

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

May 13, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 12A00040
)	
SILVERADO STAGES, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances: Kristin Piepmeier, Esq.
for Complainant

Daniel M. McGee, Esq.
for Respondent

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). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a two-count complaint against Silverado Stages, Inc. alleging that the company violated 8 U.S.C. § 1324a(b). Count I alleged that Silverado failed to prepare or present I-9 forms for twenty-eight employees, or failed to ensure that the forms were properly completed. Count II alleged that Silverado failed to prepare section 2 of Form I-9 for one employee. Silverado filed an answer contesting all the violations as well as the penalties.

The government subsequently amended its complaint to dismiss twelve of the allegations in Count I and move three violations in that count to Count II, as well as to reduce the penalties commensurately. As amended, Count I alleged that Silverado hired thirteen named individuals for whom it failed to timely prepare and/or present I-9 forms. Count II alleged that Silverado hired Sharron Galusha, Milton Gallagher, Douglas Murphy, and Steven R. Singer and failed to ensure that each employee properly completed section 1 of the form, or failed itself to properly complete section 2. ICE sought penalties in the total amount of \$7480 based on an assessment

of \$440 for each violation.

Presently pending is the government's motion for summary decision. Silverado filed a timely response and the motion is ripe for resolution.

II. BACKGROUND INFORMATION

Silverado, an S corporation owned by Jim and Sharron Galusha, has been in business since 1994 and is engaged in the operation of transportation fleets. A press release dated March 15, 2012 reflects that the company is the largest private motorcoach operator in California and the twenty-first largest in the country. It has four divisions or sites and employs 140 people. Silverado is headquartered in San Obispo, California and has a gross annual income of eleven million dollars.

The Department of Homeland Security, Immigration and Customs Enforcement (ICE) served a Notice of Inspection on Silverado on June 21, 2010 and thereafter conducted an inspection, during the course of which a Notice of Suspect Documents was issued on August 31, 2010 and a Notice of Intent to Fine on March 15, 2011. Silverado filed a request for hearing on April 6, 2011 and all conditions precedent to the institution of this proceeding have been satisfied. The complaint was filed on March 5, 2012.

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion for Summary Decision

1. Liability

The government asserts that visual inspection of Silverado's I-9s shows that while the thirteen employees listed in Count I were hired at various times between 2003 and 2009, the earliest completion date listed on any of the employees' I-9s is February 2, 2010. ICE states that A) Carlos Bobadilla was hired on June 15, 2009, B) Juan Corpus (Raya) was hired on January 21, 2009, C) Matthew Davidson was hired on June 2, 2008, D) James Dowdy was hired on December 5, 2008, E) Paulyne Eskew was hired April 16, 2007, F) David Good was hired April 10, 2007, G) Candida Hemphill was hired November 8, 2008, H) Laura Keele was hired August 7, 2008, I) Joan Kenyon was hired September 29, 2008, J) Lee Pewitt was hired on October 6, 2003, K) Andy Schweitzer was hired on October 22, 2007, L) Jose (Manuel) Solis was hired on April 29, 2007, and M) Cynthia Wilson was hired on December 4, 2007. While some of these I-9s were completed in February 2010, the I-9 forms for Joan Kenyon and Lee Pewitt were not completed until June 22, 2010, the day after service of the NIF.

ICE points out specific defects with respect to the I-9s for the individuals named in Count II. The government notes that on Sharron Galusha's I-9 form, the social security number entered in section 2 does not match the one in the company's payroll register or the taxing authority records, and no copy of Galusha's social security card was retained with the I-9 form. The government contends that this discrepancy reflects that Silverado failed to properly verify that Sharron Galusha was authorized to work in the United States.

On Milton Gallagher's I-9 form, ICE points out that "SSN" is entered as a List C document and argues that the meaning of "SSN" is unclear. ICE also points out that the attached copy of Gallagher's social security card reflects a different social security number from the number that is entered in section 2. ICE says that the term "SSN" is also entered as a list C document on Douglas Murphy's I-9, but because no copy of Murphy's social security card was attached to the I-9 "it is impossible to clarify the abbreviation." The government argues that the term "SSN" is not "widely understood."

On the I-9 for Steven Singer, a passport is entered as a List A document, but the document attached shows that Singer's passport had expired in October 2007, and the hire date on his I-9 is June 7, 2010. Silverado also verified a driver's license, which is a List B document that is valid to establish identity, but not work authorization.

