

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

September 24, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 14A00003
)	
ROMANS RACING STABLES, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
For the complainant

William Velie
For the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanction 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 Romans Racing Stables, Inc. (RRS or the company) violated 8 U.S.C. §1324a(a)(1)(B). Count I alleged that the company hired 117 individuals for whom it failed to prepare I-9 forms. Count II alleged that the company hired forty-four individuals for whom it failed to ensure proper completion of an I-9 form. RRS filed a timely answer denying liability for the violations alleged and raising affirmative defenses.

Prehearing procedures were undertaken in the course of which the company acknowledged that summary judgment is appropriate as to liability for the violations alleged in the complaint. The parties filed cross motions for summary decision addressed to the penalties to be assessed, and the company filed a response to the government’s motion. Summary decision will be entered as

to liability for all the violations alleged, and both motions are ripe for resolution as to the penalties to be imposed.

II. BACKGROUND INFORMATION

Romans Racing Stables, Inc. is a domestic business incorporated, registered, and directed by Dale L. Romans. ICE served RRS with a Notice of Inspection (NOI) on August 29, 2011. ICE thereafter sent the company a Notice of Suspect Documents and a Notice of Discrepancies dated December 28, 2011. On April 18, 2013, the government issued RRS a Notice of Intent to Fine (NIF) alleging 161 violations of the INA. The company made a timely request for hearing and ICE filed a complaint with this office on October 21, 2013. 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 penalty is \$1100. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the good faith of the employer, 3) the seriousness of the violations, 4) whether the individual was an unauthorized alien, and 5) the 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).¹ Potential penalties for the 161 violations in this case range from \$17,710 to \$177,100.

A. The Government's Motion

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

ICE's motion seeks summary decision as to liability and the imposition of penalties totaling \$150,535. The government acknowledges that RRS is a small business with no history of previous violations, and does not contend that the company acted in bad faith, but does argue that the penalties are warranted because the violations are serious and because unauthorized aliens were present in the workforce. ICE's motion reflects that it first utilized a mathematical formula to determine the penalty amount, in accordance with an internal agency guidance memorandum that sets a baseline penalty determined by the percentage of violations compared to the number of I-9 forms required. The government notes that 166 workers were employed during the period, and the audit documented 161 substantive violations. The penalty matrix² sets the baseline fine amount at \$935 per violation when the violation rate exceeds fifty percent.

ICE then adjusted the penalty based on the statutory factors. The government mitigated the penalties by five percent in light of the small size of the company, and by an additional five percent based on the absence of bad faith in I-9 preparation. ICE aggravated the penalties by five percent based on what it characterized as a substantial number of unauthorized workers, and by another five percent based on the seriousness of the violations. It treated the absence of prior violations as a neutral factor. The end result remained at the baseline fine amount of \$935 per violation, for a total of \$150,535 for 161 violations.

The government challenges the company's assertion that it is unable to pay the amount ICE seeks, and points to RRS's status as a closely-held S-corporation. ICE says that since S-corporations do not pay federal income taxes, and the income is passed through to shareholders, the company cannot establish economic hardship without providing Dale Romans' individual income tax returns since he is the lone shareholder. The government points out that Dale Romans may have personally gained directly or indirectly through his other businesses from the \$2,140,000 in corporate deductions shown on the 2011 corporate tax return.

ICE's accompanying exhibits, provided with its prehearing statement and motion for summary decision, include: G-1) Notice of Inspection (2 pp.); G-2) Payroll Records dated August 31, 2011 (22 pp.); G-3) Notice of Suspect Documents (2 pp.); G-4) Notice of Discrepancies (3 pp.); G-5) Notice of Intent to Fine (2 pp.); G-6) Forms I-9 Related to Count I (47 pp.); G-7) Forms I-9 Related to Count II; G-8) Spreadsheet documenting violations; and, G-9) IRS rules for S-Corporations.

² U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, Fact Sheet: Form I-9 Inspection Overview, Penalties for Substantive and Uncorrected Technical Violations (2013), Available at <http://www.Ice.Gov/News/Library/Factsheets/I9-Inspection.htm>.

B. The Company's Motion and its Response to the Government's Motion

The company's motion requests a reduction of the penalty to an amount that aligns more closely with other OCAHO cases assessing penalties against small businesses. RRS claims that the proposed fine would have a devastating impact from which the company would likely be unable to recover. RRS says the business is spread over multiple tracks in New York, Kentucky, and Florida, and that the fine proposed would hurt its ability to move horses to other tracks, to hire staff, and to compete at the highest level of the racing industry. The company points out that it is a small business, and is unique because horse trainers operate at a loss on horses under their care — they profit only when those horses win races.

The motion also notes that the company acted in good faith, and that, like employers in the restaurant industry, RRS has a high staff turnover rate owing to the transient nature of the horse racing industry. The company says it had no prior training in I-9 compliance prior to the inspection, but was cooperative during the inspection, and has since instituted a comprehensive plan to ensure proper completion of I-9 forms. Dale Romans is the vice-president of the Kentucky Horsemen's Benevolent and Protective Association (KyHPBA), and as such he plans to influence the horse racing industry in Kentucky by educating other employers in I-9 compliance practices and advocating for comprehensive compliance practices throughout the industry.

RRS also points out that most of the statutory factors incline in its favor, and vigorously contests the government's assertion that its workers were unauthorized. The company notes that the government's own notice of discrepancies specifically advised RRS that it should not fire the listed employees or take adverse action against them based on the letter. The company also says that because Dale Romans travels most of the time, he was not at home when these notices arrived, but acted promptly once he received the information. The company contends that the principle of proportionality should call for leniency in this case.

RRS' response to the government's motion says that although the company is good at training horses, it did not do so well at complying with the I-9 requirements. The company reiterated its position that ICE failed to carry its burden to prove that any of RRS' workers were unauthorized, and said that the penalties should be set at the lower end of the statutory range.

Accompanying the company's prehearing statement were the following exhibits: R-1) Federal Income Tax Return (13 pp.); R-2) 2012 and 2013 Profit and Loss Statements (12 pp.); R-3) Financial statements for other entities owned by Dale Romans (20 pp.); R-4) Dale Romans 2011 and 2012 W2 statements (2 pp.); R-5) I-9 Compliance Policy & Procedures (3 pp.); and, R-6)

Statement from Martin Maline, Executive Director of the Kentucky Horsemen's Benevolent and Protective Association (3 pp.).³

C. Discussion and Analysis

The parties agree that Romans Racing Stables, Inc. is a small business, and ICE appropriately mitigated the penalty on this basis, *see United States v. Carter*, 7 OCAHO no. 931, 121, 160-61 (1997), as well as on the basis of good faith. The government could have viewed the lack of history of prior violations as an additional mitigating factor, but chose not to.

While the government cites to “the presence of a substantial number of unauthorized individuals,” ICE failed to identify which individuals it believes were unauthorized. Although it tendered the Notice of Suspect Documents and the Notice of Discrepancies, these notices do not suffice to establish that each individual on the lists is necessarily an unauthorized alien. *United States v. Natural Env'tl., Inc.*, 10 OCAHO no. 1197, 5 (2013). Moreover, even if ICE had met its burden in showing the presence of unauthorized aliens, enhancing the penalties across-the-board because some individuals were unauthorized would not be supported either by the plain language of the statute or by OCAHO case law. *Id.* The statutory factor for consideration here is not whether there are unauthorized aliens 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). Absent specific evidence that any particular individual was unauthorized for employment in the United States, the penalties may not be enhanced on this basis.

The seriousness of violations, moreover, may be evaluated on a continuum because not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). The government argues, and the company acknowledges, that the violations in this case are serious. Indeed, the violations in count I for failure to prepare I-9 forms at all are the most serious of paperwork violations. *See United States v. MEMF, LLC*, 10 OCAHO no. 1170, 5 (2013). The violations in count II for failure to ensure proper completion of the form are also serious, but somewhat less so, *see United States v. Platinum Builders of Cent. Fla.*, 10 OCAHO no. 1199, 8 (2013), and the difference may be reflected in the final penalty. *Id.*

In addition to the five statutory factors, RRS seeks consideration of its ability to pay, as well as a favorable consideration of the company's efforts to improve I-9 compliance across the horse racing industry. Dale Romans evidently has other businesses in addition to RRS, including a farm, a training center, and other entities identified only as GTC and DR, LLC. His own W-2

³ The company submitted additional exhibits with its motion for summary decision, but they were largely duplicative. In the interest of clarity, the exhibits will be referenced as they were numbered with the prehearing statement.

forms for 2011, 2012, and 2013 were among the exhibits offered, as well as a summary profit and loss statement for various businesses. It is difficult to form a clear picture of the company's real current financial status from these documents.

