amount of $180.00 per violation. I hold this view because I do not think that Respondent's closely-held restaurant business is, as yet, at a stage of growth and development where a non-mitigated fine would substantially enhance the probability of compliance with IRCA's record-keeping provisions. None of the factors discussed above indicate, to me, anything more than a growing but relatively new, closely-held, family restaurant with fewer than ten full-time employees.

In reaching this conclusion, I considered carefully Complainant's arguments against mitigating penalty on account of a lack of business profit. While I agree with Complainant's statement that ``the size of the employer's business should not be equated with profitability,'' I do not view a consideration of a business' profit margin to be a wholly irrelevant factor in assessing the ``size of the business.'' I want to be careful, however, about relying too heavily on profitability as a proper criterial factor in assessing an appropriate penalty amount, because it is my view that some business decision-makers might not show as big a profit as they could have been expected to for the reason that such moneys were, for example, spent on higher salaries or other types of business employment enhancements.

Accordingly, insofar as the statutory maximum of monetary penalty amount for a first violation of eight separate record-keeping violations can only be $8,000.00 ($1,000.00 x 8 violations), I intend to mitigate the penalty amount $1,440.00 ($180.00 x 8 violations) based upon the size of the business because it is my view that Respondent's restaurant is a small business.

(ii) the good faith of the employer

``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 definitions of the term ``good faith,'' including potentially fruitful analogies which might be drawn from decisions interpreting and distinguishing ``good faith'' from ``best efforts'' in bankruptcy proceedings. See

e.g., In re Warren, 89 B.R. 87, 93 (9th Cir. BAP 1988); Goeb v. Heid (In re. Goeb), 675 F.2d 1386, 1389-90 (9th Cir. 1982). After looking at several of them, however, I suggest, and 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 what IRCA requires and to act in accordance with it. See e.g., E.E.O.C. v. First Citizens Bank of Billings, 758 F.2d 397, 403 (9th Cir. 1985), cert. denied, 474 U.S. 902, 106 S. Ct. 228 (citing to Laffy v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086, 98 S. Ct. 1281)) (cases interpreting the application of ``good faith'' in the context of the Equal Pay Act).

This suggested standard contains both a subjective component (honesty) and an objective component (reasonableness). For the purpose of mitigating civil penalties for record-keeping violations, the crux of the definition is less on a specific act in accordance with IRCA (a question which is clearly appropriate for determining liability), and more on whether an employer honestly and reasonably tries to ascertain the nature of its obligations under IRCA.

In its legal memorandum, Respondent argues, in effect, that its ``ignorance and mistake'' should be interpreted as mere ``carelessness'' and does not reflect ``disdain or such gross disregard of the employer sanctions program as to imply malevolence.'' In support of its legal position, Respondent cites to Big Bear, supra, which held that, as stated above, mere carelessness is ``tantamount to good faith.''

I do not intend to adopt this language used by Judge Morse in Big Bear, and, in any event, I find Respondent's argument that it has demonstrated ``good faith'' on the basis of ``ignorance and mistake'' to be a novel legal theory.

While not specifically finding that Respondent did not proceed with an honest intention,[4] it is my view that Respondent failed to exercise reasonable care and diligence to ``ascertain'' what its record-keeping obligations were under IRCA.

Respondent received, as it has admitted, an in-person educational visit from INS on April 4, 1988. According to the sworn affidavit of INS Special Agent Barry Levy, Respondent, in the person of Mr. Monino, informed INS that ``he was aware of IRCA's record-keeping requirements and would be in full compliance with the law.'' In his sworn affidavit, Mr. Monino admits that he ``knew he had a

[4]As stated above, we did not proceed in this case with a hearing on the issue of mitigating the penalty. In this regard, I am reluctant to draw any conclusions regarding a negative credibility finding regarding ``honest intention'' without having an opportunity to observe the demeanor of witnesses.

duty to complete the forms,'' but he was confused about the effective enforcement dates. See, Exhibit 4, at 2. At the time of the educational visit, however, Respondent also accepted a Handbook for Employers which contains information regarding the effective enforcement dates for the employer sanctions program. Apparently, Respondent did not have an opportunity to read this Handbook between April of 1988 and November of 1988.

In my view, it is not enough for Respondent to assert that it intended to comply with IRCA without some kind of showing that its efforts to ascertain the law's requirements were ``reasonable.'' Respondent's assertion that it was under a false ``impression'' about the enforcement date is simply not, in my view, a reasonable effort to ascertain the law's requirements, especially in light of its opportunities to clarify such uncertainties with INS personnel during the educational visit in April 1988. In this regard, it is my view that Respondent, notwithstanding its unsupported assertions to the contrary, does not have a reasonable excuse for not understanding when the enforcement dates became effective.

Moreover, generally speaking, I agree with Complainant that the Forms I-9 are not overly difficult to understand or complicated to fill out. In this regard, I note that Respondent does not, in its sworn affidavit, state what specific date in November it mistakenly believed the enforcement of sanctions became effective. I mention this because it is undisputed that the INS inspection took place towards the end of November, on the 22nd, to be specific. Moreover, Respondent does not dispute that INS gave it notice of the pending inspection. Respondent's effort to interpret such notice in a self-serving ambiguous manner is not, even if I accept it as credible, indicative of a reasonable exercise of due care and diligence to act in accordance with IRCA. Finally, the record also contains evidence of Respondent's last-minute and defective effort to comply with the record-keeping provisions of at least some its employees' I-9 Forms. Cf. United States v. Sophie Valdez d.b.a. La Parrilla Restaurant, supra (wherein, as stated, Judge Frosburg views the proper completion of other I-9 Forms to be a factor of consideration in assessing good faith).

Thus, when assessed in the totality of the circumstances, Respondent did not, in my view, manifest a good faith intention to ascertain and comply with IRCA's requirements. For these reasons, I do not think that Respondent is entitled to a mitigation of penalty for the Count II record-keeping violations on account of ``good faith of the employer.''

(iii) the seriousness of the violation

The literal language of the statute and the regulations clearly specify this factor of consideration in the singular. Both Judge Frosburg and Judge Morse have, as stated above, aggregated and contextualized their analysis of this factor of consideration. See, La Parrilla Restaurant, supra; and Big Bear Markets, supra. There may be sound reasons for this approach. I intend, however, to suggest another approach.

Consistent with the literal language of the statute and regulations, I am going to view the seriousness of the violation in the singular. In giving due consideration to this mitigating factor, I intend to analyze the specific violation, i.e. whether or not an I-9 form was filled out and presented; and if so, what is wrong with the form and what are the circumstances of that particular wrong.

It is my view that there are degrees of ``seriousness.'' In other words, a violation can range from very serious to utterly trivial. In giving some thought to what kinds of specific violations might be deemed ``serious'' vis-a-vis less serious, I suggest the following initial continuum.

In my view, 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 serious, 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.[5]

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[5]This ``continuum''is not exhaustive. For example, it is conceivable that an employer filled out part of a form, or did not fill out any part of the form, but instead attached photo-copies of the employee's documents to the form. I do not presently have a view on the seriousness of this kind of a violation. I offer the above suggested

In the case at bar, Respondent admits liability for failing to prepare any portion of an I-9 Form for eight employees. There is no indication in the record that Respondent made any effort whatsoever to verify the employment eligibility of these eight employees.

I consider each of these violations to be serious because a complete failure to prepare a Form I-9 is contrary to the letter and spirit of the employer sanctions program. Moreover, evidence which shows that I-9 forms were not completed for almost half a business' work force could, arguably, imply a type of discriminatory treatment which would also be prohibited under the law.

For these reasons, I consider each of the eight violations to be serious enough not to warrant any mitigation of penalty for Count II.[6]

(iv) whether or not the individual was an unauthorized alien

Respondent has asserted, without any specific corroboration that none of the eight employees named in Count II were unauthorized. Complainant has not rebutted this assertion. Insofar as Complainant has not substantially contested Respondent's assertion, I conclude that Respondent is entitled to full mitigation of penalty on this issue.

Accordingly, the penalty amount for the eight violations specified in Count II shall be mitigated another $1,440.00 ($180.00 per violation x 8 violations).

(v) history of previous violations by employer

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approach merely as an approach that can be worked with and filled in more completely on a case-by-case basis.

[6]In reaching this decision, I also considered, but did not find persuasive, Complainant's argument that Respondent's record-keeping violations, as charged in Count II, should be considered serious because Respondent also admitted liability for a ``knowing hire'' violation, as charged in Count I. In support of its argument, Complainant cited to one of the few places in the legislative history which discusses mitigation of penalty for record-keeping violations. As stated above, Congress in a House Conference Report, stated that IRCA ``provides that violations of the hiring prohibition in the bill shall be considered in assessing the level of the civil fine to be imposed.'' See, House Conf. Rep. 99-1000, 99th Cong., 2nd Sess., reprinted in 1986 U.S. Code Cong. & Admin. News: Legislative History, vol. 6, at 5844. Also, as indicated above, Judge Morse apparently follows this approach as well. See, Big Bear Market, supra. I do not agree. In my view, hiring violations are clearly and necessarily distinguishable from the issue of mitigating penalty under section 1324a(e)(5), except insofar as the particular record-keeping violation specifically relates to an employee known to be an unauthorized alien--in which case it is covered by another criterial consideration for mitigating penalty pursuant to regulation. See, 8 C.F.R. § 274a.10(b)(2)(iv). Thus, I simply do not agree with Complainant's argument that Respondent's record-keeping violation should be considered ``serious'' because Respondent violated the hiring prohibitions when it knowingly employed an unauthorized alien for whom no record-keeping violation was charged.

Though not specifically clear on its face, I am going to interpret this statutory and regulatory language as meaning no previous IRCA violations by employer. Consistent with this view, I find that nothing in the record before me indicates that Respondent has any prior IRCA violations. Accordingly, Respondent is, in my view, entitled to full mitigation of penalty in this regard. Therefore, as stated above, the penalty amount for the eight violations specified in Count II shall be mitigated another $1,440.00 ($180.00 per violation x 8 violations).

CONCLUSION

Based upon the foregoing analysis, I conclude that Respondent is entitled to full mitigation of penalty for each of eight record-keeping violations on account of (1) size of business; (2) no evidence that any of the eight charged employees were unauthorized aliens; and, (3) no prior IRCA violations by Respondent. I further find that Respondent is not entitled to mitigation on account of (1) good faith; and, (2) the seriousness of each of the violations.

Accordingly, I find that the appropriate amount of civil money penalty for Respondent's admitted violations is $3,680.00.[7]

SO ORDERED: This 11th day of October, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

[7]This dollar figure is arrived at as follows. The absolute statutory maximum for eight record-keeping violations is $8,000.00 ($1,000.00 x 8 violations). The absolute minimum is $800.00 ($100.00 x 8 violations). I have found that three of the factors of mitigation apply in full to each of the eight violations. (3 x 8 x $180.00 = $4,320.00). It is then necessary to subtract the amount determined in mitigation from the statutorily permissible maximum. ($8,000.00--$4,320.00 = $3,680.00.)