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

November 13, 2012

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 11A00075
MARCH CONSTRUCTION, INC., Respondent.	)	

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 Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed an eight-count complaint alleging that March Construction, Inc., (March or the company) engaged in 107 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b) (2011). March filed an answer denying some allegations, admitting others, and standing silent as to still others.

Preliminary prehearing procedures and motion practice ensued. On July 25, 2012, an order was issued granting in part ICE's motion for summary decision and finding liability with respect to ten of the thirteen violations alleged in Count I, and with respect to all sixty-five of the violations alleged in Counts II-IV and VI-VII. The motion was denied without prejudice as to three of the violations in Count I and as to Counts V and VIII in their entirety pending the filing of additional evidence and responses thereto. ICE submitted additional evidence with respect to Counts V and VIII but did not provide anything further respecting Count I. March made no response to the additional filings and the time for doing so has elapsed.[1]

II. BACKGROUND INFORMATION

[1] Pursuant to the previous order, March's response would have been due by September 10, 2011.

March is engaged in the business of providing concrete work for water treatment plants and is located at 18833 Redland Road in San Antonio, Texas. As of June 30, 2010, the company was owned by Jeffrey J. Specht, its president, and Albert Ortiz, another employee. The record reflects that at one time the company had approximately ninety employees, but that by early November 2011 it said it was down to sixty-five employees and that about fifty of them were to be terminated at the end of that month.

The record reflects and the parties stipulated in their prehearing statements that ICE served the company with a Notice of Inspection and administrative subpoena on September 5, 2008 in which the government requested I-9 forms and employment records for current and former employees for the period January 1, 2007 to September 5, 2008. March furnished the I-9 forms and other documents, including an employee roster. An inspection was conducted during which ICE served March with a Notice of Unauthorized Aliens, a Notice of Suspect Documents, a Notice of Discrepancies, and Employee Discrepancy Notices on July 30, 2009. On August 19, 2009, March provided documents in response to the Notice of Discrepancies and the Notice of Suspect Documents.

ICE subsequently issued a Change to Notice of Inspection Results letter and a Notice of Technical or Procedural Errors on August 21, 2009, and March was given ten days in which to correct technical and procedural errors identified in 147 of its I-9 forms. On September 9, 2009, March produced corrected I-9s and a spreadsheet. A Notice of Intent to Fine (NIF) was thereafter served on October 29, 2009, and after an additional review of the I-9s, the government served a Superseding NIF on November 17, 2010, alleging the violations subsequently charged in the complaint. March made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

In addition to evidentiary materials previously submitted, ICE's Supplemental exhibits included A) Count V List of Hire/Termination Dates and Form I-9s with Improper List A, B, or C Documents Reviewed or Verified as Indicated (5 pp.); B) Count VIII Complete List of 147 Technical Violations; twenty-seven I-9s as Originally Submitted Prior to Notice of Technical Violations Which (sic) and Attached Identity Documents (68 pp.); and C) Count VIII List of twenty-seven Uncorrected Technical Violations as Charged; twenty-seven Uncorrected I-9s (29 pp.).

III. LIABILITY

March was previously held liable for failure to present I-9 forms for ten of the individuals named in Count I, as well as for all sixty-five of the violations alleged in Counts II-IV and VI-VII. Absent additional evidence as to the three other violations alleged in Count I, no liability will be found with respect to March's alleged failure to present I-9s for Frank (Francisco) Gonzalez, Jesus Martinez, or Raymond Zapeda.

With respect to Count V, visual examination of ICE's supplemental exhibits confirms that March failed to complete properly section 2 of the I-9 forms for Patricio Cuadros and Jeffrey J. Specht as alleged. The word "visa" is entered under list A in section 2 of Cuadros' I-9, but a visa is not a proper List A document and no other document is entered in section 2. There are no entries identifying any documents at all in section 2 of Specht's I-9. March is accordingly found liable for the two violations alleged in Count V. With respect to Count VIII, visual examination of the supplemental exhibits reflects that March failed after notice to correct technical or procedural violations in twenty-seven of its I-9 forms and March will accordingly be found liable for the twenty-seven violations alleged in Count V.

Thus in addition to the seventy-five violations previously found, March is liable for the two violations in Count V and the twenty-seven violations in Count VIII, for a final total of 104 violations. Because Jeffrey J. Specht's I-9 is listed in both Count V and Count VI, however, the number of violations will be reduced to 103 so that defects in Specht's I-9 will be penalized only once, not twice.

IV. PENALTIES

A. The Views of the Parties

ICE's motion for summary decision sought penalties in the amount of $86,933.00 and offered in support the Declaration of Karen Rahlf, Forensic Auditor, dated October 18, 2011 and an accompanying Memorandum to Case File Determination of Civil Monetary Penalty. The government asserts that the baseline fine was calculated at $770.00 based on the fact that 45% of March's I-9s contained substantive violations.[2] The penalties were then aggravated for lack of good faith, for seriousness of the violations, and for the involvement of unauthorized aliens, resulting in an enhancement of $115.50 each for a total of $885.50 for each violation. The government acknowledged that the company had no history of previous violations.

[2] *See Fact Sheet*: *Form I-9 Inspection Overview* (Aug. 1, 2012), U.S. Immigration and Customs Enforcement, http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

March's response to the government's original motion for summary decision set out its views with respect to the statutory factors, vigorously disputing the government's contentions as to good faith, the seriousness of the violations, and the presence of unauthorized aliens. While March did not file evidentiary materials in response to the government's supplemental filings, documents previously filed by the company reflect a deteriorating financial position starting in 2009 and a precipitous drop in the number of employees at the end of 2011. The profit and loss statement accompanying its response to the motion reflects a loss of $808,306.65. ICE did not dispute March's assertion that the company's continued existence had become dependent upon its ability to negotiate terms with its customers and creditors.

B. Discussion and Analysis

The government has the burden of proof with respect to the penalty as well as to liability, *United States v. Amer. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996);[3] *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). I am required in assessing a penalty to give due consideration to the size of the business, the good faith of the employer, the seriousness of the violation, whether the individual was an unauthorized alien, and any history of previous violations. The obligation to consider these factors would not be satisfied were I to act as a rubber stamp for someone else's conclusions; I must make my own assessment of these factors and can do so only on the basis of specific facts supported by evidence.

Contrary to the assertion in the Memorandum to Case File Determination of Civil Monetary Penalty, the record in this matter does not appear to support a conclusion that this company is a medium size business. OCAHO case law has looked to a variety of factors in assessing the size of businesses in the construction trades, *see, e.g.*, *Carter*, 7 OCAHO no. 931, 121, 160-62 (1997) (evaluating whether a company is a small business based on, inter alia, its gross sales, the number of its employees, and the value of its assets), and it appears under these standards that March must be regarded a small business. Neither can I concur with the government's conclusion that "the overall fine should be enhanced 15% due to the lack of good faith, the seriousness of the violations, and the presence of unauthorized aliens." (Compl. Mot. Summary Dec., Ex. A.)

[3] 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.

First, according to the government's memorandum, ICE relies upon the "large quantity of violations" to support its conclusion respecting the company's lack of good faith: the Rahlf affidavit cites to the fact that 45% of the I-9s had substantive violations and 54% had technical or procedural violations. But it is well established in OCAHO case law that a 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) (noting that a dismal rate of compliance alone should not be used to enhance a penalty based on a lack of good faith). Absent evidence of such culpable conduct, bad faith has not been shown here. The large quantity of violations was, moreover, already used in setting the base penalty; it should not be used again to aggravate the penalty. *See United States v. Stanford Sign and Awning, Inc*., 10 OCAHO no. 1152, 6 (2012).

While the government treated all the violations as being equally serious, whether the violation consisted of a failure to prepare an I-9 at all or a failure to correct a minor technical or procedural error, the seriousness of violations may be more appropriately evaluated on a continuum because not all violations are necessarily equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing Carter, 7 OCAHO no. 931 at 169). Generally speaking, our case law has viewed failure to prepare an I-9 at all and failure to sign the attestation as being among the most serious of violations. *United States v. Alyn Inds.*, 10 OCAHO no. 1141, 8, 10 (2011).

While the affidavit asserts that of 241 employees 42 were unauthorized aliens, moreover, the memorandum acknowledges that 42 were <u>suspected</u> of being unauthorized aliens. The memorandum also acknowledges that OCAHO cases permit aggravation based on this factor only for the I-9 forms of specific individuals who are themselves found to be unauthorized. *See 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 suspect employees does not provide a basis for aggravating penalties across the board based on this factor. Because ICE submitted no evidence as to whether any specific individual named in the complaint was in fact unauthorized for employment, this factor may likewise not be used as a basis upon which to aggravate the penalties.

Finally, although not specifically spelled out in the statute, a company's ability to pay the penalties proposed is an appropriate factor to be weighed in assessing the amount of any penalty to be assessed. *See, e.g*., *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Nothing in the statute requires 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 at 664.

C. 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 violations established in this case is from $11,330.00 to $113,300.00.

Considering the record as a whole, the amounts originally requested appear disproportionate to the current status and resources of the employer and the penalties will be adjusted as a matter of discretion to a more modest level. For the most serious violations in Counts I and VII, the penalties will be set at $400.00 for each violation for a total of $4400.00 for those two counts. For the sixty-six violations in Counts II-VI, the penalties for each violation will be assessed at the rate of $150.00 for a total of $9900.00, and for the twenty-seven violations in Count VIII the penalties will be set at the regulatory minimum of $110.00 each for a total of $2970.00. In all the penalties for these counts would total $17,270.00, but $150.00 will be deducted so that Jeffrey J. Specht's I-9, which was included in both Counts V and VI, is not penalized twice. The total penalty is therefore $17,120.00. The parties are encouraged to work out a payment schedule that would permit payment of this amount over time.

V. FININGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. March Construction is located at 18833 Redland Road in San Antonio, Texas, where it is engaged in the business of providing concrete work for water treatment plants.

2. ICE served the company with a Notice of Inspection and administrative subpoena on September 5, 2008, in which the government requested the I-9 forms and employment records for current and former employees for the period January 1, 2007 to September 5, 2008.

3. March Construction hired Sergio V. Bartolome, Juvencio Charles, Joe A. Fernandez, Antonio Garcia, James Greene, Eric Hinojosa, Valerie A. Lindemann, Martin Mora, Juan Saavedra, and Panfilo Trevino after November 6, 1986 and failed to prepare and/or present Form I-9 for any of them.

4. March hired Eric Almogabar, Mario D. Avila, Rudy Flores, Cesar Gallegos, Job A. Gamboa, Walter V. Gamboa, Pedro Garcia, Gilbert Gloria, Leobardo Gonzalez Gomez, Rogelio Aguilar Gonzalez, Martin Gutierrez, Rachel Herrera, Joe A. Ledezma, Jose A. Martinez, Mari Anne McCullar, Ricardo Montero, Juan C. Ramirez, Francisco Rangel, Jose I. Reyes, Pedro R. Rodriguez, Juan F. Rosales, Israel Santos Morales, Brent Smith, Gilbert L. Soto, Jesus Valdez, Woodrow F. Wilhelm, and Tanya M. Zamora and failed to verify that they each attested to being

a United States citizen, a Lawful Permanent Resident, or an alien authorized to work.

5. March hired Nestor D. Acosta, Federico Charles, Eulises Morales, and Raul P. Patino and failed to ensure that each properly completed section 1 of Form I-9 by failing to verify the employee A Number or Admission number exists next to the phrase "A Lawful Permanent Resident" and the A number is not in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the Form I-9 inspection.

6. March hired Jonathan Curtis, Juan V. Gaona, Christopher Garcia, Gregory Garcia, Ivan Garza, Francisco Elisea Gomez, Agustin Gonzales, Victor Gonzales Castellanos, Nicholas Hernandez, Ronald R. Lorillard, Nicolas Maldonado, Jose A. Mendez, Gilbert Valdez Ortiz, Rolando Perez, Ryan Prejean, Jose P. Ramirez, Adrian Rodgriguez, Toribio D. Rodriguez, Paul Scribner, and Vincent Serrano and failed to ensure that each properly completed section 1 of Form I-9 by failing to verify the employee signed the attestation.

7. March hired Patricio Cuadros and Jeffrey J. Specht and failed to properly complete section 2 of Form I-9 for them by reviewing or verifying improper List A, B, or C documents.

8. March hired Brandon Bell, Oscar Cardona, William R. Caudill, Jerry Curtis, Lorenzo Escajeda, Arnulfo Flores, Manuel Gomez, Raul G. Gomez, Brandon McCullar, Charles (Butch) Robert Murray, Christopher Reed, Jeffrey J. Specht, and Jon Specht and failed to properly complete section 2 of Form I-9 by not providing a document title, identification number, or expiration date of a List A, B, or C document and a legible copy of the document was not retained and presented with the Form I-9 at the inspection.

9. March hired Benigno Rodriguez and failed to properly complete section 2 of Form I-9 by failing to sign the attestation in section 2.

10. March hired Rito Adame, Janet Aleman, Matthew Anders, Andres Barba, James Clayton Ellis, Alfredo Esparza, Calixto Espinosa, Jaime Gamboa, Antonio Gonzalez-Tamayo, Emilio Guerrero, Brian Hand, Juan Lopez, Juan Mendoza, Rolando Meza Mejia, Hector Manuel Moreno, Ernesto Ramos, John G. Reilly, Gerardo Rios, Pedro Rivas, Oscar A. Rivera, Jose De Jesus Rivera Hernandez, Jesus Rodriguez, Jesus O. Ruiz, Juan O. Ruiz, Mauricio Tapia, Jesus Zapata, and Ariel Zuniga and failed to correct technical or procedural violations in their I-9 forms after notification and an opportunity to do so.

B. Conclusions of Law

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

2. March Construction, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

3. There is no genuine issue of material fact and ICE is entitled to judgment as a matter of law with respect to March Construction, Inc.'s liability for 103 of the violations alleged in its complaint.
4. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b) (2006), 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. 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).

6. Based on the record in this case March Construction, Inc. is a small business pursuant to the standards set out in *United States v. Carter,* 7 OCAHO no. 931, 121, 160-62 (1997).

7. The seriousness of violations may be evaluated on a continuum and not all violations are necessarily equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing Carter, 7 OCAHO no. 931 at 169).

8. A company's ability to pay the proposed fine is an appropriate factor to be weighed in assessing the amount of any penalty to be assessed. *See, e.g., United States v. Raygoza,* 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.,* 3 OCAHO no. 587, 1900, 1909 (1993).

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

10. A dismal rate of I-9 compliance alone should not be used to enhance a penalty based on a lack of good faith. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

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 Department of Homeland Security, Immigration and Customs Enforcement's motion for summary decision is granted in part and denied in part. March Construction is found liable for 104 violations of 8 U.S.C. § 1324a(b) and penalized for 103 as more fully set forth herein. Giving due consideration to the record as a whole together with the statutory factors, the civil monetary penalty is $17,270.00, to be paid on a schedule to be agreed upon by the parties.

SO ORDERED.

Dated and entered this 13th day of November, 2011.

_____

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. 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).

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. Part 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.

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

November 26, 2012

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 11A00075
MARCH CONSTRUCTION, INC., Respondent.	)	

ERRATUM

In the Final Decision and Order issued November 13, 2012:

On page 9, the text reading "Dated and entered this 13th day of November, 2011" is hereby corrected to read "Dated and entered this 13th day of November, 2012."

SO ORDERED.

Dated and entered this 26th day of November, 2012.

Ellen K. Thomas
Administrative Law Judge