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

September 3, 1992

UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. 1324a Proceeding Case No. 91100085
ULYSSES, INC. AND ULYSSES RESTAURANT GROUP, INC. AND OTTIS GUY TRIANTIS, INDIVIDUALLY AND GUS OTTIS TRIANTIS, INDIVIDUALLY, ALL T/A WELLINGTON'S RESTAURANT, Respondents	)	

DECISION AND ORDER

Appearances: Kent Frederick, Esquire, Immigration and Naturalization Service, United States Department of Justice, Baltimore, Maryland, for complainant; Laurence F. Johnson, Esquire, Wheaton, Maryland, for respondent.

Before: Administrative Law Judge McGuire

Background

On March 13, 1991 and March 18, 1991, following an area control operation at respondents' place of business, Wellington's Restaurant, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon respondents a Notice of Intent to Fine (NIF), BAL 274A-90-5982, which contained four (4) counts, a total of 49 alleged illegal hire/continue to employ and paperwork violations, and proposed civil money penalty assessments totaling $10,050.

Count I alleged that subsequent to November 6, 1986, respondents had hired the two (2) individuals listed therein for employment knowing they were aliens not authorized for employment in the United States or alternatively, that respondents had continued to employ those two (2) individuals knowing they were aliens not authorized for employment in the United States, in violation of the provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(A). The total civil money penalty assessed for those two (2) violations was $3,000, or $1,500 for each violation.

Count II charged respondents with having violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to ensure that the 17 employees listed therein properly completed Section 1 of the pertinent Forms I-9. Complainant assessed a $150 civil money penalty for each of those 17 alleged paperwork violations, or a total civil money penalty of $2,550 for Count II.

In Count III, complainant alleged that respondents had also violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having allegedly failed to complete Section 2 of the pertinent Forms I-9 relating to the 25 employees listed therein. For each of those 25 alleged paperwork violations, complainant levied a civil money penalty of $150, or a total civil money penalty of $3,750 for Count III.

Count IV contained the allegation that respondents had also violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by reason of their having failed to ensure that the five (5) employees listed therein properly completed Section 1 of their pertinent Forms I-9 and/or respondents failed to properly complete Section 2 of those Forms I-9. Complainant assessed a total civil penalty of $750 on that count, or $150 for each of those five (5) alleged violations.

Respondents were also advised in the NIF of their right to request a hearing before an administrative law judge by submitting an appropriate written request within 30 days of their receipt of that citation.

On April 12, 1991, respondents timely filed such a request and on May 20, 1991, complainant filed the Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO), realleging the charges previously set forth in the NIF, and again requesting that respondents be ordered to pay civil penalties totaling $10,050, and to cease and desist from those violations arising under 8 U.S.C. §1324a(a)(1)(A) and (a)(2).

On July 12, 1991, complainant filed its First Motion to Compel Discovery, in which it averred that on May 31, 1991, respondents had received complainant's First Request for Production of Documents, First Request for Admissions, and First Set of Interrogatories, and that respondents had failed to respond or object to any portion of those discovery requests. In its motion, complainant requested that respondents be ordered to respond to those discovery requests, in accordance with the provisions of the pertinent procedural regulation, 28 C.F.R. §68.23(a).

On July 18, 1991, complainant's motion was granted and respondents were ordered to respond fully to complainant's discovery requests within 15 days of their acknowledged receipt of that order.

On August 19, 1991, respondents untimely filed their answers to interrogatories, and responses to complainant's request for admissions. After receiving those discovery materials, complainant filed a Second Motion to Compel Discovery, along with supporting memorandum, in which complainant acknowledged receipt of respondents' answers and responses to complainant's requests for admissions, but contended that respondents provided only some documents in response to the request for documents, and that almost all of respondents' answers were inadequate or incomplete. As a result, complainant requested an order compelling respondents to completely and adequately reply to the interrogatories, to the request for admissions, and to the request for production of documents. That motion was granted on September 27, 1991.

On October 18, 1991, because respondents had not responded to the September 27, 1991 order, complainant filed a Motion for Sanctions, in which it requested that the undersigned impose sanctions based upon respondents' failure to comply with the orders of July 10, 1991 and September 27, 1991.

On November 20, 1991, because respondents had not complied with the orders of July 10, 1991 and September 27, 1991 by providing full and complete replies to the various discovery requests, the undersigned ordered four (4) of the complainant's eight (8) requested sanctions, all four (4) of which are set forth at 28 C.F.R. §68.23(c). That section provides, in pertinent part, that the administrative law judge may impose various sanctions for the purposes of permitting resolution of the relevant issues and disposition of the proceeding, and to avoid unnecessary delay.

To permit resolution of the relevant issues and disposition of the proceeding, the following requested sanctions were ordered:

1. That the undersigned infers and concludes that the answers to the interrogatories which were insufficient, unresponsive, or unanswered would have been adverse to all respondents. 28 C.F.R. §68.23(c)(1).

2. That for the purposes of this proceeding, the matter or matters concerning which the Orders Granting Complainant's First and Second Motions Compelling Discovery is/are taken as having been established adversely to all respondents. 28 C.F.R. §68.23(c)(2).

3. That the respondents may not introduce into evidence or otherwise rely upon testimony by respondents, their officers or agents, nor may respondents, their officers or agents introduce into evidence or otherwise rely upon documents or other evidence, in support of or in opposition to any claim or defense. 28 C.F.R. §68.23(c)(3).

4. That the respondents may not be heard to object to the introduction and use of secondary evidence by complainant in order to show what the withheld admissions, documents, answers to the interrogatories, or other discovery replies would have shown. 28 C.F.R. §68.23(c)(4).

On December 26, 1991, following the imposition of those sanctions, complainant filed a Motion for Partial Summary Decision, in which complainant moved that the undersigned, pursuant to the provisions of 28 C.F.R. §68.38, grant a partial summary decision as to respondents' liability for the violations charged in Counts I, II, III, and IV of the Complaint. In its motion, complainant sought summary relief on the grounds that there was no genuine issue as to any material fact with respect to the facts of violation alleged in Counts I, II, III, and IV, and asserted that it was entitled to summary decision as a matter of law.

On March 9, 1992, an Order Granting Complainant's Motion for Partial Summary Decision was issued. In that Order, the four (4) named respondents were held jointly and severably liable for the 49 violations alleged in Counts I, II, III, and IV of the Complaint, and it was further ordered that the appropriate civil penalties for those violations were to have been determined following an evidentiary hearing conducted solely for that purpose, in order to consider the five (5) statutory criteria which must be utilized in assessing civil money

penalties for paperwork violations, those set forth at 8 U.S.C. §1324a(e)(5).

On April 16, 1992, a telephonic prehearing conference was conducted by the undersigned with Kent Frederick, Esquire, complainant's counsel of record, and Marvin E. Perlis, Esquire, then respondents' counsel of record. It was agreed that rather than conducting a hearing for the purpose of determining the appropriate civil penalty sums in accordance with the provisions of 8 U.S.C. §1324a(e)(4) and (5), the parties would submit written briefs concerning the appropriate civil money penalties to be assessed. Complainant was to have filed its brief shortly thereafter, and respondents were to have filed their brief on or before May 9, 1992.

On April 21, 1992, complainant filed its brief, in the form of a Motion Requesting Appropriate Civil Money Penalties with supporting memorandum. In its motion, complainant asserted that respondents' conduct has been egregious and that the violations of law of which respondents have been found liable are particularly serious. Therefore, complainant requests that respondents be ordered to pay the $10,050 total civil money penalty assessments contained in the NIF, or in the alternative, higher civil penalty assessment sums, owing to the facts which relate to these violations.

On May 19, 1992, respondents' successor counsel, Laurence F. Johnson, Esquire, contacted this office to advise the undersigned that he was assuming representation of respondents. At that time, Mr. Johnson advised our office that he was aware that the brief addressing the civil money penalties was due on that date, and stated that he would telefax a pleading entitled Respondents' Motion to Extend Time to File Brief and Response to Complainant's Motion Requesting Appropriate Civil Money Penalties, which was received in this office on that date.

In that Motion, Mr. Johnson requested a 60-day extension to file respondents' brief and response because he had only recently been retained, that he had agreed to accept the matter on a pro bono basis, that the matter involves complex factual and legal issues requiring substantial research, and that while he has handled immigration matters for many years, this was his first matter before the Office of the Chief Administrative Hearing Officer.

On May 27, 1992, the undersigned issued an order granting respondents an additional 60 days, or until July 18, 1992, to file their brief and response.

On June 1, 1992, Marvin E. Perlis, Esquire, filed a motion to withdraw as counsel for respondents. Also on that date, Laurence F. Johnson, Esquire, entered his appearance as counsel for respondents. On June 2, 1992, Mr. Perlis' motion to withdraw was granted.

On July 21, 1992, respondents filed a Motion to Continue with this Proceeding Until a Determination is made on Fourth Amendment Issues, together with supporting memorandum. This motion was denied on August 14, 1992.

