

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

March 1, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 12A00025
)	
MEMF LLC D/B/A BLACK & BLUE STEAK &)	
CRAB - BUFFALO,)	
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 (IRCA), 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that MEMF,¹ LLC d/b/a Black and Blue Steak and Crab (MEMF or the respondent) violated the Act. MEMF filed a timely answer after which ICE amended its complaint and MEMF filed a response. The gravamen of the amended complaint is that the respondent hired seventy-three named individuals and failed to ensure that each properly completed section 1 of Form I-9, or failed itself to properly complete section 2. ICE seeks penalties in the amount of \$605 for each violation alleged, or a total of \$44,165.

Both parties undertook prehearing procedures and in accordance with discussions at a telephonic case management conference held on October 18, 2012, the government filed supplemental filings to which MEMF responded. A follow-up conference was convened on November 29, 2012 in order to determine whether there were genuine issues of material fact requiring a hearing in this matter. The parties were in agreement that there were no such issues and that a partial

¹ In what was evidently a transcription error, the case was captioned as MEMB, but the correct name is MEMF. Other discrepancies in the spelling also occur in various documents.

summary decision could therefore be entered resolving the issue of liability for seventy-three violations.

On December 19, 2012, I issued an Order Granting Partial Summary Decision and Bifurcating Proceedings, and Schedule for Additional Filings. The schedule called for MEMF to submit its evidence and arguments respecting the question of penalties on or before January 31, 2013 and the government to file its response by March 1, 2013. MEMF filed its materials on January 31, 2013. On February 21, 2013, the government filed what is styled as Complainant's Motion for Summary Decision. This filing is responsive to the prior order, and the matter is ready for resolution.

II. BACKGROUND INFORMATION

MEMF is a company that was started in 2006 and is engaged in the restaurant business under the name of Black and Blue Steak and Crab, a restaurant located in Williamsville, New York. The record reflects that ICE issued a Notice of Inspection to the company on July 1, 2009, and after completion of its inspection issued a Notice of Intent to Fine on July 29, 2011. MEMF filed a timely request for hearing on August 18, 2011 and it appears that all conditions precedent to the institution of this proceeding have been satisfied. The complaint was filed on January 27, 2012.

The order of December 19 established that MEMF hired Rasheeda Brenton, Steve Brown, Christian Byrd, Katie Centi, Linde Freeland, Mary Jonas, Deirdre Maher, James Russell, Annie Sweeney, and John Winsick, and failed to ensure that each properly completed section 1 of Form I-9 or itself failed to properly complete section 2. On the forms for Rasheeda Brenton, Katie Centi, and Mary Jonas, the employee failed to attest to any status by checking the appropriate box. Steve Brown's I-9 has an invalid List C document entered. Christian Byrd's I-9 shows no List A or B documents, and Linde Freeland's and Deirdre Maher's I-9s show no List A or C documents. James Russell's I-9 contains an invalid List C document. Annie Sweeney checked a box indicating status as a lawful permanent resident but failed to enter an alien registration number. John Winsick's form contains valid List B and C documents, but the employer attestation is not signed. All ten reflect substantive violations and none reflects substantial compliance.

The order similarly established that MEMF hired Kristen Bergmann, Sarah Bickerton, Ryan Blendowski, Kyle Bossinger, Somlith Bouabane, Sam Bouabane, Nicole Briand, Salvatore Calandra, Nicholas Cino, Howard Clark, Matthew Contino, James Cutler, Christopher Delorenzo, Nico Donaldson, Michael Ferguson, Kalan Foster, Richard Harris, Dina Hessenthaler, Tyron Hoskin, Andrew Irlbacker, Kristijan Kormanjec, Kristina Krygier, Michael Lacari, Dwight Land, Michael Latona, Ryan Lebeau, Erin Lucey, Jessica Lyons, Emma Madden,

Kathleen Maher, Deena Mahmoud, Gina Mayo, Erin McGarnry, Leah Meridith, Maria Mongiolo, Richelle Mowry, Mark Muehlhaver, Kristen Neil, Emilee Norris, Elizabeth Ortolani, Darcie Prizner, Gregory Przybelak, Jacqueline Raymond, Amanda Ribbeck, Brian Rice, Kevin Rogers, Christina Scardino, Kristen Schulz, Matthew Sharpless, Elizabeth Smith, Veota Souvannavong, Tuwan Spencer, Daniel Spritzer, Daniel Steinwandel, Courtney Stokes, Meaghan Stronz, Christina Suriani, Mark Sweeney, Laura Wax, Nick Wilkey, John Willet, Samiyar Yaghma, and Paul Zelepky and failed to properly complete section 2 of the form or sign the attestation, thereby committing sixty-three violations.

III. PENALTY ISSUES

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 \$8030 to \$80,300. 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 employers' size of the business, 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. 8 U.S.C. § 1324a(e)(5) (2006).

The parties here agreed that during the investigation no unauthorized individuals were found in MEMF's workforce, and the company had no history of previous violations. They also agreed that the company acted in good faith.

A. MEMF's Position

The company asserts that all five statutory factors should weigh in its favor, and that the additional factor of equity must be considered in its favor as well. MEMF says first that for purposes of this inquiry it should be considered a small employer because at any one time it employs only around seventy-seven people, most of whom are part-time workers. While there were 234 employees and former employees during the period covered by the inspection, that number is misleading because it is reflective of the company's high turnover rate, and not its actual size. MEMF notes, moreover, that the restaurant business itself is precarious, particularly in the "rust belt" cities of Rochester and Buffalo, where unemployment rates are above the national average and where significant population losses have occurred in the last ten years. The company points as well to its business income and losses over a three-year period, and says that the penalty ICE requested would be about 12.5% of its entire income from 2011 and would create an undue hardship for the business, necessitating cuts in staff members and/or benefits for

them.

MEMF also argues that the seriousness of the violations should not warrant any enhancement because there were no violations involving failure to prepare or present an I-9, which is the most serious of the paperwork violations. The company also questions why its lack of any history of previous violations was treated as neutral rather than as a mitigating factor. Finally, MEMF argues that the penalty proposed, \$605 for each violation, is disproportionate in light of all the favorable factors, and is unduly punitive. The legislative intent and purpose of the statute is to deter future violations, not to punish an employer.

The company's filing was accompanied by exhibits consisting of: A) partnership tax returns for 2009 (85 pp.); B) partnership tax returns for 2010 (83 pp.); C) partnership tax returns for 2011 (90 pp.); D) payroll data (4 pp.); E) report showing length of employment (2 pp.); F) Articles of Organization (10 pp.); and G) description of violations and employee information (3 pp.).

B. ICE's Position

The pertinent portion of ICE's filing asserts that of the 234 forms presented, seventy-three had substantive violations, resulting in an error rate of thirty-one percent, and that pursuant to its *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* of November 25, 2008, this results in a baseline fine of \$605 per violation. The government said it then mitigated the penalty by 5% (\$30.25) for the absence of bad faith, and another 5% for the absence of unauthorized workers. ICE then aggravated the penalties by 5% (\$30.25) "given the large size of Respondent's business," and another 5% for the seriousness of the violations, so the net amount of the fine remained at \$605 for each violation. ICE notes that the total is less than 15% of the company's 2009 income, and that any claim of inability to pay is rebutted by the respondent's tax returns. The government argues that its penalty request of \$44,165 is supported by the record and should be enforced in full. The government's filing was accompanied by an undated Memorandum to File with the subject, "Determination of Civil Money Penalty."

C. Discussion and Analysis

MEMF's point is well taken that most of the statutory factors weigh in its favor. First, the record does not support the government's finding that the restaurant is a large employer. The memorandum accompanying the government's submission states unequivocally that the number of employees was 234, but the record makes clear that MEMF never had that many employees during a single time period. Our case law has previously noted the high turnover inherent in the restaurant industry, and in assessing the number of employees has focused on the number that were actually working at a particular time rather than on the aggregate number of total employees and former employees. *Cf. United States v. Pegasus Rest.*, 10 OCAHO no. 1143, 6-7 (2012)

(also considering the Small Business Administration standards for code 5812, noninstitutional “eating and drinking places”);² *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 7 (2010).

The memorandum reflects that one of the criteria the government used in ascertaining the size of the business was the question of whether the employer “used all the personnel and financial resources at the business’ disposal to comply with the law.” As explained in *United States v. Sunshine Building Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1176 n.22 (1998), this test originated in the legacy INS guidelines, is not supported in our case law, and appears to be more relevant to the factor of good faith than to the size of an employer’s business. By the standards customarily applied in these proceedings, MEMF is a small-to-medium employer at most.

While I do concur with the government’s characterization of the violations here as serious, none of the violations involved the failure to prepare an I-9 at all, the most serious of paperwork violations. The seriousness of violations may be evaluated on a continuum and not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). Apart from seriousness, all the other factors are favorable to the employer. The company is small, it acted in good faith, and it had no unauthorized workers or previous history of noncompliance.

MEMF did not argue an inability to pay the amount requested but invoked a different nonstatutory factor of equity, and said that the proposed penalty would create an undue hardship for the business and was disproportionate in light of all the favorable factors. Considering the record as a whole in light of all the facts and circumstances, the penalties will be adjusted as a matter of discretion to \$450 each or a total of \$32,850.

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>.

IV. 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. MEMF is a limited liability company doing business as Black and Blue Steak and Crab, a restaurant located in Williamsville, New York.
2. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Inspection to MEMF on July 1, 2009.
3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to MEMF on July 29, 2011.
4. MEMF filed a request for hearing on August 18, 2011.
5. For the period covered by the Department of Homeland Security, Immigration and Customs Enforcement's inspection, MEMF produced a total of 234 I-9 forms for current and former employees.
6. MEMF averaged around seventy-seven full-time or part-time employees at any given time.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.
2. MEMF is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).
3. MEMF engaged in seventy-three 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 employer's size of the business, 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. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

6. Based on the record in this case MEMF is a small business. *Cf. 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. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010).

8. While all the violations established are serious, the remaining statutory factors are favorable to MEMF.

ORDER

MEMF is liable for seventy-three violations of the Employment Eligibility Verification System and is directed to pay a civil money penalty in the total amount of \$32,850.

SO ORDERED.

Dated and entered this 1st day of March, 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.