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
KERRY J. VICKERS, d/b/a S&B Cleaning, Respondent.	)	OCAHO Case No. 94A00157

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(November 21, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Ann M. Tanke, Esq., for Complainant
Leslie Jewell, Esq., for Respondent

I. *Introduction and Background*

A. Procedural History

On August 22, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint against Kerry J. Vickers, d/b/a S&B Cleaning (Vickers or Respondent) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint, predicated on a Notice of Intent to Fine (NIF) issued by INS on May 17, 1993, alleged four counts in violation of section 101 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324a.[1]

Count I charges Respondent with knowingly hiring and/or knowingly hiring by use of labor through contract, six named individuals not authorized for employment in the United States, in violation of 8 U.S.C. § 1324a(a)(1)(A). Complainant requests a civil money penalty of $9,900.00 for this count, or $1,650.00 per violation.

[1] On August 29, 1994 the Chief Administrative Hearing Officer (CAHO) assigned this case to Administrative Law Judge (ALJ) Robert B. Schneider. On February 7, 1995, the CAHO transferred it to me.

Count II charges Respondent with failure to prepare and/or present for inspection the employment eligibility verification forms (Forms I-9) for six named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests a civil money penalty of $4,920.00 for this count, or $820.00 per violation.

Count III charges Respondent with failure to prepare and/or present for inspection the Forms I-9 for three named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests a civil money penalty of $1,512.00 for this count, or $504.00 per violation.

Count IV charges Respondent with failure to properly complete section 2 of the Forms I-9 for six named individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant requests a civil money penalty of $1,824.00 for this count, or $304.00 per violation.

The total civil money penalty requested for the four counts of the Complaint is $18,156.00.

Following the filing of the Complaint, Respondent moved to substitute Leslie Jewell, Esquire, as counsel of record, and for an extension of time to file an answer. On October 5, 1994, the motions were granted. On November 1, 1994, Respondent, by counsel, timely filed its Answer.

Respondent's Answer denied the substantive allegations of the Complaint, and asserted seven affirmative defenses.

Respondent's affirmative defenses contend that: (1) the six individuals named in Counts I and II, and one of the individuals named in Count III were independent contractors and, therefore, as they were not employees, Respondent did not knowingly hire unauthorized workers, or fail to prepare and/or present Forms I-9; (2) Respondent acted in good faith in failing to prepare the documents in Count II as the individuals were not employees but independent contractors, not requiring Forms I-9; (3) Complainant improperly alleged and failed to charge with specificity two of the three Count III allegations of failure to prepare and/or present Forms I-9; (4) Respondent acted in good faith in preparing the Forms I-9 for two of the individuals listed under Count III and all six individuals listed under Count IV; (5) Respondent in good faith cooperated with the Complainant in its investigation and request for compliance with verification requirements despite the fact that he did not receive educational information regarding verification requirements; (6) Complainant impermissibly practiced selective enforcement of employer sanctions based on Fifth Amendment equal protection grounds; and (7) the statements of the six individuals named

in Counts I and II and the three individuals named in Count III may have been taken under duress.

On December 20, 1994, Leslie Jewell, filed a motion to withdraw as Respondent's counsel. On December 29, 1994, Complainant filed its response in opposition to the motion to withdraw. On January 9, 1995, ALJ Schneider issued an Order denying the motion to withdraw pending completion of discovery. Respondent's counsel was instructed to file a supplemental motion requesting leave to withdraw after completion of discovery. Respondent's counsel has not filed such a supplemental motion, and remains counsel of record in this case.

On August 10, 1995, Complainant filed a Motion to Deem Request for Admissions Admitted, on the basis that Respondent had not responded to Complainant's Request for Admissions which had been served on December 28, 1994. Respondent did not file an opposition or other response to this motion. By order dated September 1, 1995, I granted Complainant's Motion to Deem Request for Admissions Admitted.

On October 12, 1995, Complainant filed a Motion for Summary Decision. Respondent filed no opposition or other response.

B. Factual Summary

Pursuant to the Order Granting Complainant's Motion to Deem Request for Admissions Admitted, Respondent has been deemed to have admitted the following facts: that he hired the six individuals named in Count I of the Complaint after November 6, 1986, knowing that they were not authorized for employment in the United States; that he failed to prepare and present Forms I-9 for the six individuals named in Count II of the Complaint; that he hired the three individuals named in Count III of the Complaint after November 6, 1986, and failed to prepare and present Forms I-9 for these individuals; and, that he hired the six individuals named in Count IV of the Complaint after November 6, 1986 and failed to properly complete Section 2 of the Forms I-9 for these individuals.

II. *Discussion*

The Rules of Practice and Procedure (Rules) which govern this proceeding state, in pertinent part:

> (c) The Administrative Law Judge 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 and that a party is entitled to summary decision.

