

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. 93A00091
EXIM, INC., AND)
JAIME MONARDES,)
INDIVIDUALLY)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING
COMPLAINANT'S REQUEST FOR RELIEF

(January 27, 1994)

Appearances:

For the Complainant
William L. Sims, Esquire

For the Respondent
David W. Chew, Esquire

Before:

E. MILTON FROSBURG
Administrative Law Judge

I. Procedural History

On December 29, 1993, I issued an Order Granting Complainant's Motion for Summary Decision Regarding Liability. The detailed procedural history of this case is included in that Order.

In that Order, I bifurcated the issue of the appropriate amount of civil money penalties and directed the parties to submit statements regarding the application of 8 U.S.C. § 1324a(e)(5). On January 19, 1994, Complainant filed its statement. To date, Respondents have not filed any statement regarding the appropriateness of the requested civil money penalties.

II. Facts

In my previous Order, I found Respondents liable for the violations alleged in Count 1 in that they failed to prepare, retain and/or make available for inspection, employment eligibility verification forms (Form I-9) for 21 individuals in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1324a(a)(1)(B). I also found Respondents liable for the one violation alleged in Count 2 in that they failed to ensure that the employee properly completed section 1 of the employment eligibility verification form (Form I-9) in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B). Further, I found the Respondents liable for the violations alleged in Count 3 in that they failed to properly complete section 2 of the employment eligibility verification form (Form I-9) for thirteen (13) individuals in violation of § 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B). The Complainant requested total civil money penalties of \$28,700 for these violations.

III. Civil Money Penalties

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, § 274A(e)(5) of the Immigration and Nationality Act, 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.

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant argues that Respondent, Exim, Inc., should be considered a moderately sized business and asserts that Respondent employed approximately seventy (70) employees in its relatively stable workforce. Further, Complainant stated that Federal and State employment records indicated a total of \$202,395.17 in wages paid for the quarter ending June 30, 1990. Additional records, according to the Complainant, revealed a total of \$700,308.55 in wages paid for the year of 1989. Respondents have not filed a statement regarding the appropriateness of the requested civil penalties; however, Respondent's counsel represented that he believed that Respondent, Exim, Inc., is no longer in business.

Based on the record, I agree with the Complainant's position that the Respondent, Exim, Inc., should be classified as a small to medium sized business presently not in operation.

2. Good Faith of the Employer

The Complainant asserts that the Respondents did not show good faith in their compliance with the requirements of 8 U.S.C. § 1324a. In its statement with regard to the issue of civil money penalties, the Complainant indicated that the Respondents had previously been issued a Citation Or Warning Letter in January, 1988, regarding alleged IRCA violations.

The record supports a finding of a lack of good faith. When I consider the number of violations proven after Respondent had the benefit of a prior warning, I find that it would not be appropriate to mitigate based on this factor in Counts 1, 2, and 3.

3. Seriousness of the Violation

Complainant argues in its statement that the violations were serious since Respondents' failure to prepare Form I-9s and/or properly complete Form I-9s increased the possibility of an unauthorized person's employment. In its statement, Complainant indicated that this did happen; several unauthorized aliens were apprehended at Respondents' worksite.

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Respondents failed to address these allegations by the Complainant. Therefore, in my discretion, I find that Respondents' violations are serious. I will consider the seriousness of the offense when determining the civil penalties.

4. Whether or Not the Individual Was an Unauthorized Alien

A careful review of the Complaint in this matter indicates that there were no unauthorized aliens alleged in any of the alleged violations although in its statement regarding civil money penalties, the Complainant indicated that there were several unauthorized aliens who were apprehended at the Respondents' worksite. However, Complainant made no monetary adjustments regarding this factor.

Respondent has made no argument with regard to this factor. Under 8 U.S.C. § 1324a(e)(5), in my discretion, I find it inappropriate to increase the civil money penalties based on this factor since none of the alleged violations related to an unauthorized alien.

5. History of Previous Violations of the Employer

In its statement regarding civil money penalties, the Complainant indicated that the Respondents had been issued a citation on a previous occasion and alluded to an understanding that this prior action could be construed as an aggravating factor in the present case. Therefore, the Complainant indicated an upward adjustment of \$180.00 for each of the violations regarding this factor. The record, however, does not reveal that a prior complaint was filed against this Respondent for civil money penalties. Therefore, I find that there were no previous proven violations in this case.

B. Amount of Civil Money Penalty

Complainant has requested that I assess a total civil money penalty in this matter of \$28,700.00 for all three Counts. In Count 1 of the Complaint, the Complainant has requested a civil money penalty of \$820.00 for each of the 21 individuals listed in paragraph A, for a total of civil money penalties of \$17,220.00. In Count 2 of the Complaint, the Complainant has requested a civil money penalty of \$820.00 for the one violation. In Count 3 of the Complaint, the Complainant has requested a civil money penalty of \$820.00 for each of the thirteen (13) individual violations, for a total civil money penalties of \$10,660.00. Complainant explained that it adjusted the minimum \$100.00 civil money penalty upwards by \$180.00 for each of four factors, i.e., size, good faith,

seriousness of violation and previous history, thus, arriving at the \$820.00 figure.

I have previously found that the Complainant had proven, by a preponderance of the evidence, that the Respondents had violated 8 U.S.C. § 1324a(a)(1)(B) as alleged in all three Counts in the Complaint. After careful review of all the evidence of record, I find that Complainant's requested amount of civil money penalties is inappropriate. In my discretion, using a judgmental approach, I find that it is reasonable and appropriate to conclude that for Count I the amount should be \$500.00 for each of the individuals listed in paragraph A of Count 1 making a total of \$10,500.00 in civil money penalties.

As to Count 2 of the Complaint, I find that it is reasonable and appropriate to indicate a civil money penalty of \$500.00 for the one violation in Count 2.

I find that it is reasonable and appropriate to indicate a civil money penalty of \$500.00 for each of the individuals listed in paragraph A of Count 3 of the Complaint for a total of \$6,500.00.

Therefore, I direct the Respondents to pay to the Complainant a total of \$17,500.00. I specifically find that the Respondent, Jaime Monardes, President and an Officer of the corporation, is individually and personally responsible and liable along with the corporation, Exim, Inc., for the civil money penalties awarded.

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.

SO ORDERED this 27th day of January, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge