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. 93A00220
WILLIAMS PRODUCE, INC., Respondent.	)	

FINAL DECISION AND ORDER
(February 3, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Keith Hunsucker, Esq., and
Terry C. Bird, Esq. for Complainant

David W. Davenport, Esq. of Lamar,
Archer & Cofrin, for Respondent

I. *Procedural History*

This is a proceeding pursuant to 8 U.S.C. § 1324a, enacted as section 101 of the Immigration Reform and Control Act of 1986, as amended (IRCA). On December 23, 1993, the Immigration and Naturalization Service (Complainant or INS) initiated this proceeding by filing a complaint against Williams Produce, Inc. (Respondent or Williams) in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint is based on a previous Notice of Intent to Fine (NIF) sent to Respondent by INS and dated August 6, 1993.

Count I of the complaint alleges that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare the employment eligibility verification form (Form I-9) for 143 named individuals. Count II of the complaint alleges that Respondent again violated § 1324a(a)(1)(B) by failing to ensure that one named individual properly completed section 1 of the Form I-9. Count III alleges as a third category of § 1324a(a)(1)(B) violations that Respondent failed to properly complete section 2 of the Form I-9 for 65 named individuals. Finally, Count IV alleges violation of § 1324a(a)(1)(B) for failing to ensure that 231 named individuals properly completed sections 1 and 2 of the Form I-9. The total civil money penalty requested is $281,600.

On January 6, 1994, OCAHO issued a notice of hearing (NOH) which forwarded a copy of the complaint to Williams. The NOH advised Williams that it had 30 days from receipt of the notice to file an answer to the complaint. On February 14, 1994, Respondent timely filed an answer to the complaint.[1]

Respondent's answer denies liability as to all four counts of the complaint. The answer also contains the following three affirmative defenses: (1) that the civil money penalty requested by INS is excessive and therefore violates the Eighth Amendment of the United States Constitution as well as the State of Georgia Constitution and that the request for such fines violates Respondent's right to substantive due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and similar provisions of the Georgia Constitution; (2) that Complainant is barred from conducting this proceeding because the Attorney General failed to provide a prior citation to Respondent warning it of a potential violation as required by 8 U.S.C. § 1324a(i)(2); and (3) that 8 U.S.C. § 1324a(i)(2) is vague and ambiguous, rendering enforcement of that section a violation of Respondent's right to due process under the U.S. Constitution and Georgia State Constitution.

As agreed in the first two telephonic prehearing conferences, the parties submitted a joint stipulation of facts relating to issues of liability. In the stipulation, all allegations of the complaint were admitted as true by the Respondent. In addition, the parties stipulated (1) that no forms or information were disseminated to Respondent by the Attorney General respecting the requirements of 8 U.S.C. § 1324a prior to issuance by INS of a NIF (the service of which prompted the

[1] Due to adverse weather conditions, delivery of the complaint was delayed. It was therefore accepted as timely although it otherwise would have been late.

request for hearing which undergirds the filing of the instant complaint), (2) that the Attorney General did not provide a citation or warning to Respondent indicating that a violation of 8 U.S.C. § 1324a may have occurred and (3) that Respondent's officers, Ray Williams and Joey Tucker, "will appear at the evidentiary hearing and be available for examination by the Complainant as adverse witnesses."

On August 1, 1994, Respondent filed a position statement "setting out [the] remaining disputes as to liability [which survive the stipulation of facts] and to inform the Court as to inferences to be drawn from the stipulated facts previously submitted." Position Statement of Williams Produce, Inc. at 1 [hereinafter Position Statement]. In the Position Statement, Respondent reaffirmed the affirmative defenses it had raised in its answer to the complaint. Respondent also stated that although it had stipulated that it had not "'properly' prepare[d] I-9 forms in all instances, in most of the cases[,] it complied or attempted to comply with the spirit if the [sic] not the letter of the law." Position Statement at 2. The position statement reasserted Respondent's request for a hearing on these issues.

