

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

March 23, 2012

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 11A00004
)	
H & H SAGUARO SPECIALISTS,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Summary decision in this matter was previously granted in part and provisionally denied in part pending submission of supplemental evidence. *United States v. H & H Saguario Specialists*, 10 OCAHO no. 1144 (2012).¹ The previous decision found that liability was established for all 13 of the violations charged in Count I of the complaint because the government’s evidence demonstrated that H & H Saguario Specialists hired Refujio R. Alcantar, Ramiro Barajas, Juan L. Fishback, Jason P. Forte, Everado Garcia Payan, Kenneth Gillespie, Eugene A. Guerra, DeRenda D. Hill, Stanley F. Howell, Ted L. Kresbach, Rebecca Mazone, Edgar J. Ross, and Candito Sanchez for employment in the United States and failed to properly complete section 2 of Form

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>.

I-9 for each of them. In addition liability was found for 5 of the 14 violations charged in Count II. Specifically, it was established that H & H Saguario Specialists hired Kenneth Hindman, Gabriel Martinez, Carlos Parra-Olivas, Javier Lopez-Vepez, and Kendra Ellens for employment in the United States and failed to prepare or present I-9 forms for each of them.

The motion was provisionally denied as to the remainder of Count II pending the submission of additional evidence as to certain former employees, Joel Cerrales, Ignacio Gonzales, Francisco Hernandez, Alberto Morquechol, Miguel Rangel Garcia, Alejandro Ruiz-Orozco, Tomas Sanchez-Moreno,² Everardo Tovar, and Modesto Vasquez-Hernandez, because it could not be determined from the record whether the company actually had a duty on July 1, 2009, the date of the Notice of Inspection, to retain I-9s for any of these individuals. While the government's evidence did show that all the individuals named in Count II were hired after November 6, 1986 and that H & H failed to produce I-9s for each of them, this showing was found insufficient to establish liability with respect to some former employees because an employer is obligated to retain the I-9 of a former employee only for a period of three years after an employee's hire date, or one year after that employee's termination date, whichever is later, 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i). The parties were also given the opportunity to clarify the current status of the respondent company because that status was not evident from the record.

The government submitted additional evidence consisting of A) a Notice of Suspect Documents together with a list showing hand-written termination dates for former employees; B) an Employee Discrepancy Notice; C) an Arizona withholding form and federal W-4 form for Miguel Rangel Garcia; D) an Arizona withholding form and federal W-4 form for Everardo Tovar; E) an Arizona Corporation Commission Certificate of Dissolution dated October 15, 2010; F) a chart containing information from DES wage reports; and G) a chart captioned TECS Case Number PX19NR09PX0016.

II. DISCUSSION AND ANALYSIS

In order for H & H to have a duty to produce an I-9 form for a former employee on July 1, 2009, the individual would have to have a hiring date within the 3 year period prior to July 1, 2009, or a termination date within the 1 year period prior to July 1, 2009, whichever of the two dates is later. 8 U.S.C. § 1324a(b)(3). The government's supplemental evidence establishes that Miguel Rangel Garcia was hired by H & H on September 15, 2006; I conclude accordingly that H & H was still required on July 1, 2009 to retain and present an I-9 form for him. The evidence also reflects that Everardo Tovar was hired on October 18, 2006 and terminated on September 13, 2007; I conclude that on July 1, 2009 H & H still had a duty to retain and present Tovar's I-9 form as well. Summary decision as to liability will therefore be entered in favor of the

² It is undisputed that the correct name for this individual is actually Tomas Sanchez Romero.

government with respect to these two additional violations alleged in Count II.

