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

October 18, 2013

UNITED STATES OF AMERICA, Complainant, v. KOBE SAPPORO JAPANESE, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 12A00084

FINAL DECISION AND ORDER

Appearances:

Colleen E. Taylor
for the complainant

Christopher P. Chaney
for the 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 (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint alleging that Kobe Sapporo Japanese, Inc. (Kobe or the company) violated 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Kobe hired twenty-six named individuals for whom it failed to ensure that the individual properly completed Section 1 of the Employment Eligibility Verification Form (Form I-9) and/or failed itself to properly complete Section 2 or 3. Count II alleged that Kobe hired Jairo G. Javier, Wayne D. Shuck, Amanda G. Moore, and Jose J. Maya-Jimenez and failed to prepare and/or present I-9 forms for each of them after being requested to do so by an authorized agency of the United States. The complaint sought penalties totaling

$29,452.50.

Kobe filed a timely answer admitting liability for the violations alleged in Counts I and II, but contesting the amount of the proposed penalties as both inappropriate and excessive. Prehearing procedures were undertaken, a telephonic prehearing conference was held, and a schedule was established for the parties to file memoranda and evidence in support of their respective positions as to the question of penalties. Those filings have been made and the issue is ripe for resolution.

II. BACKGROUND INFORMATION

Kobe Sapporo is a small family-owned restaurant specializing in Teppanyaki cooking and sushi cuisine. It is located at 101 Venture Drive in Smithfield, North Carolina. The manager of the restaurant is Zhijian Kuang, aka Tony Kuang. The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) served the restaurant with a Notice of Inspection (NOI) on September 15, 2010, and Kobe provided the requested documents in a timely manner. ICE's investigative report reflects that at the time of the events in issue, Kobe had approximately fifteen active employees, and that the restaurant presented I-9 forms for twenty-six current and former employees. On April 28, 2011, ICE served Kobe with a Notice of Intent to Fine (NIF), and Kobe filed a timely request for hearing on May 27, 2011. ICE's complaint was thereafter filed on June 13, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

III. ASSESSMENT OF THE PENALTIES

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 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). 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 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 thirty violations alleged in this case varies from a low of $3300 to a high of $33,000.

A. ICE'S Memorandum

ICE's memorandum in support of its proposed penalty was accompanied by exhibits consisting of: A) Memorandum to Case File with appendix (8 pp.); B) an unmarked I-9 form; C) 2010 records from the Employment Security Commission of North Carolina; D) I-9 forms and supporting documents (54 pp.); E) wage records for the employees named in Count II (4 pp.); and F) ICE's Report of Investigation (4 pp.).[2]

ICE said that in assessing the proposed penalties it first utilized internal agency guidelines to establish a baseline fine by using a matrix pursuant to which a 100% violation rate results in a penalty of $935 for each violation. The base fine was then mitigated by 5% in light of the small size of Kobe's business, but aggravated by 5% for bad faith and another 5% for the seriousness of the violations. The government treated the lack of unauthorized aliens and the absence of any history of previous violations as neutral.

In support of its contention that Kobe lacked good faith, ICE says that several factors show both independently and collectively that Kobe Sapporo engaged in culpable behavior beyond the mere failure of compliance, and that aggravation of the penalties is warranted. First, the government says the most visible evidence of a lack of good faith is that the vast majority of the forms are backdated. The government asserts that its exhibit D, the company's I-9s, shows that all were prepared on a version of the form containing a revision date of August 7, 2009. On sixteen of the forms Kobe Sapporo submitted, the date the employee purported to have signed the form antedates the August 7, 2009 revision date, and the forms were obviously created after the

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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.

[2] Page 4 was omitted from the initial submission but was subsequently presented.

employee claimed to have signed them. ICE says that the sample form provided to Kobe at the time of the inspection was a "marked" form created on September 14, 2010 and given to Kobe on September 15, 2010, and that an I-9 on the marked form dated prior to September 15, 2010 is prima facie evidence of backdating. All twenty-six of the forms submitted have indicia of backdating. ICE argues that the evidence of backdating establishes "culpable behavior by the respondent that goes beyond mere non-compliance, and that is indicative of a lack of good faith."

The government says in addition that Kobe's total failure to complete section 2 of the forms is highly serious as well as indicative of a "blatant disregard to the statutory and regulatory mandates" of the Act, quoting *United States v. Café El Camino Real*, 2 OCAHO no. 307, 29, 46 (1991). ICE argues that OCAHO precedent establishes that misstatements on I-9 forms combined with a practice of failing to examine the underlying documents constitutes bad faith, citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1167-68 (1998).

ICE treated the two remaining factors as neutral, arguing that unless facts were presented to establish that each should be a mitigating factor, they should remain neutral. The government said that although its investigation revealed one terminated employee with suspect documents, it was unable to determine that the individual was unauthorized.

B. Kobe's Response

Kobe's memorandum was accompanied by exhibits consisting of: 1) a letter dated March 11, 2013 transmitting Balance Sheets and Income Statements from 2009-2012 (10 pp.); 2) 2011 Tax Return (3 pp.); 3) 2010 Tax Return (3 pp.); 4) 2009 Tax Return (3 pp.); and 5) Department of Labor "Regional and State Employment and Unemployment Summary" dated March 2013 (4 pp.).

Kobe's memorandum criticizes the proposed penalty as disproportionate to the size and character of the restaurant and unduly punitive, and says the penalties should be set at $110 for each violation. The company takes issue with the government's assessment of its good faith factor and suggests that inquiry into an employer's good faith should focus on compliance prior to, not after, service of the NOI, citing *United States v. New China Buffet*, 10 OCAHO no. 1133, 4 (2010). In Kobe's view, events after the NIF should not form the basis of analysis and that backdating of section 1 is of no significance because the I-9s were filled out only by the employees; the company did not complete section 2 of the form and did not itself engage in any backdating. The company points out that the employees were not told what dates to enter, and some entered their dates of hire rather than the date they signed the form, while others entered two dates. Kobe said that during the period prior to the NOI the restaurant exercised reasonable care and diligence to ascertain its obligation to refrain from hiring unauthorized aliens, and it did not hire unauthorized workers. Kobe also challenges the government's assessment of the

seriousness of the violations, and says it was previously unaware of the I-9 requirement. Kobe argues that while its conduct may be negligent, it does not rise to the same level of seriousness as intentional violations such as falsification of the forms or refusal to use the forms. In Kobe's view these circumstances should be considered in mitigation, and that the absence of unauthorized aliens and lack of previous history should be considered in its favor as well.

Finally, Kobe relies on nonstatutory factors it says should also mitigate any penalty; lack of proportionality and inability to pay. Kobe points out that ICE is requesting 89% of the maximum permissible fine, and that OCAHO case law suggests that penalties so close to the maximum should be reserved for more egregious circumstances than are reflected here, citing *United States v. La Hacienda Mexican Café*, 10 OCAHO no. 1167, 3 (2013). The company suggests that even in a "worst-case scenario," with a large employer that willfully disregarded its obligations and intentionally falsified I-9s, hired unauthorized aliens, and had a previous history of violations, the penalty would be only $3547.50 more than what the government is requesting here.

Kobe says it had losses of $18,565 in 2012 (exhibit 1), and that income has been down for the past three years due to the high unemployment level in the area, which directly impacts the restaurant industry. The company also points to an unemployment rate in North Carolina that is higher than the national average at 9.5%, and says that undue hardship would be occasioned by the proposed fine, necessitating cuts in staff and/or benefits. Kobe says a minimum fine would be more appropriate, and requests a payment schedule that would permit payment over a six-month period.

C. Discussion and Analysis

The parties agree that Kobe is a small business, and ICE mitigated the penalty accordingly. *See Carter*, 7 OCAHO no. 931 at 121, 160-61.

OCAHO case law has observed that absent some indication of what instructions were given to the company at the time of the NOI, backdating alone is insufficient to support a finding by a preponderance of the evidence that good faith was lacking. *See United States v. Pharaoh's Gentleman's Club*, 10 OCAHO no. 1189, 4-5 (2013). An employer may, for example, not understand English, or may not have been provided with any specific instructions as to what to do. The surrounding circumstances make a difference, and without examining those circumstances there are competing inferences that may be drawn from the mere fact that the forms are backdated. Here, however, although the government's brief failed to mention the fact, the record reflects that Forensic Auditor Aaron McRee had specifically instructed Tony Kuang on September 15, 2010 not to backdate any documents so Kobe was clearly on notice of this requirement.

Failure to prepare a timely I-9 form for an employee is, moreover, treated as a very serious

violation since it may permit an unauthorized individual to maintain unlawful employment. *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013); *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010). The seriousness of this violation aggregates over time. *Siam Thai Sushi*, 10 OCAHO no. 1174 at 4. Kobe concedes that paperwork violations are serious, but it contends that since it was unaware of the I-9 form requirement, its failure should be viewed as a negligent, rather than intentional. Additionally, Kobe contends the delay in preparing the I-9 forms was less a serious violation than other substantive paperwork violations. ICE was nevertheless justified in assessing the seriousness of the violations as an aggravating factor and Kobe's ignorance of the I-9 Form requirements does not mitigate the seriousness of the committed offense.

The assessment of an appropriate monetary civil penalty is not restricted to consideration of only the five statutory factors. *Hernandez*, 8 OCAHO no. 1043 at 664. A company's ability to pay the proposed fine may be weighed in assessing the amount of the penalty. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 11 (2010). The goal in calculating civil penalties is to set a sufficiently meaningful fine in order to enhance the probability of future compliance. *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013); *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), but the penalties are not intended to cause employees to lose their jobs or to force employers out of business. *Snack Attack*, 10 OCAHO no. 1137 at 11. An employer's financial health, the economy, the employer's ability to pay the fine, and the potential effect of the fine on the company are all appropriate additional factors to be considered. *Id.*

The penalty requested here, $981.75 for each violation, is only $118.25 short of the maximum permissible penalty. Penalties approaching the maximum, however, should be reserved for the most egregious violations. *See Fowler Equip.*, 10 OCAHO no. 1169 at 6; *La Hacienda Mexican Café*, 10 OCAHO no 1167 at 3. In consideration of the record as a whole, the penalties for this small family business will be adjusted to an amount closer to the midrange of permissible penalties. The penalties for the violations in Count I involving failure to ensure proper completion of the verification form for twenty-six employees will be assessed at the rate of $500 per violation or a total of $13,000 for Count I. The penalties for the more serious violations in Count II involving failure to prepare or present Forms I-9 for four employees will be assessed at the rate of $600 per violation, or a total of $2400 for Count II. The total amount of the penalty is $15,400.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Kobe Sapporo Japanese, Inc. is a domestic private corporation located in Smithfield, North Carolina.

2. Kobe Sapporo Japanese, Inc. is a small family-owned and operated company engaged in the business of running a restaurant.

3. The United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection on Kobe Sapporo Japanese, Inc. on September 15, 2010.

4. The United States Department of Homeland Security, Immigration and Customs Enforcement served Kobe Sapporo Japanese, Inc. with a Notice of Intent to Fine on April 28, 2011, alleging a total of thirty violations.

5. Kobe Sapporo Japanese, Inc. filed a request for hearing on May 27, 2011.

6. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint against Kobe Sapporo Japanese, Inc. on June 13, 2012.

7. Kobe Sapporo Japanese, Inc. hired Nichole M. Adams, Zhi Wei Chen, Yufen Peng, Gregory A. Grodecki, Shaoli Huang, Jayna N. Baker, James N. Knight, K'Brai Krungglai, Wuzhen Zou, Guan Zhu Kuang, Wei Jian Kuang, Zhi Jian Kuang, Suying Li, Wei Ping Lin, Julie M. Love, Kristin V. Love, Evelyn Martinez, Jessica J. McGuire, Cassandra L. Mishler, Lucio M. Pacheo, Guansen Ou, Nhim Tan, Anh Lu Tan, Virginia M. Warren, Mu Ying Zou, and Ellen M. Melvin, and failed to ensure that their I-9 forms were properly completed.

8. Kobe Sapporo Japanese, Inc. hired Jairo G. Javier, Jose J. Maya-Jimenez, Amanda G. Moore, and Wayne D. Shuck, and failed to prepare and/or present I-9 forms for them after being requested to do so.

9. Forensic Auditor Aaron McRee specifically instructed Tony Kuang, the manager of Kobe Sapporo Japanese, Inc., on September 15, 2010 not to backdate documents, and all twenty-six I-9 forms in Count I have indicia of backdating.

B. Conclusions of Law

1. Kobe Sapporo Japanese, Inc. is an entity within the meaning of 8 U.S.C § 1324a(a)(1) (2012).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. An employer must comply with the verification requirements by ensuring that an employee completes section 1 of the Form I-9, and by itself completing sections 2. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

4. 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).

5. 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) (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).

6. Kobe Sapporo Japanese, Inc. is liable for twenty-six violations in Count I and four violations in Count II, for a total of thirty violations of 8 U.S.C. § 1324a(a)(1)(B).

7. In assessing the 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).

8. 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)).

9. To support a finding of bad faith, the government must present evidence of culpable conduce 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).

10. Backdating alone is insufficient to support a finding that good faith was lacking, as competing inferences may be drawn without consideration of surrounding circumstances. *See United States v. Pharaoh's Gentlemen's Club*, 10 OCAHO no. 1189, 4-5 (2013).

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

Kobe Sapporo Japanese, Inc. is liable for thirty violations and is directed to pay penalties in the total amount of $15,400. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered this 18th day of October, 2013.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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.