

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

January 24, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 12A00014
)	
LA HACIENDA MEXICAN CAFE,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint with the Office of the Chief Administrative Hearing Officer alleging that La Hacienda Mexican Cafe (La Hacienda) engaged in violations of 8 U.S.C. § 1324a(b) (2006) and 8 C.F.R. 274a.2(b) (2012) by hiring twenty-four named individuals for employment in the United States and failing to prepare and/or present I-9 forms for them upon request. La Hacienda filed an answer and prehearing procedures were undertaken.

Presently pending is ICE’s motion for summary decision. La Hacienda is not represented by counsel and did not respond to the motion. It did, however, make its position clear in its answer and prehearing statement. The government’s motion is accompanied by exhibits G-1) Notice of Inspection (2 pp.); G-2) Current Employee List and Terminated Employee List (3 pp.); G-3) Federal Employer Identification Number; G-4) Enforcement Subpoena 3/3/2011; G-5) Response Letter from California Employment Development Department; G-6) Individual Employee Evidence (36 pp.); G-7) Enforcement Subpoena 4/27/11; G-8) records from California Employment Development Department (19 pp.); G-9) records from California Employment Development Department (10 pp.); G-10) Payroll Summaries (38 pp.); G-11) Employee List; G-12) Business License (3 pp.); and G-13) Notice of Intent to Fine (2 pp.).

II. BACKGROUND INFORMATION

The respondent is a Mexican cafe restaurant in Imperial, California, that was opened in July, 2008 and is owned by Rosalva Q. Caro. The record reflects that ICE served La Hacienda with a Notice of Inspection on February 25, 2011 directing the company to provide copies of its I-9 forms, but that when the government's agents came to collect the forms, Rosalva Caro stated that the company had no I-9s on file. Ms. Caro provided two lists, one for the seven then-current employees and another for some former employees. Her son, Oscar Caro, subsequently provided the hire and termination dates for the former employees. On November 7, 2011, a Notice of Intent to Fine was served on the company, and on November 18, 2011, La Hacienda filed a request for hearing. All conditions precedent to the institution of this proceeding have been satisfied.

The company's answer to the complaint asked for reduction in the proposed penalties because the respondent is a small cafe unable to pay a fine of \$22,440 as is requested. The answer notes that Imperial Valley, California, has the highest unemployment rate in the nation, that the restaurant had to close one location (of two) in 2010 because of the economy, and that the number of employees had dropped from twenty-four to seven. The company's prehearing statement said that Ms. Caro was simply unaware of the I-9 form until the NOI was served, but that she did ask new employees for resident alien cards, government issued IDs, and driver's licenses and that all the employees had proper documentation. No unauthorized aliens were found in the workforce.

III. DISCUSSION AND ANALYSIS

There appears to be no genuine issue of material fact as to the violations themselves, and La Hacienda will accordingly be found liable for hiring the following individuals and failing to prepare and/or present I-9 forms for them upon request: Carmen Cornejo, German Ortiz, Gloria Palomares, Juan Ramirez-Diaz, Concepcion Rodriguez, Jose Rodriguez, Ricardo Sillas-Gamboa, Mario Aguirre, Elizabeth Arevalo, Wendy Duarte, Diana Estrada, Consuelo Flores, Jessica Ibarra, Luz Maria Longoria, Ricardo Longoria, Jr., Lina Lopez, Domingo Ortega, Maria Jesus Perez, Gema Quintero, Jose Quintero, Sergio Ramirez, Jesus Rivas Gomez, Angela Trull, and Leonardo Vargas.

The government's penalty calculation started with a baseline fine of \$935 for each violation based upon the fact that 100% of the forms were missing. ICE said it aggravated the penalties for lack of good faith and the seriousness of the violations, but then mitigated them based on the size of the employer and the lack of history of previous violations. The baseline thus remained \$935 for each violation and the total sought is \$22,440. La Hacienda's answer, on the other hand, requests that the penalties be reduced to \$100 for each violation, or a total of \$2400.

While I concur with the government's conclusion that the violations are serious, I cannot concur in its suggestion that there is any lack of good faith shown. Our case law has long held that a poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply. See *United States v. Karnival Fashion, Inc.*, 5 OCAHO no 783, 477, 480 (1995) (modification by the CAHO). No such culpable conduct has been asserted here. The government concluded instead that "[t]he high percentage of substantive violations is indicative of the serious disregard for the employment eligibility verification requirements," but in order to "disregard" a requirement, one has to be at least minimally aware of the requirement in the first place. There is not the slightest suggestion in the record that Ms. Caro had any knowledge of the requirement. The percentage of violations has in any event already been given determinative weight in setting the baseline fine; it should not be used to enhance it yet again. Ms. Caro evidently ensured that all the workers were authorized for employment and there is no history of any previous violations. Both these factors weigh in the employer's favor.

A final factor to be considered that was not addressed by the government is the extent to which a respondent is able to pay the proposed penalty. See *United States v. H & H Saguario Specialists*, 10 OCAHO no. 1147, 5 (2012)¹ (citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995)); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993)). Neither party submitted evidentiary materials bearing on this question but I have no reason not to credit the statements in La Hacienda's answer that the cafe is "barely making it right now," and that having to pay \$22,440 "will take [it] out of business."

The penalties requested here are so near the maximum permissible as to appear disproportionate to the size and character of this small cafe restaurant. The only negative factor is the seriousness of the violations; all the other factors are favorable to the employer. Penalties at or near the maximum permissible should be reserved for more egregious circumstances than are reflected here. The penalties in this case will accordingly be adjusted as a matter of discretion in light of the record as a whole to \$400 for each violation.

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>.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. La Hacienda Mexican Cafe is a Mexican restaurant located in Imperial, California, that was opened in July, 2008 and is owned by Rosalva Q. Caro.
2. The United States Department of Homeland Security, Immigration and Customs Enforcement served La Hacienda Mexican Cafe with a Notice of Inspection on February 25, 2011.
3. The United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine on La Hacienda Mexican Cafe on November 7, 2011.
4. La Hacienda Mexican Cafe filed a request for hearing on November 18, 2011.
5. La Hacienda Mexican Cafe hired Carmen Cornejo, German Ortiz, Gloria Palomares, Juan Ramirez-Diaz, Concepcion Rodriguez, Jose Rodriguez, Ricardo Sillas-Gamboa, Mario Aguirre, Elizabeth Arevalo, Wendy Duarte, Diana Estrada, Consuelo Flores, Jessica Ibarra, Luz Maria Longoria, Ricardo Longoria, Jr., Lina Lopez, Domingo Ortega, Maria Jesus Perez, Gema Quintero, Jose Quintero, Sergio Ramirez, Jesus Rivas Gomez, Angela Trull, and Leonardo Vargas for employment in the United States and failed to prepare and/or present I-9 forms for them upon request by the government.
6. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer alleging that La Hacienda Mexican Cafe (La Hacienda) engaged in twenty-four violations of 8 U.S.C. § 1324a(b) (2006) and 8 C.F.R. 274a.2(b) (2012).

B. Conclusions of Law

1. La Hacienda Mexican Cafe 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. La Hacienda Mexican Cafe engaged in twenty-four violations of 8 U.S.C. § 1324a (2006).
4. All the violations were serious in nature.

5. A poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).
6. Proportionality is a critical factor in setting penalties. *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012).

ORDER

La Hacienda Mexican Cafe is found liable for twenty-four violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) and is directed to pay penalties in the total amount of \$9600.

SO ORDERED.

Dated and entered this 24th day of January, 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.