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. §1324a Proceeding
	)	CASE NO. 92A00084
RICHARD PIZZUTO	)	
DIMENSIONS IN HAIR	)	
AND SKIN	)	
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 January 26, 1991. 8 C.F.R. §274a.9 (1992). Upon Respondent's request for hearing before the Administrative Law Judge (ALJ), Complainant filed a Complaint on April 20, 1992 in which it alleged that Respondent failed to prepare Employment Eligibility Verification Forms (Form I-9) within three (3) days of hire for ten (10) individuals listed in the Complaint and that, further, it failed to properly complete section 2 of the Form I-9, thus violating section 1324a(a)(1)(B) of the Immigration & Nationality Act (Act). 8 U.S.C. §1324a(e)(3) (1986).

On April 27, 1992, 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 May 11, 1992, I issued a Notice of Acknowledgment to the parties which advised them that a prehearing telephonic conference would be held shortly and cautioned Respondent again about need for a timely

filed Answer. On or about June 1, 1992, Respondent timely filed its Answer.

In a prehearing telephonic conference on July 2, 1992, I heard argument on Complainant's Motion for Summary Decision, filed June 25, 1992 wherein Respondent admitted liability, waived its request for hearing and joined with Complainant in a request to have me set the civil penalties as the parties had not been able to agree on an appropriate penalty amount.[1] Upon further discussion, the parties and I agreed that: 1) they would submit a joint motion waiving the hearing, 2) they would motion for me to determine the amount of civil penalty, and 3) my determination of the amount of civil penalty would be based on a review of the record, the relevant statute and regulations and a review of the parties' written arguments regarding the five factors enumerated in Section 1324a(e)(5) of the Immigration & Nationality Act. On August 6, 1992, I granted said motion.[2]

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 asserts that Respondent's business is of medium size, profitable, and employs approximately ten (10) employees. Respondent states that it employs twelve (12) individuals and that Respon-

[1] On July 8, 1992, Respondent filed its response to Complainant's Motion for Summary Decision which, I assumed, had been delayed by the mail service.

[2] Complainant's Motion for Summary Decision filed on June 25, 1992 contained its arguments regarding the appropriateness of the civil penalty amounts based on the five factors enumerated in Section 1324a(e)(5). Respondent's Brief Addressing Mitigating Factors was filed August 10, 1992.

dent's net income would be severely and adversely affected by the substantial civil penalty Complainant is requesting.

I find that Respondent's business is small based on the totality of the evidence. See, e.g., U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91). As such I find that Respondent is entitled to mitigation based on this factor.

2. Good Faith of the Employer

Complainant argues that Respondent failed to prepare Form I-9 for ten (10) employees within three (3) days of hire and that, when they were completed on July 15, 1992, they were improperly done despite an educational visit on February 21, 1992. Respondent argues, on the other hand, that he displayed good faith in that he attempted to complete the I-9 to the best of his ability after the educational visit and that there is no evidence to the contrary. Respondent states that his good faith is further evidenced by his compliance with all other state and federal laws concerning his business.

In this case, I find that the time span of almost five (5) months from the time of the educational visit until the time the Forms I-9 were filled out is indicative of a lack of good faith in complying with the requirements of the Act. Respondent's argument of good faith compliance with other compulsory laws is, in this instance, irrelevant. Therefore, I find that Respondent is not entitled to mitigation based on this factor.

3. Seriousness of the Violation

Complainant argues that the violations by Respondent are of a serious nature based on the fact that all of Respondent's Forms I-9 were deficient and untimely. Respondent argues that he deserves mitigation because the I-9 Forms were incomplete due to mistake based on his ignorance. Further, Respondent argues that if its violations are determined to be serious,, they are the least serious type of paperwork violation since section 1 was entirely completed by the employee. See U.S.A. v. Felipe, 1 OCAHO 108 (11/29/89).

I have examined the Forms I-9 which show the Respondent has not completed any portion of the certification section of section 2. I agree with the reasoning expressed in United States v. J.J.C.C. Inc., 1 OCAHO 154 (4/13/90) where the ALJ stated that the lack of certifica-

tion by the employer in section 2 of the Form I-9 is a serious violation "implying avoidance of liability for perjury, also reckless disregard for plain and obvious statutory and regulatory mandates made clear to Respondent". Id. at 9-10. Therefore, I find that Respondent is not entitled to mitigation based on this factor.

4. Whether or not the Individual was an Unauthorized Alien

Complainant argues that Respondent employed one unauthorized alien at time of the employer survey. I note that Respondent was not charged with a knowing hire/continuing to employ violation. Respondent agrees that there was one employee who was an unauthorized alien, but insists that it was not aware of this individual's illegal status and that since the time of the employer survey this individual has become a permanent resident. Respondent argues further that there should be mitigation as to the civil penalty on the nine violations not involving the unauthorized alien.

I will follow my reasoning in U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91) and mitigate the civil penalty amount in the nine violations not involving illegal aliens, but not mitigate in the one violation involving the illegal alien.

5. History of Previous Violations of the Employer

Respondent and Complainant agree that there were no prior violations by this employer. Therefore I will mitigate based on this factor.

6. Other Mitigating Factors

Respondent argues that the purpose of the civil penalties portion of the Act is to bring about compliance with the Immigration Reform and Control Act (IRCA); it is not to destroy small businesses. If a civil penalty of more than fifteen hundred dollars ($1,500) is imposed, Respondent argues, it would amount to severe punishment and have an adverse impact his small business which has taken ten (10) years to build and which provides employment and lifeblood to the local economy.

Section 1324a(e)(5) does not restrict the ALJ to considering only the five factors enumerated when determining the amount of civil penalties. I agree with Respondent's statements about the purpose of

IRCA and will take its arguments into consideration when determining the civil penalty.

B. Amount of Civil Penalty

Complainant has requested that I assess a total civil penalty of five thousand dollars ($5,000) for the ten (10) violations in the Complaint, which reflects a five hundred dollar ($500) civil penalty for each violation. Respondent stated that it has offered to pay a total civil penalty of fifteen hundred dollars ($1,500) which it argues fulfills the purpose of the statute. Respondent further argues that any civil penalty imposed in excess of this amount would be severe punishment and would affect the viability of its business.

After a review of the record, OCAHO cases, and the relevant law, I have determined, using a judgmental approach, that a civil penalty of two hundred fifty dollars ($250) per violation for the nine (9) violations not involving the illegal alien is appropriate and that a civil penalty of three hundred fifty ($350) is appropriate for the one violation involving the illegal alien. As such, the total civil penalty for the violations of Count I amounts to two thousand six hundred dollars ($2,600). The parties may wish to enter into a mutually agreeable payment schedule for payment of this civil penalty if it appears that payment in full creates a severe financial hardship to Respondent.

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 21st day of August, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge