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

December 17, 1992

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| UNITED STATES OF AMERICA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. 1324a Proceeding<br>OCAHO Case No. 92A00006 |
| JOHN W. GUEWELL AND<br>ALFRED P. COOPER, D/B/A<br>WAGCO SECURITY SERVICES,<br>Respondent. | ) | |

DECISION AND ORDER

On October 25, 1991, the Immigration and Naturalization Service (INS) issued and served a three-count Notice of Intent to Fine (NIF) SFR 90-274A-7119 upon respondents, John W. Guewell and Alfred P. Cooper, doing business as Wagco Security Services.

In Count I, complainant alleged that respondent hired the two (2) individuals listed therein for employment in the United States after November 6, 1986, failing to ensure that those two (2) individuals properly completed Section 1 of their respective Forms I-9, in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(B). For each of these violations, complainant assessed a civil money penalty of $325, for a total of $650.

Count II contained the allegation that respondents also violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having allegedly failed to complete Section 2 of the pertinent Forms I-9 relating to the 39 employees listed therein. For each of those 39 alleged paperwork violations, complainant levied a civil money penalty of $325, or a total civil money penalty of $12,675 for Count II.

In Count III, it was alleged that respondents additionally violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by reason of their having

failed to properly complete Section 2, and by reason of their having failed to ensure that the four (4) employees listed therein properly completed Section 1, of the pertinent Forms I-9. Complainant assessed a total civil money penalty of $1,500 on that count, or $375 for each of those four (4) alleged violations.

Respondents were advised in the NIF of their right to request a hearing before an administrative law judge by submitting an appropriate written request within 30 days of their receipt of the citation, and by letter dated November 22, 1991, respondents timely filed such a request.

On January 14, 1992, complainant filed the Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO), realleging the charges previously set forth in the NIF, and again requesting that respondents be ordered to pay civil penalties totaling $14,825.

On June 18, 1992, complainant filed a Motion to Compel Discovery, asserting therein that on March 9, 1992, it had mailed its First Set of Interrogatories and Request for Production of Documents to counsel for respondents, the responses to which were received on April 13, 1992. In their response to complainant's Request for Production of Documents, complainant averred, respondents stated that three (3) documents, a document described as the "WAGCO book", time sheets, and tax returns, would be produced at a later date. Complainant fur-ther alleged that as of the date of the filing the motion, respondents failed to produce their partnership tax returns for 1990 and 1991, the document described as the "WAGCO book", and the requested time sheets, despite repeated requests by complainant. In its motion, complainant also asserted that on March 30, 1992, it mailed a Second Set of Interrogatories to counsel for respondents, for which, complainant averred, respondents had not provided appropriate responses as of the time it filed the motion. Complainant requested in its motion that respondents be ordered to respond to those discovery requests, in accordance with the provisions of the pertinent procedural regulations, 28 C.F.R. §68.20(d) and §68.19(b).

On June 24, 1992, complainant's motion was granted and respondents were ordered to provide to complainant copies of all the requested documents and to make available to complainant written answers to all interrogatories propounded by complainant within 15 days of their acknowledged receipt of that order.

On July 20, 1992, complainant filed a motion entitled Complainant's Motion for Sanctions, requesting therein that certain sanctions, from among those enumerated at 28 C.F.R. §68.23, be imposed upon respon-dents for not having furnished the discovery replies and document copies which had been outlined in the June 24, 1992 order.

On July 24, 1992, respondent filed a Declaration in Opposition to Complainant's Motion for Sanctions, in which respondents advised that the files containing the requested information could not be located, that they had filed for bankruptcy under Chapter 7, that their business office had been locked and they had been denied access to information and documents which were required to furnish further discovery responses.

On August 14, 1992, because respondents had failed to comply with the June 24, 1992 order for the production of documents or the answering of interrogatories, the undersigned issued an Order Granting Complainant's Motion for Sanctions, ordering the four (4) sanctions requested by complainant, all of which are set out at 28 C.F.R. §68.23(c). That section provides, in pertinent part, that the administrative law judge may impose various sanctions for the purposes of permitting resolution of the relevant issues and disposition of the proceeding, and to avoid unnecessary delay.

