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

March 6, 1998

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 97A00043
FORTUNE EAST FASHION, INC.,)
Respondent.)
)

FINAL ORDER SETTING CIVIL MONEY PENALTIES

Procedural History

This is an action arising under the Immigration and Nationality Act, 8 U.S.C. §1324a (1994) (INA or the Act), as amended, in which the United States Immigration and Naturalization Service (complainant or INS) is the complainant and Fortune East Fashion, Inc. (respondent or Fortune East) is the respondent. On January 9, 1997, INS filed a complaint in three counts with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging in Count I that respondent, after November 6, 1986, failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Form I–9) for six named individuals, alleging in Count II that respondent failed to ensure that one named individual hired after November 6, 1986 properly completed Section 1 of Form I–9, and alleging in Count III that respondent failed to complete Section 2 of Form I–9 within three business days of hire for ten named individuals hired after November 6, 1986. Penalties were originally sought for seventeen violations in the total amount of $6,110.00 consisting of $395.00 for each of six violations alleged in Count I ($2,370.00 total), $440.00 for one violation in Count II, and $310.00 each for eight violations and $410.00 each for two other violations alleged in Count III, or $3,300.00.

On November 4, 1997, I issued an Order which granted in part and denied in part INS' motion for summary decision and found liability for fifteen violations involving all but two of the individuals named in the complaint. On December 19, 1997, INS moved to dismiss the charges relating to Nga Huang Su in Count I and Sandy Lau Fong in Count III. The unopposed motion was granted on December 30, 1997, and a schedule was set out for submissions concerning the appropriate penalties. The sole remaining issue is therefore the determination of appropriate civil money penalties for the 15 violations established.

INS filed a timely motion for approval of its proposed penalties requesting a new total of $5,405.00. While the calculation is not explicitly set out, the new amount appears to consist of the $6,110.00 originally requested in the complaint less appropriate deductions made for the two dismissed charges in Counts I and III. For Count I, INS thus apparently now seeks a total of $1,975.00 or $395.00 for each of five failures to prepare or make available Form I–9s. For Count II, INS still seeks a penalty of $440.00 for Fortune East's failure to ensure that the individual listed in the count properly completed Section 1 of the form. For Count III, the total penalty would be $2,990.00, or $310.00 for each of seven failures to properly complete Section 2 of the form within three business days, and $410.00 each for the other two. In support of its request, INS filed a memorandum of points and authorities and the declaration of Special Agent Michael Curran with attached Exhibits A and B. Fortune East made no response to the request; however, its letter pleading filed May 13, 1997 contested the penalty amount as "excessive and inappropriate" compared to the company's size, revenue, and profit and the fact that it had gone out of business.

Discussion

The statutory section relevant to the imposition of penalties for paperwork violations provides that:

> With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil money penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §1324a(e)(5). *See also* 8 C.F.R. §274a.10(b)(2). Consideration of all the statutory factors is obligatory, but neither the statute nor its accompanying regulations preclude the consideration of other factors in addition to those enumerated. Neither does the statute require either that any one factor be given greater weight than the others, *United States v. Reyes*, 4 OCAHO 592, at 6 (1994),[1] or that the factors be weighted equally. *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1097 (1990), *aff'd*, 1 OCAHO 184 (1990). Consideration of a given factor is, of course, possible only where there is relevant evidence in the record. *United States v. Catalano*, 7 OCAHO 974, at 8 (1997).

In this case, a telephonic case management conference was held on December 30, 1997, at which the parties agreed that the respondent is a small business. It appeared from the record to have twenty-six employees. Fortune East's letter pleading of May 13, 1997 suggests that the company's revenue and profit were not sufficient and states that it ceased operation and went out of business in February 1997 due to "lack of business opportunities."

INS' request does not address the second and fourth statutory factors, the respondent's good faith and the absence of any history of past violations, and there is nothing in the record which indicates either that Fortune East has acted other than in good faith or that it had any prior violations. The company's request for hearing stated that "[t]he incomplete information on the I–9 form mainly are due to the Employer's language problem and does not reflect the company's intent to the defraud the INS or knowingly to hire illegal alien." It is not clear how long the employer was in business, but all the hire dates in the record are in March 1996 or after. Thus the only information that can be discerned from the record regarding the length of time Fortune East was in business is that it operated from at least some time in March 1996 to some time in February 1997.

INS urges in support of its proposed penalties that the penalties should be aggravated based on the remaining two statutory factors: the seriousness of the violations, and, as to Count II and certain of

[1]Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

the violations in Count III, the involvement of illegal aliens. There is no indication why the specific aggravating amounts were selected, or whether consideration was given to any mitigating factors such as that Fortune East was a small business, acted in good faith, and had no prior violations. The only reference to the specific amounts is the request "that the penalty be aggravated between $210 and $340 or about 23% to 37% of the maximum allowable."

Absent other explanation by INS for these specific amounts, I have made reference to the INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, dated August 30, 1991, in an effort to ascertain how the proposed penalties might have been initially arrived at. While I am not bound by those Guidelines, I have consulted them in an effort to understand INS' rationale in order to better assess the reasonableness of its proposed penalties. The Guidelines were developed in order to standardize the INS penalty setting process, Guidelines at 1, 3, and thus provide the ground rules for the initial penalty proposal.

Those Guidelines provide that for setting an initial penalty the starting point in the case of a first time violator is to be the statutory minimum. The Guidelines then direct that INS analyze each of the five statutory factors based on evidence in the file, and increase the amount based upon the factors found to be aggravating. Guidelines at 3.[2] INS Guidelines also set forth some of the appropriate considerations for evaluating each of the factors. A formulaic approach is taken, with the range of permissible increase or reduction for each factor set at not more than one-fifth of the difference between the statutory minimum and maximum, which in the case of a verification violation means that the increase may be anywhere from $1.00 to $180.00 for each factor.

A. *Penalties Assessed for Count I*

The violations in Count I consist of failure to prepare or make available for inspection Forms I–9 for five named employees hired after November 6, 1986. Failure to prepare I–9s is always a serious violation because it subverts the purpose of the law and "that failure frustrates the national policy by which employers and INS are intended to assure that unauthorized aliens are excluded from the

[2]For subsequent violations, the starting point is the statutory maximum, with similar reductions depending upon mitigating factors.

workplace." *United States v. Reyes*, 4 OCAHO 592, at 10 (1994). Since the violations in Count I are serious, it is appropriate to aggravate the penalty based on that factor. Had the INS Guidelines been followed in doing so, the range of appropriate penalties for each violation in Count I would be $101.00—$280.00 ($100.00 minimum, plus $1.00—$180.00 aggravation). However INS' proposed penalty per violation in this count is $395.00, or $295.00 above the minimum, and no explanation is provided as to why the penalties proposed exceed the permissible amounts directed by INS' own guidelines.

I do not mean to suggest that INS is limited in all cases to requesting the amounts prescribed in its Guidelines, but simply to require that where INS seeks to depart from its own rules it must articulate some reason why it is appropriate to do so. Because I am unable to discern from the record any reasonable basis for the specific penalties proposed for this count, I consider them *de novo*.

One of the principal reasons for imposing civil money penalties is their deterrent effect on the offending employer: a meaningful penalty enhances the probability of future compliance. Where, as here, the business has gone out of existence, the deterrent value of the aggravated penalty is far from evident; indeed it appears merely punitive. I find the seriousness of the violations to be offset to some degree by the employer's status and good faith and find $180.00 a more appropriate penalty for each of these five violations, or $900.00 for Count I.

B. *Penalty Assessed for Count II*

The sole violation in Count II is that respondent failed to ensure that Jwe Hua Li properly completed Section 1 of the I–9. Specifically, Li failed to check any of the boxes in the attestation portion of Section 1 to indicate whether he is a United States citizen or national, a permanent resident, or an alien authorized to work in the United States. INS seeks a penalty of $440.00 based upon the fact that the violation was serious and because Jwe Hua Li was an illegal alien.

Failure of an employer to ensure that the employee properly completes the attestation portion of Section 1 at the time of hire is a serious violation since attestation is "a critical factor in gauging an employee's compliance with IRCA." *United States v. El Paso Hospitality, Inc.*, 5 OCAHO 737, at 122 (1995); *United States v. Task*

Force Security, Inc., 4 OCAHO 625, at 341 (1994). While a failure to complete the attestation in Section 1 may not be as serious as a total failure to prepare the form, *El Paso Hospitality*, 5 OCAHO 737, at 122; *United States v. The Body Shop*, 1 OCAHO 185, at 1224–25 (1990), it is nevertheless exceedingly serious in that the omission of the individual's immigration status defeats the whole purpose of the employment eligibility verification process. The purpose of the system is to ensure that new employees are lawfully entitled to work in the United States; absent any indication that the employee is a citizen or national, a lawful permanent resident, or an alien authorized to work until a certain date, the attestation in Section 1 is meaningless. In this instance, it led to the hiring of an illegal alien.

Li's illegal status is demonstrated by the declaration of INS Special Agent Michael Curran and the attached exhibits A and B. The declaration sets forth and authenticates Exhibit A, containing, *inter alia*, the I–9 form for Jwe Hua Li and a copy of his New York state driver's license and social security card, and Exhibit B, which includes a print-out from INS' computerized Central Index System (CIS), showing a search of the record for Li by name, with no record being found. The requested penalty of $440.00 is $340.00 more than the minimum, and is within the parameters of the INS Guidelines in view of two aggravating factors. I therefore find it is reasonable.

