

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. 92A00238
LANDSCAPES BY SUSANNA,)
Respondent.)
_____)

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

On August 30, 1993, the Administrative Law Judge (hereinafter ALJ) issued a decision and order assessing civil penalties against the respondent in the above captioned proceeding for sixteen violations of the employment eligibility verification requirements of the Immigration Reform and Control Act, codified at section 1324a(b) of Title 8, U.S. Code. In a previous order in this proceeding dated July 26, 1993, the ALJ granted complainant's Motion for Summary Decision as to liability only and directed the parties to submit statements with regard to the application of the mitigating factors which, pursuant to section 1324a(e)(5), must be considered by the ALJ in determining the amount of a civil money penalty.

Although complainant submitted a statement indicating that it sought only the statutory minimum of \$100 for each violation, the respondent failed to submit any statement regarding the imposition of civil money penalties. The ALJ assessed the penalty for the sixteen violations at \$1,600.00 and directed respondent to pay the complainant that amount "on or before 30 days from the date of this Order . . ." ALJ's Decision and Order at 3.

The Chief Administrative Hearing Officer's Review Authority

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in section 1324a(e)(7) of Title 8, U.S. Code, and delegated to the Chief Administrative Hearing Officer in section 68.53(a) of Title 28, Code of Federal Regulations; I find it

necessary to modify the ALJ's August 30, 1993, order in the above captioned proceeding for the reasons set forth below.

Time Period for Payment of Civil Money Penalties

As previously noted, the ALJ directed respondent to pay complainant "on or before thirty days from the date of this Order, the total sum of one thousand six hundred dollars (\$1,600)." ALJ's Decision and Order at 3. As cited above, section 1324a(e)(7) of Title 8, U.S. Code, and section 68.53(a) of Title 28, Code of Federal Regulations, provide for administrative review of an ALJ's decision and order. Section 68.53(a) provides in pertinent part that:

(1) . . . within thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer may issue an order which modifies or vacates the Administrative Law Judge's decision and order.

(2) If the Chief Administrative Hearing Officer issues an order which modifies or vacates the Administrative Law Judge's decision and order, the Chief Administrative Hearing Officer's decision and order becomes the final agency decision and order of the Attorney General on the date of the Chief Administrative Hearing Officer's decision and order. If the Chief Administrative Hearing Officer does not modify or vacate the Administrative Law Judge's decision and order, then the Administrative Law Judge's decision and order becomes the final agency order of the Attorney General thirty (30) days after the date of the Administrative Law Judge's decision and order.

28 C.F.R. §68.53(a)(2).

Pursuant to section 1324a(e)(8) of Title 8, U.S. Code, and section 68.53(a)(3) of Title 28, Code of Federal Regulations, one adversely affected by a final agency order may file a petition for review of the final agency order with the appropriate circuit court of appeals within forty-five (45) days after the date of the final agency order.

Given this legislative and regulatory framework for administrative and/or judicial review, it was inappropriate for the ALJ to direct respondent to pay the civil money penalty by a date certain that falls before it is clear that the ALJ's order has become the final agency order.

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ACCORDINGLY,

I hereby MODIFY the sentence containing the above quoted language requiring payment "on or before thirty days from the date of this Order" to read as follows: "I direct Respondent to pay to Complainant a total of one thousand six hundred dollars (\$1,600)."

Modified this 10th day of September, 1993.

JACK E. PERKINS
Chief Administrative
Hearing Officer

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FINAL ORDER AND DECISION REGARDING
CIVIL PENALTIES

I. Introduction

In 1986, the Immigration and Nationality Act of 1952 ("Act") was amended by the Immigration Reform and Control Act (IRCA), which made significant revisions in national policy with respect to illegal immigrants. 8 U.S.C. §1324a. Accompanying other dramatic changes, IRCA introduced the concept of controlling employment of undocumented aliens by providing an administrative mechanism for imposition of civil liabilities upon employers who hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. In addition to civil liability, employers face criminal fines and imprisonment for engaging in a pattern or practice of hiring or continuing to employ such aliens.

Additionally, 8 U.S.C. § 1324a also provides that the employer is liable for failing to attest, on a form established by the regulations, that the individual is not an unauthorized alien, and that the documents proving identity and work authorization have been verified. Imposition of orders to cease and desist with civil money penalties for violation of the proscriptions against hiring, and authorizes civil money penalties for paperwork violations is authorized by the statute. 8 U.S.C. §1324a(e)(4),(5).

II. Procedural History

On July 26, 1993, I issued an Order in this matter finding abandonment of the hearing request by Respondent and an alternative Order granting Complainant's Motion for Summary Decision as to liability only. The Complainant was directed to file its statement with regard to the application of §274A(e)(5) of the Act on or before August 10, 1993. I also granted Respondent the opportunity to respond on or before August 10, 1993.

On August 5, 1993, I received Complainant's statement regarding application of §274A(e)(5) of the Act. In its statement, Complainant indicated that the INS sought only the "minimum" fine for each of the sixteen violations in the complaint for a total civil money penalty in the amount of \$1,600.00. Thus, in its discretion the INS did not request more than the statutory minimum penalty (\$100.00) for any of the sixteen "paperwork" violations.

To date the Respondent has not filed any statement regarding the imposition of the civil penalties.

III. Discussion

With respect to the determination of the amount of civil penalties to be set for violations of the paperwork requirements of 8 U.S.C. §1324a, Section 274A(e)(5) of the Act, which corresponds to 28 C.F.R. 68.52(c)(iv), states:

(T)he order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100.00 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 of not the individual was an unauthorized alien and the history of previous violation.

I have previously held that I am not restricted to considering only these five (5) factors, though, when making my determination. See U.S. v. Pizzuto, 2 OCAHO 447 (8/21/92).

IV. Factors Under Section 274A(e)(5)

Normally, I would elaborate on the mandatory factors to consider under §274A(e)(5) ie, size of business of the employer being charged,

good faith of the employer, seriousness of the violation, whether or not the individual was an unauthorized alien and history of previous violations of the employer, to determine the amount of civil monetary penalties. However, in this case since the Complainant has assessed the statutory minimum fines and the Respondent has not objected, it is not necessary for me to elaborate any further. Therefore, after careful review of the entire record, the parties' arguments and the relevant law, I find that, using a judgmental approach, the amount of civil penalties requested by the Complainant is appropriate and fair.

The Respondent is directed to pay to the Complainant, on or before 30 days from the date of this Order, the total sum of one thousand six hundred dollars (\$1,600.00).

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, the Chief Administrative Hearing Officer may issue an Order which modifies or vacates this Decision and Order.

IT IS SO ORDERED this 30th day of August, 1993 at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge