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

October 18, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00086
	)	
RED BOWL OF CARY, LLC, INC. D/B/A RED BOWL ASIAN BISTRO, Respondent.	)	

FINAL DECISION AND ORDER

Appearances:

Colleen E. Taylor
for the complainant

Christopher P. Chaney
for the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to 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 (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Red Bowl of Cary, LLC, dba Red Bowl Asian Bistro (Red Bowl or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by hiring twenty-three named individuals for whom it failed to prepare and/or present I-9 forms. The complaint sought penalties totaling $21,505.

Red Bowl filed a timely answer admitting liability for the violations alleged, but contesting the amount of the proposed penalty as both inappropriate and excessive. Prehearing procedures were undertaken, a telephonic prehearing conference was held, and a schedule was established for the parties to file memoranda and evidence in support of their respective positions as to the question of penalties. Those filings have been made and the issue is ripe for resolution.

II. BACKGROUND INFORMATION

Red Bowl of Cary is engaged in the restaurant business as Red Bowl Asian Bistro located at 2020 Boulderstone Way, Cary, North Carolina, where it specializes in Asian cuisine. ICE served Red Bowl with a Notice of Inspection (NOI) on February 17, 2011, at which time the restaurant had twenty-three active employees. ICE's Investigative Report reflects that Zhe Lin, the manager, delivered the I-9 forms on February 23, 2011 and advised that they were completed after the NOI and that he and Red Bowl's president, Xue Zhi Lin, were previously unaware of the requirement to use the form. A Notice of Intent to Fine (NIF) was issued to the company on July 29, 2011 and Red Bowl made a timely request for hearing on August 26, 2011.

III. ASSESSMENT OF THE PENALTIES

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 $1100. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the good faith of the employer, 3) the seriousness of the violations, 4) whether the individual was an unauthorized alien, and 5) the 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).[1] Potential penalties for the twenty-three violations in this case range

[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

from $2530 to $25,300.

A. ICE'S Memorandum

ICE's memorandum in support of its proposed penalty was accompanied by exhibits consisting of: 1) Memorandum to Case File (6 pp.); 2) I-9 forms and supporting documents (49 pp.); and 3) ICE's Report of Investigation (3 pp.). ICE said that in assessing the proposed penalties it first utilized a mathematical formula in accordance with internal agency guidelines to establish a baseline fine. The baseline figure is calculated using a matrix pursuant to which a 100% violation rate for an employer's I-9s sets the amount at $935 for each violation. The base fine was then mitigated by 5% in light of the small size of Red Bowl's business. The government found no evidence of bad faith, and treated this factor as neutral, as it did the additional factors of lack of unauthorized aliens and absence of any history of previous violations. ICE aggravated the penalties by 5% for the seriousness of the violations in light of the fact that total failure to prepare I-9s "completely defeats the purpose of the employment eligibility program," quoting *United States v. Felipe, Inc*., 1 OCAHO no. 93, 626, 636 (1989).

B. Red Bowl's Response

Red Bowl points out that good faith is shown by demonstrating "an honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance with it," quoting *Felipe,* 1 OCAHO no. 93 at 634. The standard contains both a subjective (honesty) and an objective (reasonableness) component. *Id.* Instead of focusing on the completion of the I-9 forms, however, Red Bowl focuses instead on its assertion that it exercised reasonable care to ascertain its obligation to refrain from hiring unauthorized aliens, and the fact that it has never done so. Red Bowl also argues that because it was unaware of the requirement to complete I-9 forms its conduct may have been negligent, but the restaurant's violations were nevertheless less serious than, for example, an intentional falsification of the forms, or an outright refusal to fill them out would be.

Red Bowl contends in addition that a fine of $935 for each violation, or 83% of the maximum permissible, is unduly punitive in light of a statutory analysis showing no aggravating factors. The restaurant says that even in a worst-case scenario, where a large company willfully disregarded its obligations, falsified I-9 forms, employed unauthorized workers, and had a history of previous violations, the penalty would still be only $3,794.45 more than what the government is seeking here. Red Bowl says the government's proposed penalty represents 16% of its income for the tax year 2011 and would create undue hardship, and that its income has remained

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http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

depressed for the last three years because of the high unemployment in the geographical area, which directly impacts the restaurant industry.

In Red Bowl's view, a more appropriate penalty would be $110 for each violation, or a total of $2530. The restaurant requests a schedule permitting payment over a six-month period.

C. Discussion and Analysis

The parties agree that Red Bowl of Cary is a small business, and ICE appropriately mitigated the penalty on this basis. *See United States v. Carter*, 7 OCAHO no. 931, 121, 160-61 (1997). While ignorance of the law does not amount to a showing of good faith, *see United States v. New China Buffet Restaurant*, 10 OCAHO 1133, 5 (2010), there is no suggestion here that the restaurant exhibited any bad faith either. OCAHO case law makes clear, however, that an employer's failure to prepare a timely I-9 form for an employee is a serious violation because it may permit an unauthorized individual to maintain unlawful employment, *United States v. Siam Thai Sushi Restaurant*, 10 OCAHO no. 1174, 4 (2013), and an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). The government acknowledges that its investigation did not reveal the presence of any unauthorized aliens, and the parties agree that Red Bowl has no history of previous violations, so the only negative factor is the seriousness of the violations. The other statutory factors, as well as the record as a whole, weigh in Red Bowl's favor.

The assessment of an appropriate monetary civil penalty is not restricted to consideration of only the five statutory factors. *Hernandez*, 8 OCAHO no. 1043 at 664. In setting penalties, OCAHO case law frequently examines nonstatutory factors as well, and typically affords due consideration to the extent to which a respondent is able to pay the proposed penalty. *See United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1147, 5 (2012) (citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995)*; United States v. Minaco Fashions*, 3 OCAHO no. 587, 1900, 1909 (1993). Sixteen percent of a restaurant's income for the tax year 2011 as proposed here appears excessive in light of the record, given the nature of the business and the economic climate in which it operates. A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO 1008, 175, 201 (1998), but should not be unduly punitive in light of the respondent's resources. *Minaco Fashions*, 3 OCAHO no. 587 at 1909.

Penalties so close to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO 1169, 6 (2013). In view, moreover, of the general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (2006), amended by § 223(a) of the Small

Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996), the penalty for this small restaurant will be adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties, and will be assessed at the rate of $450 for each of twenty-three violations, for a total penalty of $10,350.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Red Bowl of Cary is a small restaurant doing business as Red Bowl Asian Bistro at 2020 Boulderstone Way, Cary, North Carolina.

2. The United States Department of Homeland Security, Immigration and Customs Enforcement served Red Bowl of Cary with a Notice of Inspection on February 17, 2011.

3. Red Bowl of Cary had twenty-three active employees on February 17, 2011.

4. The manager for Red Bowl of Cary delivered twenty-three I-9 forms to the United States Department of Homeland Security, Immigration and Customs Enforcement on February 23, 2011.

5. The manager for Red Bowl of Cary advised the United States Department of Homeland Security, Immigration and Customs Enforcement on February 23, 2011 that the I-9 forms had been completed after the company received the Notice of Inspection, and that he and Red Bowl's president were previously unaware of the requirement to use the form.

6. The United States Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine to Red Bowl of Cary on July 29, 2011.

7. Red Bowl of Cary filed a request for hearing on August 26, 2011.

8. Red Bowl of Cary hired Stephen L. Bickford, Jay D. Burgher, Christina L. Ferro, Xue Zhi Lin, Gabriela G. Nishikubo, Christopher A. Scott, Anthony M. Watson, Peggi Wen, Colin J. McHale, Max A. Arnold, Penny Wen, Cuilan Liang, Xinzhong Lin, Shiu Li Pao, Minghui Chen, Zhe Lin, Michael C. Thompson, Ying Lin, Xiezhao Cheng, Jianhui Lin, Harrison Richardson, Kin Jun Zhang, and Jessica L. McAdaragh and failed to prepare I-9 forms for them within three days of their respective dates of hire.

B. Conclusions of Law

1. Red Bowl of Cary is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

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) (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. Red Bowl of Cary is liable for twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B).

7. In assessing the 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).

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

9. A penalty should also be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), without being "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

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

Red Bowl of Cary, Inc. is liable for twenty-three violations and is directed to pay penalties in the total amount of $10,350. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the restaurant.

SO ORDERED.

Dated and entered this 18th day of October, 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.