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

August 17, 2011

UNITED STATES OF AMERICA, Complainant, v. ALYN INDUSTRIES, INC., D/B/A ELECTRONIC SOURCE COMPANY Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 10A00082

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States is the complainant and Alyn Industries, Inc., d/b/a Electronic Source Co. (Alyn or the company) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three count complaint alleging that Alyn committed 62 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b).

Count I alleged that Alyn hired 2 named individuals and failed to prepare and/or present a form I-9 for either of them. Count II alleged that the company hired 1 named individual and failed to ensure that the individual properly completed section 1 of the form, and Count III alleged that Alyn hired 59 named individuals for whom it failed itself to properly complete section 2. Penalties were sought in the amount of $1,028.50 for each violation, or $2,057.00 for Count I, $1,028.50 for Count II, and $60,681.50 for Count III, for a total of $63,767.00.

Alyn filed an answer admitting the violations but challenging the reasonableness of the proposed penalties and making a counterproposal of its own. Pursuant to an order for prehearing statements, both parties filed their respective statements and a telephonic prehearing conference was subsequently conducted at which ICE was represented by counsel and Scott Alyn, the

respondent's president, appeared for the company without benefit of counsel. Discovery was commenced informally and each party was instructed to provide the other with various materials relevant to the question of penalties. They did so, after which ICE filed a motion for summary decision.

The unrepresented company initially filed no response to the motion, but thereafter did retain counsel whose appearance was filed on the last permissible day for a response, together with a request for a short extension of time to respond. Additional time was granted over the government's objection, but the subject matter of the response was limited to the only unresolved issue, that of the appropriate penalties for violations that were already established.

After the response was filed, the government filed a reply to the response and Alyn then filed a counter response to the government's reply. The government then filed an objection to the respondent's counter response to the complainant's reply. Because both the government's reply and Alyn's counter response to it were filed in derogation of the rules of this forum neither is considered.[1] The government's objection to Alyn's counter response is dismissed as moot.

II. BACKGROUND INFORMATION

Alyn Industries is a California corporation owned by its president, Scott J. Alyn, and located at 16032 Arminta Street in Van Nuys, California, where it is engaged, under the name Electronic Source Company, in the business of manufacturing printed circuit board assemblies for some of southern California's leading companies in the aerospace, military, medical, telecommunication and wireless markets.

The instant dispute arises over a Notice of Intent to Fine (NIF) that was served upon Alyn on November 25, 2009 after completion of an ICE inspection that began on or about July 7, 2009. The Notice alleged that Alyn committed the violations that were subsequently charged in the complaint. Alyn made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2010). These rules specify that unless the administrative law judge provides otherwise, no reply to a response, counter response to a reply, or any further responsive document is to be filed with respect to a motion. 28 C.F.R. § 68.11(b). The government did not seek or secure prior approval before submitting its reply and Alyn did not seek or secure prior approval for its counter response either.

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection. 8 U.S.C. § 1324a(b) (2006). Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2). Forms must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and must be made available to the government for inspection upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2). The employer is responsible for ensuring that the employee properly completes section 1 of the Form I-9, in which the employee attests to information about his or her status in the United States, 8 C.F.R. § 274a.2(b)(1)(i)(A), as well as for properly completing section 2, in which the employer attests to examining specific documents establishing the employee's identity and eligibility for employment. 8 C.F.R. § 274a.2(b)(1)(i)(B).

Specific failures to provide all the information required are colloquially known as "paperwork violations." Civil money penalties are assessed for such violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual is $110, and the maximum penalty is $1,100. The following factors must be considered in assessing the appropriate penalties: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).[2]

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

IV. EVIDENCE CONSIDERED

A. Exhibits Accompanying ICE's Motion

Exhibits accompanying ICE's motion for summary decision include: 1) Memorandum of Law in Support of Motion for Summary Decision (15 pgs.); 2) Notice of Inspection (2 pgs.); 3) Fact Sheet: Form I-9 Inspection Overview (7 pgs.); 4) Report of Investigation (3 pgs.); 5) Business Entity Detail; 6) Forms I-9 and attachments (115 pgs.); 7) Automatic Data Processing, Inc. (ADP) records for Electronic Source Company (13 pgs.); 8) Business Entity Questionnaire signed by President Scott Alyn; 9) Employee List signed by Bookkeeper Enoc Garcia (2 pgs.); 10) Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties, Nov. 25, 2008 (46 pgs.); 11) Calculation of Civil Money Penalty; 12) Memorandum to Case File Determination of Civil Money Penalty (5 pgs.); 13) Complaint, Notice of Intent to Fine, and Request for Hearing (17 pgs.); 14) Respondent's Answer to the Complaint (4 pgs.), and 15) Certificate of Service.

B. Exhibits Accompanying Alyn's Response

Exhibits accompanying Alyn's response to ICE's motion for summary decision include A) Order Granting Motion for Leave to File Response, issued May 17, 2011 (3 pgs.); B) Independent Accountants' Reports dated March 30, 2010 and March 16, 2011 together with balance sheets, statements of income, and statements of stockholder's equity as of Dec. 31, 2008, 2009, and 2010 (12 pgs.); C) Final Decision and Order in *United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137 (2010) (15 pgs.).

In addition to the materials submitted by the parties in connection with the pending motion (with the exception of the recent unauthorized filings) I have also considered the record as a whole, including pleadings, exhibits, and all other materials of record.

V. ICE'S MOTION FOR SUMMARY DECISION CONSIDERED

Because the violations themselves were admitted, the government is entitled to summary decision as to liability for the 62 violations alleged in Counts I, II and III and the only issue in need of resolution is the quantum of civil money penalties. The government says that summary decision is also appropriate with respect to this issue as well.

The government has the burden of proof with respect to the penalty as well as to liability, *see United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp*., 6 OCAHO no. 848, 235, 239-40 (1996), and must therefore prove

the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). For purposes of this motion, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc*., 4 OCAHO no. 615, 259, 261 (1994), so all reasonable inferences must be drawn in Alyn's favor.

A. The Positions of the Parties

ICE submitted exhibits to assist in explaining how it assessed the penalty and how it considered each of the five statutory penalty factors. The government's *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (the Guide), exhibit 10, contains a matrix by which a "baseline" penalty is calculated: violations are initially identified as first, second, or third offenses, and are then divided into categories depending upon the percentage of I-9s that have substantive violations. There are six such categories; the first refers to a situation where substantive violations appear in up to 9% of the I-9s, the second category involves violations appearing in 10% to 19% of the forms, the third category is for violations in 20% to 29% of the forms, the fourth involves violations in 30% to 39% of the forms, the fifth ranges from 40% to 49%, and the sixth category encompasses those instances where 50% or more of the employer's I-9 forms contain substantive violations. When more than 50% of the employer's I-9 forms contain substantive errors, the matrix sets a baseline penalty for a first offense of $935.00 per violation. The Guide reflects that for each statutory factor that the preparer finds applicable to a given case, the baseline fine may be aggravated or mitigated by a factor of 5%, so that the baseline fine has the potential to be aggravated or mitigated up to a total of 25%.

ICE said that because 100% of Alyn's I-9s contained substantive paperwork violations, the standard fine for a first offense was assessed, after which the government aggravated each of the proposed penalties by 5% because of Alyn's lack of good faith, and by another 5% for the seriousness of the violations. ICE's memorandum also argued that the penalties should be aggravated by an additional 5% for 39 of the violations based on the fact that the individuals were unauthorized aliens, but the government's Calculation of Civil Money Penalty, exhibit 11, reflects that no aggravation was imposed based on this factor.[3] The government also argued that the presence of unauthorized aliens was evidence of bad faith. ICE treated the size of the employer and the history of previous violations as neutral factors, warranting neither aggravation nor mitigation of the penalties.

The company took issue both with the initial assessment and with the government's application of the statutory factors. Alyn says that it is a small business that acted in good faith and had no previous violations. Alyn pointed out that it is privately owned and operates at a single worksite, and though it employed 62 people as of July, 2009, it had only 50 employees as of December

[3] The penalty the government requested for each violation was $1,028.50 which reflects only a 10% enhancement over the base fine for each violation.

2010. Alyn says the company's net income in calendar 2009 was $78,155 but it had a net loss of $270,694 in calendar 2010. The company made no specific response to the government's allegations about the presence of unauthorized aliens nor did it comment on the issue of the seriousness of the violations.

B. Discussion and Analysis

1. Size of the Business

ICE concluded that Alyn was a moderate sized business. It identified a number of factors relevant to the question of an employer's size: its revenue or income, the amount of payroll, the number of salaried employees, the nature of its ownership, its length of time in business, and the nature and scope of the business facilities, citing *United States v. Draper-King Cole*, 7 OCAHO no. 933, 211, 215 (1997)). It also set forth certain subfactors it considered in arriving at its determination: whether the employer used all its resources to comply with the law, whether a higher penalty would enhance the probability of compliance, and whether the turnover ratio might have interfered with the completion of the Forms I-9, citing *United States v. Ricky Catalano d/b/a Papa Joe's Pizza*, 7 OCAHO no. 974, 860, 869-70 (1997).

As I have previously observed with respect to the first of the *Catalano* criteria, however, the test has little support in our case law and its connection to the size of an employer is questionable; it appears to be more closely related to the question of an employer's good faith than it is to the size of a particular business. *See United States v. Sunshine Building Maintenance, Inc*., 7 OCAHO no. 997, 1122, 1176 n.22 (1998). Although the second *Catalano* criterion is also a legitimate consideration, it appears to be more closely related to the ability to pay than it is to the size of the business. While an employer's financial data may help in understanding the size and scope of an operation, an employer's ability to pay is not a proxy for size; the factors are analytically distinct. *Catalano* asserts that "[a]ll other relevant considerations being equal, the statutory minimum penalty will have a greater economic impact on a marginally profitable business than on a highly profitable business." 7 OCAHO no. 974 at 870. This is doubtless true, but "marginally profitable" does not necessarily mean small, nor does "highly profitable" necessarily mean large.

Alyn's financial statements indicate that it has recently experienced a downturn in its revenue and net income. Revenue in 2009 was $4,858,023, and net income was $78,155. For 2010, the comparable figures were $3,722,767 in revenue and a net loss of $270,694. The accountant's letter noted, however, that management elected to omit the disclosures and statement of cash flows required by generally accepted accounting principles, and the letter contained the caveat that "[i]f the omitted disclosures and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows." It concluded by observing that the statements were not designed for persons not informed about such matters.

Notwithstanding any doubts as to Alyn's overall financial picture, however, OCAHO case law has generally considered companies with fewer than 100 employees to be small businesses. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1998) (business with 90 to 100 employees considered small); *United States v. Vogue Pleating, Stitching & Embroidery Corp*., 5 OCAHO no. 782, 468, 471 (1995) (business with approximately 100 employees was considered small). Alyn has only 50. While there is insufficient evidence to conclude that Alyn is anything other than a small business, it is nevertheless also perfectly evident that Alyn is not a failing "mom and pop" operation either. *See, e.g., United States v. New China Buffet Restaurant*, 10 OCAHO no. 1133, 6-7 (2010) (finding no deterrent necessary where insolvent business with 6-7 employees had closed and rent check for the business premises had bounced).

2. Good Faith

The government pointed out that Alyn has been in business since 1998 and had revenue in the millions, so it should have been able to secure training and implement proper procedures for verifying the employment eligibility of its workers, and urges that its failure to do so shows a lack of good faith for which aggravation of the penalty is warranted. ICE also urges that the presence of unauthorized workers is evidence of bad faith too, but absent any allegation or evidence that Alyn had knowledge of the presence of unauthorized workers, its state of mind could hardly have been affected by their unknown presence. *See United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 421-22 (1995) (finding that it is the knowing hire of an unauthorized alien that demonstrates bad faith).

Alyn says that its errors were the result of carelessness, not disdain or gross disregard, and that pursuant to *United States v. Big Bear Market*, 1 OCAHO no. 48, 285, 315 (1989), *aff'd by* CAHO, 1 OCAHO no. 55 (1989), *aff'd*, 913 F.2d 754 (9th Cir. 1990), this merits a finding of good faith. The company points out further that paperwork violations alone are insufficient to support a finding of lack of good faith, citing *United States v. Taco Plus, Inc*., 5 OCAHO no. 775, 416, 421-22 (1995), and that a poor rate of compliance is not in itself evidence of bad faith, citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995). It also points to the fact that since the inspection it has enrolled in E-Verify and instituted stringent compliance checks.[4]

Recent ICE Guidelines include among other subfactors in assessing good faith an employer's cooperation with the inspection. This is a legitimate consideration, but OCAHO case law has focused principally on the employer's efforts to comply with the requirements prior to the Notice

[4] Alyn also cited 8 C.F.R. § 274a.4 in its discussion of the penalties for the Count III violations, but that provision provides a good faith affirmative defense only as to knowing hire violations under 8 U.S.C. § 1324a(a)(1)(A); Alyn has not been charged with any such violations so the defense has no relevance here.

of Inspection, not after. The question is whether the employer sought to ascertain what the law requires and to conform its conduct to it. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citing *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995)). There is insufficient evidence here to conclude that Alyn made any attempt at all prior to the government inspection to accurately determine its I-9 responsibilities. But there is no support either in ICE's Guidelines or in OCAHO case law for the proposition that failure to affirmatively seek out and secure training in I-9 compliance is evidence of bad faith either, so the government has not met its burden with respect to this factor.

3. Seriousness of the Violations

The seriousness of violations may be evaluated on a continuum, and not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931 at 169). Here, all but 2 of the violations involve either a total failure to prepare an I-9 (2 violations in Count I), or a failure to sign the section 2 attestation (58 of the 59 violations in Count III). Failure to prepare an I-9 at all is among the most serious of paperwork violations, and case law reflects that the absence of the employer's attestation in section 2 is always a serious violation as well. *See United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) ("[F]ailure to prepare I-9s [is] serious because that failure frustrates the national policy ... intended to assure that unauthorized aliens are excluded from the workplace."); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990) ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury").

The other 2 violations involve Alyn's failure to ensure that Carmen Mejia checked a box in section 1 of the I-9 to attest to her status in the United States, and failure to enter either a List A or a List C document showing employment authorization in section 2 of the form for Scott Alyn. While still serious, these violations are of somewhat lesser import than the other 60.

4. Whether the Individuals Involved Were Unauthorized Aliens

The government argues that there is no particular "quantum of evidence" required to prove this factor, and that the evidence it has proffered is sufficient. The quantum of evidence for this factor, as for all the other factors, is such evidence which allows the government to carry its burden of proof by a preponderance of the evidence.

To support its allegation that 39 individuals were unauthorized aliens, the government points to its Memorandum to Case File, exhibit 12, which sets out the conclusion that for 39 of the 62 employees, the "Alien Registration Numbers presented by the employees on the Forms I-9 were

not found in the CIS[5] database or the numbers were found not to belong to the employee." The government's Report of Investigation, exhibit 4, p.3, however, reflects a somewhat more detailed result. It says that for 26 employees the Alien Registration numbers did not match the name and date of birth on the I-9 form; for 10 employees no record at all was found in the CIS database; 3 employees were found to have expired documents; 1 had previously been removed to El Salvador; and 1 had an outstanding removal order issued by an Immigration Judge.

No list of these employees was provided and no specific individuals were identified as being either among the 26 whose information did not match the CIS database, or in the group with no records, expired documents, or removal orders. The precise nature of the discrepancies between the I-9s and the CIS database for the 26 mismatches was not elaborated either, and from all that can be discerned from ICE's presentation some of the mismatches could be the result of discrepancies as simple as a variant spelling of a name or a typographical error.

While it is more probable that the employees for whom the database reflected no records at all, or those who had expired documents or pending removal orders actually were unauthorized for employment, the statutory factor for consideration here is not whether some unidentified unauthorized aliens were found to be present in the workforce, it is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added). Penalties may be aggravated for the I-9 forms only of those individuals who are themselves determined to be unauthorized. *See Hernandez*, 8 OCAHO no. 1043 at 668-69 ("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."). Absent some identification of the specific individuals who were allegedly unauthorized, the government has failed to carry its burden of proof on this factor.

5. Any History of Previous Violations

The parties are in agreement that Alyn has no history of previous violations. Alyn asserts that because this is its first offense leniency is in order, but the general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation. *See United States v. DJ Drywall, Inc*., 10 OCAHO no. 1136, 12 (2010) ("[N]ever having violated the law before is not necessarily grounds for leniency, and the company has offered no evidence or argument that such leniency is warranted in this case."); *New China Buffet*, 10 OCAHO no. 1133 at 6 ("[A]s ICE correctly points out, never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one."). *But see United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 9, 11 (2010) (finding the absence of prior violations would, under the

[5] The reference is to the U.S. Citizenship and Immigration Services, a component of the U.S. Dept. of Homeland Security.

circumstances of that case, "point to mitigation.")

6. Other Considerations

Alyn urged in addition that the goal of achieving compliance has already been realized because it is now enrolled in E-Verify, thus making a high penalty unnecessary to achieve compliance, and also analogized itself to the employer in *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 11 (2010), in which ICE's proposed penalties were substantially lowered because they were found to be vastly disproportionate to the size and resources of the company.

While Alyn characterized *Snack Attack* as reflecting substantially similar circumstances to its own, the circumstances in that case were neither similar nor analogous: Snack Attack was a small family owned fast food franchise deli sandwich business that had been losing money for some time and had only a handful of employees. *Snack Attack*, 10 OCAHO no. 1137 at 11. Alyn, in contrast, is a subchapter S corporation that has been in business for more than 10 years and had assets of $2 million in 2009 and $1.4 million in 2010. Its gross profits were $865,934 for 2009 and there were 2600 shares of common stock outstanding out of 24,000 authorized. Until recently, Alyn appears to have been a prosperous company and while it is clear that Alyn has had recent reversals, as have most employers in the current economy, there is insufficient evidence to conclude that its situation is anywhere near as dire as that presented in *Snack Attack*, or that the company lacks the ability to pay a reasonable penalty.

C. Conclusion and Summary

The permissible penalties in this case range from a low of $6,820 to a high of $68,200, and the government has proposed penalties that are very close to the highest available. Giving due consideration to the statutory criteria, the proposed penalties appear excessive.

The only factor weighing strongly against Alyn in this case is the seriousness of the violations themselves. In light of these considerations and as a matter of discretion, penalties nearer to the midrange are found more appropriate to the facts and circumstances of this case and the penalties are accordingly set at $700 each for the 60 most serious violations and $500 each for the other 2, for a total penalty of $43,000.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Alyn Industries, Inc. is an electronics manufacturing company incorporated in California in 1998 and owned by its president, Scott J. Alyn.

2. The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) served a Notice of Intent to Fine on Alyn Industries, Inc. on November 25, 2009 alleging that Alyn committed 62 violations of the Immigration and Nationality Act, 8 U.S.C. § 1324a.

3. Alyn Industries, Inc. requested a hearing before an administrative law judge on December 19, 2009.

4. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint in three counts against Alyn Industries, Inc. on June 7, 2010.

5. Alyn Industries, Inc. filed an answer to the complaint admitting the violations alleged, but disputing the amount of the penalty.

6. During the period July 2009 to December 2010, the Respondent employed between 50 - 62 employees.

7. Alyn Industries, Inc. reported gross revenue of $3,722,767 in calendar year 2010 and $4,858,023 in calendar year 2009.

8. Alyn Industries, Inc. reported a net loss of ($270,694) in calendar year 2010 and net income of $78,155 in calendar year 2009.

9. Alyn Industries, Inc. hired Pedro Fabian and Yessica Solis for employment in the United States and failed to prepare and/or present a Form I-9 for either of them.

10. Alyn Industries, Inc. hired Carmen Mejia for employment in the United States and failed to ensure that the employee properly completed section 1 of the Form I-9.

11. Alyn Industries, Inc. hired Silvina Aguirre, Scott J. Alyn, Damiana Andrade, Angelica Arana, Francisca Arvizu, Salvador Avila, Baljinder Bains, Sonia Balbuena, Susana Becerra, Maria Cabrera, Joana Carcamo, Veronica Diaz, Carlos A. Espinoza, Julio Fabian, Rubi Galvan, Enoc Grarcia, Hector Garcia, Diana Gomez, Gloria Gomez, Ingrid Guardado, Marvin Hernandez, Vladimir Khoudoiar, Dorix M. Argueta, Olivia Martinez, Teresa Mata, Juan J. Melendez, Marisela Mendoza, Amalia Montero, Moises Monzon, Maria A. Morales, Irene Morales, Maria I. Morales, Cecilia Morales, Sonia Morales, Yanira Navarrete, Felix B. Navarro, Nancy Nunez, Brenda Ochoa, Carmen Ortega, Elena Perez, Jose Pleitez, Sandra Ramirez, Dulce Reyes, Laura Romero, Gustavo Saavedra, Alberto Saldivar, Delmy E. Salvador, Fanny Salvador, Lucas Sanchez, Sonia Sandoval, Reynalda Santana, Sara Serrano, Socorro Perez, Nancy Solis, Maria Urquilla, Kou Vang, Susana Vasquez, Lizette Veloz, and Richard Yang for employment in the United States and failed to properly complete section 2 of the Form I-9 for them.

B. Conclusions of Law

1. Alyn Industries, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. Alyn Industries, Inc. engaged in 62 separate violations of 8 U.S.C. § 1324a(b).

4. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), the law requires consideration of the following factors: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer. 8 U.S.C. § 1324a(e)(5).

5. 8 U.S.C. § 1324a(e)(5) does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

6. Alyn Industries, Inc. has no history of previous violations of 8 U.S.C. § 1324a.

7. The government failed to show by a preponderance of the evidence that any of the specific individuals whose I-9s were found to contain violations was unauthorized for employment in the United States.

8. Sixty of the violations found were the result of Alyn Industries, Inc's failure either to prepare a Form I-9 at all or its failure to sign the attestation in section 2, both of which are exceedingly serious in character.

9. Two of the violations found involved Alyn's failure to ensure that Carmen Mejia checked a box in section 1 of Form I-9 to indicate her immigration status, and its failure to enter either a List A or a List C document showing employment authorization for Scott Alyn in section 2 of the form.

10. Alyn Industries, Inc.'s poor rate of I-9 compliance is insufficient to show bad faith absent some culpable conduct going beyond the mere failure to comply. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

11. Alyn Industries, Inc. was not shown to be other than a small business.

12. The evidence failed to establish that Alyn Industries, Inc. lacks the ability to pay a reasonable penalty.

13. Giving due consideration to the record as a whole and to the statutory factors, the penalties proposed are excessive and should be reduced.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

The complainant's motion for summary decision is granted as to liability, and granted as modified with respect to penalties. Alyn Industries, Inc. is directed to pay a total of $43,000 in civil money penalties. All other pending motions are denied. The parties are free to negotiate a payment schedule.

SO ORDERED.

Dated and entered this 17th day of August, 2011.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order 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 reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 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).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.