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

UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO CASE NO. 90100210
LORENZO ROBLES d/b/a LORENZO ROBLES ROOFING AND CONSTRUCTION, Respondent	)	

DECISION AND ORDER

JAMES M. KENNEDY, Administrative Law Judge

Appearances:

Janet M. Hartung and Lee Abbott,
for United States Department of Justice,
Immigration and Naturalization Service,
Complainant.

Clifford W. Brown,
for Respondent.

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I. *Introduction*

The instant proceeding was commenced by the United States of America pursuant to §274A of the Immigration and Nationality Act of 1952 (the "Act").

Throughout the 1970's and 1980's, Congress sought to reform the immigration laws in order to stem the perceived influx of illegal immigration. This goal was accomplished with the enactment of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. §1324a (1990)). IRCA effected several major amendments to the immigration statutes. Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 563 (9th Cir. 1989). One modification of particular significance is the addition of §274A to the 1952 Act. Among other things, §274A established a national employment eligibility verification system [at 8 U.S.C. §§1324a(a) (1)(B), (b)]. This verification system is designed to prevent unauthorized aliens from obtaining employment in the United States. Additional regulations which govern the application of the statutory provisions are contained at 8 C.F.R. §274a (1990).

IRCA's employment verification system instituted a novel enforcement mechanism by shifting part of the verification burden onto employers' shoulders. Mester Mfg. Co. v. I.N.S., supra. Hence the statutory and regulatory sections require employers to complete and retain employment eligibility verification forms ("I-9" Forms) for all employees who are hired after November 6, 1986. This is commonly referred to as the IRCA "paperwork" requirement.

The duty of securing employers' compliance with IRCA's paperwork requirement is delegated to agents of the Immigration and Naturalization Service ("INS"). See 8 C.F.R. §100 et seq (1990). INS agents are authorized by statute to conduct inspections of I-9 Forms which employers are required to keep for three years. See 8 U.S.C. §1324a(e)(2); 8 C.F.R. §274a.2(b)(2)(A). When the INS discovers a violation of the paperwork requirement, it may assess a civil monetary penalty which can range from a minimum of $100 to a maximum of $1,000 per violation against the offending employer. See 8 U.S.C. §§1324a(a)(1)(B), (b), (e)(5).

Prior to issuing a civil monetary penalty, the INS must notify the employer of its intent to impose a fine. The employer then has the right to request a hearing before an administrative law judge to contest the propriety of the penalty. See 8 U.S.C. §1324a(e)(3).

An IRCA administrative hearing instituted pursuant to an employer's request constitutes a formal adjudication and must be conducted in accordance with the Administrative Procedure Act. See 8 U.S.C. §1324a(e)(3)(B); also, Mester Mfg. Co. v. I.N.S., supra at 565; see generally 5 U.S.C. §554.

II. *Statement of the Case*

On June 7, 1990, the INS served a Notice of Intent to Fine ("NIF") upon Respondent Lorenzo Robles d/b/a Lorenzo Robles Roofing and Construction, a

roofing contractor in Lubbock, Texas. The NIF alleged that Respondent had failed to prepare or present I-9 Forms for forty-five (45) employees hired after November 6, 1986 in violation of §274A(a)(1)(B) of the Act and sought to impose a $22,500.00 civil penalty for the alleged violations. On June 21, 1990, Respondent, through his attorney, requested a hearing in this matter before an Administrative Law Judge.

The INS subsequently filed a Complaint, later amended, against the Respondent on June 29, 1990.

On August 6, 1990, Respondent timely filed an Answer in which he denied every allegation contained in the Complaint. In addition, the Answer alleged that the appropriate fine in this case, if warranted by the record, should not exceed the minimum amount.

On October 5, 1990, Respondent filed a First Amended Answer not only renewing his denials but asserting he is exempt from IRCA's paperwork requirement since his roofing labor was provided by independent contractors, not employees.

On December 6, 1990, I conducted a hearing on this matter in Lubbock, Texas. On March 6, 1991, Complainant and Respondent timely filed their respective briefs.

III. *Statement of Relevant Facts*

Respondent is a roofing contractor engaged in the business of installing new and replacement roofs on residential buildings. Respondent began this business sometime during June or July of 1987. Much of Respondent's roofing work is derived from certain general contractors who construct new homes in the Lubbock area. These general contractors commonly subcontract out certain types of work. Where Respondent has been selected to do a roofing job, he enters into a roofing subcontract with a general contractor. Respondent also contracts to replace roofs on existing residential homes. In the year preceding the hearing, Respondent estimates he had a total of approximately 100 to 150 roofing jobs.

Respondent has supplied income tax returns for the years 1987, 1988 and 1989. These documents indicate that his business sustained a net loss of $492.76 during 1987. In 1988, the business had net income totaling $19,402.93; in 1989, it had a net income of $8,355.85.

Respondent installs both "composition" and "cedar shake" roofs. The equipment necessary for installing this material consists of the following: hammers, knives, ratchets, strippers, pouches and tape measures. His workmen do not use air compressors or nail guns.

He personally hires his roofing crews. His only employment prerequisite is that a roofer be experienced in roofing. On the average, Respondent has six to seven roofers working for him at any one time. These roofers all work on a single crew. Normally, they supply their own tools although he sometimes loans tools to them. Respondent's roofers do not usually drive their own trucks to the job sites; often, they ride to work with Respondent.

Respondent testified that he never negotiates with the roofers regarding their compensation rates. He merely informs them of the preset "by the square" rate. In turn, Respondent is also compensated on a per "square" basis by the general contractor. A "square" consists of four bundles of cedar shingles or three bundles of composition shingles. In terms of area, a "square" equals the number of shingles necessary to cover 100 square feet of roof.

Currently, Respondent pays his roofers $18.00 for laying one square of cedar shingles and $9.00 for each square of composition. Respondent estimates a "good roofer" can install about seventeen squares of composition shingles or about eight squares of wood shingles in any given day. From the general contractors, Respondent receives $25.00 per square for the installation of wood shingles and $15.00 per square for composition.

Respondent testified he can fire the roofers at any time; similarly, they can quit at any time. He stated that the nature of roofing work generally does not require him to supervise his roofers; it consists of simple manual labor: the roofers' only apparent task is to manually nail shingles onto roofs.

Respondent's roofers do not carry business cards and do not obtain performance bonds. They do not advertise nor do they maintain business offices. While it appears that the roofers can leave work at any time, there is evidence that they must first ask for Respondent's permission. Some of Respondent's roofers have never worked for any other roofing contractor. In addition, none of the roofers in this case have ever worked for more than one roofing contractor at any given time.

Most of the roofers who testified are clearly adults; one, however, is not. Orlando Robles, who has worked for Respondent for three years, is only seventeen. Thus, he first began to work for Respondent when he was fourteen. Moreover, Joe Felix Robles, now twenty-one, has worked for Respondent for two years. Therefore, it is clear that he started to work as one of Respondent's roofers while he was nineteen.

Since the inception of his business, Respondent has treated all his roofers as "independent contractors" for certain purposes. For example, Respondent annually issues Forms 1099 (Statement of Non-Employee Income) to the roofers. He also requested them to complete I.R.S. Form W-9 (Request for Taxpayer

Identification Number and Certification) instead of Form W-4. On many of the cash receipts and canceled checks made out to his roofers, he noted that the payments were for "contract roofing".

On the other hand, other receipts and canceled checks note that the payments were for the roofers' "labor". Respondent also maintained Workmen's Compensation for his roofers from 1988 until about September, 1990. During that time, one roofer received Workmen's Compensation for injuries which he sustained on the job.

IV. *Issues to be Decided*

Liability Issue: Whether Respondent's roofers are "independent contractors" for whom Respondent had no duty to complete Employment Eligibility Verification Forms.

