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

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| UNITED STATES OF AMERICA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. § 1324a Proceeding<br>Case No. 95A00003 |
| HUGH JEFFREY FOX, dba,<br>FRANK & STEIN,<br>Respondent. | ) | |

FINAL DECISION AND ORDER
GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(May 1, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Terry Louie, Esq., for Complainant
Hugh Jeffrey Fox, pro se, Respondent

I. *Procedural History and Liability Analyzed*

On January 9, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF) served by INS upon Hugh Jeffrey Fox (Fox or Respondent) and issued on December 14, 1994.

Count I of the Complaint charges Respondent with knowingly hiring and/or continuing to employ two unauthorized aliens in violation of 8 U.S.C. § 1324a(a)(1)(A). The civil money penalty assessed for Count I is $2,500 ($1,250 for each individual). Count II of the Complaint charges Respondent with failure to prepare the employment eligibility verification form (Form I-9) for one named individual. The civil money penalty assessed for Count II is $250. Count III of the Complaint

charges Respondent with failure to complete properly section 2 of the Form I-9 for one named individual for a civil money penalty in the amount of $250. The total assessment is $3,000.

On January 24, 1995, this Office issued a Notice of Hearing (NOH) which transmitted to Respondent a copy of the Complaint and a copy of OCAHO rules of practice and procedure appearing at 28 C.F.R. part 68.[1]

On February 22, 1995, Respondent filed its Answer to the Complaint in which he denied Count I of the Complaint. With regard to Counts II and III, Respondent admits to liability stating that his site manager's "failure to secure the I 9's is in no way proof of intent to commit an illegal act by hiring the . . . [unauthorized aliens]." Answer at 3.

Because Respondent failed to certify service of a copy of its Answer on Complainant, I issued an order on February 27, 1995 which transmitted a copy of the Answer to Complainant.

On March 2, 1995, Complainant filed a Motion for Summary Decision which included affidavits and supporting documentation. Respondent failed to respond to Complainant's Motion within 10 days as required by 28 C.F.R. § 68.38(a). Nevertheless, I issued an Order on April 5, 1995 which granted Respondent additional time in which to respond to the Motion. That Order noted that the parties agree as to Respondent's liability as alleged in Counts II and III but that a material issue remains as to Count I. Specifically, Respondent was asked to comment on Complainant's summary decision exhibits including an affidavit of Respondent's local manager, Robert Irvine (Irvine), "in which he admits that he found out about the employees' unauthorized status and continued to employ them hoping eventually to obtain employment authorization for them."

On April 24, 1995, Respondent filed a response to the April 5 Order in which he admits that "Irvine had knowledge of the [unauthorized aliens'] . . . status . . ." but that Respondent himself "never knew of their status and was not trying to hide the fact that they were in my employ." Response at 1. Although Respondent states that, without knowledge of their status, he in good faith employed the aliens, knowledge is imputed to him by the fact that his agent and employee, Irvine, did

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[1] 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].

have knowledge of the aliens' lack of employment authorization. United States v. Marcel Watch Corp., 1 OCAHO 143, 1007[2] (1990) (analogizing that respondeat superior as utilized in Title VII cases demonstrates that Congress intended such principles to be applicable to IRCA cases).

OCAHO rules of practice and procedure authorize the Administrative Law Judge (ALJ) to dispose of cases, as appropriate, upon motions for summary decision. 28 C.F.R. § 68.38(c). An ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed . . ." show that there is "no genuine issue as to any material fact." Id. A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden of proof shifts to the non-moving party to prove that there is a genuine issue of fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Matsushita, 475 U.S. at 587.

Respondent admits liability on Counts II and III of the Complaint and, by virtue of the principle of respondeat superior, is deemed to have admitted liability on Count I. There is no substantial dispute of material fact before me. Accordingly, I agree with Complainant that this case is appropriate for summary decision. I do not, however, concur with the quantum of the civil money penalty assessment for the reasons stated below.

Although there are OCAHO cases in which the ALJ, granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry, that separate inquiry is not necessary where Respondent is on notice that a pending motion addresses the issue of civil money penalty as well as liability. See United States v. Raygoza, 5 OCAHO 729 at 3 (1995) (discussing United States v. Martinez, 2 OCAHO 360 (1991), vacated and remanded in part, Martinez v. I.N.S.,

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[2] Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume I, however, are to pages within the original issuances.

959 F.2d 968 (5th Cir. 1992) (unpublished)). Complainant's Motion does not address the five factors set out in 8 U.S.C. § 1324a(e)(5) which are obligatory considerations upon assessing and adjudicating the quantum of civil money penalty. However, the Motion does explicitly implicate and address both liability and the civil money penalty. Respondent "is no less on notice of the peril for failing to contest the Motion as to quantum than he is as to liability. Accordingly, there is no reason to bifurcate this proceeding and to delay judgment on penalty while now adjudicating liability." Id. Therefore, while the better practice for INS would be to include in motions for summary decision its rationale for assessing civil money penalties, I find in the materials of record sufficient basis on which to adjudicate the appropriate sums.

II. *Civil Money Penalty Adjudged*

A. Count I: substantive violations

The statutory minimum for the civil money penalty in a case involving a first-time offense of unauthorized hire of aliens is $250; the maximum is $2,000. 8 U.S.C. § 1324a(e)(4)(A)(i). As 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 Raygoza, 5 OCAHO 529 at 3; United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). Therefore, I only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of the assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

In response to the April 5, 1995 Order inviting Respondent to respond to Complainant's documentary evidence that Irvine knowingly hired unauthorized aliens, Respondent asserts:

> Due to the fact that I live in Virginia and this business was in Minnesota, I was forced to place some basic trust in Mr, [sic] Irvine. Mr. Irvine was acting as our agent when he originally hired the . . . [unauthorized aliens]. Mr. Irvine is solely responsible for continuing to employ . . . [the aliens] and for trying to assist them in a status change. Although I did know that . . . [they] were in my employ, I employed them in good faith. Proof of this is that I paid unemployment and Social Security, as well as Federal Taxes on both of . . . [them]. I never knew of their status and was not trying to hide the fact that they were in my employ.

Response at 1.

Although § 1324a does recognize good faith as an affirmative defense to substantive violations of § 1324a,[3] it is insufficient to assist Respondent in defending against the penalty. While Respondent's lack of knowledge with regard to his employees' status is a factor to be weighed in reducing the civil money penalty assessed by the INS, his carelessness in permitting Irvine to proceed on his behalf does not absolve him of a serious violation of § 1324a. Accordingly, I discount the INS assessment from $1250 to $900 for each individual listed in Count I of the Complaint for a total amount of $1800.

B. Counts II and III: paperwork violations

The statutory minimum for the civil money penalty in a paperwork violation case is $100 per individual; the maximum is $1,000. As with the substantive violations, I have no reason to increase the penalty beyond the amount assessed by INS. Therefore, I only consider a range between the statutory minimum of $100 and $250, the amount requested by INS.

Five statutory factors must be considered in setting 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 the 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).

1. Size of Business

No evidence was submitted by either party on this factor. The fact that Respondent is a franchisee, prosecuted by INS in his individual capacity as operator of what is commonly known as a fast-food outlet compels the conclusion that the size of the enterprise is small. In any event, the most significant factors with respect to the civil money penalty are that the individuals in Counts II and III were unauthorized and that Respondent had no history of violations. Nevertheless, OCAHO case law consistently holds that where a business is "small," the civil money penalty may be mitigated. See, e.g., Giannini Landscaping Inc., 3 OCAHO 573; United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990).

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[3] See 8 U.S.C. § 1324a(a)(3).

2. Good Faith

OCAHO case law states that "to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)). See also United States v. Big Bear Market, 1 OCAHO 48 (1989); aff'd United States v. Big Bear Mkt., 913 F.2d 754 (9th Cir. 1990). Both individuals listed in Counts II and III are also listed in Count I, i.e., both are unauthorized aliens, whose lack of status to authorize employment was known to Irvine, Respondent's agent.

The purpose of the employment verification regimen is to provide a mechanism by which employers and INS can audit and assure compliance with the prohibition against employment of unauthorized aliens in the United States. It follows that Irvine, and therefore Respondent, can hardly be complimented for good faith compliance in employing the aliens, knowing them to be unauthorized. To the contrary, by the very nature of their lack of status, Respondent could not exercise good faith in complying with Form I-9 requirements as to the individuals in Count I. Nevertheless, to assume an absence of good faith within the meaning of § 1324a(e)(5) so as to aggravate the penalty because of the employment of unauthorized aliens, without more, obscures the differentiation in § 1324a(e)(5) between the factors of "good faith" and "whether or not the individual was an unauthorized alien." The command of the statute is to consider both factors, not to subsume one within the other. Accordingly, absent data additional to the finding of continuing unauthorized employment, this factor does not serve to aggravate the civil money penalty.

3. Seriousness

OCAHO case law states that "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." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (citing United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992)). Respondent's failure to provide any Form I-9 for the individual in Count II is therefore a serious violation which will aggravate the penalty. In contrast, Count III alleges only failure to complete properly section 2 of the Form I-9, a violation which is less serious and therefore mitigated to some extent.

4. Unauthorized Aliens

Both individuals in Counts II and III were unauthorized aliens, a factor which aggravates the civil money penalty.

5. History of Previous Violations

Respondent has no history of previous violations, a factor which mitigates in his favor. See Giannini, 3 OCAHO 573 at 8.

Upon consideration of the five factors, I find that the appropriate civil money penalty for Count II is $230 and for Count III is $200.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings, motion and documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied.

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the INS assessment. With regard to the paperwork violations, while the size and lack of previous violations do not support a finding for a high penalty, the aggravating factors of lack of good faith, seriousness and employment of unauthorized aliens do not support an assessment for the statutory minimum. Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That Complainant's Motion for Summary Decision is granted;

2. That Respondent knowingly continued to employ the two individuals named in Count I who were unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(2);

3. That Respondent failed to retain and/or make available for inspection the Form I-9 for one individual named in Count II in violation of 8 U.S.C. § 1324a(a)(1)(B);

4. That Respondent failed to complete properly § 2 of the Form I-9 for one named individual in Count III in violation of 8 U.S.C. § 1324a(a)(1)(B);

5. That upon consideration of the substantive violations and Respondent's assertions with regard to them, and the statutory criteria to be considered in 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 following amount:

   Count I: $900 as to each named individual, for a total of $1800
   Count II: $230 as to one named individual, for a total of $230
   Count III: $200 as to one named individual, for a total of $200

   For a total civil money penalty of $2,230;

6. That Respondent cease and desist from violating 8 U.S.C. § 1324a.

This Final Decision and Order Granting Complainant's Motion for Summary Decision 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). 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 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 1st day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge