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. l324a Proceeding Case No. 94A00121
CHEF RAYKO, INC., D/B/A CHEF RAYKO'S CUCINA ITALIANA Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF ADMINISTRATIVE LAW JUDGE'S ORDER

On August 30, 1995, the Honorable Marvin H. Morse, the Administrative Law Judge (ALJ) assigned to *United States v. Chef Rayko*, issued a Final Decision and Order against Chef Rayko, hereinafter the Respondent.

The Complaint contains four counts. Count I alleges Respondent knowingly hired and/or continued to employ one individual unauthorized as to that employment in violation of 8 U.S.C. § 1324a(a)(2). Counts II-V allege that Respondent violated section 1324a(a)(1)(B) by not complying with the employment eligibility verification (paperwork) requirements of section 1324a(b). In previous motions practice, the ALJ found that the Respondent was in violation of section 1324a(a)(2) for knowingly continuing to employ one unauthorized worker, as alleged in Count I. Under Count II, the ALJ had determined that the Respondent failed to comply with the employment verification requirements by not properly completing section 2 of the employment eligibility verification form (Form I-9) for three individuals. Under Count III, the ALJ had found that Respondent did not retain and/or did not make available for inspection the Forms I-9 for 24 individuals, as required by section 1324a(b)(3). As to Count IV, the ALJ had found the Respondent

failed to prepare the Forms I-9 for four individuals as required by section 1324a(b). On Count V, the ALJ had found that the Respondent failed to ensure that two individuals named in that count timely completed section one of the Forms I-9 as required by section 1324a(b)(1). Only liability as to five individuals listed in Count III and the assessment of civil money penalties remained to be addressed in the ALJ's Order of August 30, 1995. This Modification and Remand concerns the ALJ's assessment of civil money penalties.

The ALJ, having found the Respondent liable for paperwork violations as alleged in Counts II-V, assessed the penalty for those violations after considering the following factors specified by the statute:

> In determining the amount of the penalty, [for paperwork violations] 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 violations.

8 U.S.C. § 1324a(e)(5).

With regard to the factor pertaining to whether the employees involved were unauthorized aliens, the Complainant Immigration and Naturalization Service (INS) argued that the civil money penalty should be aggravated as to seven of the paperwork violations because the named employees were not authorized to work in the United States. The Respondent contended that the penalty should be mitigated because Respondent was without knowledge that these individuals were unauthorized. ALJ Order at 7-8. In declining to aggravate the civil money penalty based on this factor, except for one employee listed in Count IV who was also the subject of a "knowing hire and/or continuing to employ" violation of section 1324a(a)(2) charged in Count I, the ALJ stated as follows:

> [I] do not normally "consider uncharged events as evidence of any further violations."[1] Although Complainant submitted copious evidence to demonstrate that seven . . . employees were unauthorized for employment, it is obvious that, for whatever reason, INS prosecuted Chef Rayko on only one count of unauthorized employment (i.e. Count

[1] Certainly it is well established in OCAHO case law that uncharged prior events will not be used as justification for aggravating a civil money penalty on the basis of the "history of previous violations" factor in section 1324a(e)(5). *See, e.g. United States v. Honeybake Farms, Inc.*, 2 OCAHO 311, at 4-5 (1991). However in the context of the instant case, the ALJ's use of this precept is inappropriate for the reasons set forth below.

> I).[2] I refuse to aggravate the civil money penalty based on Complainant's evidence that six individuals implicated in the paperwork counts may have been unauthorized as to their employment by Respondent. There is simply no proof that Respondent knew that any of the individuals in Counts III and . . . [three out of four] in Count IV were unauthorized. There is evidence that even after finding out that Perez-Morales (the individual in Count I, who is also included in Count IV) was unauthorized, Chef Rayko continued to retain him as an employee. *See* Tr. at 235-6. Therefore, I will aggravate the penalty in Count IV but only as to the individual also named in Count I.

ALJ Order at 8 (footnotes omitted).

The ALJ erred in requiring proof that the employer had knowledge of the six employees' unauthorized status as a prerequisite for aggravating the civil money penalty based on this factor. Certainly the Complainant is obliged to document the employees' unauthorized status in order to justify any enhancement of the civil money penalty based on this factor. *See, e.g., United States v. Karnival Fashion*, 5 OCAHO 783, at 3-4 (1995)(modified on other grounds). However, there is nothing in the plain wording of the statute, the legislative history, or the applicable regulations to support the grafting of an additional "knowledge" requirement to this factor. Indeed, OCAHO case law has consistently held that an employer's lack of knowledge of an employee's unauthorized status is irrelevant in determining whether to aggravate the civil money penalty based on this factor. *See, United States v. Davis Nursery Inc.*, 4 OCAHO 694, at 20 (1994); *United States v. Giannini Landscaping Inc.*, 3 OCAHO 573, at 8 (1993); *United States v. Pizzuto*, 2 OCAHO 447, at 5 (1992); *United States v. Land Coast Insulation*, 2 OCAHO 374, at 27 (1991); *United States v. Acevedo*, 1 OCAHO 95, 650-51 (1989).

With the exception of *Giannini Landscaping Inc.*, all of the aforementioned cases involved complaints alleging only verification violations. However, if OCAHO adjudicators were to adhere to the position of the ALJ in the instant case, they would be precluded from increasing the fine for the factor of unauthorized aliens in any case in which the complaint alleged only verification violations. I find no basis in the law for such a constraint. Indeed OCAHO case law has consistently held that, to the extent verification errors or omissions could lead to the hiring of

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[2] I hope the discussion below will make clear that the INS' exercise of prosecutorial discretion as to which employees are the subject of a substantive unauthorized employment charge, is essentially irrelevant to the inquiry and analysis to be made in assessing paperwork fines under this particular factor. Clearly, it is much easier to prove an employee's unauthorized status than it is to prove an employer's knowledge of that status. The thrust of this modification is that sufficient evidence of unauthorized status is all that is required to make this factor applicable to a given paperwork violation.

unauthorized aliens, they are considered more serious violations because they undermine the verification system, which in turn "[r]ender[s] ineffective the congressional prohibition against the employment of unauthorized aliens." *United States v. Wu*, 2 OCAHO 434 at 2 (1992). Accordingly, if an employer's verification violation does in fact lead to the hiring of an unauthorized alien, it is perfectly consistent with the statutory scheme to aggravate the penalty on that basis, irrespective of the employer's knowledge, or lack of knowledge, of the employee's unauthorized status.

Given the relatively brief and general wording of the five factors listed in section 1324a(e)(5), this agency has generally accorded the ALJs broad discretion in applying them. *See generally, United States v. Felipe*, 1 OCAHO 108, 726 (1989). Certainly, in the ordinary case, the Chief Administrative Hearing Officer would not be justified in quibbling about exactly how much weight an ALJ should attach to a given factor in an individual case. However, section 1324a(e)(5) commands that "[d]ue consideration shall be given . . . ," to each of the five factors. Accordingly, "[i]t is . . . of the utmost concern of this agency that the five factors mandated by statute be given due consideration by an Administrative Law Judge when determining a civil money penalty." *Felipe* at 732. I conclude that, in this particular instance, the ALJ has not given due consideration to one of the factors because he declined to accord any weight to the unauthorized alien factor on the basis of a legal interpretation which I find is not supported by the statute, regulations, or case law.

ACCORDINGLY,

For the above stated reasons, the ALJ's Final Decision and Order is hereby modified, to the extent that it relies on the above-quoted reasoning from page 8 of that order, and remanded to determine whether the civil money penalties imposed on the Respondent should be increased in light of the above determination.

It is **SO ORDERED** this 29th day of September, 1995

JACK E. PERKINS
Chief Administrative Hearing Officer

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UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding Case No. 94A00121
CHEF RAYKO, INC., D/B/A CHEF RAYKO'S CUCINA ITALIANA Respondent.	)	

FINAL DECISION AND ORDER
(August 30, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: MaeLissa Brauer, Esq., for Complainant
Kimberly J. Barton, Esq., for Respondent

I. *Procedural History*

On June 24, 1994, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint alleging that Chef Rayko, Inc. (Chef Rayko or Respondent) violated § 101 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324a. The Complaint, filed in the Office of the Chief Administrative Hearing Officer (OCAHO), includes an underlying Notice of Intent to Fine (NIF) issued on February 24, 1994, and a request for hearing dated March 13, 1994.

The Complaint alleges four counts. Count I charges Respondent with knowingly hiring and/or continuing to employ one named individual unauthorized as to that employment in violation of § 1324a(a)(2). Count I demands a civil money penalty of $1,290. Counts II-V allege that Respondent violated § 1324a(a)(1)(B) by not complying with the requirements of § 1324a(b). Count II charges Respondent with failing properly to complete section 2 of the employment eligibility verification form (Form I-9) for three named individuals. Count II demands a civil money penalty of $1,710 ($630 for each of two individuals and $450 for

the third). Count III, as amended,[1] charges Respondent with failure to retain and/or make available for inspection the Form I-9 for 24 named individuals. Count III demands a civil money penalty of $15,660 ($630 for each of 21 individuals and $810 each for three of them). Count IV charges Respondent with failure to prepare the Form I-9 for four named individuals. Count IV demands a civil money penalty of $3,060 ($810 for each of three individuals and $630 for one of them). Count V charges Respondent with failure to ensure that two named individuals timely completed section 1 of the Form I-9. Count V demands a civil money penalty of $630 per individual, for a total of $1,260, with a consequential reduction in the number of individuals and penalty for Count III. Complainant seeks a total civil money penalty of $22,980. In addition, INS requests that an order issue directing Respondent to cease and desist from employing unauthorized aliens.

On June 27, 1994, OCAHO issued a Notice of Hearing which transmitted to Respondent a copy of the Complaint.

On August 1, 1994, Respondent timely filed its Answer which denied the allegations of the Complaint and stated "that the proposed penalty or award is excessive and inappropriate. . . ." Answer at 1.

Complainant filed successive Motions for Summary Decision which were granted by Orders dated December 14, 1994, January 4, 1995 and March 9, 1995. As a result of Complainant's Motions, during a telephonic prehearing conference on March 16, 1995, "[t]he parties confirmed that the only remaining issues as to liability are five individuals in Count III of the Complaint. . . ." Fifth Prehearing Conference Report and Order at 1 (March 16, 1995). With respect to these individuals as well as the civil money penalty issue, Respondent continued to request an evidentiary hearing which was held on March 21, 1995.

On June 12, 1995, Complainant filed its Post-Hearing Opening Brief [hereinafter cited as Complainant's Brief]; Respondent filed its Brief on July 28, 1995 [hereinafter cited as Respondent's Brief]. Complainant also filed a post-hearing response brief on August 11, 1995 [hereinafter cited as Complainant's Response Brief]. Respondent declined the opportunity to file a reply brief.

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[1] On January 17, 1995, Complainant filed a Motion to Amend the Complaint to add a Count V. Respondent filed an Opposition to the Motion to Amend on February 7, 1995, which it orally withdrew during a telephonic prehearing conference on February 16, 1995 at which time I granted the Motion to Amend. Count III of the Complaint was reduced to 24 individuals and the penalty demanded was diminished accordingly.

II. *Discussion*

A. Remaining Liability Issues

The issues of liability which survived prior motion practice pertain to five individuals listed in Count III of the Complaint for whom Respondent is alleged to have failed to retain and/or make available for inspection the Form I-9. Respondent's principal, Rayko Blasic (Blasic), was personally served with a Notice of Inspection by INS on January 25, 1993. Tr. at 115-16; Cplt. Exh. E. The Notice scheduled an inspection of Respondent's Forms I-9 for February 1, 1993. Tr. at 116; Cplt. Exh. E. Upon request by Respondent's former attorney, the inspection was postponed until February 5, 1993. Tr. at 117-18. According to Complainant, on that date, Respondent presented INS with approximately 22 I-9s. Id. at 118. Forms I-9 for the five individuals at issue were not presented at that time. Tr. at 119-20. None of the I-9s were taken by INS because Respondent's attorney would not permit them to be removed; copies of only three I-9s were made by the agents. Tr. at 122.

Respondent attempts to rebut Complainant's assertion, claiming that there is no evidence in the record to prove that Complainant was not presented with the five I-9s on February 5. Resp. Br. at 5. However, the evidence is consistent with the conclusion that Respondent failed to submit the I-9s on the day of inspection. Both the INS Special Agent in charge of the inspection, David C. Case (Case), and INS Special Agent Albert B. Plasket (Plasket) who assisted in the inspection, recall no such submission,[2] and Respondent's evidence is not to the contrary. Respondent appears to concede as much, arguing that, through counsel, it presented I-9s for the five individuals on February 8, 1995. Resp. Br. at 4; Tr. at 167-8.

On February 8, 1993, pursuant to a subpoena served by INS late on the 5th, Rayko Blasic met the INS agents at their offices. According to Respondent's claim, by counsel, Case was presented with the missing I-9s and refused to accept them. Resp. Br. at 5; Tr. at 266. In contrast, Case testified that he cannot recall being offered additional forms, but agrees he would not have accepted them if they had been offered.[3] Tr. at 167-8. Significantly, Blasic has no knowledge whether I-9s were

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[2] Tr. at 119-20, 167-8, 222-4.

[3] In addition to Case, Plasket who was present at the inspection, testified that he witnessed and recorded all the I-9s presented on the day of inspection and that the five I-9s at issue were not presented. Tr. at 220-24.

presented at that time. Tr. at 265-7. In sum, there is no evidence to support Respondent's assertion that its attorney presented the five I-9s on February 8, 1993 or at any other time. In addition, there is no claim by Respondent that the February 8, 1993 "employer interview" session pursuant to subpoena was a continuation of the February 5 inspection.

Moreover, it is unnecessary to decide whether Respondent presented the five I-9s on February 8, 1993. Under 8 U.S.C. § 1324a(b)(3), an employer is required to make Forms I-9 available to the INS for each individual hired. Consistent with § 1324a(b)(3), INS regulations provide, in pertinent part, that Forms I-9 must be made available at the time of inspection and "[a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements. . . ." 8 C.F.R. § 274a.2(b)(2)(ii) (emphasis added).

In addition, OCAHO caselaw holds that presentation of I-9s in an untimely manner, while relevant to the civil money penalty with respect to consideration of good faith, "is not relevant in determining the facts of the violation." United States v. 4431 Inc., T/A Candlelight Inn, 4 OCAHO 611 at 17 (1994) (Order Granting In Part and Denying In Part Complainant's Motion for Summary Decision). Accordingly, I find unavailing Respondent's argument that submission of the five I-9s on February 8, 1995 would constitute compliance with § 1324a paperwork requirements. In addition, I find and conclude that Respondent failed to make available as required the five I-9s at issue.

B. Civil Money Penalty Adjudged

1. Substantive Violation

Respondent is liable for one violation of knowingly continuing to employ Jaime Perez-Morales (Perez-Morales), an unauthorized alien. The statutory minimum civil money penalty for a substantive violation is $250; the maximum $2,000. 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 INS assessment, i.e., $1,290. See United States v. Williams Produce, Inc., 5 OCAHO 730 (1995), appeal filed, No. 95-8316 (11th Cir. 1995); 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).

Unlike treatment of paperwork violations under § 1324a, IRCA is silent as to factors to consider in determining the appropriate civil money penalty for an unauthorized hire. Complainant asserts that the penalty was adjusted upwards because of the seriousness of the violation. As Complainant notes, "[t]he sole purpose of 8 U.S.C. § 1324a is to prevent the hiring of unauthorized aliens." Cplt. Br. at 16. According to Complainant, by continuing to employ an unauthorized alien while knowing him to be ineligible for employment, Respondent committed a serious violation of § 1324a. Id.

While I sympathize with Respondent's desire to retain a "terrific worker,"[4] I must agree with Complainant that continuing to employ an unauthorized alien after having learned of his illegal status is a serious violation of IRCA. However, while Complainant's evidence indicates that more than one Chef Rayko employee may have been unauthorized for employment, the Complaint charges only one such violation. I generally "'do not consider uncharged events as evidence of any further violations.'" Williams Produce, 5 OCAHO 730 at 9. Accordingly, I deem it fair and just to reduce the penalty to $700 for knowingly continuing to employ one unauthorized alien.

2. Paperwork Violations

Respondent has been found liable for paperwork violations as alleged in Counts II-V. As with substantive violations, IRCA sets forth a statutory minimum and maximum penalty for paperwork violations. The statutory minimum is $100; the maximum $1,000. 8 U.S.C. § 1324a(e)(5). On assessing and adjudicating the penalty, I am obliged to consider five factors. Id. The factors are size of the business, good faith, seriousness, unauthorized aliens and previous violations. Id. In weighing each of these factors, I utilize a judgmental and not a formula approach. See, e.g., Williams Produce, 5 OCAHO 730; 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 the specific case, consistent with the guidance of IRCA jurisprudence as precedent. In addition, as with substantive violations, I assess a civil money penalty which is not less than the statutory minimum and, except in unusual circumstances not present here, not in excess of the sum sought by INS.

a. Size of Business

[4] Tr. at 235-36.

Complainant asserts, and Respondent agrees, that Respondent is a small business. Cplt. Br. at 20; Resp. Br. at 13. As such, Complainant argues that Chef Rayko,

> [w]ith such a limited number of employees . . . should have been able to properly [sic] complete I-9 Forms for each of its employees. The Respondent did not employ such a large workforce that it would have been impossible or overly burdensome for the Respondent to complete I-9 forms.
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> . . .
>
> Therefore, in this particular situation, the fact that the Respondent is a small business does not warrant mitigation.

Cplt. Br. at 20-1.

I disagree with Complainant's interpretation of size as a factor. OCAHO caselaw holds that where a business is 'small,' the civil money penalty is to be mitigated. United States v. Riverboat Delta King, Inc., 5 OCAHO 738 at 3 (1995); Giannini, 3 OCAHO 573 at 9; United States v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (1990). Whatever was intended by size as a consideration, I cannot suppose that the small size of an enterprise was to be considered an aggravating factor except in extraordinary circumstances not present here. Therefore, since Complainant agrees that Chef Rayko is a small business, the factor of size mitigates in Respondent's favor.

b. Good Faith of Employer

OCAHO caselaw states 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)).

Complainant argues that "Respondent was aware that the law requires employers to complete I-9 Forms, but the Respondent chose not to comply with the law." Cplt. Br. at 18. Specifically, Complainant relies on the fact that Respondent "is unable to explain why I-9 forms were completed for some employees and not for all." Id. Complainant's argument, however, is overtaken by a recent decision by the Chief Administrative Hearing Officer (CAHO), holding that "[a] dismal rate of Form I-9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion."

United States v. Karnival Fashion, Inc., 5 OCAHO 769 at 4 (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order). Rather, "the fact that a high number of the Forms I-9 are missing or contain deficiencies . . . seems more relevant to the 'seriousness of the violation' factor." Id. at 3-4.[5] On the facts in this case, I am satisfied that partial compliance with Form I-9 requirements does not per se lead to a conclusion that the employer acted in bad faith in failing fully to comply with I-9 verification regiments.

Respondent argues that good faith was exhibited by Respondent because Chef Rayko's owner "cooperated in every form and fashion with the Immigration Service. . . ." Resp. Br. at 6. Respondent mistakenly refers to behavior following the inspection as a basis for characterizing its conduct with respect to I-9 compliance requirements. 'Good faith,' however, refers to an employer's attempt at compliance with IRCA prior to the date of inspection. See Riverboat Delta King, 5 OCAHO 738 at 4-5 ("[w]hile . . . [Respondent's] cooperation with the Border Patrol is a subfactor to take into consideration, the fact that Respondent undertakes prospectively [i.e., after the inspection] to alert other employers as to IRCA requirements, while admirable, is not a factor which mitigates in its favor. It is only logical that the good faith of an employer is calculated at the time of investigation and not thereafter"). Accordingly, the factor of good faith will be used neither to mitigate nor to aggravate the civil money penalty.

c. Seriousness of Violations

As stated in earlier cases, "[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)). For instance, "failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as any-

[5] Compare Williams Produce, 5 OCAHO 730 at 8 (the ALJ rejected the claim that the employer acted in good faith because it "'knew most of the local citizens and non-citizens who were employed at the plant' and . . . [knowing] whom to check for employment eligibility verification" was under a lesser obligation to satisfy employment eligibility verification requirements).

thing 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)).

