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

January 25, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 94A00034
ALBERTA SOSA, INC., Respondent.	)	

DECISION AND ORDER

Appearances: Patricia Gannon, Esquire, Immigration and Natural ization Service, United States Department of Justice, New York, New York, for Complainant; Arthur L. Alexander, Esquire, New York, New York, for Respondent

Before: Administrative Law Judge Joseph E. McGuire

Procedural History

On March 7, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a five (5)-count Complaint against Alberta Sosa, Inc. (respondent). Some 40 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, were alleged and civil penalties totaling $28,080 were proposed for those alleged infractions.

In Count I, complainant charged that, after November 6, 1986, respondent knowingly hired and/or continued to employ the six (6) individuals named therein for employment in the United States, knowing that those individuals were aliens not authorized for em-

ployment in the United States, in violation of IRCA, 8 U.S.C. §1324a(a)(1)(A). Complainant alternately contended that respondent, having hired those six (6) individuals for employment in the United States after November 6, 1986, continued to employ them knowing that they were (or had become) unauthorized with respect to such employment, in violation of IRCA, 8 U.S.C. §1324a(a)(2) and 8 C.F.R. §274a.3. Complainant requested civil money penalties totaling $7,620, or $1,270 for each of those six (6) violations.

In Count II, complainant alleged that, after November 6, 1986, respondent had employed the 11 individuals named therein for employment in the United States, and that respondent had failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Forms I–9) for those individuals, in violation of the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties of $725 for each of the 10 violations numbered 1–7 and 9–11, and $555 for the remaining single infraction numbered 8, or civil money penalties totaling $7,805.

In Count III, complainant alleged that respondent, after November 6, 1986, had failed to ensure that the 13 employees listed in paragraph A had properly completed Section 1, and that respondent had failed to properly complete Section 2, of the 13 pertinent Forms I–9, in violation of the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant levied civil money penalties of $700 for the three (3) violations numbered 7, 8 and 13 in paragraph A; $545 for those five (5) numbered 1, 2, 4, 10 and 12; $530 for those three (3) numbered 3, 5 and 9; and $465 for the remaining two (2) charges numbered 6 and 11, totaling $7,345 for that count.

Complainant averred in Count IV that respondent had failed to ensure proper completion of Section 1 of the Forms I–9 for each of the six (6) individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States in violation of IRCA, 8 U.S.C. §1324a(a)(1)(B). Complainant asked that respondent be fined $635 for those two (2) violations numbered 1–2, and $465 for each of the four (4) numbered 3–6, or civil money penalties totaling $3,130.

In Count V, complainant alleged that respondent had hired the four (4) individuals named therein after November 6, 1986, for employment in the United States and failed to properly complete Section 2 of their Forms I–9, in violation of IRCA, 8 U.S.C.

§1324a(a)(1)(B). Complainant assessed civil money penalties totaling $2,180 for Count V, or $545 for each of those four (4) violations.

On March 9, 1995, the undersigned issued an Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Order Denying Respondent's Counsel's Motion to Withdraw as Counsel. In that Order, which fully set forth the procedural history of this proceeding, complainant's motion for summary decision was granted as to the facts of violation alleged in Counts I, III, IV and V, and partially granted that motion as to four (4) of the 11 violations alleged in Count II of the Complaint. Summary decision was partially denied as to the remaining seven (7) infractions alleged in Count II.

On August 28, 1995, complainant filed a Second Motion for Summary Decision.

On October 6, 1995, this Office issued an Order Granting Complainant's Second Motion for Summary Decision, which granted complainant's motion for summary decision as to the facts of violation in the remaining seven (7) violations charged in Count II, and resulted in a full grant of summary decision as to all 40 allegations in Counts I through V of the Complaint. In that Order, the parties were directed to submit concurrent written briefs addressing the issue of civil money penalties concerning those 40 violations and to have completed those filings on or prior to November 15, 1995.

On November 8, complainant filed its Motion for Approval of Complainant's Proposed Penalty Amounts.

Respondent has failed to file a response to the October 6, 1995 Order.

Determination of the Appropriate Civil Money Penalties

Statutorily Mandated Factors

Where illegal hires or continuing to employ violations are involved, as in Count I, the pertinent portion of IRCA provides for the imposition of civil money penalties, as well as a cease and desist order:

> [w]ith respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection—

> (A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of —
>
> (i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,
>
> (ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
>
> (iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and
>
> (B) may require the person or entity —
>
> (i) to comply with the requirements of subsection (b) . . . with respect to individuals hired . . . during a period of up to three years, and
>
> (ii) to take such other remedial action as is appropriate.

8 U.S.C. §1324a(e)(4).

In the absence of a showing that respondent firm has been previously subject to an order under this IRCA provision, the civil penalty range for the six (6) violations in Count I is not less than $250 and not more than $2,000 for each infraction.

The provisions of IRCA do not provide any statutory criteria that must be considered when assessing the civil money penalties for those six (6) illegal hire/continuing to employ violations. *See* 8 U.S.C. §1324a–(e)(4). This is in sharp contrast to the section of IRCA addressing paperwork violations, which mandates that in assessing civil money penalties for infractions of that type, consideration must be given to the five (5) statutory criteria set forth at 8 U.S.C. Section 1324a(e)(5).

In determining the appropriate civil money penalties to be imposed for paperwork violations, as alleged in Counts II through V, IRCA provides:

> With respect to a [paperwork] violation of subsection (a)(1)(B) of this section,the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, 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).

1. *Size of Business*

Accordingly, in determining the appropriate civil money penalties to be assessed, the size of respondent's business is the first statutory factor to be considered. Neither the provisions of IRCA nor the implementing regulations provide definitive parameters in determining the size of a business. *United States v. Tom & Yu, Inc.*, 3 OCAHO 445, at 4 (1992); however, prior OCAHO decisions provide guidance. The size of a business is determined by its revenue or income, the amount of its payroll, the number of salaried employees, the nature of its ownership, the length of time it has been in business, and the nature and scope of its business facilities. *United States v. Felipe, Inc.,* 1 OCAHO 93, at 632 (1989).

Complainant asserts that respondent is a large business. Mem. Law at 3. Complainant states that respondent is engaged in the business of manufacturing children's and ladies' sportswear in the New York area, was incorporated in 1990, has been in business over four (4) years, and employs approximately 70 full-time and part-time individuals. *Id.* Complainant has not offered any information regarding respondent's financial condition, indicating that it had requested such information in its interrogatories and requests for production of documents, but that respondent had not responded. *Id.* As a result "[i]t is Complainants [sic] position that since Respondent did not answer or object to any of the Complainant's interrogatories or production of documents that this Court should conclude that the admission, documents, or other evidence would have been adverse to [respondent] in accordance with 28 C.F.R. section 68.23(c)." *Id.* Under complainant's theory, business revenue, growth, and size would all be established adversely to respondent. *Id.*

Section 68.23(c) of Title 28 of the Code of Federal Regulations provides that "[i]f a party . . . fails to comply with an order . . . of the Administrative Law Judge [ALJ], the [ALJ], may . . . [i]nfer and conclude that the . . . evidence would have been adverse to the non-complying party". 28 C.F.R. §68.23(c). While complainant's theory *may* be viable in certain situations, no order has been issued addressing respondent's failure to respond to requested discovery in the instant proceeding, and thus an adverse inference or conclusion regarding respondent's size, revenues, or growth is inappropriate.

Respondent has failed to submit a written brief recommending the appropriate civil money penalty sums to be assessed in this proceeding, despite having been accorded an opportunity to do so. As a result, respondent has neither confirmed nor contested complainant's assertion that it is a large business.

In part because the record is incomplete regarding any significant business figures, and partly because of prior decisions holding that business entities employing in excess of 70 employees to have been "small", it is found that respondent is a small business. *See United States v. Anchor Seafood Distribs*., 5 OCAHO 758, at 5 (1995) (holding that respondent, who employed 93 employees, was a small business); *United States v. Vogue Pleating, Stitching & Embroidery Corp.,* 5 OCAHO 782, at 3–4 (1995) (classifying respondent, who employed about 100 employees, as small). Thus, the civil money penalty amount will be mitigated based upon this factor. *See United States v. Task Force Sec., Inc.,* 4 OCAHO 625, at 6 (1994); *United States v. Wood 'N Stuff,* 3 OCAHO 574, at 6 (1993).

2. *Good Faith of the Employer*

The second element that must be considered in determining civil money penalties is whether the facts demonstrate a showing of good faith on respondent's part. Although IRCA is silent on what constitutes good faith, OCAHO case law has established that mere allegations of paperwork violations do *not* constitute a lack of good faith for penalty purposes. *United States v. Valladares*, 2 OCAHO 316, at 6 (1991). To demonstrate a lack of good faith on respondent's part, it is necessary that complainant present some evidence of culpable behavior on respondent's part beyond mere ignorance of the law. *United States v. Primera Enters., Inc.,* 4 OCAHO 692, at 4 (1994); *United States v. Honeybake Farms, Inc.*, 2 OCAHO 311, at 3 (1991).

Complainant argues that respondent has shown a lack of good faith:

> On May 5, 1993, a consent survey was conducted at Respondents [sic] place of business. Consent . . . was granted by Respondent's owner . . . [Special] Agent [Denise] Sandy and the other agents accompanying her, interviewed approximately 50 employees. Twenty-five, [sic] of the fifty employees interviewed on this date, [sic] were determined to be unauthorized employees. These twenty-five employees were found to be illegal aliens in the United States and have since been put in deportation proceedings. . . .

> On May 7, 1993 Agent Sandy accompanied by another agent, delivered a Notice of Inspection to Respondent's place of business . . . When the Agents arrived, they buzzed an outside intercom and told the listener that they were Immigration. The agents were told to wait. The Agents heard a bell, that sounded like an alarm inside the factory. The door was eventually opened by Alberta Sosa, owner of the company. The agents observed many individuals running towards the back of the factory. Agent Sandy asked Alberta Sosa why individuals were running towards the back of the factory, Alberta Sosa stated "they are just nervous when they hear Immigration." . . .
>
> . . . Moreover, on April 16 [sic] 1993, the Respondent was given an informational visit by [INS]. Further, in light of the consent survey, in which fifty percent of Respondent's workforce was found to be unauthorized and illegal in the United States, and the delivery of the notice of inspection, in which individuals were found running to the back of the factory, Respondent has shown culpable behavior beyond mere ignorance.

Mem. Law at 3–4.

As noted previously, respondent has failed to address this criterion, also. Respondent has, however, admitted that it knowingly hired and/or continued to employ the six (6) illegal aliens listed in Count I; that it failed to prepare and/or make available to INS the Forms I–9 for the 11 individuals named in Count II; that it failed to properly complete Section 2, and also failed to ensure that the 13 employees listed in Count III properly completed Section 1, of their Forms I–9; that it failed to ensure that the six (6) employees listed in Count IV properly completed Section 1 of their Forms I–9; and that it failed to complete properly Section 2 of the Forms I–9 for those four (4) employees named in Count V. Based on the uncontroverted assumption that respondent employs only 70 people in total, Forms I–9 for 40 out of 70 employees—or some 57 percent—were either not prepared and/or were unavailable, or had not been completed properly and in a timely manner, as required by the pertinent provisions of IRCA.

In addition to its poor record of compliance, respondent has further exhibited culpable behavior by its undisputed actions of May 5 and 7, 1993. On May 5, 1993, less than one (1) month after receiving an educational visit from the INS on April 17, 1993, 25 out of respondent's 50 employees were determined to have been unauthorized aliens. Two days later, on May 7, 1993, when INS Agent Sandy and a second agent arrived at respondent's business and announced their presence, Agent Sandy heard respondent ring a bell/alarm in its factory. Upon entering the factory, Agent Sandy observed employees running towards the back of the factory. Absent a believable al-

ternative explanation, which respondent has failed to offer, it can only be reasonably concluded that such an alarm was designed to warn unauthorized aliens of the INS's arrival, and to facilitate their avoiding detection and arrest. This conclusion is further supported by the response of the owner, Alberta Sosa, to the effect that "they are just nervous when they hear Immigration", when asked by the agents why individuals were running towards the back of the factory. Clearly such behavior equates with a lack of cooperation on respondent's behalf, and exhibits "culpable behavior *beyond mere failure of compliance*." *United States v. Karnival Fashions, Inc.,* 5 OCAHO 783, at 3 (1995) (as modified) (identifying a lack of good faith where a prior educational visit to respondent was demonstrated, where respondent failed to cooperate with an INS visit, and where INS had apprehended an illegal alien on respondent's premises during a prior occasion).

Accordingly, it is found that respondent did not act in good faith, and, therefore, is not entitled to mitigation as to the proposed civil money penalties based upon this element.

3. *Seriousness of the Violation*

The third of the five (5) statutory criteria to be considered involves the seriousness of the violations alleged. Because"[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," United States *v. Eagles Groups, Inc.,* 2 OCAHO 342, at 3 (1992), paperwork violations are always serious. *See United States v. Mathis*, 4 OCAHO 717, at 6 (1995) (as modified); *United States v. Reyes*, 4 OCAHO 592, at 8 (1994); *United States v. Minaco Fashions, Inc*., 3 OCAHO 587, at 8 (1993); *United States v. Felipe, Inc.,* 1 OCAHO 93, at 636–37 (1989).

The record indicates that respondent failed to prepare and/or make available to INS the Forms I–9 for the 11 individuals named in Count II; that it failed to properly complete Section 2 , and further failed to ensure that the 13 employees listed in Count III properly completed Section 1, of their Forms I–9; that it failed to ensure that the six (6) employees listed in Count IV properly completed Section 1 of their Forms I–9; and that it failed to complete properly Section 2 of the Forms I–9 for those four (4) employees named in Count V. As the CAHO emphasized in his Modification of *Wu*, "'a total failure to prepare and/or present the Forms I–9 is . . . serious

since such conduct completely subverts the purpose of the law,' even where no unauthorized aliens are implicated." *United States v. Wu,* 3 OCAHO 434, at 2 (1992) (as modified) (quoting *United States v. A-Plus Roofing*, 1 OCAHO 209, at 1402 (1990)).

Accordingly, it is appropriate to increase the monetary penalties for all counts based upon this factor. *See United States v. Task Force Sec.*, *Inc.,* 4 OCAHO 625, at 7–8 (1994) (concluding that failure to prepare and/or present Forms I–9, failure to ensure that an employee properly completes Section 1 of the form, and failure to complete any portion of Section 2 are all serious violations of IRCA).

4. *Involvement of Unauthorized Aliens*

The fourth element to be considered is whether any of the individuals involved were illegal aliens. 8 U.S.C. §1324a(e)(5).

Complainant indicates that on May 5, 1993, 25 of the approximately 50 employees present at respondent's place of business were determined to have been unauthorized. Mem. Law at 3–4. Clearly, respondent's penalties should be increased based upon this criterion. *See United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 8 (1993) (finding that, because at least seven (7) of respondent's employees were unauthorized, seven (7) of the 87 infractions at issue should be aggravated); *United States v. Camidor Properties, Inc.*, 1 OCAHO 299, at 1982 (1991) (indicating that aggravation of the penalty for the single employee who was determined to be an illegal alien was appropriate); *United States v. Alaniz*, 1 OCAHO 297, at 1969 (1991) (stating that a showing that several of respondent's employees had admitted to being unauthorized aliens was sufficient to warrant aggravation as to *all* the paperwork violations).

5. History of Previous Violations

The fifth and final statutory criterion to be considered in assessing an appropriate civil money penalty is that of determining whether the respondent has a history of previous violations. Complainant "concedes that Respondent has had no previous violation with 8 C.F.R. 274a." Mem. Law at 2. Therefore, respondent is entitled to mitigation of its civil money penalties based on that factor. *See Task Force Sec.,* 4 OCAHO 625, at 8; *Giannini Landscaping, Inc.,* 3 OCAHO 573, at 8.

In summary, respondent is entitled to mitigation of the proposed civil money penalties based upon its small size and the absence of a showing of previous violations. However, respondent is not entitled to any reduction of the levies based upon good faith. And the amounts of the proposed civil penalties must be increased, owing to the seriousness of the violations and the involvement of unauthorized aliens.

Penalty Assessment

Having enacted IRCA, Congress placed a duty upon employers to inspect and verify employment eligibility documents presented during the hiring process, *see* 8 U.S.C. §1324a(b), and employers are required, with limited inapplicable exceptions, to verify the identify and work authorization of all individuals hired after November 6, 1986. *Id.* Additionally, employers must refuse to hire individuals not authorized to work in this country. *See Task Force,* 4 OCAHO 625, at 9.

IRCA provides for civil money penalties for employers who fail to comply with its paperwork provisions and those levies range from a statutorily mandated minimum of $100 to a maximum of $1,000 for each violation. 8 U.S.C. §1324a(e)(5). And as noted earlier, the provisions of IRCA also proscribe the practice of knowingly hiring and/or continuing to employ aliens not authorized for employment in the United States and the range of civil money penalties to be assessed under this factual scenario is not less than $250 nor more than $2,000 for each of the six (6) violations of that nature at issue. Assessment of these civil money penalties serves the dual purpose of deterring repeat infractions of IRCA by the cited employer, and also encourages compliance by others similarly situated. *See United States v. Ulysses, Inc.,* 3 OCAHO 449, at 8 (1992).

INS is tasked with enforcing the provisions of IRCA, and is accorded broad discretion in assessing penalties for violations of this type. That flexibility permits INS to more fairly levy appropriate penalties based upon fact specific inspection scenarios. *Id.* Additionally, IRCA grants to the administrative law judge broad discretion in ordering appropriate civil money penalties for paperwork violations. 8 U.S.C. §1324a(e)(5).

It is found that respondent violated the provisions of IRCA in the manners alleged in Counts I through V of the Complaint.

It is further found that complainant properly assessed civil money penalties in the total sum of $28,080 for the 40 violations at issue, in the amounts of $1,270 for each of the six (6) violations set forth in Count I of the Complaint, $725 for each of the 11 violations contained in Count II, except for Violation 8 therein, for which the sum of $555 was properly levied, $700 for each of Violations 7, 8, and 13 in Count III, $545 for each of Violations 1, 2, 4, 10, and 12 in that count, and $465 for each of the remaining infractions, Violations 6 and 11 in that count.

Accordingly, respondent is hereby ordered to pay civil money penalties in the total sum of $28,080, in accordance with the monetary allocations set forth in the preceding paragraph.

Respondent is further ordered to cease and desist from further violations of the provisions of 8 U.S.C. §1324a(a)(2) and 8 U.S.C. §1324a(a)(1)(B).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7)–(8) and 28 C.F.R. §68.53.