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
	)	CASE NO. 93A00041
BUSINESS	)	
TELECONSULTANTS, LTD.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(September 27, 1993)

Appearances:

For the Complainant
Leila Cronfel, Esquire
Immigration & Naturalization Service

For the Respondent
Ann Allott, Esquire

Before: E. MILTON FROSBURG
Administrative Law Judge

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I. *Introduction*

In 1986, the Immigration and Nationality Act of 1952 was amended by the Immigration Reform and Control Act (IRCA), which made significant revisions in national policy with respect to illegal immigrants. 8 U.S.C. §1324a. Accompanying other dramatic changes, IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring or continuing to employ such aliens.

Section 1324a also provides that the employer is liable for failing to attest, on a form established by the regulations, that the individual is not an unauthorized alien, and that the documents proving identity and work authorization have been verified. Additionally, 8 U.S.C. §1324a authorizes the imposition of orders to cease and desist with civil money penalties for violation of the proscriptions against hiring, and authorizes civil money penalties for paperwork violations. 8 U.S.C. §1324a(e)(4),(5).

II. *Procedural History*

On March 8, 1993, a Complaint Regarding Unlawful Employment, which incorporated the Notice of Intent to Fine previously issued and properly served on Respondent on January 21, 1993 and Respondent's January 25, 1993 request for hearing, was effectively served. The eight count Complaint contained the following: Count I, one violation of 274A(a)(1)(B) of the Immigration and Nationality Act (INA), in that Respondent failed to ensure that the employee properly completed section 1 of the Employment Eligibility Verification Form (Form I-9) and requested a civil money penalty of $460; Count II, one violation of 274A(a)(1)(B) of the INA in that Respondent failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9) and requested a civil money penalty of $460; Count III, eight (8) violations of 274A(A)(1)(B) of the INA in that Respondent failed to make available for inspection the Employment Eligibility Verification Form (Form I-9) and requested a civil money penalty of $460 for seven of the violations and $640 for the remaining violation; Count IV, one violation of 274A(a)(1)(B) of the INA in that Respondent failed to complete section 2 of the Employment Eligibility Verification

Form (Form I-9) within three business days of the hire and requested a civil money penalty of $460; Count V, one violation of 274A(a)(1)(A) of the INA in that Respondent knowingly hired and/or continued to employ after November 6, 1986, an individual who was unauthorized for employment in the United States and requested a civil money penalty of $1,125; Count VI, one violation of 274A(a)(1)(B) of the INA in that Respondent failed to ensure that the employee timely completed section 1 of the Employment Eligibility Verification Form (Form I-9) and requested a civil money penalty of $460; Count VII, seventeen (17) violations of 274A(a)(1)(B) of the INA in that Respondent failed to prepare the Employment Eligibility Verification Form (Form I-9) and/or failed to ensure that the employee properly completed section 1, and failed to properly complete section 2 of the employment Eligibility Verification Form (Form I-9) and requested a civil money penalty of $460 per violation; and Count VIII, thirteen (13) violations of 274A(a)(1)(B) of the INA in that Respondent failed to ensure that the employee timely completed section 1 of the Employment Eligibility Verification Form (Form I-9) and/or failed to complete section 2 of the Employment Eligibility Verification Form (Form I-9) within three business days of the hire and requested a civil money penalty of $460 for each violation. The total civil money penalty requested in the Complaint was $20,625. Complainant also requested a cease and desist order with regard to §§ 274A(a)(1)(A) and (a)(2) violations.

Served with the Complaint was the Notice of Hearing on Complaint which advised the parties of Respondent's right to file an Answer to the Complaint and the consequences of a default judgment, should it not so file.

Respondent's timely Answer was filed on April 1, 1993 and raised five affirmative defenses, i.e.: (1) that Respondent mistakenly believed that copied documentation attached to the Form I-9 would suffice for the attestation requirement; (2) that the forms used for the Notice of Inspection and the Form I-9 did not comply with Paperwork Reduction Act, 44 U.S.C. 3501 in that the INS both failed to submit the forms to the OMB before they were published and failed to display an OMB control number and expiration date on the I-9 form; (3) that the Complainant was not entitled to the order requested in paragraph B of the "wherefore" clause of the Complaint; and, (4) that the there was a further violation of the Paperwork Reduction Act in that Respondent was required to respond to an audit twice within the same calendar quarter in violation of 5 C.F.R. 1320.6(a).

Respondent's fifth affirmative defense argued the five factors of the statute. 8 U.S.C. §1324a(e)(5).

Complainant filed a Motion to Strike Affirmative Defenses on April 16, 1993 to which Respondent did not reply. Respondent did file a Motion to Dismiss on May 25, 1993, again arguing that Complainant's violations of the Paperwork Reduction Act required that I dismiss this case. Complainant's opposition was filed on June 4, 1993, to which Respondent replied on July 14, 1993. I reserved ruling on these motions in my June 15, 1993, prehearing telephonic conference as the parties agreed that there were no factual disputes in this case and that they were beginning settlement negotiations.

