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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. l324a Proceeding
	)	Case No. 91100156
CHARLES C. W. WU d/b/a Airport Budget Hotel Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

On June 9, 1992, the Honorable E. Milton Frosburg, the Administrative Law Judge (hereinafter ALJ) assigned to this matter, issued a decision and order assessing civil penalties against the respondent in the above captioned proceeding. In the decision and order, the ALJ examined the statutory factors that must be considered when determining a civil penalty for violations of the employment eligibility verification system (hereinafter paperwork violations) under section 1324a(a)(1)(B) of Title 8, U.S. Code [enacted as section 101(a)(1)(B) of the Immigration Reform and Control Act of 1986 (IRCA)]. The subsection dealing with assessment of penalties for paperwork violations states in pertinent part:

> In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §1324a(e)(5).

Regarding the seriousness of violations in which the respondent completely failed to prepare employment eligibility verification forms (Forms I-9), the ALJ stated "that since [r]espondent totally failed to have any I-9 Forms filled out but, at the same time, his actions did not 'render ineffective the Congressional prohibition against the employment of unauthorized aliens', that this will be a neutral factor. See [U.S. v.] Valladares, [2 OCAHO 316 (4/15/91)]; [U.S. v.] Cafe Camino Real Inc., [2 OCAHO 307 (3/25/91)]." ALJ's Decision and Order at 7. The ALJ imposed a civil penalty of $225.00 for each of the violations, thereby mitigating the amount complainant requested ($460.00 per violation) by $235.00. Id. at 8.

Because the language used by the ALJ could be misinterpreted, and possibly cited as precedent in a manner which is inconsistent with this agency's established policy and previous rulings regarding the serious-ness of violations, it is necessary for me to issue a clarifying modification of the ALJ's order. The above quoted sentence from the ALJ's order could be interpreted as a declaration that the total failure to com-plete Forms I-9 is not serious because such conduct does not "render ineffective the Congressional prohibition against the employment of unauthorized aliens." A number of final orders issued by this agency have stated precisely the opposite. See e.g., U.S. v. Dodge Printing, 1 OCAHO 125 (1/12/90); U.S. v. San Ysidro Ranch, 1 OCAHO 183 (5/30/90); U.S. v. Cahn, 1 OCAHO 127 (1/26/90); U.S. v. A-Plus Roofing, 1 OCAHO 209 (7/27/90). These cases all stand for the proposition that "a total failure to prepare and/or present the Forms I-9 is . . . serious since such conduct completely subverts the purpose of the law," even where no unauthorized aliens are implicated. U.S. v. A-Plus Roofing, at 5.

Additionally, the legislative history stresses the importance of the verification system, without which the employer sanctions provisions of IRCA would be rendered ineffective. See H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, 60 (1986) and S. Rep. No. 132, 99th Cong., 1st Sess., 8 (1985). Specifically, the Congress felt that an effective verification system is essential to the statutory scheme because it provides a fair and workable means of screening out unauthorized aliens and, for those who follow the proper procedures, an affirmative defense to a charge of knowingly hiring, recruiting, or referring for a fee unauthorized aliens. Id. Certainly, such an assertion by Congress makes it clear that a failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious.

ACCORDINGLY,

I hereby MODIFY the above quoted portion of the ALJ's order to the extent to which it could be interpreted as indicating that the complete failure to fill out Forms I-9 does not "render ineffective the Congressional prohibition against the employment of unauthorized aliens" and thus should not be considered serious for purposes of section 1324a(e)(5) of Title 8, U.S. Code. As is clear from an examination of this agency's caselaw and the relevant legislative history, a failure to fill out any portion of Forms I-9 would indeed "render ineffective" IRCA's regulatory scheme to deter the employment of unauthorized aliens. I leave intact that portion of the order which imposes a civil penalty of $225.00 per violation as the ALJ, in fact, increased the civil penalty from the statutory minimum of $100.00 per violation.

Modified this 9th day of July, 1992.

JACK E. PERKINS
Chief Administrative Hearing Officer

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v.	)	8 U.S.C. §1324a Proceeding
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AIRPORT BUDGET HOTEL,	)	
Respondent.	)	
	)	

FINAL ORDER AND DECISION SETTING CIVIL PENALTIES

I. *Procedural History*

Pursuant to its regulatory authority, Complainant served Respondent with a Notice of Intent to Fine, dated August 7, 1991. 8 C.F.R. §274a.9 (1992). Upon Respondent's request for hearing before the Administrative Law Judge, Complainant filed a Complaint on September 12, 1991. 8 U.S.C. § 1 324a(e)(3)(1986). The Office of the Chief Administrative Hearing Officer served a Notice of Hearing on Complaint Regarding Unlawful Employment on the parties which notified them of Respondent's need to Answer the allegations in the Complaint within thirty (30) days of receipt or possibly suffer a default judgment.

On September 24, 1991, I issued a Notice of Acknowledgment to the parties which advised them that a pre-hearing telephonic conference would be held shortly and cautioned Respondent again about need for a timely filed Answer. On October 10, 1991, Respondent timely filed its Answer and raised its Affirmative Defenses, i.e., ignorance of the law and good faith compliance after learning of its ability to comply with IRCA. In response, Complainant filed a Motion To Strike Affirmative Defenses on October 23, 1991, based on the premise that the raised affirmative defenses were legally insufficient or not sufficiently supported by the facts. On November 5, 1992, Respondent

filed its Response To Motion To Strike Defenses in which it asserted that its Affirmative Defenses supplied a valid defense for mitigation of potential penalties, even if not supplying a complete defense to the charges.

In an Order, dated November 13, 1991, I granted Complainant's motion based on my finding that Respondent admitted that his defenses were directed to the amount of civil penalties to be imposed, not to the issue of liability and, thus, was premature.

On January 22, 1992, in the first pre-hearing conference with the parties' counsel, Respondent admitted liability, indicated that it would likely stipulate to a waiver of hearing and, the parties agreed to submit the issue of civil penalties to me for determination. As such, I directed to complete discovery on the civil penalty issues and to submit a joint motion, on or before the close of business on February 24, 1992, regarding the waiver of hearing and the desire to have me determine the civil penalties.

On March 6, 1992, a Stipulation Regarding Waiver of Hearing and Submission of Briefs on Issue of Appropriate Fine, signed on March 2, 1992 by Joseph Greene and Weldon Caldbeck for the Complainant and Charles C.w. Wu and James Kaplan for Respondent were filed. The Stipulation contained: (1) a waiver of hearing; (2) an agreement between the parties that I would set the amount of civil penalties based on the submitted briefs, attachments, exhibits and the record in this case; and (3) Respondent's admission of liability for the violations set forth in Count I of the Complaint. Also filed on that date were Respondent's Admissions As To Liability in which it again admitted liability to all alleged violations in the Complaint. Respondent again asserted that the only dispute remaining pertained to the amount of civil penalty. Therefore, with the agreement of the parties, in an Order dated March 10, 1992, I directed the parties to submit briefs, on or before April 10, 1992, regarding the civil penalty issues. On April 10, 1992 Respondent filed its brief; Complainant's brief was filed on April 14, 1992.

Based on review of the parties' briefs, I held a pre-hearing telephonic conference on May 29, 1992 to discuss Respondent's admission of liability as it pertained to one individual since the Respondent's brief apparently raised the issue that this individual's date of hire was prior to November 6, 1986. During the conference, Respondent apologized for the misunderstanding and again reiterated that it was not

contesting liability nor was its argument intended to do so. The argument was meant to relate, solely, to the factors affecting the civil penalty amount. Thus, with the liability issues settled, I informed the parties that I would set, as requested by the parties, the civil penalties by written Order.

II. *Civil Penalties*

Section 274A(e)(5) states:

> the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien and the history of previous violation.

A. Factors

1. Size of the Business of the Employer Being Charged

Complainant makes no assertions regarding this factor. Respondent, however, asserts that its business is small, as it employs no more than six (6) employees at one time, that it is a sole proprietorship, and that it has experienced a net loss of approximately $30,000 in both 1989 and 1990.

Although net loss is not alone determinative for mitigation of this factor, nor is the number of employees that Complainant employs, I find that Respondent's business is small based on the totality of the evidence. As such I find that Respondent is entitled to mitigation based on this factor. See, e.g., United States v. Masoud Pour d.b.a. La Plaza Restaurant, 1 OCAHO 164 (4/3/0/90).

2. Good Faith of the Employer

Complainant argues that this case is one where there was no good faith by the employer in complying with IRCA. Complainant cites to United States v. Felipe, Inc., 1 OCAHO 93 (10/11/89), in which the Administrative Law Judge held that in order to establish the good faith factor, Respondent should demonstrate that there was an honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act accordingly. Complainant asserts that

despite "diligent attempts throughout June and July, 1991" by Special Agent James S. Upson to educate Respondent to his obligations, Respondent did not fulfill them. Further, Complainant argues that despite the repeated contact between the Complainant and Respondent, Mr. Wu did not have any completed I-9 Forms available on three separate scheduled inspections between June and July, 1991 and that Respondent allegedly informed the agent that he had not prepared the I-9 Forms. Complainant argues further that Respondent's argument, that he was not provided with forms after he lost those originally given to him is suspect, and not consistent with a claim of good faith behavior.

Respondent argues, on the other hand, that he did not "learn of his ability to comply with the I-9 requirement until July 3, 1991". He does admit to being supplied with the forms and instructions for completion and the scheduling of a compliance review on July 9, 1991. Respondent asserts that, prior to the inspection, he lost the I-9 Forms that were supplied to him. He asserts further that when he tried to obtain replacements at the local INS office, he was advised that the forms were unavailable and that is the reason for Respondent's noncompliance at the compliance review. Respondent asserts that he has completed these forms at this time and has submitted them to this court for review.

I have reviewed the arguments set forth in the parties' briefs and in the filed affidavits. Respondent admits in his affidavit to having learned of the "I-9 Form filing requirements of the INS subsequent to an investigation by the INS on June 14, 1991....On July 3, 1991, Respondent was provided with I-9 Forms by the INS and the Respondent was instructed to complete the I-9 Forms for a compliance review on July 9, 1991." Thus, Respondent admits to being advised of the legal requirements.

Even, if for argument's sake, I accept Respondent's argument that he did not lack good faith and the delay in compliance was due, both, to his loss of the I-9 Forms and the Complainant's inability to provide replacements, the dates on the subsequently completed I-9 Forms show dates from August 7, 1991 through October 9, 1991 and these dates, coming between one and three months after the compliance review date, don't support a finding of diligence and good faith. Therefore, based on the parties' affidavits, and the record, I find that Respondent did not show good faith in complying with IRCA. No mitigation will be granted for this factor.

3. Seriousness of the Violation

Complainant argues that the violation by Respondent is of a serious nature based on the fact that it can find no effort to attempt to comply with IRCA and prepare the I-9 forms. It further argued that the late preparation of the forms cannot be a mitigating factor, especially noting the late date of their preparation.

Respondent, on the other hand, cites to United States v. Big Bear, 913 F.2d 754 (9th Cir. 1990), wherein he alleges that the respondent in that case was charged with the same type of violation as Respondent in this case, but with more violations and was fined the minimum amount and, thus, Respondent should receive mitigation on this factor.

The published OCAHO cases show that there have been various interpretations of what constitutes a serious violation. See e.g., United States v. J.J.C.C. Inc., 1 OCAHO 154 (4/13/90); United States v. Cafe Camino Real, Inc. 1 OCAHO 307 (3/25/91); United States v. Valladares, 2 OCAHO 316 (4/15/91) at 7; United States v. Eagles Group, Inc, d.b.a. Golden Eagle Services, 2 OCAHO 342 (6/11/91). After a review of those cases and the facts in this case, I find that since Respondent totally failed to have any I-9 Forms filled out but, at the same time, his actions did not "render ineffective the Congressional prohibition against the employment of unauthorized aliens", that this will be a neutral factor. See Valladares; Cafe Camino, Real, Inc.

4. Whether or Not the Individual Was an Unauthorized Alien

Complainant does not allege that there were any illegal aliens involved in this case. Respondent affirmatively asserts that there were none. Therefore, I find that this factor has been satisfied for mitigation.

5. History of Previous Violations of the Employer

Respondent and Complainant agree that there were no prior violations by this employer.

III. *Amount of Civil Penalties*

Complainant has requested that I assess a total civil penalty of five thousand nine hundred eighty dollars ($5,980) for the thirteen (13) violations in the Complaint which reflects a four hundred sixty ($460)

civil penalty for each violation. Respondent argues that the minimum civil penalty for each violation is appropriate and that the total amount of civil penalty be thirteen hundred dollars ($1,300) which reflects a civil penalty of one hundred dollars ($100) for each violation in the Complaint.

After a review of the record and the relevant cases and law, I have determined, using a judgmental approach, that a civil penalty of two hundred twenty five dollars ($225) per violation is appropriate. As such, the total civil penalty for the violations of Count I amounts to two thousand nine hundred twenty five dollars ($2,925).

The penalty is to be paid to the Complainant within thirty (30) days from receipt of this Order unless the parties agree to a payment schedule memorialized in writing.

All motions not previously ruled on in this case are denied.

Under 28 C.F.R. 68.53(a) a party may file, with the Chief Administrative Hearing Officer, a written request for review of this Decision and Order together with supporting arguments. Within thirty (30) days of the date of the Administrative Law Judge's Decision and Order, the Chief Administrative Hearing Officer may issue an Order which modifies or vacates this Decision and Order.

IT IS SO ORDERED this 9th day of June, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge