

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

August 9, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 13A00009
)	
MR. MIKE’S PIZZA, 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 complaint alleging that Mr. Mike’s Pizza, Inc. (Mr. Mike’s or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare the Forms I-9 for sixteen named employees within three business days of their corresponding dates of hire. The total penalty sought was \$14,960.

Mr. Mike’s, by its President, David D. Nicola, filed a timely answer by letter-pleading in which Nicola stated that Mr. Mike's did not dispute the findings "that [the company] failed to prepare the Employment Eligibility [V]erification Form (Form I-9) for the sixteen individuals listed in the Complaint" The letter requested that the fine be reduced. Based on the company's admission, an order was issued finding no genuine issue of material fact with respect to liability, and providing an opportunity for the parties to set out their views as to the appropriate penalties. Both parties did so, after which a telephonic prehearing conference was held on March 28, 2013 to clarify some remaining issues.

Because Mr. Mike's indicated that some of its employees were recruited through a third-party agency, the company was given additional time to seek information as to whether the agency itself had completed I-9s for those individuals. Mr. Mike's subsequently filed more complete I-9 forms dated January 1, 2013 for two of these individuals, but it does not appear that timely I-9 forms were prepared for any of them by Mr. Mike's or any other entity.

II. BACKGROUND INFORMATION

Mr. Mike's Pizza, Inc. is a restaurant located in Lake Placid, New York. ICE served Mr. Mike's with a Notice of Inspection (NOI) on February 17, 2011. Mr. Mike's submitted sixteen I-9s along with a current payroll list. A Notice of Intent to Fine (NIF) was served on Mr. Mike's on September 14, 2012, after which the company made a timely request for hearing that was received by ICE on October 10, 2012. ICE filed its complaint on October 24, 2012.

The previous order of December 20, 2012 found that Mr. Mike's was liable for hiring Samuel Adams, Vadim Bacsan, Nicholas Carelli, Logan Celeste, Vadim Cretu, Jan Cyrha, Lucas Discanciati, Stefan Gyorkos, Seth Hough, Nicole Lewis, Pedro Lima, Nicholas McCarthy, Tynan McKillip, Molly Smith, Kara Sternberg, and Diane Whitney, and failing to prepare I-9s for them within three days of their respective dates of hire as alleged in the complaint.

III. 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 employer's size of 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). Because the government has the burden of proof with respect to the penalty, *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2013),¹ ICE must prove

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

the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

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 respondent's ability to pay a proposed fine, for instance, may be an appropriate factor to be weighed in assessing the amount of the penalty. See *United States v. Pegasus Rest. Inc.*, 10 OCAHO no. 1143, 7 (2012). The permissible range of penalties for the sixteen violations in this case varies from a low of \$1760 to a high of \$17,600.

A. The Government's Position

ICE explains that a baseline fine of \$935 per violation or a total of \$14,960 was assessed because Mr. Mike's had a 100% error rate. The government then mitigated the penalty by five percent based on Mr. Mike's status as a small business, but aggravated the penalty based on the seriousness of the violations. The government says that Mr. Mike's conceded that all of the Forms I-9 the company submitted to ICE were prepared after the NOI. ICE treated the remaining factors of good faith, history of previous violations, and presence of unauthorized workers as neutral.

B. Mr. Mike's Position

Mr. Mike's requests that the minimum penalty of \$110 be imposed for each violation. The company says that it is a small business having only ten to twelve employees and that it was not trying to ignore the law; it simply failed to prepare the proper paperwork. The company argues that the violations are not serious because most of the employees were individuals who are personally known to Nicola and grew up in Lake Placid, and the ones who were international visitors were obtained from an agency that engages in rigorous screening of employees who come to the United States to work. The company stresses that it did not employ any unauthorized aliens and has no history of previous violations. Mr. Mike's says that it will be forced to lay off several employees if the penalty is not reduced substantially and that many of its employees live paycheck-to-paycheck. Nicola points out that Mr. Mike's business, like many in upstate New York, has been hurting since 2008. Attached to the company's filing are Mr. Mike's federal income tax returns from 2008 to 2010.

database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

C. Discussion and Analysis

ICE is correct in finding that the violations are serious. OCAHO case law has long held that failure to timely prepare an I-9 is a serious violation. *See United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998). The penalty proposed nevertheless appears excessive in light of the record as a whole. Mr. Mike's is a very small business, and the parties do not dispute that the restaurant is struggling. There is no suggestion that the company acted in bad faith to avoid the requirements of the law, and it also appears undisputed that Mr. Mike's was simply unaware of the I-9 requirement until it received the NOI. Apart from the seriousness of the violations, most of the statutory factors thus weigh in Mr. Mike's favor. Penalties so close to the maximum permissible should be reserved for more egregious violations than are demonstrated here. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), but should not be "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

In view, moreover, of the general public policy of leniency toward small entities, as set out 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), the penalty for this small pizza restaurant will be adjusted to an amount closer to the midrange of permissible penalties, or \$400 for each violation. The total penalty thus is \$6400.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Mr. Mike's Pizza, Inc. is a restaurant located in Lake Placid, New York.
2. The Department of Homeland Security, Immigration and Customs Enforcement served Mr. Mike's Pizza, Inc. with a Notice of Inspection (NOI) on February 17, 2011.
3. The Department of Homeland Security, Immigration and Customs Enforcement served Mr. Mike's Pizza, Inc. with a Notice of Intent to Fine on September 14, 2012.
4. Mr. Mike's Pizza, Inc. made a timely request for hearing that was received by the Department of Homeland Security, Immigration and Customs Enforcement on October 10, 2012.

5. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on October 24, 2012.

6. Mr. Mike's Pizza, Inc. hired Samuel Adams, Vadim Bacsan, Nicholas Carelli, Logan Celeste, Vadim Cretu, Jan Cyrha, Lucas Discanciati, Stefan Gyorkos, Seth Hough, Nicole Lewis, Pedro Lima, Nicholas McCarthy, Tynan McKillip, Molly Smith, Kara Sternberg, and Diane Whitney, and failed to prepare I-9 forms for them within three days of their respective dates of hire.

B. Conclusions of Law

1. Mr. Mike's Pizza, 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. Mr. Mike's Pizza, Inc. engaged in sixteen violations of 8 U.S.C. § 1324a(a)(1)(B).

4. 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").

5. In assessing an appropriate penalty, the following factors must be considered: 1) the employer's size of 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).

6. A respondent's ability to pay a proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty. *See United States v. Pegasus Rest. Inc.*, 10 OCAHO no. 1143, 7 (2012).

7. Penalties close to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

8. A penalty should also 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

Mr. Mike's Pizza, Inc. is liable for sixteen violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of \$6400. The parties are free to set up a payment schedule that will minimize the impact of the penalty on the operation of the business during the off-season.

SO ORDERED.

Dated and entered this 9th 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) (2012).

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.