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

June 7, 2012

UNITED STATES OF AMERICA, Complainant, v. FOUR SEASONS EARTHWORKS, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00083

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 (2006), in which the Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint on May 16, 2011 alleging that Four Seasons Earthworks, Inc. (Four Seasons or the company) violated 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b).

Four Seasons filed a timely answer denying the violations and raising affirmative defenses. Prehearing procedures including discovery and preliminary motion practice ensued and are now completed. Presently pending is the government's motion for summary decision in which ICE dismissed the two allegations originally made in Count II, sought summary decision for the nineteen violations alleged in Count I, and reduced its original penalty request to $808.50 per violation for a total penalty of $15,361.50.

Although Four Seasons is represented by counsel, no response was made to the government's motion. Notice was accordingly issued informing Four Seasons of a final date for responding and stating that absent a response, the motion would be decided without further input from the company. No response was made and the motion is ripe for decision.

II. BACKGROUND INFORMATION

Four Seasons is a family-owned general building contractor engaged in the business of constructing single-family homes and performing demolition work. The company was incorporated in 2004, is located in Wilmington, North Carolina, and at the time of the November 2009 inspection had 22 employees. Charles Ohnmacht, Sr. and Carolyn Ohnmacht, the company president, are co-owners of Four Seasons. They are the parents of Charles Ohnmacht, Jr. and Valarie Fowler, who is the secretary and treasurer of the company.

The record reflects that ICE served Four Seasons a Notice of Inspection and Administrative Subpoena on November 19, 2009, directing the company to produce the I-9 forms for all its current employees and for former employees who were terminated on or after January 1, 2009. In response Four Seasons produced a total of 41 I-9 forms. After the investigation concluded the government issued Four Seasons a Notice of Intent to Fine (NIF) on August 23, 2010 and Four Seasons made a timely request for a hearing on September 21, 2010. All conditions precedent to the institution of this proceeding have been satisfied.

III. POSITIONS OF THE PARTIES

ICE seeks summary decision as to the allegations in Count I that Four Seasons failed to ensure that 19 employees properly completed section 1 of Form I-9, or failed itself to properly complete sections 2 or 3 for the I-9s for John David Bain, James Lee Blackburn, Robert S. Bowen, Christopher L. Christmas, Valarie J. Fowler, Travis J. Greise, Travis D. Jones, Darrell L. Kenney, Miguel Dasilva Lopes, Anthony Miller, Sean M. Millinor, Charles Ohnmacht Sr., Charles Ohnmacht Jr., Carolyn Ohnmacht, Richard Pasquarello, Larry J. Pauler, Karen Redd, Walter R. Smith, and Jonathan T. Sullivan. Specifically, the government alleges that in section 2 of each I-9 Four Seasons entered information only for a List B document, with no information provided for either a List A or a List C document.

Four Seasons' answer did not deny the violations themselves, but asserted that they should be treated as technical rather than substantive because the company set forth the employee's Social Security number on the I-9 forms and many employee files contained copies of supporting documents such as social security cards, military identification cards and birth certificates. While Four Seasons evidently did not produce the copies of the supporting documents when it presented the I-9 forms, the government acknowledged that Four Seasons did subsequently produce copies of some of the documents on January 20, 2011. ICE asserts that this late production nevertheless does not absolve the respondent from liability.

IV. EVIDENCE CONSIDERED

A. Exhibits Accompanying the Government's Motion

The government's exhibits include A) Articles of Incorporation (2 pp.); B) Notice of Inspection and Administrative Subpoena served November 19, 2009 (4 pp.); C) ICE Report of Investigation (6 pp.); D) Forms I-9 (41 pp.); E) Employer's Quarterly Tax and Wage Report for the quarter ending December 31, 2009 (3 pp.); F) Employee contact list dated November 30, 2009 (2 pp.); G) Notice of Intent to Fine served August 23, 2010 (6 pp.); H) Redacted letter from Four Seasons to ICE dated January 20, 2011 with attachments (12 pp.); I) ICE Memorandum to Case File dated March 8, 2010 (7 pp.); and J) Four Seasons unsigned federal and North Carolina tax returns for year ending December 31, 2010 (37 pp.).

B. Exhibits Accompanying Four Seasons' Answer

While Four Seasons made no response to the motion, it did submit exhibits with its answer. The exhibits were not numbered and for ease of identification they are referred to as 1) Partial Notice of Intent to Fine served on August 23, 2010 (6 pp.); 2) ICE Memorandum to Case File dated March 8, 2010 (7 pp.); 3) Employee list with hire dates; 4) I-9s (14 pp.) 5) Current employee list as of November 19, 2009; 6) Administrative Subpoena served November 19, 2009; 7) Redacted letter[1] from Four Seasons to ICE dated January 20, 2011 with attachments (11 pp.).

V. APPLICABLE LAW

A. Summary Decision

OCAHO rules[2] provide that a complete or partial summary decision may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). A party seeking a summary disposition bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution. *Id.*

Summary decision does not issue automatically, even when the nonmoving party fails to respond

[1] The redaction on the letter provided by the company is different from that on the letter provided by the government as Ex. H.

[2] Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

to a motion. *United States v. Sourovova*, 8 OCAHO no. 1020, 283, 284 (1998).[3] The moving party still has the burden to show that there is no genuine issue of material fact, and also that the party is entitled to judgment as a matter of law. *Id.*; 28 C.F.R. § 68.38(c).

B. The Employment Eligibility Verification System

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days notice. 8 C.F.R. § 274a.2(b)(2)(ii) (2010). Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2).

The form has two parts; section 1 consists of an employee attestation, in which the employee provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents were examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A).

For purposes of completing section 2 of the form, employers are required to examine either a List A document, or both a List B and a List C document for each employee, and to enter certain information about the document(s) on the form. 8 C.F.R. § 274a.2(b)(1)(ii), (v). List A documents are those that establish both identity and employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A); List B documents establish identity only, 8 C.F.R. § 274a.2(b)(1)(v)(B); while List C documents establish only employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(C). Employers are permitted, but not required, to copy the documents they examine. 8 C.F.R. § 274a.2(b)(3). If an employer does make copies of its employees' documents, the copies are to be kept with the I-9 form. *Id.*

[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 in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

VI. DISCUSSION AND ANALYSIS

Four Seasons' suggestion that the violations alleged should be treated as technical or procedural is untenable because retaining a photocopy of an identity or work authorization document with the I-9 without recording the relevant information on the I-9 itself is insufficient in most instances to comply with the regulations. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 9-10 (2011). Those regulations specifically provide in pertinent part that,

> An employer … may, but is not required to, copy or make an electronic image of a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy or electronic image is made, it must be retained with the Form I-9. The copying or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form I-9.

8 C.F.R. 274a.2(b)(3) (emphasis added).

Thus it is accordingly unnecessary to consider whether or not Four Seasons' late production of copies of supporting documents can be considered, because even had the copies been timely produced with the I-9 forms, their production would not have excused the company's failure to enter the necessary information on the form itself. Visual examination of the I-9 forms of the individuals named in Count I reflects that in each instance information was entered for the individual's driver's license, a List B document, but that no information at all was entered for either a List A or a List C document.

While Four Seasons' answer asserts that it entered a social security number as a List C document, this is true only with respect to some of the I-9 forms that Four Seasons produced; it is not true with respect to the I-9s for the individuals named in Count I.[4] The I-9 forms for each of the 19 individuals named in Count I contain no entry for a List C document, and failure to include information from either a List A, or both a List B and List C document is a substantive violation. *Ketchikan*, 10 OCAHO no. 1139 at 19; *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 4-5 (2010).

There is accordingly no genuine issue of material fact with respect to the violations alleged in Count I and ICE is entitled to summary decision as a matter of law with respect to liability for

[4] The government did not allege violations as to the other I-9 forms on which a social security number was entered as a List C document, and these forms are not in dispute.

these 19 violations.[5]

VII. PENALTIES

A. Standards to be Applied

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): 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. The range of penalties available in this case is thus from $2,090.00 to $20,900.00.

The following factors must be considered in assessing the appropriate penalties: 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. 8 U.S.C. § 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).

The government bears the burden of proof with respect to the penalty as well as to liability. *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). For purposes of the pending motion, I view the facts in the light most favorable to Four Seasons as the nonmoving party, *United States v. Primera Enters., Inc*., 4 OCAHO no. 615, 259, 261 (1994), and thus draw all reasonable inferences in favor of the company.

In this forum, there is no single approved method of calculating penalties. *See United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 731 (1989) (affirmation by CAHO). Our case law has utilized both the mathematical approach taken in *Felipe, see United States v. Davis Nursery*, 4 OCAHO no. 694, 938-40 (1994), and the judgmental approach, *see United States v. Catalano*, 7 OCAHO no. 974, 860, 869 (1997); *United States v. Reyes*, 4 OCAHO no. 592, 1, 7 (1994).

While 8 U.S.C. § 1324a(e)(5) requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration. Nothing in the statute or the regulations requires either that the same weight be given to each of the factors in every case, *cf. United States v. Monroe Novelty Co., Inc*., 7 OCAHO no. 986, 1007, 1016-17 (1998), or that any aggravation or mitigation of a penalty is limited to any particular percentage. Rather, the weight to be given

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[5] The government alleged that there were additional errors on at least some of these forms. It is unnecessary to reach the question of other violations because only one penalty will be assessed for each deficient I-9 regardless of the number of violations it contains.

each factor in assessing a penalty depends upon the facts and circumstances of the particular case. *United States v. Raygoza,* 5 OCAHO no. 729, 48, 51 (1995) (each factor's significance is based on the specific facts in the case).

B. The Government's Calculation of the Proposed Penalty

Forensic Auditor Aaron N. McRee says that he calculated the penalty in accordance with the methodology in ICE's "Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties" dated November 25, 2008 (Guide).[6] He first took the number of I-9 forms with substantive violations (21),[7] then divided it by the total number of employees and former employees as of the date of the inspection (43). Because the resulting percentage, 48.84%, fell between 40 - 49%, the base fine was set at $770 per violation in accordance with the grid set out in the Guide.

McRee then considered the statutory factors and initially concluded that all the base penalties should be aggravated by 10%, 5% each for bad faith and for the seriousness of the violations. The government's motion reconsidered the question of bad faith and reduced its original figure by 5%, but retained the 5% aggravation for seriousness of the violations. McRee said there were no unauthorized aliens and the company had no history of previous violations of 8 U.S.C. § 1324a and treated each as a neutral factor. ICE also treated the size of the business as neutral as well.

C. Four Seasons' Position

Although Four Seasons did not respond to the government's motion, it addressed the government's penalty request in other filings. Four Seasons' answer asserted that the company is a small, family-operated business that attempted in good faith to comply with the requirements. A letter the company sent to ICE pointed out that this small, family-operated business has been a victim of the diminished construction economy in Southeastern North Carolina, and that in November 2009 another family-owned company, Four Seasons of the Coastal Carolinas, was already in bankruptcy. The letter said that shortly thereafter both Charles Ohnmacht, Sr. and

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[6] The Guide reflecting current ICE policy is not binding in this forum. *See United States v. Sunshine Bldg. & Maint., Inc.,* 7 OCAHO no. 997, 1122, 1175 (1998); *United States v. Fortune East Fashion, Inc.,* 7 OCAHO no. 992, 1075, 1078 (1998). The document is not part of the record, but the relevant portions are available on ICE's website. *See* U.S. Immigration and Customs Enforcement, *Fact Sheet: Form I-9 Inspection Overview* 5-6 (Dec. 1, 2009), *available at* http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

[7] ICE dropped its allegations for 2 violations. The difference between 19 and 21 alleged violations would not have resulted in a lower base penalty.

Carolyn Ohnmacht filed for individual bankruptcy. Attached to the letter was a printout from the U.S. Bankruptcy Court for the Eastern District of North Carolina reflecting Four Seasons of Coastal Carolina, Inc.'s bankruptcy filing on August 26, 2009, and the Bankruptcy Court's issuance of a Final Decree on October 12, 2010. No specific evidence was provided to show the individual bankruptcy filings of Charles Ohnmacht, Sr. and Carolyn Ohnmacht, but for purposes of this motion I credit the assertions made in the letter.

Finally, the company pointed out that 4 of the violations alleged involve the I-9s of members of the Ohnmacht family, and said that the fine should be adjusted downward because of its size, its good faith, and the fact that it did not employ any unauthorized workers.

D. Discussion and Analysis

The parties are in agreement that there were no unauthorized workers and that Four Seasons has no history of previous violations. These factors are generally viewed favorably for the company. The views of the parties differ as to how the remaining factors should be assessed or weighted.

ICE treated the size of the business as a neutral factor, saying that the company is "more than just a 'mom and pop' operation." But a business does not have to be a "mom and pop" operation in order to qualify as a small business; companies with significantly more than 22 employees have consistently been found in our jurisprudence to be small employers. *See United States v. Pegasus Rest., Inc*., 10 OCAHO no. 1143, 4, 7 (2012) (53-55 employees); *United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO no. 782, 468, 471 (1995) (approximately 100 employees). OCAHO cases have often looked to the classifications used by the U.S. Small Business Administration (SBA) in determining whether a business is small, *see Pegasus Rest.*, 10 OCAHO no. 1143 at 6; *Ketchikan Drywall*, 10 OCAHO no. 1139 at 26; *United States v. Carter*, 7 OCAHO no. 931, 121, 160-61 (1997), and according to the SBA, a company engaged in building new single-family homes with annual receipts up to $33.5 million per year qualifies as a small business. 13 C.F.R. § 121.201 (2010) (code 236115 for New Single-Family Housing Construction).

The company contends that it is small and this factor should count in its favor. Four Seasons' gross receipts for the year ending December 31, 2010 totaled $1,932,189, with ordinary business income of $350,492. For the quarter ending December 31, 2009 the company had total payroll of $265,900 but because construction is a seasonal business it is difficult to extrapolate from this figure on an annualized basis. The thrust of Four Seasons' filings in any event suggests a downward trajectory. Based on the information available and the fact of only 22 employees, it would be difficult to characterize Four Seasons as anything other than a small business, a factor which ordinarily favors the employer. *Skydive Acad*., 6 OCAHO no. 848 at 235, 241.

Although ICE reconsidered its initial view that the penalties should be aggravated based on bad faith, it still treated this factor as neutral and did not mitigate its proposed penalty for good faith,

as Four Seasons suggests should be the case. Analysis of an employer's good faith should focus first on whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to issuance of the Notice of Inspection. *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). The fact that Four Seasons properly completed 22 of the I-9s it produced to the government demonstrates that Four Seasons did take steps to become aware of how to complete the I-9 form properly, but that it nevertheless repeatedly made the same mistake on each of the particular I-9s forms at issue, none of which indicated exposure to unlawful hiring.

The seriousness of violations is ordinarily evaluated on a continuum, because not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931 at 169). Our case law has acknowledged that the failure to enter either a List A or a List C document showing employment authorization in section 2 of the I-9 is a serious violation, but the cases generally characterize this error as less serious than the failure to prepare an I-9 at all, or the failure of either the employee or employer to sign the section 1 or 2 attestation. *See United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 8-10 (2011) (setting the penalty at $700 for the "most serious" violations of failure to complete the I-9 or failure to sign the section 2 attestation, but at $500 for the failure to include List A or C information).

Four Seasons' I-9s reflect that 18 of the 19 employees involved checked the box for U.S. citizen in section 1 of the I-9, and one employee failed to check any box in that section. Four of the violations involved the I-9s of members of the Ohnmacht family. While the company made the same mistake in its completion of 19 of its I-9 forms, it appears to have taken pains to ensure that it hired only individuals authorized to work in the United States, and this can be said to count in its favor.

CONCLUSION

A penalty should 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). While the company evidently did quite well in 2009 and was to some extent still profitable in 2010, an overall downturn in the company's construction business since then would be consistent with trends in the national economy during the same period. Given the downward trend in construction and the subsequent bankruptcy of a separate family-owned company it is reasonably clear that there have been significant financial setbacks for this small company over the last few years.

Considering the record as a whole and the statutory factors in particular, the penalties will be adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to the materials submitted by the parties, I have also considered the record as a whole, including pleadings, exhibits, and all other materials of record, on the basis of which I make the following findings and conclusions.

A. Findings of Fact

1. Four Seasons Earthworks, Inc. is a family-owned general building contractor engaged in the business of constructing single-family homes and performing demolition work incorporated in 2004 and located in Wilmington, North Carolina.

2. The Department of Homeland Security, Immigration and Customs Enforcement served Four Seasons Earthworks, Inc. a Notice of Inspection and an Administrative Subpoena on November 19, 2009.

3. After conducting an investigation the Department of Homeland Security, Immigration and Customs Enforcement issued Four Seasons Earthworks, Inc. a Notice of Intent to Fine (NIF) on August 23, 2010.

4. Four Seasons Earthworks, Inc. made a request for hearing on September 21, 2010.

5. The Department of Homeland Security, Immigration and Customs Enforcement initially filed a two count complaint on May 16, 2011 in which it alleged that Four Seasons Earthworks, Inc violated 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b); it subsequently elected to pursue only the first count.

6. Four Seasons Earthworks, Inc. filed an answer to the complaint on June 20, 2011.

7. Four Seasons Earthworks, Inc. is owned by Charles Ohnmacht Sr. and Carolyn Ohnmacht.

8. Charles Ohnmacht Sr. and Carolyn Ohnmacht are the parents of Charles Ohnmacht Jr. and Valarie J. Fowler.

9. Four Seasons Earthworks, Inc. is the employer of Charles Ohnmacht Sr., Carolyn Ohnmacht, Charles Ohnmacht Jr. and Valarie J. Fowler.

10. Four Seasons Earthworks, Inc. hired 19 employees for employment in the United States including John David Bain, James Lee Blackburn, Robert S. Bowen, Christopher L. Christmas, Valarie J. Fowler, Travis J. Greise, Travis D. Jones, Darrell L. Kenney, Miguel Dasilva Lopes, Anthony Miller, Sean M. Millinor, Charles Ohnmacht Sr., Charles Ohnmacht Jr., Carolyn

Ohnmacht, Richard Pasquarello, Larry J. Pauler, Karen Redd, Walter R. Smith, and Jonathan T. Sullivan, and failed to properly complete section 2 of the Form I-9 for each of them.

11. Four Seasons Earthworks, Inc. had gross receipts of $1,932,189 for the year ending December 31, 2010.

12. Four Seasons Earthworks, Inc. had a payroll of $265,900 for the quarter ending December 31, 2009.

13. Four Seasons Earthworks, Inc. employed 22 individuals in November 2009.

14. Four Seasons Earthworks, Inc. had no employees who were unauthorized to work in the United States.

15. A separate family-owned company, Four Seasons of Coastal Carolina, Inc., filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of North Carolina in August 2009 and the Court issued a Final Decree in October 2010.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding appear to have been satisfied.

2. Four Seasons Earthworks, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

3. Four Seasons Earthworks, Inc. engaged in 19 separate violations of 8 U.S.C. § 1324a(b).

4. 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).

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).

6. Based on the record in this case Four Seasons Earthworks, Inc. is a small business. *United States v. Carter*, 7 OCAHO no.931, 121, 160-62 (1997).

7. The seriousness of violations may be evaluated on a continuum and not all violations are necessarily equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931 at 169).

8. A company's ability to pay the proposed fine is an appropriate factor to be weighed in assessing the amount of any penalty to be assessed. *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).

9. There is no genuine issue of material fact and ICE is entitled to judgment as a matter of law with respect to Four Seasons' liability for the 19 violations alleged in Count I of its complaint.

10. Giving due consideration to the record as a whole together with the statutory factors, the civil monetary penalty is adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties.

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 complainant's motion for summary decision is granted as to liability. The penalty request is modified so that the violations will be assessed in the amount of $500.00 each for a total penalty of $9500.00.

SO ORDERED.

Dated and entered this 7th day of June, 2012.

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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. 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.