

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

July 18, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 12A00061
)	
PHARAOH'S GENTLEMAN'S CLUB, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III, Esq.
For the complainant

Kevin W. Spitler, Esq.
For the respondent

I. PROCEDURAL HISTORY

The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in two counts against Pharaoh's Gentleman's Club, Inc. (Pharaoh's or the company) alleging that the company violated 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(a)(1)(B) (2006). Count I alleged that Pharaoh's hired thirty named individuals and failed to prepare a Form I-9 for each within three days of hiring them. Count II alleged that the company hired ten named individuals and failed to ensure that their I-9s were properly completed. Pharaoh's filed an answer after which prehearing procedures were undertaken.

At a telephonic prehearing conference held on December 12, 2012, the parties entered into certain factual stipulations that were adopted without the necessity of further proof, and which are more fully set forth herein as the findings of fact numbered 1-11. The company conceded

that it hired all the individuals named in the complaint, that it failed to timely prepare I-9 forms for the individuals named in Count I, and that it failed to ensure that the forms for the employees named in Count II were properly completed. Based on the evidence and admissions, summary decision was found for the government on the issue of liability, and the parties were given the opportunity to make additional filings with respect to the issue of appropriate penalties. The government filed a motion for summary decision and Pharaoh's made filings in response. The motion is ready for resolution.

II. BACKGROUND INFORMATION

Pharaoh's Gentleman's Club is an adult entertainment business incorporated in the State of New York and located at 999 Aero Drive in Cheektowaga, New York. The government served Pharaoh's with a Notice of Inspection (NOI) on September 15, 2010, and with a Notice of Intent to Fine (NIF) on February 22, 2012. Pharaoh's made a timely request for hearing on February 28, 2012, and all conditions precedent to the institution of this proceeding have been satisfied.

The company admitted that it hired Breanne Alessi, Erin Meyers, Linda Gerace, Peter Gerace, Nadine Getty, Tressa Breedlove, Donald Parrino, Shannon Horner, Christopher Chudy, Jessica Brandon, Jennifer Zaleski, Jennifer Franklin, Diane Bertola-Connolly, Maryke Payne, Jonathan Suba, Nadine Bivens, Amanda Spencer, Brian Rosenthal, Paul Prior, Bianca Baker, Michael Galley, Rachel Maman, Colleen Short, Jasmine Dixon, Elizabeth Chudy, Shauna Cardinale, Amanda Wilson, Erin Lindsey Bourget, Shelby Johnston, and Thomas Licata, and failed to prepare I-9 forms for each within three days of their respective dates of hire (Count I).

Pharaoh's also acknowledged that it hired Katie Artieri, Janyne Betz, Nicole Laporte, Kristen Doyle, Ashley McIntosh, Samia Singleton, Lindsay Manning, Chip Kryszczuk, Kathryn Fletcher, and Krystyn Menosky, and failed to ensure the proper completion of their I-9 forms (Count II). The company is accordingly liable for all forty violations alleged in the complaint.

III. PENALTY ASSESSMENT

A. The Government's Motion

The government's motion says it computed the penalty in accordance with agency guidance, and established a baseline fine of \$935 per violation because 76% of the employer's I-9 forms had substantive violations. The baseline total came to \$38,335 for forty-one violations.¹ A

¹ There are also other references in ICE's filings to forty-one violations, but the complaint names only thirty individuals in Count I and ten in Count II, thus charging forty violations, not

memorandum of case file accompanied the motion and explained the government's rationale. The memo reflects that the company had a very high employee turnover rate. Pharaoh's, for instance, had fifty-four employees when the NOI was served; however, the company employed nearly one hundred and fifty people during some portion of the period from January 1, 2010 to September 15, 2010. The size of the business was treated as a mitigating factor, reducing the penalty by 5%.

The memo noted with respect to the issue of good faith that the company had been cooperative, but that at least twenty-two I-9s were backdated. ICE asserted that the backdating was evidenced by the fact that the version of the form Pharaoh's used did not exist at the time the I-9 was supposedly completed. There were also four instances in which the identification documents provided with the form were issued after the purported preparation date of the I-9, and four instances where the I-9 was not completed within three days of the employee's hire. ICE treated the alleged lack of good faith as an aggravating factor, increasing the penalty by 5%. Another 5% increase was imposed because of the seriousness of the violations, but the penalties were then mitigated by 5% because of the absence of unauthorized aliens. The lack of history of previous violations was treated neutrally. The net result was an assessment of \$935 for each violation.

B. Pharaoh's Gentleman's Club's Position

The Club urges that only a minimum penalty should result because it is under extreme financial pressure. First, Pharaoh's says that as a result of a sales tax audit, its accrued sales tax liability increased by approximately \$120,000 between 2010 and 2011. Attachments accompanying the company's prehearing statement explain that although Pharaoh's had not regarded the provision of private dancers for customers as subject to the state sales tax, the New York State Department of Taxation and Finance ruled to the contrary, and as a result Pharaoh's entered a settlement agreeing to a payment plan requiring substantial monthly payments for back sales tax liability. In addition, Pharaoh's says it is without Dramshop insurance and is the subject of a five-million-dollar personal injury suit brought by an individual hit by a drunk driver.

The company's most recent submission reports that since the telephone conference, Pharaoh's had been assessed another \$63,000 for unemployment insurance as a result of changing the employee status of dancers from "independent contractors" to "employees," a step taken as a result of the sales tax audit.

forty-one. Included with the government's exhibits is an otherwise unaccounted for I-9 form for Adele R. Perino, but no allegations are made in the complaint about this I-9 and no liability is found with respect to it.

C. Discussion and Analysis

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. 8 C.F.R. § 274a.10(b)(2) (2013). The penalties permissible for the forty violations found in this case thus range from \$4400 to \$44,000. 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. 8 U.S.C. § 1324a(e)(5).

The government has the burden of proof with respect to the penalty as well as to liability, *see United States v. American Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996);² *United States v. Skydive Academy of Hawaii Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996), and must therefore prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). Consideration of a particular factor is possible only if there is evidence relevant to that factor in the record. *See United States v. Catalano*, 7 OCAHO no. 974, 860, 868 (1997). In order to support a finding of bad faith, there must be real evidence of some culpable conduct that goes beyond the mere failure of compliance with the verification requirements. *See United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012).

The record supports the government's assessment that Pharaoh's is a small business, that no unauthorized aliens were found in the workforce, that there was no history of previous violations, and that the violations found were serious. While visual examination of the I-9 forms prepared for the employees named in Count I confirms that most of them have been backdated, absent some indication of what specific instructions were given to the company at the time of the NOI,

² 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>.

this fact alone is simply insufficient to support a finding by a preponderance of the evidence that good faith was lacking. ICE's memorandum of case file does not elaborate on the point and the government appears to infer that good faith was lacking based solely on the backdating. But there are other competing inferences that could reasonably be drawn in the absence of any information about the surrounding facts and circumstances. Although the record here does not support a finding that good faith was lacking, it does not support a finding that good faith was exercised, so no findings are made with respect to this factor.

The government argues in addition that there is no reliable independent evidence that the fine proposed would cause any financial hardship, and that even if the company's documents represent its true financial strength, any economic hardship is temporary due to recent burdens imposed by other governmental entities. ICE also points out that Pharaoh's retained \$100,000 in undistributed profits. A subsequent submission by Pharaoh's indicated, however, that the undistributed profit was not in the form of cash, but represented profit from prior years that was invested in Pharaoh's to make improvements to the company's fixed assets.

The amount the government requests is \$38,335, more than a third of the company's undistributed profits, and in any event appears unduly harsh in light of the record and the setbacks the company is experiencing. Considering the record as a whole and the statutory factors in particular, the penalties will be adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties. For each of the thirty violations in Count I involving untimely prepared I-9s, the penalty will be \$450, and for each of the ten violations in Count II involving defective I-9s, the penalty will be \$400. The total penalty is \$17,500.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Pharaoh's Gentleman's Club, Inc. is a domestic private corporation subject to the laws and jurisdiction of the United States.
2. A Notice of Inspection was served upon the Respondent on September 15, 2010, which requested, among other items, the presentation of a payroll list indicating current employees as well as all Forms I-9 for those employees.
3. The Respondent was requested to present all documentation to DHS no later than September 21, 2010.

4. A Notice of Intent to Fine was served on the Respondent on February 22, 2012, alleging violations of the Immigration and Nationality Act § 274A(a)(1)(B) and seeking a total of \$38,335 in civil money penalties.
5. The Respondent filed a request for hearing on February 28, 2012.
6. The Government filed a Complaint before the Office of the Chief Administrative Hearing Officer against the Respondent on April 12, 2012.
7. The Respondent filed an Answer to the Complaint on June 4, 2012.
8. The Respondent hired all employees listed in the Complaint after November 6, 1986.
9. The audit of the Respondent did not reveal the presence of any unauthorized aliens.
10. The Respondent has no history of previous violations of INA § 274A(a)(1)(B).
11. The Respondent should be considered to be a small business for the purpose of calculating the penalties to be imposed.
12. Pharaoh's Gentleman's Club, Inc. hired Breanne Alessi, Erin Meyers, Linda Gerace, Peter Gerace, Nadine Getty, Tressa Breedlove, Donald Parrino, Shannon Horner, Christopher Chudy, Jessica Brandon, Jennifer Zaleski, Jennifer Franklin, Diane Bertola-Connolly, Maryke Payne, Jonathan Suba, Nadine Bivens, Amanda Spencer, Brian Rosenthal, Paul Prior, Bianca Baker, Michael Galley, Rachel Maman, Colleen Short, Jasmine Dixon, Elizabeth Chudy, Shauna Cardinale, Amanda Wilson, Erin Lindsey Bourget, Shelby Johnston, and Thomas Licata, and failed to prepare I-9 forms for them within three days of their respective dates of hire.
13. Pharaohs's Gentleman's Club, Inc. hired Katie Artieri, Janyne Betz, Nicole Laporte, Kristen Doyle, Ashley McIntosh, Samia Singleton, Lindsay Manning, Chip Krysczuk, Kathryn Fletcher, and Krystyn Menosky for employment in the United States, and failed to ensure the proper completion of their I-9 forms.

B. Conclusions of Law

1. Pharaoh's Gentleman's Club, 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. Employers are required to prepare and retain I-9s for employees and make those forms available for inspection upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii).
4. An Employment Eligibility Verification Form (Form I-9) is timely prepared when section 1 of the I-9 form is completed on the day the employee is hired, and section 2 is completed within three business days of the employee's date of hire. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).
5. Pharaoh's Gentleman's Club, Inc. is liable for forty violations of the Immigration and Nationality Act § 274A(a)(1)(B).
6. Failure to prepare an I-9 in a timely manner is a serious violation. *See United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998).
7. The seriousness of a particular violation is evaluated on a continuum because not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997)).
8. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b) (2006), due consideration must be given to the following factors: 1) the size of the employer's business, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individual was an unauthorized alien, and 5) the history of previous violations. 8 U.S.C. § 1324a(e)(5).
9. The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).
10. An employer's ability to pay is an appropriate factor to consider in assessing a civil money penalty. *See United States v. H&H Saguaro Specialists*, 10 OCAHO no. 1147, 5 (2012).
11. A penalty 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).

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

Pharaoh's Gentleman's Club, Inc. is liable for forty violations and is directed to pay a penalty totaling \$17,500. The parties are free to negotiate a payment schedule to minimize the impact on the business.

SO ORDERED.

Dated and entered this 18th day of July, 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 (2012). 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.