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
	)	OCAHO Case No. 94A00015
CONTINENTAL SPORTS CORP., Respondent.	)	

ERRATA
(September 21, 1995)

The caption of the FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT dated September 20, 1995 is hereby corrected to "FINAL DECISION AND ORDER GRANTING JUDGMENT FOR COMPLAINANT."

SO ORDERED.

Dated and entered this 21st day of September, 1995.

MARVIN H. MORSE
Administrative Law Judge

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FINAL DECISION AND ORDER GRANTING
COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT
(September 20, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Zsa Zsa DePaolo, Esq., for Complainant
Daniel J. Kean, Esq.,
Brian Meck, Esq., for Respondent

I. *Introduction*

A. Procedural History

On January 26, 1994, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO).[1] The four-count Complaint alleges that Continental Sports, Inc. (Continental or Respondent) violated § 274A of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Exhibit A to the Complaint is a Notice of Intent to Fine (NIF) issued by INS upon Respondent on July 22, 1993.

[1] This case was initially assigned to Administrative Law Judge (ALJ) Schneider; it was reassigned to me on February 7, 1995.

Count I of the Complaint alleges that Respondent failed to prepare and/or failed to make available for inspection the employment eligibility verification form (Form I-9) for 34 named individuals. The civil money penalty requested for Count I is $5,100 ($150 for each individual). Count II of the Complaint, as amended,[2] alleges that Respondent failed properly to complete section 2 of the Form I-9 for 163 named individuals and requests a civil money penalty of $16,300 ($100 for each individual). Count III of the Complaint alleges that Respondent failed to ensure that four individuals properly completed section 1 of the Form I-9. The civil money penalty requested in Count III is $400 ($100 for each individual). Count IV alleges that Respondent failed to ensure that employees properly completed section 1 and Respondent failed to complete section 2 of the Form I-9 for 26 individuals. The civil money penalty requested in Count IV is $2,600 ($100 for each individual).

On January 27, 1994, OCAHO issued a Notice of Hearing which transmitted a copy of the Complaint to Respondent.

On March 30, 1994, Complainant filed a Motion for Default Judgment, stating that Respondent failed to file a timely answer as required by 28 C.F.R. § 69.9(a). Following an Order to Show Cause Why Default Judgment Should Not Issue, Respondent filed an Answer on May 2, 1994[3] in which it denied the allegations in the Complaint. In its defense, Respondent stated that "a goodfaith [sic] effort was made to locate the employment eligibility verification forms that were prepared and some were found, but Respondent, in no way, attempted to fail to make available for inspection the Form I-9's [sic] as they may be in the control of someone other than the Respondent due to the change of administration and management." Answer at 2.

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[2] Count II of the Complaint originally listed 144 violations and requested $100 in civil money penalties for each individual listed. On February 3, 1995, by facsimile transmission, Complainant requested that Count II be amended to include 19 additional violations of § 1324a which "were inadvertently overlooked during the original review of this file." Motion to Amend at 3. The civil money penalty requested for the additional violations was $1,900 ($100 per violation). Absent objection by Respondent, I granted Complainant's Motion to Amend during the third prehearing conference held on April 20, 1995.

[3] Respondent's counsel also filed a Motion for Leave to File Late Answer which included an affidavit stating that his failure timely to file an Answer to the Complaint was "due to my inadvertence and excusable neglect. . . ." Affidavit at 2.

On May 25, 1994, ALJ Schneider denied Complainant's Motion for Default Judgment because "Respondent's counsel acted in good faith, his failure to file a timely answer was inadvertent, and I do not find that the filing of a late answer prejudiced Complainant's case in any way." United States v. Continental Sports Corp., 4 OCAHO 640 (1994) (Order Denying Complainant's Motion for Default Judgment).

An evidentiary hearing scheduled for September 12, 1994 was postponed in order to allow additional time for settlement negotiation in light of the fact that "Respondent is not contesting liability." Order Continuing Hearing at 1 (September 7, 1994).

In a status report dated September 23, 1994, Complainant stated that "Respondent has agreed to pay a civil money penalty of $15,000 . . . for its liability for violating the Employment Verification requirements of § 274A(a)(1)(B)." Status Report at 1. Apparently, however, the settlement process was not successful as, in a second status report dated November 29, 1994, Complainant advised the ALJ that counsel for Respondent had negotiated the settlement with Gary Mathiesen (Mathiesen), vice president of Continental, who was not authorized to bind Respondent; only Ron Dixon (Dixon), president of Continental could bind Respondent. Counsel for Respondent therefore requested additional time in order to contact Dixon.

In a status report filed on January 25, 1995, Complainant recited that "Respondent has failed to contact Complainant with respect to any settlement in this matter since November 29, 1994." Consequently, on February 6, 1995, Complainant filed a Motion to Schedule an Evidentiary Hearing. Complainant asked that the case be scheduled for a hearing on the merits because Respondent "has failed to execute the settlement offer that was agreed upon between the parties in late September of 1994" and "Complainant no longer expects that Continental Sports will engage in a good faith negotiated settlement of this matter." Motion at 2.

On March 16, 1995, a second prehearing conference was held during which counsel for Respondent "stated its intent to resubmit Complainant's settlement offer to his client." During a third prehearing conference on April 20, 1995, counsel for Respondent "stated that he had not been able to contact his client and needed only a few more days in which to conclude the settlement agreement." The conference was therefore adjourned until May 5, 1995. At the resumed conference, the parties concluded they were unable to negotiate a

settlement. An adversarial evidentiary hearing was scheduled to be held on September 28-9, 1995.

On May 25, 1995, Complainant filed a Motion to Amend the Complaint to include Dixon in the caption as a liable party. Complainant stated that it "makes this request in order that the record may accurately reflect that Mr. Ronald B. Dixon, as the president of Continental . . ., has the authority to speak and act on behalf of the Corporation." Motion to Amend at 1-2. Acknowledging the frustration on the part of Complainant's counsel in light of repeated assurances of settlement, I nevertheless denied Complainant's request in an Order dated July 13, 1995 because "there is no basis at this juncture for assuming that Continental was utilized as a front for Dixon or as his alter ego." United States v. Continental Sports, Inc., 5 OCAHO 780 at 4 (1995) (Order Denying Complainant's Motion to Amend the Complaint).

At the telephonic prehearing conference held August 31, 1995, I announced my readiness to dispose of the case on an appropriate motion, to be filed promptly, and the response, if any, to be filed by facsimile transmission. Respondent's counsel was aware at the conference of the likelihood that INS would file a dispositive motion.

On September 1, 1995, Complainant filed a Motion for Default Judgment. No response was filed by Respondent or on its behalf.[4]

B. Counsel for Respondent's Notice of Withdrawal

On September 6, 1995, counsel for Respondent filed a Notice of Intent to Withdraw as attorney of record. The Notice was served on INS and Respondent. The Notice states that, "pursuant to CR 71, . . . [t]his withdrawal shall be effective without order of the court on the said date unless a written objection to the withdrawal is served upon the undersigned withdrawing attorney prior to the above effective date . . ." of August 31, 1995. Notice of Intent to Withdraw at 1.

Counsel for Respondent's "Notice" is fully lacking in procedural fairness, either to the bench or anyone else. It is also woefully

[4] The understandings reached at the August 31, 1995 prehearing conference are recited in the Sixth Prehearing Report and Order at 1 (September 1, 1995). Respondent was afforded three working days in which to respond to Complainant's Motion. Id. See also 28 C.F.R. § 68.11(b) (the time for responding to a motion is normally ten days or "such other period as the Administrative Law Judge may fix . . .").

inaccurate. Aside from the fact that I am not bound by "CR 71" whatever rule that may be, counsel also fail to comply with the very procedural rule they cite. They recite that the withdrawal is effective on August 31, 1995. The Notice of Intent to Withdraw, however, was not served until September 1, 1995. In essence, counsel, by their own terms, make it impossible for anyone to object to their withdrawal prior to it taking effect. Not only does such a motion violate OCAHO rules of practice and procedure,[5] it violates the most basic notions of fairness and equity.

No less significantly, counsel's "Notice" is also plain wrong. Counsel for Respondent cannot reasonably believe that they are correct when they recite that "[t]his matter is not currently set for trial." As agreed by the parties, this case has been set for hearing for over three months! Counsel's withdrawal is in any event in direct conflict with the clear statement of OCAHO rules of practice and procedure: withdrawal is subject to judicial scrutiny, and the judge is empowered to grant or deny a request to withdraw. See 28 C.F.R. § 68.33(c). Respondent's counsel make no pretense of a request for withdrawal. Accordingly, given the defects in their Notice, I deny the request to withdraw. Their error is compounded by the flagrant disregard of the understanding reached at the August 31, 1995 conference, i.e., that unless the case were disposed of on motion practice, another conference would be held on September 19, 1995 at 8:30 a.m., P.D.T. At that hour, neither attorney for Respondent was available when my Office placed the telephone call. For that reason alone, this case could be disposed of as tantamount to abandonment of the request for hearing. See 28 C.F.R. § 68.37(b)(1) and (2).

II. *Complainant's Motion For Default Judgement*

Although Complainant captions its Motion as a "default judgment," it is styled in the form of a motion for summary decision and I treat it as such.[6]

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[5] See 28 C.F.R. § 68.11(b) ([w]ithin ten (10) days after a written motion is served . . . any party to the proceeding may file a response in support of, or in opposition to, the motion . . ." (emphasis added)).

[6] The Motion requests that, based on Respondent's failure to respond to Complainant's Request for Admissions, I find "no genuine issue of material fact and Complainant is entitled to a summary decision as to Respondent's liability." Motion for Default Judgment at 9. At a subsequent point, the Motion speaks of a request for "summary default judgment." Id. at 13.

A. Liability Established

Complainant undertakes that it served Respondent with Interrogatories and Requests for Admissions on June 27, 1995, and that no response to these discovery requests was forthcoming. The time for a response has now passed. See 28 C.F.R. § 68.21(b). Under OCAHO rules of practice and procedure, where a party fails either to deny or set forth specific reasons for failing to answer a request for admissions within 30 days, the admissions are deemed admitted. Id. See also United States v. Sosa, Inc., 5 OCAHO 739 at 4 (1995) (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Order Denying Respondent's Counsel's Motion to Withdraw as Counsel). Although it is common practice to file a motion to deem matters not responded to be admitted, Complainant's Motion for Default Judgment/Summary Decision implicitly encompasses such a motion. I have before me Complainant's Request for Admissions, to which Respondent did not reply, and to the Motion to which there also has been no response. On the basis that the facts sought to be admitted are deemed admitted, there is no genuine dispute of any material fact. Therefore, I conclude that Respondent admits liability for all counts listed in the Complaint, as amended.

B. Civil Money Penalty Adjudged

Although there are OCAHO cases in which the ALJ, granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry, that separate inquiry is not necessary where Respondent is on notice that a pending motion addresses the issue of civil money penalty as well as liability. See United States v. Raygoza, 5 OCAHO 729 at 3 (1995) (discussing United States v. Martinez, 2 OCAHO 360 (1991), vacated and remanded in part, Martinez v. I.N.S., 959 F.2d 968 (5th Cir. 1992) (unpublished)). Since Complainant specifically addresses the civil money penalty in its Motion for Default Judgment/Summary Decision, this Order adjudicates the penalty assessed by INS.

The statutory minimum for a civil money penalty in a case involving paperwork violations is $100 per individual; the maximum is $1,000. 8 U.S.C. § 1324a(e)(5). As the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See Raygoza, 5 OCAHO 729 at 3; United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I will therefore only consider the range of options between the statutory minimum and the amount assessed by INS in

determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

Five statutory factors must be considered in setting the civil money penalty. The factors are: "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 the previous violations." 8 U.S.C. § 1324a(e)(5). In weighing each of these factors, I utilize a judgmental and not a formula approach. See, e.g., United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping, Inc., 3 OCAHO 573 (1993).

As Complainant demands civil money penalties in Counts II, III and IV at the statutory minimum, there is no reason to weigh the five factors in order to adjudicate the civil money penalty as to those counts. Complainant, however, assessed a civil money penalty in Count I which represents a $50 increase per capita over the statutory minimum. Therefore, I will weigh the five statutory factors for this Count only. It is noteworthy that as to 193 individuals in Counts II-IV, Complainant seeks only the statutory minimum, and seeks but $50 over that amount for each of the 34 individuals in Count I. This represents a total difference between the sum assessed and the statutory minimum of $24,400 and $22,700, respectively, or $1,700. Since no response to Complainant's Motion was filed by Respondent, only Complainant's submission will be analyzed.

1. Size of Business

Complainant argues that Continental is a large business and, although not explicitly stated, presumably capable of properly completing Forms I-9. In support of an aggravated penalty based on size, Complainant states

> Continental's 1988 business license reported a gross annual income of $3,500,000. Washington state tax reports filed by Continental indicate it employed 150 to 200 employees as Administrative Staff, part-time concession staff, sales staff, maintenance staff, and, part-time security and arena staff between 1988 and 1992.

Motion at 10-11.

Absent a contrary claim by Respondent, I agree with Complainant that Continental is a large business capable of hiring staff to educate personnel and to comply with I-9 requirements. This factor therefore marginally aggravates the civil money penalty.

2. Good Faith

Complainant asserts that Respondent"s "compliance with . . . [§ 1324a] has been minimal at best and does not substantiate . . . good faith compliance . . ." because, "[o]f the 341 I-9 Forms audited in its 1992 inspection, INS discovered 208 I-9 verification violations." Motion at 11. Respondent's lack of good faith compliance is especially apparent, according to Complainant, because, during an interview with INS in 1989, "Continental's Payroll supervisor Kerry Boston and General Manager, Mike McCall informed INS investigators that Continental was well aware of the I-9 requirements." Id. At that time, Continental was given educational materials on the employment eligibility verification regime. Id.

Again, Respondent does not refute Complainant's argument. Based on the information provided by Complainant, I conclude that Respondent was aware of § 1324a's requirement that an I-9 be completed for each individual hired. This factor alone, however, is insufficient to rise to the level of bad faith. See United States v. Karnival Fashion, Inc., 5 OCAHO 769 at 3-4 (1995) (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Final Decision and Order) ("[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"). By failing, however, to comply with IRCA requirements after having received educational visits from INS, Respondent exhibits "culpable behavior" indicative of bad faith. Id. at 2 ("[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"). Lack of good faith will therefore be used to aggravate marginally the civil money penalty.

3. Seriousness of the Violations

Complainant states that, "in light of INS contact with the Corporation in 1989, and its expressed assurances that it was both aware of the law and complying with the I-9 requirements[,] . . ." the paperwork violations are serious. I agree with Complainant that the paperwork violations are serious as, "'[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.'" Giannini, 3 OCAHO 573 at 9 (citing United States v. Eagles Groups, Inc., 2 OCAHO 342 at 3 (1992)). It has been my regular practice, however, to make a distinction between differing paperwork violations, based on the amount or extent of the deficiency. See, e.g., United States v. Fox, 5 OCAHO 756 at 6 (1995). Count I lists 34 violations of failure to retain and/or make available. "[F]ailure 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." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 19 (citing United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992)) (Modification of the Decision and Order of Administrative Law Judge). Accordingly, this factor will be used to aggravate marginally the penalty.

4. Employment of Unauthorized Aliens

Complainant asserts that Respondent "was employing unauthorized Canadian nationals" and therefore the civil money penalty should be aggravated. Motion at 12. Although OCAHO caselaw holds that the employment of unauthorized aliens is generally considered a factor which aggravates the civil money penalty,[7] I do not normally "'consider uncharged events as evidence of any further violations.'" United States v. Karnival Fashion, Inc., 5 OCAHO 769 at 4 (1995) (citing United States v. Williams Produce, 5 OCAHO 730 at 9 (1995)), modified by CAHO on other grounds.

In addition, even in cases where a complainant submits copious evidence showing employment of unauthorized aliens to support its assertion that the civil money penalty for paperwork violations should be aggravated, I have refused to aggravate the penalty. Here, where presented only with Complainant's assertion, without documentary evidence of unauthorized aliens, I find even less reason to consider Complainant's argument. Accordingly, the civil money penalty will not be aggravated based on this factor.

5. Previous § 1324a Violations

Complainant states that Respondent has no prior § 1324a violations. Therefore, this factor mitigates in Respondent's favor. See Giannini, 3 OCAHO 573 at 8.

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[7] See, e.g., Giannini, 3 OCAHO 573 at 8; Fox, 5 OCAHO 756 at 6.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, pleadings, motions and documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied.

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the INS assessment. With regard to Counts II-IV, the amount assessed as a civil money penalty is already at the minimum and therefore no mitigation is possible. As to Count I, I find that there is adequate evidence in the form of size of the business, lack of good faith, and seriousness to warrant, at the very minimum, a $50 increase over the minimum. Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. that Complainant's Motion for Default Judgment/Summary Decision is granted;

2. that Respondent failed to prepare and/or make available for inspection the Form I-9 for 34 named individuals as listed in Count I of the Complaint in violation of 8 U.S.C. § 1324a;

3. that Respondent failed properly to complete section 2 of the Form I-9 for 163 named individuals as listed in Count II of the Complaint in violation of 8 U.S.C. § 1324a;

4. that Respondent failed to ensure that employees properly completed section 1 of the Form I-9 for four named individuals as listed in Count III in violation of 8 U.S.C. § 1324a;

5. that Respondent failed to ensure that employees properly completed section 1 and failed to complete section 2 of the Form I-9 for 26 named individuals as listed in Count IV in violation of 8 U.S.C § 1324a;

6. that, upon consideration of the statutory criteria to be considered in determining the amount of the penalty for violation of 8 U.S.C. § 1324a, it is reasonable to require Respondent to pay a civil money penalty in the following amount:

Count I, $150 as to 34 named individuals, for a total of $5,100
Count II, $100 as to 163 named individuals, for a total of 16,300
Count III, $100 as to four named individuals, for a total of $400
Count IV, $100 as to 26 named individuals, for a total of $2,600

for a total civil money penalty of $24,400;

7. that the hearing previously scheduled is hereby canceled.

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). 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 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.

SO ORDERED.

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

MARVIN H. MORSE
Administrative Law Judge