

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. 93A00018
PENROD NATIONAL)
ENTERPRISES, INC.,)
d.b.a. FLORAL BIONOMICS)
LANDSCAPE MANAGEMENT)
Respondent.)
_____)

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

On September 3, 1993, the Administrative Law Judge (hereinafter ALJ) issued a decision and order assessing civil penalties against the respondent in the above captioned proceeding for 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.

The three-count complaint in this proceeding alleged thirty-one (31) violations of the employment eligibility verification requirements. Count I alleged that the respondent failed to retain and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for two named individuals in violation of section 1324a(b)(3) of Title 8, U.S. Code. Count II alleged that the respondent failed to properly complete section 2 of the Forms I-9 for four named individuals in violation of section 1324a(a)(1)(B) of Title 8, U.S. Code. Count III alleged that the respondent failed to ensure that twenty-five (25) named employees properly completed section 1, and respondent failed to properly complete section 2, of the Forms I-9.

In a previous order in this proceeding, dated July 27, 1993, the ALJ granted complainant's Motion for Summary Decision only as to liability for the thirty-one (31) above enumerated violations and directed respondent, if it wished, to submit a statement on or before August 10, 1993, addressing the application of the five factors which, pursuant to section 1324a(e)(5), must be considered by the ALJ in determining the amount of a civil money penalty.

Respondent failed to submit any statement regarding the imposition of the civil money penalties. The ALJ assessed a total civil penalty of nine thousand seven hundred fifty dollars (\$9,750), which reflected a civil penalty of fifteen hundred dollars (\$1,500) for the two violations in Count I of the complaint, four hundred dollars (\$400) per violation for the four violations in Count II, and two hundred sixty-six dollars (\$266) for each of the twenty-five violations in Count III, and directed respondent to pay the complainant that amount "on or before thirty (30) days from the date of this Order." ALJ's Decision and Order at 5-6.

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 September 3, 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 (30) days from the date of this Order, the total sum of nine thousand seven hundred fifty dollars (\$9,750.00)." ALJ's Decision and Order at 6. 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) [W]ithin 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.

ACCORDINGLY,

I hereby MODIFY the sentence containing the above quoted language requiring payment "on or before thirty (30) days from the date of this Order" to read as follows: "I direct Respondent to pay to Complainant a total of nine thousand seven hundred fifty dollars (\$9,750)."

Modified this 22nd day of September, 1993.

JACK E. PERKINS
Chief Administrative Hearing Officer

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FINAL DECISION AND ORDER GRANTING
COMPLAINANT'S REQUEST FOR RELIEF
(September 3, 1993)

Appearances: Frederick E. Newman, Esq.
For Immigration & Naturalization Service

Kenneth N. Rivera, Esq.
For Respondent

Before: E. MILTON FROSBURG
Administrative Law Judge

I. Procedural History

On July 27, 1993, I issued an Order Granting Complainant's Motion To Strike Affirmative Defenses and also granting Complainant's Motion for Summary Decision. The detailed procedural history of this case is included in that Order.

In that order, I bifurcated the issue of the appropriate amount of civil money penalties and directed Respondent, if it wished, to submit a statement, on or before August 10, 1993, regarding the application of the five factors enumerated in 28 C.F.R. § 68.52(c)(iv). The Complainant had filed its statement with regarding to the application of 28 C.F.R. § 68.52(c)(iv).

To date, Respondent has not filed any statement regarding the appropriateness of the requested civil money penalties.

II. Facts

In my previous Order, I found Respondent liable in Count I of the Complaint for two (2) violations of failing to retain or make available for inspection the employment eligibility forms (Form I-9). 8 U.S.C. § 1324a(b)(5) and in Count II for four (4) violations of failing to properly complete section 2 of the employment eligibility verification form (Form I-9). 8 U.S.C. § 1324a(a)(1)(B). Also, I found Respondent liable in Count III in that Respondent failed to ensure that the twenty-five (25) named employee properly completed section 1 of the Forms I-9 and that Respondent failed to properly complete section 2 of said employment eligibility verification forms (Form I-9). Complainant has assessed total civil money penalties of nine thousand seven hundred fifty dollars (\$9,750.00) for these violations.

III. Civil Penalties

With respect to the determination of the amount of civil money penalties to be set for vi With respect to the obligations of the paperwork requirements of 8 U.S.C. § 1324a, § 274A(e)(5) of the Immigration and Nationality Act ("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 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 argues that Respondent should be considered a medium sized business and asserts: (1) that Respondent employed approximately forty-two (42) persons at the time of the I-9 audit. The Complainant had gross revenues of approximately \$1,00,000.00 during 1991. Respondent has offered no argument on this issue.

I agree with Complainant's position and find that Respondent is a medium sized business. As such, I will not mitigate with respect to this factor in Counts I, II and III and, in my discretion, will consider this factor when determining the appropriateness of the requested civil money penalties for all Counts.

2. Food Faith of the Employer

Complainant asserts that Respondent did not show good faith in its compliance with the requirements of 8 U.S.C. § 1324a. Complainant states that Respondent demonstrated negligence when it failed to complete forms I-9 for two (2) of its employees and failed to ensure proper I-9 completion for 29 other employees. Respondent has not offered any argument with regard to this factor.

I agree with Complainant that the facts indicate that there was no good faith effort on Respondent's part to comply with the requirements of 8 U.S.C. § 1324a. As such, I find that it would not be appropriate to mitigate based on this factor in all Counts.

3. Seriousness of the Violation

Complainant argues that failure to record identity and/or employment eligibility documentation in Section 2 of the Form I-9 is the type of violation which could permit illegal aliens to infiltrate the work force and is serious. Also, that failure to prepare the Form I-9 at all is a more serious violation because when no employment eligibility verification is done the Border Patrol has no way to confirm eligibility. Respondent has offered no argument with regard to this factor.

I agree with Complainant's argument that these violations are serious. See U.S. v. Dodge Printing, 1 OCAHO 125 (1/12/90) (paperwork violations may be serious violations of the Act.). Previous case law has found that a serious violation is one which "render(s) ineffective the Congressional prohibition against employment of unauthorized aliens". U.S. v. Valladares, 2 OCAHO 316 (4/15/92). Therefore, I find that Respondent is not entitled to mitigation in Counts I, II and III based on this factor, and, in my discretion, I will consider the seriousness of these offenses when determining the civil money penalties.

4. Whether or not the Individual was an Unauthorized Alien

Complainant asserted that there is no evidence to support the employment of an unauthorized alien. Respondent has offered no argument regarding this factor. As such, I will mitigate in Counts I, II and III based on this factor.

5. History of Previous Violations of the Employer

Complainant asserts that there were no previous violations of Section 274A by this Respondent. Respondent offered no argument with regard to this factor. As such, I will mitigate in Counts I and II and III based on this factor.

B. Amount of Civil Penalty

Complainant has assessed a total civil penalty in this case of nine thousand seven hundred fifty dollars (\$9,750.00), which reflects a civil penalty of one thousand five hundred (\$1,500.00) for two violations in Count I; four hundred dollars (\$400.00) for each of the four violations in Count II and two hundred sixty-six dollars (\$266.00) for each of the twenty-five violations in Count III.

After a careful review of the record and the parties' arguments, I find that, using a judgmental approach, the amount of civil money penalties requested by Complainant is reasonable and appropriate and well within the parameters of 28 C.F.R. § 68.52(c)(iv). Therefore, I direct Respondent to pay to Complainant, on or before thirty (30) days from the date of this Order, a total sum of nine thousand seven hundred fifty dollars (\$9,750.00).

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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 3rd day of September, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge