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

July 22, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00097
AMERICAN TERRAZZO CORP., d/b/a JOHN DELALLO FOODS, Respondent.	)	

ERRATUM

On July 18, 1996, I issued a Final Decision and Order. This Decision is hereby corrected in the following ways:

The last sentence of the second full paragraph at page three states, "I therefore granted Respondent's motion for summary decision as to liability with respect to Counts II and III." This sentence is corrected to read "I therefore granted Complainant's motion for summary decision as to liability with respect to Counts II and III."

The first sentence of the second full paragraph at page nineteen states, "Finally, I find that Respondent has proven the charges in Count III of the complaint; . . . " This sentence is corrected to read, "Finally, I find that Complainant has proven the charges in Count III of the complaint; . . . "

ROBERT L. BARTON, JR.
Administrative Law Judge

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FINAL DECISION AND ORDER

I. *Procedural History*

On March 1, 1995 agents of the Immigration and Naturalization Service (INS) requested Respondent to present for inspection on March 7, 1995 all employment eligibility verification forms (I–9 forms) for Respondent's employees hired on or after November 6, 1986. *See* Complaint, ¶D of Count II.[1] Subsequently, on April 19,

[1] Paragraph D of Count II of the complaint alleges that on August 12, 1994 the INS requested Respondent to present for inspection on August 19, 1994 all I–9 forms for employees hired on or after November 6, 1986. In its brief at page 2, Complainant states, citing to CX–N–1 (Memorandum of Investigation), that the correct date for the inspection was May 7, 1995, not August 12, 1994. However, Complainant's statement also is in error. Special Agent Barry testified at the hearing that the notice of the inspection took place on March 1, 1995, and the inspection took place on March 7, 1995. Tr. at 35–37. Moreover, the Memorandum of Inspection (CX–N–1) confirms that the inspection took place on March 7, 1995, not May 7, 1995 as stated in Complainant's brief and not August 19, 1994 as stated in paragraph D of Count II of the complaint. Therefore, the complaint will be amended to conform to the evidence; i.e. paragraph D of Count II is amended to read that the request for inspection took place on March 1, 1995 and the inspection took place on March 7, 1995. *See* 28 C.F.R. §68.9(e); *United States v. Tinoco-Medina*, 5 OCAHO 806 (1995) (allowing an amendment to conform to the evidence).

1995 the INS served a notice of intent to fine on Respondent, alleging that Respondent had violated Section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a, and seeking the payment of a fine in the amount of $14,950. On May 24, 1995 Mr. John De Lallo, on behalf of Respondent, formally requested a hearing in this matter.

The complaint in this case, which contains three counts, was filed on June 8, 1995 and served on June 9, 1995. Count I alleges that Respondent knowingly hired and/or continued to employ an individual known as Viktoria Gabor[2] in violation of Section 274A(a)(1)(A) of the INA, 8 U.S.C. §1324a(a)(1)(A), which makes it unlawful, after November 6, 1986, to hire an individual knowing she is unauthorized to work. Count II of the complaint alleges that Respondent failed to prepare and make available for inspection the employment eligibility forms (I–9) for three named individuals in violation of §274A(a)(1)(B) of the INA, 8 U.S.C . §1324a(a)(1)(B), which makes it unlawful, after November 6, 1986, to hire an individual without complying with §274A(b) of the INA, 8 U.S.C. §1324a(b). Count III of the complaint alleges that Respondent hired twenty-two individuals for employment without properly completing Section 2 of the I–9 forms, in violation of Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). The request for inspection took place on March 1, 1995, and the inspection took place on March 7, 1995.

Respondent's answer to the complaint was received on June 30, 1995. In the answer Respondent admitted the allegations in paragraphs A-C of Count I, but denied the allegations in paragraphs D and E of Count I that it knew the illegal status of Ms. Gabor either at the time it hired her or during her continuing employment. Respondent denied the allegation in Count II that it had not prepared I–9 forms for the three individuals. Respondent stated that it had completed Section 1 of the I–9 forms but did admit that Section 2 had not been completed. With respect to Count III, Respondent admitted that by not recording the identifying numbers of the documentation it had failed to complete Section 2 of the I–9 forms. With respect to the prayer for relief, Respondent alleged that the proposed

[2] By the time of the hearing Ms. Gabor had married and had changed her last name to Kalkowski. Tr. at 14–15. However, since at the time of her employment by Respondent her name was Gabor, and the documents introduced in the record refer to the last name Gabor, *see, e.g.,* CX–F–1, she will be referred to as Gabor in this decision.

penalty was grossly unfair and excessive and would constitute a serious financial hardship.

Following receipt of the answer, on July 13, 1995 the First Prehearing Order was served, and a joint response to the first prehearing order by the parties was filed on August 9, 1995. In the joint response the parties stipulated that Respondent violated Section 274A(a)(1)(B) of the INA with respect to the three individuals listed in Count II and also with respect to the twenty-two individuals listed in Count III. Respondent did not stipulate to the violation alleged in Count I or agree to the penalty requested by Complainant in Counts I–III.

On November 7, 1995, I received Complainant's motion for summary decision which was supported by a memorandum of points and authorities. The motion requested decision on the issue of liability for all three counts of the complaint. With respect to Counts II and III, the motion was based on the fact that Respondent admitted liability for the violations set forth in those Counts in its answer to the complaint and in the stipulations set forth in the joint response. With respect to Count I, alleging the knowing violation, Complainant contended that, based on the Respondent's answers to discovery requests, and the documentation attached to the motion, there was no genuine issue of material fact and Complainant is entitled to judgment as a matter of law. On November 20, 1995, I received Respondent's one page response to the motion.

A telephone prehearing conference was held with both parties on December 8, 1995, and a transcript of the conference was prepared.[3] Although the answer to the complaint did not specifically admit liability, in the joint response filed on August 9, 1995 and in its answer to the summary decision motion, Respondent acknowledged liability for both Counts II and III. However, Respondent did not sign the joint response. Therefore, in order to avoid any misunderstanding, this matter was raised during the prehearing conference, and

[3] The following abbreviations will be used throughout the Decision:

PHC Tr.	—	Transcript of the December 8, 1995 Prehearing Conference
PHCR	—	December 13, 1995 Prehearing Conference Report
Tr.	—	Transcript of April 11, 1996 Hearing
CX	—	Complainant's exhibit
C. Br.	—	Complainant's June 13, 1996 Post Hearing Brief
R. Br.	—	Respondent's May 13, 1996 Post Hearing Brief

Respondent expressly admitted that it committed the violations alleged in Counts II and III. PHC Tr. at 8–9.

Based on Respondent's answer to the complaint, the joint response, Respondent's answer to the summary decision motion, and the statements during the prehearing conference, I ruled that Respondent had admitted paragraphs A–E of Count II of the complaint, had admitted paragraphs A–C of Count III of the complaint, and had admitted violating Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful to hire, after November 6, 1986, for employment in the United States an individual without complying with the requirements of Section 274A(b) of the INA. I therefore granted Respondent's motion for summary decision as to liability with respect to Counts II and III. *See* PHC Tr. at 9; PHCR at 3.

However, because there were genuine issues of material fact remaining with respect to Count I, as well as genuine issues regarding the assessment of penalty for Counts II and III, I denied the motion for summary decision with respect to those issues. *See* PHCR at 3–6. I stated that Complainant's case with respect to actual knowledge was based on inference and circumstantial evidence which was too weak to sustain on a motion for summary decision when all reasonable inferences must be accorded the non-moving party. PHCR at 4. Specifically I ruled that it was inappropriate to attempt to resolve the issues of Respondent's knowledge on a motion for summary decision. Thus I concluded that there was a genuine issue of material fact as to the Respondent's knowledge of Ms. Gabor's status at the time of her hire and during her employment, and there was insufficient evidence at that time to apply a theory of constructive knowledge. PHCR at 5. Both parties informed the Court that they wished an evidentiary hearing on the remaining issues. Complainant listed three witnesses that it wished to call and also provided an exhibit list. Respondent did not file a witness or exhibit list.

A hearing was held in Pittsburgh, Pennsylvania on April 11, 1996. At the beginning of the hearing Complainant was permitted to amend Count II of the complaint to delete paragraph C which alleged that Respondent failed to prepare I–9 forms for the three individuals listed in Count II.[4] Complainant presented testimony by two witnesses, INS

[4] Although Complainant moved to delete this allegation, as discussed *infra* at 12, 15, Respondent later admitted during the hearing that it did not prepare the I–9 forms for the three individuals listed in Count II, or the twenty-two individuals listed in Count III, until after it received the INS' March 1, 1995 request for inspection. Tr. at 66–68.

Special Agent Robert S. Barry and Ms. Viktoria Gabor. Also during the hearing certain exhibits offered by Complainant were accepted in evidence; specifically, CX–A–1–3, B–1–4, C–1–7, D–1–5, E–1–2, F–1, G–1, H–1–2, I–1, J–1–5, K–1–2, L–1–3, M–1, N–1, O–1–25, Q–1–6, and R–1.[5] *See* Tr. at 17, 21, 34, 39, and 73–76. Respondent did not offer any testimony or documentary evidence. At the conclusion of the hearing, I closed the record pursuant to 28 C.F.R. §68.49. The parties were given leave to file post-hearing briefs. On May 13, 1996 Respondent filed a two page document entitled "Presentation of Additional Comments" which has been accepted as Respondent's post-hearing brief. *See* May 14, 1996 Order. Complainant's brief was filed on June 13, 1996. Thus, the case now is ready for adjudication. This decision is based on the record which consists of the complaint, answer to the complaint, the parties August 9, 1995 joint response, the transcript of the prehearing conference, and the testimony and exhibits introduced in evidence during the hearing.

II. *Issues*

The remaining issues for resolution are as follows:

1. Whether Respondent hired and/or continued to employ Viktoria Gabor after November 6, 1996 knowing that she was not authorized for employment in the United States as asserted in Count I of the complaint, and, if so, what penalty is appropriate?

2.What penalty should be imposed for the paperwork violations asserted in Counts II and III of the complaint?

Complainant concedes that it has the burden of proof with respect to both liability and penalty. C. Br. at 1; *see also, United States v. Skydive Academy of Hawaii Corp. d/b/a Skydive Hawaii,* 6 OCAHO 848 (1996) (hereinafter *Skydive*).[6]

[5] Complainant's February 14, 1996 proposed list of exhibits included CX–J–1–5, and the hearing transcript reflects that exhibit CX–J–1–5 was received in evidence. *See* Tr. at 39, n. 16. CX–J consists of Respondent's federal corporate tax return for 1994, form 1120, with attached schedules. However, exhibit CX–J which Complainant submitted to the court reporter included seven pages and is marked CX–J–1–7. Pages CX–J–5–6 of the new exhibit appear to be duplicates of CX–J–3–4 respectively. These duplicate pages are unnecessary and were not received in evidence. Therefore, the record correctly should reflect that CX–J consists of five pages, as marked in the prehearing submission.

[6] A copy of the *Skydive* decision was provided to the parties when the briefing schedule was established.

III. *Findings and Conclusions*

A. *Count I*

In Count I Complainant alleges that Respondent hired Ms. Viktoria Gabor after November 6, 1986 knowing that she was an alien not authorized for employment in the United States and that Respondent continued to employ her knowing that she was or had become an unauthorized alien with respect to such employment. Respondent admitted in its answer to the complaint that it had hired Ms. Gabor and that she was an alien not authorized for employment in the United States but denied that it knew she was unauthorized, either at the time of her hire or during her employment. *See* Answer ¶¶2–4. Respondent asserts that as soon as it learned of Ms. Gabor's unauthorized status, it immediately discharged her.[7] CX–D–4.

There are two separate issues raised by Count I of the complaint. Paragraph D of Count I asserts that Respondent knew Ms. Gabor was unauthorized at the time it hired her, and paragraph E of Count I alleges that, as an alternative to paragraph D, Respondent continued to employ Gabor knowing that she was or had become an unauthorized alien. At the outset of the hearing Complainant asserted that Respondent had actual knowledge of Ms. Gabor's unauthorized status at the time it hired her or at least became aware of her unauthorized status during her employment and yet continued to employ her. Tr. at 9. Alternatively Complainant contends that even if the Court does not find actual knowledge, I should find that Respondent had constructive knowledge of Ms. Gabor's unauthorized status at the time it hired her and continued to employ her with such knowledge. Tr. at 9, 77.

The standard of proof with respect to both paragraphs D and E is *preponderance of the evidence;* i.e. whether Complainant has shown that it is more likely than not that Respondent hired and/or continued to employ Ms. Gabor knowing that she was an alien unauthorized to work in the United States. Complainant does not have to prove these allegations by clear and convincing evidence or beyond a reasonable doubt. It merely has to show that it is more likely than not that Respondent knew Gabor was unauthorized. Moreover,

[7] Ms. Gabor was hired on May 7, 1994 and was terminated on February 17, 1995. CX–D– 4.

Complainant does not have to produce incriminating statements or admissions to prove this allegation. Indirect and circumstantial evidence may be sufficient to establish knowledge.[8] Further, since Respondent is a corporation, it is the knowledge of the corporate entity, not just one individual, which is important.

The term "knowing" has been defined in both the regulations and case law to mean more than simply actual knowledge. Thus, 8 C.F.R. §274a.1(l) states that the term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. The regulation also references the term "constructive knowledge", which may include but is not limited to situations where an employer fails to complete or improperly completes the I–9 form, has information available to it that would indicate that the alien is not authorized to work, or acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf. 8 C.F.R. §274a.l(1)(i)–(iii).

The meaning of the term "knowing" in Section 1324a(a)(1)(A) has been addressed by several past OCAHO cases which have interpreted the term knowing to mean "knew or should have known." *United States* v. *Mester Mfg. Co.,* 1 OCAHO 53 (Ref. No. 18) (1988)*, aff'd*, 879 F.2d 561 (9th Cir. 1990); *United States v. New El Rey Sausage Company, Inc*., 1 OCAHO 389 (Ref. No. 66) (1989), *modified by the Chief Administrative Hearing Officer (CAHO),* 1 OCAHO 542 (Ref. No. 78) (1989), *aff'd,* 925 F.2d 1153 (9th Cir. 1991). The term "knowing", even as used in criminal statutes, is not limited to positive knowledge but includes the state of mind of one who acts with an awareness of the high probabilities of the fact in question. *See*

[8] In denying Complainant's motion for summary decision, I stated that the evidence was insufficient to establish that Respondent had actual knowledge that Ms. Gabor was an unauthorized alien either at the time of hire or during her continued employment. PHCR at 4. I further noted that Complainant's case with respect to actual knowledge was based on inference and circumstantial evidence which was too weak to sustain on a motion for summary decision when all reasonable inferences must be accorded the non-moving party. *Id.* Complainant's case now has been considerably strengthened by the testimony of the two witnesses, particularly that of Ms. Gabor. Moreover, while it is improper to attempt to resolve disputed factual issues regarding the knowledge of a party on a motion for summary decision, it is entirely appropriate, and indeed necessary, to do so once an evidentiary hearing has been held.

United States v. Sophie Valdez, d/b/a La Parilla Restaurant (hereinafter *Sophie Valdez)*, 1 OCAHO 598, 608–09 (Ref. No. 91) (1989), *reconsideration denied,* 1 OCAHO 685 (Ref. No. 104) (1989), *denial of reconsideration aff'd,* 1 OCAHO 744 (Ref. No. 112) (1989), citing *United States v. Jewel*, 532 F.2d 697, 702 (9th Cir. 1976) (en banc) (holding that in criminal law deliberate failure to investigate suspicious circumstances imputes knowledge).[9] The words "should have known" suggest constructive rather than actual knowledge. Thus, Complainant may prove the allegations in Count I by establishing, by a preponderance of the evidence, that Respondent either knew or should have known that Ms. Gabor was an unauthorized alien.

Although, as noted previously, Complainant asserted at the hearing that it would show that Respondent had actual knowledge of Ms. Gabor's unauthorized status, in its post hearing brief Complainant only asserts a theory of constructive knowledge as a basis for a finding of liability with respect to Count I of the complaint. Specifically, Complainant contends that Respondent had constructive knowledge of Ms. Gabor's unauthorized status both at the time of hire, as well as during the duration of her employment. C. Br. at 2. To establish constructive knowledge Complainant relies on the educational visit from the Department of Labor, CX–I–1, the fact that Gabor told Respondent that she was a foreign student with Hungarian citizenship, Tr. at 22, that Respondent saw her social security card which states on its face that it is "Valid for Work Only with INS Authorization," CX–F–1, that Gabor never produced any other documentation nor did she ever fill out an I–9 form, Tr. at 18–19, and that without Gabor's knowledge or participation, Respondent created an I–9 form for Gabor and checked "U.S. citizen" as her eligibility for employment. C. Br. at 9. Complainant asserts that these multiple layers of information provided Respondent with constructive knowledge, if not actual knowledge, of her unauthorized status. C. Br. at 9.

I will first consider the allegation in paragraph D that Respondent knew or should have known Ms. Gabor was unauthorized at the time it hired her in February 1994. In its brief Complainant does not assert that Respondent had actual knowledge of Gabor's unauthorized status at the time it hired her. Moreover, the record does not establish that Respondent possessed actual knowledge of Respondent's unauthorized status. Indeed, in other cases involving

[9] However, the mere failure to prepare an I–9 form, without other evidence, is not proof of knowledge. *Sophie Valdez, supra* at 610.

similar circumstances judges have refused to find actual knowledge. *See New El Rey Sausage Company, Inc.,* 1 OCAHO 389, 415 (Ref. No. 66) (finding that the record did not show that the employer had actual knowledge), *modified on other grounds by the CAHO,* 1 OCAHO 542 (Ref. No. 78), *aff'd,* 925 F.2d 1153 (9th Cir. 1991);

However, Complainant contends that, even if Respondent did not have actual knowledge that Gabor was unauthorized, by purposely failing to investigate, and remaining ignorant, Respondent had constructive knowledge of Gabor's unauthorized status at the time it hired her. C. Br. at 7. Complainant has cited several cases in support of its constructive knowledge theory, including *Mester Manufacturing Co., supra; New El Rey Sausage Company, Inc., supra;* and *United States v. Noel Plastering,* 3 OCAHO 427 (1991), *aff'd,* 15 F.3d 1088 (9th Cir. 1993).

The theory of constructive knowledge with respect to Section 1324a was first developed in *Mester Manufacturing Co.*, and only has been adopted by one federal circuit to date. Moreover, most of the cases applying constructive knowledge have done so in the context of a continuing hire situation where the INS has warned the employer about possible unauthorized aliens and the employer has continued to employ these individuals despite the warning. Complainant has cited and I have found only one OCAHO case in which a theory of constructive knowledge has been applied to an initial hire situation when no INS warning had been given to the employer. *See Sophie Valdez, supra* at 608–10.

The *Sophie Valdez* decision was rendered seven years ago and appears to be contrary to the subsequent decision of the Ninth Circuit Court of Appeals in *Collins Foods International v. INS,* 948 F.2d 549 (9th Cir. 1991).[10] There the Circuit Court gave clear warning that

[10] Complainant agrees that *Collins* and *Sophie Valdez* are inconsistent. C Br. at 9. While the Ninth Circuit decision in *Collins* is not binding here, neither is *Sophie Valdez*. The Judge's decision in *Sophie Valdez* was issued on September 27, 1989 and was not appealed. Instead the INS sought reconsideration of the decision, which the Judge denied on November 15, 1989. On November 27, 1989 INS filed a request for administrative review which ostensibly sought review of the order denying reconsideration but in fact sought review of issues addressed in the decision. The CAHO declined the INS' invitation to review the issues in the decision and affirmed the November 15 order denying reconsideration. Therefore, the CAHO neither addressed nor affirmed the decision applying a theory of constructive knowledge to an initial hire situation. While the Judge did so, the decision of another Administrative Law Judge constitutes persuasive but not binding authority, and where that decision appears to be contrary to a latter Circuit Court decision, I decline to follow it.

the doctrine of constructive knowledge must be sparingly applied, reversing a finding of constructive knowledge by the ALJ and CAHO in an initial hire situation where no INS warning had been given. In *Collins,* the INS relied on a social security card which it contended the employer should have known was not valid. The ALJ agreed, holding that Respondent should have known the employee was not authorized for work in the United States, and the CAHO affirmed. 1 OCAHO 828, 838 (Ref. No. 123) (1990), *aff'd,* 1 OCAHO 875 (Ref. No. 129) (1990).

While the Ninth Circuit's decisions are not binding in this case since it arises in Pennsylvania which is within the jurisdiction of the Third Circuit Court of Appeals, the Ninth Circuit decisions are the only federal circuit precedent on this issue and are quite persuasive. Complainant argues that *Collins* does not bar a finding of constructive knowledge in this case and attempts to distinguish *Collins* by arguing that Respondent was given more affirmative information than the employer in *Collins*. C. Br. at 11. In *Collins,* the INS relied on the fact that the job was offered over the telephone to the employee and that the employer examined the employee's social security card when filling out an I–9 form. Here, Complainant notes that the information on the card only requires the employer to be able to read English to understand the significance, rather than the close scrutiny the Court found acceptable in *Collins*.

The difficulty with Complainant's argument is that much of the evidence it relies on to support its assertion of constructive knowledge is not tied to the initial hire. For example, while Respondent produced a copy of Ms. Gabor's social security card in response to a discovery request, it is not clear when it obtained the same. Gabor testified that she did not present her social security card at the time she was hired. Tr. at 21. She also could not remember whether she showed Respondent her Hungarian passport when she applied. Tr. at 21. Moreover, although the evidence indicates that at the time she was hired Gabor informed David De Lallo that she was a foreign student from Budapest, Hungary, and that management and staff knew she was a Hungarian citizen, Tr. at 22, CX–Q–2, she also told him that she had restricted work authorization. CX–Q–3. Thus, these facts alone do not show that Respondent knew or should have known that Respondent was unauthorized at the time Respondent hired her in May 1994.

Further, the other evidence also fails to establish that Respondent knew or should of known of Gabor's unauthorized status when it hired her. For example, while Complainant introduced evidence that Respondent was visited by the U.S. Department of Labor (DOL) in 1992, it did not show what was discussed or what information was given to the Respondent. Indeed Complainant did not call the DOL investigator (or indeed any DOL employee) to testify. Thus, the record merely shows that DOL visited Respondent in 1992, that Respondent was unaware of the I–9 form and its requirements at that time, and that some publications were provided to Respondent. CX–I–1. In short, based on the record evidence, Complainant has failed to show, by a preponderance of the evidence, that Respondent knew or should have known that Ms. Gabor was an unauthorized alien at the time she was hired.

While a theory of constructive knowledge has been utilized to hold employers liable in certain cases where the employer continued to employ individuals after the INS had notified the employer of the employees' questionable status, *see Mester Manufacturing Co., supra* and *New El Rey Sausage, supra,* constructive knowledge was not applied to the initial hire. Moreover, the INS notice was a crucial fact which is lacking here.[11]

A federal circuit decision also found constructive knowledge when the employer had been given a warning by the INS and continued to employ the suspect aliens. *Noel Plastering v. OCAHO*, 15 F.3d 1088 (9th Cir. 1993), The Court in *Noel Plastering* found that the employer had received written notice from the INS that the employees were likely unlawfully employed aliens which was sufficient to give an employer constructive knowledge of a violation.

Therefore, based on the above analysis, I conclude that Complainant has failed to prove, by a preponderance of the evidence, the allegations of paragraph D of Count I that Respondent hired Viktoria Gabor knowing that she was an alien not authorized for employment in the United States.

[11] For example, in *Mester*, the Ninth Circuit Court affirmed the ALJ's finding of constructive knowledge because the INS specifically had notified the employer about three employees whom the INS suspected of using false alien registration cards, and the employer continued to employ them without taking appropriate action to verify their status. *See Mester Mfg. Co. v. INS,* 879 F.2d 561, 564, 566–67 (1989).

However, although the evidence is insufficient to show that Respondent knew Ms. Gabor was unauthorized at the time of her initial hire, the documentary evidence and testimony does establish that Respondent did acquire knowledge of Ms. Gabor's unauthorized status during her employment and continued to employ her nevertheless. Thus, Complainant has established, by a preponderance of the evidence, that Respondent continued to employ Ms. Gabor after learning that she was an unauthorized alien.

In this respect Ms. Gabor's testimony was especially instructive. Ms. Gabor testified that she was hired by David De Lallo, who was the owner/manager of Respondent, Tr. at 16, that she never told Mr. De Lallo or any other person associated with Respondent that she was a United States citizen, that she told David De Lallo that she was a foreign student from Budapest, and that everybody knew she was a Hungarian citizen. Tr. at 22; *see also* CX–Q–1–6 (Record of Sworn Statement of Victoria (sic.) Gabor). Furthermore, when during the hearing Complainant's counsel showed her an I–9 form dated May 7, 1994 with her name, address and social security number which attested that she was a citizen or national of the United States, CX–G–1, she testified that the I–9 form was not in her handwriting, that she did not complete an I–9 form for Respondent, and that she did not know why anyone would mark on the document that she was a United States citizen. Tr. at 18–19. On cross-examination she reiterated that everyone knew she was a Hungarian citizen, and she never indicated to anyone that she was a United States citizen. Tr. at 24–25.[12]

Further, since Gabor testified without contradiction that she did not complete the I–9 form, Special Agent Barry concluded that Respondent falsified Gabor's I–9 form. Tr. at 59–60. Section 1 of the I-9 form, which is entitled Employee Information and Verification, states that it is to be *completed* and *signed* by the *employee* at the time employment begins. It is clear that Respondent, not Gabor, filled out the information in Section 1 of the I–9 form. Indeed, Respondent admitted that it completed the I–9 forms only after receiving the notice of inspection in March 1995. Tr. at 66–68. Further, the I–9 form specifically states that "federal law provides for imprisonment and/or fines for false statements . . . in connection with the completion of this

[12] I find that Ms. Gabor was a credible witness. Her testimony was not impeached on cross-examination and was not contradicted by any other witnesses or evidence. Further, Ms. Gabor stated that she was testifying of her own free will and was not coerced or offered any benefit to testify. Tr. at 22.

form." CX—G. Yet Respondent checked the provision attesting that Ms. Gabor was a citizen or national of the United States.