An order dated August 3, 1993 sought to clarify the issues to be litigated at the hearing. Noting that Respondent's statement regarding its attempt to comply with preparing the Form I-9 was presumably a foreshadowing of its intent to assert substantial compliance as a defense, the order warned that it would probably be necessary to review some if not all of the Forms I-9 at the hearing. United States v. Williams Produce, Inc., 4 OCAHO 671 (1994). Apart from this and other defenses previously asserted by Respondent, the Order noted that the main issue at hearing would be the appropriate civil money penalty.

On August 8, 1994, Complainant filed a Response to Respondent's Position Statement. In the Response, Complainant states its belief that following the factual stipulations made by the parties, there are no legal issues with regard to liability; only the issue of quantum of penalty remains. Nevertheless, in response to Respondent's Position Statement, Complainant asserts that Respondent's defenses lack legal foundation. INS asserts that Respondent's defense of a lack of citation/ warning by the Attorney General under 8 U.S.C. § 1324a(i)(2) is based on a misunderstanding of § 1324a. Under § 1324a(i)(2), Complainant asserts that following a six-month introductory public information period, the Attorney General was to provide citations only for a 12-month period. Once the 18-month 'grace period' expired, no

employer was exempt from § 1324a nor were any citations/warnings required as a condition precedent to enforcement and § 1324a liability.

In addition, Complainant argues that since § 1324a(i)(2) is not applicable in this case, Respondent's argument that it is unconstitutionally vague is moot. Finally, responding to Respondent's defense that the complaint is unconstitutional, Complainant asserts that the recitation of constitutional defenses is too vague to permit Complainant to respond.

In the third prehearing conference report and order issued on August 24, 1994, I warned Respondent that its defense of failure to issue a prior citation is unavailing as to I-9 paperwork violations arising subsequent to the 18th month of § 1324a's enactment.

On October 4, 1994, an evidentiary hearing was held in Atlanta, Georgia at which four witnesses testified.

On December 14, 1994, Complainant filed a post-hearing opening brief which states that only the amount of penalty to be assessed remains at issue, and discusses three of the five statutory factors relevant in determining civil penalty amount [hereinafter referred to as Cplt. Opening Brf.]. See 8 U.S.C. § 1324a(e)(5). The three factors discussed by Complainant are (1) size of business, (2) good faith of employer and (3) seriousness of the violation.

On December 16, 1994, Respondent filed a post-hearing opening brief devoted to arguing the validity of its claim that the Attorney General was required to provide Respondent with a citation/warning of a potential violation. [hereinafter Resp. Opening Brf.].

On January 9, 1995, Complainant filed its post-hearing closing brief, denominated "Complainant's Response Brief." Complainant attacks Respondent's arguments on three grounds: (1) that the requirement of a citation to first-time offenders within the first twelve months after the six-month information period following enactment of § 1324a is not applicable to this case; (2) that the evidence does not support Respondent's arguments that its culpability is lessened by the fact that it did not employ illegal aliens; and (3) that Respondent's assertions that its financial worth is low are unsubstantiated.

On January 17, 1995, Respondent filed its Response Brief which argues that Complainant failed to state a claim because it had not alleged "specific factual information as to a given I-9 form" so as to

enable the adjudicator to determine whether a violation of the law had occurred. Resp.'s Response Brief at 2. Respondent also incorporated by reference its arguments set forth in its Answer, Position Statement and Opening Brief. In addition, Respondent reiterates its arguments to mitigate the civil money penalty.

II. *Discussion*

A. Liability Established

Respondent stipulated to all allegations of the complaint. See Stipulations dated July 29, 1994 [hereinafter Stipulations]. Nevertheless, Williams continues to assert a defense to liability based on 8 U.S.C. § 1324a(i)(2) which required the Attorney General to provide an employer with a citation for a potential violation of § 1324a. The section Respondent refers to, however, only requires the Attorney General to issue a citation within the first twelve months following a "6-month public information period." 8 U.S.C. § 1324(i)(1).[2]

Title 8, § 1324a(i)(2) specifically provides that the twelve-month citation period is "subsequent" to the information period thereby making a total of 18 consecutive months of time during which § 1324a was not fully operational following its enactment in 1986. See United States v. Widow Brown's Inn, 3 OCAHO 399 (1992); United States v. Interdynamics, Inc., 3 OCAHO 433 (1992). Thereafter, however, no citations need issue as a precedent to INS issuing a NIF which alleges § 1324a violations. Because Respondent's reliance on § 1324a(i)(2) is unavailing, its constitutional defenses lack merit, and it has stipulated to liability, the only remaining issue is the quantum of civil money penalty.

B. Civil Money Penalty Adjudged

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[2] This defense was first asserted in Respondent's Answer as an affirmative defense. Respondent's other affirmative defenses are equally as unavailing. For example, the defense based on the Eighth Amendment to the U.S. Constitution, as well as on other state and federal constitutional provisions, claiming that the complaint violates Respondent's right to be free of "excessive fines" is not viable before me in light of the statutory maximum and minimum penalty amount set forth in § 1324a(e)(4) & (5). This is especially true since I am prepared to reduce the penalty assessed by INS on consideration of several mitigating factors. See infra. Respondent's third affirmative defense that § 1324a is vague and ambiguous and its enforcement would violate its right to due process under state and federal law is without merit. In contrast, § 1324a(b) is painstakingly specific, spelling out an employer's duties regarding verification of employment eligibility.

The statutory minimum civil money penalty is $100 per individual; the maximum is $1,000. 8 U.S.C. § 1324a(e)(5). Since the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I therefore only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

Five statutory factors must be considered in determining reasonableness of the civil money penalty. The factors are: "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). In weighing each of these factors, I utilize a judgmental and not a formula approach. See e.g., United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993). The result is that each factor's significance is based on the facts of a specific case, although the guidance of IRCA jurisprudence as precedent is not ignored.

In addition, although not binding on this fact-finder, I also from time to time examine pertinent guidelines established by INS for determining the civil money penalty, the purpose of which is to promote consistency. See INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, Aug. 30, 1991 [hereinafter Guidelines]. Allison Densmore (Densmore), the INS agent assigned to Williams, and who initially determined the amount of civil money penalty assessed, testified that she utilized certain of these guidelines in determining the amount of the assessment.

C. Factors Applied

1. Size of Business

Neither IRCA nor the relevant regulations provide guidelines for determining business size. See Tom & Yu, Inc., 3 OCAHO 445. Nevertheless, previous OCAHO cases dealing with § 1324a violations have analyzed to several factors including (1) the number of individuals employed by the enterprise, (2) gross profit of the enterprise, (3) assets and liabilities, (4) nature of the ownership, (5) length of time in

business, and (6) the nature and scope of the business facilities. See e.g., Giannini Landscaping, Inc. 3 OCAHO 573 and United States v. Davis Nursery, Inc., 4 OCAHO 694 (1994).

Respondent has testified that it employed 185 people in 1990, 193 people in 1991 and 254 people in 1992 but that because many of its employees are hired on a seasonal basis, only 60 to 70 were actually working at any given time. Tr. at 39-43. In addition, both parties introduced extensive financial information for Williams, as highlighted below.

In 1990, Williams earned a gross profit of $215,812; in 1991, a gross profit of $317,958; and in 1992, $341,424. Tr. at 53. In addition, Williams has assets which include real property, a packing shed worth $171,337 and machinery and equipment worth $152,638. Tr. at 69-70. The real property is mortgaged at approximately $270,000; $57,000 is owed on the equipment, resulting in a net worth approximating only $16,000. Tr. at 27, 50 and 66. These factors tend to show that although Respondent is not a small business, it is also not a large business either.

Complainant disputes the significance of Respondent's financial bottom line. Complainant argues that Respondent's assets and payroll, considering the nature and scope of the business, make Williams a company which "easily could have properly maintained I-9 Forms for each employee just as it properly complied with other federal laws relating to employees." Complainant's Post-Hearing Brief at 8. Complainant argues that Williams employed a general manager and an office manager, both of whom were familiar with Forms I-9 and, therefore, had sufficient staff to prepare the forms. In contrast, Williams contends that despite having an office and general manager, it is a "lean operation." Tr. at 14. Both its managers participated in the daily operations of Williams and packed produce as did any other employee.

