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

January 5, 2012

UNITED STATES OF AMERICA, Complainant, v. PEGASUS RESTAURANT, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00016

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 is the complainant and Pegasus Restaurant, Inc. (Pegasus or the company) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a one count complaint alleging that Pegasus violated 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). Pegasus filed a timely answer and prehearing procedures were undertaken.

An order was issued on July 21, 2011 granting the government's oral motion to amend the complaint, and granting partial summary decision based on certain facts stipulated to by the parties. That order found the company liable for having hired 134 named individuals for whom Pegasus failed to prepare or present a Form I-9 upon request, and set out a schedule for the parties to address the question of appropriate penalties. Pursuant to the schedule, the government filed its memorandum with attachments and Pegasus filed its response, also with attachments. The government thereafter filed a reply to Pegasus's response although the scheduling order made no provision for the filing of a reply, nor did the government seek leave to file a reply as required by 28 C.F.R. § 68.11(b).[1] The government's reply was filed in derogation of OCAHO

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2010). Rule § 68.11(b) specifies that unless the administrative law judge provides otherwise, no reply to a response, counter response

rules is accordingly not considered.

II. BACKGROUND INFORMATION

Pegasus is a Colorado corporation located at 313 Jerry Street in Castle Rock, Colorado. The company has been in the restaurant business since 1984, and at its present location since 1989. Pegasus is owned by its president, John T. De Lay and has approximately 55 employees. The government served an Amended Notice of Intent to Fine (NIF) on Pegasus on October 8, 2010, after completion of an inspection. Pegasus made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

Among the factual findings made in the previous order were that Pegasus had no history of previous violations, and that 130 of the 134 individuals named in the complaint were authorized to be employed in the United States. Four, subsequently identified as Gabriel G. Torres, Manuel Torres, Antonio Heredia, and Guilliermo Heredia, were not so authorized. The history of previous violations and the presence of unauthorized individuals in the workforce are two of the five factors that must be considered in assessing the appropriate penalties. The remaining factors to be considered are the size of the business of the employer, the good faith of the employer, and the seriousness of the violations. 8 U.S.C. § 1324a(e)(5).

The parties have differing views as to how those factors are to be assessed and/or the relative weight to be given to each. 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).[2] Rather, the weight to be given each factor in assessing a penalty depends upon the facts and circumstances of the particular case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995) (each factor's significance is based on the specific facts in the case).

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to a reply, or any further responsive document is to be filed with respect to a motion.

[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.

III. EVIDENCE CONSIDERED

With the exception of the government's unauthorized reply filed on October 17, 2011, I have considered the record as a whole, including previous pleadings, exhibits, and all other materials of record. Evidentiary materials accompanying the government's Memorandum of Law in Support of Request for Civil Money Penalties included exhibits consisting of G-5) certified copies of records from the Douglas County Colorado Office of the Assessor (6 pgs.); and G-6) ICE's Report of Investigation dated July 30, 2009 (4 pgs.). Accompanying Pegasus' response were exhibits consisting of H-1) Profit & Loss Statement for January through December 2010 (4 pgs.); H- 2) 2010 corporate income tax return for Pegasus, Inc. (14 pgs.); and H-3) list of former employees for whom Pegasus said it completed I-9s (6 pgs.).

Materials submitted accompanying the government's Prehearing Statement included exhibits G-1) Notice of Inspection (3 pgs.); G-2) Pegasus Restaurant, Inc. Quarterly Wage Report - Colorado Dept. of Labor for July 1, 2006 to June 30, 2009 (5 pgs.); G-3) Colorado Corporate Report (8 pgs.); and G-4) Amended Notice of Intent to Fine served October 8, 2010 (6 pgs.). Pegasus's Prehearing Statement was accompanied by exhibits R-1) 2008 corporate income tax return for Pegasus, Inc. (16 pgs.); R-2) 2009 corporate income tax return for Pegasus, Inc. (16 pgs.); and R-3) Pegasus Restaurant, Inc. Unemployment Insurance Tax Reports for the quarters ending March 31, 2008, June 30, 2008, September 30, 2008, December 31, 2008, September 30, 2009 and December 31, 2009 (34 pgs.).

IV. ASSESSMENT OF THE PENALTIES

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, and the maximum for each is $1,100. The government has the burden of proof with respect to the penalty as well as to liability. *See United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996). For purposes of this motion, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enterprises., Inc*., 4 OCAHO no. 615, 259, 261 (1994), so all reasonable inferences must be drawn in Pegasus's favor.

A. The Positions of the Parties

1. The Government

The government seeks $981.75 for each of the 134 violations for a total penalty of $131,554.50. Although ICE's memorandum acknowledged that not all the statutory factors were adverse to Pegasus, it nevertheless treated none of the statutory factors as grounds for mitigation, but argued instead that the circumstances in their entirety warrant "a firm penalty."

ICE argued first that Pegasus was neither a small nor a large business for purposes of penalty consideration, and that neither aggravation or mitigation of a penalty was warranted based on the respondent's size. It argued that although Pegasus had only 53-55 employees, it had employed 134 individuals over the three year investigative period, and its gross sales for both 2008 and 2009 were over a million dollars, so that it was hardly a "mom and pop" operation. The government said further that it found Pegasus lacking in good faith based on the fact that De Lay deliberately disregarded the law for more than twenty years during which neither he nor anyone on the company's behalf had prepared I-9 forms at all.

ICE's Memorandum cited extensively to OCAHO case law supporting the proposition that failure to complete I-9s is among the most serious of paperwork violations. *See, e.g., United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) (finding that failure to prepare I-9s frustrates national policy designed to insure exclusion of unauthorized aliens from the workplace). The government argued that aggravation of the penalty was accordingly warranted for each of the 134 violations.

Finally, ICE acknowledged that the company had no history of previous violations, but pointed out that four of the individuals named in the complaint were unauthorized for employment in the United States. Despite using strong language in addressing the questions of good faith and the presence of unauthorized aliens, the government nevertheless appears to have treated these as neutral factors, neither aggravating nor mitigating its proposed penalties on these grounds.

2. The Respondent

The company's response asserted that the government did not carry its burden of proof of justifying the penalty proposed, which it points out is nearly 90% of the maximum allowable by law. It faulted the government's request as well for providing no analysis or rationale for the methodology behind the proposed fine, and for relying principally on a conclusory statement about the circumstances in their entirety. Pegasus also said the amount of the fine is disproportionate to the resources of the business since the amount requested is equivalent to about six years of its 2010 net income and about two years of John De Lay's annual salary.

The company took issue as well with the government's analysis and application of the statutory factors. Pegasus says that because it is a small business and has no history of previous violations, the penalty should have been mitigated based on both these factors. Pegasus cited to OCAHO cases treating the absence of any history of previous violations as a favorable factor. *See United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 9, 11 (2010) (finding the absence of prior violations would, under the circumstances of that case, "point to mitigation"); *United States v. Task Force Security*, 4 OCAHO no. 625, 33, 341 (1994) (reducing a penalty where the respondent had no history of previous violations under 8 U.S.C. §1324a).

The company acknowledged that the government's characterization of the seriousness of the

violations is justified, and appeared to accept the proposition that its failure to prepare the I-9s precludes any mitigation based on good faith. It did point out, however, that ICE's suggestion that it acted in bad faith by completing no I-9s over a 20 year period was nowhere supported by evidence in the record. Pegasus admitted that four of its employees were unauthorized to work in the United States but said all four either quit or were terminated at the time of the ICE audit, and cited *United States v. Jonel*, 8 OCAHO no. 1008, 1, 21 (1998) to the effect that if penalties are to be aggravated based on the presence of unauthorized workers, aggravation is appropriate only for the violations involving those four workers who were unauthorized, and not for other, authorized employees.

Finally, Pegasus pointed to two other nonstatutory factors it believes should redound to its credit in assessing a penalty. First, Pegasus says it readily admitted its wrongdoing and cooperated with the government by providing relevant information about its business. Second, the company said it is now in compliance with its I-9 completion requirements and will enroll in ICE's IMAGE[3] program upon resolution of this case.

B. Discussion and Analysis

In this forum, there is no one single permissible method of calculating penalties, *see United States v. Filipe, Inc.*, 1 OCAHO no. 108, 726, 731 (1989) (affirmation by CAHO). Our case law has sometimes utilized the mathematical approach initially taken in *Filipe*, *see United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 924, 938-40 (1994), but has also used a more judgmental approach, *see United States v. Catalano*, 7 OCAHO no. 974, 860, 869 (1997). There are other possibilities as well, and ICE has developed its own specific methodology for establishing penalties.

Pegasus correctly observed that the government's memorandum did not explain the rationale or methodology by which ICE made its initial penalty calculations. This appears, however, to have been done pursuant to the government's *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (the Guide).[4] The Guide contains a matrix by which ICE first calculates a baseline penalty: violations are divided into six categories depending upon the percentage of I-9s

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[3] IMAGE is the ICE Mutual Agreement between Government and Employers program through which the government provides selected employers with education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment eligibility verification program, and anti-discrimination procedures.

[4] This document is not part of the record, but the relevant portions are available on ICE's website. *See* U.S. Immigration and Customs Enforcement, *Fact Sheet: Form I-9 Inspection Overview* (Dec. 1, 2009), *available at* http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

that are missing or have substantive violations. This case falls into the sixth of those categories, that in which 50% or more of the I-9 forms are missing or defective. For this category the matrix sets a baseline penalty for a first offense of $935 per violation. The Guide reflects that the penalty may be aggravated or mitigated by a factor of 5% for each of the statutory factors, and ICE elected to aggravate the baseline penalties by 5%.

As explained in *Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011), while ICE has broad authority and discretion in deciding how to assess penalties, *see United States v. Aid Maintenance Co.*, 8 OCAHO no. 1023, 321, 343 (1999) (citing *United States v. Ricardo Calderon, Inc.*, 6 OCAHO no. 832, 102, 109 (1996)), the agency's internal guidelines have no binding effect in this forum, *see United States v. Sunshine Building & Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1175 (1998).[5] Thus if the penalties as proposed appear to be disproportionate in light of the size and resources of the business, or for other reasons particular to the specific case, the result can be adjusted.

The parties here disagree about the size of the employer's business. Evidence in the record related to this question reflects that Pegasus is wholly owned by its president, John De Lay, and that his salary from the company has declined progressively from $78,000 in 2008 to $71,538 in 2009, and to $59,308 in 2010. The company's corporate income tax returns indicate that its gross sales in 2008 were $1,667,433 and its taxable income was $4,976; for 2009, sales were $1,604,804 and taxable income was $7,528; and for 2010 gross sales were $1,586,165 and taxable income was $10,195. According to its 2010 Profit & Loss statement, Pegasus had net income of only $19,377.39 in 2010. The company does own the building in which it operates, which was assessed at a value of $1,092,630 in 2011.

In assessing the size of a restaurant business, our jurisprudence has considered a number of factors, including the number of employees. In *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992), Judge Morse found an employer with two restaurants and 100 employees to be a small employer despite larger gross sales than the respondent's in this case. In so doing, he also took official notice of the Standard Industrial Classification (SIC) Manual used by the Small Business Administration (SBA) for size determination purposes which suggested that the standard for noninstitutional "eating and drinking places" (code 5812) would be $3,500,000 in annual receipts. *Id*. at 45. *See also United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992) (relying, inter alia, on the same SBA standard to determine size of the business).

OCAHO case law has recognized too that there are some types of businesses that are characterized by rapid turnover of employees resulting in a large number of violations relative to

[5] *Sunshine* made reference to superseded guidelines established by legacy INS. For abolition of INS, transfer of its functions, and treatment of related matters see note at 8 U.S.C. § 1551.

the number of actual employees at any given time, *see, e.g. Snack Attack Deli*, 10 OCAHO no. 1137 at 7, and this factor may weigh on that assessment as well. Other types of businesses of even larger size than Pegasus have also been held to be small businesses. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) (finding business with 90 to 100 employees to be small); *United States v. Vogue Pleating, Stitching & Embroidery Corp*., 5 OCAHO no. 782, 468, 471 (1995) (same). The record considered in the light of our case law does not support a conclusion that Pegasus is anything other than a small employer.

While the government's memorandum made allegations suggesting that Pegasus acted in bad faith by not completing any I-9s for twenty years, factual allegations made in a brief or memorandum are not evidence, *United States v. Yin Tien Chen*, 9 OCAHO no. 1092, 4 (2003), and there appears to be no actual evidence in the record that would support a finding that no I-9s were completed in twenty years.

OCAHO cases considering the question of good faith have generally looked to the steps an employer took prior to the inspection to ascertain what the law required and conform its conduct its conduct to it. *United States v. Riverboat Delta King, Inc*., 5 OCAHO no. 738, 126, 130 (1995). Consideration of a particular factor is possible only when there is relevant evidence in the record, *Catalano*, 7 OCAHO no. 974 at 868, and the existence of 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). The evidence presented here is not sufficient to show bad faith.

Finally, OCAHO precedent reflects that a respondent's ability to pay a proposed fine is an appropriate factor to be weighed in assessing the amount of the civil monetary penalty. *See, e.g.*, *Raygoza*, 5 OCAHO no. 729 at 48, 52. A penalty should be sufficiently meaningful to accomplish the purpose of deterring future violations, *Jonel*, 8 OCAHO no. 1008 at 201, without being "unduly punitive" in light of the respondent's resources. *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Proportionality is key.

C. Conclusion and Summary

The permissible penalties in this case range from a low of $14,740 to a high of $148,740, and the government has proposed penalties that are very close to the highest available. Giving due regard to the record as a whole and to the statutory criteria, the penalties proposed appear excessive in light of the employer's size and resources, and they should be adjusted to an amount within the reasonable capacity of the respondent to pay.

I decline to reduce the penalties for the four violations involving unauthorized workers, which will remain at $981.75, but the remaining 130 violations will be reduced to $350 each for a total penalty of $49,427, a figure that is still sufficiently substantial to have a significant deterrent

effect going forward.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Pegasus Restaurant, Inc. is a Colorado company located at 313 Jerry Street in Castle Rock, Colorado.

2. Pegasus Restaurant, Inc. has been in business since 1984 and is owned by its president, John T. De Lay.

3. On July 21, 2011, the government was granted summary decision as to liability based on the finding that Pegasus Restaurant, Inc. hired 134 named individuals for whom it failed to prepare or present Form I-9 upon request.

4. As of October 2011, Pegasus Restaurant, Inc. employed about 55 individuals.

5. Pegasus Restaurant, Inc. reported gross sales of $1,586,165 in calendar year 2010, $1,604,804 in calendar year 2009 and $1,667,433 in calendar year 2008.

6. Pegasus Restaurant, Inc. reported taxable income of $10,195 in calendar year 2010, $7,528 in calendar year 2009 and $4,976 in calendar year 2008.

7. Pegasus Restaurant, Inc. had net income of $19,377.39 in calendar year 2010.

8. Annual salary for the President of Pegasus Restaurant, Inc., John De Lay, declined progressively from $78,000 in 2008 to $71,538 in 2009, and to $59,308 in 2010.

9. Four of the employees for whom Pegasus Restaurant did not complete I-9 forms, Gabriel G. Torres, Manuel Torres, Antonio Heredia, and Guilliermo Heredia, were not authorized to work in the United States.

10. Pegasus Restaurant, Inc. has no history of previous violations of 8 U.S.C. § 1324a.

B. Conclusions of Law

1. Pegasus Restaurant, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

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

3. Pegasus Restaurant, Inc. engaged in 134 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), 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. 8 U.S.C. § 1324a(e)(5) 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. The weight to be given each factor in assessing a penalty depends upon the facts and circumstances of the particular case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995).

7. Consideration of a particular factor is possible only when there is relevant evidence in the record. *United States v. Catalano*, 7 OCAHO no. 974, 860, 868 (1997).

8. The government bears the burden of proof with respect to an appropriate penalty. *United States v. American Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996).

9. Considered in light of OCAHO case law, Pegasus Restaurant, Inc. was found to be a small business.

10. 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).

11. In assessing the question of good faith, OCAHO case law has principally looked to the efforts a respondent made prior to the inspection in order to ascertain what the law requires and conform its conduct to it. *United States v. Riverboat Delta King, Inc*., 5 OCAHO no. 738, 126, 130 (1995).

12. Evidence was insufficient to conclude that Pegasus Restaurant, Inc. acted in bad faith prior to the inspection.

13. Failure to prepare a Form I-9 at all is among the most serious of paperwork violations. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994).

14. Penalties may be enhanced when individuals in the workforce are unauthorized for employment in the United States, but only for the specific unauthorized individuals. *United*

States v. Jonel, 8 OCAHO no. 1008, 1, 21 (1998).

15. The evidence failed to establish that Pegasus Restaurant, Inc. lacks the ability to pay a reasonable penalty.

16. Giving due consideration to the record as a whole and to the statutory factors, the penalties proposed for the authorized workers are disproportionate and should be reduced.

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

Pegasus Restaurant, Inc. is directed to pay a total penalty of $49,427, which consists of $981.75 each for the violations involving Gabriel G. Torres, Manuel Torres, Antonio Heredia, and Guilliermo Heredia, and $350 each for the remaining 130 violations. All other pending motions are denied. The parties are free to negotiate a payment schedule.

SO ORDERED.

Dated and entered this 5th day of January, 2012.

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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.