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. 93A00013
GIANNINI LANDSCAPING, INC.	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(November 9, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William F. Jankun, Esq., for Complainant.
Arthur J. Giorgini, 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. As confirmed by the Prehearing Conference Report and Order dated April 15, 1993, Giannini Landscaping, Inc. (Giannini or Respondent), acquiesces as to liability regarding all the individuals named in the complaint. Having stipulated to liability, only the amount of civil money penalties remains at issue.

The April 15, 1993 order set out an agreed schedule for filings by the parties as the predicate for final decision on a paper record. However, "against the possibility that Respondent at the time of its filings or the judge should express the need for an evidentiary hearing," August 12, 1993 was reserved for hearing. On May 17, 1993, the Immigration and Naturalization Service (INS or Complainant), filed a Motion For Approval of Complainant's Proposed Penalty Amounts. On May 19, Respondent filed a Motion for Denial of Complainant's Proposed Penalty Amounts. On June 7, Complainant filed a Memorandum in Opposition to Respondent's Motion For Denial of Complainant's

Proposed Penalty Amounts.* By order dated June 29, 1993, I recited that "Respondent's filing on the amount of penalty is silent as to an evidentiary hearing. Moreover, preliminary review of the submissions by both parties suggests there is a sufficient basis for decision without need for an evidentiary confrontation." There have been no subsequent filings by the parties.

The parties having agreed to resolution of the dispute upon a paper record, in lieu of a confrontational evidentiary hearing, this decision and order issues upon consideration of their documentary submissions.

INS assessed a total civil money penalty of $53,110, comprised as follows:

> Count I for failure to prepare and/or make available for inspection the employment eligibility verification form (Form I-9) for fifty-four (54) named individuals, $730 for one individual, Jose Genaro Lazo Cruz aka Genaro Lazo aka Genero Lazo, and $600 for the 53 other individuals, **$32,530** in the aggregate;
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> Count II for failure to ensure that employer properly completed §1, and failure to properly complete §2 of the Form I-9 for 13 named individuals, $730 each for four individuals, Jose Antonio Catalan Veliz, Guillermo Garcia Suret aka Guillerno Garcia, Eduardo Maldonado Jolan aka Edwardo Maldonado, Albric Alexander Morales Aguilera aka Alexander Morales, and $600 for the 9 other individuals, **$8,320** in the aggregate;
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> Count III for failure to properly complete §2 of the Form I-9 for 20 named individuals, $730 each for two individuals, Pracelis Mendez aka Pracelis Mendes, Jose Favio Santos Garcia, and $600 for the 18 other individuals, **$12,260** in the aggregate.

A. The Filings

(1) Motion For Approval of Complainant's Proposed Penalty Amounts

In support of the assessment at $53,110, INS relies on a Declaration of Special Agent Charles Mitchell (Mitchell). Mitchell contends that at the time of his investigation, Respondent employed at any one time 40 to 45 workers during the summer season and 20 in the winter season.

* Complainant's Opposition proposed that I not consider Respondent's Motion for Denial of Complainant's Proposed Penalty Amounts because it was filed two days late. INS suggested as an alternative that I treat Respondent's Motion as a rebuttal and disregard any subsequent submissions. As there were no further submissions, Complainant's request became moot.

Mitchell also states:

- On March 22, 1990 Respondent's manager Jim Pritchard received an educational visit from an INS special agent. He was briefed, given a copy of INS' Handbook For Employers, and the name and telephone number of the INS officer in the New York district to contact if he had additional questions.

- Respondent presented him with quarterly reports of wages, for the period from January 1, 1990 to September 30, 1991, which reports a payroll in excess of $200,000 per year. Mitchell contends that the size of Respondent's workforce and its financial resources indicate that it knew or should have known about the work authorization status of its employees and complied with the requirements of the Immigration and Nationality Act.

- By affidavit dated August 8, 1991, Jose Favio Santos Garcia (Santos) stated that when he was hired in June of 1990 he informed Respondent's President Mitchell Giannini that he was going to apply for a work permit with INS. Santos obtained work authorization on September 16, 1991. On October 17, 1991 Respondent presented an I-9 form dated October 9, 1991 for Santos without signing the certification.

- By sworn statement dated August 8, 1991, Jose Genaro Lazo Cruz (Lazo) said to be an unauthorized alien, stated that when he was hired in March 1991 Respondent's president told him that he should apply for work papers but that he "could work" while he was waiting for papers. Respondent failed to prepare or present a Form I-9 for Lazo at the time of the compliance inspection.

- By sworn statement dated August 8, 1991, Albric Alexander Morales Aguilleara (Morales) said to be an unauthorized alien, stated that when he was hired by Respondent in July of 1991, he told Respondent's president Mitchell Giannini that he was waiting for his passport from El Salvador in order to apply for work permission. Respondent presented a Form I-9 for Morales with only "Alexander Morales" handwritten on the form.

- Respondent should have presented I-9 forms for eighty-seven (87) employees. Instead, it failed to prepare or present I-9s for 54 of its employees and presented incomplete I-9 forms for all of its other 33 employees.

- On six of the I-9s, the only item completed was the name of the employee. Four of these employees, Jose Antonio Catalan Veliz, Guillermo Garcia Suret, Eduardo Maldonado Jolan and Morales, were said to be unauthorized aliens.

- Respondent failed to certify that it had seen the required documentation on all of the 33 incomplete I-9s, including that for Pracelis Mendez, said to be an unauthorized alien when he was hired on April 6, 1991 and whose I-9 form was dated October 9, 1991.

- Eleven of Respondent's employees had not attested to their status as U.S. citizens or authorized aliens.

(2) Motion For Denial of Complainant's Proposed Penalty Amounts

Respondent asks that I deny the proposed penalty amounts and instead impose the minimum civil money penalty for each violation. Respondent relies on the Declaration of Mitchell Giannini, president, sole officer and stockholder of Respondent. Respondent contends that Respondent's non-compliance was unintentional and not an act of bad faith.

Mitchell Giannini's declaration recites that Giannini operates a lawn maintenance and landscape service business with a seasonal workforce, June through September of 20 to 30 employees; not more than 10 in October and November; not more than four employees, December through March, and not more than 10 in April and May.

Respondent contends that those averages have pertained for the past three years. Except for 1992 and 1993, employee turnover was at a high rate. Respondent claims that:

- prior to the summer of 1991, it was unaware of the requirements of 8 U.S.C. §1324a regarding the preparation and maintaining Forms I-9 for all employees.

- the wage records that were presented to INS included I-9s for all employees in Respondent's employ on the date of inspection and for all employees hired thereafter.

- the accountant who maintained the employee records failed to inform Respondent of the requirements of §1324a.

Of the employees listed in the complaint, none were employed more than 90 days except

- #29 Lazo listed in Count I, said to be the same individual as #7 in Count II.
- #2 Veliz listed in Count II
- #1 Caceres, #3 Fattaruso, #6 Heinshon, #11 Mendez, #13 Morales, #14 Rodenzo, #17 Ruland, #18 Ruland and #20 Vilorio listed in Count III.

- all employees are part-time, working a maximum of 25 hours per week.
- Respondent readily made its records available and cooperated with INS.
- As Respondent reported a loss of $53,363 on its 1992 Income Tax Return, imposition of a penalty in excess of $100 per violation would cause it to go out of business; 20 to 30 persons would lose their jobs and there would be a loss of tax revenue to the federal government.
- This is the first and only complaint received by Respondent involving a violation of 8 U.S.C. §1324a.
- All employees listed in the complaint provided Respondent with copies of Social Security cards, and their names and addresses as required by the Respondent's accountant.
- Respondent acted in good faith and relied upon the advice and knowledge of its accountant.
- Respondent assumed that all of the persons listed in the complaint were eligible for employment or authorized to be employed as they all had Social Security cards.
- Once Respondent was made aware of the requirements of §1324a, it has complied with all requirements, and maintains complete and signed Forms I-9.

(3) Memorandum In Opposition To Respondent's Motion For Denial of Complainant's Proposed Penalty Amounts

Complainant points out that in contrast to the lower employment levels claimed by Respondent, Giannini's employment records from December 1989 to September 1991 show that Respondent employed from 27 to 33 employees in May of 1990, from 17 to 29 employees between October and December 1990, and from 17 to 27 employees from April to May 1991.

Complainant notes also that in contrast to Respondent's claim that prior to 1992, employee turnover was at a high rate, Giannini's Exhibit B shows that during the period December 28, 1989 to September 25, 1991, except for the end of March, Respondent never hired more than four employees per week and, during many weeks hired either none or one employee.

In contrast to the good faith claims, including Respondent's assertion that it relied on its accountant and did not know of §1324a obligations until the summer of 1991, Complainant refers to the March 1990 INS educational visit. Complainant relies also on its contention, reported by Agent Mitchell, that at least one unauthorized alien claims he was told he should apply for papers and two aliens told Mr. Giannini they were going to apply for permission to work, and were hired anyhow. Moreover, of the 42 employees in 1991, 15 had been employed in 1990 as shown in Exhibit B, in contrast to Respondent's claim that most of the 1991 employees had not worked there in 1990. Complainant points to two individuals identified on the payrolls records as Lazo, each with a different first name and differing social security numbers in response to Respondent's claim that INS had double-counted an employee named Lazo.

INS asks that I reject Respondent's claim that it is financially unable to pay the penalty assessed by Complainant, noting that the only documentation proffered is the 1992 Income Tax return showing a loss of $53,363. The reported loss reflects compensation officer of $79,200, paid exclusively to Mr. Giannini as the sole officer. Complainant asserts also that Respondent's claim of inability to pay omits income from rental property and interest of $14,726. Based on the above, Complainant contends Respondent's claim of financial inability should be rejected.

II. *Discussion*

A. Statutory Framework

Title 8 U.S.C. §1324a(e)(5) sets out the statutory parameters for assessment and adjudication of the civil money penalty. Each 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, it has been my practice to 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, 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). Since the record here does not disclose any such unanticipated facts, I have no reason to increase the penalty beyond the INS assessments which vary from $600 to $730 per violation. At the minimum asked by Respondent, the penalty would be $ 8,700.

Upon 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 the facts of each case to the factors, I utilize a judgmental rather than a formulaic analysis. Tom & Yu, 3 OCAHO 445; 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 with the five statutory factors.)

B. Statutory Factors Applied

On motion practice, the parties do not address all of the five factors. INS challenges Respondent's good faith, insists not only that several of the individuals named in the complaint were unauthorized aliens, but that the I-9s as to several were incomplete, and as to two, unattested. INS also questions the inability to pay claim. Respondent claims payment of more than $100 per individual will put it out of business, asserts its violation was unintentional, that its good faith is supported by its having only employees with social security cards, that it is now in compliance, and provides payroll numbers.

(1) Previous Violations

It is uncontested that Respondent has no history of previous viola-tions, a factor which mitigates the penalty on behalf of Respondent.

(2) Named Individuals as Unauthorized Aliens

Although Respondent claims all employees had social security cards, its payroll records contrast with the claim it has only one employee named Lazo, suggesting less than perfect attention to social security data. Significantly, Respondent does not dispute Agent Mitchell's assertion that three employees were known to Respondent not to have work authorization, and that another four were unautho-rized aliens.

For purposes of this decision, at least seven of the individuals hired by Giannini were unauthorized to work. One individual who began working for Respondent in June of 1990, applied for work authorization, but was not granted authorization until September 16, 1991. One of two individuals named Lazo, an unauthorized alien hired by Respondent in May of 1991, was told he should apply for work papers and that he "could work" while he was waiting for authorization. One employee, Morales, informed Respondent that he was waiting for his passport to come from El Salvador so that he could apply for work

authorization. I conclude that Respondent employed unauthorized aliens, a factor which aggravates the penalty as to seven of 87 individuals. See e.g., U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91).

(3) Good Faith of the Employer

OCAHO rulings indicate that the mere existence of paperwork violations is insufficient to show a "lack of good faith" for penalty purposes. See United States v. Valladares, 2 OCAHO 316 (4/15/91). Instead, in order to demonstrate a "lack of good faith" the record must show culpable behavior beyond mere failure of compliance. See United States v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91).

Here, there is more than mere failure of compliance. Although Respondent blames its accountant for not alerting it to IRCA obligations, it does not rebut the fact that INS had made an educational visit to Giannini's manager, Jim Pritchard as early as March 22, 1990. The INS agent briefed Mr. Pritchard on the requirements of §1324a, and provided him with a copy of the INS Handbook for Employers. Failure by the employer to attest to I-9s frustrates Complainant's ability to audit an employers's effort at compliance. U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90).

I conclude that Respondent has failed to evidence good faith compliance. To the contrary, failure to present I-9s for 54 employees while at the same time presenting incomplete I-9s for 37 others, reflects at best a disinterest in compliance responsibility. I conclude that Respondent has not acted in good faith, a factor which aggravates the penalty. I note, without affect on the penalty adjudication, that Respondent's dissembling and pointing at its accountant does not inform the record. Instead, much of Respondent's protestations of good faith address liability, no longer an issue.

(4) Size of Business of Employer

Neither IRCA nor the relevant procedural regulations provide guide-lines to use in determining business size. See Tom & Yu, Inc., 3 OCAHO 445; Felipe, 1 OCAHO 93. The parties are not in agreement as to the maximum number of individuals employed by Giannini. However, on analysis of Respondent's payroll records, Complainant's Opposition adopts a figure of 33 employees a figure substantially similar to Giannini's claim of 20 to 30. The contentions are in

substantial equilibrium. Accepting 33 as the high, I find that Giannini employs an average of substantially fewer than 33 employees. There is no dispute that this is a seasonal business, with substantial turnover and significantly lower employment levels in off-season. Its gross profit for 1992 was $267,286. Accordingly, I conclude that Giannini is a small enterprise, a factor which mitigates the penalty. See, e.g., U.S. v. Camidor Properties, 1 OCAHO 299 (2/25/91).

(5) 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 comprise counts II and III of the complaint were all flawed. Count I implicates 54 employees as to whom there were no I-9s presented. Of the 33 forms presented, only the employees' names appeared on six, four of whom were unauthorized. None of the 33 were attested. 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.

The earliest decision on a litigated record which applied 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 was adjudged at the statutory minimum. Big Bear, 1 OCAHO 48. In contrast to Big Bear, the violations in the present case are more than inadvertent. The presentation of incomplete I-9s while omitting others is more than mere negligence. The seriousness of the deficiency is compounded by the breach of the employer's duty to assure proper entries by the employee. Precedent holds that an employer's failure to ensure proper employee entries constitutes a serious violation. J.J.L.C., at 10. Furthermore, Respondent's failure to sign any Form I-9 is also more than negligence in light of the explicit certification requirement at §2 of the Form I-9. I find the violations to be serious because they "frustrate national policy." Id.

Applying OCAHO precedent to the facts of this case, I conclude that the violations are serious, a factor which aggravates the penalty.

(6) Additional Factors to Consider

Both parties address ability to pay. As I have previously held, in U.S. v. M.T.S. Service Corporation, 3 OCAHO 448 (8/26/92), at 4,

> 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 disagree with Respondent that its 1992 Federal Income Tax return is probative of its financial ability to pay a civil money penalty of more than the statutory minimum. Rather, I agree with Complainant's analysis set forth in its opposition.

C. Civil Money Penalties Adjudged

In determining the appropriate assessment levels, I have considered the range of options between the statutory floor and the amounts assessed by INS. While I do not find a basis for reducing the sums to the minimum, I conclude that the INS assessment is disproportionately large in relation to the annual dollar volume of Respondent's business. The only year's performance shown on the record is 1992 when Giannini's annual receipts totaled $540,000. A penalty of $53,000 against an enterprise of that dimension is unduly punitive. I have considered Respondent's size in terms of annual receipts, in context of the seriousness of the violations, the lack of good faith, the presence of unauthorized aliens and the absence of prior violations. It is appropriate to adjudge the civil money penalties, count by count, implicitly reflecting the statutory factors, but not allocating differential penalties to the unauthorized aliens. Having considered the statutory factors in context of the foregoing discussion, I adjudge the civil money penalty in the amounts set forth below.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, 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,	$350.00 as to each named individual,	$18,900
Count II,	$200.00 as to each named individual,	$ 2,600
Count III,	$250.00 as to each named individual,	$ 5,000

For a total of **$26,500**.

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). As provided at 28 C.F.R. §68.53(a)(2), 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.

SO ORDERED.

Dated and entered this 9th day of November, 1993.

MARVIN H. MORSE
Administrative Law Judge