In counts III and IV, Respondent was found liable for failure to retain and/or make available and failure to prepare the Form I-9, respectively. As these are relatively more serious violations, the civil money penalty will be aggravated based on this factor. Counts II and V, on the other hand, while serious in that the sections of the I-9 not completed by Respondent "are critical for deterring hiring illegal aliens,"[6] and will be aggravated, the penalty adjudged will reflect their relatively less serious nature.

d. Unauthorized Aliens

Complainant argues that the civil money penalty should be aggravated because "Respondent employed seven individuals who were not authorized to work in the United States." Cplt. Br. at 16. Three of the individuals alleged to be unauthorized are included in Count III; four are in Count IV and one constitutes Count I. In response, Respondent asserts that the penalty for these individuals should be mitigated because Blasic had no knowledge that these individuals were unauthorized. Resp. Br. at 8-9.

OCAHO caselaw holds that the employment of unauthorized aliens is generally considered a factor which aggravates the civil money penalty. See, e.g., Giannini, 3 OCAHO 573 at 8; United States v. Fox, 5 OCAHO 756 at 3-4 (1995). However, as suggested at page 5, supra, I do not normally "'consider uncharged events as evidence of any further violations.'"[7] Although Complainant submitted copious evidence to demonstrate that seven (three in Count III, four in Count IV and one in Count I) employees were unauthorized for employment,[8] it is obvious that, for whatever reason, INS prosecuted Chef Rayko on only one count of unauthorized employment (i.e., Count I). I refuse to aggravate the civil money penalty based on Complainant's evidence that six

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[6] Davis Nursery, 4 OCAHO 694 at 22.

[7] Karnival Fashion, Inc., 5 OCAHO 769 at 4 (Final Decision and Order) (citing Williams Produce, 5 OCAHO 730 at 9), modified by CAHO on other grounds.

[8] See Cplt. Exhs. A-D and O-X. Although the transcript record of exhibits introduced at hearing recites that Exhibit P was "introduced but inadvertently not admitted," it is clear from colloquy at hearing that Exhibit P was admitted into evidence. See Tr. at 5, 215 and 220.

individuals implicated in the paperwork counts may have been unauthorized as to their employment by Respondent. There is simply no proof that Respondent knew that any of the individuals in Counts III and the two of three (out of four) in Count IV were unauthorized. There is evidence that even after finding out that Perez-Morales (the individual in Count I, who is also included in Count IV) was unauthorized, Chef Rayko continued to retain him as an employee. See Tr. at 235-6.[9] Therefore, I will aggravate the penalty in Count IV but only as to the individual also named in Count I.

e. Previous § 1324a Violations

As it is undisputed that the Respondent lacks a history of previous violations of § 1324a, this factor will mitigate in Respondent's favor. See Riverboat Delta King, 5 OCAHO 738 at 6.

f. Other Factors to be Considered

"OCAHO caselaw instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties." King's Produce, 4 OCAHO 592 at 9. One such factor is the Respon-dent's "ability to pay." See, e.g., Minaco Fashions, 3 OCAHO 587 at 9.

Respondent argues that "a large fine would certainly put Chef Rayko's out of business" and that, if a large fine is imposed upon that business, "[b]eing that we are almost $150,000 in the hole right now, it would probably bankrupt us." Resp. Br. at 13-14; Tr. at 253-4. At hearing, Respondent's accountant testified that, although generating a profit in the past, Chef Rayko currently operates at a loss. Tr. at 283-303. In addition, there was testimony that, for the past few years, Blasic has funded Chef Rayko with personal credit card debt. Tr. at 250-1, 285. I am satisfied that, although the evidence fails to persuade of a penalty at the statutory minimum, the sum assessed by INS would be unduly punitive in light of Respondent's financial situation.

Respondent suggests that personal bias on the part of Special Agent Case resulted in an unusually high penalty assessment. Resp. Br. at 11-12. Complainant's penalty assessments, however, were reviewed and approved in its chain of command. Tr. at 135. I find no persuasive proof of bias and find further that there is no reason to doubt the

[9] Blasic's contention that he was unaware that Perez-Morales was undocumented until months after he came to work reflects the danger lurking in failure to comply with paperwork requirements.

credibility of the INS supervisory decision-making. In any event, the penalties adjudged sharply reduce Complainant's assessment.

Respondent also argues that, with regard to certain of the individuals listed in Count II, it substantially complied with the I-9 regimen. For instance, Respondent asserts that the fine assessed by INS is too high for one defective I-9 because "[a]ll of the required documents were listed although they were on the wrong line and the three tiny slashes in the middle of the form for the date of hire was not completed." Resp. Br. at 7. For another individual, Respondent states that INS unreasonably requests a high fine for the "omission of a date in a tiny space that the majority of normal people would not have even noticed. . . ." Id. at 8. Respondent trivializes the need for an audit trail; the absence of a date ("three tiny slashes") clearly called for on the Form I-9 is not a minor infraction as Respondent suggests; it is not substantial compliance.[10] However, Respondent's argument that the other conceded defects were relatively insignificant persuades me that the Count II penalty should be, and it is, reduced.

As to Count V, Respondent argues that allowing INS to fine Respondent for failing to complete the Form I-9 within three days is "fundamentally unfair." Resp. Br. at 10. Specifically, Respondent states that if an employer fails to comply with § 1324a within three days, "[a]n employer can never rectify his error." Id. In this way, "[t]he Court's [sic] are promoting employer's [sic] to commit fraud. If an employer realizes he's made a mistake and can never rectify the mistake, it would be too tempting to backdate any I-9 that had an error on it's face." Id. Respondent faults INS for its failure "to educate new business owners" and instead, "[p]lacing a burden on the employer to contact every federal and state agency to see if they have any special rules and forms. . . ." Id. at 10-11.

I am unable to grant Respondent's request to "rethink the decision on punishing employers for coming into compliance, albeit late. . . ." Id. at 11. Respondent's claims, broadly construed, essentially contest federal authority to free the workplace from employment of unauthorized aliens. I reject out of hand the insinuation that the obligation to complete employment eligibility verification paperwork by a time certain following hire invites fraud except on the part of employers who by their own lack of character may be disposed to deceit and deception. Furthermore, Respondent misunderstands the law when it suggests

[10] See, e.g., Williams Produce, 5 OCAHO 730 at 9-10.

that compliance with IRCA necessitates wholesale inquiries of public agencies.

g. Summary: 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 Respondent's inability to pay a substantial penalty do not support a finding for the penalty assessed by INS, the aggravating factor of seriousness also does not support adjudication of the statutory minimum. Due to the relatively more serious nature of violations involving failure to prepare and failure to retain/make available Forms I-9 listed in Counts III and IV, I adjudge a higher amount for these violations than for the violations involving failure properly to prepare the Forms I-9s listed in Counts II and V. I also assess a higher amount for the paperwork deficiency as to the one unauthorized alien included in Count IV about whose status Respondent had knowledge. Finally, I make a distinction between violations involving failure to complete section 2 of the Form I-9 (Count II) and failure to ensure that individuals timely completed section 1 (Count V).[11]

III. *Ultimate Findings, Conclusion 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)(2) by knowingly continuing to employ an alien not authorized for employment in the United States as alleged in Count I of the Complaint;

2. that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with the employment verification requirements of 8 U.S.C. § 1324a(b) as alleged in Counts II, III, IV and V of the Complaint;

[11] Section 2 of the Form I-9 requires an employer to record an individual's employment authorization information. I view failure to complete this section containing information vital to the I-9 verification procedure as more serious than failure timely to complete section 1. Completion of section 1 after three days is untimely but, if accomplished after three days, is a less serious violation than complete failure to comply as to section 2.

3. that, with respect to Count I, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of **$700** for the single a violation of 8 U.S.C. § 1324a(a)(2);

4. that, upon consideration of the statutory criteria and other factors relevant to 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 II,	$250 as to each of 3 named individuals,	**$ 750**
Count III,	$400 as to each of 24 named individuals,	**$9600**
Count IV,	$700 as to one named individual,	**$ 700**
	$300 as to each of 3 named individuals,	**$ 900**
Count V,	$200 as to each of 2 named individuals,	**$ 400**

For a total of $12,350;

5. that Respondent will cease and desist from further violations of 8 U.S.C. § 1324a.

6. **that Respondent pay a total civil money penalty of $13,050**.

This Final Decision and Order is the final action of the judge unless, "within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324a(e)(7).

"A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 30th day of August, 1995.

MARVIN H. MORSE
Administrative Law Judge