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

January 16, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 11A00104
NEBEKER, INC., D/B/A AIRE SERV, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

A complaint in two counts was filed by the Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) alleging that Nebeker, Inc., d/b/a Aire Serv (Nebeker or the company) violated 8 U.S.C. § 1324a(b) (2006) and 8 C.F.R. § 274a.2(b) (2012). Count I asserted that Nebeker hired fifteen individuals for employment and failed to ensure that they properly completed section 1, or failed itself to properly complete section 2 or 3 of Form I-9. Count II asserted that Nebeker hired another seven individuals for whom it failed to prepare or present I-9 forms upon request. Penalties were sought in the total amount of $22,627.

Nebeker filed an answer denying the material allegations of the complaint. Pursuant to an order for prehearing statements, each party filed a prehearing statement and a telephonic conference was subsequently conducted. Neither party indicated a need for discovery, so a schedule was issued calling for the filing of dispositive motions and responses as set out in 28 C.F.R. § 68.38.[1] Because the deadline for dispositive motions thereafter came and went with no dispositive motions filed and no other communications with this office by the parties, a request was issued for a status report. ICE filed a report stating that settlement attempts had been unsuccessful and requesting that a hearing be scheduled "due to the failure of settlement negotiations." Nebeker made no response to the request.

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012).

Even when settlement negotiations are unsuccessful, however, parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact. *See United States v. Aid Maint. Co.*, 7 OCAHO 951, 475, 478 (1997) (stating that the purpose of summary adjudication is to avoid an unnecessary hearing).[2] A notice and order of inquiry was accordingly issued to the parties, posing a series of questions designed to determine whether or not there actually were any disputed factual issues, which was not self-evident from the previous filings.

Because Count I of the complaint made only vague generalized allegations as to unidentified violations occurring in sections 1, 2, or 3 of the employer's I-9 forms, ICE was directed in particular to identify with specificity each of the errors it was complaining of and to provide copies of the I-9s and any supporting documents for my examination. ICE was also requested to provide the hire and termination dates for any former employees named in Count II in order to demonstrate whether in fact the employer still had a duty on the date of inspection to retain an I-9 form for each of them.

Nebeker was directed to notify this office if it claimed that it actually did timely present an I-9 form for any employee named in Count II, and ICE was directed to notify this office if it disputed any of the factual information set out in Nebeker's prehearing statement and exhibits. Any party believing that there was a genuine issue of material fact in dispute was directed to so advise this office. Finally, the order of inquiry gave ICE a deadline to file appropriate materials in support of its penalty assessment, and gave Nebeker a period of time in which to file a response to any such materials.

II. RESPONSES MADE TO THE ORDER OF INQUIRY

ICE filed a response to the inquiry accompanied by exhibits consisting of A) sixteen I-9 forms; B) Report of Investigation dated January 25, 2011 (4 pp.); C) Notice of Inspection, Subpoena, and Employee Lists (7 pp.); D) Docket Sheet for Bankruptcy Petition # 10-36051 (3 pp.); E) Email and LinkedIn pages (5 pp.); F) Utah Business Search printout; G) Utah Business Search printout; H) I-9 and search documents for Abel Castillo Contreras (7 pp.); I) Notice of Suspect

[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.

Documents, Notice of Unauthorized Aliens, and Confirmation of Notice of Inspection Results (6 pp.); J) I-9 and search documents for Saturnino Lezama-Medel (14 pp.); and K) I-9 and search documents for Jose Silva Rodriguez (10 pp.). The government subsequently filed a supplemental response together with clean copies of the I-9 forms previously presented, noting that the former contained markings made by the forensic auditor. Nebeker did not respond to the inquiry or ICE's materials.

The exhibits provided reflect that DHS served a Notice of Inspection and administrative subpoena on Nebeker in September 2010 requesting the production of I-9s and supporting documents for active and terminated employees from September 20, 2007 to September 20, 2010 and other documents. In response, Nebeker produced I-9s to the government, along with an employee roster, workforce service reports, and its articles of incorporation. ICE issued a Notice of Suspect Documents on October 25, 2010 advising Nebeker that Abel Contreras, Saturnino Lezma-Medel, and Jose Silva Rodriguez appeared to be unauthorized for employment. A Notice of Unauthorized Aliens dated December 14, 2010 and a Confirmation of Notice of Inspection Results dated January 24, 2011 further advised Nebeker that unless these individuals provided other alternative documentation they would be deemed unauthorized for employment. Attachments to the complaint reflect that after completion of its investigation ICE served Nebeker with a Notice of Intent to Fine (NIF) on February 18, 2011, and Nebeker, by counsel, made a timely request for hearing on March 7, 2011. All conditions precedent to the institution of this proceeding therefore appear to have been satisfied.

III. LIABILITY FOR THE ALLEGED VIOLATIONS

The record reflects that Nebeker, Inc. is located in Layton, Utah, and that its President is Boyd Nebeker. At the time of the inspection, Nebeker had seven employees. Visual inspection of the I-9s of the fifteen individuals named in Count I reflects that for Brooke Winn, Carrie Greenwald, Brent Burgie, Kyle Peterson, Robert Hall, Juventino Aguilar, and Filberto Lezama, Nebeker failed to ensure that the employee signed the attestation in section 1 and failed itself to sign the attestation in section 2. For Shane Heywood, a Hunters Education Certificate was entered as a List C document, but is not a valid List C document. For William Mangum a Utah ID card is entered as a List C document but is not a valid List C document. Similarly, for Richard Villalobos and Charese Phillips, the entry for a List C document contains a number that does not identify a valid List C document. For Abel Contreras, the name of the employer or authorized representative is not printed in the certification block of section 2.

For Flavio Silva Rodriguez, two I-9 forms were provided. On the form dated January 5, 2008, the employer failed to ensure that the employee checked a box in section 1 to identify his status in the United States. On the second, undated form for this employee, neither the attestation in section 1 nor the attestation in section 2 was completed. The I-9s for Jose Silva Rodriguez and

Saturnino Lezma-Medel are backdated.

While the company initially denied the allegations in Count II, it subsequently acknowledged that I-9s were not presented to the government upon request for Bertam Adams, Carlos Alba, Ramses Campa, Andrew Givens, Oscar Hernandez, Ryan Robertson, and Jeremy Warren. Hire and termination dates provided by ICE confirm that for the named former employees, Nebeker was still required on the date of inspection to retain an I-9 form for each of them, and liability is accordingly established for Count II as well.

The Department of Homeland Security, Immigration and Customs Enforcement is entitled to summary decision as to respondent's liability for twenty-two violations of 8 U.S.C. § 1324a(b).

IV. ASSESSMENT OF PENALTY

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). 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. 8 U.S.C. § 1324a(e)(5).

A. The Views of the Parties

The government's complaint sought penalties of $15,427.50 for Count I and $7199.50 for Count II, or a total of $22,627.00 based on an assessment of $1028.50 for each violation. ICE's prehearing statement did not explain the rationale for its assessments and the exhibits it filed at that time do not relate to penalty issues. Nebeker's prehearing statement requested leniency in setting the penalties because the company is no longer in business and has "a considerable amount of debt to vendors and creditors along with the State of Utah and IRS." Nebeker's prehearing statement went on to explain that the owner had to file personal bankruptcy, had a negative net worth of $423,441, and was working with the state authorities and IRS to resolve tax liabilities. Nebeker filed exhibits supporting its statement together with a schedule of income and expenses.

ICE's filings accompanying the response to the inquiry contend that Nebeker's assertions do not tell the whole story, and that any inferences the company wants drawn from its prehearing statement are not reasonable in light of all the facts. For example, ICE says that while it is correct that the respondent filed a Chapter 13 bankruptcy petition, the government's exhibit D reflects that the proceeding was subsequently dismissed for failure of the debtor to file information. Similarly, ICE contends that while the company is no longer operating as Nebeker,

Inc., the government's exhibits E, F, and G nevertheless reflect that Boyd Nebeker has sent out email invitations via LinkedIn to connect with a company called Aire Serv of Northern Utah, that Kyle Nebeker, Boyd Nebeker's son, is the registered agent for Air Serv, and that Boyd Nebeker is still much involved with the business that is operating at Nebeker's same former address, but under a new name. ICE points out in addition that the I-9s Nebeker filed with its prehearing statement are different from the I-9s that the company presented at the time of inspection, and that there are other indications that these I-9s were not in fact prepared on the dates they purport to have been. ICE points out as well that the financial statements Nebeker offered are not current and do not reflect current reality.

ICE points out further that 88% of the forms subject to inspection either were not presented or had serious substantive errors, and that three of the individuals, Abel Contreras, Saturnino Lezma-Medel, and Jose Silva Rodriguez were unauthorized for employment in the United States and that Nebeker has not contended otherwise.

B. Discussion and Analysis

ICE does not suggest that Nebeker had any history of previous violations, or that it could at any time be characterized as anything other than a small employer. The company had only seven employees at the time of the inspection. These are factors that appear favorable to the company. On the negative side are the presence of three unauthorized individuals in the workforce and the seriousness of the violations.