On June 28, 1993, Complainant filed a status report in which it stated that the settlement negotiations had not been fruitful. On July 6, 1993, to support its Motion to Strike Affirmative Defenses, Complainant filed a letter from the Office of Management and Budget which had confirmed that the Form I-9 had been properly approved by that office and that no expiration date needed to be displayed.

On July 6, 1993, Complainant filed a Motion to Compel Response to Production of Documents. On July 8, 1993, I issued an Order Confirming Prehearing Telephonic Conference, an Order Granting Complainant's Motion to Strike Affirmative Defenses, an Order Denying Respondent's Motion to Dismiss and a Sua Sponte Order Staying Respondent's Response to Complainant's Motion to Compel. In that Order, I noted that Respondent stated that it was not contesting liability but only the appropriate amount of the civil penalty and that each party had agreed to submit a statement requesting that I set the civil penalty amount based on the five factors in 274A(e)(5); as such, Respondent was directed to file a statement admitting liability and to submit additional financial information to Complainant. I reserved ruling on the pending Motion to Compel. On July 12, 1993, Complainant filed a Motion to Compel Response to Complainant's First Set of Interrogatories.

On July 19, 1993, Complainant filed a letter requesting that I grant its pending motion to compel as Respondent had recently indicated that, as it believed that information was not relevant to the proceeding it would not be turning over its tax information that had been requested in discovery. On that same date, Respondent filed its statement representing that I set the civil penalty amount. Respon-

dent's statement regarding the application of the five factors in 274A(e)(5) was filed on July 23, 1993.

On July 27, 1993, I held a prehearing telephonic conference. Based on that conference:

(1) Respondent agreed to file a statement admitting liability for all alleged violations in the Complaint, whether or not it felt that it might have a valid defense as the previously filed statement did not meet this standard; said statement was filed on July 29, 1993.

(2) Respondent also agreed to file another copy of the financial information that it has submitted to the Court, and to Complainant, with regard to the five factors in Section 274A(e)(5) of the INA in which Respondent's Certified Public Accountant would certify that the figures were true and correct; said statement was filed on August 11, 1993.

(3) Respondent would file a statement waiving its request for hearing and requesting that this Court set the amount of civil money penalties in this case; said statement was filed on July 29, 1993.

(4) Complainant would file a statement waiving its right to a hearing and a statement requesting that this Court set the amount of civil money penalties in this case; said statement was filed on August 2, 1993; and,

(5) Complainant would file its statement with regard to the application of the five factors in Section 274A(e)(5) on or before August 27, 1993; said statement was filed on August 27, 1993.

III. *Discussion*

With respect to the determination of the amount of civil penalties to be set for violations of the paperwork requirements of 8 U.S.C. 1324a, Section 274A(e)(5) of the INA, which corresponds to 28 C.F.R. 68.52(c)(iv), states:

> (T)he order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $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 violation.

I have previously held that I am not restricted to considering only these five (5) factors, though, when making my determination. See U.S. v. Pizzuto, 2 OCAHO 447 (8/21/92).

The statute states that the civil penalty for a "knowing hire/continuing to employ" violation is:

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph

8 U.S.C. § 1324a(e)(4)(A).

In contrast to Section 274A(e)(5), when considering the amount of civil penalties to set for knowing hire/continuing to employ violations of the Act, the statute is silent as to any mandatory or discretionary considerations. 8 U.S.C. 1324a(a)(1)(A), (a)(2); U.S. v. Buckingham Ltd., 1 OCAHO 151 (4/6/90). Thus, it is left to my sound discretion to set the civil penalty amount for knowing hire/continuing to employ violations, although I generally consider the five factors in my determination.

It is important to note that I am not bound in my determination of the civil penalty amounts by Complainant's request in its Complaint. See generally, 8 U.S.C. § 1324a; U.S. Cafe Camino Real, Inc., 2 OCAHO 307 (3/25/91); U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91).

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant asserts that Respondent, Business Teleconsultants, Ltd., has adamantly refused to supply it with discovery information which will show the financial stability of the business and that, based on the information it has been supplied with, Respondent is not a small business and has the ability to pay the proposed penalty. Complainant's argument is based mainly on a 1992 Independent Accountant's Report, the only full year's financial information supplied by Respondent. Although other information has been supplied, Complainant argues that it relates to 1993, a partial year and, thus, is speculative.

Complainant argues further that Respondent's size should be considered a reflection of the business' ability to generate income. Thus, Complainant asserts, based on the limited information supplied by Respondent, Respondent generated over one and one-half million dollars in sales and retained earnings of one-third of a million dollars in 1992. Complainant also states that Respondent's profit margin from January-June, 1993, has ranged from a high of 41% to a low of 26% with each of its shareholders receiving up to $89,200 per year in salary.

Respondent, on the other hand, argues that it is a small business that is marginal at this time. Respondent asserts that the business, since its inception in or around 1984, has only employed a total of 70 employees most who were term workers earning less that $1,000 during their terms of employment. Further, Respondent argues that it is suffering serous business losses at the present time and cannot afford to pay a large penalty. Respondent asserts that as of June, 1993, the business is suffering a $64,000 loss.

Based on Respondent's financial documents, the business had a $14,000 loss in 1992.

Previous cases have held that Respondents' ability to demonstrate tax losses does not necessarily establish Respondent's poor financial condition or its inability to pay a civil penalty. See U.S. v. A-Plus Roofing, 1 OCAHO 273 (7/27/90).

I have considered the arguments and evidence and have taken note that Respondent has supplied only information for 1992 and 1993. Based on the record before me, the number of employees and Respondent's financial standing, I have determined that Respondent is a small to medium sized business. I will take this finding into consider-

ation. See U.S. v. Camidor, 1 OCAHO 299 (2/20/91); U.S. v. Huang, 2 OCAHO 300 (2/25/91).

2. Good Faith of the Employer

Complainant asserts that Respondent did not show good faith in its compliance with the requirements of 8 U.S.C. § 1324a. Complainant supports its position by stating that Respondent admitted knowingly hiring an alien not authorized to work in the United States, that it did not complete the Forms I-9 for its employees (although aware of the requirement to do so as far back as 1988), that its argument that it was unaware that the Forms I-9 had to be "meticulously" completed and that its errors were unintentional and unknowing was without merit, and that its noncompliance rate was 97%. Complainant also argues that Respondent's alleged attempt to comply with the law was a last minute effort, with many of the Forms I-9 being completed on the day before the scheduled inspection. Thus, Complainant argues that Respondent is not entitled to mitigation based on this factor.

On the other hand, Respondent argues that it acted in good faith because although it admits knowing of the law requiring completion of the Form I-9 it was unaware that the forms needed to be completed meticulously. Respondent states that it will not repeat its errors and has had its office manager retrained in the proper method of Forms I-9 completion.

As to good faith with respect to the knowing hire violation, Respondent is not contesting the violation or the fine. I have considered the parties' arguments and have determined that Respondent did not show good faith in its compliance with 8 U.S.C. 1324a. I base this finding on the high noncompliance rate and Respondent's admitted knowledge of the law. As such, I find that it would not be appropriate to mitigate based on this factor.

3. Seriousness of the Violation

Complainant argues that Respondent's violations are all serious and frustrate the ability of the Complainant to verify an employer's compliance or noncompliance with IRCA, thus, defeating the purpose of the law.

Respondent admits the seriousness of its violations and asks for mitigation based on the fact that it has remedied the situation and has

disseminated information to many others in the business community so as to facilitate other's compliance with the law.

Previous case law has found that a serious violation is one which "render(s) ineffective the Congressional prohibition against employment of unauthorized aliens". U.S. v. Valladares, 2 OCAHO 316 (4/15/91). In addition, a total failure to prepare the Form I-9 is more serious than a failure to fill in certain sections. U.S. v. Dodge Printing Centers, 1 OCAHO 125 (1/12/90).

In this case, I find that Respondent's violations are serious, although the ones pertaining to partial completion are less serious than those pertaining to total noncompliance. Additionally, I find that the hiring of an unauthorized individual is serious. Thus, I will not mitigate based on this factor.

4. Whether or not the Individual was an Unauthorized Alien

The parties agree that Respondent has employed one (1) unauthorized alien. Respondent argues, though, that it has always met the spirit of the law by asking for documents to show that each prospective employee was a lawful worker.

Further, Respondent states that except for the one admission, there have been no other illegal workers.

Complainant argues that it has not received sufficient discovery, as requested, in order to determine if Respondent had employed more illegal aliens.

Based on the record before me, I will consider that Respondent has employed only one unauthorized alien.

5. History of Previous Violations of the Employer

Both Complainant and Respondent assert that there were no previous violations of Section 274A by this Respondent.

B. Amount of Civil Penalty

Respondent does not contest the amount of civil money penalties requested for violation of 274(a)(1)(A) of the INA. Based on the record,

I find that, using a judgmental approach Complainant's requested civil money penalty for that violation is appropriate namely $1,125.00.

As to the other violations, using a judgmental approach and based on the record a review of the Forms I-9 and the conference with the parties, I find that an appropriate civil penalty is $250 per violation amounting to a civil money penalty of $10,500 for paperwork violations. Thus, Respondent shall pay to Complainant a total of $11,625 in civil money penalties.

Respondent shall cease and desist from any and all further violations of 8 U.S.C. § 1324a.

Under 28 C.F.R. 68.53(a) a party may file with the Chief Administrative Hearing Officer, a written request for review of this Decision and Order together with supporting arguments. Within thirty (30) days of the date of the Administrative Law Judge's Decision and Order, the Chief Administrative Hearing Officer may issue an Order which modifies or vacates this Decision and Order.

IT IS SO ORDERED this 23rd day of September, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge