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

January 15, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00104
TWO FOR SEVEN, LLC D/B/A BLACK & BLUE RESTAURANT, Respondent.	)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
For the complainant

Michael B. Berger
For the respondent

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint in two counts against Two for Seven, LLC (the "company"), alleging that the company engaged in two hundred ninety-nine separate violations of the statute. Count I alleged that the company hired twenty-three individuals for whom it failed to prepare I-9 forms within three days of hire and/or failed to present the forms upon request. Count II alleged that the company hired two hundred seventy-six individuals for whom it failed to ensure the proper completion of an I-9 form.

The company filed an answer to the complaint and the parties filed prehearing statements. On January 23, 2013, the company filed a response to ICE's prehearing statement[1], stating that some of the employees listed in the complaint either were never employees of the company, or were employed for less than three days. In its response to the company's prehearing statement, ICE conceded that there is insufficient evidence to prove that eleven of the employees listed in the complaint were employed for three days or more. A prehearing conference was held on April 18, 2013, in which the parties agreed to a stipulation that those allegations be dismissed, and those allegations were dismissed by order on April 19, 2013[2].

On May 22, 2013, the company filed a second response to ICE's prehearing statement, asserting that seventy-seven additional individuals should be removed from the complaint, for reasons including duplicate I-9's, termination prior to the audit period, work duration of three days or less, hire date after the audit period, the individual never working, and the individual not being considered an employee. Two for Seven contended that the total number of fineable violations is two hundred eleven.

ICE filed a motion for summary decision on June 27, 2013. On July 23, 2013, the company submitted its "Third Response to Complainant's Prehearing Statement."[3] Two for Seven updated its position as to some of the "duplicate" I-9's, stating that only sixty-six, not eighty-eight, of the two hundred ninety-nine violations should be dismissed. Two for Seven's latest filing thus concedes that there are two hundred thirty-three finable violations. The issues regarding the disputed violations and the penalty assessment have been fully briefed and the motion for summary decision is ripe for resolution.

II. BACKGROUND

ICE served Two for Seven with notices of inspection (NOIs) on July 15, 2008, May 21, 2009, and April 7, 2010. Collectively, the notices had an audit period from January 1, 2007 through April 7, 2010, but the audit period was subsequently adjusted to begin on January 1, 2008.

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[1] Though titled as a response to ICE's prehearing statement, the filing is more accurately the prehearing statement of Two for Seven.

[2] Four violations in Count I were removed, leaving nineteen. Seven violations in Count II were removed, leaving two hundred sixty-nine. Two hundred eighty-eight violations remain in the complaint.

[3] This filing, made in response to the motion for summary decision and including an argument regarding the penalty assessment, is treated as a response to the motion for summary decision.

ICE has made a *prima facie* showing of, and Two for Seven has conceded, two hundred thirty-three separate fineable violations. Of the remaining fifty-five disputed violations, Two for Seven argues that forty-six individuals were terminated before the scope of ICE's audit, five worked less than three days and were not already removed from the complaint, one was hired after the scope of the audit, two never worked for the company, and one was not considered an employee of the company. All disputed violations are alleged in Count II of the complaint.

In support of the assertion that the forty-six individuals were terminated prior to the start of the audit period, January 1, 2008, Two for Seven relies on I-9 forms containing handwritten termination dates. The company also submits self-created spreadsheets containing payroll data, and hire and termination dates. The company asserts that violations for individuals terminated prior to January 1, 2008 cannot be included. In support of its arguments for the nine other individuals, Two for Seven relies on the same spreadsheets, as well as those individuals' I-9 forms.

For all of the violations conceded, Two for Seven disputes the penalty amount, based on the consideration of all relevant factors.

III. APPLICABLE LAW

A. Summary Decision

Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal cases. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010).[4] Accordingly, OCAHO jurisprudence looks to federal case law for guidance in determining when summary decision is appropriate. *Id.*

[4] 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.

A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 2 (2010), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing the motion may not rest upon the allegations or denials set forth in its pleading, but must set forth specific facts showing that there is a genuine issue of fact for a hearing. 28 C.F.R. § 68.38(b). All facts and reasonable inferences therefrom are viewed in the light most favorable to the non-moving party. *United States v. Primera Enters.*, 4 OCAHO No. 615, 259, 261 (1994).

B. Employer Obligations under 8 U.S.C. § 1324a

The Immigration and Nationality Act imposes an affirmative duty on employers to prepare and retain certain forms for any employees hired after November 6, 1986 and to make those forms available for inspection. 8 U.S.C. § 1324a(b) (2012). The forms must be retained for a period of three years after the date of hire of an employee, or one year after the date of termination of the employee, whichever is longer. 8 U.S.C. § 1324a(b)(3)(B).

An I-9 form is timely completed where the individual completes Section 1 at the time of hire, and the employer, within three days of hire, physically examines the individual's documents, and attests to their appearance as genuine. 8 C.F.R. 274a.2(b)(1)(ii). An employer who hires an individual for employment of a duration less than three business days is required to complete the form and sign the attestation *at the time of hire*. *See United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013). However, where an individual is hired with the expectation of continued employment, but quits after the first day, an employer may be able to avoid liability for failure to complete the attestation. *Id*. (citing *United States v. ABC Roofing & Waterproofing*, 2 OCAHO no. 358, 447, 462-64 (1991), *aff'd in pertinent part*, 2 OCAHO no. 358, 435, 441 (1991) (modification by Chief Administrative Hearing Officer)).

C. Penalty Assessment

Civil money penalties are assessed for violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2). The minimum penalty for each individual for whom a violation occurred is $110, and the maximum is $1,100. *Id*. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the good faith of the employer, 3) the seriousness of the violation, 4) whether the individual was an unauthorized alien, and 5) the employer's history. *Id*.

IV. DISCUSSION

A. Liability

1. Forty-six individuals terminated prior to January 1, 2008.

The bulk of the contested violations pertain to forty-six individuals Two for Seven claims were terminated prior to January 1, 2008. Two for Seven states that the Notice of Inspection requested a list of employees "hired on or after January 7, 2007," but that a memorandum from Forensic Auditor Jeanne Vandenberg stated that the Notice of Intent to Fine included only I-9 forms "pertaining to persons who were employed for more than three days after January 1, 2008 through April 7, 2010."

While Two for Seven argues that the language in the Vandenberg memorandum is ambiguous in that it is not clear whether the audit includes those who were terminated, the applicable law is clear about document retention requirements. The Vandenberg memorandum, dated May 13, 2013, has no ability to modify the NOI retroactively. An employer is required to retain the I-9 form of an individual and keep it available for inspection from the time an individual is hired until three years after the date of hire or one year after the date of the individual's termination, whichever is later. 8 U.S.C. § 1324a(b)(3)(B), *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1147, 2 (2012). Therefore, in order for Two for Seven to be under a duty to produce an I-9 form for a former employee, the individual would have to have been hired after January 1, 2005, or terminated after January 1, 2007.

Here, Two for Seven's spreadsheet (Third Response to Complainant's Prehearing Statement, Exhibit B) shows the hire and termination dates of 45 employees.[5] The earliest hire date of any of these individuals is in July, 2005. All of the individuals were hired after January 1, 2005 and Two for Seven was under a continuing obligation to retain the I-9 form for all forty-six of them. The company is liable for its failure to do so.

2. Five individuals who worked less than three days.

Two for Seven argues that Randall Abbott, Scott Darrow, Natalie Kirisits, Michael Moranz, and Jordan Rubin were employed for a period of less than three days, and therefore the company was not required to complete forms for those individuals.

As previously stated, a company that hires an individual for three or fewer days must complete the I-9 form on the date of hire. The company may avoid liability only where the individual was

[5] For a forty-sixth individual, Matthew Fuller, no termination date is included.

hired for continued employment, but quit shortly thereafter, frustrating the company's efforts to comply with the requirements. *ABC Roofing & Waterproofing*, 2 OCAHO no. 358 at 464; *see also United States v. DuBois Farms*, 2 OCAHO no. 376, 601, 628-29 (1991) (declining to find employer liable for failure to prepare forms where employment was terminated on the first day). The expectations of the parties with respect to the duration of employment, as well as other facts and circumstances surrounding the hire must be evaluated on a case by case basis; there is no per se rule. *A&J Kyoto Japanese Rest.* 10 OCAHO no. 1186 at 6.

Randall Abbott is listed on the payroll spreadsheet (Exhibit A with Two for Seven's third response to the government's prehearing statement). While the company says it "states and can show [Abbott] indeed worked three days or less," it has failed to show that. For Randall Abbott, neither a hire date or termination date appear. Scott Darrow's hire date is October 21, 2009, but no termination date is available.[6] For Michael Moranz, the spreadsheet shows a hire date of December 5, 2009, and a termination date of December 8, 2009. Natalie Kirisits has a hire date of October 20, 2008, and a termination date of October 23, 2008. Jordan Rubin's hire date is July 22, 2007, and his termination date was the on the same day.

Two for Seven presented evidence that Michael Moranz, Natalie Kirisits, and Jordan Rubin were terminated within three days of hire. Two for Seven is in the business of operating a restaurant; it is not a company that relies on "day labor" like the company in *United States v. Jenkins*, 5 OCAHO no. 743, 164, 169-71 (1995). There, an employer was liable for failure to prepare where the employee was picked up at a day-labor site to work for the employer. There is not the slightest suggestion that Two for Seven ever hired individuals for day labor.

In *A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186 at 8-9, the respondent made a similar assertion that individuals were terminated within three days of hire, but ICE refuted that defense by pointing to evidence that showed the employer paid wages to them for more than three days of work. *Id*. Here, unlike the complainant in *A&J Koyoto*, ICE has made no showing that any of the individuals received wages from Two for Seven for any days worked at all. The circumstances and the record as a whole support a finding that the company should not be held liable for violations for failing to properly complete forms for Michael Moranz, Natalie Kirisits, and Jordan Rubin, each of whom was terminated within three days of hire, and for whom no evidence was presented of wages being paid.

The company is, however, liable for the violations involving Randall Abbott and Scott Darrow.

3. One individual hired after the April 7, 2010.

[6] Scott Darrow was previously employed by Two for Seven from August 6, 2005 through March 25, 2006. Only the I-9 from his previous employment period was presented, and it is incomplete.

ICE alleges that an I-9 was not properly prepared for Brian J. Nunez, and indeed, his I-9 is not complete. ICE asserts that because his I-9 was produced by Two for Seven in response to the NOI, that he is an employee within the scope of investigation. Two for Seven's Exhibit A (with its third response to ICE's prehearing statement) shows, however, that Nunez was hired after the last NOI was served. In fact, ICE previously acknowledged that Nunez was hired after the last NOI. Two for Seven was not obligated to present an I-9 for him and will not be liable for failure to prepare it properly.

4. Two individuals who never worked for the company.

Two for Seven argues that two I-9s ICE counted as violations were for individuals, Robert Rehbury[7] and Theresa Nobliski, who never worked for the company. The payroll records (exhibits in the third response to ICE's prehearing statement) do list both Rehbury and Nobliski, but unlike the other individuals in the records, there are no hire or termination dates for them. Additionally, the government has made no showing that either individual ever received remuneration or wages from Two for Seven. Without more than an I-9 itself, ICE has not established liability because it has not shown that Rehbury and Nobliski ever actually worked for the company.

Because it has not been shown that the individuals were employees of Two for Seven, the company cannot be held liable for the substantive errors in the I-9 forms of those individuals.

5. One individual who was not considered an employee.

Two for Seven argues that Samuel Carey "was not considered an employee" and therefore his improperly completed I-9 should not be counted as a finable violation. Both the Excel payroll spreadsheet and the Pixelpoint list provided by the company list Carey as "manager." The spreadsheet also has a notation of "not employee," but Two for Seven provides no explanation as to why managers should not be considered employees. Two for Seven's prehearing statement lists Samuel Carey as a witness and labels him as "partner," but because Two for Seven is a limited liability company, it has no partners.

An employee is defined as "an individual who provides services or labor . . . for wages or other remuneration." 8 C.F.R. § 274a.1(f). As a general rule, an individual is not an employee of an enterprise if he has ownership and interest and controls all or part of the enterprise. Restatement (Third) of Employment Law § 1.03. However, OCAHO has observed that whether partners, officers, members of boards of directors, and major shareholders could qualify as employees is

[7] The complaint spells the name "Rehburg", but the employment records spell it "Rehbury".

not necessarily determined simply by the individual's title. *United States v. Santiago's Repacking, Inc.*, 10 OCAHO no. 1153, 5 (2010), citing *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448-50 (2003). In *Santiago's* for example, the company was a general partnership and Santiago Moreno was one of three partners. *Santiago's*, 10 OCAHO no. 1153 at 4. While the record was limited as to Moreno's role vis-à-vis the other partners, it was clear that he was in a position to control the direction of the company, including the hiring and firing of others, and his own compensation. *Id*. at 6. The ALJ found that the preponderance of the evidence demonstrated that Moreno was a working partner, not an employee.

Here, in contrast, there is not a scintilla of evidence that Carey has any ownership share in the company, nor are there any other indicia of ownership and control. There is no evidence that Carey bears any risk of loss or liability for the company's debt. There is no suggestion that Carey has voting power, policy making authority, or any other attributes of proprietorship. The evidence reflects that Samuel Carey was listed on the payroll and an I-9 was partially prepared for him. Two for Seven has offered no evidence whatsoever to support its assertion that Carey was not an employee of the company. The government made a prima facie showing of employee status and Two for Seven offered no countervailing evidence beyond its mere assertion that it did not "consider" Carey an employee. Two for Seven is accordingly liable for failure to properly complete an I-9 form for him.

B. Penalty

The permissible range of penalties for the two hundred eighty-three violations in this case varies from a low of $31,130 to a maximum of $311,300. Because the government has the burden of proof with respect to liability, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2013), ICE must prove the existence of any aggravating factor by a preponderance of the evidence. *United State v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

Both parties acknowledge that Two for Seven is a relatively small-sized business, and ICE reduced its baseline penalty by five percent for this reason. Also, the absence of illegal aliens led ICE to reduce the fine by an additional five percent. ICE treated the lack of previous violations as neutral, but aggravated the penalty by five percent based on Two for Seven's alleged bad faith, and an additional five percent for the seriousness of the violations. ICE's motion states that bad faith is evident from "the pattern and practice of employing workers without completing the Forms I-9."

But absent an evidentiary showing, there is no presumption of bad faith merely because the violations occurred. *United States v. Platinum Builders of Cent. Fla.*, 10 OCAHO no. 1199, 9 (2013). A dismal rate of compliance with employment verification requirements cannot alone be used to increase a penalty based on the good faith criterion. *Id*. The seriousness of the violations

is evaluated on a continuum, moreover, and not all violations are considered equally serious. *Carter*, 7 OCAHO no. 931, at 169. Failure to prepare an I-9 at all is among the most serious violations. *See United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994). The nineteen violations in Count I for failing to prepare are more serious than the violations in Count II involving errors and omissions on the forms, and that difference may be reflected in the final penalty. *See Platinum Builders of Cent. Fla.*, 10 OCAHO no. 1199, at 8.

The penalty assessment is not restricted to the five statutory factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). A company's ability to pay the proposed fine may be weighed in assessing the amount of the penalty. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 11 (2010). In calculating civil penalties, the goal is to set a sufficiently meaningful fine in order to promote future compliance. *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013); *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998). The penalties are not meant to force employers out of business or result in the loss of employment for workers. *See Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 11.

Here, ICE has requested a penalty of $935 per violation, totaling $264,605 for two hundred eighty-three violations. The penalty sought is eighty-five percent of the maximum penalty and OCAHO case law directs that penalties approaching the maximum should be reserved for the most egregious violations. *See Fowler Equip.*, 10 OCAHO no. 1169 at 6. ICE's proposed fine, moreover, amounts to more than half of the company's income for 2011, an excessive fine for a relatively small business located in an economically depressed area of western New York.

In consideration of the statutory factors and the record as a whole, the penalties for Two for Seven, LLC will be adjusted to an amount nearer to the mid-range of possibilities. The penalties for the nineteen violations in Count I, the more serious violations, will be assessed at a rate of $500 per violation, or $9,500 for Count I. The penalties for the two hundred sixty-four violations in Count II for failing to properly complete both parts of the form will be assessed at a rate of $300 per violation, or $79,200. The total penalty is $88,700.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Two for Seven, LLC is a small restaurant doing business as Black and Blue Restaurant at 3349 Monroe Avenue, Rochester, New York.