Penalty Issue: What is the proper level of civil penalty which should be imposed upon Respondent if such a penalty is warranted?

V. *Liability Analysis*

A. *Elements of Paperwork Violation*

The elements for a violation of IRCA's employment verification provisions [8 U.S.C. §1324a(a)(1)(b)] are: a) a person or an entity, b) who hires an individual for employment in the United States, c) after November 6, 1986, d) without complying with the requirements contained in 8 U.S.C. §1324a(b).

There is no dispute between the parties regarding most of the liability elements in this case. Respondent, of course, has filled out no I-9 forms for any of the forty-five roofers named in the Complaint. The only real dispute in this case concerns the "hiring for employment" element. This dispute centers upon Respondent's claim that his forty-five roofers are independent contractors.

In its brief, Complainant argues that there is no genuine dispute regarding the roofers' status. Complainant asserts that Respondent has admitted the roofers to be "employees" in his response to a pre-hearing request for admissions. Yet, during the hearing, Respondent presented contrary evidence. Furthermore, even if I found that Respondent has admitted the roofers to be employees, such a statement is not necessarily conclusive on this particular issue despite the fact that it no doubt is highly probative. Any such admission does not preclude me from conducting an analysis of all the circumstances surrounding the case. Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2nd Cir. 1988) (which held a similar admission to be highly probative, but nevertheless conducted an analysis of all the surrounding circumstances).

Consequently, despite Complainant's contention that there is no disputed liability issue in this case, I proceed to analyze the "independent contractor" issue on its merits.

B. *Burden of Production*

In its brief, Complainant asserts that Respondent's independent contractor claim is in the nature of an affirmative defense and that Respondent therefore bears the burden of proof on the issue. Clearly it is a defense, but not an affirmative defense as that phrase is generally defined.

In the present case, the roofers' independent contractor status bears directly upon the question of whether the Respondent has hired them "for employment". This latter inquiry is part of Complainant's prima facie case. See United States v. Sophie Valdez d/b/a La Parrilla Restaurant, OCAHO Case No. 89100014, November 15, 1989 (Order Denying Complainant's Motion for Partial Reconsideration and Granting Complainant's Motion for Clarification), aff'd by CAHO, December 12, 1989; see also 8 U.S.C. §1324a(a)(1)(B). By asserting the independent contractor defense, Respondent simply seeks to controvert an element of Complainant's case. In this context, Respondent's exemption claim does not constitute an affirmative defense.

Nevertheless, Respondent does bear the "burden of production" with respect to the independent contractor defense. That is because Complainant has presented sufficient evidence to indicate the roofers in this case are statutory employees. That evidence includes the hire and termination list which Respondent submitted to the Complainant, as well as Respondent's response to complainant's first request for admissions. In view of the absence of dispute regarding the other liability elements, such evidence is adequate to establish a prima facie case of an IRCA verification violation against Respondent. It is also buttressed by the testimony of two of Respondent's former roofers. The burden to demonstrate that the roofers are independent contractor status therefore shifts to the Respondent. Cf. Donovan v. Tehco, Inc., 642 F.2d 141, 144 (5th Cir. 1981) (under Fair Labor Standards Act, burden to produce evidence of independent contractor status shifts to employer after government introduced wage transcriptions based on the employer's payroll records).

C. *Applicable Law*

Clearly, neither IRCA nor its regulations require an employer to complete I-9 forms for the independent contractors with whom it chooses to do business. IRCA itself imposes the obligation only with respect to employees. The INS regulations which mirror the statute specifically recognize the duty does not extend to independent contractors. 8 C.F.R. §274a.1(f). This is no doubt due to legislative history.

In my opinion that history impels the conclusion that an IRCA "employee" is synonymous with the definition of "employee" under federal labor laws, except for certain limitations such as those found in the National Labor Relations Act.[1] See H.R. Rep. No. 682, 99th Cong., 2nd Sess., pt. 1, at 45-46 (1986). Even under the NLRA,

however, an independent contractor is excluded from the definition of "employee."[2] N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 156 (1968).

That intent has additional foundation under the principle that words should not be stretched beyond their plain meaning, absent some statutory language to the contrary. According to Congress, the plain meaning of "employee" does not normally incorporate the concept of the independent contractor. H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947). As IRCA contains no language expanding the meaning, it is clear that there is no Congressional intent to cover independent contractors under that statute. That clearly led the INS to draft regulations which recognize the independent contractor exception to the "paperwork" obligation. Indeed, language to that effect is found in the INS "Handbook for Employers," p.7 (M-274).

Although the statute does not provide any guidelines for the determination of independent contractor status, the regulation which implements it does. After an initial reference to being an independent business, 8 C.F.R. §274a.1(j) lists seven nonexclusive items by which a claim of independent contractor can be measured. The rule itself recognizes its limitations and provides that other factors may be used.[3] Even though the words are somewhat different, in application they are really no different from the common law rules compiled in the Restatement (Second) of Agency, §220 (1958). The common law factors were specifically approved for use under Section 2(3) of the NLRA by the Supreme Court. N.L.R.B. v. United Ins. Co. of America, supra. Indeed, they are not dissimilar from the Supreme Court's "economic reality test" of United States v. Silk, 331 U.S. 704 (1947) (determining an employee not to be an independent contractor under the Fair Labor Standards Act). Under any of these nearly identical tests, no single factor is determinative, although it does appear that the degree of

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[1] Those limitations are intended to exclude certain types of workers from collective- bargaining units. They pertain to supervisors, agricultural laborers, domestics working in private houses and family members employed in a family business.

[2] Section 2(3) of the NLRA [29 U.S.C. §152(3)], added to the Labor Act in 1947, does not actually define the term, "independent contractor," but specifically excludes such individuals from the definition of "employee."

[3] The seven factors found in the rule are whether the worker: a) supplies the tools; b) makes his/her services available to the general public; c) works for more than one client at a time; d) has an opportunity for a profit or loss on the work in question; e) invests in the enterprise; f) directs the sequence of work; and g) determines the hours during which the work is to be done.

control is often given the greatest weight.[4] Under IRCA, as under the other tests, the question of "control" is whether the employer has the right of control, not whether it actually exercises control, over a worker's actions. Cf. Marvel v. United States, 719 F.2d 1507, 1514 (10th Cir. 1983).

In addition, since the seven enumerated IRCA factors appear to be generally patterned after common law indicia, other common law factors not listed by the IRCA regulation also may be applicable in determining the presence of independent contractor status in IRCA cases. Examples of such common law factors are: what is the level of skill required in the particular occupation; what is the method of payment (whether it is by the time or by the job); whether the parties believe they are creating an employer-employee relation; locality and/or industry practice; and whether the worker is in business for himself or herself. See, Restatement (Second) of Agency, supra.

D. *Conclusionary Findings*

Each of Respondent's current roofers stated that they could come or go as they please. In his brief, Respondent argues that such evidence demonstrates the roofers to be "independent contractors." I find the testimony unpersuasive.

Complainant called two of Respondent's former roofers as witnesses. They testified that Respondent had told them when to begin work in the morning. One testified he could leave the job site at any time but only after he had first asked Respondent for his permission (though Respondent usually granted it). The presence of such conflicting testimony does not establish that Respondent's roofers could control their own work hours.

But even if it is assumed that Respondent's roofers have the right to come or go as they please, it would still be insufficient to establish that the roofers "controlled" their own hours. The "right" to come or go as one pleases can easily be interpreted as a privilege rather than a right derived from their claimed status as independent contractors. This is especially significant in light of the relatively unskilled and fungible

nature of their roofing labor. It is clear that these roofers do not have the bargaining power to negotiate their own work hours. Therefore, the fact that the roofers are allowed a certain degree of freedom could just as well be due to the Respondent's liberal policy, rather than to the roofers' status as independent contractors.

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[4] Texas follows the common law and results under state law analysis would no doubt be the same. See Pitchfork Land & Cattle Co. v. King, 162 Tex. 331, 346 S.W.2d 598, 603 (1961); Sherard v. Smith, 778 S.W.2d 546 (Tex. Ct. App. 1989); and Home Interiors and Gifts, Inc. v. Veliz, 695 S.W.2d 35 (Tex. Ct. App. 1985).

In any event, freedom of movement is not incompatible with employee status. There is evidence that Respondent retains general supervisory power over the roofers despite the fact that they can usually 'come or go as they please'. For example: Respondent has exercised his discretion to allow one of his roofers to quit work earlier than usual; he has instructed several roofers regarding the correct method for laying roofing materials; and he usually is present at the work sites (he often works alongside the other roofers). This obviously outweighs the roofers' limited freedom of movement. See In Re Brown, 743 F.2d 664, 667 (9th Cir. 1984) (applying California law on independent contractors which also emphasizes the common law "control" test).

Given the skill level required to perform the work, Respondent normally would not have been required to give any instructions to the roofers regardless of whether they were statutory employees or independent contractors. The roofers never attended any formal courses of instruction before being hired since the job involves only manual labor. One roofer received all his roofing knowledge as a result of Respondent's instructions.

That the requisite skills here are low also tends to indicate that the roofers are not independent contractors. Independent contractor status often depends upon a sufficiently high level of skill such that the individual has bargaining power. These roofers do not possess a high degree of skill. The roofing work which they perform requires little instruction and consists almost entirely of manual labor. Their only function is to provide their individual labor (unlike Respondent, who has contracted to provide crews of roofers). Hence, the roofers' labor constitutes "routine work". Courts have often held that workers' ability to independently perform "routine work" is not indicative of nonemployee status. See Mitchell v. John R. Crowley & Bro., Inc., 292 F.2d 105, 108 (5th Cir. 1961). In this context, it is difficult to envision these roofers as independent contractors.

The evidence shows that none of Respondent's roofers has actually engaged in simultaneous jobs with other roofing contractors. Furthermore, none has sought to provide his services to the general public at any time. They do not carry business cards; they do not advertise their services nor do they maintain any business offices. Such evidence indicates that there is insufficient entrepreneurial motive on the part of the Respondent's roofers to warrant their being considered "to be in business for themselves."[5]

Similarly, there is little indication that the roofers have any profit motive. There is no evidence which shows the roofers to have the opportunity for profit or loss.

[5] The fact that two of the roofers were teenagers at the time they first began to work for the Respondent also strongly indicates that they could not have been independent contractors. It is particularly difficult to conceive of any entrepreneurial motive on the part of a fourteen year old working for his brother's business.

Specifically, they do not have the chance to obtain greater profit for themselves by substituting cheaper building materials since the materials are always provided to them; they also never negotiate with Respondent regarding their compensation. In fact, Respondent presets the rate of compensation. These facts are consistent with Complainant's assertion that the roofers are statutory "employees" of the Respondent.

Although the roofers here are required to provide their own tools, that does not show they are genuine independent contractors. The tools are basic and relatively inexpensive (evidence indicates that the tools cost between $75.00 and $100.00 for each roofer). Therefore, the fact that the roofers provide their own tools does not greatly aid the Respondent's argument. Employers commonly require employees to provide their own hand tools.

There is no evidence that the roofers have made any monetary investment in any enterprise related to their work.[6] Consequently, this factor tends to point to the fact the roofers are Respondent's employees.

Respondent's roofers do not contract to do a particular roofing job for the Respondent. Rather, they generally work on several consecutive jobs without any specified time of termination. Hence they are not paid by the job. Instead, they are paid according to the number of roofing squares laid. Payment by the square resembles the practice of paying factory employees by the total number of pieces manufactured by each employee, i.e. "piecework".

