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

January 10, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 11A00133
TASTE OF CHINA, Respondent.	)	

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 Taste of China engaged in fourteen violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) (2012). Count I alleged that Taste of China hired Xing Juan Liang and failed to prepare and/or present her Form I-9 upon request. Count II alleged that Taste of China hired thirteen named individuals and failed to ensure that they properly completed section 1 of Form I-9 or failed to itself properly complete section 2 or section 3 of Form I-9.

Taste of China filed an answer, and a telephonic prehearing conference was subsequently conducted at which the respondent was represented by David Wu, the son of the owners and the assistant manager of the restaurant. Neither party sought discovery. Presently pending is the government's Motion for Summary Decision, to which Taste of China filed a timely response.

In addition to materials previously submitted, ICE's Motion for Summary Decision included the following exhibits: A) Dun and Bradstreet Report for Taste of China (5 pp.); B) Notice of Inspection, dated February 10, 2011; C) Affidavit of ICE Auditor Eric Lesonsky (3 pp.); D) Forms I-9 with attachments, provided by respondent (16 pp.); E) Respondent's payroll, provided by respondent on February 24, 2011 (2 pp.); F) Confirmation letter sent to the respondent, dated March 8, 2011; G) Notice of Intent to Fine, dated May 20, 2011 (4 pp.); and H) ICE Form I-9 Inspection Overview (4 pp.). Taste of China's response included attachment A) twenty-five corrected Forms I-9 for previous employees and current employees (25 pp.).

II. BACKGROUND INFORMATION

Taste of China is a privately owned family restaurant business started in 1995 and located in Houlton, Maine. The record reflects that Taste of China has had as few as ten employees, and at the time of inspection had fourteen employees. ICE served a Notice of Inspection on Taste of China on February 18, 2011, and the company produced fourteen I-9 Forms[1] and other documents, including a list of current employees and payroll records from January 31, 2011 to February 28, 2011. The affidavit of ICE Auditor Eric Lesonsky reflects that he scanned the fourteen I-9 Forms into a PDF document and saved the document onto a password protected CD. He sent the CD to Taste of China with a letter asking the restaurant to notify Homeland Security Investigations within ten business days if Taste of China had provided any documentary information that was not contained on the CD. On March 15, 2011, Investigator Lesonsky telephoned Taste of China manager, David Wu, providing him the password to the CD and asking him to confirm that the I-9s submitted were the same ones on the CD and that they were all the I-9s for Taste of China's current workforce. Wu responded that the file did contain the I-9s and that he was unsure why Xing Juan Liang's I-9 form was missing. Wu agreed to call with more information regarding the missing I-9 but officer Lesonsky said he did not hear back from him. Taste of China's answer said that Xing Juan Liang's I-9 was lost.

A Notice of Intent to Fine, dated May 20, 2011, was served upon Taste of China and the company made a timely request for a hearing. All conditions precedent to the institution of this proceeding have been satisfied.

III. LIABILITY

Count I alleges that Taste of China failed to prepare and/or present an I-9 for Xing Juan Liang, and Taste of China acknowledged that it was unable to find her I-9. Taste of China is accordingly liable for the violation alleged in Count I.

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[1] One of the forms was a duplicate of Katie Bither's I-9, so there were fourteen forms, but for only thirteen employees.

With respect to the thirteen violations alleged in Count II, visual inspection of the I-9 forms reflects that each contains at least one substantive violation. The company failed to complete the section 2 attestation for David Wu, Yan Chi Li, Jennifer Molloy, Carolyn Carmichael, Julia Lunn, Nicholas Carmichael, Katie Bither, Choi Mei Wu, Skyler Jones, and Benjamin Dooley. Taste of China failed to ensure that Chaowen Ma and Yu Li Ma checked a box to indicate whether the individual was a citizen of the United States, an alien lawfully admitted for permanent residence, or an alien authorized to work in the United States. Finally, the employer failed to include information sufficient to identify the List B and List C documents that the employer entered in section 2 for Nancy Bradshaw.

Taste of China acknowledged that there were mistakes in the I-9s for all the individuals named in Count II, but suggests that it should have been given ten days to correct the errors in the forms for Nancy Bradshaw, Chaowen Ma, and Yu Li Ma. A statutory defense is provided by 8 U.S.C. § 1324a(b)(6) for technical or procedural violations where there was a good faith attempt to comply with the requirements, but the ten-day statutory correctional period is available only where the errors are technical or procedural in nature. Examination of the I-9s for these employees reflects that each contains at least one substantive violation. Because the defense is not available for substantive errors, ICE was not required to provide Taste of China ten days to correct them. Taste of China is therefore liable for the thirteen violations alleged in Count II.

IV. PENALTIES

The government has the burden of proof with respect to both penalty and liability, and must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Amer. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996);[2] *see also United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). In assessing the penalty, the following factors must be considered: 1) the size of business, 2) the good faith of the employer, 3) the seriousness of the violation, 4) whether the individual was an unauthorized alien, and 5) any history of previous violations.

[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.

The parties agreed at the prehearing conference that Taste of China is a small business, that no unauthorized aliens were employed, and that Taste of China has no history of previous violations. Therefore, the only issues in dispute regarding the penalty are the seriousness of the violations and the employer's good faith.

A. The Views of the Parties

ICE's Motion for Summary Decision sought penalties in the amount of $13,090. It says that because there were substantive violations for 100% of the company's workforce, the baseline fine was set at $935 for each violation. The original calculation, according to the Lesonsky affidavit, added a five percent enhancement for the seriousness of the violations and a five percent enhancement for the employer's lack of good faith, to reach a result of $981.75 per violation. The government's motion reduced this amount by five percent due to the small size of Taste of China's business and another five percent due to the lack of unauthorized workers, resulting in a net assessment of $935 per violation.

Taste of China's response argues that the penalty assessed for Count I is still excessive, because Xing Juan Liang, David Wu's aunt, is a citizen of the United States whose I-9 had been prepared many years ago, but was apparently misplaced. The response asks for reduction in the penalties for Count II as well, because the amount requested would be devastating for the business. Taste of China argues that good faith should be a mitigating factor, not an aggravating one, because it exercised reasonable care and diligence, cooperated with the investigation by providing available I-9s to ICE, and has taken steps to relieve Wu's parents of their I-9 responsibilities. Wu points out that his parents work hard and ensured that all employees were authorized, but that his parents lack fluency in English and were not knowledgeable about the form. He said he was representing the company himself because of the costs of hiring an attorney. Taste of China challenges the setting of a "baseline" fine on the basis of the percentage of violations and characterizes the result as excessive and unjust. Wu seeks a baseline fine at the statutory minimum, $110, or a "Warning Notice" instead of the penalty proposed.

B. Discussion and Analysis

The seriousness of a violation is evaluated on a continuum because not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). While I concur with the government that the violations involving the failure to present an I-9 for Xing Juan Lang, which is considered the most serious violation, or failure to complete the section 2 attestation for David Wu, Yan Chi Li, Jennifer Molloy, Carolyn Carmichael, Julia Lunn, Nicholas Carmichael, Katie Bither, Choi Mei Wu, Skyler Jones, and Benjamin Dooley were of a very serious character, I cannot concur that the record supports a finding of lack of good faith.

Case law has long held that a poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply. *See United States v.*

Karnival Fashion, Inc., 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO). ICE's motion recognizes this standard but nevertheless points to no evidence of conduct sufficiently culpable to support a finding that the company lacked good faith. ICE cites alternatively to *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130-31 (1995) (quoting *United States v. Williams Produce, Inc.*, 5 OCAHO no. 730, 54, 62 (1995)) for the proposition that another appropriate test for good faith is the question of whether a respondent "exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." ICE argues that Taste of China's failure to follow the instructions on the form "demonstrates the employer's utter disregard for the basic instructions contained on the Form I-9 itself," and that the company thus did not exercise reasonable care and diligence to conform its conduct with the law.

But failure to follow the instructions on the form is just another way of saying that the company did not comply with all the I-9 requirements. As explained in *Karnival*, "a dismal rate of Form I-9 compliance alone" should not be the basis for increasing a penalty based on the good faith criterion. To the extent that the alternate test in *Riverboat* may be read as inconsistent with the *Karnival* formulation, *Riverboat* should not be followed. *See Karnival*, 5 OCAHO no. 783 at 480 (criticizing *Williams* as inconsistent with the correct standard). Because the alternate test in any event has its origins in the superseded legacy INS Guidelines of 1991, any conflict between the two standards in a particular case must be resolved in favor of the approach taken in *Karnival*.

Factors that may be considered in addition include the extent to which a respondent is able to pay the penalty. *See United States v. H & H Saguaro Specialists,* 10 OCAHO no. 1147, 5 (citing *United States v. Raygoza,* 5 OCAHO no. 729, 48, 52 (1995)*; United States v. Minaco Fashions, Inc.,* 3 OCAHO no. 587, 1900, 1909 (1993)), but the record reflects very little evidence bearing on this question. A Dun & Bradstreet Report printed on February 8, 2011, indicates that Taste of China had sales of $1,000,000 but the source of this information is unclear, the time period covered is not identified, and there is little other information respecting the company's profitability or its obligations.

C. Conclusion

Considering the record as a whole, the only factor not weighing in the company's favor is the seriousness of the violations. The penalties requested are so near the maximum permissible as to appear disproportionate to the size and resources of the business, particularly in light of its character, which is, as reported by David Wu, literally a "mom and pop" operation.

As explained in *United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143, 7 (2012), proportionality is critical to setting penalties. The amount 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,

Minaco, 3 OCAHO no. 587 at 1909. Penalties will accordingly be adjusted as a matter of discretion to an amount nearer the lower end of the mid-range. For the violation in Count I, the penalty will be set at $500. For the ten most serious violations in Count II, the penalties will be set at $400 each for a total of $4000. For the remaining three violations in Count II, the penalties will be set at $200 each for a total of $600. Penalties therefore total $5100 for all fourteen violations established.

V. FINDINGS AND OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Taste of China is a small, privately owned family restaurant business located in Houlton, Maine.

2. During the period examined, Taste of China had between ten and fourteen employees.

3. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection on Taste of China on February 18, 2011.

4. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine on Taste of China on May 20, 2011.

5. David Wu filed a timely request for a hearing on behalf of Taste of China.

6. Taste of China hired Xing Juan Liang for employment and failed to present an I-9 form for her upon three days' notice.

7. Taste of China hired David Wu, Yan Chi Li, Jennifer Molloy, Carolyn Carmichael, Julia Lunn, Nicholas Carmichael, Katie Bither, Choi Mei Wu, Skyler Jones, and Benjamin Dooley for employment and failed to complete the certification in section 2 of their I-9 forms.

8. Taste of China hired Chaowen Ma and Yu Li Ma for employment and failed to ensure that each checked a box in section 1 of Form I-9 to indicate status as a citizen of the United States, a lawful permanent resident, or an alien authorized to work in the United States.

9. Taste of China hired Nancy Bradshaw for employment and failed to include information sufficient to identify the List B and List C documents that the employer entered in section 2 for Nancy Bradshaw, and did not retain and/or present a legible copy of the documents at the inspection.

10. Taste of China did not employ any unauthorized aliens.

11. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint against Taste of China on September 19, 2011.

B. Conclusions of Law

1. Taste of China is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

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

3. Taste of China engaged in fourteen violations of 8 U.S.C. § 1324a (2006).

4. The seriousness of a violation is evaluated on a continuum because not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010).

5. A poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

6. Proportionality is a critical factor in setting penalties. *See United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012).

ORDER

The Department of Homeland Security, Immigration and Customs Enforcement's Motion for Summary Decision is granted in part and denied in part. Taste of China is found liable for fourteen violations of 8 U.S.C. § 1324a(b). Giving due consideration to the record as a whole, and to the statutory factors, the civil monetary penalty is $5100, to be paid on a schedule agreed upon by the parties.

SO ORDERED.

Dated and entered this 10th day of January, 2013.

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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. pt. 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. pt. 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.