2. The United States Department of Homeland Security, Immigration and Customs Enforcement served Two for Seven, LLC with Notices of Inspection on July 15, 2008, May 21, 2009, and

April 7, 2010.

3. Two for Seven, LLC had three hundred twenty-seven employees during the period of inspection.

4. The United States Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to Two for Seven, LLC on August 21, 2012.

5. Two for Seven, LLC filed a request for hearing on August 24, 2012.

6. Two for Seven, LLC hired Christopher Alfieri, Justin Andrews, John Barlay, Colleen Barnes, Zachary Brown, Nicolas Colon, Jarod Farrell, Tyler Floyd, Clara Gilman, Lauren Hinish, Antione Jones, Brittany Jones, Marigot Lustyu, Adrienne Mackdavis, Shannon Pacitto, Dino Rendic, Matthew Ricci, Dean Smalls, and Jamie Stephens, and failed to prepare I-9 forms for them within three days their respective dates of hire.

7. Two for Seven, LLC hired the following individuals and failed to ensure that their I-9 forms were properly completed:

Randall Abbott	Christopher DiPasquale	Denise Lemos	Christopher Salva
Phillip Adams	Sarah Drake	Salvatore Lentine	Allison Sams
Joseph Aiello	Miranda Duffy	Christin Leszezynski	Bethzaide Sanchez
Stephen Albert	Aimee Duncan	Abigail Leunk	Bridget Sanese
Justin Allbright	William Dunning	Jason Levy	Nimish Sarraf
Shay Alvarez	Joseph Edd	Erin Lill	Rebecca Seger
Adrienne Anetrini	John Elliott	Brian Maehr	Robert Shackleford
Alexander Arpag	Jeff Emblidge	Michelle Marino	Trevor Shannon
Brianne Auria	Samanthe Erbe	Emily Marturano	Zachary Sharlow
Tim Bach	Daniel Fallon	Michael Mayer	Shauna Sidoti
Max Bailey	Ludmila Fatyak	Thomas Mays	Briana Sierens
Nicole Bandy	Joshua Fitch	Kathleen McBennett	Robin Sleight
Michelle Baritot	Meghan Flaherty	Andrew Mear	Tabitha Smith
Salvador Batista	Nancy Flaherty	Jeremy Messner	Eric Snow
Rocky Baye	Ryan Flaherty	Joseph Meyers	Aaron Sperber
Kelly Bayer	Olga Fonseca	Sean Miller	Clayton Stanley
Justin Beal	Jonathan Formella	Caela Moore	Akira Stata
Peter Bergemann	Laura Fox	Jennifer Myles	Christopher Steckel
Kristen Bergmann	Shaina Freund	Thomas Neary	Alysia Stefaniw
Emily Berliant	Matthew Fuller	Christopher Nightingale	Jessica Seffanson
Skye Bierton	Delbert Garrow	Erin Nightingale	Bryan Stehler
Joesph Bisnett	Rich Gebo	Nitzen Noam	Jeremy Stoddard
Michael Boyd	Jon Gillan	Rebecca Nucelli	Christina Suriani
Kylie Brandt	Joshua Goeke	Roland Oliver	Matthew Sydor
Daniel Brentson	Timothy Goodspeed	Jaqueline O'Neil	Kevin Tarantello
Ryan Brewen	Tracy Goss	Katie O'Reilly-Thayer	Percy Tate
Nicole Briand	James Gray	Zachary Orlowski	Jacob Taylor
Kristen Brown	Jacinda Gregoire	Rochelle Osinski	Julia Templar
Ronika Brown	Ashley Harris	Matthew Owens	Mackenzie Teren
Alexandra Buckner	Jenna Hasan	Heather Paolo	Shane Teren
Kara Buckholtz	Antonio Haynes	Marisa Paolini	Sarah Thompson
Kelly Burgart	Kacy Heverly	Andrew Parke	Taryn Thompson
Derek Burgholzer	Gregory Hibit	Jennifer Pasley	Shardar Tisdale
Robert Burkhart	Cadan Higley	Michael Pasley	Krista Tolison
Adam Burns	Lorenzo Hill	Edward Pavone	Christopher Tomeno
Trevor Burns	Tyler Hill	Brian Peachey	Michael Topf
Elizabeth Butt	Larissa Hoffend	Stephen Pearson	Jenelle Torttorella
John Butt	Karrie Holley	Terry Peck, Jr.	Justin Turney
Patrick Callegy	Scott Horan	Justin Perkins	Olivia Tylutki
Brendan Cameron	Mallory Howe	Debbie Pifer	Stephanie Urena
Marissa Cameron	Bradley Howson	Chad Pike	Brooke Valentine
Katharine Carey	Katharine Huddle	Lucas Pint	Donald Valerio
Samuel Carey	Matthew Imburgia	Elizabeth Porta	Marie Verlinde
Jesse Cartagena	Ryan Ingalls	Julie Purpura	Stephen Vlosky

