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. 92A00220
OSCAR LUIS CHACON, Respondent.	)	

FINAL DECISION AND ORDER
(November 23, 1993)

MARVIN H. MORSE, Administrative Law Judge

APPEARANCES: William L. Sims, Esq., for Complainant.
Eduardo N. Lerma, Esq., for Respondent.

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986) at Section 101, enacted section 274A of the Immigration and Nationality Act of 1952 as amended (INA), codified at 8 U.S.C. §1324a. IRCA adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penal-ties are authorized also when an employer has failed to observe record keeping verification requirements in the administration of the employer sanctions program.

II. *Procedural Background*

On August 11, 1992, the Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) on Oscar Chacon, Sr., at 12481 Socorro Road, San Elizario, Texas. The NIF charged Oscar Chacon, Sr. (Chacon or Respondent), with violation of 8 U.S.C. §1324 by (1) employing two named individuals alleged to be

known to him to be not authorized for employment in the United States, and (2) failing to prepare employment eligibility verification forms (Forms I-9) for those individuals. INS assessed civil money penalties of $3,880, consisting of $1,300 per individual for unauthorized employment and $640 per individual for the I-9 violations. Respondent, by counsel made an undated but timely request for hearing. 8 U.S.C. §1324a(e)(3).

On October 5, 1992, INS filed a complaint in the Office of the Chief Administrative Hearing Officer (OCAHO), against Chacon, alleging violations of §1324a in terms identical to the NIF. On October 10, 1992, OCAHO issued a notice of hearing transmitting the complaint to Respondent. By a timely answer filed October 29, 1992, Respondent denied generally all allegations of the complaint.

Count I of the complaint charges that Respondent violated 8 U.S.C. §1324a(a)(1)(A), by employing in the United States, two named aliens, Jose Luis Arellanes Villescas (Arellanes) and Manuel Gonzalez Carrasco (Gonzalez), knowing they were not authorized for employment in the United States.

Count II of the complaint charges that Respondent violated §1324a(a)(1)(B), by hiring Arellanes and Gonzalez for employment in the United States without complying with the requirements of §1324a(b) and 8 C.F.R. §274a.2(b) for preparation of employment authorization verification forms (Forms I-9s) as to said employees.

Telephonic prehearing conferences were held on January 15, March 2, and April 22, 1993. A confrontational evidentiary hearing was held in El Paso, Texas on May 20, 1993. INS introduced four witnesses, Senior Border Patrol Agent Fernando B. Lucero (Lucero), Border Patrol Agent Nicholas David Harrison (Harrison), Border Patrol Agent Norma C. Housler (Housler), Border Patrol Agent Reginald Buck (Buck), and fourteen exhibits. Chacon's evidence was his own testimony.

Respondent's motion for separation of witnesses was granted, as was his request for a Spanish language interpreter. Virtually every remark made on the record, whether by a witness, the judge, or counsel for either party, was translated to and for Chacon by interpreters employed by the Office of the Immigration Judges. The interpreters acted under oath, and were made available for voir dire as to their impartiality and competence. Their impartiality and competence is not in doubt.

On July 20, 1993, Complainant filed its post-hearing brief. On July 24, 1993, Respondent's attorney filed a letter advising that Chacon "wishes not to spend further attorney's fees and, therefore, respectfully requests to decide the case based on the evidence introduced during the course of trial."

III. *Facts*

Chacon is an individual who conducts farming operations, principally pecan groves, on land he owns at 12481 Socorro Road, San Elizario, TX 79849. The property includes his residence and an office building located ten to fifteen feet off the road which he leases for rent to Chamos Enterprises (Chamos), a Texas corporation. Chamos is in the publicity business, not farming. Chamos is a family corporation whose president is Victoria Sagnara Chacon; Chacon and a daughter, Adriana Legarda, are vice presidents. The manager and sole share-holder is Alberto Chacon Sagnara, his son.

In May 1989, Lucero's first contact with Chacon was an educational visit to the Socorro Road property made pursuant to his duty assignment, to advise Chacon of employers' obligations under IRCA. Lucero testified that, with Chacon's wife present, he talked to Chacon and left a copy of INS' Handbook for Employers (M-274). Exhibit 14, an I-9 for Luis Rey Hernandez, signed by Chacon as employer on January 1, 1990, confirms Respondent's familiarity with IRCA requirements.

On May 4, 1991, while he was on border patrol duty, Harrison noticed Chacon with two individuals in the driveway of the Socorro Road property; one of the two was holding a shovel, the other a hoe. As he left his vehicle, the two walked away from Chacon. Harrison called to the two and after talking with them in Spanish he apprehended them, in Chacon's presence in proximity to a drainage ditch on Respondent's property. Harrison testified that he told Chacon that they wanted payment for their work and that the two then talked to Chacon who gave them each ten dollars. They left the shovel and hoe behind.

As Harrison drove Arellanes and Gonzalez, to the Fabens Border Patrol Station (Fabens Station), they said Chacon had hired them to work for some money and a meal, and that he had paid them $10 each. They were turned over at Fabens Station to agents Housler and Buck, for processing.

Housler questioned Arellanes, Buck questioned Gonzalez. Housler and Buck took sworn statements from the aliens (Forms I-215W, exhs.

8, 10), filled out records of deportable aliens (I-213, exhs. 9, 11), and testified accordingly. Both aliens reported that they had entered the United States that afternoon in search of work. They saw a man at work as they walked past the property at 12481 Socorro Road. They claim they asked him (Chacon) if he had any work for them to do, and that Chacon had promised them each $12 and a meal "for three hours work". Both requested, and were granted voluntary departure to Mexico, that day. Both aliens were undocumented, without authorization to be employed in the United States.

Respondent did not prepare I-9s for the two aliens.

On May 9, 1991, Lucero delivered a notice dated May 6, 1991, addressed to Chacon advising that Arellanes and Gonzalez had been apprehended as illegal aliens,

> at your place of business. These aliens were removed from the United States and are therefore ineligible for further employment without first presenting the documentation necessary for the completion and execution of Form I-9. Any prior employment relationship between you and these aliens was terminated by their removal. This letter is to inform you that these aliens are, at present, unauthorized to work in the United States. This is a very serious matter that requires your immediate attention.

Exh. 2 (Alien Apprehension Letter).

Because Chacon was not available, Lucero handed the notice to Ramiro Sierra (Sierra) at the Chamos building. From prior contact, the agent believed Sierra to be Chacon's secretary. At the same time, Lucero handed Sierra a May 6, 1991 notice of inspection letter addressed to Chacon. The letter advised that on May 16, 1991,

> Agent Lucero will appear at your place of business for the purpose of reviewing your I-9 Forms. During this review, Agent Lucero will discuss the requirements of the law with you and inspect your I-9 Forms. The purpose of this review is to assess your compliance with the employment provisions of the Act.

Exh. 3 (Notice of Inspection).

On May 16, 1991, Lucero went to the Socorro Road property but Chacon was not there. Sierra told him Chacon had left the residence and was not available. Sierra told Lucero he had given the two May 6 notices to Chacon who had told Sierra he had no I-9s to present. Lucero told Sierra he wanted to see Chacon at 10:00 a.m., the next day. On May 17, Chacon met with Lucero at a pool outside Chacon's house. No one else was present. According to the agent, Respondent acknowledged that he had done wrong by hiring the aliens. "He told

me he knew better because he had been educated before ." Tr. 35. Lucero testified that Chacon admitted he asked the two if they were looking for work. Lucero testified that Respondent said he agreed to hire them for two to three hours for ten dollars each, and a meal. According to Lucero, Respondent hired them to help him with mortar repair on the drainage ditch check gate; they had been working an hour and a half before Harrison arrived, and he did pay them $10 each. Lucero heard Chacon to say,

> I understand I broke the law but I thought, since I was working them only for a couple of hours, I thought I was doing the right thing.

Tr. 40.

Lucero testified that Chacon, referring to a prior incident said,

> I admit that I hired these [aliens], . . . But the previous case I did not hire that alien. These two I did and I admit it, I did wrong.

Tr. 41.

A year later, on May 7, 1992, Lucero served a subpoena in connection with "an investigative proceeding . . . relating to employment verification requirements" concerning Arellanes and Gonzalez. The subpoena directed Chacon to provide to the agent certified financial statements or income tax returns for 1990 and 1991 of apprehended aliens. Lucero handed the subpoena to Sierra, but did not obtain the subpoenaed documents until he returned to the Chamos building on a later date by agreement with Sierra. Lucero saw Chacon give the documents, i.e., Chacon's personal income tax returns, to Sierra who photocopied them and handed them to the agent.

On August 11, 1992, when Agent Lucero attempted to serve the NIF on Chacon, Sierra told him Chacon was not available. Lucero left the NIF with Sierra, explaining Chacon's appeal rights.

According to INS, Chacon's responses to discovery denied he solicited labor from or employed the two aliens, that remuneration was discussed or agreed upon, and that he had received an educational visit. INS Brief at 2. No part of that discovery is in the evidentiary record. Nevertheless, Respondent limited his direct case to the claim that Sierra is an employee of Chamos, not of Chacon. On redirect examination, Chacon asserted that Sierra lacked authority to accept "important documents pertaining to" Respondent. Tr. 124. However, having said on re-cross examination that he could not "remember"

whether he had ever seen the alien apprehension letter, notice of intent to fine, or subpoena (exhs. 2,3,4), in response to inquiry from the bench he thought "possibly so, but I don't understand English. I can't remember them very well." Tr. 127, 126-27.

Respondent's testimony on direct and cross examination was essentially limited to Sierra's lack of authority to act for him, and the related distinction between Chacon, individually, and Chamos. Only after counsel for both parties had concluded their examination, and the judge began a colloquy, did Chacon articulate a defense against the claim of unauthorized employment.

Respondent denied that he hired Arellanes and Gonzalez. Rather, he was working on the property when two men (Arellanes and Gonzalez) approached and asked him for work. His response: "No, I don't have any work for you." Tr. 131. It was then he noticed a station wagon approach him, Arellanes and Gonzalez. He soon learned it was an INS agent who asked "What are these fellows doing here?" Chacon's response: "They were asking for work and I didn't hire them. I was working by myself shoveling the sand in." Id. Respondent contends the agent took Arellanes and Gonzalez to the side and spoke to them about requesting payment from Respondent for them. According to Respondent, Arellanes and Gonzalez laughed and asked, "What is he going to pay us? We haven't even worked anything for him." Tr. 132. As Chacon says, that statement was not in the agent's report.

Respondent labeled as false, Lucero's testimony that he had acknowledged employing Arellanes and Gonzalez.

IV. *Discussion*

Determining what happened on May 4, 1991, turns on credibility, i.e., whether, based on the evidence adduced, I am more inclined to believe Complainant's or Respondent's version of the facts in dispute.

Chacon's direct examination was limited to the role of Sierra, and ownership of Chamos. Had the record closed after his direct testimony (Tr. 113-15), cross examination (Tr. 115-24), and the redirect (Tr. 124-25) it engendered, there would have been no rejoinder to Complainant's direct case. Until that point, Chacon made no reference to the events of May 4, 1991. Patently, INS had made its direct case.

It is significant that Chacon's version of the facts of May 4, 1991 gushed forth only after his direct and cross examination by

counsel had finished. His counsel asked not a single question concerning May 4, 1991, until I opened up the inquiry. I am unable to form a judgment as to truthfulness based on demeanor. Chacon, sitting aside his attorney, was impassive throughout the hearing. While others were testifying, I formed the impression from his eye movement and nodding of his head, that he was following the proceeding. Nothing more. His countenance was barely more animated when responding to my questions as a witness in his own behalf.

Testimony forthcoming only after a party represented by counsel has rested his case is dubious at best. Absent any corroboration of record to support the self-serving narrative that emerged only at that point, I cannot credit Chacon's testimony. Considering the limited extent of Chacon's direct case, and the inherent inconsistencies between his responses to my inquiries, and other evidence of record, I find Respondent's testimony to be lacking in credibility. He can only be believed as to the events of May 4, 1991, if I conclude that four INS agents fabricated their testimony and exhibits, and that three of them, Harrison, Housler and Buck, colluded with two illegal immigrants, all under oath, three in testimonial form at hearing, two in official affidavits. This I am loath to and will not do because on this record any falsity is Chacon's. Declining to make an opening or other statement on the record and omitting a post-hearing brief, even his attorney failed to argue Chacon's version of events.

Moreover, the defense presented has a hollow ring. For purposes of deciding this case, it is immaterial whether Chamos or Chacon own the Socorro Road real estate. The extent of Respondent's control over Chamos, a family business, is also of no consequence. He conceded he owns, farms and resides on the real estate on which the building leased to Chamos is located. Chacon is an officer of Chamos, and they share the same postal address on Socorro Road. Whether or not Chacon owns Chamos is immaterial to whether he hired Arellanes and Gonzalez. Lack of an equity position in the corporation does not inform as to whether Respondent had responsibility for the hiring of workers, whether for himself or for Chamos.

The distinction between Chacon and Chamos, "much-to-do-about- nothing," suggests at best that Sierra was an employee of the latter and not literally of Chacon's. Chamos is a Chacon family enterprise, and Sierra quite obviously passed INS documents to Chacon. On the witness stand, Chacon fell short of denying that he had received documents delivered by Lucero. The speciousness of the defense claim is illustrated by Chacon's request for hearing in response to the NIF delivered to Sierra. The legal insufficiency of the claim is highlighted

by the absence of any special appearance or claim to that effect in the request for hearing and omission of such an affirmative defense in the answer to the complaint. I find that the NIF which was delivered to Sierra reached Chacon, who authorized his attorney to file the request for hearing. I conclude that Chacon's failure to recall whether other INS documents reached him via Sierra to be consistent with effective service by the same route, i.e., Sierra.

Sierra's participation in May 1992, handing over Chacon's tax returns to Lucero in response to the subpoena delivered to Sierra, is established by Lucero, Chacon's contrary claim notwithstanding. Respondent's claim that he and Lucero never met in Sierra's presence is defeated by his failure to produce Sierra as a witness. The pattern of dealing between Lucero, Sierra and Chacon, consistent with Lucero's testimony, supports the conclusion that Lucero accurately reported Chacon's acknowledgment of wrongdoing. Lucero, not Chacon, is the trustworthy witness on this record. Again, I find Chacon lacking in credibility.

Chacon's effort at disparaging Sierra's apparent authority to receive process addressed to Chacon is too transparent to be taken seriously, given the unrebutted narrative by Agent Lucero of his dealings with Sierra in the presence of Chacon. I find that for all practical purposes, Chacon utilized Sierra as his agent in dealings with INS.

Chacon's argument that he had no responsibility for hiring, and, therefore, cannot be culpable for employing unauthorized aliens, is irreconcilable with his answer to my question concerning I-9 practices. I asked whether he had prepared I-9s for Arellanes and Gonzalez. His response: "Absolutely. I've never, never hired any alien that doesn't have any papers." Tr. 130. I understood Chacon to be speaking generically of workers he hires and not specifically of the two aliens.

Based on the whole record, I have no doubt that Respondent was aware of his §1324a obligations. Coupling that awareness with the events of May 4, 1991, and his admission to Lucero, I conclude that (a) Respondent hired the two aliens for employment in the United States, and (b) knew them to be unauthorized for employment in the United States, or acted with such reckless disregard for their employment eligibility that knowledge of their ineligibility for such employment can be imputed to him. Arellanes and Gonzalez were employed by Respondent, albeit briefly and frustrated by INS intervention. Respondent agreed to compensate each of the aliens with cash and a meal, for three hours of farm labor. Accordingly, I find, by the preponderance of the evidence, that Respondent hired Arellanes and

Gonzalez for employment in the United States, knowing them not to be authorized to work in the United States. I find in favor of Complainant on Count I.

No I-9s were prepared or presented for Arellanes and Gonzalez. Having concluded that Respondent hired Arellanes and Gonzalez, it follows that failure to prepare I-9s violates §1324a. Chacon was aware of the I-9 procedures from the educational visit which I find Lucero made, and as confirmed by Chacon's having processed an I-9 for Luis Rey Hernandez. I find sufficient and unexceptionable the notice by INS of its demand to inspect the I-9s; none were forthcoming for Arellanes and Gonzalez. For the reasons already discussed, I accept the testimony of Lucero that he delivered the notice of inspection to Sierra, who so advised Chacon. Moreover, it is unrebutted that Sierra told Lucero there were no such I-9s. Accordingly, I find, by the preponderance, of the evidence, that Respondent failed to prepare and present I-9s for the two aliens whom he had employed. I find in favor of Complainant on Count II.

V. *Civil Money Penalty*

A. Count I

There is no statutory criteria for assessment and adjudication of civil money penalties for knowingly hiring unauthorized aliens. 8 U.S.C. §§1324a(e)(4),(5). For knowing hire penalties, OCAHO precedent has, however, borrowed from the statutory criteria mandated for assessment and adjudication in respect of paperwork violations. §1324a(e)(5); U.S. v. Ulysses, 3 OCAHO 449 (9/3/92). Complainant notes on brief that its Field Manual for Employer Sanctions indicates that the five factors "although not exclusive, shall be persuasive." INS Brief at 8. The factors are (1) size of the employer's business; (2) history of previous violations; (3) good faith of the employer; (4) seriousness of the violation(s), and (5) whether the individual(s) was an unauthorized alien.

Agent Lucero testified that he had initiated the recommended INS assessment sought in this case. He calculated the assessment on the basis of equally dividing the five factors into the differential between the statutory minimum and maximum penalty. He considered both size and lack of previous violations in favor of Chacon, but increased the penalty on consideration that his conduct lacked good faith, the violations were serious, and the individuals were unauthorized aliens.

On May 4, 1991, Arellanes and Gonzalez were unauthorized for employment in the United States. The knowing hire of the two aliens cannot be good faith. U.S. v. Mester Mfg. Co., 1 OCAHO 18 (6/17/88), aff'd, Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir. 1989). Compare §1324a(a)(2) (good faith paperwork compliance is an affirmative defense to a charge of knowing hire). Patently, knowing hire of unauthorized aliens is serious as it violates the essence of the national immigration policy enacted by IRCA. There is no evidence of prior violations, and the enterprise is small.

While factors additional to those analogous to §1324a(e)(5) may be considered in appropriate cases, there is no suggestion on this record of any reason to do so. Without vouchsafing Complainant's mathematics, considering the factors outlined above and in the absence of contrary argument, I have no reason to disturb the Count I assessments.

B. Count II

INS determined the penalties for failure to prepare I-9s in similar fashion to its Count I calculations. The two aliens about whom this case revolves were unauthorized for employment in the United States. Moreover, I cannot find good faith on the part of the employer, given the conclusion of unauthorized hire of Arellanes and Gonzalez. Paperwork violations are always potentially serious, since "the principal purpose of the I-9 form is to allow an employer to ensure that it is not hiring anyone who is not authorized to work in the United States." U.S. v. Eagles Groups, Inc., 3 OCAHO 342 at 3 (6/11/92). Total failure to prepare and present I-9s is patently serious as it disables both the employer and the government from auditing compliance with the underlying raison d'etre of the employment eligibility verification process, the disincentive to employ unauthorized aliens. In its assessment, INS quite properly credited Chacon for lack of previous violations, and size.

Factors additional to those which IRCA commands may be considered in assessing civil penalties. See e.g. U.S. v. Giannini Landscaping, Inc., OCAHO Case No. 93A00013 (11/9/93) at 10; U.S. v. M.T.S. Corp., 3 OCAHO 448 (8/26/92) at 4. On this record, there is no reason to do so. As with Count I, I have no reason, considering the factors outlined above, and in the absence of contrary argument, to disturb the Count II assessments.

VI. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, testimony, evidence, briefs, and arguments submitted by the parties. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. As previously discussed, I determine, upon the preponderance of the evidence, that Respondent violated 8 U.S.C. §1324a(a)(1)(A) by hiring for employment the aliens named in Count I of the complaint in the United States, knowing them not to be authorized for employment in the United States.

2. As previously discussed, I determine, upon the preponderance of the evidence, that Respondent violated 8 U.S.C. §1324a(a)(1)(B), by hiring for employment in the United States, the two individuals named in Count II of the complaint, without complying with the requirements of 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b).

3. Respondent will cease and desist from further violations of §1324a.

4. Upon consideration, including that of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty in the amount of $2,600.00 for the Count I violations, and in the amount of $1,280 for the violation found for Count II, for a total assessment of $3,880.00.

SO ORDERED.

Dated and entered this 23rd day of November, 1993.

MARVIN H. MORSE
Administrative Law Judge