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.93A00040
ENRIQUE REYES D/B/A KING'S PRODUCE, Respondent.	)	

FINAL DECISION AND ORDER

(January 6, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: John B. Barkley, Esq., for Complainant.
Joyce A. Rebhun, Esq., for Respondent.

I. *Procedural Background*

This is a proceeding pursuant to 8 U.S.C. §1324a, enacted as section 101 of the Immigration Reform and Control Act of 1986, as amended (IRCA). On March 1, 1993, the Immigration and Naturalization Service (Complainant or INS), initiated this proceeding by filing a complaint against Enrique Reyes d/b/a/ King's Produce (Reyes or Respondent), in the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint alleges in count I that in violation of 8 U.S.C. §1324a(1)(A), Reyes had hired a named individual for employment in the United States, knowing him not to be authorized for such employment. Count II of the complaint alleges that Reyes had failed,

when obliged to do so, by 8 U.S.C. §1324a(1)(B), to prepare employment authorization verification forms (Forms I-9) for 24 named individuals, including the individual named in Count I.

On March 3, 1993, OCAHO issued a notice of hearing which forwarded a copy of the complaint to Reyes and another copy to an attorney who had previously identified himself to INS as counsel for Reyes. The attorney informed OCAHO on April 1, 1993 that he no longer represented Reyes. On April 3, 1993, I issued an order which transmitted to Reyes another copy of the complaint, the attorney's letter and a copy of OCAHO rules of practice and procedure. Reyes was advised that he had 30 days from receipt of the order to file an answer to the complaint. On May 6, 1993, Reyes filed a timely answer to the complaint.

Respondent's answer to the complaint denies the count I, knowing hire allegation. Reyes claims the named individual, Tito Armando Quintanar Robles (Tito Quintanar), was never an employee, was not paid, and lived in Mexico, was visiting in Las Vegas and "just happened to be in my establishment on the day the Immigration Service investigators came." He denies Count II liability also, contending that he took over the business from Benjamin Garcia (Garcia) in September 1991. Reyes hired new employees for whom he executed six I-9s which INS took from him when it inspected the premises. He says he should not be liable for employees hired before he took over the business and that he completed I-9s for new hires. Attached to the answer is an INS agent's receipt dated 12/3/91 for "six I-9s and payroll records pertaining to King's Produce." Reyes claims he cannot specify the employees for whom the I-9s were taken because the I-9s were never returned, but presumes they were for his new employees, including his two sons who are employees.

Telephonic prehearing conferences, each confirmed by a report and order of the judge were held among INS counsel, Reyes and the judge on July 6 and July 20, 1993, September 21 and December 9, 1993. At the first conference, INS agreed to dismiss count I and the related inclusion in count II of Tito Quintanar. The third conference scheduled a fourth to be held on December 9, 1994. The dates of February 16-17, 1994 were reserved for trial. As noted in the Third Prehearing Conference Report and Order (9/23/93):

> Counsel for INS reported that he has been advised that Mr. Reyes has retained counsel, has spoken with her by telephone, and was told she would enter an appearance. No attorney having yet appeared on behalf of Respondent, I advised Mr. Reyes that both INS and I would continue to deal with him as unrepresented. Mr.

> Reyes said he understood that he will continue to be treated as a pro se party until both INS and the bench are formally advised to the contrary.

On December 2, 1993, INS served a motion for summary decision on Respondent. At the conference, Reyes acknowledged having received the motion for summary decision. He suggested he had expected his counsel to participate in the conference, but due to an accident she was unable to do so. As noted in the Fourth Prehearing Conference Report and Order,

> I cautioned that a timely response was due not later than December 16, 1993. I suggested also that he is obliged to file a factual response in affidavit form in order to provide a basis for the judge to determine whether there is a substantial dispute of material fact such as to warrant going forward with the hearing already scheduled for February 16-17, 1993 in or around Las Vegas, Nevada.
>
> It was explained to Reyes that he has the burden of responding to Complainant's extensive and detailed materials filed in support of its motion for summary decision. I stressed that those materials suggest that he may be unable to persuade the judge that he was not the employer of the individuals identified in the complaint, and urged him to consider settlement.
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> On the basis that he was obtaining counsel, I obtained the acquiescence of Complainant to an extension of the time in which Respondent must respond to the motion for summary decision. Another telephonic prehearing conference was also scheduled. I cautioned Reyes that as a matter of the judge's scheduling obligations, I must have a basis on which to decide by the date of that conference whether the hearing will go forward. Reyes stated he understood my remarks.

The time for filing a response to the motion was extended to December 30, 1993. Respondent's attention was directed to 28 C.F.R. §68.38. The fifth telephonic prehearing conference was scheduled for January 4, 1994.

On January 3, 1994, counsel for Reyes filed an entry of appearance and a Response to Motion for Summary Decision with attachments, including a declaration by Reyes and another by Alfonso Morales (Morales), both over counsel's signature. The thrust of Complainant's motion is that there is no genuine dispute of material fact as to liability for paperwork violations, i.e., failure to present I-9s, and that the bases underlying the civil money penalty also cannot be disputed. The response essentially claims that King's Produce is not a sole proprietorship, but is instead a partnership between Reyes and Garcia in which the latter made the hiring decisions. In effect, Respondent seeks to impeach both the Clark County, Nevada, business license, and 1990 Federal income tax returns. The Nevada license identifies Reyes

as the sole proprietor of King's Produce. The joint tax returns of Reyes and Lydia A. Reyes include a Form 1040 Schedule C reporting as a principal business, "vegetables processing plant," identified as King's Produce.

During the January 4, 1994 conference, counsel and I discussed the pending motion and response, and together addressed the attachments to the pleadings. INS moved to strike the Morales declaration filed by Reyes as not factually accurate. Interrupting a dispute between counsel, I stated my understanding that Respondent's claim that King's Produce is a partnership and not a sole proprietorship is a non-issue because liability attaches to a partner as well as to an individual owner. I stated that I was inclined to grant the motion for summary decision because no genuine dispute of material fact appears to survive the motion practice, rendering unnecessary a confrontational evidentiary hearing. Counsel for Respondent acknowledged my suggestion that the response to the motion essentially addresses the quantum of penalty rather than the fact of liability.

II. *Discussion*

A. Liability Established

On November 26, 1991, INS Special Agent Richard A. Burgess (Burgess), served a notice of I-9 inspection and subpoena on "Kings Produce," attention "owner/designee." The inspection was scheduled for December 3, 1991. The subpoena directed Respondent to present, inter alia, its business license, Forms I-9, an employee roster showing hire and termination dates and Forms W-4 and payroll records pertaining to all employees hired after November 6, 1986. In response to the two document demands, Alfonso Morales (Morales), a tax preparer who provides accounting and bookkeeping services in Las Vegas appeared before Burgess on behalf of Respondent on December 3, 1993. As the result, INS obtained payroll records and I-9s for six individuals.

For the reasons explained below, I conclude that Complainant's motion, supported by extensive attachments, establishes liability for failure to prepare I-9s for the individuals listed in count II of the complaint (twenty-three of the original twenty-four, deleting Tito Quintanar as proposed by INS). There is no genuine dispute of material fact as would justify denial of the motion for summary decision.

Thirty-eight individuals are named in the payroll printouts, including those listed in count II. Morales is included as is Garcia, but Morales and many others are not included in count II. The omission in Reyes' response to the motion of any counter to Complainant's documentary support for failure to present I-9s for the listed employees, prompts the conclusion that the I-9s he presented at the December 3, 1991 inspection were for individuals other than those listed in count II.

