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. 92A00215
DAVID DAY d.b.a. DAVID DAY MASONRY Respondent.	)	

FINAL DECISION AND ORDER REGARDING
CIVIL MONEY 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 August 20, 1993, I issued a Decision and Order in this matter granting Complainant's Motions for Sanctions, Renewed Request to Deem Request for Admissions Admitted and Motion for Dismissal of Request for Hearing based upon abandonment. However, Complainant at that time did not address the five (5) factors regarding § 274A(e)(5) of the Act for me to consider prior to arriving at civil money penalties. Therefore, I directed the Complainant to submit a statement or memorandum to me, within fifteen (15) days of receipt of my order, addressing those issues. I also permitted the Respondent to address these issues, if it wished.

On August 24, 1993, for good cause, I granted Complainant's unopposed Motion requesting an enlargement of time to September 13, 1993 to file its Memorandum on the civil money penalties.

On September 27, 1993, I received Complainant's Memorandum regarding application of § 274A(e)(5) of the Act. In its Memorandum, Complainant urged the court to increase the civil money penalties from the amount requested in the Complaint.

To date, Respondent has not filed any statement or memorandum regarding the imposition of the civil money penalties.

III. *Discussion*

With respect to the determination of the amount of civil money 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 or 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).

The statute also states that the civil money penalty with respect to a knowing hire/continuing to employ violation is:

> (1) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred;

> (2) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
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> (3) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph,

8 U.S.C. § 1324a(e)(4)(A).

A reading of the above statute shows that in contrast to 8 U.S.C. § 1324a(e)(5), when considering the appropriate amount of civil penalties to set for knowing hire/continuing to employ violations, of the Act, the statute is silent as to any mandatory or discretionary considerations. 8 U.S.C. § 1324a(a)(1)(A), (a)(2); U.S. v. Buckingham Ltd., 1 OCAHO 151 (4/6/90). Thus, it is left to my sound discretion to set the civil penalty amount for knowing hire/continuing to employ violation, although I generally consider the five factors in my determination. It is important to note that I am not bound in my determination of the civil penalty amounts by Complainant's request in its Complaint. See, in general, 8 U.S.C. § 1324a; U.S. v. Cafe Camino Real, Inc., 2 OCAHO 307 (3/25/91); U.S. v. Lane Coast Corporation, Inc., 2 OCAHO 379 (9/30/91).

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

1. Size of the Business of the Employer Being Charged

In its Memorandum, Complainant characterized the Respondent's business as being small to medium-sized and indicated that at the time of audit, Respondent employed approximately twenty-five employees. Complainant also indicated that Respondent had not provided it with sufficient financial information, despite discovery requests, to enable it to accurately assess Respondent's financial situation. Respondent did, however, supply a Schedule C (Form 1040) for 1992, which indicated that the Respondent was certainly not a large-sized company. Complainant suggested that, because the Respondent disobeyed the court's order and had not provided financial or other information enabling an accurate determination of its business size, its answers to the discovery request should be inferred as adverse to the Respondent. Thus, Respondent should be found to be a small-to-medium-size business with a fine amount aggravated accordingly.

Respondent has not addressed this factor. After a review of the full record in this case, and based on the information before me, I find that the size of the Respondent's business will be considered small to medium size. I will not mitigate on this factor.

2. Good Faith of the Employer

I have reviewed the record in this case and find that Respondent has not acted in good faith in its responsibility to comply with the requirements of IRCA. I base this on the fact Respondent has not properly completed its Forms I-9, has not complied with its affirmative duty with regard to completion of Section 1 and/or Section 2 of the Form I-9, and has hired unauthorized workers.

The Respondent has not addressed this factor. I will not mitigate based on this factor.

