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,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00078
THE RED COACH RESTAURANT, INC., Respondent.	)	

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
for the complainant

Jeffrey F. Swiatek
Dina Allen
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 The Red Coach Restaurant, Inc. (Red Coach or the company) alleging in Count I that the company hired nine individuals for whom it failed to prepare I-9 forms within three business days of their respective dates of hire, and/or failed to present the forms to ICE upon request, and in Count II that the restaurant failed to ensure the proper completion of the I-9 forms for forty-one employees.

Red Coach filed an answer admitting in part and denying in part the material allegations, and raising ten affirmative defenses. Prehearing procedures were undertaken, the parties filed their respective prehearing statements, and a telephonic prehearing conference was conducted on January 16, 2013, at which time the parties committed to certain factual stipulations as reflected

in their prehearing statements. The stipulations were adopted and are more fully set forth herein as the findings of fact numbered 1-14. The stipulations are sufficient to establish liability for seven of the nine violations alleged in Count I, and for all forty-one of the violations alleged in Count II. Presently pending is the government's motion for summary decision. The company filed a timely response to the motion together with the respondent's cross motion for summary decision.

II. BACKGROUND INFORMATION

Red Coach, an S-corporation wholly owned by Thomas Reese, operates as a small bed-and-breakfast located in Niagara Falls, New York. The company's certificate of incorporation reflects that Reese founded the business in 1980. The company's answer asserts that Red Coach's business is seasonal in nature and attracts tourists who visit Niagara Falls during the summer months. Red Coach has about sixty employees in the summer and forty in the winter, and the turnover rate is very high. Annual payrolls were $474,081 in 2009, $498,243 in 2010, and $588,255 in 2011. The answer states further that during 2009-10 the number of rooms at the bed-and-breakfast was increased from nineteen to thirty-one, and that four additional rooms were added during 2011-2012. In order to finance the expansion, the company took on a mortgage of over $600,000 plus a line of credit for over $300,000, and incurred about $1.3 million in debt during the period 2009-2012 to undertake capital improvements.

ICE served a Notice of Inspection (NOI) on Red Coach on or about February 15, 2011, and a Notice of Intent to Fine (NIF) on April 6, 2012. The company filed a timely request for hearing on April 30, 2012. ICE filed its complaint on June 5, 2012, and all conditions precedent to the institution of this proceeding have been satisfied.

III. EVIDENCE CONSIDERED

In addition to documents accompanying the complaint and answer, I have considered the record as a whole, including in particular the submissions made with the parties' prehearing statements as well as those made with the pending motions. The government's prehearing statement was accompanied by exhibits consisting of G-1) Notice of Inspection dated February 15, 2011 (2 pp.); G-2) Employee Listing (3 pp.); G-3) Notice of Technical or Procedural Failures dated March 30, 2011 (3 pp.); G-4) I-9 forms (58 pp.); and G-5) Notice of Intent to Fine (2 pp.).

Exhibits accompanying Red Coach's prehearing statement consisted of R-1) Affidavit of Thomas Reese (5 pp.); R-2) InterExchange and Alliance Abroad Group Information (5 pp.); R-3) Commercial Loan Statement (3 pp.); R-4) Home Equity Line of Credit Account Statements (8

pp.); R-5) HVS Hotel Management Contract (18 pp.); R-6) The Red Coach Restaurant, Inc. Certificate of Incorporation (6 pp.); R-7) 2009, 2010, and 2011 Income Tax Returns (49 pp.); R-8) 2009, 2010, and 2011 W-2 forms for Thomas Reese (3 pp.); and R-9) Stephen Pusateri's I-9 form.

IV. LIABILITY

There are only two allegations in Count I that were not definitively resolved by the stipulations. The record reflects that Red Coach prepared a timely I-9 for Stephen Pusateri in 2006, but that the form was inadvertently omitted from the group of I-9s provided to ICE at the time of the inspection. The omission was corrected after the complaint was received, but the company nevertheless failed to present the I-9 within three days of being requested to do so and is therefore found liable for the alleged violation involving this I-9. Because Thomas Reese's employment antedates the effective date of IRCA, however, Red Coach had no obligation to prepare an I-9 form for him, *United States v. Anodizing Industries, Inc.*, 10 OCAHO no. 1184, 5 (2005) (discussing the so-called "grandfather clause") [1] and is not liable for failure to do so, as the government's motion ultimately concedes. The company is accordingly liable for eight violations in Count I and forty-one violations in Count II.

V. PENALTY ASSESSMENT

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 a violation occurred after September 29, 1999, is $110, and the maximum is $1100. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor

[1] 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.

rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

A. The Government's Motion

The government's motion was accompanied by exhibit G-6, Memo to Case File Determination of Civil Money Penalty. The exhibit reflects that a baseline penalty was established using the "Standard Fine Amount" chart in ICE's HQ Worksite Enforcement *Guide to Administrative Form I-9 and Civil Money Penalties*. ICE found substantive violations on forty-eight percent of the I-9s, for which the matrix set the fine at $770 per violation. Multiplying that amount by forty-nine, the number of violations alleged, resulted in a total base fine of $37,730.

In assessing the penalty in light of the statutory factors, ICE finds that the company is a small business that did not act in bad faith. It assesses the violations as "not particularly serious" and says no unauthorized aliens were identified. The government therefore mitigates the penalty by five percent for each of these factors, resulting in a reduction of $7,546. The absence of any history of previous violations is treated as neutral because Red Coach had not been audited before. The net penalty accordingly is set at $30,184. The government notes that the amended fine was less than ten percent of the company's 2009 income, and even less of a percentage for subsequent years, and says the amended fine should be enforced in full because the only shareholder in the company received "substantial compensation" and did not submit his individual income tax returns.

B. Red Coach's Motion

Red Coach observes that all of the statutory factors are favorable to the company, and that certain other factors should be considered as well, including the steps Reese took to ensure compliance after the enactment of IRCA, the high employee turnover that results in a higher number of violations relative to the size of the business (which significantly impacts ICE's initial calculation), the company's involvement with international student work-placement companies as sources for summer employees, and the fact that Reese no longer operates Red Coach or employs the individuals who work there.

The company characterizes ICE's approach as narrow and incomplete, failing as it does to consider the debt Reese personally incurred as a result of the capital program and the highly leveraged status of Red Coach. The company points out that significant improvements and maintenance are required on a regular basis, and that ten percent of income is very significant for this restaurant/bed-and-breakfast in light of its debt and future expenses, as well as the common cash flow challenges in the industry itself. The affidavit of Thomas R. Reese, exhibit R-1, explains that upon passage of IRCA, he trained the manager, Douglas Ujeski, in I-9 preparation,

and that Ujeski trained others. He says that because of the company's size and limited financial resources, hiring a human resource manager was not commercially practicable, and that due to the seasonal nature of the business, many employees are hired at the same time in the spring. Red Coach worked with student work-placement companies to provide opportunities for international students to experience work and life in the United States, and relied on those companies for assistance with the work authorization procedures.

Reese's affidavit says further that part of his motivation for expanding Red Coach was to be able to generate interest for a management company to run the business, and that as of September 1, 2012, he entered a seven-year agreement with HVS Hotel Management Company. HVS will now manage the operation, including hiring, firing, and supervising employees, so that Reese personally is now simply the owner and not the employer. Engaging the Management Company has, however, significantly increased Red Coach's expenses because the agreement requires payment of $6,000 or 2.5% of gross revenue, whichever is greater, per month, as well as fifteen percent of the Income Before Fixed Charges as compared with the twelve-month period following completion of a two-room addition under construction in 2012. Other exhibits confirm the assertions in the Reese affidavit.

