

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. §1324 PROCEEDING
) OCAHO CASE No 90100266
MEXICO BAKERY, INC.,))
GUILLERMO PERALES,))
JOSE ALVARADO, AND))
MARCOS MACARENA,))
OWNERS,))
Respondents.))
_____))

PARTIAL DEFAULT JUDGMENT
AND ORDER TO SHOW CAUSE

A. Statement of the Case

On August 24, 1990, Complainant filed a Complaint Regarding Unlawful Employment under the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, with the Office of the Chief Administrative Hearing Officer. The Complaint charges Respondent Guillermo Perales d/b/a Mexico Bakery, Inc., violated 8 U.S.C. §1324a(a)(1)(A), by knowingly hiring five (5) unauthorized aliens for employment in the United States after November 6, 1986. In the alternative, the Complaint alleges Respondent violated 8 U.S.C. §1324a(a)(2) by continuing to employ the same individuals after discovering they lacked authorization to work in the United States. The Complaint further alleges that Respondent failed to properly prepare, retain or present employment verification forms (Form I-9) for twelve (12) employees, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant sought a civil money penalty totaling nine thousand two hundred and fifty dollars (\$9,250.00) for the alleged violations.

The Complaint and Notice of Hearing were served on Respondent by certified mail on September 4, 1990. The Notice of Hearing advised

Respondent of his duty to file an Answer to the Complaint within thirty days after the receipt of the Complaint, and that the failure to file a timely Answer could result in the entry of a default judgment.

Respondent was further informed of his responsibility to file an Answer to the Complaint on or before October 10, 1990, by this tribunal's notice of September 17, 1990. The September 17 notice specifically called attention to the fact that Respondent's prior request for a hearing was not an Answer as required by applicable rules.

On October 24, 1990, Complainant filed a Motion to Amend Complaint. The motion sought to add Jose Alvarado, Marcos Macarena and Mexico Bakery, Inc. as Respondents. Complainant served copies of the Motion to Amend Complaint and the Proposed Amended Complaint on Guillermo Perales at Mexico Bakery's business address. On October 25, 1990, an Order to Show Cause why Complainant's Motion to Amend Complaint should not be granted issued.

On November 19, 1990, Complainant served copies of its Notice to Amend Complaint and the Proposed Amended Complaint upon Jose Alvarado and Marcos Macarena at Mexico Bakery's business address.

As no response to the Order to Show Cause was received, Complainant's Motion to Amend Complaint was granted on November 21, 1990, subject to further proof that Jose Alvarado and Marcos Macarena were notified of this proceeding. Said Order further postponed the time for Respondents to file an Answer to December 27, 1990.

No Answer was ever filed by any Respondent. On January 21, 1991, Complainant filed the instant Motion for Judgment by Default. Complainant attached a "Declaration of Counsel As To Notice" with its default motion. In this Declaration, Complainant stated that Jose Alvarado was personally served with the Amended Complaint on December 5, 1990 and that Marcos Macarena was served with the Amended Complaint by mail at his personal mailing address on December 19, 1990. In addition, Complainant avers that Alvarado and Macarena were personally reminded of the December 27, 1990, deadline for filing an Answer in this proceeding.

On January 28, 1991, an Order to Show Cause and Postponing Hearing issued. That Order required the parties to show, on or before February 21, 1991, why Complainant's Motion for Default Judgment should not be granted and, if granted, why the civil money penalty should exceed the minimum amount.

On February 21, 1991, Complainant timely filed a Memorandum In Support of Civil Money Penalties sought by the Complaint.

B. Findings of Fact and Conclusions of Law

Due and adequate notice of the requirement to file an Answer to Complaint has been given. Notwithstanding, no Answer has been filed and no justification for failing to file an Answer has been provided. Accordingly, I grant Complainants

Motion for Default Judgment as to Respondents Guillermo Perales and Mexico Bakery, Inc. in accord with 28 C.F.R. §68.6(b).

For reasons set forth below, Complainant's Motion for Default Judgment is denied at this time with respect to Respondents Jose Alvarado and Marcos Macarena.

As pertinent here, IRCA provides that it is "unlawful for a person or other entity to hire...for employment in the United States...(A) an alien knowing the alien is an unauthorized alien...or (B) an individual without complying with the [statutory verification] requirements..." Additionally, it is "unlawful for a person or other entity, after hiring an alien for employment...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." See 8 U.S.C. §1324a(a)(1)(A), (a)(1)(B), (a)(2).

Under regulations issued implementing these statutory provisions the term "employment" was construed to mean "any service or labor performed by an employee for an employer within the United States..." 8 C.F.R. §274a.1(h). Under the same regulations, the term "employee" was defined to include "an individual who provides services or labor for an employer for wages or other remuneration..." and the term "employer" was defined as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee..." 8 C.F.R. §§274a.1 (f) and (g). These regulatory definitions constitute legally binding "legislative rules." See United States v. Wrangler's Country Cafe, Inc. and Henry D. Steiben Individually, OCAHO Case No. 89100381, March 6, 1990 (Order Denying Respondent Steiben's Motion to Dismiss and Motion for Summary Decision).

Complainant's Memorandum In Support of Civil Money Penalties contain certain affirmative averments indicating that, by entering default judgment against Respondents Alvarado and Macarena, a substantial injustice may result.

Apparently both Alvarado and Macarena have conceded to representatives of Complainant that they are owners of a minority stock interest in Mexico Bakery, Inc., the corporate Respondent. However, Complainant avers in the aforementioned Memorandum that these Respondents have made other assertions which include: 1) neither Alvarado nor Macarena worked at Mexico Bakery, Inc. in any capacity at the time the matters alleged as unlawful in the Complaint were uncovered; 2) both claim to be stockholders of Respondent Mexico Bakery, Inc. "on paper" only; 3) Alvarado claims that he takes no part in the management of Respondent Mexico Bakery, Inc.; 4) Alvarado, aware of the potential for problems arising from his stock ownership, declared that he has attempted to convince Respondent Perales, apparently the chief executive officer of the corporate entity and the overseer of its day-to-day operations, to dissolve the corporate entity; 5) Alvarado apparently alerted the U.S. Border Patrol to some

of the conduct found unlawful herein; 6) Macarena declared that he sold the greater portion of his interest in the corporate entity to Alvarado and another individual and had not participated in its management "in several years;" and 7) Macarena asserted that he does not know or do business with Respondent Perales.

Based on those matters before me, Respondent Mexico Bakery, Inc. appears to be a small corporation. Alvarado's purported assertion concerning his efforts to cause the dissolution of the corporate entity may well suggest that no market exists by which individual stockholders can readily divest themselves of an ownership interest in this entity even if they so desired. When this fact is considered together with other declarations apparently made by Alvarado and Macarena to Complainant, considerable doubt has arisen as to whether those two individuals, notwithstanding their stock ownership, act in any manner in the interest of the employing entity here sufficient to be deemed an "employer" within the meaning of 8 C.F.R. §274a.1(g).

For these reasons, and to avoid perpetrating any unjust action, Complainant will be ordered to show cause why its motion to amend the complaint as to Alvarado and Macarena was not improvidently granted.

In accord with these findings, I conclude that Respondents Mexico Bakery, Inc. and Guillermo Perales unlawfully hired or continued to employ the following named individuals within the meaning of 8 U.S.C. §§1324a(a)(1)(A) or (a)(2):

1. Jose Ramon Sosa-Rodriguez	4. Luis Alfredo Castro
2. Juan Rodriguez-Sosa	5. Anabel Ruiz de Miramontes
3. Luis Garcia-Contreras	

I further conclude that Respondents Mexico Bakery, Inc. and Guillermo Perales violated 8 U.S.C. §1324a(a)(1)(B) by failing to properly prepare, retain, or present after request, the verification form, designated by the Attorney General as Form I-9, for the following named individuals:

1. Jose Ramon Sosa-Rodriguez	7. Eric Garcia
2. Juan Rodriguez-Sosa	8. Jose Hernandez-Ibanez
3. Luis Garcia-Contreras	9. Maria Nieves
4. Luis Alfredo Castro	10. Olga Alicia Silva

5. Anabel Ruiz de Miramontes	11. Nora Trevino
6. Esperanza Alaniz	12. Isidro Vasquez

C. Civil Money Penalties

Complainant seeks to impose civil money penalties of \$1500 each for two knowing hire or continuing to employ violations and \$1000 for each of the remaining three violations of this nature. For the verification violations, Complainant seeks a penalty of \$300 each for the 5 individuals who were the subject of the knowing hire or continuing to employ violations -- and for whom no I-9 was presented after request -- and \$250 for the seven remaining violations in which incomplete I-9s were presented. The total penalty Complainant seeks is \$9250.

IRCA specifies a civil monetary penalty from \$250 to \$2000 for each knowing hire, or continuing to employ, violation where, as here, there is no prior history of violations. 8 U.S.C. §1324a(e)(4)(A)(i). In addition, IRCA specifies a civil monetary penalty from \$100 to \$1000 for each verification violation. 8 U.S.C. §1324a(e)(5).