On July 21, 1992, also, respondents filed a pleading captioned Respondents' Request for Minimum Penalties and Opposition to INS Motion Requesting Appropriate Civil Money Penalties, in which respondents urged that the minimum civil penalties be assessed for only 47 violations (excluding two paperwork violations respondents characterized as de minimis), or civil penalties totaling $5,000, i.e. the $100 statutory minimum amount for each of the 45 remaining paperwork violations and the statutory $250 minimum amount for each of the two (2) "knowingly hired" charges.

Respondents' substantial compliance defense as it relates to the two (2) paperwork charges alleged to be de minimis, is without merit. U.S. v. Applied Computer Technology, 2 OCAHO 367 (9/19/91). And even in the event that such defense had been properly asserted, it has not been timely raised. In the Order Granting Complainant's Motion for Partial Summary Decision, liability for all of the violations in Counts I, II, III, and IV was determined. All that remains to be decided is the appropriate civil money penalty to be assessed for those violations. Having resolved the facts of violation in complainant's favor, further consideration must be given to the appropriateness of the 49 separate civil penalties which must be assessed.

Under these facts, the two (2) individual civil penalty sums for the two (2) "knowingly hired" violations in Count I must be assessed in amounts ranging from the statutorily mandated minimum sum of $250 to the maximum sum of $2,000 for each violation. 8 U.S.C. §1324a(e)(4). The 47 individual civil penalty sums for each of the paperwork violations in Counts II, III and IV must be assessed in amounts ranging from the statutorily mandated minimum sum of $100

to the maximum sum of $1,000 for each violation. 8 U.S.C. §1324a(e)(5).

The latter section of the statute also provides that in determining the amount of the civil money penalties assessed in connection with paperwork violations, 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 civil money penalties for the two (2) "knowingly hired" charges set forth in Count I may be assessed without reference to those five (5) criteria which must be utilized in paperwork violations. United States v. Sergio Alaniz, d/b/a La Segunda Downs, 1 OCAHO 297 (2/22/91). However, those criteria may also be of assistance in determining the appropriate civil money penalties to be assessed in 'knowingly hire' violations. Id. at 4.

In issuing the NIF at issue, complainant assessed a total civil money penalty of $3,000, or $1,500 for each of the two (2) "knowingly hired" violations in Count I, and total civil money penalties of $7,050, or $150 for each of the 47 paperwork violations in Counts II, III and IV.

A review of the appropriateness of the civil penalties to be assessed for the violations at issue begins by considering the first of the five (5) required elements, the size of respondents' business. According to the Maryland wage and hour report covering the third quarter of 1989, for the business entity involved in this litigation, Wellington's Restaurant, respondents employed 168 employees and had a total payroll of $219,760.96. For the fourth quarter of 1989, respondents employed a total of 166 employees and paid wages totaling $265,201.14. Respondent advises that the total gross sales for Wellington's Restaurant and its related banquet and catering facilities are between $2 to 3-million annually.

Having no statutory parameters to utilize in determining business size, the administrative law judge in United States v. Tom & Yu, Inc., d/b/a Peking Garden Restaurant, OCAHO Case No. 91100082 (8/18/92), took administrative notice of the Standard Industrial Classification (SIC) manual utilized by the U.S. Small Business Administration (SBA) for site determinations, and found that businesses in the restaurant industry which have annual receipts

totaling less than $3.5-million are considered small within that industry. By the use of that standard, the size of respondents' restaurant business, having total annual gross sales between $2 to 3-million must be categorized as small.

The second of the five (5) criteria to which consideration must be given involves respondents' good faith. I find no evidence that respondents acted in good faith under these facts.

INS conducted an educational visit on November 25, 1987, at Wellington's Restaurant to inform the management of their responsibilities under IRCA. On March 3, 1988 respondents were cited by the INS following an area control operation for having knowingly hired one unauthorized alien and for 29 paperwork violations. Nevertheless, respondent continued to hire individuals knowing they were not authorized for employment and continued to commit paperwork violations resulting in the offenses at issue.

Respondents' attitude concerning their employment eligibility verification responsibilities under IRCA has been less than cooperative and, as noted earlier, they have failed to make a good faith attempt to comply with the requirements of IRCA, even after having previously been placed on notice as to those responsibilities.

Concerning the seriousness of the 49 violations at issue, some 25 of the 47 paperwork violations involve improper completion of Section 2 of the relevant Forms I-9. And five (5) of those 47 infractions involved deficiencies in both Sections 1 and 2 of the pertinent Forms I-9. Seventeen (17) of those 47 violations concerned respondents' failure to properly complete Section 1 of the relevant Forms I-9 and in five (5) of those violations no part of Section 1 had been completed. Any failure to complete any portion of Section 2 of a Form I-9 must be regarded as a serious violation. United States v. Acevedo, 1 OCAHO 95 (10/12/89).

A recent OCAHO decision noted that, in cases where there are a substantial number of paperwork violations, those violations must be characterized as serious because they tend to undermine the congressionally mandated scheme. United States v. Noel Plastering and Stucco, Inc., 3 OCAHO 427 (5/12/92). This factual setting discloses that there were 47 paperwork violations found in an investigation of a business which employs some 170 individuals, or infractions involving some 28-per cent of the workforce. Despite respondents' contentions to the contrary, these violations must be viewed as serious.

The fourth factor to be considered is that of determining whether any of the 47 paperwork violations involved unauthorized aliens. In this case, five (5) illegal aliens were seized in the course of INS' investigation, and INS charged respondent with having illegally hired two (2) of those. It should be noted, however, that of the 47 Forms I-9 found to be in violation, none pertained to any of those five (5) illegal aliens who were arrested.

The fifth and final factor to which consideration must be given is respondents' history of prior violations. As noted earlier, in discussing the respondents' lack of good faith, it is noteworthy that in March, 1988, during the citation period prior to full implementation of IRCA, respondents were cited for having knowingly hired one (1) individual who was not authorized to work and for 29 paperwork violations, despite having been informed of their responsibilities under IRCA during an educational visit some four (4) months earlier, in November, 1987. In light of that prior incident, which involved identical infractions as those at issue, respondents' awareness of their obligations under IRCA's employment verification process has not been demonstrated, at best, and has been ignored or rejected, at worst.

The enactment of IRCA represents a significant modification of United States policy concerning illegal immigration and document inspection and verification by employers in the hiring process is obviously essential in the implementation of that policy. In order to comply with the provisions of IRCA, employers must, with limited inapplicable exceptions, verify the identity and work authorization of all individuals hired subsequent to November 6, 1986 and must also refuse to hire those not authorized to work. Failure to comply with those provisions results in the assessment of civil money penalties, which serve the dual purposes of deterring repeat infractions by the employing entity cited, and encouraging compliance by other employers similarly situated.

As the enforcement agency, INS is granted considerable discretion in assessing civil money penalties, in order to fairly and effectively deal with the foreseeable factual variances encountered in the day-to-day inspections settings.

As noted earlier, for each of the two (2) "knowingly hire" violations in Count I, INS was required to assess a civil money penalty ranging from the minimum amount of $250, under these facts, to the maximum

amount of $2,000, under these facts, for each of those infractions and levied a $1,500 civil money penalty for each.

And for each of the 47 remaining paperwork violations in Counts II, III, and IV, INS was tasked with assessing civil money penalties for each of those infractions ranging from the mandated minimum amount of $100, under these facts, to the maximum sum of $1,000, under these facts, for each of those charges and assessed a $150 civil money penalty for each.

In view of the foregoing, in can be seen that in the event that INS had imposed the minimum civil money penalties for these 49 violations the total civil penalties sum would have been $5,200 and a maximum civil penalty assessment on each charge would have resulted in civil penalties totaling $51,000.

Accordingly, the $10,050 civil penalties total sum assessed herein prompts the finding that in setting these 49 civil money penalties the INS acted very conservatively, if not in fact somewhat leniently, considering the total factual setting in which these violations occurred.

For these reasons, respondents' request for administrative relief must be denied and the total civil money penalties assessment sum of $10,050 for the 49 violations at issue is being affirmed.

Order

Respondents' April 12, 1991, request for review of the facts of violation set forth in NIF BAL 274A-90-5982, dated March 13, 1991, as well as the appropriateness of the proposed total civil money penalty sum of $10,050 arising out of the issuance of that notice, is hereby ordered to be and is denied.

It is further ordered that the appropriate total civil money penalty sum for the 49 violations cited in NIF BAL 274A-90-5982 is $10,050, or $1,500 for each of the two (2) "knowingly hire" charges contained in Count I and $150 for each of the 47 paperwork violations set forth in Counts II, III, and IV of the Complaint.

It is further ordered that respondents cease and desist from further violations of 8 U.S.C. §1324a(a)(1)(A) or (a)(2).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 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 respondents, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (8) and 28 C.F.R. §68.53 (1991).