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

March 18, 2010

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 10A00016
NEW CHINA BUFFET RESTAURANT, Respondent.	)	

ORDER BIFURCATING ISSUES OF LIABILITY AND RELIEF, GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION, AND SETTING DEADLINE FOR SUPPLEMENTAL FILINGS

I. PROCEDURAL HISTORY

A complaint in one count was filed against the respondent New China Buffet Restaurant (New China) on October 28, 2009 by the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government). The complaint reflects that the government issued a Notice of Intent to Fine to New China on July 27, 2009, and the respondent thereafter made a timely request for hearing. The respondent filed a written answer to the complaint on December 2, 2009. Pursuant to an Order for Prehearing Statements, both parties filed timely prehearing statements setting out their respective positions as to the allegations. Each of the responses was accompanied by exhibits consisting of seven I-9 forms; the government's exhibits are denominated as G-1 through G-7, and the respondent's exhibits are denominated as R-1 through R-7.

Presently pending is the government's motion for summary decision. New China filed no response to the motion, and the time for responding has elapsed.[1] The motion was accompanied

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2009). A party has 10 days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). ICE's motion was filed on

by additional exhibits consisting of G-8) the declaration of Michele A. Turner (2 pages); G-9) Interim Guidelines: Section 274A(b)(6) of the Immigration and Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 with Appendices (11 pages); and G-10) a document captioned "Form I-9 Inspection Overview," prepared by ICE's Worksite Enforcement Unit and dated November 19, 2009 (7 pages). The motion seeks summary decision as to liability and the assessment of civil money penalties in the amount of $6,872.25.

II. APPLICABLE LAW

A. Summary Decision

Summary decision as to all or part of a complaint may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[2]

When a motion for summary decision is made and supported as provided in the rules, the opposing party may not rest upon mere allegations or denials in a pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences therefrom are viewed in the light most favorable to the non-moving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994). Doubts are to be resolved in favor of the party opposing summary decision. *Id.*

February 2, 2010, so New China's response was due by February 17, 2010.

[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 on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

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

The INA imposes an affirmative duty upon 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) (2006). Forms must be completed for each new employee within three business days of the hire, and each separate failure to properly prepare, retain, or produce the forms upon request constitutes a violation.

Regulations designate form I-9 as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2). The form has two parts. Section 1 consists of an employee attestation, in which the employee provides information under oath about his or her status in the United States. Section 2 consists of an employer attestation, which has two separate components: a documentation part and a certification part. Both are crucial to enforcement. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 971 (1997) (modification by the Chief Administrative Hearing Officer). The documentation part requires the employer to list the specific documents which were examined to establish an individual's identity and eligibility for employment, and to provide certain information about the documents. The certification part requires the employer or agent to sign the form under penalty of perjury within three days of hiring an employee certifying that the employer examined the documents identified and found that they appear to be both genuine and related to the individual named.

The statute provides that an entity charged with technical and procedural failures in connection with the completion of an I-9 form must be afforded a 10 day period after being advised of the basis for the failure in which to correct such technical and procedural errors. 8 U.S.C. § 1324a(b)(6). No such relief is available, however, when the violation is substantive in nature rather than technical or procedural. *See* Limiting Liability for Certain Technical and Procedural Violations of Paperwork Requirements, 63 Fed. Reg. 16909-13 (April 7, 1998) (explaining that the section relieves employers from liability for certain minor, unintentional violations of the verification requirements, but does not provide a shield to avoid the basic requirements of the Act).[3] Section 1324a(b)(6) thus applies only to certain specific technical or procedural failures, not to failures to comply with core verification requirements.

C. Penalties

Civil money penalties with respect to employment eligibility verification failures are assessed according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a first offense violation occurred after on or after September 29, 1999 is $110, and the maximum penalty is $1,100. The statute requires that the following factors

[3] Although the rule was finalized in 2003, 67 Fed. Reg. 74713 (December 9, 2002) (Final Rule 1/00/03), it has not yet been codified.

be considered in assessing the appropriate amounts: 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. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, and it does not rule out consideration of additional factors. *United States v. Hernandez,* 8 OCAHO no. 1043, 660, 664 (2000).

III. THE UNDERLYING DISPUTE ABOUT RESPONDENT'S I-9 FORMS

The government contends, and its Exhibits G-1 through G-7 reflect, that New China failed to complete section 2 of form I-9 for Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Lin. On each of the government's exhibits, there are no documents identified as having been examined, and the certification section is missing both the date and the signature. On each, the business name and address is typed in, but section 2 lacks any other information. Thus both the documentation part and the certification part of section 2 are defective on each of the forms.

New China's Exhibits R-1 through R-7 differ significantly from the government's Exhibits G-1 through G-7. In each of New China's I-9 forms, section 2 has been partially completed. Each is signed by Chang Jiang Jin, who is identified as "Member LLC," and, with one exception, each of the forms is dated November 19, 2009.[4] The start dates for the employees, however, are listed as July 1, 2007 for five individuals, September 1, 2007 for one individual, and April 1, 2008 for the remaining individual. The section provided for listing the specific documents that were examined to verify the identity and employment eligibility of the employee is still blank in all seven of New China's revised forms.

The respondent argues both in its answer and in its prehearing statement that its failure to sign and date the I-9 forms was a technical or procedural failure, and that it should have been given ten business days in which to correct the forms. New China's prehearing statement argues that because it has now corrected its I-9 forms, the complaint is moot and should be dismissed.

IV. DISCUSSION AND ANALYSIS - LIABILITY

The short answer to New China's contention is that it is simply wrong. Failure to properly complete section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one. Failure of the employer to sign the certification within three business days is a substantive violation, and failure to identify proper List A, or List

[4] Section 2 of the I-9 form of Yi Mei Ouyang (Exhibit R-4) is dated November 19, 2007.

B and C documents on the form and to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the form, is also a substantive violation. *See generally* Memorandum by Acting Associate Commissioner Paul W. Virtue (March 1997) (the Virtue Memorandum), Appendices A and B (providing checklists identifying respectively which omissions are substantive violations and which are technical or procedural violations) (included as part of government's exhibit G-9).

New China's attempts to belatedly "correct" what are clearly substantive violations is accordingly ineffective. It should be noted as well that even on the "corrected" forms, section 2 of all the I-9s is still defective in substantive ways with respect to both the documentation portion and the certification portion: failure to identify any List A, or List B and C documents on the form or to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the I-9 form is a substantive violation which was still not "corrected" on any of the forms. Failure to complete the form within three days of the employee's hire is also a substantive violation, and is not cured or "corrected" by belated partial completion of the form.

The record thus plainly reflects that New China failed properly to complete section 2 of form I-9 for Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Lin. New China Buffet Restaurant's contention that the violations charged were technical and procedural is wrong as a matter of law and ICE is entitled to summary decision as to liability.

V. DISCUSSION AND ANALYSIS - PENALTY ASSESSMENT

The government provided the declaration of Michele A. Turner to explain the rationale for the penalties it sought. The declaration asserts that the base fine was assessed in accordance with ICE guidelines by comparing the number of substantive violations to the total number of I-9 forms presented to calculate the violations percentage. In this case, 100% of the forms presented contained substantive violations, so the base fine was set on the high end at $935.00 for each violation. Because all the violations were serious in nature, the penalties were further aggravated by a factor of 5%, or $46.75 each, to result in a fine of $981.75 for each violation. No mitigating factors appear to have been applied, and the only additional explanation for the final assessment was that,

> All five factors were taken into consideration and it was determined that the overall fine should be enhanced five percent due to the seriousness of the violations - specifically due to all of the Forms I-9 having substantive violations.

But the fact that 100% of the forms had substantive violations had already been considered in setting the baseline itself at the higher end of the penalty range, so aggravating based on the very

same factor appears to be piling on by using the same factor twice.

No explanation was provided at all for the weight or consideration given to the other statutory factors. While ICE's brief recites that it "did not enhance the proposed civil money penalty against Respondent" based on the size of the business, good faith, any involvement of unauthorized aliens, or any history of previous violations, the brief, like the declaration, was silent as to the question of whether mitigation of the penalties was considered based on those factors, and no facts were set forth which would inform such consideration. The only descriptive information the record contains about New China is in ICE's prehearing statement, which recites that New China is a restaurant in Summerville, S.C. serving ethnic Chinese food.

Summary decision does not necessarily ensue just because the nonmoving party fails to respond to a motion for summary decision; the proponent of the motion still has the burden of establishing that the party is entitled to judgment as a matter of law. *United States v. Sourovova*, 8 OCAHO no. 1020, 283, 284 (1998). That burden was not met with respect to the civil money penalties sought here, because it is patently clear that there is insufficient information to provide any reasonable basis upon which to either aggravate or mitigate the base penalty amounts. Not only am I unable to assess whether ICE gave adequate consideration to the penalty factors, I am also unable to give adequate consideration to them myself, as the law requires me to do. *See Maka v. INS*, 904 F.2d 1351, 1357-58 (9th Cir. 1990) (citing *Holiday Food Serv. v. Dep't of Agric.*, 820 F.2d 1103, 1105 (9th Cir. 1987)). Consideration of the relevant factors is not possible when there is no evidence in the record bearing on them. *Holiday Food Serv.*, 820 F.2d at 1106.

In this case there is no information about the size of the employer's business or its ability to pay; there is no information about any history of prior violations, or whether there were unauthorized aliens. If there were only seven employees, this is likely to be a small business, but I cannot just speculate about these matters, and the record provides no basis upon which to consider either aggravation or mitigation based on this or any other factor. Neither does the record provide a basis for determining how the statutory factors were taken into account by ICE in assessing the penalty. *Cf. United States v. Nev. Lifestyles, Inc.*, 3 OCAHO no. 463, 673, 691 (1992) (denying summary decision where it was unclear how factors were taken into account). ICE's conclusory statement that the factors "were taken into consideration" is too opaque to provide any useful information as to how the factors were considered.

Accordingly, while the liability issue may be resolved summarily, the penalty issue may not. The parties will be given the opportunity to provide any factual information bearing on the statutory factors or other factors which should be considered by way of aggravation or mitigation of the proposed penalties.

VI. FINDINGS AND CONCLUSIONS

A. Findings of Fact

1. United States Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to New China Buffet Restaurant on July 27, 2009.

2. New China Buffet Restaurant made a timely request for hearing.

3. United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint in one count against New China Buffet Restaurant with the Office of the Chief Administrative Hearing Officer on October 28, 2009.

4. New China Buffet Restaurant filed a written answer to the complaint on December 2, 2009.

5. New China hired Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Jin for employment in the United States after November 6, 1986 and failed to properly complete section 2 of form I-9 for each of them.

6. United States Department of Homeland Security, Immigration and Customs Enforcement seeks penalties in the amount of $981.75 for each of the seven violations, or a total of $6,872.25.

B. Conclusions of Law

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

2. Complainant is entitled to summary decision on the issue of liability.

3. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), 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).

ORDER

The issues of liability and relief are bifurcated. The motion of the complainant United States Department of Homeland Security, Immigration and Customs Enforcement for summary decision is granted as to the issue of liability and denied as to the assessment of civil money penalties. The parties will have until April 16, 2010 to supplement the record by providing additional evidence or information bearing on the statutory penalty factors or any other factors that should be considered by way of aggravation or mitigation of the penalties to be assessed.

SO ORDERED.

Dated and entered this 18th day of March, 2010.

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Ellen K. Thomas
Administrative Law Judge