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. 95A00016
TACO PLUS, INC. d/b/a TACO LOCO, Respondent.	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(June 20, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William F. McColough, Esq.
for Complainant
Rosemarie Tomasio, pro se
for Respondent

I. *Procedural History*

On February 2, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint against Taco Plus, Inc. (Taco Plus or Respondent) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint alleges that Respondent violated 8 U.S.C. § 1324a, § 101 of the Immigration Reform and Control Act (IRCA), prohibiting employers from hiring unauthorized aliens and requiring employers to verify employment authorization by properly filling out an employment eligibility verification form (Form I-9) for each employee. Exhibit A to the Complaint is Complainant's Notice of Intent to Fine (NIF) which was served on Respondent on November 2, 1994.

Count I of the Complaint charges Respondent with knowingly hiring and/or continuing to employ one named unauthorized alien in violation of 8 U.S.C. § 1324a(a)(1)(A). The civil money penalty for Count I is $375.

Counts II through IV allege that Respondent violated the paperwork requirements under 8 U.S.C. § 1324a(a)(1)(B). Count II charges Respondent with failure to ensure that two named employees properly completed sections 1 and Respondent with failure to complete properly section 2 of the Form I-9; the civil money penalty is $570 ($225 for one violation and $345 for the other). Count III charges Respondent with failure to complete properly section 2 of the Form I-9 for seven individuals; the civil money penalty is $1,575 ($225 for each violation). Count IV charges Respondent with failure to ensure that one named individual timely completed sections 1 and Respondent with failure to complete properly section 2 of the Form I-9; the civil money penalty is $220. The total civil money penalty requested is $2,740.

On February 3, 1995, OCAHO issued a Notice of Hearing which transmitted a copy of the Complaint to Respondent.

On February 27, 1995, Respondent timely filed an Answer to the Complaint in which it admitted to the allegations of Count I. Answer at 2. As for Counts II, III, and IV, Respondent states that all of the individuals listed "had full and complete information filled in the I-9 form which I checked and verified." Respondent nevertheless admits that "I should of [sic] signed the form but I just threw the forms (because everything is done quickly when you are the sole-owner and bottle-washer) in my file drawer." Answer at 4.

On March 10, 1995, Complainant filed a Motion to Strike Respondent's "first defense . . . wherein it appears to be claiming that it acted in good faith as it is clearly insufficient as a matter of law and fact, and is based on an erroneous interpretation of the law." Motion to Strike at 1.

By Order dated April 4, 1995, I granted Complainant's Motion to Strike on the grounds that while "'good faith compliance with the paperwork requirements is an affirmative defense to an unauthorized employment charge[,] . . . with respect to liability for paperwork violations, good faith goes only to the quantum of civil money penalty and not the fact of liability.'" Order of April 4, 1995 at 2 (citing United

States v. Mester Manufacturing Co., 1 OCAHO 18, 70 (1988),[1] aff'd, 879 F.2d 561 (9th Cir. 1989)). See 28 C.F.R. § 68.8(c)(2), § 68.11(b).[2]

On May 17, 1995, Complainant filed a Motion for Summary Decision (Motion). Although the time for a response has passed, Respondent has not filed an answer to the Motion.

II. *Discussion*

OCAHO rules of practice and procedure authorize the administrative law judge (ALJ) to "enter 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 and that party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, it must be kept in mind that all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. United States v. David Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). Failure to meet this burden requires that summary decision be granted in the moving party's favor.

A. Liability Established

---

[1] 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 1, however, are to pages within the original issuances.

[2] 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].

As previously stated, Respondent admits to liability for all counts of the Complaint. As to Count I, Complainant correctly states that, although good faith is a defense to allegations of § 1324a(a)(1)(A) violations, it does not apply where the employer is proven to have knowingly hired an unauthorized alien. See 8 U.S.C. § 1324a(a)(3). Respondent admits

> full penalties for this individual as we are responsible for hiring Demetrio Gonzalez without his authorization to work in the United States. We hired this individual in an emergency situation. We needed help desperately and he was the only applicant. His brother was working for us and was authorized to work in the United States. We were told that Demetrio was getting his papers anytime. Believing this, we put Demetrio on the payroll.

Answer at 2. These statements establish a lack of good faith compliance with § 1324a; Respondent knew prior to hiring the alien that he was unauthorized for employment. I find Respondent liable for Count I of the Complaint.

As to Counts II-IV, Co-owner Rosemarie Tomasio (Tomasio) argues

> I truly thought they were my I-9 forms, for my files. With all honesty, I'm sorry, I never thought about signing them. I do not sign my copy of my monthly tax forms because it is only for my files. . . .

Answer at 4. Respondent's exhibits to the Motion for Summary Decision show that it is true that Respondent did not attest by signature to any of the Forms I-9.

Complainant asserts that, to the extent Respondent argues substantial compliance as a defense, it cannot escape liability. As I have previously held, "[a]ttestation is an essential substantive requirement, making its omission a critical factor in gauging an employer's compliance with IRCA." United States v. J.J.L.C., Inc., 1 OCAHO 154, 1096 (1990). "Unlike omissions which may be deemed technical in nature, an employer's failure to sign an I-9 is not substantial compliance." Id. Accordingly, I also find Respondent liable for Counts II-IV.

B. Civil Money Penalty

The Motion addresses both liability and civil money penalty. Accordingly, it is appropriate to dispose in this Final Decision and Order of the civil money penalty issue as well as the liability issue. See United States v. Fox, 5 OCAHO 756 at 3 (1995) (stating that "[a]lthough 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").

1. Substantive Violation

The statutory minimum civil money penalty for substantive violations is $250 per individual; the maximum is $2,000. 8 U.S.C. § 1324a(e)(4)(A)(i). It is my practice to consider only a civil money penalty between the statutory minimum and 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). Unlike paperwork violations, there are no statutory factors which must be considered in assessing the appropriate fine. Since Respondent has offered no evidence which would lead me to conclude it does not deserve the penalty assessed by INS, I let that assessment stand.

2. Paperwork Violations

In cases involving paperwork violations, the statutory minimum civil money penalty is $100; the maximum is $1,000. See 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. As with substantive violations, I therefore 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).

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 these 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 caselaw as precedent is not ignored.

a. Size of Business

Neither IRCA nor the relevant regulations provide guidelines for determining business size. See Tom & Yu, Inc., 3 OCAHO 445. However, OCAHO caselaw has consistently held that where a business is 'small', the civil money penalty is to be mitigated. See Giannini, 3 OCAHO 573 at 9; United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990). As Respondent failed to respond to the Motion for Summary Decision, only Complainant specifically addressed the factor of size. INS contends that,

> Respondent is a restaurant business that appears to have a payroll of about ten individuals at any given time, not counting the two owners who appear to also work [sic] at the business. It appears that most of respondent's employees are service persons part of whose wages are the result of tips. For the week ending 7/25/93 it appears that a net total of $1,178.24 was disbursed as salary to its employees. (Exhibit B) Profitability is unknown. In view of its size there appears to be little reason for not correctly preparing I-9's.

Motion at 6-7.

I disagree with Complainant that this factor should aggravate the civil money penalty. In other OCAHO cases involving employers with very few employees and little other information with which to determine size, I have held that the business is small and therefore the civil money penalty should be mitigated. See, e.g., United States v. Raygoza, 5 OCAHO 729 at 3-4 (1995). I so hold.

b. Good Faith of Employer

Complainant argues that "Respondent has failed to demonstrate an honest intention to exercise reasonable care and diligence in its compliance with the law . . . [because it] has admitted knowingly employing an unauthorized alien for a [sic] least a ten month period, during what it claims was an emergency situation." Motion at 7. In addition, Complainant asserts lack of good faith because "[o]ne hundred percent of the I-9's presented for inspection are deficient in one or more respects [and] [a] one hundred percent failure can not be based on carelessness but rather shows a total disregard of its responsibility." Id.

While I agree with Complainant that, having knowingly employed an unauthorized alien and having failed to complete any of the I-9s properly does lend itself to a finding of bad faith, OCAHO caselaw requires more than "the mere fact of paperwork violations" in order "to show a 'lack of good faith.'" 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)).

Respondent's co-owner Tomasio stated that she did not attest to the information in the I-9s because she thought that, like Internal Revenue Forms, it was her business record. Having obtained the required information, but failing to sign the Forms I-9 as was the case with the majority of Respondent's I-9s, does not persuade me that Respondent was showing culpable behavior necessary to prove bad faith. Therefore, this factor will be used to mitigate the civil money penalty for all but the violation involving the I-9 for the unauthorized alien.

c. Seriousness of the Violations

Complainant argues that Respondent has committed serious violations of § 1324a because (1) the unauthorized alien hired in an "emergency situation" was kept on as an employee even after no emergency existed and (2) "Respondents [sic] failure to properly complete [sic] section 2 of an [sic] I-9s for any of its employees shows a reckless disregard for compliance with IRCA requirements." Motion at 7.

As I have stated before, there are various degrees of seriousness. United States v. Williams Produce, Inc. 5 OCAHO 730 at 8 (1995). Counts II-IV allege that Respondent failed to complete certain sections of the Form I-9. While "[c]ompletion of these sections of the I-9 form are critical for deterring hiring [of] illegal aliens," upon review of copies of the I-9s attached to Complainant's Motion, I cannot agree with Complainant that Respondent failed properly to complete section 2 for any of its employees. See Motion at 7. I do, however, agree with Complainant that the I-9 presented for the unauthorized alien in Count I is "so deficient that it is almost tantamount to a total failure to prepare . . ." the Form I-9. Motion at 7. I find the violations listed in Counts II-IV serious. However, I make a distinction between one individual in Count II (i.e., the unauthorized alien who is also listed in Count I) and the other individuals listed in Counts II-IV, finding that as to the first individual, the violation is relatively more serious.

d. Employment of Unauthorized Aliens

Respondent employed one unauthorized alien who is also listed in Count II as an individual for whom Respondent failed to complete properly an I-9. The civil money penalty will be aggravated for this individual.

e. History of Previous Violations

There is no evidence of prior § 1324a violations.

f. 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 business and lack of previous violations do not support a finding for the penalty assessed by INS, the aggravating factors of lack of good faith, seriousness and employment of unauthorized alien do not support adjudication of the statutory minimum. In addition, in assessing the penalty, I note that INS has already assessed a fairly low penalty in light of the factors. Due to the relatively more serious nature of the one individual in Count II for whom virtually no information was filled in, I adjudge a higher amount for this violation than for the remaining paperwork violations containing some, albeit not all required information.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, the Answer, pleadings 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 by failing as alleged in the Complaint to comply with the requirements of §§ 1324a(a) and (b) with respect to the individuals named in Counts I, II, III, and IV of the Complaint;

2. That Respondent pay a civil money penalty in the amount of $375 for the hiring of an unauthorized alien listed in Count I;

3. That upon consideration of the statutory criteria and other relevant factors used for determining the amount of civil money penalty for paperwork violations listed in Counts II-IV, it is just and reasonable to require Respondent to pay civil money penalties in the following amounts:

Count II, $300 as to one and $200 as to the other named individual, for a total of $500;

Count III, $150 as to each of the seven named individuals, for a total of $1050;

Count IV, $200 as to the named individual, for a total of $200;

For a total civil money penalty of $2,125.

This 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 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 20th day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge