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

August 24, 2012

UNITED STATES OF AMERICA, Complainant, v. FORSCH POLYMER CORPORATION, Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00076

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 United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two count complaint alleging that Forsch Polymer Corporation (Forsch or the company) committed 11 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b). Count I asserts that the company hired Sheryl A. Breckenridge and failed to prepare or present an I-9 form for her upon request. Count II asserts that Forsch hired ten named employees and failed to ensure that they properly completed section 1 of the form, or failed itself to properly complete section 2 or section 3. The government sought penalties of $1075.25 for each violation or a total of $11,827.75.

Forsch, by its President William F. Cosman Jr., filed an answer after which both parties filed prehearing statements. A telephonic case management conference was held, informal discovery ensued, and cross motions were filed by the parties. An order was entered on July 25, 2012 granting the government's motion summary decision in part, and finding the respondent liable for the substantive violation alleged in Count I. The allegations in Count II were taken under advisement pending additional filings by the parties. The government filed its Supplement to Complainant's Motion for Summary Decision on August 8, 2012 and Forsch, by its president,

filed a response on August 22, 2012. The motion is ripe for adjudication.

II. BACKGROUND INFORMATION

Forsch Polymer Corp. was incorporated by its president, William F. Cosman, Jr., in 1988 and is located in Englewood, Colorado. The government served Forsch with a Notice of Inspection on June 21, 2010 in which it requested I-9s for those employees employed during the period June 21, 2009 to June 21, 2010. The government received 12 I-9 forms in response.

ICE advised Forsch in July of 2010 of its suspicion that four employees, Martin Barraza, Hilario Cabral, Ramiro Chavez and Martin Hernandez, were not authorized for employment in the United States. In a letter to DHS dated August 17, 2010 Forsch informed the agency that the four individuals had been informed of the discrepancies, but said that since the notification it had been unable to contact them. The letter concluded by noting that the individuals had not shown up for work and were no longer employed by the company.

As a result of its audit, ICE served Forsch with a Notice of Intent to Fine (NIF) on November 22, 2010 charging that Forsch failed to prepare or present an I-9 form for one employee and engaged in substantive paperwork violations in the I-9 forms of ten employees. Forsch made a timely request for a hearing and all conditions precedent to the institution of this proceeding appear to have been satisfied.

III. ISSUES AS TO LIABILITY

The previous decision held Forsch liable for hiring Sheryl A. Breckenridge and failing to prepare and/or present an I-9 for her upon request. Count II alleges that there were substantive paperwork errors in section 1 and/or section 2 or 3 of the I-9 forms for Martin Barraza, Hilario Cabral, Ramiro Chavez, William Cosman, Holly Cosman, Trena Hernandez, Martin Hernandez, Gyu Kwon, Gary Mead, and Efren Vigel; these allegations were taken under advisement pending additional filings by the government because it was not clear precisely what violations the government was relying on.

The government's supplemental filing clarified the basis for these allegations. As to the I-9s for Hilario Cabral, Ramiro Chavez, William Cosman, Holly Cosman, and Efren Vigil, the forms reflect that they were not completed until after the Notice of Inspection was issued, although the hire dates for these employees ranged from 1988 through 2009. Cabral in addition failed to check any box in section 1 to attest to his immigration status. The I-9 form for Trena Hernandez was clearly backdated; she was hired on September 3, 2003 and while both section 1 and section 2 are dated September 1, 2003, the copies of documents the company purportedly examined were not even issued until well after that date. The driver's license purportedly examined was issued

on July 6, 2009 and the social security card was dated July 2, 2008. The I-9 form for Gary Mead was undated, but it reflects that he was hired on October 1, 1990 and the documents purportedly examined by the employer were not even in existence at that time. Mead's passport was issued in 2000 and his driver's license in 2004. If those documents were examined to verify Mead's employment eligibility, it appears that the form was backdated. Summary decision will accordingly be entered for the government finding violations in the I-9s of these 7 employees.

With respect to Gyu Kwon, Martin Barraza, and Martin Hernandez, however, the only violation alleged by the government was the failure to complete the I-9 form within three days of hire. The so-called "Virtue Memorandum,"[1] which the government purports to follow, classifies this as a technical or procedural violation rather than a substantive violation, and case law reflects that an employer may not be held liable for such violations without notice and an opportunity to correct them. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12-15 (2001). *See* 8 U.S.C. § 1324a(b)(6) (technical or procedural failure will not be penalized unless the government explained the basis for the failure and provided the employer a period of not less than ten business days to correct the violation).

Summary decision will accordingly be issued with respect to liability for violations in the I-9s of Hilario Cabral, Ramiro Chavez, William Cosman, Holly Cosman, Efren Vigil, Trena Hernandez, and Gary Mead. Summary decision will be denied as to the I-9s of Gyu Kwon, Martin Barraza and Martin Hernandez and the allegations with respect to them will be dismissed.

IV. PENALTIES

The government's motion did not address the question of penalties, but ICE previously submitted evidence in support of its penalty calculation, including exhibits A) Memorandum to Case file; B) Fine Computation Worksheet; C) Count I of the NIF; and D) Count II of the NIF. The documents reflect that the government started with a base penalty of $935.00 per violation, then aggravated each of the penalties by 15%; 5% for the seriousness of the violations, 5% for a lack of good faith, and 5% for the employment of four unauthorized aliens. The assessment treated the size of the business and the lack of any previous history of violations as neutral.

Forsch has objected throughout the process to the fact that the proposed fines were 97.75% of the maximum permissible amount for first time paperwork violations. The company also disputed the government's assertion of bad faith and the treatment of its small size as neutral, and

[1] Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 at 7 (Mar. 6, 1997) ("Timeliness Failures Contained on Forms I-9 Obtained From I-9 Inspections Conducted on or After September 30, 1996,"), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997).

protested the aggravation of penalties for all the violations when only four of the individuals were unauthorized for employment. Its response to ICE's supplement explains the status of each of the individuals, attributes the violations themselves to oversight, and again protests setting the fines at 97.75% of the maximum based on "a mathematical equation." It also objects to setting the same penalties for each of the violations without regard to the differences between them.

OCAHO case law confirms that it is inappropriate to aggravate a penalty for one individual based on the fact that someone else was unauthorized. The governing statute provides that one of the factors to be considered in setting penalties is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added). This means that the penalties may not be enhanced for all the violations in Count II just because some of individuals were unauthorized. As explained in *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000), "[n]othing in the statute or in common sense suggests that the penalty for a paperwork violation involving Mark Nichols should be enhanced because Mario Hernandez or some other individual was unauthorized."[2] An enhanced penalty based on this factor is appropriate only for the I-9s involving Hilario Cabral and Ramiro Chavez, persons who were themselves unauthorized for employment.

While the violations are serious, Forsch's point is persuasive that 97.75% of the maximum permissible penalty amounts for first time paperwork violations appears excessive in light of the size of this company, which has only 12 employees. Giving due consideration to the record as a whole, the statutory factors in particular, and to the arguments of the parties, the penalties for Count II will be adjusted to amounts closer to the mid-range. For violations involving the I-9s of William Cosman, Holly Cosman, Efren Vigil, Trena Hernandez, and Gary Mead, the penalties will be set at $500.00 each, and for the violations involving the I-9s of Hilario Cabral and Ramiro Chavez the penalties are assessed at $700.00 each, resulting in a total penalty for Count II of $3900.00. For the violation in Count I involving the failure to prepare an I-9 for Sheryl A. Breckinridge the penalty is an additional $700.00 so that the final total is $4600.00.

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[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

SO ORDERED.

Dated and entered this 24th day of August, 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.