Finally, Ms. Gabor's social security card states that it is valid for work only with INS authorization. CX–F–1. Respondent admits that it has never seen a social security card marked like Ms. Gabor's card, CX–D–1, and yet it did not take any further steps to check her authorization to work.

While Mr. John De Lallo, who represented Respondent throughout this proceeding, including the prehearing conference held on December 8, 1995 and during the hearing on April 11, 1996, professed his lack of knowledge as to Ms. Gabor's status, it is Respondent's corporate knowledge that is critical. His son David De Lallo was identified as Respondent's manager, and he interviewed and hired Ms. Gabor. The record evidence shows that David De Lallo knew that Ms. Gabor was a Hungarian citizen, that she was not an United States citizen, and that she was not authorized to work in this country without INS authorization. I note that David De Lallo did not appear or testify at the hearing, and thus Ms. Gabor's testimony is uncontradicted.

Given the testimony and documentary evidence in this record, I conclude that while Complainant has failed to show the state of Respondent's knowledge at the time of Gabor's initial employment, it has established that Respondent knew or should have known of Ms. Gabor's unauthorized status during her employment. Therefore, Complainant has proven the allegations in Count I of the complaint (except for paragraph D) by a preponderance of the evidence.

With respect to penalty, Complainant has requested a Count I penalty of $1,200 and a cease and desist order. In support of its penalty request, Complainant asserts that the requested penalty is justified by the seriousness of the violation and Respondent's lack of good faith.[13] Complainant contends that the most serious violations

[13] In discussing the penalty sought in Count I, Complainant has discussed the statutory factors set out in Section 1324a(e)(5) which apply to paperwork violations. Count I of the complaint alleges a violation of Section 1324a(a)(1)(A) which prohibits the knowing hire or employment of an unauthorized alien. The criteria set forth in Section 1324a(e)(5) may be helpful as guidelines in assessing the penalty for unlawful employment of aliens, but they do not specifically apply to Section 1324a(a)(1)(A) violations, both because IRCA does not mandate them and because of the substantive differences between the two types of violations. *See United States v. Buckingham Limited Partnership d/b/a Mr. Wash,* 1 OCAHO 1059, 1073 (Ref. No. 151) (1990).

of the employers sanctions provisions of the INA are those for hiring or continuing to employ a person who is not authorized for employment in the United States. C. Br. at 12. Complainant further argues that Respondent could only have continued to employ Ms. Gabor by deliberately attempting to avoid knowledge of her status, and that Respondent displayed a lack of good faith in not making a reasonable attempt to acquire further knowledge of her employment eligibility. C. Br. at 13.

Continuing to employ an unauthorized alien once an employer is aware of that person's unauthorized status is a serious offense. *United States v. Great Bend Packing Co., Inc.,* 6 OCAHO 835, at 4 (1996). Moreover, Respondent has not offered any evidence or reasons why a $1,200 penalty for this offense is unreasonable, and Respondent has not suggested that it is unable to pay the penalty. The minimum penalty for a knowing violation is $250 and the maximum penalty is $2,500. I find that an assessment of $1,200 for continuing to employ an unauthorized alien is reasonable, and thus I assess that amount for the violation of Count I.

B. *Counts II and III*

Count II, as amended, asserts in pertinent part that on March 1, 1995 INS agents requested that Respondent present for inspection all I–9 forms for Respondent's employees hired after November 6, 1986 and that Respondent failed to prepare and/or present the I–9 forms for the three individuals listed in Count II (Lynette Lutz, Fred Heiser, and Chris Dunn). The complaint requests a civil money penalty of $550 for each violation for a total of $1,650 for Count II.

Count III asserts that Respondent failed to properly complete Section 2 of the I–9 form for the twenty-two individuals listed therein. As with Count II, the complaint requests a penalty of $550 for each violation for a total penalty of $12,100 for Count III.

As previously noted, Respondent admitted the violations in Counts II and III, and therefore I granted partial summary decision for Complainant on the issue of liability. However, contrary to the assertion in Count II, and despite Respondent's admission, the record evidence shows that Respondent did present I–9 forms for inspection for the three employees in Count II. In fact, Complainant introduced the I–9 forms for the three individuals in evidence; namely CX–O–7 (Chris Dunn), CX–O–11 (Fred Heiser), and CX–O–14 (Lynette Lutz).

However, the evidence also shows that Respondent failed to prepare these I–9 forms prior to the time it received the INS Notice of Inspection. Tr. at 66–67, 79. Moreover, the I–9 forms for employees Dunn, Heiser and Lutz are incomplete, as are the I–9 forms prepared for the twenty-two employees listed in Count III of the complaint.

Although Complainant deleted paragraph C of Count II at the outset of the hearing, the evidence clearly shows, and indeed Respondent admitted, Tr. at 66–67, 79, that it only prepared the I–9 forms after it received the Notice of Inspection from the INS. Even though the amended Count II no longer charged a failure to prepare I–9 forms for the three individuals, this issue was tried and the evidence clearly shows that Respondent did not prepare I–9 forms until after it received the inspection notice. As provided in both the OCAHO Rules of Practice and the Federal Rules of Civil Procedure, liberal amendments of pleadings, including the complaint, are permitted to conform such pleadings to the evidence. Thus, the OCAHO Rules of Practice provide in pertinent part that when issues not tried by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and such amendments may be made as necessary to make the pleadings conform to the evidence. 28 C.F.R. §68.9(e). Similarly, as provided in Rule 15(b) of the Federal Rules of Civil Procedure, when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The case law holds that even when a party fails to move to amend, the failure to so amend will not affect the resolution of an issue not raised by the pleadings but tried by the parties. *See Southeastern Sprinkler Co., Inc. v. Meyertech Corp.,* 831 F.2d 410, 422–23 (3d Cir. 1987); *Nanavati v. Burdette Tomlin Memorial Hospital,* 857 F.2d 96 (3d Cir. 1988). Therefore, conforming the complaint to the evidence of record, I find that Respondent failed to prepare I–9 forms for the three individuals in a timely fashion, and thus violated 8 U.S.C. §1324a(a)(1)(B).[14]

