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

May 27, 2010

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 10A00016
	)	
NEW CHINA BUFFET RESTAURANT, Respondent.	)	

FINAL DECISION AND ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint against New China Buffet Restaurant (New China) in which it alleged that New China violated 8 U.S.C. § 1324a (2006). On March 18, 2010, I issued an order bifurcating the issues of liability and relief in the matter and granting the government's motion for summary decision with regard to liability. The order found that New China hired seven individuals for employment for whom it failed to properly complete section 2 of form I-9.

The government's motion was denied, however, with respect to the amount of the civil monetary penalties to be assessed, and both parties were given an opportunity to supplement the record by providing additional evidence or information bearing on the statutory penalty factors enumerated in 8 U.S.C. § 1324a(e)(5) or any other factors that should be considered by way of aggravation or mitigation of the penalties to be assessed. Both parties made timely submissions containing such information and evidence, and the penalty issue is now ripe for decision.

II. APPLICABLE LAW

8 U.S.C. § 1324a(e)(5) sets forth the civil monetary penalties to be assessed for paperwork violations and the factors that must be considered when assessing those penalties. *See also* 8 C.F.R. § 274a.10(b)(2) (2010). With respect to employment eligibility verification failures,

civil monetary penalties are assessed according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2):[1] the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1,100.[2]

The statute requires that the following factors be considered in assessing the appropriate penalty amounts: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).[3]

III. EVIDENCE PRESENTED

The government's supplemental brief was accompanied by one exhibit, designated as G-11) the declaration of Michele Turner, dated April 13, 2010 (5 pages) ("Turner Declaration II").

The respondent's statement was accompanied by 15 exhibits, designated as: R-1) Affidavit of Chang Jin Jiang, dated April 9, 2010 (2 pages); R-2) printout of tax summary for January 2009 (3 pages); R-3) printout of tax summary for February 2009 (3 pages); R-4) printout of tax summary for March 2009 (3 pages); R-5) printout of tax summary for April 2009 (1 page); R-6) printout of tax summary for May 2009 (3 pages); R-7) printout of tax summary for June 2009 (3 pages); R-8) printout of tax summary for July 2009 (3 pages); R-9) printout of tax summary for August 2009 (3 pages); R-10) printout of tax summary for September 2009 (3 pages); R-11) printout of tax summary for October 2009 (3 pages); R-12) printout of tax summary for

---

[1] 8 U.S.C. § 1324a(e)(5) (2006) sets forth the civil monetary penalty amounts for paperwork violations. The implementing regulations, however, adjust the penalties for inflation, pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended.

[2] All of the violations at issue occurred well after September 29, 1999.

[3] 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 on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

November 2009 (3 pages); R-13) printout of tax summary for December 2009 (3 pages); R-14) Form W-2 Wage and Tax Statement 2008 for Fen Zhe Chen, Cui Ping Jiang, Min Hui Chen, Zhi Lin, Chang Jin Jiang, and Tai Peng Ouyang (6 pages); and R-15) Termination of Lease Agreement signed by Charles Ackland, Yong Zhi Li, Bi Xia Jiang, and Chang Jin Jiang and dated March 4, 2010 (2 pages), together with a document from Branch Banking and Trust dated January 21, 2010 showing a photocopy of a returned check for $5,500.00 made out to Mongolian Enterprises from Chang Jin Jiang and dated January 15, 2010, and a page captioned Check 21 Disclosure for Return of Substitute Check.

IV. THE POSITIONS OF THE PARTIES

A. ICE's Submission

ICE says that because New China filed no response to the motion for summary decision, the respondent did not timely contest the requested penalty or present timely evidence in rebuttal, and ICE met its burden to show that there is no genuine issue of material fact with regard to the amount of the civil monetary penalty it requested. It nonetheless says that in light of the evidence submitted in New China's "post hearing brief," it has reexamined the question of penalty and has now lowered its original request from an initial assessment of $981.75 per violation, a total of $6872.25, to a new assessment of $935.00 per violation, for a total of $6,545.00.

The declaration of Michele Turner, the forensic auditor who prepared the NIF, explains that the initial penalty assessment was created in accordance with the ICE guidelines set forth in a document entitled "Worksite Enforcement: Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties," dated November 25, 2008 (hereinafter Guide). The document has not been made part of the record.[4]

The declaration asserts that the Guide contains a matrix by which a "baseline" penalty amount is calculated. The violations are categorized as first, second, or third offenses, and are then divided by the percentage of I-9s containing substantive violations. The ranges include a category for 0 to 9%, 10-19%, 20-29%, 30-39%, 40-49%, and 50% or more. For a first offense, where more than 50% of the employer's I-9 forms contain substantive errors, the baseline penalty is $935.00 per violation, which is the baseline that was set in this case. The declaration states further that

[4] Attached to the original motion as exhibit G-10 is a 7 page document dated November 19, 2009 and captioned Form I-9 Inspection Overview. The document also sets out guidelines for the assessment of civil money penalties. Because the earlier Guide referred to in the Turner declaration does not appear in the record, it is unclear what differences, if any, there are between the two documents.

Guide provides that for each statutory factor that the preparer finds applicable to a given case, the baseline fine is to be aggravated or mitigated by 5%, so that the baseline fine has the potential to be aggravated or mitigated up to a total of 25%.

The government says that in light of New China's recent submission, it now considers the restaurant to be a small business, and therefore proposes that the original penalty requested in the NIF be reduced by five percent, or by $46.75 per violation. The original penalty request had aggravated the penalty request by five percent from the baseline, or by $46.75 per violation, based on the seriousness of the violations. ICE says that although it considered the large percentage of I-9s containing errors as part of its assessment of "seriousness," it is not "double-counting" for this factor because the Guide's matrix does not differentiate among percentages higher than 50%. Thus, a company with 100% of I-9s in violation may incur a more enhanced penalty than one having a lower percentage in the same category. Accordingly, it finds this level of aggravation appropriate.

ICE argues that the remaining three factors should be considered neutral, neither aggravating nor mitigating the baseline penalty amount. It suggests that the employer's good faith should be treated as a neutral factor here because although New China did not hinder the investigation, the restaurant's overall compliance, including its ineffective attempt to correct the I-9 forms after the inspection, was so deficient that the penalty should not be mitigated on this basis.

It further contends that although the I-9 investigation yielded no evidence showing that New China's business had involved any unauthorized aliens, "absence of evidence is not evidence of absence." The lack of evidence showing the involvement of unauthorized aliens, it says, might mean either compliance with the law or concealment of such involvement, and "[a]s Respondent has submitted no evidence on this issue, either possibility is equally likely, especially in light of Respondent's relatively small number of employees." Accordingly, it argues that this factor should be treated as neutral as well.

Finally, it suggests that the employer's history of previous violations should be treated as neutral because "the lack of evidence of a history of documented prior violations could be attributable only to the fact that New China Buffet has not been the subject or any prior investigation," and because the statute does not contemplate automatically rewarding employers who have no previous violations.

In total, with a five percent mitigation for the size of the respondent's business and a five percent aggravation for the seriousness of the violations involved, the government suggests a penalty at the baseline amount of $935.00 per violation, for a total of $6545.00.

B. New China's Submission

The Affidavit of Chang Jin Jiang states that he was the owner of New China Buffet and that he

started the business around May of 2007. In addition to himself, the business also employed his daughter, his son-in-law, and four other workers. The affidavit says that each of the employees is a lawful permanent resident, that none was an illegal immigrant, and that the restaurant has no history of previous violations. The affidavit further recites that because the business was losing money, the affiant terminated the lease for the premises on March 4, 2010 and closed the business. Attached to the affidavit are documents reflecting various taxes due, W-2 forms for employees, the Termination of Lease Agreement, and other documents reflecting that New China's check for the January rent payment was returned by the bank for insufficient funds.

