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. § l324a Proceeding
	)	Case No. 95A00014
KARNIVAL FASHION, INC. Respondent.	)	

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

On July 20, 1995, the Honorable Marvin H. Morse, the Administrative Law Judge (ALJ) assigned to United States v. Karnival Fashion, issued a Final Decision and Order assessing civil money penalties against the respondent for violations of 8 U.S.C. § 1324a (1994), the employer sanctions statute enacted as § 101 of the Immigration Reform and Control Act of 1986 (IRCA).

On June 6, 1995, the ALJ issued an Order Granting Complainant Partial Summary Decision which found the respondent liable for two Counts of violations of 8 U.S.C. § 1324a(a)(1)(B) [employment eligibility verification violations, often referred to as "paperwork" violations] involving failure to prepare or make available for inspection Employment Eligibility Verification Forms (Forms I-9) for 17 individuals and failure to complete section 2 of the Form I-9 within three business days of hire for 22 individuals. Following briefing by the parties regarding the five statutory factors to be considered in determining the amount of civil money penalties to be imposed, as set forth in 8 U.S.C. § 1324a(e)(5), on July 20, 1995, the ALJ issued the Final Decision and Order which is the subject of this modification. The ALJ assessed civil money penalties of $6,800 for Count one, at $400 per violation and $6,600 for Count II, at $300 per violation.

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 (CAHO) in section 68.53(a) of 28 C.F.R.; it is necessary, upon review, to modify the ALJ's July 20, 1995, Final Decision and Order in this case for the reasons set forth below.

Discussion

As noted above, the statute governing employer sanctions sets out five required considerations in determining the appropriate civil money penalties to be imposed for paperwork violations:

> 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).

Although it is well established that ALJs have wide latitude in the setting of civil money penalties, See United States v. Mathis, 4 OCAHO 717, at 2 (1995) (citing United States v. Park Sunset Hotel, 3 OCAHO 525 (1993)), the CAHO has de novo review authority and in considering any facts or issues of law which were previously before the ALJ, the CAHO may substitute his judgment for that of the ALJ. See Mester Mfg. Co. v. INS, 900 F.2d 201, 203 (9th Cir. 1990); and Maka v. INS, 904 F.2d 1351, 1356 (9th Cir. 1990). A review of the record in the instant case indicates that the ALJ properly considered four of the statutory factors: the size of the business, the seriousness of the violations, whether unauthorized aliens were involved, and the history of previous violations.

In discussing the good faith factor as applied to the respondent, the ALJ recites the standard frequently applied in OCAHO case law that, "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." ALJ order at 2 (citing United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 7 (1993) (citing United States v. Valladares, 2 OCAHO 316 (1991))). In addition, the ALJ correctly states that this standard has required the complainant to present some evidence of "culpable behavior beyond mere failure of compliance" on the respondent's part in order to demonstrate a lack of good faith. ALJ order at 2 (citing Minaco Fashions, 3 OCAHO 587, at

7 (citations omitted)). See also United States v. Taco Plus, 5 OCAHO 775, at 5-6 (1995).

The facts of Minaco Fashions are illustrative of the type of behavior which would reveal a lack of good faith on the part of the respondent, justifying an aggravation of the civil penalty amount based on that factor. In Minaco Fashions the respondent had received an educational visit from the INS regarding the respondent's duties under IRCA just three weeks before the INS apprehended several unauthorized aliens employed by the respondent. 3 OCAHO 587, at 7. The ALJ in Minaco Fashions correctly considered these facts as evidence of a lack of good faith. Id. A lack of good faith has routinely been found where the complainant has shown prior educational visits to respondent's place of business by officials of the INS or the Department of Labor in which respondent's responsibilities under IRCA are explained and informational materials are provided. See United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8-9 (1993); See also United States v. Task Force Security, Inc., 4 OCAHO 625, at 7 (1994). In addition, the INS has been successful in arguing a lack of good faith under other circumstances. See United States v. Primera Enters. Inc., 4 OCAHO 692, at 4 (1994) (finding of lack of good faith for failure to cooperate in INS investigation); See also United States v. Enrique Reyes, 4 OCAHO 592 (1994) (finding a lack of good faith for paperwork violations after INS had previously apprehended an undocumented alien upon the premises).

However, in applying the oft stated standard as set out in Minaco Fashions to the facts of this case, the ALJ erred in concurring with the arguments made by the complainant regarding the respondent's lack of good faith, stating:

> Complainant asserts that Respondent acted in bad faith with regard to its IRCA obligations because "it failed to complete Forms I-9 for seventeen employees and improperly completed Forms I-9 for twenty two employees." Cplt. Motion at 3. According to Complainant, "[t]his means that, despite its apparent awareness of the mandates of IRCA, Respondent complied with the law in only nineteen of fifty eight hires, which is a compliance rate of under thirty three percent." Id.
>
> I agree. As stated in Williams,[1] the fact that Respondent did produce most of the required Forms I-9, albeit deficient in content, shows that "its officer/managers knew of IRCA's requirement that an employer verify employment eligibility" yet still "failed to verify properly employment eligibility." 5 OCAHO 730 at 8. Accordingly, the factor of good faith will be applied to aggravate the civil money penalty.

ALJ Decision and Order at 2-3.

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[1] United States v. Williams Produce, 5 OCAHO 730 (1995), appeal filed, No. 95-8316 (11th Cir. 1995).

This language suggests that "an awareness of the mandates of IRCA" can be inferred simply by showing that the respondent properly completed some Forms I-9, and that this in turn can be used as the sole basis for establishing a lack of good faith. However, the legal standard to be applied in this case, correctly recited by the ALJ, and well-established in OCAHO case law, requires the INS to prove culpable behavior beyond mere failure of compliance.

A search of the ALJ's decision as well as the record as a whole has revealed no evidence pointing to culpable behavior beyond the fact that a high number of the Forms I-9 are missing or contain deficiencies, information which seems more relevant to the "seriousness of the violation" factor. This amounts to nothing more than "the mere fact of paperwork violations" which, as stated above, is "insufficient to show a lack of good faith for penalty purposes." Minaco Fashions, 3 OCAHO 587, at 7. I hold that the ALJ's analysis, finding a lack of good faith on the part of the respondent, is incompatible with the legal standard established in OCAHO case law and cited by the ALJ in this case.

I recognize that the Williams Produce decision, to which the ALJ cites, is inconsistent with the standard I have approved herein. Nevertheless, I hold that the facts of this case, as contained in the record, fail to show any real evidence of culpable behavior to prove a lack of good faith on the part of the respondent. A dismal rate of Form I-9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion. To hold otherwise could have led to a finding of lack of good faith based on paperwork deficiencies alone.

ACCORDINGLY,

For the above stated reason, the ALJ's Final Decision and Order is hereby modified in that the civil money penalties to be imposed upon the respondent are reduced to the following amounts:

Count I, $300 as to each of the 17 named individuals, $5,100
Count II, $200 as to each of the 22 named individuals, $4,400

For a total civil money penalty of $9,500.

It is **SO ORDERED** this 21st day of August, 1995.

JACK E. PERKINS
Chief Administrative Hearing Officer

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FINAL DECISION AND ORDER
(July 20, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Patricia Gannon, Esq., for Complainant
Dan Brecher, Esq., for Respondent

I. *Procedural History*

On June 6, 1994, an Order was issued granting Complainant partial summary decision and setting forth the complete procedural history of this case. See 5 OCAHO 769 (1995). The Order granted Complainant summary decision on Counts I and II, comprising the entire substantive allegations at issue, but leaving the issue of civil money penalty open because Complainant's Motion for Summary Decision presented "no factual predicate on which to analyze the factors . . . ." Id. at 3.

In response to my request for memoranda or briefs analyzing the five statutory factors required to be considered upon adjudicating a civil money penalty, Complainant filed a Motion on June 21, 1995 [hereinafter Complainant's Motion]. No response was filed by Respondent although the deadline for a timely response has passed. Accordingly, only Complainant's Motion will be analyzed.

II. *Discussion*

The statutory minimum civil money penalty in a § 1324a paperwork case is $100; the maximum $1000. On assessing and adjudicating the penalty, five factors must be taken into consideration. See 8 U.S.C. § 1324a(e)(5). The factors are size of the business, good faith, seriousness, unauthorized aliens and previous violations. In weighing each of these factors, I utilize a judgmental and not a formula approach. See, e.g., United States v. Williams Produce, 5 OCAHO 730 (1995), appeal filed, No. 95-8316 (11th Cir. 1995); United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573 (1993). The result is that each factor's significance is based on the facts of a specific case, although the guidance of IRCA (Immigration Reform and Control Act) jurisprudence as precedent is not ignored.

A. Size of Business

Although IRCA and implementing regulations provide no guidelines for determining business size, previous OCAHO cases dealing with § 1324a violations have discussed the following factors: "(1) the number of individuals employed by the enterprise, (2) gross profit of the enterprise, (3) assets and liabilities, (4) nature of the ownership, (5) length of time in business, and (6) nature and scope of the business facilities." Williams at 6 (citing Giannini Landscaping Inc.; United States v. Davis Nursery, Inc., 4 OCAHO 694 (1994)).

Complainant states that "[i]n the present case, . . . [it] does not possess complete or reliable information regarding any of these six factors other than the number of employees. Cplt. Motion at 2. According to Complainant, Respondent employed 58 individuals at the time of the I-9 inspection. This fact, as well as the fact that "Respondent had sufficient resources [in the form of managerial staff] at its disposal in order to comply with its obligations under IRCA," requires that "Respondent's business should be found to be either an aggravating or a non-mitigating factor." Id. at 3.

The fact that Respondent employed 58 employees does not in and of itself persuade me to conclude that Respondent is either a large or small business. As a general principle, an establishment with 58 employees is not necessarily a large enterprise; depending on its line of business, it may well be medium-sized. Overall, however, the lack of evidence available to assess this factor leads me to conclude that size is neither mitigating nor aggravating. Accordingly, having considered

this factor, I find its application sufficiently inconclusive as to have any impact on the outcome.

B. Good Faith of Employer

OCAHO case law holds that "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

Complainant asserts that Respondent acted in bad faith with regard to its IRCA obligations because "it failed to complete Forms I-9 for seventeen employees and improperly completed Forms I-9 for twenty two employees." Cplt. Motion at 3. According to Complainant, "[t]his means that, despite its apparent awareness of the mandates of IRCA, Respondent complied with the law in only nineteen of fifty eight hires, which is a compliance rate of under thirty three percent." Id.

I agree. As stated in Williams, the fact that Respondent did produce most of the required Forms I-9, albeit deficient in content, shows that "its officer/managers knew of IRCA's requirement that an employer verify employment eligibility" yet still "failed to verify properly employment eligibility." 5 OCAHO 730 at 8. Accordingly, the factor of good faith will be applied to aggravate the civil money penalty.

C. Seriousness of Violations

With regard to paperwork violations, there are various degrees of seriousness. Davis Nursery, 4 OCAHO 694 at 21 (citing United States v. Felipe, Inc., 1 OCAHO 93 (1989)). "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." Davis Nursery, 4 OCAHO 694 at 21 (quoting United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge)). Respondent has been found liable for failing to prepare and/or make available Forms I-9 for seventeen employees. As these violations are serious, I will apply this factor to aggravate the civil money penalty.

Count II of the Complaint charges Respondent with failing timely to complete the Form I-9 for 22 individuals. Although I agree with Com-

plainant that these violations are serious because "[f]ailure to timely complete [sic] Forms I-9 greatly increases the likelihood that an employer will hire unauthorized workers," I do not find these violations to be as serious as the failure to prepare and/or make available violations in Count I. Cplt. Motion at 4. Therefore, the civil money penalty will be mitigated slightly to reflect a difference between Counts I and II.

D. Unauthorized Aliens

Complainant states that "Respondent employed twenty three unauthorized aliens at the time of inspection . . ., account[ing] for more than one third of Respondent's work force." Id. According to Complainant, "[t]he high percentage of unauthorized aliens in Respondent's employ underscores Respondent's failure to comply with the verification requirements of IRCA . . . [and] should be considered aggravating." Id.

I agree with Complainant that the employment of unauthorized aliens is generally considered an aggravating factor. See, e.g., United States v. Fox, 5 OCAHO 756 at 3-4 (1995). However, Counts I and II, for which Respondent was found liable, do not allege substantive violations of § 1324a; instead, they list paperwork violations. Compare 8 U.S.C. § 1324a(a)(1)(A) with § 1324a(a)(1)(B). In addition, as tempting as it is to aggravate the civil money penalty, particularly where Respondent did not submit any information to the contrary, I cannot do so where, as here, Complainant submits no documentary evidence in support of its assertions that Respondent employed unauthorized aliens.[2] As I have stated in the past, "'I do not consider uncharged events as evidence of any further violations.'" Williams Produce, 5 OCAHO 730 at 9. Accordingly, absent convincing evidence that Respondent hired unauthorized aliens, I will neither mitigate nor aggravate the civil money penalty based on this factor.

E. Previous § 1324a Violations

As "Complainant concedes that Respondent had not previously been cited for a violation of 8 U.S.C. section 1324a," this factor will mitigate in Respondent's favor. Cplt. Motion at 4. See also Giannini, 3 OCAHO 573 at 8.

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[2] Complainant does attach to its Motion a declaration from INS Special Agent William Riley who attests to having found 22 unauthorized aliens employed by Respondent at the time Riley inspected Respondent's premises. This evidence, however, without a finding of liability against Respondent for employing unauthorized aliens, is insufficient to persuade me that the civil money penalty should be aggravated based on this factor.

F. Effect of Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. While the lack of previous § 1324a violations does not support a finding for the penalty assessed by INS, the aggravating factors of seriousness and lack of good faith do not support adjudication at the statutory minimum. In addition, due to the relatively more serious nature of violations involving failure to prepare and/or make available in Count I, I adjudge a higher amount for these violations than for the violations involving failure to complete section 2 of the Form I-9 within three days of hire as alleged in Count II.[3]

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings, 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 a preponderance of the evidence:

1. That, having found Respondent liable for two counts of violating 8 U.S.C. § 1324a(a)(1)(B),[4] I adjudge civil money penalties in the following amounts:

   Count I, $400 as to each of the 17 named individuals, $6,800
   Count II, $300 as to each of the 22 named individuals, $6,600

For a total civil money penalty of $13,400.

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). 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 Final 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) and 28 C.F.R. § 68.53.

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[3] INS proposed a differentiated penalty as among several of the individuals listed in Count II but omitted any explanation to account for such treatment. This Decision and Order adjudiciates the penalty in an identical amount for each Count II individual.

[4] See 5 OCAHO 769 (1995).

SO ORDERED.

Dated and entered this 20th day of July, 1995.

MARVIN H. MORSE
Administrative Law Judge