Davis Cassidy	Jaqueline Irons	Amos Ravines	Andrew Walker
Kelie Chesebro	Chase Jarrett	Eli Ravines	Chelsea Wallace
Summer Ciao	Amanda Johnson	Christopher Redman	Stephen Wallenbeck
Adam Cipolla	Caitlin Johnson	Michael Redmond	Lindsey Washburn
Glenn Clement	Gabrielle Johnson	Katelynn Reece	Chelsea Weber
Pleasant Clemens	Jillian Jones	Rachel Reed	Erik Weis
Angel Collazo	Lauren Jones	Shariff Reese	Sondra Wells
Dwayne Collins	Jeff Jordan	Jenna Retzer	William Whitwell
Candace Colon	Christopher Kang	Samuel Reyes	Marcus Wilcox
Ashley Corson	Jason Karutz	Tony Rials	Richard Wilcox
Allison Cotter	Weston Kase	Christopher Rivera	Benjamin Willsea
Jessica Craig	Mark Keida	David Roberts	Michael Wojtowicz
Elysia Cristantello	Ben Kelly	Julia Roberts	Kristina Wolf
Mary Cross	Travis Kerr	Muriel Roberts	Nicolle Woodson
Drew Cusimano	Linda Kicherer	Ian Rogers	Nicolas Woollacott
Scott Darrow	Thomas Knepp	Thomas Romo	Hayley Yahn
Sean Davern	Jarrett Knight	Tyrone Rudolph	Charles Yarrington
Daniel Dehond	Frances Knope	Emily Rus	Christina Zahn
Carmen DeJesus	Jeffrey Koch	William Rus	
Lauren DeJoy	Matt Koch	Brandon Salamone	
Mark DeMara	Justin Krezmer		
Lana DeNottia	Gregory Ladow		
Jennifer Depaz	Joseph Lemmon		
Jonathan DeRue			
Brandon DeSormeaux			
Catherine Dick			
Jeanne DiNatale			

B. Conclusions of Law

1. Two for Seven, LLC is an entity within the meaning of 8 U.S.C. 1324a(a)(1) (2012).

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

3. An employer must comply with the verification requirements by ensuring that an employee completes section 1 of the Form I-9, and by itself completing section 2. 8 C.F.R § 274a.2(b)(1)(i)(A), (ii)(B).

4. An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of hire. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

5. Failure to prepare an I-9 within three business days is a serious violation. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (failure to timely prepare an I-9 is serious because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified).

6. When an employee is hired for a period of less than three days, the employer is obligated to complete that employee's I-9 at the time of hire. 8 C.F.R. § 274a.2(b)(1)(iii). However, when the expected duration of an individual's employment is cut short, an employer's efforts to comply with its I-9 obligations can become frustrated and, in some circumstances, liability may be avoided. *See United States v. DuBois Farms*, 2 OCAHO no. 376, 601, 628-29 (1991).

7. An employer is required to retain and make available for inspection an I-9 form for an individual for a period of one year after the date of the individual's termination, or a for three years after the individual's date of hire, whichever is later. 8 U.S.C. § 1324a(b)(3).

8. Two for Seven, LLC is liable for two hundred eighty-three violations of 8 U.S.C. 1324a(a)(1)(B).

9. In assessing the appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

10. Penalties close to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

11. A penalty should also be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), without being "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

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

Two for Seven, LLC is liable for two hundred eighty-three violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $88,700. The parties

are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered this 15th day of January, 2014.

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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.