3. Seriousness of the Violation

In my decision of August 20, 1993, I found that Respondent had hired three named individuals, after November 6, 1986, who were not authorized for employment in the United States and that Respondent knew that they were not authorized for employment in the United States. Additionally, in the alternative, I found that Respondent continued to employ these individuals knowing that they were not authorized for employment in the United States. I also found that Respondent failed to prepare the Forms I-9 for two-named individuals in violation of the Act and that Respondent failed to ensure that four- named individuals properly completed Section 1 of the Form I-9 and that these individuals were hired after November 6, 1986. I further found that the Respondent failed to complete Section 2 of the Forms I-9 for three-named individuals and also failed to complete Section 2 of the Forms I-9 within three business days of the hire with respect to one named individual hired after November 6, 1986. These actions were in violation of Section 274A(1)(b) of the Act.

The Respondent has not responded to this factor. After a review of all the information of record and relevant case law, I find that the above mentioned violations are all serious and therefore, I will not mitigate based on this factor.

4. Whether or Not the Individual was an Unauthorized Alien

As to Count I, all three individuals have been found to be unauthorized aliens. Respondent has made no argument based on this factor. I will not mitigate based on this factor.

As to Count II, the two named individuals are also named in Count I and are unauthorized aliens. Respondent has made no argument based on this factor. I will not mitigate based on this factor.

As to Count III, none of the individuals are unauthorized aliens. Respondent has made no argument on this factor. I will consider this when determining the civil money penalty.

As to Count IV, none of these individuals are unauthorized aliens. Respondent has made no argument on this factor. I will consider this when determining the civil money penalty.

As to Count V, this individual is not an unauthorized alien. Respondent has made no argument on this factor. I will consider this when determining the civil money penalty.

5. History of Previous Violations

In its memorandum, the Complainant argued that there is no history of previous violations concerning this Respondent and that, therefore, this is not an aggravating nor a mitigating factor.

The Respondent did not respond to this factor. After careful review of all the evidence of record, I have determined that I will consider this when determining the civil penalties.

6. Civil Penalty Amount

In the conclusion of its Memorandum, Complainant urged the court to increase the fine penalty amount from that originally requested in the Complaint. Complainant refers the court to U.S. v. Ebrahim Banafsheha, 3 OCAHO 525 (9/13/93) wherein, upon modification of an ALJ Decision, the Chief Administrative Hearing Officer declared that the ALJ can increase or decrease the fine amounts proposed by the INS after considering the five factors, as long as his decision is not capricious or arbitrary.

I am in agreement with Complainant that this particular Respondent did not act in a candid or respectful manner in dealing with the INS or the court. However, I must keep in mind that the function of the court, basically, is to make sure that Respondent is in compliance with the law; it is not to levy a fine which may be so severe as to put the Respondent out of business.

In Count I of its Complaint, the Complainant requested a civil money penalty in the amount of $2,850.00, i.e., $950.00 for each violation.

In Count II of the Complaint, Complainant requested civil money penalties in the amount of $920.00 for two individuals i.e., $460.00 for each individual violation.

In Count III of the Complaint, Complainant requested civil money penalties in the amount of $920.00, i.e., $230.00 for each of the four individuals named.

In Count IV of the Complaint, Complainant requested civil money penalties of $690.00, i.e., $230.00 for each of the three individual violations.

In Count V of the Complaint, Complainant requested civil money penalties in the amount of $230.00 for the one in violation.

Thus, in total the civil money penalties requested amounted to $5,610.00

After, careful consideration and review of my findings with regard to the five factors of § 274A(e)(5), the entire record of evidence in this matter, and using a judgmental approach, I have determined that the requested civil money penalties by the INS of $5,610.00 is well within the parameters of 28 C.F.R. 68.52(c)(5) and is found to be reasonable and appropriate under the circumstances of this particular case.

Thus the Respondent is Ordered to pay to Complainant the sum of $5,610.00 in civil money penalties and to cease and desist from violating the proscriptions against hiring and/or continuing to employ unauthorized aliens in the United States, pursuant to 8 U.S.C. § 1324a.

Pursuant to 28 C.F.R. 68.53(a), this Decision and Order is the final Decision and Order of the Attorney General unless within thirty days from this date, the Chief Administrative Hearing Officer shall have modified or vacated this Decision and Order.

IT IS SO ORDERED this 10th day of November, 1993 at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge