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. 92A00131
NEVADA LIFESTYLES, INC.	)	
DBA: COMMERCIAL DRAPERY	)	
CLEANERS,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(May 10, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Richard Knuck, Esq., for Complainant.
Nevada Lifestyles, Inc., Pro Se, Respondent

I. *Introduction*

The Immigration Reform and Control Act of 1986 (IRCA)[1] adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated
the prohibitions against unlawful employment and/or the record- keeping verification requirements of the employer sanctions program.

II. *Procedural Summary*

[1] Pub. L. No.99-603, 100 Stat. 3359 (1986), enacted, as Section 101 of IRCA Section 274A of the Immigration and Nationality Act of 1952 as amended, codified at 8 U.S.C. §1324a, amended by the Immigration Act of 1990, Pub. L. No.101-649, 104 Stat. 4978 (1990).

A. The NIF, the Complaint and the Answer

On December 9, 1991, the Immigration and Naturalization Service (INS or Complainant) conducted an employee survey at the business site of Nevada Lifestyles, Inc. (Lifestyles or Respondent). On May 4, 1992, INS served Respondent with a Notice of Intent to Fine (NIF) alleging violations of the employment sanctions provisions of IRCA.

On June 11, 1992, the INS filed a complaint against Complainant which alleged forty seven paperwork violations. In Counts I and II of the complaint, INS alleges that Respondent failed to prepare and/or retain and/or make available for inspection twenty four Employment Eligibility and Verification Forms (Forms I-9). In Count III, INS alleges that Respondent failed to complete Section 2 of twenty three Forms I-9. Of the I-9s made available to the INS, none had complete certification.

Respondent timely filed an answer raising a variety of defenses, objections and affirmative defenses.

B. The Prehearing Conferences and the Motions for Summary Decision

On July 10, 1992, October 19, 1992 and November 19, 1992, the parties and the bench participated in telephonic prehearing conferences. The parties engaged in vigorous motion practice, including cross motions for summary decision.

My October 16, 1992 order denied both parties' cross motions for summary decision and granted in part Complainant's motion to strike affirmative defenses. Summary decision was denied on the basis that there existed "genuine issue[s] as to material . . . fact." 28 C.F.R. §68.38 (c) [1991]. Inter alia, the order dismissed all but one of Respondent's constitutional defenses. The dismissal focused on Respondent's commerce clause, on its facial constitutionality defenses,[2] and on its claim of impermissible selective prosecution.

[2] In regard to the facial constitutionality of IRCA, the order states, "It is sufficient to note that Lifestyles has preserved its facial constitutional challenge on the record. However, I am unaware of any constitutional infirmity in Section 101 of IRCA. Big Bear, 1 OCAHO at 30." 3 OCAHO 462 (10/16/92) at 15 (Order Denying Cross Motions for Summary Decision and Granting in Part Complainant's Motion to Strike Affirmative Defenses).

By order dated October 22, 1992, I dismissed Respondent's defense that INS' failure to reduce an oral informant's tip to writing invalidates the ensuing investigation. At the second prehearing conference, Complainant identified fourteen potential witnesses; Respondent identified three, and agreed to identify other potential defense witnesses to INS, not later than October 26.

C. Discovery and Preparation for Hearing

The parties worked out their discovery problems without significant intervention by the judge. In preparation for hearing, Lifestyles filed subpoena requests.

Respondent's initial November 5 request consisted of a handwritten note with a list of fifty four witnesses attached. Respondent moved to subpoena certain public officials, e.g., President George Bush, Senator Harry Reid and Assistant Attorney General Stuart Gerson. Following a revised request, I issued subpoenas for seven individuals. I refused to issue subpoenas for public figures. Order on Subpoena Request (11/25/92). See In re United States, 985 F.2d 510 (11th Cir.1993) (reaching the same result as to subpoenas for high public officials).

On November 27, 1992, Respondent filed a copy of a motion it anticipated filing in the Ninth Circuit. On December 7, 1992, a copy of the Ninth Circuit order denying Lifestyle's motion for that court's intervention "by means of the extraordinary remedy of mandamus" was also filed here.

D. The Evidentiary Hearing, Complainant's Motion to Dismiss, and Post Hearing Briefs

The evidentiary hearing was held in Henderson, Nevada on December 2 and 3, 1992.

Complainant filed a motion to dismiss on December 2, 1992. Complainant moved to dismiss six individuals named in Count II of the complaint and two individuals named in Count III of the complaint. According to Complainant's motion the identified individuals were hired prior to November 7, 1986 and are therefore grandfathered under IRCA.

Respondent and Complainant filed post hearing briefs respectively on February 2, 1993 and February 22, 1993.

III. *Statement of Facts*

A. Background Information

Respondent operates a dry cleaning business, incorporated in Nevada. Lifestyles' principals are Messrs. Mario Sanders (Sanders), President and Jack Ferm (Ferm), Vice President. During the fall of 1991, they negotiated with K.C.&W., a Nevada general partnership, for the purchase of its business. Acquisition negotiations were lengthy. In the course of the negotiations, K.C.&W. made its books and records available to Lifestyles for at least one week prior to signing the sales contract. On November 14, 1991, Lifestyles purchased the business from K.C.&W.

Sanders testified that the purchase agreement for Lifestyles warranted that the business had $1.2 million in annual gross receipts at the time of purchase but that business had fallen off in the intervening time period. He declined to provide precise statistics.

As part of the purchase transaction, Lifestyles retained the K.C.&W. employees, including Debra Carr (Carr) (also known as Debra Acuna). However, Carr was discharged shortly after Lifestyles acquired the business.

At hearing, Carr testified that she is a fluent in Spanish. Both K.C.&W. and Lifestyles relied on her language skills to train and work with the Spanish speaking staff. Carr testified that in this capacity, she came to know that Lifestyles was employing aliens not authorized to work in the United States. While still in Lifestyles' employ, Carr informed management about the unauthorized aliens. Carr further testified that upon receipt of this information, Respondent expressed disinterest and failed to investigate.

Ferm disputed Carr's testimony. He testified that Carr did not inform Ferm or Sanders of the unauthorized employees. Furthermore, Ferm asserted that Carr had been responsible for the hire of the individuals named in the complaint.

B. How the Investigation Began

INS investigated Respondent pursuant to a telephone tip it received on or about December 2, 1991. The first telephone tip was followed a few days later by a second telephone call. On both occasions, the

informant called to advise INS that Lifestyles employed illegal aliens. Both times, the informant identified herself as Carr (Carr).

After the second telephone call, Special Agent Gilberto Cortinas (Cortinas) was directed to do a surveillance of Lifestyles. Cortinas spent about fifteen minutes observing the Lifestyles premises from the outside. Cortinas testified that the purpose of his visit was to verify that the business actually existed; he found it was located where Carr had indicated. During his surveillance, Cortinas also tried to evaluate the size of the business, the number of agents needed to do an employer survey, and the location of the exits.

C. Employer Survey

On December 9, 1991, several INS agents and detention officers went to the Lifestyles premises. Special Agent Richard Burgess (Burgess) went into one of the offices at the dry cleaning establishment. Cortinas waited for Burgess outside the office.

Approximately four other special agents and two detention officers waited in back of the establishment.

Burgess requested consent from Sanders to conduct an employer survey.[3] In his office, Sanders gave his consent to Burgess. Outside his office, Sanders repeated his consent. The second time Cortinas was also a witness to the consent.

By radio, Burgess and Cortinas notified the agents and officers waiting in back that entry consent had been given. The employer survey commenced. INS reportedly apprehended five illegal aliens.

D. Document Inspection

On December 13, 1991, Cortinas inspected some of Lifestyles' employment records. In the presence of two Lifestyles secretaries and Ferm, Sanders presented Cortinas with his current employee roster, Forms I-9, Forms W-4 and job applications.

Cortinas told Sanders that he needed copies of the documentation. Sanders offered to have his secretary make them for Cortinas.

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[3] During an employer survey, INS interviews employees found on the employer's premises about their immigration status.

Because the secretary was busy that day, Cortinas and the secretary arranged for Cortinas to pick up the copies the following Monday. On December 13, Cortinas picked up the copies from Lifestyles. Cortinas testified that fourteen of the Forms I-9 were filled out after the December 9 employer survey and before Cortinas December 13 return.

IV. *Discussion*

A. Identifying the Issues

Only a few issues remain open. The principal issues are:

(1) Whether the INS violated its authority during the investigatory stage, either in the initiation of the investigation or in its execution. Subsumed in this issue is the question whether INS violated Respondent's Fourth Amendment rights.

(2) Whether Respondent is responsible for maintaining correctly completed Forms I-9. Additionally, whether Respondent can be held exclusively responsible without also holding Respondent's predecessor responsible. Subsumed in this issue is the question whether an employer's IRCA liability is triggered exclusively by the literal act of hire.

(3) Whether the civil money penalties assessed by INS are reasonable, particularly in light of the fact the Respondent had acquired the business only twenty eight days prior to the initial investigation.

B. The Investigation

Respondent argues that INS exceeded its authority by commencing its investigations of Lifestyles on the basis of Carr's two December, 1991 phone calls. In effect, Respondent argues that the call was made by an "unknown informer" and therefore fatally infects the ensuing investigation, complaint and litigation. Respondent Brief at 4. In support of its argument, Respondent cites,

> The Attorney General shall establish procedures—(A) for individuals and entities to file written, signed complaints respecting potential violations subsection (a) or (g)(1). . .

8 U.S.C. §1324a(e)(1)(A).

Complainant counters that Carr identified herself and recited her connection with Respondent. Consequently, her calls were not

anonymous. INS further argues that whether or not the calls were anonymous, they formed a legitimate basis for initiation of an investigation.

At hearing, Respondent attempted to impeach Carr, by referring to her criminal record and by calling as a witness Graciela Solis, a Lifestyles employee. Respondent's effort was to persuade the judge that Carr lacked credibility. Nothing in Lifestyle's challenges to Carr's conduct or in Solis' testimony detracts from the essentials of Carr's testimony, i.e., that during her employment she became aware that certain individuals inherited by Lifestyles from K.C.&W. were illegals. I find her testimony believable and in no way impaired.

On this point, the INS interpretation of both the facts and the law is correct. Having expressly identified herself by name and having accurately related her prior association with Lifestyles, Carr's calls were not anonymous. INS' investigatory follow up on the tips it received from Carr was valid.

The legal import Respondent attaches to anonymity is misplaced in any event. OCAHO precedent has already established the validity of an investigation commenced on the basis of an anonymous tip. U.S. v. Widow Brown's Inn, 3 OCAHO 399 (1/15/92).

C. The Employer Survey

At the evidentiary hearing, Respondent argued, in effect, that the INS employer survey violated Respondent's protected search and seizure rights under the Fourth Amendment. Based on its view that the employer survey was defective, Respondent uses a type of fruit of the poisonous tree analysis and argues that the complaint must be dismissed.

At issue is whether the consent authorized by Sanders to INS entry is equivalent to a waiver of Fourth Amendment protections to which Respondent might otherwise be entitled in the workplace context. I note in passing, that there is considerable authority which holds that the privacy expectation in the workplace is low. Therefore, the Fourth Amendment protections available to Respondent are few. Widow Brown's Inn, 3 OCAHO 399 at 30 citing O'Connor v. Ortega, 480 U.S. 709, 725 (1987).

This forum has previously examined the issue of entry consent for the purposes of an employer survey.

> Consent is probably the most recognized exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593-594 (1945); Zap v. United States, 328 U.S. 624, 630 (1945)") . . . To prevail in its assertion of the consent exception, INS must establish voluntary consent. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Voluntariness is a question of fact to be determined from "all of the circumstances," Schneckloth v. Bustamonte, 412 U.S. at 249. . . . Beyond the voluntariness of the consent, the record must establish that whoever gave consent had authority to do so.

Widow Brown's Inn, 3 OCAHO 399 at 30.

Widow Brown's Inn held that no Fourth Amendment violation had occurred where consent had been given.

In view of Sander's voluntary consent, his position of authority in the corporation and OCAHO precedent, I hold that INS' employer survey did not violate Respondent's Fourth Amendment rights. Having ruled against Respondent's assumption that the employer survey violated a constitutional guarantee, Respondent's derivative fruit of the poisonous tree argument also falls.

D. Document Inspection

I also overrule Respondent's Fourth Amendment objections vis a vis INS' document inspection. Sanders freely consented to document inspection. The extent of the voluntariness of consent is demonstrated by the fact that at Sanders' direction, a Lifestyles secretary provided INS with clerical assistance, i.e., photocopying to expedite the document inspection.

E. Lifestyles' Responsibility for Maintenance of Correct and Complete Forms I-9

Respondent's Form I-9 compliance was defective. The germane issue is whether Respondent and Respondent alone bears the responsibility of ensuring the perfection of the I-9s. I expressly left this issue open in my October 16 Order. At that time I stated,

> . . . [T]he claim that Respondent is not liable under §1324a, with respect to employees who were hired (after November 6, 1986) by a predecessor employer whose business Lifestyles purchased in 1991, is a matter to be determined on the factual record. . . . If at evidentiary hearing, Respondent is able to show that employees were hired by a predecessor employer, I may still conclude that Lifestyles is liable under §1324a for paperwork violations. [At this time] I am not persuaded that IRCA is applicable only to employers who effect initial hire.

U.S. v. Nevada Lifestyles, 3 OCAHO 463 (10/16/92) (Order Denying Cross Motions for Summary Decision) at 12.

(1) Lifestyles did not hire the individuals listed in the complaint but it continued their employment.

It is undisputed that an employer's I-9 responsibility initially attaches at the time of hire.

(a) Hire

INS regulations define both what is and what is not a hire.

The term hire means the actual commencement of employment of an employee for wages or other remuneration.

8 C.F.R. §274a.1(c).

An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

8 C.F.R. §274a.2(b)(1)(viii).

Applying the regulations to the facts of this case, I confirm my October 16 holding that it is reasonable as a matter of regulatory interpretation to conclude that Lifestyles did not hire the individuals listed in the complaint.

(b) Continuing Employment

INS regulation defines the term continuing employment:

> An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable. . .

8 C.F.R. §274a.2(b)(1)(viii)(7).

> An employer . . . continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets;

8 C.F.R. §274a.2(b)(1)(viii)(7)(ii).

I hold that after the sale of K.C.&W. to Lifestyles, Respondent con-tinued to employ the individuals named in the complaint.

(2) Lifestyles Bears I-9 Responsibilities

As earlier stated, a hiring employer explicitly is made responsible for initiating the execution of Forms I-9. A non-hiring employer, e.g., a continuing employer, is exempted by INS regulation from initiating Forms I-9 where the hiring employer has fulfilled that obligation. Stated differently, an employer, who has acquired a business and retains the predecessor's employees, is neither expected to dispose of I-9s previously executed by its predecessor in interest nor required to execute all new I-9s. The exception alleviates a continuing employer's redundant paperwork burden. The exception is not a device to indemnify non-hiring employers against I-9 liability. If the I-9s initiated by the predecessor in interest were omitted or were defective, the successor in interest is liable for such deficiencies. The successor is obliged to satisfy I-9 requirements on its own or run the risk that its predecessor did not.

It may be assumed arguendo, that a successor in interest could avoid liability simply by asserting that named individuals were hired by its predecessor. On such an assumption, an employer would avoid I-9 responsibility via corporate reorganization, merger, or sale of stock or assets. For example, the principal stockholder of an entity with a large newly hired staff could decide to sell stock to a spouse or corporate insider and thereby obviate the need for IRCA paperwork compliance. Alternatively, in order to avoid having to pay and/or litigate the fine assessed in a NIF, the business could change from a corporation to a limited partnership. The policy engendered by such construction would create employer incentives to become successors in interest in order to avoid IRCA paperwork requirements. Obviously, Congress did not intend to undermine IRCA with such a gross loophole. As stated in a previous order,

> Such interpretation would permit successor employers to ignore IRCA with impunity as to such employees, thereby undermining the very purpose of the statute.

Nevada Lifestyles, 3 OCAHO 463 (Order Denying Cross Motions for Summary Decision) at 12. See also U.S. v. Ulysses, 3 OCAHO 409 (3/9/92) (Order Granting Complainant's Motion for Partial Summary Decision).

Because Lifestyles was not the hiring entity as defined in 8 C.F.R. §274a.1(c), it falls within the regulatory exception. The only comfort

Lifestyles can derive from the exception, however, is the ability to avoid redundancy, i.e., freedom from an obligation to initiate I-9s practices for continuing employees for whom I-9s had previously been executed. Lifestyles relies on the I-9s executed by K.C.&W. at its peril. A fortiori, Lifestyles is at risk where I-9s were neither prepared by its predecessor nor presented to INS by Lifestyles.

Title 8 U.S.C. §1324a obliges an employer of individuals in the United States to comply with I-9 requirements whether such employer initiated the hire or is an arms length successor in interest of a previous employer who effected the hire. The §1324a regime obliges both successor and predecessor employers to comply with national policy with respect to employment in the United States.

(3) OCAHO Precedent

OCAHO precedent has dealt with the IRCA liability of successors in interest. U.S. v. Marnul, 3 OCAHO 441 (7/21/92); U.S. v. Ulysses, 3 OCAHO 409. In Marnul a limited general partnership was the successor in interest of a corporation.

Although the partnership and the corporation were separate and distinct entities, management was comprised of the same individuals before and after the change in ownership form. The successor partnership employed a number of the individuals previously employed by the corporation. According to the Marnul holding, the partnership effected a new hire when it employed the individuals previously employed by the corporation. Therefore, the partnership could not rely on the Forms I-9 executed by its predecessor. Marnul stands for the proposition that the successor entrepreneur is obliged to execute new Forms I-9 for its employees, whether or not they were also employed by its predecessor.

With the exception of identity of management both before and after the transfer of ownership transaction, the Marnul facts parallel the facts here. While the Marnul and Lifestyles outcomes are the same, the analyses differ. Whereas Marnul held the successor employer liable on the basis that its employees were essentially new hires, I find the successor liable where the predecessor failed to perfect its I-9 practices and the successor failed to bring such paperwork into compliance.

In Ulysses, there were four named respondents, i.e., Ulysses, Inc., Ulysses Restaurant Group, Inc., Ottis Guy Triantis, individually and

Gus Ottis Triantis, individually. Ulysses Restaurant Group, Inc. was formed after INS cited Ulysses Inc. and members of the Triantis family for IRCA violations. The ALJ held all respondents jointly and severally liable, essentially finding the variety of ownership arrangements to be a nullity, i.e., the ALJ pierced the corporate veil, concluding in effect that the transfers of ownership were legally a fiction.

The transfer of ownership transactions in Ulysses and here differ significantly. On the record, the Lifestyles acquisition was an arm's length sale of an ongoing concern, in contrast to Ulysses. However, Ulysses informs this decision to the extent that it holds a successor entrepreneur liable for the §1324a paperwork deficiencies of its predecessor.

(4) Conclusion

I hold that Lifestyles cannot shield itself from liability under §1324a on the basis that it is a successor in interest. This conclusion establishes that an employer does not avoid employment eligibility verification compliance as the result of acquiring a pre-existing workforce. Accordingly, I find that Respondent violated 8 U.S.C. §1324a as to thirty nine individuals as alleged in Counts I, II and III of the complaint, as amended by Complainant's December 2 Motion to Dismiss.[4] Eighteen violations are for failure to prepare the Form I-9 and/or failure to retain and/or make available for inspection the Form I-9 in Counts I and II. Twenty one violations are for failure to complete §2 of the Form I-9 in Count III.

My holding that the government can obtain all the liability that is forthcoming from I-9 deficiency against the successor entrepreneur, i.e., Lifestyles, does not preclude INS from prosecuting both the predecessor and the successor in the appropriate circumstances. Any claim for contribution or otherwise that Lifestyles might have against its predecessor is a matter of private law, and not an issue on the question of liability to the government for violation of 8 U.S.C. §1324a.

F. Civil Money Penalties

Having found Lifestyles liable for thirty nine paperwork violations, the remaining issue is the reasonableness of the civil money penalty

[4] The motion to dismiss the charges as to eight individuals named in the amendment is granted.

assessed by INS. The statutory minimum for the civil money penalty is $100; the maximum is $1,000. 8 U.S.C. §1324a(e)(5). In determining the quantum of penalty, I am obliged to consider the five factors prescribed by 8 U.S.C. §1324a(e)(5): size of the employer's business, good faith of the employer, seriousness of the violation, whether or not the individuals involved were unauthorized aliens and the history of previous violations.

In the initial adjudication of liability for paperwork violations under 8 U.S.C.§1324a(a)(1)(B), I applied the five statutory factors on a judgmental basis. U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89), aff'd by CAHO (5/5/89); aff'd, Big Bear Market No.3 v. I.N.S., 913 F.2d 754 (9th Cir.1990). I utilize a judgmental and not a formula approach, considering each of the five factors. U.S. v. Tom & Yu, 3 OCAHO 445 (8/18/92); Widow Brown's Inn, 2 OCAHO 399; U.S. v. DuBois Farms, Inc., 2 OCAHO 376 (9/24/91); U.S. v. Cafe Camino Real, 2 OCAHO 307; U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90) at 10; 1 OCAHO 170 (5/11/90) (Order Denying Respondent's Request for Stay and for Reconsideration In); denial of request for stay and for reconsideration affirmed by CAHO, 1 OCAHO 184 (6/7/90); U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90).[5]

Since the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond that amount. DuBois Farms, 2 OCAHO 376 at 30-31; Cafe Camino Real, 2 OCAHO 307 at 16. I consider only the range of options between the statutory minimum, and the amount assessed by INS. Tom & Yu, 3 OCAHO 445; Widow Brown's Inn, 2 OCAHO 399; DuBois Farms, 2 OCAHO 376 at 30-31; Cafe Camino Real, 2 OCAHO 307 at 16; Big Bear Market, 1 OCAHO 48 at 32; J.J.L.C.; 1 OCAHO 154 at 9.

The NIF, as adopted in the complaint, proposed and adhered to $400.00 for one failure to prepare and/or retain and/or make available for inspection a Form I-9, $250.00 for each failure to prepare and/or retain and/or make Forms I-9 available for inspection, and $175.00 for each failure to complete §2 of the Forms I-9.

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[5] Cf. U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89) (applying a mathematical formula to the five factors in adjudging the civil money penalty for paperwork violations); U.S. v. Felipe, Inc., 1 OCAHO 108 at 5 and 7 (11/29/89). On administrative appeal, the CAHO commented, "This statutory provision does not indicate that any one factor be given greater weight than another." The CAHO affirmation also explained that while the formula utilized by the judge was "acceptable," it was not to be understood as the exclusive method for keeping faith with the five statutory factors.

(1) The Factors Applied

(a) Size

The record is imprecise as to the number of employees on Lifestyles' payroll. Complainant's Brief at 21. Respondent's quarterly wage report for the period ended 12/3/191 (exh. C) confirms 47 employees for each of the first two months of the reporting period. In contrast the total shown is 67 on Exhibit C. The W-2 report dated January 25, 1992 (exh. D) shows thirty seven individuals excluding Ferm and Sanders. On brief, Complainant identifies the figure forty seven. I hold that Complainant's figure is within the correct range and is accepted as sufficiently accurate for the analysis as to size.

Complainant asserts that Lifestyles has annual gross receipts of $1.2 million. Respondent concedes that sum as its 1990 gross receipts, but asserts that business has declined since then.

Both parties claim that Lifestyles is not small. Complainant argues from this claim that the civil money penalties should remain as assessed. Respondent criticizes INS for selectively prosecuting larger business establishments in order to increase INS' revenues.

Neither IRCA nor relevant regulations provide guidelines for determining business size. As a proxy for size standards, I refer to the Standard Industrial Classification (SIC) Manual utilized by the U.S. Small Business Administration (SBA). See Tom & Yu, 3 OCAHO 445. SBA regulations explain that dry cleaning establishments with annual gross incomes under $2.5 million are small; laundry and garment services grossing less than $3.5 million annually are small. 13 C.F.R. §121.601 (1992). Applying either SBA standard to Lifestyles gross income, Respondent is a small business.

Notwithstanding the parties' claims to the contrary, I hold that Lifestyles is a small business. Furthermore, I hold that this size determination augers in favor of reduction rather than an augmentation of the civil money penalty.

(b) Good Faith

(i) OCAHO Precedent

Although 8 U.S.C. §1324a(e)(5) identifies good faith as a factor to consider in assessing the amount of civil money penalties, it "is silent

. . . as to what constitutes good faith. . . ." Tom & Yu, 3 OCAHO 445 at 5. OCAHO caselaw provides some guidance.

Bad faith is found in instances of egregious Respondent conduct. Id. at 5. Forgery and apparent forgeries on Forms I-9 have been held to be examples of bad faith. Cafe Camino Real, 2 OCAHO 307 at 16 (where the ALJ found the "record barren of good faith compliance . . . the violations are repugnant to claims of good faith. [One] forgery . . . and the apparent forgery of at least seven other Form I-9 employee signatures deprives Respondent of any good faith contention.")

In a §1324a case, where the employer was found to have knowingly continued to employ unauthorized aliens, it was held that the employer's conduct lacked good faith, when it failed to investigate after INS notification that it was employing illegal aliens. The ALJ determined that the Respondent lacked good faith despite the fact that only twenty two days had elapsed between the time INS agents put the employer on notice of irregularities and the raid on the employer's premises. U.S. v. Mester, [Mester I], 1 OCAHO 18 (6/17/88); adopted by CAHO (7/12/88); aff'd Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir.1989).

(ii) Lifestyles in the Context of OCAHO Precedent

In the case at bar, Respondent failed to investigate whether it employed illegal aliens despite information provided to it by Carr. Carr's information placed Respondent on notice of potential IRCA compliance problems. Notably however, at the time of the communication between Carr and Lifestyles management, Respondent had been in business for two weeks. At the time of the survey, Respondent had been in business for twenty eight days.

As informed by OCAHO precedent, Respondent's failure to heed Carr's tip is not tantamount to bad faith. Cf. Camino Real, 2 OCAHO 307. At issue is whether or not Respondent's conduct was lacking in good faith.

Lifestyles is distinguishable from Mester, 1 OCAHO 18. In Mester, INS' notice to the employer underpins the lack of good faith regarding the immigration status of its employees. In contrast, the notice to Lifestyles was provided by an employee with no immigration law credentials. On this record, Respondent had no reason to believe that Carr was in a position to make an accurate immigration status evaluation.

In the case at bar, the ideal course of action would have been for Respondent to investigate Carr's allegations. An investigation would have been evidence of Respondent's good faith and thereby would have been a factor in limiting civil money penalty liability. Furthermore, in the course of an investigation Respondent might have entirely avoided IRCA liability by discovering and correcting the I-9 deficiencies.

Respondent's conduct was not ideal. I am not able to conclude that it was egregious, particularly considering the relatively short period of time from date of purchase to date of the employer survey, i.e. twenty eight days. Consequently, in adjudging the amount of civil money penalty, I do not disturb Complainant's assessment. Big Bear Market, 1 OCAHO 48.

(c) Seriousness of the Violations

Complaints exclusively based on paperwork violations can be characterized as serious.

> Paperwork violations are always potentially serious, since '[the] 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.' U.S. v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (6/11/92).

U.S. v. M.T.S. Service Corp., 3 OCAHO 448 (8/26/92). See also U.S. v. Noel, 2 OCAHO 427 (9/23/91).

In the paperwork context, the seriousness factor refers to the degree to which the respondent being charged has deviated from the proper Form I-9 completion from the proper Form I-9 completion format . . .

U.S. v. Tuttle Design Build, 3 OCAHO 422 (4/21/92) (Order Denying Respondent's Motion to Compel Discovery).

OCAHO precedents identify hallmarks of serious IRCA violations. Failure to prepare or present Forms I-9 has been characterized as "blatant disregard to the statutory and regulatory mandates of IRCA." Cafe Camino Real, 2 OCAHO 307 at 16. See also Widow Brown's Inn, 3 OCAHO 399 at 41; U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91); Felipe, 1 OCAHO 93 at 12; U.S. v. A-Plus Roofing, Inc., 1 OCAHO 209 (7/27/90).

Failure of attestation at §2 of the Form I-9 has been held to be

> . . . a serious violation, implying avoidance of liability for perjury but also reckless disregard for plain and obvious statutory and regulatory mandates made clear. . .

J.J.L.C., 1 OCAHO 154 at 10;. Accord U.S. v. Ulysses, Inc., 3 OCAHO 449 (9/3/92); M.T.S. Service Corp., 3 OCAHO 448 at 5; Land Coast Insulation, Inc., 2 OCAHO 379; U.S. v. Acevedo, 1 OCAHO 95 (10/21/89).

Lifestyles did not comply with IRCA's paperwork mandate, by failing to present eighteen Forms I-9 and failing to complete §2 and sign twenty three Forms I-9. I hold such violations to be serious. The following comment from OCAHO precedent is apropos here.

> Taken separately or as a whole, Respondent's disregard for substantive compliance frustrates national policy reflected in enactment of §1324a.

J.J.L.C., 1 OCAHO 154 at 10.

*(*d) Unauthorized Aliens

Complainant claims on brief that the individual named in Count I was an unauthorized alien and that three individuals named in Count III were unauthorized aliens. That the individuals identified in the complaint were unauthorized aliens was neither alleged nor proven. Accordingly, I hold that for purposes of civil money penalty assessment, there were no unauthorized aliens implicated in the charges against Lifestyles.

(e) No Prior History of Violations

There is no allegation on this record of prior violations.

(2) Civil Money Penalties Adjudged

Application of the statutory criteria to the violations found suggests civil money penalties modestly discounted from the levels assessed by INS. The discount accrues from my conclusion that Lifestyles is small and that the good faith factor in this case is essentially neutral; the discount would be greater but for the finding of seriousness.

In lieu of the penalties proposed by INS, i.e., $400.00, $250.00, and $175.00 for each violation of Counts I, II and III, respectively, I adopt the following:

Count I,	as to the named individual	$350.00
Count II,	as to each named individual	$200.00
Count III,	as to each named individual	$150.00

V. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, motions, briefs and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon the preponderance of the evidence, that:

1. Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing as alleged in the complaint to prepare Employment Eligibility and Verification Forms with respect to the individuals named in Counts I and II, said individuals having been hired after November 6, 1986 by Respondent's predecessor and found to be employees of Respondent at the time the forms should have been forthcoming;

2. Respondent violated 8 U.S.C. §1324a(b)(1) by failing as alleged in the complaint to complete §2 of employment verification forms with respect to the individuals named in Count III, said individuals having been hired after November 6, 1986 by Respondent's predecessor, found to be employees of Respondent at the time the incomplete forms were present;

3. That upon consideration of the statutory criteria for determining the amount of the civil money penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent with respect to Count I to pay $350.00 per violation for a total of $350.00, with respect to Count II to pay $200.00 per violation for a total of $3400.00, and for violation of 8 U.S.C. §1324a(b)(1) it is just and reasonable to require Respondent with respect to Count III to pay $150.00 per violation for a total of $3150.00, to pay a grand total for all violations of $6900.00;

4. This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.52(c) (iv) (1991), including the Partial Summary Decision and Order, 3 OCAHO 412, incorporated and adopted herein. As provided at 28 C.F.R. §68.53(a)(2) (1991), this action shall become the final order of the Attorney General unless, within thirty 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 parties adversely affected. See 8 U.S.C. §§1324a(e)(7), (8); 28 C.F.R. §68.53 (1991).

SO ORDERED.

Dated and entered this 10th day of May, 1993.

MARVIN H. MORSE
Administrative Law Judge