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

October 23, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 13A00093
DURABLE, INC. Respondent.	)	

AFFIRMANCE BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER

Appearances:

Joseph M. Yeung
For the complainant

Nicole A. Kersey
For the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to 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 (2012). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a four-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Durable, Inc. (Durable or respondent), alleging that Durable engaged in 300 violations of 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Durable failed to ensure that eight employees properly completed section 1 of the Employment Eligibility Verification Form (I-9); Count II alleged that Durable failed to properly complete section 2 of the Form I-9 for six employees; Count III alleged that Durable failed to ensure that 170 employees properly completed section 1 of the form; and Count IV alleged that Durable failed to properly complete section 2 of the form for 116 employees.

ICE sought penalties in the amount of $329,895 for the 300 violations alleged ($1,092.50 for each of the violations alleged in Counts I and II; and $1,100 for each of the violations alleged in Counts III and IV).

On September 23, 2014, Administrative Law Judge (ALJ) Ellen K. Thomas entered a final decision and order finding Durable liable for all 300 violations and directing it to pay a civil money penalty in the amount of $329,895, matching the penalty amount sought by ICE. Respondent filed a timely request for administrative review of the ALJ's decision and order with the Chief Administrative Hearing Officer (CAHO), in accordance with OCAHO's procedural rules at 28 C.F.R. § 68.54 (2013). In its request for review, respondent contested the ALJ's findings related to both liability and the penalty determination. ICE filed a response to the request for review, arguing in favor of affirmance of the ALJ's decision and order. Respondent also filed a brief in support of its request for administrative review, expanding upon the arguments originally made in the request for review. I have reviewed each of these documents and considered the relevant portions of the official case record in arriving at this decision.

II. JURISDICTION AND STANDARD OF REVIEW

Under the applicable statute and regulations, the CAHO has discretionary authority to review any final order of an ALJ in a case brought under 8 U.S.C. § 1324a, and may modify or vacate a decision or order of the ALJ within thirty days of the date of entry of that decision and order. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 2 (2013); *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 478 (1995).[1]

III. DISCUSSION

A. Arguments of the Parties

Respondent raises five principal arguments in its Request for Administrative Review and Brief in Support of Request for Administrative Review. First, respondent argues that for 115 of the Forms I-9 upon which ICE based an alleged violation, Durable complied with the employment eligibility verification requirements in substance, but merely recorded the document information (minus the issuing authority) and signed in the wrong section. Thus, respondent contends, these violations should have been characterized as "technical or procedural" violations, and the fines for those violations should have been eliminated.[2] In its response to the request for

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and 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 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 OCAHO's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[2] Respondent argues in a footnote in its Brief in Support of Request for Review that although ICE argued that a number of the 115 I-9s at issue also contained violations in section 1 of the form, those violations were not charged by ICE, and therefore respondent should not be fined for those violations. However, each of the I-9s at issue was

review, ICE refers back to the arguments and citations made in its Motion for Summary Decision and Response to the Respondent's Motion for Summary Decision, and asserts that the ALJ's finding on this issue is supported by statute, regulation, and OCAHO case law.

Second, respondent argues that even if those 115 violations are considered to be "substantive" violations, they were not serious violations (and, therefore, did not warrant aggravating the penalty) because the forms reflect that Durable reviewed appropriate documents, recorded the document information (except for the issuing authority), and attested to this review and recordation under penalty of perjury. In response, ICE argues that the ALJ's determination that these were serious violations was supported by facts and case law.

Third, respondent argued that in assessing the penalty the ALJ erred in shifting the burden of proof to respondent on the issue of good faith. ICE argued in response that shifting the burden to respondent was proper because ICE had presented evidence to demonstrate the absence of good faith, and respondent was then required to rebut this evidence with evidence of its own.

Fourth, respondent argued that the ALJ improperly allowed the fines to be increased "three-fold" based on a history of previous violations, despite a temporal gap of more than twenty years between the previous violations and the current violations. ICE asserts that the ALJ's findings on this issue again were supported by facts and case law.

Finally, respondent argued that the violations at issue here were far from the "most egregious," and yet the ALJ determined that fines near the maximum amount were appropriate. Respondent argues that the ALJ gave undue weight to the fact that a significant number of unauthorized workers were found to be working at Respondent's facility, and compares its violations to those in *United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211 (2014), in which fines at the maximum level were not deemed appropriate. In response, ICE points to the ALJ's finding that *M & D Masonry* was distinguishable from the instant case because, unlike respondent in this case, M & D Masonry "had no history of previous violations and its workforce did not consist of more than ninety percent unauthorized employees."

B. Recording Document Information and Signing in Section 3 Instead of Section 2 of Form I-9

Respondent argues in both its request for review and its brief in support that recording document information and signing in section 3 of the Form I-9 instead of section 2 is merely a "technical or procedural" violation, not a "substantive" violation; thus, respondent contends that the fines for the 115 subject I-9s should be eliminated. Respondent asserts that the language of the attestation statement in section 3 is "effectively identical" to that in section 2, and, therefore, by reviewing the employees' documents, recording the document information (other than the hiring date and issuing authority) in section 3, and attesting under penalty of perjury to having done so, respondent substantially complied with the employment eligibility verification requirements.

---

included by ICE in Count II or Count IV of the original complaint. Thus, each of those I-9s is properly the subject of a violation and accompanying fine for the violations charged.

In her final decision, the ALJ held that "an employer may not elect to sign section 3 as a substitute for properly completing section 2 of an employee's I-9." Final Decision and Order, at 12. I agree. As the ALJ correctly notes, information required in section 2 is missing from section 3, including—crucially—the date of hire. Omitting the date of hire from the Form I-9 renders it impossible to determine whether the employee timely completed the attestation as to their citizenship or immigration status upon the date of hire and whether the employer timely completed the required document review and employer attestation within three business days of the date of hire, as required by 8 C.F.R. § 274a.2(b)(1)(ii).

Moreover, it is clear from the face of the form that use of section 3 is only appropriate if an employee is rehired and/or if the employee's previous grant of work authorization had expired. Indeed, the portion of section 3 in which respondent entered document information explicitly states that it should only be used if the employee's previous grant of work authorization has expired.

Therefore, clearly section 3 is to be used only if section 2 was properly completed at the time of hire, and if the employee is rehired or their previous work authorization had expired. Regardless of whether information is entered by the employer in section 3, the failure to properly complete and sign section 2 of the Form I-9 within three business days of the date of hire is a substantive violation. *See United States v. Catalano*, 7 OCAHO no. 974, 860, 866 (1997).

C. Seriousness of the Violations

The failure to properly complete and sign section 2 of the Form I-9 within three business days of the date of hire is also a serious violation. *See United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 4 (2014). Respondent argued that even if recording information and signing in section 3 instead of section 2 is a substantive violation, it is not a serious violation, and the penalties for those violations should be reduced accordingly. In support of this argument, respondent cites *United States v. Catalano*, 7 OCAHO no. 974, 860, 872 (1997), which held that the failure to sign the attestation in section 2 rendered the Forms I-9 at issue deficient, regardless of the fact that the employer had apparently erroneously signed section 3, instead of section 2. Respondent asserts that as to the issue of the seriousness of the violation, the *Catalano* case held that signing the I-9 in section 3, instead of section 2, was not a serious violation. However, this mischaracterizes the *Catalano* decision.

The ALJ in *Catalano* ultimately stated that he was "unable to conclude that these violations are *sufficiently serious* to warrant ratcheting up the civil money penalty." *Catalano*, 7 OCAHO no. 974, at 872 (emphasis added). The ALJ in that case did not say that the violations were not serious; instead, the ALJ merely found that, in the context of that particular case, they were not *sufficiently serious* to significantly increase the penalty. In that case, all of the other statutory factors inclined in favor of the company—the company was a small business; complainant did not demonstrate an absence of good faith; there were no unauthorized workers found in the company's workforce; and there was no history of previous violations. *Id.* at 869-72. In that context, the ALJ concluded that the government had not proven that the employer's conduct had materially affected the purpose of the verification regimen, and, therefore, refused to aggravate the penalties on the basis of seriousness of the violations. *Id.* at 872. Obviously the context of the

violations is very different in this case, given Durable's history of previous violations and the presence in its workforce of a substantial number of unauthorized workers (ninety percent).

Moreover, even if these violations were considered to be somewhat "less serious" because of the recording of most of the document information and an employer signature in section 3, it is well settled in OCAHO case law that, although the ALJ must give due consideration to each of the statutory factors, each factor need not be given equal weight, and other factors may be considered. *See, e.g., United States v. Senox Corp.*, 11 OCAHO no. 1219, 8 (2014) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000)). Some factors may be more compelling than others in the context of a specific case, and may justify substantial penalties even if some of the violations are not deemed to be the absolute most serious violations possible. *See infra* III.F. Here, the ALJ appropriately concluded that all of the violations were properly classified as "serious," even if in differing degrees.

D. Good Faith of the Employer

Respondent next argues that the ALJ erred in shifting the burden of proof to respondent on the issue of the good faith of the employer. Respondent asserts that the ALJ improperly focused on respondent's failure to present evidence of good faith, thereby erroneously shifting the burden of proof to respondent from ICE, which has the burden of proof to demonstrate a lack of good faith. Respondent also argues that the ALJ failed to acknowledge that respondent's compliance "improved dramatically" between the time of the previous violations and the issuance of the Notice of Inspection in this case. Respondent concludes that, even if the fines were not to be decreased based on a finding of good faith, neither should they have been aggravated on the basis of bad faith. Respondent therefore contends that the overall fine should be reduced accordingly.

Respondent confuses shifting the burden of *proof* with shifting the burden of *production*. The burden of proof as to liability and as to the existence of any aggravating factors to increase the penalty always rests with the government in cases under 8 U.S.C. § 1324a. *See, e.g., United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 2 (2014). However, once the government has introduced evidence related to a given factor, the burden of *production* shifts to the respondent to introduce evidence of its own to controvert the government's evidence. *See, e.g., United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382 (1991) (modification by the CAHO) ("[T]he complainant bears the ultimate burden of proving the allegations of the complaint by a preponderance of the evidence…. While this burden never varies, […] the burden of producing or going forward with evidence may shift between the parties."); *cf. United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996) (explaining the shifting burden of production in the context of motions for summary decision); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202 (2013) (explaining and applying the shifting burden of production in retaliation cases under 8 U.S.C. § 1324b). If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden of proof on that element. *See Alvand, Inc.*, 2 OCAHO no. 352, at 382-87.

Such is the case here. ICE introduced evidence of the prior settlement agreement entered into by Durable respecting numerous previous violations of 8 U.S.C. § 1324a. The existence of this agreement, combined with Durable's subsequent failure to institute a process to ensure

compliance with the employment eligibility verification requirements in any significant manner going forward, was deemed sufficient to demonstrate the absence of good faith by the employer. Respondent claimed that it performed internal audits and conducted informal training, but the ALJ observed that the alleged audits apparently resulted in the creation of false or deficient I-9s. Moreover, respondent failed to offer any admissible evidence to show that the alleged training did indeed take place. Thus, the ALJ concluded that respondent's actions (or lack thereof) demonstrated a "noncompliant disposition" similar to that found in *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO no. 958, 537, 543 (1997), and this was sufficient to find that respondent did not act in good faith. I find no error in this analysis. At no time did the ALJ shift the burden of *proof* onto respondent on the good faith factor; rather, once ICE had introduced evidence showing the lack of good faith, the burden of *production* shifted to respondent to introduce evidence of its own to rebut ICE's evidence. However, respondent failed to do so.

E. History of Previous Violations

Respondent argued that the ALJ allowed fines to be increased "three-fold" based on a history of violations, despite the temporal gap of more than twenty years between the previous violations and the ones currently at issue. Specifically, respondent alleges that ICE first increased the base fine in the case based on the prior violations, then increased the fines by an additional five percent based on the history of previous violations, and then used the history of violations as a factor supporting another five percent increase in the fines on the basis of bad faith. Respondent points to OCAHO case law explaining that if a factor is given determinative weight in setting the baseline fine, it should not be used to enhance the penalty further. *See, e.g., United States v. La Hacienda Mexican Café*, 10 OCAHO no. 1167, 3 (2010). However, this challenge to the ALJ's final decision and order is inapposite.

First, although the history of previous violations was a factor in the good faith analysis undertaken by the ALJ, it was not the sole (or even primary) basis for the finding with respect to good faith. Rather, the focus was on the actions taken by the employer *after* entering into the settlement agreement respecting the previous violations, actions which were apparently non-existent or completely ineffectual based on the number and types of violations respondent subsequently committed in this case. As the ALJ noted, one of the traditional questions asked in the context of the good faith inquiry is, "what steps, if any, the employer took prior to the [Notice of Inspection] to ascertain what the law requires and to conform its conduct to it." Final Decision and Order, at 14 (citing *United States v. Taste of China*, 10 OCAHO no. 1164, 4-5 (2013)). The ALJ concluded that there was "no evidence that Durable took any steps at all, either directly after entering the settlement agreement or in the ensuing years, to ascertain what the law requires or to conform its conduct to the law's requirements." *Id.* If, perhaps, Durable had sought out Form I-9 guidance or training for its employees, developed training of its own, established standard operating procedures for completion of I-9s, performed regular and well-documented internal audits, or taken any other measurable and documented steps evidencing its desire to fully comply with the law, good faith may have been found, despite its history of previous violations. In this case, however, it was not the previous violations in and of themselves, but rather respondent's failure to conform its practices to the law *after* the previous violations that was the justification for finding that respondent failed to act in good faith.

Second, respondent's reliance on the principle expressed in *La Hacienda Mexican Café* is misplaced. In that case, ICE attempted to use the high percentage of violations as the basis for aggravating the penalty based on a lack of good faith. *La Hacienda Mexican Café*, 10 OCAHO no. 1167, at 3. The ALJ in that case first pointed out that OCAHO case law has consistently held that a poor rate of compliance is insufficient, standing alone, to show lack of good faith, and then observed that because the percentage of violations had already been given determinative weight in setting the baseline fine, ICE should not use it to enhance the penalty yet again. *Id.* It is notable here that the ALJ in this case did not apply ICE's formula or matrix in determining the appropriate penalty. Instead, the ALJ applied the required statutory factors, and did not aggravate the penalty by using any of the statutory factors multiple times.

Accordingly, respondent confuses ICE's method of calculating the penalty level with the ALJ's method of doing so. OCAHO cases have repeatedly observed that the ALJ is not bound by ICE's penalty determination or by the calculations made according to ICE's enforcement matrix. *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011) (citing *United States v. Sunshine Bldg. & Maint., Inc.*, 7 OCAHO no. 997, 1122, 1175 (1998); *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1078 (1998)). Rather, the ALJ considers the record as a whole, with due attention paid to the statutory factors in particular, to arrive at a penalty that appears just and reasonable in light of all the circumstances of that particular case. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 25 (2011); *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995). In certain cases, some facts and factors may be more compelling than in other cases. *See Raygoza*, 5 OCAHO no. 729, at 51 (observing that each factor's significance is based on the specific facts of the particular case). If ICE's proposed penalty appears reasonable in light of the consideration of the record as a whole, and application of the required statutory factors, the ALJ need not modify that penalty. *See Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, at 24. Thus, although ICE may have counted a single factor multiple times in its calculation, which utilizes a rigid penalty matrix, the ALJ has discretion to weigh and consider the statutory factors (and other relevant factors) within the specific context of each individual case. Here, the ALJ found the history of previous violations, in conjunction with respondent's subsequent failure to comport its procedures with the law, its creation of Forms I-9 long after the employees were hired, and its entry of false hire dates on I-9 forms, to be compelling facts. I find nothing improper in the ALJ's consideration of the history of previous violations in this context.[3]

F. Total Penalty Assessment

Finally, respondent argues that penalties near the maximum amount should be reserved for the most egregious violations, and contends that its violations are far from the most egregious. Respondent attempts to compare the violations in this case to the violations at issue in *United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211 (2014), where penalties at the maximum level were found not to be appropriate.

[3] Respondent's argument that the penalties should not have been aggravated based on the history of previous violations because of the temporal gap between the previous violations and the current ones is similarly unavailing. Nothing in the statute imposes a temporal limit on the relevance of the history of previous violations. I find nothing improper in the ALJ's analysis of this issue in her Final Decision and Order.

Although OCAHO cases have expressed the general principle that penalties at or near the maximum should be reserved for the most egregious violations, *see United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014), this does not mean that literally only the most egregious violations possible are deserving of penalties approaching the statutory maximum. Rather, there may be a variety of violations that are sufficiently egregious (after consideration of all of the required factors and the record as a whole) to merit penalties near the allowable maximum. The ALJ concluded after her review that this was such a case, noting that most of the statutory factors weighed against the respondent and there were no apparent equities that would compel significant mitigation of the penalties proposed. Final Decision and Order, at 16.

Discussing the comparison to the employer in the *M & D Masonry* case, the ALJ noted that M & D Masonry and Durable "are not similarly situated because M & D Masonry had no history of previous violations and its workforce did not consist of more than ninety percent unauthorized employees." *Id.* Indeed, these two factors seem particularly compelling in this case because they go to the very heart of 8 U.S.C. § 1324a's purpose. The very purpose of the employment eligibility verification requirements is to ensure that employers verify and certify the identity and employment authorization of every new hire in order to prevent the hiring of unauthorized workers. In this case, Durable failed to properly verify and certify its employees' employment eligibility and ninety percent of its workforce was found to be comprised of unauthorized workers. Furthermore, Durable failed to put meaningful compliance procedures into place after its previous violations and settlement agreement. As the ALJ noted in her final decision, "[t]he principal goal of a civil money penalty is to enhance the probability of future compliance." Final Decision and Order, at 16 (citing *United States v. Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, 6 (2013)). The penalties imposed against Durable based on its previous violations clearly did not significantly enhance its compliance with the requirements of 8 U.S.C. § 1324a, as evidenced by the substantial number of Forms I-9 containing serious violations, and the extraordinary number of unauthorized workers it employed. Consequently, it was reasonable to conclude that penalties near the maximum amount were necessary to induce this employer to fully comply in the future with its obligations under the statute.

IV. CONCLUSION

I find no error in the ALJ's analysis contained in the final decision and order in this case. Instead, I find that: failing to complete and sign section 2 was properly regarded as both a substantive and serious violation; the ALJ did not improperly shift the burden of proof on the issue of good faith; the ALJ properly considered the respondent's history of previous violations in arriving at her decision; and the penalties assessed by the ALJ in her final decision and order appear just, reasonable, and necessary in light of the record as a whole and the statutory factors in particular. Accordingly, the final decision and order of the ALJ is AFFIRMED.

Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final decision and order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have affirmed the ALJ's order, the ALJ's final decision and order will become the final agency order 60 days after its issuance by the ALJ. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 23rd day of October, 2014.

_____

Robin M. Stutman
Chief Administrative Hearing Officer