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

January 16, 1998

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00038
MONROE NOVELTY CO., INC. D/B/A MONROE NOVELTIES CORP., Respondent.	)

FINAL DECISION AND ORDER GRANTING SUMMARY DECISION

Procedural History

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324a (1994) (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA). The Immigration and Naturalization Service (complainant or INS) filed a complaint in two counts against Monroe Novelty Co., Inc. (respondent or Monroe) alleging that it failed to prepare or make available for inspection employment verification forms (Form I–9) for thirty-nine named individuals and that it also failed to ensure that four other named individuals properly completed Section 1 of the form. Penalties were sought in the total amount of $13,160.00: $11,800.00 for Count I and $1,360.00 for Count II. After additional pleadings and proceedings, I issued an order to show cause on October 24, 1997 in which respondent Monroe Novelty was instructed to make written answers to complainant's requests for admission and to show either that there is genuine issue of material fact remaining for hearing or any other cause why summary decision should not issue in favor of complainant INS.

In a prior order dated July 29, 1997 I had advised the parties that INS' earlier motion for judgment on the pleadings would be treated

as a motion for summary decision because it called for consideration of matters outside the pleadings. *Maggette v. Dalsheim*, 709 F.2d 800, 802 (2d Cir. 1983). Specifically, documentary evidence attached to the motion included complainant's requests for admission, four I–9 forms, a Notice of Inspection, Monroe Novelty's Certificate of Incorporation, an Investigative Inspection Worksheet consisting of three pages and a certification, Monroe Novelty's W–2 reconciliation reports for 1995 and 1994, a W–2 listing report for 1993, and correspondence. The notice afforded Monroe the opportunity to submit evidence in opposition to the motion and to respond to the requests for admission. It also invited the complainant to supplement the evidence submitted with its motion.

On November 7, 1997 Monroe Novelty made written answers to the requests for admission but submitted no rebuttal evidence in response to the motion. Respondent essentially admitted the factual allegations in the complaint, but protested the amount of the proposed fines. In its defense, Monroe Novelty argued that it is a small business which had been unaware of the verification requirements until it was visited by INS agents in December 1995 and that the persons for whom it failed to present I–9s are former employees who worked for only a short time and left, so that respondent was unable to contact them to obtain the information to prepare their I–9s after the fact. Monroe stated further that it could correct the deficiencies on the four defective I–9s. Respondent also reported that the tenants in its building consist of about 25 small factories and that other tenants with missing I–9s had received only a warning. Monroe had stated in earlier communications that it requested dismissal of the charges asserting that "I have never received any notification by mail or otherwise, about a law stating that each employee must fill out a (sic) I–9 form" and that since becoming aware of the law it had fully complied with it.

On December 12, 1997, INS requested a ruling on its motion for judgment on the pleadings (sic). As previously noted, my prior order of July 29, 1996 converted that motion to one for summary decision and invited the submission of additional evidence; however neither INS or Monroe submitted additional evidence.

Applicable Law

A. *Standards for Summary Decision*

OCAHO rules provide that the Administrative Law Judge may enter a summary decision in favor of either party if the pleadings,

affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. §68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly it is appropriate to look to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO 611, at 222 (1994).[1] Case law directs that the party seeking a summary decision has the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When a motion for summary decision is made and supported as provided in the rules, the opposing party may not rest upon mere allegations or denials in a pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. §68.38(b). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the non-moving party. *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 261 (1994). All doubts are therefore resolved in favor of the party opposing summary decision, particularly where, as here, that party is unrepresented. *See, e.g.*, *United States v. Harran Transp. Co. Inc.*, 6 OCAHO 857, at 3 (1996).

B. *Duties Imposed by the INA*

The INA makes it unlawful after November 6, 1986 to hire an alien for employment or to continue to employ an alien hired after that date in the United States knowing the alien is or has become unauthorized for employment. 8 U.S.C. §1324a(a). The INA also imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986, and to make those forms available for inspection by INS officers. Each failure to properly prepare, retain, or produce the forms in accordance with the employment verification system is a separate violation of the Act. Specific requirements include *inter alia*, the attestation of the employer under penalty of perjury that it has examined documents

[1]Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

as specified in the statute to verify that the individual is not an unauthorized alien, 8 U.S.C. §1324a(b)(1), and the attestation of the employee under penalty of perjury that he or she is eligible for employment, 8 U.S.C. §1324a(b)(2). An employer is required to retain the forms for a period of three years after the date of an employee's hire or one year after the date of termination, whichever is later. 8 U.S.C. §1324a(b)(3).

Liability

In order to establish the violations alleged, INS must show that the named individuals were hired after November 6, 1986, and the each of the factual allegations is true as to all the individuals named in that count. Examination of the Investigative Inspection Worksheet (Exhibit D with complainant's Motion for Judgment on the Pleadings) demonstrates that no I–9 forms were produced for any of the 39 former employees named in Count I, and that each was hired after November 6, 1986, and had worked for at least three days. In each instance charged. the retention period had not yet expired at the time of the inspection. Respondent states that in December 1995, INS agents came to the shop and asked for I–9 forms. As nearly as can be ascertained from the record, however, the Notice of Inspection was dated February 15, 1996 and the inspection was scheduled for February 23, 1996 (Exhibit B). Complainant's request for admission, however, asks Monroe to admit that on March 12, 1996, INS officers did not receive the forms for the 39 individuals listed in Section III. (Exhibit A). In assessing whether the retention period had expired for any individual prior to the inspection date I have therefore considered that date to be the only one clearly established, March 12, 1996.

Examination of the I–9 forms for Leo Neuhaus, Roland Wieder, Gladys Zurita, and Yechiel Fischer (Exhibit A with complainant's Motion for Judgment on the Pleadings), named in Count II, demonstrates that in each case the form is lacking a date next to the employee's signature in Section 1. Each form contains in Section 2 a certification as to the date the employee began work; in each instance that date is after November 6, 1986.

Uncontradicted evidence thus shows that Monroe hired 39 individuals after November 6, 1986 for whom it failed to prepare or make available for inspection the Form I–9 as alleged in Count I, and that it hired four named individuals after November 6, 1986

and failed to ensure they properly completed Section 1 of the Form I–9 as alleged in Count II of the complaint.

Civil Money Penalties

The INA requires that in assessing an appropriate civil money penalty I give due consideration to five factors: the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual involved was an unauthorized alien, and the history of previous violations. 8 U.S.C. §1324a(e)(5). Imposition of a penalty without consideration of the relevant factors is improper. *United States v. Catalano*, 7 OCAHO 974, at 8 (1997) citing *Maka v. INS*, 904 F.2d 1351, 1357 (9th Cir. 1990) *amended by* 932 F.2d 1352 (9th Cir. 1991). Appropriate consideration of these factors is possible, however, only in light of the evidence in the record. *Id*. That evidence is quite limited in this case, consisting only of the documents attached to the INS' motion for judgment on the pleadings, the pleadings themselves, and correspondence from respondent, including the answers to the requests for admission.

A. *INS' Proposed Penalties*

INS' complaint asserts that it seeks a total of $11,800.00 for Count I: $380.00 each for 38 individuals and $400.00 for Gustavo Cohetero. These are the same penalties as were set forth in the original Notice of Intent to Fine (NIF), but no explanation is offered for the variation or for precisely how the amount of those penalties were assessed. In addition, it is unclear whether there is a typographical error inasmuch as the arithmetic is wrong: if 38 violations were assessed at $380.00 each, and one at $400.00, the total would be $14,800.00 for Count I, not $11,800.00. If the total for this count is correctly stated as $11,800.00, it would appear that the 38 were assessed at $300.00 each, not $380.00, and one at $400.00. I assume this to be the case. For Count II, complainant seeks a penalty of $1360.00: $340.00 for each violation. Again, these are identical to the penalties sought in the NIF, but no explanation is provided as to how the penalties were assessed.

Absent other explanation by INS, I have made reference to the INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, August 30, 1991, in an effort to ascertain how the proposed penalties might have been initially set.

While I am not bound by those Guidelines, I have nevertheless consulted them in order to try to understand the INS' rationale because I can better assess the reasonableness of the proposed penalties if I understand the basis for them. The Guidelines were developed in order to standardize the INS penalty setting process, Guidelines at 1, 3, and thus provide the ground rules for the penalty proposed.

Those Guidelines provide that for setting an initial penalty the starting point in the case of a first time violator is to be the statutory minimum. The Guidelines then direct that INS analyze each of the five statutory factors based on evidence in the file, and increase the amount based upon the factors found to be aggravating. Guidelines at 3.[2] INS Guidelines also set forth some of the appropriate considerations for evaluating each of the factors. Because it is not self-evident which of the factors were used to aggravate the penalty, I examine each in light of the Guidelines as well as OCAHO case law.

1. *Size of the Employer*

In assessing the size of an employer, the test is characterized by INS Guidelines as whether or not the employer used all the personnel and financial resources at its disposal to comply, whether a higher penalty would enhance the probability of compliance, and whether an employer with numerous violations has a sufficiently frequent turnover rate to interfere with completion of all the I–9s. Guidelines at 8. Among the subfactors which may be considered are the number of employees, the rate of new hiring, the amount of the payroll, business revenue or income, net worth, assets, nature of ownership, length of time in business, nature and scope of business facilities including number of divisions or sites, geographical scale (local, regional, statewide, national). OCAHO cases have considered many of the same factors. *Catalano*, 7 OCAHO 974, at 9. While much of this information is absent from the record, there is nevertheless a basis for finding Monroe to be a very small employer with a high turnover rate.

The certificate of incorporation for Monroe Novelty is dated January 22, 1985. The employer describes itself as a small business, engaged in manufacturing ladies' belts, which hires "come & go em-

[2]For subsequent violations, the starting point is the statutory maximum, with similar reductions depending upon mitigating factors.

ployees for unskilled labor such as applying buckles & eyelets to each belt." Some of the employees worked for less than a week. Examination of the Investigative Inspection Worksheet confirms that many of the former employees worked for only a few days. It appears from the documentation that Monroe Novelty's 1995 total payroll was $121,048.00; for 1994 it appears to be $148,588.76; and for 1993, $172,727.12. The Investigative Inspection Worksheet lists only 9 current employees and it appears reasonably clear that respondent is a very small employer. Examination of the Investigative Inspector Worksheet demonstrates that none of the 39 persons whose I–9s were not presented is currently employed. Each worked for at least three days, but many for only a week or two. Thus it would thus appear very unlikely that any aggravation of penalties could have been based upon the size of the employer.

2. *Good Faith*

As to the factor of good faith, the Guidelines describe the test as whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it. Subfactors which the Guidelines set forth for possible consideration are the percentage of the post-IRCA hired workforce that was unauthorized, percentage for which I–9s were missing or improperly completed, employer's willingness to cooperate with the investigation, failure to correct violations after previous contact, warning or fine, measures to ensure future compliance, and any falsification of records or assistance to unauthorized aliens in evading detection.

Only one of the 39 named employees whose I–9 was not presented here appears to have been unauthorized for employment. A letter from INS to respondent dated January 30, 1996 asserts that on December 7, 1995 INS apprehended Gustavo Cohetero-Barragas and Nelson Cantos-Cardenas who were not authorized to work. (Exhibit H attached to Complainant's Request for Admissions). Nelson Cantos was apparently first employed prior to November 6, 1986; no allegations are made with respect to his I–9 and he does not appear to be a person for whom Monroe was required to complete the form. INA applies only to the hiring of aliens after November 6, 1986 so that Nelson Cantos is not appropriately considered here.

In its answers to requests for admission, Monroe Novelty asserted "Please understand that we started this business in '85, and we somehow missed the information about the new law concerning I–9

forms. The first I heard about it was from the INS officials. I can get plenty of legal & authorized aliens and also U.S. citizens since I abide by the minimum wage law & the type of work requires no special skills." Monroe appears to have been cooperative and willing to correct the violations. The only negative consideration other than the employment of Gustavo Cohetero is the number of missing I–9s.

It is unclear whether any aggravation was based on this factor. I note, however, that OCAHO case law is clear that lack of good faith requires some showing of culpable behavior beyond the mere failure to comply. *Catalano*, 7 OCAHO 974, at 10. Binding precedent in this forum is clear that "a dismal rate of Form I–9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion. To hold otherwise could have led to a finding of lack of good faith based on paperwork deficiencies alone." *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 480 (1995) (Chief Administrative Hearing Officer's Modification of Administrative Law Judge's Final Decision and Order). There can be, in other words, no presumption of bad faith absent an evidentiary showing. No such showing has been made here. Monroe Novelty asserts that it was not aware of the law at all and I find no reason in the record to believe that the violations were not in good faith.

3. *Seriousness of the Violation*

The test in the Guidelines for seriousness of a violation is the degree to which the violation materially affects the purpose of the verification process, which is to avoid the possibility of hiring an unauthorized alien. Paperwork violations are always potentially serious; however some violations are more serious than others. For example, the failure to prepare an I–9 at all is always a serious violation because it vitiates the whole purpose of the employment eligibility verification system. The omission of a date from Section 1, however, is clearly a less serious omission than failure to prepare the I–9 at all. The reason the attesting employee is required to date the attestation in Form I–9 is because the Form should show affirmatively that the employee attested to his status on the date he or she actually began work. Examination of the four I–9s with omitted dates in Section 1 shows that three of the four individuals presented United States passports the expiration dates of which are shown on the I–9s, that each completed and signed the attestation in Section 1, and that Section 2 in each case shows the date that employee began work.

The employer attestation is dated as well, showing when the specific documents were examined. Roland Weider presented a green card; he completed and signed the attestation in Section 1, the date of expiration appears, and the date Weider started work is shown in Section 2. The employer attestation is dated as well.

Thus all the requisite information is contained in the I–9 in these four instances. The specific omissions charged here are not the kind which lead to the employment of unauthorized aliens. While the absence of the date of signature is a violation, it is under the circumstances found here a technical rather than a substantive violation. As compared to the failure to prepare an I–9 at all, it is *de minimis*.

4. *Whether Unauthorized Aliens Were Involved*

It is also an aggravating factor if a paperwork violation involves an unauthorized alien; Gustavo Cohetero appears to have been an unauthorized alien and it is apparent that the penalty as to his I–9 may have been aggravated under the Guidelines based upon this factor; such an aggravation is supported in the record. However, no aggravation of penalties based on this factor would be warranted as to the remainder of the violations based on anything in this record. It is not suggested that Monroe knew he was unauthorized or that Monroe continued to employ Gustavo Cohetero once notified of his status.

5. *History of Previous Violations*

No previous history of previous violations is alleged. Thus it does not appear possible that any aggravation could have been based on a history of prior violations. While a prior warning or Notice of Intent to Fine may be an aggravating factor in an appropriate case, nothing in this record suggests any such prior contact; it is in fact reasonably clear from the record that the visit of the INS agents in December 1995 was Monroe Novelty's first contact with the agency and that no aggravation could have been based upon this factor.

B. *Reasonableness of the Proposal*

The range of permissible penalties for each paperwork violation is not less than $100.00 and not more than $1,000.00 for each such violation, so the appropriate penalty for the violations established here potentially ranges anywhere from $4,300.00 to $43,000.00. I

find no basis in the record upon which to predicate any increase in the penalties based upon the size of the business, the employer's good faith, any history of previous violations, or, with the exception of Gustavo Cohetero, involvement of an unauthorized alien. Any other aggravation could only be based upon the seriousness of the violations.

The Guidelines provide that the starting point is the statutory minimum, with any increases to be based upon the aggravating factors. A formulaic approach is taken, with the range of permissible increase or reduction for each factor set at not more than one-fifth of the difference between the statutory minimum and maximum, which in the case of a verification violation means that the increase may be anywhere from $1.00 to $180.00 for each factor. Yet the individual penalties proposed here for each of the 38 violations in Count I exceed the minimum statutory penalty by $200.00 (or $280.00 depending upon where the typographical error occurred), by $300.00 for the violation involving Gustavo Coherto, and by $240.00 for each of four violations alleged in Count II. It is therefore apparent that INS must have found at least two aggravating factors in each instance inasmuch as each penalty appears to have been increased by more than the one-fifth of the difference between the minimum and the maximum as set forth in the Guidelines.

On this record, I find those increases unreasonable except as to the I–9 of Gustavo Cohetero. I am, moreover, unwilling without some compelling reason to approve a higher penalty for failure to enter a date next to the signature on section 1 of an I–9 than I do for the more serious violation of failing to prepare an I–9 at all.

Because I am unable to discern from the record a reasonable basis for most of the penalties proposed, I consider them *de novo*. I find only the penalty requested for Gustavo Cohetero to be within reasonable parameters based on the aggravation both because of the seriousness of violation and the fact that he was unauthorized.

C. *Penalty Assessed*

In addressing them at length, I do not, of course, mean to suggest that the Guidelines provide the only method of assessing penalties; to the contrary nothing in the statute requires that the same weight be given to each factor or that other factors cannot be considered as well. The weight to be given each factor depends, it seems to me,

upon the facts and circumstances of the particular case. Here, for example, although the failure to prepare an I–9 form is serious, I am nevertheless reluctant to increase the penalty very much on this marginal employer because of multiple failures to complete forms for employees some of whom worked for only a few days. The purpose of the penalty provision is to achieve and ensure compliance; that purpose has been achieved and leniency is appropriate here.

I appreciate that paperwork requirements are an integral part of the congressional scheme for controlling illegal immigration. The lenity applied to the facts of this case is not in derogation of the paperwork requirements but rather in recognition of the paucity of evidence to support a higher penalty.

Findings of Fact, Conclusions of Law, and Order

Findings of Fact

1. Respondent Monroe Novelty Co., Inc. d/b/a Monroe Novelties Corp. is a corporation duly organized and incorporated in 1985 under the laws of the state of New York and is doing business at 336 West 37th Street, New York, New York 10018.

2. On July 17, 1996, officers of the INS personally served respondent with a Notice of Intent to Fine.

3. On July 23, 1996 Monroe Novelty made a timely request for hearing.

4. Monroe Novelty hired the following individuals for employment after November 6, 1986:

    1. Elba Brnitez
    2. Luis Carchi
    3. Jean Charles
    4. Mauricio Chauez
    5. Wilson Cobo
    6. Gustavo Cohetero
    7. William Colon
    8. Gerald Cooper
    9. Martha Crespo
    10. Ana Cruz
    11. Gladys Dunnets

12. Josephina Estrada
13. Ana Felilpe
14. Maricisa Guanoquzia
15. Gladys Hidalgo
16. Laura Huerto
17. Ana Lopez
18. Luz Lopez
19. Emalania Martinez
20. Francisco Martinez
21. Issaac Martinez
22. Ana Mateo
23. Ana Morel
24. Yoselanda Mouel
25. Sandra Oredeana
26. Lillian Pena
27. Jose Raul
28. Ana Reboza
29. Daniel Ritz
30. Eduardo Rodriguez
31. Isabel Royas
32. Meliton Sanchez
33. Ana Santa
34. Valencia Socora
35. Maria Valencia
36. Jean Valera
37. Marfal Vargaz
38. Jesus Vazkuez
39. Carmello Villegas
40. Leo Neuhaus
41. Roland Wieder
42. Gladys Zurita
43. Yechiel Fischer

5. On March 12, 1996 Monroe Novelty provided INS with various documentation including I–9 Forms for Leo Neuhaus, Roland Wieder, Gladys Zurita, and Yechiel Fischer.

6. Section 1 of each of the I–9 Forms for Leo Neuhaus, Roland Wieder, Gladys Zurita, and Yechiel Fischer is lacking a date next to the employee's signature.

7. On March 12, 1996, Monroe Novelty failed to present or make available for inspection the I–9 Forms for the following employees:

1. Elba Brnitez
2. Luis Carchi
3. Jean Charles
4. Mauricio Chauez
5. Wilson Cobo
6. Gustavo Cohetero
7. William Colon
8. Gerald Cooper
9. Martha Crespo
10. Ana Cruz
11. Gladys Dunnets
12. Josephina Estrada
13. Ana Felilpe
14. Maricisa Guanoquzia
15. Gladys Hidalgo
16. Laura Huerto
17. Ana Lopez
18. Luz Lopez
19. Emalania Martinez
20. Francisco Martinez
21. Issaac Martinez
22. Ana Mateo
23. Ana Morel
24. Yoselanda Mouel
25. Sandra Oredeana
26. Lillian Pena
27. Jose Raul
28. Ana Reboza
29. Daniel Ritz
30. Eduardo Rodriguez
31. Isabel Royas
32. Meliton Sanchez
33. Ana Santa
34. Valencia Socora
35. Maria Valencia
36. Jean Valera
37. Marfal Vargaz
38. Jesus Vazkuez
39 Carmello Villegas

8. Gustavo Cohetero was unauthorized for employment in the United States.

Conclusions of Law

1. All jurisdictional prerequisites to this action have been fulfilled.

2. Respondent hired 39 employees after November 6, 1986 for work in the United States for whom it failed to prepare or make available for inspection the Forms I–9.

3. Respondent hired four employees after November 6, 1986 for work in the United States and failed to ensure that they completed Section 1 of Form I–9 properly.

Order

Monroe Novelty shall cease and desist from further violations of 8 U.S.C. §1324a. Monroe Novelty shall also pay a total civil money penalty of $4,980.00, consisting of $110.00 for each instance of failure to prepare an I–9 for 38 named employees, $400.00 for failure to prepare an I–9 for Gustavo Cohetero-Barragas, and $100.00 for each of four failures to ensure that the employee entered a date next to the signature in Section 1 of Form I–9.

SO ORDERED.

Dated and entered this 16th day of January, 1998.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

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