With respect to the other former employees named in Count II, however, Joel Cerrales, Ignacio Gonzales, Francisco Hernandez, Alberto Morquechol, Alejandro Ruiz-Orozco, Tomas Sanchez Romero, and Modesto Vasquez-Hernandez, it appears that the retention period had already expired at the time of the government's inspection and that H & H accordingly had no duty to present I-9 forms for them on or after July 1, 2009. The supplemental evidence reflects that Cerrales was last employed by H & H during the first and second quarters of 2006, that Gonzales was employed by H & H from the first to the third quarter of 2006 and was probably terminated on September 28, 2006, that Hernandez was employed from the first to the third quarter of 2007 and terminated no later than September 30, 2007, that Morquechol was employed from the first quarter of 2006 through the third quarter of 2006 and terminated no later than September 30, 2006, that Ruiz-Orozco was employed during the second quarter of 2006 and probably terminated on May 18, 2006, that Sanchez Romero was employed in the first and second quarters of 2006, and was then hired again in the first quarter of 2007 and probably terminated on September 13, 2007, and that Vasquez-Hernandez was employed during the first quarter of 2006 and probably terminated on September 13, 2007. No liability has been shown with respect to the company's failure to produce I-9s for these former employees on or after July 1, 2009. The government's supplemental filing acknowledged that for each of these individuals the I-9 retention period had expired prior to July 1, 2009.

III. CIVIL MONEY PENALTIES

A. The Positions of the Parties

The government's supplemental filing reassessed its proposed penalties in light of the elimination of seven of the violations alleged in Count II to propose a new total penalty of \$18,700.00. The original motion for summary decision did not specifically address the penalty question, but the Czarzasty affidavit and the attachments to the complaint explain the method that was used both in establishing a base fine and in evaluating the statutory factors. Czarzasty said she determined in accordance with ICE's internal guidelines,³ that 100% of H & H's I-9s were defective or missing, and that the prescribed penalty in such a situation was \$935.00 for each violation. Czarzasty said she then mitigated the penalty by 5% based on the size of the business and aggravated the penalty by 5% based on the seriousness of the violations, which in

³ Worksite Enforcement, U.S. Immigration & Customs Enforcement, *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (2008). The relevant portion of the Guide is included in the U.S. Immigration and Customs Enforcement (ICE), *Form I-9 Inspection Overview 5-6* (2009), available at <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>.

effect cancelled each other out. The remaining factors, good faith of the employer, whether or not the individuals involved were unauthorized aliens, and any history of previous violations by the employer, were treated as neutral.

Ellens' answer to the complaint said that she could not come up with the amount the government sought "in the rest of my lifetime," and the government's supplemental evidence reflects that the company itself was dissolved effective October 15, 2010. The record further reflects that Ellens filed for personal bankruptcy on June 22, 2011.

B. Discussion and Analysis

H & H had five employees and a payroll of only \$14,766 for the second quarter of 2009, so the government's penalty memorandum appropriately characterized the business as a small one. *See United States v. Carter*, 7 OCAHO no. 931, 121, 160-62 (1997); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990). The government is also correct in noting that failure to prepare an I-9 at all and failure to sign the section 2 certification are both considered serious violations. *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). Although the government says it determined that some of the employees were unauthorized for employment it did not specify either who they were or how it made that determination. A Notice of Suspect Documents was issued in this matter but the government has not alleged that any specifically named employee was unauthorized for employment and it acknowledged that H & H had no history of previous violations.

The government was also correct in its assessment of good faith as a neutral factor. Ellens' answer said that she simply did not know the way in which H & H staff completed the I-9s was wrong, but ignorance of the law does not equate to good faith. *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)). Nonetheless, there is no evidence of bad faith either. Ellens said that she asked for Social Security cards and took taxes out for each employee, and that H & H prepared and filed tax reports every quarter, even when it was unable to make the payment.

Even on this relatively bare record it is clear that the respondent's resources are minimal. Ellens herself evidently stopped taking a salary from H & H during the quarter ending September 30, 2008 and H & H was unable to remit payment for unemployment taxes it withheld from its employees' wages from January 1, 2008 through June 30, 2009, the last date on which such information is included in the record. The Unemployment Tax and Wage Reports for the quarters ending March 31, 2008, June 30, 2008, September 30, 2008, March 31, 2009, and June

30, 2009 were all filed without any payment and are stamped “NO REMITTANCE,”⁴ even though the amounts due were fairly modest, ranging from \$7.34 to \$211.40. The business, moreover, was dissolved in 2010 and there clearly is no deterrent effect to be achieved by the imposition of a substantial penalty. Ellens herself subsequently sought bankruptcy protection in a no-asset case.

Ability to pay is an appropriate consideration in setting civil money penalties. *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). In light of all the surrounding circumstances and considering the record as a whole, I find that the proposed penalties should be substantially reduced.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. H & H Saguaro Specialists was a small desert plant company incorporated in 1999 that was owned during the relevant period by Kendra Ellens; it had its principal place of business in Phoenix, Arizona.
2. United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection and Administrative Subpoena on H & H Saguaro Specialists on July 1, 2009 seeking the production of I-9 forms and other employment documentation.
3. The United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on H & H Saguaro Specialists on August 23, 2010 alleging that Respondent committed 27 violations of the Immigration and Nationality Act, 8 U.S.C. § 1324a.
4. H & H Saguaro Specialists filed a request for hearing on September 22, 2010.
5. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office in two counts against H & H Saguaro Specialists on October 14, 2010.
6. H & H Saguaro Specialists hired all the individuals named in Count I, Refujio R. Alcantar, Ramiro Barajas, Juan L. Fishback, Jason P. Forte, Everado Garcia Payan, Kenneth Gillespie, Eugene A. Guerra, DeRenda D. Hill, Stanley F. Howell, Ted L. Kresbach, Rebecca Mazone,

⁴ H & H evidently owed no taxes for the quarter ending December 31, 2008.

Edgar J. Ross, and Candito Sanchez, for employment in the United States and failed to sign the attestation in section 2 of Form I-9 for any of them.

7. H & H Saguaro Specialists hired the individuals named in Count II, Joel Cerrales, Kendra Ellens, Ignacio Gonzales, Francisco Hernandez, Kenneth Hindman, Javier Lopez-Yepe, Gabriel Martinez, Alberto Morquechol, Carlos Parra-Olivas, Miguel Rangel-Garcia, Alejandro Ruiz-Orozco, Tomas Sanchez-Moreno, Everardo Tovar, and Modesto Vasquez-Hernandez, for employment in the United States, and failed to prepare or present I-9 forms for any of them on or after July 1, 2009.

8. The government's supplemental evidence reflects that Joel Cerrales was last employed by H & H Saguaro Specialists during the first and second quarters of 2006.

9. The government's supplemental evidence reflects that Ignacio Gonzales was employed by H & H Saguaro Specialists from the first to the third quarter of 2006 and that he was probably terminated on September 28, 2006.

10. The government's supplemental evidence reflects that Francisco Hernandez was employed by H & H Saguaro Specialists from the first to the third quarter of 2007 and terminated no later than September 30, 2007.

11. The government's supplemental evidence reflects that Alberto Morquechol was employed by H & H Saguaro Specialists from the first quarter of 2006 through the third quarter of 2006 and terminated no later than September 30, 2006.

12. The government's supplemental evidence reflects that Miguel Rangel Garcia was hired by H & H Saguaro Specialists on September 15, 2006.

13. The government's supplemental evidence reflects that Alejandro Ruiz-Orozco was employed by H & H Saguaro Specialists during the second quarter of 2006 and probably terminated on May 18, 2006.

14. The government's supplemental evidence reflects that Tomas Sanchez Romero was employed by H & H Saguaro Specialists in the first and second quarters of 2006, and was hired again in the first quarter of 2007 and probably terminated on September 13, 2007.

15. The government's supplemental evidence reflects that Everardo Tovar was hired by H & H Saguaro Specialists on October 18, 2006 and terminated on September 13, 2007.

16. The government's supplemental evidence reflects that Modesto Vasquez-Hernandez was employed by H & H Saguaro Specialists during the first quarter of 2006 and probably terminated on September 13, 2007.