2. Penalties

The government requests penalties in the amount of \$7480, or \$440 for each violation. By way of explanation, ICE notes that Silverado is a mid-size business in terms of its annual sales and the size of its workforce. ICE says that the company should have complied better because it has been operating since 1987 and has revenues in the millions of dollars. But because there is no evidence of culpable conduct, ICE treats the good faith factor as neutral. The government treats the absence of any history of previous violations as a neutral factor as well. ICE's memorandum says that it aggravated the penalties both because of the seriousness of the violations and because of the presence of unauthorized aliens in the workforce in that two employees, Juan Corpus (Raya) and Jose Manuel Solis, lacked proper documentation. No specific amount is set forth by which the penalties were aggravated, and there is no indication what the baseline amount was. While a copy of the ICE Worksite Enforcement Guidelines is included as an exhibit, there is no explanation provided as to how the Guidelines were applied in this particular case.

ICE's motion was accompanied by exhibits consisting of A) Memorandum of Law in Support of Motion for Summary Decision (14 pp.); B) Notice of Inspection; C) Notice of Intent to Fine (5 pp.); D) Request for Hearing (2 pp.); E) Business Entity Detail; F) I-9 forms (40 pp.); G) Payroll records (17 pp.); H) Business Entity Questionnaire (3 pp.); I) employee list (2 pp.); J) ICE Worksite Enforcement Guidelines (49 pp.); K) Wage and withholding report dated July 31, 2010

(22 pp.); L) PR Web, *Silverado Stages Named Largest California Based Private Motorcoach Company*, March 15, 2012 (2 pp.); M) Notice of Suspect Documents (3 pp.); and N) Certificate of Service.

B. Silverado's Response

1. Liability

Silverado suggests that it substantially complied with the requirements of the statute and that the violations are technical or procedural. The company says it engaged in due diligence and that any mistakes or omissions were not of a character to warrant the penalties ICE seeks. Silverado also says that in the absence of a final agency rule regarding which violations are technical or procedural, the decision as to whether a violation is substantive "is often made arbitrarily and capriciously at the discretion of an agent."

As to Count I, the company says that although ICE is alleging that the forms were not timely prepared, the government actually does not know for a fact whether the forms were prepared but then misplaced, lost, or destroyed, and that there is no reason to assume that the I-9s were not prepared at the time of the named individuals' employment. Silverado says the proportion of missing forms is small and that it is "plausible" that the forms were prepared but were lost or destroyed when the business relocated or when the personnel department changed.

As to Count II, Silverado contends that the specific facts surrounding each of the alleged violations do not warrant the penalties being sought. The company points out that the discrepancy between Sharron Galusha's social security number as it appeared on the I-9 form and as it appeared on the payroll register was corrected as soon as it was identified. Silverado says Milton Gallagher's I-9 was accompanied by a copy of his social security card that bore the same social security number as the number in section 1 of the form, and that the government's suggestion that the term "SSN" is unclear is absurd. Similarly, the company says Douglas Murphy's I-9 had a properly identified social security number and a copy of the missing card was available. Finally, Steven Singer's expired passport number was noted on his I-9.

2. Penalty

Silverado reiterates its view that ICE has too much discretion in deciding whether a violation is substantive as well as in selecting a penalty. The company says that only a few errors were detected in the hundreds of forms the auditors took, that Silverado has dedicated personnel and outside consultants, and that it takes corrective action when needed. The company argues that any violations it committed are technical, that the individuals named were authorized, and that the fact that two employees were found to have fraudulent documents was not the company's fault.

IV. DISCUSSION AND ANALYSIS

A. Liability

The distinction between substantive violations and those that are technical and procedural is elaborated in a memorandum to INS from Paul W. Virtue, INS Acting Executive Commissioner for Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), available at 74 No. 16 Interpreter Releases 706, at app. I (Apr. 28, 1997). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001),¹ public dissemination of the Interim Guidelines may be viewed as an invitation to rely upon the guidelines as representing agency policy. The Interim Guidelines define the ambiguous statutory concept of technical and procedural violations in a manner that is arguably more generous than the strict statutory language of the INA. *Id.* at 10. While this office is not bound by the Virtue Memorandum, the government is so bound. *Id.* at 12. Thus contrary to Silverado's contentions, it is simply inaccurate to state that ICE has unfettered discretion to classify violations arbitrarily and without guidelines.

ICE is correct that visual inspection of the I-9 forms for the thirteen employees named in amended Count I reflects that each of the forms was untimely prepared and that liability is established for those violations. Silverado's hypothesis that these forms might have been prepared to replace timely prepared forms that were then lost or misplaced amounts to no more than speculation. The government is not obligated to establish its case beyond reasonable doubt or rebut whatever "plausible" imaginary scenarios can be postulated. Visual inspection of the I-9s reflects that they were not timely prepared, and in the absence of evidence creating a genuine issue of fact, the government has established the violations by a preponderance of the evidence.

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>.

As to amended Count II, examination of the I-9s persuades me that the allegations with respect to Sharron Galusha, Douglas Murphy, and Milton Gallagher should have been left in Count I. Galusha's I-9 reflects that she was hired on April 3, 2003² and her I-9 form is dated April 15, 2010. Douglas Murphy's I-9 form reflects that he was hired on December 3, 1995 and the form is dated February 11, 2010. Milton Gallagher's I-9 reflects that he was hired on August 4, 2000³ and his I-9 was completed on February 12, 2010. These violations are not different from the other violations in Count I, and the pleadings will be amended again to conform to the evidence, pursuant to 28 C.F.R. § 68.9(e). See *United States v. American Terazzo Corp.*, 6 OCAHO no. 877, 527, 591 (1996). These three violations are accordingly restored to Count I. It is therefore unnecessary to address the question of whether the term "SSN" is "widely understood." There is no basis in this record upon which to make a finding as to this question, and while my own personal view is that most employers and employees would probably recognize the term, factual questions are not susceptible to resolution based on personal impressions.

As to the remaining violation alleged, examination of Steven Singer's I-9 reflects that a passport is entered as a List A document but no expiration date is shown. The photocopy attached reflects that Singer's passport expired in October 2007 and is stamped, "cancelled." While Silverado also entered a driver's license on the form, a driver's license is a List B document that establishes identity and is not evidence of work authorization. Liability is established for the remaining violation alleged in Count II, and is accordingly found for all counts.

B. Penalty

While ICE includes a copy of its *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* as an exhibit, it nowhere explains how it applied those guidelines to this case to obtain a penalty of \$440 per violation. The record reflects that the NIF initially sought penalties at the rate of \$770 per violation but when ICE amended its complaint, it lowered the penalties requested without explaining the rationale for the lowered assessment.

In its motion for summary decision, the government says it aggravated the penalties on the basis of seriousness of the violations and on the presence of unauthorized workers, but does not provide a baseline fine or state the amount by which it aggravated the penalties for either of these factors. To the extent that penalties were aggravated across the board for the presence of unauthorized workers, such aggravation is inconsistent with OCAHO case law. As explained in *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013), it is appropriate to enhance a civil

² Silverado's list of active employees reflects, however, that Sharron Galusha was hired on June 1, 1993.

³ Silverado's list of active employees reflects, however, that Milton Gallagher was hired on May 25, 2003.

penalty based on an employee's undocumented status, but this is true only with respect to the I-9 form for the specific employee who is found to be unauthorized: the statutory factor to be considered is not whether unauthorized aliens are found in the workforce, it is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added); see *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000).

Nevertheless, in light of the record as a whole and the statutory factors in particular, an assessment of \$440 for each violation is well within the statutory parameters, is less than half the maximum permissible, and appears reasonable in light of the record in this matter. In the absence of any compelling reason to alter the assessment, it will not be disturbed.

V. FINDINGS OF FACT AND CONCLUSION OF LAW

A. Findings of Fact

1. Silverado Stages, Inc., an S corporation owned by Jim and Sharron Galusha, has its headquarters in San Obispo, California and is engaged in the operation of transportation fleets.
2. Silverado Stages, Inc. has four divisions or sites and employs 140 people.
3. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection on Silverado Stages, Inc. on June 21, 2010.
4. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Suspect Documents to Silverado Stages, Inc. on August 31, 2010.
5. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to Silverado Stages, Inc. on March 15, 2011.
6. Silverado Stages, Inc. filed a request for hearing on April 6, 2011.
7. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint against Silverado Stages, Inc. on March 5, 2012.
8. Silverado Stages, Inc. hired Carlos Bobadilla, Juan Corpus (Raya), Matthew Davidson, James Dowdy, Paulyne Eskew, David Good, Candida Hemphill, Laure Keele, Joan Kenyon, Lee Pewitt, Andy Schweitzer, Jose (Manuel) Solis, Cynthia Wilson, Sharron Galusha, Milton Gallagher, and Douglas Murphy and failed to prepare or present timely completed I-9s for them.
9. Silverado Stages, Inc. hired Steven Singer and failed to properly complete section 2 of Form I-9 for him.

B. Conclusions of Law

1. Silverado Stages, 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. Silverado Stages, Inc. is liable for seventeen violations of 8 U.S.C. § 1324a(b).

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

Silverado Stages, Inc. is directed to pay a civil money penalty in the total amount of \$7480.

SO ORDERED.

Dated and entered this 13th 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.