

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

September 22, 2011

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 10A00068
)	
ICE CASTLES DAYCARE TOO, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under 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 (ICE or the government) is the complainant and Ice Castles Daycare Too, Inc. (Ice Castles Daycare) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint in three counts¹ alleging that the company violated 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). The complaint asserts that Ice Castles Daycare Too, Inc. failed to prepare or retain I-9 forms for 74 employees and seeks penalties of \$55,352.00.

Ice Castles Daycare filed an answer in which it acknowledged that it did not complete or retain I-9 forms for the employees named, raised an affirmative defense pursuant to 8 U.S.C. § 1324a(b)(6)(A), and contended that the penalties sought were excessive. Discovery and preliminary motion practice ensued and are now completed. Presently pending is the government’s motion for summary decision, to which Ice Castles Daycare filed a response. The motion is ripe for decision.

¹ The Notice of Intent to Fine (NIF) includes one count - Failed to Prepare and/or Present the Employment Eligibility Verification Form (Form I-9) for 74 employees. The complaint lists three counts for the same 74 employees, failure to prepare I-9s within three days of the date of hire, failure to comply with the I-9 attestation requirement, and failure to retain I-9 forms, all of which are a part of the one charge in the NIF.

ICE's motion seeks summary decision as to both liability and the requested penalties. Ice Castles Daycare challenged the formula used by the government in calculating its proposed penalty as well as the reasonableness of the result, and requested that the penalties be assessed instead at the statutory minimum rate of \$110 per violation, for a total of \$8,140.00.

II. BACKGROUND INFORMATION

Ice Castles Daycare is a daycare facility for children that is licensed by the State of Texas Department of Family and Protective Services and has its principal place of business in El Paso, Texas. The business was established and began operations in October 2000. It has about 30 employees, and is wholly owned by Alejandrina Delgado and her husband Raul Delgado, who serve respectively as its president and treasurer.

The Affidavits of Alejandrina Delgado and Raul Delgado state that there is a lot of turnover in the day care business and that each has general responsibility for the hiring of employees. Both attest that when the business was begun, they consulted an attorney and an accountant, neither of whom informed them about the need to complete I-9 forms. Both affiants state that they were generally aware that unauthorized aliens could not be hired, but that until they received a Notice of Inspection they were unaware of the I-9 form itself. They did, however, examine documents for each new hire both to verify the person's identity and to ensure that the individual was authorized to work, and in some instances they kept copies of the documents they examined. The affidavits state further that the daycare facility licensing procedure requires every employee to undergo a state and national criminal background check, which requires employees to provide information as to their date of birth, sex, race, ethnicity, skin tone, height, weight, eye color, hair color, place of birth and home address, social security number and driver's license number. Both affidavits assert that the affiants did everything necessary to comply with the employment eligibility verification system except for completing I-9 forms.

The affidavits indicate that Ice Castle Daycare's enrollment is down this summer, from 190 to 144 children owing to cuts in government funded child care assistance and to the generally poor state of the economy. Both point out that the penalty ICE is seeking is much more than their annual business income for each of the years 2006 - 2010.

The record reflects that on July 1, 2009, the government served a Notice of Inspection and Subpoena on Ice Castles Daycare requesting the Employment Eligibility Verification Forms (I-9s) for employees who worked between June 30, 2006 and July 1, 2009. The government thereafter served a Notice of Intent to Fine on Ice Castles Daycare on January 22, 2010. Ice Castles Daycare made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

III. EVIDENCE CONSIDERED

A. Exhibits Accompanying the Government's Motion

The government included with its motion exhibits G-1²) selected pages from the transcript of the May 5, 2011 deposition of ICE Special Agent Lillian Garcia (6 pages); G-2) selected pages from the transcript of the May 5, 2011 deposition of Raul Delgado (5 pages); and G-3) selected pages from the transcript of the May 5, 2011 deposition of Alejandrina A. Delgado (5 pages).

B. Exhibits Accompanying Ice Castle Daycare's Response

The respondent included with its response exhibits R-1) Affidavit of Raul Delgado signed on July 15, 2011 (5 pages); R-1A) U.S. income tax return for Ice Castles Daycare Too, Inc. for 2006 (18 pages); R-1B) U.S. income tax return for Ice Castles Daycare Too, Inc. for 2007 (16 pages); R-1C) U.S. income tax return for Ice Castles Daycare Too, Inc. for 2008 (16 pages); R-1D) U.S. income tax return for Ice Castles Daycare Too, Inc. for 2009 (16 pages); R-2) Affidavit of Alejandrina Delgado signed on July 15, 2011 (5 pages); and R-3) selected pages from the transcript of the May 5, 2011 deposition of ICE Special Agent Lillian Garcia (3 pages).

IV. APPLICABLE LAW

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days notice. 8 C.F.R. § 274a.2(b)(2)(ii). Regulations designate Form I-9 as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2). Forms must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2).

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 \$1,100. The following factors must be considered in assessing the appropriate penalties: 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

² The government's exhibits were not identified by number. Exhibit numbers are assigned for ease of identification.

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, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).³

V. ICE's MOTION FOR SUMMARY DECISION CONSIDERED

The affirmative defense raised in the answer, § 1324a(b)(6), provides a defense to certain technical and procedural violations committed in good faith. Because failure to prepare an I-9 form is a substantive violation and is not merely technical or procedural, *see United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3-4 (2010), the defense is unavailable to Ice Castles Daycare. The government is accordingly entitled to summary decision as to liability for the 74 violations alleged and the only remaining issue is the quantum of civil money penalties. The government's motion says that summary decision is appropriate with respect to this issue as well.

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); *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996). For purposes of considering the government's motion, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), so all reasonable inferences must therefore be drawn in Ice Castles Daycare's favor.

A. The Positions of the Parties

Although Ice Castles Daycare challenges the legitimacy of ICE's guidelines, the operative facts in this case are not in dispute. The parties agree that Ice Castles Daycare is a small employer, that it acted in good faith, that there were no unauthorized aliens involved, that Ice Castles Daycare has no history of previous violations and that all the violations were serious. Where they differ sharply is as to how those particular factors should be evaluated in order to reach an equitable penalty assessment. There are accordingly no genuine issues of material fact in dispute and the penalty issue may be resolved by summary decision.

³ 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>.

1. ICE's Position

The permissible penalties in this case range from a low of \$8,140 to a high of \$81,400. ICE's motion seeks an assessment of \$748 for each violation, or a total of \$55,352. The deposition transcript of ICE Special Agent Lillian Garcia indicates that she calculated the baseline penalty as \$935 per violation, and then mitigated that amount by 5% each for the size of the business, good faith of the employer, whether or not the individuals involved were unauthorized aliens, and any history of previous violations by the employer. Garcia treated the factor of seriousness of the violations as neutral.

The government did not explain with specificity how the baseline penalty itself was established, but this is typically done based on ICE's internal guidelines as set forth at U.S. Immigration and Customs Enforcement (ICE), *Form I-9 Inspection Overview 5-6* (2009), available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/i9-inspection.pdf>. The guidelines utilize a matrix which indicates that where more than 50% of the employer's I-9s are missing or defective, the baseline penalty for a first offense violation is \$935.00.

Special Agent Garcia testified in a deposition that the only leeway she has in setting the fine is either to aggravate or to mitigate the baseline penalty on the basis of one or more of the five factors under the enhancement matrix. The matrix permits a 5% aggravation or mitigation for each factor, or a maximum of 25% for all the factors combined. Garcia also testified that ICE was able to verify that all the employees were authorized to work.

2. Ice Castles Daycare's Position

Ice Castles Daycare challenged the ICE guidelines themselves, pointing out that the factor upon which ICE places the majority of the weight, the percentage of violations, isn't even one of the five factors set out by the legislature for consideration. Ice Castles Daycare contends that using the percentage of violations as the first and foremost criterion can lead to such absurd results as a small mom and pop company with the maximum permissible mitigation paying a much higher fine than a large national company with the maximum permissible aggravation would have to pay for the exact same number and kind of violations, just because of the percentage differential. It argues further that ICE's formulaic methodology gives an insufficient role to the mandated statutory factors, lacks the force of law, and is entitled to minimal deference.

Ice Castles Daycare also emphasizes that such a large fine is unnecessary and could put it out of business. Its ordinary business income in 2006 was \$20,962, in 2007 it had a loss of \$4,092 and in 2008 and 2009 its ordinary business income was \$5,536 and \$37,910 respectively. The facility now has declining enrollments. Both affidavits point to current compliance and new recordkeeping procedures ensuring future compliance.

B. Discussion and Analysis

In this forum, there is no one single permissible method of calculating penalties, *see United States v. Felipe*, 1 OCAHO no. 108, 726, 731-32 (1989) (affirmation by CAHO). Our case law has utilized both the mathematical approach initially taken in *Felipe*, *see United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 924, 938-40 (1994), and a judgmental approach, *see United States v. Catalano*, 7 OCAHO no. 974, 860, 869 (1997); *United States v. Reyes*, 4 OCAHO no. 592, 1, 6-7 (1994). There are other possibilities as well, and ICE has developed its own methodology for establishing penalties.

The enforcement agency has broad authority and discretion in deciding how it will 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)), and when the government reaches an appropriate assessment, the result need not necessarily be disturbed. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 200 (1998) (approving proposed penalties after finding them within the statutory parameters and warranted by the evidence). But where, as here, the proposed penalties appear to be disproportionate, and ICE was able to verify that the respondent did ensure that all the employees were work-authorized, the result can be adjusted. The government's guidelines have no binding effect in this forum, *see United States v. Sunshine Building & Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1175; *United States v. Fortune East Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1078 (1998),⁴ and OCAHO may exercise its authority to review the penalty question de novo. *Aid Maintenance*, 8 OCAHO no. 1023 at 344.

This is a relatively young child care facility with a declining enrollment, still struggling in an environment of declining sources of government assistance in an industry with a relatively high turnover rate for employees, the government verified that all the employees were eligible to work, and review of the record makes it evident that ICE in this case actually did everything it could do itself to minimize the penalty within the constraints imposed upon it by the matrices it had to follow. The result it reached, however, is still almost one hundred and fifty percent of the facility's ordinary business income for 2009. OCAHO, on the other hand, has the capacity to take into account developments after the issuance of the NIF, and our case law reflects that additional factors, such as a company's current ability to pay the proposed fine may also be considered and weighed into its assessment of the amount of the penalty as well. *See, e.g., United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

While § 1324a(e)(5) requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations

⁴ The cases cited deal with guidelines previously 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.

requires in OCAHO proceedings either that the same weight be given to each of the factors in every case, *cf. United States v. Monroe Novelty Co., Inc.*, 7 OCAHO no. 986, 1007, 1016-17 (1998), or that the weight given to any one factor is limited to any particular percentage of the total. Rather, the weight to be given each factor in assessing a penalty depends upon the facts and circumstances of the particular case. *Raygoza*, 5 OCAHO no. 729 at 51 (each factor's significance is based on the specific facts in the case).

C. Conclusion

The dominant weight in this case will be given to the size and nature of the business, the efforts it undertook to avoid hiring any unauthorized workers, and its ability to pay. The penalties will in addition be further reduced to take account of the high turnover rate in the child care industry, which puts this employer in the position of having a large number of violations relative to its small number of employees. Reduction of the penalties to a point in the lower midrange should not, however, be viewed as minimizing the seriousness of the violations themselves, which are still among the most serious of paperwork violations. *Reyes*, 4 OCAHO no. 592 at 10. In the exercise of discretion, I find that the penalties should be assessed at \$250 each for a total of \$18,500.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Ice Castles Daycare Too, Inc. is licensed by the State of Texas to operate as a daycare facility for children and has its principal place of business in El Paso, Texas.
2. The U.S. Department of Homeland Services, Immigration and Customs Enforcement served a Notice of Inspection and Immigration Subpoena on Ice Castles Daycare Too, Inc. on July 1, 2009 requesting original I-9 Forms, (Employment Eligibility Verification Forms) for employees working from June 30, 2006 to July 1, 2009.
3. The U.S. Department of Homeland Services, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on Ice Castles Daycare Too, Inc. on January 22, 2010.
4. Ice Castles Daycare Too, Inc. made a request for a hearing before an administrative law judge on January 28, 2010.
5. The U.S. Department of Homeland Services, Immigration and Customs Enforcement filed a complaint in three counts against Ice Castles Daycare Too, Inc. on March 25, 2010.
6. Ice Castles Daycare Too, Inc. filed an answer to the complaint on April 28, 2010 admitting

some of the allegations of the complaint and asserting an affirmative defense.

7. Ice Castles Daycare Too, Inc. was established and began operations in October 2000.
8. Ice Castles Daycare Too, Inc. is wholly owned by Alejandrina Delgado and her husband Raul Delgado, who serve respectively as president and treasurer.
9. As of July 2011, Ice Castles Daycare Too, Inc. had about 30 employees.
10. Employee turnover in the daycare industry is fairly high.
11. The affidavits of Alejandrina Delgado and Raul Delgado reflect that they consulted with an attorney and an accountant prior to establishing Ice Castles Daycare Too, Inc., neither of whom informed them about an employer's I-9 responsibilities.
12. All 74 of Ice Castles Daycare Too, Inc.'s employees were authorized for employment in the United States.
13. As of July 2011, Ice Castles Daycare Too, Inc.'s enrollment was 144 children, down from 190 children.
14. Ice Castles Daycare Too, Inc.'s 2009 U.S. income tax return shows gross sales of \$608,499 and ordinary business income of \$37,910.
15. Ice Castles Daycare Too, Inc.'s 2008 U.S. income tax return shows gross sales of \$582,433 and ordinary business income of \$5,536.
16. Ice Castles Daycare Too, Inc.'s 2007 U.S. income tax return shows gross sales of \$557,688 and ordinary business loss of \$4,092.
17. Ice Castles Daycare Too, Inc.'s 2006 U.S. income tax return shows gross sales of \$557,147 and ordinary business income of \$20,962.
18. Ice Castles Daycare Too, Inc. failed to prepare the Employment Eligibility Verification Form (Form I-9) for all 74 individuals named in the complaint, including Lydia Aceves, Lucila Alba, Sandra Arroyo, Laura Calleros, Rosa D. Campos, Maria Castillo, Berenice Castrejon, Mayda A. Castrejon, Elaine Chavez, Juana Chavez, Elsa Chavira, Veronica Cortez, Ilbian Cruz, Lizett Cruz, Maria Delosangeles, Darlene Escobar, Socorro Esparza, Erika Espinoza, Vera Estrada, Griselda Fierro, Maria Fierro, Lilia L. Flores, Maria Gallardo, Elizabeth Gamero, Luz Garcia, Monica Garcia, Rosa A. Garcia, Natalia Gomez, Claudia Gonzalez, Aida Gracia, Virginia Grenke, Anna Gutierrez, Claudia Hernandez, Dora I. Hernandez, Raul Hernandez, Ruth Hernandez, Sophia Hernandez, Maria Hernandez de Lope, Lizet Herrera, Teresa Herrera, Cindy

Loya, Nidia Maese, Rosa Mata, Ruth J. Melendez, Ruth Mendez, Cynthia Molina, Monica Moreno, Claudia Nevarez, Faveola Nunez, Estela A. Ochoa, Graciela Orozco, Beatrice Porras, Erika Puentes, Laura Ramirez, Marisela Ramirez, Veronica Ramirez, Evelyn Reyes, Luz A. Rivas, Brenda Rivera, Veronica Rocha, Francisca Rodriguez, Monica Ruan, Sylvia Rubio, Adriana Salas, Lynette Saldana, Marta P. Santos, Lisa Soria, Karla Torres, Monica Urquidi, Maria Vazquez, Valerie Velasquez, Cindy Villegas, Ella Whicker and Graciela Zolorzano.

B. Conclusions of Law

1. Ice Castles Daycare Too, 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. Ice Castles Daycare Too, Inc. engaged in 74 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. Ice Castles Daycare Too, Inc. has no history of previous violations of 8 U.S.C. § 1324a.
7. All 74 employees named in the complaint were authorized for employment in the United States.
8. 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).
9. There is no genuine issue of material fact in dispute as to Ice Castles Daycare Too, Inc.'s good faith.
10. Ice Castles Daycare Too, Inc. is a small business.
11. The penalties proposed are disproportionate to the size and resources of Ice Castles Daycare Too, Inc. and should be reduced.
12. Giving due consideration to the record as a whole, to the statutory factors, and to the ability

of Ice Castles Daycare Too, Inc. to pay the penalties will be assessed at the rate of \$250 for each violation.

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

The complainant's motion for summary decision is granted as to liability, and granted as modified with respect to penalties. Ice Castles Daycare Too, Inc. is directed to pay a total of \$18,500 in civil money penalties. All other pending motions are denied.

SO ORDERED.

Dated and entered this 22nd day of September, 2011.

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.