To permit resolution of the relevant issues and disposition of the proceeding, the following sanctions were ordered:

1. That the undersigned infers and concludes that the answers to the interrogatories which were insufficient, unresponsive, or unanswered would have been adverse to all respondents. 28 C.F.R. §68.23(c)(1).

2. That for the purposes of this proceeding, the matter or matters concerning which the Order Granting Complainant's Motion to Compel Discovery is/are taken as having been established adversely to all respondents. 28 C.F.R. §68.23(c)(2).

3. That the respondents may not introduce into evidence or other-wise rely upon testimony by respondents, their officers or agents, nor may respondents, their officers or agents introduce into evidence or otherwise rely upon documents or other evidence, in support of or in opposition to any claim or defense. 28 C.F.R. §68.23(c)(3).

4. That the respondents may not be heard to object to the introduc-tion and use of secondary evidence by complainant in order to show what the withheld admissions, documents, answers to the interroga-tories, or other discovery replies would have shown. 28 C.F.R. §68.23(c)(4).

On August 20, 1992, following imposition of those sanctions, complainant filed a motion entitled Complainant's Motion for Summary Decision and Points and Authorities in Support of Motion for Summary Decision, in which complainant moved that the undersigned, pursuant to the provisions of 28 C.F.R. §68.38, grant summary decision as to respondent's liability for violations of Section 274A of the Immigration and Nationality Act (INA) for all individuals named in Counts I, II, and III of the Complaint. In addition, complainant requested that fines be assessed on the basis of the evidence submitted.

On September 25, 1992, an order was issued granting in part com-plainant's motion for summary decision. In that order, the undersigned found respondents liable for all 45 violations alleged in Counts I, II, and III of the Complaint, and provided that a hearing be scheduled to determine the appropriate civil money penalties for those violations, in accordance with 8 U.S.C. §§ 1324a(e)(4) and (5).

On October 7, 1992, the parties and the undersigned conducted a pre-hearing telephone conference, in the course of which the parties agreed to submit briefs rather than conduct an evidentiary hearing on the issue of the appropriate civil money penalty assessments for the 45 violations set forth in the Complaint.

On October 13, 1992, complainant filed a Statement Regarding Its Brief on Fine Amounts, wherein it stated that it would rely on the arguments and evidence already submitted as part of its motion for summary decision for the undersigned's consideration of fine amounts against respondents.

On November 16, 1992, respondents filed their Brief Re Imposition of Fines, in which they addressed the factors to be considered in determining the appropriate civil money penalty, and requested that the minimum fine be imposed.

In determining the amount of the penalty to be imposed for paperwork violations, IRCA provides:

> With respect to a (paperwork violation), the order under this subsection shall require the person or entity to pay a civil penalty in the amount of not less that $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. § 1324a(e)(5).

The Complaint seeks a civil money penalty of $325 for the violations found with regard to both of the employees named in Count I of the Complaint; $325 for the violations with regard to each of the 39 employees named in Count II; and $375 with regard to each of the four (4) employees named in Count III.

The first statutory factor to be considered in determining the appro-priate penalty is the size of respondents' former business. For our purposes, the size of respondents' now bankrupt business is that which existed on the date of the pertinent INS inspection at issue. United States v. Dodge Printing Centers, 1 OCAHO 125, at 6 (1/12/90).

Complainant contended in its motion that the respondents' partnership should be regarded as a medium-sized business. In support of this contention, complainant introduced federal tax returns provided by the respondents showing gross receipts of $192,289 for calendar year 1988, and $657,775 for calendar year 1989. Complainant also introduced state unemployment insurance reports, showing that respondents employed 20 persons and had a total payroll of $25,215.76 in the first quarter of 1989; employed 37 persons and had a total payroll of $63,473.27 in the second quarter of 1989; employed 60 persons and had a total payroll of $129,530 in the fourth quarter of 1989; employed 76 persons and had a total payroll of $199,453.62 in the first quarter of 1990; and employed 88 persons and had a total payroll of $193,494.90 in the second quarter of 1990.

