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

January 5, 2000

United States of America, Complainant,	)
v.	) 8 U.S.C. § 1324a Proceeding) OCAHO Case No. 99A00034
Irma Hernandez, Respondent.	)

FINAL ORDER GRANTING JUDGMENT BY DEFAULT AND IMPOSING CIVIL MONEY PENALTIES

Appearances: Ann M. Tanke, Esq., Immigration and Naturalization Service, for complainant

Christopher J. Flann, Esq., Moulton, Bellingham, Longo & Mather, P.C., for respondent

Before: Honorable Ellen K. Thomas

I. *PROCEDURAL HISTORY*

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (INA or the Act). The United States Immigration and Naturalization Service (INS or the Service) filed a complaint in three counts with the Office of the Chief Administrative Hearing Officer (OCAHO) on April 16, 1999 alleging first, that respondent Irma Hernandez hired and/or contracted to employ Mario Hernandez knowing him to be an alien not authorized to work in the United States; second, that she failed to complete Section 2 of the Employment Eligibility Verification Form (Form I–9) for Dawn Estes, Jonathan Green, Ramon Hernandez, Debra Hoffert, Kellie Johnson, Michelle Jones, Jamie Robinson and Alexander Shoaf, individuals she hired after November 6, 1986; and third, that she failed to prepare and/or present for inspection Forms I–9 for Mario Hernandez (also named in Count I), and

Mark Nichols, both individuals she hired after November 6, 1986. Penalties were sought in the total amount of $6925, consisting of $1225 for Count I, $4400 for Count II ($550 for each of eight violations), and $1300 for Count III ($650 for each of two violations). Exhibits attached to the complaint included a Notice of Intent to Fine (NIF) dated August 13, 1998, and a timely filed Request for Hearing. The complaint was served upon the respondent's attorney on May 3, 1999. No answer was filed. Instead, Irma Hernandez' attorney, Christopher J. Flann, Esq., filed a motion seeking to withdraw from his representation of her. INS filed a response indicating it was unopposed to Flann's withdrawal.

INS then moved for a default judgment. On July 1, 1999, I granted the motion to withdraw and issued an Order to Show Cause Why Default Judgment Should Not Issue. Patrick O'Brien, Esq. telephoned this office in response, identifying himself as Irma Hernandez' new counsel and requesting an extension of time in which to file a response to the Order to Show Cause. The request was granted and O'Brien was advised that he should also file a notice of appearance. However, he did not file a response to the order, an answer, or a notice of appearance. Instead, Irma Hernandez thereafter filed a response of her own and an affidavit in which she sought another extension of time in which to obtain new counsel and to file an answer. The affidavit represented *inter alia* that Hernandez did not fully understand the English language or the current legal proceedings. Accordingly I supplied her with a copy of the Rules of Practice and Procedure for Administrative Hearings [1], and granted her additional time to obtain new counsel and to file an answer in compliance with those rules. Both parties were invited as well to make written comments regarding the statutory factors applicable to the setting of penalties for paperwork violations. More than sixty days has since elapsed without further communication from the respondent.

II. *LIABILITY*

The INA makes it unlawful after November 6, 1986 to hire an alien for employment in the United States or to continue to employ an alien hired after that date knowing the alien is or has become unauthorized for employment. 8 U.S.C. § 1324a(a)(1)(A) and (a)(2). The Act also imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after

[1] 28 C.F.R. Pt. 68 (1999).

November 6, 1986, and to make those forms available for inspection by INS officers. 8 U.S.C. § 1324a(a)(1)(B) and § 1324a(b)(1),(2) and (3). A violation of the first of these prohibitions is commonly referred to as a "knowing hire," and of the second as a "paperwork violation." Each failure to properly prepare, retain, or produce the forms in accordance with the employment verification system is a separate violation of the Act. 8 U.S.C. § 1324a(a)(1)(B). The INA also sets forth the permissible ranges of money penalties both for a "knowing hire" violation and for a "paperwork" violation. 8 U.S.C. § 1324a(e)(4) and (5).

The allegations in Count I of the complaint set out all the elements of a violation of 8 U.S.C. § 1324a(a)(1)(A), while the allegations in Counts II and III state 10 separate violations of 8 U.S.C. § 1324a(a)(1)(B). Because Irma Hernandez failed to deny these allegations despite repeated opportunities to do so, a default judgment finding liability for all counts is appropriate and will be entered.

III. *PENALTIES REQUESTED*

INS is the only party which submitted comments respecting penalties. It now suggests that the penalties it originally proposed in its complaint should be increased by an unspecified amount in light of additional information it obtained after the initial assessment. The Service first states that it has come to light that the business may be larger than originally thought. Also, it notes that after the penalties were originally set, a criminal investigation was conducted which led to the respondent's indictment for harboring an illegal alien, and that in the course of that investigation the respondent made false statements to investigating officers in that she lied about the residence of Manuel Leal-Rodriguez, an illegal immigrant. The respondent and her husband entered a plea of guilty to the charge of harboring Leal-Rodriguez, and judgment was entered on June 11, 1999, finding Irma Hernandez guilty of violating 8 U.S.C. § 1324(a)(1)(A)(iii) which prohibits concealing or harboring an alien knowing that alien to be in the United States in violation of the law.

In support of its request for additional penalties, the Service filed the Affidavit of John T. Stavlo, Special Agent, which states that the affiant was the case agent for both the sanctions investigation and the criminal investigation of Hernandez' business, the Acapulco Restaurant, that he executed a search warrant at the residence of the respondent and seized $25,342, and that the Chief

of Police in Belgrade, Montana informed him that the respondent and her husband had put down $25,000 as a down payment toward the purchase of a new restaurant at a time when the Service still had the cash it had seized at the residence. The affidavit states further that the Service arrested Manuel Leal-Rodriguez on August 5, 1998 and Hector Nunez on September 22, 1998, that these individuals were illegal aliens who had been observed and videotaped working at the respondent's business, and that Stavlo obtained sworn statements from co-workers confirming their employment. The affidavit does not disclose when or by whom the two individuals were observed or videotaped. Neither does it identify by name the co-workers whose statements were allegedly taken. The statements themselves were not submitted. It does not appear from the record that INS issued a NIF or filed a complaint with respect to the employment of either Manuel Leal-Rodriguez or Hector Nunez, nor does the Service allege that any of the paperwork violations complained of in Counts II and III of this action involved either of these two alleged aliens.

IV. *DISCUSSION*

A. *The Knowing Hire of Mario Hernandez*

The range of statutorily permissible penalties for a knowing hire violation escalates in accordance with whether the entity being penalized has previously been the subject of one or more orders under the same provision. For a first offense, the minimum penalty is $250 and the maximum is $2000 for each unauthorized alien; for a second offense, the penalties are increased to at least $2000 but not more than $5000 each; and for a third or subsequent offense, the range is $3000 to $10,000 for each. 8 U.S.C. § 1324a(e)(4)(A)(i),(ii), and (iii).[2] Within the parameters set forth in the statute, the setting of penalties for knowing hire violations is otherwise within the discretion of the administrative law judge. *Cf. United States v. Sunshine Bldg. Maintenance, Inc.*, 7 OCAHO 997, at 1186–87 (1998).

[2] In accordance with the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (Pub.L. No. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub.L. 104–134 Section 31001), INS published a final rule adjusting these penalties for inflation. 64 Fed.Reg. 47099–104 (August 30, 1999). The enhanced penalties apply to violations occurring after September 29, 1999 and thus are inapplicable to this case.

The penalty originally requested for the violation in Count I, the knowing hire of Mario Hernandez, was $1225. The Service noted that in setting that penalty initially, it considered this the most serious of all the violations. I concur in the Service's view of the seriousness of the knowing hire violation. A knowing hire is always the most serious violation of § 1324a; indeed the overriding Congressional purpose in enacting the employment eligibility verification system was precisely to prevent the hiring of unauthorized workers. The original penalty requested is well within the statutory parameters and will be approved, but I decline as a matter of discretion to increase it further based on the additional information INS provided.

If INS wishes to assess civil money penalties against this respondent for having employed Manuel Leal-Rodriguez and Hector Nunez, it is well aware of the procedures for doing that. These procedures include the issuance of a Notice of Intent to Fine (NIF) and the filing of a complaint. I am unaware of any authority, and INS cites none, for the proposition that the penalty for the knowing hire of Mario Hernandez should be increased on the basis of an allegation that the respondent may also at some point have employed two other individuals whose allegedly unauthorized employment INS chose not to challenge by issuing a NIF. The "proof" that the respondent employed Leal-Rodriguez and Nunez consists of a conclusory third hand report by an INS agent that unnamed persons observed and videotaped them and that unnamed co-workers gave statements about their employment. In the absence of any showing that Irma Hernandez has been the subject of a prior order under 8 U.S.C. § 1324a(e)(4), the penalty for Count I will not be further enhanced based on conclusions reported by unnamed individuals.

B. *The 10 Paperwork Violations*

In contrast to penalties for knowing hire violations, the discretion of an administrative law judge in setting penalties for paperwork violations is constrained by the statutory direction that due consideration be given to five specific factors: 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). The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors. My understanding of these instruc-

tions is, as with a knowing hire violation, that each violation must be considered separately: that is, each of the paperwork violations must be assessed on its own terms.

INS said that in establishing the penalties originally, it had previously viewed the size of the employer and its lack of any history of previous violations as mitigating factors, while viewing the absence of good faith, the seriousness of the violations and the involvement of an unauthorized alien as aggravating factors. Now, however, it has changed its view as to the employer's size and the absence of previous violations, and urges that in light of additional evidence, including the identification of two additional unauthorized aliens who worked for the respondent, even further aggravation is warranted for the factors of absence of good faith, seriousness of the violations and unauthorized alien involvement.

1. *The Size of the Employer Charged*

The Service now suggests that the size of the employer's business should not be a mitigating factor because the respondent's business may be larger and more profitable than it previously believed based on the amount of cash at Hernandez' disposal. No showing was made, however, that these funds, concededly a large amount of cash to keep around the house, necessarily represented proceeds of the restaurant business which gave rise to the complaint. For all that the record discloses Irma Hernandez may have won the lottery or sold the movie rights to her autobiography. Absent more compelling facts than the unexplained possession of a lot of cash, I cannot conclude that a restaurant business which employed 25 or fewer persons is anything other than a small business, a fact which ordinarily is considered as a mitigating factor.

2. *The History of Previous Violations*

Neither do I believe that the history of previous violations should be changed from a mitigating to an aggravating factor in this case, because I find no such history to have been established. As noted, INS neither issued a NIF nor filed a complaint with respect to the two additional allegedly unauthorized aliens, and it does not allege that any of the 10 paperwork violations complained of in this action involved either of these aliens. While INS suggests that the conviction upon a plea of guilty by the respondent and her husband to a charge of harboring Manuel Leal-Rodriguez indicates that the history of undetected violations

was greater than was previously known, the judgment of conviction makes no reference at all to employment. It was entered on June 11, 1999, and states that the harboring offense concluded September 20, 1998. INS has not addressed the question of whether this is a "previous" violation within the meaning of the statute or, as it appears, a subsequent violation. While there is no specific indication in the record of when the violations alleged in Counts I, II, and III actually occurred, the Stavlo affidavit notes that he completed the sanctions investigation on July 24, 1997[3], well before the arrest of Leal-Rodriguez or Nunez.

Neither does the Service address the question of whether the statutory language refers to previous violations of provisions other than those addressed by the employment eligibility verification system. OCAHO case law suggests that in order to prove a history of previous violations the complainant must establish that the respondent previously violated § 1324a, that INS issued a NIF and filed a complaint against the respondent based on that violation, and that the respondent was afforded the opportunity for a due process hearing. *See, e.g.*, *United States v. Honeybake Farms, Inc.*, 2 OCAHO 311, at 95 (1991); *United States v. Robles*, 2 OCAHO 309, at 78 (1991). Virtually all the OCAHO cases discussing this factor focus on whether the respondent has a history of previous employment verification violations, i.e., violations of § 1324a. *See, e.g.*, *United States v. Davis Nursery, Inc.*, 4 OCAHO 694 (1994) (mitigating the penalty because the respondent had no prior history of employer sanctions violations); *Sunshine Bldg. Maintenance*, 7 OCAHO 997, at 1184 (holding that "mitigation is in order for this factor" where there was no evidence of any prior violations of § 1324a); *United States v. Draper-King Cole, Inc.*, 7 OCAHO 933, at 220 (1997) (holding that the respondent was entitled to mitigation of the proposed civil money penalties because it had no prior history of § 1324a violations).

A few OCAHO cases have specified the types of events that do *not* establish a history of previous violations. *Honeybake Farms*, for example, held that such a history could not be established by a prior "warning notice" against the respondent because "a 'warning notice' does not contain any formal judgment or admission regarding Respondent's liability for prior IRCA violations." Thus without an opportunity for a hearing that affords the respondent

[3] It is not clear whether this is a typographical error. The NIF was issued on August 13, 1998.

due process, the respondent's prior misconduct could not be characterized as a "violation" for penalty aggravation purposes. 2 OCAHO 311, at 95.

Nor have allegations of a prior hire of undocumented aliens in the absence of an opportunity for a due process hearing been found to constitute a "history of previous violations" for penalty setting purposes. In *United States v. Alaniz*, 1 OCAHO 297, at 1969–70 (1991), the complainant alleged that even though there were no prior sanctions against the respondent, there was evidence of a prior violation because the respondent had previously hired and then discharged one of the four unauthorized employees whose alleged knowing hire was involved in the case. The administrative law judge declined to use the "history of previous violations" factor to aggravate the penalty because the respondent had not been afforded the opportunity for a due process hearing in relation to the allegation of a prior hiring violation. *Id.*

Similarly, in *Robles*, the administrative law judge found no evidence of any previous violations where the Service had increased the proposed fine based on the arrest of an illegal alien who claimed to have been employed by the respondent. The administrative law judge reasoned that the complainant could have alleged a "knowing hire" violation against the respondent in the proceeding based on the illegal alien's statement. The alien's statement was not, however, considered evidence of a "previous violation" because the respondent had neither been charged with a violation based upon that evidence nor afforded a due process hearing regarding that incident. 2 OCAHO 309, at 78; *see also United States v. Exim, Inc.*, 4 OCAHO 604, at 140 (1994) (holding that the respondent had no history of previous violations because, although the respondent previously had been issued a citation, no complaint had been filed against the respondent for civil money penalties). In *United States v. Primera Enters., Inc.*, 4 OCAHO 692, at 917 (1994), on the other hand, the respondent did have a history of previous violations because it had been cited twice previously "for infractions of this nature," the INS had issued a NIF against the business and its former president for multiple violations, and the respondent had previously been assessed civil money penalties of $3500 and $4500 on two separate occasions.

At least one OCAHO case has held that prior criminal convictions, even if immigration-related, do not constitute evidence of a "history of previous violations." *United States v. Reyes*, 4 OCAHO

592, at 8 (1994). In *Reyes*, the respondent had been charged in a nineteen count indictment with making false statements and using false documents to aid in obtaining adjustment of status for certain aliens, none of whom was involved in the paperwork violations at issue in the case. Although the respondent had entered a plea of guilty to two counts of the indictment and been sentenced to electronic monitoring home confinement, a fine, and probation, the administrative law judge nevertheless did "not consider the fact of the criminal convictions to be tantamount to evidence of previous violations." *Id.*

INS offers no reason why I should reject the guidance or reasoning in these cases. In the absence of any prior order or finding as to violations of the employment eligibility verification system I do not conclude that either the subsequent conviction of Irma Hernandez for harboring Leal-Rodriguez or hearsay about his or Nunez' employment is sufficient to show a history of previous violations, and have no reason to aggravate penalties based on this factor.

3. *The Seriousness of the Violations and the Involvement of Unauthorized Aliens*

With respect to the relative seriousness of the paperwork violations, INS said it originally considered the violations charged in Count III to be more serious than those in Count II, and it therefore assessed $650 for each of the violations in Count III and $550 for each of the violations in Count II. I agree that the total failure to prepare or present an employee's I–9 form at all is obviously more serious than an error in the completion of one of the sections of the form, so that aggravation of the penalties for the two violations alleged in Count III is warranted based on the seriousness of those violations.

However only one of the individuals for whom no I–9 was prepared or presented, Mario Hernandez, was, in fact, an unauthorized alien. Aggravation for the failure to prepare or present an I–9 for Mario Hernandez is therefore warranted based on both the seriousness of the violation and the fact that Mario Hernandez was himself unauthorized for employment. No aggravation based on the second of these factors is warranted for Mark Nichols, however, because there is no showing that Mark Nichols was unauthorized for employment. The statutory factor for consideration here is "whether or not *the individual* was an unauthorized alien,"

8 U.S.C. § 1324a(e)(5) (emphasis added), that is, whether the individual who is involved in the particular violation was unauthorized. Nothing in the statute or in common sense suggests that the penalty for a paperwork violation involving Mark Nichols should be enhanced because Mario Hernandez or some other individual was unauthorized.

I am unable to make any independent assessment of the seriousness of the violations alleged in Count II because no information was presented as to the nature of the specific alleged defects or omissions in Section 2 of the eight I–9s, whether the same error was made on each of the eight forms or there were different errors, and whether the alleged defects or omissions were substantive or technical and procedural in nature. In the absence of any showing as to the nature of the specific errors or omissions complained of, I will not approve aggravation of the penalties based on the seriousness of the violations alleged in Count II. I do not understand 8 U.S.C. § 1324a(e)(5) to suggest or support increasing the penalty for the respondent's unidentified errors or omissions in completing Section 2 of Kellie Johnson's I–9 form because the respondent allegedly employed Hector Nunez or failed to prepare an I–9 for Mark Nichols. Neither is it self-evident why a paperwork violation would retroactively become more severe based on after-acquired evidence about someone else's unauthorized status. I therefore reduced each of the penalties INS proposed for the unidentified violations in Count II because aggravation of these penalties based on the seriousness of those violations is unsupported.

4. *The Good Faith of the Employer*

INS indicated that it initially considered a lack of good faith as an aggravating factor because Irma Hernandez "had knowingly hired an illegal alien, failed to prepare Forms I–9 on the illegal alien employees, and had failed to properly and/or timely complete the Forms I–9 on all of the other employees." Now, however, the Service requests further aggravation because the respondent acted in bad faith by making false statements to investigating officers in a criminal investigation and therefore "lacked good faith to a far greater extent than previously believed."

It is well established in OCAHO case law 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 1907 (1993) (citing *United States v. Valladares*,

2 OCAHO 316, at 144 (1991)). The respondent's "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." *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 480 (1995)(modification by the CAHO). While the complainant does not have to show that the respondent acted with evil intent or bad motives, it must produce some evidence of "culpable behavior beyond mere failure of compliance." *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 1738 (1993).

It is also well established that the knowing hire of an illegal alien does not per se constitute a lack of good faith for purposes of aggravating a penalty for paperwork violations. *See United States v. Fox*, 5 OCAHO 756, at 280 (1995). *Fox* explains that "to assume an absence of good faith within the meaning of § 1324a(e)(5) so as to aggravate the penalty because of the employment of unauthorized aliens, without more, obscures the differentiation in § 1324a(e)(5) between the factors of 'good faith' and 'whether or not the individual was an unauthorized alien.' The command of the statute is to consider both factors, not to subsume one within the other." *Fox* held that "absent data additional to the finding of continuing unauthorized employment, this factor (lack of good faith) does not serve to aggravate the civil money penalty." *Id.*

Examples of "culpable behavior beyond mere failure of compliance" in OCAHO jurisprudence have included the following: (1) lack of compliance with verification requirements despite prior educational visits by INS officials regarding compliance, *see, e.g.*, *Giannini Landscaping*, 3 OCAHO 573, at 1783; (2) failure to cooperate during an INS inspection, *see, e.g.*, *United States v. Alberta Sosa, Inc.*, 6 OCAHO 831, at 95–97 (1996); (3) failure to comply with verification requirements after apprehension of an undocumented alien on the premises, *see, e.g.*, *Reyes*, 4 OCAHO 592, at 8–9; and (4) a manager's perjured signatures on several I–9 forms and a customary practice of failing to examine the underlying documents, *see, e.g.*, *Sunshine Building*, 7 OCAHO 997, at 1179.

First, a lack of good faith has routinely been found where the respondent's failure to present or complete the Form I–9 followed an educational visit by INS officials to the respondent's place of business. *See, e.g., Minaco Fashions*, 3 OCAHO 587, at 1907; *Draper-King Cole*, 7 OCAHO 933, at 216–18. In *Minaco Fashions*, for

example, it was held that the respondent lacked good faith where INS made an educational visit three weeks before the apprehension of unauthorized aliens on Minaco's premises. The INS agent had briefed the respondent on the requirements of § 1324a and provided him with a copy of the INS Handbook for Employers. Nevertheless, the respondent subsequently failed to prepare I–9s and where they were prepared, failed to attest to the entries at section 2 of the I–9. It was also noted that the respondent's lack of I–9 compliance was pervasive and that the number of unauthorized aliens on the payroll was extensive. 3 OCAHO 587, at 1907.

Similarly, in *Draper-King Cole*, the respondent lacked good faith where INS had made three separate visits within a year prior to the final audit. Of the 192 Forms I–9 that were completed after the initial educational visit, 114 or 59% were improperly completed. It was held that such a failure rate could not be explained by merely alleging that the agent failed to properly educate the respondent as to its obligations under IRCA. 7 OCAHO 933, at 218.

Second, lack of good faith has been found where the respondent failed to cooperate with INS during the inspection process. *See, e.g.*, *Alberta Sosa*, 6 OCAHO 831, at 96–97 (failure to cooperate where the respondent sounded an alarm designed to warn unauthorized aliens of the INS agent's arrival and to facilitate their avoiding detection and arrest).

Third, OCAHO cases have found a lack of good faith where the respondent failed to comply with verification requirements after INS had apprehended an undocumented alien on the premises. *See, e.g.*, *Reyes*, 4 OCAHO 592, at 9. In *Reyes*, for example, there was more than mere failure of compliance where the respondent failed to present I–9s for 23 employees after November 21, 1991, the date INS agents conducted a survey of Respondent's premises and apprehended Ascencio-Ruiz, an undocumented alien, because a reasonably prudent employer acting in good faith would have taken steps after that to assure compliance with I–9 requirements. *Id. See also United States v. Carter*, 7 OCAHO 931, at 165–66 (1997).

Finally, bad faith has been found for purposes of aggravating a civil money penalty where one of the respondent's managers used perjured signatures on I–9 forms and had a customary prac-

tice of failing to examine the underlying documents. *Sunshine Building*, 7 OCAHO 997, at 1179.

Such examples have expressly *not* included conduct subsequent to or wholly unrelated to the paperwork violations at issue. Thus in *United States v. Mathis*, 4 OCAHO 717 (1995), where the administrative law judge had considered the respondent's conduct in discovery as bearing on the question of good faith, the order was modified by the Chief Administrative Hearing Officer (CAHO) because "by according weight to the behavior of the respondent during the discovery phase of the litigation in the context of a good faith analysis, the ALJ has taken into consideration facts beyond the scope of a permissible good faith analysis . . ." 4 OCAHO 717, at 1107. The CAHO explained that "the factors taken into account, particularly with regard to good faith, have related in some way to the egregiousness of the IRCA violation itself." *Id.* at 1108 (quoting *United States v. Park Sunset Hotel*, 3 OCAHO 525, at 1268 (1993)(modification by the CAHO)). Enhancing the civil money penalties on the basis of misconduct during the litigation "is not authorized by anything in the statute or regulations." *Id. See also United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 130 (1995) ("It is only logical that the good faith of an employer is calculated at the time of investigation and not thereafter.").

In this case, there is no evidence in the record that INS agents counseled the respondent about her responsibilities under the statute prior to the paperwork violations or that the respondent failed to cooperate with officials during the INS inspection process. Neither was there a clear showing as to whether any undocumented alien was working for the respondent prior to the time the respondent committed the paperwork violations. The record suggests otherwise. Finally, as the CAHO explained in *Mathis*, it is inappropriate for an administrative law judge to consider a respondent's behavior which is unrelated to the IRCA violations in determining whether the respondent acted in good faith. Acts of Irma Hernandez during the criminal investigation may be reprehensible, but they have not been shown to be specifically related to any of the paperwork violations at issue in this proceeding. Thus, none of the grounds INS uses to support its argument that the respondent lacked good faith warrants aggravation of civil money penalties for the particular paperwork violations alleged in this case.

V. *SUMMARY*

I thus concur in the Service's initial view that the size of the employer and the absence of any history of previous violations were appropriately treated as mitigating factors, while the seriousness of the violations and the involvement of an illegal alien, where appropriate, were aggravating factors.

The latter two factors are not, however, broadly applicable to every violation regardless of the facts. Aggravation for the seriousness of the violation applies to the failure to prepare or present I–9 forms for two employees as alleged in Count III, but not to the unidentified errors or omissions in completing Section 2 for the eight employees named in Count II. Aggravation because of the alien's unauthorized status is appropriate only as to failure to prepare or present the form for Mario Hernandez. Accordingly, the $650 penalty proposed for Hernandez will be approved, but the penalty for failure to prepare or present Mark Nichols' form will be reduced to $575.

In the absence of any specific information about the nature of the eight violations alleged in Count II aggravation for their seriousness is unwarranted, and those penalties will be reduced to $450 each. Unlike INS, I do not find that the particular paperwork violations complained of occurred in bad faith, and I therefore conclude that aggravation is unwarranted for this factor. Offsets of $50 to each of the proposed penalties for paperwork violations will be made in order to discount for the aggravation previously applied. Neither, on the other hand, do I find on this record any grounds for mitigation based on this factor and the offsets are accordingly modest.

Penalties will therefore be assessed in the amount of $1225 for Count I, $3200 for Count II ($400 each for eight violations) and $1125 for Count III ($600 for the violation involving Mario Hernandez and $525 for the violation involving Mark Nichols), totalling $5550.

On the basis of the record and for the reasons stated, I make the following findings, conclusions and order.

FINDINGS AND CONCLUSIONS

1. A notice of intent to fine (NIF) was served on Irma Hernandez on August 13, 1998 and Hernandez made a timely request for a hearing.

2. Irma Hernandez hired Mario Hernandez for employment after November 6, 1986 knowing him to be an alien not authorized for employment in the United States, or contracted to obtain his employment knowing he was unauthorized.

3. Hernandez hired Dawn Estes, Jonathan Green, Ramon Hernandez, Debra Hoffert, Kellie Johnson, Michelle Jones, Jamie Robinson and Alexander Shoaf for employment after November 6, 1986 and failed properly to complete Section 2 of Form I–9 for each of them.

4. The specific errors and omissions in the I–9 forms for Dawn Estes, Jonathan Green, Ramon Hernandez, Debra Hoffert, Kellie Johnson, Michelle Jones, Jamie Robinson and Alexander Shoaf were not identified.

5. Irma Hernandez hired Mario Hernandez and Mark Nichols for employment after November 6, 1986 and failed to prepare Form I–9 for each of them, or to make such forms available for inspection upon request by INS.

6. Mario Hernandez was unauthorized for employment in the United States.

7. Respondent's business, the Acapulco Restaurant, had fewer than 25 employees and was a small business.

8. No showing was made as to whether or not the respondent's paperwork violations were committed in good faith or bad faith.

9. Failure to prepare or present a Form I–9 for an employee hired after November 6, 1986 is a serious violation.

10. No history of previous violations by the respondent's business was shown.

11. All jurisdictional prerequisites to this action have been satisfied.

12. Respondent Irma Hernandez's knowing hire of Mario Hernandez is a violation of § 1324a(a)(1)(A) and (a)(2) which render it unlawful to hire or to continue to employ an alien knowing the alien to be unauthorized for employment.

13. Respondent engaged in 10 separate violations of § 1324a(a)(1)(B) which renders it unlawful to hire any individual for employment without complying with the requirements set out in § 1324a(b).

ORDER

Irma Hernandez shall henceforth cease and desist from further violating the provisions of §§ 1324a(a)(1)(A) and 1324a(a)(2) by hiring aliens for employment knowing them to be unauthorized for employment in the United States, or by continuing to employ unauthorized aliens after learning that they are unauthorized. Irma Hernandez shall pay civil money penalties in the total amount of $5550.

SO ORDERED.

Dated and entered this 5th day of January, 2000.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This Order dated January 5, 2000 shall become the final agency order unless modified, vacated or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative review by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R, Part 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1). Administrative review

by the Attorney General is available in accordance with 28 C.F.R. § 68.55. Judicial review of a final agency order is available to respondent, in accordance with the provisions of 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.