

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

March 18, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 12A00031
)	
SEVEN ELEPHANTS DISTRIBUTING CORP.,)	
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). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint alleging in Count I that Seven Elephants Distributing Corp. hired Dennise Villamor and failed to prepare and/or present Form I-9 for her, and in Count II, that the company hired thirty-three named individuals for whom it failed to properly complete section 2 of Form I-9. Seven Elephants filed a timely response to the complaint arguing that because it inspected, copied, and retained the employees’ documents with the forms, the violations should be considered technical and procedural in nature. Prehearing procedures were undertaken pursuant to which both parties filed prehearing statements. Discovery was conducted informally.

Presently pending is ICE’s motion for summary decision. While no formal response was filed to the motion, the respondent filed financial information as well as hire and termination dates for its employees as previously requested. The letter of transmittal providing that information states that most of the company’s assets have been turned over to the Bank of America, that the company is basically no longer operating, and that it remains open only “to finalize legal matters.” The government has not challenged these assertions, but respondent has not offered evidence to support them.

II. BACKGROUND INFORMATION

Seven Elephants Distributing Corp. is a privately held corporation located in Vernon, California, where it was engaged in the importation and sale of consumer electronics. The owners of the company are Ashkan Tabibnia and Sharam Tabibnia, and the office manager at all times relevant was Mojgan Meg Tabibnia. ICE served the company with a Notice of Inspection on January 21, 2010, and a Notice of Suspect Documents on January 28, 2010. After completing its inspection, the government issued the company a Notice of Intent to Fine on August 12, 2010, and the company filed a timely request for hearing on September 8, 2010. The complaint was filed on February 9, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

III. THE INSTANT MOTION

A. The Government's Position

As to Count I, ICE says its exhibits reflect that Dennise Villamor's name appears on the Employee Information Certification Form signed by the Office Manager on January 25, 2010 but that no I-9 was presented for her in response to the government's request. Because this employee's termination date was March 13, 2009, less than a year prior to the inspection notice, Seven Elephants was still obligated to retain and present an I-9 for her, but failed to do so. *See* 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2). As to Count II, ICE argues that visual examination of the I-9s in issue reflects that the section 2 attestation is defective in all thirty-three forms because it is totally blank, unsigned, or missing critical information pertaining to a proper List A or C document. All the violations alleged are substantive in nature.

The complaint seeks penalties in the amount of \$1028.50 for each violation, or a total of \$34,969. The government characterizes the company as a small business. It says there is no evidence of culpable conduct warranting a finding of bad faith, but suggests the factor should be treated neutrally rather than favorably for the employer because the business has been operating since 1994 and has revenues in the millions, and because "[t]here is no reason why training and proper procedures . . . could not have been implemented over the years."

ICE points out that all the violations are serious and that aggravation of the fine was warranted based on that factor. ICE argues that additional aggravation of the penalties is warranted because seven of the thirty-four employees whose I-9s were defective were unauthorized to work. The government contends that because several employees lacked proper documentation, there is

no genuine issue of material fact as to whether the violations involved unauthorized aliens. ICE treats the absence of any previous violations as a neutral factor.

ICE's motion was accompanied by exhibits identified as 1) Memorandum of Law in Support of Motion for Summary Decision; 2) Cortera Company Profile, Seven Elephants Distributing; 3) Kompas Company Profile, Seven Elephants Distributing Corp.; 4) 7 Elephants Corporation Office, <http://7elephantscorp.com/about>; 5) Notice of Inspection; 6) Notice of Suspect Documents; 7) Response to Notice of Inspection; 8) Employment Eligibility Verification Forms, Forms I-9; 9) 7 Elephants Distributing Corp., Payroll Register, January 21, 2010; 10) Business Entity Questionnaire; 11) Employee List; 12) Employer's Prehearing Statement; 13) Notice of Case Assignment, Complaint, Notice of Intent to Fine, Request for Hearing,¹ and Business Entity Detail; 14) Employer's Response to Complaint; 15) Calculation of Civil Money Penalty; 16) Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties, November 25, 2008; and 17) Certificate of Service.

B. The Company's Position

Seven Elephants does not dispute the allegation in Count I, but vigorously adheres to its position that the violations in Count II should be treated as technical or procedural because while it did not properly complete the section 2 attestation portion of the forms, the company inspected and copied the employees' documents and retained the document copies with the I-9s. Seven Elephants pointed out in earlier filings that it had enrolled in the E-Verify program, that it had suffered a burglary of its warehouse during which over \$600,000 in inventory was stolen, that it was then down to only eight employees, and that the fine proposed was grossly disproportionate to its remaining resources. The company's answer also questioned why a sixty-three page manual and five seminars are required to learn how to do an I-9 form correctly, and suggested that the I-9 preparation process itself needed simplification.

The company's response to the Notice of Suspect Documents noted that one of the employees on the government's list, Albert Anvari-Ghasr, was not an unauthorized alien at all, but was in fact a citizen of the United States. Seven Elephants did not contest the unauthorized status of the remaining employees on the list, Cesar Lucero, Daniel Martinez, David Rojas, Juan Olivera, Paulino Ramos, Sergio Ortiz, and Victor Vargas, and said they had all been terminated.

¹ Why the government presented duplicates of the pleadings in this matter is unelaborated.

C. Discussion and Analysis

As an initial matter, Seven Elephants is simply mistaken in its view that copying documents can be a satisfactory substitute for properly completing section 2 of an I-9 form. Employers are permitted, but not required, to copy the documents that they examine. 8 C.F.R. § 274a.2(b)(3). If an employer does make copies of its employees' documents, the copies are to be kept with the I-9 form. *Id.* But retaining a photocopy of an identity or work authorization document with the I-9 without recording the relevant information on the I-9 itself is insufficient in most instances to comply with the regulations. *See United States v. Four Seasons Earthworks, Inc.* 10 OCAHO no. 1150, 5 (2012) (citing *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 9-10 (2011)).² Failure to properly complete the section 2 attestation accordingly remains a substantive violation.

It appears that penalties for all the violations were aggravated based on the presence of seven unauthorized workers. As explained in *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013), while it is entirely appropriate to enhance a civil penalty based on the undocumented status of an employee, this is true only with respect to the I-9 form for the specific employee who is found to be unauthorized. The statutory factor for consideration here is not whether unauthorized aliens are present in the workforce, it is “whether or not *the individual* was an unauthorized alien.” 8 U.S.C. § 1324a(e)(5) (emphasis added); *see United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000) (“Nothing in the statute or 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.”). It is accordingly inappropriate to aggravate penalties for all the violations across the board based on the presence of some unauthorized individuals in the workforce. It is entirely appropriate, however, to assess a higher penalty for the seven specific violations involving the I-9 forms for Cesar Lucero, Daniel Martinez, David Rojas, Juan Olivera, Paulino Ramos, Sergio Ortiz, and Victor Vargas.

The penalties the government requested are very near the maximum permissible, and appear

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>.

disproportionate to the current size and status of the employer. As explained in *United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143, 7 (2012), proportionality is critical to setting penalties, and penalties so close to the maximum should be reserved for more egregious violations than are shown here, *United States v. Fowler Equipment Co.*, 10 OCAHO no. 1169, 6 (2013). They will accordingly be adjusted to an amount closer to the mid-range of permissible penalties. For the most serious violation, that in Count I, the penalty will be assessed at \$600. For the seven violations in Count II that involve the I-9s of unauthorized workers, the penalties will be assessed at \$500 each. For the remaining twenty-six violations in Count II the penalties will be assessed at \$400 each. The total penalty is \$14,500.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Seven Elephants Distributing Corp. is located in Vernon, California, where it was engaged in the importation and sale of consumer electronics.
2. The Department of Homeland Security, Immigration and Customs Enforcement served Seven Elephants Distributing Corp. with a Notice of Inspection on January 21, 2010.
3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Suspect Documents to Seven Elephants Distributing Corp. on January 28, 2010.
4. The Department of Homeland Security, Immigration and Customs Enforcement issued to Seven Elephants Distributing Corp. a Notice of Intent to Fine on August 12, 2010.
5. Seven Elephants Distributing Corp. filed a timely request for hearing on September 8, 2010.
6. The complaint in this matter was filed on February 9, 2012.
7. Seven Elephants Distributing Corp. hired Dennise Villamor and failed to present an Employment Eligibility Verification Form (Form I-9) for her after being requested to do so by an authorized agency of the United States.
8. Seven Elephants Distributing Corp. hired Rodie O. Abejero, Vivian P. Arevalo, Ramon L. Ascencio, Carlos A. Ayon, Johnny R. Baldelomar, Janis V. Bunao, Anabel Campos, Pedro S. Elias, Raul A. Flores, Albert Anuam Ghasr, Melissa M. Goodger, Blanca R. Herrera (aka Blanca Santos), Corey A. Kotler, Ashley A. Leyva, Donabella Maria Elsa A. Lucas, Cesar E. Lucero, Jose L. Marin, Daniel Martinez, Paola Mata (aka Paola Holguin), Juan J. Olivera, Sergio R.

Ortiz, Paulino Ramos, Reyna S. Ramos, David Rojas, Vincent A. Sabas, Quiel Leandro B. Santiago (aka Quile Santiago), Amirali Shaerzadeh, Mojgan Tabibnia Kotler, Simindorht Tabibnia, Victor E. Vargas (aka Victor Vargas), Christian L. Villegas, Rachel D. Zayas (aka Rachel de Chavez), and Jesus Ruben Hidalgo Zayas and failed to complete properly section 2 of Form I-9 for each of them.

9. Cesar Lucero, Daniel Martinez, David Rojas, Juan Olivera, Paulino Ramos, Sergio Ortiz, and Victor Vargas were not authorized for employment in the United States.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.
2. Seven Elephants Distributing Corp. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).
3. Seven Elephants Distributing Corp. engaged in thirty-four 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), one must consider 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) (2006).
5. The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).
6. Based on the record in this case, Seven Elephants Distributing Corp. Inc. is a small business. *Cf. United States v. Carter*, 7 OCAHO no. 931, 121, 160-62 (1997).
7. The seriousness of violations are evaluated on a continuum and not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, (2010) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997)).

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

Seven Elephants Distributing Corp. is liable for thirty-four violations of 8 U.S.C. § 1324a and 8 C.F.R. § 274a.2 for which it is directed to pay a civil money penalty in the total amount of \$14,500.

SO ORDERED.

Dated and entered this 18th day of March, 2013.

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.