

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

August 1, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 12A00076
)	
MONADNOCK MOUNTAIN SPRING)	
WATER, INC.,)	
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 two-count complaint alleging that Monadnock Mountain Spring Water, Inc. (Monadnock or the company) violated 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Monadnock failed to timely prepare and/or retain, and timely present I-9s for eighteen employees upon request. Count II alleged that Monadnock failed to ensure that employees properly completed section 1 of Form I-9, or failed itself to properly complete section 2 or 3 for Nick Bernier and Paul Theriault.

Monadnock, by its Vice President Kevin McGonigle, filed an answer, after which prehearing procedures were undertaken. At a telephonic prehearing conference held on February 28, 2013, the parties entered into certain factual stipulations that were adopted without the necessity of further proof and are more fully set forth herein as the findings of fact numbered 1-7. The company acknowledged that it failed to prepare timely I-9 forms for the eighteen individuals named in Count I, warranting summary decision as to liability for Count I. Monadnock was directed to provide financial information to ICE to facilitate settlement discussions, and, in the event that settlement was not achieved, a schedule was set out for the filing of dispositive motions with respect to the remaining issues.

Presently pending is the government's motion for summary decision. Monadnock did not file a response and the time for doing so has elapsed.¹

II. BACKGROUND INFORMATION

Monadnock Mountain Spring Water, Inc. is a New Hampshire corporation organized in 1987 and located at 8 Mansur Road in Wilton, New Hampshire, where it is engaged in the business of retailing bottled spring water. ICE served a Notice of Inspection (NOI) on Monadnock on or about June 16, 2011, at which time the company had forty-one employees. On January 26, 2012, ICE served the company with a Notice of Intent to Fine (NIF), and the company filed its request for hearing on February 7, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

III. LIABILITY

ICE's motion for summary decision was accompanied by exhibits consisting of: A) Dun and Bradstreet Business Information Report, Monadnock Mountain Spring Water, Inc. (8 pp.), B) Notice of Inspection, dated June 10, 2011 (2 pp.), C) DHS Form 6051R, D) Forms I-9 for Nick Bernier and Paul Theriault, named in Count II (2 pp.), E) Employee List, F) New Hampshire Corporation Division internet printout (2 pp.), G) ICE Form I-9 Inspection Overview (7 pp.), and H) 2011 U.S. Income Tax Return for an S Corporation, Monadnock Mountain Spring Water.

Visual inspection of the I-9s for Nick Bernier and Paul Theriault, exhibit D, confirms that each contains at least one substantive violation. On Bernier's I-9, Monadnock entered a birth certificate under List B. While a birth certificate may be a valid List C document, it is not acceptable for purposes of establishing identity and is thus not a valid List B document. *See* 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(i)-(ix) (2013). Paul Theriault's I-9 reflects that Monadnock failed to ensure that the employee checked a box in section 1 to attest to a particular status as a U.S. citizen, lawful permanent resident, or work-authorized alien—a serious substantive violation. *See, e.g., United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011); *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080 (1998) (finding that omission of the employee's immigration status defeats the whole purpose of the verification process).

The parties already stipulated that Monadnock failed to prepare I-9s within three business days

¹ *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012). A party has ten days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion was served on April 5, 2013 so Monadnock's response was due by April 22, 2013.

for the eighteen employees listed in Count I, so Monadnock is accordingly liable for a total of twenty violations.

V. PENALTY ASSESSMENT

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is \$110, and the maximum is \$1100. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). 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).

A. The government's position

The government's motion indicates that ICE set the base fine at \$770 per violation based on an error rate of 48.8 %, which it calculated by dividing the number of substantive violations by the total number of employees for whom I-9s were required. ICE then mitigated the fine by five percent based on Monadnock's status as a small business, and initially aggravated the amount by five percent based on Monadnock's alleged lack of good faith. ICE subsequently elected not to pursue the enhancement for lack of good faith, observing upon reevaluation that although Monadnock prepared the I-9s after the NOI, the company did not backdate the forms or try to feign compliance. ICE treated the factor of good faith as neutral, as it did the lack of unauthorized workers and the lack of any history of previous violations.

The government urges that the violations be treated as serious for purposes of assessing the appropriate penalty amount because failure to prepare a Form I-9 is among the most serious of paperwork violations, as are an employee's failure to attest to any particular immigration status in section 1, and an employer's omission of a document showing employment eligibility in section 2. Finally, ICE argues that Monadnock has not demonstrated an inability to pay the proposed fine because a single page of its 2011 S corporation tax return showing gross receipts of \$6,234,883, gross profits of \$3,183,986, and a business loss of \$74,666, was not accompanied by any attached schedules, balance sheets, or other information. In light of these omissions, the government contends that it is impossible to determine either what caused Monadnock's business losses or whether the company lacks the ability to pay the proposed fine. The government says its exhibit A, the Dun and Bradstreet report, reflects that the business has a fair credit rating and has promptly paid its obligations for the previous twenty-four months.

The government also indicated a willingness to create a three-year payment plan so as not to create an undue burden for the company.

B. Monadnock's Position

Monadnock did not file a response to the government's motion, but its answer says the proposed fine will result in financial hardship. The company says it has been in business since 1988 and has never employed an unauthorized worker. Monadnock points out that forty-one subpoenaed records were submitted to ICE immediately, and only fifteen required additional information. Monadnock's prehearing statement characterizes the proposed fine as "outrageous" and says the proposed fine will result in the layoff of an employee. Finally, the company states that it has shown good faith by signing up for and implementing E-verify.

C. Discussion and Analysis

Failure to prepare an I-9 within three business days of an employee's date of hire is a serious violation as ICE contends. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (reasoning that failure to timely prepare an I-9 is serious "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified"). Both violations in Count II are serious as well because failure to verify proper section 2 documents, and failure to ensure that an employee attests in section 1 to his or her authorization to work in the United States are both violations that interfere with the very purpose of the verification requirements. *See United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 747-48 (1997).

The remaining factors, however, are favorable to the employer, and ICE concedes that Monadnock has no history of previous violations and is a small business that did not employ unauthorized workers or lack good faith. The seriousness of the violations is accordingly the only factor weighing against the company. The company's 2011 S corporation tax return shows business losses of \$74,666, and the cause of this loss is not relevant for the purposes of determining Monadnock's ability to pay the proposed fine.

Penalties so close to the maximum permissible are ordinarily reserved for more egregious violations than have been shown here. *United States v. Seven Elephants Distrib. Co.*, 10 OCAHO no. 1173, 5 (2013). As explained in *United States v. Pegasus Restaurant., Inc.*, 10 OCAHO no. 1143, 7 (2012), proportionality is critical to setting penalties. Based on OCAHO case law, the record as a whole, and the policies reflected in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996)), I would ordinarily be inclined to make a modest reduction in the penalty. ICE's offer to accept a three-year payment plan for the amount it requested, may, on the other hand, have more value to Monadnock than a modest reduction. The penalty will accordingly be assessed in the alternative. Monadnock may, at its option, pay a lump sum penalty at the rate of \$525 for each violation, for a total of \$10,500, or, alternatively,

accept ICE's offer for a three-year payment schedule and pay a penalty over time totaling \$14,630.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. At all times relevant to this matter, Monadnock Mountain Spring Water, Inc., was and is duly authorized and registered to do business in the State of New Hampshire.
2. All individuals listed in Counts I and II of the Complaint were current employees of Monadnock Mountain Spring Water, Inc. on June 16, 2011, the date ICE served the Notice of Inspection upon the company.
3. All employees of Monadnock Spring Water, Inc., named in the Complaint were hired on or after November 6, 1986.
4. The documents provided by Monadnock Mountain Spring Water, Inc., to ICE in response to the Notice of Inspection and administrative subpoena, served on or about June 16, 2011, were the original documents and/or true and accurate copies thereof as directed in the administrative subpoena.
5. The Forms I-9 provided by Monadnock Mountain Spring Water, Inc., to ICE in response to the administrative subpoena are all of the Forms I-9 maintained or retained for employees working on Monadnock Mountain Spring Water, Inc. on June 16, 2011, and Monadnock Mountain Spring Water Inc., stipulates to their authenticity.
6. Monadnock Spring Water, Inc., failed to prepare, within three business days of hire, Forms I-9 for the individuals listed in Count I of the Notice of Intent to Fine.
7. Monadnock Mountain Spring Water, Inc., is not and has not been the subject of any previous findings of violations of the provisions of INA § 274A.
8. Monadnock Mountain Spring Water, Inc., hired Kevin McGonigle, Debra Neals, Gary Neals, Doug Danskin, Andrew Henderson, William Hoefsmit, Denis Gautier, Timothy O'Brien, Kerry Girard, Daniel Dineen, Ernest Paro, Eric Lacroix, Ian Hayes, Tyler Skiff, Arthur Joslin, Jay Matylweski, Susan McMullen, and Linda Alaimo, and failed to prepare their I-9s within three business days of their respective dates of hire.
9. Monadnock Mountain Spring Water, Inc. hired Paul Theriault and failed to ensure that he properly completed section 1 of Form I-9.

10. Monadnock Mountain Spring Water, Inc. hired Nick Bernier and failed to properly complete section 2 of his I-9 form.

11. Monadnock Mountain Spring Water, Inc. is a small employer that acted in good faith, and had no unauthorized workers or history of previous violations.

B. Conclusions of Law

1. Monadnock Spring Water, 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. An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of the hire. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B) (2013).

4. In completing section 2, an employer must review documents that, alone or together, establish an employee's identity and work authorization. 8 C.F.R § 274a.2(b)(1)(v) (2013).

5. Monadnock Spring Water, Inc. committed twenty violations of 8 U.S.C. § 1324a(a)(1)(B) (2006).

6. Failure to prepare an I-9 within three business days of an employee's date of hire is a serious violation. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (reasoning that failure to timely prepare an I-9 is serious "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified").

7. Failure to verify proper section 2 documents and failure to ensure that an employee attests in section 1 to his or her authorization to work in the United States are both serious violations that interfere with the very purpose of the verification requirements. *See United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 747-48 (1997).

8. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). 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).

ORDER

Monadnock is liable for twenty violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to advise the government within thirty days whether it elects to pay a lump sum civil money penalty of \$10,500 now, or whether it will accept ICE's offer to set up a payment schedule and pay the sum of \$14,630 over a three-year period.

SO ORDERED.

Dated and entered this 1st day of August, 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.