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

April 27, 1992

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	Case No. 91100181
RAMON YAMAMOTO, D/B/A	)	
ELVIS PALACE RESTAURANT,	)	
Respondent.	)	
	)	

DECISION AND ORDER

Appearances: Weldon S. Caldbeck, Esquire, Immigration and Naturalization Service, United States Department of Justice, Denver, Colorado, for complainant;
James A. Kaplan, Esquire, Machol, Davis & Michael, Denver, Colorado, for respondent.

Before: Administrative Law Judge McGuire

Ramon Yamamoto, d/b/a Elvis Palace Restaurant (respondent), requests administrative review of the $5,920 civil money penalties which have been assessed in connection with a citation issued by complainant and served upon respondent for violations of the employment eligibility verification requirement, or paperwork, provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

On September 17, 1991, following an August 29, 1991 inspection and Form I-9 audit of respondent's employment records at his restaurant, which is located on the premises of the Airport Budget Hotel, in Denver, Colorado, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon respondent a three-count citation designated Notice of Intent to Fine (NIF) DEN-91-1191.

That citation alleged in Count I that respondent, following complainant's request that he do so, had failed to present for inspection the employment forms (Forms I-9) for the 12 individuals listed therein who had been hired by respondent for employment at his restaurant after November 6, 1986, allegedly in violation of the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil penalty of $460 for each of those 12 alleged violations, or a total civil money penalty of $5,520 in Count I.

In Count II of that citation, complainant alleged that respondent had also violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by reason of his having failed to properly complete section 2 of the Forms I-9 pertaining to the two individuals listed therein, who had also been hired by the respondent after November 6, 1986 for employment at his restaurant. A civil money penalty totaling $400, or $200 for each of those two alleged infractions, was proposed in Count II.

In Count III, respondent was cited for having failed to properly complete section 2 of the Form I-9 pertaining to the individual named therein, again in violation of the wording of 8 U.S.C. §1324a(a)(1)(B), and a civil money penalty of $200 was assessed for that alleged violation.

On October 28, 1991, in reply to respondent's timely request for a hearing before an Administrative Law Judge, complainant filed the two-count Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO), realleging therein those charges designated as Counts I and II in the NIF, and reasserted its request that respondent be ordered to pay the separate, previously described civil money penalties in Counts I and II which total $5,920, or $5,520 for Count I and $400 for Count II.

On March 6, 1992, the parties jointly filed a pleading captioned Stipulation Regarding Waiver of Hearing and Submission of Briefs on Issue of Appropriate Fine, in which respondent conceded his liability concerning the facts of violation alleged in Counts I and II, and the parties mutually agreed to address the sole remaining issue, that of the appropriate civil money penalty sum for Counts I and II, through the submission of briefs and supporting documentation rather than by way of an evidentiary hearing.

On that date, also, an appropriate order was issued confirming the parties' stipulations and noting that, in accordance with the provisions

of 8 U.S.C. §1324a(e)(5), respondent would be required to pay civil penalties ranging from $100 to $1,000 for each individual involved in the acknowledged violations, giving due consideration to the five criteria which are set forth in that statutory section.

In their briefs, the parties acknowledge that civil penalty sums must be assessed in amounts ranging from the statutorily mandated minimum sum of $100 to the maximum sum of $1,000 for each violation since the applicable provisions of IRCA provide that civil money penalties for paperwork violations "shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." 8 U.S.C.§1324a(e)(5).

The parties are also cognizant of the fact that that section of IRCA also provides that in determining the amount of the penalty, due consideration shall be given to: (1) the size of the business of the employer being charged; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized alien; and (5) the history of previous violations.

The parties agree that three of the five criteria set forth in the preceding paragraph do not come into play in this factual scenario - (1) that for civil money penalty assessment purposes, the size of respondent's restaurant business, which employs 10 or fewer employees on average, and of which respondent is the sole proprietor, should be regarded as small; (4) none of the 14 individuals listed in Counts I and II were shown to have been unauthorized aliens; and (5) respondent has no history of prior IRCA paperwork violations.

Since the parties have properly agreed that only two of the five statutory criteria should be considered, we limit our further discussion to the two remaining factors which must be considered in determining the appropriate civil money penalty sums to be assessed under these disputed facts namely, the good faith of the respondent and the seriousness of the violations.

Concerning respondent's good faith, complainant maintains that respondent has displayed a complete lack of good faith in carrying out his document inspection and verification responsibilities. In support of that contention, and by the use of affidavits secured from the inspection officials, INS Special Agents Wayne Kirkpatrick and James S. Upson, complainant points out that in mid-June 1991 respondent

became aware of his record keeping duties, including the preparation of an INS Form I-9 for each employee.

In the course of the INS Form I-9 audit conducted at respondent's place of business on August 29, 1991, the 14 paperwork violations at issue, all involving the failure to present and/or failure to fully prepare the pertinent Forms I-9, were noted by the INS special agents. It is further urged that respondent produced only seven Forms I-9 in the course of that audit and that five of those were certified by a business entity identified as Airport Budget Hotel, which is apparently respondent's lessor, rather than having been certified by respondent.

In addressing the seriousness of these violations, complainant notes that the factual record discloses that respondent's actions clearly display a disregard for his responsibilities under the employer paperwork provisions of IRCA.

Complainant concludes that upon combining the lack of good faith which respondent has demonstrated, together with the seriousness of these 14 infractions, the total civil money penalty assessment of $5,920 was properly levied.

Meanwhile, respondent, in addressing the same two assessment criteria, states that his good faith has been amply demonstrated since on August 29, 1991, in the course of the INS Form I-9 audit, he provided to the INS special agents properly completed Forms I-9 for all of his then current employees. Respondent states that at the time of the INS Form I-9 audit he was not aware that he was being requested to present a Form I-9 for each employee, past or present. It was only upon receiving the NIF that respondent became aware that all Forms I-9 were to have been made available to the INS special agents. Respondent advises that he subsequently made available to INS the completed Forms I-9 for the 14 individuals listed in Counts I and II.

Respondent also maintains that the offenses at issue are not serious when compared to those involved in Big Bear Supermarket No. 3 v. INS, 913 F.2d 754 (9th Cir. 1990), in which a $100 minimum civil money penalty assessment for each violation therein was affirmed. Respondent feels that these factors justify a total civil money penalty of $1,400, or the minimum of $100 civil money penalty for each of these 14 infractions at issue.

Respondent's reliance upon Big Bear, in urging that he has demonstrated good faith under these facts, is misplaced since in that ruling there was a finding that Big Bear had shown substantial good faith throughout the investigation therein, a circumstance which, in view of the finding set forth in the next paragraph, precludes the instant facts from being considered to be remotely analogous.

In the matter of respondent's good faith, I find little or none upon which respondent can reasonably base his request that the minimum statutory civil money penalty of $100 be assessed for each of these 14 violations.

Similarly, I must disagree with respondent's contention that these 14 infractions are not serious. There is ample OCAHO authority in support of the proposition that any failure, as here, to complete any portion of section 2 of a Form I-9 is regarded as a serious violation. U.S. v. Acevedo, 1 OCAHO 95 (10/12/89). And any violation of this character is regarded as serious because of the effect which such an infraction has upon a national policy pronouncement, which the enactment of IRCA embodies. U.S. v. J.J.L.C., Inc., 1 OCAHO 154 (4/13/90). Similarly, the failure of an employer to prepare the required Forms I-9 for as few as three individuals has been held to have been serious since that oversight was viewed to have been in blatant disregard of IRCA's mandates. U.S. v. Cafe Camino Real, Inc., 2 OCAHO 307 (3/25/91).

Moving now to the appropriate civil penalty sums to be assessed for these 14 violations. Complainant believes that a total assessment of $5,920 is in order, or $460 for each of the 12 violations in Count I, or $5,520, and $400 in total civil money penalties in Count II, or $200 for each of the two violations in that count. And as noted earlier, respondent believes that the total civil penalty assessment should be $1,400, or the $100 statutory minimum for each of the 14 violations at issue.

I find that the appropriate civil money penalty assessment for each of the 12 violations in Count I, those which involve respondent's failure to provide the 12 Forms I-9 concerning those 12 individuals listed in that portion of the citation, is $400, or a total of $4,800 for those 12 violations.

It is further found that the appropriate civil money penalty assessment for each of the two violations in Count II, those which allege

respondent's failure to properly complete section 2 of the Forms I-9 concerning the two individuals listed therein, is $200, or a total of $400 for those two infractions.

Accordingly, respondent's October 28, 1991, request for review of the facts of violation contained in NIF DEN-91-1191, dated September 17, 1991, is hereby denied.

However, it is further ordered that the appropriate total civil money penalty assessment in connection with the issuance of DEN-91-1191 is $5,200, or $400 for each of the 12 violations set forth in Count I and $200 for each of the two violations in Count II therein, rather than the total civil money penalty sum of $5,920, as previously assessed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order may be appealed in accordance with the provisions of 8 U.S.C. §1324a(e)(7) and those provisions set forth in 28 C.F.R. §68.1 - .50, Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices.