

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

February 20, 2013

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00023
	)	
FOWLER EQUIPMENT COMPANY, INC.,	)	
Respondent.	)	
_____	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006) (IRCA). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint alleging that Fowler Equipment Company, Inc. (Fowler Equipment) engaged in 106 violations of the Act. Fowler filed a timely answer denying the material allegations and raising eleven affirmative defenses, after which prehearing procedures were undertaken.

Presently pending is ICE’s motion for summary decision, to which Fowler Equipment filed a response. The motion is ripe for resolution.

II. BACKGROUND INFORMATION

Fowler Equipment has its headquarters in Union, New Jersey, where it engages in the business of selling and servicing laundry equipment to various facilities such as commercial laundromats, apartment buildings, hospitals, and hotels. The company’s owner and president since 1978 has been Douglas W. Fowler, whose father founded the company around 1953. Fowler Equipment says it employs about thirty-two people and has no formal HR director or manager. ICE served

a Notice of Inspection and Subpoena on the company on November 19, 2009. After completing its investigation, the government issued Fowler Equipment a Notice of Intent to Fine (NIF) on May 31, 2011, and the company made a timely request for a hearing on June 22, 2011. All conditions precedent to the institution of this proceeding have been satisfied.

The government filed its complaint on January 20, 2012, alleging that Fowler Equipment hired 1) Adel M. Ahmed, 2) Hussain Ahmed, 3) Ross Alpert, 4) Gustavo Almiron, 5) Pablo Balarezo, 6) Aubrey I. Barker, 7) Julio Blanco, 8) Stephen D. Brown, 9) Maxwell C. Burgess, 10) Collis A. Chance, 11) Alan Cohen, 12) Angelo Datoma, 13) Jose O. Garcete, 14) Lisa R. Herrejon, 15) Victor Herrera, 16) Andres Jimenez, 17) Marvin Kane, 18) Thomas P. Lecompte, 19) John R. Lorenzo, 20) James W. Meals, 21) Alan Meyers, 22) Misael Molina, 23) Alnardo Rivera, 24) Edward Robinson, 25) Joseph Smith, 26) Fred E. Struck, and 27) Madge Wittel, and failed to prepare and/or present I-9 forms for them upon request.

The complaint also alleges that Fowler Equipment hired 1) Abraham Ahmed, 2) Filipe J. Almiron, 3) Eugene Anecie, 4) Robert Anzalone, 5) Ashley E. Bettinger, 6) Robert L. Briley, 7) Luis P. Cabic, 8) Thomas E. Cana, 9) Paul T. Carroll, 10) Maria I. Claudio, 11) Sean R. Conley, 12) Gregg A. Coveny, 13) Alrick R. Cunningham, 14) Marc Davidman, 15) Erika Diaz, 16) Joseph E. Dobiszewski, 17) Daniel O. Enriquez, 18) Johana Estrada, 19) Dean D. Fowler, 20) Douglas W. Fowler, 21) Helene M. Fowler, 22) Donald Fulmer, 23) Carlos A. Garcia, 24) Susan F. Gasar, 25) Tennille M. Gass, 26) David Giguere, 27) Katharine L. Hadow, 28) Bernard W. Hess, 29) William D. Holmes, 30) Mark V. Howard, 31) Laura A. Imburgio, 32) Roger S. Joseph, 33) Alan J. Kloor, 34) Andrzej Kolakowski, 35) Gabriel Linares, 36) Alexis A. Linares-Rijo, 37) Pedro C. Linares-Rijo, 38) Steven Lopez, 39) Alonso Lotero, 40) Gregory Lugo, 41) Marvin Lynn, 42) Jose Martinez, 43) Jennifer McClinton, 44) Jomo K. McKend, 45) Stephen J. Micoletti, 46) Donald W. Millard, 47) Sharon L. Moran, 48) Gerardo Olivera, 49) James P. O'Neil, 50) Jay S. Osman, 51) Lisa M. Pallo, 52) Michael A. Perise, 53) Peter D. Piperata, 54) Ron L. Reichelt, 55) Dean A. Rhymer, 56) Efrain Rios, 57) Jorge H. Rios, 58) Luis E. Rios Sinisterra, 59) Edward A. Robinson, 60) Robert J. Rowe, 61) James P. Sanborn, 62) Juan S. Sanchez, 63) Thomas L. Schmidt, 64) Leonid Shapiro, 65) Robert N. Siegel, 66) Enrique Smith, 67) Karen A. Smith, 68) Dennis E. Solazzo, 69) Kese T. Stacker, 70) Holdrean St. Pierre, 71) William G. Stumpp, 72) Kenneth R. Sykes, 73) Jorge Vasquez, 74) Samuel Vega, 75) Eleanor I. Vieira, 76) James R. Voelbel, 77) Kenneth L. Warren, 78) Roger W. Wheeler, and 79) Mark A. Wills, and either failed to ensure that the employee properly completed section 1 of the I-9 form, or failed itself to properly complete section 2 or 3 of the form.

### III. THE POSITIONS OF THE PARTIES

#### A. ICE's Motion

ICE's motion stated initially that the parties agreed that there were certain employees named in the complaint for whom Fowler Equipment was no longer required at the time of inspection to retain I-9 forms, and that the names of those individuals should be removed from the complaint. Specifically, ICE said that there were nine individuals whose names should be removed from the group of twenty-seven employees for whom the company allegedly failed to present I-9 forms: Aubrey I. Barker, Julio Blanco, Maxwell Burgess, Collis A. Chance, Lisa R. Herrejon, Victor Herrera, John Lorenzo, Alnardo Rivera, and Madge Wittel. Similarly, the government said there also were nineteen individuals whose names should be removed from the group of seventy-nine employees for whom I-9 forms were allegedly not properly completed: Paul T. Carroll, Johana Estrada, Carlos A. Garcia, Katharine Hadow, Bernard W. Hess, Gregory Lugo, Marvin Lynn, Jose Martinez, Jennifer McClinton, Stephen J. Micoletti, Gerardo Olivera, Jay S. Osman, Peter D. Piperata, James P. Sanborn, Juan S. Sanchez, Kenneth R. Sykes, Eleanor I. Vierra, Kenneth L. Warren, and Mark A. Wills. In view of the reduced number of alleged violations, the government modified its penalty request to \$77,418.

The complaint as modified now alleges that Fowler Equipment hired eighteen individuals for whom it failed to prepare, present, or retain I-9 forms, and that it hired sixty individuals and either failed to ensure that the employee properly completed section 1 of the I-9 or failed itself to properly complete section 2 or section 3. The government contends that with respect to these allegations, there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The government points out first that while Fowler Equipment did not admit liability as to the failure to present eighteen I-9s, it nevertheless conceded that fifteen of the forms were not presented upon request, but only presented after service of the NIF. Visual inspection of the forms that were originally presented at the time of the Notice of Inspection reflects that the attestation in section 2 was not completed or signed on any of the forms.

ICE explains that its baseline penalty calculation is \$935 per violation because more than 90% of the forms involved violations. The government says it considered the five statutory penalty factors, and enhanced all the penalties for bad faith to result in a fine of \$981 per violation. The government says it found bad faith because Fowler Equipment did not explain its noncompliance and demonstrated a "lack of recognition of [its] violation of the law." For the eighteen I-9s that were not presented, an additional 5% was added for the seriousness of the violations, raising the rate for those violations to \$1028.50 each. The government treats the remaining three factors as neutral.

ICE explains its rationale for treating the remaining factors as neutral by stating that Fowler Equipment was “neither definitely a small nor a large business for purpose (sic) of employer sanctions penalties,” and that the company should not benefit from being treated as a small business because it declined to provide corporate financial data and was clearly not a “mom and pop” operation. The government says that while no unauthorized workers were found, it was possible that unauthorized aliens were among the eighteen for whom no I-9 was presented. ICE treats the final factor, the absence of any history of previous violations, as neutral, stating that Fowler Equipment’s history did not justify enhancing the penalties.

Although the government’s motion was not accompanied by exhibits, the evidence in support of this motion accompanied ICE’s prehearing statement. Exhibits include G-1) the complaint and Notice of Intent to Fine (11 pp.); G-2) Notice of Inspection and Administrative Subpoena (3 pp.); G-3) I-9 forms and attached documentation (196 pp.); G-4) various timesheets and wage reports (27 pp.); G-5) Dun & Bradstreet reports, Manta internet website materials (16 pp.); G-6) Certificate of Incorporation and related documents (5 pp.); G-7) Form I-9 Inspection Overview (8 pp.), G-8) Memorandum to Case File (7 pp.); G-9) Affidavit of Special Agent Thomas Roldan (2 pp.); and G-10) Affidavit of Michael Rheame, Auditor (4 pp.).

#### B. Fowler Equipment’s Response

Fowler Equipment does not dispute the failure to complete section 2 of its I-9s, but says by way of explanation that its personnel believed that inspecting and copying the employees’ documents and attaching the copies to the I-9 form was sufficient to satisfy the legal requirements. The company points out that copies of the documents were attached to most of its I-9s. The company disputes the allegations of failure to present eighteen I-9s and says that it did produce I-9s for fifteen of those individuals, albeit not until October of 2011, after service of the NIF. Fowler states further that no I-9 was required for Douglas W. Fowler because he was hired in 1978, prior to the enactment of IRCA, and has “grandfathered” status. Fowler Equipment argues that there should be only minimal fines imposed for Douglas W. Fowler’s immediate family members because they posed no risk of being unauthorized and no harm could result from their I-9 violations. Finally, Fowler Equipment points out that Edward A. Robinson is double-counted in the complaint and says that his I-9 should be penalized only once.

Fowler Equipment characterizes the government’s penalty request as “extraordinary” and takes dead aim at ICE’s penalty guidelines. The company points out that under those guidelines the single most important factor in determining a fine is the percentage of violations, a factor found nowhere in the statute. As a result, Fowler Equipment says the impact of the statutory factors is minimized in the government’s matrix used to calculate penalties because the baseline fine “can only be aggravated or mitigated by up to 5% based on each of the five statutory factors.” The company asserts that the inflexibility of the matrix limits ICE’s ability to use common sense.

The company takes issue as well with the manner in which ICE assessed some of the statutory factors, noting that there is no factual basis for ICE's assertion of bad faith or its suggestion that Fowler Equipment is not a small employer. Fowler Equipment observes that negligence is not bad faith, and says it made bona fide efforts to comply but was "not attuned to the attestation requirement." The company insists that there were only three real failures to produce I-9s and that the penalty should reflect this. Fowler notes further that the government cited no example of a business of its size being characterized as anything but small, and highlights OCAHO cases finding businesses of its size or even larger to be small employers, e.g., *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 2, 4 (2012) (approximately 30 employees); *United States v. Pegasus Rest.*, 10 OCAHO no. 1143, 4, 7 (2012) (53-55 employees). Fowler Equipment's response was accompanied by exhibits consisting of: R-1) I-9s and document copies produced to the government on October 18, 2011 (31 pp.); R-2) I-9s prepared in 2012 for Fowler employees (71 pp.); and R-3) an email from ICE's counsel to Fowler Equipment's counsel dated October 21, 2011, with redactions (2 pp.).

#### IV. DISCUSSION AND ANALYSIS

##### A. Liability

Based on the concessions made at the prehearing conference and in the government's motion, the allegations respecting the I-9 forms for Aubrey I. Barker, Julio Blanco, Maxwell C. Burgess, Collis A. Chance, Lisa R. Herrejon, Victor Herrera, John R. Lorenzo, Alnardo Rivera, Madge Wittel, Paul T. Carroll, Johana Estrada, Carlos A. Garcia, Katharine L. Hadow, Bernard W. Hess, Gregory Lugo, Marvin Lynn, Jose Martinez, Jennifer McClinton, Stephen J. Micoletti, Gerardo Olivera, Jay S. Osman, Peter D. Piperata, James P. Sanborn, Juan S. Sanchez, Kenneth R. Sykes, Eleanor I. Vierra, Kenneth L. Warren, and Mark A. Wills must be dismissed.

Fowler Equipment failed to present I-9 forms for eighteen of its employees on the date of inspection, November 19, 2009. The company's argument that it submitted these forms in October of 2011 has no merit because the violations occurred at the time of inspection. That the company submitted the I-9s after the inspection does not absolve it of liability.

Regarding the allegation that the company failed to properly complete section 2 of the I-9 forms for sixty individuals, it is well established in OCAHO case law that merely copying List A, List B, or List C documents without completing section 2 does not satisfy the verification requirements. 8 C.F.R. § 274a.2(b)(3) ("The copying or electronic imaging of any such document and retention of the copy or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form I-9."); see *United States v. H & H Saguario Specialists*, 10 OCAHO no. 1144, 5-6 (2012). The company's having attached copies of the

employees' documents to most of its I-9s does not negate its violations of the verification requirements. The record reflects, however, that Douglas W. Fowler's employment antedates the passage of IRCA and that the company was not required to complete or retain an I-9 for him. The allegation respecting Douglas W. Fowler will be dismissed. As to Fowler's immediate family members, the company was required to complete and retain I-9s for them and its failure to complete section 2 on each of their I-9s does constitute a violation.

The company points out, and review of the complaint confirms, that the name of Edward A. Robinson appears on both lists. Because the violation involving the I-9 for Edward A. Robinson should be penalized only once, his name will be removed from the group of eighteen individuals for whom I-9s were not presented, but retained in the group for whom section 2 of the form was not completed.

Fowler will be found liable for seventeen failures to present I-9s and fifty-nine failures to properly complete the form, which totals seventy-six violations.

#### B. Penalty Assessment

OCAHO caselaw has long recognized that there is no single preferred method of calculating penalties. *United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 732 (1989) (affirmance by CAHO). The principal focus must be on the reasonableness of the result achieved, not the particular methodology employed to reach that result. The goal is to set a penalty that is sufficiently meaningful to enhance the probability of future compliance, *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). Another appropriate guideline in determining whether a fine is excessive is the relationship between the fine and the nature of the offense. *See United States v. Dominguez*, 8 OCAHO no. 1000, 5, 77 (1998).

Permissible penalties for the seventy-six violations in this case range from \$8360 to \$83,600. As Fowler Equipment points out, the penalties ICE seeks are close to the permissible maximum. The company suggests that even if all its employees were unauthorized for employment and it failed to prepare a single I-9, the fine could still only be slightly more than the amount ICE is currently seeking. Our case law has previously observed that penalties approaching the maximum should be reserved for the most egregious violations. *See United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013).

While I concur with the government that the violations here are serious, I cannot concur in the suggestion that Fowler Equipment is anything other than a small employer. The government notes that the workforce is stable at about thirty employees, but says that the company is not a "mom and pop" operation and is not in any apparent danger of closing. Nothing in our case law

suggests, however, that a business must be in danger of failing to be considered small, or that it must be a “mom and pop” operation. While it may be appropriate to look at matters in addition to the number of employees, such as revenue or income, payroll, nature of ownership, or length of time in business, to help assess the size of an employer’s business, no single factor can be determinative. The fact that a business is profitable, for example, does not, without more, make it a large employer. *See United States v. Alyn Inds., Inc.*, 10 OCAHO no. 1141, 5-6 (2011) (observing that “‘marginally profitable’ does not necessarily mean small, nor does ‘highly profitable’ necessarily mean large”). Fowler Equipment is a small family business and neither the fact that it is profitable nor the fact that it has existed since at least 1953 changes that.

The government’s conclusion that bad faith is shown here because the I-9 process “was virtually ignored” or because respondent’s failure to complete the attestation in section 2 was its “habitual practice,” must be rejected. In order to support a finding of bad faith, there must be evidence of some culpable conduct that goes beyond the mere failure of compliance with the verification requirements. *Pegasus Rest.*, 10 OCAHO no. 1143 at 7. Such evidence is lacking in this record. Absent an appropriate evidentiary showing, there is no presumption of bad faith. *See Jonel*, 8 OCAHO no. 1008 at 198. The government offers no explanation why it treated respondent’s lack of previous violations as neutral, and declines to favorably consider the absence of unauthorized workers on the basis that their absence was “not due to any acts of, or diligence on the part of Fowler.”

Considering the record as a whole and the statutory factors in particular, the proposed assessment appears unduly harsh and will be adjusted as a matter of discretion to a result closer to the mid-range of permissible penalties. The seventeen violations involving failure to prepare and/or present I-9s will be assessed at the rate of \$700 per violation, and the fifty-nine failures to properly complete the section 2 attestation will be assessed at the rate of \$500 each, for a total penalty of \$41,400.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Findings of Fact

1. Fowler Equipment Co. has its headquarters in Union, New Jersey, where it is engaged in the business of selling and servicing laundry equipment to various facilities such as commercial laundromats, apartment buildings, hospitals, and hotels.
2. The owner and president of Fowler Equipment Co. is Douglas W. Fowler, whose father founded the company in approximately 1953.
3. Fowler Equipment Co. employs about thirty-two people.

4. ICE served a Notice of Inspection and Subpoena on Fowler Equipment Co. on November 19, 2009.
5. After completing its investigation the government issued Fowler Equipment Co. a Notice of Intent to Fine on May 31, 2011.
6. Fowler Equipment Co. made a request for hearing on June 22, 2011.
7. Douglas W. Fowler has been employed at Fowler Equipment Co. since 1978.
8. Fowler Equipment Co. hired Adel M. Ahmed, Hussain Ahmed, Ross Alpert, Gustavo Almiron, Pablo Balarezo, Stephen D. Brown, Alan Cohen, Angelo Datoma, Jose O. Garcete, Andres Jimenez, Marvin Kane, Thomas P. Lecompte, James W. Meals, Alan Meyers, Misael Molina, Joseph Smith, and Fred E. Struck, and failed to prepare, present, or retain I-9 forms for them.
9. Fowler Equipment Co. hired Abraham Ahmed, Filipe J. Almiron, Eugene Annecie, Robert Anzalone, Ashley E. Bettinger, Robert L. Briley, Luis P. Cabic, Thomas E. Cana, Maria I. Claudio, Sean R. Conley, Gregg A. Coveny, Alrick R. Cunningham, Marc Davidman, Erika Diaz, Joseph E. Dobiszewski, Daniel O. Enriquez, Dean D. Fowler, Helene M. Fowler, Donald Fulmer, Susan F. Gasar, Tennille M. Gass, David Giguere, William D. Holmes, Mark V. Howard, Laura A. Imburgio, Roger S. Joseph, Alan J. Kloor, Andrzej Kolakowski, Gabriel Linares, Alexis A. Linares-Rijo, Pedro C. Linares-Rijo, Steven Lopez, Alonso Lotero, Jomo K. McKend, Donald W. Millard, Sharon L. Moran, James P. O'Neil, Lisa M. Pallo, Michael A. Perise, Ron L. Reichelt, Dean A. Rhymer, Efrain Rios, Jorge H. Rios, Luis E. Rios Sinisterra, Edward A. Robinson, Robert J. Rowe, Thomas L. Schmidt, Leonid Shapiro, Robert N. Siegel, Enrique Smith, Karen A. Smith, Dennis E. Solazzo, Kесе T. Stacker, Holdrean St. Pierre, William G. Stumpp, Jorge Vasquez, Samuel Vega, James R. Voelbel, Roger W. Wheeler, and failed to properly complete or sign the attestation in section 2 on their I-9 forms.
10. No unauthorized employees were found in Fowler Equipment Co.'s workforce.
11. Fowler Equipment Co. has no history of previous violations.



B. Conclusions of Law

1. Fowler Equipment Co. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).
2. All conditions precedent to the institution of this proceeding have been satisfied.
3. The allegations in the complaint regarding the I-9 forms for Aubrey I. Barker, Julio Blanco, Maxwell Burgess, Collis A. Chance, Lisa R. Herrejon, Victor Herrera, John R. Lorenzo, Alnardo Rivera, Madge Wittel, Paul T. Carroll, Johana Estrada, Carlos A. Garcia, Katharine Hadow, Bernard W. Hess, Gregory Lugo, Marvin Lynn, Jose Martinez, Jennifer McClinton, Stephen J. Micoletti, Gerardo Olivera, Jay S. Osman, Peter D. Piperata, James P. Sanborn, Juan S. Sanchez, Kenneth R. Sykes, Eleanor I. Vierra, Kenneth L. Warren, and Mark A. Wills must be dismissed.
4. Because the employment of Douglas W. Fowler antedates the passage of the Immigration Reform and Control Act of 1986, Fowler Equipment Co. was not obligated to create or retain an I-9 form for him.
5. The allegations in the complaint regarding the I-9 form of Douglas W. Fowler must be dismissed.
6. Because the I-9 form for Edward A. Robinson should be penalized only once, not twice, the allegation of failure to present his I-9 form will be dismissed.
7. Fowler Equipment Co. hired seventeen individuals for whom it failed to prepare, present, or retain I-9 forms.
8. Fowler Equipment Co. hired fifty-nine individuals and failed to properly complete section 2 of Form I-9 for each of them.
9. While all the violations established are serious in nature, the remaining statutory factors are favorable to Fowler Equipment Co.

ORDER

The allegations respecting the I-9 forms for Aubrey I. Barker, Julio Blanco, Maxwell C. Burgess, Collis A. Chance, Lisa R. Herrejon, Victor Herrera, John R. Lorenzo, Alnardo Rivera, Madge Wittel, Paul T. Carroll, Johana Estrada, Carlos A. Garcia, Katharine Hadow, Bernard W. Hess, Gregory Lugo, Marvin Lynn, Jose Martinez, Jennifer McClinton, Stephen J. Micoletti, Gerardo Olivera, Jay S. Osman, Peter D. Piperata, James P. Sanborn, Juan S. Sanchez, Kenneth R. Sykes, Eleanor I. Vierra, Kenneth L. Warren, and Mark A. Wills are dismissed. The allegation respecting the I-9 form for Douglas W. Fowler is dismissed. The allegation of failure to present an I-9 form for Edward A. Robinson is dismissed.

Fowler Equipment Co. is liable for a total of seventy-six violations and is directed to pay a civil money penalty in the amount of \$41,400.

SO ORDERED.

Dated and entered this 20th day of February, 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.