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

August 7, 2013

UNITED STATES OF AMERICA, Complainant, v. NEW SUN TRANSIT, INC. D/B/A LA TOLTECA MEXICAN RESTAURANT, Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 12A00072

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
for the complainant

Matthew L. 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 in two counts against New Sun Transit, Inc. alleging that the company engaged in forty-three separate violations of the statute. Count I alleged that the company hired thirty-seven individuals for whom it failed to prepare I-9 forms within three days of hire and/or failed to present the forms upon request. Count II alleged that the company hired six individuals for whom it failed to ensure the proper completion of an I-9 form.

New Sun filed an answer, the parties filed their respective prehearing statements, and a telephonic prehearing conference was conducted at which the parties committed to certain factual stipulations as reflected in their prehearing statements. The company's answer did not challenge the factual allegations underlying the complaint, and the stipulations previously agreed to at the prehearing conference were accepted without the necessity of further proof. The stipulations are entered as the findings of fact numbered 1-13 and are sufficient to establish liability for Counts I and II.

Presently pending is ICE's Motion for Summary Decision. New Sun filed a timely response and the motion is ripe for resolution.

II. ASSESSMENT OF PENALTY

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 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 $1100. The range of penalties available in this case is thus from $4730 to $47,300. 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 size of the employer's 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).

A. The Government's Motion for Summary Decision

The government's motion requests that summary decision be entered as to liability and that penalties be assessed in the amount of $36,184.50. ICE acknowledges that the company is a small business, that New Sun did not lack good faith, that the audit did not reveal the employment of any unauthorized aliens, and that New Sun has no previous history of violations. In explaining its methodology for calculating the penalty, ICE refers to an attached Memorandum to Case File indicating that a "baseline" penalty of $935 was established for each violation. The memo reflects that the baseline amount was then mitigated by 5% for the size of the business, 5% for the good faith of the employer, and 5% for the absence of unauthorized aliens. The resultant penalty was then aggravated by 5% because of the seriousness of the violations. The lack of any history of previous violations was treated as a neutral factor. ICE argues that the assessment is appropriate in light of the company's tax returns from 2009 to 2011, that the amount assessed is less than thirty percent of the company's profits for 2011, and that the assessment should be enforced in full.

B. New Sun's Opposition to the Motion for Summary Decision and Response to the Penalty Calculation

New Sun's response points out that because the factual stipulations were adopted, there is no need for a motion for summary decision. The restaurant also objects to any consideration of the government's Memorandum to Case File inasmuch as it was undated, unexecuted, and unsworn. New Sun says the document does not set forth such facts as would be admissible into evidence in this proceeding or show affirmatively that the maker was competent to testify to the matters stated therein, as required by 28 C.F.R. § 68.38(b).[1] New Sun points out in addition that ICE's guidance on penalty calculations is not binding in this forum and that the statutory factors set out at 8 U.S.C. § 1324a(e)(5) should form the only basis for a penalty determination.

The restaurant points out that the government acknowledged that most of the statutory factors weigh in its favor and that the sole negative factor is the failure to prepare the forms within three days of hire and prior to the issuance of the Notice of Inspection. New Sun says that it cooperated and accepted responsibility, saving the government the expense of trial, and militating in favor of a minimal fine.

C. Discussion

New Sun's objection to ICE's Memorandum to Case File is overruled. The exhibit is 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. The record reflects that New Sun is a domestic corporation doing business in Williamsville, New York, as La Tolteca Mexican Restaurant, and that ICE correctly classified it as a small business. ICE also appropriately characterizes how the remaining factors apply to the company in finding that while New Sun acted in good faith, had no unauthorized employees, and no history of previous violations, the violations themselves were nevertheless serious in nature.

The final penalty result reached, however, appears disproportionate to the nature of this particular employer's business and the company's resources. While ICE points out that the amount requested is "less than thirty percent of the Respondent's 2011 profits," it appears to me that thirty percent of a company's annual profit is an extremely high fine for any employer, let alone for a small restaurant that acted in good faith and had a high employee turnover. Penalties of such magnitude should be reserved for employers that act in bad faith or hire unauthorized workers, not for those that act in good faith and hire only authorized workers. Our case law has

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

often observed that penalties approaching the maximum should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013);[2] *United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013).

The ultimate goal in setting a penalty is to assess an amount 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 particular 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).

As a matter of discretion, the penalties here will be adjusted to an amount nearer to the low end of the mid-range of permissible penalties. While the violations are serious, seriousness may be evaluated on a continuum since not all violations are necessarily equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). Here, the violations in Count I involving the failure to prepare and/or present Forms I-9 for thirty-seven workers are of a more serious nature than those in Count II involving errors or omissions on the I-9 forms, and that difference will be reflected in the final penalty assessment. The penalties for the violations in Count I will be $400 each, or a total for Count I of $14,800, while the penalties for the violations in Count II will be $300 each, or a total for Count II of $1800. The total penalty is $16,600.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. New Sun Transit, Inc. is a domestic corporation doing business as La Tolteca Mexican Restaurant at 7530 Transit Road, Williamsville, New York 14221.

[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.

2. A Notice of Inspection ("NOI") was served upon the Respondent on November 3, 2011 which requested, among other items, the presentation of a list of all current employees as well as all Forms I-9 for those employees.

3. The Respondent was requested to present all documentation to DHS no later than November 14, 2011.

4. The NIF was served on the Respondent on April 4, 2012 alleging forty-three violations of Immigration and Nationality Act § 274A(a)(1)(B) and seeking a total of $36,184.50 in civil money penalties.

5. The Respondent filed a timely request for hearing on April 27, 2012.

6. The Complainant filed a Complaint before the Office of the Chief Administrative Hearing Officer against the Respondent on May 22, 2012.

7. The Respondent filed a timely Answer to the Complaint on June 28, 2012.

8. The Respondent hired all employees listed in the Complaint after November 6, 1986.

9. The Respondent failed to prepare and/or present Forms I-9 for the thirty-seven workers listed in Count I of the Complaint.

10. The Respondent failed to ensure the proper completion of Sections 1, 2, and/or 3 of the Forms I-9 for the six employees listed in Count II of the Complaint.

11. The Respondent should be considered to be a small business for the purpose of calculating the penalties to be imposed.

12. The audit of the Respondent's Forms I-9 did not reveal the employment of unauthorized aliens.

13. The Respondent has no history of previous violations of INA § 274A(a)(1)(B).

B. Conclusions of Law

1. New Sun Transit, Inc. 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 Sun Transit, Inc. engaged in forty-three separate violations of 8 U.S.C.§ 1324a(b).

4. Penalties approaching the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.,* 10 OCAHO no. 1169, 6 (2013); *United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013).

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 Sun Transit, Inc. is liable for forty-three violations of 8 U.S.C. § 1324a(b) and is directed to pay a civil money penalty in the total amount of $16,600.

SO ORDERED.

Dated and entered this 7th day of August, 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.