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. 91100184
M.T.S. SERVICE	)	
CORPORATION D/B/A	)	
MAGGIE'S CATERING	)	
MEXICO TIPICO	)	
RESTAURANT,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(August 26, 1992)

MARVIN H. MORSE, Administrative Law Judge

Deborah S. Nordstrom, Esq., for Complainant.
Rudy Aguirre, 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 25, 1992, I issued a Prehearing Conference Report and Order Including Finding of Liability adjudicating the question of liability of M.T.S. Service Corporation (MTS or Respondent) in favor of the Immigration and Naturalization Service (INS or Complainant). That order stated,

> During the first prehearing conference on March 10, 1992, the parties agreed that there is no issue as to liability, as confirmed by the First Prehearing Conference Report and Order. During the second prehearing conference the parties ratified the understanding that Respondent does not contest liability for the violations alleged. I am satisfied that this understanding provides a sufficient basis on which to adjudicate the liability. . .

Id.

That ruling fully disposed of the liability issue, leaving for further decision the adjudication of an appropriate civil money penalty for the violations established.

Neither party has asserted 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 documentary submissions by the parties.

The Immigration and Naturalization Service assesses a total civil money penalty of $17,900.00, comprised as follows:

—$3,250.00, $250.00 per individual, for failure to properly complete §2 of the employment verification form (Form I-9) for thirteen (13) named individuals;

—$9,750.00, $250.00 per individual, for failure to ensure that the employee properly completed §1, and failed to properly complete §2 of the Form I-9 for thirty nine (39) named individuals;

—$4,900.00, $350.00 per individual, for failure to retain and/or make available for inspection Forms I-9 for fourteen (14) named individuals.

The Notice of Intent to Fine (NIF), dated July 31, 1991, differed from the total alleged in the complaint which recites the civil money penalty assessments outlined above. Respondent's answer to the complaint, filed January 2, 1992, disputes the reasonableness of those fine levels. Following the March 25, 1992 order, Complainant filed an opening brief on the penalty issue, accompanied by extensive documentary materials after which Respondent filed a brief in response, with attachments, to which Complainant filed a reply brief.

II. *Discussion*

A. Statutory Framework

Title 8 U.S.C. §1324a(e)(5) sets out the statutory parameters of the civil money penalty amount. 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 considering 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. Tom & Yu, OCAHO Case No.

91100082 (8/18/92); U.S. v. Widow Brown's Inn, 2 OCAHO 399 (1/15/92) at 38-39; 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 adjudicating a just and reasonable civil money penalty 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 were unauthorized aliens,

(3) the size of the business of the employer being charged,

(4) the seriousness of the violation, 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. Tom & Yu, OCAHO Case No. 91100082; 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, 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

On brief, the parties both acknowledge the five statutory factors to be considered in determining the penalty assessed. According to their briefs, they agree that Complainant has no history of previous violations. The parties concur that none of the individuals identified

in the complaint were unauthorized aliens. The parties also agree that the size of the enterprise is small. The parties are justified on the documentary record in their positions regarding the lack of previous violations, absence of unauthorized aliens, and the small size of the business. I find no reason to disturb their understanding. I find that Complainant has no history of previous violations, that none of the named individuals were unauthorized aliens, and that the size of the business is small.

The parties disagree as to the relevance of a putative claim by Respondent as to its financial inability to pay the amount assessed by INS. Complainant notes that the claim is undocumented, and that it is not a statutory factor "to be considered in assessing" the civil money penalty. Complainant suggests that such a factor, if it were held to be relevant, is subsumed into the "size of the business factor." Complainant's Brief in Response (May 28, 1992) at 3. The INS argument is, in effect, that ability to pay has already been implicitly considered and, accordingly, should not be separately considered in adjudicating a just and reasonable penalty.

The statutory factors to be duly considered in determining the amount of the civil money penalty for paperwork violations are not exclusive. 8 U.S.C. §1324a(e)(5). I am unaware of any inhibition to consideration by the judge of factors additional to those which IRCA dictates. So long as the statutory factors are taken into due consideration, there is no reason that additional considerations cannot be weighed separately. Accord U.S. v. Pizzuto, OCAHO Case No. 92A00084 (8/21/92) at 6 ("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 Complainant that Respondent's financial inability claim is undocumented. On that basis, I reject the claim.

This Final Decision and Order discusses the two remaining factors, i.e., seriousness of the violations and the good faith of the employer.

