

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

August 15, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 11A00126
)	
NATURAL ENVIRONMENTAL, 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 Natural Environmental, Inc. (Natural Environmental or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by hiring twenty-five named employees for whom it failed to prepare or present I-9 forms.

An answer was filed on behalf of the company by its owner and president, Ken O'Haver. The answer said that O'Haver had no previous experience in these matters, so when ICE asked for the company's "current" I-9 forms, O'Haver thought that new forms had to be prepared, and he so instructed the office manager. O'Haver said he was shocked to learn subsequently that the company would be fined based on these newly-prepared forms. The misunderstanding was ultimately cleared up, and O'Haver subsequently presented the company's original I-9 forms that had been prepared at the time the employees were hired.

Presently pending is the government's motion for summary decision. Natural Environmental filed a timely response and the motion is ripe for adjudication.

II. BACKGROUND INFORMATION

Natural Environmental is a landscaping business located at 1162 North Marshall Avenue in El Cajon, California. At the time of the events in issue Natural Environmental had twenty-five employees. ICE served a Notice of Inspection (NOI) on the company on or about September 15, 2010, and a Notice of Intent to Fine (NIF) on March 30, 2011. On April 26, 2011, after receiving the NIF, Natural Environmental presented its original I-9 forms to ICE and requested additional analysis because of a misunderstanding about precisely what was to have been presented for inspection. After reviewing the untimely presented original I-9s, ICE told the company that had those forms been presented in the first place the fine would have been \$15,053.50 instead of \$26,881.25. The government extended the period for filing a request for hearing, and Natural Environmental filed its request on July 22, 2011. ICE's complaint was filed on August 5, 2011.

III. THE DISPUTES BETWEEN THE PARTIES

A. ICE's Motion

ICE's motion for summary decision asserts that there is no genuine issue of material fact as to the existence of the violations. It is undisputed that National Environmental presented twenty-five backdated I-9 forms that were prepared after the company was served with the NOI. The government says that even had the company presented its original forms in a timely manner, over half of those forms contained substantive violations. ICE points out that for eight employees, Jose Adan-Bustos, Jose Arredondo, David Camacho, Juan Esquibel, Ricardo Guardado, Jose Hernandez, Arturo Rosas-Prado, and Yoalmo Zuniga, the company failed to fill out the certification in section 2. For three employees, Ruben Casquera, Oscar Perez, and Jessica Vankirk, Natural Environmental presented untimely I-9 forms that were the same as those presented in response to the NOI. The I-9 form for one employee, Jorge Loaiza a.k.a. Jorge Luiz Zoto, reflects that the section 1 attestation is unsigned.

The government says that because the violation rate was more than fifty percent, the baseline fine was set at \$935 per violation. The penalties were then aggravated by five percent for the lack of good faith, five percent for the seriousness of the violations, and five percent for the involvement of unauthorized aliens. No adjustments were made for the size of the business or the lack of any previous history of violations, so the resulting penalty was \$1075.25 for each violation. In support of its view that good faith was lacking, the government says that Natural Environmental "did not exercise reasonable care and diligence in reviewing and completing the Forms I-9 it provided." ICE's memorandum says in addition that background checks revealed that fifty-two percent of the company's workforce in September 2010, or thirteen employees, lacked proper

documentation and that the involvement of unauthorized aliens justifies aggravating the fine for this factor as well.

B. Natural Environmental's Response

Natural Environmental says that it engaged in a good faith effort to substantially comply with 8 U.S.C. § 1324a(a)(B)(1) by filling out timely I-9 forms when it hired employees, but that O'Haver erroneously assumed that I-9s had to be filled out on an annual basis, which is why in September 2010 the company completed new I-9s that were dated January 1, 2010. O'Haver states that had proper directions been given at the time of the audit, the original forms would have been timely produced. He says that he filled out employees' I-9s and verified their documents, and is not to blame for the fact that some of the documents turned out to be fraudulent.

Natural Environmental says that "a fair and punitive amount" for a penalty would be \$3850 based on errors in ten of the original I-9 forms, because only ten forms actually contain substantive violations. In support of its view, the company says no penalty should be assessed for the I-9s of Mauro Baldovinos, Ruben Casquera, or Jorge Loaiza a.k.a. Jorge Luiz Zoto, because the company did prepare and present I-9s for them, and any errors on the forms were technical or procedural errors for which the company should have been given a ten-day notice and opportunity to correct. Natural Environmental also argues that while the attestation in section 2 is not complete on the original forms for Jose Adan-Bustos, Jose Arredondo, David Camacho, Juan Esquibel, Ricardo Guardado, Jose Hernandez, Arturo Rosas-Prado, and Yoalmo Zuniga, documents attached to their I-9s provide the requisite information. For Oscar Perez, Natural Environmental suggests that the I-9 must have been lost, because standard procedure would have been to complete it upon hire. For Jessica VanKirk, Natural Environmental asserts that the employee was hired through a temporary employment agency "where we were assured authorization to work in the U.S. had already been completed" and the company therefore thought it did not need to complete another I-9.

With respect to the penalty, Natural Environmental says its business has declined by fifty percent since 2007, that gross receipts have fallen by forty-eight percent and net profits by fifty percent, and that the company has a substantial amount of debt on its balance sheet. The company points out that while it had twenty-five employees at the time of the audit, it is now down to fifteen full-time and one part-time employee, a thirty-six percent reduction. Natural Environmental says that due to a lack of available business financing because of factors beyond its control, such as the stalled economy, it is incapable of paying the fine requested. Natural Environmental also says the proposed fines are disproportionate to its size and resources, particularly because the failures were the result of ignorance, not willfulness.

C. Discussion and Analysis

It is undisputed that Natural Environmental produced newly-created and backdated I-9 forms for twenty-five employees at the time of the inspection, and the company is accordingly liable for failure to present timely completed I-9s for these twenty-five employees. That some timely completed I-9s did in fact exist and were presented after the NIF is not a sufficient justification for the company to avoid liability, but it is an appropriate circumstance weighing in favor of leniency when assessing the penalty. The fact that there are substantive violations in some of the later-produced I-9s will not be considered as relevant to the penalty in this case, because the I-9s to be penalized based on the complaint are the twenty-five backdated forms that Natural Environmental initially presented in response to the NOI, each of which will be penalized only once. In other words, no additional penalties will be assessed based on the existence of violations on a different set of forms that were never addressed in a NIF.

Permissible penalties for the twenty-five violations found in this case range from \$2750 to \$27,500. ICE argues that aggravation of the penalties is warranted not only on the basis of the seriousness of the violations, but also on the basis of a lack of good faith and the presence of unauthorized aliens. The government has the burden of proof to demonstrate the existence of any alleged aggravating factor by a preponderance of the evidence. *See United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

In support of its assertion that Natural Environmental lacked good faith, the government asserts that the company did not exercise reasonable care and diligence in reviewing and completing the I-9s because it first provided twenty-five forms that were created after the NOI, and then seven months later produced other forms, more than half of which contained substantive violations. OCAHO case law has long held, however, that in order to support a finding of bad faith, there must be evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer). The government's memorandum points to no evidence of bad faith beyond the assertion that reasonable care and diligence was not exercised. But a dismal rate of I-9 compliance standing alone may not, in light of *Karnival Fashion*, be used to increase a penalty based upon a lack of good faith.

No enhancement is warranted based on the presence of unauthorized aliens either. First, unsupported factual allegations made in a brief or memorandum are not evidence and do not provide a sufficient basis for summary decision. *See Lima v. NYC Dep't of Educ.*, 10 OCAHO no. 1128, 13 (2009). ICE proffered no evidentiary support for the proposition that thirteen unauthorized aliens were employed at Natural Environmental, and did not even identify by name the individuals it contended were unauthorized. The record reflects elsewhere that during the course of the inspection ICE issued the company a Notice of Suspect Documents on December 8,

2010. Natural Environmental did include as one of its exhibits a copy of that Notice, which shows the names of the individuals the government said had suspect documents. A Notice of Suspect Documents, however, does not by itself establish that each individual on the list is necessarily an unauthorized alien.

Our case law, moreover, does not in any event permit an across-the-board penalty enhancement for all of an employer's I-9s based on the fact that only some of the individuals were unauthorized. The statutory factor for consideration is not whether unauthorized aliens are present 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. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013); *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 668-69 (2000). It is accordingly inappropriate to enhance penalties across the board for all the violations based on the presence of some unauthorized workers. While it is appropriate to assess a higher penalty for a specific violation involving the I-9 form for an individual who is actually shown to be an unauthorized alien, suspicion alone does not justify such a result.

The government requests penalties at the rate of \$1075.25 for each violation, an amount that falls short of the maximum permissible by only \$24.75. Our case law suggests, however, that penalties so close to the maximum should be reserved for violations more egregious than have been shown here. See *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013); *United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013). Considering the record as a whole, the penalties for this small business will be adjusted to an amount closer to the low end of the midrange of permissible penalties and will be assessed at the rate of \$400 for each violation. The total penalty is \$10,000.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Natural Environmental, Inc. is a landscaping business located at 1162 North Marshall Avenue in El Cajon, California.
2. The owner and president of Natural Environmental, Inc. is Ken O’Haver.
3. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection on Natural Environmental, Inc. on or about September 15, 2010.
4. Ken O’Haver initially believed that I-9 forms had to be completed on an annual basis.

5. When asked to produce current I-9 forms, Ken O'Haver instructed the office manager to prepare new I-9 forms dated January 1, 2010.
6. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine on Natural Environmental, Inc. on March 30, 2011.
7. On April 26, 2011, after the company received the Notice of Intent to Fine, Natural Environmental, Inc. presented another set of I-9s for some of the employees named in the complaint and requested additional analysis.
8. The Department of Homeland Security, Immigration and Customs Enforcement, reviewed Natural Environmental, Inc.'s untimely presented original I-9s and told the company that had those forms been presented in the first place the fine would have been \$15,053.50 instead of \$26,881.25.
9. The Department of Homeland Security, Immigration and Customs Enforcement extended the period for filing a request for hearing, and Natural Environmental, Inc. filed its request for hearing on July 22, 2011.
10. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on August 5, 2011.
11. Natural Environmental, Inc. hired Rafael Acosta, Jose Adan-Bustos, Jose Arredondo, Mauro Baldovinos, David Camacho, Miguel Canales, Ruben Casquera, Daniel Castellanos, Ludolfo Castellanos, Santiago Cota, Juan Esquibel, Carlos Gomez, Ricardo Guardado, Jose Hernandez, Jorge Loaiza, Orlando Lugardo, Keith Marbourg, Francisco Mendoza, Kenneth O'Haver, Oscar Perez, Luis Reyes, Nicholas Rodriguez, Arturo Rosasprado, Jessica Vankirk, and Yoalmo Zuniga, and presented backdated I-9 forms for them that were not prepared until after service of the Notice of Inspection.

B. Conclusions of Law

1. Natural Environmental, 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. Natural Environmental, Inc. is liable for twenty-five violations of 8 U.S.C. § 1324a(a)(1)(B).
4. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), due consideration must be given to the following factors: 1) the employer's size of

business, 2) the employer's good faith, 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) (2006).

5. The government has the burden of proof regarding both liability and penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

6. A poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply with the verification requirements. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (Modification by the Chief Administration Hearing Officer).

7. OCAHO case law does not permit an across-the-board penalty enhancement for all of an employer's I-9s based on the fact that only some of the individuals were unauthorized because the statutory factor that must be considered is not whether unauthorized aliens are present 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. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013); *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 668-69 (2000).

8. Penalties approaching the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013); *United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013).

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

Natural Environmental, Inc. is liable for twenty-five violations and is directed to pay penalties in the amount of \$10,000.

SO ORDERED.

Dated and entered this 15th 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.