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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	Case No. 91100082
TOM & YU, INC.	)	
T/A PEKING GARDEN	)	
RESTAURANT,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(August 18, 1992)

MARVIN H. MORSE, Administrative Law Judge

Donald V. Ferlise, Esq., for Complainant.
Josephine Ferro, Esq., and Edward Cuccia, Esq.,
for Respondent.

I. *Background*

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324a. On March 19, 1992, I issued a Partial Summary Decision and Order adjudicating the question of Respondent's liability in favor of Complainant. 3 OCAHO 412. That ruling fully disposed of the liability issue, leaving for further decision the adjudication of an appropriate civil money penalty for the violations established in the March 19 action.

Neither party has demonstrated that the pending adjudication requires a confrontational evidentiary hearing in contrast to resolution upon a paper record. Accordingly, this decision and order issues upon consideration of the documentary submissions discussed below.

The Immigration and Naturalization Service (Complainant or INS) demands a total civil money penalty of $12,000.00. Complainant assesses:

—$1,000.00 for failure to prepare and/or present for inspection an employment eligibility verification form (Form I-9) for one (1) named individual;

—$10,500.00 for failure to properly complete §2 of the Form I-9 for twenty one (21) named individuals;

—-$500.00 for failure to ensure that one (1) named employee properly completed §1 and failed to properly complete §2 of the Form I-9.

My March 19 order catalogues in a somewhat detailed fashion the factual and procedural background of the case at bar. I incorporate by reference that background and focus here exclusively on civil money penalties and apposite procedure.

The Notice of Intent to Fine (NIF), dated November 27, 1989, recites the level of fines requested by INS, as outlined above. Respondent's answer, filed July 28, 1991, disputes the reasonableness of those fine levels, citing several affirmative defenses. The motion practice of both parties thoroughly ventilated both sides of this issue during the following months.

II. *Discussion*

A. Statutory Framework

Title 8 U.S.C. §1324a(e)(5) sets out the statutory parameters of an employer's civil money penalty liability. A paperwork violation requires a penalty of "not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." Id. In determining the quantum of penalty, I consider only the range of options between $100 per individual, the statutory minimum, and the amount assessed by INS, absent facts arising during litigation which were unanticipated by INS in assessing the penalty. U.S. v. Widow Brown's Inn, 2 OCAHO 399 (1/15/92); U.S. v. DuBois Farms, 2 OCAHO 376 (9/24/91) at 30-31; U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91) at 16; U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90) at 9; U.S. v. Big Bear, 1 OCAHO 48 (3/30/89) at 32, aff'd, Big Bear Market No. 3 v. INS, 913 F.2d 754 (9th Cir. 1990). Since the record here does not disclose any such unanticipated facts, I have no reason to increase the penalty beyond the INS assessed amount.

In making a civil money penalty amount determination within the delineated range, I am obliged to consider five factors prescribed at 8 U.S.C. §1324a(e)(5).

(1) the history of previous violations,

(2) whether or not the individual(s) named in the complaint's counts were unauthorized aliens,

(3) the seriousness of the violation,

(4) the size of the business of the employer being charged, and

(5) the good faith of the employer.

To facilitate tailoring of these factors to the facts of each case, I utilize an elastic judgmental rather than a formulaic analysis. Widow Brown's Inn, 2 OCAHO 399; DuBois Farms, Inc., 2 OCAHO 376; Cafe Camino Real, 2 OCAHO 307; J.J.L.C., 1 OCAHO 154; U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90); Big Bear Market, 1 OCAHO 48. But cf. U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89) (applying a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations); aff'd by CAHO, 1 OCAHO 108 (11/29/89) at 5 and 7 ("This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable", it was not to be understood as the exclusive method for keeping faith with the five statutory factors.)

B. Statutory Factors Applied

The parties agree that Complainant has no history of previous violations. They also agree that no Form I-9 was prepared for Jun Ying Xie, the individual named in Count I, and that this individual was unauthorized to work in the United States during the relevant time period. Furthermore, INS asserts and Respondent concedes that the paperwork violations alleged are "serious". The parties are justified on the documentary record in their positions regarding these three factors and I see no reason to disturb their understanding.

Only two disputed factors remain in determining the civil money penalty amount. I focus analysis on these two factors, i.e. the size of the business and the good faith of the employer.

(1) Size of the Business

Respondent, a Pennsylvania corporation, maintains two eating facili-ties, a small 'takeout' restaurant located within a mall and a mid-size, free standing restaurant. Employing twenty-three (23) individuals, Respondent represents that only one employee is full time and the remaining twenty-two (22) are part time. In substantiation, Respondent has filed its payroll. Respondent's gross profits for 1989, 1990, and 1991 ranged between $250,978 and $344,431, according to the first page of its tax returns for those years. Those documents also inform as to gross receipts. Gross receipts for 1989, 1990 and 1991 were respectively $371,155.00, $492,870.00 and $422,477.00. Tom & Yu, Inc. claims it is a small business and, consequently, that imposition of the NIF assessment would create an undue hardship.

INS asserts that Tom & Yu is a medium-sized business, drawing attention to the size of its work force and its profitability.

Restaurants in other employer sanctions adjudications have been held to be small or at least marginally small. E.g., Widow Brown's Inn, 2 OCAHO 399 at 40; Cafe Camino Real, 2 OCAHO 307 at 16. Comparing this Respondent with similarly situated businesses that have been before me, Tom & Yu, Inc. is clearly within the small range.

Neither IRCA nor relevant regulations provide clear guidelines for determining business size. I use as persuasive authority and take official notice of the Standard Industrial Classification (SIC) Manual utilized by the U.S. Small Business Administration (SBA) for size determinations. The SIC standard suggests that Respondent is a small business for SBA purposes. The size standard of the most pertinent SIC, SIC 5812, "eating and drinking places" other than institutional is $3,500,000.00 in annual receipts, i.e. businesses which have annual receipts under $3,500,000.00 are considered to be small within that industry. See also Widow Brown's Inn, 2 OCAHO 399.

Taking into consideration Respondent's tax data, caselaw precedent and the SBA standards, I conclude that Tom & Yu, Inc. is a small business.

(2) Good Faith

The parties have divergent views of the good faith of the employer. In arguing that it attempted in good faith to comply with the requirements of IRCA, Respondent claims it was handicapped in its compliance by a February 2, 1989 educational visit from INS, which was so cursory as to be deficient. Respondent recites that the INS representa

tive delivered an employer's instruction booklet, but did not discuss with anyone in authority the contents of the booklet or an employer's IRCA responsibilities. Respondent represents that it nevertheless responded to this cursory visit by consulting with an accounting firm. Complainant does not contest Respondent's recital.

In contrast, INS argues that Respondent failed to properly prepare Forms I-9 for any of its employees, despite what it considers to have been a proper educational visit. INS asserts that Respondent's conduct, "shows a blatant disregard of the law . . . and a total lack of good faith." Complainant's Motion for Summary Decision, November 19, 1991.

Although both parties agree that an INS representative visited Respondent's place of business and left an employer's instruction manual, they disagree as to the adequacy of that visit. They disagree also as to what is appropriate responsive employer conduct in response to a visit, and whether Respondent's conduct was inadequate and, therefore, lacking in good faith.

Title 8 U.S.C. §1324a is silent both as to what constitutes good faith and as to what comprises an educational visit. Generally, bad faith holdings under IRCA caselaw have been accompanied by evidence of egregious employer conduct. U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91) ("Simply stated, and in the interest of brevity and clarity, I find [no good faith] under these facts. This hearing record abounds in documented instances . . . that respondent's attitude concerning the paperwork responsibilities of IRCA may most accurately be described as indifferent, if not cavalier."); Cafe Camino Real, 2 OCAHO 307 at 16 ("I find this record barren of good faith compliance . . . the violations are repugnant to claims of good faith. [One] forgery . . . and the apparent forgery of at least seven other Form I-9 employee signature deprives Respondent of any good faith contention.").

Decisions by administrative law judges have used circumstances in context of educational visits both as the basis for finding bad faith and as the basis for rejecting allegations of bad faith. For example, in one decision flawed paperwork subsequent to an educational visit was rejected as evidence of bad faith under 8 U.S.C. §1324a. U.S. v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91). In contrast, an employer was recently held to lack good faith in part because of its flawed response to an educational visit. Widow Brown's Inn, 2

OCAHO 399. That case, however, is distinguishable from the case at bar. In Widow Brown's Inn in contrast to Tom & Yu:

(1) the educational visit was relatively thorough, including inter alia a tutorial-type session with the bookkeeper in charge of executing IRCA paperwork, and

(2) the bad faith determination was premised in substantial part on the conclusion that the employer had not simply been careless but, instead, had deliberately failed to prepare and present Forms I-9.

Taking into account IRCA precedents as they generally pertain to the good faith element and as they specifically pertain to the good faith element in light of educational visits, I am unable to find bad faith in Respondent's compliance efforts.

C. Civil Money Penalties Adjudged

Application of the statutory criteria to the violations found suggests civil money penalties slightly discounted from the levels assessed by INS. Three of the statutory factors are held to be as agreed to by the parties; two of the statutory factors are considered in favor of Respondent.

In lieu of the penalties proposed by INS, i.e. $1,000.00, $500.00 and $500.00 for each violation of Counts I, II and III respectively, I adopt the following:

Count I,	as to the named alien,	$ 1,000.00
Count II,	as to each named alien,	$ 400.00
Count III,	as to the named alien,	$ 400.00

III. *Ultimate Findings Conclusions, and Order*

I have considered the pleadings, motions and accompanying documentary support as submitted by the parties. All motions and other requests not previously disposed of, are denied. Accordingly, as more fully explained above, I find and conclude:

1. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent with respect to Count I to pay $1,000.00 per violation for a total of $1,000.00.

2. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it

is just and reasonable to require Respondent with respect to Count II to pay $400.00 per violation for a total of $8,400.00.

3. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent with respect to Count III to pay $400.00 per violation for a total of $400.00.

4. This Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(c) (iv) (1991), including the Partial Summary Decision and Order, 3 OCAHO 412, incorporated and adopted herein. As provided at 28 C.F.R. §68.53(a)(2) (1991), this action shall become the final order of the Attorney General unless, within thirty days form the date of this Decision and Order, the Chief Administrative Hearing Officer, shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. §§1324a(e)(7), (8); 28 C.F.R. §68.53 (1991).

SO ORDERED.

Dated this 18th day of August, 1992.

MARVIN H. MORSE
Administrative Law Judge