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. 93A00174
DANNY MATHIS D/B/A MATHIS MASONRY, Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S ORDER

On December 7, 1994, the Honorable Joseph E. McGuire, the Administrative Law Judge (hereinafter ALJ) assigned to United States v. Mathis, issued a final DECISION AND ORDER determining the amount of civil money penalties to be imposed against the respondent for numerous violations of the employer sanctions provisions of the Immigration Reform and Control Act (IRCA), as codified at 8 U.S.C. § 1324a (1994). Included in Count I of the complaint were three violations of 8 U.S.C. § 1324a(a)(1)(A), pleaded in the alternative as knowing hire and/or continuing to employ violations. Counts II through V contained 45 various employment eligibility verification (hereinafter paperwork) violations of 8 U.S.C. § 1324a(a)(1)(B).

The ALJ had already determined that the respondent is liable for all of the alleged violations in an Order Granting Complainant's Motion for Partial Summary Decision entered August 30, 1994. The present Order and Decision issued on December 7, 1994, was to determine the amount of civil money penalty to be assessed, using the five factors which must be considered when establishing a civil money penalty for paperwork violations, set forth at 8 U.S.C. § 1324a(e)(5) as follows:

> In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charges, 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.

It is the ALJ's analysis of the second statutory factor, good faith, which is the subject of this order.

THE CHIEF ADMINISTRATIVE HEARING OFFICER'S REVIEW AUTHORITY

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in 8 U.S.C. § 1324a(e)(7), and delegated to the Chief Administrative Hearing Officer in section 68.53(a) of 28 C.F.R.*[1]; it is necessary, upon review, to modify the ALJ's December 7, 1994, order in Mathis for the reasons set forth below.

GOOD FAITH FACTOR

IT WAS INAPPROPRIATE FOR THE ALJ TO CONSIDER THE RESPONDENT'S BEHAVIOR DURING THE HEARING PROCESS IN DETERMINING WHETHER THE RESPONDENT ACTED IN GOOD FAITH.

As part of the discussion of the good faith of the respondent in the final decision and order, the ALJ stated:

> Furthermore, respondent has repeatedly failed to respond to complainant's discovery requests, and on June 23, 1994, the undersigned found that respondent had failed to comply with the Order granting complainant's Motion to Compel. Accordingly, it is found that respondent did not act in good faith and therefore is not entitled to mitigation of the proposed civil money penalty amount based upon the good faith criterion.

(ALJ decision at 6)

By according weight to the behavior of the respondent during the discovery phase of the litigation in the context of a good faith analysis, the ALJ has taken into consideration facts beyond the scope of a permissible good faith analysis as established in the Chief Administrative Hearing Officer's (CAHO) modification of United States v. Park Sunset Hotel, 3 OCAHO 525 (1993).

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*[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

In a manner quite similar to the present case, the ALJ in Park Sunset Hotel included references to the behavior of the respondent and respondent's counsel during the course of litigation as a part of the good faith analysis. In modifying the ALJ's opinion, the CAHO noted that wide latitude has been given ALJs in determining which factors may be used when setting the amount of civil money penalties to be assessed, even beyond the five statutory factors to be considered, but added:

> However, the facts considered have invariably been "with respect to" the substantive IRCA violations charged in the complaint. The factors taken into account, particularly with regard to good faith, have related in some way to the egregiousness of the IRCA violation itself. Park Sunset Hotel at 3.

As in Park Sunset Hotel, the instant ALJ order appears to include a consideration of the behavior of the respondent and counsel during the administrative judicial process in the decision of whether to mitigate on the basis of the respondent's good faith. As previously stated in Park Sunset Hotel, "By expanding the concept of good faith, or lack thereof, to include acts or omissions during the course of litigation, the ALJ blurs the distinction between conduct that gives rise to the litigation and conduct that influences the information reaching the tribunal, such as withholding or suppressing information." Park Sunset Hotel at 4.

In the present case, the ALJ has already used the judicial remedies available to respond to the respondent's behavior by orders based on 28 C.F.R. §§ 68.23(a), 68.21(b), and 68.38(c). The statute does not make allowances for a further penalty for noncompliance with discovery orders to be the enhancement of civil money penalties. "[E]nhancing IRCA civil money penalties on the basis of misconduct during the prehearing phase of litigation is not authorized by anything in the statute or regulations." Park Sunset Hotel at 4.

In light of this modification of the ALJ's decision and order, the ALJ is directed, in accordance with 28 C.F.R. § 68.53(d), to set the appropriate civil money penalty to be assessed against the respondent using an analysis based on the whole record to determine whether the respondent is entitled to mitigation on the basis of good faith.

ACCORDINGLY,

The ALJ's DECISION AND ORDER is hereby MODIFIED in that it was inappropriate for the ALJ to consider the respondent's behavior during the hearing process in determining whether the respondent acted in good faith.

IN ADDITION,

The ALJ is directed, in accordance with 28 C.F.R. § 68.53(d), to set the appropriate civil money penalty to be assessed against the respondent using an analysis based on the whole record to determine whether the respondent acted in good faith.

It is **SO ORDERED**, this 4th day of January, 1995

JACK E. PERKINS
Chief Administrative Hearing Officer

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

December 7, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 93A00174
DANNY MATHIS, D/B/A MATHIS MASONRY, Respondent.	)	

DECISION AND ORDER

Appearances: Joseph R. Dierkes, Esquire, Immigration and Naturalization Service, United States Department of Justice, Kansas City, Missouri, for complainant; Michael N. Weiss, Esquire, Miami, Florida, for respondent.

Before: Administrative Law Judge McGuire.

On September 21, 1992, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by serving Notice of Intent to Fine (NIF) KAN-92-15213, upon Danny Mathis, doing business as Mathis Masonry (respondent). That citation contained five counts and alleged a total of 48 violations of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324a, for which civil money penalties totaling $21,670 were assessed.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent knowingly hired and/or continued to employ the three (3) individuals listed therein, knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. §§1324a(a)(1)(A), 1324a(a)(2). Complainant levied a civil money penalty of $850 for each of those three (3) alleged violations, for a total civil money penalty of $2,550.

In Count II, complainant charged that respondent employed the six (6) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare Employment Eligibility Verification Forms (Forms I-9) pertaining to those individuals, in violation of IRCA, 8 U.S.C. 1324a(a)(1)(B). A civil money penalty of $640 was assessed for each of those alleged infractions, for a total civil money penalty of $3,840 on that count.

Count III cited respondent for having hired the 29 identified individuals for employment in the United States after November 6, 1986, as well as having failed to ensure that those individuals properly completed section 1, and that respondent had failed to complete section 2 of the pertinent Forms I-9, again in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $580 for the first of those alleged violations and $400 for the remaining 28 alleged violations, for a total civil money penalty of $11,780.

Complainant alleged in Count IV that respondent failed to properly complete section 2 of the Forms I-9 for each of the eight (8) listed individuals, all of whom were allegedly hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $350 for each of those alleged violations, or a total of $2,800 for the eight (8) alleged violations in that count.

In Count V, complainant asserted that respondent hired the two (2) individuals named therein for employment in the United States after November 6, 1986, and failed to ensure that those two (2) individuals properly completed section 1 of the pertinent Forms I-9, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a total civil money penalty of $700 for the violations alleged in that count, or $350 for each of the two (2) alleged violations.

Respondent was advised in the NIF of his right to contest those 48 charges by submitting a written request for a hearing before an administrative law judge within 30 days of his receipt of that citation,

and on July 1, 1993, Michael N. Weiss, Esquire, respondent's counsel of record, filed such a request.

On September 23, 1993, complainant filed the Complaint at issue, in which it reasserted the 48 allegations set forth in Counts I, II, III, IV and V of the NIF, as well as the requested civil money penalties totaling $21,670 for those alleged infractions.

On October 25, 1993, respondent timely filed his Answer, in which he generally denied all of the alleged IRCA violations set forth in the Complaint.

On March 14, 1994, complainant forwarded discovery requests, consisting of Requests for Admissions, Requests for Production, and Interrogatories, to respondent's counsel.

On April 19, 1994, because no responses to those discovery requests had been received within the time provided under the procedural regulations, complainant filed a pleading captioned Complainant's Motion to Compel Responses to Discovery, and in the Alternative for Sanctions, and for an Order Finding that Complainant's Requests for Admissions Have Been Admitted by the Respondent.

On May 3, 1994, the undersigned issued an Order Granting Complainant's Motion to Compel, in which each matter for which an admission had been requested in complainant's Requests for Admissions was deemed to have been admitted. Respondent was also ordered to provide written answers to complainant's Interrogatories and to provide complainant with copies of all documents requested by complainant, and to have done so within 15 days of his acknowledged receipt of that order.

Respondent was further advised in that May 3, 1994 Order that in the event he failed to comply with the terms thereof, further appropriate sanctions would be ordered from among those enumerated at 28 C.F.R. section 68.23(c).

On May 5, 1994, complainant filed a Motion for Continuance, requesting therein that the June 7, 1994 hearing in this matter be continued generally. An order granting that motion was issued on May 6, 1994.

On May 9, 1994, complainant filed a Motion for Partial Summary Decision Against Respondent, with supporting memorandum, request-

ing summary decision be entered in its favor on the facts of violation alleged in the Complaint.

On May 24, 1994, complainant also filed a Motion for Sanctions, in which it requested that an order be issued imposing sanctions against respondent based on respondent's failure to respond to complainant's Interrogatories and Request for Production of Documents.

On June 23, 1994, the undersigned found that respondent had failed to comply with the Order Granting Complainant's Motion to Compel, and ordered the following sanctions:

1. That the undersigned finds and infers that the answers to the interrogatories which were unanswered would have been adverse to respondent. 28 C.F.R. §68.23(c)(1).

2. That for the purposes of this proceeding, the matter or matters concerning which the Order Granting Complainant's Motion to Compel Responses to Discovery was issued is/are taken as having been established adversely to respondent. 28 C.F.R. §68.23(c)(2).

3. That respondent may not introduce into evidence or otherwise rely upon the documents requested in Complainant's Request for Production, in support of or in opposition to any claim or defense. 28 C.F.R. §68.23(c)(3).

4. That respondent may not be heard to object to the introduction and use of secondary evidence by complainant in order to show what the withheld documents or answers to interrogatories would have shown. 28 C.F.R. §68.23(c)(4).

In that June 23, 1994 Order, the undersigned also granted complainant's request that a ruling on its outstanding Motion for Partial Summary Decision be delayed in order to allow complainant an opportunity to supplement that motion and its supporting memorandum by the use of the inferences and the adverse factual findings generated by the sanctions specifically imposed by that Order. Complainant was given 30 days in which to amend and/or supplement that motion and its supporting memorandum.

On July 13, 1994, complainant filed a Supplement to Memorandum in Support of Complainant's Motion for Partial Summary Decision Against Respondent, requesting therein that specific inferences be drawn from respondent's failure to comply with complainant's discov-

ery requests, and requesting that those inferences be applied to its Motion for Partial Summary Decision.

On August 30, 1994, the undersigned granted complainant's Motion for Partial Summary Decision as it pertained to respondent's liability for all of the violations alleged in the Complaint. All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for those 48 violations.

On September 21, 1994, the undersigned held a telephonic prehearing conference with both counsel of record, in which it was decided that no evidentiary hearing would be held in Sedalia, Missouri. In lieu of conducting a hearing for the purpose of determining the appropriate civil money penalties for the violations contained in the Complaint, counsel agreed to submit written briefs recommending civil penalty sums for the 48 violations at issue by giving due consideration to the five (5) criteria listed in the pertinent provision of IRCA governing civil money penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5). Concurrent briefs were to have been filed by November 21, 1994.

On November 7, 1994, complainant filed a brief captioned Complainant's Brief Regarding Amount of Civil Money Penalties, requesting therein that fines totaling $21,670 be assessed against the respondent.

Respondent has failed to file a written brief recommending civil penalty sums.

In determining the appropriate civil money penalties 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 than $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).

Hence, in determining the appropriate civil money penalty to be assessed, the first statutory factor 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 (1992).

Complainant characterizes respondent's business, Mathis Masonry, as a small business. The only information in the record regarding the size of respondent's business is a statement by respondent that he had hired approximately 70 employees since 1989. See Declaration of INS Special Agent Jesse Stoker, May 6, 1994, at 3. Because the record is imprecise in regard to the number of workers employed by respondent at any one time, and because complainant has considered Mathis Masonry to be a small business, it is found that respondent is a small business. Accordingly, I will mitigate the monetary penalty based upon this factor. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 6 (1994); United States v. Wood 'N Stuff, 3 OCAHO 574, at 6 (1993).

The second of the five (5) factors that must be accorded consideration in determining civil money penalties is the respondent's good faith. Although IRCA is once again silent on what constitutes good faith, case law has established that mere allegations of paperwork violations do not constitute a "lack of good faith" for penalty purposes. United States v. Valladares, 2 OCAHO 316, at 6 (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 (1991).

Complainant asserts that respondent has failed to exercise good faith in its compliance with IRCA. Respondent knowingly hired and/or continued to employ three (3) individuals who were not authorized for employment in the United States. Respondent also failed to complete Employment Eligibility Verification Forms for six (6) of his employees and improperly completed the Forms I-9 for 39 additional workers.

Furthermore, respondent has repeatedly failed to respond to complainant's discovery requests, and on June 23, 1994, the undersigned found that respondent had failed to comply with the Order granting complainant's Motion to Compel. Accordingly, it is found that respondent did not act in good faith and therefore is not entitled to mitigation of the proposed civil money penalty amount based upon the good faith criterion.

The third statutory element that requires consideration concerns the seriousness of the violations involved. 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 (1992), paperwork violations are always serious. See United States v. Enrique Reyes, 4 OCAHO 592, at 8 (1994); United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 8 (1993).

Respondent knowingly hired and/or continued to employ the three (3) individuals named in Count I, knowing that those individuals were not authorized to work in the United States. Additionally, respondent failed to prepare Forms I-9 for the six (6) individuals named in Count II and also failed to properly complete Forms I-9 for 39 additional individuals named in Counts III, IV and V of the Complaint. These are serious violations under IRCA because they completely undermine the purpose of the law. Accordingly, it is appropriate to increase the monetary penalty based upon this factor. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 7 (1994); United States v. Enrique Reyes, 4 OCAHO 592, at 9 (1994).

The fourth criterion to be considered is whether any of the individuals involved was an illegal alien. Complainant has shown that respondent hired and/or continued to employ Jose Jesus Guerrero-Saldana, Alejandro Coronado-Moreno and Jose Alfredo Reyes-Estrada, all of whom were aliens not authorized for employment in the United States. Because those individuals were illegal aliens, it is appropriate to increase the civil monetary penalty based upon this criterion. See Enrique Reyes, 4 OCAHO 592, at 9.

The fifth and final factor to be addressed in assessing the appropriate civil money penalty is respondent's history of previous violations. Complainant acknowledges that although respondent has had previous encounters with INS, it does not recommend aggravating the fine based upon this factor because the respondent has never been fined for violating IRCA. Thus, respondent is entitled to mitigation of its civil money penalty based on this factor. See United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8 (1993).

In enacting IRCA, Congress, significantly modified the United States policy regarding immigration inasmuch as IRCA mandates that employers have a duty to inspect and verify employment eligibility documents presented in the hiring process. Thus, employers are required, with limited inapplicable exceptions, to verify the identity and work authorization of all individuals hired after November 6, 1986. Furthermore, employers must refuse to hire individuals not authorized

to work in this country. See United States v. Task Force Security, Inc., 4 OCAHO 625, at 9 (1994).

IRCA provides for civil money penalties for employers who fail to comply with IRCA's paperwork provisions. These 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 duel purpose of deterring repeat infractions of IRCA and also encourages employers to comply with IRCA. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (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).

INS is charged with enforcing IRCA, and is accorded broad discretion in assessing penalties for violations of this type. That flexibility permits INS to more fairly levy appropriate penalties based upon fact specific inspection scenarios. Id.

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

The pertinent provisions of IRCA require that complainant levy civil money penalties for the 48 violations at issue. Complainant seeks $2,550 or $850 for each of the three (3) Count I violations, which equates to 43 percent of the statutory maximum civil money penalty for those three (3) "knowingly hire/continue to employ" violations permitted under IRCA. With regard to the 45 paperwork violations, complainant levied fines of $3,840 for the six (6) violations in Count II, $11,780 for the 29 violations in Count III, $2,800 for the eight (8) Count IV violations and $700 for the two (2) violations in Count V, which also equates to 43 percent of the statutory maximum civil money penalty for those 45 paperwork violations.

Respondent, on the other hand, has failed to submit a written brief recommending the appropriate civil money penalty sums to be assessed under these facts, despite having been accorded an opportunity to do so.

After carefully considering the five (5) previously mentioned statutory criteria, I find that complainant's recommended penalty sums of $2,550 in Count I, $3,840 in Count II, $11,780 in Count III, $2,800 in Count IV and $700 in Count V, were appropriately assessed.

It is ordered that the appropriate total civil money penalty assessment for the 48 violations set forth in NIF KAN-92-15213 is $21,670, or $2,550, $3,840, $11,780, $2,800 and $700 for those violations alleged in Counts I, II, III, IV and V, respectively.

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 respondents, in accordance with the provisions of 8 U.S.C. §§ 1324a(e)(7), (9) and 28 C.F.R. § 68.53 (1991).