New China says that it is a small, family-owned business begun in 2007, and that because it had only seven employees, the fact that there are errors in 100% of the I-9 forms should not have the same weight as it would for a large business with a 100% rate of violations. It contends that although it did not fully complete the I-9 forms within three business days of hiring each employee, the fact that it later signed and dated the forms indicates that it complied in good faith with its legal obligations. It further asserts that the seriousness of the violations is "reduced by virtue of its size and lack of prior knowledge," and that DHS did not give it adequate warning of its failure to comply with the law.

Based on all of the statutory factors, New China says that the penalty should be reduced to somewhere in the mid-range on the penalty scale, or about $400.00 per employee.

V. DISCUSSION

With only seven employees, New China was unequivocally a small business, and ICE correctly notes that this factor should cut in the restaurant's favor. *United States v. Carter*, 7 OCAHO no. 931, 121, 160-62 (1997) (90 to 100 employees considered a small business); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990) (three to six employees). In addition, I concur in ICE's view that the violations involved in this case are clearly serious. Although the high percentage of I-9s containing errors does not operate to render those errors any more inherently serious than they already are, the employer's failure to attest in section 2 is always a serious violation. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990)("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury").

Good faith was appropriately treated by ICE as a neutral factor in this case. Although New China cooperated with ICE's investigation, the primary focus of a good faith analysis is on the respondent's compliance *before* the investigation. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the Chief Administrative Hearing Officer). The restaurant's professed ignorance of the law's requirements does not amount to a showing of good faith. *See, e.g., United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989) (ignorance and mistake do

not suffice to show good faith where reasonable care and diligence are required). Nonetheless, a poor rate of compliance is not, in and of itself, a reason to find that a respondent acted in bad faith. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 670 (2000) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995)(modification by the Chief Administrative Hearing Officer)). Good faith was thus properly treated as neither a positive nor a negative factor in assessing the appropriate penalty amount.

ICE also appropriately treated the restaurant's lack of history of previous violations as a neutral factor, although I cannot concur in the government's argument that New China's lack of previous violations "does not mean that it has no history of violations" simply because it has never been the subject of a prior I-9 inspection. This view does not accord with OCAHO precedent, which recognizes a history of previous violations of § 1324a only where those violations are actually proven. *Hernandez*, 8 OCAHO no. 1043 at 666 (" . . . in order to prove a history of previous violations the complainant must establish that the respondent previously violated § 1324a, that [the government] issued a NIF and filed a complaint against the respondent based on that violation, and that the respondent was afforded the opportunity for a due process hearing."); *United States v. Honeybake Farms, Inc.*, 2 OCAHO no. 311, 91, 94-95 (1991); *United States v. Robles*, 2 OCAHO 309, 62, 76 (1991). The fact that New China has never been the subject of a previous investigation, let alone a NIF and an administrative hearing, makes clear that the restaurant has no history of previous violations, and it carries no burden to present "rebuttal evidence" because there is nothing to rebut. Nonetheless, as ICE correctly points out, never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one.

I cannot agree, however, with ICE's conclusion that the involvement of unauthorized aliens should be treated as a neutral factor in this case. Despite ICE's assertion that the restaurant has submitted no evidence regarding this factor, New China submitted the Affidavit of Chang Jin Jiang, which attests that all of the employees were lawful permanent residents, and none was an illegal alien. Given that this attestation is the only evidence in the record regarding the involvement of unauthorized aliens, an issue upon which the government has the burden of proof, *see United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996), I find that no unauthorized aliens were employed at the restaurant. New China is a small family business, in which the former owner attested to knowing the work authorization status of all of the employees, three out of seven of whom were members of his immediate family. Under these circumstances, the absence of any unauthorized aliens should weigh somewhat in New China's favor, rather than being treated as neutral.

The single factor, however, that in my judgment weighs most heavily on the assessment of civil penalties in this case is a nonstatutory one. The Affidavit of Jin Jiang, together with the exhibits accompanying it, reflects that at some point subsequent to the initial penalty assessment, New China Buffet was losing money, and that the business is now closed. There is thus no deterrent

factor to be considered, and OCAHO precedent reflects that inability to pay a proposed fine is an appropriate factor to be weighed in assessing the amount of the civil monetary penalty. *See, e.g.*, *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993) (reducing the penalty amount because it was "unduly punitive" in light of the respondent's annual income).

In the instant case, the respondent's exhibits reflect that the restaurant's $5,500 rent check for January of 2010 was returned for insufficient funds, and that it owes the lessor of the building that amount, in addition to having incurred a fee for the returned check. If New China was unable to pay the rent for January, and now owes a debt of that amount in addition to the taxes and other debts it may owe, the restaurant will realistically be hard put to pay the government's requested penalty amount. Quite apart from the statutory penalty factors, New China's current status militates in favor of a more realistic and lower penalty amount that it might actually be able to pay.

VI. SUMMARY AND CONCLUSION

I concur with ICE's conclusion that New China is a small business, and that this should be treated as a factor weighing in the restaurant's favor. I also concur that the seven violations committed are serious, and that this factor cuts against the restaurant. Further, I agree with ICE's conclusion that good faith should be treated as a neutral factor in this case, and that New China's lack of any history of previous violations should also be treated as a neutral factor. Because I find that the only evidence on the issue of the presence of unauthorized aliens shows that the restaurant's owner did have knowledge of the immigration status of the people who worked there, and none were unauthorized, this is a factor weighing somewhat in New China's favor as well. Finally, I find that New China has suffered such financial difficulties that it is no longer in existence, so it cannot pay the fine assessed. As a matter of discretion, I will lower the penalty amount due to the respondent's inability to pay the penalties proposed.

After consideration of the statutory factors and the employer's ability to pay, I will adjust the penalty to $450.00 per violation, for a total penalty of $3150.00.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. New China Buffet Restaurant hired Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Jin for employment in the United States after November 6, 1986 and failed to properly complete section 2 of form I-9 for each of them.

2. All seven of the restaurant's employees were lawful permanent residents of the United States.

3. New China Buffet Restaurant was losing money and was closed in 2010.

4. New China Buffet Restaurant signed a Termination of Lease Agreement on March 4, 2010.

5. New China's January rent check in the amount of $5,500.00 was returned for insufficient funds.

B. Conclusions of Law

1. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), the law requires consideration of the following factors: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer. 8 U.S.C. § 1324a(e)(5) (2006).

2. The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043 660, 664 (2000).

3. New China Buffet Restaurant is a small business. *United States v. Carter*, 7 OCAHO no. 931, 121, 160-62 (1997); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990).

4. New China Buffet Restaurant's violations of § 1324a were serious. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990).

5. New China Buffet Restaurant's ignorance of the law does not constitute good faith, but there is no evidence that it acted in bad faith either. *See, e.g., United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989); *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 670 (2000) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer)).

6. New China Buffet Restaurant has no history of previous violations of 8 U.S.C. § 1324a (2006).

7. New China Buffet Restaurant did not hire any unauthorized aliens.

8. New China Buffet Restaurant has limited resources to pay the fine assessed, and its inability to pay is taken into consideration. *See, e.g., United States v. Raygoza*, 5 OCAHO no. 729, 48, 52

(1995); *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

New China Buffet Restaurant is directed to pay the sum of $450.00 for each of seven violations, for a total of $3,150.00 in civil money penalties.

SO ORDERED.

Dated and entered this 27th day of May, 2010.

_____
Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order shall become the final agency order after 30 days 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) (2006) and 28 C.F.R. Part 68 (2010). 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. Part 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.