

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

September 26, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 14A00004
)	
MOTT THOROUGHBRED STABLES, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller, III
for the Complainant

Thomas R. Ragland
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 three-count complaint alleging that Mott Thoroughbred Stables, Inc. (Mott Stables, the stables, or the company) violated 8 U.S.C. §1324a(a)(1)(B). Count I alleged that the company hired eleven individuals for whom it failed to prepare I-9 forms. Count II alleged that the company hired seventy individuals for whom it failed to ensure proper completion of an I-9 form. Count III alleged that the company hired twenty-one individuals for whom it failed to correct technical or procedural violations on I-9 forms within ten days of service of a Notification of Technical or Procedural Failures (NTPF).

Mott Stables filed a timely answer admitting ten of the eleven violations alleged in Count I and all of the violations alleged in Count II, but denying the violations alleged in Count III and contesting the amount of the proposed penalty. Prehearing procedures were undertaken, in the course of which the parties agreed that Count III should be dismissed, which was done in an order dated April 1, 2014. The parties subsequently filed cross motions for summary decision and Mott Stables filed a response to the government's motion. The stables' motion admitted the remaining violation in Count I, and summary decision will be entered as to liability for the violations alleged in Counts I and II. The only remaining issue is the appropriate amount of the penalty to be imposed, and the cross motions are ripe for resolution as to that question.

II. BACKGROUND INFORMATION

Mott Stables is a company located in Elmont, New York, that stables and trains thoroughbred horses at various racetracks in the area. It is incorporated, registered and directed by William I. Mott, who owns ninety-five percent of the voting stock, the remainder of which is owned by Tina Mott. William and Tina Mott are the sole shareholders in this subchapter S corporation.

ICE served the company with a Notice of Inspection (NOI) on August 29, 2011. ICE thereafter sent the company a NTPF and a Notice of Discrepancies dated February 2, 2012, followed by a Notice of Suspect Documents (NSD) dated February 13, 2012. The government issued a Notice of Intent to Fine (NIF) on April 29, 2013, alleging 104 violations of the INA. The company made a timely request for hearing and ICE filed a complaint with this office on October 28, 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. § 274a10(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 the 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 eighty-one remaining violations in this case range from \$8910 to \$89,100.

A. The Government's Motion

ICE's motion seeks summary decision as to liability and the imposition of penalties totaling \$68,161.50. The government acknowledges that Mott Stables is a small business with no history of previous violations, and does not contend that the company acted in bad faith. ICE notes, however, that unauthorized workers were found in the company's workforce, and that the violations are serious. The motion reflects that ICE first utilized a mathematical formula to determine the baseline penalty amount, in accordance with an internal agency guidance memorandum that sets penalties by determining the percentage of violations compared to the number of I-9 forms required. The government notes that 134 workers were employed during the period of inspection, and that there are eighty-one 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 mitigated the penalty by another five percent despite its determination that unauthorized workers were present. The government aggravated the penalty by five percent based on the seriousness of the violations, and treated the absence of prior violations as a neutral factor. The resulting fine was reduced to \$841.50 per violation, for a total of \$68,161.50.

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>.

² U.S. Dep't of Homeland Sec., Immigrations 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>.

The government challenges Mott's assertion of economic hardship, and points to the company's status as a closely held corporation. ICE complains that the stables provided only its 2010 and 2011 tax returns, not the return for 2012,³ and that these returns indicate that the company avoided paying federal income tax in each of those years despite gross receipts in excess of \$5,000,000. The government notes that William Mott, the company's majority shareholder, received at least \$500,000 in compensation in 2011, and that the penalty amounts to less than one half of one percent of the company's assets and less than fourteen percent of William Mott's compensation.

Exhibits accompany ICE's prehearing statement include: G-1) Notice of Inspection (2 pp.); G-2) Notice of Technical or Procedural Failures (11 pp.); G-3) Notice of Discrepancies (3 pp.); G-4) Notice of Suspect Documents (2 pp.); G-5) Employee list (3 pp.); G-6) Payroll journal (17 pp.); G-7) Documentation for Count I violations (4 pp.); G-8) Spreadsheet documenting count II violations (5 pp.); and, G-9) Forms I-9 for Count II.

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

The company's motion points out that Mott Stables has failed to turn a profit in any of the preceding three years, and requests a reduction of the penalty to a total of \$8,970.50. Mott questions the use of the percentage of violations to set a baseline penalty, and says that such an approach is unsupported by statute, by regulation, or by case law. The company also questions using the same penalty for every violation because the violations differ and the penalties should reflect their relative seriousness. The stables also notes that penalties so near the maximum permissible should be reduced because the violations are not egregious. Mott Stables notes that it is small business with no history of previous violations, that it acted in good faith in its I-9 preparation, and that the present litigation itself has served as a sufficient deterrent to future violations, irrespective of the fine.

The company points to its zero net profits or net losses for several years, and argues that the penalties proposed could force Mott to terminate employees, sell assets, and/or close the business. Mott Stables notes that it is a separate legal entity, and that the personal assets of the shareholders are irrelevant to the company's ability to pay. It says in addition that ICE's comments on the reasons for the company's tax deductions should carry little weight. The company proposes that the penalties for the seventy violations in Count II be set at \$110 per violation, and that the penalties for the eleven more serious violations in Count I be set at \$115.50 per violation, for a total penalty of \$8,970.50 for both counts.

³ The company subsequently provided a copy of its 2012 return with its motion for summary decision; the document is identified as Exhibit R-5.

Mott Stables' response to ICE's motion reiterates the company's criticisms of the government's penalty matrix, and says that a baseline penalty at the top of the range is disproportionate and unreasonable.

Accompanying the company's prehearing statement and motion for summary decision were the following exhibits: R-1) Sworn statement of Ms. Tina Mott (2 pp.); R-2) 2010 Corporate Income Tax Return (10 pp.); R-3) 2011 Corporate Income Tax Return; R-4) Form I-9 for Robert Brothers; and, R-5) 2012 Corporate Income Tax Return (9 pp.).

C. Discussion and Analysis

The parties agree that ICE appropriately mitigated the penalty on the basis of Mott's size, *see United States v. Carter*, 7 OCAHO no. 931, 121, 160-61 (1997), as well as on the basis of good faith. Despite ICE's assertion that unauthorized aliens were found in the workforce, the government did not identify with specificity any particular individual it believed to be unauthorized, so this factor actually inclines in the company's favor, as does the company's lack of history of any previous violations.

As Mott Stables points out moreover, the seriousness of paperwork violations 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 violations in Count I involving failure to prepare I-9 forms are the most serious of paperwork violations, *see United States v. MEMF, LLC*, 10 OCAHO no. 1170, 5 (2013), because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). The violations in Count II involving failure to ensure the proper completion of the forms 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 penalties. *Id.*

In addition to the five statutory factors, Mott seeks consideration of the company's ability to pay, and points to the gross receipts and net losses on its corporate tax returns. Mott Stables says that William Mott's personal assets are irrelevant to the determination of whether the business itself has the ability to pay. But given the limited information reflected in the tax returns, it is difficult to form a clear picture of the company's real financial status, and it is well established in our case law that a corporation's ability to demonstrate tax losses does not necessarily establish either a company's poor financial condition or its inability to pay. *See, e.g., United States v. Bus. Teleconsultants, Ltd.*, 3 OCAHO no. 565, 1622, 1629 (1993), *citing United States v. A-Plus*

Roofing, 1 OCAHO no. 209,⁴ 1397, 1401 (1990).

Nevertheless, and with or without consideration of the stables' ability to pay, ICE's proposed penalties computed at the rate of \$841.50 for each violation amount to more than three quarters of the maximum permissible, and penalties at this level are ordinarily reserved for more egregious violations than have been shown here. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). Such severe penalties appear unduly harsh, and disproportionate in particular to the everyday garden-variety violations in Count II. (A chart of these violations is shown in government's exhibit G-8). Given the circumstances as a whole, 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 eleven violations in count I, and \$400 for each of the seventy violations in Count II, for a total penalty of \$33,500.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Mott Thoroughbred Stables, Inc. is a domestic business incorporated, registered, and directed by William I. Mott.
2. The United States Department of Homeland Security, Immigration and Customs Enforcement served Mott Thoroughbred Stables, Inc. with a Notice of Inspection on August 29, 2011.
3. The United States Department of Homeland Security, Immigration and Customs Enforcement served Mott Thoroughbred Stables, Inc. with a Notice of Intent to Fine on April 29, 2013.
4. Mott Thoroughbred Stables, Inc. filed a request for hearing on May 29, 2013.
5. Mott Thoroughbred Stables, Inc. hired 1) Filipe Castro; 2) Robert Brothers; 3) David Borundo; 4) Micaela Chaves; 5) Melisio Lopez; 6) Juan Mercado; 7) Jesus Soto; 8) Pablo Velasquez; 9) Maurice Young; 10) Yvonne Warren; and, 11) Mark Watts, and failed to prepare and/or present I-9 forms for them.

⁴ Incorrectly cited in *Bus. Teleconsultants* as no. 273.

6. Mott Thoroughbred Stables, Inc. hired 1) Alfredo Balber; 2) Jorge Balber; 3) Alvaro Barajas; 4) Rodolphe Brisset; 5) Bayron Cardona; 6) Esvin Cardona; 7) Marroquin Gelper Cardona; 8) Luis Ceja Garnica; 9) Helene Conway; 10) Diego Delgadillo; 11) Jose Luis Donis; 12) Patricia Echavarria Ramirez; 13) Jose Carlos Esparza Sanchez; 14) Cesar Ivan Esparza; 15) German Barrera (Esparza); 16) Jose Guadalupe Esparza; 17) Jose Saul Esparza; 18) Milo Fields; 19) Alvaro Fierros Mondragon; 20) Jose Fierros; 21) Jesus Figueroa; 22) Jose Luis Figueroa Castro; 23) Richard Figueroa; 24) Lindo Garcia-Alvarez; 25) Omar Ganica; 26) Manuel Garcia; 27) Jose Garcia; 28) Mario Garcia; 29) Patricia Hammel; 30) Eduardo Hernandez Martinez; 31) Favian Hernandez Martinez; 32) Cardozo Hernandez Meliton; 33) William Higgins; 34) John Himmer; 35) Mijail Nicolaith Ixcoy Lo; 36) Homero Jimenezl; 37) Marissa LaCava; 38) Kristen Lindsay; 39) David Lively; 40) Saul Lopez; 41) Ismael Martinez; 42) Jesse Martinez; 43) Jose Alfredo Martinez; 44) Jose Humberto Martinez; 45) Rogelio Martinez Sanchez; 46) Kenneth McCarthy; 47) Harry Miller; 48) Travis Miller; 49) Caroline Nally; 50) Christopher Peake; 51) Hector Perez; 52) Marco Perez Garcia; 53) Neil Poznansky; 54) Rony Quintero; 55) Marino Ramos Garcia; 56) David Rider; 57) Brijido Rivas; 58) Valerio Roa; 59) Jennufer Robinson; 60) Luis Rodriguez Davila; 61) Gabrielle Russum; 62) Alvaro Santibanez; 63) Alison Siegler; 64) Jessica Schultz; 65) Erma Scott; 66) Gustavo Solorio; 67) Eduardo Soto; 68) Kenneth Stevenson; 69) Joanna Trout; and, 70) Ronald Waddell, 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 I-9 form for each individual.

7. Mott Thoroughbred 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 that Mott Thoroughbred Stables, Inc. acted in bad faith at any time relevant to this matter.

B. Conclusions of Law

1. Mott Thoroughbred 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 filing have been satisfied.

3. Mott Thoroughbred Stables is liable for eighty-one violations of 8 U.S.C. § 1324a(a)(1)(B).

4. 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).

5. Failure to prepare an I-9 in a timely fashion is a serious violation because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013).

6. 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

Mott Thoroughbred Stables, Inc. is liable for eighty-one violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of \$33,500. 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 26th 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.