Respondents contend, however, that their now-defunct partnership, Wagco Security Services, was a small business, started primarily with funds borrowed for small minority-owned businesses. Respondents further contend that, even in a good year, their gross receipts totaled less than $1,000,000.

Neither IRCA nor the relevant procedural regulations provide guide-lines to use in determining business size. See United States v. Tom &

Yu, Inc., 3 OCAHO 445 (8/18/92). Among factors previously considered in determining the size of a business entity for the purpose of assess-ing the appropriate civil money penalty, are those of revenue or income, the amount of payroll, the number of salaried employees, the nature of ownership, the length of time in business, the nature and scope of the business activity, and its profitability. See United States v. Felipe, 1 OCAHO 93 (10/11/89).

Because respondents were in the business of providing services, there is only an indirect correlation between the size of respondents' business and the amount of respondents' gross revenues. More illustrative of the size of the business is the partnership income and loss. For 1988, respondent Cooper reported a $4,809 partnership loss. For 1989, the partnership itself reported income of $26,115, which was split evenly between the partners. While profit and loss of business entities will not always be determinative of the size of the business, in this situation the respondents' partnership was particularly labor-intensive, it was started with a small, minority-owned business loan, it never became what one would term a financial success, and it is more determinative than any other factor. Accordingly, respondents' partnership should be considered small for the purpose of Determining the appropriate penalty amount.

The next factor to consider in determining the appropriate civil money penalty is the respondents' good faith. Again, the statute and regulations fail to define good faith. OCAHO rulings indicate that the mere existence of paperwork violations is insufficient to show a "lack of good faith" for penalty purposes. See United States v. Valladares, 2 OCAHO 316 (4/15/91). Instead, in order to show a "lack of good faith" for the purpose of aggravating the penalty amount, complainant must demonstrate culpable behavior beyond mere ignorance on the part of respondents. See United States v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91); United States v. Lola O'Brien, d/b/a O'Brien Oil Co., 1 OCAHO 166 (5/2/90).

Complainant notes, in asserting a lack of good faith on the part of respondents, that in January, 1990, a representative of the United States Department of Labor reviewed respondents' compliance with the employment eligibility verification requirements of IRCA. Complainant submitted with its motion a record of that visit, showing that at that time respondents had some incomplete records. In particular, the report shows that Section 2 was incorrectly completed on some of the forms examined. At that time, according to the report,

respondent Guewell assured the representative from the Department of Labor of full future compliance. Subsequently, respondents' employment eligibility verification forms (Forms I-9) were examined by complainant on August 15, 1990. This inspection revealed 45 total violations, 43 of which included failures to complete Section 2 of the pertinent Forms I-9. Of these, 18 were completed after January 19, 1990, the date the report was filed by the representative of the United States Department of Labor, most of them by respondent Guewell.

Respondents assert that there is no evidence that they acted in bad faith or with the intent of making a gain. Respondents explain that they simply lacked the ability to be in business for themselves and to fill out the Forms I-9 correctly.

Complainant is not required to show that respondents profited from their failure to properly complete the Forms I-9 in order to show a lack of good faith. Nor is the absence of bad faith the same as a showing of good faith for purposes of mitigating the penalty.

Complainant has demonstrated that respondents were put on notice by the Department of Labor of the importance of properly completing employment eligibility verification forms for every employee hired. Respondent Guewell assured the representative of the Department of Labor who first examined respondents' Forms I-9 that he would thereafter fully comply with the r ecordkeeping requirements of IRCA. In spite of this assurance, respondents continued to fill out the forms incorrectly.

While respondents may not have had the acumen to run a successful business, the fact that they assured future compliance with the record-keeping requirements of IRCA after an investigation by the Department of Labor shows that they knew, or should have known, how to properly complete the Form I-9. Having failed to do so, after giving that assurance to comply with the recordkeeping requirements, consti-tutes an obvious display of a lack of good faith. Accordingly, good faith will not be considered a mitigating factor in determining the appropriate penalty.

The next factor to be considered in determining the appropriate civil money penalty is the seriousness of the violation, or that which in-volves the degree to which the respondent being charged has deviated from the proper Form I-9 completion format. United States v. Tuttle's

Design Build, 3 OCAHO 422, at p.4 (Order Denying Respondent's Motion to Compel Discovery) (4/21/92).

In Count I, complainant has established that respondents failed to ensure that the individuals listed therein properly completed Section 1 of the Form I-9. In particular, those individuals failed to attest to their status in the appropriate block on the form. Any failure, even one grounded upon negligence as opposed to willfulness, to complete any part of the form is serious because it defeats the purpose of the employment eligibility verification program. United States v. Felipe, 1 OCAHO 93 (10/11/89). In this instance, the failure of the individual employed to attest to employment status subverts the intention of Congress that employees attest under penalty of perjury that they are authorized for employment in the United States. See 8 U.S.C. §1324a(b)(2).

In Count II, complainant established that respondents failed to properly complete Section 2 of the pertinent Forms I-9 for the 39 individuals listed.

In order to properly complete Section 2 of the Form I-9, the employer or authorized agent of the employer must examine one document from List A, Documents that Establish Identity and Employment Eligibility on the form (United States Passport, Certificate of United States Citizenship, Certificate of Naturalization, unexpired foreign passport with attached Employment Authorization, or Alien Registration Card with photograph), or examine one document from List B, Documents that Establish Identity (State-issued driver's license or State-issued i.d. card with photograph, or information including name, sex, date of birth, height, weight, or color of eyes, with the State specified; U.S. Military Card; or other document establishing identity, specified) and one document from List C, Documents that Establish Employment Eligibility (Original Social Security Number Card; birth certificate issued by State, county, or municipal authority bearing a seal or other certification; or an unexpired INS Employment Authorization form). The employer must then check the appropriate box on the form for the document examined and note the document identification number of the form or forms examined, and the expiration date, if any, thereof. Finally, the employer or authorized agent of the employer must complete the certification block on the form.

Respondents failed to complete any part of Section 2 for seven (7) of the 39 individuals listed in Count II. For two (2) other individuals,

respondents failed to complete the certification and improperly iden-tified only one document from Lists B and C. On four (4) other forms, the certification block was completed, but no documents were checked. On an additional four (4) forms, respondents failed to identify or misidentified the required documents, and failed to complete the certification block. On the remaining forms, respondents failed to examine and identify a sufficient number of documents, examined and identified improper documents, or failed to properly identify the document examined.

Failure to complete any portion of Section 2 of a Form I-9 must be regarded as a serious violation. United States v. Land Coast Insulation, Inc., 2 OCAHO 379, at p. 26 (9/30/91). For this reason, all of the violations contained in Count II must be regarded as serious.

Those seven instances in which respondents failed to complete any part of Section 2 must be considered particularly egregious because in failing to complete any part of Section 2 respondents defeated the purpose of the employment eligibility verification program, that of having employers investigate and attest to the eligibility of their employees for employment in the United States. See Felipe, supra. See also United States v. Acevedo, 1 OCAHO 95, at 5 (11/12/89) ("Section 2 of the I-9 Form ... is the very heart of the verification process initiated by Congress in IRCA.")

Employer failure to complete the certification block must also be con-sidered a particularly serious violation, implying not only an attempt to avoid liability for perjury, but also "reckless disregard for plain and obvious statutory and regulatory mandates made clear to respondent(s)". United States v. J.J.L.C., Inc., 1 OCAHO 154 at 9-10 (4/13/90).

In Count III, complainant established that respondents failed to properly complete Section 2, and also failed to ensure that the indivi-duals listed completed Section 1, of the Forms I-9 for the four indivi-duals listed therein. On three of those Forms I-9, the individuals failed to attest to their status in Section 1. On one of those forms, respondents failed to complete any part of Section 2. On another, respondents failed to identify which documents they had examined establishing identity and employment eligibility. On the third form, respondents only identified a document establishing employment eligibility.

On the remaining Form I-9 implicated in Count III, the individual failed to sign and date the attestation block in Section 1, and respondents failed to identify the document they examined establishing identity in Section 2.

As noted above, it is a particularly serious violation for an employer to leave Section 2 blank. It is also a serious violation to fail to com-plete any part of an I-9 Form. Less serious is an individual's failure to properly sign Section 1 of the form. See Felipe at 12. However, taken as a whole, the violations established by complainant in Count III are fairly serious.

For these reasons, the violations established by the complainant are sufficiently serious to preclude any mitigation of the penalty.

The next factor to be considered is whether any of the individuals involved was an unauthorized alien. Complainant has advised that none of the employees named in this matter was unauthorized to work in the United States. Conse-quently, complainant is entitled to mitiga-tion on this factor. See United States v. Martinez, 2 OCAHO 360, at 5 (8/1/91); Honeybake Farms, supra, at 4.

The final factor to consider in determining the appropriate civil money penalty is the history of previous violations by respondents. Complainant admits that there have been no previous IRCA violations by this employer. Therefore, this will also mitigate the civil money penalty. See United States v. Charo's Corp., 2 OCAHO 369, at 14 (8/29/91); Martinez, supra; Honeybake Farms, supra; United States v. Huang, 1 OCAHO 300, at 4 (2/25/91); United States v. Camidor Properties, Inc., 1 OCAHO 299, at 5 (2/25/92).

Congress, in enacting IRCA, significantly modified our national policy concerning immigration. Critical to this remedial legislation is the placement of document inspection and verification responsibilities upon employing entities in the hiring process. Those responsibilities, with limited, inapplicable exceptions, consist of verifying the identity and employment authorization of all individuals hired since November 6, 1986.

IRCA provides for civil money penalties for violations of those paperwork duties. The purpose behind those penalties is twofold: that of deterring repeat infractions of IRCA by the employing entity cited, and that of encouraging other similarly-situated employers to comply

with the requirements of the employment eligibility verification system. See Land Coast Installation, Inc., supra, at 28.

For each paperwork violation, IRCA provides for fines ranging from a statutorily mandated minimum of $100 to a maximum sum of $1,000 for each violation. 8 U.S.C. §1324a(e)(5). As the assessing agency, INS is granted broad discretion in assessing civil money penalties for violations of IRCA within these guidelines, in order to fairly and effectively deal with the factual variances encountered in the various inspections settings. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (9/3/92).

IRCA also provides the administrative law judge with discretion in ordering the appropriate civil money penalty for paperwork violations. 8 U.S.C. §1324a(e)(5).

For the 45 violations at issue, complainant's range of total civil pen-alty sums ranged from $4,500, or the minimum $100 assessment for each infraction, to $45,000 in the event that the maximum assessment of $1,000 had been levied for each violation.

Complainant has sought a total of $14,825 in penalties for the viola-tions charged in the Complaint, or some 33 per-cent of the maximum civil penalty sums. In particular, complainant seeks $325 for each violation established in Count I, $325 for each violation established in Count II, and $375 for each violation established in Count III.

Meanwhile, respondents urge that the $100 minimum assessment be levied for each of the 45 infractions at issue, or a total of $4,500 in civil money penalties.

Upon consideration of the statutorily-mandated factors for determining an appropriate civil money penalty, I find that a penalty of $200 is appropriate for each violation contained in Counts I, II and III, rather than the previously-assessed amounts of $325, $325, and $375, respectively.

Accordingly, the appropriate total civil money penalty for these 45 violations is $9,000.

## Order

It is ordered that the appropriate total civil money penalty assessment in connection with the issuance of NIF SFR 90-274A- 7119 is $9,000, or $200 for each of the 45 violations set forth in that citation, rather than the sum of $14,825, as previously assessed.

JOSEPH E. MCGUIRE
Administrative Law Judge

## Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondents, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (8) and 28 C.F.R. §68.53 (1991).