17. H & H Saguario Specialists was dissolved by the Arizona Corporation Commission effective October 15, 2010.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.
2. H & H Saguario Specialists was an entity within the meaning of 8 U.S.C. § 1324a(a)(1) during the period relevant to this case.
3. H & H Saguario Specialists engaged in 20 separate violations of 8 U.S.C. § 1324a(b).
4. H & H Saguario Specialists engaged in all 13 of the violations of 8 U.S.C. § 1324a(b) alleged in Count I by hiring Refujio R. Alcantar, Ramiro Barajas, Juan L. Fishback, Jason P. Forte, Everado Garcia Payan, Kenneth Gillespie, Eugene A. Guerra, DeRenda D. Hill, Stanley F. Howell, Ted L. Kresbach, Rebecca Mazone, Edgar J. Ross, and Candito Sanchez for employment in the United States and failing to properly complete section 2 of Form I-9 for each of them.
5. An employer is obligated to retain the original I-9 for a former employee for three years after that employee's hire date or for one year after that employee's termination date, whichever is later. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i).
6. An employer should not be penalized for failure to present an I-9 form that the employer has no duty to retain. *H & H Saguario Specialists*, 10 OCAHO no. 1144, 6 (2012).
7. H & H Saguario Specialists engaged in 7 of the violations of 8 U.S.C. § 1324a alleged in Count II by hiring Kenneth Hindman, Gabriel Martinez, Carlos Parras Olivas, Javier Lopez-Yepetz, Kendra Ellens, Miguel Rangel-Garcia and Everardo Tovar for employment in the United States and failing to produce I-9 forms for them upon request.
8. H & H Saguario Specialists incurred no liability under 8 U.S.C. § 1324a for failing on or after July 1, 2009 to present I-9 forms for Joel Cerrales, Ignacio Gonzales, Francisco Hernandez, Alberto Morquechol, Alejandro Ruiz-Orozco, Tomas Sanchez Romero, and Modesto Vasquez-Hernandez because the I-9 retention period had already expired as to each of them.
9. 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).
10. H & H Saguario Specialists was 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).

11. All the violations H & H Saguario Specialists engaged in were serious. *United States v. Reyes*, 4 OCAHO no. 592, 1, 9-10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990).

12. Ignorance of the law does not constitute good faith, but there is no evidence that H & H Saguario Specialists acted in bad faith either. *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989).

13. H & H Saguario Specialists has no history of previous violations of 8 U.S.C. § 1324a.

14. The government failed to show that any specific individual named in Count I or Count II was unauthorized for employment in the United States.

15. Inability to pay is properly taken into consideration in setting a penalty. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

16. Because H & H Saguario Specialists was dissolved in 2010 there is no deterrent effect to be considered in this case.

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

The government's motion for summary decision is granted with respect to liability for all 13 of the violations alleged in Count I, and 7 of the 14 violations alleged in Count II. The government's motion is otherwise denied. Penalties will be assessed in the amount of \$150.00 for each of the 13 violations in Count I and \$200.00 for each of the 7 violations in Count II, for a total penalty of \$3350.00.

SO ORDERED.

Dated and entered this 23rd day of March, 2012.

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. Part 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. 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.

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

April 16, 2012

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 11A00004
)	
H & H SAGUARO SPECIALISTS,)	
Respondent.)	
_____)	

ERRATA

In the Final Decision and Order issued March 23, 2012:

1) On page 3, the text “that Hernandez was employed from the first to the third quarter of 2007 and terminated no later than September 30, 2007,”

is replaced with the text “that Hernandez was employed from the first quarter of 2006 to the third quarter of 2007 and terminated no later than September 30, 2007,”

2) On page 3, the text “that Sanchez Romero was employed in the first and second quarters of 2006, and was then hired again in the first quarter of 2007 and probably terminated on September 13, 2007,”

is replaced with the text “that Sanchez Romero was hired between January 1, 2006 and March 31, 2006, was rehired in the first quarter of 2007, thus the initial hiring event fell prior to July 1, 2006, and was terminated no later than September 13, 2007,”

3) On page 6, the text “10. The government’s supplemental evidence reflects that Francisco Hernandez was employed by H & H Saguario Specialists from the first to the third quarter of 2007 and terminated no later than September 30, 2007.”

is replaced with the text “10. The government’s supplemental evidence reflects that Francisco Hernandez was employed by H & H Saguario Specialists from the first quarter of 2006 to the third quarter of 2007 and terminated no later than September 30, 2007.”

4) On page 7, the text “14. The government’s supplemental evidence reflects that Tomas Sanchez Romero was employed by H & H Saguaro Specialists in the first and second quarters of 2006, and was hired again in the first quarter of 2007 and probably terminated on September 13, 2007.”

is replaced with the text “14. The government’s supplemental evidence reflects that Tomas Sanchez Romero was hired by H & H Saguaro Specialists between January 1, 2006 and March 31, 2006, was rehired in the first quarter of 2007, thus the initial hiring event fell prior to July 1, 2006, and was terminated no later than September 13, 2007.”

SO ORDERED.

Dated and entered this 16th day of April, 2012.

Ellen K. Thomas
Administrative Law Judge