

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

June 21, 2012

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 11A00069
)	
STANFORD SIGN AND AWNING, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under 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 Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint alleging that Stanford Sign & Awning, Inc. (Stanford or the company) violated 8 U.S.C. § 1324a(b). A previous order dated March 8, 2012, *United States v. Stanford Sign & Awning, Inc.*, 10 OCAHO no. 1145 (2012), granted the complainant’s motion for summary decision in part with respect to one of the violations alleged in Count I,¹ and denied the motion in part as to the remainder of the allegations in Count I as well as the allegations in Counts II and III, without prejudice to ICE’s renewing the motion based on additional evidence. The motion has been renewed and the time for response has elapsed without further response from the company.

II. THE RENEWED AND REVISED MOTION FOR SUMMARY DECISION

The renewed and revised motion reflects that ICE will not pursue either Count I with respect to the remaining individuals named in it, or Count III, but that it does seek summary decision with

¹ Specifically, the order found that Stanford hired Scott Glenn for employment in the United States and failed to present an I-9 form for him on three days notice.

respect to all 17 violations alleged in Count II. It says that there are no genuine issues of material fact with respect to liability, and that it is entitled to the penalties it seeks for these 17 violations as well as for the single violation found in the previous order. In support of the renewed motion the government presented its Exhibits G-8, G-9, and G-10. Exhibit G-8 is a Notice of Technical and Procedural Failures dated November 1, 2010 (3 pp.); Exhibit G-9 consists of copies of I-9 forms for 17 employees, some with supporting documents (43 pp.); and Exhibit G-10 consists of payroll information for Richard Del Gatto (2 pp.).

Count II alleges that Stanford failed to ensure that 17 named employees properly completed section 1, and/or failed itself to properly complete sections 2 or 3 of the form for them. Visual examination of the I-9 forms and supporting documents confirms ICE's contentions that Stanford failed to ensure that Jose Alberto Valenzuela signed the attestation in section 1 of his I-9 form, and failed to ensure that Robin Theresa DesRoches, Oscar Ibarra, and Julio Cesar Ocegueda checked a box in section 1 on their forms. No alien number was entered anywhere on the form for these three individuals. The I-9 of Rosendo Eduardo Estrada reflects that he checked a box indicating status as a lawful permanent resident, but Stanford failed to ensure that he entered an alien number in section 1, and the number does not appear elsewhere on the form. No copy of the I-551 was retained and presented with the I-9 form.

Visual inspection of the I-9 forms reflects further that Stanford failed to properly prepare section 2 for a number of employees. For Michael H. Brown, a California driver's license was entered as a List A document and a copy was retained, but a driver's license is not a List A document and no List C document was provided. For Michael Robert Delgatto a List C document was entered, but no List B document. For Joe A. Maverchik a List B document was entered, but no List C document.

The evidence further reflects that Stanford failed to provide a document title, identification number, and/or expiration date for a document in section 2 of the I-9 forms for Jeremy W. Kelly and Michael A. Leon, and did not retain copies of their documents or present them at the time of inspection. Other I-9s reflect that Stanford failed to sign or date the attestation in section 2 for Bonnie J. Gill, David B. Lesage, and Adam Nguyen.

The I-9 form for Marcos Meza Jimenez reflects a hire date of September 9, 1998 and both section 1 and section 2 are similarly dated, but the version of the form utilized is the revision effective June 5, 2007, so it is readily apparent that the form must have been backdated. The revision date clearly appears in the bottom right corner in the margin of the form. ICE also observed that the manager who signed the form, Robin T. DesRoches, was not even hired herself until March 24, 2003 so could not have prepared the form on September 9, 1998. The hire date and section 2 attestation for Judith R. Pritchard both reflect dates in October of 1995, but the attestation was

also signed by Robin T. DesRoches, who started at Stanford in 2003.² In addition, Stanford also failed to reverify the authorization of Jose M. Barrera in section 3 before the expiration date on Barrera's card, and waited two months to do so. Similarly, the original work authorization document of Jose C. Lopez expired in 2004 and this employee was not reverified until January 20, 2010.

Accordingly Stanford is liable for the 17 violations alleged in Count II as well as for the violation previously found with respect to Count I.

III. PENALTY ASSESSMENT

The five factors that must be given due consideration in setting an appropriate penalty are the size of the employer's business, the good faith of the employer, the seriousness of the violations, whether the individual was an unauthorized alien, and any history of previous violations. 8 U.S.C. § 1324a(e)(5). The government has the burden of proof with respect to the penalty as well as to liability, *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. *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

A. The Government's Position

In light of the reduced number of violations, ICE recomputed its proposed penalties. The government acknowledged that it established the baseline amount by using the departmental guidance routinely used in calculating penalties,³ that guidance bases its penalty assessments on a matrix that divides the violations into six categories depending upon the percentage of I-9s that are missing or have substantive violations. ICE noted that because the recalculated percentage of violations was now 37%, it reduced the base fine commensurately to \$605.00 per violation. ICE said it then enhanced the penalty to ensure the probability of compliance in the future, and sought a total of \$12,523.50 for the eighteen violations established. No enhancement was sought based on the size of the business or any history of previous violations, but ICE aggravated the proposed

² According to the government, an ICE auditor indicated that examination of Pritchard's original I-9 showed that the date was originally March 25, 2003 but that this date was whited out and changed to October 7, 1995.

³ See *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties*. The document is not part of the record, but the relevant portions are available on ICE's website. U.S. Immigration and Customs Enforcement, *Fact Sheet: Form I-9 Inspection Overview* (Dec. 1, 2009), available at <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>.

penalties by a total of 15%; 5% based on Stanford's lack of good faith, 5% for the seriousness of the violations, and 5% for the involvement of unauthorized aliens.

In support of its assertion that Stanford did not act in good faith, ICE said that the company was provided an opportunity to make corrections to technical and procedural errors found on 25 of its I-9 forms, and that it failed to follow directions properly with respect to all of them. Further, ICE says that two suspected undocumented employees were terminated before the government received the I-9 forms and that ICE therefore enhanced the proposed penalties for lack of good faith.

With respect to seriousness, the government says that "the percentage of violations is extremely high and, therefore, ICE has found this to be a serious violation." It goes on to note that failure to present an I-9 form is always a serious violation so ICE enhanced the penalties for this reason as well.

As to the involvement of unauthorized aliens, ICE says there were three employees without proper documentation in December of 2010 and that after a Letter of Suspect Documents was issued, two of them were terminated. Stanford presented a parole document and authorization for the third, but ICE said that the authorization was no longer valid. ICE said that it would nevertheless afford Stanford "the benefit of the doubt" and would enhance the fine an additional 5% based only upon the hiring of two unauthorized aliens.⁴

B. The Company's Position

While Stanford did not respond to the revised motion, its previous filings point out that it is a small company with no HR department as such, and that it has 51 employees in two different locations. Stanford says that profits if any are put back into the business to upgrade vehicles, computers, and overhead, and that because its business is linked to the construction industry the past two years have been difficult, with sales going down and expenses going up, and that the company has had to reduce management salaries, freeze employee wages, take away vacation time, and reduce participation in health insurance. The company also asserted that the fine originally proposed was excessive in light of its size and good faith, and could bankrupt the company.

C. Discussion

Without explicitly saying so, ICE evidently concluded that Stanford was a small employer and the record supports that conclusion; ICE also correctly notes that Stanford has no history of

⁴ It is unclear what benefit of the doubt was afforded inasmuch as 5% is the maximum enhancement permitted for each factor under ICE's penalty guidelines.

previous violations. I cannot concur, however, in the government's suggestion that the company acted in bad faith. ICE argues that bad faith is shown by two factors; first, Stanford's failure to correct technical errors on 25 forms, and second, the presence in the workforce of two suspect individuals identified in Count I who were terminated prior to the audit. Our case law does not support a finding of bad faith on either of the grounds alleged.

