

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

May 3, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 11A00021
)	
SIWAN & SONS, INC. D/B/A SUBWAY,)	
#35029 AND SUBWAY #23095,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is one of two companion cases.¹ The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint against Siwan & Sons, Inc. d/b/a Subway #35029 and Subway #23095 (Siwan & Sons, the respondent, or the company) in Pembroke, North Carolina. The respondent filed a timely answer after which discovery and other prehearing procedures were undertaken. The matter was thereafter stayed for a lengthy period owing to [redacted] affecting Mohammed Siwan, president, representative, and resident agent for the company, who had been acting for the company in these proceedings. [Redacted] and his wife, Christine Siwan, and the company’s accountant, Omayra D. Coon, CPA, ultimately had to take over the representation.

Presently pending is the government’s motion for summary decision. Siwan & Sons filed a response in opposition to the motion and the motion is ripe for resolution.

II. BACKGROUND INFORMATION

Siwan & Sons operates as two Subway franchise restaurants located at 930 NC Highway 711 (Subway #35029) and 963 Prospect Road (Subway #23095) in Pembroke, North Carolina. At all times relevant, Mohammad Ali Ibrahim Thweib was the manager of store #35029 and Shonda Lynn Jones-Hardin was the manager of store #23095. ICE served a Notice of Inspection (NOI)

¹ The other case is *United States v. Siwan & Brothers*, No. 11A00020, involving a different Subway that is located in Lumberton, North Carolina (Subway #37616).

on December 16, 2009 requesting production of the company's I-9s and supporting documents for current employees and for former employees terminated between January 1, 2008 and December 16, 2009. Siwan & Sons produced eighty-eight I-9s² in response. The inspection also included examination of 2008 and 2009 wage records from the North Carolina Employment Security Commission. A Notice of Intent to Fine was thereafter issued on October 4, 2010, and the respondent made a timely request for hearing. All conditions precedent to the institution of this proceeding have been satisfied.

Count I of the complaint originally alleged that the company failed to ensure that seventy-nine named employees properly completed section 1 of Form I-9 and/or that the employer itself failed to properly complete section 2 or 3 of the form. After subsequent review, ICE amended Count I to delete the names of seven former employees for whom Siwan & Sons was no longer required on the date of the NOI to retain the forms, leaving seventy-two alleged violations in that count. Count II alleged that Siwan & Sons failed to prepare or present I-9 forms for eight employees.

III. THE MOTION AND RESPONSE

A. ICE's Motion

ICE argues first that there is no genuine issue of material fact and that it is entitled to summary decision as to liability as well as proposed penalties totaling \$82,280.³ First, the government contends that visual inspection of the I-9 forms for the individuals named in amended Count I reflects that sixty-five of the forms were not completed within three days of hire, and lack the employee's signature in section 1. Sixty-four of these forms are backdated. Only two have section 2 fully completed. Most lack any issuing authority or expiration date for the documents listed. Two forms lack an expiration date for a work authorization document in section 1 and a hire date in section 2. As to Count II, the government asserts that eight names appear on the company's wage records and those employees received wages during the relevant period but no I-9 was presented for them at the time of inspection. The names are: 1) BART (LNU, FNU), 2) DAVE (LNU, FNU), 3) BART (LNU, FNU), 4) BLOU (BLOUNT, Wanda), 5) SEA (Seals, Nikki), 6) LOC (Locklear, Locklear), 7) LEWI (Lewis, Kelly), and 8) HUNT (Hunt, Laura). A note follows indicating that LNU means Last Name Unknown and FNU means First Name Unknown.

² ICE's exhibit states that Siwan submitted ninety-two I-9s, but some were duplicates.

³ ICE modified its original penalty request commensurately with the reduction of the number of violations alleged in Count I.

ICE says that with the amendment of Count I, there are still violations for 83.33% of the respondent's workforce and that a "baseline" fine was assessed at \$935 per violation. ICE states that it treated the size of the business as a neutral factor in assessing the penalties because the company was neither a large nor a small employer. The government argues that while the respondent is not a large business itself, Subway franchise owners nevertheless have the benefit of human resources training from the franchisor, including training in I-9 compliance. ICE says it aggravated the penalties further based on the seriousness of the violations and what it characterizes as the respondent's lack of good faith, the most visible evidence of which was the backdating of forms. On seventy-one forms, the date the company entered on the forms actually preceded the revision date of the version of the form used, showing that the form Siwan & Sons used did not actually exist on the date the restaurant purportedly signed it.

Accompanying the motion were exhibits consisting of A) Amended Count I (3 pp.); B) Articles of Incorporation (7 pp.); C) Notice of Inspection and Subpoenas (12 pp.); D) ICE Office of Investigations, Reports of Investigation; E) Forms I-9 and supporting documentation provided by respondent (112 pp.); F) Employment Security Commission of North Carolina Wage Records for 2008 and 2009 (3 pp.); G) Notice of Intent to Fine; H) ICE Office of Investigations, Memorandum to Case File (8 pp.); I) The respondent's statement attached to his request for a hearing (22 pp.); J) Human Resources material provided by Subway (64 pp.); K) Choice Point Records; and L) The respondent's statement dated October 29, 2010 (10 pp.).

B. Siwan's Response

The company's response takes issue with the government's contentions that the Subway franchise provided training and guidance on I-9 compliance. Mohammed Siwan has been a Subway franchisee since February 1996 and the two-week training he attended in 1996 did not include such training. The owners' meetings held in North Carolina, moreover, are not focused on this issue. Additionally, the Subway Operations Manual he initially received, dated August 1993, did no more than mention the form, without providing any details. Mohammed Siwan received another version of the manual dated 1998 when he opened the other store, but it provided no details either. While the franchisor may have updated the manual after that, only new franchisees receive the updated version while older franchisees use the version issued to them when they opened their stores.

The company challenges ICE's use of the term "backdated," and says, as Mohammed Siwan himself has acknowledged all along, that Siwan copied the old forms onto the revised version because he misunderstood an internet posting stating that prior editions of the form would no longer be valid after April 3, 2009. Because he has limited knowledge of English, he thought the forms had to be redone. The response acknowledges that Mohammed Siwan also made mistakes in completing the forms, but argues that the penalties proposed are unjust and would

force the closing of the businesses, thus leaving the employees without jobs and devastating the family. Siwan & Sons says it is a small business, that the size of the franchisor is not relevant to the size of the franchisee, and that Subway does not provide continuing education to its franchisees. The restaurant argues that Mohammed Siwan made a good faith mistake in copying the forms, and that he and the company's accountant subsequently put together a Manager Hiring Procedure Manual and trained the managers as to their responsibilities, thus ensuring future compliance. Finally, the company points out that there were no unauthorized aliens and no history of previous violations – factors which should operate in its favor. Finally, the company says it had no funds to hire a lawyer and would be ruined by the proposed fine.

Accompanying the response were exhibits consisting of R-1) Letters to and from the National Ombudsman for the Small Business Administration dated November 2010 (4 pp.); R-2) Subway Franchise World Headquarters Diploma dated February 20, 1996; R-3) Subway Operations Manual, Circulation August 1993, Personnel Section (19 pp. numbered 2.1-2.19), Training Section (34 pp. numbered 3.1-3.34); R-4) Subway Operations Manual, Circulation July 1998, Personnel and Training Section (83 pp.); R-5) NAFSA article from website (2 pp.); R-6) Notice of Intent to Fine (2 pp.); R-7) Complaint Regarding Unlawful Employment (13 pp.);⁴ R-8) Manager Hiring Procedure Manual, Form I-9 Section, Updated 12/3/10 (66 pp.); R-9) Manager Signature Sheets for Siwan & Sons, Inc. managers and for Siwan & Brother's, Inc. managers (3 pp.); R-10) SBA definition of small business concern from SBA website); R-11) Income Tax Return for S Corporation, Form 1120S for 2008 for Siwan & Sons, Inc. and Siwan & Brother's, Inc. (2 pp.); and R-12) Income Tax Return for S Corporation, Form 1120S for 2009 for Siwan & Sons, Inc. and Siwan & Brother's, Inc. (3 pp.).

IV. DISCUSSION AND ANALYSIS

A. Liability

There appears to be no genuine issue of material fact respecting the violations alleged in amended Count I, and the record reflects that Siwan & Sons hired Brittany Laurant Berney, Ashley M. Jones, Margaret R. Oxendine, Tina Marie Oxendine, James P. Sanders, Fathi Ziad Siwan, Ahmad Sowwan, Mohammad Ali Ibrahim Thweib, Christian L. Blue, Jacquisha N. Brooks, Joy Bullard, Tiffany C. Bullard, Porchia R. Burns, Candice Chavis, Anessa Clark, Rhonda Cleveland, Tasha H. Cleveland, Tiffany L. Dixon, Lilly Ann M. Figueredo, Amber Hamilton, Skylla Hammonds, Magen Ann Harding, Dylan Hubbard, Courtney S. Hunt, Shannon R. Hunt, Jessica Diane Jacobes, Tabitha M. Jacobs, Samantha K. Inman, Ashley F. Locklear, John L. Locklear, Keisha B. Locklear, Lakotah Locklear, Meghan N. Locklear, Michelle Locklear, Sierra Locklear, Stephanie Locklear, Tiffany D. Locklear, Katherine D. Loman,

⁴ The complaint is for Siwan & Brothers, Inc. No. 11A00020, not for this case.

Meaghan N. Lowery, Heather Lowry, Liz Morales, Tiffany Newsome, Brittany L. Oxendine, Jennifer Oxendine, Brian G. Page, Matthew Polk, Renae B. Sanders, Tamie Sloan, Renee Stapleton, Bradley D. Strickland, Heather N Strickland, Melissa Walker, Tabitha L. Woods, Johnnie C. Jacobs, Brittany Abernathy, Ashley N. Allen, Amie S. Balsiger, Katina Branham, Michelle K. Brouse, Eve L. Dail, Brittany D. Hunt, John Johnson, Brittany N. Locklear, Danielle N. Locklear, Brittiny Melton, Kim D. Moore, Kendra L. Pass, Arafat Sider, Candice Smith, Ashley M. Stabley, Ihab Tarda, and Megan Wingerter and failed to ensure that the employees properly completed section 1 of Form I-9, or failed itself to properly complete section 2.

Count II of the complaint alleged that the company hired 1) BART (LNU, FNU), 2) DAVE (LNU, FNU), 3) BART (LNU, FNU), 4) BLOU (Blount, Wanda), 5) SEA (Seals, Nikki), 6) LOC (Locklear, Locklear), 7) LEWI (Lewis, Kelly), and 8) HUNT (Hunt, Laura) and failed to prepare or present I-9s for them. These identifications were evidently taken from payroll records. The government's motion seeks summary decision as to all eight. An attachment to the company's request for hearing, included as exhibit I, identifies the first BART as Christy Bartly, DAVE as David R. Smith, and the second BART as Charlene Barton.

The company suggests that LOC could be Ashley Locklear whose I-9 was produced and who was named in Count I, or Nikie Locklear, for whom an I-9 was also presented. It identifies Nikki Seals, Kelly Lewis, and Laura Hunt as individuals who were hired at Siwan and Brothers, and probably borrowed by Siwan & Sons since they appear on the payroll for the other store. The government rejects the suggestion that LOC could be Ashley or Nikie Locklear, noting that the social security number on their I-9 forms do not match the one on the payroll records for LOC.

I decline in any event to find a violation for failure to prepare an I-9 form for an unnamed, unknown person. Even if "LOC" is not Ashley or Nikie Locklear, the record reflects that there are several other individuals employed by Siwan & Sons who have the surname Locklear and whose names already appear in Count I. Violations will, however, be found for the remaining seven allegations in Count II, although it must be taken into consideration during the penalty assessment that two of the individuals, Kelly Lewis and Laura Hunt, actually did have I-9s that were completed by Siwan & Brothers, and the form for Nikki Seals was belatedly located.

B. Penalties

Civil money penalties are assessed for paperwork violations 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 the violation occurred after September 29, 1999, is \$110, and the maximum penalty is \$1100. The following factors must be considered in assessing an appropriate penalty: 1) the size of the business of the employer being charged, 2) the good faith of the employer, 3) the seriousness of the violation, 4) whether or not the individual was an unauthorized alien, and 5) the history of previous violations by the employer. 8 U.S.C. § 1324a(e)(5). The statute does not require that

equal weight be given to each factor or rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). 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, 576, 581 (1996) (citing *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996)).

Having considered these factors and the arguments of the parties with respect to the appropriate penalties, I find that the penalties proposed are excessive in light of the record as a whole. The only factor not weighing in the company's favor is the seriousness of the violations, and the penalties requested are so near the maximum permissible as to appear out of proportion to the size and resources of the business, particularly in light of its character as a small family restaurant franchise operation.

First, as has previously been observed, the high turnover of employees in the fast food industry can easily give a misleading impression as to a franchise restaurant's actual size. See *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 7 (2010) (finding a different Subway franchise to be a small employer). The suggestion that the size of a small fast food restaurant can be altered by virtue of its status as a franchisee was not found persuasive in *Snack Attack*, and is not found persuasive here. In light of previous OCAHO case law, Siwan & Sons must be considered a small employer. Absent specific evidence, moreover, there can be no presumption that the human resources training program of a large parent franchisor necessarily included training in I-9 compliance at the time this store was opened.

Second, while there is some evidence that may suggest an absence of good faith, the evidence is not sufficient to create a factual issue. ICE says there is compelling circumstantial evidence to suggest that "the respondent attempted to frustrate the inspection process by backdating most of the Forms I-9," but the record reflects instead that Mohammed Siwan never represented that the forms he presented were the original I-9s; he stated from the outset that he had copied them. How this constitutes an attempt to frustrate the inspection is not clear.

ICE also argues that it is reasonable to infer that the I-9 forms in Count I were not completed until after service of the NOI, and that this is evidence of culpable behavior going beyond mere failure to comply, as required to support a finding of bad faith. See *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO). But inferences are not evidence, and the inference suggested is not the only one that may be drawn from the established facts. The fact that ICE chooses to disbelieve the employer's explanation of why the forms were completed late does not constitute evidence of bad faith.

There were no unauthorized workers found at Siwan & Sons and there is no history of previous violations. Except for the seriousness of the violations, the other statutory factors appear either neutral or favorable to the employer, and I also note that two of the violations in Count II could

be regarded as less serious than the usual failure to prepare an I-9 because the employment eligibility of Kelly Lewis and Laura Hunt had been verified and these employees' I-9s had been completed by the company's affiliate, Siwan & Brothers.

As explained in *United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143, 7 (2012), proportionality is critical to setting penalties. The amount 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). A final persuasive factor in favor of leniency to this small employer is the legislative policy preference expressed in the Small Business Regulatory Enforcement Fairness Act of 1996, § 223(a), Pub. L. No. 104-121 (codified at 5 U.S.C. § 601 note (2006)), that calls generally for reducing civil penalty assessments on small entities. *Cf. Balice v. USDA*, 203 F.3d 684, 691 n.5 (9th Cir. 2000). Penalties will accordingly be adjusted as a matter of discretion to an amount nearer the lower end of the penalty range and set at \$200 for each violation. The total penalty is \$15,800.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Siwan & Sons, Inc. operates as two Subway franchise restaurants, Subway #35029 and Subway #23095, located in Pembroke, North Carolina.
2. The Department of Homeland Security, Immigration and Customs Enforcement served Siwan & Sons, Inc. with a Notice of Inspection (NOI) on December 16, 2009.
3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to Siwan & Sons, Inc. on October 4, 2010.
4. Siwan & Sons, Inc. made a request for hearing on or about October 18, 2010.
5. The Department of Homeland Security, Immigration and Customs Enforcement filed its complaint against Siwan & Sons, Inc. on November 18, 2010.
6. Siwan & Sons, Inc. hired seventy-two named employees and failed to ensure that they properly completed section 1 of Form I-9, or failed itself to properly complete section 2.
7. Siwan & Sons, Inc. hired seven named individuals for whom it failed to produce I-9 forms for upon request.

B. Conclusions of Law

1. Siwan & Sons, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).
2. All conditions precedent to the institution of this proceeding have been satisfied.
3. The Department of Homeland Security, Immigration and Customs Enforcement is entitled to summary decision finding that Siwan & Sons, Inc. engaged in seventy-nine violations of the requirements of the Employment Eligibility Verification System. 8 U.S.C. § 1324a(b).
4. Proposed penalties are reduced as a matter of discretion.

ORDER

Siwan & Sons, Inc. is found liable for seventy-nine violations of the requirements of the Employment Eligibility Verification System and is directed to pay civil money penalties in the amount of \$15,800. The parties are free to negotiate a payment schedule.

SO ORDERED.

Dated and entered this 3rd day of May, 2013.

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.