

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

July 25, 2013

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 12A00062
)	
NEW STAR AT NIAGARA FALL, INC., D/B/A)	
NEW STAR BUFFET,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
For the complainant

Robert D. Kolken
For the respondent

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint against New Star at Niagara Fall (sic), Inc. d/b/a New Star Buffet alleging that the company hired eleven individuals and failed to prepare I-9 forms for them within three business days of their respective dates of hire, and/or to present the forms upon request. New Star filed an answer and prehearing procedures were undertaken. The parties filed their respective prehearing statements and a telephonic prehearing conference was subsequently conducted at which the parties committed to certain factual stipulations. Although the prospects for settlement appeared favorable, they ultimately proved unsuccessful.

Presently pending is ICE's motion for summary decision. New Star filed a timely response and the motion is ready for resolution.

II. BACKGROUND INFORMATION

Exhibits attached to New Star's prehearing statement reflect that the respondent is a small restaurant business that became operational on May 1, 2010. The company's answer did not challenge the factual allegations underlying the complaint, and the stipulations agreed to at the prehearing conference were accepted without the necessity of further proof. The stipulations of the parties are entered as the first seven findings of fact in this matter.

The stipulations and admissions made at the conference are sufficient to establish liability for the eleven violations alleged in the complaint. The company conceded that it hired Li Cheng, Xu Hui Li, Bi Wei Lin, Zhen Guang Lin, Shu Min Lu, Yin Lin Wang, Ya Fang Weng, Hui Yang, Wei Yang,¹ Ye Zhen, and Chang Bin Zou, and failed to present or timely prepare their I-9s within three business days of their respective dates of hire. The record reflects that ICE issued a Notice of Inspection (NOI) to the restaurant on February 1, 2011, requesting the production of documents on or before February 18, 2011, and that when no documents were forthcoming, ICE agents visited the business on March 10, 2011 to inquire. Ten I-9 forms were produced the next day, March 11, 2011. ICE's memorandum to case file reflects that all the forms were dated by both the employer and the employee on March 2, 2011. Other documents produced by New Star reflected that there was an eleventh employee, Wei Yang, for whom no I-9 was produced.

III. PENALTIES

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2) (2013): 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. 8 C.F.R. § 274a.10(b)(2). The range of penalties available in this case is thus from \$1210 to \$ 12,100.

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 size of the business of

¹ ICE's motion refers to this employee as "Yang Wei" but the name appears in the complaint as "Wei Yang."

the employer, 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).

A. ICE's Motion

ICE is seeking a total of \$10,799.25 in civil money penalties. The government's motion was accompanied by exhibits consisting of G-5)² a Memorandum to Case File, Determination of Civil Money Penalty, and G-6) Affidavit in Support of an Administrative Proceeding. The motion asserts that because New Star's I-9 error rate was 100%, the *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* dated November 25, 2008 called for a baseline fine of \$935 per violation. ICE's exhibit G-5 reflects that while the government treated the size of the employer as a mitigating factor, an enhancement of 5% was made to the baseline amount for a lack of good faith, and an additional 5% because of the seriousness of the violations, resulting in a net penalty of \$981.75 for each violation, or a total of \$10,799.25.

In support of the claim that New Star acted in bad faith, the narrative states that while the employer was generally cooperative, all the forms were dated after service of the Notice of Inspection on February 1, 2011, and all the employees had been employed since at least December 2010. ICE said that in completing the I-9s, the company used "a copy of a conspicuously marked Form I-9 provided to them with the Notice of Inspection." The absence of unauthorized aliens as well as the absence of any previous history of violations were treated as neutral factors.

The Affidavit of James J. Donoghue indicates that based on his personal investigation and information from other sources, there is a financial and business relationship between Xu Hui Li, the owner of New Star Buffet, and Bei Wei Lin and Shu Min Lu, the owners of the building in which the restaurant is located. Donoghue raised a number of questions about the corporate tax returns submitted by the company. He also interviewed two employee of RBS Citizens Bank about account activity for business accounts as well as personal accounts used by Lin and Lu. Additionally, he looked into the financial activities of Bei Wei Lin, spoke to a New York State Police Investigator about Bei Wei Lin's gambling activities, and performed records checks that indicate Bei Wei Lin and his wife, Shu Min Lu, are the owners of a Porsche Cayenne. Donoghue also conducted surveillance of the restaurant. He determined that Xu Hui Li was the nephew of Bei Wei Lin and Shu Min Lu.

² Because the exhibits accompanying the government's prehearing statement were numbered G-1 through G-4, the sequential numbering of the exhibits accompanying the motion starts with G-5.

ICE suggests that the investigation calls into question whether the company's tax returns present a true picture of the financial position of the business, and says that the fine proposed should therefore be enforced in the full amount requested.

B. The Company's Response

New Star's initial response points out that because the stipulations were adopted, there was no need for a motion for summary decision. The company also objects to any consideration of the government's exhibits G-5 and G-6 in setting a penalty. New Star says the documents were not sworn to, did not set forth such facts as would be admissible into evidence in this proceeding, and did not show affirmatively that the declarants in each document were competent to testify to the matters stated therein, as required by 28 C.F.R. § 68.38(b).³ New Star points out in addition that the Memorandum was undated.

The company's response suggests that any penalty to be imposed should be in the lower range of penalties because the restaurant has only ten employees and its failure to prepare timely I-9 forms was due to ignorance, not bad faith. New Star says it acted in good faith, employed no unauthorized individuals, and had no history of violations. The company complains that it already had to expend \$2500 to oppose ICE's unjustifiable motion to compel discovery and that this circumstance should be taken into account in assessing a penalty.

C. Discussion and Analysis

New Star's objections to ICE's exhibits are overruled. The exhibits are taken into consideration not necessarily as evidence of the truth of all the matters asserted therein, but rather as an explanation of the government's rationale for setting the proposed penalty. Apart from the issue of whether the restaurant is paying excessive rent, however, it is unclear what impact any gambling or spending activities on the part of the proprietor's aunt and uncle should have on the question of whether an appropriate fine has been assessed.

While ICE's motion refers to the company's claimed inability to pay, I previously denied the government's motion to compel discovery of "additional financial documentation to demonstrate the Respondent's inability to pay the stated fine" precisely because the company never claimed that it could not pay the amount requested. New Star claimed only that it shouldn't *have* to pay that much, because the amount requested is excessive. The fact that an employer has the ability to pay a given fine amount is not enough to establish that it should be required to do so. The ultimate question with respect to the penalty is not, after all, whether the restaurant can pay whatever amount ICE asks for, it is whether an appropriate penalty has been assessed in the first

³ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012).

instance considering the particular facts and circumstances in light of the five factors set out in the statute. Considering those factors, it appears that three are clearly favorable to the employer: the company's size, the absence of unauthorized workers, and the lack of previous violations.

While I concur with the government's conclusion that the violations are serious, ICE did not demonstrate by a preponderance of the evidence that New Star acted in bad faith. First, because the company admitted the violations, the I-9 forms themselves were never put in evidence and I am unable to undertake any independent review of them. Second, it is undisputed that the I-9s were prepared after the Notice of Inspection as alleged; ICE's memorandum to case file reflects that the I-9 forms were all dated March 2, 2011. There is no suggestion that New Star backdated the forms or in any other way attempted to deceive ICE about when the forms were prepared. New Star stated that until the Notice of Inspection it was unaware of the I-9 requirement, and that it promptly complied when advised about the requirement.

The mere existence of a violation, without any context whatsoever, ordinarily is not sufficient to show the state of mind of the employer. This is a relatively new restaurant operation that was in existence for only a few years at the time of inspection, and there is no evidence whatsoever that, prior to receiving the NOI, New Star management knew anything about the I-9 form or how it was to be prepared. The significance of the assertion in the government's memorandum to case file that the company used "a copy of a conspicuously marked Form I-9 provided to them with the Notice of Inspection" is thus unclear where New Star has never disputed that the forms were prepared after the NOI and the company used the form ICE provided to it.

Our case law makes clear that the government has the burden of proof with respect to the penalty as well as to liability, *United States v. American Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996);⁴ *United States v. Skydive Academy of Hawaii Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996), and must therefore prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). Consideration of a particular factor is possible only if there is evidence relevant to that factor in the record. See *United States v. Catalano*, 7 OCAHO no. 974, 860, 868 (1997). Thus in order to support a

⁴ 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>.

finding of bad faith, there must be real evidence of some culpable conduct that goes beyond the employer's mere failure of compliance with the verification requirements. *See United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012). Absent evidence of such conduct or evidence of the employer's state of mind, no inference of bad faith may be drawn. This bare record does not reflect such evidence.

For a fledgling "mom and pop" restaurant with only ten employees and a payroll totaling only \$84,147 for the calendar year 2010, moreover, the proposed penalty appears unduly harsh as well as disproportionate to the size and the status of the employer. As explained in *Pegasus*, 10 OCAHO no. 1143 at 7, proportionality is critical to setting penalties. Penalties this close to the maximum permissible should be reserved for more egregious violations than have been shown here. *Cf. United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). The penalties will accordingly be adjusted as a matter of discretion to an amount closer to the mid-range of permissible penalties. For failure to present an I-9 form for Wei Yang, the penalty will be assessed at \$500. For the ten remaining violations, the penalties will be set at \$400 for each violation. The total penalty is \$4500.

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. A Notice of Inspection ("NOI") was served upon Respondent on February 1, 2011.
2. The Respondent was requested to present all documentation to DHS no later than February 18, 2011.
3. On March 10, 2011, after having received no communication from the Respondent, Special Agents of the Department of Homeland Security visited the Respondent's business to inquire about the documents that were requested.
4. On March 11, 2011, the Office of the Special Agent in Charge in Buffalo, New York received from the Respondent ten Forms I-9 and the NYS-45-ATT Quarterly Combined Withholding and Wage Reporting dated January 4, 2011, which indicated an eleventh employee named Yang Wei.
5. The eleven employees listed in Count I of the Complaint were employed by the Respondent

during some or all of the period from January 1, 2010 to February 1, 2011.

6. Respondent hired the eleven individuals listed in Count I of the Complaint after November 6, 1986.
7. Respondent failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for the individuals in Count I within three business days of their corresponding date of hire.
8. New Star at Niagara Falls, Inc. d/b/a New Star Buffet is a Chinese buffet restaurant located in Niagara Falls, New York.
9. New Star at Niagara Falls, Inc. d/b/a New Star Buffet began operations on or about May 1, 2010.
10. New Star at Niagara Falls, Inc. d/b/a New Star Buffet hired the employees listed in Count I, Li Cheng, Xu Hui Li, Bi Wei Lin, Zhen Guang Lin, Shu Min Lu, Yin Lin Wang, Ya Fang Weng, Hui Yang, Wei Yang, Ye Zhen, and Chang Bin Zou for employment in the United States.
11. The ten I-9 forms New Star at Niagara Falls, Inc. d/b/a New Star Buffet produced to ICE on March 11, 2011 were dated March 2, 2011.
12. New Star at Niagara Falls, Inc. d/b/a New Star Buffet did not present an I-9 form for Wei Yang on March 11, 2011.

B. Conclusions of Law

1. New Star at Niagara Falls, Inc. d/b/a New Star Buffet 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. New Star at Niagara Falls, Inc. d/b/a New Star Buffet is liable for eleven violations of the Employment Eligibility Verification System.
4. The government has the burden of proof with respect to the penalty as well as to liability. *See United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996).
5. The Department of Homeland Security, Immigration and Customs Enforcement did not demonstrate by a preponderance of the evidence that New Star at Niagara Falls, Inc. d/b/a New

Star Buffet acted in bad faith.

6. Penalties close to the maximum permissible should be reserved for egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

7. The penalties will be adjusted as a matter of discretion to an amount nearer to the mid-range of permissible penalties.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

New Star at Niagara Fall (sic), Inc. d/b/a New Star Buffet is liable for eleven violations of 8 U.S.C. § 1324a(b) and is directed to pay a civil money penalty in the total amount of \$4500.

SO ORDERED.

Dated and entered this 25th day of July, 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) (2006) and 28 C.F.R. pt. 68 (2012). 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.