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

March 18, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00058
SIAM THAI SUSHI RESTAURANT, D/B/A FOUR SIAMESE COMPANY, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanction 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 Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint against Siam Thai Sushi Restaurant d/b/a Four Siamese Company, Inc. (Siam Thai or respondent) alleging that Siam Thai violated 8 U.S.C. § 1324a(a)(1)(B) when it hired eighteen named individuals and failed to prepare Forms I-9 for them "within three business days of their date of hire and prior to the Notice of Inspection." Siam Thai filed an answer admitting the material allegations of the complaint, but contesting the amount of the penalty.

The parties filed their prehearing statements, after which a telephonic conference was conducted at which Siam Thai accepted the twelve factual stipulations proposed by the government. The stipulations are sufficient to establish liability for the eighteen violations alleged in the complaint; they are more fully set forth infra and are adopted as findings of fact in this case. A schedule was established 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.

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). [1]

A. The Government's Memorandum

ICE's memorandum states that the baseline penalty was set at $935 for each I-9 because the violations involved 100% of Siam Thai's workforce. ICE said it then mitigated the penalties by 5% each because of the small size of the employer and the absence of any unauthorized workers, but aggravated the penalties by 5% each because of a lack of good faith and because of the seriousness of the violations. ICE treated the lack of previous violations as a neutral factor, so the net effect of applying all the factors was that the penalty remained $935 for each violation, which would result in a penalty calculation of $16,830. ICE acknowledged that the complaint initially sought penalties in the total amount of $16,308, not $16,830, and explained that it recently realized the numbers were inadvertently transposed. The government declined to seek amendment of the lower amount and said it considered the error to be a "discretionary reduction in light of respondent's claimed inability to pay the proposed fine."

B. Siam Thai's Response

Siam Thai's response states that on July 19, 2010, the restaurant had only ten employees, three of whom were the owner, his wife, and their son, and that the business had losses of $49,346 for 2011, $41,188 for 2010, and $33,308 for 2009. Documents in the form of S Corporation tax returns attached to the restaurant's answer and prehearing statement support those figures. The

[1] 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.

restaurant argues that it is "financially fragile at best," so only a minimum fine should be imposed.

Siam Thai takes issue with the government's assertion that it lacked good faith. It points out that it prepared and submitted I-9 forms within four days after receiving the Notice of Inspection, and accepted responsibility by conceding liability for its inadvertent failure of compliance with the verification requirements, thus saving the parties the time and expense of going to trial. Siam Thai argues that the seriousness of the violations should be mitigated by the short delay in preparing the I-9s, and said it was simply unaware of the I-9 requirement until it received the Notice of Inspection. It argues that the lack of unauthorized workers and its lack of history of previous violations should weigh in its favor as well. Siam Thai's answer said that the proposed fine would cripple this small family business and could result in the unemployment of thirteen U.S. workers.

C. Discussion and Analysis

Siam Thai appears to be the prototypical "mom and pop" small family restaurant business. ICE concedes that Siam Thai is a small employer, did not employ unauthorized workers, and has no history of previous violations. While I concur with ICE's finding that the violations were serious, the minimal evidence in this record does not support the government's view that Siam Thai lacked good faith. The only support offered for that proposition is the government's assertion that the restaurant, "did not demonstrate good faith in that 100% of its workforce failed to complete an I-9 until AFTER the inspection. Moreover, when the I-9s were prepared each was incomplete and contained substantive errors in each I-9."

But neither the fact that an employer's I-9s are missing nor that they are defective is sufficient to show a lack of good faith. As explained in *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (Modification by the Chief Administrative Hearing Officer), 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 . . . ."[2]

A failure of compliance based on ignorance of the law is accordingly insufficient to establish bad faith. *See United States v. Aid Maint. Co.*, 8 OCAHO no. 1023, 320, 345 (1999); *United States v. O'Brien Oil Co.*, 1 OCAHO no. 166, 1144, 1145 (1990). This is not a case in which an employer backdated the forms or otherwise made an effort to conceal information or mislead ICE as to when the I-9s were actually completed. *Cf. United States v. Occupational Res. Mgmt.*, 10

[2] The Chief Administrative Hearing Officer also observed that an employer's missing or defective I-9s appear more relevant to the seriousness of the violation factor than to the good faith factor. *Id.*

OCAHO no. 1166, 27 (finding bad faith where two of the employer's agents entered false information to make it appear that forms were timely completed); *see also 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).

Here, in contrast, the restaurant said it was unaware of the I-9 requirement until it received the Notice of Inspection, and once it became aware, it promptly prepared the forms. The forms are dated between July 19 and July 23, 2010, four business days after the restaurant received the Notice of Inspection, and the record is wholly devoid of any facts or circumstances that would suggest that any of the information provided in the forms is inaccurate, although visual inspection of the forms reflects that there are some errors or omissions. Absent evidence of culpable conduct that goes beyond the mere failure to comply with the verification requirements there has been no showing that Siam Thai lacked good faith. *See United States v. Taste of China*, 10 OCAHO no. 1164, 4-5 (2013).

Failure to complete any I-9s forms prior to the issuance of a Notice of Inspection, however, cannot be treated as anything less than a serious violation. *See Am. Terazzo*, 6 OCAHO no. 877 at 593. Seriousness is nevertheless evaluated on a continuum since not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). OCAHO case law reflects that the longer the delay in preparing an I-9 for a new employee, the more serious the violation is considered. *See United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998) (finding failure to prepare I-9s within three business days to be serious, but distinguishing between delays of a few days and those of a few months). The underlying principle is that an individual whose eligibility is unverified could be unauthorized for employment for all the employer knows, and the longer the individual's eligibility remains unverified, the longer is the potential for unauthorized employment. *Id.* at 1080. In this case, the delay in preparing the I-9s ranges from over a year to ten days.[3] While the preparation of some I-9s was more delayed than others, enhancement of the all the penalties by some measure is appropriate based on the seriousness of these violations.

A penalty should 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). Here, while Siam Thai's violations are considered serious, most of the statutory factors weigh in its favor. Yet ICE's proposed penalty of $935 per violation is close to the maximum permissible fine.

[3] Siam Thai hired eleven employees in March and April of 2009, one in September of 2009, and six in June and July of 2010.

Based on the totality of the circumstances reflected in the record as a whole and, in particular, on the respondent's circumstances and resources, the proposed penalty will be modified to an amount closer to the mid-range of possibilities. The penalties will be set at $500 each for the eleven I-9s prepared in March and April of 2009, $450 for the I-9 prepared in September of 2009, and $400 each for the six I-9s prepared in June and July of 2010, resulting in a total of $8350.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

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

1. Siam Thai Sushi is a restaurant located in Glen Falls, New York.

2. A Notice of Inspection ("NOI") was served upon respondent on July 19, 2010, which requested, among other items, the presentation of a payroll list indicating current and terminated employees dating back to January 1, 2009, as well as Forms I-9 for those employees.

3. The Respondent was requested to and presented all documentation, including I-9s prepared *after* the Notice of Inspection was served, to the Government no later than July 23, 2010. All 18 of the I-9 forms contained substantive errors.

4. The Notice of Intent to Fine ["NIF"] was served on Respondent on January 4, 2011, alleging violation of Immigration and Nationality Act § 274A(a)(1)(B) and seeking a total of $16,308.00 in civil monetary penalties.

5. The Respondent filed a request for hearing on January 17, 2011.

6. The Government filed a Complaint against the Respondent before the Office of Chief Administrative Hearing Officer on April 9, 2012.

7. The Respondent filed an Answer to the Complaint on May 18, 2012.

8. The 18 employees listed in Count I of the Complaint were employed by Respondent during some or all of the period covered by the Notice of Inspection.

9. Respondent hired the 18 individuals listed in Count I of the Complaint after November 6, 1986.

10. Respondent failed to prepare, and/or present the Employment Eligibility Verification Form

(Form I-9) for the individuals listed in Count I, within three business days of their corresponding dates of hire.

11. The Respondent has no history of previous violations of INA § 274A(a)(1)(B).

12. The Respondent was not found to be employing unauthorized aliens during the time of this inspection.

B. Conclusions of Law

1. Siam Thai Sushi Restaurant is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

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

3. Siam Thai Sushi Restaurant admitted liability for hiring Anethaya Alarcan, Thavorn Cameron, Churat Chomchard, Rujirat Currie, Rayna Hayes, William Hennessey, Jennifer Jiapong, Anel Kopytova, Phairam Luffman, Saisunee Michareune, Souphone Michareune, Jose Ortega, Tatiana Pavlova, Shealyn Severance, Justin Spraragen, Jiraporn Spraragen, Darrel Spraragen, and Keith Van Arsdal for employment in the United States and failing to prepare I-9 forms for them within three business days of their corresponding hire dates.

4. The Department of Homeland Security, Immigration and Customs Enforcement did not meet the burden of proof to show a lack of good faith because it did not point to evidence that Siam Thai Sushi Restaurant 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 seriousness of violations is evaluated on a continuum since not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010).

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

7. A penalty should 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

Siam Thai Sushi Restaurant is liable for eighteen violations of 8 U.S.C. § 1324a(a)(1)(B) for failure to prepare and/or present I-9s for employees within three business days of their respective hire dates and is ordered to pay a civil money penalty of $8350.

SO ORDERED.

Dated and entered this 18th 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.

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

March 21, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
vi.	)	OCAHO Case No. 12A00058
SIAM THAI SUSHI RESTAURANT, D/B/A FOUR SIAMESE COMPANY, INC., Respondent.	)	

ERRATUM

In the Final Decision and Order issued in this matter on March 18, 2013, the second sentence in the first paragraph on page 5, reading: "The penalties will be set at $500 each for the eleven I-9s prepared in March and April of 2009, $450 for the I-9 prepared in September of 2009, and $400 each for the six I-9s prepared in June and July of 2010, resulting in a total of $8350. " is stricken.

The following sentence is inserted in its place: "The penalties will be set at $500 each for the I-9s of the eleven employees hired in March and April of 2009, $450 for the I-9 of the employee hired in September of 2009, and $400 each for the I-9s of the six employees hired in June and July of 2010, resulting in a total of $8350."

SO ORDERED.

Dated and entered this 21st day of March, 2013.

Ellen K. Thomas
Administrative Law Judge