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. 92A00122
RICHARD BAKOVIC, Respondent.	)	

DECISION AND ORDER
(January 15, 1993)

I. *General Background*

A. The Immigration Reform and Control Act

This case arises under Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986) at section 101, enacting section 274A of the Immi-gration and Naturalization Act of 1952 as amended (INA, or the Act), 8 U.S.C. §1324a. With enactment of IRCA, Congress adopted significant revisions in national policy on illegal immigration. Under IRCA, employers are vulnerable to civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. They are also subject to civil penalties for failure to observe IRCA's recordkeeping verification requirements, i.e., paperwork requirements.

B. Procedural Background

On June 1, 1992, the Immigration and Naturalization Service (INS or Complainant) filed a complaint against Richard Bakovic (Bakovic or Respon-dent). Complainant alleged seventeen paperwork violations. Respondent filed a timely answer on July 2, 1992. The answer admits that no employment verification forms (Forms I-9) were prepared for the individuals named in the complaint. Respondent contends that the individuals are independent contractors, not employees, and, therefore, he was not required to prepare Forms I-9.

The parties and the bench participated in a telephonic prehearing conference on September 3, 1992. It was agreed that, absent prior settlement, the parties would file factual stipulations and briefs regarding the independent contractor issue and any other pertinent issue. A second telephonic conference was held on November 23, 1993.

(1) The Joint Stipulation of Facts

On November 23, 1992, the parties filed a joint stipulation of facts. The parties anticipated that their stipulations would "serve as a predicate for a decision on the law." First Prehearing Conference Report and Order, (9/4/92). This expectation was reiterated subsequent to the filing of the stipulation. "Neither party anticipated that material facts not comprehended by the stipulation remain in dispute." Second Prehearing Conference Report and Order, (11/24/92). A confrontational evidentiary hearing was contemplated only if facts should "appear in dispute" during briefing on the independent contractor issue. Id.

The parties stipulated, inter alia, that:

•Respondent is a commercial fisherman;

•Respondent contracts with "crewpersons" to assist in the fishing business;

•Crewpersons are paid based on a percentage of the catch, less certain costs;

•While on the ship, Respondent's Captain has the final word on who will perform a specific function, location of the actual fishing, acceptable behavior on board, and who will be terminated;

•Internal Revenue Service (IRS) Publication #15 characterizes crewpersons, such as those employed by Respondent, as self-employed;

•INS Publication (M-274) states that an employer does not need to complete Forms I-9 for independent contractors;

•Respondent and crewpersons each provide certain equipment and supplies;

•Crewpersons do not work exclusively for Respondent, but may also contract to work with other fishing businesses.

(2) The Parties' Briefs

On December 7, 1992, both parties filed briefs which focus on the independent contractor issue. The issue is whether the individuals named in the complaint are employees or independent contractors. IRCA mandates paperwork compliance for an entity's employees, but not for its independent contractors. Respondent filed a reply brief on December 28, 1992.

(a) Complainant's Argument

Complainant contends that the named individuals are employees. Complainant rejects Respondent's reliance on treatment of crewmem-bers as self-employed individuals under certain IRS regulations. Rebutting Respondent's assertion, Complainant argues that "self-em-ployed" individuals are not necessarily "independent contractors." Complainant maintains that IRS definitions are not binding under IRCA, even assuming the named individuals were found to be self-employed under IRS rules.

Focusing on IRCA regulations and caselaw, Complainant recites pertinent hallmarks of independent contractor status and applies them to the facts of the case at bar. INS finds independent contractor hallmarks absent here, observing that the stipulated facts are not persuasive of independent contractor status for the individuals identified in the Bakovic complaint. For example, Complainant argues that crewpersons lack authority to control the work environment; they lack the opportunity for profit or loss and other accouterments of independent business status, e.g., offices, telephones, business addresses and business cards. Complainant cites the presence of a traditional characteristic of employee status, i.e., that the work of crewpersons is fundamentally unskilled labor. Complainant urges that I conclude from these factors that:

•The crewmembers are Respondent's economically dependent employees and;

•Respondent is liable for the imposed sanctions.

(b) Respondent's Argument

Contending that the named crewpersons are independent contractors, Respon-dent makes two fundamental claims.

•Bakovic's crewmembers' work situation satisfies the hallmarks of independent contractor status;

•Lack of notice and the equities demand that Bakovic be exonerated from paperwork liability.

Respondent relies on several indicia for the claim that crewmembers are independent contractors. Crewmember compensation is contingent on work product, rather than a fixed hourly rate, i.e., a crewmember's compensation depends on the catch. Respondent argues that this method of compensation, exposing crewmembers alternatively to opportunities for profit and risk of loss, is an indice of independent contractor status. Respondent also notes that crewmembers provide certain equipment. Crewmembers are, moreover, at liberty to contract with employers other than Respondent.

Arguing the equities, Respondent asserts that INS has not provided sufficient notice to require employer paperwork compliance. Without providing a definition of independent contractor, the INS Handbook for Employers makes the bald statement that employers need not provide Forms I-9 for independent contractors. Bakovic's claim that crewmembers are self-employed and consequently independent contractors relies on IRS Publications ##15 and 595; Circular E Employer's Tax Guide, the Tax Guide for Commercial Fishermen, and his assertion that the IRS has not challenged his claim that the individuals are not his employees.

II. *Discussion*

A. Legal Background

(1) The General Legal Context

As recognized by the parties, liability turns on a determination as to whether the named individuals are employees or independent contrac-tors. Preponderance of the evidence is the applicable legal standard. 8 U.S.C. §1324a(e)(3)(C); 28 C.F.R. §68.52(c)(1); U.S. v. Mr. Z Enterprises, Inc., 1 OCAHO 288 (1/11/91). Judicial determinations in this area are fact driven and lack a bright line.

> Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.

N.L.R.B. v. Hearst Publications, 322 U.S. 111, 121 (1944).

See also Rita, Note: Fishing for Dollars: The IRS Changes Course in Classifying Fishermen for Employment Tax Purposes, 77 CORNELL L. REV. 393, 399 (1992) (". . . [A]gency and court decisions have provided some meaningful content to the 'usual common-law rules' that determine the employer-employee relationship. Unfortunately, they have not always done so with complete unanimity or consistency."); Moran, Willfulness: The Inner Sanctum or Unnecessary Element of Section 6672, 11 U. TOL. L. REV. 709, 823 (1980).

The lack of clear distinction between independent contractors and employees may be particularly difficult for employers. Despite the uncertainty in this area of the law, they must premise market place decisions on the presumed employment status of individuals.

> Deciding whether to classify a worker as an employee or as an independent contractor can present an interesting and analytical challenge for courts and counsel alike, but verges on Russian roulette for the business owner.

Marmoll, Employer-Employee Relations: Independent Contractor v. Employee Status, 37 N.Y.U. INST. ON FED. TAX'N. ch. 29 at 29.01, at 29-2 (1979).

The pertinent INS regulation provides the following guidance,

> The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that deter-mination include, but are not limited to, whether the individual or entity: [1] supplies the tools or materials; [2] makes services available to the general public; [3] works for a number of clients at the same time; [4] has an opportunity for profit or loss as a result of labor or services provided; [5] invests in the facilities for work; [6] directs that order or sequence in which the work is to be done and [7] determines the hours during which the work is to be done. . . . (Numbers supplied).

8 C.F.R. §274a.1(j)

(2) Common Law Factors

IRCA determinations do not rely exclusively on the regulatory factors.[1] The evolving IRCA caselaw has looked to the common law developed in non-IRCA areas. U.S. v. Robles, 2 OCAHO 309 (3/29/91) at 9; Mr. Z, 1 OCAHO 288 (1/11/91) at 41.

Common law analyses not set forth in §274a.1(j) include:

•Whether or not a particular worker is considered an independent contractor depends on the working relationship between the employer and the individual in question, e.g., the amount of employer supervision and the manner in which the work relationship is terminated.

•Workers whose pay is determined by the amount of time they work, rather than the number and quality of jobs they do, are not considered independent contractors.

•Workers performing a job requiring low level skills are rarely independent contractors.

•Whether or not a particular worker is considered an independent contractor depends on employer/employee intent and local and industry practice.

•The provision of certain benefits, e.g., annual leave, retirement benefits, social security benefits, indicates employee, rather than independent contractor, status.

Robles, 2 OCAHO 309 at 9; Mr. Z, 1 OCAHO 288 at 42; General Inv. Corp. v. United States, 823 F.2d 337, 342 (9th Cir. 1987) ("subsidiary factors to define common law employment status [include]: (1) whether the business has the right to discharge the worker; (2) whether the business furnishes tools to the person rendering the service; (3) whether the business provides the worker with a place to work; and (4) whether the work is performed in the course of the individual's business rather than in some ancillary capacity."); Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980); Mitchell v. John R. Crowley & Bro., Inc., 292 F.2d 105, 108 (5th Cir. 1961) (individuals in question held not to be independent contractors because the work they performed required exclusively low level skills.).

[1] Subsection 274a.1(j) provides that the enumerated factors are not necessarily the exclusive basis for decision making.

In prioritizing the importance of various characteristics to determine employee/independent contractor status, it has been held that,

. . . no single factor is determinative, although it does appear that the degree of control is often given the greatest weight. (Emphasis added.)

Robles, 2 OCAHO 309 at 9. See also Mr. Z, 1 OCAHO 288 at 42; General Inv. Corp., 823 F.2d at 341.

(3) The Economic Reality Test

The economic reality test is another basis for determining whether an individual is an independent contractor or an employee. As established by the Supreme Court, this test requires that,

> the economic factors which are related to the purposes of the act [referring to the Social Security Act] should be controlling rather than factors concerned with the physical performance of the work.

United States v. Silk, 331 U.S. 704, 705 (1947).

See also Lutcher, 633 F.2d at 883 ("The distinction between employment and an independent contractual affiliation depends upon the economic realities of the situation."); Mitchell v. Howard Memorial Hospital, 853 F.2d 762, 766 (9th Cir. 1988); E.E.O.C. v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) (the test instructs courts to examine "the economic realities underlying the relationship between the individual and the so-called principal . . ."); Vakharia v. Swedish Covenant Hosp., 765 F. Supp. 461, 466 (N.D. Ill. 1991) ("The term 'economic realities' refers to the 'degree of economic dependence of the worker on the putative employer.' (cite omitted)"); Norman v. Levy, 767 F. Supp. 1441 (N.D. Ill. 1991).

(4) The Maritime Industry

The maritime industry has not developed a clear industry standard which defines independent contractor status. It has been observed, however, that "individual fishermen have traditionally shared the boat owners' belief that they are self-employed." Rita, Note: Fishing for Dollars: The IRS Changes Course in Classifying Fishermen for Employment Tax Purposes, 77 CORNELL L. REV. 393, 431. Nevertheless, maritime cases regarding crewmembers status have come out both ways.

Holding that crewmembers are employees see e.g. United States v. Webb, Inc., 397 U.S. 179 (1970); Kirkconnell v. United States, 347 F.2d 260 (Ct.Cl. 1965); Cape Shore Fish Co., Inc. v. United States, 330 F.2d 961, (Ct.Cl. 1964); Jackson v. Phinney, 266 F. Supp. 835, (W.D. Tex. 1967); Capital Trawlers, Inc. v. United States, 216 F. Supp. 440 (D. Me. 1963); aff'd, 324 F.2d 506 (1st Cir. 1963).

For the contrary holding, i.e., that crewmembers are independent contractors see e.g. Maniscalco v. Director of Division of Employment Security, 327 Mass. 211, 97 N.E.2d 639 (1951) (exemplary of the factual grounding for an outcome that crewmembers were independent contractors. The modus operandi of putative employer was to take a vote among crewmembers as to where to fish, the type of fish and the selling price of catch.); Barrett v. Phinney, 278 F. Supp. 65 (S.D. Tex. 1968); Star Fish & Oyster Co. v. U.S., 223 F. Supp. 402 (S.D. Ala. 1963).

IRS publications cited by the Respondent reflect changes effected by the Tax Reform Act of 1976, currently codified at IRC §3121(b) (20)(1988). The cited provision addresses the employee/ independent contractor issue in the context of a maritime employer's tax liability in certain limited circumstances. IRC §3121 (b)(20).[2]

The parties cite the following extract.

> The Pan Fishing Co. engaged Mike Rose . . . Mike hires a crew of 15 to operate the vessel. He offers to pay each crew member the "lay" (sharing of the profit) basis. . . .
>
> The members of a fishing crew are generally employees either of the captain (if he is not an agent of the owner of the vessel) or of the vessel owner. Amounts paid to crew members on the "lay" basis are considered wages, and the agreements under which the crews are hired in these circumstances are contract of hire. . . .

This IRS example is similar to the employment arrangement reported by Respondent. Complainant's Brief, Exh. C-3. The example demonstrates that even under the IRS schemata, crewmembers are generally considered employees. IRS simply exempts, as a matter of policy, owners of vessels carrying less than 10 from obligations which generally attach to employers. IRS cautions that the exemption is in-

---

[2] Under §3121(b)(20) and related regulations, a crewmember is considered self- employed if: (1) the number of crewmembers during a given trip is under ten; (2) the boat's venture is to catch fish or other aquatic life, and (3) crewmember compensation is calculated on the basis of his/her share of the boat's catch or share of the proceeds from the boat's catch. See also IRS Publication #15; Circular E Employer's Tax Guide (Revised February 1992); Tax Guide for Commercial Fishermen.

tended only for IRS purposes, i.e., a "self-employed" crewmember under §3121(b)(20), may nevertheless be considered an employee for other purposes.[3] See Rev. Rul. 79-101, 1979-1 C.B. 156. Aside from the fact that IRCA liability attaches irrespective of the number of individuals engaged in the enterprise, the IRS exemption, by its own terms, does not extend beyond IRS application.

(5) IRCA Precedents

(a) U.S. v. Robles[4]

In Robles, the dispositive issue was whether certain roofers were employees or independent contractors. The judge held that the roofers were employees. The Robles analysis focused on a number of factors, e.g., the roofers did not have sufficient control over the work situation to determine their working hours; the employer and/or his representative was always present at the work site when the roofers were working; the work performed by the roofers required only low level skills; the roofers did not have business cards, business offices and did not advertise their services; the employer maintained workmen's compensation for the roofers. Employment status was found despite the fact that the roofers owned their own tools; employer tax returns denominated these individuals independent contractors; and the roofers were paid per square of roof laid, rather than by the hour.

The judge determined that the INS regulations were simply an amalgam of common law rules and the economic reality test. The Robles analysis reflects application of these rules and test and their legal progeny as persuasive authority. RESTATEMENT (SECOND) OF AGENCY, §220 (1958); N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 156 (1968); Silk, 331 U.S. at 704.

---

[3] Although the parties are not agreed that the terms "self-employed" and "independent contractor" status are synonymous, for purposes of this decision, it is a distinction without a difference.

[4] Robles, 2 OCAHO 309

(b) U.S. v. Mr. Z Enterprises, Inc.[5]

One strand of Mr. Z dealt with the independent contractor issue. An individual named in the complaint worked as a gardener. The dispo-sitive issue was whether he was an employee or an independent contractor of a construction company. The gardener was held to be an independent contractor.

Testimony showed that the gardener set his own hours, used his own tools and paid his own social security taxes. Furthermore, both he and the respondent understood the gardener to be an independent contractor. Additionally, the ALJ took judicial notice that general contractors often hire subcontractors, i.e., independent contractors such as gardeners.

The legal underpinnings of Robles and Mr. Z are identical, i.e., 8 C.F.R. §274a.l(j), general common law factors and the economic reality test. Due to factual differences, the cases rendered different outcomes.

B. Paperwork Liability

(1) Control

The element of control dominates independent contractor determination, whether the controlling authority is 8 C.F.R. §274a.1(j), IRCA caselaw, general common law and/or the economic reality test. Although the element of control is dominant, it is not the exclusive determinative element.

> Although a variety of factors may be used to analyze employment status, employer control over the manner in which the work is performed . . . 'is the basic test.' (cite omitted).

General Inv. Corp., 823 F.2d at 341.

See also Robles, 2 OCAHO 309 at 9; Mr. Z, 1 OCAHO 288 at 42; Mitchell, 853 F.2d at 766 (". . . we identified a number of factors that should be considered when determining whether an employment relationship existed, the primary one being the extent to which the 'employer' has a right to control the means and manner of the worker's performance."); Brown v. California, 743 F.2d 664, 667 (9th Cir. 1984)

---

[5] Mr. Z, 1 OCAHO 288. See also U.S. v. Eier, d/b/a/ Blue Mountain Recreation Bikes d.b.a. Blue Mountain Recreation and Cyclery, 1 OCAHO 256 (10/26/90).

("In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. . . . The California Supreme Court has emphasized that the most significant factor is the right to control the means by which the work is accomplished; the other factors are merely 'secondary elements.'" (cites omitted)); Marvel v. United States, 719 F.2d 1507 (10th Cir. 1983); Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717 (2d Cir. 1943) (Judge Learned Hand wrote, "[T]he test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said . . . "); Jones v. Goodson, 121 F.2d 176 (10th Cir. 1941); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 514 (N.D. Calif. 1976).

In the case at bar the parties have stipulated that although the crew may have some precatory discussion, Respondent's Captain has the final word regarding who will perform a specific function, the location of the actual fishing, acceptable behavior on board, and who will be terminated. Cf. Maniscalco, 327 Mass. at 211, 97 N.E.2d at 639. As in Robles, Bakovic or the Captain controls work hours. Moreover, Bakovic or his agent is physically present throughout the duration of the work relationship. The potential and actual worker control here is easily distinguishable from the control exercised by the gardener in Mr. Z or by the crewmembers in Maniscalco.

On the basis of the factual stipulation, the Respondent and/or his agent exercise virtually exclusive control over "the means and methods" for completing the job, by directing "the order or sequence in which the work is to be done and determines the hours during which the work is to be done." 8 C.F.R. §274a.1(j). I hold that the Respondent, and not the crewmembers, controls the workplace. Control being such a dominant characteristic in the independent contractor/employee dichotomy, such a determination augers heavily in favor of a finding that the crewmembers are employees.

(2) Other factors

(a) Tools and Equipment

According to §274a.1(j), the provision of tools and equipment is a hallmark of independent contractor status. Nevertheless, the roofers in Robles provided their own tools and equipment and were still held to be employees, and not independent contractors.

Here crewmembers supply some equipment, such as knives and foul- weather clothing, however Respondent supplies "most necessary equipment and supplies for catching fish, such as nets, hooks and bait." Stipulated Facts, (11/23/92). The crewmembers appear to provide a lower percentage of the working tools than were provided by the Robles roofers. I find that the circumstances described by the parties is more indicative of an employee relationship than an independent contractor relationship.

(b) Crewmember Payment

Crewmembers are paid by the "lay" system, i.e., pay is contingent on the size of the catch. Therefore, crewmembers undertake some econo-mic risk which resembles independent contractor risk. Arguably, such pay arrangements show that crewmembers have an "opportunity for profit or loss as a result of labor or services provided." 8 C.F.R. §274a.1(j).

In the maritime industry this type of crewmember payment is the custom, irrespective of independent contractor or employee status. The IRS Publication #595 example of crewmember employee status, supra at 8, follows industry custom. Even the IRC to which Respondent looks for persuasive authority, provides that vessels with more than 10 crewmembers are employees despite the "lay" mode of payment.

Given the circumstances of the present case, the industry customs, the IRS policy and in light of Robles, I am not persuaded that Bakovic's payment method leads to the conclusion that the crewmembers are independent contractors.

(c) Crewmember Independence

Freedom to contract with different employers is an independent contractor characteristic. Highly skilled individuals are those most able to arrange this type of work situation.

The parties stipulate that Bakovic's crewmembers may perform du-ties for other fishing vessels. However, the stipulated facts do not in-form whether or how frequently crewmembers actually work for others. The work of crewmembers does not require particularly high skills. The Stipulated Facts do not suggest that crewmembers have offices, business telephones or business cards. In Robles an absence of these independent contractor accouterments lead to the determina-

tion that the individuals in question were employees. Robles, 2 OCAHO 309 at 11.

Whatever theoretical potential the Stipulated Facts may provide for a finding of independent status, the record lacks facts demonstrating actual crewmember independence.

(3) Equities

Respondent's argument, that reliance on its IRS claim of crewmembers' self-employed status exonerates it from IRCA paperwork liability, has intuitive appeal. It is well accepted practice to use other statutes and caselaw as influential authority. The INS counter that the IRC and its regulations are not binding under IRCA is technically correct. That technicality does not preclude reference to the IRC for guidance.

In this case, where IRS explicitly limits the applicability of its own regulation, Respondent's equitable argument is not persuasive. Re-spondent's claim falls in view of the IRS caution that its independent contractor/employee distinction applies exclusively to the IRS. Rev. Rul. 79-101, 1979-1 C.B. 156. I do not find that the equities mandate a finding that the crewmembers are independent contractors.

(4) Liability Determination

Consistent with the agreed procedure in this case, I do not find that facts set out in the stipulation are in dispute. Therefore, an evidentiary hearing on the issue of liability is not required. Taking into account the considerations analyzed above, as applied to the Stipulated Facts, I hold that the individuals named in the complaint are employees. I find that Respondent violated 8 U.S.C. §1324a by failing to prepare Forms I-9 for such individuals and is liable for such violations.

C. Civil Money Penalties

This decision and order follows from the procedure adopted at the two telephonic prehearings, as confirmed by orders dated September 4 and November 24, 1992. By virtue of the conclusion that for purposes of §1324a liability the individuals named in the complaint are employees, Respondent is liable as a matter of law for a civil money penalty. 8 U.S.C. §1324a(e)(5). Subsection (e)(5) requires an assessment of not less than $100 and not more than $1000 "for each individual with respect to whom such violation occurred." INS

assessed a penalty of $500 for each of the 17 employees, a total of $8,500. This assessment is the approximate midpoint of the required range.

The INS assessment typically is the ceiling on the penalty I will consider. 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. M.T.S. Service Corp., 3 OCAHO 448 (8/6/92); U.S. v. Tom & Yu, 3 OCAHO 445 (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).

The Stipulated Facts were not intended to and do not address the appropriate penalty level to be adjudged. This decision and order invites the parties to address the penalty issue by filing statements, with attached exhibits as appropriate. Subject to the procedure set out in the last paragraph of this decision and order, the statements are in lieu of a confrontational evidentiary hearing on the issue of civil money penalties.

Subsection (e)(5) mandates five factors to be considered in adjudging the quantum of civil money penalties. The statutory factors are: (1) size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether or not any of the individuals were unauthorized aliens, and (5) whether there is a history of prior violations. Neither IRCA nor its legislative history explains the five factors.

The judge has discretion to consider factors other than those cata-logued by the statute. I recently held,

> 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) [3 OCAHO 447] 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.")

M.T.S. Service Corp., 3 OCAHO 448 at 4.

The evolving caselaw has borrowed a decisional standard in at least one respect, i.e., size. I have held the standard industrial classification (SIC) system utilized by the U.S. Small Business Administration (SBA) to be pertinent to § 1 324(a)(e)(5) decisionmaking. Widow Brown's Inn, 3 OCAHO 399 at 40; Tom & Yu, Inc., 3 OCAHO 445 at 4. Accord U.S. v. Ulysses, Inc., 3 OCAHO 449 (9/3/92) at 7. Under that system, a commercial fishing enterprise whose average annual receipts do not exceed $2,000,000 would be considered small. 13 C.F.R. §121.601. The Stipulated Facts establish that Respondent is a commercial fishing enterprise but they are silent as to its size.

Under §1324a, "ability to pay" has sometimes been addressed in context of size, See discussion M.T.S. Service Corp., 3 OCAHO 448 at 4. Lacking a better IRCA-related definition of size, I rely on the SIC paradigm as utilized by SBA. I do not consider "ability to pay" a determinant or consequence of size. Rather, I consider such ability to be a circumstance to be considered in addition to, but not in derogation of, size considerations.

III. *Ultimate Findings, Conclusions and Order*

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

1. Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing, as alleged in the complaint, to prepare employment verification forms with respect to the individuals named in the complaint, said individuals being found to be employees of Respondent at the time the forms should have been forthcoming;

2. The following procedure is adopted for adjudication of a just and reasonable civil money penalty which necessarily must consider the factors set forth in 8 U.S.C. §1324a(e)(5);

(a) Not later than February 1, 1993, Complainant shall file a statement in support of its assessment or of such lesser civil money penalty as it now supports.

(b) Not later than February 16, 1993, Respondent shall file a statement of position as to the penalty.

(c) I intend to issue a final decision and order which adjudicates a civil money penalty on the basis of submissions pursuant to subparagraphs (a) and (b), above. However, I will convene a telephonic prehearing conference to address whether to schedule a confrontational evidentiary hearing if:

(i) not later than February 29, 1993, either party files a pleading which makes a persuasive showing of the existence of a dispute of material fact as to the quantum of penalty, or

(ii) I determine sua sponte that there is such a dispute.

3. Upon conclusion of the procedure provided at paragraph 2, above, I will issue a final decision and order that will incorporate by reference this decision and order.

SO ORDERED.

Dated and entered this 15th day of January, 1993.

MARVIN H. MORSE
Administrative Law Judge