C. *Penalties Assessed for Count III*

The violations described in Count III consist of Fortune East's failure to complete Section 2 of Form I–9 within three business days of hire for each of nine individuals. INS requests that the penalties be increased due to the seriousness of the violations and, in two cases, because the employees Long Chan Tang and Dan Tong Chen were illegal aliens.

Failure to complete Section 2 within three business days of hire is considered serious because "[p]atently, for all an employer knows, employees could have been unauthorized for employment during all the substantial time their eligibility is unverified." *El Paso Hospitality*, 5 OCAHO 737, at 123. The longer the employer's eligibility remains unverified, the more serious the offense becomes. In this case, the I–9s in Count III were not completed until the day Fortune East was served with the INS Notice of Inspection.

Delay in completing an I–9 is not necessarily as serious as failure to complete the I–9 at all, or failure to ensure completion of Sections 1 and 2. The length of the delay between the initial hire and the completion of the I–9 may be used as a factor in determining the relative seriousness of the particular violation and accordingly the amount by which the penalty should be enhanced. That distinction is not reflected in the request here: the penalty requested for the violation involving Mei Ip Chan, whose I–9 was completed five days late, for example, is the same as that requested for the violation involving Kin Hung Chu, whose I–9 was completed more than five *months* after hire. In each instance the penalty sought exceeds the minimum penalty by $210.00, which is more than the INS Guidelines would initially call for. No explanation is provided as to why the penalties for those individuals were aggravated in excess of the $1.00—$180.00 authorized in the Guidelines.

The time lapse between the initial hire and the completion of Form I–9 for the nine employees named in Count III varies from eight days to over five months. The length of time between the date of hire and the completion of Section 2 and INS' proposed penalty for each violation may be summarized as follows:

Name	*Time Between Hire and Completion of I–9*	*Proposed Penalty*
Mei Ip Chan	Eight days	$310
Dan Tong Chen	Eleven days	$410
Kin Hung Chu	Over five months	$310
Ying Chen Da	Two months	$310
Hou Fong	One month	$310
Xian Huang Qiu	Over five months	$310
Long Chan Tang	Over three months	$410
Shu Xing Yang	Nearly five months	$310
Bi Yum Ye	Ten days	$310

That Dan Tong Chen and Long Chan Tang are illegal aliens is shown by the Curran declaration and accompanying documentation. Exhibit A shows that Long Chan Tang presented an alien registration card with the number A 2515679 and that Dan Tong Chen presented a document with the number A 14884383. Exhibit B demonstrates that a search of the Central Index System showed that the number A 25115679 had not been issued and that the number A 14884383 was assigned to an individual named Eliane Janne Aendekerk David. Neither Dan Tong Chen nor Long Chan Tang was eligible for employment. The permissible penalties under the Guidelines for the violations

involving Long Chan Tang and Dan Tong Chen would be $101.00—$460.00 each: the $100.00 minimum penalty aggravated by an amounts up to $180.00 for each of two penalty factors. I find the proposed penalty of $410.00 for the violation involving Long Chan Tang to be well within the parameters of the Guidelines and to be reasonable because the length of the three-month delay enhances the seriousness of the violation and because he was an illegal alien. For Dan Tong Chen, the delay in completing whose I–9 was only eleven days, the factor of delay seems to me less serious than that in the case of Long Chan Tang. I find $350.00 to be more appropriate for this violation.

INS proposes a penalty of $310.00 for each of the other seven violations in Count III. The proposed penalty exceeds what would be expected under the Guidelines, again with no explanation of why it has been enhanced beyond the Guidelines or why no distinction was made based on the relative length of the delay in completing the form. Some of the delays in completing I–9s were a matter of days, and others in excess of five months. Two of the violations, for Mei Ip Chan and Bi Yum Ye, do not appear sufficiently serious to merit maximum aggravation of the penalty because their forms were completed within eight and ten days of hire respectively. The penalties for these two violations will be set at $200.00 and the remaining five at $280.00 each.

Accordingly, the total penalty assessed for nine violations in Count III will be $2,560.00, or $200.00 each for the violations involving Mei Ip Chan and Bi Yum Ye, $410.00 for Long Chan Tang, $350.00 for Dan Tong Chen, and $280.00 each for Kin Hung Chu, Ying Chen Da, Hou Fong, Xian Huang Giu, and Shu Xing Yang. .

Penalty Assessed

Respondent shall be required to pay a total of $3,900.00 or $900.00 for Count I; $440.00 for Count II, and $2,560.00 for Count III.

SO ORDERED.

Dated and entered this 6th day of March, 1998.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7) and (8), and 28 C.F.R. §68.53.