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

March 21, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00108
SKYDIVE ACADEMY OF HAWAII CORP. d/b/a SKYDIVE HAWAII, Respondent.	)	

FINAL DECISION AND ORDER ASSESSING CIVIL PENALTY

I. *Procedural History*

On July 12, 1995 a complaint was served on Respondent Skydive Academy of Hawaii, d/b/a Skydive Hawaii (hereinafter Respondent or Skydive). The Complaint contains three counts alleging violations of the Immigration and Nationality Act (INA). Count I alleges that Respondent hired three named individuals after November 6, 1986 and failed to complete section 2 of the I–9 employment eligibility verification form (hereinafter I–9) within three business days of their hire; Count II of the Complaint alleges that Respondent hired five named individuals for employment after November 6, 1986 and failed to make available for inspection the I–9 forms for these individuals; and Count III alleges that Respondent hired eight named individuals after November 6, 1986 and failed to properly complete section 2 of the Form I–9 for these individuals. All three counts assert that the acts alleged therein constitute violations of Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). The complaint seeks a penalty of $1,920 for the three violations in Count I, $3,200 for the five violations of Count II, and $5,120 for the eight violations of Count III.

On August 14, 1996 Respondent filed its answer to the complaint, admitting certain allegations, such as the hiring of the named individuals, but denying the violations and requesting that the complaint be dismissed. However, on September 11, 1995, in a joint response to the August 15, 1995 First Prehearing Order, the parties agreed to waive an evidentiary hearing and also stipulated that, if they were unable to settle the case, Respondent would not contest the merits of the complaint as to liability but would limit its defense to the issue of penalty. The parties also proposed a briefing schedule, which I adopted in the Second Prehearing Order issued on September 19, 1995. That Order required Respondent to file its opening brief not later than October 27, 1995, Complainant to file its brief not later than November 30, 1995, and Respondent to file its reply brief not later than December 15 1995. The Order further noted that the record in the case consisted solely of the pleadings and that if either party sought to rely on documentary evidence in support of its position on penalty, it must attach any relevant documents to its brief and move for admission of such documents.

Respondent served its opening brief on October 26, 1995 (hereinafter RBr.). Attached to the brief was a Declaration by Shu Hua Hinshaw, a Director of Respondent and the spouse of Frank Hinshaw, Respondent's President and sole shareholder. Complainant served its brief on November 13, 1995 (hereinafter CBr.). With its brief Complainant also filed a motion to accept in evidence certain documents identified as Attachments A to D. Respondent served its reply brief on December 15, 1995 and attached an affidavit by Frank Hinshaw dated December 12, 1995 (hereinafter R.R.Br.).

On November 24, 1995 I denied Complainant's motion to admit Attachments A to D because they were not marked in accordance with the Second Prehearing Order and also because Complainant had failed to demonstrate the relevance of the exhibits, particularly with respect to Exhibit D. However, the motion was denied without prejudice, and I specifically provided that Complainant would have until December 5, 1995 to serve new exhibits properly marked and accompanied by an exhibit list which described the relevancy of each exhibit with specificity.

On December 7, 1995 Complainant served a new set of properly marked proposed exhibits (CX–A–D) and moved that these

late filed exhibits be received in evidence. In support of its motion to accept the late filed exhibits, Complainant notes that it received the order denying the original motion and requiring resubmission on November 27, 1995, thus allowing only five working days before the deadline to resubmit the attachments. Also Complainant's counsel states that she was furloughed and also took one week of previously scheduled Thanksgiving week annual leave, all of which created a backlog of matters requiring immediate attention. Finally she notes that she had no clerical support to assist her in preparing exhibits, and that she is responsible for numerous appearances in the Immigration Court, all of which contributed to the delay in preparing the memorandum and attachments.

Respondent did not object to Complainant's motion to admit the exhibits in evidence and consequently on January 22, 1996 I granted Complainant's motion to admit Exhibits CX–A–D. I also conditionally admitted both Frank Hinshaw's December 12, 1995 affidavit and Shu Hua Hinshaw's October 26, 1995 declaration, unless Complainant objected to the receipt of the same by February 5, 1996. Complainant has not objected, and therefore they are part of the record. At the same time I ordered further briefing by the parties on issues relating to certain penalty factors, such as the size of the business, seriousness of the violations and good faith. Both parties have submitted supplemental briefs (hereinafter C. Supp. Br. and R. Supp. Br. respectively), as well as a factual stipulation dated February 26, 1996 and an exhibit marked CX–E. Respondent also moved to admit in evidence a February 28, 1996 affidavit by its President Frank Hinshaw and two exhibits (profit and loss statements for 1994 and 1995) marked RX–A and B respectively, which were attached to its supplemental brief. On March 18, 1996, I granted Respondent's motion to admit the affidavit and exhibits and closed the record pursuant to 28 C.F.R. §68.49(b). On March 19, 1996 I reopened the record to admit the factual stipulation and CX–E. Therefore, the evidentiary exhibits in this case are CX–A–E, RX–A–B, Frank Hinshaw's two affidavits (dated December 12, 1995 and February 28, 1996 respectively), Shu Hinshaw's October 26, 1995 declaration, and the factual stipulation. This case is now ready for adjudication. This decision and order is issued pursuant to Section 68.52 of the Rules of Practice. 28 C.F.R. §68.52.

II. *Findings of Fact and Conclusions of Law*

A. *Liability*

As noted previously, in the parties' response to the August 15, 1995 First Prehearing Order, the parties stated that they waived an oral evidentiary hearing, and that Respondent agreed not to contest the merits of the complaint but would accept a decision as to liability and would limit its defense to the issue of penalty. However, in order to be certain Respondent intended to waive its opportunity to contest liability, in the January 22, 1996 Order I gave Respondent until February 5, 1996 to revise its position. Respondent did not respond, and therefore I find that Respondent has waived a hearing on the issue of liability and has admitted all those paragraphs of the complaint alleging a violation of the INA. Thus, Respondent has admitted that it failed to complete section 2 of the employment eligibility form (I–9) within three business days of the hire of three individuals (Shu Hua Hinshaw, Bern H. Mueller, and Sandy Elaine Zeldes), as alleged in Count I; that Respondent failed to make available the I–9 forms for five individuals (Roger Clarke Goldtrap, Frances Kelly Matkovich a.k.a. Kelly F. Matkovich, Madeline Noa, Wayne G. Sauls, and Grainne M. Saunders), as alleged in Count II; and failed to properly complete section 2 of the I–9 form for eight individuals (Kenneth Davis, Jeff Fish, Frank Hinshaw, Katsunori Kojima, David Osmond, Donald Orr, Juan Ramon Rivas, and William Weir), as alleged in Count III. Therefore, I find that Respondent violated Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b) of the INA, 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b).

B. *Penalty*

The three counts of the complaint all involve violations of Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B), which are referred to as paperwork violations; i.e. failure to complete the I–9, in whole or in part, or to retain and present the forms for inspection. The statute provides that with respect to violations of Section 1324a(a)(1)(B), the civil penalty shall be not less than $100 and not more than $1,000 for each individual for whom a violation occurred. 8 U.S.C. §1324a(e)(5). The statute further provides that in determining the amount of the penalty, due consideration shall be given to

the size of the business of the employer, the employer's good faith, the seriousness of the violation, whether or not the individual(s) were unauthorized aliens, and the history of prior violations. While the statute prescribes that these factors must be considered, it does not specifically state that these are the only factors which may be considered. Indeed, OCAHO case law confirms that these five factors are not exclusive, and that other factors may be considered in appropriate circumstances. *See United States v. Davis Nurseries Inc.,* 4 OCAHO 694, at 14 (1994); *United States v. Minaco,* 3 OCAHO 587, at 9 (1993); *United States v. Felipe, Inc.*, 1 OCAHO 626 (ref. no. 93) (1989), *aff'd by CAHO*, 1 OCAHO 726 (ref. no. 108) (1989).

Complainant has addressed each of the five factors in its brief. Complainant states that each violation was assigned a $640 penalty. Given that there are 16 violations, the total recommended penalty is $10,240. Complainant recognizes that the statutory minimum is $100, and therefore it has calculated the penalty by evaluating the five factors as to whether they should be used to increase the penalty beyond the minimum base line amount. Complainant specifically states that no additional penalty was assessed based on either a history of previous violations or knowing hiring of unauthorized aliens. It does contend that based on the size of the business, lack of good faith, and the seriousness of the violations, the penalty per violation should be increased by $180 per violation for each of the three factors, which, added to the baseline $100, amounts to $640 per violation.

Respondent agrees with Complainant that it did not knowingly hire unauthorized aliens, and that it has no history of prior violations. However, it disagrees with Complainant concerning the application of the statutory factors relating to the size of the business, the seriousness of the violation and the lack of good faith. Respondent contends that it is a small business, that it was acting in good faith at all times and that the violations were not serious.

The statute does not specify which party has the burden of proof with respect to the statutory factors set forth in 8 U.S.C. §1324a(e)(5). While this issue has not been the subject of extensive discussion in the case law, the existing OCAHO cases suggest that the burden of proof lies with the Complainant, both with respect to liability and penalty. *See United States v. Sophie Valdez d/b/a La Parrilla Restaurant,* 1 OCAHO 685, 687 (ref. no. 104) (1989). Since Complainant has the burden of establishing the allegations in the

complaint, including the requested penalty in the prayer for relief, and since Complainant seeks to justify the requested penalty in this case on the basis of certain factors, such as the size of the business, lack of good faith, and seriousness of the violations, I conclude that Complainant has the burden of proof. Therefore, if the record is insufficient to establish a particular factor I will not aggravate the penalty based on that factor.

1. *Size of the Business*

After noting that neither the statute nor regulations provide any assistance in determining the size of the business, Complainant postulates the rather novel theory that the penalty should be increased for this factor if the employer failed to use all the personnel and financial resources at the business's disposal to comply with the law. CBr. at 4. Complainant argues that a review of Skydive's incomplete I–9 forms reveals that the Respondent did not use all the personnel and financial resources at the business' disposal to comply with the law and that justifies increasing the penalty by $180 per violation. Further, Complainant argues that it is reasonable to increase the penalty amount by $180 for each violation to enhance the probability of compliance with the employment eligibility verification process. Finally, Complainant notes that Respondent's business generated about $112,500 from its employment of Torsten Werner, a German national who Respondent knew was not authorized to work in this country.[1] *Id.* at 2, 4–5.

While Complainant's theory is creative, its brief does not cite any case law to support its rather singular proposition that failure by a business to use all its personnel and financial resources to comply with the law should be considered as an aggravating factor. Moreover, Complainant does not cite record evidence to support its assertion that Respondent derived significant economic benefit from Werner's employment.

[1] Complainant states that Werner is a German national admitted under a Visa Waiver Pilot Program as a WT nonimmigrant visitor for pleasure who is not authorized for employment in this country. CBr. at 3. Although Complainant contends in its brief that Respondent knew Werner was an unauthorized alien, it did not charge a violation in the complaint with respect to Werner's employment. Moreover, as discussed later in this decision, the record evidence does not establish this fact. Therefore, I will not credit Complainant's assertion that Werner's employment should be considered a "knowing hire" violation.

Rather than adopting the Complainant's theory, I instead elect to utilize the criteria which have traditionally been utilized to evaluate the size of the business, such as assets, income, profits, number of employees, etc. *See United States v. Felipe, Inc.,* 1 OCAHO 626 (ref. no. 93) (1989), *aff'd by CAHO*, 1 OCAHO 726 (ref. no. 108) (1989). Except in rare circumstances, the small size of a business is a mitigating, not an aggravating factor. *United States v. Great Bend Packing Co., Inc*., 6 OCAHO 835, at 5 (1996); *United States v. Riverboat Delta King, Inc*., 5 OCAHO 738, at 3 (1995) . Therefore, I reject Complainant's argument that a penalty should be aggravated under the size of the business factor if the employer fails to use all its resources to comply with the law.

In the January 22, 1996 Order I directed the parties to file a stipulation, or submit documents, providing information as to Respondent's business revenue or income, amount of payroll, number of employees, etc. Respondent has attached to its supplemental brief an affidavit by its President and owner Frank Hinshaw dated February 28, 1996 and profit and loss statements for 1994 (RX–A) and 1995 (RX–B). The 1994 profit and loss statement shows that Respondent had total income in 1994 of $1,028,386.80 and net income of $72,307.71. RX–A–1–2. The 1995 profit and loss statement shows that Respondent's total income increased to $1,598,347.51, but net income dropped to $56,492.86.[2] RX–B–1–2. Mr. Hinshaw's affidavit states that he is the sole shareholder and that Respondent rents its premises and does not own any real property.

Neither IRCA nor its implementing regulations provide guidelines for determining business size. However, some past OCAHO cases have referenced the standards utilized by the U.S. Small Business Administration. *See United States v. Tom & Yu, Inc.*, 3 OCAHO 445, at 3–4 (1992); *United States v. Ulysses, Inc.*, 3 OCAHO 449, at 7 (1993) (restaurant with gross sales between $2–3 million considered small business). For the purpose of providing aid to small business, Congress has defined a small business as one which is independently owned and operated and not dominant in its field of operation. 15 U.S.C. §631. Moreover, pursuant to this statute, the Small Business Administration has issued regulations which provide further guidance as to what is considered a small business for the purpose of obtaining loans and other assistance from the Small

[2] Hinshaw states in his affidavit that RX–A and B are true and accurate copies of Respondent's profit and loss statement.

Business Administration (SBA). The SBA regulations are organized by industry categories entitled Standard Industrial Classification (SIC) codes and indicate the maximum number of employees or annual receipts for a concern of that type to be considered small. While there is no specific category for sky diving companies, there is a category for recreation services. *See* 13 C.F.R. §121.60, at 27 (SIC 7999), which defines a small business as one with $5 million or less in gross receipts. Using that standard, Respondent clearly is a small business, since its gross receipts were considerably less than $5 million for each of 1994 and 1995. Therefore, based on the record evidence in this case, including but not limited to Hinshaw's affidavits and RX–A–B, I conclude that Respondent is a small business, and therefore the civil penalty should not be aggravated based on the size of the business.

Even if I did not credit Respondent's evidence, I would still rule against Complainant on the issue of size of the business because Complainant has the burden of proof on this issue and has failed to carry its burden. Indeed, despite the fact that Complainant was given ample opportunity to submit either documents or stipulations with respect to the size of the business, including an extension of time to serve its supplemental brief, it has failed to provide any credible evidence on this issue. Instead Complainant submitted a stipulation which cross-referenced a two page article from the Honolulu Star-Bulletin generally discussing Skydive Hawaii and describing a newspaper reporter's skydiving experience at Skydive! CX–E. This newspaper article contains no details on Respondent's business revenue, amount of payroll, or number of employees. [3] Thus, Complainant has dismally failed to prove the elements of this statutory factor. Since, as I ruled previously, Complainant has the burden of proof, I will not aggravate the penalty in this case based on the size of the business.

2. *Good Faith*

Complainant also argues that the penalty in this case should be aggravated due to the Respondent's lack of good faith. Complainant relies on two arguments for its lack of good faith contention: (1) that

[3] The Rules of Practice permit a party to conduct discovery. *See* 28 C.F.R. §§68.18–68.24. Therefore, Complainant could have used the discovery procedures to gain information about the size of Respondent's business.

16 out of a total of 37 I–9 forms were deficient, and (2) the events relating to Torsten Werner, a German national.

Complainant notes that the first contact between Respondent and INS occurred on November 16, 1994 when INS officials conducted a survey of Skydive Academy and uncovered evidence of a "knowing violation" with respect to German national Torsten Werner who was admitted under the Visa Waiver Pilot Program as a "WT" nonimmigrant visitor for pleasure but was observed tandem skydiving with a tourist from Japan. CBr. at 2–3; C. Supp. Br. at 6. The I–9 forms were audited on November 22, 1994, and discrepancies in the forms were discussed as well as the question of whether Werner was an employee of Skydive Hawaii. CBr. at 3. However, for reasons not explained in the brief, the INS declined to charge Respondent with a knowing violation based on its employment of Werner. *Id.*

Nevertheless, Complainant now argues that the events concerning Werner should be considered to find lack of good faith. Complainant notes that Respondent permitted Werner to stay in a room located next to the business rent free, that Werner was performing a service for Respondent (tandem dives over a long period of time), and that Respondent may have assisted Werner to evade detection. C. Supp. Br. at 7.

Initially I would note that the parties waived an oral hearing and the opportunity to present testimony in this case. Thus, the pleadings, stipulations, and written exhibits introduced in evidence comprise the record in this case, and this decision must be based solely on the record, not matters referenced in the briefs which are outside the record.

With respect to the deficiencies in the I–9 forms, Complainant seems to have confused the issue of the seriousness of the violations with lack of good faith. The fact that 16 of the 37 I–9 forms were deficient alone does not demonstrate lack of good faith. As I advised the parties in my January 22, 1996 Order, the Chief Administrative Hearing Officer (CAHO) held in *United States v. Karnival Fashion, Inc.,* 5 OCAHO 783 (1995) that the INS must prove culpable behavior beyond mere failure on the part of an employer to complete I–9 forms and states that a dismal rate of Form I–9 compliance alone should not be used to increase the civil money penalty sums based on the statutory good faith criterion. Thus, applying *Karnival*,

Respondent's rather dismal compliance rate alone does not justify a finding of lack of good faith.

Complainant also relies on the actions with respect to Mr. Werner to demonstrate lack of good faith. However, Complainant did not charge Respondent with a knowing violation. In fact, the complaint does not charge any type of violation with respect to Werner. The complaint solely deals with paperwork violations, and there is no record evidence of lack of good faith with respect to those violations.

Finally, Complainant's argument that Respondent assisted an unauthorized alien and failed to cooperate in the investigation is unsupported by the record. The fact that Hinshaw told Werner that his wife advised him not to say anything is hardly proof that Respondent was assisting an unauthorized alien to evade detection. Similarly, the fact that a private interview between Hinshaw and Werner took place (which INS allowed) proves nothing. Complainant does not ask that I increase the civil money penalty because Respondent employed unauthorized aliens. CBr. at 8. Rather, Complainant states that the penalty should not be aggravated for that factor. I find it illogical and inconsistent for Complainant to argue that I should increase the penalty because the assisting of an unauthorized alien demonstrates lack of good faith when it stipulates that Respondent did not employ unauthorized aliens for the purpose of calculating the penalty. Moreover, Complainant concedes that once the I–9 inspection commenced, Mr. Hinshaw cooperated in providing the forms and related records. C. Supp. Br. at 7–8; CX–C–1–4 and CX–D–1–2. Since the I–9 forms are the subject of the complaint, I find that Respondent did cooperate in the investigation of the charges that are the basis of this complaint.

Complainant has failed to show that the type of factors which have justified a finding of lack of good faith are present here. A prior educational visit to a company's premises has warranted a finding of lack of good faith in some prior cases. *See United States v. Minaco*, 3 OCAHO 587, at 7 (1993); *United States v. Giannani Landscaping*, 3 OCAHO 573, at 8 (1994). Hinshaw states that Respondent never received any prior educational visits regarding the company's responsibilities under IRCA and never received any informational materials from the Immigration and Naturalization Service, Department of Labor, or any other entity. Hinshaw Affidavit dated February 28, 1996, ¶7. Complainant has not asserted or produced evidence which contradicts Hinshaw's assertion. Moreover,while previous apprehen-

sion of an unauthorized alien upon the business premises can be a basis for finding lack of good faith, *see United States v. Reyes*, 4 OCAHO 592, at 8 (1994), here Werner's apprehension took place in the same week as part of the same audit of Respondent's business and thus should not be considered a prior apprehension.

I conclude that Complainant has not even come close to proving lack of good faith, and therefore I will not aggravate the civil penalty based on this factor.

