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

September 29, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 93A00024
PRIMERA ENTERPRISES, INC., D/B/A J.B.'S LOUNGE, Respondent.	)	

DECISION AND ORDER

Appearances: Lee Abbott, Esquire, Immigration and Naturalization Service, United States Department of Justice, El Paso, Texas, for complainant; Bertha A. Zuniga, Esquire, El Paso, Texas, for respondent.

Before: Administrative Law Judge McGuire

Background

On January 17, 1992, complainant, acting by and through the Immigration and Naturalization Service (INS/complainant), initiated this proceeding by serving a three-count Notice of Intent to Fine (NIF), Number 92-EPT-274A-077 (III) upon Primera Enterprises, Inc. (respondent). That citation contained three (3) alleged violations of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100

Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952, as amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). For those three (3) alleged infractions, complainant assessed civil money penalties totaling $3,820.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent allegedly knowingly hired and/or continued to employ the individual listed therein, knowing that that individual was an alien not authorized for employment in the United States, thus violating the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(a)(2). Complainant assessed a civil money penalty of $2,000 for that alleged illegal hire violation.

In Count II, complainant alleged that respondent employed the individual named therein for employment in the United States after November 6, 1986 and that respondent had failed to prepare an Employment Eligibility Verification Form (Form I-9) for that individual, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied a civil money penalty of $1,000 for that alleged paperwork violation.

In Count III, complainant charged that respondent had failed to ensure that the individual named therein properly completed Section 1, and that respondent had failed to complete Section 2 of the Form I-9 for that individual, again, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant proposed a civil money penalty of $820 for that alleged paperwork violation.

Respondent was advised in the NIF of its right to request a hearing before an administrative law judge by submitting an appropriate written request within 30 days of its receipt of that citation, and by letter dated February 10, 1992, respondent timely filed such a request.

On February 1, 1993, complainant filed the Complaint at issue with this office, in which it reasserted those charges previously recited in the NIF and again requested that respondent be ordered to pay civil money penalties totaling $3,820.

On March 8, 1993, respondent filed its Answer to the Complaint.

On May 11, 1994, following the issuance of the undersigned's April 27, 1994, Order Granting Complainant's Motion to Strike Answer, based upon respondent's counsel's having failed to file an answer that

comported with the requirements of the pertinent procedural rule, found at 28 C.F.R. Section 68.9(c), respondent filed an Amended Answer.

In that Amended Answer, respondent's counsel of record, Bertha Zuniga, Esquire, identified Enrique Silva as the president of the named respondent firm, Primera Enterprises, Inc., d/b/a/ J.B.'s Lounge.

On May 19, 1993, both counsel of record and the undersigned participated in the initial prehearing telephone conference. Counsel jointly advised that a compromise settlement, in the amount of $1,700, had been reached concerning all matters in controversy and that the concluding documents would be filed shortly.

On November 19, 1993, Ms. Zuniga filed a Motion to Withdraw, based upon respondent's failure to cooperate "in regards to his continued representation." This motion was subsequently denied.

On December 27, 1993, during another prehearing conference involving both attorneys and the undersigned, Ms. Zuniga advised that Mr. Enrique Silva had started another business and had refused to pay the INS the $1,700 compromise settlement sum he had agreed upon earlier.

On January 3, 1994, complainant resumed its discovery activities and the resulting motion practice led to the issuance of orders in which all alleged facts of violation in the three-violation, three-count Complaint were resolved in complainant's favor. Only the appropriateness of the then amended proposed civil money penalties sums, totaling $3,110, consisting of the sums of $1,650, $820, and $640 for Counts I, II, and III, respectively, remain at issue.

On August 1, 1994, the undersigned held another telephonic prehearing conference with both attorneys, in the course of which it was determined that no hearing would be held in El Paso, Texas. In lieu of conducting a hearing on the issue of the appropriate civil money penalties for the violations set forth in the Complaint, counsel agreed to submit written briefs containing recommended civil penalty sums for the violations at issue by utilizing the five (5) statutory criteria found in the provisions of 8 U.S.C. § 1324a(e)(5). Concurrent briefs were to have been filed by August 15, 1994.

On August 4, 1994, complainant filed a brief captioned Complainant's Proposed Statement of Facts and Conclusions of Law Relating to the

Proper Civil Money Penalty, asking that fines totaling $3,110 be assessed against the respondent.

Respondent has not filed a brief.

Discussion

In determining the appropriate civil money penalties to be imposed for these violations, IRCA provides that due consideration shall be afforded the following five factors:

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.

8 U.S.C. § 1324a(e)(5).

Accordingly, in determining the appropriate civil money penalty to be assessed, the first of the five (5) statutory factors to be considered is the size of respondent's business. Neither the provisions of IRCA nor the implementing regulations provide any assistance in determining the size of a business. United States v. Tom & Yu, Inc., 3 OCAHO 445, at 4 (August 18, 1992).

Respondent's business, Primera Enterprises, Inc., d/b/a/ as J.B.'s Lounge, employed approximately ten (10) to twelve (12) employees during the period in question. The record is incomplete as to the financial condition of respondent, owing to respondent's refusal to comply with complainant's investigative subpoena, which had requested copies of respondent's financial records. Although the respondent firm has been shown to be small in size, a factor usually resulting in mitigation of the proposed civil money penalties, See United States v. Enrique Reyes, 4 OCAHO 592, at 7 (January 6, 1994), such mitigation is being withheld because of respondent's unexplained refusal to make available its financial records, as ordered by the INS subpoena.

The second of the five (5) criteria that merits consideration in determining civil money penalties consists of the respondent's good faith. Again, IRCA is silent on what constitutes good faith, but case law has established that mere allegations of paperwork violations do not consti-

tute a "lack of good faith" for penalty purposes. United States v. Valladares, 2 OCAHO 316, at 6 (April 15, 1991). To demonstrate a "lack of good faith" on the part of the respondent it is necessary for the complainant to present some evidence of culpable behavior beyond mere ignorance on the respondent's behalf. See United States v. Honeybake Farms, Inc., 2 OCAHO 311, at 3 (April 2, 1991).

The record lacks any evidence demonstrating that respondent acted in good faith. INS personnel counseled respondent on its responsibilities under IRCA in 1988 and did so again in 1990. Nevertheless, respondent knowingly hired individuals who were not authorized for employment in the United States, and respondent also committed paperwork violations that resulted in the infractions at issue.

As previously mentioned in connection with the size of its business, respondent did not cooperate with complainant's subpoena for financial records, and respondent has not responded properly to several of complainant's discovery requests.

Therefore, it is found that respondent did not act in good faith and consequently is not entitled to mitigation of the proposed civil money penalty amount based upon that criterion.

The seriousness of the violations involved is the third statutory element that requires consideration. Because "[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" United States v. Eagles Groups, Inc., 2 OCAHO 342, at 3 (June 11, 1992), paperwork violations are always serious. See United States v. Enrique Reyes, 4 OCAHO 592, at 8 (January 6, 1994); United States v. Minaco Fashions. Inc., 3 OCAHO 587, at 8 (December 20, 1993).

Respondent knowingly hired and/or continued to employ the individual named in Count I and also failed to ensure that that same individual properly completed the pertinent Form I-9. Additionally, respondent failed to ensure that the individuals named in Counts II and III properly completed section 1 of their Forms I-9 and respondent failed to properly complete section 2 of those same two (2) forms.

Those IRCA offenses are serious violations because they completely frustrate the purpose of that statute. Accordingly, respondent is similarly not entitled to mitigation of the proposed civil money penalty sum on these violations.

Next it must be determined whether either of the individuals involved was an illegal alien. It has been shown that respondent hired Bretzel Leticia Garcia-Herrera, an alien not authorized for employment in the United States. Thus, the fact that this individual was an illegal alien weighs against respondent. See United States v. Enrique Reyes, 4 OCAHO 592, at 9 (January 6, 1994). For that reason, respondent is not entitled to mitigation on the fourth factor, either.

The fifth and final criterion to be addressed in assessing the appropriate civil money penalties is respondent's history of previous violations. INS records disclose that respondent has been cited twice previously for infractions of this nature. In 1988, complainant issued a NIF against the business, J.B.'s Lounge, and its former president, Francisco Silva, the brother of the current president, Enrique Silva, charging respondent firm with multiple violations of IRCA. The administrative law judge ordered respondent to pay a civil money penalty of $3,500 in that proceeding.

In 1991, respondent was again cited for violations of this type and paid $4,500 in total civil money penalties.

The record clearly shows that respondent has a history of prior violations. Accordingly, the proposed civil money penalties cannot be mitigated based upon this criterion.

The enactment of IRCA represents a significant modification of United States immigration policy since that statute mandates that employers have a nondelegable duty to inspect and verify employment eligibility documents presented by all job applicants. Employers are required, with limited inapplicable exceptions, to verify the identity and work authorization of all individuals hired after November 6, 1986, and employers must refuse to hire individuals and those not authorized to work in this country. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 9 (April 15, 1994).

IRCA provides for civil money penalties for employers who fail to comply with IRCA's paperwork provisions and those penalty amounts range from a statutorily mandated minimum of $100 to a maximum of $1,000 for each violation. 8 U.S.C. § 1324a(e)(5). Assessment of these civil money penalties serves the dual purpose of deterring repeat infractions of IRCA by the cited employer and also encourages similarly situated employers to comply with that statute. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (September 3, 1992).

For the "knowingly hire/continuing to employ" violation in Count I, IRCA provides for a penalty ranging from the minimum amount of $250 to a maximum sum of $2,000 for each infraction for the first violation. 8 U.S.C. § 1324a(e)(4)(A)(i). Repeat violations can result in civil penalties of $2,000 to $5,000 for the second infraction, 8 U.S.C. § 1324a(e)(4)(A)(ii), and $3,000 to $10,000 civil penalties for three or more violations of this nature, 8 U.S.C. § 1324a(e)(4)(A)(iii).

IRCA's provisions task INS with enforcing IRCA, and that agency is accorded broad discretion in assessing penalties for violations of this type and that flexibility permits INS to more fairly levy appropriate civil money penalties based upon varying inspection scenarios. Id.

IRCA also grants to the administrative law judge wide latitude in ordering appropriate civil money penalties for paperwork violations. 8 U.S.C. § 1324a(e)(5).

Complainant must levy civil money penalties for the three (3) violations at issue and it seeks $1,650 for the violation contained in Count I, $820 for the Count II violation, and $640 for the violation set forth in Count III, for a total civil money penalty of $3,110.

Respondent has failed to submit a written brief concerning the amounts of the civil money penalties which should be levied under these facts, despite having been accorded an opportunity to do so.

After considering the five (5) previously mentioned statutory criteria, I find that complainant did not act arbitrarily or capriciously in recommending the civil money penalty sums of $1,650, $820, and $640 in Counts I, II, and III, respectively. To the contrary, given respondent's prior IRCA violations, INS has shown considerable restraint in levying these civil penalty amounts.

Accordingly, the appropriate total civil money penalty for these three (3) violations is $3,110.

Order

Respondent's request for administrative review of the proposed civil money penalties contained in the three (3) counts in NIF 92-EPT-274A-077 (III), as set forth in its attorney's, Bertha A. Zuniga, Esquire's, request for hearing dated February 10, 1992, is hereby ordered to be and is denied.

It is further ordered that the appropriate total civil money penalty assessment for the three (3) violations set forth in that citation is $3,110, or $1,650 for the violation cited in Count I, $820 for the violation set forth in Count II, and $640 for the violation contained in Count III.

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.