Nevertheless, and with or without consideration of the company's ability to pay, ICE's proposed penalties of \$935 per violation constitutes eighty-five percent of the maximum permissible, and penalties so close to the maximum are ordinarily reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). Such severe penalties appear unduly harsh, especially for the everyday garden-variety violations in Count II. (A chart of these violations is shown in the government's exhibit G-8). Given the transient nature of the industry, and in light of the general policy of leniency toward small entities as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), as amended by § 223(a) of the Small Business Regulatory Enforcement Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996), the penalties for this small business will be adjusted as a matter of discretion to an amount closer to the mid-range and will be assessed at a rate of \$500 for each of the 117 violations in count I, and \$400 for each of the forty-four violations in count II, for a total penalty of \$76,100.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Romans Racing Stables, Inc. is a domestic business incorporated, registered, and directed by Dale L. Romans.
2. The United States Department of Homeland Security, Immigration and Customs Enforcement served Romans Racing Stables, Inc. with a Notice of Inspection on August 29, 2011.
3. The Department of Homeland Security, Immigration and Customs Enforcement served Romans Racing Stables, Inc. with a Notice of Intent to Fine on April 18, 2013.
4. Romans Racing Stables, Inc. filed a request for hearing on May 3, 2013.
5. Romans Racing Stables, Inc. hired 1) Edgar Abrego; 2) Aldo Aburto; 3) Braiham Aguirre-Martinez; 4) Gustavo Albarado; 5) Donia Alvaro; 6) Herbert Anderson; 7) Luis Avina; 8) Eliu Barcu; 9) Nelson Barrera; 10) Bakyt Bokoloeu; 11) Alexa Boulanger; 12) Ricardo Brito; 13) Kimberley Brooking; 14) Geovani Calzadilla; 15) Marisa Collazos; 16) Roberto Contreras; 17) Javier Contreras; 18) Kevin Contreras; 19) Rony Corrales; 20) Seymour Cox; 21) Katrina Danez; 22) Clarence Daniel; 23) Aparna Das; 24) Elvis Davis; 25) Juan De Lion; 26) Roberto Delgado; 27) Vania Duarte; 28) Olivia Eberle; 29) Joshua Edward; 30) Lewis Epps; 31) Admarido Espinoza; 32) Scott Evrett; 33) Juan Fabian; 34) Benjamin Fedd; 35) Cesar Figueroa; 36) Francisco Figueroa; 37) Mark Filiponi; 38) Avilo Garcia; 39) Bernabe Garcia; 40) Maria Garcia;

41) Mirian Bacilio Garcia; 42) Kara Giglio; 43) Daniel Gomez; 44) Mary Gomez; 45) Pablo Primerio Gomez; 46) Aniceto Gonzalez; 47) Edgar Gonzelez; 48) Lionel Gonzalez; 49) Zuniga Gonzallo; 50) Alejandro Granda Salas; 51) Mark Guidry; 52) Ed Haney; 53) Adeldo Munoz Hernandez; 54) Justino Hernandez; 55) Nelson Hernandez; 56) Hector Herrera; 57) Leonico Ignacio; 58) Jorge Iron; 59) Francisco Ixcoy-sontay; 60) Sarah Jones; 61) James Joyce; 62) Jocelyne Kenny; 63) Madelyn Kinnard; 64) Ramon Lacen; 65) Leonardo Maldonado; 66) Ubaldo Maldonado; 67) Allen Marragh; 68) Mayra Marroquin; 69) Gisela Martinez; 70) Cleotide Mendez-Hernandez; 71) Mario Morales; 72) Brenda Lorenz Moreyra; 73) Ellu Mosqueira; 74) Alexander Naupac; 75) Lilia Nunez; 76) David O'Leary; 77) Terry Oliver; 78) Maria Perez Ortiz; 79) Andres Osorio; 80) Gustavo Palma; 81) Andres Paredes; 82) Rafael Pena; 83) Lorenzo Perez; 84) Rigoberto Perez; 85) Leopoleo Prieto; 86) Joelito Quevado; 87) Jose Quevado; 88) Rosa Quintanilla; 89) Alfonso Ramirez; 90) Raul Ramirez; 91) Salvador Ramos; 92) Jose Rea; 93) Roel Regalado; 94) Celestino Munoz Rivas; 95) Angel Rivas-Munoz; 96) Brigido Rosario Rivera; 97) Jack Rivera; 98) Ana Martinez Rodriguez; 99) Jose Roque; 100) Marcelino Salas; 101) Juan Sanchez; 102) Asia Savasta; 103) Ricardo Seminario; 104) Elvia Tapia; 105) Gilberto Torres; 106) Reymundo Tranguilino; 107) Sergio Turbides; 108) Roxanna Ubilla Tello; 109) Manuel Angel Ulloa; 110) Ramos Valentin; 111) Ruben Velazquez; 112) Esmeralda Villalobos; 113) Inocencio Vincencio; 114) William Walden; 115) Herbert Wilson; 116) Thomas Womble; and, 117) Ziniga Rafael, and failed to prepare and/or present I-9 forms for them.

6. Romans Racing Stables, Inc. hired 1) Cesar Anibal Abrego; 2) Rodolfo Abrego; 3) Faustino Aguilar; 4) Freddy Aguilera; 5) Gabina Atempa; 6) Baldemar Bahena; 7) Lucrecia Barrera; 8) Carlos Campos; 9) Broni Contreras; 10) Lucia Contreras; 11) Ramiro Corletto; 12) Palma Cupertino; 13) Hugo Encarnacion; 14) Josafat Esquivel; 15) Sonia Esquivel; 16) Fabian Eustaqio; 17) Nelson Fabian; 18) Juana Flores Rodriguez; 19) Anibal Garcia; 20) Catalino-Hernandez Gonzalez; 21) Saul Gonzalez; 22) Vicente Gonzalez; 23) Tari Hendrickson; 24) Laura Hernan; 25) Angel Hernandez; 26) Vicerino Hernandez; 27) Walter Herrera; 28) Katherine Johnson; 29) Pedro Labra; 30) Enrique Lanuza Abrego; 31) Gerardo Maldonado; 32) Yolanda Maldonado; 33) Edgar Martinez; 34) Claudia Mata; 35) Carlos Melgar; 36) Cristel Montecinos; 37) Maria del Carmen Orantes; 38) Alfonso Policarpo; 39) Maria Portillo; 40) Jose Quezada; 41) Felipe Salas; 42) Porfirio Sanchez Perez; 43) Adrian Vincencio; and, 44) Juan Vincencio, and either failed to ensure the individual properly completed section 1 of the I-9 form, or failed itself to properly complete section 2 or 3 of the form I-9 for each individual.

7. Romans Racing Stables, Inc. is a small business with no history of previous violations.

8. The United States Department of Homeland Security, Immigration and Customs Enforcement did not suggest and the record does not reflect that Romans Racing Stables, Inc. acted in bad faith at any time relevant to this matter.

9. No specific individual employed by Romans Racing Stables, Inc. was shown to be an alien not authorized for employment in the United States.

B. Conclusions of Law

1. Romans Racing Stables, 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. Romans Racing Stables, Inc. is liable for 161 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. 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).

5. A Notice of Discrepancies or a Notice of Suspect Documents, standing alone, is not sufficient to establish that all the individuals listed are aliens unauthorized for employment in the United States. *United States v. Platinum Builders of Cent. Fla.*, 10 OCAHO no. 1199, 9 (2013).

6. The statutory factor for consideration in setting a penalty is not whether unauthorized aliens were present in the workforce, it is "whether or not the individual was an unauthorized alien." 8 U.S.C. § 1324a(e)(5); see *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013).

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).

ORDER

Romans Racing Stables, Inc. is liable for 161 violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of \$76,100. 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 24th day of September, 2014.

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.