3. *Seriousness of the Violation*

Complainant asserts that paperwork violations are always serious, referencing *United States, v. Primera Enterprises, Inc.,* 4 OCAHO 692 (1994) and cases cited therein. CBr. at 6. Respondent contends the violations were not serious, noting that there was no intentional falsification, nor deliberate failure to prepare an I–9. Respondent acknowledges that it failed to prepare I–9 forms for five employees and that the forms were not completed in all parts for other employees. However, Respondent asserts that the employees were either American citizens or authorized to work in the United States. RBr. at 3.

To my knowledge the CAHO has never taken the position that every paperwork violation, no matter how minor or technical, is a serious violation. Indeed such an approach would make a nullity of the statutory factor, since, under Complainant's theory, a paperwork violation would always be a serious violation. While paperwork violations are always *potentially* serious because the principal purpose of the I–9 is to allow an employer to ensure that it is not hiring anyone who is unauthorized to work in the United States, *United States v. Reyes,* 4 OCAHO 592, at 8 (1994), I decline to adopt the sweeping proposition that all paperwork violations are serious, no matter how minor or technical.

While paperwork violations are always potentially serious, the facts of each case must be carefully considered to evaluate the degree of seriousness. Thus, the seriousness of the violations should be viewed as a continuum. *United States v. Felipe, Inc., 1* OCAHO 626 (ref. no. 93) (1989), *aff'd by CAHO,* 1 OCAHO 726 (ref. no. 108) (1989).

Indeed the Administrative Law Judges (ALJ) and CAHO have carefully scrutinized the violations in each case to determine the seriousness of the violation. In *United States v. Charles C. W. Wu d/b/a Airport Budget Hotel,* 3 OCAHO 434 (1992), the CAHO held that a total failure to complete and/or present I–9 forms is serious since such conduct completely subverts the purpose of the law even when no unauthorized aliens are implicated. Since such a total failure fundamentally undermines the effectiveness of the employer sanctions statute, it should not be treated as anything less than serious. The CAHO did not state, however, that all paperwork violations are serious. Moreover, as noted in the *Wu* decision, the holding was in line with many prior ALJ decisions that failure to prepare and/or present an I–9 form is a serious violation. *See , e.g., United States v. M.T.S. Service Corp.,* 3 OCAHO 448, at 4–5 (1992); *United States v. A-Plus Roofing*, 1 OCAHO 1397 (ref. no. 209) (1990); *United States v. Acevedo*, 1 OCAHO 647, 650 (ref. no. 95) (1989).

While all paperwork violations potentially are serious, the seriousness of the violation should be determined by examining the specific failure in each case. Specifically, some paperwork violations have been held to be not serious. *See, e.g. United States v. Eagles Groups, Inc.*, 2 OCAHO 342, at 5 (1991); *United States v. Big Bear Market*, 1 OCAHO 286 (ref. no. 48) (1989), *aff'd by CAHO,* 1 OCAHO 341 (ref. no. 55), *aff'd* 913 F.2d 754 (9th Cir. 1990). Further, of those violations which are considered serious, some are more serious than others. This is the approach that has been taken in several decisions. For example, in *United States v. Karnival*, 5 OCAHO 783 (1995), the Judge, citing *Charles C.W. Wu*, 3 OCAHO 434 (1992), found that failing to complete I–9 forms was more serious than failing to complete I–9 forms in a timely manner. In *United States v. Minaco*, 3 OCAHO 587, at 8 (1993), the Judge held that failure to complete the attestation in section 2 of the I–9 was a serious violation. Other cases have held that failure to complete any part of section 2 of the I–9 is a serious violation. *United States v. Land Coast Insulation, Inc.,* 2 OCAHO 379 (1991); *United States v. Acevedo,* 1 OCAHO 647, 651 (ref. no. 95) (1989).

In applying the case law to the current situation, I find that, in accordance with prior case law, the failures to make available for inspection the I–9 forms for the five individuals listed in Count II are serious violations, regardless of whether these individuals were unauthorized aliens or not. *See United States v. Charles C.W. Wu*, *supra.* The failure to complete Section 2 of the I–9 in a timely man-

ner for the three individuals listed in Count I is also a serious violation, although it is not as serious as the violations in Count II. *See United States v. Karnival*, 5 OCAHO 783 (1995). With respect to Count III, failing to properly complete section 2 of the I–9 form for eight named individuals, I find that in this case all the violations are serious. However, the type of missing information differs with respect to the individuals and the degree of seriousness varies considerably.

C. *Calculating the Penalty Amount*

In calculating a penalty for paperwork violations, like the Complainant and in accord with OCAHO precedent, *see, e.g., United States v. Felipe, Inc.*, 1 OCAHO 626 (ref. no. 93) (1989), *aff'd by CAHO,* 1 OCAHO 726 (ref. no. 108) (1989), I start with the baseline amount of $100 in calculating a penalty and consider the five criteria as possible aggravating factors.

One line of cases has applied a mathematical formula in calculating penalty. *See, e.g., United States, v. Felipe, supra; United States v. Davis Nursery,* 4 OCAHO 694 (1994). The ALJ in *Felipe* noted that the difference between the statutory maximum ($1,000) and statutory minimum ($100) was $900. Dividing the $900 by 5 for the five statutory criteria, one arrives at a penalty of $180 each. The opinion further states that the Judge would consider the parties' arguments to determine how they respectively allocate particularized factors of consideration within each of the five statutorily mandated categories and to fractionalize the $180 in proportion to the persuasiveness of the respective arguments.[4] *Felipe,* 1 OCAHO 626, 629 (ref. no. 93) (1989).

On appeal, the CAHO affirmed. 1 OCAHO 726 (ref. no. 108) (1989). Specifically, the CAHO concluded that the Judge did not err in weighing equally the five factors to be given due consideration. Further, the CAHO held that the Judge did not err in using a mathematical formula when calculating the civil money penalties, noting that a similar approach has been utilized by other administrative agencies and affirmed by the courts. However, the CAHO noted that the Judge's mathematical approach is not the sole permissible

[4]As discussed previously, Complainant seeks to add an additional penalty of $180 for each statutory factor to the $100 baseline amount, which is in accordance with the *Felipe* case.

method when determining the proper civil money penalty for paperwork violations.

As the CAHO noted, the mathematical approach has not been the only approach taken in evaluating the statutory factors. A judgmental approach also has been utilized, in which the Judge analyzes each factor but does not necessarily assign a specific dollar figure for each statutory factor. *See United States v. Jenkins*, 5 OCAHO 743 (1995); *United States v. King's Produce*, 4 OCAHO 592 (1994); *United States v. Giannini Landscaping Inc*., 3 OCAHO 573 (1993).

I have carefully read and considered the various decisions and evaluated the different approaches used. Both approaches have their merits, and, as noted, the CAHO as yet has not imposed a single method. While the ultimate penalty calculation most likely will not greatly differ whether one uses the mathematical method or the judgmental method, the former does assure more predictability and consistency, which is a factor not to be lightly disregarded.

After careful consideration, I conclude that Complainant's recommendation of $180 for each statutory factor is reasonable and is supported by case law, such as *Felipe.* Therefore, I will begin with a base line factor of $100 per violation, which is the minimum penalty, and will increase the penalty by up to $180 for each aggravating factor which Complainant has shown to be applicable in this case.

As noted previously, Complainant here does not base its recommended penalty either on a charge of knowingly hiring unauthorized aliens or a history of prior violations. With respect to size of business and lack of good faith, for which Complainant sought to aggravate the penalty amount by $180 each, I have rejected Complainant's contention and have found that Complainant failed to show that the penalty should be aggravated based on these two factors.

The remaining factor on which Complainant relies is the seriousness of the violations for which Complainant seeks to aggravate each violation by $180. I will start with Count II which is the most serious violation because Respondent completely failed to make available for inspection the I–9 forms for five individuals. Respondent's attempts to denigrate the seriousness of the charge by contending that it exercised due care and diligence are to no avail. As noted previously, a total failure to prepare and/or present an I–9 form is a serious viola-

tion since such conduct completely subverts the purpose of the law even when no unauthorized aliens are implicated. *See Charles C.W. Wu*, 3 OCAHO 434, at 2. With respect to these five violations in Count II, the appropriate penalty is $280 per violation (the statutory minimum of $100 plus $180 for the seriousness of the violation) for a total of $1400 (five violations multiplied by $280).

With respect to Count I, Respondent failed to complete Section 2 of the I–9 form within three business days for the three named individuals. (Sandy Elaine Zeldes, Shu Hua Hinshaw, and Bern N. Mueller). With respect to Sandy Zeldes, part one of the I–9 was completed on January 22, 1994 and part two was not completed until almost a month later on February 17, 1994. CX–C–21. Shu Hua Hinshaw was hired on August 4, 1993 but part one of the I–9 form was not completed until November 19, 1994 and there is no date for the completion of part two. CX–C–14. Finally, as to Bern Mueller, part one was dated September 26, 1991 but part two was not completed until *three years later* on September 27, 1994. CX–C–18. While untimely completion of I–9 forms is marginally less serious than total failure to prepare the forms, the failure to complete the form in a timely fashion (two of the forms were not completed until over a year and three years respectively) is a serious violations which warrants an aggravated penalty. I find that a penalty of $270 for each violation is appropriate, for a total penalty for Count I of $810 (three violations multiplied by $270).

With respect to Count III, Respondent has admitted that it failed to properly complete section 2 of the I–9 form for the eight individuals listed in Count III. Since the uncompleted parts differ with respect to each of the eight individuals, I will discuss the specific failure as to each I–9 form. As to David Osmond and William Weir, they were hired respectively on April 7, 1993 and July 18, 1994 but section 2 of the I–9 was completely blank. *See* CX–C–65 (Osmond) and CX–C–76 (Weir). A total failure to complete section 2 must be considered a serious violation. *United States v. Land Coast Insulation, Inc.,* 2 OCAHO 379 (1991); *United States v. Acevedo*, 1 OCAHO 647, 651 (ref. no. 95) (1989). Thus with respect to these two individuals I impose a penalty of $280 each.

As to the other six individuals listed in Count III, section 2 was completed only in part. Regarding employees Katsunori Kojima and Donald Orr, neither an expiration date nor document identification number were provided for the drivers license in list B of section 2 of

the I–9 form and no identification number is provided for the social security card checked in list C. CX–C–52 (Kojima) and CX–C–70 (Orr). No photocopies of these documents were in the employer's records. While some parts of section 2 were completed, this violation was almost as serious as that for Osmond and Weir. Therefore, I find that the violations as to Orr and Kojima should be aggravated by $170 for a total assessment of $270 for each violation.

As to Kenneth Davis, the drivers license in list B of section 2 does not include an expiration date and the social security card in list C does not include the identification number. CX–C–39. Section 2 of Frank Hinshaw's I–9 form has no expiration date for the U.S. passport in list A. CX–C–49. Again these are serious violations but somewhat less serious than those for Orr and Kojima where there was an absence of both expiration dates and document identification. Consequently I find that these violations should be aggravated by $150 for a total of $250 per violation.

With respect to Jeff Fish, section 2 of the I–9 form fails to list the document identification number for the U.S. passport in list A, or the identification number in list C for the social security card. CX–C–41. While a photocopy of the social security card is provided which shows the identification number, no copy of the passport is provided. CX–C–42. Similarly, with respect to Juan Rivas, the only missing information in Section 2 is the identification number for the social security card in list C. CX–C–71. I find that these violations are somewhat serious but only warrant an increased penalty of $100 above the minimum, for a total penalty of $200 for each violation.

Thus, the total penalty assessment for Count III is $2,000.

III. *Conclusion*

I find and conclude upon a preponderance of the evidence that Respondent violated Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). After considering the relevant criteria I assess a civil penalty of $810 for Count I, $1,400 for Count II, and $2,000 for Count III, for a total penalty of $4,210.

ROBERT L. BARTON,
Administrative Law Judge Jr.

Notice Regarding Appeal

Pursuant to the Rules of Practice, 28 C.F.R. §68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review together with supporting arguments. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become final within thirty days of the date of the decision and order unless the CAHO modifies or vacates the decision and order. *See* 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a party adversely affected by a final order issued by the Judge or the CAHO may, within 45 days after the date of the final order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of this order. See 8 U.S.C. §1324a(e)(8).