See 28 C.F.R. § 68.38.

Upon a motion for summary decision, the moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. Id. 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. It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. Celotex, 477 U.S. at 324.

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the non-moving party. Id. at 587.

A. Liability Established

Respondent having been deemed to have admitted the facts recited above, there remains no genuine issue as to any material fact regarding liability for the violations charged in Counts I through IV of the Complaint. Respondent's first and third affirmative defenses relate solely to liability and are overtaken by his admissions. Respondent's second, fourth and fifth affirmative defenses allege that Respondent acted in good faith with respect to the paperwork violations alleged in Counts II through IV. Respondent's alleged good faith is relevant to the civil money penalty for paperwork violations, but is not a defense to liability for such violations. See, e.g., United States v. Task Force Security, Inc., 3 OCAHO 533 at 5 (1993). Respondent's sixth affirmative defense asserts that Complainant impermissibly practiced selective enforcement of the employer sanctions provisions. OCAHO case law provides that, in order to establish a defense of selective prosecution/enforcement, a respondent must make out a prima facie case to the effect that (1) others similarly situated are generally not being prosecuted for the same conduct, and (2) the government's discriminatory conduct is motivated by an impermissible motive. United States v. McDougal, 4 OCAHO 687 at 12 (1994) (citing United States v. Aquilar, 871 F.2d 1436, 1474 (9th Cir. 1989); United States v. Lee, 786 F.2d 951 (9th Cir. 1986)). Respondent's only support for his selective enforcement affirmative defense is that one of the individuals named in Count III is the son of an employee of the INS. Clearly this

is insufficient to make out a prima facie case of selective prosecution/enforcement as it fails to show either that others similarly situated are not prosecuted for the same conduct, or that the government is motivated by an impermissible motive. Alleging no facts in support of its seventh affirmative defense (that the statements of the six individuals named in Counts I and II, and the three individuals named in Count III may have been taken under duress) Respondent has abandoned his seventh affirmative defense, which in any case only asserts that there may have been duress.

By failing to respond to discovery and to motions filed by Complainant, Respondent implicitly invited me to find that the alleged violations have been proven. I conclude that no genuine issues of material fact remain as to Respondent's liability for the violations. Accordingly, Complainant's Motion for Summary Decision is granted as to liability.

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., 959 F.2d 968 (5th Cir. 1992) (unpublished)). In the present case, Complainant's Motion for Summary Decision fully addresses the five factors set out in 8 U.S.C. § 1324a(e)(5) as obligatory considerations to be taken into account upon assessing and adjudicating the quantum of civil money penalty for paperwork violations. 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, I find in the materials of record sufficient basis on which to adjudicate the appropriate sums to be assessed as civil money penalties for the violations.

III. *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 729 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, 2 OCAHO 399 (1992).

There are no statutory criteria for assessment and adjudication of civil money penalties for knowingly hiring unauthorized aliens. 8 U.S.C. §§ 1342a(e)(4), (5). OCAHO case law provides that the statutory criteria mandated for assessment and adjudication of penalty in regards to paperwork violations may be utilized for allocating the appropriate penalty in the context of knowing hire violations. United States v. Oscar Luis Chacon, 3 OCAHO 578 at 8 (1993). However, such criteria are not binding in assessing a knowing hire penalty, which may be assessed without reference to them. United States v. Ulysses, 3 OCAHO 449 at 6 (1992).

Respondent has been deemed to have admitted hiring the six individuals named in Count I, knowing that they were unauthorized for employment in the United States. As already noted, the finding of liability overtakes Respondent's affirmative defenses with respect to Count I. Therefore, there is no proffer by Respondent to counter the penalty assessment. Having found that Respondent knowingly hired six unauthorized aliens, I have no reason to disturb Complainant's assessment of $1,650.00 for each individual listed in Count I of the Complaint, a total amount of $9,900.00.

B. Counts II through IV: 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 per individual and the amounts requested by INS in Counts II, III and IV.

Five statutory factors are considered in adjudicating the civil money penalty: "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. Enrique Reyes, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993).

1. Size of Business

Complainant's Motion for Summary Decision states that Respondent is a small business. In contrast, Complainant neither mitigated nor aggravated the penalty based on this factor. See Motion for Summary Decision at 2-3. OCAHO case law makes clear that where a business is "small," the civil money penalty generally will 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). I will modestly reduce Complainant's penalty assessments for Counts II through IV for this factor.

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. Karnival Fashion, Inc., 5 OCAHO 783 at 2 (1995) (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order); United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

The CAHO, in Karnival Fashions, Inc., 5 OCAHO 783 at 2-3, identified examples of culpable conduct which demonstrate a lack of good faith, e.g., where there is a lack of compliance with verification requirements despite prior educational visits regarding compliance, Giannini Landscaping, Inc., 3 OCAHO 573 at 8-9; Task Force Security, Inc., 3 OCAHO 533 at 7; the respondent failed to cooperate in an INS investigation, United States v. Primera Enterprises, Inc., 4 OCAHO 692 at 4 (1994); the respondent did not comply with verification requirements after INS had previously apprehended an undocumented alien on the premises, United States v. Enrique Reyes, 4 OCAHO 592 at 8 (1994).

Complainant's Motion for Summary Decision states that it aggravated the penalty for Counts II through IV based on Respondent's lack of good faith, as demonstrated by Respondent's lack of cooperation in the INS investigation. Specifically, Complainant states that:

> [t]he Form I-9 inspection was originally scheduled for December 3, 1992, but was delayed at the request of Respondent on December 10, 1992. Due to the limited amount of information provided by Respondent on December 10, 1992, Complainant

> issued an Administrative Subpoena on December 24, 1992, which was delivered by certified mail on January 4, 1993.
>
> Respondent requested another extension of time to comply with the Subpoena, which was granted until February 16, 1993 in Helena, Montana. An agent of Complainant traveled from Havre, Montana to Helena, Montana on February 16, 1993, to meet with Respondent for his compliance with the Subpoena. The agent waited all day, but Respondent neither showed up nor called regarding his compliance with the Subpoena. Said Subpoena has not been complied with by Respondent to date. Respondent's failure to cooperate in the inspection and investigation process establishes his lack of faith.

Motion for Summary Decision at 3 (citing Primera Enterprises, Inc., 4 OCAHO 692).

Respondent's Answer asserts as a Fifth Affirmative Defense that he "in good faith cooperated with the Complainant in its investigation and request for compliance with verification requirements." Answer at 5. However, Respondent states no facts demonstrating such cooperation, and is deemed to have admitted that it failed to comply with the Subpoena.

Both Karnival Fashions, Inc. and Primera Enterprises, Inc., demonstrate that lack of cooperation with an INS investigation demonstrates a lack of good faith. Accordingly, as Respondent has been deemed to have admitted that it did not cooperate with Complainant's investigation, I find that Complainant correctly determined that Respondent lacked good faith and was correct to aggravate the penalty for Counts II through IV.

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 prepare Forms I-9 for the six individuals in Count II and the three individuals in Count III are, therefore, serious violations which will aggravate the penalty. In contrast, Count IV alleges only failure to properly complete section 2 of the Form I-9, a violation which is less serious and therefore not aggravated to the same extent.

Complainant's Motion for Summary Decision states that the seriousness of the violations in Counts II and III was an aggravating factor in the penalty assessments for those counts. Furthermore,

Complainant correctly states the Count IV violations are not as serious as those in Counts II and III, and that the penalty for Count IV was aggravated due to its seriousness, but not as much as the penalty in those counts. Accordingly, I find that Complainant correctly analyzed the relative seriousness of the violations in assessing the penalty for Counts II through IV.

4. Unauthorized Aliens

The individuals in Count II were unauthorized aliens, a factor which aggravates the civil money penalty as to them. However, the individuals in Counts III and IV were not unauthorized aliens which mitigates the penalty. Complainant correctly applied this factor in assessing the penalty for Counts II through IV.

5. History of Previous Violations

Respondent has no history of previous violations, a factor which mitigates in his favor. See Giannini Landscaping, Inc., 3 OCAHO 573 at 8. Complainant's Motion for Summary Decision states that it mitigated the penalty for this factor for each violation in Counts II through IV.

Upon consideration of the five factors, I find judgmentally that the appropriate civil money penalty for Count II is $750.00 per violation for a total of $4,500.00, for Count III is $450.00 per violation for a total of $1,350.00 and for Count IV is $275.00 per violation for a total of $1,650.00.

IV. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings, motions 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 hired the six individuals named in Count I knowing they were unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(2);

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

4. That Respondent failed to prepare and/or make available for inspection the Forms I-9 for the three individuals named in Count III in violation of 8 U.S.C. § 1324a(a)(1)(B);

5. That Respondent failed to complete properly section 2 of the Forms I-9 for six named individuals in Count IV in violation of 8 U.S.C. § 1324a(a)(1)(B);

6. 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: $1,650.00 as to each of the six named individuals, for a total of $9,900.00
Count II: $750.00 as to each of the six named individuals, for a total of $4,500.00
Count III: $450.00 as to each of the three named individuals, for a total of $1,350.00
Count IV: $275.00 as to each of the six named individuals, for a total of $1,650.00

For a total civil money penalty of **$17,400.00**;

7. 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 21st day of November, 1995.

MARVIN H. MORSE
Administrative Law Judge