UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 15, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	Case No. 93A00093
TASK FORCE SECURITY, INC., D/B/A TASK FORCE SECURITY AND INVESTIGATIONS, Respondent.	)	

DECISION AND ORDER

Procedural History

On May 7, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced these proceedings by filing the five-count Complaint at issue. Complainant has assessed a civil money penalty of $600 for each of the 151 violations alleged therein, for a total proposed civil money penalty sum of $90,600, as opposed to the sum of $91,200, which is contained in the Prayer for Relief portion of the Complaint, as well as in complainant's October 26, 1994 Motion for Approval of Complainant's Proposed Civil Penalties.

The $600 differential is attributable to an arithmetic miscalculation in computing the total civil penalties in Count IV. Complainant assessed $600 civil penalties for each of the 76 alleged violations therein and inadvertently computed the proposed total civil penalty sum for that count as being $46,200, rather than $45,600.

Count I alleged that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Form (Form I-9) for the individual named therein, in violation of the provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(B). Complainant proposed a civil money penalty of $600 for that alleged violation.

In Count II, complainant charged respondent with having violated IRCA, 8 U.S.C. §1324a(a)(1)(B), by having allegedly failed to ensure that the 66 employees listed therein properly completed Section 1 of their pertinent Forms I-9, and by having allegedly failed to properly complete Section 2 of those forms. Complainant assessed a total civil penalty of $39,600 on that count, or $600 for each of those 66 alleged violations.

In Count III, it was alleged that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B), by having failed to ensure that the six (6) employees listed therein properly completed Section 1 of their pertinent Forms I-9. Complainant assessed a $600 civil money penalty for each of those six (6) alleged paperwork violations, or a total civil money penalty of $3,600.

Count IV alleged that respondent violated the provisions of IRCA, 8 U.S.C. §1324a(a)(1)(B), by having failed to complete Section 2 of the pertinent Forms I-9 relating to the 76 employees listed therein. For each of those 76 alleged paperwork violations, complainant levied a civil money penalty of $600, or a total civil money penalty of $45,600.

In Count V, complainant asserted that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B), by having failed to update the pertinent Forms I-9 for the two (2) individuals named therein to reflect that those individuals are still authorized to work in the United States. Complainant assessed a civil money penalty of $600 for each of those alleged violations, for a total civil money penalty of $1,200 for those alleged violations.

On June 1, 1993, respondent filed its Answer, asserting therein:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. That the original I-9 form, dated 05/07/87, which was the form given to respondent, was confusing and unclear, especially as to Part 2, and that as a result of ambiguities and incomplete instructions in the original I-9, the INS revised the document, as of 11/21/91.

6. That, in view of the misleading or unclear condition of the I-9, together with the fact that respondent had had no advice, training, information or other contact prior to the inspection visit, that employer had substantially complied with the requirements of the statute.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

7. That there was no mens rea: that one of the elements of the violation, **knowingly** employing unauthorized persons, or failing to complete the required documentation, was not present. The employer did not knowingly hire unauthorized persons, and, as soon as the employer became aware of the I-9 requirement, without the assistance or advice of the INS, the employer did the best they (sic) could, with the deficient forms and incomplete advice or training, to comply.

Answer, ¶¶5-7.

On June 7, 1993, complainant filed a Motion to Strike Affirmative Defenses, pursuant to 28 C.F.R. section 68.9(d), and Rule 12(f) of the Federal Rules of Civil Procedure.

On June 7, 1993, complainant also filed a Motion for Judgment on the Pleadings, asserting therein that it was entitled to judgment as a matter of law on the undisputed facts of record.

On June 25, 1993, the undersigned issued an Order Granting in Part and Denying in Part Motion to Strike Affirmative Defenses and Denying Motion for Judgment on the Pleadings. In that Order, respondent's second affirmative defense was ordered stricken, and respondent was instructed to submit a pleading detailing its allegations in connection with its first affirmative defense, substantial compliance.

In addition, because respondent had failed in its Answer to deny any of the allegations contained in the Complaint, that Order further provided that respondent would ordinarily have been deemed to have admitted all of the allegations in the Complaint. 28 C.F.R. §68.9(c)(1). But since respondent had pleaded substantial compliance to the alleged paperwork violations, complainant was not entitled to judgment on the pleadings concerning the alleged facts of violation.

On July 7, 1993, the undersigned held a telephonic prehearing conference with the parties, in which respondent's counsel asserted that respondent would file an amended answer on or before August 2, 1993, detailing the manner in which it had substantially complied with the paperwork requirements of IRCA, 8 U.S.C. §1324a.

On August 26, 1993, complainant filed a Motion to Strike the Affirmative Defense of Substantial Compliance, asserting therein that

respondent's affirmative defense of substantial compliance as asserted in its Answer should be stricken since it fails to comport with the procedural regulations and interpreting caselaw.

On August 26, 1993, also, complainant separately filed a Motion to Compel Respondent to Answer Complainant's First Interrogatories and to Respond to Complainant's First Request for Production of Documents, and a Motion for Judgment on the Pleadings.

On August 31, 1993, respondent filed a letter requesting an extension of time to respond to those three (3) motions. That request was granted, and the time for its responses to those motions was extended to September 16, 1993.

By September 23, 1993, however, and continuing to date, respondent has failed to file its promised amended Answer, its response to complainant's Motion to Strike the Affirmative Defense of Substantial Compliance, and its response to complainant's Motion for Judgment on the Pleadings.

Because respondent's first affirmative defense, that which asserted substantial compliance, was impermissibly and solely based upon a conclusory set of facts, a defect that respondent was given the opportunity, but failed, to remedy, the undersigned ordered that that remaining affirmative defense also be stricken on that date.

Resultingly, because respondent was deemed to have admitted the allegations contained in Counts I, II, III, IV, and V, and also because there are no remaining defenses, the undersigned found respondent liable for all 151 violations in the Complaint. Accordingly, on September 23, 1993, complainant's Motion for Judgment on the Pleadings was granted.

In the Order granting complainant's Motion for Judgment on the Pleadings, the undersigned stated that appropriate civil money penalties for those violations, utilizing the five (5) criteria set forth at 8 U.S.C. §1324a(e)(5), would be ordered following an evidentiary hearing conducted solely for that purpose.

Those statutory criteria to which due consideration shall be given are (1) the size of the business of the employer being charged; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized alien, and (5) the history of previous violations.

On October 26, 1993, complainant filed a Motion for Approval of Complainant's Proposed Penalty Amounts, with a supporting Memorandum, requesting that the undersigned approve complainant's proposed penalty amounts, that respondent be ordered to pay civil money penalties totaling $91,200, as initially proposed, and that complainant be granted any other appropriate relief.

On October 28, 1993, the undersigned held a telephonic prehearing conference with counsel for the parties, during which respondent's counsel stated that he wished to file a reply to complainant's October 26, 1993 Motion. The undersigned informed the parties that, depending upon respondent's reply, appropriate civil penalties would either be assessed based upon the relevant evidence adduced at a hearing scheduled in New York City solely for that purpose, or, in the alternative, through the use of briefs, should the parties favor that procedure over an evidentiary hearing.

On November 8, 1993, respondent filed a Memorandum of Law in Opposition to Complainant's Motion for Approval of Proposed Penalty Amounts, in which respondent took issue with the methodology utilized by complainant in computing the proposed civil money penalty sums, asserting that complainant had failed to consider the reality of respondent's situation and had also failed to follow the 14-page Guidelines for the Determination of Employer Sanctions Civil Money Penalties, set forth by the Commissioner of INS, copies of which respondent supplied.

Civil Penalties

As noted previously, in determining the amount of the penalty to be imposed for paperwork violations, IRCA provides:

> With respect to a (paperwork violation), the order under this subsection shall require the person or entity to pay a civil penalty in the amount of not less that $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 violations.

8 U.S.C. § 1324a(e)(5).

Complainant seeks a civil money penalty of $600 for each of the 151 violations contained in the five-count Complaint, for a total civil money penalty of $90,600, as herein amended.

1. Size of Respondent's Business

The first statutory criterion to be considered in determining the appropriate penalty is the size of respondent's business.

Neither IRCA nor the relevant procedural regulations provide guidelines for use in determining business size. See United States v. Tom & Yu, Inc., 3 OCAHO 445 (8/18/92). Among factors previously considered in determining the size of a business entity for the purpose of assessing the appropriate civil money penalty are those of revenue or income, the amount of payroll, the number of salaried employees, the nature of ownership, the length of time in business, the nature and scope of the business activity, and profitability. See United States v. Felipe, 1 OCAHO 93 (10/11/89).

Complainant contends that the respondent firm is a large business, which is solely owned by Frank Maddalena, which has been doing business for over 10 years, and which appears to have increased its assets from $62,237 in 1989 to $1,098,583 in 1992.

According to respondent's tax returns, copies of which were submitted by complainant with its Motion, respondent reported significantly higher gross receipts over the past four (4) years, i.e. $2,135,296 in 1989, $2,804,954 in 1990, $3,607,288 in 1991, and $4,453,866 in 1992.

Because respondent was in the business of providing services, there is only an indirect correlation between the size of that business and respondent's gross revenues. United States v. Guewell and Cooper, 3 OCAHO 478, at 6 (12/17/92). More illustrative of the size of the business is its profit or loss. Id.

Respondent asserts that it incurred operating losses in 1989 and in 1991, and that it had earned a profit of less than two percent (2%) in 1990 and less than three percent (3%) in 1992. Respondent's Opposition, at 3.

Based upon this evidence, it is found that respondent is a small-to-medium-sized business. Accordingly, the proposed civil money penalty will be mitigated for this factor. See United States v. Mid-Island Jericho Motel, 3 OCAHO 485, at 3 (11/3/92); United States v. The Body Shop, 1 OCAHO 185, at 9 (6/19/90).

2. Good Faith

The next factor required to be considered in determining the appropriate civil money penalty is respondent's good faith. Again, the statute and regulations fail to define good faith in this context. See Tom & Yu, 3 OCAHO 445, at 5; Felipe, 1 OCAHO 93, at 9. While it is unclear from the statute what constitutes "good faith" on respondent's part, the mere existence of paperwork violations standing alone is insufficient to show a "lack of good faith" for penalty purposes. See United States v. Guewell and Cooper, 3 OCAHO 478, at 6 (12/17/92); United States v. Valladares, 2 OCAHO 316 (4/15/91).

Rather, in order to show a "lack of good faith" for the purpose of aggravating the penalty amount, complainant must demonstrate culpable behavior beyond mere ignorance on the part of respondent. See United States v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91); United States v. O'Brien, 1 OCAHO 166 (5/2/90).

In the Memorandum in support of its Motion, complainant contends that on August 7, 1990, the United States Department of Labor conducted an informational visit to respondent's place of business, at which time respondent was provided with IRCA-related publications. Complainant contends that, in spite of this visit, 151 of the Forms I-9 at issue were seriously defective.

In its defense, respondent asserts that it never received any manuals, educational visits, or other information from the Immigration and Naturalization Service (INS), complainant's enforcement agency, and that its only contact with the employment eligibility verification system was the aforementioned August 1990 visit by the Department of Labor personnel. Furthermore, respondent argues, the violations at issue resulted from its carelessness in recordkeeping, and not from a disdain for or gross disregard of the employer sanctions system. For these reasons, respondent contends that it has demonstrated good faith under these facts.

Respondent's contentions notwithstanding, review of the Forms I-9 at issue reveals an indifference on respondent's part concerning their proper completion. Accordingly, respondent is not entitled to mitigation of the proposed civil money penalty sums based upon good faith.

3. Seriousness of the Violation

The third element which must be taken into account concerns the seriousness of the violations involved.

The "seriousness of the violation" factor refers to the degree to which the respondent being charged has deviated from the proper Form I-9 completion format. United States v. Tuttle's Design Build, 3 OCAHO 422, at 4 (4/21/92). A violation is "serious" if it renders ineffective the Congressional prohibition against the employment of unauthorized aliens. Valladares, 2 OCAHO 316, at 7. This factor is to be considered in context of the factual setting of the particular case. United States v. M.T.S. Serv. Corp., 3 OCAHO 448, at 4 (8/26/92).

Complainant asserts that the paperwork violations at issue are particularly serious, noting that respondent has failed to provide any information establishing the identity or employment eligibility of any of the 142 employees whose Forms I-9 are at issue, thereby defeating the principal purpose of the employment eligibility verification system, i.e., "allow(ing) an employer to ensure that it is not hiring anyone who is not authorized to work in the United States." Complainant's Memorandum, at 4-5 (quoting United States v. Eagles Groups, Inc., 2 OCAHO 342, at 2 (6/11/92)).

Complainant also asserts that respondent's actions, particularly its failure to have guaranteed that its employees had indicated their immigration status and its failure to have also guaranteed that those same employees had dated and signed the forms, demonstrates an obvious disregard for section 1 of the Forms I-9.

In opposition, respondent, while admitting to "substantial carelessness," asserts that those conceded acts of indifference should be mitigated because it has never received an educational visit or materials from INS and also by the fact that its in-house procedures eliminated the possibility of it knowingly having hired an unauthorized alien.

A failure to prepare and/or present a Form I-9, as is established in Count I, must be categorized as serious because such conduct subverts the purpose of IRCA. Therefore, where an employer has failed to prepare or present a Form I-9, it is appropriate to assess a greater fine. Tuttle's Design Build, 3 OCAHO 422, at 4; United States v. A-Plus Roofing, Inc., 1 OCAHO 209, at 5 (7/27/90).

In addition, the failure of an employee to complete the attestation portion of section 1 must also be regarded as serious because such admitted failure subverts the Congressional mandate that employees attest under penalty of perjury that they are authorized for employment in the United States. Guewell and Cooper, 3 OCAHO 478, at 7. Most of the Forms I-9 implicated in Counts II and III are deficient in this manner.

Furthermore, failure to complete any portion of section 2 of the Form I-9, as is evidenced in Counts II and IV, is viewed as a serious violation. Id.; United States v. Ulysses, Inc., 3 OCAHO 449, at 7 (9/3/92); United States v. Acevedo, 1 OCAHO 95 (10/12/89).

Finally, respondent's failure to have updated Forms I-9 for the two individuals named in Count V must be viewed as serious, also, because it represents a failure on respondent's part to guarantee that no unauthorized individuals are in its employ, thereby frustrating the central purpose of the employment eligibility verification system.

Accordingly, despite respondent's contentions to the contrary, the violations contained in the Complaint must be viewed as serious, and therefore, the proposed civil money penalty sums will not be mitigated based upon this factor.

4. Unauthorized Aliens

There is no evidence to indicate that any of the paperwork violations involved unauthorized aliens. For this reason, respondent is entitled to mitigation on the fourth factor listed in 8 U.S.C. §1324a(e)(5). United States v. Giannini Landscaping, Inc., OCAHO Case No. 93A00013 (Final Decision and Order)(11/9/93); United States v. Martinez, 2 OCAHO 360, at 5 (8/1/91); Honeybake Farms, 2 OCAHO 311, at 4.

5. Prior History of Violations

The fifth and final factor to be considered in determining the appropriate civil money penalty sums to be assessed is respondent's history of previous violations. Complainant does not argue that respondent possesses a history of prior violations of IRCA, 8 U.S.C. §1324a. Accordingly, this fact also mitigates the civil money penalty. Giannini, OCAHO Case No. 93A00013, at 8; United States v. Martinez, 2 OCAHO 360, at 5 (8/1/91); Honeybake Farms, 2 OCAHO 311, at 4;

United States v. Huang, 1 OCAHO 300, at 4 (2/25/91); United States v. Camidor Properties, Inc., 1 OCAHO 299, at 5.

Decision

In enacting IRCA, Congress significantly modified our national policy concerning immigration. An essential element of this remedial legislation is the placement of document inspection and verification responsibilities upon employing entities in the hiring process. Those responsibilities, with limited, inapplicable exceptions, consist of verifying the identity and employment authorization of all individuals hired since November 6, 1986.

IRCA provides that fines ranging from a statutorily mandated minimum of $100 to a maximum sum of $1,000 are to be assessed for each paperwork violation. 8 U.S.C. §1324a(e)(5). As the assessing agency, INS is granted broad discretion in assessing civil money penalties for violations of IRCA within these guidelines, in order to fairly and effectively deal with the factual variances encountered in the various inspection settings. See Ulysses, 3 OCAHO 449, at 8.

Similarly, the pertinent provisions of IRCA also provide the administrative law judges with considerable discretion in ordering the appropriate civil money penalty amounts for paperwork violations. 8 U.S.C. §1324a(e)(5).

For the 151 violations at issue, complainant is required to assess total civil penalty sums ranging from $15,100, representing the minimum statutory $100 assessment for each infraction, to the sum of $151,000, which is the maximum assessment of $1,000 for each violation at issue.

Complainant seeks $600 for each of the 151 violations established in the Complaint or a total of $90,600 in penalties for the violations, or some 60 percent (60%) of the maximum civil penalty sums which can be levied.

Meanwhile, respondent urges that the $100 minimum assessment be levied for each of the 151 infractions at issue, or a total of $15,100 in civil money penalties.

The purpose behind the civil money penalties is twofold: to deter repeat infractions of IRCA by the employing entity cited, and to encourage other similarly-situated employers to comply with the requirements of the employment eligibility verification system. See

Land Coast Installation, Inc., 2 OCAHO 379, at 28. The civil penalty provisions of IRCA are not designed nor should they be utilized to destroy small businesses. United States v. Pizzuto, 3 OCAHO 447, at 5-6 (8/21/92).

Upon applying the previously mentioned statutory criteria to these disputed facts, I find that the appropriate civil money penalty for each of the 151 paperwork violations at issue is $300, rather than the previously-assessed amount of $600 for each of those infractions.

Accordingly, the appropriate total civil money penalty assessment for these 151 violations is $45,300.

Order

It is ordered that the appropriate total civil money penalty assessment in connection with the issuance of NIF NYC 274A-92005092 is $45,300, or $300 for each of the 151 violations set forth in that citation, rather than the previously-assessed and amended sum of $90,600.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 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 respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7), (8) and 28 C.F.R. §68.53.