The parties dispute whether King's Produce is a sole proprietorship of Reyes, as claimed by INS, or a partnership between Reyes and Garcia, as claimed by Reyes. However, resolution of that dispute is not material to a determination of liability on the part of Reyes. Assuming that Reyes was gold mining in Mexico during part of the period the hires were effected, he was, by his own account, a partner of Garcia. An enterprise in partnership form is an employing entity for 8 U.S.C. §1324a purposes, as listed in the pertinent INS regulation. 8 C.F.R. §274a.1(b). Moreover, Reyes is bound by the hiring and employment actions of his partner. As logic and general principles of partnership would suggest, Complainant's definition of the term employer for §1324a purposes makes clear that Reyes, as a partner, would be no less responsible for failure to prepare I-9s than if he were a sole proprietor:

> (g) The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration.

28 C.F.R. §274a.1(g).

I have considered and rejected Reyes' claim that as a partner, Garcia but not Reyes, bears the onus of I-9 compliance. I do not, however, find the enterprise before me to be a partnership. Nothing contained in either the Reyes or Morales declarations requires that conclusion. Since at least October 1960, as confirmed by the statement Morales gave INS in December 1991, Reyes has been legally responsible for employment actions taken by King's Produce. All of the individuals listed in count II were hired after October 1990. The evidence before me implicates an employer that held itself out to state and federal authorities as a sole proprietorship.

I do not speculate whether, consistent with Reyes' partnership status contention, he can as matter of private law, successfully maintain a cause of action against Garcia for recovery of the §1324 liability. Because I cannot join Reyes in impeaching the documentary trail which comports with sole proprietorship, I do not treat Garcia as a partner for purposes of establishing liability for I-9 compliance. Reyes, d/b/a King's

Produce, is the employer of the individuals identified in count II. It is unlawful for an employer to hire an employee without complying with the employment authorization verification requirements of 8 U.S.C. §1324a(b). The employer is liable for failure to "attest on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien. . . ." 8 U.S.C. §1324a(b)(1)(A). I find that Respondent failed to prepare twenty-three employment authorization verification forms as required by §1324a.

To the extent that Reyes is understood to assert that any of the listed individuals were employed by a predecessor entity, his defense is unavailing. This is so because a successor employer may, with impunity, fail to accomplish I-9s for its predecessor's employees only if "the employer obtains and maintains from the previous employer records and Forms I-9 where applicable." 8 C.F.R. §274a.2(b)(viii)(A)(7). See U.S. v. Nevada Lifestyles, Inc., 3 OCAHO 518 (5/10/93) at 9-11.

B. Civil Money Penalty Adjudged

Having found Reyes liable for twenty-three paperwork violations, the remaining issue is the reasonableness of the civil money penalty 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). But 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); aff'd by CAHO, 1 OCAHO 108 (11/29/89) at 5 and 7. ("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 with the five statutory factors).

I utilize a judgmental and not a formula approach, considering each of the five factors. U.S. v. Minaco Fashions, Inc., OCAHO Case No. 93A00089 (12/30/93) at 6; U.S.v. Giannini Landscaping Inc., 3 OCAHO 573 (11/9/93) at 6-7; U.S. v. Nevada Lifestyles, Inc., 3 OCAHO 518 at 12-13; U.S. v. Tom & Yu, 3 OCAHO 445 (8/18/92); U.S. v. Widow Brown's Inn, 3 OCAHO 399 (1/15/92); U.S. v. DuBois Farms, Inc., 2 OCAHO 376 (9/24/91); U.S. v. Cafe Camino Real, 2 OCAHO 307 (3/25/91); 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); affirmed by CAHO, 1 OCAHO 184 (6/7/90) (denial of request for stay and for reconsideration); U.S. v. Buckingham Limited Partnership, 1 OCAHO 151 (4/6/90).

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.

Complainant's underlying notice of intent to fine, as adopted in the complaint, proposed and adhered to $400 for each failure to prepare a Form I-9. The aggregate amount at issue is, therefore, $9,200. Respondent's answer to the complaint cites the five factors and asserts that the paperwork assessment is excessive and inappropriate. The January 4, 1994 conference discussed Complainant's and Respondent's arguments with respect to the assessment; counsel agreed that there is no need for further evidence or argument.

C. The Factors Applied

(1) Size

The record is imprecise as to the number of employees on Respondent's payroll at any one time. Respondent's answer to the complaint asserts that it is a small business. Complainant does not contend otherwise. Reyes' income tax return, jointly with his wife, shows gross expenses of $8,884 for 1990, presumably for a period beginning in October of that year. No income is reported. Doubtless the enterprise became more active in ensuing reporting periods, but there is no basis on which to suppose that it did not remain small. INS suggests that because Respondent is small "it was quite capable of

monitoring the paperwork requirements," by reason of which "full mitigation should not be given." Cplt. Memo of Pts. and Authorities at 10. I disagree with INS as to the significance of the size of the employer. The logic of Complainant's argument suggests that the smaller the enterprise, the more responsible it ought to be. Whatever significance is supposed to be accorded to size, I am unwilling to assume that Congress intended the result sought by INS. At least in the absence of particular proof as to the significance of size in relation to compliance in a given case, smallness of the enterprise augurs well in favor of the employer.

(2) Previous Violations

It is uncontested that Respondent has no history of prior violations. Complainant's motion contends, however, that Respondent has a prior immigration-related criminal conviction that should be taken into account in determining the appropriate penalty. Respondent has not taken issue with the assertion of criminality. Reyes was charged in a nineteen count indictment in U.S. v. Enrique Reyes-Cota, (D NV) (Case No. CR-S-91-223-LDG RJJ), with making false statements and using false documents in aid of adjustment of status of certain aliens, none of whom are included in the paperwork violations in this case. In April 1992, Reyes pleaded guilty to two counts of the indictment; the remainder were dismissed on motion of the United States. Reyes was sentenced on April 20, 1992, to electronic monitoring home confinement for two months, a fine of $2,000, and probation for five years. I do not consider the fact of the criminal convictions to be tantamount to evidence of previous violations.

(3) Named Individuals as Unauthorized Aliens

The allegedly unauthorized alien named in count I who was included also in count II, Tito Quintanar, will be dismissed from the complaint as requested by INS. One other unauthorized alien is included in count II, i.e., Elias Ascencio-Ruiz (Ascencio-Ruiz). Having been hired by "Benny," presumably Garcia, before Reyes returned from Mexico in September 1991, Ascencio-Ruiz was employed only from August 1991 until apprehended by INS on November 21, 1991. The fact that one employee among the twenty-three failures to prepare I-9s is an unauthorized alien, is a factor which weighs against the employer.

(4) Good Faith of the Employer

OCAHO rulings indicate that the mere existence of paperwork violations is insufficient to show a "lack of good faith" for penalty purposes. See United States v. Valladares, 2 OCAHO 316 (4/15/91). Instead, in order to demonstrate a "lack of good faith" the record must show culpable behavior beyond mere failure of compliance. See United States v. Honeybake Farms, Inc., 2 OCAHO 311 (4/2/91).

Here, there is more than mere failure of compliance. This case is distinguishable from recent precedents where the record established that INS had conducted an educational visit to the employer prior to the I-9 inspection. See U.S. v. Minaco Fashions, Inc., OCAHO Case No. 93A00089 at 7; U.S. v. Giannini Landscaping, Inc., 3 OCAHO 573 at 8. Nevertheless, at least as of November 21, 1991, the date INS agents conducted a survey of Respondent's premises and apprehended Ascencio-Ruiz, a reasonably prudent employer acting in good faith would have taken steps to assure compliance with I-9 requirements as to all employees. This, Reyes did not do, although according to his own declaration, he was by then back in Las Vegas. It is unclear whether Reyes understands that the I-9 obligations of an employer do not turn on the citizenship status of the employees. Both in his answer to the complaint and in the declaration accompanying his opposition to the motion for summary decision, he stresses the fact that his two sons, employees of King's Produce, are citizens of the United States. Nothing in the statute or implementing regulations suggests that compliance with employment authorization verification requirements turns on citizenship status.

I conclude that Respondent has failed to evidence good faith compliance. To the contrary, failure to present I-9s for twenty-three employees reflects at best a disinterest in compliance responsibility. I conclude that Respondent has not acted in good faith, a factor which aggravates the penalty. I note, without affect on the penalty adjudication, that Reyes' insistence that responsibility rests primarily with Garcia may be correct as an issue to be resolved between the two of them. It does nothing to mitigate the penalty to be adjudged in this case.

(5) Seriousness of the Violations

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

seriousness factor must be considered in context of the factual setting of the particular case.

No Forms I-9 were forthcoming for the individuals named in count II of the complaint. IRCA case law makes clear that presentation of I-9s on which the employer fails to attest in section 2,

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

J.J.L.C., 1 OCAHO 154 at 9-10. Accord, Nevada Lifestyles, 3 OCAHO 518; U.S. v. Ulysses, Inc., 3 OCAHO 449 (9/3/92); U.S. v. M.T.S. Service Corp., 3 OCAHO 448 (8/26/92); U.S. v. Land Coast Insulation, Inc., 2 OCAHO 379 (9/30/91); U.S. v. Acevedo, 1 OCAHO 95 (10/21/89).

The earliest decision on a litigated record which applied the factors of 8 U.S.C. §1324a(e)(5) found that in context of the facts in that case, the employer's violations were inadvertent. On that basis, the penalty was adjudged at the statutory minimum. Big Bear, 1 OCAHO 48. In contrast to Big Bear, the violations in the present case are more than inadvertent. I find the failure to prepare I-9s to be serious because that failure frustrates the national policy by which employers and INS are intended to assure that unauthorized aliens are excluded from the workplace.

Applying OCAHO precedent to the facts of this case, I conclude that the violations are serious, a factor which aggravates the penalty.

(6) No Additional Factors to Consider

OCAHO caselaw instructs that factors additional to those which IRCA commands may be considered in assessing civil penalties. See e.g. Minaco Fashions, Inc., OCAHO Case No. 93A00089 at 9; Giannini Landscaping, Inc., 3 OCAHO 573 at 10. As I stated in M.T.S. Service Corporation, 3 OCAHO 448 (8/26/92), at 4,

> I am unaware of any inhibition to consideration by the judge of factors additional to those which IRCA dictates. So long as the statutory factors are taken into due consideration, there is no reason that additional considerations cannot be weighed separately. Accord U.S. v. Pizzuto, OCAHO Case No. 92A00084 (8/21/92) at 6 ("Section 1324a(e)(5) does not restrict the ALJ to considering only the five factors enumerated when determining the amount of civil penalties.")

In the present case, no additional factors have been presented.

D. Civil Money Penalties Adjudged

In determining the appropriate assessment levels, I have considered the range of options between the statutory floor and the amounts assessed by INS. I do not find a basis for a substantial reduction of Complainant's assessment. By his own statement, Reyes was inattentive to employment practices by King's Produce. However, Garcia or some other individual was in operational charge at least during the period Reyes was prospecting in Mexico. Moreover, I have not given total credence to the rationale by which Complainant argues in its motion in support of the assessment, e.g., as to size and the criminal conviction. Accordingly, taking the five factors into consideration in context of the entire circumstances, it is appropriate to reduce the civil money penalties by one-fourth, with the result set out below.

III. *Ultimate Findings, Conclusions and Order*

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

1. That Complainant's motion for summary decision is granted.

2. That count I and so much of count II as pertains to the individual named in count I are dismissed, as requested by Complainant.

3. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing as alleged in the complaint to comply with the requirements of 8 U.S.C §1324a(b) with respect to the individuals named in count I of the complaint.

4. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to make payment as follows:

Count II, $300.00 as to each of twenty-three named individuals, for a total of $**6,900**.

5. That the hearing previously scheduled is canceled.

6. This 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). As

provided at 28 C.F.R. §68.53(a)(2), 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.

SO ORDERED. Dated and entered this 6th day of January, 1994.

MARVIN H. MORSE
Administrative Law Judge