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

January 29, 1996

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| UNITED STATES OF AMERICA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. §1324a Proceeding |
| | ) | OCAHO Case No. 94A00048 |
| RICARDO CALDERON, INC.,<br>Respondent. | ) | |

**ERRATA**

The Final Decision and Order in this proceeding, issued on January 25, 1996, is hereby amended as follows: on page 1 of that Decision and Order, in the caption, the OCAHO Case No. is changed from 95A00048 to 94A00048.

JOSEPH E. MCGUIRE
Administrative Law Judge

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| UNITED STATES OF AMERICA, Complainant, | ) | |
| v. | ) | 8 U.S.C. §1324a Proceeding |
| | ) | OCAHO Case No. 95A00048 |
| RICARDO CALDERON, INC., Respondent. | ) | |

**DECISION AND ORDER**

Appearances: Patricia Gannon, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for Complainant;
Lawrence Wilens, Esquire, New York, New York, for Respondent

Before: Administrative Law Judge Joseph E. McGuire

*Procedural History*

On March 18, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a two (2)-count Complaint against Ricardo Calderon, Inc. (respondent), which contained 27 alleged violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a. Civil penalties totaling $17,990 were proposed for those alleged infractions.

In Count I, complainant alleged that, after November 6, 1986, respondent had employed the 13 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 $785 for each of the eight (8) violations numbered 1, 3, 4, 6, 8, 9, 12 and 13 and $620 for each of the remaining five (5) infractions numbered 2, 5, 7, 10 and 11, or civil money penalties totaling $9,380.

In Count II, complainant charged that after November 6, 1986, also, respondent had failed to complete Section 2 of 14 Forms I–9 within three (3) business days after having hired for employment in the United States the 14 individuals named therein, in violation of the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed civil money penalties totaling $8,610 on that count, or $615 for each of those 14 violations.

On October 16, 1995, the undersigned issued an Order Granting Complainant's Motion for Summary Decision as to the facts of violation alleged in Counts I and II of the Complaint. In that Order, which also fully set forth the prior procedural history in this proceeding, the parties were directed to submit concurrent written briefs addressing the appropriate civil money penalty sums to be assessed for those 27 violations and to have done so within 15 days of their acknowledged receipt of that Order, or not later than November 6, 1995.

On November 8, having been granted an oral extension, complainant filed its Motion for Approval of Complainant's Proposed Penalty Amounts.

Respondent has failed to file a response to the October 16, 1995 Order.

*Determination of the Appropriate Civil Money Penalties*

*Statutorily Mandated Factors*

In determining the appropriate civil money penalties to be imposed for paperwork violations, 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).

But OCAHO rulings 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's business, Ricardo Calderon, Inc., is a large business. Mem. Law at 2. Complainant also states that the respondent corporation, which manufactures neck ties, was incorporated in 1992 and at all times relevant employed approximately 30 full-time and part-time individuals. *Id.* Complainant has offered no information regarding respondent's financial condition except to note that respondent "appears to have a healthy financial growth." *Id.*

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 businesses larger than 30 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 accorded due consideration 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 the 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 failed to exercise reasonable care in its completion of Forms I–9. Thirteen Forms I–9 were not even prepared or presented on the date of the inspection. Nine of the thirteen Form I–9's [sic] not presented relate to unauthorized aliens." Mem. Law at 3. Complainant further contends that respondent "did not exercise reasonable care and due diligence in complying with IRCA's requirements" and that "Forms I–9 are not overly difficult to understand or complicated to fill out." *Id.*

As noted previously, respondent has also failed to address this criterion. Respondent has, however, admitted that it failed to prepare and/or make available to INS the Forms I–9 for the 13 individuals named in Count I, and that it failed to complete Section 2 of the 14 Forms I–9 for those employees named in Count II within three (3) days of hire. Based on the uncontroverted assumption that respondent employs only 30 people in total, Forms I–9 for 27 out of 30 employees, or some 90 percent, were either not prepared and/or were unavailable, or had not been completed properly and in a timely manner, as required under the pertinent provisions of IRCA.

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).

With regard to the 27 paperwork violations, complainant urges that "Respondent has failed to fill out fourteen of the I–9 form [sic] within three days of hire. At the date of the consent survey, close to 50% of the work staff was found to be unauthorized workers and illegal aliens in the United States", and urges the undersigned to aggravate respondent's penalty as to this criterion. Mem. Law at 4.

The record indicates that respondent failed to prepare and/or make available for inspection Forms I–9 for 13 of its employees named in Count I. 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)).

Respondent further failed to properly complete Forms I–9 for the 14 individuals named in Count II of the Complaint within three (3) business days of the date those individuals were hired. While an untimely, improper completion may be viewed as marginally less serious than a total failure to prepare Forms I–9, such a failure is nonetheless serious, especially because those 14 forms were not completed until after complainant's compliance investigation. *United States v. El Paso Hospitality, Inc.*, 5 OCAHO 737, at 7 (1995) (finding that a failure to complete Section 2 of the Form I–9 within three (3) days was "not as serious as failing to complete a Form I–9, or to ensure the completion of section 1 or to properly complete section 2."); *United States v. Chef Rayko, Inc.,* 5 OCAHO 794, at 10 n.11 (1995) (opinion of administrative law judge) (indicating that "[c]ompletion 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.").

Thus, respondent's 13 infractions listed in Count I are considered serious violations under IRCA because they completely undermine the purpose of the law. *See Mathis,* 4 OCAHO 717, at 6; *United States v. Primera Enters., Inc.*, 4 OCAHO 692, at 5 (1994); *Felipe, Inc.*, 1 OCAHO 93, at 636–37. In comparison, respondent's 14 violations recited in Count II will be treated as marginally less serious than those delineated in Count I. Accordingly, it is appropriate to increase the monetary penalties based upon this criterion, although less so for those 14 infractions listed in Count II.

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 alleges that "[a]t the date of the consent survey, close to 50% of the work staff was found to be unauthorized workers and illegal aliens in the United States." Mem. Law at 4. INS Special Agent Denise M. Sandy states in complainant's supporting declaration that "[n]ine of the thirteen Form I–9's [sic] that were not presented by Respondent's attorney's [sic] on the date of the Inspection [sic] related to unauthorized and illegal aliens that were arrested by me and other agents on the date of the employer consent survey." *Id.* at 5–6. Absent any facts to the contrary by respondent, it must be assumed that at least nine (9) of those employees named in Count I, for whom the respondent failed to prepare and/or make available for inspection Forms I–9, were unauthorized aliens.

Regarding those individuals named in Count II, complainant further contends that "[o]f the 14 I–9 Forms that were completed, most have expired work authorization dates. It can not [sic] be determined if indeed had the Respondent filled out the Form I–9 within three business days . . . whether these workers would have been eligible for work authorization at the time." *Id.* at 4. Special Agent Sandy declares that "Respondent's agent failed to timely fill out the Form I–9 for fourteen of Respondent's employees. These I–9's [sic] had expired work authorization for its employees." *Id.* at 6.

Visual inspection of the 14 Forms I–9 at issue in Count II of the Complaint reveals that four (4) of those forms were completed by self-identified U.S. citizens or nationals; six (6) were completed by self-identified lawful permanent residents; and four (4) were completed by self-identified authorized aliens. Of the six (6) lawful per-

manent residents, documents for two (2) had no reported expiration dates; documents for three (3) had expiration dates of March 26, 2001, September 16, 2001, and February 26, 2002; and the documentation for one (1) had an expiration date of August 7, 1993. As to the four (4) employees who checked the third box ("an alien authorized to work until ___/___/___"), their expiration dates ranged from June 30, 1993, to December 6, 1994. All 14 Forms I–9 were verified on May 3, 1993.

Since INS conducted its compliance investigation of respondent's premises on April 27, 1993, it would appear, contrary to Special Agent Sandy's assertion, that each of those 14 employees identified in Count II were authorized to work in the United States on the date upon which complainant conducted its search (April 27, 1993), as well as on the date their employment eligibility was verified by respondent (May 3, 1993).

Nonetheless, because the record reveals that at least nine (9) of the 30 individuals employed by respondent on the date of INS's consent investigation were unauthorized aliens, and because respondent was subsequently determined to have failed to prepare and/or make available for inspection Forms I–9 for those illegal aliens, it is appropriate to increase the proposed civil money penalties for nine (9) of the 13 violations charged in Count I 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. 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); *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).

5. *History of Previous Violations*

The fifth and final statutory criterion to be considered in assessing the 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*, 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 on the bases of its size and a showing of no previous violations. Respondent is not entitled to any reduction of the levies based upon a showing of good faith, and it has been shown that the proposed civil money penalties should be increased, owing to the seriousness of these infractions, as well as the involvement of unauthorized aliens.

*Penalty Assessment*

In enacting IRCA, Congress mandated upon employers a duty 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). 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 other employers. *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 and II of the Complaint.

It is further found that complainant properly assessed civil money penalties totalling $17,990 for those 27 violations, i.e., $785 for each

of the eight (8) violations numbered 1, 3, 4, 6, 8, 9, 12, and 13, and $620 for each of the remaining five (5) violations numbered 2, 5, 7, 10, and 11 in Count I, and $615 for each of the 14 infractions alleged in Count II of the Complaint.

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 thisDecision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available o respondents, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (9) and 28 C.F.R. §68.53 (1991).