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

March 13, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00057
EL AZTECA DUNKIRK, 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 (IRCA), 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint alleging that El Azteca Dunkirk, Inc. engaged in twenty violations of the Act, for which it sought penalties in the amount of $11,000. The company filed a timely answer denying the material allegations and prehearing procedures were undertaken. Both parties filed prehearing statements, after which a telephonic prehearing conference was conducted. Exhibits accompanying the government's prehearing statement were discussed, and it was evident that notwithstanding the company's denials, visual examination of its I-9 forms reflected that with two exceptions, driver's licenses had been improperly entered as List A documents in section 2 of the form, and no List B or C documents were entered. On the other two I-9s, a voter registration card and a school ID had been entered as List A documents, and no List B or C documents were entered.

These substantive violations were apparent on the face of the I-9 forms and were sufficient to establish liability. Proceedings were stayed for a period of forty-five days to permit settlement discussions, after which the parties were to file materials in support of their positions with respect to the appropriate penalties. The settlement discussions were unsuccessful, the appropriate filings have been made, and the question of penalties is ripe for resolution.

II. BACKGROUND INFORMATION

El Azteca Dunkirk, Inc. is a Mexican restaurant located in Dunkirk, New York. The company was incorporated in November, 2008, and at the time of the government's inspection employed about ten people. A Notice of Inspection (NOI) was served on the company on July 1, 2009 in response to which the company provided, inter alia, twenty I-9 forms for its current and former employees. After completing the inspection, the government issued a Notice of Intent to Fine (NIF) to El Azteca on July 11, 2011. El Azteca filed a request for hearing on August 9, 2011 and all conditions precedent to the institution of this proceeding have been satisfied. The complaint was filed on April 9, 2012.

III. PENALTY ASSESSMENT

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 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).

A. The Government's Request

The government's submission was accompanied by exhibits G-1) Notice of Inspection (2 pp.); G-2) I-9 forms (49 pp.); G-3) employee dates of hire and termination; G-4) Certificate of Incorporation (3 pp.); G-5) Certificate of Authority; G-6) Notice of Intent to Fine (2 pp.); G-7) Fine Calculation Table; and G-8) Memorandum to Case File, Determination of Civil Money Penalty (6 pp.).

For reasons that do not appear of record, the government's penalty calculation was not based on the *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* of November 25, 2008, but evidently rests instead on the 1991 legacy INS Guidelines. ICE set a baseline fine of $110 for each violation rather than using the matrix contained in the current guidance. The government's Memorandum to Case File, Determination of Civil Money Penalty (exhibit G-8) noted that El Azteca has twenty[1] employees, that no unauthorized aliens were found in its workforce, and that the company has no history of previous violations.

[1] At the time of the inspection, there were ten employees. The other ten I-9s were for former employees.

The memorandum reflects that the baseline penalty was then aggravated by $190 for each violation based on the factor of the size of the employer. The explanation provided said that the employer did not use all the personnel and financial resources at its disposal to comply with the law, that there was an error rate of 100%, and that "the employer has sufficient assets and capitalization to comply with the law." The memorandum says that the penalties were additionally aggravated in the amount of $250 for each violation based on the government's determination that the employer did not demonstrate good faith. The rationale provided is that the employer did not comply with the law, and all the I-9s had substantive violations of failure to enter proper List A, B, or C documents in section 2.

The memorandum reflects that the government did not aggravate the penalties for the seriousness of the violations, but did believe that "the people on the employee list may or may not be the actual employees working at the company." The government also observes that the owner has a previous conviction for hiring undocumented aliens and that a previous owner had been arrested for immigration violations.

B. The Company's Position

El Azteca contends that the fine is grossly excessive and contains two unnecessary adjustments. In its view, a more appropriate penalty would be the government's baseline amount of $110 for each violation, or a total of not more than $2200. The company points out that the proposed fine is almost two months of net payroll for this small Mexican restaurant, which is its owner's sole livelihood, and that the penalty proposed would have a negative impact on the business. El Azteca states, for example, that paying the proposed penalty is likely to require laying off some employees, reducing hours for other employees, and reducing the hours of operation. The company predicts that these changes could threaten its survival. El Azteca says that the statutory factors should be mitigating, and that the government's baseline fine, with no adjustments, should be assessed. In addition, the company says that if a fine is imposed, a payment plan allowing for payment over three years would be appropriate.

Accompanying the company's filing were exhibits consisting of R-1) payroll for August 6 – August 19, 2012, R-2) corporate tax return for S Corporation for 2008 (9 pp.); R-3) corporate tax return for S Corporation for 2009 (12 pp.); R-4) corporate tax return for S Corporation for 2010 (12 pp.); and R-5) corporate tax return for S Corporation for 2011 (20 pp.).

C. Discussion and Analysis

OCAHO case law has long held that in order to support a finding of bad faith, there must be evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 478, 480 (1995) (modification by the Chief Administrative Hearing Officer).[2] The narrative in the government's memorandum points to no evidence of bad faith beyond the fact that El Azteca's I-9 forms were deficient, which is just another way of reiterating that the violations occurred. A dismal rate of compliance may not, in light of *Karnival Fashion,* be used to increase a penalty based upon the good faith criterion. The facts recited in the memorandum may support an assertion that the violations are serious, but they do not support a finding of bad faith. The government has the burden of proof to demonstrate the existence of any aggravating factor by a preponderance of the evidence, *see United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997), and that burden has not been met with respect to the assertion of bad faith.

Research discloses no case in our jurisprudence that has endorsed the notion of aggravating penalties based on the size of the employer's business where the business has only ten employees. Our case law, to the contrary, generally regards a smaller size as weighing favorably for the employer, especially with respect to a business that can be characterized as a "mom and pop" operation. The test of whether an employer did or did not use all the personnel and financial resources at its disposal to comply with the law was, moreover, viewed with skepticism in this forum when presented by legacy INS as relevant to size, *see United States v. Sunshine Building Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1176 n.22 (1998) (observing that test was arguably more appropriate for good faith than for size), and the intervening years have not altered that view.

[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.

It is unclear why random assertions as to illegal conduct on the part of present or former owners of the business were included in the memorandum. No specific evidence was offered to support these assertions and they have not been linked with any particular statutory factor. They are accordingly disregarded.

The record here does not support enhancement of the government's baseline penalties on the bases requested. Were I approaching the question de novo, a somewhat higher penalty would be assessed, but here there is no compelling reason not to give the company the benefit of the government's original baseline penalty without the enhancements. In view of the minimal fine assessed no payment schedule will be established.

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. El Azteca Dunkirk, Inc. is a Mexican restaurant located in Dunkirk, New York.

2. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection (NOI) on El Azteca Dunkirk, Inc. on July 1, 2009.

3. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine on El Azteca Dunkirk, Inc. on July 11, 2011.

4. El Azteca Dunkirk, Inc. filed a request for hearing on August 9, 2011.

5. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint in this matter on April 9, 2012.

6. El Azteca Dunkirk, Inc. hired twenty employees and failed to properly complete section 2 of Form I-9 for each of them.

B. Conclusions of Law

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

2. El Azteca Dunkirk, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

3. El Azteca Dunkirk, Inc. engaged in twenty separate violations of 8 U.S.C. § 1324a(b).

4. In assessing penalties for violations of 8 U.S.C. § 1324a(b) consideration of the following factors is required: 1) the employer's size of 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.

5. The Department of Homeland Security, Immigration and Customs Enforcement must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

6. 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).

7. Based on the record in this case El Azteca Dunkirk, Inc. is a small business. *See United States v. Carter*, 7 OCAHO no.931, 121, 160-62 (1997).

8. Consideration of a given factor requires that there be evidence in the record. *See United States v. Catalano*, 7 OCAHO no. 974, 860, 868 (1997).

9. In order to support a finding of bad faith, there must be evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 478, 480 (1995) (modification by the Chief Administrative Hearing Officer).

10. Apart from the seriousness of the violations, the statutory factors in this case are favorable to El Azteca Dunkirk, Inc. and leniency is appropriate.

Order

El Azteca Dunkirk is liable for twenty violations of 8 U.S.C. § 1324a(b) and is directed to pay penalties in the amount of $2200.

SO ORDERED.

Dated and entered this 13th day of March, 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.