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

March 28, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00055
MODERN DISPOSAL INCORPORATED, 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). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint against Modern Disposal, Inc. (Modern Disposal or the company) alleging that the company violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare I-9 forms for fifty-five of its employees within three business days of their respective hire dates or prior to the service of the Notice of Inspection (NOI). ICE sought penalties in the total amount of $33,275.

Modern Disposal filed an answer admitting the material allegations of the complaint, but contending that the penalty was excessive and inappropriate. The parties filed their prehearing statements and a telephonic conference was subsequently conducted at which Modern Disposal admitted the violations and accepted the government's proposed stipulations.[1] Liability was accordingly established, and a schedule was set out for the parties to file materials in support of their respective positions as to the appropriate amount of the penalty. Those filings have been made and the issue is ripe for resolution.

[1] The stipulations are more fully set forth infra and are adopted as findings of fact in this case.

II. ASSESSMENT OF THE PENALTY

The following factors must be considered when assessing an appropriate penalty: 1) the employer's size of business, 2) the employer's good faith, 3) the seriousness of the violations, 4) the presence of any unauthorized aliens in the employer's workforce, and 5) the employer's history of previous violations. 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. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).[2]

A. The Government's Memorandum

ICE set the baseline penalty at $605 per violation, in accordance with the DHS/ICE fine matrix, because fifty-five of the 163[3] I-9s submitted to ICE, or 34%, contained substantive errors. The government said that at the time of the inspection Modern Disposal employed 168 workers and was not necessarily a small employer. The government explained that it then aggravated the penalty by five percent based on the factor of size because the company "failed to use its personnel and financial resources to comply with the law." ICE also asserted that Modern Disposal failed to act in good faith prior to the inspection so another five percent aggravation was added. In support of its claim of lack of good faith, ICE said that fifty-five of the I-9s presented were not prepared within three days of the employees' hire dates as they should have been, and in fact were not completed until after the NOI. Additionally, when the I-9s were presented, they contained substantive errors.

ICE then mitigated the penalty by five percent based on the factor of seriousness, and another five percent for the lack of unauthorized workers in Modern Disposal's workforce. The rationale for mitigating based on seriousness was that the company showed "a measured degree

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[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.

[3] The stipulation agreed to by the parties says that 161 I-9s were produced, not 163. The discrepancy is minor and would not affect the government's calculation of the penalty.

of compliance" in that 108 of its I-9s were in compliance with the law. ICE treated Modern Disposal's lack of any history of previous violations as a neutral factor, so the net result remained at the baseline assessment at $605 for each violation, or a total of $33,275.

B. Modern Disposal's Response

Modern Disposal's response pointed out that the government never explained how the $605 baseline penalty was determined. The company offered an alternative method of calculation, suggesting that if the error rate was 34%, the baseline penalty for each violation should be set at 34% of the maximum permissible penalty of $1100, or $374 for each violation. The total fine resulting from this approach would be $20,570. Modern Disposal also suggested that if there were to be any enhancement of the penalty based on the company's size, the enhancement should be limited to 10% of the difference between the minimum and maximum permissible penalties, that is, 10% of $990, or $99, for each violation.

III. DISCUSSION AND ANALYSIS

As Modern Disposal pointed out, the government did not explain its methodology for calculating the penalty. The context makes clear, however, that ICE made its assessment pursuant to its *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties*, dated November 25, 2008 (hereinafter Guide), which has not been made part of the record.[4] The Guide contains a matrix by which a "baseline" penalty amount is calculated. Violations are categorized as first, second, or third offenses, and a grid is set out grouping them in accordance with the percentage of I-9s containing substantive violations. The ranges include categories for 0 to 9%, 10-19%, 20-29%, 30-39%, 40-49%, and 50% or more of I-9s with violations. For a first offense where 34% of the employer's I-9 forms contain substantive errors, the grid provides a baseline penalty of $605 per violation, the baseline set in this case. After making its baseline assessment, the government adjusts the result in light of the five statutory factors in order to make its final calculation. The Guide provides that for each of the factors the preparer finds applicable to a given case, the baseline fine may be aggravated or mitigated by 5%, so the baseline fine has the potential to be aggravated or mitigated by a maximum of 25%.

Because the factual record was not fully developed in this case, there is insufficient evidence to support some of the government's contentions with respect to the penalty factors. There is, for example, no evidence, other than the number of employees, upon which to predicate a finding as to the company's size. Ordinarily such additional factors as the employer's overall revenues and

[4] The Guide is available at the ICE website at http://www.ice.gov/doclib/news/library/factsheets/pdf/i9-inspection.pdf.

profitability, the amount of the employer's payroll, and the nature and scope of the facilities would weigh into this assessment as well. *See, e.g., United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 632 (1989). Based upon the minimum information available, Modern Disposal appears to be a small-to-medium sized employer at best, so I find no fault with ICE's statement that the company is not necessarily a small employer. The government's aggravation of the penalties based on the employer's size, however, does not rest on the size of Modern Disposal's workforce but rather upon the assertion that the company failed to use its personnel and financial resources to comply with the law—a test that has for many years been criticized in our case law. *See United States v. Sunshine Bldg. Maint.*, 7 OCAHO no. 997, 1122, 1176 n.22 (1998) (noting that the test is arguably more relevant to an employer's good faith than to the size of its business); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 240-41 (1996) (characterizing the approach as a "rather singular proposition" and a creative theory). There is, in any event, no evidence that would indicate what personnel, financial, or other resources ICE thought were available for this purpose that the company did not use.

Similarly lacking in evidentiary support is ICE's finding that the company lacked good faith, which is predicated upon no more than the fact that fifty-five of the I-9s presented were not prepared within three days of the employees' hire dates but after the NOI, and that when the I-9s finally were completed they contained substantive errors. As explained in *United States v. Body Shop*, 1 OCAHO no. 185, 1219, 1223 (1990), the tardy completion of an employer's I-9s is not necessarily an indication of bad faith. Neither the fact that an employer's I-9s are missing nor the fact that they are defective is sufficient in itself to show a lack of good faith. In order to make such a finding there must be "evidence pointing to culpable behavior beyond the fact that a high number of the Forms I-9 are missing or contain deficiencies . . . ." *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (Modification by the Chief Administrative Hearing Officer).[5] Here, no such evidence exits, Modern Disposal's prehearing statement pointed out that all but one of the fifty-five I-9 forms at issue were for employees hired in 2003 or earlier. Since 2003, when Modern Disposal hired a human resources director to oversee preparation of hiring documents, the company has complied in good faith with §1324a. The company's remaining 108 I-9 forms completed since 2003 were in compliance.

The dates on the forms for the fifty-five employees involved in the violations are accurate and clearly indicate what Modern Disposal readily admitted: that the forms were filled out after the Notice of Inspection. This is not a case in which an employer tried to make it appear that its I-9s were prepared earlier than they actually were or otherwise tried to mislead the government. *See,*

[5] The Chief Administrative Hearing Officer also observed in *Karnival* that the fact that the employer's I-9 forms were missing or defective appeared more relevant to the seriousness of the violation factor than to the good faith factor. *Id.*

e.g., *United States v. Occupational Res. Mgmt.*, 10 OCAHO no. 1166, 27 (2013) (finding bad faith where two of the employer's agents entered false information to make it appear that forms were timely completed); *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 576, 594-96 (1996) (finding gross negligence and bad faith where forms were backdated and altered); *United States v. Cafe Camino Real, Inc.*, 2 OCAHO no. 307, 29, 46 (1991) (observing that apparent forgery of eight employee signatures deprives respondent of any claim of good faith).

ICE mitigated the penalties based on their seriousness, but the government's rationale for doing so does not withstand scrutiny in light of OCAHO case law. Instead of focusing on the seriousness of the specific violations involving the fifty-five tardy I-9 forms that are the basis for this proceeding, ICE based its assessment of seriousness on the fact that because the company's other 108 I-9s did not contain violations, Modern Disposal showed a "measure of compliance." Nothing in the statute or caselaw suggests, however, that the seriousness of a violation can be measured by examining all an employer's other I-9s rather than the ones in which the violations are contained. This novel approach appears to be utilizing the percentage of I-9s with violations relative to the total number of I-9s as a test for seriousness. Since that percentage was already used to set the baseline penalty in the first instance, it should not be used yet again to assess penalty factors. *See United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013). The seriousness of a violation must be evaluated with reference to the I-9 involved in the violation, not on whether the employer's other I-9s were satisfactorily completed.

Failure to prepare an I-9 in a timely fashion is, moreover, always a serious violation because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *See Sunshine*, 7 OCAHO no. 997, at 1182 (citing *United States v. El Paso Hospitality, Inc.*, 5 OCAHO no. 737, 116, 123 (1995)). The longer the employer delays in preparing an I-9, the more serious is the violation. *See, e.g.*, *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998) (finding failure to prepare I-9 within three business days as serious, but distinguishing between delays of a few days and those of a few months). In this case, all but one of these employees have hire dates in 2003 or before, and the earliest any of their I-9s was completed was in 2009. The delays range between three and ten years.

IV. CONCLUSION

While I cannot concur in the government's reasoning with respect to three of the penalty factors, its net result is nevertheless well within the statutory parameters and reasonably close to the mid-range of permissible penalties, which vary from $6050 to $60,500. Although Modern Disposal characterized the proposed fine as inappropriate and excessive, the company put forward no rationale or evidence that would compel or even justify a different result. Where the government reaches a reasonably appropriate penalty, the result need not be disturbed, *see United States v. Jonel, Inc.*, 8 OCAHO no.1008, 175, 200 (1998) (approving proposed penalties after finding them within the statutory parameters and warranted by the evidence), so the penalties proposed will remain unaltered.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

The following stipulations between the parties are adopted as findings of fact:

1. A Notice of Inspection ("NOI") was served upon Respondent on November 19, 2009.

2. The Respondent was requested to present all documentation to DHS no later than November 24, 2009. One-hundred and sixty-one Forms I-9 were presented for inspection. The Respondent also provided an employee list active as of 12/2/2009, and its Certificate of Authority from the New York State Department of Taxation and Finance.

3. The fifty-five employees listed in Count I of the complaint were employed by respondent during some or all of the period from January 1, 2009 to February 1, 2010.

4. On March 16, 2010, A Notice of Technical or Procedural Failures ["Notice"] was served on Respondent. Accompanying this Notice were 86 Form I-9s that contained technical or procedural errors. The employer was given until March 31, 2010, to correct the highlighted or circled errors on these I-9 Forms. In a letter dated April 7, 2010, the respondent returned the corrected I-9 Forms.

5. Respondent hired the fifty-five individuals listed in Count I of the Complaint after November 6, 1986.

6. Respondent failed to timely and properly prepare, and/or present the Employment Verification Form (I-9) for the individuals listed in Count I, within three business days of their

corresponding date[s] of hire.

7. The employees listed in Count I are Robert J. Allen, Robert J. Arbatosky, Jaime A. Balogh, Joseph E. Bank, Deborah A. Benaquist, David A. Bloom, Steven Buck, Jack Clement, Elizabeth S. Collins, Ruth Ann Davidson, Dennis J. Ertel, Fletcher Ewing, Ronald A. Forster, William F. Gabrielli, Francis L. Giles, Brian R. Hanaka, Steven P. Hanaka, Gerald L. Hansen, Robert C. Hargrave, Jason E. Hutcheson, Paul M. Krantz, Stuart Kumm, David Kyser, John D. Lapham, Robert L. Lightcap, Robert C. Lingard, Carl R. Mang, Christy R. Mansfield, Keith M. Marsh, Deboarah[6] R. Misner, Jeffrey J. Naylor, Patrick Neary, Christopher M. Newman, John P. O'Neill, Matthew A. Panosian, Coleen Penzotti, Francine R. Pfaff, Kris Porter, Robert M. Quarantillo, John S. Renne, Michael F. Riccio Jr., Jeffrey Rider, Phillip J. Robichaud, Craig C. Schaeffer, Patrick G. Stone, Michael B. Stuart, James D. Swing, Marc R. Thomas, Ian C. Walpole, Robert Webber, Patrick D. Weis, Michael S. Williams, Larene D. Winkley, Patrick R. Winter, and Philip A. Young.

8. Modern Disposal is located at 4746 Model City, Model City, New York 14107.

B. Conclusions of Law

1. Modern Disposal, Inc. is an entity within the meaning of 8 U.SC. § 1324a(a)(1) (2006).

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

3. Modern Disposal, Inc. is liable for fifty-five violations of 8 U.S.C. §1324a(a)(1)(B) (2006).

4. The Department of Homeland Security, Immigration and Customs Enforcement did not present or point to evidence showing that Modern Disposal, Inc. engaged in culpable conduct beyond the mere failure to comply with the verification requirements. *See United States v. Taste of China*, 10 OCAHO no. 1164, 4-5 (2013) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995)).

5. The theory that a penalty may be aggravated based on the size of the employer because the employer failed to use all its personnel and financial resources to comply with the law is unsupported in OCAHO case law. *See United States v. Sunshine Bldg. Maint.*, 7 OCAHO no. 997, 1122, 1176 n.22 (1998); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 240-41 (1996).

6. Failure to prepare an I-9 within three business days of an employee's hire date is always

[6] It appears from this employee's I-9 that the correct spelling is Deborah.

considered serious because an employee could be unauthorized for employment during the entire time his or her eligibility is unverified. *See United States v. Sunshine Bldg. Maint.*, 7 OCAHO no. 997, 1122, 1182 (1998) (citing *United States v. El Paso Hospitality, Inc.*, 5 OCAHO no. 737, 116, 123 (1995)).

7. The longer an employer delays in preparing an employee's I-9, the more serious is the violation. *See United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998).

8. Where the government reaches a reasonably appropriate penalty, the result need not be disturbed. *See United States v. Jonel, Inc.*, 8 OCAHO no.1008, 175, 200 (1998).

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

Modern Disposal is liable for fifty-five violations of 8 U.S.C. § 1324a(a)(1)(B) for failure to prepare I-9s for employees within three business days of their respective hire dates and is ordered to pay a civil money penalty of $33,275.

SO ORDERED.

Dated and entered this 28th day of March, 2013.

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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.