C. Discussion and Analysis

The range of permissible penalties for the forty-nine violations established in this case is from a minimum of $5390 to a maximum of $53,900. Although ICE appears to consider all the statutory factors as being favorable to Red Coach, the government nevertheless seeks a penalty totalling $30,184. While I cannot concur in the government's assessment that the violations are "not particularly serious," the penalty still appears unduly harsh in light of the record. First, as Red Coach points out, there is no deterrent effect to be achieved when the whole operation is now in the hands of another company altogether, and penalizing Red Coach or Thomas Reese has no effect on the HVS Hotel Management Company. *Cf. United States v. H&H Saguaro Specialists*, 10 OCAHO no. 1147, 5 (2012); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6-7 (2010). Second, the recent expansion and the agreement with the management company have put Red Coach in such a highly leveraged position that readily accessing cash may be a problem. In light of the record as a whole and the statutory factors in particular, the penalties will be adjusted to an amount closer to the low end of the mid-range. For the more serious violations in Count I, the penalties will be assessed at the rate of $500 for each violation, for a total of $4000 for Count I. The violations in Count II will be assessed at the rate of $300 for each violation, for a total of $12,300. The total penalty is $16,300.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. The Red Coach Restaurant, Inc. is an S-Corporation organized under the laws of the State of New York and is wholly owned by Thomas Reese of 457 Riverview Drive, Youngstown, New York.

2. A Notice of Inspection ("NOI") was served upon the Respondent on February 15, 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 February 25, 2011.

4. A Notice of Technical or Procedural Failures was served upon the Respondent on March 30, 2011 that provided the Respondent until April 15, 2011 to correct the technical and/or procedural failures noted therein, and in a timely manner, the Respondent submitted the corrected documents.

5. A Notice of Intent to Fine was served on the Respondent on April 6, 2012 alleging fifty violations of Immigration and Nationality Act § 274A(a)(1)(B) and seeking a total of $34,650.00 in civil monetary penalties.

6. The Respondent filed a timely request for hearing on April 30, 2012.

7. The Complainant filed a Complaint before the Office of the Chief Administrative Hearing Officer against the Respondent on June 5, 2012.

8. The Respondent filed a timely Answer to the Complaint on July 6, 2012.

9. With the exception of the owner Thomas Reese, the Respondent hired all employees listed in the Complaint after November 6, 1986.

10. With the exception of Thomas Reese and Stephen Pusateri, the Respondent failed to prepare and/or present Forms I-9 for the seven remaining workers listed in Count I of the Complaint.

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

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

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

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

15. The Red Coach Restaurant, Inc. prepared a timely I-9 for Stephen Pusateri in 2006, but the form was inadvertently omitted from the group of I-9s provided to ICE during the inspection.

16. The I-9 form for Stephen Pusateri was produced to the government after the filing of the complaint.

17. As of September 1, 2012, Thomas Reese entered a seven-year agreement with HVS Hotel Management Company pursuant to which HVS will manage the operation of The Red Coach Restaurant, Inc., including hiring, firing, and supervising employees.

18. Thomas Reese personally is now simply the owner of The Red Coach Restaurant, Inc. and not the employer.

B. Conclusions of Law

1. The Red Coach Restaurant, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

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

3. An employer must comply with the verification requirements by ensuring that an employee completes section 1 of the Form I-9, and by itself completing section 2. 8 C.F.R § 274a.2(b)(1)(i)(A), (ii)(B).

4. An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of the hire. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

5. Failure to prepare an I-9 within three business days of an employee's date of hire is a serious violation. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (reasoning that failure to timely prepare an I-9 is serious "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified").

6. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

7. The government has the burden of proof regarding both liability and penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

8. 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).

9. The Red Coach Restaurant, Inc. is liable for eight violations in Count I and forty-one violations in Count II.

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

The Red Coach Restaurant, Inc. is liable for forty-nine violations and is directed to pay penalties in the total amount of $16,300. The parties are free to establish a payment schedule in order to minimize the impact of the penalty during the company's off-season.

SO ORDERED.

Dated and entered this 7th day of August, 2013.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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.