First, it is well established in OCAHO case law that paperwork violations standing alone are insufficient to support a finding of lack of good faith, so a poor rate of compliance is not in itself necessarily evidence of bad faith. *United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 421-22 (1995). Culpable behavior beyond the mere failure of compliance is required. *Id.*; *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995). In responding to ICE's initial motion, Stanford explained the failure to correct technical errors by saying that DesRoches misunderstood the instructions given to her verbally by an agent with a heavy accent. Because of the misunderstanding DesRoches did not really know how the corrections were supposed to be made. She thought that ICE would review the forms with her, but this did not happen. The agent just picked up the corrected forms and left without any consultation. Nothing in Stanford's response would lend support to a finding of bad faith.

Second, absent any allegation or evidence that Stanford had knowledge that the two individuals ICE identified were unauthorized for employment, the company's state of mind could hardly have been affected one way or another by the presence of these individuals in the workforce. ICE does not explain how a fact of which an employer is unaware can be used to impute to it a guilty state of mind. *Cf. Taco Plus*, 5 OCAHO no. 775 at 421-22 (finding that employer's having *knowingly* employed an unauthorized alien and failed to prepare I-9s "properly does lend itself to a finding of bad faith") (emphasis added).

With respect to the seriousness of the violations, while I concur with the government's conclusion that the failure to prepare an I-9 is always a very serious violation, I note that only one of the violations involves a failure to prepare an I-9, and no additional enhancement is warranted as to other violations based on Stanford's failure to present an I-9 for Scott Glenn. Any aggravation of a penalty for the seriousness of other violations must be based on the seriousness of the specific violation reflected on the particular individual's I-9.

The seriousness factor is, moreover, best evaluated on a continuum because not all violations are necessarily equally serious. OCAHO case law has acknowledged that while failure to enter either a List A or a List C document showing employment authorization in section 2 is serious, it is not as serious a violation as is an employer's failure to complete an I-9 at all or to sign the attestation in section 2. *See United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 8, 10 (2011) (setting a penalty of \$700 for each failure to complete an I-9 or to sign the section 2 attestation, but assessing \$500 for each failure to enter a List A or C document); *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (finding all the violations serious as all involved either failure to prepare an I-9 at all or failure to sign the section 2 attestation).

Enhancement based on the seriousness of the violation would thus be appropriate for failing to prepare an I-9 for Scott Glenn, and for backdating the forms for Marcos Meza Jimenez and Judith R. Pritchard, as well as for Stanford's failure to sign the attestation in section 2 for Bonnie J. Gill, David B. Lesage, and Adam Nguyen, but penalties may not be enhanced across the board basis regardless of the particular violation involved.

While ICE also argues that an overall enhancement based on seriousness is warranted because the percentage of violations is "extremely high," I do not concur in this assessment for two reasons. First, it is unclear by what standard 37% can be characterized as "extremely high" when placed on a scale of 1-100%, and second, the percentage of violations has already been accorded determinative weight in making ICE's original baseline penalty calculation in the first instance. The template for the initial assessment provides an escalating scale of base penalties as the percentage of violations itself increases. Because the percentage of violations was the sole criterion used to determine the baseline fine, it ought not to be used again as an aggravating factor.

The final factor to be considered is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added). This is by definition an individualized factor; not one that penalizes a particular I-9 because some other individual was unauthorized. Penalties may be enhanced based on this factor only for the I-9 forms of those individuals who are themselves determined to be unauthorized. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 668-69 (2000) ("[n]othing 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"). The presence in the workforce of some other suspect employee does not provide a basis for aggravating penalties across the board based on this factor.

D. Conclusion

Civil money penalties are assessed for I-9 noncompliance violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual is \$110.00, and the maximum for each is \$1,100.00. The range of penalties for the 18 violations established is \$1,980.00 to \$19,800.00.

Giving due consideration to the statutory factors I find for the most part they incline in Stanford's favor, with the exception of the seriousness of the violations involving: 1) the failure to prepare an I-9 for Scott Glenn, 2) the backdating of the forms for Marcos Meza Jimenez and Judith R. Pritchard, and 3) the failure to sign the attestation in section 2 for Bonnie J. Gill, David B. Lesage, and Adam Nguyen. Some enhancement is appropriate for each of these six violations and considering all the factors together with the record as a whole, the penalties for these violations will be \$600.00 each.

With respect to the proposed penalties for the remainder of the violations involving the I-9 forms

for Jose Alberto Valenzuela, Robin Theresa DesRoches, Oscar Ibarra, Julio Cesar Ocegueda, Rosendo Eduardo Estrada, Michael H. Brown, Michael Robert Delgatto, Joe A. Maverchik, Jeremy W. Kelly, Michael A. Leon, Jose M. Barrera, and Jose C. Lopez however, these will be adjusted as a matter of discretion to fall closer to the midrange at \$500.00 each.

A total penalty will therefore be assessed at \$9,600.00.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Stanford Sign & Awning, Inc. is a small business engaged in manufacturing signs and awnings that has its principal place of business at 2556 Faivre Street, Chula Vista, California and another location at San Marcos.
2. A Notice of Inspection was served on Stanford on September 15, 2010, together with two Enforcement Subpoenas.
3. The government subsequently received from the company various I-9 forms with supporting documentation and other information from both Stanford's Chula Vista location and Western Sign and Awning, Inc., the company's San Marcos location.
4. After completion of the inspection process, the government served a Notice of Intent to Fine on Stanford on March 2, 2011.
5. Stanford Sign & Awning, Inc. filed a request for a hearing on or about March 15, 2011.
6. Stanford Sign & Awning, Inc. hired Scott Glenn for employment in the United States and failed to present an I-9 form for him on three days notice.
7. Stanford Sign & Awning, Inc. prepared I-9 forms for Jose Alberto Valenzuela, Robin Theresa DesRoches, Oscar Ibarra, Julio Cesar Ocegueda, Rosendo Eduardo Estrada, Michael H. Brown, Michael Robert Delgatto, Joe A. Maverchik, Jeremy W. Kelly, Michael A. Leon, Bonnie J. Gill, David B. Lesage, Adam Nguyen, Marcos Meza Jimenez, Judith R. Pritchard, Jose M. Barrera, Jose C. Lopez, named in Count II of the complaint, and each of the forms reflected errors and omissions.
8. Stanford Sign & Awning is a small business.

B. Conclusions of Law

1. Stanford Sign & Awning, 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. Stanford Sign & Awning, Inc. failed to comply with the requirements of 8 U.S.C. § 1324a(b) with respect to Scott Glenn, Jose Alberto Valenzuela, Robin Theresa DesRoches, Oscar Ibarra, Julio Cesar Ocegueda, Rosendo Eduardo Estrada, Michael H. Brown, Michael Robert Delgatto, Joe A. Maverchik, Jeremy W. Kelly, Michael A. Leon, Bonnie J. Gill, David B. Lesage, Adam Nguyen, Marcos Meza Jimenez, Judith R. Pritchard, Jose M. Barrera, and Jose C. Lopez.
4. Giving due consideration to the statutory factors, the penalties for the violations involving the I-9s of Scott Glenn, Bonnie J. Gill, David B. Lesage, Adam Nguyen, Marcos Meza Jimenez, and Judith R. Pritchard will be adjusted to \$600.00 each.
5. Giving due consideration to the statutory factors, the penalties for the violations involving the I-9s of Jose Alberto Valenzuela, Robin Theresa DesRoches, Oscar Ibarra, Julio Cesar Ocegueda, Rosendo Eduardo Estrada, Michael H. Brown, Michael Robert Delgatto, Joe A. Maverchik, Jeremy W. Kelly, Michael A. Leon, Jose M. Barrera, and Jose C. Lopez will be adjusted to \$500.00 each.

ORDER

Department of Homeland Security, Immigration and Customs Enforcement's motion for summary decision is granted in part and denied in part. Stanford Sign & Awning, Inc. is liable for 18 violations of 8 U.S.C. § 1324a(b) as more fully set forth herein, and is directed to pay a total penalty of \$9,600.00.

SO ORDERED.

Dated and entered this 21st day of June, 2012.

Ellen K. Thomas
Administrative Law Judge