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. 94A00121
CHEF RAYKO, INC., D/B/A CHEF RAYKO'S CUCINA ITALIANA Respondent.	)	

DECISION AND ORDER ON REMAND
(October 5, 1995)

MARVIN H. MORSE, Administrative Law Judge

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

On August 30, 1995, following hearing on the merits, I issued a Final Decision and Order (D&O) adjudicating liability and a civil money penalty. United States v. Chef Rayko, Inc., 5 OCAHO 794 (1995) (Final Decision and Order). On September 27, 1995, the Immigration and Naturalization Service (INS or Complainant) filed a request for administrative review by the Chief Administrative Hearing Officer (CAHO); on September 29, 1995, Respondent, Chef Rayko, Inc. (Chef Rayko) filed a Motion in Opposition to Complainant's request for review.

By Order dated September 29, 1995, upon review pursuant to 8 U.S.C. § 1324a(e)(7), the CAHO modified and remanded the D&O. United States v. Chef Rayko, Inc., 5 OCAHO 794 (1995) (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order). The Modification addressed only that portion of the D&O which refused to aggravate the penalty as to six of seven unauth-

orized individuals shown by Complainant to have been included among those employees for whom no Forms I-9 were presented by Respondent.

The D&O discussed adjudication of an appropriate civil money penalty in terms of the statutory imperative to "consider" five prescribed factors, including "whether or not the individual was an unauthorized alien." 8 U.S.C. § 1324a(e)(5). As to that factor, the D&O explained that customarily I do not consider uncharged events as evidence of other violations. Acknowledging that "Complainant submitted copious evidence to demonstrate that seven . . . employees were unauthorized for employment, I nevertheless concluded that there was no proof that Respondent knew that six of the seven were unauthorized." Chef Rayko, 5 OCAHO 794 at 8 (Final Decision and Order). Agreeing that uncharged prior events cannot support penalty adjudication, the Modification explains that "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." Chef Rayko, 5 OCAHO 794 at 4 (Modification).

The Modification does not disturb the principle that uncharged violations are not entitled to "consideration" in adjudicating paperwork civil money penalties. Rather, the Modification implicitly concludes that for purposes of penalty adjudication proof of unauthorized status is tantamount to specification of such a violation which, if credible,[1] obliges the judge to "consider" that unauthorized aliens are present. In such case, it is immaterial whether the employer knew that the individuals were unauthorized.[2]

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[1] The Modification requires consideration of the employment eligibility status of employees implicated in paperwork violations only where there is proof of unauthorized status. This requirement is consistent with, as the Modification explicitly acknowledges, the discussion and result in United States v. Karnival Fashion, 5 OCAHO 783 (1995). Chef Rayko, 5 OCAHO 794 at 3 (Modification). Karnival refused to aggravate the civil money penalty where INS provided "no documentary evidence in support of its assertions that Respondent employed unauthorized aliens." Karnival, 5 OCAHO 783 at 4.

[2] The Modification describes OCAHO case law as having "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." Chef Rayko, 5 OCAHO 794 at 3 (Modification). Until the present Modification, however, OCAHO case law did not all that clearly establish that lack of knowledge is immaterial to determining whether to aggravate or mitigate the civil money penalty. See, e.g., United States v. Giannini Landscaping Inc., 3 OCAHO 573 at 8 (1993) (stating that (continued...)

I understand also that the Modification demands only that the judge consider the presence of unauthorized aliens but does not compel the judge to enhance the penalty because of their presence. Accordingly, in view of the Modification and upon remand, this Order considers for the first time Complainant's proof that (in addition to the employee previously found to be unauthorized) three of the individuals in Count III and three of the individuals in Count IV were unauthorized aliens employed by Chef Rayko. See Cplt. Exhs. A-D, O-X. With this in mind, however, I do not adjust the penalty upwards as Complainant demands in its Brief to the CAHO. Complainant overlooks that there is another alternative to ratcheting the civil money penalty up or down for each of the factors, namely, leaving the penalty in equilibrium as to a particular factor. Nothing in statute or case law requires that the analysis by which each statutory factor is considered results in aggravation or mitigation of the penalty; it is sufficient if, judgmentally, the factors considered together yield a reasonable and just penalty. Stated another way, consideration of a singular factor takes place in context of all other considerations in arriving at an appropriate civil money penalty.

I now consider that seven aliens unauthorized as to employment by Chef Rayko were implicated in the paperwork violations. Considering also the penalty of $12,250 previously adjudged, the nature and financial situation of the enterprise, and the totality of considerations discussed in the D&O, this Order retains the penalty previously adjudged.

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[2](...continued)
"[s]ignificantly, Respondent does not dispute . . . [the INS Agent's] assertion that three employees were known to Respondent not to have work authorization, and that another four were unauthorized aliens." Although the ALJ adjusted the civil money penalty upwards because of the unauthorized aliens, there is no mention of the relevance of Respondent's knowledge); United States v. Pizzuto, 3 OCAHO 447 at 5 (1992) (emphasis added) (stating that although "Respondent agrees that there was one employee who was an unauthorized alien, but insists that it was not aware of this individual's illegal status . . .," no mitigation is warranted with respect to the factor of unauthorized aliens); United States v. Acevedo, 1 OCAHO 95, 650-51 (1989) (stating only that no mitigation results where an individual is unauthorized for employment). Compare, United States v. Davis Nursery Inc., 4 OCAHO 694 at 20 (1994), where the judge stated that "[t]he fact that Respondent did not know . . . [that the employee] was an illegal alien is not relevant to determining mitigation for a paperwork charge."

The result reached in this Order is consistent with the Modification[3] as well as OCAHO case law interpreting the factor of unauthorized aliens.[4] In addition, by not mitigating in Respondent's favor, Complainant obtains what it requested in its initial post-hearing brief dated June 12, 1995:

> The Respondent employed seven individuals who were not authorized to work in the United States. . . . Therefore, mitigation is not warranted for this factor in regard to the three unauthorized aliens in Count III and all of the unauthorized aliens in Count IV.

Cplt. Opening Br. at 17 (emphasis added).

SO ORDERED.

Dated and entered this 5th day of October, 1995.

MARVIN H. MORSE
Administrative Law Judge

[3] The Modification explains that upon review of the adjudication of a civil money penalty, the weight given to a particular factor is not something to "quibble" about so long as the ALJ affords each factor "due consideration." Chef Rayko, 5 OCAHO 794 at 4 (Modification).

[4] See supra notes 1 and 2.