In its Memorandum in Support of Civil Money Penalties, the Complainant addresses the five factors in 8 U.S.C. §1324a(e)(5) for verification violations. Complainant concedes that the employing entity is a small business with no past history of IRCA violations. However, Complainant also argues that the verification violations are serious because Respondents apparently failed to inspect any employment eligibility documents for those five individuals alleged in the complaint to be aliens not authorized for employment in the United States.

Additionally, Complainant argues that Respondents have demonstrated bad faith by failing to cooperate with INS' inspection visits and by engaging in suspect employment practices, to wit, smuggling unauthorized aliens across the U.S. border with Mexico for employment.

In response to Complainant's Memorandum on this question, Respondent Guillermo Perales denies that he was engaged in any smuggling activities or that he was intentionally uncooperative with inspection agents as Complainant claims. Perales attributes the incomplete paperwork to inadequate training of personnel retained to replace the corporation's office manager of long standing who resigned in early 1990 and the hiring of some aliens not authorized to work in the United States to Jose Ramon Sosa-Rodriguez, Respondent's plant manager with responsibility for hiring and firing of production personnel and himself an alien not authorized to work in this country.

I deem it inappropriate to give consideration to any alleged smuggling activities or the degree of cooperation Respondents may or may not have given inspection agents in the context of a default judgment decision. Notwithstanding, I deem the monetary penalties sought here to be generally reasonable. Although Respondent Mexico Bakery, Inc. is a small business without prior violations, the fact that a significant number of employees were aliens not authorized for employment in the U.S., including its plant manager, suggests a reckless and cavalier attitude toward IRCA's requirements.

Complainant seeks a \$1500 penalty in connection with the unlawful employment of plant manager Jose Ramon Sosa-Rodriguez and Juan Rodriguez-Sosa, identified in Respondent's memorandum as the plant manager's cousin who was not actually on Respondents' payroll. The penalty sought in connection with Jose Ramon Sosa-Rodriguez is deemed reasonable especially in light of the responsibilities vested in that individual.

The fine sought for the other three instances of unlawful employment is \$1000 which I also deem reasonable in these circumstances. However, in the absence of some further rationale concerning the penalty sought for the unlawful employment of Juan Rodriguez-Sosa, the penalty assessed in that instance will be established at \$1000 in conformity with that assessed for other production employees.

The penalties sought in connection with the verification violations related to the unlawful employment of five aliens is deemed reasonable. The remaining seven verification violations involve the improper completion of I-9 Form Section 2. In view of the size of Respondents' business, the lack of prior violations, and the claim that these errors resulted from inexperienced clerical personnel, a \$100 penalty shall be entered for each of those seven violations.

Order¹

IT IS HEREBY ORDERED that Respondents Mexico Bakery, Inc. and Guillermo Perales:

1. Cease and desist from further violations of 8 U.S.C. §1324a(a)(1) (A).

¹ Pursuant to 28 C.F.R. §68.51(a) any party may file a request for review, together with supporting arguments, of a final order and decision of an administrative law judge by the Chief Administrative Hearing Officer within five (5) days of the date of such decision. Any such request for review should be addressed to The Chief Administrative Hearing Officer, Executive Office For Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church VA 22041. To be timely if served by mail, any such request for review of this Order must be received by the Chief Administrative Hearing Office on or before April 24, 1991. See 28 C.F.R. §§68.79a)and 68.7(c)(2).

2 OCAHO 315

2. Comply with the employment eligibility verification requirements of 8 U.S.C. §1324a(a)(1)(B).

3. Pay a civil money penalty of Seven Thousand Seven Hundred Dollars (\$7,700) for the violations specified in the above Findings of Fact and Conclusions of Law.²

IT IS FURTHER ORDERED that the hearing as to Respondents Mexico Bakery, Inc. and Guillermo Perales, heretofore postponed indefinitely be, and hereby is, canceled.

IT IS FURTHER ORDERED that Complainant show cause, on or before April 29, 1991, why its motion to amend the complaint in this matter as to Respondents Jose Alvarado and Marcos Macarena was not improvidently granted.

DATED: April 12, 1991.

WILLIAM L. SCHMIDT
Administrative Law Judge

² The calculation of the civil money penalty was made as follows: Three Hundred Dollars (\$300) each for five (5) paperwork violations and One Hundred Dollars (\$100) each for seven (7) paperwork violations for a total of Two Thousand Two Hundred (\$2,200); Fifteen Hundred Dollars (\$1,500) for (1) knowing hire, or continuing to employ, violation and One Thousand Dollars (\$1,000) each for the remaining four (4) knowing hire, or continuing to employ, violations for a total of Five Thousand Five Hundred Dollars (\$5,500).