Respondent argues in its brief that there is voluminous testimony to the effect that the roofers "controlled" their own work and movements;
that therefore they were working for themselves. Despite such testi- mony, Respondent has not presented sufficient evidence to demonstrate that the roofers are independent entrepreneurs. The testimony shows Respondent did not impose stringent working conditions upon his roofers (i.e. he may have allowed his roofers to come to work at their own choosing); yet, that license does not demonstrate that the roofers exercised any independent judgment regarding any aspect of roofing work except in the most rudimentary sense.

Likewise, there is also thin evidence that both the roofers and Respondent consider themselves to be in an independent contractor relationship. That is supported by the income tax treatment and be the fact that other roofing contractors in the area commonly follow an independent contractor format when using roofers. Yet that evidence is offset by stronger evidence tending to show

[6] During the hearing, all the roofers testified that they have never obtained performance bonds as insurance against defective workmanship.

that Respondent considers them to be employees.[7] For example, certain pay receipts indicate they were issued for "labor" rendered by the roofers; Respondent also maintained workmen's compensation insurance for the roofers (one roofer had actually collected for a job-related injury). Finally, although many of the witnesses testified that they view themselves as independent contractors, that evidence has been contradicted by other testimony given by Respondent's former roofers who were called to testify by the Complainant.

Respondent's argument also fails for the entire record does not demonstrate the roofers possess sufficient entrepreneurial motive and bargaining power. Whether a worker has sufficient "entrepreneurial interest" in his or her working arrangements is an important inquiry the common law "control test" for independent contractor status. See Lucky Stores, 243 NLRB 642, 644 (1979); see also Bricklayers Local 6 (Key Waterproofing), 268 NLRB 879, 882 (1984).

There is a paucity of cases which address the issue of independent contractor specifically dealing with roofers. Research has disclosed one NLRB case involving a roofing company which employed roofing crews which it claimed were independent contractors. Better Building Supply Corp., 259 NLRB 469 (1981).The facts of Better Building Supply are sufficiently similar to the case at hand to warrant a comparison between them.

In Better Building Supply, the respondent roofing company ("company") marketed a "polyester cold processing" roofing system. After obtaining a roofing job, the company then contracted the work to certain subcontractors who did the work themselves, but sometimes hired their own roofing crews. All roofers were expected to provide their own tools. They were also paid by the square at a rate preset by the company. It appears that the roofing workers in Better Building Supply possessed a greater degree of skill in the performance of their work when compared to the roofing workers in this case. While the roofing "subcontractors" were free to seek other work, they never did so. Further, the roofing material was invariably furnished to them at no cost thus depriving them of an opportunity to obtain profits by substituting cheaper materials. Under such circumstances, the Board held that the roofing subcontractors were actually employees of the roofing company.

All of the indicators of employee status listed in Better Building Supply are also present here. It therefore lends support to Complainant's contention that Respondent's roofers are not independent contractors.

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[7] Cf. Stone v. Pinkerton Farms, Inc., 741 F.2d 941, 943 (7th Cir. 1984) Under such circumstances, the Board held that the roofing subcontractors were actually employees of the roofing company.

In view of the entire record of this case, and after considering the various relevant indicia, I find the forty-five roofers who are the subjects of this case to be Respondent's "employees" as defined by IRCA.

Since Respondent has admitted that he did not complete any I-9 Forms for the forty-five employees who are the subjects of the current proceeding, I must find Respondent to have violated 8 U.S.C. §1324a(a)(1)(B) when he failed to comply with IRCA's employment eligibility verification requirements for the forty-five roofers named in the Complaint.

Based upon all the evidence presented by the parties, I hereby make the following:

E. *Conclusions of Law*

a. On or after November 6, 1986, Respondent hired the following forty-five (45) individuals for employment in the United States and failed to complete Forms I-9 for each of them.

1. Eddie Arriaga
2. Juan J. Arriaga
3. Elias Ayala
4. Steve Ballesteros
5. Ricardo D.J. Banos
6. Anthony Davila
7. Gregorio De Leon
8. Frankie Dorsett
9. De Salud Flores
10. Dimas A. Flores
11. Manuel Flores
12. Nicanor Franco
13. Juan S. Garcia
14. Demetrio Gonzalez
15. Valdemar Gonzalez
16. Raymundo Guerro or Raymond Grera
17. Johnny Lazo
18. Isreal Lucio
19. Pablo Lucio
20. Gilbert Martinez
21. Rudy Martinez
22. Salvador Menjivar
23. Daniel Moreno, Jr.
24. Roy Moreno
25. Jesse Orschell
26. Max Ortega
27. Dennis Perez
28. Toby Pesina
29. Carl Pugh
30. Vincente Ramirez
31. Noel Rivera
32. Joe Felix Robles
33. Orlando Robles
34. Valentino Robles
35. David Rodriguez
36. Juan Rodriguez
37. Gonzalo Rojas, Jr.
38. Armando Rugio
39. Robert Salazar
40. Silvino Siliano
41. Dusty Skidmore
42. Carlos Tovar
43. Erminio Tovar
44. Fidencio Vicuna
45. Daniel Villarreal

b. The acts described in paragraph A. above constitute violations of 8 U.S.C. §1324a(a)(1)(B) as a breach of the duties and obligations of an employer to

comply with the verification of employment eligibility and inspection requirements as set forth in 8 U.S.C. §1324a(b).

VI. *Penalty Determination*

Having found Respondent to have breached IRCA's employment verification provisions, I next consider the appropriate civil monetary penalty which is to be imposed.

IRCA lists five factors which can either mitigate or aggravate the amount of the penalty which should be levied against an employer for paperwork violations. They are: 1) the good faith of the employer; 2) the employer's history of previous IRCA violations, if any; 3) his size;

4) the seriousness of the current violations; and 5) whether the individuals for whom I-9 Forms were not properly completed were actually unauthorized aliens. See 8 U.S.C. §1324a(e)(5).

A. *Respondent's Good Faith*

Respondent has attempted to demonstrate that he has complied with IRCA's paperwork requirements in "good faith". Although "good faith" is not an affirmative defense to a paperwork violation, it is a mitigating factor in determining the amount of the civil penalty. See 8 U.S.C. §1324a(e)(3).

Complainant, in turn, has attempted to demonstrate Respondent's "bad faith" compliance with IRCA's requirements by presenting evidence of an anonymous telephone threat which the INS believes was made by Respondent against one of its field agents. Although the INS dispatcher testified that she recognized Respondent's voice as being the same as the person who had made the alleged threat, she was previously unfamiliar with it and her accuracy cannot be accepted with confidence. Border patrolman Darrel Crump agrees that Respondent in person has always been cooperative with a person likely to make threats, and since there is great likelihood of error with respect to anonymous telephone calls, I find Complainant has failed to prove any bad faith on Respondent's party by virtue of this incident.

Complainant also presented the testimony of an INS agent which attributes to Respondent the remark that he will go out of business rather than comply with IRCA. Respondent, however, has testified to the contrary. After considering all the facts I find Complainant's evidence is insufficient to support its contention of bad faith on the part of the Respondent.

I find no other evidence of "bad faith" on Respondent's part. In fact, Respondent has demonstrated that he has sought to cooperate with the INS during the inspection process. I therefore find Respondent to have shown good faith in this matter. This factor therefore serves to mitigate the penalty.

B. *History of Previous Violations*

There is no evidence of any previous IRCA violations on the part of the Respondent. Assistant chief patrol agent C.W. Thompson of the Border Patrol, aware of the arrest of an illegal alien who claimed to

have been employed by Respondent, testified that he had increased the proposed fine as a result.

That very incident prompted the INS inspection which resulted in this proceeding. Complainant could, therefore, have alleged an IRCA "knowing hire" violation against Respondent in this proceeding based on the illegal alien's statement, but did not. Instead, Complainant now argues that the illegal alien's statement is evidence that Respondent has a history of previous violations.

Complainant's argument is misplaced. That statement does not constitute a "history of previous violation: for penalty setting purposes. Respondent has not even been charged with an IRCA violation based upon that evidence. Even if he had been, OCAHO has made no finding nor has Respondent formally admitted to the INS (by consent to an order) that he has actually committed such a violation. In view of the fact that Respondent has not been given a hearing providing him with due process over that incident, I cannot accept Complainant's argument that Respondent has a "history of previous violations." United States v. Sergio Alaniz d/b/a La Segunda Downs, OCAHO Case No. 90100173, February 22, 1991 (Decision and Order Granting Complainant's Motion for Summary Decision); also, United States v. Lola O'Brien d/b/a Wexford Farms, OCAHO Case No. 89100387, May 2, 1990. Rather than aggravating the penalty, this factor is a mitigating one.

C. *Size of the Employer*

The size of the employer is small. As noted, Respondent's tax returns for the period covering the violations show he had gross income of $8,156.45 and a net loss of $492.76 for the year 1987. In 1988, he had gross income of $36,397.81 and net income of $19,402.93. And in 1989, he had a gross income of $23,705.40 and a net income of $8,355.85.

The legislative intent in assessing civil monetary fines against violating employers is not to punish them, but to secure their future compliance with the statute. See United States v. Masoud Pour d/b/a La Plaza Restaurant, OCAHO Case No. 89100573, April 30, 1990. It is clear that a heavy fine will seriously damage Respondent's viability as a business. This would be contrary to IRCA's purpose. Therefore, Respondent's extremely small size requires a mitigation of the penalty.

D. *Seriousness of the Current Violations*

The number of violations in this case (45 in all) appears to be an aggravating factor for penalty purposes for it suggests Respondent has flouted IRCA. However, as noted, there is strong evidence that treating roofing workers as independent contractors is a common practice in the roofing industry in the Lubbock area. While this fact would not affect the legal status of the roofing workers in this case, it does indicate that the Respondent's violation is not as serious as the numbers suggest. Instead, Respondent appears to have been merely following an industry practice which had grown in the community. I recognize that violations of IRCA's paperwork requirements alone have been found to be serious. See United States v. Lola O'Brien d/b/a O'Brien Oil Company, OCAHO Case No. 89100386, May 2, 1990. Even so, that case did not involve the type of good faith seen here. Therefore I find this factor to be neutral, neither aggravating nor mitigating the penalty amount.

E. *Actual Hire of Unauthorized Aliens*

Finally, there is no evidence that any of Respondent's 45 employees who are the subjects of this proceeding are illegal aliens. This factor also serves to mitigate the penalty amount.

After an examination of all the factors contained in 8 U.S.C. §1324a(e)(3), there appears to be no aggravating circumstances in this case which would justify the imposition of a civil penalty in excess of the minimum amount against the Respondent. As a result, I reduce the instant civil monetary penalty from the proposed $500 per violation to $100 per violation.

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following:

VII. *Order*

RESPONDENT SHALL:

1. Comply with the verification requirements of 8 U.S.C. §1324a(b) with respect to individuals hired by insisting upon the presentation of properly completed I-9 Forms and by retaining them for a period of 3 years.

2. Pay a civil money penalty in the amount of $4,500.00. The total fine is calculated as follows: $100.00 for each of the forty-five (45) violations of 8 U.S.C. §1324a(a)(1)(B).

IT IS FURTHER ORDERED:

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 from the date of this decision, any party files a written request for review of this decision with the Chief Administrative

Hearing Officer. Any such review requests should be accompanied by the party's supporting arguments.

JAMES M. KENNEDY
Administrative Law Judge

March 29, 1991