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

May 19, 2015

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00089
HOMESTEAD METAL RECYCLING CORP., 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 (2012). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Homestead Metal Recycling Corp. violated 8 U.S.C. § 1324a(a)(1)(B) by failing to timely prepare and/or present Forms I-9 for seven employees. The complaint seeks penalties totaling $5890.50.

Homestead, by its administrator, Ana San Roman, filed an answer stating that until the company received the Notice of Inspection (NOI), Homestead had been unaware of the I-9 requirement. The answer admitted the violations alleged as to four of the employees, but asserted affirmative defenses as to the other three and said the proposed penalties were excessive. Prehearing procedures were undertaken, after which the government filed a motion for summary decision. Homestead did not file a response, and its time for doing so has elapsed.[1] The government's motion is ripe for resolution.

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014). A party has ten days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion was served on February 5, 2015, so Homestead's response was due by February 20, 2015.

II. BACKGROUND INFORMATION

Homestead Metal Recycling, incorporated on May 1, 2012 by Otto J. San Roman, is a nonferrous metal recycling transfer facility located in Homestead, Florida. ICE served Homestead with a NOI on September 23, 2013, at which time Ana San Roman told special agent James Wolynetz that Homestead had been in business only for a short time and had six employees, but no I-9 forms had been prepared for any of them.

On September 30, 2013, Ana San Roman presented six I-9 forms she prepared after the NOI, an employee list, a payroll registry, the company's Articles of Incorporation, a Business Entity Questionnaire, and other documents, including a narrative about the company and a copy of a complaint filed by a former employee. The narrative stated that shortly after Homestead first opened its doors, the partner who helped start the company abruptly withdrew and shut down the business. Otto and Ana San Roman, who put their life savings into the company, thereafter reopened the business on or about June 1, 2013. Ana San Roman says Homestead experienced many obstacles and hardships after opening its doors, including being harassed by a competitor and being robbed at gunpoint. The record reflects that Ana San Roman told ICE that both she and her husband have other full time jobs, and that the company is in survival mode and struggling to stay afloat.

ICE served Homestead with a Notice of Intent to Fine (NIF) on December 6, 2013, after which the company made a timely request for hearing on December 16, 2013. ICE filed the instant complaint on June 30, 2014. All conditions precedent to the institution of this proceeding have been satisfied.

ICE's complaint alleges that Homestead failed to timely prepare and/or present I-9 forms for Kheimbigh Eduardo Arriaza, Osby Atkins, James Brown, Alejandro Morua, Osmany Pelegrin, Teresa Rabassa, and Oscar Rollins. Homestead's answer did not contest the allegations involving Arriaza, Atkins, Brown, or Pelegrin, but contended by way of affirmative defense that Morua, Rabassa, and Rollins were not employees, so the company was not obligated to prepare I-9 forms for them. Homestead requested that any proposed penalties be waived or reduced.

III. POSITIONS OF THE PARTIES

A. The Government's Motion

The government's motion contends that there are no genuine issues of material fact and that Homestead was obligated to prepare timely I-9 forms for all of the named individuals. ICE says that Teresa Rabassa, Alejandro Morua, and Oscar Rollins are all properly classified as employees of the company notwithstanding Homestead's assertions to the contrary.

The government points to the Business Entity Questionnaire completed by Homestead in September 2013 that identified only one owner, Otto Jose San Roman. Section K-1 of the company's 2013 corporate tax return, which was certified under penalty of perjury, reflects that Otto J. San Roman owned 100% of the company's shares and was entitled to deduct all the losses that year. The government points out as well that Homestead's employee roster specifically includes Rabassa and Morua, but not Otto J. San Roman, and that Homestead prepared I-9s for Rabassa and Morua, but not for Otto J. San Roman. Rabassa and Morua, moreover, are not listed as authorized signatories on the corporate bank account. The government says Homestead's interrogatory answers reflect that Rabassa owns only 10% of the issued stock and Morua 20%, while Otto J. San Roman owns 70%. ICE acknowledges that Rabassa and Morua may have corporate voting rights, but says that these rights are de minimus and that these individuals are unable to direct or influence corporate affairs.

ICE says further that Rabassa is not identified as having authority to hire or fire employees, and her compensation consists of an hourly wage ranging from $7.79-$10, not a salary commensurate with substantial corporate responsibility. ICE says the company's narrative that Homestead provided to special agent Wolynetz in September 2013 identifies Morua as the "manager" and "foreman," not as a company officer, partner, or owner, and does not suggest that he had an ownership interest in the company at that time. ICE says that Morua's employment is, in any event, subject to control and direction from the dominant shareholder, Otto San Roman.

ICE contends that Homestead identified Oscar Rollins as a former employee in the employee roster the company provided, and says the wages Homestead paid to Rollins are documented in the company's payroll registry. ICE points to the regulatory definition in 8 C.F.R. § 274a.1(f) stating that an employee is "an individual who provides services or labor . . . for wages or other remuneration," and says Rollins clearly falls within this definition. The government points out in addition that Rollins filed a legal action against Homestead for overtime and minimum wage payments in the County Court of the 11th Judicial Circuit in Miami-Dade County and that the company entered a settlement with him resolving those allegations.

The government says its penalty calculation gave consideration to the statutory factors and mitigated the proposed penalties based on Homestead's status as a small business, on the lack of unauthorized aliens in Homestead's workforce, and on the company's lack of history of previous violations. ICE says it aggravated the penalty based on the seriousness of the violations and treated the remaining factor of good faith as neutral, for a result of $841.50 for each violation, and a total adjusted penalty of $5890.50.

ICE contends that Homestead's 2013 tax return, the only document Homestead submitted to establish its inability to pay the proposed penalty, is insufficient to show such an inability because, while it reflects a substantial corporate loss, the form fails to delineate how the loss was calculated and is therefore not indicative of the company's overall financial health. ICE says

further that the tax return is incomplete because it does not include Form 1125-E, which would show corporate officer compensation. The government says Homestead did not provide annual reports, financial statements, balance sheets, or asset or liability statements, and that it has money available in its bank account. ICE also points to the Rollins lawsuit, which the company settled for $5000 despite stating five days earlier in its prehearing statement that it lacked the money to pay any fine. Even if Homestead could establish an inability to pay, ICE says the penalty should be in the midrange of permissible penalties, like those imposed in other OCAHO cases involving family-owned financially struggling businesses that committed serious violations.

B. Homestead's Defense

Homestead acknowledged liability for failing to timely prepare I-9s for four employees but says the company was not required to prepare I-9s for the other three. Homestead says that after Jorge Suarez, the original partner, resigned, Alejandro Morua became a new partner with full responsibility for running the day-to-day operations, and Teresa Rabassa took full responsibility for the administrative functions of the business. Homestead says that because it could not afford to pay Morua and Rabassa high salaries, the company offered each a percentage of the business instead, so each is a partial owner. Homestead says this information is reflected on its Amended Annual Report filed on October 10, 2013 with the Florida Department of State Division of Corporations. The amended report reflects that Morua is the company's vice president and Rabassa is the treasurer. Homestead says that although the company prepared and presented I-9s to agent Wolynetz for these individuals, it was not obligated to do so and the allegations involving these employees should be dismissed.

Homestead also contends that it should not be held liable for failing to prepare an I-9 for Oscar Rollins, because Rollins was neither a full-time nor a part-time employee, but worked only temporarily on an "as needed" basis. Homestead says that Rollins was initially allowed to do minor jobs around the shop, such as sweeping, throwing out the garbage, and loading the truck, but he failed to show up ninety percent of the time, and Homestead asked him not to come back. Homestead says that Rollins was only in the shop for about three weeks, during which he showed up to work only for a few days.

The company requests a warning notice in place of a penalty, but says if a penalty is imposed, it should be the minimum permissible because the penalties proposed would constitute a "death sentence" and require the company to shut its doors. Homestead characterizes itself as a "penny business" that is not yet profitable because it is still in its infancy, and as a "mom and pop" operation in a small southern Florida city with an unemployment rate exceeding twenty percent. The company provided a news article from the *Miami Herald* dated in December 2013 confirming the high unemployment rate in the area.

Homestead emphasizes that the company had only hired employees just a few months before the NOI, and says it was unfairly targeted after a competitor allegedly provided false information to

ICE in an attempt to shut the company down. The company points out as well that its current six employees were previously unemployed and most were receiving federal assistance. The company says the only reason the forms weren't timely prepared was that Ana San Roman was completely unaware of the I-9 requirement, but all the employees were eligible to work in the United States and Homestead corrected its mistake immediately by enrolling in E-Verify. An E-Verify printout shows that Ana San Roman received a score of 92.86% on the E-Verify Knowledge Test.

IV. EVIDENCE CONSIDERED

Accompanying the government's motion was the declaration of special agent James Wolynetz, as well as the following exhibits: A) Notice of Inspection dated September 18, 2013 (3 pp.); B) DHS Reports of Investigation dated October 10, 2013 and September 24, 2013 (6 pp.); C) I-9s (12 pp.); D) Homestead's employee roster; E) Homestead's payroll registry (2 pp.); F) Homestead's Articles of Incorporation (3 pp.); G) Business Entity Questionnaire (2 pp.); H) Narrative Pertaining to Homestead by Ana San Roman, dated September 26, 2013 (3 pp.); and I) Oscar Rollins's complaint against Homestead in the County Court of the 11th Judicial Circuit, Miami-Dade County, Florida (9 pp.).

The government also filed a Notice of Filing of Discovery Materials and Notice of Discovery Dispute, appended to which were answers to certain of ICE's interrogatories, Homestead's banking account statements for 2013, and evidence of a settlement in *Rollins v. Homestead Metal Recycling Corp*. ICE did not file a motion to compel and the discovery dispute was not ruled upon, but the documents were considered as evidence for purposes of the pending motion.

Homestead's exhibits accompanied its answer and included: R-1) DHS property receipt; R-2) Notice of Intent to Fine (2 pp.); R-3) 2013 Florida Profit Corporation Amended Annual Report filed October 10, 2013; R-4) Florida Department of State corporation summary (2 pp.); R-5) article from the *Miami Herald* dated December 25, 2013 (2 pp.); R-6) results for E-Verify Knowledge test dated September 26, 2013; R-7) portion of Notice of Intent to Fine; R-8) email from Otto San Roman to Lorraine Tashman dated December 6, 2013 (2 pp.); R-9) email from Otto San Roman to Lorraine Tashman dated January 14, 2014 (4 pp.); and R-10) email from Otto San Roman to Lorraine Tashman dated June 22, 2014 with attached corporate tax returns for Homestead (22 pp.).

V. DISCUSSION AND ANALYSIS

A. Liability

An individual is not an employee of an enterprise if he or she, through an ownership interest, controls all or part of the enterprise. *See* Restatement (Third) of Employment § 1.03 (Tentative Draft no. 2, revised, 2009). Neither the form of the business nor the individual's title is determinative. *Cf. Clackamas Gastroenterology Assocs. v. Wells,* 538 U.S. 440, 450-51 (2003). Common law agency principles inform the analysis, the principal factor being that of control. *Id.* at 448 (finding that the common-law element of control is the principal guidepost); *see also United States v. Jalisco's Bar and Grill, Inc.*, 11 OCAHO no. 1224, 9 (2014).[2] The question of a person's employment status is a mixed question of law and fact, and can be resolved as a matter of law in the absence of a factual dispute. *See United States v. Santiago's Repacking, Inc*., 10 OCAHO no. 1153, 6 (2012).

Because the government made a prima facie showing that Morua and Rabassa were on the payroll, Homestead bears the burden of proof of its defense that they were actually owners, not employees. *See United States v. Barnett Taylor, LLC*, 10 OCAHO no. 1155, 7 (2012). The only evidence that Homestead presented to support this defense consists of incorporation documents listing Morua and Rabassa as officers of the company, but these documents were not filed until October 2013, after issuance of the NOI. Homestead's responses to discovery reflect that Morua holds a 20% ownership interest in Homestead, and that Rabassa holds a 10% ownership interest, but the company's 2013 tax return shows that Otto San Roman still held 100% of the stock in 2013. Otto San Roman is also the only individual having the power of the purse in that he is the only one authorized to conduct transactions from Homestead's bank account. Morua and Rabassa appear on both the employee roster and on the payroll registry, and the record reflects that both received W-2s for 2013. That Morua is in charge of the company's day-to-day operations and Rabassa runs the administrative functions are not sufficient indicia of control to establish that they were not employees at the time of the NOI.

[2] 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.

Homestead also failed to establish that Oscar Rollins was not an employee. The company's employee roster reflects that Rollins was hired on June 17, 2013 and terminated on July 12, 2013. Rollins performed various tasks as needed, including sweeping, throwing out garbage, and loading trucks. Homestead's payroll registry reflects that Rollins was issued checks for $180 on June 21, 2013; $200 on June 29, 2013; $166 on July 5, 2013; and $250 on July 12, 2013 as wages for these tasks. Despite his short tenure and poor attendance record, Homestead paid Rollins in exchange for his labor, which is sufficient to satisfy the definition of an employee under 8 C.F.R. 274a.2(f). Homestead was accordingly obligated to prepare an I-9 for Rollins as well.

Homestead admitted it failed to timely prepare I-9s for Kheimbigh Eduardo Arriaza, Osby Atkins, James Brown, and Osmany Pelegrin, and the record reflects that the company was obligated as well to timely prepare I-9s for Alejandro Morua, Teresa Rabassa, and Oscar Rollins, but failed to do so. Homestead is accordingly liable for seven violations.

B. Penalties

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. The penalties in this case range from a low of $770 to a high of $7700. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), it must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). 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).

OCAHO case law has long held that failure to prepare an I-9 at all is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996). While slightly less serious, failure to timely prepare an I-9 is also a very serious violation because the longer the employer delays in preparing an individual's I-9, the higher chance there is of unauthorized employment. *See United States v. Two for Seven, L.L.C.*, 10 OCAHO no. 1208, 13 (2014) (citing *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013)); *see also Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013).

Apart from the seriousness of the violations, however, all the remaining statutory factors weigh heavily in Homestead's favor. Particularly where, as here, a fledgling business has had so many setbacks just trying to get off the ground, the general public policy of leniency toward small entities, as set out in § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996), 5 U.S.C. 601 note (2006), argues powerfully against such a substantial fine.

Homestead's 2013 tax return shows a total income of $1710 and an ordinary business loss of $107,581, with compensation to officers of $26,675. The company's bank statement at the end of December 2013 for its only account shows a balance of $10,158.86. ICE's proposed penalty is more than half that balance and appears wholly disproportionate in light of the record as a whole. Our case law consistently holds, moreover, that 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 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).

Based on the record as a whole and the statutory factors in particular, the penalties will be reduced to the low end of the midrange and assessed at a rate of $350 per violation for a total of $2450.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Homestead Metal Recycling, incorporated in 2012, is a nonferrous metal recycling transfer facility located in Homestead, Florida.

2. Otto Jose San Roman is the majority owner of Homestead, and Ana San Roman is the company's administrator.

3. Department of Homeland Security, Immigration and Customs Enforcement served Homestead Metal Recycling Corp. with a Notice of Inspection (NOI) on September 23, 2013.

4. Department of Homeland Security, Immigration and Customs Enforcement served Homestead Metal Recycling Corp. with a Notice of Intent to Fine on December 6, 2013.

5. Homestead Metal Recycling Corp. made a request for hearing on December 16, 2013.

6. Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on June 30, 2014.

7. Homestead Metal Recycling Corp. hired Kheimbigh Eduardo Arriaza, Osby Atkins, James Brown, Alejandro Morua, Osmany Pelegrin, Teresa Rabassa, and Oscar Rollins and failed to prepare I- 9 forms for them until after the Notice of Inspection.

B. Conclusions of Law

1. Homestead Metal Recycling Corp. 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. Homestead Metal Recycling Corp. is liable for seven 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).

5. Failure to prepare an I-9 at all is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996).

6. Failure to timely prepare an I-9 is also a very serious violation because the longer the employer delays in preparing an individual's I-9, the higher chance there is of unauthorized employment. *See United States v. Two for Seven, L.L.C.*, 10 OCAHO no. 1208, 13 (2014) (citing *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013)); *see also United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (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).

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

Homestead Metal Recycling Corp. is liable for seven violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of $2450. The parties are encouraged to set up a payment schedule that will minimize the impact of the penalty on this struggling start-up company's business.

SO ORDERED.

Dated and entered this 19th day of May, 2015.

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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.