[14] Employers must ensure that an individual they hire completes Section 1 of the I–9 form at the time of hire. 8 C.F.R. §274a.2(b)(1)(i)(A). Employers must, within three business days of hire, physically examine the documentation presented by the employee which establish identity and employment eligibility, and complete Section 2 of the I–9 form. 8 C.F.R. §274a.2(b)(1) (ii)(b); *see also United States v. Davis Nursery, Inc.,* 4 OCAHO 694, at 12–13 (1994).

Respondent disputes the appropriateness of the penalty requested in Counts II and III. Therefore, the appropriate penalty with respect to Counts II and III is a disputed issue which remains to be resolved. Since Respondent has admitted and I have found twenty-five violations of the Act, and since the Act requires a minimum penalty of $100 per violation for paperwork violations, the minimum penalty that must be assessed for these violations is $2,500. In determining the appropriate penalty, the statute provides that due consideration must be given to five factors; namely, the size of the business of the employer, the employer's good faith, the seriousness of the violation, whether the employee was an unauthorized alien, and any history of previous violations by the employer. 8 U.S.C. §1324a(e)(5).

In this case Complainant concedes that the Respondent is a small business and that there were no prior violations and thus does not seek to aggravate the penalty on those bases. Further, although initially Complainant sought to aggravate the penalty for the paperwork violations based on the fact that Viktoria Gabor was an unauthorized alien, in its brief Complainant has withdrawn that assertion. C. Br. at 15. However, Complainant does contend that the penally should be aggravated based on the seriousness of the violations and Respondent's lack of good faith. C. Br. at 15. Respondent contends that the violations were not serious, and that it acted in good faith at all times. R. Br. at 1.

Citing *Skydive,* 6 OCAHO 848 (1996), Complainant concedes, as it must, that it has the burden of proof with respect to both liability and penalty. Since the Complainant has the burden of establishing the allegations in the complaint, including the requested penalty in the prayer for relief, Complainant has the burden of proving any factors which it alleges justify an aggravated penalty. *Skydive*, 6 OCAHO 848, at 4 ; *see also Sophie Valdez*, 1 OCAHO 685, 687 (Ref. No. 104). If the record is insufficient to establish a particular factor I will not aggravate the penalty based on that factor. *Skydive,* 6 OCAHO 848, at 4. Therefore, in this case as in *Skydive,* I will start with the minimum penalty of $100 and aggravate the penalty based on any factors which Complainant establishes by a preponderance of the evidence. Here there is no history of prior violations, Respondent is a small business, and there is no evidence that any of the employees listed in Counts II or III were unauthorized aliens. Thus, I must consider whether the penalty should be aggravated based on the seriousness of the violations and/or lack of good faith.

1. *Seriousness of the Violations*

While all paperwork violations are potentially serious because the principal purpose of the I–9 form is to allow the employer to ensure that it is not hiring an individual who is unauthorized for work, *see United States v. Reyes,* 4 OCAHO 592, at 8 (1994), the seriousness of each violation must be determined by examining the specific failure in each case. With respect to the three individuals listed in Count II, Respondent failed to prepare I–9 forms prior to receiving the notice of inspection. I conclude, in accordance with prior case law, that failure to prepare I–9 forms is a serious violation. *United States v. Charles C.W. Wu,* Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision and Order, 3 OCAHO 434, at 2 (1992); *Reyes,* 4 OCAHO 592, at 8. Therefore, the penalty will be aggravated for the three violations found in Count II.

Although Count III does not allege that Respondent failed to prepare the I–9 forms for the twenty-two individuals listed therein but rather failed to properly complete Section 2, again, conforming the complaint to the evidence, the record shows that, as with Count II, Respondent did not complete the I–9 forms until after it received the inspection notice. Tr. 66–67. In any event, even if it had prepared the forms in a timely fashion, the failure to complete Section 2 of the forms is a serious offense. Section 2 of the form is a critical part, since it contains the employer review and verification. Section 2 provides for the listing of the information which shows that the employee is eligible for employment in the United States. The case law holds that failing to complete Section 2 is a serious offense. *See United States v. Minaco Fashions, Inc.,* 3 OCAHO 587, at 8 (1993); *United States v. Land Coast Insulation, Inc.,* 2 OCAHO 379, at 26 (1991); *United States v. Acevedo,* 1 OCAHO 647, 651 (Ref. No. 95) (1989). Therefore, I find that the twenty-two violations in Count III also are serious violations.

2. *Lack of Good Faith*

Good faith is one of the statutory factors listed in 8 U.S.C. §1324a(e)(5). As required by *United States v. Karnival Fashion, Inc.,* Modification by the CAHO of the Administrative Law Judge's Final Decision and Order, 5 OCAHO 783 (1995), Complainant recognizes that in order to prove lack of good faith, the INS must demonstrate that the Respondent acted with culpable behavior, rather than demonstrating mere failure of compliance. C. Br. at 15. Complainant

asserts that it is not just the failure to complete the I–9 forms but rather Respondent's deliberate falsification of the I–9 forms that constitutes lack of good faith. C. Br. at 16. Respondent contends that it acted in good faith in hiring the employees listed in Counts II and III, and that its actions were the result of confusion and misunderstanding. Because the INS informed Respondent that it must present for inspection properly completed I–9 forms, Respondent copied the I–9 forms available to it and tried to match the dates on the forms with the dates of hiring. R. Br. at 1.

In *Karnival Fashion,* the CAHO modified the decision and penalty issued by the Administrative Law Judge because the Judge had aggravated the penalty based on lack of good faith and there was no evidence of any culpable behavior other than the mere failure to complete I–9 forms in a proper manner. The CAHO stated that because there was no evidence pointing to culpable behavior beyond the fact that a high number of I–9 forms were missing or contained deficiencies, the record was insufficient to show lack of good faith. *Id.* at 3–4. The CAHO concluded that this amounted to no more than the mere fact of paperwork violations which is insufficient to show a lack of good faith for penalty purposes and that a dismal rate of I–9 compliance alone should not be used to increase the civil money penalty based on the statutory good faith criterion. *Id*. at 4.

Here, however, we have more than merely a dismal rate of I–9 compliance or the mere fact of paperwork violations. First, it is clear that Respondent did receive an earlier visit from the U.S. Department of Labor. Although the details of what occurred are not explicit, the written record clearly establishes that a DOL investigator did visit Respondent on February 7, 1992, that Respondent was unaware of the I–9 requirements at that time and did not have any required employment eligibility verification records, and that certain publications, including the INS Handbook, were provided to Respondent at that time. CX–I–1. Thus, I conclude that Respondent did receive a prior educational visit from the U.S. Department of Labor. A prior educational visit to a company's premises regarding the company's responsibilities under IRCA has warranted a finding of lack of good faith in some prior cases. *See Minaco Fashions, Inc.,* 3 OCAHO 587, at 7; *United States v. Giannini Landscaping,* 3 OCAHO 573, at 8 (1994).

Moreover, Respondent has admitted that it prepared the I–9 forms for its employees only after the INS commenced its investigation in

March 1995. Tr. at 66–67, 79. Fifteen of the I–9 forms for the twenty-five individuals listed in Counts II and III contained false information. Specifically, ten forms were back dated (CX–O–2, 4, 6, 8–10, 15, and 19–21), four contained altered dates (CX–O–3, 5, 11, and 17), and one I–9 form was both back dated and altered (CX–O–24). Tr. at 50–59. In response to my questions, INS Special Agent Barry discussed the specific problems with each of the I–9 forms. Tr. at 48–63. As noted by Agent Barry, the dates in the certification section of Section 2 of the I–9 form were altered for one employee in Count II and three employees listed in Count III. As to Count II, the date in the certification in Section 2 of the I–9 form for employee Fred Heiser (¶A2, CX–O–11), appears to have been altered. Tr. at 55. With respect to Count III, the date in the certification part of Section 2 in the I–9 form for employee Jean Amrhein (¶A8, CX–O–3) was altered by retracing in different ink, Tr. at 50; and the dates (specifically the year) of the signature of employee Melissa Brower (¶A14, CX–O–5) and employee Steven Rasmussen (¶A1, CX–O–17), have been retraced, Tr. at 51, 56.

Aside from the altered dates, ten of the I–9 forms for employees listed in Count III of the complaint apparently were back dated. On seven of the forms the dates in Section 2 preceded the dates in Section 1 of the I–9 form. *See* CX–O–2, 4, 6, 9–10, 19 and 21. For example, the date in Section 2 of the I–9 form for employee Matthew Amoroso (¶A16, CX–O–2) is January 31, 1994, which predates March 4, 1995, the date provided in Section 1. Since the date in Section 1 is supposed to reflect the date the employee was hired, obviously the date recorded in Section 2 should not precede the date in Section 1. Moreover, as to four of the I–9 forms, the dates of the certification in Section 2 of the I–9 forms precede the date the forms themselves were published. *See* CX–O–8, 15, 19, 20. For example, both Section 1 and Section 2 of the I–9 form for employee Paul Dunn (¶A10, CX–O–8) list dates in November 1990, but the I–9 form was revised on November 21, 1991. Therefore, since the attestation dates in Dunn's I–9 form precede the date the form was available, clearly the I–9 form was not completed as of the certified dates. Similarly, the I–9 forms for three other employees also predate the revised form; namely, Mark Manula's form is dated November 1989 (CX–O–15), Jeanne Reed's form is dated July 1991 (CX–O–20), and George Pudlo's form is dated in 1984 (CX–O–19), which precedes not only the revised I–9 form but even the date of the Immigration Reform and Control Act which was passed in 1986!

During the hearing, after Agent Barry testified, Respondent readily admitted that prior to March 1, 1995 it did not prepare any I–9 forms for the twenty-five individuals who are listed in Counts II and III of the complaint. Tr. at 67, 79. After Respondent received the Notice of Inspection, Respondent filled out I–9 forms indicating the dates that it believed they started employment with the company. Tr. at 67. Respondent did not call the INS, even after receiving the Notice of Inspection, to question what action Respondent was supposed to take. Tr. at 68. In short, because the INS told Respondent to provide I–9 forms for the employees, Respondent then filled out I–9 forms using the dates it believed the employees commenced employment.

Although Complainant asserts that Respondent engaged in intentional falsification, Respondent has not been charged with document fraud. During the hearing Respondent readily admitted what occurred. I have concluded, based in part on Mr. De Lallo's participation in the prehearing conference and the hearing, that Respondent was grossly negligent but was not actively attempting to deceive the government. If Respondent truly had been trying to deceive the government, it would not have entered dates on the forms that were so obviously wrong and would not have readily admitted its mistakes at the hearing.

However, Complainant does not have to show that Respondent acted with evil intent or from bad motive to prove lack of good faith. Complainant only needs to present some evidence of "culpable behavior beyond mere failure of compliance." *Karnival Fashion*, Modification by the CAHO, 5 OCAHO 783, at 2; *Minaco Fashions, Inc.*, 3 OCAHO 587, at 7. Gross negligence can constitute such culpable behavior. *See United States v. Raygoza,* 5 OCAHO 729, at 4 (1995). Moreover, a lack of good faith has routinely been found when the INS has shown that a respondent received a prior educational visit by officials of the INS or the Department of Labor in which the respondent's responsibilities under IRCA were explained and informational materials were provided. *Karnival Fashion*, Modification by the CAHO, 5 OCAHO 783, at 2–3; *Giannini Landscaping, Inc.,* 3 OCAHO 573, at 8–9. Although in this case the details of the 1992 visit by DOL are not entirely clear, there undeniably was an informational visit from the Department of Labor in 1992, and some publications were provided, including the INS Handbook for Employers. CX–I–1; Tr. at 41–42. The INS Handbook provides information concerning the requirements of IRCA, including the requirement for

completing I–9 forms. Tr. at 41. Moreover, the I–9 form on its face explains what the employer is required to do.

Therefore, based on the record in this case, I find that Complainant has shown, by a preponderance of the evidence, culpable behavior beyond mere failure of compliance and thus the penalty should be aggravated based on lack of good faith.

3. *Ability to Pay the Proposed Penalty*

OCAHO case law holds that the five statutory factors are not exclusive, and that other relevant factors may be considered in setting a penalty. *United States v. Davis Nurseries, Inc*., 4 OCAHO 694, at 14 (1994); *Reyes,* 4 OCAHO 592, at 9; *United States v. MTS Service Corp.,* 3 OCAHO 449, at 4 (1992). Among these factors is the ability of the respondent to pay a proposed penalty. *Raygoza*, 5 OCAHO 729, at 5; *Minaco Fashions, Inc.*, 3 OCAHO 587, at 9; *Giannini Landscaping, Inc.,* 3 OCAHO 573, at 10. However, the burden of asserting and proving this defense rests on the Respondent. In this case, Respondent did allege in its answer that the proposed penalty would constitute a serious financial hardship. Answer at 2. However, Respondent has not offered any evidence that it cannot pay the penalty sought in the complaint or that the assessment of the penalty would constitute a serious financial hardship.

Complainant introduced in evidence Respondent's federal corporate income tax returns (IRS Form 1120) for 1994 and 1992. Tr. at 38–40; CX–J–1–5 and CX–K–1–2. Complainant offered the tax returns to show Respondent's gross profits for the years in question. Tr. at 38. Complainant contends that while Respondent is a small business, the returns show that it is a fairly successful one as far as restaurants go. Tr. at 38–39.

Actually the returns show just the opposite. While the tax returns show that Respondent had a gross profit, they also show a net operating loss in both years. In fact, line 29c of form 1120 for 1994 shows a net operating loss of $109,337.46. CX–J–1. That is a significant loss, especially for what Complainant concedes is a small business.[15] Tr. at 38, ln. 24–25.

[15] The 1992 corporate tax return showed a smaller net operating loss of $30,984.64. Since that return reflects a time period of four years ago, it is not as significant as the 1994 return. However, the two returns show that the business did not generate a net profit in either year.

However, the issue here is whether at this time Respondent is unable to pay the penalty proposed by Complainant and, if so, whether it can pay any penalty. First, as noted above, it is Respondent's burden to prove such inability by a preponderance of evidence. While some allowance must be made for the fact that Respondent was not represented by counsel, it is still Respondent's burden to prove this defense. Respondent did not argue at the hearing or in its post-hearing submission that it cannot pay the penalty. Further, the record evidence does not show that Respondent cannot pay the penalty proposed in the complaint. While the tax returns suggest that Respondent did not generate a profit in 1992 and 1994, the record evidence in this case does not show that Respondent is unable at this time to pay the proposed penalty. In fact, no information as to Respondent's present or recent financial condition has been presented. Therefore, the record does not reflect whether Respondent is presently profitable. And, even as to the recent past, inexplicably no tax return for 1993 was produced. Moreover, while the prior tax returns showed that Respondent suffered a net operating loss for two years, it did have a gross profit in each year. Even if the restaurant is not profitable, it may have assets available to pay a civil money penalty. Therefore, I conclude that the record in this case does not show that Respondent is unable to pay the penalty proposed in the complaint or assessed in this order.

4. *Calculation of Penalty for Paperwork Violations*

Complainant is seeking a penalty of $550 for each of the three paperwork violations in Count II for a total of $1,650, and also is seeking a penalty of $550 for the twenty-two violations in Count III for a total of $12,100.[16] In calculating a penalty for paperwork violations, I start with the minimum penalty of $100 as a baseline and consider the five statutory criteria as possible aggravating factors. *See Skydive,* 6 OCAHO 848, at 10–11; *United States v. Felipe, Inc.,* 1 OCAHO 626 (Ref. No. 93) (1989), *aff'd by CAHO*, 1 OCAHO 726 (Ref. No. 108) (1989). The difference between the statutory maximum ($1,000) and statutory minimum ($100) is $900, and dividing the

[16] Although, as noted previously, Complainant has withdrawn its contention that the penalty should be aggravated based on hiring of unauthorized aliens, C. Br. at 15, n. 4, Complainant neither modified its penalty request of $550 per violation nor explained why the original requested penalty should not be reduced considering it is now relying on only two statutory factors.

$900 by five for the five statutory factors one arrives at a figure of $180 for each statutory factor. In each case the Judge can consider the evidence to determine whether and how to allocate or fractionalize the $180 in proportion to the offense (e.g. the degree of the seriousness of the offense or the extent of lack of good faith).

As noted previously, in this case Complainant does not contend that the penalty should be aggravated based on the size of Respondent's business, a history of prior violations, or hiring unauthorized aliens. Complainant does contend that the penalty should be aggravated based on the seriousness of the offenses and Respondent's lack of good faith, and I have found that Complainant has established these elements with respect to the three violations in Count II and the twenty-two violations in Count III. Therefore, I conclude that an additional penalty of $360 for the two aggravating factors should be added to the baseline minimum of $100 for each violation, for a total of $460 for each record keeping violation in Count II and Count III. Thus, I assess a total penalty of $1,380 for the three violations in Count II, and a total penalty of $10,120 for the twenty-two violations in Count III.

IV. *Conclusions and Order*

Complainant has proven the charges in paragraphs A, B, C, and E of Count I of the complaint, including the assertion that Respondent continued to employ Viktoria Gabor knowing that she was an alien not authorized for employment in the United States , in violation of 8 U.S.C. §1324a(a)(2) and 8 C.F.R. §274a.3, which render it unlawful for a person or other entity, after hiring an alien for employment in the United States after November 6, 1986, to continue to employ the alien knowing that the alien is an unauthorized alien with respect to such employment. I assess a penalty of $1,200 for this violation. Respondent shall cease and desist from further violations of Section 1324a(a)(2).

Further, I find that Complainant has proven the charges in Count II of the complaint, as amended; namely, that Respondent hired the three individuals listed in Count II after November 6, 1986 and failed to timely prepare completed I–9 forms for these individuals, in violation of 8 U.S.C. §1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or other entity to hire an individual for employment in the United States without complying with the re-

quirements of 8 U.S.C. §1324a(b). I assess a penalty of $460 per violation for a total penalty of $1,380 for Count II.

Finally, I find that Respondent has proven the charges in Count III of the complaint; namely that Respondent hired the twenty-two individuals listed in Count III for employment in the United States after November 6, 1986 and failed to properly complete Section 2 of the I–9 form for each individual in violation of 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful after November 6, 1986 for a person or other entity to hire for employment in the United States, an individual without complying with 8 U.S.C. §1324a(b)(1) and 8 C.F.R. §274a.2(b)(1)(ii). I assess a penalty of $460 per violation for a total penalty of $10,120 for Count III.

Therefore, I order Respondent to pay a total civil money penalty of $12,700.

ROBERT L. BARTON, JR.
Administrative Law Judge

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).