(1) Seriousness of the Violations

Paperwork violations are always potentially serious, since "[t]he principal purpose of the I-9 form is to allow an employer to ensure that it is not hiring anyone who is not authorized to work in the United States." U.S. v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (6/11/92). The seriousness factor must be considered in context of the factual setting of the particular case.

The Forms I-9 which form the basis of the complaint were all flawed. None were signed by the employer. Thirty-nine forms also lacked the proper employee signature. Additionally, Respondent failed to present twenty-six Forms I-9. Twelve of the omitted Forms I-9 were presented to INS at a later date. Fourteen Forms I-9 were never presented.

IRCA caselaw makes clear that failure of attestation at §2 of the Form I-9

> is a serious violation, implying avoidance of liability for perjury, but also reckless disregard for plain and obvious statutory and regulatory mandates. . . .

J.J.L.C., 1 OCAHO 154 at 9 - 10.

Precedent also holds that an employer's failure to ensure proper employee entries constitutes a serious violation. Id. at 10. Accordingly, I agree with Complainant's reliance on my prior decisions to the effect that,

> failure to prepare or present the Form I-9 is regarded as a serious violation. U.S. v. Widow Brown Inn, [sic] 2 OCAHO 399 (1/15/92); U.S. v. DuBois Farms, 2 OCAHO 376 (9/24/91).

Complainant's Brief (April 4, 1992) at 3-4.

The earliest decision implicating the factors of 8 U.S.C. §1324a(e)(5) found that in context of the facts in that case, the employer's violations were inadvertent. On that basis, the penalty amount was set at the statutory minimum. Big Bear, 1 OCAHO 48. Big Bear is inapposite here. The presentation of twelve I-9s on a date after the inspection implies that the failure to produce the other fourteen was more than mere negligence. Furthermore, Respondents failure to sign any Form I-9 is also more than negligence in light of the certification requirement at §2 of the Form I-9. In contrast to Big Bear, the MTS violations are more than inadvertent.

INS has the better argument concerning Respondent's deficient I-9s. As already noted, not one of the fifty-two I-9s (Counts I and II) are signed on behalf of the employer. INS correctly notes the holding in J.J.L.C., 1 OCAHO 154 at 9-10. The seriousness of that deficiency is compounded by the thirty-nine (Count II) violations of the employer's duty to assure proper entries by the employee. Id. at 10.

Applying OCAHO precedents to the facts of this case, I find Respondent's violations to be serious.

(2) Good Faith of the Employer

Agreeing with Respondent, I discount entirely all references to the putative presence of unauthorized aliens on the MTS payroll in Complainant's arguments and in the evidentiary submissions accompanying its April 16 brief. Particularly where INS agrees that none of the named individuals are named in the complaint, an uncharged offense of unauthorized employment is uninformative as to the quantum of penalty for paperwork violations. Consequently, disagreement between the parties as to good faith turns essentially on differing views of the extent of information communicated to Respondent in an INS educational visit.

Respondent does not claim that INS deliberately mislead MTS in its educational foray. It follows that no matter how forthcoming or reti-cent INS may be in its educational initiative, the employer's failure to present Forms I-9 as to certain employees and the lack of any attestation on I-9s which are presented is a per se breach of good faith. Nothing could be plainer than that the employer must complete the I-9 and that a signature is required at §2. See J.J.L.C., 1 OCAHO 154 at 10 (holding the "record barren of good faith" where attestations were missing and copies of tendered documents were attached to the I-9s.)

I find that the employer did not act in good faith.

C. Civil Money Penalties Adjudged

The MTS violations are serious and lacking in good faith compliance with statutory and regulatory imperatives. The other statutory factors i.e., the history of previous violations, the unauthorized status of named aliens, and the size of the employer, are already reflected in the INS assessments. The assessments, within the authorized range of options, are modest. Therefore, I conclude that the INS assessments are justified by the documentary record.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, briefs and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon the preponderance of the evidence:

1. That Respondent violated 8 U.S.C. §1324a(A)(1)(B) by failing as alleged in the complaint to comply with the requirements of 8 U.S.C.

§1324a(b)(1), (2) and (3) with respect to the individuals named in Counts I, II and III of the complaint.

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 to make payment as follows:

Count I,	$250.00 as to each named individual,	$3,250.00
Count II,	$250.00 as to each named individual,	$9,750.00
Count III,	$350.00 as to each named individual,	$4,900.00

For a total of $17,900.00

3. 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). 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 from 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 and entered this 26th day of August, 1992.

MARVIN H. MORSE
Administrative Law Judge