INS Guidelines note that the test for "size" is "whether or not the employer used all the personnel and financial resources at the business' disposal to comply with the law." Guidelines at 8. It appears that the Williams managerial staff performed the same work as the typical employees. I cannot find that Williams acted in total disregard of its IRCA obligations. It did not fail to reasonably allocate resources in an attempt to comply with the law.

The Guidelines support "[a] secondary "test" for consideration of the size factor, [i.e.,] . . . whether a higher monetary penalty would enhance the probability of compliance. All other relevant considerations being equal, the statutory minimum penalty will have a greater economic impact on a marginally profitable business than on a highly profitable business." Id. While Williams is not operating at a loss, it is also not "highly profitable." It is reasonable to characterize Respondent's operation as "marginally" profitable.

Finally, the Guidelines note that even if a company has numerous § 1324a violations but has a "frequent turnover rate[, it] . . . might not be able to personally complete all required I-9's [sic]." Id. Williams' case is one for which the size consideration does not warrant a high penalty per individual. Based on the Guidelines as well as the other subfactors discussed above, a minimum penalty allocated to this factor is more appropriate than the higher penalty allocated by Densmore.

2. Good Faith of Employer

OCAHO case law holds that "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

One subfactor listed in the Guidelines is whether, prior to assessing a penalty, INS made an educational visit. Minaco, 3 OCAHO 587 at 7. Densmore used this factor to heighten the amount of penalty on the basis that an agent had previously visited a business known as Williams Farms and found I-9s which were improperly filled out. Densmore concedes, however, that Williams Farms and the Respondent in this case, while possibly sharing some of the same employees, are separate business entities. Tr. at 121-2. At the time that Williams Farms received its educational visit, the Respondent did not yet exist. Reliance on this subfactor is inappropriate because the record does not establish that Respondent ever received an educational visit.

Likewise, Densmore's use of the Guideline subfactor which looks to cooperation of the Respondent is not enough to show bad faith. Densmore states that Williams' managers had refused to supply another INS agent with the requested Forms I-9. Tr. at 115. Other testimony, however, points out that Williams was then in its "busy

season," the period of harvesting crops. The refusal was in fact a delay until Williams could find the time to meet with INS to present the requested I-9s. The delay, lasting eight days, although understandably nettlesome to INS, is not tantamount to bad faith. Tr. at 116.

On the other hand, the Guidelines state that the "'test' for . . . [good faith] is whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." Guidelines at 9 (emphasis added). The I-9s that Respondent did produce, whether complete or not, demonstrate that its officers/managers knew of IRCA's requirement that an employer verify employment eligibility. Respondent did not, however, act in accordance with IRCA since it failed in many cases to complete any part of the I-9 for numerous employees and where it did, failed to verify properly employment eligibility.

In its defense, Respondent argues that its manager, Joey Tucker, a third generation resident of the county in which Respondent is located, "knew most of the local citizens and non-citizens who were employed at the plant" and therefore knew whom to check for employment eligibility verification. Section 1324a provides no exception for an employer's knowledge of or familiarity with his or her employees; their place of residence, like citizenship, is irrelevant to § 1324a's requirement that an employer properly complete I-9s. Rather, § 1324a provides unequivocally that an employer "must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual [regardless of their history or standing in the local community] is not an unauthorized alien. . . ." 8 U.S.C. § 1324a(b)(1)(A) (emphasis added). Therefore, considering the magnitude of its violations of § 1324a, I find that Respondent has not acted in good faith, and that this factor serves to aggravate the civil money penalty.

3. Seriousness of Violations

Although Respondent argues that this is "simply" a paperwork violation and therefore not deserving of a high monetary penalty, "[p]aperwork violations are always potentially serious, since '[t]he 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.'" Giannini, 3 OCAHO 573 at 9 (citing United States v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (1992)). There are, however, various degrees of seriousness. United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (citing United States v. Felipe, Inc., 1 OCAHO 93

(1989)). "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." Davis Nursery, 4 OCAHO 694 at 21 (quoting United States v. Charles C.W. Wu, 3 OCAHO 434, at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge)).

Count I of the complaint alleges that Respondent failed to prepare the Form I-9 for 143 individuals. Respondent offered no evidence to contest the allegation and admits to the allegations of Count I. Stipulations at 1. As OCAHO case law finds these violations to be serious, I will not use consideration of this factor to mitigate the penalty assessed by INS.

Counts II, III and IV allege that Respondent improperly filled out either sections 1 or 2, or both, of the Form I-9. The fact that there are 297 violations compels the view that this is virtually as serious as is failure to prepare. "Completion of these sections of the I-9 form are critical for deterring hiring illegal aliens." Davis Nursery, 4 OCAHO 694 at 22. Because of the large aggregation of violations, I find no grounds to use this factor to mitigate the penalty assessed.

4. Employment of Unauthorized Aliens

Respondent argues that the civil money penalties imposed are excessive because Williams employed no unauthorized aliens. Complainant, however, asserts that it cannot be sure that Respondent did not employ illegal aliens. "Because of the deficiencies in the Forms I-9 submitted by the Respondent, the Complainant is not able to determine whether Respondent's employees were authorized to work in the United States." Complainant's Response Brief at 4.

Although Complainant's argument has merit, it is unproven that Williams employed unauthorized aliens. As I stated at hearing, "I do not consider uncharged events as evidence of any further violations." Tr. at 78. Accordingly, absent employment of unauthorized aliens, consideration of this factor mitigates in favor of Respondent.

5. Previous § 1324a Violations

There is no evidence on this record of any previous § 1324a violations by Williams, "a factor which mitigates the penalty on behalf of Respondent." Giannini, 3 OCAHO 573 at 8.

6. Other Factors

"OCAHO case law instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties." United States v. King's Produce, 4 OCAHO 592 at 9 (1994). One such factor is the Respondent's "ability to pay." See e.g., Minaco Fashions, 3 OCAHO 587 at 9. In this case, although evidence fails to persuade of a penalty at the statutory minimum, the sum assessed by INS would be unduly punitive.

Respondent also argues that the civil money penalty should be reduced because it substantially complied with § 1324a requirements. I find Respondent's argument at best unavailing. Respondent failed to prepare 143 Forms I-9. Upon examination of the forms produced and for which Respondent failed to properly examine employee documentation, numerous forms are not even signed on behalf of the certifying manager. "[A]bsent attestation it is not possible to determine whether the employer has [properly] satisfied the substantive requirement that it has 'verified that the individual is not an unauthorized alien.'" United States v. J.J.L.C., Inc., 1 OCAHO 154 at 7 (1990). Even when signed, the forms lack other basic information required, such as the name of the business and its address. Accordingly, I find lacking in credibility Respondent's argument that it substantially complied with § 1324a.

7. Effect of Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. While the size of the enterprise, lack of previous violations and ability of Respondent to pay a high fine do not support a finding for the penalty assessed by INS, the aggravating factors of seriousness and lack of good faith do not support adjudication of the statutory minimum. Due to the relatively more serious nature of violations involving failure to prepare the Forms I-9, I adjudge a higher amount for these violations than for the violations involving failure to properly prepare the I-9s. Finally, I make a distinction between violations involving failure to complete only one section of the Form I-9 in contrast to failure to complete both sections.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, transcript of hearing, briefs, motions, and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied.

Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing as alleged in the complaint to comply with the requirements of 8 U.S.C. § 1324a(b)(1), (2) and (3) with respect to the individuals named in Counts I, II, III and IV of the complaint.

2. That upon consideration of the statutory criteria and other relevant factors used 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 civil money penalties in the following amounts:

   Count I, $300.00 as to each of 143 named individuals, $42,900
   Count II, $200.00 as to the named individual, 200
   Count III, $200.00 as to each of 65 named individuals, 13,000
   Count IV, $250.00 as to each of 231 named individuals, 57,750

For a total of **$113,850**.

This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv).[3] As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Final Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7), (8) and 28 C.F.R. § 68.53.

SO ORDERED.

Dated and entered this 3rd day of February, 1995.

MARVIN H. MORSE
Administrative Law Judge

[3] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt.68].