While it is entirely appropriate to enhance a civil penalty based on the undocumented status of an employee, this is true only with respect to the I-9 form for the specific employee who is found to be unauthorized: the factor for consideration here is not whether unauthorized aliens are present in the workforce, it is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added). As explained in *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000), "[n]othing in the statute or 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." It is accordingly not appropriate to aggravate penalties for all the violations across the board based on the presence of three unauthorized workers. It is entirely appropriate, however, to assess a higher penalty for the three violations involving the I-9 forms for Abel Contreras, Saturnino Lezma-Medel, and Jose Silva Rodriguez.

While I concur with the government that the violations involving the failure to present an I-9 are of a very serious character, our case law holds that 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). In this instance, the violations in Count II are more serious than those in Count I.

Consideration of a given statutory factor is possible only if there is relevant evidence in the record. *United States v. Catalano*, 7 OCAHO no. 974, 860, 868 (1997). Minimal evidence was presented by either party respecting the question of whether Nebeker did or did not act in good faith and no findings can be made with respect to this factor. 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). While the evidence does not support a finding of bad faith, it does not necessarily support a finding of good faith either.

Other nonstatutory factors that may be considered 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, 4-5 (2012). The skepticism ICE expressed with respect to some of the assertions in Nebeker's prehearing statement regarding the respondent's ability to pay appears to have substantial support, and it should be noted, moreover, that the assertions in a party's prehearing statements are precisely that: the assertions do not constitute evidence and are not accorded evidentiary weight. Notwithstanding the paucity of the record, however, rather than prolong this matter further with additional inquiries seeking yet again to pry the relevant information from the parties, the penalties will be assessed on the basis of the limited record established.

Even absent an adequate record the penalties requested here are so near the maximum permissible as to appear disproportionate to the size and character of the employer. As explained in *United States v. Pegasus Restaurant., Inc.*, 10 OCAHO no. 1143, 7 (2012), proportionality is critical to setting penalties. Penalties will accordingly be adjusted to an amount closer to the mid-range of permissible penalties. For the seven violations in Count II and for the three violations in Count I involving unauthorized workers, the penalties will be assessed at $600 each. For the remaining twelve violations in Count I the penalties will be assessed at $400 each. The total penalty is accordingly $10,800.

V. FINDINGS OF FACT AND CONCLUSION OF LAW

A. Findings of Fact

1. Nebeker, Inc. is a small company headed by Boyd Nebeker and located in Layton, Utah.

2. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection and administrative subpoena on Nebeker, Inc. in September 2010.

3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Suspect Documents on October 25, 2010 advising Nebeker, Inc. that Abel Contreras, Saturnino Lezma-Medel, and Jose Silva Rodriguez appeared to be unauthorized for employment.

4. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Unauthorized Aliens dated December 14, 2010 and a Confirmation of Notice of Inspection Results dated January 24, 2011 on Nebeker, Inc. advising the company that unless Abel Contreras, Saturnino Lezma-Medel, and Jose Silva Rodriguez provided other alternative documentation they would be deemed unauthorized for employment.

5. The Department of Homeland Security, Immigration and Customs Enforcement served Nebeker with a Notice of Intent to Fine (NIF) on February 18, 2011.

6. Nebeker, Inc., by counsel, made a request for hearing on March 7, 2011.

7. All the individuals named in Counts I and II of the complaint were employed by Nebeker at some time during the period from September 20, 2007 to September 20, 2010.

8. At the time of the inspection, Nebeker had seven employees.

9. Nebeker, Inc. hired Brooke Winn, Carrie Greenwald, Brent Burgie, Kyle Peterson, Jose Silva Rodriguez, Shane Heywood, Flavio Silva Rodriguez, William Mangum, Richard Villalobos, Charese Phillips, Saturnino Lezma-Medel, Abel Contreras, Robert Hall, Juventino Aguilar, and Filberto Lezama and failed to ensure that they properly completed section 1of Form I-9, or failed itself to properly complete section 2.

10. Nebeker, Inc. hired Bertam Adams, Carlos Alba, Ramses Campa, Andrew Givens, Oscar Hernandez, Ryan Robertson, and Jeremy Warren and failed to produce I-9 forms to the government for them upon request.

B. Conclusions of Law

1. Nebeker, Inc. 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. Parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact, *United States v. Aid Maintenance Co.*, 7 OCAHO 951, 475, 478 (1997).

4. Nebeker, Inc. engaged in twenty-two violations of 8 U.S.C. § 1324a (2006).

5. 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).

6. 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).

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

ORDER

Nebeker, Inc. is found liable for twenty-two violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) and is directed to pay penalties in the total amount of $10,800.

SO ORDERED.

Dated and entered this 16th day of January, 2013.

_____

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.