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

June 13, 2014

UNITED STATES OF AMERICA, Complainant, v. GOLF INTERNATIONAL D/B/A DESERT CANYON GOLF, Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 13A00074

FINAL DECISION AND ORDER

Appearances:

Amy Martin
For the complainant

John Pope
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 four-count complaint alleging that Golf International d.b.a. Desert Canyon Golf (Golf International, Golf, or the company) violated 8 U.S.C. § 1324a(a)(1)(B). Golf filed a timely answer. Prehearing procedures were undertaken, which included the filing of ICE's first amended complaint dismissing some of the allegations and reducing the proposed penalty from $136,697 to $113,742.05.

After prehearing procedures were completed, a partial summary decision and order was issued on March 26, 2014 finding Golf liable for 129 violations of 8 U.S.C. § 1324a(a)(1)(B) and setting out a schedule for submissions addressing the issue of penalties. *See United States v. Golf, Int'l*, 10 OCAHO no. 1214, 9 (2014).[1] Those filings have been made and the issue is ripe for resolution.

II. STANDARDS APPLIED

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 (2012), it 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 weight to be given each of these factors will depend upon the facts and circumstances of the individual case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995). Nothing in the statute suggests that equal weight must be given to each factor, nor does the enumeration of these factors rule out consideration of such additional factors as may be appropriate in a specific case. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

[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.

III. THE POSITIONS OF THE PARTIES

A. The Government's Position

ICE says it calculated the baseline penalty using the methodology set forth in the written guidance available on its website. The government says that because the percentage of inaccurate, incomplete, and missing I-9 forms is the most objective measure of the extent of an employer's failure to comply with the requirements, the baseline rate is calculated by using the percentage of violations. For Golf, the rate was eighty-seven percent, so the matrix in ICE's guidance sets the base fine at $935 for each violation.[2]

The government then mitigated the penalty across the board by five percent for the small size of Golf's business, and by another five percent based on Golf's lack of history of previous violations. ICE said it treated the good faith factor as neutral, and, with three exceptions, also treated the unauthorized alien factor as neutral. The exceptions were for the violations involving the I-9s for Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios, individuals the government determined to be unauthorized.

ICE says it also aggravated the penalties by five percent for two of the counts based on the seriousness of the violations, stating that failure to prepare an I-9 form at all, and failure to record or review employment and identity documents, frustrate the purpose of the I-9 requirements. The total penalties the government seeks for all the violations add up to $113,742.05.

B. Golf's Position

Golf is a golf course and restaurant in Fountain Hills, Arizona, owned and operated by Frieder Ort and his family. The company describes itself as a small business that provides employment for an average of seventy full and part-time workers. Golf vigorously objects to the audit and complaint, and characterizes the proposed penalty as excessive, unwarranted, and completely inappropriate. The company argues that the bulk of the fine is assessed "for what is essentially a single error," because the company failed to sign the section 2 attestation on multiple I-9s. Golf says that "[m]uch like a typewriter with a bad key will cause the same error on every page, the Respondent has made one error of judgment that was applied to nearly every employee." The company says that failure to complete section 2 was only "benign neglect," and that it did not fail

[2] The eighty-seven percent figure was based on the number of violations alleged in the original complaint. The amended complaint removed ten of those allegations, but the percentage of violations still exceeded fifty percent. The matrix sets the base penalty at $935 in all cases where the percentage exceeds fifty percent, so reducing the number of violations did not result in any reduction in the baseline fine.

to fulfill its duty to ensure that it hired only authorized workers. Golf says the problem resulted from its failure to understand that participation in the E-Verify program did not relieve it of the obligation to sign the section 2 attestation.

Golf says further that as soon as it received notice of the deficiencies, it remedied all the violations, provided the ICE auditor with amended I-9s, and verified employees' documents wherever possible. The company emphasizes that every employee hired after January 1, 2008 was put through the E-Verify process to ensure that the company did not hire unauthorized workers. Finally, the company points out that only three of more than 150 employees were unauthorized for employment, and that each was timely terminated upon notification of the individual's status. In the company's view, a warning notice is more appropriate and such a punitive fine sends the wrong message to small employers that do their best to comply with the requirements.

IV. DISCUSSION AND ANALYSIS

The parties agree that Golf is a small business with no history of previous violations. There is no dispute, moreover, about the employment eligibility of Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios; Golf acknowledged their status and says it terminated each of them promptly upon being notified of their status. The parties agree that the remaining employees were authorized.

The only penalty factor about which the parties disagree is the seriousness of the violations. The government points out that Golf engaged in 129 violations, and says all were serious. The violations included failure to sign section 2 of the form for 110 employees, failure to ensure that fifteen employees properly completed section 1 or failure to properly complete section 2 of their forms, and failure to present I-9s for four employees. While I concur in the government's view that all these violations are serious, not all are equally so. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Carter*, 7 OCAHO no. 931 at 169) (explaining that violations are evaluated on a continuum because not all violations are equally serious). Failure to prepare an I-9 form at all is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Academy of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996). Our case law makes clear that the failure to prepare an I-9 should never be treated as anything less than serious. *See Raygoza*, 5 OCAHO no. 729 at 52. Second, failing to sign the section 2 attestation for nearly all its employees is not, as Golf contends, a "single, benign error," but instead reflects a pattern of serious violations on multiple I-9 forms. *See United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 5 (2014) (explaining that an employer's failure to sign section 2 is a very

serious violation because section 2 is where the employer attests that it examined documents to verify an employee's authorization to work and identity).

Golf's participation in the E-Verify program does not does not relieve the company from its obligation to properly complete I-9s for its employees. *See Golf Int'l*, 10 OCAHO no. 1214 at 6 (explaining that E-Verify does not provide employers blanket protection from violations of IRCA). *See generally The E-Verify Program for Employment Verification Memorandum of Understanding*, USCIS, 4 (last revised Sept. 1, 2009) ("The Employer understands that participation in E-Verify does not exempt the Employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees."). An employer's failure to ensure that an employee properly completes section 1, or its own failure to properly complete section 2, while less serious, are nonetheless also considered serious violations. *Cf. United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 9 (citing *United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 8-10 (2011)).

Apart from the seriousness of the violations, however, the statutory factors otherwise incline in Golf's favor. The penalty proposed, moreover, is near the maximum permissible, a result ordinarily reserved for more egregious violations than have been shown here. *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). 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," *United States v. Minaco Fashions*, Inc., 3 OCAHO no. 587, 1900, 1909 (1993).

Based on the record as a whole and the statutory factors in particular, the penalties will be adjusted to fall closer to the midrange of permissible penalties. A penalty of $500 each will be imposed for the violations involving failure to present I-9 forms for James Brown, Bruce Butler, Martin Nadirsha, and Ricardo Ruiz Rodriguez, as well as for the violations involving the I-9s for Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios, aliens unauthorized for employment. A penalty of $450 each will be imposed for the remaining 107 violations involving failure to sign the section 2 attestation, and $400 each for the 15 violations involving failure to properly complete section 1 or 2 of the form. The total penalty is $57,650.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. An order issued on March 26, 2014 found Golf International d.b.a. Desert Canyon Golf liable for 129 violations of 8 U.S.C. § 1324a(a)(1)(B). *United States v. Golf Int'l*, 10 OCAHO no. 1214, 9 (2014).

2. Golf International d.b.a. Desert Canyon Golf is a small business that provides employment to seventy full and part-time employees.

3. Golf International d.b.a. Desert Canyon Golf has no history of previous violations.

4. The parties did not dispute that Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios were unauthorized for employment in the United States.

5. Golf International d.b.a. Desert Canyon Golf promptly terminated Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios upon learning of their unauthorized status.

6. The Department of Homeland Security, Immigration and Customs Enforcement did not suggest that Golf International d.b.a. Desert Canyon Golf acted in bad faith.

B. Conclusions of Law

1. 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).

2. Failure to prepare an I-9 at all is always very serious because it completely subverts the purpose of the employment eligibility verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Academy of Haw.*, 6 OCAHO no. 848, 235, 249 (1996).

3. Failure to complete and sign the section 2 attestation is a very serious violation. *See United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 5 (2014) (explaining that an employer's failure to sign section 2 is a very serious violation because section 2 is where the employer attests that it examined documents to verify an employee's authorization to work and identity).

4. An employer's failure to ensure that the employee properly completes section 1, or its own failure to properly complete section 2 is a serious violation. *Cf. United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 9 (citing *United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 8-10 (2011)).

5. 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).

6. 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 employer'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

Golf International d.b.a. Desert Canyon Golf is ordered to pay a civil money penalty of $57,650 for engaging in 129 violations of 8 U.S.C. § 1324a(a)(1)(B).

SO ORDERED.

Dated and entered this 13th day of June, 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.