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

February 11, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 13A00020
NEW OUTLOOK HOMECARE, LLC, Respondent	)	

Appearances:

Gwendylan Tregerman,
For the complainant

F. Henry Ellis, III
For the respondent

FINAL DECISION AND ORDER

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 New Outlook Homecare, LLC (New Outlook or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to ensure that employees properly completed section 1 of Form I-9 and/or by itself failing to properly complete section 2 or 3 of the form for twenty-two employees. The total penalty sought was $21,598.50. New Outlook filed an answer to the complaint, and prehearing procedures were undertaken. Presently pending is the government's motion for summary decision. New Outlook has filed a timely response and the matter is ripe for resolution.

II. BACKGROUND

New Outlook Homecare, LLC is a home healthcare company located in Newton, Massachusetts. ICE served New Outlook with a Notice of Inspection (NOI) on March 29, 2012. In response, New Outlook submitted documents including twenty-one I-9 forms on April 3, 2012, and one additional I-9 thereafter. The government served New Outlook with a Notice of Intent to Fine on July 31, 2012, and the company made a request for hearing on April 29, 2012. ICE filed a

complaint with this office on January 7, 2013. All conditions precedent to the institution of this proceeding have been satisfied.

III. LIABILITY

A. The Government's Position

ICE says it withdrew its allegation involving the I-9 form for Pearly Evans because the company demonstrated that Evans was the owner of New Outlook and no I-9 was required for her. The government asserts that visual inspection of the remaining twenty-one I-9s reflects that section 2 on each form is blank, and no form contains a signature by the employer attesting that documents were examined to verify the employee's identity and employment eligibility. ICE's exhibits include the I-9s for Marie Achliche-Milien,[1] Belkis Aquino, Marie Brutus, Hazel Bryan, Angella Christie, Rachel Dieudonne, Patricia Fanfan, Gaslaine Gigi Gabriel, Leonie Hyatt, Rosmarie[2] Jean, Mosette Phillip,[3] Princess King, Gabrinar Monumar, Marc Noel, Rachel Oscar, Corrine Paterson, Rohan Smith, Nicole St. Hubert, Abiola Welch, Damion West, and Nancy Wright.

B. The Respondent's Position

New Outlook does not contest liability for the violations, but characterizes them as minor clerical errors.

C. Discussion and Analysis

Visual inspection of the forms reflects that, contrary to New Outlook's view, the violations are not minor clerical errors, but serious substantive errors in the completion of the section 2 certification portion of the form. Section 2 of the I-9s for all but three of these employees is completely blank. Section 2 of Angella Christie's I-9 contains only a date, section 2 of Leonie Hyatt's I-9 contains only her printed name and the company name and address, and section 2 of Corrine Patterson's I-9 contains only her printed name. Although the central purpose of the entire employment eligibility verification system is to ensure that the examination of appropriate documents is both conducted and recorded, these forms contain no signatures attesting that New Outlook examined documents to verify the employees' identities and authorization to work. OCAHO case law confirms that such failures constitute serious violations. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)).[4] ICE accordingly met its burden of establishing that it is entitled to summary decision regarding these violations.

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[1] The correct spelling of this individual's last name is Acliche Milien.

[2] The correct spelling of this individual's first name is Rose Marie.

[3] The correct spelling of this individual's last name is Phillipe.

[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

IV. 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. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2013), ICE must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

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).

A. The Government's Position

ICE calculated a baseline penalty in accordance with internal agency guidance that sets a penalty of $935 for each violation when the employer's error rate exceeds fifty percent. ICE auditor Eric Cohen states in his affidavit that the government mitigated the penalty by five percent based on New Outlook's status as a small business, but aggravated the penalty based on the seriousness of the violations. ICE initially aggravated the fine by five percent based on a lack of good faith, but later abandoned this enhancement and treated this factor as neutral, as it did the remaining statutory factors: the absence of any history of previous violations and the absence of unauthorized workers.

B. New Outlook's Position

The company argues that ICE's proposed penalty is unreasonable and excessive, and that its positive equities outweigh the minor errors the company made in completing I-9s. New Outlook points out that ICE appears to have given little credit to the factors warranting mitigation: its size, its good faith, and the absence of unauthorized workers or of any history of previous violations. The company also points out that the proposed penalty is eighty-five percent of the maximum permissible, and says it would be an abuse of government power to impose such a fine when a more fair and reasonable penalty would be $150 for each violation, or a total of $3150.

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.

C. Discussion and Analysis

ICE 's characterization of the violations as serious is in accord with OCAHO case law holding that failure to properly complete section 2 is always a very serious violation. *See Metropolitan Warehouse*, 10 OCAHO no. 1207 at 7. The government was also correct in its finding that New Outlook's business is small. The remaining factors appear favorable to the company, and a proposed penalty consisting of eighty-five percent of the maximum permissible does appear unduly harsh for this small home health care provider.

Penalties at or near the maximum permissible should be reserved for more egregious violations than have been demonstrated here. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), but should not be "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Given the nature of the business and considering the record as a whole in light of the general public policy of leniency toward small entities 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 penalties for this small home healthcare company will be adjusted to an amount closer to the midrange of permissible penalties, and set at $450 for each violation. The total penalty is thus $9450.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. New Outlook Homecare, LLC is a home healthcare company located in Newton, Massachusetts.

2. The Department of Homeland Security, Immigration and Customs Enforcement served New Outlook Homecare, LLC with a Notice of Inspection (NOI) on March 29, 2012.

3. The Department of Homeland Security, Immigration and Customs Enforcement served New Outlook Homecare, LLC with a Notice of Intent to Fine on July 31, 2012.

4. New Outlook Homecare, LLC made a request for hearing on April 29, 2012.

5. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on January 7, 2013.

6. New Outlook Homecare, LLC hired Marie Achliche-Milien, Belkis Aquino, Marie Brutus, Hazel Bryan, Angella Christie, Rachel Dieudonne, Patricia Fanfan, Gaslaine Gigi, Leonie Hyatt, Rosmarie Jean, Mosette Phillip, Princess King, Gabrinar Monumar, Marc Noel, Rachel Oscar, Corrine Paterson, Rohan Smith, Nicole St. Hubert, Abiola Welch, Damion West, and Nancy Wright, and failed to properly complete section 2 of their Forms I-9.

B. Conclusions of Law

1. New Outlook Homecare, LLC is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

2. New Outlook Homecare, LLC filed a timely request for hearing.

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

4. New Outlook Homecare, LLC is liable for twenty-one violations of 8 U.S.C. § 1324a(a)(1)(B).

5. 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).

6. Failure to properly complete section 2 is a very serious violation because section 2 is where an employer attests that it reviewed documents establishing an individual's identity and authorization to work in the United States. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)).

7. 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).

8. A penalty should 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

New Outlook Homecare, Inc. is liable for twenty-one violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of $9450. The parties are encouraged to work out a schedule for installment payments to alleviate the impact on New Outlook's business.

SO ORDERED.

Dated this 11th day of February, 2014.

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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) (2012).

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.

UNITED STATES DEPARTMENT OF JUSTICE
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February 19, 2014

UNITED STATES OF AMERICA, Complainant,	)	
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v.	)	OCAHO Case No. 13A00020
NEW OUTLOOK HOMECARE, LLC, Respondent	)	

ERRATA

In the Final Decision and Order issued on February 11, 2014:

On page 1, the text reading "the company made a request for hearing on April 29, 2012" is hereby corrected to read "the company made a request for hearing on August 29, 2012."

On page 4, the text reading "New Outlook Homecare, LLC made a request for hearing on April 29, 2012" is hereby corrected to read "New Outlook Homecare, LLC made a request for hearing on August 29, 2012."

SO ORDERED.

Dated and entered this 19th day of February, 2014.

Ellen K. Thomas
Administrative Law Judge