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. 93A00016
GRS INC., d.b.a. GASKET ENGINEERING, Respondent.	)	

FINAL DECISION AND ORDER REGARDING CIVIL MONEY PENALTIES

(April 18, 1994)

Appearances:

Thomas L. Day, Esquire
For Complainant

Donald L. Ungar, Esquire
For Respondent

Before:

E. MILTON FROSBURG
Administrative Law Judge

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 civil money penalties for paperwork violations is authorized by the statute. 8 U.S.C. § 1324a(e)(4),(5).

II. *Procedural History*

On January 27, 1993, a three (3) count Complaint was filed against Respondent, GRS Inc., d.b.a., Gasket Engineering. Count I alleged that Respondent failed to ensure that two of its employees properly completed Section 1 of the Employment Eligibility Verification Form (Form I-9). Count II alleged that Respondent failed to properly complete Section 2 of the Employment Eligibility Verification Form (Form I-9) for twenty (20) employees. Count III alleged that Respondent failed to ensure that nine (9) named employees properly completed Section 1 and that Respondent failed to properly complete Section 2 of the Employment Eligibility Verification Form (Form I-9) for the same nine (9) employees. On January 28, 1993, the Office of the Chief Administrative Hearing Officer (OCAHO) served a Notice of Hearing On Complaint Regarding Unlawful Employment on Respondent's attorney of record, Donald L. Ungar, and Respondent Corporation, which advised Respondent that a timely Answer must be filed pursuant to 28 C.F.R. 68.9 in order to avoid a default judgment. On February 8, 1993, as is my usual procedure, this office issued a Notice of Acknowledgment.

On February 23, 1993, Respondent filed an Answer to said Complaint denying the allegations and arguing that the proposed penalties were inappropriate and excessive. Respondent also filed a copy of the discovery documents, i.e., Interrogatories and Request to Inspect and Copy Documents, it had served on Complainant. On February 24, 1993, I issued an Order Directing Procedures for Prehearing Discovery.

By order, dated March 26, 1993, a Prehearing Telephonic Conference was scheduled for April 5, 1993. However, based on the parties' representation that settlement in this case was likely, on that date, I granted their request for a postponement and directed that the parties request a Prehearing Telephonic Conference within fifteen (15) days of the date of that order.

On April 26, 1993, Complainant filed an Amended Complaint and a Motion for Leave to Amend Complaint in order to: (1) correct the factual allegation "C" in Count II to read: "Respondent failed to properly complete section 2 of the Form I-9 for the individuals listed in paragraph A"; (2) the penalty amount in Count II; and, (3) the total civil money penalties sought.

On May 11, 1993, Complainant filed a Motion for Summary Decision and Points and Authorities in Support of Motion for Summary Decision.

On May 16, 1993, I issued an Order Granting Complainant's Motion to Amend Complaint and, at the same time, found that Complainant's Motion for Summary Decision was premature as Respondent had not had time to file an answer to the Amended Complaint. Respondent was granted until June 11, 1993 to respond to the Amended Complaint and/or until June 16, 1993, to file its Response to the Motion for Summary Decision.

On May 20, 1993, Respondent filed its Answer to Complainant's Motion for Summary Decision and Motion to Permit Withdrawal of Admissions. On June 14, 1993, Respondent filed an Answer to the Amended Complaint wherein it denied all allegations contained in the Amended Complaint.

On July 1, 1993, at a Prehearing Telephonic Conference, Respondent's counsel represented that, despite the fact that the parties had agreed on a settlement amount, the settlement negotiations had broken down because Complainant would not agree to an enlarged payment schedule. At that time, I suggested that the parties might be interested in stipulating to liability, since it did not seem to be at issue, and filing

a joint written request for me to set the civil penalty amount. As an alternative, the parties would continue discovery and file status reports until hearing. A hearing date was set for August 31, 1993.

On July 15, 1993, this office received a letter from Respondent's attorney indicating that he had faxed a new Settlement Offer to Complainant. Counsel also stated that if the offer were not acceptable, Respondent was willing to accept liability and let the court assess the civil money penalties, providing it could submit mitigating evidence in the form of affidavits.

On July 30, 1993, I held a Prehearing Telephonic Conference, later memorialized in an August 2, 1993 Order. During the conference, Respondent's attorney, at Complainant's request, verbally reaffirmed its admission of liability for all violations alleged in the Complaint and its request that I set the appropriate amount of civil money penalties based on written memoranda and affidavits. As Complainant stated that it would like to review the affidavits that Respondent intended to submit to the court before determining whether additional discovery was necessary, I directed Respondent to submit to Complainant, on or before August 10, 1993, the affidavits he intended to file with the court regarding mitigation of the civil penalties. Complainant was directed to file either a written or telephonic report with the court on or before August 17, 1993, stating whether (1) it needed further discovery, (2) it needed a continuance of the hearing, and/or, (3) it agreed to allow the court to determine the civil penalties based on written memoranda.

On July 28, 1993, Respondent's counsel filed a Status Report again stating that the Respondent was willing to admit liability and allow the court to assess the civil money penalty without a formal hearing as long as it could submit mitigating evidence in the form of updated financial records and employees' declarations with respect to the allegations concerning alleged forged Forms I-9. Since no response was forthcoming from Complainant, and I was very aware that Complainant wished to be heard on issues of good faith and alleged forgery of the employees' signatures, on August 12, 1993, I issued a Notice Scheduling Hearing for August 31, 1993, at 9:00 a.m. at the United States Department of Labor, Office of Administrative Law Judges, in San Francisco, California.

On August 16, 1993, Complainant filed a letter-pleading requesting postponement of the hearing for ninety (90) days in order to complete discovery. On August 18, 1993, Respondent filed a letter-pleading opposing the Complainant's request for lack of good cause.

On August 19, 1993, I issued an Order confirming an August 17, 1993 Prehearing Telephonic Conference wherein I granted a thirty (30) day continuance of the hearing for reasonableness and good cause. The hearing date was reset for September 21, 1993.

On September 7, 1993, I issued an Order Confirming Prehearing Telephonic Conference wherein I granted Complainant's Motion for Summary Decision on liability only and confirmed the hearing on civil money penalties. I also memorialized Complainant's representation at the conference that it had not received answers to its Interrogatories which were necessary for its hearing preparation and that Respondent would investigate the information requested and contact the Complainant with the Responses as soon as possible.

On September 17, 1993, Complainant filed a Motion to Compel Discovery with Points and Authorities in Support of Motion in which it argued that the Respondent had failed to answer certain interrogatories and requested that the court compel the answers. I did not rule on this motion prior to hearing.

On September 21, 1993, I held the evidentiary hearing as scheduled. On October 28, 1993, I issued an Order Regarding the Official Hearing Transcript and submission of Post Hearing Briefs. In that Order, I indicated that the parties would have ten days from date of receipt of the transcript to notify me of any corrections, that Complainant was to submit its post-hearing brief on, or before, December 8, 1993, and that Respondent was to submit its post-hearing brief within thirty (30) days hence.

On November 9, 1993, I granted Complainant's Request for Extension of Time to File Transcript Corrections and Post-Hearing Brief until November 14, 1993 and December 18, 1993, respectively.

After a review of the suggested corrections filed November 15, 1993, I issued an order on November 19, 1993 wherein I found the suggested transcript corrections to be proper and ordered that they be incorporated.

On December 20, 1993, Complainant filed its Post-Hearing Brief wherein it set out its analysis of the five factors found in 8 U.S.C. § 1324a(e)(5). On January 13, 1994, Respondent filed its Post-Hearing Brief wherein it requested that the appropriate total civil money penalty be found in the amount of $5,000.00, determined by setting the civil money penalty per violation at $100.00 for the 31 violations, plus

an additional civil money penalty of $100.00 for each of the nine false signatures, and an additional $1,000.00 civil money penalty for Respondent's failure to follow compliance instructions.

III. *Discussion*

The Complaint filed in this matter has three (3) distinct counts, all involving paperwork violations. Respondent has orally, and in writing, admitted liability for thirty-one (31) alleged violations in the Amended Complaint. In the Amended Complaint, Complainant requested the Respondent pay a total civil money penalty of $13,270.00 for the violations charged. In Count I, Complainant requested civil money penalties of $390.00 and $520.00 respectively for the two (2) violations set out, for a total of $910.00. In Count II, Complainant requested civil money penalties of $400.00 for each of the 20 violations, for a total of $8,000.00. In Count III, Complainant requested civil money penalties of $440.00 for four of the violations and $520.00 for five of the violations, for a total of $4,360.00. The higher civil money penalties requested related to the violations which contained falsified employees' signatures made by Respondent's agents.

A. Civil Money Penalties

With respect to the determination of the amount of civil money penalties of the paperwork requirements of 8 U.S.C. §1324a, 274A(e)(5) of the Immigration and Nationality 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.

1. Factors

a. Size of the Business of the Employer Being Charged

Complainant argued in its Brief that Respondent should be considered a moderately sized business. In support, Complainant represented that Respondent had given it only limited financial information and, based on that information, represented that Respondent employed approximately twenty-two to twenty-eight individuals during

the years 1989-1990 with gross sales of $1,632,438.00 for the calendar year 1990, and $424,544.79 in wages for the year 1989.

Complainant alleged that, although other financial information was requested from the Respondent by way of interrogatories, the interrogatories were never fully answered. Further, although Respondent introduced additional financial figures at hearing, Complainant urged that the data submitted by the Respondent was misleading and should be given no weight since the figures submitted were only for the first three quarters of 1992 without a claim that the last quarter's were unavailable. Complainant argued that this deficiency was significant because fourth quarter figures usually show the larger sales figures, as evidenced by Respondent's 1990 figures.

The Respondent argued that it is not a large company and has had a substantial decrease in sales and an increase in wages since 1990.

b. Good Faith of the Employer

Complainant argued that Respondent has not evidenced good faith in its compliance with 8 U.S.C. § 1324a and has shown egregious conduct. At hearing, Complainant produced the following supportive evidence. In May, 1988, Respondent was educated by the Department of Labor (DOL) Wage and Hour Division, regarding the requirements of IRCA. Respondent was not in compliance at that time, but agreed to comply immediately.

On June 6, 1989, Complainant sent a noncompliance letter to Respondent, based on the DOL audit. The letter advised Respondent of its obligations under IRCA and requested immediate corrective action. Respondent failed to return an enclosed certification that remedial action had been taken to correct the problem noted by DOL. Due to the lack of certification of voluntary compliance, on May 10, 1990, Complainant served Respondent with a Notice of Inspection for May 18, 1990. While serving the Notice of Inspection, the agent again educated Respondent's representatives regarding Respondent's responsibilities under IRCA and provided the M-274 Handbook for Employers.

On May 18, 1990, the date of the audit, Respondent failed to appear, but instead submitted to Complainant an envelope containing Xerox copies of 28 Forms I-9, although the originals had been requested. Complainant again requested original I-9 forms; they were subsequently presented.

Complainant's audit revealed many IRCA violations including thirty-eight (38) missing Forms I-9; these were received by Complainant on June 7, 1990. These late submitted Forms I-9's were reviewed because several appeared to have suspicious signatures. As a result, those documents, along with known signatures, were sent to the Complainant's Forensic Document Laboratory for analysis.[1] The results showed that the employees named on the Forms I-9 were not the same individuals who had prepared or signed the document.

At hearing, Complainant reminded the court that one of Respondent's employees admitted, under oath, that she had signed several Forms I-9 with the employee's name and had tried to disguise her handwriting. Also admitted by Respondent's employee was that Section 2 of the Form I-9 had been completed without anyone seeing the documents which were identified on the form and that the attestation date on many documents was not the date Section 2 was actually signed.

As further evidence of Respondent's lack of good faith in IRCA compliance, Complainant argued that Respondent's employees did not admit to their actions, even after Complainant discovered the falsifications. In fact, Complainant argued that evidence of further egregious conduct and attempts at evading liability is found in a joint declaration signed by Respondent's office managers which stated that they had falsely signed employee signatures on Form I-9. Notably, they did not specify, either in the declaration or at hearing, which Forms I-9 each manager was individually responsible for.

Complainant continued to support its argument of Respondent's lack of good faith compliance by directing the court to the incredibility and inconsistencies between the office manager's declarations, deposition testimony, and the hearing testimony. For example, Ms. Steffen, one of the office managers and Respondent-Owner's sister-in-law, testified at hearing that she signed the employee's name in Section 1 on all six Forms I-9 in question. However, previously at deposition, she testified that she signed only two. At hearing, Ms. Steffen blamed confusion for the discrepancy. Complainant posits that this explanation is not credible since Ms. Steffen testified at deposition that she had reviewed all six Forms I-9 prior to deposition and, thus, was familiar with the forms before her sworn testimony.

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[1] Suspicious documents belonging to former employees who could not be located were not sent for analysis and no further action was taken.

Complainant further posits that Ms. Steffen was not credible when she stated she didn't see anything wrong with signing the employee's name in Section 1 of the Form I-9. As she had previously worked in the loan department of Bank of America, and had handled many official documents, Ms. Steffen obviously knew that signing another person's name and purposely disguising that fact was wrong.

Respondent on the other hand, argued that Ms. Steffen and Ms. Verkest, sisters-in-law of Respondent-Owner, did not act with any evil or malicious intent but panicked and acted foolishly when advised of the audit, making matters worse.

I note that there was some discrepancy between the hearing testimony and the deposition testimony as to who actually falsified each of the employees' signatures; it is apparent from the testimony and evidence that both women knew about the falsifications and were involved. They both explained their actions at the hearing by testifying that, because they knew an audit was coming up and were told to get ready for it, they did what they believed was necessary to bring all records up to date. As they believed that the Forms I-9 were ordinary, unimportant paperwork, and did not remember reading any particular warnings on the documents themselves, they did not believe that they were doing anything wrong.

Certainly, any claim by Respondent that its agent's actions were done in good faith is difficult to believe considering the testimony to the purposeful falsification of the employee's signatures, the purposeful disguising of the signer's handwriting, the purposeful practice in disguising the signatures, and Respondent's agents' lack of candor. The failure to be in compliance despite the two educational visits, the lack of voluntary compliance in 1988 and 1989, and the failure to return the voluntary compliance letter in 1988, are further evidence of a lack of good faith.

In consideration of all the evidence of record, it is clear that the Respondent, through its agents/employees, did not show good faith and, therefore, I find that this factor may not be mitigated. See U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91).

c. Seriousness Of The Violations

Complainant argues that the violations in this case are serious as they impede its ability to enforce the Congressional mandate set forth in 8 U.S.C. 1324a. Further, Complainant argues that at least one

Administrative Law Judge has found that intentional falsification of Forms I-9 are the most serious violations he can contemplate. U.S. v. Felipe, 1 OCHAO 93 (10/11/89).

Respondent, on the other hand, admits that the violations alleged in Count II pertaining to allegation A5 and the violations in Count III pertaining to allegation A1, A2, A3, and A4, are serious. Respondent admits that the violations relating to Count III, allegations A2, A3, A9 are more serious than the others. Respondent argues that all other violations were not serious as they did not seriously hamper Complainant from determining whether any of the named employees were authorized for work in the United States.

As to the violations in Count I, Respondent argued that they were not serious because Section 2 was completed properly and, thus, Complainant had enough information to verify the individuals' work authorization status. As to the remaining violations in Count II, Respondent discussed each separately and argued that the missing information did not impede Complainant's burden of checking work authorization. Respondent argued that the missing social security numbers in section 2 could be obtained from section 1, that missing driver's license numbers could be easily ascertained by the Complainant accessing Department of Motor Vehicle records in the individuals' state of residence, i.e., California, and that the genuineness of an employee's signature is an issue of good faith and not one of seriousness. As to the violations in Count III, Respondents stated that for one of the individuals in this Count, two Forms I-9 had been filled out and although neither was complete only one was missing the employee's signature. The other one, however, is the one that is consistent with the allegations in this Count. Further, Respondent argued that missing signatures do not hamper Complainant's enforcement and that the genuineness of an employee's signature is an issue of good faith and not one of seriousness.

I am not persuaded by Respondent's arguments. The obligation to provide correct and specific information on the Form I-9 has been mandated to the employee and the employer. Congress did not intend to burden Complainant with investigation of other government records to find the information required on the Form I-9. To suggest that Complainant assume that an employee who lists California as his address also has a driver's license in the State of California, and that Complainant should access those records to ascertain and verify Form I-9 information, is missing the point. This information is to be supplied by employee and employer. In fact, Respondent's suggestion that

Complainant engage in additional investigation to determine an individual's immigration status, or to supply missing information on the Form I-9's, seems to support Complainant's argument that their investigation is impeded when this information is not apparent on the face of the Form I-9.

Therefore, I find that the violations in this case impede Complainant's obligation to enforce 8 U.S.C. § 1324a. Further, purposeful falsification is particularly serious. See U.S. v. Felipe, 1 OCAHO 93 (10/11/89).

In this particular case, there was outright falsifying of the signatures of nine (9) employees on the Forms I-9, six that were named in the Complaint. There certainly was no excuse for the Respondent's actions. Fortunately for the Respondent, no undocumented individuals were involved in this Complaint. No mitigation will be found for this factor.

d. Whether Or Not The Individuals Were Unauthorized Aliens

All parties agree that there were no unauthorized aliens involved.

e. History Of Prior Violations

There is no history of prior violations regarding this particular Respondent.

f. Additional Factors

Respondent has additionally argued that its current gross sales figures for the four quarters ending September 30, 1993 were $1,207,440.00. This was $424,994.00 less than the 1990 figures submitted by the Complainant. Further, its gross wages for the same four quarters, ending September 30, 1993, were $477,775.76. This was $57,230 more than Respondent paid out in 1990. Thus, Respondent argued that it currently has lower gross sales and increased wage expenses, leaving it with less net income. Therefore, a large fine would impose an economic hardship on Respondent.

IV. *Conclusion*

After a careful review of the total record, I find that the Respondent's business is of moderate size, that there was no good faith by the employer, that the violations were serious, that there were no unauthorized individuals involved and no history of previous violations.

I also find that the Complainant's assessment of fines is well within the parameters of the statute. Respondent, however, has argued for mitigation of those requested amounts.

Respondent has suggested that the appropriate civil money penalties should be $5,000.00. Respondent arrived at this figure by arguing that a minimum civil money penalty should be awarded for each of the 31 violations, that an additional $100 should be awarded for each of the nine (9) falsely signed Forms I-9 and that an addition $1,000 should be awarded for Respondent's failure to comply with the law. Respondent supports this proposed civil money penalty by arguing that this amount will achieve a balance between assuring further compliance with the paperwork requirements and the Respondent's continued stability. Counsel for Respondent has asserted that Respondent is now in compliance with the statute's requirements, has educated its staff, and will continue to be in compliance.

I hope that Respondent is in compliance at this point in time and will continue to be so. However, I do have some concerns. Ms. Steffen's testimony at the hearing was that the foreman at the Respondent's Los Angeles location, who has been instructed in the proper procedure, fills out the Forms I-9 and then faxes them to Ms. Steffen for review. Should an error be discovered, he is instructed to redo the form.

Although this procedure appeared to be appropriate, my concern arose when Ms. Steffen admitted that she has not provided the Handbook For Employers, Instructions For Completing I-9 to the foreman. Further, she did not assert that her review, and should it be necessary, a "do over" of the Form I-9, was completed within three days of hire. I admonished Ms. Steffen to remedy this situation immediately and to be aware of issues of possible discrimination in completion of the Form I-9.

With regard to Respondent's argument of financial hardship if a civil money penalty greater than $5,000.00 is awarded, I am not persuaded. Respondent has provided some financial documentation, but not much, and certainly not enough to prove its argument. For instance, I have no income tax returns for Respondent, I have only limited figures for two quarters in 1992 and I have no figures for the last quarter of 1993. Respondent has provided some extremely limited additional documentation with its post hearing brief, but not enough to support its argument.

Respondent, however, does make a good argument that the purpose of the statute was compliance, not economic destruction of American businessmen. Bearing this in mind, after considering the facts in this case, the testimony and credibility of the witnesses, the limited financial information provided, and the egregious conduct in this case, I find that the appropriate civil money penalties are:

1. For Count I, Valdez, Jesus - $250.00 and for Dunham, Michael - $520.00 for a total civil money penalty of $770.00;

2. For Count II, a civil money penalty of $300.00 for each and every violation for a total civil money penalty of $6,000.00; and

3. For Count III, a civil money penalty of $440.00 for the violations alleged in paragraphs A1, A2, A3, and A4 and a civil money penalty of $520.00 for the violations alleged in paragraphs A5, A6, A7, A8, and A9, for a total civil money penalty of $4,360.00.

As such, Respondent is directed to pay Complainant a total civil money penalty in this case of $11,130.00. Further, all prior motions or requests by the parties are denied.

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.

SO ORDERED this 18th day of April, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge