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. 92A00065
RANDALL KURZON, IND., and	)	
ALONZO RESTAURANT	)	
VENTURES, INC.,	)	
Jointly and Severally.	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

(May 13, 1994)

Appearances:

For the Complainant
Weldon S. Caldbeck, Esquire
Leila Cronfel, Esquire

For the Respondent
Randall Kurzon, Pro Se

Before:

E. MILTON FROSBURG
Administrative Law Judge

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I. _Procedural History_

On December 6, 1993, I issued a Decision and Order finding, among other things, that Respondent Alonzo Restaurant Ventures (ARV) and Respondent Randall Kurzon were liable for violations of 8 U.S.C. §§ 1324a(a)(1)(B) and 8 U.S.C. §1324a(a)(1)(A) of the Immigration and Nationality Act (Act). Specifically, I found Respondent ARV liable for the forty-seven (47) violations set forth and not dismissed in Count I, the forty-eight (48) violations set forth in Count II and the eight (8) violations not dismissed in Count III. I found, further, that Respondent Randall Kurzon was jointly and severally liable with ARV for many of the violations, i.e., twenty-six (26) of the paperwork violations in Counts I and II and all eight (8) violations in Count III. The specifics were set out in my December 6, 1993 Order.

In that Order, I bifurcated the issue of appropriate civil money penalties and directed Complainant, and Respondents, if they wished, to submit statements on or before January 12, 1994, regarding the application of the five (5) factors enumerated in 28 C.F.R. § 68.52(c)(iv) and any other relevant factors which they wished for me to consider in setting the civil money penalty amounts.

Additionally, I set out, in detail, my reasoning for finding Respondents liable for the violations of the Act. In my Findings of Fact and Conclusions of Law, I stated, among other things,: (1) that the testimony of Respondent, Randall Kurzon (Kurzon), was found to be not credible; (2) that Complainant had proven, by a preponderance of the evidence, that Respondent, Alonzo Restaurant Ventures, Inc., had violated 8 U.S.C. §1324a(a)(1)(B) in that it failed to properly prepare the employment eligibility verification forms (Form I-9) for forty-seven (47) individuals as enumerated in Count I of the Complaint; (3) that Complainant had proven, by a preponderance of the evidence, that Respondent, Alonzo Restaurant Ventures, Inc., had violated 8 U.S.C. § 1324a(a)(1)(B) in that it failed to properly complete Section 2 of the Form I-9 for forty-eight (48) named individuals in Count II of the Complaint; (4) that Complainant had proven, by a preponderance of the evidence, that the eight (8) named individuals not dismissed in Count III were hired by Respondents and that Respondents knew that the named individuals in Count III were not authorized for work in the United States at the time of hire and that said hiring violated 8 U.S.C. § 1324a(a)(1)(A); (5) that Respondent Kurzon was individually liable under 8 U.S.C. § 1324a(a)(1)(B) for 26 paperwork violations in Count I and Count II of the Complaint, as enumerated in my December 6, 1993 Decision and Order, and that he was also individually liable

under 8 U.S.C. § 1324a(a)(1)(A) for the eight (8) violations in Count III of said Complaint; (6) that Respondent Kurzon, according to the credible evidence of record, commingled his personal funds with those of ARV; (7) that the directors of ARV failed to maintain adequate corporate records or minutes; (8) that Respondent Kurzon controlled the funds of the corporation and its management; (9) that the other shareholders had abdicated their responsibilities as directors of ARV; (10) that the directors did not maintain a required, arms-length relationship with the corporation; (11) that there was such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and Respondent Kurzon were indistinct; and, (12) that although Complainant requested that I pierce the corporate veil and find Kurzon individually responsible on that basis, applying the facts to the relevant case law, I found that I was not persuaded by the evidence of record to pierce the corporate veil.

On January 18, 1994, Complainant filed its Supplemental Brief In Support Of The Penalty Assessments in this case. To date, Respondents have not filed any statement regarding the appropriateness of the assessed civil money penalties. I have inferred that they are relying on the record.

Complainant stated in its post-hearing brief that it originally requested a total civil money penalty of $59,045.00[1] for the above mentioned violations as determined by the amounts set forth in the Complaint. This figure is broken down as follows:

(1) Count I - $25,665.00. The requested penalties range from $275 to $690 per violation for the 47 violations;

(2) Count II - $21,380.00. The requested penalty ranging from $200 to $700 per violation for the 48 violations; and,

[1] This $59,045 amount reflects the total of the requested civil money penalties in the Complaint for the 47 proven violations in Count I, the 48 proven violations in Count II, and the 8 proven violations in Count III. The Complaint contains a civil money penalty request of $66,530.00, reflecting 52 alleged violations in Count I, 48 alleged violations in Count II, and 11 alleged violations in Count III.

(3) Count III - $12,000.00. The requested penalty is $1,500.00 per violation for the 8 violations.[2]

Complainant's position is that these assessments should be substantially upheld based upon an application of the factors in 8 U.S.C. §§ 1324a(e)(4) and 1324a(e)(5) and incorporated in the court's final order.

II. *Civil Money Penalties*

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). 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).

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;

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[2] The Court has run independent totals for the remaining violations in Counts I, II and III, using the amounts requested in the Complaint. Although these figures are the same as Complainant's for Counts II and III, the Court's figures for Count I total $24,975.00. Thus, the Court's total for the civil money penalties requested in this case is $58,355.00.

I inferred that this difference was due to a minor computation error on Complainant's part which has not affected my determinations regarding the appropriate amount of civil money penalties for each violation nor did it prejudice either party.

(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,

(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 money penalties to be set for knowing hire/continuing to employ violations, the statute is silent on 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 violations, although I generally consider the five factors in my determination.

A. Counts I and II-Paperwork Violations

In the Complaint, for Count I, failure to prepare the Forms I-9, Complainant initially requested civil money penalties ranging from $275 to $690 for fifty-two violations. Five allegations were later dismissed.

The lowest civil money penalty requested, $275, related to the violation associated with Mr. Kurzon, Respondent and principal in ARV. Complainant requested civil money penalties of $350 for the violations associated with Mr. Alvaro Munoz-Alonzo and Mr. Jose Alonzo Sanchez, the two other principals in ARV. Complainant requested $610 for the violations associated with Mr. Floriberto Alonzo and Mr. Noel Alonzo, and $690 for the violations associated with the illegal aliens Mr. Perez and Mr. Quesada. Complainant requested $535 for each of the remaining 40 violations.

For Count II, failure to properly complete section 2, Complainant requested civil money penalties ranging from $200 to $700. The smaller amounts, $200 and $275, corresponded to the Forms I-9 with the least missing information. The requested civil money penalties increased as the amount of missing information increased, with the highest civil money penalties requested relating to the illegal aliens named in this Count. Thus, for the Forms I-9 missing all the information in section 2 or in the certification section of section 2,

Complainant requested $425 in civil money penalties. For those violations associated with six illegal aliens named in this Count, Complainant requested $700 in civil money penalties for five of them and $630 for the sixth. Complainant also requested a $700 civil money penalty for Mr. Marcos Munoz and Mr. Jose Munoz who were originally alleged to be illegal aliens in Count III, but whose names were dropped from that count prior to hearing as no witnesses could be located. Complainant requested $700 in civil money penalties for the violations associated with Mr. Perfecto Cano who was not named in Count III as an illegal alien; section 2 of his Form I-9 was blank. The total civil money penalty requested in the Complaint for Count II was $21,380.

For Count III, knowingly hiring unauthorized individuals, Complainant requested $1,500 for each of the eight violations.

This amounted to a requested total civil money penalty of $12,000.00 for Count III.

In its post-hearing brief, which discussed the application of the factors in 8 U.S.C. 1324a(e)(5), Complainant presented argument to support civil money penalties of $640 for the violations associated with the two illegal aliens named in Count I and the six illegal aliens named in Count II and $460 for the remaining 45 violations in Count I and 42 violations in Count II. Complainant's requested civil money penalties for Count III remained the same, $1,500 for each of the eight violations. This amounted to a total civil money penalty of $21,980.00 for Count I, $23,160.00 for Count II, and $12,000.00 for Count III for a total of $57,140.00.

1. Factors Under § 274A(e)(5)

a. Size of the Business of the Employer Being Charged

In its Supplemental Brief In Support Of Penalty Assessment, Complainant did not specifically characterize the Respondent's business size. However, it did indicate that Respondent ARV was not a large-sized company.

Although Respondents did not address this particular factor, considering the evidence and testimony that I do have in front of me, I would consider the Respondent's business to be a small business. Respondent, ARV, consists of two (2) restaurants with a fluctuating number of employees, usually around 10, including the three (3) principals. Based on its federal income tax returns for the years 1988,

1989, 1990, Respondent ARV was a going concern. Based on the credible evidence and record, that appears to still be true.

b. Good Faith of the Employer

Complainant asserts that Respondents did not show good faith in their compliance with IRCA's requirements and are not entitled to any mitigation of the penalty for this factor. Complainant argues that since Kurzon claims that he was aware of IRCA's requirements even before ARV commenced business, the facts support the position that the manner in which the Forms I-9 were completed demonstrated "clear carelessness, if not disdain for the verification requirements." As such, Complainant argues that these paperwork violations should be assessed $180.00 in addition to the minimum civil penalty amount for this factor.

As further support for its position, Complainant asserts that during the extensive search of the ARV records, a total of sixty-eight (68) Forms I-9 were recovered. Forty-eight (48) of these were incorrectly completed and another forty-seven (47) were not prepared at all.

I have considered Complainant's argument and Respondents' testimony, as well as that of his present and former office employees, in making my determination regarding Respondents' good faith compliance with the Act. I find that Respondents' admitted knowledge of the law and the rate of noncompliance clearly show that Respondents did not exhibit good faith in complying with 8 U.S.C. § 1324a.

c. Seriousness of the Violation

Violations that tend to undermine the Congressionally mandated scheme of IRCA are considered serious. See United States v. Noel Plastering and Stucco, Inc., 3 OCAHO 427 (5/12/92); U.S. v. Dodge Printing, 1 OCAHO 125 (1/12/980) (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 (4/15/91).

Complainant argues that the nature and substantial number of Respondent's violations, i.e., failure to prepare the Forms I-9 for forty-seven (47) employees, the failure to complete Section 2 for forty-eight (48) separate employees, and the complete failure to complete any of Section 2 on thirty-four (34) of the Forms I-9, make Respondents'

violations serious. Complainant argues that these violations warrant an upward assessment of another $180.00. Respondents have made no argument with regard to this factor.

Applying the facts in this case to the law, I agree with Complainant's argument that these violations are serious. As such, I find that Respondents are not entitled to mitigation based on this factor and I will consider Complainant's request for an increased $180 assessment based on this factor.

d. Whether or Not the Individual was an Unauthorized Alien

Complainant argues that since Respondents were found to have knowingly hired eight unauthorized individuals in violation of 8 U.S.C. § 1324a(1)(A), no mitigation should be allowed in the amount of civil money penalties requested for the violations in Counts I and II which relate to these individuals. Instead, Complainant argues that the civil money penalties for the violations relating to Salvador Perez and Inez Quezada in Count I and relating to Carmelo Alonzo, Jorge Munoz, Marcial Campos, Javier Quezada, Gil Gonzales, and Rafael Mendoza in Count II should include an additional $180.00 assessment.

Respondents did not present argument on this factor.

Based on a review of the arguments, the credible evidence of record, and the relevant law, in my sound discretion, I find that it would not be appropriate to mitigate based on this factor in Counts I and II for violations relating to the said illegal aliens. I will consider Complainant's request for the additional assessment.

e. History of Previous Violations of the Employer

Complainant represented that Respondents had no prior violations. As such, I will take this into consideration in my determination of the civil money penalty amounts.

f. Other Factors

Respondents have not addressed any of the factors of 8 U.S.C. 1324a(e)(5), although in an April 30, 1993 letter pleading, they suggested that the court review an unnamed Supreme Court case regarding civil fines and violations of the Eighth Amendment to the U.S. Constitution. With regard to that suggestion, in my order of December 6, 1993, I stated:

Respondents' last argument was that the civil penalties imposed violated the Eighth Amendment of the U.S. Constitution. In Browning-Ferris Industries of Vermont, Inc. v. Kelco, 109 S. Ct. 2909 (1989), the Supreme Court examined the issue of whether the Eighth Amendment Excessive Fines clause applies to punitive damages awarded by a civil jury. In its limited holding, the Court stated that, although it had never considered a civil application of the Excessive Fines Clause of the Eighth Amendment, "its cases had long understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments." Id. at 2913 (citations omitted). The Court then stated that it would not go so far as to hold that the excessive fines clause applied solely to criminal cases. However, it did not determine to what extent it might apply to civil cases. Id. at 2914.

Of course, as no civil penalties had been imposed in this case when Respondents raised this argument, the cited case was not relevant. However, in my December 28, 1992 Order, I noted that Respondents had only advanced this novel argument, but had not supplied any legal or factual support for it. In fact, their whole argument amounted to the statement that the civil fines in this case violated the Eighth Amendment. Therefore, as Respondents had shown no support for it, I did not dismiss based on this argument. I allowed Respondents, if they wished, to raise this issue again at a later time, as long as they supported it on a legal and factual basis.

As Respondents have not addressed or supported this argument since that time, i.e., they have not presented legal or factual support, despite the court's invitations to do so, I will not consider this issue.

B. Count III - KNOWING HIRE/CONTINUING TO EMPLOY

Complainant argues that the requested penalty of $1,500.00 for each of the eight knowing hire violations is justified, fair and reasonable when considering the evidence. Complainant reasserts that the testimony and demonstrative evidence showed that, not only did the Respondents hire the unauthorized aliens, but they actually assisted in the arrangement and transportation of some of these aliens to Respondent's business from Mexico for the sole purpose of employment. Complainant argues that these violations are serious and that Respondents' have not demonstrated good faith compliance.

Respondent did not present argument.

III. *Amount of Civil Money Penalties*

In this case, I am in agreement with the Complainant that Respondents did not act in a candid or cooperative manner in dealing with the INS either before, or after, the issuance of the Complaint. Further, much of Respondent Kurzon's testimony was not credible.

A. Counts I and II

I have carefully considered the evidence in this case and the application of 8 U.S.C. 1324a(e)(5) on Counts I and II. I must keep in mind that the function of the court, basically, is to make sure that the Respondent is in compliance with the law; it is not to levy a civil money penalty which may be so severe that Respondent is put out of business. I have taken into consideration that the violations with regard to the illegal aliens are more serious violations than those associated with authorized workers and, in my opinion, should result in higher civil money penalties. However, in this case, I believe that in determining the appropriate amount of civil money penalties for the violations associated with the illegal aliens in Counts I and II, it is important to consider that there will be separate, substantial civil money penalties awarded for the knowing hire of those same unauthorized individuals. Therefore, with respect to Count I, considering the relevant law, the statute, all the evidence of record, Complainant's requests for civil money penalties, the seriousness of these violations, Respondents' egregious lack of good faith, my findings with regard to the other 8 U.S.C. 1324a(e)(5) factors, and my intention to be fair and reasonable, I find that, using a judgmental approach, Respondent ARV is liable for civil money penalties in Count I as follows:

1. for each of the violations associated with Salvador Perez and Inez Quesada, the appropriate and reasonable civil money penalty is $560;

2. for each of the remaining 45 violations in Count I, the appropriate and reasonable civil money penalty is $460.

Thus, the total civil money penalty for ARV with respect to Count I is $21,820.00.

In accordance with my Decision and Order of December 6, 1993, I find that Respondent, Mr. Randall Kurzon, is jointly and severally liable with ARV for the following civil money penalties in Count I:

Alonzo Carmelo	$460
Floriberto Alonzo	$460
Noel Alonzo	$460
Angie Brauch	$460
Juan Cortes	$460
Victor Cortes	$460
Alberto Mendoza	$460
Jorge Munoz	$460
Rudolfo Munoz	$460

Salvador Perez	$560
Inez Quezada	$560,

for a total of $5,260 in civil money penalties for violations in Count I.

In considering the civil money penalty amounts for Count II, I have considered that a total failure to prepare Forms I-9, as Respondents have done in Count I, is more serious than the failure to properly complete section 2. However, I do consider the total failure to complete section 2 to be a serious violation.

Again using the judgmental approach, with respect to Count II, considering the relevant law, the statute, all the evidence of record, Complainant's requests for civil money penalties, the seriousness of these violations, Respondents' egregious lack of good faith, my findings with regard to the other 8 U.S.C. 1324a(e)(5) factors, and my intention to be fair and reasonable, I find that the appropriate and reasonable civil money penalty amounts for Count II are as follows:

1. for the 6 violations associated with the illegal aliens, Marcial Campos, Javier Quesada, Carmelo Alonzo, Gil Gonzalez-Guitierrez, Rafael Mendoza-Ponce, Jose Munoz-$500 for each violation;

2. for the 32 violations wherein section 2 of the Form I-9 is blank or essentially blank-$400 for each violation.

3. for the 2 violations relating to Jorge Alonzo Munoz and Marcos Munoz, wherein section 2 of the Form I-9 is missing the employer's signature-$350 for each violation.

4. for the 8 remaining violations wherein various information in missing in section 2 but the employer's signature appears-$250 for each violation.

This totals $18,500 in civil money penalties for Count II.

In accordance with my Decision and Order of December 6, 1993, I find Respondent, Randall Kurzon, is jointly and severally liable with ARV for the civil money penalties in Count II associated with:

Juan Alcantar	$250
Carmelo Alonzo	$500
Bill Chase	$400

Jacklyn Chase	$400
Ruperto Chavez-Rodrigues	$400
Stanley Holveck	$400
Lugo Omar Martinez	$400
Rafael Mendoza-Ponce	$500
Jose Munoz	$500
Marcos Munoz	$350
Gail Plimpton	$400
Patricia Provencher	$400
Javier Quezada	$500
Juanita Reeder	$400
Kurt Stolkholm	$400

totaling $6,200 in civil money penalties for violations in Count II.

B. Count III

With regard to Count III, in both the Complaint and the post hearing brief, Complainant has requested $1,500 for each of the 8 remaining violations. Although this request is in the high range, I have considered the entire record and the relevant law. In arriving at my determination of the appropriate and reasonable amount of civil money penalties in Count III, I considered it significant that:

1. Respondents knowingly hired all eight unauthorized individuals named in Count III;

2. Respondents were aware of the legal prohibition against this conduct as well as the severe penalties associated with it prior to its execution;

3. Respondents have not presented factual or legal argument against Complainant's requested civil money penalties; and,

4. Respondents have not presented, for my consideration, any legal or factually relevant evidence regarding any equities they might have.

As such, considering the above, the seriousness of the violations, Respondents' egregious lack of good faith in their compliance with the statute, the relevant law, the statute, all the evidence of record, Complainant's requests for civil money penalties, and my intention to be fair and reasonable, I find that, using a judgmental approach, Complainant's request is fair, appropriate, and reasonable. As such, I

find that Respondent ARV and Respondent Kurzon are jointly and severally liable for the total civil money penalties in Count III in the amount of $12,000.00 as determined by a civil money penalty of $1,500.00 for each violation.

As such, Respondent ARV is liable for total civil money penalties of $52,320.00 in this case and Respondent Kurzon is jointly and severally liable for total civil money penalties of $23,460.00 in this case.

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 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 13th day of May, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge