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

May 2, 2013

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00020
SIWAN & BROTHERS, INC. D/B/A SUBWAY #37616, 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 & Brothers, Inc. (Siwan & Brothers, the respondent, or the company) d/b/a Subway #37616 in Lumberton, North Carolina. The respondent filed a timely answer to the complaint and prehearing procedures were undertaken. The matter was thereafter stayed for a lengthy period owing to [redacted] affecting Mohammed Siwan, the president, representative, and resident agent for the company, who had been acting for the restaurant in these proceedings. [Redacted], and ultimately his wife, Christine Siwan, and the company's accountant, Omayra D. Coon, CPA, had to take over the representation.

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

[1] The other case is *United States v. Siwan & Sons*, No. 11A00021, involving two Subway stores located at 930 NC Highway 711 (Subway #35029) and 963 Prospect Road (Subway #23095) in Pembroke, North Carolina.

II. BACKGROUND INFORMATION

Siwan & Brothers operates as a Subway franchise restaurant located at 5070 Fayetteville Road, Lumberton, North Carolina 28358 (Subway #37616). ICE served the company with a Notice of Inspection (NOI) on December 16, 2009 requesting production of the company's I-9s and supporting documents for its current employees and for former employees terminated between January 1, 2008 and December 16, 2009. Siwan & Brothers produced fifty-two I-9s 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 on October 18, 2010. All conditions precedent to the institution of this proceeding have been satisfied.

III. THE MOTION AND RESPONSE

A. ICE's Motion

Count I of the complaint alleged that the company failed to ensure that forty-five named employees properly completed section 1 of the form at the time of hire, and/or failed itself to complete section 2 or section 3. Count II alleged that the respondent failed to produce I-9s for Amber D. McGuire, Ihab Tarda, and Fathi Ziad Siwan. ICE's motion asserts that there is no genuine issue of material fact and that it is entitled to summary decision as to liability, as well as to proposed penalties totaling $46,282.00 for Count I and $3085.50 for Count II, or a grand total of $49,368.00.

First, the government contends that visual inspection of the I-9 forms for the individuals named in Count I reflects that forty-three of the forms are backdated, were not completed within three days of hire, and lack the employee's signature in section 1. On many of the forms section 2 is not fully completed, and on forty-four forms the respondent failed to enter the issuing authority or expiration date for the documents listed. Although copies of supporting documents are attached to the forms for Mohammed Siwan and Megan Leigh Moss, the pertinent information has not been entered on the form. The form for Victoria Ashley Locklear has no signature on the attestation in section 2. As to Count II, the social security numbers for Amber D. McGuire, Ihab Tarda, and Fathi Ziad Siwan appear on the company's wage records and those individuals received wages during the relevant period, but no I-9 was presented for them at the time of inspection.

ICE says that because there were violations for 87.27% of the respondent's workforce, 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 parent franchisor, including training in I-9 compliance. ICE says it aggravated the penalties further based on the seriousness of the violations for failure to complete section 2, and what it characterizes as the respondent's lack of good faith, the most visible evidence of which was backdating that appeared on the I-9 forms. On fifty-one forms, the date the company entered on the form actually preceded the revision date of the version of the form used, showing that the form Siwan & Brothers used did not actually exist on the date the restaurant representative purportedly signed it.

Exhibits accompanying the motion were identified as A) Articles of Incorporation (2 pp.); B) Notice of Inspection and Subpoena (6 pp.); C) ICE Office of Investigations, Reports of Investigation Summary (6 pp.); Forms I-9 and supporting documentation provided by respondent (59 pp.); E) Employment Security Commission of North Carolina Wage Records for 2008 and 2009 (6 pp.); F) Notice of Intent to Fine (7 pp.); G) ICE Office of Investigations, Memorandum to Case File (7 pp.); The respondent's statement attached to his request for a hearing (15 pp.); I) Human Resources material provided by Subway (64 pp.); J) Choice Point Records (3 pp.); and K) The respondent's statement dated October 29, 2010 (12 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 I-9 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 still 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 restaurant's old I-9s onto the revised version because he misunderstood an internet posting stating that prior editions of Form I-9 would no longer be valid after April 3, 2009. Because he has limited knowledge of English, he thought that the original forms had to be redone on the new version of the I-9 form. The

response acknowledges that Mohammed Siwan also made mistakes in completing the forms. As to the persons named in Count II, the company argues that Ihab Tarda was originally hired by Siwan & Sons, Inc. and that his I-9 was produced in response to the subpoena in that case. If he was paid by Siwan & Brothers it was because he was "borrowed" from the other restaurant. Similarly, if Fathi Ziad Siwan was paid by Siwan & Brothers, he was just filling in for someone else. Amber McGuire's I-9 was not produced because Siwan did not copy it.

The response argues that the penalties proposed are unjust and would force the closing of the business, thus leaving the employees without jobs and devastating the family. The company says it is a small employer, 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.); R-8) Manager Hiring Procedure Manual, Form I-9 Section, Updated 12/3/10 (67 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

The record reflects that there is no genuine issue of material fact respecting the violations alleged. Siwan & Brothers hired Mohammed Fathi-Abdalla Siwan, Victoria Ashley Locklear, Alexzandria L. Arbasetti, Sandy M. Patterson, Renee Stapleton, Shannon C. Cronis, Cornia L. Jacobs, Katherine D. Loman, Kelly Nicole Lewis, Zakaria N. Al-Hatto, Jason E. Mccarty, Martin

L. Williams, Jr., Miranda L. Davis, Megan F. Wingerter, Alicia P. Pierce, Charlene N. Cook, Rebecca A. Brown, Renae B. Sanders, Tracy N. Locklear, April R. Cumbie, Candis Smith, Samantha K. Inman, Tabatha M. Jacobs, Thomas Z. Jones, Tiffany C. Bullard, Valery Quinones Villegas, Kayla N. Grant, Jamie Lee MacClean, Kelly N. Hendrix, Lorinda Gerald, Jerrie L. Anderson, Kayla N. Wilkins, Megan Leigh Moss, Kimiko A. English, Magen A. Harding, Catherine R. Barnes, Kristen N. Edwards, Kristen D. Rice, Linda Bunnell, Amanda C. Hunt, Brandi N. Hunt, Amie S. Balsiger, Laura A. Hunt, Michelle Rangle Garcia, and Kendra Hunt, and visual inspection of the forms reflects that the company failed to ensure that each employee properly completed section 1 of Form I-9, or failed itself to properly complete section 2. Siwan and Brothers is accordingly found liable for the violations in Count I. The three violations in Count II are basically undisputed and liability is established for them as well.

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. Permissible penalties in this matter thus range from $5280 to $52,800, and ICE seeks $49,368.

The following factors must be considered in assessing an appropriate penalty: 1) the size of the business of the employer being charged, 2) the employer's good faith, 3) the seriousness of the violation, 4) whether or not the individual involved were unauthorized aliens, and 5) the history of previous violations. 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 the statutory 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 operation.

First, as has previously been observed, the high turnover of employees in the fast food industry may give a misleading impression as to a franchise restaurant's actual size. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 7-8 (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. Notwithstanding the number of I-9s involved, the fact is that at the time of the inspection in this case Siwan & Brothers had seven employees. In light of previous OCAHO case law, the restaurant 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 suggestion of an absence of good faith, the evidence is not sufficient to create a factual issue. While 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," 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. 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 & Brothers 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 Ihab Tarda and Fathi Ziad Siwan had been verified and these employees' I-9s had been completed by the company's affiliate, Siwan & Sons.

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 factor in favor of leniency toward this small employer is the legislative policy preference reflected 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 will be assessed at the rate of $200 for each violation. The total penalty is $9,600.

V. FINDINGS OF FACT AND CONCLUSION OF LAW

A. Findings of Fact

1. Siwan & Brothers, Inc. operates as a Subway franchise restaurant and is located at 5070 Fayetteville Road, Lumberton, North Carolina 28358 (Subway #37616).

2. The Department of Homeland Security, Immigration and Customs Enforcement served Siwan & Brothers, 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 & Brothers, Inc. on October 4, 2010.

4. Siwan & Brothers, Inc. made a request for hearing on October 18, 2010.

5. The Department of Homeland Security, Immigration and Customs Enforcement filed its complaint on November 18, 2010.

6. Siwan & Brothers, Inc. hired forty-five named employees for whom the company failed to properly complete Form I-9 at the time of hire.

7. Siwan & Brothers, Inc. hired Amber D. McGuire, Ihab Tarda, and Fathi Ziad Siwan and failed to produce I-9 forms for them upon request.

B. Conclusions of Law

1. Siwan & Brothers, 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 & Brothers, Inc. engaged in forty-eight violations of the requirements of the Employment Eligibility Verification System. 8 U.S.C. § 1324a(a)(b).

4. The proposed penalties are reduced as a matter of discretion.

ORDER

Siwan & Brothers, Inc. is found liable for forty-eight violations and directed to pay a penalty in the amount of $9600.

SO ORDERED.

Dated and entered this 3rd day of May, 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.